ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of	)	DOCKET NO. 980986-TL
	)	
	)	FILED: December 10, 1998
Complaint of Intermedia Communications Inc. against GTE Florida Incorporated for breech of of Florida Partial interconnection agreement under Section 251 and 252 of the Telecommunications Act of 1996, and request for relief.	)	

INTERMEDIA COMMUNICATIONS INC.'S

DIRECT TESTIMONY OF JULIA O. STROW

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AFA ____
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ORIGINAL

Q: Please state your name, employer, position, and business address.

A: My name is Julia Strow. I am employed by Intermedia Communications Inc. (Intermedia) as Assistant Vice President, Regulatory and External Affairs. My business address is 3625 Queen Palm Drive, Tampa, Florida 33619.

Q: What are your responsibilities in that position?

A: I am the primary interface between Intermedia and the incumbent local exchange carriers (ILECs). In that capacity, I am involved in interconnection negotiations and arbitrations between Intermedia and the ILECs. I am also primarily responsible for strategic planning and the setting of Intermedia's regulatory policy.

Q: Please briefly describe your educational background and professional experience.

A: I graduated from University of Texas in 1981 with a B.S. in Communications. I joined AT&T in 1983 as a Sales Account Executive responsible for major market accounts. I subsequently held several positions with BellSouth's Marketing Department, with responsibilities for Billing and Collection and Toll Fraud Services. In 1987, I was promoted to Product Manager for Billing Analysis Services, with responsibility for the development and management of

BellSouth's toll fraud detection and deterrence products. In 1988, I was promoted into the BellSouth Federal Regulatory organization. During my tenure there, I had responsibility for regulatory policy development for various issues associated with Billing and Collection Services, Access Services, and Interconnection. In 1991, due to a restructuring of the Federal Regulatory organization, my role was expanded to include the development of state and federal policy for the issues I mentioned above. During my last two years in that organization, I supported regulatory policy development for local competition, interconnection, unbundling, and resale issues for BellSouth. I joined Intermedia in April 1996 as Director of Strategic Planning and Regulatory Policy. In April, 1998, I became Vice President, Regulatory and External Affairs.

Q. Do Intermedia and GTE Florida have an interconnection agreement under Section 252 of the Telecommunications Act of 1996?

A. Yes. Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Intermedia Communications Inc. (Intermedia) and GTE Florida Incorporated (GTEFL) negotiated an interconnection agreement and filed it with the Florida Public Service Commission (Commission). In accordance with Section

252(e) of the Act, the Commission approved the interconnection agreement by Order No. PSC-97-0719-FOF-TP, issued on June 19, 1997. This agreement was subsequently amended by GTEFL and Intermedia and was approved by the Commission by Order No. PSC-97-0788-FOF-TP, issued July 2, 1997. A copy of the relevant portions of the interconnection agreement and subsequent amendment (collectively "Agreement") is attached as JOS-1.

Q. Why did Intermedia file a complaint against GTEFL?

A. GTEFL sent a letter, dated December 16, 1997, from Ms. Kimberly Tagg to Mr. Kirk Champion, of Intermedia, stating in part as follows:

> GTE believes that there is an error in your billing for reciprocal termination of local traffic as provided for in our interconnection agreement. It appears that you are billing GTE for more than Local Traffic as defined in that agreement.

A copy of this letter is attached as JOS-2. Moreover, GTEFL stated that it disputed the bill and was withholding payment.

Intermedia responded to GTEFL by letter dated January 7, 1998, stating that Intermedia strongly disagrees with GTEFL's position that it is billing more than local traffic. In fact, Intermedia reiterated its request that GTEFL specifically identify what traffic GTEFL believes is not local in

the billings from Intermedia and to identify the specific dollar amount that GTEFL considers to be non-local traffic. A copy of this letter is attached as JOS-3.

Q. What is the significance of this correspondence?

A. GTEFL's refusal to provide reciprocal compensation for local ISP traffic originated by its end-users that terminates on Intermedia's network constitutes a material and willful breach of the terms of the interconnection Agreement. GTEFL's action also violates Section 251(b)(5) of the Act which sets forth the obligation of all local exchange companies (LECs) to provide reciprocal compensation. Moreover, GTEFL's action is inconsistent with a number of state regulatory decisions which have addressed this issue.

Q. Did GTEFL and Intermedia attempt to resolve this dispute further?

A. Yes. Intermedia and GTEFL participated in a meeting to discuss these issues on January 26, 1998. GTEFL then sent another letter to Intermedia, dated February 5, 1998, providing its position on the exchange of information service provider traffic and its proposal of the manner in which billing disputes should be handled pending final resolution by the FCC or appropriate state commission. A copy of this letter is attached as JOS-4.

By letters dated February 17, 1998 and March 2, 1998, GTEFL again informed Intermedia that it believed there was an error in billing regarding local traffic and was withholding payment. Copies of these letters are attached as JOS-5.

Also on March 2, 1998 representatives from GTEFL and Intermedia conducted a teleconference regarding the billing dispute. After this meeting, Intermedia sent an e-mail to GTEFL regarding Intermedia's position that traffic transported and terminated to ISPs is local traffic and is subject to reciprocal compensation, its proposed solution, and comments to GTEFL's proposed long-term and interim solutions. A copy of this correspondence is attached as JOS-6.

Q. Did GTEFL agree with Intermedia's position?

A. No. Therefore, Intermedia informed GTEFL, by letter dated June 15, 1998, which is attached as JOS-7, that since they have not been able to reach resolution with respect to the issue of Internet traffic, Intermedia has no alternative but to seek resolution of the issue via the regulatory process.

Q. Does the Agreement have provisions for dealing with disputes between the parties?

A. Yes. Although, the interconnection agreement provides for dispute resolution through binding arbitration, Intermedia informed GTEFL of its intent to file this

complaint with the Commission. In this case, however, GTEFL has agreed to handle this dispute through the complaint process and not arbitration. GTEFL, however, stated that it reserves the right to demand arbitration in any other future disputes with Intermedia.

Q. Why does GTEFL's refusal to provide compensation for the transport and termination of traffic to Internet Service Providers constitute a material and willful breach of the Agreement?

A. Because under the Agreement, the parties owe each other reciprocal compensation for any "Local Traffic" terminated on the other's network. Traffic to ISPs meets that definition of "Local Traffic."

Specifically, Section 1.20 of the Agreement defines "Local Traffic" as:

> 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 <u>not</u> 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 here- after as "optional EAS."

The traffic at issue originates and terminates

within GTEFL's current local serving area.

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.

Moreover, Section 3.3.1 of the original Agreement regarding mutual compensation 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.

Paragraph 33 of the amended interconnection agreement provides that the terms of the GTE/AT&T agreement (the AT&T terms) specified in Appendix I shall not take effect for purposes of the Agreement until ten days following GTE's receipt of written notice of Intermedia's election to replace them. Intermedia has not provided GTEFL with written notice of election of AT&T terms.

To reiterate, pursuant to the Agreement, the parties owe each other reciprocal compensation for any "Local Traffic" terminated on the other's network.

Q. Why is the ISP traffic at issue here subject to

reciprocal compensation?

A. Because, as noted above, this ISP traffic meets the definition of local traffic under Section 1.20. The ISP traffic at issue is originated by a GTEFL end-user, delivered to Intermedia, and terminated on Intermedia's network. This is the essence of a local call. Pursuant to the Agreement, calls from GTEFL's end-users to Intermedia's end-users that are ISPs are thus subject to reciprocal compensation.

Nothing in the Agreement creates a distinction pertaining to calls placed to telephone exchange end-users that happen to be ISPs. All calls that terminate within a local calling area, regardless of the identity of the end-user, are local calls under Section 1.20 of the Agreement, and reciprocal compensation is due for such calls. This includes telephone exchange service calls placed by GTEFL's customers to Intermedia's ISP customers.

Finally, there is nothing absolutely unique in the nature of a call to an ISP that could separate ISP traffic from other local traffic with long holding times (i.e. calls to a help desk, reservation centers, travel agencies, and customer service centers).

Q. **Has the Florida Public Service Commission made a determination that this traffic is local in other cases?**

A. Yes. In deciding complaints against BellSouth Telecommunications, Inc. (BellSouth), the Commission held that "traffic that is terminated on a local dialed basis to Internet Service Providers or Enhanced Service Providers should not be treated differently from other local dialed traffic." (Order No. PSC-98-1216-FOF-TP, issued September 15, 1998, in *Complaints of WorldCom Technologies, Inc., Teleport Communications Group, Inc./TCG South Florida, Intermedia Communications Inc., and MCI Metro Access Transmission Services, Inc. against BellSouth Telecommunications, Inc.* for breach of terms of interconnection agreement under Section 251 and 252 of the Telecommunications Act of 1996, and request for relief, Dockets Nos. 971478-TL, 980184-TP, 980495-TP, and 980499-TP, page 22 (Order). BellSouth has filed a complaint in federal court regarding the Commission's decision.

Q. Has any federal court considered this issue?

A. Yes. Three federal courts have upheld state commission decisions in Texas, Illinois and Washington that calls to ISPs are subject to reciprocal compensation obligations under interconnection agreements. Copies of these decisions are attached as JOS-8.

Q. Was Intermedia a party to the BellSouth proceeding?

A. Yes. In the proceeding, the Commission found that, "BellSouth must compensate Intermedia according to the parties' interconnection agreement, including interest, for the entire period the balance owed is outstanding." Order at 22.

Q. Does the Commission's decision address generic questions about the ultimate nature of ISP traffic for reciprocal compensation purposes?

A. No. The Commission only addresses the issue of whether ISP traffic should be treated as local or interstate for purposes of reciprocal compensation as necessary to show what parties might reasonably have intended at the time they entered into their contracts.

Q. Is the language regarding reciprocal compensation in the GTEFL/Intermedia Agreement the same or similar to the BellSouth/Intermedia Interconnection Agreement?

A. Yes. The BellSouth/Intermedia 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. The terms Exchange, and EAS exchange are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

The portion of the BellSouth/Intermedia Agreement regarding reciprocal compensation states:

> The delivery of local traffic between the parties shall be reciprocal and compensation

will be mutual according to the provisions of this Agreement.

Section IV(B) states:

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

The language of the GTEFL/Intermedia Agreement is substantially the same (Sections 1.20, 3.1, and 3.3.1), therefore GTEFL should be required to pay Intermedia, under the terms of the contract, all monies owed.

Q. Was there ever any question at Intermedia that the reciprocal compensation provision in the Agreement was applicable for the transport and termination of traffic to ISPs?

A. No. Intermedia has consistently viewed this traffic as local pursuant to the Agreement. Indeed, when we amended the contract to include the present language, our largest customer was an ISP, so obviously, reciprocal compensation requirements were significant to us and presumably GTEFL was aware of this.

Q. Have other state commissions made a decision on this issue?

A. Yes. Twenty-four of the twenty-four state commissions who have heard complaints on this issue have ruled that calls from an end-user to an ISP are local traffic and subject to reciprocal compensation. I

have attached a list of the 24 cases as JOS-9.

Q. If the Commission determines that GTEFL should be required to compensate Intermedia for the transport and termination of traffic to ISPs, what should the Commission require of GTEFL?

A. GTEFL should be required to immediately compensate Intermedia for the total amount outstanding for the transport and termination of local traffic pursuant to the terms of the Agreement. Moreover, on a going-forward basis, GTEFL should be ordered to continue to compensate Intermedia for such traffic in accordance with the Agreement.

Q. Does this conclude your testimony?

A. Yes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery(*) or U.S. Mail this 10th day of December, 1998, to the following:

Cathy Bedell*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Kimberly Caswell
Anthony Gillman
GTE Florida Incorporated
201 North Franklin Street
Tampa, Florida 33602

Donna L. Canzano

Donna L. Canzano

1.10 "Exchange Service" refers to all basic access line services, or any other services offered to end users which provide end users with a telephonic connection to, and a unique telephone number address on, the public switched telecommunications network ("PSTN"), and which enable such end users to place or receive calls to all other stations on the PSTN.

1.11 "EIS" or "Expanded Interconnection Service" means a service that provides interconnecting carriers with the capability to terminate basic fiber optic transmission facilities, including optical terminating equipment and multiplexers, at GTE's wire centers and access tandems and interconnect those facilities with the facilities of GTE. Microwave is available on a case-by-case basis where feasible.

1.12 "FCC" means the Federal Communications Commission.

1.13 "Guide" means the GTE Customer Guide for CLEC Establishment of Services - Resale and Unbundling, which contains GTE's operating procedures for ordering, provisioning, trouble reporting and repair for resold services and unbundled elements. A copy of the Guide has been provided to ICI.

1.14 "Interconnection" means the physical connection of separate pieces of equipment, transmission facilities, etc., within, between and among networks, for the transmission and routing of Exchange Service and Exchange Access. The architecture of interconnection may include collocation and/or mid-span meet arrangements.

1.15 "IXC" or "Interexchange Carrier" means a telecommunications service provider authorized by the FCC to provide interstate long distance communications services between LATAs and authorized by the State to provide long distance communications services.

1.16 "ISDN" or "Integrated Services Digital Network" means a switched network service providing end-to-end digital connectivity for the simultaneous transmission of voice and data.

1.17 "ISUP" means a part of the SS7 protocol that defines call setup messages and call takedown messages.

1.18 "Local Exchange Carrier" or "LEC" means any company certified by the Commission to provide local exchange telecommunications service. This includes the Parties to this Agreement.

1.19 "Local Exchange Routing Guide" or "LERG" means the Bellcore reference customarily used to identify NPA-NXX routing and homing information.

1.20 "Local Traffic" means traffic that is 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."

1.21 "MDF" or "Main Distribution Frame" means the distribution frame used to interconnect cable pairs and line trunk equipment terminating on a switching system.

1.22 "Meet-Point Billing" or "MPB" refers to an arrangement whereby two LECs jointly provide the transport element of a switched access service to one of the LEC's end office switches, with each LEC receiving an appropriate share of the transport element revenues as defined by their effective access tariffs.

1.23 "MECAB" refers to the *Multiple Exchange Carrier Access Billing* ("MECAB") document prepared by the Billing Committee of the Ordering and Billing Forum ("OBF"), which functions under the auspices of the Carrier Liaison Committee ("CLC") of the Alliance for Telecommunications Industry Solutions ("ATIS"). The MECAB document, published by Bellcore as Special Report SR-BDS-000983, contains the recommended guidelines for the billing of an access service provided by two or more LECs, or by one LEC in two or more states within a single LATA.

1.24 "MECOD" refers to the *Multiple Exchange Carriers Ordering and Design ("MECOD") Guidelines for Access Services - Industry Support Interface*, a document developed by the Ordering/Provisioning Committee under the auspices of the Ordering and Billing Forum ("OBF"), which functions under the auspices of the Carrier Liaison Committee ("CLC") of the Alliance for Telecommunications Industry Solutions ("ATIS"). The MECOD document, published by Bellcore as Special Report SR-STS-002643, establish methods for processing orders for access service which is to be provided by two or more LECs.

1.25 "Mid-Span Fiber Meet" means an Interconnection architecture whereby two carriers' fiber transmission facilities meet at a mutually agreed-upon POI.

1.26 "NANP" means the "North American Numbering Plan", the system of telephone numbering employed in the United States, Canada, and the Caribbean countries that employ NPA 809.

1.27 "NID" or "Network Interface Device" means the point of demarcation between the end user's inside wiring and GTE's facilities.

1.28 "Numbering Plan Area" or "NPA" is also sometimes referred to as an area code. This is the three digit indicator which is defined by the "A", "B", and "C" digits of each 10-digit telephone number within the NANP. Each NPA contains 800 possible NXX Codes. There are two general categories of NPA, "Geographic NPAs" and "Non-Geographic NPAs". A Geographic NPA is associated with a defined geographic area, and all

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3. Transport and Termination of Traffic.

3.1 Types of Traffic. 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. Neither Party is to send cellular traffic or traffic of any third party unless an agreement has been made between the originating Party and both the tandem company and the terminating company.

3.2 Audits. Either Party may conduct an audit of the other Party's books and records, no more frequently than once per twelve (12) month period, to verify the other Party's compliance with provisions of this Article IV. Any audit shall be performed as follows: (i) following at least ten (10) days' prior written notice to the audited Party; (ii) subject to the reasonable scheduling requirements and limitations of the audited Party: (iii) at the auditing Party's sole cost and expense; (iv) of a reasonable scope and duration; (v) in a manner so as not to interfere with the audited Party's business operations; and (vi) in compliance with the audited Party's security rules.

