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February 28, 2003

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Ms. Patricia Christensen
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Undocketed VoIP Workshop

Dear Ms. Christensen:

Enclosed please find the post-workshop comments of Level 3 Communications, LLC, along with nineteen (19) attachments.

Please do not hesitate to call me if you have any questions.

Sincerely,

Marsha Rule

Marsha E. Rule

cc: Mr. Mike Romano

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Phone-to-Phone Internet Protocol Telephony (Voice Over Internet Protocol) Workshop	))))	Undocketed February 28, 2003

POST-WORKSHOP COMMENTS
OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC ("Level 3") welcomes the opportunity to provide comments to the Florida Public Service Commission ("Commission") regarding the current state of Internet protocol ("IP") telephony and the proper regulatory treatment of such services.

Level 3 is a facilities-based communications and information services company with an international network completely optimized, end-to-end, for IP technology. Level 3 offers IP-based services, including broadband transport, submarine transmission, and softswitch-based telecommunications services. Level 3 offers services primarily to other carriers, Internet service providers ("ISPs"), application service providers, and voice-over-IP ("VoIP") service providers who utilize substantial amounts of bandwidth to deliver their services.

Level 3's all-IP network contains no circuit switches. Instead, its network is designed with softswitch architecture – a distributed set of hardware and software platforms used to seamlessly interconnect IP networks to the circuit switched network. With softswitch architecture, core switching functions are not handled in each single unit, such as in a circuit switch network. Instead, switching functions are more efficiently distributed throughout the network to handle traffic in multiple locations. The result is a pure IP network that interoperates with the existing circuit-switched public network.

Level 3 agrees with the Commission's philosophy that "customers are served best by

markets that facilitate the efficient provision of safe and reliable utility services at fair prices," and applauds the Commission's goal of removing regulatory barriers to competition.[1] If not hindered by undue regulation, VoIP technology will continue to develop exciting, innovative and economically efficient applications for customers. VoIP is emerging and evolving in the marketplace, is highly dynamic, and is not capable of easy categorization at this point. The Commission should avoid taking action that would force VoIP services into existing telecommunications regulatory service models. Premature or imprecise regulatory action will inhibit, rather than enhance, competition.[2] In keeping with the Commission's goal to "eliminate regulatory involvement to the extent permitted by law," the Commission should take a cautious approach to allow VoIP services to develop without unnecessary telephone regulation.

For example, Level 3's all IP softswitch-based network architecture is constructed to make the most of the rapidly decreasing costs of moving information in packetized form. However, consumers will not benefit from the technological change that drives those costs down unless companies offering such advanced services can interconnect and exchange traffic with circuit-switched networks without being saddled with the artificial economic inefficiencies of those legacy networks. As discussed herein, one of the most inefficient aspects of the legacy

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1 *See* Florida Public Service Commission mission statement at http://www.psc.state.fl.us/:

> Customers are served best by markets that facilitate the efficient provision of safe and reliable utility services at fair prices. The mission of the Florida Public Service Commission is to promote the development of competitive markets – as directed by state and federal law – by removing regulatory barriers to competition, and by emphasizing incentive-based approaches, where feasible, to regulate areas that remain subject to rate of return regulation. Once markets become sufficiently competitive, the Florida Public Service Commission will eliminate regulatory involvement to the extent permitted by law.

2 Regulatory restraint also will aid in the development of facilities-based competition, which has long been of interest to this Commission. While ILEC networks were built at ratepayer expense, via monopoly rate-of-return funding, competitors today have no captive monopoly customers to pay for new networks, and must instead seek investor funding in a risky economic environment. The Commission should avoid imposing regulatory handicaps on the development of facilities-based alternatives to use of the PSTN.

network is the current access charge regime that benefits incumbent carriers. It is not surprising, therefore, that of the regulatory obligations that incumbent local exchange carriers ("ILECs") advocate for VoIP providers, imposition of access charges is their highest priority.

The advent of VoIP could play at least two important roles in the market. First, if left free to respond to customer demand and expectations, VoIP services could become the proverbial "killer application" that stimulates much-anticipated broadband deployment. IP-enabled services allow providers and consumers to combine voice, data, video, and other applications more seamlessly than is possible on today's public switched telephone network ("PSTN"). Forcing one kind of IP-enabled service – voice – into a regulatory category separate from other IP-enabled services will only frustrate this goal and deny consumers the choices they clearly are seeking in a more competitive communications and information services marketplace.

The second important role that VoIP could play is a corrective one. VoIP services may best be viewed as an opportunity to remedy the antiquated inconsistencies and inefficiencies in telephone regulation today. A system that treats the same PSTN network function at least five different ways for jurisdictional and compensation purposes cannot be sustained in a competitive marketplace.[3] VoIP challenges outdated regulatory models by treating all packets as packets, whether they are voice, video, data, or something else, and regardless of where they originate

[3] In her statement accompanying the FCC's Notice of Proposed Rulemaking regarding a unified intercarrier compensation regime, Commissioner Ness astutely noted that the exact same network function can have multiple prices – and even differing directions of payment – depending upon whether the call is deemed local, long distance, Internet-bound, CMRS or paging in nature. *See Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Notice of Proposed Rulemaking (rel. Apr. 27, 2001), at Separate Statement of Commissioner Ness. Add to this the complexities of intraLATA toll and interLATA toll, and interstate and intrastate splitting of traffic, and it becomes all too clear that Commissioner Ness was on the mark in stating that "[i]n an era of convergence of markets and technologies, this patchwork of regimes no longer makes sense. What had been a historical artifact may have become an unsustainable anomaly." *Id.* Level 3 submits that the nascent emergence of VoIP is the catalyst that finally makes clear that the historical patchwork of intercarrier compensation regimes *has in fact become* an unsustainable anomaly.

and terminate. Rather than trying to squeeze the round pegs of VoIP into the square holes of traditional telephony regulation, the Commission should seize the opportunity to revisit and reform the existing regulatory framework and compensation mechanisms in anticipation of new kinds of services.

Finally, even if it should decide that traditional telephony regulation is warranted in some respect, the Commission should be wary of treating all VoIP services – even all phone-to-phone VoIP services – as a single, easily defined category. As explained further herein, the flexibility provided by IP-enabled services makes a "one-size-fits-all" approach to regulation of such services difficult, if not impossible, to administer. Rather than viewing *all* phone-to-phone IP telephony services as subject to one broadly defined category of regulation, this subject warrants more careful attention to individual offerings and the applications each provides to consumers.

Level 3 responds below to specific questions raised by staff.

1. WHAT IS VoIP TELEPHONY AND HOW DOES IT COMPARE TO CONVENTIONAL TELEPHONE SERVICE?

The term "VoIP telephony" comprises a number of different services. Thus, if one is going to engage in regulation of such services as a traditional telephone service – a point that Level 3 would discourage for the reasons set forth in Sections 1 and 2 herein – one must examine each specific VoIP application to determine how it compares to conventional telephony. Many of the issues identified by staff appear premised on the assumption that phone-to-phone VoIP services will offer a complete substitute for local exchange service. It would be both incorrect and overreaching to find that all VoIP services – even those that may utilize a phone-to-phone connection in some respect – are a substitute for basic local exchange services, and that they therefore necessarily should be subject to the same regulatory framework as traditional telephone services.

A. Technical Aspects

- *Identification of network elements used to process an IP telephone call and functionality of each element.*

This information must be gathered on a service-specific basis. The range of VoIP applications available is increasingly broad, and more services are under development. Because there is no standard VoIP product, one must examine the features and characteristics of each service, and if applicable, the arrangements the VoIP provider has made with PSTN carriers. In general, however, Level 3 believes that the way in which many VoIP products are provided today would require no more use of carrier networks than would be involved in the exchange of any local telephone call on the PSTN. Specifically, VoIP traffic is handled on the PSTN through the VoIP provider's use of local telephone lines (e.g., primary rate interfaces ("PRIs") or direct inward dials ("DIDs")) or local interconnection trunks. Thus, if one wishes to compare VoIP traffic to other traffic, it is most analogous to a local call in terms of how it makes use of "network elements" or otherwise places any burden on the PSTN.

- *Discussion of numbering issues such as number assignment and number portability.*

The use of VoIP technology to process and transport voice traffic does not raise any number assignment or number portability issues.[4] National bodies such as the North American Numbering Council and the Industry Numbering Committee are considering such issues, and there has been no finding yet that VoIP services have any unique or adverse impact on numbering resources. Carriers who obtain and assign telephone numbers are subject to applicable number assignment and number portability requirements regardless of how they offer

[4] *See* Attachment 1: "Report on VoIP Numbering Issues - Much Ado About Nothing?," Issue: 393 - VoIP Numbering Issues, Contribution VoIP-001, submitted at January 9, 2003, INC VoIP Workshop by Penn Pfautz, AT&T.

service or what additional features may be available to their customers. The availability of new VoIP applications will place no additional strain on number assignment or number portability.

At the workshop, staff raised questions regarding the use of VoIP services for long-distance number portability. Level 3 notes that carriers are not currently required to provide geographic number portability; should such a requirement eventually be imposed it could actually reduce the need for additional numbering resources. For example, the winter Florida visitor described by staff would need only one telephone number that could "follow" him to Florida, and would not have to obtain an additional Florida telephone number. Further, incumbents and competitors alike currently offer foreign exchange ("FX") service without impact on number assignment or local number portability, and a FX-like VoIP service would be no different in that regard. It is always the case today that a telephone number remains associated with the NXX code and rate center from which it is assigned. Even if a customer (including a VoIP provider or its customer) is in a distant location via a FX arrangement, that customer's telephone number would always be associated with the original rate center for rating and routing purposes – and that number could be ported like any other FX telephone number if and when the customer chose to change service providers.

- *E911 – Discussion of the ability of VoIP to identify the caller and address and deliver the information to the correct Public Safety Answering Point.*

This question provides a good example of why a "one-size-fits-all" approach to regulation is inappropriate. It is difficult to tell whether customers will expect or demand 911 or wireless enhanced 911 ("E911") in connection with a VoIP service offering – even a phone-to-phone offering – without considering how that service is structured and made available. (For example, can the customer access emergency services otherwise? Is the service in-bound in

nature only such that *no* outbound call could be placed?) In the end, this question may largely depend upon whether the phone-to-phone VoIP service in question is a true substitute for basic local exchange service.

- *Funding of E911.*

Pursuant to Section 365.172, Florida Statutes, E911 services are funded by fees levied on wireless services. Level 3 therefore does not believe that VoIP services will have any impact on E911 funding.

- *Directory and Information Service telephone number listings – Identify how a VoIP customer would have his VoIP telephone number listed in the telephone directory and directory information services.*

This question again highlights the need for a case-by-case analysis as opposed to a broad-brush regulatory approach. If customers do not expect directory listings and associated features in purchasing a particular VoIP service, imposing such a requirement on the provider in question would be unnecessary. Moreover, VoIP providers who assign telephone numbers to their customers and seek to provide competitive substitutes for local exchange telecommunications services will likely have to offer features that are attractive and useful to their customers, which probably would include directory listings. This is a case in which the Commission should see what market forces dictate before assuming what consumers will expect.

- *Billing format and content – Explain how customers are billed for VoIP and what information is contained on the bills.*

How customers are billed and the information on the bills depends on the type of VoIP service to which they subscribe. Level 3 does not believe this is an important issue for most VoIP or other enhanced/information services. For example, Level 3 is unaware of any customer

confusion relating to customer bills for Internet access. VoIP providers who seek to provide competitive substitutes for local exchange telecommunications services will have to provide customer-friendly bills in order to win and retain customers.

- *TDD Compatibility – Identify any technical incompatibility problems involving the processing of a call made from a TDD device used by the hearing impaired.*

Level 3 is unaware of specific issues in this regard; as noted above, however, competitive service providers must be able to satisfy customer needs and desires, or those customers will seek service elsewhere.

- *What services can VoIP provide that wireline cannot?*

By using a lower-cost network technology with intelligence and functionality concentrated in customer hardware, VoIP has the potential to provide services, features and applications unavailable in the legacy PSTN. For example, VoIP applications can enable users to access all forms of messages – voice mail, e-mail, fax, and video mail – from a common mailbox. This would be difficult or extremely expensive to accomplish over the wireline PSTN, which has its intelligent functionality embedded in the network itself and therefore cannot easily be engineered to provide such applications. Indeed, even a phone-to-phone IP telephony call might involve interaction with stored data or a change in protocol (e.g., through use of IP-based customer premises "telephone" equipment) that adds value from the customer's perspective above and beyond what the customer would experience on a standard local or long distance telephone call, and is central to allowing the customer to complete or receive the call in question. As shown in Attachment 2, VoIP is capable of supporting multiple simultaneous applications and it allows provisioning of services that would be difficult or extremely expensive to provide over the legacy PSTN.

As discussed further herein, however, the threat that VoIP will be subject to the current access charge regime constitutes a disincentive for the development and deployment of VoIP applications. IP-based services do not fit easily into the legacy regulatory classifications that provide the foundation for the current access regime and should not be forced into that mold.

- *What impact will VoIP have on the economy of Florida?*

If Florida provides the right regulatory climate, such that VoIP services can develop free from regulations developed in and applicable to a monopoly PSTN-only era, VoIP can create new market opportunities and new jobs in Florida as well as generate benefits for consumers. In particular, the efficiencies associated with IP-enabled services will allow consumers to purchase voice services (over which other services can and will be layered) at a lower price, provided that outdated compensation structures such as access charges do not artificially drive up the cost – and thereby undermine the economic benefits – associated with such services.

- *What impact will VoIP have on state taxes?*

It is not clear that VoIP will have any impact on state communications taxes, given the existing structure of such taxes. Communications taxes are imposed on "communications services," but not "information services" or Internet access.[5] Thus, Florida law may require

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[5] *See* Section 202.11(3), Florida Statutes, which defines "communications" and Section 202.11(7), Florida Statutes, which defines "information services":

> (3) "Communications services" means the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term does not include:
> (a) Information services.
> * * *
> (h) Internet access service, electronic mail service, electronic bulletin board service, or similar on-line computer services.
> * * *
> (7) "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, using, or making available information via communications services, including, but not limited to,

taxation of some VoIP services and exemption of others, depending on the nature of the specific service.

B. Service Quality

- *Discussion of network reliability.*

As noted above, there is a broad range of VoIP applications, with more services under development. Network reliability must therefore be examined on a service-specific basis. Ultimately, VoIP providers will have to offer their customers reliable service in order to gain and retain market share. This question too therefore highlights the need for consideration of VoIP services on a case-by-case basis, taking into account among other things the basic and enhanced aspects of the service offered and the expectations of the consumer. For its part, Level 3 operates in certain cases as both a telecommunications carrier (local and long distance) and an information services provider. Level 3 therefore understands that its ability to attract and retain business will depend in part upon customers viewing Level 3's VoIP services as "carrier-grade." In other words, the business will rise or fall in part upon the customer's experience in being able to experience seamless transmissions of voice and other data, with minimal, if any, disruptions in service using an IP-based network.

- *Types of services that are provided, i.e., local, toll, caller ID, etc.*

As discussed above and outlined in Attachment 2, there are multiple applications – often overlapping – for VoIP and other IP-enabled services. In some cases, a VoIP service may

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electronic publishing, web-hosting service, and end-user 900 number service. The term does not include any video, audio, or other programming service that uses point-to-multipoint distribution by which programming is delivered, transmitted, or broadcast by any means, including any interaction that may be necessary for selecting and using the service, regardless of whether the programming is delivered, transmitted, or broadcast over facilities owned or operated by the seller or another, or whether denominated as cable service or as basic, extended, premium, pay-per-view, digital, music, or two-way cable service.

provide local connectivity (perhaps inbound- or outbound-only or two-way in nature), while in others it may used to provide both local and long distance service. In other cases still, it might combine these services with applications such as interaction with stored data, "pop-up screens" that allow speakers to transmit visual information too, or other enhanced or advanced features. In the end, the features and functions will need to be identified on an individual case basis by the needs of the customer base and the capabilities of the IP-based network.

- *Handling of customer complaints.*

Many VoIP applications currently available are used by organizations with very specific and sophisticated technological needs. Obviously, providers must be able to satisfy these customers, including handling any customer inquiries or complaints that may arise, in order to retain them as customers. However, Level 3 is not aware of any special concerns in this regard.

- *Compliance with service quality standards – what standards apply and how are they implemented.*

Level 3 understands and shares the Commission's concern over ensuring that customers receive a reliable level of service. However, the imposition of service quality standards on IP-enabled services should be discouraged for at least three reasons.

First, it is premature to examine service quality from a regulatory perspective while this market is still maturing. It remains to be seen whether customers will utilize these VoIP services as a substitute for local service in every respect, and whether VoIP might also deliver benefits that outweigh slight (perhaps even unperceivable) discrepancies in service quality.

Second, Level 3 submits that the application of traditional ILEC service criteria – e.g., deployment of maintenance personnel in X hours, or installation of service within Y days – may be largely inapplicable in a remotely operated IP-based environment that does not rely upon

circuit switches and traditional copper loop technology. In fact, many of the PSTN service criteria in place today do not apply squarely to even "traditional" services offered by alternative local exchange carriers ("ALECs") over circuit-switched networks, and the Commission has elected not to apply such criteria to ALECs. Superimposing traditional ILEC network-based service metrics on the distributed network architecture associated with an IP-based network that offers voice, video, and data capabilities to customers all at once could be unmanageable.

Finally, the public interest would be best served by considering service quality issues on a case-by-case basis if and when customers express concern. Many providers such as Level 3 already are compelled by the competitive market to demonstrate the quality of their services to prospective customers in order to attract their business.[6] If complaints from customers regarding VoIP service become prevalent enough, the Commission could at that time consider whether more stringent regulatory protections are required based upon the nature of the service.

Thus, the Commission should refrain from superimposing PSTN-designed metrics on an IP-based service environment. Instead, the Commission should view service quality as something to be driven by customer demand rather than regulatory fiat. In the end, customers will only come to accept and make use of VoIP services if they believe that they can receive an acceptable level of quality.

2. ECONOMICS

A. Claims That Access Charge Revenues Will Decline Do Not Justify Regulation Of VoIP Services.

The Commission should not regulate VoIP services in response to any ILEC claims that

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[6] For example, Level 3 today offers an IP-based wholesale long-haul voice transport product. In order to attract and retain the business of interexchange carriers, Level 3 tracks a number of service indicators such as Call Success Rate, Network Efficiency Ratio, Latency, Packet Loss, Jitter, and Network Availability. If Level 3's interexchange carrier customers find the service to be of poor quality, those carriers are capable of taking their business elsewhere. As a result, Level 3 has an unmistakable incentive to make sure that the service is of a high enough quality level to meet and exceed its customers' needs.

the introduction of such services will significantly reduce their access charge revenues. Such claims are simply unfounded. ILECs typically describe how most interexchange carriers would convert their networks over to IP technology should VoIP remain exempt from access charges, leading to the ultimate elimination of access charges that ILECs allege are needed to maintain their local networks.[7] Such claims, however, usually lack any supporting factual evidence.

Contrary to the ILECs' characterization of the interexchange market, VoIP service is still very much an emerging technology that has made little progress in supplanting the interexchange market. At this point, it is estimated that VoIP comprises merely 1-5% of the interexchange market.[8] VoIP's small market share is particularly striking given that almost five years have passed since the Federal Communications Commission ("FCC") issued its *Report to Congress* discussing VoIP services and technology. In short, market statistics do not support ILEC claims of drastic access charge revenue reductions due to a rush to VoIP.

Moreover, any ILEC claims that the "sky is falling" fail to consider that VoIP providers currently compensate ILECs adequately for the use of their local networks through local end user service rates or by paying cost-based termination charges for reciprocal compensation. Not satisfied with this compensation, ILECs consistently attempt to force VoIP providers to move to non-cost-based access services in an effort to maintain their access charge revenue stream. The fact that ILECs have historically enjoyed an access charge revenue stream does not mean that

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[7] *See, e.g., AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Comments of Frontier Telephone of Rochester, Inc. at 3, Comments of Missouri Small Telephone Company Group at 6, and Comments of National Exchange Carrier Association at 6.

[8] Probe Research, Inc., *Voice over Packet Markets*, 2 CISS Bulletin 11-16, at 4 (2001).

they are entitled to receive those revenues in perpetuity.[9]

The FCC has recognized the difficulty of determining the costs, implicit subsidies, and profit components of access charges.[10] The ILECs typically threaten that they will be forced to raise end user customer rates if access charge revenue streams diminish, and often warn that universal service will suffer unless their access charge revenues continue unabated. Their unwarranted concern strongly suggests that ILECs are using access charges to subsidize their provision of service to their local end users. Section 254(e) of the Communications Act of 1934, as amended, however, provides that universal service support "should be explicit."[11] Indeed, the Fifth Circuit has made clear that Section 254(e) prohibits implicit subsidies for universal service support.[12] The Fifth Circuit further concluded that requiring ILECs to recover their universal service contributions from their interstate access charges constituted an implicit subsidy "in violation of a plain, direct statutory command" under Section 254(e) of the Act.[13]

It appears that the ILECs are doing exactly what Section 254(e) prohibits – using access

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[9] Even if the ILECs were losing access charge revenue, any such losses would not justify classifying VoIP services as telecommunications services. Should the Commission believe that rulemaking is necessary, it should not adopt rules based on vague threats of local rate increases by the ILECs. Rather, it should adopt rules based on applicable law, relevant facts, and the public interest. At bottom, the ILECs' position appears to be that voice is voice and so long as VoIP telephony transmits voice communications, regardless of whether it qualifies under the statutory definition, it is a telecommunications service subject to access charges. While it is possible that some VoIP services are not enhanced, that does not justify a conclusion that all such services, or even a subset of such services, are *never* enhanced and therefore should be regulated in the same manner as traditional voice telephony. Nor does it justify the ILECs engaging in self-classification of services and unilaterally determining which transmissions are and are not subject to access charges.

[10] *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance User, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962, ¶¶ 26, 201 (2000) (*CALLS*).

[11] 47 U.S.C § 254(e).

[12] *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999) (*TOPUC*) ("we are convinced that the plain language of § 254(e) does not permit the FCC to maintain *any* implicit subsidies for universal service support.").

[13] *Id.; see also Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 623 (5th Cir. 2000) ("we made clear in *TOPUC* that the implicit/explicit distinction turns on the distinction between direct subsidies from support funds and recovery through access charges and rate structures.").

charge revenues as an implicit subsidy to provide universal service support to their customers. If this is true, the Commission should take immediate action to extract any implicit subsidies from access charges, rather than forcing VoIP providers to sustain such illegal subsidies by moving their traffic from cost-based local retail and co-carrier local trunk termination services to above-cost access services. Level 3 notes that the Florida Commission has provided ILECs the opportunity to obtain explicit universal service support, but no Florida ILEC has requested such support.[14]

ILECs continually fail to provide convincing evidence that their current streams of access charge revenues are necessary to maintain affordable local rates, and even if those revenues are supporting local rates, under Section 254(e) of the Act, they may no longer do so. In this regard, Level 3 reiterates its primary position that the Commission should view the advent of VoIP services as a corrective opportunity rather than as a chance to extend traditional telephony regulation. The complicated questions presented by VoIP provide regulators the opportunity to take the steps first outlined in 1996 by rationalizing intercarrier compensation and addressing concerns (if valid and substantiated) regarding end user rates through adoption of a competitively neutral, adequately funded explicit universal service contribution system.

An examination of the public interest requires that the Commission evaluate the benefits that VoIP-based services provide to the entire public, not just to ILECs. The Commission must carefully consider the burdens of imposing access charges on Internet-based services such as certain forms of VoIP. The reasons underlying the FCC's refusal in its *Report to Congress*[15] to adopt an access charge regime for VoIP services, including its concern regarding the nascent and

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[14] *See* Order No. PSC-95-1592-FOF-TP, in which this Commission established a mechanism for universal service support.

[15] *See* Section 3.C, *infra*.

rapidly evolving state of the VoIP market, continue to apply in the VoIP service market of today. As a result, the Commission should follow the lead of the FCC and eight other state commissions by retaining its current deregulatory policy towards VoIP services and not imposing on such services traditional circuit-switched above-cost access charges that likely would serve only to stunt growth and stifle innovation in that developing market.

More specifically, to avoid the creation of competitive distortions and ensure that providers make deployment decisions based on economics and customer demand rather than out of regulatory fear and uncertainty, Level 3 urges the Commission to reaffirm the current state of the law – that access charges do not presently apply to IP-based services – for all VoIP applications regardless of whether the service is phone-to-phone, phone-to-computer or computer-to-computer. By requesting the Commission to reaffirm the access charge exemption for VoIP traffic, Level 3 is not asking the Commission to ignore the need for comprehensive compensation and universal service reform. To the contrary, Level 3 is asking only that the Commission uphold the compensation structure applicable to VoIP traffic – including the Enhanced Service Provider ("ESP") "exemption" that is for better or for worse, depending upon one's perspective – in place today. After affirming this part of the access charge regime, the Commission should work in conjunction with the FCC to adopt prospective regulations governing the appropriate compensation regime for the exchange of all traffic and to ensure sustainable universal service.

B. Imposing Artificial Non-Cost-Based Compensation Structures Would Undermine Efficiency, Generate Uncertainty as to Enforcement, and Deter VoIP Deployment.

The headlines are everywhere confirming analyst and industry reports that VoIP services are not just the wave of the future, but are providing cost savings and generating new revenue for early adopter-customers who demand these innovative new services today. The Commission

should not, however, interpret the news reports as a sign that VoIP providers are fearlessly rolling-out such applications. As noted herein, circuit-switched transmissions dominate interexchange voice now and will do so for the foreseeable future. In fact, the triumphant headlines mask a very real disincentive for deployment that has been lurking in the shadows for some time – regulatory uncertainty. Although providers are beginning to deploy VoIP applications, the threat that ILECs may unilaterally decide to impose the current access charge regime on VoIP applications or that state commissions may impose traditional telephony regulation may prevent many providers from realizing the true economic efficiencies associated with the provision of integrated voice and data services, thereby depriving consumers of the full range of product innovation.

Regulations designed for circuit-switched networks make little technical sense in an environment where packet switching, Internet transmission protocols, optical switching, and decreasing transport costs permit more efficient networks and provide greater flexibility for customer applications. The nature of IP-based services could make enforcement of traditional regulatory classifications next to impossible. IP technology blurs traditional distinctions between local and long distance service and between voice, fax, data, and video services. The fundamental design of Internet protocol networks converts all forms of information into indistinguishable packets of digital bits. Packets are routed through networks based on a non-geographical, non-hierarchical addressing scheme that allows packets to follow several possible routes between network nodes. Additionally, Internet protocol technology allows users to designate multiple "ports" on their terminals so that multiple applications may simultaneously send and receive information. This means that in the streams of packets flowing to a particular terminal, some may be carrying digitized voice messages, others may be carrying a computer

program being downloaded from a remote server, and others may be carrying video entertainment. Some may end up at a computer terminal, while others end up at an IP-enabled telephone, while others still end up at a standard telephone station on the PSTN.

The Commission should take account of the operational and technical considerations that will affect the exchange of VoIP traffic between providers. Specifically, the Commission should consider whether it is truly possible to segregate certain categories of VoIP traffic (e.g., time division multiplexing ("TDM")-to-TDM) from other categories of VoIP traffic (e.g., TDM-to-IP) provided over the same platform.[16] Moreover, even if such traffic categories could be identified and segregated, the Commission should consider the network inefficiencies that would result from the separate routing of traffic – specifically, the competitive implications and cost of requiring potentially redundant network facilities to handle traffic that from an engineering perspective need not go over different facilities.

Thus, before making any finding that phone-to-phone VoIP telephony is subject to access charges, the Commission must not only address the technical and operational concerns that will inevitably arise in trying to enforce such differential treatment, but also consider whether imposing traditional regulatory obligations on one aspect of an integrated IP-based service would

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[16] If one wants to focus on phone-to-phone IP telephony in particular, further complications arise in trying to define what constitutes a phone and enforce access charges with respect to that subset of services only. Would a call placed to or from an IP-enabled telephone qualify as "phone-to-phone"? That call (which originates or terminates in IP) would undergo a net protocol conversion if the other destination is TDM, such that it should be considered "enhanced" or part of an "information" service under the FCC's rules and the Act. Another concern is that a "phone-to-phone" distinction relies upon increasingly anachronistic technological assumptions. For example, how does one classify an IP-enabled voice service that utilizes an ENUM-type arrangement (discussed further below) to permit calls placed from phones on the public (circuit) switched telephone network to be routed to any of several destinations via IP addresses, one or more of which may be "TDM" or "IP," and one or more of which could be a computer or a telephone? Even putting aside the technical details of defining a telephone, attempting to categorize such a service based upon whether a given call ends up at a "telephone" or a "computer" could effectively put VoIP providers in the position of policing the equipment at their customers' various premises on a *call-by-call* basis. The burden of such an endeavor would likely be enormous, if it could be achieved at all. Moreover, any requirement to identify and track "phone-to-phone" VoIP transmissions could raise privacy concerns, since a provider of multiple IP services (voice, data, fax, etc.) may have to determine the nature of the packet itself.

impose such high costs on the provider that offering these services would no longer be economically feasible. In short, imposing artificial distinctions on IP-based applications could actually generate greater uncertainty and discourage the very voice competition that VoIP providers are trying to offer to customers. The Commission must carefully consider the downstream implications of perpetuating policies that treat any particular minute of traffic differently from any other for compensation purposes. Indeed, if incumbents are allowed to treat phone-to-phone IP telephony differently for compensation purposes, they may very well seize upon that as a motivation to discriminate against such traffic in other respects as well.

C. Most Phone-to-Phone VoIP Services and Other Kinds of VoIP Services Will Likely Place No Greater "Strain" on ILEC Networks Than Any Local Call.

In considering whether to impose artificially high access charges on VoIP transmissions, the Commission should also consider the economics of interconnection. Specifically, the Commission should look at the network functions each carrier performs in carrying a VoIP transmission and determine compensation based upon functionality cost. In most situations, it will likely be the case that the VoIP transmission will utilize the same call flow as any local call on the ILEC's network or between the ILEC and an ALEC. If that is the case, there is no reason from a network cost perspective to treat those calls differently for "compensation" purposes – no additional cost is incurred, and no additional compensation should be due.

Under current law, an ESP is entitled to purchase services from local tariffs rather than being treated as a purchaser of access services. This "exemption" – which is part and parcel of the larger legal construct that is the access charge regime today – provides the means by which many ISPs and other ESPs connect today to the PSTN, allowing them to utilize ILEC and ALEC local services such as primary rate interface-integrated services digital network ("PRI-ISDN"), DID arrangements, and local interconnection trunks. As a result, these ESPs (including VoIP

providers) can originate and/or terminate calls to the PSTN on a local basis. By virtue of this structure, traffic that is "enhanced" in nature is not routed via a traditional access network arrangement, and therefore such traffic should not be considered subject to access charges.[17] Instead, the call involving the ESP is treated as local in nature and is routed over local facilities on the ILEC network – and where an ALEC is involved, the call is routed over local interconnection facilities between the ILEC and the ALEC. In short, carriers should not be "compensated" for network functions they do not provide. Where calls involving two competing local exchange carriers (an ILEC and an ALEC) travel the same path over local interconnection trunks, all such calls should be treated the same in all respects for network compensation purposes. Even if one believes access charges are an appropriate means of intercarrier compensation notwithstanding their lack of relationship to cost, such access charges should only be imposed where VoIP services can be shown to generate additional network responsibilities for a carrier above and beyond that associated with the handling of a local call.

3. CURRENT STATE OF THE LAW REGARDING VoIP

Federal Law

Although VoIP services have only recently come into existence, the current unregulated status of these services may be traced back more than twenty years to the FCC's basic and enhanced regulatory decisions in the *Computer Proceedings* in which the FCC decided to allow enhanced services to flourish unregulated and unfettered by Title II of the Communications Act of 1934, as amended ("Act"). Since the Telecommunications Act of 1996 ("1996 Act"), the FCC's basic and enhanced regulatory dichotomy has evolved into an analysis of whether a

[17] One might submit that by trying to impose access charges without taking account of the actual network functionality performed or the ESP exemption that is part of today's access charge regime, the ILECs are trying to engage in arbitrage of the existing intercarrier compensation regime – the very activity of which they accuse VoIP providers.

service is a regulated telecommunications service or an unregulated information service. Post-1996 Act, there have been many opportunities for the FCC to begin regulating VoIP services as telecommunications services under the full panoply of Title II regulation, but the FCC has rightly and repeatedly refused to do so.

A. Basic and Enhanced Services Regulatory Scheme Pre-1996 Act

The FCC established the distinction between "basic services" and "enhanced services" in the Second Computer Inquiry in 1980 ("*Computer II*").[18] There, the FCC defined "basic services" as "the common carrier offering of transmission capacity for the movement of information."[19] In general, a basic service transmits information generated by a customer from one point to another, without changing the content of the transmission. Thus, the "basic" service category was intended to define the transparent transmission capacity that makes up conventional communications service. In *Computer II*, the FCC indicated that because "basic" services are "wholly traditional common carrier activities," they are regulated under Title II of the Act.[20]

By contrast, in *Computer II*, the FCC defined unregulated "enhanced services" as:

> services, offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; [2] provide the subscriber additional, different or restructured information; or [3] involve subscriber interaction with stored information.[21]

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[18] *Second Computer Inquiry*, Final Decision, 77 F.C.C.2d 384 (1980); *modified on recon.* 84 F.C.C.2d 50 (1980); *further modified on recon.* 88 F.C.C.2d 512 (1981); *aff'd. sub nom. Computer and Communications Industries Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied* 461 U.S. 938 (1983) ("*Computer II*").

[19] *Id.* at 420.

[20] *Id.* at 435.

[21] *Id.* at 387; *see also* 47 C.F.R. § 64.702(a).

The FCC concluded in *Computer II* that regulation of enhanced services is unwarranted because the market for those services is competitive and consumers benefit from that competition.[22] The FCC reached this conclusion notwithstanding the close relationship between communications and some services it classified as enhanced:

> We acknowledge, of course, the existence of a communications component. And we recognize that *some enhanced services may do some of the same things that regulated communications services did in the past.* On the other side, however, is the substantial data processing component in all these services.[23]

Prior to the enactment of the 1996 Act, the FCC generally retained and reaffirmed its existing basic/enhanced distinction in subsequent *Computer Proceedings*.[24] In determining whether a service is enhanced, the FCC has traditionally applied each clause of the definition against the specific functionalities of the service.[25] The service is generally deemed "enhanced" if it meets the language of one of the three clauses, as interpreted by the FCC.

B. Telecommunications Service and Information Service Definitions in 1996 Act

The 1996 Act codified the FCC's past decisions regarding the basic/enhanced regulatory dichotomy by creating new regulatory categories designated as "telecommunications service" and "information service," which are fundamentally the equivalent of the FCC's prior categories of basic and enhanced services, respectively.

Specifically, the 1996 Act defines "telecommunications service" as "the offering of

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22 *Id.* at 433.

23 *Id.* at 435 (emphasis added).

24 *See Third Computer Inquiry, Phase II*, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd. 1150 (1988) ("*Computer III*").

25 *See, e.g., U S West Communications, Inc. Petition for Computer III Waiver*, Order, 11 FCC Rcd. 1195 (1995); *AT & T 900 Dial-It Services and Third Party Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd. 3429 (1989).

telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used."[26] The term "telecommunications" is defined as "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."[27]

The definitions of "telecommunications" and "telecommunications service" can be contrasted with "information service," which is defined by the 1996 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.[28]

The FCC's first opportunity to consider the relationship between its traditional basic/enhanced dichotomy and the telecommunications/information service dichotomy occurred in the context of establishing safeguards for Regional Bell Operating Company ("RBOC") provision of interLATA services. In the *Non-Accounting Safeguards Order*, the FCC concluded that those protocol processing services that qualify as "enhanced" should be treated as "information services" under the 1996 Act because they satisfy the statutory requirements of offering "a capability for ... transforming [and] processing ... information via telecommunications."[29] The FCC indicated in the *Non-Accounting Safeguards Order* that

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[26] 47 U.S.C. § 153(46).

[27] 47 U.S.C. § 153(43).

[28] 47 U.S.C. § 153(20).

[29] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 21955-58, ¶¶ 104-7 (1996) ("*Non-Accounting Safeguards Order*").

services that result in no net protocol conversion to the end user may continue to be classified as basic regulated services.[30]

C. Universal Service Report to Congress

In its 1998 Report to Congress on Universal Service ("*Report to Congress*" or "*Report*"), the FCC once again confirmed the parallel relationship between the basic/enhanced regulatory dichotomy and the telecommunications/information services definitions included in the 1996 Act.[31] The FCC concluded that the categories of "telecommunications service" and "information service" contained in the 1996 Act are mutually exclusive and parallel the *Computer II* definitions of "basic service" and "enhanced service." In this fashion, the FCC decided that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their service "via telecommunications."[32]

Beyond these definitional considerations, the *Report to Congress* presented the FCC with its first opportunity to begin regulating VoIP services as telecommunications services under Title II, but the FCC explicitly refused to do so – even in the case of VoIP service that might happen to utilize telephones on the originating and terminating ends. The FCC's refusal to regulate VoIP services in the *Report to Congress* is particularly noteworthy considering that concerns about the unregulated status of VoIP and other Internet services were some of the driving forces behind the Congressional mandate for the FCC to issue the *Report*. At the time, the Senators who pushed for the *Report to Congress* to be issued strongly urged the Commission to find that

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30 *Id.* at ¶ 106.

31 *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501(1998) ("*Report to Congress*").

32 *Id.* at ¶ 39.

VoIP and other Internet services should be regulated as telecommunications services.[33]

Instead, in the *Report to Congress*, the FCC considered the existing technology for different types of VoIP services and tentatively decided that for "computer-to-computer" VoIP services, ISPs likely would not be providing regulated "telecommunications" to subscribers.[34] In contrast, for "phone-to-phone" VoIP services, the FCC tentatively determined that certain classes of such services appear to lack the characteristics that would render them unregulated "information services." Characteristics of these "phone-to-phone" VoIP services include:

(1) the provider holds itself out as providing voice telephony;
(2) the provider does not require the customer to use different customer premises equipment ("CPE");
(3) the customer may call telephone numbers assigned in accordance with the North American Numbering Plan; and
(4) the provider transmits customer information without any net change in form or content.[35]

Importantly, the FCC refused to make any definitive regulatory determinations concerning any class of VoIP services in its *Report to Congress*, at least until a better record could be established that took into account the application of the enhanced service criteria to individual VoIP service offerings such as these and the broad policy issues involved.[36] In coming to this decision, the Commission recognized that regulatory distinctions based on technological differences in VoIP services being offered at that time could quickly be "overcome by changes in technology."[37] Furthermore, the FCC correctly acknowledged that definitive regulatory classifications for VoIP services were not appropriate at that time due to the

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33 *Id.* at ¶¶ 34-36, 49, 51, 78, 85.

34 *Id.* at ¶ 87.

35 *Id.* at ¶ 88.

36 *Id.* at ¶ 90.

37 *Id.* As discussed above, there are complications today in even defining what might constitute a phone.

"emerging" and "dynamic" nature of the Internet services market.[38]

D. U S West Petition

In its *Report to Congress*, the FCC practically invited parties to file petitions seeking a declaration that certain forms of VoIP services were telecommunications services subject to regulation. The first formal petition in response was filed on April 5, 1999. In its petition, U S West, Inc. ("U S West") asked the FCC for a declaratory ruling that it could impose access charges on VoIP service providers.[39] U S West limited its request to providers and services that meet the same "phone-to-phone" characteristics as outlined in the FCC's *Report to Congress*:

(1) the provider holds itself out as providing voice telephony;
(2) the provider does not require the customer to use different CPE;
(3) the customer may call telephone numbers assigned in accordance with the North American Numbering Plan; and
(4) the provider transmits customer information without any net change in form or content.[40]

U S West asked the FCC to determine that services meeting these criteria are telecommunications services and that providers must subscribe to local exchange carriers' interstate exchange access tariffs for originating and terminating VoIP services. Importantly, the FCC again refused to take the opportunity to regulate VoIP services, and instead never sought public comments on the U S West Petition, or took any other action on it.

E. Telecommunications Reporting Worksheet

Since the filing of U S West's Petition, the FCC has been faced with another opportunity to clarify that VoIP services should be regulated, had it desired to do so. When the FCC released the consolidated telecommunications reporting worksheet that carriers use to report revenues for

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38 *Id.*

39 *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed Apr. 5, 1999) ("*U S West Petition*").

40 *Id.; see also* discussion of *Report to Congress, supra,* at Section 3.C.

universal service and other purposes, the instructions to the worksheet appeared to indicate that VoIP providers were required to contribute to various federal funds, including universal service.[41] Even though one RBOC asserted that the language in the proposed worksheet did not constitute a change in FCC policy and that providers of such services should not be exempt from contribution requirements, the FCC refused to accept the RBOC's position. Instead, the FCC specifically noted that it had previously decided to defer making pronouncements about the regulatory status of various forms of VoIP services and therefore deleted all language that appeared to change the FCC's existing regulatory treatment of VoIP services.[42]

F. Intercarrier Compensation Proceeding

The issue of how VoIP should be treated from an intercarrier compensation perspective is pending before the FCC in a Notice of Proposed Rulemaking.[43] In this proceeding, the FCC is considering broad reforms to its intercarrier compensation regime, including whether to implement a bill and keep system. Importantly, in this *Intercarrier Compensation* proceeding, the FCC has made abundantly clear that under the current state of the law, VoIP "is exempt from the access charges that traditional long-distance carriers must pay."[44]

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41 The instructions as proposed indicated that carriers must contribute to the Universal Service Fund, among others, based on revenue from "calls handled using internet technology as well as calls handled using more traditional switched circuit techniques." *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Notice of Proposed Rulemaking and Notice of Inquiry, 13 FCC Rcd 19295 (1998).

42 *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, 14 FCC Rcd 16602, ¶ 22 (1999).

43 *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM*").

44 *Id.* at ¶133.

The FCC has not issued a final decision in its *Intercarrier Compensation* proceeding, which has been pending for almost two years. However, as described below, in the context of a recent industry roundtable discussion, the Senior Deputy Chief of the Wireline Competition Bureau indicated that the FCC intends to complete this proceeding by the end of 2003. Given the period of time that has passed since the FCC first sought comment on the issues in this proceeding, it is likely that the FCC will ask parties to refresh the record before issuing a decision. However, pending completion of this intercarrier compensation rulemaking, the current state of federal law remains that VoIP providers offering "enhanced" or "information" services (*i.e.*, those VoIP services that satisfy the FCC's enhanced services test or the Act's definition of "information service") should not be required to pay access charges.

G. FCC International VoIP Advocacy Position

In its *Report to Congress*, the FCC specifically recognized the Commission's international advocacy position that IP telephony "serves the public interest by placing significant downward pressure on international settlement rates and consumer prices."[45] The Commission stated that alternative calling mechanisms such as VoIP are an "important pro-competitive force in the international telecommunications services market."[46]

Since the issuance of the *Report to Congress*, the FCC has repeated this position in the international arena through then-Commissioner Ness, who advised the International Telecommunication Union during a three-day IP telephony forum in 2001 of the Commission's position on the deregulation of VoIP services, stating that the *Report*:

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[45] *Id.* at ¶ 93 (*citing Rules and Policies on Foreign Participation in the U.S. Telecommunications Market and Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd. 23891 (1997)).

[46] *Id.*

> preserved the *unregulated status of IP telephony*, although we noted that we would determine on a case-by-base basis whether certain phone-to-phone IP telephony – as opposed to computer-to-computer IP telephony configurations – may be properly classified as telecommunications services. Our decision to adopt a case-by-case approach, rather than make definitive pronouncements in the absence of a complete record on specific offerings, was prudent due to the nascent state of the technology. As in other instances, the FCC recognized the dynamism of the Internet and the need to consider whether any tentative definition of IP telephony would be quickly overcome by technological changes.[47]

Any decision by the FCC or this Commission to regulate VoIP services would constitute a change in the U.S.'s deregulatory policy towards IP telephony services and thus a change in the FCC's international position regarding the proper regulation of VoIP services. In doing so, the U.S. would face a serious loss of credibility in the international arena, considering its long-standing stance against the regulation of Internet applications, including VoIP.[48] Level 3 therefore strongly recommends that the Commission consider the impact that any change in its regulatory policy towards VoIP services could have on the FCC's stated goals of reducing settlement rates and prices for international services.

H. Pending VoIP Declaratory Rulings

At this time, there are two declaratory ruling petitions concerning VoIP services pending before the FCC. The first declaratory ruling petition was filed by AT&T Corp. ("AT&T") on October 18, 2002.[49] In its petition, AT&T seeks a declaratory ruling from the FCC that confirms (1) AT&T's phone-to-phone VoIP services that are carried over the Internet are entitled to subscribe to local services and are permanently exempt from any requirement that they subscribe

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[47] Remarks of Commissioner Susan Ness (as prepared for delivery), Information Session – WTFP (Mar. 7, 2001) ("*Commissioner Ness Remarks*") (emphasis added).

[48] *See Report to Congress*, Separate Statement of Commissioner Powell at 4.

[49] *AT&T Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002).

to access services or pay above-cost access charges; and (2) all other phone-to-phone VoIP services are exempt from access charges unless and until the FCC adopts regulations that prospectively provide otherwise. The FCC has sought and received comments on AT&T's VoIP petition, with the reply comment period ending just recently on January 24, 2003.[50] The FCC has not yet issued a final ruling on AT&T's petition.

The second VoIP declaratory ruling petition pending before the FCC was filed by pulver.com on February 5, 2003. In its petition, pulver.com requests the FCC to declare that its Free World DialUp ("FWD") VoIP service is neither "telecommunications" nor a "telecommunications service" that is subject to federal regulation. pulver.com describes FWD as a service that "facilitates point-to-point broadband Internet Protocol (IP) communications." Customers of FWD register with pulver.com to obtain a free user ID and password to access the service. They then can use IP telephones purchased from third-party vendors to make VoIP calls over their broadband connection purchased from the provider of their choice (whether cable, wireline, satellite or wireless). FWD "members" can only call other FWD members and are assigned unique FWD numbers that are not part of the North American Numbering Plan. pulver.com argues that because FWD does not provide the customer with any transmission capabilities, the service is not "telecommunications" as defined under the Act. pulver.com also maintains that FWD is not a "telecommunications service" under the Act because it is provided to users free of charge instead of "for a fee." As such, pulver.com submits that FWD is not a regulated service subject to the FCC's Title II jurisdiction.

The FCC released a public notice on February 14, 2003, seeking comments on

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[50] *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Public Notice, DA 02-3184 (rel. Nov. 18, 2002).

pulver.com's VoIP petition.[51] Comments are due March 14, 2003, and replies are due April 2, 2003.

I. FCC Participation in NTIA VoIP Roundtable Discussion

The National Telecommunications and Information Administration ("NTIA") recently hosted a roundtable session to discuss business and regulatory issues related to VoIP services. FCC representatives attended these roundtable discussions. The FCC representative on the business panel was Dr. Robert Pepper, Chief of the Office of Plans and Policy, and the FCC representative on the regulatory panel was Jeff Carlisle, Senior Deputy Chief of the Wireline Competition Bureau.

Most of Dr. Pepper's comments on VoIP business issues focused on the international aspects of VoIP. He stated that VoIP has grown in this market in two respects: (1) as a part of broadband networks being installed in countries with no traditional telephony networks; and (2) as an arbitrage mechanism for very high international accounting rates. He indicated that international markets are now seeing the additional features and functions of VoIP networks in the U.S. As for domestic issues, Dr. Pepper maintained that arbitrage is not a big issue in the U.S., but rather features and functions of VoIP services domestically have driven its growth.

During the roundtable discussion on regulatory issues, Mr. Carlisle repeatedly stated that the regulatory issues surrounding VoIP must be considered on a case-by-case basis due to the wide variety of VoIP services in the market. He disagreed with applying a "nascent service" threshold to new services such as VoIP, and instead suggested that the nascent state of a market is a tool that regulators could use in deciding whether they should regulate a particular type of new service. As for questions about whether bill and keep would be appropriate for VoIP, Mr.

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[51] *Pleading Cycle Established for Comments on pulver.com Petition for Declaratory Ruling*, WC Docket No. 03-45, Public Notice (rel. Feb. 14, 2003).

Carlisle indicated that the FCC intends to conclude its *Intercarrier Compensation* proceeding by the end of 2003. He stressed that intercarrier compensation is inextricably linked to subscriber line charges and universal service, such that one input cannot be reviewed without the others.

In response to the National Association of Regulatory Utility Commissioners ("NARUC") representative's comments that regulation is an end-destination determination, Mr. Carlisle expressed concern that state regulators' attempts to regulate VoIP based on end-driven determinations could be problematic on a federal level.

In sum, the FCC has repeatedly refused to regulate VoIP services, although it has had ample opportunity do so. Recognizing the inherent difficulty in establishing broad classifications for VoIP due to its rapidly evolving nature, the FCC instead has decided to adopt a case-by-case approach in determining whether a particular type of VoIP service should be regulated as a telecommunications service. At this time, the FCC has not made any definitive determinations regarding any particular type of VoIP services, although two proceedings regarding different types of VoIP services are pending before it.

J. Development of Electronic Numbering Standards

The Commission should also be aware of recent activity at the federal level with respect to the development of standards to allow for the seamless translation of calls between the PSTN and IP-based networks. Just a few weeks ago, the Director of the NTIA sent a letter to the U.S. Coordinator for International Communications and Information Policy at the Department of State regarding a proposed electronic numbering standard known as "ENUM."[52] The NTIA Director indicated that the "convergence of telecommunications and computing technologies" is

[52] A copy of the NTIA letter is attached hereto as Attachment 3. The term "ENUM" refers to the International Engineering Task Force protocol that resolves a telephone number to a series of URLs using a Domain Name System (DNS)-based architecture.

presenting our nation with "an important decision that will impact how our nation will maintain its world leadership in technology policy." As the NTIA letter explains, ENUM will facilitate convergence by allowing the linking of Internet and telephony platforms through a single identifier. The Director urged rapid consideration of how to implement an ENUM standard in a way that "ensures competition, interoperability, security, and privacy." FCC Chairman Powell has likewise sent correspondence to the Department of State regarding movement toward an "opt in" to the ENUM standard.[53]

This correspondence between federal administration officials regarding ENUM is important to this docket because it shows how convergence necessitates a change in the historical ways of thinking about the telephone network. If NTIA's "preliminary issues" can be resolved and ENUM implemented, it would promote the ability of an end user to be able to utilize a single telephone number and Internet protocol addresses to support connectivity to and from a variety of devices, including but not limited to a standard telephone station. For example, one might use ENUM together with a telephone number to handle calls placed to a personal assistant device, to a cellular phone, or to a computer.[54] ENUM would effectively allow a customer to define its use of a telephone number as needed, including associating that telephone number alternatively (even on an hour-to-hour or minute-to-minute basis) with a mobile device, a telephone, or a computer, all of which are tied to a single IP address. Some VoIP services today already utilize variations of ENUM that allow customers to have their traffic directed to an IP address. Rather than hinder the convergence of technologies by trying to tie these new ways of doing business to

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[53] A copy of Chairman Powell's letter is attached hereto as Attachment 4.

[54] *See* "U.S. Endorses Merging Telephone, Internet Numbers, " Feb. 13, 2003, http://story.news.yahoo.com/news?tmpl=story2&cid=575&ncid=738&e=6&u=/nm/20030213/wr_nm/tech_enum_dc.

historical ways of doing business on the telephone network when monopoly providers had a switch in every exchange and one could only attach certain customer premises equipment to the telephone network, this Commission should recognize and promote convergence.

Other State Commissions

Many other state regulatory commissions have faced issues related to imposing certain aspects of traditional regulatory regimes on VoIP services. Strikingly, a total of eight state commissions – Alabama, Colorado, Georgia, Kentucky, Nebraska, North Carolina, Oregon and Washington – have declined to impose traditional circuit-switched regulatory obligations on VoIP services, whereas only two state commissions – New York and Tennessee – and one Colorado state court have taken the opposite position. Nebraska is considering VoIP in a rulemaking proceeding to reform the state's access charge and universal service regimes. Each of these decisions is discussed below.

None of the three cases that imposed a traditional circuit-switched regulatory burden on VoIP should be persuasive to this Commission. Notably, the Colorado state court case conflicts with two decisions of the Colorado Public Utilities Commission ("CO PUC"), the entity that should have primary jurisdiction to impose intrastate regulatory obligations on VoIP. With respect to the New York and Tennessee decisions, it is important to note that the commissions in these states ignored the FCC's guidance in its *Report to Congress* regarding the regulatory treatment of VoIP, as further described below. It is also critical to note that the New York commission used a case-by-case approach to resolve the issue before it and expressly limited the impact of its decision to the facts at hand. The New York commission indicated that its analysis should not be construed as a policy with respect to all VoIP services.

Level 3 urges the Commission to follow the lead of a majority of state commissions and

the FCC and not impose burdensome circuit-switched regulatory obligations on VoIP traffic, particularly until the FCC takes any action in this regard. The reasons for this are two-fold.

First, VoIP technology presents a difficult regulatory proposition for states due to the difficulty in determining the jurisdictional nature of a particular VoIP call. VoIP is similar to Internet services in that it blurs traditional distinctions between local and long distance services, between intrastate and interstate services, and between voice, fax, data and video services. Packets routed through VoIP networks transmit indistinguishable bits of data over non-geographical, non-hierarchical means. As such, VoIP networks are comprised of streams of analogous packets, each of which could be carrying digitized voice messages, a computer program being downloaded from a remote service, or video entertainment. In other words, a state commission that would seek to regulate VoIP services would be faced with the daunting task of distinguishing the intrastate portion of a particular type of VoIP service for which it has jurisdiction to regulate. Such a distinction would be difficult, if not impossible, to establish and thus the Commission should wait until the FCC has provided further guidance on the subject.[55]

Second, as a newly developing technology, VoIP should not be exposed to different regulatory regimes across the country. Such circumstances would hinder the growth and progress of VoIP services as providers become forced to expend valuable resources on unwieldy administrative issues involved in responding to potentially 51 state regulatory regimes.

A. Alabama

In an arbitration hearing last year,[56] the Alabama Public Service Commission ("AL

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[55] Level 3 understands that the National Association of Regulatory Utility Commissioners earlier this week adopted a resolution that would call for the FCC and the State commissions to work together under the auspices of the Joint Conference on Advanced Services to address questions relating to VoIP.

[56] Attachment 5, *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc.*, Docket No. 27385, Order Accepting Arbitrator's Opinion (Al. P.S.C. May 21, 2001).

PSC") declined to require a definition of switched access traffic that includes IP telephony. BellSouth had proposed that parties adhere to BellSouth's access tariff, with the specific addition of "IP telephony" to the list of services considered to be switched access. Intermedia argued instead that switched access should be restricted to "Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar switched exchange access services."

The AL PSC agreed with Intermedia and concluded that it should "decline to require a definition of switched access which specifically includes Internet Protocol Telephony at this time." Foremost in the AL PSC's reasoning was its observation that the FCC had not then (and still has not) determined how IP telephony is to be classified.

B. Colorado

In two arbitration proceedings, the CO PUC declined to require a definition of switched access traffic that includes IP telephony. First, after evaluating Qwest's and ICG Telecom Group's arguments about phone-to-phone IP telephony, the CO PUC prohibited Qwest from assessing access charges on ICG's IP-based service because it found that the service did not use Qwest's routing, switching, and transmission path services that make up switched access.[57] The CO PUC found it unnecessary to reach the question of whether phone-to-phone IP telephony was a telecommunications or information service.[58] The CO PUC made the same determination in an

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[57] Attachment 6, *ICG Telecom Group, Inc.*, Docket No. 00B-103T, Decision No. C00-858, 8 (Colo. P.U.C. Aug. 7, 2000) ("We reject Qwest's proposal to subject phone voice interexchange traffic transmitted over a carrier's packet switched network to switched access charges.").

[58] *Id.* at 7; Attachment 7, *Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with US West Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 00B-103T, Decision Denying applications for Rehearing, Reargument, or Reconsideration, Decision No. C00-1071, 11 (Colo. P.U.C. Sept. 27, 2000).

arbitration between Level 3 and Qwest.[59]

In contrast, following the ICG decision but prior to the Level 3 decision by the CO PUC, a Colorado state court ordered a provider of IP telephony services to pay access charges to Qwest.[60] It is important to note that the decision in this case conflicts with the two decisions issued by CO PUC, the entity that should have primary jurisdiction over intrastate access charges.

C. Georgia

In numerous arbitration proceedings, the Georgia Public Service Commission has declined to require a definition of switched access traffic that includes IP telephony "until it can further consider the issue."[61]

D. Kentucky

In a 2001 arbitration order on the subject of reciprocal compensation and access charges for IP telephony, the Kentucky Public Service Commission ("KY PSC") observed that "this issue appears to be more hypothetical than actual."[62] The KY PSC felt that it needed an opportunity to analyze and consider this issue in greater detail, and declined to address the issue of IP telephony in the absence of a more complete record focused on individual service offerings. The parties

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[59] Attachment 8, *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Docket No. 00B-601T, Initial Commission Decision, Decision No. C01-312 (Colo. P.U.C. Mar. 30, 2001).

[60] Attachment 9, *Qwest Corporation v. IP Telephony, Inc.*, Case No. 99 CV 8252, Slip op. at 1-2 (Denver D. Ct. Jan. 12, 2001).

[61] Attachment 10, *Petition of Sprint Communications Company L.P. For Arbitration with BellSouth Telecommunications, Inc.* Docket No. 12444-U (Ga. P.S.C. May 1, 2001); Attachment 11, *Petition of BellSouth Telecommunications, Inc. for Arbitration of an Interconnection Agreement with Intermedia Communications, Inc.*, Docket No. 11644, Order (Ga. P.S.C. Sept. 28, 2000).

[62] Attachment 12, *Petition by AT&T Communications of the South Central States, Inc. and TCG Ohio for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc.*, Case No. 2000-465 (Ky. P.S.C. May 16, 2001).

were invited to petition the KY PSC to address this issue should the use of IP telephony "become more frequent."

E. Nebraska

In 1998, by its own motion, the Nebraska Public Service Commission ("NE PSC") opened a proceeding to conduct a general investigation into VoIP, including the regulatory role the NE PSC has in relation to VoIP services.[63] Instead of mandating regulatory requirements on VoIP services, the NE PSC determined that if providers of VoIP services "were subject to access and other charges as they are currently structured, these obligations could suffocate the development of IP telephony." The NE PSC further noted that because VoIP "does not place the same burdens upon the network as does traditional switched telecommunications, the obligations of its providers should not be the same."

Given the problems with placing current access charge and universal service requirements on VoIP providers, the NE PSC decided to close its general VoIP proceeding and consider VoIP's role in access charges and universal services in a separate access charge/universal service reform proceeding pending before the NE PSC. The NE PSC has sought comment on these issues, but has not yet issued a final decision with respect to VoIP.[64]

F. New York

In a complaint proceeding, the NY PSC ruled that phone-to-phone IP telephony as offered by one provider was a telecommunications service subject to the same regulations as

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[63] Attachment 13, *Internet Telephony of the Telecommunications Industry*, App. No. C-1825/PI-21 (Neb. P.S.C. Sep. 28, 1998).

[64] Attachment 14, *Investigation Into Intrastate Access Charge Reform*, App. No. C-1628 (Neb. P.S.C. Oct. 2, 1998).

conventional long distance service.[65] The NY PSC required a retail provider of IP telephony to pay an amount in excess of $700,000 in intrastate access charges to Frontier Telephone of Rochester. The NY PSC based its decision on the facts in that specific case, which involved a number of functional similarities between the IP telephony service at issue and conventional long distance service. In this case, the call was converted from circuit-switched format to IP format back to circuit-switched format, resulting in no net protocol conversion. In addition, only 60% of the calls actually used IP format for the middle leg.

Significantly, the NY PSC ignored the FCC's guidance in its *Report to Congress* regarding the regulatory treatment of VoIP. Specifically, in its decision, the NY PSC misinterpreted the FCC's statement in its *Report to Congress* that the FCC "*may* find it reasonable" to impose "similar access charges" to VoIP in future proceedings as requiring the imposition of access charges in the proceeding that was before the NY PSC.

G. North Carolina

In an arbitration proceeding, the North Carolina Utilities Commission declined to require a definition of switched access traffic that includes IP telephony and declined to address the appropriate treatment of IP telephony as it pertains to reciprocal compensation.[66]

H. Oregon

The Oregon Public Utility Commission ("OR PUC") approved an arbitrator's decision to exclude IP telephony from the definition of switched access services for which access charge

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[65] Attachment 15, *Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, Case 01-C-1119, Order Requiring Payment of Intrastate Carrier Access Charges (N.Y.P.S.C. May 31, 2002).

[66] Attachment 16, *MCImetro Access Transmission Services, LLC*, Docket No. P-474, Sub 10 (N.C.U.C. Aug. 2, 2001).

compensation would be required.[67] The arbitrator specifically declined to establish a new policy that would treat phone-to-phone VoIP services as interexchange telecommunication services. Instead, the arbitration decision found that Level 3's phone-to-phone IP telephony calls underwent a net protocol conversion such that they fit within the FCC's and the Act's definition of an unregulated enhanced service exempt from access charges.

I. Tennessee

In a departure from other states, the Tennessee Regulatory Authority ("TRA") has held that calls using IP, regardless of whether the call is data or voice, should be treated the same as circuit switched traffic.[68] In its analysis, rather than relying on the FCC's guidance in its *Report to Congress* with respect to the regulatory treatment of VoIP, the TRA instead relied on the previous determination by the FCC that calls delivered to Internet service providers comprise interstate access. Noting that the FCC did not preclude states from applying this same analysis to voice traffic delivered via IP, the TRA determined that "it does not matter whether a call is voice or data for purposes of intercarrier compensation." The TRA further cited to FCC statements that "there are [no] inherent differences between the costs of delivering a voice call to a local end-user and a data call to an ISP," concluding that calls using IP should be treated as circuit switched calls.

J. Washington

In a consolidated proceeding to consider Qwest's Section 271 compliance and to review Qwest's Statement of Generally Available Terms ("SGAT"), the Washington Utilities and

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[67] Attachment 17, *Level 3 Communications, LLC*, ARB 332, Order No. 01-809 (Ore. P.U.C. Sep. 13, 2001).

[68] Attachment 18, *Petition of MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc.*, Docket No. 00-00309, Interim Order (T.R.A. Apr. 3, 2002).

Transportation Commission ("WUTC") required Qwest to strike all references to phone-to-phone VoIP in its proposed SGAT.[69] Qwest had included phone-to-phone VoIP services in the definition of switched access services to require payment of access charges on such services. The WUTC refused to allow the inclusion of VoIP in the definition of switched access services, and instead noted that reciprocal compensation payments are required for ISP-bound traffic.

In sum, a majority of state regulatory commissions that have considered issues related to imposing traditional regulatory regimes on VoIP services have declined to do so, and in the two situations in which they decided to impose certain types of traditional regulatory obligations, those state commissions failed to follow the FCC's guidance in this regard. Level 3 urges the Commission to follow the FCC's regulatory policy toward VoIP as most other states have done, and not impose burdensome traditional regulatory obligations on VoIP services in an effort to allow these nascent services to continue to flourish and evolve unfettered by unnecessary regulation.

Florida Law

The Commission is charged with the obligation to "eliminate any rules and/or regulations which will delay or impair the transition to competition" pursuant to Section 364.01(4)f), Florida Statutes, but there are no Florida statutes or rules that specifically govern VoIP. The Commission has exclusive statutory jurisdiction over "telecommunications companies" pursuant to Section 364.01, Florida Statutes. Therefore, in order to determine whether a specific VoIP service or application is subject to the Commission's jurisdiction, it must first be determined whether it constitutes "telecommunications." However, while Section 364.02, Florida Statutes,

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[69] Attachment 19, *Investigation into U S West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996,* Docket Nos. UT-003022 and UT-003040, Initial Order Finding Noncompliance in the Areas of Interconnection, Number Portability, and Resale, ¶ 175 (W.U.T.C. Feb. 2001).

defines a number of telecommunications-related terms, it does not define the term "telecommunications." Notwithstanding some tentative conclusions in the *Report to Congress* about what *may* constitute a telecommunications service, the FCC has not yet determined whether any given VoIP application constitutes a telecommunications service.

The Florida Supreme Court recently construed the concept of a telecommunications "service" rather broadly and upheld the Commission's determination that BellSouth's late payment charge was a "nonbasic service" pursuant to Section 364.02(8), Florida Statutes, the price for which was therefore capped by Section 364.051(5), Florida Statutes. [70] In reaching this conclusion, however, the Court relied upon "the totality of the concepts historically utilized leading into price regulation" and the fact that BellSouth historically categorized the charge as a "service." VoIP services are just emerging, and do not share this historical background. This decision therefore would not necessarily justify the Commission's jurisdiction over VoIP services.

[70] *BellSouth v. Jacobs, et al.*, Florida Supreme Court Case No. SC01-2055, opinion issued October 31, 2002.

CONCLUSION

VoIP, as it continues to evolve in the marketplace and outside the traditional telecommunications regulatory structure, is highly dynamic and not capable of easy encapsulation. As such, sweeping regulatory declarations about VoIP services are both dangerous and counterproductive, which is why the FCC applies its basic/enhanced distinction on a case-by-case basis, evaluating the specific attributes of a particular service to determine whether it should be subject to traditional regulatory obligations. This Commission should similarly take a careful case-by-case approach to ensure that any traditional telephone regulations applied to VoIP providers are consistent with governing law as well as consistent with the Commission's stated mission and statutory mandate of removing regulatory barriers to competition. Level 3 urges the Commission to follow the lead of the FCC and eight other state commissions by retaining its current deregulatory policy towards VoIP services and not imposing on such services traditional circuit-switched above-cost access charges that likely would serve only to stunt growth and stifle innovation in that developing market.

Respectfully submitted,

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Attachments:

Attachment 1 "Report on VoIP Numbering Issues - Much Ado About Nothing?," Issue: 393 - VoIP Numbering Issues, Contribution VoIP-001, submitted at January 9, 2003, INC VoIP Workshop by Penn Pfautz, AT&T.

Attachment 2 VoIP Applications Diagram

Attachment 3 Letter from NTIA to U.S. Coordinator for International Communications and Information Policy at the Department of State regarding ENUM standard.

Attachment 4 Letter from FCC Chairman Michael Powell to U.S. Coordinator for International Communications and Information Policy at the Department of State regarding ENUM standard.

Attachment 5 *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc.,* Docket No. 27385, Order Accepting Arbitrator's Opinion (Al. P.S.C. May 21, 2001).

Attachment 6 *ICG Telecom Group, Inc.*, Docket No. 00B-103T, Decision No. C00-858, 8 (Colo. P.U.C. Aug. 7, 2000)

Attachment 7 *Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with US West Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 00B-103T, Decision Denying applications for Rehearing, Reargument, or Reconsideration, Decision No. C00-1071, 11 (Colo. P.U.C. Sept. 27, 2000).

Attachment 8 *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Docket No. 00B-601T, Initial Commission Decision, Decision No. C01-312 (Colo. P.U.C. Mar. 30, 2001).

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Attachment 13 *Internet Telephony of the Telecommunications Industry*, App. No. C-1825/PI-21 (Neb. P.S.C. Sep. 28, 1998).

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Attachment 15 *Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, Case 01-C-1119, Order Requiring Payment of Intrastate Carrier Access Charges (N.Y.P.S.C. May 31, 2002).

Attachment 16 *MCImetro Access Transmission Services, LLC*, Docket No. P-474, Sub 10 (N.C.U.C. Aug. 2, 2001).

Attachment 17 *Level 3 Communications, LLC*, ARB 332, Order No. 01-809 (Ore. P.U.C. Sep. 13, 2001).

Attachment 18 *Petition of MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc.*, Docket No. 00-00309, Interim Order (T.R.A. Apr. 3, 2002).

Attachment 19 *Investigation into U S West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996,* Docket Nos. UT-003022 and UT-003040, Initial Order Finding Noncompliance in the Areas of Interconnection, Number Portability, and Resale, ¶ 175 (W.U.T.C. Feb. 2001).

INC NANP VoIP Workshop Contribution

Source: Penn Pfautz
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Date: January 9, 2003

Issue: 393 – VoIP Numbering Issues

Title: Report on VoIP Numbering Issues – Much Ado About Nothing?

Notice

This contribution has been prepared to assist the Industry Numbering Committee. The contribution is offered to the Committee as the basis for discussion and is not a binding proposal on AT&T, which reserves the right to amend or withdraw The statements contained herein at any time.

ATTACHMENT 1
LEVEL 3'S VoIP COMMENTS

Introduction

Issue 393 suggests that voice over IP (VoIP) may raise important numbering considerations. This document analyzes some of the impacts that have been suggested in other venues and offers a set of principles that, it is hoped, can resolve the issue without significant changes to existing guidelines.

Rate Center Association of Numbers

It has been noted that some VoIP service offers allow customers to choose a number associated with a rate center other than the one in which their premises are located and/or to move into a new rate center while keeping their original number. It has been suggested that these offers somehow violate the rate center assignment principle. It should be noted that these same capabilities are offered in the PSTN today. For example, foreign exchange (FX) service allows a uuser to have a number from another rate center. Although FX is sometimes implemented with a dedicated facility between the foreign end office and the user, this is not necessarily the case. Nor is FX necessarily a tariffed service. Wireless service is also sometimes with a number from a different rate center than that associated with the customer's nominal location and some wireless customers elect to keep their numbers when they move. Even when a wireless customer uses a number associated with the rate center of their home location, calls may be delivered to a distant location as the customers moves about.

It is understood that neither FX nor wireless constitutes a violation of the rate center principle because the PSTN point-of-interface (POI) where a carrier would deliver a call is within or appropriate to the rate center. In both FX and wireless cases calls are still delivered to the switch identified with the number in the LERG or NPAC database, a switch with appropriate interconnection within the LATA that includes the rate center for the number as designated by the LERG. Callers to the number are billed and settlement charges for carriers apply based on that rate center – not the one to which the call may be extended by the FX or wireless service provider. The FX or wireless customer pays separate charges for said extension from the PSTN POI.

Likewise, in the VoIP service offers noted, it is likely that the provider has located a gateway in the rate center in question and obtained numbers ultimately provided to end user customers by purchasing DID service from a LEC end office to the gateway. Again, calls to the numbers in question are delivered at a POI appropriate to the rate center (in conformance with the DID tariff) and end user billing and carrier settlements are the same as if the DID trunks terminated in a PBX rather than an IP gateway. The extension of calls via VoIP to the user in another rate center is not part of the PSTN and not unlike the extension of a call from a PBX via a tie trunk to another PBX. Thus, it appears, that, contrary to suggestion, there is no violation of the rate center principle.

Impact on Number Conservation

Another concern sometimes expressed is that VoIP offers such as those discussed above will negatively impact efforts to conserve numbering resources. The implication seems to be that either VoIP use of numbers is less efficient than that of other services and/or that the market potential is so vast that large amounts of resources will be quickly consumed. Given the existence of FX services and wireless numbers that users may keep when they move to a new area it can not be argued that VoIP usage is less efficient than in the PSTN. Instead, the claim seems to be that VoIP will make capabilities like these so much easier to provide to customers on an inexpensive basis that demand will skyrocket and that is bad because it uses up numbers. Beyond the fact that numbers exist for users to have the services they want and no one wishes to restrict their consumption for actual service (as opposed to by inefficient allocation), there are several reasons to believe the sky is not falling.

First, customers must still pay for the numbers they use. In the case cited above where the VoIP carrier obtains numbers by purchasing DID service the LEC either explicitly charges for numbers provided or otherwise bundles the cost into its service offering. The VoIP carrier obtains its numbers on the same basis as any other end user so its service cannot be "free" to its end users and the price will prevent most users from obtaining many numbers.

Second, the basis of the assertion that there will be large customer demand for *additional* numbers must be that customers will want numbers in multiple distant jurisdictions. (Simply having a number, then moving but keeping it will not increase the use of numbers.) The premise is that by having numbers local to potential callers VoIP customers can be reached without toll charges and/ or can appear locally situated to *their* potential customers. While some such demand no doubt exists, it can also be satisfied in other ways, such as toll-free (8YY) services for which prices have declined rapidly and, increasingly, VoIP on a PC-to-PC basis.

Third, just as there are scenarios under which VoIP might increase demand for numbers, there are others in which it could reduce them. Although not necessarily driven by VoIP applications, increases in broadband Internet access have reduced demand for second line voiceband data service and thus the numbers such second lines would require. Also, there are architectures under which VoIP can provide capability to have something like a second line without assigning a second number. It is difficult then to confidently predict whether VoIP will increase or decrease number usage.

NRUF Reporting

Concerns have also been raises with respect to how VoIP offers could or should affect NRUF reporting. In this context it is useful to understand the different ways in which a VoIP carrier could obtain numbers. First, the VoIP carrier could obtain numbers directly from the NANPA or Pooling Administrator if they operate as a properly certificated local service provider. In this case the same rules apply as for other LSPs and there is no issue. The second alternative is to purchase DID service into a gateway from LEC. In this case, the numbers given to the VoIP carrier should be treated as Assigned by the LSP, just as would a block of DID numbers provided to a PBX customer regardless of whether the PBX customer currently has all numbers routed to a working station. There is no more need for the VoIP carrier to file an NRUF report than for any other end

user. Moreover, numbers assigned to VoIP providers who purchase DID service will not negatively impact a LEC's ability to get numbering resources since as Assigned numbers they contribute to positively to utilization

Conflicts with INC Guidelines

It has also been suggested that use of numbers in some VoIP service offerings may conflict with INC guidelines. The following are taken from the *VoIP Numbering Issues Paper* presented to the NANC on November 19, 2002. Responses to the issue descriptions are in underlined text.

(1) Central Office Code Assignment Guidelines dated September 27, 2002

(a) Assumptions 2.1:

The NANP resources are considered a public resource and are not owned by the assignees. Consequently, the resources cannot be sold, brokered, bartered, or leased by the assignee for a fee or other consideration. Transfer of code(s) due to merger/acquisition is permitted.
If a resource is sold, brokered, bartered, or leased for a fee, the resource is subject to reclamation.

Issue Description:
It should be clear to customers when purchasing service from any service provider that the customer is not purchasing the number and does not own the number.

This applies, as stated, to any service provider and the resale provision applies to arbitrage not provision as part of a service. If VoIP carriers' advertising is misleading with respect to the inalienability of number assignments, that is not an issue to be resolved by the INC.

(b) Assumption 2.2

NANP numbering resources shall be assigned to permit the most effective and efficient use of a finite numbering resource in order to prevent premature exhaust of the NANP and delay the need to develop and implement costly new numbering plans.

Issue Description:
The existing numbering resources have historically been allocated for specific geographic areas. By assigning New York telephone numbers to Georgia residents this geographic association is impacted.

As discussed above the POI for the number remains as required and VoIP does not present a special case.

(c) Assumption 2.10:

SPs and numbering resource administrators are responsible for managing numbering resources in accordance with these guidelines and the orders of applicable regulatory authorities.

Issue Description:
INC numbering guidelines will have to be revised to incorporate VoIP applications that use NANP numbers. Is it time for resellers and VoIP service providers to be recognized as service providers subject to the accountability for their use of TNs?

Furthermore, the impacts of area code relief measures such as NPA splits must be addressed as this may require changes to the numbers used by VoIP providers.

There is no need to revise guidelines as long as VoIP providers obtain numbers as either as LSPs in their own right or as end users. NPA splits effect VoIP numbers in the same way as any other. The numbers must be changed if they are part of the set of Central Office codes for which the NPA is changing.

(d) Assumption 2.14:
It is assumed from a wireline perspective that CO codes/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO codes/blocks are assigned. Exceptions exist, for example tariffed services such as with the exception of foreign exchange service.

Issue Description:
Should all providers be afforded the opportunity to be excluded from this existing assumption, permitting the use of numbers beyond rate centers? This is a large issue since existing number assignment guidelines and regulations for the request, use, and reporting of numbers are all rate center based.

See the rate center discussion above.

Number Portability

Number portability raises what is potentially the only real issue with respect to VoIP use of numbers but one, which may be easily resolved. As to the question of whether VoIP providers should be required to implement LRN, it is clear that if the PSTN POI changes, LRN must be used and that the PSTN POI may not move so as to be inappropriate to the rate center. Nor does the definition of the N-1 carrier change *with respect to the PSTN POI.* If a call to the VoIP NXX from a given PSTN originating switch is a local call, then the originating PSTN carrier is responsible for the LNP query. If the call is a toll call, then the PICed IXC is responsible. Any extension of the call outside the PSTN from the PSTN POI does not figure in the decision.

The real issue is whether, if the VoIP carrier obtains numbers as an end user (i.e., through a DID offer), the VoIP carrier's end user is entitled to port the number to another service provider, be it PSTN, VoIP, or some other technology. AT&T believes the answer should be yes.
In this case, the donating VoIP carrier will have to request the port as the end user of record with respect to the current (DID) local service provider. This need not require changes to the existing interfaces if the exchange of LSR/LSC is still between the donating LEC and the to-be-ported to carrier. Where that recipient carrier is not a certificated local service provider, the new VoIP carrier would need to work with the LSP that provides *its* DID service as an end user to effect the port.
As to snapback, numbers obtained as certificated LEC should snapback to that LEC as today. Likewise numbers obtained by a VoIP carrier as and end user and then ported to another carrier should snapback to the original LEC from which they were obtained.

Finally, there is no need for LECs to offer location portability since VoIP does not move the PSTN POI outside the number assignment area.

Cost Recovery for Number Administration

VoIP offers raise no issue with respect to number administration cost recovery as long as numbers are obtained as a certificated LEC or as an end user. In the former case, the VoIP carrier pays these costs, as do other LECs. In the latter, the VoIP carrier contributes to these costs, as do other end users purchasing service under the same offers.

Status of VoIP Carriers re Local Service Mandates

If VoIP carriers offer full replacement of local service they can obtain numbers from the NANPA or Pooling Administrator and it will be a policy matter for the corresponding state commissions to determine what mandates apply rather than an issue for an industry body such as the INC. If the offer does not purport to replace local service, VoIP carriers may purchase service from other carriers to get numbers and mandates such as N11 service may not apply.

ENUM

ENUM as defined in IETF RFC 2916 is a capability for transforming telephone numbers into Internet domain names and then using the Domain Name System (DNS) to obtain URIs (Uniform Resource Identifiers – generally URLs) for communication services the number assignee has chosen to associate with their number. The information returned by a DNS query could include a URL to set up a VoIP call to the number assignee. Since ENUM can be used with the numbers that a subscriber already has (to provide an alternate, e.g., Internet based, termination path for calls) it is not clear whether ENUM will increase the demand for numbers (as might happen if customers choose to get additional numbers to provide an ENUM address of record) or reduce it (as customers can index multiple communication capabilities under a single number).

Suggested Principles

This section suggests a set of principles that can help resolve some of the apparent issues with respect to VoIP numbering.

Numbers exist to provide services.

Numbers exist to facilitate services for subscribers. Use of numbers by a service is not a reason for restricting a service, though numbers should be used as efficiently as possible.

Guidelines should maintain technology neutrality without assuming service equivalence.

Different technologies may lend themselves to different architectures and may be used to provide services in ways that are not identical.

Numbers should have a PSTN Point-of- Interface appropriate to the corresponding rate center.

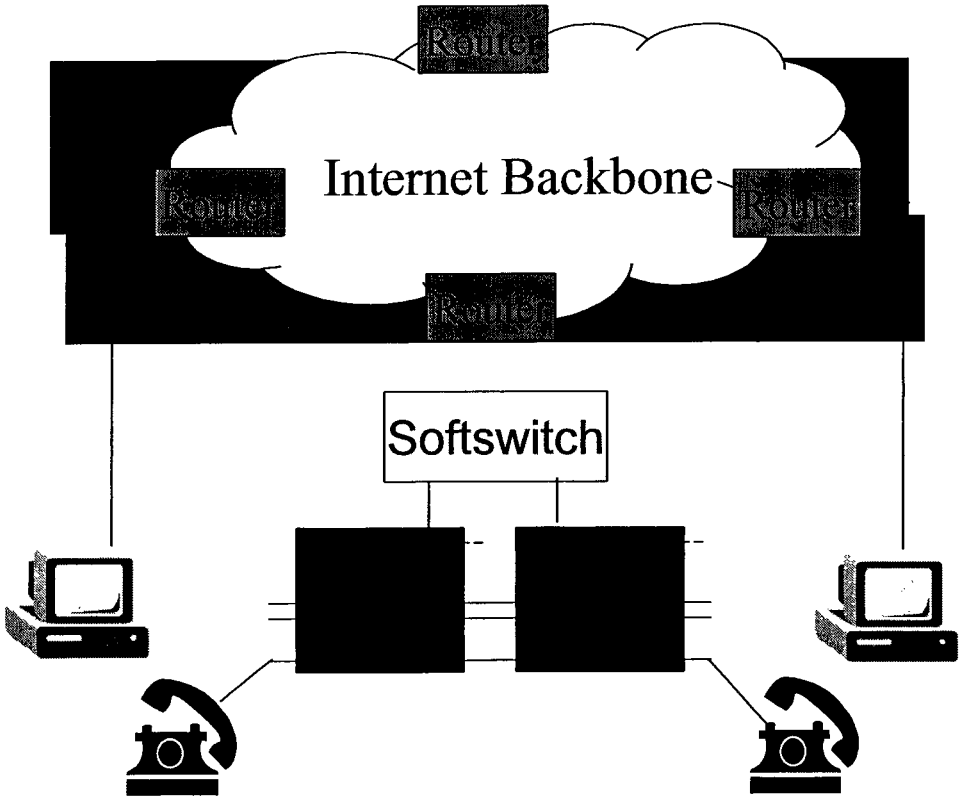
What users do on the other side of that point-of-interface does not alter the POI

End users have a right to number portability

Conclusion

Other than the issue of whether end users of a VoIP offer that obtains numbers by purchasing service from a LEC should have the right to port their numbers to another service provider, it has not been demonstrated that VoIP raises numbering issues in a way different from any other technology. As such, there is as yet no need to modify current guidelines. Accordingly, it is suggested that INC document this conclusion as the resolution to Issue 393.

VoIP applications are an innovative step forward -- not just another way to provide phone service



- Innovative Applications Include:
  - Find Me-Follow Me with Presence Across Media (Unified Messaging)
  - Voice-Based Electronic Commerce Portal
  - IP Centrex
  - Web-Enabled Virtual Call Centers
  - Real-Time Fax Transmissions
  - Multi-Party Conferencing
  - Collaborative White Boarding
  - High-Fidelity Audio
  - High-Definition Video
  - Real Time Chat
  - Store and Forward Voice Service

UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and
Information Administration
Washington, D.C. 20230

The Honorable David A. Gross
U.S. Coordinator for International Communications
and Information Policy
Department of State
2201 C Street, N.W.
Washington, DC 20520

Dear Ambassador Gross:

The convergence of telecommunications and computing technologies is once again presenting the United States with an important decision that will impact how our nation will maintain its world leadership in technology policy. We currently have the opportunity to participate or "opt in" to the new global domain set aside for electronic numbering (ENUM), e164.arpa. Because of the potential benefits of ENUM, the Department of Commerce through the National Telecommunications and Information Administration (NTIA) believes that the United States should seize this opportunity and take steps to participate in e164.arpa, consistent with the highest standards of security, competition, and privacy.

As a mapping protocol that links the Internet and telephony platforms through a single identifier, ENUM has the potential to facilitate convergence of communications networks by linking e-mail addresses, telephone numbers, fax numbers, and cell phone numbers for individuals or businesses. To date, thirteen International Telecommunication Union (ITU) member nations, including the United Kingdom, have opted into e164.arpa and are beginning to establish trials to provide ENUM services. The United States has been supportive of ITU work in this area, recognizing that using ENUM through a globally coordinated domain may provide efficiencies and opportunities for global interconnectivity that could benefit both industry and users. As you recall, during the September 2001 Study Group 2 meeting, the United States expressed our support for the ITU's work regarding RFC 2916, the proposed standard for ENUM, which designates e164.arpa as the top-level domain of the ENUM tree.

While NTIA recommends that the State Department continue to support work at the ITU to reach conclusion on the ENUM Recommendations and Supplement, the time has come for the United States to be more active on this issue. Specifically, the United States should move quickly to address certain key preliminary issues regarding U.S. implementation of ENUM and, if resolved satisfactorily, then formally opt in to e164.arpa.

On the domestic side, we must ensure that ENUM can be implemented in a pro-consumer, secure, and competitive manner. In August 2002, NTIA held a forum on ENUM at which industry and non-profit entities discussed the various benefits and challenges of this new technology. There was strong consensus among the forum participants in favor of the United States opting in to e164.arpa, but only if ENUM can be implemented in a way that ensures competition, interoperability, security, and privacy.

Keeping this view in mind, we have developed principles to guide domestic implementation of ENUM. The following principles have strong roots in proven telecommunications and technology policies and

are intended to maximize opportunities for industry, while protecting the security and privacy of consumers in the United States:

- **Preserve national sovereignty:** Any participation by the United States in a coordinated, global approach must preserve the United States' national sovereignty. That is, the United States and every other participating nation should have the right to determine whether and in what manner ENUM or any alternative is implemented domestically.

- **Support competition:** Domestic implementation of ENUM must also allow for competition among providers and operators on as many levels as feasible.

- **Promote innovation:** Adoption of ENUM or ENUM alternatives must encourage innovation and promote advanced voice and data services through new products, services, and vendors.

- **Protect users' security and privacy:** Domestic implementation of ENUM must be done in a manner that maximizes the privacy and security of user data entered in the ENUM DNS domain. For example, ENUM providers should develop systems to ensure the authentication and authorization of users who enter and update their personal information.

- **Minimize regulation:** Governance of ENUM on the international and national level must be accomplished through the least regulatory means possible. For example, a coordinated, global approach to ENUM should not give rise to a new regulatory apparatus to govern international and domestic implementation.

- **Preserve opportunity for alternative deployments:** The implementation of ENUM within the United States must not preclude alternative deployments of ENUM or other solutions that may provide competitive alternatives to ENUM.

- **Allow for interoperability:** In order to support competition and the emergence of alternative technologies and networks, the implementation of ENUM within the United States should accommodate alternative deployments' interconnection with the ENUM tree.

- **Preserve stability and security:** Any implementation of ENUM must not diminish the stability and security of the Internet or telecommunications systems.

Before opting in to e164.arpa, we must ensure that ENUM can be implemented domestically in a manner consistent with the above principles. These factors also should play a role in the selection of Tier 1 operator(s). NTIA is committed to working with the Department of State and the relevant agencies, such as the Federal Communications Commission (FCC), to ensure that ENUM can be implemented in this manner.

Internationally, the ITU procedures to opt in require that each Member State enter its specific country code (or portion of a country code) into the ENUM tree. The United States will need to determine how best to coordinate this process with the nineteen nations in Country Code 1. Once these implementation issues are resolved, the Department of State would make any necessary notifications regarding the United States' decision to opt in. Industry can then establish trials and begin to provide ENUM services to U.S. businesses and consumers.

NTIA is committed to working diligently to resolve these implementation issues with the FCC and the Department of State. These three agencies are beginning a series of meetings to establish processes to determine how to resolve both the domestic and international questions. I look forward to working with you and Chairman Powell to ensure a successful multilateral and domestic review of ENUM so that we

can soon begin to reap the benefits of ENUM within the United States.

Sincerely,

Nancy J. Victory

cc: Chairman Michael K. Powell

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Federal Communications Commission

Washington, D.C.

CHAIRMAN

February 13, 2003

The Honorable David A. Gross
US Coordinator and Deputy Assistant Secretary
Office of International Communications and Information Policy
Bureau of Economic and Business Affairs
United States Department of State
2201 C Street, NW
Washington, DC 20520

Dear Ambassador Gross:

ENUM is a new and potentially important service, a product of the convergence of the traditional public switched telephone network with the Internet.

I endorse the recommendations, as expressed in Assistant Secretary Victory's letter of February 12, 2003, that the United States take concrete steps towards studying whether or not to opt in to e164.arpa, and that the United States government promote resolution of the many issues surrounding a possible domestic implementation of ENUM. I further support the notion that any implementation should involve minimal domestic and international regulation, and should reflect the need to preserve national sovereignty, competition, interoperability, innovation, stability, security and privacy.

We are deeply appreciative of the close cooperation on this issue with the Department of State and NTIA. We recognize that these different agencies have different missions, different sources of legal authority, and different but complementary competencies and responsibilities. Continued progress on this issue, as on so many emerging issues, will depend on ongoing teamwork among our three agencies. Again, I thank you and look forward to working with you, your staff and NTIA in this important issue.

Sincerely,

Michael K. Powell

cc: Assistant Secretary Nancy J. Victory

ATTACHMENT 4
LEVEL 3'S VoIP COMMENTS

Alabama Public Service Commission

Orders

In the Matter of:	) **DOCKET 27385**
Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)
	)
	)
	)
	)
	)
	)

ORDER

BY THE COMMISSION:

We hereby adopt the Arbitration Panel Recommendation and Proposed Order Regarding Interconnection Agreement issued March 2, 2001, by the Arbitration Panel, with exceptions noted hereinafter and the document is incorporated herein and made a part of this Order.

The exceptions as noted are that Issues 6, 7, 8, 9 and 10 are effective on an interim basis pending the outcome of generic hearings on collocation policy, including collocation intervals. Also, on Issue 37, the parties have agreed on a "bill and keep" mechanism for packet data traffic until such time as a suitable mechanism for measuring this type traffic is developed.

ATTACHMENT 5
LEVEL 3'S VoIP COMMENTS

IT IS SO ORDERED.

IT IS FURTHER ORDERED, That this Order is effective as of this date.

DATED at Montgomery, Alabama, this21st day of May, 2001.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary

3

In the Matter of:

Petition for Arbitration of the)

Interconnection Agreement between)

BellSouth Telecommunications, Inc.,)

and Intermedia Communications, Inc.,)

Pursuant to Section 252(b) of the)

Telecommunications Act of 1996.)

Docke

ARBITRATION PANEL RECOMMENDATION AND

PROPOSED ORDER

REGARDING INTERCONNECTION AGREEMENT

BY THE COMMISSION:

HEARD: Wednesday, June 21, 2000, Commission Hearing Room 904, RSA Union Building, 100 North Union Street, Montgomery, Alabama

BEFORE: Judge Carl L. Evans, arbitration facilitator; Larry S. Smith, arbitrator; and David Peeler, arbitrator

APPEARANCES:

On behalf of BellSouth Telecommunications, Inc.

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Ronald J. Jarvis, Esq.

Kelley, Drye, & Warren

I INTRODUCTION/BACKGROUND

This arbitration proceeding is pending before the Alabama Public Service Commission (hereinafter known as Commission) pursuant to Section 252(b) of the Telecommunications Act of 1996 (hereinafter known as Act or the 1996 Act). This proceeding was initiated by BellSouth Telecommunications, Inc.'s (hereinafter known as BellSouth) filing of a Verified Petition for Arbitration of an Interconnection Agreement with Intermedia Communications, Inc., (hereinafter Intermedia) pursuant to Section 252(b) of the Telecommunications Act of 1996 on December 7, 1999.

On or about July 1, 1996, Intermedia Communications, Inc, and BellSouth Telecommunications, Inc., entered into a voluntarily negotiated agreement pursuant to the requirements of the Telecommunications Act of 1996. The two-year interconnection agreement expired on July 1, 1998, but was extended by mutual agreement between Intermedia and BellSouth to December 31, 1999.

By letter dated June 28, 1999, BellSouth requested the negotiation of a new interconnection agreement and proposed a starting date for negotiations between the parties. The parties agreed that these negotiations would be deemed to have started on July 1, 1999. The parties have agreed to operate under the terms of their existing agreement until a new interconnection agreement is approved.

On December 7, 1999, BellSouth filed a petition for arbitration with the Commission. BellSouth's position set forth only ten disputed issues; however, Intermedia raised several other issues prior to the expiration of the arbitration window. On January 3, 2000, Intermedia filed its answer to BellSouth's petition and brought forth 38 additional issues that were outstanding between the parties at the time BellSouth filed its petition.

Testimony was filed on June 7, 2000. At the time of the hearing 27 issues remained unresolved. The issues to be arbitrated were included in the Jackson Rebuttal Exhibit 1, Revised Issues Matrix. The issues as listed in the matrix are:

> Revised Issue 2(a) Should the definition of local traffic for the purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act include Internet Service Provider (ISP) traffic?
>
> Issue 3 Should Intermedia be compensated for end-office, tandem, and transport elements for purposes of reciprocal compensation?
>
> Issue 6 For the purposes of collocation, should intervals be measured in business days or calendar days?
>
> Revised Issue 7 What charges should Intermedia pay to BellSouth for space preparation for physical collocation?
>
> Issue 8 Is BellSouth's interval for responding to Intermedia's bona fide collocation requests appropriate?

Issue 9 Is BellSouth's interval for physical collocation provisioning appropriate?

Issue 10 Are BellSouth's policies regarding conversion of virtual to physical collocation reasonable?

Issue 12 What is the appropriate definition of currently combines pursuant to FCC rule 51.315(b)?

Issue 13(a) Should BellSouth be required to provide access to enhanced extended links (EELs) at UNE rates?

Issue 13(b) Should BellSouth be required to allow Intermedia to convert existing special access to EELs at UNE rates?

Issue 18(c) Should BellSouth be required to provide access on an unbundled basis in accordance with, as defined in the FCC's UNE Remand Order, to packet switching capabilities?

Revised Issue 22 Should BellSouth be required to provide nondiscriminatory access to interoffice transmission facilities in accordance with, and as defined in, the FCC's UNE Remand Order?

Revised Issue 25 Should BellSouth be required to furnish access to UNEs (i) User to Network Interface (UNI), (ii) Network to Network Interface (NNI), and (iii) Data Link Control Identifiers (DLCI) at Intermedia's specified committed information rates (CIR)?

Issue 26 If the parties honor applicable law, should they be allowed to establish their own local calling areas and assign numbers for local use anywhere within such areas?

Issue 29 In the event that Intermedia chooses multiple tandem access (MTA), must they establish points of interconnection at all BellSouth access tandems where Intermedia's NXXs are homed?

Issue 30(a) Should Intermedia be required to designate a home local tandem for each assigned NPA/NXX?

Issue 30(b) Should Intermedia be required to establish points of interconnection to BellSouth access tandems within the LATA on which Intermedia has NPA/NXXs homed?

Issue 31 For purposes of compensation, how should IntraLATA Toll Traffic be defined?

Issue 32 How should switched access traffic be defined?

Revised Issue 33 Should BellSouth and Intermedia be liable to each other for lost switched access revenues due to lost or damaged billing data?

Issue 37 Should all framed packet data transported within a Virtual

Circuit that originate and terminate within a LATA be classified as local traffic?

