BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of

Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.

DOCKET NO. 990691-TP

VOLUME 4
Pages 387 through 511

PROCEEDINGS:	HEARING
BEFORE:	COMMISSIONER J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER E. LEON JACOBS
DATE:	October 7, 1999
TIME:	Commenced at 9:30 a.m. Concluded at 6:30 p.m.
LOCATION:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	JANE FAUROT, RPR NOTARY PUBLIC IN AND FOR THE STATE OF FLORIDA AT LARGE

APPEARANCES:

(As heretofore noted.)

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ALPHONSO VARNER

Continues his testimony under oath from Volume 3:

CROSS EXAMINATION

BY MR. KRAMER:

Q Mr. Varner, is BellSouth contending that the Commission does not have -- this Commission does not have jurisdiction to order reciprocal compensation?

A Yes, we are, but we are not contending that here in this proceeding. We are contending that in our appeal of the FCC's order and that is a matter to be resolved by the courts. What we are contending here in this arbitration proceeding is that that issue is unsettled. Whether the Commission will have this authority or not is not clear and won't be until the courts are decided. But more importantly for this proceeding, the issue is even if the Commission decides that they want to do something based on the FCC saying that they can, reciprocal compensation is not the right thing to do. It is not sound public policy.

Q Can I ask you to turn to Page 36 of your testimony, the remaining testimony?

MR. KITCHINGS: Is that Page 36 of his direct, Mr. Kramer?

MR. KRAMER: Yes.

THE WITNESS: I'm there.

BY MR. KRAMER:

Q In your Q and A beginning on Line 12, you say: "This issue is not subject to arbitration under Section 252." Are you withdrawing this portion of your testimony?

A No, I'm not.

Q Then you are saying -- then for this proceeding you are conceding that this issue is subject to arbitration, is that correct?

A No, I'm not, not under Section 252. The FCC has clearly said that the compensation mechanism for ISP-bound traffic is not a 251 obligation. It is only 251 obligations that are arbitrated under 252. What they also said, though, is that if parties can't agree on how to handle this, state commissions can arbitrate that. But that is not a 252 arbitration. They can do it under the same proceeding that is 252, but it is not an obligation under 251, so it can't be a 252 arbitration.

Q Is this a 252 arbitration we are in?

A I believe it is. It is an interconnection agreement under Section 252.

Q I'm sorry, I couldn't hear you.

COMMISSIONER DEASON: Could you repeat your answer, Mr. Varner?

A Yes. Yes, this is an interconnection agreement being arbitrated under Section 252 of the Telecom Act.

Q Well, I guess the issue is, can this Commission arbitrate the reciprocal compensation in this proceeding, or can it not?

A I'm trying to figure out the best way to explain. I believe that -- no, I don't believe that they can. What has happened is that the FCC has attempted to grant authority for commissions to resolve this matter. That is before the courts and that is what I'm trying to separate out here.

Now, you do have the fact that the FCC has said that state commissions can craft a compensation mechanism. So given that you have that effective order, they have said that state commissions can do it so they wouldn't be violating an FCC order if they were to do it. However, the FCC was very, very clear that it is not a 251 obligation. So whatever arbitration the state commission does under this is not an obligation of an issue under 251, so it is not a 252 arbitration. Because 252 arbitrations only deal with the obligations under 251. This is not one of those.

Q Are you saying the Commission's order will be unenforceable if it orders reciprocal compensation?

A That is a legal conclusion that I can't reach. I just don't know.

Q Well, if I'm hearing you, you seem to be rendering fairly free legal opinions about whether or not this is or is not within the scope of 251 and 252.

MR. KITCHINGS: I object, Mr. Commissioner, to the extent that it is argumentative. Is there a question there?

MR. KRAMER: Yes, the question is why he is not able to render a legal opinion with regard to that question, given all the other legal opinions that are in here.

COMMISSIONER DEASON: I'm going to strike that question. You can proceed forward with the remainder of your cross.

BY MR. KRAMER:

Q Mr. Varner, can I ask you to read the -- turn to Paragraph 25 of the FCC's February 26th declaratory ruling. And so that we can make sure we are all reading from the same page literally, may I give the witness a copy of the same version that we are all working from?

MR. EDENFIELD: I will be happy to provide Mr. Varner with a copy if that is okay with the Commission.

COMMISSIONER DEASON: Go ahead.

THE WITNESS: I have one.

BY MR. KRAMER:

Q Could you read the first sentence of Paragraph

25, and the sentence beginning on the bottom, the fourth sentence beginning toward the bottom of the page, the text of the page, "as we observed," and including the next sentence?

A Did you ask me to read the first sentence and the forth sentence, or just the fourth?

Q Why don't we begin with the first. If we could, could we begin with the first? Thank you. I may have been confusing things, yes.

A And just the first sentence, or go on to --

Q Let's start with the fourth, then I will point out where I would like you to pick up.

A Start with the fourth?

Q I'm sorry. The first, excuse me.

A Okay. Just start, you will tell me when to stop, is that where we are?

Q Right.

A Okay. Number 25, "Even where parties to interconnection agreements do not voluntarily agree on an intercarrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."

Q And could you now just jump to the sentence beginning, "as we observed," two lines up from the bottom, and read it and the next sentence?

A Yes. "As we observed in the local competition order, state commission authority over interconnection agreements pursuant to Section 252 extends to both interstate and intrastate matters. Thus, the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the Section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law."

Q Thank you. In light of these FCC pronouncements, is it still your position that the question of reciprocal compensation for ISP-bound traffic is outside the 252 process?

A Yes, it is, because when you go to Footnote 87, which we have read several times, the FCC clearly says that the reciprocal compensation obligations of Section 251 do not apply to this traffic. So given that that does not apply to this traffic, that is the only part of Section 251 that might even remotely be concerned with this issue.

So since there is no 251 obligation, then there is no basis under 252 to arbitrate with regard to that issue. I believe what the FCC is saying back here is that, yes, the states obviously will be involved in arbitration proceedings with regard to Section 252. If they want to include within those arbitration proceedings the arbitration of this issue, they can. They are not implying that this is, in fact, an obligation of 251, or that the arbitration proceedings under 252 necessarily apply to this. It is a matter of convenience that states can do it in that proceeding, but that doesn't change the fact that it is not a 251 obligation.

Q You referred to Footnote 87, Mr. Varner, and the fact that it states that this is not within 251(b)(5). Could you also read the last sentence of Footnote 87?

A Yes. "As discussed supra, in the absence of a federal rule, state commissions have the authority under Section 252 of the act to determine an intercarrier compensation for ISP-bound traffic."

Q Isn't the FCC pretty explicit there that it believes this is authority given to the states under Section 252?

A No, I believe what they are saying is that in the conduct of their 252 proceedings, that they can address this issue. The act clearly says that 252 arbitrations apply to obligations under 251. So if you interpret it the way that you just said, the FCC will be contradicting themselves in the same footnote, which I don't think they are attempting to do.

Q Now, Mr. Varner, on Page 14 of your testimony --

MR. KITCHINGS: Is that the direct, Mr. Kramer?

I'm sorry. I apologize.

MR. KRAMER: I'm sorry. I will be working in the direct for the next several questions. It is the direct, yes.

BY MR. KRAMER:

Q Are you with me at Page 14?

A I'm there.

Q You state that payment of reciprocal compensation for ISP-bound traffic is inconsistent with the law. Is it your -- hasn't the FCC said that a state commission could find in an arbitration proceeding that reciprocal compensation is, in fact, consistent with the law?

A I was trying to recall the exact words that they used. I don't think that that's what they said. They said it would not violate any of their existing rules since they don't have any. So since they don't have any rules then it can't violate them since they don't currently exist.

Q So at a minimum, the FCC, you would agree with me, has said that it is not inconsistent with federal law for --

A I didn't mean to cut you off.

Q At a minimum you would agree with me the FCC has said that it is not inconsistent with federal law for state commissions to find that reciprocal compensation should be paid for ISP traffic?

A That they have not said that it's not inconsistent, was that your question?

Q No, they have said that it is not inconsistent.

A I don't believe that's what they said. I said that -- I believe what they said is that in the absence of governing federal law, which they're talking about there is their rules, that they can go ahead and establish reciprocal compensation as a means for -- as a compensation mechanism for this traffic, this non-local traffic.

However, that is not a mechanism that is required. The states could decide on any number of other compensation mechanisms. They could decide on bill and keep, for example. They could decide on an access based compensation mechanism, or they could decide on no compensation mechanism at all.

What you have right now is a situation where there are no FCC prescriptions. Clearly, the FCC has said the act says this is not a 251 obligation. So then since there are no other rules in place, then the states are free to develop a compensation mechanism consistent with public policy that they see fit. But you have to remember overriding all of that is the issue in the courts about whether the FCC could, in fact, allow the states to develop any kind of compensation mechanism for this traffic at all.

Q Mr. Varner --

COMMISSIONER DEASON: Excuse me just a minute, I want to clarify something. Bill and keep is an appropriate compensation mechanism, then? Or it is -- I say appropriate, it is permissible?

THE WITNESS: It is permissible for this type traffic, for this ISP traffic, because you are not operating under Section 251 of the act or 252 of the act. So bill and keep is certainly a permissible way to handle this particular traffic. And, quite frankly, I think it's a better way than reciprocal compensation.

MR. KRAMER: Mr. Varner -- I'm sorry, were you done, Commissioner?

COMMISSIONER DEASON: Yes.

BY MR. KRAMER:

Q Mr. Varner, isn't bill and keep a mechanism designed to reconcile accounts under reciprocal compensation under Section 251(b)(5)?

A Excuse me, I don't follow.

Q Isn't bill and keep prescribed by the statute as a mechanism for handling reciprocal compensation under 251(b)(5)?

A It is an alternative way that carriers can agree to be compensated for traffic under 251(b)(5), but that is only for traffic for which 251(b)(5) is applicable. It doesn't preclude the Commission -- that language in the act I don't believe precludes the Commission from adopting that as a compensation mechanism for traffic that is not covered by 251(b)(5). Because what the act is dealing with is traffic that is covered by 251(b)(5).

Q And so your argument is that even though the statute refers Section 252(d)(2)(B)(1) states that -- the statute shall not be construed --

COMMISSIONER DEASON: Excuse me. The witness probably needs to see what you're referring to.

MR. KRAMER: Unfortunately, I don't have copies.

COMMISSIONER DEASON: Does counsel have a copy?

MR. KITCHINGS: I do, Commissioner Deason.

COMMISSIONER DEASON: Please provide that to your witness.

MR. KRAMER: Thank you, Commissioner.

THE WITNESS: All right, I have a copy now.

MR. EDENFIELD: Thank you, Commissioner Deason.

BY MR. KRAMER:

Q I'm reading at Section 252(d), and I'm reading in Paragraph (2)(B), large letter B as in boy, of the paragraph which says, "This paragraph shall not be construed to preclude arrangements that afford the mutual recovery of costs through bill and keep," is in essence what it says. Let me read the whole thing. "To preclude arrangements that afford the mutual recovery of cost through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery such as bill and keep arrangements."

A I'm sorry, could you tell me where you were reading, because I was trying to find it. I just couldn't find it. I have a copy.

MR. KRAMER: May I approach the witness just to show him? It's hard to find.

COMMISSIONER DEASON: If counsel has no objection, please do so.

MR. KITCHINGS: Go ahead, please.

THE WITNESS: If you would just give me a reference I could find it. Oh, you're over here. Oh, you're in little 'i'. Got it.

COMMISSIONER DEASON: Let me ask counsel and the witness, when you're reading something such as that, intricate parts of the law, you may want to read that a little slowly for purposes of the court reporter.

MR. KRAMER: Thank you, I will.

BY MR. KRAMER:

Q I am reading Section 252(d)(2), capital letter (B), as in boy, lower case (i). "This paragraph shall not be construed to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery, such as bill and keep arrangements."

Now, your contention, Mr. Varner, is that even though that provision is specifically applicable to 251(b)(5), this Commission is not precluded from finding that as an appropriate billing arrangement under -- excuse me, as an appropriate billing arrangement to compensate for ISP traffic, is that correct?

A That's correct, because the provision that you read, which is 252, says -- 252(a), which is sort of the general section dealing with this, it's called charges for transport and termination of traffic. "For the purposes of compliance by an incumbent local exchange carrier with Section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless," and it goes on, and then it picks up the rules of construction that you read.

What they are saying in that paragraph is that if carriers wanted to they could waive their reciprocal compensation obligations for traffic that is, in fact, covered by 251(b)(5) and go to bill and keep, if that is what they want to do.

But here what we are dealing with, as the FCC has made very clear, is traffic that is not under 251(b)(5). So the provisions that you are reading which are provisions that describe limitations around what can be done for traffic that is under 251(b)(5), wouldn't apply to this traffic since it is not under 251(b)(5).

Q But, of course, Mr. Varner, the FCC has said, hasn't it, that its policy of treating ISP-bound traffic as local suggests that reciprocal compensation should, in fact, be paid for such traffic, hasn't it?

A No, that's not exactly right.

Q Well, can I ask you to read -- I'm sorry, were you done with your answer? Could I ask you to read the last sentence of Paragraph 25?

A 25. It says, "While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would if applied in a separate context of reciprocal compensation suggest that such compensation is due for that traffic."

I think to understand that you have to go on and read Paragraph 26, where it says, "Some CLECs construe our rules treating ISPs as end users for purposes of interstate access traffic as requiring the payment of reciprocal compensation. Incumbent LECs contend that our rules preclude the imposition of reciprocal compensation. Either of these options might be a reasonable exception of our rules, but the Commission never applied either the ESP exemption or its rules regarding the joint provision of access to the situation where two carriers collaborate to deliver traffic to an ISP."

And I think what the FCC is doing there is, again, they wrote this order in the context of several state commissions having already decided that under interconnection agreements that reciprocal compensation was due on this traffic. And they were explaining how it is that they understand that states might have reached that conclusion. But they have been very, very clear throughout this order to clearly point out that the traffic is, in fact, not local traffic and reciprocal compensations -- reciprocal compensations obligations of 251(b)(5) don't apply.

Q But, of course, that Paragraph 26 is the same paragraph where the Commission goes on to say that Commissions could conclude in an arbitration that reciprocal compensation is the appropriate vehicle for -- excuse me, for reciprocal -- excuse me, the appropriate vehicle for compensation for ISP traffic. And, in fact, the Commission concludes there, don't they, by saying that state commissions if they don't do reciprocal compensation have to provide some other compensation mechanism?

A You've kind of got two questions there, so I'm going to have to answer yes and no. Yes to part, and no to part is what I'm going to have to do.

Q Well, if you're seeing two, would you mind doing that. I thought I had asked only one. I meant to ask only one.

MR. KITCHINGS: Perhaps if counsel would restate the question so that we could understand.

MR. KRAMER: Okay, I will be glad to do that.

BY MR. KRAMER:

Q This is the same paragraph, the Paragraph 26 you were reading from is the same paragraph where the FCC goes on to find that the states do have authority to order reciprocal compensation in arbitration proceedings, and to say that while states also are free not to require the payment of reciprocal compensation for this traffic -- I'm smoothing out the ending here -- and to adopt another compensation mechanism. Isn't it correct that that is the same paragraph where the FCC makes that statement?

A Yes, but I sort of disagree with ICG's interpretation of that paragraph. What the FCC has said is that there is no governing federal law on this subject, so now the state commissions are free to adopt reciprocal compensation, they are free to adopt bill and keep, they are free to adopt an access method of compensation, they are free to adopt nothing at all until such time as the FCC specifies what has to be done, then the FCC will determine it. But up until that point, since there are no rules in the FCC's view, the state commissions are free to -- the field is pretty much wide open as to what they can do.

Q Let's go back to that point of the wide openness of the field, Mr. Varner. You will recall we began this particular part of this voyage together on Line 21 of Page 14 of your direct testimony. Where you state, again, that BellSouth's position is that payment of reciprocal compensation for ISP-bound traffic is inconsistent with the law.

A That's correct.

Q Now, I would ask you to read the last sentence on page -- I think we have already read this one. Mr. Varner, how do you square that with the FCC's explicit statement that neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by Section 251(b)(5). And, again, I was reading from that sentence in Paragraph 26.

A Yes, I believe I can square that. What they are saying there is that whatever the state commission does, since there are no rules in place, will not be in violation of any of their rules, because there aren't any. My statement is that it is consistent with the law because of the fact that the telecom act and the FCC's rules specify situations under which reciprocal compensation applies, and that is to local traffic.

Q So you disagree -- excuse me. I'm sorry.

A This is not local traffic. So if you had to conclude -- if you are going to conclude that reciprocal compensation was going to apply and be consistent with the law, the traffic that you're talking about has to have the same characteristics that local traffic does. That is, you've got the originating carrier collecting all of the money needing to share some of that with the terminating carrier. This traffic is the exact opposite of that, so there is no way that an obligation that was designed for that situation can be applied to traffic that operates the exact opposite way.

Q So you are disagreeing with the FCC?

A No, I'm not disagreeing with the FCC.

Q Well, I thought, Mr. Varner, I just heard you say it would be -- I just read you testimony that said -- your testimony that said it is inconsistent with the law, whereas the FCC has said it is consistent with the law?

A No, I don't think they said it was consistent with the law. What they said was that it doesn't violate any of their rules, because they don't have any.

Q And you don't construe that as meaning it's consistent with the law?

A No. They haven't decided that yet. The subject of what the proper compensation mechanism should be for this traffic is the subject of the further notice of proposed rulemaking. That's why they issued that, because they don't have a rule governing this traffic so they don't know what is the proper compensation mechanism. So they set up a proceeding to enable them to find out what the mechanism should be. That's why they issued the notice.

Q So the law that you find this to be inconsistent with is 251?

A Yes. 251(b)(5), yes.

Q And your motion is that even though it is inconsistent with the law it can be consistent with what the FCC has said here?

A Yes. Therein lies part of the problem, I think, which is the authority issue. When I said, you know, I don't disagree with it, I said I do disagree with one respect, that they have the authority to sort of vest this power in the states. But that is going to be an issue the courts are going to decide, certainly not a subject for this arbitration.

Q Let me just point this out to you one last time, Mr. Varner. The sentence says neither the statute nor our rules. Do you still contend that your statement is consistent with what the FCC has said?

A Yes. Yes, my statement is that it is

inconsistent with the law, and it is inconsistent with the reciprocal compensation provisions of the law, because those provisions were designed to apply to traffic that had specific characteristics and those are the characteristics of local traffic. This traffic does not. So there is no way that it can be consistent with the provisions in the law to apply to local traffic when this traffic doesn't have the characteristics that local traffic -- in fact, it has the exact opposite characteristics of local traffic.

Q Mr. Varner, whatever the legality, I take it your position is that this Commission ought not to arbitrate the issue of reciprocal compensation, is that correct? Of reciprocal compensation for ISP-bound traffic.

A I think that they should not arbitrate the issue. I don't, again, address the issue whatever the legality. I'm not saying that the Commission should violate the law by any means, so I'm not saying they should ignore the law. I'm saying that the law does not require reciprocal compensation, reciprocal compensation is not sound public policy, and that's not what they should find should apply to this traffic.

Q Thank you for that correction. I did not mean to say that the Commission should be violating the law. I think what I meant to say is that laying to one side the issue of whether it is legal or not, it is your position the

Commission should not arbitrate it. Let me withdraw.

Now, it is your position, though, that the Commission should not arbitrate the issue of reciprocal compensation for ISP-bound traffic, is that correct?

A Yes.

Q Again, now, I want to ask you about --

COMMISSIONER DEASON: Let me get some clarification. What should we do to address this issue?

THE WITNESS: I believe that what you should do is just defer it to the FCC.

COMMISSIONER DEASON: Now, I'm going to refer to you the last sentence of Paragraph 26, again.

THE WITNESS: Yes.

COMMISSIONER DEASON: Under your interpretation this allows the Commission, the State Commission, to either require reciprocal compensation, or to adopt another compensation mechanism, or do nothing, is that correct?

THE WITNESS: That's correct.

COMMISSIONER DEASON: And do you also think it allows the Commission to simply require whatever is the final decision by the FCC and is upheld by the courts to apply retroactively?

THE WITNESS: Yes, I believe it does. That is a compensation mechanism. There is really no restrictions that the FCC has placed on what the compensation mechanism a state commission might adopt in this interim period might look like.

COMMISSIONER DEASON: Is there information that is available and will be retained to enable parties to engage in some type of retroactive application of the FCC decision? I assume that perhaps it depends on the FCC decision?

THE WITNESS: I don't really think so, because the basic data that you would need to have is what is the traffic that is flowing between the carriers to these ISPs, and that can be collected and held and identified. It will require some exchange of data that doesn't currently exist or, you know, establish some mechanisms that probably don't currently exist. It can be done relatively easy.

The one thing that you would have to know is we would have to know when a call is going to an ISP, and I said you would have to give us some information that would allow us to be able to identify that. They could put it on separate trunk groups, and if they didn't want to do that they could give us telephone numbers that we would know to calls dialed to certain telephones numbers are ISP telephone numbers and we could collect that traffic in a separate pod or something like that. That's really all that needs to be done. And, likewise, we would give them phone numbers so they could do the same thing for calls that would come to ISPs that we serve.

BY MR. KRAMER:

Q Mr. Varner, coming back to this issue of your recommendation that the Commission not arbitrate the issue. Hasn't the FCC in the notice of proposed rulemaking portion of this declaratory ruling order tentatively concluded that it will go to a market driven negotiation process for having parties resolve the issue of reciprocal compensation?

A Yes, it has.

Q And that would be in Paragraph 29?

A Yes, it is.

Q And hasn't the FCC concluded with respect to that option that the parties, and that option being that the FCC would go to a negotiation process driven by market forces. Hasn't the FCC concluded, tentatively concluded in connection with that option, that it would be the states that would then resolve the question of intercarrier compensation in arbitration proceedings?

A That's one of the tentative conclusions. In fact, what they have done in their notice of proposed rulemaking, which is --

Q They have done what? I didn't hear you.

A I said that is one of the tentative conclusions. What they have done in their notice of proposed rulemaking, which is what they usually do in these, is they have put out several alternatives and asked the parties to comment on those. And based on the record built through those comments they will then rule on what they think the outcome should be. So they tentatively concluded that could be commercial arbitration -- I mean, not commercial, I'm sorry, commercial negotiations. Back in Paragraph 31 they have another mechanism which would be they would establish rules. Back in Paragraph 33 they have got another mechanism where they invite parties to submit alternatives to these.

They go on, which is the paragraph you're talking about, to talk about how disputes might be settled. And one way would be to settle the issue through 251 and 252 arbitrations. And one of the things interestingly that they request comment on in that is whether or not that is legal or not, whether they can require it to be done. So that's one of the things that at least they question in their own notice, whether or not it's proper for them to do that. Another alternative is they would arbitrate it, it would come to them and they would arbitrate it.

Q But, Mr. Varner, there are two tentative conclusions in that regard, aren't there? There is a tentative conclusion that it will be driven -- that reciprocal compensation for ISP calls will be set by a negotiation process driven by market forces and within that option those negotiations -- to the extent the parties cannot agree, hasn't the FCC tentatively concluded that it will be the states that resolve the disputes through arbitrations under 251 and 252?

A As one of the tentative conclusions. What they really say is they -- when they talk about that is in Paragraph 28, and it says, "We tend to conclude that our rules should strongly reflect our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contract. We seek comment on two alternative proposals for implementing such a regime."

The first alternative proposal is in Paragraph 29, which is just -- the parties just negotiate. The second one is in Paragraph 31, where they set a set of federal rules that guide the negotiations. Now, once they have done that, they also go in and say, of course, the success of this is going to depend on, you know, to some extent on how disputes are resolved. So then they sought comment on various methods by which disputes might be resolved.

One would be the states would do it, and another would be the FCC would do it, another was that commercial arbitration would do it. Another one that they said is that they wanted comment on whether they have the authority to establish an arbitration process that is final and binding and not subject to additional review. So it is typical of the way they do these notices is they put out a number of options, they ask the parties to comments on them, and then they will decide which one they are -- or they may decide to do none of these and do something altogether different based on whatever they got out of the record.

Q Mr. Varner, but isn't the only option that they tentatively conclude will be the one that they will use in the negotiation process to resolve the disputes, isn't the only option they tentatively conclude they will use, arbitration by the states?

A No, I disagree with that. I think what you are looking --

Q Well, can you point -- excuse me.

A I think where the difficulty comes in is when they talk about tentative conclusion versus alternative proposal, and you're reading some difference in that, I submit that there isn't. There isn't any difference in those by the fact that they say we tentatively conclude and they also have an alternative proposal. The fact is they are inviting comment on all of those, and they will decide which one of these or something else that it will be. There is nothing you can glean from a notice of proposed rulemaking that provides you any guidance really as to what the ultimate rule will look like.

Q So the tentative conclusion in your mind is without any weight?

A It has no force or effect. I mean, it doesn't obligate anybody to do anything. It just provides one of the options for people to address when they file their comments for the FCC to build a record.

Q Okay. Mr. Varner, let's go to your -- let's go to your diagrams, if we might, that are contained in Exhibit AJV-1, 2, 3 -- no, I'm sorry, 1, 2, 4 and 5 are the numbers I have. And I want to begin with Diagram B.

In Diagram B, if I'm understanding this correctly, you acknowledge that this is the way a conventional circuit switched call from one end user calling another end user, each of them with telephones, this is the path such a call would take through the network going in either direction, and for this call you agree that there should be reciprocal compensation. If that call is going from the left to the right, the reciprocal compensation would flow from the ILEC to the CLEC, and if it is going from the right to the left, the compensation would flow in the opposite direction. Is that a fair summary?

A In part. It does identify sort of the physical routing of the call, but in addition there is a very important point at the top of the -- at the top of the page, it says the ILEC receives a monthly fee from its end user to apply towards the cost of terminating the local calls. So in addition it is specifying the physical routing. It is also illustrating the economics that underlie the provision of the service. And Diagram B is illustrating economics associated with a local call.

Q All right. Turning to Diagram F now. Now, in Diagram F we have the same -- would you agree that we have the same physical routing through the network when a call moves from the left to the right, linked one side your qualification that the -- we have the same physical movement, the same physical routing of the call as it moves from left to right as we had in Diagram B, except that this time the call goes to an ISP or an IXC. Would you agree with me the physical routing is the same?

A It could be. It may or may not be, but one option is that it could be. It could be going through the same tandem, but it may not be.

Q But it makes the same use of the network getting to the end, the destination, in the diagram you have drawn, doesn't it?

A No, it does not. That's where we differ. I don't think it makes the same use of the network.

Q Well, let's go through the individual steps here.

The end user originates the call, and again we are moving from left to right in both diagrams. The end user originates the call, it goes to the LEC end office in both diagrams, correct?

A Yes.

Q It goes from the LEC end office to the tandem switch, correct?

A Yes, it does.

Q Is goes to either the -- from the tandem switch to the CLEC end office, or the ICO/CLEC end office in both Diagram B and F, correct?

A Yes, it does.

Q And so in Diagram B it then goes from the -- now from the CLEC end office to the telephone, whereas in Diagram F it goes from the CLEC end office to the ISP or IXC, right?

A That is correct.

Q So up to the CLEC end office, the CLEC end office in Diagram B, and the ICO/CLEC end office in Diagram F, they are identical, isn't that correct?

A They could be. They could be using the same network facilities, the same trunk and so forth.

Q Right. And, in fact, the same functionality would be used in both Diagram B and in both Diagram F by the CLEC end office or the ICO/CLEC end office, to send the call to, in Diagram B, the telephone, or in Diagram F, the ISP or IXC?

A No, that is not true.

Q There would be different functionalities?

A Well, in some cases it would be different. It would depend in the case of an IXC, what kind of access service they bought. If they bought Feature Group A it could the same. If they bought Feature Group D it would have to be different.

Q But if the telephone in Diagram B were a PRI, and the termination in Diagram F were also a PRI, even if that PRI terminated in an ISP, the functionality used by the CLEC EO or the ICO/CLEC EO would be the same to terminate that call to a conventional PRI, isn't that correct?

A What I'm having difficulty with is you never terminate a call to a PRI. A PRI is a facility, it's a service itself. You terminate the call to a place. You either terminate it to an end user or you terminate it, you know, to a website or something like that.

Q All right. Let's say then --

COMMISSIONER DEASON: Excuse me for a second. Excuse me. Mr. Varner, could you define a PRI, please?

THE WITNESS: It's a Primary Rate Interface, and what it is is -- you are probably more familiar with the term DS1. All it is is a 24 voice grade channel capable digital facility.

COMMISSIONER DEASON: Okay. Thank you.

MR. KRAMER: I'm sorry, Commissioner. I thought we had defined it earlier in the day when --

COMMISSIONER DEASON: Well, it has been a long day.

MR. KRAMER: If you think it has been long up there, you ought to know how it feels down here.

BY MR. KRAMER:

Q But when the call is sent, when the call is delivered, transmitted, over by the CLEC end office or the ICO/CLEC end office to the PRI, the functionality used to transmit the call over the PRI will be the same, isn't that correct?

A It could be. Let's assume that it is for illustrative purposes.

Q So now you attach all of the economic consequences and the other consequences that you attach, in the distinction between Diagram B and Diagram F, despite the identities we have just identified of the call traversing the entire network occurs because the call is going to an ISP instead of to a, for example, conventional PBX, which is a private bench exchange, just a large telephone system for receiving incoming calls, is that correct?

A No, that is not correct. Because as I pointed out on the first diagram, in addition to just the physical routing, I was describing the economics, as well. And that is the thing that is different. Regardless of -- like I say, let's assume for a minute that you are using the exact same kind of physical facilities. The issues with regard to determining a compensation mechanism have to take into account who is paying for what, who is the cost causer, who is whose customer.

And that is the thing that is different between Diagram B and F. In Diagram B, the originating end user is a customer of the originating telecommunications carrier. They are being billed by them. That carrier is collecting the money, and they are the only ones collecting money. Diagram F is the exact opposite. That customer is an end user of the ISP. They are paying the ISP for that service.

When you buy Internet access, you don't get it from the local telephone company as part of your basic rate. You have to pay whatever the Internet access fee is to whoever the Internet access provider is in order to get that service. You are an end user of that ISP for that. What in turn happens is the ISP is a customer of the local exchange company or companies that are involved.

That is the access regime that the FCC set up. When they set up the access charge regime, it was set up specifically to provide a way for carriers, ISPs, IXCs, and anybody to utilize the local network, to collect traffic, and in turn utilize those capabilities to provide a service to their end users. There being the IXC's or the ISP's end users.

Q But, Mr. Varner, in both diagrams the telephone subscriber, the end user on the left is a subscriber of the LEC that originates the call, isn't that correct?

A No. That is the distinction I was making. In the situation on Diagram B, yes, they are, in fact, an end user of the LEC. The situation in Diagram F, they are not. They are an end user of the ISP or the IXC on that call. For example, assume that is a long distance call. LECs don't -- they are not a customer of a LEC. We can't provide interLATA service. They have to be a customer of the interexchange carrier on those calls.

The same thing is true on an ISP. When we provide you 1-FR or 1-FB, you don't get Internet access for that. You have to go to the Internet access provider to get that service. The Internet access provider in turn is using our facilities. If we were providing service to the Internet access provider, then that Internet access provider is a customer of ours and the end user is a customer of the ISP. In Diagram F the ISP is a customer of ICG.

Q Are you saying the end user in Diagram F doesn't subscribe to dial tone service from BellSouth?

A They do.

Q So in both B and F, the end user is a subscriber and is a customer of BellSouth's, of the telephone company on the left?

A No, that is not correct. What Diagram F is illustrating is, in fact, what happens when an end user is utilizing the local network to either get Internet access service or long distance service. And what it is showing is that what they are doing is they are using the local network in the same way. When they get those two, those two services are very similar. The only difference really between the two is that the IXC pays switched access charges and the ISP pays business exchange rates. That is really the only difference between the two. Everything else is the same. But, in fact, when you compare it to Diagram B, when you look at the cost causation relationship, who is a customer of whom, and who is collecting the revenue, the two situations are exactly the opposite.

Q So let's see if we can try to wrap this up. So what you are saying is by virtue of the fact that it is now an ISP or an IXC who is serving -- no, let me just ask one other question. You would agree with me that the CLEC EO, the CLEC in Diagram B or the ICO/CLEC in Diagram F, both incur costs in bringing -- in handling the traffic coming from the left side of the diagram, wouldn't you?

A Yes. Both parties incur costs. The company on the left-hand side and the company on the right-hand side incur costs.

Q And it is equally true that in both diagrams the company on the right-hand side incurs costs?

A Yes, they both incur costs, the left and the right.

Q Right, in both diagrams?

A In both diagrams.

Q Right. And so the transformation of all the relationships you're talking about occur because even though we have incurred -- the network is the same, everybody is incurring costs along the same way, but this transformation occurs, the whole economic relationship, the whole physical relationship, everything is upset because we have put an ISP and -- or an IXC, it doesn't matter which, on the right side of the diagram instead of an end user?

A No, I'm not suggesting that. Because when you are providing that service, you have changed the service that is provided.

Q Well, what else has happened to change the service that is provided other than we have put somebody else on the other end of the telephone call?

A What else has happened is you have now changed the service as defined by the FCC. They have said in one case who was, in fact, the customer, who should be paying, and so forth for one type of call. They have specified a different cost causation rate mechanism, they have specified a different means of who is to be billed, and different party of who is to pay, and different determination of who is the customer when, in fact, it is a carrier that is involved in the call.

So you have done all of that. It is not just simply a matter of changing, you know, a block on a diagram. You have invoked a totally different set of rules, a totally different set of relationships.

We are not allowed to bill that end user for those calls. We can't do it, and we said we can't. They have said they are not our customer.

Q And in your mind it doesn't matter in Diagram F whether the recipient of the call on the right-hand side of the diagram is an ISP or an IXC? The same service, same consequences?

A Well, there is one difference which I identified. The price that they pay is different. But in terms of the nature of the service that is provided, it is the same. Or if they do pay a different price, the IXC pays switched access charge. The ISP pays business exchange rates. That is the only difference.

Q Right. But other than that it is the same? Their use of the network is the same and everything else?

A Yes.

Q Mr. Varner, I would like to --

MR. KRAMER: May I approach the witness?

COMMISSIONER DEASON: Any objection?

MR. KITCHINGS: If we could take a look at what it is you are going to show him.

COMMISSIONER DEASON: Provide it to counsel first, please.

COMMISSIONER JACOBS: While you are doing that, can I ask a question? Mr. Varner, in the prior line of questioning -- let's for the purpose of this look at Diagram F again. The end user and the first LEC circled there?

THE WITNESS: Yes.

COMMISSIONER JACOBS: It is true that that end user will be a local customer of that LEC?

THE WITNESS: Not on that diagram.

COMMISSIONER JACOBS: Why not?

THE WITNESS: Okay. Because what happens is this. What this diagram is specifically illustrating is a call that is made to -- let's assume it is an ISP, an Internet service provider, or it is a call that is being made to an Internet --

COMMISSIONER JACOBS: So they are not using the public switched network to access the ISP?

THE WITNESS: Oh, yes, they are. They are using the public switched network. That is what gives rise to the fact that costs are being caused for the local telephone company. But they are not a customer of the local telephone company for that service. The ISP or the IXC is the local telephone company's customer. See, they are the one that is billed for that by the local telephone company.

COMMISSIONER JACOBS: I understand, but for purposes of access to the Internet, they may not be a customer of the LEC, of the ILEC?

THE WITNESS: That is exactly right. They are a customer of the Internet service provider.

COMMISSIONER JACOBS: I'm clear with you there. But to have dial tone, would they not be a customer of the incumbent LEC?

THE WITNESS: To get basic exchange service, yes, they have to be. And that is what I illustrated on Diagram B.

COMMISSIONER JACOBS: Okay. Now, is there no part of their basic local service that contributes towards the upkeep of that LEC's end office and tandem switch there?

THE WITNESS: That's correct.

COMMISSIONER JACOBS: There is no part of that --

THE WITNESS: No part of that. That don't get that as part of their basic rate.

COMMISSIONER JACOBS: That is all usage based?

THE WITNESS: No, it is all non-local. So when we develop local rates or if we do local cost studies and so forth, we don't include those calls. Like when you call a interexchange carrier, we don't include those calls as part of the use of the local network because that is not local traffic.

COMMISSIONER JACOBS: Okay. Let's go to the other end here. Earlier I think -- let me make sure I understood it correctly. The representation was that the CLEC is getting to recover -- is getting to double recover?

THE WITNESS: Yes.

COMMISSIONER JACOBS: And the reasoning is because it has this ISP as its local customer, and I assume -- and the implication there was that they were getting some revenues outside of what would be the normal local access fee, local fee?

THE WITNESS: Yes.

COMMISSIONER JACOBS: Is that the normal arrangement, that ISPs pay their serving LECs something different than a local fee? I thought they simply buy from the local tariffs.

THE WITNESS: The ISPs?

COMMISSIONER JACOBS: The ISPs buy from the local tariffs when they acquire services from the LEC, their serving CLEC?

THE WITNESS: That's correct. That is what they do. It is not the ISP that would be double recovering, it would be the CLEC serving the ISP that would be double recovering.

COMMISSIONER JACOBS: I'm sorry. You're right, it's the CLEC. But my point is this. So they are going to buy from the local tariff there, and the same arrangement. They are not necessarily paying in that local tariff rate charges to cover this particular traffic, are they?

THE WITNESS: No, they are.

COMMISSIONER JACOBS: Okay, then I'm confused. Why would they not do it on one and then on the other?

THE WITNESS: Because when the FCC set up the access charge regime, it said that for these ISPs, for their service of collecting traffic from end users, which would be from this LEC end office on the left, all the way over to where the ISP is located, for that service they will pay the business exchange rate.

They will pay the price in the business exchange tariff for that service. But that same service for interexchange carriers they said they are going to pay switched access charges.

So the compensation for that, or the price that the ISP pays for being able to utilize the local carrier's networks, to be able to provide this ISP service to this end user, is a business exchange price. But they only pay that to one carrier. They pay that to the carrier that serves them. And in Diagram F they are paying that.

If this is BellSouth on the left and ICG on the right, they are paying that to ICG. ICG is the one that is sending them the bill every month, is charging them those business exchange rates and collecting that revenue. That revenue is supposed to be for providing a service all the way from the LEC end office on the left all the way to the ISP. But they are collecting the money. BellSouth is incurring part of those costs on the left-hand side of the diagram, but we are not getting any money.

COMMISSIONER JACOBS: Okay. Thank you.

BY MR. KRAMER:

Q I have provided excerpts from the FCC's first reported order and its access charge reform proceeding, Docket 96-262. The citation is 12 FCC Record, 15982 (1997).

Mr. Varner, I'm going to ask you to read and the excerpts I have provided are the part of the order where the FCC deals with the treatment of interstate information services, which ISP services are one. And, Mr. Varner, I'm going to ask you to look at Paragraph 345, which is contained in Page 16133. And if you could just -- if you wouldn't mind reading that paragraph, I would appreciate it.

A Read Paragraph 345?

Q Yes.

A All right. "We decide here that ISPs should not be subject to interstate access charges. The access charge system contains noncost-based rates and inefficient rate structures, and this order goes only part of the way to remove rate inefficiencies. Moreover, given the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. Commercial Internet access, for example, did not even exist when access charges were established. As commenters point out, many of the characteristics of ISP traffic, such as large numbers of incoming calls to Internet service providers, may be shared by other classes of business customers."

Q Mr. Varner, by excluding Internet service providers from access charges and by the kinds of discussion that you have just read, hasn't the FCC said that, in fact, it does make a policy difference whether the person on the right end of your Diagram F is an ISP or an IXC?

A Yes, and I never suggested that they didn't. They have done that since 1983. And what you just had me read was out of their access charge reform order, and what they were dealing with is whether now instead of continuing to let ISPs pay business exchange rates, they ought to pay switched access rates, just like an IXC. And what they concluded here is one more time, no, they didn't think that they should do that. So they did not conclude that the nature of the traffic was any different. What they concluded was that the charges that apply should remain to be different, just like they always have done.

Q And one of the things they conclude is that they use the network differently, they don't use the network in a manner analogous to IXCs.

A That is true with respect to the provision of access charges and how they should pay for it. And that is consistent with what they said in their declaratory ruling, when in Paragraph 29 they said it wasn't clear to them that a pure per minute of use compensation mechanism was the proper one to have for this, which is what access charges are.

So all of these are consistent. All of this has to do with the price paid. It has nothing to do with the nature of the traffic, who should pay, and certainly has no bearing on what an intercarrier compensation mechanism should look like. It doesn't even begin to touch the issue of who is being paid for this and who is not.

Q But you want to treat them the same as an IXC, because you want to make them subject to the same access charge regime except at a different price, isn't that right?

A I would like to do that, but the FCC has said that we are not. So given that fact, this is where we are. They are paying business exchange rates for this traffic. The proper thing that should be done is a compensation mechanism should be established such that the carrier on the left-hand side of this, who is incurring some cost, is compensated for the cost that they are incurring. And the carrier on the right-hand side doesn't get to keep the money, all of the money, and it certainly doesn't mean that in addition to the carrier on the right keeping all of the money, they ought to get even more money from the carrier on the left.

Q But doesn't the scam that you -- excuse me, the scheme, that you have -- I'm sorry. Isn't the scheme that you have devised -- I'm trying to get it here. Isn't the scheme that you have devised here -- now I forgot what I was going to say. Just give me a moment, please.

But doesn't the scheme that you have devised here, in essence, say that they are to be subjected to -- that ISPs are to be subjected to the same access charge regime, but just to a different price?

A No, no.

Q Isn't that the only way you can get to saying that the end user is, in fact, the customer of the ISP?

A No. First, I haven't devised a scheme at all. All I have done is described and illustrated for you how the FCC's access charge regime operates, and how it was designed to operate, and what kinds of calls it would apply to, and compare that to what reciprocal compensation properly applies to. All I have done is simply describe the various arrangements that currently exist. I haven't devised or proposed anything in this. I did, but that is another story.

COMMISSIONER DEASON: You tried. You didn't, you tried.

BY MR. KRAMER:

Q All right. We will leave this point. Mr. Varner, so under your proposal here, what do you want the Commission -- I will withdraw. All right. Let me go to a few other points.

MR. KRAMER: Mr. Chairman, I have about I'm going to say a half an hour more, so do you want to take a break?

COMMISSIONER DEASON: Yes, we are going to take a recess, then. Ten minutes.

MR. KRAMER: Thank you. I think I can finish up in a half an hour.

COMMISSIONER DEASON: We will take ten minutes at this time.

(Off the record briefly.)

COMMISSIONER DEASON: I call the hearing back to order.

BY MR. KRAMER:

Q Mr. Varner, I now want to ask you a few questions about the EEL. Okay. At Page 12 of your direct testimony you state that the EEL -- sorry, it's not Page 12. It is Page 14 of your direct testimony. You state that the EEL, the enhanced extended link, replicates special access service. Do you see where I am talking about?

A Yes.

Q And in that same answer you express a concern about arbitrage opportunities or loss of revenue as a result of that arbitrage, because presumably -- well, I would like you to explain how the arbitrage would work and what the concern is there.

A Okay. The base concern is that this EEL requires

BellSouth to combine UNEs, and we are not required to do that. That is essentially the base concern. ICG wants a facility that connects an end user to their collocation space. Well, in order to have such a facility in place, BellSouth has to create it. If we were to create such a facility for ICG, we would be creating the same thing that we would be creating with special access service. That is exactly the same thing we would be providing with special access service. And the only difference between those two would be the price. So the base concern is that we are not willing to simply just combine these elements to provide ICG an opportunity to just get lower priced special access service.

Q Well, if a CLEC customer, then, who wanted to -- well, let me rephrase that. Wouldn't it assuage your concern and, in fact, wouldn't it completely obviate it, if a CLEC who asked you for EELs agreed that they would use the EEL solely to provide local exchange services?

A I don't know. That proposition was advanced, I think, last night, and without being able to research it more, I just can't answer that.

Q But that would eliminate the arbitrage opportunities completely, wouldn't it, if the facility were being used only for local exchange service?

A Again, I don't know. I haven't looked at that alternative, I guess, enough to be able to tell. The first I heard of it was yesterday evening and, quite frankly, in getting ready to the hearing, I just haven't had much time to think about it.

Q Well, what if ICG agreed to use the BellSouth tandem switches for all IXC traffic until the FCC resolves the EEL issue in the rulemaking which you referred to earlier? May I withdraw that so I can lay the predicate properly? Thank you.

Mr. Varner, you recall earlier we discussed the FCC's -- I'm sorry, do you recall earlier Mr. Edenfield discussed the FCC's press release on the UNE remand proceeding?

A Yes.

Q And do you recall that one of the things that emerged from that discussion was that the FCC is initiating a rulemaking proceeding to decide whether it will require EELs, and, if so, what they will be used for?

A No. They are issuing a rulemaking proceeding to decide to what extent, if any, UNE dedicated transport can be used to substitute for special access. And that would be whether either alone or as part of an EEL, but it is UNE dedicated transport regardless of what configuration it might be in.

Q And so that proceeding presumably would address the availability -- assuming, that is, the proceeding and it goes forward. We are all acting on the basis of a press release here. We understand that. But assuming that is the proceeding and it goes forward, that proceeding presumably would embrace within it the availability of EEL for special access?

A No, I don't think so. The availability of EEL, I think, if you look at the press release, it has really already been dealt with by the FCC. They couldn't require it and they didn't require it. If, in fact, in the Eighth Circuit something happens to, you know, reinstate some of the current FCC rules that have vacated, that may change. So with regard to EEL availability, based on the press release, the FCC has dealt with that issue.

Q Well, let's just back up to your statement that they couldn't require it and wouldn't require it. You have explained, haven't you, that an EEL looks just like a special access facility?

A After BellSouth does the combination, that's correct. But the basic problem is is BellSouth has to combine the UNEs in order to create this in the first place, which is what the FCC can't require us to do.

Q Well, is it then your position that special access facilities would not be an existing combination of UNEs in the network under 3(15), under Section 3(15)(b) of the FCC's rules?

A That's correct. Again, I addressed that in my summary.

Q So if an end user who has a special access facility now changes out to a CLEC, changes service providers to a CLEC, and the CLEC says to BellSouth that it wants to take that existing combination of the loop and the transport that BellSouth has combined as a special access facility and start using it at UNE rates, you are saying the end user would not be able to do that?

A Well, the end user would never have it to start with. You see, when you are talking about special access service, the end user would never have it. What would have happened is a carrier, let's say, for example ICG, would have come to BellSouth and said, okay, I want a special access facility that goes from end user A to my collocation space. So we would have put that together for ICG. And we would be billing ICG for that. So the end user never would have bought that. BellSouth never would have sold that to the end user, we would have sold it to ICG as a special access service.

So then ICG, still being the customer who we combined these for would then come along and say that is now currently combined. Well, it never was combined for the end user in the first place. We provided the access service to

ICG. We never provided service to the end user.

Q Assuming the ordering process and the subscriber relationship is as you have described, are you saying that if you had provided the special access circuit to, let's say ICG, and MCI came along and said it is taking over the customer and it now wants the same already combined facility at UNE rates, it would not be available?

A No, it would not. What MCI could do is come along and purchase special access service for itself just like ICG did. Again, I addressed that in my summary, and what I have pointed out is that is my understanding based on the press release of how the FCC defines currently combined. Hopefully when they issue their order, you know, we will have more detail on that. But that is the way it appears to be at this point.

Q So right now BellSouth's position is that BellSouth would not allow conversion of existing special access facilities, already combined existing special access facilities to EELs?

A Yes, that would be correct.

Q That is your position?

A Yes, because 3(15)(b) doesn't apply to those.

Q Right. I understand that would be your position. Okay. Now, I want to just go back for a moment to the FCC rulemaking. The FCC rulemaking in your view would not be addressing conversion of special access facilities to UNEs?

A I don't know. The only thing we know from the press release, it is going to be addressing the extent to which transport can be used as a substitute for special access. So, now, again, that is -- what I have told you is about everything that is in the press release on that subject. That is really all you know.

Q Well, let's assume that -- let me go back to your testimony on Page 14 because -- and I want to ask you this question. If ICG said -- the only concern that ICG expressed in this testimony is the arbitrage concern. If ICG agreed not to use that UNE -- excuse me, that EEL to provide special access, what concern would be left other than -- and I don't mean to be argumentative when I say this, other than an anticompetitive concern with keeping a competitor from providing services?

MR. KITCHINGS: I object to the question, Mr. Commissioner. I believe that has been asked and answered.

COMMISSIONER DEASON: There has been an objection.

MR. KRAMER: I don't believe that has been asked, Your Honor. I'm trying to --

COMMISSIONER DEASON: I don't think so, either. The objection is overruled. The question stands.

THE WITNESS: Would you repeat the question?

MR. KRAMER: I will try.

BY MR. KRAMER:

Q The only concern expressed in your testimony about converting special -- about providing EELs is that they would be used to arbitrage special access. If that concern is addressed by ICG's saying it won't use EEL to provide special access, the only concern I can see that would be left is a competitive concern with not allowing the competitor to get access to a facility it can use to compete more effectively.

A I see how you have the misunderstanding, and that is not the case. Again, our concern is this, that to provide the EEL we will have to combine those elements. We are not obligated to do that. When we do perform this function of combining elements, you will have several consequences that occur. One of the ones is the price arbitrage opportunity I described here for special access. Another one may be private line.

There may also be other arbitrage opportunities with regard to other switched services. I was not meaning to imply that this is the only concern. This was an example of one of the concerns, of one of them, that arises when we are thrust in this position of being forced to combine UNEs, which we are not obligated to do.

Q That is not what your testimony says. Your testimony expresses only one concern.

A The basic concern my testimony expresses is that we should not have to do this because we are not obligated to do it. And I gave you one of the consequences, the negative consequences, and one of the concerns that we have with regard to doing it.

Q Mr. Varner, can we turn to your rebuttal testimony now?

A The rebuttal, did you say?

Q Yes. And on Page 5, in Mr. Starkey's rebuttal testimony, he set forth Section 64702 of the FCC's rule which defines an enhanced service provider. And he was quite explicit about saying that nowhere do you cite any authority for the proposition that ISPs are carriers. Can you tell me what authority you are relying upon since under the FCC's rule as set forth in Mr. Starkey's rebuttal ISPs are enhanced service providers?

A That ISPs are enhanced service providers?

Q I'm sorry, information service providers.

A Well, it is in Footnote 2 of the declaratory ruling. It says for purposes of this declaratory ruling, we refer to providers of enhanced services and providers of information services as ESPs, a category which includes Internet service providers, which we refer to here as ISPs.

Q That's correct.

A The Commission stated in the access charge reform order, the term enhanced services defined in the Commission's rule that services and so forth, and it has this quote out of the act.

Q That's correct.

A So what the Commission has done is that they have characterized ISPs or Internet service providers as a class of ESPs. And in their previous access charge orders, they have specifically said -- and in this order, that these people use access services. So the access -- so they are carriers. Carriers use access services by definition.

Q Mr. Varner, in everything you just said, you didn't cite anything where the FCC has said ISPs are carriers. Everything you read said ISPs are enhanced service providers, information service providers, but nothing you read said that they are carriers. I'm asking you what is the authority for saying, what can you cite me by way of precedent or by way of a ruling by any regulatory agency, that says in face of the FCC's rule, Section 47 CFR 64702 that says that they are not carriers and they are not regulated as carriers? I'm looking for some authority, some precedent, for this assertion.

A First, I disagree with you that there is an FCC rule that says they are not carriers. Second, the first place that I am familiar with it is in the 1983 access charge order, which I may have a copy of. And, third, throughout this declaratory ruling, the FCC is very, very clear that these people use access charges, they are subject to the access regime, they simply don't pay the access revenues. So that is what makes them carriers.

Q Well, Mr. Varner, can I call your attention to paragraph -- well, I had better use my copy. Paragraph 10 of the FCC's declaratory ruling order. If I can find my copy. Would you mind reading the last sentence of that order of that paragraph, Paragraph 10?

A Of which order?

Q The FCC's February 26th declaratory ruling.

A Paragraph 10, did you say?

Q Yes.

A All right. I have it. Yes, I read it.

Q Does the FCC say there that ISPs are not common carriers?

A They are not Title 2 common carriers is what they are referring to when they say that. I refer you to Footnote 8, where it says, see for example MTS and WATS market structure order among the varieties of users --

Q I'm sorry, Mr. Varner. Excuse me. I didn't hear where you are reading. Could you just tell me again?

A Footnote 8 of the same order.

Q Footnote 8 of the same order. Okay. I'm sorry. Could you go on?

A Among the variety of users of access service are enhanced service providers, amendment to Part 69 of the Commission's rules relating to enhanced service providers. And remember, the FCC previously said that ISPs were a subset of enhanced service providers.

Q That is correct, but you --

A I wasn't finished. It goes on.

Q I'm sorry. Excuse me.

A The ESP exemption order referring to certain classes of exchange access users, including enhanced service providers, amendment to Part 69, so forth. ESPs, like facilities-based interexchange carriers and resalers, use the local network to provide interstate services, access charge reform order. Information service providers may use incumbent LEC facilities to originate and terminate interstate calls. It is very clear that the FCC is treating these people as carriers and the service that they are getting is access service, which is the point of my testimony.

Q Well, of course, Mr. Varner, it is your assertion that just because you use access services, you are a carrier. Isn't it true that end users can buy access services right out of the tariff?

A Not under the FCC's access charge regime. The distinction that the FCC uses to distinguish people who pay access charges from people who don't is carrier versus end user. That is the terminology that they use. People who pay access charges are carriers. People who don't are treated as end users. That is the way that they distinguish between people.

The problem is that when you get into the state arena, we use those terms differently. But they really only have -- they have a dichotomy. They have two groups. You are either carriers or end users. The carriers pay access charges and end users don't. That is why you hear throughout this order, they repeatedly say we are treating these people as end users for pricing purposes because they don't pay access charges.

Q I have, I think, I hope, two more questions for you here. Are you taking the position that anybody who buys an access service out of an access tariff -- let me reframe that. Are you taking the position that an end user is not entitled to buy an access service out of an access tariff?

A Not under the FCC's description of what those terms mean.

Q May I have a yes or a no and then you can explain?

A Okay. I would say I'm not sure which way to go, yes or no, because I don't know which one the question calls for.

Q Let me try it again. Are you taking the position that an end user cannot buy access services without converting itself to a carrier?

A Yes. Under the FCC's dichotomy of what constitutes a carrier versus an end user. Now you can have people in the state arena that you look at and traditionally consider end users who would then go buy access service. But under the FCC's dichotomy of the way that they describe people, you are either carrier or an end user. And if you are a carrier, you pay access charges. If you are an end user, you don't. So under that dichotomy, if you pay access charges, you are a carrier.

Q And so if you -- again, so your position is an end user who buys a service out of -- that end users cannot buy access services out of tariffs, that is your position, is that right?

A Under the FCC's dichotomy, that is correct. There are people that we traditionally call end users that, yes, would buy access services.

Q One last thing. Just turning to the very bottom line on Page 8 -- excuse me, on Page 3 of Footnote 9 of the FCC's declaratory ruling.

A I'm sorry. Footnote 9. I made a mistake. On my copy I told you I was reading out of Footnote 8. I was reading out of Footnote 9.

Q Yes, I realized that. Thank you.

A Okay, I'm there.

Q Would you read the parenthetical there?

A Which one? There are several.

Q The very last one, the bottom line.

A Oh, the very last one?

Q Yes, on the bottom of the page.

A Where it says information service providers may use incumbent LEC facilities --

Q No, it begins ESPs "like facilities". It is the bottom line of Footnote 9 on Page 3.

A "ESPs, like facilities-based interexchange carriers and resalers use the local network to provide interstate services."

Q And so, Mr. Varner, isn't the FCC saying that ESPs are not facilities-based interexchange carriers at all? Because if they were facilities-based carriers, the FCC wouldn't say they were like facilities-based carriers?

A They are not facilities-based interexchange carriers. I mean, in the context of like an AT&T or an MCI or whatever, they are not providing that service.

Q One final area.

COMMISSIONER DEASON: Before you proceed, let me make an announcement that the air conditioning has been turned off, okay? And the doors have been locked, so if you leave the building, don't expect to come back in.

BY MR. KRAMER:

Q One last area, Mr. Varner, if I can just find it here. I am on Page 12 of your rebuttal testimony. I am looking at the question that begins on Line 9 where you say that Mr. Starkey is pointing out that -- do you see that?

A Yes.

Q And let me understand. It is your position that it is irrelevant to the issue at hand whether or not BellSouth is recovering its costs from second lines, is that correct?

A Yes, that is correct. It is irrelevant for determining what would be an appropriate reciprocal intercarrier compensation mechanism to apply for ISP traffic.

Q Well, how does that fit with your notion that BellSouth is the carrier who is not recovering its costs here?

A I don't see how there is any nexus between those two, quite frankly.

Q Well, let me ask you, Mr. Varner --

A That was my point of Mr. Starkey's testimony. I didn't see that it had any relevance to the issue.

Q Let me ask you, Mr. Varner, if you could take a look at Paragraph 346 of the FCC's access reform order, which is the document I passed out earlier. Would you mind reading that paragraph? I think this is the last reading of the night.

A The whole thing?

Q Please.

A "We also are not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, the usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators."

Q And as Mr. Starkey notes on Page 27 and 28 of his direct testimony, BellSouth has been a particular beneficiary of second line traffic, hasn't it?

A I don't know we have been a particular beneficiary or not. We have sold second lines. That has nothing to do with this issue. The paragraph that you had me read has nothing to do with the issue of intercarrier compensation.

What the FCC was saying is that these may be relevant things to consider when you decide whether ISPs should pay access charges or business rates. And what they are saying is this, that if, in fact, the business rate is too low, then the states should go -- then the LECs should go and have the state regulators increase the business rates, as opposed to them applying access charges. And that is really what they are talking about. It has nothing to do with intercarrier compensation.

Q But it does have to do with BellSouth's claim that it is not getting adequately compensated, doesn't it?

A No, it does not.

Q All right. Thank you, Mr. Varner. I have just a few questions and then we will wrap up. These will be quick.

Mr. Varner, just a few questions about your background here. We have established earlier that you are not a lawyer?

A Oh, yes, that's correct.

Q Are you trained as an economist?

A Am I trained as an economist?

Q You are supposed to say thankfully when I ask you if you are not a lawyer.

A No, quite frankly, I have no problem with lawyers.

Q Are you trained as an economist?

A I don't have a degree in economics.

Q Have you ever been a practicing economist?

A No, I have not.

Q And, Mr. Varner, you have been with BellSouth your whole career since you got out of school in 1972?

A Just about.

Q Do you think it would be fair to say that you have a bias in favor of BellSouth?

A To some extent I would say so. But, you know, my job at BellSouth really is to do the opposite. Having a bias towards them really doesn't allow me to serve the purpose I'm supposed to serve. My purpose is supposed to tell them what are the public policy ramifications of what it is that they are trying to do. And so what I am supposed to do is to look at these issues as dispassionately as I can and determine what is the right thing for public policy and provide them with that input.

Now they may choose to ignore it and do something else or not, but that is what I am supposed to do. So, yes, I would say yes, I do have a bias, but to carry out my job functions I'm supposed to put that aside and try to be as dispassionate as I can.

MR. KRAMER: Thank you, Mr. Varner. I have nothing further.

COMMISSIONER DEASON: Staff.

MR. FORDHAM: Thank you, Commissioner.

CROSS EXAMINATION

BY MR. FORDHAM:

Q Mr. Varner, we have talked a great deal about EELs already, but let me ask you just a couple of more specific questions. Under the existing agreement that BellSouth has with ICG, is BellSouth providing the same EEL loops and packet switching capabilities that ICG is seeking in this new agreement?

A I know we are not providing the EEL. I'm not sure about the packet switching. I just don't know.

Q Okay. Is the EEL loop a preexisting combination in BellSouth's network, or would BellSouth be required to combine the loop and the transport piece to create the EEL loop?

A We would have to combine it.

Q Now, in your direct testimony on Page 14, sir, you stated that BellSouth is willing to provide ICG with the EEL loop that it requested upon execution of a voluntary commercial agreement that is not subject to the requirements of the act. Is BellSouth still willing to do that, sir?

A With one caveat. I'm not sure it is what they have requested. We have developed some proposals and we have made one to them. I don't know whether that fulfills everything that they want or not, but we are certainly willing to continue to offer them the professional service arrangement that we have already given them.

Q In your direct testimony on Page 43, you stated that BellSouth has agreed to unbundle its existing tariff package switching frame relay service and provide it to ICG. Is BellSouth still willing to do that?

A As part of our professional services arrangement, yes.

Q Okay. Let's talk a minute about binding forecasts. It was noted earlier in the testimony that BellSouth did agree to a binding forecast provision in its agreement with KMC Telecom. Is that correct, sir? Did they agree to a binding forecast in that agreement?

A No, that is not correct. What we agreed to was for the parties to determine if, in fact, we could come up with a binding forecast mechanism that we could agree to. Essentially it was an agreement to negotiate, continue negotiating, and come up with an arrangement.

Q And is that the same proposal that you are making to ICG in this negotiation?

A Yes. Yes, it is.

Q But it is not truly a binding forecast?

A No, because we don't have a binding forecast arrangement. We are trying to determine whether there is -- whether we can actually implement that and carry it out, and it has turned out to be rather complicated to be able to do that and still fulfill our non-discrimination obligations to other carriers. It is what we are trying to work our way through.

Q Turning our attention now to discounts, does BellSouth offer volume and term discounts for tariff services and custom service arrangements?

A Yes, we do.

Q You say yes?

A Yes.

Q Now, are those discounts applicable for UNEs as ICG is proposing?

A No, they are not. They are not even applicable to all tariff services. Some tariff services have volume or term contract arrangements with them, some don't.

Q Do you have a short answer for why not?

A Basically, it is dictated by the marketplace and what you have to be able to do in the marketplace. Usually what you will find in the ones that have them are situations wherein they are competitive and the other providers offer a volume and term arrangement. So in order to compete, we have to offer them as well.

Q Well, that is short enough, I guess. On Page 15 of your direct testimony, at Lines 1 and 2, you stated that any impact of volume requested by ICG is already included in the utilization percentage. And what do you base that statement on, sir?

A The way that the cost studies were done. Mr. Starkey in his testimony proposed that if they were to enter into a volume discount arrangement, that somehow the plant utilization would increase. The way plant utilization was utilized in setting the prices for UNEs, it would not increase.

Q Okay. On Page 44 of your direct testimony, Lines 8 through 10, you stated that BellSouth's nonrecurring rates already reflect any economies involved when multiple UNEs are ordered and provisioned at the same time. Is that a similar type explanation?

A Yes, it is.

Q And on Pages 14 and 15 of your rebuttal testimony, you stated that plant utilization in the study represents this Commission's view of plant utilization in the future. And you stated that Mr. Starkey does not have a correct understanding of "the cost studies". To which study were you referring, sir?

A The cost studies that this Commission used to establish the UNE prices. Mr. Starkey's testimony is based on a view that the cost studies were developed utilizing factors like plant utilization as the network is, or was historically, and that is not what the Commission did.

The Commission developed these factors based on their view of what the network would look like in the future. These were all forward-looking incremental studies. So given that, the conclusions that he is drawing are not valid with respect to the way that the Commission did the studies, because they used projected utilization. They didn't use actual utilization.

Q So it was a dissimilar criteria in essence?

A That's correct.

MR. FORDHAM: Thank you, Mr. Varner. No further questions.

COMMISSIONER DEASON: Commissioners. Redirect.

MR. KITCHINGS: No, Mr. Commissioner.

COMMISSIONER DEASON: Exhibits? I believe we have Exhibit 5 and Exhibit 6. Are they moved at this time?

MR. KITCHINGS: Yes, Mr. Commissioner, we would move those into the record.

COMMISSIONER DEASON: Without objection, show then Exhibits 5 and 6 are admitted.

(Exhibit Number 5 and 6 received into evidence.)

COMMISSIONER DEASON: Mr. Varner, you may be excused.

MR. KITCHINGS: Commissioner Deason, I'm sorry, I believe we have one more exhibit.

COMMISSIONER DEASON: There has been identified Exhibit 4. Is that the exhibit that you are referring to?

MR. KITCHINGS: The 10K, yes.

COMMISSIONER DEASON: Yes, sir. That is Exhibit 4. Do we have copies of that available, or what is the status?

MR. KITCHINGS: The status of this is, Commissioner Deason, is that what we have done, the entire 10K is almost 300 pages. So in an effort to save a few trees, what we have agreed to do -- correct me if I'm wrong. What we have agreed to do is take the first 19 pages of that and submit that as the exhibit in lieu of the 300 pages. And I would point out that the portion to which I was referring just for ease of reference later, is found on Page 8 of that exhibit. It is in Section Number 9 there in the middle, just for later reference.

COMMISSIONER DEASON: Any objection? Very well. Just be sure that all parties have a copy and the court reporter gets a copy.

MR. KITCHINGS: We will get those copied and distributed tomorrow.

COMMISSIONER DEASON: Very well. Exhibit 4, as described, will be admitted without objection.

(Exhibit Number 4 received into evidence.)

MR. KRAMER: Commissioner, I have one additional item. I have discussed with counsel and secured the permission of counsel to recall Ms. Schonhaut for one question and answer. I would request permission to do that at this time in order to correct the record.

COMMISSIONER DEASON: Okay. Before we do that, we need to take care of the technicality of having the rebuttal testimony entered into the record.

MR. KRAMER: Yes. I'm sorry. Excuse me.

COMMISSIONER DEASON: And then if you want to go through that process, if there are any exhibits, they likewise need to be identified. We have rebuttal testimony of two witness that have not yet been admitted. I understand there is no objection by any of the parties for the insertion of this rebuttal testimony, is that correct?

MR. EDENFIELD: That is correct, Commissioner Deason. BellSouth has no objection to that.

COMMISSIONER DEASON: Staff has no objection?

MR. FORDHAM: No objection, Commissioner.

COMMISSIONER DEASON: Therefore, the prefiled rebuttal testimony of Witness Schonhaut and Witness Starkey will be inserted into the record.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

REBUTTAL TESTIMONY

OF

CINDY Z. SCHONHAUT

ON BEHALF OF ICG TELECOM GROUP, INC.

DOCKET NUMBER 990691-TP

Q. ARE YOU THE CINDY SCHONHAUT THAT CAUSED DIRECT TESTIMONY TO BE FILED IN THIS PROCEEDING?

A. Yes, I am.

Q. HAVE ICG AND BELLSOUTH REACHED A SETTLEMENT OF ANY OF THE ISSUES IN THIS PROCEEDING SINCE THE PARTIES FILED THEIR DIRECT TESTIMONY?

A. Yes, subsequent to the filing of direct testimony, ICG and BellSouth have settled several issues. These include issues relating to the bona fides request process (Issue Number 2), the reporting of the breakdown between intrastate and interstate traffic (Issues 8 and 9) and various matters concerning collocation (Issues 11-16). However, issues still remain regarding the application of reciprocal compensation for ISP-bound calls (Issue Number 1), the availability of unbundled network elements ("UNEs") associated with packet switching (Issue Number 3), the availability of the enhanced extended link ("EEL") as a UNE (Issue Number 4), volume and term discounts for UNEs (Issue Number 6), payment of reciprocal compensation to ICG at the tandem rather than the end office rate (Issue Number 7), binding forecasts (Issue Number 10) and performance standards and remedies (Issues 5 and 18-25).

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY TODAY?

A. I would like to take this opportunity to respond to the testimony of Mr. Varner, particularly his analysis of the various orders of the Federal Communications Commission ("FCC") and court opinions that have some bearing on the instant proceeding. I will also respond to Mr. Varner's testimony about reciprocal compensation for calls to ISPs, and about the availability of the EEL as a UNE.

Q. WHAT IS THE PROBLEM, IN GENERAL TERMS, WITH MR. VARNER'S TESTIMONY?

A. Mr. Varner spends a good deal of time discussing various FCC orders and corresponding court decisions. In virtually every case, Mr. Varner's point is that this Commission should not become involved in this issue because the concerns may one day be addressed elsewhere. Under Mr. Varner's approach, the existence of any legal uncertainty is cause for competitive paralysis. Mr. Varner preaches inaction and offers no prescription to break the current regulatory gridlock.

The regulatory vacuum that would result from this Commission's inaction would have significant effects on both ICG and competition within this state. The carriers would be left to fight out their differences among themselves, with BellSouth the all-but-certain winner in every instance. In addition, if this

Commission does not act on the issues in ICG's petition for arbitration, it will either be a very long time indeed before ICG is able to win relief (as in the case of UNEs or UNE combinations), or ICG will be forever foreclosed from relief for the period before the FCC finally acts (as in the case of reciprocal compensation for ISP calls). The delay that ICG and other ALECs face in having these issues addressed will dictate the speed with which competition begins to flourish in this state. ICG hopes to continue to provide more innovative services to more customers at better prices, but this can occur only if the regulatory environment is supportive and attentive to competitive concerns. To this end, ICG respectfully requests that this Commission act in this proceeding to bring much needed certainty to the competitive playing field in Florida.

Q. DO YOU AGREE WITH MR. VARNER'S ARGUMENT THAT IT WOULD BE "WASTED EFFORT" FOR THIS COMMISSION TO ADDRESS THE ISSUE OF RECIPROCAL COMPENSATION FOR CALLS TO ISPS?

A. No. While the FCC will eventually take up the issue of how calls to ISPs are to be compensated, its rule will be prospective only. See Declaratory Ruling and Notice of Proposed Rulemaking in CC Docket 96-98, released on February 26, 1999 ("Declaratory Ruling"). If this Commission does not take action to compensate for calls to ISPs, ICG will *never* be compensated for the calls it delivers to ISPs during the interim until the FCC adopts a rule, because the FCC rule will be prospective only in application. To compound the adverse impact on ICG, the interim period until the FCC acts could stretch for several months or even a year. It previously took the FCC almost two years (20 months) to respond to the June 1997 request for clarification that led to the Declaratory Ruling. Letter from Richard Metzger, General Counsel for the Association for Local Telecommunications Services to Regina Keeney, Chief, Common Carrier Bureau, FCC (June 20, 1997). If reciprocal compensation for calls to ISPs were foreclosed as a source of revenue for several months or more, ICG would be forced to re-think its options concerning its operations in this state. See Schonhaut direct at 16.

For its part, the FCC has given the state commissions the proverbial green light to consider reciprocal compensation for ISP-bound traffic until the FCC adopts a prospective rule. The Declaratory Ruling states that:

> Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding - or a subsequent state commission decision that those obligations encompass ISP-bound traffic - does not conflict with any [FCC] rule regarding ISP-bound traffic.

Declaratory Ruling, ¶26 (citations omitted). This language makes clear that this Commission's consideration of reciprocal compensation will not result in "wasted effort," as suggested by Mr. Varner.

Mr. Varner's argument that the Commission would waste its efforts in addressing reciprocal compensation for calls to ISPs is particularly weak. He states that the FCC's authority "to confer this ability on the states is being challenged in court." Varner direct at 15. He then adds that "states could find they do not have the authority to create even an interim compensation arrangement" and that the "authority is valid only until the FCC completes its rulemaking..." Id. In making this argument, however, Mr. Varner concedes that the present state of the law is such that this Commission has the requisite authority to order reciprocal compensation for calls to ISPs. Until the FCC acts, only a court order can remove this authority, but no court has thus far given any indication that it will change the existing situation before the FCC adopts a rule. Mr. Varner's theory would have the existence of any legal challenge to an FCC decision result in competitive paralysis. That is precisely the outcome that this Commission should act to preclude.

Q. WHAT ARE THE CONSEQUENCES TO ICG, OTHER ALECS, AND ISPS IF THIS COMMISSION DECLINES TO ADDRESS THE ISSUE OF RECIPROCAL COMPENSATION FOR CALLS TO ISPS?

A. In my direct testimony, I set forth a number of the consequences that will befall ICG and other ALECs if the Commission declines to address reciprocal compensation or otherwise precludes such compensation. Schonhaut direct at 6-7. In brief, without reciprocal compensation for delivering traffic to ISPs, ICG and other ALECs would be left to raise their rates or absorb their costs - either of which would be destructive to their ability to attract and keep customers. The remaining option would be to decline to provide service to ISPs. In addition, if reciprocal compensation for calls to ISPs were precluded as a source of revenue, the marketplace might dictate that future growth in the provision of telecommunications service be directed toward end users other than ISPs with more conventional calling needs. In other words, instead of encouraging the development of products and specialized services to support the Internet and data services, the marketplace would reward service providers that support more traditional users whose telecommunications needs are already being addressed.

ISPs would also be required to make strategic business decisions. If ALECs like ICG are forced to raise their rates to ISPs because the ALECs are not recovering their cost of terminating the traffic, it could result in increased costs to end users. There is no way of knowing how ISPs would handle rate increases, and whether ISP rate increases would artificially suppress demand for services in such a way that the growth of the Internet in this state would not reach the levels it otherwise would have.

Q. WHAT IS WRONG WITH MR. VARNER'S VIEW THAT SINCE ISP-BOUND TRAFFIC IS NOT LOCAL TRAFFIC IT IS NOT SUBJECT TO THE RECIPROCAL

COMPENSATION OBLIGATIONS?

A. Mr. Varner misses the point of the recent FCC Declaratory Ruling. In that ruling, the FCC made a *jurisdictional* finding that calls to ISPs when exchanged between two carriers within the same local calling area in a state are "jurisdictionally mixed and appear to be largely interstate." FCC Ruling at ¶¶18-20. For compensation purposes, however, the FCC concluded that calls to ISPs are to be compensated in accordance with the actions of the *state commission* unless and until the FCC adopts a further order governing compensation. Any FCC order will have prospective application only. Declaratory Ruling ¶¶21-27. In the interim, the FCC permitted state commissions to *treat calls to ISPs as local for purposes of reciprocal compensation*. Id.

Q. IS THERE ANY BASIS FOR MR. VARNER'S CLAIM THAT RECIPROCAL COMPENSATION FOR ISP CALLS IS NOT A PROPER SUBJECT OF A STATE ARBITRATION PROCEEDING UNDER SECTION 252 OF THE ACT?

A. No . This is simply a variation of Mr. Varner's argument that calls to ISPs are not local. Mr. Varner reasons that because calls to ISPs are not local, the reciprocal compensation provisions of Sections 251 and 252 are not implicated, so calls to ISPs cannot be the subject of a Section 252 arbitration proceeding under his theory. Varner direct at 15-16. The FCC has already provided the answer to Mr. Varner's theory: calls to ISPs may be treated as local for purposes of reciprocal compensation until the FCC adopts a new rule with prospective application only. The FCC concluded in the Declaratory Ruling that:

> [S]tate commission authority over interconnection agreements pursuant to section 252 "extends to both interstate and intrastate matters." Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process.

Declaratory Ruling, ¶25 (citations omitted).

Q. DO YOU AGREE WITH MR. VARNER'S STATEMENT THAT ISPS ARE CARRIERS THAT PURCHASE ACCESS SERVICE?

A. No. ISPs purchase business services out of local exchange tariffs. Mr. Varner attempts to show that ISPs are carriers, because if they are considered as such, according to Mr. Varner, the ISPs would be purchasing access service and the ALEC serving them would not be eligible for reciprocal compensation. The Declaratory Ruling provides the answer to Mr. Varner's argument:

> In the <u>Access Charge Reform Order</u>, the Commission decided to maintain the existing pricing structure pursuant to which ESPs are treated as end users for the purpose of applying access charges. Thus, *the [FCC] continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local.*

Declaratory Ruling, ¶ 5.

Elsewhere in the ruling, the FCC makes clear that, until it adopts a prospective rule, the consequence of "treating ISP-bound traffic as if it were local" under the access charge regime suggests that calls to ISPs be subject to reciprocal compensation:

> While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied, in the separate context of reciprocal compensation, suggest that such compensation is due for the traffic.

Declaratory Ruling, ¶25.

Q. SHOULD THIS COMMISSION ADOPT BELLSOUTH'S INTERIM PROPOSAL DESCRIBED AT PAGES 29-36 OF MR. VARNER'S TESTIMONY CONCERNING COMPENSATION FOR CALLS TO ISPS?

A. No. For the reasons set forth in Mr. Starkey's rebuttal testimony, the interim inter-carrier mechanism suggested by BellSouth is inappropriate. Furthermore, for the reasons set forth in ICG's Motion To Strike filed concurrently with this rebuttal testimony, it is outside the scope of the issues of this arbitration proceeding.

Q. DO YOU AGREE WITH THE WAY MR. VARNER CHARACTERIZES WHAT UNES AND UNE COMBINATIONS BELLSOUTH MUST CURRENTLY MAKE AVAILABLE?

A. No. Mr. Varner's lengthy recitation of the history of FCC's local competition rules, combined with his analysis of the current state of the law, appears to be designed to intimidate this Commission from taking up this issue in this case. He argues, in effect, that in the face of any uncertainty surrounding the status of the FCC's rules on UNEs, this Commission should do nothing. Unfortunately, doing nothing on an important issue like the availability of UNEs will significantly retard, if not halt, the growth of competition in the telecommunications marketplace of this state. As a consequence, customers would be deprived of the full benefits of competition.

This Commission should reject all suggestions that it do nothing while competition struggles to grow in this state. In fact, the Commission should do exactly the opposite of what BellSouth suggests. The Commission should step into the vacuum created by the vacating of the FCC's rule on UNEs, and actively oversee the provision of UNEs and UNE combinations until the time the FCC implements a new rule. Although BellSouth states that it will make some UNEs available to ICG, it does not specify which ones. Rather than letting BellSouth set its own rules, this Commission must take affirmative steps in this arbitration to ensure that the growth of competition is not stymied.

Q. WHAT ARE THE UNES AND UNE COMBINATIONS AT ISSUE IN THIS PROCEEDING?

A. In this proceeding, the availability of UNEs and UNE combinations arise with regard to two specific issues. First, ICG has requested that packet switching capabilities be available as UNEs. Mr. Holdridge discusses in his rebuttal testimony this particular issue and BellSouth's apparent agreement to provide these capabilities on a UNE basis.

Second, ICG has requested that BellSouth provide the enhanced extended loop ("EEL") as a UNE. Mr. Holdridge reviews ICG's need for the EEL in his rebuttal testimony. BellSouth's position is that an EEL is a "combination of loops and dedicated transport" that would "replicate private line and/or special access services." Varner Direct at 14. Mr. Varner argues that BellSouth is not required to perform this combination for ICG. Id.

Q. SHOULD BELLSOUTH BE REQUIRED TO PROVIDE ICG THE EEL AS A UNE?

A. Yes. During negotiations, BellSouth offered to provide the EEL, which is an existing combination of UNEs, to ICG on a contract basis outside of the interconnection agreement context. This Commission has the option of requiring BellSouth to make available existing UNE combinations for the interim until the FCC adopts a new UNE rule. BellSouth need not "perform" the UNE combination, as stated by Mr. Varner; it should merely provide the EEL, a UNE combination that already exists in the network, anywhere ICG requests it at TELRIC rates.

In any event, the EEL simply combines two UNEs (loop and line-side transport) that are key elements in the competitive telecommunications scheme. As evidence of their centrality to the ability to compete, the local loop and transport (albeit trunk side) are two of the essential elements included in the Act's 14 point checklist. 47 U.S.C. §271. This Commission should not hesitate to mandate the EEL's combination of two of the elements most necessary to continuing competition in Florida.

Q. DO YOU AGREE WITH MR. VARNER THAT BELLSOUTH IS NOT REQUIRED TO PROVIDE ICG THE EEL AS A UNE BECAUSE IT COMBINES A LOOP AND DEDICATED TRANSPORT THAT REPLICATES A RETAIL SERVICE?

A. No, I do not. In this regard, I note that the Commission at its August 31, 1999 meeting adopted a Staff recommendation on this issue in a proceeding involving a dispute between BellSouth, on the one hand, and AT&T and MCI WorldCom, on the other, in Docket No. 971140 . In that proceeding, the Staff analyzed the U.S. Supreme Court's decision in AT&T Corp. V. Iowa Utilities Bd., 119 U.S. 366 (1999), and stated "it is staff's belief that the Court's opinion allows an entrant to purchase UNE combinations that recreate retail services at prices based on forward-looking costs."

Q. AT PAGE 14 OF HIS TESTIMONY, MR. VARNER DESCRIBES THE EXTENT TO WHICH BELLSOUTH WILL PROVIDE AN "ENHANCED EXTENDED LINK" (EEL) TO ICG PURSUANT TO A "...COMMERCIAL AGREEMENT THAT IS NOT SUBJECT TO THE REQUIREMENTS OF THE ACT." WHY IS THIS NOT ACCEPTABLE?

A. This approach is unacceptable because it allows BellSouth to avoid its obligations under Section 251 of the Act to provide access to unbundled network elements at cost-based rates. The enhanced extended link is an existing combination of unbundled network elements that exist within the BellSouth network. As such, BellSouth is required to provide the EEL to ICG at TELRIC based prices. BellSouth's attempt to provide the EEL outside of the requirements of the Act is a transparent attempt to levy prices for these elements that are in excess of its TELRIC based prices as adopted by the Commission.

Q. IS THERE ANOTHER REASON WHY BELLSOUTH SHOULD BE REQUIRED TO OFFER ICG THE EEL ON A UNE BASIS?

A. Yes, there is. BellSouth's refusal to provide ICG the EEL on a UNE basis constitutes unlawful discrimination in violation of Section 251(c)(3) of the Act. BellSouth has offered to provide an EEL as a UNE in an interconnection agreement with at least one other ALEC, DeltaCom. The BellSouth/ DeltaCom Interconnection Agreement contains the following EEL provision under Section IV. (Access to Unbundled Network Elements):

> B. 14 The Parties shall attempt in good faith to mutually devise and implement a means to extend the unbundled loop sufficient to enable DeltaCom to use a collocation arrangement at one BellSouth location per LATA (e.g., tandem switch) to obtain access to the unbundled loop(s) at another such BellSouth location over BellSouth facilities.

Under Section 251(c)(3) of the Act, BellSouth has the duty to provide to any requesting telecommunications carrier "nondiscriminatory access to network elements on an unbundled basis." BellSouth has failed to fulfill this duty in its negotiations with ICG. BellSouth also has violated §202(a) of the Act which prohibits "...any unjust or unreasonable discrimination in charges ... facilities, or services...." 47 U.S.C. §202(a).

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes, it does.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

REBUTTAL TESTIMONY

OF

MICHAEL STARKEY

ON BEHALF OF ICG TELECOM, INC.

DOCKET NUMBER 990691-TP

Q. PLEASE STATE YOUR NAME.

A. My name is Michael Starkey.

Q. ARE YOU THE SAME MICHAEL STARKEY WHO PREVIOUSLY FILED DIRECT TESTIMONY IN THIS PROCEEDING?

A. Yes, I am.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. My rebuttal testimony will respond to a number of issues raised by BellSouth Telecommunications, Inc. ("BellSouth") in its direct testimony. Specifically, I will address the following issues:

I. I will respond to arguments raised by Alphonso J. Varner describing BellSouth's duty to compensate ICG for ISP-bound traffic. Specifically, I will dispel BellSouth's argument that the Commission should simply not address this extremely important issue within the context of this arbitration. (Varner direct, 15).

II. I address Mr. Varner's arguments that ICG should, instead of receiving reciprocal compensation payments for carrying BellSouth's traffic, pay

BellSouth for carrying that traffic, though it is my understanding that this testimony is subject to a Motion to Strike. I conclude that Mr. Varner has so twisted the FCC's decisions and the rubric of common sense that this proposal can't be taken seriously.

III. I show that Mr. Varner is mistaken in his contention that ICG is not entitled to be compensated at the tandem interconnection rate.

Q. BEFORE YOU EXPLAIN YOUR POSITION ON EACH OF THE ISSUES ABOVE, CAN YOU FIRST SUMMARIZE YOUR RESPONSE TO BELLSOUTH'S POSITION THAT ICG SHOULD PAY BELLSOUTH FOR CARRYING BELLSOUTH'S CUSTOMERS' ISP-BOUND TRAFFIC?

A. As a preliminary matter, I note that concurrently with the filing of its rebuttal testimony, ICG Telecom, Inc. (ICG) has filed a Motion to Strike the portion of Mr. Varner's testimony addressing this argument as outside the scope of the issues to be arbitrated. My discussion of this matter is subject to the ruling on that motion.

BellSouth's proposition is outlandish. BellSouth's argument is an obvious attempt to shift the Commission's attention away from the proper cost recovery mechanisms required to ensure that carriers like ICG are compensated for carrying traffic generated by BellSouth's end users. At its heart, BellSouth's position makes obvious the fact that while it continues to sell enormous amounts of second access lines and generally does everything it can to reap windfall profits from its customers' internet usage, it is unwilling to pay the carriers that end up carrying the brunt of its end users' traffic – the ICGs of the marketplace (i.e. ALECs). Boiled down, BellSouth asks this Commission to believe that carriers like ICG should pay BellSouth for the privilege of carrying the traffic of BellSouth's customers! When the Commission applies sound economics, good public policy, and common sense to the subject of reciprocal compensation, it will reject the argument out of hand. Later in my testimony, I discuss at greater length why on every front BellSouth's argument in support of its "switched access sharing" proposal is grossly flawed and inappropriate.

Q. CAN YOU REITERATE ICG'S POSITION REGARDING THE ISSUE OF PROPER PAYMENT FOR TRAFFIC ORIGINATED ON THE NETWORK OF ONE INTERCONNECTING LEC AND PASSED TO AN ISP SERVED BY THE OTHER INTERCONNECTING LEC?

A. It is ICG's position that sound economic and public policy rationales require that another carrier be compensated for costs incurred when a first carrier uses the other carrier's network for purposes of completing the originating traffic of a customer of that first carrier. BellSouth's customers use ICG's network whenever they dial an ICG customer, regardless of whether ICG's customer is a residential customer or an ISP. BellSouth's use of ICG's network generates costs that ICG must recover, just as ICG's use of the BellSouth network generates costs for which ICG is willing to compensate BellSouth. As I fully explained in my direct testimony, the costs generated by a call bound for an ISP customer do not differ from those generated by calls bound for other types of ICG customers. Hence, BellSouth should be required to compensate ICG for its use of ICG's network regardless of whether the call is bound for an ISP or any other type of local customer. Because calls to an ISP are identical to other local calls, the reciprocal compensation rate applicable to local traffic is the best cost-based rate available for purposes of establishing reasonable compensation for ISP-bound traffic.

Q. CAN YOU BRIEFLY DESCRIBE BELLSOUTH'S POSITION ON THIS MATTER AS YOU UNDERSTAND IT?

A. I will attempt to, though BellSouth's position appears to be multi-layered. The following citations from the testimony of Mr. Varner give us some insight:

1. Mr. Varner says reciprocal compensation is not applicable to ISP-bound traffic. (Varner direct at 4).
2. BellSouth recommends this Commission not address this issue because it asserts compensation for ISP bound traffic is not subject to a §252 arbitration. (Varner direct at 15).
3. Mr. Varner argues that payment of reciprocal compensation for ISP-bound traffic is inconsistent with sound public policy and economic principles of cost causation.
4. According to Mr. Varner, ICG should compensate BellSouth for the use of ICG facilities by a BellSouth customer to place a call to an ICG served ISP. (Exhibit No. AJV-6).

Q. PLEASE RESPOND TO BELLSOUTH'S CONTENTION THAT RECIPROCAL

COMPENSATION RATES ARE NOT APPLICABLE TO ISP BOUND TRAFFIC.

A. Mr. Varner's statements fly in the face of pertinent FCC rulings. It is clear from reading the FCC's *Declaratory Ruling in C.C. Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 96-98* (hereafter *Declaratory Ruling*), that while the FCC made a number of critical decisions impacting compensation for ISP bound traffic, the FCC left to the states an enormous responsibility to determine the proper compensation that carriers should receive for this traffic until a national rule is established. The following excerpt from paragraph 26 of the FCC's *Declaratory Ruling* best frames a state commission's responsibility in this regard:

> Although reciprocal compensation is mandated under Section 251(b)(5) only for the transport and termination of local traffic, <u>neither the statute nor our rules prohibit a state commission from concluding in an arbitration</u> that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding - or a subsequent state commission decision that those obligations encompass ISP-bound traffic - does not conflict with any Commission rule regarding ISP-bound traffic. *By the same token, in the absence of governing federal law, state commissions also are*

> *free* *__not__* *to require the payment of reciprocal compensation for this traffic* ***__and to adopt another compensation mechanism__****.*

(Footnotes omitted, emphasis added).

Q. WHY DID YOU HIGHLIGHT THE LAST SENTENCE OF THE ABOVE QUOTATION?

A. I think there is an important point the FCC is making in the last sentence that it reiterates more directly in paragraph 29:

> We acknowledge that, no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network.

It seems clear from these two paragraphs that while a state Commission is "...free not to require the payment of reciprocal compensation for this traffic...", if it chooses this path it must "adopt another compensation mechanism." It is clear that the FCC's pronouncements leave no room for BellSouth's position that the Commission should ignore the issue.

The FCC has obviously left the state commissions to determine an appropriate rate of compensation one LEC should pay another for ISP-bound traffic. It appears that it has given the state commissions an option to either adopt the reciprocal compensation rates that they have adopted as reasonable payment for all other types of local traffic, or, to construct another means of compensation specific to ISP-bound traffic. While ISP-bound traffic may no longer meet the legal definition of local traffic that the FCC has found appropriate for compensation under §251(b)(5) of the Act, the FCC has given a strong indication that such reciprocal compensation rates are a good place to start when determining reasonable rates for ISP-bound traffic.

Q. HAVE OTHER STATE COMMISSIONS MADE DECISIONS IN THIS RESPECT SINCE THE FCC ISSUED ITS DECLARATORY RULING?

A. Yes, as many as 16 states have issued decisions since the FCC's issuance of its *Declaratory Ruling* and have found that payments for ISP-bound traffic are appropriate. Among those that have interpreted the FCC's *Declaratory Ruling* for purposes of governing interconnection agreements within their intra-state jurisdictions is the Maryland Public Service Commission. In my opinion, the Maryland Commission provides the most reasoned reading to date of the FCC's intentions. In Order No. 75280 at pages 16 and 17, the Maryland Commission finds as follows:

> Thus, under the FCC's *ISP Order*, it is incumbent upon this Commission to determine an interim cost recovery methodology which may be used until the FCC completes its rulemaking on this issue and adopts a federal rule governing inter-carrier compensation arrangements.
>
> In fact, according to the FCC, "State commissions are free to require reciprocal compensation for ISP-bound calls, or not require reciprocal compensation and **adopt another compensation mechanism**, bearing in mind that ISP/ESPs are exempt from paying

access charges." This directive does not leave us the option of providing for no compensation for ISP-bound calls. State commissions must either require reciprocal compensation or develop another compensation mechanism. To fail to provide for any compensation would violate the 1996 Act, which states:

> A State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. (47 USC §252(d)(2)(A)).

We are very concerned that the adoption of BA-MD'S position will result in ALECs receiving no compensation for terminating ISP-bound traffic. Such an effect will be detrimental to our efforts to encourage competition in Maryland. No one disputes that local exchange carriers incur costs to terminate the traffic of other carriers over their network. In the absence of finding that reciprocal compensation applies, a class of calls (ISP traffic) will exist for which there is no compensation. The reciprocal compensation rates established by our arbitration order and

> contained in the approved Statement of Generally Available Terms ("SGAT") reflect the costs of this termination. Until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic, we find that it is in the public interest to require BA-MD to pay our arbitrated reciprocal compensation rates contained in the SGAT as an **interim** compensation mechanism.

(Footnotes omitted; emphasis in original).

Q. MR. VARNER SUGGESTS IN HIS TESTIMONY THAT "COMPENSATION FOR ISP BOUND TRAFFIC IS NOT SUBJECT TO A SECTION 252 ARBITRATION." HOW DO YOU RESPOND?

A. One needs only to place Mr. Varner's testimony beside the FCC's pronouncement to see that he is wrong. In footnote 87, found in paragraph 26 of the FCC's *Declaratory Ruling*, the FCC states:

> As discussed, *supra*, in the absence of a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic.

Moreover, in its *Notice of Proposed Rulemaking* included as a portion of its *Declaratory Ruling*, the FCC tentatively concludes that even as a result of the federal policy it ultimately adopts in a federal rule, states should still play the role of setting inter-carrier compensation rates for ISP-bound traffic:

> 30. We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate

telecommunications traffic [ISP-bound traffic] should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts.

Q. PLEASE RESPOND TO BELLSOUTH'S ASSERTION THAT ICG SHOULD PAY BELLSOUTH FOR ORIGINATING THE CALL WHEN A CALL IS ULTIMATELY PASSED TO AN ISP?

A. BellSouth's claim is the absurd result of its erroneous argument that switched access charges should apply to traffic passed to ISP customers and that the switched access charge regime is the proper framework within which to view ISP traffic and its proper compensation.

Q. PLEASE EXPLAIN.

A. BellSouth's mistaken premise is that ISPs actually purchase switched access services from ILECs and ALECs when gaining access to the public switched network and that ISPs are thereby "carriers" that should be required to bear the burden of all costs generated from their customers (i.e. BellSouth and ICG customers) that subscribe to internet services. From this notion, BellSouth derives the argument that it should be compensated, by ICG, for originating those switched access calls, i.e., ICG should pay BellSouth when a

Bellsouth end user calls an ISP served by ICG.

Q. PLEASE DESCRIBE THE DIFFERENCES BETWEEN THE SWITCHED ACCESS AND RECIPROCAL COMPENSATION FRAMEWORKS.

A. The differences are major. Within the switched access charge regime, long distance carriers of toll traffic compensate local exchange carriers both to originate and terminate calls placed over their networks. On the other hand, reciprocal compensation obligates the local exchange carrier originating a local call to compensate the carrier to which the call is sent for delivery to the called number. The switched access framework is not the appropriate framework within which to view ISP-bound traffic.

Q. WHY NOT?

A. Very simply, because the switched access framework is intended for long-distance carriers and toll traffic, neither of which is present when ICG completes a call from a BellSouth customer to its ISP. The FCC has already found that switched access charges do not apply to such traffic. Hence, it is important that even if this Commission decides that the reciprocal compensation rate paid for all other local traffic is not applicable to ISP-bound traffic and that some other rate should apply, it must find that the reciprocal compensation *framework* (i.e., the originating carrier is responsible for costs associated with carrying the call) is the proper framework within which to establish reasonable rates for ISP-bound traffic. If any semblance of economic cost causality is to remain in the local exchange marketplace, BellSouth's proposal to charge ALECs for carrying

BellSouth's traffic must be rejected.

Q. BELLSOUTH CONTENDS THAT THE FCC HAS REGULATED DATA CARRIERS AS INTERSTATE CARRIERS FOR OVER 30 YEARS AND HAS HELD THAT WHILE THESE CARRIERS ARE BEING PROVIDED ACCESS SERVICES, THEY ARE ALLOWED TO COLLECT TRAFFIC AT THE PRICES FOR BUSINESS SERVICES. CAN YOU COMMENT?

A. ISP's are not "carriers" based on the FCC rules. In the FCC's *Computer II Inquiry* (77 FCC 2d 384, 387, May 2, 1980), the FCC found that ESPs (of which ISPs are a subset) are not common carriers within the meaning of Title II of the Communications Act (Title II includes all requirements associated with common carriage). This FCC decision was codified in FCC rule 64.702. Section 64.702 of the FCC rules provides:

> [T]he term enhanced service shall refer to services offered over common carrier transmission facilities used in interstate communications which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information, or involve subscriber interaction with stored information. <u>Enhanced services are not regulated under Title II of the Act</u>.

(Emphasis added). In addition, more recent FCC regulations clearly specify that ISPs are to be treated as end users, not as carriers. The FCC's *Declaratory*

Ruling from earlier this year at paragraph 15 specifically comments on the status of ISPs:

> The Commission's treatment of ESP [enhanced service providers, of which ISPs are a subset] traffic dates from 1983 when the Commission first adopted a different access regime for ESPs. <u>Since then, the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs</u>. As such, the Commission discharged its interstate regulatory obligations through the applications of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local.

(Emphasis added). This plain language clearly discredits the testimony of Mr. Varner with respect to his characterization of ISPs as carriers rather than end users. Indeed, Mr. Varner fails to include a single reference in his testimony supporting why he believes the FCC or any other authority has ever considered ISPs to be "carriers."

Q. IS THERE ADDITIONAL INFORMATION WHICH REFUTES MR. VARNER'S CONTENTION THAT ISPS ARE CARRIERS WHO PURCHASE SWITCHED ACCESS SERVICES FOR PURPOSES OF PROVIDING INTERSTATE TOLL SERVICES TO

THEIR CUSTOMERS?

A. Yes, there is. Regardless of how the FCC has regulated "data carriers," as Mr. Varner has used that term, ISPs, to the extent they compare to the "data carriers" to which Mr. Varner refers, are not purchasing or being provided interstate access services when they purchase connection to the public switched network.

The FCC has provided an exemption such that ISPs are not purchasing access and do not pay access charges. BellSouth concludes from this information that ISP-bound traffic is subject to the switched access regime, and the FCC has simply suspended the requirement that ISPs pay these charges. Indeed, BellSouth goes so far as to suggest that the rates ISPs pay local carriers like ICG are actually access charges assessed on a per month, instead of a per minute basis. As such, goes the argument, local carriers like ICG should be responsible for sharing those monthly access charges with BellSouth in compliance with industry standard access sharing arrangements. (Carriers often share switched and special access revenues through "meet point billing" arrangements, wherein the percentage ownership of facilities required to provision the service is determined and the access charge revenues are divided among the carriers based on this percentage. But, in meet point billing, the carrier receiving jointly provided service from the provider carrier <u>is</u> purchasing access.) This analysis is tortured and self-serving.

Q. PLEASE ELABORATE.

A. First, the revenue ICG, or any other local exchange carrier, receives from an ISP is not switched or special access revenue charged on a monthly, instead of on a per minute of use basis. The FCC has stated on numerous occasions that ISPs are to connect to the public switched network using intrastate, local business access line tariffs. That is what they pay, and that is what they purchase. (*Declaratory Ruling,* ¶20).

Second, the FCC in its *Declaratory Ruling* makes clear that the proper framework within which to view compensation for ISP-bound traffic is the reciprocal compensation framework wherein the carrier originating a call is responsible for the costs of carrying the call. Therefore, it seems clear from the FCC rulings that compensation for ISP-bound traffic is not subject to the switched access framework. (*Declaratory Ruling*, ¶30. The FCC states, "...We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under Sections 251 and 252 of the Act." Switched access services are not part and parcel of sections 251 and 252, as held by the FCC in its *First Report and Order* in C.C. Docket No. 96-98 (paragraph 478), hence, it is clear that the FCC considers reciprocal compensation requirements, as exclusively included in sections 251 and 252 of the Act, as the model by which "this (i.e. ISP-bound traffic) interstate telecommunications traffic should be governed....").

Third, switched access charges are assessed on toll traffic generated by a local exchange carrier's customer and passed to an interexchange carrier. Fundamentally, the traffic at issue here, traffic to an ISP, is not toll traffic. The end user customer dialing the call is not assessed toll charges, the ISP to which the traffic is ultimately passed is not purchasing switched access service, and perhaps most importantly, none of the revenues generated by either the ILEC or the ALEC can be considered toll or access revenue. Hence, despite BellSouth's arguments, there is little if any relationship between traffic bound for an ISP customer and traffic bound for an IXC. All technical, economic and regulatory comparisons between local traffic, ISP traffic and long distance/access traffic indicate that local traffic and ISP traffic share far more similarities than do ISP traffic and toll/access traffic.

Q. CAN YOU EXPLAIN IN GREATER DETAIL WHY NONE OF THE REVENUES GENERATED BY EITHER THE ILEC OR THE ALEC IN A CALL TO AN ISP CAN BE CONSIDERED TOLL OR ACCESS REVENUE?

A. The FCC has specifically held that revenues and costs generated by traffic to an ISP must be considered to be intrastate, not interstate, traffic. In fact, both SBC and Bell Atlantic have attempted to reclassify costs and revenues from traffic to an ISP provider as interstate access traffic. The FCC rejected both filings. In the most recent attempt made by Bell Atlantic in this regard the FCC's Common Carrier Bureau had the following to say:

> As I recently explained to SBC Communications, the Commission requires carriers to classify the costs and revenues associated with

ISP-bound traffic as intrastate for jurisdictional separations and reporting purposes.

(July 29, 1999 letter from Lawrence E. Strickling, Chief, Common Carrier Bureau, to Don Evans, Vice President, Regulatory Affairs, Bell Atlantic). It is interesting to note that Mr. Strickling, the Chief of the FCC's Common Carrier Bureau and the author of the Commission's letter to Bell Atlantic, cited the FCC's *Declaratory Ruling* as the authority for requiring Bell Atlantic to classify its ISP-bound traffic as intrastate, not interstate, traffic.

Q. IF ALL TECHNICAL, ECONOMIC, AND REGULATORY COMPARISONS INDICATE THAT TRAFFIC BOUND FOR ISP PROVIDERS MORE CLOSELY RESEMBLES LOCAL TRAFFIC AS OPPOSED TO SWITCHED ACCESS TRAFFIC, ON WHAT BASIS DOES BELLSOUTH CONTEND THAT THIS TRAFFIC IS SWITCHED ACCESS TRAFFIC FOR WHICH RECIPROCAL COMPENSATION IS NOT REQUIRED?

A. BellSouth's entire rationale for refusing to pay reciprocal compensation for ISP-bound traffic is based upon the argument that ISP-bound traffic is interstate, not local, traffic.

Q. WHAT ECONOMIC CONDITIONS BEAR ON BELLSOUTH'S PREMISE?

A. Certainly, sound economic and public policies must recognize that when a carrier uses another carrier's network and costs result, the carrier upon whose network the call originates (the true cost causer) must be responsible for compensating the other carrier for the costs it incurs. Even BellSouth acknowledges this point. At page 47 of his testimony, Mr. Varner has no problem understanding why compensation must be paid whenever a local call originates on the BellSouth network and is directed to the ICG network. Only when the exact same local call is passed by a competitive local provider to an ISP end user does Mr. Varner begin to reassess the economic and public policy ramifications of such compensation. However, neither the economic nor technical characteristics of the call have changed. The only change that BellSouth can even argue is one of the regulatory definition of the traffic. Regardless, Mr. Varner and BellSouth assert that this change requires a substantial shift in the way in which costs for this traffic must be recovered. Now, instead of BellSouth paying ICG to carry this traffic originated by its local exchange customers, BellSouth says ICG should compensate BellSouth for carrying the exact same traffic. All of this results not from a change in calling patterns, a change in the equipment required to carry the traffic, or really, any physical or economic change at all. It results simply from the fact that Mr. Varner and BellSouth assert a regulatory paradigm shift has occurred. That is, the end user receiving the call (i.e., the ISP) should now be considered a "carrier" who is purchasing switched access services to provide an interstate toll service. Mr. Varner's testimony in this respect specifically highlights the fact that BellSouth's position has no basis in sound economic or public policy rationale and that BellSouth's position is nothing more than a contrived strawman.

Q. EVEN IF IT WERE APPROPRIATE TO DISCARD SOUND ECONOMIC AND PUBLIC POLICY RATIONALE, DO YOU AGREE WITH BELLSOUTH'S ARGUMENT?

A. No, I do not. Neither does BellSouth's affiliate.

Q. PLEASE EXPLAIN.

A. In a press release dated March 12, 1997, hailing a strategic agreement between BellSouth (via BellSouth.net) and IBM that would provide a comprehensive set of internet/intranet services to customers in the Southeast, John Robinson, president of BellSouth.net, Inc. said,

> By connecting to the Internet through the IBM Global Network, BellSouth customers will get an important benefit - the ability to access the Internet from more than 830 locations in 49 counties <u>with just a local call</u>.

(From the BellSouth Website. Emphasis added).

When marketing the internet to its own customers BellSouth makes every effort to make accessing the internet as easy and economical as possible for its own ISP customers. Indeed, in the excerpt above, BellSouth is not only admitting that a call made to its wholly owned ISP (Bellsouth.net) is a local call, it is marketing this fact as a major advantage of using BellSouth.net.

Q. MR. VARNER INCLUDES A NUMBER OF DIAGRAMS WITH HIS TESTIMONY DEPICTING A NUMBER OF CALL SCENARIOS. CAN YOU DESCRIBE THE POINT MR. VARNER IS ATTEMPTING TO MAKE AND PROVIDE

YOUR ANALYSIS OF HIS TESTIMONY?

A. Mr. Varner includes the following diagrams in his testimony: AJV-1, AJV-2, AJV-4, and AJV-5. If I understand Mr. Varner's point correctly, he is, through these diagrams, attempting to show the differences between calls made to an end user customer and calls made to what he refers to as an ISP/IXC. AJV-1 provides two diagrams (A&B) depicting the difference between a local call carried solely by BellSouth (Diagram A) and then a call carried by both BellSouth and an ALEC such as ICG (Diagram B).

Mr. Varner at pages 19-20 of his testimony describes Diagram A as follows:

> In this scenario, the ILEC receives a monthly fee from its end user to apply towards the cost of that local call. For that payment the ILEC provides the end user with transport and termination of local calls throughout the local calling area. End users typically do not pay for calls terminated to them. Importantly, in this case, the end user is the ILEC's customer, which means that the end user pays the ILEC revenue for the service.

Similarly, at page 20 Mr. Varner describes Diagram B as follows:

> By comparison, Diagram B illustrates a typical local call that is handled by two carriers – one end of the call is handled by an ILEC, and an ALEC handles the other end of the call. In this scenario, when the ILEC's end user makes a local call to the ALEC's end

> user, the ILEC's end user is paying the ILEC the same price for local exchange services as in Diagram A.... As previously noted, end users do not pay for local calls terminated to them, so the ALEC cannot be expected to charge its end user. While the ILEC is receiving the same revenues as shown in Diagram A, its costs are lower. Consequently, reciprocal compensation would be paid by the ILEC to compensate the ALEC for terminating that local call over its network. If the reciprocal compensation rate equals the ILEC's cost, the ILEC is indifferent to whether the ILEC or the ALEC completes the call.

Now, importantly, Mr. Varner attaches Exhibit AJV-5 that includes Diagram G. Diagram G is Mr. Varner's depiction of a call originated on the BellSouth network, transported to an ALEC for transfer to the ALEC's ISP customer. It is important to note that Diagram G is in every way exactly the same as Diagrams A and B, except that Mr. Varner has changed the name (and shape) of the end user receiving the call from an "end user" (the shape of a telephone) to an "ISP" (the shape of a STOP sign). Diagrams A, B and G use exactly the same network schematic. They incorporate all of the same facilities and functionality, indicating that the route of the call and all other handling characteristics are exactly the same regardless of whether the call is completed to a residential, business or ISP customer. Indeed, if you were to remove the verbiage from Mr. Varner's diagrams I think you would find that they are all derived from exactly the same underlying picture.

Q. WHY IS THIS IMPORTANT?

A. These diagrams directly contradict Mr. Varner. Mr. Varner attempted to demonstrate that there are major differences between calls made to ALEC business and residential end users (calls subject to reciprocal compensation) and calls made to ISPs (calls not subject to reciprocal compensation according to Mr. Varner). However, the fact that Mr. Varner is required to use exactly the same network diagram, incorporating exactly the same facilities and functions for purposes of depicting both types of calls, shows that there is no difference from a technical or economic perspective between these calls. The only difference that is apparent is made in Mr. Varner's verbiage wherein he likens the ISP to an IXC and therefore decides that calls to ISPs are, or should be, regulated differently.

Q. PLEASE CONTINUE.

A. Mr. Varner's diagrams actually make my point that BellSouth should be economically indifferent as to whether it pays reciprocal compensation for calls bound for an ISP or whether it completes those calls itself. With respect to Diagram B and its depiction of a local call terminated by ICG on BellSouth's behalf, Mr. Varner suggested the following:

> As previously noted, end users do not pay for local calls terminated to them, so the ALEC cannot be expected to charge its end user. While the ILEC is receiving the same revenues as shown in Diagram

A, its costs are lower. Consequently, reciprocal compensation would be paid by the ILEC to compensate the ALEC for terminating that local call over its network. If the reciprocal compensation rate equals the ILEC's cost, the ILEC is indifferent to whether the ILEC or the ALEC completes the call.

(Varner direct at 20.) Even though there is no difference between a call depicted in Diagram B (about which Mr. Varner is speaking here) and Diagram G (a call to an ISP served by ICG), Mr. Varner's characterization as to the way that such calls should be treated in terms of reciprocal compensation differs by 180 degrees. Indeed, Mr. Varner argues that calls depicted by Diagram G are so different, that BellSouth should pay ICG for carrying the call in one scenario, but BellSouth should receive revenue from ICG in another. I emphasize that nothing in the network, the routing of the call, or the economics of the call (i.e. cost causation) actually changed between Diagram B (local calls for which BellSouth says reciprocal compensation is appropriate) and Diagram G (calls to ALEC ISPs for which BellSouth says it must receive payment for originating). At best, a purported regulatory distinction (i.e. the claim that the ISP is an IXC and not an end user - a distinction that I have refuted above) has been made between the two call types. Regardless, this regulatory distinction does not change the fundamental technical, economic, or public policy nature of the call and the manner by which costs should be recovered. In short, Mr. Varner's diagrams prove that there is no difference between calls made to an ICG residential or business customers and an ICG ISP. Likewise, the costs ICG incurs in carrying this traffic when generated by BellSouth local exchange customers do not differ and hence, the rates assessed by ICG on BellSouth for purposes of recovering the costs of this traffic should not differ.

Q. MR. VARNER AT PAGE 38 OF HIS TESTIMONY INCLUDES A TABLE INTENDED TO SHOW THAT THE LACK OF RECIPROCAL COMPENSATION FOR ISP BOUND TRAFFIC WOULD NOT DISTORT THE MARKETPLACE MAKING ISP CUSTOMERS LESS ATTRACTIVE THAN OTHER TYPES OF CUSTOMERS. DO YOU HAVE ANY COMMENTS REGARDING MR. VARNER'S TABLE?

A. Yes, I do. Mr. Varner at page 38 of his testimony includes the following chart:

	SERVING AN ISP AND RECEIVING RECIPROCAL COMPENSATION	*SERVING AN ISP WITHOUT RECEIVING RECIPROCAL COMPENSATION*
REVENUE FROM ISP FOR SERVICE	$600	$900
RECIPROCAL COMPENSATION REVENUE PAID	$300	$0
COST OF PROVIDING SERVICE TO ISP	($600)	($600)
NET MARGIN	$300	$300

In my direct testimony I argued that the absence of reciprocal compensation payments would distort the marketplace. Mr. Varner attempts to use the table above to show that reciprocal compensation paid for ISP bound traffic is the culprit responsible for distorting the competitive marketplace. However, properly viewed, Mr. Varner's table actually undermines his point and supports mine.

Q. WHY DO YOU BELIEVE THE ABOVE TABLE SHOWS THAT THE ABSENCE OF RECIPROCAL COMPENSATION PAYMENTS FOR ISP BOUND TRAFFIC WOULD DISTORT THE MARKETPLACE?

A. The table above makes a number of assumptions: (1) that it costs an ALEC $300 to carry traffic originated on the ILECs network to the ISP, (2) that it costs an ALEC $300 to provide an access line to an ISP, and (3) that the ALEC receives a $300 margin. Using these assumptions lets review two scenarios: (1) the Commission requires BellSouth to compensate ICG for carrying BellSouth's customers' traffic to ICG ISPs, and (2) the Commission decides to not require reciprocal compensation for such ISP bound traffic.

Under scenario (1), ICG would receive $600 from its ISP customer for an access line allowing the ISP to connect to the network. Likewise, it would receive $300 from BellSouth for carrying traffic originated from BellSouth customers to the ISP (a total of $900 in revenue). All told, the ALEC would incur $600 in costs ($300 for provisioning the access line and $300 for carrying BellSouth's traffic) and receive $900 in revenue while charging its ISP customer $600.

If the Commission were to decide not to require BellSouth to pay for ICG's carriage of its traffic, scenario number (2) would look much different.

Under scenario number 2, ICG would receive $0 from BellSouth for carrying its traffic. Regardless, it would still incur both its own $300 in cost for providing an access line to the ISP and it would continue to incur $300 in costs associated with carrying BellSouth's traffic. Hence, in order to maintain its $300 net margin, ICG would be required to charge $900 to its ISP instead of the $600 it charged earlier.

You need only compare scenario 2 above with a scenario wherein the ICG customer in question is a large business user instead of an ISP to appreciate the market distortion. The following table compares a scenario very much like Mr. Varner's, except that it compares a business customer and an ISP customer served by ICG and assumes reciprocal compensation payments for ISP bound traffic are not required:

	SERVING A BUSINESS CUSTOMER WITH LARGE INBOUND CALLING PATTERNS	*SERVING AN ISP*
REVENUE FROM ACCESS LINE SERVICE	$600	$900
RECIPROCAL COMPENSATION REVENUE PAID	$300	$0
COST OF PROVIDING SERVICE	($600)	($600)
NET MARGIN	$300	$300

Because BellSouth agrees that calls to ICG business users are subject to reciprocal compensation, it would reimburse ICG for the $300 in costs associated with carrying its traffic. Hence, serving a large business user would look very much like scenario number 1 above, in which ICG was required to charge only $600 for a network access line to serve the customer. In the marketplace under scenario 2, however, assuming the Commission allowed BellSouth to avoid reimbursing ICG for carrying its traffic, ICG could offer the exact same business line to a business customer at $600 that it must offer to an ISP at $900 to receive the same net margin. Or, looking at it another way, ICG could charge $600 to a business customer for an access line and receive $300 in net margin while offering the same access line to an ISP for $600 and receiving $0 in net margin. It is easy to see that under such a scenario, ISPs would become less attractive than any customer for which reciprocal compensation would be paid. Further, it is likely rates to ISPs would go up or carriers serving large numbers of ISPs would find themselves with a large population of unprofitable customers.

Q. HOW WOULD THIS SITUATION BE AFFECTED BY BELLSOUTH'S PROPOSAL THAT ICG PAY BELLSOUTH FOR ORIGINATING CALLS TO ITS ISP CUSTOMERS?

A. This aspect reveals the ludicrous nature of BellSouth's proposition. If ICG were required to pay BellSouth for carrying large amounts of BellSouth's traffic to its ISP customers, ISPs would not be merely unprofitable (i.e. generating $0 in net margin); they would be a financial burden. Under such a circumstance, ICG would be providing a great service to BellSouth's customers (i.e. carrying traffic bound for the internet) and incurring substantial costs to do so, while at the same time being required to pay BellSouth for the"opportunity." It simply doesn't make any sense.

Q. WOULD SUCH A SITUATION BENEFIT BELLSOUTH?

A. Undoubtedly. Such a circumstance would greatly benefit BellSouth at the expense of the ALECs and the marketplace. This is exactly the point I made in my direct testimony. When the Commission attempts to understand BellSouth's underlying rationale for its somewhat bizarre recommendation regarding reciprocal compensation, it should keep in mind the likely results of adopting such a recommendation. In a world where ALECs are required to pay BellSouth for carrying its customers' internet traffic, ISPs will undoubtedly pay higher rates for the same services offered to other businesses and they are likely to simply become far less attractive. As a result, fewer and fewer carriers would attempt to serve them. In general, life becomes hard as an ISP.

However, there is a class of ISPs in the market that would be somewhat insulated from this effect. Any ISP that had an affiliation with a local exchange carrier <u>and provided services primarily to customers served by the local exchange carrier</u>, would create a situation wherein the LEC rarely, if ever, was required "share" ISP revenues with another LEC. This lack of sharing would lower the costs of providing services to the ISP and would increase the profitability not only of the LEC serving the ISP, but also of the ISP itself. This type of ISP would be a powerful competitor against ISPs without such an "on-net" customer base. It could charge prices significantly below ISP competitors who were paying higher rates to ALECs while maintaining profitability. To illustrate, BellSouth.net would be such a competitor. Because BellSouth still maintains a near monopoly market position in the provision of services to residential and small business customers (the primary customer base responsible for dial-up internet access), BellSouth would, under BellSouth's compensation proposal, rarely if ever need to share ISP revenues with other local carriers. Rarely would an ALEC customer dial into BellSouth.net (at least compared to the number of BellSouth customers calling non-BellSouth ISPs) such that BellSouth would be required to share revenues with the local exchange carrier. In the vast majority of circumstances, BellSouth.net would serve BellSouth's local exchange customers so that BellSouth would receive all revenues.

Q. IS THERE ANY REQUIREMENT THAT BELLSOUTH.NET SERVE ALL CUSTOMERS THAT REQUEST ITS SERVICE?

A. I am not aware of any such requirement. However, it is not likely that BellSouth.net would turn customers away simply because they happen to obtain local service from another carrier. What is more likely, is that BellSouth would attempt to provide better ISP prices and services to its own local exchange customers as opposed to local exchange customers of other carriers. In that way, BellSouth.net would be an attractive alternative only to BellSouth local customers and customers of other local carriers would be unlikely to subscribe to BellSouth.net. Not only is this likely, it happens today. BellSouth currently offers promotions that tie its local exchange services and its internet services together at discounted rates. Indeed, it is my understanding that e.spire and the Competitive Telecommunications Association (Comptel) have recently filed a complaint with this Commission highlighting BellSouth's marketing efforts in this regard.

Q. IF BELLSOUTH OFFERED SERVICES TO ISPS OTHER THAN BELLSOUTH.NET, WOULDN'T THIS FORCE BELLSOUTH TO SHARE REVENUES WITH ALECS WHOSE CUSTOMERS DIALED THOSE NON-BELLSOUTH AFFILIATED ISPS?

A. Yes, if BellSouth were to serve a non-BellSouth affiliated ISP that had no incentive to serve primarily BellSouth customers, it is likely BellSouth, under its own proposal, would be required to share the revenues associated with serving the ISP with other ALECs. However, I already highlighted in my direct testimony the fact that BellSouth has lost an enormous number of ISP providers (or new providers have chosen never to obtain service from BellSouth). This results from the fact that ALECs provide those ISPs with more flexible service offerings and work directly with the ISPs to enhance their business. BellSouth, because of BellSouth.net, has no incentive to assist the ISPs in their business. Likewise, it has no incentive (indeed it has a disincentive) to provide those ISPs with quality services at reasonable rates. A primary example of BellSouth's unwillingness to accommodate the unique needs of ISPs is BellSouth's unwillingness to allow ISPs to collocate in its central offices. ISPs prefer to share the environmentally controlled offices used by local exchange carriers to aggregate traffic. These offices provide efficient means by which to connect to the public switched network. Many ALECs allow the ISPs, just like they allow other large users, to use their central office space to house equipment. To this point, however, BellSouth has refused to allow similar access to its central offices. In this way, and simply by not meeting the needs of ISPs, BellSouth could, and would have an incentive to, dissuade non-BellSouth affiliated ISPs from using its services and thereby requiring that BellSouth share revenues with other ALECs.

Q. CAN YOU SUMMARIZE BELLSOUTH'S POSITION AS TO WHETHER ICG SHOULD BE ALLOWED TO CHARGE BELLSOUTH A RECIPROCAL COMPENSATION RATE EQUAL TO THAT WHICH BELLSOUTH CHARGES, INCLUDING TANDEM SWITCHING AND TRANSPORT COSTS?

A. BellSouth believes that while it should be allowed to charge ICG a "reciprocal" compensation rate including the recovery of end office, tandem and transport costs, ICG should be allowed to charge BellSouth a rate only recovering end office costs. At page 45 of his testimony Mr. Varner states as follows:

BellSouth's position is that if a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem interconnection rate only if ICG's switch is identified in the local exchange routing guide ("LERG") as a tandem..

Likewise, at page 44 of his testimony Mr. Varner states:

> ICG is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide.

Q. CAN YOU REITERATE ICG'S POSITION ON THIS ISSUE?

A. BellSouth should pay ICG a reciprocal compensation rate based upon the recovery of tandem, transport and end office switching costs. The FCC at paragraph 1090 of its *First Report and Order in C.C. Docket No. 96-98* (hereafter referred to as the FCC's Local Competition Order) provides the following guidance with respect to the appropriate rate of reciprocal compensation ICG should receive from BellSouth:

> 1090. We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending upon whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to an end-office switch. *<u>In such event, states shall also consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch</u>* and thus,

> whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. *<u>Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate</u>*.

(Emphasis added).

The actual FCC rule that discusses this issue is even more direct:

> **51.711 Symmetrical reciprocal compensation**
>
> (3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate. (Rule 41.711 also includes subparts (a)(1) and (a)(2) that have been excluded from the above excerpt.)

Accordingly, the FCC establishes that the LEC's tandem interconnection rate is the appropriate rate for an ALEC to receive if this single geographic criterion is met. In states in which ICG has an established business, it employs a network configuration in which its switch serves a geographical area comparable to that served by a tandem switch <u>and</u> provides comparable functionality. That is to say, ICG's switching platform transfers traffic among discrete network nodes that exist in the ICG network for purposes of servicing groups of its customers in exactly the same fashion that BellSouth's tandem switch distributes traffic – a similarity that the FCC does not require to justify the application of the tandem rate. In Florida, ICG is in a start-up mode. However, as it grows its business in Florida, ICG intends to develop the type of network – including the geographical coverage of its switches – that typifies its approach to network design in other jurisdictions.

Q. WOULD THERE BE A SEPARATE BASIS FOR APPLYING THE TANDEM RATE?

A. Yes. As ICG deploys its network in Florida, when it provides comparable functionality, that will provide a separate, independent basis for the tandem rate.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

COMMISSIONER DEASON: I need to know at this time if there are any exhibits attached thereto?

MR. KRAMER: No, there are no exhibits. Thank you.

COMMISSIONER DEASON: Very well. There needs to be one witness recalled to make a correction, is that correct?

MR. KRAMER: Yes.

COMMISSIONER DEASON: Please proceed.

MR. KRAMER: Ms. Schonhaut, could you take the stand?

Thereupon,

CINDY SCHONHAUT

was recalled as a witness, and having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KRAMER:

Q Ms. Schonhaut, do you recall that earlier you and I had a discussion and I asked you if ICG routed interexchange traffic from its switch directly through end office -- through direct trunking, excuse me, to IXC POPs, or if it sent interexchange traffic through the tandem. Do you recall that discussion?

A Yes, I do.

Q And do you recall I asked you that question and you responded that the traffic was sent through direct trunking, do you recall that?

A Yes, I did.

Q Do you want to amend that answer now?

A Yes, I would like to. I partly misunderstood the question and partly misspoke. The way -- and so in the break earlier I had a chance to check with network people in our company, and all access traffic that ICG provides to end users of ours goes through the Bell tandem, the BellSouth tandem, the relevant BellSouth tandem. We don't -- even if the customers are on our network, the traffic doesn't go directly to the IXC. We, through interconnection, hand it off to Bell through the tandem and then it reaches the IXC through the Bell tandem.

MR. KRAMER: Thank you. Nothing further. Thank you, Commissioners.

COMMISSIONER DEASON: Any cross examination?

MR. EDENFIELD: None, Commissioner Deason.

COMMISSIONER DEASON: Staff, any cross on that?

MR. FORDHAM: No, Commissioner.

COMMISSIONER DEASON: Very well. I believe then that all scheduled witnesses have either appeared or had their testimony inserted into the record. And we have identified six exhibits and all six exhibits have been admitted. Is there anything further to come before the Commission at this time?

MR. FORDHAM: Not by staff, Commissioner.

MR. EDENFIELD: Not BellSouth.

COMMISSIONER DEASON: What is the briefing schedule? Do you have that information?

MR. KRAMER: I recall the 29th, if I'm correct.

MR. FORDHAM: I believe that is correct, Commissioner.

COMMISSIONER DEASON: The briefs will be due the 29th of October, is that correct, or is it November?

MR. FORDHAM: I seem to have misplaced my CASR, Commissioner.

MR. GOGGIN: It is the 29th of October.

COMMISSIONER DEASON: The 29th of October briefs are due? Very well. Thank you all for your participation. This hearing is adjourned.

(The hearing concluded at 6:30 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceedings was taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages number 1 through 510 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 15th day of October, 1999.

Jane Faurot

JANE FAUROT, RPR
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Tallahassee, Florida

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Exh. 1

OFFICIAL RECOGNITION LIST

FLORIDA COMMISSION ORDERS

1. Florida Public Service Commission - Order No. PSC-98-1216-FOF-TP
2. Florida Public Service Commission - Order No. PSC-99-0658-FOF-TP
3. Florida Public Service Commission - Order No. PSC-99-1477-FOF-TP
4. Florida Public Service Commission - Order No. PSC-98-0604-FOF-TP
5. Florida Public Service Commission - Order No. PSC-98-0844-FOF-TP
6. Florida Public Service Commission - Order No. PSC-98-0810-FOF-TP
7. Florida Public Service Commission - Order No. PSC-97-0294-FOF-TP
8. Florida Public Service Commission - Order No. PSC-96-1532-FOF-TP
9. Florida Public Service Commission - Order No. PSC-97-0857-FOF-TP
10. Florida Public Service Commission - Order No. PSC-98-0990-FOF-TP
11. Florida Public Service Commission - Order No. PSC-96-1579-FOF-TP
12. Florida Public Service Commission - Order No. PSC-99-1089-FOF-TP
13. Official Recognition of the Commission Decision in Docket No. 990149-TP on September 7, 1999 (Order Pending)
14. Official Recognition of the Commission Decision in Docket No. 971140-TP on August 31, 1999 (Order Pending)

FCC ORDERS AND RULES

1.	FCC Order 99-38 (DN 96-98)	Declaratory Ruling- Inter-Carrier Compensation for ISP-Bound Traffic
2.	FCC Order 99-48 (DN 98-147)	Deployment of Wireline Services Offering Advanced Telecommunications Capability
3.	FCC Order 96-325 (DN 96-98)	Interconnection Order
4.	FCC Order 96-394 (DN 96-98)	Order on Reconsideration
5.	FCC Order 96-333 (DN 96-98)	Second Report and Order

COURT DECISIONS

1. United States Court of Appeals for the Eighth Circuit - AT&T Corp. et al. v. Iowa Utilities Board et al., 119 S.Ct. 721 (1999)
2. Supreme Court of the United States - No. 97-826 - AT&T Corp. et al. v. Iowa Utilities Board et al. (January 25, 1999)

FEDERAL ACT

1. The Telecommunications Act of 1996

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET
NO. 990691-TP EXHIBIT NO. 1
COMPANY/
WITNESS: Staff - FPSC
DATE: 10-7-99

Professional Activities

- Former member of the Missouri Public Service Commission's Task Force on FCC Docket Nos. 91-141 and 91-213 regarding expanded interconnection, collocation, and access transport restructure
- Former member of the AT&T / Missouri Commission Staff, *Total Quality Management Forum* responsible for improving and streamlining the regulatory process for competitive carriers
- Former member of the Missouri, Oklahoma, Kansas, Texas, and Arkansas five state Southwestern Bell Open Network Architecture (ONA) Oversight Conference
- Former delegate to the Illinois, Michigan, Indiana, Ohio, and Wisconsin Ameritech Regional Regulatory Conference (ARRC) charged with the responsibility of analyzing Ameritech's "Customers First" local exchange competitive framework for formulation of recommendations to the FCC and the U.S. Department of Justice
- Former member of both the Illinois and Maryland Local Number Portability Industry Consortiums responsible for developing and implementing a permanent data-base number portability solution

Testimony Profile and Experience

Before the Missouri Public Service Commission
Case No. TO-99-370
Petition of BroadSpan Communications, Inc. for Arbitration of Unresolved Interconnection Issues Regarding ADSL with Southwestern Bell Telephone Company
On behalf of BroadSpan Communications, Inc.

Before the Michigan Public Service Commission
Case No. U-11831
In the Matter of the Commission's own motion, to consider the total service long run incremental costs for all access, toll, and local exchange services provided by Ameritech Michigan.
On behalf of MCIWorldCom, Inc.

Before the Illinois Commerce Commission
Docket Nos. 98-0770, 98-0771 *cons.*
Proposed Modifications to Terms and Conditions Governing the Provision of Special Construction Arrangements and, *Investigation into Tariff Governing the Provision of Special Constructions Arrangements*
On behalf of AT&T Communications of Illinois, Inc.

Before the Michigan Public Service Commission
Case No. U-11735
In the matter of the complaint of BRE Communications, L.L.C., d/b/a PHONE MICHIGAN, against Michigan Bell Telephone Company, d/b/a AMERITECH MICHIGAN, for violations of the Michigan Telecommunications Act
On behalf of BRE Communications, L.L.C.

Before the Indiana Utility Regulatory Commission
Cause No. 40830
In the Matter of the request of the Indiana Payphone Association for the Commission to Conduct an

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET
NO. 990691-TP EXHIBIT NO. 2
COMPANY/
WITNESS: Starkey
DATE 10-7-99

Investigation of Local Exchange Company Pay Telephone tariffs for Compliance with Federal Regulations, and to Hold Such Tariffs in Abeyance Pending Completion of Such Proceeding
On behalf of the Indiana Payphone Association

Before the Michigan Public Service Commission
Complaint Pursuant to Sections 203 and 318 of the Michigan Telecommunications Act to Compel Respondents to Comply with Section 276 of the Federal Telecommunications Act
On behalf of the Michigan Pay Telephone Association

Before the Missouri Public Service Commission
Case No. TO-98-278
In the Matter of the Petition of Birch Telecom of Missouri, Inc., for Arbitration of the Rates, Terms, Conditions, and Related Arrangements for Interconnection with Southwestern Bell Telephone Company
On behalf of Birch Telecom of Missouri, Inc.

Before the Public Service Commission of the Commonwealth of Kentucky
Administrative Case No. 361
Deregulation of Local Exchange Companies' Payphone Services
On behalf of the Kentucky Payphone Association

Before the Public Utilities Commission of Ohio
Case No. 96-899-TP-ALT
The Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan Which May Result in Future Rate Increases
On behalf of the MCI Telecommunications Corporation

Before the Public Utilities Commission of the State of Hawaii
Docket No. 7702
Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii
On behalf of GST Telecom Hawaii, Inc.

Before the Michigan Public Service Commission
Case No. U-11410
In the Matter of the Petition of the Michigan Pay Telephone Association to initiate an investigation to determine whether Michigan Bell Telephone Company d/b/a Ameritech Michigan and GTE North Incorporated are in compliance with the Michigan Telecommunications Act and Section 276 of The Communications Act of 1934, as amended
On behalf of the Michigan Pay Telephone Association

Before the Indiana Utility Regulatory Commission
Cause No. 40849
In the matter of Petition of Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana for the Commission to Decline to Exercise in Whole or in Part its Jurisdiction Over, and to Utilize Alternative Regulatory Procedures For, Ameritech Indiana's Provision of Retail and Carrier Access Services Pursuant to I.C. 8-1-2.6 Et Seq.
On behalf of AT&T Communications of Indiana, Inc.

Before the Federal Communication Commission
C.C. Docket No. 97-137
In the Matter of Application by Ameritech Michigan for Authorization under Section 271 of the

Communications Act to Provide In-Region, InterLATA Service in the State of Michigan.
On behalf of the AT&T Corporation

Before the Indiana Utility Regulatory Commission
Cause No. 40611
In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements and Transport and Termination under the Telecommunications Act of 1996 and Related Indiana Statutes
On behalf of the MCI Telecommunications Corporation

Before the Public Utility Commission of Ohio
Case No. 97-152-TP-ARB
In the matter of the petition of MCI Telecommunications Corporation for arbitration pursuant to section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Cincinnati Bell Telephone Company
On behalf of the MCI Telecommunications Corporation

Before the Michigan Public Service Commission
Case No. U-11280
In the matter, on the Commission's own motion to consider the total service long run incremental costs and to determine the prices of unbundled network elements, interconnection services, and basic local exchange services for AMERITECH MICHIGAN
On behalf of the MCI Telecommunications Corporation

Before the Illinois Commerce Commission
Docket No. 96-0486
Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic
On behalf of the MCI Telecommunications Corporation

Before the Public Utility Commission of Ohio
Case No. 96-922-TP-UNC
In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic
On behalf of the MCI Telecommunications Corporation

Before the New Jersey Board of Public Utilities
Docket No. TX95120631
In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services
On behalf of the MCI Telecommunications Corporation

Before the Michigan Public Service Commission
Case No. U-11104
In the matter, on the Commission's Own Motion, to Consider Ameritech Michigan's Compliance With the Competitive Checklist in Section 271 of the Telecommunications Act of 1996
On behalf of AT&T Communications of Indiana, Inc.

Before the Public Utility Commission of Ohio
Case Nos. 96-702-TP-COI, 96-922-TP-UNC, 96-973-TP-ATA, 96-974-TP-ATA, Case No. 96-1057-TP-

UNC
In the Matter of the Investigation Into Ameritech Ohio's Entry Into In-Region InterLATA Services Under Section 271 of the Telecommunications Act of 1996.
On behalf of AT&T Communications of Ohio, Inc.

Before the Illinois Commerce Commission
Docket No. 96-0404
Investigation Concerning Illinois Bell Telephone Company's Compliance With Section 271(c) of the Telecommunications Act of 1996
On behalf of AT&T Communications of Illinois, Inc.

Before the Commonwealth of Massachusetts Department of Public Utilities
In the Matter of: D.P.U. 96-73/74, D.P.U. 96-75, D.P.U. 96-80/81, D.P.U. 96-83, D.P.U. 96-94, NYNEX - Arbitrations
On behalf of the MCI Telecommunications Corporation

Before the Pennsylvania Public Utility Commission
Docket No. A-31023670002
In the Matter of the Application of MCI Metro Access Transmission Services, Inc. For a Certificate of Public Convenience and Necessity to Provide and Resell Local Exchange Telecommunications Services in Pennsylvania
On behalf of MCImetro Access and Transmission Services, Inc.

Before the New Jersey Board of Public Utilities
Docket No. TO96080621
In the Matter of MCI Telecommunications Corporation for Arbitration with Bell Atlantic-New Jersey, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996
On behalf of the MCI Telecommunications Corporation

Before the Wisconsin Utility Regulatory Commission
Cause No. 40571-INT-01
Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Wisconsin Bell Telephone Company d/b/a Ameritech Wisconsin
On behalf of AT&T Communications of Wisconsin, Inc.

Before the Public Utility Commission of Ohio
Case No. 96-752-TP-ARB
Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Ohio Bell Telephone Company d/b/a Ameritech Ohio
On behalf of AT&T Communications of Ohio, Inc.

Before the Illinois Commerce Commission
Docket No. 96-AB-003
Docket No. 96-AB-004 *Consol.*
Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois
On behalf of AT&T Communications of Illinois, Inc.

Before the Michigan Public Service Commission
Case No. U-11151

Petition for Arbitration of Interconnection Rates, Terms and Conditions, and Related Arrangements with Michigan Bell Telephone Company d/b/a Ameritech Michigan
On behalf of AT&T Communications of Michigan, Inc.

Before the Indiana Utility Regulatory Commission
Cause No. 40571-INT-01
In the Matter of the Petition of AT&T Communications of Indiana, Inc. Requesting Arbitration of Certain Terms and Conditions and Prices for Interconnection and Related Arrangements from Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana Pursuant to Section 252 (b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996.
On behalf of AT&T Communications of Indiana, Inc.

Before the Missouri Public Service Commission
Case No. TT-96-268
Application of Southwestern Bell Telephone Company, Inc. to Revise P.S.C. Mo.-No. 26, Long Distance Message Telecommunications Service Tariff to Introduce the Designated Number Optional Calling Plan
On behalf of the MCI Telecommunications Corporation

Before the Corporation Commission of the State of Oklahoma
Cause No. PUD 950000411
Application of Southwestern Bell Telephone Company for an Order Approving Proposed Revisions in Applicant's Long Distance Message Telecommunications Service Tariff
Southwestern Bell Telephone Company's Introduction of 1+ Saver Direct^{sm}
On behalf of the MCI Telecommunications Corporation

Before the Georgia Public Service Commission
Docket No. 6415-U and 6537-U *cons.*
Petition of MCImetro to Establish Nondiscriminatory Rates, Terms and Conditions for the Unbundling and Resale of Local Loops
On behalf of MCImetro Access Transmission Services

Before the Public Service Commission of the State of Mississippi
Docket No. 95-UA-358
Regarding a Docket to Consider Competition in the Provision of Local Telephone Service
On behalf of the Mississippi Cable Television Association

Before the Maryland Public Service Commission
Docket No. 8705
In the Matter of the Inquiry Into the Merits of Alternative Plans for New Telephone Area Codes in Maryland
On behalf of the Staff of the Maryland Public Service Commission

Before the Maryland Public Service Commission
Docket No. 8584, Phase II
In the Matter of the Application of MFS Intelenet of Maryland, Inc. for Authority to Provide and Resell Local Exchange and Inter-Exchange Telephone Service; and Requesting the Establishment of Policies and Requirements for the Interconnection of Competing Local Exchange Networks

In the Matter of the Investigation of the Commission on its Own Motion Into Policies Regarding Competitive Local Exchange Telephone Service
On behalf of the Staff of the Maryland Public Service Commission

Before the Illinois Commerce Commission
Docket No. 94-0400
Application of MCImetro Access and Transmission Services, Inc. For a Certificate of Exchange Service Authority Allowing it to Provide Facilities-Based Local Service in the Chicago LATA
On behalf of the Office of Policy and Planning, Illinois Commerce Commission

Before the Illinois Commerce Commission
Docket No. 94-0315
Petition of Ameritech-Illinois for 708 NPA Relief by Establishing 630 Area Code
On behalf of the Office of Policy and Planning, Illinois Commerce Commission

Before the Illinois Commerce Commission
Docket No. 94-0422
Complaints of MFS, TC Systems, and MCI against Ameritech-Illinois Regarding Failure to Interconnect
On behalf of the Office of Policy and Planning, Illinois Commerce Commission

Before the Illinois Commerce Commission
Docket Nos. 94-0096, 94-0117, and 94-301
Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois, et al.
On behalf of the Office of Policy and Planning, Illinois Commerce Commission

Before the Illinois Commerce Commission
Docket No. 94-0049
Rulemaking on Line-Side and Reciprocal Interconnection
On behalf of the Office of Policy and Planning, Illinois Commerce Commission

Before the Illinois Commerce Commission
Docket No. 93-0409
MFS-Intelenet of Illinois, Inc. Application for an Amendment to its Certificate of Service Authority to Permit it to Operate as a Competitive Local Exchange Carrier of Business Services in Those Portions of MSA-1 Served by Illinois Bell Telephone and Central Telephone Company of Illinois
On behalf of the Office of Policy and Planning, Illinois Commerce Commission

Before the Illinois Commerce Commission
Docket No. 94-0042, 94-0043, 94-0045, and 94-0046
Illinois Commerce Commission on its own motion. Investigation Regarding the Access Transport Rate Elements for Illinois Consolidated Telephone Company (ICTC), Ameritech-Illinois, GTE North, GTE South, and Central Telephone Company (Centel)
On behalf of the Office of Policy and Planning, Illinois Commerce Commission

Before the Illinois Commerce Commission
Docket No. 93-0301 and 94-0041
GTE North Incorporated. Proposed Filing to Restructure and Consolidate the Local Exchange, Toll, and Access Tariffs with the Former Contel of Illinois, Inc.
On behalf of the Office of Policy and Planning, Illinois Commerce Commission

Before the Public Service Commission of the State of Missouri
Case No. TC-93-224 and TO-93-192
In the Matter of Proposals to Establish an Alternate Regulation Plan for Southwestern Bell Telephone Company

On behalf of the Telecommunications Department, Missouri Public Service Commission

Before the Public Service Commission of the State of Missouri
Case No. TO-93-116
In the Matter of Southwestern Bell Telephone Company's Application for Classification of Certain Services as Transitionally Competitive
On behalf of the Telecommunications Department, Missouri Public Service Commission

Selected Reports, Publications and Presentations

Telecommunications Pricing in Tomorrow's Competitive Local Market
Professional Pricing Societies 9th Annual Fall Conference
Pricing From A to Z
Chicago, Illinois, October 30, 1998

Recombining Unbundled Network Elements: An Alternative to Resale
ICM Conferences' Strategic Pricing Forum
January 27, 1998, New Orleans, Louisiana

MERGERS - Implications of Telecommunications Mergers for Local Subscribers
National Association of State Utility Consumer Advocates Mid-Year Meeting,
Chicago, Illinois, June 24 1996

Unbundling, Costing and Pricing Network Elements in a Co-Carrier World
Telecommunications Reports' Rethinking Access Charges & Intercarrier Compensation
Washington, D.C., April 17, 1996

Key Local Competition Issues Part I (novice)
Key Local Competition Issues Part II (advanced)
with Mark Long
National Cable Television Associations' 1995 State Telecommunications Conference
Washington, D.C., November 2, 1995

Competition in the Local Loop
New York State Telephone Association and Telephone Association of New England Issues Forum
Springfield, Massachusetts, October 18, 1995

Compensation in a Competitive Local Exchange
National Association of Regulatory Utility Commissioner Subcommittee on Communications' Summer Meetings
San Francisco, California, July 21, 1995

Fundamentals of Local Competition and Potential Dangers for Interexchange Carriers
COMPTEL 1995 Summer Business Conference
Seattle, Washington, June 12, 1995

Diagram 1

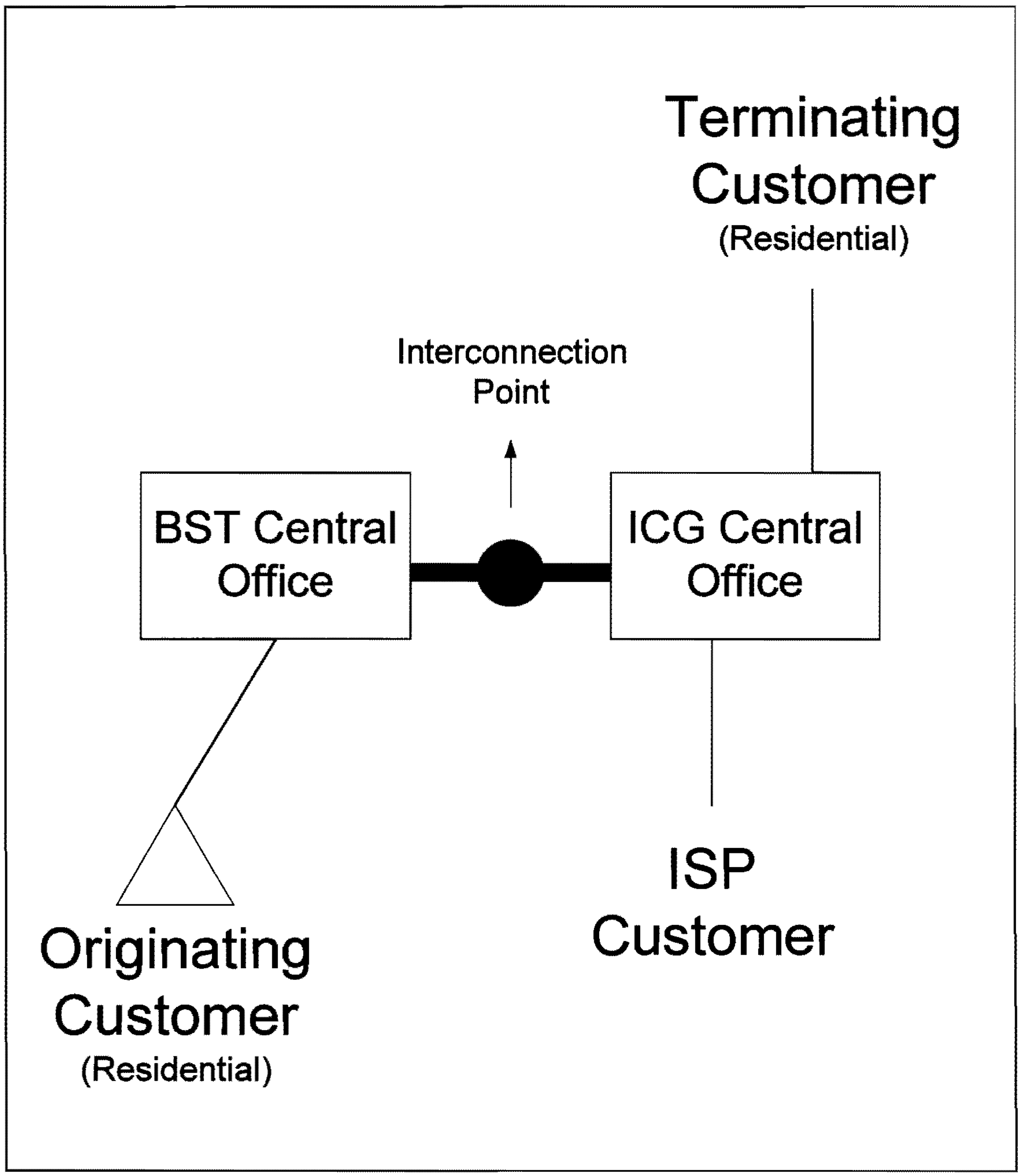

Terminating
Customer
(Residential)
Interconnection
Point
BST Central
Office
ICG Central
Office
Originating
Customer
(Residential)
ISP
Customer

Diagram 2

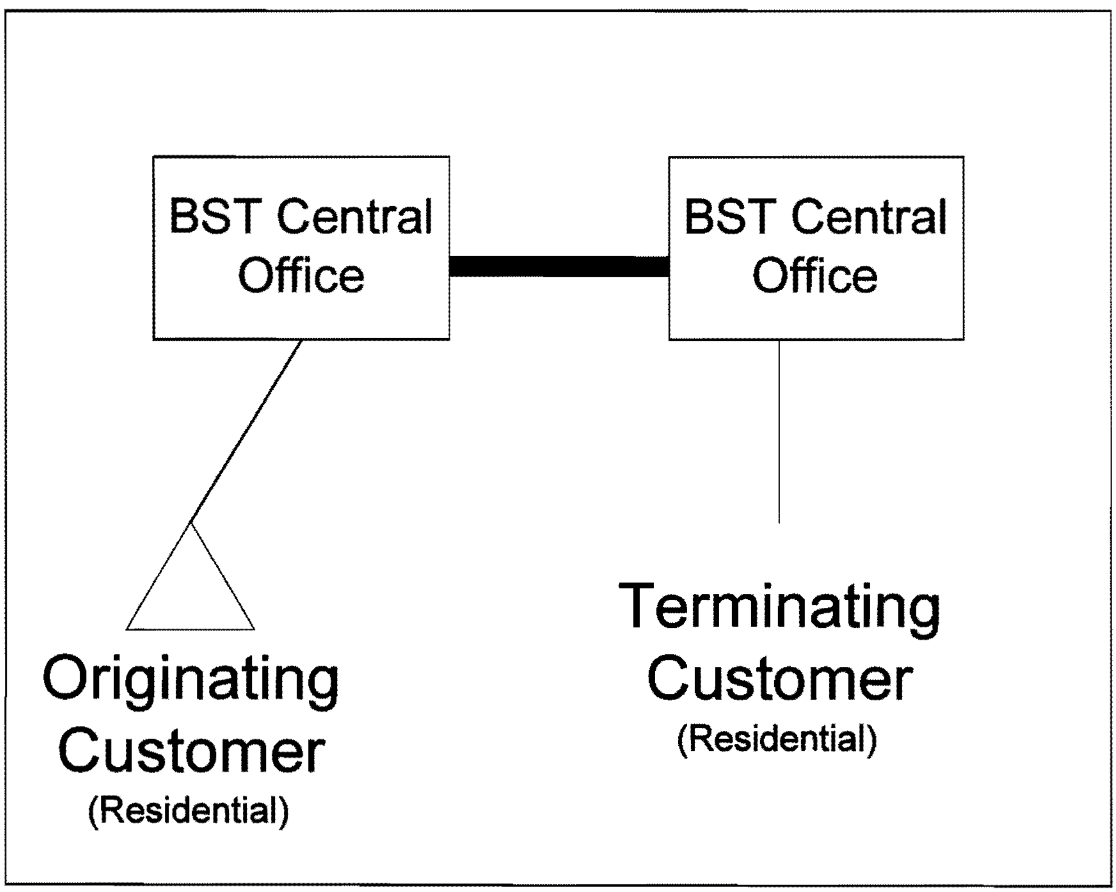
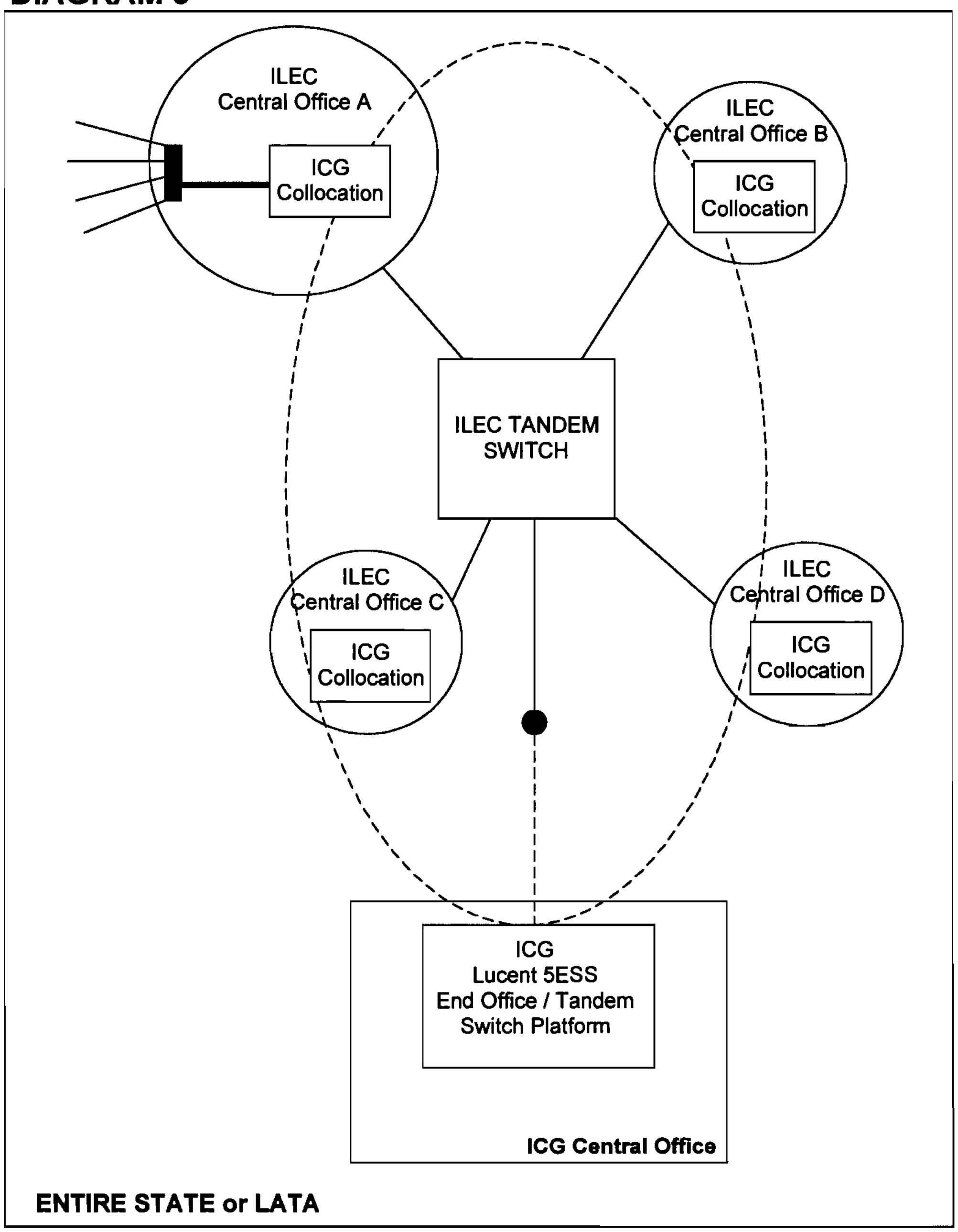

BST Central Office
BST Central Office
Originating Customer
(Residential)
Terminating Customer
(Residential)

DIAGRAM 3


ILEC
Central Office A
ICG
Collocation
ILEC
Central Office B
ICG
Collocation
ILEC TANDEM
SWITCH
ILEC
Central Office C
ICG
Collocation
ILEC
Central Office D
ICG
Collocation
ICG
Lucent 5ESS
End Office / Tandem
Switch Platform
ICG Central Office
ENTIRE STATE or LATA

STATE PUC DECISIONS

Decisions Requiring Reciprocal Compensation for ISP Traffic

1. **Alabama.** *In re: Emergency Petitions of ICG Telecom and ITC Deltacom for a Declaratory Ruling*, Docket 26619 (Ala. Pub. Serv. Comm'n March 4, 1999)

Alabama. *In re: Emergency Petitions of ICG Telecom and ITC Deltacom for a Declaratory Ruling*, Docket 26619 (Ala. Pub. Serv. Comm'n June 21, 1999)

2. **California.** Opinion-Decision 99-06-088, *In the Matter of Petition of Pacific Bell for Arbitration with Pac-West*, Application 98-11-024 (Cal. Pub. Util. Comm'n June 24, 1999)

California. Order Modifying and Denying Application for Rehearing of Decision 98-10-057 – Decision 99-07-047, *Order Instituting Rulemaking and Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, 95-04-043 (Rulemaking) and 95-04-044 (Investigation) (Cal. Pub. Util. Comm'n July 22, 1999)

3. **Delaware.** Arbitration Award, *In the Matter of the Petition of Global Naps South for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware*, PSC Docket No. 98-540 (Del. Pub. Serv. Comm'n Mar 9, 1999)

Delaware. Order No. 5092 and Findings and Opinion to Accompany Order, *In the Matter of Application of Global Naps South for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware*, PSC Docket No. 98-540 (Del. Pub. Serv. Comm'n June 22, 1999)

4. **Florida.** Order Resolving Complaint and Notice of Proposed Agency Action and Order Requiring Determination of Terminated Traffic Differential, Order No. PSC-00-0658-FOF-TP, *In re: Request for Arbitration Concerning Complaint of ACSI and e-spire against BellSouth*, Docket No. 981008-TP (Fla. Pub. Serv. Comm'n Apr. 6, 1999)

Florida. Order on Arbitration of Interconnection Agreement, Order No. PSC-99-1477-FOF-TP, *In re: Request for Arbitration Concerning Complaint of Intermedia Against GTE Florida*, Docket No. 980986-TP (Fla. Pub. Serv. Comm'n July 30, 1999)

5. **Hawaii.** Decision and Order 16975, *In the Matter of the Petition of GTE Hawaiian for a Declaratory Order*, Docket No. 99-0067 (Haw. Pub. Util. Comm'n May 6, 1999)

6. **Indiana.** Order On Reconsideration, *In the Matter of the Complaint of Time Warner Against Indiana Bell for Violation of the Terms of the Interconnection Agreement*, Cause No. 41097 (Ind. Util. Reg. Comm'n June 9, 1999)

7. **Maryland.** Order No. 75280, *In the Matter of the Complaint of MFS Intelnet against Bell Atlantic-Maryland for Breach of Interconnection Terms and Request for Immediate Relief*, Case No. 8731 (Md. Pub. Serv. Comm'n June 11, 1999)

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET
NO. 990691-TP EXHIBIT NO. 3
COMPANY/
WITNESS: ICG
DATE 10-7-99

8. **Minnesota.** Order Denying Petition, *In the Matter of the Petition of US West for a Determination that ISP Traffic Is Not Subject to Reciprocal Compensation*, Docket No. P-421/M-99-529 (Mn. Pub. Util. Comm'n Aug 17, 1999)

9. **Nevada.** Arbitration Decision, *In re Petition of Pac-West for Arbitration to Establish Interconnection Agreement with Nevada Bell*, Docket No. 98-10015 (Nev. Pub. Util. Comm'n Mar. 4, 1999)

Nevada. Order Adopting Revised Arbitration Decision and Revised Arbitration Decision, *In re Petition of Pac-West for Arbitration to Establish Interconnection Agreement with Nevada Bell*, Docket No. 98-10015 (Nev. Pub. Util. Comm'n Apr. 8, 1999)

10. **New York.** Order Instituting Proceeding to Reexamine Reciprocal Compensation, *Proceeding on Motion of Commission to Reexamine Reciprocal Compensation*, Case No. 99-C-0529 (N.Y. Pub. Serv. Comm'n Apr. 15, 1999)

New York. Opinion and Order Concerning Reciprocal Compensation, *Proceeding on Motion of Commission to Reexamine Reciprocal Compensation*, Case No. 99-C-0529 (N.Y. Pub. Serv. Comm'n Aug. 26, 1999)

11. **Ohio.** Entry On Rehearing, *In the Matter of the Complaints of ICG, MCImetro, and Time Warner v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation*, Case No. 97-1557-TP-CSS, et al. (Oh. Pub. Util. Comm'n May 5, 1999)

12. **Oregon.** Commission Decision, Order No. 99-218, *In the Matter of Petition of Electric Lightwave for Arbitration of Interconnection with GTE Northwest*, ARB 91 (Or. Pub. Util. Comm'n Mar. 17, 1999)

13. **Pennsylvania.** Joint Motion of Chairman Quain and Commissioners Rolka, Brownell & Wilson, *Joint Petition for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, P-00991648 and P-00991649 (Penn. Pub. Util. Comm'n Aug. 26, 1999)

14. **Rhode Island.** Order, *Re: NEVD of Rhode Island Petition for Declaratory Judgement*, Docket No. 2935 (R.I. Pub. Util. Comm'n July 21, 1999)

15. **Tennessee.** First Order of Arbitration Award, *In Re: Petition of Nextlink for Arbitration of Interconnection with BellSouth*, Docket No. 98-00123 (Tenn. Reg. Auth. May 18, 1999)

16. **Washington.** Arbitrator's Report and Decision, *In the Matter of Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave and GTE Northwest*, Docket No. UT -980370 (Wash. Util. and Trans. Comm'n March 22, 1999)

Washington. Third Supplemental Order Granting WorldCom's Complaint, *WorldCom v. GTE Northwest*, Docket No. UT -980338 (Wash. Util. and Trans. Comm'n May 12, 1999)

Decisions Declining to Reach the Merits

1. **Massachusetts.** *Complaint of MCI WorldCom Against New England Telephone and Telegraph for Breach of Interconnection Terms*, D.T.E. 97-116-C (Mass. Dept. of Telecommunications and Energy May 19, 1999)

2. **Missouri.** Order Denying Application for Rehearing, *In the Matter of Petition of Birch Telecom for Arbitration with Southwestern Bell*, Case No. TO-98-278 (Mo. Pub. Serv. Comm'n Mar. 9, 1999)

Missouri. Order Clarifying Arbitration Order, *In the Matter of Petition of Birch Telecom for Arbitration with Southwestern Bell*, Case No. TO-98-278 (Mo. Pub. Serv. Comm'n April 16, 1999)

3. **West Virginia.** Commission Order, *Sprint Petition for Declaratory Ruling*, Case No. 99-0166-T-PC (W.V. Pub. Serv. Comm'n May 7, 1999)

Decision Finding Reciprocal Compensation Inapplicable for ISP Traffic

1. **New Jersey.** Telecommunications Decision and Order, *In the Matter of the Petition of Global Naps for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Bell Atlantic-New Jersey*, Docket No. TO98070426 (N.J. Bd. of Pub. Util. July 12, 1999)

FEDERAL COURT DECISIONS

Upholding Reciprocal Compensation for ISP Traffic

1. *Illinois Bell Tel. Co. v. Worldcom Tech., Inc.*, 179 F.3d 566, No. 98-3150 (7th Cir. June 18, 1999)

2. BellSouth Telecomm. v. ITC Deltacom Comm., No. 99-D-287-N, 99-D-747-N (M.D. Ala. August 18, 1999)

3. *Michigan Bell Telephone Co., v. MFS Intelenet of Michigan, Inc.*, No. 5:98 CV 18, (W.D. Mich. August 4, 1999) *(affirming* Michigan PSC Order, January 28, 1998*)*

4. *U.S. West Communications, Inc. v. Worldcom Technologies, Inc.*, No. 97-857-JE (D. Or. Mar, 24, 1999)

Finding Reciprocal Compensation Inapplicable to ISP Traffic

None.