3.3 Compensation For Exchange Of Traffic.

3.3.1 Mutual Compensation. 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.

3.4 Tandem Switching Services. The Parties will provide tandem switching for traffic between the Parties end offices subtending each other's access tandem, as well as for traffic between the Parties and any third party which is interconnected to the Parties' access tandems.

3.4.1 The originating Party will compensate the tandem Party for each minute of originated tandem switched traffic which terminates to third Party (e.g. other CLEC, ILEC, or wireless service provider). The applicable rate for this charge is identified in Appendix C.

3.4.2 The originating Party also assumes responsibility for compensation to the company which terminates the call.

3.4.3 Services Provided. Tandem switching services provided pursuant to this section 3.4 shall include the following:

(a) signaling;

(b) screening and routing;

December 16, 1997

Mr. Kirk Champion
Intermedia Communications, Inc.
3625 Queen Palm Drive
Tampa, FL 33619

Dear Mr. Champion:

GTE believes that there is an error in your billing for the reciprocal termination of local traffic as provided for in our interconnection agreement. It appears that you are billing GTE for more than Local Traffic as defined in that agreement. In addition, ICI's rates are based on "opt-in" language from the AT&T agreement. Given this, the rates charged on the invoices do not correspond to the AT&T opt-in rates.

Based on this appearance, GTE disputes your bill dated December 3, 1997 totaling $843,239.78 and is withholding payment. GTE requests that we establish a discussion and work toward resolution of this issue as soon as possible.

Please contact me at 813/273-2904 to establish a review of this dispute.

Sincerely,

Kimberly Tagg
Support Manager – Emerging Markets

Cc: Michael A. Marczyk
Ann Lowery
Julia Strow

January 7, 1998

Ms. Kimberly Tagg
GTE Network Services
One Tampa Center
201 N. Franklin Street
Tampa, Florida 33602

Dear Ms. Tagg:

This is to acknowledge our receipt of your letter dated December 16, 1997 disputing the reciprocal compensation billing in the amount of $843,239.78 for local traffic termination. You identify two issues associated with the dispute. The letter states that Intermedia appears to billing for more than local traffic as defined in our agreement to which Intermedia strongly disagrees. The billing rendered contains only local traffic as defined in our agreement. On December 17 when I called to inquire about this statement, you referred me to Steve Pitterle. In my discussion with Mr. Pitterle, I requested a written explanation from GTE as to what was meant by the statement "more than local traffic" in your letter, although I understand from my discussion with him that GTE is referring to Internet traffic. I have not received anything from Mr. Pitterle and would request again some specific explanation, in writing, from GTE which specifically identifies what traffic GTE feels is not local in the billings from Intermedia. Additionally, I would like to request that GTE identify the specific dollar amount of the $843,239.78 that GTE considers to be non-local traffic and that payment of the balance or non-disputed amount be paid.

The second issue raised in the letter addresses what the actual rate for the local reciprocal compensation should be. As we discussed on December 17, 1997, Intermedia is required to notify GTE in writing of its desire to "opt in" to the approved AT&T agreement. To date, no such notification has been given by Intermedia therefore we are operating under the approved contracts executed between Intermedia and GTE. It is my understanding based on our conversation that GTE is in agreement with Intermedia on this point.

I also request by this letter that the dispute resolution procedures in our interconnection agreement be initiated to resolve the issue as to what if any of our billing is for "non-local" traffic. I will be the Intermedia representative responsible for this negotiation. Please have the designated GTE representative contact me to establish the action plan for our negotiations.

Please call me on 813-829-2072 if you have any questions.

Sincerely,

Julia Strow

Julia Strow
Director - Industry Policy
Intermedia Communications Inc.

cc: Michael Viren
Michael Marczyk
Ann Lowery
Steve Pitterle

GTE Telephone Operations

4100 N. Roxboro Road
P.O. Box 1412
Durham, NC 27702
919 317-5453

February 5, 1998

VIA AIRBORNE AND FACSIMILE

Ms. Julia Strow
Intermedia Communications, Inc.
3625 Queen Palms Drive
Tampa, FL 33619

Dear Julia:

Subject:. INTERMEDIA COMMUNICATIONS INC.

Attached is GTE's position on the exchange of information service provider traffic for your review. In addition, GTE's proposal of the manner in which billing disputes should be handled pending final resolution by the FCC or appropriate state commission has also been addressed.

Please contact me at your convenience when you have reviewed the attached and are prepared to discuss it. I can be reached at 919/317-5453.

Yours truly,

Ann Lowery

Ann Lowery
Manager-Carrier Compensation - East

OAL:kbm
Enclosure

c: M. Marczyk
S. Pinterle
K. Tagg
A. Wood

ISP Bill Adjustment

Background:
Per the FCC's Local Interconnection Order, GTE and CLECs pay reciprocal compensation for local traffic. A disagreement has arisen between GTE (and most ILECs) and the CLECs as to the definition of local traffic. Specifically, the disagreement has focused on whether ISP traffic is local, and thus eligible for reciprocal compensation. GTE strongly contends that ISP traffic is interstate in nature and is not subject to reciprocal compensation. Historically, the jurisdictional nature of traffic has been determined by its end-to-end configuration, not by the presence of intermediate local switching and/or transport. Since ISP traffic is passed through the LECs to ISP sites that could be anywhere in the nation or the world, ISP traffic must be interstate/international, not intrastate, and especially not local. In the FCC's Access Charge Order, the FCC ruled that calls to an information service provider (ISP) would be exempt from interstate access charges, but the FCC has not ruled that ISP traffic is intrastate or local.

Issue:
CLECs pass ISP traffic through their switch, before sending it on to ISP sites. If the CLEC switch houses NXX codes that are local or EAS to the originating GTE end user customer, such calls appear to be local traffic. Since these calls are not local, but are interstate, if the CLEC bills GTE reciprocal compensation for such calls, they must be adjusted out. However, GTE has no precise way of knowing which calls are to ISPs and not subject to reciprocal compensation, and which calls are local and properly subject to reciprocal compensation.

Interim Solution:
ISP traffic has a longer average holding time than local traffic. The average GTE holding time for local traffic is approximately 3.5 minutes. Absent the CLEC identifying and removing their ISP traffic from their local reciprocal compensation bill to GTE, GTE will attempt to estimate the ISP traffic and withhold payment for such traffic. GTE will estimate the CLEC's ISP traffic by analyzing the bill detail, assume that traffic with a holding time of greater than 10 minutes is ISP traffic and adjust the bill from the CLEC accordingly.

Also, since ISP providers may have service that terminates to GTE, GTE will also adjust out any billing to CLECs that has a holding time of more than 10 minutes.

Thus GTE will pay CLECs reciprocal compensation as provided for in the Interconnection Agreement, but only for local traffic, not ISP traffic.

Long Term Solution:
GTE will remove actual ISP traffic from local when the ability to identify such traffic is available. Until then, the interim solution described above will continue.

GTE Network Services

One Tampa City Center
201 N. Franklin Street
Tampa, FL 33602

February 17, 1998

Ms. Julia Strow
Director – Strategic Planning
Intermedia Communications, Inc.
3625 Queen Palm Drive
Tampa, FL 33619

Dear Ms. Strow:

GTE believes that there is an error in your billing for the reciprocal termination of local traffic as provided for in our interconnection agreement. It appears that you are billing GTE for more than Local Traffic as defined in that agreement. In addition, ICI's rates are based on "opt-in" language from the AT&T agreement. Given this, the rates charged on the invoices do not correspond to the AT&T opt-in rates.

Based on this appearance, GTE disputes charges billed for November and December 1997, totaling $488,891.14, and is withholding payment. This is in addition to the $843,239.78 disputed in our letter to you dated December 16, 1998. We can further discuss this matter on our conference call scheduled for March 2, 1997 at 10:00 am EST. The conference bridge for this meeting is 919/317-7033.

Please contact me at 813/273-2904 if you have any questions regarding the above.

Sincerely,

Kimberly Tagg

Kimberly Tagg
Support Manager – Emerging Markets

Cc: Michael A. Marczyk
Ann Lowery
Kirk Champion

GTE Network Services

One Tampa City Center
201 N. Franklin Street
Tampa, FL 33602

March 2, 1998

Ms. Julia Strow
Director – Strategic Planning
Intermedia Communications, Inc.
3625 Queen Palm Drive
Tampa, FL 33619

Dear Ms. Strow:

GTE believes that there is an error in your billing for the reciprocal termination of local traffic as provided for in our interconnection agreement. It appears that you are billing GTE for more than Local Traffic as defined in that agreement.

Based on this appearance, GTE disputes charges billed for November and December 1997, totaling $488,891.14, and is withholding payment. This is in addition to the $843,239.78 disputed in our letter to you dated December 16, 1998. We can further discuss this matter on our conference call scheduled for March 2, 1997 at 10:00 am EST. The conference bridge for this meeting is 919/317-7033.

Please contact me at 813/273-2904 if you have any questions regarding the above.

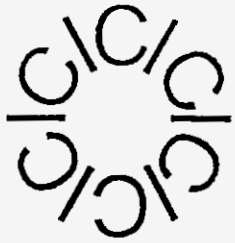
Sincerely,

Kimberly Tagg

Kimberly Tagg
Support Manager – Emerging Markets

Cc: Michael A. Marczyk
Ann Lowery
Kirk Champion

FAXED 3/2/98



Intermedia Communications- Inc.

Facsimile Cover Sheet

To:	Kimberley Tagg
Company:	
Phone:	
Fax:	813-204-8839
From:	Julia Strow
Company:	ICI-Industry Policy
Phone:	813-829-2072 813-829-0011 ext. 2072
Fax:	813-829-4923
Date:	03/02/98
Pages including this cover page:	2

Comments:

GTE/Intermedia
Reciprocal Compensation for ISP Traffic

Intermedia Position: Traffic transported and terminated to ISPs is local traffic and therefore subject to reciprocal compensation provisions of the interconnection agreement between GTE and Intermedia.

Basis for Intermedia's Position and Current Status: The FCC has long held that calls to ISPs must be treated as local calls by ILECs regardless of whether the ISP reformats or retransmits information received over such calls to or from out-of-state destinations. Calls placed to ISPs over local numbers provided out of the ILEC tariff are clearly local. Recent state commission rulings on this issue are supportive of Intermedia's positions. In every case where a final ruling has been issued, the state commission has found that ISP traffic is local and therefore subject to reciprocal compensation. These states include Arizona, Connecticut, Colorado, Illinois, Maryland, Michigan, Minnesota, Oregon, Texas, Virginia, Washington, West Virginia, Oklahoma and North Carolina. Furthermore, in Florida a recent staff recommendation also supports Intermedia's position as well as the interim decision in New York.

Proposed Solution: Since the states where decisions have been made have unanimously ruled in favor of Intermedia's position and it would appear that Florida will also rule that ISP traffic is local and subject to mutual compensation, GTE should pay Intermedia the balance due on outstanding reciprocal compensation invoices in full. At such time that a decision is made that determines that the ISP traffic is not local and therefore not subject to mutual compensation, then Intermedia will cease to assess those charges at that point on a going forward basis unless required by the order to retroactively adjust the charges.

Comments to GTE's Proposed Long Term and Interim Solutions: Intermedia rejects GTE's proposals for two reasons. First, GTE nor any other party has the ability to identify ISP traffic. Second, use of a surrogate methodology using holding times of greater than 10 minutes as the basis for excluding ISP traffic in the interim, is unacceptable since GTE would be arbitrarily withholding compensation on other local calls with holding times in excess of 10 minutes.

Outstanding Issues:

In proceedings that are underway or decisions that have been reached by state commissions on this issue to which GTE was not a party, will GTE abide by those decisions for purposes of this dispute?

Prepared by:
Julia Strow
Director - Industry Policy
Intermedia Communications Inc.
03/02/98

June 15, 1998

Ms. Kimberly Tagg
GTE Network Services
One Tampa Center
201 N. Franklin Street
Tampa, Florida 33602

Dear Ms. Tagg:

As you aware GTE and Intermedia have been seeking to reach resolution of the reciprocal compensation billing dispute via the dispute resolution procedures contained in our interconnection agreement. Unfortunately, with regard to the issue of Internet traffic we have not been able to reach resolution. In light of this, Intermedia has no alternative but to seek resolution of the issue via the regulatory process.

Intermedia has, however, determined that with regard to the issue of the billing initiation date for reciprocal compensation provisions that such billing should be initiated under the time frame specified by our interconnection agreement. Therefore, billing adjustments will be made by Intermedia to resolve this matter.

Additionally, it has been brought to my attention that some billing adjustments have also been made to bill for access minutes of use instead of for conversation minutes of use. If you should have any questions about this issue, please contact me as well.

Sincerely,

Julia Strow

Julia Strow
Director - Industry Policy
Intermedia Communications Inc.

ILLINOIS BELL TELEPHONE COMPANY d/b/a Ameritech Illinois, Plaintiff,
v.
WORLDCOM TECHNOLOGIES, INC. as a successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group Inc., MCI Telecommunications Corporation and Mcimetro Access Transmission Services, Inc., AT & T Communications of Illinois, Inc., and Focal Communications Corporation
and
Dan MILLER, Richard Kolhauser, Ruth Kretschmer, Karl Mcdermott, and Brent Bohlen, Commissioners of the Illinois Commerce Commission (In Their Official Capacities and not as Individuals), Defendants.

No. 98 C 1925.

United States District Court, N.D. Illinois.

July 23, 1998.

MEMORANDUM OPINION AND ORDER

COAR, J.

*1 Plaintiff Illinois Bell Telephone Co. d/b/a/ Ameritech Illinois ("Ameritech") has filed the instant suit challenging the Illinois Commerce Commission's ("ICC" or "the Commission") determination that Internet calls are "local traffic" as defined by Interconnection Agreements between Ameritech and several of the defendants, and therefore subject to reciprocal compensation. Ameritech contends that the ICC's decision violates the Telecommunications Act of 1996. A hearing on the merits of the case was held by this court on June 25, 1998. As set forth in this Memorandum Opinion and Order, this court upholds the ICC's decision.

I. PROCEDURAL HISTORY

In 1996, plaintiff Ameritech entered into negotiations for separate Interconnection Agreements with five of the defendants in this case, Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom"), MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc. ("MCI"), AT & T Communications of Illinois, Inc. ("AT & T"), and Focal Communications Corporation ("Focal") (collectively the "Carrier defendants"). (Compl.¶ 16.) In 1996 and 1997 each of the Agreements was approved by the Illinois Commerce Commission ("ICC" or "the Commission"). On September 8, 1997, one of the Carrier defendants, TCG, filed a complaint against Ameritech alleging that Ameritech had violated the terms of its Interconnection Agreement by refusing to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Internet Service Providers ("ISPs") on TCG's network. (Order at 2.) On October 9 and 10, 1997, WorldCom and MCI filed similar complaints against Ameritech, and the three cases were consolidated on November 4, 1997. (Order at 2.) Subsequently, petitions to intervene were granted as to Focal, AT & T, and others. (Order at 2.)

On March 11, 1998, the ICC entered an Order incorporating factual findings regarding the Carrier defendants' complaints and concluding that Ameritech had violated its Interconnection Agreements. On March 27, 1998, Ameritech filed the instant suit against the Carrier defendants and the Commissioner of the Illinois Commerce Commission ("the Commissioners") seeking review in federal court of the ICC's March 11 Order pursuant to Section 252(e)(6) of the Telecommunications Act of 1996 and 28 U.S.C. § 1331. Ameritech's five-count complaint alleges that the ICC's order is contrary to governing federal law. [FN1] As relief, Ameritech requests this court to declare that the term "local traffic" as used in the Agreements does not include Internet ISP calls, declare that the ISP calls are not subject to the payment of reciprocal compensation, and issue an injunction against the enforcement of the ICC's order.

FN1. Count I alleges that the Commission's interpretation of the Agreements is erroneous as a matter of law because, pursuant to the Agreement, the Internet ISP calls are switched exchange access

service. (Compl.¶¶ 40-45.) Count II alleges that the ICC order is contrary to controlling FCC orders which hold that Internet ISP calls are exchange access traffic. (Compl.¶¶ 46-51.) Count III alleges that the ICC's order violates controlling federal law which assigns authority over interstate communications to the FCC. (Compl.¶¶ 52-56.) Count IV alleges that the ICC order violates sections 251(b)(5), 252(d)(2), and 251(g) of the 1996 Act. (Compl.¶¶ 57-62.) Finally, Count V alleges that the ICC order must be set aside under Illinois law. (Compl.¶¶ 63-4.) Not all of the counts alleged in the complaint were presented to this court in the final briefing on the merits.