Issue 38 If there are no Virtual Circuits on a frame relay interconnection facility when it is billed; should the parties deem the Percent Local Circuit Use to be zero?

Issue 39(a) What are the appropriate charges for interconnection trunks between the parties' frame relay switches?

Issue 39(b) What are the appropriate charges for frame relay network-to-network interface (NNI) ports?

Issue 39(c) What are the appropriate charges for permanent virtual circuit (PVC) segments (i.e., Data Link Connection Identifier (DLCI) and Committed Information Rates (CIR)?

Issue 39(d) What are the appropriate rates for requests to change a PVC segment or PVC service order record?

Issue 48 Should the parties adopt the performance measures, standards, and penalties imposed by the Texas Public Utility Commission on Southwestern Bell Telephone?

In accordance with the Commission's Telephone Rule T-26(C), the Commissioners appointed Judge Carl L. Evans, arbitration facilitator; Larry S. Smith, Utility Rate Supervisor; and David Peeler, Public Utilities Auditor III, as arbitrators in this matter (hereinafter known as Arbitration Panel or Panel). The Arbitration Panel conducted hearings on June 21 and 22, 2000, to allow the parties to present testimony regarding the twenty-seven unresolved issues.

The parties resolved two of the twenty-seven issues prior to submission of the briefs. The parties were able to close Issue 22 (Nondiscriminatory Access to interoffice transmission facilities) and Issue 38 (Percent Local Circuit Use when there are initially no virtual circuits on a frame relay interconnection facility). There were twenty-five remaining issues when the briefs were filed. The parties filed briefs regarding these issues on July 24, 2000. The Panel will address these issues in the report and recommendation.

II FINDINGS AND CONCLUSIONS

Issue 2(a) Should the definition of local traffic, for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act, include Internet Service Provider (ISP) traffic?

BellSouth's Position

BellSouth asserts that traffic directed to Internet Service Providers (ISPs) should not be included in the definition of local traffic for purposes of the parties' reciprocal compensation obligations. BellSouth's position is that the Federal Communications Commission (FCC) has found that ISP traffic is interstate traffic in its declaratory ruling in CC Docket 96-98 on February 26, 1999. In addition, the FCC has established a rulemaking proceeding to determine the

appropriate mechanism for inter-carrier compensation for interstate ISP-bound traffic. BellSouth argues that because ISP traffic is interstate, there is no reason to include such in the definition of local traffic. BellSouth believes that providing the local service provider with reciprocal compensation creates an unearned windfall to the local service provider who has the ISP as a customer. BellSouth maintains that this Commission has not concluded that ISP calls are local; thus, this Commission can rule in this proceeding that ISP calls are excluded from the definition of local traffic.

Intermedia's Position

Intermedia maintains that all calls originated by either party and destined for an ISP should be subject to reciprocal compensation. Intermedia cites Sections 251(b)(5), 251(c)(2), and 252(d)(2) of the 1996 Act as evidence that incumbent local exchange carriers have an obligation to interconnect with competitive carriers and to provide reciprocal compensation for the exchange of local traffic. Intermedia states that the 1996 Act defines the interconnection obligations of incumbent local exchange carriers (ILECs) in very broad terms and does not exclude local calls to ISPs from interconnection and reciprocal compensation obligations. Intermedia avers that calls to ISPs are typically local calls and are subject to reciprocal compensation.

Further, a determination that ISP calls are not subject to reciprocal compensation would result in a class of calls for which no compensation is provided. Tr. At 854. According to Intermedia such a result would be inconsistent with the carefully drawn compensation scheme articulated in the 1996 Act. Intermedia asserts that the Act contemplates that carriers will receive compensation for the use of their respective networks through either access charges or reciprocal compensation. Without such compensation competitive local exchange carriers (CLECs) will be discouraged from serving ISPs because the cost of serving ISPs would become increasingly prohibitive. The potential anti-competitive impact of denying CLECs reciprocal compensation for the transport and termination of ISP bound traffic has been recognized by various state commissions according to Intermedia.

Intermedia cites this Commission's decision in the ICG arbitration (Docket 27069) which required BellSouth to pay reciprocal compensation to CLECs for ISP-bound calls pending the adoption of a federal rule by the FCC subject to retroactive true-up. Intermedia believes that this issue has been decided and should not be a part of the arbitration. Intermedia states that BellSouth is attempting to litigate an issue that has already been definitively determined in this state, and Intermedia is unwilling to participant in this duplicative exercise.

Intermedia states that absent a FCC ruling regarding reciprocal compensation this Commission's order stands. In addition, Intemedia points out that on March 24, 2000, the United States Circuit Court of Appeals for the District of Columbia Circuit vacated the FCC's February 26, 1999, Declaratory Ruling in CC Docket No. 96-98 regarding the jurisdiction of reciprocal compensation. The court remanded the Declaratory Ruling back to the FCC for its glaring lack of reasoned decision-making. The Circuit Court did not reject the FCC's end-to-end analysis for declaring ISP-bound calls to be jurisdictionally interstate; however, the Circuit Court held that the analysis has no relevance to the question of whether ISP-bound traffic is local for reciprocal compensation purposes according to Intermedia.

Intermedia emphasizes that this Commission should rule in the same manner in this case as it ruled in the ICG case. Intermedia emphasizes that this Commission considers its ruling an interim measure until the FCC issues a final ruling in the matter of reciprocal compensation.

Panel Discussion of Issue 2(a)

This Commission has ruled in the ICG case (Docket 26029) and in the ITC^DeltaCom case (Docket 27091) that reciprocal compensation should be paid for local traffic and for ISP-bound calls that appear to be functionally equivalent to local traffic. This Commission stated that failure to allow reciprocal compensation for ISP-bound calls would exclude such traffic from being compensated since that traffic is not subject to access charges at this time. The Circuit Court of Appeals of the District of Columbia has stayed the FCC's 1999 order and remanded the matter to the

FCC for further ruling and clarification. In the ITC^Deltacom case noting the stay of the FCC Order, this Commission determined that a generic hearing regarding this issue was justified. In addition the Commission that a retroactive true-up was necessary. The Commission ordered the parties to track ISP-bound traffic in order to prepare for the eventuality of a retroactive true-up.

Conclusion of Issue 2(a)

At this time the FCC has not ruled on the remand. Thus, based upon this Commission's ruling in the previous arbitrations cited above, the Panel concludes that ISP-bound calls are subject to reciprocal compensation, pending the establishment of a federal rule or an Alabama Commission generic ruling, and retroactive true-up from the effective date of the interconnection agreement that results from this arbitration.

Issue 3 Should Intermedia be compensated for end office, tandem, and transport elements for purposes of reciprocal compensation?

BellSouth's Position

BellSouth states that it is inappropriate to pay reciprocal compensation for the tandem switching function if a call is not handled by a switch on a tandem basis. BellSouth affirms that Intermedia is seeking to be compensated for the cost of equipment it does not own and functionality does not provide. Tr. 33. BellSouth alleges that the FCC has determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. Tr. 65. BellSouth states that the FCC directed state commissions to consider two factors in determining whether a CLEC should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch. According to BellSouth the state commissions should consider whether or not new technologies performed functions similar to those performed by an incumbent local exchange company's (ILEC's) tandem switch. The state commissions should also determine whether or not some or all calls terminating on the new entrant's network should be priced as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent carrier's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate according to BellSouth. BellSouth contends that there is a lack of evidence in the record to prove that Intermedia's switch serves an area comparable to the area served by BellSouth's tandem switch. BellSouth states that in a similar situation in Illinois a federal district court ruled that there was insufficient evidence to support MCI's request for the tandem interconnection rate. MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc., 1999 U. S. Dist. LEXIS 11418, *19(N.D. Ill. June 22, 1999). According to the Court, MCI was required to identify the location of its customers and the geographical area actually served by MCI's switch, which MCI failed to do. BellSouth argues that Intermedia has not presented evidence that it actually serves customers throughout the Birmingham area as required by the geographic test.

Additionally, BellSouth alleges that Intermedia's switch does not connect one trunk to another for the local tandem interconnection purpose. Thus, Intermedia's switch does not meet the functionality test. BellSouth has cited several court cases as support for the functionality test. BellSouth contends that several federal court and state commission decisions plainly hold that the functions performed by another carrier's switch should be considered in determining whether that carrier is entitled to receive compensation for end-office, tandem, and transport elements in transporting terminating traffic. BellSouth points to the Florida Public Service Commission's decision in a MCI/Sprint arbitration in 1997 in which that Commission determined that MCI was not entitled to compensation for transport and tandem

switching unless it actually performs each function. BellSouth cites the recent BellSouth/Intermedia arbitration in which the Florida Commission staff recommended against granting Intermedia reciprocal compensation for tandem switching. According to BellSouth, the Florida staff utilized both the geographic comparability test and the functionality test to determine Intermedia's qualification for the tandem rate. BellSouth also refers to a California Commission decision that reached a similar conclusion in an arbitration proceeding between MFS/WordCom and Pacific Bell. See CPUC Decision 99-09-069.

Intermedia's Position

Intermedia asserts that it satisfies the FCC requirements to qualify for reciprocal compensation at the tandem interconnection rate. Intermedia alleges that the determinative question is whether or not Intermedia's Northern Telecom DMS-500 switch and glass fiber network in and around Birmingham serves a geographic area comparable to the area served by a single BellSouth local tandem switch. Intermedia cites FCC Rule 51.711(a)(3) as the controlling factor for considering if Intermedia qualifies for the tandem interconnection rate. Intermedia states that BellSouth has not offered evidence that Intermedia does not meet the requirements for the tandem interconnection rate. Intermedia states that its switch does not have to perform all of the functions of the BellSouth local tandem but must simply serve a comparable area. Intermedia suggests that BellSouth is attempting to employ language from paragraph 1090 of the FCC's First Report and Order regarding Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, to imply that the FCC set two requirements for qualification for the tandem interconnection rate. Paragraph 1090 reads:

> [S]tates shall also consider whether new technologies (e.g. fiber or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of the transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnection carrier's additional costs is the LEC tandem interconnection rate.

Intermedia maintains that its network architecture cannot be the same architecture as BellSouth's because that would dictate that Intermedia utilizes the same network architecture as BellSouth in order to perform the same tandem switching function as BellSouth does. Intermedia states that the FCC Rule was intended to allow tandem interconnection rate compensation for CLEC switching and network functions that do not precisely mirror an ILEC's network and switching capabilities. Intermedia's witness, Carl Jackson, testified that Intermedia's switches are multi functional and perform some of the traditional functions of tandem switches, including the aggregation of traffic from multiple remote locations. Tr. 856. In addition, Intermedia's switching platforms meet the definition and perform the same functions identified within the Local Exchange Routing Guide (LERG) for tandem offices and Class 4/5 switches. Tr. 919-920. Intermedia also filed an Exhibit (Jackson Exhibit 4) that describes the functionality of its Northern Telecom switch.

Intermedia explains that it has already received the tandem switching rate in Georgia and North Carolina. Intermedia also cites a case (D. T. E. 99-42) where the Massachusetts Department of Telecommunications and Energy ruled that MediaOne was entitled to the tandem rate; North Carolina Commission also ruled the same for ICG in another case (Docket No. p 582).

Discussion of Issue 3

FCC Rule FCC Rule 51.711(a)(3) indicates that the state commissions consider whether the switch of a carrier, other than the incumbent LEC, serves a geographic area comparable to the area served by the incumbent LEC. If the other carrier's switch does serve a comparable area, the appropriate rate is for the carrier is the incumbent LEC's tandem interconnection rate. In its 98-96 Order the FCC ordered the states to establish presumptive symmetrical rates. In

addition, the FCC stated:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such an event, state shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

Based upon a review of FCC Rule 51.711(a)(3) we believe that Intermedia does not have to prove that its switch performs the exact functions that BellSouth's tandem switch performs.

The FCC recognized that newer technologies can perform various functions without replicating the older technology switches. Thus, the appropriate test to determine whether the a CLEC with newer technology switches and facilities is the geographic area served by a CLEC's switch, and no other test is necessary. In the ICG Arbitration (Docket 27069) and ITC^DeltaCom Arbitration (Docket 27091) this Commission determined that geographic test was the only test needed.

Our review of the record in this case indicates that Intermedia's witness, Jackson, in this case has attested to the fact that Intermedia's switch does indeed serve a comparable geographic area as BellSouth's switch. Jackson also stated that Intermedia's switches are multifunctional and perform some of the traditional functions of tandem switches (i.e., aggregating traffic from remote locations). In light of this testimony, the panel believes that the reciprocal compensation rate paid to Intermedia should include the elemental rates of transport, end office, and tandem switching.

Conclusion of Issue 3

Based on the foregoing discussion, the Panel concludes that Intermedia's switch serves an area geographically comparable to the area covered by BellSouth's tandem switch. In addition, Intermedia's switch performs functions similar to those performed by BellSouth's tandem switch. Thus, we further conclude that BellSouth should pay Intermedia the reciprocal compensation rate which includes elemental rates for transport, end office, and tandem switching.

Issue 6 For the Purposes of Collocation, should Intervals be measured in Business Days or Calendar Days?

Issue 7 What charges should Intermedia Pay to BellSouth for Space Preparation for Physical Collocation?

Issue 8 Is BellSouth's Interval for Responding to Intermedia's Bona Fide Collocation Requests Appropriate?

Issue 9 Is BellSouth's Interval for Physical Collocation Provisioning Appropriate?

BellSouth's Position

BellSouth states that its standard collocation intervals are in business days because skilled contractors and governmental personnel typically work during standard business hours, Monday through Friday. Tr. 598. BellSouth alleges that the response interval of 30 days to a CLEC's request for collocation is reasonable. Within the 30 business-day time frame, BellSouth advises CLECS within 10 days as to whether space is available. Tr. 599.

According to BellSouth, numerous factors are considered when evaluating a collocation request. Consideration of the building configuration includes location of doors, stairs, air handling, building outline, and the physical capacity of the structure. Also, space usage and forecasted demand are considered. This includes determination of used space, occupied space, and reserved space, all of which are not available for consideration.

BellSouth asserts that building codes and regulatory requirements must also be considered in the determination of available collocation space. This includes National Fire Protection Act minimum requirements for buildings and structures as well as the Standard Building Code which most counties and municipalities adopt. Other considerations include BellSouth design practices that detail maximum equipment line-up length, travel distances to exits, front and rear equipment aisle widths, and the size of various support components. Separation distances must be maintained to prevent service outages caused by grounding violations. In addition, cost analysts must review the collocation request to set the price for providing the desired space to the CLEC according to BellSouth.

BellSouth believes that the Commission should affirm BellSouth's current provisioning interval of 90 business days for collocation under normal conditions. For extraordinary conditions BellSouth provisions collocation in 130 business days. Tr. 602. BellSouth states that these provisioning intervals should apply to both caged and cageless physical collocation.

Intermedia's Position

According to Intermedia, the use of business days creates the deceptive appearance that BellSouth is responding in writing to collocations applications within 30 days when the period is actually six weeks. The 90 business days for provisioning physical collocation is equivalent to four calendar months and the 130 business days is actually six months. Tr. 636-637.

Intermedia states that BellSouth witness, Milner, agreed on cross examination that BellSouth had used calendar day intervals in the past and that the use of calendar days was not an industry standard since some ILECs use calendar days. Tr. 637-638.

Intermedia also points out that on cross-examination, Mr. Milner admitted that some of BellSouth's employees routinely work weekends and some work centers are staffed on a 24 hour a day basis. Tr. 640. Intermedia states that BellSouth's statement that the FCC's 10 day initial response time is really business days is problematic. Under cross-examination, Mr. Milner could not point to any authority to support this interpretation. Tr. 644-646. Intermedia contends that if the FCC had intended business days, it would have specified business days. Intermedia maintains that the use of calendar days for performance intervals for collocation ensures timely performance by BellSouth.

Intermedia submits that Individual Case Basis pricing is inappropriate at a time when BellSouth has had sufficient experience with collocation to determine the price of various collocation components. Intermedia maintains that BellSouth specifies units for its space preparation items but nevertheless does not set forth unit pricing. Intermedia contends that BellSouth's space preparation should be cost based with prices clearly denoted. Intermedia asks the

Commission to require BellSouth to propose appropriate rates for space preparation.

Discussion of Issues 6, 7, 8, 9

We note that on August 10, 2000, the FCC released its Order on Reconsideration in CC Dockets 98-147 and 96-98. In this Order, the FCC addressed a remand by the D. C. Circuit regarding certain aspects of the FCC's Advanced Services First Report and Order (Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket 98-147, First Report and Order and Further Notice of Proposed Rulemaking, adopted March 18, 1999). In that order, the FCC clarified the requirements in its First Report and Order. In its recent Order the FCC stated that where neither the state nor the parties to an interconnection agreement set a different deadline, an incumbent LEC is required to inform a new entrant within ten calendar days after receiving the application whether its collocation application has been accepted or denied. If the incumbent LEC deems that application unacceptable, it must advise the competitive LEC of any deficiencies within this ten-calendar day period. To retain its place in the incumbent's queue, the competitive LEC must cure any deficiencies in its collocation application and resubmit the application within ten calendar days after being advised of them. See paragraph 26 FCC Order CC Dockets 98-147 on Reconsideration and 96-98 Notice of Proposed Rulemaking.

Further the FCC concluded:

> that an incumbent LEC should be able to complete any technically feasible physical collocation arrangement, whether caged or cageless, no later than 90 calendar days after receiving an acceptable collocation application, where space, whether conditioned or unconditioned, is available in the incumbent LEC premises and the state commission does not set a different interval or the incumbent and requesting carrier have not agreed to a different interval. See Paragraph 27 CC Dockets 98-147 and 96-98, August 9, 2000.

The FCC stated that to complete provisioning of a collocation arrangement, an incumbent LEC must finish construction in accordance with the requesting carrier's application and turn functional space over to the requesting carrier. The FCC further stated that the ten-calendar day deadline for responding to a collocation request and the 90-day provisioning deadline will serve as maximum intervals. See paragraphs 30 and 37, respectively of the FCC Order on Reconsideration.

Intermedia has stated that BellSouth should provide specific prices for space preparation costs for physical collocation rather than "Individual Case Basis" (ICB) pricing. The Panel agrees with Intermedia that BellSouth should provide Intermedia with specific pricing of space preparation costs. In its First Report and Order on advanced Services (CC Docket 98-147) the FCC required incumbent LECS to make shared collocation cages available to new entrants. The FCC also requires incumbent to prorate the charge for space conditioning and preparation undertaken by the incumbent LEC to construct the shared collocation cage or condition the space for collocation use, regardless of how many carriers actually collocate in that cage. The incumbent must determine the total charge for site preparation and allocate that charge to a collocating carrier based on the percentage of the total space utilized by that carrier. See paragraph 41 of FCC First Report and Order in CC Docket 98-147. The FCC has also stated that the incumbent LEC must make cageless collocation available in single-rack or bay increments.

Conclusion of Issues 6, 7, 8, 9

Based upon the above discussion, we conclude that the Commission should require BellSouth to respond to Intermedia's request for collocation within 10 calendar days as required by the FCC. Further, the Commission should require BellSouth to provision physical collocation within 90 calendar days after receiving an acceptable collocation application, where space is available in accordance with the FCC Order. This Commission should require BellSouth to provide the rates for space preparation at the time BellSouth provides a response to Intermedia's request for

collocation. The above recommendations comply with the FCC's rules regarding collocation and with Section 251(e)(6) of the Telecommunications Act of 1996.

Issue 10 Are BellSouth's Policies Regarding Conversion of Virtual to Physical Collocation Reasonable?

BellSouth's Position

BellSouth argues that its policies regarding conversion of virtual to physical collocation are reasonable. BellSouth asserts that the terms and conditions that apply to a conversion of virtual collocation to physical collocation should be consistent with the terms and conditions of the assessment and provisioning of physical collocation. Tr. 606. BellSouth states that it treats a conversion to physical collocation the same as an application for physical collocation. BellSouth states that it allows conversion in place from virtual to physical collocation when three conditions are met: 1) there is no change in the amount of equipment or the configuration of the equipment in the virtual collocation arrangement, 2) the conversion would not cause the equipment or the results of that conversion to be located in space reserved for BellSouth's future needs, and 3) the converted arrangement does not limit BellSouth's ability to secure its own equipment and facilities. Tr. 606-607. BellSouth alleges that security is an issue because CLEC and ILEC equipment is sometimes bolted together as evidenced by Mr. Milner's testimony and Exhibit. Tr. 622-624. BellSouth believes that its policies are reasonable. Further, BellSouth states that if a collocator requests the conversion then the collocator should be responsible for any cost incurred.

Intermedia's Position

Intermedia believes that in place conversion from virtual to cageless physical collocation arrangements should not give rise to additional costs, delays, and service interruptions. Tr. 868. Intermedia states that it is willing to accept the proposition that in place conversion of virtual collocation may not be permitted where BellSouth has reserved space for its own future use. Intermedia further states that it is willing to agree that in place conversion will be allowed if Intermedia does not increase the amount of space it occupies and any changes to the arrangement can be accommodated by existing power, HVAC, and other requirements.

Intermedia believes that BellSouth's wording regarding commitment to in place conversion absent extenuating circumstances and technical reasons is too vague. Intermedia states that it is not clear what BellSouth means by "extenuating circumstances" or "technical reasons." Intermedia prefers language that is more specific.

Intermedia objects to BellSouth charging the same application fee for conversion of virtual collocation arrangement to physical arrangement as it charges for physical collocation. Intermedia also disagrees with BellSouth requiring the same provisioning interval for conversion as it requires for physical collocation. Intermedia states that an in place conversion of virtual collocation to cageless physical collocation arrangement essentially equates to leaving CLEC equipment where it is, while shifting the responsibility for its maintenance and repair to the CLEC. Intermedia emphasizes that BellSouth witness, Milner, identified only rerouting equipment alarm circuits for maintenance purposes as the task necessary for an in place conversion of virtual collocation to physical collocation. Tr. 662-663.

Intermedia believes that if CLEC equipment is not moved, that CLEC should not incur any expenses associated with a new application, such as space allocation, HVAC, power, feeder distribution, grounding, and cable racking. Intermedia believes that BellSouth's application fee and 90-day provisioning interval should not apply to in place conversions of virtual collocation to physical collocation.

Discussion of Issue 10

BellSouth has stated that it allows an in-place conversion from virtual to cageless physical collocation arrangement when: 1) there is no change in the amount of equipment or the configuration of the equipment in the virtual collocation arrangement, 2) the conversion would not cause the equipment or the results of that conversion to be in space reserved for BellSouth's future needs, and 3) the converted arrangement does not limit BellSouth's ability to secure its own equipment and facilities. Intermedia believes that an in-place conversion should be allowed if Intermedia does not increase the amount of space it occupies and any changes to the arrangement can be accommodated by existing power, HVAC, and other requirements.

It seems that Intermedia and BellSouth agree on the main points for in-place conversion from virtual to physical collocation. However, Intermedia believes that an in-place conversion from virtual collocation to cageless physical collocation arrangement should not require the same application fee as for a new physical collocation arrangement. In addition, Intermedia thinks that the 90-calendar day provisioning interval for physical collocation should not apply to in place conversions of virtual collocation arrangements.

An in-place conversion from virtual to cageless physical collocation arrangement involves changing the ownership and maintenance responsibilities. An application for conversion from virtual to cageless physical collocation arrangement should be differentiated from a new application for physical collocation.

However, BellSouth needs to evaluate these conversions to determine whether such arrangement creates any safety or security concerns. An application for collocation conversion could be submitted by Intermedia with BellSouth responding by acceptance or denial of such request. This will allow BellSouth to address any security or safety considerations as well as any information related to the type of work to be performed by BellSouth. If the conversion quires no physical changes, the only charges that should apply are administrative, billing, and engineering record updates.

Because the ILEC has to review the requirements for in-place conversion from virtual to cageless physical collocation arrangement, the response interval for an in-place conversion should not vary from that required by the FCC. In its recent Order the FCC stated that where neither the state nor the parties to an interconnection agreement set a different deadline, an incumbent LEC is required to inform a new entrant within ten calendar days after receiving the application whether or not its collocation application has been accepted or denied. . See paragraph 26. Thus, we believe that the ten-calendar day response period should apply to requests for conversions from virtual collocation to cageless collocation.

Since an in-place conversion from virtual collocation to cageless physical collocation requires only an update of records, the provisioning interval for in-place conversion of virtual collocation to cageless physical collocation should be less than maximum provisioning interval of 90 calendar days set by the FCC for physical collocation. Thus, a provisioning interval of 30 calendar days should be sufficient to complete the process of an in-place conversion.

Conversions from virtual collocation to cageless collocation which involve moving the equipment to another location would require a provisioning interval that is longer than that for an in-place conversion. A conversion from virtual collocation to cageless collocation that requires moving the equipment to another location should be treated as a request for cageless collocation. The Commission addressed the provisioning interval for cageless collocation in the ITC^DeltaCom/BellSouth Arbitration by requiring BellSouth to provision cageless collocation within 60 calendar days of receiving a request for cageless collocation. Thus, the 60-calendar day provisioning requirement should also apply to a conversion from virtual to cageless collocation that requires moving the equipment to a different location.

Likewise conversions from virtual to caged physical collocation would require a longer interval. Such a conversion should be treated like a new request for caged physical collocation. Thus, BellSouth should provision a conversion from virtual to caged physical collocation within 90 calendar days of receiving an application which meets the standards set for an application for caged physical collocation. This time frame complies with the FCC's requirements

set in its Order on Reconsideration Adopted on August 9, 2000. (CC Docket No. 98-147 and CC Docket No. 96-98).

Conclusion of Issue 10

Based upon the foregoing, the panel concludes that BellSouth should provision an in-place conversion from virtual to cageless physical collocation arrangement when: 1) there is no change in the amount of equipment or the configuration of the equipment in the virtual collocation arrangement, 2) the conversion would not cause the equipment or the results of that conversion to be in space reserved for BellSouth's reasonable future needs, and 3) the converted arrangement does not limit BellSouth's ability to secure its own equipment and facilities. These conditions should comply with the FCC's requirements of nondiscriminatory access to collocation facilities and nondiscriminatory safety requirements. See Paragraphs 48, 56, and 57 of Cc Docket No. 98-147 and CC Docket No. 96-98 adopted August 9, 2000.

The Arbitration Panel concludes that BellSouth should be required to inform Intermedia whether its application meets BellSouth's collocation standards within 10 calendar days after receiving the application from Intermedia. We also conclude that BellSouth should provision caged physical collocation within 90 calendar days from the receipt of an application, which meets BellSouth's requirements for caged physical collocation. Further, BellSouth should provision cageless collocation within 60 calendar days from the receipt of an application which meets BellSouth's requirements for cageless collocation we so conclude.

We also conclude that the response interval for conversions from virtual to physical collocation should be 10 calendar days. The provisioning interval for conversions from virtual collocation to physical collocation should be based upon the type of conversion being performed. Thus we conclude that in-place conversion from virtual collocation to cageless collocation should be provisioned within 30 calendar days when such conversion does not add equipment or change the configuration of the equipment. We further conclude that the provisioning interval for conversions from virtual collocation to cageless collocation which involve additions of equipment or moving the equipment to another location should be 60 calendar days and the provisioning interval for conversions of virtual collocation to caged physical collocation should be 90 calendar days as prescribed by the FCC. In addition, we conclude that the application fee for in-place conversions from virtual collocation to cageless physical collocation should include only the charges for administrative, billing, and engineering record updates. In the ITC^DeltaCom Arbitration this Commission determined that the rates for cageless physical collocation should be the same as the rates (including the application fee) charged for virtual collocation. We conclude that these rates should also apply in this case and recommend that this Commission apply virtual collocation rates to cageless physical collocation. The above recommendations comply with the FCC's collocation rules and with Section 251(e)(6) of the Telecommunications Act of 1996.

Issue 12 What is the Appropriate Definition of "Currently Combines" pursuant to FCC Rule 51.315(b)?

Issue 13(a) Should BellSouth be required to provide access to enhanced links (EELs) at UNE rates?

Issue 13(b) Should BellSouth be required to allow Intermedia to convert existing special access to EELs at UNE rates?

BellSouth's Position

BellSouth contends that the definition of "currently combines" includes only UNE combinations that are already combined and providing service to a particular customer at a particular location. Tr. P. 78. BellSouth refers to the FCC's UNE Remand Order for confirmation that BellSouth has no obligation to combine UNE's for CLECs when those elements are not currently combined in BellSouth's network. BellSouth further stated that the FCC prohibited an incumbent LEC from separating elements that are already combined unless requested to do so by a CLEC. See 47 C.F.R. 51.315(b).

BellSouth asserts that the FCC declined to adopt a definition of currently combined that would include all elements ordinarily combined. BellSouth stated that this Commission should find that BellSouth is obligated to provide UNE combinations at TELRIC-based rates only where such combinations are in fact combined in BellSouth's network and providing service to a particular customer at a particular location. Tr. p. 83. BellSouth argues that the FCC has declined to define the EEL as a separate network element in its UNE Remand Order. See para. 478. Thus, except to the extent that these elements are already combined in BellSouth's network, BellSouth has no obligation to provide CLECs with the EEL. BellSouth states that BellSouth and Intermedia have signed a nine-state agreement resolving the conversion of special access to EELs. Thus, BellSouth refused to brief Issue 13(b) but reserved the right to do so at a later date if Intermedia takes a position that the issue is not settled.

Intermedia's Position

Intermedia requests that this Commission revisit its decision in the ICG Arbitration, Docket 27069, regarding combinations such as EELs that are not already combined in BellSouth's network. Intermedia argues that the EEL is essential to competition in the state of Alabama because it assists CLECs such as ICG and Intermedia to access BellSouth customers without going to the expense and delay of collocating in every central office. Intermedia asserts that even if BellSouth does not combine the loop and transport for a given customer premises at a given time, BellSouth's special access service mimics this combination and is available from BellSouth's tariff at a much higher rate essentially on demand. Further, Intermedia contends that the FCC's policies subject to the terms and conditions of agreements between BellSouth and CLECs such as Intermedia, Intermedia may order special access arrangements from BellSouth for a particular customer and then convert that arrangement to a UNE EEL once it is in place. Intermedia explains that it wants to simply order the UNE EEL directly from BellSouth without having to go to extra expense and delays associated with ordering special access and then converting it to a UNE EEL. Intermedia submits that skipping a step in this situation is pro competitive and good for the citizens of Alabama.

Intermedia points out that the Georgia Commission has ordered to provide UNE combinations such as EELs whether or not they are already combined for a particular customer at a particular location so long as they are ordinarily combined by BellSouth in its network as in the case of special access. Tr. 466.

Intermedia further stated that BellSouth was obligated by law to convert special access to UNE EELs because BellSouth and Intermedia have executed an agreement that addresses the conversion of special access to EELs. Thus, intermedia did not fully address Issue 13(b) but reserved the right to do so in a subsequent filing.

Discussion of Issues 12, 13(a), and 13(b)

BellSouth contends that the FCC has already decided this issue in its UNE Remand Order and that UNE combinations are not required unless those combinations are currently (already) combined. On this basis, BellSouth states that it is not obligated to provide the EEL anywhere in its network but only where such elements are already combined for a particular customer and at a particular location.

Intermedia argues that this Commission has the authority to require BellSouth to provide UNE combinations anywhere in BellSouth's network. Thus, this Commission should require BellSouth to provide the EEL to CLECs anywhere within BellSouth's network. Intermedia points out that the Georgia Commission has ordered BellSouth to provide UNE combinations such as EELs so long as they are ordinarily combined within BellSouth's network. Intermedia continues by stating that special access is a tariffed service that is the same as the EEL but at much higher rates. Both parties pointed out that they have an agreement that provides for conversion of special access to EELs under certain conditions.

We note that in its UNE Remand Order, the FCC declined to define the EEL as a separate network element. The FCC also declined to interpret 51.315(b) as requiring incumbents to combine unbundled network elements that are ordinarily combined. The FCC also declined to reinstate rules 51.315(c)-(f). However, the FCC also stated that it believed that the reasoning of the Supreme Court's decision to reinstate rule 51.315(b) based upon nondiscrimination language of Section 251(c)(3) applies equally to rules 51.315(c)-(f). The FCC noted that incumbent LECS routinely provide combinations of loop and transport elements for themselves in order to: 1) deliver traffic to their own packet switches, 2) provide private line services, and 3) provide foreign exchange service. The FCC also noted that incumbent LECS routinely provide the functional equivalent of the EEL through special access. See paragraph 481 in CC Docket 96-98 Third Report and Order and Fourth Further Notice of Proposed Rulemaking, adopted September 15, 1999.

The FCC also stated that experience demonstrates that incumbent LECs have refused to provide access to network elements so that competitors could combine them, except in situations where competitive LECs have collocated in the incumbent's central offices. See paragraph 482 of CC docket 96-98 September 15, 1999. In paragraph 482 of the same Order, the FCC stated its belief that Section 251(c)(3) provides a sound basis for reinstating rules 51.315(c)-(f). However, this Commission has set its own precedent with the ICG Telecom Group, Inc., Arbitration, Docket 27069, followed by the ITC^DeltaCom Communications, Inc., Arbitration, Docket 27091, which interpreted "currently combines" to mean already combined and providing service to a particular customer at a particular location. Thus, we shall interpret "currently combines" in the same manner as this Commission has interpreted the phrase.

The parties agreed that they would not address the issue of conversion of special access to EELs since the parties reached agreement on this issue on a nine-state basis. Since there is agreement between the parties regarding this issue, the panel declines to address the issue.

Conclusion of Issues 12, 13(a), and 13(b)

Based upon the foregoing, the Panel concludes that the Commission should determine that UNE combinations (and specifically, the UNE EEL) are not required unless those combinations are currently (already) combined. This comports with the Commission's decisions in prior Arbitration proceedings. Since the parties have reached agreement regarding conversion of special access to EELs, the panel will not address that issue nor will the panel address the rates to be charged for such converted EELs.

Issue 18(c) Should BellSouth be required to provide access on an unbundled basis in accordance with, and defined in, the FCC's UNE Remand Order, to packet switching capabilities?

Issue 25 Should BellSouth be required to furnish access to the following as UNEs: (a) User to Network Interface, (b) Network-to Network Interface, and (c) Data Link Control Identifiers at Intermedia-specified committed information rates?

Issue 39 What are the appropriate rates for: (a) interconnection trunks between the

Parties' frame relay switches, (b) frame relay network-to-network interface ports, (C) permanent virtual circuit segments (i.e., Data Link Connection Identifier) and committed Information Rates, and (d) requests to change a permanent virtual circuit segment or permanent virtual circuit service order record?

BellSouth's Position

BellSouth contends that neither the Act nor the FCC's rules require BellSouth to unbundle packet switching. BellSouth states that the FCC in its UNE Remand Order the FCC expressly declined to unbundle specific packet switching technologies that incumbent LECS may have deployed in their networks. BellSouth states that the FCC adopted a limited exception that has four conditions as set out in FCC Rule 51.319(c)(5). BellSouth cites paragraph 312 of the UNE Remand Order which denies a request by e.spire/Intermedia to require incumbent LECS to unbundle ports on incumbent's data switches or routers and connectivity, including the switching fabric and associated software functions, between such ports at capacities ranging from DS0 to DS3. E.spire/Intermedia focused their request on a specific packet switching technology - frame relay. The FCC rejected this request stating that it will define an unbundled element in a technologically neutral manner and that defining an unbundled network element according to a particular packet switching technology, such as frame relay, violates this principle of technological neutrality. BellSouth asserts that the FCC found it appropriate to examine packet switching under the "impair" standard of Section 251(d)(2)(B). Thus, the FCC determined that competing carriers would not be impaired without access to the incumbent LEC's packet switching functionality. BellSouth avers that the FCC recognized that there are numerous carriers providing service with their own packet switches and that competitors are actively deploying facilities used to provide advanced services to serve certain segments of the market. BellSouth contends that Intermedia has not produced any evidence which would indicate that it is impaired without access to packet switching on an unbundled basis. BellSouth stated that access to (1) User to Network Interface, (2) Network to Network Interface, and (3) Data Link Control Identifiers are specific packet switching components of Frame Relay Service. BellSouth describes Frame Relay as a form of packet switching. BellSouth states that since it is not required to provide unbundled packet switching under Section 251 of the Act or by any FCC Order, these rates are not subject to TELRIC pricing methodology. Tr. 117-118. BellSouth contends that the appropriate charges for frame relay interconnection trunks are BellSouth's rates in its Access Tariff. According to BellSouth, frame relay is typically transporting interLATA traffic. Since charges for interconnection trunks that carry voice grade traffic on an interLATA basis are billed from the interstate access tariff, frame relay traffic should be treated the same according to BellSouth. Therefore, the appropriate charges for each of the components above are found in BellSouth's Access Tariff.

Intermedia's Position

Intermedia states that the FCC defines packet switching as the basic function of routing individual data units or packets based on address or other routing information contained in the packets. Intermedia asserts that the FCC has explicitly found that an ILEC must provide nondiscriminatory access to unbundled packet switching capability where: (a) the ILEC has deployed digital loop carrier (DLC) systems, including integrated digital loop carrier or universal digital loop carrier systems, or has developed any other system in which fiber optic facilities replace copper facilities in the distribution section; (b) there are no spare copper loops capable of supporting XDSL services the requesting carrier seeks to offer; (c) the ILEC has not permitted a requesting carrier to deploy a DSLAM in the remote terminal, pedestal, or environmentally controlled vault of the interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points; and (d) the ILEC has deployed packet switching capability for its own use.

Intermedia maintains that BellSouth refuses to include the FCC's definition of packet switching capability in the interconnection agreement. Furthermore, according to Intermedia, BellSouth refuses to discuss the conditions under which BellSouth must provide access to packet switching capability to Intermedia as required by the FCC rules. Instead, BellSouth insists that it will always conform to the requirements of Section 51.319(c) of the FCC rules and

thus never have to provide packet switching to Intermedia.

Intermedia refers to cross examination of BellSouth witness, Varner, in which he admitted that at least three of the four conditions exist in BellSouth's network at present. Tr. 486. Intermedia states that according to Varner the only condition that is not present is the inability of a CLEC to collocate its DSLAM in a remote terminal pedestal or environmentally controlled vault or to obtain virtual collocation at the subloop interconnection points. Tr. 488. Intermedia points out that Mr. Varner was unable to identify any pedestal or remote terminal or controlled environmental vault in BellSouth's system that currently can accommodate collocation of CLEC DSLAMs. Mr. Varner did not have any personal knowledge concerning BellSouth's compliance with this condition, apart from what some unnamed person had supposedly told him according to Intermedia. Tr. 488. Instead according to Intemedia, Varner punted to Mr. Milner who admitted that BellSouth has never collocated CLEC DLSAMs in any remote terminals in Alabama. Tr. 596.

Nevertheless, Milner asserted that some but not all of BellSouth's remote terminals could accommodate such collocation. Tr. 626. Milner did not know the percentage of BellSouth's remote terminals which could accommodate CLEC DSLAMs in Alabama. Tr. 632. According to Intermedia, Milner stated that if BellSouth could accommodate a CLEC request for collocation at a remote facility, it would just seek a waiver, unless BellSouth, itself, had DSLAMs in that remote facility. Tr. 633 635.

Intermedia maintains that BellSouth has provided no actual proof that its actual practices satisfy the FCC's requirement. Consequently, there can be no guarantee that BellSouth will always make such arrangements available to CLECs and thereby avoid triggering the mandatory requirement that it furnish packet switching as a UNE. Thus Intermedia contends that it is entirely possible that BellSouth may be required to offer packet switching at some point on a mandatory basis. For this reason Intermedia wants the language concerning the FCC's requirement for packet switching in the interconnection agreement. In this way Intermedia maintains that it will be assured the ability to purchase packet switching if at any time BellSouth satisfies all four conditions set forth in the FCC rules.

At a minimum Intermedia wants to include a definition of the packet switching capability UNE and the FCC's language setting forth the conditions under which BellSouth might have to provide packet switching UNE in the agreement. Intermedia wants the interconnection agreement to require BellSouth to provide unbundled packet switching in any individual case where all four conditions are met. In addition, Intermedia requests that this Commission require BellSouth to provide unbundled access to Frame Relay network elements at cost based rates stating that the FCC has expressly found that Section 251(d)(3) provides states commissions with the ability to establish additional unbundling obligations, as long as the obligations comply with Subsections 251(d)(3) (B) and (C) of the communications Act. See Third Report and Order, at 73.

Thus, according to Intermedia, this Commission has the authority to find that packet switching and more specifically, Frame Relay, must be unbundled by BellSouth. Intermedia wants access at cost based rates to the following Frame Relay UNEs: User-to-Network Interface, Network-to-Network Interface, and Data Link Control Identifiers at specified Committed Information Rates. Further, Intermedia wants BellSouth to provide interconnection trunks between BellSouth's Frame Relay and Intermedia's Frame Relay at cost based rates.

Intermedia states that access to packet switching is critical for a carrier to compete effectively, but alternatives to packet switching elements outside BellSouth's network in Alabama are sorely lacking. According to Intermedia, lack of access to packet switching capabilities and specifically, BellSouth's packet switching capabilities materially diminishes Intermedia's ability to provide packet switched services in Alabama. In the absence of TELRIC based rates, Intermedia requests that this Commission require BellSouth to establish interim rates at 50 percent of BellSouth's currently effective tariffed rates for User-to-Network Interface, Network-to-Network Interface, and Data Link Control Identifiers at specified Committed Information Rates. These rates could be subject to true-up once the Commission has the opportunity to conduct a cost proceeding.

Discussion of Issues 18(c), 25, and 39

In paragraph 313 of the UNE Remand Order the FCC stated:

> In locations where the incumbent has deployed digital loop carrier (DLC) systems, an uninterrupted copper loop is replaced with a fiber segment or shared copper in the distribution section of the loop. In this situation and where no spare copper facilities are available, competitors are effectively precluded altogether from offering XDSL service if they do not have access to unbundled packet switching. Moreover, if there are spare copper facilities available, these facilities may not meet technical requirements for the provision of certain advanced services. For example, if a loop length exceeds 18,000 feet, the provision of ADSL service is technically infeasible. When an incumbent has deployed DLC systems, requesting carriers must install DSLAMs at the remote terminal instead of at the central office in order to provide advanced services. We agree that, if a requesting carrier is unable to install its DSLAM at the remote terminal or obtain spare copper loops necessary to offer the same level of quality for advanced services, the incumbent can effectively deny competitors entry into the packet switching market. We find that, in this limited situation, requesting carriers are impaired without access to unbundled packet switching. Accordingly, incumbent LECS must provide requesting carriers with access to unbundled packet switching in situations in which the incumbent has placed its DSLAM in a remote terminal. This obligation exists as of the effective date of the rules adopted in this Order. The incumbent will be relieved of this unbundling obligation only if it permits a requesting carrier to collocate its DSLAM in the incumbent's remote terminal, on the same terms and conditions that apply to its own DSLAM. Incumbents may not unreasonably limit the deployment of alternative technologies when requesting carriers seek to collocate their own DSLAMs in the remote terminal.

Thus, in this limited circumstance, the FCC has required the incumbent LEC to make packet switching available to the competitive LEC. In the UNE Remand Order adopted September 1999, the FCC addressed the "necessary" and "impair" standards in relation to the U. S. Supreme Court's January 1999 decision regarding the unbundling obligations of Section 251 of the Telecommunications Act of 1996. According to the FCC the "necessary" standard in Section 251 (d)(2) (A) is a stricter standard that applies to proprietary network elements. The "impair" standard in Section 251(d)(2) (B) applies to non-proprietary network elements. In paragraph 305 of the UNE Remand Order the FCC indicated that no party had alleged that packet switching was proprietary within the meaning of Section 252 (d)(2). Thus, the "necessary" standard would not apply. Instead, the FCC examined the packet switching capability under the "impair" standard. The FCC declined to require unbundling of the packet switching functionality except in limited circumstances because there are multiple carriers providing service with their own packet switches. Many competitors are actively deploying facilities to provide advanced services to serve certain segments of the market, namely medium and large business. Thus, a competitor has access to packet switching through other competitors. The FCC stated that competitors may be impaired in their ability to offer service without access to incumbent LEC facilities in residential and small business markets due to the cost and delay of obtaining collocation in every central office that the requesting carrier provides service using unbundled loops. However, the FCC declined to require unbundling of the packet switching capability as a general matter.

The FCC rejected e.spire/Intermedia's request for a packet switching or frame relay unbundled network element. Espire/Intermedia focused their request on the frame relay which is a particular packet switching technology. The FCC rejected this request by stating that it defined unbundled network elements in a technologically neutral basis to the extent possible. Defining an unbundled network element according to a particular packet switching technology, such as frame relay, violates this principle of technological neutrality. Also, e.spire/Intermedia did not provide any evidence to support a finding that requesting carriers are impaired without access to unbundled frame relay. The FCC commented that e.spire/Intermedia are free to demonstrate to a state commission that lack of unbundled access to the incumbent's frame relay network element impairs their ability to provide the services they seek to offer. Further, the FCC stated that a state commission is empowered to require incumbent LECS to unbundle specific network elements used to provide frame relay service, consistent with the principles set forth in the UNE Remand Order. See paragraph 312.

In light of the instructions in the FCC UNE Remand Order, this Commission has the ability to require the unbundling of packet switching and frame relay if it determines that a competitor is impaired without such requirement. Intermedia has stated in its brief that it would be impaired without unbundling the requested elements in Issues 18(c) and 25. However, Intermedia has not provided any evidence in the record of such impairment. Because Intermedia has not

provided any record of impairment in this proceeding, we recommend that this Commission decline to require BellSouth to provide the network elements requested in Issues 18(c) and 25. J. Carl Jackson, testifying for Intermedia, stated that this Commission should establish TELRIC based rates for the elements requested by Intermedia in Issues18 (c) and 25. Mr. Jackson cited Sections 251 and 252 of the Telecommunications Act of 1996 as basis for this requirement. However, the fact that these elements are not required to be unbundled precludes the establishment of TELRIC prices for these elements except for the limited circumstance in the FCC rules regarding the unbundling of packet switching. Therefore, this time the rates for frame relay elements and interconnection trunks between Intermedia's frame relay and BellSouth's frame relay should be those rates in BellSouth's Access Tariff.

Conclusion of Issues 18(c), 25, and 39

The Arbitration Panel concludes that the Commission should require BellSouth to provide access to packet switching in the limited circumstance described by the FCC in its UNE Remand Order. BellSouth should not be required to provide access to packet switching in general and, specifically, frame relay and the specific elements requested by Intermedia unless Intermedia can provide sufficient proof that it (Intermedia) will be harmed without such access. We further conclude that at this time the rates for frame relay elements and interconnection trunks between Intermedia's frame relay and BellSouth's frame relay should be those rates in BellSouth's Access Tariff.

Issue 26 Should parties be allowed to establish their own local calling areas and assign numbers for local use anywhere within such areas, consistent with applicable law?

BellSouth's Position

BellSouth believes that Intermedia should use its NPA/NXX in such a way that BellSouth can distinguish local traffic from intraLATA toll traffic and interLATA toll traffic for BellSouth originated traffic. According to BellSouth if a CLEC assigns numbers having the same NPA/NXX to customers both inside and outside BellSouth's local calling area, BellSouth has no way to determine whether BellSouth's end users are making a local or a long distance call when BellSouth's customer calls a CLEC's end user. Tr. 98. BellSouth contends that if Intermedia assigns numbers with the same NPA/NXX both inside and outside the BellSouth local calling area, it would be difficult to determine what type of call has been made and to determine what charges apply. Tr. 98-99. This causes BellSouth and other local exchange carriers to lose valid toll and/or switched access revenue and to incur costs that are not recovered according to Bellsouth. In addition, BellSouth pays reciprocal compensation as if the traffic were local. BellSouth maintained that it is indifferent to the manner in which Intermedia defines its local calling areas for its own end users, but in order to properly route traffic, all telecommunications service providers must inform all other telecommunications service providers where traffic for a given NPA/NXX code should be delivered for completion of calls. BellSouth contends that the determination of whether a given call is local or toll and thus what charges are appropriate is of serious concern.

Intermedia's Position

Intermedia contends that its ability to assign NPA/NXXs should not be subject to BellSouth's control. Intermedia wants to be able to assign NPA/NXXs freely within its calling areas and not be forced to mimic BellSouth's calling areas. Intermedia states that BellSouth wants Intermedia to make NPA/NXX assignments to make it easy for BellSouth to differentiate its own subscriber's calls. Tr. 99. In other words, BellSouth wants to restrict Intermedia's use of its NPA/NXXs in order to further its own objectives. Intermedia asserts that there is no law that restricts a competing carrier from assigning a NPA/NXX to a subscriber that is physically located outside the area with which BellSouth

typically associates the NPA/NXX. Intermedia claims that the flexibility to design its own local calling areas and to assign number resources to them as it see fit is crucial to Intermedia's ability to compete with innovative and distinct products.

Intermedia states that BellSouth's witness, Varner, admitted that BellSouth's foreign exchange offering has the very same effect as the conduct it seeks to restrict Intermedia from engaging in. Varner also admitted that BellSouth has ISP customers in Alabama that have appearances in a given rate center to be able to provide their customers the ability to make local calls to connect when that call would otherwise be considered a toll call. Tr. 520-521. In this instance a competing carrier would not be able to ascertain that its customers are calling a distant ISP because such calls would appear to be local calls to the competing carrier.

Intermedia states that the language proposed by BellSouth in the draft agreement restricts only Intermedia concerning the assignment of NPA/NXXs; BellSouth does not impose the same restrictions on itself.

Intermedia argues that the benefits of allowing Intermedia to assign its own NPA/NXXs include number conservation. Allowing Intermedia to assign its NPA/NXXS across multiple rate centers rather than by rate center could alleviate the problem of number exhaust. Tr. 927-928.

Discussion of Issue 26

BellSouth states that its major concern is to ensure that calls are routed correctly and that the appropriate charges are reflected for a call. According to BellSouth witness, Milner, BellSouth is not attempting to limit Intermedia's flexibility regarding the design or operation of its network, but BellSouth and all carriers must know of Intermedia's trunking plans in order that required routing instructions or translations can be installed to ensure that calls are directed to and from Intermedia's end user customers. Tr. 592-593. BellSouth witness, Varner, states that ILECs and state commissions have historically defined and placed in tariffs specific exchange rate centers throughout each LATA and state. Varner explains that rate centers are essential for determining whether a call will be local or toll. Also, rates centers are used by the industry as the basis for determining originating end user billing and cost recovery by the originating company. Varner states that state commissions rely on rate information to determine expanded local calling areas and associated rates. Varner states that assigning numbers by methods other than rate centers causes BellSouth and other local exchange carriers to lose valid toll and/or switched access revenues, to incur costs that are not recovered, and to inappropriately pay reciprocal compensation as if the traffic were indeed local. Tr. 99-101.

According to Intermedia, assigning numbers across rate centers not only allows Intermedia flexibility but also contributes to number conservation. Carl Jackson, testifying for Intermedia, stated that Intermedia will agree to reasonable requirements for interconnection in every LATA and that Intermedia will take responsibility to enter its NPA/NXX information into the Local Exchange Routing Guide. Tr. 888.

BellSouth has stated that its primary concern is to have information available in order to properly route and rate calls. Intermedia has stated that its main concern is flexibility in assigning numbers and that it will provide the proper information in order for BellSouth to rate and route calls. Thus, we believe that if Intermedia provides the appropriate information to other carriers to enable them to properly rate calls to Intermedia's numbers, there should be no prohibition against allowing Intermedia to assign numbers within a LATA.

Conclusion of Issue 26

Based upon the foregoing, the Arbitration Panel concludes that it is appropriate to allow the parties to establish their

own local calling areas as long as each party provides the proper information for the other party to rate and route calls to each other's numbers.

Issue 29 In the event Intermedia chooses multiple tandem access (MTA), must Intermedia establish points of interconnection (POI) at all BellSouth access tandems where Intermedia's NXXs are homed?

Issue 30 Should Intermedia be required to: (A) designate a home local tandem for each assigned NPA/NXX or (B) establish points of interconnection to BellSouth access tandems within the LATA on which Intermedia has NPA/NXX's homed?

BellSouth's Position

BellSouth states that its local tandems were created for efficient tandem switching of local traffic served by those tandems. By interconnecting to a BellSouth local tandem, Intermedia may deliver its local traffic to BellSouth end offices (and third party end offices) subtending that local tandem. If more than one BellSouth local tandem serves a particular BellSouth local calling area and Intermedia elects to interconnect at BellSouth's local tandem for Intermedia's local traffic, Intermedia must establish one or more of the BellSouth local tandems as a home local tandem for its NPA/NXXs and establish interconnection to the BellSouth local tandem or tandems on which BellSouth homes its NPA/NXX according to BellSouth. Tr. 619. However, Intermedia may elect to use the multiple tandem access (MTA) service option

BellSouth asserts that multiple tandem access, (MTA) ,is an option available to all CLECs including Intermedia. To ensure proper routing of calls, the CLEC must interconnect with BellSouth's network at each tandem access where the CLEC's NPA/NXX codes home according to BellSouth. NPA/NXX code homing arrangements are published in the Local Exchange Routing Guide, (LERG), so that all telecommunications carriers in the industry will know where to send calls and where the calls originate. According to BellSouth the MTA option obviates the need for a CLEC to establish interconnection trunking at access tandems where the CLEC has no NPA/NXX codes homing. Tr. 617.

BellSouth claims that it is not attempting to limit Intermedia's flexibility regarding its network or numbering scheme. However, BellSouth avers that all telecommunications carriers, including BellSouth, must know where Intermedia's NPA/NXX codes are homes. If not, translations and routing of calls will not be possible and calls will not be completed.

Intermedia's Position

Intermedia disagrees with BellSouth concerning the need for Intermedia to designate a home local tandem for each of Intermedia's NPA/NXXs, as well as, establish a point of interconnection at each and every tandem where its NPA/NXXs are homed. Intermedia wants to interconnect where it is efficient and economical to do so. Tr. 890. Intermedia believes that the requirement that BellSouth seeks to impose is inefficient and uneconomical.

Intermedia claims that the current arrangement between BellSouth and Intermedia attests to the fact that BellSouth's request is unnecessary. Tr. 675. Intermedia asserts that there is no evidence that the parties have had any problem routing and delivering traffic to each other before this language was conceived by BellSouth. Tr. 676. According to Intermedia, cross examination of Mr. Milner revealed that Mr. Milner was not aware of any changes in Intermedia's network which would require the imposition of new language in order to complete calls. Tr. 676-679. Consequently, the interconnection agreement between BellSouth and Intermedia need not specify that Intermedia should designate a local tandem for each NPA/NXX, and establish a point of interconnection at each and every tandem. Therefore Intermedia requests that this burdensome and one-sided language be stricken.. Intermedia states that requiring Intermedia to establish trunk groups to each and every access tandem where Intermedia has NPA/NXXs homed under the MTA option defeats the purpose of the MTA. Tr. 890. According to Intermedia, MTA is an option that would allow Intermedia to send traffic to and receive traffic from customers served by end offices which subtend BellSouth's tandems by connecting to one tandem or less than all of the tandems. The requirement that Intermedia establish interconnections to each and every tandem is contrary to the concept of MTA.

Intermedia contends that the Telecommunications Act of 1996 requires ILECS to allow a CLEC to interconnect at any technically feasible point. The Act did not compel a CLEC to interconnect at more than one point or allow ILECS to institute requirements that a CLEC pay more if it did not choose to interconnect at a point or points convenient to the ILEC.

Intermedia believes that the issue is whether BellSouth can require Intermedia to interconnect at multiple points to minimize the distances that calls would have to be hauled on BellSouth's network or whether once a call is on BellSouth's network, BellSouth must take the responsibility for hauling it to Intermedia's interconnection point without charging additional fees. Intermedia believes that the federal statute requires BellSouth to interconnect with Intermedia at points which Intermedia chooses. Intermedia avers that the current language proposed by BellSouth was not in the original agreement. Tr. 673. Further, Intermedia does not believe that the current language is required by any statute. According to Intermedia, BellSouth has not provided any reference to any statute that requires the language or conditions which BellSouth has included in the draft agreement. In addition, BellSouth admits that the type of interconnection BellSouth seeks is not technically necessary according to Intermedia; the parties can operate without it and have been doing so. Tr673-674.

Intermedia believes that BellSouth's intent is to require Intermedia to interconnect in a way that is most convenient to BellSouth. The alternative for Intermedia is to pay extra by electing to use multiple tandem access service. Tr. 674. Intermedia asserts that BellSouth's access tandems are connected to each other, and thus BellSouth can carry traffic from one access tandem to another. Intermedia believes that the real issue is BellSouth's attempt to extract extra compensation for hauling traffic between its tandems or to force Intermedia to configure its network in such a way that BellSouth will not have to haul traffic between its tandems even though this is not strictly necessary. According to Intermedia, either method imposes large additional costs on Intermedia. Intermedia believes that BellSouth's attempt is contrary to the simple language of the Telecom Act of 1996 and requests that the language in question be stricken from the parties' agreement.

Discussion of Issues 29 and 30

BellSouth indicates that homing arrangements require that a CLEC interconnect with BellSouth's network at each access tandem where the CLEC's NPA/NXX codes home. This ensures that calls are properly routed. An alternative to interconnecting at each access tandem is the multiple tandem access option. BellSouth states that this option alleviates the need for a CLEC to establish interconnection trunking access tandems where the CLEC has no NPA/NXX codes homing. Tr. 617. Intermedia counters that the issue is about BellSouth attempting to extract extra compensation for hauling traffic between its tandems; otherwise, BellSouth would require Intermedia to configure its network in such a way that BellSouth will not have to haul traffic between its tandems. Such a requirement would force large additional costs on Intermedia according to Intermedia.

BellSouth has stated that Intermedia has to either establish interconnection at each BellSouth access tandem to which

Intermedia's NPA/NXXs are homed or to use multiple tandem access service and interconnect at the BellSouth access tandem to which Intermedia has its NPA/NXXs homed. However, Intermedia must still establish interconnection at each BellSouth access tandem to which Intermedia has NPA/NXXs homed.

Intermedia argues that it should not have to interconnect with BellSouth at each access tandem to which it has NPA/NXXs homed. Intermedia argues that the Telecom Act of 1996 requires BellSouth to interconnect at any technically feasible point that Intermedia requests. However, the Act did not specify a minimum number of interconnection points. Intermedia's stance is to deliver traffic to BellSouth and to have BellSouth haul the traffic between BellSouth's access tandems.

BellSouth believes that Intermedia should have to interconnect to each access tandem to which Intermedia has NPA/NXXs homed thus requiring Intermedia to haul the traffic. However, BellSouth's MTA allows a CLEC to establish trunking to only one access tandem within a LATA. Thus, if Intermedia chooses the MTA option, it seems reasonable that Intermedia would home its NPA/NXXs codes to that access tandem. In this way Intermedia can still configure its network and assign its NXXs in the most efficient manner.

Conclusion of Issues 29 and 30

Based upon the foregoing, the Panel concludes that on an interim basis Intermedia should be required to establish a point of interconnection to each of BellSouth's access tandems within the LATA to which Intermedia's NPA/NXXs are homed. Intermedia may opt for multiple tandem access in order to allow Intermedia to interconnect with BellSouth at only one access tandem. In that instance, Intermedia would have its NPA/NXXs homed to that BellSouth access tandem. We believe that this issue is of such importance and complexity as to require a further study. Accordingly we recommend that the Commission conduct a generic hearing concerning this matter.

Issue 31 For purposes of compensation, how should intraLATA Toll Traffic be defined?

BellSouth's Position

BellSouth has proposed that intraLATA toll traffic be defined as any telephone call that is not local or switched access. BellSouth states that it does not propose to limit the type of toll traffic that Intermedia carries. Tr. 103. BellSouth asserts that this Commission should adopt BellSouth's proposed definition for intraLATA toll traffic.

Al Varner, testifying for BellSouth, stated that BellSouth's definition of intraLATA toll traffic was not intended to exclude circuit switched data traffic because this traffic is treated the same as voice traffic. However, BellSouth believes that it is appropriate to differentiate the treatment of packet switched data because the obligations are different. While BellSouth is obligated to interconnect its packet switching network with Intermedia's packet switching network, packet data is not subject to unbundling obligations of Section 251(c) according to Varner.

Varner explained that BellSouth has proposed to facilitate interconnection of the parties' packet switching networks by agreeing to treat all traffic (originating and terminating) in the LATA as local. However, BellSouth wants to make it clear that this proposal applies only to interconnection facilities and not to reciprocal compensation. Varner believes that Intermedia's position on this issue is that all data traffic within the LATA should be treated as local for reciprocal compensation purposes. However, if data traffic is considered non-local for reciprocal compensation purposes there is no obligation to pay compensation on such non-local traffic.

Intermedia's Position

Intermedia contends that BellSouth seeks to define intraLATA toll traffic in a manner which excludes messaging or data and only includes voice traffic. Intermedia claims that applicable law makes no distinction between voice and data for interconnection purposes. Intermedia quotes the FCC's Order regarding Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Paragraph 47. In that paragraph, the FCC stated that for the purposes of interconnection obligations of carriers the Act does not draw a regulatory distinction between voice and data services.

Intermedia elaborates that the FCC made it clear that intraLATA toll traffic includes both voice and data traffic and no legal distinction can be made between them. Intermedia believes that BellSouth's intent with its definition of intraLATA toll traffic is to exclude data traffic. Consequently Intermedia urges this Commission to reject BellSouth's definition of intraLATA toll traffic and adopt Intermedia's definition. Intermedia's definition of intraLATA toll traffic is all basic intraLATA message services other than local traffic. Carl Jackson, testifying for Intermedia explained that Intermedia's definition would ensure that toll traffic cannot be limited to traffic which uses one type of equipment, such as analog circuit switches, but will include non-local traffic carried over facilities that employ technologies such as packet switching. Tr. 891.

Discussion of Issue 31

In 47 CFR Section 51.5, the FCC defines telephone toll service 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. And in its August 8, 1998, Advanced Services Order, the FCC recognized that the pro-competitive provisions of the Telecommunications Act of 1996 are technologically neutral and thus apply equally to advanced services and to circuit switched voice services. In addition, its First Report and Order and Further Notice of Proposed Rulemaking regarding Deployment of Wireline Services in Advanced Telecommunications Capability, CC Docket 98-147, adopted March 8, 1999, the FCC concluded that incumbent LECs are subject to Section 251(c) in their provision of advanced services. The FCC specifically stated that incumbent LECs are subject to the interconnection obligations of Section 251 (a) and 251(c)(2) with respect to both their circuit switched and packet switched networks. (See paragraph 15). In its Third Report and Order and Fourth Further Notice of Proposed Rulemaking, in the Matter of Implementation of Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, adopted September 15, 1999, the FCC limited the unbundling requirements for packet switching as well as exempting incumbent LECs from unbundling local circuit switching in certain circumstances in the top 50 MSAs in the country. See Paragraphs 281, 285, and 313. In Paragraph 317, the FCC noted that its concern about the lack of deployment of advanced services in rural areas and stated that it will carefully monitor the deployment of broadband services to ensure that the objectives of Section706 and the Act are being met. Thus, we are reluctant to agree with BellSouth witness, Varner, that BellSouth has no obligations regarding packet switched data traffic. Although BellSouth's current obligations are limited, this could change in the future especially if the FCC determines that incumbent LECs are not deploying advanced services in a timely manner either in rural areas or urban areas.

Intermedia's definition of IntraLATA toll traffic simply includes all traffic within the LATA which is not local traffic. BellSouth takes exception to this definition because it includes packet switched data traffic. As we have noted, BellSouth's obligations for unbundling packet switching are different from those for circuit switching. However, BellSouth has not provided legitimate reasons to define intraLATA toll traffic in a way to exclude packet switched data traffic. Intermedia's definition more closely fits the FCC's definition of toll service. We believe that Intermedia's definition for intraLATA traffic should be adopted. With regard to packet switched traffic the parties should work

toward determination of a method of compensation for handling of such traffic.

Conclusion of Issue 31

Based upon the foregoing, the Panel concludes that the Commission should accept Intermedia's definition of intraLATA toll traffic. The Panels also recommends that the parties continue to discuss the issue of compensation for packet switched data traffic.

Issue 32 How Should Switched Access Traffic be defined?

BellSouth's Position

BellSouth proposes to define switched access traffic as it is defined in the BellSouth Access Tariff with the inclusion of Internet Protocol Telephony. On cross examination, Mr. Varner stated that switched access service provides a two-point electrical communications path between the interexchange carrier terminal location and telephone exchange service location. Mr. Varner explained that part of the definition provides for the use of common terminating, switching, and trunking facilities. Varner elaborated that switched access traffic is provided over switched access service. Tr. 533-535. Upon further cross examination, Mr. Varner explained that BellSouth was not modifying its definition of switched access traffic but instead was asking for acknowledgment that IP Telephony was included in switched access traffic.

BellSouth contends that its switched access service tariff is sufficient to describe and define switched access traffic; thus, there is no need for an additional definition in the interconnection agreement. According to BellSouth if any definition switched access traffic is included in the interconnection agreement, it is important to specify IP telephony in the definition to avoid confusion due to the increasing use of IP technology mixed with traditional circuit switching analog and digital technology to transport long distance telephone calls. BellSouth witness, Varner, believes that is important to specify that such traffic is subject to switched access charges just as other long distance traffic would be. Tr. 105. BellSouth maintains that it seeks only to address long distance telecommunications transmitted via IP telephony because such traffic is subject to switched access charges. BellSouth states that it would be agreeable to the following language:

> Additionally long distance telecommunications transmitted over IP telephony will be considered switched access traffic.

BellSouth believes that the above language will alleviate any concerns that BellSouth sought to include local traffic transmitted over IP telephony as switched access traffic. BellSouth noted the difference of IP (Internet Protocol) telephony from ISP (Internet Service Provider) traffic. IP telephony is a mode or method of completing a telephone call. This does not mean that the service necessarily uses the World Wide Web but refers to a set of technical operating specifications for managing and interconnecting networks. Internet protocol is the language that gateways use to talk to each other. It has nothing to do with the transmission medium (wire, fiber, microwave, etc.) that carries the data packets between gateways, but concerns gateways or switches that are found on either end of that medium. Tr. 105.

According to BellSouth, unlike ISP-bound traffic, IP telephony is not exempt from the application of switched access

charges. Tr. 111. BellSouth's position is that switched access charges, not reciprocal compensation, apply to phone-to-phone long distance calls that are transmitted using IP telephony because such calls go to an IXC just like any other long distance calls. BellSouth declares that the FCC has not made any rulings to exclude IP telephony traffic, as opposed to ISP-bound traffic from the application of switched access charges. Tr. 111. BellSouth states that if the Commission determines that it is necessary to address switched access in the local interconnection agreement, BellSouth requests that its proposed language be adopted.

Intermedia's Position

Intermedia proposes the following definition for switched access traffic:

> Switched access traffic is defined as telephone calls requiring local transmission or switching services for the purpose of the origination or transmission of telephone toll service. Switched access traffic includes the following types of traffic: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar switched exchange access services.

Intermedia contends that BellSouth's definition for switched access traffic is unworkable. It refers to BellSouth's Access Tariff; however, the definition cannot be found in BellSouth's Switched Access Tariff according to Intermedia. When questioned about the definition, Mr. Varner stated that paragraph E.6.1 of the Access Tariff defines the term, Switched Access Traffic. Tr. 529-530. However, Intermedia points out that the term defined in the tariff is, in fact, BellSouth's switched access service offering. Tr. 534-535.

In addition, BellSouth wants to add the additional concept of IP telephony, which does not appear anywhere in the BellSouth Switched Access Tariff according to Intermedia. Intermedia claims that the FCC has not classified IP telephony as other than information services. Intermedia refers to the FCC's April 10, 1998, Report to Congress [see Federal State Joint Board On Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998)] in which the FCC suggests that certain phone to phone IP telephony lacks the characteristics that would render them information services, the FCC did not believe that it was appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings.

Intermedia asserts that BellSouth's access tariff does not address IP telephony in the context of switched access traffic or in any other context. Tr. 547-549. Also, FCC rules do not mention anything about linking IP telephony to switched access traffic or service. Id. Intermedia believes that the status of IP telephony is a matter of exclusive jurisdiction of the FCC and as such has not been resolved by that Commission (Tr. 892). Intermedia believes that it is inappropriate for BellSouth to attempt to compel Intermedia to include IP telephony in the definition of switched access traffic when such a determination has not been made by the FCC. Accordingly, Intermedia requests that the Commission reject BellSouth's definition of switched access traffic and require the adoption of Intermedia's definition.

Discussion of Issue 32

BellSouth's proposed definition of switched access traffic refers to BellSouth's Access Tariff which defines switched access service. According to that tariff, Switched Access Service provides a two-point electrical communications path between the interexchange carrier terminal location and telephone exchange service location. BellSouth proposes to add a sentence that states that long distance telecommunications transmitted over IP telephony is considered switched access traffic. On cross examination by Intermedia, Mr. Varner stated that in Part 69 of the FCC rules, the FCC defined access service as service which includes services and facilities provided for the origination or termination of any interstate or foreign telecommunications. 47 C. F. R. 69.

Intermedia objects to referencing BellSouth's Access Tariff when that tariff does not include a definition of switched access traffic but instead defines switched access service. In addition, Intermedia states that the FCC has not yet ruled on the classification of IP telephony.

Intermedia proposes a definition which states that switched access traffic is defined as telephone calls requiring local transmission or switching services for the purpose of the origination or transmission of telephone toll service. Switched access traffic includes the following types of traffic: Feature Group A, Feature Group B, Feature Group D, 800/888 access and 900 access, and their successors or similar switched exchange access services. We believe that Intermedia's definition of switched access service is acceptable. We do not believe that we should address IP telephony at this time because the FCC has not addressed the classification of such service.

Conclusion of Issue 32

Based upon the foregoing, the Arbitration Panel concludes that Intermedia's definition of switched access traffic should be included in the agreement between BellSouth and Intermedia. Further, we recommend that this Commission decline to require a definition of switched access which specifically includes Internet Protocol Telephony at this time.

Issue 33 Should BellSouth and Intermedia be liable to each other for lost-switched revenues due to lost or damaged billing data?

BellSouth's Position

BellSouth believes that this issue is not appropriate for arbitration because it deals with switched access revenues instead of local interconnection terms and conditions. However, BellSouth is willing to accept Intermedia's proposed language except for the cap on the liabilities of the parties. Tr. 111-112.

BellSouth states that this issue is considered only for cooperative efforts by the parties to reconstruct lost or damaged data fails. The issue is important to BellSouth because BellSouth's switched access revenues are substantial. Tr. 112. BellSouth asserts that it must rely on accurate information from CLECs such as Intermedia to accurately bill IXCs. BellSouth objects to Intermedia's proposed cap of $10,000 because it bears no relationship to the switched access revenues at risk according to BellSouth.

Intermedia's Position

Intermedia proposes a reciprocally applicable provision which institutes sound practices for addressing lost and damaged billing data. This provision holds the party responsible for the loss financially responsible. Intermedia also proposes a cap on reimbursement of $10,000 per episode. Intermedia contends that this should address any fears of potentially unlimited liability. Intermedia claims that it is reasonable for both parties to accept their financial responsibility to each other for revenue losses caused by damaged or lost billing data.

Discussion of Issue 33

Intermedia's proposed language reads as follows:

> In the event of a loss of data, both Parties shall cooperate to reconstruct the lost data and shall make their best efforts to do so within 48 hours. If such reconstruction is not possible, the Parties shall use a reasonable estimate of the lost data based on twelve (12) months of prior usage data, provided that if twelve (12) months of prior usage data is not available, the Parties shall base the estimate on as much prior usage data that is available; and further provided, however, that if reconstruction is required prior to the availability of at least three (3) months of prior usage data, the Parties shall defer such reconstruction until three (3) months of prior usage data is available. If the estimated billing is not accepted for payment by the affected Access Services Customer(s), the responsible Party shall be liable to the other Party for any resulting lost revenue up to a maximum of $10,000 in the aggregate in any one (1) month period. Lost revenue may be a combination of revenues that could not be billed to the End Users and associated Access Service revenues. Lost revenue will be calculated by subtracting the amount actually paid by the affected Access Services Customer(s) from the estimated billing derived pursuant to the process set forth in this section. See Section 6.8.6 of the Proposed Interconnection Agreement, page 18.

BellSouth's proposed Interconnection Agreement also contains a liability clause in Section 6.8.3. This clause assigns liability to the party that is responsible for the lost data. The liability is equal in amount to the unbillable or uncollectible revenues. See Proposed Interconnection Agreement Section 6.8.3, page 18. We agree with BellSouth that there is no basis established for Intermedia's $10,000 cap. We note that the language proposed by Intermedia contains a mechanism to resolve disputes in the event of lost or damaged billing data. Thus, it appears that disputes should be settled without liability to the party responsible for the lost or damaged data. BellSouth has expressed its willingness to accept Intermedia's proposed language with the exception of the language regarding a liability cap. Consequently, we believe that the liability cap should be removed from the language. If the parties are fully satisfied with the specified mechanism, reference to any liability may be removed from this section.

Conclusion of Issue 33

Based on the foregoing, we conclude that the Commission should adopt Intermedia's proposed language regarding lost or damaged billing data with the exception of the language regarding a liability cap.

Issue 37 Should all framed packet data transported within a virtual circuit that originate and terminate within a LATA be classified as local traffic?

The BellSouth Position

BellSouth has proposed the following to Intermedia:

> Frame Relay frame packet data is transported within Virtual Circuits ("VC"). If all the data packets transported within a VC originate and terminate within a LATA, then for purposes of establishing interconnections between the Parties, such traffic will be treated the same as local circuit switched traffic ("Local VC"). This traffic will not be treated as Local Traffic for any other purpose under this Agreement, including but not limited to reciprocal compensation. Tr. 113.

BellSouth claims that the intent of this language is to facilitate the process of interconnecting the frame relay networks

of BellSouth and Intermedia. BellSouth states that it believes that Intermedia is attempting to extend this offer to include payment of reciprocal compensation for non-local traffic. BellSouth notes that there is no obligation to pay reciprocal compensation for non-local traffic. Tr. 114.

Intermedia's Position

Intermedia believes that frame relay data packets constitute local traffic and hence should be subject to some form of reciprocal compensation. Intermedia states that BellSouth concedes that to the extent that frame relay traffic is local, it is subject to reciprocal compensation obligations. Tr. 564-565. Intermedia contends that notwithstanding the fact that frame relay traffic is subject to reciprocal compensation, BellSouth has not established a mechanism for paying reciprocal compensation. Instead, BellSouth has sought to define away the problem by treating frame relay as local only for the purposes of interconnection according to Intermedia. Intermedia indicates that BellSouth perceives that computing reciprocal compensation payments would be difficult because there are no minutes of use.

Intermedia also recognizes that it has not proposed a mechanism to compute reciprocal compensation for the exchange of local frame relay traffic. Nevertheless, the record reflects the parties' agreement that local frame relay traffic is subject to some form of reciprocal compensation according to Intermedia. Intermedia asserts that in the absence of an acceptable mechanism, the Commission should require the parties to submit either a joint proposal or an individual best offer for reciprocal compensation of local frame relay traffic.

Discussion of Issue 37

The parties appear to be in agreement that local frame relay traffic is subject to some form of reciprocal compensation. Al Varner, testifying for BellSouth admitted that if frame relay traffic originates and terminates with a local calling area, it is treated as local traffic. Mr. Varner also admitted that reciprocal compensation would be due on that traffic regardless of whether it s voice or data traffic. However, further cross examination revealed that the North Carolina Commission instructed the parties to determine some mechanism or agreement for measuring frame relay traffic and the method of compensation. Tr. 565-566. Mr. Varner elaborated that the traditional reciprocal compensation mechanisms will not work for packet data because packet networks do not measure minutes of use, the mechanism for reciprocal compensation in circuit switched networks. Thus, the remaining task for the parties is to determine a mechanism for reciprocal compensation for framed packet data traffic.

We note that we have declined to classify frame relay traffic in any way. We believe that the important issue is compensation for such traffic and instruct the parties to propose a mechanism for that compensation.

Conclusion of Issue 37

Based upon the foregoing, the Arbitration Panel concludes that this Commission should instruct BellSouth and Intermedia to submit a proposal either jointly or individually for reciprocal compensation of local frame relay traffic.

Issue 48 Should the Parties adopt the performance measures, standards, and penalties imposed by the Texas Utility Commission on Southwestern Bell Telephone?

BellSouth's Position

BellSouth claims that it already has an extensive set of performance measurements (Service Quality Measurements or SQMs). BellSouth states that it has spent over two years establishing its performance measurements with input from the CLEC community as well as the FCC and several state commissions. BellSouth contends in spite of Intermedia's objections that BellSouth's SQMs are inadequate as compared to the Texas measurement plan, Intermedia has not compared the BellSouth and Texas measurements. Tr. 1151. Mr. Coon, testifying for BellSouth, has asserted that there are very few differences between the Texas plan and BellSouth's sets of measurements. Tr. 794. BellSouth furnishes this Commission with monthly reports of BellSouth's SQM results. According to BellSouth, there is no need to change the measures at this time. Thus, BellSouth urges the Commission to adopt BellSouth's SQMs here.

BellSouth recognizes the FCC's preference for self-effectuating enforcement mechanisms. Tr. 119. However, BellSouth believes that such enforcement mechanisms are appropriate in connection with obtaining Section 271 relief and not before. BellSouth has prepared a Voluntary Self-Effectuating Enforcement Mechanism (VSEEM) that has been adopted into numerous CLEC agreements and adequately addresses Intermedia's concerns according to BellSouth. Tr. 120. BellSouth submits that the Commission should adopt those provisions contained in BellSouth Exhibit AJV-7, (Tr. 173-341), the VSEEM III, rather than adopting the Texas plan advocated by Intermedia BellSouth contends that this Commission does not have the authority to require the parties to enter into a penalty provision. According to BellSouth, the Alabama Legislature has not conveyed this power to the Commission; thus this issue should be dismissed from consideration in this proceeding.

Intermedia's Position

Intermedia states that it has asked this Commission to consider the Texas Performance Measures Plan in whole or in part for the purpose of ensuring that BellSouth functions efficiently and in good faith in its transactions with CLECs. Intermedia lists three things that it would like this Commission to consider with respect to performance measures: a) self-effectuating mechanisms of enforcement, b) review and choose the best ideas of the Tennessee Regulatory Authority regarding these measures, and c) the lack of any performance measures relating directly to the provisioning of frame relay interconnection trunks or other elements related to frame relay. Intermedia believes that no set of measurements will be meaningful without a self-effectuating mechanism of enforcement that includes penalties that are sufficiently stringent to give BellSouth incentive to refrain from anti-competitive delays, and unacceptable performance. Intermedia argues that BellSouth's enforcement solution, which involves an expedited complaint process before this Commission, is not an effective approach because this approach will clog the Commission's dockets with many issues that could be resolved more simply by built-in enforcement mechanisms. Intermedia thinks that the approach adopted by the Tennessee Regulatory authority of selecting the best ideas from competing sources and synthesizing a final result provides a good basis for this Commission to address this issue. Intermedia also believes that frame relay provisioning has been ignored when performance standards have been reviewed in the past. Since these types of data offerings are the wave of the future, the importance of service specific performance measures cannot be overestimated according to Intermedia.

Discussion of Issue 48

BellSouth contends that this Commission does not have the authority to prescribe penalties regarding performance measures. BellSouth also argues that the current set of performance measures and standards are sufficient to determine BellSouth's compliance with Section 271.

Intermedia argues that self-effectuating penalties are necessary to ensure that BellSouth provides nondiscriminatory access to UNE's. Intermedia also asserts that frame relay provisioning has been ignored in the determination of specific

performance measures.

Under Section 271 of the Telecommunications Act of 1996, this Commission has the obligation to review a list of 14 checkpoints in order to determine whether BellSouth has compliance with the requirements of Section 271. Various state commissions are considering performance measures and guarantees. We believe that this Commission should open a docket to determine what performance measures should be adopted and determine whether guarantees should be incorporated.

Conclusion of Issue 48

Based upon the foregoing, the Panel concludes that the Commission should open a docket to determine what performance measures should be adopted and determine whether performance guarantees should also be adopted.

Respectfully submitted this 2nd day of March, 2001.

The Intermedia Arbitration Panel

_____

Judge Carl L. Evans,

_____

David Peeler, Utilities Auditor III

_____

Larry S. Smith, Utilities Rate Supervisor

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary

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Decision No. C00-858

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00B-103T

IN THE MATTER OF PETITION BY ICG TELECOM GROUP, INC., FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC., PURSUANT TO § 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996.

INITIAL COMMISSION DECISION

Mailed Date: August 7, 2000
Adopted Date: August 1, 2000

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APPEARANCES:

Craig D. Joyce, Esq., Denver, Colorado;

Albert H. Kramer, Esq., and Jacob S. Farber, Esq., Washington, D.C., for ICG Telecom Group, Inc.; and

John L. Munn, Esq., and Richard L. Corbetta, Esq., Denver, Colorado, for U S WEST Communications, Inc.

I. BY THE COMMISSION

A. Statement of the Case

1. On February 28, 2000, ICG Telecom Group, Inc. ("ICG"), filed a Petition for Arbitration of an Interconnection Agreement with U S WEST Communications, Inc. ("U S WEST"). U S

WEST changed its name to Qwest Corporation ("Qwest") after the filing of this petition.

2. On March 22, 2000, ICG filed a Supplement to its Petition for Arbitration.

3. On March 24, 2000, Qwest filed a Response to the Petition for Arbitration.

4. ICG requests that we arbitrate unresolved issues pursuant to § 252(b) of the Telecommunications Act of 1996 ("Act"), 47 U.S.C. § 252(b).

5. By Decision No. C00-343, mailed on April 3, 2000, we referred the matter to an Administrative Law Judge ("ALJ") for hearing. Because of the time constraints contained in the Act, pursuant to the provisions of § 40-6-109(6), C.R.S., we find that due and timely execution of our functions requires that the recommended decision of the ALJ be omitted, and that we render an initial decision.

6. By Decision No. R00-399-I, (April 18, 2000) a prehearing conference was scheduled for April 28, 2000. At the prehearing conference, a procedural schedule and hearing dates of June 26 through 30, 2000 were established. The motion of ICG to admit attorneys Albert H. Kramer, Esq., and Jeffrey J. Binder, Esq., Washington, D.C. to practice before the Commission in this docket was granted. In addition, a joint motion filed on April 27, 2000 by ICG and Qwest for an extension of time to

conclude arbitration proceedings was granted. The operative date of June 21 for a decision on the disputed issues on the Petition for Arbitration was extended for a period of 45 days until August 7, 2000. ICG and Qwest expressly waived the nine-month arbitration time frame contained in § 252(b)(4)(C) of the Act and expressly waived the right to petition the Federal Communications Commission ("FCC") to invoke jurisdiction pursuant to § 252(e)(5) of the Act.[1]

7. On May 22, 2000, ICG and Qwest filed a joint motion to further extend by 30 days the operative date for the Commission to resolve the issues contained in ICG's Petition for Arbitration. The ALJ denied the joint motion. (Decision No. R00-567-I, May 25, 2000).

8. On May 26, 2000, ICG filed an Unopposed Motion for Reconsideration of Interim Order No. R00-567-I. In Interim Order No. R00-639-I that motion was denied.

9. The hearing commenced as scheduled on June 26, 2000. ICG moved for the admission of Jacob S. Farber, Esquire, Washington, D.C. The motion was granted. As an additional preliminary matter, Qwest's motion for directed verdict on certain issues presented for arbitration was addressed. The ALJ denied the motion for directed verdict.

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1. Decision No. R00-487-I mailed on May 10, 2000.

10. Witnesses offered testimony and Exhibits 1 through 41 were marked for identification and admitted into evidence. Administrative notice was taken of decisions from Commission Docket No. 96S-331T. In addition, administrative notice was taken of Decision No. C00-685 (Exhibit 18), and Exhibit 21. At the conclusion of ICG's case, Qwest renewed its motion for directed verdict. The ALJ denied the motion. At the conclusion of the hearing, the ALJ directed the parties to file statements of position/briefs on or before July 7, 2000. Counsel for the parties requested that the prefiled testimony of certain witnesses and portions of prefiled testimony of other witnesses that were not introduced as part of the hearing record be withdrawn from the official files of the Commission. It was ordered that only the testimony of record at the hearing would be considered.

II. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION

Under the Act, parties seeking to enter into an interconnection agreement are required to enter into negotiations for voluntary resolution of interconnection issues, bringing the matter before state commissions for arbitration. ICG and Qwest entered into extensive negotiations this arbitration proceeding and succeeded in resolving many of the outstanding issues. Eighteen issues remained to be arbitrated by

the Commission. The issues presented for arbitration are contained in the Issues Matrix attached to the post-hearing briefs of Qwest and ICG.

In approaching an arbitration, the Commission has two goals. First, the Commission seeks to replicate the agreement the parties would reach in a competitive market. Second, the Commission seeks to arbitrate an agreement consistent with § 251 of the Act. Applying these criteria, the Commission will order the following resolution to the issues in dispute:

A. Issues 1 - (A)2.2, 2 - (A)2.44, and 18 - (C)3.1: Whether Voice Over Internet Protocol Is Included or Excluded From Switched Access

1. Both ICG and Qwest agree on proposed language for interconnection agreement sections (A)2.2, (A)2.44, and (C)3.1. Qwest proposed additional language expanding switched access to apply to phone voice interexchange traffic that is transmitted over a carrier's packet switched network using protocols such as transmission control protocol and internet protocol ("TCP/IP").

2. ICG asserts that voice over internet protocol ("VoIP") is part of a hybrid service, a service combining message-switching capability with data processing. The FCC considers a hybrid service to be an information service. Switched access charges do not apply to information service under the enhanced service provider ("ESP") exemption.

3. Qwest argues that VoIP is a telecommunications service because it does not provide additional, different or restructured information to the subscriber. Switched access charges apply to telecommunications service.

4. Both parties offer a considerable amount of testimony about the classification, telecommunications or information service, of VoIP. The import of the respective classifications for VoIP is that as a telecommunications service, switched access charges would apply; as an information service, the charges would not apply. Based on testimony offered in this docket, however, we do not need to classify VoIP to determine if VoIP uses switched access services.

5. Qwest witnesses McDaniel and Craig, and ICG witness Gillan, testified how VoIP works: An end-user dials a local telephone number to gain access to the gateway of a private network; the end-user responds to the prompts of the gateway to enter the telephone number of the party he wishes to call; the private network then delivers the call to the terminating network.

6. A toll call works as follows: The end-user dials the long distance telephone number of the party he wishes to call; the incumbent local exchange carrier's("ILEC") network uses switched access (switch and transport functions) to hand

the call off to the end-user's IXC; the IXC's network then delivers the call to the terminating network.

7. ICG's VoIP offering does not use Qwest's network in the same manner as calls for which switched access charges apply. When switched access is used, Qwest provides routing and switching from the end-user at the originating end to the IXC, and routing and switching from the IXC to the called party at the receiving end. If both the originating end and receiving end are within the same LATA, Qwest also provides the switched access transmission path. Switched access charges are applied to recover these costs of routing, switching, and the transmission path. In contrast, with ICG's VoIP, ICG's gateway and ICG's IP network are used to deliver the call from the end-user at the originating end to the called party at the receiving-end. VoIP does not use Qwest's routing, switching, and transmission path services. Because the functionality and network use for VoIP is different, it should not be subject to switched access charges. We reject Qwest's proposal to subject phone voice interexchange traffic transmitted over a carrier's packet switched network to switched access charges.

8. ICG's VoIP service does not constitute toll-bridging that the Commission has disapproved of in past cases. *See, e.g.*, El Paso County Tel. Co. v. Voice Networks, Inc., Docket No. 99K-335T, Decision No. C00-760 (July 11, 2000);

Avicomm, Inc. v. PUC, 955 P. 2d 1023 (Colo. 1998). First, in providing its VoIP product ICG is not using Qwest's local network in the same manner as an interexchange carrier would in providing toll calling. ICG provides a substantial portion of the facilities, including transmission and transport, used in offering its VoIP product. Second, the toll-bridging disapproved of by the Commission in the past involves the use of equipment and the local exchange carrier's network to forward a call across local calling areas, primarily for the purpose of avoiding access charges. Here, in contrast, the primary purpose of ICG's VoIP product is neither the avoidance of access charges, nor, from end-users perspective, the avoidance of toll charges.

9. To say that ICG's VoIP offering is not subject to switched access charges is not to say that an interconnection agreement reached in a competitive market would provide for no compensation to Qwest for VoIP's use of its network. To the contrary, a freely negotiated agreement in a competitive market would likely provide for compensation by ICG to Qwest for the actual cost VoIP imposed on the Qwest network. Of course, transaction costs and information costs would certainly affect this rate of compensation, as well. All that said, the Commission has no record on that and is presented with a binary choice -- switched access charges apply to VoIP, or not.

Section 252(b)(4) of the Act limits our consideration to the issues presented in the petition and response. Based on that record, we believe that not subjecting VoIP to switched access charges better replicates the agreement that would be reached in a competitive marketplace and better satisfies § 251 of the Act, than the alternative.

10. We reject Qwest's proposed additional language. The interconnection agreement shall include the language agreed on by Qwest and ICG for sections (A)2.2, (A)2.44, and (C)3.1.

B. Issue 6 - (A)3.24: Technical Publications and Procedural Changes

1. Both ICG and Qwest agree on proposed language for section (A)3.24. ICG proposed additional language that would require Qwest to provide 90 days notice to ICG before making changes implementing revisions or updates to technical publications. ICG also proposes language to allow ICG to invoke dispute resolution if ICG does not agree with the implementation changes Qwest proposes. ICG offered no testimony to support its additional language.

2. Qwest is concerned that ICG's proposed language would prevent revisions and updates to technical publications by freezing versions initially in effect for the entire term of ICG's interconnection agreement. Qwest argues that it might not be able to comply with ICG's proposal because Qwest would make

changes to implement revisions and updates to technical publications for other CLECs. These revisions could result in changes to Qwest's facilities and operations. In this event, it would not be possible to meet the requirements of previous versions of technical publications.

3. Although ICG did not file testimony in support of its proposed language, we find notification to be reasonable if changes are required to implement revisions or updates to technical publications. We do not find ICG's proposed 90 day notice requirement to be reasonable. A 90 day notice requirement could unreasonably delay availability of system improvements or technology advancements to Colorado customers. We believe a 30 day notice requirement is more reasonable. We reject ICG's proposed dispute resolution as unnecessary.

4. Section (A)3.24 of the interconnection agreement shall include the proposed language ICG and Qwest agree on. In addition, language shall be included in section (A)3.24 requiring Qwest to provide 30 days notice to ICG prior to making a change that implements revisions or updates to technical publications.

C. Issue 10 - (C)2.2.8.2: Local Service Interconnection (LIS) Forecasting

1. ICG and Qwest agree on language for section (C)2.2.8.2 requiring joint planning and the exchange of LIS

trunking forecast information. ICG proposes additional language that would require Qwest to provide quarterly to ICG a twelve month forecast of the availability, projected usage, and proposed expansion of Qwest facilities. ICG offered no testimony in support of its proposed additional language.

2. Qwest replied that the release of this data to ICG is appropriate. The information ICG wants includes competitively sensitive, confidential information for other CLECs.

3. We reject ICG's proposed additional language. ICG offers nothing in support of its proposal which, if adopted, would burden Qwest with providing additional information on a quarterly basis. The interconnection agreement section (C)2.2.8.2 shall only include the proposed language ICG and Qwest agree on.

D. Issue 11 - (C)2.2.8.4: Changing Previously Submitted Forecasts

1. Qwest and ICG agree on the proposed language for issue 11[2] except for Qwest's proposed additional language which would not allow ICG to place orders for seven months after submission of a forecast. Qwest indicates it takes seven months or more to construct facilities after a forecast is submitted.

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[2] ICG's issues matrix contains proposed additional language for issue 11. We believe the language should have been placed on the matrix under issue 12, not 11, it concerns binding forecasts.

ICG did not file testimony opposing Qwest's proposed additional language.

2. Qwest's proposed additional language literally requires a seven month waiting period to place orders against submitted forecasts. We find a disconnection between Qwest's proposed additional language and Qwest witness Malone's testimony indicating that orders could be placed immediately after a forecast is submitted, with the condition that those orders may not be completed for seven months or more *if facilities have to be constructed.*

3. Qwest's proposed additional language does not capture Qwest's intent. There is agreed upon language, that states Qwest will have one month after receipt of a forecast to determine network needs and six months or more will be required to complete network build. This language appears to match Qwest's testimony on this issue. We reject Qwest's proposed additional language because it is contrary to the testimony offered in support of it. The interconnection agreement shall only include the proposed language ICG and Qwest agree on for issue 11.

E. Issue 12 - (C)2.2.8.4: Binding Forecasts

1. ICG proposes additional language for section (C)2.2.8.4 that would allow ICG to request Qwest to enter into binding forecasts with ICG for the purchase (by ICG) and

provision (by Qwest) of services and facilities. ICG's language further proposes a method to mitigate any capacity shortfalls. ICG presents no testimony in support of its proposal.

2. Qwest opposes a binding forecast, arguing it is unworkable. Qwest states that it must accommodate the needs of many carriers and, thus, must maintain control over the forecasting process. Qwest contends that, if the proposed language of ICG were adopted it would result in overbuilding of capacity and impair Qwest's ability to manage the planning of its network.

3. ICG has not indicated its forecasted needs are not being met by the process Qwest currently uses. ICG's additional proposed language will not be included in the interconnection agreement section (C)2.2.8.4.

F. Issue 13 - (C)2.2.8.13.1: Reciprocal Forecast Obligations

1. ICG proposes language to make forecasts for interconnection trunks reciprocal requiring Qwest to provide forecasts to ICG. ICG has not presented any testimony in support of its reciprocal forecasting proposal.

2. Qwest points out that ICG does not have an obligation to provide LIS trunks, unbundled elements, or collocation to Qwest. There is no justification for reciprocity here.

3. ICG receives information on Qwest's plans for construction during joint planning meetings. ICG has not indicated Qwest's forecasting process has not met its needs. The interconnection agreement shall not include a reciprocal forecast requirement. It will include Qwest's proposed language.

G. Issue 15 - (C)2.3.4.1.3: Reciprocal Compensation for Internet Related Traffic

1. This issue involving reciprocal compensation for Internet Service Provider ("ISP")-bound traffic was a major issue in dispute between ICG and Qwest. ICG requests compensation from Qwest for-ISP bound calls made by Qwest customers that terminate on ICG's network. The calls are bound for Internet providers who are ISP customers of ICG.