I-16-0AS
NCB

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P.O. BOX 991
MONTGOMERY, ALABAMA 36101-0991

JIM SULLIVAN, PRESIDENT
JAN COOK, ASSOCIATE COMMISSIONER
GEORGE C. WALLACE, JR., ASSOCIATE COMMISSIONER

WALTER L. THOMAS, JR.
SECRETARY

IN RE: EMERGENCY PETITIONS OF ICG TELECOM GROUP INC. AND ITC DELTACOM COMMUNICATIONS, INC. FOR A DECLARATORY RULING.

DOCKET 26619

I. INTRODUCTION AND BACKGROUND

By Order entered on August 6, 1998, this consolidated proceeding was established to consider the separate Petitions of ICG Telecom Group, Inc. (ICG) and ITC DeltaCom Communications, Inc. (ITC DeltaCom) for a Declaratory Ruling interpreting and enforcing certain terms of their respective interconnection agreements with BellSouth Telecommunications, Inc. (BellSouth).[1] The contractual provisions which the Commission was requested to interpret address local traffic and the payment of reciprocal compensation for the exchange of such local traffic. The ICG/BellSouth interconnection agreement was executed on October 7, 1997 and approved by the Commission on November 17, 1997.[2] The ITC DeltaCom/BellSouth interconnection agreement was entered on March 12, 1997 and approved by the Commission on May 5, 1997.[3]

Both ICG and ITC DeltaCom argued in their Petitions for declaratory relief that BellSouth had improperly refused to pay reciprocal compensation for local calls terminating at their end user customers who are Internet Service Providers (ISPs). ICG and ITC DeltaCom both requested in their Petitions that the Commission render a determination that telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone exchange service end user to the respective end users of ICG and ITC DeltaCom, including ISPs, qualify as local traffic under the terms of their respective interconnection agreements and are, therefore, subject to the payment of reciprocal compensation under the terms and conditions of those agreements.

The August 6, 1998 Order of the Commission established a September 3, 1998 hearing date for the Petitions of ICG and ITC DeltaCom. In the interest of advancing judicial economy, the

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[1] ICG filed its Petition on July 6, 1998 while ITC DeltaCom submitted its Petition on July 14, 1998.

[2] Part B of the General Terms and Conditions Section of the October 7, 1997 ICG/BellSouth agreement defines "local traffic" while §§6.1 and 6.2 of said agreement define the obligations of the parties with respect to the payment of reciprocal compensation. The aforementioned §6.2 was, however, amended by mutual agreement of the parties which was entered on May 11, 1998. The entire ICG/BellSouth interconnection agreement of October 7, 1997 and the May 11, 1998 amendment thereto were incorporated by reference into ICG's Petition for a Declaratory Ruling.

[3] Item 40 of Attachment B to the March 12, 1997 agreement entered between ITC DeltaCom and BellSouth defines "local traffic" while §VI (B) of that agreement defines the obligations of the parties with regard to reciprocal compensation. The parties did, however, substitute a new §VI (B) provision in a Fourth Amendment executed on August 22, 1997. The entire ITC DeltaCom/BellSouth interconnection agreement and the four amendments thereto were incorporated by reference into ITC DeltaCom's Petition for a Declaratory Ruling.

Commission incorporated language into the August 6, 1998 Order which encouraged Competitive Local Exchange Carriers (CLECs) with interconnection agreement disputes with BellSouth which closely paralleled those of ICG and ITC DeltaCom to intervene and actively participate in the proceedings scheduled to commence on September 3rd. The Commission noted that absent compelling arguments to the contrary, it was the Commission's intention to liberally allow intervention by CLECs who could reasonably demonstrate that their interests would be affected by a Commission decision interpreting the ICG and/or ITC DeltaCom interconnection agreements as they related to the payment of reciprocal compensation for ISP traffic. On August 13, 1998 the Commission entered a Procedural Ruling establishing deadlines for the prefiling of testimony and addressing other procedural matters.

On August 18, 1998 BellSouth filed Answers to the Petitions of ICG and ITC DeltaCom. In its Answers to both Petitions, BellSouth alleged that calls made to the internet through ISPs that originate on one carrier's network do not terminate on the other carrier's network as is required for reciprocal compensation to apply. BellSouth argued that a single internet call thus placed may communicate with interstate, foreign and local destinations simultaneously and must, therefore, be considered jurisdictionally interstate. As such, BellSouth asserted that jurisdiction over ISP traffic was clearly vested with the Federal Communications Commission (FCC).

BellSouth also argued in its Answers to the Petitions of both ICG and ITC DeltaCom that it was axiomatic that reciprocal compensation should flow in both directions. BellSouth alleged that neither ICG nor ITC DeltaCom were entitled to the relief they sought because the ISP traffic which they based there respective claims on flowed only their way.

BellSouth urged the Commission to dismiss the Petitions of both ICG and ITC DeltaCom due to BellSouth's claim that jurisdiction over ISP traffic rests exclusively with the FCC. In the alternative, BellSouth urged the Commission to hold the Petitions of ICG and ITC DeltaCom in abeyance until the FCC renders a determination on the issues in question. BellSouth asserted that the FCC had the issue of reciprocal compensation for ISP traffic under consideration and would make a determination in the very near future.

With respect to the Petition of ITC DeltaCom, BellSouth alleged that there was no mutual agreement between BellSouth and ITC DeltaCom concerning the reciprocal compensation provisions of their interconnection agreement. BellSouth alleged that the law at the time the parties executed their agreement was such that ISP traffic was not considered to be local and, therefore, was excluded from reciprocal compensation obligations. BellSouth argued that it had no rational economic reason to agree to reciprocal compensation for ISP traffic and that local traffic has customarily been interpreted in the telecommunications industry to exclude ISP traffic.

BellSouth also filed a separate Motion to Dismiss the Petition of ICG on August 18, 1998. In support of said Motion, BellSouth raised jurisdictional arguments similar to those raised in its Answers to the Petitions of ICG and ITC DeltaCom. BellSouth did, however, further support those arguments in a detailed Memorandum of Law.

On August 31, 1998 ICG submitted its response to BellSouth's Motion to Dismiss. ICG again asserted that consumer calls to ISPs within their local service area constituted local calls and were, therefore, intrastate telecommunications within the jurisdiction of the Commission. ICG accordingly urged the Commission to deny the Motion to Dismiss filed by BellSouth.

Pursuant to the August 6, 1998 Order of the Commission, the public hearing concerning the Petitions of ICG and ITC DeltaCom was held on September 3-4, 1998. In addition to the CLEC Petitioners ICG and ITC DeltaCom, Intermedia Communications, Inc. (Intermedia)[4]; KMC Telecom, Inc. (KMC)[5]; e.spire Communications, Inc. (e.spire)[6]; Hyperion Telecommunications, Inc. (Hyperion)[7] were allowed to intervene and participate in the proceedings. AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc. also petitioned to intervene, but did not appear to further their interventions.

At the outset of the proceedings conducted on September 3, 1998 BellSouth and ICG were permitted to orally argue BellSouth's Motion to Dismiss ICG's Petition. After hearing the arguments of both sides, the presiding Administrative Law Judge denied BellSouth's Motion.

A total of nine witnesses testified during the two day hearing. BellSouth sponsored the direct and rebuttal testimony of Mr. Jerry Hendrix and the rebuttal testimony of Mr. Albert Halprin. ICG presented the direct testimony of Mr. Thomas E. Allen, Jr. and the direct and rebuttal testimony of Mr. J. Carl Jackson, Jr. ITC DeltaCom presented the direct testimony of Mr. Foster O. McDonald

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[4] Intermedia has an interconnection agreement with BellSouth which was originally executed on June 21, 1996 and was approved by the Commission on November 22, 1996. Said agreement defines "local traffic" at §1.D while the reciprocal compensation obligations of the parties are defined at §4.B. The Intermedia/BellSouth interconnection agreement was not directly at issue in the proceeding because Intermedia did not allege that BellSouth owes it reciprocal compensation for the transport and termination of calls to ISPs in Alabama. Intermedia represented that it intervened on the basis that any policy determinations rendered by the Commission in this proceeding might affect potential negotiations between Intermedia and BellSouth. See Intermedia Post-Hearing Brief at p. 3, fn. 2.

[5] KMC has an interconnection agreement with BellSouth which was originally executed on January 24, 1997 and was approved by the Commission on May 5, 1997. Said agreement defines "local traffic" at §1.4.1 and defines the reciprocal compensation obligations of the Parties at §§1.50 and 5.2. KMC alleges that BellSouth improperly, unilaterally, and unlawfully decided to withhold reciprocal compensation which was due KMC for calls terminating at KMC's ISP customers. Tr. at 332-333 (ODEN).

[6] e.spire has an interconnection agreement with BellSouth which was originally executed on July 25, 1996 and was approved by the Commission on October 28, 1996. Said agreement defines local traffic at Item 48 of Attachment B and discusses the obligations of the Parties with regard to the exchange of traffic at §VI.A. As required by the aforementioned agreement, e.spire has submitted its dispute with BellSouth concerning the payment of reciprocal compensation for ISP traffic in Alabama to binding commercial arbitration. e.spire nonetheless maintains that a decision by the Commission as to the jurisdictional nature of ISP Traffic may have a precedential effect on that issue in commercial arbitration to all parties in Alabama. e.spire Post-Hearing Brief at p. 3; Tr. at 419-420 (Oustanding-Opening Statement).

[7] At the time of the hearing, Hyperion did not have authority as a CLEC in Alabama and has not entered into an interconnection agreement with BellSouth. Hyperion nonetheless represented that its plans were to apply for such certification in the near future and that a determination in this cause could have a precedential effect on Hyperion. Hyperion subsequently received its certificate to provide CLEC service in Alabama by Order dated March 5, 1999 in Docket 26817.

and Mr. James C. Wilkerson along with the direct and rebuttal testimony of Mr. Christopher J. Rozycki. Intermedia sponsored the direct testimony of Ms. Julia Strow while KMC submitted the direct testimony of Mr. Gregory A. Oden. The CLEC intervenors e.spire and Hyperion did not present the testimony of witnesses but did have counsel present to conduct cross-examination of BellSouth's witnesses.

At the conclusion of the proceedings of September 4, 1998 the parties to the proceedings indicated a desire to submit Post Hearing Briefs. The Commission accordingly granted the parties leave to submit simultaneous briefs no later than September 25, 1998. BellSouth, ITC DeltaCom, Intermedia and e.spire each submitted individual briefs while ICG, KMC and Hyperion submitted a joint brief. GTE South, Inc. (GTE) also submitted an *Amicus Curiae* brief in support of BellSouth.[4]

II. STATUTORY CONSIDERATIONS

In order to promote competition in the local exchange telecommunications market, the Telecommunications Act[5] at §251(a) imposes a general duty on all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. With regard to incumbent local exchange carriers (ILECs) such as BellSouth, the duty to interconnect is even more specifically defined by §251(c)(2). ILECs are also charged by §251(c)(1) with a specific duty to negotiate in good faith with regard to the fulfillment of the interconnection duties imposed by the Act.

In conjunction with the above mentioned interconnection obligations, the Act at §251(b)(5) requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. For purposes of compliance with §251(b)(5), the Act provides at §252(d)(2)(A) that a state Commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

It should be noted, however, that according to the provisions of §252(a)(1), ILECs may upon receiving a request for interconnection services or network elements pursuant to §251 negotiate and

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[4] GTE acknowledges that it did not seek intervenor status in the proceeding because it was not a party to any of the interconnection agreements under review. GTE nonetheless represented that as an Incumbent Local Exchange Carrier with interconnection agreements in place, it had an interest in the proceeding due to the likelihood that it would find itself confronted with some of the same legal issues which BellSouth has encountered. GTE emphasized that it was merely attempting to address the jurisdictional issues involved and was not attempting to address the issues of fact regarding the language of the interconnection agreements under review.

[5] The Communications Act of 1934 as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 USC §§151 et seq. (the Act). Cites to sections of the Act are accordingly cited to 47 USC.

enter into a binding agreement with a requesting telecommunications carrier or carriers without regard to the standards set forth in Sections (b) and (c) of §251. This provision was undoubtedly implemented to provide flexibility in arms length negotiations.

Any interconnection agreement negotiated must be submitted to the appropriate state Commission under §252(e). The state Commission must act to approve or reject the agreement within ninety days after its submission by the parties pursuant to §252(e)(4). According to the terms of §252(e)(2)(A), the state Commission may only reject an agreement adopted by negotiation if it finds that the agreement or a portion thereof discriminates against a telecommunications carrier not a party to the agreement, or the implementation of such an agreement or a portion thereof is not consistent with the public interest, convenience and necessity. This Commission has approved each of the interconnection agreements under review in this proceeding pursuant to the provisions discussed herein.

III. THE JURISDICTION OF THE COMMISSION

The Commission's general authority to render the Declaratory Ruling sought by the Petitioners and Intervenors is derived primarily from the broad supervisory powers granted to the Commission pursuant to the *Code of Alabama*, 1975 §§37-1-32 and 37-2-3, as well as Rule 22 of the Commission's Rules of Practice.[10] The specific authority of the Commission to interpret and enforce the terms and conditions of the interconnection agreements under review in this proceeding is a derivative of the exclusive authority granted by §252 (e) (1) of the Act to this and other state Commissions to approve or reject interconnection agreements submitted for review. That authority was explicitly recognized by the U. S. Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 879 (1998) wherein the Court noted:

> We also believe that state Commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to §§251 and 252. Subsection 252(e)(1) of the Act explicitly requires all agreements under the Act to be submitted for state Commission approval...We believe that the state Commission's plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state Commissions have approved.[11]

Although our view that state Commissions have the plenary authority to interpret and enforce the terms and conditions of interconnection agreements which have been approved by them pursuant to §252(e)(1) is consistent with that expressed by the Eighth Circuit, we are compelled to reassess our position in light of the Supreme Court's ruling in *AT&T Corp. v. Iowa Utilities Board*, No. 97-826 (and consolidated cases), 1999 WL 24568 (U.S. Jan. 25, 1999) that the Eighth Circuit

[10] The Commission's statutory authority to promulgate rules such as the Rules of Practice is derived from *Code of Alabama*, 1975 §37-1-38.

[11] *Iowa Utilities Board* at 804

reached that conclusion in ruling on an issue that was not ripe for consideration. More specifically, the Eighth Circuit concluded that state Commissions have the plenary authority to interpret and enforce interconnection agreements in ruling on challenges to the FCC's claim that §208 of the Act gives it authority to review agreements approved by state Commissions[12]. The Supreme Court did not address the merits of the Eighth Circuit's findings regarding the plenary authority of the states to enforce interconnection agreements approved by them, but concluded that the dispute concerning the FCC's §208 authority was not yet ripe for review because the FCC had not actually adopted rules implementing that authority.

The reassessment of our jurisdictional authority concerning the interconnection agreements under review thus begins with an analysis of the FCC's discussion of its §208 authority in its *First Report and Order*. Our review of the FCC's discussion in that regard leads us to the conclusion that the FCC intended to emphasize that parties who are *aggrieved by state determinations* concerning interconnection agreements may subsequently elect to either bring an action for Federal District Court Review or file a §208 complaint against a common carrier with the FCC[13]. The prerequisite for either avenue of review, however, seems to be a prior determination by the appropriate state Commission.

With regard to the FCC's specific conclusion that an aggrieved party *could* file a §208 complaint alleging that a common carrier is violating the terms and conditions of a negotiated or arbitrated interconnection agreement, we find that the FCC's use of the word *could* indicates that the filing of a §208 complaint as the result of an interpretational dispute is certainly not envisioned by the FCC to be the exclusive remedy for the resolution of such a dispute[14]. In the case before us, ICG and ITC DeltaCom submitted petitions to this Commission seeking our review and enforcement of the terms and conditions of their respective interconnection agreements with BellSouth. It is, therefore, our position that even when the Act is construed in the broad manner which is necessary to provide the FCC with the authority it purports to have to review State approved interconnection agreements, that authority is by no stretch of the imagination exclusive. Accordingly, this Commission unequivocally has the jurisdiction to act on the Petitions submitted to us in this cause.[15]

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[12] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 (Aug. 8, 1996) (hereinafter FCC's *First Report and Order*).

[13] FCC's *First Report and Order* at ¶128. It appears that the FCC must at a minimum implement a rulemaking proceeding to establish procedures for the filing of such complaints.

[14] FCC's *First Report and Order* at ¶127.

[15] Indeed, prior to the Supreme Court's decision in *AT&T v. Iowa Utilities Board*, the FCC conceded that pursuant to the Eighth Circuit's ruling in *Iowa Utilities Board v. FCC*, it did not have jurisdiction to enforce the terms and conditions of state approved interconnection agreements and did not seek referral of such issues. *See BellSouth Telecommunications, Inc. v. U.S. LEC of North Carolina, L.L.C. et al.*, Civil Action No. 3:99CV170-MU(W.D.N.C.), Response of Federal Communications Commission as *Amicus Curiae* to Motion for Referral of Issues, at p. 1-4.

We now turn to a discussion of the threshold jurisdictional arguments raised by BellSouth. BellSouth argues that calls made by an end user to access the Internet or other services offered by an ISP constitute traffic that is jurisdictionally interstate. According to BellSouth, the fact that a single Internet call can simultaneously access computer databases in the same state, in other states and in other countries render such calls inseverably interstate based on the criteria of *Louisiana Public Service Commission v. FCC*, 476 US 355 (1986). Based on that assessment, BellSouth asserts that jurisdiction over ISP traffic has been, and continues to be, clearly vested with the FCC which is presently considering the precise issue raised by the Petitioners[16]. BellSouth accordingly urges the Commission to take no action and defer to the conclusions which will ultimately be reached by the FCC[17].

On February 26, 1999, the FCC released its much anticipated Order clarifying the jurisdictional status of calls to ISPs.[18] The FCC concluded therein that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. The FCC further concluded, however, that given the absence of a federal rule regarding the appropriate inter-carrier compensation for such traffic, parties shall be bound by their existing interconnection agreements as interpreted by state Commissions.[19]

The FCC conceded that in many respects, it and the incumbent LECs have long treated ISP-bound traffic as though it were local. Against that backdrop, and in the absence of a contrary FCC rule, the FCC recognized that parties entering into interconnection agreements may reasonably have agreed for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic that such traffic should be treated in the same manner as local traffic. The FCC noted that when construing the parties' agreements to determine whether the parties so agreed, state Commissions had the opportunity to consider all the relevant facts including the negotiation of the

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[16] The FCC also noted in an *Amicus Curiae Brief* before the United States District Court for the Western District of North Carolina (*Id.*) that pending before the Agency were requests filed by MFS Communications Company, Inc. (MFS), a CLEC, and the Association for Local Telecommunications Services (ALTS), a trade association that represents CLECs, that the FCC clarify whether the reciprocal compensation obligations of §251(b)(5) of the Act apply to traffic routed to CLEC customers that are ISPs. The FCC indicated that in response to these requests it would address the threshold question of whether calls to ISPs are subject to the FCC's jurisdiction. *See Pleadings for Reconsideration and Clarification of Access to Interconnection Proceedings*, 61 Fed. Reg. 53,922 (1996); *Pleading Cycle Established for Comments on Requests by ALTS for Clarification*, Public Notice, FCC Common Carrier Bureau/CPD 97-30, 12 FCC Rcd 9713 (rel. July 2, 1997). Although ALTS filed a letter with the FCC's Common Carrier Bureau "seeking to withdraw its request for clarification, the FCC noted that the issue ALTS raises remains pending before the Commission pursuant to the MFS Petition and the Agency's authority on its own motion to "issue a declaratory ruling terminating a controversy or removing uncertainty." 47 CFR §1.2. *See also* 5 USC §554(e). BellSouth additionally argued in its Post-Hearing Brief at p. 7, fn. 4 that the FCC's October 30, 1998 Memorandum Opinion and Order in *GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79 (*The GTE DSL Tariff Filing*) was envisioned as being the FCC's dispositive determination as to the jurisdictional nature of ISP traffic.

[17] BellSouth's jurisdictional arguments were also advanced by GTE in its *Amicus Curiae Brief* in this cause.

[18] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket No. 96-98 (rel. February 26, 1999) (FCC's *ISP Declaratory Ruling*); *Inter-Carrier Compensation for ISP Bound Traffic*, Notice of Proposed Rulemaking, CC Docket No. 99-68 (rel. February 26, 1999) (FCC's *ISP NPRM*).

[19] *Id.* at ¶¶ 1, 22

agreements in the context of the FCC's long standing policy of treating ISP-bound traffic as local and the conduct of the parties pursuant to those agreements. The FCC specifically recognized that state Commissions, not the FCC, are the arbiters of what factors are relevant in ascertaining the parties' intentions. The FCC noted that nothing in its *ISP Declaratory Ruling* should be construed to question any determination a state has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.[20]

In light of the above discussion, it appears that nothing in the FCC's *ISP Declaratory Ruling* precludes this Commission from embarking on analysis of the terms and conditions of the interconnection agreements which we have been requested in this proceeding to interpret and enforce. In fact, our actions herein appear totally consistent with the aforementioned holdings of the FCC.

In order to minimize any possible confusion regarding the conclusions we reach in this proceeding, however, we emphasize at this juncture that we are not herein determining the generic issue of the jurisdictional nature of ISP traffic. To the contrary, we are considering the jurisdictional nature of such traffic only to the extent that it is prudent and necessary to determine the intent of the parties when they entered the interconnection agreements which we have been requested to review.

IV. <u>THE SUBSTANTIVE ARGUMENTS OF THE PARTIES</u>

A. <u>The Substantive Arguments Advanced by the CLEC Petitioners and Intervenors</u>

Although each of the CLEC Petitioners/Intervenors in this cause stand in a slightly different factual posture with BellSouth, they generally assert the same position with regard to the underlying legal issues identified in this proceeding. Accordingly, the arguments of the CLEC Petitioners/Intervenors are, for the most part, addressed herein in a collective fashion.

The primary argument advanced by the CLEC Petitioners/Intervenors is that pursuant to the plain language of the interconnection agreements under review, BellSouth is required to pay reciprocal compensation to each CLEC which is a party to such an agreement for terminating BellSouth originated traffic to ISPs served by the affected CLECs.[21] They assert that the interconnection agreements under review uniformly specify that each party thereto will pay the other party for local traffic terminating on the other carrier's network at agreed upon rates. The CLEC Petitioners/Intervenors contend that ISP traffic constitutes local traffic for which reciprocal compensation must be paid.

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[20] *Id.* at ¶¶ 22-25.

[21] ICG asserts that the fact that its interconnection agreement with BellSouth excludes traffic terminating to ISPs from reciprocal compensation pending the entry of a final order by this Commission or the FCC, or upon BellSouth's "knowing" payment of reciprocal compensation to any other CLEC, does not affect the strength of its arguments along those lines. *See* Joint Post-Hearing Brief of ICG, KMC and Hyperion at p. 2, fn. 2.

Although there are some minor distinctions in the respective interconnection agreements, the CLEC Petitioners/Intervenors assert that the agreements generally define local traffic as any telephone call that originates in one exchange and terminates in either the same exchange or a corresponding Extended Area Service (EAS) exchange.[38] The CLEC Petitioners/Intervenors maintain that the definition of local traffic in the respective interconnection agreements does not discriminate among types of end users or exclude calls from end users in the same local calling area to other end users in the same local calling area that happen to be ISPs. As such, the CLEC Petitioners/Intervenors contend that calls originated by BellSouth and transported and terminated by the CLEC Petitioners/Intervenors to their ISP customers are indeed local traffic for which BellSouth must pay reciprocal compensation pursuant to the interconnection agreements under review. Given the clarity in the aforementioned agreements, the CLEC Petitioners/Intervenors assert that the Commission need not look outside the terms of these agreements to resolve the dispute concerning the payment of reciprocal compensation for ISP traffic.

In the event the Commission concludes that there is ambiguity in the interconnection agreements concerning the definition of local traffic and the obligations of the parties to pay reciprocal compensation for calls to ISPs within the local calling area, the CLEC Petitioners/Intervenors advance numerous arguments in support of their position that a reasonable interpretation of their agreements leads to the logical conclusion that BellSouth should pay reciprocal compensation for the ISP traffic in question. The CLEC Petitioners/Intervenors support those arguments with evidence of record which is extrinsic to the interconnection agreements themselves.

The CLEC Petitioners/Intervenors assert that in determining the intent of the parties to the interconnection agreements under review, the Commission should consider the fact that, with the exception of the negotiations conducted between BellSouth and ICG, the subject of reciprocal compensation for ISP traffic was never openly discussed during any of the negotiations between BellSouth and the CLEC Petitioners/Intervenors with whom they executed those interconnection agreements.[39] With the exception of ICG, the CLEC Petitioners/Intervenors allege that reciprocal compensation for ISP traffic was never openly discussed during negotiations due to the fact that all parties understood such traffic to be local in nature and, therefore, subject to reciprocal compensation.

In support of their position, the CLEC Petitioners/Intervenors point to the fact that ISP calls are considered local pursuant to common industry practices. Specifically, the CLEC

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[38] ICG, KMC, Hyperion Joint Post Hearing Brief at pp. 3 and 12; ITC DeltaCom Post Hearing Brief at pp. 3-4; Intermedia Post Hearing Brief at p. 12; e.spire Post Hearing Brief at p. 3.

[39] BellSouth generally concurs with these representations. See BellSouth Post Hearing Brief at p. 11.

Petitioners/Intervenors argue that BellSouth charges its own ISP customers local business line rates for local telephone exchange service that enables the ISP's customers to connect to their service via a local call. Much like the CLEC Petitioners/Intervenors, the service provided by BellSouth to its ISP customers is generally under its local exchange tariff and calls to the ISPs are rated and billed just like any other local call placed via a seven digit local telephone number. BellSouth does not assess toll charges for these calls and in fact records the minutes associated with such calls as local for purposes of jurisdictional separations and ARMIS reporting requirements with the FCC.

The CLEC Petitioners allege further that BellSouth has knowledge of a 1989 Florida Public Service Commission decision wherein the Florida Commission determined that calls to ISPs should be viewed as jurisdictionally local.[34] The CLEC Petitioners/Intervenors assert that BellSouth was fully aware of the Florida PSC's decision at the time it entered the interconnection agreements in question.

Given these prevalent local treatments of ISP traffic and BellSouth's knowledge of same, the CLEC Petitioners/Intervenors assert that it was incumbent upon BellSouth to raise an issue concerning such traffic during negotiations and to specifically exclude it from the definition of local traffic and/or the obligation to pay reciprocal compensation. The Petitioners allege that their argument that BellSouth never intended to exclude ISP traffic from the definition of local traffic subject to reciprocal compensation is bolstered by the fact that BellSouth never broached the subject of developing a mechanism to distinguish and separate ISP traffic from other local traffic. They contend that such a mechanism would have been an absolute necessity had BellSouth legitimately intended to exclude such traffic for purposes of paying reciprocal compensation.[35]

The CLEC Petitioners/Intervenors rely on numerous arguments to counter the BellSouth claims that calls to ISPs, which would otherwise be local, are not such under the interconnection agreements' definition of local traffic because they do not in fact terminate at the ISP. First, the CLEC Petitioners/Intervenors alleged that the evidence persuasively shows that when a call reaches an ISP, the call is "answered" due to the fact that the call receives "answer supervision". They contend that the call is established for billing purposes when the ISP answers the incoming call. The CLEC Petitioners/Intervenors thus argue that calls placed over the public switched telephone network to ISPs are "terminated" when they are delivered to the telephone exchange service premise bearing the telephone number of the ISP which is called.

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[34] *Investigation into the Statewide Offering of Access to the Local Network for Purposes of Providing Information Services*, Docket No. 880423-TP, Order (September 5, 1989, Florida Public Service Commission) (*Florida Information Services Order*).

[35] *See* Tr. at p. 64 (Williams); Tr. at p. 345 ([illegible]).

In further support of their argument that calls to ISPs terminate at the ISP's point of presence, the CLEC Petitioners/Intervenors point to the FCC's definition of "termination" for purposes of reciprocal compensation as established in the FCC's *First Report and Order*. The CLEC Petitioners/Intervenors point specifically to the FCC language stating:

> We define termination for purposes of §251(b)(5) [the reciprocal compensation provision of the 1996 Act] as the switching of traffic that is subject to §251(b)(5) (e.g. local traffic) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called parties premises.[26]

The CLEC Petitioners/Intervenors further point to recent rulings in the FCC's *Universal Service Order* describing Internet traffic as calls with two severable components.[27] They maintain that pursuant to the rulings of the FCC, the first component is the local exchange telecommunications call to the ISP which is properly subject to reciprocal compensation. They allege that the second component is the information service component which is irrelevant for purposes of determining BellSouth's reciprocal compensation obligation.[28]

The CLEC Petitioners/Intervenors further assert that the FCC recently affirmed its conclusion that the local call to the ISP is separate and distinguishable from any subsequent ISP activity in its *Advanced Telecommunications Order*.[29] The CLEC Petitioners/Intervenors directed the Commission to the language in that Order where the FCC specifically stated that:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately. The first is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.[30]

Additional FCC precedent cited by the CLEC Petitioners/Intervenors includes the FCC's *Access Charge Reform Order* wherein the FCC declined to allow local exchange carriers to assess interstate access charges on ISPs.[31] They assert that the FCC in that Order unambiguously characterized the connection from the end user to the ISP as local traffic when it concluded that: "To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence."

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[26] *See* FCC's *First Report and Order* at ¶1040.

[27] *Federal-State Joint Board on Universal Service Report and Order*, CC Docket No. 96-45, (rel. May 8, 1997) (*Universal Service Order*).

[28] *Id.* at ¶783.

[29] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and consolidated cases*, CC Docket No. 98-147 and consolidated Dockets, Memorandum Opinion and Order and Notice of Proposed Rulemaking (rel. Aug. 7, 1998) (*Advanced Telecommunications Order*).

[30] *Id.* at ¶36.

[31] *In Re: Access Charge Reform*, First Report and Order, CC Docket No.'s 96-262, 94-1, 91-213, 95-72 (rel. May 17, 1997) (*Access Charge Reform Order*) ¶¶ 344-348.

The CLEC Petitioners/Intervenors also cite the FCC's *Non Accounting Safeguards Order* wherein the FCC again determined that the local call placed to an ISP is separate from the subsequent information service provided.[32] According to the CLEC Petitioners/Intervenors, severability of these components was key to the FCC's conclusion that if each was provided, purchased, or priced separately, the combined transmissions did not constitute a single interLATA transmission.

The CLEC Petitioners/Intervenors also note that in a recent Report to Congress concerning Universal Service matters, the FCC states that ISPs are not telecommunications service providers and, therefore, are not subject to regulation as common carriers.[33] Similarly, the CLEC Petitioners/Intervenors point to the conclusions recently drawn by the U.S. Court of Appeals for the Eighth Circuit in *Southwestern Bell Telephone Company v. FCC*, No. 97-2618 at 38 (8th Cir., August 19, 1998) wherein the Court declared that ISPs do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges. The court went on to note that ISPs subscribe to LEC facilities in order to receive *local* calls from customers who want to access the ISPs data, which may or may not be stored in computers outside the state in which the call was placed.

The CLEC Petitioners/Intervenors assert that the above noted conclusions of the FCC and the Eighth Circuit refute BellSouth's arguments that ISP calls do not terminate at the ISP but rather "transit" the CLEC network to remote Internet host computer sights which may simultaneously be interstate and international during the course of any given call. According to the CLEC Petitioners/Intervenors, BellSouth's arguments in that regard ignore the above noted dichotomy recognized by the FCC and the fact that the CLEC Petitioners/Intervenors provide the necessary telecommunications functions in a switched communications system to terminate calls to ISPs. The CLEC Petitioners/Intervenors surmise that it is abundantly clear that the FCC at this time does not consider a call that would otherwise be a local exchange call to be an interstate or international communication merely because the local exchange end user is an ISP.

In addition to the FCC precedent discussed above, the CLEC Petitioners/Intervenors cite decisions from other jurisdictions where the issue of whether ISP traffic is local and, therefore, subject to reciprocal compensation has been addressed. At the time Post Hearing Briefs were submitted by the parties, some twenty-one state Commissions had addressed the issue of reciprocal

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[32] *Implementation of Non-Accounting Safeguards of §§271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-149 (rel. Dec. 24, 1996) (*Non Accounting Safeguards Order*), ¶ 120.

[33] *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45 (April 10, 1998) ¶106.

compensation as it relates to ISP traffic.[34] The CLEC Petitioners/Intervenors assert that every state Commission which has taken final action with respect to the classification of calls placed to ISPs has ruled that such calls constitute local traffic and are, therefore, subject to the payment of reciprocal compensation.

The CLEC Petitioners/Intervenors also note that on June 22, 1998 the United States District Court for the Western District of Texas issued its *nunc pro tunc* Order affirming the Texas PUC's decision that calls to ISPs are local and further affirming the Texas PUCs decision that the interconnection agreement in question provided for reciprocal compensation for the termination of calls to ISPs.[35] Similarly the CLEC Petitioners/Intervenors point out that on July 21, 1998, the United States District Court for the Northern District of Illinois affirmed the Illinois Commerce Commission's determination that local exchange carriers are entitled to reciprocal compensation under reviewed interconnection agreements for calls terminated to ISPs.[36] The CLEC Petitioners/Intervenors also represented that the United States District Court for the Western District of Washington found in reviewing an interconnection agreement approved by the Washington Utilities and Transportation Commission, that the state Commission had not acted arbitrarily or capriciously in "deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fees".[37]

Since the time that the parties submitted their Post-Hearing Briefs, other state Commissions have entered rulings on the issue of whether ISP traffic is subject to reciprocal compensation. Those decisions were provided to the Commission and all other parties of record by counsel for ICG and ITC DeltaCom. Like the other state Commissions, each of those cases held that calls terminating to ISPs are local traffic and are, therefore, subject to the payment of reciprocal compensation.[38]

The final category of arguments raised by the CLEC Petitions/Intervenors allege that a finding by the Commission in favor of BellSouth in this instance would contravene public policy in at least

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[34] *See* Appendix A attached hereto.

[35] *Southwestern Bell Telephone Company v. The Public Utility Commission of Texas*, Case No. MO98-CA43, Order (*nunc pro tunc*) (W.D. TX., June 22, 1998).

[36] *Illinois Bell Telephone Company, d/b/a Ameritech Illinois v. WorldCom Technologies, Inc.*, Case No. 98-C-1925 Memorandum Opinion and Order, (N.D. ILL. July 21, 1998). The court held that the Illinois Commission properly concluded that pursuant to industry practice, a call "terminates" at the ISP thus making it a local call subject to reciprocal compensation *Id.* *See* [illegible] at 26-28.

[37] *U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, Case No. C97-222 WD, Order on Motions for Summary Judgment (W.D. Wash., Jan. 7, 1998). ESP = Enhanced Service Providers of which ISP's are a subset.

[38] Cox [illegible] Communications Corporation v. Southwestern Bell Telephone Company, Docket 98-167-C, Order No. 6 (Arkansas Public Service Commission, December 21, 1998); Complaint of MCI [illegible] of Georgia against BellSouth Telecommunications, Inc., Docket No. 11966-U (Georgia P.S.C. December 28, 1998); Complaint against U.S. West Communications, Inc. By Electric Lightwave, Inc., Docket No. 98-049-36 (Utah P.S.C. January, 1999); Complaint of WorldCom Technologies, Inc. against New England Tel. And Tel. Co., d/b/a Bell Atlantic - Massachusetts for Alleged Breach of Interconnection Terms entered into under §§251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116 (Mass. Dept. Of Telecom. And Energy, Oct. 26, 1998); Docket 98-10-057, ISP Decision (California Public Utilities Commission, Oct. 22, 1998).

two significant aspects. First, they argue that an adoption of the BellSouth position would create a class of calls for which there would be no compensation. They argue that when a BellSouth customer places a call to a CLEC customer which is an ISP, BellSouth originates the call and then hands the call off to the CLEC at their mutual point of interconnection. The CLEC transports and terminates the call to its ISP customer. BellSouth is fully compensated by its customer for arranging for the completion of its calls to ISPs from the payment of tariffed local exchange rates and subscriber line charges. By contrast, the CLEC receives no compensation from BellSouth's customer for providing termination services and is barred by FCC rules from charging access charges to the ISP. The CLEC Petitioners/Intervenors, therefore, allege that unless BellSouth pays reciprocal compensation for the termination of calls placed to ISPs, BellSouth will be utilizing the network facilities of the CLECs at no cost and in violation of §§251 and 252 of the Telecommunications Act.

As their second public policy argument, the CLEC Petitioners/Intervenors contend that if they are not compensated for the cost involved in terminating calls to ISPs, their service to ISPs will be uneconomical and they will be forced to discontinue service to that class of customers. If that occurs, the CLEC Petitioners/Intervenors assert that BellSouth will be in a position to achieve a monopoly over the provisioning of local service to ISPs. They contend that such a result is clearly contradictory to the procompetitive goals of the Telecommunications Act. They contend further that such a scenario would generally threaten the competitiveness of Internet access because BellSouth will be in a position to monopolize Internet access by forcing ISPs out of the market in favor of its own ISP.

The CLEC Petitioners/Intervenors thus assert that an adoption of BellSouth's position would have the practical effect of precluding the CLEC Petitioners/Intervenors from soliciting ISPs as customers. They allege that it would then be more difficult for CLECs such as themselves to establish a competitive presence in Alabama because ISPs as a class of customers would be practically unavailable to them. The CLEC Petitioners/Intervenors point out that such a scenario would preclude ISPs from enjoying the benefits of local telecommunications competition.

Some of the CLEC Petitioners/Intervenors also raise the issue of whether an adoption of BellSouth's position would preclude BellSouth from achieving §271 approval from the Commission. We will not address the merits of those arguments for purposes of this proceeding.

B. <u>The Substantive Arguments Advanced By BellSouth</u>

BellSouth acknowledges that the core issue raised by the CLEC Petitioners/Intervenors is whether BellSouth and those parties agreed, through their respective interconnection agreements, to treat calls through which an end user obtains access to services offered by an Internet service provider as local traffic subject to reciprocal compensation. BellSouth contends that the Petitioners bear the burden of proving that they and BellSouth mutually agreed to subject ISP traffic to the reciprocal compensation obligations of their respective agreements and that BellSouth's refusal to pay reciprocal compensation for ISP traffic constitutes a breach of contract.

BellSouth notes that each party to the proceeding, with the exception of ICG, has admitted that the exact topic of whether ISP traffic would be subject to reciprocal compensation never arose during contractual negotiations. BellSouth points out that each of those parties has further represented that they assumed that BellSouth agreed that ISP traffic would be encompassed by the local traffic definition in their respective agreements.

BellSouth asserts, however, that the law existing at the time that the parties negotiated the agreements in question reflects that it was unreasonable for the CLEC Petitioners/Intervenors to "blithely" assume that BellSouth agreed with their proposed treatment of ISP traffic. BellSouth in fact alleges that it did not view ISP traffic to "terminate" within the local calling area based on the laws and regulations which were effective at the time of the negotiations in question.

BellSouth represents that the CLEC Petitioners/Intervenors have not shown that BellSouth either held a contrary view, or that such a view was inherently unreasonable. Accordingly, BellSouth maintains that the CLEC Petitioners/Intervenors have failed to show that the party's mutually agreed to an essential element of the agreements in question - the scope of the reciprocal compensation obligations of the parties. Since there was never an express meeting of the minds on that essential term of the agreements, BellSouth contends that the Commission should find that it did not breach the agreements when it later refused to pay reciprocal compensation for ISP traffic.

BellSouth maintains that the rules of contractual interpretation in Alabama dictate that the Commission must consider the FCC decisions and rules, case law, and trade usage at the time the parties negotiated and executed the agreements in question in order to determine what types of calls the parties intended to encompass within the term local traffic, and to aid and interpret the requirement that reciprocal compensation applies only to that traffic. BellSouth further emphasizes that the Commission must decide whether the interpretation of the agreements advanced by the CLEC Petitioners/Intervenors is reasonable in light of the practical effect those interpretations will have. Finally, BellSouth argues that the Petitioners have the burden of demonstrating that, at the time BellSouth negotiated the agreements in question, it considered FCC precedent to require ISP traffic to be included within the definition of local traffic for purposes of reciprocal compensation.

BellSouth asserts that the CLEC Petitioners/Intervenors have clearly not met their burden of proof because (1) The FCC has expressly found services provided by ISPs to be interstate in nature; (2) The FCC has traditionally determined the jurisdictional nature of a call by examining its end to end nature; and (3) it would have been economically irrational for BellSouth to have agreed to subject ISP traffic to the payment of reciprocal compensation.

In addressing the issue of economic irrationality, BellSouth asserts that traffic collected by non-voice ISPs will always be one-way, not two-way traffic. According to BellSouth, such traffic will originate from an end user through the ISP network and terminate on the Internet host computer. Reciprocal compensation, therefore, becomes one-way compensation to those CLECs specifically targeting large ISPs. Hence, if ISP traffic were subject to the payment of reciprocal compensation, the originating carrier in most instances would be forced to pay the interconnecting carrier more than the originating carrier receives from an end user to provide local telephone service. As Mr. Hendrix of BellSouth testified it would have made no economic sense for BellSouth to have agreed to such an absurd result.[39]

With regard to developments at the FCC, BellSouth emphasized that the Association for Local Telecommunications Services (ALTS), a CLEC trade association, had originally filed a letter with the FCC asking for clarification of whether ISP traffic should be included within the definition of local traffic. According to BellSouth, ALTS' decision to turn to the FCC for clarification clearly demonstrated an understanding and acknowledgment by its CLEC membership that ISP traffic is jurisdictionally interstate, not local. Although ALTS subsequently requested that its original Petition be withdrawn, the FCC opted to transfer the issues raised by ALTS into another Docket, in lieu of simply closing the matter. According to BellSouth, those actions on the part of the FCC demonstrate the FCC's unwillingness to relinquish exclusive jurisdiction of the ISP traffic issue to the states.[40] BellSouth further notes that the FCC's decision to address the issue of the jurisdictional nature of ISP traffic in conjunction with its ruling on *GTE's DSL Tariff Filing* was also indicative of its jurisdiction concerning the issue.[41]

BellSouth also vehemently challenges the severability or "two-call" theory regarding ISP traffic which was espoused by the CLEC Petitioners/Intervenors. BellSouth contends that calls from end users to ISPs only transit through the ISP's local point of presence to the Internet and does not terminate there. According to BellSouth, there is no interruption of the continuous transmission of signals that would justify treating the ISP as anything other than another link in the chain of transmission between the end user and the Internet host computer.[42]

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[39] Tr. at p. 533 (Hendrix).

[40] *See* fn 16 *supra*.

[41] *Id.*

[42] Tr. at p. 529 (Hendrix).

In fact, BellSouth contends that the CLEC Petitioners/Intervenors' contention that a call from an end user to an ISP is nothing more than a local call separate and distinguishable from the ISP's subsequent routing of the call to the Internet is inconsistent with the FCC's description of Internet service in its *Non-Accounting Safeguards Order*.[43] BellSouth asserts that in actuality, ISPs take calls and, as part of the information service they offer to the public, transmit these calls to and from the communications networks of other telecommunications carriers. According to BellSouth, these calls are ultimately delivered to Internet host computers which are in all likelihood not in the local serving area of the ISP.[44] BellSouth contends that the fact that ISPs reformat information received from users via circuit-switched connections into packets does not demonstrate that the calls to the ISPs terminate at the ISP location.

BellSouth maintains that the fact that ILECs deliver ISP traffic to CLECs over local interconnection trunks, use signaling associated with local calling, and send answer supervision when a call is received has no jurisdictional significance. BellSouth alleges that the FCC has long held that the jurisdiction of a call is determined not by the physical location of the communications facilities or the type of the facilities used, but by the nature of the traffic that flows over those facilities. BellSouth, therefore, represents that it is irrelevant that the originating end user and the ISP's point of presence are in the same local calling area, or that the local interconnection trunks are used to transmit those calls, because the ISPs point of presence is not the terminating point of such ISP traffic. BellSouth emphasizes that what is dispositive from a jurisdictional perspective is the relationship between where the call begins and where it ends. They allege that the Petitioners severability or "two call" theory completely ignores the end to end nature of an Internet call and has been rejected by the FCC in a number of contexts.

The first FCC decision cited by BellSouth in support of its position that the FCC has rejected the severability or "two call" theory is the FCC's decision in *The Memory Call Case*.[45] In *The Memory Call Case*, the FCC was urged to find that when a voice mail service is accessed from out of state, two jurisdictional transactions take place: One from the caller to the telephone company switch that routes the call to the intended recipient's location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate. According to BellSouth, the FCC employed an end to end analysis to determine the jurisdictional nature of such calls, and concluded that the entire communication was interstate even though the "second call" (the

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[43] See fn. 32, supra.

[44] Tr. at pp. 307-308 (Hendrix).

[45] *Petition for Emergency Relief and Declaratory Ruling filed by BellSouth Corporation*, 7 FCC Rcd. 1619 (1992), aff'd *Georgia Public Service Commission v. FCC*, 5 F.3d 1499 (11th Cir. 1993)(hereinafter referred to as *The Memory Call Case*)

actual accessing of the customers voice mail box) occurred within a piece of equipment that was purely in the State of Georgia.[46]

BellSouth also pointed out that the FCC asserted its jurisdictional authority over local calls used to provide interstate service in its *Foreign Exchange Decision*.[47] Said decision involved a challenge of an intrastate New York Telephone tariff imposing a charge on the local exchange service used by out of state customers of FX and common control switching arrangement (CCSA) services. Notwithstanding the fact that the originating caller utilized FX service by dialing a local number and paying local charges, and despite the fact that the FX customer had to purchase local exchange service from New York Telephone, the FCC concluded that this service as a whole was interstate and thus subject to FCC jurisdiction.

BellSouth asserts that the holding in the *Foreign Exchange Decision* is directly relevant to the instant dispute because in both cases, an interstate call is completed in part through the use of intrastate local exchange services. Further, originating end users of Foreign Exchange Services and ISP service make calls by dialing a local number and paying local service charges. Just as in the *Foreign Exchange Decision*, BellSouth asserts that the FCC declines to treat such calls as the sum of their jurisdictionally separable components. Instead, the FCC considers the service as a whole to be interstate. According to BellSouth, calls bound for the internet through an ISP switch can only be characterized as interstate exchange access traffic, not local traffic because such calls terminate not at the ISP's equipment, but rather at the Internet host computer containing the data that the originating end user seeks to access.

BellSouth recognizes that the FCC has for some time exempted ISPs from paying switched access charges to the LECs for originating traffic to them. ISPs are instead permitted to receive calls over local exchange service lines purchased from the LEC. BellSouth asserts, however, that the FCC's decision to exempt ISPs from paying access charges for policy and political reasons in no way alters the fact that the traffic they collect is access traffic, not local traffic. BellSouth contends that if the FCC had indeed concluded that traffic received by ISPs was local, there would be no need for it to exempt that traffic from the access charge regime.

BellSouth similarly discounts the conclusions reached by the FCC in its *Universal Service Order* wherein it declared that when a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering. According to BellSouth,

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[46] *Id.* at 1620-21.

[47] *New York Telephone Co. - Exchange System Access Line Terminal Charge for FX and CCSA service*, Memorandum, Opinion and Order, 76 F.C.C. 2d 349 (1980). (The FCC's *Foreign Exchange Decision*).

the fact that Internet service itself may not be a telecommunication service – the actual issue before the FCC in the Universal Service proceeding – is relevant only to the issue of whether ISPs must contribute to the Universal Service Fund and is not relevant to the jurisdictional classification of traffic received by ISPs. With Internet traffic, BellSouth maintains that it is the beginning and ending point of communication, not the application of Universal Service rules to the components of the transmission, which dictates its jurisdictional status.

In sum, BellSouth concludes that nothing in any of the FCC decisions cited by the CLEC Petitioner/Intervenors compels the conclusion that ISPs must be viewed as end users at whose premises Internet calls terminate. BellSouth asserts that the FCC precedent it cites clearly evidences the FCC's recognition of the interstate nature of calls carried by ISPs.

With respect to the numerous state and federal court decisions on the issue of ISP traffic cited by the CLEC Petitioners/Intervenors, BellSouth urges the Commission to consider that many state Commissions that have examined the issue have recognized that the matter is currently before the FCC and have indicated that their determinations may be subject to change once the FCC issues a ruling on the jurisdictional nature of ISP traffic. BellSouth asserts that it would be incorrect to construe the decisions of these other state Commissions regarding the application of reciprocal compensation to ISP traffic as definitive determinations that ISP traffic is local traffic subject to reciprocal compensation under the Act.[46] In an effort to provide the Commission with a better understanding as to the impact of the other state Commission decisions cited, BellSouth attached to its Post-Hearing Brief a copy of an analysis of the various state Commission decisions on the ISP issue prepared by SBC Telecommunications, Inc. and filed with the FCC on August 14, 1998 in *SBC Telecommunications, Inc., ex parte Jurisdictional Nature of Calls to Internet Service Providers*: CCB/CPD 97-30. BellSouth requested that the Commission take administrative notice of that Docket. BellSouth's request in that regard is hereby granted.

BellSouth lastly challenges the contention of the CLEC Petitioners/Intervenors that the Commission will impede competition in the State of Alabama if it determines that ISP traffic is not local traffic subject to reciprocal compensation. BellSouth asserts that the CLEC Petitioners/Intervenors have offered no evidence to support their position and in fact contends that the inclusion of ISP traffic in the definition of local traffic will yield catastrophic results in Alabama's local residential market. BellSouth asserts that it is apparent that the Petitioners have no intention of competing in Alabama's local residential market and intend to rely upon BellSouth's mandated role as the ILEC "carrier of last resort" to provide service to the less profitable residential market. BellSouth asserts that the CLEC Petitioners/Intervenors' demands will serve only to improperly

[46] Tr. at pp. [illegible] ([illegible]).

increase BellSouth's cost of providing service to the citizens of Alabama and will thus exclusively benefit the CLEC Petitioners/Intervenors.

V. DISCUSSION AND CONCLUSIONS

Despite the somewhat complex arguments advanced by the parties in this cause, the bottom line issue in this proceeding is relatively straight forward. The Commission must determine whether the parties to the interconnection agreements under review intended, at the time those agreements were entered, to treat telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone exchange service end user to the respective ISP end users of the affected CLEC Petitioners/Intervenors as local traffic subject to the payment of reciprocal compensation.

The Commission must first focus on the actual language of the five interconnection agreements under review. The agreements which ITC DeltaCom, KMC, e.spire and Intermedia executed with BellSouth do not specifically reference ISP traffic. Each of those agreements do, however, have similar definitions of local traffic and similarly define the reciprocal compensation obligations of the parties.

The interconnection agreement executed between ICG and BellSouth has significant variations from the aforementioned agreements. In particular, the ICG/BellSouth agreement contains a provision excluding ISP calls from the payment of reciprocal compensation except in certain circumstances.

We begin our assessment of the individual agreements with a review of the provisions of the ITC DeltaCom agreement with BellSouth which address local traffic and define the reciprocal compensation obligations of the parties. We follow that assessment with a review of the terms and conditions of the agreements executed between BellSouth and KMC, Intermedia and e.spire which address local traffic and the reciprocal compensation obligations of the parties.

The terms and conditions of the ITC DeltaCom/BellSouth agreement which define local traffic are found at Attachment B to the original agreement executed between ITC DeltaCom and BellSouth on March 12, 1997. Said Attachment, at item 48, defines local traffic as follows:

> "Local traffic" means any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange and EAS exchanges are defined and specified in Section A.3 of BellSouth's General Subscriber Service tariff.

Also under review in the ITC DeltaCom agreement are the provisions defining the obligations of the parties with regard to reciprocal compensation. Item 3 of the August 22, 1997 Fourth Amendment to the ITC DeltaCom/BellSouth agreement reflects the mutual agreement of the parties to substitute a new Section VI (B) to the agreement which addresses those obligations. That substitute section reads in pertinent part as follows:

> With the exception of the local traffic specifically identified in subsection (C) hereafter, each party agrees to terminate local traffic originated and routed to it by the other party. Each party will pay the other for terminating its local traffic on the others network the local interconnection rate of S.009 per minute of use in all states...[8]

The interconnection agreement between KMC and BellSouth which was approved by the Commission on May 5, 1997 defines local traffic at Section 1.41 as follows:

> "Local traffic" refers to calls between two or more Telephone Exchange Service users where both telephone exchange services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area (e.g. Extended Area Service Zones in adjacent local calling areas). Local traffic includes the traffic types that have been traditionally referred to as "local calling" and as "Extended Area Service (EAS)." All other traffic that originates and terminates between the end users within the LATA is toll traffic. In no event shall the local traffic area for purposes of local call termination billing between the parties be decreased.

At Section 1.58, the KMC/BellSouth agreement defines the reciprocal compensation obligation of the parties as follows:

> "Reciprocal compensation" is as described in the Act and refers to the payment arrangements that recover costs incurred for the transport and termination of telecommunications traffic originating on one party's network and terminating on the other party's network.

The KMC/BellSouth agreement addresses the reciprocal compensation obligations of the parties with even more specificity at Sections 5.8.2 and 5.8.3:

> 5.8.2 The parties shall compensate each other for transport and termination of local traffic (local call termination) at a single identical reciprocal and equal rate as set forth in Exhibit A.
>
> 5.8.3 The reciprocal compensation arrangements set forth in this agreement are not applicable to switched exchange access service. All switched exchange access service and all intraLATA toll traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs.

The interconnection agreement between Intermedia and BellSouth was originally approved by the Commission on November 22, 1996. Said agreement defines local traffic at Section 1.D as follows:

> Local traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange and EAS exchanges are defined and specified in Section A.3 of BellSouth's General Subscriber Service tariff.

With regard to the Intermedia/BellSouth agreement's treatment of the reciprocal compensation obligations of the parties, the agreement states in pertinent part at Section 4.B that:

> Each party will pay the other for terminating its local traffic on the others' network the local interconnection rates as set forth in Attachment B-1 by this reference incorporated herein...

[8] The subsection (C) referenced in the aforementioned language is an exclusion governing intermediary tandem switching and transport services which appear to be irrelevant for purposes of our consideration herein.

The interconnection agreement between e.spire and BellSouth was approved by the Commission on October 28, 1996. Said agreement defines local traffic at Attachment B, item 48 as follows:

> Local traffic is defined as any telephone calls that originate in one exchange and terminate in either the same exchange or a corresponding Extended Area Service ("EAS") exchange.

The e.spire/BellSouth agreement addresses the exchange of traffic at Section 7.A. The agreement specifies therein that:

> The parties agree...that local interconnection is defined as the delivery of local traffic to be terminated on each party's local network so that customers of either party have the ability to reach customers of the other party without the use of access codes or delay in the processing of the call. The parties further agree that the exchange of traffic on BellSouth's Extended Area Service (EAS) shall be considered local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section.

It is also significant to note that each of the aforementioned interconnection agreements have "Entirety" or "Merger" Clauses which are substantially similar. Those provisions specify that the agreements in question, along with specified attachments thereto, set forth the entire understanding and agreement of the parties. The "Entirety Clauses" also generally specify that subsequent or contemporaneous writings are not binding unless signed by a duly authorized officer or representative of the party to be bound.[38]

Recapping the arguments of the parties in summary fashion, ITC DeltaCom, KMC, Intermedia and e.spire assert that pursuant to the plain language of their respective interconnection agreements with BellSouth, calls to ISPs are included within the definition of local traffic. They, therefore, maintain that calls to ISP are clearly subject to the reciprocal compensation obligations of their respective agreements. Even if the Commission determines that their agreements are ambiguous and considers extrinsic evidence in order to determine the intent of the parties, the aforementioned CLEC Petitioners/Intervenors maintain that the extrinsic evidence they have cited leads to the logical conclusion that BellSouth never intended to exclude ISP traffic from the reciprocal compensation obligations of their respective interconnection agreements. ICG readily concedes that it has different contractual language than the remaining CLEC Petitioners/Intervenors, but nonetheless maintains that the payment of reciprocal compensation by BellSouth to the other CLEC Petitioners/Intervenors "will require BellSouth to pay ICG reciprocal compensation for ISP traffic pursuant to an amendment agreed to by BellSouth.

BellSouth asserts that the CLEC Petitioners/Intervenors bear the burden of proving that they and BellSouth mutually agreed to subject ISP traffic to the reciprocal compensation obligations of

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[38] ITC DeltaCom/BellSouth agreement at Section XXX; KMC/BellSouth agreement at Section 34.01; Intermedia/BellSouth agreement at Section XXIX; e.spire/BellSouth agreement at XXX.

the respective interconnection agreements, and that BellSouth's refusal to pay reciprocal compensation for ISP traffic constitutes a breach of those contracts. BellSouth alleges that its agreement with ICG clearly excludes ISP traffic from the reciprocal compensation obligations.

With regard to the Petitioner ITC DeltaCom and the CLEC intervenors KMC, e.spire and Intermedia, BellSouth asserts that the explicit topic of whether ISP traffic would be subject to reciprocal compensation never arose during their contractual negotiations. As noted previously, BellSouth contends that it was unreasonable for those parties to assume that because the topic never came up, BellSouth agreed with their proposed treatment of ISP traffic. In fact, BellSouth asserts that based on the law which existed at the time the interconnection agreements in question were negotiated, BellSouth did not view ISP traffic to terminate within the local calling area.

BellSouth alleges that none of the parties have shown that BellSouth held a contrary view or that such a view was inherently unreasonable. BellSouth accordingly concludes that the aforementioned CLEC Petitioners/Intervenors have failed to show that the parties mutually agreed to their respective reciprocal compensation obligations which is an essential element of their agreements. BellSouth, therefore, maintains that the CLEC Petitioners/Intervenors cannot show that BellSouth has breached the interconnection agreements in question by refusing to pay reciprocal compensation for ISP traffic. BellSouth contends that it is appropriate for the Commission to consider the extensive extrinsic evidence which BellSouth has submitted in support of its position.

The rules of contractual interpretation in Alabama dictate that the Commission must first conclude whether the interconnection agreements under review contain any ambiguity. Specifically, the Commission must determine whether the agreements in question are susceptible to more than one reasonable interpretation. *Reynolds v. Alabama Department of Transportation*, 828 F. Supp. 1077 (M.D. Ala. 1996). The mere fact that BellSouth, as a party to the aforementioned agreements, alleges that they have a different construction of those agreements than do the CLEC Petitioners/Intervenors does not conclusively establish that the agreements are indeed ambiguous. *American Farm Bureau Federation v. Alabama Farmers Federation*, 935 F. Supp. 1533 (M.D. Ala. 1996), *aff'd.* 121 F.3d 723 (11th Cir. 1997). An ambiguity is held to exist only when the Commission finds that the agreements in question are reasonably subject to more than one interpretation. *U. S. for Use and Benefit of Capps v. Fidelity and Deposit Company of Maryland*, 875 F. Supp. 803 (M.D. Ala. 1995) and *Reynolds v. Alabama Department of Transportation*, *supra*.

Although the interconnection agreements that ITC DeltaCom, KMC, Intermedia and e.spire each executed with BellSouth seem rather straight forward with regard to the definition of local traffic and the reciprocal compensation obligations of the parties, none of those agreements address with specificity ISP traffic or the meaning of the word "terminates" as used in each agreement's definition of local traffic. The silence of the agreements on these important matters does give rise to some reasonable ambiguity concerning the interpretation of the agreements.

Having concluded that the agreements in question are reasonably subject to ambiguity, the determination of the true meaning of the agreements and the intent of the parties becomes a question for the Commission. *Bean v. Gantrell*, 665 So.2d 523, 524 (Ala. Civ. App. 1995). In rendering determinations regarding the meaning of ambiguous agreements and the intent of the parties with regard to same, the Commission may look to extrinsic evidence. *Tarry Cove North v. Baldwin County Sewer*, 480 So.2d 1171,1173 (Ala. 1985). The Commission must, however, strive to accord the contracts a reasonable interpretation to the extent permitted by the language of the contracts. *American Farm Bureau Federation v. Alabama Farmers Federation*, supra. It is the duty of the Commission to presume that the parties intended to make a reasonable contract rather than an unreasonable one. *Ex parte Agee*, 669 So.2d 102, 105, *rehearing denied on remand Agee v. Moore*, 669 So.2d 106 (Ala. 1995).

In particular, we note that at the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants including the F.C.C. Like the CLEC Petitioners/Intervenors, BellSouth was fully aware of the industry's prevailingly local treatment of ISP traffic at the time that it entered the interconnection agreements in question. In fact, BellSouth itself afforded ISP traffic prevailingly local treatment in the same respects that the CLECs did at that time.

Even today, both BellSouth and the CLEC Petitioners/Intervenors charge their ISP customers local business line rates for local telephone exchange service that enables the ISPs' customers to access their service via a local call. The service provided to ISP customers by BellSouth and the CLEC Petitioners/Intervenors falls under their local exchange tariffs and calls to ISPs are rated and billed just as any other local call placed via a seven digit local telephone number. Neither BellSouth nor the CLEC Petitioners/Intervenors assess toll charges for those calls. BellSouth specifically advises consumers subscribing to its Internet service provider that access to the BellSouth ISP is achieved via a local call.[31]

As further indication of the prevailingly local treatment afforded to ISP traffic, BellSouth reports the minutes of use associated with such calls as local for ARMIS reporting requirements with the FCC. Further, BellSouth characterizes expenses and revenues associated with ISP-bound traffic as intrastate for jurisdictional separations purposes.

Even the FCC noted in its *ISP Declaratory Ruling* that it has since 1983 treated enhanced service providers, of which ISPs are a subset, as end users under the access charge regime and

[31] Tr. at p. 121.

permitted them to purchase their links to the public switched telephone network through intrastate local business tariffs rather than through interstate access tariffs. The FCC specifically recognized that it has, by its actions in that regard, discharged its interstate regulatory obligations through the application of local business tariffs and has thus treated ISP-bound traffic as though it were local.[32]

We again emphasize that the prevailingly local treatments of ISP traffic detailed above were also in place at the time the interconnection agreements under review herein were entered. We thus conclude that the industry custom and usage at that time dictated that ISP traffic be treated as local and, therefore, subject to reciprocal compensation. We find that the treatment of ISP traffic as local was in fact so prevalent in the industry at that time that BellSouth, if it so intended, had an obligation to negate such local treatment in the interconnection agreements it entered by specifically delineating that ISP traffic was not to be treated as local traffic subject to the payment of reciprocal compensation. *See Loeb & Co., Inc. v. Martin*, 327 So.2d. 711 (Ala. 1976).

Also persuasive is the evidence of record demonstrating BellSouth's awareness of the 1989 decision of the Florida Public Service Commission wherein the Florida Commission held that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls.[33] BellSouth's knowledge of the *Florida Information Services Order* is particularly enlightening given the fact that BellSouth generally negotiates interconnection agreements on a region-wide basis. The existence of that decision strongly suggests that BellSouth was fully aware of the prevailingly local treatment afforded ISP traffic by industry usage and custom long before the interconnection agreements under review were negotiated and executed. If there was indeed no intention to encompass ISP traffic within the meaning of local traffic as BellSouth claims, it is reasonable to assume that BellSouth would have taken steps to specifically exclude ISP traffic from the definition of local traffic in light of the *Florida Information Services Order*.

Perhaps the most persuasive evidence that BellSouth did not intend to exclude calls to ISPs from the definition of local traffic when it entered the agreements under review is gleaned from the conspicuous absence of a mechanism to track, separate and exclude ISP traffic from the local billing records of the CLEC Petitioners/Intervenors. BellSouth was certainly in a position to know that such a mechanism would be necessary to segregate ISP traffic from local calls, yet no attempt was ever made to develop and incorporate such a mechanism. Ms. Strow of Intermedia pointed out that ISP calls are recorded as local calls and the CLECs are the only entities who can, with certainty, identify such traffic[34]. That claim is validated by the difficulty BellSouth has experienced in its recent efforts

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[32] *FCC's ISP Declaratory Ruling* at ¶23. *See* fn. 16 *supra*.

[33] *Id.* at fn. 24 *supra*.

[34] Tr. at pp. 481, 486-487.

to unilaterally identify ISP traffic for purposes of withholding reciprocal compensation for such disputed traffic.

Given the comprehensive nature of the interconnection agreements under review and the specificity with which they address virtually all interconnection issues, we find it difficult to fathom that BellSouth would not insist on a specific, itemized exception excluding ISP traffic from the definition of local traffic had that been its intention. The prevailingly local treatment afforded to ISP traffic by industry participants at the time the agreements under review were entered, and BellSouth's knowledge of that industry custom and usage, made it imperative that BellSouth specifically exclude calls to ISPs from the definition of local traffic subject to the payment of reciprocal compensation. Given the circumstances then existing, we find the absence of such a specific exclusion or exception to be persuasive of the fact that BellSouth did not intend to exclude ISP traffic from the definition of local traffic when it entered the agreements in question.

In conclusion, we find that with regard to the interconnection agreements BellSouth entered with ITC DeltaCom, KMC, Intermedia and e.spire, telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone service end user to the respective ISP end users of the effected CLEC Petitioners/Intervenors qualifies as local traffic which is subject to reciprocal compensation. Based on the discussion above, we find that BellSouth was clearly in a position to know that the exclusion of such traffic from the definition of local traffic for purposes of the payment of reciprocal compensation was a necessity. BellSouth did not, however, incorporate such an exclusion and is, therefore, in breach of the interconnection agreements with ITC DeltaCom, KMC, Intermedia and e.spire under which it has withheld reciprocal compensation for ISP traffic. Certainly, BellSouth's August 12, 1997 memorandum to all CLECs declaring BellSouth's position that ISP traffic was jurisdictionally interstate did nothing to incorporate an exception for ISP traffic into the interconnection agreements of ITC DeltaCom, KMC, Intermedia and e.spire. The Entirety Clauses contained in each of those agreements precludes such unilateral action.

We accordingly find that BellSouth must, within 20 days of the effective date of this order, pay all reciprocal compensation amounts withheld for ISP traffic under their interconnection agreements with ITC DeltaCom, KMC and Intermedia. BellSouth must also continue to pay such amounts for the duration of those interconnection agreements. Our conclusions in this regard would also apply to the interconnection agreement executed between BellSouth and e.spire but for the fact that those parties have submitted their reciprocal compensation disputes to arbitration.

We now turn to an analysis of the interconnection agreement between ICG and BellSouth which was approved by the Commission on November 17, 1997. As noted previously, that agreement has terms and conditions which notably deviate from those contained in the interconnection agreements of the remaining CLEC Petitioners/Intervenors. Although the definition of local traffic in that agreement as set forth at Part B of the General Terms and Conditions Section is substantially similar to the definition of local traffic in the agreements discussed above, the provisions of the ICG/BellSouth agreement which discuss the obligations of the parties with regard to reciprocal compensation are radically different. More particularly, the ICG/BellSouth interconnection agreement at Sections 8.1 and 8.2 of Attachment 3 provide as follows.

> 8.1 BellSouth shall provide for the mutual and reciprocal recovery of the costs of transporting and terminating local calls on its and ICG's network. The parties agree that charges for transporting and termination of calls on its respective networks are set forth in Attachment 11.
>
> 8.2 Interconnection with Enhanced Service Providers (ESPs). BellSouth will exempt traffic originated to and terminated by ESPs from the reciprocal compensation arrangements of this agreement. The parties acknowledge that the issue of compensation for ESP traffic is being addressed by the FCC. The parties agree to implement the final order addressing compensation or lack thereof for this traffic from the date this agreement is executed.

Section 8.2 above was, however, amended pursuant to the mutual agreement of ICG and BellSouth. The May 11, 1998 amendment modifying the language Section 8.2 of Attachment 3 states:

> Until the state Public Service Commission or the FCC determines, in a final and non-appealable order, as referenced in Section 16.4, whether enhanced service provider and information service provider traffic is within the definition of Local Traffic, this traffic will be held for payment until the jurisdiction of such traffic is determined, except as noted below. The Parties will adjust, if necessary, their mutual compensation billing for local traffic termination to reflect the FCC's or Commission's decision. The period of adjustment shall be from the effective date of the original agreement dated October 7, 1997, to the date the order of the FCC or Commission becomes final and non-appealable, as referenced in Section 16.4. BellSouth and ICG will, in the interim, pay for local non-ISP/ESP traffic as specified in Attachment 3. Both parties agree to provide for fair and equitable treatment under this agreement, and BellSouth will not knowingly discriminate against ICG for the payment of reciprocal compensation for all local traffic. In particular, if BellSouth knowingly pays any CLEC for ISP/ESP traffic prior to a final and non-appealable order, then BellSouth shall pay ICG for such traffic within ten days regardless of whether there is a final and non-appealable order.

Clearly, the agreement between BellSouth and ICG excludes ISP traffic from the reciprocal compensation obligations set forth in the document absent the occurrence of the conditions described in the amendment delineated above. With regard to the condition that payment of reciprocal compensation for enhanced service provider and information service provider traffic will be held for payment until the jurisdiction of such traffic is determined to be local in a final non-appealable order from this Commission or the FCC, we note that we are not herein issuing a policy determination that ISP traffic is jurisdictionally local. Such a generic policy determination appears to be necessary to trigger the condition of payment in the ICG/BellSouth amendment given the agreement between ICG and BellSouth to exclude ISP traffic from the reciprocal compensation obligations of the parties pending such a jurisdictional determination. Unlike the scenario with the other agreements under review, ICG and BellSouth specifically discussed the treatment of ISP traffic and agreed to exclude it from the payment of reciprocal compensation absent a determination that such traffic is jurisdictionally local.

We further note that the FCC's *ISP Declaratory Ruling* does establish as a matter of policy that ISP-bound traffic is jurisdictionally interstate. That finding by the FCC also appears to preclude the payment of reciprocal compensation for ISP traffic under the ICG/BellSouth agreement.

The other condition of payment delineated in the ICG/BellSouth amendment set forth above is triggered by BellSouth's "knowing" payment to any CLEC for ISP/ESP traffic *prior to a final and non-appealable order*. Clearly, if BellSouth "knowingly" pays reciprocal compensation to the other CLEC Petitioners/Intervenors for ISP traffic *prior to a final non-appealable order* from this Commission or the FCC, BellSouth must also pay ICG reciprocal compensation for such traffic.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That BellSouth Telecommunications, Inc. shall within 20 days of the effective date of this order, remit to ITC DeltaCom, Communications, Inc., KMC Telecommunications, Inc. and Intermedia Communications, Inc. any and all reciprocal compensation amounts withheld for ISP traffic. Reciprocal compensation for such traffic shall also be paid on a going forward basis so long as the interconnection agreements interpreted herein remain in effect. It is the Commission's understanding that e.spire Communications, Inc.'s reciprocal compensation claims against BellSouth are being addressed through independent arbitration proceedings.

IT IS FURTHER ORDERED BY THE COMMISSION, That with regard to the interconnection agreement between ICG Telecom Group, Inc. and BellSouth Telecommunications, Inc., ISP traffic is clearly excluded from the reciprocal compensation obligations of the parties. However, in the event that BellSouth "knowingly" pays any CLEC for internet service provider or enhanced service provider traffic prior to a final and non-appealable order of this Commission or the Federal Communications Commission, BellSouth shall within ten (10) days pay ICG for such traffic regardless of whether there is a final and non-appealable order.

IT IS FURTHER ORDERED, That jurisdiction in this cause is hereby retained for the issuance of any further orders as may appear just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 4th day of March, 1999.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan

Jim Sullivan, President

Jan Cook

Jan Cook, Commissioner

George C. Wallace

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr.

Walter L. Thomas, Jr., Secretary

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P.O. BOX 991
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3/14/1

J. M. SULLIVAN, PRESIDENT
JAN COOK, ASSOCIATE COMMISSIONER
GEORGE C. WALLACE, JR., ASSOCIATE COMMISSIONER

WALTER L. THOMAS, JR.
SECRETARY

IN RE: Emergency Petitions of ICG Telecom Group, Inc. and ITC DeltaCom Communications, Inc. for a Declaratory Ruling - Application of ICG Telecom Group, Inc. for Partial Reconsideration.

DOCKET 26619

ORDER

BY THE COMMISSION:

I. INTRODUCTION AND BACKGROUND

By Order entered on August 6, 1998, this consolidated proceeding was established to consider the separate petitions of ICG Telecom Group, Inc. (ICG) and ITC DeltaCom Communications, Inc. (ITC DeltaCom) for a Declaratory Ruling interpreting and enforcing certain terms of their respective interconnection agreements with BellSouth Telecommunications, Inc. (BellSouth). The contractual provisions which the Commission was requested to interpret addressed local traffic and the payment of reciprocal compensation for the exchange of such local traffic. Specifically at issue was the treatment of Internet Service Provider (ISP) traffic.

The Commission subsequently granted petitions to intervene in this proceeding from Intermedia Communications, Inc. (Intermedia); KMC Telecom, Inc. (KMC); e.spire Communications, Inc. (e.spire); and Hyperion Telecommunications, Inc. (Hyperion). With the exception of Hyperion, each of the aforementioned intervenors had, at the time of the September 3-4, 1998 hearings held in this cause, entered interconnection agreements with BellSouth which included terms and conditions similar to those being interpreted in the agreements which ITC DeltaCom and ICG had executed with BellSouth.

By Order entered in this cause on March 4, 1999, the Commission concluded with regard to the interconnection agreements which BellSouth entered with ITC DeltaCom, KMC, Intermedia and e.spire, that telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone service end user to the respective ISP end users of the affected CLEC Petitioner/Intervenors qualified as local traffic which was subject to the payment of reciprocal compensation. The Commission reasoned that although the interconnection agreements in question did not specifically address ISP traffic in the provisions defining local traffic or the reciprocal compensation obligations of the respective parties, BellSouth was clearly in a position to know that the exclusion of such traffic from the definition of local traffic for purposes of the payment of reciprocal compensation was a necessity. The Commission's conclusions in that regard were based predominantly on three factors which were found to be controlling: (1) all participants in the telecommunications industry afforded ISP traffic prevailingly local treatment at the time the interconnection agreements in question were entered; (2) BellSouth was aware of a ruling from at least one state Commission (the Florida PSC)[1] that ISP traffic was considered jurisdictionally local; and (3) the absence of a mechanism in the agreements to measure/segregate ISP traffic.

Based on the foregoing reasoning, BellSouth was ordered to pay ITC DeltaCom, KMC and Intermedia all reciprocal compensation amounts withheld for ISP traffic within twenty days of the effective date of the March 4, 1999 Order. The Commission noted that BellSouth and e.spire had submitted their reciprocal compensation dispute to binding arbitration and thus did not order BellSouth to remit payment to e.spire.

With respect to the interconnection agreement between ICG and BellSouth, the Commission concluded that said agreement had terms and conditions which notably deviated from those contained in the interconnection agreements of the remaining CLEC Petitioner/Interveners. Unlike the scenario with the other agreements under review, the Commission found that ICG and BellSouth had specifically discussed the treatment of ISP traffic during negotiations and had agreed to "exclude" it from the payment of reciprocal compensation absent a determination by this Commission or the Federal Communications Commission (FCC) that such traffic is jurisdictionally local. Since the Commission made it clear that it was not rendering such a generic jurisdictional determination, it was concluded that that condition of payment in the May 11, 1998 amendment executed between ICG and BellSouth had not been met. The Commission further noted that the FCC's finding in its

[1] *Investigation into the Statewide Offering of Access to the Local Network for Purposes of Providing Information Services*, Docket No. 880423-TP, Order (September 5, 1989, Florida PSC).

February 26, 1999 *ISP Declaratory Ruling*[2] that ISP traffic is jurisdictionally interstate appeared to preclude the payment of reciprocal compensation for ISP traffic under the BellSouth/ICG agreement.

The Commission also addressed the language in the May 11, 1999 amendment executed between ICG and BellSouth which established another condition of payment for ISP traffic. In particular, the Commission found that payment for ISP traffic would be triggered by BellSouth's "knowing" payment to any CLEC for ISP/ESP (Enhanced Service Provider) traffic *prior to a final and nonappealable Order* from this Commission or the FCC. The Commission accordingly ruled that BellSouth would not be required to pay ICG for ISP traffic pursuant to the May 11, 1998 amendment unless BellSouth paid any other CLEC *prior to* a final nonappealable Order from this Commission or the FCC.

II. <u>ICG's Application for Partial Reconsideration and the Responsive Motions Thereto</u>

On or about March 29, 1999, ICG filed an Application for Partial Reconsideration of the Commission's March 4, 1999 Order. ICG specifically requests in its Application that the Commission reverse its prior conclusion that ISP traffic is excluded from the reciprocal compensation obligations set forth in the interconnection agreement executed between BellSouth and ICG absent a determination from this Commission or the FCC that ISP traffic is jurisdictionally local. ICG alleges that payment for ISP inbound traffic under the BellSouth/ICG interconnection agreement does not turn on the jurisdictional characterization of such traffic, but is instead contingent on a finding that ISP traffic is within the agreement's definition of local traffic. ICG argues that a determination that ISP traffic is within the definition of local traffic is required by the language in its agreement with BellSouth which reflects the intention of the parties that ICG will be treated fairly and equitably as compared to other CLECs.

Consistent with the above reasoning, ICG further seeks a reversal of the Commission's prior conclusion that the findings of the FCC in its February 25, 1999, ISP Declaratory Ruling defining the jurisdictional status of ISP traffic as interstate appears to preclude the payment of reciprocal compensation for ISP traffic under the BellSouth/ICG agreement. ICG lastly seeks a

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[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. February 26, 1999) (FCC's *ISP Declaratory Ruling*). *Inter-Carrier Compensation for ISP bound traffic*, Notice of Proposed Rulemaking, CC Docket No. 99-68 (rel. February 26, 1999) (FCC's *ISP NPRM*).

reversal of the Commission's finding that BellSouth need only pay ICG for ISP inbound traffic if it pays any other CLEC *prior to* a final nonappealable Order from this Commission or the FCC.

In support of its Application for Partial Reconsideration, ICG argues that it expressly agreed with BellSouth that terminating ISP traffic payments were to be "held for payment" and not "excluded" from the reciprocal compensation obligations of the parties. ICG submitted a draft version of the May 11, 1998 amendment to the interconnection agreement between BellSouth and ICG which was eventually adopted. ~~According to ICG,~~ that draft version of the amendment reflects the intention of both parties to "hold" the terminating ISP traffic payments in accrual until the issue of reciprocal compensation for ISP traffic is decided by the FCC or this Commission.

In further support of its Application for Partial Reconsideration, ICG maintains that the May 11, 1998 amendment incorporates the express agreement of BellSouth and ICG that ICG will be treated "fairly and equitably" and on a "non-discriminatory basis" when compared to other CLECs. According to ICG, those provisions of the May 11, 1998 amendment promise "most favored nation" treatment to ICG.

ICG alleges that the draft version of the May 11, 1998 amendment which it submitted demonstrates that the language in the amendment stating that ICG will be paid by BellSouth if BellSouth knowingly pays another CLEC before a final non-appealable order was added later as a mere example of ICG's "most favored nation" treatment agreed to by BellSouth. ICG accordingly maintains that under the express intentions of BellSouth and ICG, ICG is to be paid ISP reciprocal compensation by BellSouth when any other CLEC is paid by BellSouth for such traffic.

On or about April 8, 1999 BellSouth filed a Motion to Strike ICG's Application for Partial Reconsideration. BellSouth argues that ICG's submission of "new" evidence was improper and that ICG's application should be stricken. More specifically, BellSouth argues that ICG did not, and cannot, meet the established requirements of Alabama Law for the submission of "new" evidence in support of a request for reconsideration.[3] BellSouth points out that the

[3] BellSouth cites Rule 59(e) of the Alabama Rules of Civil Procedure; *Tolin v. Kellogg Co.*, 546 So.2d. 385 (Ala. 1989); *Weeks v. Danford*, 603 So.2d 387 (Ala. 1992); and *Register Propane Gas Company, Inc. v. Thacker*, 685 So.2d (Ala. 1996) in support of its proposition.

parole evidence submitted by ICG was apparently available at the time of the hearings conducted in this cause, but was not introduced by ICG despite BellSouth's presentation of testimony concerning the negotiations between ICG and BellSouth.

BellSouth further argues that even if the "new" evidence submitted by BellSouth is accepted by the Commission, it does not give rise to arguments that were not already raised by ICG and considered by the Commission *prior* to ruling against ICG. BellSouth also points out that absent a finding by the Commission that the language in the May 11, 1998 amendment to the BellSouth/ICG interconnection agreement is ambiguous, the parole evidence submitted by ICG in support of its Application for Reconsideration is inadmissible, regardless of the timing of its attempted introduction.

On or about April 16, 1999, ICG submitted its Reply to BellSouth's Motion to Strike. ICG asserts that BellSouth incorrectly concludes that ICG is basing its Application for Partial Reconsideration solely on the "new" evidence presented with the Application. ICG maintains that its Application for Partial Reconsideration is in fact based on a number of other factors including existing testimony of record and the FCC's *ISP Declaratory Ruling* which was released well after the hearings in this matter were concluded.

ICG again asserts in its April 16, 1999 Reply that the Commission's ruling that ISP traffic is "excluded" from the reciprocal compensation obligations of the BellSouth/ICG agreement is inconsistent with the express provisions of the agreement as amended on May 11, 1998. According to ICG, it is clear from the May 11, 1998 amendment: (1) that inbound ISP traffic is not even presumptively "excluded" from compensation, but is merely "held for payment" pending a FCC or Commission decision, (2) that the issue of compensation for ISP traffic is to be decided based on whether inbound ISP traffic is within the agreement's definition of local traffic; and (3) that BellSouth will provide "fair and equitable" treatment and "will not knowingly discriminate against ICG for payment of reciprocal compensation for all local traffic" (i.e. "the most favored nation" treatment).

ICG contends that the inconsistency of the Commission's decision with regard to the aforementioned provisions of the BellSouth/ICG interconnection agreement constitutes clear legal error which is grounds for reconsideration independent of whether there is newly discovered evidence. ICG asserts that the evidence presented in its Application for Partial Reconsideration merely confirms that the Commission's interpretation of the agreement was mistaken. ICG also maintains in its April 16, 1999 Reply that the FCC's *ISP Declaratory Ruling* and the Commission's determinations with regard to the other CLEC agreements in its March 4, 1999 Order constitute intervening changes in controlling law that provide independent grounds for reconsideration of the Commission's decision regarding ICG's agreement.

On or about April 29, 1999, BellSouth submitted a Reply to ICG's Reply to the BellSouth Motion to Strike. BellSouth again argues in its Reply that ICG's Application for Partial Reconsideration is based on the introduction of "new" evidence which may not be introduced pursuant to Alabama Law. BellSouth alleges that ICG's claim that its Application for Partial Reconsideration is not based solely on that "new" evidence is undermined completely by ICG's repeated reliance on that "new" evidence throughout the remainder of its Reply to BellSouth's Motion to Strike. BellSouth also asserts that it would be inappropriate to consider either the Commission's March 4, 1999 Order or the FCC's February 26, 1999 *ISP Declaratory Ruling* as intervening legal events which justify the submission of "new" evidence through ICG's Application for Partial Reconsideration.

BellSouth points out that the contract negotiation issue that ICG claims became relevant as a result of the FCC's *ISP Declaratory Ruling* was a key issue in the proceedings from the outset and was explored in detail at the hearings. BellSouth notes that ICG filed rebuttal testimony concerning contract negotiations, had its negotiating witness available at the hearing, but made a voluntary, conscious decision not to present that witness's testimony at the hearing. BellSouth, therefore, alleges that it would be inequitable to now allow ICG to submit such evidence.

On May 5, 1999 ICG submitted a Rebuttal to BellSouth's April 29, 1999 Reply. ICG reiterates in that filing its previously raised legal arguments and attempts to bolster its prior arguments that public policy concerns dictate that its Application for Partial Reconsideration be granted. In particular, ICG maintains that its continued viability in Alabama will be threatened if it does not receive a favorable ruling on its Application for Partial Reconsideration.

III. DISCUSSION AND CONCLUSIONS

A. *Procedural Background*

In interpreting the agreements which ITC DeltaCom, KMC, e.spire and Intermedia executed with BellSouth, the Commission carefully analyzed each agreement's definition of local traffic as well as the provisions of each agreement which defined the reciprocal compensation obligations of the respective parties. The Commission found that the agreements in question were ambiguous given their silence concerning the specific treatment of ISP traffic. The Commission then considered all of the circumstances present at the time of the execution of those agreements in order to determine the intent of the parties. The Commission concluded that the parties to the agreements in question intended for ISP inbound traffic to be within the definition of local traffic for purposes of reciprocal compensation. More specifically, the Commission concluded that, based on the factors previously enumerated herein, BellSouth should have expressly excluded ISP traffic from the definition of local traffic or the reciprocal compensation provisions in each of the aforementioned agreements if it indeed intended for such traffic to be excluded for purposes of reciprocal compensation.

In interpreting the interconnection agreement executed between BellSouth and ICG, the Commission also focused on the agreement's definition of local traffic as well as the provisions of the agreement defining the reciprocal compensation obligations of the parties. That analysis revealed that the ICG agreement defined local traffic in a manner which was substantially similar to the manner in which the agreements the other CLECs entered with BellSouth defined that traffic. In applying the second prong of the analysis, however, it was noted that, unlike the agreements of the other CLECs, the provisions of the ICG agreement outlining the reciprocal compensation obligations of the parties specifically addressed ISP traffic. The testimony of record also indicated that the issue of the payment of reciprocal compensation for ISP inbound traffic was the topic of much discussion during the negotiations conducted between ICG and BellSouth.

Given the fact that the BellSouth/ICG agreement was not silent as to the treatment of ISP traffic but instead addressed it with some specificity, the Commission's premise for interpreting the agreements of ITC DeltaCom, KMC, e.spire and Intermedia and ruling in their favor was not present with regard to the interconnection agreement executed between ICG and BellSouth. The Commission found that, unlike the other CLEC Petitioner/Intervenors, ICG had agreed to "exclude" ISP traffic for purposes of the payment of reciprocal compensation, absent a determination that such traffic is jurisdictionally local. The Commission specifically noted that the conclusions reached in the March 4, 1999 Order regarding ISP traffic were not intended as such a generic jurisdictional determination that ISP traffic is local. The Commission went on to recognize, however, that the FCC had, in its *ISP Declaratory Ruling*, found that ISP traffic is jurisdictionally interstate. The Commission reasoned that these factors precluded payment under the provisions of the May 11, 1998 amendment executed between ICG and BellSouth which appeared to "exclude" payment for ISP traffic absent a finding by the Commission or the FCC that ISP traffic is jurisdictionally local.

The Commission also addressed the language in the May 11, 1998 amendment executed between ICG and BellSouth which requires BellSouth to pay ICG reciprocal compensation for ISP inbound traffic within ten days in the event that BellSouth knowingly pays any other CLEC *prior* to a final nonappealable Order from the FCC or this Commission. The Commission ordered BellSouth to adhere to that obligation in the event that it knowingly pays any CLEC for such traffic *prior* to such a final, nonappealable Order.

B. Summary of the Arguments Presented by ICG

As noted previously, ICG contends in its Application for Partial Reconsideration and its other supporting Motions that the Commission's finding that the May 11, 1998 amendment it executed with BellSouth "excludes" ISP traffic from the reciprocal compensation obligations of the parties absent a determination that such traffic is jurisdictionally local was in error. ICG alleges that the May 11, 1998 amendment does not "exclude" ISP traffic from the reciprocal compensation obligations of the parties at all, but merely directs that such traffic will be "held for payment" until the FCC or this Commission determines that such traffic is within the agreement's definition of local traffic.

ICG further argues that the Commission improperly interpreted the May 11, 1998 amendment's provisions addressing the obligations of the parties to treat each other equitably and precluding BellSouth from knowingly discriminating against ICG for the payment of reciprocal compensation. As noted previously, ICG claims those provisions of the May 11, 1998 amendment afford it "most favored nation" treatment by BellSouth. ICG alleges that said clause was not given due consideration by the Commission.

ICG's ultimate conclusion is that its "most favored nation" clause requires the Commission to find that ISP traffic is within the definition of local traffic pursuant to its agreement with BellSouth.' ICG alleges that given its "most favored nation" clause, the Commission's findings that ISP traffic was within the definition of local traffic in the agreements of the other CLECs which participated in the proceedings in this cause dictate an identical finding where ICG is concerned. ICG maintains that such a result is also required by equity and public policy concerns.

C. Summary of the Arguments Presented by BellSouth

BellSouth's primary arguments in opposition to ICG's Application for Partial Reconsideration center around the procedural irregularities associated with ICG's submission of supplemental evidence following the conclusion of the proceedings in this cause. BellSouth's arguments regarding the legal requirements for the submission of "new" evidence in support of a request for rehearing and the legal prerequisites for the submission of parole evidence in contractual interpretation disputes are well placed. It is, however, unnecessary for the Commission to become mired in the resolution of those procedural arguments given the fact that the Commission is in a position to render a determination on ICG's Application without reference to, or reliance on, the supplemental evidence submitted by ICG. In fact, the persuasive arguments presented by ICG in its pleadings center on contractual language and other matters which are already of record in this proceeding.

D. The Findings of the Commission Upon Reconsideration

As recognized in the March 4, 1999 Order entered in this cause, the Commission is bound by the rules of contractual interpretation as established by Alabama Case Law in its review and interpretation of interconnection agreements. Those well established rules dictate that contractual interpretation is guided first and foremost by the intentions of the parties. Absent any ambiguity in the contractual language being interpreted, the intentions of the parties are to be gleaned from the express terms of the contract under review. *Ryan Warranty Services, Inc. v. Welch*, 694 So.2d 1271, (Ala. 1997) *rehearing denied.*

Although the Commission did not specifically find in the March 4, 1999 Order entered in this cause that the May 11, 1998 amendment executed between ICG and BellSouth contained ambiguity, it is apparent from ICG's differing, but reasonable, interpretation of the terms of that amendment that said document is reasonably susceptible to more than one interpretation. As such, the agreement does contain ambiguity which requires further interpretation by the Commission. *U.S. for Use and Benefit of Capps v. Fidelity and Deposit Company of Maryland*, 875 F Supp. 603 (M.D. Ala. 1995).

In resolving the ambiguity in the amendment, the Commission must first look to the entirety of the agreement between ICG and BellSouth to determine the full intentions of the parties. Further, the various terms of the agreement must be construed *in pari materia* such that all terms of the contract under review are given effect. *Sullivan, Long & Haggerty v. Southern Electric Generating Co.*, 667 So.2d 722 (Ala. 1995).

In so construing the agreement, the Commission must strive to afford the contractual language under review a reasonable interpretation to the extent the language of the agreement permits such a construction. *American Farm Bureau Federation v. Alabama Farmers Federation*, 935 F.Supp. 1533 (M.D. Ala. 1996), *aff'd*, 121 F. 3d 723 (11th Cir. 1997). It is in fact the duty of the Commission to presume that the parties intended to make a reasonable contract rather than an unreasonable one. *Ex Parte Agee*, 669 So.2d 102, 105, *rehearing denied, on remand, Agee v. Moore*, 669 So 2d 106 (Ala. 1995).

After applying the aforementioned principles to the ICG/BellSouth agreement on reconsideration, it appears that the underlying intention of ICG and BellSouth in adopting the May 11, 1998 amendment to their interconnection agreement was to have the issue of whether reciprocal compensation payments must be made for ISP inbound traffic finally determined by this Commission or the FCC. Additionally, the "most favored nation" clause of that amendment indicates the intention of the parties to treat each other equitably where the issue of ISP traffic is concerned. BellSouth is in fact precluded by that language from discriminating against ICG where payment for ISP traffic is concerned.

Although it is clear that the parties placed great emphasis on the jurisdictional status of ISP traffic and likely thought the issue of payment for such traffic would ultimately be contingent on a finding that ISP inbound traffic is jurisdictionally local, a closer reading of all the applicable provisions of the May 11, 1998 amendment indicates that the jurisdictional determination was not necessarily intended to be the sole criteria for determining the issue of whether payment is due for ISP inbound traffic. ICG's "most favored nation" clause also addresses payment for ISP traffic and is much broader than it was previously interpreted to be. In particular, ICG's "most favored nation" treatment is not totally contingent upon BellSouth paying another CLEC for ISP traffic *prior* to a final, nonappealable order from this Commission or the FCC as the Commission's March 4, 1999 Order indicates.

The prevailing logic in the telecommunications industry at the time that the May 11, 1998 amendment was executed, was that the issue of payment of reciprocal compensation for ISP inbound traffic would turn on the jurisdictional characterization of such traffic as determined by this Commission or the FCC. The FCC indeed determined in its *ISP Declaratory Ruling* that ISP traffic is predominantly interstate in nature. In so ruling, however, the FCC emphasized that its jurisdictional determination was not dispositive of the issue of whether payment for ISP traffic must be made pursuant to the terms and condition of existing interconnection agreements.[4] The FCC recognized that some compensation mechanism should be developed for such traffic and instituted a proceeding to investigate the matter further.[5] The FCC also recognized that state Commission's have wide latitude to decide the issue of payment for ISP inbound traffic pursuant to existing interconnection agreements or through arbitrations.[6]

Based on the foregoing, it is apparent that the Commission failed to adequately consider ICG's "most favored nation" clause and incorrectly determined in the March 4, 1999 Order that the payment of reciprocal compensation for ISP under the BellSouth/ICG agreement was contingent upon the determination that such traffic is jurisdictionally local. It is also apparent that the Commission incorrectly concluded that the FCC's determination in its

[4] See FCC's *ISP Declaratory Ruling* at ¶1
[5] *Id* at ¶23.
[6] *Id* at ¶'s 24 and 26.

ISP Declaratory Ruling that such traffic is predominantly interstate precludes the payment of reciprocal compensation under the BellSouth/ICG agreement.

The Commission is essentially faced with the dilemma of adhering to the interpretation of the BellSouth/ICG agreement as set forth in the March 4, 1999 Order and thereby frustrating the intentions of the parties, or interpreting the agreement upon reconsideration in a manner that gives ICG's "most favored nation" clause the meaning it was intended to have. The rules of contractual interpretation dictate that the Commission must pursue the latter approach and give the "most favored nation" clause the weight and meaning which the parties intended for it to have. Without such an interpretation, the intention of the parties will be frustrated and ICG will not be at all compensated for the ISP traffic which it incurs expenses in terminating. Such an unreasonable result would be clearly contrary to the "most favored nation" clause of ICG's agreement, as well as the general principles of contractual interpretation.

In summary, it is clear upon further review of the evidence of record that ICG and BellSouth did not "exclude" ISP traffic from the reciprocal compensation obligations of the parties as originally concluded in the March 4, 1999 Order entered in this cause. We instead find upon reconsideration that ICG and BellSouth agreed in their May 11, 1998 amendment to "hold" such traffic until the entry of a final Order from the FCC or this Commission.

Although the Commission is still of the opinion that the first sentence of the May 11, 1998 amendment reflects the belief of BellSouth and ICG that their dispute would be resolved by a jurisdictional determination from this Commission or the FCC, the Commission should have recognized that such a dispositive jurisdictional determination was not provided by this Commission or the FCC. After coming to that determination, the Commission should have then proceeded to give ICG's "most favored nation" clause the weight and consideration it was intended to have. More specifically, since the Commission held that BellSouth was required to pay ITC DeltaCom, KMC and Intermedia any and all reciprocal compensation amounts withheld for ISP traffic, the Commission should have determined that ICG's "most favored nation" clause dictated that BellSouth must also pay ICG for such traffic.

Instead of focusing on the general provisions of ICG's "most favored nation" clause, however, the Commission incorrectly focused on the sentence following that clause which generally provides that if BellSouth "knowingly" pays any CLEC for ISP traffic *prior* to a final, nonappealable order from this Commission or the FCC, BellSouth will then pay ICG for such traffic. The general provisions of ICG's "most favored nation" clause are much broader than the terms of that following sentence. It is, therefore, clear that any payment by BellSouth of reciprocal compensation for ISP traffic will trigger payment to ICG regardless of whether such payment is made *prior* to a final, nonappealable order from this Commission or the FCC.

The Commission is fully aware that the issue of whether ISP traffic constitutes local traffic as opposed to interstate traffic for purposes of the reciprocal compensation provisions of the interconnection agreements BellSouth executed with ITC DeltaCom, ICG, KMC, Intermedia, e.spire and Hyperion is currently before the United States District Court for the Middle District of Alabama as part of BellSouth's appeal of the Commission's March 4, 1999 Order.[7] It does not, however, appear that the District Court has before it the issue of whether payment by BellSouth of reciprocal compensation for ISP traffic to ITC DeltaCom, KMC and Intermedia will also obligate BellSouth to pay ICG pursuant to the terms of ICG's "most favored nation" clause. No party to this proceeding has raised the argument that the Commission does not have jurisdiction to address ICG's Application for Partial Reconsideration and the Commission concludes that the actions taken herein are within said jurisdiction.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That the findings and conclusions set forth herein are hereby adopted.

IT IS FURTHER ORDERED BY THE COMMISSION, That based on the findings and conclusions adopted herein, ICG's Application for Partial Reconsideration of the Commission's March 4, 1999 Order entered in this cause is hereby granted as set forth herein.

IT IS FURTHER ORDERED BY THE COMMISSION, That consistent with the findings and conclusions adopted herein, we hold that ICG Telecom Group, Inc., (ICG) and BellSouth Telecommunications, Inc. (BellSouth) did not agree to "exclude" ISP traffic from the reciprocal compensation obligations of the parties; that the Federal Communications Commission's finding that ISP traffic is jurisdictionally interstate in its *ISP Declaratory Ruling* does not preclude BellSouth from paying ICG reciprocal compensation for ISP traffic; and that pursuant

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[7] *BellSouth Telecommunications, Inc. v. ITC DeltaCom Communications, Inc., et. al.* Civil Action 99-D-237-N

to ICG's "most favored nation" clause, BellSouth must in fact pay ICG reciprocal compensation for ISP traffic when it pays any carrier reciprocal compensation for such traffic.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders deemed just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 21-27 day of June, 1999.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan

Jim Sullivan, President

Jan Cook

Jan Cook, Commissioner

George C. Wallace

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L Thomas, Jr.

Walter L. Thomas, Jr., Secretary

Decision 99-06-088 June 24, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the matter of the petition by Pacific Bell (U 1001 C) for arbitration of an interconnection agreement with Pac-West Telecomm, Inc. (U 5266 C) pursuant to Section 256(b) of the Telecommunications Act of 1996.	Application 98-11-024 (Filed November 16, 1998)

OPINION

1. Summary

We affirm the results adopted in the Final Arbitrator's Report, and approve the resulting arbitrated Interconnection Agreement between Pacific Bell and Pac-West Telecomm, Inc. Parties shall each sign the adopted Interconnection Agreement, and shall file the signed Interconnection Agreement within 5 days of today. The proceeding is closed.

2. Background

Pacific Bell (Pacific or applicant) and Pac-West Telecomm, Inc., (Pac-West or respondent) entered into a Local Interconnection Agreement on March 15, 1996. By letter dated April 30, 1998, Pacific notified Pac-West that it was terminating the 1996 agreement, and was prepared to begin negotiations for a new Interconnection Agreement (Agreement).

Having failed to reach a new agreement by negotiation, on November 16, 1998, Pacific filed an application for arbitration pursuant to Section 252 of the

Telecommunications Act of 1996 (Act).[1] By letter dated December 2, 1998, applicant and Pac-West jointly stated their agreement that Pac-West's response could be delayed pending Commission consideration of a subsequent motion to dismiss.[2] They also agreed that the time period for a Commission decision under the Act would be extended from nine to ten months.[3]

On December 3, 1998, respondent filed a motion for immediate dismissal. On December 11, 1998, applicant filed a response in opposition to the motion. Also on December 11, 1998, respondent filed a reply to applicant's response.

An Initial Arbitration Meeting was held on December 21, 1998. By letter dated December 23, 1998, applicant and respondent jointly agreed to an additional delay in the filing of Pac-West's response, and a further extension of time from 10 to 11 months for a Commission decision under the Act.

On February 4, 1999, we denied respondent's motion for dismissal. (Decision (D.) 99-02-014.) Consistent with the agreed upon schedule, Pac-West filed its response on February 8, 1999. On February 17, 1999, parties jointly filed a revised statement of unresolved issues (also referred to herein as the issues matrix), and applicant served testimony in response to the issues raised by respondent. A total of 41 items were presented for arbitration within 22 specifically identified issues.

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[1] The caption submitted by applicant contains a typographical error. Arbitration is sought by applicant pursuant to Section 252(b), not Section 256(b), of the Act.

[2] All references to the Commission are to the California Public Utilities Commission. References to the Federal Communications Commission (FCC) are noted separately.

[3] The Act requires that arbitrations be completed by state commissions within nine months after the date on which the local exchange carrier receives a request for negotiation under the Act. (47 U.S.C. Section 252(b)(4)(C).)

Arbitration conferences and hearings were held on February 22, 23, 24, and 25, and March 4, 1999. On March 8, 1998, parties served a further revised statement of unresolved issues reflecting resolution of several issues. Briefs were filed on March 15, 1999, and the matter was submitted for preparation of the Draft Arbitrator's Report (DAR). As a result of resolution of many issues by parties over the course of the conferences and hearings, 15 items were finally presented for arbitration within 11 issues.

At the request of the Arbitrator, on March 16, 1999 applicant served a revised proposed Interconnection Agreement (Agreement) reflecting what it understood to be joint acceptance of all items except for the specific items wherein dueling clauses were presented in the statement of unresolved issues. On March 17, 1999, parties individually served a further revised statement of unresolved issues summarizing their support for each position.

By letter dated March 19, 1999, Pac-West stated that the Agreement provided by Pacific on March 16, 1999 contained many differences from what Pac-West understood to be the Agreement. By letter dated March 23, 1999, Pacific addressed the issues raised in Pac-West's March 19, 1999 letter, and provided a revised Agreement.

By letter dated March 24, 1999, Pac-West stated its disagreement with elements of Pacific's March 23, 1999 revised Agreement, particularly with regard to the price exhibits. At the Arbitrator's request, parties continued to seek resolution of their differences.

By conference call on March 30, 1999, parties stated their desire that the arbitration remain on the existing timeline, with the DAR issued on March 30, 1999. By letter dated March 30, 1999, parties confirmed their statements in the conference call "that both parties were unaware of any additional issues which will arise in this proceeding other than those contained in the Issues Matrix and the briefs." The DAR was filed and served on March 30, 1999.

By letter dated April 5, 1999 on behalf of both parties, Pac-West served a complete Agreement with dueling clauses. The April 5, 1999 Agreement resolved all issues raised in Pac-West's letters dated March 19, 1999, and March 24, 1999. Further, parties confirmed that the only issues to be arbitrated were those presented in the latest issues matrix.

Comments on the DAR were filed on April 9, 1999 by applicant, respondent and GTE California Incorporated. The Final Arbitrator's Report (FAR) was filed and served on April 23, 1999.

Pursuant to Rule 4.2.1,[4] on April 30, 1999, parties filed a complete Interconnection Agreement incorporating the arbitrated results. Concurrently, parties each filed a statement which identified the criteria in the Act and the Commission's Rules by which the negotiated and arbitrated portions of the Agreement are to be tested, stated whether the negotiated and arbitrated portions pass or fail those tests, and stated whether or not the Agreement should be approved or rejected by the Commission. By letters dated May 26, 1999, and letters dated or executed June 10, 1999, each party stated their agreement that a Commission decision under the Act could be extend a limited period beyond the May 27, 1999 Commission meeting.

3. Discussion

3.1 Negotiated Portions of Agreement

Section 252(e) of the Act provides that we may only reject an agreement (or portions thereof) adopted by negotiation if we find that the agreement (or

[4] Resolution ALJ-174, Revised Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996.

portions thereof) discriminates against a telecommunications carrier not a party to the agreement, or implementation of such agreement (or portion thereof) is not consistent with the public interest, convenience and necessity. No party or member of the public alleges that any negotiated portion of the Agreement should be rejected. We find nothing in any negotiated portion of the Agreement which results in discrimination against a telecommunications carrier not a party to the Agreement, nor which is inconsistent with the public interest, convenience and necessity.

3.2 Arbitrated Portions of Agreement

Section 252(e) of the Act, and our Rule 4.2.3, provide that we may only reject an agreement (or any portion thereof) adopted by arbitration if we find that the agreement does not meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC pursuant to Section 251, or the standards set forth in Section 252(d) of the Act.[5]

Fifteen items were presented for arbitration. In statements filed with the conformed Agreement, parties each state that the arbitrated outcomes do not violate the Act or Commission Rules with regard to 11 of the 15 items. That is, parties do not state that they agree with the arbitrated outcomes for the 11 items when their positions were not adopted. Parties continue to believe their position on each item should be adopted. Nonetheless, each party states that the 11 arbitrated outcomes do not meet a threshold test for rejection by the Commission under the Act and our Rules.[6]

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[5] Section 251 states interconnection standards. Section 252(d) identifies pricing standards.

[6] Pac-West qualifies its statement by saying that it does not waive its rights to contest the compliance of any of these provisions with the requirements of the Act in the event

Footnote continued on next page

Of the four remaining arbitrated outcomes, Pacific contends that three arbitrated outcomes that are contrary to Pacific's recommendations must be rejected: (1) the definition of local calls, (2) the definition of toll free service, and (3) whether local traffic which Pac-West delivers to its internet service provider (ISP) customers is subject to this agreement. These are arbitrated issues 1A, 1B, and 2. They are related and will be addressed together in the discussion below.

Pac-West argues that one arbitrated outcome contrary to its recommended position must be rejected. That item is arbitrated issue 3: the proper compensation to be paid to Pac-West for its termination of local traffic subject to the Agreement.

3.2.1 Definition of Local Traffic, Definition of Toll Free Service and Internet Service Provider Traffic (Issues 1A, 1B and 2)

Pacific argues that finding Pac-West ISP-bound traffic as local violates the Act, and that the arbitrated outcome must, therefore, be rejected. Pacific points out that Section 251(b)(5) of the Act specifies its duty to establish reciprocal compensation for the transport and termination of telecommunications, and that the FCC has concluded that this obligation applies only to traffic that originates and terminates within the local area. Pacific further states that the FCC's recent Declaratory Ruling (dated February 25, 1999) finds that ISP-bound traffic is not

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the FAR is not accepted in its entirety by the Commission. Pac-West asserts that its evaluation of compliance with the Act's requirements is totally premised on the interrelationship of these provisions with other provisions of the arbitrated Agreement. Modification of some provisions of the Agreement as mandated by the FAR can and would materially affect the business, financial, and operational implications of other provisions, according to Pac-West. Under such circumstances, Pac-West says one or more of the affected provisions could potentially be contrary to the requirements of the Act. (Pac-West's Statement dated April 30, 1999, page 9, footnote 6.)

local, is not separated into two distinct components, and must be viewed as one single communication.

We affirm the results of the arbitration. The first arbitrated issue is the definition of local calls (Issue 1A) and the definition of toll free service (Issue 1B). For the reasons stated by the Arbitrator, we find Pac-West's specifically proposed Agreement clauses more reasonable than those proposed by Pacific.

For example, Pacific proposes a definition of local calls that is inconsistent with Commission and industry practice. Further, Pacific's proposed definition is in conflict with a reasonable reading of Pacific's tariffs, as explained in both D.99-02-096 and the FAR. Similarly, Pacific proposes to apply a definition of toll-free service to ISP-bound calls that is inconsistent with the dialing pattern used for these calls, as well as the definition of a local call.

We reach the same conclusion with regard to the second arbitrated issue: whether local traffic delivered by Pac-West to its ISP customers is subject to this Agreement. While Pacific is right that the February 25, 1999 FCC Declaratory Ruling generally finds a call to an ISP is not composed of two parts but is one call, and that such calls are largely interstate, the FCC also states that it has a longtime policy of treating this traffic as local. (FAR, page 21, citing FCC Declaratory Ruling, paragraph 24.) Further, the FCC emphasizes that it has treated, and continues to treat, ISP-bound traffic as local for the purpose of exempting ISPs from access charges. (FAR, page 21, citing FCC Declaratory Ruling, paragraphs 16, 20, and 23.)

Moreover, the FCC states that state commissions may determine in arbitrations whether reciprocal compensation should apply, and that the fact that the FCC finds ISP-bound traffic to be largely interstate does not necessarily remove it from the negotiation and arbitration process of the Act. (FAR, page 21, citing FCC Declaratory Ruling, paragraph 25.) While the FCC states that arbitrated outcomes must be consistent with governing federal law, nothing about the result of this arbitration is inconsistent with governing federal law since the FCC itself says it "currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic." (FAR, page 21, citing from FCC Declaratory Ruling, paragraph 26.)

Finally, the FCC specifically says "nothing in this Declaratory Ruling precludes state commissions from determining...that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the [FCC's] rulemaking." (FAR, page 26, citing from FCC Declaratory Ruling, paragraph 27.)[7] We concur with the Arbitrator that continuation of reciprocal compensation is appropriate as an interim measure pending completion of further consideration by the FCC and this Commission.

We point out, however, that arbitrated issue 20 addresses modifications to the Agreement. Consistent with the arbitrated outcome of issue 20, the adopted Agreement must be amended without unreasonable delay as soon as the FCC and/or this Commission issue further decisions on treatment of ISP-bound traffic, inter-carrier compensation, and rating and routing.[8] Amendments to the adopted agreement must be submitted by advice letter. Approval of an advice letter will ensure that the resulting modification is consistent with FCC and Commission decisions. If found otherwise, the advice letter will be rejected, with

[7] The FCC's rulemaking on inter-carrier compensation was initiated on February 25, 1999, concurrently with adoption by the FCC of its Declaratory Ruling.

[8] The FCC will consider the matter further in its Notice of Proposed Rulemaking in CC 99-68, adopted February 25, 1999. The Commission will give further consideration to treatment of ISP-bound traffic in our decision addressing an application for rehearing of D.98-10-057, or another proceeding. The Commission will also consider proper treatment of routing, rating and inter-carrier compensation for ISP-bound traffic in Rulemaking 95-04-043 and Investigation 95-04-044 (local competition proceeding).

directions to parties regarding an appropriate amendment, to the extent reasonable.

Pacific contends that adoption of Pac-West's position on these threshold issues will transform Pac-West's unconventional service into the ordinary, including Pac-West's rating and routing practices which eliminate toll charges for long distance calls. According to Pacific, this would occur by all competitive local exchange carriers adopting these clauses from the Pacific/Pac-West Agreement under their "pick and choose" rights.[9] Pacific concludes that the adoption of Pac-West's position, even for the interim pending further FCC and Commission decisions, will create mischief, and be reckless, inequitable and unsound.

To the contrary, all interconnection agreements approved by this Commission require that they be brought into conformance with subsequent decisions of the Commission. Thus, even interim adoption of the clauses here by another carrier under their "pick and choose" rights will be subject to modification as, and when, appropriate. Moreover, all amendments to agreements (even those under "pick and choose") require approval before they become effective. We will not approve an amendment that adopts the Pac-West clauses without a clear statement that the amendment is subject to modification based on subsequent Commission action, as also required in the Pacific/Pac-West Agreement.

Pacific repeats other arguments addressed in the FAR. We do not repeat each argument, and the Arbitrator's resolution, here, but affirm the Arbitrator's conclusions as stated in the FAR.

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[9] 47 U.S.C. Section 252(i), and 47 C.F.R. Section 51.809.

3.2.2 Compensation

Pac-West states that the arbitrated outcome regarding compensation fails to meet the standards of the Act, and violates one or more Commission rules or regulation, and must, therefore, be rejected. We disagree, however, for all the reasons stated in the FAR.

For example, rates must be symmetrical unless proven otherwise by an appropriate cost study. Pac-West fails to prove rates should be asymmetrical. (FAR, pages 28-29, citing 47 C.F.R. Sections 51.711(a) and (b).)

Further, the reasonableness of asymmetrical rates must be proven by a cost study. Pac-West's study is based on the FCC's Hybrid Cost Proxy Model (HCPM). The model is a cost proxy model, not a cost model.

As part of the HCPM platform, Pac-West's study relies on the Hatfield & Associates, Inc. (HAI) switching and interoffice facilities modules, version 5. We reviewed, and soundly rejected, earlier versions of the HAI model. The evidence here is not convincing that the infirmities which led to our rejection of the HAI model have been adequately resolved.

The purpose of the HCPM is to estimate the costs of providing universal services support, and to develop universal services support payments, not the costs of call termination. As the FCC says, the HCPM produces "estimates...of providing the supported services" and "will serve as the foundation for determining the final universal service support payments," not call termination costs. (FAR, page 29, citing from the FCC Fifth Report and Order "In the Matter of Federal-State Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs" adopted October 22, 1998, paragraph 12.)

Further, the FCC does not say that the HCPM is appropriate for developing switch termination costs, or rates for the purpose of reciprocal compensation. In fact, the FCC says that where switching costs are important, a cost model to determine such costs would need more scrutiny. (FAR, page 30, citing FCC Fifth Report and Order, paragraph 75.)

FCC regulations require that the cost study used to justify asymmetrical rates be based on the network costs of the carrier other than the incumbent local exchange carrier (i.e., in this case, Pac-West). In contrast, the HCPM determines "costs on a wide scale basis," according to the FCC, not a carrier-specific basis. (FAR, page 30, citing from the FCC Fifth Report and Order, paragraph 12.)

Pac-West largely used default proxies when running the HCPM, including a default value for switch investment. Switch investment is one of the most critical items for determining termination costs. Pac-West has been in business for several years, and has experience buying switches. Pac-West's President testified that Pac-West is a rapidly growing company, and there is every reason to believe it plans to continue that growth. Pac-West is, therefore, in a reasonable position to determine its forward-looking switch investment cost. Pac-West's use of the proxy value is unreasonable here. Moreover, as explained in the FAR, where Pac-West sought to employ Pac-West specific input factors, not all were reasonable. (FAR, pages 30-31.)

For all these reasons, as well as others stated in the FAR, we believe Pac-West failed to justify asymmetrical rates. We find nothing about the arbitrated result on compensation that would justify its rejection. Therefore, we adopt the arbitrated outcome.

Pac-West recommends in its April 30, 1999 statement that the Commission require immediate implementation of Pacific's prices from the Open Access and Network Architecture Development (OANAD) proceeding (Rulemaking 93-04-003/Investigation 93-04-002). Pac-West makes this recommendation based on its understanding that the OANAD prices will be available before this decision. We decline to adopt Pac-West's recommendation given that the OANAD prices are not yet adopted and final. Nonetheless, as required by Resolution ALJ-174, the interim rates adopted herein must be revised on a going forward basis to mirror the rates adopted in the OANAD pricing decision when they are adopted.

3.3 Preservation of Authority

Section 252(e) of the Act, and our Rule 4.2.3, provide that nothing shall prohibit a state Commission from establishing or enforcing other requirements of state law in its review of an agreement, including compliance with intrastate telecommunications service quality standards, or other requirements of the Commission. Other than the matters addressed and disposed of above, no party or member of the public identifies any clause of the Agreement that potentially conflicts with any state law, including intrastate telecommunications service quality standards, or other requirements of the Commission, and we are aware of none.

4. Unforeseen Emergency

The Public Utilities Code, and our Rules of Practice and Procedure, generally require that proposed decisions be circulated to the public for comment, and the Commission not issue its decision any sooner than 30 days following the filing and service of the proposed decision.[10] On the other hand, the Act requires that the Commission reach its decision to approve or reject an

[10] See Pub. Util. Code §§ 311(d) and (g), and Rules 77 to 83 of the Commission's Rules of Practice and Procedure.

arbitrated agreement within 30 days after submission by parties.[11] This establishes a conflict.[12]

Pursuant to Rule 81, consideration of this decision qualifies as an "unforeseen emergency situation." An unforeseen emergency situation is one "that requires action or a decision by the Commission more quickly than would be permitted if advance publication were made on the regular meeting agenda." (Rule 81.) It qualifies as such because of a deadline "for Commission action imposed by legislative bodies..." (Rule 81(g).) Therefore, we consider and adopt this decision today on the basis of an unforeseen emergency.

5. Effective Date

The Agreement provides that it is effective upon approval by the Commission. We approve the Agreement today, but it is not yet signed by the parties. To avoid confusion about the effective date, the Agreement should be determined to be approved by the Commission on the date that the signed copy is filed with the Commission. Parties should sign the approved Agreement, and file it with the Commission, within 5 days from today.

Findings of Fact

1. On April 30, 1999, parties filed an arbitrated Agreement for Commission approval, along with statements whether or not the Agreement should be approved by the Commission.

2. The parties negotiated the entire Agreement, with the exception of 15 items presented for arbitration.

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[11] 47 U.S.C. Section 252(e)(4).

[12] See D.99-01-009 for a more thorough discussion and explanation.

3. No party or member of the public alleges that any negotiated portion of the Agreement must be rejected.

4. No negotiated portion of the Agreement results in discrimination against a telecommunications carrier not a party to the Agreement, or is inconsistent with the public interest, convenience and necessity.

5. In their April 30, 1999 statements, parties say that the arbitrated outcomes with regard to 11 of the 15 issues, even if different than the position of the party, do not meet a test in the Act or Commission Rules for rejection of the Agreement.

6. Pacific proposes a definition of local calls that is inconsistent with Commission and industry practice, and conflicts with a reasonable reading of Pacific's tariffs, as explained in both D.99-02-096 and the FAR.

7. Pacific proposes to apply a definition of toll-free service to ISP-bound calls that is inconsistent with the dialing pattern used for these calls, as well as the definition of local calls.

8. The FCC has a longtime policy of treating ISP-bound traffic as though it were local.

9. The FCC has treated, and continues to treat, ISP-bound traffic as though it were local for the purpose of exempting ISPs from access charges.

10. The FCC currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic.

11. Nothing about the result of this arbitration is inconsistent with governing federal law.

12. Nothing in the FCC's February 25, 1999 Declaratory Ruling precludes state commissions from determining that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the FCC's rulemaking.

13. Consistent with the arbitrated outcome of issue 20, the adopted Agreement must be amended without unreasonable delay as soon as the FCC and/or this Commission issue further decisions on treatment of ISP-bound traffic, inter-carrier compensation, and rating and routing.

14. All amendments to agreements (even those under "pick and choose") must be submitted by advice letter, and must be approved before they become effective.

15. Interconnection rates must be symmetrical unless proven otherwise by an appropriate cost study. (47 C.F.R. Section 51.711.)

16. FCC regulations require that the cost study used to justify asymmetrical rates be based on the network costs of the carrier other than the incumbent local exchange carrier (i.e., in this case, Pac-West).

17. Pac-West fails to prove rates should be asymmetrical.

18. The purpose of the HCPM (the model used by Pac-West for the call termination costs it seeks to be paid by Pacific) is to estimate the costs of providing universal services support, and to develop universal services support payments, not the costs of call termination.

19. The HCPM determines costs on a wide scale basis, not a carrier-specific basis.

20. Pac-West largely used default proxies when running the HCPM, including a default value for switch investment.

21. Switch investment is one of the most critical items for determining termination costs.

22. Pac-West has been in business for several years, and has experience buying switches.

23. Pac-West's President testified that Pac-West is a rapidly growing company, and it is reasonable to believe that Pac-West plans to continue to grow.

24. Pac-West is in a reasonable position to determine its forward-looking switch investment cost.

25. As required by Resolution ALJ-174, the interim rates adopted herein must be revised on a going forward basis to mirror the rates adopted in the OANAD pricing decision when they are adopted.

26. No arbitrated portion of the Agreement fails to meet the requirements of Act Section 251, including FCC regulations pursuant to Section 251, or the standards of Act Section 252(d).

27. No provision of the Agreement conflicts with State law, including compliance with interstate telecommunications service quality standards, or other requirements of the Commission.

28. The Act requires that the Commission approve or reject an arbitrated interconnection agreement within 30 days after the agreement is filed. (47 U.S.C. Section 252(e)(4).)

29. The Commission generally may not act on a proposed decision any sooner than 30 days after it is filed and served for public comment. (Pub. Util. Code §§ 311(d) and (g).)

30. The Commission's 30-day period before acting on a proposed decision may be reduced or waived in an unforeseen emergency situation. (Pub. Util. Code § 311(g)(2).)

31. An unforeseen emergency situation includes deadlines established for Commission action imposed by legislative bodies. (Rule 81(g).)

32. Parties in writing have agreed that the time requirement for a Commission decision under the Act may be extended a limited period beyond May 27, 1999.

Conclusions of Law

1. State commissions may determine in arbitrations whether reciprocal compensation should apply, and that the fact that the FCC finds ISP-bound

L/ngs

MAIL DATE
July 26, 1999

Decision 99-07-047 July 22, 1999

Before The Public Utilities Commission Of The State Of California

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

ORDER MODIFYING AND DENYING APPLICATIONS FOR REHEARING OF DECISION 98-10-057

INTRODUCTION

In Decision (D.) 98-10-057 the Commission affirmed its jurisdiction over telephone traffic between end users and Internet Service Providers (ISPs), and determined that such calls are subject to the bill-and-keep or reciprocal compensation provisions of applicable interconnection agreements.[1] The Decision was issued as a result of a motion filed by the California Telecommunications Coalition (Coalition)[2] regarding the jurisdictional status and billing treatment of

1 Under standard reciprocal compensation provisions of interconnection agreements, the cost of providing access for a customer's local call that originates from one local exchange carrier's network and terminates on another local exchange carrier's network is attributed to the carrier from which the call originated. (47 CFR §51.701(e), 51.703.) Such "local" calls are distinct from "long distance" calls which merely pass through interexchange switches and involve access charges rather than reciprocal compensation fees.

2 For purposes of the Motion, the Coalition consists of the following parties: ICG Telecom Group, Inc., Teleport Communications Group, Inc., MCI Telecommunications Corporation, Sprint Communications Co., L.P., Time Warner AxS of California, L.P., Teligent, Inc.,

telephone calls utilizing a local exchange number to access ISPs. The Coalition sought a Commission order affirming that calls delivered to ISPs should be treated as local calls, under Commission jurisdiction, and subject to the reciprocal compensation provisions of applicable interconnection agreements.

GTE California Inc. (GTEC) and Pacific Bell (Applicants) have filed applications for rehearing of this Decision. Responses were filed by Pac-West Telecomm, Inc. (Pac-West) and the Coalition.[3] Both Applicants allege the Commission misapplied federal law in concluding that ISP-bound traffic is local and therefore subject to reciprocal compensation. Pacific raises the argument that several findings of the Decision are not supported by adequate evidence. Pacific also asserts that the Decision is "internally inconsistent" as well as inconsistent with a prior Commission decision. Finally, Pacific argues that the Commission violated the Federal Telecommunications Act of 1996 (Act) and acted in excess of its authority in purporting to change Pacific's local calling areas and in revising numerous interconnection agreements without evidence. Pacific also has requested oral argument on all of the issues presented in its application for rehearing. GTEC also argues that it would be error for the Commission to implement the Decision until a complete record on the unique one-way flow and costs of Internet traffic is established.

DISCUSSION

A. Request for Oral Argument

Pacific requests oral argument on *all* issues raised in its application for rehearing, on the basis that "the application raises issues of 'major significance for the Commission.'" While some of the issues raised in Pacific's application are

California Cable Television Association, and Brooks Fiber Communications.

[3] For purposes of the Response to Pacific's Application for Rehearing, the Coalition consists of: ICG Telecom Group, Inc., MCI Worldcom, Inc., California Cable Television Association, Sprint

of significance, Pacific fails to demonstrate that oral argument will materially assist the Commission in resolving the application. As such, Pacific's request does not meet the requirements for oral argument as set forth in Rule 86.3 of the Commission's Rules of Practice and Procedure. We received extensive and thorough briefs from several parties addressing the issues raised in Pacific's application. We find the briefs are sufficient in assisting the Commission in resolving the applications for rehearing. We also find that oral argument would produce further delay in this proceeding, and we note that other proceedings before this Commission are awaiting our decision in this matter. For the above reasons, the Commission denies Pacific's request for oral argument. (Rule 86.5.)

B. The Commission Did Not Err in Treating ISP-bound Traffic as Local for Purposes of Inter-carrier Compensation Provisions of Interconnection Agreements

We will first address the issue of treating ISP-bound calls as local for the purpose of reciprocal compensation. In our Decision, we noted that reciprocal compensation provisions of interconnection agreements only apply to local communications. In order to determine whether ISP traffic was defined as local or interstate, we looked at whether the network of computer systems comprising the Internet can properly be characterized as a telecommunications network for purposes of measuring the termination point of a telephone call to access the Internet through an ISP. In resolving this question, we analyzed a string of FCC cases and orders regarding the treatment of Internet traffic. We noted for example that the FCC defined telecommunications access to the Internet as being distinctly different from telecommunications access for interstate long-distance calls. (Decision, p. 9.) We cited to one FCC Report and Order in which the FCC concluded that "Internet access consists of more than one component." (Decision,

Communications Co., L.P., and Time Warner Telecom of California, L.P.

p. 9, citing FCC's Report and Order In Re Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776 (Released May 8, 1997) ¶ 83.) We further noted that the FCC had found that "Internet access services are appropriately classified as information, rather than telecommunications, services,"[4] and that the FCC affirmed that the categories of "telecommunications service" and "information service" are mutually exclusive. (Decision, p. 9.) Based on our review of these FCC cases and other authorities, we concluded that service to an ISP which thereafter connects to the Internet constitutes two separate components, the first a telecommunications service which "terminates" at the ISP's modem, and a second component characterized as an information service which consists of the transmission of data beyond the ISP modem. (This is referred to as the "two-call" or "two-component" theory.) In the discussion portion of the Decision, we stated that "the relevant determinant as to whether ISP traffic is intrastate is the distance from the end user originating the call to the ISP modem. If this distance is within a single local calling area, then we conclude that such call is a local call, and subject to this Commission's jurisdiction." (D.98-10-057, p. 12.)

Both Applicants point to an FCC Order in GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148, FCC 98-292, Memorandum Opinion and Order, Oct. 30, 1998 (GTE Order), issued shortly after this Commission issued D.98-10-057. Pacific and GTEC argue that in the GTE Order, the FCC unequivocally rejects the "two-call" theory which grounds the Decision's reciprocal compensation rationale. In the GTE Order, the FCC ruled that GTE's proposed DSL Solutions-ADSL Service (ADSL service) is a mixed use special access which is mostly interstate and thus properly tariffed at the federal

[4] D.98-10-057, p. 9, citing Report to Congress in re Federal-State Joint Bd. On Universal Service, FCC 98-67 at ¶ 73 (Released April 10, 1998).

level.[5] (GTE Order ¶¶ 25-26.) The Applicants argue that many of the arguments relied on in the Decision concerning the jurisdictional nature of ISP traffic were rejected in the FCC's GTE Order. The FCC rejected the argument, for example, that ISP-bound traffic must be separated into an intrastate telecommunications service provided by the LEC and an interstate service provided by the ISP. (GTE Order ¶ 12.) The FCC relied on Petition for Emergency Relief and Declaratory Ruling Filed by Bellsouth Corp. (Memory Call), 7 FCC Rcd 1619 (1992), Teleconnect Co. v. Bell Tel. Co. of Penn. Et al., 10 FCC Rcd 1626 (1995), and other authorities to find that Internet communications "do not terminate at the ISP's local server, as some competitive LECs and ISPs contend, but continue to the ultimate destination or destinations." (GTE Order ¶ 19.) The applicants argue that since the FCC unequivocally rejected the "two-call theory" that is the foundation of our Decision, and found that calls to ISPs are jurisdictionally interstate, this Commission can no longer require these calls be subject to reciprocal compensation provisions of applicable interconnection agreements.

Although our jurisdictional analysis regarding ISP traffic is inconsistent with the FCC's order, we disagree that the GTE Order compels a reversal of our decision to treat ISP-bound calls as local for purposes of reciprocal compensation provisions of applicable interconnection agreements. In the GTE Order, the FCC recognized that reciprocal compensation, as applied to Internet calls, was not at issue. The FCC emphasized in its GTE Order that it decided only the issue of "GTE's federal tariff for ADSL service, which provides specifically for a dedicated connection, rather than a circuit-switched, dial-up connection, to ISPs and potentially other locations." (GTE Order ¶ 2) The FCC specifically

[5] ADSL service permits ISPs to provide end users with high-speed access to the Internet, using a combination of the local telephone plant and specialized equipment at the wire center. The end user connects to the ISP's point of presence (POP), and from there, the communication travels on to the Internet. ADSL involves a dedicated, rather than a dial-up, connection to the ISP's POP.

noted that the scope of its holding excluded the type of issue addressed in our Decision:

> This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs. [Footnote omitted.] Unlike GTE's ADSL tariff, the reciprocal compensation controversy implicates: the applicability of the separate body of Commission rules and policies relating to inter-carrier compensation when more than one local exchange carrier transmits a call from an end user to an ISP, and the applicability of interconnection agreements under sections 251 and 252 of the Communications Act, as amended by the Telecommunications Act of 1996, entered into by incumbent LECs and competitive LECs that state commissions have found, in arbitration, to include such traffic. Because of these considerations, we find that this Order does not, and cannot, determine whether reciprocal compensation is owed, on either a retrospective or a prospective basis, pursuant to existing interconnection agreements, state arbitration decision, and federal court decisions. (GTE Order ¶ 2).

Since the GTE Order relates specifically to GTE's ADSL offering, which is distinguishable from dial-up Internet access addressed in our Decision, and since the FCC explicitly declared that its GTE Order does not determine whether reciprocal compensation is owed for traffic delivered to ISPs, we find that the FCC's GTE Order does not establish legal error in or compel a reversal of our Decision as the Applicants contend. However, the FCC stated in its GTE Order that it would issue a separate order specifically addressing reciprocal compensation issues. On February 25, 1999, the FCC adopted <u>Implementation of the Local</u>

Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 98-68, Feb. 25, 1999 (Declaratory Ruling).

In the Declaratory Ruling, the FCC similarly states that for jurisdictional purposes, ISP-bound traffic should be analyzed on an end-to-end basis, rather than by breaking the traffic into component parts. The FCC stated that the communications at issue do not terminate at the ISP's local server, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state. (Declaratory Ruling ¶ 12.) The FCC noted that while it has previously distinguished between the "telecommunications component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to universal service, and while the FCC concluded that ISPs do not appear to offer "telecommunications service" and thus are not "telecommunications carriers", it has never found that "telecommunications" end where "enhanced" service begins. (Id., ¶ 13.) The FCC's ISP Order finds that while ISP-bound traffic is "jurisdictionally mixed," it appears to be "largely interstate." The FCC rejects the two-component theory for calls to ISPs, applies a one-communication theory, and finds that the reciprocal compensation requirement of Section 251(b)(5) of the Act does not govern inter-carrier compensation for ISP-bound traffic.[6]

Since the FCC makes many of the same findings and arguments regarding the jurisdictional nature of dial-up ISP traffic as it did in its GTE Order, we can evaluate many of the Applicants' allegations of legal error in light of the Declaratory Ruling. Pacific and GTEC both contend that since D.98-10-057 is based on a two-call theory it can no longer be followed. Rather, as a result of the

[6] FCC Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, adopted February 25, 1999.

FCC's GTE Order, Pacific argues that calls to ISPs must now be understood as non-local interstate calls, and that reciprocal compensation requirements cannot be mandated. Pacific concludes that ISP traffic cannot be subject to reciprocal compensation and, as interstate traffic, meet point billing as a minimum is appropriate. GTEC likewise argues that since the Commission's application of FCC precedent is inconsistent with the FCC's jurisdictional analysis, the Decision must be reversed.

Although our jurisdictional analysis is inconsistent with the FCC's Declaratory Ruling, the FCC's ruling does not require a different result with respect to our decision to treat ISP-bound calls as local for purposes of reciprocal compensation. As the FCC explicitly stated, the conclusion that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate "does not in itself determine whether reciprocal compensation is due in any particular instance." (Declaratory Ruling ¶1.) Moreover, the FCC stated that its determination that a portion of dial-up ISP-bound traffic is interstate is not dispositive of interconnection disputes currently before state commissions. (Id., ¶ 20.)

The FCC makes it abundantly clear that it does not intend to preempt or interfere with any state commission decision regarding compensation for ISP-bound traffic. Contrary to the assertions of Pacific and GTEC, the FCC has not asserted exclusive jurisdiction over inter-carrier compensation for all ISP-bound traffic. (Declaratory Ruling, Footnote 73.) The FCC declared that: "Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic." (Id., ¶ 28.)

Neither the FCC's GTE Order or Declaratory Ruling contain any statement that the FCC has decided to terminate the "shared jurisdiction" approach that it has taken to date with respect to state jurisdiction over certain aspects of Internet-related services. The FCC did not reach the conclusion that Internet traffic is wholly interstate and that state regulatory commissions had no authority to determine whether reciprocal compensation applied to ISP-bound calls in their respective states. To the contrary, the FCC acknowledged that some of this traffic may be intrastate. (Declaratory Ruling ¶ 18.) The FCC might have declared all state commission decisions, either issued generically or in arbitrations, as invalid and directed this traffic to be treated as strictly interstate and excluded from reciprocal compensation. The FCC did not take this approach. Instead, the FCC stated that it would not interfere with state commission decisions on this issue. (Id., ¶¶ 21, 27.)

Until the FCC establishes a new regime for inter-carrier compensation for these calls, state commissions remain free to determine what, if any, intercarrier compensation should be paid for the delivery of such ISP traffic. (Id., ¶ 7.) The only limitation is that such a state determination must not conflict with federal law. As the FCC noted in its Declaratory Ruling, there currently is no federal rule addressing this issue, and accordingly found "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism." (Id., ¶ 21.) Thus, the FCC's Declaratory Ruling expressly preserves the authority of state commissions to determine an appropriate compensation mechanism for ISP-bound traffic.

In our Decision, we recognized that "even where interstate services are jurisdictionally mixed with intrastate services and facilities otherwise regulated by the states, the FCC has ruled that state regulation of the intrastate service will not be preempted unless it thwarts or impedes a valid federal policy." (D.98-10-057, at 20.) As we noted in our Decision, and as the FCC noted in its Declaratory Ruling, there is no federal rule or regulation on this matter which would be affected by our Decision. Quite the contrary, the FCC explicitly stated "a state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding – or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic." (Declaratory Ruling ¶ 26.) In fact, in a footnote to that statement, the FCC states: "As noted, in other contexts we have directed states to treat such traffic as local." (Id., Footnote 88.) Furthermore, the FCC emphasizes that it has treated, and continues to treat, ISP-bound traffic as local for the purpose of exempting ISPs from access charges. (Id., ¶ 23.)

Pacific and GTEC argue that, under current governing federal law, they cannot be required to pay reciprocal compensation for termination. To the contrary, the FCC explicitly recognized that it has had a longstanding policy of treating this traffic as local and that reciprocal compensation may be an appropriate compensation mechanism for ISP-bound traffic:

> While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic. (Id., ¶ 25.)

At this point, reciprocal compensation has not been eliminated as a compensation option by the FCC. State commissions may continue to treat this traffic as local and find that this traffic is subject to reciprocal compensation provisions of interconnection agreements, pending further action by the FCC.

The FCC's Declaratory Ruling acknowledges that state commissions may have reached different positions as to the nature and jurisdiction of ISP-bound traffic:

> We recognize that our conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent those

> conclusions are based on a finding that this traffic terminates at an ISP server, but nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below. (Id., ¶ 27.)

Although we did reach a different position on the jurisdictional nature of ISP-bound traffic, we nonetheless have reached a legally sustainable result. Our determination that reciprocal compensation provisions of applicable interconnection agreements should apply to the termination of this traffic does not rest on the "two-call" theory which has been rejected by the FCC. Our Decision addressed two separate issues: the jurisdictional nature of Internet communications, and the proper treatment of ISP-bound calls for purposes of reciprocal compensation provisions of interconnection agreements. In an analysis independent of our jurisdictional determination, we found that reciprocal compensation provisions of applicable interconnection agreements applied to ISP-bound traffic in California.

As discussed in the Decision, the parties to the interconnection agreements which are subject to reciprocal compensation for local calls voluntarily agreed to such a provision. We found no legal reason for treating calls to ISPs differently than other local calls. The FCC's Declaratory Ruling does not change this result: "We acknowledge that, no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network." (Declaratory Ruling ¶ 29.) "[W]e note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." (Id., ¶ 25.) Our determination that this traffic should be treated as local for reciprocal compensation purposes is consonant with the FCC's Declaratory Ruling:

> The telecommunications network functions that are required to terminate ISP traffic are no different from the functions required to terminate local calls of any other end user. The CLCs incur costs to terminate calls to ISPs just as they do for other calls. Likewise, the ILEC is relieved of the burden of terminating such traffic. We find no legal basis for treating ISP traffic differently from the traffic of any other similarly situated end users. (D.98-10-057, at 17.)

We recognized that the CLCs perform a necessary function in terminating ISP traffic, thus enabling the communication to be completed. We further stated, "Absent a compensation agreement, the CLC terminating the ILEC customer's call receives no compensation for its termination. It is therefore equitable that the CLC be compensated through termination fees applicable to local calls." (D.98-10-057, at 18.) Finally, we noted in the Decision that treating ISP traffic as local is consistent with the manner in which such traffic has been treated in interconnection agreements historically prior to the recent change initiated by Pacific in questioning the validity of such treatment. (Id., at 19.)

As noted above, the FCC Ruling states that while reciprocal compensation is not compelled by the Act, other equitable or legal considerations may suggest that compensation is due for this traffic. (Declaratory Ruling ¶ 27.) In our Decision, considerations other than the mere fact that these calls are local governed our decision that this traffic be subject to reciprocal compensation provisions of applicable interconnection agreements. As explained above, other legal and equitable considerations provide a foundation for our Decision. The Decision will be modified to add additional findings to reflect this rationale. As such, there is no need to revisit our Decision on this issue. We conclude that, although our jurisdictional analysis is inconsistent with the FCC's analysis, the Applicants have not demonstrated legal error in our construction of interconnection agreements as requiring the payment of compensation to CLCs for terminating ISP-bound traffic.

C. The Decision's Findings Are Adequate and Supported by the Record

We now turn to Pacific's arguments that the Decision and its findings are not supported by any record. Pacific claims that the Decision contains findings which have no basis in any record evidence. Pacific further argues that the Commission relied on materials outside the record in reaching its decision. Specifically, Pacific points to Findings of Fact Nos. 4, 10, 11, 13, and 14, claiming that there were no evidentiary hearings to create a factual record for these findings, and there is no evidentiary record that otherwise provides any basis for these findings.

We disagree with Pacific's presumption that evidentiary hearings were necessary prior to the issuance of this Decision. Pacific's assertion is based on a misunderstanding of the record in a rulemaking proceeding like this one, where the Commission exercises its legislative authority. Under the Commission's quasi-legislative authority, it has discretion to grant a hearing or issue regulations without full evidentiary hearings. In a rulemaking proceeding under the Commission's Rules of Practice and Procedure, "written proposals, comments, or exceptions are used instead of evidentiary hearings." (Rule 14.1.) Where, as in this case, proceedings are appropriately characterized as legislative in nature, the California Supreme Court has held that evidentiary hearings are not required. (See, Wood v. Public Utilities Commission (1971) 4 Cal.3d 288, 292.) In such instances, the requirements are purely statutory and the agency is not circumscribed by the concept of due process or other restrictions applicable to judicial or quasi-judicial adversary proceedings.

The Commission received extensive comments from the parties on the issues addressed in the Decision. We arrived at many of the conclusions in this Decision based on a combination of information provided in written submissions, our individual and institutional experience, general information, and common sense. (See, Re Tariff Filing Rules for Telecommunications Utilities, Other than Local Exchange Carriers and AT&T-C [D.93-05-010] 49 C.P.U.C.2d 197, 201 (1993).) To say that there is no record evidence in this case ignores the fact that this is a rulemaking proceeding where the record is developed through written submissions. The Commission has a more than ample and sufficient record for its decision in the comments that it received from the parties.

As the Commission acted under its legislative authority when it adopted D.98-10-057, it is appropriate to judge its findings in that context. When an agency acts under its quasi-legislative authority, the California Supreme Court has stated, "[n]ot only does the 'finding' of such 'facts' belong to the quasi-legislative function, the 'facts' 'found' must themselves be viewed as quasi-legislative in nature. All are informed with legal, policy, and technical considerations.... Consequently, none is similar to the sort of 'historical or physical facts' ...typically found in the course of administrative adjudication." (20th Century Ins. Co. v. Garamendi (1994) 8 Cal.4th 216, 278 n12.) Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion. (Western Oil & Gas Assn. V. State Lands Comm. (1980) 105 Cal.App.3d 554, 564, quoting Davis, Administrative Law Treatise (1958) § 7.02, p. 423.)

The findings of fact Pacific complains of are the types of general facts that help the Commission decide questions of law and policy. The reasoning that led the Commission to each fact is clearly set forth in the decision. Finding of

Fact No. 4,[7] for example, was culled from a discussions in the comments of the parties and the Decision concerning prior FCC cases which classified various elements of access to the Internet via ISPs as information or telecommunications services. (See, Decision, pp. 8-12.) The fact that "no party presented any factual or technical evidence concerning either telecommunications or computer networks" is irrelevant and unnecessary to this finding. Likewise, Pacific argues that Finding No. 13 was made without record evidence concerning what telecommunications network functions are required to terminate ISP traffic, whether any such functions are performed by Pacific Bell or CLECs, or whether those functions are the same or different than required to terminate other calls. Finding of Fact No. 13 states: "The telecommunications network functions that are required to terminate ISP traffic are no different from the functions required to terminate local calls of any other end user." Again, we find that our general expertise and knowledge of the telecommunications industry, as well as the written submissions of the parties provides a sufficient basis for this finding. Moreover, Pacific makes no showing that this finding is in any way incorrect.

Finding of Fact 14 states: "The fact that ISP traffic flows predominantly in one direction does not negate the costs involved in terminating traffic." Pacific argues that this finding was made without evidence regarding CLCs' costs involved in terminating ISP traffic. GTEC similarly argues that it would be an error for this Commission to implement D.98-10-057 until a complete record on the unique one-way flow and costs of Internet traffic were established. GTEC provides no analysis of its own as to why it thinks such a record is necessary. Instead it cites the following passage from a draft alternate decision:

[7] Finding of Fact No. 4 states: "ISP service is composed of two discrete elements, one being a telecommunications service by which the end user connects to the ISP modem through a local call, the second being an information service by which the ISP converts the customer's analog messages into data packets which are individually routed through the modem to host computer networks located throughout the world."

> In setting our policy regarding paging companies, the Commission carefully considered the imbalance of traffic flow and the unique costs associated with paging traffic. In sharp contrast to this considered step, we know of no record in the arbitrated interconnection agreements between ILECs and CLCs that either directly addressed the imbalance in ISP traffic flow or any special pricing/costing characteristics associated with this type of communication.

GTEC apparently draws a parallel between ISP-bound traffic and paging traffic in making its assertion that a record is required on the flow and costs of ISP-bound traffic. In determining that paging companies were entitled to reciprocal compensation for the termination of paging traffic, the Commission did consider the imbalance of traffic flow and unique costs associated with paging traffic. However, this imbalance was a result of the fact that LECs and paging providers employ different technologies. One-way paging customers could not originate telecommunications on the paging company's network which would terminate on a LEC's network. That is not the same situation as in the case of ISP-bound traffic. As we noted in our Decision:

> The imbalance of ISP traffic flow merely reflects the fact that the vast majority of telephone customers still are served by an ILEC and thus, most calls will originate with ILEC customers....[T]he obligation for reciprocal compensation applies to all carriers, not just to the ILECs. Thus, where calls are originated by CLC customers and terminated by an ILEC to its own ISP customer, the CLC must pay termination fees to the ILEC on whose network the call was terminated. (D.98-10-057, at 17-18.)

Finding of Fact No. 14 states that the fact that such calls flow predominantly in one direction does not negate the costs involved in terminating traffic, nor justify denying carriers compensation for the termination of local calls to which they are otherwise entitled. The actual costs incurred is irrelevant to this determination. The U.S. District Court for the Northern District of California agrees: "Nothing in the statute's [referring to the Telecommunications Act of 1996] language indicates that such compensation agreements are not required if a disproportionate number of calls will originate with the facilities of one carrier or if no calls will originate with those of the other carrier." (Pacific Bell v. Cook Telecom, Inc., et al., No. C97-03990, 1998 U.S. Dist. LEXIS 14430, at *18 (U.S.D.C. Sept. 3, 1998).)

We find that the record is sufficient to support our Decision in this case. Applicants' arguments are merely a distraction from one of the real underlying issues in this case: that ILECs should be bound by their agreement to pay reciprocal compensation for local calls, which historically included ISP-bound calls prior to the recent change initiated by Pacific in questioning the validity of such treatment. The recent FCC Declaratory Ruling certainly affirms the validity of treating ISP-bound traffic as local for purposes of inter-carrier compensation arrangements. We accordingly find the Applicants' arguments without merit.

Pacific also raises several arguments concerning Findings of Fact 10 and 11, including the claim that these findings were made without any evidence concerning any CLC or ISP network in California as to the location of ISP modems, and the potential abuse or misuse of the assignment of numbers. Finding of Fact No. 10 states: "The relevant determinant of whether ISP traffic is intrastate is the whether between (sic) the rate centers associated with the telephone number of an end user originating the call and the telephone number at the ISP modem where the call is terminated are both intrastate." We find that in light of the FCC's Declaratory Ruling, which found ISP-bound traffic to be largely interstate, this Finding of Fact could and should be deleted. Therefore, Pacific's argument concerning this finding is moot. We address Pacific's other arguments concerning Finding of Fact No. 11 below.

Finally we address Pacific's argument that the Commission relied on matters that were not part of the record in issuing the Decision. First, Pacific points to a statement made in Commissioner Knight's concurring opinion: "[n]umerous technical arguments had been made on both sides to define why use of the Internet is or is not like any phone call." Pacific argues that there are no such technical arguments anywhere in the record. Pacific further contends that Commissioner Knight based part of his discussion on an ex parte communication by Bank of America. Pacific specifically notes Commissioner Knight's assertion that the Decision provides "certainty for the CLECs "who have invested millions of dollars in networks to terminate calls" and for the investment community backing the CLECs that relied upon the contractual arrangements that the Commission approved. Pacific argues that these assertions were not based on any evidence in the record, but instead rely on an ex parte communication from Bank of America. We find Pacific's arguments devoid of merit. To suggest that no technical arguments have been offered in this proceeding is simply disingenuous and ignores the record in this case. Commissioner Knight's statements regarding certainty for CLECs and the investment community could easily have been culled or inferred from the several rounds of briefs filed by the parties. For example, in one response filed in support of the Coalition's Motion, FirstWorld Anaheim, FirstWorld SoCal, FirstWorld Orange Coast, and FirstWorld SGV, stated that:

> FirstWorld has developed and acted on business plans based in part on the current industry practice of reciprocal compensation for local calls to ISPs. These business plans involve ISPs as underlying recipients of FirstWorld services. FirstWorld has invested time, money and facilities into the local marketplace for the development of these business plans. However, Pacific's and GTEC's unilateral decision on this issue

> of reciprocal compensation creates an unacceptable level of uncertainty, which may have a direct effect on these business plans. The Commission must act quickly to reduce uncertainty and to affirm current industry practice. (FirstWorld Response to the Coalition's Motion, filed April 2, 1998, p. 2.)

Pacific's claim that the concurring opinion was based on extra-record material is, therefore, speculative.[8] Furthermore, the statements contained in Commissioner Knight's concurrence are not findings of the Decision itself. Pacific has failed to demonstrate that the Decision rests on materials or evidence not in the record. As such, Pacific's allegations of legal error are without merit.

D. The Decision Should Be Clarified As To How ISP-bound Calls Are Classified As Local For Purposes Of Inter-carrier Compensation

Pacific makes several arguments stemming from our attempt to define which ISP-bound calls would qualify as a local call for purposes of reciprocal compensation provisions. In our Decision, we stated that the "relevant determinant as to whether ISP traffic is intrastate is the distance from the end user originating the call to the ISP modem. If this distance is within a single local calling area, then we conclude that such call is a local call...." (D.98-10-057, at 12.) Finding of Fact No. 11 states: "If the rate centers associated with the telephone number of the end user originating the call and the telephone number used to access the ISP modem lies within a single local calling area, then such call is a local call." Pacific argues that "these determinations were made without any evidence concerning any CLEC or ISP network in California as to the location of

[8] Pacific's argument that the Commission relied on material not in the record is somewhat ironic in that Pacific itself tries to introduce evidence in its application for rehearing which is not part of the record in this proceeding. The exhibits attached to Pacific's application are not part of the record in this case and accordingly will not be considered by this Commission in reviewing the application for rehearing.

ISP modems, the potential abuse or misuse of the assignment of numbers, etc." (Pacific Application for Rehearing, p. 9.)

Pacific further claims that the Decision is "internally inconsistent." Pacific notes that the body of the Decision states that with regard to the telecommunications component of the call to the ISP which formed the basis for intrastate jurisdiction, the Decision found that this component consisted of the leg of the call from the end user to the ISP modem. Pacific argues that this is inconsistent with Finding of Fact 11 which states that a local call depends exclusively on "the telephone number used to access the ISP modem." Pacific argues that this notion that local calls are defined based on the telephone numbers used to access the ISP modem, as opposed to the physical location of the ISP modem or even the physical location of the switch that connects to the modem, is inconsistent with the theory that the calls "terminate" at the ISP modem and with the Commission rules on Pacific Bell local calling areas.

Finally, Pacific argues that the Commission acted in excess of its authority and in violation of federal law insofar as the Decision's definition of a local call violates Pacific's tariffs, changes Pacific's interconnection agreements, and redefines Pacific's local calling areas. Pacific argues that under its current tariffs, whether a call is local depends on whether the calling party and called party are within the same local calling area. According to Pacific, calls within the 12-mile radius of the local exchange calling area are billed as local calls. Pacific further notes that almost all of the interconnection agreements it has entered into with CLCs have pricing provisions that are based on the Commission distinction between local and toll calls. Pacific argues that the Decision radically changes its interconnection agreements by redefining Pacific's local calling areas and virtually eliminating the category of toll traffic. According to Pacific, toll calls will become a thing of the past if the nature of the call is made to depend on the designation of the telephone number, rather than on the geographic location of the parties.

Pacific predicts that CLCs will designate all numbers as "local" and require Pacific to route those calls to their switches.