Ameritech also filed a motion for stay of the ICC's order pending review. On May 1, 1998, this court issued a stay of the Order pending expedited review of the case on the merits. The defendant Commissioners have filed two motions to dismiss the plaintiff's complaint. Due to the expedited nature of this proceeding, the Commissioners' motions are not yet fully briefed, and will therefore be reviewed in a subsequent decision of this court. At this court's suggestion, the instant Opinion and Order are without prejudice to the Commissioners' positions raised in the motions to dismiss.

II. BACKGROUND

A. THE TELECOMMUNICATIONS ACT OF 1996

*2 The Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the United States Code) (hereinafter "the Act" or "Telecommunications Act"), is intended to foster competition in local telephone service. The Act, which amends the Communications Act of 1934, works to open "all telecommunications markets through a pro-competitive, deregulatory national policy framework." In Re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, CC Dockets 96-262 et al., Third Report and Order, 11 F.C.C. Rcd. 21354, ¶ 2 (Dec. 24, 1996) (hereinafter "Third Report and Order"). See generally MCI Telecommunications Corp. v. Bellsouth Telecommunications, Nos. 97 C 2225, 97 C 4096, 97 C 0886, 97 C 8285, 1998 WL 146678, at *1-2 (N.D.Ill. March 31, 1998); GTE South, Inc. v. Morrison, Jr., 957 F.Supp. 800, 801-02 (E.D.Va.1997). The Act preempts state and local barriers to market entry and requires new entrants into local telecommunication markets to be provided with access to telephone networks and services on "rates, terms, and conditions that are just, reasonable, and non-discriminatory." 47 U.S.C. § 251(c)(2)(D) (1998).

Under Sections 251 and 252 of the Act, incumbent Local Exchange Carriers ("LECs") and telecommunication carriers 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 by the Act. See id. §§ 251(c), 252. Section 252 provides that parties may enter into agreements either voluntarily or through arbitration with a state public utility commission. If the parties are unable to reach an agreement voluntarily, either party may petition the state public utility commission for arbitration. See id. § 252(b)(1). A final interconnection agreement, whether negotiated or arbitrated, is reviewed by the state commission in order to determine whether it complies with the Act. See id. § 252(e)(1).

The Act further provides that any party that is "aggrieved" has the right to bring an action in federal court to challenge the terms of the interconnection agreement: "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 250, of this title and this section." Id. § 252(e)(6). Courts have found that review by the federal courts under Section 252(e)(6) of the Act extends to "the various decisions made by [state commissions] throughout the arbitration period which later became part of the agreement ..." GTE South, 957 F.Supp. at 804.

B. STANDARD OF REVIEW

The Telecommunications Act does not explicitly state the standard that federal district courts should apply when reviewing the decision of a state commission. The Supreme Court has held that in situations "where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed ... consideration is to be confined to the administrative record and ... no de novo proceeding may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715, 83 S.Ct. 1409, 1413, 10 L.Ed.2d 652 (1963) (citations omitted). Accordingly, review in the instant case is limited to the administrative record. See, e.g., U .S. West Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, Slip Op. at 3 (W.D.Wash. Jan.7, 1998).

*3 Courts that have examined the standard to be applied in appeals from state commissions have found that the language of Section 252(e)(6) clearly limits a court's jurisdiction to determining whether the agreement meets the requirements of federal law, in particular, the Telecommunications Act. See, e.g., Southwestern Bell Tel. Co. v. Public Util. Comm'n, No. 98 CA 043, Slip Op. at 9 (W.D. Tex. June 16, 1998) (citing GTE Northwest, Inc. v. Hamilton, 971 F.Supp. 1350, 1354 (D.Or.1997)). District courts reviewing decisions of state commissions agree that the commissions' interpretations of federal law are reviewed de novo, while all other issues, including factual findings, are reviewed with substantial deference. See, e.g., Southwestern Bell, No. 98 CA 043 at 10-11; U.S. West Communications, Inc. v. MFS Intelinet, Inc., No. C 97-222WD (W.D.Wash. Jan. 7, 1998); GTE South, 957 F.Supp. at 804; U.S. West Communications, Inc., v. Hix, 986 F.Supp. 13, 17 (D.Colo.1997); AT & T Communications of California, Inc. v. Pacific Bell, No. C 97-0080, 1998 WL 246652, at *3 (N.D.Cal. May 11, 1998). Courts have reasoned that such a standard furthers the goals of the Telecommunications Act because state commissions have "little or no expertise in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency." Hix, 986 F.Supp. at 17.

This court agrees with the reasoning of the above-cited district courts regarding the standard of review for actions brought under the Telecommunications Act. In this two-tiered system of review, the court must first address whether the state commission's action in reviewing the interconnection agreements was procedurally and substantively in compliance with the Act and its regulations. See Southwestern Bell, No. 98 CA 043 at 10. If the court finds that the decision is consistent with federal law, the court must next determine whether the decision was arbitrary, capricious, or not supported by substantial evidence. Id. at 10-11. "Generally, an agency decision will be considered arbitrary and capricious if the agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Hix, 986 F.Supp. at 18 (citing Friends of the Bow v. Thompson, 124 F.3d 1210, 1215 (10th Cir.1997)).

III. ANALYSIS

The case at bar is an issue of first impression for this court. Although one other district court, Southwestern Bell Tel. Co. v. Public Util. Comm'n, No. 98 CA 043, Slip Op. at 14-25 (W.D. Tex. June 16, 1998) (holding that calls to an ISP are "local traffic" and therefore eligible for reciprocal compensation), [FN2] and state commissions in 19 states, (Carrier Def.'s Ex. 6), have determined that LECs must provide reciprocal compensation for calls to the Internet, no federal court in the Seventh Circuit has yet to answer this question.

FN2. Another federal district court found, in reviewing an 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 fee." U.S. West Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, Slip Op. at 8 (W.D.Wash. Jan.6, 1998) ("ESPs" refers to "Enhanced Service Providers," which include Internet Service Providers.).

*4 This case involves the arcane regulatory and contractual question of the appropriate compensation for LECs that terminate Internet traffic. Ameritech argues that such calls are properly classified as "interstate" [FN3] exchange access calls and therefore no reciprocal compensation should apply. The Carrier defendants and the Commissioners argue that such calls are "local" and therefore require reciprocal compensation under the terms of the Interconnection Agreements. Some review of relevant terminology and technology is useful for understanding the issue at bar, in particular, the billing procedures for local and long distance calls, as well as the growing phenomenon of the Internet and Internet Service Providers.

FN3. The Federal Communications Commission has determined that interstate telecommunications occur "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia." In re Federal-State Joint Board on Universal Service, FCC 98-67, Report to Congress, CC Docket No. 96-45, ¶ 112 (April 10, 1998).

A. RECIPROCAL COMPENSATION

Section 251(b)(5) of the Telecommunications Act 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. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Dockets 96-98 et al., First Report and Order, 11 F.C.C. Rcd. 15499, ¶ 1034 (Aug. 8, 1996) (hereinafter "First Report and Order")

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." Id. § 51.701(b)(1). Ameritech argues that Internet calls are not properly classified as "local" calls under the Interconnection Agreements at issue. Therefore, according to Ameritech, payment of reciprocal compensation is improper.

B. ACCESS CHARGES

"Access charges" are the fees that long distance carriers, known as interexchange carriers ("IXCs"), pay to LECs for connecting the end user to the long distance carrier. "Access charges were developed to address a situation in which three carriers--typically, the originating LEC, the IXC, and the terminating LEC--collaborate to complete a long-distance call." First Report and Order ¶ 1034. Typically, the long-distance carrier will pay both the terminating and originating LEC an access charge. The service provided by the LECs is known as "exchange access." The 1996 Act defines "exchange access" as "toffering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U .S.C. § 153(16) (1998). [FN4]

FN4. "Telephone toll service" is defined by the act as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48) (1998).

C. THE INTERNET

*5 "The Internet is an international network of interconnected computers .... [which] enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a unique and wholly new medium of worldwide human communication." Reno v. American Civil Liberties Union,--- U.S. ----, ----, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997) (footnote and internal citation omitted). The Internet functions by splitting up information into small chunks or "packets" that "are individually routed through the most efficient path to their destination ..." In re Federal-State Joint Board on Universal Service, FCC 98-67, Report to Congress, CC Docket No. 96-45 (April 10, 1998) at ¶ 64 (hereinafter "Universal Service Report"). Despite the growing importance of the Internet in worldwide communications, "[t]he major components of the [Telecommunications Act] have nothing to do with the Internet ." Reno, ---- U.S. at ----, 117 S.Ct. at 2338.

D. INTERNET SERVICE PROVIDERS

An Internet Service Provider ("ISP") is an entity that provides its customers the ability to obtain on-line information through the Internet by communicating with web sites. ISPs function by combining "computer processing information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." Universal Service Report ¶ 63. If an ISP is in a local calling area, the ISP customer dials a seven-digit number to access the ISP facility and is generally charged a flat fee for the ISP usage, in addition to the corresponding local fee rate for the call to the ISP. [FN5] Among the services offered to many subscribers to the Internet are electronic mail, file transfers, Internet Relay Chat, and the ability to browse and publish on the World Wide Web. See, e.g., American Civil Liberties Union v. Reno, 929 F.Supp. 824 (E.D.Pa.1996), aff'd, Reno v. American Civil Liberties Union, --- U.S. ----, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

FN5. Typically, when an individual calls the Internet the call is routed to a "dial-in site." "a small physical location (a phone closet for instance) that contains the electronic equipment needed to accept modem calls and connect them to" the Internet. Haran Craig Rashes, The Impact of the Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers, 16 Temp. Envtl. L. & Tech. J. 49, 69 (1997) (internal citations and footnote omitted.) "Each Internet Service Provider may place anywhere from one or two to thousands of incoming lines and modems in the same location. An Internet Service Providers' equipment at local dial-in sites consists of banks or pools of modems configured in multi-line hunt groups, with one lead number serving as a central number to receive calls." Id.

ISPs have been exempted from paying "access charges" to LECs for connecting them to the end user. Third Report and Order ¶ 288. In 1983, the FCC classified ISPs as "end users" rather than as "carriers" for purposes of the access charge rules. Id. As a result of this decision, ISPs purchase services from LECs "under the same intrastate tariffs available to end users, by paying business line rates and the appropriate subscriber line charge, rather than interstate access rates." Id. ¶ 285. In a 1996 Order reviewing the 1983 "exemption" decision, the FCC "tentatively conclude[d] that the current pricing structure should not be changed so long as the existing access charge system remains in place." Id. ¶ 288.

E. TELECOMMUNICATIONS VS. INFORMATION SERVICES

The FCC has repeatedly made it clear that "telecommunications" and "information services" are "mutually exclusive" categories. Universal Service Report ¶ 59. See also id. ¶ 57 ("[W]e find strong support in the text and legislative history of the 1996 Act for the view that Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services.") According to the FCC, such an interpretation is "the most faithful to both the 1996 Act and the policy goals of competition, deregulation, and universal service." Id. ¶ 59. The distinction drawn by the FCC mirrors the definitions of "telecommunications" and "information

services" in the Act. "Information service" is defined by the Telecommunications Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20) (1998). "Telecommunications," however, is defined by the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. § 153(43).

*6 Following the definitions in the Act, the FCC has found that the key distinction between telecommunications and information services rests on the functional nature of the end user offering. Universal Service Report ¶¶ 59,86. "[I]f the user can receive nothing more than pure transmission, the service is telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service." Id. ¶ 59.

Applying these definitions, the FCC has determined that Internet services are "information services" and not " telecommunications." See, e.g., Universal Service Report ¶ 66 ("Internet service providers themselves provide information services, not telecommunications .."); Id. ¶ 80 ("The provision of Internet access service ... is appropriately classed as an 'information service." '); Id. ¶ 81 ("Internet access provider[s] ... are appropriately classified as information service providers.").

There may be some rare instances, however, when the services provided by the Internet are actually telecommunications. For example, the FCC indicated in its recent report that "phone-to-phone telephony" [FN6] lacks the characteristics of information services, and could actually be classified as telecommunications services. Id. ¶ 89. However, the FCC reserved making any final ruling on the subject until a more complete record is established. See id. ¶ 90. See generally Robert M. Frieden, Dialing for Dollars: Should the FCC Regulate Internet Telephony?, 23 Rutgers Computers & Tech. L.J. 47 (1997) (discussing the various policy issues that may arise from the development of Internet telephony).

FN6. In phone-to-phone telephony, "the customer places a call over the public switched telephone network to a gateway, which returns a second dial tone, and the signaling information necessary to complete the call is conveyed to the gateway using standard in-band (i.e., DMTF) signals on an overdial basis. The customer's voice or fax signal is sent to the gateway in unprocessed form (that is, not compressed and packetized). The service provider compresses and packetizes the signal at the gateway, transmits it via IP to a gateway in a different local exchange, reverses the processing at the terminating gateway and sends the signal out over the public switched telephone network in analog, or uncompressed digital, unpacketized form." Universal Service Report ¶ 84, n. 177.

F. THE INTERCONNECTION AGREEMENTS

At the heart of this dispute are the Interconnection Agreements which were entered into between Ameritech and the various Carrier defendants. All of the Agreements provide that "local traffic" which terminates on the "other Party's network" is eligible for reciprocal compensation. Specifically, the Agreements state that:

Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's or [the Carrier Defendant's] network for termination on the other Party's network.

(MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT & T § 5.7.1; Focal § 5.8.1.) The Agreements define "local traffic" as "local service area calls as defined by the Commission," (TCG § 1.43), or as:

a call 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; provided that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

*7 (MFS § 1.38; MCI § 1.2; AT & T § 1.2; Focal § 1.46.) (emphasis in original). The Agreements further provide that "switched exchange access service" is not eligible for reciprocal compensation. (MFS § 5.8.3; TCG § 5.6.2; MCI § 4.7.2; AT & T § 4.7.2; Focal § 5.8.2). Switched exchange access service" is defined in the Agreements as "the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service," which includes "Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services." (MFS § 1.56; TCG § 1.65; MCI sch. 1.2; AT & T sch. 1.2; Focal § 1.66.)

The parties do not contend that the Agreements specifically classify the Internet as either local traffic or exchange access service. Indeed, this court could not find an express reference to the Internet in the various Interconnection Agreements.

G. THE COMMISSION'S DECISION

The Commission's Order concludes that Ameritech Illinois must pay reciprocal compensation to the Carrier defendants with respect to calls placed by Ameritech Illinois customers through the Internet via ISPs who are customers of the Carrier defendants. [FN7] In its decision, the Commission first reviewed the procedural history of the case and the positions of the parties. (Order at 1-10.) The Commission then presents a four-page analysis of the relevant facts and law for reaching its decision that reciprocal compensation applies to Internet calls.

FN7. The Order states in the pertinent part:
IT IS THEREFORE ORDERED that the interpretation of the interconnection agreements made in this order shall be effective from the dates of those interconnection agreements and that Ameritech Illinois shall henceforth pay each of the complainants all charges for reciprocal compensation for all calls which are within 14 miles and for that traffic that is billable as local from its customers to ISPs that are the customers of the complainants. Similarly, each competitive local exchange carrier shall pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois.
IT IS FURTHER ORDERED that within five business days of entry of this Order, Ameritech Illinois shall pay each of the competitive local exchange carriers all reciprocal compensation charges which have been withheld, with interest at the statutory rate. To the extend Ameritech Illinois billed the competitive local exchange carriers for reciprocal compensation and then later provided them with credits on their bills for ISP traffic, it shall resubmit bills to the competitive local exchange carriers for the credited amounts.
(Order at 16.)

The Commission's first reason for its decision is based on the language of the Agreements themselves. The Interconnection Agreements state that reciprocal compensation applies "for transport and termination of Local Traffic billable by Ameritech [or the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's [or the Carrier Defendant's] network for termination on the other Party's line." (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT & T § 5.7.1; Focal § 5.8.1) (emphasis added). According to the Commission, the "billable" language in the Agreements "unambiguously provide[s] that reciprocal compensation is applicable to local traffic billable by Ameritech." (Order at 11.) Reasoning that Ameritech charges end users local service charges when completing calls that terminate at a competitor's ISP customer, the Commission concluded that "the plain reading" of the billable language necessitates reciprocal compensation charges for ISP calls. (Order at 11.)

The second rationale employed by the

Commission is again dependent on the language of the Agreements. Specifically, the Agreements provide that reciprocal compensation applies for calls terminated on the other party's line. (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT & T § 5.7.1; Focal § 5.8.1) The Commission found that a call to an ISP terminates at the ISP before it is connected to the Internet. (Order at 11.) The Commission was persuaded by the Carrier defendants' definition of industry practice, in which call termination "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, and answer supervision is returned." (Order at 11, citing WorldCom Ex. 1.0 at 7.) According to the Commission, "termination" in the context of the Agreements does not mean that the call ends. (Order at 11.) The Commission's view of termination of the call leads to the conclusion that such calls are correctly classified as local calls under the Agreements.