Controlling Law

2. ICG first argues that federal law requires reciprocal compensation for ISP traffic. In particular, ICG asserts that the court in *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), determined that Internet traffic is telephone exchange service. According to ICG, § 251(b)(5) of the Act and FCC implementing rules mandate reciprocal compensation for all traffic constituting telephone exchange service. ICG further suggests that *Bell Atlantic* establishes that calls to ISP's terminate at the ISP under the

controlling FCC regulation 47 C.F.R. § 51.701(d).[3] If the calls terminate at the ISP, federal law requires a reciprocal compensation arrangement for ISP-bound calls. Finally, ICG argues that a bill and keep compensation arrangement would be unlawful in this case. 47 C.F.R. § 57.713(b) authorizes bill and keep only where traffic is "roughly balanced." Here, the record demonstrates that ISP traffic between ICG and Qwest is not roughly balanced. Therefore, ICG contends, the Commission cannot approve bill and keep as the intercarrier compensation arrangement. We disagree with these arguments.

3. As we held in Decision Nos. C00-479 and C00-685, the § 252 arbitration between Sprint Communications and U S WEST, currently effective federal law grants state commissions, in § 252 proceedings, the discretion to adopt or *not adopt* reciprocal compensation for ISP-bound traffic. In the present case, ICG reads too much into the *Bell Atlantic* decision when it reasons that the court, in effect, mandated reciprocal compensation. *Bell Atlantic* vacated the FCC's holding that ISP traffic is not local in nature and, consequently, not subject to reciprocal compensation under § 251(b)(5). While the court may have suggested that Internet calls *appear* to be exchange service

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[3] ICG also cites *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475 (5th Cir. 2000), as establishing that Internet calls terminate at the ISP for purposes of determining whether reciprocal compensation is appropriate for this traffic.

and *appear* to terminate at the ISP, it made no such rulings that would bind state commissions in § 252 proceedings. Instead, the court remanded the matter to the FCC for further "explanation" why Internet calls are not properly seen as terminating at the ISP, and why such traffic is not regarded as exchange service. *Bell Atlantic*, at 9. Notably, the court did not disturb the FCC's holding in the Declaratory Ruling[4] that state commissions have the discretion to determine the intercarrier compensation mechanism for ISP traffic in § 252 proceedings. As part of that discretion, the FCC ruled, state commissions "are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism." Declaratory Ruling, ¶ 26. This directive from the FCC is still effective, notwithstanding the *Bell Atlantic* decision, and, as such, we are not compelled to adopt reciprocal compensation for ISP traffic.

4. As for the suggestions that bill and keep is unlawful because ISP traffic between ICG and Qwest is not roughly balanced, we note: FCC Rule 57.713(b), upon which ICG's argument is based, applies only to local traffic. Thus, the necessary premise of this argument is that Internet traffic is local in nature. As discussed above, however, federal

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[4] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 14 FCC Rcd 3689 (Feb. 26, 1999).

authorities, including the FCC, have not yet determined that Internet calls are local.

ICG Position Regarding Reciprocal Compensation

5. ICG contends that a large number of ISPs are customers of competing local exchange carriers ("CLECs") not because of the existence of the reciprocal compensation mechanism, but simply because ILECs have not served ISPs well. The CLECs, according to ICG, are filling that void by offering special packages, more state-of-the-art networks, and collocation in the CLECs' central offices. The CLECs are attracted to serving ISP's because the CLECs must pay for the large investment necessary to begin to offer local exchange service and so are initially looking for customers, such as the ISP's, which generate large traffic volumes immediately. With this customer base, the CLECs can subsequently expand into the broader business and residential markets. ICG claims that this gradual process, by which the CLECs target niche markets to acquire market share and revenue base and only later expand into broader areas, should not be criticized because the competitive market place should operate in this manner. The Commission, according to ICG, must allow markets to work in this manner rather than managing the process by disallowing reciprocal compensation in an attempt to relieve Qwest of all financial

obligations which arise because of Qwest's failure to compete for ISP business.

6. Even though ISP-bound calls flow predominantly from ILEC end-users over CLEC facilities to ISPs, ICG argues that Qwest benefits even if required to pay reciprocal compensation. If Internet traffic continues to grow, Qwest will experience a corresponding increase in demand for second lines which it can fill with little additional investment. Qwest can also benefit by providing its own Internet service and by providing its own service to ISP's. Furthermore, while Qwest may be required to make millions of dollars of investment to meet the growing Internet demand, ICG contends that this is minor in comparison to the overall Qwest investment in Colorado. ICG's presence in this market actually helps Qwest because it reduces the amount of capacity Qwest must provide.

7. ICG supports its recommendation for adopting reciprocal compensation for ISP-bound traffic by first observing that ISP's are information service providers, not providers of telecommunications services. As a result of this, ICG argues that ISP's, in particular, cannot be providers of long distance service. ICG disagrees with Qwest's contention that ISP-bound calls must be long distance because, like other long distance calls, the originating switch does not know the ultimate destination or routing of the calls. ICG observes that this is

not a distinction between local and long distance service but between calls using a single versus multiple networks. Therefore, a call is not necessarily long distance just because the originating switch does not know the ultimate destination or routing of the call.

8. ICG believes it is critical to consider the economic impacts of any compensation scheme. In response to Qwest's argument that reciprocal compensation forces non-Internet users to subsidize Internet users, ICG states: What is actually happening is that low-volume users are subsidizing their high-volume counterparts because of an overly averaged rate structure, independent of whether or not reciprocal compensation is being used. This problem, according to ICG, can be addressed by adopting usage-sensitive local exchange rates, not by rejecting reciprocal compensation. Without usage-sensitive rates, high-volume Internet users will continue to be subsidized. Under reciprocal compensation, ILECs bear the burden; under bill and keep, CLECs do.

9. Qwest also argues that reciprocal compensation results in subsidization of both the CLECs and the ISPs. ICG disputes this by observing that CLECs and ISPs are both providing services that are necessary for the completion of the ISP-bound call. Furthermore, Qwest argues that reciprocal compensation results in excessive use of the Internet. ICG

responds that what is really relevant is that the local rate structure is such that revenues do not cover the costs for Internet calls; until such is the case, there will be inefficient levels of Internet usage.[5] Finally, Qwest argues that reciprocal compensation results in excessive entry by CLECs specializing in ISP traffic. ICG contends that this is only true, at most, in the short run, and this simply reflects the way in which competitive markets work until profits are driven down by entry to a sustainable level.

10. ICG believes that its economic analysis leads to the conclusion that reciprocal compensation is the appropriate mechanism to deal with the costs incurred by ILECs and CLECs during the transmission of ISP-bound calls. If this option is not adopted, ICG sees no feasible alternative for cost recovery. ICG is the only entity which does not have a relationship with the ultimate cost cause, namely, Qwest's end-user, and cannot recover its costs directly. ICG also claims that it cannot increase its price to the ISPs because they could buy the same services out of ICG's business tariffs. Moreover, ICG argues,

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[5] For example, because of the access charge exemption, ISPs pay less than they would otherwise. In turn, they can charge less than they could otherwise, so the demand for their services is higher than it otherwise might be. All of this, according to ICG, has nothing to do with whether or not reciprocal compensation is used, however.

it cannot increase prices to the ISPs because this would cause them to switch to Qwest.

11. Not only does ICG support the use of reciprocal compensation, it also contends that the compensation rate be set at the voice rate because the end-office provides the same services in both instances. Any difference between the costs of ISP-bound calls and voice calls suggested by Qwest is really, according to ICG, a comparison between calls of longer and shorter duration. ICG argues that the Commission can best address this difference by revising all reciprocal compensation mechanisms so that they have two components, a set-up charge and a per-minute charge.

12. As for Qwest's contention that its costs exceed those of a CLEC specializing in ISP traffic, ICG observes that Qwest's costs may actually be lower due to economies of scale. If this is not the case and Qwest is at a cost-disadvantage, as it alleges, because its network must serve a much more diverse customer base, ICG contends that Qwest itself could build a separate network for ISP customers. In any case, ICG argues, the FCC's reciprocal compensation procedure requires that the level of compensation be based upon the TELRICs for the ILEC. Therefore, the CLECs costs are irrelevant.

13. ICG finally contends that no compensation mechanism (e.g. bill and keep) can be adopted which depends on

the differentiation between Internet and non-Internet calls because the Qwest method for doing so is flawed. Many calls that are of long duration and to modems are not placed to ISPs. Therefore, the Qwest procedure for identifying such calls will not accurately represent the volume of ISP traffic.

Qwest Position Regarding Reciprocal Compensation

14. Qwest contends that many ISPs have chosen to be customers of CLECs instead of ILECs, not because the service offered by the CLECs is superior, but simply because of the arbitrage opportunities introduced into the process by the reciprocal compensation mechanism. This mechanism allows Internet users to subscribe to an ISP without having to pay the full incremental costs of their ISP-bound calls. In addition, Qwest observes that it must serve a rather diverse customer base and so is precluded from specializing in ISP traffic, unlike ICG and other CLECs. For these reasons there exists an imbalance in ISP traffic, with the vast majority flowing from ILEC end-users through the ILEC to a CLEC, which transports the calls to an ISP, which, in turn, conveys them to the Internet. Qwest offers data to show that far more minutes (or messages) of calls flow from Qwest to ICG than from ICG to Qwest, and a much larger percentage of the calls from Qwest to ICG are bound for the Internet than are from ICG to Qwest.

15. Qwest argues that the combination of the CLECs specialization in serving ISPs and the adoption of reciprocal compensation would result in Qwest bearing most of the new network facilities costs related to the continued growth in Internet usage. This situation is exacerbated, according to Qwest, by the fact that ISPs benefit from an access charge exemption, which eliminates any possibility of Qwest being reimbursed by the ISPs for costs incurred to transport ISP-bound calls. Since these costs were not accounted for when residential basic exchange rates, or any other rates for that matter, were set in the past, Qwest contends that it will experience pressure to raise these rates in the future. Doing so would, according to Qwest, be unsupportable in this era of growing competition. Moreover, Qwest finds that such rate increases would directly violate the requirement in recent federal and state telecommunications law to remove implicit subsidies from its rate structure.

16. Qwest observes that *Bell Atlantic* did not reverse the FCC determination that ISP-bound calls are interstate in nature. As a result, Qwest recommends that the Commission find that ISP-bound traffic is predominately interstate, not local, and that ISPs are telecommunications carriers, not end-users, just as we did in the interconnection agreement with Sprint. In other words, Qwest favors relying upon the ILEC/IXC analogy for

ISP traffic rather than ILEC/CLEC analogy. It finds the ILEC/IXC analogy more appropriate because both IXCs and ISPs market their services to customers, determine what rates, terms and conditions to impose, and engage in billing customers. Qwest concludes that the originating subscriber, in these circumstances, acts as a customer of the IXC or ISP, not as a customer of the ILEC. Because ISP-bound calls are similar to interstate long distance calls, Qwest argues that, conceptually, the ISP should collect revenues from the cost-causing end-user and then compensate all other carriers involved in transporting the call. Because of the federal access charge exemption for ISPs,[6] however, this option is not feasible. Consequently, Qwest recommends that the ISP compensate its own LEC which, in turn, would share this compensation with the other carriers involved. Finally, Qwest contends that Internet calls are technically more similar to long distance than local calls because in neither case does the originating switch know the ultimate destination of the call nor does the terminating switch know the origin of the call. Even if ISP-bound calls and local calls were functionally equivalent, this equivalence would not, according

[6] Qwest further observes that the very existence of this exemption proves that Internet calls do not terminate at the ISP because, if they did, the ISP would not be a telecommunications carrier and hence would not be in a position to be required to pay access charges.

to Qwest, require that the costs for these two types of calls be recovered in the same manner.

17. Turning to economic considerations, Qwest argues that reciprocal compensation is improper from a cost-causation perspective regardless of whether ISP-bound calls are interstate or local. Cost-causation implies that ISPs should charge end-users for the costs of Internet calling and then compensate the other carriers involved in transporting the calls. If, instead, a reciprocal compensation mechanism is adopted, it will result in the inefficient subsidy of Internet use, the distortion of the local exchange market, and the generation of unintended arbitrage opportunities. In particular, in addition to the subsidization of Internet users by Qwest's customers who do not use the Internet, reciprocal compensation will cause excessive use of the Internet and excessive entry by CLECs specializing in ISP traffic even in the long run, as well as providing disincentives for CLECs to offer widespread basic exchange service. Only when ISP-bound traffic becomes less profitable will CLECs move away from specializing in it so that traffic flows become more balanced. For these reasons, Qwest recommends that reciprocal compensation be rejected. Even if the Commission fails to be persuaded by these arguments, it should still deny reciprocal compensation, pending further FCC determination on the issue.

18. If reciprocal compensation is rejected, Qwest argues that the theoretically defensible solution would be for the ISP to pay access charges to all other carriers involved. Since this is precluded by the federal access charge exemption for ISPs, Qwest's alternate proposal is that ICG share its revenues from the ISP with Qwest in proportion to their relative costs. Bill and keep represents for Qwest a third-best alternative, which it regards as a reasonable interim solution.

19. If the Commission chooses to adopt the reciprocal compensation mechanism despite Qwest's recommendation to the contrary, Qwest argues that the compensation rate should be lower for ISP-bound traffic than for voice traffic, because of cost differences between the two types of traffic. Qwest contends that the costs of ISP-bound calls are lower, in part, because these calls are of longer duration so the initial set-up costs are spread over more minutes. These costs are also lower, according to Qwest, because trunk utilization rates are higher with ISP-bound calls and because more data than voice messages can be put on each DSI at the same time. Finally, a CLEC like ICG can design a network used mainly for ISP-bound calls to be more efficient, and hence less costly than a general purpose network such as Qwest's. As for whose costs should be used in quantifying the compensation rate if this mechanism is used, Qwest observes that, if the cost of transporting traffic to a

particular customer (in this case the ISP) differs greatly from the average, the FCC has declined to use the ILEC's TELRIC as a proxy for the CLEC's costs. Qwest cites, as an example of this, the issue of paging providers' costs *Local Competition Order, ¶ 1093*. Furthermore, Qwest asserts that ICG is required by Section 4 CCR 723-39 to present a cost study to determine this inter-carrier compensation rate and it has not done so.

20. If, on the other hand, bill and keep is adopted as Qwest recommends, it realizes that it must be able to differentiate ISP-bound calls from others, which are still subject to reciprocal compensation. Qwest outlines a multi-step process by which this can be accomplished. Potential problems associated with this process, Qwest argues, represent billing issues and any resulting discrepancies can be handled through the dispute resolution process, which is part of the interconnection agreement.

Commission Decision

21. Of the two analogies offered by the parties for the transport of ISP-bound calls, namely, ICG's ILEC/CLEC analogy and Qwest's ILEC/IXC analogy, the Commission finds Qwest's version more persuasive. In transporting an ISP-bound call, the ISP plays a role similar to that of the IXC in the transmission of an interstate long distance call. We believe that the originator of either call, the ILEC end-user, acts

primarily as the customer of the ISP or IXC, not as the customer of the ILEC. Qwest and ICG participate in transporting the call to the Internet in much the same way as they would in providing access to an IXC as part of its process of completing an interstate call. As a result of this analogy, we could conclude that the end-user should pay the ISP, which, in turn, should compensate both Qwest and ICG for the costs incurred in transporting the ISP-bound call.[7] This payment of access charges by the ISP is precluded, however, by the FCC's access charge exemption for ISPs. Consequently, the Commission must select some other method of covering these costs.

22. ICG recommends a reciprocal compensation mechanism. We disagree. We find that the adoption of this mechanism will likely result in the subsidies, market distortions, and inappropriate incentives, which Qwest suggests will be the case.[8] As an alternative to reciprocal compensation, Qwest first recommends that ICG should share its revenues from its ISP customer with Qwest in proportion to their relative costs incurred in participating in the transmission of the ISP-

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[7] The principle of cost-causation could lead us to the same conclusion, namely, that the ISP should charge the cost-causing end-user and then compensate both Qwest and ICG.

[8] This rejection of reciprocal compensation is not inextricably connected to our conclusion that Internet bound calls appear to be interstate in nature. Even if they were deemed to be local, we would still not favor adopting reciprocal compensation with a positive rate.

bound call. The Commission rejects this suggestion as well because it is functionally equivalent to requiring the ISP to pay access charges to both Qwest and ICG. We will, however, adopt Qwest's other recommendation, namely, the use of bill and keep. The Commission finds this mechanism defensible in this situation because it focuses on the need for various networks to interconnect, but requires each carrier to recover its costs through charges imposed upon its own customers. We believe that such an approach is the best way to encourage greater, more seamless interconnection in the future.[9]

23. The Commission does not agree with ICG that rejecting reciprocal compensation in favor of bill and keep will result in ICG's being unable to recover its costs for transmission of ISP-bound calls. Assuming ISPs can, as ICG asserts, switch to ICG's business basic exchange rate, ICG still has the opportunity to raise its ISP rate at least to that level. If additional revenues are needed, ICG could consider raising its business basic exchange rate for all customers.[10] Finally, we conclude that ICG could change its tariff to

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[9] As we move forward to the consideration of globally connected communications networks, we need to abandon the archaic approaches to service categorization and regulatory jurisdiction. Regardless of technology or purpose, universal access to equitable connections should be the goal. Whether a call is local, interstate, voice, data, Internet, wireless or wireline should not be a determining factor in how the activity is regulated, priced or compensated.

preclude ISPs from switching to the business basic exchange rate.

24. ICG's other fear that its ISP customers will migrate to Qwest should it raise its rates above Qwest's business tariff is a real one. Qwest's tariffed business rate will act as a price ceiling for ICG. Thus we do see a manifestation of the ill effects of overly-averaged rates, as ICG has pointed out. The lesson to draw from this is not as clear to the Commission as it is to ICG, however. If tariffed business rates are overly-averaged and act as an artificially low price ceiling for ISPs, then the answer may be to move towards the averaging of rates.

25. The outcome of this decision not to allow reciprocal compensation for ISP-bound traffic, though not perfect, sets things closer to being right than the alternative. By not allowing reciprocal compensation, ISP and ISP-users will more fully internalize the costs they impose on the network. Qwest customers who do not use the Internet will no longer be paying the "freight" for the Internet users. Thus, this outcome comes closer to rationalizing both the inter-carrier and end-user compensation. Likewise, this avoids some of the economic distortions caused by continuing reciprocal compensation.

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[10] The feasibility of any of these rate increases is also dependent upon the rates charged by Qwest and other CLECs for comparable services.

Carriers should have better price signals in deciding how to build their networks and solicit their customers; customers should have better price signals as to the costs of their use of the network.

26. The disallowance of reciprocal compensation for ISP-bound traffic best replicates what an interconnection agreement in a competitive market place would look like. It also comports with § 251(2)(2)(D) that interconnection be on rates, terms and conditions that are just, reasonable and nondiscriminatory. Finally, by eliminating an unintended arbitrage opportunity, this outcome encourages the efficient entry of competitors into the residential market. Thus, the outcome is pro-competitive and anti-subsidy: ISP users pay for what they use; competitors can serve them accordingly; and non-ISP-users do not have to pay for services they do not use.

27. The bill and keep method requires that Qwest be reasonably able to differentiate ISP-bound traffic from other forms of traffic flowing from Qwest to ICG. Non-Internet traffic is subject to reciprocal compensation. We find that Qwest has such capability, though problems may still arise when executing this call identification process. These problems can be addressed through the dispute resolution process included in the Qwest/ICG interconnection agreement. Alternatively, if ICG can devise a better method for differentiating ISP-bound calls

from others, it can request that the existing interconnection agreement be altered to reflect this superior procedure. As we pointed out in the Sprint order, ICG has the least cost access to this information about ISP-bound and non-ISP-bound traffic. Now that ICG is aware of its compensation rights under the interconnection agreement, it should have ample incentive to make sure its traffic with Qwest is properly differentiated.

H. Issue 16 - (C)2.3.10: Identifying Qwest as the IntraLATA Toll Provider

1. Qwest and ICG agree on language for interconnection agreement section (C) 2.3.10, except for the language regarding the method for determining the volume of intraLATA toll traffic in the event of a dispute as to the classification of traffic between local/EAS and toll. ICG originally proposed in its Issues Matrix that the dispute would be resolved with reference to the LERG. However, ICG in its Statement of Position (page 40, footnote 47), proposes to submit the dispute to a neutral third party expert. ICG proposes to modify the second sentence of its Issues Matrix as follows:

> In the event of a dispute as to the classification of the traffic as between Local/EAS and toll, the dispute will be resolved by a neutral third party expert based on an audit of both parties' data.

2. Qwest's proposed language states that, in the event of a dispute over the classification of traffic, the originating party will provide usage data for its toll traffic.

In testimony, Qwest indicates it would refer to its toll usage tracking ("TUT") reports to provide usage data on toll traffic.

3. Qwest has not had the opportunity in this docket to respond to ICG's proposed use of a neutral third party audit for dispute resolution because ICG made the proposal in its Statement of Position. We remind the parties that future disputes can be submitted to this Commission for resolution. There is no need for language in this section of the interconnection agreement specifying how disputes shall be resolved. Therefore, we reject both ICG's and Qwest's proposed dispute resolution language. The interconnection agreement shall only include the language both parties agree on.

I. Issue 27/UNE 7 - (E)3.2.3: Sub-Loop Unbundling

1. This unbundled network element ("UNE") issue involves the requirement for Qwest to provide ICG access to unbundled sub-loops. ICG addressed this issue in its Statement of Position, even though it did not provide testimony on this issue. ICG proposes access to unbundled sub-loops at any technically feasible point in the ILEC's outside plant where sufficient space is available. ICG relies on FCC Rule 51.319(a) as indicating where access to sub-loop should be allowed (*i.e.*, pole or pedestal, network interface device, minimum point of entry, single point of interconnection, main distribution frame, remote terminal, and feeder/distribution frame). In addition,

ICG argues TELRIC pricing should be used for sub-loop unbundling.

2. Qwest proposes that access to unbundled sub-loops be provided only at field connection points ("FCPs"). The FCPs would be located in close proximity and connected to Feeder Distribution Interfaces ("FDIs"). Qwest's proposal requires the first CLEC requesting sub-loop unbundling at an FDI to pay for FCP construction at that site. Qwest would not provide another CLEC access to unbundled subloops at the FCP until the first CLEC confirmed that it had received reimbursement from the other CLEC for a portion of the FCP construction charge.

3. The sub-loop unbundling issue is new to this Commission. Given the scant record on this issue in this docket, our decision will only apply in the interim and is subject to change based on decisions in future proceedings, specifically Docket No. 99A-577T.

4. We are not convinced by Qwest that FDIs are the only technically feasible point on Qwest's network for sub-loop unbundling. Because our decision only applies in the interim, the interconnection agreement shall not specify the actual points for sub-loop unbundling on Qwest's system. Therefore, we reject both ICG's and Qwest's proposed language for sub-loop unbundling. The interconnection agreement shall require Qwest

to provide sub-loop unbundling at all technically feasible points on Qwest's network where space is available.

J. Issue 28/UNE 8 - (E)3.2.2: Digital Loop Carrier

1. This UNE issue involves the unbundling of loops provisioned by digital loop carrier ("DLC") or integrated digital loop carrier ("IDLC"). ICG addressed this issue in its Statement of Position, but did not provide testimony on this issue. ICG proposes that it be allowed to request a method of deriving an unbundled loop, including loops provisioned by DLC or IDLC. If Qwest determines that the unbundling method requested by ICG is not technically feasible, and Qwest can demonstrate this fact, Qwest may provide another unbundling method.

2. Qwest proposes to provide ICG an unbundled loop, to the extent possible, if a loop is provisioned by DLC. Qwest would attempt to locate a loop not provisioned by DLC and "swap" it with the loop provisioned by DLC. Qwest opposes ICG's proposal because it would allow ICG to propose the method of unbundling loops provisioned by DLC. It is important to Qwest to be able to maintain control of the method of unbundling when a loop is provisioned by DLC because of the variety of DLCs used on Qwest's network.

3. The unbundling of loops provisioned by DLC is also new to this Commission. Again, given the scant record on

this issue in this docket, our decision shall only apply in the interim and is subject to change based on decisions in future proceedings, specifically Docket No. 99A-577T.

4. Qwest indicates that an unbundled loop would be provided for a loop provisioned by DLC if it can find a loop not provisioned by DLC. Qwest cannot simply reject ICG's request for the unbundled loop if it cannot swap loops, and another method could be used to provide the unbundled loop. We reject both ICG's and Qwest's proposed language for unbundling loops provisioned by DLC. The interconnection agreement shall include language which requires Qwest to provide unbundled loops for loops provisioned by digital loop carrier.

K. Issue 29/UNE 9 - (E)11: Special Construction

1. This issue addresses procedures to be used for special construction required as a result of a request by ICG for access to UNEs. ICG did not offer testimony in support of the language it proposes regarding special construction. ICG's proposed language would require Qwest, if facilities are not available, either to construct facilities and sell them to ICG, or to combine UNEs to replicate unbundled loop and only charge ICG for an unbundled loop, not for component UNEs.

2. For any request that requires construction of network capacity, facilities, or space for access to or use of UNEs, Qwest proposes to provide a quote for the CLEC's portion

of the special construction. If accepted, construction would commence after receipt of the construction charge payment from ICG. Qwest would maintain ownership of the constructed facilities.

3. We do not find it reasonable to require Qwest to construct facilities for ownership by ICG. The Commission considered combinations of UNEs when the rates for component UNEs were set. If UNEs are combined to replicate an unbundled loop, ICG shall pay the individual charges for the component UNEs which make up the UNE combination. We reject ICG's proposal. The interconnection agreement shall include Qwest's proposed language. Our decision shall only apply in the interim and is subject to change based on decisions in future proceedings, specifically Docket No. 99A-577T.

L. Issue 30 - (E)3.2.3: Enhanced Extended Loop

1. An enhanced extended loop ("EEL") is a service provided by Qwest which allows a CLEC to extend loops from the end-user premise to a CLEC collocation in a different wire center. ICG presented no testimony in support of its EEL proposal. ICG's proposed language would require the parties to devise a means to extend unbundled loops to allow ICG to use a collocation arrangement at one Qwest location per LATA in order to obtain access to unbundled loops at another Qwest central office.

2. Qwest's proposal would allow ICG to extend loops from the end-user premise located in one wire center to an ICG collocation in a different wire center. Qwest would limit the use of EEL to instances involving a significant amount of local exchange service. EEL is only available in density zone 1 in the Denver MSA for Capitol Hill, Curtis Park, Dry Creek, Denver Main, and Denver North wire centers.

3. We note that EEL is an emerging service. While Qwest indicates it voluntarily provides EEL, we believe it is the type of service offering envisioned by the Telecommunications Act. Absent testimony by ICG supporting its proposal, we reject ICG's language. The interconnection agreement shall include Qwest's proposed language. Our decision shall only apply in the interim and is subject to change based on decisions in future proceedings, including Docket No. 99A-577T.

M. Issue 31/UNE 10 - (E)3.2.3: Spectrum Management

1. This issue addresses spectrum management, the process used to avoid interference, such as crosstalk, between transmission systems that use pairs in the same cable. ICG has not presented any testimony in support of its proposal. ICG's proposed language would not allow Qwest to restrict ICG to using a particular loop for the same purposes or service for which Qwest uses the loop.

2. Qwest's proposed language allows Qwest to control the use of certain cables in light of spectrum management considerations. Qwest indicates in testimony that it should be allowed to control the use of certain facilities to eliminate the possibility of crosstalk. Qwest believes that it is important to maintain the quality and integrity of its network, and asserts that it performs spectrum management in accordance with industry guidelines.

3. The use of loops by CLECs should only be limited by the design capability of each loop. A CLEC should expect to be able to use a loop according to accepted engineering standards and practices for that type of cable. That is, after all, what they are leasing. Qwest's proposed language is too open-ended and could permit anticompetitive temptations. Qwest cannot place limitations on loops under the guise of spectrum management if those loops would otherwise be capable of supporting the desired use. We reject both ICG's and Qwest's proposed language. The interconnection agreement language shall reflect our decision here.

N. Issue 35/UNE 13 - (E)3.2.4.3; (E)3.2.4.4; and (E)3.4.11: Coordinated Installation

1. ICG and Qwest agree on language for (E)3.2.4.3 and (E)3.2.4.4. ICG has proposed additional language for (E)3.4.11. adding detailed procedures to Qwest's procedures for

the coordination of installation of unbundled loops. ICG has not presented any testimony in support of its proposed additional language. That language specifies procedures to be followed by ICG and Qwest for coordinated conversions of live local exchange services to unbundled loops.

2. Qwest represents that its proposed language specifies the procedures Qwest follows for coordinated installations, including conversions, for all other CLECs.

3. ICG has not presented any testimony indicating why the language agreed on for (E)3.2.4.3 and (E)3.2.4.4. is not sufficient for coordinated installations. We reject ICG's proposed additional language. The interconnection agreement shall include the language for (E)3.2.4.3 and (E)3.2.4.4. agreed on by the parties.

O. Issue 37 - (F)1.3.6.5: Reciprocal Compensation and Switched Access Revenues for Internet-Related Traffic

1. Under interim number portability (INP), Qwest must pay interstate and intrastate switched access compensation to ICG and the other CLECs. The revenues to be passed through are computed by multiplying average minutes of use per line by the number of INP lines eligible for switched access and, finally, by the tariffed rate, adjusted by the revenue distribution by rate element factors (Exhibit A attached to Part F of the Local Interconnection Agreement between Qwest and ICG).

Such computations are done separately for interstate/interLATA switched access, intrastate/interLATA switched access, and intrastate/intraLATA switched access. The dispute here arises over the determination of the number of INP lines to be used. Qwest contends that INP lines associated with ISPs should be deleted from the total and provides language to that effect. ICG disagrees. While the record in the case clearly indicates the parties' positions, it does not provide us with any rationale for those positions. Qwest offered this proposal. Because of the insufficiency of the record, the Commission has no basis upon which to adopt Qwest's language at this time. Therefore, Qwest's position is rejected.

P. UNE 28 - (E)13.4.1: Rates for UNE Combinations

1. This issue involves the rates to be charged for UNE combinations. ICG presented no testimony in support of its proposal regarding rates for UNE combinations. ICG's proposed language requires Qwest to charge the sum of the recurring and nonrecurring rates for the component UNEs in UNE combinations. For UNE combinations that are not currently combined, Qwest would be required to charge a TELRIC based charge for the combination.

2. Qwest's proposed language incorporates by reference Qwest's tariffed or otherwise approved rates for recurring and nonrecurring charges for each UNE.

3. We reject ICG's proposed language. The interconnection agreement shall include Qwest's proposed language.

III. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration filed by ICG Telecom Group, Inc. on February 28, 2000 are resolved as set forth in the above discussion.

2. Within 30 days of the final Commission decision in this docket, ICG Telecom Group, Inc. and Qwest Corporation shall submit a complete proposed interconnection agreement for approval or rejection by the Commission, pursuant to the provisions of 47 U.S.C. § 252(e) of the Telecommunications Act of 1996.

3. The Motion to Strike Response of ICG Telecom Group, Inc., filed by Qwest Corporation on July 24, 2000 is granted. Response time to the motion is waived.

4. The twenty-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

5. This Order is effective upon its Mailed Date.

B. **ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING August 1, 2000.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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_____
Commissioners

COMMISSIONER POLLY PAGE
ABSENT.

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Decision No. C00-1071

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00B-103T

IN THE MATTER OF PETITION BY ICG TELECOM GROUP, INC., FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC., PURSUANT TO § 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996.

DECISION DENYING APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: September 27, 2000
Adopted Date: September 7, 2000

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of the Applications for Rehearing, Reargument, or Reconsideration ("RRR") filed by ICG Telecommunications Group, Inc. ("ICG") and Qwest Corporation ("Qwest") on August 28, 2000. Pursuant to § 40-6-114, C.R.S., ICG and Qwest request reconsideration of Decision No. C00-858.

2. For the reasons stated in Decision No. C00-858 and here, we deny the applications for RRR.

B. ICG Application for RRR

1. ICG believes that the Commission should require reciprocal compensation for Internet Service Provider ("ISP") calls. If the Commission wants to address the possible

difference in length between ISP-bound calls and local calls in general, ICG argues, we could adopt a two-part reciprocal compensation rate for all calls subject to such compensation. The other possibility ICG recommends is that the Commission apply the current reciprocal compensation rate to ISP-bound calls now, and then implement a true-up process after completion of the generic intercarrier compensation docket which we recently opened (Docket No. 00I-494T).

2. ICG argues that, *Bell Atlantic v. FCC,* 206 F.3d1 (D.C. Cir. 2000) (*"Bell Atlantic",)* and *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas,* 208 F.3d 475 (5th Cir. March 30, 2000) (*"Southwestern Bell"*) determined that ISP-bound traffic is local and thus subject to reciprocal compensation under Section 251(b)(5) of the Telecommunications Act of 1996. ICG argues as follows: the *Bell Atlantic* court found that the treatment of a call depends upon the class of service into which it falls. The court went on to determine that ISP-bound calls must be "telephone exchange service," by process of elimination, because they cannot possibly be exchange access service. If they were, the ISPs would thus be determined to be toll service providers and, hence, providers of telecommunications services. This cannot be, however, because ISPs have been found to be providers of information services, not telecommunications services.

3. ICG continues arguing that *Southwestern Bell* holds that ISP-bound traffic terminates at the ISP and, therefore, meets the FCC definition of local traffic. As such, the Commission should not have determined that calls to ISPs are more similar to calls to interexchange carriers than to local calls.[1] ICG believes, in short, that the Commission has failed either to acknowledge or apply the statutory framework as established by these court decisions, and should now order reciprocal compensation for ISP-bound traffic.

4. ICG next turns to the policy considerations concerning the alleged economic distortions resulting from reciprocal compensation, ICG first argues that these considerations are immaterial because, in the framework provided by *Bell Atlantic*, it is the statutory classification of traffic which is relevant. Even if these policy considerations were relevant, however, ICG criticizes the Commission for offering no analysis to support its position and for failing to address ICG's counter arguments. For example, ICG contends that no subsidy results from the imposition of reciprocal compensation *per se*. ICG maintains that, if any subsidy exists, it simply results from the difference in the average call length between ISP-bound calls and other local calls. As another example, ICG

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[1] Moreover, ICG asserts, it presented uncontroverted evidence that ISP-bound calls and local calls are functionally equivalent.

notes, Qwest argues that the subsidy for ISP-bound calls is exacerbated by the ESP exemption for which ISPs qualify. ICG counters that, even if such a subsidy exists, its existence is totally unrelated to whether reciprocal compensation is required.

5. ICG also argues that Qwest provides little defense in its statement of position for its assertions concerning market distortions introduced by the application of reciprocal compensation. The only point Qwest discusses, according to ICG, is the notion that the adoption of reciprocal compensation encourages CLECs to specialize in ISP-bound traffic. ICG claims, however, that is has many non-ISP, local exchange customers and that, while it serves ISPs , it does so because they represent a fast growing market, not because of the possibility of receiving reciprocal compensation for carrying Internet calls.

6. ICG further believes that the Commission is wrong to adopt bill-and-keep for ISP traffic because of the serious imbalance in the traffic flows. ICG argues that this violates both federal and state law (*e.g.*, FCC regulation 47 C.F.R. § 57.713(b)), and that the FCC, in its *Local Competition Order*,[2]

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[2] The Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 1112 (1996).

made it clear that bill-and-keep is inappropriate whenever any traffic is imbalanced, not just local traffic as Qwest suggests. Moreover, ICG observes the Denver District Court overturned the use of bill-and-keep because there was no demonstration that traffic was roughly balanced, and consequently bill-and-keep violates § 40-15-502(2)(b). *U S West Communications, Inc. v. Colorado Public Utilities Commission*, Case No. 96-CV-2566 (October 24, 1997).

7. ICG observes that it is obligated to interconnect with Qwest, and incurs costs in doing so. Without reciprocal compensation, there is a confiscatory taking because ICG has no other way of covering these costs. If it wishes to increase the rates it charges ISP customers, ICG argues, it must increase rates to all business customers because ISP customers pay the same rates as other business customers. However, in attempting to raise rates to ISP customers, ICG is constrained by the rates which these customers can get from competitors, including Qwest.

8. ICG further contends: The Commission claims to be trying to replicate the competitive marketplace through its rulings. However in a competitive market, ICG would never agree to the bill-and-keep arrangement imposed upon it here by the Commission. Furthermore, while the Commission relies upon the ILEC/IXC analogy, it offers no example in which bill-and-keep is used in that environment.

9. In as much as the Commission recently opened an investigatory docket to deal with intercarrier compensation issues in a global fashion, ICG finds it inconsistent that the Commission has engaged here in piecemeal rulemaking concerning the treatment of just a single category of traffic terminating to a single carrier. Nevertheless, if such treatment is to be determined here, ICG offers what it considers to be a reasonable compromise. It proposes a two-rate option for reciprocal compensation which it asserts will address the over-recovery of costs resulting from applying the existing reciprocal compensation mechanism to ISP-bound calls because of their alleged longer average duration. ICG claims that both parts of its proposed reciprocal compensation rate can be derived from the costs studies filed in Docket No. 96S-331T.

C. Commission Decision

1. The Commission's Initial Decision has already addressed the arguments which ICG raises here. We will, however, comment further on two issues.

2. ICG focuses on the alleged difference in average duration of calls between ISP-bound calls and local calls in general, and argues that this problem can be addressed by employing a two-part reciprocal compensation rate. The Commission does not agree that the problems associated with reciprocal compensation can be eliminated simply by using such a

compensation rate. We find that, no matter how the reciprocal compensation mechanism is constructed, applying it will result in the cost causers not covering the total costs of the ISP traffic. Some of the costs will be borne by the end-users of Qwest who do not place any calls to an ISP on ICG's network. Therefore, for this reason and others, the Commission continues to favor bill-and-keep over reciprocal compensation, regardless of whether the latter is designed as a one or two-part rate.

3. ICG also contends that, if the Commission adopts bill-and-keep, thereby preventing ICG from receiving reciprocal compensation payments from Qwest, it has no other feasible way in which to recover its costs of carrying this Internet traffic. ICG argues that it cannot raise its rates to ISPs without raising rates to all of its business customers. Such action would result in losing ISP customers to Qwest and other competitors.

4. The Commission does not believe that ICG's options are as limited as it indicates. ICG's own witness, Ms. Cindy Schonhaut, stated in her direct testimony (pp. 5-6):

> Compared to the ILECs, ICG frequently has been able to offer ISPs service packages that are carefully tailored to the ISPs' operations. For example, ICG has led the way offering volume and term discounts of which ISPs, along with other end users, can take advantage. ICG has gone beyond offering simple delivery of telecommunication services to the ISP's demarcation point and has provided turn-key solutions for ISP needs. ISPs have also been attracted by ICG's

> superior network, which consists entirely of digital switching and fiber-optic transport facilities, as opposed to the analog/digital switching mix and a hybrid of fiber, microwave, and copper network transport facilities offered by the typical incumbent. In addition, ICG offers ISPs the option of collocating ISP equipment in ICG's central office, while ILECs do not allow ISPs to collocate in their central offices.

5. This testimony suggests that ICG has flexibility to raise rates. If the Commission believes ICG's witness, ICG should be able to charge higher prices than its competitors because it offers a superior product, more closely designed to meet the needs of the ISPs. Beyond these specific observations, the Commission simply believes that we should move toward a situation in which each telecommunications firm provides its chosen array of services, incurs the costs of doing so, and covers those costs through rates charged to its own customers.

6. As for the pendency of Docket No. 00I-494T, that proceeding, at this point in time, is simply intended to investigate issues regarding intercarrier compensation. Termination compensation for Internet traffic is only one issue to be investigated by the Commission. If we determine in that docket that changes should be made to existing compensation mechanisms then further formal proceedings will be initiated. It is premature at this time to assume that Docket No. 00I-494T will affect the ICG/Qwest interconnection agreement as related to ISP traffic. However, in the event rulings are made in that

proceeding or in follow-on dockets that affect the issue of intercarrier compensation for Internet calls, ICG and Qwest are directed to timely modify their interconnection agreement to make it consistent with future Commission orders.

D. Qwest Application for RRR

1. Qwest seeks reconsideration of the Commission's decision rejecting its proposal to expand switched access to apply to phone-to-phone voice over internet protocol ("VoIP") traffic. Qwest offers four reasons for reversing our Initial Commission Decision. Qwest argues: first, the initial decision is too broad in scope; second, the initial decision cannot be reconciled with Commission Decision No. C00-760 ("VNI decision"); third, the Commission's attempt to distinguish the VNI decision is unpersuasive; and fourth, the FCC has recognized that phone-to-phone internet protocol telephony bears all the hallmarks of telecommunications services to which switched access charges apply.

2. As for the supposed overbreadth (application for RRR pages 2-4), of the initial decision, Qwest asserts that the initial decision indicates that all VoIP traffic should be exempt from switched access charges. We disagree. Decision No. C00-858 applies to the issue which is before the Commission: whether or not switched access should apply to phone-to-phone VoIP traffic.

3. Qwest then argues (application for RRR pages 4-12) that the initial decision cannot be reconciled with the Commission's VNI decision and that the Commission's attempt to distinguish the VNI decision is unpersuasive. Qwest correctly points out that VNI was providing interexchange service through various methods including the use of packet switching technology (also known as Internet Protocol ("IP")). We determined in the VNI decision that the service provided by VNI resulted in improper avoidance of access charges.[3] VNI specifically intended to avoid access charges.

4. In this case, ICG is not attempting to avoid access charges. ICG and Qwest disagree on the appropriate level of compensation for the use of Qwest's network by ICG's VoIP traffic. Qwest argues that switched access charges should apply to VoIP calls and that ICG's VoIP traffic uses Qwest network similarly to calls using Feature Group A. ICG points out in testimony that IP traffic does not use the conventional feature group access arrangements used by interexchange carriers and that the established switched access charges listed in Qwest's tariff do not include an appropriate charge for VoIP traffic[4]. This record does not offer any other compensation options for

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[3] Decision No. C00-760, paragraph A.2.g.

[4] ICG witness Gillan's direct testimony, page 5, lines 15-12 and rebuttal testimony, page 2, lines 21-22.

our consideration. Given the binary choice of whether or not current switched access charges should apply to phone-to-phone VoIP calls, we determined that these charges should not apply.

5. We urge the parties to reach a negotiated agreement on the appropriate compensation level for uses of the network (such as VoIP traffic).

6. Qwest argues (application for RRR pages 12-16) that the FCC has recognized that phone-to-phone internet protocol telephony bears all the hallmarks of telecommunications services to which switched access charges apply. We note that the FCC has not yet made a determination on whether switched access charges should apply to phone-to-phone voice over IP traffic. In our initial decision, we did not classify VoIP calls as either a telecommunications service or an information service. There is no need for us to classify VoIP to determine if switched access charges should apply.

7. We deny Qwest's request for reconsideration. The interconnection agreement shall not include the additional language proposed by Qwest on this matter.

8. As with the issue concerning termination compensation for ISP traffic, the Commission Docket No. 00I-494T and follow-on dockets could affect intercarrier compensation for VOIP calls. Again, ICG and Qwest are directed to timely modify

their interconnection agreement to reflect future Commission orders relating to compensation for VOIP calls.

9. Qwest next requests (application for RRR pages 16-19) clarification of statements in Decision No. C00-858 which indicated that Qwest proposes to only allow sub-loop unbundling at Feeder Distribution Interfaces ("FDIs"). Qwest asserts such statements do not accurately relect Qwest's position on sub-loop unbundling. In RRR, Qwest states that it has agreed to unbundle the sub-loop at any technically feasible point on its network. The record, however, reflects that the only points Qwest has determined to be technically feasible for sub-loop unbundling are FDIs. The only indication that Qwest would consider requests for sub-loop unbundling at points other than FDIs is in Qwest witness Hubbard's oral testimony.[5] Nevertheless, to the extent Qwest's actual position is not reflected in the decision, we acknowledge Qwest's position on sub-loop unbundling, as stated in RRR, that: Qwest agrees to unbundle the sub-loop at any technically feasible point on its network.

10. Qwest (application for RRR pages 19-23) also seeks reconsideration of the Commission's decision rejecting its proposed language regarding the use of Field Connection Points

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[5] June 28, 2000 transcript, p. 206, l. 3-7:

Q: What is your understanding about where U S West is required to provide access to subloops?

A: Basically, any technically feasible points, and it will do so.

(FCPs) to accomplish sub-loop unbundling. Qwest offers five reasons for reversing our decision: First, the FCP process protects the integrity of the networks of the CLECs and Qwest; second, physical space limitations dictate the use of the FCP process; third, the FCP process provides non-discriminatory, equal access to all CLECs and Qwest; fourth, the FCP process provides a single design for cross-connection of the Qwest loop network to various CLEC loop networks would allow Qwest to quickly reply to the requesting CLEC; and fifth, the FCP process allows the CLEC to efficiently use the connection to the ILEC loop for remotely managing and tracking the CLEC's own network. Because sub-loop unbundling is new to this Commission and we are uncertain of the real need for the additional facilities (with the additional costs) that would be associated with the use of FCPs, we reject Qwest's proposal to use FCPs to accomplish sub-loop unbundling. Qwest's request for reconsideration is denied. We reaffirm our initial decision rejecting both ICG's and Qwest's proposed language and requiring Qwest through the interconnection agreement to provide sub-loop unbundling at all technically feasible points on Qwest's network.

11. Qwest (application for RRR pages 23-24) finally seeks clarification of the Commission's description of Qwest's position on unbundling of loops provisioned by digital loop carrier ("DLC") to the effect that an unbundled loop would be

provided for a loop provisioned by DLC if Qwest can find a loop not provisioned by DLC. In RRR, Qwest states that it has agreed to provide unbundled loops for loops provisioned by DLC. If Qwest cannot find a loop not provisioned by DLC to swap with the loop provisioned by DLC, Qwest will use another method to provide an unbundled loop. The record, however, did not reflect Qwest intent, in all cases, to provide unbundled loops for loops provisioned by DLC. Qwest's proposed language for the interconnection agreement did not indicate that Qwest would necessarily provide an unbundled loop for a loop provisioned by DLC.[6] We now acknowledge Qwest's position on unbundling loops provisioned by DLC, as being: Qwest agrees to provide unbundled loops for loops provisioned by DLC. This does not change our initial decision rejecting both ICG's and Qwest's specific proposed language for unbundling loops provisioned by DLC and ordering interconnection agreement language that requires Qwest to provide unbundled loops for loops provisioned by digital loop carrier.

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[6] U S WEST Issues Matrix, page 14: "If U S WEST uses Integrated Digital Loop Carrier (IDLC) systems to provide the local Loop, **to the extent possible**, U S WEST will make alternate arrangements to permit CLEC to order a contiguous Unbundled Loop" (emphasis added).

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration by ICG Telecommunications Group, Inc. filed on August 28, 2000 is denied.

2. The Application for Rehearing, Reargument, or Reconsideration by Qwest Corporation filed on August 28, 2000 is denied.

3. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING September 7, 2000.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

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Decision No. C01-312

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 00B-601T

IN THE MATTER OF PETITION OF LEVEL 3 COMMUNICATIONS LLC, FOR ARBITRATION PURSUANT TO § 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996 TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION.

INITIAL COMMISSION DECISION

Mailed Date: March 30, 2001
Adopted Date: March 16, 2001

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ATTACHMENT 8
LEVEL 3'S VoIP COMMENTS

APPEARANCES:

Michael R. Romano, Esq., Broomfield, Colorado, and Russell M. Blau, Esq., Washington, D.C., for Level 3 Communications LLC;

Mary Rose Hughes, Esq., and John M. Devaney, Esq., Washington, D.C., for Qwest Corporation.

I. BY THE COMMISSION

A. Statement of the Case

1. On October 31, 2000, Level 3 Communications LLC ("Level 3"), filed a Petition for Arbitration of an Interconnection Agreement (the "Interconnection Agreement") with Qwest Corporation ("Qwest"). Level 3 requests that we arbitrate unresolved issues in its Interconnection Agreement with Qwest pursuant to § 252(b) of the Telecommunications Act of 1996 ("Act"), 47 U.S.C. § 252(b). On November 27, 2000, Qwest filed its Response to the Petition for Arbitration.

2. By Minute Entry dated November 29, 2000, we referred the matter to an Administrative Law Judge ("ALJ") for hearing. Because of the time constraints contained in the Act, and pursuant to the provisions of § 40-6-109(6), C.R.S., we find that due and timely execution of our functions requires that the recommended decision of the ALJ be omitted, and that we render an initial decision.

3. The ALJ held a scheduling conference on December 5, 2000 between the parties' counsel. Decision No. R00-1402-I memorialized the procedural schedule agreed to by the parties.

The schedule set deadlines for the submission of prepared testimony and established hearing dates of January 30 and 31, 2001.

4. On January 24, 2001, the ALJ granted the motion of Qwest to admit attorneys Mary Rose Hughes, Esq., and Kelly Cameron, Esq., of Perkins Coie, LLP, Washington, D.C. to practice before the Commission in this docket in Decision No. R01-53-I.

5. On January 25, 2001, the unopposed motion of Qwest to withdraw and replace the direct testimony of witnesses Rachel Torrence and Robert F. Kennedy originally filed with the Commission on January 4, 2001 was granted. See, Decision No. R01-56-I.

6. The hearing commenced as scheduled on January 30, 2001. Initially, several preliminary matters were resolved. First, the motion of Qwest to admit attorney John M. Devaney, Esq., of Perkins Coie, LLP, Washington, D.C. to practice before the Commission in this docket was granted. Second, the motion of Level 3 to admit attorneys Michael R. Romano, Esq., Broomfield, Colorado, and Russell M. Blau, Esq., of Swidler Berlin Shereff Friedman, LLP, Washington, D.C. to practice before the Commission in this docket was granted. Third, the unopposed motion of Qwest to withdraw and replace the rebuttal testimony of witnesses Robert F. Kennedy originally filed with the Commission on January 16, 2001 was granted.

7. As an additional preliminary matter, the joint motion of the parties for an extension of time to conclude the arbitration proceedings which are the subject of this docket was granted. The operative date of February 26, 2001 for a decision on the disputed issues raised in this matter was extended to March 30, 2001. Level 3 and Qwest expressly waived the nine-month arbitration time frame contained in § 252(b)(4)(C) of the Act as well as their right to petition the Federal Communications Commission ("FCC") to invoke jurisdiction pursuant to § 252(e)(5) of the Act. The parties also agreed not to appeal this Commission decision on the basis of its issuance outside the nine-month arbitration time frame contained in § 252(b)(4)(C) of the Act. The grant of this motion for extension resulted in the modification of various deadlines previously established by Decision No. R00-1402-I--the extension of the due date for filing the hearing transcript to February 16, 2001 and the extension of the due date for filing Post-Hearing Briefs to March 2, 2001.

8. The parties stipulated that the pre-filed direct and rebuttal testimony and related exhibits of Level 3 witness Timothy J. Gates (Level 3 Exhibits 1 and 2 respectively) and the rebuttal testimony and related exhibits of Qwest witness William E. Taylor (Qwest Exhibit 1) be admitted into evidence. In addition, both parties waived their respective right to conduct cross-examination of these witnesses. Oral testimony was

presented by Level 3 witnesses Ann Nagel and William P. Hunt and by Qwest witnesses Larry Brotherson, Joseph Craig and Robert Kennedy. Level 3 Exhibits 1 through 8 and 10 and Qwest Exhibits 1, 2 and 4 through 8 were marked for identification, offered and admitted into evidence. Level 3 Exhibit 9 was rejected and Qwest Exhibit 3 was withdrawn.

9. On March 2, 2001 both parties filed their Post-Hearing Briefs as well as a revised Issues Matrix.

II. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION

Under the Act, parties seeking to implement an interconnection agreement relating to telecommunications services are required to engage in good faith negotiations in an attempt to informally and voluntary resolve interconnection issues. This Commission's authority to arbitrate issues only arises the parties are unable to resolve them on their own. Level 3 and Qwest entered into negotiations about the interconnection agreement involved in this proceeding[1] and succeeded in resolving 20 of the 24 disputed issues originally identified in Level 3's Petition for Arbitration. Four issues remain to be arbitrated by the Commission. These issues are summarized in the Issues Matrix attached to the parties' Post-Hearing Briefs.

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[1] An October 27, 2000 draft of the Interconnection Agreement was attached to the Petition for Arbitration as Exhibit B.

In arbitrating an interconnection agreement, the Commission seeks to arbitrate an agreement consistent with the provisions of § 251 of the Act. Applying this criteria, the Commission will order the following resolution to the issues in dispute:

A. Issue 2 - Provisions 4.29; 7.3.4.1.3; and 7.3.6: Whether the parties should be required to compensate one another for the transport and termination of trafic destined for Internet Service Providers ("ISPs")

1. The language proposed by Level 3 to Provisions 4.29, 7.3.4.1.3 and 7.3.6 of the Interconnection Agreement would require traffic originating on the network of one party and destined for an ISP served by the other party to be treated and routed as Exchange Area Service ("EAS")/Local Traffic and compensated at the EAS/Local Traffic rate.[2] Alternatively, Level 3 proposes that the Commission adopt a single intercarrier compensation rate structure for all local traffic that would provide for the "phase-down" of rates to be paid by one carrier to another over the term of the Interconnection Agreement. Under Level 3's proposals Qwest would be required to compensate it in some manner for ISP-bound calls made by Qwest customers that terminate on Level 3's network. Qwest's proposed language would negate this result by effectively classifying such traffic as "interstate" thereby removing it from the reciprocal

[2] The Interconnection Agreement provides that EAS/Local calls begin and end within a Local Calling Area or Extended Service Area which has been defined by the Commission.

compensation provisions of 251(b)(5) of the Act. Therefore, under Qwest's proposal compensation would not be paid by one party to the other for ISP-bound traffic.

2. Level 3 observes that it performs a service for Qwest when it terminates calls placed by Qwest's end users to ISP's served by Level 3. It incurs costs in providing this service and believes that it should be fairly compensated for the same. Level 3 argues that if it or some new entrant did not terminate these calls, Qwest would be required to deploy sufficient facilities and capacity to do so. Therefore, according to Level 3, Qwest should be economically indifferent as to whether it pays Level 3 for terminating such calls based on rates derived from its own cost studies or whether it transports and terminates this traffic itself. Level 3 contends that prohibiting the recovery of any of the costs required to transport and terminate Qwest's ISP traffic is unsustainable, anti-competitive and contrary to the public interest.

3. Level 3 concedes that prior Commission decisions on this subject mandate a "bill and keep" mechanism, whereby no reciprocal compensation is paid for ISP-bound traffic.[3] Level 3 contends that such a system is unfair and inherently anti-competitive given the "one-way" nature of ISP traffic. It is

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[3] See, *In the Matter of the Petition of ICG Telecom Group, Inc.*, Decision No. C00-858, Adopted August 1, 2000 (the "ICG Decision"); and *In the Matter of the Petition of Sprint Communications Company, L.P.*, Decision No. C00-479, Adopted May 3, 2000 (the "Sprint Decision").

undisputed that virtually all the traffic Qwest exchanges with Level 3 is one-way traffic that originates on Qwest's network destined for ISP's served by Level 3.[4] Virtually no traffic originates on Level 3's network destined for ISP's served by Qwest. Citing FCC Rule 51.713(b), Level 3 contends that the same economic principals that led the FCC to sanction a "bill and keep" mechanism only when local traffic between carriers is "roughly balanced" applies to ISP-bound traffic as well. Level 3 submits that ordering a "bill and keep" mechanism for ISP-bound traffic in the face of major traffic imbalances directly violates the intent and specific guidelines established by the FCC for that mechanism.

4. Level 3 recognizes that prior FCC rulings allow the Commission not to require the payment of reciprocal compensation for ISP-bound traffic and to adopt another compensation mechanism.[5] It points out, however, that a "bill and keep" system effectively results in no compensation being paid to it for such traffic. It contends that the FCC never intended that result, otherwise it would have expressly stated that other potential compensation mechanisms could include a "no compensation" option. In addition, it contends that various

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[4] See, Qwest Exhibit 3.

[5] See, *FCC Declaratory Ruling in the ISP Proceeding*—CC Docket No. 96-98; Released February 26, 1999; at ¶ 26 (the "ISP Order").

portions of the ISP Order[6], as well as the decision in *Bell Atlantic Telephone Companies v. FCC,* 206 F.3d 1 (D.C. Cir. 2000), support the conclusion that calls to ISPs should be treated as all other local traffic for reciprocal compensation purposes. Level 3 contends that Colorado is "nearly alone" among other state commissions in concluding that ISP-bound traffic should receive no compensation.[7]

5. Level 3 argues that various public policy considerations and economic rationales support requiring reciprocal compensation to be paid for ISP-bound traffic. These include, among others, the following: (a) allowing incumbent local exchange carriers ("ILEC's) such as Qwest to direct calls to the ISPs by using the competitive local exchange carrier ("CLEC") network without paying anything for its use penalizes the CLEC for attracting customers via innovative customer service focused products; (b) since calls directed to ISPs are functionally identical to local voice calls for which termination charges are paid, compensating a carrier for one type of call but not the other generates inaccurate economic signals in the marketplace that discourage firms from serving ISPs; and (c) requiring carriers to pay reciprocal compensation rates for ISP-bound traffic is economically efficient since they

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[6] See, ISP Order, ¶ 25.

[7] See, Exhibit C of the Petition for Arbitration.

are based on the ILEC's underlying costs which they would incur if required to terminate such traffic on their own network.

6. Allowing ILEC's such as Qwest to avoid paying reciprocal compensation for ISP-bound traffic will, in Level 3's opinion, skew the supply suitability of ISP services versus other local services, thereby making other local exchange services relatively more attractive production alternatives. This may, in turn, raise ISP prices relative to other local exchange services thereby impairing an ISP's ability to receive services at rates comparable to other local end users. Level 3 contends that this "price discrimination effect" results in electronic and e-commerce demand growing at a slower pace than if there were no price discrimination. Level 3 submits that this is contrary to the FCC's stated desire to provide ISPs with an access charge exemption so as to place them on a level playing field with other customers.

7. Level 3 takes issue with the underlying assumptions used by the Commission in reaching its finding in the ICG Order that implementation of a "bill and keep" mechanism for ISP-bound traffic "...encourages the efficient entry of competitors into the residential market."[8] It disagrees with the Commission's conclusion that Qwest customers who do not use the Internet will no longer be effectively subsidizing Internet

[8] See, ICG Order, Section II, G at ¶26.

users. In this regard, Level 3 points out that Qwest has not shown that it would not be fully compensated for those originating calls through its local rate structure. It contends that under a "bill and keep' system it will be Level 3 shareholders who are funding Qwest's customers access to ISPs. This result will, in Level 3's opinion, violate Congressional intent regarding enhanced services and will increase costs and reduce competitive alternatives for customers.

8. For these reasons, Level 3's primary position is that the Commission should reverse its prior decisions and order reciprocal compensation for ISP-bound calls at the same rate as other calls unless and until it or the FCC finally determines whether such traffic is local or interstate in nature.

9. In arguing that it should receive some form of compensation for ISP-bound traffic, Level 3 attempts to distinguish this case from the ICG and Sprint deecisions where the Commission found that a "bill and keep" system should be adopted. Level 3 points out that the Act limits the Commission's ability to resolve interconnection agreements to the issues presented in the petition for arbitration and the parties' associated responses. Unlike the ICG and Sprint cases where the Commission faced an "all-or-nothing" choice of either authorizing reciprocal compensation or adopting the "bill and keep" system, Level 3 has presented the Commission with the option of adopting an alternate compensation methodology for

ISP-bound traffic. Such an alternative rate mechanism could, in Level 3's opinion, provide the Commission a means of encouraging efficient entry into the market while providing reasonable compensation for every call a carrier terminates, including those involving ISPs.

10. Level 3's alternate proposal involves a single intercarrier compensation rate applicable to all local traffic, including ISP-bound traffic, within Colorado. Level 3 describes this as a "relative use responsibility" compensation mechanism. Under this proposal, the Commission would approve rates for all locally-dialed traffic that resemble what other ILECs have agreed to through market negotiations. Level 3 suggests that the intercarrier compensation rates other ILECs have agreed to with CLECs would provide an appropriate guide. These rates would be paid for "out of balance" traffic (i.e., those minutes above a 3:1 terminating/originating ratio) and would "phase-down" over the 30-month period of the Interconnection Agreement. The rate for termination of all locally-dialed "out of balance traffic" during the first year would start at $0.002. The "out of balance" rate would then drop to $0.0015 in the second year of the agreement and to $0.0012 in the last 6 months of the agreement. During this time, the rates for "in balance" traffic (i.e., minutes at or below the 3:1 ratio) would remain as the existing reciprocal compensation rate. Level 3 contends that

this alternative provides the Commission with a market-based solution between full and no compensation for ISP-bound traffic.

11. Qwest contends that ISP traffic is not local and, therefore, should not be subject to reciprocal compensation. Citing the fact all the traffic it exchanges with Level 3 is one-way traffic originating on Qwest's network, Qwest argues that paying Level 3 reciprocal compensation for such traffic would create an incentive for it to market exclusively to ISPs and to exclude other customers from its marketing efforts. Qwest relies on the rationale advanced by the Commission in the ICG and Sprint decisions to support its argument against paying reciprocal compensation for ISP-bound traffic.

12. Qwest contends that technical distinctions between the manner in which ISP-bound traffic is routed makes it more analogous to interstate long distance calls than to local calls. Qwest finds three basic distinctions. First, an ISP-bound call does not terminate in the local calling area. The call is connected to a modem at the ISP as an interface and is then delivered by the ISP to a web site specified by the end user. Under this view, the ISP does not terminate the call but is the carrier of the call. Second, for both long distance and ISP-bound calls the switch of the originating carrier does not know the ultimate destination of the call and the originating carrier does not deliver the call to its ultimate destination. The originating provider delivers the call to another carrier,

an inter-exchange carrier ("IXC") for interstate calls or a CLEC serving an ISP for ISP-bound calls, and that carrier identifies the network for which the call is destined and delivers the call to that network. Third, for a local call the switch of the originating carrier knows the destination of the call and the originating carrier has a direct path to the final destination. Unlike long distance and ISP-bound calls, the originating carrier does not "hand off" a local call for delivery to the final destination.

13. Qwest argues that it should not be required to pay reciprocal compensation for ISP-bound traffic because it is already spending substantial sums to expand the capacity of its network to handle ever increasing levels of Internet traffic. These expansions are necessary because of the longer "hold times" of Internet bound calls. Qwest also argues that it should not be required to pay reciprocal compensation at the EAS/Local rate for ISP-bound traffic because a specialized network designed to serve such traffic (such as Level 3's) is much more efficient and can be operated at less cost than a network (such as Qwest's) designed to serve multiple needs.

14. Qwest contends that Level 3's argument that the *Bell Atlantic* decision supports a reversal of the ICG and Sprint decisions ignores the essential holding of those orders. Those orders relied on the economic principles of cost causation, not jurisdictional distinctions over whether ISP-bound traffic is

interstate or local, in deciding that reciprocal compensation should not apply to such traffic. Under these principles it is Qwest's view that an ISP should charge its customer for the cost of an ISP-bound call and then compensate both Qwest and the involved CLEC for originating and delivering the call to the ISP. Qwest observed that in the ICG and Sprint Orders the Commission adopted the analogy between a long distance call originated by a Qwest subscriber and delivered to an IXC and an ISP-bound call originated by a Qwest subscriber and delivered to an ISP via a CLEC. Qwest acknowledges that this result is effectively precluded by the FCC policy exempting ISPs from access charges.

15. Qwest's "next-best" cost causation form of compensation for ISP-bound traffic, an equitable sharing between the ILEC and the CLEC of revenues earned by the CLEC from the lines and local exchange usage it sells to the ISP, has also been rejected by the Commission as too closely resembling access charges precluded by the FCC's exemption policy. That leaves, in Qwest's opinion, the third-best cost causation option, bill-and-keep. While imperfect, Qwest argues that bill-and-keep eliminates that opportunity for arbitrage, the practice of specializing in delivering ISP-bound calls for the purpose of taking advantage of the margin between the reciprocal compensation available for such calls and the CLEC's lower unit cost for such a specialized service.

16. Qwest also takes issue with Level 3's contention that it receives no compensation whatsoever for ISP-bound traffic under a bill-and-keep mechanism. While acknowledging that the FCC's exemption policy precludes all parties to an ISP-bound call from fully recovering their respective costs from each other, Qwest contends that Level 3 will receive some local exchange revenue from ISPs in connection with such traffic.

17. With regard to Level 3's alternative compensation mechanism proposal, Qwest observes that, to date at least, the Commission has found no compelling reason to implement reciprocal compensation at any positive rate for ISP-bound traffic. It opposes Level 3's alternative proposal for the same reasons it opposes reciprocal compensation at the EAS/Local rate.

18. The arguments presented by Level 3 are insufficient to convince us that we should reverse our prior decisions mandating a bill-and-keep compensation mechanism for ISP-bound traffic. Currently effective federal law grants us the discretion to adopt or *not adopt* reciprocal compensation for ISP-bound traffic in § 252 arbitration proceedings. The *Bell Atlantic* does not mandate a reciprocal compensation approach for ISP-bound traffic. Rather, that decision vacated the FCC's prior holding that ISP traffic is not local in nature, and remanded the case back to the FCC for a further explanation of its previous determination that such traffic is predominately

interstate and, consequently, not subject to reciprocal compensation under § 251(b)(5). *Bell Atlantic*, at 9. While the court may have suggested that Internet calls may *appear* to be functionally similar to local traffic, it made no definitive ruling on that issue to bind state commissions in § 252 proceedings. The court did not disturb the FCC's holding in the Declaratory Ruling[9] that state commissions have the discretion to determine the intercarrier compensation mechanism for ISP traffic in such proceedings. As part of that discretion, the FCC specifically held that state commissions "are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism." Declaratory Ruling, ¶ 26. This directive from the FCC is still effective, notwithstanding the *Bell Atlantic* decision, and, as such, we retain the policy discretion not to adopt a reciprocal compensation mechanism for ISP traffic.

19. As for Level 3's argument that bill and keep is unlawful because ISP traffic between it and Qwest is not roughly balanced, FCC Rule 57.713(b), upon which Level 3's argument is based, applies only to local traffic. Thus, the necessary premise of this argument is that Internet traffic is local in

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[9] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 14 FCC Rcd 3689 (Feb. 26, 1999).

nature. Federal authorities, including the FCC, have not yet determined that Internet calls are local.

20. We find Qwest's ILEC/IXC analogy for the transport of ISP-bound calls more persuasive than the ILEC/CLEC analogy advanced by Level 3. We continue to believe that in transporting an ISP-bound call, the ISP plays a role similar to that of the IXC in the transmission of an interstate long distance call. We believe that the originator of either call, the ILEC end-user, acts primarily as the customer of the ISP or IXC, not as the customer of the ILEC. Qwest and Level 3 participate in transporting a call to the Internet in much the same way as they would in providing access to an IXC as part of its process of completing an interstate call.

21. Level 3 proposes that we adopt its alternative compensation mechanism instead of bill-and-keep in connection with the Interconnection Agreement. This mechanism would assess Qwest a charge for Level 3's termination of calls to its ISPs. As a result, Level 3's proposal constitutes a positive compensation rate for ISP-bound traffic. In this sense, the mechanism proposed by Level 3 is not substantially different than other proposals for ISP-bound traffic compensation that we have already rejected. We continue to believe that adoption of such a mechanism will likely result in the same subsidies, market distortions, and inappropriate incentives, that we

previously identified in the ICG and Sprint decisions.[10] Reciprocal compensation at a positive rate violates the economic principle that a proper price signal requires that the end user be charged a price equal to the marginal cost of the service.[11] Accordingly, we will adopt Qwest's proposed language which will implement a bill and keep mechanism. This mechanism is appropriate because it focuses on the need for various networks to interconnect, but requires each carrier to recover its costs through charges imposed upon its own customers. We believe that such an approach is the best way to encourage greater, more seamless interconnection in the future.[12]

22. The Commission does not agree with Level 3 that rejecting reciprocal compensation in favor of bill and keep will result in its inability to recover the costs it incurs for the transmission of ISP-bound calls. Level 3 has the ability to recover such costs under the same procedures we identified in

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[10] Consistent with our earlier decisions on this issue, our rejection of reciprocal compensation in this case is not based on our conclusion that Internet bound calls appear to be interstate in nature. Even if they were deemed to be local, we would still not favor adopting reciprocal compensation with a positive rate.

[11] Such a price signal allows the end user to accurately compare the benefits of acquiring another unit of the product to the costs of acquiring another unit. It also properly signals ILECs and CLECs with respect to the relative benefits of deploying their capital to serve ISPs versus serving other potential customers.

[12] As we move forward to the consideration of globally connected communications networks, we need to abandon the archaic approaches to service categorization and regulatory jurisdiction. Regardless of technology or purpose, universal access to equitable connections should be the goal. Whether a call is local, interstate, voice, data, Internet, wireless or

the ICG decision. Level 3 has the opportunity to raise its ISP rate to its business basic exchange rate, it can raise its business basic exchange rate for all customers[13], or it could change its tariff to preclude ISPs from switching to the business basic exchange rate.

23. Our decision not to allow reciprocal compensation for ISP-bound traffic is not perfect. However, it is better than any other alternative that has been presented to us. By not allowing reciprocal compensation, ISP and ISP-users will more fully internalize the costs they impose on the network. Qwest customers who do not use the Internet will no longer be paying the "freight" for the Internet users. Thus, this outcome comes closer to rationalizing both the inter-carrier and end-user compensation. Likewise, this avoids some of the economic distortions caused by continuing reciprocal compensation. Carriers should have better price signals in deciding how to build their networks and solicit their customers; customers should have better price signals as to the costs of their use of the network.

24. In our opinion, the disallowance of reciprocal compensation for ISP-bound traffic best comports with § 251(2)(2)(D) of the Act which requires that interconnection be

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wireline should not be a determining factor in how the activity is regulated, priced or compensated.

[13] The feasibility of any of these rate increases is also dependent upon the rates charged by Qwest and other CLECs for comparable services.

on rates, terms and conditions that are just, reasonable and nondiscriminatory. Finally, by eliminating an unintended arbitrage opportunity, this outcome encourages the efficient entry of competitors into the residential market. Thus, the outcome is pro-competitive and anti-subsidy. ISP users pay for what they use; competitors can serve them accordingly; and non-ISP-users do not have to pay for services they do not use.

25. Since non-Internet traffic is subject to reciprocal compensation, the bill and keep method requires that Qwest be reasonably able to differentiate ISP-bound traffic from other forms of traffic flowing from Qwest to Level 3. We understand that Qwest has such capability. Any problems that may arise when executing this call identification process can either be addressed through the dispute resolution process included in the Interconnection Agreement or a request can be made for modifying the Interconnection Agreement. Level 3 has the least cost access to this information about ISP-bound and non-ISP-bound traffic. Now that it is aware of its compensation rights under the Interconnection Agreement, it should have ample incentive to make sure its traffic with Qwest is properly differentiated.

26. The Commission makes the following findings with respect to the specific contract language for Provisions 4.29. 7.3.4.1.3 and 7.3.6. We approve language for these provisions that both parties agree upon. We aprove Qwest's proposed

language for provision 4.29. We approve the following language for provision 7.3.4.1.3:

> Reciprocal compensation only applies to EAS/Local Traffic and does not apply to Internet Related Traffic. Internet Related Traffic shall be exchanged on a bill and keep basis.

B. Issue 3 - Provisions 4.39 and 4.58: Whether the definition of switched access should include phone-to-phone IP Telephony.

1. The language proposed by Level 3 to Provisions 4.39 and 4.58 of the Interconnection Agreement would have the effect of excluding calls transmitted over a carrier's packet switched network carried via an Internet Protocol ("IP Telephony") from switched access charges.

2. The language proposed by Qwest would expand switched access to apply to "phone-to-phone" IP Telephony traffic by including IP Telephony in the definition of "Switched Access Services" contained in the Interconnection Agreement. Qwest submits that its definition of "phone-to-phone" IP Telephonyis narrowly drafted so as to ensure that only IP telephony that meets applicable definitions of "telecommunications" service (and not those that are computer-to-computer services) will be subject to switched access charges.

3. Level 3 asserts that Qwest's proposal ignores established legal distinctions between "telecommunications" and

"information" services[14] and between the FCC's definitions of basic" and "enhanced" services.[15] Level 3 asserts that IP Telephony is an unregulated enhanced service since it meets the "protocol processing" test contained in 47 C.F.R. §64.702(a). The FCC has determined that such enhanced services should be treated as information services under the Act.[16] The FCC has also determined that so-called "hybrid" services (services that combine an information capability with telecommunications services) are also enhanced services.[17] As a telecommunications service, switched access charges would apply; as information services or "hybrid" services, the charges would not apply. Since switched access charges apply to telecommunication services but not to information or "hybrid" services, they should not, according to Level 3, apply to IP Telephony.

4. Level 3 is not requesting that a particular IP Telephony service offering be examined for the purpose of determining that it is not subject to access charges. Rather, it objects to the language proposed by Qwest on the basis of its belief that such language contains a definition of IP Telephony

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[14] See, 47 U.S.C. §153(43) and 47 U.S.C. §153(20).

[15] See, *Second Computer Inquiry*, 77 F.C.C.2d 384 (1980)(Computer II").

[16] See, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket 96-149, First Report and Order and Further Notice of Rulemaking, 11 FCC Rcd 21905, 21955-58, ¶¶104-107 (1996).

[17] See, *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Red 11501, at ¶¶58 (1998)(Report to Congress).

that is imprecise, overly broad and would treat all forms of IP Telephony as telecommunications services subject to switched access charges. Level 3 believes that an interconnection agreement arbitration proceeding such as this is an improper forum for the Commission to determine how to regulate IP Telephony services. It urges the Commission to reject Qwest's proposed language and to resolve this issue in the context of its currently pending investigation relating to intercarrier compensation practices.[18] It fears that the adoption of Qwest's language would effectively create new law and would preclude the Commission and the FCC from making future fact-based classifications of a specific service. In this regard, Level 3 contends that Qwest improperly characterizes its arbitration petition by asking the Commission to determine that a particular service it offers, (3) Voice, should be subject to switched access charges. Level 3 points out that Qwest may avail itself of the Commission's complaint procedures if it believes that (3) Voice constitutes a telecommunications service for which access charges should be paid.

5. Level 3 contends that its proposed language is consistent with the current status of the law and the previously enunciated policy positions of this Commission. In this regard,

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[18] See, Docket No. 00I-494T, *Investigation into Modification of Compensation Practices and Policies Regarding Intercarrier Compensation* (August 30, 2000).

Level 3 observes that the FCC has deferred making any specific determination of whether IP Telephony is a telecommunications service for which switched access charges would apply. It has also failed to act on a U S West petition asking it to make such a determination.[19] Level 3 also cites the ICG decision, where we prohibited Qwest from assessing charges on IP Telephony traffic notwithstanding our reluctance to specifically categorize it as an information service. Level 3 urges us to continue the approach we took in the ICG proceeding pending further consideration of this issue by the FCC.

6. In Qwest's view, "phone-to-phone" IP Telephony is functionally the same as ordinary long distance circuit-switched telephone service. It asserts that IP Telephony falls within the definitions of "telecommunications service" and "telecommunications" contained in the Act and under Colorado law.[20] It also cites a recent Denver District Court decision in support of its contention that IP Telephony is not a "hybrid" service as alleged by Level 3.[21] It further asserts that IP Telephony provided by Level 3 should not be exempt from switched access charges since it does not meet the definition of

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[19] See, *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Charges on IP Telephony* (filed April 5, 1999).

[20] See, § 40-15-102(29), C.R.S.

[21] See, *Qwest Corporation v. IP Telephony, Inc.*, Case No. 99CV8252 (Denver District Court; January 12, 2001).

"enhanced service" under Colorado law[22] or under the criteria established by the FCC.[23] Therefore, switched access charges should apply to that service. Simply because a carrier arranges its network so that some portion of each call traverses the Internet should not change the classification of the call from a telecommunications service to an information service. Qwest disagrees with Level 3's position that all IP Telephony services require protocol processing. Specifically, Qwest argues that "phone-to-phone" IP Telephony requires no such processing and, therefore, cannot be classified as an information service under the FCC rule cited by Level 3. Qwest contends that the FCC Report to Congress supports this view.

7. Qwest argues that attempts to classify carriers or the services they provide on the basis of the technology they use is not useful from an economic point of view. It contends that exempting IP Telephony from access charges will cause carriers to distort their choices of technology and the appearance of their services merely in order to qualify for the exemption. The resulting migration of long distance toll providers to IP Telephony will, in Qwest's opinion, ultimately require intrastate end user charges to be increased to make up for the loss of access charge revenues. This will result in

[22] See, 4 CCR 723-12.3.9.

[23] See, Report to Congress at ¶¶88-89.

inefficient product and service development, insufficient infrastructure investment, and an inefficient mix of technologies to provide the services telecommunications customers desire. Qwest also questions the wisdom of retaining a policy designed to promote the growth of nascent and untested communications technologies (including IP Telephony) that are now prominent enough to rival older technologies.

8. Both parties offered testimony comparing IP Telephony calls with traditional voice calls. Essentially, with a traditional voice call the network opens a circuit that connects the caller's telephone to the receiver's telephone and the wire loop becomes completely dedicated to that particular call. A call made via IP Telephony converts the caller's words into electronic "packets" that move separately along the fastest possible routes to their destination where a computer then reassembles them in the proper order and turns them into sound. As a result of these differences, Level 3 contends that IP Telephony calls do not utilize the circuit-switched network in the same manner as traditional voice calls and, consistent with our decision in the ICG case, are not subject to access charges.

9. Qwest analyzes Level 3's (3) Voice service in furtherance of its argument that the language it proposes for the Interconnection Agreement should be adopted. Qwest contends that from the consumer's perspective, as well as with respect to the use of the local network, (3) Voice service is no different

than that offered by any other long distance carrier. While Qwest concedes that a protocol conversion at Level 3's facilities is involved in the transmission of a (3) Voice call, it asserts that this conversion does not result in any net transformation of the information transmitted. For this reason, Qwest contends that such a call does not meet the Colorado definition of enhanced services set forth at 4 CCR 723-12.3.9.

10. Qwest also contends that the transmission of a (3) Voice call requires it to provide the same switching and call set-up functions on the originating and terminating end that are required for traditional voice calls. Qwest contends that Level 3 is asking Qwest to carry Qwest user originated calls to Level 3's long distance packet-switched network using the Qwest local network and LIS trunks. Qwest submits that this network is intended to exchange local calls between it and Level 3 that are not subject to access charges. Therefore, Qwest argues that Level 3 is seeking to bypass the Qwest long distance network to avoid paying access charges for long distance calls that originate and terminate on Qwest's local network. Qwest contends that the only basis for Level 3's request is that it uses an IP-based (packet-switched) network as opposed to a traditional (circuit-switched) network. Since a (3) Voice call is, in Qwest's opinion, functionally indistinguishable from traditional long distance calls they should not be exempt from access charges.

11. Qwest offers a recent Denver District Court ruling[24] as confirmation of the appropriateness of requiring Level 3 to pay switched access charges. The Court determined IP Telephony, Inc. ("IPT") is a long distance carrier and is obligated to pay switched access charges to Qwest. Qwest asserts the IP telephony service of Level 3 is similar to service provided by IPT and therefore, Level 3 is obligated to pay switched access charges.

12. Our authority to adjudicate interconnection agreement arbitration proceedings is limited to the issues presented in the arbitration petition and the response. The petition for arbitration submitted by Level 3 did not request a specific ruling as to whether its (3) Voice service would be subject to access charges. Rather, it asked that we reject language proposed by Qwest that would have the effect of requiring switched access charges to be paid for virtually all forms of IP Telephony by including that service under the "switched access service" definition contained in the Interconnection Agreement. We agree with Level 3, therefore, that approval of the language proposed by Qwest would go well beyond a determination that Level 3 must pay access charges in connection with its (3) Voice service. With regard to the

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[24] Qwest Corporation's Post Hearing Brief, Exhibit D, Qwest Corporation v. IP Telephony, Inc., Case Number 99CV8252, January 12, 2001.

general issue of whether access charges may be assessed in connection with IP Telephony, we reaffirm our holding contained in the ICG decision.

13. IP Telephony does not use Qwest's network in the same manner as calls for which switched access charges apply. When switched access is used, Qwest provides routing and switching from the end-user at the originating end to the IXC, and routing and switching from the IXC to the called party at the receiving end. If both the originating end and receiving end are within the same LATA, Qwest also provides the switched access transmission path. Switched access charges are applied to recover these costs of routing, switching, and the transmission path. In contrast, with IP Telephony the CLEC's gateway and IP network are used to deliver the call from the end-user at the originating end to the called party at the receiving-end. IP Telephony does not use Qwest's routing, switching, and transmission path services. Because the functionality and network use for IP Telephony is different, it should not be subject to switched access charges. Therefore, we reject Qwest's proposal to subject phone-to-phone IP telephony to switched access charges.

14. There is no evidence that the IP Telephony service proposed by Level 3 constitutes toll-bridging that the Commission has disapproved of in El Paso County Tel. Co. v.

Voice Networks, Inc., Docket No. 99K-335T. *See* Decision No. C00-760 (July 11, 2000).

15. We are unable to determine that the IP telephony service offered by Level 3 is similar to service offered by IPT. The recent ruling by the Denver District Court requiring IPT to pay switched access charges to Qwest does not persuade us that Level 3 should pay switched access charges to Qwest for Level 3's IP telephony.

16. Based on the record, we believe that not subjecting IP Telephony to switched access charges better satisfies § 251 of the Act, than the alternative.

17. We reject Qwest's proposed additional language to Provisions 4.39 and 4.58 of the Interconnection Agreement. The Interconnection Agreement shall include the language agreed on by Qwest and Level 3 in connection with these Provisions.

C. Issue 6 - Provisions 7.3.1.1.3.1 and 7.3.2.2: Whether Internet-related traffic should be included in calculating each party's responsibility for originating traffic over its own network.

1. At the time of the hearing, Issue 6 consisted of several sub-issues relating to the financial responsibility of the parties for their respective network facilities on each side of the point of interconnection ("POI"). The parties' Post-Hearing Briefs along with the revised Issues Matrix filed on March 2, 2001, reveal that only one sub-issue now remains for resolution: whether Internet-related traffic should be included

in calculating each party's responsibility for originating traffic over its own network.

2. The parties have generally agreed that the financial responsibility for trunks and facilities used to exchange traffic will be allocated on a "relative use" basis. The cost of trunks and facilities will be apportioned among the parties on the basis of each party's originating traffic flowing over those trunks. The language proposed by Level 3 to Provisions 7.3.1.1.3.1 and 7.3.2.2 of the Interconnection Agreement would include Internet-related traffic in the relative use calculation. The language proposed by Qwest would not.

3. Level 3 characterizes this issue as "...the extent to which a CLEC is required to bear financial responsibility for facilities on Qwest's side of the POI that carry Qwest's originating traffic."[25] Level 3 cites 4 CCR 723-39-3.5[26] and certain FCC "rules of the road"[27] which require each carrier to assume the financial obligation to deliver local traffic originated by its customers to the POI and to recover such costs from its end users. Level 3 contends that these "rules of the

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[25] Level 3 Post-Hearing Brief, page 34.

[26] 4 CCR 723-39-3.5 provides that each company interconnecting pursuant to the provisions of this Section shall be responsible for construction and maintaining the facilities on its side of the point of interconnection unless the parties agree to another arrangement.

[27] See, *TSR Wireless, LLC et al. V. U S West Communications, Inc.*, et *al.*, File Nos. E-98-13. E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. Jun. 21, 2000).

road" should apply to Internet-related traffic as well.

4. Level 3 points out that under Qwest's proposal if Qwest originates 95% of the local traffic going over a DTT facility, Level 3 would only be responsible for 5% of the charges set for that DTT. However, if the traffic originated by Qwest end-user customers is Internet-related or ESP traffic, even though 95% of the minutes going over the facility are originated by Qwest customers, Level 3 would bear 100% of the cost of that facility. Level 3 contends that this violates FCC rules by requiring it to pay Qwest for a portion of the costs Qwest incurs to bring its end users' calls over the Qwest network. Level 3 also points out that a Commission decision adopting Qwest's Issue 6 proposal coupled with a decision denying it reciprocal compensation for terminating ISP traffic[28] would be particularly unfair. Under this scenario, Level 3 would receive nothing for terminating ISP calls placed by Qwest's customers, but would be financially responsible for the originating facilities used to carry those calls over the Qwest network to the POI.

5. Qwest contends that the effect of adopting the Level 3 proposal would be that Level 3 would avoid paying any of the costs of the interconnection facilities it orders from Qwest that are necessary to deliver traffic to the ISPs Level 3

[28] See Issue 2 above.

serves. This would occur because Level 3 does not originate any traffic in Colorado. Because of Level 3's exclusive focus on serving ISPs, all of the traffic flowing over the interconnection facilities would be Internet-related traffic originating on Qwest's network. Under the parties' agreement to allocate costs on the basis of their relative use of the interconnection facilities, the inclusion of Internet traffic would dictate that all of the relative use would be associated with Qwest. Under Qwest's view, Level 3 would, therefore, obtain necessary interconnection facilities for free.

6. Qwest contends that this result would be economically inefficient because Level 3 directly causes the costs associated with the DTT and entrance facilities it obtains from Qwest in furtherance of its business decision to exclusively serve ISPs. As the "cost-causer" for these facilities, Qwest submits that Level 3 should be required to bear their cost. In support of its position, Qwest cites the decision entered by the Commission in *Petition of AirTouch Paging, Inc. for Arbitration of an Interconnection Agreement with US WEST Communications, Inc.*[29] In that decision, the Commission denied a request by AirTouch that US WEST not assess charges for the portion of the interconnection facilities AirTouch obtained from US WEST used to carry AirTouch's local

[29] Docket No. 99A-001T, Decision No. C99-419, April 23, 1999.

one-way paging traffic. The Commission held that good economic sense dictated that as the "cost-causer" of the subject facilities, AirTouch should be required to pay for them.

7. Qwest also contends that including Internet-related traffic in the relative use calculation is legally impermissible for three reasons. First, it violates Qwest's Colorado Interconnection tariff.[30] Second, adoption of the Level 3 proposal would violate §252(d)(1) of the Act which requires that rates for interconnection and network elements be "just and reasonable" and based on the "cost...of providing the interconnection or network element."[31] Qwest contends that including Internet traffic in the calculation of relative use would prevent Qwest from recovering the costs it incurs to provide Level 3 with interconnection facilities in direct violation of this provision of the Act. Third, and for the same reason, such a result would constitute an "unlawful taking" of property under the Fifth Amendment to the United States Constitution. Finally, Internet traffic should not be included in the relative use calculation for the same reason it should

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[30] Qwest Colorado P.U.C. Tariff No. 17, Sections 3.4 A.2.d and 4.4 expressly provide that Internet calls shall be excluded from calculating relative use for DTT and entrance facilities.

[31] See, *Iowa Utilities Board v. FCC*, 120 F.3d 753, 810 (8th Cir. 1997), aff'd in part, rev'd in part, remanded, *At&T Corp. v. Iowa Utils, Bd.*, 525 U.S. 366 (1999)(Under the Act, an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests).

not be subject to the reciprocal compensation provisions of § 251(b)(5) of the Act; namely, it is not local traffic.

8. The logic underlying our decision on reciprocal compensation for Internet bound traffic dictates a similar result here. When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of entrance facilities and direct trunked transport.

9. We approve the language agreed on by both Level 3 and Qwest. We also approve the additional language proposed by Qwest for Provisions 7.3.1.1.3.1 and 7.3.2.2 (a) indicating the new factor will exclude Internet related traffic and be based on non-Internet related traffic. We reject Qwest's proposed language stating: "The use of this factor shall not be deemed in any way to compromise or waive Qwest's position that Internet Related Traffic is interstate in nature.

D. Issue 13 - Provisions 7.4.6; 7.4.7 and 7.4.8: What is the appropriate interval governing the provisioning of trunks.

1. The language proposed by Level 3 to Provision 7.4.6 of the Interconnection Agreement would require that Qwest

provide Level 3 with initial trunks at a POI within 22 business days of Qwest's receipt of a valid Access Service Request ("ASR"). Level 3's proposed language to Provision 7.4.7 would require that subsequent trunking arrangements for interconnection be completed within 15 business days of Qwest's receipt of a valid ASR. Level 3 proposes that Provision 7.4.8 provide that arrangements to relieve trunk blocking between the parties be completed within five business days of Qwest's receipt of a valid ASR.

2. Qwest modified its proposed language for Provisions 7.4.6 and 7.4.7 subsequent to the hearing of this matter. That modified language is set forth in the Issues Matrix submitted with the parties' Post-Hearing Briefs.

3. Qwest's newly proposed language for Provision 7.4.6 provides for future amendment of the Interconnection Agreement to incorporate all aspects of the Commission's final decision in Qwest's currently pending Section 271 proceeding relating to performance measures for the establishment of trunking arrangements. Pending implementation of that amendment, Qwest proposes to use good faith efforts to provision trunking in accordance with a performance objective that is within average monthly intervals that are at parity with the average monthly intervals it achieves in Colorado for establishing Feature Group D type trunking arrangements.

4. Qwest's newly proposed language for Provision 7.4.7 calls for it to provide Level 3 with specific due dates for each order that Level 3 submits for the establishment of subsequent trunking arrangements. The due dates are to be determined on a case-by-case basis in accordance with the guidelines for LIS trunks contained in Qwest's Interconnect & Resale Resource Guide ("IRRG"). Qwest proposes that its IRRG be modified to incorporate the terms of the Commission's final decision in the its Section 271 proceeding relating to performance measures for establishing trunking arrangements.

5. Qwest proposes that Level 3's proposed language for Provision 7.4.8 relating to trunk blocking be excluded.

6. In support of its position, Level 3 states that it is merely seeking to establish reasonable intervals in the Interconnection Agreement to obtain certainty about the time frames within which Qwest will provide interconnection trucks. Level 3 contends that such certainty is essential for planning and marketing purposes. It states that it will be unable to meet critical dates for market activation and customer service unless it has the ability to rely upon and enforce trunk provisioning timeframes supplied to it by Qwest. Level 3 submits that trunk provisioning interval certainty is even more important in the case of blockage on existing trunks. Trunk blockage prevents Qwest customers from reaching Level 3 customers and vice versa. Level 3 wants to be able to provide

its customers with accurate and certain information concerning the resolution of blocking situations.

7. Level 3 finds Qwest's proposal unacceptable for three reasons. First, it does not obligate Qwest to fulfill initial trunk orders within any specified amount of time. Second, Qwest would have the right to unilaterally modify the provisioning intervals contained in its IRRG or in the parity standard with regard to subsequent trunk orders. Third, Qwest's proposal specifically provides that it is not legally bound by the provisioning intervals contained in the IRRG or the parity standards. As a result, Level 3 asserts that Qwest's proposal fails to establish provisioning intervals that can be relied upon and that it has no legal recourse if Qwest fails to comply with the IRRG.

8. Level 3 believes that the contractual trunking/blocking intervals it proposes are reasonable given the detailed trunk forecasts it provides to Qwest on a quarterly basis. According to Level 3, such forecasts provide Qwest with sufficient advance information to enable it to comply with the intervals included in the Level 3 proposal. In support of its position, Level 3 cites a decision of the Texas Public Utility

Commission that imposed a 20-day trunk provisioning requirement.[32]

9. Qwest contends that the intervals for trunk provisioning suggested by Level 3 are arbitrary and are an attempt to gain preferential treatment. Qwest contends that the uniform application of provisioning intervals to all CLEC's is required by § 251(c)(2)(D) of the Act. It submits that a contractual arrangement with Level 3 for provisioning trunks at different intervals than apply to other CLECs would be discriminatory.

10. Qwest also contends that the Level 3 proposal for trunk provisioning intervals is neither realistic nor reasonable. In this regard, it states that many different factors need to be considered in determining timeframes for the installation, change or rearrangement of trunks. Establishing a set interval for such provisioning as proposed by Level 3 would, in Qwest's opinion, deprive it of the flexibility it needs to modify provisioning intervals to reflect changes in CLEC forecasting and its own provisioning process. Qwest contends that use of its IRRG to establish uniform provisioning intervals provides this needed flexibility.

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[32] See, *In the Matter of Application by SBC Communications, Inc, Southwestern Bell Telephone Company and Southwestern Bell Communications services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65.

11. We agree with Level 3 that there are compelling commercial reasons for trunk provisioning intervals to be specified in the Interconnection Agreement. We have two concerns with the language proposed by Level 3. First, the proposed language does not address the consequences of overforecasting by Level 3. Mitigation measures for overforecasting need to be identified. We are also concerned that the language might under certain circumstances, *i.e.*, such as large volumes of orders for trunks, negatively impact trunk provisioning intervals to Qwest's retail and other wholesale customers. This does not mean that Qwest could totally ignore the specified intervals and after the fact claim that there were circumstances that prevented Qwest from meeting the trunk provisioning intervals. Qwest is required to provide advanced notice to Level 3 when Qwest will not be able to comply with a specified interval. The advanced notice shall state the reason why Qwest is unable to provision the trunks within the specified interval and indicate the date on which the trunks will be provisioned.

12. We reject Qwest's proposed language. We order the Parties to draft language to be included in the Interconnection Agreement which includes Level 3's proposed language modified to address the concerns identified above.

III. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration filed by Level 3 Communications, LLC on October 31, 2000 are resolved as set forth in the above discussion.

2. Within 30 days of the final Commission decision in this docket, Level 3 Communications, LLC and Qwest Corporation shall submit a complete proposed interconnection agreement for approval or rejection by the Commission, pursuant to the provisions of 47 U.S.C. § 252(e) of the Telecommunications Act of 1996.

3. The twenty-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

4. This Order is effective immediately upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING March 16, 2001.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

COMMISSIONER POLLY PAGE
ABSENT.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO
Case number: 99CV8252 Courtroom 1

ORDER

QWEST CORPORATION, INC.,

Plaintiff,

v.

IP TELEPHONY, INC., d/b/a MOUNTAIN SOLUTIONS TELECOM GROUP, INC.,

Defendant.

THIS MATTER is before the Court on Plaintiff's Motion For Partial Summary Judgement and Defendant's Motion For Summary Judgement. The Court having reviewed the motions and the applicable authority enters the following order.

For telephone purposes, Colorado is divided into geographic areas called "local exchange areas." Within these local exchange areas, local exchange carriers ("LECs") such as Qwest or competitive local exchange carriers ("CLECs") provide unlimited local calling for a flat monthly fee. A local call is a call that both originates and terminates within the same local exchange area. On these local calls, the LEC is responsible for getting the call to its destination and for paying any other carriers that may assist in carrying the call.

A long distance or interexchange call is a telephone call that terminates in a local exchange area other than the one in which it originates. When a caller places a long distance call, it is the caller's long distance carrier, not the local exchange carrier, that is responsible for getting the call to its destination and for paying any other carriers, including the LECs and CLECs on both ends of the call, for their assistance in carrying and terminating the call.