In response, the Coalition argues that Pacific confuses matters by attempting to focus on the ISP modem for determining, not whether the call is inter- or intrastate, but whether the call is "local" or "interexchange." The Coalition claims that Pacific is attempting to introduce into this reciprocal compensation phase of the rulemaking some of the issues and arguments currently being considered by the Commission in the "rating and routing" phase of this proceeding. The Coalition points out that the relevant determinant as to whether a call is local is not the distance between the callers themselves, but rather the distance in airline miles between the rate center point associated with the telephone number of the calling party and the rate center point associated with the telephone number of the called party. According to the Coalition, as a practical matter, no carrier could possibly rate telephone calls based on the actual location of the parties because neither ILEC nor CLC billing systems contain such information. The Coalition claims that the Decision could be clarified by removing references to the location of the ISP's modem for purposes of determining whether a call is "local" while retaining references to the ISP's modem for the purpose of determining whether the call is an intrastate call or not.

Pac-West similarly responds that the Commission's decision to classify calls for purposes of reciprocal compensation as local or toll based on the rate centers of the calling and called parties' telephone numbers is not inconsistent with its determination that jurisdiction over such calls should be established based on the actual physical locations of the originating party's station and the ISP modem. Pac-West also asserts that, contrary to the claims of Pacific and GTEC, calls are not rated based on the physical locations of the calling and called parties, but rather are based on the rate centers associated with the calling and called parties' telephone numbers.

We agree that Pacific confuses the issue by focusing on the ISP modem for determining whether a call is "local" or "toll" rather than inter- or intrastate. However, we find several of Pacific's arguments rendered moot to the extent the FCC has now declared ISP-bound traffic largely interstate. The issue remains, however, in determining how a call to an ISP should be rated as local for inter-carrier compensation purposes. The parties apparently dispute whether the relevant determinant is the geographic location of the parties, or the distance between the rate centers associated with the called and calling parties' telephone numbers.

In this Decision, we asserted jurisdiction over dial-up calls to ISPs for the purpose of determining whether reciprocal compensation or bill-and-keep provisions of interconnection agreements were applicable to these calls. The jurisdictional analysis aside, it was our intent that calls to ISPs be treated as any other local call for the purpose of reciprocal compensation. In the Decision we specifically stated that "the rating of calls should be treated in a consistent manner whether they happen to involve an ISP or any other end user." (D.98-10-057, at 13.) Ordering Paragraph No. 2 similarly reflects our intention:

> All carriers subject to interconnection agreements containing reciprocal compensation provisions are directed to make the appropriate reciprocal payment called for in such agreements for the termination of ISP traffic which would otherwise qualify as a local call based on the rating of the call measured by the distance between the rate centers of the telephone number of the calling party and the telephone number used to access the ISP modem until such agreements are ended. (D.98-10-057, Ordering Paragraph 2.)

However, in reviewing the text of the Decision, as well as in Finding of Fact 11, and Ordering Paragraph No. 2, we agree that the language used, while not legally erroneous, is technically incorrect. As is explained in D.98-07-095, each telephone number is assigned a "rate center," a physical location designated by vertical and horizontal (V&H) coordinates. These coordinates are used to calculate airline mileage between rate centers for rating and billing purposes. Whether a call is rated as local is determined by the distance from the rate center associated with the originating caller's telephone number. If the distance from the rate center associated with the originating caller's telephone number to the rate center associated with the called party's number (i.e. the ISP, or another end user) is within the originating caller's local calling area, the call is local.

The Commission has established a local calling area of up to 12 miles between rate centers. (Re Alternative Regulatory Frameworks for Local Exchange Carriers [D.90-11-058] 38 Cal.P.U.C.2d 269 (1990).) Calls within applicable Extended Area Service (EAS) are also considered local. If the distance between rate centers exceeds 12 miles, or EAS, then the call is rated as a toll call. (See, e.g., D.98-07-095, at 3.)[9]

Therefore, the correct relevant determinant as to whether ISP traffic is treated as local is the distance between the rate centers of the calling and called parties, not the physical location of the modem or the parties terminal equipment. The text of the Decision at page 12, as well as Finding of Fact 11 and Ordering Paragraph 2 should accordingly be modified to reflect the correct technical definition of a local call. For interconnection purposes, a dial-up call to an ISP would be treated as local if the rate center associated with the ISP's telephone number is within the 12 mile radius, or applicable EAS, of the rate center associated with the originating caller's telephone number. This is consistent with

9 We note that there are certain minor variations and exceptions to these rules, which we do not intend to disturb by this decision. For example, in certain rural areas the local calling area may be greater than 12 miles. Also, intrastate, inter LATA calls are not local, with the exception of six routes. Interstate, intra LATA calls are also not local with the exception of Verde to Reno and Winterhaven to Arizona. Certain intrastate, interLATA calls (i.e., operator assisted local calls) are not local.

Pacific's tariffs, and does nothing to change Pacific's local calling areas or its interconnection agreements with CLCs.[10]

As modified, the Decision is consistent with other decisions issued by this Commission regarding the determination of whether a call is rated as local. (See, e.g., D.90-11-058; D.98-07-095.) Insofar as it was our intent to treat calls to ISPs as any other local call, we find no merit to Pacific's claims that the Decision constitutes wholesale revision of its local calling areas, interconnection agreements, or tariffs. The Coalition is correct that several of the arguments and issues raised by Pacific are being addressed by this Commission in a separate phase of this proceeding. Pacific's concerns regarding the physical location of the ISP modems and the potential misuse of abuse in the assignment of numbers relate to issues associated with the disparate routing and rating of calls, where a CLC seeks to obtain telephone numbers linked with a rate center with V&H coordinates that do not coincide with the geographic location of the end user. The Commission has taken comments in R.95-04-043/I.95-04-044 on the proper treatment of routing and rating, plus appropriate inter-carrier compensation for those calls. (See, D.97-12-094 and D.99-02-096.) This Decision does not address whether CLC may assign a telephone number outside the geographic location of a rate center, and this issue need not be addressed on rehearing. The legality and

[10] Pacific's tariff defines a "local call" as "a completed call or telephonic communication between a calling station and any other station within the local service area of the calling station." A "local service area" is defined as an "area within which are located the stations which customers may call at exchange rates, in accordance with the provisions of the exchange tariffs." (Pacific's Schedule Cal.P.U.C. A2.1.1) However, in determining the distance of the call for rating purposes, the relevant measurement is not the distance between the callers, or stations, but rather the distance in airline miles between the rate centers associated with the telephone numbers of the called and calling parties. Schedule Cal.P.U.C. No. A6, 3rd Revised Sheet 2, Section 6.2.1.A.4, Rates and Charges, a. Method of Applying Rates: "(1) Toll rates between points (cities, towns or localities) are based on the airline distance between rate centers. In general, each point is designated as a rate center.... (2) Determine the airline distance between the rate centers involved...." Therefore, based on this provision, toll tariffs do in fact prescribe call rating based on the distance between the applicable rate centers of the called and calling parties, not the physical location of the parties' terminal equipment. (See also, D.99-02-096.)

The legality and validity of this practice instead will be determined in a separate order. Likewise, this Decision does not address the question of how call rating and inter-carrier compensation is implicated or affected by the use of disparate rating and routing points. The consideration of these issues for calls involving the use of disparate rating and routing points is before the Commission in the previously mentioned proceedings in R.95-04-043/I.95-04-044. The findings and conclusions concerning reciprocal compensation obligations in D.98-10-057 should not be construed as prejudging the outcome of the Commission's deliberations regarding inter-carrier compensation in the aforementioned proceedings regarding disparate rating and routing practices. In light of the above discussion, we find that Pacific's concerns on this issue do not implicate legal error in this Decision.

E. Pacific's Allegation That The Decision Is "Inconsistent" With A Prior Commission Decision Is Without Merit

Pacific claims that the Decision's theory that calls terminate [*43] at the ISP's modem is inconsistent with the decision issued in the Cook Telecom Inc. arbitration. (D.97-09-122.) Pacific argues that in Cook Telecom, we found that calls to paging customers "did not terminate with Cook but went all the way to the paging customer." (Pacific Application, p. 19.) Pacific claims that this statement is somehow inconsistent with this Decision's determination that calls "terminate" at the ISP modem. Aside from the fact that Pacific's argument is based on a distortion of the use of the word "terminate," as well as a distorted comparison of the issues presented in the Cook case and in the present case, we find that Pacific's arguments are rendered mute by the modifications made to the Decision as described herein and the fact that the FCC declared that ISP-bound calls do not "terminate" at the ISP's modem, but constitute a continuance transmission to a distant website. As such, we find Pacific's argument does not establish legal error in the Decision.

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Decision 99-07-047

CONCLUSION

We have reviewed each and every allegation of legal error raised in the rehearing applications, and find that good cause for rehearing has not been shown. However, the Decision shall be modified to clarify how a call to an ISP is rated as a local call, for purposes of inter-carrier compensation provisions of interconnection agreements.

Therefore, **IT IS ORDERED** that:

1. Decision 98-10-057 is modified as follows:

   a) The last two paragraphs at page 12 of the Decision are modified to read:

"We conclude that the relevant determinant as to whether ISP traffic should be rated as local is the distance from the rate center associated with the telephone number of the end user originating the call to the rate center associated with the ISP's telephone number. If the distance from the originating caller's rate center to the ISP's rate center is within the originating caller's local calling area (the 12 miles radius and applicable EAS), then the call should be treated as local. In contrast, calls which terminate at a remote location outside ~~of the originating~~ caller's local calling area should not be ~~rated as~~ local (i.e., they should be treated as toll calls or long distance).

Pacific argues that the telephone numbers for the ISP modem may be located in a different LATA from the CLC switch through which the call passes. In such instances, Pacific argues, the call would not be local, but would be a toll call. While we agree that such calls would be treated as toll calls, we find such an argument to be a red herring. Our finding remains unchanged that the rating of calls should be treated in a consistent manner whether they happen to involve an ISP or any other end user. The Commission is currently reviewing in R.95-04-043/I.95-04-044 the issue of how calls should be rated in situations where disparate rating and routing points are used. Disparate rating and routing is where the designated rate center of the called part's NXX prefix is different from the rate center from which the called party's terminal equipment is served. Depending on the outcome of that proceeding, the requirements for the rating of calls in such instances may be subject to modification accordingly."

b) Finding of Fact No. 10 shall be deleted.

c) Finding of Fact No. 11 is modified to read:

"If the rate center associated with the telephone number of the end user originating the call is within 12 miles or EAS of the rate center associated with the telephone number used to access the ISP, then such call should be rated as a local call."

d) The following is added as Finding of Fact No. 15:

"LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network, just as they do for other calls."

e) The following is added as Finding of Fact No. 16:

"Absent a compensation agreement, a LEC terminating another LEC customer's call receives no compensation for its termination."

f) Conclusion of Law No. 1 shall be deleted.

g) Conclusion of Law No. 2 is modified to read:

"This Commission has the authority to determine whether ISP-bound calls are subject to the reciprocal compensation provisions of interconnection agreements."

h) The following is added as Conclusion of Law No. 6:

"It is equitable that a LEC be compensated through termination fees applicable to local calls, including ISP-bound calls."

i) Ordering Paragraph No. 2 is modified to read:

"All carriers subject to interconnection agreements containing reciprocal compensation provisions are directed to make the appropriate reciprocal payment called for in such agreements for the termination of ISP traffic which would otherwise qualify as a local call until such agreements are ended, or until or unless the Commission reaches a different determination in its deliberations concerning the use of disparate rating and routing points being conducted in R.95-04-043/I.95-04-044. Whether an

ISP-bound call should be treated as local is based on the rating of the call measured by the distance from the rate center associated with the originating caller's telephone number to the rate center associated with the telephone number used to access the ISP modem.

2. Pacific Bell's request for oral argument on its application for rehearing is denied.

3. The application for rehearing filed by Pacific Bell is denied.

4. The application for rehearing filed by GTE California, Inc. is denied.

This decision is effective today.

Dated July 22, 1999, at San Francisco, California.

RICHARD A. BILAS
President
JOEL Z. HYATT
CARL W. WOOD
Commissioners

I will file a written concurrence.

/s/ RICHARD A. BILAS
President

I dissent.

/s/ HENRY M. DUQUE
Commissioner

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner

R.95-04-043, I.95-04-044
D.99-07-047

Concurring Opinion of President Bilas

I continue to support this Commission's decision on the applicability of reciprocal compensation for Internet Service Providers (ISP) traffic.

Although I have had several opportunities to decide certain aspects of reciprocal compensation, I am still left with the impression that this Commission would benefit from a generic proceeding. Today's order correctly denies rehearing. However, I would like a record that reflects what effect, if any, the recent FCC orders have on this issue. Similarly, I would like to see ISPs, CLCs, and ILECs discuss the financial ramifications of various compensation methodologies in a generic proceeding.

I have previously noted that one possible vehicle is the Local Competition docket. While this is still an option, I am open to a new proceeding which may have the ability to move more quickly.

As I stated in my concurring opinion on the PacWest/Pacific Bell arbitration decision, it is my intention for a generic proceeding to begin in the very near future and to have a decision ready for the Commission in a few months after beginning. I reiterate that such a timely proceeding is necessary in the quickly changing telecommunications environment.

RICHARD A. BILAS
Commissioner

San Francisco, California
July 22, 1999

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE PETITION OF	)	
GLOBAL NAPS SOUTH, INC. FOR	)	
THEARBITRATION OF UNRESOLVED ISSUES	)	PSC DOCKET NO. 98-540
FROM THE INTERCONNECTION	)	
NEGOTIATIONS WITH BELL ATLANTIC-	)	
DELAWARE, INC. (FILED DECEMBER 9, 1998)	)	

ARBITRATION AWARD

DATED: MARCH 9, 1999

G. ARTHUR PADMORE
ARBITRATOR

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BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE PETITION OF GLOBAL NAPS SOUTH, INC. FOR THEARBITRATION OF UNRESOLVED ISSUES FROM THE INTERCONNECTION NEGOTIATIONS WITH BELL ATLANTIC- DELAWARE, INC. (FILED DECEMBER 9, 1998)	))))))	PSC DOCKET NO. 98-540

ARBITRATION AWARD

I. BACKGROUND

1. Pursuant to Section 252 (b) of the Telecommunications Act of 1996 (Athe Act@), on December 9, 1998, Global NAPs South, Inc. (AGlobal NAPs@ or AGNAPs@) filed with the Public Service Commission of Delaware (Athe Commission@) a Petition for the Arbitration of Unresolved Issues concerning its negotiations with Bell Atlantic-Delaware, Inc. (ABA-Del@) for an interconnection agreement.

2. In accordance with the Commission=s *Guidelines for Negotiations. Mediation. Arbitration and Approval of Agreements Between Local Exchange Telecommunications Carriers* (Athe Guidelines@), the Commission=s Executive Director appointed the undersigned Arbitrator to arbitrate the unresolved issues.[1] No other persons sought to intervene in these arbitration proceedings.

3. On January 21, 1999, as required by Rule 20 of the Guidelines, I filed with the parties my Notice Letter, which: (a) formally identified five issues that I

[1] See December 23, 1998 Memorandum of Bruce H. Burcat, Esquire to Petitioner, GNAPs, Respondent, BA-Del, and the Public Advocate.

deemed subject to arbitration in this proceeding; and (b) set forth a procedural schedule that afforded the parties an opportunity to conduct discovery and file written comments addressing these issues.

4. Based upon the pleadings filed by the parties, I determined that there were no factual disputes, hence an evidentiary hearing was unnecessary for resolution of the issues under consideration.

5. Pursuant to 47 U.S.C. ' 252(b)(4)(B), I have considered the entire record of this arbitration and, based thereon and upon the best information available, I make the following award for the reasons set forth and discussed below.

II. ISSUES TO BE ARBITRATED

6. In my January 21, 1999 letter to the parties, I identified five issues to be arbitrated in these proceedings, and posed the following questions to the parties, to-wit:

a) **Interim Relief.** Can GNAPs, pursuant to 47 U.S.C. '252 (i), opt into an existing interconnection agreement on an Ainterim@ basis while its own interconnection agreement is being arbitrated?

b) **Terminating Compensation Rates.** Where GNAPs has Aopted into@ an interconnection agreement, what are the appropriate rates to be charged to BA-Del for calls that originate on BA-Del=s network and terminate on GNAPs= network?

c) **Calls to Internet Service Providers.** Should Internet-bound traffic be deemed local traffic for purposes of compensation?

d) **Mirroring of Future Contract Changes.** If GNAPs Aopts into@ an existing interconnection agreement adopted by BA-Del and a third party CLEC,[2] would GNAPs be bound by any changes occurring to the original agreement by operation of law?

e) **Equivalent Length of Contract Term.** Should BA-Del be required to extend to GNAPs the equivalent length of the term of

[2] CLEC is an acronym for Competitive Local Exchange Carrier. ILEC is an acronym for Incumbent Local Exchange Carrier.

the contract as set forth in the original contract that GNAPs opted into pursuant to 47 U.S.C. ' 252 (i)?

7. In addition to the foregoing questions, I posed a series of additional, but more detailed, questions to the participants concerning the identified issues. In accordance with the procedural schedule, on February 8, 1999 and February 18, 1999, GNAPs and BA-Del filed initial and reply comments to all of the questions posed.[3]

III. AWARD

8. **Interim Relief**. 47 U.S.C. ' 252 (i) provides that once an ILEC, such as BA-Del, has entered into an interconnection agreement with a CLEC and that agreement has been approved by the state regulatory commission, any other CLEC may Aopt into@ the terms of that agreement.[1] In its Petition, GNAPs specifically requested this Commission to direct that Awhile this arbitration is pending, BA[-Del] promptly provide GNAPs with interconnection ***on an interim basis*** on terms consistent with those provided in the already-approved agreement between BA[Del] and MFS Intelenet of Delaware, Inc. (AMFS@).@ (Petition of GNAPs at 1, emphasis added.) According to GNAPs, it sought to adopt the MFS agreement while the parties negotiated and/or arbitrated disputes as to what the terms of that agreement mean and how they are to be applied.

9. BA-Del contended that allowing GNAPs to Aopt into@ an interconnection agreement while pursuing better terms through negotiation and/or arbitration would frustrate Congressional policy in support of voluntarily negotiated agreements. (BA-Del at 10.) BA-Del also argues that GNAPs is seeking to have it both ways, *i e* , to opt into the MFS agreement while continuing to negotiate and/or arbitrate a separate interconnection agreement. (Id.)

[3] The Initial comments, filed on February 8, 1999 will be cited as A([Party] at __)@ and the Reply comments will be cited as A([Party-R] at __)@.

10. In subsequent pleadings, GNAPs has refuted the suggestion that it seeks Ato have it both ways.@ Instead, GNAPs asserts that the disputes between the parties center around the interpretation and application of the terms and conditions contained in the MFS agreement and do not involve the arbitration of a separate agreement. GNAPs has emphatically declared that the so-called Ainterim agreement@ that it wants imposed on BA-Del is the same agreement that it has wanted to opt into since August, 1998. (GNAPs-R at 16-17.) GNAPs contends that BA-Del has repeatedly refused to allow GNAPs to opt into the MFS agreement unless GNAPs Aagrees to onerous additional terms.@ (Id. at 17.)

11. **Award.** My review of the pleadings convinces me that GNAPs does not seek to Aopt into@ the MFS agreement on an interim basis. The record, therefore, does not support the claim that GNAPs seeks to opt into one agreement while arbitrating or negotiating another. This Commission has previously concluded that 47 U.S.C. ' 252(i) has dual purposes: (a) Ait allows new entrants to quickly enter the local exchange market by taking interconnection under an already approved agreement without incurring the costs otherwise arising from the negotiation and arbitration process, and (b) it Aimposes an anti-discrimination constraint on the carrier-to-carrier negotiation process; it restrains an incumbent local exchange carrier from treating similarly situated new entrants dissimilarly.@ *PSC Dockets No. 98-275 & 312-98, Order No 4959 at & 5* (December 1, 1998). In view of the foregoing, I conclude that GNAPs should be allowed to opt into the MFS agreement as required by law. Accordingly, BA-Del shall provide GNAPs the same terms and conditions of the MFS agreement for the period of time discussed, *infra*, under the heading, AEquivalent Length of Contract Term.@

12. **Terminating Compensation Rates.** GNAPs contends that under section 251(b)(5) of the Act, a carrier is entitled to receive compensation when it terminates calls that originate on the network of another carrier. GNAPs seeks compensation from BA-Del based upon rates established in the MFS agreement. BA-

Del, on the other hand, argues that since GNAPs wants to change a material term of the MFS agreement, *i.e* , the July 1, 1999 termination date, its request is not a proper Aopt-in@ request under section 252(i) of the Act and that the inclusion of the rates established in PSC Docket No. 96-324 (Athe SGAT proceeding@) is therefore appropriate.

13. In addition, BA-Del contends that it is entitled to protection under FCC Rule 51.809(b), which exempts ILECs from providing a service or network element to a carrier pursuant to a previously approved interconnection agreement where the ILEC can demonstrate that such provision would be more costly than providing it to the original carrier. BA-Del also argues that at the time it negotiated the terms and conditions of the MFS agreement, Internet traffic was neither a contemplated subject of negotiation nor a known quantity. Thus, according to BA-Del, when it negotiated the MFS agreement, it expected the traffic flow between the contracting carriers to be Aroughly balanced@ over the term of the contract. (BA-Del at 5.)

14. BA-Del also contends that too long a period of time has lapsed since approval of the MFS agreement, and it is no longer reasonable to require BA-Del to interconnect with another requesting CLEC at the terms set forth in the MFS agreement. BA-Del points to the fact that GNAPs requested to opt into the MFS agreement nearly two years after the Commission had approved it and ten months before it was to expire by its own terms. BA-Del asserts that in adopting the Areasonable period@ language in Rule 51.809(c),[2] the FCC compared interconnection agreements to interexchange contract tariffs, under which a negotiated service arrangement is available to other customers for only ninety days. (Id. at 3-4, n.3.) According to BA-Del, given the rapid technological and competitive changes occurring in the telecommunications industry, requiring the availability of contract terms and conditions for over a two-year period cannot be deemed reasonable in the case of a three-year agreement. Therefore, BA-Del urged the Commission to find that the Areasonable period@ during which BA-Del had to make the initial reciprocal compensation rates of the MFS agreement available expired long ago. Moreover, since the Commission has expended substantial resources to determine just and reasonable rates for network elements, the Commission should find reasonable BA-Del=s insistence that its interconnection agreement with GNAPs substitute the Commission=s SGAT rates for call terminations with the rates set forth in the MFS agreement.

15. GNAPs asserts that BA-Del is not entitled to the exemptions set forth in FCC Rule 51.809, and that even if it were, BA-Del has failed to provide any evidence in this proceeding to support such findings. In particular, GNAPs argues that the language of Rule 51.809(b)(1), and the rationale for its adoption, indicates that the Aunit costs@ are the relevant consideration, not just Acosts.@ (GNAPs-R at 4-6.) GNAPs contends that BA-Del=s mere expectation that it will send more traffic to GNAPs (and, therefore, will incur greater costs) is insufficient under Rule 51.809(b)(1). GNAPs argues that the terms of the MFS agreement supplant and contradict BA-Del=s assertions that it expected the traffic flow between the contracting carriers to be Aroughly balanced@ over the term of the contract. (GNAPs-R at 6-7.)

16. GNAPs also disputes BA-Del=s claim for exemption under FCC Rule 51.809(c). According to GNAPs, that rule requires BA-Del to identify particular technical arrangements called for by the MFS agreement that are either technically obsolete or substantially more costly today than at the time the agreement was approved. GNAPs contends that BA-Del has made no such showing in this proceeding. (Id. at 3-4.)

17. **Award.** To qualify for an exemption under Rule 51.809(b)(1) BA-Del must show that providing interconnection to Global NAPs will Aexceed the cost of providing a particular interconnection, service, or element to the requesting telecommunications carrier that originally negotiated the agreement.@ Attached to BA-Del=s initial response in this docket is the Affidavit of Jeffrey A. Masoner, Vice President-Interconnection Services for BA-Del=s parent=s Industry Services Line of Business. In his Affidavit, Mr. Masoner asserted that based upon the experience of Bell Atlantic-Massachusetts and GNAPs= parent company in Massachusetts, BA-Del expects to provide more traffic to Global NAPs than it expected to send to MFS. (BA-Del at Masoner Affidavit, pp. 3-6.) According to Mr. Masoner, BA-Del expected traffic between BA-Del and MFS to be Aroughly balanced.@ (Id.)

18. I concur with GNAPs= assertion that BA-Del=s Aexpectation@ is insufficient to establish that it will actually incur more unit cost in providing interconnection to Global NAPs than to MFS. I say this especially in light of the terms of the MFS agreement which, in my view, contradict and supplant the expectations harbored by BA-Del. Section10.3.1 of the MFS agreement explicitly recognizes that traffic flows will be variable and dependent upon Athe customer segments and service segments within customer segments to whom MFS decides to market its services.@ Evidently, both MFS and BA-Del recognized that, depending on MFS=s choice of marketing strategy, there would be situations that Aproduce traffic that is substantially skewed in either the inbound or outbound direction.@

19. BA-Del has also failed to offer credible evidentiary support for its assertion that it will incur higher transport costs by interconnecting with GNAPs than it would have experienced with MFS at the time the Commission approved the MFS Agreement. BA-Del merely stated that it will incur these transport costs because it will have Ato provide trunking between its network and distant points of presence@ but offered no affirmative evidence of such costs. Moreover, I am persuaded by GNAPs= contentions, which BA-Del has not refuted, that Section 1.60 of the MFS agreement corresponds to industry practice[3] and that BA-Del contemplated delivering traffic to an MFS point of presence within the same LATA.[4]

20. Furthermore, BA-Del has not established, pursuant to the exemption contained in Rule 51.809(b), that it would be unreasonable to permit GNAPs to opt into the MFS Agreement at this time. To qualify for an exemption under Rule 51.809(b), BA-Del is required to identify particular arrangements that are either technically infeasible or substantially more costly today than at the time the MFS Agreement was approved. BA-Del has not satisfactorily done so in this proceeding. Consequently,

[4] My review of Section 1.60 of the MFS agreement confirms that Athe Rating Point/Routing Point (or the specific geographic point identified by a specific V&H coordinate) must be located within the LATA in which the corresponding NPA-NXX is located.@

BA-Del is not entitled to protection under the exemptions contained in FCC Rule 51.809(b) and must, therefore, provide reciprocal compensation to GNAPs pursuant to the terms and conditions contained in the MFS Agreement.

21. **Calls to Internet Service Providers.** A major issue in dispute between BA-Del and GNAPs is the appropriate treatment for calls made by BA-Del customers to Internet Service Providers (AISPs@) that terminate on GNAPs= network. BA-Del asserts that calls to ISPs do not terminate at the ISP=s local premises but instead constitute a single transmission to a distant Internet destination. Thus, Internet traffic is not local traffic for purposes of reciprocal compensation.

22. Citing the MCI Arbitration Award (PSC Docket No. 97-323), GNAPs contends that this Commission has previously determined that calls to ISPs are local calls like any other for purposes of reciprocal compensation under the Act.

23. **Award.** In PSC Docket No. 97-323, this Arbitrator concluded that ISP-bound traffic was local traffic and, therefore, should not be excluded from reciprocal compensation requirements merely because the purpose of such calls was to gain Internet access. (Award at 14.) In reaching that conclusion, the Arbitrator considered the following factors: (a) Internet service providers take service from local exchange companies under local exchange business service tariffs; (b) such providers use their connections to the public switched network as do other customers; and (c) Internet service providers are considered to be end users for purposes of access charges.

24. In Consolidated Dockets No. 312-97 and 97-285, asserting that BA-Del had presented no evidence that persuaded me otherwise, I reached the same conclusion for the reasons stated above. (*Findings and Recommendations of the Hearing Examiner* at 11, PSC Consolidated Dockets No. 312-97 and 97-285, September 10, 1998.) The Commission declined to decide the AISP traffic/reciprocal compensation issue@ in that case, stating that it did not Abelieve it would be beneficial to decide in this matter the proper interplay between ISP traffic and the reciprocal compensation obligation.@ (PSC Order No. 4959 at 7, December 1, 1998.) The Commission also observed that

> the ISP traffic issue has come couched in jurisdictional terms about whether such traffic is intrastate or interstate in nature. Yet, other persons may have an interest in how that jurisdictional question is both framed and answered. In light of that, the Commission leaves for another day, and to another proceeding, the question of whether the obligation of one carrier to pay reciprocal compensation extends to traffic delivered to an ISP by another carrier.

(Id. at 7-8.)

Since the issuance of the Commission=s Order, the FCC has addressed the jurisdictional issue and has made suggestions with respect to appropriate interim treatment, pending further FCC action, of the issue concerning inter-carrier compensation for delivery of ISP-bound traffic.

25. On February 25, 1999, the FCC issued its *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No 99-68* (ARuling@). The FCC acknowledged that it has no rule governing inter-carrier compensation for ISP-bound traffic. (Ruling at & 9.) However, the FCC asserted that traditionally, it has Adetermined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.@ (Id.) Thus, for purposes of determining the jurisdictional issue, the FCC concluded that ISP-bound calls Ado not terminate at the ISP=s local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state.@ (Id. at & 12.) The FCC, however, clearly stressed that its jurisdictional decision was not dispositive of an ILEC=s reciprocal compensation obligations under a negotiated or arbitrated interconnection agreement.

26. With respect to the issue of inter-carrier compensation for delivery of ISP-bound traffic, the FCC stated that it found no reason Ato interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.@ (Id. at & 21.) The FCC also indicated that in the absence of a rule relating to inter-carrier compensation, parties could voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252. (Id. at & 22.) Under such a scenario, parties would be bound by those interconnection agreements, as interpreted and enforced by state commissions. (Id.) The FCC further acknowledged that even in the absence of voluntary agreement by parties on an inter-carrier compensation mechanism for ISP-bound traffic, Astate commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic.@ (Id. at &25.) The FCC expressed the following rationale for a state commission adopting

such a procedure:

> [S]tate commission authority over interconnection agreements pursuant to section 252 >extends to both interstate and intrastate matters.= Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the [FCC] has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

(Id.)

27. The foregoing persuades me to conclude that although the FCC has determined the jurisdictional issue concerning ISP-bound traffic, it has clearly recognized the authority of state commissions to continue to make decisions concerning the issue of inter-carrier compensation for such traffic in arbitrated and negotiated interconnection agreements. This recognition accommodates this Commission=s approving such agreements and, thereby, enabling CLECs to expeditiously commence competitive operations in Delaware, consistent with the goals and spirit of the Act.

28. No evidence has been presented in this proceeding to indicate that the MFS agreement has: (a) any provision that requires metering ISP-bound traffic or otherwise segregating it from local traffic, particularly for the purpose of billing for reciprocal compensation; or (b) any provision that sets forth a special compensation plan or procedure for ISP-bound traffic; or (c) any provision or procedure that treats revenues associated with ISP-bound traffic as interstate or intrastate revenues. It is, therefore, evident that the MFS agreement does anticipate treating ISP-bound traffic as local for purposes of reciprocal compensation. Under such circumstances, I find it reasonable to conclude that until the FCC issues a final order establishing a rule concerning inter-carrier compensation for ISP-bound calls, GNAPs is entitled to collect termination compensation rates as set forth in the MFS agreement. Such a conclusion is consistent

with the FCC=s assertion in its Ruling that Anothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the [FCC=s proposed rulemaking].@ (Id. at & 27.)

29. **Mirroring of Future Contract Changes.** This issue is no longer in dispute. In the aftermath of the Supreme Court=s recent decision,[4] and the reinstatement of FCC Rule 51.809, an Aopted-into@ agreement need not mirror any and all future changes to the original agreement. Subject to the important exceptions established by the FCC in the rule, mirroring of future contract changes is not required because CLECs may include terms and conditions from other previously approved agreements. However, all contracts, including those that mirror previously approved agreements, are subject to changes in applicable law.

30. **Equivalent Length of Contract Term.** GNAPs seeks to compel BA-Del to provide it an interconnection agreement with a similar life span as the MFS agreement, *i.e.*, a term of three years. Global NAPs contends that the term[5] of an interconnection agreement is a material aspect of an existing agreement because the affected CLEC must make substantial investment and business decisions based upon the terms and conditions of that agreement. GNAPs points to the staged progress provisions, or phases, contained in the MFS Agreement as indications that the agreement is structured to be carried out over a particular time period. GNAPs also notes that the phases of the agreement could never be accomplished if the actual termination date were applied to Global NAPs.

31. BA-Del asserts that under the Supreme Court=s recent decision, BA-Del is under no obligation to extend the MFS agreement to GNAPs. BA-Del argues that GNAPs= request to opt into an interconnection agreement over two years after its approval cannot be deemed reasonable in the case of a three-year agreement. In support

of this argument, BA-Del states that when it negotiated the July 16, 1996 agreement with MFS: the Act was only a few months old; the FCC had not issued its First Report & Order (AFCC Order@); it was not known which pricing methodologies the FCC would ultimately adopt to calculate rates consistent with the Act; and there was little indication of how the industry would develop under the new regime. Therefore, BA-Del claims, it negotiated a specific termination date for the MFS agreement. According to BA-Del, it believed that such action would ensure that if the rates were inconsistent with the methodologies ultimately adopted by the FCC and implemented by this Commission, or if the other unanticipated factors arose, BA-Del would not be Astuck indefinitely@ with contract terms based on outdated assumptions.

32. **Award.** I do not find reasonable GNAPs Aequivalent contract term@ argument (*i.e* , that CLECs should be allowed to extend the term of an existing interconnection agreement). While I disagree with BA-Del=s contention that the availability of the MFS contract should not extend beyond the first year after its approval by this Commission, I am persuaded by BA-Del=s argument that granting CLECs the ability to extend existing interconnection agreements would be unreasonable. I say this primarily because such action would confer on such third parties the potential to unduly disadvantage the ILEC, whose extended obligations under the contract could be based on Aoutdated@ assumptions.

33. It is my opinion that under ordinary circumstances, the term of an Aopted-into@ interconnection agreement should, at a very minimum, be the same as the negotiated term of the original agreement. This means that ordinarily, an opted into agreement will expire when the original interconnection agreement expires. I recommend that the Commission adopt this practice as a matter of policy.

34. Notwithstanding the foregoing, however, the record in this docket persuades me that an exception is warranted in this case. In a previous docket, the Commission directed BA-Del to provide interconnection to a CLEC under the terms and

conditions contained in the MFS agreement. (Order No. 4959, *Consolidated Dockets No 97-285 and 312-97*, December 1, 1998.) In that proceeding, BA-Del raised arguments practically identical to those raised here about whether or not Focal Communications (AFocal@), the applicant therein, could Aopt-into@ the very same MFS agreement. After consideration, the Commission adopted the Hearing Examiner=s conclusion that Focal should be allowed to opt into that agreement. In spite of the Commission=s decision under a similar set of facts, BA-Del continued, for approximately six months after the Hearing Examiner=s recommendation to the Commission, to deny GNAPs= right to opt into the MFS agreement.

35. In my view, it would be unfair under the circumstances to require GNAPs to bear that loss. Accordingly, I recommend that, given the peculiar circumstances of this case, the Commission direct BA-Del to extend the expiration of GNAPs= opted into interconnection agreement by six months, *i.e.*, from July 1, 1999 to December 31, 1999. It should be noted that this exception should have no precedential effect, except under an identical set of circumstances.

IV. CONCLUSION

36. In summary, pursuant to section 252(b) of the Act, and based upon the findings discussed above, I make the following Awards:

BA-Del shall provide GNAPs the same terms and conditions of the MFS agreement for the period of time set forth below in subparagraph D;

BA-Del is not entitled to protection under the exemptions contained in FCC Rule 51.809(c) and must, therefore, provide reciprocal compensation to GNAPs pursuant to the terms and conditions contained in the MFS Agreement;

Until the FCC issues a final order establishing a rule concerning inter-carrier compensation for ISP-bound calls, GNAPs is entitled to collect termination compensation rates as set forth in the MFS agreement; and

Unless the parties negotiate and mutually agree to a longer term, GNAPs= opted into MFS agreement shall expire on December 31, 1999.

37. Consistent with Rule 29 of the Guidelines, within 30 days hereof, the parties may submit for Commission review their negotiated agreement into which this Award should be consolidated.

Respectfully submitted,

G. Arthur Padmore
Arbitrator

Dated: March 9, 1999

[1]. The Court of Appeals for the Eighth Circuit held that CLECs could only select the terms and conditions of a prior interconnection agreement as a Awhole@ and could not Apick and choose@ terms and conditions from previous agreements to assemble a new and separate agreement. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997). On January 25, 1999, the U.S. Supreme Court reversed the Eighth Circuit Court ruling, holding that carriers could, in fact, Apick and choose@ terms from various interconnection agreements. See *AT&T Corporation et al v. Iowa Utilities Board*, 1999 WL 24568 (U.S.)

[2]. FCC Rule 51.809(c) provides that A[i]ndividual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act.@

[3]. Indeed, Section 1.60 indicates that the routing and rating procedures set forth therein are in accordance with ABellcore Practice BR-795-100-100.@

[4]. *AT&T Corp. et al. v. Iowa Utilities Board et al., supra.*

[5]. In the context of the discussion in this section, the word Aterm@ means the number of years that during which, by agreement of the parties, the interconnection agreement shall remain

effective.

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF GLOBAL NAPS SOUTH, INC., FOR THE ARBITRATION OF UNRESOLVED ISSUES FROM THE INTERCONNECTION NEGOTIATIONS WITH BELL ATLANTIC-DELAWARE, INC. (FILED DECEMBER 9, 1998)	)	PSC DOCKET NO. 98-540

ORDER NO. 5092

AND NOW, this 11th day of May, 1999;

WHEREAS, pursuant to section 252(b) of the Telecommunications Act of 1996, on December 9, 1998, Global NAPs South, Inc. ("GNAPs") filed with the Public Service Commission of Delaware a "Petition for the Arbitration of Unresolved Issues Concerning its Negotiations with Bell Atlantic-Delaware, Inc. ("BA-Del") for an Interconnection Agreement;"

WHEREAS, in accordance with the Commission's "Guidelines for Negotiations, Mediation, Arbitration and Approval of Agreements Between Local Exchange Telecommunications Carriers," the Commission's Executive Director appointed an arbitrator to arbitrate the unresolved issues;

WHEREAS, the Arbitrator issued an Arbitration Award on March 9, 1999;

WHEREAS, the Commission has reviewed and considered the filings submitted in this docket by the parties and the Commission Staff, has reviewed the Arbitration Award of March 9, 1999, and has heard oral argument from the parties at a duly noticed public hearing; now, therefore,

IT IS ORDERED:

1. The Commission approves an Interconnection Agreement between Global NAPs South, Inc., and Bell Atlantic-Delaware, Inc., as interpreted by the Arbitration Award of March 9, 1999, for the reasons stated therein, with further findings to be entered at a later date.

2. On or before June 1, 1999, the parties shall jointly file with the Commission an Interconnection Agreement which conforms to the Arbitration Award of March 9, 1999.

3. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chairman

Commissioner

Commissioner

Commissioner

Commissioner

ATTEST:

Secretary

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF GLOBAL NAPS SOUTH, INC., FOR THE ARBITRATION OF UNRESOLVED ISSUES FROM THE INTERCONNECTION NEGOTIATIONS WITH BELL ATLANTIC-DELAWARE, INC. (FILED DECEMBER 9, 1998)	)	PSC DOCKET NO. 98-540

FINDINGS AND OPINION TO ACCOMPANY ORDER NO. 5092

AND NOW, this 22nd day of June, 1999, the Commission has considered the entire record in this docket including, but not limited to, the following: 1) the Arbitration Award of the Arbitrator dated March 9, 1999; 2) the Statement of Bell Atlantic-Delaware, Inc., filed April 13, 1999; 3) Global NAPs South Inc.'s Comments Concerning Approval of Its Interconnection Agreement With Bell Atlantic-Delaware, Inc., filed April 13, 1999; 4) the Reply Comments of Bell Atlantic-Delaware, Inc., filed May 10, 1999; 5) the Comments of the Public Service Commission Staff filed April 23, 1999; and 6) the oral argument presented by the parties and the Commission Staff during the Commission's deliberations on May 11, 1999. It now enters the following Findings and Opinion in support of PSC Order No. 5092 (May 11, 1999), previously entered in this docket.

Procedural History

This matter came before the Commission on the Petition of Global NAPs South, Inc. ("GNAPs") For Arbitration of Interconnection Rates, Terms, Conditions and Related Relief and

a) Can GNAPs, pursuant to 47 U.S.C. §252(i), opt into an existing interconnection agreement on an "interim" basis while its own interconnection agreement is being arbitrated?

b) Where GNAPs has "opted into" an interconnection agreement, what are the appropriate rates to be charged BA-Del for calls that originate on BA-Del's network and terminate on GNAPs' network?

c) Should Internet-bound traffic be deemed local traffic for purposes of compensation?

d) If GNAPs "opts into" an existing interconnection agreement adopted by BA-Del and a third party CLEC, would GNAPs be bound by any changes occurring to the original agreement by operation of law?

e) Should BA-Del be required to extend to GNAPs the equivalent length of the term of the contract as set forth in the original contract that GNAPs opted into pursuant to 47 U.S.C. §252(i)?

The letter permitted the parties to conduct discovery commencing January 22, 1999. In addition, the Arbitrator informed the parties that they were each to file two, simultaneous submissions responding to questions posed in the letter. The letter also stated:

> Although the pleadings suggest that evidentiary hearings may be necessary, I have not yet determined whether or not such hearings are appropriate; thus, I will defer making that decision at this time.

The Arbitrator directed the parties to file their first submission on February 8, 1999 and to include "[a]ll evidence on which the parties intend to rely. . . ." The second submission was due on February 18, 1999. The Arbitrator's letter informed the parties:

> The record closes on this date [February 18, 1999] unless otherwise determined by the Arbitrator.

The letter also notified the parties that evidentiary hearings would be held on March 10-11, 1999, but only "if deemed necessary" by the Arbitrator. The penultimate paragraph of the Arbitrator's five-page letter stated:

> The parties are hereby put on notice that after the close of the record, I am required to make my arbitration award based upon the best information then available to me, "from whatever source derived." 47 U.S.C. § 252(b)(4)(B).

The parties did not object to any of the proposals in the Arbitrator's letter.

On February 8 and 18, 1999, GNAPs and BA-Del filed their submissions and evidence in support of their respective positions. BA-Del included a "Proposed Arbitration Award" with its February 18, 1999 Reply and did not ask the Arbitrator for the opportunity to present additional evidence or to convene an evidentiary hearing.

On March 9, 1999, the Arbitrator issued the Award. The Arbitrator concluded that "there were no factual disputes, hence an evidentiary hearing was unnecessary for resolution of the issues under consideration." Id. at 2.

That same day, March 9, 1999, BA-Del instituted a separate proceeding with the Commission by filing a Petition for Declaratory Order Recognizing that Internet Traffic is not

"Local" Traffic Subject to Reciprocal Compensation Under the Terms of Bell Atlantic-Delaware's Interconnection Agreements. Ostensibly, the March 9, 1999 Petition raised an issue that was under consideration in this arbitration proceeding.

On March 15, 1999, BA-Del filed a Petition asking the Commission to vacate the March 9, 1999 Arbitration Award. BA-Del contended, among other things, that the very filing of its earlier March 9, 1999 Petition automatically revoked the Arbitrator's jurisdiction to address the subject of reciprocal compensation under the terms of its interconnection agreement. BA-Del also argued that the Arbitrator violated paragraph 23 of the *Guidelines* and BA-Del's due process rights by: 1) failing to hold an evidentiary hearing; and 2) failing to notify the parties that an award might issue without an evidentiary hearing. BA-Del maintained that these supposed due process errors were compounded by the Arbitrator's failure to seek comment from the parties on the impact of a February 25, 1999 Internet Traffic Order issued by the Federal Communications Commission. BA-Del's Petition to Vacate raised a number of additional challenges to the Arbitration Award that did not implicate jurisdictional or due process questions.

BA-Del's Petition to Vacate was filed in order to seek expedited relief and was not intended to meet paragraph 37 of the *Guidelines*, which addressed the procedure for seeking Commission review of the Arbitration Award. On March 17 and 18, 1999, the Commission's Executive Director notified the parties that the Commission would hear BA-Del's Petition to Vacate at its

March 23, 1999 meeting, but the matters to be considered would be limited to jurisdictional and due process issues. GNAPs filed a response to the Petition to Vacate on March 22, 1999.

The Commission heard argument on March 23, 1999 and unanimously decided to deny BA-Del's Petition to Vacate without prejudice. Subsequently, the Commission entered Order No. 5094 in this docket holding, in part:

> 1. Bell Atlantic-Delaware, Inc.'s "Petition to Vacate Arbitration Award" is denied without prejudice,
>
> 2. The Commission, by denying Bell Atlantic-Delaware, Inc.'s "Petition to Vacate," is not endorsing any position concerning the correctness of the Arbitration Award and that any jurisdictional, procedural, or substantive errors may be brought forth during the review process for the parties' interconnection agreement.

Afterwards, the parties filed the submissions identified in the first paragraph on page one above and the Commission heard argument at its May 11, 1999 meeting.

On June 1, 1999, BA-Del and GNAPs jointly filed with the Commission a proposed interconnection agreement.

The Commission Adopts The March 9, 1999 Arbitration Award With No Modifications

On May 11, 1999, the Commission voted four to one[1] in favor of adopting the March 9, 1999 Arbitration Award with no modifications. In PSC Order 5092, entered on that date, the Commission stated, in part:

1. The Commission approves an Interconnection Agreement between Global NAPs South, Inc., and Bell Atlantic-Delaware, Inc., as interpreted by the Arbitration Award of March 9, 1999, for the reasons stated therein, with further findings to be entered at a later date.

The Commission's further findings are set forth herein. A copy of the Arbitration Award is attached hereto as Exhibit "A" and incorporated by reference herein.

Jurisdiction and Due Process

In its April 13, 1999 Statement to the Commission, BA-Del devoted little attention to the jurisdiction and due process issues that dominated its earlier Petition to Vacate. In any event, the Commission concludes that BA-Del's jurisdiction and due process attacks present insufficient grounds to reject the Arbitration Award.

BA-Del's argument that the mere filing of its March 9, 1999 Petition on reciprocal compensation automatically deprived the Arbitrator of subject matter jurisdiction is unconvincing. If BA-Del was correct, a party could undermine the arbitration process by the unilateral act of filing a petition with the Commission touching on an issue arguably before the arbitrator. BA-Del cited no legal authority whatsoever to support its position and none has been identified independently.

BA-Del was not denied procedural due process. Under paragraphs 9 and 10 of the *Guidelines*, BA-Del was required to

---

[1] Chairman McMahon, Vice Chairman Twilley, and Commissioners McClelland and McRae voting to adopt; Commissioner Puglisi voting no.

submit with its January 4, 1999 Response "all relevant material" it wanted the Arbitrator to consider. The Arbitrator's January 21, 1999 letter identified the disputed issues, set forth the discovery and procedural schedules, and made abundantly clear that the parties were to file all of the evidence they relied upon with their February 8 and 18, 1999 submissions. The Arbitrator explicitly stated that the record would close on February 18, 1999 and he would thereafter convene evidentiary hearings only "if deemed necessary". Given the terms of the Arbitrator's January 21, 1999 letter, the parties fully understood that the schedule did not afford them any certainty that an evidentiary hearing would be held.

Despite the notice afforded by the Arbitrator's January 21, 1999 letter, BA-Del did not object to the arbitration procedure until **after** the Arbitrator issued an award it considered unfavorable. BA-Del could have presented this issue to the Arbitrator after receiving his letter. Yet, BA-Del lodged no objection and instead signified its agreement with the proposed procedure by adhering to it without complaint. Indeed, BA-Del even filed a proposed arbitration award on February 18, 1999, reflecting its understanding that the record was closed and an award might issue without further proceedings. Under the circumstances, then, BA-Del waived its right to attack the arbitration procedure.

A party is not entitled to forgo objections to the procedure for an arbitration, gamble upon a favorable result and, after losing, raise alleged procedural defects with the

Commission that were never presented to the Arbitrator. Furthermore, to allow a party to challenge an arbitration award on procedural grounds that were not presented to the arbitrator before the award itself was issued would be monumentally inefficient.

It should be noted that after the Award was issued, BA-Del never made an application under paragraph 40 of the *Guidelinos* to submit evidence directly to the Commission. Nor did it make a written application under paragraph 53 of the *Guidelines* to modify the arbitration procedure.

Concerning the FCC's February 25, 1999 Order, it appears that BA-Del never made a written application to the Arbitrator to file a submission about its import, even though BA-Del knew the record was closed and an award might be issued. Had BA-Del made such an application, it would have been a matter left to the Arbitrator's discretion. The Arbitrator did not ask for submissions from the parties and obviously concluded that none were required. The Arbitrator cited the FCC Order in the Award, discussed it at length, and explained the consideration he gave to it. Id. at 11-3. Under the circumstances presented here, BA-Del was not denied due process.

Interim Relief

BA-Del maintains that GNAPs improperly sought to opt into the MFS interconnection agreement on an interim basis while simultaneously seeking to negotiate a better deal. The Commission agrees with and adopts the Arbitrator's Award on this issue. Id. at 3-5. It appears manifest that, from the outset, GNAPs sought to opt into the MFS agreement. The parties simply disagreed on how the language of the MFS agreement would apply to them and thus GNAPs sought arbitration.

Terminating Compensation Rates

The Commission agrees that BA-Del failed to establish that it met the qualifications for an exemption under FCC Rule 51.809. BA-Del failed to show that providing interconnection to GNAPs would exceed the cost of providing a particular interconnection, service, or element to MFS.

BA-Del failed to offer credible evidentiary support for its assertion that it will incur higher transport costs by interconnecting with GNAPs than it would have experienced with MFS at the time the Commission approved the MFS agreement. BA-Del merely stated that it will incur these transport costs because it will have "to provide trunking between its network and distant points of presence" but offered no affirmative evidence of such costs. Moreover, BA-Del failed to refute GNAPs' contentions that Section 1.60 of the MFS agreement corresponds to industry practice and that BA-Del contemplated delivering traffic to an MFS point of presence within the same LATA.

BA-Del failed to establish that it would be unreasonable to permit GNAPs to opt into the MFS agreement at this time. To qualify for an exemption under Rule 51.809(b), BA-Del was required to identify particular arrangements that are either technically infeasible or substantially more costly today than at the time the MFS Agreement was approved. BA-Del has not satisfactorily done so in this proceeding.

In summary, then, the Commission adopts the Arbitration Award on this issue. Id. at 7-9.

Calls To Internet Service Providers

The Commission agrees with the Arbitrator's conclusion that "in the absence of a rule [from the FCC] relating to inter-carrier compensation, parties could voluntarily include this [ISP-bound] traffic within the scope of their interconnection agreements." Id. at 11-2. The Commission also agrees that the MFS agreement should be interpreted as treating ISP-bound traffic as local for purposes of reciprocal compensation. Id. at 13. Under the circumstances presented in this arbitration proceeding, then, it is reasonable to conclude that until the FCC issues a final order establishing a rule concerning inter-carrier compensation for ISP-bound calls, GNAPs is entitled to collect termination compensation rates as set forth in the MFS agreement.

Mirroring Of Future Contract Changes

The Commission agrees with and adopts the Arbitrator's Award on this issue. Id. at 13-4. In the aftermath of the Supreme Court's recent decision in AT&T Corp. et al. v. Iowa Utilities Board, ____U.S.____, 119 S. Ct. 721, 67 USLW 4104 (1999), and the reinstatement of FCC Rule 51.809, an "opted-into" agreement need not mirror any and all future changes to the original agreement.

Equivalent Length Of Contract Term

GNAPs maintained throughout these proceedings that BA-Del is required to provide it with a three-year interconnection agreement; a term equivalent to that originally afforded MFS.

BA-Del contends that GNAPs must take the MFS agreement as written, with its express termination date of July 1, 1999.

Although GNAPs seeks to opt into the MFS interconnection agreement as written, it nevertheless asks the Commission, in essence, to void the provision in the agreement which contains a specific expiration date. Admittedly, the MFS agreement was to remain in effect for approximately three years. However, by its very terms, the three-year period was to begin on July 16, 1996 and expire on July 1, 1999. Thus, the three-year term GNAPs seeks to opt into included a start date and an end date. Having determined that it wishes to opt into the MFS agreement, GNAPs cannot at the same time ask the Commission to treat specific terms in the agreement as if they were null and void.

Although not prepared to provide GNAPs with a three-year agreement, the Arbitrator determined that the expiration date should be extended from July 1 to December 31, 1999. He explained his reasons in detail. Id. at 15-6.

The Arbitrator observed that, in a previous docket, the Commission directed BA-Del to provide interconnection to a CLEC under the terms and conditions contained in the MFS agreement. (Order No. 4959, *Consolidated Dockets No. 97-285 and 312-97*, December 1, 1998.) In that proceeding, BA-Del raised arguments practically identical to those raised here. The Arbitrator also found that, in spite of the Commission's previous decision, BA-Del continued, for approximately six months after the Hearing Examiner's recommendation to the Commission, to deny GNAPs' right to opt into the MFS agreement.

In essence, the Arbitrator concluded that BA-Del unfairly and unreasonably dragged its feet, knowing that the agreement GNAPs wished to opt into would expire on July 1, 1999. The Arbitrator determined that it would be inequitable to require GNAPs to bear the loss associated with this undue delay. Id. at 15-6. Consequently, under the peculiar circumstances of this case, the Arbitrator carved out a very narrow exception and directed BA-Del to extend the expiration date of GNAPs' opted into interconnection agreement by six months, i.e., from July 1, 1999 to December 31, 1999.

An arbitrator has authority to decide all factual and legal issues properly presented within the scope of the arbitration. And, an arbitrator has broad discretion to fashion a remedy that will address unfair conduct. It has also been said that, under appropriate circumstances, an arbitrator may afford relief of an equitable nature.

The Commission concludes that, under the unique circumstances presented here, the Arbitrator acted within his authority when he extended the BA-Del/GNAPs interconnection agreement by six months. It should be noted that the Commission considers this exception to apply only to the specific facts presented here and therefore this ruling has no precedential effect.

Retention Of Jurisdiction By The Commission

The post-award submissions by BA-Del and GNAPs are laced with considerable hyperbole; what a lay person might call mudslinging. BA-Del charges that GNAPs seeks a financial windfall, has absolutely no interest in engaging in local competition, and the Arbitration Award granting limited relief to GNAPs contravenes the public interest. GNAPs counters that BA-Del has denied it rightful compensation, engaged in deliberate delaying tactics and thereby thwarted its legitimate efforts to engage in competition in Delaware. Without taking sides in this verbal donnybrook, the Commission wishes to underscore its desire to encourage local telephone competition in Delaware. Typically, the Commission reserves jurisdiction to enter such further Orders in a given docket as may be deemed just or proper to protect the public interest. The Commission will follow its usual practice in this docket.

DETERMINATION

In summary, the Commission determines as follows:

1) BA-Del shall provide GNAPs the same terms and conditions as the MFS agreement;

2) BA-Del was not denied due process in these proceedings and the Arbitrator did not lack subject matter jurisdiction to enter the Award;

3) BA-Del must provide reciprocal compensation to GNAPs pursuant to the terms and conditions contained in the MFS agreement;

4) Until the FCC issues a final order establishing a rule concerning inter-carrier compensation for ISP-bound calls, GNAPs is entitled to collect termination compensation rates as set forth in the MFS agreement;

5) GNAPs is not entitled to an interconnection agreement with BA-Del for a three-year term. Under the specific facts of this case, GNAPs' interconnection agreement with BA-Del shall expire on December 31, 1999. The Commission's determination concerning the expiration date of the BA-Del/GNAPs' interconnection agreement is expressly limited in scope to the unique circumstances presented by this docket; and

6) On June 1, 1999, BA-Del and GNAPs jointly filed with the Commission an interconnection agreement. The Commission hereby approves the interconnection agreement jointly filed by the parties.

BY THE COMMISSION:

Chairman

Joshua M. Twilley
Vice Chairman

Arnetta McRae
Commissioner

Commissioner

Commissioner

ATTEST:

Karen J. Nickerson
Secretary

E X H I B I T "A"

COPY

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE PETITION OF	)	
GLOBAL NAPS SOUTH, INC. FOR	)	
THEARBITRATION OF UNRESOLVED ISSUES	)	PSC DOCKET NO. 98-540
FROM THE INTERCONNECTION	)	
NEGOTIATIONS WITH BELL ATLANTIC-	)	
DELAWARE, INC. (FILED DECEMBER 9, 1998)	)	

ARBITRATION AWARD

DATED: MARCH 9, 1999

G. ARTHUR PADMORE
ARBITRATOR

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BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE PETITION OF GLOBAL NAPS SOUTH, INC. FOR THEARBITRATION OF UNRESOLVED ISSUES FROM THE INTERCONNECTION NEGOTIATIONS WITH BELL ATLANTIC-DELAWARE, INC. (FILED DECEMBER 9, 1998)	)	PSC DOCKET NO. 98-540

ARBITRATION AWARD

I. BACKGROUND

1. Pursuant to Section 252 (b) of the Telecommunications Act of 1996 ("the Act"), on December 9, 1998, Global NAPs South, Inc. ("Global NAPs" or "GNAPs") filed with the Public Service Commission of Delaware ("the Commission") a Petition for the Arbitration of Unresolved Issues concerning its negotiations with Bell Atlantic-Delaware, Inc. ("BA-Del") for an interconnection agreement.

2. In accordance with the Commission's *Guidelines for Negotiations, Mediation, Arbitration and Approval of Agreements Between Local Exchange Telecommunications Carriers* ("the Guidelines"), the Commission's Executive Director appointed the undersigned Arbitrator to arbitrate the unresolved issues.[1] No other persons sought to intervene in these arbitration proceedings.

[1] See December 23, 1998 Memorandum of Bruce H. Burcat, Esquire to Petitioner, GNAPs, Respondent, BA-Del, and the Public Advocate.

3. On January 21, 1999, as required by Rule 20 of the Guidelines, I filed with the parties my Notice Letter, which: (a) formally identified five issues that I deemed subject to arbitration in this proceeding; and (b) set forth a procedural schedule that afforded the parties an opportunity to conduct discovery and file written comments addressing these issues.

4. Based upon the pleadings filed by the parties, I determined that there were no factual disputes, hence an evidentiary hearing was unnecessary for resolution of the issues under consideration.

5. Pursuant to 47 U.S.C. § 252(b)(4)(B), I have considered the entire record of this arbitration and, based thereon and upon the best information available, I make the following award for the reasons set forth and discussed below.

II. ISSUES TO BE ARBITRATED

6. In my January 21, 1999 letter to the parties, I identified five issues to be arbitrated in these proceedings, and posed the following questions to the parties, to-wit:

> a) **Interim Relief.** Can GNAPs, pursuant to 47 U.S.C. §252 (i), opt into an existing interconnection agreement on an "interim" basis while its own interconnection agreement is being arbitrated?
>
> b) **Terminating Compensation Rates.** Where GNAPs has "opted into" an interconnection agreement, what are the appropriate rates to be charged to BA-Del for calls that originate on BA-Del's network and terminate on GNAPs' network?
>
> c) **Calls to Internet Service Providers.** Should Internet-bound traffic be deemed local traffic for purposes of compensation?
>
> d) **Mirroring of Future Contract Changes.** If GNAPs "opts into" an existing interconnection agreement adopted by BA-Del and a third

party CLEC,[2] would GNAPs be bound by any changes occurring to the original agreement by operation of law?

e) **Equivalent Length of Contract Term.** Should BA-Del be required to extend to GNAPs the equivalent length of the term of the contract as set forth in the original contract that GNAPs opted into pursuant to 47 U.S.C. §252 (i)?

7. In addition to the foregoing questions, I posed a series of additional, but more detailed, questions to the participants concerning the identified issues. In accordance with the procedural schedule, on February 8, 1999 and February 18, 1999, GNAPs and BA-Del filed initial and reply comments to all of the questions posed.[3]

III. AWARD

8. **Interim Relief.** 47 U.S.C. §252 (i) provides that once an ILEC, such as BA-Del, has entered into an interconnection agreement with a CLEC and that agreement has been approved by the state regulatory commission, any other CLEC may "opt into" the terms of that agreement.[4] In its Petition, GNAPs specifically requested this Commission to direct that "while this arbitration is pending, BA[-Del] promptly provide GNAPs with interconnection ***on an interim basis*** on terms consistent with those provided in the already-approved agreement between BA[Del] and MFS Intelenet of Delaware,

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[2] CLEC is an acronym for Competitive Local Exchange Carrier. ILEC is an acronym for Incumbent Local Exchange Carrier.

[3] The Initial comments, filed on February 8, 1999 will be cited as "([Party] at __)" and the Reply comments will be cited as "([Party-R] at __)".

[4] The Court of Appeals for the Eighth Circuit held that CLECs could only select the terms and conditions of a prior interconnection agreement as a "whole" and could not "pick and choose" terms and conditions from previous agreements to assemble a new and separate agreement. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997). On January 25, 1999, the U.S. Supreme Court reversed the Eighth Circuit Court ruling, holding that carriers could, in fact, "pick and
(. . . . note continued to next page.)

Inc. ("MFS")." (Petition of GNAPs at 1, emphasis added.) According to GNAPs, it sought to adopt the MFS agreement while the parties negotiated and/or arbitrated disputes as to what the terms of that agreement mean and how they are to be applied.

9. BA-Del contended that allowing GNAPs to "opt into" an interconnection agreement while pursuing bettor terms through negotiation and/or arbitration would frustrate Congressional policy in support of voluntarily negotiated agreements. (BA-Del at 10.) BA-Del also argues that GNAPs is seeking to have it both ways, *i.e.*, to opt into the MFS agreement while continuing to negotiate and/or arbitrate a separate interconnection agreement. (Id.)

10. In subsequent pleadings, GNAPs has refuted the suggestion that it seeks "to have it both ways." Instead, GNAPs asserts that the disputes between the parties center around the interpretation and application of the terms and conditions contained in the MFS agreement and do not involve the arbitration of a separate agreement. GNAPs has emphatically declared that the so-called "interim agreement" that it wants imposed on BA-Del is the same agreement that it has wanted to opt into since August, 1998. (GNAPs-R at 16-17.) GNAPs contends that BA-Del has repeatedly refused to allow GNAPs to opt into the MFS agreement unless GNAPs "agrees to onerous additional terms." (Id. at 17.)

11. **Award.** My review of the pleadings convinces me that GNAPs does not seek to "opt into" the MFS agreement on an interim basis. The record, therefore, does not support the claim that GNAPs seeks to opt into one agreement while arbitrating or negotiating another. This Commission has previously concluded that 47 U.S.C. §252(i)

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choose" terms from various interconnection agreements. See *AT&T Corporation et al. v. Iowa*
(. . . . note continued to next page.)

has dual purposes: (a) "it allows new entrants to quickly enter the local exchange market by taking interconnection under an already approved agreement without incurring the costs otherwise arising from the negotiation and arbitration process, and (b) it "imposes an anti-discrimination constraint on the carrier-to-carrier negotiation process; it restrains an incumbent local exchange carrier from treating similarly situated new entrants dissimilarly." *PSC Dockets No. 98-275 & 312-98, Order No 4959 at ¶ 5* (December 1, 1998). In view of the foregoing, I conclude that GNAPs should be allowed to opt into the MFS agreement as required by law. Accordingly, BA-Del shall provide GNAPs the same terms and conditions of the MFS agreement for the period of time discussed, *infra*, under the heading, "Equivalent Length of Contract Term."

12. **Terminating Compensation Rates.** GNAPs contends that under section 251(b)(5) of the Act, a carrier is entitled to receive compensation when it terminates calls that originate on the network of another carrier. GNAPs seeks compensation from BA-Del based upon rates established in the MFS agreement. BA-Del, on the other hand, argues that since GNAPs wants to change a material term of the MFS agreement, *i.e.*, the July 1, 1999 termination date, its request is not a proper "opt-in" request under section 252(i) of the Act and that the inclusion of the rates established in PSC Docket No. 96-324 ("the SGAT proceeding") is therefore appropriate.

13. In addition, BA-Del contends that it is entitled to protection under FCC Rule 51.809(b), which exempts ILECs from providing a service or network element to a carrier pursuant to a previously approved interconnection agreement where the ILEC can demonstrate that such provision would be more costly than providing it to the original

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Utilities Board, 1999 WL 24568 (U.S.)

carrier. BA-Del also argues that at the time it negotiated the terms and conditions of the MFS agreement, Internet traffic was neither a contemplated subject of negotiation nor a known quantity. Thus, according to BA-Del, when it negotiated the MFS agreement, it expected the traffic flow between the contracting carriers to be "roughly balanced" over the term of the contract. (BA-Del at 5.)

14. BA-Del also contends that too long a period of time has lapsed since approval of the MFS agreement, and it is no longer reasonable to require BA-Del to interconnect with another requesting CLEC at the terms set forth in the MFS agreement. BA-Del points to the fact that GNAPs requested to opt into the MFS agreement nearly two years after the Commission had approved it and ten months before it was to expire by its own terms. BA-Del asserts that in adopting the "reasonable period" language in Rule 51.809(c),[5] the FCC compared interconnection agreements to interexchange contract tariffs, under which a negotiated service arrangement is available to other customers for only ninety days. (Id. at 3-4, n.3.) According to BA-Del, given the rapid technological and competitive changes occurring in the telecommunications industry, requiring the availability of contract terms and conditions for over a two-year period cannot be deemed reasonable in the case of a three-year agreement. Therefore, BA-Del urged the Commission to find that the "reasonable period" during which BA-Del had to make the initial reciprocal compensation rates of the MFS agreement available expired long ago. Moreover, since the Commission has expended substantial resources to determine just and reasonable rates for network elements, the Commission should find

[5] FCC Rule 51.809(c) provides that "[i]ndividual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this
(. . . . note continued to next page.)

reasonable BA-Del's insistence that its interconnection agreement with GNAPs substitute the Commission's SGAT rates for call terminations with the rates set forth in the MFS agreement.

15. GNAPs asserts that BA-Del is not entitled to the exemptions set forth in FCC Rule 51.809, and that even if it were, BA-Del has failed to provide any evidence in this proceeding to support such findings. In particular, GNAPs argues that the language of Rule 51.809(b)(1), and the rationale for its adoption, indicates that the "unit costs" are the relevant consideration, not just "costs." (GNAPs-R at 4-6.) GNAPs contends that BA-Del's mere expectation that it will send more traffic to GNAPs (and, therefore, will incur greater costs) is insufficient under Rule 51.809(b)(1). GNAPs argues that the terms of the MFS agreement supplant and contradict BA-Del's assertions that it expected the traffic flow between the contracting carriers to be "roughly balanced" over the term of the contract. (GNAPs-R at 6-7.)

16. GNAPs also disputes BA-Del's claim for exemption under FCC Rule 51.809(c). According to GNAPs, that rule requires BA-Del to identify particular technical arrangements called for by the MFS agreement that are either technically obsolete or substantially more costly today than at the time the agreement was approved. GNAPs contends that BA-Del has made no such showing in this proceeding. (Id. at 3-4.)

17. **Award.** To qualify for an exemption under Rule 51.809(b)(1) BA-Del must show that providing interconnection to Global NAPs will "exceed the cost of providing a particular interconnection, service, or element to the requesting telecommunications carrier that originally negotiated the agreement." Attached to BA-

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section for a reasonable period of time after the approved agreement is available for public (. . . . note continued to next page.)

Del's initial response in this docket is the Affidavit of Jeffrey A. Masoner, Vice President-Interconnection Services for BA-Del's parent's Industry Services Line of Business. In his Affidavit, Mr. Masoner asserted that based upon the experience of Bell Atlantic-Massachusetts and GNAPs' parent company in Massachusetts, BA-Del expects to provide more traffic to Global NAPs than it expected to send to MFS. (BA-Del at Masoner Affidavit, pp. 3-6.) According to Mr. Masoner, BA-Del expected traffic between BA-Del and MFS to be "roughly balanced." (Id.)

18. I concur with GNAPs' assertion that BA-Del's "expectation" is insufficient to establish that it will actually incur more unit cost in providing interconnection to Global NAPs than to MFS. I say this especially in light of the terms of the MFS agreement which, in my view, contradict and supplant the expectations harbored by BA-Del. Section10.3.1 of the MFS agreement explicitly recognizes that traffic flows will be variable and dependent upon "the customer segments and service segments within customer segments to whom MFS decides to market its services." Evidently, both MFS and BA-Del recognized that, depending on MFS's choice of marketing strategy, there would be situations that "produce traffic that is substantially skewed in either the inbound or outbound direction."

19. BA-Del has also failed to offer credible evidentiary support for its assertion that it will incur higher transport costs by interconnecting with GNAPs than it would have experienced with MFS at the time the Commission approved the MFS Agreement. BA-Del merely stated that it will incur these transport costs because it will have "to provide trunking between its network and distant points of presence" but offered

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inspection under section 252(f) of the Act."

no affirmative evidence of such costs. Moreover, I am persuaded by GNAPs' contentions, which BA-Del has not refuted, that Section 1.60 of the MFS agreement corresponds to industry practice[6] and that BA-Del contemplated delivering traffic to an MFS point of presence within the same LATA.[7]

20. Furthermore, BA-Del has not established, pursuant to the exemption contained in Rule 51.809(b), that it would be unreasonable to permit GNAPs to opt into the MFS Agreement at this time. To qualify for an exemption under Rule 51.809(b), BA-Del is required to identify particular arrangements that are either technically infeasible or substantially more costly today than at the time the MFS Agreement was approved. BA-Del has not satisfactorily done so in this proceeding. Consequently, BA-Del is not entitled to protection under the exemptions contained in FCC Rule 51.809(b) and must, therefore, provide reciprocal compensation to GNAPs pursuant to the terms and conditions contained in the MFS Agreement.

21. **Calls to Internet Service Providers.** A major issue in dispute between BA-Del and GNAPs is the appropriate treatment for calls made by BA-Del customers to Internet Service Providers ("ISPs") that terminate on GNAPs' network. BA-Del asserts that calls to ISPs do not terminate at the ISP's local premises but instead constitute a single transmission to a distant Internet destination. Thus, Internet traffic is not local traffic for purposes of reciprocal compensation.

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[6] Indeed, Section 1.60 indicates that the routing and rating procedures set forth therein are in accordance with "Bellcore Practice BR-795-100-100."

[7] My review of Section 1.60 of the MFS agreement confirms that "the Rating Point/Routing Point (or the specific geographic point identified by a specific V&H coordinate) must be located within the LATA in which the corresponding NPA-NXX is located."

22. Citing the MCI Arbitration Award (PSC Docket No. 97-323), GNAPs contends that this Commission has previously determined that calls to ISPs are local calls like any other for purposes of reciprocal compensation under the Act.

23. **Award.** In PSC Docket No. 97-323, this Arbitrator concluded that ISP-bound traffic was local traffic and, therefore, should not be excluded from reciprocal compensation requirements merely because the purpose of such calls was to gain Internet access. (Award at 14.) In reaching that conclusion, the Arbitrator considered the following factors: (a) Internet service providers take service from local exchange companies under local exchange business service tariffs; (b) such providers use their connections to the public switched network as do other customers; and (c) Internet service providers are considered to be end users for purposes of access charges.

24. In Consolidated Dockets No. 312-97 and 97-285, asserting that BA-Del had presented no evidence that persuaded me otherwise, I reached the same conclusion for the reasons stated above. (*Findings and Recommendations of the Hearing Examiner* at 11, PSC Consolidated Dockets No. 312-97 and 97-285, September 10, 1998.) The Commission declined to decide the "ISP traffic/reciprocal compensation issue" in that case, stating that it did not "believe it would be beneficial to decide in this matter the proper interplay between ISP traffic and the reciprocal compensation obligation." (PSC Order No. 4959 at 7, December 1, 1998.) The Commission also observed that

> the ISP traffic issue has come couched in jurisdictional terms about whether such traffic is intrastate or interstate in nature. Yet, other persons may have an interest in how that jurisdictional question is both framed and answered. In light of that, the Commission leaves for another day, and to another proceeding, the question of whether the obligation of one carrier to pay reciprocal compensation extends to traffic delivered to an ISP by another carrier.

(Id. at 7-8.)

Since the issuance of the Commission's Order, the FCC has addressed the jurisdictional issue and has made suggestions with respect to appropriate interim treatment, pending further FCC action, of the issue concerning inter-carrier compensation for delivery of ISP-bound traffic.

25. On February 25, 1999, the FCC issued its *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68* ("Ruling"). The FCC acknowledged that it has no rule governing inter-carrier compensation for ISP-bound traffic. (Ruling at ¶ 9.) However, the FCC asserted that traditionally, it has "determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." (Id.) Thus, for purposes of determining the jurisdictional issue, the FCC concluded that ISP-bound calls "do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state." (Id. at ¶ 12.) The FCC, however, clearly stressed that its jurisdictional decision was not dispositive of an ILEC's reciprocal compensation obligations under a negotiated or arbitrated interconnection agreement.

26. With respect to the issue of inter-carrier compensation for delivery of ISP-bound traffic, the FCC stated that it found no reason "to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism." (Id. at ¶ 21.) The FCC also indicated that in the absence of a rule relating to inter-carrier compensation, parties could voluntarily include

this traffic within the scope of their interconnection agreements under sections 251 and 252. (Id. at ¶ 22.) Under such a scenario, parties would be bound by those interconnection agreements, as interpreted and enforced by state commissions. (Id.) The FCC further acknowledged that even in the absence of voluntary agreement by parties on an inter-carrier compensation mechanism for ISP-bound traffic, "state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic." (Id. at ¶25.) The FCC expressed the following rationale for a state commission adopting such a procedure:

> [S]tate commission authority over interconnection agreements pursuant to section 252 'extends to both interstate and intrastate matters.' Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the [FCC] has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

(Id.)

27. The foregoing persuades me to conclude that although the FCC has determined the jurisdictional issue concerning ISP-bound traffic, it has clearly recognized the authority of state commissions to continue to make decisions concerning the issue of inter-carrier compensation for such traffic in arbitrated and negotiated interconnection agreements. This recognition accommodates this Commission's approving such agreements and, thereby, enabling CLECs to expeditiously commence competitive operations in Delaware, consistent with the goals and spirit of the Act.

28 No evidence has been presented in this proceeding to indicate that the MFS agreement has: (a) any provision that requires metering ISP-bound traffic or otherwise segregating it from local traffic, particularly for the purpose of billing for reciprocal compensation; or (b) any provision that sets forth a special compensation plan or procedure for ISP-bound traffic; or (c) any provision or procedure that treats revenues associated with ISP-bound traffic as interstate or intrastate revenues. It is, therefore, evident that the MFS agreement does anticipate treating ISP-bound traffic as local for purposes of reciprocal compensation. Under such circumstances, I find it reasonable to conclude that until the FCC issues a final order establishing a rule concerning inter-carrier compensation for ISP-bound calls, GNAPs is entitled to collect termination compensation rates as set forth in the MFS agreement. Such a conclusion is consistent with the FCC's assertion in its Ruling that "nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the [FCC's proposed rulemaking]." (Id. at ¶ 27.)

29. **Mirroring of Future Contract Changes.** This issue is no longer in dispute. In the aftermath of the Supreme Court's recent decision,[8] and the reinstatement of FCC Rule 51.809, an "opted-into" agreement need not mirror any and all future changes to the original agreement. Subject to the important exceptions established by the FCC in the rule, mirroring of future contract changes is not required because CLECs may include terms and conditions from other previously approved agreements. However, all

[8] *AT&T Corp. et al. v. Iowa Utilities Board et al., supra.*

contracts, including those that mirror previously approved agreements, are subject to changes in applicable law.

30. **Equivalent Length of Contract Term.** GNAPs seeks to compel BA-Del to provide it an interconnection agreement with a similar life span as the MFS agreement, *i.e.*, a term of three years. Global NAPs contends that the term[9] of an interconnection agreement is a material aspect of an existing agreement because the affected CLEC must make substantial investment and business decisions based upon the terms and conditions of that agreement. GNAPs points to the staged progress provisions, or phases, contained in the MFS Agreement as indications that the agreement is structured to be carried out over a particular time period. GNAPs also notes that the phases of the agreement could never be accomplished if the actual termination date were applied to Global NAPs.

31. BA-Del asserts that under the Supreme Court's recent decision, BA-Del is under no obligation to extend the MFS agreement to GNAPs. BA-Del argues that GNAPs' request to opt into an interconnection agreement over two years after its approval cannot be deemed reasonable in the case of a three-year agreement. In support of this argument, BA-Del states that when it negotiated the July 16, 1996 agreement with MFS: the Act was only a few months old; the FCC had not issued its First Report & Order ("FCC Order"); it was not known which pricing methodologies the FCC would ultimately adopt to calculate rates consistent with the Act; and there was little indication of how the industry would develop under the new regime. Therefore, BA-Del claims, it negotiated a specific termination date for the MFS agreement. According to BA-Del, it believed that such action would ensure that if the rates were inconsistent with the

methodologies ultimately adopted by the FCC and implemented by this Commission, or if the other unanticipated factors arose, BA-Del would not be "stuck indefinitely" with contract terms based on outdated assumptions.

32. Award. I do not find reasonable GNAPs "equivalent contract term" argument (*i.e.*, that CLECs should be allowed to extend the term of an existing interconnection agreement). While I disagree with BA-Del's contention that the availability of the MFS contract should not extend beyond the first year after its approval by this Commission, I am persuaded by BA-Del's argument that granting CLECs the ability to extend existing interconnection agreements would be unreasonable. I say this primarily because such action would confer on such third parties the potential to unduly disadvantage the ILEC, whose extended obligations under the contract could be based on "outdated" assumptions.

33. It is my opinion that under ordinary circumstances, the term of an "opted-into" interconnection agreement should, at a very minimum, be the same as the negotiated term of the original agreement. This means that ordinarily, an opted into agreement will expire when the original interconnection agreement expires. I recommend that the Commission adopt this practice as a matter of policy.

34. Notwithstanding the foregoing, however, the record in this docket persuades me that an exception is warranted in this case. In a previous docket, the Commission directed BA-Del to provide interconnection to a CLEC under the terms and conditions contained in the MFS agreement. (Order No. 4959, *Consolidated Dockets No. 97-285 and 312-97,* December 1, 1998.) In that proceeding, BA-Del raised

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[9] In the context of the discussion in this section, the word "term" means the number of years that (. . . . note continued to next page.)

arguments practically identical to those raised here about whether or not Focal Communications ("Focal"), the applicant therein, could "opt-into" the very same MFS agreement. After consideration, the Commission adopted the Hearing Examiner's conclusion that Focal should be allowed to opt into that agreement. In spite of the Commission's decision under a similar set of facts, BA-Del continued, for approximately six months after the Hearing Examiner's recommendation to the Commission, to deny GNAPs' right to opt into the MFS agreement.

35. In my view, it would be unfair under the circumstances to require GNAPs to bear that loss. Accordingly, I recommend that, given the peculiar circumstances of this case, the Commission direct BA-Del to extend the expiration of GNAPs' opted into interconnection agreement by six months, *i.e.*, from July 1, 1999 to December 31, 1999. It should be noted that this exception should have no precedential effect, except under an identical set of circumstances.

IV. CONCLUSION

36. In summary, pursuant to section 252(b) of the Act, and based upon the findings discussed above, I make the following Awards:

A) BA-Del shall provide GNAPs the same terms and conditions of the MFS agreement for the period of time set forth below in subparagraph D;

B) BA-Del is not entitled to protection under the exemptions contained in FCC Rule 51.809(c) and must, therefore, provide

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during which, by agreement of the parties, the interconnection agreement shall remain effective reciprocal compensation to GNAPs pursuant to the terms and conditions contained in the MFS Agreement;

C) Until the FCC issues a final order establishing a rule concerning inter-carrier compensation for ISP-bound calls, GNAPs is entitled to collect termination compensation rates as set forth in the MFS agreement; and

D) Unless the parties negotiate and mutually agree to a longer term, GNAPs' opted into MFS agreement shall expire on December 31, 1999.

37. Consistent with Rule 29 of the Guidelines, within 30 days hereof, the parties may submit for Commission review their negotiated agreement into which this Award should be consolidated.

Respectfully submitted,

G. Arthur Padmore
Arbitrator

Dated: March 9, 1999

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. against BellSouth Telecommunications, Inc. regarding reciprocal compensation for traffic terminated to internet service providers.	DOCKET NO. 981008-TP ORDER NO. PSC-99-0658-FOF-TP ISSUED: April 6, 1999

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON
E. LEON JACOBS, JR.

APPEARANCES:

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On behalf of Commission staff.

<u>ORDER RESOLVING COMPLAINT</u>
<u>AND</u>
<u>NOTICE OF PROPOSED AGENCY ACTION</u>
<u>ORDER REQUIRING DETERMINATION OF TERMINATED TRAFFIC DIFFERENTIAL</u>

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed in this Order, wherein we have required the parties to determine the number of minutes originated by e.spire and terminated on BellSouth's system and have required the parties to then use this information to derive the differential between what e.spire terminated on BellSouth's system and what BellSouth terminated on e.spire's system, is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

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I. CASE BACKGROUND

On August 6, 1998, American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. (e.spire) filed a complaint with us against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, e.spire asked us to enforce its Interconnection Agreement with BellSouth regarding reciprocal compensation for traffic terminated to Internet Service Providers. On August 31, 1998, BellSouth filed its Answer and Response to e.spire's Petition. We conducted an administrative hearing in this matter on January 20, 1999.

II. DEFINITION OF "LOCAL TRAFFIC"

The parties' dispute focused on the definition of the term "local traffic" in their agreement. e.spire believed that this term included traffic to ISPs, while BellSouth argued that it did not. In the parties' Interconnection Agreement, local traffic is defined as:

> telephone calls that originate in one exchange and terminate in either the same exchange, or a corresponding Extended Area Service (" EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

It is important for us to determine whether or not the parties intended to cover traffic to ISPs within the definition of "local traffic" in their agreement, because the application of Section VI(B) of the parties' agreement is dependent upon "local traffic." Section VI(B) reads as follows:

> Compensation
>
> The Parties agree that BellSouth will track the usage for both companies for the period of the Agreement. BellSouth will provide copies of such usage reports to [e.spire] on a monthly basis. For purposes of this Agreement, the Parties agree that there will be no cash compensation exchanged by the parties during the term of this Agreement

> unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis. In such an event, the Parties will thereafter negotiate the specifics of a traffic exchange agreement which will apply on a going-forward basis.

According to the terms of this provision, if calls made to ISPs are included in the term "local traffic," these calls will be included in determining whether the difference in minutes of use for terminating local traffic has exceeded two million minutes per state on a monthly basis. Pursuant to Section VI(B), once the two million minute threshold was met, the parties were to enter into negotiations to establish a traffic exchange agreement.

Both parties offered arguments on whether ISP traffic should be treated as local or interstate. e.spire witness Falvey argued that the FCC believes that dial-up calls to ISPs consist of two components: 1) telecommunications and 2) information. Witness Falvey also argued that a call placed over the public switched network normally is considered terminated when it is delivered to the exchange bearing the called telephone number. Witness Falvey maintained that the customers originating the calls to the ISPs over BellSouth's local network order service from BellSouth pursuant to local exchange tariffs, and that BellSouth bills the calls placed by its customers to ISPs as local calls.

BellSouth witness Hendrix explained that a call to an ISP does not terminate at the Internet local Point of Presence (POP). Witness Hendrix stated that this traffic is jurisdictionally interstate. Witness Hendrix further cited the FCC 1987 Notice of Proposed Rulemaking in CC Docket No. 87-215, in which the FCC proposed to lift the ISP access charge exemption. The witness maintained that if calls to ISPs were local, there would be no need to lift an access charge exemption.

BellSouth witness Hendrix further argued that BellSouth would have had no reason to consider ISP traffic to be anything other than jurisdictionally interstate traffic when it negotiated these agreements. Witness Hendrix added:

> Further, had BellSouth understood that e.spire considered ISP traffic to be local traffic subject to reciprocal compensation,

> the issue would have been discussed at length. During the negotiations of the agreement with e.spire, as well as with any ALEC, no party questioned the local traffic definitions referenced in the GSST and utilized in the agreements or whether ISP traffic should be considered local traffic.

In response, e.spire witness Falvey argued that:

> It was not incumbent upon e.spire to list all types of traffic that would be considered local. The purpose of a general definition, like the definition of local traffic in e.spire's Interconnection Agreement, is to obviate the necessity to provide an exhaustive list of services. Indeed, e.spire did not list ISP traffic as local traffic. Nor did it list as included in the definition of local traffic other types of high volume call recipients, such as calls to airline reservation desks, call-in centers, radio stations, or ticket companies, as local calls. There was no need to provide an exhaustive list of types of local calls because a general definition of local calls was included in the Agreement.

BellSouth witness Hendrix maintained, however, that e.spire should have known BellSouth's position on ISP traffic, because witness Hendrix negotiated the agreement with Mr. Richard Robertson of e.spire. Witness Hendrix noted that Mr. Robertson was an employee of BellSouth just a few months prior to negotiating the agreement for e.spire, and that he was well aware of BellSouth's policies. We note, however, that Mr. Robertson was not called by either party to testify in this matter. Thus, no direct evidence regarding Mr. Robertson's knowledge or intentions was presented in this case.

Witness Hendrix also stated that BellSouth advised the ALEC industry by letter dated August 12, 1997, that pursuant to current FCC rules regarding enhanced service providers (ESPs), of which ISPs are a subset, ISP traffic is jurisdictionally interstate, not local. The letter also stated that due to this fact, BellSouth would neither pay nor bill reciprocal compensation for this traffic. BellSouth did not, however, have a method to track ISP traffic at the time the August 12, 1997, letter was sent.

In addition, BellSouth witness Hendrix stated that e.spire was not just using strictly local trunks, but also trunks that carry interlata traffic and other types of traffic. Witness Hendrix also referred to a letter dated January 8, 1998, from BellSouth to e.spire, which stated in part:

> . . .during our meeting in November, you indicated that ACSI used combined trunks for its traffic. In order to ensure that the 2 million minute threshold has been reached, BellSouth would like to audit the process used by ACSI to jurisdictionalize its traffic between local and interexchange on these combined trunks.

e.spire witness Talmage disagreed and explained that e.spire and BellSouth have established multiple trunk groups that carry exclusively local traffic, and that these trunk groups have been designated as local trunk groups pursuant to Section V.D.1.A of the Interconnection Agreement. Witness Talmage did agree that the minutes of use billed to BellSouth for reciprocal compensation included ISP traffic to the extent that this traffic was carried over the local trunks. e.spire witness Talmage emphasized, however, that the usage reports generated by e.spire to bill BellSouth for reciprocal compensation were based on calls terminated to trunk groups designated to carry exclusively local traffic.

Determination

With regard to the arguments presented on the jurisdictional nature of traffic to ISPs, we addressed many of these same arguments in Order No. PSC-98-1216-FOF-TP. We note that the issue of the jurisdictional nature of traffic to ISPs is a matter that has recently been considered by the FCC. Nevertheless, it is not necessary for us to determine the jurisdictional nature of this traffic in order to resolve this complaint. We only need to determine the intent of the parties regarding ISP traffic during the negotiation of their Agreement. Therefore, we have considered these arguments only to the extent that they relate to the parties' intent at the time they entered into the agreement. As we emphasized in Order No. PSC-98-1216-FOF-TP, circumstances that existed at the time the contract was entered into by

BellSouth and e.spire, and the subsequent actions of the parties should be considered in determining what the parties intended.

In James v. Gulf Life Insur. Co., 66 So.2d 62, 63 (Fla. 1953), the Florida Supreme Court referred to Contracts, 12 Am.Jur. § 250, pages 791-93, for the general proposition concerning contract construction:

> Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from their language . . . Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred . . . An interpretation which is just to both parties will be preferred to one which is unjust.

In Order No. PSC-98-1216-FOF-TP, we also agreed that, in the construction of a contract, the circumstances in existence at the time the contract was made are evidence of the parties' intent. Triple E Development Co. v. FloridaGold Citrus Corp., 51 So.2d 435, 438, rhg. den. (Fla. 1951). What a party did or omitted to do after the contract was made may be properly considered. Vans Agnew v. Fort Myers Drainage Dist., 69 F.2d 244, 246, rhg. den., (5th Cir.). Courts may look to the subsequent action of the parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corp., Intl., 489 F.2d 144, 151 (5th Cir.) citing LaLow v. Codomo, 101 So.2d 390 (Fla. 1958). See Order No. PSC-98-1216-FOF-TP at p. 16.

Upon consideration, the evidence in this case does not indicate that the parties intended to exclude ISP traffic from the definition of "local traffic" in their Interconnection Agreement. In determining the parties' intent, we examined the parties' actions subsequent to entering into the agreement. While BellSouth witness Hendrix argued that BellSouth did not intend for ISP traffic to be subject to reciprocal compensation, the evidence does not support his assertions for several reasons. First, BellSouth's witness Hendrix conceded that BellSouth did not have the capability of tracking traffic to ISPs. In fact, BellSouth currently can only track minutes of use to ISPs if it has the ten-digit terminating numbers for the ISPs. Otherwise, BellSouth can only develop an estimate based on call holding times. Further, witness Hendrix asserted that e.spire cannot distinguish on a call-by-call basis whether the call is an ISP call. He indicated, however, that e.spire should be able to do so by using the NXX associated with the ISP. On these points, we find it difficult to reconcile how either party intended to exclude ISP traffic from local traffic when neither party had a means to track such traffic. In addition, BellSouth witness Hendrix acknowledged that ISP traffic was not discussed during negotiations. It seems reasonable to us that if the parties had intended to exclude traffic to ISPs from the definition of the term "local traffic," there would have been some discussion on the subject, particularly in view of the agreement's provisions on the tracking of traffic and the parties' decision to include a two-million-minute threshold in their agreement.

We also find it revealing that BellSouth notified the ALEC industry that it would neither pay nor bill reciprocal compensation for calls to ISPs by letter dated August 12, 1997. BellSouth sent this notification more than a year after BellSouth entered into the Interconnection Agreement with e.spire. Furthermore, BellSouth did not have a means of tracking this traffic; therefore, BellSouth could not have known whether it was paying or billing for this traffic. We note that this situation is identical to the situation we addressed in Order No. PSC-98-1216-FOF-TP, where we stated:

> This is perhaps the most telling aspect of the case. BellSouth made no effort to separate out ISP traffic from its own bills until the May-June 1997 time frame. . . . Prior to that time, BellSouth may have paid some reciprocal compensation for ISP traffic, and based on their position that the traffic should be treated as local, this is as one would expect. In some cases the contracts were entered into more than a year before this time period.

Order No. PSC-98-1216-FOF-TP at p. 19.

Also, BellSouth treats its own ISP traffic as local traffic. e.spire witness Falvey explained that:

> BellSouth consistently has: (1) charged all such calls under its local tariffs; (2) treated such calls as local in separations reports and state rate cases; (3) treated such calls as local when they are exchanged among adjacent ILECs; and (4) routed such calls to e.spire over interconnection trunks reserved for local calling.

e.spire further argued in its brief that Attachment B of the parties' Interconnection Agreement defines local traffic as:

> telephone calls that originate in one exchange and terminate in either the same exchange, or a corresponding Extended Area Service (" EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.

e.spire emphasized that this definition is the identical definition found in the Intermedia-BellSouth Agreement that we addressed in Order No. PSC-98-1216-FOF-TP. In that Order, we found that the parties did not intend to exclude traffic to ISPs. Order at p. 24. After reviewing similar arguments and actions of the parties in this proceeding, we believe that BellSouth and e.spire did not intend to exclude ISP traffic from the definition of local traffic in their Interconnection Agreement.

Finally, in Order No. PSC-98-1216-FOF-TP, we found that:

> . . . [W]hile there is some room for interpretation, we believe that the current law weighs in favor of treating the traffic as local, regardless of jurisdiction, for purposes of the Interconnection Agreement. We also believe that the language of the Agreement itself supports this view. We therefore conclude on the basis of the plain language of the Agreement and of the effective law at the time the Agreement was executed, that the parties intended that calls originated by an end user of one and

> terminated to an ISP of the other would be rated and billed as local calls; else one would expect the definition of local calls in the Agreement to set out an explicit exception.

Order No. PSC-98-1216-FOF-TP at p.20.

BellSouth noted in its brief that we acknowledged that the FCC had not yet ruled on the jurisdictional nature of ISP traffic. BellSouth stated that the FCC has now stated its position on this issue. BellSouth explained that by allowing GTE to file its ADSL tariff at the federal level and treating it as part of an end-to-end interstate communication, the FCC determined that ISP Internet traffic has always been interstate traffic. We note, however, that the FCC also stated that:

> We emphasize that we decide here only the issue designated in our investigation of GTE's federal tariff for ADSL service, which provides specifically for a dedicated connection, rather than a circuit-switched, dial-up connection, to ISPs and potentially other locations. . . . This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs.

FCC Order 98-292 at ¶ 2.

The FCC further explained that

> . . . [W]e find that this Order does not, and cannot, determine whether reciprocal compensation is owed, on either a retrospective or a prospective basis, pursuant to existing interconnection agreements, state arbitration decisions, and federal court decisions. We therefore intend in the next week to issue a separate order specifically addressing reciprocal compensation issues.

FCC Order 98-292 at ¶ 2.

On February 26, 1999, the FCC released its Declaratory Ruling and Notice of Proposed Rulemaking in FCC Docket 99-38 on the issue of ISP-bound traffic. Therein, the FCC determined that this traffic ". . . is jurisdictionally mixed and appears to be largely interstate." Order at p. 2. Nevertheless, the current state of the law has no impact on our resolution of this complaint. Based on the plain language of the agreement, the effective law at the time the agreement was executed, and the actions of the parties in effectuating the agreement, it is clear to us that the parties intended that calls originated by an end user of one and terminated to an ISP of the other would be rated and billed as local calls. If the parties intended otherwise, we believe that they would have set out an explicit exception in the definition of local calls in their Agreement.

III. **TWO MILLION MINUTE DIFFERENTIAL**

Again, we refer to Section VI(B) of the Interconnection Agreement between e.spire and BellSouth. This portion of the parties' agreement is set forth in full in the preceding section of this Order. Therein, the parties' agreed that they would not exchange cash compensation for traffic, "unless the difference in minutes of use for terminating local traffic exceeds 2 million minutes per state on a monthly basis." The parties did not agree that the two million minute differential had been met; therefore, we must make that determination. There are two main aspects of this dispute relating to local usage reports and the local traffic differentials that were to be derived from these reports.

BellSouth argued that e.spire included ISP traffic in its calculation of the minutes of use for terminating local traffic in Florida. BellSouth contended that ISP traffic is not local traffic and should not be included. e.spire did not contest the fact that they included traffic to ISPs in determining the minutes of use for terminating local traffic in Florida. In fact, e.spire witness Talmage stated that to the extent ISP traffic is carried over local trunks, it was included.

A. Local Usage Reports

In accordance with Section VI(B) of the agreement, BellSouth was responsible for tracking the usage for both companies and providing copies of usage reports to e.spire on a monthly basis. BellSouth failed to meet this requirement. BellSouth witness Hendrix explained that once BellSouth agreed to track local usage for e.spire, BellSouth initiated plans to develop this equipment and the processes to produce the tracking reports. Due to the complexity of BellSouth's network and the fact that it was attempting to track originating and terminating local minutes of use, the witness asserted that developing the means to produce these reports took longer than expected. Witness Hendrix stated that representatives of BellSouth and e.spire met on November 3, 1997. In that meeting, BellSouth informed e.spire that BellSouth was not yet technically capable of providing local traffic usage reports.

e.spire witness Talmage further explained that once it became apparent that BellSouth would not provide usage reports, e.spire was forced to develop its own usage reports. The witness stated that e.spire implemented the TrafficMASTER software product in November 1997 for its usage reporting. BellSouth witness Hendrix added that BellSouth informed e.spire by letter dated January 8, 1998, that BellSouth would agree to use e.spire's usage reports for determining the local traffic differentials. Witness Hendrix further stated that BellSouth expressed its desire to audit the process used by e.spire's TrafficMASTER. Witness Hendrix asserted that BellSouth wanted to have such audit capabilities, because BellSouth wanted to be able to determine the extent to which e.spire was including ISP traffic in calculating the two million minute threshold.

B. Local Traffic Differentials

Section VI(B) of the Interconnection Agreement between e.spire and BellSouth refers to the difference in local traffic exchanged by the parties. In accordance with Section VI(B), the difference between the minutes of local traffic originating on e.spire's network and terminating on BellSouth's network minus the minutes of local traffic originating on BellSouth's network and terminating on e.spire's network, or vice versa, must exceed two million minutes per month in Florida before the parties will negotiate a traffic exchange agreement.

BellSouth argued in its brief that e.spire has not proven that this difference in minutes of use has been met. Witness Hendrix testified that the report he viewed only showed traffic terminating from BellSouth to e.spire.

e.spire witness Talmage asserted, however, that the differential occurred in March, 1998, and has continued to occur each month thereafter. e.spire has provided reports that show traffic terminated to e.spire's Jacksonville, Florida, switch for the months of May, 1998, through September, 1998, which is the only switch at issue in this proceeding. e.spire also provided summary reports of local traffic, both originating and terminating, at its Jacksonville switch for March and April, 1998. These summary reports show that the differential threshold in minutes of use for terminating local traffic was exceeded in both of these months.

Determination

Upon consideration, we find that the evidence demonstrates that the two million minute differential for terminating local traffic in Florida did occur in March, 1998. We agree with BellSouth that the evidence also shows that e.spire included traffic to ISPs in determining that this threshold had been met. e.spire's inclusion of the ISP traffic in its calculation of the differential was, however, appropriate in view of our determination that the parties did not intend to exclude traffic to ISPs from the definition of "local traffic" within their agreement. Although BellSouth argued that the two million minute differential threshold had not been met, it has not presented any evidence to show that e.spire's usage reports are incorrect.

IV. RECIPROCAL COMPENSATION RATE

Pursuant to Section VI(B) of the Interconnection Agreement between e.spire and BellSouth, the parties were required to negotiate the specifics of a traffic exchange agreement once the two million minute threshold was met. BellSouth argued that we should require the parties to negotiate a rate on a going-forward basis if we determine that the two-million-minute threshold has been met. e.spire's witness Falvey responded by explaining that e.spire and BellSouth had attempted to negotiate a rate, but that the negotiations quickly failed. Therefore, e.spire believed it should be allowed to obtain a rate from another party's Interconnection Agreement with BellSouth in accordance with Section XXII of the e.spire/BellSouth agreement, also known as the Most Favored Nations clause (MFN). Pursuant to Section XXII, e.spire argued that we should set the reciprocal compensation rate at $.009, the rate provided to MFS/WorldCom in its agreement with BellSouth.

Specifically, e.spire witness Falvey argued that Section XXII of the parties' agreement allows e.spire to adopt rates, terms, or conditions of another CLEC's agreement. Witness Falvey also stated that when e.spire determined that the two-million-minute differential threshold had been reached, e.spire sent BellSouth a Most Favored Nations request for a rate of .9 cents per minute. Witness Falvey contended that e.spire had the ability to rely upon its Most Favored Nations clause instead of negotiating the rate to be applied to the traffic.

BellSouth's witness Hendrix argued that e.spire had not negotiated with BellSouth, but had, instead, simply identified rates to which e.spire was willing to agree. Witness Hendrix further asserted that Section XXII was not intended to supersede the negotiation provisions of Section VI(B). He added that the parties had never intended to pay each other during the term of the agreement.

Section XXII(A) of the Interconnection Agreement specifies that:

> If as a result of any proceeding before any Court, Commission, or the FCC, any voluntary agreement or arbitration proceeding pursuant to the Act, or pursuant to any applicable federal or state law, BellSouth becomes obligated to provide interconnection, number portability, unbundled access to network elements or any other services related to interconnection whether or not covered by this Agreement to another telecommunications carrier operating within a state within the BellSouth territory at rates or on terms and conditions more favorable to such carrier than the comparable provisions of this Agreement, then [e.spire] shall be entitled to add such network elements and services, or substitute such more favorable rates, terms or conditions for the relevant provisions of this Agreement, which shall apply to the same states as such carrier and such substituted rates, terms or conditions shall be deemed to have been effective under this Agreement as of the effective date thereof to such other carrier.

Under common principles of contract interpretation, the more specific language of Section VI(B) would control in this agreement.
South Florida Beverage Corporation V. Efrain Figueredo, 409 So. 2d 490, 495 (Fla. 3rd DCA 1982), citing Hollerbach v. U. S., 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898 (1914); Bystra v. Federal Land Bank of Columbia, 82 Fla. 472, 90 So. 478 (1921); and 4 Williston on Contracts § 618 (3rd ed. 1961). Nevertheless, it is clear from the evidence presented that the parties did attempt to negotiate a rate, but that the negotiations between the parties quickly failed. As stated by e.spire's witness Falvey,

> There was a negotiation that took place, but it was initiated by this provision. . . . I wouldn't expect to get anything less than I am entitled to, .9 cents a minute under my MFN clause. So take that as a stating point. Their counter to that was .2 cents a minute, which is, I believe, lower than any carrier that I know of gets in this state.

The witness also indicated that he agreed that negotiation was required under Section VI(B) of the Agreement, but that the negotiations "foundered, because we couldn't agree on some very basic things." Once the negotiations required under the specific provisions of Section VI(B) broke down, we believe that the more general provisions of Section XXII of the agreement were properly invoked by e.spire. e.spire opened negotiations with BellSouth pursuant to Section VI(B) of the agreement. BellSouth responded by offering a rate of .2 cents a minute. No agreement was reached. There is nothing in the agreement that suggests that anything more was required. Therefore, we shall resolve the dispute by enforcing the MFN provisions of the agreement. The reciprocal compensation rate shall be effective from the date that we have determined that e.spire met the two-million-minute differential threshold, March, 1998, and after the effective date of the agreement from which e.spire elected to take the rate, as set forth in Section XXII of the e.spire/BellSouth Agreement. The evidence demonstrates that e.spire elected the rate in the MFS/WorldCom agreement with BellSouth. Thus, the reciprocal compensation rate shall be set at $.009.

V. ATTORNEY'S FEES

We note that e.spire also asked that we award e.spire attorney's fees and costs associated with this case. e.spire reiterated its request in its brief. In its brief, e.spire indicated that it sought attorney's fees pursuant to the parties' agreement. e.spire did not, however, refer to a specific portion of the agreement in support of its request.

Having reviewed the agreement, we believe that the pertinent section of the agreement is Section XXV (A), Arbitration, which states, in part:

> Any controversy or claim arising out of, or relating to, this Contract or the breach thereof shall be settled by arbitration. . . . Provided, however, that nothing contained herein shall preclude either Party from filing any complaint or other request for action or relief with the FCC or the appropriate state commission, including any appeals thereof. The Party which does not prevail shall pay all reasonable attorney's fees and other legal expenses of the prevailing Party.

Based upon Section XXV (A) of the parties' agreement, it appears that e.spire is entitled to reasonable attorney's fees relating to this case in view of our determination that e.spire should prevail in this matter. Therefore, BellSouth shall be required to pay e.spire all of e.spire's reasonable attorney's fees and legal expenses associated with this case, in accordance with the provisions of Section XXV(A) of the parties' Agreement.

VI. PROPOSED AGENCY ACTION
CALCULATION OF FULL TERMINATED TRAFFIC DIFFERENTIAL

As explained herein, e.spire provided reports that show traffic terminated to e.spire's Jacksonville, Florida, switch for the months of May, 1998, through September, 1998. e.spire also provided summary reports of originating and terminating local traffic at its Jacksonville switch for March and April, 1998. These reports clearly demonstrate that the two-million minute differential was exceeded in these months. There is not, however, sufficient evidence in the record of this proceeding to determine how many minutes of traffic originated from e.spire and terminated on BellSouth's system for all of the months at issue in this proceeding, due in part to BellSouth's failure to provide traffic reports in accordance with the terms of the parties' agreement. e.spire's reports only provided sufficient information to calculate the minutes terminated on BellSouth's system for March and April, 1998. In order to determine the specific amount owed by BellSouth to e.spire under the terms of the parties' agreement, it is, therefore, necessary to determine the differential between the minutes of use (MOUs) that e.spire terminated on BellSouth's system and that which BellSouth terminated on e.spire's system. Only after the full differential is identified can the specific amount owed by BellSouth to e.spire be determined.

In order to determine the differential and the specific amount owed by BellSouth to e.spire, we shall require the parties to determine the number of minutes originated by e.spire and terminated on BellSouth's system using actual, available information. The parties shall then use this amount to derive the differential between what e.spire terminated on BellSouth's system and what BellSouth terminated on e.spire's system.

If actual information is not available for the parties to use to determine the number of minutes originated by e.spire and terminated on BellSouth's system, then the parties shall be required to use the methodology described below to estimate the number of minutes originated from e.spire and terminated on BellSouth's system. Using the methodology described, the parties can input the information that is available in the record and derive an estimate of the differential. Upon estimating the number of minutes originated from e.spire and terminated on BellSouth's system, the differential between what was terminated on both parties' systems may be derived.

Methodology:

The amount of traffic over a network consists of incoming and outgoing calls over a company's lines. Based on the information that is available in this case, it appears to us that the amount of traffic over e.spire's lines in any month, both originating from e.spire and terminating on BellSouth, and originating from BellSouth and terminating on e.spire, can be assumed to be relatively consistent over the months in question. Using the information on incoming and outgoing usage provided by e.spire for the months of March and April, 1998, an average value for usage per line can be calculated. This average value (k), can be used to estimate how much traffic was originated from e.spire and terminated on BellSouth's system. For a particular month in the past, an estimate of the traffic from e.spire to BellSouth may be calculated by multiplying e.spire's lines for that month by the average value (k) and then subtracting the known BellSouth to e.spire traffic.

The parties shall report to us once they have determined the amount owed by BellSouth to e.spire based on the $.009 rate, and the amount has been paid to e.spire. The parties shall provide this report in a period not to exceed 4 months from the date of our vote at our March 16, 1999, Agenda Conference.

VII. CONCLUSION

We have based our determination herein upon the evidence presented, the briefs of the parties, and our staff's recommendation. We believe it is consistent with the agreement between the parties, which was approved by us pursuant to the Telecommunications Act of 1996, 47 U.S.C. §252(e).

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Complaint filed by American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. against BellSouth Telecommunications, Inc. is resolved as set forth in the body of this Order. It is further

ORDERED that the parties shall report to us by July 16, 1999, the amount owed by BellSouth Telecommunications, Inc. to American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. based on the $.009 rate, and the amount has been paid to American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. It is further

ORDERED that the provisions of this Order requiring the parties to determine the number of minutes originated from American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. and terminated on BellSouth Telecommunications, Inc.'s system using actual information or using the methodology set forth herein if actual information is not available are issued as proposed agency action and shall become final and effective unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that if no timely protest is received from a substantially affected person of the requirement to determine the number of minutes originated from American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. and terminated on BellSouth Telecommunications, Inc.'s system using actual information or using the methodology set forth herein if actual information is not available, this Docket shall be closed upon the filing of the parties' report on their determination of the amount owed and paid by BellSouth Telecommunications, Inc. to American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. based on the $.009 rate.

By ORDER of the Florida Public Service Commission this 5th day of April, 1999.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein requiring the parties to determine the number of minutes originated from American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. and terminated on BellSouth Telecommunications, Inc.'s system using actual information or using the methodology set forth herein if actual information is not available is preliminary in nature. Any person whose substantial interests are affected by this proposed action may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on April 26, 1999.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the portion of this order requiring the parties to determine the number of minutes originated from American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. and terminated on BellSouth Telecommunications, Inc.'s system using actual information or using the methodology set forth herein if actual information is not available becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

With regard to the other action taken in this order, any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning complaint of Intermedia Communications, Inc. against GTE Florida Incorporated for breach of terms of Florida partial interconnection agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief.	DOCKET NO. 980986-TP ORDER NO. PSC-99-1477-FOF-TP ISSUED: July 30, 1999

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON

ORDER ON ARBITRATION OF INTERCONNECTION AGREEMENT

BY THE COMMISSION:

On August 3, 1998, Intermedia Communications, Inc. (Intermedia) filed a complaint against GTE Florida Incorporated (GTEFL) for breach of the parties' Interconnection Agreement. Based on the initial complaint and GTEFL's response, this matter was set for hearing.

On February 26, 1999, the FCC released Order FCC 99-38 in CC Docket No. 96-98, its Declaratory Ruling on Inter-Carrier Compensation for ISP-bound Traffic and Notice of Proposed Rulemaking in CC Docket No. 99-68. In light of this FCC Order, the parties to this proceeding informed the Commission of certain procedural stipulations by letter dated March 2, 1999. The parties agreed to stipulate all of the prefiled testimony into the record, waive their right to cross-examination on that testimony, file supplemental, prefiled testimony by March 12, 1999, cancel the hearing set for March 9, 1999, and file briefs as originally scheduled. This request was granted by Order No. PSC-99-0458-PCO-

TP, issued on March 4, 1999. In accordance with the parties' stipulation, supplemental testimony was filed on March 9, 1999, addressing the effect of the FCC's Declaratory Ruling on reciprocal compensation.

The issue before us is whether, under the parties' Interconnection Agreement, GTEFL and Intermedia are required to compensate each other for transport and termination of traffic to Internet Service Providers (ISPs). It is Intermedia's position that the term "local traffic", as used in the parties' Interconnection Agreement and as construed consistently by numerous regulatory bodies, contemplates calls from end users to ISPs both originating and terminating within GTEFL's local service area. Intermedia believes that GTEFL has breached the parties' Interconnection Agreement and should be required to pay Intermedia for terminating local traffic under the reciprocal compensation provisions of the Agreement.

It is GTEFL's position that the FCC has ruled that ISP traffic is jurisdictionally interstate and that GTEFL never agreed to include ISP traffic within the Agreement's local traffic definition. Further, GTEFL argues, there is no basis for subjecting this non-local traffic to reciprocal compensation obligations that the Agreement applies only to local traffic.

As stated above, the issue before us is to determine whether, according to the terms of their Interconnection Agreement, Intermedia and GTEFL are required to compensate each other for transport and termination of traffic to ISPs. In order for such reciprocal compensation to apply, traffic to ISPs must be considered "local traffic" as that term is defined in the parties' Agreement. We have addressed this issue previously in other similar cases. (See Docket Nos. 971478-TP, 980184-TP, 980495-TP, 980499-TP and 981008-TP) In making our decision in these earlier cases, we did not make a determination on the generic question of the jurisdictional nature of ISP traffic. In the first complaint (Dockets 971478-TP, et al), we stated:

> ...[I]n this decision we only address the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what the parties might reasonably have intended at the time they entered into their contracts. Our decision does not address any

> generic questions about the ultimate nature of ISP traffic for reciprocal compensation purposes, or for any other purposes. (PSC-98-1216-FOF-TP, p.5)

As previously stated, the FCC has recently issued a Declaratory Ruling regarding the jurisdictional nature of ISP traffic in Order No. FCC 99-38 in CC Docket No. 96-98 released on February 26, 1999. In that Order the FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." (FCC 99-38, ¶1) However, the FCC made no determination as to whether reciprocal compensation is due for ISP-bound traffic. Rather, the FCC stated:

> Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted by state commissions. (FCC 99-38, ¶22)

As part of their Order, the FCC issued a Notice of Proposed Rulemaking in CC Docket No. 99-68 seeking comment on inter-carrier compensation for ISP-bound traffic. In the interim the FCC stated that "[u]ntil adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic." (FCC 99-38, ¶28)

Further, in Order FCC 99-38, the FCC recognized that there was no rule in place governing ISP traffic and that some parties to Interconnection Agreements may have agreed, for the purposes of reciprocal compensation, to include ISP-bound traffic as local traffic. As cited above, the FCC left it to state commissions to ascertain the parties' intentions by interpreting existing Agreements. Also, the FCC provided a noninclusive list of factors that a state commission may use in ascertaining the parties intentions as it pertains to this traffic. (FCC 99-38, ¶24) Among the factors were: 1) whether incumbent LECs serving ESPs (including

ISPs) have done so out of intrastate or interstate tariffs; 2) whether revenues associated with those services were counted as intrastate or interstate revenues; 3) whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic; 4) 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 5) whether if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. FCC 99-38, ¶24. We considered many of these factors in deciding previous ISP cases.

We note that in reaching our decision herein, we are considering whether reciprocal competition is due in an existing Agreement and what the parties may have reasonably intended at the time they entered their Agreement. We approved the Interconnection Agreement between Intermedia and GTEFL by Order No. PSC-97-0719-FOF-TP, issued June 19, 1997, and an amendment to this Agreement by Order No. PSC-97-0788-FOF-TP, issued July 2, 1997, almost two years prior to the FCC issuing its Declaratory Ruling on the jurisdictional nature of ISP traffic.

Section 1.20 of the parties' Interconnection Agreement defines "local traffic" as traffic:

> originated by an end user of one Party and terminates to the end user of the other Party within GTE's then current local serving area, including mandatory local calling scope arrangements. A mandatory local calling scope arrangement is an arrangement that requires end users to subscribe to a local calling scope beyond their basic exchange serving area. Local Traffic does not include optional local calling scopes (i.e., optional rate packages that permit the end user to choose a local calling scope beyond their basic exchange serving area for an additional fee), referred to hereafter as "optional EAS."

Section 3.1 of the Agreement regarding transport and termination of traffic states in part:

> The Parties shall reciprocally terminate Local Traffic originating on each other's networks

> utilizing either direct or indirect network interconnections as provided in this Article.

Regarding reciprocal compensation, Section 3.3.1 of the Agreement states:

> The Parties shall compensate each other for the exchange of Local Traffic in accordance with Appendix C attached to this Agreement and made a part hereof. Charges for the transport and termination of intraLATA toll, optional EAS arrangements and interexchange traffic shall be in accordance with the Parties' respective intrastate or interstate access tariffs, as appropriate.

In her direct testimony, Intermedia witness Strow argues that traffic to ISPs fits the definition of "local traffic" as that term is defined in their Agreement, in that it is originated by a GTEFL end-user, delivered to Intermedia, and terminated on Intermedia's network. Witness Strow argues in rebuttal testimony that an Internet communication consists of two segments: (1) a local telephone call from an end-user to an ISP; and (2) an enhanced transmission from the ISP over the Internet. Witness Strow states that for purposes of reciprocal compensation, the call ends when it is delivered to the ISP. This is generally referred to as the "two-call" theory. Intermedia argues that in the Access Charge Reform Order, 12FCC RCD 15982, the FCC declined to allow LECs to assess interstate access charges on ISPs. GTEFL witness Pitterle counters "[t]hat the Commission <u>exempted</u> Enhanced Service Providers (ESPs) from access charges indicates its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary."

GTEFL witness Jones explains in his direct testimony how the Internet works and contends that traffic to ISPs is jurisdictionally interstate. Witness Pitterle states that the FCC's ruling in the GTE Asymmetric Digital Subscriber Line (ADSL) Order, FCC 98-292, to tariff GTE's ADSL service at the federal level, proved that ISP traffic was jurisdictionally interstate. However, we note that in that Order the FCC specifically states that "[t]his Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs." FCC 98-292, ¶2.

Both parties argue the jurisdictional nature of ISP traffic. The recent ruling by the FCC now asserts that ISP-bound traffic is jurisdictionally mixed but appears to be largely interstate. However, the FCC recognized that its record regarding the treatment of this traffic may not have always been clear, as it stated:

> Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. . . . Moreover, the Commission has directed states to treat ISP traffic as if it were local, by permitting ISPs to purchase their PSTN links through local business tariffs. As a result, and because the Commission had not addressed inter-carrier compensation under these circumstances, parties negotiating interconnection agreements and the state commissions charged with interpreting them were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs, leading to the present dispute. (FCC 99-38, ¶9)

In order to determine whether the parties considered ISP traffic to be local for purposes of reciprocal compensation, we must look to the plain language of the contract, the intent of the parties at the time their Agreement was executed and the subsequent actions of the parties. We have also reviewed our determinations on the jurisdictional nature of ISP traffic at the time the parties entered into their Agreement. Our first ISP dertermination involved WorldCom Technologies, Inc., Teleport Communications Group, Inc., Intermedia Communications, Inc., and MCI Metro Access Transmission Services, Inc. against BellSouth (Docket No. 971478-TP et. al). In that case, we determined that: "while there is some room for interpretation, we believe that current law weighs in favor of treating the traffic as local, regardless of jurisdiction, for purposes of the Interconnection Agreement." PSC-98-1216-FOF-TP, p.20. We note that BellSouth has appealed this decision to federal district court. Case No. 4:98CV352-RH BellSouth Telecommunications, Inc. vs. WorldCom Technologies, Inc. etc, et al. The FCC's recent

Order is consistent with our previous ruling. In its recent Order it stated:

> [T]he Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. (FCC 99-38, ¶23)

In evaluating the actions of the parties, we find that neither party discussed ISP traffic during negotiations. Intermedia witness Strow argues that nothing in the Agreement creates a distinction pertaining to calls placed to telephone exchange end-users that happen to be ISPs. GTEFL argues in its brief that it has always correctly understood that ISP traffic is jurisdictionally interstate and thus outside the scope of local interconnection obligations. GTEFL further argues that its longstanding corporate position with regard to the jurisdictional nature of ISP traffic is a prominent matter of public record. GTEFL, however, did not provide any evidence to substantiate this latter claim. GTEFL also argues in its brief that during negotiations, Intermedia showed no signs of differing with GTEFL's well-known position on the jurisdictional nature of ISP traffic.

The most significant evidence in determining the parties' intent is that neither party had a means of measuring ISP traffic. Intermedia witness Strow argues that had GTEFL intended to exclude ISP traffic, a system to identify and measure ISP traffic would have had to been discussed by the parties. Witness Strow further states that neither company can currently distinguish these types of calls. The evidence of record supports these statements. GTEFL did not provide its first proposal to measure this traffic until February 5, 1998, which was some time after their Agreement had been approved by the Commission. Moreover, the method proposed by GTEFL to measure this traffic was to "estimate" based on call holding-times. GTEFL provided no evidence that it could measure actual usage of calls to ISPs. We conclude that had GTEFL intended to exclude calls to ISPs from "local traffic," knowing that ISP-bound calls would go across local trunks, they would have had a method in place to measure this traffic, or during contract negotiations they would have discussed a means to "estimate" this traffic with Intermedia. We note that GTEFL offered this proposed method to measure ISP traffic only after it received bills for reciprocal compensation.

Both parties point to the recent FCC Order in an attempt to help their case. Intermedia's primary argument is that a call to an ISP consists of two parts: (1) a local telephone call from an end-user to an ISP; and (2) an enhanced transmission from the ISP over the Internet. The FCC specifically repudiated this "two call" theory and stated:

> We disagree with those commenters that argue that, for jurisdictional purposes, ISP-bound traffic must be separated into two components: an intrastate telecommunications service, provided in this instance by one or more LECs, and an interstate information service, provided by the ISP. As discussed above, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication. (FCC 99-38, ¶13)

GTEFL's primary argument is that ISP-bound traffic is jurisdictionally interstate, not local, and is not subject to reciprocal compensation.

We do not believe that the FCC's Declaratory Ruling is dispositive of the issue before the Commission. While the FCC did rule that ISP-bound traffic was jurisdictionally mixed and appeared to be largely interstate, it did not rule that reciprocal compensation was not due for this traffic. (FCC 99-38, ¶1) In making its determination the FCC recognized that its policy on ISP traffic may have been unclear because of its own treatment of ISP traffic. The FCC stated:

> While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate

> context of reciprocal compensation, suggest that such compensation is due for that traffic. (FCC 99-38, ¶25)

The Order provided for state commissions to interpret existing Agreements, such as this one, and, until a final rule is adopted, to determine whether reciprocal compensation should apply for this traffic.

In conclusion, based on the record before us, we conclude that GTEFL has failed to establish that the parties intended to exclude ISP-bound traffic from "local traffic" as that term is defined in their Interconnection Agreement. We have considered what the parties may have reasonably intended at the time they entered into their contract by evaluating the plain language of the contract and the subsequent actions of the parties, as evidenced in the record.

The subsequent actions of the parties also do not show that either party intended to exclude ISP traffic from "local traffic." While GTEFL argues that it had a longstanding corporate position on the jurisdictional nature of ISP traffic, it did not provide any evidence to substantiate this claim. Rather, the record shows that GTEFL never considered ISP traffic as anything other than local until it received bills for reciprocal compensation from Intermedia. Further, GTEFL had no means of tracking ISP traffic. In addition, we cannot reconcile how GTEFL could have had a longstanding corporate policy on ISP traffic, knowing the "local" characteristics of this traffic (i.e., it appears as "local traffic" on their network), and not have had a means in place to measure this traffic in order to calculate reciprocal compensation obligations. Based on the foregoing, we conclude that the agreement contemplated ISP traffic to be local, and that GTEFL should compensate Intermedia according to the parties' Interconnection Agreement for the entire period the balance owed is outstanding.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Interconnection Agreement between Intermedia Communications, Inc., and GTE Florida Incorporated, approved by this Commission Order No. PSC-97-0719-FOF-TP, issued June 19, 1997, and as amended, contemplated Internet Service Provider traffic to be local. It is further

ORDERED that GTE Florida Incorporated should compensate Intermedia Communications, Inc., according to their Interconnection Agreement for the entire period the balance owed is outstanding. It is further

ORDERED that this docket may be closed.

By ORDER of the Florida Public Service Commission this 30th day of July, 1999.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

CB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida

Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of) GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED For a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation.	DOCKET NO. 99-0067

DECISION AND ORDER NO. 16975

Filed May 6, 1999
At 10:30 o'clock A .M.

Karen Higashi
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.
K. Higashi

11-May-99 [illegible]

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED For a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation.	Docket No. 99-0067 Decision and Order No. 16975

DECISION AND ORDER

I.

GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED (GTE Hawaiian Tel) filed a petition on March 23, 1999, requesting a declaratory order that traffic to internet service providers (ISP-bound traffic) is interstate and not subject to reciprocal compensation (i.e., transport and termination compensation). GTE Hawaiian Tel's petition is made pursuant to Hawaii Revised Statutes (HRS) chapter 269 and Hawaii Administrative Rules (HAR) chapter 6-61.

Copies of the petition were served upon the Division of Consumer Advocacy, Department of Commerce and Consumer Affairs (Consumer Advocate). The Consumer Advocate filed a statement of intent to participate on April 9, 1999.

Motions to intervene were separately filed by AT&T Communications of Hawaii, Inc.; GST Telecom Hawaii, Inc.; Sprint Communications Company L.P.; and Time Warner Telecom of Hawaii, L.P. dba Oceanic Communications on April 12, 1999.

GTE Hawaiian Tel filed a response to the motions to intervene on April 19, 1999.[1]

II.

GTE Hawaiian Tel contends that, in light of a recent declaratory ruling issued by the Federal Communications Commission (FCC) that held that a substantial portion of ISP-bound traffic is interstate traffic,[2] we should reverse our rulings in Decision and Order No. 16775 and Order No. 16826 (Docket No. 7702 orders), which held that ISP-bound traffic is local and subject to reciprocal compensation.[3] GTE Hawaiian Tel argues that, because we had based these decisions on the fact that the FCC had not ruled that ISP-bound traffic was interstate traffic at that time, the commission should now reverse its decisions due to the FCC's recent order.

We disagree with GTE Hawaiian Tel's characterization of the impact and significance of the FCC Order. Although the FCC ruled that ISP-bound traffic was largely interstate traffic, it did not mandate that such traffic be excluded from reciprocal compensation. To the contrary, the FCC stated that nothing in its

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[1]Although not required, Oceanic Communications filed a reply to GTE Hawaiian Tel's response on April 23, 1999.

[2]See Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic* (FCC rel. February 26, 1999) (FCC Order).

[3]Decision and Order No. 16775 was the final order for phase II of Docket No. 7702, and Order No. 16826 was a reconsideration order, which denied GTE Hawaiian Tel's request to have ISP-bound traffic declared interstate.

declaratory ruling precludes state commissions from determining that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the FCC's rulemaking on inter-carrier compensation for ISP-bound traffic.[4]

With respect to our prior Docket No. 7702 decisions on ISP-bound traffic, we generally agree that they were based in large part on FCC rulings; however, our reading of the FCC Order leads us to conclusions that are contrary to GTE Hawaiian Tel's request. In particular, we conclude that: (1) the FCC did not intend to interfere with our findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic[5]; (2) our prior Docket No. 7702 rulings on ISP-bound traffic are not in conflict with the FCC Order[6]; (3) parties that have agreed to include ISP-bound traffic within their interconnection agreements are bound by those agreements, as interpreted and enforced by state commissions[7]; and (4) where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, we nonetheless may determine in arbitration proceedings at this point that reciprocal compensation should be paid for such traffic.[8]

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[4] *See* FCC Order, at ¶ 27. Currently, the FCC has no rule governing inter-carrier compensation for ISP-bound traffic. The FCC Order initiates rulemaking in Section IV, *Notice of Proposed Rulemaking*, CC Docket No. 99-68. *See* FCC Order, at ¶ 28.

[5] *See* FCC Order, at ¶ 21.

[6] *See* FCC Order, at ¶ 26.

[7] *See* FCC Order, at ¶ 22.

[8] *See* FCC Order, at ¶ 25.

Accordingly, we find that there is no conflict between our Docket No. 7702 orders and the FCC Order. Further, we choose not to revisit this issue and will allow current reciprocal compensation arrangements in existing interconnection agreements to continue. Having ruled on GTE Hawaiian Tel's request it is unnecessary to address the motions to intervene.

III.

THE COMMISSION ORDERS that GTE Hawaiian Tel's request for a declaratory order that ISP-bound traffic is interstate and not subject to transport and termination compensation, is denied. This docket is closed.

DONE at Honolulu, Hawaii this 6th day of May, 1999.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By ______________________
Dennis R. Yamada, Chairman

By ______________________
Rae M. Loui, Commissioner

By ______________________
Gregory G. Y. Pai, Commissioner

APPROVED AS TO FORM:

____
Anthony D. Valdes
Commission Counsel

98-0007.sm

11-May-99 03;

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE COMPLAINT OF TIME WARNER COMMUNICATIONS OF INDIANA, L.P. AGAINST INDIANA BELL TELEPHONE COMPANY, INCORPORATED, D/B/A AMERITECH INDIANA, FOR VIOLATION OF THE TERMS OF THE INTERCONNECTION AGREEMENT	)	CAUSE NO. 41097 ORDER ON RECONSIDERATION APPROVED:

BY THE COMMISSION:
G. Richard Klein, Commissioner
Scott R. Jones, Assistant Chief Administrative Law Judge

JUN 09 1999

On February 3, 1999, the Indiana Utility Regulatory Commission ("Commission") entered its Order in this Cause finding in favor of the Complainant, Time Warner Communications of Indiana, L.P. ("Time Warner" or "Petitioner"). Subsequently, Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana ("Ameritech Indiana") filed its "Ameritech Indiana's Petition for Rehearing and Reconsideration", which appears in the following words and figures, to-wit:

(H.I.)

On February 26, 1999, the Federal Communications Commission ("FCC") issued its declaratory ruling in CC Docket No. 96-98 and notice of proposed rulemaking in CC Docket No. 99-68 ("Declaratory Ruling"). On March 1, 1999, Time Warner filed its "Time Warner Telecom's Response to Ameritech's Petition for Rehearing and Reconsideration" which appears in the following words and figures, to-wit:

(H.I.)

On March 16, 1999, Ameritech Indiana filed its "Reply to Time Warner Telecom's Response to Ameritech's Petition for Rehearing and Reconsideration" which appears in the following words and figures, to-wit:

(H.I.)

On March 29, 1999, the presiding Commissioner and Administrative Law Judge requested by Docket Entry that the parties specifically address the impact of the FCC's declaratory ruling of February 26, 1999 on this Docket. As a result, on April 12, 1999, Time Warner filed its "Time Warner Telecom's Brief Concerning the Impact of the FCC's Declaratory Ruling" which appears in the following words and figures, to-wit:

(H.I.)

Ameritech Indiana filed its "Ameritech Indiana's Memorandum Concerning the Impact of the FCC's February 26, 1999 Declaratory Ruling on the Commission's February 3, 1999, Order in this Cause" which appears in the following words and figures, to-wit:

(H.I.)

Intervenor TCG Indianapolis, d/b/a AT&T Local Services ("AT&T") filed its "Brief of TCG Indianapolis" which appears in the following words and figures, to-wit:

(H.I.)

And, US Exchange of Indiana, LLC ("US Exchange") filed its "Brief of US Exchange of Indiana, LLC" which appears in the following words and figures, to-wit:

(H.I.)

On April 22, 1999, Time Warner filed its "Time Warner Telecom's Reply Brief Concerning the Impact of the FCC's Declaratory Ruling" which appears in the following words and figures, to-wit:

(H.I.)

Ameritech Indiana filed its "Ameritech Indiana's Response to Time Warner's Brief Concerning the Impact of the FCC's Declaratory Ruling on this Commission's Initial Order in this Cause" which appears in the following words and figures, to-wit:

(H.I.)

US Exchange of Indiana LLC filed its "Reply Brief of US Exchange of Indiana LLC" which appears in the following words and figures, to-wit:

(H.I.)

On May 14, 1999, Time Warner filed its "Time Warner Telecom's Seventeenth Supplemental Request to Take Administrative Notice" which appears in the following words and figures, to-wit:

(H.I.)

On May 21, 1999, Time Warner filed its "Time Warner Telecom's Eighteenth Supplemental Request to Take Administrative Notice" which appears in the following words and figures, to-wit:

(H.I.)

On May 25, 1999, Ameritech Indiana filed its "Ameritech Indiana's Submission of Supplemental Authority" which appears in the following words and figures, to-wit:

(H.I.)

The Commission, based upon the above-described filings, now finds as follows:

1. **Jurisdiction**. The Commission previously determined in its September 16, 1998, Order that it has jurisdiction over the issues involved in this proceeding. We found that TA '96 as interpreted by the courts, specifically charges the states with the responsibility of enforcing the provisions of interconnection agreements, as has been requested in the instant proceeding. See Iowa Utilities Board v. Federal Communications Commission, 120 F3d 753 804 (8th Circuit 1997). Consistent with the law, Article XXXIV of the Interconnection Agreement also authorizes the IURC to resolve any disputes between the parties.

In our Order of September 16, 1998, we rejected Ameritech's request that we stay the proceeding pending action by the FCC. We determined that any decision by the FCC regarding the manner in which ISPs might be regulated if they are to be treated as telephone companies will not resolve Time Warner's allegation of a breach of contract of the interconnection agreement. Nor will any decision by the FCC regarding the jurisdictional nature of Internet Service Provider ("ISP") traffic on a going forward basis bind the Commission's determination of the parties intention of how ISP traffic should be treated at the time the interconnection agreement was executed.

These jurisdictional determinations were affirmed in our Order of February 3, 1999, which interpreted the interconnection agreement in such a fashion as to require the payment of reciprocal compensation between the parties to the interconnection agreement for termination of ISP traffic as Time Warner argued the interconnection agreement requires. Subsequently, as we have earlier noted, the FCC issued its declaratory ruling and notice of proposed rulemaking in CC Docket No. 99-68 on February 26, 1999. In its declaratory ruling, the FCC concluded that ISP traffic "is jurisdictionally mixed" and it had jurisdiction, at least in part, because it was "largely interstate." See Declaratory Ruling at paragraph 1. The FCC noted that ISP traffic historically has been treated as local by all parties and, further, in the absence of any federal rules directly addressing inter-carrier compensation for such traffic, "found no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic." See Declaratory Ruling at paragraph 21. Ameritech Indiana argues that for reasons other than jurisdiction the Commission's previous ruling in this Cause should be reconsidered in light of the declaratory ruling. These arguments are considered below. We find that the Commission has jurisdiction over the parties and the subject matter herein.

2. **Ameritech Indiana's Petition for Rehearing and Reconsideration**. The basis for Ameritech Indiana's Petition for Rehearing and Reconsideration of February 23, 1999 is no different

than the arguments that it raised in this proceeding prior to the Commission's Order of February 3, 1999. Hence, there is no reason to reconsider or grant rehearing on the basis of Ameritech Indiana's Petition of February 23, 1999.

3. Effective FCC Declaratory Ruling. The FCC's declaratory ruling of February 26, 1999 addressed the issue of whether a local exchange carrier is entitled to receive reciprocal compensation for traffic it delivers to an information service provider, particularly an internet service provider. ("ISP") In its Order, the FCC stated, at paragraph 12, that

> Consistent with these precedents, we conclude, as explained further below, that the communications at issue here do not terminate at the ISPs local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically an internet web site that is often located in another state. The fact that the facilities and apparatus used to deliver traffic to the ISPs local service may be located within a single state does not affect our jurisdiction. As the Commission stated in Bell South Memory Call, "This Commission has jurisdiction over, and regulates charges for, the local network when it used in conjunction with the origination and termination of interstate calls." Indeed, in the vast majority of cases, the facilities that incumbent LECs use to provide interstate access are located ~~entirely~~ within one state. Thus, we reject MCI WorldCom's assertion that the LEC facilities used to deliver traffic to ISPs must cross state boundaries for such traffic to be classified as interstate.

Ameritech argues that this declaratory ruling, which, we observe, was issued in anticipation of a rulemaking, requires that this Commission grant its Petition for Reconsideration since our Order of February 3, 1999 concluded that the communications between Ameritech Indiana and Time Warner terminate at the ISP's local server. However, Time Warner and the Intervenors argue that it was not the FCC's intent that its declaratory ruling have such an affect upon previously entered state determinations. The FCC states, at paragraph 1 of its Order, that:

> After reviewing the record developed in response to these requests, we conclude that ISP bound traffic is jurisdictionally mixed and appears to be largely interstate. This conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance. As explained below, parties may have agreed to reciprocal compensation for ISP-bound traffic, or a state commission, in the exercise of its authority to arbitrate interconnection disputes under Section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic. In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.

Also in its declaratory ruling, the FCC considered that parties may have entered into agreements intending to apply reciprocal compensation to ISP bound traffic, and concluded that its declaratory ruling should not be construed to question determinations by states made in the past or in the future where parties have agreed to treat such traffic as local traffic under existing interconnection agreements. The FCC, in its declaratory ruling, provides guidance in this connection:

> Against this backdrop, and in the absence of any contrary commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. When construing the parties' agreements to determine whether the parties still agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this commission's long standing policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements. For example, it may be appropriate for state commissions to consider such factors as [1] whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; [2] whether revenues associated with those services were counted as intrastate or interstate revenues; [3] whether there is evidence that incumbent LECs or CLECs made any effort to meet this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; [4] whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs as local telephone charges; and [5] whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. These factors are illustrative only; state commissions, not this commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions. Nothing in this declaratory ruling, therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP bound traffic as local traffic under existing interconnection agreements.

(Declaratory Ruling at paragraph 24)

Ameritech argues in its Response to the presiding hearing officers' docket entry of March 29, 1999, that the commission's order of February 3, 1999 improperly relies upon extrinsic evidence because the contract language was unambiguous. However, we observe that the type of extrinsic evidence considered in our February 3, 1999 Order was the very type described in the excerpted portion of the FCC's declaratory ruling appearing above. Ameritech appears to find it necessary, in adopting the FCC's Declaratory Ruling as being supportive of its positions, to pick and choose only those portions it finds most suited to its argument before this Commission.

We relied upon a reading of the Interconnection Agreement itself when we determined that reciprocal compensation should be applied to the interconnection agreement in dispute. Our attention to the extrinsic evidence merely affirmed our independent conclusion that, under the terms of the Agreement, reciprocal compensation was appropriate since Ameritech was trending the traffic for intended purposes as local. The FCC also provided further guidance to state commissions asked by parties to interconnection agreements to reconsider previous rulings in light of its declaratory ruling:

> State commissions considering what effect, if any, this declaratory ruling has on their

decisions as to whether reciprocal compensation provisions of interconnection agreeme apply to ISP-bound traffic might conclude, depending upon the basis of those decisions, t it is not necessary to re-visit those determinations. We recognize that our conclusion at IS bound traffic is largely interstate might cause some state commissions to re-examine th conclusion that reciprocal compensation is due to the extent that those conclusions are bas on a finding that this traffic terminates at an ISP server, but nothing in this declaratory ruli precludes state commissions from determining, pursuant to contractual principles or oth legal or equitable considerations, that reciprocal compensation is an appropriate inter-carri compensation rule pending completion of the rulemaking we initiate below. (Declarato Ruling at paragraph 27)

Our Order stated, at page 12, that "While the FCC is currently considering various issu regarding internet communications and may issue a proposal for rule-making, any action by the FC in the future cannot change the intentions of the parties at the time the interconnection agreeme was executed or their legal obligations." We also observed that "The FCC agrees with th commission that the proper construction of an existing interconnection agreement does not turn any subsequent decision of the FCC. Id. (see Response of FCC as Amicus Curiae to Motion f Referral of Issues in Bell South Telecommunications, Inc. v. US LEC of North Carolina, Civ Action No. 3:98-CV 170-MU (U.S. Dist. Ct., W.D.N.C.)) Hence, while we are mindful of actio in proceedings before the FCC, the construction of this interconnection agreement warrants th conclusion that at the time it was executed, the parties intended ISP traffic to be treated as local, ar we so find." Order at page 12. Thus, considered in a light most favorable to Ameritech, it appea that the FCC's ruling suggests that a state commission may wish to alter its previous interpretatic of a disputed interconnection agreement regarding ISP traffic if that ruling contained a finding th ISP traffic terminates at an ISP server. Our Order did not make any findings of a broad nature as th FCC describes. We merely found that Time Warner and Ameritech Indiana intended that reciproc compensation apply to ISP-bound traffic at the time they executed the Agreement. In its Seventeent Supplemental Request to Take Administrative Notice, Time Warner brings to the Commission attention a decision of the Public Utilities Commission of Hawaii which found that the FCC rulin did not preclude state commissions from determining that reciprocal compensation is an appropria interim compensation rule, while Ameritech, in its Submission of Supplemental Authority filed Ma 25, 1999, brings to our attention a ruling of the Massachusetts Department of Telecommunicatior and Energy which afforded the FCC's declaratory ruling a pre-emptive effect. In its brief filed i this docket on April 12, 1999, TCG Indianapolis d/b/a AT&T local services cites four state ruling subsequent to the Declaratory Ruling which preserve the usage of reciprocal compensation.

We find that there is no need to disturb our Order of February 3, 1999, in light of the FCC' February 26, 1999 ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking.. We furth find that it is unsound policy to disturb agreements based upon events occurring subsequent to ou approval of such agreements except in the rarest of circumstances or at the express direction of reviewing court. Therefore, we find that the Petition for Reconsideration and Rehearing Ameritech Indiana should be denied.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The Petition for Rehearing and Reconsideration of Ameritech Indiana is hereby denied.

2. This Order shall be effective on and after the date of its approval.

<u>MCCARTY, RIPLEY AND ZIEGNER CONCUR; SWANSON-HULL NOT PARTICIPATING; KLEIN ABSENT:</u>

APPROVED:

JUN 09 1998

I hereby certify that the above is a true and correct copy of the Order as approved.

Joseph M. Sutherland

Joseph M. Sutherland
Executive Secretary to the Commission

STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

ORDER NO. 75280

IN THE MATTER OF THE COMPLAINT OF MFS INTELNET OF MARYLAND, INC. AGAINST BELL ATLANTIC - MARYLAND, INC. FOR BREACH OF INTERCONNECTION TERMS AND REQUEST FOR IMMEDIATE RELIEF	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 8731

I. INTRODUCTION

This matter comes before the Commission pursuant to a Petition of Bell Atlantic – Maryland, Inc. ("BA-MD") for Declaratory Order that Internet Traffic is not "Local" Traffic Subject to Reciprocal Compensation ("Petition"). Specifically, BA-MD seeks an order declaring that, pursuant to the February 25, 1999 Federal Communications Commission ('FCC") Order,[1] and under the terms of BA-MD's interconnection agreements, calls from BA-MD's network to Internet Service Providers ("ISPs") served by interconnecting carriers do not constitute local traffic subject to reciprocal compensation. By Letter Order dated March 17, 1999, the Commission requested that parties file comments on BA-MD's petition by March 29, 1999. The Commission received comments from fifteen parties.[2] BA-MD filed a letter response to these comments on March 31, 1999 and filed a more extensive response on April 6, 1999. On

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling, CC Docket 96-96 (rel. February 26, 1999) ("ISP Order").

[2] Parties filing comments included AT&T, Commission Staff, MCI Worldcom, Global NAPS South, Inc., Office of People's Counsel, Starpower Communications, Inc., Focal Communications Corporation, KMC III Telecom, Inc., Choice One Communications, Inc., Sprint Communications Company L.P., Prism Operations LLC, Intermedia Communications, Inc., e.spire Communications, Inc., Association for Local Telecommunications Services, and Conectiv Communications, Inc.

April 14, 1999, the Commission heard oral argument during its weekly administrative meeting.

II. BACKGROUND

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996 ("1996 Act"), which establishes a framework for opening the local telephone markets to competition.[3] In order to promote competition in the local exchange telecommunications market, the 1996 Act imposes a general duty on all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as BA-MD, the duty to interconnect is even more specifically defined by Section 251(c)(2).

In conjunction with the above-mentioned interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

[3] *See*, 47 U.S.C. §§251-261. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), is codified throughout title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

47 U.S.C. §252(d)(2)(A). However, it should be noted that ILECs may negotiate and enter into a binding agreement with a requesting telecommunications carrier without regard to the standards set forth in Sections (b) and (c) of §251. 47 U.S.C. §252(a)(1).

The procedures for negotiations between Competitive Local Exchange Carriers ("CLECs") and ILECs are governed by §252 of the Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated, in whole or part, by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement or a portion thereof discriminates against a telecommunications carrier not a party to the agreement, or the implementation of such an agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. §252(e)(2)(A).

The issue of the correct treatment of ISP-bound traffic first arose in Maryland when MFS Intelenet of Maryland, Inc. ("MFS") filed a complaint requesting that we enforce the reciprocal compensation provisions of the interconnection agreement between MFS and BA-MD. ("MFS agreement"). MFS is a local exchange carrier providing telephone services in various regions of Maryland in competition with BA-MD. On July 16, 1996, MFS and BA-MD entered into an interconnection agreement under §§251 and 252 of the 1996 Act. Among other things, the MFS agreement contains terms addressing provision of interconnection and reciprocal compensation between the parties. Pursuant to §252 of the 1996 Act, the MFS agreement was filed with the Commission and we approved the agreement on October 9, 1996.[4] Pursuant to the MFS agreement, MFS and BA-MD exchange traffic between their respective networks, so that a customer subscribing to MFS' local exchange service can place calls to customers subscribing to BA-MD's local exchange service, and vice versa. Both MFS and BA-MD provide local exchange services over their respective networks to end use customers, including some business customers operating as ISPs.

On April 28, 1997, nine months after entering into the MFS agreement and six months after we approved that agreement, BA-MD sent a letter to MFS stating that it intended to discontinue payments of reciprocal compensation for local exchange traffic terminating to ISPs. In its letter, BA-MD claimed that local exchange traffic delivered to ISPs was ineligible for reciprocal compensation and stated that BA-MD intended to withhold reciprocal compensation payments for traffic BA-MD believed may be delivered to ISPs. BA-MD further indicated that it would seek refund of money previously paid as compensation for such calls.

On May 21, 1997, MFS filed a complaint with the Commission alleging that the actions of BA-MD violated the 1996 Act and the MFS agreement. Specifically, MFS alleged that BA-MD's actions were contrary to the plain language of the MFS agreement. According to MFS, Sections 1.44 and 1.61 of the MFS agreement established the parameters for reciprocal compensation between MFS and BA-MD. These sections state:

[4] *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*, Case No. 8731, Phase(a), Order No. 72939, 87 Md. PSC 210 (Oct. 9, 1996)

1.44 "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. Local Traffic does not include traffic originated or terminated by a commercial mobile radio service carrier.

1.61 "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.

MFS contended that pursuant to these provisions, to the extent an ISP purchases local exchange service from MFS and receives calls which originate from users of BA-MD provided local exchange service, BA-MD is obligated to pay reciprocal compensation to MFS for termination of such calls. MFS requested that the Commission declare the MFS agreement's reciprocal compensation provisions fully applicable to calls that terminate at ISPs. On July 2, 1997, BA-MD responded to the MFS complaint. In its response, BA-MD contended that ISP traffic is interstate and the Commission should leave the determination of what compensation is due to the FCC.

On September 11, 1997, we released our Letter Order in response to the MFS complaint. In this Order, we noted that "the primary issue presented is resolvable pursuant to the terms of the BA-MD/MFS Interconnection Agreement."[5] We accordingly found that MFS was entitled to compensation for the transport and termination of ISP-bound telephone calls. BA-MD's Petition for Reconsideration of the MFS Order was subsequently denied by the Commission.[6]

We considered this issue a second time within the context of a Sprint Communications Company, LP ("Sprint") complaint. On December 2, 1998, Sprint filed a Motion for Resolution of Disputed Issue. This motion was filed in response to BA-MD's refusal to sign an interconnection agreement unless it stated that Internet traffic is not local and not subject to reciprocal compensation. Sprint sought a Commission ruling on how ISP-bound calls should be treated. Basically, Sprint wanted the Commission to find that ISP-bound traffic was local and therefore, subject to reciprocal compensation. After consideration of the comments filed by Sprint, BA-MD and Staff, the Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from BA-MD.[7]

On February 26, 1999, the FCC released its Order clarifying the jurisdictional status of calls to ISPs.[8] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." However, the FCC further concluded that

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[5] Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Bell Atlantic-Maryland, Inc. and Andrew D. Lipman, Swidler & Berlin, Chg. (Sept. 11, 1997). ("MFS Order").

[6] Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Bell Atlantic-Maryland, Inc. (Oct. 1, 1997).

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

[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96 (rel. February 26, 1999) ("ISP Order").

given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by state commissions."[9] Thus, the FCC permitted states which have treated ISP-bound traffic as local under interconnection agreements to continue to require ILECs to compensate CLECs under contractual principles or other legal or equitable considerations.[10]

III. DISCUSSION

BA-MD's argument essentially is that because the FCC has determined that ISP-bound calls are largely interstate in nature, BA-MD can no longer be required to provide reciprocal compensation under its interconnection agreements because reciprocal compensation only applies to local traffic. If the finding that ISP-bound traffic is largely interstate was all that the FCC had decided, BA-MD's contention probably would be correct.

However, the FCC also went on to state that this conclusion is not dispositive of interconnection disputes currently before state commissions.[11] The FCC noted that, since 1983, the FCC itself has treated ISP-bound traffic as though it were local.[12] "In addition, ILECs characterized expenses and revenues associated with ISP-bound traffic

[9] *Id.*, at para. 1. See, also, para. 22.

[10] *Id.*, at para. 27.

[11] *ISP Order*, at para. 20.

[12] *Id.*, at para. 23.

as intrastate for separations purposes."[13] The FCC found that "[A]gainst this backdrop, and in the absence of any contrary [FCC] rule, parties entering into interconnection agreements may reasonably have agreed, for purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic."[14] Thus, the clarification of the jurisdictional issue was not the FCC's only holding.

The FCC took the opportunity to issue some subsidiary conclusions. First, the FCC made clear that its jurisdictional determination did not in itself establish whether reciprocal compensation is due in any particular instance. The FCC recognized that parties might have agreed to reciprocal compensation for ISP-bound traffic, or a State commission exercising its authority under §§251 and 252 of the 1996 Act might have imposed reciprocal compensation obligations for this traffic.

The FCC developed a list of factors State commissions should consider when construing interconnection agreements to determine whether the parties agreed that ISP-bound calls should be treated as local at the time the contract was entered into. These factors include:

1. negotiation in the context of the FCC's longstanding policy of treating ISP traffic as local;
2. the conduct of the parties pursuant to those agreements;
3. whether ILECS serving ISPs have done so out of intrastate or interstate tariffs;
4. whether revenues associated with those services were counted as intrastate or interstate revenues;

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[13] *Id*

[14] *Id.*, at para. 24.

5. whether there is evidence that ILECs 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; and
6. whether, if ISP traffic is not treated as local and subject to reciprocal compensation, ILECs and CLECs would be compensated for this traffic.

While many of these factors constitute nothing more than an ILEC following established FCC procedures, the factors demonstrate that at the time the interconnection agreements were entered into, ISP-bound traffic was consistently treated as if it were local. Thus, if any of the ILECs wanted to change the prevailing view for purposes of reciprocal compensation negotiations, the companies were obligated to raise this issue during negotiations. Silence on the issue would logically be construed as accepting the prevailing treatment for ISP-bound traffic.

Furthermore, the FCC also found that even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, "State commissions may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."[15] According to the FCC, because no current rule exists on this specific issue, State commissions have had "no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal

[15] *Id.*, at para. 25.

compensation."[16]

Clearly, the FCC's interpretation of the 1996 Act is that, in view of the absence of FCC rule to the contrary, State commissions have authority to decide whether ILECs and CLECs intended to treat ISP-bound traffic as local when they negotiated their agreements. If the parties did, then the State commissions have authority to require that such intention be honored. Moreover, the FCC's ruling is that State commissions have authority in arbitration proceedings to require that reciprocal compensation be paid even if the parties do not agree.

Our ISP decisions have taken two different tracks. In the MFS decision, the Commission concluded that, under contract principles, pursuant to the interconnection agreement between the parties, MFS was entitled to compensation for termination of calls to ISPs. In this decision, we did not make a determination as to the jurisdictional nature of calls to ISPs. We concluded that the parties intended for ISP calls to be local. In contrast, in the Sprint decision, the Commission did address the jurisdictional nature of calls to ISPs and concluded that these calls were local. Since we find that a different analysis should be applied in the context of an approved negotiated interconnection agreement as opposed to an arbitration order, we will separately discuss whether CLECs should receive reciprocal compensation for ISP-bound traffic under each of these scenarios.

A. Approved Negotiated Interconnection Agreements

The primary issue in this context is relatively straightforward. We must determine whether the parties to the approved interconnection agreements intended, at the time those agreements were entered into, to treat ISP-bound telephone calls as local

[16] *Id.*, at para. 26.

traffic subject to the payment of reciprocal compensation.[17] First, we must focus on the actual language of the interconnection agreement under review. We begin our assessment with a review of the provisions which define local traffic and address the reciprocal compensation obligations of BA-MD and MFS. The terms and conditions of the MFS agreement which define local traffic are found in Section 1.44 of the original agreement executed between MFS and BA-MD on July 16, 1996. This section states:

> 1.44 "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. Local Traffic does not include traffic originated or terminated by a commercial mobile radio service carrier.

Also under review are the provisions addressing the reciprocal compensation obligations of both BA-MD and MFS. Section 1.61 reflects the mutual agreement of the parties, and that subsection reads in pertinent part:

> 1.61 "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.

[17] Under well-established principles of contract construction, the parties' intent is determined at the time of contracting, not at some subsequent date. See, e.g., *Hardy v. Brookhart*, 259 Md. 317, 326-27 (1970).

At the time the interconnection agreement was entered into, ISP traffic was treated as local in virtually every respect by all industry participants, including the FCC. BA-MD was fully aware of the industry's prevailing local treatment of ISP traffic at the time that it entered into the interconnection agreement in question. In fact, BA-MD afforded ISP traffic local treatment in the same respect that the CLECs did at the time. Thus, at the time the interconnection agreement was entered into, the prevailing local treatment of ISP traffic already was in place. Even today, both BA-MD and the CLECs charge their ISP customers local business line rates for local telephone exchange service that enables the ISP's customers to access their service via a local call. The service provided to ISP customers by both BA-MD and CLECs falls under their local exchange tariffs and calls to ISPs are rated and billed just as any other local calls. Neither BA-MD nor the CLEC assesses toll charges for those calls. Further indication of the prevailingly local treatment afforded ISP traffic is the fact that BA-MD records the minutes of use associated with such calls as local for ARMIS reporting requirements with the FCC. Finally, BA-MD characterizes expenses and revenues associated with ISP-bound traffic as intrastate for jurisdictional separation purposes.

Even the FCC noted in its *ISP Order* that since 1983, it has treated ISPs as end users under the access charge regime and permitted them to purchase their links to the public switched telephone network through intrastate business tariffs rather then through interstate access tariffs. The FCC specifically recognized that it has, by the actions in that regard, discharged its interstate regulatory obligations through the application of local business tariffs and has thus treated ISP-bound traffic as though it were local.

Perhaps the most persuasive evidence that BA-MD did not intend to exclude calls to ISPs from the definition of local traffic is found in the conspicuous absence of a mechanism to track, separate and exclude ISP traffic from the local billing records of the CLECs. BA-MD certainly was in a position to know that such a mechanism would be necessary to segregate ISP traffic from local calls, yet no attempt was ever made to develop and incorporate such a mechanism.[18] Although BA-MD was well aware of the existence of ISP traffic at the time the MFS agreement was negotiated, it made no effort to exclude calls to ISPs from the definition of local traffic, but did expressly exclude commercial mobile radio service traffic. In contrast, there is no indication that the MFS agreement contemplated the segregation of ISP traffic, either as toll or as a "unique" form of local traffic.

Based on the foregoing, and recognizing the prevailing local treatment of ISP traffic at the time the agreement was executed, we conclude that the regulatory and industry custom at that time dictated that ISP traffic be treated as local, and therefore, subject to reciprocal compensation. We find that the treatment of ISP traffic as local was so prevalent in the industry at that time that BA-MD, if it so intended, had an obligation to negate such local treatment in the interconnection agreements it entered into by specifically excluding ISP traffic from the definition of local traffic subject to the payment of reciprocal compensation.

Given the comprehensive nature of the MFS agreement and the specificity with

[18] In conjunction with the prevailing local treatment afforded ISPs, BA-MD's actions immediately subsequent to executing the agreement evidence an intent to treat ISP-bound calls as local traffic. After our approval of the MFS agreement, MFS and BA-MD began operating under its terms and for many months, paid one another the agreed upon local compensation rates for the transport and termination of calls, including ISP-bound calls.

which they address virtually all interconnection issues, we find it difficult to understand how BA-MD could fail to insist on a specific itemized exception excluding ISP traffic. BA-MD's knowledge of that regulatory and industry custom made it imperative that BA-MD specifically exclude calls to ISPs from the definition of local traffic subject to the payment of reciprocal compensation.[19] Given the circumstances then existing, we find the absence of such a specific exclusion or exception to be persuasive of the fact that BA-MD did not intend to exclude ISP traffic from the definition of local traffic when it entered into the MFS agreement. Under all of the circumstances existing at the time the contract was entered into, we conclude that the parties contemplated reciprocal compensation payments for ISP traffic. For MFS and those CLECs who "opted-in" to the MFS agreement, this conclusion means that those parties shall receive reciprocal compensation for ISP-bound calls until July 1, 1999 under the rates set forth in the interconnection agreement.[20]

In conclusion, we find that with regard to the MFS agreement, telephone calls originating from a BA-MD provided telephone service end user to the respective ISP end users of MFS are subject to the reciprocal compensation provisions of that agreement. Based on the discussion above, we find that BA-MD was clearly in a position to know

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[19] It should be noted that, unless a contract provides otherwise, the law applicable at the time and place the contract is entered into is to be considered a part of that contract. See, e.g., *Denice v Spotswood I. Quinby, Inc.*, 248 Md. 428, 433-34 (1968).