*8 In the final part of the Commission's analysis, it rejected the argument made by Ameritech that a call's distance must be determined on an "end-to-end" basis, that is, from the end user to the web site. Such a reading would be an "outdated conception of the telecommunications network" and would be inconsistent with the Act and "the FCC's own decisions." (Order at 11-12.) In a rather confusing explanation of this point, the Commission states that Internet calls are unlike Feature Group A ("FGA") calls, which are classified in the Agreements as "switched access service." FGA calls are long distance calls that end users initiate by dialing a local seven-digit number. When the user dials the local number, she is connected to the interexchange carrier's toll switch which gives the user a second dial tone, at which point the user dials a long distance number. Although Ameritech argued that FGA calls are functionally identical to Internet ISP calls, the Commission found that such calls are distinguishable because FGA calls undeniably involve telecommunications traffic with the end user to which the call is terminated. In contrast, Internet calls involve what the FCC has found to be "information services" after the call is terminated to the ISP. "Based on these critical distinctions [between telecommunication traffic and information service] the FCC has determined that ISP traffic is not an exchange access service, but rather, ISPs should be treated as 'end users.' " (Order at 12.) (emphasis in the original).

H. FCC RULINGS

This court's role in reviewing the ICC's decision requires that it examine the court's interpretation of federal law de novo. See discussion, supra, Part II.B. Examining the FCC's interpretation of the relevant issue is therefore necessary because if this court finds that the FCC has a reasonable and consistently held interpretation of the applicable law, those rulings would be entitled to substantial deference. Cf. Arkansas v. Oklahoma, 503 U.S. 91, 110, 112 S.Ct. 1046, 1059, 117 L.Ed.2d 239 (1992); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). See also Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 411 (7th Cir.1987) ("An agency's construction of its own regulation binds a court in all but extraordinary cases."); United States v. Baxter Healthcare Corp., 901 F.2d 1401, 1407 (7th Cir.1990) (finding that a court must give great deference to agency's interpretations of its own regulations).

After reviewing relevant FCC precedent, this court finds that the FCC has not reached a coherent decision on the issue of the compensation of LECs providing Internet access. This result is due, in part, to the fact that the Internet, as a relatively new development to the telecommunications world, presents unique questions that have not previously been addressed by FCC decisions and policy. For example, the FCC recently initiated a Notice of Inquiry seeking comments on the effect of the Internet and other information services on the telephone network, noting that the Internet creates perplexing policy issues:

*9 [T]he development of the Internet and other information services raise many critical questions that go beyond the interstate access

charge system that is the subject of this proceeding. Ultimately, these questions concern no less than the future of the public switched telephone network in a world of digitalization and growing importance of data technologies. Our existing rules have been designed for traditional circuit-switched voice networks, and thus may hinder the development of emerging packet-switched data networks. To avoid this result, we must identify what FCC policies would best facilitate the development of the high-bandwidth data networks of the future, while preserving efficient incentives for investment and innovation in the underlying voice network. In particular, better empirical data are needed before we can make informed judgments in this area.
Third Report and Order ¶ 311.

This court's determination that no clear rule on the issue exists is confirmed by the fact that on June 20, 1997, the FCC expedited consideration of a request for clarification of its rules from the Association for Local Telecommunications. The issue under review is identical to the issue at bar: whether LECs are entitled to reciprocal compensation pursuant to section 251(b) of the Telecommunications Act for transport and termination of traffic to LECs that are information service providers. See Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, Public Notice, FCC Common Carrier Bureau/CPD 97-30, 12 F.C.C. Rcd. 9715 (July 2, 1997). Thus, the precise issue under review in the instant case is currently being decided by the FCC. As of the date of this Memorandum Order and Opinion, the issue has not been resolved. See also Memorandum of the Federal Communications Commission as Amicus Curiae, Mem. at 2, June 29, 1998, filed in Southwestern Bell, No. 98 CA 043 (stating that the issue of the rights of LECs to receive reciprocal compensation is "pending before the FCC in an administrative proceeding and remains unresolved). Any ruling by the FCC on that issue will no doubt affect future dealings between the parties on the instant case.

The Carrier defendants and the Commissioners argue that reciprocal compensation applies only to telecommunications, and, therefore, the fact that ISPs generally do not provide telecommunications necessitates a finding that reciprocal compensation must be paid to the terminating LEC. Ameritech responds, however, that such argument is a red herring. Ameritech relies heavily on the FCC's statement in its 1998 Universal Service Report that the issue of reciprocal compensation does not "turn on" on the telecommunications/information service distinction:

We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the Commission, does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider.

*10 ¶ 106, n. 220. Although the statement of the FCC in Footnote 220 is ambiguous as it relates to the issues involved here, this court agrees with Ameritech to the extent that any rationale regarding whether reciprocal compensation must be paid for such calls cannot hinge entirely on the information service/telecommunications distinction. This does not mean, however, that the distinction does not exist [FN8] (see discussion, supra, Part III.E) or that an understanding of the distinction is wholly irrelevant to a discussion of the issue at bar.

FN8. For example, at oral argument, counsel for the plaintiff clearly stated that it is "undisputed" that ISPs provide information services and are not providers of telecommunications. (Tr. at 31.)

Despite the fact that Ameritech shuns the information service/telecommunications distinction, it nonetheless argues that language in the FCC's reports indicating that Internet information services are provided via

telecommunications is relevant to their argument. See Universal Service ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.' "); Id. ¶ 3 (stating that the Internet "stimulates our country's use of telecommunications"; ISPs are "major users of telecommunications."); Id. ¶ 15 ("[W]e clarify that the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications.' "). Nonetheless, for the same reasons stated against the defendants' use of the distinction, this court finds that the fact that ISPs use telecommunications is not the determining factor in the instant case.

Ameritech's reliance on language in the Universal Service Report indicating that the telecommunications backbone to the Internet is "interstate telecommunications" is more persuasive authority for of the plaintiff's view. See, e.g., Universal Service Report ¶ 55 ("We conclude that entities providing pure transmission capacity to Internet access or backbone providers provide interstate 'telecommunications.' Internet service providers themselves generally do not provide telecommunications.") (emphasis added); Id. ¶ 67 ("The provision of leased lines to Internet service providers, however, constitutes the provision of interstate telecommunications. Telecommunications carriers offering leased lines to Internet service providers must include the revenues derived from those lines in their universal contribution base.") (emphasis added).

Although the characterization of leasing lines to local ISPs as providing "interstate telecommunications" causes this court to pause, ultimately this court is not convinced that such language compels a finding under federal law that a call from an end user to an ISP is an interstate call and that termination for billing purposes does not occur at the ISP. This court is especially skeptical of the above cited language from the Universal Service Report because of the context in which the term "interstate" is discussed. A great deal of the Universal Service Report discusses the future of the FCC's goal of providing "universal service," that is, services to all customers throughout the country, "including low-income customers and those in rural, insular, and high cost areas ... at rates that are reasonably comparable to rates charged for similar service in urban areas." 47 U.S.C. § 254(b)(3)(1998). Under the Telecommunications Act, carriers "that provide interstate telecommunications services must contribute to federal universal service mechanisms." Universal Service Report ¶ 55. A concern arises with the development of the Internet because, as information service providers, ISPs do not contribute directly to the development of universal service. Id.

*11 Given this background, this court is not convinced that the use of the term "interstate" in the context of discussing the Internet means that the FCC has made a determination that calls to the Internet are "interstate" for billing purposes. Nor is this court persuaded that such statements would require the overturning of a state commission's finding that such calls terminate locally at the ISP. Instead, the FCC has only provided that those who lease lines to ISPs provide interstate telecommunications and therefore ISPs are contributing, albeit indirectly, to the goal of universal service. Id. In essence, by leasing their lines from telecommunications carriers that do contribute to the universal system, the ISPs are contributing to the continuation of the goal of universal coverage. See id. ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.' To the extent that the telecommunications inputs underlying Internet services are subject to the universal service contribution mechanism, that provides an answer to the concern ... [that] there will no longer be enough money to support the infrastructure needed to make universal access to voice or Internet communications possible.") (footnote and internal quotations omitted).

The FCC has made statements acknowledging that calls to the Internet using a seven-digit number are "local." See, e.g., In re Access Charge Reform, First Report and

Order, 12 F.C.C. Red. 15982, ¶ 342, n. 502 ("To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.") (emphasis added). The FCC has also indicated that rate structures for such calls are appropriately addressed by state, rather than federal, regulators. See id. ¶ 345-46 ("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, 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.") (emphasis added). [FN9]

FN9. Ameritech states that most calls to ISPs are subject to flat (low) rate calls, and Internet calls tend to be longer than other types of calls. Under the current rate structure, Ameritech contends, if reciprocal charges are applicable to such charges Ameritech must pay more to the terminating LEC than it can bill its customers. Implicit in Ameritech's argument is the assertion that the reciprocal payments thus incurred far exceed the cost to the LEC for terminating the call. If that is true, it is unclear how the state regulators can adequately restore equity to the process except through some bifurcation which would assign a different reciprocal rate to ISP traffic. Merely raising the rates that the originating LEC charges its local customers would simply finance a windfall for the terminating LEC out of the pocketbooks of customers.

Ameritech further argues, relying on decisions involving the creation of the access charge regime (see discussion, supra, Part III.B, III.D), that the FCC has ruled that Internet Calls are exchange access calls. For example, in 1983 the FCC stated that:

Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them.... Were we at the outset out impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.

*12 MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 78 (1983). Although the FCC has continued to uphold its ruling that ISPs are exempt from any access charges (see, e.g., Universal Service Report ¶ 146), the FCC has clarified its position in more recent rulings. In particular, the FCC has stated that due to "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." In the Matter of Access Charge Reform, First Report and Order, CC Docket Nos. 96-262 et al., FCC 97-158, ¶ 345 (May 16, 1997). Indeed, instead of classifying ISPs as IXCs, the FCC has maintained that ISPs are, and should remain, classified as end users. Id. ¶ 348. Furthermore, the FCC has concluded, at least "tentatively," that the current structure of charging ISPs as end users should "not be changed so long as the existing access charge system remains in place." Third Report and Order ¶ 288.

In conclusion, this court finds that at the time that the Agreements were entered into there was no clear FCC position on whether or not calls to Internet ISPs are interstate exchange access calls. The FCC is currently reviewing the very question at issue in this case. Accordingly, the answer to the question of the interpretation of the Agreements lies principally in contract interpretation. These are questions that this court must review with substantial deference to the ICC's findings.

I. FINAL ANALYSIS OF ICC DECISION

The ICC's decision states three reasons for rejecting Ameritech's argument. This court finds that the third reason, which is based principally on the information services/ telecommunications distinction, is not relevant to the case at bar. (See discussion, supra, Part III.H.) However, as the third reason does not include incorrect statements of federal law and this court finds that the remaining two reasons stated in the Commission's opinion are sufficient to uphold the decision, Ameritech's request that the decision be set aside is rejected.

The third section of the ICC's analysis is less clear than the other two arguments. Indeed, the third argument is jumbled and difficult to decipher. Without clearly linking its reasoning to its decision to uphold reciprocal compensation for Internet calls, the ICC states in one stream of reasoning (encompassing only one page of text) that: (1) end-to-end jurisdiction is "outdated"; (2) FGA calls are distinguishable from Internet calls; (3) the Internet provides "information services" and not "telecommunications"; and, (4) ISPs are not exchange access service, but rather "end users." (Order at 11-12.) In fact, this section of the Commission's opinion reads more like a selective review of FCC precedent than solid reasoning for supporting reciprocal compensation for Internet calls.

*13 For the reasons already discussed, this court finds that these statements of the Commission, though overstated, are not expressly violative of existing federal law. However, to the extent that this portion of the Commission's decision relies heavily on the distinction between information service and telecommunications, this court rejects that analysis. The FCC has warned that this distinction, although it does exist, is not the answer to whether the LEC is entitled to reciprocal compensation for terminating Internet traffic. See Universal Service Report ¶ 106, n. 220. Nonetheless, the Commission's analysis does not "turn on" this distinction. Furthermore, as the decision stands on its own based on the first two rationales, this court does not find that the Commission's discussion of the information servi ce/ telecommunications distinction provides a basis for reversal. [FN10]

FN10. Ameritech also criticizes the ICC's use of the distinction with Feature Group A calls ("FGA"), which is mentioned in the ICC's highlighting of the information service/telecommunications distinction in the third portion of its analysis. Ameritech stresses the point that FGA calls are "functionally and technically" indistinguishable from an Internet call. (Ameritech Merits Brief at 10.) However, Ameritech does not cite a single statute or ruling in support of this view. Although it may be appealing to analogize the two types of calls as functionally similar, this court will not be swayed by such argument. As previously discussed, a special provision in the Interconnection Agreements explicitly excludes FGA calls from paying reciprocal compensation. No such exception is provided for Internet calls.

Close analysis of the remaining two rationales reveals that such reasoning is consistent with federal law and is supported by substantial evidence. These two arguments are: (1) the Agreements use of the word "billable" requires reciprocal compensation for Internet traffic because Ameritech bills such calls as local; and, (2) the industry use of the word "terminates" requires a finding that the call to the ISP terminates at the ISP.

First, the "billable" rationale is a reasonable interpretation of the contracts. Ameritech argues that such a reading is wrong as a matter of law, contending that the Agreements define local traffic based not on billing treatment, but on points of origin and termination of the traffic. (Ameritech Resp. at 14.) Ameritech further informs that the billing practice for Internet calls is identical to the billing treatment of FGA calls, and therefore the Commission's holding would make FGA calls "local." Ameritech does not cite any cases to support this proposition. Furthermore, Ameritech ignores the fact that the Agreements specifically exclude FGA calls from the reciprocal compensation provision. No such explicit provision is found in the Agreements regarding Internet calls. In fact, the Internet and ISPs are not even mentioned in the Agreements. No doubt the next time Interconnection Agreements are negotiated

between the parties such a provision regarding the termination of Internet calls will be the subject of vigorous discussion. However, this court will not impose such a provision into the Agreements as written.

Although reasonable persons may differ on the interpretation of the language of the Agreements, a finding that calls that are billed as local must receive reciprocal compensation is not violative of current federal law. Furthermore, such a finding is a reasonable interpretation of the contracts and is neither arbitrary nor capricious. It is undeniable that Ameritech has consistently billed it customers for their calls to ISPs as local calls. This court therefore concurs with the ICC's conclusion that the Ameritech billing scheme warrants a finding that such calls are subject to reciprocal compensation.

*14 Second, this court finds that the ICC's determination that calls to the ISP terminate at the ISP is not contrary to federal law and is supported by substantial evidence. Ameritech's argument that federal law requires that this court adopt a "jurisdictional" standard for termination that would be measured on an "end-to-end" basis is not convincing. Although Ameritech is correct that "end-to-end" language is used in some earlier FCC decisions in different contexts, [FN11] the FCC has not issued any rulings indicating that Internet calls must be measured on an end-to-end basis, with the ultimate web site qualifying as one "end." Furthermore, all of the cases cited by the plaintiff in support of its end-to-end argument are from the pre-1996 Act era. (See Ameritech Mem. at 17-18.)

FN11. See, e.g., Southwester Bell Tel. Co. Transmittal Nos. 1537 & 1560 Revisions to Tariff F.C.C. No. 68, Order Designating Issues for Investigation, 3 F.C.C. Rcd. 2339, ¶ 28 (1988) (rejecting the view that two calls are created by the use of a 1-800 number for a credit card call and stating that "[s]witching at the credit card switch is an intermediate step in a single end-to-end communication."); Petition for Emergency Relief and Declaratory Ruling Filed by the Bellsouth Corporation, 7 F.C.C. Rcd. 1619, 1619-21 (1992) (finding that a call to an out-of-state voice mail service is a single interstate communication); Long-Distance/USA, Inc., 10 F.C.C. Rcd. 1634, ¶ 13 (1995) (finding that 1-800 calls are a single communication: "both court and Commission decisions have considered the end-to-end nature of the communication more significant than the facilities used to complete such communications).

Instead of classifying the web sites as the jurisdictional end of the communication, the FCC has specifically classified the ISP as an end user. See, e.g., Third Report and Order ¶ 288. Given the absence of an FCC ruling on the subject, this court finds it appropriate to defer to the ICC's finding of industry practice regarding call termination. Indeed, the Internet Agreements themselves authorize the Commission to determine when a call qualifies as "local." [FN12]

FN12. TCG's Agreement provides that "local traffic" is "local service area calls as defined by the Commission." (TCG § 1.43.) The Agreements of the other Carrier defendants provide that a "local call" is:

a call 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: provided that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

(MFS § 1.38; MCI § 1.2; AT & T § 1.2; Focal § 1.46.) (emphasis added).