IPT is not a LEC or CLEC. IPT does not provide local exchange telephone service to its customers. Rather, IPT operates only as a long distance service provider. As such, when one of IPT's customers places a long distance call, it is the responsibility of IPT to get the call to its destination and to pay every other carrier along the way that is involved in carrying the call. It is IPT's legal obligation, therefore, to pay the LECs or CLECs on either end of its customer's long distance calls the originating and terminating switched access charges.

IPT's argument that it is a "toll reseller" and is therefore not responsible for switched access charges is without merits. Whether IPT characterize itself as a toll

reseller or not, unless the switch access charges are paid by IPT or by the contract service provider, in this case ICG, it amount to toll bridging. IPT is the long distance carrier for the customer making the long distance call and is, therefore, ultimately responsible for the switched access charges.

IT IS THEREFORE ORDERED that Plaintiff's Motion For Partial Summary Judgement is hereby granted and the Court enters judgement in favor of Plaintiff and against the Defendant on the issue of liability as requested in the motion.

IT IS FURTHER ORDERED that Defendant's Motion For Summary Judgement is hereby DENIED.

Done this 12th day of January, 2001

BY THE COURT

R. Michael Mullins
District Court Judge

cc: All Counsel

In Re: Petition of Sprint Communications Company L.P. For Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996

Docket No. 12444-U

Georgia Public Utilities Commission

2001 Ga. PUC LEXIS 55

May 1, 2001

OPINIONBY: [*1] MCDONALD, JR.

OPINION: **ORDER**

BY THE COMMISSION:

On June 8, 2000, Sprint Communications Company L.P. ("Sprint") petitioned the Georgia Public Service Commission ("Commission") to arbitrate certain unresolved issues in the interconnection negotiations between Sprint and BellSouth Telecommunications, Inc. ("BellSouth").

I. JURISDICTION AND PROCEEDINGS

Under the Federal Telecommunications Act of 1996 (the Federal Act), State Commissions are authorized to decide the issues presented in a petition for arbitration of interconnection agreements. In addition to its jurisdiction of this matter pursuant to Sections 251 and 252 of the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act) O.C.G.A. § § 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23.

The Commission approved the previous interconnection agreement between the parties for a three-year period beginning June 27, 1997. On August 29, 2000, the Commission issued its Procedural and Scheduling Order in this matter. A hearing was held before the Commission [*2] on February 5, 2001. On February 26, 2001, the parties filed simultaneous briefs on the unresolved issues. The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. FINDINGS AND CONCLUSIONS

1. Issue 4

Should BellSouth make its Custom Calling Features available for resale on a standalone basis?

The Federal Act imposes the duty upon incumbent local exchange carriers ("ILECs") "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." *47 U.S.C. § 251*(c)(4). The parties disagree over whether this statutory obligation applies to Custom Calling Features on a stand-alone basis. Sprint argues that Custom Calling Features fit within the meaning of "any telecommunications service." The Federal Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used." *47 U.S.C. 153* [*3] (46). Sprint points out that BellSouth provides Custom Calling features at retail to end-users. (Sprint Post-Hearing Brief, p. 3).

In its First Report and Order n2, the FCC stated that ILECs are not required to "disaggregate a retail service into more discrete retail services." (P877). BellSouth argues, in effect, that the Custom Calling features are "more discrete retail services," and that therefore, Sprint's request goes beyond BellSouth's obligation under the Federal Act. BellSouth argues that it meets its obligation by allowing Sprint to resell Custom Calling features "under the same terms and conditions that BellSouth provides those services to BellSouth's end-user customers." (BellSouth Post-Hearing Brief, p. 4). BellSouth's tariff A13.9 provides that Custom Calling services are provided in addition to basic telephone service. BellSouth's tariff A13.9.2B states that these

services are only furnished in connection with individual line residence and business main service. Since BellSouth end-user customers must subscribe to basic local exchange services in order to receive Custom Calling features, it is in compliance with the Federal Act to require the same for Sprint's end-user [*4] customers.

n2 First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (August 8, 1996) ("First Report and Order").

In Docket No. 7061-U, *Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*, the Commission determined that "switch vertical features should not be priced as individual elements but incorporated within the unbundled switch port element." (Order Establishing Cost-Based Rates, p. 5). It is consistent with the Commission's earlier decision not to disaggregate the Custom Calling Features from the loop, to determine that these features are "more discrete retail services" as contemplated in the FCC's First Report and Order. The Commission finds that BellSouth is not obligated to make its Custom Calling Features available on a stand-alone basis.

2. Issue 7

In situations where a CLEC's end-user customer is served via unbundled switching and is located in density zone 1 in one of the top fifty Metropolitan Statistical Areas ("MSAs") and who currently has three lines or less, adds [*5] additional lines, should BellSouth be able to charge market-based rates for all of the customer's lines?

FCC Rule 51.319(c)(2) sets forth an exception to an ILEC's general obligation under FCC Rule 51.311, to provide nondiscriminatory access to local circuit switching capability and local tandem switching capability. FCC Rule 51.319(c)(2) states that "an incumbent LEC shall not be required to unbundle local circuit switching for requesting telecommunications carriers when the requesting telecommunications carrier serves end-users with four or more voice grade (DSO) equivalents or lines." This exception is subject to the ILEC providing nondiscriminatory access to combinations of unbundled loops and transport throughout Density Zone 1. In addition, for the exception to apply, the ILEC's local circuit switches must be located in the top 50 Metropolitan Statistical Area (MSA), and in Density Zone 1.

Two issues have arisen concerning the applicability of this exception. The first concerns whether when a customer who currently has three lines or less, and then adds additional lines, the exception applies to all of the customer's lines. That is, whether BellSouth can charge marketbased [*6] rates for all of the lines or just the additional lines. Sprint argues that it would foster competition to limit the exception to the additional lines. (Sprint Post-Hearing Brief, p. 7). BellSouth claims that this could result in customers gaming the system by staggering their line orders. (BellSouth Post-Hearing Brief, p. 8). The Commission does not find any basis in the FCC regulation for limiting the applicability of the exception to the additional lines; therefore, the Commission adopts BellSouth's position on this issue.

The second issue related to this exception is whether this exception applies when the customer's four lines are not all located at the same premises. In Docket No. 11853-U, *Petition of AT&T Communications of the Southern States, Inc. and Teleport Communications Atlanta, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, the Commission determined that the plain language of the regulation indicates that the exception applies regardless of whether the four lines are located at different premises. (Commission Order, p. 8-9). Consistent with its determination [*7] in Docket No. 11853-U, the Commission concludes that the customer's four lines do not all have to be at the same premises in order for the exception to apply.

3. Issue 8

Should BellSouth be able to designate the network Point of Interconnection ("POI") for delivery of BellSouth's local traffic?

Issue 49

Should BellSouth be allowed to designate a virtual point of interconnection in a BellSouth local calling area to which Sprint has assigned a Sprint NPA/NXX? If so, who pays for the transport and multiplexing, if any, between BellSouth's virtual point of interconnection and Sprint's point of interconnection?

Under Section 252(c)(2) of the Federal Act, BellSouth has the duty to provide CLECs with interconnection with its network "at any technically feasible point within the carrier's network." The dispute among the parties concerns which party must bear the costs of transporting traffic from a BellSouth local calling area to the point of interconnection established by Sprint.

This issue has arisen in other arbitration proceedings before the Commission. In Docket No. 11901-U, the Commission ordered the initiation of a generic proceeding to address points of [*8] interconnection and virtual FX. In Docket No. 13542-U, *Generic Proceeding on Point of Interconnection and Virtual FX Issues*, the Commission will resolve these issues. Accordingly, the Commission finds it prudent not to rule on these issues in the context of this proceeding.

4. Issue 9

Should the parties' Agreement contain language providing Sprint with the ability to transport multi-jurisdictional traffic over a single trunk group, including an access trunk group?

At the commencement of the hearing, the parties informed the Commission that they had reached an agreement with respect to this issue. (Tr. 7). Specifically, the parties have agreed that Sprint's request to route multi-jurisdictional traffic over the same trunk group, including access trunk groups, is technically feasible. If the parties are unable to agree upon the reasonable costs related to Sprint's proposal, then the parties will request that the Commission determine the reasonable costs. (Sprint Post-Hearing Brief, p. 14, BellSouth Post-Hearing Brief, pp. 10-11).

The Commission finds that the agreement between the parties is reasonable and hereby incorporates this agreement into this order.

5. [*9] Issue 12

Should voice-over-Internet ("IP Telephony") traffic be included in the definition of "Switched Access Traffic"?

Issue 12 involves whether the definition of switched access in the arbitration agreement should include a reference to IP Telephony. In its Brief, BellSouth argued that it is irrelevant whether the call is placed using traditional telephone-to-telephone protocol or whether the call is placed over the internet. BellSouth argued that, either way, reciprocal compensation is not due for a long distance call. (BellSouth Post-Hearing Brief, p. 11). Sprint maintained that since the FCC has not decided this issue yet, the arbitration agreement should remain silent on this issue. (Sprint Post-Hearing Brief, p. 15).

This issue has arisen in Docket Nos. 11644-U, 11901-U and 11853-U n3. In each proceeding the Commission has deferred ruling on the issue until it can further consider the issue. The parties notified the Commission prior to its ruling in this docket that this issue has been resolved and thus no Commission action is warranted.

n3 Docket No. 11644-U, *Petition of BellSouth Telecommunications, Inc. For Arbitration of an Interconnection Agreement With Intermedia Communications, Inc. Pursuant To Section 252(b) of the Telecommunications Act of 1996*, (Order, p. 14 of 17).
Docket No. 11901-U, *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, (Order, p. 12 of 28).
Docket No. 11853-U, (Order, p. 10 of 19).
[*10]

6. Issue 17

Should Sprint be given space priority over other CLECs in the event that Sprint successfully challenges BellSouth's denial of space availability in a given central office, and the other CLECs who have been denied space do not challenge?

For the allocation of collocation space, BellSouth maintains a waiting list of CLECs based on the date BellSouth received the individual CLEC's collocation request. (BellSouth Post-Hearing Brief, p. 12). Sprint's position is that a CLEC's successful challenge to BellSouth's denial of collocation space should trump collocation application date for assignment of collocation space. This means that should Sprint apply for collocation space after another CLEC, but challenge successfully BellSouth's denial of space, it should be given priority of space assignment over this hypothetical CLEC that chose not to make such a challenge. The logic behind Sprint's proposal is that it is more equitable to reward the CLEC that incurs the costs of touring BellSouth's central office than the CLEC that did not invest the time and resources. (Sprint Post-Hearing Brief, p. 17).

FCC Rule 51.323(f)(1) obligates ILECs to allocate collocation space [*11] on a first-come, first-serve basis. The rule does not include an exception that would accommodate the variation proposed by Sprint. In fact, the very purpose of Sprint's proposal would be to deviate from a first-come, first-serve basis. The Commission concludes that to allow the challenging CLEC to gain priority over a CLEC that requested collocation space first would be in violation of the FCC Rule. The Commission declines to adopt Sprint's position on this issue. n4 BellSouth shall not be obligated to grant priority to a CLEC that successfully challenges BellSouth's denial of collocation space. Instead,

BellSouth shall allocate collocation space based on the date it receives the CLEC's collocation request.

n4 While decisions of other state commissions are not binding on this Commission, the Commission notes that the Florida Public Service Commission recently determined that "an applicant's place on the waiting list for collocation space shall be based upon the date the ILEC received the applicant's collocation application." (*See*, Order Granting in Part and Denying in Part Motion for Reconsideration, FPSC Docket No. 990321-TP, dated November 17, 2000.).

7. Issue 18 [*12]

Should Sprint and BellSouth have the ability to negotiate a demarcation point different from Sprint's collocation space, up to and including the convention distribution frame?

Issue 18 involves two issues: (1) which party chooses the demarcation point; and (2) the location of the demarcation point. The demarcation point is where ILEC and CLEC facilities meet. BellSouth and Sprint would each be responsible for the maintenance and provisioning of facilities on their side of the demarcation point. Sprint argues that the second issue stated above is of greater importance, and that the appropriate location for the demarcation point is its collocation space. (Tr. 129). Sprint argues, first, that since its request is technically feasible that it has a legal right to designate the Point of Termination (POT) bay, which is on the perimeter of Sprint's collocation space, as the demarcation point. (Sprint Post-Hearing Brief, pp. 18-19). From a logistics standpoint, Sprint reasons that Sprint's facilities should be located close to its collocation space. Other arrangements would increase costs to Sprint. *Id.* at 19.

The FCC has prohibited BellSouth from requiring CLECs to use intermediate **[*13]** points of interconnection, such as a POT bay. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking (March 31, 1999) P42. This means that BellSouth cannot obligate other CLECs to do what Sprint is requesting it be allowed to do in this agreement. Since other CLECs may not wish to designate the demarcation point at the POT bay, BellSouth will not be able to standardize the collocation process for all CLECs. BellSouth opposes Sprint's request because it claims that standardization is necessary for BellSouth to efficiently provision collocation arrangements. (BellSouth Post-Hearing Brief, p. 14).

The Federal Act obligates ILECs to provide interconnection at any technically feasible point within the carrier's network. *47 U.S.C. 251*(c)(2)(B). However, it is a separate question as to whether the CLEC can choose the demarcation point. The Federal Act does not grant CLECs the right to designate demarcation points. While it was established that BellSouth could interconnect at the POT bay, the record raises questions as to the technical feasibility **[*14]** for BellSouth to accommodate CLECs each proposing different demarcation points. BellSouth's testimony indicates that it would impair its ability to meet collocation intervals if BellSouth routinely had to alter its collocation process to accommodate different demarcation point designations. (Tr. 305). BellSouth proposes that designating the demarcation point at the conventional distribution frame ("CDF") would provide the necessary standardization. (BellSouth Post-Hearing Brief, p. 14). The Commission finds that BellSouth shall be allowed to choose the demarcation point. The demarcation point, as chosen by BellSouth, shall be the CDF, unless otherwise mutually agreed to by BellSouth and Sprint.

8. Issue 19

In instances where Sprint desires to add additional collocation equipment that would require BellSouth to complete additional space preparation work, should BellSouth be willing to commit to specific completion intervals for specific types of additions and augmentations to the collocation space?

In Docket No. 7892-U, *Performance Measurements for Telecommunications Interconnection, Unbundling and Resale*, the Commission established benchmarks for the provisioning **[*15]** of collocation arrangements. (Order, p. 6 of 31). Issue 19 involves whether collocation augmentation applications should be treated differently than initial collocation applications. Sprint requests a more detailed completion interval schedule for specific types of additions and augmentations to collocation space.

Sprint proposes categorizing augmentation requests as simple, minor, intermediate, or major. Simple augments, "such as the placement of additional AC convenience outlets, or only a fuse change for additional DC power," would be provided within 20 days from BellSouth's receipt of the application. (Tr. 27). Sprint proposes a 45-day interval for minor augments, such as interconnection cabling arrangements where the infrastructure exists. (Tr. 28). The interval for intermediate augments, "consisting of additional interconnect panels/blocks, cabling DC Power arrangements, where minor infrastructure work is required," would be 60 days. Finally, major augments, such as cage expansion or power cabling, would be provided within 60-90 days from the date that BellSouth

receives Sprint's application. (Tr. 28). Sprint states that adopting its proposal would alleviate the uncertainty [*16] that results from the parties addressing augment applications on a case-by-case basis. (Sprint Post-Hearing Brief, p. 22).

BellSouth attacks Sprint's proposed intervals as not being based on any statistical or empirical data. (BellSouth Post-Hearing Brief, p. 15). Sprint's witness, Melissa Closz, testified that the intervals were derived by engineers at Sprint's ILEC affiliate that perform the work in question. (Tr. 137-138). Ms. Closz testified that provisioning for Sprint's ILEC affiliate and BellSouth would be substantially the same. (Tr. 138). Sprint has provided adequate support for its proposed intervals.

BellSouth argues that Sprint's proposed additions and augments "do not fit neatly into categories," and that differences between central offices would result in different completion dates for each application. (BellSouth Post-Hearing Brief, p. 15). The Commission's current intervals were not developed based on differences in BellSouth's central offices. BellSouth's logic for denying Sprint's request would pertain to the existing collocation intervals adopted by the Commission. The proposed intervals seek to provide the same benefits as those adopted by the Commission. The Commission [*17] finds that Sprint's proposed intervals are adopted, with the exception of the interval for major augments.

9. Issue 21

Are there situations where Sprint should be permitted to convert in place when transitioning from a virtual collocation arrangement to a cageless physical collocation? If so, under what situations?

The Commission addressed this issue in Docket No. 11644-U. In its order, the Commission determined that virtual collocation may be converted to "in place" physical collocation according to the following specified criteria:

(1) There is no change in the amount of equipment or the configuration of the equipment that was in the virtual collocation arrangement;

(2) The conversion of the virtual collocation arrangement would not cause the equipment or the results of that conversion to be located in the space that BellSouth has reserved for its own future needs;

(3) Due to the location of the virtual collocation arrangement the converted arrangement does not limit BellSouth's ability to secure its own equipment and facilities;

(4) Any changes to the arrangement can be accommodated by existing power, HVAC, and other requirements;

(5) Under normal circumstances [*18] the conversion be handled by BellSouth in 60 calendar days;

(6) The interim application fee for such conversion from virtual to physical be $ 1,000, until such time as BellSouth shall file with this Commission a cost study for the conversion of virtual collocation to physical collocation and the same is adopted by this Commission. (Order, p. 8 of 17).

Consistent with its decision in Docket No. 11644-U, the Commission finds that these criteria should still apply to the "in place" conversion of virtual to physical collocation.

10. Issue 31

Should BellSouth be required to charge Sprint cost-based rates for dedicated OS/DA trunking?

ILECs are required to provide operator services and directory assistance ("OS/DA") as an unbundled network element, unless they provide "customized routing or a compatible signaling protocol." *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (released January 14, 2000) P442 ("UNE Remand Order"). The Commission has decided previously that BellSouth has met the requirement of providing customized [*19] routing. n5 The FCC noted the competitive alternatives for OS/DA in concluding that "the additional nondiscrimination requirements of section 251(b)(3), coupled with evidence of multiple alternative providers of OS/DA service in the marketplace, provide strong evidence that competitors are not impaired without access to the incumbent's OS/DA service as an unbundled element." UNE Remand Order, P441.

n5 Docket No. 11853-U, Order, p. 12 of 19; Docket No. 11901-U, Order, p. 4 of 28.

Sprint maintains that even if BellSouth is not obligated to unbundle OS/DA services, it is still required to provide transport elements at cost-based rates. (Sprint Post-Hearing Brief, p. 26). However, the FCC listed the cost of transporting traffic to the facilities as a cost involved in self-provisioning OS/DA. *Id.* at P450. The costs involved in transporting traffic are part of the costs

of a service for which the FCC has determined competitive alternatives exist and that is not an UNE. It would undermine the FCC's determination to isolate a component of OS/DA costs and find that market-based rates are inappropriate. The Commission finds that BellSouth shall be entitled to offer market-based rates [*20] for dedicated OS/DA trunking.

11. Issue 49

Should BellSouth be required to provide Sprint with two-way trunks upon request? If so, should BellSouth be required to use those two-way trunks for BellSouth originated traffic?

Federal regulations require BellSouth to provide two-way trunking upon request if technically feasible. *47 U.S.C. § 51.*305(f). This rule directly answers in the affirmative the first inquiry contained in this issue. In fact, BellSouth states that it agrees that it must provide two-way local interconnection trunks if requested. (BellSouth Post-Hearing Brief, p. 19). The dispute between the parties concerns whether BellSouth should be obligated to use the two-way trunks for BellSouth originated traffic. BellSouth claims that it is not always more efficient to use two-way trunks. *Id.* Sprint argues that under BellSouth's position, Sprint would lose the benefits of two-way trunking.

The Commission previously addressed this issue in Docket No. 11901-U. In its order, the Commission determined that "allowing BellSouth not to use the two-way trunking based on when it decides two-way trunking is not efficient would undermine [*21] the apparent intent of the federal regulation." (Order, p. 10 of 28). This reasoning is supported by the FCC in its Local Competition Order, where it found that an ILEC must accommodate two-way trunking if technically feasible. *Local Competition Order, P219.* Consistent with its prior ruling on this issue, the Commission finds that BellSouth is obligated to use two-way trunking for BellSouth originated traffic.

12. Issue 51

Upon denial of a Sprint request for physical collocation, what justification, if any, should BellSouth be required to provide to Sprint for space that BellSouth has reserved for itself or its affiliates at the requested premises?

Issue 51 involves the information BellSouth must provide to Sprint to justify a denial of a Sprint application for physical collocation. Both the FCC and the Commission have addressed this issue. In its *Advanced Services Order on Reconsideration* n6, the FCC ordered ILECs to provide to state commissions the necessary information to evaluate the ILEC's and its affiliates' reservations of space for future growth as well as a detailed description of the specific future uses for which the space has been reserved. P61. [*22] On July 23, 1999, in Docket No. 10429-U n7, the Commission issued an Order Adopting Interim Procedures for the Handling of Collocation Waiver Requests Filed by Incumbent Local Exchange Carriers. Sprint argues that the Interim Procedures adopted by the Commission are not sufficient to verify BellSouth's need to reserve the space, or whether the amount of reserved space is overstated. [Sprint Post-Hearing Brief, p. 30].

n6 Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 98-147 and CC Docket No. 96-98, Released August 10, 2000.

n7 *Generic Proceeding for the Purpose of Holding Workshops and Hearings to Determine if Specific Procedures need to be Established for the Handling of Collocation Waiver Requests filed by Incumbent Local Exchange Carriers.*

The Commission disagrees with Sprint's position. The procedures approved by the Commission in Docket [*23] No. 10429-U require BellSouth, upon denial of collocation request, to file a letter to the CLEC of denial of collocation request and a notice to the Commission of its intent to file collocation waiver petition. Both of these documents must contain the following information:

1. Central office designation.

2. Reason for denial.

3. All available information used by the ILEC to determine that there was no space available (e.g. worksheet, and marked engineering drawings with available project numbers).

4. Notice of date and time that walk-through is scheduled. (Order, p. 2).

Pursuant to the Commission Order in Docket No. 10429-U, BellSouth is also required to file with the Commission a collocation waiver petition. The waiver petition must attach the following information:

1. Detailed engineering drawings with project codes/available project numbers for all reserved space [including general descriptions and planned retirements].

2. Completed Physical Collocation Floor Space Worksheet.

3. Reclamation timeliness.

4. Timeliness for space availability (including timeliness for retirements and building additions).

5. Description of construction plans.

6. Staffing levels **[*24]** and schedules, and description of all administrative space and equipment.

7. Description of grounds and surrounding area. (Order, p. 2-3).

If Sprint determines that the information BellSouth files is not sufficient for its purposes, it may use the discovery rights that the Commission granted CLECs in Docket No. 10429-U. Sprint has not shown that the information BellSouth is required to file in conjunction with CLEC discovery rights is not adequate to meet its informational needs. The Commission declines to adopt the additional requirements proposed by Sprint.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues that the parties presented to the Commission for arbitration should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, that all findings, conclusions statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions **[*25]** of law, statements of regulatory policy and orders of this Commission.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 1st day of May, 2001.

Reece McAlister
Executive Secretary

Date

Lauren McDonald, Jr.
Chairman

Date

Docket No. 11644-U

In Re: Petition of BellSouth Telecommunications, Inc. For Arbitration of an Interconnection Agreement With Intermedia Communications, Inc. Pursuant To Section 252(b) of the Telecommunications Act Of 1996.

ORDER

Appearances

On behalf of Intermedia Communications, Inc.
Charles V. Gerkin, Jr., Attorney

On behalf of BellSouth Telecommunications, Inc.
Fred McCallum, Attorney
Meredith E. Mays, Attorney

On behalf of the Commission Staff
Thomas K. Bond, Attorney

BY THE COMMISSION:

On December 7, 1999, BellSouth Telecommunications, Inc. ("BellSouth" or "BST") petitioned the Commission to arbitrate certain unresolved issues in the interconnection negotiations between BellSouth and Intermedia Communications, Inc. ("Intermedia"). The Commission issues this Order to resolve the issues still remaining between the BellSouth and Intermedia (the "Parties").

ATTACHMENT 11
LEVEL 3'S VoIP COMMENTS

I. JURISDICTION AND PROCEEDINGS

Under the Federal Telecommunications Act of 1996 (the Federal Act), State Commissions are authorized to decide the issues presented in a petition for arbitration of interconnection agreements. In addition to its jurisdiction of this matter pursuant to Sections 251 and 252 of the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§ 46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21 and 46-2-23.

On or about July 1, 1996, Intermedia entered into a voluntarily negotiated interconnection agreement with BellSouth. The two-year interconnection agreement expired on July 1, 1998, but was subsequently extended by mutual agreement between Intermedia and BellSouth to December 31, 1999.

By letter dated June 28, 1999, BellSouth requested the negotiation of a new interconnection agreement, and proposed a starting point for negotiations between the Parties. The Parties agreed that these negotiations would be deemed to have started on July 1, 1999. The Parties have agreed to operate under the terms of their existing interconnection agreement until a new interconnection agreement is approved.

On December 7, 1999, BellSouth filed a petition for arbitration with the Commission, which initiated this proceeding. BellSouth's petition set forth only ten disputed issues, but indicated that several other issues had been raised by Intermedia prior to the expiration of the arbitration window. Intermedia filed its answer and new matter to BellSouth's petition on January 3, 2000, specifying the 38 additional issues that were in fact outstanding between the parties at the time BellSouth filed its petition. Pre-filed testimony was filed, discovery was permitted, and the hearing in this matter was held on May 9, 2000.

On May 26, 2000, the parties filed briefs on the following unresolved issues:

Issue 2(a): Should the definition of "local traffic" for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act include the following: Subissue 2(a): ISP traffic?

Issue 3: Should Intermedia be compensated for end office, tandem, and transport elements, for purposes of reciprocal compensation?

Issue 6: For the purposes of collocation, should intervals be measured in business days or calendar days?

Issue 8: Is BellSouth's interval for responding to Intermedia's bona fide collocation requests appropriate?

Issue 9: Is BellSouth's interval for physical collocation provisioning appropriate?

Issue 10: Are BellSouth's policies regarding conversion of virtual to physical collocation reasonable?

Issue 12: What is the appropriate definition of "currently combines" pursuant to FCC Rule 51.315(b)?

Issue 13: Should BellSouth be required to: (a) provide access to enhanced extended links ("EELs") at UNE rates; and (b) allow Intermedia to convert existing special access services to EELs at UNE rates?

Issue 18: Should BellSouth be required to provide access on an unbundled basis in accordance with, and as defined in, the FCC's UNE Remand Order, to the following: Subissue 18(c): packet switching capabilities?

Issue 22: Should BellSouth be required to offer nondiscriminatory access to interoffice transmission facilities in accordance with, and as defined in, the FCC's UNE Remand Order?

Issue 25: Should BellSouth be required to furnish access to the following as UNEs: (i) User to Network Interface ("UNI"); (ii) Network-to-Network Interface ("NNI") and (iii) Data Link Control Identifiers ("DLCI"), at Intermedia-specified committed information rates ("CIR")?

Issue 26: Should parties be allowed to establish their own local calling areas and assign numbers for local use anywhere within such areas, consistent with applicable law?

Issue 29: In the event Intermedia chooses multiple tandem access ("MTA"), must Intermedia establish points of interconnection at all BellSouth access tandems where Intermedia's NXXs are "homed"?

Issue 30: Should Intermedia be required to: (a) designate a "home" local tandem for each assigned NPA/NXX; and (b) establish points of interconnection to BellSouth access tandems within the LATA on which Intermedia has NPA/NXXs homed?

Issue 31: For purposes of compensation, how should IntraLATA Toll Traffic be defined?

Issue 32: How should "Switched Access Traffic" be defined?

Issue 33: Should BellSouth and Intermedia be liable to each other for lost switched access revenues due to lost or damaged billing data?

Issue 37: Should all framed packet data transported within a VC that originate and terminate within a LATA be classified as local traffic?

Issue 38: If there are no VCs on a frame relay interconnection facility when it is billed, should the parties deem the Percent Local Circuit Use to be zero?

Issue 39: What are the appropriate charges for the following: (a) interconnection trunks between the Parties' frame relay switches; (b) frame relay network-to-network interface points; (c) permanent virtual circuit ("PVC") segments (i.e., Data Link Connection Identifier ("DLCI") and Committed Information Rates ("CIR"); (d) requests to change a PVC segment or PVC service order record?

Issue 48: Should the parties adopt the performance measures, standards and penalties imposed by the Texas Public Utility Commission on Southwestern Bell Telephone?

II. FINDINGS AND CONCLUSIONS

The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision. The Commission makes the following findings of fact, conclusions of law and statements of regulatory policy on the remaining unresolved issues between the parties:

Issue 2(a): Should the definition of "local traffic" for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act include the following: Subissue 2(a): ISP traffic?

BellSouth argues that calls to ISPs should not be included in the definition of "local traffic" for purposes of the parties' reciprocal compensation obligations. In support of its argument, BellSouth asserts that the FCC has found this traffic to be jurisdictionally interstate on several occasions. In addition, BellSouth states that it requiring payment of reciprocal compensation for such traffic is not good public policy, and does not make good business sense. BellSouth Brief, pp. 7-9.

Intermedia, on the other hand, argues that reciprocal compensation should apply to calls originated by BellSouth and transported and terminated by Intermedia to its ISP customers, and vice versa. Intermedia asserts that both the law and good public policy dictate that reciprocal compensation should be paid for ISP traffic. Intermedia Brief, pp. 6-13.

The Commission Staff has recommended, consistent with previous decisions of this Commission, that reciprocal compensation should apply to calls terminated to ISP customers. Staff also recommended that, in the event the FCC establishes some other mechanism for

compensation for such calls, the parties may petition the Commission to revisit this issue at that time. The Commission adopts Staff's recommendation.

The Commission has previously found that it has the authority under Section 252 of the Federal Act to order a provision in the arbitration agreement that reciprocal compensation be due for ISP-bound traffic. Commission Docket 10854-U; see Declaratory Ruling[1] Paragraph 25 (State commissions "may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic.").[2] As the FCC has stated, the FCC's own policy of "treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation suggest that such compensation is due for that traffic." Id. ILECs and CLECs should be compensated for costs imposed on their systems, including costs for transport and delivery of ISP-bound calls. Consistent with the previous decisions of the Commission, the Commission requires the Parties to pay reciprocal compensation for calls to ISPs.

Issue 3: Should Intermedia be compensated for end office, tandem, and transport elements, for purposes of reciprocal compensation?

BellSouth's argues that the Commission should deny Intermedia's request for tandem switching compensation. BellSouth asserts that Intermedia failed to prove that its switch is actually performing tandem switching and failed to prove that its switch serves a geographic area comparable to BellSouth's switch. BellSouth Brief, pp. 9-16. Intermedia states that it has fully satisfied the requirements of FCC rule 51.711(a)(3) and is therefore entitled to receive reciprocal compensation at the tandem interconnection rate. Intermedia Brief, 13-21.

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[1] The FCC's Declaratory Ruling was vacated by the District of Columbia Circuit Court of Appeals for "want of reasoned decision-making" with regard to the FCC's use of the "end-to-end" analysis. Bell Atlantic Tel. Co. v. FCC, -- F.3d --, No. 99-1094, 2000 WL 273383, at *2 (D.C. Cir. Mar. 24, 2000). The District of Columbia Circuit's order removed the clarity that the Declaratory Ruling had appeared to provide regarding the jurisdictional nature of ISP traffic. Thus, at least for the time being, the jurisdictional nature of ISP traffic is once again an open question and this Commission once again finds that such traffic is intrastate in nature. Indeed, the Bell Atlantic decision makes the same distinctions between providers of telecommunication services and information services that this Commission had previously relied on in its prior ISP cases. Bell Atlantic Tel. Co. v. FCC, 2000 WL 273383, at *6-7. In any event, as discussed in footnote 2, supra, even assuming arguendo that such traffic is interstate in nature, the Commission is still authorized to address this matter and would still find that reciprocal compensation is due for such traffic.

[2] As the District Court for the Northern District of Georgia noted when it affirmed the prior ISP orders issued by this Commission, "the FCC unambiguously stated [in the Declaratory Ruling] that '[a] state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding - or a subsequent state commission decision that those obligations encompass ISP-bound traffic - does not conflict with any Commission rule regarding ISP-bound traffic.'" BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., et al., In the United States District Court for the Northern District of Georgia, Civil Action No. 1:99-CV-0248-JOF, May 4, 2000 Order, p. 27. The fact that the Declaratory Ruling was vacated for want of reasoned decision-making with regard to its use of the "end-to-end" analysis does not necessarily mean that the FCC's conclusion that state commission's are authorized to require payment of reciprocal compensation for ISP traffic even if such traffic is interstate in nature is invalid. Id. at n. 13.

Staff recommends that the Commission find that Intermedia has demonstrated that its switches perform tandem switching functions and that it serves a geographic area comparable to the area served by BellSouth; therefore, Staff recommends that the Commission find that the tandem rate element for reciprocal compensation is applicable.

47 C.F.R. § 51.711(a)(3) provides:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

If a CLEC switch "covers a geographic area comparable to that covered by a tandem switch . . . this alone provides sufficient grounds for a finding that the appropriate rate for the [switch] is the tandem switch rate." U.S. West Communications, Inc. v. Minnesota Public Utilities Commission, 55 F. Supp. 2d 968, 979 (D. Minn. 1999). Based on the evidence presented in this matter, the Commission finds that Intermedia's switch covers a geographic area comparable to that covered by a BellSouth tandem switch. Accordingly, the tandem rate element for reciprocal compensation is appropriate.

BellSouth argues that in addition to serving a geographic area comparable to the area served by the incumbent LEC's tandem switch, Intermedia must show that "its switch is actually performing tandem switching." BellSouth Brief, p. 16. The FCC directed state commissions that establish "transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch" to "consider whether new technologies (e.g., fiber ring or wireless network) perform functions similar to those performed by an incumbent LEC's tandem switch and thus whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." First Report and Order, ¶ 1090. First, the Commission notes that the FCC did not state that state commissions should consider whether the switch performs "the same" functions as a tandem switch. Instead, the FCC stated that state commissions should consider whether the switch performs "similar" functions as a tandem switch. Based on the evidence presented in this matter, the Commission finds that Intermedia's switch performs functions similar to BellSouth's tandem switches. In any event, the FCC went on to state that "[w]here the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate." Id. As previously discussed, the Commission finds that Intermedia's switch covers a geographic area comparable to that covered by a BellSouth tandem switch.

Issue 6: For the purposes of collocation, should intervals be measured in business days or calendar days?
Issue 8: Is BellSouth's interval for responding to Intermedia's bona fide collocation requests appropriate?
Issue 9: Is BellSouth's interval for physical collocation provisioning appropriate?

BellSouth states that it uses business days in order to measure collocation intervals because of its reliance upon skilled contractors and governmental personnel. Also, as the competition in Georgia increases, the number of collocation applications received by BellSouth increased. Therefore, BellSouth argues maintaining the current intervals is vital in order to properly respond to the volume of applications received. If calendar days are used to measure collocation intervals, then BellSouth submits that its actual provisioning intervals would require modification. BellSouth Brief, pp. 16-18. Intermedia argues that the collocation provision intervals in the parties' agreement should be expressed in calendar days rather than business days. Intermedia Brief, pp. 21-24.

Staff recommends that the intervals be measured in calendar days; that the interval for responding to Intermedia's bona fide collocation requests be 30 calendar days; and, the interval for physical collocation provisioning be 90 calendar days under ordinary circumstances and 120 calendar days under extraordinary circumstances. The Commission adopts Staff's recommendation.

Issue 10: Are BellSouth's policies regarding conversion of virtual to physical collocation reasonable?

BellSouth states that the terms and conditions that should apply for converting virtual collocation to physical collocation should be consistent with the terms and conditions of the assessment and provisioning of physical collocation because BellSouth evaluates both of these applications in the same manner. If a collocator makes a request for conversion from virtual to physical collocation, the collocator should be responsible for any cost incurred. BellSouth would allow conversion of virtual collocation to physical without requiring the relocation of the equipment where three conditions are met: 1) that there is no change in the amount of equipment or the configuration of the equipment that was in the virtual collocation arrangement; 2) that the conversion of the virtual collocation arrangement would not cause the equipment or the results of that conversion to be located in the space that BellSouth has reserved for its own future needs; and 3) that due to the location of the virtual collocation arrangement the converted arrangement does not limit BellSouth's ability to secure its own equipment and facilities. BellSouth Brief, pp. 18-19.

Intermedia argues that it should be allowed to convert its virtual collocation arrangements to physical collocation arrangements without requiring the relocation of its equipment. Intermedia further argues that this should be done in a timely manner. Intermedia does not disagree with BellSouth that it should be able to reserve space for future use, so long as it is

reasonable. Intermedia states that it is willing to accept the proposition that "in place" conversion of virtual collocation to physical collocation may not be permitted where the conversion would cause the arrangement to be located in the area reserved for BellSouth's future growth. Intermedia is also willing to agree that "in place" conversion will be allowed if (a) Intermedia does not increase the amount of space it occupies, and (b) any changes to the arrangement can be accommodated by existing power, HVAC, and other requirements. Intermedia also states that the application fee should not be the same as the application fee for a new request for physical collocation ($3850) as not many of the same tasks are required and further that the 90 day turnaround on such an application is unreasonable. Intermedia Brief, pp. 24-26.

The Staff recommends that virtual collocation may be converted to "in place" physical collocation according to the following criteria: 1) that there is no change in the amount of equipment or the configuration of the equipment that was in the virtual collocation arrangement; 2) that the conversion of the virtual collocation arrangement would not cause the equipment or the results of that conversion to be located in the space that BellSouth has reserved for its own future needs; 3) that due to the location of the virtual collocation arrangement the converted arrangement does not limit BellSouth's ability to secure its own equipment and facilities; (4) that any changes to the arrangement can be accommodated by existing power, HVAC, and other requirements; (5) that under normal circumstances the conversion be handled by BellSouth in 60 calendar days (this is the same interval previously approved by the Commission for cageless collocation); and (6) that the interim application fee for such conversion from virtual to physical be $1,000 (the normal physical collocation application fee is $3850; however, the costs of many of the tasks/functions that comprise that fee are not applicable to in place conversion), until such time as BellSouth shall file with this Commission a cost study for the conversion of virtual collocation to physical collocation and same is adopted by this Commission. The Commission adopts Staff's recommendation.

Issue 12: What is the appropriate definition of "currently combines" pursuant to FCC Rule 51.315(b)?

BellSouth states that it will provide combinations to Intermedia at cost-based rates if the elements are already combined and providing service to a particular customer at a particular location. BellSouth, however, acknowledges that on this issue the Commission had ordered that "currently combined" means "ordinarily combined" within BellSouth's network in Docket No. 10692-U and in Docket No. 10767-U. BellSouth Brief, pp. 19–20. Intermedia argues that the Commission should require BellSouth to provide Intermedia with access to combinations of UNEs that are already physically combined and to combinations of UNEs that are typically combined. Intermedia Brief, pp. 27-28. The Staff recommends that, consistent with its decisions in other dockets, the Commission find that BellSouth is obligated to provide to Intermedia combinations of UNE that it ordinarily combines in its network. See Docket Nos. 10692-U, 10767-U, and 10854-U. The Commission sees no reason to depart from its previous determinations.

The Commission addressed this issue in the context of Dockets 10692-U, 10767-U, and 10854-U. The Commission's Order in 10692-U included the following language:

> Rule 315(b), by its own terms, applies to elements that the incumbent 'currently combines,' not merely elements which are 'currently combined.' In the FCC's First Report and Order, the FCC stated that the proper reading of 'currently combines' is 'ordinarily combined within their network, in the manner which they are typically combined.' First Report and Order, ¶ 296. In its Third Report and Order, the FCC stated that it was declining to address this argument at this time because the matter is currently pending before the Eighth Circuit. Third Report and Order, ¶ 479.[3] Accordingly, the only FCC interpretation of 'currently combines' remains the literal one contained in the First Report and Order. The Commission finds that 'currently combines' means ordinarily combined within the BellSouth's network, in the manner which they are typically combined. Thus, CLECs can order combinations of typically combined elements, even if the particular elements being ordered are not actually physically connected at the time the order is placed.

As further explained by the Commission in Docket No. 10692-U, adopting BellSouth's proposed "currently combined" interpretation would only make the process more cumbersome for the CLEC; it would not prevent the CLEC from obtaining and using the same UNE combinations. Based on the FCC's Third Report and Order, CLECs can purchase services such as special access and resale even when the network elements supporting the underlying service are not physically connected at the time the service is ordered. At the point when the CLEC begins to receive such service, the underlying network elements are necessarily physically connected. The CLECs can then obtain such currently combined network elements as UNE combinations at UNE prices. Third Report and Order, ¶¶ 480, 486. The Commission finds that even assuming arguendo that "currently combines" means "currently combined," rather than go through the circuitous process of requiring the CLEC to submit two orders (e.g., one for special access followed by another to convert the special access to UNEs) to receive the UNE combination, the process should be streamlined to allow CLECs to place only one order for the UNE combination.

Issue 13: Should BellSouth be required to: (a) provide access to enhanced extended links ("EELs") at UNE rates; and (b) allow Intermedia to convert existing special access services to EELs at UNE rates?

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[3] While the FCC declined to address this argument again in its Third Report and Order, significantly the FCC did not disavow the position it took in the First Report and Order. BellSouth argues that "the FCC made clear that 'currently combined' elements are those elements physically combined as of the time the CLEC requests them and which can be converted to UNEs on a 'switch as is' or 'switch with changes basis." BellSouth's Brief on Impact of Third Report and Order, p. 5. The FCC, however, was not stating that Rule 51-315(b) is limited only to currently combined elements. Instead, the FCC was stating that since, at the least, Rule 51-315(b) includes currently combined elements, and since when a CLEC purchases special access the elements are currently combined, that even under the more restrictive "currently combined" interpretation, CLECs would be able to convert special access to loop-transport combinations at UNE rates. Third Report and Order ¶ 480.

BellSouth argues that, "except to the extent where currently combined elements in BellSouth's network that comprise an EEL are located, BellSouth currently has no obligation to provide CLECs with the EEL." BellSouth Brief, pp. 20-21. BellSouth notes that the FCC declined to define the EEL as a separate network element in its UNE Remand Order. UNE Remand Order, ¶ 478. BellSouth further argues that until the UNE Remand Order is complete, the FCC has made clear that carriers may not convert special access services to combinations of unbundled network elements unless the carrier uses combinations of network elements to provide significant amount of local exchange service, in addition to exchange access service to a particular customer. November 24, 1999 Supplemental Order, ¶¶ 2 and 4. Intermedia argues that BellSouth is obligated by law to provide access to EELs, and to allow the conversion of special access service to EELs, at UNE rates. Intermedia Brief, pp. 28-30.

As with issue 12 above, the Staff recommended that the Commission remain consistent with its prior decisions regarding UNE combinations and the EEL. See Docket Nos. 10692-U and 10767-U. In those prior decisions, the Commission determined that CLECs were entitled to purchase at cost-based rates, combinations of UNEs that BellSouth ordinarily combines in its network. In regards to converting existing special access services to EELs at UNE rates, the Commission stated as follows:

> On November 24, 1999, the FCC issued a Supplemental Order to its Third Report and Order. In this Supplemental Order, the FCC modified its conclusion in paragraph 486 of the Third Report and Order to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service. Supplemental Order, ¶ 4. IXCs may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities, unless the IXC uses the combination "to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." Id. at ¶ 5. Accordingly, the Commission finds that in order for a CLECs to use a loop/transport combination to provide special access service, the CLEC must provide a significant amount of local exchange service over the combination. Further, loop/transport combinations must be connected to a CLEC switch and must be used in the provision of circuit switched telephone exchange service. Such CLECs must "self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements" in order to convert special access facilities to UNE pricing. Id. at footnote 9. The FCC did not find it to be necessary for ILECs and requesting carriers to undertake auditing processes to monitor whether requesting carriers are using UNEs solely to provide exchange access service. Id. The Commission finds that BellSouth shall not make auditing a precondition to converting special access to UNEs; thus the conversion of facilities will not be delayed. The Commission finds, however, that BellSouth shall be allowed to audit CLEC records in order to verify the type of traffic being transmitted over EELs. If, based on its audits, BellSouth concludes that a CLEC is not providing a

significant amount of local exchange traffic over the facilities, BellSouth may file a complaint with this Commission.

Docket 10692-U, Supplemental Order, pp. 1-2. The Commission sees no reason to depart from its previous determinations.

Issue 18: Should BellSouth be required to provide access on an unbundled basis in accordance with, and as defined in, the FCC's UNE Remand Order, to the following: Subissue 18(c): packet switching capabilities?

BellSouth states that the FCC empowered state commissions to unbundle specific network elements used to provide frame relay (e.g. packet switching), but only to the extent that a competing carrier convinces the State Commission that it is impaired without access to those elements. BellSouth states that there is absolutely no evidence indicating that Intermedia is impaired in its packet switching capabilities; therefore, it asserts that this Commission should reject Intermedia's request to require BellSouth access to packet switching on an unbundled basis. While the FCC declined "to unbundle specific packet switching technologies incumbent LECs may have deployed in their networks," UNE Remand Order, ¶ 311, BellSouth acknowledges that the FCC adopted an exception to that determination in Rule 51.319(c)(5). BellSouth asserts, however, that each of the conditions set forth in the FCC's Rule do not exist in BellSouth's network. BellSouth Brief, pp. 21-23.

Intermedia argues that the Commission should require BellSouth to provide access to packet switching capabilities, including frame relay elements, at UNE rates. Alternatively, Intermedia argues that, at a minimum, the Commission should require that BellSouth include in the Parties agreement a definition of the packet switching capability UNE and the FCC's language setting forth the conditions under which BellSouth might have to provide the packet switching UNE in the Parties agreement. Intermedia Brief, pp. 30-36. The FCC has found that an ILEC must provide nondiscriminatory access to unbundled packet switching capability where: (a) the ILEC has deployed digital loop carrier ("DLC") systems, including integrated digital loop carrier or universal digital loop carrier systems, or has developed any other system in which fiber optic facilities replace copper facilities in the distribution section; (b) there are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer; (c) the ILEC has not permitted a requesting carrier to deploy a DSLAM in the remote terminal, pedestal or environmentally controlled vault of other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points; and (d) the ILEC has deployed packet switching capability for its own use. See UNE Remand Order, ¶ 313; 47 C.F.R. § 51.319(c)(5).

Staff recommends that the Commission find that Intermedia has not demonstrated that it is impaired; thus, BellSouth is not required to provide packet switching capabilities to Intermedia on an unbundled basis unless all four of the conditions in Rule 51.319(c)(5) are met. Consistent with Staff's recommendation, the Commission finds that Intermedia has not demonstrated that it is impaired. In the event all four of the conditions in Rule 51.319(c)(5) are met, however,

BellSouth would be required to provide packet switching capabilities to Intermedia. Accordingly, the Parties agreement should reflect this contingency.

Issue 22: Should BellSouth be required to offer nondiscriminatory access to interoffice transmission facilities in accordance with, and as defined in, the FCC's UNE Remand Order?

BellSouth states that it has agreed to provide nondiscriminatory access to interoffice facilities in accordance with the FCC's UNE Remand Order. BellSouth requests that this Commission adopt the rates submitted as BellSouth Exhibit 2 as the appropriate TELRIC-based rates for these facilities. BellSouth Brief, p. 23. Intermedia states that BellSouth is required by law to provide access to all types of unbundled transport at cost-based rates. Intermedia states that it does not object to the adoption of BellSouth's proposed rates as interim rates subject to a true-up. Intermedia Brief, pp. 36-37.

The Staff recommends that BellSouth provide access to interoffice transmission facilities in accordance with the FCC's UNE Remand Order at the Interim Rates filed by BellSouth in this docket, until such time as this Commission establishes permanent rates for such services. Such interim rates shall be subject to true-up. The Commission adopts Staff's recommendation.

Issue 25: Should BellSouth be required to furnish access to the following as UNEs: (i) User to Network Interface ("UNI"); (ii) Network-to-Network Interface ("NNI") and (iii) Data Link Control Identifiers ("DLCI"), at Intermedia-specified committed information rates ("CIR")?

BellSouth states that each of the elements (UNI, NNI, DLCI, and CIR) is a part of frame relay packet switching. As in Issue 18(c) the FCC declined to unbundle the packet switching functionality, except in limited circumstances. BellSouth asserts that these circumstances do not apply. Accordingly, BellSouth requests that this Commission find that BellSouth is not required to provide access to these elements at TELRIC-based rates. Intermedia argues that the Commission should require BellSouth to provide access to packet switching capabilities, including frame relay elements, at UNE rates.

As in Issue 18(c), Commission finds that Intermedia has not demonstrated that it is impaired. In the event all four of the conditions in Rule 51.319(c)(5) are met, however, BellSouth would be required to provide packet switching capabilities to Intermedia. Accordingly, the Parties agreement should reflect this contingency.

Issue 26: Should parties be allowed to establish their own local calling areas and assign numbers for local use anywhere within such areas, consistent with applicable law?

BellSouth argues that Intermedia should use its NPA/NXXs in such a way that BellSouth can distinguish local traffic from intraLATA toll traffic and interLATA toll traffic for BellSouth

originated traffic. BellSouth states that it is indifferent to the manner in which Intermedia defines its local calling areas for its own end users. BellSouth asserts that Intermedia must designate a "home" local tandem for its NPA/NXX codes and interconnect at that tandem. BellSouth, pp. 24-26. Intermedia asserts that it should be allowed to assign its numbering resources and establish its calling areas as it sees fit. Intermedia Brief, pp. 37-39.

The Staff recommends that Intermedia be allowed to assign its NPA/NXX codes in accordance with the establishment of its local calling areas, provided that it furnish the necessary information to BellSouth and all other telecommunication carriers so that they may identify local and toll traffic and provide for the proper routing and billing of calls. The Commission agrees.

Issue 29: In the event Intermedia chooses multiple tandem access ("MTA"), must Intermedia establish points of interconnection at all BellSouth access tandems where Intermedia's NXXs are "homed"?

BellSouth asserts that the CLEC must interconnect with BellSouth's network at each access tandem where the CLEC's NPA/NXX codes home. All telecommunications carriers, including BellSouth, must know where Intermedia's NPA/NXX codes are homed. If not, required translations and routing of calls will not be possible and calls will not be completed. BellSouth Brief, p. 26. Intermedia argues that it should not be required to establish points of interconnection at each and every BellSouth access tandem in the event it chooses multiple tandem access. Intermedia Brief, pp. 39-40.

The Staff recommends that the Commission require Intermedia to interconnect with BellSouth's network at each access tandem where its NPA/NXX codes home. The homing of the NPA/NXX codes will be as directed by the Commission in Issue # 26 in this Arbitration. The Commission adopts Staff's recommendation.

Issue 30: Should Intermedia be required to: (a) designate a "home" local tandem for each assigned NPA/NXX; and (b) establish points of interconnection to BellSouth access tandems within the LATA on which Intermedia has NPA/NXXs homed?

BellSouth states that Intermedia must establish one or more of the BellSouth local tandems as a home local tandem for its NPA/NXXs and establish interconnection to the BellSouth local tandem(s) on which Intermedia homed its NPA/NXXs. BellSouth also states that Intermedia may interconnect its network to BellSouth's network at one or more access tandems in the LATA for delivery and receipt of its access traffic. BellSouth Brief, pp. 26-27. Intermedia states that it should not be required to designate a "HOME" local tandem for each assigned NPA/NXX and to establish points of interconnection to each access tandem where NPA/NXXs are homed. Intermedia Brief, p. 40.

The Staff recommends that the Commission require Intermedia to interconnect with BellSouth's network at each access tandem where its NPA/NXX codes home. The homing of the NPA/NXX codes will be as directed by the Commission in Issue # 26 in this Arbitration. The Commission adopts Staff's recommendation.

Issue 31: For purposes of compensation, how should IntraLATA Toll Traffic be defined?

BellSouth states that IntraLATA toll traffic should be defined as any telephone call that is not local or switched access per this Agreement. (Tr. at 49). Intermedia asserts that the term "IntraLATA Toll Traffic" should not be defined in the parties' agreement to exclude data calls. Intermedia proposes that "IntraLATA Toll Traffic" be defined as "all basic intraLATA message service calls other than Local Traffic."

The Staff recommended that the Commission adopt Intermedia's definition of "IntraLATA Toll Traffic", i.e. "all basic intraLATA message service calls other than Local Traffic." The Commission agrees, and adopts Staff's recommendation.

Issue 32: How should "Switched Access Traffic" be defined?

BellSouth states Switched Access Traffic should be defined by reference to the BellSouth Access Tariff. Additionally, BellSouth states that IP telephony traffic should be considered switched access traffic. (Tr. at 50). BellSouth argues that IP telephony is simply a method of completing a telephone call and is a telecommunications service. The word "Internet" in Internet Protocol telephony refers to the name of the protocol; it does not mean that the service necessarily uses the World Wide Web and has nothing to do with the transmission medium. Intermedia states that BellSouth's definition of "Switched Access Traffic" must be rejected because, among other things, IP telephony is not access traffic. IP telephony is an information service.

The Staff recommends that the Commission adopt Intermedia's definition of "Switched Access Traffic", i.e. "Switched Access Traffic is defined as telephone calls requiring local transmission or switching services for the purpose of the origination or termination of Telephone Toll Service. Switched Access Traffic includes the following types of traffic: Feature Group A, Feature Group B, Feature Group D, 800/888 access and 900 access and their successors or similar Switched Exchange Access Services." However, Staff recommends that the Commission defer ruling on the issue of whether IP telephony is subject to access charges until it has had an opportunity to consider the issue further. While the FCC has not made any definitive rulings on the issue, it did suggest in its April 10, 1998 Report to Congress that some forms of IP Telephony might be telecommunications services rather than information services.[4] The Commission adopts Staff's recommendation.

[4] Under federal law, "Telecommunications services" means "offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." 47 U.S.C. § 153(46). "Telecommunications" means "the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or

Issue 33: Should BellSouth and Intermedia be liable to each other for lost switched access revenues due to lost or damaged billing data?

BellSouth states that it is willing to accept Intermedia's proposed language with one exception: BellSouth does not wish to place a cap on the liabilities of the parties. (Tr. at 54). Intermedia argue that in the event of a lost of data, both parties must cooperate to reconstruct the lost data and, where reconstruction is not possible, use a reasonable estimate of the lost data. In the event the estimated billing is not accepted for payment by the affected Access Service Customer(s), the responsible party will be liable to the other party for any resulting lost revenue up to a maximum of $10,000 in the aggregate and in any one-month period.

The Staff recommends that the Commission adopt Intermedia's proposed language as noted above with the removal of the cap on the liabilities as requested by BellSouth. The Commission adopts Staff's recommendation.

Issue 37: Should all framed packet data transported within a VC that originate and terminate within a LATA be classified as local traffic?

BellSouth proposed the following language on this issue:

> Frame Relay framed packet data is transported within Virtual Circuits ("VC"). If all the data packets transported within a VC originate and terminate within the LATA, then for purposes of establishing interconnections between the Parties, such traffic will be treated the same as local circuit switched traffic ("Local VC"). This traffic will not be treated as Local Traffic for any other purpose under this Agreement, including but not limited to reciprocal compensation. (Tr. at 56)

Intermedia asserts that IntraLATA data packets traversing a virtual circuit are local traffic and subject to reciprocal compensation. Intermedia further believes that there is a great deal of local frame relay traffic in Georgia, particularly because of the size of the Atlanta local calling area. Intermedia has proposed that BellSouth's definition be utilized with the deletion of the last sentence. Intermedia has also proposed that the Commission require the Parties to consult with each other and arrive at an acceptable arrangement for the treatment of local frame relay traffic, submitting the result to the Commission on a date certain, perhaps 30 days from the decision. If this is not possible, both parties should be required to submit separate recommendations in writing within 5 days thereafter.

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content of the information as sent and received." 47 U.S.C. § 153(43). "Information services" means "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . 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).

The Staff recommends that the Commission adopt Intermedia's position on this issue. The Commission agrees and finds that the Parties shall consult with each other and arrive at an acceptable arrangement for the treatment of local frame relay traffic, submitting the result to the Commission on 30 days from the effective date of this order. If the parties can reach agreement, both parties shall submit separate recommendations in writing within 5 days thereafter.

Issue 38: If there are no VCs on a frame relay interconnection facility when it is billed, should the parties deem the Percent Local Circuit Use to be zero?

BellSouth states that the appropriate PLCU for frame relay interconnection facilities, where there are no Virtual Circuits, should be zero. In the alternative, BellSouth offered to apply the same PLCU to all Local VCs in a given LATA, even if there are no Virtual Circuits on a particular frame relay interconnection facility when it is initially turned up for service. Intermedia asserts that the PLCU should be 100%. Any other percentage could unreasonable impose higher rates on Intermedia, even though BellSouth would not be incurring higher costs in providing the facility.

The Staff recommends that the Commission adopt BellSouth's alternative and apply the same PLCU to all Local VCs in a given LATA, even if there are no Virtual Circuits on a particular frame relay interconnection facility when it is initially turned up for service.

Issue 39: What are the appropriate charges for the following: (a) interconnection trunks between the Parties' frame relay switches; (b) frame relay network-to-network interface points; (c) permanent virtual circuit ("PVC") segments (i.e., Data Link Connection Identifier ("DLCI") and Committed Information Rates ("CIR"); (d) requests to change a PVC segment or PVC service order record?

Each of the items listed above in this issue are components of Frame Relay. As discussed under Issues 18(c) and 25, Intermedia has not demonstrated that it is impaired; thus, BellSouth is not required to provide packet switching capabilities to Intermedia on an unbundled basis unless all four of the conditions in Rule 51.319(c)(5) are met. In the event these four conditions are met, Intermedia shall pay the Access Tariff charge, with a true-up, until such time the Commission sets UNE rates for frame rely interconnection trunks.

Issue 48: Should the parties adopt the performance measures, standards and penalties imposed by the Texas Public Utility Commission on Southwestern Bell Telephone?

BellSouth argues that there is absolutely no reason that this Commission should disregard the well-established performance measurements adopted in Georgia for an entirely new set of guidelines set forth by the Texas Public Utility Commission. Intermedia argues that the Commission should consider adoption of additional measures and enforcement provisions to

ensure BellSouth's performance. The Staff recommends that the Commission direct that the parties incorporate the performance measures, standards, and penalties to be set by the Commission in Docket 7892-U. The Commission adopts Staff's recommendation.

III. ORDERING PARAGRAPHS

The Commission determines that the issues that the parties presented to the Commission for arbitration should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 5th day of July, 2000.

Helen O'Leary Executive Secretary	Bob Durden Chairman
Date	Date

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION BY AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. AND TCG OHIO FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))	CASE NO. 2000-465

O R D E R

On October 5, 2000, AT&T Communications of the South Central States, Inc. and TCG Ohio (collectively "AT&T") petitioned for arbitration of several issues concerning their proposed interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). BellSouth filed its response to the petition, the parties agreed to a procedural schedule, and a public hearing was held February 26, 2001. AT&T's petition indicated that there were 27 issues to be arbitrated. By the time of the hearing, only 13 issues remained. The other issues were settled or deferred to later proceedings, at the parties' request. The disputed issues, and the Commission's resolution of each, are discussed below.

Issue 1: Should calls to Internet Service Providers ("ISPs") be treated as local traffic for the purpose of reciprocal compensation?

AT&T has requested reciprocal compensation for terminating calls initiated by a BellSouth customer to its customers that are ISPs. BellSouth asserts that such compensation is unwarranted, but has agreed to abide by the Commission's Order in

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Case No. 99-218,[1] in the ICG Telecom Group, Inc. ("IGC") arbitration case. In that case, the Commission ordered BellSouth to pay reciprocal compensation to ICG for terminating ISP-bound traffic.[2] The Commission found that in the absence of reciprocal compensation for ISP-bound traffic, competitive local exchange carriers ("CLECs") would be terminating many minutes of calls from BellSouth's customers without compensation.[3] The Commission determined that reciprocal compensation should be paid for ISP-bound traffic, pending a final determination by the Federal Communications Commission ("FCC"). The Commission stated as follows:

> Equity precludes this Commission from denying ICG any compensation from BellSouth for carrying BellSouth's traffic on ICG's local network. Furthermore, it is logical to consider a call to an ISP to be a call that is "terminated" locally, at the ISP server, because a protocol conversion occurs before the information is passed on to the Internet. In the wake of the FCC's pending determination, the most reasonable method for compensation is at the current rate for local calls. However, in addition the parties should track the minutes of use for calls to ISPs and be prepared to "true-up" the compensation consistent with the FCC's decision. Thus, the compensation ordered herein for ISP-bound traffic should be retroactively "trued-up" to the level of compensation ultimately adopted by the FCC.[4]

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[1] BellSouth's Post Hearing Brief at 2, referencing Case No. 99-218, A Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Order entered March 2, 2000.

[2] Chairman Martin J. Huelsmann dissented in the affirmation of this decision in Case No. 2000-404, The Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Order dated March 14, 2001.

[3] Case No. 99-218, March 2, 2000 Order at 2.

[4] Id. at 3.

However, since the instant case was submitted to the Commission, the FCC has entered an order regarding reciprocal compensation.[5] In essence, the FCC has preempted this Commission from ordering reciprocal compensation for ISP-bound traffic. Accordingly, although the decision is almost certain to be appealed, for the time being, the parties should pay reciprocal compensation in accordance with the FCC's most recent determination. Any request for relief regarding these requirements should be directed to the FCC.

> Issues 4 and 5: What does "currently combines" mean as that phrase is used in 57 C.F.R. § 51.315(b) and should BellSouth be permitted to charge AT&T a "glue charge" when BellSouth combines network elements?

AT&T requests that BellSouth be required to combine UNEs for AT&T when BellSouth ordinarily combines the requested elements in its own network. Moreover, AT&T asserts that BellSouth should not be allowed to charge a "glue charge" when combining those elements. AT&T argues that the U.S. Supreme Court supports its view. According to the Court in AT&T Corporation v. Iowa Utilities Board, 525 U.S. 366 (1999), the Telecommunications Act of 1996

> "[f]orbids incumbents to sabotage network elements that are provided in discreet pieces, and thus assuredly contemplated that elements may be requested and provided in this form (which the Commission's rules do not prohibit). But it does not say, or even remotely imply, that elements must be provided only in this form and never in combined form."

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[5] FCC 01-131, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98) and Intercarrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68), Order on Remand and Report and Order, released April 27, 2001.

Moreover, AT&T asserts that the 47 CFR 51.309(a) supports its position. The rule provides that:

> An incumbent LEC shall not impose limitations, restrictions or requirements on requests for, or the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.

BellSouth, on the other hand, believes that recent rulings have eliminated the requirement that it provide combined elements. The Commission disagrees.

A competitor's right to obtain combinations of UNEs has been one of the more contentious issues arising from the passage of the Act and the rules originally promulgated by the FCC to implement the requirements of the Act. The rules of this Commission and of the FCC governing UNE combinations have their genesis in 47 U.S.C. § 251(c)(3) which imposes on ILECs:

> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point 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 this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

In short, BellSouth's competitors must have equal ability to provide services by means of UNEs. BellSouth consents to providing combined UNEs if the charge for combining them is "market-based."[6] However, the Commission has previously ordered

[6] BellSouth Brief at 8.

such fee, or "glue charge," to be cost-based, rather than market-based.[7] We affirm that decision here. Unless the "glue charge" is cost-based, BellSouth has created an unwarranted limitation on the use of UNEs that impairs the ability of AT&T to offer services. The "glue charge" shall be based on a TELRIC methodology. BellSouth shall file such cost-based charges for Commission review within 20 days of the date of this Order.

BellSouth next asserts that it will combine UNEs only when the requested network elements (i.e. the loop and the port) have been previously combined in its own network. AT&T argues that BellSouth should combine network elements for AT&T if BellSouth ordinarily, or typically, combines such elements for itself. The Commission agrees. Otherwise, BellSouth would be able to force unnecessary costs on its competitors, thus, impairing their ability to offer services. If the network elements are not currently combined then AT&T, or any competitor, would be forced to collocate facilities with BellSouth in order to serve the customer. BellSouth is not harmed by combining elements that are typically combined in its network if it is compensated by the CLECs for combining the elements.

Issue 6: Under what rates, terms, and conditions may AT&T purchase network elements or combinations to replace services currently purchased from BellSouth tariffs?

AT&T requests that it be allowed to convert the use of special access tariffed services to UNEs or to combinations of UNEs without incurring the "termination liability charge" contained in BellSouth's tariff. AT&T is asking that a current service be

[7] Case No. 99-348, Investigation Regarding Compliance of the Generally Available Terms of BellSouth Telecommunications, Inc. With Section 251(d) and Section 252(d) of the Telecommunications Act of 1996, Order dated October 5, 1998.

changed to a different rate structure; AT&T is not terminating any service. BellSouth, on the other hand, argues that AT&T has been receiving the benefit of term and volume discounts under the tariff and should not escape its termination charge liability.

AT&T wishes simply to change its service from the access tariff to a UNE when the UNE becomes available. No service is terminated and, thus, the Commission finds that the termination liability charge should not be assessed unless BellSouth can demonstrate a TELRIC-based cost for the conversion from the access tariff to the UNE.

Issue 7: How should AT&T and BellSouth interconnect their networks in order to originate and complete calls to end-users?

The disagreement between BellSouth and AT&T in this interconnection issue is whether BellSouth should bear the costs of carrying calls from its own customers to AT&T's customers. The Commission recently addressed this issue in the arbitration proceeding between Level 3 Communications, LLC ("Level 3") and BellSouth.[8] The Commission determined that Level 3 had a right to establish a minimum of one point of interconnection ("POI") per LATA. The Commission also recognized the potential for abuse in that arrangement and required the CLEC to establish another POI when the amount of traffic passing through a BellSouth access tandem switch reached a DS-3 level.

AT&T and BellSouth have provided no additional evidence or differing circumstances justifying a changed outcome. Thus, the Commission affirms its previous rulings in the Level 3 case. However, AT&T has agreed to establish at least

[8] Case No. 2000-404, Order dated March 14, 2001 at 1-4, Order dated April 23, 2001 at 1-2.

two physical POIs within each LATA where BellSouth provides service unless there is a de minimus volume of traffic across the LATA.[9]

AT&T may chose to provide two POIs per LATA, but based on the rationale contained in the Level 3 orders referenced herein, AT&T is required to provide only one POI per LATA. The Commission's decision complies with the standards set forth in 47 C.F.R. 51.703(b), which states that "[a] LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originate on the LECs network." It also complies with the standards of 47 U.S.C. § 251(c)(2)(B), which requires BellSouth to interconnect at any "technically feasible point."

Issue 9: Should AT&T be permitted to charge tandem rate elements when its switch serves a geographic area comparable to that served by BellSouth's tandem switch?

AT&T seeks to charge tandem rate elements when its switch serves a geographic area comparable to that served by BellSouth's tandem switch. AT&T uses a single switching platform to transfer calls between multiple ILEC central offices, as well as to transfer calls between AT&T and the ILEC network. A tandem switch connects trunks and is an intermediate connection between the originating telephone call location and the final destination of the call. AT&T's switch performs many of the same functions that BellSouth's tandem switch performs.

According to AT&T, the only requirement for recovery of the tandem interconnection rate is that its switch serve a geographic area comparable to that served by BellSouth's switch. BellSouth, on the other hand, contends that AT&T's switch must not only serve a comparable geographic area but must also perform the same tandem

[9] AT&T Post Hearing Brief at 28, footnote 21.

switching functions as BellSouth's switch. BellSouth contends that the functionality of a CLEC's switch must be considered on a case-by-case basis. AT&T has, however, presented information to demonstrate that its switch performs similar functions to those performed by BellSouth's tandem switch.

Moreover, 47 C.F.R. 51.711 (a)(3) states that:

> "[w]here the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the ILEC's tandem interconnection rate."[10]

Accordingly, AT&T should be compensated at the tandem interconnection rate.

Issue 13: What is the appropriate treatment of outbound voice calls over Internet Protocol telephony, as it pertains to reciprocal compensation?

AT&T asks this Commission to determine the appropriate treatment for outbound voice calls over Internet Protocol ("IP") telephony. IP telephony refers to the method of hauling and switching a telephone call. Traditional voice calls are analog calls and have been handled by the end office switch as analog signals. As a call is handled by the network, typically there is an analog to digital conversion, which occurs within the network. Then the packetized traffic will be hauled and later converted from digital back to analog.

AT&T agrees that traffic that originates at an end-user's premises as packetized traffic is appropriate for reciprocal compensation. As AT&T asserts, IP technology can

[10] Case Number 99-218, March 2, 2000 Order at 4.

support the use of the packet network to transmit voice service. A much more likely use will be that of a hybrid service that combines voice and data capability.[11]

BellSouth asserts that AT&T should not be allowed to avoid paying access charges or assessing reciprocal compensation from BellSouth when the packet switch technology has been used merely as a substitute for conventional long-distance services.[12]

This issue appears to be more hypothetical than actual. The Commission declines to address the issue of IP telephony in the absence of a more complete record focused on individual service offerings. The Commission needs an opportunity to analyze and consider this issue in greater detail. Either party may petition the Commission to address this issue should the use of IP telephony become more frequent.

Issue 16: Is conducting a statewide investigation of criminal history records for each AT&T employee or agent being considered to work on a BellSouth premises a security measure that BellSouth may impose on AT&T?

AT&T argues that it is unreasonable for BellSouth to require AT&T employees to have criminal background checks prior to being allowed unescorted access to BellSouth's central offices and other premises. BellSouth argues, on the other hand, that the criminal background checks for these employees or agents of AT&T is a necessary security measure. AT&T has been conducting such criminal background checks on its employees hired since April 1999. The dispute between the parties

[11] AT&T Brief at 61 through 64.

[12] BellSouth Brief at 26.

covers the period of January 1, 1995, the hiring date after which BellSouth requires AT&T's employees to undergo the criminal background check, and April 1999, the date on which AT&T began conducting criminal background checks of its own employees.

The Commission finds that there should be parity for security measures enforced from one company to another. Thus, if BellSouth conducts the criminal investigation background check for its own employees from the hiring date of January 1995 forward, then it is reasonable to impose the same requirement on AT&T's employee access. The scope, nature, and applicability of such criminal background checks must be identical between AT&T's employees that seek access to BellSouth's facilities and BellSouth's employees with similar access.

Issue 18: Has BellSouth provided sufficient customized routing in accordance with state and federal law to allow it to avoid providing Operator Services/Directory Assistance as a UNE?

The FCC has stated that, in order to avoid providing Operator Services/Directory Assistance ("OS/DA"), an ILEC must provide to all competitors access to alternate OS/DA providers. The ILEC may choose the method of access. If the ILEC provides customized routing as part of the local switching element, it is not required to provide this access as a UNE.

BellSouth argues that it provides two means of access: (1) the routing of OS/DA calls through the end-office switch using Line Class Codes ("LCC"), and (2) using the Advanced Intelligent Network ("AIN") to perform switch-based functions in on-line databases.

AT&T disputes the availability of these services and argues that BellSouth has not actually provided customized routing to any competitor in its service territory.

Furthermore, to bolster its argument, AT&T asserts the lack of business rules, provisioning intervals, stated prices or any terms and conditions for a competitor who wishes to obtain customized routing by either the AIN or LCC method. BellSouth, however, asserts that customized routing is available.

The Commission will not order BellSouth to offer OS/DA access as a UNE at this time. However, BellSouth must provide AT&T with a workable process to effectively utilize LCCs or the AIN. This process shall include, but not be limited to, documentation, processing intervals, pricing, and terms and conditions.

Issue 19: What procedure should be established for AT&T to obtain loop-port combinations (UNE-P) using both Infrastructure and Customer Specific Provisioning?

AT&T requests customized routing of OS/DA calls in conjunction with loop-port combination ("UNE-P") orders. AT&T requests the ability to establish a general "footprint" order that would apply absent any identified, customer-specific service arrangements. Additionally, AT&T wishes to specify different OS/DA routing for specific customer orders.

AT&T claims that BellSouth has not provided sufficient information to develop systems that will support "footprint" orders and argues that BellSouth requires a costly and complex ordering process utilizing LCCs to change OS/DA routing from the "footprint" for specific customers.

BellSouth argues that AT&T's ability to establish a "footprint" order has been resolved and maintains that service orders requesting different routing than the "footprint" requires correct LCCs as part of the customer order.

Both parties refer to the FCC determination in the Louisiana II order.[13] AT&T claims that the FCC requires BellSouth to allow AT&T to select more than one OS/DA routing option and prohibits BellSouth from requiring AT&T to supply actual LCCs in order to obtain OS/DA. BellSouth agrees only that the FCC requires a region-wide default OS/DA routing for CLECs.

First, the Commission finds that BellSouth should supply sufficient information for AT&T to develop the systems necessary to establish the proper procedures for "footprint" orders. This information should be supplied to AT&T within 90 days of this Order.

Second, the Commission finds that BellSouth should provide for the ability of AT&T to specify OS/DA routing for specific customer orders. BellSouth shall either (1) establish an "indicator," as opposed to LCCs, that AT&T can use on specific orders to change OS/DA routing for a customer; or (2) provide AT&T full and complete access to the necessary databases so that AT&T can efficiently and accurately determine the appropriate LCCs for a specific customer order.

Issue 22: Should the Change Control Process be sufficiently comprehensive to ensure that there are processes to handle certain specified situations?

AT&T requests certain alterations to the change control process ("CCP") to address various alleged problems. BellSouth advises that CCP is ever-evolving and regional in scope; that the CCP works; and that the Commission should not establish

[13] Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, FCC 98-271, CC Docket No. 98-121 (Released October 13, 1998).

state-specific processes. BellSouth also asserts that there are sufficient provisions for escalating disputes.

The Commission finds that the specific changes to the CCP recommended by AT&T are not warranted at this time. However, deficiencies in the CCP should be escalated as provided and, if necessary, brought before this Commission pursuant to the formal complaint process.

Issue 23: What should be the resolution of certain OSS issues currently pending in the Change Control Process but not yet provided?

AT&T asks the Commission to resolve certain OSS issues concerning (1) parsed customer service records for pre-ordering; (2) ability to submit orders electronically for all services and elements; (3) electronic processing after electronic ordering without subsequent manual processing by BellSouth personnel.[14] AT&T claims that the absence of these specific capabilities results in discriminatory access to OSS functions in violation of the 1996 Act and jeopardizes the development of competition. BellSouth responds that the capabilities sought by AT&T are either under consideration (item 1) or are not required for nondiscriminatory access to OSS functionality.

In regard to item 1, the Commission finds that the provisions of the CCP should be employed to resolve the parties' dispute. Once again, AT&T is advised that deficiencies in the CCP may be brought before this Commission through the formal complaint process. In regard to the remaining items, the Commission notes that the issues are under review in this and other BellSouth states as part of various inquiries

[14] See, e.g., Case No. 2001-105, Investigation Concerning the Propriety of InterLATA Services by BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996 (Kentucky PSC).

concerning whether BellSouth should be permitted to provide in-region, interLATA services pursuant to Section 271 of the 1996 Act. A full review of OSS issues in that proceeding, which is anticipated to include the adoption of performance standards and enforcement measures, will afford the Commission an opportunity to make comprehensive determinations regarding OSS matters. Accordingly, in this case, the Commission finds generally that BellSouth must provide nondiscriminatory access to its OSS functions at parity with the functionality it provides to itself.

Further, the Commission finds that non-discriminatory access to BellSouth's OSS functions at parity with the functionality that BellSouth provides to itself means that (1) the interfaces used by CLECs must be electronic; (2) the interfaces must provide the capability to perform functions with the same level of quality and efficiency as BellSouth provides to itself; (3) the interfaces must have adequate documentation to allow a CLEC to develop and deploy systems and processes, and to train its own employees; and (4) the interfaces must be able to meet the ordering demand of all CLECs with a response time equal to that which BellSouth provides itself.

Issue 24: Should BellSouth provide AT&T with the ability to access, via EBI/ECTA, the full functionality available to BellSouth from TAFI and WFA?

AT&T requests access through a machine-to-machine interface with the same functionality as TAFI. BellSouth, however, maintains that TAFI affords nondiscriminatory access to its maintenance and repair OSS and that no further access is required. Pending review in Case No. 2001-105, the Commission declines to decide this issue with specificity. However, it reiterates that the 1996 Act requires BellSouth to

provide nondiscriminatory access to its OSS functions at parity with the functionality BellSouth provides to itself.

The Commission, having considered AT&T's petition, BellSouth's response thereto, and all other evidence of record, and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. Reciprocal compensation shall be paid for calls terminated to an ISP in accordance with FCC dictates, though this Commission has previously determined such traffic to be local in nature.

2. BellSouth shall combine for AT&T any UNEs that it typically combines for its own customers, but BellSouth may charge AT&T a TELRIC-based combining fee.

3. Within 30 days of the date of this Order, BellSouth shall file TELRIC-based combining fees.

4. BellSouth shall not assess AT&T a termination liability charge, where AT&T is converting tariffed special access services to UNEs or combinations of UNEs.

5. AT&T shall establish at least one POI per LATA and BellSouth shall pay to transport its own customers' originating traffic to that POI.

6. AT&T shall establish another POI when the amount of traffic passing through to a BellSouth access tandem reaches AT&T's network exceeds a DS-3 level.

7. BellSouth shall compensate AT&T for use of its switch at the tandem interconnection rate.

8. Until a more complete record focusing on individual service offerings has been developed, the Commission declines to address the appropriate treatment for outbound voice calls over IP telephony.

9. BellSouth shall impose on AT&T's employees no greater requirement for criminal records check, including the scope and applicability of the check, than it does for its own employees with similar access.

10. Based on BellSouth's assertions that customized routing is currently available, the Commission will not order BellSouth to offer OS/DA access as a UNE at this time; however, BellSouth shall, within 30 days of the date of this Order, submit to AT&T, with a copy to this Commission, a workable process to effectively utilize LLC or the AIN.

11. Within 90 days of the date of this Order, BellSouth shall supply sufficient information to AT&T, with a copy to the Commission, which will enable AT&T to develop the systems necessary to establish the proper procedures for "footprint" orders for loop-port combinations.

12. BellSouth shall provide either an "indicator" or access to necessary databases to AT&T so that AT&T may specify OS/DA routing for specific customer orders.

13. No change to the CCP is warranted at this time; however, if AT&T believes that the escalation process yields insufficient progress, then AT&T may file a complaint against BellSouth with this Commission.

14. BellSouth shall provide non-discriminatory access to its OSS functions at parity with the functionality it provides to itself, as described herein.

Done at Frankfort, Kentucky, this 16th day of May, 2001.

By the Commission

ATTEST:

Executive Director

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of the Nebraska Public Service Commission, on its own motion, seeking to conduct an investigation into the effects of Internet telephony on the telecommunications industry in Nebraska.	) Application No. C-1825/ PI-21) ORDER) Entered September 28, 1998

BY THE COMMISSION:

On June 16, 1998, by its own motion, the Commission opened Docket No. C-1825/PI-21 to conduct an investigation into Internet Protocol telephony (IP telephony) to determine: what IP telephony is; what regulatory or oversight role the Commission has in relation to IP telephony; what responsibility providers of IP have to Nebraska consumers; and otherwise examine the place of IP telephony in the telecommunications industry.

The Commission requested that by August 14, 1998, interested persons submit responses to a series of questions. The following parties submitted comments: Aliant Communications (Aliant); MCI Telecommunications Corporation (MCI); US West Communications, Inc. (USW); the VON Coalition (VON); Qwest Communications Corporation (Qwest); the Nebraska Telephone Association (NTA); the Nebraska Independent Telephone Association (NITA); Nebraska Technology & Telecommunications (NT&T); Community Internet Systems, Inc.; Nebraska Cooperative Government; and Steven D. Smith.

O P I N I O N A N D F I N D I N G S

The Nebraska Constitution, Article IV section 20, empowers the Commission to regulate common carriers, including telecommunications companies. Neb. Const. Art. IV sec. 20; Neb. Rev. Stat. sec. 86-803(1). In this instance the Commission has specific jurisdiction to regulate intrastate two-way switched voice communications. Neb. Rev. Stat. sec. 86-802(2). IP telephony is two-way switched voice communications and, therefore, is subject to Commission jurisdiction when the call originates and terminates within Nebraska. Interstate calls would be subject to the jurisdiction of the Federal Communications Commission (FCC). USW also suggested that the Commission has pricing jurisdiction over all calls to ISPs using local exchange facilities.

Voice communications transmitted over the internet differ from traditional telephony in both the technology utilized, and the quality of the communication. The separately routed data "packets" transmitted through IP telephony place different demands and costs on the public switched network than do the dedicated end-to-end transmissions of traditional telephony.

While most commentors agreed that the Commission has jurisdiction over at least some aspect of intrastate IP telephony, several suggested that the Commission refrain from exercising that jurisdiction. Many indicated that traditional regulatory practices should not be applied

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to IP telephony. Parties expressed concern as to the ability to distinguish between intrastate voice communications with other data transmissions over the internet. Further, IP telephone calls are of a lower quality than traditional phone service.

As technology evolves, these shortcomings should dissipate. However, the majority of parties stated that the imposition of access or other charges could discourage advances in the technology.

We agree that if providers of IP telephony were subject to access and other charges as they are currently structured, these obligations could suffocate the development of IP telephony. Further, because IP telephony does not place the same burdens upon the network as does traditional switched telecommunications, the obligations of its providers should not be the same.

All users of the network should be treated equally, based on the costs they impose on the network. Aliant suggested that "Instead of burdening ISPs with current access charges, the (Commission) should facilitate the creation of an environment in which all network users contribute equitably to the cost of the network." The Commission has a vehicle in which the preliminary steps toward such an environment can be taken. Docket No. C-1628 was initiated by the Commission's own motion to address access charge reform and the development of a state universal service fund. The specific questions concerning an IP provider's obligations for access and universal service should be addressed in that docket.

As such Docket No. C-1825 should be closed, and the issues raised in such docket should be explored in Docket No. C-1628. The comments submitted in this docket will be included as part of the record in Docket No. C-1628, and all parties who submitted comments are encouraged to participate in those proceedings.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Docket No. C-1825/PI-21 is hereby closed, and that the questions concerning the obligations Internet Protocol providers for access, universal service contributions, and other contributions shall be addressed in Commission Docket No. C-1628.

IT IS FURTHER ORDERED that all comments received in the present application, will be made a part of the record in Docket No. C-1628.

MADE AND ENTERED at Lincoln, Nebraska, this 28th day of September, 1998.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application of the Nebraska Public Service Commission, on its own motion, to conduct an investigation into intrastate access charge reform.	)))))	Application No. C-1628 PRELIMINARY FINDINGS AND CONCLUSIONS Entered: October 2, 1998

BY THE COMMISSION:

On September 15, 1997, the Commission opened this docket for the purpose of investigating the structure of intrastate access charges and establishing a Nebraska state universal service fund (NUSF). Public notice of this docket was published in the Daily Record, Omaha, Nebraska, on September 17, 1997. All certificated interexchange and local exchange carriers were named as parties in this matter. Formal interventions were filed by the Nebraska Independent Telephone Association and the Nebraska Telephone Association.

After receiving comments from interested parties and reviewing the Nebraska Universal Service Task Force Initial Report dated July 1997, the Commission issued a prehearing conference order and requested further substantive comments and reply comments. Such comments have been received and have been given careful study by the Commission.

On May 22, 1998, a petition was filed with the Nebraska Secretary of State (the Initiative 414 Petition) seeking certification to place a measure on the November ballot which would generally require the Commission to (a) eliminate implicit subsidies contained in access charges as of the effective date of the statutory amendment set forth in the Petition; (b) establish access charges based on forward-looking economic costs; (c) develop competition in the access services marketplace; (d) adopt rules and regulations requiring incumbent local exchange carriers to provide access services on a cost-based, competitively-neutral and nondiscriminatory basis; (e) establish and maintain a filing system for tariffs by providers of access; and (f) average prices in the aggregate for intrastate long-distance services to reflect the reduction of access charges applicable to such long-distance services. The Petition, now known as Initiative 414, if approved by the voters of Nebraska, would have a significant effect on this docket, including the potential need to implement NUSF support immediately after the potential effective date of the Petition.

A further development impacts this docket. On July 17, 1998, the Federal Communications Commission (FCC) entered an order effectively delaying the implementation of the Federal universal service fund for non-rural local exchange carriers until July 1, 1999 (the FCC Order).

Based upon the foregoing developments, on August 11, 1998, the Commission entered Progression Order No. 2 in this docket and requested further comments from interested parties with regard to the

ATTACHMENT 14
LEVEL 3'S VoIP COMMENTS

impact of possible approval of the Petition and the impact of the FCC Order. The Commission received such comments on September 15, 1998, and has reviewed them.

Based upon (a) the comments submitted to the Commission in this docket; (b) the provisions of the Telecommunications Act of 1996 (the Act); (c) the mandate to continue and enhance universal service as required by Section 254 of the Act; (d) the provisions of the Nebraska Universal Service Act; (e) the recommendation of the Nebraska Universal Service Task Force; and (f) consideration of the requirements of the Petition and the FCC Order, the Commission issues the following Preliminary Conclusions and Findings which will be the subject of a full hearing before the Commission beginning on October 27, 1998.

PRELIMINARY FINDINGS AND CONCLUSIONS

The concept of universal service is not new. In the past, universal service has been funded by a conscious policy of pricing certain incumbent local exchange carriers (ILEC) services above cost, such as access service, toll service and local business service. The "implicit subsidies" contained in these charges are and have been used to keep local residential exchange service rates well below actual cost in order to maintain affordable local rates for all subscribers. This policy was adopted by both federal and state regulators and implemented by the telecommunications industry.

Due to the opening of ILEC markets to competition, this practice can no longer continue. As a result, the rates for services priced above costs should be reduced to reflect actual costs. The lost subsidies should, over a reasonable period of time, be replaced (a) through increases in rates for services priced below cost and (b) from state and federal universal service funds.

The Commission has been investigating the need for lowering access rates and creating a state universal service fund for some time. In early 1996, the Commission opened Docket C-1176, which established a Nebraska Universal Task Force to compile public comment and to develop a plan for the implementation of a NUSF. The Task Force concluded, and the Commission agrees, that quality services should be made available at just, reasonable and affordable rates to consumers in all regions of Nebraska, including low-income consumers and those in rural, insular and high-cost areas, and that such services should be comparable to those services provided in urban areas and at rates that are reasonably comparable to urban rates.

This Commission is the proper regulatory body to determine the level of support needed by Nebraska subscribers. The Commission finds that the NUSF should support service for all customer access lines whether business or residential. However, initially the Commission believes different benchmarks for residential and business service are appropriate. The Commission agrees with the analysis provided by the USF Task Force and at the outset, selects $22 per month as the residential affordability benchmark, which includes surcharges such as the federal subscriber line charge, the 911 surcharge, the relay surcharge, etc. While the

Commission has little evidence before it regarding the appropriate benchmark for business service, we find at this time, that $33 should be utilized for the purpose of determining USF funding needs. The current supported services should consist of: single-party service; touch-tone; standard "white page" (or alpha directory) listing; access to directory assistance; access to interexchange services; access to emergency services such as 911 or E911; access to operator services; toll blocking to qualifying low-income consumers; and access to advance services as defined by the Commission.

A change of this magnitude takes time and a concerted effort on behalf of all parties involved; therefore, the Commission proposes a transition period for adoption of the goals addressed in this order. Recognizing the potential effect on consumer rates, this order will first outline the end goals desired by this Commission, followed by a description of how the transition period will achieve the end result. Considering the potential impact upon consumers across the state, the Commission reserves the right to modify after notice and hearing, any and all adopted NUSF requirements at any time should the Commission deem it to be in the public's best interest.

The Commission will determine the costs to provide such local services and the benchmark above which costs will be eligible for universal service funding. Universal service costs for non-rural companies shall be developed in accordance with the Commission's recommendation to the FCC contained in Docket C-1633. The costs of service for rural companies shall be based upon embedded costs while the Commission seeks further comment relative to the appropriate cost methodology for rural companies. The Commission reserves the right to designate other services to qualify for NUSF support.

To the extent that a carrier receives federal universal service funding, such funding amounts will be subtracted from the carrier's total universal service requirement. The service area for rural and non-rural carriers shall be the carrier's certificated exchange(s). In order to qualify for the NUSF, a carrier must be a facilities-based carrier and commit to serve an entire service area that is acceptable to the Commission. Initially, the support area for all carriers shall be a census block.

A carrier must be designated an Eligible Telecommunications Carrier (ETC) to receive state universal service support. Carriers shall be designated as ETCs for non-rural service areas as long as they meet the criteria set forth in the 1996 Telecommunications Act (Act). Additional carriers other than incumbent LECs will be designated as ETCs in areas served by rural carriers only if such designation is found to be in the public interest, which shall be determined on a case-by-case basis.

The Commission will administer the NUSF. The NUSF will be sized in the following manner: (a) Develop the cost to provide local service within each census block; (b) Determine the support level within each census block by subtracting the benchmark price selected by the Commission from the cost to provide local

exchange service within a census block; and (c) For each carrier, determine the census block high-cost support amounts by multiplying the census block support levels by the number of lines served by the carrier within each census block. Each carrier's high-cost support shall be the sum of its census block support amounts less any federal high-cost support received by the carrier. The total amount of the high-cost support fund for the State of Nebraska shall be the sum of each carrier's high-cost support.

The NUSF will be funded through a flat percentage surcharge on retail, end-user revenues from services provided via the public switched network. The surcharge will be assessed on all interstate and intrastate telecommunication services. This surcharge will be applied in a manner consistent with the state sales tax. This surcharge will not apply to intermediate services, such as access, that are provided to another company as long as that company collects the universal service surcharge from the retail service it provides to end-users. For example, a LEC will not levy the surcharge on access services provided to an IXC; instead the IXC will collect the surcharge on its retail toll services. This will prevent double billing of the universal service surcharge on its retail end-users. The retail services that are provided to that service provider by a LEC or other carrier will be subject to the universal service surcharge.

This surcharge will be determined by dividing the total high-cost support amount by the retail, end-user revenue subject to the universal service surcharge. This amount should be explicitly displayed on customers' bills. In order to qualify for the NUSF, a carrier shall, within its service area, provide all supported services to all subscribers. Further, a carrier shall demonstrate that implicit subsidies have been removed from access, toll and local exchange service prices and that these services are priced at actual cost. For non-rural carriers, the Commission finds that actual cost for these services shall be based upon forward-looking costs, consistent with Commission findings in Docket C-1633. While currently, the Benchmark Cost Proxy Model (BCPM) does not explicitly calculate costs for access and toll services, actual costs for such services should be developed in a manner consistent with the cost principles and inputs approved by this Commission. Rural companies may continue to use embedded costs until such time as the Commission adopts a cost methodology for rural carriers.

Generally, the state access charge structure should approximate the interstate access charge structure except for the primary interexchange carrier charge (PICC). A PICC recovers loop costs from IXCs and the Commission does not currently believe this is competitively neutral in light of interconnection requirements contained in the Act. This access structure requires that carriers implement the local transport restructure (LTR). Additionally, carriers shall bifurcate the local switching element into a per call setup element and a per minute element. This bifurcation will more accurately reflect the manner in which costs are incurred.

With regard to terminating access, the Commission finds that because toll traffic is largely billed to the originator of the toll call and carriers have little choice in terminating toll traffic,

rates for this service should be set at cost. These rates shall not include access charge residuals (ACRs) or residual or transition interconnection charges (RICs or TICs) associated with the local transport restructure. The Commission tentatively adopts this same finding for originating access; however, the Commission may seek additional comment on the matter of originating access charges. Consistent with this finding, effective July 1, 1999, carriers will be required to eliminate the ACR charges from their rate structures. The RIC/TIC charges will be phased out during the transition period described later in this order. Carriers not in compliance with the Commission's findings, regarding the structure of access charges, shall not be eligible for USF support.

The Commission recognizes there may be significant shifting of revenues as well as costs that will occur under this plan and will allow carriers a period of transition. Non-rural companies will be allowed a transition period of two years and rural carriers four years. Each carrier shall file a transition plan with this Commission by March 31, 1999, for Commission approval. Said plans shall detail any and all rate adjustments during the applicable transition period. This plan shall include an annual tariff filing to be made on or before July 1 of each year during the transition period to affect the changes detailed in the carrier's transition plan. The affected carrier shall also detail the level of access, toll and local exchange service charges and the magnitude of the changes being made in its annual tariff filing each year during the transition period.

The Commission intends to give considerable weight to the fact that a company has a Commission-approved transition plan, should an access charge complaint be filed against that carrier, if the carrier has met or exceeded their commitments during the transition period. If a company has met its obligations, embedded costs will be determined based on an interim rate of return of 12 percent for purposes of interim universal service support. To the extent a carrier's earnings exceed this designated rate of return, the carrier will forfeit the corresponding amount of NUSF funding.

At the end of the transition period, the Commission expects that local residential and business services will be priced at cost or the benchmark, whichever is lower, and that access and toll services will be priced at cost. Costs for non-rural companies are forward-looking costs consistent with principles and inputs contained in Docket C-1633. Costs for rural companies will be embedded costs until such time as the Commission determines the appropriate costing methodology for rural companies. In each annual filing, companies should increase local service prices by the maximum percentage permitted by Statutes 86-803 and 75.709.01 until such time as these services are priced at cost or the benchmark, whichever is lower. Carriers not using the maximum permitted flexibility to increase rates that are below the applicable benchmark or cost, whichever is lower, will receive a reduced amount of interim universal service support.

Should Initiative 414 pass, it will apply to only three companies: US West, Aliant Communications and GTE. These

companies will be required to set their access charges at forward-looking economic costs; the same level that these companies will be required to set their access charges at the end of the transition period. However, this Initiative will require these reductions in a significantly shorter time frame than the transition period contemplated by this order. To the extent the reductions result in earnings below the target level, the companies will receive appropriate interim state universal service support.

The Commission seeks further comment by October 20, 1998, from all interested parties on the following issues:

1. Should the Commission adopt benchmark costs or prices?

2. What should be the level of the benchmarks? (Please provide details of how the benchmarks should be determined.)

3. Should originating access be set at the same level as terminating access?

4. Is there any public policy benefit to be derived by authorizing originating access to be priced higher than terminating access?

5. Ultimately, should a rural carrier's costs be determined in a different manner than non- rural companies? If so, what is the appropriate methodology?

6. What should the authorized rate of return be?

7. What advanced services should be supported and at what levels?

8. Should service providers using Internet protocol contribute to Universal Service? If so, does the Commission have the authority to require them to do so? How will these providers be identified?

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a copy of this order be served upon each of the parties to this docket.

IT IS FURTHER ORDERED that the public hearing on the Preliminary Findings and Conclusions set forth in this order shall commence at 9:00 a.m. on October 27, 1998, and continue as necessary through October 30, 1998.