[20] *See*, MFS agreement at §22.1. BA-MD's more recent interconnection agreements include explicit language excluding calls to the Internet from the payment of reciprocal compensation. See, e.g., Interconnection Agreement between BA-MD and Transwire Operations, LLC (Dec. 18, 1998) and Interconnection Agreement between BA-MD and Omnipoint Communications Enterprises, L.P. (Nov. 24, 1998). These parties, and any parties similarly situated would not be entitled to reciprocal compensation for ISP-bound calls. These parties are bound to their contractual agreement in the same manner and to the same extent as BA-MD.

that the specific exclusion of such traffic from the definition of local traffic for purposes of the payment of reciprocal compensation was a necessity. BA-MD failed to incorporate such an exclusion and is, therefore, in breach of the MFS agreement under which it has withheld reciprocal compensation for ISP traffic.

Accordingly, we find that BA-MD must within 15 days of the effective date of this Order, pay all reciprocal compensation amounts withheld for ISP traffic under the MFS agreement. BA-MD also must continue to pay such amounts for the duration of the MFS agreement.

B. Arbitrated Agreements

The issue of whether parties who arbitrated the issue of reciprocal compensation for ISP-bound calls are still entitled to that compensation in light of the FCC's *ISP Order* is more problematic. Obviously, there is no question of BA-MD having agreed that ISP-bound calls were local in this situation. BA-MD vigorously argued in its negotiations with Sprint, for example, that ISP-bound calls were not "local traffic." Furthermore, as noted earlier, in the arbitration we concluded that ISP-bound calls were local. This conclusion appears to have been brought into question by the FCC's *ISP Order*.

However, even this conclusion does not totally resolve the issue. The FCC found that, even in cases where a State commission does not find that the parties voluntarily agreed on an inter-carrier compensation scheme, or where a state has not addressed the issue, "state commissions may nevertheless determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."[21] State commissions may make such determinations "pursuant to contractual principles or other

[21] *ISP Order*, at para. 25.

legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule" pending completion of the FCC rulemaking on this issue.[22] Until such time as a federal inter-carrier compensation mechanism is developed, the FCC left the determination of the applicability of reciprocal compensation entirely to State commissions. Thus, under the FCC's *ISP Order*, it is incumbent upon this Commission to determine an interim cost recovery methodology which may be used until the FCC completes its rulemaking on this issue and adopts a federal rule governing inter-carrier compensation arrangements.[23]

In fact, according to the FCC, "State commissions are free to require reciprocal compensation for ISP-bound calls, or not require reciprocal compensation and adopt another compensation mechanism, bearing in mind that ISP/ESPs are exempt from paying access charges."[24] This directive does not leave us the option of providing for no compensation for ISP-bound calls. State commissions must either require reciprocal compensation or develop another compensation mechanism. To fail to provide for any compensation would violate the 1996 Act, which states:

> A State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. 47 USC § 252(d)(2)(A).

[22] *Id.*, at para. 27 (emphasis added).

[23] Specifically, the FCC stated that "[A]lthough reciprocal compensation is mandated under Section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain circumstances not addressed by Section 251(b)(5), so long as there is no conflict with governing federal law." *ISP Order*, at para. 26.

[24] *ISP Order*, at para. 26 (emphasis added).

We are very concerned that the adoption of BA-MD'S position will result in CLECs receiving no compensation for terminating ISP-bound traffic. Such an effect will be detrimental to our efforts to encourage competition in Maryland. No one disputes that local exchange carriers incur costs to terminate the traffic of other carriers over their network. In the absence of finding that reciprocal compensation applies, a class of calls (ISP traffic) will exist for which there is no compensation. The reciprocal compensation rates established by our arbitration order and contained in the approved Statement of Generally Available Terms ("SGAT") reflect the costs of this termination. Until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic, we find that it is in the public interest to require BA-MD to pay our arbitrated reciprocal compensation rates contained in the SGAT as an interim compensation mechanism. Absent such a mechanism, CLECs will be forced to absorb these costs. However, we wish to stress that this compensation rate is a temporary, but necessary, measure. The parties are of course free to negotiate another compensation rate to be applied to ISP-bound traffic. In any event, our interim rate will only apply until the FCC issues an order creating its inter-carrier compensation mechanism for ISP-bound traffic.

IT IS, THEREFORE, this 11th day of June, in the year Nineteen Hundred and Ninety-Nine, by the Public Service Commission of Maryland,

ORDERED: (1) That the parties shall reconcile the amounts owed and Bell Atlantic - Maryland, Inc. shall remit payment of reciprocal compensation charges previously withheld within 15 days of this order.

(2) That Bell Atlantic – Maryland, Inc. shall continue to pay reciprocal compensation for ISP-bound traffic under its agreement with MFS and any CLECs who opted in to that agreement until the expiration of the MFS agreement.

(3) That, on an interim basis, the inter-carrier compensation mechanism for ISP-bound calls for providers not currently operating under an approved interconnection agreement, shall be the reciprocal compensation rates established in our arbitration Order as contained in the approved SGAT.

Commissioners

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Gregory Scott	Commissioner

In the Matter of the Petition of U S WEST Communications, Inc. for a Determination That ISP Traffic Is Not Subject to Reciprocal Compensation Payments Under the MFS/U S WEST Interconnection Agreement

ISSUE DATE: August 17, 1999

DOCKET NO. P-~~3167~~, 421/~~EL~~ M-99-529

ORDER DENYING PETITION

PROCEDURAL HISTORY

On April 20, 1999 U S WEST Communications, Inc. filed a request for a ruling that traffic to Internet service providers was not subject to the reciprocal compensation requirements of its interconnection agreements with MFS Intelenet, Inc., KMC Telecom, Inc., Ovation Communications of Minnesota, Inc., and Harmony International. The Company argued that a recent Federal Communications Commission (FCC) decision finding such traffic to be largely interstate eliminated any justification for requiring reciprocal compensation for these calls.

On May 12, 1999 the Commission issued a notice soliciting comments on the request. Contel of Minnesota, Inc. d/b/a GTE Minnesota filed comments supporting U S WEST's request.

The following parties filed comments opposing the request: Sprint Communications Company L. P. and Sprint Minnesota, Inc., filing jointly; MCI WORLDCOM, Inc., MFS Intelenet, Inc. and MCI Telecommunications Corporation, filing jointly; KMC Telecom Inc. and Ovation Communications of Minnesota, Inc., filing jointly; and AT&T Communications of the Midwest, Inc.

The Department of Public Service filed comments stating that the Commission had the authority to continue requiring reciprocal compensation for traffic to Internet service providers under the four interconnection agreements at issue. The agency did not take a position on whether the Commission should do so.

On August 3, 1999 the case came before the Commission.

FINDINGS AND CONCLUSIONS

I. Legal and Factual Background

Reciprocal compensation is a creature of the federal Telecommunications Act of 1996, which opened the nation's local telephone markets to competition. The Act requires all local exchange carriers to interconnect with one another and to establish reciprocal compensation arrangements to compensate one another for the costs of transporting and terminating calls originating on other carriers' networks.[1]

Reciprocal compensation is designed only to recover the costs of transporting and terminating *local* calls; the costs of transporting and terminating interexchange calls have long been recovered through state and federal access charges. Also, the FCC rules implementing the 1996 Act explicitly limit reciprocal compensation to "local telecommunications traffic."[2]

At the same time, however, until February 26 of this year, it was unclear whether traffic from end users to Internet service providers (ISPs) was local or interstate. What was clear was that the FCC had decided, in a series of decisions going back 15 years, to treat this traffic as local traffic, unless and until changed circumstances dictated different treatment.

In 1983, when the FCC established interstate access charges, it exempted ISPs, permitting them to buy service under local business tariffs, instead of federal access tariffs, and to pay subscriber line charges, instead of access charges.[3] In 1997, when the agency fine-tuned access charges to promote local competition, it reaffirmed the ISP exemption, citing the Congressional mandate "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[4] Throughout this time, the FCC also consistently permitted local exchange carriers to record their revenues and expenses from serving ISPs as local revenues and expenses for separations purposes.[5]

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[1] 47 U.S.C. § 251(a) and (b)(5).

[2] See 47 C.F.R. 51.701.

[3] MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983).

[4] Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd at 16133-34.

[5] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Settlements for Open Network Architecture, CC Docket No. 89-79, Notice of Proposed Rulemaking, 4 FCC Rcd. 3983, 3987-88 (1989).

Of course, it was clear all along that ISP-bound traffic was unique. Although ISPs are typically located in the same local calling area as their customers, the information their customers retrieve from the Internet is stored in and transmitted through computers all over the world. Similarly, when ISP customers send electronic mail or other on-line communications, these communications often cross interexchange, interstate, and international borders.

The issue of whether ISP-bound traffic was interstate or intrastate came to a head when local competition materialized. Then, local exchange carriers had to decide, when negotiating interconnection agreements, whether to pay reciprocal compensation for ISP-bound calls. When negotiations failed, state commissions had to decide the issue. (Under the Act, carriers unable to reach negotiated interconnection agreements must take disputed issues to their state commissions.[6])

In Minnesota, some carriers negotiated interconnection agreements requiring reciprocal compensation for ISP-bound traffic; others did not. When this Commission faced the issue in arbitrating an interconnection dispute between U S WEST and MFS Communications Company, the Commission decided to require reciprocal compensation over U S WEST's objections.

That decision was based on four facts: (1) U S WEST charged ISPs standard local business rates, not special ISP rates; (2) U S WEST did not handle ISP-bound traffic differently from other local traffic; (3) the law did not require U S WEST to handle ISP-bound traffic differently from other local traffic; and (4) U S WEST had not demonstrated that separating ISP-bound traffic from other traffic was even technically feasible.[7]

After the U S WEST/MFS arbitration, three other companies exercised their right under the 1996 Act to adopt the U S WEST/MFS contract, including its terms requiring reciprocal compensation for ISP-bound traffic.[8] Those companies were KMC Telecom, Inc., Ovation Communications of Minnesota, Inc., and Harmony International.

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[6] 47 U.S.C. § 252(b).

[7] *In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with U S WEST Communications, Inc. Pursuant to Section 252 (b) of the Federal Telecommunications Act of 1996*, Docket No. P-442,421/M-96-855; P-5321, 421/M-96-909; P-3167, 421/M-96-729, ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A U S WEST COST PROCEEDING (December 2, 1996), hereinafter *U S WEST/MFS Arbitration Order*.

[8] 47 U.S.C. § 252(i).

Meanwhile, local exchange carriers throughout the country filed petitions asking the FCC to clarify whether ISP-bound traffic was subject to reciprocal compensation. On February 26, 1999 the FCC released a Declaratory Ruling finding that ISP-bound traffic was jurisdictionally mixed, but largely interstate, and subject to FCC jurisdiction.[9] The agency opened a rulemaking proceeding to determine how carriers should be compensated for carrying this traffic. In the mean time, the agency stated, state commissions should continue deciding that issue when it arose, and negotiated and arbitrated interconnection agreements addressing the issue could remain in effect.

II. U S WEST's Petition

U S WEST's petition asks the Commission to find that U S WEST, MFS, and the three companies that have adopted the U S WEST/MFS arbitrated interconnection agreement are no longer required to pay reciprocal compensation for ISP-bound traffic for the following reasons:

> **(1) The FCC has held that ISP-bound traffic is interstate traffic, and the Telecommunications Act of 1996 "does not permit state commissions to require a carrier to pay reciprocal compensation for such traffic."**
>
> **(2) The Commission's reasons for requiring reciprocal compensation in the U S WEST/MFS arbitration case are improper under the FCC's *Declaratory Ruling*.**
>
> **(3) The language of the arbitrated interconnection agreement limits reciprocal compensation to local traffic; since it is now clear that ISP-bound traffic is not local traffic, no reciprocal compensation for that traffic is required under the terms of the agreement itself.**

III. Commission Action

The Commission will deny the petition for the reasons set forth below.

A. The FCC Ruling Does Not Invalidate the U S WEST/MFS Arbitrated Interconnection Agreement.

U S WEST argued that the FCC finding that ISP-bound traffic is interstate traffic either deprives this Commission of the authority to require reciprocal compensation or exposes that decision as incorrect and compels its reversal. The Commission disagrees.

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[9] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68 (rel. Feb. 16, 1999), hereinafter *Declaratory Ruling*.

The FCC's Declaratory Ruling makes it clear that, until it completes its rulemaking on compensation for ISP-bound traffic, states retain the authority to require reciprocal compensation, to devise other compensation mechanisms, and to enforce negotiated and arbitrated interconnection agreements requiring reciprocal compensation:

> We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.
>
> *Declaratory Ruling*, at ¶ 21.

The Ruling makes it equally clear that requiring reciprocal compensation is a reasonable interim means of compensating local exchange carriers for transporting and terminating ISP-bound traffic:

> While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.
>
> *Declaratory Ruling*, at ¶ 25.

Finally, the Ruling makes it clear that in the absence of a federal rule, states had — and have — an obligation to devise some form of compensation for transporting and terminating ISP-bound traffic:

> In the absence of federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. . . .
>
> By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.
>
> *Declaratory Ruling*, at ¶ 26.

The Commission concludes that the FCC's Declaratory Ruling does not invalidate the reciprocal compensation requirements of the U S WEST/MFS arbitrated interconnection agreement or those of the adopted agreements of KMC Telecom, Inc., Ovation Communications of Minnesota, Inc., and Harmony International.

B. The Commission's Reasons for Requiring Reciprocal Compensation Under the U S WEST/MFS Interconnection Agreement Pass Muster Under the FCC's *Declaratory Ruling*.

U S WEST also claimed that the Commission's reasons for requiring reciprocal compensation in the U S WEST/MFS arbitration case were impermissible under the FCC's *Declaratory Ruling*.

The FCC cited only one instance in which state commissions should re-examine decisions requiring reciprocal compensation — when those decisions were based on findings that ISP-bound traffic terminates at the ISP server — and emphasized that there were many other strong and acceptable rationales for such decisions.[10]

The Commission explained its decision to require reciprocal compensation in the U S WEST/MFS case as follows:

> **The Commission finds that US WEST has failed to meet its burden of demonstrating a need to discriminate regarding the handling of ESP traffic. US WEST does not presently have different local rates for ESPs–it has shown no basis for imposing such discrimination on rates in this proceeding. US WEST has not shown that separating this traffic is required under the law or that it is technically feasible.**
>
> *U S WEST/MFS Arbitration Order* at 75.

This rationale does not rest on the incorrect (and prohibited) assumption that ISP-bound traffic terminates at the ISP server. Instead, it turns on the kinds of factors that the FCC has specifically identified as proper — U S WEST's treatment of ISP traffic as local traffic, its failure to segregate ISP-bound traffic from other local traffic, its charging of standard local rates to ISP customers. *Declaratory Ruling*, at ¶ 24.

The Commission concludes that its 1996 arbitration decision to require reciprocal compensation for ISP-bound traffic passes muster under the FCC's *Declaratory Ruling* and need not be re-examined.

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[10] *Declaratory Ruling*, at ¶ 27.

C. The Language of the Interconnection Agreement Does Not Preclude Reciprocal Compensation for ISP-Bound Traffic.

U S WEST also claimed that since the arbitrated interconnection agreement requires reciprocal compensation only "[i]f such traffic is local,"[11] and since we now know that ISP-bound traffic is not local, the agreement itself no longer permits the payment of reciprocal compensation for ISP-bound traffic. This is incorrect on at least two fronts.

First, the Order establishing the reciprocal compensation requirements between these two companies unequivocally required reciprocal compensation for ISP-bound traffic. The issue presented itself in the form of U S WEST-sponsored language exempting ISP-bound traffic from reciprocal compensation; the Commission struck the U S WEST language for the explicitly stated purpose of requiring reciprocal compensation for this traffic. Even if the language of the agreement failed to conform with the Commission's Order, then, justice would require the Commission to reform or interpret the language of the agreement to conform with the Order.

Second, the language of the agreement can be read to require reciprocal compensation for ISP-bound traffic. While U S WEST is correct that the agreement requires reciprocal compensation for traffic "if such traffic is local," ISP-bound traffic was treated as local when the agreement was signed, and it continues to be treated as local for regulatory purposes, pending the conclusion of the FCC's ISP rulemaking. The *Declaratory Ruling* makes this clear:

> Thus, the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local. . . .
>
> Moreover, the Commission has directed states to treat ISP traffic as if it were local, . . .
>
> Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. . . .
>
> . . . state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local . . .
>
> *Declaratory Ruling*, ¶¶ 5, 9, 16, 23, 24.

The use of the term "local," then, to identify traffic subject to reciprocal compensation, does not automatically disqualify ISP-bound traffic. In fact, it militates toward including it.

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[11] *Interconnection Agreement*, V. A.

In any case, however, the Commission reads the agreement in concert with the arbitration Or and hereby holds that the agreement requires the payment of reciprocal compensation for ISP bound traffic.

IV. Conclusion

The FCC's *Declaratory Ruling* finding ISP-bound traffic to be largely interstate explicitly authorized state commissions to continue requiring reciprocal compensation for this traffic un the FCC finishes its rulemaking on the issue. This Commission's decision requiring reciproc compensation for ISP-bound traffic in the U S WEST/MFS arbitration case remains legally sound and in full force and effect.

The Commission will deny U S WEST's petition.

ORDER

1. **U S WEST's Petition for a Determination that ISP Traffic Is Not Subject to Reciproca Compensation Payments Under the MFS/U S WEST Interconnection Agreement is hereby denied.**

2. **This Order shall become effective immediately.**

BY ORDER OF THE COMMISSION

Janet Gonzalez, for:

Burl W. Haar
Executive Secretary

(S E A L)

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BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

Docket No. 98-10015

In re petition of PAC-WEST TELECOMM, INC.

for arbitration pursuant to Section 252 of the

Telecommunications Act of 1996 to establish an

Interconnection Agreement with Nevada Bell.

Docket No. 99-1007

In re petition of ADVANCED TELCOM GROUP,

INC. for arbitration of an Interconnection

Agreement with Nevada Bell pursuant to Section

252(b) of the Telecommunications Act of 1996.

ARBITRATION DECISION

The Public Utilities Commission of Nevada ("Commission") makes the following findings of fact and conclusions of law:

Procedural History:

1. On October 12, 1998, Pac-West Telecomm, Inc. ("Pac-West") filed a Petition for Arbitration to establish an Interconnection Agreement with Nevada Bell. The petition was filed pursuant to Chapters 703 and 704 of the Nevada Revised Statutes ("NRS") and the Nevada Administrative Code ("NAC"), the regulations adopted by the Commission in Docket No. 96-12001 (later promulgated at NAC 703.280 et seq.), and 47 U.S.C. §251 et seq. This matter was designated as Docket No. 98-10015. Pac-West is currently authorized to provide resold intrastate interexchange, alternative operator and competitive local exchange services within Nevada pursuant to Certificate of Public Convenience and Necessity ("CPC") 2036 sub 3.
2. Pac West requests that the Commission arbitrate the following issue: whether a party receiving traffic from the other for termination to an Internet Service Provider ("ISP") is entitled to receive reciprocal compensation from the other pursuant to 47 U.S.C. §251(b)(5).
3. On October 22, 1998, the Commission issued a Notice of Petition for Arbitration and Notice of Prehearing Conference for Docket No. 98-10015.
4. On November 6, 1998, Nevada Bell filed its Response to the Petition.
5. By November 18, 1998, the Commission received Notices of Intent to Comment from AT&T Communications of Nevada, Inc. ("AT&T"), GTE California Incorporated, d/b/a GTE of Nevada ("GTE"), the Attorney General's Bureau of Consumer Protection - Utility Consumers' Advocate ("UCA"), Advanced Telcom Group, Inc. ("ATG"), and Sprint Communications Company L.P.
6. On November 30, 1998, the Commission held a duly noticed Prehearing Conference. Appearances were made by ATG, AT&T, GTE, Nevada Bell, Pac-West, Sprint Communications Company L.P., the Regulatory Operations Staff ("Staff") of the Commission, and the UCA. At the prehearing conference, all parties involved agreed to waive the 9-month deadline for resolution of the unresolved issues as required in 47 U.S.C. §252(b)(4)(C). In its place, the parties proposed a

procedural schedule in which the Arbitration Decision would be filed on March 4. 1999. and a final Commission decision would be issued no later than April 5. 1999. On December 10. 1998. the Commission issued a Procedural Order in Docket No. 98-10015. Also, on December 10. 1998. the Commission issued a Notice of Hearing in Docket No. 98-10015.

7. On January 8, 1999, ATG filed a Petition for Arbitration to establish an Interconnection Agreement with Nevada Bell. The petition was filed pursuant to Chapters 703 and 704 of the NRS and NAC, 47 U.S.C. §251 et seq., and, in particular, NAC 703.280 et seq. This matter was designated as Docket No. 99-1007. ATG is currently authorized to provide resold local and intrastate long distance services within Nevada pursuant to CPC 2400.
8. ATG requests that the Commission arbitrate the following issue: whether a party receiving traffic from the other for termination to an ISP is entitled to receive reciprocal compensation from the other pursuant to 47 U.S.C. §251(b)(5).
9. On January 8, 1999, ATG also filed a Motion to Consolidate Hearings on Arbitration of Common Issue pursuant to NAC 703.550 et seq. and 47 U.S.C. §252(b). On January 15, 1999, Staff filed a Joinder in the Motion. No other comments were filed. On January 19, 1999, the Commission issued an Order consolidating Docket Nos. 98-10015 and 99-1007.
10. On January 8, 1999, prefiled direct testimony was filed by ATG and Pac-West. On January 15. 1999. prefiled direct testimony was filed by Nevada Bell. On January 22, 1999, prefiled direct testimony was filed by Staff. On January 29, 1999, prefiled rebuttal testimony was filed by ATG.
11. On January 19, 1999, the Commission issued a Notice of Petition for Arbitration; Notice of Prehearing Conference; Notice of Hearing in Docket No. 99-1007.
12. On February 3, 1999, Notices of Intent to Comment were filed in Docket No. 99-1007 by GTE and Sprint Communications Company, L.P. and Central Telephone Company - Nevada d/b/a Sprint of Nevada (collectively, "Sprint").
13. On February 10, 1999, the Commission held a prehearing conference for Docket Nos. 98-10015 and 99-1007. Appearances were made by ATG, Nevada Bell, Pac-West, and Staff.
14. On February 10, 1999, the Commission commenced a hearing in the consolidated matter of Docket Nos. 98-10015 and 99-1007. Appearances were made by ATG, Nevada Bell, Pac-West. and Staff. The hearing lasted two days which included 385 pages of transcript and 14 exhibits admitted into evidence. At the close of the hearing the Presiding Officer questioned the parties whether the final decision in this matter by the Commission could be extended to April 8, 1999. No party expressed an opposition to the change.
15. On February 18, 1999, post-hearing briefs were filed by ATG, Nevada Bell, Pac-West, Sprint. and Staff.
16. On February 26, 1999, the Federal Communications Commission ("FCC") released a Declaratory Ruling in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-38. The FCC concluded that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. In addition, the FCC concluded that reciprocal compensation obligations should only apply to local traffic that originates and terminates within state defined local calling areas. Finally, the issue of reciprocal compensation for ISP-bound traffic was left to the discretion of state commissions in the exercise of their authority to arbitrate interconnection disputes.

Statutory Guidelines:

17. Pursuant to the Telecommunications Act of 1996 [Pub. L. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, United States Code)] and, in particular, 47 U.S.C. §252(b)(2)(i), the Presiding Officer has been presented with one issue to resolve in this arbitration: **Whether a party receiving traffic from the other for termination to an ISP is entitled to receive reciprocal compensation from the other pursuant to 47 U.S.C. §251(b)(5)**?
18. Pursuant to 47 U.S.C.§251(b)(5), each local exchange carrier ("LEC") has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.
19. Pursuant to 47 U.S.C. §251(c)(2)(D), each incumbent local exchange carrier ("ILEC") has the duty to provide for interconnection with the local exchange carrier's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.
20. For the purposes of compliance with section 47 U.S.C. §251(b)(5) by an ILEC , the Commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of

costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. 47 U.S.C. §252(d)(2)(A)(i).

Position of the Parties:

Pac-West and ATG:

21. Pac-West states that over the past sixteen years. the FCC has consistently yielded to state jurisdiction over switched calls to Enhanced Service Providers, including ISPs. Without exception. the provision of such services has been deemed an intrastate endeavor. (Pac-West Post-Hearing Brief at 6).
22. While Nevada Bell argues that the FCC has asserted jurisdiction over dial-up access to the Internet through an FCC memorandum decision, Nevada Bell neglected to cite the portion of the decision (Tr. at 275-276). where the FCC makes it unambiguously clear that the order did not consider or address issues regarding whether LECs were entitled to receive reciprocal compensation when they deliver to ISPs circuit-switched dial-up traffic originated by interconnecting LECs. [GTE Operating Cos., CC Docket No. 98-79. Memorandum Opinion and Order, FCC 98-292 (rel. 10/30/98) at ¶2].
23. In addition, ATG states that the FCC's Part 36 Separations Rules do not support Nevada Bell's claim that the FCC requires calls made to ISPs to be assigned to the interstate jurisdiction of the FCC. (ATG Post-Hearing Brief at 13). The FCC ten percent rule applies only to private line and WATS lines; it does not apply to switched lines; and no rule in Part 36 applies the FCC's ten percent rule to the circuit-switched services which are at issue in this proceeding. (Tr. at 269-270).
24. Even if the FCC were to reverse its earlier decisions to leave regulation of circuit- switched ISP traffic to the states, this Commission is nevertheless bound by the Telecommunications Act of 1996 to order the payment of reciprocal compensation for the completion of calls to ISPs until the FCC adopts contrary regulations. (Pac-West Post-Hearing Brief at 8).
25. Pac-West intends to locate a switch in Las Vegas and provide access to ISPs (also located in Las Vegas) via the switch in Las Vegas. Under this scenario, a Nevada Bell customer located in Reno would connect with an ISP in Las Vegas via a switch located in Las Vegas. (Tr. at 8 - 9). Reno and Las Vegas are located in different local access and transport areas (interLATA). Nevertheless, Pac-West is seeking to have reciprocal compensation apply to interLATA calls simply because the customer will access the ISP via a local number.
26. Pac-West and ATG seek to have the Commission define local calls by comparing the rate center of the NXX codes, rather than by comparing the physical location of the calling and called parties within the local calling area. (Pac-West Petition for Arbitration at 3; ATG Petition for Arbitration at 3).
27. Pac-West states that contrary to Staff's suggestion, there really is no issue of potentially adverse impacts on the local versus toll calling structure since very few toll calls would ever typically be made by consumers for the purpose of accessing ISPs. Thus, Pac-West's service would not be displacing any carrier's toll revenues. Instead, the real issue is merely whether Pac-West should be permitted to push the envelope a little bit in the extent to which local-rated ISP access is made available to consumers in outlying areas. (Pac-West Post-Hearing Brief at 15).
28. Pac-West believes that the best interests of Nevadans lie in allowing Pac-West to provide its services on a foreign exchange basis. (Id. at 15-16).
29. ATG states that even with Nevada Bell's proposal to monitor the usage of phone lines for Internet traffic (Tr. at 257-59), Nevada Bell still has not proposed a way to determine which traffic is terminating at ISPs. (ATG Post-Hearing Brief at 14). The end user requests may only request information from the ISP, and never go anywhere else, or may request information that is held in cache memory by the ISP and not need to go beyond the ISP. (Tr. at 176-77, 197-98, 229-30).
30. ATG believes that an Internet call is two calls. One is a call from the end user to the ISP, over which this Commission has jurisdiction and for which reciprocal compensation applies. The other call is an unregulated Internet data exchange called Internet Service, and is provided without Nevada regulation by entities such as America On Line and Nevada Bell Internet. (ATG Post-Hearing Brief at 16). Consequently, when a call from the public switched network reaches the first ISP modem bank, it ceases to be a telecommunications service provided by a common carrier. (Ex. 4 at 4).
31. ATG states that there is nothing in 47 U.S.C. §251 et seq. or the FCC's implementing rules which

would prevent this Commission from finding that all local traffic is subject to the obligation of reciprocal compensation. There is no FCC decision in any proceeding which would limit or prohibit the Commission from making this finding. (ATG Post-Hearing Brief at 10).

32. ATG and Pac-West state that the purpose of reciprocal compensation is to compensate carriers for carrying out call termination functions. When an ILEC terminates a call on a CLEC's network, the ILEC should pay the costs of terminating the call. If reciprocal compensation is not applied to calls to ISPs, the ILEC avoids the costs of terminating the call on its own network and avoids reciprocal compensation payment to terminate its customer's call on another carrier's network. (Tr. at 32). This gives the ILEC a competitive advantage over competing carriers.
33. ATG states that fundamental fairness dictates that ILECs and CLECs should each pay the other to terminate all local switched telecommunications traffic. (Ex. 3 at 5-6; ATG Post-Hearing Brief at 2).
34. ATG states that Nevada Bell is profiting handsomely from the growth in data traffic, and both revenues and earnings are outstripping the growth in number of access lines. (Ex. 4 at 19-20). The bottom line under any analysis is that revenue growth to Nevada Bell from Internet related sales is dwarfing any real or imagined expense from reciprocal compensation. (ATG Post-Hearing Brief at 7).
35. In addition, Nevada Bell has the same opportunity as do the CLECs to avoid paying reciprocal compensation, if it makes an effort to compete for the business of the ISPs. If Nevada Bell were to win ISP companies as customers or even retain the ones it has, then it too would receive reciprocal compensation from other carriers for ISP traffic, as it undoubtedly must if local independents' customers are dialing into ISPs in the Nevada Bell territory. (Ex. 4 at 6).
36. Pac-West stipulated that based on November 1998 data, its ratio of originating calls to terminating calls will be 1:69, while the ratio of originating minutes of use to terminating minutes of use will be 1:683. (Tr. at 51). However, ATG explains that the reason for the discrepancy in numbers between calls terminated on the CLECs' network and the ILEC's network is due to the relative size of the companies and their customer bases. (ATG Post-Hearing Brief at 2).
37. Pac-West states that Nevada Bell's reciprocal compensation payments for any local call, whether to an ISP or any other end user, should equal, dollar for dollar, the costs that Nevada Bell avoids by not having to transport and terminate the call itself. If there is, in fact, no equality between reciprocal compensation payments and avoided costs under the agreement, Nevada Bell, alone, is at fault for attempting to somehow game the system or otherwise failing to accurately state its costs. Id. at 12.
38. However, Nevada Bell has not contended that the UNE prices are faulty. Therefore, it must be concluded that the UNE prices set forth in the agreement are accurate and, as a consequence, that Nevada Bell is truly indifferent, from a long run cost perspective, as to whether it terminates local traffic or whether Pac-West terminates such traffic. (Pac-West Post-Hearing Brief at 12).
39. Strong considerations of law, public policy, and fundamental fairness to various competitive market entrants compel a finding by this Commission that all exchange of local traffic, including voice and data, should be subject to local reciprocal compensation. Fundamentally, reciprocal compensation is a competitively neutral, fair, just, and reasonable mechanism for compensating termination of calls, and no good reason exists to exclude calls terminated to ISPs. This fundamental reasoning has led commissions in some 27 other states to the same conclusions, with no state commission finding otherwise. (ATG Post-Hearing Brief at 10-11).

Nevada Bell:

40. Nevada Bell believes that ISP calls are jurisdictionally interstate in nature. Nevada Bell cites an FCC order covering GTE's offering of a DSL service which stated that the communications between an end user and an ISP is not made up of an intrastate portion and an interstate portion, but is one communication. [Nevada Bell Post-Hearing Brief at 3 citing GTE Operating Cos., CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 (rel. 10/30/98) at ¶¶1, 17].
41. Nevada Bell also states that because the FCC allowed ISP to access the public switched network via a business line at state tariff rates, the FCC asserted jurisdiction over Internet usage, making the call jurisdictionally interstate. (Tr. at 241). Since ISP calls are jurisdictionally interstate in nature, they should be excluded from the compensation provisions of an agreement for the interconnection of local traffic. (Nevada Bell Post-Hearing Brief at 11).
42. In addition, the communication does not terminate at the ISP's modem, but continues on to the

website. [Nevada Bell Post-Hearing Brief at 3 citing GTE Operating Cos., CC Docket No. 98-79. Memorandum Opinion and Order, FCC 98-292 (rel. 10/30/98) at ¶¶19-20; Ex. 8 at 16-17]. This continuous transmission may traverse both state lines and national borders. (Nevada Bell Post-Hearing Brief at 4). Without significant administrative expense to develop a jurisdictional reporting, auditing, and verification procedure for all of the parties handling the calls, or significant investment in measuring equipment by all of the parties, the end-to-end jurisdiction of the call cannot be determined. (Id. at 13-14).

43. Therefore, where it is difficult to determine through measurements or reporting, the jurisdiction of the calls using a service, the service is considered to be "contaminated" (a service handling both interstate and intrastate calls) and may be directly assigned to interstate if the station-to-station or end-to-end interstate usage is more than ten percent of the total usage of the service. If the interstate usage is less than ten percent, the usage and costs for the service are assigned to intrastate. (Ex. 8 at 15 - 16).
44. However, if the calls, usage, and costs are intrastate, they are under the jurisdiction of the Commission. (Ex. 5 at 15).
45. Nevada Bell stated that the term "local call" denotes a call made within a geographical area, where both the originating and terminating party are located, and where there are no toll or other costs beyond the local exchange service rates. (Id. at 1-2). Nevada Bell agrees with Staff that the traditional definition of a local call should be used in this matter. (Nevada Bell Post-Hearing Brief at 16-17).
46. Nevada Bell believes that using the definition of a "local call" proposed by Pac-West and ATG, would overturn years of industry custom and practice. It would also enable Pac-West and ATG to avoid paying access charges for toll-free type service and even avoid access charges for interLATA services offered to their customers. (Id. at 16).
47. Nevada Bell stated that the FCC rejected the "two call" theory and found that ISP Internet calls do not end or terminate at the ISP but are a single, continuous, end-to-end communications that is originated by a customer, transported to an ISP who then transports that call to a site on or beyond the Internet termination. (Id. at 9).
48. Nevada Bell states that given the nature and current uses of the Internet, it is not possible to identify or separate most Internet traffic by jurisdiction because the customer does not dial 1+ or 0+, but normally dials only seven digits to reach an ISP. Many interconnected companies may be involved in handling the ISP Internet call which may be terminated anywhere in the United States or the world. (Id. at 13).
49. Nevada Bell states that the FCC has determined that reciprocal compensation only applies to local communications:

> Transport and termination of local traffic for purposes of reciprocal compensation are governed by Sections 251(b)(5) and 252(d)(2) while access charges for interstate long-distance traffic are governed by Sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long distance traffic. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. 8/8/96) at ¶1033].

The FCC went on to add:

> We conclude that Sections 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area as defined in the following paragraph . . . We find that reciprocal compensation provisions of Section 252(b)(5) for transport and termination of traffic do not apply to transport or termination of interstate or intrastate interexchange traffic. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. 8/8/96) at ¶1034].

These holdings eliminate any application of reciprocal compensation to interstate or interexchange traffic. (Nevada Bell Post-Hearing Brief at 8)

50. Nevada Bell asserts that applying reciprocal compensation to dial up calls to ISPs discourages local competition. (Tr. at 7). If reciprocal compensation is permitted, CLECs could begin to use such payments for Internet traffic to fund payments to ISPs for traffic delivered to the ISPs. CLECs could remit some of their reciprocal compensation payments to pay these ISPs for connecting to the CLECs in the first place Further, Nevada Bell states that it "is prohibited by law from charging its end users, ISPs, or other carriers, access charges for the interstate access costs they are causing." (Nevada Bell Post-Hearing Brief at 20). Therefore, Nevada Bell would be forced to subsidize the CLECs and their interconnecting ISPs for the interstate communications originating from Nevada Bell customers. (Id. at 20).
51. The subsidy arises because Nevada Bell is forced to bear all the costs of originating these calls on its network, is not permitted to charge end users to recover all these costs, and, under Pac-West's and ATG's interpretation, is forced to pay all of the costs of terminating these calls to the ISPs. (Id. at 20).

Staff:

52. Staff believes that if a call to an ISP is an intrastate call, the Commission clearly has jurisdiction to regulate that call. (Staff Post-Hearing Brief at 4). Staff states that the intent of the end user in making a call is irrelevant when determining whether a call is jurisdictionally interstate or intrastate. A call is interstate because it crossed state boundaries while the converse is also true. Therefore, intent cannot be the basis for determining whether a call to an ISP is jurisdictionally interstate. (Id. at 4-5).
53. Any concern regarding interstate and intrastate separations is irrelevant to the determination of whether the Commission has rate-making authority over calls to ISPs. (Id. at 4). The FCC, by allowing ISPs to access the public switched network via a business line at state tariff rates, in effect granted states rate-making authority which includes the authority to determine whether reciprocal compensation should apply to calls to ISPs. (Id.).
54. Staff believes that a local call should be defined on the basis of the physical locations of the calling and called party. This is the traditional definition of local calling as currently used for rate-making purposes in Nevada. (Ex. 14 at 8).
55. While Pac-West and ATG propose including interLATA calls as local calls for reciprocal compensation purposes, Nevada Bell is currently prohibited from carrying interLATA traffic. Therefore, the Commission should not define calls which must cross interLATA boundaries as local. (Staff Post-Hearing Brief at 6).
56. Staff states that a call to an ISP is viewed as comprising two discrete elements, one being a telecommunications service by which the end user connects to the ISP modem through a local call, the second being an information service by which the ISP converts the customer's analog messages into data packets which are individually routed through its modem to host computer networks located throughout the world. [Ex. 14 at 4 citing California Public Utilities Commission, R-95-04-043 & I-95-04-044, Order (rel. 10/22/98)].
57. Staff believes that when the dial up call to the ISP is a local call, reciprocal compensation should apply, as it does with all other local calls. (Staff Post-Hearing Brief at 6). The failure to apply reciprocal compensation to dial up calls to ISPs would discourage local competition. (Ex. 14 at 12). There is no technical reason to treat calls to ISPs any differently from other voice calls since both types of calls use the same telecommunications network functions. (Id. at 12).
58. The guiding principles to be employed by the Commission should be whether the ILEC and CLEC compete on an equal playing field, and whether the public interest is served. (Id. at 3). The only imbalance, if any does exist, would be due to the fact that Nevada Bell is a monopoly or dominant firm having most of the local telephone customers. (Id. at 11).
59. Staff believes Nevada Bell's primary concern seems to be that Nevada Bell would pay large amounts of money in reciprocal compensation payments if reciprocal compensation were to apply to dial up calls to ISPs. (Ex. 8 at 7-8). Yet, if Nevada Bell's negotiated reciprocal compensation rate is equal to the forward-looking cost of terminating the local call, then Nevada Bell avoids the same cost when its customers' calls are terminated on another carrier's network. (Ex. 14 at 16). Therefore, the appropriate solution to any perceived problem in overpayment by Nevada Bell would be to adjust the reciprocal compensation rates, not eliminating the application of reciprocal

compensation. (Tr. at 379 - 380).

Presiding Officer Discussion:

60. The issue before the Presiding Officer is whether Pac-West and ATG are entitled pursuant to 47 U.S.C. §251(b)(5) to receive reciprocal compensation from Nevada Bell when they receive traffic from Nevada Bell that Pac-West and ATG terminate to an ISP? In order to decide this issue, the Presiding Officer believes four determinations must be made: (A) Does the Commission have jurisdiction to make a decision in this matter? (B) What is a local call? (C) What is the nature of a call "terminated" to an ISP? (D) Should reciprocal compensation apply to a call "terminated" to an ISP?

A. Jurisdiction

61 As the FCC observed, state commission authority over interconnection agreements pursuant to 47 U.S.C. §252 extends to both interstate and intrastate matters. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, FCC 99-38 (rel. 2/26/99) at ¶25 citing CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15544 (1996)]. In the absence of a federal rule regarding the appropriate inter-carrier compensation for this traffic, the Presiding Officer finds that the Commission has jurisdiction to determine the issue of reciprocal compensation for these interconnection agreements pursuant to the Commission's statutory obligations under the Telecommunications Act of 1996 (47 U.S.C. §252). As long as the carriers are located in the boundaries of the State of Nevada, the Commission has jurisdiction over that agreement.

62. Furthermore, if a call to an ISP is an intrastate call, the Commission has jurisdiction because the call was made and completed within the boundaries of the state of Nevada.

63. Finally, the Presiding Officer agrees with Staff that the FCC, by allowing ISPs to access the public switched network via a business line at state tariff rates, in effect granted states rate-making authority which includes the authority to determine whether reciprocal compensation should apply to calls to ISPs.

B. Local Call

64. The Presiding Officer finds that a local call is based on the physical location of the originating and terminating parties where there are no toll or other costs beyond the local exchange service rates.[1] To define a local call based on the rate center of the NXX codes as proposed by Pac-West and ATG would subvert industry custom and practice. It could allow them to avoid access charges for toll calls and interLATA calls as well.

C. Call "Terminated" to an ISP

65. The Internet is an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world. 47 U.S.C. §230.

66. For purposes of this discussion, Internet calling is a communication that begins with an end user in Nevada dialing a local telephone number in Nevada for connection to an ISP. The call passes through Nevada Bell's central office and is placed on an interconnection trunk for completion through a CLEC's switch. At the CLEC's switch, the call is then placed on another trunk and sent to an ISP's router, which may be located in another LATA. At the ISP's router, the connection remains open and the caller can communicate through the Internet with data bases in other states and countries.

67. The FCC has traditionally determined jurisdictional nature of a communication by the end points of the communication. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, FCC 99-38 (rel. 2/26/99) at ¶10]. When a call is "terminated" to an ISP, the FCC has concluded that the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state. (Id. at ¶12).

68. The Presiding Officer finds that a call "terminated" to an ISP consists of two parts: the telecommunications service and information service. Those two parts comprise one communication.

D. Reciprocal Compensation

69. Reciprocal compensation compensates one company for allowing another company to use its facilities. It covers the cost so that the prior company does not have to duplicate construction and equipment used to complete the call.
70. Pursuant to 47 U.S.C.§251(b)(5), reciprocal compensation obligations should apply only to traffic that originates and terminates within state-defined local calling areas. [Id. at ¶24 citing CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16013 (1996)]. Therefore, reciprocal compensation should not be applied to interstate calls, interLATA calls, or intraLATA calls that are not local calls.
71. The Presiding Officer finds that the communications at issue here do not necessarily terminate at the ISP's local server, as ATG and Pac-West contend. Instead, the communications may continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another LATA, state, or country.
72. From the record presented to the Commission, the parties were unable to show what portion of calls "terminated" to an ISP remain local. In a single Internet communication, an Internet user may, for example, request information that is held locally in cache memory by the ISP, access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, FCC 99-38 (rel. 2/26/99) at ¶18].
73. Furthermore, no party provided a plausible way to identify and separate Internet traffic by jurisdiction. Once the traffic reaches the ISP modem, nobody knows for sure what is local or long distance after that point. (Tr. at 229-230). The FCC concluded that although some Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, FCC 99-38 (rel. 2/26/99) at ¶18]. Therefore, the Presiding Officer finds that unless a party can show that a local call "terminated" to an ISP remains local during the communication, consideration of reciprocal compensation is not warranted.
74. The Presiding Officer finds that any Internet traffic that can be shown to remain local is subject to reciprocal compensation if it can also be shown to be just, and reasonable.
75. Pac-West stipulated that based on November 1998 data, its ratio of originating calls to terminating calls will be 1:69, while the ratio of originating minutes of use to terminating minutes of use will be 1:683. (Tr. at 51). The Presiding Officer does not agree with ATG's explanation that the discrepancy is due to the relative size of the companies. Instead, the Presiding Officer believes the discrepancy is based on the fact that the CLEC's customers, predominantly ISPs, are on average receiving 69 times more inbound communications than they are making outbound. In addition, each inbound communication lasts ten times as long as the average outbound one.
76. Given this huge disparity, the Presiding Officer believes that the ISPs, ATG and Pac- West, are setting up in part as CLECs to reap the windfall of potential payouts by Nevada Bell for reciprocal compensation. Nevada Bell would receive little, if any, revenue from Pac-West or ATG because their primary focus would be on the provision of call termination services to ISPs, paging companies, and other companies generating large volumes of inbound traffic. (Ex. 1 at 2). As a result, Nevada Bell would be forced to essentially subsidize Internet Service. This is not just or reasonable. ATG and Pac-West have not proven to the Presiding Officer that they will effectively provide local service. Instead, the Presiding Officer believes they are attempting to provide service to business customers for Internet Service with only token local service in an attempt to meet the reciprocal compensation criteria.
77. The Presiding Officer finds that the record built by ATG and Pac-West has not met the just and reasonable standard established pursuant to 47 U.S.C. §252(d)(2)(A)(I) to receive reciprocal compensation for Nevada Bell calls terminated on the networks of ATG and Pac-West.
78. Notwithstanding, Pac-West and ATG are still set up to make a profit. ATG stated that it will still recover its costs over the long run from its ISP end users and other end users without the benefit of reciprocal compensation. (Tr. at 77-79).
79. In conclusion, Section 252(b)(2)(A) of the Telecommunications Act of 1996 was written to

promote local competition. not Internet service. Reciprocal compensation is for local calls. not those that terminate on the Internet outside of the local calling area.

THEREFORE. based on the foregoing, it is HEREBY ORDERED that:

1. Pursuant to NAC 703.288(4)(b) this Arbitration Decision shall be served on Nevada Bell, Advanced Telcom Group. Inc. and Pac-West Telcomm, Inc., the Regulatory Operations Staff of the Commission. and the Attorney General's Bureau of Consumer Protection.

2. Pursuant to NAC 703.288(4)(c) this Arbitration Decision shall be provided to AT&T Communications of Nevada, Inc., GTE of California Incorporated d/b/a GTE of Nevada, and Sprint Communications Company L.P. and Central Telephone Company - Nevada d/b/a Sprint of Nevada.

3. The Presiding Officer retains jurisdiction for the purpose of correcting any errors which may have occurred in the drafting or filing of this Arbitration Decision.

By the Presiding Officer,
DONALD SODERBERG, Commissioner and Presiding Officer

Dated: 3/4/99 Carson City, Nevada

1. The Presiding Officer notes Nevada Bell's argument that the "intent" of the calling party determines whether the call is an interstate call. (Tr. at 87, 95-100). While ATG, Pac-West, and Staff were forced to expend resources addressing this contention, the Presiding Officer believes that delving into the mental beliefs of a calling party during these proceedings is preposterous.

BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

Docket No. 98-10015
In re petition of PAC-WEST TELECOMM, INC. for arbitration pursuant to Section 252 of the Telecommunications Act of 1996 to establish an Interconnection Agreement with Nevada Bell.

Docket No. 99-1007
In re petition of ADVANCED TELCOM GROUP, INC. for arbitration of an Interconnection Agreement with Nevada Bell pursuant to Section 252(b) of the Telecommunications Act of 1996.

At a general session of the Public Utilities Commission of Nevada, held at its offices on April 8, 1999.

Present:
Chairman Judy M. Sheldrew
Commissioner Donald L. Soderberg
Commissioner Michael A. Pitlock
Commission Secretary Jeanne Reynolds

ORDER ADOPTING REVISED ARBITRATION DECISION

The Public Utilities Commission of Nevada ("Commission") makes the following findings of fact and conclusions of law:

1. On March 4, 1999, the Presiding Officer in this matter filed the Arbitration Decision with the Commission.

2. Pursuant to NAC 703.288, facsimile and hard copies of the Arbitration Decision were sent to the parties (Nevada Bell, Advanced Telcom Group, Inc. ("ATG"), Pac-West Telecomm, Inc. ("Pac-West")) in the proceeding, the Regulatory Operations Staff ("Staff") of the Commission, the Attorney General's Bureau of Consumer Protection - Utility Consumers' Advocate ("UCA"), and the entities (AT&T Communications of Nevada, Inc. ("AT&T"), GTE California Incorporated d/b/a GTE of Nevada ("GTE"), and Sprint Communications Company, L.P. and Central Telephone Company - Nevada d/b/a Sprint of Nevada ("Sprint")) who filed notices of intent to comment.

3. On March 15, 1999, comments on the Arbitration Decision were filed by ATG, Pac- West, Nevada Bell, Staff, AT&T, and GTE. On March 22, 1999, reply comments were filed by Nevada Bell, ATG, Pac-West, Staff, and AT&T.

4. Pursuant to NAC 703.288(5), the scope of the comments received must be limited to whether the Arbitration Decision:

(a) discriminates against any telecommunications carrier that is not a party to the agreement;

(b) is consistent with the public interest, convenience, and necessity; or

(c) violates other requirements of the Commission, including, but not limited to, any standards adopted by the Commission relating to the quality of telecommunication service.

Parties' Comments:

ATG:

5. ATG states that the Federal Communications Commission ("FCC") did not give states the authority to determine that no compensation would be paid for termination of ISP traffic. (Post Arbitration Comments of ATG (hereafter "ATG Comments") at 6). Both the Telecommunications Act of 1996 ("Act") and fundamental fairness require that a local exchange carrier ("LEC"), whether incumbent LEC ("ILEC") or competitive LEC ("CLEC"), be compensated when another LEC delivers traffic to their network for competition. The FCC's Declaratory Ruling(1) states that some compensation must be paid: ". . . state commissions are also free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism." (Declaratory Ruling at ¶26). Thus beyond its inherent unfairness, the refusal of any compensation for the use of the CLECs' facilities constitutes an unconstitutional taking of property without just compensation. (ATG Comments at 7).

6. The refusal of reciprocal compensation will do untold damage to the development of competition in Nevada Bell's service territory and may well prevent meaningful competition from ever developing. (Id. at 8). The Internet is the most promising growth element of the telecommunications market. By not allowing reciprocal compensation for calls "terminated" to ISPs, there is a disincentive to compete for their business. (Id. at 9).

7. ATG believes that the Arbitration Decision is unclear in that it fails to address compensation for calls terminated on the network of Nevada Bell. (Id. at 11).

8. Further, the Arbitration Decision incorrectly concludes that the CLECs are gaming reciprocal compensation as the only reason to enter the market. The evidence of the record shows that the amount of compensation paid to CLECs under reciprocal compensation is not the gigantic amounts claimed by Nevada Bell to be a windfall. (Id. at 12). No where in the record did ATG indicate that its sole business would be service to ISPs. Instead, ATG is a full service telecommunications carrier.

9. In addition, ATG states that if the imbalance in the ratio of originating calls versus terminating calls is due to the success of CLECs' in gaining ISP customers, Nevada Bell should be motivated to try to compete for those customers, not be permitted to get a free ride on the CLECs facilities. (Id.). Furthermore, ATG is not planning to provide services primarily or solely to ISPs. There is simply no basis in the record to apply data specific to one company (referencing Pac-West's 1:69 and 1:683 ratios; see Arbitration Decision at ¶¶36, 75) to the operations of an unrelated, separate company with a very different business plan, method of operation, and customer base. (ATG Comments at 13).

10. ATG states that the burden is on Nevada Bell to show that some exception to reciprocal compensation should apply and how it would work. (Id. at 14). The rationale for this assertion is that the Telecommunications Act of 1996 expressly states that reciprocal compensation is the standard that ILECs must employ. (Id. citing 47 U.S.C. §251(b)(5)).

11. Finally, ATG emphasizes "the strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet--which has flourished to date under [the FCC's] 'hands off' regulatory approach--or the development of competition." (Declaratory Ruling at ¶6). As a result, ATG disagrees with the Arbitration Decision in that it characterizes Internet service as not included in the telecommunications services for which competition is encouraged under the Act.

Pac-West:

12. Pac-West states that ISP call termination service is a fully appropriate network offering that will provide significant value to Nevada Bell and for which Pac-West is rightfully entitled to compensation. (Comments of Pac-West (hereafter "Pac-West Comments) at 5). Requiring Nevada Bell to compensate Pac-West for performing call termination functions is simply fair business. The fact that Pac-West is focusing on the provision of call termination services at this point is of no consequence and simply should not enter into the Commission's equation for a just and reasonable outcome of this proceeding. (Id. at 7).

13. Furthermore, the suggestion in the Arbitration Decision that the entitlement to reciprocal

compensation should be limited to those carriers that aspire to provide two-way, plain old telephone service ("POTS") mirroring that offered by ILECs is out of step with reality. (Id. at 8).

14. Pac-West states that according to the FCC's Declaratory Ruling, if a state commission chooses to exclude ISP traffic from reciprocal compensation provisions 47 U.S.C. §251(b)(5), the FCC explicitly conditioned such authority on the state commission's adoption of another compensation mechanism. (Id. at 12 citing Declaratory Ruling at ¶26). Without adoption of a substitute mechanism for fairly compensating Pac- West for its provision of call termination services, the Arbitration Decision is unlawful. The Commission must require each party to compensate the other for terminating such traffic based on the agreed-upon prices for the terminating end office unbundled network element.

15. Pac-West believes that the proposal to classify calls based on the calling and called parties' locations should be rejected and, instead, should adopt the rate-center-to-rate-center calling convention. This convention is consistent with actual practice in the industry and is the only realistic, nondiscriminatory, and competitively-neutral means of classifying calls. (Pac-West Comments at 18).

16. Given the exemption of ISPs from access charges, neither Pac-West nor other carriers, including ILECs, are able to recover from ISPs the costs of terminating calls. The Arbitration Decision leaves Pac-West in the impossible position of being unable to charge ISPs for call termination and being unable to recover its costs from Nevada Bell. (Reply Comments of Pac-West at 1-2).

17. To interpret the tariffs and agreements as classifying calls based on end users' actual physical locations is nonsensical. Such a rating scheme simply would not be workable. (Id. at 4). It would require Pac-West and its ISP customers to install completely unnecessary facilities, which they are highly unlikely to do simply to serve small numbers of customers in remote areas. (Id. at 4-5).

Nevada Bell:

18. Nevada Bell agrees with the Arbitration Decision. The definition of local calling at Paragraph 64 of the Arbitration Decision is the accepted custom and practice of the industry and should be affirmed by the Commission. [Nevada Bell's Comments on the Arbitration Decision of Commissioner Donald Soderberg (hereafter "Nevada Bell Comments") at 4).

19. Nevada Bell stated that the FCC determined that ISP traffic is jurisdictionally interstate in nature.

> We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the [FCC's] rules do not govern inter-carrier compensation for this traffic.

Declaratory Ruling at ¶26 n. 87.

20. Nevada Bell agreed with the Arbitration Decision at Paragraphs 75 and 76 that the huge disparity for incoming to outgoing calls as well as originating minutes to terminating minutes indicates that Pac-West and ATG are establishing CLECs to reap the windfall of potential reciprocal compensation payments. (Nevada Bell Comments at 9).

21. The effect of the Arbitration Decision, if approved,does not mean that compensation will never be paid for the termination of ISP traffic. Instead, the proposed interconnection agreement already provides for compensation for the exchange of interstate switched access service. The carriers jointly providing access to the interstate traffic from the ISP will establish meet point billing arrangements, just as though the ISP were an interexchange carrier. (Nevada Bell's Reply to the Comments of the Other Parties Regarding the Arbitration Decision of Commissioner Donald Soderberg (hereafter "Nevada Bell Reply Comments") at 5 citing Interconnection Agreement §5.6). Under meet point billing arrangements each carrier would bill the interexchange carrier or ISP access charges. However, the FCC has explicitly exempted ISPs from the payment of access charges. As a result, the carriers jointly providing access to

the ISPs must bear their own costs without the recovery of access charges. (Nevada Bells Reply Comments at 5). Therefore, Nevada Bell will continue to bear all the costs of originating ISP traffic to ATG and Pac-West and will offset those costs with the revenue it receives from its end users.

Staff:

22. Staff does not believe that the FCC's conclusion that communications to an ISP do not terminate at the ISP's local server, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state (see Declaratory Ruling at ¶12) alters the fact that ISP-bound traffic is treated as local for rate-making purposes. ISPs are no different than any other local business customer in Nevada, and reciprocal compensation is an important component of the local rate structure. To deny reciprocal compensation for traffic bound for a local ISP would constitute discriminatory application of local rates by the Commission. (Comments on Proposed Order Regulatory Operations Staff (hereafter "Staff Comments") at 3).

23. Staff reiterates the FCC's assertion that nothing in the Declaratory Ruling precludes state commissions from determining that reciprocal compensation is an appropriate interim inter-carrier compensation rule. Indeed, the FCC went so far as to make the observation that the FCC's policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic. (Id. citing Declaratory Ruling at ¶25).

24. Staff states that the Arbitration Decision does not appear to result in any direct discrimination against another telecommunications carrier. (Staff Comments at 3).

25. Staff believes that no party provided a plausible way to distinguish between traffic bound for an ISP and traffic bound for a non-ISP residential or business customer. As a result, Staff has both a policy and legal concern about the application of call screening mechanisms by Nevada Bell. Staff states that such call screening could violate Nevada's laws regarding interception of wire communications (wiretapping laws) promulgated at NRS 179.410-515, NRS 200.610-690, and NRS 704.285. (Id. at 4).

26. Since the FCC has not adopted a special rate structure for ISPs but, rather, has deferred access pricing to the local rate structure, Staff believes that all elements of the local business customer rate structure should apply to ISP traffic in a nondiscriminatory manner. Application of some local pricing elements, but not other elements, creates a void for local ISP access whereby ISPs are treated as local business line customers when served by Nevada Bell but not as local business line traffic when served by a CLEC. (Id. at 5).

27. Staff states that the Commission approved the interconnection agreement between Pac-West and Sprint of Nevada which included reciprocal compensation as do other interconnection agreements approved statewide by the Commission. (Id.).

28. Staff states that no showing was presented that indicated that a differential in the incremental costs of terminating a call are less than the reciprocal compensation rate. Even if such a showing were made, however, that should not lead to a policy conclusion that reciprocal compensation should be denied, but rather, that the rate in question should be reduced to a level consistent with incremental cost as prescribed by 47 U.S.C. §252(d)(2)(A). (Id. at 6-7).

29. Finally, the information on the ratio of originating minutes of use to terminating minutes of use does not support a conclusion that a subsidy flow will exist. (Id. at 7). It is analogous to an observation that Nevada Bell purchases all of its electricity from Sierra Pacific Power Company ("Sierra Pacific") but sells no electricity to Sierra Pacific. To conclude that Nevada Bell is therefore subsidizing Sierra Pacific would be erroneous without considering Sierra Pacific's costs.

30. Staff states that Paragraphs 77 and 78 of the Arbitration Decision appear to deny reciprocal compensation for any and all traffic terminated on the networks of ATG and Pac- West regardless of the type of end-use customer. (Id. at 8).

GTE:

31. GTE agrees with the Arbitration Decision. By finding that a local call should not be defined by the rate center of the NXX codes, the decision prevents ATG and Pac-West from avoiding charges for toll calls and interLATA calls as well. (GTE Comments Regarding Arbitration Decision (hereafter "GTE Comments") at 2).

32. But for the so-called "ESP exemption" in 47 C.F.R. pt. 69, CLECs would be paying access charges to ILECs for such traffic as interexchange carriers do. Instead, the costs incurred for transporting such traffic are borne by the ILECs, not the CLECs. It is a perversion of the access charge regime set forth in part 69 of the federal regulations to interpret the exemption to permit the collection of compensation, in addition to the avoidance of access charges. (Id. at 2-3).

33. The FCC refuted the two-call theory advanced by Pac-West and ATG. The FCC has consistently rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers. The communications at issue here do not terminate at the ISP's local server, as ATG and Pac-West contend, but instead continue to the ultimate destination or destinations. (Id. at 3 citing FCC Declaratory Ruling at ¶¶10, 12). The Presiding Officer's decision (see Arbitration Decision at ¶68) appears to be consistent with Paragraphs 10-15 of the FCC's Declaratory Ruling.

34. The Presiding Officer's ultimate conclusion in Paragraph 79 that the "just and reasonable" standard set forth in 47 U.S.C. §252(b)(2)(A) was meant to promote competition, not the Internet is correct. CLECs which serve primarily ISPs are not bestowing the benefits of the competition on consumers. These CLECs are merely attempting to take advantage of a loophole in the law at the expense of ILECs. (GTE Comments at 4).

AT&T:

35. AT&T states that the Presiding Officer unduly relied upon the FCC's Declaratory Ruling. It does not mandate the result reached by the Presiding Officer in the Arbitration Decision and indeed suggests that a contrary decision would be appropriate at least until the FCC concludes the rulemaking. (Id. at 2). The effect of the Arbitration Decision is that neither ILECs nor CLECs will receive any compensation for the exchange of ISP traffic. (Id. at 3). The FCC recognized that reciprocal compensation is still appropriate and that in the absence of a contrary FCC rule, state commissions have the authority and jurisdiction to order reciprocal compensation. (Id. at 2-3 citing Declaratory Ruling at ¶25).

36. In addition, AT&T states that the FCC indicated that if a state commission determined that "reciprocal compensation" is not appropriate, the state commission was still entitled to "adopt another compensation mechanism." (Reply Comments of AT&T at 2 citing FCC's Declaratory Ruling at ¶26).

Commission Discussion:

37. The Commission agrees with Staff's analysis of the Presiding Officer's Arbitration Decision. The Commission finds that the Arbitration Decision is not in the public interest, convenience and necessity. Therefore, the Commission should adopt the Revised Arbitration Decision, attached hereto as Attachment 1, that conforms with Staff's conclusions and recommendations.

THEREFORE, based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that:

1. The Revised Arbitration Decision, attached hereto as Attachment 1, is APPROVED.

2. The findings delineated in the Revised Arbitration Decision shall SUPERSEDE the Presiding Officer's Arbitration Decision filed with the Commission on March 4, 1999.

3. The Commission retains jurisdiction for the purpose of correcting any errors which may have

occurred in the drafting or issuance of this Order Adopting Revised Arbitration Decision.

By the Commission,
JUDY M. SHELDREW, Chairman
DONALD L. SODERBERG, Commissioner and Presiding Officer
MICHAEL A. PITLOCK, Commissioner
Attest: JEANNE REYNOLDS, Commission Secretary
Date: 4/12/99 Carson City, Nevada

1. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; In the Matter of Inter- Carrier Compensation for ISP-Bound Traffic, CC Docket No. 96-98, CC 99-68, FCC 99-38, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68, rel. 2/26/99 (hereafter "Declaratory Ruling").

Attachment 1

BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

Docket No. 98-10015
In re petition of PAC-WEST TELECOMM, INC. for arbitration pursuant to Section 252 of the Telecommunications Act of 1996 to establish an Interconnection Agreement with Nevada Bell.

Docket No. 99-1007
In re petition of ADVANCED TELCOM GROUP, INC. for arbitration of an Interconnection Agreement with Nevada Bell pursuant to Section 252(b) of the Telecommunications Act of 1996.

REVISED ARBITRATION DECISION

The Public Utilities Commission of Nevada ("Commission") makes the following findings of fact and conclusions of law:

Procedural History:

1. On October 12, 1998, Pac-West Telecomm, Inc. ("Pac-West") filed a Petition for Arbitration to establish an Interconnection Agreement with Nevada Bell. The petition was filed pursuant to Chapters 703 and 704 of the Nevada Revised Statutes ("NRS") and the Nevada Administrative Code ("NAC"), the regulations adopted by the Commission in Docket No. 96-12001 (later promulgated at NAC 703.280 et seq.), and 47 U.S.C. §251 et seq. This matter was designated as Docket No. 98-10015. Pac-West is currently authorized to provide resold intrastate interexchange, alternative operator and competitive local exchange services within Nevada pursuant to Certificate of Public Convenience and Necessity ("CPC") 2036 Sub 3.

2. Pac West requests that the Commission arbitrate the following issue: whether a party receiving traffic from the other for termination to an Internet Service Provider ("ISP") is entitled to receive reciprocal compensation from the other pursuant to 47 U.S.C. §251(b)(5).

3. On October 22, 1998, the Commission issued a Notice of Petition for Arbitration and Notice of Prehearing Conference for Docket No. 98-10015.

4. On November 6, 1998, Nevada Bell filed its Response to the Petition.

5. By November 18, 1998, the Commission received Notices of Intent to Comment from AT&T Communications of Nevada, Inc. ("AT&T"), GTE California Incorporated, d/b/a GTE of Nevada ("GTE"), the Attorney General's Bureau of Consumer Protection - Utility Consumers' Advocate ("UCA"), Advanced Telcom Group, Inc. ("ATG"), and Sprint Communications Company L.P.

6. On November 30, 1998, the Commission held a duly noticed Prehearing Conference. Appearances were made by ATG, AT&T, GTE, Nevada Bell, Pac-West, Sprint Communications Company L.P., the Regulatory Operations Staff ("Staff") of the Commission, and the UCA. At the prehearing conference, all parties involved agreed to waive the 9-month deadline for resolution of the unresolved issues as required in 47 U.S.C. §252(b)(4)(C). In its place, the parties proposed a procedural schedule in which the Arbitration Decision would be filed on March 4, 1999, and a final Commission decision would be issued no later than April 5, 1999. On December 10, 1998, the Commission issued a Procedural Order in Docket No. 98-10015. Also, on December 10, 1998, the Commission issued a Notice of Hearing in Docket No. 98-10015.

7. On January 8, 1999, ATG filed a Petition for Arbitration to establish an Interconnection Agreement with Nevada Bell. The petition was filed pursuant to Chapters 703 and 704 of the NRS and NAC, 47 U.S.C. §251 et seq., and, in particular, NAC 703.280 et seq. This matter was designated as Docket No. 99-1007. ATG is currently authorized to provide resold local and intrastate long distance services within Nevada pursuant to CPC 2400.

8. ATG requests that the Commission arbitrate the following issue: whether a party receiving traffic from the other for termination to an ISP is entitled to receive reciprocal compensation from the other pursuant to 47 U.S.C. §251(b)(5).

9. On January 8, 1999, ATG also filed a Motion to Consolidate Hearings on Arbitration of Common Issue pursuant to NAC 703.550 et seq. and 47 U.S.C. §252(b). On January 15, 1999, Staff filed a Joinder in the Motion. No other comments were filed. On January 19, 1999, the Commission issued an Order consolidating Docket Nos. 98-10015 and 99- 1007.

10. On January 8, 1999, prefiled direct testimony was filed by ATG and Pac-West. On January 15, 1999, prefiled direct testimony was filed by Nevada Bell. On January 22, 1999, prefiled direct testimony was filed by Staff. On January 29, 1999, prefiled rebuttal testimony was filed by ATG.

11. On January 19, 1999, the Commission issued a Notice of Petition for Arbitration; Notice of Prehearing Conference; Notice of Hearing in Docket No. 99-1007.

12. On February 3, 1999, Notices of Intent to Comment were filed in Docket No. 99-1007 by GTE and Sprint Communications Company, L.P. and Central Telephone Company - Nevada d/b/a Sprint of Nevada (collectively, "Sprint").

13. On February 10, 1999, the Commission held a prehearing conference for Docket Nos. 98-10015 and 99-1007. Appearances were made by ATG, Nevada Bell, Pac-West, and Staff.

14. On February 10, 1999, the Commission commenced a hearing in the consolidated matter of Docket Nos. 98-10015 and 99-1007. Appearances were made by ATG, Nevada Bell, Pac-West, and Staff. The hearing lasted two days which included 385 pages of transcript and 14 exhibits admitted into evidence. At the close of the hearing the Presiding Officer questioned the parties whether the final decision in this matter by the Commission could be extended to April 8, 1999. No party expressed an opposition to the change.

15. On February 18, 1999, post-hearing briefs were filed by ATG, Nevada Bell, Pac-West, Sprint, and Staff.

16. On February 26, 1999, the Federal Communications Commission ("FCC") released In the Matter of

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; In the Matter of Inter-Carrier Compensation for ISP-bound Traffic, CC Docket No. 96-98, CC 99-98, FCC 99-38, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68, rel. 2/26/99 (hereafter "Declaratory Ruling"). The FCC concluded that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. In addition, the FCC concluded that reciprocal compensation obligations should only apply to local traffic that originates and terminates within state defined local calling areas. Finally, the issue of reciprocal compensation for ISP-bound traffic was left to the discretion of state commissions in the exercise of their authority to arbitrate interconnection disputes.

Statutory Guidelines:

17. Pursuant to the Telecommunications Act of 1996 [Pub. L. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, United States Code)] and, in particular, 47 U.S.C. §252(b)(2)(I), the Presiding Officer has been presented with one issue to resolve in this arbitration: **whether a party receiving traffic from the other for termination to an ISP is entitled to receive reciprocal compensation from the other pursuant to 47 U.S.C. §251(b)(5)?**

18. Pursuant to 47 U.S.C.§251(b)(5), each local exchange carrier ("LEC") has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

19. Pursuant to 47 U.S.C. §251(c)(2)(D), each incumbent local exchange carrier ("ILEC") has the duty to provide for interconnection with the local exchange carrier's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

20. For the purposes of compliance with section 47 U.S.C. §251(b)(5) by an ILEC , the Commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. 47 U.S.C. §252(d)(2)(A)(i).

Position of the Parties:

Pac-West and ATG:

21. Pac-West states that over the past sixteen years, the FCC has consistently yielded to state jurisdiction over switched calls to Enhanced Service Providers, including ISPs. Without exception, the provision of such services has been deemed an intrastate endeavor. (Pac-West Post-Hearing Brief at 6).

22. While Nevada Bell argues that the FCC has asserted jurisdiction over dial-up access to the Internet through an FCC memorandum decision, Nevada Bell neglected to cite the portion of the decision (Tr. at 275-276), where the FCC makes it unambiguously clear that the order did not consider or address issues regarding whether LECs were entitled to receive reciprocal compensation when they deliver to ISPs circuit-switched dial-up traffic originated by interconnecting LECs. (GTE Operating Cos., CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292, rel. 10/30/98 at ¶2).

23. In addition, ATG states that the FCC's Part 36 Separations Rules do not support Nevada Bell's claim that the FCC requires calls made to ISPs to be assigned to the interstate jurisdiction of the FCC. (ATG Post-Hearing Brief at 13). The FCC ten percent rule applies only to private line and WATS lines; it does not apply to switched lines; and no rule in Part 36 applies the FCC's ten percent rule to the circuit-switched services which are at issue in this proceeding. (Tr. at 269-270).

24. Even if the FCC were to reverse its earlier decisions to leave regulation of circuit- switched ISP traffic to the states, this Commission is nevertheless bound by the Telecommunications Act of 1996 to order the payment of reciprocal compensation for the completion of calls to ISPs until the FCC adopts contrary regulations. (Pac-West Post- Hearing Brief at 8).

25. Pac-West intends to locate a switch in Las Vegas and provide access to ISPs (also located in Las

Vegas) via the switch in Las Vegas. Under this scenario, a Nevada Bell customer located in Reno would connect with an ISP in Las Vegas via a switch located in Las Vegas. (Tr. at 8 - 9). Reno and Las Vegas are located in different local access and transport areas (interLATA). Nevertheless, Pac-West is seeking to have reciprocal compensation apply to interLATA calls simply because the customer will access the ISP via a local number.

26. Pac-West and ATG seek to have the Commission define local calls by comparing the rate center of the NXX codes, rather than by comparing the physical location of the calling and called parties within the local calling area. (Pac-West Petition for Arbitration at 3; ATG Petition for Arbitration at 3).

27. Pac-West states that contrary to Staff's suggestion, there really is no issue of potentially adverse impacts on the local versus toll calling structure since very few toll calls would ever typically be made by consumers for the purpose of accessing ISPs. Thus, Pac- West's service would not be displacing any carrier's toll revenues. Instead, the real issue is merely whether Pac-West should be permitted to push the envelope a little bit in the extent to which local-rated ISP access is made available to consumers in outlying areas. (Pac-West Post-Hearing Brief at 15).

28. Pac-West believes that the best interests of Nevadans lie in allowing Pac-West to provide its services on a foreign exchange basis. (Id. at 15-16).

29. ATG states that even with Nevada Bell's proposal to monitor the usage of phone lines for Internet traffic (Tr. at 257-59), Nevada Bell still has not proposed a way to determine which traffic is terminating at ISPs. (ATG Post-Hearing Brief at 14). The end user requests may only request information from the ISP, and never go anywhere else, or may request information that is held in cache memory by the ISP and not need to go beyond the ISP. (Tr. at 176-77, 197-98, 229-30).

30. ATG believes that an Internet call is two calls. One is a call from the end user to the ISP, over which this Commission has jurisdiction and for which reciprocal compensation applies. The other call is an unregulated Internet data exchange called Internet Service, and is provided without Nevada regulation by entities such as America On Line and Nevada Bell Internet. (ATG Post-Hearing Brief at 16). Consequently, when a call from the public switched network reaches the first ISP modem bank, it ceases to be a telecommunications service provided by a common carrier. (Ex. 4 at 4).

31. ATG states that there is nothing in 47 U.S.C. §251 et seq. or the FCC's implementing rules which would prevent this Commission from finding that all local traffic is subject to the obligation of reciprocal compensation. There is no FCC decision in any proceeding which would limit or prohibit the Commission from making this finding. (ATG Post-Hearing Brief at 10).

32. ATG and Pac-West state that the purpose of reciprocal compensation is to compensate carriers for carrying out call termination functions. When an ILEC terminates a call on a CLEC's network, the ILEC should pay the costs of terminating the call. If reciprocal compensation is not applied to calls to ISPs, the ILEC avoids the costs of terminating the call on its own network and avoids reciprocal compensation payment to terminate its customer's call on another carrier's network. (Tr. at 32). This gives the ILEC a competitive advantage over competing carriers.

33. ATG states that fundamental fairness dictates that ILECs and CLECs should each pay the other to terminate all local switched telecommunications traffic. (Ex. 3 at 5-6; ATG Post-Hearing Brief at 2).

34. ATG states that Nevada Bell is profiting handsomely from the growth in data traffic, and both revenues and earnings are outstripping the growth in number of access lines. (Ex. 4 at 19-20). The bottom line under any analysis is that revenue growth to Nevada Bell from Internet related sales is dwarfing any real or imagined expense from reciprocal compensation. (ATG Post-Hearing Brief at 7).

35. In addition, Nevada Bell has the same opportunity as do the CLECs to avoid paying reciprocal compensation, if it makes an effort to compete for the business of the ISPs. If Nevada Bell were to win ISP companies as customers or even retain the ones it has, then it too would receive reciprocal compensation from other carriers for ISP traffic, as it undoubtedly must if local independents' customers

are dialing into ISPs in the Nevada Bell territory. (Ex. 4 at 6).

36. Pac-West stipulated that based on November 1998 data, its ratio of originating calls to terminating calls will be 1:69, while the ratio of originating minutes of use to terminating minutes of use will be 1:683. (Tr. at 51). However, ATG explains that the reason for the discrepancy in numbers between calls terminated on the CLECs' network and the ILEC's network is due to the relative size of the companies and their customer bases. (ATG Post- Hearing Brief at 2).

37. Pac-West states that Nevada Bell's reciprocal compensation payments for any local call, whether to an ISP or any other end user, should equal, dollar for dollar, the costs that Nevada Bell avoids by not having to transport and terminate the call itself. If there is, in fact, no equality between reciprocal compensation payments and avoided costs under the agreement. Nevada Bell, alone, is at fault for attempting to somehow game the system or otherwise failing to accurately state its costs. Id. at 12.

38. However, Nevada Bell has not contended that the UNE prices are faulty. Therefore, it must be concluded that the UNE prices set forth in the agreement are accurate and, as a consequence, that Nevada Bell is truly indifferent, from a long run cost perspective, as to whether it terminates local traffic or whether Pac-West terminates such traffic. (Pac-West Post-Hearing Brief at 12).

39. Strong considerations of law, public policy, and fundamental fairness to various competitive market entrants compel a finding by this Commission that all exchange of local traffic, including voice and data, should be subject to local reciprocal compensation. Fundamentally, reciprocal compensation is a competitively neutral, fair, just, and reasonable mechanism for compensating termination of calls, and no good reason exists to exclude calls terminated to ISPs. This fundamental reasoning has led commissions in some 27 other states to the same conclusions, with no state commission finding otherwise. (ATG Post-Hearing Brief at 10-11).

Nevada Bell:

40. Nevada Bell believes that ISP calls are jurisdictionally interstate in nature. Nevada Bell cites an FCC order covering GTE's offering of a DSL service which stated that the communications between an end user and an ISP is not made up of an intrastate portion and an interstate portion, but is one communication. (Nevada Bell Post-Hearing Brief at 3 citing GTE Operating Cos., CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292, rel. 10/30/98 (hereafter "Memorandum Opinion and Order") at ¶¶1, 17).

41. Nevada Bell also states that because the FCC allowed ISP to access the public switched network via a business line at state tariff rates, the FCC asserted jurisdiction over Internet usage, making the call jurisdictionally interstate. (Tr. at 241). Since ISP calls are jurisdictionally interstate in nature, they should be excluded from the compensation provisions of an agreement for the interconnection of local traffic. (Nevada Bell Post- Hearing Brief at 11).

42. In addition, the communication does not terminate at the ISP's modem, but continues on to the website. (Nevada Bell Post-Hearing Brief at 3 citing Memorandum Opinion and Order at ¶¶19-20; Ex. 8 at 16-17). This continuous transmission may traverse both state lines and national borders. (Nevada Bell Post-Hearing Brief at 4). Without significant administrative expense to develop a jurisdictional reporting, auditing, and verification procedure for all of the parties handling the calls, or significant investment in measuring equipment by all of the parties, the end-to-end jurisdiction of the call cannot be determined. (Id. at 13-14).

43. Therefore, where it is difficult to determine through measurements or reporting, the jurisdiction of the calls using a service, the service is considered to be "contaminated" (a service handling both interstate and intrastate calls) and may be directly assigned to interstate if the station-to-station or end-to-end interstate usage is more than ten percent of the total usage of the service. If the interstate usage is less than ten percent, the usage and costs for the service are assigned to intrastate. (Ex. 8 at 15 - 16).

44. However, if the calls, usage, and costs are intrastate, they are under the jurisdiction of the Commission. (Ex. 5 at 15).

45. Nevada Bell stated that the term "local call" denotes a call made within a geographical area, where both the originating and terminating party are located, and where there are no toll or other costs beyond the local exchange service rates. (Id. at 1-2). Nevada Bell agrees with Staff that the traditional definition of a local call should be used in this matter. (Nevada Bell Post-Hearing Brief at 16-17).

46. Nevada Bell believes that using the definition of a "local call" proposed by Pac-West and ATG, would overturn years of industry custom and practice. It would also enable Pac- West and ATG to avoid paying access charges for toll-free type service and even avoid access charges for interLATA services offered to their customers. (Id. at 16).

47. Nevada Bell stated that the FCC rejected the "two call" theory and found that ISP Internet calls do not end or terminate at the ISP but are a single, continuous, end-to-end communications that is originated by a customer, transported to an ISP who then transports that call to a site on or beyond the Internet termination. (Id. at 9).

48. Nevada Bell states that given the nature and current uses of the Internet, it is not possible to identify or separate most Internet traffic by jurisdiction because the customer does not dial 1+ or 0+, but normally dials only seven digits to reach an ISP. Many interconnected companies may be involved in handling the ISP Internet call which may be terminated anywhere in the United States or the world. (Id. at 13).

49. Nevada Bell states that the FCC has determined that reciprocal compensation only applies to local communications:

> Transport and termination of local traffic for purposes of reciprocal compensation are governed by Sections 251(b)(5) and 252(d)(2) while access charges for interstate long-distance traffic are governed by Sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long distance traffic.

Declaratory Ruling at ¶1033.

The FCC went on to add:

> We conclude that Sections 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area as defined in the following paragraph . . . We find that reciprocal compensation provisions of Section 252(b)(5) for transport and termination of traffic do not apply to transport or termination of interstate or intrastate interexchange traffic.

Id. at ¶1034.

These holding eliminate any application of reciprocal compensation to interstate or interexchange traffic. (Nevada Bell Post-Hearing Brief at 8).

50. Nevada Bell asserts that applying reciprocal compensation to dial up calls to ISPs discourages local competition. (Tr. at 7). If reciprocal compensation is permitted, CLECs could begin to use such payments for Internet traffic to fund payments to ISPs for traffic delivered to the ISPs. CLECs could remit some of their reciprocal compensation payments to pay these ISPs for connecting to the CLECs in the first place. Further, Nevada Bell states that it "is prohibited by law from charging its end users, ISPs, or other carriers, access charges for the interstate access costs they are causing." (Nevada Bell Post-Hearing Brief at 20). Therefore, Nevada Bell would be forced to subsidize the CLECs and their interconnecting ISPs for the interstate communications originating from Nevada Bell customers. (Id. at 20).

51. The subsidy arises because Nevada Bell is forced to bear all the costs of originating these calls or network, is not permitted to charge end users to recover all these costs, and, under Pac-West's and A interpretation, is forced to pay all of the costs of terminating these calls to the ISPs. (Id. at 20).

Staff:

52. Staff believes that if a call to an ISP is an intrastate call, the Commission clearly has jurisdiction t regulate that call. (Staff Post-Hearing Brief at 4). Staff states that the intent of the end user in making call is irrelevant when determining whether a call is jurisdictionally interstate or intrastate. A call is interstate because it crossed state boundaries while the converse is also true. Therefore, intent cannot the basis for determining whether a call to an ISP is jurisdictionally interstate. (Id. at 4-5).

53. Any concern regarding interstate and intrastate separations is irrelevant to the determination of whether the Commission has rate-making authority over calls to ISPs. (Id. at 4). The FCC, by allowin ISPs to access the public switched network via a business line at state tariff rates, in effect granted sta rate-making authority which includes the authority to determine whether reciprocal compensation shc apply to calls to ISPs. (Id.).

54. Staff believes that a local call should be defined on the basis of the physical locations of the callin and called party. This is the traditional definition of local calling as currently used for rate-making purposes in Nevada. (Ex. 14 at 8).

55. While Pac-West and ATG propose including interLATA calls as local calls for reciprocal compensation purposes, Nevada Bell is currently prohibited from carrying interLATA traffic. Therefo the Commission should not define calls which must cross interLATA boundaries as local. (Staff Post-Hearing Brief at 6).

56. Staff states that a call to an ISP is viewed as comprising two discrete elements, one being a telecommunications service by which the end user connects to the ISP modem through a local call, th second being an information service by which the ISP converts the customer's analog messages into d packets which are individually routed through its modem to host computer networks located througho the world. (Ex. 14 at 4 citing California Public Utilities Commission, R-95-04-043 & I-95-04-044, Order, rel. 10/22/98).

57. Staff believes that when the dial up call to the ISP is a local call, reciprocal compensation should apply, as it does with all other local calls. (Staff Post-Hearing Brief at 6). The failure to apply reciproc compensation to dial up calls to ISPs would discourage local competition. (Ex. 14 at 12). There is no technical reason to treat calls to ISPs any differently from other voice calls since both types of calls us the same telecommunications network functions. (Id. at 12).

58. The guiding principles to be employed by the Commission should be whether the ILEC and CLEC compete on an equal playing field, and whether the public interest is served. (Id. at 3). The only imbalance, if any does exist, would be due to the fact that Nevada Bell is a monopoly or dominant fir having most of the local telephone customers. (Id. at 11).

59. Staff believes Nevada Bell's primary concern seems to be that Nevada Bell would pay large amou of money in reciprocal compensation payments if reciprocal compensation were to apply to dial up ca to ISPs. (Ex. 8 at 7-8). Yet, if Nevada Bell's negotiated reciprocal compensation rate is equal to the forward-looking cost of terminating the local call, then Nevada Bell avoids the same cost when its customers' calls are terminated on another carrier's network. (Ex. 14 at 16). Therefore, the appropriate solution to any perceived problem in overpayment by Nevada Bell would be to adjust the reciprocal compensation rates, not eliminating the application of reciprocal compensation. (Tr. at 379 - 380).

Commission Discussion:

60. The issue before the Commission is whether Pac-West and ATG are entitled, pursuant to 47 U.S.C

§251(b)(5), to receive reciprocal compensation from Nevada Bell when they receive traffic from Nevada Bell that Pac-West and ATG terminate to an ISP. In order to decide this issue, four determinations must be made: (A) Does the Commission have jurisdiction to make a decision in this matter? (B) What is a local call? (C) What is the nature of a call "terminated" to an ISP? (D) Should reciprocal compensation apply to a call "terminated" to an ISP?

A. Jurisdiction

61. As the FCC observed, state commission authority over interconnection agreements pursuant to 47 U.S.C. §252 extends to both interstate and intrastate matters. (Declaratory Ruling at ¶25 citing CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15544 (1996)). In the absence of a federal rule regarding the appropriate inter-carrier compensation for this traffic, the Commission has jurisdiction to determine the issue of reciprocal compensation for these interconnection agreements pursuant to the Commission's statutory obligations under the Telecommunications Act of 1996 (47 U.S.C. §252). As long as the carriers are located in the boundaries of the State of Nevada, the Commission has jurisdiction over that agreement.

62. Furthermore, if a call to an ISP is an intrastate call, the Commission has jurisdiction because the call was made and completed within the boundaries of the state of Nevada. Finally, the Commission agrees with Staff that the FCC, by allowing ISPs to access the public switched network via a business line at state tariff rates, in effect granted states rate- making authority which includes the authority to determine whether reciprocal compensation should apply to calls to ISPs.

63. Reciprocal compensation between ILECs and CLECs is a conventional local rate structure element that applies to residential and business customer traffic pursuant to 47 U.S.C. §251(b)(5) and is the subject of state commission requirements pursuant to 47 U.S.C. §252(d)(2)(A).

B. Local Call

64. The Commission finds that a local call is based on the physical location of the originating and terminating parties where there are no toll or other costs beyond the local exchange service rates. To define a local call based on the rate center of the NXX codes as proposed by Pac-West and ATG would subvert industry custom and practice. It could allow them to avoid access charges for toll calls and interLATA calls as well.

C. Call "Terminated" to an ISP

65. For purposes of this discussion, Internet calling is a communication that begins with an end user in Nevada dialing a local telephone number in Nevada for connection to an ISP. The call passes through Nevada Bell's central office and is placed on an interconnection trunk for completion through a CLEC's switch. At the CLEC's switch, the call is then placed on another trunk and sent to an ISP's router, which may be located in another LATA. At the ISP's router, the connection remains open and the caller can communicate through the Internet with data bases in other states and countries.

66. The FCC has traditionally determined jurisdictional nature of a communication by the end points of the communication. (Declaratory Ruling at ¶10). Since the FCC has not adopted a special rate structure for ISPs but has deferred access pricing to the local rate structure, all elements of local business rate structures should apply to ISP traffic in a non- discriminatory manner.

67. The Commission finds that a call "terminated" to an ISP consists of two parts: the telecommunications service and information service. Those two parts comprise one communication.

D. Reciprocal Compensation

68. Reciprocal compensation compensates one company for allowing another company to use its facilities. It covers the cost so that the prior company does not have to duplicate construction and equipment used to complete the call.

69. Pursuant to 47 U.S.C.§251(b)(5), reciprocal compensation obligations should apply to traffic that originates and terminates within state-defined local calling areas. (Id. at ¶24 citing CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16013 (1996)). As required by the FCC, local access pricing for ISPs in Nevada is the local rate structure for business line customers. Reciprocal compensation is a local rate structure element.

70. From the record presented to the Commission, the parties were unable to show what portion of calls "terminated" to an ISP remain local. Nor did any party provide a plausible way to distinguish between traffic bound for an ISP and traffic bound for a non-ISP or business customer. Furthermore, no party provided a plausible way to identify and separate Internet traffic by jurisdiction. Once the traffic reaches the ISP modem, nobody knows for sure what is local or long distance after that point. (Tr. at 229-230).

71. The Commission finds that local access pricing for ISPs in Nevada is the local rate structure for business line customers and reciprocal compensation is a local rate structure element.

72. Pac-West stipulated that based on November 1998 data, its ratio of originating calls to terminating calls will be 1:69, while the ratio of originating minutes of use to terminating minutes of use will be 1:683. (Tr. at 51). This information does not support a conclusion that a subsidy flow will exist. A subsidy determination cannot be based on the ratio of sales and can only be determined by consideration of the prices and costs of the services purchased. No evidence was presented to substantiate a subsidy claim nor was a request for arbitration on a just and reasonable reciprocal compensation rate made. This concern is misplaced if the reciprocal compensation rate is based on the incremental costs to the CLEC for terminating a call.

73. No party identified a plausible and precise method to distinguish between traffic bound to ISPs and traffic bound to non-ISP local customers. Nevada Bell's call screening method gives rise to public interest and legal concerns and should not be implicitly endorsed by a decision to deny reciprocal compensation to ISPs which are a subset of local access customers.

74. As required by the FCC, local access pricing for ISPs in Nevada is the local rate structure for business line customers. Reciprocal compensation is a local rate structure element. Denial of reciprocal compensation would represent discriminatory application of an important local rate element available fo traffic to the business line customers.

75. Denial of reciprocal compensation for local traffic bound for an ISP will slow the development of competition and negatively affect the Nevada economy and public interest.

76. No party provided analysis or evidence that reasonably supports a subsidy claim. Congress provided the criteria to prevent unreasonable cash flows under reciprocal compensation by requiring an incremental cost foundation. (See 47 U.S.C. §252(d)(A)). No local exchange carrier receives a subsidy i the reciprocal compensation rate is based on the additional costs of terminating calls. The appropriate policy standard to prevent service subsidization is cost-based rates, not a policy that disbands service.

77. Reciprocal compensation should be paid by Nevada Bell to Pac-West or ATG for traffic originated by a Nevada Bell customer and terminated to any customer, including an ISP, obtaining local access from Pac-West or ATG when those customers are located within the same Nevada Bell local calling area. Similarly, reciprocal compensation should be paid by Pac-West or ATG to Nevada Bell for traffic originated by a Pac-West or ATG customer and terminated to any customer, including an ISP, obtaining local access from Nevada Bell when those customes are located within the same Nevada Bell local calling area.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on April 14, 1999

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss

CASE 99-C-0529 - Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation.

ORDER INSTITUTING PROCEEDING
TO REEXAMINE RECIPROCAL COMPENSATION

(Issued and Effective April 15, 1999)

BY THE COMMISSION:

BACKGROUND

In 1995, the Commission established a regulatory framework to govern how carriers would compensate each other for calls terminating on their respective networks.[1] The Commission determined that there should be such compensation (termed reciprocal compensation) and that it should be cost-based, mutual, and symmetrical.

The rapid growth in Internet traffic and other large-volume call termination to single customers has altered the reciprocal compensation landscape. With competitive local exchange carriers (CLECs) having captured a significant share of the traffic to Internet Service Providers (ISPs) and chatlines, incumbent local exchange carriers (ILECs) are generally paying greater amounts of reciprocal compensation to CLECs than vice

[1] Case 94-C-0095, Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition on the Local Exchange Market, Order Instituting Framework for Directory Listings, Carrier Interconnection and Inter-carrier Compensation (issued September 27, 1995) and Opinion and Order Adopting Regulatory Framework, Opinion 96-13 (issued May 22, 1996).

versa. As a result, Bell Atlantic-New York (BA-NY) and Frontier Telephone of Rochester, Inc. (Frontier) attempted to exclude Internet traffic from reciprocal compensation payments in 1997. The Commission declined to allow such an exclusion, but instituted Case 97-C-1275 to investigate issues surrounding reciprocal compensation and the termination of Internet traffic. [1] The Commission closed that proceeding in March 1998 upon determining that incumbent carriers did not provide sufficient justification to treat Internet traffic as different from other local traffic for reciprocal compensation purposes. [2]

These issues were raised again in the context of traffic bound for so-called "chatlines," which also involve large volumes of traffic bound for single customers (<u>i.e.</u>, the Chatline provider). In that proceeding, the Commission sought cost and rate design information from interested carriers that tended to support a different cost-based compensation scheme for the termination of chatline, Internet and other similar traffic. [3] On March 15, 1999, BA-NY responded to this invitation by submitting "Comments on Costs and Rate Structures Applicable to Large-Volume Call Termination to Single Customers." On March 18, 1999, a Notice was issued requesting comments on BA-NY's March 15, 1999 submission as well as other reciprocal compensation proposals submitted in response to our Chatline Order. On March 2, 1999, BA-NY also filed a petition to reopen

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[1] Case 97-C-1275, et.al., <u>Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic</u>, Order Denying Petition and Instituting Proceeding (issued July 17, 1997).

[2] Case 97-C-1275, et.al., <u>Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic</u>, Order Closing Proceeding (issued March 19, 1998).

[3] Case 98-C-1273 and 98-C-1479; Order Directing Carriers to File Tariffs For Chatline Services and Related Actions (issued February 4, 1999) (February 4, 1999 Order or Chatline Order).

Case 97-C-1275 and requesting interim relief. Comments on BA-NY's March 15, 1999 proposal, BA-NY's March 2, 1999 Petition, and on other reciprocal compensation proposals were received on March 29, 1999.

DISCUSSION

BA-NY's and other ILECs' positions that the termination of large volumes of convergent traffic is more cost effective than the termination of traffic to a diverse group of end users seems logical. Based on the filings received from interested carriers, we find that a basis exists to reexamine whether existing reciprocal compensation arrangements are affected by the termination of large-volume call termination traffic to single customers. Although the Federal Communications Commission's recent Declaratory Ruling and Notice of Proposed Rulemaking [1] concluded that ISP-bound traffic is largely interstate and not subject to its rule governing reciprocal compensation [2], the decision allows state commissions to continue to set inter-carrier compensation for this traffic.

We recognize the need to address this matter quickly, and one possible course of action would be to set temporary rates. Doing so, however, would divert resources from the setting of permanent rates and could thereby impede a timely, ultimate resolution. Therefore, we will instead implement an expedited process that will enable us to decide this matter on a

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[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98) and Inter-Carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68), Declaratory Ruling and Notice of Proposed Rule Making (rel. February 26, 1999) (FCC Declaratory Ruling).

[2] See, FCC Declaratory Ruling at footnote 87. The FCC determined that the communication from an end user to an ISP to a website is not two calls, but is instead one typically interstate call. States, however, may continue to apply reciprocal compensation to this traffic.

permanent-rate basis by August 1999.

Accordingly, the Office of Hearings and Alternative Dispute Resolution is directed to establish procedures designed to permit the Commission to decide this matter by August 1999. The proceeding should address appropriate, cost-based reciprocal compensation rates that are consistent with the Commission's competitive goals.

CONCLUSION

The Commission determines that a basis exists to reexamine the reciprocal compensation scheme established in 1995. We therefore institute a proceeding, under the direction of an Administrative Law Judge, to investigate reciprocal compensation rates as applied to ISP-bound or other similar telephone traffic. We anticipate that this proceeding will permit the Commission to make a determination regarding this matter by August 1999 or shortly thereafter.

The Commission orders:

1. A proceeding is instituted to reexamine reciprocal compensation, particularly costs and rate structures applicable to large-volume call termination to single customers.

2. New York Telephone Company d/b/a Bell Atlantic-New York's petition to reopen Case 97-C-1275 is denied.

By the Commission,

(SIGNED) DEBRA RENNER
Acting Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 99-C-0529 - Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation.

NOTICE OF PREHEARING CONFERENCE

(Issued April 15, 1999)

TAKE NOTICE that a prehearing conference will be held before Administrative Law Judge Joel A. Linsider on Wednesday, April 21, 1999 beginning at 2:00 p.m. at the Commission's Albany offices, Empire State Plaza, Swan Street Building, Core 4 (North), Third Floor.

The principal purposes of the conference are to define in detail the issues raised by the Commission's Order Instituting Proceeding to Reexamine Reciprocal Compensation (issued the same day as this notice) and to consider associated scheduling matters.

DEBRA RENNER
Acting Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 99-10

CASE 99-C-0529 - Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation.

OPINION AND ORDER CONCERNING RECIPROCAL COMPENSATION

Issued and Effective: August 26, 1999

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

COMMISSIONERS:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 99-C-0529 Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation.

OPINION NO. 99-10

OPINION AND ORDER
CONCERNING RECIPROCAL COMPENSATION

(Issued and Effective August 26, 1999)

BY THE COMMISSION:

INTRODUCTION AND BACKGROUND

By order issued April 15, 1999, we instituted this proceeding "to reexamine reciprocal compensation, particularly costs and rate structures applicable to large-volume call termination to single customers."[1] "Reciprocal compensation" refers to an arrangement between two local exchange carriers in which each carrier compensates the other for the transport and termination on the second carrier's network facilities of calls originating on the first carrier's facilities. These arrangements, introduced in New York in 1995, are now governed by the federal Telecommunications Act of 1996 (the 1996 Act) and various rules and decisions of the Federal Communications Commission (FCC).

The present inquiry grows out of an unanticipated development: a substantial imbalance in traffic flows (and, in consequence, revenue streams) between incumbent local exchange carriers (ILECs) and some competing local exchange carriers (CLECs) having a preponderance of customers, such as

[1] Case 99-C-0529, Order Instituting Proceeding to Reexamine Reciprocal Compensation (issued April 15, 1999)(the Instituting Order), p. 4.

Internet service providers (ISPs), that receive far more calls than they make. To put the matter in context, it is necessary to describe in some detail the history and legal framework of reciprocal compensation in general.

Early New York Decisions

In our 1995 "Framework Order,"[2] we adopted a reciprocal compensation plan under which local exchange carriers (LECs) were to compensate one another for calls terminated on one another's networks. The compensation mechanism was to be cost-based (i.e., was to exclude the contribution to universal service costs included in the access charges paid by inter-exchange carriers to LECs completing calls on their behalf), mutual, and symmetrical. These cost-based arrangements were to be available only to facilities-based full-service providers (FSPs), who, by the nature of their operations, directly supported universal service; other carriers would be required to pay the higher carrier access charges for call termination.

In adopting the reciprocal compensation regime, we considered and rejected an alternative, termed "bill-and-keep," under which carriers would not pay one another for completing calls but would simply bill their own end-users and retain the resulting revenues. (In general, CLECs had favored bill-and-keep, fearing that they would send more calls to the incumbent's network for completion than they would receive and therefore be net losers under a reciprocal compensation arrangement; ILECs, sharing the same assumptions, had favored reciprocal compensation.) We rejected bill-and-keep as less cost-based, inasmuch as it would reflect actual costs only if traffic flows between carriers were at least roughly in balance. Finally, we noted that carriers could negotiate terms differing from those we adopted, as those terms were

[2] Case 94-C-0095, Competition II Proceeding, Order Instituting Framework for Directory Listings, Carrier Interconnection and Intercarrier Compensation (issued September 27, 1995).

made available to other carriers on a non-discriminatory basis.

The 1996 Act as Interpreted by the FCC

To state the matter most generally, the federal reciprocal compensation provisions, like those we had adopted earlier, call for mutual reimbursement of termination costs measured by reference to the incremental costs of the ILEC, which are to serve as a proxy for the CLEC's costs unless the CLEC proves its costs are, in fact, higher. More specifically, the 1996 Act imposes on all local exchange carriers "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[3] The terms for reciprocal compensation are to be set forth in inter-carrier interconnection agreements, reviewed or arbitrated by the state commissions, pursuant to the general scheme of the 1996 Act. In addition, the competitive checklist that must be met under the 1996 Act by a Bell Operating Company seeking authority to provide long-distance service includes reciprocal compensation arrangements that meet the 1996 Act's pricing standards.[4]

Those pricing standards specify that terms and conditions for reciprocal compensation may be considered just and reasonable only if they "(i) . . . provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination of calls that originate on the network facilities of the other carrier; and (ii) . . . determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[5] These requirements, however, do not preclude "the mutual recovery of costs through the offsetting of reciprocal

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[3] 47 U.S.C. §251(b)(5).

[4] 47 U.S.C. §271 (c)(2)(B)(xiii).

[5] 47 U.S.C. §252(d)(2)(A).

obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)"[6]; but the FCC has determined that bill-and-keep may be imposed by a state commission only "if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates."[7] In addition, the statutory requirements do not "authorize the [FCC] or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls."[8]

The FCC has determined as well that reciprocal compensation rates, like those for unbundled network elements generally, must be set on the basis of forward-looking economic costs, estimated in accordance with the Total Element Long-Run Incremental Cost (TELRIC) method.[9] In most cases, however, payments to a CLEC for terminating calls originating on an ILEC network are not to be set on basis of the CLECs own costs; instead, they are to be set symmetrically, on the basis of the ILEC's costs unless a CLEC presents a cost study showing its own costs to be higher and thereby rebutting the

[6] 47 U.S.C. §252(d)(2)(B)(i).

[7] CC Docket No. 96-98, et al., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, et al., First Report and Order (released August 8, 1996)(Local Competition Order), ¶1112.

[8] 47 U.S.C. §252(d)(2)(B)(ii).

[9] Local Competition Order, ¶1056. We have done so; existing reciprocal compensation rates are based on the TELRIC costs of the underlying network elements as determined in the First Network Elements Proceeding (Cases 95-C-0657 et al.) and subject to reexamination in the Second Network Elements Proceeding (Case 98-C-1357). For that reason, the present proceeding considers what equipment may be used to terminate particular types of traffic but does not attempt to determine unit costs of any such equipment. States may also use a default proxy set by the FCC, not pertinent here, or, in appropriate situations, bill-and-keep arrangements.

presumption of symmetry. In reaching that decision, the FCC reasoned, among other things, that the ILEC's costs would be a reasonable presumptive proxy for those of the CLEC inasmuch as both would be serving in the same geographic area; that symmetric compensation might reduce an ILEC's ability to use its bargaining strength to negotiate termination charges that were seriously asymmetric in its favor; and that symmetrical rates would be administratively easier to manage and would avoid requiring CLECs to perform costly forward-looking economic cost studies (unless they undertook to do so in an effort to rebut the presumption of symmetry and show their costs exceeded the ILEC's).[10]

The FCC further noted that the "additional costs" referred to in the statute as recoverable are primarily the traffic-sensitive component of local switching, together with a reasonable allocation of common costs.[11] Costs will vary, however, depending on the type of switching involved, and states may establish rates that differ on that basis.[12] In traditional ILEC network architecture, customers are connected to end office switches, groups of which are connected to each other through tandem switches. The tandems reduce the need for inter-office transport facilities and make the system correspondingly more efficient. CLECs, however, may use different technologies to perform functions equivalent to those performed by an ILEC through the use of tandem switches; a CLEC with a particular number and dispersion of customers, for example, may find it efficient to substitute transmission facilities for tandem switching in a manner that would be inefficient for an ILEC. The FCC therefore concluded that

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[10] Local Competition Order, ¶¶1085-1090.

[11] Ibid., ¶¶1057-1057.

[12] Ibid., ¶1090. Bell Atlantic-New York takes the position that while the FCC spoke explicitly only of separate rates for tandem and end-office termination (next defined), it did not preclude disparate rates for other categories, as long as they are applied symmetrically.

"where the [CLEC's] switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the [CLEC's] additional costs is the [incumbent's] tandem interconnection rate,"[13] which will be higher than its end-office interconnection rate. These two rates--the tandem switching rate and the end-office switching rate--along with the concept of "functional equivalence" between an ILEC's tandem switch and a CLEC's differently configured network capable of serving the same geographic area, figure prominently in the proposals under consideration in this case.

The FCC also determined that reciprocal compensation arrangements apply only to local traffic, and that long-distance traffic remains subject to the carrier access charge regime. It allowed the states to determine the areas to be considered local for these purposes.[14]

More recently, in February 1999, the FCC determined that traffic directed to an ISP was, in fact, largely interstate (in that it did not terminate at the ISP's local server but continued to Internet websites often in other states) and therefore not subject to its reciprocal compensation rule. It instituted proposed rulemaking on the subject but determined, at least for the time being, that carriers remained bound by their existing interconnection agreements, as interpreted by state commissions, and that states remained free to apply reciprocal compensation to ISP traffic.[15] (Nearly all states that have considered the matter

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[13] Id.

[14] Ibid., ¶¶1034-1035.

[15] CC Docket No. 96-98, Local Competition Provisions of the Telecommunications Act of 1996, and CC Docket No. 99-68, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking (released February 26, 1999)(FCC ISP Ruling). Bell Atlantic-New York and its affiliates have brought suit against this aspect of the FCC's decision, contending that state commissions lack authority to impose reciprocal

have continued to apply reciprocal compensation to this traffic. The sole exceptions to date are Massachusetts, which, having initially applied reciprocal compensation on the premise that the traffic was intrastate, reversed itself in light of the contrary FCC decision,[16] and New Jersey.)

The Current Situation

Consistent with these legal requirements, the tariffs of New York Telephone Company d/b/a Bell Atlantic-New York (Bell Atlantic-New York) provide for reciprocal compensation at the higher tandem or lower end-office rate (termed, respectively, "Meet Point B" and "Meet Point A"), depending on the nature and location of the interconnection. A Meet Point A interconnection (at an end-office switch) will permit a CLEC to hand off traffic for delivery to any customer served by the end-office switch. A Meet Point B interconnection (at a tandem switch) will permit the handing off of traffic for delivery to any customer served by any of the end offices subtending the tandem. The Meet Point A (end-office) rate is equal to the sum of the rates for switch usage and a common trunk port. The Meet Point B (tandem) rate is equal to the sum of the rates for a tandem trunk port, end-office-to-tandem common trunking and associated trunk port costs, tandem switch usage, and end-office switch usage.

The rates for both types of connection are based on costs as determined in the First Network Elements Proceeding, and are subject to modification in light of the conclusions to be reached in the Second Network Elements Proceeding. Most (but not all) interconnection agreements between Bell Atlantic-New York and CLECs defer to the tariffed rates, some

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compensation plans for Internet-bound traffic. Bell Atlantic-New York's Initial Brief, p. 14, n. 32.

[16] MCI WorldCom Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Mass. D.T.E. 97-116. The Massachusetts case was decided by a 3-2 vote.

of them providing for a "blended" rate lying between those parameters and, in some cases, subject to change as the CLEC's network evolves; any change in the tariffed rates resulting from this proceeding would flow through to the rates charged under those agreements. Reciprocal compensation for Frontier Telephone of Rochester (Frontier) is governed by its 1994 Open Market Plan (OMP), which incorporates a negotiated, above-cost rate that will remain in place (except where otherwise provided in particular interconnection agreements) until the OMP expires, or unless we decide in this proceeding to modify it.[17]

The effects of reciprocal compensation as now structured have been greatly affected by the unexpectedly rapid growth of the Internet and of other services (such as "chatlines") that generate very large volumes of traffic inbound to individual customers who produce far smaller volumes of outbound traffic. (This type of traffic is sometimes referred to as "convergent.") Many Internet service providers and chatlines are served by CLECs; as a result, ILECs, whose own customers direct many calls to ISPs and chatlines but receive very few in return, may end up paying out much more in reciprocal compensation than they take in. In the most extreme situations, discussed below, it is alleged that some CLECs are nothing more than ISPs that have adopted the trappings of CLECs solely to receive a reciprocal compensation revenue stream. Even in less extreme situations, it is argued that some CLECs are serving a niche market that is made lucrative by a perverse regulatory anomaly rather than by the underlying economics of the situation.

[17] Cases 95-C-0657 et al. and 93-C-0033 et al., First Network Elements Proceeding and Rochester Telephone Corp. - Rate Stability Agreement, Opinion No. 99-8 (issued July 22, 1999), mimeo pp. 25-27. To avoid terminological confusion, it should be noted that Frontier, in contrast to other parties, generally associates "tandem switching" with the lower of the two reciprocal compensation rates; it characterizes the higher rate as recovering the costs of tandem switching plus end office switching and termination.

These developments, and efforts by Bell Atlantic-New York and Frontier to discontinue reciprocal compensation payments associated with Internet traffic, led us to institute an inquiry in July 1997 (the ISP Case). Bell Atlantic-New York contended, among other things, that because calls to ISPs did not in fact terminate at the ISP but were ultimately delivered to host computers, many of which were out-of-state, the calls should be seen as interstate and, accordingly, not subject to reciprocal compensation. We rejected that view, determining that a call to an ISP, like a call to a radio call-in program or any other large volume call recipient, was a local call,[18] billed at local rates, and therefore subject to reciprocal compensation. We went on to reject various other arguments, based on cost characteristics or network congestion, for treating calls to ISPs differently from other calls, and we simply closed the proceeding.[19]

The issue arose again in the contest of chatlines. In an order directed primarily to chatline blocking, we noted the existence of compensation arrangements under which carriers shared their reciprocal compensation revenues with information providers (IPs). We inferred on that basis that the reciprocal compensation revenues exceeded the termination costs they were supposed to cover, and we cited as well the traffic imbalances already noted. We invited carriers to file cost and rate information that might warrant a different compensation system for the calling at issue, though we noted we would examine only tariffed rates and would leave existing interconnection agreements intact.[20]

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[18] As noted, the FCC has recently taken a different view; its decision is discussed below.

[19] Case 97-C-1275, Reciprocal Compensation Related to Internet Traffic, Order Closing Proceeding (issued March 19, 1998).

[20] Case 98-C-1273 et al., Blocking Obligations for Chatline Services (Chatline Proceeding), Order Directing Carriers to File Tariffs for Chatline Services and Related Actions (issued February 4, 1999).

Bell Atlantic-New York responded to that invitation and petitioned for a reopening of the ISP Case, reconsideration of the decision reached there, and interim relief. After considering responsive comments and the recent FCC action, we found a basis for reexamining "whether existing reciprocal compensation arrangements are affected by the termination of large-volume call termination traffic to single customers."[21] We declined to reopen the ISP case; denied interim relief as, in effect, a distraction from the more important process of setting permanent rates; and instituted this proceeding for that purpose, directing that it be conducted on an expedited basis.

PROCEDURAL HISTORY

Following a prehearing conference on April 21, 1999, Administrative Law Judge Joel Linsider issued a ruling defining the scope of the proceeding and adopting procedures and a schedule for the hearings.[22] Among other things, he identified various issues properly within the proceeding (including the relationship between the rates that may be set here and those included in interconnection agreements), and he noted that costing of the components of the various network configurations had been or will be handled in the First or Second Network Element Proceeding and should not be repeated or anticipated here. He reserved judgment on whether the burden of proof rested entirely on the ILECs, in the traditional manner, or was shared with CLECs; but he asked all parties, CLECs included, to submit threshold testimony describing the facilities they use to serve ISPs and chatlines and setting forth specified data on their traffic patterns.[23]

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[21] Instituting Order, p. 3.

[22] Case 99-C-0529, Ruling on Procedure and Schedule (issued April 27, 1999).

[23] The Judge later ruled that parties not submitting threshold testimony would not be permitted to submit later rounds of testimony or to cross-examine, though they would be

Numerous parties submitted testimony; they are identified (by full name and short description used in this opinion) in Appendix B. Hearings before Judge Linsider were held in Albany on June 21-22, 1999; cross-examination was waived as to all witnesses except those sponsored by Bell Atlantic-New York and Frontier. The record comprises 793 pages of stenographic transcript and 64 exhibits; portions of that record have been designated as proprietary.[24]

Briefs and reply briefs were invited; parties submitting them also are identified in Appendix B. Following the conclusion of the hearings, parties were asked, in a letter from Dan Martin of the Office of Communications dated June 24, 1999, to include with their briefs their replies to a series of questions; several parties responded to those questions instead of submitting briefs.

OVERVIEW OF PARTIES' POSITIONS AND THIS OPINION

The ILECs (primarily Bell Atlantic-New York and Frontier) and CPB propose substantial changes to the existing reciprocal compensation arrangements. Among the CLECs, Time Warner proposes a substantial change, and MCIW offers a modest change as a less favored alternative to maintenance of the status quo. All other CLECs would maintain the status quo, though they differ in their arguments for doing so.

Putting the matter in its most general terms, Bell Atlantic-New York begins its brief by announcing "the current reciprocal compensation regime is broken, and needs to be fixed," and Frontier refers to the ILECs' "hemorrhage of cash

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permitted to file briefs. He also clarified that parties who, by their nature, had no threshold data to submit (such as industry organizations and the State Consumer Protection Board) were not subject to this requirement. Case 99-C-0529, Ruling Concerning Parties Not Filing Threshold Testimony (issued May 20, 1999).

[24] Consistent with usual practice, this material has been designated proprietary on a provisional basis. The Judge's ruling determining the final status of each item is pending.

in the form of reciprocal compensation."[25] In stark contrast, CTSI _et al._ state unequivocally that "this proceeding is about [Bell Atlantic-New York's] great distaste for paying its competitors to provide termination services for local telecommunications traffic initiated by [Bell Atlantic-New York's] customers"[26]; and Global NAPs sees this case as the latest battle in the ILECs' ongoing war to frustrate the competitive evolution contemplated by the Telecommunications Act of 1996. With "resale moribund" and "[unbundled network element]/collocation hobbled," Global NAPs charges, Bell Atlantic-New York is now

> seeking protection from the meager interconnection-based competition that has thus far developed. Bell Atlantic[-New York] complains that its competitors are niche-based, ignore the residential market, and are "abusing" the system by exercising their rights under the [1996] Act and expecting the ILECs to comply with their duties. As Bell Atlantic[-New York] sees it, this outrageous behavior must be ended, and quickly, by jiggering the rules to eliminate even the niche competition that has been able to develop. This, of course, is anticompetitive nonsense.[27]

[25] Bell Atlantic-New York's Initial Brief, p. 1; Frontier's Initial Brief, p. 1.

[26] CTSI _et al._'s Initial Brief, p. 1.

[27] Global NAPs' Reply Brief, pp. 3-4.

As is apparent, Time Warner is not far off the mark when it refers, in its reply brief, to the heavily rhetorical nature of the initial briefs.[28]

For purposes of this overview, parties are grouped on the basis of whether they propose changes (even modest changes as a less favored alternative) or fully endorse the status quo.

Parties Proposing Changes

Bell Atlantic-New York contends that CLECs serving a preponderance of customers with convergent traffic flows avoid many of the costs that are incurred by full-service providers (CLECs and ILECs alike) and therefore should not receive reciprocal compensation at rates that reflect those costs. Providing such above-cost compensation to CLECs, in its view, requires ILECs to finance their competitors; beyond that, it encourages CLECs to seek out niche markets rather than becoming full-service providers, thereby harming customers by denying them the benefits of true competition, and creates disincentives to introducing more efficient arrangements for Internet access.

Bell Atlantic New York offers four proposed remedies:

> remove from intercarrier compensation rates all costs associated with vertical switching features[29]
>
> deny a CLEC reciprocal compensation at tandem (Meet Point B) rates for the delivery of convergent traffic if the CLEC does not offer

[28] This is not to say, as Time Warner goes on to worry, that "the Commission has been left to its own devices to reconcile a difficult and often conflicting record, providing a poor basis upon which to reach a reasoned decision." Time Warner's Reply Brief, p. 1. The results we have reached are reasonable and are supported by substantial evidence.

[29] "Vertical" features are all switching functions other than those used in the simple routing and delivery of traffic.

a tandem interconnection option

deny all reciprocal compensation for the delivery of Internet-bound traffic; or, if compensation is provided, limit it to "direct variable cost"[30]

require all local exchange carriers to provide "geographically relevant interconnection points" (GRIPs) when they assign customers numbers outside the rate centers in which the customers are located.[31]

Frontier describes what it considers to be the current regime's disastrous effects on ILECs and undesirable results for society as a whole. It goes on to propose that Internet traffic be excluded from reciprocal compensation and treated on a bill-and-keep basis, as the Commission is legally permitted to do. Termination of non-Internet convergent traffic should be compensated on the basis of the CLEC's own costs rather than the ILEC's, which Frontier believes to be legally permissible; if the ILEC's costs are to be used, they should be limited to the ILEC's "tandem switching cost, not [including] its local switching and termination costs."[32]

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[30] Direct variable cost excludes (in addition to vertical features) depreciation, return, and any allocation of joint and common costs.

[31] Users, such as ISPs, may request such service in order to establish a presence outside their geographic areas, making it possible for their own customers to call them without incurring toll charges.

[32] Frontier's Initial Brief, p. 10. As noted, Frontier uses "tandem costs" to refer to the lower of the alternatives.

Time Warner stresses the variation among CLECs with respect to business plans, network configuration, and traffic patterns. Asserting that its own traffic imbalance is less extreme and less relevant than that of some other CLECs, it argues that what it terms "responsible CLECs"[33] design their networks to carry originating as well as terminating traffic and build those networks to serve a broad range of customers. In its view, the optimal reciprocal compensation rate is a negotiated blended rate (such as those in Time Warner's own interconnection agreements) falling between the ILEC's tandem and end-office rate; the blend takes account of both carriers' network design, customer types, and traffic patterns. Time Warner urges us to avoid disturbing blended rate arrangements; but where these arrangements are inappropriate (because the CLEC does not build out its network and serve two-way traffic), it would establish a sliding scale framework that ties the reciprocal compensation rate to the CLEC's traffic patterns and number of interconnection points.

MCIW favors maintenance of the status quo and denies that traffic patterns are a proper indicator of costs. It suggests, however, that an extreme traffic imbalance (an incoming to outgoing ratio of 100:1 or more) could trigger an audit of the CLEC's network configuration to determine whether it in fact met the functional equivalence test for receiving reciprocal compensation at the tandem rather than the end-office rate.

CPB regards traffic patterns as a fair indicator of functional equivalence (or its absence) and suggests a below-tandem rate where the incoming to outgoing ratio is 5:1 or more. But it would apply that remedy only after it had been shown that the local market was, in fact, open to competition, to avoid the risk that the CLEC's traffic pattern (or, more fundamentally, its serving only the convergent traffic niche market) may have been caused by the ILEC's failure to open the

[33] Time Warner's Initial Brief, p. 4.

market in a manner that permits CLECs to become full-service providers.

Parties Favoring the Status Quo

CLECs other than those identified in the foregoing section generally urge maintenance of the status quo, offering a variety of arguments in its support. They contend, among other things, that no showing has been made of pertinent differences between how traffic is handled by ILECs and by CLECs, and that traffic imbalances say nothing about a carrier's costs or about whether a CLEC's network is functionally equivalent to an ILEC's. Indeed, some say, reciprocal compensation contemplates a traffic imbalance; and ILECs, which initially sought reciprocal compensation rather than bill-and-keep because they thought the imbalance would favor them, should not be heard to change their position simply because the imbalance in fact turned out to work against them. They note that ILECs benefit, through avoided costs, when CLECs deliver calls; and they warn against denying CLECs the opportunity to recover their costs and, where those costs are, in fact, less than the CLEC's, to enjoy the benefits of their innovations and efficiencies.

Some CLECs warn against depriving carriers of legitimate opportunities to pursue niche markets as a means of entry or growth, and some suggest that barriers to broader entry leave them no choice but to seek out convergent traffic. They note in particular the unfairness that would result from taking away those opportunities after they had acted in reliance on them. Some CLECs deny that traffic imbalances imply any abuse of the system; others, as already noted, distance themselves from putative abusers, and urge that any remedy be properly targeted.

With regard to non-Internet traffic, some CLECs contend any change from the existing arrangements would violate applicable legal constraints, including the FCC's commitments to functional equivalence as the measure of whether the tandem rate should be allowed and to TELRIC as the measure of costs. With regard to Internet traffic, CLECs recognize the FCC ISP Ruling has provided the states more discretion (though some raise legal concerns about deaveraging by type of customer) but urge maintenance of the status quo on policy grounds.

Finally, CLECs object to specific aspects of the various proposals for change, raising both legal and policy issues.

The Attorney General, whose office filed only a reply brief, asks us to "consider[,] as [our] first order of concern, how or if any . . . changes [to the existing reciprocal compensation regime] would adversely affect availability of affordable internet access for New York consumers." He therefore urges us to "move with extreme caution" in considering whether to make any such changes.[34]

This Opinion

We begin with the question of burden of proof, unusual in this case because the rates at issue are the CLECs' but the costs on which they are based are the ILECs'. We then consider the parties' views on the broad question of whether the existing system is broken and in need of repair. We next present, one by one, the specific proposals for change and the arguments for and against them. Finally, we evaluate the record and describe the remedies we are adopting.

In view of the large number of CLECs filing briefs, it is not surprising that many cover the same ground and present the same arguments. We present the pertinent arguments that have been offered, but we make no attempt to summarize each individual brief or to attribute each argument to each party making it.

BURDEN OF PROOF

[34] Attorney General's Reply Brief, p. 3.

The issue of burden of proof arose at the prehearing conference, where the CLECs generally saw the burden as resting with the ILECs, as in a traditional rate case, while the ILECs saw the burden as shared. In his ensuing ruling, the Administrative Law Judge declined to resolve conclusively questions that might require further briefing but, as already discussed, required the CLECs to provide threshold information.[35]

In its brief, Bell Atlantic-New York contends that the rates at issue here are the CLECs' and that, accordingly, they bear the burden of proof, even with respect to proposals made by ILECs. It cites the Public Service Law's (PSL's) provision that

> at any hearing involving a change or a proposed change of rates, the burden of proof to show that the change or proposed change if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be upon the utility.[36]

It adds that it makes sense for the CLEC to bear the burden of proof inasmuch as it has the best information related to its rates, including how it serves its customers and how it realizes efficiencies by specializing in convergent traffic. Asserting that the CLECs have offered no analysis in support of their slogan that "a minute is a minute," i.e., that all types of traffic impose the same switching and transport costs, Bell Atlantic-New York contends that the proposition must be rejected on burden of proof grounds alone. Frontier,

[35] Case 99-C-0529, Ruling on Procedure and Schedule (issued April 27, 1999), p. 3.

[36] PSL §92(2)(f). Bell Atlantic-New York notes that in 1921, the statute was amended to impose on the utility the burden of proof with respect to all proposed rate changes, not merely rate increases proposed by the utility itself. It observes as well that CLECs come within the statute's definition of a utility.

meanwhile, sees the CLECs' failure to provide information on their actual costs as warranting an inference that those costs are over-recovered by reciprocal compensation rates based on the ILEC's TELRIC.

In response, CTSI et al. argue that the purpose of the proceeding is not necessarily to reduce rates but, quoting from the Instituting Order, "to reexamine whether existing reciprocal compensation rates are affected" by convergent traffic. The first step in that reexamination is to determine whether there are differences in network costs that warrant a different rate, and the burden of that showing is on Bell Atlantic-New York, as the party that instituted the proceeding and that advocates a change in the existing regulatory regime. The CLECs' own costs, they continue, are not at issue, given that the ILECs's costs are used as a proxy. CTSI et al. add that Bell Atlantic-New York has not borne its burden, in view of, among other things, the CLECs' "uncontroverted evidence that they utilize the same facilities to terminate all types of traffic and that their costs to terminate traffic are the same regardless of the nature of their traffic."[37]

The PSL's imposition of the burden of proof on the utility defending its existing rate or proposing a higher one does not resolve the matter here, for it contemplates a very different kind of proceeding, in which the utility's costs, concerning which it has by far the greatest access to pertinent information, come under scrutiny in an attempt to determine their reasonableness and prudence. Here, in contrast, the configurations of the CLECs' systems are pertinent, which is why the CLECs were directed to provide system descriptions, but the reasonableness of the actual costs incurred by CLECs in constructing their networks are not at issue. Moreover, what is at issue is less the CLECs' rates than the proper way to understand and apply the regulatory structure pursuant to which those rates are set. The parties

[37] CTSI et al.'s Reply Brief, p. 15.

advocating changes (the ILECs, Time Warner, and CPB) have, at a minimum, the burden of going forward and making at least a prima facie case that change is needed and, even more, that their specific proposals represent reasonable responses to problems that have been identified. And, in the face of substantive responses to their prima facie cases, they face a substantial burden of persuasion as well.[38]

When all is said and done, however, this case should not be decided on the basis of burden of proof. In a traditional rate case, if a consumer group goes forward with a prima facie showing that forecast tree-trimming expense, for example, should be reduced, the utility's burden of proof means it must respond persuasively to that showing or risk suffering a reduction in its allowance for that item. Here, in contrast, the issue is one of broader policy development and application, and we have the authority to range further afield to craft a just and reasonable result, based on substantial evidence in the record but less tied to burden of proof considerations than a traditional rate case decision might have been.

THE ALLEGED NEED FOR RELIEF

The ILECs' Claims[39]

Frontier sums up the ILECs' view of the situation as follows:

> The battle lines in this proceeding are well-drawn. The incumbents are experiencing a hemorrhage of cash in the

[38] As added warrant for imposing the burden of proof on the parties proposing changes, CTSI et al. cite State Administrative Procedure Act (SAPA) §306, which provides that the burden of proof shall be on the party who initiated the proceeding. That provision is not pertinent here, however, since this is not an adjudicatory proceeding subject to Article 3 of SAPA.

[39] These presentations of parties' positions include, on occasion, responsive points as well.

> form of reciprocal compensation, and the more they pay in reciprocal compensation, the more they have to invest in facilities to carry the traffic to their competitors in order to pay even more. The competitors are earning tremendous profits on this traffic, because they charge rates all out of proportion to their actual costs. The customers who are creating all this incoming traffic are also sharing in the gravy train, and some are receiving free service or even being paid to take service merely because they generate large amounts of incoming traffic. A whole industry is growing up to feed on the revenue stream from the incumbents, and the focus of local exchange competition is shifting to the attraction of one-way incoming service.[40]

Frontier goes on to compare the incentives provided to CLECs by reciprocal compensation arrangements to those offered to qualifying energy producing facilities by the federal Public Utility Regulatory Policies Act of 1978 and New York's "Six Cent Law," both of which, it suggests, encourage the production of otherwise uneconomic products. Frontier warns of disastrous impacts on ILECs and alleges adverse effects on society in general. These include the invention of services such as chatlines, which, Frontier says, we found were not necessarily beneficial; the creation of disincentives to the provision by CLECs of service to flat-rate residential customers, whose monthly payments to their LEC will likely just exceed the LECs reciprocal compensation payments on their account; and the need for uneconomical investments on the part of the ILEC to carry traffic originated by their flat rate customers for delivery to CLECs' customers.

Frontier contends further that the existing arrangements encourage CLECs to charge discriminatory rates to benefit convergent customers and to invest in switches that otherwise would not be economic; it cites a CLEC that has installed two switches, one a tandem and the other a local

[40] Frontier's Initial Brief, p. 1 (footnote omitted).

exchange switch, alongside its voice mail platform in Rochester "in an attempt to charge reciprocal compensation for incoming traffic and to obtain the lion's share of access revenues for incoming toll calls."[41] Frontier disputes the premise that society benefits from CLECs reducing rates to ISPs, contending that any such benefit is simply a poorly thought through, unnecessary, and anti-competitive subsidy.

Relief from this situation is warranted, Frontier continues, because reciprocal compensation makes sense only where, in its absence, the originating LEC would receive compensation for the call and the terminating LEC would not, and where the costs borne by both LECs are nearly equal. Internet traffic, it argues, does not meet these conditions, inasmuch as most of it originates from flat rate residential subscribers who pay no additional charges for their calls to ISPs. Meanwhile, even in the absence of reciprocal compensation, the CLEC receives incremental revenues from its ISP customer, while the ILEC is required not only to pay reciprocal compensation but to incur substantial expenses for the Internet traffic it carries.[42] (CPB responds that these costs, attributable to the demands imposed by Frontier's own customers, are irrelevant to the proper level of reciprocal compensation.)

Bell Atlantic-New York presents similar arguments. It cites statements, drawn from CLEC web sites and submitted in Bell Atlantic-New York's comments in the Chatline Proceeding, to the effect that many CLECs seek customers with convergent traffic "simply for the purpose of collecting

[41] Frontier's Initial Brief, p. 4, n. 11.

[42] Frontier observes that the party actually responsible for the costs is the ISP, which charges its end users for its services and, in some situations, receives from the CLEC a portion of the reciprocal compensation revenues received by the CLEC on its account. Frontier suggests that ISPs should, in fact, be regarded as carriers who, rather than receiving compensation from ILECs, should be obligated to pay carrier access charges.

intercarrier compensation payments from incumbent LECs. Indeed, in many cases intercarrier compensation has become the principal line of business for such carriers."[43] Noting that during the first quarter of 1999, the aggregate measured traffic flow from Bell Atlantic-New York to CLECs was more than ten times greater than the flow in the reverse direction,[44] Bell Atlantic-New York contends that the market is being shaped by regulation, that ILECs are being forced to finance their competitors, and that customers are injured because CLECs are discouraged from becoming the kind of full service providers who will bring the benefits of true competition.

Bell Atlantic-New York goes on to describe the FCC's symmetry and functional equivalence principles for reciprocal compensation, and it argues that though the FCC ISP Ruling permits states to apply those requirements to ISP traffic, it does not require them to. It points as well to the Framework Order and urges us to reaffirm and apply the Framework Order's principles of universal service (which Bell Atlantic-New York sees as favoring "intercarrier compensation rules that provided incentives for provision of a broad range of services to a wide variety of customers"[45]); symmetry (meaning that the ILEC's rate levels should apply to the CLEC as well, the question being which rate applies under which circumstances); functional equivalence, defined as "the ability to terminate calls to all customers served by a carrier's unique, stand alone network by delivery to a single point of interconnection[46]"); and efficient interconnection (requiring, as a further condition of charging tandem rates, that CLECs "provide the incumbent appropriate interconnection options

[43] Bell Atlantic-New York's Initial Brief, p. 1.

[44] Tr. 96, 165-166.

[45] Bell Atlantic-New York's Initial Brief, p. 15.

[46] Framework Order, p. 6, n. 1, cited at Bell Atlantic-New York's Initial Brief, p. 16, n. 40.

within their network that would allow the incumbent access to more efficient connections"[47]). Bell Atlantic-New York adds that the symmetry principle, as we and the FCC have adopted it, makes actual CLEC costs irrelevant.

As discussed in more detail in connection with its specific proposals, Bell Atlantic-New York maintains that the termination of convergent traffic enjoys efficiencies that are unavailable when more broadly dispersed traffic is terminated. The CLECs respond that these claims are unsubstantiated.

The CLECs' Positions

Although the CLECs' briefs vary in their treatment of the issues, several common themes may be identified. This section is organized around those themes.

1. The Significance of Carrying Convergent Traffic

AT&T, among others, argues that traffic imbalances say nothing about the proper level of reciprocal compensation and that reciprocal compensation, in fact, contemplates traffic imbalances, without which the simpler bill-and-keep system could have been adopted. It contends as well that Bell Atlantic-New York overlooks other traffic imbalances that run in its favor, such as its termination of 2.7 times as many minutes of wireless traffic as CLECs terminate for it. Mid-Hudson/Northland and MCI, among others, note that it was the ILECs that, over the CLECs' objection, favored creation of the reciprocal compensation mechanism; these parties urge that the ILECs be required to accept the consequences of their tactics and not be bailed out now that their bet has gone sour.

Looking to the genesis of the traffic imbalance rather than its implications, several CLECs, such as CTSI et al., attribute the tendency of some CLECs to seek convergent traffic customers to Bell Atlantic-New York's continued

[47] Framework Order, p. 6, cited at Bell Atlantic-New York's Initial Brief, p. 16.

imposition of barriers to more broad-based market entry. CTSI *et al.* assert that

> If Bell Atlantic effectively denies access to loops, and it is cost-prohibitive for the entrant to deploy them, serving customers that require fewer loops is clearly rational business behavior. If Bell Atlantic provides woefully inadequate operations support systems that make large-scale ordering and provisioning completely unreliable, providing services that are less dependent on effective OSS interfaces is also logical. If Bell Atlantic neglects a market segment by failing to offer collocation arrangements that customers in that market segment want, providing those collocation arrangements is one way to compete. And if Bell Atlantic makes it extremely difficult to transition a customer from Bell Atlantic to a CLEC, targeting customers that are establishing businesses is also logical. In all of these cases, ISPs are excellent customers for CLECs.[48]

CPB responds that reciprocal compensation rates should be cost-based regardless of who pays whom.

Some CLECs broaden this point, asserting that pursuing niche markets is not merely a reaction to barriers erected by ILECs but is a proper strategy for entering the market, either enroute to becoming a full-service provider or as an inherently reasonable business plan in itself. Mid-Hudson/Northland, TRA, and others urge us to avoid making changes that would undermine the expectations of small, innovative carriers who had relied in good faith on the existing regulatory structure to provide them revenue streams from niche markets--and especially not to do so in order to protect ILEC monopolists from the consequences of their own mistakes in favoring reciprocal compensation. (Bell Atlantic-New York challenges the premise of reliance, asserting that CLECs recognized the possibility that the existing rules might

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[48] CTSI *et al.*'s Initial Brief, pp. 10-11.

change; for that reason, among others, it sees no need for a transition period before new arrangements are introduced.)

Mid-Hudson/Northland add that the sharing by CLECs of revenues with ISP customers (which Bell Atlantic-New York cites as evidence that reciprocal compensation revenues that were improperly above cost) is nothing more than the sharing of cost savings with end user customers, in a manner conceptually the same as an ILEC's attracting a prospective customer with an individual case basis pricing arrangement substantially below the tariffed price. Since the beneficiaries of the practice are end users, Mid-Hudson/Northland suggest, the practice should be encouraged, not discouraged.[49]

Reinforcing the propriety of pursuing of niche markets, MCIW, the Cable Association, and others assert that Bell Atlantic-New York itself does so, citing its recent introduction of Internet Protocol Routing Service (IPRS) to attract ISP customers. The Cable Association notes that the service was introduced following our denial of Bell Atlantic-New York's request for immediate relief from reciprocal compensation obligations relating to ISP-bound traffic; and it suggests that granting the request, which the Cable Association characterizes as one for protection from competitive forces, would have vitiated Bell Atlantic-New York's incentive to introduce the new service. In response, Bell Atlantic-New York denies that IPRS was a reaction to our decision, arguing it could never have been planned and introduced that quickly. More broadly, it objects to the premise that it should be encouraged to compete to retain its customers by being required to subsidize its competitors.

In contrast to the CLECs who emphasize the propriety of pursuing niche markets, others point to the distinctions among CLECs, some of which are, or aspire to be, full service providers. They urge us to do nothing in this proceeding that

[49] Mid-Hudson/Northland's Initial Brief, p. 17.

would interfere with their ability to function in that capacity. Without suggesting that a focus on ISP or convergent traffic is inherently abusive, they argue that CLECs that may be found to be abusing the existing regulatory structure should be pursued separately, in a manner that does not protect the ILECs from competition by full service, facilities-based providers. CTSI et al., for example, cite testimony that they have not limited themselves to high volume convergent traffic customers, and they object to a one-size-fits-all approach.[50]

The point is emphasized by Time Warner and Lightpath. Lightpath contends that it serves a diverse customer base and points to the blended reciprocal compensation rate in its interconnection agreement with Bell Atlantic-New York, which permits it to receive reciprocal compensation based on end-office rates for traffic terminated via end-office trunks and on tandem rates for traffic terminated via tandem trunks.[51] It charges that Bell Atlantic-New York's effort to seek broad changes in existing reciprocal compensation arrangements rather than pursuing the few CLECs who allegedly abuse the system represents an effort to use the regulatory system to undermine competitive carriers in the one area where they have succeeded in eroding Bell Atlantic-New York's market share.[52] It asks us "to maintain the status quo--especially with respect to full-service, facilities-based carriers. . . ."[53]

Time Warner, meanwhile, urges recognition of the variation in CLECs' business plans and operating networks, asserting that "responsible CLECs, those that design their networks and their points of interconnection . . . based on

[50] CTSI et al.'s Initial Brief, p. 21.

[51] Lightpath's Initial Brief, p. 16.

[52] Ibid., pp. 5-6. The Cable Association argues to similar effect. Cable Association's Initial Brief, p. 4.

[53] Lightpath's Reply Brief, p. 3.

sound engineering principles for the flow of both originating and terminating traffic, have built their networks to serve a broad range of local telephone customers."[54] It adds that "the ILECs have offered no evidence to dispute the fact that responsible CLECs have built out, and continue to augment, their networks as necessary to handle actual and anticipated two-way traffic volumes among providers."[55] Recognizing this degree of variation among CLECs, and attempting to provide incentives for CLECs to build out their networks, Time Warner offers its own proposed modification, described in detail below, to the existing reciprocal compensation scheme.

Bell Atlantic-New York responds that there is no basis for distinguishing among CLECs in this way and that its proposals are intended not to punish vice or reward virtue but only to reflect the fact that it costs less to deliver convergent traffic than to deliver traffic to numerous, widely dispersed customers. It therefore would apply its proposals to the convergent traffic carried by FSPs as well as to niche players.

[54] Time Warner's Initial Brief, p. 4, footnotes omitted.

[55] Ibid., p. 5.

2. Relationship between Traffic Ratios and Costs

Many CLECs assert that the ILECs have shown no relationship between the type of traffic carried and the costs incurred to terminate it; they insist that "a minute is a minute," regardless of the type of traffic being carried.[56] CompTel, for example, cites Bell Atlantic-New York's witness's confirmation that it uses the same network facilities for all types of traffic, and e-Spire/Intermedia note the witness's statement that network components are not related to traffic imbalances.[57] Bell Atlantic-New York disputes these characterizations of its witness's testimony, contending, among other things, that the use of similar facilities, referred to by the witness, does not mean the facilities are identical.[58]

MCIW similarly contends that Bell Atlantic-New York failed to show that CLECs' costs are lower than ILECs' because they provide service to convergent customers; it cites its own witness's statement that

> virtually all of the CLECs in this case provided information that, in aggregate, demonstrates that ISP traffic is being routed through the same interconnection, transport, and circuit switching equipment that all other traffic is being routed over. [Bell Atlantic-New York] provided similar testimony stating that, to the extent that it could identify ISPs separately from other end users, calls to those ISPs are also being routed through the same interconnection, transport, and switching equipment and facilities as any other type of end user call.[59]

[56] TRA's Initial Brief, pp. 3-4.

[57] CompTel's Initial Brief, p. 4, citing Tr. 296, 307, 308; e-Spire/Intermedia's Initial Brief, pp. 6-7, citing Tr. 297-298.

[58] Bell Atlantic-New York's Reply Brief, p. 15, n. 30.

[59] Tr. 722, cited in MCIW's Initial Brief, p. 4.

CTSI et al. cite in particular what they characterize as Bell Atlantic-New York's testimony that the length of the loop has nothing to do with the carrier's terminating costs.[60] Lightpath, apparently distinguishing full-service CLECs from others, states that "despite extensive testimony filed by both incumbent and competitive carriers, no evidence has been presented to demonstrate that terminating large volumes of calls to single customers is more cost effective for full service, facilities-based providers than terminating other types of traffic."[61]

Several CLECs stress the centrality of the functional equivalence determination in deciding whether the rate should be set at the tandem or end-office level or at some point in between. AT&T notes our statement in the Framework Order that functional equivalence does not depend on a CLEC's network architecture as long as the CLEC can terminate calls to all customers served by its network through a single point of interconnection. Disputing Bell Atlantic-New York's suggestion that CLECs' use of a single-switch network architecture may provide them efficiencies and lower costs that would warrant withholding reciprocal compensation at tandem rates, AT&T explains that a CLEC must use the single-switch network architecture in the early stages of competition until it gains volumes that would warrant the installation of additional end- office and tandem switches.[62] CompTel notes the FCC's determination that a CLEC is entitled to a tandem rate in cases where its switch serves a geographic area comparable to that served by the ILECs tandem switch. MCIW see the functional equivalence doctrine as permitting a state commission to determine whether a particular CLEC is entitled to the tandem rate on the basis of "economically

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[60] Tr. 178, cited in CTSI et al.'s Initial Brief, pp. 8-9.

[61] Lightpath's Initial Brief, p. 2.

[62] AT&T's Initial Brief, p. 8.

relevant considerations, mainly the geographic coverage that the CLEC's switch supports"[63] instead of on the basis of such irrelevant considerations as traffic ratios. Lightpath argues that its system meets both the FCC's geographic area standard and our single point of interconnection standard and that its consequent tandem functionality is not vitiated by the fact that it serves some convergent customers. It asserts that

> once a CLEC has made the necessary investment to build out a full facilities-based network that meets the commissions' [i.e., FCC's and PSC's] definitions of tandem functionality, it is entitled to be compensated for its costs using tandem switching as a proxy. . . Thus, a CLEC's right to receive tandem termination rates is based on the overall functionality of the switch with respect to calls and all customers served by the CLEC's switch, and not on the characteristics of a particular call or type of traffic.[64]

In response, CPB maintains that tandem functionality is not needed to terminate calls to a small number of large-volume customers and that such customers can be served using high-capacity facilities having a lower cost-per-minute than the low-capacity facilities used to serve a large number of widely dispersed customers. It urges us to reflect these cost differences in the reciprocal compensation rates applicable to traffic terminated to large-volume customers. Frontier asserts that these differences mean that a lower compensation rate for this type of traffic would be consistent with the federal requirements, and it points to Time Warner's recognition of cost differences between convergent and other traffic.

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[63] MCIW's Initial Brief, p. 5.

[64] Lightpath's Initial Brief, pp. 14-15 (emphasis in original).

3. Other Cost-Related Issues

Several CLECs argue that the cost calculus should recognize the fact ILECs avoid costs when CLECs terminate traffic that they originate. AT&T states, for example, that

> [Bell Atlantic-New York's] own TELRIC costs form the basis for the existing rates. If [Bell Atlantic-New York] terminates less in- bound ISP traffic because such traffic is terminated instead by CLECs, [Bell Atlantic-New York] saved the costs of delivering such traffic. As long as such costs are appropriately calculated, [Bell Atlantic-New York] suffers no loss and cannot complain that an "imbalance" in traffic or payments represents a basis for altering rates.[65]

TRA adds that the ILEC's retail rates recover termination costs and that allowing an ILEC to avoid responsibility for those costs, by delivering traffic to a CLEC for termination without paying full compensation, would unjustly enrich the ILEC and represent "a classic monopoly abuse of the ILEC's customers."[66]

Some CLEC's respond to Bell Atlantic-New York's concern that its reciprocal compensation payments exceed the revenues it receives from end-users that place calls to ISPs. CTSI et al., for example, note that any averaged rate structure contemplates customers that generate more costs than revenues being offset by others that generate more revenues than costs; that if Bell Atlantic-New York's residential retail rate is inadequate, it should be examined elsewhere; that dial-up access to the Internet generates other sources of revenues for an ILEC, such as additional lines and vertical features; and that the existence of Bell Atlantic-New York's own ISP (Bell Atlantic.net) suggests that its end-user rate structure supports dial-up access to ISPs, for if it did not,

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[65] AT&T's Initial Brief, p. 7.

[66] TRA's Initial Brief, pp. 4-5.

its provision of a competitive ISP service would be unlawfully subsidized by its monopoly ratepayers.[67] Lightpath argues that any mismatch between revenues from calls with long holding times and the costs of carrying those calls should not be solved through adjustments to reciprocal compensation; to do so, it says, would force CLECs to subsidize calls with long holding times originated by ILECs.

Finally, several CLECs, including Global NAPs, assert that even if it made more sense to recover ISP termination costs through carrier access charges (on the premise that ISPs are analogous to carriers rather than final destinations for traffic), doing so is precluded. The only way to recover those costs, accordingly, is through reciprocal compensation.

4. Legal and Procedural Points

Lightpath, among others, contends that the existing reciprocal compensation framework is legally binding for local (i.e., for purposes of this case, non-ISP) traffic, pointing to the doctrine of functional equivalence as determinative. Bell Atlantic-New York does not really dispute that point, though it takes a very different view of what "functional equivalence" entails. CTSI et al. cite the provision of the FCC's rules that prohibit an ILEC from charging a CLEC element rates that "vary on the basis of the class of customers served by the requesting carrier, or on the type of service that the requesting carrier purchasing such elements uses them to provide."[68] Bell Atlantic-New York responds that it is proposing to distinguish among types of traffic, not types of customer,[69] and that such distinctions are clearly permitted, as evidenced by the authorization to apply different rates to

[67] CTSI et al.'s Initial Brief, pp. 25-26.

[68] 47 C.F.R. §51.503(c).

[69] The exception is for ISP customers, no longer subject to the FCC's rule.

tandem-routed and end-office-routed traffic.

In addition, Lightpath, CTSI et al., and others assert that regardless of what may otherwise be decided in this case, existing interconnection agreements should prevail at least until the ends of their terms.

Bell Atlantic-New York responds that its proposals should be incorporated into existing agreements only to the extent those agreements, by their own terms, require or allow that incorporation. The proposals, in its view, should guide interconnection negotiations, be incorporated in LEC tariffs, and be applied in resolving disputes, but should not alter existing agreements.

On a more specific matter, Bell Atlantic-New York observed in its initial brief that "agreements already in force should be interpreted in accordance with normal principles of contract interpretation."[70] Citing its comments in the Chatline Proceeding, it went on to assert that those agreements, properly interpreted, would not provide for inter-carrier compensation for Internet traffic, presumably because such traffic does not "terminate" on the receiving carrier's network (consistent with the FCC's finding in its ISP Ruling). In its reply brief, Lightpath strongly disputes that reading, insisting its agreement with Bell Atlantic-New York was intended to include Internet traffic, and it asks us to clarify that Bell Atlantic-New York must continue to honor its contractual agreements until they expire.[71]

Positions of State Agencies

1. CPB

CPB attributes traffic imbalances to multiple factors: like the CLECs, it sees the imbalances as resulting from the ILECs' failure to open markets adequately and from

[70] Bell Atlantic-New York's Initial Brief, p. 5.

[71] This specific issue, along with others, is resolved below, in the "Discussion and Conclusions" section.

the CLECs' own logical business plans; but, like the ILECs, it also assigns a role to the incentives provided by the reciprocal compensation structure. It suggests that excessive reciprocal compensation rates artificially discourage competition for customers that originate telephone calls, such as residential and small business customers, and it therefore sees a need to adjust the existing system while still providing compensation for all call termination. (Its proposal is described in detail below.) To ensure, however, that the traffic imbalances that are dealt with by its proposal do not result from the ILECs' failure to open their markets to CLECs, it would defer application of its remedy until the ILECs' local market is fully open to competition.[72]

In response, Bell Atlantic-New York argues that if the market is not yet fully open (a premise it rejects) continuing to make niche markets artificially attractive will work against the development of local competition, not in favor of it. And even if its actions prevented CLECs from maturing to tandem functionality (another premise it rejects), that would be no reason to provide reciprocal compensation at above-cost levels. AT&T, citing CPB's statement that "<u>one reason</u> for the current imbalance in the exchange of traffic between ILECs and CLECs is that ILECs' local markets are not yet open to competition," asserts that "as recognized by the CPB, <u>the real reason</u> for the current imbalance in traffic flows is that [Bell Atlantic-New York] has not yet opened the local market to broad based competition."[73]

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[72] CPB's Initial Brief, p. 19.

[73] <u>Id.</u>; AT&T's Reply Brief, p. 8 (emphasis supplied in both quotations).

2. The Attorney General

As noted, the Attorney General emphasizes the need to avoid any steps that would impede widely available Internet access.

SPECIFIC PROPOSALS

Bell Atlantic-New York's Proposals

1. Exclusion of Vertical Feature Costs

Bell Atlantic-New York proposes to exclude from the Phase 1 switching costs on the basis of which reciprocal compensation rates are set all costs associated with "vertical features," such as call waiting, which are not used in the simple routing and delivery of traffic. Acknowledging that the amount to be excluded cannot be determined on the basis of the record in Phase 1 of the First Network Elements Proceeding, it suggests a reduction of 30%, subject to true-up following a closer examination of the issue in the Second Network Elements Proceeding. Characterizing the proposal as a "modest" one that "has been inexplicably controversial,"[74] it suggests that parties opposing it have misunderstood the purpose of the Phase 1 studies, which were concerned with switching costs in general and not their relationship to intercarrier compensation rates, in connection with which disaggregation of switching costs into "originating" and "terminating" components is warranted.

Several CLECs, including AT&T, Lightpath, and Global NAPs, suggest that the vertical features proposal, which applies to all traffic, not only to large-volume traffic to single customers, is beyond the scope of this case and may or should be examined elsewhere. Lightpath and CTSI et al. assert as well that Bell Atlantic-New York has offered no support for its proposal, either to show that vertical features are not used in call termination or to show that the 30% adjustment is a reasonable place holder pending further

[74] Bell-Atlantic-New York's Initial Brief, p. 17.

inquiry in the Second Network Elements Proceeding.

Some CLECs question the motivation for Bell Atlantic-New York's proposal. CTSI et al. suggest that Bell Atlantic-New York is contriving to remove these costs from reciprocal compensation (so it will pay less) while leaving them in network element rates (so it will receive more). Global NAPs suggests that Bell Atlantic-New York has become concerned that reciprocal compensation rates may be too high only in light of its realization that it will have to pay compensation, not merely receive it. It sees this as a benefit of the present system's imposition on Bell Atlantic-New York of competitive pressures to establish the lowest reasonable call termination rate.[75] Frontier, in its reply brief, accepts that challenge and urges reduction of the rate to zero, that is, its replacement by bill-and-keep.

2. Non-ISP Convergent Traffic

Bell Atlantic-New York proposes to allow Meet Point B (tandem-rate) reciprocal compensation to be charged "only when traffic is being delivered or terminated (a) through a tandem point of interconnection, or (b) through facilities that are 'functionally equivalent' to a tandem. This rule should be applied symmetrically to all carriers, both CLECs and incumbents. It would call for different results, however, depending upon the type of network architecture used by the carrier in question."[76] More specifically, a CLEC would be paid tandem-rate reciprocal compensation if, like Bell Atlantic-New York itself, it installed one or more tandem switches, used them to provide an actual tandem functionality, and offered other carriers the option of interconnecting either at the tandem or at the end office. In addition, tandem rate compensation would be paid

[75] Global NAPs' Initial Brief, p. 2, n. 3.

[76] Bell Atlantic-New York's Initial Brief, p. 20 (emphasis in original, footnote omitted).

to a CLEC that did not use tandem switching but whose facilities were nevertheless functionally equivalent to a tandem switch. As the wording of its proposal suggests, Bell Atlantic-New York sees it as consistent with the doctrines of functional equivalence and symmetry, properly understood. In Bell Atlantic-New York's view, however, the functional equivalence test cannot be met for large volume one-way traffic.

The claim of functional equivalence for a tandemless network is based on the premise that long loops, SONET rings, and other facilities take the place of the tandem and provide similar functionality. But Bell Atlantic-New York maintains that such wide area functionality need not be used in delivering traffic to a small number of large volume customers (in contrast to a widely dispersed base including substantial numbers of small customers). In the former instance, the delivering carrier can use high capacity facilities having a lower per-minute cost than the voice grade facilities needed to deliver traffic to a widely dispersed group of customers. In addition, Bell Atlantic-New York cites Global NAPs' witness's statement that ISP-bound traffic makes more efficient use of switching and transport capacity than does conventional voice telephony.[77] Beyond these factors, Bell Atlantic-New York continues, delivery of traffic to a small number of large volume customers permits a carrier to avoid the costs associated with substantial numbers of idle distribution facilities.

To show that its proposal is consistent with the FCC's rule, Bell Atlantic-New York points to the rule's statement that a CLEC is entitled to tandem interconnection rates when its switch "serves a geographic area comparable to the area served by the incumbent ILEC's tandem switch"[78]; and

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[77] Ibid., p. 24, citing Tr. 649. (Bell Atlantic-New York refers to the witness as Cablevision's rather than Global NAPs'.)

[78] 47 C.F.R. §51.711(a)(3) (emphasis supplied).

it maintains that "'serving' an area does not merely entail delivering traffic to a few customers located within that area, no matter how large it may be."[79] It may be significant in this regard that AT&T refers to the FCC's standard not as "functional equivalence," which it attributes only to our Framework Order, but as "geographic equivalence," perhaps intending in this way to counter Bell Atlantic-New York's multi-faceted view (comprising nature of service as well as geography) of functional equivalence.

Recognizing that start-up CLECs will use fewer switches and an extended loop distribution architecture as the functional equivalent of a mature ILEC network using tandems, Bell Atlantic-New York nevertheless contrasts a start-up CLEC intending to be a full service provider with one targeting large volume convergent customers. It asserts that the former will necessarily install more extensive and less efficiently used facilities and will eventually be required to install tandem switching as its network begins to resemble that of a mature ILEC; the niche player, in contrast, will not be required to make these investments. And even if the niche player changed its strategy and began to seek a general customer base, the portion of its network designed to serve convergent customers would remain more efficient.

Further reducing the cost of serving large-volume convergent customers, Bell Atlantic-New York argues, is the ability to use shorter connections between the CLEC switch and the customer, perhaps even reducing that distance to zero through collocation.

To translate the foregoing analysis into rates, Bell Atlantic-New York would use traffic ratios as a measure of functional equivalence: a high ratio would be taken to imply that the CLEC was serving a high proportion of convergent customers; a ratio close to one would suggest that the CLEC, like Bell Atlantic-New York, itself, was serving a

[79] Bell Atlantic-New York's Reply Brief, pp. 12-13.

representative distribution of customers. It proposes a ratio of 2:1 as the dividing line: Meet Point A (end-office) rates would apply where the ratio was 2:1 or greater; Meet Point B (tandem) rates would apply only where the ratio was less than 2:1. The proposal would apply to all types of convergent traffic, not merely that directed to the Internet. In Bell Atlantic-New York's view, reference to the traffic imbalance is reasonable because such an imbalance can arise only if one carrier is serving customers that receive more traffic than they originate; and it entails little administrative cost, since traffic flows in each direction are already billed. It regards the 2:1 threshold as generous, since, in principle, it would be reasonable to charge the lower rate for all traffic in excess of a 1:1 ratio.[80]

Finally, Bell Atlantic-New York denies that its proposal unfairly penalizes CLECs; it applies, it says, not to particular carriers but to particular traffic. A CLEC serving that type of traffic would receive the end-office rate; a CLEC serving a broader and more dispersed group of customers might receive the tandem rate. Bell Atlantic-New York characterizes its proposal not as a penalty imposed on CLECs that focus their efforts on ISP customers, but as a means of insuring that they are not rewarded by being over compensated for their efforts.

As already suggested, CLECs take the position that Bell Atlantic-New York's understanding of functional equivalence violates the FCC's rule. CTSI et al., for example, dispute the premise that a CLEC could receive the tandem rate only if it served thousands of customers within the pertinent geographic area. They assert that "if a CLEC has facilities in place that provide tandem switch functionality capable of serving many customers in a geographic area comparable to that served by [Bell Atlantic-New York's] tandem switch, that is sufficient. Nothing more

[80] Bell Atlantic-New York's Reply Brief, p. 17.

is required under the FCC's test."[81] In addition, they complain Bell Atlantic-New York is proposing to charge CLECs different rates on the basis of the types of customers they serve, contrary to the FCC's rules.[82] Lightpath maintains the efficiencies CLECs allegedly enjoy on account of serving a small number of large customers have no application to full service providers, whose networks are built to serve a wide customer base, even if they serve ISPs as well.[83] Global NAPs, meanwhile, maintains that the number of customers served by the CLEC has no bearing on whether it meets the functional equivalence standard. Beyond that, it contends a CLEC can "serve" a wide geographic area by allowing its customers to collocate with it, even without constructing a fiber network traversing the area: "a CLEC may 'serve' a wide geographic area. . . by incurring the costs associated with allowing its customers that need to receive calls from such an area to collocate at [its] switch, by incurring the costs associated with deploying physical facilities to customer locations in different local calling areas throughout the LATA, or some combination of both."[84] It warns against penalizing the smallest and newest CLECs or motivating them to sign up a handful of customers in diverse locations merely to qualify for the tandem rate.