The ICC's decision included the following finding of fact regarding call termination:

[W]e are persuaded by Mr. Harris' explanation of industry practice with respect to call termination. He testified that call termination within the public switched network "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned ..."

(Order at 11.) This definition of "termination" [FN13] is crucial to understanding the meaning of the Agreements, as the Agreements specifically use the word termination in defining reciprocal

compensation. When a customer of a LEC dials the ISP's local, seven-digit number, the customer is connected to the ISP. Once this "call connection" is established between the caller and the telephone exchange service of the seven-digit number, the call is deemed "terminated" for purposes of the Agreements. The fact that the ISP then connects the user to the Internet, where the user may access unlimited web sites, does not alter the fact that the call has been "terminated" at the ISP for purposes of reciprocal compensation.

FN13. The ICC's definition of "termination" closely follows that adopted by the ICC. See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, ¶ 1040 (Aug. 8, 1996) ("We define 'termination,' for purposes of section 251(b)(5) [the reciprocal compensation provision of the Telecommunications Act], as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises.").

J. The ICC Order Violates Section 251(g) of the Act

Ameritech's final argument is that the ICC's order violates Section 251(g) of the Telecommunications Act. Pursuant to Section 251(g),

On or after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

*15 According to Ameritech, because no court order, consent decree, regulation, order, or policy of the FCC provided for the payment of reciprocal compensation prior to February 7, 1996, reciprocal compensation cannot now apply. Ameritech states that reciprocal compensation could only apply if the FCC were to explicitly so require by regulation. Such an argument is circular, and escapes the logic of this opinion. Section 251(g) merely provides that local exchange carriers must provide services with the same "equal access and nondiscriminatory interconnection restrictions and obligations" as prior to the passage of the Telecommunications Act, until such restrictions or obligations are superseded. As this court has found that the FCC has no prior ruling that controls in the instant case, there is no ruling that could possibly be violated by ordering continued payments of reciprocal compensation by the plaintiff. Furthermore, as the defendants point out, Ameritech did indeed pay reciprocal compensation for local calls prior to the passage of the Act.

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion and Order, this court affirms the Commission's determination that Local Exchange Carriers are entitled to reciprocal compensation under the Interconnection Agreements for Internet calls. The stay of the Commission's order is continued for an additional thirty-five (35) days to allow the parties to appeal.

END OF DOCUMENT

1998 U.S. Dist. LEXIS 12938 printed in FULL format.

SOUTHWESTERN BELL TELEPHONE COMPANY, PLAINTIFF, v. PUBLIC UTILITY COMMISSION OF TEXAS; PAT WOOD, III; JUDY WALSH; PATRICIA A. CURRAN; TIME WARNER COMMUNICATIONS OF AUSTIN, L.P.; TIME WARNER COMMUNICATIONS OF HOUSTON, L.P.; AND FIBRCOM, INC., DEFENDANTS.

MO-98-CA-43

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, MIDLAND - ODESSA DIVISION

1998 U.S. Dist. LEXIS 12938

June 16, 1998, Decided

June 16, 1998, Filed

DISPOSITION: [*1] Plaintiff Southwestern Bell Telephone Company's Request for Declaratory and Injunctive Relief DENIED.

COUNSEL: For SOUTHWESTERN BELL TELEPHONE COMPANY, plaintiff: Robert J. Hearon, Jr., Graves, Dougherty, Hearon & Moody, Austin, TX. Jack D. Ladd, Stubbeman, McRae, Sealy et al, Midland, TX. Michael Diehl, Graves, Doughtery, Hearon & Moody, Austin, TX. Vann Culp, STUBBEMAN, McRAE, SEALY LAUGHLIN & BROWDER, INC., MIDLAND, TX. Edward L. Eckhart, SOUTHWESTERN BELL TELEPHONE COMPANY, Austin, TX. Joseph E. Cosgrove, Jr., SOUTHWESTERN BELL TELEPHONE COMPANY, Austin, TX. Thomas J. Horn, Southwestern Bell Telephone Co., Austin, TX.

For PUBLIC UTILITY COMMISSION OF TEXAS, PAT WOOD, III, JUDY WALSH, PATRICIA A. CURRAN, defendants: Mary A. Keeney, Energy Division, Austin, TX. Amanda Atkinson Cagle, Texas Attorney General's Office, Austin, TX.

For TIME WARNER COMMUNICATIONS OF AUSTIN, LIMITED PARTNERSHIP, TIME WARNER COMMUNICATIONS OF HOUSTON, LIMITED PARTNERSHIP, FIBRCOM, defendants: Charles L. Tighe, Midland, TX. J. Stephen Ravel, Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P., Austin, TX. W. Bruce Williams, Cotton, Bledsoe, Tighe & Dawson, Midland, TX. John H. Knox, Bickerstaff, [*2] Heath & Smiley, Austin, TX. Diane M. Barlow, Casey, Gentz & Sifuentes, Austin, TX.

For WORLDCOM TECHNOLOGIES INCORPORATED, CSW/ICG CHOICECOM, COSERV LIMITED LIABILITY CORPORATION, GST TEXAS LIGHTWAVE INCORPORATED, amicus: Jad Davis, Turner & Davis, Midland, TX. Richard M. Rindler, Michael L. Shor, Swidler & Berlin, Washington, DC.

For AMERICAN COMMUNICATIONS SERVICES INCORPORATED, amicus: W. Scott McCollough, McCollough & Associates, Austin, TX.

For TELEPORT COMMUNICATIONS GROUP INCORPORATED, amicus: Craig Morgan, Brown, McCarroll, etal, Austin, TX. Douglas W. Trabaris, Attorney at Law, Chicago, IL. Jessie A. Amos, Brown McCarroll & Oaks Hartline, Austin, TX.

For FEDERAL COMMUNICATIONS COMMISSION, amicus: Brian G. Kennedy, Civil Division, Department of Justice, Washington, DC.

JUDGES: HONORABLE LUCIUS D. BUNTON, III, SENIOR U.S. DISTRICT JUDGE.

OPINIONBY: LUCIUS D. BUNTON, III

OPINION: ORDER

BEFORE THE COURT, in the above-captioned cause of action, is Plaintiff Southwestern Bell Telephone Company's Complaint for Declaratory and Injunctive Relief, filed March 19, 1998. Also before the Court is

Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed [*3] May 4, 1998; Defendant Public Utility Commission of Texas and its Commissioners' Proposed Conclusions of Law, filed May 7, 1998; and Defendant Time Warner's Proposed Conclusions of Law, filed May 7, 1998. In a hearing conducted on April 16, 1998, the Court also heard arguments of counsel in this case and denied Plaintiff's Motion for Preliminary injunction, filed April 1, 1998. After considering the arguments of counsel and amicus curiae, the agency record, and the applicable standard of review, it is the Court's opinion that the following Order is appropriate.

I. BACKGROUND

Plaintiff Southwestern Bell Telephone Company's ("Southwestern Bell") suit for declaratory and injunctive relief is essentially an appeal of the Texas Public Utility Commission's ("PUC") decision of February 27, 1998. In its decision against Southwestern Bell, the PUC (1) characterized connections to Internet Service Providers as "local traffic" and (2) held that Southwestern Bell's interconnection agreement with Time Warner Communications of Austin, L.P.; Time Warner Communications of Houston, L.P.; and Fibrecom, Inc. (collectively, "Time Warner") required Southwestern Bell to compensate Time Warner for [*4] "local calls" connecting Southwestern Bell's customers to Time Warner's business customers which are Internet Service Providers ("ISPs"). Southwestern Bell contends that (1) the PUC was without jurisdiction to approve an interconnection agreement involving connections to ISPs, (2) the connections to ISPs are properly classified as "interstate calls" falling under the regulatory jurisdiction of the Federal Communications Commission (the "FCC"), and (3) the PUC erred in finding that Southwestern Bell's interconnection agreement with Time Warner also set rates of compensation for connections to ISPs.

A. Southwestern Bell and Time Warner's Interconnection Agreements

The interconnection agreements between Southwestern Bell and Time Warner are at the heart of the instant case. Southwestern Bell and Time Warner are "local exchange carriers" that provide local telecommunication services within an "exchange" area. n1 47 C.F.R. § 51.5 (1997). In order for customers of Southwestern Bell and Time Warner to "call" one another, the two telecommunication carriers must "interconnect" their individual telecommunications networks both physically and contractually. Id. Through "reciprocal [*5] compensation" provisions in the interconnection agreements, the cost of providing access for a customer's call that originates from one local exchange carrier's network and then terminates in another local exchange carrier's network is attributed to the local exchange carrier from which the call originated. 47 C.F.R. §§ 51.701(e), 51.703 (1997). Such "local" calls are different from long-distance calls which must pass through "interexchange" switches that allow calls to pass from one exchange into another exchange and involve "access charges" instead of reciprocal compensation fees. 47 C.F.R. § 69.2 (1997); see also *Public Utility Commm'n v. ATT&T Communications, 777 S.W.2d 363 (Tex. 1989)* (describing interstate and intrastate access charges).

n1 Within an exchange, telecommunication customers may make local calls without "0" or "1" being dialed. Abbreviations and Terms Used in Pleadings and Docs. at 1. Furthermore, in this case, Southwestern Bell is the incumbent local exchange carrier and Time Warner is a competitive local exchange carrier seeking to gain a greater share of the local telecommunications market. See 47 C.F.R. § 51.5 (1997).

[*6]

In the instant case, Southwestern Bell and the Time Warner defendants entered into two interconnection agreements on July 17, 1996, and on August 19, 1997. n2 The most relevant portions of the agreements help define the nature of Southwestern Bell's reciprocal compensation plan with Time Warner. First, both interconnection agreements define Southwestern Bell's and Time Warner's customers as "end users":

§ 1.19 End User -- means a third-Party residence or business that subscribes to telecommunications services provided by either of the Parties. (First Agreement).

§ 1.21 End User -- means a third-Party residence or business that subscribes to telecommunications services provided by either of the Parties, or by another telecommunications service provider. (Second Agreement).

Second, both agreements define "local traffic" based upon the origination and termination of telephone calls within a local calling area or exchange:

§ 1.31 Local Traffic --means traffic which originates and terminates within a SWBT exchange including mandatory local calling area arrangements. Mandatory Local Calling Area is an arrangement that requires end users [*7] to subscribe to a local calling area beyond their basic exchange serving area. (First Agreement).

§ 1.33 Local Traffic --Local Traffic, for purposes of intercompany compensation, is if (i) the call originates and terminates in the same SWBT exchange area; or (ii) originates and terminates within different SWBT Exchanges that share a common mandatory local calling area, e.g., mandatory Extended Area Service (EAS), mandatory Extended Local Calling Service (ELCS), or other like types of mandatory local calling scopes." (Second Agreement).

Third, the First and Second Agreements provide for reciprocal compensation for the transport and termination of local traffic between Southwestern Bell's and Time Warner's end users on a per-minute-of-usage rate. n3 First Agreement § 5.05; Second Agreement § 5.3.2.

n2 The July 17, 1996 agreement was between Southwestern Bell and Time Warner Communications of Austin, L.P., Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, July 17, 1996 ("First Agreement"). The Texas PUC approved the agreement on October 11, 1996. The second agreement modified some of the provisions of the first agreement and added Time Warner Communications of Houston, L.P.; and Fibrcom, Inc. to the interconnection agreement. The parties submitted the second agreement for PUC approval on August 19, 1997. Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, August 19, 1997 ("Second Agreement").

[*8]

n3 The per-minute-of-usage rate ("MOU") is $ 0.00975 per MOU for tandem-routed traffic and $ 0.00720 per MOU for end-office-routed traffic. First Agreement § 5.05; Second Agreement § 5.3.2.

Respectively on July 17, 1996, and on August 19, 1997, Southwestern Bell and Time Warner presented their negotiated agreements for the Texas PUC's approval stating that no outstanding issues existed between the parties requiring arbitration. n4 However, Southwestern Bell contends that in June of 1997, during the negotiation of the Second Agreement, it sent letters to both the PUC and Time Warner stating that Internet calls were not local traffic, and therefore were not subject to the provisions of the First Agreement requiring compensation for the termination of local calls. See Southwestern Bell Telephone Co.'s Original Complaint for Declaratory and Injunctive Relief Ex. 1 at 2 (letter of June 9, 1997, from Jack Frith of Southwestern Bell to Tom Staebell, Director of Interconnect Management for Time Warner Communications). Nevertheless, the parties failed to include provisions in the [*9] Second Agreement dealing with telecommunications to ISPs. Indeed, neither interconnection agreement explicitly includes provisions for Internet connections nor even mentions the Internet. Subsequently, Southwestern Bell refused to pay termination fees for calls that its customers had made to Time Warner's ISP customers.

n4 Joint Application of Southwestern Bell Telephone Co. and Time Warner Comm. of Austin, L.P., for Approval of Interconnection Agreement under the Federal Act and PURA 95 at 1 (July 17, 1996); Application of Time Warner Comm. of Austin, L.P., Time Warner Comm. of Houston, L.P., Fibrcom, Inc. and Southwestern Bell Telephone Co. for Approval of Interconnection Agreement under PURA and the Federal Act at 2 (August 19, 1997).

B. The Internet

The Internet "is an international network of interconnected computers." *Reno v. ACLU, 138 L. Ed. 2d 874, 117 S. Ct. 2329, 2334 (1997)*. Essentially, the "Internet is a distributed packet-switched network, which means that information [traveling [*10] along 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 P 64 (Released April 10, 1998). "Even two packets from the same message may travel over different physical paths through the network . . . [which] enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the server where the information resides." Id.; *Reno, 117 S. Ct. at 2335.*

Today, the Internet "enable[s] tens of millions of people to communicate with one another and to access vast amounts of information around the world." *Reno, 117 S. Ct. at 2334.* To access the Internet, individuals can subscribe to the services of ISPs. The ISPs pay their own telecommunications service provider for the telecommunications services that allow an ISP's customers to call it. If an ISP is located in the same "local" calling area, an ISP's customer may dial a seven-digit number over ordinary telephone lines to the ISP facility for a flat monthly fee or on a usage-sensitive [*11] basis. n5 The ISP's modem then converts the analog messages from its customers into data "packets" that are sent through the Internet and its host computers and servers See App.

A to PL's Application for Prelim. Inj. Ex. 45 at 3 (January 16, 1998 letter of America Online, Inc.). Finally when the host computers and servers send information back to the ISP, the ISP converts the information back to analog form to be transmitted over the telephone network back to the ISP's customer. Id.

n5 See Haran Craig Rashes,The Impact of Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers, 16 TEMP. ENVTL. L. & TECH. J. 49, 57-60, 68-70 (1997) (describing local telephone connections to ISPs).

C. The Texas PUC Decision

On October 7, 1997, Time Warner filed a Complaint and Request for Expedited Ruling with the Texas PUC and against Southwestern Bell. Time Warner alleged that Southwestern Bell had breached its interconnection agreements when it refused to pay [*12] termination charges for Internet traffic initiated by Southwestern Bell customers and directed to the ISPs that were Time Warner customers. Southwestern Bell, however, alleged that the PUC did not have jurisdiction to arbitrate the ISP issue because the ISP traffic was jurisdictionally interstate in nature and that the interconnection agreements excluded "calls" to ISPs from the reciprocal compensation provisions.

The PUC referred Time Warner's complaint to an administrative law judge, who was designated by the PUC to act as Arbitrator on the question of how Internet traffic should be treated. On January 7, 1998, the Arbitrator ruled in favor of Southwestern Bell that the ISP traffic was jurisdictionally interstate, not local, and therefore Southwestern Bell did not owe Time Warner any transport and termination charges for Internet calls. Arbitration Award, PUC Docket No. 18082, at 4-5 (January 7, 1998) ("Arbitration Award"). Furthermore, the Arbitrator found that Southwestern Bell had not agreed in its interconnection agreements to treat Internet traffic as local, and that Southwestern Bell had not waived its contentions by failing to seek arbitration of the issue. Id. at [*13] 23-26.