IT IS FURTHER ORDERED that comment on the enumerated issues be filed on or before October 20, 1998, which is the date previously established for parties who will be presenting testimony at the hearing to pre-file such testimony.

MADE AND ENTERED at Lincoln, Nebraska, this 2nd day of October, 1998.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on March 20, 2002

COMMISSIONERS PRESENT:

Thomas J. Dunleavy, Presiding
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 01-C-1119 - Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges.

ORDER REQUIRING PAYMENT OF
INTRASTATE CARRIER ACCESS CHARGES

(Issued and Effective May 31, 2002)

BY THE COMMISSION:

INTRODUCTION

On August 13, 2001, Frontier Telephone of Rochester, Inc. (Frontier) filed a complaint against US DataNet Corporation (DataNet) stating that DataNet has refused to pay tariffed and properly assessed intrastate access charges. Frontier requests the Commission order DataNet to pay Frontier's applicable past and present intrastate access charges together with late payment charges.[1] Frontier further requests us to declare that in the event of continued nonpayment, Frontier may terminate service to DataNet's long distance access numbers following the procedures outlined in its tariff upon appropriate notice to DataNet, PaeTec Communications, Inc.[2] and the Commission.

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[1] FTR claims $713,714.37 from August 1999 through May 2001.

[2] PaeTec Communications, Inc. is a competitive local exchange carrier providing switched dial tone and other services in Rochester and other areas. PaeTec is providing routing of DataNet's traffic.

In response to Frontier's complaint, DataNet explains that it provides long distance and other enhanced services to customers through what is commonly known as Internet protocol (IP) telephony,[3] and therefore, under Federal law, is not required to pay intrastate access charges such as those billed by Frontier. DataNet asks the Commission to dismiss this complaint on these grounds, and implies that if we adopt a contrary position, it would raise significant policy issues of national importance and, therefore, should be referred to the Federal - State Joint Board.

Also in its response, DataNet points out that Frontier waited two years to raise these issues, despite its full knowledge of DataNet's operations. DataNet claims that it relied on Frontier's silence over that entire period as assent that no access charges were due. DataNet acknowledges that if Frontier had notified them that Frontier would be claiming an entitlement to access charges, it would have considered reconfiguring its network or its connections to the local exchange network and subscribed to less-costly methods of access. DataNet argues that any findings now that access charges are due must be strictly limited to prospective applicability only. Finally, DataNet requests that if we find that intrastate access charges apply, we conduct an investigation of the validity of Frontier's existing intrastate access rates, and pending completion of such a review, direct Frontier to establish interim rates equivalent to its comparable interstate access charges.

The Small Company Group (SCG) representing 28 rural New York telephone companies also filed comments regarding this complaint. The SCG believes that the issues raised by DataNet's operations are not limited to Frontier but apply to any local exchange carrier (LEC) where that LEC provides access services in an area where DataNet operates. Hence, SCG

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[3] Internet Protocol (IP) telephony services enable real-time voice transmission using Internet protocols. The services can be provided in two basic ways: through software and hardware at the customer's premises or through "gateways" that enable applications originating and/or terminating on the public switched telephone network (PSTN). Gateways are computers that transform the circuit-switched voice signal into IP packets, and vice versa, and perform associated signalling, control, and address translation functions. The voice communication can be transmitted along with other data on the "public" Internet, or can be routed through PSTNs or through intranets or other private data networks. (In the Matter of Federal-State Joint Board on Universal Service, cc Docket No. 96-45, 13 FCC RD 11501, Release Number 98-67, released April 10, 1998, Para 84).

requests the Commission to establish a new proceeding to address the policies and rules that will govern the establishment of relationships between similarly situated LECs and companies such as DataNet.

DataNet opposes SCG's request, and submits that the proceeding sought by SCG is inappropriate and unnecessary, and in any event should not occur in this forum. DataNet reiterates in its comments that IP telephony, such as that provided by DataNet, is an information service subject to Federal jurisdiction, and under existing FCC rules is not subject to access charges. DataNet notes that all policies relating to the existing exemption will continue to be established by the FCC, and to the extent that SCG wishes a reversal of that current Federal policy, the appropriate forum in which to pursue that relief is the FCC.

Taconic Telephone Corp. (Taconic) also submitted comments in support of the complaint filed by Frontier. It requests that the Commission enforce the intrastate access provisions of Frontier's tariff and order DataNet and other similarly-situated companies to pay all outstanding access charges. DataNet did not respond to Taconic's comments.

PETITION

In its complaint, Frontier explains that its Tariff P.S.C. No. 3, at §6.2.1(A), §17.4.1 and §17.4.2 identifies a charge for Local Transport plus a further charge for Local Switching per intrastate minute of usage. These tariffs are applicable for originating access to long distance carriers whose customers reach the carriers by dialing 7-digit numbers provided by a LEC to the long distance carrier through the "line side" of the central office switch serving the long distance carrier. This type of access is defined as Feature Group A (FG-A) services. It is also possible for long distance carriers to use 7-digit numbers with "trunk-side" access from their serving LEC, in which case this type of access is defined as Feature Group B (FG-B). Frontier's access charges for FG-A and FG-B are identical. Frontier believes that the call routing of DataNet's customers and the multiple switching aspects of its network entitles Frontier to FG-A and/or FG-B intrastate access charges.

In June and July 2001, Frontier billed intrastate access charges to DataNet based on Frontier's count of actual minutes originating with Frontier's local exchange customers and terminating to DataNet's long distance access numbers. Normally Frontier would apply a

Percentage of Interstate Usage (PIU) factor[4] to DataNet's total minutes of use in order to determine the minutes applicable to intrastate access charges. However, Frontier claims that it had no means of determining whether a caller reaching DataNet's switch was making an interstate or an intrastate call, and DataNet would not supply Frontier with a PIU factor. Pursuant to Tariff P.S.C. No. 3, §2.3.10(A), when a long distance carrier uses FG-A or FG-B access, it is required to provide the PIU factor to Frontier. Frontier states that it had no means of directly measuring the PIU factor because the long distance number is not dialed until after the call leaves the Frontier network. Therefore, Frontier billed DataNet's total minutes at its tariffed intrastate access charge rate. Frontier notes that it is willing to apply a reasonable PIU on a retroactive basis if DataNet complies with Frontier's tariff by providing a reasonable PIU and by paying Frontier's applicable tariffed access charges.

DataNet, a Syracuse, New York based company, states that it provides service to customers in the Rochester local service territory as well as throughout New York, through what is commonly known as Internet protocol (IP) telephony. It claims that through its use of IP telephony, it is able to provide high quality inter-city service to the general public at a price significantly less than what is being demanded by the major long distance carriers. DataNet acknowledges that the efforts of Frontier and other LECs to demand access charges from providers of IP telephony such as DataNet are not new. However, DataNet believes that such efforts remain completely contrary to Federal policies and requirements and has refused to pay Frontier the intrastate access charges that Frontier has billed.

In order to resolve the various issues that Frontier presented in its complaint against DataNet, a clear description and discussion of DataNet's network configuration is necessary. According to Frontier's complaint and DataNet's response, the dialing pattern for customers in the Rochester service territory accessing DataNet's long distance service is as follows:

(a) The customer dials a local Rochester number, which is DataNet's 7-digit long distance access number that is provided by PaeTec Communications, Inc., a CLEC operating in Rochester.

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[4] The amounts for Interstate and Intrastate access charges are very different in Frontier's tariffs. Absent other information, Frontier's petition assumed all applicable charges at the higher Intrastate rate. DataNet stated that it could provide the Commission with the Percent Interstate Usage (PIU) so that the proper amounts can be calculated.

(b) If DataNet's Caller ID technology recognizes that the call is coming from a customer who has an account with them, the call is processed. Otherwise, the customer is prompted to enter an authorization code (also known as a Personal Identification Number – "PIN").

(c) Once a caller is authorized, the customer gets an interactive response unit that prompts the customer (if all information is correct to this point) to dial the area code and telephone number of the party to be reached.

By means of this dialing scheme, DataNet's customers are able to make calls anywhere within New York and elsewhere within the United States and Canada.

DataNet's corresponding network configuration for a customer making a long distance voice call is described as:

(a) The call goes over the local Frontier loop serving the customer placing the call.

(b) It then goes to Frontier's local central office where the call is switched.

(c) The switched call goes over Frontier's interoffice trunks to Frontier's tandem.

(d) The call is switched by the tandem and routed over an intercarrier trunk to PaeTec's switch.

(e) In the PaeTec switch, the call goes over local access facilities which are leased by DataNet from PaeTec and is delivered to DataNet's IP network.

(f) DataNet takes the signal from PaeTec and converts it to IP for transmission over its system. At the terminating end, the protocol is converted back to a signal compatible with the public switched telephone network.

(g) Approximately 40% of the time, DataNet's IP network does not serve the called party's general location, in which case, DataNet uses the facilities of inter-exchange carriers to complete its calls, and therefore, no protocol conversion is used or needed.

Frontier argues that based on the call routing and DataNet's network configuration, it is entitled to assess intrastate access charges to DataNet pursuant to its Local Switching and Local Transport tariffs in P.S.C. No. 3, §6.2.1(A), 17.4.1 and 17.4.2. It asserts that DataNet advertises that it "uses Voice-over Internet Protocol to route calls over our private network using Internet technology," which would indicate that it provides services as an Internet protocol telephony provider. However, Frontier believes that DataNet does not use the public Internet to route its calls -- it uses IP only within its own network, and both caller and called parties send and receive analog voice signals using ordinary telephones. Frontier further asserts

that DataNet bills its customers like a telecommunications carrier, including taxes and surcharges.

Frontier claims that DataNet's network configuration requires multiple switching and transport operations before an originating DataNet call from a customer in Frontier's local service territory leaves Frontier's network. Frontier acknowledges that DataNet could avoid the Local Transport rate charges by taking originating traffic at each of Frontier's host central offices through collocation arrangements. Frontier believes that since it switches and routes these calls, it is entitled to assess intrastate access charges on DataNet's traffic for both Local Switching and Local Transport, pursuant to Frontier's Tariff P.S.C. No. 3, §6.2.1(A), 17.4.1 and 17.4.2.

DISCUSSION

In addressing Frontier's complaint, separate informal meetings were held with both parties, and we reviewed the FCC's views of Internet protocol telephony providers. Based on our analysis, the Commission concludes that DataNet is not providing enhanced information services, but rather telecommunication services for which access charges should apply.

The FCC made an extensive analysis of telecommunications services, enhanced services and IP telephony in particular. It stated:

> "We recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments. We therefore examine in this section Internet-based services, known as IP Telephony, that most closely resemble traditional basic transmission offerings. The Commission to date has not formally considered the legal status of IP telephony. The record currently before us suggests that certain "phone-to-phone IP telephony" services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services." (In Matter of Federal-State Joint Board on Universal Service (cc Docket No. 96-45, 13 FCC RD 11501, Release Number 98-67, released April 10, 1998, Para. 83, citations omitted)

The FCC noted that the 1996 Telecommunications Act defined "telecommunications" to mean "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 or received," and defined "information service" to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing, but does not

include any use of any such capability for the management, control or operation of the telecommunications system or the management of telecommunications service." (Id. Para. 30)

Accordingly, the FCC concluded that an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers "telecommunications." (Id. Para. 39). Continuing, the FCC noted that certain protocol processing services that result in no net protocol conversion to the end user are deemed telecommunications services (Id. Para. 50). "The protocol processing that takes place incident to phone-to-phone IP Telephony does not affect the service's classification, under the Commission's current approach because it results in no protocol conversion to the end user." (Id. Para. 52, citations omitted).

The FCC stated that this functional approach is consistent with Congress's direction that the classification of a provider should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a 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. Para. 59).

More specifically, the FCC defined "phone-to-phone" IP telephony as a service which: 1) holds itself out as providing voice telephony service; 2) does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call over the public switched telephone network; 3) allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and 4) transmits customer information without net change in form or content. (Id. Para. 88)

The FCC noted that when an IP telephony service provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over an "IP network." These providers typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate calls. From a functional standpoint, according to the FCC, users of these services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. (Id. Para. 89).

Thus the FCC concluded that: "users of certain forms of phone-to-phone IP telephony appear to pay fees for the sole purpose of obtaining transmission of information without change in form or content. Indeed, from the end-user perspective, these types of phone-to-phone IP telephony service providers seem virtually identical to traditional circuit-switched carriers. The record currently before us [FCC] suggests that these services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services." (Id. Para. 101, citations omitted).

Finally, specifically addressing the issue of access charges the FCC stated: "We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are "telecommunications services," and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges." (Id. Para 91)

In the instant case, the Commission focused on an individual service offering. We reviewed all the submissions, the configuration of DataNet's system, the nature of the service provided, and the FCC decisions. Based on that review the Commission finds that:

(a) DataNet holds itself out as providing voice telephony service.

(b) It does not provide enhanced functionality to its customers, such as storing, processing or retrieving information.

(c) Its customers are not required to use CPE different from the CPE used to place ordinary calls over the public switched telephone network.

(d) Its customers place calls to telephone numbers assigned in accordance with the North American Numbering Plan.

(e) Its use of Internet protocol is only incident to its own private network and does not result in any net protocol conversion to the end user.

(f) A substantial portion of its traffic uses no IP conversion at all and is handled by interexchange carriers (IXCs).

(g) It uses the same circuit-switched access as obtained by IXCs and imposes the same burdens on the local exchange as do IXCs.

Accordingly, we conclude that the service provided by DataNet is simple, transparent long distance telephone service, virtually identical to traditional circuit-switched

carriers. Its service fits the definition of "telecommunications" contained in the 1996 Telecommunications Act and is not "information service" or "enhanced service." Thus, its traffic is access traffic just like any other IXC's traffic. We also conclude that DataNet imposes the same burdens on the local exchange as do other interexchange carriers and should pay all applicable and appropriate charges paid by other long distance carriers, including access charges. In addition, we find that Frontier raised the issue of access charges in a timely manner, as soon as it discovered the nature of DataNet's service, and did not intentionally delay its request for payment.

Finally, we note that the issue here is a specific complaint concerning DataNet's service, and not a general policy discussion that might involve the Federal-State Joint Board as DataNet suggests. Further, we see no need for the initiation of a new proceeding as suggested by the SCG. Therefore, we will direct DataNet and Frontier to meet and discuss the access charges owed Frontier consistent with the determination in this proceeding. If they cannot agree on an amount and payment schedule, they may petition the Commission and/or seek the intervention of Staff.

CONCLUSION

Based on our findings the Commission concludes that DataNet is liable for properly billed access charges for past and present service. The parties are directed to meet to attempt to work out an agreement on a reasonable payment schedule. Absent agreement the parties may seek further relief.

The Commission orders:

1. To the extent consistent with the findings and conclusion of this Order, the requests of Frontier Telephone of Rochester, Inc. are granted and in all other respects are denied.
2. All other relief is denied.
3. This proceeding is continued.

By the Commission,

(SIGNED)

JANET HAND DEIXLER
Secretary

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-474, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996	)))))	ORDER RULING ON OBJECTIONS AND REQUIRING THE FILING OF THE COMPOSITE AGREEMENT

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; Chairman Jo Anne Sanford and Commissioners Judy Hunt, J. Richard Conder, Robert V. Owens, Jr., and Lorinzo L. Joyner

BY THE COMMISSION: This proceeding involves a petition filed by MCImetro Access Transmission Services, LLC (MCIm) seeking arbitration of an interconnection agreement with BellSouth Telecommunications, Inc. (BellSouth). On April 3, 2001, the Commission entered a Recommended Arbitration Order (RAO) in this docket. As part of that Order, the Commission made the following

FINDINGS OF FACT

1. BellSouth may impose manual operations support systems (OSS) nonrecurring charges (NRCs) when MCIm orders unbundled network elements (UNEs) manually and BellSouth, itself, does not have the capability to order electronically for its own retail operation or when BellSouth has an electronic interface and has provided MCIm with comparable capability to order UNEs electronically, and MCIm instead chooses to order manually. Conversely, BellSouth may not impose manual OSS NRCs when BellSouth has the capability to order electronically, but is not offering such comparable capability to MCIm to order UNEs electronically. Further, the Parties are encouraged to continue their negotiations to develop mutually agreed upon language for inclusion in the Interconnection Agreement that is consistent with the foregoing.

2. If any service contained in the Access Tariff is offered primarily or substantially to end users rather than interexchange carriers (IXCs), BellSouth must make the service available to local carriers at wholesale rates, for the purpose of resale.

3. BellSouth is not required to provide operator services and directory assistance (OS/DA) as a UNE because it is currently providing customized or selective

routing which would enable MCIm to use an alternative OS/DA provider. The Parties should continue testing these routing methods and, if the testing is successful, then the Parties should include language in the Interconnection Agreement outlining how the service will be provisioned. The Parties are encouraged to strive to successfully negotiate a mutually agreed upon price for this service.

4. To the extent BellSouth has substantially different loop offerings which do not have national technical specifications, BellSouth may use its technical standards. However, to the extent BellSouth's loop offerings are substantially the same as those for which national technical standards have been established, BellSouth must use the national technical specifications for that particular loop. Additionally, MCIm may, at its discretion, file a complaint with the Commission if at any point it believes BellSouth is imposing improper terms and conditions through its technical specifications.

5. BellSouth should transmit Automatic Numbering Identification (ANI)-II digits to MCIm via Feature Group D signaling when MCIm acquires the unbundled network element platform (UNE-P) except where it is not technically feasible. The Interconnection Agreement between the Parties should identify those instances in which technical limitations exist.

6. BellSouth is obligated to provide unbundled dedicated transport throughout its network between locations and equipment designations (including interoffice transmission facilities to network nodes connected to MCIm switches, or to wire centers of other requesting carriers) so long as the facilities are existing and used to provide telecommunications services. Furthermore, BellSouth is not obligated to construct new transport facilities at a competing local provider's (CLP's) request along routes where BellSouth has not deployed facilities for its own use.

7. MCIm should have the option of routing its OS/DA traffic using the customized routing methods offered by BellSouth or in the same manner that BellSouth routes its own traffic. The Parties are encouraged to continue their negotiations to develop mutually agreed upon language for inclusion in the Interconnection Agreement and the appropriate prices, where applicable.

8. MCIm's right to dedicated transport as a UNE includes SONET rings; however, BellSouth should not be required to construct special facilities for MCIm if it has not deployed those services for its own use.

9. BellSouth is not required to provide the calling name (CNAM) database via electronic download, magnetic tape, or via similar convenient media as requested by MCIm. However, based on the record of evidence, the Parties are instructed to attempt to negotiate a price for an electronic download of the CNAM database.

10. BellSouth is obligated to utilize two-way trunks upon MCIm's request, but only where it is technically feasible and there is not sufficient traffic to justify one-way trunks.

11. MCIm may designate its own points of interconnection (POIs) with BellSouth's network. Further, if MCIm interconnects at points within the local access and transport area (LATA) but outside of BellSouth's local calling area from which traffic originates, MCIm should be required to compensate BellSouth for, or otherwise be responsible for, transport beyond the local calling area.

12. There is insufficient evidence in the record to make a determination on the issue of transit traffic on one-way or two-way trunks. BellSouth and MCIm are encouraged to further negotiate this issue. If BellSouth and MCIm cannot resolve this issue after such further negotiations, BellSouth and MCIm should file a report in this docket by May 3, 2001, as to the specific reasons transit traffic can or cannot be aggregated with local and intraLATA toll traffic on two-way trunks.

13. The current procedures used by BellSouth and MCIm, whereby Wireless Type 2A traffic transiting BellSouth's network is treated as BellSouth-originating or BellSouth-terminating traffic for compensation purposes, should continue for the present time. However, the Parties should develop and deploy a meet-point billing arrangement applicable to this traffic as soon as possible in order to assess appropriate compensation amounts. BellSouth and MCIm should be allowed to continue to use their existing compensation procedures for transiting Wireless Type 1 traffic. Furthermore, the Commission finds no reasonable basis upon which to require BellSouth to pass on reciprocal compensation payments received from MCIm to wireless carriers prior to implementation of a meet-point billing arrangement; unless, of course, BellSouth has a contractual obligation between itself and wireless carriers to do so. However, in that case, any issue of nonpayment would be between BellSouth and the wireless carriers, rather than BellSouth and MCIm.

14. Because of the uncertainty surrounding the issue of Internet Protocol (IP) telephony, the Commission declines to require a definition of switched access traffic that specifically includes IP telephony at this time, and, further, for the same reason the Commission declines to address the appropriate treatment of IP telephony, as it pertains to reciprocal compensation.

15. To the extent that MCIm is not utilizing local interconnection trunks solely for originating or terminating its interexchange traffic, MCIm may combine switched access and local traffic on interconnection trunks, provided that the switched access is being provided to an MCIm local exchange customer. Further, MCIm must provide adequate billing records to BellSouth to enable it to bill switched access to the appropriate CLPs.

16. Interconnection agreements should define the terms of reciprocal compensation in instances where a third party is involved in the exchange of local traffic; however, BellSouth has no legal obligation to perform as may be required under MCIm's proposed language in sections 9.7.1 and 10.7.1.1 in Attachment 4 of the Interconnection Agreement. Therefore, the Commission rejects MCIm's proposed language in these sections. If requested by MCIm to deal with a third party on reciprocal compensation issues, BellSouth should be entitled to compensation for any extraordinary functions that it performs. This issue may signal the need for MCIm to negotiate interconnection agreements with other carriers with which it exchanges local traffic.

17. Calls within a LATA originated by BellSouth customers to MCIm foreign exchange (FX) customers are to be considered local and, therefore, subject to reciprocal compensation.

18. The Parties should establish an interim inter-carrier compensation mechanism for Internet Service Provider (ISP)-bound traffic which is identical to that for non-ISP-bound traffic but which is subject to true-up once the Federal Communications Commission (FCC) has decided upon a methodology for ISP-bound traffic and the Commission has implemented it.

19. For reciprocal compensation purposes, MCIm should be compensated at BellSouth's tandem interconnection rate. MCIm's proposal that MCIm and BellSouth agree on a figure that represents the average mileage of all end offices subtending the applicable BellSouth tandem office is rejected.

20. MCIm's proposed language regarding license for rights-of-ways is rejected. MCIm is advised in particular cases to pursue obtaining an easement for the protection it seeks. BellSouth, however, should be obligated to provide reasonable notice to MCIm of the sale or conveyance of property on which MCIm has installed facilities.

21. In accordance with BellSouth's standard license agreement applicable to all CLPs, BellSouth may require that payments for make-ready work be made in advance.

22. There is insufficient evidence in the record to make a determination on this issue with regard to exchange service resold by MCIm; thus the Parties are encouraged to further negotiate this aspect of the issue. When exchange service is offered by MCIm through UNEs or through the use of MCIm's own facilities, then BellSouth should bill the charges for collect calls, third-party calls, or other operator-assisted calls to the end user. The Parties are required to include mutually agreed upon language in the Interconnection Agreement which clearly indicates that the carriers must provide adequate billing information so that the end user can be billed clearly, accurately, and in a timely manner.

23. BellSouth has failed to demonstrate that it provides MCIm with nondiscriminatory access to existing pre-ordering and ordering interfaces when DS1 combos are being ordered. It is appropriate to refer the issues MCIm has raised in Matrix Issue No. 80 of this docket to the change control process (CCP) for further action. MCIm and BellSouth are required to file separate CCP status reports every three months, beginning on June 29, 2001, on the progress the CCP has had in addressing and resolving these issues.

24. BellSouth should be required to provide a service order inquiry capability for local services. It is appropriate to refer the issues MCIm has raised in Matrix Issue No. 81 of this docket to the CCP for further action. MCIm and BellSouth are required to file separate CCP status reports every three months, beginning on June 29, 2001, on the progress the CCP has made in addressing and resolving these issues.

25. BellSouth may disconnect MCIm for nonpayment provided that BellSouth notifies the Commission and Public Staff of any proposed disconnection at the same time it notifies MCIm.

26. BellSouth has not provided sufficient justification for changing the format for providing call billing records. Therefore, BellSouth should continue to provide complete billing information with all Electronic Message Interchange (EMI) standard fields to MCIm.

27. The Commission declines to rule on the issue of whether BellSouth should be required to give written notice when a central office conversion will take place before midnight or after 4:00 a.m. but instructs the Parties to continue to negotiate on this matter.

28. Since MCIm compensates or is willing to compensate BellSouth for providing operator services to MCIm's customers, BellSouth operators should ask each MCIm customer for his or her carrier of choice when he or she requests a rate quote or time and charges. If the chosen carrier is an Operator Transfer Service (OTS) subscriber, the call should be transferred and the applicable OTS rate should apply. If BellSouth is unable to transfer a customer because either the long distance carrier of choice is not a subscriber to BellSouth's OTS service or BellSouth does not have facilities to that long distance carrier, BellSouth should advise the customer to contact his or her long distance carrier directly for rate quotes and time and charges.

29. BellSouth is required to provide shared transport in connection with the provision of custom branding. BellSouth and MCIm are required to negotiate the rates, terms, and conditions for equipment and/or facilities modifications, etc., if any, that may be required with respect to, or associated with, BellSouth's network to allow it to provide the shared transport that MCIm has requested, that is, to the extent such matters are not now governed by existing lawfully approved tariffs or enforceable contracts.

30. The Commission declines to require inclusion of MCIm's proposed language concerning damages in the Interconnection Agreement. The Parties will be given the option, through mutual agreement, of either including Sections 11.1.1 and 11.1.2 ("Liability Cap") in the Agreement without the language proposed by MCIm or deleting those sections altogether.

31. The disputed language regarding specific performance need not be included in the Interconnection Agreement.

32. MCIm is allowed to obtain rates, terms, and conditions by "opting in" provisions of other interconnection agreements, with such provisions to be effective on an interim basis upon filing with the Commission an agreement between MCIm and BellSouth to adopt such provisions. Further, BellSouth is not required to provide MCIm with copies of BellSouth's interconnection agreements with third parties within 15 days of filing such agreements with the Commission or to put such agreements on the Internet.

33. BellSouth is required to take "all reasonable actions necessary" to avoid disclosure of MCIm's confidential information, and MCIm bears the burden of proving BellSouth's guilt in the event of disclosure.

On April 27, 2001, MCIm filed a letter stating that Findings of Fact Nos. 2, 25, 27, 30, and 32 (Matrix Issue Nos. 3, 94, 96, 107, and 109) had been resolved between MCIm and BellSouth. On May 1, 2001, MCIm filed a letter stating that Finding of Fact No. 24 (Matrix Issue No. 81) had been resolved between MCIm and BellSouth. On May 2, 2001, MCIm filed a letter stating that Finding of Fact No. 22 (Matrix Issue No. 75) had been resolved between MCIm and BellSouth.

On May 3, 2001, BellSouth filed objections to Findings of Fact Nos. 6, 8, 12, 15, 18, 23, and 29 (Matrix Issue Nos. 18, 23, 37, 42, 47, 80, and 101). On that same day, MCIm filed objections to Findings of Fact Nos. 3, 7, 10, 11, 12, 13, 15 (Matrix Issue Nos. 5, 19, 34, 36, 37, 39, and 42).

On May 7, 2001, ITC^DeltaCom Communications Inc. (ITC^DeltaCom) filed Comments on the RAO regarding Finding of Fact No. 17 (Matrix Issue No. 46).

On May 7, 2001, the Commission entered an Order in this docket soliciting responses to the objections.

On May 17 and 18, 2001, MCIm filed letters stating that Findings of Fact Nos. 3, 5, 7, 8, and 29 (Matrix Issue Nos. 5, 15, 19, 23, and 101) had been resolved between MCIm and BellSouth.

On June 11, 2001, BellSouth, MCIm, and the Public Staff filed responses to the objections.

Discussions and Commission conclusions regarding the issues raised by BellSouth, MCIm, and ITC^DeltaCom in their objections and comments are set forth below. These matters are addressed below by reference to the specific Findings of Fact which coincide with those findings set forth in the RAO entered in this docket on April 3, 2001, which are the subject of said objections and comments.

A glossary of acronyms is attached hereto as Appendix A.

FINDING OF FACT NO. 6 (MATRIX ISSUE NO. 18): Is BellSouth required to provide all technically feasible unbundled dedicated transport between locations and equipment designated by MCIm so long as the facilities are used to provide telecommunications services, including interoffice transmission facilities to network nodes connected to MCIm switches and to the switches or wire centers of other requesting carriers?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth is obligated to provide unbundled dedicated transport throughout its network between locations and equipment designations (including interoffice transmission facilities to network nodes connected to MCIm switches, or to wire centers of other requesting carriers) so long as the facilities are existing and used to provide telecommunications services. BellSouth is not obligated to construct new transport facilities at a CLP's request along routes where BellSouth has not deployed facilities for its own use.

OBJECTIONS

BELLSOUTH: The Commission should clarify its Order to find that BellSouth is not required to construct new transport facilities for MCIm, irrespective of whether BellSouth has facilities along the route requested by MCIm. Also, BellSouth requested that the Commission reconsider its conclusion and limit MCIm's right to unbundled dedicated transport to transport between (1) a BellSouth switch or central office and an MCIm switch or central office or (2) between two BellSouth switches or central offices.

ITC^DELTACOM: ITC^DeltaCom did not comment on this Finding of Fact.

MCIm: MCIm did not comment on this Finding of Fact.

RESPONSES

BELLSOUTH: BellSouth was the objector and therefore did not file a Response.

ITC^DELTACOM: ITC^DeltaCom did not address this issue in its comments.

MCIm: MCIm stated in its Response that MCIm agreed all along that BellSouth is not required to install new facilities (except for electronics) to accommodate MCIm's request for dedicated transport. MCIm stated that BellSouth did not raise its concern about providing dedicated transport from one local calling area to another in the contract language in dispute in Matrix Issue No. 18, in its testimony, at the hearing in this case, or in its Post-Hearing Brief. MCIm further stated that BellSouth is simply attempting to add a limitation to its dedicated transport obligation that it neither sought to negotiate or arbitrate and for which it cites no legal authority.

PUBLIC STAFF: The Public Staff agrees that BellSouth should not be required to construct new facilities for MCIm, either along new routes where BellSouth currently has no facilities in place or along routes where BellSouth does have existing facilities. The Public Staff stated that if MCIm requests access to existing transport facilities that extend to network nodes connected to MCIm switches or other locations on BellSouth's network, BellSouth should make facilities available to MCIm.

DISCUSSION

The Commission again answers this issue on providing unbundled dedicated transport in the affirmative, while concluding that BellSouth is not obligated to construct new transport facilities at a CLP's request along routes where BellSouth has not deployed facilities for its own use. The Commission further clarifies the decision set forth in the RAO by stating that BellSouth is also not required to construct new facilities along routes where no facilities are in place or along routes where BellSouth does have existing facilities.

The Commission does not agree with BellSouth that MCIm's right to unbundled dedicated transport should be limited to transport between a BellSouth switch or central office and MCIm's switch or central office or between two BellSouth central offices. Under paragraph 324 of the UNE Remand Order, "an ILEC's unbundling obligation extends throughout its ubiquitous transport network."

CONCLUSIONS

The Commission upholds and affirms its original decision regarding this issue, subject to the further clarification set forth above. Finding of Fact No. 6 (Matrix Issue No. 18) should, therefore, be amended to read as follows:

BellSouth is obligated to provide unbundled dedicated transport throughout its network between locations and equipment designations (including interoffice transmission facilities to network nodes connected to MCIm switches, or to wire centers of other requesting carriers) so long as the facilities are existing and used to provide telecommunications services. Furthermore, BellSouth is not obligated to construct new transport facilities at a competing local provider's (CLP's) request along routes where BellSouth has not deployed facilities for its own use or along routes where no facilities are in place or where BellSouth does not have existing facilities.

FINDING OF FACT NO. 10 (MATRIX ISSUE NO. 34): Is BellSouth obligated to provide and use two-way trunks that carry each party's traffic? (MATRIX ISSUE NO 35): If the Parties ever choose to implement a combination trunk group, should that trunk group be operated as a two-way trunk?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth is obligated to utilize two-way trunks upon MCIm's request, but only where it is technically feasible and there is not sufficient traffic to justify one-way trunks. The Commission stated further that it believes that this logically extends to the combination of trunks, should the Parties ever choose to implement a combination trunk group.

OBJECTIONS

BELLSOUTH: BellSouth did not object to this Finding of Fact.

ITC^DELTACOM: ITC^DeltaCom did not object to this Finding of Fact.

MCIm: MCIm objected to Finding of Fact No. 10 stating that, in ruling that BellSouth is not required to provision and use two-way trunks when there is sufficient traffic to justify one-way trunking, the Commission has engrafted an exception on FCC Rule 51.305, which provides that "[i]f technically feasible, an incumbent LEC shall provide two-way trunking upon request." MCIm stated that the FCC discussed a second rationale for two-way trunking (not creating a barrier to entry) and concluded, consistent with FCC Rule 51.305(f), that Bell companies should not be able to refuse to provide two-way trunking. MCIm contended that the RAO would allow BellSouth to refuse to provide two-way trunking and force MCIm to come to the Commission and prove that MCIm does not carry a sufficient amount of traffic to justify separate one-way trunks. MCIm contended that this would substantially impair MCIm's ability to require BellSouth to provision and use two-way trunks upon request. MCIm stated that both the Georgia and Florida

Commissions have concluded that under this rule BellSouth should provide and use two-way trunking when MCIm so requests. MCIm submitted that those rulings are correct and that this Commission should reach the same result.

RESPONSES

BELLSOUTH: BellSouth stated that its position is that the use of one-way or two-way trunking is best determined by the Parties on a case-by-case basis. BellSouth further stated that, solely from an engineering perspective, two-way trunks should be used when the traffic patterns in both directions will result in a significant reduction of switch trunk ports over separate one-way trunks. BellSouth argued that if the traffic is predominately in one direction, there are little to no savings in two-way trunk terminations over one-way trunk terminations. BellSouth argued that the Commission correctly concluded that BellSouth is obligated to provide and use two-way local interconnection trunks where traffic volumes are too low to justify one-way trunks. BellSouth stated that it is entirely consistent with the FCC's order for the Parties' agreement to contain language stating that "BellSouth is obligated to utilize two-way trunks upon MCIm's request, but only where it is technically feasible and there is not sufficient traffic to justify one-way trunks." BellSouth contended that the Commission's recommended ruling on this issue should be made final.

ITC^DELTACOM: ITC^DeltaCom did not file a response to this issue.

MCIm: MCIm objected to this Finding of Fact and, therefore, did not file a response.

PUBLIC STAFF: The Public Staff stated in its Response that FCC Rule 51.305(f) appears to support MCIm's position that BellSouth must provide two-way trunking whenever requested by MCIm. However, the Public Staff further stated that Rule 51.305(f) was adopted in the FCC's Interconnection Order and must be considered in that context. The Public Staff noted that in paragraph 219 of the Interconnection Order the FCC stated:

> [W]here a carrier requesting interconnection pursuant to section 251(c)(2) does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC must accommodate two-way trunking upon request where technically feasible. Refusing to provide two-way trunking would raise costs for new entrants and create a barrier to entry. Thus, we conclude that if two-way trunking is technically feasible, it would not be just, reasonable, and nondiscriminatory for the incumbent LEC to refuse to provide it.

The Public Staff stated that, in its view, this language indicates that the FCC did not intend to require an ILEC to accommodate two-way trunking when the requesting CLP's network does "carry a sufficient amount of traffic to justify separate one-way trunks." Consequently, the Public Staff recommended that the Commission should not adopt the

position of the Georgia and Florida Commissions, but should adhere to its present position. The Public Staff noted that the Georgia Commission's order indicates that it did not take paragraph 219 of the Interconnection Order into consideration at all, and the Florida Commission does not appear to have given that paragraph sufficient weight.

The Public Staff stated it agrees with the Florida Commission that this issue is essentially one of sound engineering practices. The Public Staff noted that the Florida Commission stated at page 69 of its March 30, 2001 order: "WorldCom's and BellSouth's trunk engineers should cooperatively work together to decide when to use two-way trunking on a case-by-case basis that is mutually beneficial for both parties. We note that both parties agree with this suggestion." The Public Staff contended that there should be no presumption that either one-way or two-way trunks are appropriate. Instead, the Public Staff contended that the Parties should confer and determine which type of trunking will be more efficient under the circumstances in a given fact situation. The Public Staff stated that if they are then unable to agree, the Commission can resolve the issue. The Public Staff expressed confidence that in almost all situations the Parties will be able to reach agreement by focusing on efficiency and sound engineering practices.

DISCUSSION

The Commission agrees with the Public Staff's assessment of the FCC's language in paragraph 219 of the Interconnection Order that the FCC did not intend to require an ILEC to accommodate two-way trunking when the requesting CLP's network does "carry a sufficient amount of traffic to justify separate one-way trunks." We, therefore, believe that our decision in the RAO on this issue is correct and that BellSouth is obligated to utilize two-way trunks upon MCIm's request, but only where it is technically feasible and there is not sufficient traffic to justify one-way trunks.

In addition, the Commission agrees with the Public Staff that the Parties should not presume that either one-way or two-way trunks are appropriate in a given fact situation, but should instead confer and determine which type of trunking will be more efficient by focusing on efficiency and sound engineering practices. If the Parties are unable to reach agreement, they can then request the Commission to resolve the issue.

CONCLUSIONS

The Commission affirms and upholds its original decision that BellSouth is obligated to utilize two-way trunks upon MCIm's request, but only where it is technically feasible and there is not sufficient traffic to justify one-way trunks.

FINDING OF FACT NO. 11 - MATRIX ISSUE NO. 36: Does MCIm, as the requesting carrier, have the right pursuant to the Act, the FCC's First Interconnection Order, and

FCC regulations, to designate the network point (or points) of interconnection at any technically feasible point?

INITIAL COMMISSION DECISION

The Commission concluded that MCIm may designate its own points of interconnection (POIs) with BellSouth's network. Further, if MCIm interconnects at points within the local access and transport area (LATA) but outside of BellSouth's local calling area from which the traffic originates, MCIm should be required to compensate BellSouth for, or otherwise be responsible for, transport beyond the local calling area.

OBJECTIONS

BELLSOUTH: BellSouth did not object to this Finding of Fact.

ITC^DELTACOM: ITC^DeltaCom did not comment on this Finding of Fact.

MCIm: While the Commission appears to have agreed with MCIm that it has the right to choose the POI between its network and that of BellSouth, the Commission erred in finding MCIm responsible for the transport of traffic originated inside the LATA but outside the BellSouth local calling area for the reasons as generally stated in Commissioner Ervin's dissent, joined in by Commissioner Judy Hunt.

RESPONSES

BELLSOUTH: BellSouth stated in its Response that the Commission has correctly ruled on this issue for the reasons as generally set forth in the Recommended Arbitration Order. BellSouth also referred to Paragraph 209 of the FCC's Local Interconnection Order where the FCC stated that "because competing carriers usually compensate incumbent LECs for additional costs incurred in providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect." The Commission's decision was just and equitable.

ITC^DELTACOM: ITC^DeltaCom did not address this issue in its comments.

MCIm: MCIm was the objector and therefore did not provide a Response.

PUBLIC STAFF: The Public Staff noted that MCIm had bought forth no new authority or argument that the Commission has not previously considered. Moreover, the FCC has indicated that the question is far from definitively settled and in its Unified Intercarrier Compensation Notice of Proposed Rulemaking (Paragraphs 112-114) earlier this year has called for comments. The Commission's finding in this issue is well-reasoned and should stand.

DISCUSSION

This issue was addressed both within this docket and Docket No. P-140, Sub 73 and Docket No. P-646, Sub 7 (AT&T/BellSouth Arbitration). In the AT&T/BellSouth Order Ruling on Objections and Requiring the Filing of the Composite Agreement, with reference to this issue, the Commission justly observed that "[t]his issue has been one of the most exhaustingly analyzed and briefed issues the Commission has ever dealt with in an arbitration proceeding."

The Commission went on to observe that no new arguments had been brought forward on reconsideration by the competition; that it believed that the law was hardly dispositive in the competitor's favor; and that, indeed, fairness required in this case the opposite result from that favored by the competitor. The Commission also noted that the FCC has solicited comments on the issue in its Notice of Proposed Rulemaking in CC Docket No. 01-92, issued on April 27, 2001. To the Commission, this was a further indication that the proposition that the CLP should bear no transport costs in the instant context is less obvious than some parties believe.

The very same considerations apply here. MCIm has brought forward no new evidence or arguments that would persuade the Commission to reconsider its decision on this issue. Accordingly, for the reasons stated above and in the original RAO, the Commission reaffirms its decision herein.

CONCLUSIONS

The Commission upholds and affirms its original decision on this matter.

FINDING OF FACT NO. 12 (MATRIX ISSUE NO. 37): Should BellSouth be permitted to require MCIm to fragment its traffic by traffic type so it can interconnect with BellSouth's network?

INITIAL COMMISSION DECISION

In its RAO, the Commission noted that this issue primarily concerns whether transit traffic should be on a separate trunk group from other traffic, as proposed by BellSouth, or whether transit traffic should be on the same trunk group with local and intraLATA toll traffic, as proposed by MCIm. Transit traffic is traffic that originates on one carrier's network, is switched and transported by BellSouth, and then is sent to another carrier's network.

The Commission pointed out that BellSouth and MCIm had referred to billing and traffic type identification problems, but they had not provided a clear statement of what problems actually exist, if any. Therefore, the Commission concluded that there was

insufficient evidence in the record to make a determination on this issue. The RAO directed BellSouth and MCIm to negotiate further on this issue. If they could not reach agreement after further negotiation, the RAO stated that BellSouth and MCIm should file a report in this docket by May 3, 2001, as to the specific reasons why transit traffic can or cannot be aggregated on a single trunk group.

OBJECTIONS

BELLSOUTH: BellSouth objected to Finding of Fact No. 12 and stated that the fragmentation of transit traffic from local traffic on separate trunk groups is necessary and essential in order to ensure proper billing. BellSouth also reported that the Parties have not been able to resolve this issue. In its Objections to the RAO, BellSouth opined that it is important to distinguish between local transit traffic and switched access transit traffic when considering this issue. With respect to a local call, and transit traffic associated with that local call, BellSouth stated that it does not object to transporting such traffic over the same local trunks that carry other local traffic. With respect to switched access transit traffic and the underlying long distance call, BellSouth stated that switched access transit traffic should not be mixed over local interconnection trunks for the reasons discussed in its objection to Finding of Fact No. 15 (Matrix Issue No. 42), below.

ITC^DELTACOM: ITC^DeltaCom did not object to this Finding of Fact.

MCIm: MCIm also objected to Finding of Fact No. 12. In its Objections to the RAO, MCIm stated that BellSouth has acknowledged that its supergroup trunks can accommodate regular local traffic and transit traffic on the same trunk group. According to MCIm, BellSouth's only concern appears to be that it might have difficulty billing for such traffic. MCIm submitted that whatever concern BellSouth has in this regard can be satisfied by MCIm providing BellSouth with appropriate records. BellSouth provides MCIm with records MCIm needs in order to bill other carriers for traffic terminated by MCIm and MCIm is willing to provide BellSouth with the same type of records so that BellSouth can bill other carriers. MCIm stated that this process is good enough for MCIm to be able to bill, and should be good enough for BellSouth as well. MCIm added that the Parties have agreed upon audit language in the interconnection agreement, so BellSouth would have the ability to verify the records provided by MCIm. Therefore, MCIm submitted that this issue should be resolved in its favor.

RESPONSES

BELLSOUTH: BellSouth stated in its Response that it had submitted its own Objection to the RAO on this issue and BellSouth incorporated its discussion of this issue in its Response by reference. BellSouth stated that the Commission should overrule MCIm's objection and adopt the position set forth in BellSouth's objection on this issue.

ITC^DELTACOM: ITC^DeltaCom did not file a Response.

MCIm: In its Response, MCIm cited the statement in BellSouth's objection that BellSouth does not object to transporting local transit traffic over the same local trunk groups that carry other local traffic. MCIm contended that the reasons BellSouth sets forth for not wanting to put switched access traffic on these same trunks, which are discussed in BellSouth's objections to Finding of Fact No. 15 (Matrix Issue No. 42), are without merit.

PUBLIC STAFF: The Public Staff stated in its Response that BellSouth and MCIm have not submitted the specific information requested by the Commission on the billing problems that may arise from combining transit traffic and other traffic. Instead, the Public Staff believes that they have largely restated their previous positions on this issue. The Public Staff noted that BellSouth stated that local transit traffic can be carried on the same trunks with other local traffic, but switched access transit traffic should not be mixed with other traffic, while MCIm stated that MCIm is prepared to provide any records needed in order to enable BellSouth to bill correctly for transit traffic that is combined with other traffic.

The Public Staff does not believe the Commission is in any better position to resolve this issue now than it was at the time the RAO was issued because the Parties have not filed the report the Commission directed them to file by May 3rd in the event that they could not reach a negotiated agreement. Therefore, the Public Staff recommended that the Commission should again instruct the Parties to file this report.

DISCUSSION

As stated above, in the RAO the Commission pointed out that BellSouth and MCIm had referred to billing and traffic type identification problems, but they had not provided a clear statement of what problems actually exist, if any. Therefore, the Commission concluded that there was insufficient evidence in the record to make a determination on this issue. The RAO directed BellSouth and MCIm to negotiate further on this issue, and if they could not reach agreement, to file a report in this docket by May 3, 2001 on the specific problems involved in combining transit traffic and other traffic on a single trunk group.

Despite the failure of the Parties to reach an agreement in further negotiations on this issue, neither BellSouth or MCIm filed the report the Commission directed them to file by May 3rd, and both Parties filed an objection with their comments on this issue. In its objection, BellSouth provides a clear statement that it does not object to transporting local transit traffic over the same local trunks that carry other local traffic. However, BellSouth maintains that switched access transit traffic should not be mixed over local interconnection trunks for the reasons BellSouth sets forth in its objection to Finding of Fact No. 15 (Matrix Issue No. 42), as discussed below.

Given BellSouth's statement that it does not object to transporting local transit traffic over the same local trunk groups that carry other local traffic, it appears that local transit traffic is no longer part of this issue. In Finding of Fact No.15 of the RAO, which addressed Matrix Issue No. 42, the Commission stated that "[t]o the extent that MCIm is not utilizing local interconnection trunks solely for originating or terminating its interexchange traffic, MCIm may combine switched access and local traffic on interconnection trunks, provided that the switched access is being provided to an MCIm local exchange customer. Further, MCIm must provide adequate billing records to BellSouth to enable it to bill switched access to the appropriate CLPs." The Commission believes that BellSouth and MCIm should resolve the issue of switched access transit traffic over local interconnection trunks consistent with the Commission's decision on Matrix Issue No. 42.

CONCLUSIONS

The Commission concludes that Finding of Fact No. 12 (Matrix Issue No. 37) should be amended to read as follows:

> BellSouth should be required to allow MCIm to combine local transit traffic on the same local trunks that carry other local traffic. Further, the Parties should resolve the issue of switched access transit traffic consistent with the Commission's decision on Matrix Issue No. 42.

FINDING OF FACT NO. 13 (MATRIX ISSUE NO. 39): How should Wireless Type 1 and Type 2A traffic be treated under the Interconnection Agreement?

INITIAL COMMISSION DECISION

The Commission concluded that the current procedures used by BellSouth and MCIm, whereby Wireless Type 2A traffic transiting BellSouth's network is treated as BellSouth-originating or BellSouth-terminating traffic for compensation purposes, should continue for the present time. However, the Parties should develop and deploy a meet-point billing arrangement applicable to this traffic as soon as possible in order to assess appropriate compensation amounts. BellSouth and MCIm should be allowed to continue to use their existing compensation procedures for transiting Wireless Type 1 traffic. Furthermore, the Commission found no reasonable basis upon which to require BellSouth to pass on reciprocal compensation payments received from MCIm to wireless carriers prior to implementation of a meet-point billing arrangement; unless, of course, BellSouth has a contractual obligation between itself and wireless carriers to do so. However, in that case, any issue of nonpayment would be between BellSouth and the wireless carriers, rather than BellSouth and MCIm.

OBJECTIONS

BELLSOUTH: BellSouth did not object to this Finding of Fact.

ITC^DELTACOM: ITC^DeltaCom did not object to this Finding of Fact.

MCIm: MCIm objected to this Finding of Fact stating that the Commission's statement in the RAO that "any issue of nonpayment would be between BellSouth and the wireless carriers, rather than BellSouth and MCIm" does not state the reality of the situation. If an MCIm customer originates a call that transits BellSouth's network and terminates to a CMRS provider, that CMRS provider may rightfully seek reciprocal compensation from MCIm. If BellSouth wants to receive from MCIm money that rightfully belongs to a third party, it is only right that BellSouth indemnify MCIm against claims from that third party. If the Commission concludes that BellSouth is not required to pass along reciprocal compensation payments to wireless carriers, then it should order BellSouth to indemnify MCIm for any claim that a wireless carrier might make with respect to such payments. MCIm should not be put in the position of paying BellSouth, only to have a wireless carrier claim MCIm is liable to it as the originating carrier for calls terminated by the wireless carrier.

RESPONSES

BELLSOUTH: This issue concerns the treatment of wireless traffic. In the RAO, the Commission ordered that the Parties continue to use their current procedures for Wireless Type 2A traffic, that the Parties should develop and deploy a meet-point billing arrangement for this type of traffic as soon as possible, and that the Parties should continue to use their existing procedures for Wireless Type 1 traffic. In its objection, MCIm requests that BellSouth indemnify MCIm for any claims that a wireless carrier might make for reciprocal compensation. To the extent MCIm is asking BellSouth to insure that MCIm will not have to pay reciprocal compensation to a wireless carrier with respect to a call for which MCIm has already paid BellSouth reciprocal compensation, BellSouth agrees to that request. To the extent that the request for "indemnification" includes any other implied obligation, BellSouth cannot agree to a broad undertaking. In any event, BellSouth understands its obligations to MCIm under the circumstances at issue herein. The RAO decision is adequate to address the issues and it should become final.

ITC^DELTACOM: ITC^DeltaCom did not file a Response.

MCIm: MCIm raised the Objection. Thus, MCIm filed no response in this regard.

PUBLIC STAFF: The volume of Wireless Type 1 traffic is quite small and BellSouth is incapable of distinguishing originating or terminating Wireless Type 1 traffic from its own originating or terminating traffic. Further, BellSouth handles this traffic identically for all

CLPs, including MCIm. The existing compensation procedures between BellSouth and MCIm for Wireless Type 1 traffic are satisfactory and should not be disturbed. For Wireless Type 2A traffic, BellSouth has accepted payment for transiting fees and reciprocal compensation from MCIm and then failed to forward the reciprocal compensation payments to the terminating wireless carrier. This occurred because BellSouth and MCIm did not have a meet point billing agreement in place which would enable BellSouth to accurately determine the amount the wireless carrier should receive for each MCIm-originated call. BellSouth and MCIm plan to implement a meet point billing arrangement in the last quarter of 2000. To the extent that BellSouth is contractually obligated to calculate and issue reciprocal compensation payments from MCIm to the wireless carriers for Wireless Type 2A traffic, BellSouth should begin doing so expeditiously and should promptly "true up" any payments it was previously responsible for making, but which it never actually made. This should eliminate any need for BellSouth to indemnify MCIm for failure to make reciprocal compensation payments.

DISCUSSION

In the RAO, the Commission concluded that absent a contractual obligation between BellSouth and wireless carriers, there was "no reasonable basis upon which to require BellSouth to pass on reciprocal compensation payments received from MCIm to wireless carriers prior to implementation of a meet-point billing arrangement." In that case, the Commission noted, any issue of nonpayment would be between BellSouth and the wireless carriers, rather than between BellSouth and MCIm. MCIm objected to this conclusion and contends that if BellSouth is not required to pass through the reciprocal payments to the wireless carriers, it should be required to indemnify MCIm against claims from a wireless provider for such payments.

BellSouth witness Varner testified that the volume of Wireless Type 1 traffic is quite small and that BellSouth is incapable of distinguishing originating or terminating Wireless Type 1 traffic from its own originating or terminating traffic. Further, BellSouth handles this traffic identically for all CLPs, including MCIm. Accordingly, the Commission's conclusion that existing compensation procedures between BellSouth and MCIm for Wireless Type 1 traffic are satisfactory remains valid.

For Wireless Type 2A traffic, BellSouth has apparently accepted payment for transiting fees and reciprocal compensation from MCIm and then failed to forward the reciprocal compensation payments to the terminating wireless carriers. According to BellSouth witness Varner, this occurred because BellSouth and MCIm did not have a meet-point billing agreement in place which would enable BellSouth to accurately determine the amount the wireless carrier should receive for each MCIm-originated call. BellSouth witness Varner further testified that BellSouth and MCIm planned to implement a meet-point billing arrangement in the last quarter of 2000. Furthermore, BellSouth has agreed to MCIm's request for assurance that MCIm will not have to pay reciprocal

compensation to a wireless carrier with respect to a call for which MCIm has already paid reciprocal compensation to BellSouth. To the extent BellSouth is contractually obligated to calculate and issue reciprocal compensation payments from MCIm to the wireless carriers for Wireless Type 2A traffic, BellSouth should do so expeditiously and should promptly "true up" any payments it was previously responsible for making, but which it never actually made. MCIm will therefore receive the protection from liability that it seeks.

CONCLUSIONS

The Commission upholds and affirms its original decision on this issue, subject to the clarification set forth above.

FINDING OF FACT NO. 15 (MATRIX ISSUE NO. 42): Should MCIm be permitted to route access traffic directly to BellSouth end offices or must it route such traffic to BellSouth's access tandem?

INITIAL COMMISSION DECISION

The Commission concluded that to the extent that MCIm is not utilizing local interconnection trunks solely for originating or terminating its interexchange traffic, MCIm may combine switched access and local traffic on interconnection trunks, provided that the switched access is being provided to an MCIm local exchange customer. Further, MCIm must provide adequate billing records to BellSouth to enable it to bill switched access to the appropriate CLPs.

OBJECTIONS

BELLSOUTH: BellSouth objected to Finding of Fact No. 15 stating that the Commission's language in the RAO, if applied literally, would permit MCIm to send terminating switched access traffic to BellSouth over local interconnection trunks as long as (1) the interconnection trunks were not being used solely for switched access traffic and (2) the switched access service is being provided to an MCIm local exchange customer. BellSouth stated that because both conditions apply to MCIm's use, it appears that MCIm may only terminate switched access traffic over local interconnection trunks for calls originated by MCIm local exchange customers. BellSouth argued that while that appears to be a reasonable limitation in concept, it will be impossible to enforce.

BellSouth stated that, for example, if MCIm has a local exchange customer in Houston, Texas who calls a BellSouth customer in Raleigh, it appears that MCIm would be permitted to route that call over local interconnection trunks under the Commission's RAO. At the same time, BellSouth stated that if an AT&T local customer in Houston called a BellSouth customer in Raleigh, and MCIm performed an intermediate switched access transit function for AT&T on that call (such as providing competitive access service), then

MCIm would not be permitted to route that call over local interconnection trunks. BellSouth contended that, at the present time, there is no way for the BellSouth network to distinguish between the two calls discussed above. That is, BellSouth stated, it will not have the ability to identify the local service provider for the customer originating an interstate call that terminates in North Carolina. BellSouth contended that the billing records that MCIm could provide, if any, would only be available after the ineligible call had been completed. BellSouth further stated that to the extent MCIm was providing a competitive access service to an interexchange service, BellSouth would not be able to identify the IXC for whom MCIm provided such service. BellSouth stated that MCIm offered no evidence in the record of this case that it could provide BellSouth with any such billing information. BellSouth requested that the Commission simply prohibit MCIm from routing switched access traffic over local interconnection trunks.

ITC^DELTACOM: ITC^DeltaCom did not object to this Finding of Fact.

MCIm: MCIm objected to Finding of Fact No. 15 stating that the Act and orders of the FCC make clear that MCIm is entitled to use interconnection trunks (as well as dedicated transport) to provide exchange access services to IXCs. MCIm agreed with the Commission's statement in the RAO that MCIm may combine switched access and local traffic on interconnection trunks, to the extent MCIm is not using interconnection trunks solely for originating or terminating its interexchange traffic. But, MCIm contended, the Commission's statement that MCIm's ability to place switched access traffic on interconnection trunks is limited to cases in which the access is being provided to an MCIm local exchange customer fails to comply with Section 251 of the Act as interpreted by the FCC.

MCIm stated that, as an initial matter, it is incorrect to describe switched access as being provided to MCIm's or any other LEC's local exchange customers. MCIm stated that switched access is a service provided to interexchange carriers and it is merely requesting that it be allowed to provide switched access service to an IXC when the IXC wishes to terminate a toll call to local customers. MCIm contended that BellSouth in effect maintains that it should have a monopoly on providing switched access services to IXCs terminating toll calls to BellSouth's local exchange customers. MCIm argued that the RAO preserves that monopoly for BellSouth because MCIm would be prohibited from using interconnection trunks or dedicated transport to provide exchange access service to IXCs terminating calls to BellSouth customers. MCIm argued that this proposed limitation effectively would prevent MCIm from providing exchange access service.

MCIm submitted that the proposed limitation to MCIm local customers is wrong as a matter of law. MCIm explained that the proposed limitation is based on the FCC's *Third Order on Reconsideration and Further Notice of Proposed Rulemaking,* CC Docket No. 96-98 and CC Docket 95-185 (August 18, 1997) ("Third Order"). MCIm argued that the question in that case (as it related to this issue) was whether a CLP using an unbundled

local loop and unbundled local switching to provide local exchange service is entitled to bill the IXC for the access services associated with those UNEs and whether in that circumstance the CLP could offer exchange access using dedicated transport. Third Order, paragraph 17. The FCC answered in the affirmative, ruling that a CLP may use dedicated transport to provide exchange access service to a customer to whom it also provides local exchange service, and that the CLP in that case is entitled to assess originating and terminating access charges to IXCs. Third Order, paragraph 38. MCIm stated that the FCC's ruling thus did not purport to limit a CLP's use of dedicated transport, but rather clarified that CLPs could use dedicated transport to provide exchange access in the manner requested by CLPs in that proceeding.

MCIm stated that the FCC made clear in its Local Competition Order and in the UNE Remand Order that generally there are no limitations on a CLP's ability to use dedicated transport to provide exchange access. The FCC stated in the UNE Remand Order:

> In the *Local Competition First Report and Order*, the Commission found that section 251(c)(3) "permits interexchange carriers and all other requesting carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers." In particular, the Commission found that its conclusion not to impose restrictions on the use of unbundled network elements was "compelled by the plain language of the 1996 Act" because exchange access and interexchange services are "telecommunications services." Moreover, in the *Local Competition First Report and Order*, the Commission found that "the language of section 251(c)(3), which provides that telecommunications carriers may purchase unbundled elements in order to provide a telecommunications service, is not ambiguous." This conclusion that the Act does not permit usage restrictions was codified in Rule 51.309(a), which provides that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting carrier intends." That rule was not challenged in court by any party.

MCIm contended that the limitation proposed in the RAO is not supported by any ruling of the FCC, but, to the contrary, would contravene the Act and clear rules established by the FCC on the provision of exchange access services.

RESPONSES

BELLSOUTH: In its Response to MCIm's objection, BellSouth stated that it submitted its own Objection to the Commission's RAO on this issue and incorporates its discussion of that issue herein by reference. BellSouth stated that the Commission should overrule MCIm's objection and adopt the position set forth in BellSouth's objection on this issue.

ITC^DELTACOM: ITC^DeltaCom did not file a response to this issue.

MCIm: In its Response, MCIm summarized that this issue involves the question of whether a CLP will be permitted to route terminating switched access traffic directly to BellSouth end offices over local interconnection trunks, or whether it will be required to deliver such traffic to BellSouth at BellSouth's access tandems over access trunks. MCIm noted that both Parties have filed objections to the Commission's ruling that MCIm's ability to place switched access traffic on interconnection trunks is limited to cases in which the access is being provided to an MCIm local exchange customer. BellSouth objects because it contends this limitation is unworkable; MCIm objects because such a limitation fails to comply with Section 251 of the Act as interpreted by the FCC.

MCIm stated that to put this issue in perspective, assume that MCIm seeks to compete with BellSouth for providing terminating access service to IXCs. In this situation, MCIm contended, an IXC could route its terminating traffic to an MCIm tandem switch, from which MCIm could terminate the call directly (if the called party was an MCIm local customer) or could deliver the call to BellSouth's end office switch for termination (if the called party was a BellSouth local customer). MCIm stated that the RAO would limit MCIm to the former situation (calls to MCIm local customers) and thus to cases in which MCIm would not need to use local interconnection trunks to complete the calls.

MCIm argued that if there was no such limitation, MCIm also could provide service to IXCs seeking to complete calls to BellSouth local customers. MCIm stated that in the case of a call to a BellSouth customer, BellSouth would be entitled to bill the IXC for the end office switching component of access charges, and MCIm would be entitled to bill the IXC for the tandem switching and transport components. MCIm pointed out that if MCIm were not permitted to route terminating access traffic directly to BellSouth's end offices, but instead had to send such traffic to BellSouth's access tandem via switched access trunks, then MCIm would be foreclosed from providing a competitive access service -- because BellSouth always would perform the tandem switching and transport functions, and would be entitled to bill the IXC for those services. MCIm stated that since BellSouth has the great majority of customers in its service territory, MCIm would be prevented, as a practical matter, from providing exchange access service.

MCIm contended that because both Parties' disagree with the part of the ruling limiting MCIm's use of interconnection trunks for exchange access to MCIm local exchange

customers, that part of the ruling should be removed. MCIm argued that because MCIm is entitled as a matter of law to offer exchange access service to IXCs using local interconnection trunks, the remainder of the ruling, which allows MCIm to combine switched access and local traffic on interconnection trunks so long as MCIm is not using the trunks solely for originating or terminating its IXC traffic, should be upheld.

PUBLIC STAFF: In its Response to MCIm's contention that the Commission erred in stating that MCIm may combine switched access and local traffic on interconnection trunks only when the switched access is being provided to an MCIm local exchange customer, the Public Staff pointed out that, as the Commission noted in its RAO, the FCC specifically stated in paragraph 38 of the *Third Order* that a carrier that takes "shared or dedicated transport as an unbundled network element may use such transport to provide interstate exchange access services to customers to whom it provides local exchange service." (Emphasis added). The Public Staff noted that, in paragraph 61 of the order, the FCC requested comments from interested parties on "whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service." The Public Staff stated that the FCC has never ruled on this issue, and thus there is no clearly established authority for a CLP to provide switched access over interconnection trunks to customers of other ILECs. The Public Staff contended that the Commission reasonably concluded that MCIm's right to combine switched access and local traffic on interconnection trunks should be limited in accordance with paragraph 38 of the *Third Order.*

In response to BellSouth's contention that when an interstate call terminates in North Carolina, its network cannot identify the calling party's local service provider, the Public Staff stated that it recognizes that BellSouth may have difficulty in distinguishing switched access traffic terminating over interconnection facilities from local traffic. However, the Public Staff stated that the Commission has addressed this concern by directing MCIm to "provide adequate billing records to BellSouth to enable it to bill switched access to" the appropriate interexchange carriers (IXCs). The Public Staff contended that adequate billing records should include the identity of the IXCs that need to be billed for access and the amount to be billed. The Public Staff stated that if BellSouth wishes to audit MCIm's records concerning traffic routed over interconnection facilities (for example, to determine whether any of the traffic came from customers who do not obtain local service from MCIm), it should be permitted to do so. The Public Staff recommended that the Parties' interconnection agreement should be modified to permit such audits if they are not now allowed.

DISCUSSION

The Commission agrees with the Public Staff that it has reasonably concluded in the RAO that MCIm's right to combine switched access and local traffic on interconnection

trunks should be limited in accordance with paragraph 38 of the *Third Order.* Furthermore, the Commission agrees with the Public Staff that if BellSouth wishes to audit MCIm's records concerning traffic routed over interconnection facilities to determine whether any of the traffic came from customers who do not obtain local service from MCIm, it should be permitted to do so. The interconnection agreement should be modified to permit such audits if they are not now allowed.

CONCLUSIONS

The Commission upholds and affirms its original decision in this regard. In addition, the Commission concludes that the interconnection agreement should be modified to permit audits as discussed by the Public Staff, if they are not now allowed. Accordingly, Finding of Fact No. 15 (Matrix Issue No. 42) should be amended to read as follows:

> To the extent that MCIm is not utilizing local interconnection trunks solely for originating or terminating its interexchange traffic, MCIm may combine switched access and local traffic on interconnection trunks, provided that the switched access is being provided to an MCIm local exchange customer. Further, MCIm must provide adequate billing records to BellSouth to enable it to bill switched access to the appropriate CLPs. The Parties' interconnection agreement should be modified to permit audits if they are not now allowed.

FINDING OF FACT NO. 17 (MATRIX ISSUE NO. 46): Under what conditions, if any, should the Parties be permitted to assign an NPA/NXX code to end users outside of the rate center in which the NPA/NXX code is homed?

INITIAL COMMISSION DECISION

The Commission concluded that calls within a LATA originated by BellSouth customers to MCIm foreign exchange (FX) customers are to be considered local and, therefore, subject to reciprocal compensation.

OBJECTIONS

BELLSOUTH: BellSouth did not object to this Finding of Fact.

ITC^DELTACOM: ITC^DeltaCom filed comments on the RAO on May 7, 2001. ITC^DeltaCom stated that its comments are wholly concerned with the Commission's conclusion that only "calls within a LATA originated by BellSouth customers to MCIm FX customers are to be considered local, and, therefore, subject to reciprocal compensation." ITC^DeltaCom maintained that the Commission correctly concluded that a telephone call from a BellSouth customer physically located in one rate center to a MCIm customer

physically located in a different rate center but who has an NPA/NXX code from the same rate center as the caller placing the call is a local call and that reciprocal compensation would be due. However, ITC^DeltaCom argued that the Commission circumscribed its conclusion by restricting it only "to the extent [the calls] are within a LATA." ITC^DeltaCom asserted that this restriction is unwarranted and does not logically or necessarily follow from the premises upon which the Commission's conclusion is based. ITC^DeltaCom recommended that the Commission remove this unnecessary restriction from its final Order for a number of reasons. However, ITC^DeltaCom stated that alternatively, the Commission should expressly limit its decision in this matter to the Parties in the case without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

ITC^DeltaCom stated in its comments that the Commission should remove the unnecessary restriction of "to the extent [the calls] are within a LATA" from its final Order in this matter for the following reasons:

(1) It was not necessary for the Commission to address the question of whether reciprocal compensation would be owed for FX calls that traversed a LATA boundary because MCIm conceded that "MCIm would be willing to agree to never assign an NPA/NXX code to a customer physically located outside the LATA if it would resolve this issue." As MCIm was not seeking compensation for FX calls crossing LATA boundaries, there was no reason for the Commission to reach this decision. The Commission's announcement of a LATA restriction in this case has the unfortunate, and presumably unintended, consequence of potentially binding other parties based on a record that is not fully developed on this issue. It would be more appropriate for the Commission to reach the decision of whether reciprocal compensation is owned for FX calls crossing LATA boundaries when presented with this question by parties who have a genuine dispute over the issue or, otherwise, through a generic industry proceeding where all interested parties have the opportunity to comment. If it were believed necessary in the instant matter, the Commission could impose the restriction expressly and uniquely on MCIm based on its concession without attaching the restriction to the conclusion that the calls are local based on a logical analysis of the FX service.

(2) LATAs were established to expressly delineate where the Regional Bell Operating Companies (RBOCs) could offer service. There has never been a restriction on CLPs from transporting traffic across LATA boundaries. CLPs have not been confined to the LATA boundaries, at least in part, because of Congress' intent to introduce competition into what had been a

protected monopoly market. By limiting its Finding of Fact No. 17 to calls within a LATA, the Commission would be applying a RBOC-specific restriction to all carriers.

(3) The Commission's LATA qualification potentially conflicts with its earlier decisions on reciprocal compensation. The Commission has repeatedly honored the principle that a call is "terminated" when it is "delivered to the telephone exchange service bearing the called telephone number." In this case, given that the Commission has required MCIm to have in place either owned or leased dedicated facilities between the FX customer's premises and the switch, the calls to MCIm's FX subscribers are delivered to the telephone exchange service bearing the called telephone number at the switch. Where a CLP switch is located in the same local calling area as the calling party, there is no question that under the Commission's previous decisions the call is a local call regardless of where the FX subscriber chooses to transport the call. As the Public Staff appropriately analyzed in its Proposed Order, a call from a BellSouth customer in Lenoir to a MCIm customer with a Lenoir NPA/NXX code is local, regardless of whether the FX customer's physical premises is in Charlotte or Denver.

(4) The Commission also grounds its decision on what it believes to be the FCC's ruling in a 1980 decision. However, the Commission's reliance on that ruling to draw a distinction between intraLATA and interLATA FX calls is misplaced. In the New York Telephone Company case, New York Telephone failed to file an intrastate tariff with the New York Public Service Commission to add a surcharge on interstate FX and CCSA subscribers amounting to $75.00 per month initially and increasing to $160.00 per month after nine months. By contrast, physically intrastate FX service subscribers paid a charge of $9.23 in addition to the local business line rate. Faced with this confiscatory surcharge on out-of-state FX customers only, the FCC relied upon the fact that FX service consists of both private lines and local exchange service as part of an overall, integrated end-to-end service to reach its conclusion that any charges concerning the local distribution of FX and CCSA services that apply to interstate customers only are subject to the jurisdiction of the FCC and must be filed with the FCC.

(5) It is not true, as BellSouth asserts, that "there is no authority . . . for the proposition that a telephone call which is originated in one local calling area and terminates outside of that local calling area is subject to the payment of reciprocal compensation." Under previous Commission decisions, FX calls terminate when they are delivered to the local exchange service bearing the called number, not when they reach some other destination chosen by the FX subscriber. The Michigan Public Service Commission ruled in

January 2001 that calls routed to FX subscribers outside of a local calling area constitute local calls subject to reciprocal compensation obligations.

(6) Although not expressly stated by the Commission in its RAO, it appears that the Commission may have been concerned with the equity of permitting MCIm to receive reciprocal compensation for interLATA FX calls while BellSouth could not do the same thing based on its inability to provide interLATA long distance.

Based on the foregoing, ITC^DeltaCom requested that the Commission conclude in its final Order that all FX calls, whether intraLATA or interLATA, be considered local and, therefore, subject to reciprocal compensation or, alternatively, that the Commission expressly limit its decision in this matter to the Parties in this case without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

MCIm: MCIm did not object to this Finding of Fact.

RESPONSES

BELLSOUTH: BellSouth stated in its Response that the Commission did not fully adopt BellSouth's position on this issue in its RAO, however, neither BellSouth nor MCIm submitted an Objection on this issue. BellSouth noted that, rather, ITC^DeltaCom filed an objection to the Commission's conclusion that interLATA FX-type calls would not qualify for reciprocal compensation.

BellSouth stated that while it does not necessarily agree with the Commission's ruling to the extent that it permits non-local, intraLATA calls to qualify for reciprocal compensation, there is certainly no justification for ITC^DeltaCom's request that the Commission extend the reciprocal compensation obligation to include interLATA and perhaps interstate calls. BellSouth argued that if ITC^DeltaCom's position were adopted, CLPs could collect reciprocal compensation for calls originating in North Carolina and terminating in New York or Chicago. BellSouth maintained that clearly the reciprocal compensation created by TA96 for the exchange of local traffic was never intended to apply to such interstate calls.

BellSouth noted that while ITC^DeltaCom attempts to distinguish the FCC's decision in the New York Telephone Company - Exchange System Access Line Terminal Charge for FX and CCSA Service, Memorandum Opinion and Order, 76 F.C.C. 2d 349 (1980), ITC^DeltaCom offered no rebuttal to the other state commission decisions such as Maine, Texas, and Illinois cited by BellSouth which support BellSouth's position. BellSouth noted that the decisions in the states mentioned are more restrictive than the Commission's decision in the RAO.

BellSouth recommended that the Commission overrule ITC^DeltaCom's objection and adopt the decision in the RAO for Finding of Fact No. 17 as final.

ITC^DELTACOM: ITC^DeltaCom objected to this Finding of Fact and, therefore, did not provide a response.

MCIm: MCIm did not address this issue in its Response.

PUBLIC STAFF: The Public Staff did not address this issue in its Response.

DISCUSSION

The Commission notes that its conclusion in the RAO limiting its decision to calls within a LATA originated by BellSouth customers to MCIm FX customers was due primarily to MCIm's own witness' testimony during the hearing. As the RAO noted, MCIm witness Price agreed during cross-examination at the hearing that a call from a BellSouth customer in Lenoir, North Carolina to a MCIm FX customer in Denver, Colorado is not a local call by virtue of the fact that the call crosses LATA boundaries. Further, witness Price stated that MCIm would be willing to agree to never assign an NPA/NXX code to a customer physically located outside of the LATA if it would resolve this issue. In this arbitration docket, MCIm's own witness agreed that a call from a BellSouth customer in Lenoir, North Carolina to a MCIm FX customer in Denver, Colorado is not a local call by virtue of the fact that the call crosses LATA boundaries. Therefore, it was completely logical for the Commission with this record to limit its decision to calls within the LATA.

The Commission also notes that the RAO specifically states that its decision in this regard was based on the evidence presented in this case.

Based on the comments of ITC^DeltaCom and a review of the RAO, the Commission finds it appropriate to clarify that the decision reached by the Commission in this docket is based solely on the evidence produced in this record and is made without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

CONCLUSIONS

The Commission upholds and affirms its original decision in this regard, subject to the clarification that its decision is made without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

FINDING OF FACT NO. 18 - MATRIX ISSUE NO. 47: Should reciprocal compensation payments be made for ISP-bound traffic?

INITIAL COMMISSION DECISION

The Commission concluded that the Parties should establish an interim inter-carrier compensation mechanism for Internet Service Provider (ISP)-bound traffic which is identical to that for non-ISP-bound traffic but which is subject to true-up once the FCC has decided upon a methodology for ISP bound traffic and the Commission has implemented it.

OBJECTIONS

BELLSOUTH: BellSouth objected to this Finding of Fact and asked the Commission to take into consideration the FCC's recent Order on Remand and Order in CC Docket 96-98, released on April 27, 2001 (ISP Traffic Remand Order), in which the FCC concluded that carriers do not owe reciprocal compensation for ISP-bound traffic and adopted an interim inter-carrier compensation mechanism to address the concerns it identified. The interim mechanism establishes a specific schedule for diminishing compensation for ISP-bound traffic over a three-year period. The Commission should order the Parties to include in their final agreement language conforming to the ISP Traffic Remand Order.

ITC^DELTACOM: ITC^DeltaCom did not object to this Finding of Fact.

MCIm: MCIm did not object to this Finding of Fact.

RESPONSES

BELLSOUTH: BellSouth objected to this Finding of Fact and, therefore, did not provide a Response.

ITC^DELTACOM: ITC^DeltaCom did not address this issue in its comments.

MCIm: MCIm stated in its Response that, because the Commission has not yet determined how, if at all, it will implement the FCC's decision, BellSouth's request that the Parties be directed to include in their interconnection agreement language conforming to the FCC's decision is premature. MCIm cited to the Commission's May 11, 2001 Order Requesting Comments in Docket No. P-100, Sub 133m.

PUBLIC STAFF: The Public Staff agreed with BellSouth that the FCC's interim reciprocal compensation mechanism should apply as dictated by the FCC, effective on or after 30 days after publication of the FCC's decision in the Federal Register. Docket No. P-100, Sub 133m has to do with the appropriate treatment of traffic exchange prior to that time.

DISCUSSION

The Commission concurs with BellSouth that, pursuant to the FCC's ISP Traffic Remand Order, the Parties should be required to include in their final agreement language which conforms to that Order. The FCC's ISP Traffic Remand Order became effective on June 14, 2001, or 30 days after publication in the Federal Register. Docket No. P-100, Sub 133m is concerned with traffic exchanged prior to that date and, more specifically, whether the true-up requirement previously instituted by the Commission remains viable. It therefore has no direct bearing on the implementation of the latest FCC Order.

CONCLUSIONS

The Commission concludes that this issue should be reconsidered and that the Parties should be required to include in their final agreement language conforming to the ISP Traffic Remand Order. Accordingly, Finding of Fact No. 18 (Matrix Issue No. 47) should be amended to read as follows:

> The Parties shall include in their final agreement language conforming to the FCC's ISP Traffic Remand Order.

FINDING OF FACT NO. 23 (MATRIX ISSUE NO. 80): Should BellSouth be required to provide an application-to-application access service order inquiry process?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth had failed to demonstrate that it provided MCIm with nondiscriminatory access to existing pre-ordering and ordering interfaces when Digital Signal Level One (DS1) combos are being ordered. The Commission was concerned about the lack of parity and concluded that it was appropriate to refer the issues MCIm had raised in Issue No. 23 (Matrix Issue No. 80) of this docket to the Change Control Process (CCP) for further action. Further, the Commission ordered MCIm and BellSouth to file separate CCP status reports every three months, beginning on June 29, 2001. Finally, the Commission found it appropriate to require that the initial reports identify each specific CCP issue which MCIm raised in this proceeding and briefly describe the progress which had been made in the preceding three months in discussing and resolving each issue and that as issues are resolved to the satisfaction of both MCIm and BellSouth, they may be dropped from the reports.

OBJECTIONS

BELLSOUTH: BellSouth objected to Finding of Fact No. 23 stating that it objects to the suggestion that it is not providing MCIm with nondiscriminatory access to its Operations Support Systems (OSS). Further, BellSouth stated that it does not object to this issue

being referred to the CCP, but requests some clarification. BellSouth requested that the Commission clarify how it desires this matter to be treated by the CCP — as a Type 2 Change Request (CR) mandated by the Commission or as a Type 4 or 5 CR for the participating CLPs to review and prioritize.

BellSouth acknowledged that the Commission was troubled by MCIm's assertion that BellSouth's retail operations may obtain electronic pre-ordering information in connection with an order for MegaLink® service. BellSouth noted that the Commission concluded that "BellSouth has failed to demonstrate that it provides MCIm with nondiscriminatory access to existing pre-ordering and ordering interfaces when DS1 combos are being ordered." BellSouth requested that the Commission reconsider its decision to the extent that it suggests that BellSouth is not providing nondiscriminatory access to its OSS.

BellSouth stated that the Commission's concerns about parity are misplaced. BellSouth asserted that MCIm offered no evidence to contradict BellSouth's evidence that the pre-ordering functionality for Local Service Requests (LSRs) is "robust" and available through an application-to-application interface. Thus, BellSouth argued that there is no evidence to contradict BellSouth's assertion that its pre-ordering interfaces for LSRs are providing CLPs with nondiscriminatory access to BellSouth's OSS.

Further, BellSouth stated that this issue does not concern LSRs. Instead, BellSouth explained that MCIm requested that BellSouth construct an application-to-application interface for the continued submission by MCIm of Access Service Requests (ASRs) for local service. BellSouth noted that the ASR process is a method used by an IXC to order facilities. BellSouth stated that MCIm is not submitting orders for DS1 combos and explained that, as testified by BellSouth witness Pate, MCIm is instead submitting orders for special access and later converting those circuits. Thus, BellSouth remarked that MCIm is not even using ASRs to request local service.

BellSouth also noted that this same issue has been addressed in both Florida and Georgia. In Florida, BellSouth pointed out that the Florida Public Service Commission in Order No. PSC-01-0824-FOF-TP, dated March 30, 2001, in Docket No. 000649-TP, denied MCIm's request for an application-to-application interface and found that BellSouth was providing nondiscriminatory access to OSS ordering and pre-ordering functions. In Georgia, BellSouth stated that the Georgia Public Service Commission in its Order in Docket No. 11901-U, dated February 6, 2001, also denied MCIm's request for an application-to-application interface for ASRs. However, BellSouth noted that the Georgia Commission did order the parties to work together to "increase electronic ordering and flow-through for complex and manually ordered services."

BellSouth stated that it does not object to this issue being referred to the CCP, but requested some clarification. BellSouth stated that changes to BellSouth's interfaces that

are mandated by a state commission are called Type 2 CRs. Further, BellSouth explained that Type 2 CRs will take precedence over those enhancements submitted by BellSouth which are Type 4 or by the CLPs which are Type 5. BellSouth commented that BellSouth and CLP initiated CRs are prioritized by the CLPs, as defined in the CCP, in their desired order of impact for implementation. BellSouth requested that the Commission clarify how it desires this matter to be treated by the CCP — as a Type 2 CR mandated by the Commission or as a Type 4 or 5 CR for the participating CLPs to review and prioritize.

ITC^DELTACOM: ITC^DeltaCom did not object to this Finding of Fact.

MCIm: MCIm did not object to this Finding of Fact.

RESPONSES

BELLSOUTH: BellSouth raised the Objection. Thus, BellSouth filed no response in this regard.

ITC^DELTACOM: ITC^DeltaCom did not file a Response.

MCIm: MCIm stated in its Response that the Commission was clearly correct in its ruling that "BellSouth has failed to demonstrate that it provides MCIm with nondiscriminatory access to existing pre-ordering and ordering interfaces when DS1 combos are being ordered." MCIm noted that BellSouth's position is that MCIm must order DS1 combos via the manual LSR process. In contrast, MCIm explained that BellSouth's representatives ordering the functionally equivalent MegaLink® circuits use BellSouth's electronic Regional Ordering System (ROS) and are able to use point-and-click technology with pull-down screens to construct the order before electronically transmitting it to BellSouth's provisioning systems. Additionally, MCIm pointed out that, in the Order of the Georgia Commission referenced in BellSouth's Objection, the Georgia Commission also included a sentence in its ruling on the issue which states: "Until BellSouth makes available a tested electronic LSR process, MCIW shall be entitled to order DS1 combos using the electronic ASR process." MCIm contended that given this Commission's finding of discrimination, the final order in this docket should include the same requirement.

In regard to BellSouth's request that the Commission clarify how it desires this matter to be treated by the CCP, as a Type 2 CR mandated by the Commission or as a Type 4 or 5 CR for the participating CLPs to review and prioritize, MCIm proposed that the issues raised in Matrix Issue No. 80, be treated as a Type 2 CR mandated by the Commission. In support of its position, MCIm remarked that this case was heard by the Commission in August 2000 and that to date an electronic LSR process for DS1 combos has not been implemented. Thus, MCIm asserted that BellSouth has already taken far too long to rectify the disparity between the ordering processes for MegaLink® circuits and DS1 combos.

PUBLIC STAFF: The Public Staff believes that this issue will be addressed more fully when the Commission considers BellSouth's Section 271 petition which was filed on April 12, 2001. Additionally, the Public Staff stated that it does not believe the evidence is sufficiently developed to enable the Commission to reach a conclusion as to whether BellSouth is providing this functionality to its competitors in substantially the same manner that it provides such functionality to itself. Thus, the Public Staff stated in its Response that the Commission should decline to rule as to whether BellSouth is providing nondiscriminatory access and instead consider the issue during BellSouth's Section 271 proceeding.

Further, in regard to BellSouth's request that the Commission clarify how it desires this matter to be treated by the CCP, the Public Staff suggested that the participants be allowed to prioritize this issue, rather than requiring the issue to have precedence over other requests which the participants may deem to be more crucial. However, the Public Staff suggested that the Commission reserve the right to escalate the priority level if the quarterly CCP reports on this issue suggest that BellSouth is not satisfactorily addressing MCIm's concerns regarding the application-to-application access service order inquiry process.

JUNE 29, 2001 QUARTERLY CCP REPORTS

BELLSOUTH: On June 29, 2001, BellSouth filed its initial quarterly CCP Status Report. Therein, BellSouth stated that MCIm is seeking to continue to be allowed to order DS1 combos (Enhanced Extended Loops (EELs)) using the electronic ASR process and noted that this issue was referred to the CCP for action and reporting. BellSouth reported the following:

- On June 14, 2000, MCIm submitted a Type 3 (Industry Standard Change) CR, for an UNE via an ASR, specifically requesting EELs limited to DS1 and above. This request was assigned CR No. 0086.

- On June 26, 2000, CR No. 0086 was withdrawn by the originator because an existing CR was active. MCIm's request was to be addressed with the active CR No. 0378.

- CR No. 0378 was not adopted. The basis for this decision was that BellSouth's OSS for UNEs was configured to utilize the LSR and the ASR was configured for access services. The ASR form does not contain all the necessary fields required to provision a UNE order and additional information would be required. An appeal was submitted, but after review, BellSouth's decision concerning the modification of the ASR to accept UNEs was unchanged. The Ordering and Billing Forum (OBF) also reviewed ASR use and in OBF Issue No. 1524, the OBF determined that UNE ordering on

the ASR would not be allowed. The ASR allowed for the CLP/IXC/customer to order supporting network facilities (local transport between central offices) to support their overall service offerings.

- On June 20, 2000, the originator of CR No. 0378, updated the request to include a list of data fields not currently appearing on the ASR. By June 26, 2000, BellSouth reaffirmed its position that orders for local UNE loops should be submitted via the LSR. No plans currently exist to use the ASR for UNE products. The ASR can be used for interoffice trunking only.

- Under CR No. 0078, BellSouth is developing plans to mechanize the EELs ordering process. This is targeted for late 2001. Release Prioritization Ranking activities are currently underway. Upon deployment, CLPs can electronically order UNE EELs using the LSR. BellSouth believes that this mechanization effort will resolve MCIm's request for electronic ordering capability of UNE EELs and permit a resolution of Issue No. 80 entirely.

MCIm: MCIm did not file an initial quarterly CCP Status Report. In this proceeding only two matrix issues — Matrix Issues Nos. 80 and 81 — were ordered to be reported on, in the required reports. On May 1, 2001, MCIm filed a letter stating that Matrix Issue No. 81 had been resolved. Thus, the only outstanding issue to be addressed in the quarterly reports was Matrix Issue No. 80.

DISCUSSION

In the RAO, under our discussion of this issue, the Commission stated the following:

> Considering that BellSouth provides itself the capabilities to obtain pre-ordering information electronically and to have that information transmitted electronically when BellSouth representatives order MegaLink circuits, but does not provide comparable capabilities to MCIm when ordering DS1 combos which appear to be functionally equivalent to MegaLink circuits, the Commission does not believe that parity is being provided. The Commission considers that matters of modifications to existing pre-ordering and ordering interfaces, the integratability of such interfaces, and the development of new interfaces as raised in this issue are important ones, which would be best addressed in the CCP. The Commission agrees with the Public Staff that it would be appropriate to direct BellSouth and MCIm to refer this issue (Matrix Issue No. 80) to the CCP for further action. The Commission finds it appropriate to instruct BellSouth to ensure that each participant in the CCP is given ample opportunity to review MCIm's proposed changes prior to consideration at the appropriate CCP meeting.

Accordingly, the Commission concluded that BellSouth had failed to demonstrate that it provided MCIm with nondiscriminatory access to existing pre-ordering and ordering interfaces when DS1 combos are being ordered. Furthermore, in the RAO, the Commission ordered MCIm and BellSouth to file separate CCP status reports every three months, beginning on June 29, 2001. The Commission stated that this level of monitoring should motivate the Parties to exercise their best efforts to reach mutually acceptable solutions to their OSS disputes.

In regard to BellSouth's request that the Commission reconsider its decision to the extent that it suggests that BellSouth is not providing nondiscriminatory access to its OSS, the Public Staff remarked in its Response that this issue will be addressed more fully when the Commission considers BellSouth's Section 271 petition. Additionally, the Public Staff contended that it does not believe the evidence is sufficiently developed to enable the Commission to reach a conclusion as to whether BellSouth is providing the functionality, at issue, to its competitors in substantially the same manner that it provides such functionality to itself.

Based upon further consideration, the Commission concludes that it would be reasonable, at this time, to decline to rule as to whether BellSouth is providing nondiscriminatory access to BellSouth's existing pre-ordering and ordering interfaces when DS1 combos are being ordered. Instead, the Commission will consider the issue, as recommended by the Public Staff, during BellSouth's Section 271 proceeding which is scheduled for hearing beginning October 29, 2001.

Further, as indicated in BellSouth's CCP Status Report, under CR No. 0078 - Extended Loops, Type 5, BellSouth is developing plans to mechanize the EELs' ordering process. This is targeted for late 2001. Upon deployment, BellSouth explained that CLPs will be able to electronically order UNE EELs using the LSR. BellSouth believes that this mechanization effort will resolve MCIm's request for electronic ordering capability of UNE EELs and permit a resolution of Issue No. 80 entirely. As of April 25, 2001, per the Change Review Prioritization, this CR was assigned a ranking of 15 of 36. However, according to BellSouth, Release Prioritization Ranking activities are currently underway. The prioritization meetings are held quarterly in March, June, September, and December.

The Commission understands that BellSouth plans to expeditiously implement an ordering process for UNE EELs/DS1 combos that should sufficiently address the concerns raised by MCIm in Matrix Issue No. 80. As BellSouth has indicated, implementation is planned for late 2001, and accordingly, the Commission expects that appropriate actions will be taken to resolve this matter within the next few months. As a result, the Commission believes that BellSouth should be required to implement, in a timely manner, an ordering process enabling the CLPs to electronically order UNE EELs/DS1 combos

using the LSR, with the exact manner in which and date by which this upgrade to BellSouth's existing OSS will become available vis a vis other proposed changes to BellSouth's OSS to be determined through the CCP.

In regard to BellSouth's request for clarification of how the Commission desires this matter to be treated by the CCP, the Commission believes that it would be appropriate to treat the matter as a Type 4 or 5 CR, for the participating CLPs to review and prioritize, rather than requiring the issue to be classified as a Type 2 CR, which would take precedence over other requests which the participants, collectively, may deem to be of more immediate concern. However, the Commission reserves the right to escalate the priority level if the quarterly CCP reports on this issue suggest that BellSouth is not satisfactorily addressing MCIm's concerns.

Further, the Commission assumes that MCIm considered that its June 11, 2001 filing of a Response to BellSouth's Exception in regard to Finding of Fact No. 23 (Matrix Issue No. 80) was the same position, apparently, as what MCIm would have explained if it had filed the required June 29, 2001 CCP Status Report which was required by the RAO. The Commission reminds BellSouth and MCIm that the filing date of their next quarterly CCP status reports on Matrix Issue No. 80 are to be filed on September 28, 2001. Such reports are to be filed by both Parties.

CONCLUSIONS

The Commission declines to decide, at this time, whether BellSouth is providing nondiscriminatory access to BellSouth's existing pre-ordering and ordering interfaces when DS1 combos are being ordered. Instead, the Commission will consider the issue during BellSouth's Section 271 proceeding which is scheduled for hearing beginning October 29, 2001. However, the Commission believes that BellSouth should be required to implement, working through the CCP and in a timely manner, an ordering process enabling the CLPs to electronically order UNE EELs/DS1 combos using the LSR. Further, the Commission requires BellSouth and MCIm to continue to include this issue in their respective quarterly CCP status reports. The next filing date for such reports is September 28, 2001. Accordingly, the Commission concludes that Finding of Fact No. 23, should be amended to read as follows:

> BellSouth is required to implement, in a timely manner, an ordering process enabling the CLPs to electronically order UNE EELs /DS1 combos using the LSR. It is appropriate to refer the issues MCIm has raised in Matrix Issue No. 80 of this docket to the CCP for further action and implementation. MCIm and BellSouth are required to file separate CCP status reports every three months, beginning on September 28, 2001, concerning the progress the CCP has made in addressing and resolving these issues.

IT IS, THEREFORE, ORDERED as follows:

1. That, in accordance with the Commission's January 24, 2001 and November 3, 2000 Orders issued in Docket No. P-100, Sub 133, MCIm and BellSouth shall jointly file a Composite Agreement by no later than Friday, August 31, 2001.

2. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

3. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 6 (Matrix Issue No. 18), but clarifies and modifies that finding of fact to read as follows:

> BellSouth is obligated to provide unbundled dedicated transport throughout its network between locations and equipment designations (including interoffice `` facilities to network nodes connected to MCIm switches, or to wire centers of other requesting carriers) so long as the facilities are existing and used to provide telecommunications services. Furthermore, BellSouth is not obligated to construct new transport facilities at a competing local provider's (CLP's) request along routes where BellSouth has not deployed facilities for its own use or along routes where no facilities are in place or where BellSouth does not have existing facilities.

4. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 10 (Matrix Issue No. 34 and Matrix Issue No. 35).

5. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 11 (Matrix Issue No. 36).

6. That Finding of Fact No. 12 (Matrix Issue No. 37) shall be amended to read as follows:

> BellSouth should be required to allow MCIm to combine local transit traffic on the same local trunks that carry other local traffic. Further, the Parties should resolve the issue of switched access transit traffic consistent with the Commission's decision on Matrix Issue No. 42.

7. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 13 (Matrix Issue No. 39), as clarified hereinabove.

8. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 15 (Matrix Issue No. 42), but clarifies and amends that finding of fact to read as follows:

To the extent that MCIm is not utilizing local interconnection trunks solely for originating or terminating its interexchange traffic, MCIm may combine switched access and local traffic on interconnection trunks, provided that the switched access is being provided to an MCIm local exchange customer. Further, MCIm must provide adequate billing records to BellSouth to enable it to bill switched access to the appropriate CLPs. The Parties' interconnection agreement should be modified to permit audits if they are not now allowed.

9. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 17 (Matrix Issue No. 46), subject to the clarification that its decision is made without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

10. That Finding of Fact No. 18 (Matrix Issue No. 47) shall be amended to read as follows:

The Parties shall include in their final agreement language conforming to the FCC's ISP Traffic Remand Order.

11. That Finding of Fact No. 23 (Matrix Issue No. 80) shall be amended to read as follows:

BellSouth is required to implement, in a timely manner, an ordering process enabling the CLPs to electronically order UNE EELs /DS1 combos using the LSR. It is appropriate to refer the issues MCIm has raised in Matrix Issue No. 80 of this docket to the CCP for further action and implementation. MCIm and BellSouth are required to file separate CCP status reports every three months, beginning on September 28, 2001, concerning the progress the CCP has made in addressing and resolving these issues.

ISSUED BY ORDER OF THE COMMISSION.

This the 2nd day of August, 2001.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

bb080201.01

Commissioner Sam J. Ervin, IV dissents in part by separate opinion.
Commissioner Judy Hunt joins in Commissioner Ervin's separate dissenting opinion.
Commissioner James Y. Kerr, II did not participate.