CLECs also challenge Bell Atlantic-New York's use of a 2:1 ratio as the demarcation point between the two rates, claiming it has shown no link between that traffic ratio and a CLECs termination costs. CTSI et al. cite a Maryland proceeding in which Bell Atlantic-Maryland's counsel acknowledged the ratio was "arbitrary."[85] Lightpath similarly

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[81] CTSI et al.'s Reply Brief, p. 9.

[82] 47 C.F.R. §51.503(c).

[83] Lightpath's Reply Brief, pp. 4-5.

[84] Global NAPs' Reply Brief, p. 14.

[85] CTSI et al.'s Reply Brief, p, 7, citing Complaint of MFS

sees no factual support for the 2:1 ratio, disputing what it characterizes as Bell Atlantic-New York's view that "the interests of full-service, facilities-based CLECs are accommodated by its ratio approach."[86] It reiterates the claim that its switches serve an area at least as large as that served by a typical Bell Atlantic-New York tandem and that Bell Atlantic-New York can reach all its customers through a single point of interconnection; it therefore sees itself as meeting our test of tandem functionality as well as the FCC's, regardless of its traffic ratio.

Finally, MCIW pursues a somewhat different line of reasoning, arguing that Bell Atlantic-New York's proposal would, in effect, improperly force CLECs to install tandem switches and build inefficient networks simply to satisfy Bell Atlantic-New York's requirements.

3. ISP Traffic

Given the flexibility afforded the states by the FCC's determination that Internet traffic is exempt from reciprocal compensation, Bell Atlantic-New York argues that we would be justified in setting compensation for that traffic at zero. It cites in this regard the Massachusetts decision, noted above, that declined to mandate payment of reciprocal compensation for Internet traffic and left it to the parties to negotiate their own arrangements; it asserts that the New Jersey Commission recently reached a similar conclusion. Should we decline to take so drastic a step, Bell Atlantic-New York would recommend a rate equal to what it terms "direct variable costs."

In support of its zero-compensation proposal, Bell Atlantic-New York contends that, in principle, ISPs are interstate carriers who should pay carrier access charges.

Intelenet of Maryland Against Bell Atlantic of Maryland, Case No. 8731, Hearing Proceedings (April 14, 1999) Tr. 167-168.

[86] Lightpath's Reply Brief, p. 6.

Because the FCC has exempted them from access charges, however, both the originating and terminating LECs are undercompensated. Asserting, with illustrations, that Bell Atlantic-New York's revenues from its customers who place calls to ISPs tend to be below cost, it argues that requiring it to pay intercarrier compensation to the terminating carrier makes a bad situation worse and requires "ILECs [to] remit to CLECs revenues that they never receive";[87] it would be better in its view "for the Commission to restrict both LECs to the local exchange revenues each receives from its customer (in the case of the originating LEC, the local charges the Internet user pays; in the case of the LEC delivering the call to the ISP, the local charge the ISP pays). This proposal is competitively neutral as between the two involved LECs."[88] Bell Atlantic-New York regards a zero rate as further justified by the abusive tactics of those CLECs using ISP traffic to generate reciprocal compensation revenue streams, as discussed earlier. Noting the claim that CLECs' termination of calls enables ILECs to avoid the cost of termination, Bell Atlantic-New York contends that intercarrier compensation is not based on avoided costs; it is designed to compensate the terminating carrier for the costs it incurs.

Bell Atlantic-New York's alternative proposal for ISP traffic would take the current Meet Point A and Meet Point B rate levels (reduced to eliminate vertical feature costs in accordance with its first proposal) and adjust them to remove investment costs (depreciation and return) and joint and common costs, all of which are included in the TELRIC analysis that forms the basis for the existing rates. (It denies such rates would be confiscatory, inasmuch as the CLEC could recover its costs from its ISP customer.) The precise rate levels would be determined in the Second Network Elements

[87] Bell Atlantic-New York's Reply Brief, p. 20.

[88] Bell Atlantic-New York's Initial Brief, p. 36 (emphasis in original).

Proceeding, but Bell Atlantic-New York suggests interim rates based on the record of the First Network Elements Proceeding. Noting that CLECs have argued that reduced compensation rates for Internet traffic would deter Internet growth, Bell Atlantic-New York asserts that ISPs already benefit from their exemption from interstate access charges, and it cites the Massachusetts Commission's observations that the Internet is powerful enough to stand on its own and that eliminating the subsidies produced by regulatory distortion would encourage efficient investment in Internet and other technology.

Administering these proposals would require a means to identify Internet traffic, and Bell Atlantic-New York, consistent with its view of burden of proof in this case, would impose the burden of identifying the traffic on the CLEC. In the absence of a showing by the CLEC, Bell Atlantic-New York would presume all convergent traffic (i.e., all traffic in excess of its proposed 2:1 ratio discussed in the previous section) to be Internet traffic.

CLECs press various arguments in response. e.spire/Intermedia dispute the premise that states are free to set below-TELRIC rates for ISP traffic, contending that the FCC ISP Ruling granted them, until a final federal rule is promulgated, only "the authority under section 252 of the [1996] Act to determine intercarrier compensation rates for ISP-bound traffic."[89] In its view, the reference to §252 requires TELRIC-based rates for ISP traffic. CTSI et al. and Global NAPs dispute Bell Atlantic-New York's reference to the Massachusetts ISP decision, the former noting that the portions it relies on are disputed dicta and the latter citing the many states that, in contrast to Massachusetts (and, more recently New Jersey), have held ISPs to be no different from other calls with regard to reciprocal compensation. CTSI et al. also note the FCC's statement in its ISP ruling that CLECs

[89] e.spire/Intermedia's Initial Brief, p. 11, citing the FCC ISP Ruling, ¶25 (emphasis supplied).

incur costs to deliver ISP traffic and that some compensation is warranted to enable them to recover those costs.[90]

Global NAPs disputes the relevance of Bell Atlantic-New York's allegations that it fails to recover its costs of originating ISP-bound calls, arguing that they are no different in this regard from all other local calls with longer-than-average holding times. In its view, the only pertinent question is whether local calling revenues overall suffice to recover the costs of local calling; it charges that Bell Atlantic-New York would have "CLECs . . . made into indentured servants for Bell Atlantic-New York's end-users who, after all, are the source of both the costs and the revenues at issue here."[91] (Bell Atlantic-New York maintains, however, that its local calling rates were set before the advent of the Internet and are now capped under its Performance Regulation Plan.) Global NAPs argues as well that if all CLECs that served ISP customers disappeared, Bell Atlantic-New York's costs would increase by more than it would save by avoiding reciprocal compensation payments, for it would have to augment its own network to complete the calls directed to ISPs. Bell Atlantic-New York's proposal therefore

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[90] FCC ISP Ruling, ¶29.

[91] Global NAPs' Reply Brief, p. 15. Global NAPs supports reciprocal compensation in part on the premise that local calling is "sent paid," that is, the originating carrier is to collect from the end-user revenues adequate to deliver the call to its destination. If a different carrier terminates that call, those revenues should be shared so the terminating carrier can recover its costs. (Global NAPs' Initial Brief, pp. 3-4.) BA takes the view that any such sharing, if applied pro rata (on the basis of each carrier's costs) to existing originating revenues would produce reciprocal compensation payments below current end-office rates. It therefore regards Global NAPs reasoning as suggesting a remedy that, while not a substitute for its own proposal, "at least would eliminate the absurd and anti-competitive requirement that originating ILECs remit to CLECs revenues that they never receive and that are below the originating ILECs' costs." (Bell Atlantic-New York's Reply Brief, p. 20.)

would grant Bell Atlantic-New York a windfall by permitting it to continue to avoid those costs while freeing it of any (or most) of its reciprocal compensation obligation.

Finally, the Attorney General asserts that by entering the market for ISP-bound traffic, CLECs have contributed to the greater availability of Internet access to end-users. He suggests that "changing or abandoning reciprocal compensation for ISP-bound traffic could have the detrimental effect of limiting consumer choice in securing internet access, and increasing the price of such service, which in turn might limit the number of New York consumers who can avail themselves of internet access. The Commission should avoid this result."[92]

[92] Attorney General's Reply Brief, p. 6.

4. Geographically Relevant Interconnection Points

ISPs often ask their local exchange carriers to assign them "virtual local numbers," i.e., numbers associated with each of the local calling areas in which their customers might be located regardless of whether the ISP itself or the carrier serving it has facilities in those areas. The ISPs do so to make it convenient and cheap for their customers to place calls with long holding times to them. Bell Atlantic-New York contends that these arrangements, though not unlawful, can result in the carrier serving the ISP passing on to another carrier--usually the originating ILEC--the cost of transporting the virtual local call from the ISP's customer's local calling area to the area in which the ISP is physically located. For example, if a call is originated on Bell Atlantic-New York's network and directed to an ISP served by a CLEC, and the CLEC declines to provide Bell Atlantic-New York a point of interconnection (POI) within the originating local calling area, Bell Atlantic-New York must carry the call (and install the facilities needed to do so) to the local area in which the CLEC has a POI even though Bell Atlantic-New York "receives only local usage rates from the originating end user and nothing at all from either the CLEC or the ISP. (Indeed, far from being compensated by the CLEC for transporting its call, [Bell Atlantic-New York] is actually required to pay the CLEC intercarrier compensation for the privilege of transporting its interexchange call for free, and is being prevented by the CLEC's numbering practices from being compensated by its end user through toll charges.)"[93]

To remedy the situation, Bell Atlantic-New York requests that all LECs be required to establish, upon the

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[93] Bell Atlantic-New York's Initial Brief, p. 44 (emphasis in original). Bell Atlantic-New York adds that no such unfairness is imposed in the converse situation where a CLEC hands a call off to Bell Atlantic-New York for termination, inasmuch as Bell Atlantic-New York offers CLECs a POI at each of its switches.

request of any interconnected LEC, a geographically relevant interconnection point (GRIP) in every rate center in which it assigns telephone numbers, unless the interconnecting carriers negotiate alternative arrangements. The requirement would apply to all interconnections; but Bell Atlantic-New York nonetheless considers it proper to consider the matter in this proceeding, inasmuch as the underlying problems typically arise in connection with delivery of ISP and other convergent traffic. The requirement could be fulfilled either by establishing an actual physical POI or by purchasing dedicated transport from Bell Atlantic-New York at approved rates, thereby avoiding the alleged need for CLECs to deploy uneconomic new transport facilities in order to satisfy the GRIP requirement.

NYSTA, perceiving a related problem, objects more generally to the use of virtual local numbers. In its view, they improperly convert what should be a toll call into a local call, thereby denying LECs and inter-exchange carriers the toll and access charges that would be associated with a toll call. NYSTA would regard the location of the end-user requesting the NXX code (and not, as in the GRIPs proposal, the location of the POI) as determining whether to treat the call as local or toll. CTSI et al. respond that the general matter of virtual NXX codes is beyond the scope of this proceeding and that, in any event, Bell Atlantic-New York has acknowledged that their use is lawful.

CPB objects to the GRIPs proposal on the grounds that it would require CLECs to undertake substantial investments in areas where they have few customers, frustrating the development of efficient CLEC networks. It nevertheless observes that Bell Atlantic-New York's underlying concern "appears valid,"[94] and it suggests a more efficient way to deal with it would be to allow Bell Atlantic-New York to charge a TELRIC-based per-mile fee for any additional trunking

[94] CPB's Initial Brief, p. 22.

costs Bell Atlantic-New York incurs to deliver the calls at issue to CLECs. Taking strikingly different views of CPB's position, AT&T responds by asserting that CPB joins it in regarding the GRIPs proposal as anti-competitive and inefficient; Bell Atlantic-New York says "the statutory representative of the State's consumers" recognizes the problem Bell Atlantic-New York raises and "offers a solution not inconsistent with [Bell Atlantic-New York's own] proposal."[95] It adds that the rates contemplated by CPB are the interoffice transport rates set in the First Network Elements Proceeding.

Several CLECs object strenuously to both GRIPs and the mileage-fee alternative. Global NAPs sees them as efforts to undermine the pro-competitive regime established by the 1996 Act, which offsets the ILECs' market advantages by allowing CLECs to decide whether to interconnect at one point or many, denying that choice to the ILECs (meaning that an ILEC can be required to deliver all traffic to a single point designated by the CLEC), and forbidding an ILEC to charge a CLEC for the privilege of receiving its traffic. Meanwhile, Bell Atlantic-New York is obligated to deliver to a CLEC traffic originated by its own customers and directed to the CLEC's customers, and it cannot complain of the costs of doing so (though it is free, Global NAPs suggests, to charge its end-users a rate that covers those costs). Global NAPs (and other CLECs) add that the cost of transporting traffic is, in any event, modest; Bell Atlantic-New York acknowledges that transport costs are insensitive to distance but contends it incurs fixed costs in delivering the traffic over dedicated trunks.

[95] AT&T's Reply Brief, p. 11, Bell Atlantic-New York's Reply Brief, p. 21.

Frontier's Proposals[96]

1. Internet Traffic

Citing the flexibility afforded the states with regard to Internet traffic by the recent FCC decision and the absence of any "basis in law or policy to require ILECs to subsidize ISPs by allowing ISPs to water at the reciprocal compensation trough,"[97] Frontier proposes that there be no reciprocal compensation for traffic to ISPs on any network and that such traffic be handled on a bill-and-keep basis. Beyond that, it urges us to prohibit the discriminatory offering of discounted local exchange services to ISPs on the basis of their incoming traffic patterns as well as the discriminatory sharing of reciprocal compensation payments between carriers and ISPs.

Should we reject this primary proposal, Frontier would recommend compensation for Internet traffic priced at the ILECs "incremental (TELRIC) tandem switching cost."[98] As a further alternative, Frontier suggests that where the incoming to outgoing traffic ratio is 2:1 or greater for three successive months, reciprocal compensation be reduced to the tandem switching rate (as defined in the preceding footnote) until the ratio has dropped below 2:1 for three successive months.

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[96] Relatively few parties respond specifically to Frontier, for the arguments directed at Bell Atlantic-New York's proposals for the most part apply to Frontier's as well. Accordingly, no specific responses are reported in this section; but it should not be inferred that Frontier's proposals are unopposed.

[97] Frontier's Initial Brief, p. 8.

[98] As already suggested, Frontier seems to be referring here to the narrowly defined tandem switching cost itself, thereby intending to exclude the trunking, trunk port, and end office switch usage components of, for example, Bell Atlantic-New York's Meet Point B (tandem) rate; because of efficiencies of scale, per-unit tandem switch usage, so limited, is less costly than per-unit end-office switch usage. This accounts for Frontier's reference to tandem

2. <u>Other Convergent Traffic</u>

Refusing to concede as a legal matter that we are obligated to set reciprocal compensation rates for convergent traffic on the basis of the ILEC's costs, Frontier urges us to do so on the basis of the CLECs costs, reduced by the monthly revenues paid by the ISP to the CLEC for incoming traffic. (The premise of that reduction appears to be that the rates paid by a customer, including an ISP, are intended to cover both incoming and outgoing calling. Because an ISP imposes no costs related to outgoing traffic, the full amount of its payment defrays the termination costs that reciprocal compensation is also intended to cover.)

Should we nevertheless continue to use the ILEC's costs as the basis for reciprocal compensation, Frontier would set the rate at the ILEC's tandem switching costs (once again as defined above), on the premise that when a CLEC terminates traffic to a convergent customer's platform, the CLEC switch is acting as a tandem: it receives traffic only from other switches and terminates the traffic using large trunk-side connections. Frontier regards these as the hallmarks of tandem, not end-office switching and it sees "no reason for the Commission to pretend that the CLEC is performing anything like the widely-distributed and far-flung end-office switching that the ILEC performs when terminating small volumes of traffic to the thousands of customers and large service territories served by most ILEC switches."[99]

<u>Time Warner's Proposal</u>

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cost as a lower rather than a higher figure; it portrays the higher alternative (analogous to Bell Atlantic-New York's Meet Point B rate) as "tandem switching plus local switching." (Frontier's Reply Brief, p. 1. See also Bell Atlantic-New York's Reply Brief, p. 11, n. 19.)

[99] Frontier's Initial Brief, pp. 10-11.

Time Warner regards the ideal to be a blended rate negotiated between the two carriers; by its very nature, a blended rate, which is adjusted downward as the CLEC's network evolves, fully accounts for that evolution and for traffic flows. Time Warner suggests that "the fact that a CLEC has accepted a blended rate provides solid evidence that it has adequately and responsibly built out its network in support of its originating traffic and the public switched network."[100]

Where a negotiated blended rate does not apply, Time Warner suggests a framework for dealing with convergent traffic that takes account of both the CLEC's network configuration and its traffic ratio. It distinguishes among CLEC networks on the basis of their points of interconnection with the ILEC, and, for each level, uses a different traffic ratio to determine whether the reciprocal compensation rate is to be at the tandem or at the lower, convergent traffic, rate.

CLECs at Level 1, new to a LATA, will have only a single point of interconnection (POI) and their traffic ratios will likely be out of balance even if they do not serve primarily convergent customers. Accordingly, reciprocal compensation would be at the tandem rate for traffic within a 5:1 ratio; traffic above that ratio would be assumed to be convergent and the lower, convergent rate would apply. At Level 2, a CLEC would have three or four points of interconnection, and compensation for traffic exchanged at those POI's would be at the end-office rate. For traffic exchanged at tandems, the tandem rate would apply only where there was a traffic ratio less than 10:1; in other instances, the convergent rated would apply. Finally, where the CLEC has more than five points of interconnection (Level 3), the convergent rate would apply to traffic delivered at a tandem only when the traffic ratio exceeded 15:1. Time Warner suggests that the Level 2 and Level 3 arrangements would apply

[100] Time Warner's Initial Brief, p. 8 (footnote omitted).

relatively rarely, since in most of those instances the carriers would have negotiated a blended rate.

Time Warner asserts that its proposal is consistent with both state and federal law and with our goal of encouraging competition in the local exchange market. It reasons that we are free to determine that different proxy rates may apply to different network configurations, which may impose different costs. By taking into account traffic ratios and points of interconnection, Time Warner continues, its proposal "also promotes investment in facilities-based networks, which ultimately benefits consumers through increased real competition."[101] Time Warner stresses that it uses the traffic ratios not to directly infer information about traffic termination costs but only as a proxy to determine the likelihood that convergent traffic exists. It recognizes the tentative nature of the traffic ratios and point-of-interconnection trigger points used in its proposal, and offers to participate in any forum we may wish to convene to reach consensus on modifications to its proposal.

Finally, Time Warner objects to any proposed reciprocal compensation rate of zero, noting that carriers incur real costs when terminating any type of traffic.

In response, Bell Atlantic-New York "applaud[s] Time Warner's recognition that a problem exists,"[102] but says the proposal does little to alleviate it. In general, Bell Atlantic-New York believes the deployment of multiple interconnection points would not affect its showing that convergent traffic is less costly to deliver; specifically, it believes the number of interconnection points used by Time Warner is too low and its traffic exchange ratios too high.

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[101] Time Warner's Initial Brief, p. 17.

[102] Bell Atlantic-New York's Reply Brief, p. 18.

MCI's Proposal

Although MCI's primary position is to favor maintenance of the reciprocal compensation status quo, it suggests that extremely high traffic ratios could be used to trigger an audit, which would then determine whether the CLEC's network configuration warranted allowing it to charge the tandem rate for reciprocal compensation. It suggests that a traffic imbalance exceeding 100:1 (including all minutes exchanged, not just local minutes) could trigger such an audit.[103] MCI notes that this proposal would be consistent with the FCC's rule that allows a state commission to determine whether an individual CLEC is entitled to the tandem rate, taking account of economically relevant considerations--primarily the geographic coverage of the CLECs switch.[104] It would go no further than this, however, in ascribing significance to traffic ratios.

Time Warner responds that MCI's proposal, like its own, uses traffic ratios as a trigger. But it believes the individual audits that would be triggered under MCI's proposal would create uncertainty and impose administrative burdens, while failing to facilitate low-cost competitive entry.

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[103] MCI's Initial Brief, p. 5.

[104] 47 C.F.R. §51.711.

CPB's Proposal

CPB reaffirms that reciprocal compensation rates should be based on TELRIC and should be symmetrical. In its view, however, they also "should be deaveraged to reflect the significant differences in the underlying costs of terminating various types of traffic."[105] It cites record evidence[106] that termination of traffic to ISPs requires at most a single switch instead of the multiple switches required by tandem functionality and that, in such instances, tandem rate elements should not be applicable.

Because of the administrative burdens and costs of determining the functionality associated with the termination of costs to each customer or type of customer for each CLEC, CPB proposes, instead, what it characterizes as "a variant of the traffic flow imbalance approach proposed by [Bell Atlantic-New York] and implicit in questions posed by Staff."[107] It suggests that where a carrier's incoming to outgoing traffic ratio exceeds some threshold, perhaps 5:1, reciprocal compensation would not be set on the basis of tandem functionality unless the carrier could show that it was providing tandem functionality notwithstanding its traffic ratio. CPB regards traffic imbalance as a suitable proxy for identifying tandem functionality because carriers having high traffic ratios "serve predominantly ISPs and other large volume customers, instead of a large number of geographically dispersed customers. Compensation received by such carriers should not include tandem rate elements."[108]

An importantly distinguishing feature of CPBs proposal is that it would not use traffic imbalance to

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105 CPB's Initial Brief, p. 17.

106 Ibid., p. 16, citing Tr. 199-200. See also Tr. 180, to the effect that CLECs commonly use a single-switch architecture.

107 CPB's Initial Brief, p. 18.

108 Id.

determine the reciprocal compensation rate until the ILEC's local market was fully open to competition. Only then, CPB reasons, will CLECs be able to attract a large volume of customers, including those who originate call to ISPs; and only then, therefore, will it be possible to infer the absence of tandem functionality from the existence of a traffic imbalance.

CPB urges as well that any new reciprocal compensation arrangement be preceded by a transition period sufficient to prevent unnecessary disruption of CLECs' businesses and avoid penalizing them for having responded to incentives created by the previous regulatory structure. CPB suggests that the transition period could be as short as six months if the new arrangements were delayed until ILEC markets are fully open to competition; if the change were made before markets are fully opened, the transition period should last at least one year. Stressing its unique status as a non-industry party, CPB maintains its proposal is fair to all concerned--CLECs, ILECs, customers originating calls, and customers receiving them.

As already noted, both AT&T and Bell Atlantic-New York stress the aspects of their respective positions that CPB appears to endorse.

DISCUSSION AND CONCLUSIONS

In General

In assessing the significance of the traffic imbalances that are so much at issue here, one must begin with the very basic point that reciprocal compensation was chosen over bill-and-keep in part because some imbalances were seen as likely. The ILECs' earlier advocacy of reciprocal compensation over bill-and-keep does not legally estop them from now urging changes in reciprocal compensation, or even its total abandonment; but it does suggest at least that the existence of imbalances should not be seen by them as a complete surprise. Of course, the imbalances are greater than those that were anticipated, clearly producing unexpectedly large flows of revenues in one direction, and the question is what, if anything, to do about it.

The parties have presented two related ways of looking at that question. The first emphasizes the economic soundness (and legal requirement) that reciprocal compensation rates be grounded in costs and attempts to determine what, if anything, the traffic imbalances imply about those costs. The other point of view looks to the causes of the imbalances and attempts to assess their virtue: the ILECs accuse the CLECs of having found a way to game the system, and the CLECs protest that the ILECs' intransigence about opening mass markets has left them no choice but to pursue a profitable niche--either as an end in itself or as a means of gaining the strength needed to attempt full entry. The second type of analysis is related to the first; for when all is said and done, changes in rates can and should be made primarily with an eye to costs. But it maintains, nonetheless, that these decisions should take account of the players' motivations.

In this regard, CPB provides useful perspective in its presentation of the many factors underlying the traffic imbalances. CLECs have pursued ISP and other convergent traffic customers for multiple reasons: because reasonable and honest business plans might suggest doing so; because ILECs may not have opened mass markets as quickly and effectively as they might have; and because current reciprocal compensation arrangements may unintendedly overcompensate carriers that terminate calls to convergent customers. From the perspective of this proceeding, however, it is this last factor that is primary. We have no need to judge motives; and the ILECs' alacrity in opening markets is under review in other cases. What we must do here, simply, is to determine whether the current regulatory regime provides for reciprocal compensation at rates that fail to properly track costs, thereby skewing the market by creating unintended, uneconomic incentives to the pursuit of ISP and other convergent customers as a means by which CLECs can draw above-cost revenues from ILECs.

The record as a whole suggests that the costs of serving a small number of large, convergent customers will likely be lower than the costs of serving a mass market. This is not to say that every CLEC with a traffic imbalance has, in fact, lower costs; much will depend on the configuration of the CLEC's network and the customers it is designed to serve (as distinct from those it actually serves at a particular time). As a general rule, however, large convergent customers can be served via more efficient, higher capacity facilities, and those facilities will likely have less idle time. Bell Atlantic-New York correctly argues that "functional equivalence" does not require conclusively presuming that the costs of serving a small number of large customers located around a geographic area are no less than the costs of serving the mass market within that geographic area; notwithstanding AT&T's characterization of the standard as "geographic equivalence," it remains one of "functional equivalence," taking account, as Bell Atlantic-New York suggests, of how the CLEC "serves" the area and not merely of the area's size.

This is not to say, of course, that each CLEC's costs must be examined. For good reason, the pertinent costs are those of the ILEC, unless the CLEC chooses to come in with a study showing its costs are higher. But if a CLEC's network is one that is not functionally equivalent to an ILEC's tandem, the law permits, and economic policy suggests, that the CLEC not be compensated at tandem rates. And there may be situations in which a traffic imbalance suggests an absence of tandem functionality.

In sum, the reciprocal compensation system is not fundamentally broken, but neither is it operating wholly satisfactorily. There is need for adjustment short of total overhaul, and the proposals in this proceeding should be assessed in that light.

<u>Vertical Features</u>

Bell Atlantic-New York's vertical features proposal makes considerable sense in the abstract; if these features are not used in terminating traffic, their costs should not be reflected in reciprocal compensation rates. Bell Atlantic-New York itself recognizes that the costs at issue cannot be measured until the conclusion of the Second Network Elements Proceeding and it therefore proposes a placeholder estimate of 30%. But it offers no support for that placeholder, and we see no basis for accepting it.

Accordingly, the proposal is rejected for now. It may be considered again at the conclusion of the Second Network Elements Proceeding, in which the costs associated with vertical features can be further considered. In addition, Bell Atlantic-New York may propose, in its compliance filing in this proceeding, a better supported placeholder for immediate use in removing the costs of vertical features from reciprocal compensation rates. Other parties will be permitted to comment on any such proposal, and, if the support for the placeholder is persuasive, the rates will be adjusted accordingly.

Convergent Traffic

As already suggested, a significant traffic imbalance suggests a preponderance of convergent traffic. There may be, of course, other reasons for traffic imbalances, particularly in the case of relatively new CLECs; and the 2:1 traffic ratio proposed by Bell Atlantic-New York is not high enough to trigger remedial action. Once the ratio reaches 3:1, however, the inference of predominantly convergent traffic becomes stronger and, in turn, implies, without demonstrating conclusively, greater efficiency and lower costs in the termination of traffic. That inference of lower costs cannot be disregarded if compensation is to be cost-based; at the same time, it is not conclusive enough to have a definitive effect on rates.

An inference of this sort can be effectively handled by a rebuttable presumption, in a manner similar to that suggested by CPB. If a carrier's incoming to outgoing traffic ratio exceeds 3:1 for the most recent three-month period, it is fair to presume that a substantial portion of its traffic is convergent, costing less to terminate, and that delivery of that traffic therefore should be compensated at end-office (in the Bell Atlantic-New York context, Meet Point A) rather than tandem (Meet Point B) rates. The end-office rate should apply to the portion of the traffic that exceeds the stated ratio, and the tandem rate should continue to apply to the portion of the traffic below that ratio. (In effect, the compensation would be at the blended rate characteristic of many interconnection agreements.)

The CLEC whose compensation is so adjusted will be permitted, however, to rebut the presumption with a suitable showing that its network and service are such as to warrant tandem-rate compensation for all traffic. Most of the factors to be considered in any such showing would go to the carrier's overall network design and take account of whether the network has tandem-like functionality that enables it to send, as well as receive, traffic. The network design factors to be considered include, but are not limited to:

the number and capacity of central office switches;

the number of points of interconnection offered to other local exchange carriers;

the number of collocation cages;

the presence of SONET rings and other types of transport facilities;

the presence of local distribution facilities such as coaxial cable and/or unbundled loops.

The presence of some or all of these network components in substantial quantities would demonstrate that the carrier in question was investing in a network with tandem-like functionality, designed to both send and receive customer traffic. Multiple interconnection points, collocation cages, SONET rings and other types of transport facilities in various combinations are all evidence of a network being built out to reach a dispersed customer base. Collocation cages along with the use of unbundled loops are a clear indication the carrier intends to serve residential and small business customers. The presence of the network design features would be more important than actual numbers of residential and business customers served given the newness of the competitive local exchange market.

If a carrier subject to the presumption succeeds in rebutting it, the compensation paid to the carrier will revert to its previous, higher, level. In addition, the carrier will be made whole for the difference between the higher and lower compensation rates for the interval going back to its filing of its rebuttal presentation. These arrangements should be set forth in all tariffs that contain reciprocal compensation provisions.

ISP Traffic

Even if the FCC ISP Ruling affords us the discretion to adopt either of Bell Atlantic-New York's proposals, we see no sound reason to treat ISP traffic differently from other convergent traffic. For one thing, the FCC ISP Ruling is not the FCC's last word on the subject, and a regulatory regime based on it might have to be changed yet again before too long. More substantively, Bell Atlantic-New York has shown no reason to treat ISP traffic differently from other convergent traffic, and its specific proposals are similarly unsupportable. To deny all compensation for ISP termination would be to unfairly ignore the indisputable fact that CLECs completing these calls incur costs in doing so; and even if ISPs in concept resemble interexchange carriers that should recover their costs through carrier access charges, current federal law prevents them from doing so. Meanwhile, Bell Atlantic-New York's direct variable cost proposal, though less harsh, is poorly supported. There appears to be no reason to abandon TELRIC costing in this context, and the rebuttable presumption regime adopted for convergent traffic in general can address any legitimate concerns associated with ISP traffic. At the same time, it would be wrong to exempt ISP traffic from this remedy to promote Internet access, as the Attorney General may be suggesting. For all these reasons, no special reciprocal compensation rates will be set for Internet-bound traffic; it will be treated the same as other convergent traffic (i.e., in accordance with the remedy adopted under the preceding heading).

GRIPs

NYSTA's broad concern related to virtual NXX codes goes beyond the scope of this proceeding and need not be considered further. Bell Atlantic-New York's more limited proposal, to require CLECs to establish GRIPs or else reimburse Bell Atlantic-New York for the cost of hauling traffic from the virtual NXX to the interconnection point, is properly within the proceeding, for it bears directly on reciprocal compensation levels.

On its face, Bell Atlantic-New York makes a good case for the fairness of its proposal, which is designed to spare it the cost of, in effect, subsidizing a CLEC's use of virtual NXXs. The CLECs respond that federal law gives them, for good pro-competitive reasons, considerable discretion with regard to selecting points of interconnection and requires the originating carrier to bear the cost of hauling traffic to the point of interconnection. But while federal law likely affords us more discretion here than the CLECs say,[109] there appears to be no need to superimpose a GRIPs-type remedy on

[109] For example, the FCC has said that "a requesting carrier that wished a 'technically feasible' but expensive interconnection would . . . be required to bear the cost of that interconnection, including a reasonable profit." (Local Competition Order ¶199.)

the convergent traffic remedy already adopted. Any additional benefits to Bell Atlantic-New York would be relatively minor, and the unintended effects on access to the Internet from remote areas could be substantial. The GRIPs proposal therefore will be rejected, at least for now, though it may be raised again in the Second Network Elements Proceeding.

Time Warner's Proposal

Time Warner's proposal, though creative, would require considerably more elaboration and refinement before its adoption could be considered. (Time Warner itself seems to recognize as much in its offer to participate in further forums regarding the proposal.) It appears, however, that those additional efforts are unnecessary, inasmuch as the course of action we are taking here adequately deals with the deficiencies identified in the existing reciprocal compensation regime. Accordingly, Time Warner's proposal will not be further pursued at this time.

Implementation

CPB suggests deferring any action until we are satisfied that local markets have been fully opened to competition, but there appears to be no need to impose any such condition on a remedy growing out of an immediate concern. Bell Atlantic-New York's opening of its market, of course, is under review in Case 97-C-0271, which provides adequate oversight of the matter, and Frontier's actions likewise are being considered in other proceedings.

The need for a transition period, advocated by most CLECs, also is questionable at best. Carriers have been on notice at least since this case began that changes might be in the offing, and those changes can take effect without any further transition period.

Finally, we emphasize that the decisions reached in this proceeding do not modify the terms of existing contracts except to the extent those contracts, by their own terms, incorporate or defer to the tariffs affected by the determinations reached here. Contracts (and parties to them) being what they are, there may be some disputes about how that rule is applied, but there is no way we can anticipate all such disputes or attempt to resolve them in advance. On the specific issue of ISP traffic, however, as raised in the exchange between Bell Atlantic-New York and Lightpath, we see no basis for excluding ISP traffic from reciprocal compensation pursuant to an existing interconnection agreement unless the agreement explicitly so provides. Without such an explicit provision, there is no reason to assume that the parties intended their agreement to be modified by a regulatory decision regarding the character of ISP traffic.

<u>The Commission orders</u>:

1. Within 10 days after the date of this opinion and order, any local exchange carrier whose tariffs contain provisions related to reciprocal compensation shall file amendments to those tariffs consistent with this opinion and order and shall serve a copy of those amendments on each active party to this proceeding. Such tariff amendments shall not take effect on a permanent basis until approved by the Commission; but, except as provided in the next ordering clause, such amendments shall take effect on a temporary basis, subject to refund or reparation, not later than 15 days after the date of this opinion and order. Except as provided in the next ordering clause, any party wishing to comment on any compliance filing may do so within 15 days after the date of the filing, submitting 15 copies of its comments.

2. If New York Telephone Company d/b/a Bell Atlantic-New York includes in its compliance filing a revised proposal to remove from reciprocal compensation rates the costs of vertical switching services, comments on that proposal will be due not later than 30 days after the date of the filing. Any party filing such comments should submit 15 copies. No such proposal shall take effect without the

approval of the Commission.

3. For good cause shown pursuant to Public Service Law §92(2), newspaper publication of the tariff amendments filed in accordance with this opinion and order is waived.

4. This proceeding is continued.

By The Commission,

(SIGNED) DEBRA RENNER
Acting Secretary

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PARTIES AND THEIR FILINGS
(An "X" indicates the party submitted the filing in question; see Endnote for information on joint filings)

PARTY[110]	SHORT DESIGNATION	THRESHOLD TESTIMONY	INITIAL TESTIMONY	RESPONSIVE TESTIMONY	INITIAL BRIEF	REPLY BRIEF
AT&T Communications of New York, Inc.	AT&T	X	X	X	X	X
NYS Attorney General	Attorney General					X
New York Telephone Company d/b/a Bell Atlantic-New York	Bell Atlantic-New York	X	X	X	X	X
Cable Television and and Telecommunications Association of New York, Inc.	Cable Association		X		X	
Citizens Telecommunications Company of New York, Inc.	Citizens	X	X			X
Competitive Telecommunications Association	CompTel				X	
NYS Consumer Protection Board	CPB				X	X
CTSI, Inc.	CTSI	X	X	X	X	X
e.spire Communications Inc.	e.spire	X	X	X	X	X
Focal Communications Corporation	Focal	X	X	X	X	X
Frontier Telephone of Rochester, Inc.	Frontier	X	X		X	X

110 This list is alphabetized by Short Designation

Company L.P.

PARTIES AND THEIR FILINGS
(an "X" indicates the party submitted the filing in question; see Endnote for information on joint filings)

PARTY	SHORT DESIGNATION	THRESHOLD TESTIMONY	INITIAL TESTIMONY	RESPONSIVE TESTIMONY	INITIAL BRIEF	REPLY BRIEF
Time Warner Telecom, Inc.	Time Warner	X	X	X	X	X
Telecommunications Resellers Association	TRA				X	
Warwick Valley Telephone Co.	Warwick	X				

ENDNOTE

CTSI, Focal, PaeTec, and RCN submitted joint briefs; they are referred to as "CTSI *et al.*"
e.spire and Intermedia submitted joint briefs; they are referred to as "e.spire/Intermedia."
Mid-Hudson and Northland submitted a joint brief; they are referred to as "Mid-Hudson/Northland."

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reciprocal compensation in New York inasmuch as it does not yet operate as a competitive local exchange carrier within the State.

PARTIES AND THEIR FILINGS
(an "X" indicates the party submitted the filing in question; see Endnote for information on joint filings)

PARTY	SHORT DESIGNATION	THRESHOLD TESTIMONY	INITIAL TESTIMONY	RESPONSIVE TESTIMONY	INITIAL BRIEF	REPLY BRIEF
Global NAPs, Inc.	GNAPs	X	X	X	X	X
Intermedia Communications, Inc.	Intermedia	X	X	X	X	X
Internet Communication LLC	Internet	X				
Cablevision Lightpath, Inc.	Lightpath	X	X	X	X	X
MCI WorldCom, Inc.	MCIW	X	X	X	X	X
Mid-Hudson Communications, Inc.	Mid-Hudson	X	X		X	
Northland Networks, Ltd	Northland				X	
NYS Telecommunications Association, Inc.	NYSTA				X	X
PaeTec Communications, Inc.	PaeTec	X	X		X	X
RCN Telecom Services, Inc.	RCN	X	X	X	X	X
Sprint Communications	Sprint	[111]			X	

[111] Responded to request by noting that it neither pays nor receives

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of ICG Telecom Group, Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom of Ohio, L.P., Complainants, v. Ameritech Ohio, Respondent. Regarding the Payment of Reciprocal Compensation.	Case No. 97-1557-TP-CSS Case No. 97-1723-TP-CSS Case No. 98-308-TP-CSS

ENTRY ON REHEARING

The Commission finds:

(1) On August 27, 1998 and October 14, 1998, the Commission rendered three nearly identical decisions in complaints brought against Ameritech Ohio (Ameritech) by three competitive local exchange carriers namely, ICG Telecom Group, Inc. (ICG), MCImetro Access Transmission Services, Inc. (MCImetro), and Time Warner Telecom of Ohio, L.P. (Time Warner).[1] Through those opinion and orders, the Commission found that, at the time the parties negotiated the involved interconnection agreements, the parties deemed end user calls made over the public switched telephone network to an internet service provider (ISP) as local calls subject to the reciprocal compensation provisions of the applicable interconnection agreements.

The Commission also found that the involved interconnection agreements were negotiated by extremely experienced and knowledgeable parties who were keenly aware of and familiar with telecommunications precedent and policies at the time the interconnection agreements were negotiated. The Commission emphasized, however, that its decision

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[1] ICG Opinion and Order issued August 27, 1998, MCImetro Opinion and Order issued October 14, 1998, and Time Warner Opinion and Order issued October 14, 1998.

"should not be viewed by anyone as an opinion on the broader policy implications involved," many of which Ameritech cited in support of its position in these matters. Finally, the involved Commission orders recognized that the Federal Communications Commission (FCC) was in the process of considering arguments addressing these broader policy issues and that the FCC's deliberations could have an impact on the issues presented by the parties.

(2) Section 4903.10, Revised Code, states that any party who has made an appearance in a Commission proceeding may file an application for rehearing within 30 days of the journalization of a Commission decision.

(3) Applications for rehearing were timely filed by Ameritech in each of the involved complaint proceedings. Memoranda contra the applications for rehearing were timely filed by ICG, MCImetro, and Time Warner. Given the similarity of the issues involved and the decisions rendered in the three opinion and orders in these matters, the Commission finds that consolidation of these three matters for purposes of issuing a decision on rehearing is warranted.

(4) Ameritech raises a number of arguments in support of its applications for rehearing. Primarily, however, those arguments can be categorized as follows: (1) reiteration of arguments previously made through testimony and through briefs; and (2) statements of position and decisions made on a federal level subsequent to the Commission's August 27, 1998 and October 14, 1998 orders in these three proceedings.

(5) In its first general rehearing category, Ameritech asserts that the Commission erred in finding that Internet calls from Ameritech end users routed through an ISP served by the complainants to reach the Internet are local calls subject to the reciprocal compensation provisions under the involved interconnection agreements. Ameritech argues that the Commission impermissibly imposed the burden on Ameritech to prove that Internet calls fall within the definition of switched exchange access service without first analyzing whether the complainants proved that such calls could be characterized as local traffic under the involved interconnection agreements.

Ameritech further argues that the Commission erred in concluding that calls to the Internet through ISPs are no different than other local traffic. Ameritech maintains that, for purposes of Internet traffic, what is important is the jurisdiction of the traffic, which in this instance is interstate in nature. Ameritech analogizes this traffic to Feature Group A calls. Moreover, the Commission's misplaced reliance upon the distinction between telecommunications and information services is erroneous as a matter of law Ameritech observes. The Commission also erred, according to Ameritech, by failing to address any of the FCC precedent existing at the time the parties negotiated the involved interconnection agreements. This precedent, in Ameritech's view, stands for the proposition that calls to the Internet are not local but rather interexchange carrier calls subject to exchange access.

(6) Regarding its second rehearing category, Ameritech asserts that rehearing is warranted because, since the issuance of the August 27, 1998 and October 14, 1998 orders, certain events on the national level directly affects the Commission's orders in these three proceedings. One such event, according to Ameritech, is that the FCC released a decision on October 30, 1998, which confirmed that Internet calls are not local but interstate because those calls do not terminate until those calls reach the distant databases.[2] Ameritech also points to a November 11, 1998 Resolution adopted by the National Association of Regulatory Utility Commissioners (NARUC) for the prospect that the states themselves recognize that traffic over the Internet is jurisdictionally mixed. Notwithstanding its early arguments, Ameritech asserts that these later events warrant granting rehearing to reconsider these matters.

(7) ICG, MCImetro, and Time Warner posit that many of Ameritech's arguments raised on rehearing are merely a restatement of arguments thoroughly briefed, considered, and, thereafter, rejected by the Commission. MCImetro and Time Warner did, however, specifically address Ameritech's reliance on the FCC's *GTE ADSL* decision. In fact in the *GTE ADSL* order, MCImetro and Time Warner note, the FCC specifically disclaimed that its order acted as precedent

2 The FCC order Ameritech cites in support of this argument is *In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148,* CC Docket No. 98-79, Adopted October 30, 1998; Released October 30, 1998 (hereafter *GTE ADSL* order).

in carrier-to-carrier reciprocal compensation disputes under interconnection agreements between carriers. The FCC further limited, according to MCImetro and Time Warner, its decision concerning the jurisdictional treatment to the transport of data from an end user over GTE's frame relay network.

(8) With the exception of the arguments concerning the *GTE ADSL* order and, to a lesser extent, the NARUC Resolution, Ameritech's assignments of error raise no arguments on rehearing not fully considered by the Commission in the August 27, 1998 and October 14, 1998 orders. Therefore, rehearing based upon those assignments of error is denied.

In rendering the August 27, 1998 and October 14, 1998 orders, the Commission noted that our decisions were based solely on our interpretation of what the parties understood at the time the involved interconnection agreements were negotiated. In making those decisions we looked at the provisions defining the terms "local traffic" and "switched exchange access service." Based in part on our understanding that the parties had clearly identified switched exchange access service and did not include in that definition ISP traffic, the Commission found ISP traffic to be local traffic and thus eligible for reciprocal compensation. In addition, the Commission noted that it is also revealing to know that Ameritech treats its own ISP customer traffic as local for purposes of booking revenues, separations, and ARMIS reporting. Further, the Commission noted that an Ameritech end user making a similar call to an ISP served by Ameritech and within Ameritech's local calling area will not be assessed toll charges for that call.

The Commission also found relevant to our decisions in the involved orders, that Ameritech had paid reciprocal compensation to ICG and MCImetro for ISP traffic for some period of time. Subsequently, the record reveals that Ameritech unilaterally began to withhold reciprocal compensation rather than attempt to resolve the dispute under the dispute resolution procedures set forth in the negotiated agreements. Another factor that supported the Commission's decision was that, during negotiation of the involved interconnection agreements, the complainant's had requested bill and keep as the compensation methodology for local traffic compensation purposes. However, Ameritech refused bill and keep and, instead, insisted on compensation based on a minutes-of-use methodology. The Commission found that, by its argument in these proceedings, Ameritech was attempting to undo what it had bargained for in the negotiations involving the interconnection agreements.

The Commission also noted that our decisions were in accord with existing FCC authority (See, *Access Charge Reform, Price Cap Performance Review, Transport Rate Structure and Pricing, Usage of the Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, First Report and Order, adopted May 7, 1997; released May 16, 1997), as affirmed by the Eighth Circuit Court of Appeals in *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d, 523 (8th Cir. 1998), as well as the FCC's *Universal Service Order*. We further noted that the FCC had explicitly recognized that local calls to ISPs over the public switched telephone network are separate and distinct from the information services provided by the ISP over the packet-switched network. The FCC has stated:

> We agree with the Joint Board's determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network component, which is the connection over a LEC network from a subscriber to an Internet service provider, in addition to the underlying information service.
>
> ***
>
> When a subscriber obtains a connection to an internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the internet service provider's service offering.
>
> *Universal Service Order, 12 FCC at 8822.*

Having had an additional opportunity to consider the arguments Ameritech previously raised concerning the appropriate interpretation of the parties' involved interconnection agreements, the Commission finds that Ameritech has raised no new arguments upon which the Commission should grant rehearing.

(9) As further support for its applications for rehearing. Ameritech pointed to two subsequent pronouncements at the federal level which. in Ameritech's view. warrant granting rehearing. The first is the *GTE ADSL* decision. In that decision. issued on October 30. 1998. the FCC. according to Ameritech. revisited and reaffirmed its existing precedent involving Internet traffic. More specifically. the FCC affirmed that Internet communications are inherently interstate in nature and that the jurisdictional nature of every Internet communication is determined by its end points. thereby rejecting the notion that a communication is divided at intermediate routing or switching points such as the ISP's local server. The *GTE ADSL* decision also clarifies the FCC's *Universal Service Order* by noting that the distinction that the FCC drew was solely for the purpose of determining which entities are required to contribute to universal service according to Ameritech.

The second pronouncement that Ameritech relies on is a NARUC Resolution adopted on November 11. 1998. Ameritech argues that through this resolution the NARUC members recognized that: "[t]he traffic over the Internet is jurisdictionally mixed and the jurisdictional nature of the traffic may be discovered in the future." Ameritech points to this language to dispel the notion that all traffic terminates locally at the ISP switch.

(10) Ameritech's reliance on the *GTE ADSL* order as justification for its argument on the status of Internet traffic is misplaced. The FCC's order in no way alters the logic. reasoning. or the conclusions set forth in the Commission's decisions in these matters. In the *GTE ADSL* decision. the FCC found that GTE's proposed ADSL service was an interstate offering properly tariffed on an interstate basis. In arriving at that decision. however. the FCC distinguished between the dedicated data links being offered by GTE and the circuit-switched. dial-up connections from end users to ISPs which are the focus of the Commission's orders from which Ameritech has sought rehearing.

Moreover. the FCC disclaimed that its decision in *GTE ADSL* acted as precedent in carrier-to-carrier reciprocal compensation disputes involving interconnection agreements between carriers. The FCC specifically limited the breadth of its decision by stating that:

> [T]his Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs . . . . We find that this Order does not and cannot determine whether reciprocal compensation is owed, on either a retrospective or prospective basis, pursuant to existing interconnection agreements, state arbitration decisions, and federal court decisions. We therefore intend ... to issue a separate order specifically addressing reciprocal compensation issues.
>
> *GTE ADSL* Order, ¶2.

(11) Similarly, regarding the NARUC Resolution, the Commission disagrees with Ameritech that the resolution represents grounds for reconsidering the August 27, 1998 and October 14, 1998 orders. Initially, we note that a NARUC Resolution issued after a substantive decision in an Ohio complaint case has been rendered has no binding effect whatsoever on this Commission. Just as we found in the initial orders in these three complaint cases that other state commission decisions have no legally binding effect on us, a NARUC Resolution holds no greater weight over us.

Even if we were to find that the NARUC Resolution is entitled to weight in these cases, we do not agree with Ameritech's proposition that this resolution provides grounds for rehearing. Rather, in our view, a fair reading of the NARUC Resolution is that the resolution is directed toward the relationship and subsequent orders of the FCC in the wake of the *GTE ADSL* decision. We also note that, at the time of the *GTE ADSL* decision, the FCC had not rendered a formal opinion on the reciprocal compensation issue for Internet traffic over the public switched network. However, the FCC did intimate that its future decision, addressed in more detail below, would not retroactively impact state decisions rendered on the interconnection agreements which have already been litigated before the state commissions.[3]

(12) On February 25, 1999, the FCC issued a decision intended to clarify whether a local exchange carrier is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an ISP. See, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68* (hereafter *Declaratory Ruling*), released February 26, 1999. By entry issued on March 5, 1999, the attorney examiner afforded the parties in these complaint cases an opportunity to submit comments and reply comments on the impact, if any, of the FCC's *Declaratory Ruling*. ICG, MCImetro, Time Warner, and Ameritech timely submitted initial and reply comments.

(13) In its initial and reply comments, Ameritech argues that the FCC's *Declaratory Ruling* refutes the underpinnings of the Commission's August 27, 1998 and October 14, 1998 orders and those orders should now be vacated. In support of this argument, Ameritech claims that the FCC, in its *Declaratory Ruling*, found that Internet traffic does not terminate at the ISP's local server and, consequently, Internet traffic is not subject to reciprocal compensation under Section 251(b)(5) of the Telecommunications Act of 1996 (1996 Act). Ameritech continues that the *Declaratory Ruling* confirmed FCC precedent dating back to at least 1983 that enhanced service provider (ESP) traffic, including ISP traffic, is non-local interstate traffic that, for public policy purposes, has been exempted from the payment of interstate access charges.

Ameritech claims that it was aware of this precedent at the time the involved interconnection agreements were negotiated and, since there was no question in Ameritech's view that the proper classification of ISP traffic, based on longstanding FCC policy, is exchange access, rather than local, it was not necessary to address the proper classification of ISP

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3 In a speech before the same NARUC commissioners who adopted the November 11, 1998 Resolution discussed herein, FCC Chairman Kennard stated, when discussing the issue of reciprocal compensation between local carriers handling Internet traffic, "I believe that those states have been right to decide that issue (reciprocal compensation for Internet traffic) when it has been presented to them and I do not believe it is the role of FCC (sic) to interfere with those state decisions in any way." Remarks of William E. Kennard, Chairman of the Federal Communications Commission to the National Association of Regulatory Utility Commissioners, Orlando, Florida, and November 11, 1998.

traffic in the involved agreements. Ameritech avers that, since the involved interconnection agreements are clear and unambiguous regarding ISP traffic, the Commission is foreclosed from considering extrinsic evidence outside of the four corners of the agreements in order to arrive at a determination that the parties must pay each other reciprocal compensation on Internet traffic.

(14) The complainants, ICG, MCImetro, and Time Warner, claim that nothing in the FCC's *Declaratory Ruling* warrants reconsideration or modification of the August 27 1998 or October 14, 1998 orders.[4] ICG contends that Ameritech's arguments ignore the clear distinction in the FCC's *Declaratory Ruling* between a jurisdictional analysis and regulatory treatment. Ameritech's selective interpretation of the FCC's *Declaratory Ruling*, ICG maintains, ignores a significant portion of what the FCC actually said. Contrary to Ameritech's argument, the complainants point out that the FCC specifically abstained from interfering with state decisions on regulatory treatment in the absence of an FCC rule governing inter-carrier compensation. In fact, MCImetro points out that the FCC expressly rejected the claim of incumbent local exchange carriers, like Ameritech, that only the FCC has jurisdiction over this issue and that the 1996 Act and FCC rules preclude state commissions from interpreting interconnection agreements to require reciprocal compensation for ISP-bound traffic.

Further, MCImetro maintains that the FCC specifically noted that whether the parties reached an agreement regarding ISP-bound traffic is a question of fact, not law, based on the circumstances. Under well-established principles of contract construction, the parties' intent is determined at the time of contracting, not at some subsequent date, MCImetro observes. ICG also observes that Ameritech's argument constitutes an impermissible collateral attack on the *Declaratory Ruling*. Such an attack on the *Declaratory Ruling* can only be made at the United States Court of Appeals for the District of Columbia Circuit that is reviewing the FCC decision. Finally, the complainants maintain, four

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4 Following the issuance of the examiner's March 5, 1999, entry, AT&T Communications of Ohio, Inc. (AT&T) and TCG Ohio filed comments in the three above-captioned complaint cases as amici curiae. The arguments raised by AT&T and TCG Ohio are addressed in the arguments made by ICG, MCImetro, and Time Warner. Therefore, the Commission need not separately address the arguments raised by AT&T and TCG Ohio.

state commissions have rendered decisions after the FCC's *Declaratory Ruling* In each case, the state commission found that the *Declaratory Ruling* did not alter the state commission's authority to find that reciprocal compensation was required for ISP traffic under an interconnection agreement.

(15) The March 5, 1999, attorney examiner's entry afforded the parties a brief opportunity to submit initial and reply comments on the impact, if any, of the FCC's February 26, 1999 *Declaratory Ruling*. Having thoroughly reviewed the *Declaratory Ruling* as well as the submitted comments, the Commission finds that the *Declaratory Ruling* does not affect our earlier decisions interpreting and enforcing the interconnection agreements already in force. Moreover, we find that the *Declaratory Ruling* provides explicit support for the reasoning underlying the Commission orders.

Although the *Declaratory Ruling* did opine on the jurisdictional nature of Internet calls, the FCC did not, contrary to Ameritech's position, conclude that its resolution of the jurisdictional nature of ISP-bound traffic resolved the issue of whether reciprocal compensation is owed for that traffic. Rather, the FCC divided its analysis into two major components. The first component focuses on the nature of ISP-bound traffic for the purpose of resolving jurisdictional issues and the second component addressing what regulatory treatment should apply to such calls. In fact the FCC repeatedly emphasized that its examination was intended to resolve only the jurisdictional issues. This decoupling of the FCC's jurisdictional analysis from its regulatory treatment is not new and is illustrated by the very existence of the ESP exemption from interstate access charges. The ability of the FCC to make this jurisdictional/regulatory distinction has been challenged by Ameritech and affirmed by the United States Court of Appeals in the *Access Charge Reform Order*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982; *aff'd sub nom. Southwestern Bell Tel. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

The FCC expressly recognized, in the *Declaratory Ruling*, that its jurisdictional conclusions did not resolve the question of whether reciprocal compensation is owed for this traffic. Consequently, the FCC stated that "[N]othing in this

Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate [in the Declaratory Ruling]." *Declaratory Ruling* at ¶27.

It is beyond dispute that the FCC currently has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a federal rule, the FCC recognized that "state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation." *Id.* at ¶26. The FCC expressly recognized that its existing rules could not resolve this issue. *Id.* Until there is a federal rule in place, this Commission had, and continues to have, an obligation to resolve this issue.

The FCC in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order ¶83, first announced this Commission's authority, pursuant to the 1996 Act, to regulate interstate services under certain circumstances. As a result, the FCC concluded, and the United States Supreme Court agreed, that the state commissions have parallel jurisdiction under which they may regulate, in proper circumstances, interstate traffic over which the FCC may also have jurisdiction. See, *Id.* at ¶85; see also, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

The *Declaratory Ruling* is clear. This Commission had an obligation to interpret the interconnection agreements that are the subject of these complaints. Ameritech has argued that the relevant language of the involved interconnection agreements is clear and unambiguous. We disagree. Ameritech has not cited to, and we have not found, one sentence in the involved interconnection agreements that address ISP-bound traffic. Nor have there been any allegations that the parties ever agreed on treating ISP traffic different from all other locally dialed traffic.

In the absence of such an agreement, the Commission was left with attempting to determine the parties' intent at the time the interconnection agreements were entered into. In determining that, at the time the interconnection agreements were entered into, ISP-bound traffic would be treated as local traffic and subject to reciprocal compensation, the Commission looked at a variety of factors. Those factors included the FCC's existing policies of exempting ISP traffic from access charges but permitting the costs to be incurred at the local level; the conduct of the parties pursuant to their interconnection agreement; the practice of serving ISPs out of the local intrastate tariffs; the manner in which the revenues from ISP traffic were accounted for; and how end user charges are determined. In its *Declaratory Ruling*, the FCC set forth a non-exhaustive list of factors upon which state commissions properly might determine that the parties to an interconnection agreement had decided to treat ISP traffic as subject to reciprocal compensation. The factors this Commission considered and the non-exhaustive list set for in ¶24 of the FCC's *Declaratory Ruling* are nearly identical.

For all of the foregoing reasons, the Commission finds that the FCC *Declaratory Ruling* supports affirmance of the Commission's August 27, 1998 and October 14, 1998 orders that, under the existing interconnection agreements, ISP traffic is subject to reciprocal compensation. Ameritech has raised no argument or assignment of error which warrants rehearing in these matters. Consequently, the applications for rehearing filed by Ameritech are denied.

(16) On March 29, 1999, Ameritech filed, in each of the complaint cases, a motion for oral argument. In support of its motion, Ameritech notes that "[G]iven the significance of the recent developments and the legal and financial implications of this case, Ameritech Ohio urges the Commission to grant the parties an opportunity to present oral argument and answer any remaining questions the Commission may have before this rehearing concludes." This oral argument, according to Ameritech, should prove helpful to the Commission's final deliberations and will assure the parties a full and meaningful opportunity to be heard. On April 2, 1999, ICG and Time Warner filed memoranda contra Ameritech's motion for oral argument. ICG claims that Ameritech's request is nothing more than an additional bad faith effort by Ameritech to further delay this proceeding.

Time Warner maintains that nothing has transpired which would compel this Commission to reach decisions contrary to those previously rendered. Thus, Time Warner continues, additional oral argument at this point can only be cumulative and, hence, unnecessary.

(17) Ameritech's motion for a scheduled oral argument before the Commission is denied. In making our decision in this matter, the Commission has had the benefit of an extensive record including sworn testimony, several rounds of detailed written arguments, and one oral argument concerning reciprocal compensation for ISP traffic before the Commissioners prior to the initial orders being issued. Ameritech has made no suggestion that the presentation of prepared oral remarks before the Commission will add anything to the Commission's record in this matter not heretofore already presented. Therefore, the Commission can find little value in proceeding with scheduled oral arguments. This determination on the request for scheduled oral arguments does not, however, foreclose the Commission from addressing questions to the parties in the context of our deliberations at a duly scheduled Commission meeting.

(18) The final matter with which we must deal, based upon our determination to deny the applications for rehearing, is Ameritech's requests, in the ICG and MCImetro cases, for a temporary stay of Ameritech's obligations to remit payment to ICG and MCImetro. The purpose for granting a temporary stay would be to allow Ameritech a fair opportunity to secure a preliminary judicial ruling on the motion for stay it will file with its appeal. Ameritech commits to, during the pendency of this temporary stay, remitting the disputed amounts into interest bearing escrow accounts for the benefit of ICG and MCImetro.

(19) Ameritech's request for a temporary stay of our decision on rehearing in order to seek a judicial stay during the pendency of a future appeal is denied. In our view, it is appropriate to afford the complainants a level of finality now that the proceedings before us have concluded. Therefore, we direct the parties to reconcile the amounts owed and

> Ameritech should remit payment to ICG and MCImetro within 45 days of this entry on rehearing.[5]

It is, therefore,

ORDERED, That the applications for rehearing filed by Ameritech are denied as set forth in the entry on rehearing. It is, further,

ORDERED, That Ameritech's motion for an oral argument is denied as set for herein. It is, further,

ORDERED, That Ameritech's request for a temporary stay is denied in accordance with Finding (19). It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record, their counsel, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Craig A. Glazer

Judith A. Jones

Donald L. Mason

JRJ/vrh

Entered In The Journal
May 5, 1999

Gary E. Vigorito
Secretary

Signed by Commissioners
(Schriber) Abstained
Fergus
Glazer
Jones
(Mason) Dissented

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5 Under the relevant terms of the Time Warner/Ameritech interconnection agreement, the parties agreed to measure local traffic for some period of time and then, at some future date if traffic was out of balance, compensate the other party for the traffic imbalance. Time Warner and Ameritech should apply the Commission's decision on the subject of Internet traffic and follow the relevant terms of their interconnection agreement for traffic imbalances, if any.

COPY

ORDER NO. 99-218

ENTERED MAR 17 1999

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

ARB 91

In the Matter of the Petition of Electric Lightwave, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Incorporated, Pursuant to the Telecommunications Act of 1996.	)))))	COMMISSION DECISION

DISPOSITION: ARBITRATOR'S DECISION ADOPTED AS REVISED

Procedural History

On October 7, 1998, Electric Lightwave, Inc. (ELI), filed a petition with the Public Utility Commission of Oregon (Commission) to arbitrate a contract for network interconnection with GTE Northwest Incorporated (GTE) pursuant to 47 U.S.C. §§251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act). GTE filed a response to the petition on November 2, 1998.

Prehearing conferences were held to establish a procedural schedule on October 23 and November 12, 1998. Opening testimony was filed November 30, 1998. Reply testimony was filed January 4, 1999.

A third prehearing conference was held on January 11, 1999. At the conference, the parties agreed to stipulate the prefiled testimony and exhibits into evidence, waive the scheduled hearing, and submit briefs on the outstanding issues. Opening briefs were filed on January 25, 1999. Reply briefs were filed on February 1, 1999.

On February 12, 1999, the Arbitrator issued his decision in this proceeding. GTE filed exceptions to the decision on February 22, 1999.

On February 26, 1999, the Federal Communications Commission (FCC) issued a Declaratory Ruling and Notice of Proposed Rulemaking[1] addressing inter-carrier compensation for the exchange of traffic bound for Internet Service Providers (ISPs). On March 4, 1999, the Arbitrator convened a telephone conference to discuss the ISP order. Pursuant to an agreement reached at the conference, ELI and GTE filed additional comments on March 8, 1999.

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68 (rel. February 26, 1999) (hereafter the "ISP Order").

Standards for Arbitration

This arbitration was conducted under 47 U.S.C. §252 of the Act. Subsection (c) of §252 provides:

> Standards for Arbitration--In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission [Federal Communication Commission] pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Commission Review

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. Section 252(e)(2)(B) provides that the State commission may reject an agreement (or any portion thereof) adopted by arbitration only "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

> Notwithstanding paragraph (2), but subject to section 252, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Commission Conclusion

The Commission has reviewed the Arbitrator's decision and the comments filed by GTE and ELI in accordance with the standards set out above. We conclude that the Arbitrator's decision, as revised below, comports with the requirements of the Act, applicable FCC regulations, and relevant state law and regulations.

Issue No. 1 – Should GTE and ELI compensate each other for the cost of transporting and terminating traffic exchanged between their networks that terminates to Internet Service Providers (ISPs)?

The Arbitrator's decision was issued on February 12, 1999. Consistent with Commission decisions in prior arbitration proceedings, the Arbitrator concluded that ISP-bound traffic was local and subject to reciprocal compensation pursuant to §252 of the Act.

As noted above, the FCC's ISP order was entered after the Arbitrator's decision was issued in this case Upon finding that ISP-bound traffic is "jurisdictionally mixed" and "largely interstate," the FCC initiated a rulemaking to adopt a federal rule governing inter-carrier compensation for that traffic. Pending completion of that rulemaking, however, the FCC acknowledged that State commissions may determine in arbitration proceedings that reciprocal compensation is an appropriate interim inter-carrier compensation mechanism for ISP traffic.[2]

The Arbitrator's decision correctly states that the Commission has held in other arbitration proceedings that ISP-bound traffic should be subject to reciprocal compensation. We find that it would be inappropriate to depart from that policy in this proceeding. Although the FCC has concluded that ISP traffic is largely interstate, it has also observed that ISP traffic should not be subject to interstate access charges[3] and has yet to develop a compensation structure for this traffic. In the absence of a federal rule, we believe that reciprocal compensation is a logical and reasonable method of compensating carriers for the costs incurred to terminate traffic to ISPs.

Moreover, allowing GTE and ELI to remain subject to reciprocal compensation places these carriers on the same footing as other telecommunications carriers exchanging ISP traffic in Oregon. As the Arbitrator noted, the ramifications associated with treating GTE and ELI differently from other carriers are unclear. By according ELI and GTE the same treatment as other carriers, we avoid the possibility of creating competitive inequalities that might disadvantage carriers, ISPs, and end user customers.[4]

GTE recommends that the Commission reform the interconnection agreement to establish a contract duration of no more than one year. GTE indicates that it is willing to renegotiate the ISP traffic issue after one year or after the FCC promulgates its final rules. As noted in the Arbitrator's decision, however, Sections 31 and 32 of the interconnection agreement already stipulate that any subsequent legal requirements shall be incorporated into the agreement.

[2] Id. at para. 21, 25-27.

[3] Id. at para. 20, 34.

[4] Paragraph 27 of the FCC ISP Order states "[N]othing in this Declaratory Ruling precludes State commissions from determining pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below." Id. at para. 27.

Thus, the final FCC rule establishing a interstate compensation mechanism for ISP-bound traffic will automatically supercede any contrary provisions in the interconnection agreement. ELI acknowledges that fact in its brief.

For the reasons set forth above and in the Arbitrator's decision, we find that ISP traffic should remain subject to reciprocal compensation pending adoption of a federal rule establishing an appropriate interstate compensation mechanism.

Issue No. 2 – Should separate compensation arrangements apply to ISP traffic?

The Arbitrator concluded that separate compensation arrangements should not be adopted for ISP traffic. In its March 8, 1999, comments, GTE reiterates that minute-of-use-based reciprocal compensation is inconsistent with the FCC's ISP order and "will result in a non-cost based windfall for the terminating carrier." GTE reiterates that its bill and keep or flat rate compensation alternatives are more compatible with the approach taken by the FCC and yield more equitable results.

The Commission agrees with the Arbitrator's findings that a separate compensation structure should not be adopted for ISP traffic.[5]

Issue No. 3 – What rate should be used to compensate ELI for the use of its switch?

The arbitrator concluded that ELI should be compensated at the tandem switch rate because FCC rule §51.711(a)(3) was reinstated by the Supreme Court's decision. In their briefs, ELI and GTE acknowledge that the Supreme Court's decision has given effect to §51.711(a)(3).

The Commission concludes that the FCC rules considered by the Supreme Court have not yet been reinstated. The Supreme Court reversed in part and affirmed in part, the July 18, 1997 and August 22, 1997 decisions of the Eighth Circuit. Those cases were remanded to the Eighth Circuit "for further proceedings consistent with this opinion." In our view, the Eighth Circuit must take action on remand before the FCC rules are "reinstated."

Until such time as the Eighth Circuit acts, we find that the policy articulated in the ARB 1 docket should apply to this interconnection agreement. That approach takes into account not only the geographic coverage of the non-incumbent's switch, but also the functions performed by that switch. Because the evidence shows that ELI's switch does not perform the same functions as GTE's tandem switch, we find that ELI should not be compensated at the tandem switch rate. If the Eighth Circuit approves §51.711(a)(3), that rule will apply to the ELI/GTE interconnection agreement on a prospective basis pursuant to Sections 31 and 32 of the interconnection agreement. We agree with the arbitrator that §51.711(a)(3) requires ELI to be compensated at the tandem switch rate.

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[5] The Arbitrator's decision addresses arguments raised by the parties concerning §252(d)(2)(A) of the Act, which requires that transport and termination of local traffic be based on cost. Because the FCC has determined that ISP traffic is largely interstate, it appears that the cost requirement specified in §252(d)(2)(A) is inapplicable. Nevertheless, GTE's failure to demonstrate that it is more costly to terminate ISP traffic than non-ISP traffic remains a valid reason basis for not adopting a separate compensation structure for ISP traffic.

ORDER NO. 99-218

ORDER

IT IS ORDERED that the Arbitrator's decision in this case, attached to and made part of this order as Appendix A, is adopted as revised by this order.

Made, entered, and effective MAR 17 1999.

Ron Eachus
Chairman

Roger Hamilton
Commissioner

Joan Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-14-095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-13-070(2)(a). A party may appeal this order to a court pursuant to applicable law.

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99-218

ISSUED February 12, 1999

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 91

In the Matter of the Petition of Electric Lightwave, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Incorporated, Pursuant to the Telecommunications Act of 1996.	)	ARBITRATOR'S DECISION

Procedural History

On October 7, 1998, Electric Lightwave, Inc. (ELI), filed a petition with the Public Utility Commission of Oregon (Commission) to arbitrate a contract for network interconnection with GTE Northwest Incorporated (GTE) pursuant to 47 USC §§251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act). GTE filed a response to the petition on November 2, 1998.

Prehearing conferences were held to establish a procedural schedule on October 23 and November 12, 1998. Opening testimony was filed November 30, 1998. Reply testimony was filed January 4, 1999.

On January 11, 1999, a third prehearing conference was held. At the conference the parties agreed to stipulate the prefiled testimony and exhibits into evidence, waive the scheduled hearing, and submit briefs on the outstanding issues. Opening briefs were filed on January 25, 1999. Reply briefs were filed on February 1, 1999.

Statutory Authority

This proceeding is conducted pursuant to 47 USC §252(b). The standards for arbitration are set forth in 47 USC §252(c):

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

On August 8, 1996, the Federal Communications Commission (FCC) issued its *First Report and Order*, promulgating rules pursuant to 47 USC §§251 and 252. 47 CFR § 51.100 *et seq.*[1] On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit stayed operation of the FCC rules relating to pricing and the "pick and choose" provisions.[2]

On July 18, 1997, the Eighth Circuit issued an order vacating several of the FCC rules.[3] On October 14, 1997, the Court entered an order on rehearing vacating additional FCC rules.[4] The Eighth Circuit decisions were thereafter appealed to the U. S. Supreme Court. On January 25, 1999, the Supreme Court issued a decision holding that the FCC rules, with the exception of §51.319, are consistent with the Act.[5]

Issues in Dispute

GTE and ELI request that the Commission resolve three disputed issues:

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order No. 96-325, 11 FCC Rcd 15499, Appendix B (1996) (hereafter, *First Report and Order*).

[2] *Iowa Utilities Board v. Federal Communications Commission et al*, Case Nos. 96-3321 et seq. (8th Cir, October 15, 1996) (hereafter, *Iowa Utils. Bd.*) A temporary stay was previously entered by the Court on September 27, 1996. The FCC rules subject to the stay were 47 CFR §§51.501-515 (inclusive), 51.601-611 (inclusive), 51.701-717 (inclusive), the default proxy range set forth in the order for line ports, and 51.809. On November 1, 1996, the Eighth Circuit modified the stay to allow §§51.701, 51.703, 51.717 to remain in effect.

[3] The Court vacated 47 CFR §§51.303, 51.305(a)(4), 51.311(c), 51.315(c-f), 51.317 (vacated only to the extent this rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so), 51.405, 51.501-51.515 (inclusive, except for 51.515(b)), 51.601-51.611(inclusive), 51.701-51.717 (inclusive, except for 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717, but only as they apply to CMRS providers), 51.809; *First Report and Order*, ¶¶101-103, 121-128, and 180. The Court also vacated the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC Order on Reconsideration, dated September 27, 1996. *Iowa Utils. Bd.*, 120 F.3d 753, 818, fn 38 (8th Cir 1997).

[4] On rehearing, the Eighth Circuit also vacated §51.315(b) of the FCC rules.

[5] *AT&T Corp. vs. Iowa Utilities Board*, __ U. S. __ (1999).

Issue No. 1 – Should GTE and ELI compensate each other for the cost of transporting and terminating traffic exchanged between their networks that terminates to Internet Service Providers (ISPs)?

This issue concerns the appropriate jurisdictional assignment and compensation arrangements for Internet traffic routed over interconnection trunks between GTE and ELI. This traffic is originated by end users, switched through to Internet Service Provider (ISP) gateways, routed to the Internet backbone, and continues on to the World Wide Web (hereafter referred to as ISP traffic).

Section 251(b)(5) of the Act imposes a duty upon all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. The FCC rules relating to reciprocal compensation are set forth in 47 CFR, Subpart H, §§51.701-51-717. *See also*, *First Report and Order* at ¶¶1027-1118.

GTE Position. GTE takes the position that ISP traffic is interstate in nature and therefore not subject to the reciprocal compensation requirements applicable to local traffic. GTE witness Howard Jones testified that Internet traffic differs from local exchange traffic. In a typical local exchange call, the end user dials seven or ten digits to reach another end user within the local exchange. In that situation, the entire transmission path, all of the equipment and all information exchanged, remain within the geographic boundary of the local exchange.

On the other hand, when an end user completes a typical dial access connection to an Internet information destination, a seven or ten digit call is originated by the end user's telephone service through the end user's modem to an aggregation modem at an ISP location. The aggregation modem extends the call, in an analog or digital signal stream, into Transmission Control Protocol/Internet Protocol (TCP/IP) packet stacks, which are then transmitted across telecommunications facilities to the ultimate information source web server or host device. According to Mr. Jones, the connection is established between the end user modem and web/host server; intermediate logins and/or search functions do not affect this result.[6]

GTE contends that Internet connections are interstate in nature because the transmission path for this traffic ends out of state in the vast majority of cases. Mr. Jones states that a typical Internet call may pass through as many as four National Access Points for domestic connections and an additional number of access points for international connections. For example, almost all traffic generated by America Online, Inc., customers passes through Fairfax, Virginia prior to connection. In the case of other

[6] The ISP aggregation modems feed traffic to IP routers that direct traffic to other IP routers in a hierarchical pattern until the host or information repository server is accessed. Although there may be as many as 20-50 IP routers in a given transmission path, they do not affect or alter the content of the transmission. It is also possible to access various devices for search or traffic address referencing, but these do not alter the ultimate information connection from a computer user's modem to the web/host server.

providers, the interconnection points with the Internet web backbone(s) may be even more numerous.

GTE dismisses the "two call" theory relied on by ELI to claim that Internet calls are local. According to Mr. Jones, an ISP modem does not functionally terminate one transaction with the end user modem and begin another transaction as queries are launched to the Internet. Since no information or interactive service exists at the ISP modem (including user login databases or home pages), no transaction can occur at the ISP modem. A user who has only reached the ISP modem has not completed a transmission path to a place where information services could be obtained. Traffic that goes between the user modem and the ISP modem is strictly limited to "handshake" and software comparisons that allow for the exchange of technical parameters needed to construct a path from the user modem to a point beyond the ISP modem.[7]

Mr. Jones maintains that the ISP modem is performing a function analogous to a customer PBX or premise key system that transfers calls from interstate private line/special access networks into the local exchange. In order to accommodate this interstate access use of the local exchange network, the FCC instituted a special access surcharge for these private lines. This is known in the industry as the "leaky PBX" issue. The witness asserts that the difference between "leaky PBX" calls and internet modem access to interstate backbone networks is the order of magnitude. "Leaky PBX" calls are expected to amount to a small fraction of the total calls on the private line. Modem access calls must "leak" to internet backbones to yield the user any value or information. Mr. Jones further explains that the ISP modem has no information services function, but is inserted in the transmission path as early as possible by the ISP to reduce the capacity required to be carried to the servers or ultimate destination of the user.

In the event the Commission concludes that ISP traffic is local, GTE argues that recognition must be given to the fact that a significant portion of ISP traffic to local directory numbers does not actually route to ISP modems located within the local calling area. Mr. Jones observes that traffic to seven digit dialed numbers of ISPs is often hauled to distant sites for connection to ISP "mega modem" equipment. While the user perceives that his call is locally attached to an ISP modem, it can be attached to an ISP modem hundreds of miles or several states away.

GTE acknowledges that the practice of transporting dialed traffic across toll and state boundaries is not universal, but Mr. Jones notes that the volumes involved are significant enough to warrant Commission concern and action. Thus, the Commission may wish to ascertain whether ISP calls actually route to ISP modems geographically located within the local calling area. Traffic that does not attach to local-call scope ISP

[7] Mr. Jones states that the first point is usually a path to the security server for login. The end user is not at rest or connected solely to the ISP modem during any part of the Internet session. Successive searches or connections to different web sites do not tear down the transmission path all the way back from one web site to the ISP modem and then set up a new path to a new web site. The routers within the Internet handle this activity.

modems should not be eligible for reciprocal compensation because these services are then interstate or intrastate interLATA traffic.

GTE states that its position regarding the jurisdictional nature of ISP traffic is consistent with FCC and judicial decisions, including the recent FCC order dealing with GTE's proposed asymmetric digital subscriber line (ADSL) service.[8] In that order, the FCC stated:

> (We) conclude that the communications at issue here do not terminate at the ISP's local server, as some competitive LECs and ISPs contend, but continue to the ultimate destination or destinations, very often at a distant Internet web site accessed by the end user.[9]

GTE witness Steven J. Pitterle acknowledges that the FCC's ADSL order does not apply to dial up access to the Internet. He maintains, however, that the rationale for determining jurisdictional control of ADSL services applies equally to dial up Internet access. Mr. Pitterle emphasizes that the ADSL order reaffirms the "concept of end-to-end transmission to determine jurisdiction" and specifically rejects the "two call" theory of Internet traffic suggested by ELI:

> We disagree with those commenters who argue that, for jurisdictional purposes, an end-to-end ADSL communication must be separated into two components: an intrastate telecommunications service, provided in this instance by GTE, and an interstate information service, provided by the ISP. As discussed above, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication.[10]

ELI Position. ELI contends that traffic terminated to ISPs is local traffic subject to reciprocal compensation. According to ELI witness Timothy Peters, there are two distinct transactions involved in securing access to the Internet via dial up access. The first is a local call to the ISP. The second transaction involves access to the Internet or other information service, which is performed by the ISP, not the LEC terminating the call. The second transaction may involve interstate communication or it may be merely intrastate long distance or local communication. That transaction falls under the enhanced service provider classification and is separate from the local call between the end user and the ISP. Mr. Peters claims that adding this second transaction to the local call to the ISP does not convert the entire call into an interstate call.

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[8] *In the Matter of GTE Telephone Operating Companies*, GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, CC Docket No. 98-79 (rel. October. 30, 1998) (hereafter the "ADSL order").

[9] *Id.* at para 19.

[10] *Id.* at para 20.

ELI disputes GTE's claim that the FCC "has moved very close" to GTE's position that ISP traffic is interstate. Mr. Peters emphasizes that the ADSL order specifically states that the FCC has not made any determination concerning whether ILECs should be required to pay reciprocal compensation when they exchange Internet traffic with competitive LECs:

> This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial up traffic originated by interconnecting LECs.[11]

In addition, Mr. Peters emphasizes that the ADSL order clearly states that the decision to categorize ADSL service as interstate hinges on the fact that the service is a dedicated, high-speed connection to ISPs. He states that the *MTS/WATS Market Structure Order* relied on by the FCC to reach this conclusion does not apply to switched services such as dial up telephony.[12] Thus, it is premature to predict how the FCC will ultimately rule on the jurisdictional nature of switched services to ISPs, much less how local exchange carriers should compensate each other if the FCC finds ISP traffic is interstate in nature.

ELI recommends that this issue be resolved consistent with the Commission's decision in docket ARB 1 involving U S WEST Communications, Inc. (USWC) and Worldcom Technologies, Inc. (formerly known as MFS Communications Company, Inc.).[13] In that case, the Commission concluded that ISP traffic is local traffic subject to reciprocal compensation. Mr. Peters observes that several other state regulatory commissions have reached the same result.

Decision – Issue No. 1. This issue must be resolved in favor of ELI. The identical issue was addressed by the Commission in Order No. 96-324 issued in the USWC/Worldcom arbitration. That Order states that all traffic originated and terminated by enhanced service providers is local traffic subject to reciprocal compensation payments. Internet service providers fall within the category of enhanced service providers.[14]

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[11] *Id.* at para 2 and 29.

[12] Mr. Peters points out that the FCC concluded GTE's ADSL service is a mixed-use, special access service "like the point-to-point private line service high volume telephony customers purchase for direct access to IXCs' networks." Under the "ten percent" rule adopted in the *MTS/WATS Market Structure Order*, the FCC may assert jurisdiction over a mixed-use special access service if more than a de minimis amount of traffic is interstate in nature. *See, MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660 (1989).

[13] Order No. 96-324, Appendix A at 12-13.

[14] *ADSL order* at para 7.

The Commission's decision regarding ISP traffic was sustained by the U. S District Court in *U S WEST Communications, Inc. v. Worldcom Technologies, Inc.*[15] The Court held:

> The question before this court is whether the reciprocal compensation provisions in the Agreement violate the Act or a binding FCC regulation. They do not.[16]

In making this finding, the Court specifically acknowledged the FCC's ADSL order. The Court held:

> Historically, both [Congress and the FCC] have promoted the growth of the Internet and opposed efforts to force Internet users and ISPs to pay what critics contend is a fairer share of the costs of Internet service. In recent months the FCC has hinted at a possible shift in policy that would affect reciprocal compensation for calls made to ISPs, *see, e.g.*, FCC Order No. 98-292 (October 30, 1998), p. 1-2, but to date that has not occurred. . . . US West may ask the PUC to revisit this issue if the FCC alters its policy.[17]

I agree that the Commission should revisit this issue if the FCC makes a more definite shift in policy regarding the jurisdictional nature of Internet traffic. Until that time, all such traffic should be treated as local in nature and subject to reciprocal compensation payments consistent with the decisions of the Commission and the Court.[18]

GTE raises the concern that some calls from end users to ISPs are actually routed to ISP modems located outside the local calling area. GTE contends that traffic that does not attach to local call scope ISP modems should not be eligible for reciprocal compensation because these services are properly interstate or intrastate interLATA toll calls. Because the record in this case does not discuss the methods used to distinguish local calls from toll calls, there is no way to know whether there are problems identifying this type of traffic. Assuming the traffic can be identified, it should be possible to ascertain whether calls from end users are directed to ISP modems located within the local exchange calling area. To the extent that calls to ISP providers are not directed to an ISP modem within the local calling area, they are not local calls and should not be eligible for reciprocal compensation.

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[15] *U S WEST Communications, Inc. v. Worldcom Technologies, Inc.*, Civil No. 97-857-JB, Opinion and Order, December 10, 1998, at 12-13.

[16] *Id.* at 13.

[17] *Id.* at 12-13.

[18] It is significant that numerous other state commissions have also concluded that ISP traffic is local in nature and subject to reciprocal compensation. ELI states that all of these decisions have been sustained on appeal to Federal District Court. ELI Opening Brief at 6-7, fm 3.

Issue No. 2 – Should separate compensation arrangements apply to ISP traffic?

GTE Position. If the Commission concludes that ISP traffic is local, GTE proposes that the parties use bill and keep arrangements[19] on an interim basis for that traffic. Normal local traffic -- that is, non-ISP traffic -- would still be subject to the minute of use MOU compensation structure agreed to by GTE and ELI during negotiations. If the Commission finds that bill and keep arrangements are unacceptable, GTE recommends that compensation for ISP traffic be based on flat rate, per trunk charges.

GTE witness Dr. Edward Beauvais recommends against adopting usage based reciprocal compensation rates for ISP traffic in this arbitration. He contends that it is economically inefficient to charge end user customers flat rates for local service and require local exchange carriers to pay reciprocal compensation for terminating minutes on a measured usage basis. Under flat rate structure, the marginal price seen by the customer originating a call is zero, yet the cost of providing that call is composed of the production costs plus compensation costs. This automatically results in prices being set below the incremental cost of providing the end-to-end call and creates efficiency losses for the economy as a whole. It also produces financial losses to the company providing the originating calls under a flat rate and substantial "gaming" opportunities for the company receiving the terminating compensation.

In the absence of measured rates for local service,[20] Dr. Beauvais contends that the proper short run approach is to implement intercompany compensation arrangements that follow the price structure in place for end users for that type of call. Thus, if end user customers are billed on a flat rate basis for local calls, the compensation for traffic exchanged between carriers should also be on a non-traffic sensitive basis. Dr. Beauvais maintains that this approach is necessary to avoid the economic efficiency distortions described above.

In keeping with his observation that non-traffic sensitive intercompany compensation structures correspond with existing end user rate structures, Dr. Beauvais recommends using bill and keep arrangements for intercompany compensation in the short term.[21] GTE argues that bill and keep is appropriate as an interim measure because

[19] Section 51.713(a) of the FCC rules defines bill and keep arrangements as "those in which neither of the two interconnecting carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's network."

[20] Dr. Beauvais would not object to usage based pricing for intercompany compensation if end user rates were also imposed on a measured basis. GTE does not request that the Commission adopt measured local rates in this case, however.

[21] Dr. Beauvais would not recommend a bill and keep compensation mechanism if measured rates were in place for local service. In those circumstances, bill and keep would not provide any incentive for dynamic efficiency in the marketplace and its implicit zero marginal price would lead to overconsumption of services. Usage based charges would be preferable in that instance. Dr. Beauvais also cautions that bill and keep is not practical long run solution unless the flat rate local rate structure is maintained and strict enforcement is maintained between interexchange access and local interconnection. Since bill and keep has

they will not distort customer decisions by sending customers inappropriate economic signals as would a usage based compensation mechanism. GTE witness Steven Pitterle also argues that bill and keep is the most appropriate and equitable solution because it will "maintain a consistent relationship between the lack of revenues received by GTE for Internet calls (since higher volume end users predominantly select GTE's flat rate service) and potential compensation payments made to ELI." He asserts that such an approach provides the Commission with time to consider longer term solutions, ...cluding alternative cost recovery mechanisms for GTE's compensation costs.[22]

As a second option, GTE proposes that the Commission adopt a flat rate compensation mechanism for the exchange of ISP traffic between carriers. GTE witness R. Kirk Lee states that flat rate compensation is more appropriate for ISP traffic than MOU compensation because most GTE customers using the Internet pay flat rates for basic local services. Under a usage based compensation arrangement, the payments made to competitive carriers for terminating traffic are unlimited and may exceed the fixed revenue collected by GTE from the end user customer. Mr. Lee maintains that it is unreasonable to expect GTE to pay more out in reciprocal compensation than it receives in revenue from customers originating the traffic.[23]

In addition to the expense associated with reciprocal compensation, Mr. Lee states that ISP traffic increases GTE's costs dramatically because additional network facilities must be constructed to handle increased traffic flow caused by Internet usage. A study conducted for GTE by Hewlett Packard Company found that ISPs use between 3-10 times the switch resources used by all the other subscribers on the switch. As a result, Mr. Lee claims that GTE is forced to incur additional capital costs for switch ports, trunks, facilities and processing capability that are not built into GTE's current retail rate structure. Unless GTE is provided with a mechanism to recover these costs, it will send an improper message to the telecommunications market, encouraging competitors to make uneconomic decisions and creating disincentives for facilities based competition.

To arrive at its flat rate calculation, GTE uses its Local Measured Service (LMS) usage costs, expressed on a flat rate per trunk basis, as a proxy for ELI's cost of

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the effect of creating a zero marginal price for each originating and terminating minute, it would lead to the inefficient overconsumption of access services in the long run. It would also promote dynamic inefficiency, since carriers would have little incentive to employ new lower cost technologies if they can continue to use interconnecting carrier facilities for a zero price.

[22] According to Dr. Beauvais, the optimal long-run compensation policy for originating and terminating traffic between and/or among certified telecommunications carriers is a comprehensive, usage based, "originating responsibility" plan. Such a plan would not rely on customer identity, jurisdictional classification, or technological differences in supplying telecommunications services. It would also require that the end user ultimately be billed for all calls. If compensation costs are on a minute of use or per call basis, the end user should see a rate structure reflecting these cost characteristics for economic efficiency purposes.

[23] Mr. Lee contends that this revenue loss scenario is exacerbated by the fact that basic service rates have historically been priced below cost and have been supported by contributions from toll and access services.

terminating ISP traffic in Oregon. GTE's calculation uses the average monthly minutes of local voice traffic as a starting point. GTE's LMS usage costs are based on the building block costs filed by GTE in docket UM 874, now pending before the Commission.

GTE's calculations assume that an Internet subscriber will be online for an average of 30 minutes per day, 30 days a month, for a total of 900 minutes per month.[24] This results in Internet bound traffic being attributed 68 percent of the per line terminating traffic costs, or $0.92 per month. At 900 minutes per month per Internet subscriber, a trunk filled to average capacity (i.e., 9,000 MOUs per month)[25] could carry the equivalent traffic of 10 subscribers. Multiplying $0.92 by 10 subscribers yields a rate of $9.20 per trunk per month.

ELI Position. ELI recommends that the Commission adopt a MOU reciprocal compensation mechanism consistent with the decision in USWC/Worldcom arbitration and other Commission arbitration proceedings. If a future binding decision is rendered that such traffic should be treated differently, ELI states that the interconnection agreement can be modified pursuant to Sections 31 and 32 of the agreement.[26]

ELI raises several objections to GTE's proposal to impose bill and keep or flat rate compensation arrangements for ISP traffic. First, ELI maintains that GTE has not

[24] This estimate is based on the HP study noted above, as well as studies completed by independent sources, such as America Online, Inc. (AOL). The HP study, conducted in Southern California in August 1997, found that the average call holding time for ISPs was greater than 23 minutes. All of the large ISPs studied had average call holding times between 20 and 30 minutes. With the continued growth of the Internet, GTE expects average holding times to have grown since the HP study was conducted. Mr. Lee states that this assumption was subsequently confirmed by AOL, who in May 1998, stated that Internet usage had tripled since it began offering an unlimited flat rate subscription plan. Before the flat rate plan, the average AOL user stayed online for 7 hours each month. After the introduction of the flat rate plan, that figure jumped to 23 hours per month. This equates to an average hold time of 46 minutes for each subscriber call to AOL, the largest Internet access provider in the country. Based on these studies, Mr. Lee maintains that a 30 minute average hold time for Internet calls is reasonable and conservative.

[25] According to Mr. Lee, GTE's internal studies show that this number may be closer to only 7,500 minutes per trunk for ISP traffic. However, he states that an average of 9,000 minutes is a widely accepted industry number that was originally used in the regulatory arena by the FCC in the Local Transport Restructure, Docket No. 91-213. Mr. Lee asserts that 9,000 minutes per trunk is a conservative estimate of usage per trunk.

[26] Section 31 of the interconnection agreement provides that the interconnection agreement "shall at all times be subject to changes, modifications, orders, and rulings by the Federal Communications Commission and/or the applicable state utility regulatory commission to the extent the substance of this Agreement is or becomes subject to the jurisdiction of such agency." Section 32 of the agreement provides "GTE and ELI further agree that the terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was produced. Any modifications to those requirements that may be prescribed by final and effective action of any federal, state, or local governmental authority will be deemed to automatically supercede any terms and conditions of this Agreement. Notwithstanding this section, neither Party waives any rights it otherwise has to dispute any action taken or not taken by the other Party in reliance on this section 32."

presented any evidence to show that there is any difference in cost between terminating traffic to ISPs and terminating traffic to non-ISPs. Mr. Peters asserts that the telecommunications network functions required to terminate ISP traffic are no different from the functions required to terminate local calls of any other end user customer. Applying a flat rate compensation mechanism to ISP traffic and an MOU based mechanism to non-ISP traffic will inevitably result in different levels of compensation for indistinguishable types of traffic.

Mr. Peters states that there is nothing inherently wrong with using a properly calculated flat rate port charge for reciprocal compensation purposes. However, aside from the fact that GTE's proposal applies only to ISP traffic, Mr. Lee's testimony indicates that it is also designed to link "reciprocal compensation expense with its associated costs and the revenues received from local ratepayers." Mr. Peters maintains that the revenues GTE receives from its local ratepayers are unrelated to the cost of terminating traffic to ISP customers.

ELI maintains that this arbitration proceeding is not an appropriate forum to examine the cost estimates and assumptions underlying GTE's flat rate compensation proposal. Mr. Peters points out that GTE's calculations incorporate cost estimates from studies that have not been adopted by the Commission. He further emphasizes that the Commission has previously determined that GTE's prices for interconnection and unbundled network elements shall be based on the costs and prices approved for USWC until such time as GTE-specific costs and prices are approved. *See e.g.*, OPUC docket UM 351, Order No. 96-283 at 8-10. While GTE-specific cost estimates are currently under review in OPUC docket UM 874, no GTE-specific interconnection and unbundled network element costs or prices have been approved to date.

ELI disputes several of the input assumptions included in GTE's flat rate proposal. For example, GTE's calculation attributes 68 percent of line terminating traffic "costs" to ISP-bound traffic based on estimates of average hold times of calls to ISPs. Even if these hold time estimates are accurate, Mr. Peters claims that it is inaccurate and misleading to characterize this as an assignment of cost. He asserts that the adjustment proposed by Mr. Lee "has nothing to do with the cost of terminating traffic to ISPs as opposed to terminating traffic to non-ISPs." Mr. Peters further maintains that GTE has not shown how it would separate ISP traffic from non-ISP traffic. Accordingly, there is no explanation of how GTE's proposed flat-rate trunk charges would apply.

Mr. Peters also emphasizes that GTE's opposition to MOU based compensation structure is inconsistent with positions the company has taken in other proceedings regarding reciprocal compensation. He points out that GTE has advocated MOU based compensation in prior Commission proceedings, notwithstanding the existence of a flat-rate retail rate structure. Mr. Peters further alleges that GTE has consistently opposed both bill and keep and flat-rate compensation mechanisms until now.

Decision – Issue No. 2. For the reasons stated by Dr. Beauvais, I am inclined to agree with GTE that intercompany reciprocal compensation arrangements should be examined in the near future to determine whether such arrangements should be revised to correspond with retail rate structures authorized by the Commission. It is possible that usage based reciprocal compensation payments may have revenue impacts upon originating carriers where end user customers pay flat local service rates. While it may be economically efficient to implement measured rates for local service, such an outcome is highly unlikely in Oregon given the existing statutory scheme and long standing regulatory policy favoring flat rate local service. That being the case, the most likely approach to deal with this issue is consider reciprocal compensation arrangements that correspond with the prevailing flat rate retail rate structure.

While intercompany compensation arrangements should be reevaluated at some point, I agree with ELI that it is inappropriate to adopt separate reciprocal compensation rates for ISP traffic in this proceeding. There are a number of reasons for this decision:

(a) GTE has not shown there is any difference in cost to terminate ISP traffic as opposed to non-ISP traffic. Absent such a showing, it is difficult to justify applying one compensation rate to ISP traffic and another compensation rate to non-ISP traffic. It is also difficult to reconcile GTE's proposal with §252(d)(2)(A) of the Act and §51.705 of the FCC rules, which contemplate that rates paid by telecommunications carriers for transport and termination of traffic will be based on cost.

GTE asserts that ISP traffic requires the construction of additional network facilities to handle increased traffic flows, thereby dramatically increasing its costs. It is difficult to attach much weight to this claim because the costs alleged by GTE have not been identified or quantified in detail. In order to demonstrate that ISP traffic is responsible for additional costs, GTE must make a more comprehensive showing concerning its network operations and costs. I cannot conclude that ISP traffic imposes greater costs than other types of traffic based on the evidence presented in this proceeding.

Furthermore, some of the additional costs identified by GTE may not be eligible for recovery through termination rates. According to Mr. Lee, ISP traffic is responsible for major capital expenditures for "switch ports, trunks, facilities and processing capability."[27] The FCC has concluded that non-traffic sensitive costs, such as the costs of loops and line ports associated with local switches do not constitute "additional costs" that are appropriately recovered through termination rates. *First Report and Order* at ¶1057. It is unclear from the record whether any of the costs identified by Mr. Lee include such non-traffic sensitive costs.

(b) GTE has not substantiated its claim that it will incur losses unless a separate compensation structure is adopted for ISP traffic.[28] Specifically, GTE has not shown that ELI has a disproportionately greater number of ISP customers than GTE or that GTE

[27] GTE Exhibit/5, Lee/7.

[28] *Id.* at 3.

customers generate a significantly greater amount of Internet traffic for termination by ELI than *vice versa*. Absent such a showing, the harm alleged by GTE must be considered speculative.

Moreover, I agree with ELI that the revenue concerns identified by GTE are not relevant for purposes of establishing reciprocal compensation rates for transport and termination of local exchange traffic. As emphasized above, the relevant consideration is the cost of transporting and terminating traffic.[29] *See e.g.*, 47 CFR §51.705, *First Report and Order* at ¶¶1054-1058.

(c) There is no basis in the record for adopting the bill and keep arrangements recommended by GTE. Section 51.713(b) of the FCC rules authorizes state commissions to impose bill and keep arrangements where there is evidence that traffic between interconnecting carriers is roughly balanced and is likely to remain so.[30] Subsection (c) of that rule provides that state commissions may presume that traffic between carriers will be balanced unless the presumption is rebutted.

Since is no evidence in the record concerning the traffic between ELI and GTE, there is no basis upon which to conclude that ISP traffic between those carriers will be in roughly in balance. Nor is it appropriate in this case to presume that traffic will be in balance. Indeed, GTE has proposed using a different compensation structure for ISP traffic precisely because of its concern that ISP traffic will *not* be balanced; *i.e.*, that GTE customers will originate a greater volume of traffic to ELI's ISP customers than *vice versa*. GTE cannot ask the Commission to presume a traffic balance for purposes of implementing bill and keep when the principal reason for requesting that compensation approach stems from its claim that traffic will be imbalanced.

Even if there were evidence showing that ISP traffic between ELI and GTE is balanced, GTE has not explained why bill and keep arrangements should be applied only to ISP traffic and not all of the traffic exchanged between those carriers.

GTE correctly observes that the Commission approved bill and keep arrangements as an interim reciprocal compensation method in docket ARB 2, an arbitration proceeding involving USWC and TCG Oregon. However, the facts in that case were different from those presented here. To begin with, the record in ARB 2 was sufficient to persuade the Commission that traffic was likely to be in balance. As noted above, there is no evidence in this record concerning the traffic exchanged by ELI and GTE. Second, the Commission approved bill and keep arrangements for the exchange of

[29] Even if it were proper to consider revenue considerations, there is not enough information in the record to justify singling out ISP traffic for reciprocal compensation arrangements. GTE has indicated that ISP traffic creates a potential for revenue erosion, but it is entirely possible that other types of local exchange traffic may generate similar concerns. This underscores the need for a more comprehensive examination of GTE's network operations and traffic.

[30] Interim bill and keep reciprocal compensation arrangements were adopted by the Commission in dockets CP 1, 14, and 15. *See* Order No. 96-021 at 52-61.

local traffic between USWC and TCG because it was consistent with intercompany compensation arrangements for *all local traffic* between ILECs and competitive carriers pursuant to Commission Order No. 96-021. GTE's bill and keep proposal in this case applies only to ISP traffic, not to all local traffic exchanged by ELI and GTE. Furthermore, the interim bill and keep compensation arrangements mandated in Order No. 96-021 have been terminated by the Commission.

(d) GTE did not provide any workpapers or studies to substantiate the cost data[31] used in its flat rate compensation proposal. The cost methodology and estimates used by GTE are currently under review by the Commission in docket UM 874. Those studies and cost estimates should not be used until GTE has demonstrated that they are fair and reasonable.

In its brief, GTE states that it would use costs and prices approved by the Commission in docket UM 844 in order to allay concerns regarding the use of costs and prices based on the UM 874 methodology. GTE's proposal may ease concerns relating to specific cost inputs, but there are a number of other assumptions incorporated in GTE's flat rate calculation that are not adequately explained in the record. For example, GTE uses local measured service costs, expressed on a flat rate per trunk basis, as a proxy for ELI's cost of terminating ISP traffic in Oregon. That may be a reasonable assumption, but there is nothing in the record to support that conclusion.[32] Likewise, GTE's assumptions regarding Internet usage are based on outside studies that are not included in the record and cannot be reviewed for reasonableness. Similar questions are raised by other input assumptions included in the flat rate calculation.

(e) The ramifications associated with adopting separate reciprocal compensation arrangements for ISP traffic have not been adequately explored in this proceeding. For example, it is unclear whether such arrangements will significantly disadvantage ELI *vis a vis* other telecommunications carriers that do not have separate compensation rates for ISP traffic.[33] There is also a significant possibility that imposing different reciprocal compensation rates for ISP traffic may translate into in retail rate changes for ISPs and their customers. These concerns indicate that it is more appropriate to evaluate such issues in a proceeding where all types of traffic can be examined and other interested parties be heard from. The record in this case is not sufficiently comprehensive to permit a fully informed decision regarding the consequences of GTE's proposal.

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[31] Even if GTE had produced the studies to support its UM 874 cost estimates, it is doubtful there would have been enough time to adequately review GTE's cost methodology and input data because of the limited time to complete this arbitration proceeding.

[32] Indeed, Mr. Lee's decision to use GTE's LMS costs as proxy for ELI's cost of terminating ISP traffic seems to be inconsistent with Mr. Jones claim that "GTE's costs are not a suitable proxy for determining the actual costs of ELI for the transport and termination of telecommunications traffic." *Cf.* GTE Exhibit/5, Lee/4 and GTE Exhibit/3, Jones/11.

[33] Of course, the reverse might be true if ELI customers terminated more Internet traffic on GTE's network. As noted, there is no information in the record regarding the amount of Internet traffic terminated by either carrier.

For these reasons, I find that GTE's proposal to adopt a separate reciprocal compensation structure for ISP traffic should not be adopted in this proceeding. The usage based MOU reciprocal compensation rates otherwise agreed to by the parties shall be used for the transport and termination of local telecommunications traffic by GTE and ELI.

Issue No. 3 –What rate should be used to compensate ELI for the use of its switch?

As noted above, §251(b)(5) of the Act imposes a duty on LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic exchanged with other telecommunications carriers. To be just and reasonable, such arrangements must provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. In addition, the costs must be based on a reasonable approximation of the additional costs of terminating the calls. *See*, Section 252(d)(2)(A).

ELI and GTE disagree over the rate that should be used to compensate ELI for use of its switch when it terminates local traffic originated by GTE customers. ELI contends that it is entitled to compensation at the rate established for tandem interconnection. GTE, on the other hand, contends that traffic terminated by ELI should be compensated at the end office switching rate.

ELI Position. Mr. Peters emphasizes that ELI and GTE have very different network configurations. GTE's network, like other ILEC networks, is characterized by hierarchical switching centers arranged in a "hub and spoke" configuration. GTE's end offices are the termination point of the loops that connect end user customers to the network. These end offices, in turn, are connected to a tandem switch, which allows customers served by different end offices to communicate with each other.[34] A local call that ELI delivers to GTE at one of its tandems is switched at the tandem, transported to the serving end office, switched again at the end office, and terminated to the end user.

In contrast, ELI's network deploys a single switch that is connected to a fiber optic network comprised of interlocking rings. End users are connected to this network either directly or through ILEC facilities. A local call that GTE delivers to ELI at an interconnection point is routed over the network to the ELI switch, where it is switched once and routed to the ELI end user. Mr. Peters testified that ELI's network covers the same geographic area as GTE's tandem but uses fewer switches and more transport than GTE's "hub and spoke" network.

Although ELI believes that its network configuration serves its customers more efficiently, Mr. Peters states that this does not necessarily translate into lower costs to

[34] If sufficient traffic exists between end offices, GTE may also deploy direct trunking between end offices.

terminate local traffic. He proposes that the interconnection agreement require symmetrical compensation, consistent with the approach taken by this Commission, the FCC,[15] and other state commissions. Symmetrical compensation assumes that ELI and GTE incur the same costs to transport and terminate local traffic regardless of the fact that different network architectures are employed.

Because ELI's switch covers the same geographic area as GTE's tandem switch, Mr. Peters maintains that its it is entitled to compensation at the rate GTE receives when it terminates calls within its tandem coverage area. Mr. Peters contends that this conclusion is required by §51.711(a)(3) of the FCC rules which provides:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

Section 51.711(a)(3) was vacated by the Eighth Circuit, but was reinstated by the U. S. Supreme Court in its January 25, 1999 decision. Mr. Peters points out that several state jurisdictions have adopted the FCC's approach.

GTE Position. GTE contends that ELI should be compensated at the end office switching rate when it terminates local traffic originated by GTE customers. Mr. Jones explains that ELI's switch does not perform the same functions as GTE's tandem switch.

Tandem switches perform two basic functions: First, they concentrate traffic from multiple incoming trunk groups with a common destination point and then switch that traffic to a single outgoing trunk group to the common destination.[16] Second, tandem switches perform only trunk to trunk switching. This allows more efficient use of the transport network than establishing direct trunk groups between end points where there is insufficient demand to economically justify a direct group.

Unlike tandem switches, end office switches do not perform trunk to trunk switching, but instead support a number of functions that tandems do not perform, such as line appearances, line to line switching, line to trunk switching, and trunk to line switching. Mr. Jones emphasizes that ELI's customers are connected to the line side of their switch, regardless of where those customers are located geographically. As a result, ELI's switch only functions as an end office switch.

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[15] Section 51.713 of the FCC rules requires symmetrical compensation with limited exceptions. *See also, First Report and Order* at ¶¶1085-1090.

[16] This also provides a means of combining traffic originating from subtending end offices to multiple destinations over a single trunk group and then switching that traffic to the proper destination at the tandem switch.

Decision – Issue No. 3. This issue was addressed by the Commission in the USWC/Worldcom arbitration proceeding.[37] In that case, the interconnecting carrier, Worldcom, operated a fiber ring network configuration similar to that described by ELI in this case. The Arbitrator concluded that tandem rate treatment should be adopted.

In Order No. 96-324, the Commission reversed the Arbitrator's decision. The Commission concluded that allowing tandem rate treatment for Worldcom's switch "did not comport with §252(d)(2) of the Act" because it "would not provide for mutual and reciprocal recovery of costs and would not lead to just and reasonable terms and conditions for reciprocal compensation."[38] It further held that "the Act requires the classification of a switch [to] be determined by functionality, not mere geographic scope of service" and agreed with USWC that the functions performed by Worldcom's switch were not similar to those performed by the ILEC's tandem switches.

The evidence presented in this case is consistent with the Commission's findings in the USWC/Worldcom arbitration. The testimony of GTE witness Jones indicates that the switch used in ELI's fiber ring network -- like the switch used by Worldcom -- functions differently from a tandem switch. Nevertheless, compliance with §51.711(a)(3) of the FCC rules requires that ELI's position be adopted.

At the time the USWC/Worldcom decision was rendered, §51.711(a)(3) was inoperative, having been stayed by the Eighth Circuit. The Eighth Circuit's subsequent decision to vacate that rule was reversed by the Supreme Court in its January 25, 1999 decision, meaning that §51.711(a)(3) is once again in effect. That rule clearly states that non-incumbent carriers should be compensated at the tandem switch rate if their switch serves a geographic area comparable to the ILEC's tandem switch. Mr. Peters' testimony that ELI's switch serves a geographic area comparable to GTE's tandem switch was not challenged by GTE. That being the case, ELI is entitled to compensation at the tandem rate in accordance with the FCC rule.

GTE challenges this interpretation in its brief, arguing that paragraph 1090[39] of the *First Report and Order* contemplates that the tandem rate should be used only as a

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[37] Order No. 96-324 at 4-5.

[38] *Id.* at 4.

[39] Paragraph 1090 of the *First Report and Order* states:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We therefore conclude that states may establish transport and termination rates in the arbitration process that vary according to whether traffic is routed through a tandem switch or directly to the end office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic

proxy for the non-incumbent carrier's costs and that functional considerations must also be taken into account. Although the paragraph 1090 does make reference to using the tandem rate as a proxy, §51.711(a)(3) unequivocally states that the tandem rate is "the appropriate rate" in circumstances such as those presented in this case. The language in paragraph 1090 may be reconciled with language of §51.711(a)(3) by concluding that the functions performed by a non-incumbent's switch are relevant only where the evidence shows that the non-incumbent's switch does not serve a geographical area comparable to that of the ILECs tandem switch. On the other hand, if the non-incumbent's switch covers a comparable area, §51.711(a)(3) requires that the tandem rate be used.

ELI has also proposed that the interconnection agreement provide for symmetrical reciprocal compensation. Section §51.711 requires that rates for the transport and termination of local telecommunications traffic shall be symmetrical except in limited circumstances not applicable here. Accordingly, the interconnection agreement shall provide for symmetrical compensation.

Arbitrator's Decision

1. The interconnection agreement between GTE and ELI shall specify that the transport and termination of ISP traffic exchanged by ELI and GTE is subject to reciprocal compensation.

2. The reciprocal compensation arrangements included in the interconnection agreement between GTE and ELI shall be symmetrical in accordance with 47 CFR §51.711 and assessed on a minutes of use basis. Separate reciprocal compensation arrangements shall not be implemented for ISP traffic.

3. The interconnection agreement between GTE and ELI shall specify that ELI will receive compensation at the tandem switch rate for use of its switch in accordance with 47 CFR §51.711(a)(3).

4. Within 30 days of the date of the Commission's final order in this proceeding, ELI and GTE shall submit an interconnection agreement consistent with the terms of this decision.

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area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

5. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the date this decision is served.

Dated at Salem, Oregon, this 12th day of February, 1999.

Samuel J. Petrillo
Arbitrator

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PA 17105-3265

JOINT PETITION OF SENATORS FUMO, MADIGAN AND WHITE THE PENNSYLVANIA CABLE & TELECOMMUNICATIONS ASSOCIATION AND 7 COMPETITIVE LOCAL EXCHANGE CARRIERS FOR ADOPTION OF PARTIAL SETTLEMENT RESOLVING PENDING TELECOMMUNICATIONS ISSUES	PUBLIC MEETING AUGUST 26, 1999 AUG-99-C-12 P-00991648
JOINT PETITION OF BELL ATLANTIC-PENNSYLVANIA, INC.; CONNECTIV COMMUNICATIONS, INC.; NETWORK ACCESS SOLUTIONS; AND THE RURAL TELEPHONE COMPANY COALITION FOR RESOLUTION OF GLOBAL TELECOMMUNICATIONS PROCEEDINGS	P-00991649

JOINT MOTION OF CHAIRMAN QUAIN AND
COMMISSIONERS ROLKA, BROWNELL & WILSON

Introduction

During most of the 20th century, local telephone service has been treated as a natural monopoly. The paradigm changed in Pennsylvania in 1993 with the enactment of Chapter 30 of the Public Utility Code. Pursuant to Chapter 30 of the Code, this Commission approved applications to provide competitive local exchange service in *Application of MFS Intelenet of Pa., et al.*, Docket No. A-310203F002, et al. (October 4, 1995) (*MFS-I*). These applications represented the first, facilities-based competition in the local exchange market for Pennsylvania since the first decades of the 20th century.

The national paradigm changed for the nation in 1996 with the enactment of the federal Telecommunications Act of 1996 (TA-96). Pursuant to TA-96, Congress mandated the opening of local telecommunications markets to competition.

This national initiative followed and dovetailed with Chapter 30's objective to maintain universal telecommunications service at affordable rates while encouraging the accelerated deployment of state-of-the-art, interactive broadband telecommunications services, and the introduction of a diversity in the supply of telecommunications services and service providers in rural, suburban and urban areas of Pennsylvania.

This proceeding represents an unprecedented and ambitious undertaking to resolve several interrelated dockets implementing state and federal telecommunications policy in the Commonwealth of Pennsylvania. Due to the complexity of the subject matter involved, we have up to this time proceeded to separately adjudicate individual telecommunications cases, with each case focused upon a particular issue or aspect of telecommunications regulation. See Exhibit A.

However, the litigation of telecommunications proceedings on an individual basis failed to produce satisfactory and expedient resolution of many issues. Moreover, the competition envisioned by Chapter 30 and TA-96 in the delivery of basic and advanced telecommunications services was slowed down by this approach. Consequently, this Commission attempted a settlement of issues on a "global" basis. This effort was partially successful, but parties remained far apart on many issues. Thereafter, two petitions were filed by groups of stakeholders each proposing competing solutions to the myriad of issues involved.

The competing joint petitions were consolidated and *en banc* hearings were held. After consideration of the record, including the petitions themselves, the evidence submitted at the *en banc* hearings held in June and July of this year as well as the main briefs and reply briefs filed by the parties, this motion proposes to resolve the issues raised in the petitions. Our consideration and approval of the terms of the two petitions, consistent with the modifications and discussion to follow, will provide an essential framework for resolving the affected dockets. Disposition of these proceedings consistent with this motion will also result in immediate returns for implementing robust competition in the supply of telecommunications services, products, and suppliers, while maintaining universal service at affordable rates.

The issues addressed in this resolution are: access charges; unbundled network elements (UNEs); enhanced extended loops (EELs) and other UNE combinations; interconnection; digital tariffs; calling areas; resale; Universal Service Fund Carrier Charge Pool; Lifeline programs; consumer education; rate caps and ceilings; the Internet and reciprocal compensation; operations support systems (OSS); separation of wholesale and retail operations; performance measures; competitive service designation; Section 271 approval; regulatory parity and filing requirements; abbreviated dispute resolution; and, resolution of certain pending dockets.

Our resolution is an aggressive move to jump-start competition in the local telecommunications markets. It will increase the number of local telephone companies consumers can choose from and boost investment in high-tech data and voice networks. While it is aggressive, it is also a fair and equitable resolution of the disputed issues. We are confident that it will serve the public interest.

I. ACCESS CHARGES

A. BA-PA's ACCESS CHARGE REDUCTIONS

1. Access charges represent the compensation paid by interexchange carriers (IXCs) and other competitive telecommunications providers to incumbent LECs for connection to their local networks. The record demonstrates that current

LEC access charges are priced substantially above cost, and that in order to maintain fair toll competition in Pennsylvania the current access charges of BA-PA, GTE, Sprint and the other incumbent LECs need to be reduced and restructured as set forth below.

2. Upon entry of the Commission's final order in this matter, BA-PA will use its 1999 Price Change Opportunity (" PCO") ($32.185 million) to reduce its traffic sensitive (local switching) access rate.

3. Upon approval by the Federal Communications Commission ("FCC") of BA-PA's section 271 application, but in no event later than one year following the effective date of the Commission's order in this matter, BA-PA will use $32 million, funded from its remaining PCO's through 2002 (i.e., PCOs that will be filed in November 1999, 2000, and 2001, to become effective January 1, 2000, 2001 and 2002, respectively), to reduce its traffic sensitive local switching charges to $0.009 per minute for originating local switching and to $0.009 per minute for terminating local switching. The remainder of the PCOs, if any, will be implemented consistent with its Chapter 30 obligations.

4. If BA-PA's total projected PCOs do not equal $32 million, the discrepancy will be reconciled as would typically be done in a 66 Pa. C.S. § 1307 proceeding, consistent with BA-PA's Chapter 30 obligations.

5. Beginning January 1, 1999, BA-PA shall use the annual 1998 PCO ($8.455 million) which was filed on November 14, 1997, at Docket No. R-00974221, with an original effective date of January 1, 1998, excepting the first year value, to reduce its carrier charge pool by $8.455 million annually. In addition, BA-PA shall also apply any interest accrued on $8.455 million as of January 1, 1998, to assist in reducing the carrier charge pool. As will be discussed under Lifeline in section IX, BA-PA shall use the first year's value of the 1998 PCO to fund its share of any contribution above the federal Lifeline level.

6. BA-PA shall use the annual 1997 PCO (approximately $6 million), to reduce its carrier charge pool by approximately $6 million annually.

7. The Carrier Common Line Charge ("CCLC") will be converted to a flat carrier charge on a revenue neutral basis as provided in the Small Company USF Plan contained in Appendix II of the petition filed at Docket No. P-00991649.

8. A number of interexchange carriers ("IXCs") have agreed to pass access charge reductions through to customers via direct reductions in standard measured toll service rates for residential and business customers. The Commission finds it would be useful and therefore directs all IXCs to file an annual report with the Commission, indicating how the access charge reductions have flowed through to the appropriate customer classes.

9. The $12 million BA-PA share identified in the Small Company USF will be used to size the fund but will not be a cap on BA-PA's contribution.

10. BA-PA's Carrier Charge will reflect resolution of the PCO determinations, with any accrued interest when BA-PA receives section 271 approval from the FCC, but in no event later than one year from the effective date of the Commission's order in this matter.

11. BA-PA's reductions in message toll service rates will reflect resolution of Intrastate Toll Originating Responsibility Plan ("ITORP") changes as they occur.

12. BA-PA's Carrier Charge will be included in the Commission proceeding referenced in section F below.

B. GTE's ACCESS CHARGE REDUCTION

1. GTE will conform to the terms of the Small Company USF Plan but will not be in the small company pool.

2. GTE will reduce originating and terminating traffic sensitive access charges to $0.009 per minute at each end, and the revenue impact ($7.2 million) of this reduction is captured in a separate GTE Fund which is established pursuant to this Motion.

3. GTE will convert its CCLC to a flat rate CC that is billed consistent with the Small Company USF Plan.

4. The GTE CC pool established pursuant to this Motion is initially set at $11.5 million. (Switched Access of $7.2 million, IntraLATA toll of $6.5 million, and estimated expense reductions of $2.2 million.)

5. GTE will reduce intraLATA toll rates to achieve an average rate of 11¢ per minute. The revenue impact ($6.5 million) of this reduction is captured in the GTE Fund.

6. GTE will use the basic structure of the Small Company USF and the GTE Fund will be included in the Commission proceeding referenced in the section F below.

C. SPRINT'S ACCESS CHARGE REDUCTION

1. Sprint will conform its Chapter 30 access charge reduction plan to be consistent with this Motion.

2. Sprint's access reduction plan will expire on December 31, 2003.

3. Sprint's traffic sensitive access rates are reduced to 2¢ per minute on each end coincident with the other parties' change.

4. Sprint has reduced its CCLC revenues by $16 million, resulting in a conversation minute of use rate of 11¢. The remaining CCLC revenues will be

shifted to the small company pool in the Small Company USF Plan, which will grow annually based on access lines and will be recovered from all telecommunications carriers on a proportional minute of use basis as per the Small Company USF Plan, consistent with its Chapter 30 obligations.

5. The access reduction will be offset in a revenue neutral manner by local rate increases of $12.1 million, or other rate restructuring (including the elimination of touchtone and zone charges) of $0.9 million, and receipt of funds from the Small Company USF of approximately $9 million. The size of the small company pool is calculated as per the Small Company USF Plan plus the amount required to fund the Sprint plan as described herein.

6. All access reform/rate rebalancing is revenue neutral.

7. ITORP access reductions from other ILECs are included in the revenue neutrality calculation and, therefore, this calculation is dependent upon knowing the correct access reductions of other ILECs.

8. Sprint will use the basic structure of the Small Company USF and the Sprint Fund will be included in the Commission proceeding referenced in section F below.

9. Sprint will pass through the access reductions it receives from the local exchange carriers ("LECs") on a dollar-for-dollar basis and will reduce its

average intraLATA toll revenue per minute proportionally to both residential and business customers.

D. OTHER INCUMBENT LOCAL EXCHANGE CARRIERS

1. The Rural Telephone Company Coalition ("RTCC") will convert its CCLC to a carrier charge consistent with their proposal contained in Appendix II of the petition filed at Docket No. P-00991649.

E. OTHER CLECS' ACCESS CHARGE COST SUPPORT

1. For new rate changes, the Commission will presume that CLEC access charge rates that are at or below the access rates (for origination and termination) of the local ILEC are reasonable, and it will not require cost documentation. This presumption does not preclude the CLEC from initiating a cost-based approach to the establishment of access rates. Nothing herein should be construed as requiring a CLEC to change its existing rates. This provision is intended to be consistent with the Commission's final order as it addresses Regulatory Parity/Filing Requirements at Docket No. L-00940095, as discussed in section XVIII.

F. COMMISSION INVESTIGATION

1. The Commission will initiate an investigation on or about January 2, 2001, to further refine its solution to the question of how the Carrier Charge (CC) pool will be reduced. At its conclusion, but no later than December 31, 2001, the pool will be reduced. The Commission will examine the appropriateness of a toll line charge (TLC) to recover any resulting reductions.

II. UNEs

1. The level of the rates charged by ILECs for unbundled network elements ("UNEs") and the nature of the service offerings made available are critical to the development of meaningful local competition in the Commonwealth. BA-PA's present UNEs and UNE rates are set forth in its Tariff at Tariff Telephone Pa.PUC No. 216 (Tariff 216).

2. The availability of high capacity, digital UNEs at reasonable rates will bring the benefits of advanced telecommunications services to Pennsylvania business and residential consumers much sooner than such services would otherwise be available. Accordingly, BA-PA shall continue to offer all UNEs now available to CLECs under Tariff 216 and will modify Tariff 216 as set forth below.

3. Within 30 days of The Commission's final order, BA-PA shall file tariff supplement to Tariff 216 ("Tariff Supplement 1"), which will become effective on one-day's notice, and will include the following modifications:

(a) BA-PA's rates for all UNEs will be reduced by 13.59%, from a current statewide average of $16.78 (as provided in the Commission's Order of August 7, 1997, in Application of MFS [III]). BA-PA's 2-wire UNE Loops will be reduced to an average of $14.50, specifically:

Density Cell 1	$10.65 per month
Density Cell 2	$11.20 per month
Density Cell 3	$14.75 per month
Density Cell 4	$17.75 per month

(b) The non-recurring loop qualification charge will be eliminated.

(c) BA-PA's rates for the switch port will be reduced to the following levels and will include two service offerings:

(i) A switch port rate option that includes all service features of the port which will be priced at $2.67 per port per month.

(ii) The basic local switching port function at a price of $1.90 per port, per month which includes all features in the port except 3-way calling (to be priced at $0.52 per month), centrex intercom (to be priced at $0.45 per month), custom ringing (\$0.16 per month) and calling number delivery blocking (priced at \$0.002 per call).

(d) BA-PA's switch usage rates will be reduced to the following levels:

(i) Originating Switch Usage: \$.001802 per minute of use;

(ii) Terminating Switch Usage: \$.001615 per minute of use.

4. Upon FCC section 271 approval, but in no event later than one year from the effective date of the Commission's order in this matter, BA-PA shall file a tariff supplement to Tariff 216 ("Tariff Supplement 2"), which tariff supplement will become effective on one-day's notice, and will modify Tariff 216 to reduce all UNE rates and will result in an additional 2.918%, except for the switch port and switching usage specified above for a total reduction of 16.508%. Specifically, this will result in 2-wire loop rates of:

Density Cell 1	\$10.25 per month
Density Cell 2	\$11.00 per month
Density Cell 3	\$14.00 per month
Density Cell 4	\$17.50 per month

This produces an average of \$14.01.

5. The tariff Supplements modifying Tariff 216 will offer and establish rates for additional UNEs as follows:

(a) ADSL loops: ADSL loops will be offered as UNEs priced at identical rates as 2-wire loops.

(b) HDSL loops: HDSL loops will be priced at identical rates as 4-wire loop rates.

(c) Dedicated DSlams: Dedicated DSlams will be offered in a virtual collocation-like arrangement, and as provided for in paragraph 6 below.

6. BA-PA will provide all network elements, alone or in combination, necessary to provide DSL services. If an issue arises as to the technical feasibility of a service or element, BA-PA will bear the burden of demonstrating that the provision of service or element is not technically feasible.

7. Any CLEC may request access to additional UNEs, beyond those provided for herein, by written request to the ILEC. If a satisfactory response from the ILEC is not received within 10 calendar days of the receipt of the request, any requesting CLEC may petition the Commission, requesting such UNE be offered.

8. Upon filing of Tariff Supplement 1, the Commission will institute an expedited proceeding to establish prices for any elements that have not been priced

by the Commission's Final Order, and will establish such prices under a Total Element Long Run Incremental Cost ("TELRIC") analysis.

III. EELS and UNE COMBINATIONS

1. UNE combinations must also be made available to CLECs if local competition is to occur. Providing UNEs to CLECs in combinations that are suited to the CLEC's facilities and CLEC customers' needs reduces costs and enables superior service because it avoids the need to recombine elements to provide service to customers. Additionally, providing UNEs in combination can result in less cost to the ILEC than separating the UNEs for recombining by the CLEC.

2. Tariff Supplement 1 and 2 to Tariff 216 shall include a UNE Platform ("UNE-P") service offering that allows CLECs to purchase, at a minimum, the loop, switch port, switch usage and transport elements as a combination at the prices included in Tariff 216, as modified by the Tariff Supplement. The service offering will be available to CLECs to provide service to all residential customers and to business customers with total billed revenue from local services and intraLATA toll services at or below $80,000 annually. After December 31, 2003, BA-PA may petition the Commission to request that UNE-P not be mandated for a given location(s) upon a showing that (a) collocation space is available, (b) collocation space can be provisioned in a timely manner and, (c)

upon consideration of the number of customers and revenues from those customers served by the CLEC from that central office location, that collocation represents a valid, reasonable economic alternative to the provision of UNE-P to that CLEC. BA-PA shall have the burden of proof in any such proceeding.

3. Tariff Supplement 1 and 2 will make UNE-P available to CLECs to provide local service (including vertical features), Basic Rate Interface ISDN, and Primary Rate Interface ISDN services to end users as further described herein.

4. There will be no glue charges associated with providing UNE-P as a combination of elements included in the Tariff Supplement 1 and 2, as there is no forward looking cost basis for a glue charge associated with the provision of UNE-P.

5. Tariff Supplement 1 and 2 will make all forms of the following combinations of elements available to CLECs at prices included in Tariff 216 as modified by the Tariff Supplement 1 and 2: a) Extended Loops and b) Enhanced Extended Loops (which combinations are known as "EELs") at speeds of DS0, DS1 and DS3 in all density cells.

6. Tariff Supplement 1 and 2 will make available to CLECs the following combinations of loop and transport:

(a) Voice grade and DS-0 loops with DS-0 transport;

(b) Voice grade and DS-0 loops with DS-1 transport without concentration;

(c) Voice grade and DS-0 loops with DS-1 transport with concentration;

(d) Voice grade and DS-0 loops with DS-3 transport without concentration;

(e) Voice grade and DS-0 loops with DS-3 transport with concentration;

(f) DS-1 loops with DS-1 transport

(g) DS-1 loops with DS-3 transport

(h) DS-3 loops with DS-3 transport.

7. BA-PA will provide all necessary multiplexing and concentration to provide these combinations as part of the interoffice transport function.

8. After December 31, 2003, BA-PA may petition the Commission to request that EELs not be mandated for a given location(s) upon a showing that (a) collocation space is available, (b) collocation space can be provisioned in a timely manner and, (c) upon consideration of the number of customers and revenues from those customers served by the CLEC from that central office location, that collocation represents a valid, reasonable economic alternative to the provision of EELs to that CLEC. BA-PA shall have the burden of proof in any such proceeding.

9. Tariff Supplement 1 and 2 will make EELs available to each CLEC, consistent with the Commission's Order, so long as the CLEC's usage of EEL combinations is consistent with federal law and applicable FCC decisions.

IV. INTERCONNECTION

1. The FCC Advanced Services Order (CC Docket No. 98-147, March 31, 1999) is an intervening event which requires the further development of certain record cost evidence and specific collocation alternatives.

2. The two Petitions merely address the non-recurring rates for conditioning caged, physical collocation. There is no record evidence of cost which would meet the FCC standards related to the pricing of collocation.

3. It is unclear that the various collocation alternatives offered in the two petitions are identical to the collocation offerings required by the FCC's Advanced Services Order. That order directed, inter alia, the offering of shared collocation cages, cageless collocation, and adjacent space collocation. We adopt the FCC Advanced Services Order.

4. Based on the foregoing concerns, the following is directed:

(a) Within 30 days of the effective date of the Commission's order in this matter, BA-PA will revise its Network Interconnection Services Tariff (No. 218) and its Statement of Generally Available

Terms ("SGAT") such that they fully comply with the FCC's Advanced Services Order. That revised tariff must, at a minimum, incorporate the following:

(1) To the extent they are consistent with the advanced Services Order, BA-PA will offer the 12 collocation alternatives identified in the petitions for settlement.

(2) Include a 90-day provisioning interval from the date BA-PA receives a deposit on collocation space from a CLEC to the date when BA-PA's work is completed.

(3) Incorporate the following non-recurring charges:

SCOPE	$ 1,859 for use of a cage
100 square foot cage	$13,012 per cage
200 square foot cage	$26,025 per cage
400 square foot cage	$52,050 per cage

(b) An expedited proceeding will be instituted to resolve collocation matters. The expedited proceeding must be completed within four (4) months of the effective date of the Commission's order in this matter. At a minimum, the expedited proceeding will include:

(1) The underlying cost studies and appropriate rates and charges for all collocation alternatives.

(2) The process by which technical issues are to be considered resolved and terms established such that CLECs may collocate DSLAMs and other equipment inside or adjacent to remote terminals.

(3) An examination of the 90-day provisioning interval.

(4) A determination of whether any BA-PA restrictions on access to virtually collocated equipment, the SCOPE collocation offering, termination of loops leased by collocating CLECs, and the provision of "parking lot" and "adjacent" collocation are reasonable and consistent with the FCC's Advanced Services Order.

(5) A determination of the appropriate procedures for performing joint inspections, and making available information on space exhaustion and physical collocation availability, in addition to the Internet posting discussed below.

(6) A determination of an appropriate penalty for failure to comply with the provisioning interval.

(c) Pending completion of the proceeding described above, BA-PA and the CLECs will adhere to the following collocation space standards:

(1) BA-PA has the burden to demonstrate that a particular application for any form of physical collocation is not technically feasible (47 C.F.R. § 51.321(d)) or that no space exists within or on a particular BA-PA premises for physical collocation (47 C.F.R. § 51.321(e)).

(2) A requesting CLEC seeking a particular collocation arrangement is entitled to a presumption that such an arrangement is technically feasible if any CLEC has deployed such collocation arrangement in any Pennsylvania ILEC premises.

(3) Within 10 days of receipt of a request for physical collocation, BA-PA must inform a requesting CLEC that either vacant space is available or physical collocation is not practical because of space limitations. BA-PA must file a

copy of the report with the Commission. If space is available, BA-PA must, within an additional 25 days, complete the planning and quote preparation process.

(4) Within 10 days thereafter, BA-PA shall submit to the Commission detailed floor plans or diagrams of any premises where BA-PA claims that physical collocation is not practical because of space limitations. In any such case, BA-PA must allow the requesting CLEC to tour the entire premises in question without charge, within ten days of receipt of BA-PA's floor plans. The CLEC may be accompanied by a staff member of the Public Utility Commission.

(5) For any case in which physical collocation is deemed by BA-PA to be impractical, the requesting CLEC may file a Petition for Dispute Resolution with the PUC to review BA-PA's denial. Within 25 days after service of the complaint, BA-PA must file a report with the Commission that includes information on the use of floor space, the amount of space used by collocators, the amount of space

used by third parties for purposes other than collocation, a description of plans for office renovation or expansion, and a description of plans for the conversion of space to collocation space.

(6) BA-PA must maintain a publicly available document, posted for viewing on BA-PA's Internet site, indicating all premises that are full, and must update such a document within 10 days of the date at which a premises runs out of physical collocation space. The document must provide the results of a BA-PA survey of all premises where collocation already exists or has been requested. The document must indicate the amount of space available for collocation, the number of current collocators, the amount of space being retained by BA-PA for future specific uses, and the measures BA-PA is taking to make additional space available for any premises that is space constrained. Within 30 days of the effective date of the Commission's order in this matter, BA-PA shall post the current availability of

collocation sites and continue to post the updates on BA-PA's Internet site.

(7) Within 90 days of the effective date of the Commission's order in this matter, interested CLECs will provide BA-PA a collocation forecast with a prioritized list of central offices in which collocation will be sought. BA-PA will use these forecasts to provide information on its Internet site beyond that information obtained in its initial survey.

(8) The Commission believes that interim and long-range forecasting of expected collocation needs is appropriate, although the details of these required forecasts can be developed in detail by the parties in the expedited collocation proceeding.

V. DIGITAL TARIFFS

1. BA-PA and all CLEC's shall request vendors to provide multi-hosting DSLAMs. Upon resolution of the issues associated with provision of multi-hosting DSLAMs, these arrangements shall be made available through BA-PA's Tariff 216.

2. CLECs are authorized to collocate digital subscriber line access multiplexers (DSLAMs) at remote terminals connected to the CO by fiber.

3. BA-PA may propose a reasonable dip charge for access for its loop qualification database.

4. Within 30 days of the effective date of the Commission's order, all CLECS shall provide a prioritized list of central offices, as revised semi-annually, indicating where they wish to have ADSL loop pre-qualification during the next three years. BA-PA shall integrate this list with its own Chapter 30 Network Modernization Plan and retail requirements. The parties to this action shall agree to a final prioritization consistent with BA-PA's Chapter 30 obligation of balanced deployment among rural, suburban, and urban areas.

5. BA-PA shall propose a cost-based, flat-rate engineering analysis charge to determine if a specific loop is qualified or could be qualified, even in an office that has not been surveyed; such request shall be initiated via the Local Service Request ("LSR") process, and the charge will be in addition to any charge for actually conditioning the loop. Commission approval shall be necessary prior to implementation of the engineering analysis charge and/or conditioning charge.

VI. CALLING AREAS

1. To prevent additional unforeseen costs to consumers, when an end user exercises choice in the marketplace and changes local carriers from an ILEC to a CLEC, calls placed by the end user which were local calls under the ILEC's rate schedule will remain local calls for CLEC service unless the customer affirmatively selects a calling plan which includes different local calling areas. This consumer protection will be applicable whether or not the carrier selected by the customer has an interconnection agreement with the affected ILEC. Where no interconnection agreement exists between the two carriers, the CLEC will not assess any termination charges on affected calls until such time as an interconnection agreement is finalized.

2. When a CLEC offers local exchange service to customers within a given ILEC exchange, all pre-existing ILEC extended area service routes will be

implemented by the CLEC. Neither ILECs nor CLECs may assess toll access charges for originating and terminating calls that terminate to a CLEC customer located in the pre-existing local calling area of the originating customer or any future expanded calling areas. Nothing in this section is intended to prevent CLECs or ILECs from offering innovative calling plans which include local calling areas that differ from existing ILEC local calling areas.

3. In addition to the above, and in order to ensure that ILECs and CLECs that employ rate bands or rate groups in the determination of a customer's monthly basic local exchange rates are able to accurately bill their end-user customers based on the number of access lines in the local calling area, ILECs and CLECs shall provide each other with an accurate count of access lines in each exchange of a local calling area on a recurring basis consistent with the ILEC's or CLEC's local exchange tariff.

VII. RESALE

1. Resale represents a non-facilities based mechanism by which CLECs can offer local telecommunications services to their customers. BA-PA's wholesale discounts will remain unaffected except as set forth in the Rural/Residential Promotion, which will allow residential and rural customers to

share proportionately in the more varied and advanced services at lower rates which competition will deliver to consumers.

2. BA-PA's Tariff Supplement will include a Rural/Residential Promotion consistent with the following:

(a) The Rural/Residential Promotion will be effective until BA-PA receives section 271 approval, but, in any event, no later than one year from the effective date of the Commission's order in this matter.

(b) Under the Rural/Residential Promotion, BA-PA's resale discount will be increased from 20.69% to 25.69%, without operator services, and from 18.43% to 23.43%, with operator services, for CLEC residential resale lines in Density Cell ("DC") 3 and DC4.

(c) BA-PA's resale discount for residential lines in DC4 will be increased by 2% for each 10% share of a given CLEC's total resold lines serving residential customers in DC4, with a maximum of a 6% incremental discount for DC4 residential resale lines.

(d) If a CLEC qualifies for the incremental DC4 discount set forth in subparagraph (c), the CLEC will qualify for an additional 1% discount in DC1, DC2, and DC3 for each 5% share of the CLEC's total resold lines which are serving residential customers in those density cells, with a maximum incremental discount of 5%.

(e) Each carrier which qualifies for the incremental discounts set forth in subparagraphs (c) and (d) above will submit a monthly report to the Commission which documents the CLEC's eligibility for the incremental discount.

(f) BA-PA must make ICB contracts available for resale at a wholesale discount. However, we are mindful that the discount rates established for application to BA-PA at R-00963578 did not anticipate our rulings in this proceeding and we invite BA-PA to file a proposed resale discount rate that would be applicable to the resale of ICBs.

VIII. UNIVERSAL SERVICE FUND CARRIER CHARGE POOL

1. A Universal Service Fund ("USF") is a means to reduce access and toll rates for the benefit of the end-user and will encourage greater toll competition, while at the same time continuing to maintain the affordability of local service rates.

2. The Commission will issue proposed regulations for the implementation and administration of the USF.

3. The Pennsylvania USF will be sized in accordance with Appendix A attached to the 1649 Petition, plus our allowance for Sprint's participation, except that BA-PA's contribution shall not be capped.

4. The USF will operate to reduce customer bills that exceed the local rate cap of $16.00 per month.

IX. LIFELINE

1. It is necessary and appropriate to protect the telecommunications needs of low income consumers, which includes maintaining and, if possible, increasing the level of subscribership in Pennsylvania. While Lifeline programs have provided much needed assistance to Pennsylvania's low income telephone customers, certain characteristics of the existing programs have limited Lifeline participation and have reduced the dissemination of benefits. Improved Lifeline programs are essential to ensure that the benefits of local telephone competition will be shared by all customers and that all citizens of Pennsylvania will have access to telephone service if desired. Accordingly, the following program shall be implemented.

2. Within 60 days following the effective date of the Commission's final order in this matter, each LEC operating in the Commonwealth will take all necessary steps to modify their Lifeline programs consistent with the following:

(a) All Lifeline programs will be targeted to improve telecommunications penetration rates among low income customers.

(b) Each LEC will provide Lifeline benefits at least equal to the Lifeline benefits offered by that LEC today.

(c) On the effective date of the Commission's order in this matter, threshold eligibility for Lifeline for each LEC will be expanded from 100% to 150% of the poverty level. Lifeline will be provided as set forth below:

- The current Lifeline Program, which provides for a reduction of $9.00 monthly for customers whose income level is 100% of the poverty level or below, shall remain unchanged.
- For future Lifeline customers whose income level is 100 to 150% of the poverty level, the monthly discount will be $5.25, with restrictions on vertical services, except that all such customers shall be eligible to purchase one vertical service, obtained at tariffed rates.
- No customer with an overdue balance for vertical services will be permitted to obtain vertical services while enrolled in the Lifeline program.

3. A mechanism of eligibility verification that is not unduly burdensome will be sought from and negotiated with the Pennsylvania Department

of Welfare. There will be no automatic enrollment, but BA-PA will work with the other parties to this action and with the Pennsylvania Department of Public Welfare to increase customer utilization of this program.

4. BA-PA will provide an annual report to the Commission and interested parties (including OCA, OSBA, City of Philadelphia, PULP, and the Council on Utility Choice) of the status of the Lifeline, LinkUP and Universal Telephone Assistance Program ("UTAP") programs including information regarding telephone penetration rates on county and state levels and segmented by income, rental/ownership of residence and other socio/economic demographics as used in the FCC/Joint Board Lifeline and LinkUp Reports together with such other information as the Commission may prescribe.

(a) Eligibility verification for Lifeline and LinkUp will be identical to and will reflect the following guidelines presently employed to determine LinkUp eligibility.

(1) income at or below 150% of the federal poverty income guidelines;

or

(2) enrollment in General Assistance (GA), Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI), Medical Assistance (MA), Low

Income Home Energy Assistance Program (LIHEAP), Food Stamps, and State Blind Pension (SBP).

5. BA-PA will fund its share of any contribution above the federal level from the first year value of the 1998 PCO (which was filed on November 14, 1997, at Docket No. R-00974221, with an original effective date of January 1, 1998), previously unexpended Lifeline funds, and, to the extent necessary, other funding sources.

6. Nothing in this section is intended to reduce or replace BA-PA's continuing obligation to fund the UTAP program at current levels.

X. CONSUMER EDUCATION

1. Competition in long-distance telephone service has been a reality for 15 years and, while customers are experiencing lower long distance rates as a result of competition, customers do not feel they have the information to take advantage of the opportunities or are able to cut through the clutter in the marketplace. The advent of a newly competitive market for local telephone service may create similar confusion among consumers about their new choices.

2. In order to mitigate that confusion, we will create a three year education program with the following objectives

(a) Build universal awareness of how telephone regulation has changed and what this means to consumers throughout the Commonwealth.

(b) Provide information on how and why to shop for a local telephone service provider.

(c) Conduct special programs to address the consumer education needs of all constituencies, including those with limited incomes, people with disabilities, people in rural and urban areas, seniors, and people of diverse ethnic and cultural backgrounds.

(d) Work with the Office of Consumer Advocate, community based organizations and other agencies to educate consumers about their rights with respect to slamming and cramming.

(e) Encourage residential and small business customers to explore the new marketplace envisioned by our action here.

(f) Educate customers on how to evaluate their options in the new marketplace.

(g) Explain to customers that this new opportunity should expand the range of choices now available in selecting a telecommunications provider.

3. In order to assist the Commission in meeting these consumer education objectives, we will establish a non-profit 501(C)(3) corporation: The Council on Utility Choice. The Council shall be composed of consumer and utility representatives and serve at the pleasure of the Commission. The Council shall be comprised of the following: the president of the PTA; the Consumer Advocate; the chair of the Pennsylvania Public Utility Commission's Consumer Advisory Council; a representative of the Governor's Advisory Commission on African American Affairs; a representative of the Governor's Advisory Commission on Latino Affairs; the Executive Director of the Pennsylvania Rural Development Council; the Executive Director of the Community Action Association of Pennsylvania; two professional educators and a Public Utility Commission representative who will be designated by the Chairman. All funds directed toward consumer education as a result of this proceeding will be directed to the Council on Utility Choice.

4. All telecommunications carriers will support the Education Campaign by making contributions to the fund semi-annually. The first contribution will be due within thirty (30) business days of entry of the order. Telecommunications carriers will not pass through the Consumer Education contributions to end users.

5. The total budget of the Consumer Education Fund will be as follows:

(a) $8.8 million, based on $0.33 per access line for each year of the program.

(b) The amount of the contribution will be recovered from all carriers on a proportional minutes of use basis, similar to the Carrier Charge allocation to toll carriers.

XI. RATE CAP/CEILING

1. BA-PA's rates for protected services, as defined in 66 Pa. C.S. § 3002, shall be capped at current levels in effect at the time of the Commission's final order in this matter until December 31, 2003. The rate cap precludes a shifting of costs between customer classes due to the designation of any of BA-PA's services as "competitive" under 66 Pa. C.S. § 3005.

2. As to all other ILECs, a rate ceiling will be implemented which caps the one-party residential local rates of each such ILEC, including charges for dialtone, touchtone, and local usage, at $16.00 per month until December 31, 2003. As set forth below, if such ILEC's one-party residential rate above $16.00 per month is found to be just and reasonable by the Commission, the revenue associated with the difference between the rate ceiling and the approved rate will be recovered from the Pennsylvania USF.

3. There shall be no increases to protected service rates for any ILEC except as otherwise provided herein for the purpose of offsetting or recovering the reduction of switched access or toll rates charged by an ILEC prior to December 31, 2003.

4. Additionally, there shall be no SLC assessed on the bills of any ILEC which is designed to recover revenues associated with the reduction of either

switched access rates or toll rates unless and until determined by the Commission in the context of the investigation described in section I. F).

5. As will be discussed in section XVI, certain of BA-PA's local services for certain business customers will be classified as competitive under 66 Pa. C.S. § 3005, resulting in deregulation of rates and earnings for those services to those customers. Until these certain business services are deemed competitive for all business customers, it is necessary to maintain certain consumer protections applicable to affected customers to assure that the customers are not adversely impacted by the competitive classification. Accordingly, BA-PA shall maintain existing tariffs on file for the affected competitive services and customers which will assure that, at a minimum, the affected customers maintain the ability to purchase services classified as competitive at existing rates. Such tariffs will act as a rate cap on these services and will assure that the affected customers get any benefit associated with competitive classification without risking increases in rates as a result of such classification.

XII. INTERNET/RECIPROCAL COMPENSATION

1. Internet calls shall continue to be treated as local for the purpose of intercarrier compensation. This determination is consistent with the recent FCC ruling, which held that calls initiated by a consumer that are destined for an

Internet service provider are jurisdictionally interstate in nature. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (Feb. 26, 1999).

2. The FCC did not conclude, however, that reciprocal compensation should not be paid on such calls. To the contrary, the FCC held that each state should continue to determine how it would treat such calls for purposes of reciprocal compensation and other intrastate purposes. We have already ruled that calls destined for an Internet service provider which are dialed within a local calling area should be considered to be "local" for purposes of reciprocal compensation agreements. Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of section 5.7.2 of its Interconnection Agreement with BA-PA Atlantic-Pennsylvania, Inc., Docket No. P-00971256 (June 16, 1998). The decision made herein is consistent with and an expansion of that decision.

3. The Commission fully expects that the current interconnection agreements regarding reciprocal compensation for the local treatment of internet calls shall be fully abided by, consistent with the FCC's decision and this determination.

XIII. OSS

1. All issues related to OSS testing shall be resolved consistent with the Commission Order of April 2, 1999 at Docket Nos. M-00991228 and P-00991643.

XIV. SEPARATION OF WHOLESALE/RETAIL OPERATIONS

1. BA-PA, a wholly-owned subsidiary of Bell Atlantic Corporation ("Bell Atlantic"), controls a substantial portion of the local service market in Pennsylvania. Bell Atlantic proposes to merge with GTE Corporation ("GTE"), another telecommunications holding company whose subsidiary, GTE North, Inc., controls the second largest local service market share in Pennsylvania. This proceeding affects only Pennsylvania operations and is completely separate from the Joint Application of Bell Atlantic and GTE for approval of their agreement and plan of merger, at docket numbers A-310200F0002, A-311350F0002, A-310222F0002, and A-310291F0003.[1] Should the merger be approved, Bell Atlantic will then control the two subsidiaries operating in Pennsylvania with the largest local service market shares.

2. Separate and apart from the issues contained in the above-referenced proceeding, we conclude for purposes of this docket that structural separation is

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1 The merger of these two holding companies, Bell Atlantic and GTE, has a much larger scope than just Pennsylvania operations. Because their holding companies have subsidiaries operating in Pennsylvania, this Commission is required to review that application as a separate matter and will do so at the appropriate time. As to this proceeding, our review involves only the subsidiary's operations in Pennsylvania. For instance, the structural separation requirement imposed by this section only applies to BA-PA and would not require repositioning of any properties that would affect the network infrastructure commitments of these companies under Chapter 30 or otherwise. First, it is our intent with this proposal, that the network infrastructure will remain intact as part of the wholesale business operation, and secondly, this proposal sets in place a procedure that will insure an adequate review of the positioning of each element of BA-PA's operations. This process is completely consistent with the legislative mandates of Chapter 30 and is the most effective way to eliminate unfair competition in the supply of local telecommunications services. It will not, however, have any application to the way in which Bell Atlantic and GTE merge or operate their holding companies.

the most efficient tool to ensure competition where a large incumbent monopoly controls the market. BA-PA controls over 90 percent of the local service market in its service territory at this time. This competitive presence strongly supports our conclusion that structural separation is necessary to provide the competition envisioned under Chapter 30 of the Public Utility Code and the federal Telecommunications Act of 1996.

3. The federal Telecommunications Act and our own statutory mandate under Chapter 30 of Title 66 have as goals the provision of competitive services by alternative providers on equal and/or non-discriminatory terms. Both legislative enactments envision a telecommunications arena where competition creates savings and technological innovation for our nation and the Commonwealth. Both utilize and/or authorize structural separation as a regulatory tool to implement a competitive market where unfair competition may result absent its implementation.

4. BA-PA asserts that we have no legal authority to require structural separation of its wholesale and retail business operations nor in fact even the authority to require adherence to a code of conduct beyond that presented in its petition. BA-PA is incorrect. The legislative mandates noted above, as well as the Commission's general powers to regulate utilities, most certainly contemplate the

utilization of the most efficient regulatory tools to open and maintain competitive markets and protect the public interest.

5. The Telecommunications Act ("Act") requires that BA-PA provide certain services through a structurally separate affiliate. Those services are: (1) manufacturing activities, as defined in section 273(h) of the Act; (2) origination of interLATA services other than incidental interLATA services, out of region services, or previously authorized activities (each as defined in the Act); and, (3) interLATA information services other than electronic publishing and alarm monitoring services (both as defined in the Act). Section 272(b) of the Act defines structural separation and sets forth substantially the same requirements which were suggested in the 1648 petition.

6. The Telecommunications Act envisions BA-PA's structural separation taking place prior to BA-PA's offering of long distance services. It is entirely consistent with that provision that the Commission order structural separation of the wholesale and retail arms of its business at this time. The goal is the same; to ensure fair competition and marketing of activities and services in an emerging competitive market. State law supports structural separation as well. See 66 Pa. C.S. § 501; 3001(3); 3001(5); 3005(h).

7. Nevertheless, we recognize that this record does not contain the necessary detail for the Commission to actually implement immediate structural separation of the wholesale and retail business operations. Consequently, BA-PA and all other parties shall have a further opportunity to develop the record necessary for the Commission to make an informed decision regarding the implementation of structural separation. It is important, however, that we make clear at this time that structural separation is the alternative we have chosen. Therefore, we commit to examining and considering the newly-created record in detail so as to achieve structural separation and to assure a fair transition in a manner that is not confiscatory to BA-PA.

8. For the foregoing reasons, we will direct the structural separation of the wholesale and retail business operations of BA-PA in order to create a competitive telecommunications market in the Commonwealth. To accomplish this, we will open a separate proceeding in order to allow BA-PA and all other parties a full and fair opportunity to present evidence as to why certain elements should or should not be separated, and specifically to allow BA-PA the opportunity to demonstrate that separation of certain elements of its system will be too burdensome or will result in a confiscatory expenditure. We envision that current cost studies will be conducted and at the conclusion of the structural

separation proceeding, we will have before us a complete record which will allow us to implement separation in a way which guarantees fair competition while at the same time ensuring that BA-PA can successfully compete.

9. Accordingly, as part of the final Order in this matter, BA-PA shall be ordered to file and serve on the parties to this proceeding, within 60 days of the entry date of the Commission Order, a plan that creates a separate affiliate to supply retail telecommunication services which will operate independently from the BA-PA wholesale operations.

(a) The plan shall be of sufficient detail to identify each component or element of retail service needed to be structurally separate and to allow a current and verifiable cost analysis of each component or element, and to provide the Commission with such cost analysis.

(b) Where BA-PA is of the belief that excessive cost or duplication will be required for a specific element to be structurally separate, it shall file a mitigation proposal for that element. BA-PA shall bear the burden of providing the Commission with the necessary current and verifiable cost support on this issue. Failure to do so shall result in the structural separation of the specific element as the Commission deems appropriate.

(c) The plan shall meet the structural and transactional requirements similar to those required by the Telecommunications Act for a separate affiliate to provide long distance service.

(d) Parties to this proceeding shall file comments within 60 days of service of BA-PA's structural separation plan and/or mitigation proposal regarding each element or component of said plan.

(e) Where a party disputes that BA-PA's characterization of an element is impractical for separation, and BA-PA has provided cost documentation and analysis in support of that argument, the party shall provide appropriate analysis and evidence supporting its position.

(f) The Commission will review the plan and/or alternate proposals and comments, and order implementation of specific elements where there are no contested facts.

(g) If the Commission's review reveals disputed facts concerning a specific element of the structural separation, the Commission will refer that element to the Office of Administrative Law Judge for an expedited hearing and recommended solution to be completed and returned to the full Commission within 90 days.

10. This procedure will allow the necessary detail to be established to fully implement structural separation of the wholesale and retail business operations of BA-PA while ensuring that excessive cost and duplication of assets and employees are kept to a minimum. During the course of this Structural Separation Proceeding, BA-PA should implement a functional separation of its wholesale and retail business operations by a separate division and shall abide by the Code of Conduct, a copy of which is attached to the Motion as Exhibit B. The parties to this proceeding, and the appropriate Commission offices implementing the structural separation decision we reach today, shall do so with a view to facilitating a final Commission order implementing structural separation within one year of the effective date of the Commission's final order in this matter.

XV. PERFORMANCE MEASURES

1. In the related performance measures docket, P-00991643, the Commission will establish performance measures and standards, including self-executing remedies to prevent and provide disincentive for backsliding, which will be implemented within 90 days from the effective date of the Commission's final order in this matter, unless otherwise ordered.

2. Upon implementation of performance measures and standards, and until December 31, 2003, the ILECs will submit a monthly report to the Commission and to all CLECs which provides the results of its compliance with established measures and standards.

XVI. COMPETITIVE SERVICE DESIGNATION

A. TOLL SERVICE

1. Effective upon BA-PA's receipt of section 271 approval from the FCC, BA-PA's intraLATA toll service will be designated competitive under 66 Pa. C.S. § 3005.

2. With respect to service level imputation, total toll revenues must exceed total imputed switched access and carrier charges on an aggregated toll services level.

B. BUSINESS SERVICE

1. Upon the Commission's final order in this matter, BA-PA business services will be declared competitive per 66 Pa. C.S. § 3005 for customers generating $80,000 or more in annual total billed revenue ("TBR"), where LNP. i.e. Local Number Portability is available. BA-PA Total Billed Revenue ("TBR") is billed revenue from all tariffed services.

2. Business services will remain available to all business customers at current rates under Commission-approved tariffs until January 1, 2003.

3. Customers generating less than the $80,000 threshold will be governed by existing business tariffs. For business customers generating between $40,000 and $80,000 in annual TBR, BA-PA may offer ICB contracts where: (a) the customer already subscribes to local exchange service from a CLEC; or (b) the customer actually has received a bona fide bid with stated terms and conditions for local exchange services from a CLEC. One year after LNP is available statewide in BA-PA's service territory, BA-PA may offer ICB contracts for customers generating between $10,000 and $40,000 in annual TBR under the same conditions as listed in the prior sentence. However, in no case can the ICB offering be below BA-PA's cost. BA-PA will file with the Commission under proprietary seal all ICB proposals at the same time as the proposal is presented to

the customer. BA-PA will file with the Commission all ICB contracts under proprietary seal.

4. Any multi-year contract with a business customer executed within one year of FCC section 271 approval is subject to commission review and revision under federal law and 66 Pa. C.S. § 508, as applicable, if there is an allegation that the contract constitutes an anticompetitive action. Thereafter, the Commission shall exercise the powers granted to it by federal law and section 508 as it deems appropriate.

5. If BA-PA waives, or offers to waive, termination liability in any contract in return for re-signing its customer, BA-PA must also waive such liability for a 90-day period to permit that customer to switch to a competitive carrier. BA-PA must also send the customer a Miranda Warning-type letter describing the waiver provisions of a settlement. Receipt of the letter triggers the 90-day cooling-off period, during which the BA-PA contract in question may be canceled without incurring any termination liability.

6. Competitive business services are subject to imputation on a total services/total business activity basis (i.e. Centrex, toll, special access, all business services, etc.).

7. After providing written notice to the Commission, BA-PA will reduce the $80,000 threshold for business services declared competitive based upon the following schedule:

(a) For customers generating $40,000 or more in TBR, one year after LNP is available throughout BA-PA's service territory; and

(b) For customers generating $10,000 or more in TBR, two years after LNP is available throughout BA-PA's service territory.