On February 27, 1998, the PUC issued its Order reversing the Arbitrator's ruling. Specifically, the PUC concluded that "Internet service via the traditional telecommunications network involves multiple components," PUC Order, PUC Docket No. 18082, at 4 (February 27, 1998) ("PUC Order"). The PUC determined that Internet service is divided into an information service component and a traditional telecommunications component. Id. Thus, in cases where the ISP location is within the local calling area, the PUC had jurisdiction over the "telecommunications service component, rather than the information service component," of the Internet connection. Id. Furthermore, the PUC held that the interconnection agreements were not ambiguous because the "language in dispute clearly hinged upon the definition of 'local traffic' and an interpretation of the point at which traffic 'terminates.'" Id. at 5. Thus, the PUC ordered Southwestern Bell to pay reciprocal compensation fees to Time Warner prospectively and retroactively, with interest, for the "local calls that terminate to [Time Warner] customers, including such customers that are ISPs." Id.

D. Southwestern Bell's [*14] Application for Preliminary Injunction

On April 1, 1998, Southwestern Bell filed an Application for Preliminary Injunction with this Court asserting that the PUC's ruling would require Southwestern Bell to pay as much as $ 421 monthly in termination fees for Internet calls by Southwestern Bell customers to ISPs who are Time Warner customers although Southwestern Bell receives only about $ 12 per month in regulated rates from its basic residential customers. Southwestern Bell further alleged that the PUC's ruling would amount to losses for Southwestern Bell of $ 400,000 a month. n6 The PUC and Time Warner opposed Southwestern Bell's request for preliminary injunctive relief, asserting that the PUC's decision to treat Calls to ISPs as local was legally correct, but also contending that Southwestern Bell had not shown irreparable harm or otherwise met the standards for temporary injunctive relief. At an extensive hearing on April 16, 1998, the Court denied Southwestern Bell's application for temporary injunction. On April 29, 1998, the parties filed a stipulation as to the contents of the PUC's administrative record and the other evidence now before the Court, and stated that no [*15] party intended to present additional testimony. Accordingly, the Court is now rendering a final decision disposing of all remaining issues in this case.

n6 Southwestern Bell also asserts that other carriers situated similarly to Time Warner have or will seek the benefit of the PUC's Time Warner Internet ruling, either as precedent, or through 'most favored nation' rights, and that the end result of these actions may be as much as $ 60 million in unrecoverable losses for Southwestern Bell in the coming year.

II. STANDARD OF REVIEW

Congress has provided that the federal district courts have jurisdiction to review a State agency's approval, rejection, or arbitration of an interconnection agreement. *GTE Northwest, Inc. v. Nelson, 969 F. Supp. 654, 656 (W.D. Wash 1997); U.S. West Communication, Inc. v. Hix, 986 F. Supp. 13, 15 (D. Colo. 1997).* Thus, *47 U.S.C. § 252*(e)(6) mandates that:

In any case in which a State commission makes a determination under this section, any party aggrieved [*16] by such determination that may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6) (Supp. 1998) (emphasis added).

Congress does not explicitly state the full scope or standard of review which courts retain over state agency interconnection decisions. Id. However, the language of § 252(e)(6) appears "clear in limiting [a] court's jurisdiction to determining whether the agreement meets the requirements of the [Telecommunications] Act [of 1996]." *GTE Northwest Inc. v. Hamilton, 971 F. Supp. 1350, 1354 (D. Ore. 1997).* Futhermore, "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [the Supreme] Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held." *United States v. Carlo Bianchi and Co. 373 U.S. 709, 715, 10 L. Ed. 2d 652, 83 S. Ct. 1409 (1963); Woods v. Fed. Home Loan Bank Bd., 826 F.2d 1400, 1406 (5th Cir. 1987),* cert. denied, *485 U.S. 959, 99 [*17] L. Ed. 2d 422, 108 S. Ct. 1221 (1988).* The Supreme Court has noted that a "fundamental principle[] of judicial review of agency action" is to place the "focal point for judicial review [upon] the administrative record already in existence, not some new record made initially in the reviewing court." *Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985).* Thus, the scope of this Court's review is limited to determining whether the PUC complied with the mandates of the based upon the state agency record. See *TCG Milwaukee, Inc. v. Pub. Serv. Comm'n of Wisconsin 980 F. Supp. 992, 998 (W.D. Wis. 1997)* ("Generally, review proceedings are confined to the record created in the administrative agency.").

Furthermore, in appeals of agency decisions limited to the administrative record, a court has essentially two standards of review. First, a court must review de novo issues of federal law. *Abbeville Gen. Hosp. v. Ramsey, 3 F.3d 797, 803 (5th Cir. 1993),* cert. denied, *511 U.S. 1032, 128 L. Ed. 2d 194, 114 S. Ct. 1542 (1994).* Generally, "federal courts do not defer to state agencies on questions of federal law since such agencies [*18] are not subject to Congressional oversight and they lack expertise in interpreting and implementing federal law." *U.S. West Communication, Inc. v. Hix, 986 F. Supp. 13, 16 (D. Colo. 1997); Abbeville Gen. Hosp., 3 F.3d at 803.* n7 Therefore, using de novo review, the Court's "first inquiry . . . in reviewing the interconnection agreements approved by the PUC is whether the PUC's action was procedurally and substantively in compliance with the [Telecommunications] Act [of 1996] and the implementing regulations." *U.S. West Communications, Inc., 986 F. Supp. at 19; Abbeville Gen. Hosp., 3 F.3d at 803.*

n7 Unlike review of the state agency decisions, federal courts give a more "deferential review of a federal agency's interpretation of federal law [because of] its 'expertise and familiarity . . . with [the] subject matter of its mandate and the need for coherent and uniform construction of federal law nationwide.'" *Abbeville Gen. Hosp. v. Ramsey, 3 F.3d 797, 803 (5th Cir. 1993)* (quoting *Turner v. Perales, 869 F.2d 140 (2d Cir. 1989)).*

[*19]

Second, if the agency acted in compliance with federal law, the Court's standard of review is whether the administrative agency acted in an arbitrary or capricious manner, unsupported by substantial evidence. *Carlo Bianchi and Co., 373 U.S. at 715 (1963); Abbeville Gen. Hosp., 3 F.3d at 804.* In *United States v. Carlo Bianchi and Co., 373 U.S. 709, 715, 10 L. Ed. 2d 652, 83 S. Ct. 1409 (1963),* the Supreme Court observed that "the standards of review adopted in the Wunderlich Act -- 'arbitrary,' 'capricious,' and 'not supported by substantial evidence' -- have frequently been used by Congress and have consistently been associated with a review limited to the administrative record." Id. Moreover, "the term 'substantial evidence' in particular has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court." Id. "This standard goes to the reasonableness of what the agency did on the basis of the evidence before it, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body." Id. Thus, "if the PUC's action is found [*20] to be in compliance with federal law and regulations, then the PUC will be given deference, through application of the arbitrary and capricious standard, as to all other issues." *U.S. West Communication, Inc., 986 F. Supp. at 19;* see, e.g., *Abbeville Gen. Hosp., 3 F.3d at 804* (applying arbi-

trary and capricious standard to state agency findings if agency acted in compliance with federal law).

III. DISCUSSION

"We realize that attempting to apply established trademark law in the fast-developing world of the internet is somewhat like trying to board a moving bus."

--Judge Van Graafeiland in *Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997).*

A. The Telecommunications Act of 1996

Congress enacted the Telecommunications Act of 1996 (the "Act") to "promote competition in the local telephone service market." *Reno v. ACLU, 138 L. Ed. 2d 874, 117 S. Ct. 2329, 2338 (1997); GTE Northwest Inc. v. Hamilton, 971 F. Supp. 1350, 1352 (D. Ore. 1997); W. PCS II v. Extraterritorial Zoning Auth., 957 F. Supp. 1230, 1237 (D.N.M. 1997); GTE South Inc. v. Morrison, 957 F. Supp. 800, 801 (E.D. Va. 1997).* n8 Therefore, "the Act mandates [*21] that existing local exchange carriers . . . allow interconnecting services providers access to local networks in order to provide competing local telephone service." *GTE South, Inc., 957 F. Supp. at 802; 47 U.S.C 251*(c) (Supp. 1998). Specifically, the Act requires that "each telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunication carriers." *47 U.S.C.* § *251*(a)(1) (Supp. 1998). Moreover, the Act mandates that incumbent local exchange carriers and competing local exchange carriers negotiate in good faith with each other regarding agreements to interconnect their telecommunication networks. *47 U.S.C.* § *251*(c) (Supp. 1998). n9

n8 See Gary J. Guzzi, Note, Breaking Up the Local Telephone Monopolies: The Local Provisions of the Telecommunications Act of 1996, *39 B.C.L. Rev. 151, 151-58 (1997)* (describing how the 1996 Act supports local competition).

n9 Title *47 U.S.C.* § *251*(c) states that each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith . . . the particular terms and conditions of agreements to fulfill the duties described in [*47 U.S.C.* § *251*(b), (c)]. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The 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 to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [*47 U.S.C.* §§ *251*, 525].

47 U.S.C. § *251*(c) (Supp. 1998).

[*22]

To oversee the implementation of the Act's interconnection mandate, Congress has specifically authorized the States to review the interconnection agreements that incumbent local exchange carriers make with competing local exchange carriers. *47 U.S.C.* § *252* (Supp. 1998). The telecommunications carriers may either (1) enter voluntary negotiations with each other for interconnection agreements, or (2) enter interconnection agreements through arbitration by a State commission. *47 U.S.C.* § *252* (a), (b) (Supp. 1998). In either case, however, any "interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." *47 U.S.C.* § *252*(e)(1) (Supp. 1998). When the interconnection agreement or any portion of it has been adopted by negotiation, the State commission may only reject the agreement if "the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or . . . the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." *47 U.S.C.* § *252*(e)(2)(A) (Supp. 1998). An arbitrated agreement, however, must conform to the requirements [*23] of *47 U.S.C.* § *251* and § 252(d). *47 U.S.C.* § *252*(e)(2)(B) (Supp. 1998).

Therefore, the Telecommunications Act of 1996 governs the case at bar. Southwestern Bell is a telecommunications carrier, a local exchange carrier, and an in-

cumbent local exchange carrier under federal law. *47 U.S.C. §§ 153* (26), (44), and 251(a)-(c) (Supp. 1998). Moreover, Time Warner is a telecommunications carrier and local exchange carrier. *47 U.S.C. §§ 153* (26), (44) (Supp. 1998). The Act also classifies the PUC as a "state commission" which "has regulatory jurisdiction with respect to intrastate operations of carriers." *47 U.S.C. § 153*(41) (Supp. 1998). And finally, the instant case involves a dispute over the terms of negotiated interconnection agreements allowing Southwestern Bell customers to "call" Time Warner customers over their connected networks. *47 U.S.C. §§ 251*, 252 (Supp. 1998). Accordingly, the Court will examine (1) whether the PUC complied with federal law when it ruled that the interconnection agreements governed "local" phone calls from Southwestern Bell's customers to Time Warner's ISP customers, and (2) whether the PUC acted arbitrarily and capriciously when it ruled that [*24] the interconnection agreements did not exclude calls to ISPs.

B. Jurisdiction of PUC: Interstate or Local?

The Plaintiff contends that the PUC lacked the jurisdiction under federal law to regulate and set rates for communications accessing the Internet. Furthermore, the Plaintiff contends that Internet connections must be treated as interstate calls, not local calls. The Court will consider these contentions together because --like the local telecommunication networks of the parties in this case-- the Plaintiff's arguments are necessarily interconnected. The 1996 Act clearly requires state commissions like the Texas PUC to approve the interconnection agreements of local phone service companies. *47 U.S.C. § 252*(e)(1) (Supp. 1998). Furthermore, "the state commissions' 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." *Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997)*, cert. granted, *118 S. Ct. 879 (1998)*. However, if telecommunication connections to ISPs are not considered local phone calls, then only the FCC, not the PUC, had [*25] jurisdiction over the instant case. See *47 U.S.C. § 151* (Supp. 1998) (Congress created the FCC to regulate "interstate and foreign commerce in communication by wire and radio."). Thus, this Court must determine de novo whether federal law treats Internet connections as either interstate or local intrastate phone calls.

Whether modem links to ISPs should be considered local telephone calls presents an issue of first impression for this Court. However, the Court is not without any guidance. Generally, unlike the review of state agency decisions, a federal court will give much deference to the FCC's interpretation of the Telecommunications Act of 1996. See *Pac. Gas Transmission Co. v. Fed. Energy Regulation Comm'n, 998 F.2d 1303, 1308 (5th Cir. 1993)* (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984); Udall v. Tallman, 380 U.S. 1, 16-17, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965))*(federal courts give federal agencies much deference in the interpretation of their own regulations, ruling, and enabling statutes); *Citizens for Fair Util. Reg. v. U.S. Nuclear Reg. Comm'n, 898 F.2d 51, 54 (5th [*26] Cir. 1990)*, cert. denied, *498 U.S. 896, 112 L. Ed. 2d 205, 111 S. Ct. 246 (1990)*. Moreover, as is often the case with new technology, the Internet has increasingly become a presence in the federal courts. See, e.g., *Reno v. ACLU, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997)* (applying First Amendment analysis to Internet communications); *Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997)* (dealing with personal jurisdiction and trademark law over the Internet).

I. Interstate Characteristics of the Internet

Because of the Internet's ability to efficiently transmit information all over the world, transactions over the Internet may involve interstate commerce. For example, in *United States v. Carroll, 105 F.3d 740 (1st Cir. 1997)*, cert. denied, *138 L. Ed. 2d 187, 117 S. Ct. 2424 (1997)*, the First Circuit Court of Appeals found that transmitting sexually explicit photographs over the Internet satisfied the "interstate commerce" requirement of the federal child pornography statutes. *105 F.3d at 742*. The circuit court reasoned that "transmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes [*27] transportation in interstate commerce." Id.; See also *United States v. Tucker, 136 F.3d 763, 763-64 (11th Cir. 1998)* (downloading sexually explicit photos over Internet supported interstate commerce requirement). Moreover, in trademark infringement cases the federal courts have recognized that firms using the Internet to conduct business in other states may subject themselves to the personal jurisdiction of those states. *Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997); Planned Parenthood Fed'n of Am., Inc. v. Bucci, 1997 U.S. Dist. LEXIS 3338, 1997 WL 133313* at *3 (S.D.N.Y. 1997) ("The nature of the Internet indicates that establishing a typical home page on the Internet, for access to all users, would satisfy the Lanham Act's 'in commerce' requirement.").

To further determine whether a communication service is properly "interstate" and accordingly under the jurisdiction of the FCC, courts generally examine the "nature" of the communication, rather than focusing upon

the physical location of the communication facilities used to complete a call. For instance, in *National Ass'n of Regulatory Utility Commissioners [*28] v. Federal Communications Commission, 241 U.S. App. D.C. 175, 746 F.2d 1492 (D.C.Cir. 1984)*, the District of Columbia Circuit Court of Appeals held that the FCC had the authority to regulate the use of intrastate Wide Area Telecommunications Services ("WATS") used to complete interstate communications. *746 F.2d at 1501*. The D.C. Circuit emphasized that the 'dividing line between the regulatory jurisdictions of the FCC and states depends on 'the nature of the communications which pass through the facilities [and not on] the physical location of the lines.'" Id. at 1498. Thus purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use." Id; see also *Sprint Corp. v. Evans, 846 F. Supp. 1497, 1500-01 (M.D. Ala. 1994)* (800-number calls originating within one state and being completed in other states "involve interstate communications within the meaning of the Communications Act."); *United States v. AT&T Co., 57 F. Supp. 451, 453-5 (S.D.N.Y. 1944)*, aff'd, *325 U.S. 837 (1945)* (despite two-step process first connecting call to local telephone service and then connecting [*29] call to out-of-state destination, the call was considered a single interstate communication regulated by the FCC).

The FCC has likewise rejected arguments that certain telephone calls using intrastate components to complete interstate calls should be treated as if consisting of two different jurisdictional transactions. For example, in In Re Southwestern Bell Telephone Co., CC Docket No. 88-180 (Released April 22, 1988), Southwestern Bell argued that "a credit card call should be treated for jurisdictional purposes as two calls: one from the card user to the [interexchange carrier's] switch, and another from the switch to the called party." Id. at P 25. The FCC, however, rejected Southwestern Bell's reasoning and concluded that "switching at the credit card switch is an intermediate step in a single end-to-end communication." Id. at P 28 (utilizing rationale of *Nat'l Ass'n of Regulatory Util. Comm'rs v. Fed. Communications Comm'n, 241 U.S. App. D.C. 175, 746 F.2d 1492 (D.C. Cir. 1984))* (emphasis added). Also, in *In Re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 F.C.C.R. 1619 (FCC 1992)*, the Georgia Public Service [*30] Commission argued that "BellSouth's voice mail service is a purely or predominantly intrastate service . . . . [because] when the 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." Id. at P 8 (citations omitted). Nevertheless, the FCC found that the "fact that the facilities and apparatus used to provide BellSouth's voice mail service may be located within a single state [did] not affect [the FCC's] jurisdiction." Id. at P 12. The FCC reasoned that an "out-of-state call to BellSouth's voice mail service is a jurisdictionally interstate communication, just as is any other out-of-state call to a person or service." Id.