GLOSSARY OF ACRONYMS
Docket No. P-474, Sub 10

Act	Telecommunications Act of 1996
ADUF	Access Daily Usage File
AIN	Advanced Intelligent Network
ANI	Automatic Numbering Identification
ASR	Access Service Request
AT&T	AT&T Communications of the Southern States, Inc.
ATIS	Alliance for Telecommunications Industry Solutions
BellSouth	BellSouth Telecommunications, Inc.
CABS	Carrier Access Billing System
CCP	Change Control Process
CCSA	Common Control Switching Arrangement
CFA	Channel/Connecting Facility Assignment
CLEC	Competitive Local Exchange Company (Carrier)
CLLI	Common Language Location Identification
CLP	Competing Local Provider
CMDS	Centralized Message Distribution System
CNAM	Calling Name
Commission	North Carolina Utilities Commission
CR	Change Request
DS1	Digital Signal Level One
ECCKT	Exchange Company Circuit ID
EEL	Enhanced Extended Loop
EMI	Electronic Message Interchange or Exchange Message Interface
EODUF	Enhanced Optional Daily Usage File

ERS	Extended Reach Service
EXACT	Exchange Access Control and Tracking
FCC	Federal Communications Commission
FX	Foreign Exchange
GSST	General Subscriber Services Tariff
ICG	ICG Telecom Group, Inc.
ILEC	Incumbent Local Exchange Company (Carrier)
INP	Interim Number Portability
Intermedia	Intermedia Communications, Inc.
IP	Internet Protocol
ISDN	Integrated Services Digital Network
ISP	Internet Service Provider
ITC^DeltaCom	ITC^DeltaCom Communications, Inc.
IXC	Interexchange Carrier
LATA	Local Access and Transport Area
LCC	Line Class Code
LEC	Local Exchange Company (Carrier)
LERG	Local Exchange Routing Guide
LFACS	Loop Facility Assignment Control System
LNP	Local Number Portability
LSO	Local Service Office
LSR	Local Service Request
LTR	Local Transport Restructure
MCIm	MCImetro Access Transmission Services, LLC
NRC	Nonrecurring Charge
OBF	Ordering and Billing Forum

ODUF	Optional Daily Usage File
OS/DA	Operator Services and Directory Assistance
OSS	Operations Support Systems
OTS	Operator Transfer Service
PLU	Percent Local Usage
PON	Purchase Order Number
POP	Point of Presence
Public Staff	Public Staff-North Carolina Utilities Commission
RAO	Recommended Arbitration Order or Revenue Accounting Office
ROS	Regional Ordering System
SL	Service Level
SOCS	Service Order Communication System
SWC	Serving Wire Center
TA96	Telecommunications Act of 1996
TCG	TCG of the Carolinas, Inc.
TAG	Telecommunications Access Gateway
TELRIC	Total Element Long Run Incremental Cost
TOPS	Traffic Operator Position System
TR	Technical Requirement
UNE	Unbundled Network Element
UNE-P	Unbundled Network Element Platform

DOCKET NO. P-474, SUB 10

COMMISSIONER SAM J. ERVIN, IV, DISSENTING IN PART: As is apparent from an examination of the Commission's order, the majority has overruled MCIm's objection to that portion of the Recommended Arbitration Order requiring MCIm to bear the cost of delivering BellSouth-originated local traffic from a BellSouth local calling area to a point of interconnection designated by MCIm within the same LATA and outside the BellSouth local calling area within which the call originated. For the reasons which I stated in more detail in my dissents from the Commission's decisions with respect to this issue in In re Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc., and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc., Docket Nos. P-140, Sub 73, and P-676, Sub 7, Recommended Arbitration Order (March 9, 2001); In re Petition of MCImetro Access Transmission Services, L.L.C., For Arbitration of Proposed Agreement with BellSouth Telecommunications, Inc., Docket No. P-474, Sub 10, Recommended Arbitration Order (April 3, 2001); and In re Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc., and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc., Docket Nos. P-140, Sub 73, and P-646, Sub 7, Order Ruling on Objections and Requiring the Filing of Composite Agreement (June 19, 2001), I continue to believe that the Commission's decision is inconsistent with the Telecommunications Act of 1996 and FCC's interconnection regulations; that the fact that the FCC has solicited comments concerning the interrelationship between its decisions authorizing competing carriers to select a single point of interconnection and its reciprocal compensation rules in the context of developing a unified system for intercarrier compensation in In re Matter of Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking, CC Docket 01-92 (April 27, 2001), does not support a decision authorizing a result which I believe to be expressly forbidden by the literal language of the FCC's decisions and interconnection regulations; and that the "equity" argument upon which the Commission has repeatedly relied in addressing this issue assumes the point in dispute, supports a result different from the one which the Commission actually reaches, and is not competitively neutral. As a result of my continued disagreement with the Commission's decision with respect to this issue and the fact that the issues raised at this stage of this proceeding are being decided by the full Commission, In re Petition of Sprint Communications Company, L.P., for Arbitration with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. P-294, Sub 23, Recommended Arbitration Order (July 5, 2001)(Ervin, Commissioner, concurring in the result), I respectfully dissent from the Commission's decision with respect to this issue. I do, however, fully concur in the remainder of the Commission's decision.

\s\ Sam J. Ervin, IV
COMMISSIONER SAM J. ERVIN, IV

ORDER NO. 01-809

ENTERED SEP 13 2001

This is an electronic copy. Attachments may not appear.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 332

In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection.	)	COMMISSION DECISION

DISPOSITION: ARBITRATOR'S DECISION ADOPTED

On April 19, 2001, Level 3 Communications, LLC (Level 3) filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996[1] (the Act). Qwest responded to the petition on May 14, 2001. The parties agreed that there were four unresolved issues for the Commission to decide, as follows:

1. Should the parties be required to provide each other reciprocal compensation for Internet-bound traffic?
2. Should interexchange telephone-to-telephone calls sent over a packet switched network, (IP telephony), be defined as Switched Access Traffic and compensated accordingly?
3. What is the proper method for allocating costs incurred for trunking and facilities on Qwest's side of the Point of Interconnection (POI)?
4. What are the proper means for determining local interconnection service trunk provisioning intervals?

The Commission assigned Administrative Law Judge Allan J. Arlow to act as arbitrator in this case. Teleconferences were held on May 31 and June 8, 2001, and a procedural schedule was subsequently established by the exchange of electronic correspondence. The parties filed initial briefs on June 26, 2001, and rebuttal briefs and testimony on July 3, 2001. At the time initial briefs were filed, the parties notified the Commission that they had reached a written stipulation that briefs would only address Issues 2-4. By joint letter of July 10, 2001, the parties submitted an agreement asking for several procedural changes. By Ruling of July 11, 2001, those changes were granted as follows: The parties waived their rights to a hearing for the purposes of cross-examination of witnesses, agreeing instead to submit transcripts from arbitration proceedings in Colorado and Arizona covering these issues prior to July 17, 2001;

[1] Level 3 and Qwest do not hav

Level3 withdrew its reply brief; and the parties were to file briefs on July 17 and reply briefs on July 24, 2001, at which time the record would be closed.

By joint letter of July 23, 2001, the parties agreed that Issue 1 would be separated from the remaining issues and that the parties' statutory rights to a timely ruling on that issue would be temporarily waived until September 10, 2001. By letter of August 6, 2001, the parties (1) requested an extension of time until August 16, 2001, in which to complete their discussions and to present for Commission resolution any argument with respect to Issue 1, (2) waived until September 17, 2001, their statutory rights for a timely ruling from the Commission on Issue 1, and (3) waived until August 15, 2001, their statutory rights for a timely ruling from the Commission on Issues 2-4. The Arbitrator issued a ruling on August 6, 2001, granting the letter request, acknowledging the waivers and adopting the proposed schedule. By joint letter of August 15, 2001, the parties advised the Commission that Issue 1 had been resolved by mutual agreement and withdrawn from the request for arbitration. The Arbitrator issued his decision in this proceeding on August 15, 2001. Level 3 filed exceptions to the decision on August 27, 2001.

Statutory Authority

The standards for arbitration are set forth in 47 USC §252(c):

> "In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement."

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. Section 252(e)(2)(B) provides that the State commission may reject an agreement (or any portion thereof) adopted by arbitration only "if it finds that the agreement does not meet the requirements of section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

> "Notwithstanding paragraph (2), but subject to section 252, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."

Level 3 takes exception to the Arbitrator's decision on Issues 3 and 4.

With respect to Issue 3, the Arbitrator found that the proper method for allocating costs incurred for trunking and facilities on Qwest's side of the Point of Interconnection (POI) was to exclude internet-bound traffic from the relative use calculation for allocating costs. Level 3 asserts that the law requires that such internet-bound traffic should be included in the calculation and that the Arbitrator's decision was in error in the following respects:

> (1) The Arbitrator applied Section 251(b)(5) in his decision-making process and that section does not apply to transport facilities on the originating carrier's side of the POI and failed to distinguish the *TSR Wireless* case.[2]
>
> (2) The Arizona Commission correctly found that Qwest should recover its costs from its own customers who originate the calls to Level 3.
>
> (3) The Arbitrator erred in taking notice and giving any weight to the fact that no parties in UM 823 objected to the Qwest language.
>
> (4) Relative use is the appropriate means to distribute financial obligations and the Arbitrator erred in failing to find that if traffic is out of balance, the financial responsibility should reflect it.

With respect to Issue 4, the Arbitrator found that the language proposed by Qwest set forth the proper means for determining local interconnection service trunk provisioning intervals. Level 3 asserts that the Arbitrator erred as follows:

> (1) The Arbitrator prematurely applied the results of the UM 823 proceeding.
>
> (2) The Arbitrator disregarded section 252(i) of the Act.

Issue 3 Discussion

We discuss in turn and reject each of Level 3's exceptions and decline to adopt its proposed contract language.

First, Level 3 states that Section 251(b)(5) is irrelevant because it does not apply to the originating side of the POI and the Arbitrator should therefore not rely upon

[2] *TSR Wireless, LLC et al. v. U S. West communications, Inc., et al.* Nos. E-98-13m E-98-15m E-98-16, E-98-17, E-98-18, Memorandum Opinion an Order (rel. June 21, 2000), *aff'd, Qwest Corporation, et al. v. Federal Communications Commission and United States of America,* 2001 U.S. App. LEXISA 13389 (D.C. Cir. June 15, 2001).

it. However, it is the FCC's interpretation of Section 251 in its *ISP Remand Order* that sets forth the policies that the Arbitrator is applying in the case.[3] Furthermore, while 47 C.F.R. Part 51, cited by Level 3, includes the obligation to transport traffic to POIs, it does not, by implication, automatically provide the means for calculating the cost recovery for those facilities, as Level 3 implies. To support its claim of legal error, Level 3 faults the Arbitrator for not addressing the *TSR Wireless* case, claiming, at page 6, that the case is controlling. However, the Arbitrator noted that Qwest asserted that Level 3 had misinterpreted the *TSR Wireless* case,[4] stating that it was clearly distinguishable on its facts.[5]

Second, while Level 3, takes the position that its proposed language reflects well-established legal principles and cites the Arizona Commission decision as proper precedent for Oregon action, it does not even mention, much less seek to distinguish, the recent Colorado Commission arbitration decision which entirely supports the Arbitrator's findings and conclusions on this issue:

> "When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for the costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of the entrance facilities and direct trunked transport." [6]

Third, Level 3 also claims that no weight should be given to the Administrative Law Judge's findings on this issue in UM 823. Level 3 is incorrect in that regard. The Administrative Law Judge found that Qwest's language had met its *prima facie* burden of proof of compliance with Checklist Item 1 in its 271 proceeding. Compliance with FCC rules is an integral part of such a finding. The numerous intervening parties in that docket have played an active and critical role in alerting the Commission to potential noncompliance by Qwest with its interconnection obligations,

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[3] "The same arbitrage opportunities that the FCC cites with respect to the termination of ISP-bound traffic, apply in the allocation of ILEC facilities' costs on the basis of relative use by the traffic originator, because an ILEC customer who calls an ISP generates an identical number of minutes-of-use over facilities on the ILEC side of the POI as over the CLEC's terminating facilities. The overall thrust of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic." (Arbitrator's decision, p. 8).

[4] *Arbitrator's decision*, p. 6, citing Qwest Reply Brief, pp. 7-10.

[5] Qwest notes that the traffic is not internet-related and that the traffic, being *intraMTA*, is the equivalent of local traffic. Since the case excludes non-local traffic from the relative use calculation, Qwest asserted that *TSR Wireless* actually supported its position. Qwest Reply Brief, p. 10

[6] *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to §252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation,* Dkt. No. 00B-601T, (Colo. P.U.C. March 30, 2001) at 36. "We also approve the additional language proposed by Qwest for Provisions 7.3.1.1.3.1 and 7.3.2.2(a) indicating the new factor will exclude Internet related traffic and be based on non-Internet related traffic."

and their decision not to seek Commission review of this issue was properly worthy of note by the Arbitrator.

The final point of exception by Level 3 is merely a reiteration of its earlier argument and is rejected.

Issue 4 Discussion

With respect to Issue 4, the Arbitrator found that the language proposed by Qwest set forth the proper means for determining local interconnection service trunk provisioning intervals. We discuss in turn and reject each of Level 3's exceptions; we decline to adopt its proposed contract language and concur in the Arbitrator's findings and conclusions.

First, Level 3 asserts that the Arbitrator erred because he prematurely applied the results of the UM 823 proceeding. It claims that the Arbitrator precluded the issue from debate because it had yet to be litigated, even though, as Level 3 notes in its Exceptions, it "has committed to abide by the final outcome of the 271 proceeding." (p. 12). As Level 3 is aware, the 271 process is one of recommendation and not a formal proceeding subject to court review. By gratuitously asserting that it agreed to abide by the outcome of the Qwest Oregon 271 proceeding, Level 3 accepted the overall process, as well. In this instance, the Arbitrator noted at p. 10, that no party had taken exception to the methodology proposed by Qwest and approved in the Recommendation Report of the Administrative Law Judge. Under our procedures, the Commission will not revisit a specific issue previously resolved to the satisfaction of all parties to the proceeding in making a final recommendation to the FCC. Having agreed to abide by our processes, Level 3 cannot now attack them.

Second and finally, Level 3 asserts that the Arbitrator disregarded Section 252(i) of the Act, which allows other CLECs to opt-in to provisions they find in other agreements that are more favorable. This ability, Level 3 claims, removes any potential discriminatory effect. (Exceptions, pp. 12-13). Level 3 then states that "[t]he Arbitrator's finding effectively undermines all reasons for CLECs to negotiate individualized interconnection agreements" since, under Section 252(i) "[a]ny carrier that wanted to include Level 3's proposed language in their agreement would be free to do so..." (*Id.* at p. 13). To buttress its argument, Level 3 faults the Arbitrator for failing to explain why Level 3's DSL analogy was flawed and attacks the analogy used by the Arbitrator to explain the discriminatory effect of Level 3's proposal. We disagree with Level 3. The Arbitrator noted the discriminatory effect in the text of his Decision at page 10: "The flaw in Level 3's logic lies in the fact that to give an absolute commitment to Level 3, must, of necessity, adversely affect the rights of others (waiting their turn for the provisioning of trunks)." The analogy in footnote 43 used by the Arbitrator, and quite unlike Level 3's DSL analogy, is both clear and apt. Furthermore, were Qwest to rely on the availability of a clause used only in extreme circumstances--*force majeur*—as Level 3 suggests in its Exceptions at page 14, it would only encourage discriminatory behavior by Qwest against other CLECs in an effort to avoid litigation in the day-to-day administration of interconnection agreements.

Commission Conclusion

The Commission has reviewed the Arbitrator's decision and the exceptions filed by Level 3. The Arbitrator's decision complies with the requirements of the Act, applicable FCC regulations, and relevant state law and regulations, and should be approved.

ORDER

IT IS ORDERED that the Arbitrator's decision in this case, attached to and made part of this order as Appendix A. is adopted.

Made, entered and effective _____.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

ORDER NO. 01-809

ISSUED August 15, 2001

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 332

In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(B) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection.	)))))))	ARBITRATOR'S DECISION

On April 19, 2001, Level 3 Communications, LLC (Level 3) filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996[7] (the Act). Qwest responded to the petition on May 14, 2001. The parties agreed that there were four unresolved issues for the Commission to decide. Although each party framed the issues in different language, they are essentially as follows:

5. Should the parties be required to provide each other reciprocal compensation for Internet-bound traffic?
6. Should interexchange telephone-to-telephone calls sent over a packet switched network, (IP telephony), be defined as Switched Access Traffic and compensated accordingly?
7. What is the proper method for allocating costs incurred for trunking and facilities on Qwest's side of the Point of Interconnection (POI)?
8. What are the proper means for determining local interconnection service trunk provisioning intervals?

Teleconferences were held on May 31 and June 8, 2001, and a procedural schedule was subsequently established by the exchange of electronic correspondence. The parties filed initial briefs on June 26, 2001 and rebuttal briefs and testimony on July 3, 2001. At the time initial briefs were filed, the parties notified the Commission that they had reached a written stipulation that briefs would only address Issues 2-4. By Joint Letter of July 10, 2001, the parties submitted an agreement asking for several procedural changes. By Ruling of July 11, 2001, those changes were granted as follows: The parties waived their rights to a hearing for the purposes of cross-examination of witnesses, agreeing instead to submit transcripts from arbitration proceedings in Colorado and Arizona covering these issues prior to July 17, 2001; Level 3 withdrew its reply brief;

[7] Level 3 and Qwest do not have any pre-existing interconnection agreement in Oregon.

and the parties were to file briefs on July 17 and reply briefs on July 24, 2001, at which time the record would be closed.

By letter of July 23, 2001, the parties agreed that Issue 1 would be separated from the remaining issues and that the parties' statutory rights to a timely ruling on that issue would be temporarily waived until September 10, 2001. By letter of August 6, 2001, the parties (1) requested an extension of time until August 16, 2001, in which to complete their discussions and to present for Commission resolution or any argument with respect to Issue 1, (2) waived until September 17, 2001, their statutory rights for a timely ruling from the Commission on Issue 1 and (3) waived until August 15, 2001, their statutory rights for a timely ruling from the Commission on Issues 2-4. I issued a ruling on August 6, 2001, granting the letter request, acknowledging the waivers and adopting the proposed schedule.

Statutory Authority

The standards for arbitration are set forth in 47 USC §252(c):

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
> (5) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
> (6) establish any rates for interconnection, services, or network elements according to subsection (d); and
> (7) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Issue No. 2 (Sections 4.39 and 4.58)–Should interexchange telephone-to-telephone calls sent over a packet switched network, (IP telephony), be defined as Switched Access Traffic and compensated accordingly?

Positions of the Parties. Qwest proposes to define IP telephony as a telecommunications service utilizing switched access[8] and, therefore, subject to switched access charges, a position Level 3 opposes. To support this definition, Qwest contends that "applicable FCC rules and pronouncements require" the payment of such charges.[9] It notes that IP telephony was described by the Federal Communications Commission (FCC) in its *Report to Congress*[10] as bearing the characteristics of telecommunications

[8] "Phone-to-phone IP telephony as used in this paragraph means a service that uses the local network for: (1) the termination of calls that originated outside the local calling area; *or* (2) the origination of calls that terminate outside the local calling area; *and* that utilizes the end-user telephone equipment, local loop, and local switching function in the same manner as other circuit-switched telecommunications that are subject to switched access on the PSTN [public switched telephone network]." (Qwest Brief, p. 10).
[9] Qwest Brief, p. 3.
[10] Report to Congress, *Federal-State Joint Board on Universal Service,* 13 FCC Rcd 11501 (1998), ¶¶ 88-89.

services, and notes that Level 3 witnesses testified in Arizona and Colorado interconnection proceedings of their intention to behave in precisely the manner described in the *Report to Congress*.[11] Qwest essentially argues that practical functionality, rather than the technology employed, should be the standard used to determine whether IP telephony should be treated as an interexchange telecommunications service subject to switched access charges[12] and cites Colorado and Florida interconnection cases to support that view.[13] Qwest claims that such a finding is not inconsistent with the FCC's determination that ISPs are enhanced service providers.[14]

Level 3 argues that the question of whether FCC rules and policies require the payment of switched access charges for IP telephony turns on whether IP telephony is a telecommunications service or an information service.[15] Level 3 notes that an undisputed portion of the proposed interconnection agreement, Section 4.20, contains a definition of "enhanced service" identical to that in the FCC's rules and that the FCC has indicated that "information service" and "enhanced service" have identical meanings. Level 3 asserts that an IP telephone call undergoes a net protocol conversion prior to termination[16] and therefore fits the FCC definition of enhanced, or information, service, even while it fits Qwest's "telecommunications service" definition. Level 3 emphasizes that the FCC has declined to act on Qwest's 1999 petition to grant the relief sought here.[17]

Discussion. The Commission must determine the current status of federal law with respect to the treatment of Level 3's proposed service. The Commission is obligated by Section 252(c)(1) of the Act to resolve arbitration disputes in compliance with the Act and FCC regulations. In this instance, the question as to whether IP telephony is an "enhanced service," according to the FCC's rules, is central to the resolution of Issue 2.

Under FCC rules, enhanced services are those services, "offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; [2] provide the subscriber additional, different or restructured information; or [3] involve subscriber interaction with stored information."[18] Thus, a service that employs computer processing applications

[11] *See* Docket no. T-03654A-00-0882 and T-01051B-00-0882) (AZ tr.), p. 182 and Docket no. 00B-601T (CO tr.), pp. 73-75.
[12] Qwest Brief, pp. 7-9.
[13] *Qwest Corporation v. IP Telephony, Inc.,* Case No. 99CV8252, slip op. at 1-2 (Denver D. Ct., Jan 12, 2001) and *Petition of BellSouth Telecommunications, Inc.,* 20-00 Fla PUC LEXIS 975 (Fla. P.S.C. August 22, 2000).
[14] Qwest Brief, pp. 4-5, citing FCC 01-131 released April 27, 2001(*ISP Remand Order)*, ¶ 11 and n. 16. However, the *Report to Congress* also indicates that the FCC intended for these categories to be mutually exclusive. (*See infra*).
[15] Level 3 Reply Brief, pp. 1-2.
[16] *Id.*, pp. 2-3, citing Ex. 2 (Hunt Rebuttal Testimony) at 6:14-16, Colorado Arb tr at 82:3-84:16 and AZ Arb. Tr. at 232:11-15 and 241:19-23.
[17] *Id.*, p. 7.
[18] 47 CFR § 64.702(a) (emphasis supplied). The 1996 Act describes these services as "information services." *See* FCC 01-131 released April 27, 2001, (*ISP Remand Order)*, fn. 16, citing 47 C.F.R. §153(20) and *Universal Service Report to Congress,* 13 FCC Rcd at 11516 ("the Act's definitions of

that act on the protocol of the information, meets the first criterion; and, furthermore, as the FCC rule is currently written, any one of the three criteria set forth above is sufficient to place a service within the enhanced services definition.

From a review of the record, I find that a phone-to-phone IP telephone call is functionally equivalent to a typical voice call over the PSTN. However, practical functionality is not the deciding factor. As Level 3's witness testified in prior interconnection proceedings, an IP telephone call undergoes a net protocol conversion prior to termination. Using the FCC rule's criteria, Level 3's proposed IP telephony service fits FCC's definition of an enhanced service and the Act's definition of an information service.

In 1983, the FCC determined that Enhanced Service Providers (ESPs) should be exempted from paying interstate access charges. As this Commission recently noted,[19] the FCC reaffirmed the exemption in 1991 and in 1997, citing the FCC's declared need to "preserve the vibrant and competitive free market that presently exists for Internet and other interactive computer services."[20] The FCC reaffirmed the exemption itself earlier this year.[21]

While Qwest correctly notes that the *Report to Congress* indicates an intention on the part of the FCC to *consider* treating IP telephony as a telecommunications service, it has inaccurately characterized the current state of federal regulations. The FCC has failed to take action on this issue, notwithstanding the submission by Qwest of its 1999 *Petition*[22] which describes this exact matter with particularity. The FCC has decided to adopt a "case-by-case" approach in determining whether to classify certain phone-to-phone IP telephony as telecommunications services.[23] No determination of this issue has yet been made at the federal level.

In the absence of such a determination, the question therefore remains as to whether the Commission should utilize this arbitration proceeding to establish a new policy that would treat phone-to-phone IP telephony as an interexchange telecommunications service. For the reasons set forth below, I rule against such action.

State public utility commissions in several other jurisdictions have already concluded that arbitration proceedings relating to contract disputes between LECs are not the appropriate forums to determine the classification of phone-to-phone IP telephony.[24] For example, in the state of Washington, the more appropriate forum of the 271

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telecommunications service and information service essentially correspond to the pre-existing categories of basic and enhanced services").

[19] *See* Order No. 00-722, November 9, 2000, Docket ARB 238, *Sprint Communications Company, LP\Qwest Corporation Arbitration* (ARB 238), p. 5.

[20] *In the Matter of Access Charge Reform,* 12 FCC Rcd 15982 (1997).

[21] *ISP Remand Order,* fns. 18, 19.

[22] *Petition of U S WEST, Inc., for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed April 5, 1999).

[23] *See* prepared remarks of Commissioner Ness to the International Telecommunication Union's IP Telephony Forum, March 7, 2001 appended to Level 3 Ex. 2, Hunt Rebuttal Testimony as Ex. B.

[24] *See* Level 3 Brief, p. 7 and cases cited therein.

proceeding, which included review of Qwest's Statement of Generally Available Terms (SGAT), the administrative law judge concluded that Qwest had to strike all references to IP telephony in its SGAT to comply with its checklist requirement on that issue. [25]

In Workshop 2 of the Oregon 271 proceeding[26], the relevant portion of Qwest's initial SGAT exhibit, Qwest/261, Sections 4.39 and 4.57, included phone-to-phone IP telephony. However, when faced with objections from Electric Lightwave, Inc. and AT&T, Qwest did not choose to argue the issue as it has done here. Rather, Qwest demurred, omitting the language from Qwest/389 in both instances and making suggested modifications to SGAT sections 7.2.1.2.3 and 7.5.1, thus avoiding an exploration of the subject in a setting where it would have been examined in depth.[27] Furthermore, in its most recent Oregon SGAT, filed June 12, 2001 in docket UM 973, Qwest again chose to make no mention of IP telephony, even as this arbitration dispute was pending.

IP telephony is likely to be largely interstate in nature.[28] As the matter is already being considered by the FCC, partly due to the Qwest *Petition*, it is also likely that any action which this Commission might take now would conflict with at least some portion of FCC rules emerging from that federal proceeding. Qwest itself raises policy questions surrounding IP telephony--specifically, the long-term impact of IP telephony on universal service.[29] However, arbitration proceedings are particularly ill-suited for the exploration of industry-wide economic questions.

In light of the foregoing considerations, I decline to include such a provision here.

Issue No. 3 (Sections 7.3.1.1.3.1 and 7.3.2.2.1): What is the proper method for allocating costs incurred for trunking and facilities on Qwest's side of the Point of Interconnection (POI)?

Level 3's customers are primarily ISPs. In other jurisdictions where Qwest and Level 3 interconnect, Level 3 originates almost none of the traffic across the Qwest DTT and entrance facilities; Qwest customers originate virtually all of the traffic by calling Level 3's ISP customers. [30] In order to serve its customers, Level 3 must interconnect with Qwest. To do so, it intends to obtain direct trunk transport (DTT) and

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[25] *In the matter of the Investigation into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996,* Docket No. UT-003022; *In the matter of the Investigation into U S WEST COMMUNICATIONS, INC.'s Statement of Generally available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket No. UT-003040, *Initial Order Finding Noncompliance in the Areas of Interconnection, Number Portability and Resale,* Conclusion (14), ¶ 349.

[26] *In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996, Docket UM 823.*

[27] *See Workshop 2 Findings and Recommendation Report of the Administrative Law Judge and Procedural Ruling* in Docket UM 823 issued July 3, 2001, pp. 15-16.

[28] The parties acknowledge that the Commission's authority is limited to intrastate access charges. (*See, e.g.,* Qwest Opening Brief, p. 10, fn. 3).

[29] Qwest Brief, pp. 9-10.

[30] *Id.*, pp. 12, 14.

entrance facilities from Qwest. There is no dispute that the responsibility for paying for DTT and entrance facilities is determined by each party's relative use of the facilities, with relative use determined by the amount of traffic that each party originates over the facilities.[31] The sole question to be arbitrated on this issue is whether Internet-bound traffic delivered to Information Service Providers (ISPs) should be included in calculating the relative use of those facilities. Level 3 contends that such traffic should be included, while Qwest asserts that it should not.

Positions of the parties. Level 3 asserts that Qwest improperly draws an "artificial" distinction between types of traffic that are both locally-dialed and transported over common facilities and contends that "Qwest has in fact agreed to route enhanced service provider traffic, including ISP-bound traffic, over its exchange service EAS/local trunk groups until the FCC determines that access charges apply to such traffic."[32] To support its contention, Level 3 cites the *ISP Remand Order,* footnote 149,[33] which it interprets as meaning that "nothing in the FCC's decision prevents the Commission from ruling that Qwest must bear the responsibility for originating all traffic—ISP or otherwise—over interconnection facilities to the POI under FCC rules. In fact, the FCC has made clear that the Commission should require Qwest to continue to bear the responsibility for originating traffic to the POI..."[34] Level 3 relies on *TSR Wireless*[35] to distinguish between responsibility for paying for the *termination* of traffic (the bifurcated Issue 1 in this proceeding and the central subject of the *ISP Remand Order*) and *originating* traffic (Issue 3). Level 3 claims that, since Qwest has the absolute responsibility to carry ISP-bound traffic over its facilities, it cannot ignore the existence of such traffic and the "rules of the road" in calculating the relative use of the facilities involved.[36]

Qwest contends that the reasoning contained in the FCC's *ISP Remand Order*[37] applies with equal force to the relative use question presented here and that Level 3's attempt to distinguish between the treatment of reciprocal compensation for termination of traffic (as opposed to ILEC transport and interconnection) misinterprets the FCC's previous findings in the *TSR Wireless* case.[38] Qwest also cites the initial decision of the Colorado Commission[39] which excluded Internet traffic from the parties' intercarrier compensation obligations relating to local traffic under section 251(b)(5) of

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[31] Level 3 Initial Brief, pp. 14-15.

[32] Level 3 Brief, pp. 16-18.

[33] "This interim regime affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection." (emphasis in text).

[34] Level 3 Brief, p. 19.

[35] *TSR Wireless, LLC v. U S WEST Communications, Inc, et al.*, FCC 00-194 (rel. June 21, 2000) at ¶ 34.

[36] Level 3 Brief, p. 18.

[37] *See* ¶¶5-7, 21.

[38] Qwest Reply Brief, pp. 10-13.

[39] *In the Matter of the Petition of Level 3 Communications LLC, for Arbitration Pursuant to §252(B) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation,* Dkt. No. 00B-601T, (Colo. P.U.C. March 30, 2001) at 36. "We also approve the additional language proposed by Qwest for Provisions 7.3.1.1.3.1 and 7.3.2.2(a) indicating the new factor will exclude Internet related traffic and be based on non-Internet related traffic."

the Act, when calculating relative use of Qwest facilities. The Colorado Commission reasoning cited by Qwest is as follows: "When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for the costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of the entrance facilities and direct trunked transport." [40]

Discussion. Section 251 of the Act provides, in pertinent part as follows:

> (b) Obligations of All Local Exchange Carriers.—Each local exchange carrier has the following duties:...
>
> (5) The duty to establish reciprocal compensation arrangements for the *transport* and termination of telecommunications traffic.
>
> (g) Continued Enforcement of Exchange Access and Interconnection Requirements.—On and after the date of enactment of the Telecommunications Act of 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* 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 the date of enactment of the Telecommunications Act of 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 such date of enactment. During the period beginning on such date of enactment 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. (emphasis supplied).

It is the FCC's interpretation of the interplay of these two subsections of Section 251 that largely governs the result I reach on this issue. The FCC found and concluded in the *ISP Remand Order* at ¶¶21 and 23:

> Internet usage has distorted the traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results. Because traffic to ISPs flows one way, so does money in a reciprocal compensation regime....These effects prompted the [FCC] to consider the nature of ISP-bound traffic and to examine whether there was any flexibility under the statute to modify and address the pricing mechanisms for this traffic.

[40] *Id.*

> [We] conclude that ISP-bound traffic is not subject to the reciprocal compensation requirement in section 251(b) because of the carve-out provision in section 251(g), which excludes several enumerated categories of traffic from the universe of "telecommunications" referred to in section 251(b)(5).

ARB 238, the most recent, previous Oregon case in which the Commission examined the impact of ISP-bound traffic on the obligation of carriers to pay reciprocal compensation for the *termination*[41] of traffic, was decided prior to the *ISP Remand Order,* cited above, and relied upon FCC reaffirmation of state authority to require reciprocal compensation of ISP-bound traffic.[42] In light of the FCC's findings set forth in the *ISP Remand Order,* the Commission's authority in this area has been preempted.

Neither Section 251(b)(5) nor the FCC's analysis makes a distinction between termination and transport for the purposes of excluding access to information services from reciprocal compensation. The same arbitrage opportunities that the FCC cites with respect to the termination of ISP-bound traffic, apply in the allocation of ILEC facilities' costs on the basis of relative use by the traffic originator, because an ILEC customer who calls an ISP generates an identical number of minutes-of-use over facilities on the ILEC side of the POI as over the CLEC's terminating facilities. The overall thrust of the language of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded, when calculating relative use by the originating carrier.

Previous Commission opportunities to consider the precise language on this issue (as opposed to reciprocal compensation for the termination of traffic) have been limited to the Oregon 271 proceeding. In Workshop 1, AT&T and WorldCom, Inc. raised this issue as a reciprocal compensation question, designated Issue 13-6. The Commission decided to withhold judgment on the issue in Workshop 1 until the parties had the opportunity to comment on the interrelated discussion of Interconnection, Checklist Item 1, in Workshop 2A.[43] In the intervening period, AT&T and WorldCom apparently dropped their objection to the exclusion of Internet traffic from the calculation of relative use, and the Qwest-preferred language remained at the close of Workshop 3 in Qwest/389 and continues to appear in the Qwest SGAT of June 12, 2001:

> 7.3.1.1.3.1 (regarding entrance facilities) provides in part, that "....The initial [50-50] relative use factor will continue for both bill reduction and

[41] Payment to a carrier terminating traffic for the use of *its* facilities. In the instant proceeding, that is the subject of Issue 1. Issue 3, discussed here, relates to payments for facilities on the traffic *originator's* side of the point-of-interconnection.

[42] ARB 238, Order No. 00-722, p. 15.

[43] *Workshop 1 Findings and Recommendation Report of the Commission*, Docket UM 823, dated April 16, 2001, pp. 22-23.

payments until the Parties agree to a new factor, based upon actual minutes of use data for *non-Internet Related* traffic to substantiate a change in that factor." (emphasis supplied).[44]

Similar language also appears in the June 12, 2001 SGAT with respect to direct trunked transport in section 7.3.2.2.1. In the absence of objection by the intervening parties in the 271 proceeding, as the administrative law judge, I did not recommend to the Commission that it find these provisions in Qwest's proposed SGAT language failed to comply with the requirements of the Act. Qwest had thus met its *prima facie* burden of proof of compliance and the issue was closed.

In light of the FCC's findings and conclusions in the *ISP Remand Order* and the satisfactory resolution of the issue in the Oregon 271 proceeding, I find that the adoption of the Qwest-proffered language most closely reflects the policies of both the FCC and the Commission by removing the incentives for uneconomic behavior in the provision of telecommunications services to Internet Service Providers.[45]

Issue 4 (Sections 7.4.6, 7.4.7 and 7.4.8): What are the proper means for determining local interconnection service trunk provisioning intervals?

The provisions in the Qwest-offered contract currently in dispute are as follows:

7.4.6 Service intervals and due dates for initial establishment of trunking arrangements at each new switch location of Interconnection between the Parties will be determined on an Individual case Basis.

7.4.7 Qwest will establish intervals for the provision of LIS [local interconnection service] trunks that conform to the performance objectives set forth in Section 20. Qwest will provide notice to CLEC of any changes to the LIS trunk intervals consistent with the change management process applicable to the IRRG. Operational processes within Qwest work centers are discussed as part of the CLEC Industry Change Management Process (CICMP). Qwest agrees that CLEC shall not be held to the requirements of the IRRG.

7.4.8 The ordering Party may cancel an order at any time prior to notification that service is available....[remainder omitted for lack of relevancy].

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[44] *See In the Matter of the Statement of Generally Available Terms and conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Oregon,* Docket UM 973, Qwest Oregon SGAT—First Revision, filed June 12, 2001.

[45] Qwest had also argued that requiring Qwest to provide Level 3 with trunking and entrance facilities under circumstances where it will never receive compensation also constitutes an unconstitutional taking of its property. (Brief, p. 16, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In light of the above findings on the intent of the FCC and the policies of the Commission, it is unnecessary to consider the constitutional question presented by Qwest.

Positions of the Parties. Level 3 contends that it is in a vulnerable position because it must rely in part upon its competitor to provision the network facilities it needs. It argues that for planning purposes it requires certainty with respect to the time frames for the provisioning of facilities. To this end, it proposes that Qwest provide initial trunks at the POI within twenty-two business days of receipt of a valid Access Service Request (ASR), fifteen days for subsequent installations (such as augments), and a five-day interval where blocking occurs.[46] Level 3 contends that Qwest's refusal to commit to firm delivery dates provides it with an unfair competitive advantage, because Qwest itself does not rely on competitors for its facilities.[47] Level 3 states that, merely because no other party has ever had such a provision, does not make it improper; other parties may opt in to the Level 3-Qwest agreement pursuant to Section 252(i) of the Act. However, Level 3 also notes that it "does not seek to disrupt the uniformity that any such [Section 271 proceeding] service quality docket is intended to establish." [48]

Qwest asks the Commission to reject Level 3's demands. It notes that, while Level 3's wishes are understandable, no other CLEC has such certainty of provisioning, and that acceding to Level 3's request would inevitably lead to claims of discriminatory treatment by other CLECs and disrupt the uniform methods of treatment established in the Qwest 271 Oregon workshops. (Brief, pp. 16-17). Qwest further claims that Level 3 will receive a due date and a firm order confirmation as part of the procedures set forth in the Service Interval Guide (the Guide), which is based on years of provisioning experience, and that the Guide will provide Level 3 with a good indicator of expected provisioning intervals. Such a plan, Qwest asserts, is both practical and nondiscriminatory in application. (*Id.*, p. 18).

Discussion. Section 251(c)(2)(D) of the Act requires that conditions for interconnection be nondiscriminatory. Level 3 claims that it is not seeking discriminatory treatment and that the Act envisioned contractual differences and therefore allowed for "opting in." The flaw in Level 3's logic[49] lies in the fact that to give an absolute commitment to Level 3 must, of necessity, adversely affect the rights of others. By definition, such treatment is discriminatory and violative of this provision of the Act.

Level 3 has also indicated that it will abide by whatever uniform methods of treatment adopted in the Oregon 271 proceeding. In that proceeding, sections 7.4.6, 7.4.7 and 7.4.8 were closed at the end of Workshop 2. These provisions are not the

[46] Petition, p. 13; Brief, pp. 24-25.
[47] Brief, p. 26.
[48] *Id.* at p. 29 and Reply Brief, p. 16.
[49] Level 3 states in its Reply Brief at p. 15: "[A]sking for specific and binding intervals where no carrier has sought them before does not mean that Level 3 is seeking preferential treatment. By [Qwest's] reasoning, the first carrier to ask for a DSL loop in Oregon should have been denied because no other carriers were receiving DSL loops." The proper analogy would be a cineplex that guarantees a person that s/he will not need to wait in a movie queue any longer than ten minutes. If a movie is extremely popular, it will require cutting in line ahead of others already waiting in order to meet the ten minute commitment. For every patron who "opts in" to such an agreement, others become further disadvantaged until, ultimately, the cinema management would necessarily be in default.

subject of any party's comments submitted to the Commission in response to the July 3, 2001 Workshop 2 Recommendation Report issued by the Administrative Law Judge.

Therefore, in light of my finding that Level 3's proposal is discriminatory and in violation of Section 251(c)(2)(D) of the Act and, in further consideration of Level3's commitment to adopt whatever language emerges from the Oregon 271 proceeding, the proposed language of Level 3 is rejected and Qwest's provisions are adopted.

Arbitrator's Decision

1. The interconnection agreement between Level 3 and Qwest shall exclude definitions or references to IP telephony from Sections 4.39 and 4.58 or any other indications that IP telephony is a telecommunications service, telecommunications access service or subject to access charges.

2. The interconnection agreement between Level 3 and Qwest shall exclude ISP-related traffic for the purposes of calculating the relative use of transport and entrance facilities and shall adopt the Qwest-offered versions of Sections 7.3.1.1.3.1 and 7.3.2.2.1, with respect thereto.

3. The interconnection agreement between Level 3 and Qwest shall utilize language with respect to local service trunk provisioning intervals consistent with the requirements for nondiscriminatory treatment of all interconnecting carriers and the procedures adopted by the parties in Workshop 2 in Docket UM 823.

4. Within 30 days of the date of the Commission's final order in this proceeding, Qwest and Level 3 shall submit an interconnection agreement consistent with the terms of this decision.

5. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the dated this decision is served.

Dated at Salem, Oregon, this 15th day of August, 2001.

Allan J. Arlow
Administrative Law Judge

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 3, 2002

IN RE:

PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES, LLC AND BROOKS FIBER COMMUNICATIONS OF TENNESSEE, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. CONCERNING INTERCONNECTION AND RESALE UNDER THE TELECOMMUNICATIONS ACT OF 1996	)	**DOCKET NO. 00-00309**

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I. FACTUAL AND PROCEDURAL HISTORY

On April 14, 2000, MCImetro Access Services, LLC and Brooks Fiber Communications of Tennessee, Inc. (collectively "WorldCom") filed a petition pursuant to Section 252(b) of the Telecommunications Act of 1996 ("Act") requesting that the Tennessee Regulatory Authority ("Authority") arbitrate the interconnection agreement between WorldCom and BellSouth Telecommunications, Inc. ("BellSouth"). Including sub-issues, the petition contained one hundred twelve (112) issues. BellSouth filed a response to the petition on May 9, 2000. At the June 6, 2000 Authority Conference, the Directors accepted the petition for arbitration, appointed themselves as Arbitrators, appointed the General Counsel or his designee to serve as the Pre-Arbitration Officer, and directed the parties to participate in mediation.[1]

The parties participated in a mediation conference on October 11, 2000, thereby resolving a number of issues. On November 13, 2000, the parties submitted the *Tennessee Matrix of Unresolved Issues*, and on April 27, 2001, the parties updated the *Tennessee Matrix of Unresolved Issues*. In an order entered on May 1, 2001, the Pre-Arbitration Officer approved and adopted the April 27th *Tennessee Matrix of Unresolved Issues*.

The Directors, acting as arbitrators, held a hearing on May 7th and 8th, 2001. As a result of the hearing and negotiations preceding the hearing, the parties resolved many issues. The following twenty-eight (28) issues remain unresolved: 6, 8, 18, 28, 34, 35, 36, 37, 40, 42, 45, 46, 47, 48, 51, 52, 55, 56, 61, 62, 63, 64, 67, 68, 80, 95, 100, and 110. The Directors, acting as arbitrators, deliberated the merits of the remaining, disputed issues following a regularly scheduled Authority Conference on December 18, 2001.

[1] *See Order Accepting Arbitration, Appointing Arbitrators, Appointing a Pre-Arbitration Officer and Directing Mediation*, p. 1 (Aug. 3, 2000).

II. ISSUE 6 - SHOULD BELLSOUTH BE DIRECTED TO PERFORM, UPON REQUEST, THE FUNCTIONS NECESSARY TO COMBINE UNBUNDLED NETWORK ELEMENTS ("UNEs") THAT ARE ORDINARILY COMBINED IN ITS NETWORK?

A. Positions of the Parties

BellSouth claims that it is not obligated to combine UNEs because the Eighth Circuit Court vacated Section 51.315(c)-(f) of the FCC Rules.[2] In support of its position, BellSouth cites the Federal Communications Commission's ("FCC") *UNE Remand Order*[3] and asserts that the FCC "confirmed that incumbent LECs presently have no obligation to combine network elements for CLECs when those elements are not currently combined in BellSouth's network."[4] Additionally, BellSouth argues that requiring it to combine UNEs is not sound public policy.[5]

WorldCom argues that "the only reasonable interpretation of the 'currently combines' requirement is that BellSouth is obligated to provide the types of combinations that ordinarily exist in its network . . . regardless of whether such elements are combined today to serve the particular customer that WorldCom wishes to serve."[6] WorldCom argues that Section 315(b) of the FCC Rules requires BellSouth to provide combinations and applies to elements that the incumbent "currently combines," not merely elements that are "currently combined." In support of its position, WorldCom cites the *First Report and Order*[7] for the proposition that currently combines means "ordinarily combined within their network, in the manner which they are typically combined."[8]

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[2] *See* Cynthia K. Cox, Pre-Filed Direct Testimony, pp. 8-9 (Dec. 6, 2000).
[3] *See In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* FCC 99-238, CC Docket No. 96-98, 15 FCC Rcd. 3696 (Nov. 5, 1999) (Third Report and Order and Fourth Further Notice of Proposed Rulemaking) (hereinafter *UNE Remand Order*).
[4] Cynthia K. Cox, Pre-Filed Direct Testimony, p. 9 (Dec. 6, 2000).
[5] *See id.* at 9.
[6] Don Price, Pre-Filed Rebuttal Testimony, p. 6 (Dec. 13, 2000).
[7] *See In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* FCC 96-325, CC Docket No. 96-98, 11 FCC Rcd. 15,499, para. 296 (Aug. 8, 1996) (First Report and Order) (hereinafter *First Report and Order*).
[8] Don Price, Pre-Filed Direct Testimony, p. 11 (Dec. 6, 2000) (quoting *First Report and Order*, *supra* note 7, ¶ 296).

B. Deliberations and Conclusions

The Arbitrators addressed this same issue in Docket No. 99-00948 and held:

> Rules governing combinations of network elements have been the subject of continuous litigation since their introduction in 1996. The Eighth Circuit of the United States Court of Appeals vacated Section 51.315 (b) through (f) of the FCC Rules in 1997.[9] The Eighth Circuit stated that subsection (b) "is contrary to § 251(c)(3) because the rule would permit the new entrants access to the incumbent LEC's network elements on a bundled rather than unbundled basis" and that the subsection (c) – (f) could not "be squared with the terms of subsection 251(c)(3)."[10] The Supreme Court overruled the Eighth Circuit's decision as to Section 51.315(b) and held that the FCC's interpretation of Section 251(c)(3) was "entirely rational" and "well within the bounds of the reasonable."[11] On remand, the Eighth Circuit recognized that the Supreme Court reversed the Eighth Circuit's decision to vacate Section 51.315(b) and, therefore, only discussed Section 51.315(c)-(f), the "Additional Combinations Rule."[12]
>
> Section 51.315(b) provides: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."[13] The Arbitrators agree with the [Georgia Public Service Commission's] conclusion that Section 51.315(b) applies to elements that BellSouth currently combines, not only those elements that are currently combined.[14] In the *First Report and Order*, the FCC stated that the proper reading of "currently combines" is "ordinarily combined within their network, in the manner which they are typically combined."[15] In the *UNE Remand Order*, the FCC declined to further elaborate on the meaning of "currently combines" after noting that the matter was pending in the Eighth Circuit Court of Appeals.[16] Therefore, the only FCC interpretation of "currently combines" is the interpretation in the *First Report and Order*.
>
> The Authority has addressed this same issue and the Directors acting as Arbitrators have addressed a similar, related issue in other dockets. In the Permanent Prices Docket, the Authority held that "ILECs are now prevented from separating network elements that are already combined before leasing them to a competitor."[17] In a later Order, the Authority affirmed this holding by ruling that "BellSouth must

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[9] *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) *aff'd in part rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 737-38 (1999).

[10] *Id.*

[11] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395, 119 S.Ct. 721, 737-38 (1999).

[12] *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758-59 (8th Cir. 2000) *cert. granted in part*, 121 S.Ct. 878 (2001).

[13] 47 C.F.R. § 51.315(b).

[14] *See GPSC February 2000 Order*, p. 11.

[15] *First Report and Order*, [*supra* note 7] ¶ 296.

[16] *See UNE Remand Order*, [*supra* note 3] ¶ 479.

[17] *Permanent Prices, Order Re Petitions for Reconsideration and Clarification of Interim Order of Phase I*, p. 20 (Nov. 3, 1999). Although the discussion of Section 51.315(b) was commingled with the discussion of whether BellSouth must provide Integrated Digital Loop Carrier ("IDLC"), IDLC is distinguishable in that it is a service "platform" rather than an unbundled network element. As such, it combines the loop and switch port functions, not loop and switch port unbundled network elements. It should be noted that those same IDLC functions cannot be separated without destroying the identity and many of the advantages of the IDLC platform itself.

> provide the combination throughout its network as long as it provides this same combination to itself anywhere in its network."[18]
>
> In *ICG Telecom*, the Arbitrators ruled that BellSouth was to provide Enhanced Extended Links ("EELs"), which consist of two combined UNEs, to ICG Telecom Group, Inc. Although the Arbitrators did not specifically define "currently combines" in *ICG Telecom*, the Arbitrators find that decision should serve as guidance in determining the proper definition of "currently combines" herein.
>
> Given the plain language of Section 51.315(b), federal decisions related to the validity of Section 51.315(b), the FCC's interpretation of Section 51.315(b), the Authority's decision in the Permanent Prices Docket, and the Arbitrators' decision in *ICG Telecom*, the Arbitrators voted unanimously to define "currently combines" as any and all combinations that BellSouth currently provides to itself anywhere in its network. Thus, the Arbitrators reject BellSouth's position that the combination has to be already combined for a particular customer at a particular location. Instead, BellSouth must provide any combination to Intermedia throughout Intermedia's network as long as BellSouth provides that same combination to itself anywhere in its network.[19]

In Docket No. 00-00691, the Arbitrators adopted this same reasoning.[20] The Arbitrators found that neither party presented any basis for resolving the issue presented in this Docket differently than the issues presented in Docket Nos. 99-00948 or 00-00691. Therefore, consistent with the Arbitrators' previous decisions and the authorities cited therein, the Arbitrators voted unanimously to require BellSouth to provide Sprint any UNE combinations at the sum of TELRIC[21] rates that BellSouth combines for its own retail customers anywhere in BellSouth's network.

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[18] *Permanent Prices, Second Interim Order Re: Cost Studies and Geographic Deaveraging*, p. 10 fn. 17 (Nov. 22, 2000).

[19] *In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948, *Interim Order of Arbitration Award*, pp. 26-28 (Jun. 25, 2001) (footnotes 9 through 18 appear in the original).

[20] *See In re: Petition of Sprint Communications Company L.P. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 00-00691, *Final Order of Arbitration Award*, pp. 5-7 (Jan. 24, 2002).

[21] TELRIC is an acronym for Total Element Long Run Incremental Cost, which is a cost methodology.

III. ISSUE 8 - SHOULD UNBUNDLED NETWORK ELEMENT ("UNE") SPECIFICATIONS INCLUDE NON-INDUSTRY STANDARD, BELLSOUTH PROPRIETARY SPECIFICATIONS?

A. Positions of the Parties

BellSouth states that "[a]lthough industry standards provide useful guidance for the provision and maintenance of UNEs, there are no industry standards at present for every UNE."[22] BellSouth asserts that it has "developed standards in cases where no industry standard exists which should be incorporated into the parties' interconnection agreement."[23]

WorldCom proposes industry standard UNE specifications for loops and states:

> The additional requirements BellSouth is seeking to include would impose burdensome restrictions on WorldCom and would inject inconsistencies that could well lead to contract disputes. Loop specifications should provide parameters that the parties can rely on when designing their networks. BellSouth's proposal has much more self-serving objectives and should be rejected.[24]

WorldCom opposes BellSouth's specifications, BellSouth TR73600, "because it is a BellSouth proprietary specification" and "includes many provisions that are contractual in nature, stating the terms and conditions on which BellSouth will offer described services."[25]

B. Deliberations and Conclusions

Section 51.311(b) of the FCC Rules provides: "[T]he quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself."[26] UNE technical specifications should not include terms and conditions. Instead, general terms and conditions should be specified in the

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[22] W. Keith Milner, Pre-Filed Direct Testimony, p. 7 (Dec. 6, 2000).
[23] *Id.*
[24] Don Price, Pre-Filed Direct Testimony, p. 18 (Dec. 6, 2000).
[25] *Id.* at 17-18.
[26] 47 C.F.R. § 51.311(b).

interconnection agreement and should be applicable to all UNEs. BellSouth has the right to develop and use an internal standard for its own purposes, but should not impose that standard on a competing local exchange carrier ("CLEC") when that standard pertains to anything other than specificity of UNE quality.

BellSouth's specifications include general terms and conditions. WorldCom provided industry standards for UNEs where standards currently exist. In cases where no industry standard currently exist, WorldCom has agreed to accept BellSouth's technical specifications as proposed in BellSouth's TR73600.

Based on the foregoing, the Arbitrators voted unanimously to: (1) adopt the industry standards proposed by WorldCom in Appendix 1 of Attachment 3;[27] (2) require that UNEs be provided to WorldCom equal in quality to that which BellSouth provides to itself in compliance with Section 51.311(b) of the FCC Rules and include only the necessary industry standards to ensure the technical specifications pertaining to a UNE are met and (3) require the parties to include any terms and conditions in the general provisions of the interconnection agreement and make such terms and conditions applicable to all UNEs.

[27] Appendix 1 of Attachment 3 to the interconnection agreement is attached to WorldCom's petition for arbitration and includes BellSouth TR73600 technical specifications where there is no proposed industry standard.

IV. ISSUE 18 - IS BELLSOUTH REQUIRED TO PROVIDE ALL TECHNICALLY FEASIBLE UNBUNDLED DEDICATED TRANSPORT BETWEEN LOCATIONS AND EQUIPMENT DESIGNATED BY WORLDCOM SO LONG AS THE FACILITIES ARE USED TO PROVIDE TELECOMMUNICATIONS SERVICES, INCLUDING INTEROFFICE TRANSMISSION FACILITIES TO NETWORK NODES CONNECTED TO WORLDCOM SWITCHES AND TO THE SWITCHES OR WIRE CENTERS OF OTHER REQUESTING CARRIERS?

A. Positions of the Parties

BellSouth argues that the FCC requires it to "unbundle dedicated transport in BellSouth's existing network and has specifically excluded transport between other carriers' locations."[28] Thus, BellSouth contends that it is not required to offer or build dedicated transport facilities between WorldCom network switches or WorldCom's network and another carrier's network.[29] BellSouth quotes the FCC's *First Report and Order* and argues that it is only required to "'provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers.'"[30] BellSouth also relies on the FCC's *UNE Remand Order* for the proposition that it is not required to construct facilities where the incumbent local exchange carrier ("ILEC") has not deployed transport facilities for its own use.[31]

WorldCom counters that "BellSouth is required to provide dedicated interoffice transmission facilities to the locations and equipment designated by WorldCom, including network nodes connected to WorldCom wire centers and switches and to the wire centers and switches of other requesting carriers."[32] WorldCom argues that pursuant to Section 51.319(d)(2)(C), BellSouth "must permit a requesting carrier to connect unbundled interoffice transmission facilities to equipment designated by the requesting carrier"[33] and that "BellSouth's unbundling obligation's

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[28] Cynthia K. Cox, Pre-Filed Direct Testimony, p. 16 (Dec. 6, 2000).
[29] *See id.* at 16-17.
[30] *Id.* at 16 (quoting *First Report and Order*, *supra* note 7, ¶ 440).
[31] *See id.* at 16-17 (citing *UNE Remand Order*, *supra* note 3, ¶ 324).
[32] Don Price, Pre-Filed Direct Testimony, p. 19 (Dec. 6, 2000).
[33] *Id.* at 20 (citing 47 C.F.R. § 51.319(d)(2)(C)).

'extends *throughout* its ubiquitous transport network.'"[34] Therefore, WorldCom concludes that, although "BellSouth is not required to build new transport facilities . . . it is required to provide unbundled service where it has facilities."[35]

B. Deliberations and Conclusions

Section 51.319(d)(1) of the FCC Rules clearly supports WorldCom's position in that it provides:

> Interoffice transmission facility network elements include:
> (i) Dedicated transport, defined as incumbent LEC transmission facilities, including all technically feasible capacity-related services including, but not limited to, DS1, DS3 and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers . . . .[36]

In addition, Section 251(a)(1) of the Act provides that each telecommunications carrier has the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[37] Based on these authorities, the Arbitrators voted unanimously to require BellSouth to provide all technically feasible unbundled dedicated transport between locations and equipment designated by WorldCom so long as the facilities currently exist in BellSouth's network, including interoffice transmission facilities to network nodes connected to WorldCom switches and to the switches or wire centers of other requesting carriers.

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[34] *Id.* (quoting *UNE Remand Order*, *supra* note 3, ¶ 324).
[35] *Id.*
[36] 47 CFR § 51.319(d)(1)(i).
[37] 47 U.S.C. § 251(a)(1) (Supp. 2000).

V. ISSUE 28 - SHOULD BELLSOUTH PROVIDE THE CALLING NAME DATABASE ("CNAM") VIA ELECTRONIC DOWNLOAD, MAGNETIC TAPE, OR VIA SIMILAR CONVENIENT MEDIA?

A. Positions of the Parties

BellSouth asserts that it "provides CLECs with access to its calling name database on an unbundled basis consistent with the requirements of the FCC's UNE Remand Order."[38] BellSouth further asserts that "[a]ccess to BellSouth's calling name database is made available to CLECs regardless of whether the CLEC has its end user names stored in BellSouth's calling name database or whether the CLEC elects to maintain its own database for its end users' names."[39] Moreover, BellSouth contends that lack of an electronic download does not impair a CLEC's ability to offer service to its customers.[40]

WorldCom asserts that the FCC requires BellSouth to offer unbundled access to call-related databases, including the CNAM database.[41] WorldCom urges that an electronic download of the database is efficient, the least costly means of providing the database, and is technically feasible.[42] Lastly, WorldCom asserts that it will compensate BellSouth for the database download.[43]

B. Deliberations and Conclusions

In the *UNE Remand Order*, the FCC stated:

> We find that, as a general matter, requesting carriers' ability to provide the services they seek to offer is impaired without unbundled access to the incumbent LECs' call-related databases. Thus, we require incumbent LECs, upon request, to provide nondiscriminatory access to their call-related databases on an unbundled basis, for the purpose of switch query and database response through the SS7 network. We conclude that requesting carriers' ability to provide the services they seek to offer is impaired without unbundled access to the incumbent LECs' [Advanced Intelligent Network (AIN)] platform and architecture. Thus, we find that incumbent LECs,

[38] Cynthia K. Cox, Pre-Filed Direct Testimony, p. 24 (Dec. 6, 2000) (citing *UNE Remand Order, supra* note 3, ¶ 402).
[39] *Id.*
[40] *See id.* at 25.
[41] *See* Don Price, Pre-Filed Direct Testimony, p. 30 (Dec. 6, 2000) (quoting *UNE Remand Order, supra* note 3, ¶¶ 15-16).
[42] *See id.*
[43] *See Post Hearing Brief of WorldCom*, p. 9 (Jul. 6, 2001).

> upon request, must provide nondiscriminatory access to their AIN platform and architecture.[44]

Thereafter, the FCC clarifies that the definition of call-related databases includes the CNAM database.[45] Additionally, the FCC states:

> Incumbent LECs must allow requesting carriers that have purchased an incumbent LEC's local switching capability to use the incumbent LEC's service control point element in the same manner, and via the same signaling links, as the incumbent LEC itself. An incumbent LEC must allow a requesting carrier that has deployed its own switch and has linked that switch to an incumbent LEC's signaling system to gain access to the incumbent LEC's service control point in a manner that allows the requesting carrier to provide any call-related database-supported services to customers served by the requesting carrier's switch.[46]

The FCC has made it clear that ILECs such as BellSouth are required to provide nondiscriminatory access to the CNAM database and BellSouth is complying with this requirement.

WorldCom takes issue, however, with the fact that it currently obtains access to the CNAM database via BellSouth's SS7 network.[47] WorldCom contends that in order to provide CNAM information on a call using this source, it must: (1) dip into its own database in search of information; (2) if the calling party is not a WorldCom customer, WorldCom must do a table look-up based on the calling party's NPA-NXX and determine the database that must be searched; and (3) query that database.[48] WorldCom states that this method is time consuming and costly and, therefore, requests an electronic download.[49] BellSouth did not know whether there had been discussions on WorldCom's offer to compensate BellSouth for a download of the CNAM database and merely indicated that was not their preferred method of delivery.[50]

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[44] *UNE Remand Order*, *supra* note 3, ¶ 402.
[45] *See id.* ¶ 403.
[46] *Id.* ¶ 410.
[47] *See* Don Price, Pre-Filed Rebuttal Testimony, p. 13 (Dec. 13, 2000).
[48] *See id.*
[49] *See id.*
[50] Transcript of Proceedings, May 8, 2001, pp. 310-11 (Hearing).

Based on the foregoing, the Arbitrators found that requiring BellSouth to provide an electronic download of the CNAM database to WorldCom is consistent with the Act and places BellSouth and WorldCom in parity. Therefore, the Arbitrators voted unanimously to require BellSouth to provide an electronic download of the CNAM database to WorldCom provided WorldCom compensates BellSouth for the download.

VI. ISSUES 34 AND 35 - IS BELLSOUTH OBLIGATED TO PROVIDE AND USE TWO-WAY TRUNKS THAT CARRY EACH PARTY'S TRAFFIC?

A. Positions of the Parties

BellSouth asserts that it is "only obligated to provide and use two-way local interconnection trunks where traffic volumes are too low to justify one-way trunks."[51] BellSouth argues that in other situations it has the option of using one-way trunks for its traffic. BellSouth explains that two-way trunks are not always the most efficient due to busy hour characteristics and balance of traffic.[52]

WorldCom contends that two-way trunking is more efficient than one-way trunking when traffic flows in both directions, because two-way trunking requires fewer trunks and minimizes the number of trunk ports needed for interconnection. WorldCom also argues that its proposed language incorporates Section 51.305(f) of the FCC Rules. WorldCom asserts that if it orders a two-way trunk and BellSouth is permitted to refuse to use that trunk for its traffic, the efficiencies of two-way trunking would be lost and Section 51.305(f) would be meaningless.[53]

B. Deliberations and Conclusions

The Arbitrators find that the ILEC and CLEC should jointly use two-way trunking to create effective use of the public network and to avoid negating the efficiencies the FCC sought to obtain. Section 51.305(f) of the FCC Rules states: "If technically feasible, an incumbent LEC shall provide two-way trunking upon request."[54] The FCC has concluded that the term "technically feasible"

[51] Cynthia K. Cox, Pre-Filed Direct Testimony, pp. 26 (Dec. 6, 2000).
[52] *See id.* at 26-27.
[53] *See* Lee Olson, Pre-Filed Direct Testimony, p. 3-4 (Dec. 6, 2000).
[54] 47 CFR § 51.305(f).

refers to technical or operational concerns, not economic, space, or site concerns.[55] In the *UNE Remand Order*, the FCC stated:

> Costs and Quality. We find that lack of unbundled access to the incumbent's shared transport facilities materially increases a requesting carrier's costs of providing service. . . . Specifically, an inability to reasonably forecast traffic volumes would likely cause a requesting carrier to purchase an insufficient amount, or conversely, too much dedicated transport capacity. In shared transport arrangements, the switch routes the competitor's traffic through the most efficient trunking group available. The trunking group is shared among many users, including the incumbent LEC's end users, thereby reducing requesting carrier costs and utilizing capacity only when necessary to route and complete a call.[56]

Based on the foregoing, a majority[57] of the Arbitrators voted that, upon request, BellSouth shall provide and use two-way trunking where available unless it demonstrates to the Authority that the provision or use of two-way trunking is not "technically feasible" due to operational or technical concerns.

[55] *See First Report and Order*, *supra* note 7, ¶ 198.
[56] *UNE Remand Order*, *supra* note 3, ¶ 375.
[57] Director Greer agreed that BellSouth should provide two-way trunks, but further stated that the Arbitrators should not require BellSouth to use the two-way trunks. Transcript of Proceedings, Dec. 18, 2001, p. 29 (Arbitration Deliberations).

VII. ISSUE 36 - DOES WORLDCOM, AS THE REQUESTING CARRIER, HAVE THE RIGHT PURSUANT TO THE ACT, THE FCC'S LOCAL COMPETITION ORDER, AND FCC REGULATIONS, TO DESIGNATE THE NETWORK POINT (OR POINTS) OF INTERCONNECTION ("POI") AT ANY TECHNICALLY FEASIBLE POINT?

A. Positions of the Parties

BellSouth frames the issue as "whose customers should pay for the costs that WorldCom creates as a result of its network design decisions."[58] BellSouth argues that WorldCom's approach fails to take into consideration the fact that there is not one BellSouth network.[59] BellSouth does not, however, object to WorldCom designating a single POI in a LATA on one of BellSouth's networks for WorldCom's end users' originating traffic or to WorldCom "using the interconnecting facilities between BellSouth's 'networks' to have local calls delivered or collected throughout the LATA."[60] Despite these concessions, BellSouth argues that if local calls are completed between BellSouth's customers and WorldCom's customers using this single point of interconnection, then WorldCom should be financially responsible for the additional costs WorldCom causes.[61]

WorldCom proposes that it will choose a POI in each LATA in which it originates traffic and that each party will be responsible for transporting and terminating the other party's traffic from the POI.[62] WorldCom argues that under this proposal it "would not be required to arrange transport on BellSouth's side of the POI before it could serve customers in another local calling area, but could expand its network as traffic volumes warranted."[63] WorldCom argues that the "FCC places

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[58] Cynthia K. Cox, Pre-Filed Direct Testimony, p. 30 (Dec. 6, 2000).
[59] *See id.*
[60] *Id.*
[61] *See id.* at 31.
[62] *See* Lee Olson, Pre-Filed Direct Testimony, p. 10 (Dec. 6, 2000).
[63] *Id.* at 11.

the responsibility for costs associated with originating traffic on the carrier that originates the call when the originated traffic must be delivered to another carrier's network for completion."[64]

B. Deliberations and Conclusions

Section 251 of the Act obligates ILECs to provide interconnection within their networks and access to UNEs at any "technically feasible point."[65] The FCC has concluded that the term "'technically feasible' refers solely to technical or operational concerns, rather than economic, space, or site considerations" and that an ILEC must prove to the appropriate state commission that a particular interconnection or access point is not technically feasible.[66] The FCC has further concluded that the obligations imposed by Section 251 include modifications to ILEC facilities "to the extent necessary to accommodate interconnection or access to network elements."[67] BellSouth has not made any filings or demonstrated to the Arbitrators that any POI is not technically feasible. This factual situation should be treated no differently than if two ILECs were interconnecting with each other, each being responsible for delivering calls to the others' POI. Therefore, the Arbitrators voted unanimously that (1) WorldCom has the right to designate the point(s) of interconnection; (2) WorldCom shall be responsible for delivering calls to the point of interconnection with BellSouth and when WorldCom does not have facilities to transport the call to its own end user then WorldCom should be required to compensate BellSouth for use of BellSouth's network to complete the call and; (3) BellSouth shall be responsible for delivering calls to the POI, as they would with any other LEC, whether it happens to be an ILEC or CLEC.

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[64] *Id.* (citing *In re: TSR Wireless, LLC v. U.S. West Comm., Inc*, FCC 00-194, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, 15 FCC Rcd. 11,166, ¶ 34 (June 21, 2000) (Memorandum Opinion and Order)).
[65] 47 U.S.C. § 251(c)(2)(B) & (3) (Supp. 2000).
[66] *First Report and Order, supra* note 7, ¶ 198, 205.
[67] *Id.* ¶ 198.

VIII. ISSUE 37 - SHOULD BELLSOUTH BE PERMITTED TO REQUIRE WORLDCOM TO FRAGMENT ITS TRAFFIC BY TRAFFIC TYPE SO IT CAN INTERCONNECT WITH BELLSOUTH'S NETWORK?

A. Positions of the Parties

BellSouth asserts that it must separate the local traffic from toll traffic in order for it to provide local traffic direct end office trunk groups.[68] BellSouth argues that "[t]here are no valid engineering reasons to force BellSouth to transport all of [WorldCom's] local traffic via the BellSouth access tandem switches."[69] BellSouth states that it will switch WorldCom's originated local traffic via the BellSouth tandems in exchange for compensation; however, BellSouth should be allowed "to provision its trunks for its originating traffic to be terminated to [WorldCom] in any technically feasible and nondiscriminatory manner without regard to the arbitrary conditions that [WorldCom] seeks to impose."[70] WorldCom's position is that the Arbitrators should permit it to combine local, intraLATA and transit traffic on one trunk group and that doing so is often more efficient.[71]

B. Deliberations and Conclusions

This issue centers on the efficient use of trunks. If an ILEC were to require a CLEC to fragment traffic, then efficiencies are lost because the CLEC is forced to duplicate the ILEC's network architecture. This scenario also increases the CLEC's costs. Section 51.305 of the FCC Rules provides: "An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network: (1) For the transmission and routing of telephone exchange traffic, exchange access traffic or both; (2) At

[68] *See* W. Keith Milner, Pre-Filed Direct Testimony, p. 15 (Dec. 6, 2000).
[69] *Id.*
[70] *Id.*
[71] *See* Lee Olson, Pre-Filed Direct Testimony, pp. 13-14 (Dec. 6, 2000).

any technically feasible point . . . ."[72] The Arbitrators read this Section as providing CLECs with the ability to combine local, intraLATA and transit traffic at any technically feasible point and to transport this traffic on one trunk from their POI. The specific traffic type should be readily distinguishable using SS7 signaling on all trunks.

BellSouth prefers that WorldCom place its local traffic on direct end office trunk groups when the amount of traffic creates network efficiencies, but is willing to continue to switch WorldCom's originated local traffic via the BellSouth tandems if WorldCom continues to compensate BellSouth.[73] From this concession it is apparent that WorldCom is already combining local, intraLATA, and transit traffic and should be permitted to continue to do so, provided the calls are properly timed, rated, and billed. Therefore, the Arbitrators voted unanimously to permit WorldCom to combine local, intraLATA, and transit traffic on one trunk group provided the calls are properly timed, rated, and billed.

[72] 47 CFR § 51.305(a)(1) & (2).
[73] *See* W. Keith Milner, Pre-Filed Direct Testimony, p. 15 (Dec. 6, 2000).

IX. ISSUE 40 - WHAT IS THE APPROPRIATE DEFINITION OF INTERNET PROTOCOL ("IP") AND HOW SHOULD OUTBOUND VOICE CALLS OVER IP TELEPHONY BE TREATED FOR PURPOSES OF RECIPROCAL COMPENSATION?

A. Positions of the Parties

BellSouth asserts that IP is an "agreed upon set of technical operating specifications for managing and interconnecting networks" and that IP telephony is a "mode or method of completing a telephone call."[74] BellSouth states that, to the extent that it is technically feasible, reciprocal compensation should apply to local calls provided via IP telephony and access charges should apply to long distance calls provided via IP telephony.[75]

WorldCom did not propose a specific definition of IP. WorldCom argues that whether long-distance carriers should pay access charges when utilizing IP telephony is beyond the scope of this arbitration. Instead, WorldCom argues that this issue is clearly within the FCC's jurisdiction. WorldCom also notes that the FCC has declined for now to impose access charges on IP telephony.[76]

B. Deliberations and Conclusions

The FCC has not provided a specific definition of IP. The FCC's definition of enhanced services, however, is instructive. The FCC defines enhanced services as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information."[77] Using this definition, the

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[74] Cynthia K. Cox, Pre-Filed Direct Testimony, p. 45 (Dec. 6, 2000).
[75] *See id.* at 47-48.
[76] *See* Don Price, Pre-Filed Direct Testimony, pp. 37-38 (Dec. 6, 2000) (citing *In re: Federal-State Joint Board on Universal Service*, FCC 98-67, CC Docket No. 96-45, 13 FCC Rcd. 11,501 (Apr. 10, 1998) (Report to Congress)).
[77] 47 CFR § 65.702.

Arbitrators voted unanimously to define IP for the purpose of this proceeding as the computer processing format of subscriber transmitted information that allows a subscriber to receive access to additional, different, or restructured information.

Having defined IP, the next question is how should outbound voice calls over IP telephony be treated for purposes of reciprocal compensation. Once again, the FCC has not decided this specific issue, but it is useful to look at how the FCC treats a call to internet service providers ("ISPs"). The FCC established intercarrier compensation rates for traffic delivered to ISPs and concluded that this traffic is interstate access traffic, specifically "information access."[78] The FCC did not preclude states from applying this same analysis to voice traffic delivered via IP. This fact supports the position that it does not matter whether a call is voice or data for purposes of intercarrier compensation. In further support of this position is the FCC's finding that "[t]he record fails to demonstrate that there are inherent differences between the costs of delivering a voice call to a local end-user and a data call to an ISP, thus the 'mirroring' rule we adopt here requires that incumbent LECs pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic."[79] Based on the foregoing, the Arbitrators voted unanimously that calls using IP, regardless of whether the call is data or voice, should be treated the same as circuit switched traffic subject to FCC Rules for intercarrier compensation.

[78] *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* FCC 01-131, CC Docket No. 96-98, 16 FCC Rcd. 9151, ¶ 44 (Apr. 27, 2001) (Order of Remand and Report and Order) (hereinafter *Reciprocal Compensation Remand Order*).
[79] *Id* ¶ 8.

X. ISSUE 42 - SHOULD WORLDCOM BE PERMITTED TO ROUTE ACCESS TRAFFIC DIRECTLY TO BELLSOUTH END OFFICES OR MUST IT ROUTE SUCH TRAFFIC TO BELLSOUTH'S ACCESS TANDEM?

A. Positions of the Parties

It is BellSouth's position that WorldCom is attempting to disguise switched access traffic as local traffic by routing such switched access traffic over local interconnection trunks. BellSouth contends that the switched access traffic should be handled according to switched access tariffs. BellSouth proposed language "making clear that WorldCom will not 'deliver switched access to BellSouth for termination except over WorldCom ordered switched access trunks and facilities.'"[80]

WorldCom argues that the Arbitrators should reject BellSouth's position because it would allow BellSouth to monopolize the tandem services business. WorldCom asserts that BellSouth's solution "effectively would require WorldCom to route all toll traffic to BellSouth's access tandems using special access facilities, and would preclude WorldCom from routing toll traffic from its own tandem switches to BellSouth end offices."[81]

B. Deliberations and Conclusions

As long as carriers properly identify calls by traffic type (either local or long distance), rate and time the calls, and compensate parties for each traffic type then WorldCom should be permitted to route access traffic directly to BellSouth end offices. In the *First Report and Order*, the FCC found:

> New entrants will only be encouraged to interconnect at end-office switches, rather than tandem switches, when the decrease in incumbent LEC transport charges justifies the extra costs incurred by the new entrant to route traffic directly through the incumbent LEC's end-office switches. Carriers will interconnect in a way that minimizes their costs of interconnection, including the use of cost-based LEC network elements.[82]

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[80] Cynthia K. Cox, Pre-Filed Direct Testimony, pp. 51 (Dec. 6, 2001) (quoting BellSouth's proposed language).
[81] Don Price, Pre-Filed Direct Testimony, p. 40 (Dec. 6, 2000).
[82] *First Report and Order, supra* note 7, ¶ 1091.

This finding clearly supports the proposition that CLECs should not be required to duplicate the ILEC's network, but instead should be permitted to provide service in the most practical and efficient manner to further establish competition in the market place. BellSouth's position is contrary to this proposition. Therefore, the Arbitrators voted unanimously to order BellSouth to permit WorldCom to route access traffic directly to BellSouth end offices and not require WorldCom to route such traffic to BellSouth's access tandem. Additionally, the Arbitrators voted unanimously that each party should be properly compensated for each traffic type.

XI. ISSUES 45 AND 48 - HOW SHOULD THIRD PARTY TRANSIT TRAFFIC BE ROUTED AND BILLED BY THE PARTIES?

A. Positions of the Parties

BellSouth asserts that, despite WorldCom's desires, it is not obligated to pay reciprocal compensation for local transit traffic terminating to WorldCom. Instead, BellSouth contends that WorldCom should seek compensation from the originating carrier.[83] BellSouth contends that "the CLEC is responsible for ordering from and payment to BellSouth for the applicable transiting interconnection charges" and is responsible for negotiating an interconnection agreement with other CLECs with which they intend to exchange traffic.[84] BellSouth notes that it provides records to CLECs that allow them to bill a third party carrier for terminating traffic from the originating LEC.[85]

WorldCom states that transit traffic should be exchanged over the same logical trunk group as all other local and intraLATA toll traffic. WorldCom contends that this is the most efficient method because it reduces the number of trunk groups needed and simplifies translations. WorldCom also asserts that minimizing the number of bills and record exchanges for transit traffic promotes efficiency. WorldCom proposes the following compensation regimes: (1) if a call is originated from WorldCom, transited through BellSouth, and terminated to an independent LEC, then BellSouth should bill WorldCom transiting and termination charges and (2) if a call is originated from an independent LEC, transited through BellSouth, and terminated to WorldCom, then BellSouth bills the independent LEC a transiting charge, if applicable, and WorldCom for terminating that call on the WorldCom network.[86]

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[83] *See* Cynthia K. Cox, Pre-Filed Direct Testimony, p. 52 (Dec. 6, 2000).
[84] *Id.* at 53.
[85] *See id.* at 54.
[86] Don Price, Pre-Filed Direct Testimony, pp. 41-42 (Dec. 6, 2000).

B. Deliberations and Conclusions

In basic terms, the LEC that performs the transiting function or intermediary function is the party that takes the call from the originating LEC and hands it off to a terminating LEC. A CLEC should be responsible for its own billing functions, but the ILEC should provide the CLEC with the necessary records to enable the CLEC to bill for the calls. The FCC has stated:

> We recognize that transport and termination of traffic, whether it originates locally or from a distance exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge.[87]

Section 51.319(g) of the FCC Rules require ILECs to provide nondiscriminatory access to operations support systems, including billing functions supported by an ILECs' databases and information.[88]

Based on these authorities, the Arbitrators voted unanimously to allow the parties to route third party transit traffic as each sees fit provided that the transited traffic reaches the terminating carrier and the party properly identifies the traffic. In addition, the Arbitrators voted unanimously to order each party to be responsible for their own billing functions and BellSouth to provide to WorldCom, for compensation, the third party transit traffic records for those calls routed through BellSouth.

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[87] *First Report and Order*, *supra* note 7, ¶ 1033.
[88] 47 CFR 51.319(g).

XII. ISSUE 46 - UNDER WHAT CONDITIONS, IF ANY, SHOULD THE PARTIES BE PERMITTED TO ASSIGN AN NPA/NXX CODE TO END USERS OUTSIDE THE RATE CENTER IN WHICH THE NPA/NXX IS HOMED?

A. Positions of the Parties

BellSouth asserts that WorldCom can give telephone numbers to customers who are physically located in a different local calling area than the local calling area to which WorldCom has assigned the NPA/NXX. BellSouth adds, however, that if WorldCom does this, then calls originated by BellSouth end users to those numbers are not local calls and such calls are not subject to reciprocal compensation. Instead, contends BellSouth, the calls are long distance and WorldCom should compensate BellSouth for the originating switched access service.[89]

WorldCom refers to the assignment scenario involved in this issue as foreign exchange ("FX") service. WorldCom argues that its FX traffic should be treated as local traffic and the determination of whether a call is local depends on the NPA/NXX dialed, not the physical location of the customer.[90] In addition, WorldCom asserts that BellSouth provides this same service "without imposing the very restriction it seeks to place on WorldCom's FX service."[91] WorldCom contends that the imposition of access charges on FX service will effectively prohibit WorldCom from offering FX service in competition with BellSouth.[92]

B. Deliberations and Conclusions

In Docket No. 99-00948, the Arbitrators found that the parties may establish their own local calling areas and assign numbers for local use anywhere within such areas as long as the parties properly rate, time, and compensate each other and other carriers for the mutual exchange of such traffic. Additionally, the Arbitrators held that calls to an NPA/NXX in a local calling area outside

[89] *See* Cynthia K. Cox, Pre-Filed Direct Testimony, p. 55 (Dec. 6, 2000).
[90] *See* Don Price, Pre-Filed Direct Testimony, p 45 (Dec. 6, 2000).
[91] *Id.* at 47.
[92] *See id.* at 48.

the local calling area where the NPA/NXX is homed shall be treated as intrastate, interexchange toll traffic and, therefore, are subject to access charges. Finally, the Arbitrators determined that nothing in their ruling exempted either party or any other carrier from the provisions of Tenn. Code Ann. § 65-21-114 requiring all carriers to provide county-wide calling.[93]

The Arbitrators found that neither party presented any basis for resolving the issue presented in this Docket differently than the issues presented in Docket No. 99-00948. Therefore, consistent with the Arbitrators' decision in Docket No. 99-00948, the Arbitrators voted unanimously that the parties are allowed to assign numbers in the manner they choose, consistent with applicable law, as long as the parties properly rate, time and compensate each other and other carriers for the mutual exchange of such traffic. In addition, calls to an NPA/NXX in a local calling area outside the rate center where the NPA/NXX is homed shall be treated as intrastate, interexchange toll traffic and are, therefore, subject to access charges. Finally, nothing in this ruling should be construed as exempting either party, or any other carrier, from the Tenn. Code Ann. § 65-21-114 requiring all carriers to provide county-wide calling.

[93] *See In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of* 1996, Docket No. 99-00948, *Interim Order of Arbitration Award*, pp. 43-44 (Jun. 25, 2001).

XIII. ISSUE 47 - SHOULD RECIPROCAL COMPENSATION PAYMENTS BE MADE FOR INTERNET SERVICE PROVIDER ("ISP") BOUND TRAFFIC?

A. Positions of the Parties

BellSouth contends that pursuant to the FCC's *Reciprocal Compensation Remand Order*, "the Authority does not have jurisdiction to require the payment of reciprocal compensation for ISP-bound traffic and this issue cannot be further addressed in this proceeding."[94] WorldCom agrees that the Authority is without jurisdiction to determine whether calls to ISPs are subject to reciprocal compensation. Nevertheless, WorldCom urges the Arbitrators to affirm their previous rulings holding that ISP-bound calls are subject to reciprocal compensation and order the parties to include a provision in their interconnection agreement that would require the parties to treat ISP-bound traffic as Section 251(b)(5) traffic in the event the *Reciprocal Compensation Remand Order* is reversed, vacated or remanded.[95]

B. Deliberations and Conclusions

The Authority has specifically ruled in the past that ISP-bound traffic is local and BellSouth is required to pay reciprocal compensation to CLECs on whose networks such calls terminate.[96] However, the FCC in its *Reciprocal Compensation Remand Order* issued on April 27, 2001 concluded that "a reasonable reading of the statute is that Congress intended to exclude [ISP-bound traffic] from the reciprocal compensation requirements of Section 251(b)(5)."[97] The FCC further declared that "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no

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[94] *BellSouth Telecommunications, Inc.'s Post-Hearing Brief*, p. 32 (Jul. 6, 2001).
[95] *See Post Hearing Brief of WorldCom*, p. 36 (Jul. 6, 2001).
[96] *See In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 99-00430, *Interim Order of Arbitration Award*, p. 34 (Aug. 11, 2000); *In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Time Warner Telecom of Mid-South, L.P. Pursuant to Section 252(B) of the Telecommunications Act of 1996*, Docket No. 99-00797, *Final Order of Arbitration Award*, p. 4 (Aug. 4, 2000).
[97] *Reciprocal Compensation Remand Order*, *supra* note 78, ¶ 34.

longer have authority to address this issue."[98] The FCC then established the following reciprocal compensation regime:

1. For the first six-months after the FCC Order becomes effective, intercarrier compensation for ISP-bound traffic will be capped at a rate of $.0015 per minute-of-use ("mou"). Beginning with the seventh month, rates are capped at $.0010/mou for a period of eighteen months. Starting in the twenty-fifth month and extending until month thirty-six or the Commission takes further action on intercarrier compensation issues, rates for ISP-bound traffic will be capped at $.0007.
2. The total number of minutes that a carrier may receive reciprocal compensation for ISP-bound traffic is capped.
3. As the transitional rates are caps on intercarrier compensation they have no effect to the extent that states have ordered local carriers to exchange ISP-bound traffic at rates below the caps or on a bill-and-keep basis.
4. In order to limit disputes and costly measurements to identify ISP-bound traffic, the FCC adopts a rebuttable presumption that traffic exchanged between local carriers that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound and subject to rate caps and compensated minutes.
5. The rate caps for ISP-bound traffic, or the lower rates imposed by a state commission pertinent to such traffic, apply only if the incumbent offers to exchange all traffic subject to § 251(b)(5) at the same rate.[99]

In addition, the FCC observed that "[f]or those incumbent LECs that choose *not* to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state arbitrated reciprocal compensation reflected in their contracts."[100] In light of these developments, the Authority is without jurisdiction to determine that local calls to ISPs are properly Section 251(b)(5) traffic and subject to reciprocal compensation when BellSouth agrees to exchange Section 251(b)(5) traffic at the FCC approved rates. In the absence of such an agreement, BellSouth is subject to the Authority's rulings related to ISP bound traffic. Therefore, the Arbitrators voted unanimously to order the parties to exchange ISP-bound traffic pursuant to the requirements set forth in the FCC's *Reciprocal Compensation Remand Order* issued on April 27, 2001.

[98] *Id.* ¶ 82.
[99] *See id.* ¶ 8.
[100] *Id.* ¶ 89.

XIV. ISSUE 51 - UNDER WHAT CIRCUMSTANCES IS BELLSOUTH REQUIRED TO PAY TANDEM CHARGES WHEN WORLDCOM TERMINATES BELLSOUTH LOCAL TRAFFIC?

A. Positions of the Parties

BellSouth initially argued that the FCC's two-part test to determine whether a carrier is eligible for tandem switching compensation required a CLEC to establish that its switch serves the same geographic area as the ILEC's tandem switch and that the CLEC's switch actually performs the local tandem functions.[101] In support of its position, BellSouth cited the *First Report and Order* and Section 51.711(a) of the FCC Rules.[102] In its post-hearing brief, however, BellSouth admitted that the FCC "does not now require a tandem functionality test to be met."[103]

WorldCom maintains that it is automatically entitled to receive the tandem interconnection rate in addition to the end office interconnection rate when its switch serves an area comparable to the area served by BellSouth's tandem switch.[104] In support of its position, WorldCom cites Section 51.711(a) of the FCC Rules[105] and asserts the policy argument that adoption of BellSouth's position rewards BellSouth by allowing it to pay less for access to the more efficient WorldCom network, but charge WorldCom more for its access to BellSouth's less efficient network architecture.[106]

B. Deliberations and Conclusions

The FCC, in its most recent Notice of Proposed Rulemaking in CC Docket No. 01-92, clarified and interpreted Section 51.711(a)(3) as follows:

> Section 51.711(a)(3) of the Commission's rules requires only that the comparable geographic area test be met before carriers are entitled to the tandem interconnection rate for local call termination. Although there has been some confusion stemming from additional language in the text of the Local Competition Order regarding

[101] *See* Cynthia K. Cox, Pre-Filed Direct Testimony, p. 68 (Dec. 13, 2000).
[102] *See id.* at 69-70.
[103] *BellSouth Telecommunications, Inc.'s Post-Hearing Brief*, p. 34 (Jul. 6, 2001).
[104] *See* Don Price, Pre-Filed Direct Testimony, p. 62 (Dec. 6, 2000).
[105] *See id.* at 62-63.
[106] *See* Don Price, Pre-Filed Rebuttal Testimony, p. 35 (Dec.13, 2000).

> functional equivalency, section 51.711(a)(3) is clear in requiring only a geographic area test. Therefore, we confirm that a carrier demonstrating that its switch serves 'a geographic area comparable to that served by the incumbent LEC's tandem switch' is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network."[107]

Therefore, as long as WorldCom meets the geographic comparability test, it is entitled to the tandem interconnection rate. WorldCom does not have to satisfy the functional equivalency criteria before it may seek tandem charges.

Although the issue only requests a ruling on the circumstances requiring the payment of tandem charges, the parties' filings indicate that they do not agree on whether WorldCom has established the existence of those circumstances. The Arbitrators find that the number of customers WorldCom serves, or the location of those customers has little, if any, significance to the geographic comparability test. When the FCC issued the geographic comparability rule, it could not possibly have expected a CLEC's customer base to be numerically equivalent to that of a well-established ILEC such as BellSouth. At this stage, WorldCom's customer base is naturally much smaller and much more concentrated than BellSouth's customer base. This does not, however, mean that WorldCom's switches do not cover nor have the capacity to serve geographic areas comparable to BellSouth's local tandems. Indeed, WorldCom has provided maps of the Knoxville and Memphis areas, which are comparable to areas served by BellSouth's tandem switches, and demonstrated that its switches could serve those areas. Hence, BellSouth's contention that WorldCom has failed to meet the geographic comparability test is without merit.

Based on the foregoing, the Arbitrators voted unanimously to require BellSouth to pay tandem rates to WorldCom as long as WorldCom's switch is capable of serving a geographic area comparable to the area served by BellSouth's tandem switch. Further, the Arbitrators voted

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[107] *In re: Developing a Unified Inter-Carrier Compensation Regime*, FCC 01-132, CC Docket No. 01-92, 2001 WL 455872, ¶ 105 (Apr. 27, 2001) (Notice of Proposed Rulemaking).

unanimously that WorldCom is entitled to the tandem interconnection rate as WorldCom's switch could serve a geographic area comparable to the area served by BellSouth's tandem switch.

XV. ISSUE 52 - SHOULD BELLSOUTH BE REQUIRED TO PAY ACCESS CHARGES TO WORLDCOM FOR NON-PRESUBSCRIBED INTRALATA TOLL CALLS HANDLED BY BELLSOUTH?

A. Positions of the Parties

BellSouth does not dispute the fact that it requires WorldCom to pay originating and terminating access when its customers use WorldCom to make an intraLATA call to an independent telephone company ("ICO") customer and when an ICO customer uses WorldCom to make an intraLATA call to WorldCom's customers. According to BellSouth "[e]ven though BellSouth receives the intraLATA toll revenue, [it has] no record to indicate what call or calls the revenue applies to."[108] In essence, BellSouth claims WorldCom should go to the ICOs to collect any access charge it is due because ICOs do not send BellSouth Extended Area Calls or countywide calls and BellSouth can not validate the bill.[109]

WorldCom contends that BellSouth should pay access charges to WorldCom when BellSouth acts as an intraLATA toll carrier and an ICO makes an intraLATA toll call to a WorldCom customer or receives an intraLATA toll call from a WorldCom customer. WorldCom contends that this is similar to BellSouth requiring WorldCom to pay originating access when a BellSouth customer uses WorldCom to make an intraLATA call to an ICO's customer and terminating access when an ICO's customer uses WorldCom to make an intraLATA call to a BellSouth customer.[110]

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[108] Cynthia K. Cox, Pre-Filed Rebuttal Testimony, p. 37 (Dec. 13, 2000).
[109] *See* Cynthia K. Cox, Pre-Filed Direct Testimony, p. 75 (Dec. 6, 2000).
[110] *See* Don Price, Pre-Filed Direct Testimony, p. 64 (Dec. 6, 2000).

B. Deliberations and Conclusions

WorldCom's request is reasonable. Just as BellSouth requires WorldCom to pay "originating access when a BellSouth customer uses [WorldCom] to make an intraLATA call to an ICO's customer, and terminating access when an ICO's customer uses [WorldCom] to make an intraLATA call to a BellSouth customer,"[111] BellSouth should: (1) pay WorldCom terminating access, when BellSouth terminates a non-prescribed intraLATA call and BellSouth is the intraLATA carrier; and (2) pay WorldCom originating access when a WorldCom customer uses BellSouth to make an intraLATA call to an ICO's customer. Therefore, the Arbitrators voted unanimously to require BellSouth to pay access charges to WorldCom for non-pre-subscribed intraLATA toll calls handled by BellSouth.

[111] Don Price, Pre-Filed Direct Testimony, p 64 (Dec. 6, 2000).

XVI. ISSUE 55 - SHOULD BELLSOUTH BE REQUIRED TO PROVIDE A RESPONSE, INCLUDING A FIRM COST QUOTE, WITHIN FIFTEEN DAYS OF RECEIVING A COLLOCATION APPLICATION?

A. Positions of the Parties

BellSouth proposes that it will respond to space availability requests within ten (10) business days of receiving WorldCom's collocation application. However, due to the scope and nature of the work involved, BellSouth is offering to provide a cost quote and date the collocation arrangement will be available to the requesting CLEC within thirty (30) business days. BellSouth argues that it has to consider factors such as the existing building configuration, space usage, forecasted demand, and design practices before it responds to any CLEC with a space ready date.[112]

WorldCom agrees that BellSouth has to consider these factors in order to respond to its collocation application, but believes thirty (30) business days is unreasonable.[113] WorldCom also contends that BellSouth's proposal is not consistent with the requirements of the Act, the FCC's *Advanced Services Order*,[114] and BellSouth's own proposal to the North Carolina Public Service Commission. In short, WorldCom is requesting that the Authority reject BellSouth's proposal and require it to provide a response, including a firm cost quote, within fifteen (15) days of receiving a collocation application.[115]

B. Deliberations and Conclusions

In the Act, Congress recognized the importance of collocation arrangements in bringing competition to the telecommunications market. Section 251(c)(6) of the Act requires ILECs to

[112] *See* W. Keith Milner, Pre-Filed Direct Testimony, pp. 19-21 (Dec. 6, 2000).
[113] *See* Phillip A. Bomer, Pre-Filed Direct Testimony, pp. 15-16 (Dec. 6, 2000).
[114] *See In re: Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-48, CC Docket No. 98-147, 14 FCC Rcd. 4761 (Mar. 31, 1999) (hereinafter *Advanced Services Order*).
[115] *See* Phillip A. Bomer, Pre-Filed Direct Testimony, pp. 15-16 (Dec. 6, 2000).

provide collocation to requesting carriers on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[116] Despite this clearly stated objective of Congress, requesting CLECs must wait for protracted lengths of time, as long as six to eight months in some circumstances, after their initial collocation request before collocation space becomes available.[117] Timely provisioning of physical collocation space is critical if CLECs are to compete effectively in the markets for advanced services and other telecommunication services.[118]

The FCC has established reasonable collocation arrangements. These arrangements are standards to be followed in the absence of other reasonable arrangements set by states.[119] According to a recent order, "an incumbent LEC must tell the requesting telecommunications carrier whether a collocation application has been accepted or denied within 10 calendar days after receiving the application."[120]

WorldCom's request is slightly different from what other CLECs have requested in that WorldCom wants BellSouth to provide cost quotes with a response to its collocation application. Despite this added requirement, the Arbitrators find that WorldCom's request is reasonable particularly in light of the FCC's ten-day standard; a standard upheld by the Authority in a previous docket.[121] Moreover, the FCC has recognized that ILECs, such as BellSouth, have had ample time since the enactment of section 251(c)(6) to develop internal procedures sufficient to meet its ten

[116] 47 U.S.C. § 251(c)(6) (Supp. 2001).
[117] *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability,* FCC 00-297, CC Docket No. 98-147, 15 FCC Rcd. 17,806, ¶ 14 (Aug. 10, 2000) (Order on Reconsideration and Second Further Notice of Proposed Rulemaking) (hereinafter *Order on Reconsideration*).
[118] *See id.* ¶ 22.
[119] *See id.*
[120] *Id.* ¶ 24.
[121] *See In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948, *Interim Order of Arbitration Award*, pp. 15-16 (Jun. 25, 2001).