XVII. SECTION 271 APPROVAL

1. As part of the process of establishing the terms and conditions necessary to opening Pennsylvania's local markets to competition, procedures governing review of BA-PA's entry into the in-region long distance market should be developed to provide certainty as to the guidelines BA-PA should follow in seeking approval of its section 271 application by the Commission and the FCC.

2. Upon the Commission's final order in this matter, and upon a determination that BA-PA has passed the independent third-party OSS test, the Commission will open a new docket in order to develop a comprehensive factual record relating to review of whether BA-PA's entry into in-region long distance markets is justified. ("section 271 docket")

3. Following initiation of the section 271 docket, a 90-day commercial availability period will be commenced which will be designed to allow CLECs to test and evaluate the OSS which have passed the test of the independent third party in a real commercial setting. During the commercial availability period, CLECs will place orders over BA-PA's OSS for elements, combinations and service arrangements consistent with the Commission's final order to determine if the requests for service are pre-ordered, ordered, provisioned and billed in a manner which is transparent to end users and is equivalent in its dependability and efficiency to the systems which process long distance customer choice today.

4. Within 5 days of close of the first 30 days of the commercial availability period, BA-PA will submit a detailed report to the Commission and the parties to this action which provides data regarding the results of the first 30 days of commercial availability. Within 10 days of the submission of BA-PA's report, interested parties, including the parties to this action, may submit a responsive report which addresses BA-PA's report. Both reports will be included in the record of the Commission's section 271 docket.

5. This procedure will be repeated for the second and third 30-day commercial availability periods.

6. At any time following initiation of the section 271 docket, BA-PA may provide a 100-day advance notice to the Commission that it intends to file a section 271 application with the FCC. The notice will be served on the parties to this action.

7. Upon receiving BA-PA's notice, the Commission will schedule *en banc* hearings, as necessary, between the 85th and 90th days from receipt of the notice.

8. From the time of initiation of the Commission's section 271 docket, up until the *en banc* hearings, all parties, will work, in good faith, to develop stipulations for filing with the Commission which will enable the Commission to determine that the section 271 14-point checklist has been satisfied.

9. These stipulations will be intended to reach agreement on issues which are uncontested or otherwise stipulated and which can be omitted from the hearing process.

10. No later than ten days prior to the *en banc* hearings, interested parties may submit comments or written testimony for introduction into the record of the proceeding.

11. At the *en banc* hearings, witnesses will be provided the opportunity to make opening statements. Following opening statements, witnesses will be

subject to cross examination by the Commissioners and by other participating parties.

12. If any interested parties have information that BA-PA is not in compliance with any element of the 14-point checklist, that BA-PA has not met any specific provision of the final Order in this proceeding, or any other factor relevant to the section 271 process, including the requirements of section 271(c)(1)(A), that party may, in good faith, present that information and any supporting documentation to the Commission either in its comments or its testimony prior to the *en banc* hearings for inclusion in the record of the section 271 docket and to be considered by the Commission within that context.

13. If the Commission affirmatively finds, based on consideration of the evidence of record, that BA-PA has satisfied each point of the 14-point checklist, that it has fully and properly implemented all the provisions of the final Order in this proceeding, that BA-PA has satisfied the requirements of 47 U.S.C. section 271(c)(1)(A) and that BA-PA's entry into the in-region long distance market is otherwise in the public interest, then the Commission shall recommend to the FCC that BA-PA's section 271 application be approved. Otherwise, the Commission shall recommend to the FCC that the section 271 application be disapproved and will specifically set forth the reasons why disapproval is recommended.

XVIII. REGULATORY PARITY/FILING REQUIREMENTS

1. As the industry evolves to a competitive environment, it is necessary to transition regulatory procedures to fit the evolving business scheme, thereby eliminating or reducing regulation where it is no longer useful and maintaining regulation where it continues to serve a valid purpose.

2. In this regard, the Commission has commenced a pending rulemaking docket, at Docket No. L-00940095, to address these issues and has announced that it intends to develop binding, interim guidelines to initially implement the regulatory transition, which binding interim guidelines are then to be codified as final regulations.

3. Binding interim guidelines will be adopted by the Commission.

4. The Streamlined Tariff Filing Requirements attached hereto Exhibit "C" shall be adopted as Interim Guidelines pending completion of the aforementioned rulemaking.

XIX. ABBREVIATED DISPUTE RESOLUTION

1. The success of local competition in Pennsylvania is dependent on the efficiency and effectiveness of carrier interconnection in providing quality service at reasonable rates to customers. Given the fact that in addition to interconnecting with each other, carriers are also competing with each other, it is possible that

disputes will arise which require expedited resolution by the Commission to prevent adverse impact on consumers.

2. Therefore, an Abbreviated Dispute Resolution ("ADR") process has been developed. The ADR process is an asset to both the parties and the Commission, in that it balances the need for parties to be heard with the necessity that certain issues be decided quickly.

3. A detailed description of the ADR process is attached as Exhibit "D".

XX. RESOLUTION OF CERTAIN PENDING DOCKETS

1. Given that our resolution of the many complex and interrelated issues raised in the 1648 and 1649 petitions, and fully addressed in the subsequent prefiled testimony, hearings and briefs filed by the interested parties, also resolve most, if not all, of the substantive issues in the 17 other related Commission proceedings stayed pending the outcome of the instant proceedings, those 17 related Commission proceedings shall be closed and terminated, subject to the following exception:

> (a) Application of AT&T Communications: Petition For Arbitration of Interconnection Agreement with GTE North, Docket Nos. 310125F0002, R-00963666, and R-00963666C0001 - shall remain open as to establishment of UNE rates and other terms and conditions of local competition within the GTE service territory

2. If any of the other 17 stayed proceedings contain substantive issues not adequately resolved by this opinion and order, interested parties may bring those issues to our attention by means of a timely filed petition for reconsideration and/or clarification.

THEREFORE,

The Commission staff is directed to prepare an opinion and order in accordance with the resolution of issues set forth in this motion.

John M. Quain
Chairman

David W. Rolka
Commissioner

Nora Mead Brownell
Commissioner

Aaron Wilson, Jr.
Commissioner

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PUBLIC UTILITIES COMMISSION

Re: NEVD of Rhode Island, LLC Petition For Declaratory Judgment that Internet Traffic Be Treated as Local Traffic Subject to Reciprocal Compensation

Docket No. 2935

ORDER

I. Introduction

This matter comes before the Public Utilities Commission ("Commission") pursuant to a petition filed on May 26, 1999 by NEVD of Rhode Island, LLC ("NEVD"), seeking a declaration that Internet traffic should be treated as local traffic subject to reciprocal compensation ("Petition"). NEVD alleged that, pursuant to the February 26, 1999 *Internet Traffic Order* ("ITO") issued by the Federal Communications Commission ("FCC"), and under the terms of the Interconnection Agreement ("ICA") between Bell Atlantic-Rhode Island ("BA-RI") and NEVD, calls from BA-RI's network to Internet Service Providers ("ISPs") served by NEVD constituted "local traffic" subject to reciprocal compensation.[1]

On June 14, 1999, BA-RI filed a motion to dismiss or, in the alternative, an Answer to NEVD's Petition ("BA-RI Answer"). BA-RI also objected to a Motion to Intervene filed by AT&T on June 2, on the grounds that the proceeding involved the

[1] As the name suggests, these companies provide their customers with access to the Internet.

interpretation of the ICA between BA-RI and NEVD, so that AT&T's interests were not implicated. On June 23, 1999, NEVD filed its opposition to BA-RI's motion to dismiss ("NEVD Opposition").

The Telecommunications Act of 1996 ("the Act") establishes a framework for opening the local telephone market to competition.[2] In order to promote competition in the local exchange market, the Act imposes a general duty on all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. *47 U.S.C. § 251(a)*. With regard to incumbent local exchange carriers ("ILECs"), such as BA-RI, the duty to interconnect is even more specifically defined by Section 251(c)(2).

In addition to these interconnection obligations, the Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. *47 U.S.C. § 251(b)(5)*. To evaluate compliance with this subsection, the Act provides that a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination on each carrier's network facilities of calls that originate on the network facility of the other carrier. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. *47 U.S.C. § 252(d)(2)(A)*. However, ILECs may negotiate and enter into a binding agreement with a requesting telecommunications carrier without regard to the standards set forth in Section 251(b) and (c). *47 U.S.C. § 252(a)(1).*

The procedures for negotiations between competitive local exchange carriers ("CLECs") and ILECs are governed by Section 252 of the Act. If negotiating companies cannot reach agreement, Section 252 provides that the parties may request that the appropriate state commission arbitrate unresolved issues. Each ICA must be submitted to the state commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated, in whole or part, by the state commission. *47 U.S.C. § 252(e)(1).* However, the state commission may only reject a negotiated agreement if it finds the agreement, or a portion thereof, discriminates against a telecommunications carrier not a party to the agreement, or that the implementation of the agreement is not consistent with the public interest, convenience and necessity. *47 U.S.C. § 252(e)(2)(A).*

NEVD and BA-RI entered into an ICA on or about September 30, 1998 (the "NEVD Agreement"). Rather than negotiating the specific terms, NEVD exercised its right under Section 252(i) of the Telecommunications Act to opt into an existing ICA between Brooks Fiber Communications of Rhode Island ("Brooks") and BA-RI (the "Brooks Agreement"). NEVD's Petition represented that the Brooks Agreement was selected, in part, because it provided for reciprocal compensation for

[2] See *47 U.S.C. §§ 251-261.* The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), is codified throughout Title 47 of the United States Code. References in the text to the Act are to the relevant sections of the Code.

the termination of Internet traffic.[3] Moreover, NEVD knew that Brooks was billing BA-RI for the termination of such traffic, and that BA-RI was paying Brooks for the termination of such traffic.[4]

Among other things, the NEVD Agreement contains terms addressing the provision of interconnection services and reciprocal compensation between the parties.[5] Pursuant to the NEVD Agreement, NEVD and BA-RI exchange traffic between their respective networks so that a customer subscribing to NEVD's local exchange service can place calls to customers subscribing to BA-RI's local exchange service and vice versa. The NEVD Agreement requires each company to pay compensation for traffic that terminates on the other company's network.

The FCC's February ITO clarified the jurisdictional status of calls to ISPs. The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."[6] However, the FCC added that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic...parties should be bound by their existing interconnection agreements, as interpreted by state commissions."[7]

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[3] See NEVD Petition at ¶ 3.

[4] Id.

[5] When the Commission refers to the "NEVD Agreement", it also intends to reference the underlying Brooks Agreement opted into by NEVD.

[6] ITO, at ¶ 1.

[7] Ibid., at ¶ 21.

The FCC ruled that "where parties have agreed to include [Internet] traffic" within their ICAs, "they are bound by these agreements, as interpreted by state commissions":[8]

> Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements under Sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. *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.* (Emphasis added).

Thus, the FCC has permitted state commissions to interpret ICAs to determine whether the parties have agreed to include ISP-bound traffic within their ICAs for the purpose of determining reciprocal compensation.

II. Positions of the Parties

NEVD requested the Commission to construe the terms of its ICA (as well as the underlying Brooks Agreement on which it was based) and the FCC's ITO, and rule that the parties intended Internet traffic to be treated as local traffic, subject to reciprocal compensation.[9] In the alternative, NEVD urged the Commission to declare, pursuant to the ITO, ¶ 25, that Internet traffic be treated as local traffic even if the parties did not specifically agree to treat it as local under the terms of the ICA.[10] As a third alternative, NEVD requests the Commission to declare that

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[8] Id.

[9] See, generally, NEVD Petition; NEVD Opposition at pp. 3-4.

[10] See NEVD Opposition at p. 12.

Internet traffic be treated as local under the authority granted to it under R.I. Gen. Laws § 39-1-1(b) to provide for the "fair regulation of public utilities" and to ensure against "undue preferences" and "unfair or destructive trade practices."[11]

According to NEVD, several sections of the NEVD Agreement unambiguously established the parameters for reciprocal compensation between NEVD and BA-RI:[12]

> 1.38 'Local Traffic' means a call which is originated and terminated within a local service area as defined in P.U.C. - RI Tariff No. 15, Part A, Section 6. IntraLATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis are not considered local traffic.
>
> 1.54 'Reciprocal Compensation' is As Described in the Act.
>
> 5.7.1 Reciprocal Compensation only applies to the transport and termination of Local Traffic billable by [BA] or [NEVD] which a Telephone Exchange Service Customer originates on [BA's] or [NEVD's] network for termination on the other Party's network except as provided in Section 5.7.6 below.
>
> 5.7.2 The Parties shall compensate each other for transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Schedule. This rate is to be applied at the [NEVD-IP] for traffic delivered by [BA], and at the [BA-IP] for traffic delivered by [NEVD]. No additional charges, including Port or transport charges, shall apply for the termination of Local Traffic delivered to the [NEVD-IP] or the [BA-IP]. When Local Traffic is terminated over the same trunks as IntraLATA or InterLATA toll, any Port or transport or

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11 Id.

12 See NEVD Petition at ¶ 10.

> other applicable access charges related to the toll traffic shall be prorated to be applied only to the toll traffic.

Pursuant to these provisions, NEVD argued that to the extent an ISP purchases local exchange service from NEVD and receives calls which originate from users of BA-RI provided local exchange service, where both end-users are within the same LATA, BA-RI is obligated to pay reciprocal compensation to NEVD for termination of such calls.[13] If the parties had intended to exclude Internet traffic from the obligation to pay reciprocal compensation, NEVD claimed that the definition of "local traffic" would have expressly excluded Internet traffic.[14]

NEVD also requested that the Commission to construe and apply ¶ 24 of the ITO, and rule that NEVD's ICA includes reciprocal compensation for ISP traffic.[15] Paragraph 24 sets forth guidelines that state commissions should follow to determine the intention of the parties with respect to reciprocal compensation for Internet traffic and encourages state commissions to consider "all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements":[16]

> For example, it may be appropriate for state commissions to consider such factors as whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues

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[13] Ibid., at ¶ 11.

[14] Ibid., at ¶ 19; see NEVD Opposition at p. 6.

[15] See NEVD Opposition at p. 5.

[16] ITO, at ¶ 24.

> 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 traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. These factors are illustrative only; state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions.

Additionally, NEVD requested that the Commission construe ¶ 25 of the ITO and declare that reciprocal compensation should be paid for Internet traffic even if the parties to ICAs had not agreed to do so.[17] According to NEVD, the Commission has this authority under ¶ 25:

> *Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic*...Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to section 252 'extends to both interstate and intrastate matters.' *Thus, the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from section 251/252 negotiation and arbitration process.* However, any such arbitration must be consistent with governing federal law. *While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of*

[17] See NEVD Opposition at pp. 9-10.

> *treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.* (Emphasis added).

In response, BA-RI argued that NEVD's Petition was procedurally flawed and substantively deficient because it failed to identify a single rule, statute, or order which it seeks to have the Commission construe.[18] BA-RI also contended that the FCC's ITO expressly held that traffic to ISPs is not local, but is interstate traffic and not subject to reciprocal compensation.[19] Therefore, according to BA-RI, nothing in the Act or the ITO permits the Commission to enter an order, declaratory or otherwise, that is contrary to the FCC's ruling that Internet traffic is interstate and not local.[20]

Further, BA-RI asserted that even if NEVD's Petition were construed as a request that the Commission interpret its ICA, the Petition should be dismissed because the plain language of that agreement, according to BA-RI, expressly provided that reciprocal compensation is as described in the Act and expressly applies to local traffic only.[21] In the alternative, BA-RI specifically answered each of the Petition's numbered paragraphs.

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[18] See BA-RI Answer at p. 1.

[19] Id.

[20] Ibid., at p. 2.

[21] Id.

III. Discussion

A) Motion to Dismiss

The Commission finds that it has the requisite authority to construe the FCC's *Internet Traffic Order* and NEVD's ICA and rule that under the ITO and the ICA, the parties agreed to treat Internet traffic as local and subject to reciprocal compensation.[22]

The specific authority of the Commission to interpret and enforce ICAs is a derivative of the exclusive authority granted by Section 251(e)(1) of the Act to state commissions to approve or reject interconnection agreements submitted for review. Such an interpretation was recognized by the U.S. Court of Appeals for the Eighth Circuit in Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8th Cir 1997), rev'd in part, 119 S.Ct. 721 (1999). The Supreme Court's ruling did not address the merits of the Eighth Circuit's holding, but instead concluded that the issue was not yet ripe for consideration. AT&T Corp. v. Iowa Utilities Board, ___ U.S. ___, 119 S.Ct. 721, 142 L.Ed.2d 834, 853 (1999). Furthermore, in the ITO, the FCC interpreted the Act and declared that state commissions have primary responsibility for interpreting ICAs.[23] Accordingly, this Commission is authorized to interpret NEVD's ICA as well as the FCC's ITO and to enter an order concerning the intention of the parties with respect to reciprocal compensation for Internet traffic. BA-RI conceded that

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[22] Since NEVD adopted the Brooks Agreement in its entirety, when the Commission refers to the intention of the parties, it is referring to the intention of BA-RI and Brooks as the parties to the underlying agreement.

[23] See ITO at ¶¶ 21, 22, and 24.

under the Act, "state commissions are the primary arbiters of ICAs, regardless of the services or functionalities they concern or their jurisdictional nature."[24]

BA-RI also asserted that the FCC's ITO expressly held that traffic to ISPs is not local but interstate traffic, and not subject to reciprocal compensation. Therefore, according to BA-RI, nothing in the Act or ITO permits the Commission to enter an order, declaratory or otherwise, that is to the contrary.

If the FCC's jurisdictional finding that ISP-bound traffic is largely interstate were the extent of the ITO ruling, BA-RI's argument might have merit. However, having determined the jurisdictional issue, the FCC reiterated that state commissions retained not only the authority, but also the responsibility, to address any and all contractual and regulatory disputes pertaining to jurisdictionally mixed traffic, including ISP-bound traffic. This principle is emphasized in paragraphs 21 and 22 of the ITO, as follows:

> *We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic,* pending adoption of a rule establishing an appropriate interstate compensation mechanism.
>
> * * *
>
> Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. *Where parties have agreed to include this traffic within*

[24] See NEVD Petition at ¶ 21, and BA-RI Answer at ¶ 21.

their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions (emphasis added).

It is clear from this language that the FCC carefully refrained from interference with a state commission's actions to resolve a dispute concerning reciprocal compensation provisions in an ICA, pending the adoption of a federal rule establishing an appropriate interstate compensation mechanism. It is equally clear that the FCC did not intend to affect existing agreements in which the parties had agreed to treat this traffic as local. Thus, under the ITO, even if ISP traffic is largely interstate, parties may have agreed to treat it as local, and therefore, subject to reciprocal compensation. In addition, a state commission might impose reciprocal compensation in arbitration proceedings:[23]

> A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

Contrary to BA-RI's assertion, we find that the FCC could not have been more explicit that, in the absence of a federal rule, a state commission's interpretation of an ICA to require payment of reciprocal compensation does not create a conflict with federal law. Last month, the United States Court of Appeals for the Seventh Circuit upheld an order by the Illinois Commerce Commission

[23] Ibid., at ¶ 26.

("ICC") requiring Ameritech-Illinois to pay reciprocal compensation for ISP-bound calls. The ICC had found that Ameritech was bound under its ICA to pay reciprocal compensation for ISP-bound calls, and that Ameritech's refusal to do so was anti-competitive. Illinois Bell Telephone Company d/b/a Ameritech-Illinois v. WorldCom Technologies, Inc., et al., ___ F.3d ___, Nos. 98-3150, 98-3322, and 98-4080 (7th Cir. June 18, 1999).[26] The Seventh Circuit held that the ICC's decision was lawful and consistent with federal law, observing that the ICC's decision "is in the mainstream of thought on the issue," and that "the commissions in well over half the states have made the same determination that the ICC made, including some interpretations made after the [FCC's] February Ruling."[27] We reject BA-RI's argument that the ITO bars this Commission from ruling that under the terms of NEVD's ICA, the parties agreed to treat Internet traffic as local, subject to reciprocal compensation. Accordingly, BA-RI's motion to dismiss is denied.

B) AT&T Motion to Intervene and Scope of This Proceeding

The Commission has limited the scope of this proceeding and, thus, the purview of this Order, to an interpretation of NEVD's ICA and the FCC's ITO. The sole issue before us is whether the parties agreed to treat Internet traffic as local traffic, subject to reciprocal compensation. Since NEVD adopted the Brooks Agreement in its entirety, the Commission will look to the FCC's Order and the Brooks ICA to ascertain the intention of the parties. Accordingly, the Commission's

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[26] See Slip Op. at p. 4.

[27] See Slip Op. at p. 14.

order in this case will apply to the NEVD Agreement, to the Brooks Agreement, and to any other party that may have opted into the Brooks Agreement in its entirety.

The Commission agrees with AT&T that it has jurisdiction to fashion an interim inter-carrier compensation rule pertaining to Internet traffic that would apply to all carriers until such time as there is a federal rule establishing such a mechanism for this traffic. The Commission does not undertake to establish such a rule in this docket, but intends to open a separate docket to investigate the matter. Therefore, the Commission will treat AT&T's Motion to Intervene in this docket as a Motion to Intervene in that generic docket.

C) <u>The NEVD Interconnection Agreement and the *Internet Traffic Order*</u>

Section 5.7.1 of the Brooks and NEVD Agreements provide in pertinent part:

> Reciprocal compensation only applies to the transport and termination of local traffic billable by [BA-RI] or [NEVD] which a telephone exchange service customer originates on [BA-RI's] or [NEVD's] network for termination on the other party's network.

The contracts also specify that, "'reciprocal compensation' is As Described in the Act." "Local traffic" is defined in Section 1.38 of the Brooks and NEVD agreements as follows:

> 'Local Traffic' means a call which is originated and terminated within a local service area as defined in P.U.C. - RI Tariff No. 15, Part A, Section 6. IntraLATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis are not considered local traffic.

NEVD asserted that its Agreement unambiguously provides reciprocal compensation for the termination of Internet traffic. BA-RI attacked this position primarily by stating that the Act does not require reciprocal compensation and that the NEVD Agreement tracks the Act (reciprocal compensation is "As Described in the Act"). Therefore, according to BA-RI, the NEVD Agreement cannot be interpreted to require reciprocal compensation for calls to ISPs.

We reject BA-RI's interpretation of the NEVD Agreement. That the Act does not *require* reciprocal compensation for calls to ISPs is not to say that it *prohibits* it. An argument similar to BA-RI's was recently rejected by the Seventh Circuit Court of Appeals in Ameritech-Illinois, supra. In rejecting Ameritech-Illinois' argument that the Act does not require reciprocal compensation and that the agreements at issue tracked the Act, the Court stated:[28]

> The Act simply sets out the obligations of all local exchange carriers to provide for reciprocal compensation: 'Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.' Section 251(b)(5). Then in Section 252(d)(2), state commissions are instructed that terms and conditions for reciprocal compensation are not to be considered reasonable unless they provide 'for the mutual and reciprocal recovery by each carrier of cost associated with transport and termination of each carrier's network facilities of calls that originate on a network facilities of the other carrier' and that the costs be determined on the basis of 'reasonable approximation of the additional costs of terminating such calls.' The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out.

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[28] Ibid., at p. 12.

> The ICC's conclusion – that reciprocal compensation should apply to traffic Ameritech bills as local traffic – does not violate the act or the FCC's interpretation of the Act. In fact, the Commission was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements.

The Commission agrees with this analysis, and rejects BA-RI's assertion that reciprocal compensation does not apply to Internet traffic under the NEVD Agreement.

The Commission finds that the Brooks Agreement opted into by NEVD unambiguously reflects the parties' agreement that Internet traffic should be treated as local traffic, subject to reciprocal compensation. In this regard, the Commission is swayed by the fact that the Brooks Agreement fails to include any language that separates or excludes ISP traffic from the definition of "local traffic." This is especially noteworthy since ¶1.38 of the Agreements, defining "Local Traffic," expressly excludes "intraLATA calls originated on a 1+ presubscription basis when available or a casual dialed (10XXX/101XXXX) basis" from the definition of "local traffic." It would have been equally easy for the parties to have expressly excluded Internet traffic from the definition of "local traffic" if they had so agreed. Given the comprehensive nature of the Agreements and the specificity with which they address virtually all interconnection issues, the absence of such an exclusion is persuasive evidence that the parties intended to include Internet traffic within the definition of "local traffic." Furthermore, Bell Atlantic's own tariff, referenced in the ICA at §1.38, permits its local exchange customers to call ISPs as local calls. This

Commission finds that a fair reading of the Brooks and NEVD Agreements is that the parties intended to include Internet traffic as local traffic, subject to reciprocal compensation.

Pursuant to the FCC's ITO, the Commission finds additional bases for concluding that the parties intended to treat Internet traffic as local and subject to reciprocal compensation. Paragraph 24 of the FCC's ITO notes that "state commissions have the opportunity to consider all of the relevant facts, *including [the FCC's] longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements.*" [Emphasis added.] The FCC's historical treatment of Internet traffic as local buttresses our conclusion that if the parties had intended to exclude Internet traffic from local traffic they would have expressly provided so in their contract. Moreover, BA-RI treated Internet traffic as local by paying Brooks reciprocal compensation for such traffic following the execution of the Brooks Agreement.[29]

Paragraph 24 of the ITO also sets forth guidelines that state commissions should follow to determine the intention of the parties with respect to reciprocal compensation for Internet traffic:[30]

> *For example, it may be appropriate for state commissions to consider such factors as whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated*

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[29] See BA-RI Answer at ¶ 3 ("BA-RI admits that at the time of NEVD's adoption of the Brooks Agreement, Brooks Fiber was billing BA-RI for the termination of such traffic and that BA-RI was paying Brooks Fiber for termination of such traffic...").

[30] See ITO at ¶ 24.

> *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 traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.* These factors are illustrative only; *state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions* (emphasis added).

Based on the pleadings, this Commission is in a position to construe and apply the FCC's factors for determining the intention of the parties. We find that the application of ¶ 24 of the ITO to the ICAs at issue demonstrates that the parties intended that Internet traffic be treated as local traffic, subject to reciprocal compensation. First, BA-RI has served ISPs out of intrastate tariffs.[31] Second, revenues associated with Internet traffic are counted by BA-RI as intrastate or "local" revenue for separations purposes.[32] Third, where BA-RI has charged its local exchange customers on a message unit basis, it has included calls to ISPs as local telephone charges.[33] Fourth, if ISP traffic is not treated as local and subject to reciprocal compensation, BA-RI and CLECs will not be compensated for this

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[31] See BA-RI Answer at ¶ 36.

[32] See BA-RI Answer at ¶ 34.

[33] See BA-RI Answer at ¶¶ 12, 35 ("BA-RI admits that it allows its local exchange customers, including business exchange customers who pay usage charges, to call ISPs as local calls....")

traffic.[34] Finally, the definition of "local traffic" in the Brooks Agreement (as adopted by NEVD) fails to expressly exclude or segregate Internet traffic from the definition of "local traffic." This fact is readily ascertained by simply comparing the definition of "local traffic" in §1.38 of the Brooks Agreement to the definition of "local traffic" in §1.41 of the ICA between BA-RI and Metromedia Fiber Work Services: the Brooks Agreement does not attempt to segregate Internet traffic from the definition of "local traffic", while the definition in the Metromedia Fiber Agreement does.[35] Accordingly, our findings with respect to each of the factors set forth in ¶ 24 of the ITO support the conclusion that the parties to the Brooks and NEVD Agreements intended to treat Internet traffic as local traffic, subject to reciprocal compensation. The evidence uniformly and convincingly supports this conclusion.

Because our disposition of the issues raised in NEVD's Petition is limited to the construction of NEVD's ICA, we do not find it necessary to reach the alternative prayers for relief contained in NEVD's Opposition.

Accordingly, it is

(15915) ORDERED:

1. Under the contractual terms of the Brooks and NEVD Interconnection Agreements, as well as under ¶ 24 of the *Internet Traffic*

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[34] See BA-RI Answer at ¶ 3 ("The parties provided for compensation for local traffic only...and not non-local traffic, such as Internet traffic.").

[35] See NEVD Opposition at p. 6.

Order, Bell Atlantic-Rhode Island and NEVD intended that Internet traffic be treated as local traffic, subject to reciprocal compensation.

2. BA-RI's Motion to Dismiss NEVD's Petition for Declaratory Judgment is denied.

3. AT&T's Motion to Intervene in this docket is denied.

EFFECTIVE AT PROVIDENCE, RHODE ISLAND PURSUANT TO AN OPEN MEETING DECISION ON JUNE 29, 1999. WRITTEN ORDER ISSUED JULY 21, 1999.

PUBLIC UTILITIES COMMISSION

James J. Malachowski, Chairman

Kate F. Racine, Commissioner

Brenda K. Gaynor, Commissioner

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 18, 1999

IN RE:	)	
	)	
PETITION OF NEXTLINK TENNESSEE, L.L.C	)	DOCKET NO.
FOR ARBITRATION OF INTERCONNECTION	)	98-00123
WITH BELLSOUTH TELECOMMUNICATIONS,	)	
INC.	)	

FIRST ORDER OF ARBITRATION AWARD

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I. INTRODUCTION

This First Order of Arbitration Award ("First Arbitration Award") embodies all decisions made by Chairman Melvin J. Malone, Director H. Lynn Greer, Jr., and Director Sara Kyle, acting as Arbitrators, pursuant to the Federal Telecommunications Act of 1996 ("1996 Act") at a public meeting held on October 6, 1998.[1]

With the passage of the 1996 Act, Congress intended to foster competition in "all telecommunications market[s] in a procompetitive, deregulatory national policy framework ...." S. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996). As part of that framework, the 1996 Act requires that incumbent local exchange carriers ("incumbent LECs") provide new entrants to the local market with access to telephone networks and services on "rates, terms and conditions that are just, reasonable, and non-discriminatory." *See* 47 U.S.C. § 251(c) (1998). Pursuant to §§ 251 and 252 of the 1996 Act, incumbent LECs and competing local exchange carriers ("CLECs") have the duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements contemplated under these Sections. If the parties are unable to reach an agreement voluntarily, either party may petition the State Commission for arbitration. *See* 47 U.S.C. § 252(b)(1). A final interconnection agreement, whether negotiated or arbitrated, must be reviewed by the State Commission in order to determine whether it complies with the 1996 Act. *See* 47 U.S.C. § 252(e)(1).

[1] Subsequent to the decision of the Arbitrators on the merits of this proceeding on October 6, 1998, the Supreme Court of the United states has rendered its decision on January 25, 1999, in *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 142 L.Ed 2d 835 (1999). The Arbitrators acknowledge that the decision of the Supreme Court may in fact impact some of the issues herein, however, these decisions reflect the understanding of the Arbitrators at that point in time. Accordingly, this Order has not been altered to take into account any changes that could result from the action of the Court. Rather, this Order reflects the decisions and opinions of the Arbitrators at the time of deliberation.

On February 24, 1998, NEXTLINK Tennessee L.L.C. ("NEXTLINK") filed a petition requesting that the Tennessee Regulatory Authority ("Authority") arbitrate certain issues that NEXTLINK and BellSouth Telecommunications, Inc. ("BellSouth") had been unable to resolve through voluntary negotiation. BellSouth filed its response to NEXTLINK's petition on March 23, 1998. Although Section 252(b)(4)(C) requires a State Commission to resolve an arbitration within nine months after the date on which the incumbent LEC received the request for negotiation, NEXTLINK and BellSouth voluntarily agreed to extend until November 20, 1998, this statutory time limit.[1]

The Directors of the Authority unanimously determined that they would serve as Arbitrators in this matter. After several pre-arbitration conferences, a public hearing was held before the Arbitrators on August 24 and August 25, 1998. The following notices of appearance were entered:

Daniel Waggoner, Esquire, Davis Wright Tremaine, Suite 2600, 1501 Fourth Avenue, Seattle, Washington 98101; Alaine Miller, Esquire, 155 - 108th Avenue, NE, #810, Bellevue, Washington 98804; and Henry Walker, Esquire, Boult, Cummings, Conner & Berry, P. O. Box 198062, Nashville, Tennessee 37219-8062, appearing on behalf of NEXTLINK.

Guy M. Hicks, Esquire, BellSouth Telecommunications, Inc., Room 2101, 333 Commerce Street, Nashville, Tennessee 37201; and Bennett L. Ross, Esquire, BellSouth Telecommunications, Inc., Suite 4300, 675 West Peachtree St., NE, Atlanta, Georgia 30375, appearing on behalf of BellSouth.

Post-hearing briefs were filed by the parties on September 22, 1998. Upon agreement of the parties and without objection from the Arbitrators, all discovery responses were included as part of the evidentiary record in the proceeding.

[1] *See* Third Agreed Order to Extend Time for Arbitration entered on November 5, 1998.

II. DISCUSSION

Through negotiations both prior and subsequent to the hearing on the merits, the parties resolved several of the issues initially presented for arbitration. The following issues remained open for resolution in this arbitration proceeding: Issues 3(a) and 3(b); Issues 4(a) through (f); Issue 5; Issue 6(b); Issues 7(b) and 7(c); Issues 10(a) through (d); Issue 11; and Issues 12(a) through (d). After due consideration of the evidence, the arguments of the parties, applicable federal and state laws, rules and regulations, and the entire record in this proceeding, the Arbitrators deliberated and reached the following decisions with respect to the issues before them.

ISSUE 3(a): MUST NEXTLINK BE COLLOCATED AT BELLSOUTH'S PREMISES TO OBTAIN ACCESS TO BELLSOUTH'S DIGITAL CROSS-CONNECT SYSTEMS ("DCS")?

COMMENTS AND DISCUSSION:

According to NEXTLINK, access to DCS is a dispute over the definition of the unbundled transport element. NEXTLINK maintains that the unbundled transport network element includes DCS. NEXTLINK wants BellSouth to offer DCS with transport, contending that the Federal Communications Commission ("FCC") ordered all incumbent LECs to provide CLECs with access to DCS functionality with transport.

NEXTLINK disagrees with BellSouth that the request for access to DCS functionality with transport results in a combination of unbundled network elements. In its prefiled testimony, NEXTLINK states that BellSouth agreed in prior interconnection agreements and its Statement of Generally Available Terms and Conditions ("SGAT")[1] to provide such access to DCS when a

[1] BellSouth filed its revised SGAT on January 16, 1998, in Docket No. 97-00309.

CLEC is not collocated.[4] Yet, under cross-examination during the hearing, NEXTLINK witness Mr. Russell Land admitted that DCS access was not in BellSouth's current SGAT.[5] Mr. Land also admitted during cross-examination that NEXTLINK considers transport and DCS as one element when provisioned where NEXTLINK is not collocated, but as two separate elements when NEXTLINK is collocated.

BellSouth argues that NEXTLINK can obtain access to the routing capabilities provided by DCS without collocating by purchasing BellSouth's FlexServ offering. This retail service allows NEXTLINK to establish a link from a remote location to the control center in order to manage its own facilities through DCS without collocating. BellSouth believes that if NEXTLINK wants DCS for the purpose of channelization or multiplexing, it must be collocated in central offices where DCS has been deployed. Otherwise, BellSouth contends that it will be providing NEXTLINK with a combination of DCS and transport which it is not required to do under *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *cert. granted* 118 S. Ct. 879 (1998) (hereinafter referred to as the "Eighth Circuit decision or opinion").

According to BellSouth, physical and virtual collocation are currently the only viable methods by which CLECs may have access to unbundled network elements, and these are the only methods of access identified by the 1996 Act. While BellSouth may believe that collocation is the only method for providing access to unbundled network elements, the 1996 Act does not expressly limit access to these elements via collocation. Under the Eighth Circuit's decision states cannot require that BellSouth provide combinations of network elements, nevertheless State Commissions have the flexibility to require that CLECs such as NEXTLINK be provided

[4] *See* Pre-filed Direct Testimony of Russell Land at 13 and Pre-filed Rebuttal Testimony at 8.

[5] *See* Hearing Transcript Vol. IIA at 356.

other viable means of interconnection. Because the availability of a means for efficiently combining network elements is extremely important to the development of competition in all segments of the market and due to the many complexities associated with collocation, the Arbitrators find that alternative methods to efficiently combine unbundled network elements must be available to CLECs at this time in order to facilitate the development of competition.

In concurring with the conclusion of the United States Department of Justice, the Arbitrators find that BellSouth's policy of requiring CLECs to collocate connecting equipment as the sole manner for accessing network elements may substantially delay entry. *See* Evaluation of the United States Department of Justice, *In re: Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA services in Louisiana*, CC Docket No. 98-121, at 12 (Aug. 19, 1998). The complexities associated with collocation, both actual and potential, may have the effect of placing entrants at a distinct competitive disadvantage. In the Arbitrators' view, acceptance of collocation as the sole method of interconnection would frustrate congressional intent by effectively delaying competition in local exchange markets.

Both the 1996 Act and the Eighth Circuit's decision contemplate that incumbent LECs would provide unbundled network elements in a manner that permits requesting carriers to combine such elements in order to provide a telecommunications service. 47 USC § 251(c)(3) requires the following of an incumbent LEC:

> **The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible [4] point on**

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[4] The Federal Communications Commission ("FCC") defines "Technically Feasible" in 47 C.F.R. § 51.5 as follows:

> **Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network**

> rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement of this section and section 252. **An incumbent local exchange provider shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.** (Emphasis supplied).

Section 251 requires nondiscriminatory access to unbundled network elements so that a requesting carrier may bundle these elements in a manner that will permit it to provide telecommunications services. Further, the FCC's rules implementing Section 251 of the Act provide that "[t]echnically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to: (1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and (2) Meet point interconnection arrangements." *See* 47 C.F.R. § 51.321(b). Thus, despite the express provision in 47 USC § 251(c)(6) that provides for both physical and virtual collocation for access to unbundled network elements, the FCC has recognized that the Act does not prescribe collocation as the sole method to obtain access.

In addition, the Eighth Circuit specifically stated that "[t]he fact that incumbent LECs object to [the FCC rule requiring incumbent LECs to provide combinations of network elements] indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them." 120 F.3d at 813. Hence, to the extent practicable,

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shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts. (Emphasis supplied).

and as acknowledged by BellSouth during the hearing, alternate methods to collocation should be made available to CLECs for combining unbundled network elements.

NEXTLINK proposes two such alternative methods – the recent change method and direct access to BellSouth's network. The testimony presented in the case, however, is not sufficient to determine whether the recent change method is a viable alternative at this time. The remaining alternative to collocation is to permit NEXTLINK to obtain direct access to BellSouth's network facilities in order to combine unbundled network elements itself. Although direct access as proposed by NEXTLINK may be a viable method, NEXTLINK's proposal raises legitimate security concerns with respect to BellSouth's network. Specifically, BellSouth argues that direct access to its facilities could lead to an unacceptable risk of disruption of service as a result of technicians from numerous telecommunications carriers having access to the facilities used in providing service from BellSouth's central offices.

Neither party addressed how to reasonably mitigate security concerns other than BellSouth's position that direct access should not be allowed. As a reasonable solution to provide CLECs or NEXTLINK with an alternative method for combining unbundled network elements, while at the same time recognizing the security concerns presented by BellSouth, the Arbitrators find that NEXTLINK should be provided access to BellSouth's facilities through an independent third-party vendor who will actually perform the combining of unbundled network elements on NEXTLINK's behalf.

The Arbitrators also find that it is not necessary for NEXTLINK to be collocated in order to obtain access to DCS. If NEXTLINK wants DCS for routing and managing capabilities, then NEXTLINK may purchase FlexServ out of BellSouth's access tariff. If NEXTLINK wants DCS for channelization or multiplexing functionality in order to combine with transport, BellSouth must provide NEXTLINK with access to its DCS facilities through an independent third-party vendor who would perform the actual combining of elements on NEXTLINK's behalf. The cost of having an independent third-party combine unbundled network elements must appropriately be borne by NEXTLINK. The qualifications of the independent third-party vendor performing the combinations and the procedures for selecting the vendor will be resolved through Final Best Offers.

NEXTLINK may also be provided channelization or multiplexing capabilities of DCS if BellSouth voluntarily decides to provide NEXTLINK with a combination of DCS and transport. If BellSouth were willing to provide this combination, NEXTLINK would not be precluded from combining unbundled network elements through an independent third-party vendor via direct access to DCS.

ORDERED:

1. That NEXTLINK is not required to be collocated in order to obtain access to DCS;

2. That, if NEXTLINK wants DCS for routing and managing capabilities, NEXTLINK may purchase FlexServ out of BellSouth's access tariff;

3. That, if NEXTLINK wants DCS for channelization or multiplexing functionality in order to combine with transport, BellSouth must provide NEXTLINK with access to its DCS facilities through an independent third-party vendor who will perform the actual combining of elements for NEXTLINK at NEXTLINK's expense; and

4. That the parties are directed to submit Final Best Offers concerning the qualifications of the independent third-party vendor performing the combinations for NEXTLINK and the procedures for selecting that vendor. The Final Best Offers must be

adequate to address BellSouth's security concerns without being so onerous so as to effectively discourage NEXTLINK's use of an independent third-party vendor to combine unbundled network elements on its behalf.

ISSUE 3(b): MUST NEXTLINK PAY A RECOMBINATION CHARGE ("GLUE CHARGE") AND EXECUTE A SEPARATE AGREEMENT TO OBTAIN ACCESS TO BELLSOUTH'S DCS?

COMMENTS AND DISCUSSION:

NEXTLINK argues that DCS functionality should be provided as part of transport and no glue charge should apply. BellSouth maintains that NEXTLINK's purchase of DCS through BellSouth's FlexServ offering or accessing DCS when it is collocated would not require that NEXTLINK pay a glue charge. However, because the Eighth Circuit ruled that incumbent LECs are not required to provide CLECs with combinations of network elements, any charges assessed by BellSouth for combining transport and DCS for NEXTLINK should be negotiated between the parties outside the parameters of this proceeding.

ORDERED:

1. That, to the extent BellSouth is willing to combine transport and DCS for NEXTLINK, the parties should negotiate the charge that would apply to such combinations, with the combinations and charges not being subject to the requirements of the 1996 Act.

ISSUE 4(a): WHAT OSS AND ENGINEERING STANDARDS MUST BELLSOUTH PROVIDE TO NEXTLINK TO PERMIT NEXTLINK TO RECOMBINE UNBUNDLED NETWORK ELEMENTS?

COMMENTS AND DISCUSSION:

NEXTLINK requests that BellSouth provide any necessary assistance or Operation Support System ("OSS") functions if NEXTLINK combines unbundled network elements. BellSouth witness Mr. Al Varner testified in his direct testimony that BellSouth does not have written specifications for OSS functions and engineering standards that provide instructions for its technicians to combine unbundled network elements.[7]

The Arbitrators have determined that NEXTLINK should be required to make a specific request to BellSouth identifying the elements to be combined. Upon the receipt of this request, BellSouth must provide to NEXTLINK, at no charge, any existing OSS and engineering specifications, design records and features and capabilities of each network element used by BellSouth when it provides services to its end-users. The parties are directed to submit Final Best Offers regarding the time frame between the request by NEXTLINK and the response by BellSouth.

ORDERED:

1. That NEXTLINK shall make a specific request identifying the unbundled network elements NEXTLINK seeks to combine;

2. That, upon receipt of such a request, BellSouth shall provide to NEXTLINK, at no charge, any existing OSS and engineering specifications, design records and features and

[7] *See* Hearing Transcript Vol. IIB, at 424.

capabilities of each network element used by BellSouth when it provides services to its end-users; and

3. That the parties are directed to submit Final Best Offers relative to the time frame within which BellSouth must respond to such a request by NEXTLINK.

ISSUE 4(b): MUST NEXTLINK BE COLLOCATED WITH BELLSOUTH IN ORDER TO RECOMBINE UNBUNDLED NETWORK ELEMENTS?

ISSUE 4(c): ARE THERE ANY TECHNICALLY FEASIBLE METHODS THAT BELLSOUTH MUST OFFER TO PERMIT NEXTLINK TO RECOMBINE UNBUNDLED NETWORK ELEMENTS WHERE IT IS NOT COLLOCATED?

COMMENTS AND DISCUSSION:

NEXTLINK has requested either direct access to BellSouth's network or use of the recent change process as alternatives to collocation. BellSouth witness Varner testified that, in BellSouth's view, physical and virtual collocation are currently the only viable methods of providing CLECs with access to unbundled network elements. According to Mr. Varner, neither direct access nor the recent change method are viable alternatives to collocation.[1]

The Arbitrators' reasoning in resolving Issue 3(a) applies equally to Issues 4(b) and (c). For the reasons previously stated, it is not necessary for NEXTLINK to be collocated in order to combine unbundled network elements. As an alternative to collocation, BellSouth must provide NEXTLINK with access to its network facilities through an independent third-party vendor who would perform the actual combining of elements on NEXTLINK's behalf. The cost of having an independent third-party vendor combine unbundled network elements must appropriately be

[1] *See* Hearing Transcript Vol. IIB, at 371-372.

borne by NEXTLINK. The qualifications of the independent third-party vendor performing the combinations and the procedures for selecting the vendor will be resolved in Final Best Offers.

ORDERED:

1. That NEXTLINK is not required to be collocated in order to combine unbundled network elements;

2. That, if NEXTLINK seeks to combine unbundled network elements, BellSouth must provide NEXTLINK with access to its network facilities through an independent third-party vendor who will perform the actual combining of elements for NEXTLINK at NEXTLINK's expense; and

3. That the parties are directed to submit Final Best Offers concerning the qualifications of the independent third-party vendor performing the combinations for NEXTLINK and the procedures for selecting that vendor, which must be adequate to address BellSouth's security concerns without being so onerous so as to affectively discourage NEXTLINK's use of an independent third-party vendor to combine elements on its behalf.

ISSUE 4(d): WHAT TERMS AND CONDITIONS SHOULD GOVERN THE RECOMBINATION PROCESS IF BELLSOUTH CHOOSES TO RECOMBINE UNBUNDLED NETWORK ELEMENTS ITSELF?

ISSUE 4(e): FOR WHAT FUNCTIONS, IF ANY, MAY BELLSOUTH IMPOSE A "GLUE CHARGE?"

ISSUE 4(f): MUST BELLSOUTH PROVIDE TRANSPORT AND A LOOP TOGETHER? IF SO, UNDER WHAT TERMS AND CONDITIONS?

COMMENTS AND DISCUSSION:

NEXTLINK argues that if BellSouth is required to provide combinations of network elements, the terms and conditions must be such that allow NEXTLINK a meaningful opportunity to compete. NEXTLINK contends that rates for combinations should be no more than the sum of the Total Element Long Run Incremental Cost ("TELRIC") for each individual element involved. Also, NEXTLINK contends that BellSouth should be required to provide network combinations without the application of any glue charges.

Specifically, NEXTLINK desires access to unbundled loops at central offices where it is not collocated through the provisioning of a loop with transport without the imposition of a glue charge. NEXTLINK witness Land testified that NEXTLINK needs such access to serve those customers it cannot reach completely through its own facilities and that it is impossible for NEXTLINK to immediately collocate in every BellSouth central office. According to Mr. Land, all that is necessary for BellSouth to provide transport and a loop together is for a BellSouth technician to perform a cross-connect between the loop and transport provided to NEXTLINK.[9] NEXTLINK does not believe this request constitutes a combination of network elements.

BellSouth offers that, if NEXTLINK will identify the network combinations it wants, BellSouth is willing to negotiate outside of this proceeding, the terms, conditions, and prices under which BellSouth would provide such combinations. BellSouth witness Varner was of the opinion that combining transport and a loop together as NEXTLINK requested will resemble BellSouth's private line or special access services, both of which, are available for resale as a general tariff offering. In Mr. Varner's opinion, the Eighth Circuit decision does not require BellSouth to provide such network combinations and that requiring BellSouth to provide combinations of network elements to CLECs would discourage the development of facilities-based competition.[10]

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[9] *See* Pre filed Direct Testimony of Russell Land at 24.

[10] *See* Pre-filed Direct Testimony of Al Varner at 24 and Pre-filed Rebuttal Testimony at 23.

The Arbitrators recognize that under the Eighth Circuit decision, incumbent LECs are not required to combine unbundled network elements for CLECs, although the Eighth Circuit did not preclude incumbent LECs from voluntarily agreeing to provide such combinations. Since BellSouth is not required to provide combinations (such as combining a loop and transport), any charges assessed by BellSouth if it voluntarily agrees to do so should be negotiated between the parties outside the parameters of this proceeding.

ORDERED:

1. That, to the extent BellSouth is willing to combine network elements for NEXTLINK, the parties should negotiate the charge that would apply to such combinations, with the combinations and charges not being subject to the requirements of the 1996 Act.

ISSUE 5: SHOULD RECIPROCAL COMPENSATION FOR LOCAL TRAFFIC APPLY TO TRAFFIC TO AND FROM AN INFORMATION SERVICE PROVIDER OR AN ENHANCED SERVICE PROVIDER?

COMMENTS AND DISCUSSION:

NEXTLINK requests that the parties be required to treat traffic that originates from and terminates to an enhanced service provider ("ESP") or information service provider ("ISP") as local traffic and that reciprocal compensation should apply to such traffic. BellSouth believes that calls to ISPs are interstate because the information service itself is interstate. Consistent with the Authority's decision in Docket 98-00118 (*In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for the Issuance of a Show Cause Order*), traffic to or from ESPs or ISPs should be considered local traffic for which reciprocal compensation should be paid.

ORDERED:

1. That, consistent with the Authority's decision in Docket 98-00118, the parties are required to treat traffic that originates from and terminates to an enhanced service provider or an ISP as local traffic subject to the payment of reciprocal compensation.

ISSUE 6(b): IS IT APPROPRIATE TO INCLUDE REMEDIES, AND IF SO, WHAT SHOULD THOSE REMEDIES BE? (Performance Measurements, Reports and Remedies)

ISSUE 7(b): IS IT APPROPRIATE TO INCLUDE REMEDIES, AND IF SO, WHAT SHOULD THOSE REMEDIES BE? (Unbundled Loop Provisioning Intervals)

NEXTLINK has proposed a series of self-executing remedies that NEXTLINK asserts should apply in the event BellSouth fails to meet performance measures or loop provisioning intervals to which the parties have agreed. BellSouth contends that such remedies are not necessary or appropriate and that the only remedies which should apply are those to which the parties mutually agree.

Even assuming self-executing remedies such as those proposed by NEXTLINK are appropriate, a finding which the Arbitrators did not reach, the Arbitrators conclude that it is not possible to fashion remedies based on the evidentiary record developed in this arbitration proceeding. Although the issue of remedies could conceivably be resolved on Final Best Offers, the Arbitrators find that doing so would require a factual inquiry, which is ill-suited for resolution by Final Best Offers.

ORDERED:

1. That the establishment of remedies for BellSouth's failure to meet performance measures or loop provisioning intervals to which the parties have agreed will not be done within the confines of this proceeding because the evidentiary record herein will not support such action.

ISSUE 7(c): SHOULD BELLSOUTH PROVIDE ORDER COORDINATION AND TEST POINTS WITH ALL UNBUNDLED LOOPS AT NO ADDITIONAL COST?

COMMENTS AND DISCUSSION:

NEXTLINK proposes that BellSouth provide order coordination and test points with all unbundled loops at no additional cost. BellSouth states that it is proposing two different loop rates in Docket No. 97-01262 -- one that includes order coordination and test points and one that does not. The issue of "permanent" loop rates will be resolved in *In re: Contested Case Proceeding to Establish Final Cost Based Rates for Interconnection and Unbundled Network Elements*, Docket 97-01262. Until such time as "permanent" loop rates are established, the parties should use the existing proxy loop rates as established by the Authority in *In re: Matter of Interconnection Agreement Negotiation Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., et al.*, Docket No. 96-01152 ("AT&T/MCI Arbitration"), which includes order coordination and test points.

ORDERED:

1. That, until the Authority establishes "permanent" loop rates in Docket 97-01262, the parties should use the existing proxy loop rates established by the Authority in the AT&T/MCI Arbitration, which include order coordination and test points.

ISSUE 10(a): HOW SHOULD THE POINT OF DEMARCATION BE ESTABLISHED FOR BUILDINGS SERVED BY BELLSOUTH, INCLUDING UNDER WHAT CONDITIONS BELLSOUTH MAY ESTABLISH SUCH POINT OF DEMARCATION?

COMMENTS AND DISCUSSION:

NEXTLINK witness Land contends that relative to wire installed after 1990, the demarcation point should be presumed to be at the minimum point of entry ("MPOE"). According to Land, in situations where wiring was installed prior to August 1990, if BellSouth desires to locate the demarcation at some point other than the MPOE, BellSouth must provide evidence to NEXTLINK or the Authority demonstrating that the wire existed in the building before 1990 and that the building owner did not assert control of that wire.[11]

BellSouth, on the other hand, contends that the demarcation point should be established consistent with rules promulgated by the FCC in Docket 88-57, which are currently codified at 47 C.F.R. Section 68.3(b) (1997).[12] These rules state that in multi-unit premises that exist as of

[11] *See* Pre-filed Direct Testimony of Russell Land at 35.

[12] 47 C.F.R. § 68.3(b)provides in pertinent part as follows:

(b) Multiunit installations.

(1) In multiunit premises existing as of August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside the customer's premises than a point twelve inches from where the wiring enters the customer's premises, or as close thereto as practicable.

(2) In multiunit premises in which wiring is installed after August 13, 1990, including major additions or rearrangements of wiring existing prior to that date, the telephone company may establish a reasonable and nondiscriminatory practice of placing the demarcation point at the minimum point of entry. If the telephone company does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points. The multiunit premises owner shall determine whether there shall be a single demarcation point location for all customers or separate such locations for each customer. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside the

August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and nondiscriminatory standard operating practices. As required by the aforementioned FCC rules, a multi-unit premises in which wiring is installed after August 13, 1990, including major additions or rearrangements of wiring existing prior to that date, BellSouth will comply with a building owner's request for a single demarcation point to serve an entire building. If the building owner does not want a single demarcation point, BellSouth will provide demarcation points in each tenant's office or suite. This suggests that BellSouth queries the building owners and that the responses of the building owners guide the appropriate treatment of demarcation points consistent with 47 C.F.R. § 68.3(b).

The Arbitrators referred to 47 C.F.R. § 68.3(b) and noted that the point of demarcation in multi-unit buildings served by BellSouth should be established consistent with these rules. In addition to the requirements set forth under these FCC rules, the Arbitrators have determined that BellSouth should, upon request by NEXTLINK, make available on a timely basis any and all documentation maintained by BellSouth relative to establishing points of demarcation. This includes reducing to writing and certifying any oral representations made to BellSouth by building owners concerning demarcation points. The time within which BellSouth must respond to such a request by NEXTLINK will be resolved in Final Best Offers. If NEXTLINK believes that BellSouth is not in compliance with the FCC rules for establishing the demarcation point in a particular customer location, then NEXTLINK should file a complaint with the Authority.

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customer's premises than a point 30 cm (12 in) from where the wiring enters the customer's premises, or as close thereto as practicable.
(3) In multiunit premises with more than one customer, the premises owner may adopt a policy restricting a customer's access to wiring on the premises to only that wiring located in the customer's individual unit that serves only that particular customer.

ORDERED:

1. That the point of demarcation in multi-unit buildings served by BellSouth should be established consistent with 47 C.F.R. § 68.3(b);

2. That upon request by NEXTLINK, BellSouth shall make available to NEXTLINK on a timely basis any and all documentation maintained by BellSouth relative to establishing points of demarcation. This includes reducing to writing and certifying any oral representations made to BellSouth by building owners concerning demarcation points;

3. That the parties are directed to submit Final Best Offers concerning the time within which BellSouth must respond to a request by NEXTLINK for documentation concerning the location of the demarcation point in a particular multi-unit location; and

4. That, if NEXTLINK believes BellSouth is not in compliance with 47 C.F.R. § 68.3(b) (the FCC rules governing the establishment of the demarcation point in a particular customer location), then NEXTLINK should file a complaint with the Authority.

ISSUE 10(b): HOW MUST BELLSOUTH DEMONSTRATE THAT THE DEMARCATION POINT IN A PARTICULAR BUILDING HAS BEEN ESTABLISHED?

COMMENTS AND DISCUSSION:

NEXTLINK witness Land testified that if BellSouth desires to locate the demarcation point in a particular building at some point other than the MPOE, BellSouth should have to provide evidence to NEXTLINK demonstrating that the demarcation point has been properly established in that building.[13]

BellSouth contends that since no business owner or residential property owner in

[13] *See* Pre-filed Direct Testimony of Russell Land at 35.

Tennessee has elected to place the demarcation point at the MPOE, NEXTLINK can conclude that the demarcation point in every building is located in each tenant's office or suite. BellSouth also contends that NEXTLINK may contact BellSouth's outside plant engineering staff with requests about specific locations. According to the testimony of BellSouth witness Milner, demarcation points in buildings are based on verbal communication between property owners and BellSouth personnel. Additionally, Mr. Milner testified that there is not a written document that building owners are required to sign that explains the options for determining the demarcation point.[14]

The Arbitrators find that for a request regarding the location of the demarcation point in a specific multi-unit building, BellSouth must provide NEXTLINK with any existing written documentation, to the extent such documentation exists, stating how the demarcation point was determined. If written documentation does not exist, BellSouth should provide a contact name and telephone number of the appropriate outside plant staff and building owner. In addition, BellSouth should be required to maintain written documentation on a going-forward basis describing how the demarcation point has been established in a particular building. An authorized representative of the building owner should sign this document. Requiring BellSouth to obtain written documentation regarding the establishment of demarcation points on a going-forward basis should prevent, or at least limit, the number of disagreements that may arise over demarcation points in the future.

ORDERED:

1. That, upon request by NEXTLINK regarding the location of the demarcation point in a specific multi-unit building, BellSouth shall provide NEXTLINK with any existing written

[14] *See* Hearing Transcript Vol. ID, at 299.

documentation stating how the demarcation point was determined, to the extent such documentation exists;

2. That, if written documentation does not exist, BellSouth shall provide a contact name and telephone number of the appropriate BellSouth outside plant staff and building owner; and

3. That BellSouth from the date of the entry of this Order shall maintain written documentation on a going-forward basis describing how the demarcation point has been established in a particular building, which should be signed by an authorized representative of the building owner.

ISSUE 10(c): SHOULD THERE BE ANY RESTRICTIONS ON A BUILDING OWNER'S ABILITY TO ESTABLISH THE DEMARCATION POINT AND UTILIZE RISER CABLE AND/OR OTHER TERMINATING WIRE WITHIN THAT OWNER'S BUILDING?

COMMENTS AND DISCUSSION:

The FCC rules provide sufficient guidance on this issue, and a building owner's ability to establish the demarcation point and utilize riser cable or network terminating wire within that building should be governed by those rules.

ORDERED:

1. That a building owner's ability to establish the demarcation point and utilize riser cable or network terminating wire within that building should be governed by applicable FCC rules.

ISSUE 10(d): WHERE THE DEMARCATION POINT HAS PROPERLY BEEN ESTABLISHED SUCH THAT BELLSOUTH OWNS THE RISER CABLE AND NETWORK TERMINATING WIRE WITHIN A PARTICULAR BUILDING, UNDER WHAT TERMS AND CONDITIONS SHOULD NEXTLINK BE ALLOWED ACCESS TO THAT NETWORK TERMINATING WIRE AND/OR RISER CABLE?

COMMENTS AND DISCUSSION:

NEXTLINK asserts that it should be allowed to purchase riser cable and network terminating wire from BellSouth. BellSouth contends that riser cable and network terminating wire are sub-loop elements that NEXTLINK can purchase by placing an order and paying for such elements. BellSouth also asks the Authority to order NEXTLINK to cease its practice of unilaterally attaching its facilities to BellSouth's network terminating wire and riser cable.

The Arbitrators find that in instances where BellSouth owns the riser cable and network terminating wire within a multi-unit building, and NEXTLINK has purchased a loop from BellSouth to serve an end-user customer in that building, a separate rate need not be established for riser cable and network terminating wire because they are part of the facilities for which loop rates are established. However, when NEXTLINK installs facilities in a multi-unit building and only needs access to the riser cable and network terminating wire portion of the loop, rates should be established for these separate sub-loop elements. The proxy rates for the riser cable and network terminating wire portions of the local loop should be resolved in Final Best Offers.

ORDERED:

1. That in instances where BellSouth owns the riser cable and network terminating wire within a multi-unit building, and NEXTLINK has purchased a loop from BellSouth to serve an end-user customer in that building, a separate rate need not be established for riser cable and

network terminating wire because they are part of the facilities for which loop rates are established.

2. That, when NEXTLINK installs facilities in a multi-unit building and only needs access to BellSouth's riser cable and network terminating wire in order to serve an end-user customer, rates should be established for these separate sub-loop elements; and

3. That the parties shall submit Final Best Offers on the proxy rates to be paid by NEXTLINK for BellSouth's riser cable and network terminating wire when NEXTLINK seeks to make use of these separate sub-loop elements.

ISSUE 11: WHAT INTERVALS, IF ANY, SHOULD GOVERN BELLSOUTH'S APPLICATION PROCESSING, ORDERING, PROVISIONING, INSTALLATION, AND REPAIR OF POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY?

COMMENTS AND DISCUSSION:

NEXTLINK's witness, Mr. Gregory Breetz, testified about proposed intervals that should be established to apply to BellSouth's application processing, performance of pre-license surveys, and make-ready work conducted in connection with NEXTLINK's request for access to BellSouth's poles, ducts, conduits, and rights-of-way. NEXTLINK states that without these intervals, BellSouth has no incentive to process and implement requests for access in an efficient, timely manner. BellSouth's witness Milner responds that appropriate standard intervals do not exist for the ordering and provisioning of access to poles ducts conduits, and rights-of-way because of the uniqueness of each request.

The Arbitrators find that BellSouth should inform NEXTLINK whether it can accommodate NEXTLINK's license request and respond to NEXTLINK's license application within fifteen (15) calendar days after receipt of the application. The remaining intervals for ordering, provisioning, installation, and repair of poles, ducts, conduits, and rights-of-way, however, are issues that will be determined in *In re: BellSouth's Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 97-00309.[11] Interim intervals should be resolved in Final Best Offers.

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[11] The Arbitrators note that if BellSouth does not pursue its 271 Application pending in Docket No. 97-00309 to completion, then the provisions of the 1996 Act, independent of 47 U.S.C § 271 that require BellSouth to provide interconnection, unbundled access, resale, collocation and other specified rights, duties and privileges, will be used to resolve the remaining issues under Issue 11 upon the request any party to this proceeding.

ORDERED:

1. That BellSouth shall inform NEXTLINK whether it can accommodate NEXTLINK's license request and respond to NEXTLINK's license application within fifteen (15) calendar days after receipt of the application;

2. That the remaining intervals for the ordering, provisioning, installation, and repair of poles, ducts, conduits, and rights-of-way will be determined in Docket No. 97-00309; and

3. That, in the interim, the parties shall submit Final Best Offers for the remaining intervals for ordering, provisioning, installation, and repair of poles, ducts, conduits, and rights-of-way.

ISSUE 12(a): HOW SHOULD BELLSOUTH PROVIDE ACCESS TO LOOPS SERVED BY BELLSOUTH'S REMOTE SWITCHES?

ISSUE 12(b): MUST NEXTLINK BE COLLOCATED AT A BELLSOUTH STRUCTURE CONTAINING A REMOTE SWITCH TO OBTAIN ACCESS TO LOOPS SERVED OFF THAT REMOTE?

ISSUE 12(c): MUST NEXTLINK BE COLLOCATED AT A BELLSOUTH STRUCTURE CONTAINING THE REMOTE SWITCH EVEN WHEN NEXTLINK IS COLLOCATED AT THAT REMOTE SWITCH'S HOST CENTRAL OFFICE?

ISSUE 12(d): IF COLLOCATION IS REQUIRED, HOW MUST BELLSOUTH PROVIDE ACCESS TO LOOPS SERVED BY A REMOTE SWITCH WHEN COLLOCATION IS IMPOSSIBLE DUE TO SPACE OR OTHER LIMITATIONS?

COMMENTS AND DISCUSSION:

NEXTLINK states that it is not economically feasible for it to collocate in all BellSouth central offices in order to gain access to unbundled loops, and that BellSouth's requirement that new entrants be collocated in order to gain access to unbundled loops effectively prevents BellSouth from facing competition in large parts of Tennessee. In lieu of collocation at the remote switch, NEXTLINK argues that it should be allowed to acquire special access transport from the central office in which it is collocated to the remote switching office for access to unbundled loops at the remote switch. More specifically, NEXTLINK asserts that BellSouth should provide unbundled loops, including multiplexing, cross-connects and transport from a remote switch to the host central office where NEXTLINK is collocated. NEXTLINK does not believe that this type of arrangement constitutes a combination of elements by BellSouth because NEXTLINK will only request such loops from BellSouth in order to combine them with NEXTLINK's facilities to provide a completed service to NEXTLINK's customers. According to NEXTLINK, if the Arbitrators find that NEXTLINK must be collocated at a BellSouth remote switch in order to gain access to unbundled loops, BellSouth should provide alternative access to loops served by that remote switch if collocation is impossible due to space or other limitations.

BellSouth contends that collocation at the central office in which the remote switch is located is currently the only viable method by which a CLEC can obtain access to an unbundled loop served by that remote switch. BellSouth asserts that if unbundled loops terminated in a remote switch are trunked back to the host where NEXTLINK is collocated, as proposed by NEXTLINK, it will result in BellSouth providing a combination of transport and a loop, which BellSouth is not required to provide.[16] BellSouth maintains that even in those instances in which physical collocation is not practical for technical reasons or because of space limitation, virtual collocation is available. BellSouth states that it is not aware of any central office where virtual collocation is not currently possible. Further, because NEXTLINK has not identified any central office where it is impossible to collocate through either physical or virtual collocation, BellSouth contends that the Arbitrators need not resolve this issue. BellSouth does state, however, that in the unlikely event that collocation becomes impossible at a particular central office in the future, BellSouth is willing to negotiate with NEXTLINK a mutually acceptable alternative to collocation.

Consistent with the Arbitrators' decision on Issues 3 and 4, the Arbitrators determine that it is not necessary for NEXTLINK to be collocated at a remote switch in order to obtain access to unbundled loops served from that remote. When NEXTLINK is not collocated at a remote switch, regardless of whether NEXTLINK is collocated at the host central office, BellSouth must provide NEXTLINK with access to its network facilities through an independent third-party

[16] See *Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753 (8[th] Cir. 1997).

vendor who would perform the actual combining of elements on NEXTLINK's behalf. The cost of having an independent third-party vendor combine unbundled network elements must appropriately be borne by NEXTLINK. The qualifications of the independent third-party vendor performing the combinations and the procedures for selecting the vendor will be resolved in Final Best Offers consistent with the Final and Best Offers for Issues 3(a), 4(b) and 4(c).

<u>ORDERED:</u>

1. That NEXTLINK is not required to be collocated at a remote switch in order to obtain access to unbundled loops served from that remote;

2. That, if NEXTLINK seeks to combine unbundled network elements when it is not collocated at the remote switch, BellSouth must provide NEXTLINK with access to its network facilities through an independent third-party vendor who will perform the actual combining of elements for NEXTLINK at NEXTLINK's expense; and

3. That the parties are directed to submit Final Best Offers concerning the qualifications of the independent third-party vendor performing the combinations for NEXTLINK and the procedures for selecting that vendor, which must be adequate to address BellSouth's security concerns without being so onerous so as to effectively discourage NEXTLINK's use of an independent third-party vendor to combine elements on its behalf.

CONCLUSION

The Arbitrators state that the decisions made on October 6, 1998, are considered rendered when voted upon that day. The Arbitrators conclude that the foregoing First Order of Arbitration Award reflects resolution of the issues presented by the parties for arbitration. The Arbitrators conclude that their resolution of these issues complies with the provisions of the Federal Telecommunications Act of 1996, and is supported by the record in this proceeding.

TENNESSEE REGULATORY AUTHORITY, BY ITS DIRECTORS ACTING AS ARBITRATORS

CHAIRMAN MELVIN MALONE

DIRECTOR LYNN GREER

DIRECTOR SARA KYLE

ATTEST:

EXECUTIVE SECRETARY

SERVICE DATE

MAR 2 2 1999

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between ELECTRIC LIGHTWAVE, INC., and GTE NORTHWEST INCORPORATED Pursuant to 47 USC Section 252.	)	DOCKET NO. UT-980370 ARBITRATOR'S REPORT AND DECISION

I. MEMORANDUM

A. Procedural History.

On May 1, 1998, Electric Lightwave, Inc. (ELI), requested to negotiate an interconnection agreement with GTE Northwest Incorporated (GTE). On October 7, 1998, ELI, timely filed a Petition for Arbitration with the Washington Utilities and Transportation Commission ("Commission")[1] pursuant to 47 USC § 252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 U.S.C. § 151 et seq. (1996) (Telecom Act). The matter was designated Docket No. UT-980370.

The Commission entered an Order on Arbitration Procedure and appointed an arbitrator on October 27, 1998. GTE filed its response with the Commission on November 2, 1998.[2]

On November 13, 1998, a prehearing conference was held to establish a procedural schedule. On November 25, 1998, the parties jointly requested that the statutory deadline for resolution of disputed issues be extended and they waived all rights to challenge a Commission decision dated on or before March 8, 1999, on the basis of timeliness. On December 1, 1998, the First Supplemental Order on Prehearing Conference approving the joint request was entered. Opening testimony was filed on December 1, 1998. Reply testimony was filed January 4, 1999.

On January 13, 1999, a second prehearing conference was held. At the conference the parties agreed to stipulate the prefiled testimony and exhibits into

[1] In this decision, the Washington Utilities and Transportation Commission is referred to as the Commission. The Federal Communications Commission is referred to as the FCC.

[2] The ELI Petition, including its proposed interconnection agreement, and GTE's Response, although not separately marked as hearing exhibits, are deemed a part of the record and properly before the Arbitrator and the Commission.

evidence, waive the scheduled hearing, and submit briefs on the unresolved issues. Opening briefs were filed on January 27, 1999. Reply briefs were filed on February 1, 1999.

On February 24, 1999, the parties jointly requested an additional extension of the statutory deadline to March 22, 1999, and for permission to file supplemental briefs. The requests were granted. Supplemental briefs were filed on March 8, 1999.

B. Presentation of Issues.

The parties presented three issues for resolution in this proceeding. GTE raised an additional issue in its Supplemental Brief. The issues are:

1. Should GTE and ELI Compensate Each Other under Their Agreement for the Costs of Transport and Termination for Traffic Exchanged Between Their Networks over Local Interconnection Facilities That Terminate to Internet Service Providers?

2. What Compensation Mechanism Should Be Applied for the Costs of Transport and Termination for Traffic Exchanged Between Networks over Local Interconnection Facilities That Terminate to ISPs?

3. Should GTE Compensate ELI for Traffic Exchanged Between Their Networks at the Tandem Switching Rate or at the End Office Switching Rate?

4. Should the Commission Shorten the Negotiated and Agreed to Term of the Agreement or Establish Procedures to Clarify or Modify Interim Rules for Inter-carrier Compensation?

C. Resolution of Disputes and Contract Language Issue.

On December 1, 1998, the First Supplemental Order on Prehearing Conference was entered and stated that "final offer" arbitration would not control dispute resolution. In preparing the arbitration report in this matter, the arbitrator was not required to choose between the parties' last proposals as to each unresolved issue. The arbitrator considered the parties' arguments and made decisions consistent with the requirements of state and federal law and the Commission on an issue-by-issue basis.

As a general matter, this decision is limited to the disputed issues presented for arbitration. 47 U.S.C. § 252(b)(4). Each decision of the arbitrator is subject to and qualified by the discussion of the issue. The arbitrator reserves the discretion to either adopt or disregard proposed contract language in making decisions.

However, adoption of one party's position generally implies that the parties should use that party's contract language incorporating the advocated position in preparing a final agreement. Contract language adopted remains subject to Commission approval. 47 U.S.C. § 252(e).

This Arbitrator's Report and Decision is issued in compliance with the procedural requirements of the Telecom Act, and it resolves all issues which were submitted to the Commission for arbitration by the parties. At the conclusion of this Report and Decision, the Arbitrator addresses the approval procedure to be followed in furtherance of the issuance of a Commission order approving an interconnection agreement between the parties.

C. Generic Pricing Proceeding

On October 23, 1996, the Commission entered an order in other arbitration dockets declaring that a generic proceeding would be initiated in order to review costing and pricing issues for interconnection, unbundled network elements, transport and termination, and resale.[3] The Commission stated that rates adopted in the pending arbitrations would be interim rates, pending the completion of the generic proceeding. That proceeding is underway.[4] Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate. The conclusions of the arbitrator with respect to price proposals and supporting information are made in this context and do not necessarily indicate Commission approval or rejection of cost and price proposals for purposes of the Generic Case.

D. The Eighth Circuit Order and the FCC Rules

On August 8, 1996, the FCC issued its First Report and Order (Local Interconnection Order), including Appendix B - Final Rules (FCC Rules).[5] On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit stayed operation of the FCC Rules relating to pricing and the "pick and choose" provisions.[6]

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[3] Order on Sprint's Petition to Intervene and to Establish Generic Pricing Proceeding (October 23, 1996) (Generic Pricing Order).

[4] *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, UT-960369 (general), UT-960370 (USWC), UT-960371(GTE): Order Instituting Investigations; Order of Consolidation; and Notice of Prehearing Conference, November 21, 1996 (Generic Case).

[5] *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B- Final Rules.

[6] *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996).

On July 18, 1997, the Eighth Circuit issued an order vacating several of the FCC Rules. On October 14, 1997, the Court entered an order on rehearing vacating additional FCC Rules. The Eighth Circuit decisions were thereafter appealed to the U. S. Supreme Court. On January 25, 1999, the Supreme Court issued a decision holding that the FCC Rules, with the exception of §51.319, are consistent with the Telecom Act.[7]

E. The FCC's Declaratory Order

On February 26, 1999, the Federal Communications Commission (FCC) entered its long awaited order on the issue of inter-carrier compensation for ISP-bound traffic (Declaratory Ruling).[8] The Declaratory Ruling was in response to a number of requests to clarify whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic it delivers to an Internet service provider. Generally, competitive LECs (CLECs), such as ELI, contend that this is local traffic subject to the reciprocal compensation provisions of section 251(b)(5) of the Telecom Act. Incumbent LECs (ILECs), such as GTE, contend that this is interstate traffic beyond the scope of section 251(b)(5). The Declaratory Ruling concluded that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate, but further held that this conclusion does not in itself determine whether reciprocal compensation is due in any particular instance.

The FCC noted that it has no rule governing inter-carrier compensation for ISP-bound traffic, and found no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.[9] The FCC also reiterated that state commission authority over interconnection agreements pursuant to 252 of the Telecom Act extends to both interstate and intrastate matters, and the mere fact that ISP-bound traffic is considered largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process.[10]

The FCC issued a Notice of Proposed Rulemaking simultaneous with the Declaratory Ruling for the purpose of adopting a rule regarding inter-carrier compensation for ISP-bound traffic. In the interim, the duty of state commissions to

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[7] *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

[8] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, FCC 99-38 (February 26, 1999).

[9] Declaratory Ruling, ¶¶ 21-22.

[10] Declaratory Ruling, ¶ 25, citing the *Local Interconnection Order*, 11 FCC Rcd at 15544.

arbitrate interconnection disputes encompasses the resolution of disputed issues relating to ISP-bound traffic, consistent with governing federal law:

> . . . [N]othing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate *interim inter-carrier compensation rule* [for ISP-bound traffic] pending completion of the rulemaking we initiate below. Declaratory Ruling, ¶ 27 (Emphasis added).
>
> * * * *
>
> Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for [ISP-bound] traffic. Declaratory Ruling, ¶ 28.

The Commission must fulfill its statutory obligation under section 252 of the Telecom Act to resolve the disputes presented by ELI and GTE in this proceeding, and to decide whether an inter-carrier compensation mechanism should be established. As discussed in this report, the decision that reciprocal compensation is appropriate as inter-carrier compensation is an interim rule pending completion of the FCC's rulemaking and must vary to comply with subsequent federal rules.

F. The Internet

The Internet "is an international network of interconnected computers." *Reno. v. ACLU*, 117 S.Ct. 2329, 2334 (1997).

> [A]ccess to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant . . . are electronic mail ("e-mail"), automatic mailing list services . . ., "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium . . . located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet. *Id.*, 117 S.Ct. at 2335.

Essentially, the "Internet is a distributed packet-switched network, which means that information [being transported within the network] is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." *Report to Congress*, In Re Federal-State Joint Board on Universal Service, FCC 98-67, at ¶ 64 (April 10, 1998). Generally, individuals contract with an Internet Service Provider (ISP) for a flat monthly fee to access the Internet. ISPs pay their own local exchange carrier for the telecommunications services that allow its customers to call it. If an ISP is located in the same "local" calling area as a customer, the customer may dial a seven-digit using the public switched telephone network to connect to the ISP facility. The ISP's modem then converts the analog messages from its customers into data "packets" that are switched through the Internet and its host computers and servers. Digital information is transmitted back to the ISP to be converted into analog form and delivered to the ISP's customer.

G. Standards for Arbitration

The Telecommunications Act states that in resolving by arbitration any open issues and imposing conditions upon the parties to the agreement, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c).

II. RESOLUTION OF DISPUTED ISSUES

1. Should GTE and ELI Compensate Each Other under Their Agreement for the Costs of Transport and Termination for Traffic Exchanged Between Their Networks over Local Interconnection Facilities That Terminate to Internet Service Providers?

A. GTE's Position

GTE argues that the FCC's Declaratory Ruling requires that ISP-bound traffic should not be the subject of mutual compensation under the interconnection agreement in this proceeding. GTE states that it is incumbent upon the Arbitrator to resolve this issue in the context of the largely negotiated interconnection agreement between the parties (Agreement).[11]

The Agreement provides that the parties shall reciprocally terminate local, intraLATA toll, optional EAS, and jointly provided Interexchange Carrier traffic originating on each other's networks. Agreement, Art. V, §3.1. The Agreement also provides that charges for the transport and termination of non-local traffic, including optional EAS, intraLATA toll, and interexchange traffic shall be in accordance with the parties' respective intrastate or interstate access tariffs or price lists. Agreement, Art. V, §3.2.1. According to GTE, there is no other provision in the Agreement for compensation of interstate traffic.

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[11] *Petition of Electric Lightwave, Inc.*, Docket No. UT-980370, Exhibit B; Interconnection, Resale and Unbundling Agreement Between GTE Northwest Incorporated and Electric Lightwave, Inc.

GTE argues that the FCC determined Internet traffic to be jurisdictionally interstate. Thus, ISP-bound traffic is non-local and not subject to reciprocal compensation obligations under the negotiated terms of the Agreement. Furthermore, GTE argues that prior Commission decisions upholding reciprocal compensation for ISP-bound traffic should not be accorded any weight as precedent.

B. ELI's Position

ELI states that the FCC found ISP-bound traffic to be jurisdictionally mixed and largely interstate. However (contrary to GTE's position), ELI argues that the Declaratory Ruling provides that reciprocal compensation for ISP-bound traffic is lawful, despite the fact that it is jurisdictionally mixed. ELI argues that the Commission previously concluded that traffic terminated to ISPs is subject to reciprocal compensation, and in the absence of a contrary federal rule, the Commission should not depart from that precedent.[12]

ELI also argues that reciprocal compensation presents the most equitable mechanism for inter-carrier compensation. Carriers are typically compensated for terminating interstate traffic through access charges and local traffic through reciprocal compensation. However, ISPs do not pay access charges as a result of the FCC's "Enhanced Service Provider (ESP) exemption". Nevertheless, ELI contends that carriers must be compensated for the termination of traffic. Accordingly, reciprocal compensation is the logical alternative for ISP-bound traffic.

C. Discussion

Previous arbitration decisions by the Commission favoring reciprocal compensation for ISP traffic were made with the foreknowledge that the issue would be addressed by the FCC at a later date. GTE's argument that those decisions should not be accorded any weight as precedent in light of the FCC's Declaratory Ruling has merit. However, GTE's argument that ELI is estopped from receiving reciprocal compensation for ISP-bound traffic by the terms of the negotiated Agreement and the FCC's Declaratory Ruling is rejected as too narrow an interpretation. The parties submitted the issue to be arbitrated as:

> Should GTE and ELI compensate each other under this Agreement for the costs of transport and termination for traffic exchanged between

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[12] *Order Approving Negotiated and Arbitrated Interconnection Agreement*, In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. (MFS), and U S WEST Communications, Inc., Docket No. UT-960323 (January 8, 1997) (MFS Arbitration).

> their networks over local interconnection facilities that terminate to Internet Service Providers ("ISPs")?[13]

GTE does not dispute that ISP-bound traffic is terminated over local interconnection facilities, and ISPs continue to be entitled to purchase their public switched telephone network links through local tariffs rather than interstate access tariffs.[14] The FCC found that ISP-bound traffic is jurisdictionally mixed and a substantial portion of dial-up ISP-bound traffic is interstate.

GTE argues that the negotiated provisions of the Agreement should be strictly construed and that ELI is implicitly estopped from receiving reciprocal compensation by the Declaratory Ruling. The Agreement provides that charges for the transport and termination of non-local traffic shall be in accordance with access tariffs or price lists. GTE maintains that the FCC's determination that ISP traffic is substantially interstate requires ELI to pursue compensation under the access tariffs, suggesting that the FCC exemption of ISPs from access charges is an unrelated issue.

ELI's statement of the disputed issue in its briefs differs from Exhibit 9:

> [Should the Commission] direct the parties to compensate each other under the reciprocal compensation mechanism contained in the interconnection agreement for the costs of termination of traffic to Internet Service Providers . . ..

GTE relies on the phrase "under the Agreement" to argue that the Commission is precluded from determining, pursuant to legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule for ISP-bound traffic. However, the FCC's Declaratory Ruling recognized that the non-local character of ISP-bound traffic is not determinative of the compensation issue. The parties submitted their agreed upon statement of disputed issues prior to the FCC's Declaratory Order and GTE unreasonably relies on form over substance.

Although opening arguments by the parties focus on whether ISP-bound traffic was local or interstate, the underlying issue is whether reciprocal compensation should be exchanged. GTE witness Steve Pitterle acknowledged that the primary issue is whether the FCC's Declaratory Ruling provides that the ISP reciprocal compensation issue remains under the jurisdiction of this Commission. Exh. 3, p. 7. The Declaratory Ruling unambiguously provides that state commissions retain jurisdiction to determine whether reciprocal compensation is an appropriate interim inter-carrier compensation rule. To the extent the negotiated terms of the Agreement

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[13] Exhibit 9.

[14] Declaratory Ruling, ¶ 20.

conflict with federal law, FCC rules, or the Commission's duty to arbitrate interconnection disputes under the Telecom Act, they will be rejected when submitted for approval pursuant to section 252(e)(2)(A)(ii).

The Declaratory Ruling, ¶ 27, states:

> [N]othing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.

Accordingly, resolution of this issue requires determination of whether such other legal or equitable considerations exist.

While the FCC's Declaratory Ruling specifically addresses issues raised by various parties regarding compensation for transport and termination of ISP-bound Internet traffic, the underlying functionality provided by ISPs is the interconnection of a circuit-switched network with a packet-switched network. These two networks are fundamentally different; circuit switching reserves network resources to route messages whereas packet switching utilizes network resources based upon availability. Historically, the jurisdictional separation between circuit-switched local and long distance traffic is determined by the state in which a call originates and terminates. That distinction also reflects the additional costs incurred in reserving network resources over long distance. The jurisdictional analysis is less straightforward for the packet-switched network environment of the Internet.[15]

The FCC local Interconnection Order, at ¶ 1033, states:

> Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications.

Packet-switched networking brings the underlying costs for the transport and termination of local and long distance traffic closer to its ultimate convergence. The FCC has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, but exempted ESPs from the payment of certain interstate

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[15] Declaratory Ruling, ¶ 18.

access charges and treated ISP-bound traffic as though it were local since 1983.[16] Thus, ISP-bound traffic can be characterized as "local-interstate".

Local-interstate traffic also exists in cases where territory in multiple states is included in a single local service area, and a local call crosses state lines. Two examples of such local service areas are Pullman, WA - Moscow, ID, and Clarkston, WA - Lewiston, ID. Although the Declaratory Ruling concludes that ISP-bound local-interstate traffic does not terminate at the ISP's local server, it does not necessarily terminate at a local carrier's end-office switch in some other state either. However, a cost of "terminating the call" occurs at the end-user ISP's local server (where the traffic is routed onto a packet-switched network), and the applicable rate should be determined by the state where the terminating carrier's end office switch is located.[17] ISPs are end-users, not telecommunication carriers.

In the case of ISP-bound traffic, the terminating carrier incurring costs is the carrier that delivers traffic to the ISP. In the context of ISP-traffic, the "call" actually consists of acquiring "access" to a packet-switched network. While a packet-switched network may enable users to replicate a circuit-switched call, Internet access is an amorphous medium and should not be considered a "call" in the switched-circuit sense.

D. Decision

Inter-carrier compensation for local-interstate traffic should be governed by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Telecom Act. A single set of negotiations regarding rates, terms, and conditions is more likely to lead to a process that is market-driven and efficient outcomes for all traffic exchanged by the parties. The Commission is not precluded from determining that reciprocal compensation is an appropriate interim inter-compensation rule for ISP-bound traffic by either the FCC's Declaratory Ruling or the Agreement.

The duty of local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications must be based upon compensating costs where they are incurred. LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network and the terminating LEC does not directly receive any revenue from the customer who originates the call. Even though local-interstate traffic is not addressed by section

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16 Declaratory Ruling, ¶¶ 5 and 23.

17 This outcome is consistent with the *Local Interconnection Order*, at ¶ 1038: "In cases in which territory in multiple states is included in a single local service area . . . we conclude that the applicable rate for any particular call should be that established by the state in which the call terminates."

251(b)(5) of the Telecom Act, the FCC's policy of treating ISP-bound traffic as local for purposes of interstate access charges leads to the equitable conclusion that it also should be treated as local for purposes of reciprocal compensation charges. The only other alternative would be to apply interstate terminating access charges.

2. What Compensation Mechanism Should Be Applied for the Costs of Transport and Termination for Traffic Exchanged Between Networks over Local Interconnection Facilities That Terminate to ISPs?

A. GTE's Position

GTE argues that ISP-bound traffic should not be treated as if it were local and that no compensation for transport and termination is appropriate. GTE argues that minutes-of-use (MOU) based compensation is inappropriate for ISP-bound traffic, and bill and keep or flat-rate compensation are the only alternatives that should be considered.

GTE witness Dr. Edward Beauvais emphasizes that it is inefficient to allow flat-rated local service for end users and require local carriers to pay reciprocal compensation for exchanging traffic based upon MOU. The result would be prices for local usage set at a level below the incremental cost of providing the end-to-end call. Dr. Beauvais contends that end user charges and carrier compensation charges must complement each other, and a usage-based compensation approach should not be approved and adopted in this arbitration unless this Commission is willing to re-examine the associated issues of end user pricing on a measured basis. GTE argues that economic distortions caused by the FCC's exemption of ISPs from access charges would be exacerbated if ISP-bound traffic also is made subject to reciprocal compensation.

GTE also argues that MOU-based compensation could lead to substantial unwarranted "subsidies" between carriers because of the long hold times associated with ISP traffic, and has nothing to do with the true costs for providing that service. GTE witness R. Kirk Lee contends that the expense of reciprocal compensation for traffic with longer average call duration has not been built into GTE's retail rate structure. GTE witness Steven Pitterle claims that GTE will be unable to recover its costs if it is required to compensate ELI for ISP-bound traffic on a usage basis.

GTE states that bill and keep is preferable to both MOU and flat-rated compensation methods as an interim mechanism. Bill and keep is a reasonable approximation of costs and a preferred outcome in Washington. Mr. Pitterle contends that bill and keep is an appropriate and equitable mechanism to maintain a consistent relationship between revenues received from flat-rated end users and potential compensation payments to ELI. A bill and keep mechanism would maintain the status quo between the parties until the FCC completes its rulemaking.

Alternatively, GTE proposes a flat-rated pricing system that more closely tracks the costs associated with ISP-bound traffic, and the revenues to be received to cover those costs. As explained by Mr. Lee, non-ISP local traffic would still be subject to the MOU compensation structure in the negotiated Agreement. GTE argues that the fl-- rate per trunk charge calculated by Mr. Lee is a straightforward use of the costs developed by the Commission in the Generic Cost/Pricing Case.

B. ELI's Position

ELI proposes that the parties compensate each other for ISP-bound traffic under the MOU based reciprocal compensation mechanism contained in the Agreement. ELI argues that GTE's proposal for a different compensation mechanism for ISP-bound traffic should be rejected because GTE failed to provide any evidence that there is a cost difference between terminating traffic to ISP and non-ISP end users. ELI witness Timothy Peters contends that ELI incurs the same costs to terminate a call from a GTE customer regardless of whether that call is made to an ELI ISP customer or any other customer within the local calling area.

ELI argues that GTE's revenues are unrelated to the proper determination of an appropriate reciprocal compensation mechanism. The Telecom Act requires that prices be established based upon the cost of transporting and terminating traffic. Furthermore, ELI contends that GTE promotes pricing methodologies which the FCC determined to be inconsistent with section 252(d)(1) of the Telecom Act.

ELI opposes a bill and keep mechanism because traffic between GTE and ELI is not balanced, as the parties acknowledged by agreeing to MOU compensation for the transport and termination of local traffic. The only reason GTE is advocating a different mechanism for ISP-bound traffic is because that traffic is also imbalanced, but in favor of ELI.

ELI states that there is nothing inherently wrong with using a properly calculated flat-rated port charge for reciprocal compensation purposes; however, GTE proposes a flat-rate to be applied only to ISP-bound traffic, yet GTE does not demonstrate that the costs of terminating ISP traffic differs from other local traffic.

C. Discussion

The reciprocal compensation mechanism and rates to be established in this arbitration are interim in two respects: 1) they are interim pending the determination of permanent rates in the Commission's Generic Cost/Pricing Case; and 2) they are interim pending the FCC's NPRM. GTE's proposal for alternative reciprocal compensation mechanisms are all predicated on different mechanisms for ISP local-interstate traffic and non-ISP local traffic, even though there is no evidence in the record that the costs for transport and termination differ. GTE seeks to retain

MOU-based compensation for local traffic that is potentially imbalanced in its favor, but seeks to minimize (or avoid) any expense for ISP-bound traffic which is potentially imbalanced in ELI's favor. Furthermore, the GTE proposal does not allow for offsetting imbalances in one type of traffic with the other.

While it may be economically efficient to implement measured rates for local service as discussed by Dr. Beauvais, the existing statutory scheme and long standing regulatory policy in the state of Washington favors flat-rate local service, and this arbitration is not a proper proceeding to implement that kind of change. Due to the prevailing flat-rate retail structure and the lack of substantive evidence of differing costs for the transport and termination of ISP local-interstate and non-ISP local traffic, it is inappropriate and inequitable to adopt separate reciprocal compensation mechanisms in this arbitration.

The Commission has previously identified both bill and keep and capacity-based charge mechanisms as preferred outcomes for local call termination compensation. Nevertheless, GTE and ELI negotiated a MOU-based reciprocal compensation mechanism for local traffic in the Agreement. Furthermore, GTE considers that negotiated Agreement provision to be outside of the scope of this arbitration. The Commission approves negotiated agreements pursuant to section 252(e)(2)(A) of the Telecom Act, and there are no grounds to reject the reciprocal compensation mechanism for local traffic in the Agreement.

As the market for telecommunication services changes, traditional assumptions underlying retail rate structures may require revision as well. If GTE's retail rates do not provide sufficient revenues to offset expenses because of a shift in its end user calling patterns, a reasonable response would be to request rate relief based upon new cost studies rather than shift the burden onto other interconnecting carriers. Another reasonable response would be to support capacity based charges for the transport and termination of all traffic entitled to local treatment, not just the traffic that generates an undesirable imbalance under measured usage.

D. Decision

GTE's proposals that the Commission adopt separate reciprocal compensation mechanisms for the transport and termination of ISP-bound local-interstate and non-ISP local traffic are inappropriate and inequitable because there is no evidence that those traffic costs differ. Insofar as the parties have negotiated an MOU-based reciprocal compensation mechanism for local traffic in the Agreement and GTE considers that provision outside of the scope of this arbitration, it is unnecessary to further evaluate GTE's alternative proposals. The parties should apply the same MOU-based reciprocal compensation mechanism to ISP-bound local-interstate traffic that is used for non-ISP local traffic exchanged between their networks over local interconnection facilities.

3. **Should GTE Compensate ELI for Traffic Exchanged Between Their Networks at the Tandem Switching Rate or at the End Office Switching Rate?**

A. GTE's Position

GTE disputes ELI's claim that it serves a comparable geographic area to that served by GTE's tandem switch. GTE argues that the coverage of its tandem is substantially larger in GTE's service area than the area served by ELI's switch. GTE contends that the coverage must be equivalent or similar to the ILECs specific tandem at issue, and not a comparison between non-overlapping service areas.

GTE points to the pending installation of ELI's second switch and argues that ELI's claim that its network incurs more "transport" costs and less "switching" costs (thus, justifying the tandem rate) is negated. GTE argues that the second switch will bring switching closer to ELI's end user customers making GTE's end office switching rate more appropriate. By increasing switching, ELI proportionately reduces the transport for which the FCC designated the tandem rate as a proxy in the FCC Rules. 47 C.F.R. section 51.711(a)(3) states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

GTE also argues that ELI's fiber optic rings constitute long local loops, not transport.

GTE witness Howard Jones defines and contrasts the functionality of a tandem switch with an end office switch. A tandem switch performs two basic functions: 1) it collects traffic from incoming trunk groups according to common destination points and then switches that traffic to a single outgoing trunk group to the common destination; and 2) it performs only trunk to truck switching. An end office switch performs line to line, line to trunk, and trunk to line (but not trunk to trunk) switching. Mr. Jones characterizes the ELI switch as an end office switch because all ELI customers are connected to the line side of the ELI switch.

B. ELI's Position

ELI argues that the reason for a rule regarding comparable service areas is that the coverage area best represents a reasonable approximation of the carrier's cost of switching traffic. According to ELI the term comparable indicates that the size of the areas served by the respective carrier's switch must be similar and not necessarily overlapping. Mr. Peters describes ELI's network as a single switch that is connected to interlocking fiber optic rings. ELI covers a comparable area, but with a single switch and extensive transport, rather than multiple switches. ELI's switch effectively acts as both a tandem and end-office switch. Mr. Peters states that ELI's network configuration is more efficient for its operations, but it does not necessarily incur any less cost to terminate local traffic in its geographic service area than GTE incurs.

ELI states that the sole reason for the installation of a second switch is that ELI's current switch is out of capacity and proximity to end users has no relation to the pending installation. ELI contends that it will incur increased switching costs in order to serve the same geographic area and urges the Commission to reject GTE's position because it fails to recognize the overall symmetry between the parties' costs of transport and termination.

Finally, ELI argues that the Commission's decision in the MFS Arbitration adopted MFS's proposal that its fiber optic ring network was entitled to tandem treatment for its single switch, and rejected arguments made by U S WEST that are identical to those now forwarded by GTE.

C. Discussion

In the paragraph explaining the effect of 47 C.F.R. § 51.711(a)(3), the FCC made it clear that it was utilizing a tandem rate as "the approximate proxy for the interconnecting carrier's additional costs" where an interconnecting carrier's switch serves a comparable geographic area. *Local Interconnection Order*, ¶ 1090. Although GTE argues that the forward-looking economic costs should be similar for an incumbent LEC and an interconnecting carrier providing service in the same geographic area, it offers no economic rationale in opposition to ELI's argument that the objective is to reasonably approximate the symmetrical cost of switching traffic.

In the MFS case, U S WEST argued that the MFS network did not coincide with its extensive geographic service area. MFS argued that if it serviced customers in U S WEST's central and eastern Washington exchanges it would have to absorb the cost of construction, leasing, or purchasing unbundled network elements to provide facilities. Identical circumstances exist relating to GTE's rural central Washington exchanges.

There is substantial overlap between ELI's and GTE's service area and ELI's overall service area is comparable to GTE.[18] New entrants to the market will be unable to match the economies of scope and scale enjoyed by GTE, and the FCC's rules do not require that ELI serve the same area as GTE.

The functional similarity between a CLEC switch and an incumbent LEC's tandem switch is not relevant where the evidence supports a finding that they

[18] Exhibit 8.

serve a geographically comparable area. Nevertheless, the record indicates that ELI's switch performs the function of aggregating and routing traffic along its interlocking fiber optic rings similar to a tandem switch. Network upgrades to increase switching capacity do not impact the analysis of functional similarity of switches in alternative network configurations.

D. Decision

GTE should compensate ELI at the tandem switching rate.

4. Should the Commission Shorten the Negotiated and Agreed to Term of the Agreement or Establish Procedures to Clarify or Modify Interim Rules for Inter-carrier Compensation?

A. GTE's Position

GTE acknowledges its obligation to enter into an interconnection agreement while the FCC rulemaking opened in the Declaratory Ruling is pending. GTE argues that the FCC limited state commission authority to devise inter-carrier compensation rules by providing that a Commission decision is interim pending completion of the rulemaking. GTE believes that an unfair result will occur if it is bound by the Commission's decision after its legal obligations are clarified or modified by the FCC, and seeks to lay the groundwork for review at this time.

GTE expresses its willingness to renegotiate inter-carrier compensation either upon the issuance of final rules in FCC Docket No. 99-68, or after one year.

B. ELI's Position

ELI states that the parties negotiated and agreed to modify the rates, terms, and conditions of the interconnection agreement in order to conform with a change in law, including federal rules pertaining to the appropriate reciprocal compensation mechanism for ISP-bound traffic. Accordingly, ELI argues that GTE will not be deprived of future regulatory decisions as a result of any current, lawful decision of this Commission. If the FCC's rulemaking concludes with the adoption of a rule that conflicts with the interconnection agreement's compensation mechanism, those provisions are subject to change in accordance with federal rules pursuant to the terms of the Agreement.

C. Discussion

The Commission's authority to reject any portion of an interconnection agreement adopted by negotiation is governed by section 252(e)(2) of the Telecom Act. GTE and ELI have negotiated and agreed to an effective term of the Agreement (Article III, Section 2), and they did not request arbitration of the effective term as a disputed issue. The parties have also adopted by negotiation terms for resolving disputes arising during the effective term of the Agreement (Article III, Section 14), and for modification of the Agreement to comply with changes in law during the effective term (Article III, Sections 32 and 40). These portions of the Agreement do not discriminate against a third party telecommunications carrier, and implementation of these provisions is consistent with the public interest, convenience, and necessity. The terms of the Agreement sufficiently address GTE's concern that an unfair result may occur if subsequent FCC rules differ from the Commission's interim rules in this case.

D. Decision

The Commission should not shorten the negotiated and agreed to term of the Agreement or establish other procedures to clarify or modify interim rules for inter-carrier compensation.

III. IMPLEMENTATION SCHEDULE

Pursuant to 47 U.S.C. § 252(c)(3), the arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." In this case the parties did not submit specific alternative implementation schedules. Specific contract provisions, however, may contain implementation time lines. The parties shall implement the agreement pursuant to the schedule provided for in the contract provisions, and in accordance with the 1996 Act, the applicable FCC rules, and the orders of this Commission.

In preparing a contract for submission to the Commission for approval, the parties may include an implementation schedule.

IV. CONCLUSION

The foregoing resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 252(c). Insofar as the parties have largely negotiated an interconnection agreement, and few issues were submitted for arbitration, there is good cause to shorten the time for filing the Agreement with the Commission.

The parties are directed to submit an agreement consistent with the terms of this report to the Commission for approval within 14 days, pursuant to the following requirements of the Interpretive and Policy Statement, as modified:[18]

[18] *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (June 27, 1996)

A. Filing and Service of Agreements for Approval

1. An interconnection agreement shall be submitted to the Commission for approval under Section 252(e) within 14 days after the issuance of the Arbitrator's Report, in the case of arbitrated agreements, or, in the case of negotiated agreements, within 30 days after the execution of the agreement. The 14 day deadline may be extended by the Commission for good cause. The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) as including the approval process.

2. Requests for approval shall be filed with the Secretary of the Commission in the manner provided for in WAC 480-09-120. In addition, the request for approval shall be served on all parties who have requested service (List available from the Commission Records Center. See Section II.A.2 of the Interpretive and Policy Statement) by delivery on the day of filing. The service rules of the Commission set forth in WAC 480-09-120 and 420 apply except as modified in this interpretive order or by the Commission or arbitrator. Unless filed jointly by all parties, the request for approval and any accompanying materials should be served on the other signatories by delivery on the day of filing.

3. A request for approval shall include the documentation set out in this paragraph. The materials can be filed jointly or separately by the parties to the agreement, but should all be filed by the 14-day deadline set out in paragraph 1 above.

B. Negotiated Agreements

a. A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified, including a statement as to why the agreement does not discriminate against non-party carriers, is consistent with the public interest, convenience, and necessity, and is consistent with applicable state law requirements, including Commission interconnection orders.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. A proposed form of order containing findings and conclusions.

C. Arbitrated Agreements

a. A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified; and containing a separate

("Interpretive and Policy Statement").

explanation of the manner in which the agreement meets each of the applicable specific requirements of Sections 251 and 252, including the FCC regulations thereunder, and applicable state requirements, including Commission interconnection orders. The "request for approval" brief may reference or incorporate previously filed bri... or memoranda. Copies should be attached to the extent necessary for the convenience of the Commission.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. Complete and specific information to enable the Commission to make the determinations required by Section 252(d) regarding pricing standards, including but not limited to supporting information for (1) the cost basis for rates for interconnection and network elements and the profit component of the proposed rate; (2) transport and termination charges; and (3) wholesale prices.

d. A proposed form of order containing findings and conclusions.

D. Combination Agreements (Arbitrated/Negotiated)

a. Any agreement containing both arbitrated and negotiated provisions shall include the foregoing materials as appropriate, depending on whether a provision is negotiated or arbitrated. The memorandum should clearly identify which sections were negotiated and which arbitrated.

b. A proposed form of order is required, as above.

4. Any filing not containing the required materials will be rejected and must be refiled when complete. The statutory time lines will be deemed not to begin until a request has been properly filed.

E. Confidentiality

1. Requests for approval and accompanying documentation are subject to the Washington public disclosure law, including the availability of protective orders. The Commission interprets 47 U.S.C. § 252(h) to require that the entire agreement approved by the Commission must be made available for public inspection and copying. For this reason, the Commission will ordinarily expect that proposed agreements submitted with a request for approval will not be entitled to confidential treatment.

2. If a party or parties wishes protection for appendices or other materials accompanying a request for approval, the party shall obtain a resolution of the confidentiality issues, including a request for a protective order and the necessary signatures (Exhibits A or B to standard protective order) prior to filing the request for approval itself with the Commission.

F. Approval Procedure

1. The request will be assigned to Commission Staff for review and presentation of a recommendation at the Commission public meeting. The Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act. Commission Staff who participated in the mediation process for the agreement will not be assigned to review the agreement.

2. Any person wishing to comment on the request for approval may do so by filing written comments with the Commission no later than 10 days after date of request for approval. Comments shall be served on all parties to the agreement under review. Parties to the agreement file written responses to comments within 7 days of service.

3. The request for approval will be considered at a public meeting of the Commission. Any person may appear at the public meeting to comment on the request for approval. The Commission may in its discretion set the matter for consideration at a special public meeting.

4. The Commission will enter an order, containing findings and conclusions, approving or rejecting the interconnection agreement within 30 days of request for approval in the case of arbitrated agreements, or within 90 days in the case of negotiated agreements. Agreements containing both arbitrated and negotiated provisions will be treated as arbitrated agreements subject to the 30 day approval deadline specified in the Act.

G. Fees and Costs

1. Each party shall be responsible for bearing its own fees and costs. Each party shall pay any fees imposed by Commission rule or statute.

DATED at Olympia, Washington and effective this 22nd day of March 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

LAWRENCE J. BERG
Arbitrator

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WORLDCOM, INC., f/k/a MFS INTELENET OF WASHINGTON, INC.	)	DOCKET NO. UT-980338
Complainant,	)	
v.	)	
GTE NORTHWEST INCORPORATED	)	THIRD SUPPLEMENTAL ORDER GRANTING WORLDCOM'S COMPLAINT, GRANTING STAFF'S PENALTY PROPOSAL; AND DENYING GTE'S COUNTERCLAIM.
Respondent.	)	

SUMMARY

NATURE OF PROCEEDINGS: This formal complaint against GTE Northwest Incorporated (GTE) seeks enforcement of provisions of the interim Interconnection Agreement (Agreement) between WorldCom, Inc., f/k/a MFS Intelenet of Washington, Inc. (WorldCom), and GTE. Specifically, WorldCom alleges that GTE has violated the terms of that agreement by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of telephone exchange traffic including traffic that is handed off by GTE to WorldCom, for termination by WorldCom to Internet service providers (ISPs) who are end-use customers of WorldCom. GTE counterclaimed that WorldCom is not entitled to compensation under the Agreement for traffic generated after July 15, 1998, because of its failure to begin negotiations 45 days prior to the expiration date of the Agreement, July 15, 1998.

PARTIES: Richard M. Rindler and Michael L. Shor, attorneys, Swidler & Berlin, Chartered, Washington, D.C., represent WORLDCOM, INC., f/k/a MFS Intelenet of Washington, Inc. Kimberly A. Newman and Jennifer L. McClellan, attorneys, Hunton & Williams, Washington, D.C., represent GTE Northwest Incorporated. Gregory J. Trautman, Assistant Attorney General, represents Staff of the Washington Utilities and Transportation Commission (Commission Staff).

DECISION: GTE violated the terms of its interim Interconnection Agreement with WorldCom by failing to make any reciprocal compensation payments to WorldCom for the transport and termination of local calls, including calls to ISPs. GTE

subjected WorldCom to unreasonable disadvantage in violation of RCW 80.36.170 when it refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs while it continued to collect and retain money for providing the same service to WorldCom. Accordingly, GTE must pay penalties pursuant to RCW 80.04.380 for its repeated violation of RCW 80.36.170. GTE is not entitled to relief under its counterclaim. GTE is liable for reciprocal compensation under the terms of the Agreement after July 15, 1998.

MEMORANDUM

This proceeding arose out of a complaint brought by WorldCom seeking enforcement of an interim Interconnection Agreement. It concerns GTE's refusal to pay reciprocal compensation to WorldCom for the termination of local exchange traffic that is originated by GTE and terminated by WorldCom to ISPs who are customers of WorldCom. GTE unilaterally decided to stop paying compensation for this service in December 1997, despite the fact that GTE entered into a negotiated interconnection agreement with WorldCom that expressly provides for the payment of compensation for the termination of all local traffic.

I. BACKGROUND

A. Procedural Background.

On August 3, 1998, WorldCom, Inc. f/k/a MFS Intelenet of Washington, Inc. (WorldCom) filed a formal complaint against GTE Northwest Incorporated (GTE) seeking enforcement of provisions of the interim Interconnection Agreement (Agreement) between WorldCom and GTE. Specifically, WorldCom alleges that GTE has violated the terms of that agreement by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of telephone exchange traffic that is handed off by GTE to WorldCom, for termination by WorldCom to Internet service providers (ISPs) who are end-use customers of WorldCom. On August 24, 1998, GTE filed its answer to the complaint and asserted a conditional counterclaim. GTE's counterclaim alleged that if the Commission assumed jurisdiction over the issues identified in the complaint, WorldCom is not entitled to compensation under the Agreement for traffic generated after July 15, 1998, because of its failure to begin negotiations 45 days prior to the expiration date of the Agreement, July 15, 1998.

Pursuant to the Commission's notice of prehearing conference, Commission Staff filed a statement of issues, indicating that Staff might seek penalties against GTE pursuant to RCW 80.04.380. Administrative Law Judge Karen M. Caille (ALJ) presided at the Commission's prehearing conference on October 13, 1998, and set a procedural schedule for the filing of testimony, evidentiary hearings, and post-hearing briefs. On November 10, 1998, the parties stipulated that the matter could be submitted for decision without an evidentiary hearing, on the basis of pre-filed direct and rebuttal testimony and legal briefs. In addition, the parties stipulated that, in the event the Commission ruled in favor of WorldCom on the complaint, and against GTE on its counterclaim, the total amount set forth in the invoices produced to GTE pursuant to GTE's discovery request, represents amounts due and owing to WorldCom for reciprocal compensation for traffic transported and terminated in Washington. The fourteen invoices, dated September 1997 through October 1998, are admitted into the record.

WorldCom[1/] pre-filed the direct and rebuttal testimony of Gary Ball, Vice President for Regulatory Policy Development, and direct testimony of Ruth Durbin, Senior Manager, Local and Access Planning. GTE pre-filed the direct and rebuttal testimony of Steven J. Pitterle, Wholesale Markets Director - Negotiations, and the direct and rebuttal testimony of Howard Lee Jones, Senior Group Marketing Manager - Network Services. Commission Staff prefiled the testimony of Glenn Blackmon, Assistant Director - Telecommunications. The testimony and exhibits are admitted into the record.

The parties each filed initial and reply briefs. In its reply brief, Commission Staff requests that the Commission strike a multi-page "study" by Merrill Lynch, included as Exhibit H to GTE's initial brief. The "study" is a 24-page document by Merrill Lynch entitled "The Mysterious World of ISP-Reciprocal Compensation." Staff points out that the date of the report is October 27, 1998. GTE filed its rebuttal testimony on November 16, 1998. Staff contends that the report is testimony, and that the parties have had no opportunity to review the material, consider or examine its assumptions, or otherwise had any meaningful opportunity to address it. In light of the untimely filing of this material, the Commission grants Commission Staff's request. Exhibit H to GTE's initial brief is stricken from the record.

The parties agreed that this matter be submitted directly to the Commission for decision.

B. Undisputed Facts.

WorldCom, a competitive local exchange carrier (CLEC), and GTE, an incumbent local exchange carrier (ILEC), both operate to provide local exchange service in the state of Washington. Under the Telecommunications Act of 1996 (the Act), local exchange carriers are required to interconnect their networks, to transport and terminate local exchange traffic on those networks, and to make arrangements for mutual compensation for providing those services.

1/ During the pendency of this proceeding, WorldCom, Inc., completed its acquisition of MCI Communications Corporation, and WorldCom, Inc., was renamed MCI WorldCom, Inc. For consistency with prior pleadings, MCI WorldCom, Inc., will be referred to as "WorldCom."

Following these requirements, WorldCom and GTE negotiated the terms of an interim Interconnection Agreement effective July 15, 1996. The Agreement contains the following relevant definitions and terms:

1. "Local Calling Area" is defined as the calling area designated as "local" or "Extended Area Service" in the applicable tariffs of the LEC [Incumbent Local Exchange Carrier] which historically serviced the area prior to the introduction of local exchange competition. Agreement, Section II.R.

2. "Local Exchange Traffic" is defined as "calls made within a Local Calling Area." Agreement, Section II.U.

3. "Switched Access Service" is defined as an offering of facilities for the purpose of the origination or termination of traffic from or to Exchange Service customers in a given area pursuant to a Switched Access tariff. Switched Access Service includes Feature Group A, Feature Group B, Feature Group D, Toll Free Service, and 900 access. Switched Access does not include traffic exchanged between LECs and CLCs [Competitive Local Carrier] for purpose of local exchange interconnection. Agreement, Section II. II.

4. Section V.A. of the Agreement requires GTE and WorldCom to "reciprocally terminate local exchange traffic. . . between each others networks" and, sections B. 1. and 2., require GTE and WorldCom to pay reciprocal compensation to each other for all telephone exchange traffic carried from one party to the other at the rate of $0.0145 per minute, which rate is applicable to "all local and Extended Area Service traffic." Agreement, Section V.B.1., V.B.2.

5. Section V.B. of the Agreement also specifically makes the reciprocal compensation rates subject to any subsequent order of this Commission. It states:

> Notwithstanding the following, the Parties agree to amend this Agreement with regard to compensation for the termination of local calls (as described in this section) in accordance with any further Commission decision(s) regarding compensation for local and /or toll call termination between LECs and CLCs.

6. With respect to the duration of the Agreement, Section VIII provides in part:

> this Agreement shall, if not superseded by an interconnection agreement, expire two years after the effective date of the Agreement. In the event that the Agreement expires after two years, the interconnection arrangements in this Agreement shall remain in place until the Parties are able to negotiate and implement a new interconnection agreement. Negotiations on such

> a new agreement shall commence no later than 45 days prior to the expiration of this Agreement.

7. With respect to subsequent Commission decisions, Section XVII of the Agreement provides:

> This Agreement shall at all times be subject to such changes or modifications by the Commission as said Commission may, from time to time, direct in the exercise of its jurisdiction. If any such modifications renders the Agreement inoperable or creates any ambiguity or requirement for further amendment to the Agreement, the Parties will negotiate in good faith to agree upon any necessary amendments to the Agreement.

Subsequent to the execution of the Agreement, and in the context of the arbitration of an interconnection agreement by and between MFS and US WEST (*MFS/US WEST Arbitration*) the Commission had occasion to consider and to approve a reciprocal compensation arrangement virtually identical in all material respects to the arrangement set forth in the Agreement here.[2/] Specifically, in the *MFS/US WEST Arbitration,* the parties agreed to transport and to terminate local exchange traffic, as defined therein, and to pay mutual and reciprocal compensation for such transport and termination at negotiated rates.

MFS and US WEST expressly disagreed over whether calls terminating at Enhanced Service Providers (ESPs), of which ISPs are a sub-set, were local calls subject to the reciprocal compensation provisions of that agreement. That dispute was submitted to arbitration and the arbitrator rejected US WEST's arguments and adopted MFS' position. The Arbitrator concluded that the FCC has treated ESP traffic like other local exchange traffic and there was no reason to treat it any differently for reciprocal compensation purposes.

The Commission adopted and incorporated the findings and conclusions of the Arbitrator and approved the MFS/US WEST Agreement as presented.[3/]
US WEST appealed the Commission's decision to the United States District Court for

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2/ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc. Pursuant to 47 USC Section 252,* Docket No. UT-960323.

3/ *In the Matter of the Petition for Arbitration of an Interconnection Agreement* Between MFS Communications Company, Inc. and US WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252, Docket No. UT-960323, Order Approving Negotiated and Arbitrated Interconnection Agreement (Jan. 8, 1997).

the Western District of Washington which affirmed the Commission's decision in all material respects.[4]

WorldCom began billing GTE for reciprocal compensation in September 1997. GTE, by letter dated December 22, 1997, suggested that WorldCom was "billing GTE for more than Local Traffic as defined in the [parties interconnection] agreement. Complaint, Ex. 2. The parties met and communicated over the following months in an effort to resolve the dispute. Through May 10, 1998, WorldCom billed GTE for reciprocal compensation, covering ISP/ESP as well as non-ISP/ESP traffic. To date, none of the billed amounts have been paid.

By letter dated November 4, 1997, WorldCom advised GTE that it was requesting formal negotiations with GTE for a new interconnection agreement for Washington State. Durbin at 4; GTE Post-Hearing Memorandum, Ex. A. Those negotiations continued for several months into1998, at which time it became apparent that WorldCom and GTE would not be able to resolve their contractual negotiations without a significant devotion of additional resources and personnel.

By letter dated May 29, 1998, GTE advised WorldCom that its Agreement with GTE would expire in 45 days. The letter stated that the Agreement has no renewal clause, but that there is a continuation-of-service agreement during negotiations for a new interconnection agreement. GTE Post-Hearing Memorandum, Ex. B. On July 21, 1998, WorldCom responded to GTE's letter stating that WorldCom was not then in a position to negotiate a permanent agreement. Id. , Ex. C. GTE did not receive that letter and again wrote on August 13, 1998, requesting a response to its May 29, 1998 letter. *Id.*, Ex. D. On August 17, 1998, WorldCom wrote GTE that its July 21 letter apparently had not been received by GTE and advised GTE that WorldCom was still not in a position to negotiate another agreement. *Id.*, Ex. E. The Appendix to this Order provides a time line of the sequence of events described above.

II. ISSUES PRESENTED

The primary issue in this proceeding is: Did GTE violate the terms of its interconnection agreement with WorldCom by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of ISP local calls?

The parties have raised the following subsidiary issues:

A. Is the *MFS/US WEST Arbitration* decision binding on GTE?

4/ *US WEST Communications, Inc. v. MFS Intelenet, Inc.*, C97-222WD (Jan. 7, 1998). US WEST appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit, where the matter is pending.

B. Does the Agreement require the payment of reciprocal compensation for all local calls, including calls to ISPs?

C. Does the Commission lack jurisdiction to decide the underlying issue of whether calls terminating to ISPs are local for purposes of the reciprocal compensation provisions of the Agreement?

D. Should the Commission order GTE to pay penalties pursuant to RCW 80.04.380 for violation of RCW 80.36.170?

E. Should GTE prevail on its counterclaim?

III. DISCUSSION

The positions of the parties on the issues set forth above are as follows. WorldCom argues that the Commission already has decided this issue in the context of the MFS/US WEST arbitration and the Commission's order is binding on GTE. Alternatively, WorldCom argues that the Agreement is clear and unambiguous. In either case, WorldCom contends it is entitled to reciprocal compensation for calls terminating to ISPs.

Staff urges the Commission to reaffirm the *MFS/US WEST Arbitration* decision, as applied to the specific facts and arguments made in this case. Additionally, Staff argues that GTE should be required to pay penalties, pursuant to RCW 80.04.380, for violation of RCW 80.36.170 (relating to the prohibition of any practice by which a telecommunications company subjects either customers or competing companies to unreasonable disadvantage).

GTE maintains that this Commission does not have jurisdiction to deem ISP traffic "local" for reciprocal compensation purposes. GTE counterclaims that reciprocal compensation cannot be paid under the terms of the Agreement for any period after its expiration date of July 15, 1998. Furthermore, GTE contends that the Commission cannot legally impose penalties on GTE.

A. Is the *MFS/US WEST Arbitration* decision binding on GTE?

WorldCom. WorldCom contends that the Commission has already determined that traffic terminating to ISPs is local in a decision that is binding on GTE. *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc., and US WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252* (*MFS/US WEST Arbitration*), Docket No. UT-960323, November 8, 1996. There, US WEST asked the Commission to exclude traffic terminating to ISPs from the reciprocal compensation provisions of the proposed MFS/US WEST agreement, on the grounds that the traffic was not local. According to WorldCom, the

Commission there saw no reason to exempt ISP traffic from the reciprocal compensation provisions of that agreement. WorldCom argues that having decided the issue once, the long-established principle of *stare decisis* compels that the same conclusion be reached here.[5]

Staff. Commission Staff maintains that there is no reason for the Commission to alter its decision in *MFS/US WEST Arbitration*. Staff asserts that there is no basis to find that somehow calls terminated to an ISP are local if pursuant to an interconnection agreement between MFS and US WEST, but are not local when done if pursuant to an interconnection agreement, similar in all relevant respects, between GTE and WorldCom.

In addition, Staff points out that the GTE/WorldCom Agreement at V. B. provides:

> Notwithstanding the following [discussion of rates], the Parties agree to amend this Agreement with regard to compensation for the termination of local calls (as described in this section) in accordance with any further Commission decision(s) regarding compensation for local and/or toll call termination between LECs and CLCs.

Staff argues that the holding in the *MFS/US WEST Arbitration*, that calls to Enhanced Service Providers (and hence ISPs) are local calls subject to reciprocal compensation, should apply with equal force to calls originated by GTE and terminated by WorldCom under their interconnection agreement. According to Staff, this is not simply by virtue of the principle of *stare decisis*. Because GTE "agree[d] to amend" the Agreement in accordance with "any further decisions(s) regarding compensation for local and/or toll call termination between LECs and CLCs," (emphasis added), GTE, in Staff's view, can hardly now be heard to assert that the decision in *MFS/US West Arbitration* is of no relevance to GTE.

GTE. GTE argues that the decision in *MFS/US WEST Arbitration* is not binding on GTE. GTE contends that the Commission stated in the course of the MFS/US WEST arbitration that its decision was binding only on the parties to that arbitration. *See MFS/US WEST Arbitration*, Arbitrator's Second Procedural Order on Petition to Intervene (July 16, 1996). GTE further argues that this statement conforms with the Commission's stated policies on arbitrations. *See In the Matter of*

5/ *McClaskey v. United States Department of Energy*, 720 F. 2d 583, 587 (9th Cir. 1983)("generally, an agency must follow its own precedent or explain its reasons for refusing to do so in a particular case.") *Vergeyle v. Employment Security Department*, 28 Wn. App. 399, 404, 623 P. 2d 736, 739 (1981) ("agencies may not 'treat similar situations in dissimilar ways.'" quoting, *Jones v. Califano*, 576 F. 2d 12, 20 (2nd Cir. 1978))

Implementation of Certain Provisions of the Telecommunications Act of 1996, Docket No. UT-960269, Interpretative and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (Policy Statement) (June 27, 1996) at 4.

GTE further argues that the doctrine of *stare decisis* is only marginally relevant in the context of administrative agencies. *See R.G. Vergeyle v. Employment Security Department*, 28 Wn. App. 399, 404, 623 P.2d 736, 739 (1981). Moreover, to the extent the doctrine even applies to agency action, it is limited to adjudicative proceedings that "generally provide a guide to action the agency may be expected to take in future cases." *National Labor Relations Board. V. Wyman-Gordon Co.*, 394 U.S. 759, 766, 89 S.Ct. 1426, 1429 (1969). GTE contends that *MFS/US WEST Arbitration* was not an adjudicative proceeding. See Policy Statement at 4 ("Arbitrations under the 1996 Act will not be deemed adjudicative proceedings under the Washington Administrative Procedure Act"). Thus the doctrine of *stare decisis* has no application whatsoever to the Commission's non-adjudicative decision in the *MFS/US WEST Arbitration*.

WorldCom responds that GTE's contention that the *MFS/US WEST Arbitration* decision does not apply because GTE was not a party to that case is a "non-starter." WorldCom points out that GTE confuses the concepts of *res judicata* and *collateral estoppel* with *stare decisis*. *Res judicata* and *collateral estoppel* bind the parties and their privies and govern what may be put before a court, and, in that context, the fact that GTE was not a party might be relevant. WorldCom emphasizes it does not argue that those doctrines apply in this situation. Instead, WorldCom contends that *stare decisis* governs the outcome of this case and that the doctrine applies not only to those who were parties in a particular case, but to strangers to it as well. WorldCom states that the doctrine of *stare decisis* is based on the long-established principle that similarly situated litigants should be similarly treated. WorldCom notes that GTE does not contend that GTE and WorldCom here are not similarly situated to the litigants MFS and US WEST in the *MFS/US WEST Arbitration;* nor does GTE deny that on the key factual and legal question of the two agreements -- whether calls to ISPs are included within the scope of the Agreement's reciprocal compensation provisions -- the two agreements are virtually identical.

B. Does the Agreement require the payment of reciprocal compensation for all local calls, including calls to ISPs?

WorldCom. WorldCom contends that even if the Commission decides not to resolve this case as a matter of law by applying the doctrine of *stare decisis*, and chooses to examine the Agreement on its own, the result will be the same. WorldCom submits that the Agreement is clear and unambiguous, and when read in conjunction with *MFS/US WEST* decision, which the Agreement itself plainly requires, it calls for the payment of reciprocal compensation for all local calls, including calls to ISPs.

WorldCom explains that the calls in dispute involve calls by GTE local exchange service end-users to a WorldCom local exchange service end-user that happens to be an ISP. WorldCom asserts that the language in the Agreement unambiguously sets forth the terms and conditions under which the parties will "reciprocally terminate local exchange traffic." Agreement, Section V. A.1. It also sets forth the rate at which the parties will compensate each other for traffic carried "from MFS to GTE" and "from GTE to MFS" via local interconnection trunks. The telephone numbers of the called ISPs are associated with the calling area designated as "local" or "Extended Area Service," thereby meeting the definition of Local Exchange Traffic contained in the Agreement. Agreement, Section II. R., U. The Agreement makes no exception for traffic that is terminated by either WorldCom or GTE at an ISP. Since the calls meet the definition of Local Exchange Traffic under the Agreement, reciprocal compensation is owed for the transport and termination of the call.

Furthermore, WorldCom points out that in two separate provisions within the Agreement, the parties acknowledge that the Agreement and its terms are expressly made subject to subsequent decisions of this Commission. In Section V. B., which governs the compensation arrangements at issue here, the parties agreed to "amend this Agreement with regard to compensation for the termination of local calls (as described in this section) in accordance with any further Commission decision(s) regarding compensation for local and/or toll call termination between LECs and CLCs." Agreement, Section V. B. Similarly, in Section XVII, the Agreement also states that it is expressly subject to any subsequent decisions of the Commission.

WorldCom notes that in January 1997, several months after the Agreement became effective, the Commission did, in fact, issue " a decision regarding compensation for local. . . call termination." In *MFS/US WEST Arbitration*, the Commission interpreted an interconnection agreement with a provision which is virtually identical, in all material respects, to the provisions at issue here. The decision addressed the scope of reciprocal compensation, concluding that it is owed for all local calls, including calls to ISPs. WorldCom maintains that by its terms, the WorldCom/GTE Agreement expressly incorporated the Commission's *MFS/US WEST Arbitration* decision and its determination that reciprocal compensation is owed for local calls terminating to ISPs.[6]

GTE. GTE does not directly respond to WorldCom's argument. GTE does state in its "Statement of Undisputed Facts" that "the parties agreed to reciprocal compensation for local traffic which was actually terminated with the "local " or "extended

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6/ WorldCom attaches as Exhibit B to its initial brief a listing of 29 state commissions which have treated calls to ISPs as local for purposes of determining reciprocal compensation. GTE urges this Commission to ignore these decisions based on the FCC's *GTE ADSL Order, In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, and GTOC Transmittal No. 1148,* CC Docket 98-79, FCC 98-2992 (October, 1998), discussed *infra*.

service" areas as those terms were historically defined in the tariffs, and "[n]o party contends that the tariffs address traffic to ISPs." GTE's Post-Hearing Memorandum at 3. Staff responds that no party needed to make this contention because this is apparent from the fact that both end-users and ISPs obtain service from GTE's local tariff.

C. Does the Commission lack jurisdiction to decide the underlying issue of whether calls terminating to ISPs are local for purposes of the reciprocal compensation provisions of the Agreement?

GTE. GTE's principle contention appears to be that this Commission does not have jurisdiction to conclude that local calls terminating at ISPs are within the scope of the reciprocal compensation arrangements of the Agreement because that traffic is jurisdictionally interstate and only the FCC can determine the entitlement to compensation. GTE relies on the FCC's decision *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, and GTOC Transmittal No. 1148,* CC Docket 98-79, FCC 98-2992 (October, 1998) (*GTE ADSL Order*) as support for its position. GTE acknowledges that the FCC specifically limited its decision to a dedicated ADSL connection as opposed to non-dedicated "dial-up" ISP traffic, but argues that this makes no difference in the analysis. GTE contends that examination of the precedent that served as the basis for the *GTE ADSL Order* demonstrates an unbroken chain of FCC authority which leads to the inevitable conclusion that traffic to ISPs is interstate in nature, whether it is "dial-up" or dedicated. GTE argues that further evidence that ISP traffic is interstate for jurisdictional purposes is the fact that it would be subject to interstate access charges but for a specific exemption granted by the FCC. GTE argues that the FCC's continued exemption of ISP traffic from access charges demonstrates the agency' s recognition that such traffic is interstate. Because federal access charges apply only to interstate access traffic, the need for an exemption at all is conclusive proof that the FCC considers Internet traffic to be interstate in nature. GTE urges the Commission to reject any invitation to exercise jurisdiction over ISP traffic, in contravention of decades of FCC precedent.

WorldCom. In response, WorldCom maintains that not only is GTE's argument misplaced, but it also fails to distinguish between the jurisdictional nature of calls to ISPs and the regulatory treatment of such calls, and fails to take into account the compensation framework established in the Act. WorldCom emphasizes that this is not a case that asks the Commission to decide the jurisdictional nature of calls to ISPs. Instead, it is a case that asks the Commission to interpret the contract between the parties. Moreover, even assuming that calls to ISPs are jurisdictionally interstate, such an assumption would not resolve the compensation issue raised by WorldCom' s complaint. Adopting GTE's position would result in a class of calls for which no compensation is provided to WorldCom, or to any other terminating LEC, the use of whose facilities are essential to the successful completion of such calls. WorldCom contends that this is totally contrary to the requirement that reciprocal compensation be paid.

WorldCom explains that Section 251(b)(5) of the Act requires local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The Act does not expressly limit this obligation or exclude any particular category of traffic. Section 251(g), however, requires continued enforcement of the existing access charge regime, which (until it is superseded) provides for an alternative system of compensation for the transport and termination of telecommunications carried by three or more carriers. According to WorldCom, the only way to reconcile the two sections to give meaning to both is to interpret Section 251(b) to apply to compensation for the transport and termination of local traffic (or traffic otherwise exempt or not subject to access charges) carried by *two* carriers -- that is, traffic for which compensation is not already provided by access charges.

WorldCom states that this is the conclusion reached by the FCC in its *Local Competition Order.*[7] The FCC explained that the existing regulatory regime, in which interstate and intrastate interexchange traffic was subject to access charges, is to be maintained pursuant to Section 251(g) of the Act.[8] Traffic not subject to access charges, i.e., traffic that originates or terminates within a local calling area established by the state, or traffic otherwise not subject to access charges, would be subject to reciprocal compensation obligations.[9] The simple logic drawn from the Act is that access charges and reciprocal compensation are intended to dovetail to cover all types of traffic carried by two or more carriers; such traffic is to be treated either through reciprocal compensation or access charges, and no traffic is to incur both types of treatment. Thus, the statutory scheme requires, and the FCC has established, that under the Act the termination of traffic carried by two carriers not otherwise subject to access charges is subject to reciprocal compensation.

WorldCom maintains that this dual approach, i.e., jurisdictional nature versus regulatory treatment, was not affected by the FCC's recent order discussing the jurisdictional nature of GTE's ADSL service. According to WorldCom, the *GTE ADSL Order* is not inconsistent with prior decisions of the FCC which, in every decision since the passage of the Act, has made one point clear: notwithstanding any jurisdictional determination that calls to ISPs might be interstate, for regulatory purposes those calls always have been treated as local (if made within the local calling area).

Staff. Commission Staff makes a similar argument. Staff contends that GTE's argument is premised on the fallacious assumption that traffic terminated at ISPs

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7/ *Implementation of the Local Competition Provision in the Telecommunications Act of 1996 ("Local Competition Order"),* CC Docket No. 96-98,¶1034 (Aug. 8, 1996)

8/ *Id.*, ¶1034.

9/ *Id.*, ¶¶ 1034-1035.

must be either "local" or "interstate." Staff maintains that by erroneously framing the issue, GTE arrives at the wrong result. According to Staff, the proper distinction is not between "local" versus "interstate" traffic. Rather, the distinction is between "local" versus "toll" traffic. Staff maintains that calls which are made from one customer in the local calling area and terminated to another customer in the same local calling area -- even if that customer happens to be an Internet service provider -- are clearly local calls Blackmon Testimony, at 11. Staff points out that by industry practice, a call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the telephone exchange which bears the called telephone number. By FCC definition, "termination" is "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." 47 C.F.R. §51.701(d); Ball Testimony, at 4-5. Staff argues that neither the Agreement nor applicable law makes a distinction for calls placed by GTE's customers to WorldCom's ISP customers. All of the calls in question terminate within the Local Calling Area under the terms of the Agreement and hence are subject to payment of reciprocal compensation for their completion.

Staff/WorldCom. Both Staff and WorldCom challenge GTE's interpretation of the FCC's *GTE ADSL Order*. GTE contends that the FCC determined therein that calls terminated to an ISP are "interstate" and that this Commission therefore has no jurisdiction over the matter. Staff and WorldCom argue that GTE's contention is simply incorrect. They point out that the FCC in its decision expressly stated that it was only addressing digital subscriber line traffic, rather than dial-up traffic to ISPs:

> We emphasize that we decide here only the issue designated in our investigation of GTE's federal tariff for ADSL service, which provides specifically for a dedicated connection, rather than a circuit-switched, dial-up connection, to ISPs and potentially other locations. This issue involves the applicability of Commission rules and precedent regarding the provision by one incumbent local exchange carrier (LEC) of special access service. *This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs.* Unlike GTE's ADSL tariff, the reciprocal compensation controversy implicates: the applicability of the separate body of Commission rules and precedent regarding switched access service, the applicability of any rules and policies relating to inter-carrier compensation when more than one local exchange carrier transmits a call from an end user to an ISP, and the applicability of interconnection agreements under sections 251 and 252 of the Communications Act, as amended by the Telecommunications Act of 1996, entered into by incumbent LECs and competitive LECs that state commissions have

> found, in arbitration, to include such traffic. Because of these considerations, we find that this Order does not, and cannot, determine whether reciprocal compensation is owed, either on a retrospective or a prospective basis, pursuant to existing interconnection agreements, state arbitration decisions, and federal court decisions.

GTE ADSL Order at 1-2. (Emphasis supplied.) The FCC indicated that a decision addressing reciprocal compensation issues would be forthcoming.[10/]

D. Should the Commission order GTE to pay penalties pursuant to RCW 80.04.380 for violation of RCW 80.36.170?

Staff. Commission Staff proposes that the Commission order GTE to pay penalties pursuant to RCW 80.04.380.[11/] Staff argues that GTE's unilateral refusal to pay reciprocal compensation to WorldCom for the termination of local traffic to ISPs subjects WorldCom to unfair and unreasonable disadvantage in violation of RCW 80.36.170. Staff also recommends that GTE be required to pay WorldCom late-payment charges, as provided in Section V. B. 7. of the interconnection agreement.

RCW 80.36.170 provides in part:

> No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation, or locality, or subject any person, corporation, or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The

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10/ Following the filing of briefs and close of this record, the FCC did issue a declaratory ruling addressing reciprocal compensation. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-bound Traffic*, CC Docket No. 96-98 and CC Docket No. 99-68, Declaratory ruling in CC Docket No. 96-98and Notice of Proposed Rulemaking in CC Docket No. 99-68 (February 26, 1999). The FCC determined that, in the absence of a federal rule regarding the appropriate inter-carrier compensation for ISP-bound traffic, parties should be bound by their existing interconnection agreements, as interpreted by state commissions. *Id.* at 16. The FCC did state, however, that its policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic. *Id.* at 17.

11/ RCW 80.04.380 provides in part:

> Any public service company which shall violate or fail to comply with any provision of this title, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense.

> commission shall have primary jurisdiction to determine whether any rate, regulation, or practice of a telecommunications company violates this section.

According to Staff, this section prohibits any practice by which a telecommunications company subjects either customers or competing companies to unreasonable disadvantage. Staff emphasizes that it is critically important that an incumbent's competitors receive comparable treatment, in comparison to how the incumbent treats itself. Staff maintains that when this principle is violated, not only the competitor suffers, but ultimately, customers do as well.

Staff argues that GTE violated RCW 80.36.170 when it unilaterally refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs. Staff contends that, in effect, GTE cut off the money supply to its competitor while it continued to collect and retain money for providing the same service. Staff explains that ISPs served by GTE obtain service under GTE's local exchange services tariff. When a GTE telephone exchange service customer places a call to an ISP within the caller's local exchange area, GTE bills such customer for a local call pursuant to the terms of GTE's local tariff. Ball direct testimony, at 11-12. By contrast, GTE charges toll rates for calls to ISPs outside of the caller's local calling area. Blackmon testimony, at 10.

Staff further explains that, within the GTE network, GTE's customers continued to pay charges for local telephone service and to use that service to make calls to ISPs. Those local service revenues compensated GTE, in part, for the cost of terminating the calls on the switches serving the ISPs. Where the ISP was served by a GTE switch, that revenue was rightfully retained by GTE, since it incurred the cost of installing and operating the switch. Where that ISP was served by a WorldCom switch, that revenue was unreasonably retained by GTE, even though it incurred no cost of installing or operating the switch. According to Staff, for GTE to have treated WorldCom comparably, it would have had to cut off its own money supply at the same time that it cut off WorldCom's money supply. It should have reduced rates to local service customers to reflect the fact that terminating traffic to the Internet was a service for which, apparently, no price existed. Staff notes that not only did GTE fail to reduce its own revenues comparable to the reduction imposed on WorldCom, but it also kept the WorldCom revenues to which it clearly was not entitled.

Staff further argues, referencing Dr. Blackmon's testimony, that an incumbent's ability to restrict the cash flow of new entrants into the market would create substantial barriers to entry for small, startup companies. Dr. Blackmon's testimony points out that here, the interconnection agreement actually is not with WorldCom, but with MFS Intelenet. MFS was acquired by WorldCom at the end of 1996, and MFS was a much smaller company than the WorldCom that exists today. The amounts at issue here probably are quite significant relative to MFS' revenues in this state, and that is the relevant frame of reference. Blackmon testimony, at 12. Thus, not only are competitors harmed by unreasonable disadvantage imposed contrary to RCW 80.36.170, but customers are ultimately harmed as well.

Staff recommends that the Commission impose penalties on GTE, pursuant to RCW 80.04.380, for its repeated violation of RCW 80.36.170 up to July 15, 1998. Staff recommends that each month's obligation be treated as a separate transaction, and that each month of nonpayment be treated as a separate violation. GTE should incur a separate penalty of $1000 per month, dating from the month of the invoice to the present, for each invoice that it has unilaterally refused to pay. (For example, GTE's failure to pay a September 1997 invoice should incur penalties of $1000 per month until it is paid.)

Staff also recommends that GTE be required to pay WorldCom late-payment charges, as provided for in Section V. B. 7. of the interconnection agreement. These charges should be calculated at 1.5 percent per month, as set forth in WorldCom's tariff. Staff argues that GTE's refusal to pay reciprocal compensation for the termination of calls to ISPs is unreasonable and contrary to the terms of its tariff. Staff reasons that if GTE believed it had a legitimate basis to dispute the charges, it could have used the dispute resolution mechanism set forth in Section XXIII of the Agreement to ask the Commission to rule on the issues, rather than unilaterally withhold payment.

GTE. GTE characterizes the basis for Staff's penalty proposal to be "GTE's purported failure to abide by the terms of its interconnection agreement and state law." GTE then argues that Staff's penalty proposal must be rejected for three reasons. First, GTE contends that Staff has confused the *MFS/US WEST Arbitration* decision as an expression of state law, much like a rule or regulation. GTE argues that if the Commission wished to promulgate a regulation regarding the jurisdictional nature of ISP traffic, it certainly could do so, but only after providing appropriate notice of its proposed action and review of comments by interested parties. GTE argues that the Commission cannot impose penalties based on a single decision in an arbitration in which GTE was neither a party nor had the opportunity to be heard.

Second, GTE argues even if the MFS/US WEST decision was deemed a regulation, rule or order, then it should have been served on GTE pursuant to RCW 80.04.160. According to GTE, if this procedure had been utilized, GTE would have been given the opportunity to object to the decision on ISP traffic. Moreover, GTE would have been given the opportunity to present evidence on the issue and to participate in the full hearing required by law under RCW 80.04.160.

Lastly, GTE asserts that penalties under RCW 80.04.380 cannot be imposed by the Commission in this proceeding. GTE references RCW 80.04.400[12] and contends that since the procedure set forth in that statute has not been invoked, any imposition of damages in this proceeding would be unlawful.

In its reply brief, GTE argues that the penalties sought by Staff should not be imposed under RCW 80.36.170. GTE maintains that "[t]he contention that GTE's objection to paying reciprocal compensation for ISP traffic is somehow anti-competitive is simply wrong." GTE also references Mr. Pitterle's testimony and contends that the FCC has recognized that the impact of such a position on consumers is negligible because the issue "has nothing to do with consumer Internet charges." Pitterle reply testimony, at 11.

E. Should GTE prevail on its Counterclaim?

GTE. GTE argues that regardless of the Commission's ruling with respect to reciprocal compensation to be paid under the interim Interconnection Agreement prior to July 15, 1998, nothing in the Act or the Agreement permits WorldCom to collect reciprocal compensation for any traffic after July 15, 1998. GTE maintains that the Agreement was intended to be an interim agreement until such time as a permanent interconnection agreement in compliance with 47 U.S.C. §251 was determined either through negotiation or arbitration as required by the Act.

In support of its position, GTE references page 1 of the interim Interconnection Agreement:"

> WHEREAS the Parties intend to negotiate a *permanent* interconnection agreement pursuant to Section 251 of the Telecommunications Act of 1996, but desire to enter into an *interim* interconnection agreement pending completion of the permanent agreement under federal law;
>
> WHEREAS this Agreement is not intended by either Party to constitute compliance with the interconnection requirements of Section 251 of the Telecommunications Act of 1996;

See Exhibit F, GTE's Post-Hearing Memorandum. (Emphasis supplied). GTE argues

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12/ RCW 80.04.400 provides in part:

> Actions to recover penalties under this title shall be brought in the name of the state of Washington in the superior court of Thurston county, or in the superior court of any county in or through which such public service company may do business. In all such actions the procedure and rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided.

that, in accordance with this intention, the parties further stipulated to the following language governing the expiration of the Agreement:

> MFS and GTE agree to interconnect with each other pursuant to the terms defined in this Agreement until it is superseded by an interconnection agreement negotiated between the Parties pursuant to Section 251 of the Telecommunications Act of 1996. Notwithstanding the foregoing, this Agreement shall, if not superseded by an interconnection agreement, expire two years after the effective date of the Agreement. In the event that the Agreement expires after two years, the *interconnection arrangements* in this Agreement shall remain in place until the Parties are able to negotiate and implement a new interconnection agreement. Negotiations on such a new agreement shall commence *no later than 45 days prior to the expiration of this Agreement.*

Id., Section VIII, p. 19. (Emphasis supplied). GTE argues that the above provision contemplates that WorldCom had to initiate negotiations for a permanent interconnection agreement in accordance with the Act at least 45 days before the expiration of the interim Interconnection Agreement. According to GTE, once negotiations were initiated by WorldCom, WorldCom was then bound by the temporal limitations set forth in the Act to complete those negotiations or to arbitrate. *See* 47 U.S.C. §252(c)(1). GTE contends that under no rational interpretation of this provision can it be said that GTE agreed to pay indefinitely reciprocal compensation to WorldCom at the rates contemplated in the interim Interconnection Agreement. Nor can it be said that GTE agreed to leave in place the interconnection arrangements contemplated by the interim Interconnection Agreement beyond the deadlines contemplated by the Act.

GTE argues that in its subsequent correspondence pertaining to the permanent interconnection agreement, WorldCom acknowledged and invoked the temporal limitations set forth in the Act. On November 4, 1997, Ruth Durbin wrote to GTE the following:

> [P]ursuant to Section 251(c)(1) of the Telecommunications Act, WorldCom Technologies, Inc., on behalf of itself and affiliated operating companies providing telecommunications services in Washington (WorldCom) requests that GTE Northwest Incorporated (GTE) commence good faith negotiations to reach agreement for the following terms. (terms omitted). In light of the need to engage in meaningful negotiations before the expiration of the 135 days provided in the Act for voluntary negotiations, WorldCom requests a response by Friday, November 14th.

See Exhibit A, GTE's Post-Hearing Memorandum. GTE argues that this correspondence started the statutory clock for the parties to complete their negotiations. Accordingly, WorldCom was required by the end of April 1998, to petition this Commission for arbitration in order to secure a permanent interconnection agreement. GTE argues that the deadlines set forth in the Act are jurisdictional and therefore cannot be waived by either agreement of the parties or by order of a state commission. GTE contends the Act required WorldCom to begin negotiations all over again. WorldCom, however, failed to initiate negotiations again before the expiration of the interim Interconnection Agreement, which called for negotiations under the Act to begin no later than 45 days before the expiration of the interim Interconnection Agreement. GTE points out that it even reminded WorldCom of the impending July 15, 1998, deadline by letter dated May 29, 1998.

GTE contends that WorldCom's view that these preliminary negotiations extended the life of the interim Interconnection Agreement fails for three reasons. First, it is evident, by the reference to the Act, that GTE was agreeing to no more time than the Act would otherwise allow, provided that good faith negotiations towards a permanent interconnection agreement began no more than 45 days before the expiration of the interim Interconnection Agreement. That way, parties could predict with certainty when a permanent interconnection agreement would be in place once negotiations were commenced, because the Act permits 135 days of negotiations and 25 days more to petition a state commission for arbitration and then the state commission to reach a decision thereafter within nine months 47 U.S.C. §252 *et seq.*

Second, Section VIII does not bind GTE to pay any of the rates set forth in the interim Interconnection Agreement after the agreement expires. According to GTE, Section VIII expressly contemplates that "[i]n the event that the Agreement *expires after two years*, the *interconnection arrangements in this Agreement shall remain in place* until the Parties are able to negotiate and implement a new interconnection agreement" (Emphasis supplied.) GTE contends that this sentence contemplates that the interim Interconnection Agreement would expire and that only the interconnection arrangements set forth in the Agreement would remain in place – not the Agreement itself. GTE insists that it merely agreed in this provision to continue transporting traffic once the Agreement expired, subject to whatever compensation the parties agreed to pay, or were required to pay as a result of an arbitration, in the permanent interconnection agreement.

Third, the 1996 Act requires all parties to negotiate in good faith. 47 U.S.C. §251(c)(1). GTE argues that WorldCom has failed to negotiate at all, much less in good faith. GTE notes that Ms. Durbin admitted that she agreed to provide GTE with drafts of proposed language for the contemplated permanent interconnection agreement by March 1998, but was unable to meet that deadline. Durbin testimony, at 5-6. Ms. Durbin also admitted receipt of GTE's reminder of May 29, 1998. *Id.* at 6. In her July 21, 1998, response to GTE's May 29, 1998 letter, Ms. Durbin admitted that WorldCom was still not in a position to negotiate a permanent interconnection agreement with GTE. *See* Exhibit C, GTE's Post-Hearing Memorandum.

GTE suggests that WorldCom has no one but itself to blame for the fact that the parties have neither negotiated nor arbitrated a permanent interconnection agreement. According to GTE, WorldCom has rebuffed all its attempts to renegotiate. GTE emphasizes that WorldCom's behavior is what the jurisdictional deadlines set forth in the Act were designed to prevent. GTE contends it should prevail on its counterclaim as a result, regardless of what this Commission decides with respect to WorldCom's claim for compensation prior to July 16, 1998.

WorldCom. WorldCom does not dispute that the specific agreement expired by its terms on July 15, 1998. WorldCom, however, disagrees with GTE's interpretation of Section VIII of the Agreement concerning the effect of that expiration. WorldCom contends that by the very terms of the Agreement, the interconnection arrangements continue in place, until a new agreement is implemented.

WorldCom argues that Section VIII of the Agreement establishes two independent obligations. First, the parties were required to start negotiations on a new agreement no later than 45 days before the expiration of the existing Agreement and, second, if the Agreement expired before a new agreement was in place, the interconnection arrangements, without qualification or exception, remained in place. According to WorldCom, the facts demonstrate that these obligations were satisfied. The parties did commence negotiations no later than 45 days prior to the expiration of the existing Agreement. Negotiations began in October 1997 and ran, intermittently, through March 1998. WorldCom contends that, for reasons entirely unrelated to its desire to renegotiate an agreement with GTE for Washington, the negotiations have been in hiatus for a period of time. Consequently, the expiration date in the Agreement arrived before negotiations on a new agreement were complete. By its terms, the interconnection arrangements were to continue in place. WorldCom states that the rationale for providing continuation of the interconnection arrangements during negotiations was to prevent disruption to each other's customers.

WorldCom contends that GTE takes these same contract terms and the same facts and conjures up an interpretation that bears no resemblance to the contract itself. WorldCom argues that GTE's interpretation imposes obligations, conditions, and limitations that do not exist in the language of the contract. As an example, WorldCom references GTE's argument that the negotiation/arbitration time periods set forth in Section 252 of the Telecom Act supersede the express language of the contract. WorldCom argues that GTE is confusing two entirely separate, unrelated principles: a contractual principle that addresses the conditions for negotiating a new agreement and a statutory directive that deals with a framework for instituting and concluding negotiations or arbitration. WorldCom acknowledges that the Telecom Act sets forth a time-table for negotiating and arbitrating an interconnection agreement, but maintains that the statutory time-table is separate and distinct from, and entirely unrelated to, any requirement under the Agreement between these parties governing the time period when negotiations for a new agreement must begin. WorldCom contends that the fact that the parties might have to begin negotiations all over again does not nullify the fact that, for the purposes of the contract, the parties commenced negotiations in a timely manner.

WorldCom argues that GTE's position regarding the interconnection arrangements suffers the same defect. GTE interprets that portion of Section VIII of the Agreement as meaning that the parties would "continue transporting traffic once the interim Agreement expired, subject to whatever compensation the parties agreed to pay, or were required to pay as a result of an arbitration, in the permanent interconnection agreement." WorldCom contends that no word or phrase in Section VIII supports this conclusion.

According to WorldCom, nowhere is it written in the Agreement that the obligation to transport traffic survives but the obligation to pay for the use of WorldCom's facilities for the benefit of GTE's customers does not. Nowhere is it written that WorldCom's obligation to pay for the use of GTE's facilities for the benefit of WorldCom's customers survives but GTE's obligation to pay for the use of WorldCom's facilities does not. Nowhere is it written that any rates negotiated or arbitrated under a new agreement will relate back to the date the initial Agreement expired. WorldCom also observes that GTE fails to inform the Commission that GTE is billing WorldCom for post-July 15, 1998, reciprocal compensation and is being paid for those invoices.

WorldCom also argues that GTE is estopped from claiming that it is not obligated to compensate WorldCom for traffic transported and terminated after the July 15, 1998, expiration date. WorldCom contends that it is black-letter law that if GTE accepts the benefits of its contract with WorldCom, even after it contends that the contract, or certain terms thereunder, has expired, it must accept the burdens of that contract, including the compensation obligations.

Staff. Commission Staff notes that should the Commission determine that GTE is not required to pay reciprocal compensation under the terms of the Agreement after July 15, 1998, it does not follow that GTE should be obligated to pay nothing at all. Staff suggests that, in that event, the Commission may determine what rates are appropriate for the post-July 15, 1998 period. Staff proposes that the Commission could apply the rates to be approved in the generic interconnection pricing proceeding, Docket No. UT-960369. Alternatively, the Commission should address this issue as part of the negotiation, and, if necessary, arbitration of a new interconnection agreement between the parties. Staff recommends that at a minimum, the Commission should hold that GTE will be obligated to pay a to-be-determined compensation rate for the termination of traffic to ISPs.

In opposition to such a proposal, GTE argues that the Commission cannot impose unarbitrated terms upon GTE. GTE contends that Section 252 (e)(1) authorizes the Commission to approve or reject negotiated agreements. It does not give the Commission the authority to impose terms on an unwilling party. The Commission can only do so when it conducts an arbitration under Section 252(b) of the Act. Here, the matter is not before the Commission pursuant to an arbitration. Consequently, the Commission has no authority to unilaterally impose a new agreement on GTE or to order that compensation be paid after July 15, 1998.

COMMISSION DISCUSSION AND DECISION

Jurisdiction. Initially, we find that the Commission has jurisdiction to interpret the terms and conditions of the Agreement, including those pertaining to the payment of reciprocal compensation for the termination of local traffic. Section 251(a) of the Act sets forth the duty of telecommunications carriers to interconnect with the facilities and equipment of other carriers. Section 252(a)(1) allows for voluntary agreements to be negotiated between companies. The interim Interconnection Agreement negotiated by WorldCom and GTE and dated July 15, 1996, is a negotiated agreement. The terms of the Agreement specifically provide for the right of either party to petition the Commission "in the event of a default or violation hereunder, or for any dispute arising under this Agreement."[13] The Commission has jurisdiction over this complaint pursuant to RCW 80.01.040 (general powers of the Commission) and RCW 80.04.110, which provides that when two or more public service corporations are engaged in competition in any locality in the state, either may make complaint against the other that its practices are unreasonable, unremunerative, discriminatory, illegal, unfair, or intending or tending to oppress the complainant. The Commission also has jurisdiction pursuant to RCW 80.36.170, which provides the Commission with primary jurisdiction to determine whether any practice of a telecommunications company subjects a corporation to unreasonable disadvantage.

We are not persuaded by GTE's arguments that only the FCC can decide the issue of whether local calls terminating at ISPs are within the scope of the Agreement's reciprocal compensation arrangements. GTE's argument is based on the premise that the *GTE/ADSL Order* determines that traffic to ISPs is jurisdictionally interstate. We agree with WorldCom and Staff that GTE's argument is misplaced. This case does not ask the Commission to decide the jurisdictional nature of calls to ISPs. It asks the Commission to interpret the Agreement and enforce that contract between the parties. The Commission has clear jurisdiction to do so.

Foundation of Decision. WorldCom urges us to resolve this complaint as a matter of law by applying the doctrine of *stare decisis*. Alternatively, WorldCom

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13/ Agreement at Section XXIII.

proposes that we examine the Agreement on its own and read it in conjunction with the MFS/US WEST decision, which the Agreement requires. WorldCom maintains that the language in the Agreement is clear and unambiguous. In either case, WorldCom contends it is entitled to be paid reciprocal compensation for the termination of all local calls, including calls to ISPs. We grant WorldCom's complaint based on our reading of on the contract before us and the facts and circumstances associated with the contract. Our decision is entirely consistent with the *MFS/US WEST Arbitration* decision, as discussed below.

Reciprocal Compensation. We agree with WorldCom's analysis that, taking into consideration the compensation framework established in the Act, the termination of traffic carried by two carriers not otherwise subject to access charges is subject to reciprocal compensation. As WorldCom points out, Section 251(b)(5) of the Act requires local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 251(g), however, requires continued enforcement of the existing access charge regime until it is superseded. That regime provides for an alternative system of compensation for the transport and termination of telecommunications carried by *three or more carriers*. As WorldCom suggests, the only way to reconcile the two sections to give meaning to both, is to interpret the reciprocal compensation provision of Section 251(b) as intended to apply to compensation for the transport and termination of local traffic (or traffic otherwise exempt or not subject to access charges) carried by *two* carriers; that is, traffic for which compensation is not already provided by access charges. Based on this analysis, the Commission properly concluded in the *MFS/US WEST Arbitration* that it would be inappropriate to exclude calls to ISPs from the reciprocal compensation provision of that agreement.

We also find persuasive Staff's distinction between "local" versus "toll" traffic. As Staff explains, calls made from one customer in the local calling area and terminated to another customer in the same local calling area, even if that customer happens to be an Internet service provider, are clearly local calls. Examining the Agreement, all of the calls in question terminate within the Local Calling Area as defined in the Agreement and thus are subject to payment of reciprocal compensation for their completion. Adopting GTE's position would result in a class of calls for which no compensation is provided to WorldCom, or to any other terminating LEC, the use of whose facilities are essential to the successful completion of the call. Accordingly, GTE owes WorldCom reciprocal compensation for the transportation and termination of local calls, including calls to ISPs, at the rates negotiated under the Agreement.