2. FCC's Treatment of the Internet: A Unique Creature

In the instant case, the Plaintiff contends that an analysis of the "nature" of the communication, rather than the physical location of the communication facilities used to complete a call, logically leads [*31] to the conclusion that all aspects of Internet communications, including the seven-digit modem "dial up" to ISPs, must be considered "interstate" and within the jurisdiction of the FCC. The Court, however, disagrees. Contrary to the FCC's treatment of voice mail and other telephone services, the FCC has not explicitly categorized Internet use via local phone connections as a single end-to-end communication. Indeed, the FCC appears to define the very nature of Internet connections differently from interstate long-distance calls. For example, in the FCC's *Report and Order. In Re Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776* (Released May 8, 1997) ("Report and Order"), the FCC concluded that "Internet access consists of more than one component." Id. at P 83. The FCC reasoned that "Internet access includes a network transmission component, which is the connection over a [local exchange] network from a subscriber to an Internet Service Provider, in addition to the underlying information service," Id. Thus, the Texas PUC in the case at bar concluded that it had jurisdiction over "the telecommunications service component, rather than the information service [*32] component," of an Internet subscriber's access to the Internet. PUC Order at 4. n10

n10 Other state commissions have made similar determinations. See, e.g., In Re Brooks Fiber Communications of Michigan, Case No. U-11178 at 17 (Mich. Pub. Serv. Comm'n 1998) ("A call using a local seven-digit telephone number to reach an ISP is local traffic subject to reciprocal compensation under the interconnection agreements for all minutes of use."); Pet. of the S. New England Tel. Co. for a Declaratory Ruling Concerning Internet Serv. Provider Traffic, Docket No. 97-05-22 at 11 (Conn. Dept. of Publ. Util. Control 1997) ("There

is no difference between an ISP and SNET's other local exchange customers. Traffic carried between SNET's end user customers and ISPs within the same local calling area is local in nature and, therefore, subject to the mutual compensation arrangements."); Final Order of Pet. of Cox Virginia Telcom, Inc., Case No. PUC970069 at 2 (Va. St. Corp. Comm'n 1997) ("Calls that are placed to a local ISP are dialed by using the traditional local-service, seven-digit dialing sequence. Local service provides the termination of such calls at the ISP, and any transmission beyond that point presents a new consideration of service(s) involved.").

[*33]

The two separate components do not exist merely as a matter of semantics. Very real technological differences underlie the FCC's two-component treatment of Internet activity. n11 Under the 1996 Act, Congress has defined "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *47 U.S.C. § 153* (43) (Supp. 1998). On the other hand, an "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *47 U.S.C. § 153* (20) (Supp. 1998).

n11 In its decision to not apply interstate access charges to ISPs, the FCC noted that, "given the evolution in ISP technologies and markets since we first established [interstate per-minute] access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs [long-distance interexchange carriers]." *First Report and Order, In Re Access Charge Reform, 12 F.C.C.R. 15982 at P 345* (Released May 16, 1997). Thus, one cannot describe Internet access as equivalent to long-distance interexchanges simply because of the ability to use the Internet to gather information from around the world.

[*34]

Utilizing Congress's definitions for "telecommunication" and "information services," the FCC has found that "Internet access services are appropriately classed as information, rather than telecommunications, services." Report to Congress, In Re Federal-State Joint Bd. on Universal Serv., FCC 98-67 at P 73 (Released April 10, 1998) ("Report to Congress"). "Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport." Id. Moreover, unlike a telecommunications service, "the Internet is a distributed packet-switched network . . . [where the] information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." Id. at P 64. n12 Indeed, although the Internet provides individuals with the ability to perform a multitude of tasks like "e-mail" which may resemble telecommunications, the FCC has determined that the Internet technologically still remains as an information service:

Internet access providers typically provide their subscribers with the ability to run a variety of applications, [*35] including World Wide Web Browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others. When subscribers store files on Internet service provider computers to establish "home pages" on the World Wide Web, they are, without question, utilizing the provider's "capability for . . . storing . . . or making available information" to others. The service cannot accurately be characterized from this perspective as "transmission, between or among points specified by the user"; the proprietor of a Web page does not specify the points to which its files will be transmitted, because it does not know who will seek to download its files. Nor is it "without change in the form or content," since the appearance of the files on a recipient's screen depends in part on the software that the recipient chooses to employ. When subscribers utilize their Internet service provider's facilities to retrieve files from the World Wide Web, they are similarly interacting with stored data, typically maintained on facilities of either their own Internet service provider (via a Web page "cache") or on those of another. Subscribers can retrieve files from the World Wide Web, and [*36] browse their contents, because their service provider offers the "capability for . . . acquiring, . . . retrieving [and] utilizing . . . information."

Id. at P 76 (citations omitted); *Report and Order, 12 F.C.C.R. 8776 at P 83.* Thus, despite the ability to use the Internet for clearly interstate transactions which Congress may choose to regulate, n13 the FCC recognizes that ISPs are not similar to interstate telephone services which are merely "intermediate steps in a single end-to-end communication." In Re Southwestern Bell Telephone Co., CC Docket No. 88-180 at P 28.

n12 The FCC has noted the technological uniqueness of the Internet.

The Internet is a distributed packet-switched network, which means that information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination. Even two packets from the same message may travel over different physical paths through the network. Packet switching also enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the server where the information resides.

Report to Congress, In Re Federal-State Joint Board on Universal Service, FCC 98-67, at P 64 (Released April 10, 1998).

[*37]

n13 See, e.g., *United States v. Carroll, 105 F.3d 740 (1st Cir. 1997)* (involving federal anti-child pornography statutes); *Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997)* (involving federal trademark law and Internet activity).

In the FCC's eyes, ISPs are actually end-users that may lie within the local exchange in the same way residential customers or businesses are end-users in the local market for telephone service:

We have found that providers of pure transmission capacity to support Internet services are providers of 'telecommunications.' Internet service providers and other information service providers also use telecommunications networks to reach their subscribers, but they are in a very different business from carriersInternet service providers provide their customers with value-added functionality by means of computer processing and interaction with stored data. They leverage telecommunications connectivity to provide these services, but this makes them customers of telecommunications carriers rather than their competitors

Report to [*38] Congress, In Re Federal-State Joint Board on Universal Service, CC Docket No. 96-45 at P 105 (April 10, 1998) (emphasis added). n14 In fact, the FCC has treated ISPs as end-users since the early 1980s when it determined that ISPs should not be subjected to interstate access charges:

We tentatively conclude that information service providers should not be required to pay interstate access charges as currently constituted. . . .Although our original decision in 1983 to treat [enhanced service providers like ISPs] as end users rather than carriers was explained as a temporary exemption, we tentatively conclude that the current pricing structure should not be changed so long as the existing access charge system remains in place. The mere fact that providers of information services use incumbent LEC networks to receive calls from their customers does not mean that such providers should be subject to an interstate regulatory system designed for circuit-switched interexchange voice telephony.

*Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, In Re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, 11 F.C.C.R. 21354 at [*39] P 288* (Released December 24, 1996) ("Notice of Proposed Rulemaking"); see also *First Report and Order, In Re Access Charge Reform, 12 F.C.C.R. 15982 at P 345* (Released May 16, 1997) (concluding that ISPs should not be subject to interstate access charges) ("First Report and Order").

n14 The Plaintiff asserts that the Defendants' "two-component" argument is foreclosed by the FCC's statement that its classification of Internet service providers "made no determination . . . on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic . . . [because that] issue . . . does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider," Report to Congress, In Re Federal-State Joint Board on Universal Service, FCC 98-67 at P 106 n. 220 (April 10, 1998) ("Report to Congress"). However, the FCC's statement in context actually refers to whether "information service providers [are entitled to] some or all of the rights accorded by section 251 to requesting telecommunications carriers." Id. The instant case, however, does not question whether information service providers like ISPs are entitled to reciprocal compensation. Instead, the present case deals with whether a telecommunications carrier like Time Warner that is clearly governed by *47 U.S.C. § 251*, 252, is entitled to reciprocal compensation for the use of its local lines to access ISPs. Indeed, the FCC explicitly recognizes that "Internet service providers are not treated as carriers for purposes of interstate access charges, interconnection rights under section 251, and universal service contribution requirements." Id. at P 106.

[*40]

Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, In Re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, 11 F.C.C.R. 21354 at P 288 (Released December 24, 1996) ("Notice of Proposed Rulemaking"); see also *First Report and Order, In Re Access Charge Reform, 12 F.C.C.R. 15982 at P 345* (Released May 16, 1997) (concluding that ISPs should not be subject to interstate access charges) ("First Report and Order").

Thus, as end users, ISPs may receive local calls that terminate within the local exchange network. The FCC recognizes that ISPs are "providers of information services [that] use . . . [local exchange] networks to receive calls from their customers." *Notice of Proposed Rulemaking, 11 F.C.C.R 21354 at P 288* (emphasis added). In the instant case, the "call" from Southwestern Bell's customers to Time Warner's ISPs terminates where the telecommunications service ends at the ISPs' facilities. As a technologically different transmission, the ISPs' information service cannot be a continuation of the "call" of a local customer. n15 Southwestern Bell is bound by its interconnection agreements because [*41] "reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call . . . . [where] the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call." First Report and Order, In Re Implementation of the Local Competition Provisions in the *Telecommunications Act of 1996, 11 F.C.C.R. 15499 at P 1034* (Released August 8, 1996) (emphasis added.). n16

n15 The Plaintiff contends that the FCC's decision to make ISPs exempt from interstate access charges actually demonstrates the FCC's jurisdiction over the seven-digit modem "calls" made to ISPs. However, the Court finds that the FCC's exemption appears to apply to the interstate information component of Internet connections. Indeed, the FCC itself recognizes that ISPs are not equivalent to interexchange carriers. See supra note 11, at 19. The bottom line is that the telecommunications component of Internet service consists only of the local call that the local exchange carriers collaborate to make.

[*42]

n16 Access charges apply to long-distance traffic where "the long-distance caller pays long-distance charges to the IXC [interexchange carrier], and the IXC must pay [local exchange carriers] for originating and terminating access service." First Report and Order, In Re Implementation of the Local Competition Provisions in the *Telecommunications Act of 1996, 11 F.C.C.R. 15499 at P 1034* (Released August 8, 1996) (emphasis added).

Furthermore, the fact that telephone traffic to ISPs may be of high volume and for long periods of time does not change the unique technological qualities of the Internet. In fact, in making its determination that ISPs do not need to pay interstate access charges, the FCC considered arguments from incumbent local exchange carriers that exempting ISPs from such charges would " impose uncompensated costs on incumbent [local exchange carriers]." *First Report and Order, 12 F.C.C.R. 15982 at P 346.* The FCC simply responded that ISPs actually do compensate incumbent local exchange carriers through purchases of telecommunication services that are regulated [*43] by the states:

We also are not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs [local exchange carriers]. 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, 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.

Id. at 346 (emphasis added). n17

n17 See also Haran Craig Rashes, The Impact of Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers, 16 TEMP. ENVTL. L. & TECH. J. 49, 69 (1997) (describing local telephone services which ISPs use).

[*44]

The monster of technology arises with the death of common sense; the law cannot ignore reality. The FCC recognizes that the Internet is a unique creature, and that the "nature" of an Internet communication is unlike the telephone services falling under the FCC's interstate jurisdiction. n18 The PUC, in the instant case, is not attempting to regulate the Internet. Rather, the PUC

is merely regulating that which it has power to regulate --the seven-digit local telephone calls that Internet customers make to "dial up" their Internet Service Providers. Unlike a long-distance call, the administrative record reveals, and Southwestern Bell acknowledges, that Internet customers have no control over the multitude of paths that an Internet connection might make. Internet customers are often unaware of the geographic location of the stored information they seek to retrieve from the Internet. Moreover, Time Warner and Southwestern Bell have no control over the ISPs who enable Internet customers to log onto the Internet. The ISPs are merely business customers of the local exchange carriers which provide an information service via telecommunications.

n18 Of course, as technology changes, information and telecommunication technologies may no longer be distinguishable. See, e.g., Sprint Unveils One-Line Communications System, Midland Reporter-Telegram, June 3, 1998, at 8C (Sprint Corp. unveils system purporting to combine circuit-switching technology with high-speed data transmissions).

[*45]

Finally, this Court's agreement with the Texas PUC's decision that modem calls to ISPs are "local," and not interstate, does not ignore nor contradict case law finding that Internet transactions may involve interstate commerce or that the "nature" of a communication, not the physical location of telecommunication facilities, is the determinative factor in determining FCC jurisdiction. Indeed, because the PUC is merely regulating the local telecommunications component of Internet access, the FCC and Congress still have interstate jurisdiction over the Internet's information service component and the "transactions" that occur over it. n19 The FCC has recognized that an identifiable technological line divides Internet service into an information and a telecommunications component. n20 It is that same line that also creates jurisdiction for the PUC in this case.

n19 Other courts have also found "local" aspects to Internet transactions. For example, in *Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997)*, the Second Circuit recognized both that transactions over the Internet could be interstate in nature and that a business on the Internet can still remain primarily "local" in character and outside of a state's long-arm personal jurisdiction statutes. *Id. at 29.*

[*46]

n20 Compare *United States v. Southwestern Cable Co., 392 U.S. 157, 169, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968)* (FCC had jurisdiction over community antenna television systems that were engaged in interstate commerce where "the stream of communication [was] essentially uninterrupted and properly indivisible.") (emphasis added).

C. Contract Interpretation

Under Texas contract law, "a contract is not ambiguous if it can be given a definite or certain meaning as a matter of law." *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex. 1996)*. "A contract, however, is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning." *Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983)*. However, "the failure to include more express language of the parties' intent does not create an ambiguity when only one reasonable interpretation exists." *Columbia Gas Transmission Corp., 940 S.W.2d at 591*. Thus, the Court must decide whether the PUC acted arbitrarily and capriciously, without substantial evidence, [*47] when it found that Southwestern Bell and Time Warner's interconnection agreements did not exclude calls to ISPs from the reciprocal compensation provisions for local traffic. n21

n21 "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Carrier v. Sullivan, 944 F.2d 243, 245 (5th Cir. 1991)* (per curiam).

In the instant case, the Court finds that the Texas PUC had substantial evidence to conclude that the Southwestern Bell-Time Warner interconnection agreements applied reciprocal compensation fees to the termination of calls accessing ISPs. As a matter of law, with respect to ISP traffic, this Court agrees with the PUC's finding that "when a transmission path is established between two subscribers in the same mandatory calling area, traffic carried on that path is local traffic, with the telecommunications service component of the call terminating at the ISP location." PUC Order [*48] at 4. Moreover, based on a reasonable interpretation of the interconnection agreements, the PUC appropriately found that the agreements were not ambiguous and "that the definition of 'local traffic' in the applicable interconnection agreements includes ISP traffic that otherwise conforms to the definition." Id. at 5.

Indeed, although Southwestern Bell contends that, prior to the Second Agreement's enactment, it had com-

municated to Time Warner its misgivings about the application of reciprocal compensation fees for ISP calls, the parties still failed to specifically exclude ISP calls from the definition of local traffic. The interconnection agreements fail to even mention "ISPs" or the "Internet" throughout the provisions. Thus, the Texas PUC did not act arbitrarily and capriciously because a reasonable interpretation of the interconnection agreements is that Southwestern Bell and Time Warner were to treat calls to ISPs as equal to calls made to other end-users or customers of either telecommunications service.

IV. CONCLUSION

The Court will deny Southwestern Bell's request for declaratory and injunctive relief against the Texas PUC. The PUC correctly determined that [*49] it had jurisdiction over the telecommunications component of Internet access and the local calls made to ISPs. Furthermore, the PUC correctly interpreted the Southwestern Bell-Time Warner interconnection agreement as unambiguous, and it correctly ordered Southwestern Bell to comply with the agreement's reciprocal compensation terms for termination of local traffic.

Accordingly,

IT IS ORDERED that Plaintiff Southwestern Bell Telephone Company's Request for Declaratory and Injunctive Relief is hereby DENIED.

SIGNED this 16 day of June, 1998.

HONORABLE LUCIUS D. BUNTON, III

SENIOR U.S. DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that after considering arguments of counsel and proposed findings of fact and conclusions of law it is appropriately ordered that plaintiff's request for declaratory and injunctive relief is hereby denied.