(10) day deadline.[122] The Arbitrators find that the same can be said for the fifteen (15) day deadline requested by WorldCom.

For BellSouth to be subject to this deadline, however, WorldCom must provide BellSouth with a forecast of its collocation needs. The FCC has found this to be a reasonable arrangement.[123] Additionally, WorldCom is not opposed to providing a forecast of its collocation needs to BellSouth either for a particular central office or statewide.[124]

Based on the foregoing, the Arbitrators voted unanimously to require BellSouth to provide WorldCom a response, including a firm cost quote, within fifteen (15) calendar days of receiving a collocation application. Further, in order for BellSouth to be subject to this time period, WorldCom must provide a forecast to BellSouth of its collocation needs. The parties shall submit final best offers on the time frame for providing the forecasts no later than January 11, 2002.

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[122] *See Order on Reconsideration, supra* note 117, ¶ 24.
[123] *See In re: Deployment of Wireline Services Offering Advanced Telecommunications Capability*, DA 01-475, CC Docket No. 98-147, 16 FCC Rcd. 4560, ¶ 11 (Feb. 21, 2001) (Memorandum Opinion and Order).
[124] *See* Transcript of Proceedings, May 7, 2001, vol. I, p. 88 (Hearing).

XVII. ISSUE 56 - FOR PURPOSES OF THE INTERCONNECTION AGREEMENT BETWEEN WORLDCOM AND BELLSOUTH, SHOULD BELLSOUTH BE REQUIRED TO PROVIDE DC POWER TO ADJACENT COLLOCATION SPACE?

A. Positions of the Parties

BellSouth opposes the provision of DC power to adjacent collocation space on two grounds. First, it argues that the FCC's rules do not require BellSouth to provide DC power to adjacent collocation arrangement.[125] Moreover, BellSouth maintains that running DC power from central offices to adjacent collocation spaces does not conform to the National Electric Safety Code because "the cabling used to house DC power is not rated for outside use."[126] BellSouth is willing, however, to provide AC power to an adjacent arrangement and claims that it utilizes this same arrangement at its own sites located outside its central office buildings.[127]

WorldCom alleges that the accommodation of AC power and the conversion of AC to DC power is a costly undertaking for any CLEC to accept.[128] As to BellSouth's concerns over safety, WorldCom states that it has offered to provide the "cabling from BellSouth's BDFB to the adjacent site, provided BellSouth supplies the conduit."[129] As for whether the cabling should be used outdoors, WorldCom argues that "typically the cabling would be run underground."[130] In addition, WorldCom argues that by requiring BellSouth to provide adjacent collocation, the FCC in the *Advanced Services Order* and *Order on Reconsideration*[131] required BellSouth to provide DC power to adjacent collocation space.[132]

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[125] *See* W. Keith Milner, Pre-Filed Direct Testimony, p. 23 (Dec. 6, 2000).
[126] *Id.*
[127] *See id.*
[128] *See* Phillip A. Bomer, Pre-Filed Direct Testimony, p. 20 (Dec. 6, 2000).
[129] Phillip A. Bomer, Pre-Filed Rebuttal Testimony, p. 13 (Dec. 13, 2000).
[130] *Id.*
[131] *See Advanced Services Order*, *supra* note 114; *Order on Reconsideration*, *supra* note 117.
[132] *See* Phillip A. Bomer, Pre-Filed Rebuttal Testimony, p. 13 (Dec. 13, 2000).

B. Deliberations and Conclusions

The Arbitrators find that WorldCom has not demonstrated why BellSouth should provision DC power to adjacent collocation space. It failed to rebut BellSouth's contention that running DC power to an adjacent collocation arrangement contravenes the National Electric Safety Code because the cabling used to house DC power is not rated for outside use. Even though WorldCom offered to provide the cabling and asserts that the cabling would be run underground, by the admission of its own witness, running the conduit underground is not considered indoor use.[133] Thus, the Arbitrators are not convinced that WorldCom's proposal satisfies the National Electric Safety Code regarding the cabling used to house DC power.

The Arbitrators are also not persuaded by WorldCom's assertion that the conversion of AC to DC power is always a more costly undertaking than providing DC power to adjacent collocation spaces. When cross-examined WorldCom's witness, Mr. Phillip Bomer, admitted that, under certain circumstances, "it may be more cost effective to run the AC in and then convert it [to DC power.]"[134]

For these reasons, the Arbitrators voted unanimously that BellSouth is not required to provide DC power to adjacent collocation space.

[133] *See* Transcript of Proceedings, May 7, 2001, vol. I, p. 98 (Hearing).
[134] *Id.*

XVIII. ISSUE 61 - FOR PURPOSES OF THE INTERCONNECTION AGREEMENT BETWEEN WORLDCOM AND BELLSOUTH, SHOULD THE PER AMPERE RATE FOR THE PROVISION OF DC POWER TO WORLDCOM'S COLLOCATION SPACE APPLY TO AMPS USED OR TO FUSED CAPACITY?

A. Positions of the Parties

BellSouth argues that the Authority adopted rates based on fused capacity in Docket No. 97-01262.[135] Further, BellSouth maintains that the per ampere charge should apply to fused capacity because BellSouth's costs for its power plant are a function of peak power loads rather than average or nominal loads.[136] BellSouth contends that it must use peak power loads because "the power plant must be built to withstand peak aggregate power demands for both BellSouth's equipment and all collocators' equipment."[137] Nevertheless, BellSouth has indicated a willingness to "work cooperatively to identify and install suitable power monitoring devices and [to] develop and implement procedures to read and tabulate monitored power consumption levels from which a bill would be generated."[138]

WorldCom maintains that BellSouth should apply the per ampere charge to amperes used rather than fused ampere capacity. WorldCom argues that this proposal permits BellSouth to recover WorldCom's pro-rata share of the cost of the power supply and fully compensates BellSouth.[139] WorldCom also asserts that BellSouth's proposal would allow it to "charge a large up-front non-recurring charge for construction of power supply, plus a recurring rate that also will reflect the cost of the power supply" thereby enabling it to recover from WorldCom more than

[135] *See* W. Keith Milner, Pre-Filed Rebuttal Testimony, p. 39 (Dec. 13, 2000).
[136] *See id.* at 38
[137] *Id.*
[138] *Id.*
[139] *See* Phillip A. Bomer, Pre-Filed Direct Testimony, pp. 31-32 (Dec. 6, 2000).

WorldCom's share of the costs.[140] Lastly, WorldCom asserts that its proposal is consistent with the rates ordered by the Authority in Docket No. 97-01262.[141]

B. Deliberations and Conclusions

BellSouth has indicated its willingness to engage in a cooperative effort to develop a method and procedure for monitoring power consumption levels in order to generate a bill.[142] Further, under cross-examination, BellSouth's witness, Mr. Keith Milner, admitted that it is inappropriate for BellSouth to charge WorldCom for amperes not used or requested by WorldCom.[143] Accordingly, the Arbitrators voted unanimously that the per ampere rate for the provision of DC power to WorldCom's collocation space should apply to amperes used and not to fused capacity.

[140] Phillip A. Bomer, Pre-Filed Rebuttal Testimony, p. 17 (Dec. 13, 2000).
[141] *See Post-Hearing Brief of WorldCom*, pp. 51-52 (Jul. 6, 2001).
[142] *See* W. Keith Milner, Pre-Filed Rebuttal Testimony, p. 38 (Dec. 13, 2000).
[143] *See* Transcript of Proceedings, May 8, 2001, vol. II, p. 510 (Hearing).

XIX. ISSUE 62 - SHOULD BELLSOUTH BE REQUIRED TO PROVISION CAGED PHYSICAL COLLOCATION SPACE (INCLUDING PROVISION OF THE CAGE ITSELF) WITHIN 90 DAYS AND CAGELESS AND VIRTUAL COLLOCATION WITHIN 45 DAYS?

A. Positions of the Parties

BellSouth proposes ninety (90) calendar days from the application date for caged and cageless collocation; fifty (50) calendar days for virtual collocation under ordinary conditions; and seventy-five (75) calendar days for virtual collocation under extraordinary conditions.[144] BellSouth defines ordinary conditions as "space being available with only minor changes required to the network or building infrastructure."[145]

WorldCom's position is that BellSouth should be required to provide caged collocation space within ninety (90) calendar days and cageless or virtual collocation within sixty (60) calendar days of the application.[146] In short, WorldCom is requesting the Arbitrators to adopt the FCC's interval for caged collocation.[147] WorldCom argues that the issues of space availability, configuration, and construction are less complex for cageless collocation than for caged collocation, therefore cageless collocation should be subject to shorter interval.[148] WorldCom also argues that the provisioning of virtual collocation is similar to cageless collocation.[149] To further justify its request for a shorter interval for cageless collocation, WorldCom references a recent regional interconnection agreement between ITC^DeltaCom and BellSouth in Tennessee containing thirty (30) day interval from the receipt by BellSouth of a bona fide order for cageless collocation.[150]

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[144] *See* W. Keith Milner, Pre-Filed Direct Testimony, pp. 27-28 (Dec. 6, 2000).
[145] *Id.*
[146] *See* Phillip A. Bomer, Pre-filed Direct Testimony, p. 33 (Dec. 6, 2000).
[147] *See id.* at 36.
[148] *See id.* at 35-36.
[149] *See id.* at 35.
[150] *See id.* at 36.

B. Deliberations and Conclusions

Consistent with the findings in Issue 55, the Arbitrators found that the timely provisioning of physical collocation space is critical to the development of competition in the markets for advanced services and other telecommunication services.[151] In the *Order on Reconsideration*, the FCC established reasonable intervals for the provisioning of collocation arrangements to be followed in the absence of other reasonable arrangements set by states.[152] According to the *Order on Reconsideration*, "an incumbent LEC should be able to complete any technically feasible physical collocation arrangements, whether caged or cageless, no later than 90 calendar days after receiving an acceptable collocation application, where space, whether conditioned or unconditioned, is available in the incumbent LEC premises."[153] The FCC reached its decisions after examining the experiences of ILECs in the provisioning of collocation arrangements to different requesting carriers. The FCC's findings suggest that there are ILECs that complete collocation requests in less than ninety calendar days.

In Docket No. 99-00430, the Arbitrators adopted ITC^DeltaCom's final best offer that required BellSouth to provide cageless collocation to DeltaCom within thirty (30) calendar days after DeltaCom places the firm order when there is conditioned space and DeltaCom installs the bays/racks.[154] Pursuant to the final best offer, in no event, should the provisioning interval for cageless collocation exceed sixty (60) business days from the date of the firm order.[155] Later, in

[151] *See supra* p. 39.
[152] *See Order on Reconsideration, supra* note 117, ¶ 22.
[153] *Id.* ¶ 27.
[154] *See In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 99-00430, *Final Best Offer of ITC^DeltaCom Communications, Inc.*, Issue 4(a) (May 4, 2000).
[155] *See id.*

Docket No. 99-00948, the Arbitrators cited their decision in Docket No. 99-00430 and held as follows:

1) BellSouth shall inform Intermedia whether collocation space is available within **ten (10) calendar days** of receiving Intermedia's application for collocation. The Arbitrators agree with the FCC that ILECs, such as BellSouth, have had the opportunity since the enactment of the Act to develop internal procedures to meet this deadline.
2) BellSouth shall provision cageless collocation to Intermedia within **thirty (30) calendar days** after Intermedia places the firm order when there is conditioned space and Intermedia installs the bays/racks. In no event, should the provisioning interval for cageless collocation exceed **ninety (90) calendar days** from the date of the firm order.
3) BellSouth shall provision caged physical collocation arrangements requested by Intermedia, provided collocation spaces are available in BellSouth facilities, within **ninety (90) calendar days.**[156]

Consistent with the *Order on Reconsideration* and the Arbitrators' previous rulings in Docket Nos. 99-00430 and 99-00948, the Arbitrators voted unanimously:

1) BellSouth shall provision cageless collocation to WorldCom within **thirty (30) calendar days** after the firm order is placed where there is conditioned space and where WorldCom installs the bays/racks. In no event, should the provisioning interval for cageless collocation exceed **ninety (90) calendar days** from the date of the firm order.

2) BellSouth shall be required to provision caged physical collocation space within **ninety (90) calendar days** of receiving an acceptable collocation application.

[156] *In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948, *Interim Order of Arbitration Award*, pp. 15-16 (Jun. 25, 2001).

XX. ISSUE 63 - FOR PURPOSES OF THE INTERCONNECTION AGREEMENT BETWEEN WORLDCOM AND BELLSOUTH, IS WORLDCOM ENTITLED TO USE ANY TECHNICALLY FEASIBLE ENTRANCE CABLE, INCLUDING COPPER FACILITIES?

A. Positions of the Parties

BellSouth asserts that the Arbitrators should not permit CLECs to use non-fiber optic entrance facilities because this would accelerate the exhaust of entrance facilities at BellSouth central offices at an unacceptable rate. BellSouth explains that the only exception occurs with adjacent collocation. BellSouth admits that the FCC does not require BellSouth to accommodate non-fiber optic entrance facilities unless ordered to do so by the state commission.[157] BellSouth asserts that such a ruling "would be to the detriment of other CLECs desiring to collocate in an office with limited entrance space available."[158]

WorldCom maintains that as a matter of parity and nondiscriminatory treatment, it is entitled to use copper entrance facilities.[159] WorldCom asserts that "[i]f copper were categorically eliminated as an entrance facility, CLECs would be forced to install the more expensive fiber optic systems, which would raise everyone's costs, and may cause undue financial burden on a new entrant."[160] WorldCom agrees that BellSouth should be allowed to reserve some space for future needs; however, it wants to review what space exists and what future requirements BellSouth has when BellSouth contends there is a near exhaust situation.[161]

B. Deliberations and Conclusions

Both BellSouth's and WorldCom's arguments have merit. Clearly, BellSouth's central offices have space constraints. Using copper facilities would certainly accelerate the exhaust of

[157] *See* W. Keith Milner, Pre-Filed Direct Testimony, p. 29 (Dec. 6, 2000).
[158] W. Keith Milner, Pre-Filed Rebuttal Testimony, p. 42 (Dec. 13, 2000).
[159] *See* Phillip A. Bomer, Pre-Filed Direct Testimony, p. 39 (Dec. 6, 2000).
[160] *Id.*
[161] *See id.* at 39-40.

entrance facilities quicker than if providers used only non-copper entrance facilities. Thus, requiring BellSouth to allow WorldCom to use copper as an entrance facility without any restrictions would have a negative impact on other CLECs that might wish to do the same. Likewise, it is true that if the Arbitrators prohibited copper entrance facility then CLECs would be forced to install more expensive fiber optic systems. Such a result would raise costs and possibly cause undue financial burden on new entrants.

Additionally, the fact that copper enables xDSL service to be provided by CLECs operates in favor of allowing copper facilities to some extent. The public interest will not be served best if the Authority rules that WorldCom is limited to fiber optic systems. Thus, public interest requires that if there is no space constraint in BellSouth central offices, WorldCom should be entitled to use any technically feasible entrance cable, including copper facilities.

Based on the foregoing, the Arbitrators voted unanimously that if there is no space constraint in BellSouth's central offices, then WorldCom is entitled to use any technically feasible entrance cable, including copper facilities. Further, if BellSouth claims that it is running out of entrance facilities in a particular central office, it should allow WorldCom a tour of its central offices. Lastly, if, after touring a given BellSouth central office, WorldCom disagrees with BellSouth's claim that there is a space constraint, WorldCom may petition the Authority for resolution of the issue.

XXI. ISSUE 64 - IS WORLDCOM ENTITLED TO VERIFY BELLSOUTH'S ASSERTION, WHEN MADE, THAT DUAL ENTRANCE FACILITIES ARE NOT AVAILABLE? SHOULD BELLSOUTH MAINTAIN A WAITING LIST FOR ENTRANCE SPACE AND NOTIFY WORLDCOM WHEN SPACE BECOMES AVAILABLE?

A. Positions of the Parties

BellSouth claims that there is "considerable time and expense associated with maintaining a waiting list for each central office in which dual entrance facilities may not be available."[162] BellSouth also argues that it is not required by the FCC to maintain a waiting list for dual entrance facilities.[163] As to whether BellSouth should provide a tour of the entrance facilities, BellSouth agreed to provide "a limited tour of the cable vault to see that there's only one cable entrance facility."[164] This, in effect, satisfies WorldCom's request.

WorldCom believes that it should be permitted a limited inspection of entrance facilities and ducts to determine whether dual entrance facilities are available.[165] As to whether BellSouth should maintain a waiting list for entrance space, WorldCom maintains that it is reasonable to expect BellSouth to maintain a waiting list for dual entrance facilities so that it can offer space to new entrants based on their position on the waiting list.[166]

B. Deliberations and Conclusions

During the Hearing, BellSouth accepted WorldCom's contention that WorldCom should be permitted a limited inspection of entrance facilities and ducts to confirm BellSouth's assertion that dual entrance facilities are not available.[167] As to the waiting list issue there is insufficient evidence in the record to sustain a finding that there is considerable time and expense associated with

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[162] W. Keith Milner, Pre-Filed Rebuttal Testimony, p. 45 (Dec. 13, 2000).
[163] *See id.* at 46.
[164] Transcript of Proceedings, May 8, 2001, vol. II, p. 516 (Hearing).
[165] *See* Phillip A. Bomer, Pre-Filed Direct Testimony, p. 41 (Dec. 6, 2000).
[166] *See id.* at 44.
[167] *See* Transcript of Proceedings, May 8, 2001, vol. II, p. 516 (Hearing).

maintaining a waiting list for central offices in which dual entrance facility may not be available.[168] It is expected that BellSouth inventories its facilities for its own purposes. It should not be any more difficult or costly to maintain a list of carriers that want to use entrance facilities as they become available. For these reasons, the Arbitrators voted unanimously that WorldCom is entitled to a tour of the entrance facilities to verify that there is only one cable entrance facility and that BellSouth is required to maintain a waiting list for dual entrance facilities.

[168] *See* W. Keith Milner, Pre-Filed Rebuttal Testimony, p. 45 (Dec. 13, 2000).

XXII ISSUE 67 - WHEN WORLDCOM HAS A LICENSE TO USE BELLSOUTH RIGHTS-OF-WAY, AND BELLSOUTH WISHES TO CONVEY THE PROPERTY TO A THIRD PARTY, SHOULD BELLSOUTH BE REQUIRED TO CONVEY THE PROPERTY SUBJECT TO WORLDCOM'S LICENSE?

A. Positions of the Parties

BellSouth defines the property in question as "BellSouth's poles, conduit or ducts to or in which [WorldCom] has attached or placed facilities pursuant to a license."[169] BellSouth argues that it has not restricted its ability to convey its property by granting a license to make use of BellSouth's facilities.[170] BellSouth contends that it "should be able to sell or otherwise convey its property without restriction so long as BellSouth gives [WorldCom] reasonable notice of such sale or conveyance."[171] BellSouth also notes that its Rights of Way agreements with WorldCom do not create an easement in favor of WorldCom and do not convey an interest in the subject property.[172]

WorldCom contends that it "should not be required to forfeit its license rights, and possibly strand facilities, when BellSouth conveys the underlying property."[173] In addition, WorldCom asserts BellSouth's position is discriminatory and anticompetitive because "BellSouth should not be able to sell property in a way that protects its own facilities but not those of WorldCom."[174] WorldCom rebuts BellSouth's reliance on the rights of way agreements by asserting that the argument is circular because, if WorldCom prevails on this issue, WorldCom will be entitled to amend the rights of way agreements.[175]

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[169] Cynthia K. Cox, Pre-Filed Direct Testimony, p. 79 (Dec. 6, 2000).
[170] *See BellSouth Telecommunications, Inc.'s Post-Hearing Brief*, p. 42 (July 6, 2001).
[171] Cynthia K. Cox, Pre-Filed Direct Testimony, p. 79 (Dec. 6, 2000).
[172] *See id.*
[173] Don Price, Pre-Filed Direct Testimony, p. 65 (Dec. 6, 2000).
[174] *Id.* at 66; *see Post-Hearing Brief of WorldCom*, pp. 61-62 (July 6, 2001).
[175] *See* Don Price, Pre-Filed Rebuttal Testimony, p. 37 (Dec. 13, 2000).

B. Deliberations and Conclusions

During the deliberations, the Arbitrators recognized that the parties did not seem to agree as to the definition of the term "property" as used in the language of the issue and that the definition of that term could affect their decision. Moreover, neither party cited any legal authority in support of their position despite the representations of counsel that the issue contains legal and policy aspects.[176] Thus, in order to avoid any unintended consequences, the Arbitrators voted unanimously to hold the issue in abeyance and to require the parties to file legal briefs and final best offers no later than January 11, 2002.

[176] *See* Transcript of Proceedings, May 8, 2001, v. II, pp. 339-42 (Hearing).

XXIII. ISSUE 68 - SHOULD BELLSOUTH REQUIRE THAT PAYMENTS FOR MAKE-READY WORK BE MADE IN ADVANCE?

A. Positions of the Parties

BellSouth asserts that WorldCom should "pay in advance for any work [WorldCom] requests BellSouth to perform, as do other CLECs that have signed BellSouth's standard license agreement."[177] BellSouth also claims that it is not unusual to require advance payment. Further, BellSouth argues this arrangement will not harm WorldCom.[178]

WorldCom maintains that a requirement for advanced payments will create delays and is not commercially reasonable.[179] Hence, WorldCom wants BellSouth to begin work as soon as WorldCom receives an invoice stating the amount BellSouth will charge for the project and offers to "fax BellSouth, upon receipt of an invoice, written authorization to commence the work at WorldCom's expense."[180] WorldCom is willing to pay the invoice within fourteen (14) days. This arrangement, argues WorldCom, will give it time to process the payment and is commercially reasonable.[181]

B. Deliberations and Conclusions

It is common for parties in a business relationship to agree to terms and conditions that require advance payments. Likewise, it is common for parties to agree to conduct their business relationship on credit with payments to be made at some later date. There is nothing fundamentally wrong with either BellSouth's or WorldCom's positions on this issue. Neither party, however, has put forward a reasonable compromise solution or presented sufficient proof or argument in favor of their respective position. Given these circumstances, the Arbitrators voted unanimously to order

[177] W. Keith Milner, Pre-Filed Direct Testimony, p. 33 (Dec. 6, 2000).
[178] *See id.*
[179] *See* Don Price, Pre-Filed Direct Testimony, p. 67 (Dec. 6, 2000).
[180] Don Price, Pre-Filed Rebuttal Testimony, p. 38 (Dec. 13, 2000).
[181] *See* Don Price, Pre-Filed Direct Testimony, p. 67 (Dec. 6, 2000).

WorldCom to compensate BellSouth for make-ready work by paying fifty percent (50%) of the invoice amount in advance and the remaining sum upon completion of the work.

XXIV. ISSUE 80 - SHOULD BELLSOUTH BE REQUIRED TO PROVIDE AN APPLICATION-TO-APPLICATION ACCESS SERVICE ORDER INQUIRY PROCESS?

A. Positions of the Parties

BellSouth maintains that the Arbitrators should not require it to provide an application-to-application access service order inquiry process. BellSouth contends that "[a]ccess services are not part of BellSouth's obligations under the Act and [WorldCom] should not be permitted to use this arbitration to try to enhance its interexchange service offerings."[182] The national standard for ordering UNEs and resale services, contends BellSouth, is through the submission of a Local Service Request ("LSR"), not an Access Service Request ("ASR").[183] BellSouth asserts that the electronic pre-ordering functionality WorldCom seeks is available through the LSR process and WorldCom's use of LSRs and ASRs is satisfactory.[184] However, BellSouth admits that the FCC has observed that the ASR process is one method for provisioning EELs.[185]

WorldCom claims that it "has been using [ASRs] to order local services, and it is those local services for which WorldCom seeks an application-to-application capability."[186] WorldCom asserts that it uses the ASR process to order DS1 loop and transport combinations ("DS1 Combos") to supply dial tone to its customers.[187] WorldCom contends that it needs pre-ordering functionalities to "enable it to order these local facilities more effectively and to compete on equal footing with BellSouth."[188]

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[182] Ronald M. Pate, Pre-Filed Direct Testimony, p. 10 (Dec. 6, 2000).
[183] *See id.* at 11.
[184] *See id.*; Ronald M. Pate, Pre-Filed Rebuttal Testimony, p. 6 (Dec. 13, 2000).
[185] *See* Ronald M. Pate, Pre-Filed Rebuttal Testimony, p. 6 (Dec. 13, 2000) (citing *UNE Remand Order*, *supra* note 3, n.581).
[186] Sherry Lichtenberg, Pre-Filed Direct Testimony, p. 13 (Dec. 6, 2000).
[187] *See id.*
[188] *Id.*

B. Deliberations and Conclusions

BellSouth objects to providing an application-to-application access service inquiry process to WorldCom on the grounds that "[a]ccess services are not part of BellSouth's obligations under the Act and [WorldCom] should not be permitted to use this arbitration to try to enhance its interexchange service offerings."[189] However, BellSouth does not deny that it has permitted CLECs, including WorldCom, to order DS1 combos via the ASR process in the past.[190] Further, under cross-examination, BellSouth's witness, Mr. Ronald M. Pate, acknowledged that an application-to-application ASR process would not benefit WorldCom unless it used the process to order a local product like the DS1 combo.[191] Mr. Pate also admitted that BellSouth uses the ASR process to order MegaLink circuits, which are functionally equivalent to DS1 combos.[192] It would be discriminatory for BellSouth to allow its representatives to obtain pre-order information electronically to order MegaLink circuits and deny a CLEC the electronic capability to order local services. Therefore, the Arbitrators voted unanimously that WorldCom is entitled to obtain an application-to-application access service order inquiry process for DS1 loop and DS1 combos.

[189] Ronald M. Pate, Pre-Filed Direct Testimony, p. 10 (Dec. 6, 2000).
[190] *See* Transcript of Proceedings, May 8, 2001, v. II, pp. 380-81 (Hearing).
[191] *See id.* at 401-02.
[192] *See id.* at 373-75.

XXV. ISSUE 95 - SHOULD BELLSOUTH BE REQUIRED TO PROVIDE WORLDCOM WITH BILLING RECORDS WITH ALL ELECTRONIC MESSAGE INTEREXCHANGE ("EMI") STANDARD FIELDS?

A. Positions of the Parties

BellSouth contends that it provides the "EMI fields that are required for the types of records included on the usage interfaces."[193] BellSouth asserts that it will continue to provide WorldCom with EMI consistent billing records; however, BellSouth asserts that the parties' interconnection agreement should make clear how the records will be provided.[194] BellSouth alleges that WorldCom's proposed language on this issue is "unclear, confusing and does not describe in sufficient detail the manner in which the records will be provided."[195] BellSouth asserts that its proposed language clarifies how BellSouth will provide the records.[196]

WorldCom claims that BellSouth should be required to provide EMI billing records, because it is the industry standard used by all the other Bell companies.[197] Unless it is contractually obligated to do so, WorldCom argues, "[BellSouth] will be free to move away from the industry standard and develop proprietary records, if it has not done so already."[198]

B. Deliberations and Conclusions

BellSouth asserts that it will provide WorldCom with EMI consistent billing records, but contends that WorldCom's proposal does not clearly delineate how BellSouth should provide the records.[199] This statement clearly indicates that the contention surrounding this issue is not if BellSouth will provide EMI billing records, but how BellSouth will provide EMI billing records. The record before the Arbitrators is not sufficient to address this specific contention nor did the

[193] David P. Scollard, Pre-Filed Direct Testimony, p. 7 (Dec. 6, 2000).
[194] *See id.* at 6.
[195] David P. Scollard, Pre-Filed Rebuttal Testimony, p. 4 (Dec. 13, 2000).
[196] *See* David P. Scollard, Pre-Filed Direct Testimony, p. 7 (Dec. 6, 2000).
[197] *See* Don Price, Pre-Filed Direct Testimony, p. 71 (Dec. 6, 2000).
[198] *Id.*
[199] *See* David P. Scollard, Pre-Filed Direct Testimony, p. 6 (Dec. 6, 2000).

parties frame the issue so as to include this particular dispute. Therefore, the Arbitrators voted unanimously to require BellSouth to provide WorldCom with billing records with all EMI standard fields. In addition, the Arbitrators voted unanimously to order the parties to submit final best offers no later than January 11, 2002 clarifying how BellSouth will provide the EMI records.

XXVI. ISSUE 100 - SHOULD BELLSOUTH OPERATORS BE REQUIRED TO ASK CALLERS FOR THEIR CARRIER OF CHOICE WHEN SUCH CALLERS REQUEST A RATE QUOTE OR TIME AND CHARGES?

A. Positions of the Parties

BellSouth argues that it is not obligated to ask customers about their carrier of choice or transfer the call to that carrier for free.[200] BellSouth offers to transfer the caller to a long distance carrier, if that carrier is an Operator Transfer Service ("OTS") customer.[201]

WorldCom is requesting that the Authority require BellSouth operators "to ask WorldCom customers for their carrier of choice when they request a rate quote or time charge and connect the caller to that carrier."[202] WorldCom agrees to pay for the time BellSouth operators spend handling calls from its customers, including the time spent asking about the customer's long distance carrier and transferring the call.[203]

B. Deliberations and Conclusions

It is unclear why this issue is still before the Arbitrators. BellSouth has agreed to WorldCom's request provided WorldCom compensates BellSouth for the service and WorldCom has agreed to compensate BellSouth. If the issue involves other contentious points, they are not apparent from the record. Therefore, based on the record, the Arbitrators voted unanimously that, as long as WorldCom is willing to compensate BellSouth for handling WorldCom customers' requests for a rate quote or time and charges, BellSouth operators shall ask WorldCom local customers their carrier of choice and answer their question accordingly.

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[200] *See* W. Keith Milner, Pre-Filed Direct Testimony, p. 34 (Dec. 6, 2000).
[201] *See id.*
[202] Don Price, Pre-Filed Direct Testimony, p. 73 (Dec. 6, 2000).
[203] *See id.* at 74-75.

XXVII. ISSUE 110 - SHOULD BELLSOUTH BE REQUIRED TO TAKE ALL ACTIONS NECESSARY TO ENSURE THAT WORLDCOM CONFIDENTIAL INFORMATION DOES NOT FALL INTO THE HANDS OF BELLSOUTH'S RETAIL OPERATIONS, AND SHOULD BELLSOUTH BEAR THE BURDEN OF PROVING THAT SUCH DISCLOSURE FALLS WITHIN ENUMERATED EXCEPTIONS?

A. Positions of the Parties

BellSouth asserts that it is willing to take all reasonable actions necessary to ensure that WorldCom's confidential information does not fall into the hands of BellSouth's retail operations. However, it refuses to agree to WorldCom's proposed language that would require BellSouth to "'take all actions' to protect such information without any limitation and without specifying what actions WorldCom has in mind."[204] Further, according to BellSouth, "WorldCom's demand that BellSouth prove that it was not the source of a release of confidential information is patently unreasonable because WorldCom's confidential information could be disclosed by any number of sources, including WorldCom itself as well as WorldCom's vendors and contractors."[205]

WorldCom maintains that BellSouth's proposal falls short of protecting WorldCom's confidential information. According to WorldCom, "BellSouth should be required to take all actions necessary to ensure that its retail operations do not obtain [WorldCom's confidential] information."[206] Further, WorldCom proposes that, if disclosure occurs, then a rebuttable presumption should arise that BellSouth has breached its obligations to preserve WorldCom's confidentiality.[207] WorldCom also opines that the "most likely source of confidential WorldCom information for BellSouth's retail units is its wholesale division."[208] WorldCom argues that

[204] *BellSouth Telecommunications, Inc. 's Post Hearing Brief*, p. 46 (Jul. 6, 2001).
[205] *Id.*
[206] Don Price, Pre-Filed Direct Testimony, p. 82 (Dec. 6, 2000).
[207] *See* Don Price, Pre-Filed Rebuttal Testimony, p. 49 (Dec. 13, 2000).
[208] *Id.* at 47.

BellSouth's retail operation will obtain an unfair competitive advantage if it receives access to WorldCom's confidential information.[209]

B. Deliberations and Conclusions

As applied, WorldCom's proposal and BellSouth's proposal are the same. To explain, application of WorldCom's proposal would implicitly include an analysis of whether BellSouth acted reasonably to ensure that WorldCom's confidential information was not inappropriately shared.

The Arbitrators disagree with WorldCom's statement that the most likely source of confidential WorldCom information is BellSouth's wholesale division. WorldCom did not substantiate this claim. WorldCom's confidential information could be obtained from any number of sources; therefore, it is not appropriate to hold BellSouth accountable simply because WorldCom's confidential information was unreasonably disclosed.

For the foregoing reasons, the Arbitrators voted unanimously to require that BellSouth take all reasonable actions necessary to ensure that WorldCom's confidential information does not fall into the hands of BellSouth's retail operations. Further, the Arbitrators determined that the burden of proving that BellSouth has failed to do so should rest with WorldCom.

[209] *See id.* at 49.

XXVIII. ORDERED

The foregoing *Interim Order of Arbitration Award* reflects the Arbitrators resolution of Issues 6, 8, 18, 28, 34, 35, 36, 37, 40, 42, 45, 46, 47, 48, 51, 52, 56, 61, 62, 63, 64, 68, 80, 100, and 110 and partial resolution of Issues 55 and 95. All resolutions contained herein comply with the provisions of the Telecommunications Act of 1996 and are supported by the record in this proceeding. BellSouth Telecommunications, Inc; MCImetro Access Services, LLC; and Brooks Fiber Communications of Tennessee, Inc. shall submit final best offers as requested herein on Issues 55, 67, and 95 no later than Friday, January 11, 2002.

TENNESSEE REGULATORY AUTHORITY,
BY ITS DIRECTORS ACTING AS
ARBITRATORS

Sara Kyle, Chairman

H. Lynn Greer, Jr., Director

Melvin J. Malone, Director

ATTEST:

K. David Waddell, Executive Secretary

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996	)	DOCKET NO. UT-003022
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	DOCKET NO. UT-003040

INITIAL ORDER FINDING NONCOMPLIANCE IN THE AREAS OF INTERCONNECTION, NUMBER PORTABILITY AND RESALE

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SYNOPSIS

1 This initial order recommends that the Commission find Qwest not in compliance with Checklist Items No. 1 (Interconnection), 11 (Number Portability), and 14 (Resale) of Section 271(c)(2)(B) of the 1996 Telecommunications Act, and further recommends that the Commission order Qwest to make certain modifications to Sections 4, 6, 7, and 10.2 of its SGAT.

INTRODUCTION

2 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc. (U S WEST),[1] with the requirements of Section 271 of the Telecommunications Act of 1996 (the Act).[2] This proceeding will also address the Washington Utilities and Transportation Commission's (Commission) review and approval of Qwest's Statement of Generally Available Terms (SGAT) under Section 252(f)(2) of the Act.

3 This initial order serves as the report of the Staff of the Commission addressing the results of the second workshop in this proceeding, makes recommendations to the Commission concerning Qwest's compliance with Checklist Items No. 1 (interconnection), 11 (Number Portability), and 14 (Resale) under Section 271, and makes recommendations concerning certain portions of Qwest's proposed SGAT. Qwest's compliance with collocation issues in Checklist Item No. 1 will be addressed in a supplemental initial order we expect to be issued on March 9, 2001.

Section 271 Process

4 Under Section 271 of the Act, Regional Bell Operating Companies (RBOCs or BOCs) may only provide toll service between local area transport areas (LATAs) if they can demonstrate that certain competitive conditions exist in their local markets. The Federal Communications Commission (FCC), after consultation with the United States Department of Justice (DOJ) and state commissions, may authorize an RBOC to provide interLATA service in a particular state if the RBOC meets the conditions, including competitive checklist items, set forth in section 271(c) of the Act. In particular, the FCC must consult with state commissions "in order to verify the

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[1] Early in this proceeding U S WEST completed its merger with Qwest. The names U S WEST and Qwest are used interchangeably in this document.

[2] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

compliance of the [RBOC] with" the requirements of section 271(c). *47 U.S.C. § 271(d)(2)(B).*

5 Qwest is the RBOC that provides local exchange and intraLATA toll service to much of Washington state. In advance of Qwest filing an application with the FCC to enter the interLATA market, the Commission in October 1997 issued an Interpretive and Policy Statement on the Process for RBOC Application under Section 271 of the 1996 Telecommunications Act, in Docket No. UT-970300 (Interpretive and Policy Statement).

6 In March 2000, the Commission issued a Supplemental Interpretive and Policy Statement on Process and Evidentiary Requirements, in Docket No. UT-970300 (Supplemental Interpretive and Policy Statement). The Supplemental Interpretive and Policy Statement adopted a process and standards for facilitating the Commission's review of Qwest's compliance with Section 271(c) of the Act. The Commission established a series of three adjudicative workshops, with an additional workshop if necessary, designed to allow the Commission and interested parties to review and comment on Qwest's compliance with Section 271(c).

7 In the Interpretive and Policy Statement, the Commission directed Qwest, Staff, Public Counsel and other interested persons to develop the evidentiary requirements for Qwest's compliance with Section 271. These parties presented to the Commission a draft statement of evidentiary requirements, which the Commission adopted in its Supplemental Interpretive and Policy Statement. Appendix A to the Supplemental Interpretive and Policy Statement identifies certain general and specific evidentiary requirements that Qwest must meet to demonstrate its compliance with each checklist item, as well as items of public interest. Appendix B to the Supplemental Interpretive and Policy Statement establishes similar evidentiary requirements for Competitive Local Exchange Carriers (CLECs). Information provided by Qwest and the CLECs will allow the Commission to better evaluate Qwest's compliance with the requirements of Section 271.

8 The Commission schedule has been modified to include a fourth workshop in July 2001 and recognizes the probability of a fifth workshop.[3] These modifications were

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[3] *In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996,* Dockets No. UT-003022 and UT-003040, Fifth Supplemental Order; Prehearing Conference Order, ¶¶ 17-18 (Oct. 25, 2000) (*Fifth Supplemental Order*); *see also In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available*

necessary to accommodate requests by Qwest and other parties to address certain checklist items in later workshops. In addition, the third party testing and audit of Qwest's OSS performance data sponsored by the Regional Oversight Committee (ROC) may not be available for review until late spring 2001, at the earliest.

The SGAT Process

9 Under Section 252(f)(1) of the Act, an RBOC may submit to a "State commission a statement of terms and conditions that such company generally offers within that State to comply with the requirements of Section 251 and the regulations thereunder and the standards applicable under this section." Section 252(f)(2) of the Act provides that:

> A State commission may not approve such statement unless such statement complies with section (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.[4]

10 On March 22, 2000, Qwest filed its proposed SGAT with the Commission in the Section 271 proceeding, and requested Commission approval of the SGAT under Section 252(f)(2). By letter dated April 14, 2000, the Commission rejected Qwest's request to review the SGAT within the Section 271 proceeding, No. UT-003022. On April 28, 2000, Qwest refiled its SGAT with the Commission in a new docket Docket No. UT-003040, requesting Commission approval. On May 19, 2000, the Commission held a workshop for interested persons to discuss the process by which the Commission would review Qwest's proposed SGAT. Following the workshop, the Commission entered an order consolidating the SGAT and Section 271 proceedings. At its June 16, 2000 open meeting, the Commission allowed Qwest's proposed SGAT to go into effect, and stated that it would further review the SGAT provisions in Docket No. UT-003040.

11 The Interpretive and Policy Statement identified that "the statement of generally available terms option that is set out in Section 271(c)(1)(B) of the Act is not available to [U S WEST] in Washington, consistent with the purposes of the Act and

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Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996, Dockets No. UT-003022 and UT-003040, Sixth Supplemental Order; Prehearing Conference Order; Notice of Prehearing Conference (Dec. 6, 2000) (*Sixth Supplemental Order*).

[4] 47 U.S.C. § 252(f)(2).

the provisions of Section 271(c)(1)(B)." Interpretive and Policy Statement at 5. In the Supplemental Interpretive and Policy Statement, the Commission clarified that

> The existing interconnection agreements between U S WEST and its competitors will form the basis for U S WEST's legal obligations concerning terms and conditions of service. The Commission will consider an SGAT or similar mechanism if the consideration is limited to elements or services that are not provided for in an interconnection agreement.

Supplemental Interpretive and Policy Statement, at 2.

12 During the first workshop session, Qwest and participating CLECs argued that the Commission should consider Qwest's SGAT for the purpose of determining Qwest's compliance with Section 271, as well as for Commission review and approval under Section 252(f). While Qwest and the CLECs are correct that the SGAT is a vehicle to document Qwest's obligations under the Act by incorporating more current industry practices and FCC determinations, Qwest's history and current practices in providing interconnection under its existing interconnection agreements should not be ignored. The SGAT alone cannot demonstrate compliance. The SGAT provides a promise by Qwest for future, untested practices.[5] As noted in the Revised Draft Initial Order for the first workshop, the parties should continue to address SGAT issues in workshops to evaluate Qwest's proposal under Section 252(f). This process is an efficient way to develop consensus on SGAT provisions. However, the parties should also address CLEC and Qwest experience and practice under existing interconnection agreements for demonstration of Qwest's compliance with Section 271.

13 Consistent with the Commission's directions in the Supplemental Interpretive and Policy Statement, the Commission will consider Qwest's proposed SGAT in its review of Qwest's compliance with Section 271(c) for the purpose of considering elements or services not provided in interconnection agreements, and may consider whether SGAT language will affect Qwest's compliance with checklist items or other requirements under Section 271(c)(1)(B). The Commission will also evaluate the terms of the SGAT independently from Qwest's compliance with checklist items under Section 271. The Commission will evaluate the SGAT to ensure that it does not violate Commission policy even though there are interconnection agreements and the SGAT is not the controlling document for all companies.

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[5] While a few CLECs have already executed the SGAT for interconnection in Washington, there is very little history of experience under the SGAT.

The Workshops

14 The Commission held its first workshop in this proceeding on June 21-23, 2000, addressing the issues of Checklist Items No. 3 (Poles, Ducts, Conduits, and Rights-of-Way), 7 (911/E911, Directory Assistance and Operator Service), 8 (White Pages Listings), 9 (Numbering Administration), 10 (Signaling and Associated Databases), 12 (Dialing Parity), 13 (Reciprocal Compensation), and provisions of the SGAT addressing these issues. The Commission held a follow-up workshop on July 6, 2000, to address unresolved issues from the June workshop session. Staff filed a Draft Initial Order on Workshop 1 issues on August 8, 2000, and a Revised Draft Initial Order on August 31, 2000 after receiving comments from the parties. The parties appeared before the Commission and presented their arguments on disputed issues on September 18, 2000. The Commission's final order on the disputed issues from the first workshop is pending.

15 The Commission held its second workshop on November 6-9, and 10, 2000, addressing the issues of Checklist Items No. 1 (Interconnection and Collocation), 11 (Number Portability), and 14 (Resale), and provisions of the SGAT addressing these issues. The workshop also addressed certain issues carried over from the first workshop, including SGAT language implementing the pick and choose provision of the Act, Section 252(i). The Commission held an additional workshop on collocation issues on November 28 and 29, 2000, and a follow-up workshop on January 3-5, 2001 to address unresolved issues from the November workshop sessions.

16 Representatives from Qwest, AT&T Communications of the Pacific Northwest, Inc. and TCG Seattle (collectively AT&T), WorldCom, Inc. (WorldCom), Sprint Communications Company, LP (Sprint), XO Washington, Inc. (XO Washington), f/k/a NEXTLINK Washington, Inc. (NEXTLINK), Electric Lightwave Inc. (ELI), Advanced TelCom Group, Inc. (ATG), Focal Communications Corporation (Focal), The Association of Local Telecommunications Services, Global Crossing Telemanagement, Global Crossing Local Services, New Edge Networks, North Point Communications, Allegiance Telecom of Washington, Inc. (Allegiance), McLeod USA Telecommunications Services, Inc. (McLeod), TRACER, Teligent Services, Inc., Rhythms Links Inc., Broadband Office Communications, Inc., Covad Communications, Inc (COVAD), ICG Communications, Inc. (ICG), MetroNet Services Corporation (MetroNet), MGC Communications, Inc., d/b/a Mpower Communications Corp. (Mpower), Yipes Transmission, Inc. (Yipes), and Public Counsel participated in the workshop sessions.

17 The parties filed briefs with the Commission on January 25, 2000, addressing their disputes over issues concerning Checklist Items No. 1 (Interconnection), 11 (Number Portability) and 14 (Resale). During the January 2001 follow-up workshop sessions,

the parties requested additional time to address collocation issues in Checklist Item No. 1. The parties filed briefs with the Commission on collocation issues on February 16, 2001, and we expect that a supplemental initial order on collocation issues will be entered on March 9, 2001. The parties may file comments with the Commission concerning this initial order and the supplemental initial order on collocation issues by March 27, 2001. The Commission will schedule a date for oral argument on these issues.

MEMORANDUM

PICK AND CHOOSE

18 The parties discussed SGAT language regarding the pick and choose provision of the Act, Section 252(i), in very general terms during the first workshop in June 2000. *See Tr. at 348-52.* During the July 6, 2000 follow-up workshop, Qwest and AT&T offered proposed SGAT language to address the issue. *Ex. 236.* The language reflects an agreement reached between Qwest and AT&T in discussions in Colorado workshops. A number of CLECs requested additional time to review the proposed language. The participants were directed to continue discussions outside of the workshop and present any disagreements in briefs by July 17, 2000. Following the workshop, Mpower, MetroNet, NEXTLINK, ELI, and ATG all requested additional time to review this SGAT language and proposed deferring the matter to a future workshop. Qwest opposed deferral. In its Fourth Supplemental Order, the Commission deferred the matter to the second workshop.

19 At the January 2001, follow-up workshop, XO Washington proposed language for SGAT Section 1.8.2 to replace that contained in Exhibit 236. *See Ex. 327.* XO's proposed language clarifies the manner by which a CLEC would request an amendment to its interconnection agreement and the way requests for multiple amendments would be handled. All parties agreed to the language proposed in Exhibit 236, as amended in Exhibit 327. *Tr. at 2448.*

20 The Commission issued an interpretive and policy statement regarding implementation of Section 252(i) of the Act.[6] In that document, the Commission adopted a number of principles and procedures for implementing the pick and choose provision of the Act. The proposed SGAT language in Exhibits 236 and 327 is consistent with those principles and procedures. The Commission approves the proposed SGAT language on pick and choose.

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[6] *See In re Implementation of Section 252(i) of the Telecommunications Act of 1996,* Interpretive and Policy Statement (First Revised), Docket No. UT-990355 (April 12, 2000).

CHECKLIST ITEM NO. 1 - INTERCONNECTION

FCC Requirements

21 The first item in the competitive checklist, Section 271(c)(2)(B), addresses interconnection. Section 271(c)(2)(B)(i) requires BOCs to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." The FCC has defined interconnection as "the physical linking of two networks for the mutual exchange of traffic."[7] Section 251(c)(2) sets forth the duties of incumbent local exchange companies (ILECs) in providing 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 this section and section 252.

22 The FCC has considered the duties set forth in Section 251(c)(2)(B), (C), and (D) in determining whether an RBOC meets the requirements of Checklist Item No. 1.

23 The FCC defines "technical feasibility" to mean that no technical or operational concerns prevent fulfilling a request for interconnection, access to unbundled network elements (UNEs), or methods of achieving interconnection, without regard to economic, accounting, space or site concerns.[8] The FCC has determined that

> Competing carriers may also choose any method of technically feasible interconnection at a particular point on the incumbent LEC's

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[7] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd. 15499, 15590, CC Docket No. 96-98, FCC 96-325, ¶ 176 1996, (*Local Competition First Report and Order*); *see also* 47 C.F.R. § 51.5.

[8] 47 C.F.R. § 51.5; *see also Local Competition First Report and Order*, ¶ 196.

> network. Incumbent LEC provision of interconnection trunking is one common means of interconnection. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements.[9]

24 At minimum, the feasible points for interconnection include: (1) the line-side of the local switch; (2) the trunk-side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; (5) out-of-band signaling transfer points necessary to exchange traffic and access call-related data bases, and (6) the points of access to UNEs.[10]

25 For an ILEC to meet the FCC's equal in quality standard, it must "provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party."[11] An ILEC "must design and operate its interconnection facilities to meet the 'same technical criteria and service standards' that are used for the interoffice trunks within the incumbent LEC's network."[12] In determining whether a BOC provides equal quality interconnection, the FCC has looked to whether there are disparities in trunk group blockage and transmission standards in interconnection provided to CLECs and the RBOC's retail operations.[13]

26 Finally, the FCC has defined "just, reasonable, and nondiscriminatory" in the context of interconnection to mean that ILECS "must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides comparable function to its own retail operations."[14]

Washington Evidentiary Requirements

27 The Commission has identified several general requirements and specific evidentiary requirements Qwest must meet to demonstrate its compliance with Checklist Item No. 1. Supplemental Interpretive and Policy Statement, Appendix A. The specific evidentiary requirements that Qwest must meet to establish compliance with Checklist Item No. 1 are:

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[9] *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, ¶ 66 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).
[10] 47 C.F.R. § 51.305.
[11] *Local Competition First Report and Order*, ¶ 224.
[12] *Bell Atlantic New York Order*, ¶ 64.
[13] *Id.*
[14] *Id.* ¶ 65.

1. How is Qwest offering interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of the Act?

2. On what dates did any nonaffiliated carriers actually interconnect with Qwest?

3. At what points within its network does Qwest provide or offer interconnection?

4. What is the price for interconnection, including all recurring and nonrecurring charges, and is it based on cost as required by section 252(d)(1)?

5. Does Qwest impose material limitations on interconnection (i.e., one-way trunking, use of different trunk groups for different "types" of traffic, etc.)?

6. Provide comparative performance data for the twelve most current months on the time required to repair outages for Qwest's lines versus the CLECs' lines.

7. Provide comparative performance data for the twelve most current months on call completion rates for originating and terminating calls across carriers.

28 In compliance with the Supplemental Interpretive and Policy Statement, Qwest filed Exhibits 342, 343, 344, and 345-C, purporting to document Qwest's compliance with the general and specific evidentiary requirements for Checklist Item No. 1. AT&T filed responses to Appendix B questions for Checklist Item No. 1 in Exhibits 301 and 372. Qwest and AT&T provided the information to supplement written testimony and exhibits.

Parties' Positions

Qwest

29 Through the testimony of Thomas R. Freeberg, Qwest states that it has satisfied the interconnection requirements of Checklist Item No. 1 through Section 7 of the SGAT, existing interconnection agreements between Qwest and CLECs, and certain processes and procedures. *Ex. 331, at 2-3.* Further, Qwest adds that it is providing interconnection in quantities that competitors demand and at an acceptable level of quality. *Id. at 3.*

30 Qwest highlighted several alternative interconnection arrangements, including physical collocation, virtual collocation, mid-span meet arrangements, entrance facilities, and interLocal Calling Area facilities. *Id. at 3, 10.* Qwest is developing a new form of interconnection to allow for the exchange of local traffic at Qwest's toll tandem switch. *Id. at 13.* Mr. Freeberg asserts that these interconnection arrangements provide for exchange of traffic at a number of different points, including the line and trunk sides of local switches, tandem switches, central office cross-connections, signal transfer points and points of access to UNEs. *Id. at 3-4.* Any other methods of interconnection are provided through Qwest's bona fide request process. *Id. at 10.*

31 According to Qwest, the Company provided interconnection trunking to over 25 facilities-based CLECs, and had over 116,962 interconnection trunks in service in Washington state as of June 1, 2000. *Id. at 7.* Of these trunks 31.3 percent route to Qwest tandem switches and 68.7 percent route to Qwest end offices. *Id. at 4.* In May 2000, over 859 million minutes of calls were exchanged over these interconnection trunks; 15.7 percent of this amount was recorded on tandem trunks and 84.3 percent was recorded on end office trunks. *Id.*

32 The process CLEC's must follow to order interconnection, or Local Interconnection Service (LIS), is set forth in the SGAT. *See Id. at 14-16.* The process starts with joint planning meetings and requires CLECs to provide forecasts of their traffic distribution to Qwest end offices and local tandem offices before the orders and due dates are determined. *Id.* Qwest offers LIS training and facility tours to CLECs. *Id.*

33 Mr. Freeberg states that Qwest provides interconnection that is at least "equal in quality" to that it provides itself, by monitoring interconnection traffic and trunk group blocking. *Id. at 17-18.* Qwest notifies CLECs of the blocking and requests whether they seek to place additional trunking orders to address the blocking. *Id. at 18.* According to Qwest, 40 percent of the CLECs notified of blocking have not taken any action. *Id.*

34 Through the ROC process, Qwest has developed performance measures to determine how well Qwest provides interconnection. In the eleven performance measures that focus on trunk provisioning, trunk repair, and network blocking Qwest argues that its performance exceeds the standards agreed to by the parties to the ROC process. *Id. at 21-28.* Qwest asserts that it is provisioning and repairing interconnection trunks for CLECs in substantially the same time and manner that Qwest provides for itself. *Id. at 6.*

35 Qwest acknowledges four written complaints filed by CLECs against US WEST or Qwest concerning interconnection issues. *Ex. 342, at 4-5.* All of the complaints have been resolved. *Id.*

AT&T

36 Through the affidavits of Kenneth L. Wilson and Timothy D. Boykin, AT&T asserts that Qwest's SGAT and AT&T's experience under its interconnection agreement demonstrate that Qwest is not providing interconnection at any technically feasible point that is at least equal in quality to that it provides itself, on terms and conditions that are just, reasonable and non discriminatory. *Ex. 371, at 4; see Ex. 301.* AT&T asserts Qwest does not meet the requirements of Checklist Item No. 1 for interconnection.

37 In his affidavit, Mr. Wilson expresses concern and objections to various SGAT provisions relating to interconnection and describes problems AT&T has experienced in its interconnection agreement with Qwest. First, AT&T objects to the SGAT definitions for "tandem office switch" and "local interconnection service (LIS) trunking." *Ex. 371 at 8-9, 11-12.* AT&T also objects to Qwest's reference the SGAT to the Interconnection and Resale Resource Guide, or IRRG, by citing to a web site. AT&T argues that as the SGAT currently reads, Qwest could make changes to requirements in the IRRG without consulting with CLECs. *Id. at 9-10.* In addition, AT&T lists concerns with numerous SGAT sections relating to interconnection. *See Id. at 13-47.*

38 AT&T cites examples from it's commercial experience with Qwest as evidence that Qwest does not yet comply with the requirements and obligations of Checklist Item No. 1. *Id. at 47.* Specifically, AT&T argues that Qwest does not allow interconnection and access at any technically feasible point in its network, because Qwest does not allow CLECs to interconnect at access tandem switches. *Id. at 48-50.* AT&T argues that Qwest provides poor interconnection trunk ordering and provisioning service. *Id. at 51-54.* Finally, Mr. Wilson asserts that Qwest's network suffers from excessive call blocking, which most affects CLECs. *Id. at 54-57.*

39 AT&T's also highlights its problems with (1) Qwest's practices relating to location routing number (LRN) assignment, (2) trunk provisioning delays due to difficulties in preparing trunk plans with Qwest, and (3) Qwest's restrictions on access to inside wire in multiple dwelling units.[15] *See Ex. 301, at 2.* Specifically, AT&T details

[15] After AT&T filed its evidence in this docket, AT&T filed a formal complaint with the Commission in Docket No. UT-003120 on this issue of access to MDU inside wire. The issue is being addressed n that proceeding.

events and communications since 1998 between AT&T and Qwest to resolve the problem of customer outages due to Qwest's assignment of LRNs to AT&T customers. *Id. at 2-10.* AT&T explains the problems it has experienced in trying to work with Qwest to develop trunk provisioning plans. AT&T argues that many of the problems arise due to incorrect data Qwest has provided to the CLECs. *Id. at 10-12.*

WorldCom

40 Through the testimony of Dayna D. Garvin,[16] WorldCom argues that it would be premature to find Qwest in compliance with Checklist Item No. 1. *Ex. 391, at 45.* WorldCom states the following general concerns about how Qwest provisions interconnection: (1) Qwest has provided interconnection to CLECs only as a result of court orders and state commission decisions, not of its own volition; (2) Qwest should provide additional information to CLECs to improve the quarterly planning and forecasting process; (3) Qwest's product offering for mid-span meet points contains no route diversity; and (4) any determination of Qwest's compliance with Checklist Item No. 1 must wait for the conclusion of the ROC third party testing process. *Id. at 3-6.*

41 WorldCom has a number of concerns with Section 7 of the SGAT. First, WorldCom argues that the SGAT definition of interconnection is too limiting, and proposes alternate language. *Id. at 6-7.* WorldCom objects to SGAT language preventing interconnection trunking between local and access tandem switches, and precluding interconnection to access tandems. *Id. at 7, 15.* WorldCom also disputes SGAT language concerning how CLECs may establish a point of interconnection or POI with Qwest. *Id. at 8-9.* WorldCom objects to SGAT language outlining four methods of interconnection, and believes that CLECs should be given the option of other technically feasible methods of interconnection. *Id. at 9-10.* WorldCom raised concerns about the LIS InterLCA Facility interconnection option. *Id. at 10.*

42 WorldCom objects, as anti-competitive, to SGAT language requiring parties to charge each other based on Qwest's tariff for interLATA toll traffic. *Id. at 11-12.* WorldCom raises concerns about Qwest's proposal that CLECs deliver end office traffic through the CLECs' collocation facilities. WorldCom believes this contradicts the Act, which allows CLECs to interconnect where technically feasible. *Id. at 12.* WorldCom objects to SGAT language removing interexchange carriers, or IXC's from the list of parties for which Qwest will accept transit traffic from CLECs. *Id. at 12-13.* WorldCom expresses concerns over how Qwest provisions facilities when a CLEC provides forecasts. *Id. at 13.* WorldCom recommends changes to SGAT

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[16] Ms. Garvin adopted the direct testimony of Thomas T. Priday filed with the Commission on October 11, 2000. *See Exs. 391 and 392.*

language concerning the resizing and reclaiming of trunk groups. *Id. at 13-14.* WorldCom expresses concern about SGAT language requiring payment of construction charges. *Id. at 14.* WorldCom recommends changes to SGAT language concerning two-way trunk groups. *Id. at 14.* Finally, WorldCom objects to SGAT language requiring CLECs to pay for billing records. *Id. at 16.*

XO Washington

43 Through the testimony of Kaylene Anderson, XO Washington expresses its concern that Qwest refuses to compensate CLECs, including XO Washington, for interconnection facilities other than entrance facilities and transport within the Qwest local calling area. *Ex. 325, at 2.* XO Washington notes that the SGAT provides that Qwest will pay a share of interconnection facilities in proportion to the amount of local traffic (but not ISP-bound traffic) that Qwest terminates to the CLEC based on the interconnection facilities Qwest provides. *Id. at 3.* However, XO Washington notes that Qwest will not pay any portion for the costs of other facilities used to provide interconnection in the Qwest central office of CLEC office. *Id.* XO Washington states that Qwest's refusal to pay for those other facilities is based on Qwest's beliefs that entrance facilities and transport between switches are the minimum facilities necessary for interconnection. *Id. at 4.*

XO Washington disagrees with Qwest and believes both companies should share the cost of all facilities that are actually used to provide interconnection in proportion to their use of those facilities. *Id.* XO Washington identifies the interconnection facilities the cost of which carriers should be responsible for a proportional share, focusing on Qwest-provided facilities, facilities constructed by each carrier to a meet point, and CLEC -provided facilities, including collocation facilities. *Id. at 6-9.* XO Washington notes that Qwest has not paid or credited XO Washington for any proportion of the costs of facilities used to interconnect the companies' networks. *Id. at 9.*

44 XO Washington is also concerned about Qwest's ability to engineer its network to accommodate the needs of CLECs. *Id. at 9-10.*

Qwest's Response

45 Through his rebuttal testimony, Mr. Freeberg responds to the affidavits and testimony filed by AT&T, WorldCom, and XO Washington. *See Ex. 348.* Based on the SGAT language changes proposed by the parties, Qwest accepted certain language, proposed alternative language, or did not accept proposals. *Ex. 348, at 2.* Qwest filed a modified Section 7 of the SGAT with the testimony of Mr. Freeberg, reflecting language changes. *Ex. 349.*

46 Among other agreements, Qwest has agreed to exchange local calls at Qwest's access or toll tandem switch, and has stricken SGAT language relating to the interLCA facilities proposal. *Ex. 348, at 3, 8.* Qwest explains why it cannot agree to proposals concerning the following SGAT provisions: (1) trunk planning problems, (2) diverse routing of interconnection trunking, (3) charges for billing records, (4) reference to the IRRG, (5) use of entrance facilities for interconnection, (6) charges for interconnection tie pairs, (7) reciprocal charges for transport, (8) signaling options, and (9) blocking on interconnection trunks. *Id. at 10-32.*

47 Qwest also responds to AT&T and XO Washington's concerns about Qwest's service performance in provisioning trunks, blocking, and compensation for the costs of collocation. *Id. at 33-39.* Specifically, Qwest argues that performance measurement data show that Qwest's interconnection trunks are experiencing a low level of blocking, and that Qwest experiences the same level of blocking on its own non-interconnection trunks. *Id. at 33-35.* Further, Qwest believes that because collocation and UNEs are not available to ILECs on a reciprocal basis from CLECs, reciprocal compensation does not make sense in that context. *Id. at 38.*

Impasse Issues

48 During the workshops and follow-up workshops, Staff prepared an issues log to document matters over which the parties were in agreement or at impasse. The reference numbers following each issue correspond to the number assigned to the issue in the issues log. For example, WA-I-2 refers to Washington interconnection issue number 2. The final version of the log has been admitted as Exhibit 279.

49 After the parties filed an updated SGAT Section 7 and their briefs on impasse issues, they resolved the following interconnection issues: Issue WA-I-13, concerning the transportation and termination of EAS; Issue WA-I-52, concerning percent local usage factoring; and Issue WA-I-70, concerning routing of LRN porting traffic.

1. Indemnity (Issue WA-I-2)

Joint Intervenors' Position

50 AT&T and WorldCom (Joint Intervenors) argue that Qwest should not be allowed to avoid responsibility for its wholesale service quality and the potential adverse impact of poor service quality on competitors and competition. The Joint Intervenors request that Qwest indemnify resellers against poor service quality to address this concern. *Joint Statement and Brief Regarding Qwest's §§ 271 and 252(f) Obligations Related*

to Interconnection, Resale and LNP, at 23 (Joint Brief). The Joint Intervenors request the Commission order Qwest to add the following section to the SGAT:

> 7.1.1.1.2. In the event that Qwest fails to meet the requirements of Section 7.1.1.1, Qwest shall release, indemnify, defend and hold harmless CLEC and each of its officers, directors, employees and agents (each an "Indemnitee") from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, costs and attorneys' fees.
>
> Qwest shall indemnify and hold harmless CLEC against any and all claims, losses, damages or other liability that arises from Qwest's failure to comply with state retail or wholesale service quality standards in the provision of interconnection services.

51 Although they address the issue in connection with interconnection, the Joint Intervenors reserve the right to address concerns regarding Section 5.9 (Indemnity) of the SGAT in the appropriate workshop on general terms and conditions of the SGAT. *Joint Brief at 25, n.70.*

52 The Joint Intervenors argue that despite AT&T's efforts to provide Qwest with the necessary information to meet AT&T's interconnection trunking needs during joint trunk planning sessions, AT&T frequently encounters Qwest-caused delay, and in some cases indefinite holds, when ordering interconnection trunks from Qwest. *Joint Brief at 24.* The Joint Intervenors claim that late installation of interconnection trunks completely precludes a CLEC from conducting any business with any customers served by such trunks.

53 The Joint Intervenors claim that Qwest has no incentive to install competitors' interconnection trunks on a timely and reliable basis. Specifically, the Joint Intervenors state that Qwest's performance assurance plan, which is being developed through a ROC workshop process, is not yet available in this proceeding. The Joint Intervenors claim that the evidence Qwest presents on average installation of interconnection trunks through unaudited performance indicators, or PIDs, is premature, and does not match AT&T's experience. The Joint Intervenors believe that their proposed SGAT section 7.1.1.1.2 creates an incentive to ensure that Qwest will meet its interconnection obligations.

Qwest's Position

54 Qwest argues that the Joint Intervenors' request for additional indemnification commitments is unfounded. *Qwest's Legal Brief Regarding Disputed Workshop #2 Issues: Checklist Items 1, 11, and 14, at 15 (Qwest Brief)*. First, Qwest claims to have made extensive indemnification commitments in Section 5.9 of the SGAT. Qwest argues that a separate indemnification provision would be duplicative and could create confusion regarding Qwest's obligations.

55 Second, Qwest argues that the proper forum to address the issue is the ROC-sponsored workshops to develop a post-271, or Post-Entry Performance Plan (PEPP).[17] *Id. at 16.* Qwest notes that AT&T is an active participant in the PEPP workshops. Qwest states that the ROC process will result in self-executing payments by Qwest if its performance drops below a certain level. Qwest objects to AT&T's demand for a third type of indemnification specific to interconnection that would require Qwest to indemnify CLECs for damages incurred as a result of its failure to meet individual provisioning requirements. *Id.*

56 Qwest argues that neither the FCC nor the Commission require that Qwest indemnify CLECs for a failure to timely install interconnection trunks. *Id.*

Discussion and Decision

57 The issue of indemnity is, as Qwest notes, addressed in the general terms and conditions section of the SGAT, section 5.9. The Commission will address these general issues later in this proceeding.

58 The Joint Intervenors are correct that Qwest should not be allowed to avoid responsibility for its wholesale service quality. However, it is not clear at this point in the proceeding whether the Joint Intervenors' proposal for common contract indemnity in a new section 7.1.1.1.2 is appropriate. Once the ROC completes workshops to develop the performance plan, and a plan is available for review, the Commission will consider it as a part of this proceeding. The issue of indemnity is

[17] The states participating in the collaborative development of a Qwest post-271 enforcement plan are: Colorado, Iowa, Idaho, Montana, Nebraska, North Dakota, South Dakota, Oregon, Utah, Washington, and Wyoming. Expected benefits from the region wide approach include the potential for more uniform service standards within the Qwest region, more efficient use of state and industry staff resources and increased cooperation among the various parties. Preliminary plans call for three workshops to beheld between October 2000 and March 2001 to develop the post-271 enforcement plan, with the final product to be completed by April 2001. The state commissions have hired MTG Consulting and the National Regulatory Research Institute to manage the process and facilitate the workshops.

more appropriately addressed when considering general SGAT issues, and after the PEPP is available. The issue of the scope of Qwest's obligations to indemnify CLECs is deferred until later workshops addressing the general terms and conditions of the SGAT, and post-entry performance assurance.

2. Entrance Facilities used for Interconnection with UNEs (Issue WA-I-5)

Joint Intervenors' Position

59 The Joint Intervenors argue that Qwest should not be allowed to prohibit the use of entrance facilities for interconnection with UNEs, or dictate where CLECs must interconnect. The Joint Intervenors contend that they have employed dedicated trunk transport as a means of interconnection, or the physical linking of their networks, to particular Qwest switches.

60 Furthermore, AT&T claims that the rate for the interconnection trunks on entrance facilities should be part of reciprocal compensation and not charged at the private line rate. Joint Intervenors note that during the workshop, Qwest had agreed to substitute "Qwest provided" for the word "entrance" in Section 7.1.2 so as to remove controversy over this section. *Tr. at 1250.* However, the latest SGAT language on this section, does not reflect this change. *Ex. 434.* The Joint Intervenors assert that FCC rules support their claim that Qwest cannot prohibit mixing entrance facilities and UNEs.[18]

61 The Joint Intervenors also object to Qwest's reference to its Private Line Transport services as an alternative means of interconnection to the extent that Qwest intends to incorporate the non-TELRIC based rates associated with Private Line Transport. The Joint Intervenors contend that the Commission should permit CLECs to use spare capacity on special access facilities for interconnection, but that such spare capacity must be paid for at TELRIC rates as required by the Act and FCC regulation thereunder. To bring this section of the SGAT into compliance, the Joint Intervenors propose that section 7.1.2.1 should be re-written, and offered new language.

Qwest's Position

62 Qwest argues that there is a distinction between interconnection and UNE requirements. Qwest distinguishes entrance facilities, which it describes as a high-speed digital loop, from direct trunked transport, which it argues is a high-speed interoffice span. *Qwest Brief, at 23.* When a party requests that Qwest provide transport, and where excess electronics do not exist, Qwest places new electronics or

[18] 47 C.F.R. § 51.321(a) & (c).

cable in the conduit between the points requested. Qwest argues that entrance facilities are fundamentally different because they often entail arranging a new digital facility by placing buried or aerial cable in a new location, as opposed to adding a cable to existing conduit or adding electronics to existing fiber.

Joint CLECs' Position

63 The Joint CLECs generally side with the Joint Intervenors and oppose Qwest's proposal to charge CLECs for interconnection facilities at rates that are not based on forward-looking cost, i.e., Private Line Transport tariff rates, particularly if Qwest refuses to pay a proportionate share of those rates but will pay only a share of the significantly lower forward-looking costs. The Joint CLECs assert that Qwest's proposal is discriminatory and inconsistent with both the Act and the FCC's pricing requirements.

Discussion and Decision

64 The parties raise two primary issues with SGAT section 7.1.2: (1) whether Qwest should be permitted to dictate the point of interconnection or interface (POI), and (2) what rates Qwest should charge. An underlying concept that brings these issues to impasse is whether entrance facilities may be combined with UNEs.

65 The Joint Intervenors' argument is persuasive in that the FCC specifically determined that interconnection may be used to access unbundled elements.[19] Qwest's reliance upon paragraph 552 of the same order for the proposition that interconnection trunks cannot be employed to access UNEs is misplaced because the paragraph discusses virtual collocation as opposed to interconnection.

66 The Joint Intervenors' position is supported by the Act and FCC rules. Section 251(c) sets forth requirements for nondiscriminatory interconnection for telephone exchange and exchange access, as well as for access to UNEs, at the request of the CLEC at any technically feasible point within Qwest's network, subject to reciprocal compensation arrangements. FCC rules provide that the rates for transport and termination are to recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier (measured at peak period).[20] An ILEC may not impose limitations, restrictions, or requirements on the use of UNEs that would impair the ability of the CLEC to offer a service in the manner the CLEC intends.[21] Finally, previous interconnection at a particular point using particular facilities is substantial

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[19] *Local Competition First Report and Order, ¶ 549.*
[20] 47 C.F.R. § 51.709.
[21] 47 C.F.R. § 51.309(a).

evidence that interconnection is technically feasible at that point, or substantially similar points, in networks using substantially similar facilities.[22] ILECs must provide any technically feasible method of obtaining access to UNEs at a particular point upon request.[23]

67 Qwest's existing interconnection agreement with Sprint provides for mid-span meet points of interface where the actual point of interconnection will be subject to negotiation, and the agreement contemplates the use of mid-span meet arrangements for access to UNEs. *Ex. 234, at 7.2.* The Sprint agreement allows for negotiation on alternative facilities including DS1 and DS3. *Id. at 7.6.1.*

68 In its agreement with AT&T, Qwest will interconnect at any technically feasible point, subject to negotiation. *Ex. 230 at 2.1.* The MFS/Qwest agreement also contemplates interconnection for access to UNEs. *Ex. 233 at 17.* The MCI/Qwest agreement provides for interconnection at any technically feasible point, including the purpose of access to UNEs, and states that an entrance facility extends from the POI. *Ex. 232, at 3.1, 5.1.*

69 These agreements show that Qwest is already offering interconnection at any technically feasible point for access to UNEs. Subject to the provisions of 47 C.F.R. § 51.709, Qwest must provide in the SGAT for interconnection through entrance facilities at a POI determined by the CLEC, including for the purpose of access to UNEs.

70 In paragraph 340 of the Commission's Thirteenth Supplemental Order in Docket No. UT-003013, the Commission directed Qwest to file rates for entrance facilities. Not withstanding the Joint Intervenors' and Joint CLECs arguments concerning Qwest's private line rate for entrance facilities, the rates for entrance facilities in Docket No. UT-003013 shall be applicable in this instance as well, and subject to proportional sharing of costs based upon use for exchange access. CLECs must pay these TELRIC rates for the DS1's used for interconnection, as long as they pay Qwest's private line DS1 rate for the portion used for private lines. Qwest must modify its SGAT to permit interconnection using entrance facilities at any technically feasible POI chosen by the CLEC, including interconnection for access to UNEs, and must revise SGAT section 7.1.2 as agreed at the workshop. *See Tr. at 1250.*

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[22] 47 C.F.R. § 51.305(c).
[23] 47 C.F.R. § 51.321(a).

3. Collocation facilities on Qwest's side of POI – Rate elements for Entrance facilities (Issue WA-I-6)

Joint Intervenors' Position

71 In section 7.1.2.2 of the SGAT, Qwest proposes that "[w]hen interconnection is provided through the Collocation provisions of Section 8 of this Agreement, the Expanded Interconnection Channel Termination (EICT) rate elements, as described in Section 7.3.1.2.1 and Exhibit A will apply." *Ex. 271.* Qwest had originally required CLECs to pay the rate for Interconnection Tie Pairs (ITP), but replaced that rate element with EICT rates.

72 The Joint Intervenors argue that it is unjust and unreasonable to charge the CLEC for the EICT as it is Qwest's obligation to transport the traffic from the CLEC's collocation space or POI in this instance. *Joint Brief at 29-30.* The Joint Intervenors argue that the EICT is Qwest's "side" of the interconnection, not the CLECs. Further, the Joint Intervenors argue that the proposal is discriminatory because Qwest does not pay CLECs for similar service. The Joint Intervenors request that the Commission modify Qwest's SGAT to address its concerns or to make payments reciprocal between the CLEC and Qwest. *Joint Brief at 30.* This issue is addressed further below in section 13 referring to issue WA-I-43.

73 The Joint Intervenors argue that the connection from the CLEC's collocation space to Qwest's switch serves the same function whether it is referred to as an "EICT" or an "ITP," and that the connection carries the CLEC traffic from the CLEC collocation POI to Qwest's switch. The Joint Intervenors explain that EICT differs from ITP because Qwest builds "repeatering" into an EICT, increasing the cost of the EICT as compared to the ITP. The Joint Intervenors believe the SGAT attempts to increase CLEC costs by requiring CLECs to pay for the EICT.

Qwest's Position

74 Qwest does not address this issue in brief, but disagreed with the Joint Intervenors' proposal during the workshop. Qwest argues that it need not share costs that CLECs incur to interconnect through collocation in a Qwest wire center because Qwest does not have a reciprocal right to collocate in CLEC switching centers. *Ex. 348, at 38.* Qwest witness Freeberg stated that "since collocated equipment is typically used for multiple purposes, the apportioning of cost would certainly be complex." *Ex. 348, at 38.*

Joint CLECs' Position

75 Similar to their position on entrance facilities, the Joint CLECs argue that Qwest is responsible for paying its proportional share of the costs of all facilities used for interconnection.

76 The Joint CLECs argue that FCC rules require Qwest to pay its proportionate share of the costs incurred for all facilities used to interconnect the Qwest and CLEC switches for the exchange of traffic between their respective customers, including collocation elements used for interconnection when the CLEC collocates in the Qwest wire center. *Joint CLEC Brief at 3.* The Joint CLECs argue that both Qwest and the CLEC must pay their proportionate share of the nonrecurring and recurring costs of all facilities constructed between their respective switches that are used to exchange local traffic, including ISP-bound traffic.

77 The Joint CLECs note further that Qwest has never requested collocation nor sought interconnection in a CLEC switching center. *Joint CLEC Brief at 3, n.2.* The Joint CLECs argue that regardless of whether Qwest can collocate in a CLEC switching center, the CLEC is entitled to recover the costs of Qwest's use of facilities to the same extent that Qwest is entitled to recover the costs of the CLEC's use of Qwest's LIS Entrance Facilities. *Id. at 3-4.*

78 The Joint CLECs cite to XO Washington's list of the collocation elements that would be subject to cost sharing when the CLEC interconnects with Qwest using collocated equipment. *Joint CLEC Brief at 4.* The Joint CLECs note that Qwest never explained how apportioning Qwest's recurring and nonrecurring rates for these elements would be any more complex than apportioning the recurring and nonrecurring rates of other facilities used for interconnection. *Id. at 4.*

79 The Joint CLECs argue that the issue is one of pricing, and in particular, pricing for collocation. The Joint CLECs argue that Qwest's charges for LIS Entrance Facilities are much less than the comparable collocation elements, even though the facilities provided are the same. *Id.* In particular, the Joint CLECs note that an entrance facility for collocation would cost 3-12 times as much as an entrance facility for interconnection. *Id.* The Joint CLECs request that the Commission order Qwest to pay its share of collocation rates, because such a ruling would comply with FCC rules, but would also provide a partial check on Qwest's pricing for collocation and LIS entrance facilities to ensure that Qwest charges comparable rates for comparable facilities. *Id.*

Discussion and Decision

80 Whether Qwest calls a facility an EICT or an ITP functionally does not matter: The function of the facility is to carry traffic from the CLEC collocation POI to Qwest's switch. The issue at impasse is whether Qwest is responsible for providing and paying for its own facilities up to the POI. This is consistent with SGAT section 7.1.2.3 which provides that each party will be responsible for its portion of the build to the POI. The Act does not grant Qwest a right to collocate equipment in a CLEC wire center. Therefore, this is not an issue in this proceeding.

81 Most interconnection agreements provide that Qwest is responsible for the network on its side of the POI. For example, the MCI/Qwest agreement, Attachment 4 at section 7.1, provides that "Each party is responsible for providing its own facilities up to the Meet Point." *Ex. 232.*

82 Under the current SGAT Section 7, whether the facility running from the collocation POI to the Qwest switch is called an EICT or an ITP has a rate effect upon CLECs which appears to be related to Qwest's attempts to prohibit interconnection for access to UNEs. Because we have disposed of that prohibition above, the only distinction left is that apparently Qwest builds "repeatering" into an EICT, thereby increasing the cost. This issue is related to the issues discussed above concerning entrance facilities and below concerning EICT collocation (Issue WA-I-43). Similar to the decision below requiring Qwest to remove restrictions in section 7.3.1.2.1 associating ITPs with UNE provisioning and not interconnection, and the discussion above requiring Qwest to pay for facilities on its side of the POI, Qwest must also remove the application of EICT rate elements language in Section 7.1.2.2.

4. Mid-Span Meet POI Unbundled Access (Issue WA-I-7)

83 Qwest's SGAT at Section 7.1.2.3 states that a mid-span meet POI may not be used by a CLEC to access UNEs.

Joint Intervenors' Position

84 The Joint Intervenors object to this language. The Joint Intervenors explain that a mid-span meet arrangement consists of facilities used to carry traffic between the ILEC's network and the CLEC's network. These same facilities (essentially the fiber optic pipe running between two locations) are identical to facilities purchased as dedicated transport, and are capable of carrying traffic of end-users served through UNEs. In order to allow competitors to make the most efficient use of a mid-span meet, the Joint Intervenors recommend the SGAT be revised to allow the use of mid-span arrangements to access UNEs.

85 In addition to the prohibition against access to UNEs, WorldCom is also concerned that Qwest's understanding of meet point arrangements may be too narrow. WorldCom proposes adding to the SGAT new sections 7.1.2.3 through 7.1.2.3.4 which set forth, among other things, four technically feasible fiber meet design options.

Qwest's Position

86 Similar to its argument about the use of entrance facilities to access UNEs, Qwest asserts that mid-span meet points may be used for interconnection but not to obtain access to UNEs. Qwest believes that its proposal is a modest restriction on the use of the mid-span meet point for interconnection. Qwest relies on paragraph 553 of the *Local Competition First Report Order* in arguing that both parties must benefit from the arrangement in order for them to share the cost.

Discussion and Decision

87 Similar to the discussion above concerning the use of entrance facilities to access UNEs, Qwest must eliminate from the SGAT the prohibition against using mid-span arrangements to access UNEs. FCC rules govern the methods of obtaining interconnection and access to unbundled elements and specify that the ILEC must provide any technically feasible method of obtaining access to UNEs at a particular point upon request.[24] The previous discussion on entrance facilities is incorporated into this discussion.

88 Approving Qwest's proposal would eliminate an efficient method of interconnection and access to UNEs. Because Section 251(c) uses the term "at any technically feasible point" and because Qwest has implemented that term in numerous existing interconnection agreements, there is no need to include WorldCom's proposed new language in the SGAT.

5. Relationship of Qwest's SPOP Policy with the SGAT (Issue WA-I-8)

Qwest's Position

89 This issue concerns the relationship to the SGAT and existing interconnection agreements with Qwest's policy for a Single Point of Presence (SPOP). Qwest states that the SPOP was developed as an initial response to Qwest's decision to permit the exchange of local traffic at the toll tandem, and to eliminate the interLCA facilities

[24] 47 C.F.R. § 51.321(a).

proposal. *Ex. 473; Tr. at 2398.* The SPOP is intended as a guide to local interconnection service; However, it is not the sole definition of LIS and does not replace any existing form of LIS available or individually negotiated by a CLEC. *Tr. at 2391.* Qwest argues that language in the SPOP supports this analysis: "If our wholesale customers have an existing CLEC Local Interconnection Service (LIS) or WSP (wireless) Type 2 Interconnection network, they can keep their existing trunking network intact, with its multiple points of interconnection (POI), adding to this current configuration as appropriate, or utilize the new SPOP in the LATA product." *Ex. 473, ¶ 4.*

90 Qwest states asserts that the model agreement for the SPOP is the SGAT, and that the concept of local interconnection through the access tandem, local tandem or end office is set forth in Section 7 of the SGAT. *Tr. at 2399.*

AT&T's Position

91 AT&T questions whether Qwest intends the SPOP or interconnection agreements to govern whether CLECs may interconnect at access tandems. AT&T believes that, in practice, Qwest product managers may treat the SPOP product as an either/or choice for CLECs, requiring them to either negotiate or retain their own LIS agreement or elect the SPOP in its entirety. *Tr. at 2399.* Specifically AT&T reported difficulty in getting access to the toll tandem through the SPOP if they already had access to the local tandem. AT&T requested that Qwest clarify how the SPOP is incorporated into and consistent with the language of the SGAT. *Tr. at 2387.* AT&T further argues that the SPOP product will lead to inefficient interconnection design and that the SPOP product violates Section 251(c)(2) and the FCC rules. *Joint Brief at 36.* As a remedy, AT&T suggests that Qwest should recast its SPOP product and its SGAT to eliminate restrictions on the CLECs' ability to designate the point or points of interconnection CLECs deem to be most efficient.

Joint CLECs' Position

92 Similar to AT&T, the Joint CLECs argue that Qwest may not require interconnection at each Qwest local tandem, and that to do so would lead to an inefficient network design. They argue that the SPOP product must be integrated into the SGAT if Qwest intends to rely on it as a means of meeting its legal obligations for interconnection. *Tr. at 2398.* The Joint CLECs are finding it difficult both to use the SPOP product and to have direct trunking to local tandems and end offices. *Tr. at 2396.* The Joint CLECs propose that the SGAT be amended to clarify this arrangement by specifying two terms. *Joint CLEC Brief at 9.* Those terms would require Qwest to permit interconnection for the exchange of local traffic at Qwest's access tandem:

(1) without requiring interconnection at the local tandem, at least in those circumstances when traffic volumes do not justify direct connection to the local tandem; and

(2) regardless of whether capacity at the access tandem is exhausted or forecasted to exhaust unless Qwest agrees to provide interconnection facilities to the local tandems or end offices by the access tandem at the same cost to the CLEC as the interconnection at the access tandem.

Id.

Sprint's Position

93 Sprint raises concerns over the status of ISP traffic when using SPOP and CLEC rights to receive reciprocal compensation for ISP traffic. Sprint notes that the SPOP provides that "Qwest will not pay reciprocal compensation for ISP-bound traffic." *Ex. 473, at 3.* Sprint also raises concerns about Qwest interpreting a CLEC's election of the SPOP as an agreement to terminate any existing reciprocal compensation arrangement the CLEC may already have for ISP traffic.

Discussion and Decision

94 The SPOP is a specific Qwest product that exists outside of the SGAT. Qwest asserts that the SPOP policies are implemented in the SGAT. The parties raise a genuine issue about whether this is true, and whether Qwest employees are using the SPOP or the SGAT as the document governing how to implement the product. Further, the parties raise concerns about how the SPOP should be integrated with the SGAT, or, for that matter, into the terms of individually negotiated agreements.

95 This issue focuses more on Qwest's performance in provisioning the SPOP product than language in the SGAT. Discussion of Qwest's performance in provisioning the product is more appropriately handled during workshop discussions on Qwest's post-entry performance plan and the ROC third party OSS testing process. However, Qwest should include in the SGAT the two provisions proposed by the Joint CLECs. *See Joint CLEC Brief at 9.* This language would begin to resolve the problem by ensuring that CLECs have access to interconnection through the access tandem or at reasonable cost.

6. One-way Trunk Group Interconnection (Issue WA-I-12)

Qwest's Position

96 Through the testimony of Mr. Freeberg, Qwest clarifies how it provides CLECs a point of interconnection in cases of two-way and one-way trunking. Qwest states that SGAT section 7.2.2.1.2.1 allows local traffic to be transported by either one-way or two-way trunking, consistent with FCC requirements in paragraph 219 of the *Local Competition First Report and Order. Qwest Brief at 6.* If a CLEC chooses two-way trunking, the CLEC defines the POI. If the CLEC chooses one-way trunking, the CLEC defines the POI for traffic flowing from the CLEC to Qwest. However, if a one-way trunk carries traffic from Qwest to the CLEC, Qwest believes it should be in the position to decide the POI and the route that the traffic follows. *Tr. at 2426, 2428.* Qwest argues that any other arrangement could lead to a requirement that Qwest develop an inefficient network and would represent a failure by the CLEC to negotiate in good faith as specified under Section 251(c)(1). *Qwest Brief at 7.* Qwest does propose language to allow CLECs to choose the POI to the extent that traffic volumes warrant. *Tr. at 2426.*

Joint Intervenors' Position

97 The Joint Intervenors argue that the CLEC should be able to determine the POI in cases where a dispute arises between the parties on the end points of Qwest one-way trunk groups, because Qwest has not permitted the establishment of an efficient route to a single point of interface. *Tr. at 2425.* AT&T disagrees with Qwest's proposed language and proposes additional language changes. *Id.* AT&T proposes that Qwest amend the SGAT to include the following sentence: "If the Parties do not agree on the end points of Qwest's one-way trunk groups, CLEC shall determine such points." *Ex. 474.* AT&T indicates that this is less a dispute over the specific language than it is a dispute over the implementation of the trunking network arrangements. AT&T suggests that one remedy for the problem is to insert the following sentence into SGAT section 7.2.2.1.2.1: "The point or points of interconnection for such one-way trunk groups shall be those designated by the CLEC." *Joint Brief at 37.*

Discussion and Decision

98 The dispute between the parties is whether the CLECs or Qwest should be able to determine the POI when Qwest provisions a one-way trunk group for traffic flowing from Qwest to the CLEC. In its *Local Competition First Report and Order,* the FCC decided that a proposal by MCI that competitors and incumbents designate POIs on each other's networks was best addressed in arbitrations and negotiations between

parties.[25] The FCC also stated that "requesting carriers have the right to select points of interconnection at which to exchange traffic with an incumbent LEC under section 251(c)(2)."[26]

99 Both Qwest and the Joint Intervenors argue that the Commission should adopt their position to encourage the most efficient use of their networks. Qwest's network structure may be very different from a CLEC's. What is more efficient for Qwest may not be for a CLEC and vice versa. The best outcome is for the parties to negotiate the POI, as suggested by the FCC. However, given that the dispute is limited to one way trunking from Qwest to the CLEC, Qwest's arguments are persuasive that Qwest should determine the POI and how to route the trunk most efficiently in its network.

7. Direct-trunked transport mid-span meets (Issue WA-I-16)

Joint Intervenors' Position

100 The Joint Intervenors argue that Qwest's 50 mile limitation on direct-trunked transport where neither the CLEC nor Qwest have facilities violates the CLEC's right to choose the most efficient point of interconnection, and is contrary to Qwest's obligations under Section 271. The Joint Intervenors argue that Qwest's proposal places the burden of building Qwest's own network onto CLECs. The proposal requires CLECs to build a mid-span trunk on all trunk interconnection routes over 50 miles where neither the CLEC nor Qwest have facilities in place. The Joint Intervenors dispute Qwest's argument that a CLEC might demand hundreds of miles of direct-trunked transport to interconnect its network to Qwest's network as an extreme and unsubstantiated justification for its proposal. *Tr. at 1308.*

101 The Joint Intervenors further argue that Qwest's proposal violates Section 251(c)(2) of the 1996 Act.

Qwest's Position

102 Qwest argues that while the Act anticipated that some modifications to an incumbent's network would be encompassed within its duties under Section 251(c)(2), Congress also recognized that there would be some reasonable boundary on this obligation. *Qwest Brief at 8, n. 24.*

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[25] *Local Competition First Report and Order,* ¶ 220.
[26] *Id.* ¶ 220 n.464.

103 Qwest admits that FCC rules require ILECs to adapt their networks for interconnection or use by other carriers, to condition loops and to activate vertical features to accommodate access to UNEs. Qwest interprets FCC policy as merely allowing competitors access to parts of the existing network Qwest has decided not to use, but allowing ILECs to determine whether an alteration requires substantial changes to the network.

104 Qwest argues that the FCC has specifically acknowledged that some reasonable end point to an incumbent LEC's obligation in this context is appropriate, stating:

> Regarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.[27]

Moreover, in defining meet point arrangements, the FCC states:

> the "point" of interconnection for the purposes of Sections 251(c)(2) and 251(c)(3) remains on "the local exchange carrier's network (e.g. main distribution frame, trunk-side of the switch), and the limited build-out of facilities from that point may then constitute an accommodation of interconnection."[28]

105 Qwest argues that if incumbent LECs were required to build out their facilities to any distance to accommodate interconnection, the FCC's use of the word "limited" in this context, and its statement regarding deferral to state commissions to determine the reasonable distance for mid-span meet points, would have no meaning. Qwest believes that if the FCC has limited an incumbent's obligations in a meet-point arrangement, that it would endorse similar, reasonable limitations on the accommodations Qwest must make when providing direct-trunked transport.

Discussion and Decision

106 In the Arbitrator's Report and Decision in Commission Docket No. UT-960310, the Arbitrator's determination of Issue 7 addressed whether the Commission should allow U S WEST to place a distance limit on mid-span meets. The issue must be considered in light of the CLEC's right to unilaterally select interconnection at any

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[27] *Local Competition First Report and Order,* ¶ 553.
[28] *Id.*

technically feasible point and Qwest's responsibility for the cost of facilities on its side of a meet point. Consistent with the arbitrator's decision, it is reasonable to impose a distance limit on Qwest's obligation to build facilities to a meet point. Qwest has proposed a reasonable limit of fifty miles, which is much greater than the one mile limit in Qwest's current agreement with MCI. *See Ex.232, Attachment 4 at 2.2.* There is no need to eliminate or modify the SGAT language.

8. MF signaling (Issue WA-I-19)

Joint Intervenors' Position

107 During the workshops, AT&T proposed and Qwest agreed to a new SGAT section 7.2.2.6.3, to address the need for MF, or multifrequency, signaling options where the Qwest switch does not have SS7 signaling capability. *See Ex. 496; Tr. at 1316-17, 2536-37.* AT&T also requests the same option when a Qwest central office switch does not have SS7 diverse routing. MF signaling is multi-frequency, in-band signaling that was widely used before the advent of SS7 signaling. *Joint Brief at 41.* The Joint Intervenors note that current switches are generally capable of operating under both MF and SS7 signaling.

108 Joint Intervenors raised the issue because Qwest has refused interconnection with AT&T in rural areas where Qwest's switches have not been updated, because the older switch employs MF signaling rather than SS7 signaling. The Joint Intervenors assert that Qwest has requested that AT&T make a bona fide request before allowing any interconnection at what AT&T asserts is otherwise a technically feasible point of interconnection. AT&T proposed the SGAT language in Exhibit 496 concerning diverse routing to resolve the delay or denial of interconnection at any technically feasible point.

109 AT&T requests additional SGAT language stating "or if the Qwest Central Office Switch does not have SS7 diverse routing." The Joint Intervenors assert that this language is necessary because in the event of a signaling failure, the CLEC customers would be left stranded, while the Qwest customers could continue to make calls. *Joint Brief at 42.* The Joint Intervenors argue that this lack of redundancy in Qwest's network has created a barrier to competition because some customers have refused to switch to CLECs due to this lack of diversity in the signaling network. The Joint Intervenors believe Qwest's failure to include the additional language violates the FCC's interconnection requirements and places Qwest out of compliance with Section 271.

Qwest's Position

110 Qwest believes building in this redundancy is not necessary. Qwest states that the SS7 system would be fixed quickly in the event of a failure, and Qwest would have to build MF links that it doesn't need to build for itself because when SS7 goes down customers can still talk to other customers in their central office. Qwest would allow CLECs to purchase such redundancy but only through a *bona fide* request. *Qwest Brief at 21.*

111 Qwest argues that AT&T's additional language is unnecessary and that Qwest has no legal duty to provide additional levels of redundancy in its network. Qwest argues that even if Qwest agreed to AT&T's proposed language, and the hypothetical failure occurred, both sets of customers served by the respective local switches of AT&T and Qwest would be severely restricted in their ability to place calls for the brief span during which signaling was interrupted. Qwest argues that the Joint Intervenors have provided no FCC orders or court decisions that would require Qwest to establish this type of signaling link redundancy.

112 Qwest argues that the FCC has only required BOCs to meet the "reasonably foreseeable" demand of CLECs even for checklist items. *Qwest Brief at 21, n.59, citing Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long distance, Inc., for Provision of In-Region, Inter-LATA Service in Louisiana,* Memorandum Opinion and Order, CC Docket No. 98-121, 13 FCC Red 20599, ¶ 54 *(Second BellSouth Louisiana Order).* Qwest asserts that the hypothetical concerns of a single carrier do not rise to the level of a "reasonably foreseeable" demand. Qwest argues that in the very unlikely event that this situation should occur, Qwest would place the repair of the failed signaling link on the highest priority and the signaling would be restored as soon as possible, reducing any parity issue to the level of de minimus. *Qwest Brief at 12.*

113 Despite these arguments, Qwest does not refuse to provide multi-frequency trunks. Qwest proposes that if a potential CLEC customer is actually concerned about this hypothetical situation, the CLEC could request this capability by submitting a bona fide request. Qwest will consider such requests on a case-by-case basis. *Id.*

Discussion and Decision

114 During the workshop, Staff requested that Qwest provide a list of the names and locations of Qwest fiber spurs in Washington state that do not have diverse fiber routing in and out. *Ex. 507, Bench Request No. 30.* In response to Bench Request No. 30, Qwest provided a map showing the Qwest interoffice network facilities used to serve customers in the state of Washington. Qwest also explained that its network

facilities include not only fiber optics, but a mix of Fiber Optics, Digital Copper T Carrier, Digital Radio, and Analog Radio.