Counterclaim. GTE counterclaims that WorldCom is not entitled to compensation under the Agreement for traffic generated after July 15, 1998, because of WorldCom's failure to begin negotiations 45 days prior to the Agreement's expiration date. The record shows that WorldCom did begin negotiations in November, 1997, and the parties engaged in negotiations through February 1998. In March, 1998, WorldCom was to provide draft issues, but failed to do so. Forty-six days prior to the expiration of the interim Agreement, GTE wrote to WorldCom asking about negotiations on the permanent interconnection agreement. WorldCom's July 21, 1998 response was not received by GTE until August 13, 1998. WorldCom responded that it was not in a position to negotiate a permanent interconnection agreement with GTE. GTE contends that the Act's statutory clock required WorldCom to petition this Commission for arbitration by the end of April 1998; otherwise WorldCom had to begin negotiations again. GTE further contends that WorldCom's actions indicate that WorldCom failed to negotiate in good faith and GTE should prevail on its counterclaim.

We note that under the terms of the interim Agreement, WorldCom did begin negotiations forty-five days prior to the expiration of the Agreement. Those negotiations, however, never reached a conclusion. Section 252(b)(1) of the Act provides that either party may request resolution of disputes through arbitration. Contrary to GTE's assertion, the obligation to seek arbitration did not rest solely on WorldCom. GTE could have requested arbitration as well. The Act's process for negotiating and arbitrating interconnection agreements encourages speedy resolution of disputes. The record before us shows that both parties failed in their obligations under the Act to negotiate in good faith.

Obligations After Termination Date. In further support of its counterclaim, GTE argues that the Agreement's Section VIII provision that the *interconnection arrangements* remain in place until the parties are able to negotiate a new agreement, refers only to the physical connection between the parties' networks. GTE contends that this sentence contemplates that the Agreement would expire and that only the physical interconnection arrangements would remain in place. The compensation for those arrangements would be dictated by the subsequent interconnection agreement. WorldCom interprets the phrase as encompassing the physical connection between the parties' networks <u>and</u> the compensation for those arrangements as set forth in the interim Agreement.

We find WorldCom's interpretation of the *interconnection arrangements* to be the more reasonable one. Section VIII specifically provides that the "interconnection arrangements *in this Agreement*" shall remain in place should the expiration date pass without implementation of a new agreement. The phrase "interconnection arrangements" is broad in scope, yet is specifically tied to the arrangements *in this Agreement.* We read it to include <u>all</u> existing arrangements in the interim Agreement. Otherwise, we would be imposing new terms on the parties – as GTE's proposal would. Adopting GTE's proposal would impose a one-way obligation on WorldCom, to provide service without compensation.[14] We find no justification for such an outcome. We

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<u>14</u>/ We note that were we to interpret the Agreement as GTE would have us do, we would then be confronted with the issue of the application of the principle of *quantum meruit* for the period subequent to July 15, 1998, with the possible outcome that the reciprocal compensation rates of the Agreement would

conclude that the terms of the interim Agreement continue until a new agreement takes its place. All arrangements remain in place; the physical connection between the parties' networks, the compensation for those arrangements, and the parties' obligation to negotiate a permanent interconnection agreement. Accordingly, GTE's obligation for the payment of reciprocal compensation under the terms of the interim Agreement continues until a new agreement is in place.

Amounts Owed. The parties have stipulated that should we rule in favor of WorldCom on the complaint and against GTE on its counterclaim, the total amount set forth in the invoices WorldCom produced and filed on November 12, 1998 represents the amounts due and owing to WorldCom for reciprocal compensation for traffic transported and terminated in Washington. The fourteen invoices date from September 20, 1997 to October 10, 1998, and total $1,458,925.48, including late-payment charges. We direct GTE to comply with the stipulation. GTE must also continue to pay WorldCom under the interim Agreement rates for any other reciprocal compensation owed subsequent to October 10, 1998, and to continue reciprocal compensation payments at the interim Agreement rate until a new agreement is in place.

Penalty. Staff recommends that we impose penalties against GTE because it has subjected its competitor, WorldCom, to unfair and unreasonable disadvantage in violation of RCW 80.36.170. We adopt Staff's recommendation. GTE violated RCW 80.36.170 when it unilaterally refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs. In essence, GTE cut off the money supply to its competitor while it continued to collect and retain money for providing the same service to GTE. As Staff points out, an incumbent's ability to restrict the cash flow of new entrants into the market would create substantial barriers to entry for small, startup companies. Thus, not only are competitors harmed by unreasonable disadvantage imposed contrary to RCW 80.36.170, but customers are ultimately harmed as well. GTE's arguments against the imposition of penalties recommended by Staff are non-responsive. GTE mischaracterizes the basis for Staff's penalty proposal as GTE's failure to comply with the *MFS/US WEST Arbitration* decision. GTE contends that Staff confuses the *MFS/US WEST Arbitration* decision as an expression of state law, much like a rule or regulation. GTE then claims that if it was expected to comply with a rule, it was entitled to participate in the Commission's procedures for adopting rules and regulations under RCW 80.04.160. We find GTE's arguments against imposition of penalties unpersuasive.

Pursuant to RCW 80.04.380, we adopt Staff's proposal that each month's obligation be treated as a separate violation. GTE should incur a penalty of $1000 per month, dating from the month of the invoice to 30 days past July 15, 1998, for each invoice that it has unilaterally refused to pay. GTE owes $66,000 in penalties.

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continue to apply. We do not reach this issue in view of our interpretation of the Agreement.

We also accept Staff's recommendation that GTE be required to pay WorldCom late-payment charges, as provided for in Section V. B. 7 of the Agreement. These charges should be calculated at 1.5 percent per month, as set forth in WorldCom's tariff. GTE offered no response to Staff's late-payment charge proposal. We observe that the fourteen invoices submitted by WorldCom include late-payment charges. We find that late-payment charges are also due on any other outstanding invoices subsequent to October 10, 1998, that GTE has failed to pay WorldCom.

Having discussed above in detail the documentary evidence concerning all material matters, and having stated findings and conclusions upon contested issues, the Commission now augments those findings and conclusions with the following general statements on the evidence of record. Those portions of the preceding detailed findings and conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

FINDINGS OF FACT

1. The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates, rules, regulations, practices, accounts, securities and transfers of public service companies including telecommunications companies.

2. WorldCom is engaged in the business of furnishing telecommunications service to the public within the state of Washington.

3. GTE is engaged in the business of furnishing telecommunications service to the public within the state of Washington.

4. GTE and WorldCom executed an interim Interconnection Agreement on July 15, 1996.

5. The interim Interconnection Agreement between WorldCom and GTE expired on July 15, 1998, however, pursuant to Section VIII of the Agreement, the interconnection arrangements remain in place until a new agreement is negotiated and implemented. Interconnection arrangements mean all arrangements including physical connection between the parties' networks, compensation for the arrangements, and the obligation of the parties to negotiate a new agreement.

6. WorldCom initiated negotiations for a permanent interconnection Agreement in November 1997. Negotiations continued through February1998 but were never completed. Neither GTE nor WorldCom requested arbitration of their disputed issues. Both WorldCom and GTE failed to negotiate in good faith.

7. On August 3, 1998, WorldCom filed a formal complaint against GTE seeking enforcement of provisions of the parties' interim Interconnection Agreement. The complaint alleged that GTE violated the terms of that agreement by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of telephone exchange traffic, handed off by GTE to WorldCom, for termination by WorldCom to its end-use customers, including Internet Se..ice Providers.

8. GTE violated the terms of its interim Interconnection Agreement with WorldCom by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of local calls, including calls to ISPs.

9. GTE should pay WorldCom reciprocal compensation under the terms of the interim Interconnection Agreement in the amount of $1,458,925.48 for the period from September 20, 1997 through October 10, 1998, pursuant to the stipulation of the parties. In addition, GTE should pay WorldCom under the terms of the interim Agreement for any outstanding invoices subsequent to October 10, 1998, until a new agreement is in place.

10. GTE subjected its competitor, WorldCom, to unreasonable disadvantage in violation of RCW 80.36.170 when it refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs, while it continued to collect and retain money for providing the same service to WorldCom.

11. GTE should pay penalties pursuant to RCW 80.04.380, for its repeated violation of RCW.80.36.170. GTE should incur a penalty of $1000 per month, dating from the month of the invoice to 30 days past July 15, 1998, for each invoice that it has unilaterally refused to pay. Based on the fourteen invoices which are the subject of the stipulation, the penalty due is $66,000.

12. GTE should pay late-payment charges on any outstanding invoices subsequent to October 10, 1998, as provided for in Section V.B.7. of the Agreement. These charges should be calculated at 1.5 percent per month, as set forth in WorldCom's tariff.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and all parties to this proceeding.

2. The interim Interconnection Agreement between WorldCom and GTE expired on July 15, 1998, however, pursuant to Section VIII of the Agreement, the interconnection arrangements remain in place until a new agreement is negotiated and implemented. Interconnection arrangements mean all arrangements including physical

connection between the parties' networks, compensation for the arrangements, and the obligation of the parties to negotiate a new agreement.

3. GTE violated the terms of its interim Interconnection Agreement with WorldCom by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of local calls, including calls to ISPs.

4. GTE must pay WorldCom reciprocal compensation under the terms of the interim Interconnection Agreement as set forth in Finding 9.

5. GTE subjected its competitor, WorldCom, to unreasonable disadvantage in violation of RCW 80. 36.170 when it refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs, while it continued to collect and retain money for providing the same service to WorldCom.

6. GTE must pay penalties pursuant to RCW 80.04.38, for its repeated violation of RCW 80.36.170 as set forth in Finding 11.

7. GTE must pay late-payment charges on any outstanding invoices subsequent to October 10, 1998, as set forth in Finding 12.

8. GTE's counterclaim is denied. GTE is liable for the reciprocal compensation rates in the Agreement after July 15, 1998, as set for in Finding 9.

ORDER

THE COMMISSION ORDERS:

1. The Complaint filed by WorldCom, Inc. f/k/a MFS Intelenet of Washington, Inc. against GTE Northwest, Inc. on August 3, 1998 alleging violation of the terms of the interim Interconnection Agreement is granted.

2. GTE is ordered to pay WorldCom reciprocal compensation as set forth in Finding 9.

3. GTE is ordered to pay penalties pursuant to 80.04.380 as set forth in Finding 11.

4. GTE is ordered to pay late payment charges as set forth in Finding 12.

5. GTE's counterclaim is denied.

6. The payments, penalties and late charges required by this order shall be made within thirty days of this order.

DATED at Olympia, Washington, and effective this day of May 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).

The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

May 19, 1999

D.T.E. 97-116-C

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

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SUMMARY

In February 1999, the Federal Communications Commission ("FCC") declared that telephone traffic bound for Internet service providers ("ISP-bound traffic") and thence onward to Internet websites is a single *interstate* call ("one call") and is therefore subject to FCC jurisdiction under the 1996 Telecommunications Act ("1996 Act"). The FCC's "one call" ruling effectively undercut the jurisdictional claim of any state utility regulatory agency over ISP-bound traffic, insofar as an agency asserted that calls to Internet websites were severable into two components: (1) one call terminating at the ISP and (2) a subsequent call connecting the ISP and the target Internet website. The FCC did not judge state regulators' decision that rested on other bases, apart from noting that decisions resting on state contract law or other legal or equitable considerations "might" still be valid until the FCC issued a final rule on the matter.

In MCI WorldCom Technologies, Inc., D.T.E. 97-116 (1998) ("Order"), relying on prior FCC's decisions that seemed to give greater scope for state jurisdiction over ISP-bound traffic, the Department of Telecommunications and Energy ("Department") had earlier ruled in favor of MCI WorldCom (a competitive local exchange carrier or "CLEC") upon its complaint that the interconnection agreement with Bell Atlantic-Massachusetts, under Section 251 of the 1996 Act, required the payment of reciprocal compensation for handling one another's ISP-bound traffic. The Order held that this interconnection agreement required reciprocal compensation for terminating ISP-bound traffic. The *express and exclusive* basis for the holding was (a) that the link between caller and ISP in ISP-bound traffic was jurisdictionally severable from the continuing link onward from the ISP to the target Internet site, (b) that ISP-bound traffic was thus "local" under the 1996 Act and the interconnection agreement, and (c) that ISP-bound traffic was, therefore, subject to Department jurisdiction as an *intrastate* rather than an *interstate* call. The Department noted that other CLECs' interconnection agreements with Bell Atlantic contained identical provisions and directed Bell Atlantic to treat them accordingly. The Department's Order claimed no other basis for its assertion of state jurisdiction over ISP-bound traffic (i.e., it asserted no jurisdictional claim based on state contract law or other legal or equitable considerations, such as the FCC had noted might underpin some state decisions).

In March, Bell Atlantic moved the Department to modify its Order in light of the FCC's ruling. After considering the motion and responsive comments, the Department today concludes that the FCC ruling has superseded its own 1998 Order and has struck down the sole and express basis for its assertion of state jurisdiction over ISP-bound traffic. The net effect of the FCC's ruling is to nullify MCI WorldCom Technologies, Inc., D.T.E. 97-116. Relying, then, on Section 252 of the 1996 Act, the Department has directed Bell Atlantic and the CLECs to negotiate their renewed dispute over payment for handling each other's ISP-bound traffic. The Department has offered to mediate the dispute, if necessary, and to arbitrate the matter, if required to.

To guide the parties in their negotiations, the Department has set forth certain views on competition in telecommunications and on its need to avoid regulatory distortions that falsely mimic competition but, in fact, simply lead to inefficient, market-entry advantage for certain CLEC/ISP entities through regulator-imposed income transfers.

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I. INTRODUCTION: THE DEPARTMENT'S ORDER OF OCTOBER 21, 1998

On October 21, 1998, the Department of Telecommunications and Energy ("Department") issued an Order granting the petition of MCI WorldCom, Inc.[1] ("MCI WorldCom") and directing New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") to continue reciprocal compensation payments[2] for the termination of local exchange traffic to Internet Service Providers ("ISPs") in accordance with its interconnection agreements. MCI WorldCom Technologies, Inc., D.T.E. 97-116, at 12 (1998) ("MCI WorldCom" or "October Order" or "Order"). The Department stated that it expected Bell Atlantic to apply its definition of local exchange traffic to all interconnection agreements between the ILEC Bell Atlantic and other Competitive Local Exchange Carriers ("CLECs"). Id. at 14.

In MCI WorldCom, the Department determined that a call to an ISP ("ISP-bound

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1 MCI WorldCom, Inc. is the successor-in-interest to WorldCom Technologies, Inc. which is the successor-in-interest to MFS Intelenet Service of Massachusetts, Inc. ("MFS"). MFS is the entity that filed the original complaint in this docket.

2 The Telecommunications Act of 1996 ("1996 Act") requires each incumbent local exchange carrier ("ILEC") (Bell Atlantic is the ILEC in Massachusetts) to open its monopoly networks to effective competition before that ILEC will be authorized to provide long-distance telecommunications services. Section 251(b)(5) of the Act requires all local exchange carriers to compensate each other for the transport and termination of local traffic that originates on one carrier's network and terminates on another carrier's network. 47 U.S.C. § 251(b)(5). The Federal Communications Commission has interpreted this provision as limiting reciprocal compensation payments to the transport and termination of *local* traffic. See 47 C.F.R. § 51.701.

traffic"[3]) is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet. Id. at 11. Because the Department decided that a call from a Bell Atlantic customer to an ISP that is terminated by MCI WorldCom--and by extension, other CLECs--is a "local call," for purposes of the subject interconnection agreements, CLECs transporting and terminating calls to ISPs were deemed eligible for reciprocal compensation. Id. at 12-13. However, in its Order, the Department explicitly recognized that proceedings pending before the Federal Communications Commission ("FCC") could require it to modify its holding. Id. at 5 n.11. Finally, concerns that ISPs in Massachusetts may be establishing themselves as CLECs solely (or predominantly) to receive reciprocal compensation from Bell Atlantic prompted the Department to request information that would enable it to determine whether to open an investigation into the regulatory status of particular CLECs. Id. at 13.

II. EVENTS SINCE OCTOBER 21, 1998

On November 6, 1998, Bell Atlantic filed a Motion for Extension of the Judicial Appeal Period for all parties until 20 days after the FCC issues a ruling on reciprocal compensation for ISP-bound traffic. On November 10, 1998, the Department granted Bell Atlantic's motion.

Also on November 10, 1998, MCI WorldCom filed a Motion for Reconsideration arguing that a Department decision to open an investigation into the regulatory status of certain CLECs

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3 There are several ways to describe dial-up, Internet calling. For consistency, we adopt the FCC's term 'ISP-bound traffic'.

would be inconsistent with the Act.[4] On February 25, 1999, the Department issued an Order denying MCI's Motion for Reconsideration, finding that the Department's general supervisory and regulatory jurisdiction permits it to request information from telecommunications carriers and to use that information in determining whether to open an investigation.[5] MCI WorldCom, D.T.E. 97-116-A at 4.

On February 26, 1999, the FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking in which it decided that jurisdiction over ISP-bound traffic is interstate. In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling (rel. Feb. 26, 1999) ("Internet Traffic Order"); Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking (rel. Feb. 26, 1999) ("NPRM"). The FCC concluded that ISP-bound traffic does "not terminate at the ISP's local server . . . but continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." Internet Traffic Order at ¶ 12. Having decided that jurisdiction over ISP-bound traffic is determined by the nature of the end-to-end transmission between a caller and an Internet site, id. at ¶¶ 12 and 18, the FCC determined that because ISP-bound traffic is interstate, that jurisdiction over the

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4 MCI also requested an extension of the judicial appeal period. The Department determined that this request was moot because the Department had previously granted Bell Atlantic's motion to extend the judicial appeal period for all parties. MCI WorldCom, D.T.E. 97-116-A at 5 (February 25, 1999).

5 Before the issuance of D.T.E. 97-116-A, the Department's Telecommunications Division issued data requests to ten CLECs to determine whether their customer bases were predominantly or solely ISPs, and whether any affiliate relationship exists between the CLECs and their ISP customers. Responses were received on or before January 20, 1999.

question of reciprocal compensation for such traffic, on the claim that it is local, lies with the FCC. Id. at ¶ 12. However, the FCC reserved for future rulemaking the question of payment for ISP-bound traffic among LECs. Id. at ¶ 21. Until that rulemaking is final, state commissions retain some, undefined measure of authority over ISP-bound traffic–consistent, of course, with the FCC's declaratory ruling on jurisdiction. Id. at ¶ 22. In the interim, state commissions either may continue, where appropriate, to enforce existing reciprocal compensation obligations between carriers under interconnection agreements or may, as needed, modify those obligations based on its findings in the Internet Traffic Order. Id. at ¶¶ 25-27. And, citing this Department's concern over "gaming" of reciprocal compensation in its October Order, the FCC "note[d] that issues regarding whether an entity is properly certified as a LEC if it serves only or predominantly ISPs are matters of state jurisdiction." Id., at ¶ 24 and n. 78.

On March 2, 1999, Bell Atlantic filed a Motion for Modification of the Department's MCI WorldCom Order ("Motion for Modification") asking the Department to determine that its interconnection agreements do not require reciprocal compensation payments for ISP-bound traffic. Bell Atlantic argues that because the FCC determined that ISP-bound traffic is interstate and not local traffic, the reciprocal compensation requirements of the 1996 Act and the FCC's rules do not govern inter-carrier compensation for this traffic (Motion for Modification at 2). Therefore, Bell Atlantic contends that it is no longer required to make such payments. Bell Atlantic further states that it will escrow reciprocal compensation payments for ISP-bound traffic until the Department determines whether to modify MCI WorldCom (id.).[6] The Department

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[6] Bell Atlantic does not indicate how it will differentiate ISP-bound traffic from local (continued...)

originally established deadlines of March 19, 1999 for opponents' responses to the Motion for Modification and March 26, 1999 for Bell Atlantic's reply to those responses.

On March 10, 1999, Bell Atlantic responded to objections to its unilateral decision to escrow payments. Bell Atlantic filed a Motion for Stay Pending Decision on Motion for Modification ("Motion for Stay"). The Motion for Stay sought permission to escrow reciprocal compensation, pending a Department ruling on its Motion for Modification.[7]

The following entities[8] filed comments in response to the Motion for Modification: Teleport Communications-Boston, Inc., and Teleport Communications Group, as AT&T companies, and AT&T Communications of New England, Inc. (collectively "AT&T"); Cablevision Lightpath-MA, Inc. ("Cablevision"); Choice One Communications, Inc. ("Choice One"); a coalition of Massachusetts CLECs and ISPs (the "Coalition"); CoreComm Limited and CoreComm Massachusetts, Inc. (jointly "CoreComm"); Focal Communications Corporation ("Focal"); Global NAPs, Inc. ("GNAPS");[9] Intermedia Communications, Inc. ("Intermedia");

(...continued)
traffic carried on its network. Instead, Bell Atlantic sets up a 2:1 proxy by stating (1) that it will escrow amounts in excess of the 2:1 ratio, billed to any CLEC that terminates at least twice as much traffic as it sends to Bell Atlantic, but (2) that if a CLEC demonstrates that the imbalance is associated with "local" traffic, Bell Atlantic will pay reciprocal compensation charges for those calls (Motion for Modification at 2 n.3).

7 Bell Atlantic notes that it filed the Motion for Stay to ensure that there would be "no ambiguity regarding [Bell Atlantic's] ability to withhold payments while the Department considers the Motion for Modification" (Motion for Stay at 3 n.2).

8 In addition to parties to D.T.E. 97-116, the Department allowed comments from all facilities-based CLECs with interconnection agreements with Bell Atlantic.

9 On March 4, 1999, GNAPS filed a petition for intervention. The Department has yet to
(continued...)

Level 3 Communications, Inc. ("Level 3");[10] MCI WorldCom; NEVD of Massachusetts, LLC ("NEVD"); PaeTec Communications, Inc.; Prism Operations, LLC ("Prism");[11] RCN-BecoCom, LLC ("RCN"); and RNK, Inc. ("RNK").[12] Bell Atlantic filed reply comments on March 15, 1999.[13]

On March 23, 1999, the Department issued MCI WorldCom, D.T.E. 97-116-B (1999) ("Escrow Order") granting Bell Atlantic interim relief from our prior Order and authorizing Bell Atlantic to place disputed reciprocal compensation payments in escrow, pending a final decision on its Motion for Modification. That Order scheduled oral argument on the contending claims, but argument was later postponed.[14]

On March 31, 1999, RNK filed a Motion for Clarification, Suspension of Escrow Order, and Reconsideration of Escrow Order ("RNK Motion for Clarification"). RNK seeks clarification on five points: (1) the relationship of the Escrow Order and specific terms contained in RNK's interconnection agreement with Bell Atlantic concerning the identity of the escrow

(...continued)
rule on that petition.

10 Level 3 is the successor-by-merger of XCOM Technologies, Inc., which is an intervenor.

11 Prism formerly was known as Transwire Operations, LLC.

12 RCN, Choice One, the Coalition, Focal, GNAPS, NEVD, Norfolk, Prism, and RNK are not parties in D.T.E. 97-116.

13 With the Department's permission, MCI WorldCom filed its response on March 15, 1999, and Bell Atlantic filed its reply to MCI WorldCom's response on March 18, 1999.

14 Bell Atlantic's appeal of the hearing officer ruling on oral argument need not be ruled upon, for today's Order renders it moot.

agent, the rate of interest on the escrow account, and the responsibility for escrow costs; (2) whether escrow authority applies to reciprocal compensation accrued only after March 23, 1999, the date of the Escrow Order; (3) whether escrow applies to reciprocal compensation due and payable for traffic only in excess of the 2:1 ratio; (4) whether the Escrow Order uses differing meanings for the terms "Internet-bound traffic" and "ISP-bound" traffic; and (5) whether the authority to escrow granted to Bell Atlantic should even apply to CLECs, like RNK, which provide multiple telecommunications services besides simply serving ISPs (RNK Motion for Clarification at 4-8). Until the Department rules on these issues, RNK argues, the Escrow Order should be suspended (id. at 8-10). RNK also argues that "extraordinary circumstances," particularly the escrow's adverse financial effect on small start-up CLECs, dictate that the Department reconsider the Escrow Order (id. at 10-11). Responses to RNK's Motion for Clarification were filed on April 5, 1999 by Bell Atlantic, GNAPS, and the Coalition.

Finally, on April 16, 1999, GNAPS filed a complaint against Bell Atlantic. The complaint seeks adjudication of GNAPS's claimed right to receive reciprocal compensation payments for calls that Bell Atlantic customers make to ISPs, where such customers receive their dial-in connections to the public switched network from GNAPS.

Comments have been extensive. After reviewing them, the Department sees no need for the oral argument originally scheduled in its Escrow Order of March 23. Therefore, Bell Atlantic's Appeal of the Hearing Officer's Ground Rules is dismissed as moot. RNK's Motion for Clarification is addressed in the context of our ruling on Bell Atlantic's Motion for

Modification.[15]

III. POSITIONS OF THE PARTIES AND COMMENTERS

A. Bell Atlantic

Bell Atlantic claims that the Department's Order in MCI WorldCom must be modified because its conclusion that ISP-bound traffic was local was based on mistakes of both fact and law regarding jurisdiction over ISP-bound traffic (Motion for Modification at 8). According to Bell Atlantic, the FCC in its Internet Traffic Order determined, contrary to the Department's finding in MCI WorldCom, that an ISP-bound call cannot be separated into two components but is a single, uninterrupted transmission from a caller to a remote website (id.). Bell Atlantic contends that because ISP-bound traffic is not local, such traffic is not subject to reciprocal compensation under the Act, the FCC's rules, or any of Bell Atlantic's interconnection agreements[16] (id. at 9). Moreover, Bell Atlantic argues, the FCC, contrary to the Department's October Order and the CLECs' present claim, rejected the argument that because ISPs have local telephone numbers, calls placed to those numbers are local calls (id.). Bell Atlantic indicates the fact that the FCC exempted enhanced service providers ("ESPs") from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would

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15 Because the substance of RNK's Motion for Clarification is addressed in the Department's findings in this Order, we need not address the question of whether the Escrow Order, as interlocutory, may properly be the subject of a motion for reconsideration or clarification (see RNK Motion for Clarification at 4 n.1).

16 Bell Atlantic indicates that its interconnection agreements only require reciprocal compensation for local traffic and that, to be "local," the call must originate and terminate within a given local access transport area ("LATA") in the Commonwealth of Massachusetts (id. at 9).

not be necessary (id.). Furthermore, Bell Atlantic argues, the FCC's recent GTE and Internet Traffic Orders have made it clear that Internet-bound traffic is interstate and therefore has no severable local component (id. at 10).

Concerning its contracting intent, Bell Atlantic states that it has not agreed to pay reciprocal compensation for ISP-bound traffic (Bell Atlantic Reply Comments at 8). Bell Atlantic argues that as a threshold legal matter and as a matter of contract law, the factual issues raised in the pleadings filed in opposition to the Motion for Modification may not constitute grounds for a determination that reciprocal compensation should be imposed for ISP-bound traffic under the interconnection agreements (id.). Bell Atlantic contends that when the wording of a contract is unambiguous, the contract must be enforced according to its terms (id. at 8-9). Because the Department has previously determined the agreements at issue to be unambiguous, Bell Atlantic argues that the Department should not now admit parole or extrinsic evidence relating to the parties' intent regarding the agreements (id.). Bell Atlantic argues that public policy and the impact on CLECs and ISPs have nothing to do with what the contracts actually say (id.). Accordingly, Bell Atlantic contends that ISP-bound traffic is not eligible for reciprocal compensation under Bell Atlantic's interconnection agreements and, further, that the CLECs have already received substantial compensation to which they are not entitled under those agreements (Bell Atlantic Motion at 10).

With respect to continued reciprocal compensation for ISP-bound traffic, Bell Atlantic states that it does not dispute that the FCC has not precluded the payment of reciprocal compensation for ISP-bound traffic in all circumstances, but that the Department's conclusion in

MCI WorldCom was not based on any of the grounds permitted by the FCC (Bell Atlantic Reply Comments at 5). According to Bell Atlantic, the FCC stated that state commissions that have ordered the payment of reciprocal compensation for Internet-bound traffic might conclude, depending on the basis of those decisions, that it is not necessary to revisit those determinations (id. at 6). Bell Atlantic notes, however, that MCI WorldCom did not rely on any of the other bases that the FCC recognized (id.). Bell Atlantic contends, in the alternative, that if the Department wishes to consider whether reciprocal compensation should continue to be imposed for Internet-bound traffic, the Department must resolve the disputed factual assertions raised by the parties in an adjudicatory proceeding that permits the parties to present evidence (id.).

B. CLECS

First, the CLECs point out that the FCC explicitly stated that "nothing in this [Internet Traffic Order] precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the [FCC's] rulemaking" (see e.g., Intermedia Comments at 5; Prism Comments at 3; Focal Comments at 11; NEVD Comments at 8, citing Internet Traffic Order at ¶ 27).

Next, the CLECs argue that the FCC's ruling on the jurisdictional analysis of calls to ISPs in its Internet Traffic Order in no way requires the Department to revisit MCI WorldCom; rather, in their view, it reaffirms the Department's Order (see e.g., AT&T Comments at 3; Coalition Comments at 3; MCI WorldCom Comments at 7-8; CoreComm Comments at 1; RNK Comments at 2). Level 3, for instance, argues that "the Department was quite clear that the determination it was making was for the purpose of classifying the traffic in the Agreement. It was not making a jurisdictional decision." Level 3 also argues that the FCC made it clear that its jurisdictional decision on ISP-bound traffic should not interfere with the decision made by a state commission (Level 3 Comments at 5; see also Choice One Comments at 3-5). According to the CLECs, the Department did not declare that ISP-bound traffic is "local" in the sense of "jurisdictionally intrastate," but only that those calls are more appropriately viewed as local traffic instead of long distance calls. The CLECs contend, therefore, that there is no conflict between MCI WorldCom and the FCC's Internet Traffic Order (see e.g., GNAPS Comments at 6; RCN Comments at 2, citing MCI WorldCom, D.T.E. 97-116, at 11-13; PaeTec Comments at 3). The CLECs maintain that Bell Atlantic chooses to focus only on the FCC's decision concerning jurisdiction, whereas the FCC specifically recognized the limit of that analysis (MCI WorldCom Comments at 10; CoreComm Comments at 3, citing Internet Traffic Order at ¶ 20) by stating that "the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local" (MCI WorldCom Comments at 11; RCN Comments at 4, citing Internet Traffic Order at ¶ 5).

CoreComm asserts that the FCC divided the analysis in its Internet Traffic Order into two parts, "one focusing on the nature of ISP-bound traffic for the purpose of resolving jurisdictional issues and the other focusing on the separate issue of what sort of regulatory treatment should be accorded such calls" (CoreComm Comments at 3). CoreComm supports this argument by quoting the first sentence of the FCC's Internet Traffic Order: "Identifying the jurisdictional and regulatory treatment of ISP-bound communications requires us to determine how Internet traffic fits within our existing regulatory framework" (CoreComm Comments at 4, citing Internet Traffic Order at ¶ 1 (emphasis added by CoreComm)). CoreComm argues that the FCC recognizes the difference between "jurisdictional analysis" and "regulatory treatment" (CoreComm Comments at 4; see also Focal Comments at 10-11).

The CLECs also contend that § 252(e)(1) of the Act gives the states the authority to interpret the interconnection agreements that they approved (see, e.g., RNK Comments at 3; NEVD Comments at 3). The CLECs base their arguments on the FCC's statement that "[n]othing in this [Internet Traffic Order], therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements" (see e.g., Coalition Comments at 4; PaeTec Comments at 6 n.16; Level 3 Comments at 5; RCN Comments at 3-4; NEVD Comments at 4, each citing Internet Traffic Order at ¶ 24). MCI WorldCom contends that "under well-established principles of contract construction, parties' intent is determined with respect to the time of contracting, not at some subsequent date" and at the time when it entered into its interconnection agreement with Bell Atlantic, both it and Bell Atlantic intended to treat calls to ISPs as local traffic subject to reciprocal compensation (MCI WorldCom Comments at 14; see also AT&T Comments at 4). In addition, the CLECs argue that the FCC identified "illustrative" factors[17] a state commission could consider when determining

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17 These "illustrative" factors are:

> whether incumbent LECs serving ESPs [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;

(continued...)

whether the parties to an interconnection agreement intended to subject ISP-bound traffic to reciprocal compensation. Furthermore, the CLECs argue, the Department previously considered these factors and correctly concluded that ISP-bound traffic is subject to reciprocal compensation under existing interconnection agreements (see e.g., MCI WorldCom Comments at 12-14; RCN Comments at 5-7; Intermedia Comments at 4-5; Focal Comments at 5; PaeTec Comment at 5). MCI WorldCom, for instance, contends that the Department, in MCI WorldCom, considered the factors the FCC identified in the Internet Traffic Order at ¶ 24, and reached a conclusion that Bell Atlantic and MCI WorldCom agreed to compensate each other for termination of all local calls by finding that (1) the characteristics of ISP-bound traffic are identical to any other local calls, (2) Bell Atlantic and all other carriers charge their customers local rates for ISP-bound traffic, (3) the ISPs' premises are located within the LATA, thus meeting the definition of local traffic in its Agreement,[18] and (4) that ISP-bound traffic is subject to reciprocal compensation obligation for the same reasons that other kind of calls -- such as calls to private networks -- are subject to

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17 (...continued)

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 traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.

Internet Traffic Order at ¶ 24.

18 But see Internet Traffic Order, at ¶ 12 ("The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our [FCC's] jurisdiction").

reciprocal compensation (MCI Comments at 3-4, 12-13, citing MCI WorldCom at 10). Accordingly, while the FCC and the Department may consider other compensation mechanisms in the future, reciprocal compensation under the existing interconnection agreement should not be modified (Level 3 Comments at 7; Prism Comments at 6-7).

AT&T argues that existing interconnection agreements should remain in full force, pending renegotiation by the parties and the FCC's completion of its rulemaking on inter-carrier compensation for ISP-bound traffic (AT&T comments at 6, citing the AT&T-Bell Atlantic Interconnection Agreement § 7.3 (providing "Parties shall negotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action")).

The CLECs bolster their argument concerning intent by noting that the telecommunication industry's custom and usage regarding ISP-bound traffic at the time the interconnection agreements were executed support their assertion that calls to ISPs are considered local and, therefore, subject to reciprocal compensation.[19] Even Bell Atlantic, the CLECs contend, recognized that calls to ISPs were local as it aptly demonstrated in its formal "Reply Comments" submitted in the FCC's proceeding to develop rules to implement §§ 251 and 252 of the Act (see e.g., Level 3 Comments at 5-6; GNAPS Comments at 3-4, citing In Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,

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[19] The CLECs cite the Alabama Public Service Commission's recent conclusion "that the industry custom and usage at that time [the interconnection agreements under review herein were entered] dictated that ISP traffic be treated as local and, therefore, subject to reciprocal compensation." (AT&T Comments at 5; MCI Comments at 14-16, citing In Re: Emergency Petitions of ICG Telecom Group Inc. and ITC Deltacom Communications Inc., Alabama PSC docket 26619 at 25 (Mar. 4, 1999)).

CC docket no. 96-98, Reply Comments of Bell Atlantic at 21 (submitted May 30, 1996)). Arguing in favor of an actual compensation mechanism as opposed to a bill and keep arrangement supported by the CLECs, Bell Atlantic declared that (1) calls to ISPs are local, (2) subject to reciprocal compensation, and (3) the rates Bell Atlantic proposed for such reciprocal compensation were reasonable (see e.g., GNAPS Comments at 3-4; Focal Comments at 8; NEVD Comments at 12, citing In Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC docket no. 96-98, Reply Comments of Bell Atlantic at 21 (submitted May 30, 1996)). The CLECs argue that the fact that Bell Atlantic did not accurately predict the impact of its proposal (which eventually prevailed) should not provide a valid basis for Bell Atlantic to repudiate its agreements (Level 3 Comments at 6). While Bell Atlantic may not have foreseen the traffic imbalance caused by many ISPs opting to take service from a CLEC, Bell Atlantic should, as the party with the much more substantial sales, marketing, and technical experience, be assigned any risks associated with its poor foresight (NEVD Comments at 13).

GNAPS further supports the CLECs argument that Bell Atlantic considered dial-up ISP calls as local by citing to Bell Atlantic's "comparably efficient interconnection" ("CEI") plans for its own Internet access service (see e.g., GNAPS Comments at 9; Focal Comments at 8-9). In its CEI plans, Bell Atlantic stated that "[f]or dial-up access, the end-user will place a local call to the Bell Atlantic Internet hub site from either a local residence or business line or from an Integrated Services Digital Network ("ISDN") service" (see e.g., GNAPS Comments at 9, citing Amendment to Bell Atlantic CEI Plan to Expand Service Following Merger with NYNEX at 2, CCB Pol 96-09 (filed May 5, 1997); Focal Comments 8-9). Accordingly, GNAPS asserts that it is obvious that Bell Atlantic understood fully the general industry practice on treating ISP-bound calls as local (GNAPS Comments at 9-10)

PaeTec argues that Bell Atlantic, in its interconnection agreements, could have specifically carved out ISP-bound traffic as non-local in the same manner as other traffic with all the characteristics of local calls was excluded from reciprocal compensation obligations (PaeTec Comments at 6 (claiming that the Bell Atlantic-MCI WorldCom interconnection agreement specifically identifies Feature Group A traffic as not subject to reciprocal compensation)). Because ISP-bound traffic was not excluded, PaeTec argues, Bell Atlantic's attempt to exclude such traffic now from its reciprocal compensation obligations is entirely a post hoc rationale now that the balance of this traffic goes against it (id. at 6-7). Moreover, PaeTec states, Bell Atlantic has a serious credibility problem with respect to this issue: if Bell Atlantic now is to be believed that it never intended to include ISP-bound traffic within the reciprocal compensation provisions of its interconnection agreement with MCI WorldCom, then one must also believe that Bell Atlantic intended to transport and terminate all traffic originated by a MCI WorldCom customer to a Bell Atlantic customer that happened to be an ISP, without any compensation at all from MCI WorldCom (id. at 8). RNK argues that another indication that Bell Atlantic intended ISP-bound traffic to be "local" for reciprocal compensation purposes is the fact that Bell Atlantic has paid for and accepted credit for local traffic that included ISP-bound calls (RNK Comments at 2). RNK thus makes a "course of conduct under the contract" argument to supplement the "usage of the trade" argument raised by GNAPS (GNAPS Comments at 9-10).

With respect to state law grounds, the CLECs argue the Department has authority to require reciprocal compensation for Internet-bound traffic as acknowledged in MCI WorldCom (Prism Comments at 3-4; RNK Comments at 3; NEVD Comments at 4). Prism argues that there is no federal law that prohibits applying reciprocal compensation to non-local calls, and points to the FCC's statement that "[i]n so construing the statutory obligation, we did not preclude parties from agreeing to include interstate traffic (or non-local intrastate traffic) within the scope of their interconnection agreements, so long as no Commission rules were otherwise violated" for support (Prism Comments at 7, citing Internet Traffic Order at ¶ 24); see also, NEVD Comments at 7). In addition, the CLECs also argue that applying the fact that ISP-bound traffic has been exempt from interstate access charges establishes that such traffic is subject to reciprocal compensation (see e.g., Prism Comments at 6; PaeTec Comments at 5; NEVD Comments at 6). The CLECs argue that, pursuant to the FCC's Internet Traffic Order, "state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' [contracting] intentions" (PaeTec Comments at 9, citing Internet Traffic Order at ¶ 24). Referring to G.L. c. 106, § 1-205(5), PaeTec asserts that because there are no express or implied terms in the interconnection agreement excluding the usage of trade that a telephone call to the telephone number of an ISP terminates when the call is answered, that usage of trade must be considered part of the definition of reciprocal compensation in the interconnection agreement" (PaeTec Comments at 10-11).

The Coalition asserts that if calls to ISPs are interstate as explained in FCC's ruling, then one may need to question how Bell Atlantic can carry such traffic because it currently lacks the authority to do so until it meets the requirements § 271 (Coalition Comment at 6). In addition, the Coalition contends that if the Department were now to adopt the single transmission analysis used in the FCC's ruling, then serious questions would arise concerning the consistency of this new analysis with the segmented transmission analysis used in Voice Mail, D.P.U. 97-101 (1998) (id. at 7). Lastly, the Coalition points out that there is "a significant question of estoppel and reliance on such practice by the CLECs that have expended very significant financial and human resources based upon the established practice that traffic to ISPs requires ILEC payment of reciprocal compensation" (id. at 7).

Regarding public policy concerns, RNK asserts that growth of the Internet is in the public interest and that the absence of reciprocal compensation will result in irreparable harm to CLECs and Massachusetts' consumers (RNK Comments at 5-6). The CLECs also contend that sound economic policy and regulatory fairness require full compensation for their significant network costs related to delivering calls to ISPs (Cablevision Letter at 2; GNAPS Comment at 4; Focal Comments at 7; RNK Comments at 6; NEVD Comment at 14).

Concerning the due process issues, MCI WorldCom contends that if the Department were to reconsider any issue, the proper procedure would be for the Department to hold an evidentiary hearing in order to investigate the parties' intent regarding calls to ISPs at the time they entered into the interconnection agreements (MCI WorldCom Comments at 17-18). RCN argues that the Department should leave MCI WorldCom in full force pending the completion of evidentiary hearings on whether the Order continues to be valid (RCN Comments at 7). GNAPS asserts that if the Department wishes to make a re-determination on the intentions of the parties in the affected agreement, the Department should conduct an evidentiary hearing to explore how the factors identified in the FCC's Internet Traffic Order apply (GNAPS Comments at 8).

IV. ANALYSIS AND FINDINGS

A. Effect of the Federal Communications Commission's Internet Traffic Order on the Continued Validity of the Department's Order in MCI WorldCom

On February 26, 1999, the FCC declared that the 1996 Act, 47 U.S.C. sec. 251(b)(5), mandated reciprocal compensation for the transport and termination of *local* traffic *only*. The FCC further held that this mandate does not extend to ISP-bound traffic, because ISP-bound traffic is not local but is interstate *for purposes of the 1996 Act's reciprocal compensation provisions*. ISP-bound traffic is thus not subject to state enforcement under the 1996 on the grounds that it is local traffic. Internet Traffic Order at ¶¶ 12 and 26 n. 87.

In ruling in favor of Federal versus state regulatory jurisdiction over ISP-bound traffic and in construing 47 U.S.C. sec. 251(b)(5), the FCC focused on the "end-to-end" nature of the Internet communication. The initiating caller or customer is one "end" of the communication, and the terminating "end" is the web or other Internet site called by the customer. The FCC rejected arguments that would segment such traffic into intra- and inter-state portions and thereby also rejected a consequent, artificial segmentation of jurisdiction. Id. at ¶ 11. The FCC noted that it "analyzes the totality of the communication when determining the jurisdictional nature of a communication . . . [and] recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications." Id. at ¶ 13. The FCC considers each such commercial transaction as "one call" "from its inception to its completion" and accordingly rejects the jurisdictional limitation implied by arbitrarily isolating the initial part of the call from the rest of the stream of interstate commerce. Id. at ¶ 11.[20]

This line of analysis is certainly not surprising or even novel. For decades, decisional law has expansively analyzed questions of Federal versus state jurisdiction under the Commerce Clause, U.S. Const. Art. I, sec. 8, cl. 3, in this way. *See, e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (practically unlimited view of the reach of Congress to local activity under the Commerce Clause if effect on interstate commerce can be posited). Unless and until modified by the FCC itself or overturned by a court of competent jurisdiction,[21] the FCC's view of the 1996 Act must govern this Department's exercise of its authority over reciprocal compensation; and the FCC so advises us. Internet Traffic Order at ¶ 27.

In October 1998, the Department had ruled on this very same, jurisdictional question in MCI WorldCom, D.T.E. 97-116.[22] On March 2, 1999, Bell Atlantic moved the Department to

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20 The FCC characterizes the Internet as "a powerful instrumentality of interstate commerce." Internet Traffic Order at ¶ 6. Although the FCC admits its treatment of enhanced service providers ("ESPs") has something of an *intrastate* flavor, id. at ¶ 5, describing the Internet in this way virtually dictated the FCC's "one call" analysis. See also *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd at 15983, 1631-33 (1997). The FCC has evidently determined to close this avenue of caselaw by distinguishing it, somewhat artificially, from its holding in Internet Traffic Order.

21 The recent "transferring [of] the States' regulatory authority wholesale to the Federal Communications Commission" for which Justice Thomas recently faulted the Court's majority in *AT&T Corp.* v. *Iowa Utilities Board* suggests that judicial reversal is unlikely. *AT&T Corp.* v. *Iowa Utilities Board*, __ U.S. __, at __, 119 S.Ct. 721, 741 (1999) (Thomas, J., dissenting).

22 Although numerous CLECs intervened in the proceeding, the Department had before it only the complaint of MCI WorldCom for alleged breach of contract by Bell Atlantic.

(continued...)

modify its Order in MCI WorldCom in light of the FCC's Internet Traffic Order. Bell Atlantic's Motion for Modification, at 10, states that ISP-bound traffic "is now, and always has been, interstate traffic . . . , and CLECs have received substantial compensation to which they are not entitled under those [i.e., their respective interconnection] agreements."

In MCI WorldCom, the Department construed the 1996 Act as conferring jurisdiction upon it to hear MCI WorldCom's complaint about interpretation of its interconnection agreement with Bell Atlantic. MCI WorldCom, D.T.E. 97-116, at 5. In exercising this jurisdiction, the Department found "that a call from a Bell Atlantic[-Massachusetts] customer that is terminated by MCI WorldCom to an ISP is a 'local call,' for purposes of the definition of local traffic in the Agreement [between Bell Atlantic and MCI WorldCom], and, as such, is eligible for reciprocal compensation." Id., at 5, 12-13. The Department noted that although the parties to the matter had "raised numerous issues," the Department's Order "*need only address* the question of *whether a call terminated* by MCI WorldCom *to an ISP is local*, thus qualifying it for reciprocal compensation under MCI WorldCom's interconnection agreement with Bell Atlantic." Id., at 6 (emphasis added). The Department's October Order thus confined its enquiry in this matter solely and exclusively to whether the ISP-bound traffic in question was "local" (i.e., intrastate) or interstate calling. This limitation of the basis for the

22 (...continued)
The Department did, however, note the implications of its Order for other interconnection agreements. MCI WorldCom, D.T.E. 97-116, at 14. The contract in question was the "Interconnection Agreement between New England Telephone and Telegraph Company and MFS Intelenet of Massachusetts, Inc." dated 26 June 1996, and filed with the Department on 10 July 1996. Of particular note, are §1.38, the definition of 'Local Traffic', and §5.8, Reciprocal Compensation Arrangements – Section 251(b)(5).

Department's holding was express; and no other basis may be reasonably inferred from the Order. The October Order's effectiveness was thus ransom to the validity of its legal or jurisdictional conclusion.

To repeat, lest it be misunderstood: there was no other basis for the Department's holding in MCI WorldCom, D.T.E. 97-116. If that express legal basis were to prove untenable (as, in the event, it has), the effectiveness of the Order could not hold. And the Department recognized and acknowledged as much. Id., at 5 n. 11 and 6 n. 12.

As it happens, the Department's "two-call" theory cannot be squared with the FCC's "one-call" analysis. In rendering its "two-call" decision on reciprocal compensation for ISP-bound traffic, the Department twice acknowledged that FCC authority over the question may trump or supersede the Department's. Noting that the FCC might exercise its superior jurisdiction in a manner inconsistent with the Department's view of the law, the Department twice observed that, in that event, its own Order might require modification or change. Id. That twice-repeated caution[23] of the risk attendant on proceeding with reciprocal compensation for ISP-bound traffic before the FCC spoke appears to have been discounted or to have gone unheeded, if one is to judge from the numerous filings in response to Bell Atlantic's Motion for Modification. The substance of these filings is rehearsed above and need not be repeated here.

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23 The point was noted for a third time in MCI WorldCom Technologies, Inc., D.T.E. 97-116-A, at 2 (1999)

MCI WorldCom also expressed reservation that an enterprise "established solely (or predominately) for the purpose of funneling traffic to an ISP (particularly if that ISP is an affiliate) . . . may jeopardize its regulatory status and entitlements as a local exchange carrier." Id., at 13. The reservation was over the potential for "gaming" the regulatory scheme--with the consequence of siphoning off revenues but achieving no advance in true, efficient competitive entry.[24] This reservation was the subject of a motion for reconsideration by MCI Telecommunications Corporation, addressed by the Department in MCI WorldCom Technologies, Inc., D.T.E. 97-116-A (1999). The significance of the reservation was recognized in Internet Traffic Order, at ¶ 24 n.78.

In its October Order, the Department exercised its authority to resolve the MCI WorldCom complaint. The Department based its Order on the express *and exclusive* premise that "[a] call to an ISP is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet." MCI WorldCom, D.T.E. 97-116, at 11, 12-13. To be sure, the FCC evidenced discomfort in trumping states' authority under Section 251(b)(5) and spoke equivocally about the effects of its declaratory order on decisions already taken by state commissions such as the Department.

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24 The matter of efficient entry by providers versus inefficient entry evidently weighs heavily upon the FCC as well. Internet Traffic Order at ¶ 6.

Internet Traffic Order at ¶¶ 27 and 28.[25] Even so, the message for the Department's MCI WorldCom Order cannot be mistaken.

The Department based its October Order on a mistake of law, i.e., on an erroneous characterization of ISP-bound traffic and on a consequently false predicate for concluding that jurisdiction was intrastate. By basing its jurisdictional analysis and finding on a mischaracterization of the nature of ISP-bound traffic, the Department exceeded its grant of state regulatory authority under the 1996 Act. Although the vague and equivocal terms of Paragraph 27 of the FCC's Internet Traffic Order may suggest that *some* state commissions "might conclude" that their reciprocal compensation orders remain viable, the FCC has, to put the matter baldly, rendered the DTE's October Order in MCI WorldCom–as a practical matter–a nullity. *Pace* the FCC's consoling notion that some states' orders might stand on

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25 The equivocation is subtle but evident in the word "necessarily" as used in the penultimate sentence of ¶ 27. It did not escape the notice of one FCC commissioner. As he so often politely but cogently does, FCC Commissioner Michael K. Powell points out the essential incoherence of the majority's dicta about state decisions affected by the Internet Traffic Order: "Such reasonableness does little to preserve those state decisions most likely to be disturbed by our 'one call' jurisdictional analysis, namely, decisions based primarily or exclusively on a 'two-call' theory. In short, I think touching on the issue of shared jurisdiction muddles our conclusion that there is federal jurisdiction with respect to these questions." Internet Traffic Order, Concurrence of Commissioner Powell, text at n. 1. There is evident division among the FCC commissioners over the implications of this "shared jurisdiction theory" (to use Commissioner Powell's term). See Separate Statement of Commissioner Susan Ness, fourth paragraph (it "remains reasonable for the states . . . to treat this [ISP-bound] traffic as local"). It may be that the FCC's temporized ("muddled" in Commissioner Powell's terms) jurisdictional analysis is a reaction to the sizeable minority of the Supreme Court, who joined Justice Thomas in expressing dismay at the FCC's earlier incursion into a traditional state province in *AT&T Corp.* v. *Iowa Utilities Board* (see note 21 *supra*).

state "contractual principles or other legal or equitable[26] considerations," Internet Traffic Order at ¶ 27, our Order stood *squarely, expressly, and exclusively* on a "two call" premise. That foundation has crumbled.[27] There is no alternative or supplemental finding in our October 1998 Order to rely on in mandating continued reciprocal compensation for ISP-bound traffic. In view of the FCC's practical negation of the legal and analytic basis of our October Order, we see no logical alternative to vacating that Order in response to the Motion for Modification. We hereby vacate MCI WorldCom, D.T.E. 97-116.

Unless *and until* some future investigation of a complaint, if one is filed, concerning the instant interconnection agreement determines a different basis for such payments, there presently is no Department order of continuing effect or validity in support of the proposition that such an obligation arises between MCI WorldCom and Bell Atlantic. Although MCI WorldCom and Bell Atlantic may still disagree about reciprocal compensation obligations

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26 The FCC's use of the word "equitable" is ambiguous. It is not clear what equitable powers a regulatory agency could, in any event, claim to exercise, as it acts under a statutory grant. The FCC's observation was evidently intended to cushion the jurisdictional blow, but all it does is muddle the message, as Commissioner Powell has observed. Internet Traffic Order, Concurrence of Commissioner Powell, text at n. 1.

27 The parties to this docket have diligently provided the Department with other states' decisions on reciprocal compensation rendered since Internet Traffic Order was issued. We have reviewed those filings. Other state commissions considered the effects of the FCC's ruling on *their* situations, on the interconnection agreements before them, and on prior decisions rendered. We have before us only *our own* October Order and the interconnection agreement construed by that Order. Useful as it has been to know what other states have made of the FCC's ruling, it is equally useful to recall Commissioner Powell's observation about the effects of that ruling: "Furthermore, having reviewed a number of the state decisions in this area, I am persuaded that the underlying facts, analytical underpinnings and applicable law vary enormously from state to state." Internet Traffic Order, Concurrence of Commissioner Powell, page 2.

under their interconnection agreement, there is–*post* February 26, 1999–no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute.

The consequences may be adverse for enterprises that acted aggressively in reliance on the nullified and now-vacated Department decision in MCI WorldCom's favor (ignoring the Department's express warnings that its decision could be changed by FCC findings). But no amount of wishful thinking can our justify clinging to a vitiated decision; nor can it empower the Department to countermand what the FCC has determined. The attempt of some parties and commenters to base their arguments on the vague terms of Paragraph 27 of Internet Traffic Order is futile. If that paragraph has any effective meaning (a matter open to doubt, given the FCC's reference to its pending rulemaking), then surely it is that only those pre-26 February decisions by state commissions founded, not on a "two call" jurisdictional theory, but rather on state contract law or some "other legal or equitable considerations" *might yet* remain viable–at any rate, "depending on the bases of those decisions" and, of course, "pending the completion of the rulemaking" the FCC initiated. Internet Traffic Order at ¶ 27. It seems patent that the FCC had in mind state decisions already, or yet to be, taken[28]--and that only to the extent such decisions might fit this vague criterion. The Department's October

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[28] The FCC's wording ("any determination a state commission has made, or may make in the future"), Internet Traffic Order at ¶ 24, must be read in light of the only plausible, saving grounds for such state determinations set out by the FCC in ¶ 27 (state decisions taken, before or after February 26, that rest on "contractual principles or other legal or equitable considerations"). State decisions whose conclusions "are based on a finding that this [ISP-bound] traffic terminates at an ISP server," id., are in another category, however. And our October Order falls into this latter group.

Order was not so based–with the result that, were that Order not vacated, it would float, untethered, in a jurisdictional void. MCI WorldCom may choose to renew its complaint upon some claim that Massachusetts contract law "or other legal or equitable considerations" give rise to mutual obligation on its and Bell Atlantic's parts to pay reciprocal compensation for ISP-bound traffic, even despite the FCC's jurisdictional pronouncement.[29]

How useful such a renewal might be is not predictable. We suggest a perhaps more promising course below.

Pending, however, such a renewal of the complaint and ultimate resolution of the matter, Bell Atlantic's Motion for Modification of March 2, 1999 is granted, in that the Department's Order in MCI WorldCom, D.T.E. 97-116, is vacated. Although that Order adjudicated only the Bell Atlantic-MCI WorldCom dispute, it professed to have broader implication (see Section IV of the October Order); and so, the suggested, broader applicability of that Order must, since the issuance of Internet Traffic Order, be doubted. MCI WorldCom, D.T.E. 97-116 at 14. However, Bell Atlantic has acted, since the October Order, on the understanding that our findings in MCI WorldCom applied to all interconnection agreements; and now a corresponding but converse understanding based on the instant Order appears warranted. In fact, as far as reciprocal compensation payments not made to MCI WorldCom

29 We do not, at this point, hazard a judgment whether such an alternative basis exists in the Bell Atlantic-MCI WorldCom interconnection agreement before us. If such a basis can be convincingly shown, then it would not be the Department's role to save contracting parties from later-regretted commercial judgments. See Complaint of A-R Cable Services, Inc., D.T.E. 98-52, at 5 n. 7 (1998).

or other CLECs as of February 26, 1999 are concerned,[30] no currently effective Department order categorically requires Bell Atlantic to pay, in some way, for handling CLECs' ISP-bound traffic. Bell Atlantic has proposed making payments under its interconnection agreements at a ratio not in excess of 2:1(terminating-to-originating traffic).[31] This arrangement is reasonable for the nonce, i.e., until the dispute is settled.

Reciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic), beginning with (and including payments that were not disbursed as of) February 26, 1999. Yet it still appears there were and may still be costs incurred by

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30 This finding partly addresses RNK's Motion for Clarification. Bell Atlantic's Motion for Modification of our October Order intimates that reciprocal compensation payments made for ISP-bound traffic before February 26, 1999 were never truly due and owing under the interconnection agreement. Bell Atlantic notes that "there is no severable 'local' component of an Internet call but such traffic is now, and *always has been*, interstate traffic. . . . Internet-bound calls are not eligible for 'local' reciprocal compensation under BA-MA's interconnection agreements, and CLECs have received substantial compensation to which they are not entitled under those agreements." Bell Atlantic's Motion for Modification, at 10 Despite Bell Atlantic's intimation, the question of refund is not before us, and so we take no position on the status of payments made by Bell Atlantic for reciprocal compensation for ISP-bound traffic prior to February 26, 1999. To do so now would be premature–assuming that D.T.E. even has jurisdiction over the question of refunds and considering the instructions below as to negotiations, mediation, and, if it must come to that, arbitration. But we shall not require Bell Atlantic to make (i.e., to disburse) any payments that were not made as of that date. See text immediately *infra*.

31 In the current absence of a precise means to separate ISP-bound traffic from other traffic, we believe that Bell Atlantic's 2:1 ratio as a proxy is generous to the point of likely including some ISP-bound traffic. However, this 2:1 proxy is rather like a rebuttable presumption, allowing any carrier to demonstrate adduce evidence in negotiations, or ultimately arbitration, that its terminating traffic is not ISP-bound, even if it is in excess of the 2:1 proxy. Where disputes arise, however, the disputants are well advised to work the matters out between themselves, rather than bringing them to this forum after less-than-thorough negotiations.

local exchange carriers in terminating such traffic. These transactions are not, however, "local" within the meaning of Section 5.8 of the Bell Atlantic-MCI WorldCom interconnection agreement. During negotiations, the parties to this agreement may determine that adequate pricing and other terms for these transactions are already governed by other contract provisions (and, certainly, arguments along these lines have been advanced in the CLECs' comments; see Section III.B. *supra*). Or else, accepting or at least acquiescing in our view of Section 5.8 of the interconnection agreement, they may jointly conclude that the present agreement is silent on the point and needs to be supplemented to provide new terms for these mutual services. They are free to arrive at either judgment in coming to terms over the present dispute.[32] The best outcome is for Bell Atlantic and MCI WorldCom (or other CLECs where other interconnection agreements are concerned) to arrive at a resolution themselves. A far less satisfactory outcome is for the Department to have to interpret, or even to supply, terms, because the parties cannot agree. If the parties act wisely, it need not come to that, however. "Section 252 sets up a preference for negotiated interconnection agreements." *AT&T Corp* v. *Iowa Utilities Board*, __ U.S. at __, 119 S.Ct. at 742 (Thomas, J., dissenting). Accordingly, we strongly advise potential complainants to follow this more promising and, in fact, statutorily preferred route *before* initiating any complaint based on "contractual principles or other legal or equitable considerations" with the Department. Moreover, it would be inefficient to have parallel complaint adjudications going on while mediation or arbitration is under way.

32 See Internet Traffic Order, at ¶ 24 n. 77.

The FCC has tentatively concluded that "the inter-carrier compensation for this telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the 1996 Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts." Internet Traffic Order at ¶ 30. Although the FCC has not formally adopted this tentative conclusion, in the currently unresolved of inter-carrier compensation for ISP-bound traffic in Massachusetts (i.e., apart from 2:1 payments for the nonce), we expect carriers to begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish, insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for all ISP-bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic. If need be, we would be willing to provide a Department mediator to facilitate agreement, pursuant to the mediation provision of section 252(a)(2). If these negotiations do not resolve the present interconnection agreement dispute, the Department can arbitrate the matter under section 252(b). At that time, consistent with the discretion we have been given by the FCC (at least until the NPRM is settled), the Department would resolve whatever issues are put before it. But such formal process implies time, and time's value in business suggests that the parties would be better off themselves resolving the matters that divide them.

We note also that termination of the obligation for reciprocal compensation payments for ISP-bound traffic (because that traffic is no longer deemed local) removes the incentive for

CLECs to use their regulatory status "solely (or predominately)" to funnel traffic to ISPs. This development also removes the need for any further Department inquiry into the regulatory status of certain CLECs, the question raised by the October Order.

B. Competition and Efficient Entry

Having, then, assessed the effect of the FCC's declaratory ruling on our October Order, we turn to larger policy questions about the role of the Department in promoting *efficient* entry by new providers. The many comments filed in this case, asserting the importance of requiring reciprocal compensation for ISP-bound traffic to advance toward the policy goal of promoting competition in the local exchange, make clear that it is necessary for this Department to express to the negotiators its views on what competition really means.

Much futile debate in public utility regulation, especially in the current environment of developing markets, revolves around unexamined or sometimes distorted use of the terms 'competition' and its derivative 'competitive'. Loose, misleading, or self-serving meaning often underlies disputes and sows confusion.[33] It underlies this dispute as well.

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33 The frequent misuse and abuse of 'competition' and allied terms calls to mind the colloquy between Humpty Dumpty and Alice, when she objects to his arbitrary and idiosyncratic meanings for words:

> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."
> "The question is," said Alice, "whether you *can* make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master--that's all."

Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (Boston: Lee

(continued...)

In so saying, we do not prejudge any formal renewal or prosecution of the dispute before us last October, where such a renewal might rest "on contractual principles or other legal or equitable considerations," as distinct from general policy arguments. But, as the parties and commenters in this docket will be negotiating, we believe it would be useful to highlight, in general terms, how the Department views underlying policy and economic issues. Otherwise, the parties must negotiate in a vacuum. In addition, certain of the interconnection agreements are coming due for renewal, e.g., MediaOne's agreement.

The unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition.[34] A loophole, in a word. There is, however–and we emphasize this point–nothing sinister or even improper about taking advantage of an opportunity such as the one presented by our October Order. One would not expect profit-maximizing enterprises like

33 (...continued)
and Shepard, 1st U.S. edition, 1872) chapter VI, p. 124.

34 See, e.g., the career accomplishment cited in Bell Atlantic Reply Comments on Motion for Modification, March 15, 1999, Attachment A, Resume of David F. Callan: "Identified niche opportunity related to asymmetrical traffic patterns under Federally mandated interconnection architecture." The premise of a mandate, of course, no longer holds *post* Internet Traffic Order.

CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited. Create an opportunity and inventive enterprise will seize upon it. It was ever thus. But regulatory policy, while it may applaud such displays of commercial energy, ought not create such loopholes or, once having recognized their effects, ought not leave them open.

Real competition is more than just shifting dollars from one person's pocket to another's. And it is even more than the mere act of some customers' choosing between contending carriers. Real competition is not an outcome in itself–it is a means to an end.[35] The "end" in this case is economic efficiency, which Baumol and Sidak have defined as "that

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[35] As noted by Justice Breyer in *AT&T Corp.* v. *Iowa Utilities Board*, "[t]he competition that the [1996] Act seeks is a process, not an end result." *AT&T Corp.* v. *Iowa Utilities Board*, Opinion of Breyer, J., __ U.S. at __, 119 S.Ct. at 751. When the exercise of regulatory authority artificially brings into play additional providers but some one else in the market is "picking up the tab" for those new players' entry, that is not competition. It is, rather, handicapping one horse so the others in the field may as likely cross the finish first, despite their otherwise slower speed. There is no real gain in the efficient deployment of society's resources and thus no net social gain. While some may make the case for incubating infant industries, the purportedly temporary "life-support" measures entailed in doing so often become necessities (even entitlements) that cannot, practically speaking, later be withdrawn.

In the case of reciprocal compensation for ISP-bound traffic, "shifting dollars from one person's pocket to another's" occurs when Bell Atlantic's reciprocal compensation payments are in excess of a CLEC's costs to terminate ISP-bound traffic. (The discussion in the text *infra* makes clear that we believe this result likely obtains. See also note 34 *supra* and note 39 *infra*.) In addition, Bell Atlantic contends that the reciprocal compensation payments it has made are in excess of the costs that Bell Atlantic avoids by no longer terminating this traffic. Therefore, Bell Atlantic is making payments to CLECs for recovery of costs that are not being incurred and is paying more than its own avoided-cost savings. As a result, Bell Atlantic's shareholders or telephone customers are losing money, and CLECs are either earning additional profits or passing through these "savings" to their own customers as *putative* benefits of competition. Such benefits are not related to any efficiencies achieved or value added by CLECs. They are simply the result of regulatory distortion.

state of affairs in which, as the specialized literature of welfare economics recognizes, no opportunity to promote the general welfare has been neglected. Such an opportunity is defined as the availability of a course of action that will benefit at least some individuals, in their own estimation, *in a way not achieved at the expense of others*." Toward Competition in Local Telephony, at 24 (emphasis added).[36,37] Failure by an economic regulatory agency to insist on true competition and economic efficiency in the use of society's resources is tantamount to countenancing and, to some degree, encouraging waste of those resources. Clearly, continuing to ***require*** payment of reciprocal compensation along the lines of our October Order is not an opportunity to promote the general welfare. It is an opportunity only to promote the welfare of

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36 See, also, Thomas J. Duesterberg and Kenneth Gordon, Competition and Deregulation in Telecommunications, p. 26 (1997), "Pricing policies and investment incentives for all parties, including the incumbents, must simultaneously be developed so as to create an efficient telecommunications system. Ideally, this means that prices of final goods and services, as well as of intermediate goods purchased by competitors, should reflect real economic costs."

37 It is perhaps not fashionable to quote him in a regulated industry, but Adam Smith put the matter justly in 1776:

> No regulation of commerce can increase the quantity of industry in any society beyond what its capital can maintain. It can only divert a part of it into a direction into which it might not otherwise have gone; and it is by no means certain that this artificial direction is likely to be more advantageous to the society than that into which it would have gone of its own accord.
>
> Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society.

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford: University of Oxford, 1869), vol. I, bk. 4, ch. 2 (the chapter concerns restraints on imports, but the point is broadly suggestive in assessing proposed government actions).

certain CLECs, ISPs, and their customers, at the expense of Bell Atlantic's telephone customers and shareholders.

The Department has consistently rejected attempts over the years to make some customers and competitors better off at the expense of others, all in the name of promoting competition. For example, when the propriety of stranded cost recovery was being debated for the electric industry, the Department (with the sanction of the Supreme Judicial Court and of the General Court[38]) found that electric companies should have an opportunity to recover all of their prudently-incurred, non-mitigable stranded costs. This decision was (and still is) opposed by some on the claim that it purportedly reduces the benefits of competition; but the Department has rejected the notion that the mere shifting of costs to other customers or shareholders can be considered a "benefit" of competition. Similarly, in its recent decision in the natural gas unbundling docket, the Department stated:

> Our role is not to guarantee the success of entrants. Rather, our role is to put in place the structural conditions necessary for an efficient competitive process -- one where marketplace decisions of both producers and consumers are made on the basis of incremental costs. An efficient, unbundled gas industry framework would allow customers to compare the LDCs'[local distribution companies] incremental costs to marketers' incremental costs. However, this comparison cannot be made if historic cost commitments are imposed asymmetrically on the LDCs. In other words, if LDCs must include the inefficient costs of past commitments in their prices, while marketers are not required to include those costs for customers who choose to migrate, then marketplace decisions, at least in the near term, are being made on the basis of an asymmetric allocation of historic cost responsibility, not on the basis of incremental costs. This does not lead to efficient competition.

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38 The Supreme Judicial Court in *Massachusetts Institute of Technology* v. *Department of Public Utilities*, 425 Mass. 856, 866-67 (1997); and the General Court in St. 1997, c. 164.

Gas Unbundling, D.T.E. 98-32-B, at 30 (1999) (footnote omitted).

As the FCC has noted, reciprocal compensation payments for ISP-bound traffic are probably not cost-based. Internet Traffic Order at ¶ 29. The revenues generated by reciprocal compensation for that incoming traffic are most likely in excess of the cost of sending such traffic to ISPs.[39] ISP-bound traffic is almost entirely incoming, so it generates significant reciprocal compensation payments from Bell Atlantic to CLECs, an imbalance which enables CLECs to increase their profits or to offer attractive rates and services to Internet service providers–or to do both. Not surprisingly, ISPs view themselves as beneficiaries of this "competition" and argue fervently in favor of maintaining reciprocal compensation for ISP-bound traffic. However, the benefits gained, through this regulatory distortion, by CLECs,

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39 Similarly, ISG-Telecom Consultants, Int'l., a Florida industry consultant that specializes in helping ISPs turn into CLECs, has characterized the income derived from reciprocal compensation as "gravy" income. See Bell Atlantic Reply Comments, March 15, 1999, Attachment F (Affidavit of Paula L. Brown), Subattachment C to Attachment F (tenth unnumbered page), copy of Internet communication of ISG-Telecom, entitled "Taking the Plunge from ISP to ISP/CLEC. Is it Right for You???", copyright 1996, 1997, 1998, 1999:

> Although reciprocal compensation could be a new revenue source for the ISP/CLEC, we at ISG-Telecom NEVER recommend creating a business plan or business case model around reciprocal compensation. ISP/CLECs that choose to become CLECs to participate in reciprocal compensation should be aware of the current regulatory climate. Reciprocal compensation, in light of recent FCC considerations, should be considered "gravy" income ONLY [emphasis in original].

See also Internet Traffic Order, at ¶ 24 n. 78, wherein the FCC recognizes the question of consistency with the statutory scheme ("*e.g.*, definition of a carrier") of such "anomalous practices" as "free [I]nternet access while getting paid for it." In a word, "gravy."

ISPs, and their customers do not make society as a whole better off, because they come artificially at the expense of others.

Where an incr--se in income results from regulatory anomaly, rather than from greater competitive efficiency in the marketplace, a regulator is well advise to take his thumb off the scale. We do so today. Arguing that we should not correct the distortions created by reciprocal compensation payments because they benefit ISPs and their customers is much like saying that one should not encourage people to quit smoking, and so avoid adverse personal and public health consequences, merely because some members of society make a living growing tobacco. Decisions like this should be driven by concerns for overall societal welfare--and not by concern for preserving the hothouse environment of an artificial market niche.[40]

C. A Further Word about the Department's October Order

The foregoing analysis makes clear how the FCC's Internet Traffic Order affected MCI WorldCom, D.T.E. 97-116, but may raise the question of why, in the first place, we required Bell Atlantic last October to pay reciprocal compensation for ISP-bound traffic. We did so *not* because we felt that it was a good policy or that it promoted competition, *but* because we felt bound by the then-current state of decisional law, relying to a large degree on the FCC's own previous pronouncements to the effect that Internet calls represented two distinct services (particularly, the FCC's prior treatment of ESPs as discussed in Internet Traffic Order, at ¶

[40] See notes 34 and 39 *supra*.

5[41]). However, unease with the result did prompt the question of whether certain enterprises had nominally established themselves as CLECs "solely (or predominately)" to benefit from reciprocal compensation. That unease underlay the caution that the October Order would have to be reconsidered, were the FCC later to undercut its legal footing. In October, it appeared that the FCC's previous "two call" analysis was determinative of the issue. Then Internet Traffic Order clarified the FCC's earlier two-service analysis and fatally undercut our conclusion that ISP-bound traffic had to be deemed local under the interconnection agreement.

Some commenters have argued that Internet Traffic Order does not require us to modify our October decision. We disagree for the reasons already stated, but that it not the point. The real question for us is *not* whether the FCC's February decision *requires* us merely to modify our October decision, *but* whether we should cast about for some reason, any reason, to sustain that questionable result.[42] On the contrary, we view the FCC's decision as "liberating," in that it gives us the discretion to do what we would have liked to have been able to do back in October–namely, to get the parties to the interconnection agreement to set

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41 See note 20 *supra*.

42 The situation is not without earlier parallel. The Department faced a similar choice and like counsel in 1994-95. The Department's policy regarding "environmental externalities" in electric regulation was overturned on purely legal grounds by the Supreme Judicial Court in *Massachusetts Electric Company* v. *Department of Public Utilities*, 419 Mass. 239, 243-50, 252 (1994) (imposing such externalities was "beyond the range of its statutory authority to do so"), the Department–barely a month after the Court had corrected it–flatly rejected counsel that it somehow cling to judicially discredited precedent. Boston Edison Company, D.P.U. 95-1-CC, at 12-14 (1995). We can be no less forthright here. A clean break with error is salutary.

rationally based, economic bounds on reciprocal compensation payments for ISP-bound traffic. The negotiations we have directed should be able to accomplish just that.

In conclusion, we observe that there have been calls for regulators to apply a battery of telecommunications regulatory requirements, including access charges, universal service levies, and service-territory obligations, to the Internet and ISPs. We do not agree with this approach. As noted by the FCC, the Internet has been successful beyond the wildest imagining--in large part because it has generally operated outside of a confining regulatory framework. Internet Traffic Order at ¶ 6.

However, the Internet should not benefit from CLECs' and ISPs' "gaming" regulation, either. Certain CLECs and ISPs have figured out a way to use reciprocal compensation--a regulatory requirement originally designed to promote local telephone exchange competition for all customers--as a revenue source for increased profits, lower Internet access costs, and maybe even improved Internet access. But someone else is "picking up the tab." In the near-term, that "someone else" appears to be Bell Atlantic. But *perhaps*[43], over the longer term, it could be Bell Atlantic's telephone customers under the price-cap regime, NYNEX Price-Cap

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[43] We employ emphasis advisedly. Only where "regulatory, judicial, or legislative changes uniquely affecting the telecommunications industry" (and other stated cost changes) impose resultant additional cost can Bell Atlantic qualify for recovery under the exogenous cost adjustment provisions of its price cap mechanism. NYNEX Price-Cap Order, D.P.U. 94-50, at 181-83. Extra-statutory, voluntary contractual undertakings are another matter--and Bell Atlantic was and is free to choose such undertakings for its own business reasons, Internet Traffic Order at ¶ 24 n. 77. See, also, Complaint of A-R Cable Services, Inc., D.T.E. 98-52, at 5 n. 7; and see note 28 *supra*. Yet, negotiation or mediation may settle the question, and so it may not be presented for Department decision for arbitration.

Order, D.P.U. 94-50, at 181-83 (1995), if the Department were on its own to insist on imposing some other basis ISP-bound reciprocal compensation on the agreement and if that insistence amounted to an exogenous regulatory variable, imposed despite the FCC's jurisdictional declaration in Internet Traffic Order.

Perpetuating this regulatory distortion would not be rational: the Internet is powerful enough to stand on its own, without such effective subsidies. Ending this regulatory distortion would encourage *efficient* investment in Internet and other telecommunications technology. Efficient investment promotes real competition that benefits all customers. Few, if any, may have foreseen this potential for distortion when the 1996 Act became law. But the FCC's negation of the legal basis for MCI WorldCom, D.T.E. 98-116, requires that we review and correct, not willfully cling to, demonstrated error. It would be regrettable to forego an opportunity to bring about a rational economic result. As the parties to the instant and other interconnection agreements attempt to sort out their disputes, they need to consider the Department's policy disposition if it is ultimately called upon to supply the solution.

V. ORDER

After due consideration, it is hereby

ORDERED: That the Motion for Modification, filed by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts on March 2, 1999, is ALLOWED in that the Order of October 21, 1998 in MCI WorldCom Technologies, Inc., D.T.E. 97-116, is hereby VACATED; and it is

FURTHER ORDERED: That the Motion for Clarification, Reconsideration and Suspension of Escrow Order, filed by RNK, Inc. on March 31, 1999 (which incorporates by reference the Letter for Specific and Expeditious Relief, filed by RNK, Inc. on March 31, 1999) is DENIED; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts shall not be required, until further notice from the Department or until negotiations result in different payment terms, to escrow any reciprocal compensation payments for Internet-bound traffic or be required to maintain the present escrow arrangement; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts shall not be required to make reciprocal compensation payments, in excess of a 2:1 terminating-to-originating traffic ratio, beginning with any payments made or to be made after (and including payments undisbursed as of) February 26, 1999.

By Order of the Department,

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Pursuant to § 252(e)(6) of the Telecommunications Act of 1996, appeal of this final Order may be taken to the federal District Court or the Federal Communications Commission. Timing of the filing of such appeal is governed by the applicable rules of the appellate body to which the appeal is made, or in the absence of such, within 20 days of the date of this Order.

CONCURRING AND DISSENTING OPINION OF JANET GAIL BESSER, CHAIR AND EUGENE J. SULLIVAN, JR., COMMISSIONER

I. INTRODUCTION

Although we agree that the FCC's Internet Traffic Order invalidated the factual two-call premise of the Department's October Order, we disagree with the majority's conclusion that this invalidation automatically serves to relieve Bell Atlantic from any and all obligations to pay compensation for ISP-bound traffic terminated by CLECs. D.T.E. 97-116-C at 25, 40. For the reasons stated below, we believe that the Department should determine whether existing interconnection agreements require the parties to pay reciprocal compensation for this traffic. In addition, we would have required Bell Atlantic to continue to escrow the disputed payments while this matter is determined. Finally, we would strongly encourage the disputants to negotiate new commercial arrangements regarding this traffic. Accordingly, we concur in part, and dissent in part from the majority's decision.

II. DISCUSSION

A. The Department's October Order

The Department's October Order explicitly and clearly limited the basis for its conclusion that calls terminated by CLECs to ISPs qualified for reciprocal compensation by determining only that such calls were "local." MCI WorldCom at 6. Although the parties in that proceeding raised numerous issues, including various substantive policy and economic reasons for paying reciprocal compensation, the Department never explored these issues through hearings and discovery. Id. The October Order made no findings with respect to any other bases for reciprocal compensation nor did that Order specifically claim that other bases did not exist. Id. Rather, the October Order clearly determined, relying solely on a two-call analysis,[1] that ISP-bound traffic constitutes "local" traffic thus "qualifying it for reciprocal compensation." Id. at 12-13.

B. The Effect of the Internet Traffic Order on the Department's October Order

On February 26, 1999, the FCC determined that ISP-bound traffic was considered interstate based on a one-call analysis. Internet Traffic Order at ¶¶ 1,3. We agree with the majority that this decision removes the basis we used to support our conclusions in the October Order. However, we disagree with the majority's view of the immediate consequences of the Internet Traffic Order for our October Order. Without the local call basis, and without deciding the validity of any other potential bases, the majority concludes that Bell Atlantic is no longer obligated to pay reciprocal compensation for ISP-bound traffic. D.T.E. 97-116-C at 25, 40.

The conclusion that Bell Atlantic is no longer obligated to pay reciprocal compensation ignores the fact that Bell Atlantic had been paying reciprocal compensation well before issuance of the October Order. MCI WorldCom at 1-2, n.6. Thus, if our October Order is in

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1 We note this was not, contrary to the majority's assertion, a "mistake of law." D.T.E. 97-116-C at 24. In fact, the FCC had, on May 7, 1997, noted that "[w]hen a subscriber obtains a connection to an [ISP] via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the [ISP's] service offering." In the Matter of Federal-State Joint Board on Universal Service, CC Docket No 96-45, at ¶ 789, Report and Order (rel. May 7, 1997); see also Internet Traffic Order at ¶¶ 13-16. Accordingly, our October Order was consistent with existing law, subsequently changed, and was not a mistake of law.

fact a "nullity"[2] as the majority states, D.T.E. 97-116-C at 24, then the logical conclusion would be that Bell Atlantic should revert back to paying full reciprocal compensation pursuant to its interconnection agreement until such time as the Department determines whether other legitimate sources of support for this obligation exist.[3] Internet Traffic Order at ¶ 24.

Moreover, we do not find anything in the Internet Traffic Order that supports the conclusion that MCI WorldCom should be vacated. D.T.E. 97-116-C at 40. We do not agree that the MCI WorldCom Order no longer gives rise to any rights or obligations; rather, we believe that the MCI WorldCom Order was valid at the very least until issuance of the Internet Traffic Order.[4] We therefore disagree with the majority's decision that Bell Atlantic is not required to pay funds due before issuance of the Internet Traffic Order. D.T.E. 97-116-C at 28 n. 30.

Finally, we also strongly disagree with the majority's suggestion that the Internet Traffic Order may have eliminated any and all obligations for Bell Atlantic ever to have paid any reciprocal compensation for ISP-bound traffic. While we may agree that Bell Atlantic's

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2 Black's Law Dictionary (6th ed. 1991) defines the phrase "null and void" as meaning "that which binds no one or is incapable of giving rise to any rights or obligations under any circumstances . . . ."

3 We view this dispute as remaining active; in our view, MCI WorldCom need not re-file its complaint in order to re-invigorate this suit. Cf. D.T.E. 97-116-C at 25. However, we believe it would be a more efficient use of resources for the Department to re-notice these issues for resolution in the context of a generic adjudication applicable to all relevant interconnection agreements.

4 This has implications, for example, for RNK, which sought funds owing before issuance of the Internet Traffic Order (RNK Letter for Specific and Expeditious Relief dated March 31, 1999).

obligation to pay reciprocal compensation for this traffic was called into question on February 26, 1999, that ruling merely changed the state of the law from that date forward. Reciprocal compensation paid from Bell Atlantic to the CLECs before that date was made pursuant to valid, legal obligations, consistent with state policy, and we disagree with any intimations to the contrary by the majority.

The Internet Traffic Order requires the Department to resume the investigation we thought we had concluded in October 1998. The FCC recognized that this might be the case for a number of state commissions, stating that it

> recognize[s] that our conclusion that ISP-bound traffic is largely interstate might cause some state commissions to ***re-examine their conclusion*** that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server, but nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking . . . . (emphasis added).

Internet Traffic Order at ¶ 27.

The majority views the authority granted to state commissions in ¶ 27 as "vague" and "equivocal." D.T.E. 97-116-C at 24. However, we believe that this interpretation is not warranted. First, we have statutory obligations to fully investigate and adjudicate disputes subject to our jurisdiction. G.L. c. 30A; see also G.L. c. 159, §§ 12(d), 16, 19, 20. We should not prejudge whether arguments yet to be put forth by litigants have or lack merit without the benefit of a complete record developed with the fundamental due process rights of cross-examination and rebuttal. Second, the majority chooses to read ¶ 27 in light of Commissioner Michael K. Powell's concurrence. However, a concurring opinion (or, we acknowledge, a dissenting one for that matter) does not make the law. Consequently, we would accept the FCC's majority view and the authority it grants to state commissions as controlling until lawfully set aside, either by a reviewing court or a subsequent FCC decision. We note the difference between a suggestion that we "might" want to or need to "re-examine" our earlier conclusion, and an order from the FCC or other appellate body vacating, nullifying, remanding, or overruling our MCI WorldCom decision. Furthermore, we are buttressed in our view that ¶ 27 contains more than "a consoling notion," D.T.E. 97-116-C at 24, by the fact that, of the eleven state commissions that have considered the reciprocal compensation issue since the Internet Traffic Order, none have found that it is dispositive of this issue nor have any determined that LECs' existing obligations to pay reciprocal compensation should be changed.[5]

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[5] WorldCom, Inc. v. GTE Northwest Inc., "Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim," Washington Utilities and Transportation Commission, Docket No. UT-980338 (May 12, 1999) (Commission found no reason to alter prior decision in MFS/US West Arbitration, and that prior finding that calls to ISPs are local calls subject to reciprocal compensation should apply to MFS/GTE agreement as well); In the Matter of the Application of Global NAPs South, Inc. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc., Delaware Public Service Commission, Docket No. 98-540, Order No. 5092 (May 11, 1999) (Commission affirmed arbitrator's award that found interconnection agreement adopted by Global NAPS *did* anticipate treating ISP-bound traffic as local for purposes of reciprocal compensation, because agreement did not contain provisions for segregation of ISP-bound traffic or other special procedures for such traffic; arbitrator also found that FCC Order not dispositive of issue and that GNAPS entitled to receive reciprocal compensation for ISP-bound calls unless and until FCC issues ruling to contrary); In the Matter of the Petition of GTE Hawaiian Telephone Company, Inc. for a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation, Hawaii Public (continued...)

5 (...continued)
Utilities Commission, Docket No. 99-0067, Decision and Order No. 16975 (May 6, 1999) (Commission found that previous finding that reciprocal compensation should be paid for Internet traffic not in conflict with FCC Order); In the Matter of the Complaints of ICG Telecom Group, Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom v. Ameritech Ohio, Ohio Public Utilities Commission, Case No. 97-1557-TP-CSS et al (May 5, 1999) (Commission found that FCC Order does not affect earlier decision and that pending new FCC rule, state commissions have authority to establish inter-carrier mechanism and to decide whether and under what circumstances reciprocal compensation is due); Electric Lightwave, Inc. v. U S WEST Communications, Inc., Oregon Public Utility Commission, Order No. 99-285 (April 26, 1999) (Commission ruled that ISP traffic is local under terms of existing interconnection agreements, agreeing with the Alabama PSC that parties were required to specifically exclude ISP traffic from the definition of local traffic or applicability of reciprocal compensation, if that was parties' intent); Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation, "Order Instituting Proceeding to Reexamine Reciprocal Compensation," New York Public Service Commission, Case No. 99-C-0529 (April 15, 1999) (Commission opened new docket to reexamine reciprocal compensation policy, particularly costs and rate structures applicable to large-volume call termination to single customers, and to set permanent rates for such by August, 1999; Commission noted that FCC order allows states to continue requiring payment of reciprocal compensation for Internet-bound traffic); In Re Petition of Pac-West Telecomm, Inc. for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Nevada Bell, "Order Adopting Revised Arbitration Decision," Nevada Public Utilities Commission, Docket Nos. 98-10015 and 99-1007 (April 12, 1999) (Commission found FCC Order does not alter fact that ISP-bound traffic is treated as local for rate-making purposes and that ISPs are no different than other local business customers; Commission noted there is no practical way of distinguishing ISP-bound traffic and fact that there is substantial imbalance between calls terminating to CLEC does not support conclusion that subsidy flow exists); In Re: Request for Arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. v. BellSouth Telecommunications, Inc. regarding Traffic Terminated to Internet Service Providers, Florida Public Service Commission, Docket No. 981008-TP, Order No. PSC-99-0658-FOF-TP (April 6, 1999) (Commission required continued payment of reciprocal compensation for Internet-bound traffic; Commission found it did not need to address jurisdictional nature of calls but only needed to examine parties' intent, which clearly showed intention that Internet-bound

(continued...)

C. The Effect of the Internet Traffic Order on the Escrow Order

Our reasoning with respect to Bell Atlantic's reciprocal compensation obligations in the wake of the Internet Traffic Order does not lead us to conclude that we ought to require Bell Atlantic to pay reciprocal compensation for ISP-bound traffic to the CLECs during the completion of this proceeding or for the pendency of a new one. Although we agree that the FCC now has final jurisdiction to regulate and establish a compensation mechanism for this traffic, the FCC recognized that it has no regulations currently in place concerning these issues

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5 (...continued)
traffic be rated and billed as local calls); In the Matter of the Petition of Pacific Bell for Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc. pursuant to Section 256(b) of the Telecommunications Act of 1996, "Order on Draft Arbitrator's Report," California Public Utilities Commission, Application 98-11-024 (March 30, 1999) (in context of arbitration of new interconnection agreement, Arbitrator found that Pacific Bell is required to pay reciprocal compensation for ISP-bound traffic, concluding that such compensation was not eliminated by FCC Order); In Re: Emergency Petitions of ICG Telecom Group, Inc. and ITC Deltacom Communications, Inc. for a Declaratory Ruling, Alabama Public Service Commission, Docket No. 26619 (March 4, 1999) ("Commission found ILECs should pay reciprocal compensation for ISP traffic under terms of interconnection agreements; Commission also found that parties intended those calls to be local because they did not exclude ISP traffic from local traffic at time agreements entered into); In the Matter of Enforcement of Interconnection Agreement between Intermedia Communications, Inc. and BellSouth Telecommunications, Inc., "Order Denying Motion for Stay," North Carolina Utilities Commission, Docket No. P-55, SUB 1096 (March 1, 1999) (Commission denies further stay for BellSouth of its November 4, 1999 order requiring payment of reciprocal compensation for ISP traffic; Commission found that any further stay must be obtained from court on appeal; in comments to district court, Commission argues that FCC Order does not disturb Commission's earlier order).

and issued an NPRM to rectify the situation. Internet Traffic Order at ¶¶ 1, 9, 21; NPRM at ¶¶ 28-36. However, for the interim period, the FCC made it clear that states could continue to determine how compensation for this traffic should be structured. While the Internet Traffic Order grants broad discretion over this compensation issue to the states for this interim period, this discretion is not unlimited. Thus, while it may be appropriate for a state to continue reciprocal compensation for contractual, policy or equitable considerations, or to develop and implement some other inter-carrier compensation mechanism, we have difficulty interpreting the FCC's order as authorizing a rate of "zero"[6] for this traffic, for the following two reasons. First, the Act requires local exchange carriers to compensate each other for the transport and termination of traffic that originates on one carrier's network and terminates on another carrier's network. 47 U.S.C. § 251(b)(5). Second, a carrier's transport and termination of this traffic has some non-zero associated costs, as the majority acknowledges.[7] D.T.E. 97-116-C at 28-29. Thus, we believe that inter-carrier compensation

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6 We note that Bell Atlantic has voluntarily offered, and the majority has accepted, to continue paying reciprocal compensation for traffic up to an imbalance of 2:1. The majority notes that because there is no technological means to segregate legitimate local traffic from illegitimate ISP-bound traffic, this ratio "is generous to the point of likely including some ISP-bound traffic." D.T.E. 97-116-C at 28 n.31. However, according to the majority, there is no legal requirement that Bell Atlantic pay any reciprocal compensation to one another for this traffic; accordingly, the effective legal "rate" is zero. Id. at 25.

7 The majority's reference to a possible impact on Bell Atlantic's ratepayers (via a price cap exogenous cost) if Bell Atlantic was ordered to continue paying reciprocal compensation is premature and speculative at best. Whether Bell Atlantic would be eligible for such exogenous cost recovery is dependent on a number of complex factors which we would not presume to prejudge.

is due but recognize that the ultimate level of this compensation remains to be determined. Accordingly, we would have continued escrow in recognition of the legitimate dispute regarding these funds and to preserve them for immediate payment upon final decision or settlement. Accord D.T.E. 97-116-B (authorizing Bell Atlantic to escrow certain reciprocal compensation payments because escrow constitutes an accepted method to preserve disputed payments during a commercial dispute, and because various interconnection agreements require escrow of funds in the event of a dispute).

D. Discussion Concerning Negotiation and Settlement of this Dispute

While we agree with the majority that a negotiated settlement is the ideal outcome, we have concerns about the process that it would use to reach such a resolution. The process the majority articulates lacks any meaningful incentives for the parties to reach a settlement for two reasons. First, the elimination of Bell Atlantic's obligation to pay reciprocal compensation into escrow for ISP-bound traffic provides a sure recipe for delay and non-settlement because Bell Atlantic now has little incentive to negotiate[5] and the CLECs have reduced leverage. Second, without an active adjudication proceeding concurrent with the negotiation/mediation/arbitration process established by § 252 of the 1996 Act, no route exists for the Department to end the dispute by issuing a final order.

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5 Given its conclusion that Bell Atlantic has no obligation to pay reciprocal compensation for ISP-bound traffic, it is not clear to us why the majority thinks Bell Atlantic would engage in negotiation, as it encourages Bell Atlantic to do, because if such discussions were to lead to an agreement for compensation, then Bell Atlantic would begin to pay its local competitors for traffic that, according to the majority, it has no obligation to pay.

E. Competition and Efficient Entry

Finally, we respond to the majority's colloquy on competition and efficient entry. In our view, this discussion is not directly related to the dispute before the Department in the instant proceeding. The substance of the discussion was not addressed directly by the parties or by the Commission as a whole in our deliberations. Therefore, we do not consider it to be a useful or appropriate addition to the Order.[9]

The majority does attempt to make a connection between the discussion in Section IV.B. and the issue of payment of reciprocal compensation for ISP-bound traffic, for example on page 32 where it states, "we do not prejudge any potential renewal of the dispute before us last October, where such a renewal might rest 'on contractual principles or other legal or equitable considerations' and not on substantive policy or economic issues." The majority appears to make this statement because it has reached a conclusion on the substantive policy and economic issues, to borrow its words, "in a vacuum."[10] In fact, one can infer from this

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9 We note that the Department occasionally provides general guidance at the close of an order on a specific adjudication, but the guidance is directly related to the substance of the order. For example, in Essex County Gas Company, D.T.E. 98-27 (1998), the Department included direction on the showing proponents of a merger should make to ensure expeditious consideration of their petitions. This type of guidance, directly related to the specific case at hand and flowing from the evidence presented, is, of course, appropriate.

10 The majority concludes, "Clearly, continuing to require payment of reciprocal compensation along the lines of our October Order is not an opportunity to promote the general welfare" without the Department having examined this question. D.T.E. 97-116-C at 34.

conclusion that the majority has determined that there is no other basis for paying reciprocal compensation without consideration of evidence or argument.

Not only did the Department's October Order not reach the question whether there were bases for payment of reciprocal compensation other than the "local call" basis on which we relied then, but we also did not address any of the substantive policy or economic issues that, as a public utilities commission charged with protecting the public interest, it is our job to address. Doing our job – that is, taking evidence and hearing argument before reaching a reasoned decision – is not "cast[ing] about for . . . any reason to sustain [a] questionable result." Id. at 38. Rather, it is doing the work necessary to determine whether a result is, in fact, questionable or not questionable. As we have already indicated, continuing the current proceeding or opening a new one to address whether there are other bases – including consideration of substantive policy or economic issues - for payment of reciprocal compensation for ISP-bound traffic should be the Department's next step in resolving the current dispute.

Janet Gail Besser, Chair

Eugene J. Sullivan, Jr., Commissioner

SEPARATE STATEMENT OF JANET GAIL BESSER, CHAIR

In addition, while I question the value of including general pronouncements in an order such as this, I cannot let what I see as the majority's incomplete or inaccurate characterization of the Department's policy on competition go unaddressed. When the majority quotes from a previous Department order on the subject, I obviously take no issue with its restatement of Department policy. The Department's deliberations in Gas Unbundling, D.T.E. 98-32-B (1999), centered on the prerequisites and regulatory framework for promoting competition in the gas industry. The passage quoted by the majority on the role of entrants was part of a larger discussion of what constitutes full and fair competition -- an oft-stated goal of the Department in the context of both electric industry restructuring, Electric Restructuring, D.P.U. 95-30 (1995) and Electric Industry Restructuring, D.P.U. 96-100 (1997) and gas unbundling, D.T.E. 98-32-B at 4. There are also other individual statements in this section with which I agree.

However, I am concerned that the overall tone of the discussion does not capture the Department's policy on competition and efficient entry. In the current context, the passage from Gas Unbundling appears to be used to bolster criticism of new entrants for pursuing their own self-interest, despite the majority's assertions to the contrary.[11] The majority's narrow focus on the actions of new entrants here does not do justice to the Department's policy on

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11 See, e.g., D.T.E. 97-116-C at 32-33 ("There is, however - and we emphasize this point - nothing illegal or improper in taking advantage of an opportunity such as the one presented by our October Order. One would not expect profit-maximizing enterprise[s] like CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited.").

competition, a broad and comprehensive policy that we have spent much of our time developing over the last several years to enable the utility industries to make the transition from traditional regulation to competitive markets and to open these markets to new entrants who will bring with them innovation and pressures for efficient operation. In my view, the Department's policy on competition is best and most succinctly captured in the principles we articulated in 1995 to guide the restructuring of the electric industry, D.P.U. 95-30, and used again in 1997 to lead off the Department's gas unbundling initiative. Department Letter to Gas Local Distribution Companies, D.T.E. 98-32 (July 18, 1997). In this Order, I fear that the majority has fallen into the trap it identified of the "[l]oose, misleading, or self-serving usage [that] often underlies disputes and sows confusion." D.T.E. 97-116-C at 31. Therefore, I must respectfully disagree with its overall characterization of Department policy on competition and efficient entry.

Janet Gail Besser

Janet Gail Besser, Chair

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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 7th day of May, 1999.

CASE NO. 99-0166-T-PC

SPRINT COMMUNICATIONS COMPANY, L.P.
Petition for a declaratory ruling from the Commission on the treatment of calls to Internet service providers.

COMMISSION ORDER

On January 28, 1999, Sprint Communications Company, L.P. (Sprint), filed a petition with the Commission, requesting a declaratory ruling from the Commission on the treatment of calls to Internet service providers (ISPs). As grounds for its petition, Sprint contends that it has been attempting to negotiate an interconnection agreement with Bell Atlantic - West Virginia, Inc. (BA- WV) but that BA-WV refuses to execute any agreement unless Sprint agrees to language regarding the treatment of calls to ISPs that is "totally inconsistent" with prior Commission rulings. Sprint Petition, at 1. Sprint claims that the two companies are at an impasse over this issue. Sprint contends that traffic to ISPs is local and subject to reciprocal compensation, and interconnection agreements must be consistent with that treatment. BA-WV, according to Sprint, takes the position that it will not execute any interconnection agreement that does not explicitly state both that Internet traffic is not local and that BA-WV is not obligated to pay reciprocal compensation on such traffic. Id . at 3.

Sprint argues that calls to ISPs should be treated in the same fashion as calls between two end users, as defined by the relationship between the originating and terminating exchanges, and that what happens after the call reaches the ISP should not be considered. Id. at 3-4. Sprint claims that it is within the Commission's jurisdiction to rule on this issue and that the Federal Communications Commission (FCC) has not preempted state jurisdiction over the issue. Id. at 4. Moreover, Sprint points out that the Commission previously ruled on this issue, in favor of MCI Telecommunications Corporation, finding that "Internet-bound traffic that originates, and is terminated to an ISP within the local calling area, should be considered 'local traffic' for the purposes of reciprocal compensation." Id ., quoting "Commission Order," MCI Telecommunications Corp., Case No. 97-1210-T-PC (Jan. 13, 1998), at 29. Sprint also considers important the fact that the Commission found, in that order, that the FCC had addressed this issue in a manner favorable to the position that such traffic is local in nature. Id. at 4-5, citing "Commission Order," MCI Telecommunications Corp., Case No. 97-1210-T-PC (Jan. 13, 1998), at 29-30. The Commission

should adopt the same position vis-a-vis Sprint's interconnection agreement with BA-WV, Sprint argues, noting that 23 other states have reached similar conclusions. Sprint Petition, at 5-6 (citations omitted.

On March 9, 1999, BA-WV filed a reply to Sprint's petition. BA-WV's reply notes that the FCC recently, on February 26, 1999, issued an order holding that circuit-switched Internet-bound calls are not local calls. BA-WV Reply, at 1, citing "Declaratory Ruling and Notice of Proposed Rulemaking," Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (Rel. Feb. 26, 1999), ¶1 (FCC Internet Traffic Order). Based on the FCC's ruling, BA- WV requests an expedited ruling from the Commission putting this issue to rest. Id. at 2.

DISCUSSION

The Commission concludes that Sprint's petition for a declaratory ruling regarding the jurisdictional nature of ISP-bound traffic should be denied, and this proceeding dismissed. In view of the FCC's ord of February 26, 1999, the Commission determines that this petition is not the proper proceeding address issues relating to the jurisdictional nature of ISP-bound telecommunications traffi

FINDINGS OF FACT

1. On January 28, 1999, Sprint Communications Company, L.P. (Sprint), filed a petition with th Commission, requesting a declaratory ruling from the Commission on the treatment of calls to Interne service providers (ISPs).

2. On March 9, 1999, BA-WV filed a reply to Sprint's petition. BA-WV's reply notes that th FCC recently, on February 26, 1999, issued an order holding that circuit-switched Internet- bound call are not local calls. BA-WV Reply, at 1, citing "Declaratory Ruling and Notice of Propose Rulemaking," Implementation of the Local Competition Provisions of the Telecommunications Act o 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (Rel. Feb. 26, 1999), ¶1 (FCC Internet Traffic Order).

CONCLUSIONS OF LAW

1. Sprint's petition for a declaratory ruling regarding the jurisdictional nature of ISP- bound traffic should be denied, and this proceeding dismissed.

2. In view of the FCC's order of February 26, 1999, the Commission determines that this petition is not the proper proceeding to address issues relating to the jurisdictional nature of ISP- bound telecommunications traffic.

ORDER

IT IS, THEREFORE, ORDERED that Sprint Communications Company, L.P.'s petition for a declaratory ruling, filed with the Commission on January 28, 1999, should be, and hereby is, denied.

IT IS FURTHER ORDERED that, upon entry hereof, this proceeding shall be removed from the Commission's active docket of cases.

IT IS FURTHER ORDERED that the Commission's Executive Secretary serve a copy of this order upon all parties of record by United States First Class Mail and upon Commission Staff by hand delivery.

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STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

At a Session of the Public Service

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In the Matter of the Petition of Birch)
Telecom of Missouri, Inc. for Arbitration)
of the Rates, Terms, Conditions and Related) **Case No. TO-98-278**
Arrangements for Interconnection with)
Southwestern Bell Telephone Company.)

ORDER DENYING APPLICATION FOR REHEARING

On April 23, 1998, the Commission issued an Arbitration Order bearing an effective date of April 24. The Arbitration Order resulted from a petition filed with the Commission by Birch Telecom of Missouri, Inc. (Birch). Birch asked the Commission to arbitrate terms of an interconnection agreement between Birch and Southwestern Bell Telephone Company (SWBT).

The only issue presented for arbitration was whether calls made within the same local calling scope to an Internet service provider (ISP) are local in nature and subject to the payment of reciprocal compensation. The Commission's Arbitration Order does not make a final decision concerning the nature of the traffic to an ISP. Instead the Commission chose to defer to an anticipated decision by the Federal

Communications Commission (FCC) regarding the nature of that traffic. The Commission's order does provide that until the FCC makes a ruling on that issue, Birch and SWBT are to compensate each other for traffic to ISPs "in the same manner that local calls to non-ISP end users are compensated, subject to a true-up following the Federal Communication Commission's determination on the issue if it becomes possible to implement a Commission approved tracking plan in the interim." SWBT filed an Application for Rehearing on April 30.

On February 26, 1999, the FCC released a Declaratory Ruling in CC Docket No. 96-98. That ruling declared that traffic delivered to an ISP is interstate in character, thus falling within the primary jurisdiction of the FCC. Section 386.500, RSMO (1994) provides that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." Given the fact that the FCC has now resolved the issue in dispute between the parties, there is no longer any need for this Commission to address that matter. Therefore, there is no sufficient reason to grant SWBT's application for rehearing. The Application for Rehearing will be denied.

IT IS THEREFORE ORDERED:

1. That the Application for Rehearing filed by Southwestern Bell Telephone Company is denied.

2. That this order shall become effective on March 9, 1999.

BY THE COMMISSION

Dale Hardy Roberts

Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton and Drainer, CC., concur

Murray and Schemenauer, CC., absent

Woodruff, Regulatory Law Judge

STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

At a Session of the Public Service

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In the Matter of the Petition of Birch)

Telecom of Missouri, Inc. for Arbitration)

of the Rates, Terms, Conditions and Related) **Case No. TO-98-278**

Arrangements for Interconnection with)

Southwestern Bell Telephone Company.)

ORDER CLARIFYING ARBITRATION ORDER

On April 23, 1998, the Commission issued an Arbitration Order bearing an effective date of April 24. The Arbitration Order resulted from a petition filed with the Commission by Birch Telecom of Missouri, Inc. (Birch), asking that the Commission arbitrate terms of an interconnection agreement between Birch and Southwestern Bell Telephone Company (SWBT).

The only issue presented for arbitration was whether calls made within the same local calling scope to an Internet Service Provider (ISP) are local in nature and subject to the payment of reciprocal compensation. The Commission's Arbitration Order does not make a final decision concerning the nature of the traffic to an ISP. Instead the Commission chose to defer to an anticipated decision by the Federal

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On February 26, 1999, the FCC released a Declaratory Ruling in C Docket No. 96-98. That ruling declared that traffic delivered to a ISP is primarily interstate in character, thus falling within th primary jurisdiction of the FCC. The FCC did not, however, determin what, if any, reciprocal compensation should be paid for calls t Internet Service Providers and instead issued a notice of propose rulemaking to deal with that issue.

On April 30, 1998, in response to the Commission's Arbitration Orde of April 23, SWBT filed an Application for Rehearing. The Commissio issued an order on March 9, 1999, denying SWBT's application fo rehearing. In that order the Commission stated that "given the fac that the FCC has now resolved the issue in dispute between the parties, there is no longer any need for this Commission to addres that matter." The Commission believed that its March 9 order woul resolve the dispute between SWBT and Birch. That was not the case.

On March 8, Birch filed a Compliance Filing and Motion for Clarification. Subsequent to the Commission's order denying SWBT's application for rehearing, on March 12, Birch filed a supplement to its motion for clarification. Birch argues that, while the FCC did determine that calls to Internet Service Providers, when exchanged between two carriers within the same local calling area in a state, are primarily subject to the FCC's jurisdiction, the FCC did not determine the amount of compensation that should be paid between carriers for the handling of those calls. The FCC also did not overturn prior state decisions in arbitration cases that would require that such compensation be paid. Birch suggests that the Commission's April 23, 1998 arbitration order requires that SWBT and Birch continue to pay reciprocal compensation for ISP bound traffic as if they are local calls until the FCC finally decides the amount of compensation that should be paid for those calls. On March 22, 1999, SWBT filed a response to Birch's Motion for Clarification in which it asserted that the Commission's orders required that no reciprocal compensation be paid for such calls.

Because of the continuing dispute between the parties, the Commission finds that it is necessary to clarify its position. The FCC's Declaratory Ruling in CC Docket No. 96-98 determined that calls made within the same local calling scope to an Internet Service Provider are more interstate than local in nature. That ruling calls into question the Commission's ruling that such calls should be compensated as local calls pending the FCC's ruling.

Ultimately, the FCC should exercise its primary jurisdiction to decide the appropriate amount of reciprocal compensation, if any, that should be paid for ISP-bound traffic. Until the FCC makes that decision, the Commission will not attempt to determine the amount of compensation that should be paid. Because the appropriate amount of compensation has not yet been determined, the parties will not be required to pay reciprocal compensation for ISP-bound traffic at this time. Nevertheless, it would be inappropriate to order that no compensation be allowed to accrue until the FCC issues its rule. The parties will be directed to continue to track traffic to ISPs as they have been doing under the Internet Service Provider Traffic Tracking Agreement that was filed with the Commission on June 11, 1998. After the FCC makes its final determination on the issue of compensation, the parties will be subject to a true-up to determine what, if any, compensation should be paid for the ISP-bound traffic that is measured up to that time.

IT IS THEREFORE ORDERED:

1. That Southwestern Bell Telephone Company and Birch Telecom of Missouri, Inc. are relieved of any obligation to immediately compensate each other for traffic to Internet Service Providers within a local calling scope that was imposed by the Commission's Arbitration Order of April 23, 1998.

2. That Southwestern Bell Telephone Company and Birch Telecom of Missouri, Inc. shall continue to track traffic to Internet Service Providers within a local calling scope as they have been doing under the Internet Service Provider Traffic Tracking Agreement that was filed with the Commission on June 11, 1998.

3. That Southwestern Bell Telephone Company and Birch Telecom of Missouri, Inc. are subject to a true-up to determine the amount of compensation that shall be paid for the ISP-bound traffic that is measured pursuant to the Internet Service Provider Traffic Tracking Agreement up to the time that the FCC determines the issue of compensation for that traffic.

4. That this order shall become effective on April 16, 1999.

BY THE COMMISSION

Dale Hardy Roberts

Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Murray, Schemenauer

and Drainer, CC., concur

Crumpton, C., dissents

Woodruff, Regulatory Law Judge

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

IN THE MATTER OF THE PETITION OF GLOBAL NAPS INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS AND RELATED ARRANGEMENTS WITH BELL ATLANTIC-NEW JERSEY, INC. PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	)	TELECOMMUNICATIONS DECISION AND ORDER DOCKET NO. TO98070426

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes final action taken by the New Jersey Board of Public Utilities (Board) in the arbitration requested by Global NAPs, Inc. (GNI) by letter dated June 30, 1998, and will resolve all outstanding and unresolved issues in GNI's interconnection dispute with Bell Atlantic-New Jersey, Inc. (BA-NJ).

PROCEDURAL HISTORY

On January 26, 1998, GNI requested interconnection and network elements from BA-NJ pursuant to section 251 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, codified in scattered sections of 47 U.S.C. §151 et seq. (hereinafter, the Act). During the period from the 135th to the 160th day after receipt of an interconnection request, the carrier or any other party to the negotiation may petition the State commission to arbitrate any outstanding issues. The State commission is required to resolve each issue set forth in any such proceeding "not later than 9 months after the date on which the local exchange carrier received the [interconnection] request under this section." 47 U.S.C. §252(b)(4)(C).

By letter dated June 30, 1998 and pursuant to section 252(b)(1) of the Act, GNI filed with the Board of Public Utilities (Board) a Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief. GNI essentially sought affirmation through the arbitration process that it was entitled to opt into an interconnection agreement previously approved by the Board between BA-NJ and MFS Intelenet of New Jersey, Inc. (MFS)[1], and to do so without any limitations or restrictions which it believed BA-NJ improperly sought to impose. By letter dated July 16, 1998, GNI advised the Board that it believed that the parties had reached an agreement for interconnection, had apparently resolved the issues raised in the petition, and requested that the Board suspend further action on the petition for arbitration pending successful execution of an interconnection agreement

The parties having failed to reach an interconnection agreement, and pursuant to the Board's arbitration procedures,[2] on September 15, 1998, Ashley C. Brown from the Kennedy School of Government at Harvard University was chosen as the Arbitrator. On September 28, 1998, both parties submitted a joint statement of the unresolved issues to the Arbitrator and each party separately submitted a statement of their response to these issues. By letter dated October 2, 1998, the parties jointly submitted a letter to the Board stating that they had agreed not to file any motions with the Federal Communications Commission (FCC) for preemption of state jurisdiction for twenty days after the expiration of the nine-month time limit imposed by the Act. Notwithstanding the efforts of Board Staff and the Arbitrator to facilitate a mutually acceptable agreement, on October 20, 1998, each party separately submitted updated statements to the Arbitrator of the unresolved issues to be decided. By Order dated October 21, 1998 in this Docket, William J. Rooney, Esq., General Counsel for GNI, and Christopher W. Savage, Esq., were granted leave to appear pro hac vice on behalf of GNI, and Robert A. Lewis, Esq., was granted leave to appear pro hac vice on behalf of BA-NJ.

On October 21, 1998, an arbitration hearing was held in Boston, Massachusetts. Post-hearing briefs were submitted on October 23, 1998. The Arbitrator issued a decision which he termed a "Recommended Interim Final Decision" on October 26, 1998 (hereinafter, the Arbitrator's Decision).

The Arbitrator recast the submitted issues into six issues and resolved them in the following manner:

(1) Is GNI an entity eligible for an interconnection agreement?

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1 See Order Approving Interconnection Agreement, I/M/O the Joint Petition of Bell Atlantic-New Jersey, Inc. and MFS Intelenet of New Jersey, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 and I/M/O the Bell Atlantic-New Jersey, Inc. Interconnection Agreement with MFS Intelenet of New Jersey, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, Docket Nos. TO96070527 and TO96070526 (March 10, 1997).

2 See Order, I/M/O The Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996, Docket No. TX96070540 (August 15, 1996) (hereinafter, Arbitration Order).

Decision: GNI is eligible for an interconnection agreement with BA-NJ. Arbitrator's Decision at 5.

(2) Is GNI entitled to most favored nation (MFN) status in regard to other interconnection agreements?

Decision: GNI is entitled to MFN status in regard to opting into other interconnection agreements between BA-NJ and other competitive local exchange carriers (CLECs), including the interconnection agreement between BA-NJ and MFS Intelenet of New Jersey, Inc. (MFS). Ibid.

(3) When opting into a preexisting interconnection agreement under MFN status, is a party bound to the agreement in its entirety, or is it free to opt in on a provision by provision basis?

Decision: If GNI opts into the MFS agreement, it may only do so on an all or nothing basis. It is not free to "pick and choose" among the provisions of that agreement and is bound to the terms and conditions as of the date they are permitted to "opt in" to the MFS agreement. Id. at 6.

(4) If GNI is entitled to opt in to the MFS agreement, what should the duration of the contract be?

Decision: The duration of the interconnection agreement between BA-NJ and GNI should be nineteen days less than three years from the date of execution. Id. at 8.

(5) Are calls to Internet Service Providers (ISPs) eligible for reciprocal compensation under the MFS interconnection agreement?

Decision: Calls to ISPs are eligible for reciprocal compensation under the MFS interconnection agreement. Id. at 9.

(6) Are the applicable reciprocal compensation rates those set forth in the MFS interconnection agreement, or the generic rates established by the Board in Docket No. TX95120631?

Decision: The reciprocal compensation rates applicable to GNI and BA-NJ if GNI opts into the MFS interconnection agreement, are, for the duration of the time that the terms therein are applicable between GNI and BA-NJ, those set forth in that agreement. Id. at 10.

Meanwhile, on the federal level, the FCC was already engaged in its consideration of the issue of whether reciprocal compensation was the appropriate form of compensation for ISP-bound traffic. On October 30, 1998, the FCC issued a Memorandum Opinion and Order in GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292 (October 30, 1998) (hereinafter, GTE Telephone). In GTE the FCC concluded an investigation of an access offering by the GTE Telephone Operating Companies, and found that GTE's offering, which would permit Internet Service Providers to provide their end-user customers with high-speed access to the Internet, was an interstate service properly tariffed at the federal level. GTE Telephone at ¶1. In GTE Telephone, the FCC expressly stated that its Order did "not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit switched dial-up traffic originated by interconnecting LECs." Id. at ¶2. The FCC stated instead that it intended "in the next week to issue a separate order specifically addressing reciprocal compensation issues." Ibid. Thereafter, the Board, along with much of the telecommunications community, waited with great anticipation for further word from the FCC on the issue of compensation for ISP-bound traffic.

With regard to the Arbitrator's Decision, and as required in the Board's Arbitration Order, the parties were required to submit for Board consideration a fully executed interconnection agreement encompassing the arbitration decision within five (5) days of the Arbitrator's decision. On November 2, 1998, GNI filed a motion requesting that the Board issue an order to the effect that:

> (a) [GNI] is for all purposes deemed to have entered into an interconnection agreement with BA that reflects the [Arbitrator's Decision], with an effective date of today, November 2, 1998; and (b) to the extent that BA's actions in any way delay the date on which [GNI] can begin exercising its rights under the agreement, the termination date of the agreement is deemed extended, day for day, during the period that BA continues to engage in such delaying efforts.
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> [November 2, 1998 Motion of GNI at 2, 10].

GNI attached a form of interconnection agreement, executed by GNI, which purports to incorporate the Arbitrator's Decision.

At its public meeting of November 4, 1998, the Board authorized its Secretary to send a letter to the parties advising them of their duties to submit a mutually executed agreement for Board consideration. The Secretary's letter was sent the same day. By letter dated November 5, 1998, GNI responded to the Board referencing its November 2, 1998 Motion and asking that the Board, in addition to the other relief requested, direct that BA-NJ pay to GNI reasonable incurred attorney's fees in connection with GNI's efforts to reach an agreement with BA-NJ during the period November 2-5, 1998. On November 5, 1998, BA-NJ submitted two versions of interconnection agreements. The first modified the GNI agreement previously submitted to the Board by GNI on November 2, 1998. The second contains modifications to the original MFS agreement based on BA-NJ's interpretation of the Federal Communications Commission (FCC) Memorandum Opinion and Order in GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292 (October 30, 1998) (hereinafter, GTE Telephone). At the same time, BA-NJ submitted its Opposition to GNI's Motion. By letter dated November 6, 1998, GNI filed an answer BA-NJ's Opposition to its Motion. By letters dated November 10, 1998 and November 12, 1998 BA-NJ and GNI, respectively, submitted additional responsive papers. BA-NJ submitted additional comments by letter dated November 19, 1998, to which GNI responded by letter dated November 20, 1998.

By letter dated November 18, 1998, the Division of the Ratepayer Advocate (Advocate) submitted comments on the Arbitrator's Decision and noted the fact that the Board had before it three forms of interconnection agreements submitted by the parties. In its letter, the Advocate disagreed with the Eighth Circuit Court of Appeals rejection of the FCC's "pick and choose" rule[3] and the Board's adoption of the Eighth Circuit's interpretation. Nevertheless, the Advocate supported an interconnection agreement as recommended by the Arbitrator, and urged the Board to approve the interconnection agreement which in effect would reflect the MFS agreement. By letter dated November 25, 1998, BA-NJ responded to the Advocate's comments and stated that the Board should not approve an interconnection agreement based on the Arbitrator's Decision, but should find that the MFS agreement which GNI seeks to adopt must contain rates which conform to the Board's December 2, 1997 Generic Order in Docket No. TX95120631 and should extend for a term which expires on July 1, 1999, the termination date of the MFS Interconnection Agreement. In addition, BA-NJ stated that the Board should clarify that, pursuant to the FCC's determination in GTE Telephone, Internet traffic is jurisdictionally interstate. By letter dated December 1, 1998, GNI disagreed with BA-NJ and stated that the FCC's analysis in GTE Telephone did not affect the proper treatment of reciprocal compensation for ISP-bound traffic. As of the date of this Order, the Parties have failed to mutually execute a comprehensive interconnection agreement based on their continuing differences in interpreting the Arbitrator's Decision and FCC Orders.

Finally, on February 26, 1999, the FCC released its Declaratory Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, I/M/O Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (February 26, 1998) (hereinafter, Declaratory Ruling). In the Declaratory Ruling, the FCC advised that it considered ISP-bound traffic to be interstate traffic not subject to the reciprocal

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[3] See Iowa Utilities Board v. FCC, 120 F.3d 753, 800 (8th Cir. 1997); aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., __ U.S. __, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

compensation obligations imposed by section 251(b)(5) of the Act, Declaratory Ruling at ¶¶1, 18, 27 and fn 87, and advised further that, in the absence of a federal rule governing inter-carrier compensation for such traffic, states are free either to impose or not impose reciprocal compensation for ISP-bound traffic, depending upon the circumstances before the state commission, including the existence of interconnection agreements. Declaratory Ruling at ¶¶1, 21, 25-27.

DISCUSSION

With regard to the first issue recited above, we FIND that the Arbitrator correctly determined that GNI is eligible to enter into an interconnection agreement. We note that at its public agenda meeting of June 9, 1999, the Board found that GNI had demonstrated that it possessed the requisite financial, technical and managerial expertise and resources which are necessary to provide local exchange and exchange access telecommunications services in New Jersey, and accordingly, the Board authorized GNI to provide local exchange and exchange access telecommunications service in New Jersey subject to the approval of its interconnection agreement and tariffs. See Order of Approval, I/M/O the Petition of Global NAPs, Inc. For a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services, Docket No. TE98060386 (June 21, 1999). Accordingly, we agree with the Arbitrator that GNI is an entity eligible for an interconnection agreement.

We also FIND that the Arbitrator is correct that as an approved local exchange carrier, GNI is entitled to opt into a pre-existing interconnection agreement through the so-called "most favored nation," or "MFN," process pursuant to section 252(i) of the Act. With regard to the third issue, subsequent to the Arbitrator's Decision, the Supreme Court reinstated 47 C.F.R. §51.809, allowing carriers to "pick and choose" parts of interconnection agreements, as well as opt into an entire agreement through the MFN process. See AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___ 119 S.Ct. 721, 738, 142 L.Ed.2d 835 (1999). Thus, we MODIFY the Arbitrator's Decision to comport with the Supreme Court decision with regard to the FCC's reinstated "pick and choose" rule.

We next turn to the fourth issue which confronted the arbitrator, the duration of the interconnection agreement created as a result of GNI opting into the terms and conditions of the MFS agreement. At the outset, we note that the FCC is currently seeking comment on just the situation that faced the Arbitrator in the matter now before the Board. In its February 26, 1999 Declaratory Ruling in CC Docket No. 96-98, the FCC noted that an arbitrator recently allowed a CLEC to opt into an interconnection agreement with a three year term for a new three year term, raising the possibility that an ILEC "might be subject to the obligations set forth in [the original] agreement for an indeterminate length of time, without any opportunity for renegotiation, as successive CLEC's opt into the agreement." Declaratory Ruling at ¶35. The FCC, therefore, is seeking comment on "whether and how section 252 (i) and MFN rights affect parties' ability to negotiate or renegotiate terms of their interconnection agreements." Ibid.

Because the Board is also concerned about the procedural and substantive rights of both ILECs and CLECs involved with the MFN and "pick and choose" processes, the Board HEREBY DIRECTS its Staff to prepare a rulemaking pre-proposal which will elicit ideas, views and comments from the industry regarding these issues. Of more immediate import, we note our preliminary belief that interconnection agreements should not exist into perpetuity without a right to have such agreements reviewed and renegotiated. Thus, on an interim basis, and subject to possible reexamination based upon the pending FCC and Staff actions noted above, we indicate herein our view that any existing agreement MFN'd by a CLEC should extend for a period of time equal to the remaining term of the original MFN'd agreement or one (1) year, whichever is greater. We further note our preliminary view that an original interconnection agreement may only be MFN'd during the original term of the agreement, and that once MFN'd for the additional term just noted, neither the original interconnection agreement nor the subsequent interconnection agreement may be subject to further adoption by any CLEC through the MFN process. This preliminary general view notwithstanding, however, we note that parties may, through negotiation, agree to adopt rates, terms and conditions which are identical to those contained in any other interconnection agreement and for a term of any length which they mutually desire. We stress that these are preliminary views which we fully expect to be commented upon by the industry in the context of both the FCC's and our own rulemaking processes.

We note also that the FCC has already expressed its view regarding how a carrier seeking interconnection, network elements or services pursuant to section 252(i) should proceed. The FCC has advised that such a carrier "need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis." First Report and Order, I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (August 8, 1996) at ¶1321. The FCC has also stated that it "leave[s] to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis." Ibid. In this regard, we remind carriers that the Board has already adopted a dispute resolution process which is made available expressly to resolve on an expedited basis petitions by carriers related to service-affecting issues and assertions of anti-competitive conduct, and is an appropriate means to resolve section 252(i) disputes. See Order on Reconsideration, I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (June 19, 1998).

With specific regard to the interconnection agreement between GNI and BA-NJ, however, we do not believe that the general view we have just announced regarding the duration of interconnection agreements adopted through the MFN process is necessarily appropriate. The GNI/BA-NJ Arbitrator rendered his decision on October 26, 1998. According to our arbitration guidelines, the parties should have submitted an interconnection agreement to the Board for its review within five (5) days thereafter. On November 2, 1998, GNI filed a motion requesting that the Board issue an order providing that the interconnection agreement between GNI and BA-NJ attached to its motion and based upon the MFS interconnection agreement shall be deemed effective on November 2, 1998, and extended day to day thereafter for every day that BA-NJ delays in signing the attached agreement. Not including any such extensions, GNI's proposed interconnection agreement incorporated a termination date of October 14, 2001, 19 days less than three years, as approved by the Arbitrator's Decision.

We have already indicated above our preliminary view that an interconnection agreement which is adopted through the MFN process should extend for a term no less than 12 months. However, as noted above in the within matter, the parties, including the Advocate, continued to file comments on the Arbitrator's Decision through the month of November, 1998, the last submission being by GNI on December 1, 1998, and the Board delayed the decision on this arbitration further while it awaited the FCC's expected determination of the issue of the nature of ISP-bound traffic. In order not to penalize GNI for delay not caused by it, we HEREBY ADOPT a term which reflects the minimum one year term of an MFN'd agreement, and in addition reflects the delay which occurred from December 1, 1998 until July 7, 1999, a period of 219 days. Accordingly, we FIND that a term of one year and 219 days, or slightly more than 19 months, is appropriate in this case. Assuming that a signed interconnection agreement which conforms to our Decision is submitted within five (5) days of the date of this Order and is approved at the Board's July 26, 1999 public meeting, this interconnection agreement will therefore terminate one year and 219 days from July 26, 1999, or March 2, 2001. Because the Decision we make herein rests upon the unique nature of the circumstances surrounding the parties and this interconnection agreement, the Board believes that it is not in the public interest to permit this agreement to be adopted through the MFN process.

With regard to the fifth issue, whether calls to ISPs are eligible for reciprocal compensation under the MFS interconnection agreement, we must begin our analysis by noting again the FCC's most recent declarations regarding ISP-bound traffic. In its October 30, 1998 GTE Telephone Memorandum Opinion and Order, the FCC presaged its later declaration that ISP-bound traffic is interstate in character by concluding that a high speed Internet access offering by the GTE Telephone Operating Companies, was an interstate service properly tariffed at the federal level. GTE Telephone at ¶1. While the FCC expressly stated that its Order did "not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit switched dial-up traffic originated by interconnecting LECs," it did state that it intended "in the next week to issue a separate order specifically addressing reciprocal compensation issues." Id. at 2.

On February 26, 1999, the FCC finally released its Declaratory Ruling, concluding that ISP-bound traffic is largely interstate, but "[i]n the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions." Declaratory Ruling at ¶1. The FCC stated that the reciprocal compensation obligations imposed by section 251(b)(5) of the Act apply only to the transport and termination of local telecommunications traffic. Id. at ¶7. Continuing its tradition of determining the jurisdictional nature of communications by reference to the end points of the communication, the FCC stated that a substantial portion of ISP-bound traffic is interstate because "the communications at issue do not terminate at the ISP's local server, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state." Id. at ¶¶10-18. The FCC advised that "pending adoption of a rule establishing an appropriate interstate compensation mechanism," it found "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic." Id. at ¶21. The FCC further advised the following:

> [i]n the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed in section 252(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions are also free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.
>
> [Id. at ¶26 (footnotes omitted)].

The FCC asserted that the adoption of rules governing inter-carrier compensation for ISP-bound traffic would serve the public interest, and proposed rules which, in the first instance, would rely on commercial negotiations as the ideal means to establish the terms of interconnection arrangements, id. at ¶28, but might also rely on arbitration on the state or even federal level, id. at ¶¶30-32.

The FCC recognized that its conclusion that ISP-bound traffic is largely interstate might cause some state commissions to reexamine conclusions that reciprocal compensation is due from ILECs to CLECs which carry this traffic to the extent that those conclusions are based on a finding that ISP-bound traffic terminates at an ISP server. Id. at ¶27. In fact, that has already occurred. In Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered into under Sections 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116-C (May 19, 1999) (hereinafter, Complaint of MCI WorldCom), the Massachusetts Department of Technology and Energy (Mass. DTE) reversed an earlier decision in which it determined that ISP-bound traffic was local based upon its understanding that such traffic was severable into two components, one call terminating at the ISP, and another call connecting the ISP to the target Internet website. Complaint of MCI WorldCom, Summary. The Mass. DTE stated that, in light of the Declaratory Ruling, the basis for its earlier decision had crumbled and that decision was now a "nullity," and "[u]nless and until modified by the FCC itself or overturned by a court of competent jurisdiction, the FCC's view of the 1996 Act must govern this Department's exercise of its authority over reciprocal compensation." Complaint of MCI WorldCom at 19-31. The Mass. DTE ruled that "[r]eciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic), beginning with (and including payments that were not disbursed as of) February 26, 1999." Ibid.

In determining whether reciprocal compensation obligations apply to ISP-bound traffic which GNI will carry, the Board does not have the benefit of earlier arbitrations which have addressed this issue, nor was the issue addressed in the Board's Generic Proceeding. See Decision and Order, I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (December 2, 1997). Although the MFS interconnection agreement was the result of both negotiations and arbitration, the reciprocal compensation issue was decided wholly through negotiations between MFS and BA-NJ. Section 5.7 of the MFS/BA-NJ agreement provided for reciprocal compensation for the transport and termination of local traffic, defined in section 1.44 of the 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." The negotiations which led to the adoption of these provisions occurred well before the FCC's declaration that ISP-bound traffic was interstate, a significant change in the law not known to either party to the negotiations and not reflected in the interconnection agreement which GNI desires to MFN.[4] The Board notes well the FCC's statements that in the absence of a federal rule regarding inter-carrier compensation for ISP-bound traffic, "parties should be bound by their existing interconnection agreements, as interpreted by state commissions." Declaratory Ruling at ¶1. In this case, however, the Board does not have an existing interconnection agreement between GNI and BA-

[4] We note, however, that pursuant to section 28 of the MFS agreement, FCC action or other legal developments which require modification of material terms contained in the agreement allows either Party to require a renegotiation of the terms that are reasonably affected by the change in the law. Thus, even were we not to exclude ISP-bound traffic from reciprocal compensation provisions of the agreement at this time, we conclude that section 28 of the MFN'd agreement could soon lead to the same result which the Board herein reaches.

NJ to interpret. Because of GNI's right to MFN an existing interconnection agreement, we FIND that it is appropriate to apply to GNI and BA-NJ the rates and terms in the existing MFS agreement which GNI desires to MFN with respect to reciprocal compensation obligations for traffic which is truly local. ISP-bound traffic, as determined by the FCC, is interstate in character, and, therefore, in the Board's view, is not entitled to reciprocal compensation. All other local traffic carried by GNI shall be subject to reciprocal compensation at the negotiated rates in the MFS interconnection agreement, that is $0.009 for local traffic delivered to a tandem switch and $0.007 for local calls delivered to an end office.

We expect that GNI will be compensated by its end user customers and/or by ISPs themselves for the ISP-bound traffic which it carries. Nevertheless, the Board is mindful of the FCC's ongoing rulemaking with regard to the appropriate form of inter-carrier compensation mechanism for ISP-bound traffic. We assure carriers that the Board shall review the FCC's ultimate ruling regarding such compensation and take appropriate action, as needed. Of course, the parties themselves are not foreclosed from further negotiations to develop more appropriate forms of compensation.

Accordingly, to clarify the last issue decided by the Arbitrator, the Board herein FINDS that the MFS interconnection agreement rates for reciprocal compensation, and not the Board's generic rates, shall apply to the interconnection agreement between the parties. The Arbitrator found that negotiated rates took precedence over rates determined by either regulation or by arbitration. Accordingly, he determined that the rates for reciprocal compensation negotiated by and between MFS and BA-NJ are applicable to the local traffic exchanged between GNI and BA-NJ. The Board agrees with the Arbitrator in this regard, but clarifies that the MFS interconnection agreement rates do not apply to the ISP-bound traffic carried by GNI since that traffic is interstate traffic pursuant to the FCC's Declaratory Ruling.

In conclusion, the Board FINDS that the resolution of all open arbitration issues set forth above and the conditions imposed herein upon the parties is consistent with the public interest and in accordance with law. The Board HEREBY APPROVES an interconnection agreement between the parties which is the same as the MFS agreement referenced above, as modified herein, as meeting the requirements of the Act for agreements which are in part negotiated and in part arbitrated. The Board DIRECTS the Parties to submit to the Board for its approval a fully executed interconnection agreement reflecting the decisions set forth herein within five (5) business days of the date of this Order.

DATED: 0/12/99

BOARD OF PUBLIC UTILITIES
BY:

HERBERT H. TATE
PRESIDENT

CARMEN J. ARMENTI
COMMISSIONER

FREDERICK F. BUTLER
COMMISSIONER

ATTEST:

MARK W. MUSSER
SECRETARY

In the Matter of the Petition of Global NAPs, Inc.
For Arbitration of Interconnection Rates, Terms, Conditions
and Related Arrangements with Bell Atlantic-New Jersey, Inc.
Pursuant to Section 252(b) of the Telecommunications Act of 1996
BPU Docket No. TO98070426

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ILLINOIS BELL TELEPHONE COMPANY d/b/a Ameritech Illinois, Plaintiff-Appellant, Cross-Appellee,
v.
WORLDCOM TECHNOLOGIES, INC., as successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group, Inc., MCI Telecommunications Corp. and MCImetro Access Transmission Services, Inc., AT & T Communications of Illinois, Inc., and Focal Communications Corporation, Defendants-Appellees,
and
Dan Miller, Richard Kohlhauser, Ruth Kretschmer, Karl McDermott, and Brent Bohlen, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals), Defendants-Appellees, Cross-Appellants.

Nos. **98-3150, 98-3322, 98-4080.**

United States Court of Appeals, Seventh Circuit.

Argued May 10, 1999.

Decided June 18, 1999.

Incumbent local exchange carrier brought action against competitors and commissioners of Illinois Commerce Commission (ICC), challenging ICC ruling that telephone connections to Internet service providers (ISPs) were local calls subject to reciprocal compensation provisions of parties' interconnection agreements. The United States District Court for the Northern District of Illinois, David H. Coar, J., 1998 WL 419493, upheld ICC decision. Incumbent carrier appealed, and commissioners cross-appealed denial of their motions to dismiss. The Court of Appeals, Evans, Circuit Judge, held that: (1) Court had jurisdiction over appeal as it related to commissioners despite absence of formal judgment against them; (2) ICC decision was subject to review by federal courts; and (3) ICC's decision did not violate federal law.

Affirmed.

[1] FEDERAL COURTS ⚷551
170Bk551
Absence of formal judgment against commissioners of Illinois Commerce Commission (ICC) did not preclude appellate jurisdiction as to commissioners, on incumbent local exchange carrier's appeal from judgment entered in favor of competitors which upheld ICC decision that telephone connections to Internet service providers (ISPs) were subject to reciprocal compensation provisions of interconnection agreements; although judgment against commissioners was not entered due to their pending motions to dismiss on grounds of immunity, motions were subsequently denied, and commissioners participated in litigation on the merits.

[1] FEDERAL COURTS ⚷768.1
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Absence of formal judgment against commissioners of Illinois Commerce Commission (ICC) did not preclude appellate jurisdiction as to commissioners, on incumbent local exchange carrier's appeal from judgment entered in favor of competitors which upheld ICC decision that telephone connections to Internet service providers (ISPs) were subject to reciprocal compensation provisions of interconnection agreements; although judgment against commissioners was not entered due to their pending motions to dismiss on grounds of immunity, motions were subsequently denied, and commissioners participated in litigation on the merits.

[2] TELECOMMUNICATIONS ⚷337.1
372k337.1
Federal court had subject matter jurisdiction, under Telecommunications Act, to review decision of state commerce commission ruling that telephone connections to Internet service providers (ISPs) were subject to reciprocal compensation provisions of parties' interconnection agreements, although commissioners, rather than commission itself, were named parties; review was not limited to interconnection agreements, but was limited to whether decision violated federal law. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251, 252, 252(e)(4, 6).

[3] TELECOMMUNICATIONS ⚷317
372k317
State commerce commission ruling that telephone connections to Internet service providers (ISPs) were local calls subject to reciprocal compensation provisions of interconnection agreements between incumbent local exchange carrier and competitors did not violate federal law, as set out in Telecommunications Act or federal agency's interpretation of act; although Act did not require that such connections be treated as local calls, ruling was consistent with parties' agreements. Telecommunications Act of 1996, 47 U.S.C.A. §§

251, 252, 252(e)(4, 6).

*567 Theodore A. Livingston (argued), Mayer, Brown & Platt, Chicago, IL, for Illinois Bell Telephone Company doing business as Ameritech Illinois, Plaintiff-Appellant in 98-3150, 98-3322, and 98-4080.

Darryl M. Bradford (argued), Jenner & Block, Chicago, IL, Thomas F. O'Neil III, Mark B. Ehrlich, MCI Worldcom Inc., for Worldcom Technologies, Inc., Defendant-Appellee in 98-3150.

Frederick J. Artwick, Sidley & Austin, Chicago, IL, for Teleport Communications Group, Inc., Defendant-Appellee in 98-3150.

Darryl M. Bradford, Jenner & Block, Chicago, IL, Adam H. Charnes, MCI Worldcom Inc., Washington, DC, for MCI Telecommunications Corp., Defendant-Appellee in 98-3150.

John P. Kelliher, Office of the Attorney General, Chicago, IL, Thomas R. Stanton (argued), Illinois Commerce Commission, Chicago, IL, for Dan Miller, Richard Kolhauser, Defendant-Appellees in 98-3150 and 98-3322.

Darryl M. Bradford, John R. Harrington, John J. Hamill, Jenner & Block, Chicago, IL, Richard M. Rindler, Swidler & Berlin, Washington, DC, Adam H. Charnes, Thomas F. O'Neil, III, Mark B. Ehrlich, MCI Worldcom Inc., Washington, DC, for Worldcom Technologies Inc., Defendant-Appellee in 98-3322.

Douglas W. Trabaris, Chicago, IL, for Teleport Communications Group, Inc., Defendant-Appellee in 98-3322.

Darryl M. Bradford, Jenner & Block, Chicago, IL, Darrel Townsley, MCI Telecommunications Corp., Chicago, IL, Adam H. Charnes, Thomas F. O'Neil, III, Mark B. Ehrlich, MCI Worldcom Inc., Washington, DC, for MCI Telecommunications Corp., Defendant-Appellee in 98-3322.

*568 Thomas R. Stanon, Illinois Commerce Commission, Chicago, IL, for Dan Miller, Richard E. Kolhauser, Ruth K. Kretschmer, Karl A. McDermott, Brent S. Bohlen, Defendant-Appellants in 98-4080.

Before BAUER, KANNE, and EVANS, Circuit Judges.

EVANS, Circuit Judge.

Once we determine whether we have jurisdiction (and the scope of that jurisdiction) under the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252, what we will have before us today is a rather narrow issue on the merits: whether a decision of the Illinois Commerce Commission regarding reciprocal compensation for telephone connections to Internet service providers violates federal law.

Until the 1990's, local phone service was monopolistic; in fact, many people viewed it as a natural monopoly. Regulation was left to the states. Now, technological advances have taken us far beyond the sort of telephone services parodied by Ernestine. [FN1] Today, we even have competition in local markets. Through the Telecommunications Act of 1996 Congress has opened the door to competing local exchange carriers and has inserted both the Federal Communications Commission (FCC) and the federal courts into the previously state-regulated monopoly. Just how far into the scheme does the federal presence reach? is the $64,000 question.

FN1. Lily Tomlin's character on Rowan and Martin's 1960's TV show, Laugh- In, who with an officious tone and a lot of nasal snorting sat at her switchboard and asked, "Have I reached the party to whom I am speaking?"

Illinois Bell Telephone Company, doing business as Ameritech Illinois (Ameritech) is the incumbent local exchange carrier in Chicago and most of the rest of Illinois. Worldcom Technologies, Inc., Teleport Communications Groups, Inc., MCI Telecommunications Corp., Inc. and MCIMetro Access Transmission Services, Inc., AT & T Communications of Illinois, Inc., and Focal Communications Corporation have, under the Act, recently become competitors with Ameritech for local telephone business. When a competitor builds its own local network it interconnects its facilities with Ameritech so that calls can be made between customers of the two networks. For example, when an Ameritech customer makes a call, the person or entity called may be the customer of another of the carriers: Ameritech bills its customer for the call as a local call. The same is true if a customer of a competing carrier calls an Ameritech customer. If this were all that happened, the carrier whose customer received the call would not be compensated for its part in the transaction. But the 1996 Act provides for "reciprocal compensation" for local calls and it requires companies to establish agreements for intercarrier compensation for the calls. If the call is a local call, then, under the Act in the first example, Ameritech would have to pay reciprocal compensation to the other carrier for "terminating" the call (in the lingo of the industry). In this way, both carriers get money. Ameritech and each of the other carriers have interconnection agreements as required by the Act, 47 U.S.C. §§ 252(b)(5) and 252(d).

Section 252(d) sets out the procedure by which interconnection agreements are to be reached. The carriers must first attempt to negotiate in good faith to reach voluntary agreements. At any time in the negotiations a party may ask a state commission to participate as a mediator. If no agreement is reached, the Act provides for compulsory arbitration of unresolved issues. Any party may petition a state commission to arbitrate the dispute. Furthermore, any agreement reached by negotiation or arbitration must be submitted to the state commission for approval. If a state commission fails to carry out its responsibilities, the FCC will preempt the state commission's jurisdiction and act for the state commission. A state commission's failure to approve or reject an ***569** agreement, however, is not a failure to act: rather, the agreement will be deemed approved.

The interconnection agreements between Ameritech and each of the other carriers in this case are nearly identical. They became effective in late 1996 and early 1997 and have been approved by the Illinois Commerce Commission (ICC). For a time, the parties routinely paid reciprocal compensation under the agreements.

Trouble arose, however, when Ameritech became concerned that it was paying out more in reciprocal compensation than it was collecting. On July 3, 1997, it sent a letter to the other carriers, claiming that the imbalance was due to their inclusion of calls involving Internet service providers (ISPs) in the requests for reciprocal compensation. Ameritech said that it would no longer pay compensation for calls to Internet service providers because those calls were not local calls. It seems that the other carriers may have been concentrating their marketing on ISPs. The agreements provided for compensation per minute of use, and calls to ISPs are, quite predictably, of long duration.

That is true because Internet service providers are companies which offer their customers connections to the Internet through the telephone network. ISPs are assigned a local telephone number and the telephone companies, including Ameritech, bill their customers for a local call when the customers call ISPs within the local calling area. However, the ultimate connection is usually to a website in a distant location, giving Ameritech a basis for claiming that the calls were not local calls subject to the reciprocal compensation agreements. For reasons we need not get into, Ameritech is not obligated to compensate the carrier of the ISP if the call is deemed to be long-distance, rather than local. In other words, at the present time if a call to an ISP is not subject to reciprocal compensation, the ISP's carrier is not compensated.

Not surprisingly, when Ameritech cut off payments the other carriers filed complaints with the ICC. On March 11, 1998, the ICC ruled in their favor, finding that the plain language of the agreements mandates reciprocal compensation; that there is no basis for treating these calls differently from other local calls. The ICC, in fact, called Ameritech's conduct anticompetitive.

Ameritech filed the present case in the District Court for the Northern District of Illinois, naming as defendants the competing carriers and the Commissioners of the ICC in their official capacity. Ameritech also filed a petition for review of the order in a state court. District Judge David H. Coar, to whom the federal case was assigned, reached a decision, as Ameritech says, "affirming the ICC Order" on July 21, 1998, and entered judgment in favor of the competing companies on August 4, 1998. In entering judgment under Rule 54(b) of the Federal Rules of Civil Procedure, Judge Coar stated:

> This Court has currently pending motions to dismiss the Illinois Commerce Commission [which, correctly labeled, would be a motion of the Commissioners] from this action. Because of the novelty and urgency of the issues presented on the merits of the action and because the Eleventh Amendment issues presented by the Commission's Motions to Dismiss were not related to the merits of the underlying claim, this Court directed the Commission to participate in briefing of the issues on the merits without prejudice to its rights to proceed on its Eleventh Amendment Motions.

On August 25 the motions of the Commissioners to dismiss the action were denied. Before August 25 Ameritech had filed an appeal of the July 21 decision; after the decision on the motions to dismiss, it filed a second notice of appeal naming all defendants; the Commissioners filed a cross- appeal. All three appeals were consolidated.

*570 [1] Appellate jurisdiction over the Commissioners is somewhat problematic in that no formal judgment was entered against them. However, it is clear that the Commissioners participated in the litigation on the merits of this action. In entering judgment pursuant to Rule 54(b) on August 4, Judge Coar made it clear that his decision disposed of the merits of the case, but also allowed the Commissioners to continue with their claim that the federal court was a forum in which they did not belong, obviously an issue which should have preceded a decision on the merits. The decision on the motions to dismiss resolved that issue, making the decision on the merits binding on the Commissioners (a decision, of course, going in their favor). It is a situation in which "formal defects in the terminating order do not prevent appeal." Otis v. City of Chicago, 29 F.3d 1159, 1165 (7th Cir.1994). See also Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978). Although we conclude that we have jurisdiction over the appeal as it involves the Commissioners, we are dismayed by this snag and, we might add, by the cursory manner in which Ameritech and the Commissioners treated the issue, despite our order to brief it.

We proceed to the merits. The issue as Ameritech presented it to us is whether the calls to Internet service providers are local calls, subject to reciprocal compensation, or longdistance calls, often interstate. That is the issue which was exhaustively briefed; that, in fact, is the easy issue. But that is not, and cannot be, the issue we decide.

The appeal of the Commissioners of the Illinois Commerce Commission will lead us, however circuitously, to the real issue before us. The Commissioners contend that the federal courts have no jurisdiction over them. Originally they contended that, among other things, sovereign immunity prevents federal courts from exercising jurisdiction over them in their official capacity because in their official capacity they are the Commission, a state entity, and the State of Illinois has not waived its sovereign immunity. That argument is no longer tenable following our recent decision in MCI Telecommunications Corp. v. Illinois Commerce Commission, 168 F.3d 315 (7th Cir.1999), in which we determined that the participation of the Commission in the scheme set out in the Act is a waiver of the state's sovereign immunity.

[2] Another of the Commissioners' contentions, however, is that the Act, which admittedly provides for some federal court review over some actions of state commissions, does not provide review in this instance. This is an attack on our subject matter jurisdiction. The Commissioners say that the scope of review under § 252(e) is limited to review of an "agreement"; nowhere, they say, is a "federal district court authorized to review an order of a state commission, the result of complaints filed with the state commission under state law...."

Section 252(e)(6) says in part:

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

The commissioners rely on the word "agreement" and ignore the word "determination" despite the fact that in an earlier order in this case-- Illinois Bell Telephone Co. v. WorldCom Technologies, Inc., 157 F.3d 500, 501 (7th Cir.1998)--we said flatly, "Decisions of state agencies implementing the 1996 Act are reviewable in federal district courts." In addition, although the present case arises in a slightly different context, our decision in MCI explains the nature of our jurisdiction. We noted that subsection 252(e)(6) provides for judicial review of "state commission actions," not simply review of "interconnection agreements" and that subsection *571 252(e)(4), when read in conjunction with subsection 252(e)(6), shows that Congress contemplated suits against state defendants in federal court. It provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." We concluded that this language meant that Congress envisioned suits reviewing "actions" by state commissions and that those suits were to be brought exclusively in the federal courts. In addition, we said that Congress intended that the "state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions." At 320.

Of course, the Commission itself is not a party to the action before us even though, in its briefing in this court, Ameritech said that it brought the action to "challenge the ICC Order." Similarly, in its complaint Ameritech said that it was filing the action pursuant to § 252(e)(6) to challenge determinations made by the Illinois Commerce Commission. Even though the Commission is not a named party, the Commissioners themselves acknowledge that, in their official capacity, they are the Commission. We have jurisdiction under § 252(e) to review the actions of the Commission and will proceed on that basis.

But what is the scope of review under § 252(e)? Writing for the Court in AT & T v. Iowa Utilities Board, --- U.S. ----, ---- n. 10, 119 S.Ct. 721, 733 n. 10, 142 L.Ed.2d 835 (1999), Justice Scalia indicated that the Act was broad federal occupation of territory once belonging to the states and that in turning some "federal policymaking ... over to state administrative agencies," Congress set out a scheme which "is decidedly novel." He continued, "saying that the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well," or, as he put it elsewhere, it is a "surpassing strange" setup. At 730 n. 6.

Our view of the scope of review, however, has already been set out in MCI in which we indicated that we would review a state commission's action for "compliance with the requirements of § 251 and § 252 of the Telecommunications Act...." We also said that we would not review those actions for compliance with state law. 168 F.3d at 320. The issue before us today, then, is whether the ICC, in determining that under the agreements the parties intended that calls to Internet service providers would be subject to reciprocal compensation, violated federal law.

[3] We have long given deference to the pronouncements of the FCC. See, e.g., FCC v. National Citizens Committee for Broad., 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978); Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (1984). It also appears that none of the telephone companies involved in the present case dispute that deference is in order; in fact, not surprisingly in this instance, everyone thinks the FCC is on its side. That agency is in the process of calling for hearings on proposed rules and will presumably carry out its duty to resolve ambiguities in the statute. Iowa Util. Bd., 119 S.Ct. at 738. But in the absence of a rule, the agency issued a declaratory ruling on February 26, 1999, on the issue of whether calls to Internet service providers are local calls. See Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (February 26, 1999). The ruling was issued after the briefing in this appeal and obviously after the agreements at issue here were drafted.

The FCC said

> that the communications at issue here do not terminate at the ISP's local server, as CLECs [competing local exchange carriers] and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state.

Declaratory Ruling at 9 ¶ 12. The FCC declined to separate ISP-bound traffic into two components: an intrastate service going *572 to the local ISP and a portion, more likely than not to be interstate, going from the ISP to the websites. The conclusion was that ISP traffic for "jurisdictional purposes [is] a continuous transmission from the end user to a distant Internet site." At 11 ¶ 13. This is the part of the ruling which Ameritech likes.

But having determined its jurisdiction, the FCC went on to a discussion of regulation of the calls in the absence of a rule covering compensation for these calls. It is this part of the ruling that the other carriers prefer. Because there is no rule yet promulgated on this issue, the FCC said:

> We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP- bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.

At 15 ¶ 21. So parties may

> voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. 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.

At 15 ¶ 22. Even if ISP traffic is largely interstate, parties may have agreed to treat it as subject to reciprocal compensation or, in fact, a state commission may impose reciprocal compensation in arbitration proceedings:

> A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding or a subsequent state commission decision that those obligations encompass ISP-bound traffic does not conflict with any Commission rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

At 18 ¶ 26.

Now that the FCC has issued its ruling, and noting again that we defer to its reasonable interpretations of the Act, our task is to examine the ICC order, not to determine whether the ICC correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation.

The short answer is that it does not. The FCC could not have made clearer that in the absence of a rule, a state agency's interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law.

The agreements here provide:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the other carrier] that a Telephone Exchange Service Customer originates on Ameritech's or [the other carrier's] network for termination on the other Party's network.

All the contracts contain the following definition, " 'Reciprocal Compensation' is As Described in the Act." In the contracts with AT & T, Focal Communications Corporation, Worldcom Technologies, Inc., MCIMetro Access Transmission Services, another relevant definition is " 'Local Traffic' means a call the distance of which is fifteen (15) miles or less as calculated by using the V & H coordinates of the originating NXX and the V & H coordinates of the terminating NXX or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation...." The "Commission" referred to is the Illinois Commerce Commission. The contract with Teleport Communications Group provides that " 'Local Traffic' means local service area calls as defined by the Commission," which again is the ICC.

*573 The ICC concluded that the agreements unambiguously provide that:

> reciprocal compensation is applicable to local traffic billable by Ameritech. Since Ameritech Illinois currently charges end users local service charges when completing calls that terminate at the complainants' ISP customers, the plain reading of the interconnection agreements inevitably leads to the conclusion that reciprocal compensation charges should apply to those calls.

ICC order dated March 18, 1998, at 11.

Ameritech attacks this conclusion primarily by stating that the Act does not require reciprocal compensation; the agreements precisely track the Act (reciprocal compensation is "as described in the Act"): therefore the agreements cannot require reciprocal compensation for calls to ISPs.

The syllogism is an oversimplification. That the Act does not require reciprocal compensation for calls to ISPs is not to say that it prohibits it. The Act simply sets out the obligations of all local exchange carriers to provide for reciprocal compensation: "Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." § 251(b)(5). Then in § 252(d)(2) state commissions are instructed that terms and conditions for reciprocal compensation are not to be considered reasonable unless they provide "for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" and that the costs be determined on the basis of a "reasonable approximation of the additional costs of terminating such calls." The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out.

The ICC's conclusion--that reciprocal compensation should apply to traffic Ameritech bills as local traffic--does not violate the Act or the FCC's interpretation of the Act. In fact, the Commission was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements. The FCC sets out factors which the state commissions may consider in evaluating the parties' intentions, concluding that the factors are illustrative only and that state commissions, not the FCC, are the arbiters of what factors are relevant in the determination. At 15 ¶ 24.

Predictably, however, Ameritech questions the ICC's determination regarding the parties' intentions. Ameritech contends that the agreements were negotiated against a backdrop of a long-standing FCC policy that ISP traffic is not local traffic. But that contention is shaky. In fact, the FCC recognized that agreements negotiated prior to the February ruling, as the ones at issue here were, were negotiated in the "context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements." At 15 ¶ 24. Undeterred, Ameritech points to prior statements and actions of the FCC, which could be interpreted as at least hinting that such traffic may ultimately be considered interstate. One such factor is that ISPs have long had an exemption from paying access fees for their connections to distant websites. The argument is that there would be no need for an exemption were the calls not interstate. Ameritech also relies heavily on In re GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, CC Docket No. 98-79 (F.C.C. Oct. 30, 1998), and to a lesser degree on In re Bell Atlantic, Tel. Cos.; Bell Atlantic Tariff No. 1; Bell Atlantic Transmittal No. 1076, CC Docket Nos. 98-168 et al. (F.C.C. Nov. 30, 1998), for the proposition that Internet traffic terminates on the Internet, not at the local server. Consequently, Ameritech says, "Internet traffic is not subject to reciprocal compensation under the Agreements or *574 federal law." It is only in a footnote in its brief filed December 23, 1998, that Ameritech acknowledges another statement, in our view an important statement, made by the FCC. We quote from GTE:

> This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuitswitched dial-up traffic originated by interconnecting LECs.

At 1-2 ¶ 2. Also, in GTE, the FCC announced its attention to issue a separate order on reciprocal compensation issues, a reference, of course, to the February ruling. Putting aside the obvious fact that both GTE and Bell Atlantic were issued after the agreements in this case and so are not relevant to what the parties had in mind at the time of the negotiations, it seems clear that the FCC would not agree with Ameritech that it has had a long-standing policy against treating calls to ISPs as local calls.

There is nothing in the FCC ruling on reciprocal compensation which would prohibit a call from being a local call for some, but not all, purposes. The ICC considered relevant factors in evaluating the agreements, including the situation at the time the agreements were negotiated. Other relevant factors are that Ameritech's customers do not pay toll charges for calls to their ISP; Ameritech bills the customer for a local call. Customers dial a local number. The calls are routed over local lines, not longdistance lines. Also quite telling from our point of view is that in the agreements, the parties specifically granted to the ICC the right to define local traffic for reciprocal compensation purposes.

The FCC could not have made clearer its willingness--at least until the time a rule is promulgated--to let state commissions make the call. We see no violation of the Act in giving such deference to state commissions; in fact, the Act specifically provides state commissions with an important role to play in the field of interconnection agreements. Additionally, the ICC is in the mainstream of thought on the issue. Not that the majority rules in these matters, but the commissions in well over half the states have made the same determination that the ICC made, including some interpretations made after the February ruling. In short, nothing in what the ICC said violates federal law in existence at this time. We affirm the decision of the district court affirming the order of the Illinois Commerce Commission.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff, v. ITC DELTACOM COMMUNICATIONS, INC., et al., Defendants.	)	Civil Action No. 99-D-287-N
BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff, v. ICG TELECOM GROUP, INC., et al., Defendants.	)	Civil Action No. 99-D-747-N

MEMORANDUM OPINION & ORDER

Before the court is Plaintiff BellSouth Telecommunications, Inc.'s ("BellSouth") Petition For Judicial Review And Complaint For Declaratory Judgment And Other Relief ("Petition"), filed on March 22, 1999.