June 16, 1998

Date

Not Reported in F.Supp.
(Cite as: 1998 WL 350588 (W.D.Wash.))

U S WEST COMMUNICATIONS, INC., Plaintiff,
v.
MFS INTELENET, INC., et al., Defendants.

No. C97-222WD.

United States District Court, W.D. Washington.

Jan. 7, 1998.

Edward T. Shaw, Seattle, WA, Sherilyn Christine Peterson, Perkins Coie, Belluvue, WA, Phillip J. Roselli, U.S. West Law Dept., Denver, CO, for Plaintiff.

Robert J. Rohan, Rohan, Goldfarb & Shapiro, Seattle, WA, Douglas G. Bonner, Swidler & Berlin, Washington, DC, Shannon E. Smith, Atty. Gens. Office, Olympia, WA, for Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

DWYER, J.

I. INTRODUCTION

*1 This action is brought by U S West Communications, Inc. ("US West") pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission (the "WUTC") concerning interconnection between U.S. West and MFS Intelenet, Inc. ("MFS"), an entrant into a local telecommunications market. The defendants are MFS and the WUTC and its commissioners. The Federal Communications Commission ("FCC") has filed a brief amicus curiae.

Pursuant to the Act, entrants into a local telecommunications market may demand the following from an incumbent local exchange carrier ("LEC"): (1) interconnection with its local network; (2) access to its individual "network elements", such as routers and switches, "at cost"; and (3) at wholesale, rights to the services the incumbent LEC offers its customers at retail. 47 U.S.C. § 251(c)(2)-(4).

On February 8, 1996, MFS requested access negotiations with U.S. West. The Act requires both parties to negotiate in good faith. 47 U .S.C. §§ 251(c)(1), 252(a)(1). When negotiations failed to produce an agreement, MFS requested, and was afforded, arbitration as authorized by the Act. 47 U.S.C. § 252(b). An arbitrator was appointed, held hearings, and issued a decision. On December 9, 1996, the parties submitted an interconnection agreement reflecting the arbitration decision. The WUTC approved the agreement on January 8, 1997. Following that approval, U.S. West brought this action pursuant to 47 U.S.C. § 252(e)(6), which provides:

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

All parties have moved for summary judgment. The materials filed, and the arguments of counsel heard on December 4, 1997, have been fully considered. Because there is no genuine issue of material fact for trial, the case may be decided on summary judgment as a matter of law pursuant to Fed.R.Civ.P. 56.

II. SCOPE AND STANDARD OF REVIEW

While the Act, at section 252(e)(6), authorizes judicial review of "the agreement," review necessarily extends to "the various decisions made by the [state commission] throughout the arbitration period which later became part of the agreement...." GTE South, Inc. v. Morrison, 957 F.Supp. 800, 804 (E.D.Va.1997).

As to the record to be reviewed, the Supreme Court has held that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed ... consideration is to be confined to the administrative record and ... no de novo proceeding may be held." United States v. Carlo Bianchi & Co., 373 U.S. 709, 715, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963). Moreover, the Act was intended to facilitate the rapid entry of new competitors into local telecommunications markets. See Iowa Utilities Bd. v. FCC, 120 F.3d 753, 791 (8th Cir.1997). That intent would be frustrated by the reception of new evidence in the reviewing court. Review is thus limited to the administrative record.

*2 As to the standard of review to be applied, a state agency's interpretations of federal law are reviewed de novo. See Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir.1997). Chevron deference (see

Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)), is not appropriate where as many as fifty state commissions will be applying the Telecommunications Act. Questions of federal law will be reviewed de novo.

The WUTC's findings of fact are a different matter. Substantial deference should be afforded to a state commission's findings because the Act gives it original jurisdiction in the area of rate-setting. See 47 U.S.C. § 252(c)(2). Principles of judicial discretion are strongest where the administrative body has primary jurisdiction over the precise matters the court is asked to decide. See West Coast Truck Lines, Inc. v. Weyerhaeuser Co., 893 F.2d 1016 (9th Cir.1990).

Iowa Utilities Board v. FCC makes clear that the state commissions have original jurisdiction over the setting of prices, including discretion to choose the methodology for calculating cost, as long as the terms of the Act are not violated. 120 F.3d at 794. The Eighth Circuit rejected an FCC order requiring state commissions to apply so-called TELRIC methodology to determine prices; the FCC may not "preempt any state pricing regulation that would employ a different methodology." Id. at 798, n. 19.

The choice of pricing and cost methodology thus rests with the commission. Its determinations in those respects must be treated as fact findings and reviewed to test whether they are arbitrary and capricious. With that deferential standard, a reviewing court under the Administrative Procedures Act (analogous here) is to consider whether the agency's decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. See City of Carmel-by-the-Sea v. United States Dep't of Transp., 95 F.3d 893, 899 (9th Cir.1996). The court may not substitute its judgment for that of the agency. Id.

III. SPECIFIC CLAIMS

The prices set in the agreement approved by the WUTC are interim prices; that is, they are subject to change during the agency's generic price and cost proceeding. It has not been shown that the WUTC used any erroneous interpretation of the Act. As to U.S. West's specific claims:

1. The WUTC's approval of the interim unbundled loop price of $13 .37 was not arbitrary or capricious. This price was chosen based on substantial information, including the WUTC's "Fifteenth Supplemental Order", Docket No. UT-950200 (recommended price: $13.38), U.S. West's proposed tariff in another proceeding, Docket No. UT-941464 (maximum proposed price: $19.24), and the FCC's proposed proxy price for Washington ($13.37), see First Report and Order, Implementation of the Local Competition Provisions in the Telecommunication Act of 1996, Appendix B, CC Docket No. 96-98 (Aug. 8, 1996), 11 FCC Rcd 15499, at ¶¶ 788-794 (hereinafter "FCC Order").

*3 US West argues that the WUTC violated section 252(d)(1) of the Act by referring to a "rate-of-return or other rate based proceeding", i.e. the Fifteenth Supplemental Order. But the Fifteenth Supplemental Order was based not on rates of return but on an incremental cost methodology called TSLRIC. See Arbitrator's Report at 5. This is the type of methodology recommended in the FCC Order at paragraphs 630 and 635.

The company also argues that use of the FCC proxy price was improper in light of Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir.1997). The Eighth Circuit held, however, that the FCC did not have jurisdiction to make rules regarding interconnection prices. The decision did not affect the validity of the underlying methodology used by the FCC, which can still be informative. The WUTC made clear it was "free ... to disregard those specific requirements" if it chose to, and that it was considering the proxy prices for their underlying methodology.

2. The WUTC did not act arbitrarily or capriciously in rejecting U.S. West's request to impose special charges for construction costs and conditioning. It found that U.S. West had offered no evidence of actual construction costs, or of a proper formula to use, or of how costs should be allocated among customers and competitors. WUTC's Order at 16-17.

3. US West has not shown that the agreement violates the Act by permitting "sham unbundling." The Act contemplates that an entrant may provide service to its customers by combining an LEC's network elements. See § 251(c)(3); Iowa Utility Board, 120 F.3d at 814. MFS is not required to provide any of its own elements in order to engage in rebundling. FCC Order at ¶ 328.

US West argues, nevertheless, that the agreement violates the Act by requiring U.S. West to do the rebundling for MFS. The Iowa Utilities case rejected an FCC rule compelling incumbents to recombine

network elements for an entrant (see 120 F.3d at 813; amendment to the second Iowa Utilities decision, 1997 WL 658718 (October 14, 1997)), but the reasoning that led to that holding does not apply here. The Eighth Circuit emphasized that compelled recombination would undermine the difference between wholesale prices for finished service and the "at-cost" price paid for network elements. 120 F.3d at 813. Here, any unfair cost arbitrage is precluded by use of a recombination fee equal to the difference between the cost and the wholesale rate for finished service.

4. The WUTC's approval of a wholesale discount of 21% off retail price was not arbitrary or capricious. The agency relied on the FCC's recommended range of 17-25%. See FCC Order at ¶¶ 932-933. US West's proposal was properly rejected as not complying with section 252(d)(3) of the Act, which requires the parties to start with the retail price and deduct costs avoided ("top down" pricing). The WUTC reasonably characterized U.S. West's method as improper "bottom up" pricing, in which expenses are added together to determine a "wholesale" price.

*4 5. The WUTC's finding that the unregulated and deregulated services are "telecommunications services" was not arbitrary or capricious. The agency correctly applied the Act in denying U.S. West's claim that it is not required to sell unregulated or deregulated services. The Act requires incumbent LECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail." 47 U.S.C. § 251(c)(4). The definition of telecommunications services is broad. 47 U.S.C. § 153(46).

6. The WUTC's finding that MFS's switches function as tandem switches more than as end office switches was not arbitrary or capricious. The commission determined the cost of call termination accordingly. In doing to, it did not violate the Act when it relied on approximations of costs submitted by MFS; rates need only be based on "reasonable approximations." 47 U.S.C. § 252(d)(2)(A)(ii).

7. The WUTC did not act arbitrarily or capriciously in deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fees. The decision was properly based on FCC regulations which exempt ESP providers from paying access charges. See 47 C.F.R. pt. 69.

8. The WUTC did not act arbitrarily or capriciously in choosing MFS's proposed division of "switched access charges" for long distance calls which are delivered to the ported numbers of each company. FCC regulations require carriers to share the switched access revenues received for a ported call. First Report and Order and Further Notice of Proposed Rulemaking, Telephone Number Portability, CC Docket No. 95-116 (July 2, 1996), 11 FCC Rcd 8352, at ¶ 140. The methodology employed for sharing access charges is left to the discretion of the commission.

9. The WUTC did not act arbitrarily or capriciously in approving a cost recovery mechanism for number portability based on the number of active local numbers each company has. The FCC has indicated that it approves portability surcharges computed on that basis. Id. at ¶¶ 130, 136. It is within a commission's discretion to approve a method based on the FCC's recommendation.

10. The WUTC did not act arbitrarily or capriciously in approving MFS's request for a single interconnection point per LATA. The agency correctly applied the Act when it limited its review to the technical feasibility of the LATA connection approved in the agreement. See 47 U.S.C. § 251(c)(2)(B) and FCC Order at ¶ 209. U.S. West's argument that the WUTC had not considered the cost of minimal LATA connections by MFS was correctly rejected. "A determination of technical feasibility does not include consideration of economic, accounting, [or] billing ... concerns." 47 C.F.R. § 51.5. U.S. West presented no evidence on the issue of technical feasibility of MFS's chosen points of connection.

11. US West's due process claims are without basis. The company has failed to show that any finding of fact was arbitrary and capricious, or that any error of law was committed. Yang v. Shalala, 22 F.3d 213, 217 (9th Cir.1994), cited by U.S. West, is not controlling because here the arbitrator and the WUTC based their decisions on the evidence submitted by the parties.

*5 In sum, it has not been shown that the WUTC or the arbitrator acted arbitrarily or capriciously, or contrary to law, in making any relevant determination, or that the agreement violates the Act. Accordingly, U.S. West's motion for summary judgment is denied. Defendants' motions for summary judgment are granted except as to the taking claim, discussed below.

IV. US WEST'S TAKING CLAIM

US West claims that the WUTC's approval of the agreement amounts to an unconstitutional taking. A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court. Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). These requirements are not met here, and the taking claim, because it is not ripe, must be dismissed without prejudice.

V. CONCLUSION

For the reasons stated, defendants are awarded summary judgment as to all claims except U.S. West's taking claim, which will be dismissed without prejudice. Judgment will be entered accordingly.

The clerk is directed to send copies of this order to all counsel of record.

END OF DOCUMENT

• Arizona Corporation Commission, Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Opinion and Order, Decision No. 59872, Ariz. CC Docket Nos. U-2752-96-362 and E-1051-96-362 (Oct. 29, 1996)

• California Public Utilities Commission, Order Instituting Rulemaking on the Commission's Own Motion into Competiton for Local Exchange Service, Rulemaking 95-04-043 and 95-04-044, Decision 98-10-057, (October 22, 1998)

• Colorado Public Utilities Commission, Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Decision Regarding Petition for Arbitration, Decision No. C96-1185, Co. PUC Docket No. 96A-287T (Nov. 5. 1996)

• Connecticut Department of Public Utility Control, Petition of the Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Service Provider Traffic, Final Decision, Conn. DPUC Docket No. 97-05-22 (Sept. 17, 1997)

• Florida Public Service Commission, Complaint of World Technologies, Inc., Against BellSouth Corporation; Docket No. 971478-TP, Order No, PSC-98-1216-FOF-TP, (September 15, 1998)

• Georgia Public Service Commission, MCI Petition for Arbitration Under the Telecommunications Act of 1996, Docket No. 6865-U, (by Commission vote on December 1, 1998)

• Illinois Commerce Commission, Teleport Communications Group, Inc. v. Illinois Bell Telephone Company, Ameritech Illinois: Complaint as to Dispute over a Contract Definition, Opinion and Order, Ill. CC Docket No. 97-0404 (Mar. 11, 1998)

• Maryland Public Service Commission, Letter from Daniel P. Gahagan, Executive Secretary, to David K. Hall, Esq., Bell Atlantic - Maryland, Inc., Md. PSC Letter (Sept. 11, 1997)

• Massachusetts Department of Telecommunications and Energy, Complaint of MFS Intelenet of Massachusetts, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts, for Breach of Interconnection Terms Entered Into Under Section 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116 (October 21, 1998)

• Michigan Public Service Commission, Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan, Opinion and Order, Mich. PSC Case Nos. U-11178, U-111502, U-111522, U-111553 and U-111554 (Jan. 28, 1998)

• Minnesota Department of Public Service, 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, Order Resolving Arbitration Issues, Minn. DPS Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Dec. 2, 1996)

• Missouri Public Service Commission, Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection with SWBT, Case No. TC-98-278 (April 23, 1998).

• New York Public Service Commission, Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Order Closing Proceeding, NY PSC Case No. 97-C-1275 (Mar. 19, 1998)

• North Carolina Utilities Commission, Interconnection Agreement between BellSouth Telecommunications, Inc. and US LEC of North Carolina, Inc., Order Concerning Reciprocal Compensation for ISP traffic, NC UC Docket No. P -55, SUB 1027 (Feb, 26, 1998)

• Public Utilities Commission of Ohio, In the Matter of the Complaint of ICG Telecom Group, Inc., Opinion and Order, Case No. 97-1557-TP-CSS (August 27, 1998)

• Oklahoma Corporation Commission, Application of Brooks Fiber Communications of Oklahoma, Inc., and Brooks Fiber Communications of Tulsa, Inc. for an Order Concerning Traffic Terminating to Internet Service Providers and Enforcing Compensation Provisions of the Interconnection Agreement with Southwestern Bell Telephone Company, Okla. CC Cause No. PUD 970000548 (Feb. 5, 1998)

• Oregon Public Utility Commission, Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, Decision, Or. PUC Order No. 96-324 (Dec. 9, 1996)

• Pennsylvania Public Utility Commission, Petition for Declaratory Order of TCG Delaware Valley, Inc. for Clarification of Section 5.7.2 of its Interconnection

Agreement with Bell Atlantic-Pennsylvania, Inc., P-00971256 (June 2, 1998).

• Tennessee Regulatory Authority, Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief, Tenn. RA Docket No. 98-00118 (Apr. 21, 1998)

• Texas Public Utility Commission, Complaint and Request for Expedited ruling of Time Warner Communications, Order, Tex. PUC Docket No. 18082 (Feb. 27, 1998)

• Virginia State Corporation Commission, Petition of Cox Virginia Telecom, Inc. for Enforcement of Interconnection Agreement with Bell-Atlantic-Virginia, Inc. and Arbitration Award for Reciprocal Compensation for the Termination of Local Calls to Internet Service Providers, Final Order, Va. SCC Case No. PUC970069 (Oct. 24, 1997)

• Washington Utilities and Transportation Commission, Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and U S West Communications, Inc. Pursuant to 47 U.S.C. § 252, Arbitrator's Report and Decision, Wash. UTC Docket No. UT-960323 (Nov. 8, 1996), aff'd U S West Communications, Inc. v. MFS Intelenet, Inc., No. C97-22WD (W.D. Wash. Jan. 7, 1998

• West Virginia Public Service Commission, MCI Telecommunications Corporation Petition for Arbitration of Unresolved Issues for the Interconnection Negotiations Between MCI and Bell Atlantic - West Virginia, Inc., Order, WV PSC Case No. 97-1210-T-PC (Jan. 13, 1998)

• Wisconsin Public Service Commission, Contractual Disputes About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc., 5837-TC-100 (May 13, 1998).