Also before the court is a Joint Memorandum Of Law For Reconsideration And In Opposition To Motion Of BellSouth Telecommunications, Inc. To Stay Order Of The Alabama Public Service Commission, which the court construes as a motion for

EOD 8/18/99

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reconsideration ("Motion For Reconsideration"), filed on March 26, 1999 by Defendants KMC Telecom, Inc. ("KMC"), Intermedia Communications, Inc. ("Intermedia"), and Hyperion Telecommunications, Inc. ("Hyperion"). Defendants KMC, Intermedia, and Hyperion also filed a Supplemental Filing In Support Of Joint Memorandum Of Law For Reconsideration And In Opposition To Motion Of BellSouth Telecommunications, Inc. To Stay Order Of The Alabama Public Service Commission ("Supplemental Filing") on March 31, 1999. Plaintiff BellSouth filed a Reply To Joint Memorandum Of Law For Reconsideration And In Opposition To BellSouth's Motion To Stay Order Of The Alabama Public Service Commission, which the court construes as a response ("Response To Motion For Reconsideration"), on April 2, 1999. Defendants KMC, Intermedia, Hyperion, and ITC^DeltaCom Communications ("ITC") filed a Supplemental Memorandum Of Law In Further Support Of Request For Reconsideration Of March 23, 1999 Order ("Supplemental Memorandum") on April 9, 1999. BellSouth filed a Reply To Supplemental Memorandum Of Law In Further Support Of Request For Reconsideration Of March 23, 1999 Order, which the court construes as a response ("Supplemental Response"), on April 22, 1999. Additionally, KMC, Intermedia, Hyperion, and ITC filed a Statement Of Supplemental Authority on July 6, 1999.

Also before the court is a Motion To Vacate This Court's March 23, 1999 Order Granting BellSouth's Motion To Stay Order Of The Alabama Public Service Commission ("Motion To Vacate"), filed by Defendant e.spire Communications, Inc. ("e.spire") on March 31, 1999.

Also before the court is a Motion To Dismiss filed by Defendants Alabama Public Service Commission ("APSC), Jim Sullivan, Jan Cook, and George C. Wallace, Jr. (collectively, "APSC Defendants") on April 19, 1999 together with their Brief In Support Of Motion To Dismiss. On May 14, 1999, BellSouth filed its Opposition To Motion To Dismiss filed by the APSC Defendants, which the court construes as a response. The APSC Defendants filed their Response To BellSouth Telecommunication Inc.'s Memo In Opposition To Motion To Dismiss, which the court construes as a reply.

Also before the court is a Motion To Dismiss, filed by Defendant ICG Telecom Group, Inc. ("ICG") on April 29, 1999 along with ICG's Memorandum In Support Of Motion To Dismiss. Plaintiff BellSouth filed its Response To ICG's Motion To Dismiss on May 14, 1999.

After careful consideration of the arguments of counsel, the relevant law, and the record as a whole, the court finds that: (1) Plaintiff BellSouth's March 22, 1999 Petition is due to be dismissed; (2) Defendants KMC, Intermedia, Hyperion, and ITC's Motion For Reconsideration is due to be denied as moot; (3) Defendant e.spire's Motion To Vacate is due to be denied as moot; (4) the APSC Defendants' Motion To Dismiss is due to be denied as moot; and (5) Defendant ICG's Motion To Dismiss is due to be denied as moot.

BACKGROUND

Prior to enactment of the Telecommunications Act of 1996, 47 U.S.C. § 151, et seq. ("the Act"), telephone service in a geographic area typically was provided by a single company. (Pet. at 4.) The Act was designed to enhance the development of competitive markets, and, to this end, the Act both mandated competition and established procedures and rules for such competition. See 47 U.S.C. §§ 251, 252. "These rules allow new carriers to offer local telephone services by either purchasing the necessary components from another telecommunications provider to create a service or buying the finished service from another provider at wholesale prices in order to resell to local consumers." (Pet. at 4.) For instance, the Act imposes on each telecommunications carrier a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1).[1] Further, each local exchange carrier ("LEC") has a duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5).[2] Additionally, each incumbent local exchange carrier ("incumbent LEC" or "ILEC") has the following duty:

> [To] provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network - (A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and (C) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the [interconnection] agreement and the requirements of this section and section 252 of this title.

47 U.S.C. § 251(c).

The Act provides a four-step process to guide parties toward

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[1]The Act defines "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services...." 47 U.S.C. § 153(44). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Id. § 153(46).

[2]The Act defines "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26).

achieving an interconnection agreement. <u>See</u> 47 U.S.C. § 252. Specifically, § 252 first provides for agreements to be arrived at through negotiation or mediation. 47 U.S.C. § 252(a). Second, if an agreement is not reached via negotiation or mediation, the Act provides for compulsory arbitration. <u>Id.</u> § 252(b). Third, once an agreement is executed, said agreement must be submitted to the state commission for approval, here the APSC. <u>Id.</u> § 252(e). Finally, the United States district courts have exclusive jurisdiction to review a state commission's determination. <u>Id.</u> § 252(e)(6).

Plaintiff BellSouth is an incumbent LEC, and Defendants ITC, ICG, KMC, Intermedia, e.spire, and Hyperion are competitive LECs ("CLEC Defendants"). Pursuant to the Act, BellSouth entered into separate interconnection agreements with the CLEC Defendants. (Pet. at 4-5.) These interconnection agreements were approved by the Alabama Public Service Commission ("APSC"). (<u>Id.</u> at 5.) Each agreement contained reciprocal compensation provisions such that "the parties agreed to pay each other reciprocal compensation only for termination of local traffic originated on the network of one party and terminated on the network of the other party." (<u>Id.</u>)

The Parties dispute "whether calls that connect customers to the Internet are[,] under the Interconnection Agreements and under Federal law, local traffic subject to the reciprocal compensation requirements of the Interconnection Agreements." (Id.) To connect to the Internet, a call is made to an Internet service provider ("ISP"), usually via a seven-digit local number that the customer dials to access the Internet ("ISP calls" or "ISP-bound traffic"). (Id. at 6.) Arguing that "such calls do not fall under the reciprocal compensation provisions," (Id.), BellSouth refused to pay reciprocal compensation for said calls.

Defendants ITC and ICG filed petitions with Defendant APSC ("APSC Petitions"), wherein they "sought a determination...as to whether calls from BellSouth customers to customers of the CLECs that happen to be ISPs are eligible for reciprocal compensation pursuant to the terms of their interconnection agreements." (Memo. For Recons. at 4.) On September 3, 1998, the APSC held a hearing, in which Defendants KMC, Intermedia, e.spire, and Hyperion ("Intervenors") intervened.

On March 4, 1999, the APSC issued its Order, wherein it determined that, "with regard to the interconnection agreements BellSouth entered with ITC DeltaCom, KMC, Intermedia and e.spire, telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone service end user to the respective ISP end users of the effected [sic] CLEC Petitioners/Intervenors qualifies [sic] as local traffic which is subject to reciprocal compensation." In re Emergency Pet. of ICG Telecom Group, Inc. & ITC DeltaCom Communications, Inc. for a Declaratory Ruling, Alabama Public Service Commission Docket No. 26619, 26 (Mar. 4, 1999) ("Order"). Further, the APSC ordered that BellSouth, "within 20 days of the effective date of this order, pay all reciprocal compensation amounts withheld for ISP traffic under their interconnection agreements with ITC DeltaCom, KMC and Intermedia. BellSouth must also continue to pay such amounts for the duration of those interconnection agreements." Id.

On March 22, 1999, BellSouth commenced the above-styled action by filing a Petition For Judicial Review And Complaint For Declaratory Judgment And Other Relief ("Petition") in this court against Defendants ITC, ICG, KMC, Intermedia, e.spire, Hyperion, and APSC. BellSouth seeks the following relief: (1) judicial review of the APSC Order; (2) "a judgment declaring that the telecommunications traffic in question is interstate - not local - in nature, and therefore not subject to the reciprocal compensation provisions of the Interconnection Agreements" (Pet. at 11); and (3) injunctive relief "enjoin[ing] the [APSC] from ordering BellSouth to pay reciprocal compensation for termination of calls delivered to ISP end users, because those calls are interstate in nature." (Id. at 12.)

Also on March 22, 1999, BellSouth filed an Emergency Motion To Pay Into Court Amounts Owed Under The APSC Order ("Emergency Motion"), wherein BellSouth moved the court for leave to deposit into the court sums due to ITC, KMC and Intermedia under the APSC Order. (Emergency Mot. at 3.) On that same date, BellSouth filed a Motion To Stay, wherein BellSouth moved the court to stay the APSC Order. (Mot. To Stay at 2.) The court held a hearing in Chambers on March 23, 1999 and granted both BellSouth's Motion To Stay and Emergency Motion by Order entered March 23, 1999. Subsequently Defendants KMC, ITC, Intermedia, and Hyperion moved the court to reconsider its March 23, 1999 Order. (Mot. For Recons. at 21.) BellSouth replied to said Motion For Reconsideration. (Resp. To Mot. For Recons.)[3] The court now considers BellSouth's Petition.

DISCUSSION

I. Standard and Scope of Review

The Act provides for judicial review by federal district courts as follows:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an

[3]The court notes that the Parties have presented their arguments concerning the likelihood of BellSouth's success on the merits of BellSouth's challenge to the APSC Order. (See Defendants' Mot. For Recons. at 14-20; Plaintiff's Resp. To Mot. For Recons. at 10-13.)

> appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). Although the Act fails to specify either the standard or scope of review, both can be gleaned from case law. The following standard of review has been developed through case law:

> [I]t is neither desirable nor practical for this court to sit as a surrogate public utilities commission to second-guess the decisions made by the state agency to which Congress has committed primary responsibility for implementing the Act.... Rather, this court's principal task is to determine whether the [Commission] properly interpreted and applied the Act, which is <u>a question of federal law that is reviewed de novo. In all other respects, review will be under the arbitrary and capricious standard</u>.

<u>MCI Telecomm. Corp. v. GTE Northwest, Inc.</u>, 41 F. Supp. 2d 1157, 1161 (D. Or. 1999) (emphasis added); <u>see also</u> <u>SouthWestern Bell Tel. Co. v. AT&T Comm.</u>, No. A 97-CA-132 SS, 1998 WL 657717, *3 (W.D. Tex. Aug. 31, 1998) (stating that state commission "interpretations of federal law - either provisions of the statute itself or the applicable FCC regulations - are reviewed de novo" and "determinations of fact and its application of facts to law are reviewed under the 'arbitrary and capricious' standard of review"); <u>AT&T Communications of Southern States, Inc. v. BellSouth Telecommunications, Inc.</u>, 7 F. Supp. 2d 661, 668 (E.D.N.C. 1998); <u>U.S. West Communications, Inc. v. Hix</u>, 986

F. Supp. 13, 19 (D. Colo. 1997). The court hereby adopts this standard.

Regarding the scope of review, "there is general agreement that review under § 252(e)(6) is confined to the administrative record." MCI Telecomm., 41 F. Supp. 2d at 1161; see also U.S. West Communications, Inc. v. Jennings, 46 F. Supp. 2d 1004, 1008 (D. Ariz. 1999). Further, a state commission's actions are not reviewed for compliance with state law. See Illinois Bell Tel. Co. v. WorldCom Tech., Inc., 179 F.3d 566, Nos. 98-3150, 98-4080, 1999 WL 436474, at *5 (7th Cir. Jun. 18, 1999). Thus, the issue before the court is not "whether the [APSC] correctly applied principles of state contract law," Id. at *6; rather, the court's task is "to see whether [the APSC's] decision [regarding reciprocal compensation for telephone connections to Internet service providers] violates federal law, as set out in the Act or in the FCC's interpretation." Id.

II. FCC Declaratory Ruling

On February 26, 1999, the Federal Communications Commission ("FCC") issued its most recent interpretation of the Act in its Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 ("Declaratory Ruling").[4]

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[4]In its Declaratory Ruling, the FCC indicates that a federal ruling on the issue of reciprocal compensation for ISP-bound traffic is forthcoming, but to the court's knowledge no such

Therein the FCC addresses "whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an Internet service provider (ISP)." Decl. Ruling at 1. The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." Id. at 2. The FCC specifically noted, however, that "[t]his conclusion...does not itself determine whether reciprocal compensation is due in any particular instance." Id. Rather, the FCC recognized that "parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic." Id. at 15. Further, "[e]ven where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine...that reciprocal compensation should be paid for this traffic." Id. at 16.

The FCC determined that "neither [the Act] nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances

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federal ruling has been issued as of the date of entry of this Order.

not addressed by section 251(b)(5), so long as there is no conflict with governing federal law." Id. at 17-18. Further, the FCC declared that "[a] state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding - or a subsequent state commission decision that those obligations encompass ISP-bound traffic - does not conflict with any Commission rule regarding ISP-bound traffic." Id. Thus, the FCC concluded:

> We recognize that our conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server, but nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.

Id. at 18 (emphasis added).

III. APSC Order

Subsequent to the FCC's issuance of the Declaratory Ruling, the APSC addressed ICG and ITC's APSC Petitions in its March 4, 1999 Order.. The APSC qualified the scope of its Order, stating that:

> [A]t this juncture...we are not herein determining the generic issue of the jurisdictional nature of ISP traffic. To the contrary, we are considering the jurisdictional nature of such traffic only to the

> extent that it is prudent and necessary to determine <u>the intent of the parties when they entered the interconnection agreements</u> which we have been requested to review.

Order at 8 (emphasis added). Thus, the APSC addressed "whether the parties to the interconnection agreements under review intended, at the time those agreements were entered, to treat telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone exchange service end user to the respective ISP end users of the effected CLEC Petitioners/Intervenors as local traffic subject to the payment of reciprocal compensation." <u>Id.</u> at 20.

The APSC first focused on the actual language of the interconnection agreements. The APSC noted that BellSouth's interconnection agreements with ITC, KMC, e.spire, and Intermedia do not specifically reference ISP traffic. <u>Id.</u> Further, each agreement contains "similar definitions of local traffic and [each] similarly define[s] the reciprocal compensation obligations of the parties." <u>Id.</u> Also, each interconnection agreement has an "Entirety" or "Merger" clause specifying that the agreement "set[s] forth the entire understanding and agreement of the parties." <u>Id.</u> at 22. Assessing these interconnection agreements pursuant to Alabama's rules of contractual interpretation, the APSC determined that, as "none of those agreements address with specificity ISP traffic or the meaning of the word 'terminates' as used in each agreement's definition of local traffic...[t]he silence of the agreements on these important matters does give rise to some reasonable ambiguity concerning the interpretation of the agreements." Id. at 23-24.

Second, the APSC focused on the intent of the Parties because, "[h]aving concluded that the agreements in question are reasonably subject to ambiguity, the determination of the true meaning of the agreements and the intent of the parties becomes a question for the Commission." Id. at 24. The APSC determined that, at the time the interconnection agreements were made, the Parties did not intend to exclude ISP-bound traffic from being subject to the reciprocal compensation provisions. Id. at 26.

The APSC reached this conclusion by examining several factors. Specifically, the APSC noted that, "at the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants including the F.C.C." Id. at 24. Further, the APSC found that "BellSouth was fully aware of the industry's prevailingly local treatment of ISP traffic at the time that it entered the interconnection agreements," noting that "BellSouth itself afforded ISP traffic prevailingly local treatment in the same respects that the CLECs did at that time." Id.

The APSC also found persuasive evidence demonstrating that BellSouth was aware of a 1989 decision of the Florida Public Service Commission ("FPSC"), wherein the FPSC held that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls. Id. at 25 (citing Investigation Into the Statewide Offering of Access to the Local Network for Purposes of Providing Information Services, Docket No. 880423-TP, Order (Sep. 5, 1989, Florida Public Service Commission) ("Florida Order")). Based on BellSouth's knowledge of both industry custom and the Florida Order, the APSC determined that, "[i]f there was indeed no intention to encompass ISP traffic within the meaning of local traffic as BellSouth claims, it is reasonable to assume that BellSouth would have taken steps to specifically exclude[] ISP traffic from the definition of local traffic in light of the Florida [] Order." Id. Indeed, the APSC determined that such prevalent treatment imposed on BellSouth "an obligation to negate such local treatment in the interconnection agreements it entered by specifically delineating that ISP traffic was not to be treated as local traffic subject to the payment of reciprocal compensation," which BellSouth did not do. Id.

Finally, the APSC noted a "conspicuous absence of a mechanism to track, separate and exclude ISP traffic from the local billing records of the CLEC Petitioners/Intervenors." Id. The APSC found this absence to evidence "that BellSouth did not intend to exclude calls to ISPs from the definition of local traffic" because "BellSouth was certainly in a position to know that such a mechanism would be necessary to segregate ISP traffic from local calls." Id.

Based on the foregoing, the APSC concluded that, "with regard to the interconnection agreements BellSouth entered with ITC DeltaCom, KMC, Intermedia and e.spire, telephone calls originating and terminating in the same local calling area from a BellSouth provided telephone service end user to the respective ISP end users of the effected CLEC Petitioners/Intervenors qualifies [sic] as local traffic which is subject to reciprocal compensation." Id. at 26. Further, the APSC determined that "BellSouth was clearly in a position to know that the exclusion of such traffic from the definition of local traffic for purposes of the payment of reciprocal compensation was a necessity." Id. The APSC determined that BellSouth did not incorporate such an exclusion and, thus, was in breach of the interconnection agreements for withholding reciprocal compensation for ISP traffic. Id.

BellSouth now challenges the APSC's Order on the following grounds. First, BellSouth claims that, contrary to the APSC's determination, Internet traffic is jurisdictionally interstate rather than local, as recently determined by the FCC. (Pet. at 7.) Second, BellSouth challenges the APSC's construction of its intent. Specifically, BellSouth attacks the APSC's consideration of BellSouth's treatment of ISP-bound traffic as local. (Reply at 12.)

IV. **Analysis**

Applying the standard of review articulated above, the court finds that BellSouth's challenges to the APSC Order fail and that said Order is due to be affirmed. Initially, the court notes that, while the FCC states in the Declaratory Ruling that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate," Decl. Ruling at 2, the FCC explicitly states that "parties may have agreed to reciprocal compensation for ISP-bound traffic," and that such agreement is permissible absent violation of federal law or regulation. Id. Thus, the court examines the APSC's assessment of the terms to which the Parties agreed and whether such terms violate federal law.

First, the court conducts a de novo review of the APSC's legal conclusion that the interconnection agreements are ambiguous as to whether ISP-bound traffic is subject to the reciprocal compensation provisions. The court applies the following rules of contract construction. "In interpreting a contract, the words of the agreement must be given their ordinary meaning." American Farm Bureau Fed'n v. Alabama Farmers Fed'n, 935 F. Supp. 1533, 1544 (M.D. Ala. 1996), aff'd, 121 F.3d 723 (11th Cir. 1997) (citation omitted). "[A] contract is unambiguous if only one reasonable meaning emerges, and the fact that parties allege different constructions of an agreement does not necessarily establish its ambiguity." Id. (internal citation omitted). That is, "[a] contract term is ambiguous if [it is] 'reasonably susceptible to more than one interpretation....'" Reynolds v. Alabama Dep't of Transp., 926 F. Supp. 1077, 1082 (M.D. Ala. 1996) (quoting Orkin Exterminating Co. v. F.T.C., 849 F.2d 1354, 1360 (11th Cir. 1988)). "To determine whether a writing is ambiguous, the court must first assess the plain meaning of the language of the writing and determine whether there are two possible reasonable interpretations." Id. If there are two possible reasonable interpretations, "the court must strive to give effect to the intention of the parties." Id.

The issue is whether calls to ISPs constitute local traffic subject to the reciprocal compensation provisions.[5] Addressing

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[5]The relevant provisions of the interconnection agreements are as follows:

1. The ITC/BellSouth agreement defines "local traffic" as follows: "'Local traffic' means any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA or a corresponding Extended Area Service

("EAS") exchange." ITC/BellSouth agreement at Attachment B, Item 49. Further, the agreement states that, "[w]ith the exception of the local traffic specifically identified in subsection (C) hereafter, each party agrees to terminate local traffic originated and routed to it by the other party. Each party will pay the other for terminating its local traffic on the others [sic] network the local interconnection rate of $.009 per minute of use in all states...." Id. at August 22, 1997 Fourth Amendment, Item 3.

The court notes that "LATA" is the acronym for "local access transport area," which means:

> [A] contiguous geographic area - (A) established before February 8, 1996, by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State...; or (B) established or modified by a Bell operating company after February 8, 1996, and approved by the Commission.

47 U.S.C. § 153(25).

2. The KMC/BellSouth interconnection agreement defines "local traffic" as:

> [C]alls between two or more Telephone Exchange Service users where both telephone exchange services bear NPA-NXX designations associated with the same local calling area of the incumbent LEC or other authorized area.... Local traffic includes the traffic types that have been traditionally referred to as "local calling" and as "Extended Area Service (EAS)." All other traffic that originates and terminates between the end users within the LATA is toll traffic. In no event shall the local traffic area for purposes of local call termination billing between the parties be decreased.

KMC/BellSouth interconnection agreement § 1.41. Further, the agreement states that "reciprocal compensation" "is as described in the Act and refers to the payment arrangements that recover costs incurred for the transport and termination of telecommunications traffic originating on one party's network and terminating on the other party's network." Id. § 1.59. The

ISP-bound traffic, the FCC has stated that:

> If these [ISP-bound] calls terminate at the ISP's local server (where another (packet-switched) "call" begins),

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agreement also provides that "[t]he parties shall compensate each other for transport and termination of local traffic (local call termination) at a single identical reciprocal and equal rate...." Id. § 5.8.2. Moreover, "[t]he reciprocal compensation arrangements set forth in this agreement are not applicable to switched exchange access service. All switched exchange access service and all intraLATA toll traffic shall continue to be governed by the terms and conditions at the applicable federal and state tariffs." Id. § 5.8.3.

3. The Intermedia/BellSouth agreement defines "local traffic" as "any telephone call that originates in one exchange and terminates in either the same exchange or a corresponding Extended Area Service ("EAS") exchange." Intermedia/BellSouth interconnection agreement § 1.D. Regarding reciprocal compensation, the Intermedia/BellSouth agreement provides that "[e]ach party will pay the other for terminating its local traffic on the others' network the local interconnection rates as set forth in Attachment B-1..." Id. § 4.B.

4. The e.spire/BellSouth agreement defines "local traffic" as "any telephone calls that originate in one exchange and terminate in either the same exchange or a corresponding Extended Area Service ("EAS") exchange." e.spire/BellSouth interconnection agreement at Attachment B, Item 48. Further, the agreement states that:

> The parties agree...that local interconnection is defined as the delivery of local traffic to be terminated on each party's local network so that customers of either party have the ability to reach customers of the other party without the use of access codes or delay in the processing of the call. The parties further agree that the exchange of traffic on BellSouth's Extended Area Service (EAS) shall be considered local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section.

Id. § 7.A.

> as many CLECs contend, then they are intrastate calls, and LECs serving ISPs are entitled to reciprocal compensation for the "transport and termination" of this traffic. If, however, these calls do not terminate locally...then LECs serving ISPs are not entitled to reciprocal compensation under section 251(b)(5).

(Decl. Ruling at 6.) Thus, the central inquiry concerns where such calls terminate. None of the agreements, however, defines the meaning of "terminate." Further, the agreements fail to specifically reference ISP-bound traffic. Thus, the court finds such agreements to be ambiguous as to whether ISP-bound traffic is subject to the reciprocal compensation provisions.

Second, pursuant to the rules of contract construction enunciated above, since the court finds an ambiguity to exist, the next step is to determine the intention of the parties at the time the agreements were entered. See Reynolds, 926 F. Supp. at 1082. The court reviews the APSC's determination of the Parties' intentions under the arbitrary and capricious standard of review.

In determining the Parties' intentions, the APSC considered the following factors: (1) that, "at the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants including the F.C.C." (Order at 24); (2) that "BellSouth was fully aware of the industry's prevailingly local treatment of ISP traffic at the time that it entered the interconnection agreements" (Id.); (3) that "BellSouth itself afforded ISP traffic prevailingly local treatment in the same respects that the CLECs did at that time" (Id.)[6]; (4) that since 1983 the FCC has "treated enhanced service providers, of which ISPs are a subset, as end users under the access charge regime and permitted them to purchase their links to the public switched telephone network through intrastate local business tariffs rather than through interstate access tariffs" (Id. at 24-25);

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[6]Specifically, the APSC focused on the following factors as evidencing BellSouth's treatment of ISP-bound calls:

> [B]oth BellSouth and the CLEC Petitioners/Intervenors charge their ISP customers local business line rates for local telephone exchange service that enables the ISPs' customers to access their service via a local call. The service provided to ISP customers by BellSouth and the CLEC Petitioners/Intervenors falls under their local exchange tariffs and calls to ISPs are rated and billed just as any other local call placed via a seven digit local telephone number. Neither BellSouth nor the CLEC Petitioners/Intervenors assess toll charges for those calls. BellSouth specifically advises consumers subscribing to its Internet service provider that access to the BellSouth ISP is achieved via a local call.
>
> As further indication of the prevailingly local treatment afforded to ISP traffic, BellSouth records the minutes of use associated with such calls as local for ARMIS reporting requirements with the FCC. Further, BellSouth characterizes expenses and revenues associated with ISP-bound traffic as intrastate for jurisdictional separations purposes.

Order at 24.

(5) that BellSouth was aware of the 1989 FPSC decision, "wherein the Florida Commission held that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls" (Id. at 25); and (6) that, when BellSouth entered into the interconnection agreements, no mechanism existed to track, separate, and exclude ISP traffic from the local billing records of the CLEC Petitioners/Intervenors, even though "BellSouth was certainly in a position to know that such a mechanism would be necessary to segregate ISP traffic from local calls." (Id.)

BellSouth challenges the third factor (that BellSouth itself afforded ISP traffic prevailingly local treatment in the same respects that the CLECs did at that time). Specifically, BellSouth argues that, since the FCC requires BellSouth to serve ISPs out of intrastate tariffs, the fact that BellSouth does so does not reflect an intent to pay reciprocal compensation for ISP traffic. (Reply at 12.) BellSouth also contends that the facts that the revenues BellSouth receives from serving ISPs may be counted as intrastate revenues and that the local exchange facilities used to serve ISPs are treated as intrastate for separations or other purposes are not conclusive with respect to BellSouth's intent because "[t]hese facts flow directly from the FCC's decision to treat 'ISP-bound traffic as though it were local.'" (Id. (citation omitted).)

In its Declaratory Ruling, the FCC states that the following evidence is permissible for use by a state commission in making a determination of intent:

> When construing the parties' agreements to determine whether the parties so agreed [whether reciprocal compensation should apply to ISP-bound traffic], state commissions have the opportunity to consider all the relevant facts, including...the conduct of the parties pursuant to those agreements. For example, it may be appropriate for state commissions to consider such factors as whether incumbent LECs serving ESPs (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 purposes 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 traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.

Decl. Ruling at 15-16. The court finds that the evidence challenged by BellSouth is encompassed within the materials specifically contemplated by the FCC for consideration in an intent-determination and, therefore, that it was neither arbitrary nor capricious for the APSC to consider same in making its determination.

The court further finds that the APSC's consideration of the other factors was neither arbitrary nor capricious. Several of these factors, namely the first, second, and fourth, concern the industry's historical treatment of ISP-bound traffic. The FCC's Declaratory Ruling specifically comments on said treatment:

> The Commission's treatment of ESP [enhanced service provider, of which ISPs are a subset] traffic dates from 1983 when the Commission first adopted a different access regime for ESPs. Since then, the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. <u>Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local</u>.

Decl. Ruling at 15 (emphasis added). The FCC explicitly acknowledges that this backdrop may evidence parties' intent concerning the treatment of ISP-bound calls in interconnection agreements:

> Against this backdrop, and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, <u>including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local</u>....

<u>Id.</u> (emphasis added). Thus, the court finds that the APSC's consideration of the first, second, and fourth factors was

permissible and neither arbitrary nor capricious.

Further, the FCC in the Declaratory Ruling explicitly referenced the sixth factor (whether there existed a mechanism to track, separate, or exclude ISP traffic from local billing records of CLECs) as one permissible for examination in making a determination of parties' intent: "[I]t may be appropriate for state commissions to consider...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." Id. at 15-16. Thus, the court finds the APSC's consideration of said factor neither arbitrary nor capricious.

Finally, the court finds that it was neither arbitrary nor capricious for the APSC to take into account BellSouth's knowledge of industry custom (second factor) and knowledge or the 1989 FPSC's decision (fifth factor). Such knowledge, which is not denied by BellSouth, is clearly relevant in determining BellSouth's state of mind at the time the interconnection agreements were entered. Such knowledge inclines the court to agree with the APSC's assessment:

> The prevailingly local treatment afforded to ISP traffic by industry participants at the time the agreements under review were entered, and BellSouth's knowledge of that industry custom and usage, made it imperative that BellSouth specifically exclude calls to

> ISPs from the definition of local traffic subject to the payment of reciprocal compensation. Given the circumstances then existing, we find the absence of such a specific exclusion or exception to be persuasive of the fact that BellSouth did not intend to exclude ISP traffic from the definition of local traffic when it entered the agreements in question.

Order at 26.

The court notes that, in support of its argument that ISP traffic is jurisdictionally interstate, BellSouth references a state commission ruling decided subsequent to the FCC's Declaratory Ruling.[7] In Order Denying Application for Rehearing, Missouri Public Service Commission, Docket NO. TO-98-278 (Mar. 9, 1999), the Missouri Commission construed the FCC Declaratory Ruling as "declar[ing] that traffic delivered to an ISP is interstate in character, thus falling within the primary jurisdiction of the FCC." Id. at 2. As discussed above, the court finds that, while the FCC determined that ISP-bound traffic is primarily interstate in nature, the FCC explicitly stated that

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[7]The court notes that BellSouth also cites Re Pac-West Telecommunications, Inc., Nevada Public Utilities Commission Nos. 98-10015, 99-1007 (Mar. 4, 1999), as a state-commission decision that "found for the incumbent local exchange carrier and against the competitive local exchange carriers." (Reply at 11.) However, as later recognized by BellSouth, the Nevada Commission's decision was subsequently revised in Re Pac-West Telecommunications, Inc., Nevada Public Service Commission Nos. 98-10015, 99-1007, 1999 WL 477181 (Nev. P.S.C. Apr. 8, 1999), wherein the Nevada Commission determined that reciprocal compensation should be paid for ISP-bound traffic when those customers are located within the same local calling area. Id. at *4.

such determination did _not_ preclude a state commission from determining that, at the time the parties entered into an interconnection agreement, the parties intended said agreement to provide reciprocal compensation for ISP-bound traffic. _See_ Decl. Ruling at 18. The FCC further determined that, absent a federal ruling to the contrary, such provision is permissible. _See id._

Further, the court notes three other state commission decisions issued subsequent to the FCC's Declaratory Ruling, wherein each commission found that, given the intent of the parties at the time the agreements were entered, the agreements provided for reciprocal compensation for ISP-bound traffic. _See_ _ICG Telecom Group v. Ameritech OH_, Ohio Public Utilities Commission Nos. 97-1557-TP-CSS, 97-1723-TP-CSS, 98-308-TP-CSS, 1999 WL 485511, at *7 (Ohio P.U.C. May 5, 1999) (upon examination of the Declaratory Ruling, the FCC's existing policies at the time the agreement was entered, conduct of parties pursuant to agreement, practice of serving ISPs out of the local intrastate tariffs, manner in which the revenues from ISP traffic were accounted for, and how end user charges are determined, finding that the parties intended that, "at the time the interconnection agreements were entered into, ISP-bound traffic would be treated as local traffic and subject to reciprocal compensation"); _Re American Communication Serv. of Jacksonville, Inc._, Florida

Public Service Commission Docket No. 981008-TP, 1999 WL 370264, at *4 (Fla. P.S.C. Apr. 6, 1999) (upon consideration of parties' actions subsequent to entering into agreement, finding that "the evidence in this case does not indicate that the parties intended to exclude ISP traffic from the definition of 'local traffic' in their Interconnection Agreement"); Re Electric Lightwave, Inc., Oregon Public Utility Commission Order No. 99-218, 1999 WL 218135, at *2-3 (Or. P.U.C. Mar. 17, 1999) (upon consideration of the FCC Declaratory Ruling and local industry custom, finding that "ISP traffic should remain subject to reciprocal compensation pending adoption of a federal rule establishing an appropriate interstate compensation mechanism").

The court also finds persuasive the Seventh Circuit's recent decision in Illinois Bell Tel. Co. v. WorldCom Tech., Inc., 179 F.3d 566, Nos. 98-3150, 98-3322, 98-4080, 1999 WL 436474 (7th Cir. June 18, 1999). Thus far, the Seventh Circuit is the only Court of Appeals to address the issue "whether a decision of [a state commission] regarding reciprocal compensation for telephone connections to Internet service providers violates federal law." Id. at *1.

In Illinois Bell, the Illinois Commerce Commission ["ICC"] had concluded that the agreements unambiguously provide that, "[s]ince Ameritech Illinois currently charges end users local service charges when completing calls that terminate at the complainants' ISP customers, the plain reading of the interconnection agreements inevitably leads to the conclusion that reciprocal compensation charges should apply to those calls." Id. at *6 (citation omitted). The ICC also assessed the following factors in reaching its conclusion: the situation at the time the agreements were negotiated; the fact that Ameritech's customers do not pay toll charges for calls to their ISP; the fact that Ameritech bills the customer for a local call; the fact that customers dial a local number; and the fact that the calls are routed over local rather than long distance lines. Id.

In assessing the validity of the ICC's findings, the court looked to the FCC's Declaratory Ruling, as well as the intent of the parties. Specifically, the court noted that "the FCC would not agree with Ameritech that it has had a long-standing policy against treating calls to ISPs as local calls." Id. Further, the court noted that "[t]here is nothing in the FCC ruling on reciprocal compensation which would prohibit a call from being a local call for some, but not all, purposes." Id. The court upheld the ICC's findings, noting that "[t]he FCC could not have made clearer its willingness -- at least until the time a rule is promulgated -- to let state commissions make the call." Id.

V. Conclusion

Based on the foregoing, the court finds that the APSC's conclusions of law, findings of fact, and application of said law to the facts survive BellSouth's challenge. Therefore, the court finds that BellSouth's Petition is due to be dismissed in its entirety.

ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that Plaintiff BellSouth's March 22, 1999 Petition be and the same is hereby DENIED, and that the claims contained therein be and the same are hereby DISMISSED.

It is further CONSIDERED and ORDERED that the stay entered by the court on March 23, 1999 be and the same is hereby LIFTED.

It is further CONSIDERED and ORDERED that the funds which were deposited with this court by BellSouth pursuant to the court's March 23, 1999 Order shall be disbursed upon appropriate motion by said Defendants.

It is further CONSIDERED and ORDERED that the Motion For Reconsideration filed by Defendants KMC, Intermedia, and Hyperion be and the same is hereby DENIED AS MOOT.

It is further CONSIDERED and ORDERED that Defendant e.spire's Motion To Vacate be and the same is hereby DENIED AS

MOOT.

It is further CONSIDERED and ORDERED that the APSC Defendants' Motion To Dismiss be and the same is hereby DENIED AS MOOT.

It is further CONSIDERED and ORDERED that Defendant ICG's Motion To Dismiss be and the same is hereby DENIED AS MOOT.

Done this the 18th day of August, 1999.

Ira De Ment
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
****

MICHIGAN BELL TELEPHONE CO.,
d/b/a Ameritech Michigan, Inc.,

Plaintiff,

v

MFS INTELENET OF MICHIGAN, INC.,
TCG DETROIT,
BROOKS FIBER COMMUNICATIONS OF MICHIGAN, INC.,
MCI TELECOMMUNICATIONS CORP.,
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
AT&T COMMUNICATIONS OF MICHIGAN, INC.,
BRE COMMUNICATIONS, LLC,
and
JOHN G. STRAND,
JOHN C. SHEA,
and
DAVID A. SVANDA,
Commissioners of the Michigan Public Service Commission, in their official capacities,

Defendants.
______________________________/

File No. 5:98 CV 18

HON. RICHARD ALAN ENSLEN

JUDGMENT

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment ("Supplemental Brief") (dkt. no. 132) is **DENIED**;

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IT IS FURTHER ORDERED that Defendants' Motions for Summary Judgment ("MPSC Brief in Opposition" and "Carrier Defendants' Joint Supplemental Merits Brief") (dkt. nos. 133 and 134) are **GRANTED**;

IT IS FURTHER ORDERED that judgment is entered for Defendants and against Plaintiff as to counts I, II, and III of Plaintiff's complaint;

IT IS FURTHER ORDERED that counts IV and V of Plaintiff's complaint are dismissed without prejudice.

DATED in Kalamazoo, MI:
Aug 2, 1999

Richard Alan Enslen
RICHARD ALAN ENSLEN
Chief Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
****

mrs /kw

MICHIGAN BELL TELEPHONE CO.,
d/b/a Ameritech Michigan, Inc.,

Plaintiff,

v

File No. 5:98 CV 18

MFS INTELENET OF MICHIGAN, INC.,
TCG DETROIT,
BROOKS FIBER COMMUNICATIONS OF MICHIGAN, INC.,
MCI TELECOMMUNICATIONS CORP.,
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
AT&T COMMUNICATIONS OF MICHIGAN, INC.,
BRE COMMUNICATIONS, LLC,
JOHN G. STRAND,
JOHN C. SHEA,
and
DAVID A. SVANDA,
Commissioners of the Michigan Public Service Commission, in their official capacities,

Defendants.
_____________________________/

HON. RICHARD ALAN ENSLEN

OPINION

Introduction

The subject of this litigation is whether reciprocal compensation between local exchange carriers ("LECs") is due for calls made to internet service providers ("ISPs"). As described in an earlier Opinion in this matter, the Telecommunications Act of 1996, Pub. L. 104-104, 1996 U.S.C.C.A.N. (110 Stat. 56) 10 (codified as amended in scattered sections of Title 47 of the United

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States Code) (hereinafter "the Telecom Act"or "the Act"), was designed to inject competition into the traditionally monopolistic area of local telephone service. To effectuate that goal, the Act requires, among other things, that incumbent LECs enter into interconnection agreements with competing LECs.

In 1997, as a result of the mandate imposed by the Act, Plaintiff Ameritech entered into a number of interconnection agreements with various competing LECs. Those agreements included provisions requiring the Parties to pay reciprocal compensation to one another for local calls initiated by the customer of one Party which were terminated by a customer of the other Party, as also required by the Act. *See* 47 U.S.C. § 251(b)(5). Section 251(b)(5) provides that all LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The corresponding regulations define reciprocal compensation as an "arrangement between two carriers . . . in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e) (1998). "The reciprocal compensation system functions in the following manner: a local caller pays charges to her LEC which originates the call. In turn, the originating carrier must compensate the terminating LEC for completing the call. . . . Reciprocal compensation applies only to 'local telecommunications traffic.' 47 C.F.R. § 51.701(a) (1998). Local telecommunications traffic is defined as traffic that 'originates and terminates within a local service area established by the state commission.'" *Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*, No. 98 C 1925, 1998 WL 419493, *4 (N.D. Ill. July 23, 1998) ("*Illinois Bell I*").

For over a year, both Ameritech and the Defendant competing LECs ("Defendant LECs" or "Carrier Defendants") paid such compensation for calls made to ISPs from an end user within the same local calling area. This case arose when Ameritech, asserting that all calls to ISPs are interstate calls, stopped paying reciprocal compensation to the Defendant competing LECs for those calls.

In response to Plaintiff's unilateral decision to cease payment, each of the Defendant LECs either filed individual complaints with the Michigan Public Service Commission ("MPSC") or intervened in such actions. Ultimately, the complaints were consolidated and the Commissioners found in favor of the Defendant LECs. On January 28, 1998, the Commissioners issued an Order instructing Plaintiff Ameritech to "cease and desist" withholding reciprocal compensation from the competing LECs for calls made to ISPs. The Commissioners ordered Plaintiff to release over S6 Million in back compensation within 10 days, to pay all future charges, and to pay the competing LECs' attorneys fees. In response to the MPSC Order, Plaintiff filed this action, pursuant to 47 U.S.C. § 252(e)(6). This action is in the nature of an appeal of the MPSC Order.[1] *See AT & T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 7 F. Supp.2d 661, 668 (E.D.N.C. 1998).

This matter was stayed on August 26, 1998, pending the FCC's issuance of a declaratory ruling on the question whether reciprocal compensation was due on calls made to ISPs. On February 26, 1999, the FCC issued its *Declaratory Ruling in in CC Docket No. 99-98 and Notice of Proposed*

[1] Though it is not precisely an appeal. *See infra* note 2.

Rulemaking in CC Docket No. 99-68 (Feb. 26, 1999) ("Ruling"). The parties have since filed briefs in which they appear to seek final disposition of this matter in light of the FCC Ruling.[2]

Reciprocal Compensation

Plaintiff's primary argument is that its agreements with the Defendant carriers are to be construed in accordance with federal law, and that the Ruling establishes as federal law that ISP-bound traffic is not local, and, therefore, is not subject to reciprocal compensation. This is only half of the story, however. The other half is that the FCC Ruling also establishes as federal law that until the FCC promulgates rules on this issue, prior state commission determinations on the issue may remain undisturbed. Plaintiff asks the Court to defer to the FCC's determination regarding the nature of ISP-bound traffic, but not to its determination that state commission decisions should control in the interstitial period before rulemaking.

While there are many technical, regulatory, and contractual issues at play here, which are described in detail in the parties' thorough briefing and in cases such as *Illinois Bell I*, the real issue is simply one of deference. As Plaintiff notes, Courts have generally applied a *de novo* standard of review to the legal conclusions of state commissions under the act. *See, e.g., U.S. West Communications. Inc. v. Hix*, 986 F. Supp 13, 19 (D. Colo. 1997). The question of whether ISP-bound calls are "local traffic" subject to reciprocal compensation appears to demand such a legal conclusion. Accordingly, Plaintiff would have the Court perform *de novo* review of the MPSC's determination, employing the FCC's new ruling, as well as other materials, in concluding whether

[2] The parties have not addressed the procedural posture of the briefs they have filed. Each, however, seeks a final resolution of this matter. The Plaintiff asks the Court to "vacate" the MPSC order, Defendants request that the MPSC order be "affirmed." The Court will construe the documents as cross-motions for summary judgment under Fed. R. Civ. P. 56.

it was legally correct. The FCC's new ruling, however, not only presents its opinion on the status of ISP-bound traffic, but, in essence, incorporates state commission determinations on the issue into the federal law of reciprocal compensation, at least for the time being. The question then becomes, has the FCC somehow relieved state commission determinations on this issue from *de novo* district court review? The Court concludes that it has achieved that effect by cloaking state commission determinations within the deference this Court must show to FCC determinations. In other words, while the parties brief extensively what the MPSC *should* have determined, the Court need go little further than what it *did*.

"'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). The Telecom Act was not so specific as to address whether ISP-bound traffic was subject to the Act's reciprocal compensation provisions. Thus, a gap remained for the FCC to fill. The FCC did not hasten to fill it, however, and it was addressed, instead, by state commissions reviewing interconnection agreements. These commissions largely concluded that ISP-bound traffic was local traffic for which reciprocal compensation was required. *See Michigan Bell Tel. Co. v. MFS Intelenet of Michigan*, 16 F. Supp.2d 828, 832 (W.D. Mich. 1998).

In the FCC's February 26, 1999 ruling, it took a step towards filling this particular gap. The FCC determined that "although some Internet traffic is intrastate, a substantial portion of internet traffic involves accessing interstate or foreign websites." Ruling at ¶ 18. Thus, while "jurisdictionally mixed," Ruling at ¶ 19, ISP-bound traffic "appears to be largely interstate." Ruling at ¶ 1. Since reciprocal compensation is due only for local telecommunications traffic, it thus appears that reciprocal compensation may not be due for at least "a substantial portion" of ISP-bound traffic. The FCC continued, however, to state that its ruling on the interstate nature of the calls is not "dispositive of interconnection disputes currently before state commissions." Ruling at ¶ 20. Instead, the FCC left the reciprocal compensation question to the LECs and the state commissions, stating that "[w]here 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*." Ruling at ¶ 22 (emphasis added).

Plaintiff asks the Court to simply disregard this fundamental part of the FCC Ruling as "inapplicable." It contends that (a) it did not agree to pay reciprocal compensation for ISP-traffic and (b) the MPSC's interpretive discretion regarding interconnection agreements is limited by state contract law and cannot be guided by what Plaintiff calls "extrinsic evidence."

Plaintiff argues that its interconnection agreements with the Carrier Defendants provide for reciprocal compensation only "as described in the Act." The Act is defined in the agreements "as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission having authority to interpret the Act within its state of jurisdiction." As noted above, the Plaintiff embraces the FCC's interpretation of the Act, insofar as it determines that ISP traffic "appears to be largely interstate." The Ruling also interprets the Act, however, to provide reciprocal compensation for ISP traffic when a state commission has so interpreted an interconnection agreement. Thus, the interconnection agreements, interpreted in accordance with the Act, currently require reciprocal compensation for ISP traffic.

The FCC has given state commissions wide latitude in interpreting agreements. As noted in the FCC Ruling, the determination of the parties' intentions is left to the state commissions. Thus, Plaintiff's assertion of its intentions is largely irrelevant. What is important is what the MPSC determined its intentions to be, and whether it made that determination in an appropriate manner. The FCC Ruling describes a wide range of matters which may be considered by a state commission in determining the propriety of reciprocal compensation for ISP-bound traffic. As noted by Defendants, the MPSC considered many of the same matters considered relevant by the FCC. Moreover, even if it had not, the items listed by the FCC were described as "illustrative only; state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions." Ruling at ¶ 24. Furthermore, "[e]ven where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."[3] Ruling at ¶ 25. Thus, the Act and the FCC permit state commissions to perform broad interpretation, which may extend beyond the precise language of the agreements themselves. Plaintiff argues that the FCC is not due deference in matters of contract interpretation. This may be true. The construction of interconnection agreements, however, involves not only bare contract interpretation, but policymaking, which is clearly a part of the FCC's and state commissions' domains. The MPSC was not limited to the "four corners" of

[3] It does not seem significant that this matter arises from an enforcement proceeding rather than an arbitration proceeding. *See Michigan Bell Tel. Co. v. Strand*, 26 F. Supp.2d. 993, 999 (W.D. Mich. 1998).

the contract, and could, indeed, rely on "extrinsic evidence" in determining the scope of the parties' interconnection agreements.

This Court's conclusion finds support in *Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*, __F.3d__, No. 98-3150 et al., 1999 WL 436474 (7th Cir. June 18, 1999) (*"Illinois Bell II"*). There, the Seventh Circuit stated:

> Now that the FCC has issued its ruling, and noting again that we defer to its reasonable interpretations of the Act, our task is to examine the ICC order, not to determine whether the ICC correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation.
>
> The short answer is that it does not. The FCC could not have made clearer that in the absence of a rule, a state agency's interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law.

Id. at *6.

Importantly, the Seventh Circuit referred to the FCC determination that state commission decisions should remain in force as part of "the FCC's interpretation of the Act." *Id.* at *7. As such an interpretation, it is entitled to deference. Furthermore, the court stated that it saw "no violation of the Act in giving such deference to state commissions; in fact, the Act specifically provides state commissions with an important role to play in the field of interconnection agreements." *Id.* at *8. This jibes with the principle that *Chevron* deference is particularly appropriate for administrative interpretations involving "a technical area that is highly specialized and requires coordinated management in all its phases." *Indep. Community Bankers Assoc. of South Dakota, Inc. v. Bd. of Govs. of the Fed. Reserve Sys.*, 838 F.2d 969, 975 (8th Cir. 1988). Here, the FCC is engaged in such an area, and has interpreted the Act to provide for a broad range of compensation schemes, consistent with its pursuit of coordinated management.

The Plaintiff has submitted to the Court, as supplemental "authority," a petition for rehearing in the Seventh Circuit of *Illinois Bell II*. The petitioner there describes the panel's opinion as providing "federal courts exclusive jurisdiction over an entire class of cases while withholding the power to decide them." (Petition of Ameritech Illinois for Rehearing at 1.) It does no such thing. Instead, the panel decided, as does this Court, that the FCC Ruling provides, in part, the law by which state commission determinations must be evaluated. The Ruling is apposite authority which guides the determination of "whether the state commission interpretation is correct." (Petition of Ameritech Illinois for Rehearing at 8.) It is true that the FCC Ruling establishes, as a matter of federal law, that essentially all state commission interpretations on this subject are presumptively correct. While that Ruling stands, however, it provides the rule by which courts, following *Chevron*, must decide the issues before them. The *Illinois Bell II* panel and this Court both decide the legality of state commission determinations by applying federal law, which includes, very prominently, FCC interpretations.

The Court concludes that the MPSC acted within the law, and that its Order should stand. The Court will therefore enter judgment for the Defendants on counts I, II, and III of Plaintiff's complaint.

State Law Claims

Under 28 U.S.C. § 1367(c)(3), the district court may decline to exercise supplemental jurisdiction over a claim if it "has dismissed all claims over which it has original jurisdiction[.]" Indeed, "'if the federal claims are dismissed before trial, . . . the state claims [generally] should be dismissed as well.'" *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, (1966)).

The Court concludes that the MPSC's award of attorneys' fees is a matter of state law, reserved to the MPSC by § 252(e)(3). Plaintiff's contention that the MPSC's Order is in violation of state administrative law is, of course, also a state law claim. The Court, therefore, in its discretion, will dismiss without prejudice Plaintiff's state claims contained in counts IV and V of its complaint.

DATED in Kalamazoo, MI:

Aug 2, 1999

RICHARD ALAN ENSLEN
Chief Judge

FILED

1999 MAR 24 P 12:00

CLERK U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

BY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

U S WEST COMMUNICATIONS, INC., Plaintiff, v. WORLDCOM TECHNOLOGIES, INC.; OREGON PUBLIC UTILITY COMMISSION, and ROGER HAMILTON, Chairman, RON EACHUS, Commissioner, and JOAN H. SMITH, Commissioner, in their official capacities as Commissioners of the Oregon Public Utility Commission, Defendants.	Civil No. 97-857-JE **ORDER**

JELDERKS, Magistrate Judge:

The court requested supplemental briefing to determine the effect, if any, upon this case of the Supreme Court's decision in AT&T Corp. v. Iowa Util. Bd., ___ U.S. ___, 119 S. Ct. 721 (1999). After reviewing those briefs, the court sees no reason to modify its earlier rulings, for the reasons set forth in this court's opinion in MCI Telecom. Corp. v. GTE Northwest, Inc., Civil No. 97-1687-JE (March 17, 1999), pp. 4-16, 27-30, and 48-51. The court declines US West's invitation to revisit the issue of compensation for ISP traffic.

Therefore, the court will enter final judgment forthwith.

IT IS SO ORDERED.

DATED this 24 day of March, 1999.

John Jelderks

John Jelderks
United States Magistrate Judge

ICG HOLDINGS INC

Filing Type: 10-K
Description: Annual Report
Filing Date: Mar 30, 1999
Period End: Dec 31, 1998

Primary Exchange: N/A
Ticker: N/A

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET
NO. 990691-TP EXHIBIT NO. 4
COMPANY/
WITNESS: ICG
DATE: 10-7-99

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

X ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 1998

OR

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

(Commission file Number 1-11965)
ICG COMMUNICATIONS, INC.
(Commission file Number 1-11052)
ICG HOLDINGS (CANADA) CO.
(Commission file Number 33-96540)
ICG HOLDINGS, INC.
(Exact names of registrants as specified in their charters)

Delaware Nova Scotia Colorado (State or other jurisdiction of incorporation or organization)	84-1342022 Not applicable 84-1158866 (I.R.S. Employer Identification No.)
161 Inverness Drive West Englewood, Colorado 80112	Not applicable
161 Inverness Drive West Englewood, Colorado 80112	co ICG Communications, Inc. 161 Inverness Drive West P.O. Box 6742 Englewood, Colorado 80155-6742
161 Inverness Drive West Englewood, Colorado 80112 (Address of principal executive offices)	Not applicable (Address of U.S. agent for service)

Registrants' telephone numbers, including area codes: (888) 424-1144 or (303) 414-5000

Securities registered pursuant to Section 12(b) of the Act:

Title of class
Not applicable
Not applicable
Not applicable

Securities registered pursuant to Section 12(g) of the Act:

Title of each class	Name of each exchange on which registered
Common Stock, $.01 par value (46,770,440 shares outstanding on March 29, 1999)	Nasdaq National Market
Not applicable	Not applicable
Not applicable	Not applicable

Indicate by check mark whether the registrants: (1) have filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrants were required to file such reports), and (2) have been subject to such filing requirements for the past 90 days. X Yes No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrants' knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. [ ]

On March 29, 1999 the aggregate market value of ICG Communications, Inc. Common Stock held by non-affiliates (using the closing price of $18.63 on March 29, 1999) was approximately $871,333,297.

ICG Canadian Acquisition, Inc., a wholly owned subsidiary of ICG Communications, Inc., owns all of the issued and outstanding common shares of ICG Holdings (Canada) Co.

ICG Holdings (Canada) Co. owns all of the issued and outstanding shares of common stock of ICG Holdings, Inc.

DOCUMENTS INCORPORATED BY REFERENCE

The definitive Proxy Statement for the 1999 Annual Meeting of Stockholders of ICG Communications, Inc. to be filed with the Securities and Exchange Commission not later than April 30, 1999 has been incorporated by reference in whole or in part for Part III, Items 10, 11, 12 and 13, of the Annual Report on Form 10-K for the fiscal year ended December 31, 1998 of ICG Communications, Inc.

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PART I

Unless the context otherwise requires, the term "Company" or "ICG" means the combined business operations of ICG Communications, Inc. ("ICG") and its subsidiaries, including ICG Holdings (Canada) Co. ("Holdings-Canada") and ICG Holdings, Inc. ("Holdings"); the terms "fiscal" and "fiscal year" refer to ICG's fiscal years ending December 31 for 1997 and 1998 and September 30 for years prior to 1997. The Company changed its fiscal year end to December 31 from September 30, effective January 1, 1997. All dollar amounts are in U.S. dollars.

ITEM 1. BUSINESS

Overview

The Company is one of the nation's leading competitive integrated communications providers ("ICPs"), based on estimates of the industry's 1998 revenue. ICPs seek to provide an alternative to incumbent local exchange carriers ("ILECs"), long distance carriers and other communications service providers for a full range of communications services in the increasingly deregulated telecommunications industry. Through its competitive local exchange carrier ("CLEC") operations, the Company operates fiber networks in regional clusters covering major metropolitan statistical areas in California, Colorado, Ohio, the Southeast and Texas. The Company also provides a wide range of network systems integration services and maritime and international satellite transmission services. Additionally, the Company began providing wholesale network services over its nationwide data network in February 1999. As a leading participant in the rapidly growing competitive local telecommunications industry, the Company has experienced significant growth, with total revenue increasing from approximately $154.1 million for fiscal 1996 to approximately $397.6 million for fiscal 1998. The Company's rapid growth is the result of the initial installation, acquisition and subsequent expansion of its fiber optic networks and the expansion of its communications service offerings.

The Federal Telecommunications Act of 1996 (the "Telecommunications Act") and pro-competitive state regulatory initiatives have substantially changed the telecommunications regulatory environment in the United States. Under the Telecommunications Act, the Company is permitted to offer all interstate and intrastate telephone services, including competitive local dial tone. In early 1997, the Company began marketing and selling local dial tone services in major metropolitan areas in California, Colorado, Ohio and the Southeast and, in December 1998, began offering services in Texas through an acquired business. During fiscal 1997 and 1998, the Company sold 178,470 and 206,458 local access lines, respectively, net of cancellations, of which 354,482 were in service at December 31, 1998. The Company had 29 operating high capacity digital voice switches and 16 data communications switches at December 31, 1998, and plans to install additional switches as demand warrants. As a complement to its local exchange services offered to business end users, the Company markets bundled service offerings provided over its regional fiber network which include long distance, enhanced telecommunications services and data services. Additionally, the Company owns and operates a nationwide data network, with 236 points of presence ("POPs") over which the Company recently began providing wholesale Internet access and enhanced network services to MindSpring Enterprises, Inc. ("MindSpring") and intends to offer similar services to other Internet service providers ("ISPs") and telecommunications providers in the future.

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In developing its telecommunications service offerings, the Company continues to invest significant resources to expand its network. This expansion is being undertaken through a combination of constructing owned facilities, entering into long-term agreements with other telecommunications carriers and through mergers and acquisitions. See "-Recent Developments."

Recent Developments

Sale of Operations of NETCOM On-Line Communication Services, Inc. On January 21, 1998, the Company acquired NETCOM On-Line Communication Services, Inc., a Delaware corporation and provider of Internet connectivity and Web site hosting services and other value-added services located in San Jose, California ("NETCOM") in a transaction accounted for as a pooling of interests for approximately 10.2 million shares of common stock of ICG ("ICG Common Stock"), valued at approximately $284.9 million on the date of the merger. On February 17, 1999, the Company sold certain of the operating assets and liabilities of NETCOM to MindSpring, an ISP located in Atlanta, Georgia. Total proceeds from the sale were $245.0 million, consisting of $215.0 million in cash and 376,116 shares of unregistered common stock of MindSpring, valued at approximately $79.76 per share at the time of the transaction. Assets and liabilities sold to MindSpring include those directly related to the domestic operations of NETCOM's Internet dial-up, dedicated access and Web site hosting services. On March 16, 1999, the Company sold all of the capital stock of NETCOM's international operations for total proceeds of approximately $41.1 million. MetroNET

Communications Corp. ("MetroNET"), a Canadian entity, and Providence Equity Partners ("Providence"), located in Providence, Rhode Island, together purchased the 80% interest in NETCOM Canada Inc. owned by NETCOM for approximately $28.9 million in cash. Additionally, Providence purchased all of the capital stock of NETCOM Internet Access Services Limited, NETCOM's operations in the United Kingdom, for approximately $12.2 million in cash. The Company expects to record a combined gain on the NETCOM transactions of approximately $200 million, net of income taxes of approximately $6.5 million, during the three months ended March 31, 1999.

In conjunction with the sale to MindSpring, the legal name of the NETCOM subsidiary was changed to ICG PST, Inc. ("PST"). PST has retained the domestic Internet backbone assets formerly owned by NETCOM which include 236 POPs serving approximately 700 cities nationwide. PST intends to utilize the retained network operating assets to provide wholesale Internet access and enhanced network services to MindSpring and other ISPs and telecommunications providers. On February 17, 1999, the Company entered into an agreement to lease to MindSpring for a one-year period the capacity of certain network operating assets for a minimum of $27.0 million, although subject to increase dependent upon network usage. MindSpring will utilize the capacity to provide Internet access to the dial-up services customers formerly owned by NETCOM. In addition, the Company will receive for a one-year period 50% of the gross revenue earned by MindSpring from the dedicated access customers formerly owned by NETCOM.

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Effective November 3, 1998, the Company's board of directors adopted the formal plan to dispose of the operations of NETCOM and accordingly, the Company's consolidated financial statements reflect the operations of NETCOM as discontinued for all periods presented. For fiscal 1996, 1997 and 1998, NETCOM reported revenue of $120.5 million, $160.7 million and $164.6 million, respectively, and EBITDA (before nonrecurring charges) of $(31.0) million, $(9.4) million and $(14.7) million, respectively.

Announcement of New Service Offerings. In August 1998, the Company began offering enhanced telephony services via Internet protocol ("IP") technology. The Company currently offers these services in 230 major cities in the United States, covering more than 90% of the commercial long distance market. The Company carries the IP traffic over its nationwide data network and terminates a large portion of the traffic via its own POPs, thereby eliminating terminating charges from the use of other carriers' network facilities. Calls that cannot be terminated over the Company's own facilities are billed at higher per minute rates to compensate for the charges associated with using other carriers' facilities. The Company currently does not generate any significant revenue from this service.

In December 1998, the Company announced its plans to offer three new network services, to be available beginning in early 1999:

Modemless remote access service ("RAS") allows the Company to provide modem access at its own switch location, rather than requiring ISPs to deploy modems physically at each of their POPs. This service will enable the Company to act as an aggregator for ISP traffic while limiting the ISP's capital deployment. Through its strategic relationship with Lucent Technologies, Inc. ("Lucent"), the Company is currently retrofitting all of its Lucent-5ESS switches with the new Lucent product that allows for RAS functionality. This service eliminates the need for ISPs to separately purchase modems and shifts the network management responsibilities to the Company. The Company plans to be the first to market RAS using Lucent's modem technology and expects the service will be available to customers in the second quarter of 1999.

Through the same technology that allows it to provide RAS, the Company plans to offer interLATA (local access and transport area) expanded originating service ("EOS"), enabling regional or local ISPs to expand their geographical footprint outside their current physical locations by carrying the ISP's out-of-region traffic on the Company's own nationwide data network. The Company will initially offer this service within its CLEC regional clusters during the first quarter of 1999, and plans to expand EOS offerings to other areas as demand warrants.

Through digital subscriber line ("DSL") technology, the Company plans to provide high-speed data transmission services primarily to business end users and, on a wholesale basis, to ISPs. DSL technology utilizes the existing ILEC twisted copper pair connection to the customer, giving the customer significantly greater bandwidth, and consequently speed, when connecting to the Internet. The Company expects to offer DSL in over 400 central offices by the end of 1999 through alliances with other companies focusing on DSL service. For example, on February 18, 1999, the Company entered into a letter of intent with NorthPoint Communications, Inc., a privately held data CLEC based in San Francisco, California ("NorthPoint"). If this agreement is finalized, NorthPoint will be designated as the Company's preferred DSL provider for a two-year period

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and the Company will purchase up to 75,000 DSL lines from NorthPoint over the two-year term. This alliance will enable the Company to accelerate the expansion of its DSL service offerings and allow NorthPoint to gain access to the Company's collocation facilities in markets where NorthPoint currently has limited or no operations. If the agreement is finalized, NorthPoint will provision and manage all of the Company's DSL services offered under this agreement. The Company expects to begin offering DSL services under this agreement in the second quarter of 1999.

Acquisition of CSWICG ChoiceCom, L.P. In January 1997, the Company announced a strategic alliance with Central and South West Corporation ("CSW") formed for the purpose of developing and marketing telecommunications services in certain cities in Texas. Based in Austin, Texas, the venture entity was a limited partnership named CSWICG ChoiceCom, L.P. ("ChoiceCom"). On December 31, 1998, the Company purchased 100% of the partnership interests in ChoiceCom from CSW for approximately $55.7 million in cash and the assumption of certain liabilities of approximately $7.3 million. In addition, the Company converted approximately $31.6 million of receivables from prior advances made to ChoiceCom by the Company to its investment in ChoiceCom. The acquired company currently provides local exchange and long distance services in Austin, Corpus Christi, Dallas, Houston and San Antonio, Texas. For fiscal 1997 and 1998, ChoiceCom reported revenue of $0.3 million and $5.8 million, respectively, and EBITDA losses (before nonrecurring charges) of $(5.5) million and $(13.6) million, respectively.

Acquisition of DataChoice Network Services, L.L.C. On July 27, 1998, the Company acquired DataChoice Network Services, L.L.C., a Colorado limited liability company providing point-to-point data transmission resale services through its long-term agreements with multiple regional carriers and nationwide providers ("DataChoice"). The Company paid total consideration of approximately $5.9 million, consisting of 145,997 shares of ICG Common Stock and approximately $1.1 million in cash. The historical results of operations of DataChoice are not significant to the Company's consolidated results of operations.

Acquisition of NikoNET, Inc. The Company completed a series of transactions on July 30, 1998 to acquire NikoNET, Inc., CompuFAX Acquisition Corp. and Enhanced Messaging Services, Inc. (collectively, "NikoNET"). The Company paid total consideration of approximately $13.8 million in cash, which included dividends payable by NikoNET to its former owners and amounts to satisfy NikoNET's former line of credit, assumed approximately $0.7 million in liabilities and issued 356,318 shares of ICG Common Stock with a fair market value of approximately $10.7 million on the date of the acquisition, for all the capital stock of NikoNET. Located in Atlanta, Georgia, NikoNET provides broadcast facsimile services and enhanced messaging services to financial institutions, corporate investor and public relations departments and other customers. The Company believes the acquisition of NikoNET enables the Company to offer expanded services to its existing customers. The historical results of operations of NikoNET are not significant to the Company's consolidated results of operations.

Discontinuance of Operations of Zycom. Due primarily to the loss of a major customer, which generated a significant obligation under a volume discount agreement with its call transport provider, the board of directors of Zycom Corporation, a 70%-owned subsidiary of the Company which operated an 800888900 number services bureau and switch platform ("Zycom"), approved a plan on August 25, 1998 to wind down and ultimately discontinue Zycom's operations. On October

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22, 1998, Zycom completed the transfer of all customer traffic to other providers and on January 4, 1999, the Company completed the sale of the remainder of Zycom's operating assets to an unrelated third party. For fiscal 1996, 1997 and 1998, Zycom reported revenue of $14.9 million, $28.3 million and $17.0 million, respectively, and EBITDA (before nonrecurring charges) of $0.6 million, $(2.7) million and $(3.3) million, respectively. The Company's consolidated financial statements reflect the operations of Zycom as discontinued for all periods presented.

Sale of Satellite Services Operating Subsidiaries. On August 12 and November 18, 1998, the Company completed the sales of the capital stock of MarineSat Communications, Inc. ("MCN") and Nova-Net Communications, Inc. ("Nova-Net"), respectively, two wholly owned subsidiaries within the Company's Satellite Services operations. MCN is a Florida-based provider of cellular and satellite communications for commercial ships, private vessels and land-based mobile units. Nova-Net provides private data networks utilizing very small aperture terminals ("VSATs") and specializes in data collection and in monitoring and control of customer production and transmission facilities in various industries, including oil and gas, electric and water utilities and environmental monitoring industries. The Company recorded a gain on the sale of MCN of approximately $0.9 million and a loss on the sale of Nova-Net of approximately $0.2 million in its consolidated statement of operations during fiscal 1998. The Company believes that the dispositions of MCN and Nova-Net will further management's ability to focus on the development and deployment of its core Telecom Services. The combined historical results of operations of MCN and Nova-Net are not significant to the Company's consolidated results of operations. The Company's remaining Satellite Services operations consists principally of the operations of Maritime Telecommunications Network, Inc. ("MTN"). See "-Satellite Services."

Financings. On February 12, 1998, ICG Services, Inc., a Delaware corporation and newly formed wholly owned subsidiary of the Company ("ICG Services"), completed a private placement of 10% Senior Discount Notes due 2008 (the "10% Notes") for gross proceeds of approximately $300.6 million. Net proceeds from the offering, after underwriting and other offering costs of approximately $9.7 million, were approximately $290.9 million. The 10% Notes are unsecured senior obligations of ICG Services that mature on February 15, 2008, at a maturity value of $490.0 million. Interest will accrue at 10% per annum, beginning February 15, 2003, and is payable in cash each February 15 and August 15, commencing August 15, 2003. The 10% Notes have been registered under the Securities Act of 1933, as amended (the "Securities Act").

On April 27, 1998, ICG Services completed a private placement of 9 78% Senior Discount Notes due 2008 (the "9 78% Notes") for gross proceeds of approximately $250.0 million. Net proceeds from the offering, after underwriting and other offering costs of approximately $7.9 million, were approximately $242.1 million. The 9 78% Notes are unsecured senior obligations of ICG Services that mature on May 1, 2008, at a maturity value of $405.3 million. Interest will accrue at 9 78% per annum, beginning May 1, 2003, and is payable in cash each May 1 and November 1, commencing November 1, 2003. The 9 78% Notes have been registered under the Securities Act.

ICG Equipment, Inc. In January 1998, the Company formed ICG Equipment, Inc., a Colorado corporation and wholly owned subsidiary of ICG Services ("ICG Equipment"), for the principal purpose of purchasing telecommunications equipment, software, network capacity and related services for sale or lease to

other operating subsidiaries of ICG ("Holdings' Subsidiaries"). By purchasing assets through ICG Equipment, the Company defers sales tax on asset purchases over the term of the operating leases between ICG Equipment and Holdings' Subsidiaries, which sales tax would otherwise be paid in full at the time of the purchase. The equipment and services provided to Holdings' Subsidiaries are utilized to upgrade and expand the Company's network infrastructure. All such arrangements are intended to be conducted on the basis of fair market value and on comparable terms that Holdings' Subsidiaries would be able to obtain from a third party. As of December 31, 1998, approximately $195.0 million of telecommunications equipment, software, network capacity and related services were under lease to Holdings' Subsidiaries by ICG Equipment.

Telecom Services

The Company operates local exchange networks in the following markets within its regional clusters: California (Sacramento, San Diego and portions of the Los Angeles and San Francisco metropolitan areas); Colorado (Denver, Colorado Springs and Boulder); Ohio (Akron, Cincinnati, Cleveland, Columbus, and Dayton); the Southeast (Atlanta, Georgia; Birmingham, Alabama; Charlotte, North Carolina; Louisville, Kentucky; and Nashville, Tennessee); and Texas (Austin, Corpus Christi, Dallas, Houston and San Antonio). The Company will continue to expand its network through construction, leased facilities and strategic alliances and, potentially, through acquisitions. The Company's operating regional fiber networks have grown from 2,143 fiber route miles at the end of fiscal 1996 to 4,255 fiber route miles as of December 31, 1998. Telecom Services revenue has increased from approximately $72.8 million for fiscal 1996 to approximately $303.3 million for fiscal 1998. Since February 1999, the Company also operates a nationwide data network with 236 POPs over which the Company provides wholesale Internet access services to MindSpring and intends to provide such services and enhanced network services to other ISPs and telecommunications providers in the future.

Strategy

The Company's objective is to be a premier provider of high quality communications services to its targeted business, ISP and carrier customers. The key elements of this strategy are:

Increase Revenue and Margins through Bundled Services to Business End Users. The Company believes that its commercial customers are increasingly demanding a broad, full service approach to providing telecommunications services. By offering integrated technology-based communications solutions, management believes the Company will be better able to capture business from telecommunications-intensive commercial accounts. To this end, the Company is complementing its competitive local service offerings with long distance and data service offerings, including its recently offered IP telephony services, and marketing these combined products through ICG's direct sales force and sales agents. Management believes a targeted business end user strategy can better leverage ICG's network footprint and telecommunications investment.

Increase Revenue and Margins through New Wholesale Network Products Offered to ISPs and Telecommunications Providers. The Company believes the Internet business is one of the fastest growing segments of the telecommunications service sector, thereby providing enormous growth opportunities for network

service providers supporting the growing base of ISPs. The Company plans to take advantage of these opportunities through the offering of wholesale Internet access and other enhanced network services to ISPs and other telecommunications providers, and expanding its current primary rate interface ("PRI") offerings with RAS, EOS and DSL. See "-Recent Developments." Management believes these new products will leverage the Company's relationships with ISPs and will position the Company to lead in the provisioning of new services to this emerging customer base.

Concentrate Networks in Regional Clusters. The Company believes that by focusing on regional clusters it will be able to more effectively service its customers' needs and efficiently market, operate and control its networks and expanded service offerings. As a result, the Company has concentrated its fiber networks in regional clusters serving major metropolitan areas in California, Colorado, Ohio, the Southeast and Texas.

Networks

The Company's networks generally comprise fiber optic cables, switching facilities, advanced electronics, transmission equipment and related wiring and equipment. The Company typically designs a ring architecture with a view toward making the network accessible to the largest concentration of telecommunications-intensive businesses in a given market.

The Company's networks are generally configured in redundant synchronous optical network ("SONET") rings that offer the advantage of uninterrupted service in the event of a fiber cut or equipment failure, resulting in limited outages and increased network reliability. The Company generally markets its services at prices below those charged by the ILEC. Management believes these factors combine to create a more reliable and cost effective alternative to ILEC networks and services.

The Company's networks are constructed to access long distance carriers as well as areas of significant end user telecommunications traffic in a cost efficient manner. The construction period of a new network varies depending upon the scope of the activities, such as the number of backbone route miles to be installed, the initial number of buildings targeted for connection to the network backbone and the general deployment of the network infrastructure. Construction is planned to allow revenue-generating operations to commence prior to the completion of the entire network backbone. When constructing and relying principally on its own facilities, the Company has experienced a period of 12 to 18 months from initial design of a network to revenue generation from such network. Based upon its experience of using ILEC facilities to provide initial customer service and the Company's agreements to use utilities' existing fiber, the Company has experienced revenue generation within nine months after commencing network design. After installing the initial network backbone, extensions to additional buildings and expansions to other regions of a metropolitan area are evaluated, based on detailed assessments of market potential. The Company is currently expanding all of its existing networks to reduce its reliance on the ILECs and evaluating development of new networks both inside and outside its existing regional clusters.

Switched services involve the transmission of voice, video or data to long distance carrier-specified or end user-specified termination sites. The switch is required in order for the Company to provide the full range of local telephone services. By contrast, the special access services provided by the

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Company and other CLECs involve a fixed communications link or "pipe," usually between an end user and a specific long distance carrier's POP. With a switch and interconnection to various carriers' networks, it is possible for the Company to direct a long distance carrier's traffic to any end user regardless of whether the end user is physically connected to the Company's owned or leased network. The Company is marketing and selling competitive local dial tone services in California, Colorado, Ohio, the Southeast and Texas. See

"-Regulation - State Regulation."

The Company's network monitoring center in Denver, Colorado monitors and manages the Company's regional fiber networks and provides high-level monitoring of the Company's local exchange switches. Centralized electronic monitoring and control of the Company's networks allows the Company to avoid duplication of this function in each city, thereby reducing costs.

The Company owns and operates a nationwide data network consisting of 236 POPs and 13 hubs containing frame relay switches and high-performance routers connecting a backbone of leased Asynchronous Transfer Mode ("ATM") switches and leased high-speed dedicated data lines in the United States. The design and architecture of the physical network permits the Company to offer highly flexible, reliable high-speed services to its customers. The data network infrastructure is monitored by a network operations center in San Jose, California.

Services

The Company's competitive local exchange services include local dial tone, long distance, enhanced telephony, data, special access and interstate and intrastate switched access services. Competitive local dial tone services consist of basic local exchange lines and trunks for business, related line features (such as voice mail, Direct Inward Dialing (DID), hunting and custom calling features), local calling, and intraLATA, also called local toll, calling. The Company believes that having a full complement of communications services, including local, long distance and data services, will strengthen its overall market position and help the Company to better penetrate the local exchange marketplace. The Company has also developed long distance services, including calling and debit cards, to complement its local exchange services family of products. The Company offers a bundled service of local, long distance and data services, delivered over a T-1 connection in several markets and intends to expand this bundled service offering to its remaining markets in the future.

The Company offers long distance services to end user customers. Although the Company carries some of its long distance traffic on its own switches, it relies upon obtaining long distance transmission capacity from other carriers to provide its services. Therefore, the Company has entered into transmission agreements, which typically provide for transmission on a per minute basis, with long distance carriers to fulfill such needs. To reduce its cost of services, the Company leases point-to-point circuits on a monthly or longer term fixed cost basis where it anticipates high traffic volume.

The Company also offers enhanced telephony services via IP technology in 230 major cities in the United States, covering more than 90% of the commercial long distance market. The Company carries the IP traffic over its nationwide data network and terminates a large portion of the traffic via its own POPs, thereby eliminating terminating charges from the use of other carriers' network

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facilities. Calls that cannot be terminated over the Company's own facilities are billed at higher per minute rates to compensate for the charges associated with using other carriers' facilities.

Private line services are generally used to connect the separate locations of a single business outside of the local calling area or LATA. Special access services are generally used to connect end user customers to a long distance telephone carrier's facilities, to connect long distance carrier's facilities to the local telephone company's central offices, and to connect different facilities of the same long distance carrier or facilities of different long distance carriers all within the same LATA. As part of its initial "carrier's carrier" strategy, the Company targeted the transport between long distance company facilities and the local telephone company central offices, and, for high volume customers, between the long distance company and the end user customer's office. In order to leverage its significant network investment, the Company also markets these services directly to end user business customers.

The Company's interstate and intrastate switched access services include the transport and switching of calls between the long distance carrier's facilities and either the local telephone company's central offices or end users. By performing the switching services, the Company can reduce the long distance carriers' local access costs, which constitute their major operating expense. Until recently, the Company experienced negative operating margins from the provision of wholesale switched services because it relies on ILEC networks to terminate and originate customers' switched traffic. The Company has raised prices on its wholesale switched services product in order to improve margins and has de-emphasized its wholesale switched services to focus on its higher margin products.

The Company's Signaling System 7 ("SS7") services provide signaling connections between long distance and local exchange carriers, and between long distance carriers' networks. SS7, sometimes referred to as "look-ahead routing," is used by local exchange companies, long distance carriers, wireless carriers and others to signal between network elements, creating faster call set-up and resulting in more efficient use of network resources. SS7 is now the standard method for telecommunications signaling worldwide. The Company has deployed signal transfer points ("STPs") throughout its networks to efficiently route SS7 data across the United States. SS7 is also the enabling technology for advanced intelligence network platforms, a set of services and signaling options that carriers can use to create new services or customer options. Carriers purchase connections into the Company's SS7 network, and also purchase connections to other local and long distance carriers on a monthly recurring basis. The Company has also developed a nationwide SS7 service with Southern New England Telecommunications Corporation ("SNET"), a subsidiary of SBC Communications, Inc. The Company believes that, together with SNET, it is one of the largest independent suppliers of SS7 services. The Company's STPs are integrated with two SNET "gateway" STPs in Connecticut.

Through NikoNET, the Company provides broadcast facsimile services and enhanced messaging services to financial institutions, corporate investor and public relations departments and other customers. NikoNET also provides facsimile to e-mail and e-mail to facsimile translation services. This product leverages the Company's network and creates high margin minutes of use.

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As part of its new strategy to maximize the value of its nationwide data network by including high-growth ISPs in its customer base, the Company is currently offering Internet access services and recently announced its plans to offer other new wholesale network services, including RAS, EOS and DSL, to ISPs, to be available beginning in early 1999. See "-Recent Developments."

Industry

The Company operates in the local telephone services market as an ICP. The Company is competing in the local, long distance, enhanced telephony and data communications markets, to provide "full service" to its business, ISP and carrier customers. The Company believes it can maximize revenue and profit opportunities by leveraging its extensive network facilities in providing multiple communications services to its customers.

Local telephone service competition was made possible by the Telecommunications Act and by deregulatory actions at the state level. Prior to passage of the Telecommunications Act, firms like the Company were generally limited to providing private line and special access services. These firms, including the Company, installed fiber optic cable connecting long distance telephone carriers' POPs within a metropolitan area and, in some cases, connecting end users (primarily large businesses and government entities) with long distance carrier POPs. The greater capacity and economies of scale inherent in fiber optic cable enabled competitive access providers to offer customers less expensive services at higher quality than the ILECs.

The Telecommunications Act, subsequent Federal Communications Commission ("FCC") decisions and many state legislative and regulatory initiatives have substantially changed the telecommunications regulatory environment in the United States. Due to these regulatory changes, CLECs are now legally able to offer many communications services, including local dial tone and all interstate and intrastate switched services, effectively opening up the local telephone market to full competition. Because of these changes in state and federal regulations, CLECs have expanded their services from providing competitive access and private line services to providing all local exchange services to become true competitors to the ILECs. See "-Regulation."

Network Services

Through the Company's wholly owned subsidiary, ICG Fiber Optic Technologies, Inc. ("FOTI"), the Company supplies information technology services and selected networking products, focusing on network design, installation, maintenance and support for a variety of end users, including Fortune 1000 firms and other large businesses and telecommunications companies. Revenue from Network Services was approximately $53.9 million for fiscal 1998.

The Company provides network infrastructure, systems and support services, including the design, engineering and installation of local and wide area networks ("LANsWANs") for its customers. These networks (within end user offices, buildings or campuses) may include fiber optic, twisted-pair, coaxial and other network technologies. The Company specializes in turnkey network installations including cabling and electronics that address specific requirements. The Company also provides professional network support services.

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These services include move, add and change services and ongoing maintenance and support services. Network Services revenue is expected to constitute a smaller percentage of the Company's future revenue as Telecom Services revenue increases.

The Company offers these network integration and support services through offices located within five regions. The regional headquarters are located in Dallas, Denver, Portland (Oregon), Los Angeles and San Francisco.

Satellite Services

The Company's Satellite Services operations consist of satellite voice, data and video services provided to major cruise lines, the U.S. Navy, the offshore oil and gas industry and other ICPs. The Company also owns a teleport facility which provides international voice and data transmission services. Revenue from Satellite Services was approximately $40.5 million for fiscal 1998.

MTN. MTN provides digital wireless communications through satellites to the maritime cruise industry, U.S. Navy vessels and offshore oil and gas platforms utilizing an experimental radio frequency license and a grant of Special Temporary Authority ("STA") issued by the FCC. MTN provides private communications networks to various cruise lines allowing for the transmission of data communications and allowing passengers to make calls from their cabins to anywhere in the world. MTN additionally provides its communications services to seismic vessels, to commercial shipping vessels and to the U.S. Navy in conjunction with a major long distance provider, which serves as the long distance carrier, while MTN provides the shipboard communications equipment. The Company believes that the radio spectrum employed under an experimental license and a grant of STA, which uses C-band radio frequencies, enables it to provide a higher quality maritime service than is available through the radio frequencies currently allocated to other maritime service providers.

In April 1996, the FCC issued a waiver allowing MTN to apply for a permanent FCC license to utilize C-band frequencies authorized under a previously issued experimental license. MTN's application is pending. Additionally, in January 1997, the FCC granted the STA, which enables MTN to conduct operations, for up to an initial six-month period, which period can be renewed for six-month terms, while the FCC's review of the permanent license application is pending. The most recent extension of the STA was received by MTN on January 29, 1999. MTN's FCC experimental license allows it to operate its shipboard earth stations on a fixed and mobile basis throughout domestic waters on a non-interference basis using C-band frequencies. MTN filed an application for renewal of the experimental authorization on January 22, 1999. MTN may continue to operate under the terms of its experimental authorization pending action on the renewal application. There can be no assurance that the Company will be granted permanent licenses, that the experimental license and STA currently being used will continue to be renewed for future terms or that any license granted by the FCC will not require substantial payments from the Company. See "-Regulation."

Teleport. The teleport in Holmdel, New Jersey, acquired as part of the Company's acquisition of MTN, is located 20 miles south of Newark and specializes in international digital voice and data communications services with

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full fiber interconnect to the local telephone company facilities in New York City. Teleport services are also provided to the maritime industry, including support of the Company's cruise ship, U.S. Navy and offshore oil platform telephone and data services business. In addition, the Company markets the resale of services from the four teleports it sold in 1996.

Customers And Marketing

The Company's primary marketing strategies for Telecom Services are to offer a broad range of local, long distance, enhanced telephony and data services, to the Company's business and ISP customers at cost effective rates. Wholesale customers typically re-market the Company's services to the retailer's end user, under the retailer's brand name. The Company markets its services in regional clusters, which it believes is the most effective and efficient way to penetrate its markets.

The Company markets its Telecom Services products through direct sales to end users and wholesale accounts, sales agents and direct mail, to a limited extent. Telecom Services revenue from major long distance carriers and resellers constituted approximately 83%, 76% and 34% of the Company's Telecom Services revenue in fiscal 1996, 1997 and 1998, respectively. The balance of the Company's Telecom Services revenue was derived from end users. The Company anticipates revenue from business and ISP customers will increase in the future as it continues to expand its bundled service offerings, increases its sales and marketing teams and focuses more on these segments of the market. In support of this strategy, the Company has substantially increased its direct sales and marketing staff. Telecommunications service agreements with its customers typically provide for terms of one to five years, fixed prices and early termination penalties.

The Company has telecommunications sales offices in: Irvine, Los Angeles, Oakland, Sacramento, San Diego, San Francisco and San Jose, California; Denver, Colorado Springs and Boulder, Colorado; Akron, Columbus, Dayton, and Independence, Ohio; Birmingham, Alabama; Atlanta, Georgia; Louisville, Kentucky; Charlotte, North Carolina; and Nashville, Tennessee; and Austin, Corpus Christi, Dallas, Houston and San Antonio, Texas. The Company's marketing staff is located in Denver, Colorado.

The Company markets its network systems integration products and services through a direct sales force located in the Rocky Mountains, Pacific Northwest, Texas and California regions. The Company also has entered into resale agreements with manufacturers of network integration products and services.

The Company offers satellite private line transmission services from its teleport to business customers that can benefit from the Company's international and domestic transmission capabilities. The Company also markets voice and data communications to the maritime industry, including cruise ships, U.S. Navy vessels, offshore oil and gas platforms and mobile land-based units.

The Company is currently utilizing its nationwide data network to provide wholesale Internet access services to MindSpring for a one-year period. During the term of this agreement, the Company plans to evaluate various strategies to identify and market similar services and other enhanced network services to

primarily local and regional ISPs and other telecommunications providers.

Competition

The Company operates in an increasingly competitive environment dominated by the ILECs, mainly the Regional Bell Operating Companies ("RBOCs") and GTE which are among the Company's current competitors. Also included among the Company's current competitors are other ILECs, other CLECs, other ICPs, network systems integration service providers, microwave and satellite service providers, teleport operators and private networks built by large end users. Potential competitors (using similar or different technologies) include cable television companies, utilities, ISPs, ILECs outside their current local service areas, and the local access operations of long distance carriers. Consolidation of telecommunications companies, including mergers between certain of the RBOCs, between long distance companies and cable television companies and between long distance companies and CLECs, and the formation of strategic alliances within the telecommunications industry, as well as the development of new technologies, could give rise to increased competition. One of the primary purposes of the Telecommunications Act is to promote competition, particularly in the local telephone market. Since the enactment of the Telecommunications Act, several telecommunications companies have indicated their intention to aggressively expand their ability to address many segments of the telecommunications industry, including segments in which the Company participates and expects to participate. This may result in more participants than can ultimately be successful in a given market.

Telecom Services. The bases of competition in competitive local telecommunications services are generally price, service, reliability, transmission speed, technological innovation and availability. The Company believes that its expertise in developing and operating highly reliable, advanced digital networks which offer substantial transmission capacity at competitive prices enables the Company to compete effectively against the ILECs, other CLECs and others providing local and enhanced telephony services.

In every market in which the Company operates telecom service networks, the ILECs (which are the historical monopoly providers of local telephone services) are the primary competitors. The ILECs have long-standing relationships with their customers and provide those customers with various transmission and switching services. The ILECs also have the potential to subsidize access and switched services with revenue from a variety of businesses and historically have benefited from certain state and federal regulations that have favored the ILECs over the Company. In certain markets where the Company operates, other CLECs also operate or have announced plans to enter the market. Some of those CLECs are affiliated with major long distance companies which have resources available to sustain an initially capital-intensive business through the point of profitability. Current competitors also include network systems integration services providers, wireless telecommunications providers and private networks built by large end users. Additional competition may emerge from cable television operators and electric utilities. Many of the Company's actual and potential competitors have greater financial, technical and marketing resources than the Company.

In addition, the long distance and data transmission businesses are extremely competitive and prices have declined substantially in recent years and are expected to continue to decline.

As a recent entrant into the wholesale network services sector, the Company faces competition from existing providers of the Company's planned services, primarily UUNet Technologies, Inc., PSINet, Inc. and, ultimately, Level 3 Communications, Inc. and Qwest Communications International, Inc. once their networks have been sufficiently developed. Other competitors also include GTE, AT&T, Sprint Corporation and the RBOCs that currently offer similar wholesale network service products to ISPs. While strong competition currently exists in this sector, the Company believes that the recent growth in the Internet industry provides expanded opportunity and demand for new providers such as the Company, and that early participants in this growing sector have increased opportunity for establishing and, once experienced, growing market share. There can be no assurance that sufficient demand will exist for the Company's wholesale network services in its selected markets, that market prices will not dramatically decline or the Company will be successful in executing its strategy in time to meet new competitors, or at all.

Network Services. The bases of competition in the network services market are primarily technological capability and experience, value-added services and price. In this market, the Company competes with a variety of local and regional system integrators.

Satellite Services. In the delivery of domestic and international satellite services, the Company competes with other full service teleports in the northeast region of the United States. The bases of competition are primarily reliability, price and transmission quality. Most of the Company's satellite competitors focus on the domestic video market. Competition is expected principally from a number of domestic and foreign telecommunications carriers, many of which have substantially greater financial and other resources than the Company. In the maritime telecommunications market, MTN competes primarily with COMSAT Corporation ("COMSAT") in providing similar telecommunications services. COMSAT has FCC licenses that are similar to MTN's and it is the sole point of control in the United States for direct access to Intelsat satellites.

Regulation

The Company's services are subject to significant federal, state and local regulation. The Company operates in an industry that is undergoing substantial change as a result of the passage of the Telecommunications Act.

The Telecommunications Act opened the local and long distance markets to additional competition and changed the division of oversight between federal and state regulators. Under previous law, state regulators had authority over those services that originated and terminated within the state ("intrastate") and federal regulators had jurisdiction over services that originated within one state and terminated in another state ("interstate"). State and federal regulators now share responsibility to some extent for implementing and enforcing the pro-competitive policies and the provisions for the Telecommunications Act.

The Telecommunications Act generally requires ILECs to negotiate agreements to provide interconnection and nondiscriminatory access to their networks on more favorable terms than were previously available in the past. However, such

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new agreements are subject to negotiations with each ILEC which may involve considerable delays and may not necessarily be obtained on terms and conditions that are desirable to the Company. In such instances, the Company may petition the proper state regulatory agency to arbitrate disputed issues. Ultimately, the terms of an arbitrated agreement are subject to review by the federal courts.

Additionally, the Company is in the process of renegotiating and extending the terms of certain of the interconnection agreements executed by the Company. There can be no assurance that the Company will be able to negotiate andor arbitrate acceptable new interconnection agreements.

On August 8, 1996, in two separate decisions, the FCC adopted rules and policies implementing the local competition provisions of the Telecommunications Act. The FCC, among other things, adopted national guidelines with respect to the unbundling of ILECs' network elements, resale of ILEC services, the pricing of interconnection services and unbundled elements, and other local competition issues. Numerous parties appealed both of the FCC's orders to the Eighth Circuit Court, and in 1997, the Eighth Circuit Court issued a decision which upheld certain of the FCC's rules but reversed many of the FCC's rules on other issues, including the pricing rules.

On January 25, 1999, the United States Supreme Court (the "Supreme Court") largely reversed the Eighth Circuit Court's decision and reestablished the validity of many of the FCC's interconnection rules including the FCC's jurisdiction to adopt pricing guidelines under the Telecommunications Act. The Supreme Court also upheld the FCC's "pick and choose" rules, which allow CLECs to adopt individual rates, terms and conditions from agreements that an ILEC has with other carriers. The Supreme Court did not, however, evaluate the specific pricing methodologies adopted by the FCC, and the appellate court will further consider those methodologies. Additionally, the Supreme Court vacated the FCC rules defining what network elements must be unbundled and made available to the CLECs by the ILECs. The Supreme Court held that the FCC must provide a stronger rationale to support the degree of unbundling ordered. As a result, the FCC likely will soon hold a rulemaking proceeding to revise its rules on unbundled network elements. Management views the Supreme Court decision as a favorable development for the CLEC industry, although the ultimate outcome of the further FCC and court proceedings resulting from the decision cannot be predicted.

On December 31, 1997, the United States District Court for the Northern District of Texas (the "District Court"), in a case brought by SBC Communications, Inc., issued a decision holding that Sections 271 through 275 of the Telecommunications Act are unconstitutional. The decision addressed the restrictions contained in Sections 271 through 275 of the Telecommunications Act on the lines of businesses in which the RBOCs may engage, including establishing the conditions that the RBOCs must satisfy before they may provide interLATA long distance telecommunications services in their local telephone service areas. On September 4, 1998, the Fifth Circuit Court of Appeals reversed the District Court decision and ruled that Sections 271 through 275 are not unconstitutional. A separate decision by the D.C. Circuit Court of Appeals issued in December 1998 also ruled that Section 271 is not unconstitutional.

The Company believes that it is entitled to receive reciprocal compensation from ILECs for the transport and termination of Internet traffic from ILEC customers as local traffic pursuant to various interconnection agreements. The ILECs have not paid most of the bills they have received from the Company and

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have disputed substantially all of these charges based on the argument that ISP traffic is not local traffic as defined by the various interconnection agreements and under state and federal laws and public policies. The resolution of these disputes will be based on rulings by state public utility commissions andor by the FCC. See "-Management's Discussion and Analysis of Financial Condition and Results of Operations - Liquidity - Transport and Termination Charges."

Federal Regulation. The Company generally operates as a regulated carrier with fewer regulatory obligations than the ILECs. The Company must comply with the requirements of the Telecommunications Act, such as offering service on a non-discriminatory basis at just and reasonable rates. The FCC treats the Company as a non-dominant carrier. The FCC has established different levels of regulation for dominant and non-dominant carriers. Of domestic common carriers, only the ILECs are classified as dominant carriers for the provision of access services, and all other providers of domestic common carrier services are classified as non-dominant. Under the FCC's streamlined regulation of non-dominant carriers, the Company must file tariffs with the FCC for domestic and international long distance services on an ongoing basis. The Company's provision of international long distance services requires prior authorization by the FCC pursuant to Section 214 of the Telecommunications Act, which the Company has obtained. The FCC recently eliminated the requirement that non-dominant interstate access carriers must file tariffs. The Company is not subject to price cap or rate of return regulation, nor is it currently required to obtain FCC authorization for the installation or operation of its fiber optic network facilities used for services in the United States. The Company may install and operate non-radio facilities for the transmission of domestic interstate communications without prior FCC authorization. The Company's use of digital microwave radio frequencies and satellite earth stations in connection with certain of its telecommunications services is subject to FCC radio frequency licensing regulation. See "-Federal Regulation of Microwave and Satellite Radio Frequencies."

State Regulation. In general, state regulatory agencies have regulatory jurisdiction over the Company when Company facilities and services are used to provide local and other intrastate services. Under the Telecommunications Act, state commissions continue to set the requirements for providers of local and intrastate services, including quality of services criteria. State regulators also can regulate the rates charged by CLECs for intrastate and local services and can set prices for interconnection by CLECs with the ILEC networks. The Company's provision of local dial tone and intrastate switched and dedicated services are classified as intrastate and therefore subject to state regulation. The Company expects that it will offer more intrastate services as its business and product lines expand. To provide intrastate service (particularly local dial tone service), the Company generally must obtain a Certificate of Public Convenience and Necessity ("CPCN") from the state regulatory agency prior to offering service. In most states, the Company also is required to file tariffs setting forth the terms, conditions and prices for services that are classified as intrastate, and to update or amend its tariffs as rates change or new products are added. The Company may also be subject to various reporting and record-keeping requirements.

The Company currently holds CPCNs (or their equivalents) to provide competitive local services in the following states: Alabama, California, Colorado, Delaware, Florida, Georgia, Hawaii, Indiana, Kansas, Kentucky, Massachusetts, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West

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Virginia, and Wisconsin. Additionally, the Company holds CPCNs (or their equivalents) to provide intrastate long distance services in the following states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

Local Government Authorizations. Under the Telecommunications Act, local authorities retain jurisdiction under applicable state law to control the Company's access to municipally owned or controlled rights of way and to require the Company to obtain street opening and construction permits to install and expand its fiber optic network. In addition, many municipalities require the Company to obtain licenses or franchises (which generally have terms of 10 to 20 years) and to pay license or franchise fees, often based on a percentage of gross revenue, in order to provide telecommunications services, although in certain states including California and Colorado, current state law prescribes the amount of such fees. Certain municipalities in Colorado, however, are continuing to charge franchise fees pending enforcement by the Colorado courts. There is no assurance that certain cities that do not impose fees will not seek to impose fees, nor is there any assurance that, following the expiration of existing franchises, fees will remain at their current levels. In many markets, the ILECs have been excused from paying such franchise fees or pay fees that are materially lower than those required to be paid by the Company for access to public rights of way. However, under the Telecommunications Act, while municipalities may still regulate use of their streets and rights of way, municipalities may not prohibit or effectively prohibit any entity from providing any telecommunications services. In addition, the Telecommunications Act requires that local governmental authorities treat telecommunications carriers in a non-discriminatory and competitively neutral manner. If any of the Company's existing franchise or license agreements are terminated prior to their expiration dates or not renewed, and the Company is forced to remove its fiber from the streets or abandon its network in place, such termination could have a material adverse effect on the Company.

Federal Regulation of Microwave and Satellite Radio Frequencies. The FCC continues to regulate radio frequency use by both private and common carriers under the Telecommunications Act. Unlike common carriers, private carriers contract with select customers to provide services tailored to the customer's specific needs. The FCC does not currently regulate private carriers (other than their use of radio frequencies) and has preempted the states from regulating private carriers. The Company offers certain services as a private carrier.

The Company is required to obtain authorization from the FCC for its use of radio frequencies to provide satellite and wireless services. The Company holds a number of point-to-point microwave radio licenses that are used to provide telecommunications services in California. Additionally, the Company holds a number of satellite earth station licenses in connection with its operation of satellite-based networks. The Company also provides maritime communications services pursuant to an experimental license and a grant of STA. The Company's experimental license has been renewed by the FCC on several occasions. On January 22, 1999, the Company submitted an application for an additional two-year renewal of the experimental license, which was due to expire in February 1999. Under the FCC's procedures, the experimental license remains

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valid pending FCC action on the renewal application. The STA was first granted on January 30, 1997 and enables the Company to conduct operations pursuant to the STA of the Company's application for a permanent license. The Company applied for six-month extensions of the STA, most recently on January 29, 1999, and received verbal grants by the FCC of each of the requested extensions. The Company also filed 32 applications for permanent full-term FCC licenses to operate shipboard earth stations in fixed ports. Those applications are pending. There can be no assurance that the Company will be granted permanent licenses, that the experimental license and STA currently being used will continue to be renewed for future terms or that any license granted by the FCC will not require substantial payments from the Company.

Employees

On December 31, 1998, the Company employed a total of 3,415 individuals on a full time basis. There are 39 employees in the Company's Oregon and Washington network systems integration services offices who are represented by collective bargaining agreements. The collective bargaining agreement with certain IBEW (International Brotherhood of Electrical Workers) employees in Oregon and southern Washington expires on December 31, 2000. Additionally, several IBEW employees in other areas of Washington are currently in negotiations for a new collective bargaining agreement. The Company believes that its relations with its employees are good.

ITEM 2. PROPERTIES

The Company's physical properties include owned and leased space for offices, storage and equipment rooms and collocation sites. Additional space may be purchased or leased by the Company as networks are expanded. The Company owns a 30,000 square-foot building located in Englewood, Colorado which houses a portion of the Company's Telecom Services business. Currently, the Company leases approximately 324,000 square feet of office space for operations located in the Denver metropolitan area and approximately 846,000 square feet in other areas of the United States.

As of December 31, 1998, the Company's corporate headquarters building, land and improvements were leased by the Company under an operating lease from an unrelated third party. The Company has entered into a letter of intent to purchase the approximately 265,000 square foot facility located in Englewood, Colorado, as well as the other previously leased assets, and expects to complete the purchase of those assets in early 1999.

ITEM 3. LEGAL PROCEEDINGS

On April 4, 1997, certain shareholders of Zycom filed a shareholder derivative suit and class action complaint for unspecified damages, purportedly on behalf of all of the minority shareholders of Zycom, in the District Court of Harris County, Texas (Cause No. 97-17777) against the Company, Zycom and certain of their subsidiaries. This complaint alleges that the Company and certain of its subsidiaries breached certain duties owed to the plaintiffs. The plaintiffs were denied class certification by the trial court and this decision has been appealed. Trial has been tentatively set for August 1999. The Company is vigorously defending the claims. While it is not possible to predict the outcome

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of this litigation, management believes these proceedings will not have a material adverse effect on the Company's financial condition, results of operations or cash flows.

A putative class action lawsuit was filed on July 15, 1997 in Superior Court of California, Orange County, alleging unfair business practices and related causes of action against NETCOM in connection with its offers of free trial periods and cancellation procedures and claiming damages of at least $10.0 million. Although the case is plead as a class action, the class has not been certified. The parties are currently conducting discovery. Trial has been tentatively set for June 1999. The Company believes it has meritorious defenses to such claims and intends to vigorously defend the action.

The Company is a party to certain other litigation which has arisen in the ordinary course of business. In the opinion of management, the ultimate resolution of these matters will not have a material adverse effect on the Company's financial condition, results of operations or cash flows.

ITEM 4. SUBMISSION OF MATTERS TO A VOTE OF SECURITY HOLDERS

None.

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PART II

ITEM 5. MARKET FOR REGISTRANT'S COMMON EQUITY AND RELATED STOCKHOLDER MATTERS

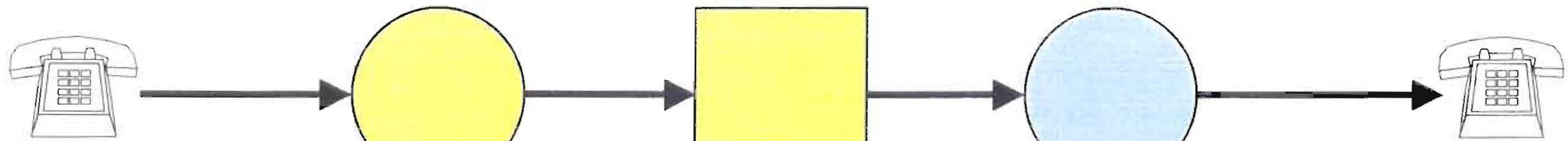
ICG Common Stock, $.01 par value per share, has been quoted on the Nasdaq National Market ("Nasdaq") since March 25, 1997 under the symbol "ICGX" and was previously listed on the American Stock Exchange ("AMEX"), from August 5, 1996 to March 24, 1997 under the symbol "ICG." Prior to August 5, 1996, Holdings-Canada's common shares had been listed on the AMEX under the symbol

Reciprocal Compensation

- **ILEC receives monthly fee from its end user to apply towards the cost of terminating local calls**

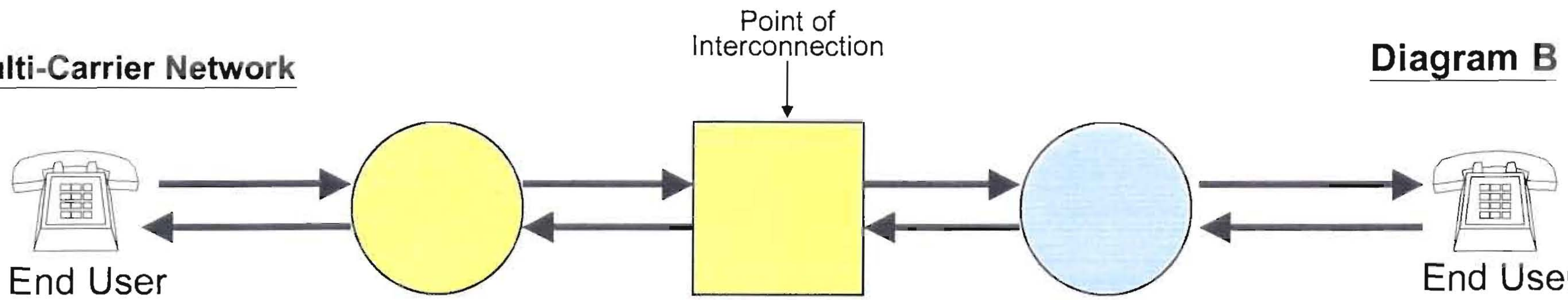
Single Carrier Network

Diagram A



Multi-Carrier Network

Diagram B



Call Flow →

ILEC pays CLEC Reciprocal Compensation

Call Flow ←

CLEC pays ILEC Reciprocal Compensation

BellSouth Telecommunication, Inc.
FPSC Docket No. 990691-TP
Exhibit AJV-2

Access Service for IXC-Bound and ISP-Bound Traffic Involving Single Carrier Network

Diagram C

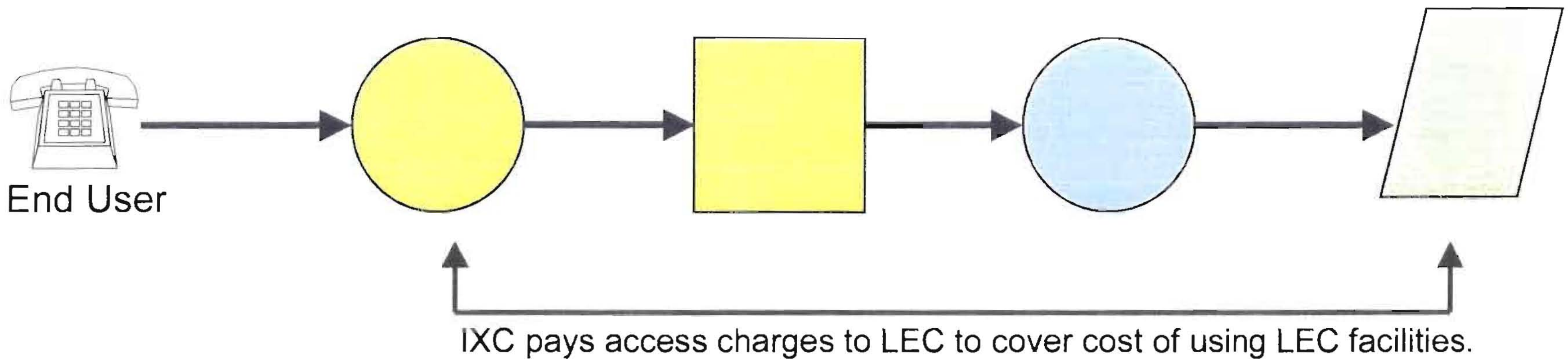
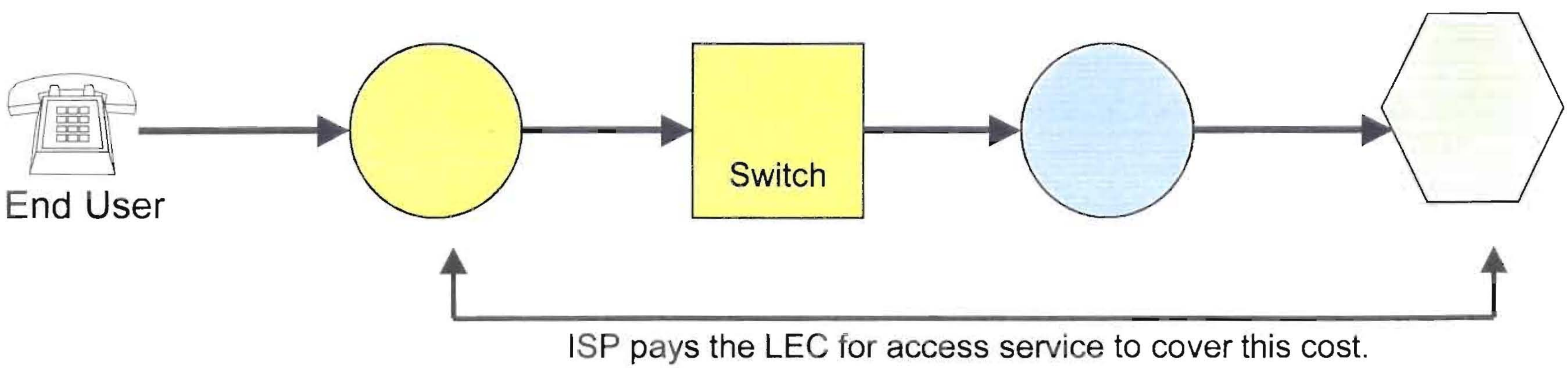


Diagram D



FILED ELECTRONICALLY 4/12/99

BellSouth Telecommunications, Inc.
FPSC Docket No. 990691-TP
August 2, 1999
Exhibit AJV-3

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inter-Carrier Compensation	)	CC Docket No. 99-68
for ISP-Bound Traffic	)	

COMMENTS

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.

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Date: April 12, 1999

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SUMMARY

The purpose of the *NPRM* is to consider the adoption of a rule "regarding the compensation for ISP-bound traffic.

BellSouth suggests that the Commission should adopt an inter-carrier compensation approach that: (1) recognizes that ISP traffic is interstate; (2) calls for negotiations between the carriers jointly providing the Internet access service; (3) is based on revenue sharing with the primary carrier sharing revenue with the secondary carrier; and (4) uses negotiation to determine the amount of inter-carrier compensation. Such an inter-carrier compensation approach promotes the Commission's goals and objectives.

Further, the Commission should find that ISP-bound traffic cannot be separated into its interstate and intrastate components. Any single Internet session can result in an Internet user accessing information in his/her own state, another state, or another country. The same user could "chat" online with people across the street or on the other side of the world. The inability to distinguish the jurisdictional nature of each communication that travels across the Internet leads to the conclusion that Internet traffic is inserverable and must be considered jurisdictionally interstate.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	

COMMENTS

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") hereby submit the following comments on the *Notice of Proposed Rulemaking,* released on February 26, 1999,[1] regarding inter-carrier compensation for ISP-bound traffic.

I. INTRODUCTION

In its *Declaratory Ruling*, the Commission found that Internet-bound communications do not terminate at an Internet Service Provider's ("ISP") local server but "continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state."[2] The Commission also concluded that a substantial portion of Internet traffic involves accessing interstate or foreign websites and hence is jurisdictionally interstate.[3] The purpose of

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1 *In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic,* CC Docket No. 99-68, *Notice of Proposed Rulemaking,* FCC 99-38, released February 26, 1999 ("*NPRM*").

2 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *Declaratory Ruling*, FCC 99-38, released February 26, 1999 at ¶ 12 ("*Declaratory Ruling*").

3 *Id.* at ¶¶ 18 and 20.

the *NPRM* is to consider the adoption of a rule governing inter-carrier compensation for ISP-bound traffic.[4]

As a preliminary matter, it is necessary to establish the framework within which the issue of inter-carrier compensation should be considered. The interstate connection that permits an ISP to communicate with its subscribers falls within the scope of exchange access and, accordingly, constitutes an access service as defined by the Commission:

> *Access Service* includes services and facilities provided for the origination or termination of <u>any</u> interstate or foreign telecommunication.[5] (emphasis added)

The fact that the Commission has exempted enhanced service providers, including ISPs, from paying interstate access charges does not alter the fact that the connection an ISP obtains is an access connection. Instead, the exemption limits the compensation that a local exchange carrier ("LEC") in providing such a connection can obtain from an ISP.[6] Further, under the access charge exemption, the compensation derived by a LEC providing the service to an ISP has been limited to the rates and charges associated with business exchange services. Nevertheless, the ISP's service involves interstate communications. The ISP obtains a service that enables a communications path to be established by its subscriber. The ISP, in turn, recovers the cost of the telecommunications services it uses to deliver its service through charges it assesses on the subscribers of the ISP's service.

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4 *NPRM* at ¶ 28.

5 47 C.F.R. § 69.2(b).

6 The access charge exemption only applies to LECs that are subject to the Commission's access charge rules (47 C.F.R. § 69.1 *et. seq.*).

Where two or more carriers are involved in establishing the communications path between the ISP and the ISP's subscriber, the access service to the ISP is jointly provided. Such jointly provided access arrangements are not new or unique nor are the associated mechanisms to handle inter-carrier compensation. The services ISPs obtain for access to their subscribers are technically similar to the line side connections available under Feature Group A. For such line side arrangements, the Commission has relied on revenue sharing agreements for the purpose of inter-carrier compensation. The long history and precedent regarding inter-carrier compensation for interstate services are instructive and relevant to the Commission's determinations in this proceeding.

II. INTER-CARRIER COMPENSATION FOR ISP-BOUND INTERSTATE TRAFFIC

The *NPRM* expresses the Commission's preference that any rule pertaining to inter-carrier compensation be based upon negotiations entered into by the respective carriers.[7] BellSouth supports a federal rule that calls for negotiation between the carriers to determine inter-carrier compensation for jointly provided interstate-services. Negotiation has long been a mechanism employed by the Commission with regard to other jointly provided access arrangements that involved potential revenue sharing. Relying on the negotiation process enables agreements to reflect the differing circumstances that arise and permits carriers to craft agreements that are particular to those circumstances.

7 *NPRM* at ¶ 28.

The *NPRM* presents an approach to inter-carrier compensation based on the negotiation process established in Sections 251 and 252 of the Communications Act.[8] As explained more fully below, such an approach is not acceptable because the Commission does not have the statutory authority to adopt it. In response to the *NPRM*'s invitation, BellSouth submits an alternative approach that is consistent with the revenue sharing approaches followed by the Commission in connection with jointly provided access service.

A. The Commission Should Not Adopt The Alternative Set Forth In The *NPRM*

The approach for interstate inter-carrier compensation set forth in the *NPRM* would make the negotiations for such compensation subject to the negotiation process established by Sections 251 and 252 of the Communications Act. The proposal contemplates that a failure on the part of the parties to reach an agreement would be subject to the arbitration procedures set forth in Section 252 of the Communications Act, wherein state commissions would have the responsibility of arbitrating any unresolved issues. Under this proposal, the Commission would have no oversight role unless the state commission failed to act in accordance with the provisions of Section 252. This proposal is fundamentally flawed.

Neither Section 251 nor Section 252 governs interstate inter-carrier compensation arrangements. The duty to negotiate under Section 251 pertains only to fulfilling the duties set forth in subsections (b) and (c) of Section 251. Section 251(b) relates to local exchange carriers' obligations regarding resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. Inter-carrier compensation for jointly provided interstate services is

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8 47 U.S.C. §§ 251 and 252.

unrelated to any of these Section 251(b) obligations.[9] Likewise, there is no nexus between Section 251(c) and interstate inter-carrier compensation. The duty to negotiate under Section 251(c) pertains to the terms and conditions that relate to interconnection, access to unbundled network elements, resale, and collocation. There is nothing in Section 251(c) that would govern interstate inter-carrier compensation.

A state commission's arbitration authority under Section 252 extends only to agreements negotiated pursuant to the requirements of Section 251. Because inter-carrier compensation for interstate services is not governed by Section 251, state commissions are without the statutory authority to arbitrate disputes over such matters. Further, the Commission does not have the authority to rewrite the Communications Act and vest the state commissions with the power to regulate matters relating to interstate communications that, under the Act, are specifically reserved to the Commission.[10]

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9 Indeed, of the five obligations enumerated in Section 251(b), only reciprocal compensation could be remotely relevant. The Commission's *Declaratory Ruling*, however, is dispositive:

> As noted, section 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected *local* telecommunications traffic. We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 251, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensations for this traffic.

Declaratory Ruling at n. 87.

10 *See* 47 U.S.C. §§ 151 and 152(a). Similarly, the Commission does not have the statutory authority to vest federal district courts with the authority to review decisions regarding inter-carrier compensation for interstate communications. Under Section 252, federal district courts only have jurisdiction to review state commission actions "to determine whether the agreement

As an alternative to relying on Sections 251 and 252, the *NPRM* proposes that the Commission adopt "a set of federal rules governing inter-carrier compensation for ISP-bound traffic pursuant to which parties would engage in negotiations concerning rates, terms and conditions applicable to delivery of interstate ISP-bound traffic."[11] Without question, the only type of mechanism that can govern inter-carrier compensation for interstate services must be one over which the Commission has oversight. Federal rules that bind interstate inter-carrier compensation obligations would be appropriate.

The *NPRM*, however, assumes that for federal rules to operate properly, an arbitration-like process needs to be in-place. Arbitration is not an essential element for effective negotiation of interstate inter-carrier compensation agreements. Further, while the Commission has considerable latitude in managing its proceedings, it must be mindful that in conducting its affairs, it must do so in a manner that is consistent with the Administrative Procedures Act and the Communications Act. Thus, the Commission cannot divest the courts of appeal of jurisdiction to review final Commission orders or to force carriers to engage in binding arbitration. To the extent disputes arise during the inter-carrier compensation negotiations, the statutory complaint process and the Commission's implementing rules already provide an effective dispute resolution mechanism.

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or statement meets the requirements of section 251 and this section." 47 U.S.C. § 252(e)(6). Inter-carrier compensation for interstate services is unrelated to the requirements of Sections 251 or 252.

11 *NPRM* at ¶ 31.

B. The Parameters Of A Properly Crafted Inter-Carrier Compensation Mechanism

At the outset, the Commission must recognize that any interstate inter-carrier compensation mechanism adopted in this proceeding gives rise to interstate costs that must be recovered through interstate rates. As obvious as this principle is, nothing in the *NPRM* indicates that the Commission has given any consideration to this basic concept. Yet, Commission precedent regarding inter-carrier compensation, *i.e.*, primary/secondary carrier agreements, revenue sharing agreements and meet point billing, firmly establishes that compensation between one carrier and another is for the purpose of recovering costs of jointly provided services and the cost of such compensation is borne by the subscriber of the jointly provided service.

For ISP-bound traffic, the ISP is purchasing an access service to receive communications from its subscribers. It uses the telecommunications service to provide its enhanced services and recovers its costs through fees charged to its subscribers. For dial-up connections, the ISP is obtaining a service that is analogous to a Feature Group A access service in that it obtains a dial tone service that has a 7/10 digit local number associated with it. The primary difference between Feature Group A and the ISP dial-up connection is that Feature Group A is based on two-way usage sensitive prices, whereas the Commission has limited the price for an ISP dial-up connection to the equivalent business exchange service rate.[12] Notwithstanding the pricing differences, the Feature Group A and the ISP dial-up services provide the customers of these services with the ability to communicate with their subscribers, and the fees paid by these

12 For BellSouth, exchange rates are generally flat-rated.

customers (*e.g.*, Interexchange carriers or ISPs) are supposed to compensate the LEC(s) for providing this service.[13]

Further, the Commission has correctly found that the preponderance of ISP communications is jurisdictionally interstate. As discussed below, there is no practical means of distinguishing intrastate and interstate components of ISP communications. For this reason the dial-up connection obtained by the ISP should be considered jurisdictionally interstate.[14] Such jurisdictional assignment does not implicate the access charge exemption for enhanced service providers. An interstate dial-up access connection for ISPs can be provided by simply adding a regulation for ISP dial-up connections to the interstate access tariff that cross-references the applicable business exchange rates that ISPs obtain from intrastate tariffs. Thus, ISPs would retain the current rate treatment of paying a rate that is no higher than a business exchange rate, but the service revenues and costs would properly be assigned to the interstate jurisdiction. Use of a cross-reference would have the further beneficial effect of making the jurisdictional alignment of service, revenues and costs transparent to the ISPs.

With regard to inter-carrier compensation for jointly-provided Internet access service, the LEC providing dial-tone to the ISP is the primary LEC and receives the interstate equivalent of a business exchange rate. The non-dial-tone LEC, or secondary LEC, receives no interstate revenues other than the subscriber line charge. Nevertheless, the secondary LEC incurs

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[13] The interstate cost components of the service include the subscriber's common line, the subscriber's switch, interoffice transport, the customer's dial-tone switch and the transport to the customer's location.

[14] At a minimum, a substantial portion of the dial-up connection must be considered jurisdictionally interstate in light of the Commission's finding in the *Declaratory Ruling*.

switching and trunking costs associated with the provision of this interstate service. Consistent with Commission precedent, the primary LEC, which has the relationship with the ISP, should compensate or share revenues with the secondary LEC.[15]

The Commission, accordingly, should adopt an inter-carrier compensation approach that: (1) recognizes that ISP traffic is interstate; (2) calls for negotiations between the carriers jointly providing the Internet access service; (3) is based on revenue sharing with the primary carrier sharing revenue with the secondary carrier; and (4) uses negotiation to determine the amount of inter-carrier compensation. Such an inter-carrier compensation approach promotes Commission goals and objectives. First and foremost, the approach does not disrupt the enhanced service providers access charge exemption. Next, while the enhanced service provider exemption remains intact, the mechanism crafted by BellSouth follows the same path that the Commission has unwaveringly pursued over the last fifteen years when it addressed LEC inter-carrier compensation matters. Finally, but equally important, the approach is procompetitive. It avoids creating regulatory incentives that artificially reward carriers that only serve selected customers. It promotes efficient networks and encourages carriers to compete across a broad range of services and customers because it ensures that carriers are compensated fairly.[16]

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[15] Prior to revenue sharing for Feature Group A, the Commission had established guidelines applicable to primary carrier/secondary carrier agreements.

[16] For example, the mechanism proposed by BellSouth would share the revenues derived from the services provided to ISPs. If such services are flat-rated, then the inter-carrier compensation would not be usage based.

C. ISP-Bound Traffic Cannot Practically Be Separated Into Its Interstate and Intrastate Components

In the *Declaratory Ruling*, the Commission determined that ISP-bound traffic was substantially interstate in nature. The Commission, however, reserved until this proceeding any determination regarding the severability of such traffic into intrastate and interstate components. It is beyond dispute that no carrier involved in delivering ISP-bound traffic has any way of determining how an ISP's subscriber is using the connection established between himself and the ISP. The only party that could theoretically track the jurisdictional use of the connection is the ISP itself. In BellSouth's opinion the tools to transform a theoretical possibility into a practical reality do not exist.

Hosts that are connected to the Internet can be located anywhere. Indeed, the fact that they are not tied to a particular geographic location represents one of the fundamental values of the Internet. Neither the IP address of the host nor its domain name links the host to a specific geographical location. Hence, there is no practical means to identify where the host is physically located. Neither the ISP's subscriber nor the ISP has any technical or operational tools that would enable them to determine which communications initiated by the subscriber or received by the subscriber are related to hosts that are located within the same local area as the ISP's local server or in another state or in another country. The dispersion of servers world-wide and the lack of duplication attests to the fact that use of the Internet will invariably involve substantial interstate communications.[17]

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[17] The WWW Consortium has compiled an extensive list of servers by geographic locations. The list is available at http://vlib.stanford.edu/Servers.html.

In addition, an ISP's subscriber typically communicates with more than one destination point on (or beyond) the Internet during a single Internet session and may do so either sequentially or simultaneously. For example, an ISP's subscriber in a single Internet session may access websites that reside on servers located in various states or in foreign countries; communicate directly with another Internet user; and "chat" online, in real time, with a group of Internet users located around the corner or around the world. Standard Internet "browsers" enable an ISP's subscriber to do all of these things simultaneously. In another example, an ISP's subscriber may download incoming e-mail from the ISP's server (which may or may not be located in the same state as the user), while accessing his stockbroker's website in another state, and listen to an audio feed that originates from a radio station in another country.[18] The dynamic capabilities of the Internet render it impossible to segregate intrastate from interstate communications.[19]

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[18] Indeed, one website, www.broadcast.com, offers an Internet user access to 984 different radio and television stations. With real-time audio and video streaming capabilities, which are available for most web browsers, Internet users can listen to radio stations and watch TV broadcasts from around the world.

[19] In a working paper, the FCC Office of Plans and Policy explained that:

> [B]ecause the Internet is a dynamically routed, packet-switched network, only the origination point of an Internet connection can be identified with clarity. Users generally do not open Internet connections to "call" a discreet recipient, but access various Internet sites during the course of a single conversation.... One Internet "call" may connect the user to information both across the street and on the other side of the world.

The paper concludes that Internet traffic "has no built-in jurisdictional divisions." Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, FCC, OPP Working Paper No. 29 (March 1997) at 45.

The inability to distinguish the jurisdictional nature of each communication that traverses an Internet connection coupled with the predominant interstate nature of Internet communications lead to the inescapable conclusion that Internet traffic is inseverable and must be considered jurisdictionally interstate.

III. CONCLUSION

ISP-bound traffic is inherently and inseverably interstate traffic. As such, it requires an interstate inter-carrier compensation mechanism over which the Commission maintains oversight authority. BellSouth has provided an approach to address inter-carrier compensation for ISP-bound traffic that recognizes the interstate character of such traffic and is consistent with Commission policies and goals.

Respectfully submitted

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.

By: /s/

M. Robert Sutherland
Richard M. Sbaratta

Their Attorneys

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Date: April 12, 1999

CERTIFICATE OF SERVICE

I do hereby certify that I have this 12th day of April 1999 served the following parties to this action with a copy of the foregoing COMMENTS by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

*Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S. W.
Room TW-A325
Washington, DC 20554

*ITS
1231 20th Street, N. W.
Washington, DC 20036

/s/

Juanita H. Lee

*** VIA HAND DELIVERY**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inter-Carrier Compensation	)	CC Docket No. 99-68
For ISP-Bound Traffic	)	

REPLY COMMENTS

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") hereby submit their Reply Comments in the above referenced proceeding.

I. INTRODUCTION

In this proceeding the Commission is considering adopting rules to govern inter-carrier compensation for interstate ISP-bound traffic. For some commenters, this proceeding is an opportunity for the Commission to "show me the money" and make inter-carrier compensation a euphemism for corporate welfare. Inter-carrier compensation becomes an excuse for transfer payments from ILECs to CLECs.

Inter-carrier compensation is more complex. The underlying concept is one in which all carriers participating in the provision of a jointly provided service are compensated for the jointly provided service. Thus, inter-carrier compensation necessarily involves consideration of the revenues associated with the jointly provided service because it is from such revenues that inter-carrier compensation is derived. In the case of ISP-bound traffic, the issue is more difficult because the Commission's access charge exemption policy constrains the prices that can be charged for ISP-bound traffic.

Calls for the Commission to emulate local reciprocal compensation schemes simply ignore the realities surrounding ISP-bound traffic. The decision the Commission must make in this proceeding requires a more thoughtful and analytical approach if the Commission is going to foster fair competition and encourage the development of advanced services and technologies.

II. THE PARADIGM FOR INTER-CARRIER COMPENSATION

The CLECs and some enhanced service providers portray the Commission's decision here to be one of simply adopting an approach that mirrors the reciprocal compensation mechanisms reflected in local interconnection agreements.[1] All of these comments share the same fundamental shortcoming. These parties apparently believe that the only task before the Commission is simply to establish an interstate payment mechanism between carriers. None of these parties consider the interstate revenue sources from which such payments must come. It is the height of folly to suggest, as these parties do, that a usage-based compensation scheme that is not accompanied by a usage sensitive charge that would be assessed on either the ISP or the ISP's subscriber could be imposed by the Commission.

Interstate compensation and interstate revenue sources are two sides of the same coin. The revenue sources for interstate ISP-bound traffic are two: (1) the subscriber line charge assessed to the ISP's subscriber and (2) the service charge assessed to the ISP.[2] The subscriber line charge, however, does not even cover of the full interstate nontraffic sensitive costs associated with facilities between the subscriber's premises and the serving central office of that subscriber. The remaining interstate nontraffic sensitive costs, as well as the switching and

[1] *See e.g.*, RCN at 6; CompTel at 2-5; Choice Communications 2-3; Focal at 14; AOL at 10; AT&T at 8.

[2] As further discussed below, the comments in this proceeding make clear that all ISP traffic should be treated as interstate. Even if there is some jurisdictionally intrastate components of ISP traffic, such components cannot be severed from interstate communications that predominate ISP traffic. Accordingly, the services used by ISPs should be treated as interstate with the revenues associated with such services considered interstate revenues.

trunking costs associated with the communications path to the ISP, in the interstate jurisdiction, would typically be recovered from the ISP. Indeed, the Commission has recognized that the main source of revenue for LECs transporting ISP-bound traffic are from the service charges that ISPs pay to use local exchange facilities. [3]

In light of these facts, it is remarkable that CLECs that serve ISPs contend that the Commission should implement an inter-carrier compensation scheme that would result in usage-based payments being made to the carrier that provides service to the ISP. In an arrangement where two carriers are providing service to establish the connection between the ISP and its subscriber, the carrier serving the ISP's subscriber currently receives no interstate revenue for its switching and trunking facilities that are used in making the connection to the ISP. It is patently absurd to impose a compensation obligation on the carrier that serves the ISP's subscriber unless the Commission concomitantly creates a new mechanism for that carrier to recover these additional costs.

In stark contrast to the proposals that call for the Commission to mimic local reciprocal compensation is BellSouth's revenue sharing approach. BellSouth's proposal is guided by and consistent with Commission precedent regarding inter-carrier compensation for jointly provided interstate services.[4] It recognizes, as the Commission does, that the primary revenue source for ISP-bound traffic is derived from the service provided to the ISP. Equally important, BellSouth's proposal ties the level of inter-carrier compensation directly to the level of

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3 *See* In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing and End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213 and 95-72, *First Report and Order*, 12 FCC Rcd 15982, 16133-16134 (1997).

4 Numerous commenters urge the Commission to use the compensation mechanisms established for jointly provided access services.

compensation that carriers derive from the jointly provided service. The link between revenue and compensation has always been fundamental to the Commission's determinations regarding inter-carrier compensation for jointly provided access. This link is of no less importance to the ultimate resolution of the issue of inter-carrier compensation for ISP-bound traffic. Indeed, given the Commission's policies that surround enhanced services, the revenue/compensation link is a paramount consideration that cannot be ignored by the Commission.

A. The Commission Should Establish Guidelines Regarding Inter-Carrier Compensation

The comments reveal a consensus across a broad spectrum of parties participating in this proceeding that it is the Commission's responsibility to oversee inter-carrier compensation for interstate traffic and to adopt rules governing such compensation.[5] While there is a diversity of opinion regarding the specific content of the Commission's rules, most parties agree that the rules should provide guidelines including general principles governing such inter-carrier compensation and the procedures to be followed to establish compensation agreements.

Among the general principles to which most parties agree is that inter-carrier compensation agreements for ISP-bound traffic should be a product of negotiations. Negotiations have the benefit of enabling parties to recognize differing circumstances. With properly structured guidelines promulgated by the Commission, the concerns of some parties that negotiations would not be effective or fair are removed.[6] In its comments, BellSouth's proposed

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5 *See e.g.*, Focal at 8; RCN at 5; GSA at 12; CIX at 4; GST Telecom at 13.

6 *See e.g.*, Cox at 3; CT Cube and Leaco at 2; GST Telecom at 11-13.

a revenue sharing plan. The revenue sharing plan provides the foundation for the Commission to use in promulgating inter-carrier compensation guidelines. It would provide the parameters to be considered in the negotiation process, and, thus, provide a structured base upon which negotiations could take place.

B. Sections 251 And 252 Have No Applicability

One of the most significant differences among the parties arises in the context of the applicability of the negotiation and arbitration process set forth in Sections 251and 252 of the Communications Act. Many CLECs argue that inter-carrier compensation agreements regarding interstate ISP-bound traffic should be governed by the same process as local interconnection agreements.[7] Most just assert that the local interconnection agreements form the appropriate foundation for interstate ISP-bound traffic, and, thus, believe that the same process, including state commission arbitration of disputes, should apply.[8] A few attempt to rationalize having the state commissions oversee the negotiation and arbitration of inter-carrier compensation agreements because of a perceived inability of the Commission to fulfill its statutory obligations.[9] None of these parties, however, provide any legal basis that would support the application of Sections 251 and 252 to interstate ISP-bound traffic.

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7 There are some parties, such as MCIWorldCom, that dispute the Commission's jurisdictional determination regarding the interstate nature of ISP-bound traffic. They presume the traffic to be local and view the process regarding inter-carrier compensation to be no different than that for reciprocal compensation.

8 *See e.g.*, KMC Telecom at 2-5; CTSI at 11-13.

9 *See e.g.*, Focal at 7-8; ALTS at 8.

In its Comments, BellSouth demonstrated that neither Section 251 nor Section 252 govern interstate inter-carrier compensation.[10] The Act simply does not provide state commissions with any authority regarding interstate inter-carrier compensation. Nor can the Commission rewrite the Communications Act and vest state commissions with the power to regulate matters relating to interstate communications that, under the Act, are specifically reserved to the Commission.

The Commission has the responsibility to regulate interstate communications. It cannot delegate that responsibility to state commissions. Even if the Commission had the statutory authority to do so, which it does not, delegation to the state commissions would constitute poor public policy. ISP-bound traffic falls within the Commission's access charge exemption, a federal policy. The access charge exemption creates an interstate subsidy that clearly can be impacted by inter-carrier compensation. Accordingly, these matters require a cohesive, singular administration of policy. Such administration can and should only take place at the federal level.

C. Interstate Inter-carrier Compensation Should Not Mirror Local Reciprocal Compensation

Many of the CLECs urge the Commission to follow the local reciprocal compensation model, claiming that there is no difference between the transport and termination of local calls and jointly providing interstate service for ISP-bound traffic.[11] In these parties' view, a minute is a minute and there should be symmetry between these types of calls.

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[10] BellSouth at 4-5. Many parties share BellSouth's view. *See e.g.*, Frontier at 5-6; ICG at 3-5; SBC at 4-7.

[11] *See e.g.*, ALTS at 12-18; AT&T at 8; AOL at 10; CTSI at 5-7; Time Warner at 3-8; CompTel at 2.

These arguments are makeweight. There are minutes associated with local traffic, with access traffic and with toll traffic. These minutes are treated differently by regulators for policy reasons and more importantly, they are treated differently in interconnection agreements. To suggest that ISP-bound traffic should be treated as local traffic amounts to little more than an argument of convenience for the CLECs.

It would be the epitome of absurdity to contend that local exchange rates take into account and fully compensate the originating LEC for ISP-bound traffic. Despite the arguments by some that ISP-bound traffic has always been considered local, the fact remains that ISP-bound traffic characteristics were never considered when local rates were established. Further, the comments show that ISP-bound traffic bears little resemblance to local traffic.[12] Indeed, for BellSouth the typical call duration for a local call is between 3 and 4 minutes. On the other hand, an Internet session, on average, is between 20 and 25 minutes. There is simply no similarity between local exchange traffic and ISP-bound traffic.

A companion argument asserted by CLECs is that, like local exchange traffic, CLECs save incumbent LECs the costs for the portion of ISP-bound communication that they handle.[13] The fallacy in this argument is two-fold. First, the CLECs ignore the fact that they displace the primary revenue source for ISP-bound traffic. Next, they omit any mention of the additional costs that originating LECs have been incurring as a result of ISP-bound traffic. TANE, for example, pointed out the additional trunking costs the LECs are incurring because of the increase in ISP-bound traffic.[14] This proceeding is not the first time that the Commission was made

[12] *See e.g.*, NTCA at 3; TANE at 2.

[13] *See e.g.*, RCN at 11.

[14] TANE at 2.

aware that ISP-bound traffic was increasing public switched network costs and increasing network congestion. Three years ago the Commission was advised during its review of the access charge exemption that ISP-bound traffic was causing network congestion and that the exemption would continue to cause ISP use of the public switched network to grow and would require additional network investment if network quality was to be maintained.[15] The comments in this proceeding confirm prior LEC predictions. There is nothing that CLECs have done to lessen the additional cost burden associated with ISP-bound traffic. There is no substance to claims that incumbent LECs have experienced cost savings because CLECs serve ISPs. To the contrary their network costs are increasing because of the exponential growth of ISP-bound traffic with its peculiar traffic characteristics and these too are costs to be considered for compensation purposes.

The symmetry that CLECs want the Commission to establish is achieved, not by treating ISP-bound traffic like local, but rather by recognizing that interstate ISP-bound traffic is no different than any other interstate traffic that uses local exchange facilities. When ISP-bound traffic is considered in its proper context, it becomes evident that compensation is not an issue that is reserved to the carrier serving the ISP. It pertains to the entire connection between the ISP subscriber and the ISP. An inter-carrier compensation mechanism must consider not only costs but also the revenue sources for such compensation. This is precisely how BellSouth's revenue sharing proposal operates.

15 *See* Comments and Reply Comments filed in connection with the Commission's proceeding, In the Matter of Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket No. 96-263, *Notice of Inquiry,* 11 FCC Rcd 21354 (1996).

D. ISP-Bound Traffic Is Jurisdictionally Inseverable

Some commenters use this proceeding to indirectly question the Commission's declaratory ruling that ISP-bound traffic is primarily interstate. Thus, often in arguing in favor of replicating the local reciprocal compensation model for ISP-bound traffic, some commenters describe the traffic as terminating at an ISP location. Others contend that an end-to-end analysis does not fit with Internet communications.

The Commission's declaratory ruling is not at issue here. Parties have adequate remedies, reconsideration or judicial review, to challenge the Commission's ruling. Nevertheless, it is clear that the Commission's jurisdictional determination is unassailable. The Commission's ruling reflects a consistent application of past Commission and judicial precedent. No party has shown otherwise.

What is clear from the comments, however, is that interstate and intrastate components of an Internet communication are inseverable.[16] No party's comments contradict the fact the ISP's do not track the jurisdictional nature of Internet traffic. Further, no commenter has shown that a practical mechanism with widespread availability exists for tracking the jurisdiction of Internet traffic. The inability to distinguish the jurisdictional nature of the communications that traverse Internet connections and the predominate interstate nature of Internet communications lead to the inescapable conclusion that Internet traffic is inseverable and must be considered jurisdictionally interstate.

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16 ISP-bound traffic can be identified. Where two LECs jointly provide the ISP connection, the two LECs would have to cooperate and exchange information in order to identify ISP-bound traffic. For example, the LEC serving the ISP would have to provide the originating LEC with the ISP dial-up numbers. The Commission, in its order here, should unequivocally make clear that LECs jointly providing services must work cooperatively and share information that is necessary or required to properly identify ISP-bound traffic.

IV. CONCLUSION

The Commission must reject the call for inter-carrier compensation for interstate ISP-bound traffic to emulate local reciprocal compensation. Such an approach would be inconsistent with existing Commission policies such as the access charge exemption for enhanced services. To reconcile its access charge exemption and inter-carrier compensation for ISP-bound traffic, the Commission will have to consider not only the costs of providing interstate services, but also the revenues derived from providing such services. The revenue sharing approach presented by BellSouth in its comments takes these factors into account and, accordingly, should be adopted by the Commission.

Respectfully submitted,

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.

By: /s/ Richard M. Sbaratta
M. Robert Sutherland
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Their Attorneys

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Date: April 27, 1999

CERTIFICATE OF SERVICE

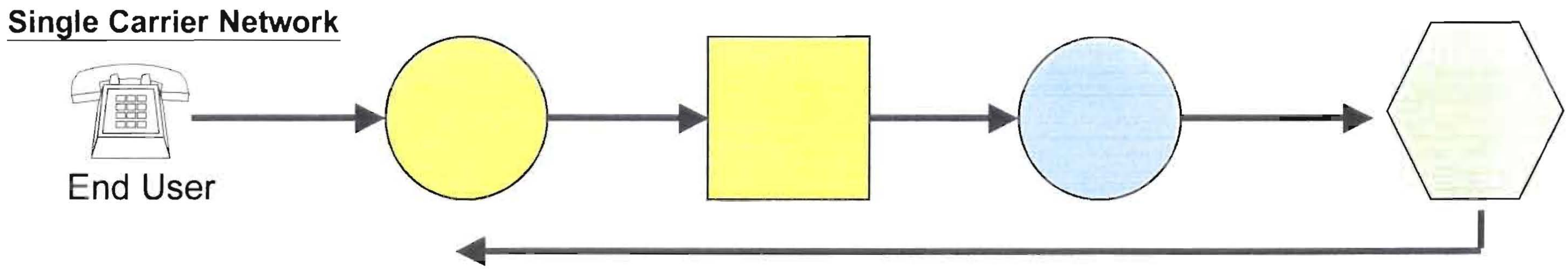
I do hereby certify that I have this 27th day of April 1999 served the following parties to this action with a copy of the foregoing REPLY COMMENTS by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.

/s/ Juanita H. Lee

Juanita H. Lee

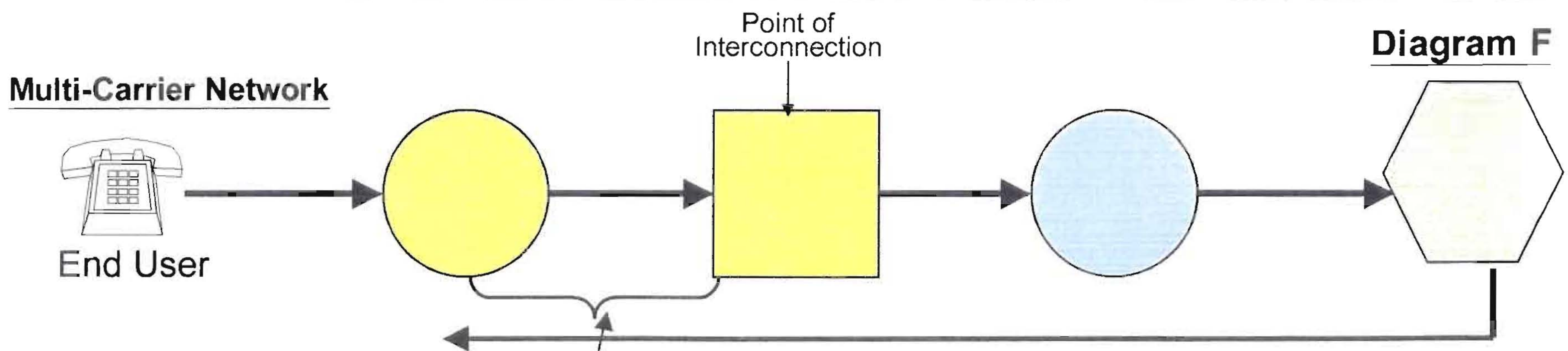
Single Network and Multi-Network Provision of Access Service

Diagram E



ISP pays the LEC for access service to cover this cost.

Diagram F



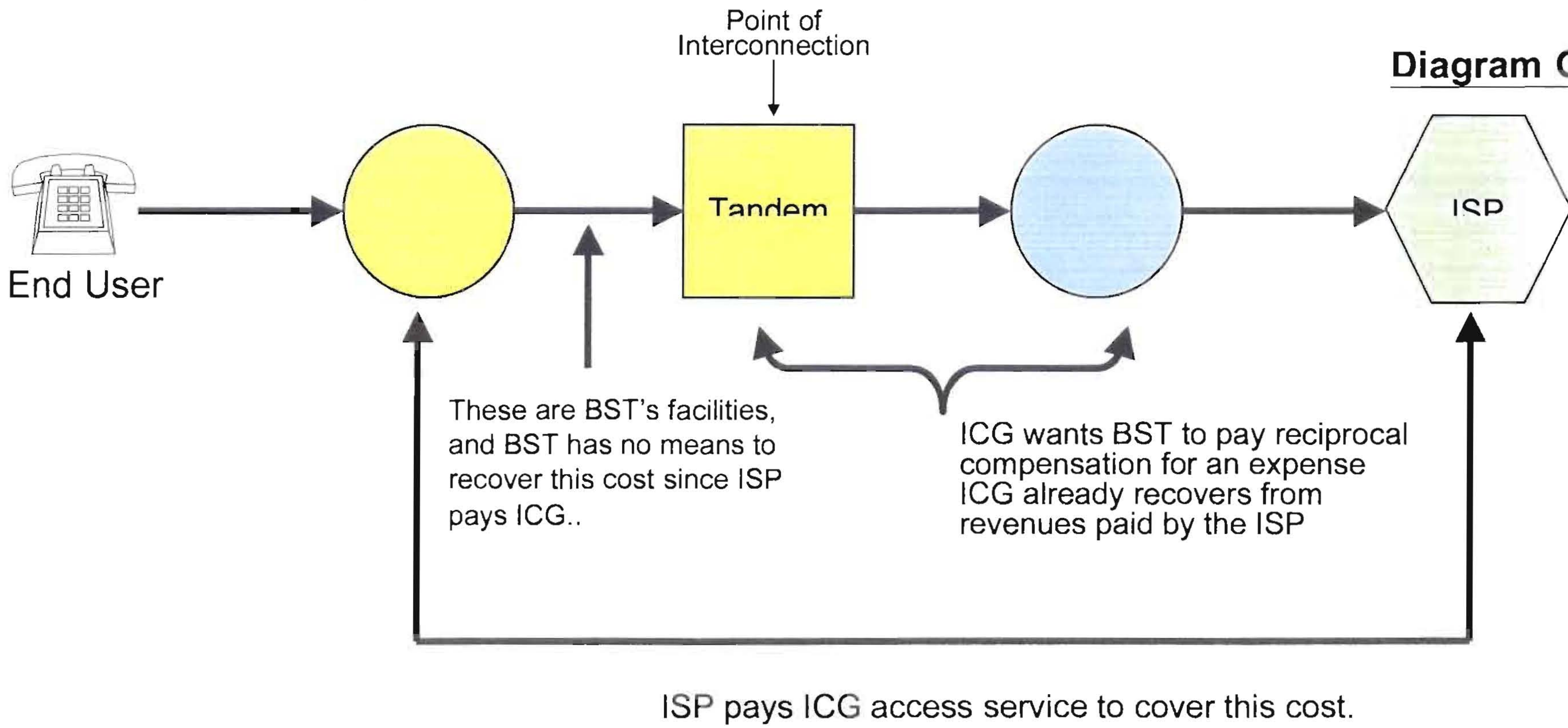
CLEC/ICO should reimburse LEC for this cost.

ISP pays the CLEC/ICO, for access service to cover this cost

ICG's Position

- ICG's position ignores the fact that ISP's purchase access service
- Paying ICG reciprocal compensation for ISP-bound traffic would result in ILEC end users subsidizing ICG's operations.

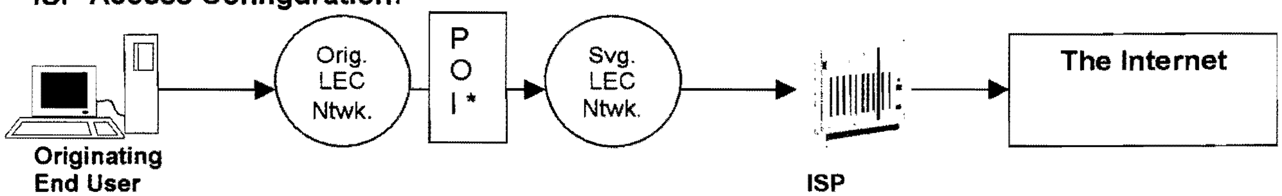
Diagram G



BellSouth's Proposed Interim ISP Inter-carrier Access Service Compensation Plan

Plan Objective is to compensate the Originating LEC(s) for portion of cost incurred in transporting ISP-bound traffic to the Serving LEC. This plan would be in effect until the FCC establishes a usage-based compensation mechanism, at which time this plan would be re-evaluated and most likely terminated.

ISP Access Configuration:



* Point Of Interface may be at the tandem or at the Serving LEC's premises

<u>Summary of Proposed Interim Revenue Sharing Arrangement:</u>

1) Each LEC that serves ISPs will be required to participate in this plan. Otherwise, only those parties that will benefit will participate – i.e., a LEC that originates more traffic to an ISP than it terminates to its own ISP will be a net receiver.

2) ISP pays Serving LEC the Serving LEC's business exchange service rate.

3) Each LEC that serves ISPs in a given LATA will be responsible for compensating LEC(s) that originate ISP traffic to the Serving LEC.

4) Facilities involved in carrying ISP-bound traffic to the ISP are as follows: Switching and Transport facilities are provided by both Originating LEC and Serving LEC and Loop facilities are provided by Serving LEC.

5) Serving LEC's PRI revenues will be shared by applying a "sharing percentage." Sharing percentage represents estimation of the proportion of its facilities that the Originating LEC uses to transport the ISP-bound MOUs to the Serving LEC. See Exhibit AJV-7 for BellSouth's calculation of its sharing percentage. BellSouth will apply the same sharing percentage to calculate the compensation due it when BellSouth is an Originating LEC as will be applied by the Originating LEC(s) when calculating compensation BellSouth owes when BellSouth is the Serving LEC.

6) Serving LEC shares its ISP revenues with Originating LECs as follows:

   a) Each Serving LEC will be responsible for identifying all minutes of use ("MOUs") which are ISP-bound that each Originating LEC delivers to the Serving LEC's network.

   b) Assume that, on average, each trunk (DS0-equivalent) carries 9000 MOUs per month (equates to 150 hours per trunk per month).

c) Based on ISP-bound MOUs identified by the Serving LEC and provided to the Originating LEC, the Originating LEC will calculate the quantity of DS1 facilities required to transport the Originating LEC's ISP-bound traffic to the Serving LEC as follows:
ISP-bound MOUs / 9000 avg MOUs per trunk / 24 trunks per DS1

d) Serving LEC will advise Originating LECs as to average PRI rate charged to ISPs.

e) Originating LEC calculates compensation due to it by the Serving LEC as follows:
Quantity of DS1s x Serving LEC's PRI rate x sharing percentage

f) Originating LEC bills Serving LEC on a quarterly basis.

g) The ISP-bound MOUs and the PRI rate as reported by the Serving LEC are subject to audit by the Originating LEC(s). The amount of compensation could be affected by results of an audit.

7) To the extent two parties have additional issues, contract negotiations between the parties can determine other terms and conditions. For example, due to technical capabilities, the two LECs may agree that the Originating LEC will identify the ISP-bound minutes of use.

The Serving LEC shares its revenues with the Originating LEC(s) via transport compensation

Illustrative Calculation with BellSouth as the Originating LEC and a CLEC as the Serving LEC

<u>Assumptions:</u>

Average MOUs per Trunk (DS0):	9,000
Serving LEC's PRI Rate:	$850

COL. A	COL. B	COL.C	COL. D	COL. E	COL. F
Originating LEC	**Number of originating ISP minutes delivered to Serving LEC** **NOTE (1)**	**Number of Equivalent Transport DS1s** **NOTE (2)**	**Serving LEC's PRI Rate** **NOTE (3)**	**Sharing %** **NOTE (4)**	**Compensation due from Serving LEC to Originating LEC** **NOTE (5)**
BellSouth	55,000,000	254.63	$850.00	8.6%	$18,613.45

NOTES:
(1) ISP-bound MOUs identified/provided by Serving LEC & provided to Originating LEC
(2) Col. C calculated as follows: Col. B / 9000 MOUs per trunk / 24 trunks per DS1
(3) Col. D is the Serving LEC's PRI Rate
(4) Col. E is BellSouth's calculated sharing percentage from Exhibit AJV-7
(5) Col. F calculated as follows: Col. C * Col. D * Col. E

Calculation of Sharing Percentage

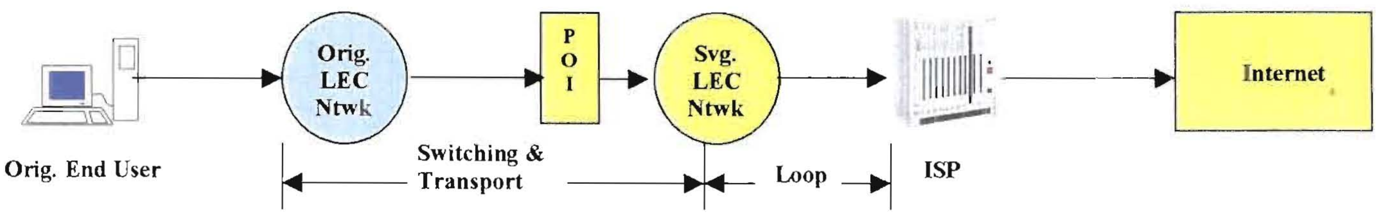
Sharing percentage is calculated by determining ratio of loop-related switching and transport facilities cost to total loop cost, then dividing by two since both Originating LEC and Serving LEC provide switching and transport facilities. BellSouth's sharing percentage is calculated as follows:

Loop Cost	= \$14.62
Associated Loop Switching Cost =	\$2.90
Associated Loop Transport Cost =	\$0.14

Total Cost	= \$17.66

((\$2.90 + \$.14) / \$17.66) / 2 = .086

Therefore, BellSouth will apply a sharing percentage of 8.6% to calculate the compensation due it when BellSouth is an Originating LEC. Likewise, when BellSouth is the Serving LEC, BellSouth expects that the Originating LEC(s) will apply a sharing percentage of 8.6% when calculating compensation BellSouth owes.



BellSouth Telecommunications, Inc.
Docket No. 990691-TP
Exhibit AJV-8
August 2, 1999

Florida Rate and Cost Analysis

Cost Ref. #	Rate Element	Cost		Rate		
		Recurring	Non-Recurring	Recurring	Non-recurring	Source
N.0	Unbundled Packet Switching Frame Relay Service					
N.1	*Unbundled Packet Switching Frame Relay Service*					
N.1.1	UPS – UNI/NNI FRS 56 KBPS	23.33	120.10	23.33	120.10	Cost Study
N.1.199	UPS – UNI/NNI FRS 56 KBPS – Disconnect		48.46		48.46	Cost Study
N.1.2	UPS – UNI/NNI FRS 64 KBPS	23.33	120.10	23.33	120.10	Cost Study
N.1.299	UPS – UNI/NNI FRS 64 KBPS – Disconnect		48.46		48.46	Cost Study
N.1.3	UPS – UNI/NNI FRS 1.536 MBPS	70.49	140.52	70.49	140.52	Cost Study
N.1.399	UPS – UNI/NNI FRS 1.536 MBPS – Disconnect		40.24		40.24	Cost Study
N.1.4	UPS – UNI/NNI FRS 44.210 MBPS	547.37	160.93	547.37	160.93	Cost Study
N.1.499	UPS – UNI/NNI FRS 44.210 MBPS – Disconnect		51.66		51.66	Cost Study
N.1.5	UPS – UNI/NNI FRS – DLCI Additional		32.32		32.32	Cost Study
N.1.599	UPS – UNI/NNI FRS – DLCI Additional - Disconnect		26.64		26.64	Cost Study
N.1.6	UPS – UNI/NNI FRS CIR – 0 BPS	.0878		.0878		Cost Study
N.1.7	UPS – UNI/NNI FRS CIR – 1-32 KBPS	.4392		.4392		Cost Study
N.1.8	UPS – UNI/NNI FRS CIR – 32-56 KBPS	.7686		.7686		Cost Study
N.1.9	UPS – UNI/NNI FRS CIR – 56-64 KBPS	.8784		.8784		Cost Study
N.1.10	UPS – UNI/NNI FRS CIR – 64-128 KBPS	1.76		1.76		Cost Study
N.1.11	UPS – UNI/NNI FRS CIR – 128-256 KBPS	3.51		3.51		Cost Study
N.1.12	UPS – UNI/NNI FRS CIR – 256-384 KBPS	5.27		5.27		Cost Study
N.1.13	UPS – UNI/NNI FRS CIR – 384-512 KBPS	7.03		7.03		Cost Study
N.1.14	UPS – UNI/NNI FRS CIR – 512-768 KBPS	10.54		10.54		Cost Study
N.1.15	UPS – UNI/NNI FRS CIR – 768-1.536 MBPS	21.08		21.08		Cost Study
N.1.16	UPS – UNI/NNI FRS CIR – 1.536-4 MBPS	52.70		52.70		Cost Study
N.1.17	UPS – UNI/NNI FRS CIR – 4-10 MBPS	133.51		133.51		Cost Study
N.1.18	UPS – UNI/NNI FRS CIR – 10-16 MBPS	213.44		213.44		Cost Study
N.1.19	UPS – UNI/NNI FRS CIR – 16-34 MBPS	453.94		453.94		Cost Study
N.1.20	UPS – UNI/NNI FRS CIR – 34-44.210 MBPS	590.26		590.26		Cost Study
N.1.21	UPS – UNI/NNI FRS – Feature Change		13.61		13.61	Cost Study

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BellSouth Telecommunications, Inc.
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Exhibit AJV-1

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DOCKET
NO. 990691-TP EXHIBIT NO. 6
COMPANY/
WITNESS: Varner
DATE 10-7-99