115 Qwest explained that the map provided in response to the bench request covers Qwest's Central Office Locations, Independent Company Central Office Locations, LATA Boundaries, the 206/360 NPA Boundary, and the Independent Company Facilities. The map shows the Fiber Regeneration Locations, Qwest Radio Repeaters, Independent Company Radio Repeaters, Radio Passive Reflectors, and Pair Gain Locations. Qwest explained that a single line on the map does not mean that there is only one cable in place for that interoffice facility. *See Ex. 507.*

116 Qwest further explained that it has deployed SS7 technology to all of its central offices in the State of Washington, and that all equipped offices have in place a minimum of two links to the SS7 network.

117 The information provided by Qwest in response to Bench Request No. 30 indicates that there is SS7 signaling capability with diverse routing in every central office. Based on the information provided by Qwest, the Commission finds that there is no need to include additional language in the SGAT to address diverse routing. If a special circumstance arises, Qwest has agreed that CLECs may make a bona fide request for additional diverse routing capability.

9. Forecasting Disputes, Deposits (Issue WA-I-24)

118 Sections 7.2.2.8.6. and 7.2.2.8.6.1 of the SGAT provide Qwest the right to require deposits from CLECs in the case of forecast quantities. Qwest will make capacity available at its lower forecast capacity. Qwest may require an up-front deposit of up to 50 percent of the estimated capital cost of the requested trunking, if the CLEC's trunk utilization over the prior 18 months is 50 percent or less. The deposit would be returned to the CLEC if its trunk utilization exceeded 50 percent within six months. In the case of a CLEC requesting Qwest to build to the CLEC's higher forecast, Qwest may require a 100 percent deposit. *Ex. 434, at 8, 9.*

Joint Intervenors' Position

The Joint Intervenors raise various performance parity issues, complaining that Qwest insists upon CLECs providing trunk forecasting, but then refuses to build to the CLEC forecast or its own forecast unless certain conditions are met. The Joint Intervenors assert that under Qwest's proposal, in a dispute over the CLEC forecast versus Qwest's own forecast, Qwest will make capacity available based on the lower forecast (which is usually Qwest's forecast). The Joint Intervenors assert that where the CLEC's trunk utilization over the preceding 18-month period is 50 percent or less

of its forecast for each month, Qwest may require a 50 percent deposit of the estimated capital cost to provision the forecasted trunks before Qwest will build to the lower forecast. They state that Qwest will return the 50 percent deposit if the CLEC's state-wide average trunk forecast-to-usage ratio exceeds 50 percent, but if the usage does not exceed 50 percent, Qwest will keep a pro rata share of the deposit. If Qwest fails to have forecasted capacity available when the CLEC orders trunks, Qwest will refund a pro rata portion of the deposit. Finally, the Joint Intervenors state that Qwest is willing to build to the higher forecast, but may require a 100 percent refundable deposit of the estimated cost to provision the new trunks.

119 The Joint Intervenors complain that the purpose of making forecasts is to ensure there is adequate capacity on Qwest's network to avoid call blocking. The Joint Intervenors assert that Qwest shows only slightly more trunk utilization than the CLECs. *Ex. 435.* The Joint Intervenors worry that when a CLEC's utilization falls, Qwest will likely assess the CLEC a 50 percent deposit of the estimated capital cost to build the forecasted trunks even though Qwest is not actually building the trunks and reserving them for the use of the CLEC that forecasted them. The Joint Intervenors are concerned that the trunks could be lost to Qwest's own internal use or other CLECs long before the CLEC that provides the forecast and pays the deposit places an order. *Tr. at 2560.*

120 The Joint Intervenors also allege that the lower forecast is likely to be Qwest's own forecast. However, the CLEC is expected to pay a deposit so that Qwest will have the aggregate capacity it predicts it will need, regardless of what the particular CLEC forecasts.[29] The Joint Intervenors argue that similar problems arise when considering Qwest's 100 percent deposit to build to the higher, presumably CLEC, forecast.

121 The Joint Intervenors argue that Qwest's alleged surplus inventory is caused by Qwest's own trunking policies, both past and present, which required CLECs to employ, for example, separate trunks to carry interLATA toll calls and obtain one-way trunks to numerous, unnecessary end offices. *Joint Intervenors Brief, at 44.* In addition, Joint Intervenors argue that some CLECs have had to order more trunk facilities than they immediately needed, because Qwest has traditionally lacked trunk facilities and experienced delays in filling trunk orders. *Tr. at 2567.* In the case of two-way trunks that carry both CLEC and Qwest traffic, Joint Intervenors claim that Qwest may be as much to blame for under utilization as any CLEC. *Tr. at 2565.* The Joint Intervenors also question the accuracy of the utilization measurements for both Qwest and CLECs, noting that an August 2000 Exhibit shows 35,457 tandem trunks

[29] Aggregate capacity includes the forecasted demand for Qwest and the CLECs; therefore the forecast is an aggregate of all forecasts.

while the Response to Bench Request No. 31 shows 27,076 trunks, and data for evaluating performance measure NI-1 shows 22,138 trunks. *Joint Brief at 45, n.124.*

Qwest's Position

122 Qwest agreed in SGAT section 7.2.2.8.4 to "ensure that capacity is available to meet CLECs' [interconnection] needs as described in the CLEC forecasts." Qwest states that, in many instances, the forecasts will require it to construct new facilities at substantial expense. Qwest is concerned that it may incur costs to build new facilities, which will lay underutilized, dormant or dark. *Qwest Brief at 17.* Qwest says under-utilization has already cost Qwest an unnecessary $300 million region-wide, and if the forecasting practices of CLECs continues, this number will only grow. *Tr. at 2561.*

123 Qwest argues it is entitled to recover its costs, but that CLECs currently do not pay anything for a LIS trunk until they order it. If the order never materializes because the CLEC over-forecasts, Qwest will build facilities that the CLEC never uses, and for which Qwest is never paid. Qwest asserts that any nonrecurring charges associated with interconnection trunks, if charged or paid at all, are a fraction of the actual cost of constructing the facility. *Qwest Brief at 18, n. 51.*

124 Qwest also argues that the proposed process is intended to provide CLECs the incentive to give Qwest accurate forecasts. Qwest rebuts the argument that CLECs should be refunded the deposit if Qwest ever has occasion to use the facility. Qwest says that this would lead to ways for CLECs to avoid being financially responsible for their inflated forecasts. Qwest says it already has enough incentive to act on CLEC's forecasts because there are self executing penalties through the performance assurance plan process if trunks are not provided timely and in sufficient volume to avoid trunk blocking. Qwest points out it has agreed to the CLEC demands on this point in the PEPP process. *Qwest Brief at 18.*

Joint CLECs' Position

125 The Joint CLECs assert that Qwest and CLECs share the responsibility for interconnecting their networks, but Qwest imposes on CLECs the burden to forecast and order interconnection facilities from Qwest sufficient to carry all local traffic between their networks, including traffic originated by Qwest's customers and terminated to CLEC's customers. *See Tr. at 2564-54; 2773-74.* The Joint CLECs say that Qwest now seeks to impose the additional burden of paying a deposit to Qwest before Qwest will construct those facilities.

126 The Joint CLECs make several arguments. First, the Joint CLECs argue that the charge Qwest proposes is not really a deposit. A "deposit" is "money given as a pledge or down payment." *Joint CLEC Brief at 10, citing Webster's New Collegiate Dictionary.* The Joint CLECs argue that Qwest does not propose to sell or transfer ownership of the facilities it builds to the CLEC, even if the CLEC pays a 100 percent down payment. The Joint CLECs complain that this is unfair because payment of the deposit does not guarantee that the facilities will be available when the CLEC orders them. *Joint CLEC Brief, at 10.* The Joint CLECs argue that the trunks to which that deposit are applicable should be dedicated to the CLEC, and the CLEC should be entitled to an ownership interest in those trunks in the same percentage as the deposit.

127 The second concern the Joint CLECs have with Qwest's deposit proposal is that they believe Qwest proposes to penalize CLECs for alleged underutilization of trunks. The proposal requires CLECs to pay an unrefundable deposit for Qwest to construct trunks in one area if there are underutilized trunks elsewhere, even if those trunks subject to a deposit are used at or over 50 percent of capacity, unless all trunks statewide are used at or over 50 percent of forecasted capacity.

128 Third, the Joint CLECs point out that Qwest proposes to calculate statewide trunk utilization based not on usage of the trunking in place but based on trunking the CLEC forecasted six months in advance of provisioning. Joint CLECs complain that Qwest will calculate the usage based on the trunks originally forecast, rather than on the revised forecast and order.

Discussion and Decision

129 The purpose of forecasting is to assure sufficient capacity on Qwest's network to avoid blocked calls, and encourage efficient use of resources. The burden should be balanced between the two parties, and so it is reasonable that there should be a deposit. However, deposits should not be based on overforecasts or underutilization of trunk groups in other geographic areas. In addition, Qwest should guarantee the availability of the forecasted trunks for which the CLEC paid the deposit. The forecasting process is still not fully implemented. As forecasting and other interconnection policies generally begin to mature, and if Qwest fails under the PEPP process to provision trunks without delay, the issue will need to be revisited. Qwest must revise the SGAT language accordingly, but the parties should also address the pro rata formula for refundable deposits and return with an agreeable formula or brief the matter for further decision making.

130 Section 4 of Qwest's Exchange and Network Services Tariff WN U-40, governing Construction Charges and Other Special Charges (Line Extension Charges) (at 4.2.2(B)(2) on Original Sheet 4, and 4.2.2(A)(1) on Original Sheet 5) provides that

Qwest retains ownership of facilities constructed largely at customer expense. The question of ownership raised by the parties is resolved in a similar manner in this proceeding. The incentive to provide accurate forecasts and the burden this places upon CLECs must be balanced together with Qwest's obligations under the Act as well as with the interests of Qwest's end-user ratepayers. The burden may fall to ratepayers if Qwest were to build facilities for CLECs that were unused or non-revenue bearing due to poor CLEC forecasts. The SGAT need not be modified to include the Joint CLECs' request for transfer of ownership.

10. Ownership of special construction facilities (Issue WA-I-30)

Qwest's Position

131 Qwest asserts that the parties have agreed to language that will permit Qwest to charge special construction charges when a CLEC requests Qwest to provide interconnection facilities in extraordinary circumstances. *Qwest Brief at 19.* No other party discussed the issue in brief. With respect to the issue of ownership, Qwest asserts that projects involving special construction charges are no different than those that do not involve such charges. Qwest argues that parties compensate Qwest through a non-recurring construction charge in the same way a retail end-user would compensate Qwest pursuant to a retail tariff. *Id.*

132 Qwest argues that, as an example, pursuant to section 4.2.2 of Qwest's Washington intrastate tariff, Qwest charges end-user customers special charges for line extensions to premises outside of the base rate area, but the tariff provides that "[a]ll line extensions are owned and maintained by the Company."[30] In addition, Qwest' notes that even though applicants may elect to furnish and set required poles or provide a trench on their own property to avoid charges, ownership of the facilities remains with Qwest. *Id.*

133 Qwest claims that it owns the facilities built whether in a retail environment or under the Act. Under the Act, CLECs lease facilities owned by incumbents. Qwest argues that the Colorado Commission has held that Qwest should retain ownership when constructing facilities for CLECs. *Qwest Brief at 20.*

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[30] Qwest Brief at 19, citing Terms, Conditions, Rates and Charges Applying to the Provision of Intrastate Exchange and Network Services Within the Operating Territory of Qwest Corporation in the State of Washington, WN U-40, effective August 30, 2000, at 4.2.2 (A)(1).

Discussion and Decision

134 Consistent with the discussion of ownership of facilities concerning issue WA-I-24, above, Qwest need not revise its proposed SGAT Section 7.2.2.8.16. This finding is also consistent with the FCC's determination that:

> Carriers requesting access to unbundled elements within the incumbent LEC's network *seek in effect to purchase the right to obtain exclusive access to an entire element, or some feature, function or capability of that element.* For some elements, especially the loop, *the requesting carrier will purchase exclusive access to the element for a specific period, such as on a monthly basis.* Carriers seeking other elements, especially shared facilities such as common transport, *are essentially purchasing access to* a functionality of the incumbent's facilities on a minute-by-minute basis.[31]

135 The FCC has also stated:

> We further conclude that a telecommunications carrier purchasing access to an unbundled network facility *is entitled to exclusive use of that facility for a period of time*, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled *to use of that feature, function, or capability for a period of time.* The specified period may vary depending on the terms of the agreement between the incumbent LEC and the requesting carrier.[32]

136 Following the FCC's determinations, there is no right of ownership, but a right to use facilities for a period of time when purchasing access to UNE's, or features, functions, or capability.

11. Exchange Access (Issue WA-I-35)

137 In SGAT section 7.2.2.9.3.2, Qwest proposes to prohibit commingling of exchange service traffic with switched access traffic on the same trunk group. The Joint Intervenors object, stating that such commingling is technically feasible and not prohibited by the FCC. *Joint Brief, at 45.*

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[31] *Local Competition First Report and Order*, ¶ 258 (emphasis added).
[32] *Id.* at ¶ 268 (emphasis added).

138 During briefing, Qwest acknowledged that the Commission has determined that such commingling is permissible, and agreed to allow such commingling in the state of Washington. *Qwest Brief, at 28.*

139 Given Qwest's concession of this issue, Qwest must remove Section 7.2.2.9.3.2 from the SGAT.

12. Exchange of Local Traffic at the Tandem Switch/Trunk Ordering (Issues WA-I-37 and WA-I-57)

Joint Intervenors' Position

140 Qwest's proposal in SGAT Section 7.2.2.9.6 requires CLECs to terminate local traffic on either Qwest local tandems or end offices and requires CLECs to order trunking to local tandems and end offices. The Joint Intervenors argue that unlike other BOCs, Qwest has artificially divided its tandem switches into local tandems and access tandems. They note that this separation is made in a single tandem switch through the use of switch modules. The Joint Intervenors further assert that Qwest will allow a CLEC conditional interconnection at the access tandem, but will deny such interconnection if there exists a local tandem serving a particular end office, even if the local tandem has exhausted capacity. *Joint Brief at 46.* The Joint Intervenors argue that the FCC has concluded that interconnection at the tandem is appropriate and technically feasible.[33] They further note that Qwest has admitted that interconnection at the access tandem is technically feasible. *Tr. at 1369.*

141 The Joint Intervenors assert that CLECs may select the point or points at which to interconnect.[34] They argue that the FCC had provided that the "incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it proves to the state public utility commission that interconnection at that point is technically infeasible."[35] The Joint Intervenors assert that interconnection at the access tandem is frequently the most efficient for the CLEC. The Joint Intervenors recommend that the Commission order Qwest to allow interconnection at the access tandem without the conditions proposed in SGAT section 7.2.2.9.6.

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[33] *Local Competition First Report and Order*, ¶ 210.
[34] *Id.* ¶ 172; *In the Matter of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Service, Inc., d/b/a southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Service in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65-, FCC 00-238, ¶ 78 (rel. June 30, 2000) *(SBC Texas Order).*
[35] *SBC Texas 271 Order*, ¶ 78; 47 C.F.R. § 51.305(e).

Joint CLECs' Position

142 The Joint CLECs argue that SGAT section 7.2.2.9.6 violates that Act and requires construction of excessive and unnecessary interconnection facilities. *Joint CLEC Brief at 7.* The Joint CLECs argue that Qwest may not require interconnection at each Qwest local tandem pointing out that the Act and FCC rules require Qwest to provide interconnection with its network "at any technically feasible point."[36] The Joint CLECs assert that the Commission has interpreted this and other applicable federal law to require that Qwest allow CLECs to interconnect at no more than a single point in each LATA, and at an access tandem, to exchange local traffic. *Id. at 6.* The Joint CLECs argue that Qwest's SGAT ignores these obligations and requires CLECs to interconnect at each Qwest local tandem or end office serving an area in which the CLEC has customers and permitting interconnection at the Qwest access tandem only if no local tandem serves that area.

143 Although Qwest has expressed the need for efficient interconnection, the Joint CLECs argue that section 7.2.2.9.6 promotes inefficient interconnection. The section requires trunking to each local tandem, regardless of the level of traffic exchanged between the CLEC and end offices served by that tandem. While Qwest and a CLEC may not exchange sufficient traffic to justify a trunk group to each local tandem in less urban areas, the SGAT imposes such inefficient trunking, rather than permitting a single trunk to the Qwest access tandem that serves that area. *Id. at 7.*

144 The Joint CLECs assert that Qwest's concerns about stranded capacity do not apply when a CLEC chooses to route local traffic through the access tandem because the traffic volumes do not justify separate trunk groups to the local tandems. *Id. at 8.* They argue that interconnection at the access tandem under these circumstances would not impact capacity on Qwest's toll and local networks any more than when no local tandem serves a particular area. The Joint CLECs assert that the SGAT could require direct trunks to the local tandem when traffic volumes justify a separate facility, just as it currently requires direct trunks to an end office under such circumstances. *Id.*

145 The Joint CLECs propose that Qwest should either permit interconnection at the access tandem or provide interconnection facilities to the local tandems and end offices served by that access tandem at the same cost to the CLEC as interconnection at the access tandem.

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[36] 47 U.S.C. § 251(c)(2)(B); 47 C.F.R. § 51.305(a)(2).

Discussion and Decision

146 The FCC has concluded that interconnection at the tandem is technically feasible.[37] In its *Local Competition First Report and Order,* the FCC rejected the imposition of reciprocal requirements on CLECs to interconnect at a point of the incumbent's choosing.[38]

147 The Joint CLECs are persuasive in their argument that interconnection at the access tandem when traffic volumes are low would not impact capacity on Qwest's toll and local networks any more than when no local tandem serves a particular area. Most importantly, Qwest has admitted that interconnection at the access tandem is technically feasible and efficient. *Tr. at 1369.* Therefore, Qwest's must revise the SGAT to permit interconnection for the exchange of local traffic at the point determined by the CLEC, in conformance with the language proposed by AT&T. Qwest must not require interconnection at the local tandem, at least in those circumstances when traffic volumes do not justify direct connections to the local tandem. Qwest must do so regardless of whether capacity at the access tandem is exhausted or forecasted to exhaust unless Qwest agrees to provide interconnection facilities to the local tandems or end offices served by the access tandem at the same cost to the CLEC as interconnection at the access tandem.

13. EICT Collocation (Issue WA-I-43)

Joint Intervenors' Position

148 The Joint Intervenors object to Qwest's proposal to charge DS-1 or DS-3 circuit rates for the physical link between the CLEC POI and Qwest's equipment in the same building, the same wires Qwest calls the Expanded Interconnection Channel Termination or "EICT." *Ex. 434.* The Joint Intervenors also object to the prohibition in the SGAT against using ITPs for interconnection, limiting their use to accessing UNEs. The wires are Qwest's physical connection to the CLEC's collocation equipment when the CLEC chooses collocation as the method used to interconnect with Qwest's network. The Joint Intervenors argue that Qwest's collocation charges are unjust, unreasonable, one-sided, discriminatory, and in violation of Section 271. The Joint Intervenors argue that Qwest must meet the CLEC at that point of interconnection.[39]

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[37] *Local Competition First Report and Order*, ¶ 210.
[38] *Id.* ¶ 220.
[39] *SBC Texas Order*, ¶ 78.

149 The Joint Intervenors argue that similar to Issue WA-I-6 concerning EITC discussed above in Section 3, Qwest should pay for its side of the interconnection, i.e., the EICT. The Joint Intervenors assert that the CLEC does not charge Qwest for these wires when the CLEC interconnects to Qwest in CLEC premises, and that Qwest should not charge CLECs. The Joint Intervenors propose as an alternative that the Commission treat these charges as subject to reciprocal compensation under this section and propose new language in section 7.3.1.2.1.

Qwest's Position

150 Qwest rejects WorldCom's and AT&T's claims that Qwest should share or absorb the costs of EICT. Qwest asserts that the Act requires CLECs to bear the costs related to collocation. *Qwest Brief at 28, n.84.*

151 Qwest argues that EICT and multiplexing costs are not properly shared through reciprocal compensation because they are costs associated with collocation. *Id. at 28-29.* Qwest asserts that AT&T admits that the primary driver of a CLEC's decision to use collocation is access to unbundled network elements, not interconnection. *Id. at 29.* Qwest argues that it should not subsidize CLECs' UNE access costs, nor should the costs of accessing UNEs be allocated to interconnection. *Id.*

152 Qwest argues that collocation is an option for CLECs as a method of interconnection. Qwest argues that EICT costs are costs that the CLEC can avoid. *Id.* Qwest argues that CLECs should absorb those costs if they are costs the CLECs can choose or avoid.

Discussion and Decision

153 Consistent with the decision in Issue WA-I-6 above concerning EICT rates, Qwest should pay for its side of the interconnection, the EICT. CLECs do not charge Qwest for this connection when they interconnect to Qwest in CLEC premises. Qwest, likewise, should not charge CLECs.

154 Qwest's view that collocation is optional is not consistent with FCC orders. The function of the facility is to carry traffic from the CLEC collocation POI to Qwest's switch. Whether Qwest calls it an EICT or an ITP does not matter functionally. Qwest is responsible for providing its own facilities up to the POI. This is consistent with the SGAT at section 7.1.2.3 which provides that each party will be responsible for its portion of the build to the POI.

155 As discussed above in Section 2 concerning Issue WA-I-5, Qwest must allow the use of interconnection tie pairs for interconnection, not just access to UNEs.

156 As discussed above in Section 3 concerning Issue WA-I-6, whether the facility running from the collocation POI to the Qwest switch is called an EICT or an ITP has a rate effect upon CLECs which appears to be related to Qwest's attempts to prohibit interconnection for access to UNEs. Qwest is responsible for constructing and paying for facilities on its side of the POI. Therefore, Qwest must remove restrictions in SGAT section 7.3.1.2.1 associating ITPs with UNE provisioning and not interconnection, and remove the application of EICT rate elements in Sections 7.1.2.2 and 7.3.1.2.1.

14. Definition of a tandem switch/ rating issues (Issue WA-I-44)

Discussion and Decision

157 SGAT section 7.3.4.2.1 describes the rates applicable to tandem switching, and refers to the definition of a tandem switch in the SGAT, section 4.11.2. Specifically, the SGAT provides that if a switch switches traffic once, a party will receive only the tandem switching rate, whereas if it switches twice, the party will receive the tandem rate, the tandem transmission rate, and the end office call termination rate. Qwest did not brief the issue, and the Joint Intervenors noted that the issue was fully briefed following the first workshop.

158 This issue was addressed at length in the Draft Initial and Revised Initial Orders from the first workshop. In those orders, we determined that both function and geography must be considered in determining the appropriate transport and termination rates. *Revised Initial Order, ¶¶ 214, 217.* The language in the SGAT, as written, would preclude the Commission's ability to exercise its judgment with respect to the factors of geography and function. *Id. ¶ 217.* Qwest's SGAT provisions, sections 4.11.2 and 7.3.4.2.1 concerning tandem treatment, do not comply with the requirements of Checklist Item Nos. 1 and 13 , section 252(f)(2). Qwest should modify its SGAT to allow for a factually based consideration of geography and function.

15. Charges for Provisioning Individual Call Record/ Transit Records (Issues WA-I-62 and WA-I-63)

159 SGAT sections 7.5.4 and 7.6.3 apply a reciprocal charge for Category 11-01-xx and 11-50-xx records sent in an EMR mechanized format. The sections note that the records are used to provide information necessary for a carrier to bill an interexchange or originating carrier for jointly provided switched access services, 8XX database queries, and transit.

Joint Intervenors' Position

160 The Joint Intervenors object to the charges for records in SGAT sections 7.5.4 and 7.6.3 because Qwest and WorldCom already exchange these records without charge by either party. *Joint Brief at 49.* WorldCom questions whether the cost associated with tracking and assessing the charge is justified considering the minimal cost associated with performing the database query to retrieve the 11-01-XX and 11-50-XX records and transmit them in an EMR mechanized format. *Id. at 49-50.*

Qwest's Position

161 Qwest argues that it is only fair to allow carriers who provide records of jointly provided switched access services, 8XX database queries, and transit to be compensated for the costs of producing those records. *Qwest Brief at 30.* In order for the carrier terminating a call to seek compensation from intermediary carriers, terminating carriers will need access to certain information. Qwest asserts that its proposal covers the costs of the party that produces that necessary information, and notes that it is a reciprocal charge that applies to both Qwest and CLECs.

162 Qwest denies that it has provided the service without charge. Qwest asserts that it has charged for this service in accounting service agreements with CLECs. *Tr. at 2759.* Qwest claims that the Act allows incumbent's to recover their costs of providing interconnection. *See Qwest Brief at 31.* Lastly, Qwest argues that parties should raise concerns with the actual rate in the Commission's ongoing cost docket.

Discussion and Decision

163 Qwest's interconnection agreements with AT&T and WorldCom contain provisions allowing parties to charge each other fees for "recording, rating, or transmitting usage data." *Ex. 230, Attachment 5, at 27; Ex. 232, Attachment 5, at 28.* In both agreements, the charges were waived for the first six months of non-test data. *Id.*

164 In the Joint Intervenors' brief, WorldCom questions whether a charge is justified based on the minimal cost of retrieving the records and transmitting them. *Joint Brief at 49-50.* However, there is no evidence in this record to answer WorldCom's question about the cost of the service.[40] Qwest claims that it does charge CLECs for

[40] Qwest states in its brief that "If Wcom has an issue with the actual rate it can raise those concerns in the Commission's ongoing cost docket." Qwest's remark is curious; Exhibit A to the SGAT states that this rate is not being addressed in the cost docket. *Ex. 106, Exhibit A at 17.*

this service. *Qwest Brief at 31.* Its SGAT states that the rate is TELRIC-based. *Ex. 106, at Ex. A, 16.*

165 The SGAT sections should remain as proposed by Qwest. No party has presented persuasive evidence to support WorldCom's objection to these rates. The provision is reciprocal, allowing CLECs to charge Qwest for the same service.

16. Interconnection at Access Tandem (Issue WA-I-64)

Joint Intervenors' Position

166 The Joint Intervenors argue that Qwest's proposal in SGAT section 4.11.2 attempts to define for CLECs when their switches constitute tandem office switches. The Joint Intervenors argue that the definition is inappropriate and was the subject of briefing in the first workshop. They assert that the final order in the first workshop should determine whether or not the definition should be revised.

167 The Joint Intervenors also argue that another portion of Qwest's proposed definition should be stricken because it attempts to dictate the conditions under which CLECs may interconnect at the access tandem. The Joint Intervenors consider this dispute related to Issue WA-I-37. The Joint Intervenors argue that the definition does not comply with FCC policy or the Act, which allows CLECs to chose any particular point of technically feasible interconnection.

Discussion and Decision

168 This issue is resolved consistent with discussion above concerning Issues WA-I-37 and WA-I-44. Qwest's definition of a tandem switch is not sufficient. Qwest may not dictate the conditions under which CLECs may interconnect at the access tandem. Under the Act and FCC rules, CLECs may interconnect at any technically feasible point.

17. Meet Point Billing/Voice Interexchange Traffic/Phone-to-Phone IP telephony (Issues WA-I-68 and WA-I-69)

Qwest's Position

169 In the SGAT, Qwest identifies the definition of Meet-Point Billing or Jointly Provided Switched Access as an arrangement whereby two LECs (including a LEC and CLEC) jointly provide Switched Access Service to include phone-to-phone voice interexchange traffic that is transmitted over a carrier's packet switched network using protocols such as TCP/IP to an interexchange carrier. *See Ex. 434 at section*

4.39. Qwest also identifies the definition of "Switched Access Service" to include a list of transmission and switching services to IXCs for the purpose of originating or terminating telephone toll service. This list includes "phone to phone IP telephony. *Id. at section 4.5.7.*

170 Qwest also sponsored Exhibit 362 that proposed the treatment of IP telephony described in a Colorado arbitration proceeding. In the Colorado proceeding, Qwest argued that this language related to the specific and limited treatment of phone-to-phone TCP/IP traffic and its relationship to switched access charges. Qwest argued that it is not intended to apply to a broader treatment of the IP/switch access issue. *Ex. 362, at 5.* Further, Qwest cites to the Colorado Commission's ruling in its VNI Decision (Docket No. 99K-335T, Decision No. C00-760, July 11, 2000) that "regardless of technology used, the provision of interexchange services without payment of access charges is improper." *Id. at 7.* Qwest sums up its position on the issue by suggesting that avoiding the payment of access charges by using IP telephony is an example of improper toll bridging.

Joint Intervenors' Position

171 The Joint Intervenors propose to strike the second half of the sentence in SGAT section 4.39 that reads "including phone-to phone voice interexchange traffic that is transmitted over a carrier's packet switched network using protocols such as TCP/IP to an Interexchange Carrier." *See Ex. 356.*

172 The Joint Intervenors argue that the issue of the treatment of IP telephony should not be addressed in the SGAT. The matter includes issues of reciprocal compensation and practical issues of attempting to separate out IP telephony traffic from other forms of traffic. *Joint Brief at 51-57.* The Joint Intervenors argue that the FCC has expressly determined that state commissions have the authority to impose reciprocal compensation obligations on ISP traffic. *Joint Brief at 53.* Referring to litigation over the FCC's decision on ISP traffic, the Joint Intervenors argue that the issue is still unresolved. The Joint Intervenors argue that it is premature to define through the SGAT the status of IP telephony as interstate or local traffic, or its reciprocal compensation status. *Joint Brief at 56.*

173 The Joint Intervenors propose that Qwest delete this language from the SGAT at sections 4.39 and 4.57, as well as make changes to other paragraphs, including but not limited to SGAT sections 7.3.1.1.3.1 and 7.3.2.2.

Joint CLECs' Position

174 The Joint CLECs argue that the SGAT proceeding is not the proper forum to determine whether switched access service includes IP telephony. *Joint CLEC at 12-13.* Specifically, the CLECs assert that Qwest is attempting to use the SGAT to define the treatment of IP telephony without factual or legal support. The Joint CLECs request the Commission order Qwest to strike the references in the SGAT.

Discussion and Decision

175 Consistent with the findings in paragraphs 199 and 200 of the Revised Initial Order in this proceeding concerning the status of ISP traffic and payment for that traffic, Qwest should strike all references in the SGAT to phone to phone IP telephony. In particular, Qwest must strike the reference to "including phone-to-phone voice interexchange traffic that is transmitted over a carrier's packet switch network using protocols such as TCP/IP to an Interexchange Carrier." *See Ex. 271, §§ 4.57, 4.3.9, 7.3.1.1.3.1, and 7.3.2.2.*

Verification of Compliance

176 To establish compliance with the requirements of Checklist Item No. 1 for interconnection, Qwest must meet the requirements of sections 251(c)(2) and 251(d)(1) of the Act. In particular, Qwest must provide interconnection at any technically feasible point, equal-in-quality to that it provides to itself or any subsidiary, affiliate, or other party to which it provides interconnection, on rates, terms and conditions that are just, reasonable, and nondiscriminatory.[41]

177 Qwest asserts that it has met the requirements for Checklist Item No. 1 for interconnection through its interconnection agreements with CLECs and through SGAT section 7. However, a review of the SGAT sections over which the parties are at impasse indicates that Qwest has not met the requirements for this checklist item. Qwest must modify its SGAT consistent with the determinations made above in this order. In particular, Qwest must allow CLECs to access UNEs through interconnection, allow CLECs to determine the point of interconnection on Qwest's network, and allow CLECs to exchange local traffic at the access tandem switch, not just the local tandem and end office switches. In addition, Qwest must not base trunk ordering deposits on use or forecasting of trunk groups in other geographic areas, and must guarantee availability of trunks for which CLECs have provided forecasts and deposits.

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[41] 47 U.S.C. § 251(c)(2).

178 Notwithstanding any modifications to the SGAT, Qwest must also demonstrate through commercial experience and a review of the audited results of relevant performance measures that it is providing interconnection pursuant to the requirements of Section 271(c)(2)(B)(i). Performance data is not yet available from the ROC third party testing process to determine if Qwest is meeting its own standards for providing interconnection. Until the Commission reviews and evaluates the audited performance data, the Commission cannot yet verify whether Qwest has met the requirements of this checklist item.

CHECKLIST ITEM NO. 11 – NUMBER PORTABILITY

FCC Requirements

179 Section 271(c)(2)(B)(xi) of the Act requires RBOCs to be in compliance with the number portability regulations adopted by the FCC pursuant to Section 251 of the Act. The Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[42] Section 251(b)(2) of the Act requires all LECs, including Qwest, "to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the [FCC]." Further, Section 251(e)(2) provides that "the cost of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]."

180 The FCC requires LECs to offer interim number portability through remote call forwarding (RCF), flexible direct inward dialing (DID), and any other technically feasible method of providing number portability.[43] LECs must deploy long-term number portability in the largest 100 Metropolitan Statistical Areas (MSAs) beginning in October 1997, but no later than December 31, 1998, and after that date, make long-term number portability available in smaller MSAs within six months after a specific request by another telecommunications carrier.[44] Once long-term number portability is deployed in an exchange, a LEC may no longer provide interim methods

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[42] *47 U.S.C. § 153(30); see also 47 CFR § 52.21(k).*

[43] *In re Telephone Number Portability*, First Report and Order and Further Notice of Rulemaking, CC Docket No. 95-116, RM 8535, FCC 96-286 (rel. July 2, 1996) ¶¶ 110-14 (*First Number Portability Order*).

[44] *First Number Portability Order*, ¶¶ 3, 77, 80.

of number portability.[45] The FCC also has established competitively neutral cost-recovery methods for administering interim and long-term number portability.[46]

Washington Evidentiary Requirements

181 The Supplemental Interpretive and Policy Statement identifies the following specific evidentiary requirements that Qwest must meet to establish compliance with Checklist Item No. 11:

1. What methods of interim number portability is Qwest providing? Specify if it is being offered under tariff or under terms of specific interconnection agreements.

2. To which CLECs is Qwest providing interim number portability, and under what terms, conditions and rates?

3. Has Qwest denied interim number portability arrangements requested by any CLECs? If so, describe the circumstances in detail.

4. What has been Qwest's operational experience in providing each type of interim number portability?

5. What are the characteristics of each interim number portability arrangement, including cost recovery and service quality implications?

6. Is Qwest going to meet the FCC-mandated implementation schedule for permanent local number portability? If not, why not??

7. If Qwest does not meet the FCC-mandated implementation schedule for permanent local number portability, how will this affect its ability to provide services to CLECs?

182 In compliance with the Supplemental Interpretive and Policy Statement, Qwest filed several exhibits regarding Qwest's compliance with the general and specific evidentiary requirements for Checklist Item No. 11. *See Exs. 291-293-C.* AT&T

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[45] *Id.*, ¶ 115.

[46] *In re Telephone Number Portability*, Third Report and Order, CC Docket No. 95-116, RM 8535, FCC 98-82 (rel. May 12, 1998) ¶¶ 8-10 (*Third Number Portability Order*); *In re Telephone Number Portability*, Fourth Memorandum Opinion and Order on Reconsideration, CC Docket No. 95-116, RM 8535, FCC 99-151 (rel. July 16, 1999), ¶¶ (*Fourth Number Portability Order*).

filed responses to Appendix B questions for Checklist Item No. 11. *Ex. 382.* Qwest and AT&T provided the information to supplement written testimony and exhibits.

Parties' Positions

Qwest

183 Through the testimony of Margaret S. Bumgarner, Qwest argues that it has satisfied the requirements for Checklist Item No. 11. *See Ex. 281.* Specifically, Qwest asserts that its SGAT and interconnection agreements establish legally binding obligations for Qwest to provide number portability in conformance with the Act and FCC rules. *Ex. 281, at 4.* In compliance with FCC rules, Qwest initially deployed long-term number portability (LNP) in the top ten Metropolitan Statistical Areas in Qwest's region, including Seattle and Tacoma. *Id.* Qwest makes four methods of interim number portability (INP) available in those exchanges not converted to LNP, i.e., remote call forwarding, direct inward dialing trunks, route indexing, and portability hub-routed indexing. *Ex. 281, at 8.* However, there is currently no demand for INP, as Qwest has deployed LNP on 100 percent of its access lines as of October 2000. *Ex. 281, at 8-9; Tr. at 1088.*

184 As of August 2000, Qwest had ported 119,548 telephone numbers in Washington for 21 CLECs, and as of May 31, 2000, had converted 12,505 INP numbers to LNP service. *Ex. 281, at 10; Ex. 290, at 2;Ex. 293; Tr. at 1088.* Qwest has deployed LNP using Location Routing Number (LRN) technology, developed using FCC requirements and industry guidelines. *Ex. 281, at 11.* LRN is an addressing and routing method that allows the re-homing of individual numbers to other switches through use of a database and signaling network. *Id.* With LRN, each public network switch is assigned a ten-digit LRN that identifies the address of the switch, and each telephone number is matched in a regional database with the LRN for the switch serving the number. *Id.* A third party, Neustar, currently administers the regional database serving Washington state. *Id.*

185 Under LNP, an Advanced Intelligent Network (AIN) trigger, also referred to as the "ten-digit unconditional trigger," launches a query to the local LNP database to determine the new routing address and sends the call to the switch that currently serves the number for call completion. *Id. at 11-12.* Qwest explains that when it receives an order for LNP, it presets an AIN trigger for the number to be ported. This allows the CLEC to control activation of number portability on the due date, or frame due time, or prior to the start time of an unbundled loop cutover. *Id. at 12.* In those situations where the trigger cannot be set automatically, a managed cut is required. *Id. at 13.* A managed cut involves manual LNP activation and coordination by both Qwest and CLEC personnel. *Id.* Qwest has documented this process in its Wholesale

Markets' Interconnect and Resale Resource Guide (IRRG), available on Qwest's website, and has made training available to CLECs. *Id. at 14.*

186 The ROC has developed two performance measures for number portability: OP-8B – "Coordinated Local Number Portability Timeliness (percent)" and OP-8C – "Non-coordinated LNP Triggers Set on Time (percent)." *Id. at 4.* Coordinated LNP involves the coordination of Qwest and the CLEC for unbundled loop cutovers, whereas non-coordinated LNP does not. *Id. at 17.* Qwest asserts that third party testing of these performance measures will provide further evidence of Qwest's compliance.

AT&T

187 Through the affidavit of Kenneth L. Wilson, AT&T asserts that Qwest has not demonstrated that it is legally bound and practically capable of providing CLECs with number portability in accordance with the FCC's requirements. *Ex. 381, at 3.* Primarily, AT&T asserts that Qwest's SGAT does not provide sufficient detail to satisfy Qwest's obligations for providing number portability. *Id. at 6.* AT&T also asserts that it has experienced a high percentage of problems with Qwest's number portability. *Id.* Mr. Wilson recommends changes to SGAT language to address issues with the SGAT and to address problems experienced by AT&T.

188 AT&T objects to SGAT section 10.2.1, asserting that the section addresses coordinated cutovers for number ports only when Qwest unbundled loops are involved. AT&T believes the section should also provide for coordinated cutovers where the CLEC is self-providing the loop. *Id. at 7-8.* AT&T believes the SGAT provides insufficient detail on Qwest's responsibility to comply with FCC rules and industry guidelines. *Id. at 8-10.* AT&T also objects to proposed due date intervals for LNP in SGAT section 10.2.6. AT&T asserts that the intervals are too long, given the automated OSS-driven process for number portability. *Id. at 10.*

189 AT&T proposes that Qwest include SGAT language allowing for managed cutovers for number portability, as Qwest has proposed including such a process in other states. *Id. at 11-13.* AT&T recommends that Qwest add a provision addressing the charges Qwest may make for LNP database queries. *Id. at 13-14.* AT&T also recommends language concerning out-of-hours cutovers, joint administration of Service Management Systems, LNP on weekends and off-business hours, ordering and cutover processes, porting unassigned numbers, mass calling numbers, and DID block numbers, and processes for excluded numbers. *Id. at 14-19.*

190 Based on its experience with porting numbers from Qwest for residential and commercial customers, both with and without unbundled loops, AT&T asserts that

Qwest does not satisfy its obligations for number portability. *Id. at 20.* AT&T identifies a number of problems it has experienced with Qwest's number porting processes. First, AT&T asserts that its customers have experienced loss of outbound and inbound service, caused by Qwest's premature loop disconnection. *Id.* AT&T also describes its experiences with (1) loss of inbound service caused by late porting, (2) poor notification by Qwest of cutovers and cutover problems, (3) Qwest's failure to address problems with the interaction of Qwest switch features and ported numbers, (4) problems in testing during and after cutovers, (5) problems with IMA in ordering number portability, (6) improper billing after cutovers, and (7) the reassignment of ported numbers. *Id. at 19-27.* Specifically, AT&T objects to Qwest personnel advising AT&T customers that problems would be resolved if they switched their service back to Qwest. *Id. at 24.*

WorldCom

191 Through the testimony of Leilani J. Hines, WorldCom raises concerns over certain SGAT provisions, as well as what WorldCom perceives as omissions in the SGAT. WorldCom asserts that the SGAT does not accurately describe Qwest's obligations to provide LNP and does not fully describe the query process. *Ex. 321, at 3, 4.* In addition, WorldCom objects to Qwest's reference to the IRRG in the SGAT without providing any ordering details, as the potential exists for Qwest to impose additional requirements on CLECs outside of the SGAT. *Id. at 4-5.* WorldCom also disputes language in the SGAT allowing Qwest to set intervals on an individual case basis. *Id. at 5-6.*

192 WorldCom proposes other changes to the SGAT to address what it believes is an incomplete description of LNP processes. These changes include adding language to (1) facilitate accurate routing and call termination, (2) ensure certification with the Number Portability Administration Center (NPAC) to verify compliance with industry standards, (3) describe Qwest's obligation to employ a 10-digit trigger, (4) ensure changes are made to the 911/E911 databases following number porting, and (5) ensure that CLECs are able to meet the particular needs of customers for porting thousand-number blocks, porting reserved and unassigned numbers, and relocating when porting numbers to a new carrier. *Id. at 6-10.*

XO Washington

193 Through the testimony of Kaylene Anderson, XO Washington, like AT&T, expressed concern that Qwest has failed to coordinate implementation of LNP with cutovers of unbundled loops, leaving customers without service. *Ex. 325, at 15.* However, XO Washington believes the issue is more appropriately addressed in the third workshop concerning unbundled loop issues, and that provisioning issues are more

appropriately addressed when the Commission evaluates Qwest's performance after the ROC third party testing is complete. *Id.*

Qwest's Response

194 Through the Rebuttal Testimony of Ms. Bumgarner, Qwest proposed modifications to its SGAT to address many of the concerns raised by AT&T, WorldCom, and XO Washington. Specifically, Qwest added language concerning (1) description of number portability and LNP, (2) terms and conditions, (3) standards and guidelines for number portability, (4) excluding certain numbers from porting, (5) identification of central office codes (NXXs) available for porting, (6) porting of DID numbers, (7) process issues concerning LIDB services, (8) reassignment of NXX codes, (9) updating 911 databases, (10) porting of reserved numbers, (11) geographic relocation while porting to a new carrier, and (12) maintenance and repair. *Ex. 290, at 84-92, 105-6.* Qwest has also added new language to address concerns about Qwest's Service Management System, charging for database queries, ordering, and managed cuts. *Id. at 95-98.*

195 Qwest objects to AT&T's proposal to add coordination of CLEC provisioned loops with LNP service, but does agree to allow CLECs the option of requesting managed cuts for such loops. *Id. at 87.* Further, Qwest objects to AT&T and WorldCom's suggestions concerning (1) porting of unassigned numbers, (2) setting the LRN trigger at the request of the CLEC, (3) intervals, and (4) some of AT&T's suggestions concerning managed cuts. *Id. at 93-95, 98-105.*

196 Qwest asserts that the problems that AT&T has experienced are anecdotal and that Qwest has resolved most of the problems. *Id. at 106-14.* Further, Qwest asserts that it sets the unconditional 10 digit trigger based on the CLEC's request, and that the CLEC controls the activation of the port by sending a message to the NPAC to broadcast to all service providers' LNP databases that the port is activated. *Id. at 107.* Qwest asserts that it is the CLEC's responsibility to notify Qwest if there is a need to delay or cancel the order, and that the problem with loss of service due to "premature disconnection" is caused by CLECs, not Qwest. *Id. at 108-9.*

Impasse Issues

197 During the workshops held on November 6-10, 2000 and January 3-5, 2001, the parties resolved some number portability issues. *See Ex. 279.* The parties resolved an issue deferred from the first workshop concerning the effect of number porting on number reassignments. *See Revised Initial Order, ¶ 327.* However, the parties remain at impasse on SGAT language concerning (1) loop provisioning coordination and the extent of coordination for CLEC-provided loops and (2) standard due date

intervals. On January 10, 2001, Qwest filed with the Commission an updated version of SGAT section 10.2, incorporating all changes to provisions concerning number portability during the second workshop 2. *See Ex. 271.*

1. Loop Provisioning Coordination; Cutovers and Porting (Issues WA-11-1, WA-11-5, WA-11-6, and WA-11-11)

Joint Intervenors' Position

198 SGAT section 10.2.2.4 addresses how Qwest will coordinate number portability with the provisioning of a Qwest-provided loop, or unbundled loop, and a CLEC-provided loop. *See Ex. 271.* Section 10.2.5.3 describes how Qwest will set the 10-digit trigger, and the circumstances under which CLECs may use a "flow through" or "managed cut" process for LNP. *Id.* The Joint Intervenors object to certain language in both sections and propose new language to address their concerns.

199 First, the Joint Intervenors argue that Qwest must provide more coordination of loop provisioning and number porting to avoid loss of service to customers caused by "premature disconnection." The Joint Intervenors also request that Qwest extend the time it sets the trigger so that the switch translations associated with the end user's telephone number are not removed until 11:59 p.m. of the day after the due date. Second, the Joint Intervenors assert that Qwest should make the same coordinated cutover process available to CLECs when provisioning a Qwest unbundled loop as when the CLEC provisions its own loop combined with number porting.[47]

200 AT&T asserted during the workshop and also in brief that it has experienced problems with Qwest prematurely disconnecting the Qwest loop before the loop has been cutover to AT&T. *Joint Brief at 6; Tr. at 1166-67.* AT&T explains that if the number is ported before the loop is cutover, the customer's service is disconnected. This occurs because the Qwest switch stops providing service to the customer's line before the AT&T switch has dial tone available for the line. The result is that a customer will be unable to place or receive calls. *Joint Brief at 6-7.* AT&T believes the problem can be corrected by "proper coordination during the LNP conversion," and proposes the additional language to sections 10.2.2.4 and 10.2.5.3. *Id. at 7.*

201 AT&T acknowledges that during the number porting process, Qwest sets a trigger for transferring the number from one switch to another, and that the CLEC activates the trigger in order to port the number. *Id. at 8.* AT&T also acknowledges that the primary reasons for Qwest's "premature disconnect" are due to customer or CLEC

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[47] Cutovers are defined as "the physical changing of lines from one phone system to another, or the installation of a new system." *Newton's Telecom Dictionary*, 212 (15th ed., 1999).

problems, *e.g.*, the customer does not keep an appointment or an installer is delayed or has problems with the installation. *Id. at 9.* However, AT&T argues that Qwest's SGAT must provide greater coordination to avoid customer outages, as Qwest has a legal obligation to ensure that LNP with loop cutovers is provided with minimum service disruptions and without impairment of quality. *Id. at 7.* AT&T asserts that the issue is of particular concern as AT&T is one of the only CLECs to expand into the residential mass market in Washington.

202 Specifically, AT&T proposes that Qwest provide more coordination on conversions and include an automated verification process to ensure that the CLEC has activated the port before Qwest disconnects the loop. *Id. at 9, 10.* AT&T asserts that the FCC required such coordination in its *Second BellSouth Louisiana Order.* In that order, in the context of interim number portability, the FCC stated:

> [A] BOC must provide unbundled access to loops on a nondiscriminatory basis. To meet this standard, a BOC must be able to deliver within a reasonable timeframe and with a minimum of service disruption, unbundled loops of the same quality as the loops the BOC uses to provide service to its own customers. In the context of checklist item (xi), we interpret this to mean that the BOC must demonstrate that it can coordinate number portability with loop cutovers in a reasonable amount of time and with minimum service disruption.[48]

203 In addition, AT&T requests that Qwest extend the 10-digit trigger and customer translations in place until 11:59 p.m. of the day after the arranged date for porting. AT&T argues that this will protect customers from Qwest prematurely disconnecting its loop. AT&T argues that both Qwest and the CLECs should do everything possible to minimize service disruptions, because when customers are out of service they cannot access 911 emergency service. *Joint Brief at 18.* AT&T asserts, in response to Qwest's arguments, that the proposal is technically feasible, would not result in late updates to the 911 database, and that any billing issues are administrative problems that Qwest can easily resolve. *Id. at 18-19.*

204 AT&T also objects to Qwest's requirement in the SGAT that CLECs use the more elaborate and expensive "managed cut" process when porting a number to a CLEC-provided loop, rather than the more automated "coordinated cutover" process. AT&T argues that such a proposal is discriminatory, anticompetitive, and impossible to implement in a mass-market entry context. *Joint Brief at 11.*

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[48] *Second BellSouth Louisiana Order,* ¶ 279.

205 Section 10.2.2.4 provides that Qwest will use a coordinated cutover process when porting a number in conjunction with the provisioning of a Qwest unbundled loop, but that CLECs may use the "managed cut" process when a CLEC-provided loop is involved. In the coordinated cutover process, Qwest sets the trigger, the CLEC activates the trigger to port the number, and Qwest disconnects the loop at 8 p.m. on the due date of the conversion. *Tr. at 1161-62, 1172.* In a managed cutover process, both Qwest and the CLEC will have personnel on a conference bridge to ensure that the cutover process goes smoothly. *Tr. at 1163, 1168-69.* AT&T maintains that the managed cut process is primarily used for large business customers, and is very costly. *Id. at 1168-69.* AT&T asserts that using such a process for cutovers for the residential mass market would be infeasible. *Id.* AT&T asserts that there is no technical reason that Qwest cannot provide the same coordination for CLEC loops as it does for its own unbundled loops.

206 AT&T maintains that Qwest cannot meet the requirements of Checklist Item No. 11 until Qwest revises its SGAT and number portability processes (1) to better coordinate LNP with loop provisioning to avoid loss of service to customers, and (2) to allow CLECs to use a coordinated cut process when provisioning their own loops.

Qwest's Position

207 Qwest objects to AT&T's proposed changes to SGAT sections 10.2.2.4 and 10.2.5.3 arguing that Qwest does not disconnect its loop prematurely, but according to schedule. *Qwest Brief at 33.* Qwest argues that the problem is with CLEC processes, not Qwest's. *Tr. at 1173-74.* Qwest asserts that it relies on the CLEC to complete its work on time. If there is a problem, the CLEC must notify Qwest 4 hours prior to 8:00 p.m. on the due date of the conversion, or Qwest will disconnect its loop as scheduled. *Qwest Brief at 33; Tr. at 1172-73.* Qwest notes that the time could be extended to 11:59 p.m. of the due date if the CLEC requested additional time. *Tr. at 2524.*

208 Qwest asserts that the FCC does not require BOCs to take extra measures in provisioning LNP, and that AT&T's suggested proposals are costly and contrary to accepted industry practice. *Qwest Brief at 33-34.* Qwest states that there is no requirement for it to take extra measures in provisioning LNP. *Id. at 33.* Qwest argues that disconnecting its loop after 8 p.m. on the due date would cause downstream problems with billing and updating the 911 database, contrary to standards set by the National Emergency Number Association (NENA). *Id. at 34.*

209 Qwest asserts that it has successfully deployed LNP according to the Act, as well as the FCC's rules and schedule. Qwest asserts that it has documented its processes and

procedures for implementing number portability and continues to change its processes to improve provisioning of number portability. *Id. at 37.*

Discussion and Decision

210 Section 251(b)(2) of the Act requires Qwest to "provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." The FCC has held that BOCs must provide number portability in a manner that allows users to retain existing telephone numbers "without impairment in quality, reliability, or convenience."[49]

211 AT&T's concerns about SGAT sections 10.2.2.4 and 10.2.5.3 raise legitimate questions about whether Qwest is offering and providing number portability in a way that seriously affects service to customers or may impede competition in the local or intraLATA market. First, does Qwest have an obligation to coordinate LNP and loop provisioning to ensure that a customer's service is not interrupted? Second, must Qwest provide the same methods for loop provisioning coordination for CLEC provided loops as its makes available for Qwest unbundled loops?

212 AT&T argues that Qwest has an obligation under FCC rules and orders to provide greater coordination or to verify that the CLEC has provisioned the loop and ported the number before disconnecting its loop. Qwest counters that it is the CLEC's responsibility to notify Qwest if the CLEC is not ready to port the number or provision the loop. There are competing concerns present here: The BOC can be responsible only for its own processes, not how the CLEC provisions the loop or if the CLEC customer fails to keep an appointment. Similarly, the CLEC can be responsible only for its own porting processes and communicating to customers the consequences of missed appointments, but not the actions of Qwest.

213 Both AT&T and Qwest present anecdotal or unsubstantiated data about how frequently customers lose service because Qwest disconnects its loop before the CLEC has ported the number or provisioned a loop. Given AT&T's claim that it is one of the only CLECs expanding into the residential mass market, and Qwest's statements that AT&T is one of two CLECs experiencing the problem, there is some credibility to AT&T's complaint. However, until the third-party testing of the ROC performance measures is complete, the Commission is not able to evaluate Qwest's performance in actually providing number portability.

214 AT&T proposes that Qwest include in SGAT section 10.2.2.4 language requiring Qwest to confirm whether the CLEC loop has been installed before disconnecting

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[49] *Second BellSouth Louisiana Order,* ¶ 276.

Qwest's the loop. AT&T asserts that such a testing procedure has been discussed in other states. *Tr. at 1167.* Qwest asserts that the software or technology to perform such verification does not yet exist. *Id. at 1170-71.* Developing such a verification or test query system will likely improve both Qwest's and AT&T's performance in provisioning loops while porting numbers. However, given that they do not yet exist, having such systems in place is not a requirement for finding Qwest in compliance with Checklist Item No. 11. Qwest need not amend SGAT section 10.2.2.4 to include such a requirement.

215 Although such testing and verification systems are not necessary, AT&T's proposal to extend the time of 10-digit trigger and customer translations is a reasonable alternative. The Commission is concerned that customers will not be able to access 911 service when service disruptions occur. In order to prevent service outages to customers should there be problems with porting a number or the coincident cutover of a loop, Qwest should wait until 11:59 p.m. of the day following the scheduled port before disconnecting a customer's previous service.

216 As AT&T states, notification of database changes to 911 providers should take place automatically when ports are made. If the Qwest customer translations are still in place, the customer will receive 911 service through the information provided by Qwest to NENA. Likewise, once the number is ported successfully, the CLEC will report the proper information to the 911 system. The service order completion and billing issues are administrative problems that Qwest should be able to resolve. The additional cost born by Qwest to accomplish these objectives cannot be used as a justification for not providing them, according to the "revenue neutral" language of section 251(e)(2). After a reasonable period of time, after more confidence is built up in these procedures, depending upon the data from the ROC third party testing process, and once the post-entry performance plan is available for review, this safety cushion might be reduced or eliminated.

217 Concerning the issue of CLEC use of coordinated or managed cutovers, discussion during the workshop sessions indicates that CLECs do not have the option to use the "coordinated cutover" process for CLEC-provided loops. *Ex. 271; Tr. at 2454.* In fact, the discussion indicates that a CLEC must always use the managed cut process when provisioning its own loop and porting a number. *Id.* AT&T's argument is persuasive that such treatment for CLEC-provided loops is discriminatory and anti-competitive. Qwest has not sufficiently explained why CLECs may not use the less time-intensive and less expensive "coordinated cutover process" when provisioning their own loops. CLECs should have the option to decide whether a managed cutover or coordinated cutover process meets their needs.

218 In its most recent orders granting approval to provide in-region, interLATA service, the FCC found that the BOC provided hot cuts[50] in compliance with the requirements for Checklist Item No. 4 (loops) because it provided two options for CLECs to choose from: fully coordinated hot cuts and frame due time hot cuts.[51] These options appear to be equivalent, if not similar to Qwest's "coordinated" and "managed" cutover processes. Given the FCC's analysis in these two decisions, this issue should also be addressed during the workshop discussing unbundled loops, as XO Washington suggested in its testimony. *Ex. 325, at 15.*

219 However, this is also an issue of Qwest's compliance with Checklist Item No. 11. Congress enacted the number portability provisions of the 1996 Act because "number portability is essential to meaningful competition in the provision of local exchange services."[52] Requiring CLECs to use more involved and expensive processes than necessary to provision CLEC loops when porting numbers will likely negatively impact the CLEC's ability to compete with Qwest, as the processes will favor Qwest's unbundled loop product over CLEC-provided loops. Qwest must modify SGAT section 10.2.2.4 to allow CLECs the option of using either the "coordinated" or "managed" cut processes when provisioning their own loops.

2. Standard Due Date Intervals (Issue WA-11-4)

Qwest's Position

220 In an exhibit filed prior to the workshop, Qwest proposed a three-day interval for LNP. *See Ex. 285, at 2.* During the follow-up workshop, Qwest proposed new intervals for number portability to apply to all situations, eliminating the categories Qwest had previously established for simple, complex, Centrex and managed out-of-hours conversions. *See Ex. 491; Tr. at 2481-83.* Under Qwest's new proposal, the interval for LNP provisioning depends upon the number of lines involved, i.e., 1 to 24 lines – five business days; 25 to 49 lines – ten business days; over 49 lines- individual

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[50] A hot cut is defined as a "conversion from an old to a new phone system which occurs instantly as one is removed from the circuit and the other is brought in." *Newton's Telecom Dictionary* 383 (15th ed. 1999).

[51] *SBC Texas Order*, ¶¶ 260-61; *In the Matter of Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and southwestern Bell Communications Services, Inc. d/b/a/ Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29, ¶ 201 (rel. Jan. 22, 2001) *(SBC Kansas/Oklahoma Order).*

[52] *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,* Memorandum Opinion and Order, CC Docket No. 97-137, FCC 97-298 (rel. Aug. 19, 1997) ¶ 341 *(Ameritech Michigan Order)*, (citing *First Number Portability Order).*

case basis (ICB). *Id.* Qwest supports its proposal with Exhibit 492, which purports to show industry recommendations, and intervals used by other ILECs. Qwest asserts that its intervals are governed by time frames set by the NPAC and industry guidelines. *Tr. at 2493-94.* Qwest asserts that the proposed intervals are necessary to allow the company to verify the information contained in LNP orders. *Qwest Brief at 36-37.* Qwest requests the Commission adopt its proposed intervals, asserting that the FCC has approved comparable intervals for Verizon and Bell South. *Id. at 37.*

Joint Intervenors' Position

221 The Joint Intervenors argue that the Commission must review the intervals based upon whether they provide a meaningful opportunity to compete. *Joint Brief at 14, citing Ameritech Michigan Order, ¶ 141.* The Joint Intervenors believe the intervals proposed in Exhibit 491 are too long.

222 The Joint Intervenors object to the intervals, noting that the new intervals are longer that the present intervals in some instances. *Tr. at 2488.* Further, the Joint Intervenors raise a concern that these intervals may preclude CLECs from providing service in the same time frames that Qwest would, putting the CLECs at a disadvantage. *Tr. at 2491-92.* In particular, they note that, according to WAC 480-120-051, Qwest's installation interval is five days. The Joint Intervenors argue that if they must wait five days for numbers to be ported, it will be impossible for them to perform the additional work involved in providing service, and still provide service in the same five-day interval. *Joint Brief at 14-17.*

223 Second, the Joint Intervenors assert that Qwest's proposed intervals should apply only to ports with unbundled loops. *Joint Brief at 16.* The Joint Intervenors argue that the proposed intervals would be discriminatory to CLECs, asserting that there should be separate intervals for LNP provisioning without Unbundled Loops: LNP functions are mostly database work, and do not justify the additional time reflected in the proposed Qwest intervals. *Id. at 16; see also Ex. 381 at 10.* AT&T notes that Qwest has conceded that verification takes place only on complex orders. *Id., n.48, citing Tr. at 2494.* AT&T proposes alternate intervals of 4 business days for simple LNP, for 1 to 50, and 51 or more lines, 5 business days for complex LNP of 1 to 25, and 26 or more lines, and 3 business days for LNP without unbundled loops of 1 to 65 lines. *Id. at 17.*

224 The Joint Intervenors argue that the Commission should not rely on Exhibit 492 to support Qwest's proposal. They argue that Qwest's chart showing other RBOC intervals cannot be verified and that Qwest's intervals exceed those listed on the chart.

Discussion and Decision

225 Qwest's exhibit identifying other RBOC LNP intervals is not persuasive to establish the reasonableness of the intervals in Qwest's SGAT. The Joint Intervenors raise sufficient doubt about verifying the data in Exhibit 492. In addition, AT&T's argument is persuasive that Qwest only provides verification on complex orders, and that the interval for LNP without unbundled loops can be reduced.

226 Having more categories, or granularity, according to type of service in ordering intervals would reflect more accurately the amount of work required by each classification. Requiring less time for LNP without unbundled loops would allow CLECs to perform their additional work after the completion of the port, and still provide installation intervals for their customers comparable to Qwest.

227 Qwest must modify its SGAT to include AT&T's proposed intervals, including an interval of three business days for LNP without unbundled loops of 1 to 65 lines.

Verification of Compliance

228 In order to meet the requirements of Checklist Item No. 11, Qwest must comply with the Act and FCC rules concerning number portability. Through its testimony and exhibits, Qwest has demonstrated that it has met the deployment schedule for long-term number portability set by the FCC. Qwest asserts that it has documented its processes and procedures for implementing number portability. Qwest also asserts that its SGAT and interconnection agreements establish legally binding obligations for Qwest to provide number portability in conformance with the Act and FCC rules.

229 Qwest must modify its SGAT in several ways before it may rely on the SGAT to support its application to provide in-region interLATA service, and before the Commission will approve the SGAT. First, Qwest must extend the time that the 10-digit trigger and customer translations are removed to 11:59 p.m. of the day following the due date. Second, Qwest must allow CLECs the option of using the coordinated cutover or the managed cutover process when provisioning CLEC provided loops and porting numbers. Third, Qwest must revise its SGAT to include AT&T's proposed LNP intervals, including LNP provision within 3 business days when there is no unbundled loop involved. When Qwest makes these modifications, Qwest may rely on the SGAT to demonstrate Qwest's legally binding obligations to provide number portability in conformance with the Act and FCC rules.

230 Notwithstanding any modifications to the SGAT, Qwest must also demonstrate through commercial experience and a review of the audited results of relevant performance measures that it is providing number portability with minimum service

disruptions and without impairment of quality. Performance data is not yet available from the ROC third party testing process to determine if Qwest is meeting its own standards for providing number portability. Until the Commission reviews and evaluates the audited performance data, the Commission cannot yet verify whether Qwest has met the requirements of this checklist item.

CHECKLIST ITEM NO. 14 – RESALE

FCC Requirements

231 Section 271(c)(2)(B)(xiv) of the Act requires a BOC to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[53] Section 251(c)(4)(A) requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[54] Section 251(c)(4)(B) prohibits "unreasonable or discriminatory conditions or limitations" on resale, with the exception that "a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers."[55]

232 The *Local Competition First Report and Order* contains several rules regarding the scope of the resale requirements and permissible restrictions on resale that a LEC may impose. In general, resale restrictions are presumed to be unreasonable unless the LEC "proves to the state commission that the restriction is reasonable and nondiscriminatory."[56]

Washington Evidentiary Requirements

233 The Supplemental Interpretive and Policy Statement identifies the following specific evidentiary requirements that Qwest must meet to demonstrate its compliance with Checklist Item No. 14:

1. How is Qwest providing telecommunications resale services in accordance with the requirements of sections 251(c)(4) and 252(d)(3)?

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[53] 47 U.S.C. § 271(c)(2)(B)(xiv).
[54] 47 U.S.C. § 254(c)(4)(A).
[55] 47 U.S.C. § 254(c)(4)(B).
[56] 47 C.F.R. § 51.613(b).

2. What services are offered for resale to CLECs? What services are not?

3. What is the level of wholesale discount for each service offered for resale?

4. Which vertical features are offered for resale to CLECs? Which are not?

5. What nonrecurring charges, if any, does Qwest impose on resellers?

6. Does Qwest impose changeover charges? If so, under what circumstances?

7. What has been Qwest's operational experience (other than order processing) in providing each service for resale?

8. Will Qwest brand resold operator call completion and directory assistance services at the reseller's request, or are those services offered on an unbranded basis only? What limitations does Qwest impose on branding?

9. Does U S Qwest provide all operator functions (i.e., operator billing options, rate quotes) on resold operator call completion services?

10. Does Qwest route, at a reseller's request, operator and directory assistance calls to the reseller's own facilities?

11. Have all retail services (including Centrex and other central-office based switching services) offered by Qwest after January 1, 1996, been made available for resale? If not, describe any restrictions, including the "grandfathering" of such services.

12. Per discussions in the Bell South/ South Carolina Order, is Qwest offering Contract Service Arrangements (CSAs) at discount rates? With CSAs, does Qwest use cancellation penalties? What written complaints, if any, has Qwest received about CSAs? What resolution has been reached, if any, for CSA complaints?

234 In compliance with the Supplemental Interpretive and Policy Statement, Qwest filed exhibits purporting to document Qwest's compliance with the general and specific evidentiary requirements for Checklist Item No. 14. *See Exs. 412 and 413.* Similarly, AT&T filed responses to Appendix B questions for Checklist Item No. 4. *Ex. 372.* Qwest and AT&T provided the information to supplement written testimony and exhibits.

Parties' Positions

235 The parties dispute Qwest's compliance with this checklist item and object to Qwest's proposed SGAT provisions on resale in several respects. This order first addresses Qwest's general compliance and then discusses the CLECs' specific concerns. Specifically, the CLECs have concerns with the following : 1) Qwest's proposals regarding the payment by Qwest to CLECs for quality of service problems caused by Qwest; 2) Qwest's reluctance to furnish CLECs with OSS volume and transaction capability information; 3) Qwest's SGAT provision regarding the handling of calls by CLEC customers to Qwest offices; 4) the lack of restrictions in the SGAT on resale ordering information being used for marketing purposes; 5) whether Qwest's Megabit service is available for resale, and on what terms; and 6) issues surrounding Qwest's resale of Centrex services.

Qwest's Position Generally

236 Through the Direct Testimony and Supplemental Direct Testimony of Lori A. Simpson, Qwest states that it satisfies the requirements of Checklist Item No. 14 through the provisions of its SGAT. *Ex. 405, at 41.* Qwest describes its legal obligations to provide resale services, as reflected in its SGAT. It discusses the processes used to provide resale services to CLECs, including training and other assistance for CLECs and the ordering, preordering, maintenance and repair processes for CLECs compared to Qwest retail services. Qwest states that its processes are designed to be nondiscriminatory and require Qwest retail representatives to complete the same preordering and ordering steps as CLECs. *Id. at 12.* Qwest states that CLEC trouble reports are handled in the same way that Qwest end users' trouble reports are handled. *Id. at 16.* Qwest provides over 31,800 resold lines to 28 active reseller CLECs in Washington. *Id. at 9.* Qwest also stated that it is tracking twelve different performance measures for resale relating to the installation and provisioning or the repair and maintenance of resold services. *Id. at 18.* These performance measures will be audited through the ROC third-party OSS testing process. *Id. at 17.* Qwest provided performance data results for the period January through May, 2000. *See Ex. 409-C.*

AT&T

237 Through the affidavit of Kenneth D. Wilson, AT&T states that the volume of resold Qwest services in Washington is small. *Ex. 371, at 86.* AT&T recommends that the Commission not rely on Qwest's unaudited performance measure data. *Id.* Mr. Wilson objects to numerous provisions in SGAT Section 6 relating to resale. Generally, he objects to limitations of services for resale subject to the wholesale discount; information required of resellers; and incorporation by reference to

documents and manuals not provided as a part of the SGAT. AT&T provided a matrix incorporating the information requested in Appendix B of the Supplemental Interpretive and Policy Statement, which appears to show that AT&T does not purchase resold services from Qwest. *See Ex. 372.*

WorldCom

238 WorldCom's witness Dayna D. Garvin adopted the prefiled testimony of Thomas T. Priday. *See Exs. 391 and 392.* Through the prefiled testimony of Mr. Priday, WorldCom stated that it had limited experience with Qwest's resold products and services. *Ex. 391, at 37.* WorldCom stated that in 1997 it initiated a test of Qwest's provisioning systems and processes under the direction of the Colorado Public Utilities Commission. *Id.* The test included placing resale orders and placing orders to migrate accounts back to Qwest or to disconnect service. *Id.* WorldCom stated that problems surfaced in processing orders for migration and disconnect, and that outstanding billing problems associated with the test customers have yet to be resolved. *Id. at 38.* WorldCom concludes that final approval of Qwest's compliance with Checklist Item No. 14 must wait for the successful completion of the third-party OSS testing. *Id.* WorldCom also expressed concerns about, and offered amended language for, SGAT sections concerned with restrictions on services to be resold, information CLECs are required to submit to Qwest, restrictions on unbranded services, and disconnection policies. *Id. at 39-44.* WorldCom did not provide a matrix reflecting its answers to the questions contained in Appendix B to the Supplemental Interpretive and Policy Statement.

MetroNet

239 Witnesses Kenneth L. Wilson and Greg Bogus filed supplemental responsive testimony on behalf of MetroNet on October 31, 2000. *Exs. 383 and 421.* Mr. Wilson testified that Qwest's tariffs and price lists discriminate against resellers and restrict resale in an unreasonable and discriminatory manner. He states that Qwest's SGAT prohibits aggregation of reseller customer locations for purposes of receiving volume discounts. He asserts that this restriction discriminates against resellers. Mr. Bogus testified that Qwest Centrex products created unreasonable and discriminatory conditions and limitations on the resale of those services. He asserts that Qwest is violating the requirements of the Commission's Twenty-Third Supplemental Order in Docket Nos. UT-911488, UT-911490, and UT-920252 by preventing CLECs from purchasing dial tone for Centrex separately from vertical features. He also testified that Qwest's errors in billing resale services to MetroNet results in improper restrictions on resale. MetroNet submitted a series of confidential exhibits, Exhibits 475-C through 486-C, to support its contention that Qwest has restructured the rates for Centrex service offerings in part to discourage resale of the Centrex service.

Qwest's Response

240 On October 20, 2000, Qwest filed rebuttal testimony from Lori A. Simpson regarding resale issues. Qwest proposed numerous revisions to its SGAT in response to concerns raised by AT&T, WorldCom, and other CLECs. *Ex. 414, 2-35; Ex. 416.* In discussing the WorldCom resale testing, Qwest noted that the testing was performed three years ago, and that the outcome of the third-party OSS testing performed under the auspices of the ROC will provide more comprehensive and timely performance data. *Ex. 414, at 36-37.*

241 At the workshops, Qwest presented further revisions to the SGAT, some of which settled more resale issues. *See Ex. 271.* Issues that remain at impasse are discussed below.

Impasse Issues

1. Quality of Service Credits and Penalties (Issue WA-14-4)

Qwest's Position

242 Qwest proposes language in SGAT section 6.2.3 to govern how and when service credits and penalties are applied to resold services. Section 6.2.3.1 addresses service credits; 6.2.3.2 pertains to fines and penalties. According to Qwest witness Ms. Simpson, the SGAT was drafted to be applicable in all of Qwest's 14 states. *Tr. at 2600.* In section 6.2.3, Qwest agrees to reimburse the CLEC for credits or fines and penalties assessed against the CLEC as a result of Qwest's failure to provide service to the CLEC. *Ex. 271.*

243 Both SGAT sections contain an almost identical set of restrictions on applying credits or penalties to resold services. These are:

- Credits or penalties are subject to the wholesale discount.
- Qwest is not required to pay credits or penalties for service failures that are the CLEC's fault;
- Qwest is not liable to pay credits or penalties to the CLEC if the CLEC is not subject to the Commission's service quality credit requirements or penalty requirements;

- Qwest will not be liable to pay credits to the CLEC if the CLEC does not provide service quality credits to its end user;
- The credit or penalty amount will not exceed the amount Qwest would pay its own end user, less any applicable wholesale discount; and
- Qwest will not provide duplicate reimbursement or payment to the CLEC for any service quality failure incident.

244 Qwest asserts that it should not pay to a CLEC more in a credit than it has received from the CLEC. *Qwest Brief, at 47.* Qwest explained that the intent of this condition is to insure that Qwest pays to a CLEC customer in a service quality credit no more than the amount Qwest received from that customer for the service. Qwest did not elaborate in the workshop on how this restriction would operate in the case of a loaner cellular phone or pager. Qwest's brief was silent on the reason a wholesale discount would be applied to penalties. During the January workshop, Qwest stated that the company may wish to look further at the rationale behind reducing penalty payments by the wholesale discount. *Tr. at 2618, 2619.* However, later in the workshop, Qwest stated that CLECs would be reimbursed for fines or penalties "and not a discounted amount if the CLEC wasn't liable for a discounted amount." *Tr. at 2622.*

245 During the workshops, Qwest asserted that service credits were meant to reimburse customers for a service for which they have paid, but did not receive. *Tr. at 2615, 2617.* Qwest's witness did not know if there were other reasons the service quality credits were being applied.

Joint Intervenors' Position

246 The Joint Intervenors argue that payment of less than the credit paid to Qwest end users is unfair and not at parity with the way Qwest treats its end user customers with respect to service quality. *Joint Brief at 60.* They characterize Qwest's condition as an unreasonable and discriminatory limitation on resale, pointing out that payment of a partial credit leaves the reseller liable to its end user customer for the full cost of the end-user's service. That cost is likely to be more than the credit Qwest would pay to the reseller. *Id.*

Discussion and Decision

247 The Commission established Qwest's wholesale discounts on the basis of the costs that Qwest avoids when reselling its retail services. The costs that Qwest avoids are

for functions that the reseller performs with respect to the end user of the service, e.g., billing and collection, and customer contact.

248 In Washington, Qwest is subject to several quality of service requirements. First, Qwest's network services tariff WN U-40, Section 2.B contains Qwest's Customer Service Guarantee Programs. These programs require:

1. Missed Appointment/Commitment Credit: a $50 credit for missed appointments or commitments.

2. Delayed Primary Basic Exchange Alternative: For delays in establishing primary basic service for more than five business days, Qwest must provide: credit equivalent to the monthly basic local service charge; waiver of the nonrecurring installation charge, provision of remote call forwarding, calling card, and a directory listing at no charge, and one of four options, which include a $100 credit for each month or partial month service is delayed; or paging service, voice messaging service, or a loaner cellular telephone for the period service is delayed.

3. Out of Service Trouble Condition Credit: For a no dial tone condition, a credit of $5 if the condition is not cleared in 2 days, and a credit equal to the monthly service rate if the condition lasts more than 7 days.

4. No Dial Tone Credit: For any month in which dial tone is not provided within 3 seconds on at least ninety percent of calls placed in a wire center during a normal busy hour, a credit equal to the monthly service rate for customers served by that wire center.

5. Trouble Report Rate Credit: For any month in which a Qwest exchange has a trouble report rate greater than the maximum allowed, a $0.25 per line credit for all customers served by that exchange.

249 Qwest is also subject to quality of service requirements under a program approved in its merger with U S WEST.[57] Finally, Qwest will be subject to a post-entry performance plan which will include self-enforcing payments by Qwest should it fail to meet certain performance requirements. These requirements will be discussed

[57] In re Application of U S WEST, Inc. and Qwest Communications International, Inc. For an Order Disclaiming Jurisdiction or, in the Alternative, Approving the U S WEST, Inc. – Qwest Communications International, Inc. Merger, Ninth Supplemental Order Approving And Adopting Settlement Agreements and Granting Application, Docket No. UT-991358, Appendix A.

further below. For ease of discussion, the parallel provisions of SGAT sections 6.2.3.1 and 6.2.3.2 are discussed separately below.

6.2.3.1(a) and 6.2.3.2(a) - Application of Wholesale Discount to Credits and Penalties

250 SGAT sections 6.2.3.1(a) and 6.2.3.2(a) state that credits or penalties paid to CLECs will be reduced by the wholesale discount.

251 In a fully competitive market, a CLEC receiving bad service from Qwest would be able to purchase wholesale service from another supplier. Under those circumstances, the CLECs would have to pay twice for service in the same month, at a wholesale price. Using this logic, the CLEC should only receive a service credit for the discounted portion of the retail service it is purchasing from Qwest. However, the situation is not that simple. In purchasing Qwest retail service, the CLEC is subject to the terms and conditions contained in Qwest's tariff, including the requirements to credit end user customers the equivalent of their monthly service charge for some types of degraded service. In the case where the degraded service is caused by Qwest, limiting the service credit Qwest pays to the CLEC to a wholesale amount, while at the same time requiring the CLEC under the Qwest tariff to credit the end user the retail monthly service charge, punishes the CLEC for service problems not of its making. Therefore, Qwest must not limit its service quality credits payable to CLECs to a wholesale amount. Qwest must credit to the CLEC the lesser of Qwest's monthly service charge or the monthly service charge the CLEC pays to its end user. If the quality problem is not due to Qwest's action, but is caused by the CLEC, Qwest will not be required to credit the CLEC.

6.2.3.1(c) and 6.2.3.2(c) - Payment Conditional on CLECs Being Subject to Commission Service Quality Rules

252 Section (c) of SGAT sections 6.2.3.1. and 6.2.3.2 states that Qwest will not be liable to provide service credits or pay fines and penalties to a CLEC if the CLEC is not subject to the Commission's requirements for service quality credits, fines or penalties. At the January workshops, Qwest stated that it would not pay credits or penalties pertaining to resold services to a CLEC if the CLEC were not subject to the Commission's service quality requirements. Qwest stated that this language would allow it to avoid payments under the quality of service requirements Qwest stipulated to in the merger agreement, since the CLECs are not subject to the merger-related service quality requirements. *Tr. at 2602.*

253 Through its SGAT and interconnection agreements, Qwest offers resale of its retail services at the terms and conditions contained in its price lists and tariffs. CLECs

choosing to resell Qwest retail offerings that are subject to the quality of service provisions in Qwest's tariff are also required to follow those terms and conditions. Therefore, Section (c) above would not apply in those circumstances.

254 As noted above, Qwest is also subject to a Service Quality Performance Program approved in the US WEST – Qwest merger proceeding, Docket No. UT-991358. The program requires the establishment of baseline performance levels in eight performance areas, against which performance will be measured and reported to the Commission on a monthly basis. These reports will be the basis for calculating the amount of credits payable to customers each month. The December report will include a calculation of any calendar year credits due to customers under the Service Quality Performance Program, subject to a petition for mitigation based on demonstrable unusual or exceptional circumstances that Qwest will have the burden to show. The maximum credit Qwest must pay ranges from $83,333 to $333,333 for each of the eight performance measures. Credits payable under the program would be paid to current customers as a bill credit on all Qwest exchange access lines. Qwest is prohibited from recovering the expense of these penalties through its regulated rates.

255 The merger agreement does not exclude Qwest's resale customers from eligibility to receive payments under the Service Quality Performance Program for retail services they purchase. Qwest may not use section (c) to exclude resold services from the retail services covered under the program.

6.2.3.1(d) and 6.2.3.2(d) - Credits and Penalties Conditioned on Pass-Through to End-User

256 SGAT sections 6.2.3.1 (d) and 6.2.3.2.(d) provide that Qwest will pay credits to CLECs only if the CLECs pay credits to their end user customers. At the January workshop, Qwest stated that the reason for service quality rules "is that the end user who's experienced the loss is reimbursed for that loss." *Tr. at 2609-10*. Qwest asserted that it provides service to the end user, not to the CLEC, and therefore had no reason to pay service quality credits to a CLEC if the CLEC was not going to pass them on to the end user. *Id.*

257 Qwest's position appears to reflect its view that the reselling CLEC is not its real customer. Qwest is wrong. In the case of resale, Qwest's customer is the CLEC. The service quality credits payable to customers under the Commission's rules, Qwest's tariff, and the merger agreement apply to *all Qwest's retail services, including resold retail services*. CLEC customers purchasing retail services for resale are not excluded from these programs and rules. Qwest may not condition payment of credits to CLEC customers on what the CLEC does with the credit, any more than it can with any other business or residential customer. If a CLEC receives a credit

and chooses not to pass it through to the end user customer, it will place itself at a competitive disadvantage and will risk losing business to companies that do pay service quality credits. Sections 6.2.3.1(d) and 6.2.3.2(d) impose unreasonable restrictions on resale and must be stricken from the SGAT.

6.2.3.1(e) – Limitation on Maximum Amount of Qwest Credits to CLEC

258 In this section, Qwest attempts to set a ceiling on the amount Qwest must pay in quality service credits to CLECs. The Commission has already ruled that credits may not be subject to the wholesale discount. Therefore, this SGAT section must be deleted.

6.2.3.1(f) and 6.2.3.2(e) – No Duplicate Reimbursements or Payments to CLECs

259 According to Qwest, these provisions are designed to prevent a CLEC from receiving payment or credit for the same service quality failure incident from more than one program, including a performance plan associated with the performance indicators. *Tr. at 2601.* Later, Qwest stated that this provision was not intended to apply to payments under any post-271 performance assurance plan, but only intended to apply to a state's service quality plan. *Tr. at 2621-22.*

260 Credits due under Qwest's Service Quality Performance Program, discussed above, are not mitigated or reduced by credits paid under the Customer Service Guarantee Program tariff provisions discussed previously.

261 Qwest will also be subject to a post-271 performance plan, which would include performance requirements in a number of operational areas, including detailed descriptions of how such requirements are measured. It also would identify the self-enforcing payments Qwest may pay if it fails to meet the performance requirements of the plan. As discussed above under the first interconnection issue, Issue WA-I-2, such a plan is currently being developed through a collaborative multi-state process, in which Washington is a participant.

262 Given that the post-271 performance assurance plan is still under development, it is premature for Qwest to impose restrictions that could affect payments under that plan. Furthermore, the provisions of Qwest's tariff and the Service Quality Performance Program associated with the merger are not meant to be mutually exclusive. CLECs and other customers may receive credits or payments under the tariff and the Service Quality Performance Program for the same outage, delay, or other service quality incident. Qwest must therefore delete sections 6.2.3.1(f) and 6.2.3.2(e) from its SGAT.

2. Handling of Calls by CLEC End Users to Qwest Offices (Issue WA-14-7)

263 This issue involves CLEC end users who mistakenly call Qwest offices regarding ordering or repair. It is addressed in SGAT section 6.4.1 for ordering and 6.6.3 for repairs. The relevant sections of the SGAT read as follows:

> Section 6.4.1: CLEC's end users contacting Qwest in error will be instructed to contact CLEC; and Qwest's end users contacting CLEC in error will be instructed to contact Qwest. In responding to calls, neither Party shall make disparaging remarks about each other. To the extent the correct provider can be determined, misdirected calls received by either Party will be referred to the proper provider of local exchange service; however, nothing in this Agreement shall be deemed to prohibit Qwest or CLEC from discussing its products and services with CLEC's or Qwest's end users who call the other Party.
>
> Section 6.6.3: CLEC and Qwest will employ the procedures for handling misdirected repair calls as specified in Section 12.3.8 of this Agreement.
>
> Section 12.3.8.1.5: In responding to repair calls, neither Party shall make disparaging remarks about each other, nor shall they use these repair calls as the basis for internal referrals or to solicit end users to market services. Either U S WEST or the CLEC may respond with accurate information in answering end-user questions.

264 Qwest asserts that it should be able to market its services and products to CLEC customers who call Qwest by mistake, stating that any restriction of these activities interferes with its right to commercial free speech. *Qwest Brief, at 51.* AT&T and WorldCom argues that Qwest's position as the dominant reseller and underlying service provider would make such conduct anticompetitive, and request that the limitation on marketing to CLEC end users be narrowly drawn to only apply to misdirected or erroneous calls. *Joint Brief at 61-62.*

265 Under the FCC's pick-and-choose rules and consistent with this Commission's Interpretive and Policy Statement issued in Docket No. UT-990355, a CLEC could adopt a provision from any approved interconnection agreement that has not expired. We note that Qwest's interconnection agreements contain provisions regarding Qwest's response to CLEC customers that call Qwest by mistake. For example, Qwest's interconnection agreement with Sprint includes a provision that prohibits Qwest from marketing its products during inadvertent contacts from CLEC customers

to Qwest. *Ex. 234, at 164.* CLECs are free to adopt such a provision in place of either the SGAT provision or provisions in their own agreements.

3. Restriction on Using Resale Ordering Information for Marketing Purposes (Issue WA-14-8)

266 AT&T raised this issue at the November workshop on resale. AT&T suggested language to be added to the SGAT to prohibit Qwest from using information received during a CLEC request for subscriber information or its order submissions for marketing purposes. *Ex. 371, ¶ 272; see Tr. at 1718.* Qwest suggested placing the language at one location in the SGAT rather than having it in several SGAT sections. At the January follow-up workshop, the parties agreed that they were at impasse on the language as well as its location. *Tr. at 2649.*

267 Section 222 of the Act requires the protection of customer information and restricts its use by carriers to the purpose for which it is intended.[58] Section 222(b) provides:

> A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

268 Given that the SGAT is one means by which Qwest demonstrates its compliance with the terms of the Act, the Commission believes language to this effect should be included in the SGAT; however, since the requirement pertains to any telecommunications service and not resale only, Qwest should place the language in the general section of the SGAT.

4. Megabit Resale (Issue WA-14-12)

269 At the January workshop, AT&T asked for clarification on whether a reseller can provide Qwest's Megabit service without providing the underlying voice service. *Tr. at 2652-53.* Qwest's witness replied that retail Megabit services are available for resale at the wholesale discount. *Tr. at 2653.*

270 The Commission observes that Megabit services are included in Qwest's Tariff WN U-39 at Section 8, which sets forth the terms and conditions under which Megabit services are offered in Washington. The parties should look to those tariff provisions to resolve this issue. The parties should look also to the Thirteenth Supplemental

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[58] 47 U.S.C. § 222.

Order in Part A of Docket No. UT-003013 in which the Commission determined that the high frequency portion of a loop is an unbundled network element.[59]

5. Per Location Pricing (Issue WA-14-13)

MetroNet's Position

271 MetroNet takes issue with SGAT sections 6.2.2.9.1. and 6.2.2.9.2, which contain per location restrictions on Centrex pricing. MetroNet asserts that Qwest's per location pricing of the NAC (network access channel) for Centrex Prime is a violation of Commission orders in Docket No. UT-950200. It states that Qwest's pricing of Centrex services was designed and intended to restrict resale. MetroNet asserts that Qwest has not offered cost or other justification for per location pricing of Centrex, but that the entire purpose for the pricing scheme was to restrict resale. MetroNet offers Exhibits 475-C through 486-C to support its contention. *Post-workshop Brief of MetroNet Services Corporation on Disputed Resale Issues, at 8 (MetroNet Brief).*

Qwest's Position

272 Qwest responds that all of its Centrex services are available for resale at the wholesale discount. It states that its Centrex Plus features are competitive services, and that terms and conditions related to such services are therefore presumptively reasonable because a competitive market would not allow unreasonable terms and conditions. *Qwest Brief at 43.*

Discussion and Decision

273 The Act does not presume that restrictions on resale of competitive services are presumptively reasonable. The Act makes no distinction between competitively classified services and those not so classified: it merely requires that "any telecommunications services" be offered for resale. Further, the Commission has expressly stated that competitive service are subject to resale.

274 Qwest's offering of Centrex services has been the subject of several dockets over the past ten years. In the Fourth and Sixth Supplemental Orders in Dockets No. UT-911488, 911490 and 920252, the Commission found that the Centrex station line or NAC was a bottleneck monopoly service.[60] Qwest was ordered to unbundle the

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[59] *See ¶¶ 22, 23, 25, 32, 66, and 67.*

[60] *Washington Utilities and Transportation Commission v. U S WEST Communications, Inc.,* Fourth Supplemental Order Denying Complaint; Accepting Tariffs Conditionally; Requiring Tariff/Price List Refiling, Docket Nos. UT-911488, 911490, 920252, at 15-16 (Nov. 18,

station line or NAC and the competitively-classified features, and to include the NAC rate in its tariff as a separate offering. In Docket UT-950200, the Commission found that Qwest had not complied with this requirement and concluded that the existing arrangements were discriminatory and in practice operated to benefit Qwest. It ordered Qwest to unbundle Centrex elements and also ordered it to remove the station location requirement.[61] Qwest's current tariff WN U-40 contains the rates for Centrex station lines. These lines are priced on a per system basis; there are no per location restrictions pertaining to this offering.[62]

275 Consistent with the Commission's previous orders on this topic, a per location restriction on the provision of the station line for resale purposes is an unreasonable restriction on resale, and cannot be included in Qwest's SGAT. With respect to Centrex features, the Commission approved the lifting of the per location restriction for Centrex features included in Qwest's price list in May 1997.[63] Based on the record before us, we see no reason to require a change to this price list offering. It is available to resellers on the same terms and conditions as retail Centrex users. Per location pricing restrictions on Centrex features need not be removed from the SGAT.

6. Centrex Prime (Issue WA-14-13)

MetroNet's Position

276 MetroNet asserts that Qwest discriminates and restricts resale by offering Centrex Prime at secret prices, terms, and conditions that have effectively precluded any reseller from reselling the services. *MetroNet Brief at 2.* MetroNet asserts that Qwest's tariff states that all terms and conditions for the provision of Centrex Prime are subject to a service agreement between the company and the customer, with rates on an ICB basis. *Id. at 16.* MetroNet observes that the prices for Centrex Prime listed on Exhibit 512 are "potential" prices, and that the prices for actual Centrex Prime contract components are filed under a confidential designation. *Id.*

1993); *Washington Utilities and Transportation Commission v. U S WEST Communications, Inc.,* Sixth Supplemental Order, Commission Order Accepting Filings, Docket Nos. UT-911488, 911490, 920252, at 2 (Dec. 2, 1994).

[61] *Washington Utilities and Transportation Commission v. U S West Communications, Inc.,* Fifteenth Supplemental Order, Commission Decision and Order Rejecting Tariff Revisions; Requiring Refiling, Docket No. UT-950200, at 126-127 (April 11, 1996).

[62] *See* Qwest Tariff WNU-40, Sec. 9.1.16. With respect to the per location pricing of Centrex Prime, the Commission does not find those restrictions to be unreasonable. Resellers wishing to avoid the per location restrictions may do so through purchase of the Centrex station lines from Qwest's tariff.

[63] See Docket No. UT 970673, effective May 1, 1997.

Qwest's Position

277 Qwest responds that it offers Centrex Prime for resale at the Commission-ordered discount. *Qwest Brief at 38.*

Discussion and Decision

278 The Commission finds that the manner in which Qwest offers Centrex Prime service results in unreasonable restrictions on resale in violation of Section251(c)(4) of the Act.

279 First, Qwest's failure to publish or provide its standard pricing scheme to resellers makes it virtually impossible for resellers to avail themselves of this service for similarly-situated customers. While Qwest's sales personnel have access to Qwest's standard prices for Centrex Prime components, resellers do not. Centrex Prime is offered on an ICB basis. The "essential terms and conditions" section of Qwest's ICB contracts for Centrex Prime do not contain enough detail to allow CLECs to know what Centrex features are being provided, how many station lines are at each location, how many locations are being served, what prices are being charged for the lines and features at each location, and other essential information. Therefore, Qwest's failure to provide its standard pricing schedule for Centrex Prime to resellers constitutes an unreasonable restriction on resale. In order to remove this restriction, Qwest must publish its standard pricing schedule for Centrex Prime, either in its tariff or in the SGAT.

7. Qwest Rebate Program (Issue WA-14-13)

280 Confidential records provided by Qwest under order in this proceeding reveal a rebate program to certain Centrex customers. *See Ex. 511-C.* These records show evidence of anticompetitive behavior as well as violation of Washington statutes concerning publication of tariffed rates and contracts filed with the Commission.[64] Qwest must correct these deficiencies in the way it offers Centrex for resale in order to be in compliance with the resale requirements under Section 251(c)(4) of the Act.

8. Termination Liability (Issue WA-14-13)

Qwest's Position

281 In the workshops on January 5, 2001, the parties discussed the application of termination liabilities of existing ICB contracts between Qwest and retail customers

[64] See RCW 80.36.110; RCW 80.36.130; RCW 80.36.150.

that a CLEC might seek to resell before the contract term has expired. Qwest would impose a termination liability on a customer if the customer sought to transfer its ICB contract with Qwest to a reseller. *Tr. at 2696.* Qwest asserts that its termination liability provisions have been approved in customer specific arrangements (CSAs) and are similar to those used by other incumbent LECs for which the FCC has approved applications for in-region interLATA authority under Section 271. *Qwest Brief at 39-40.*

Discussion and Decision

282 The issue of termination liability provisions and their effect on resale of services has been addressed in other jurisdictions. The FCC's recent order concerning SBC Communications Inc.'s Section 271 application in Kansas and Oklahoma stated that termination liabilities do not constitute a restriction on resale under Checklist Item No. 14 if termination liabilities are not triggered by the assignment of a contract to a competitive LEC.[65]

283 Several issues are at play here. First, the end user customer has presumably received a reduction in rates from Qwest in exchange for purchasing services under a term CSA agreement. It is unreasonable to allow such a customer to terminate its CSA early without penalty when it has received benefits under the arrangement. Conversely, it is unreasonable to allow Qwest to receive a termination liability payment for a contract offering from which it continues to receive revenues.

284 It is not clear, either from the record in this proceeding or from Qwest's current tariffs and price lists, whether Qwest routinely allows assignment of CSAs without termination penalties. MetroNet states that the SGAT precludes assignment without penalty. *MetroNet Brief at 15.* MetroNet also asserts that Qwest's termination liabilities on Centrex contracts can approach 60 percent of the remaining payments over the unexpired term of the contract, and that the amount of termination charges on such a contract would probably exceed the wholesale discount available to it. *Tr. at 2682.* Qwest's termination liabilities appear high compared to termination liabilities for Centrex in other states.[66] Qwest has been silent in this proceeding on whether it allows assignment of contracts without penalty. It has not provided evidence that its application of termination liabilities, or their amount, constitute reasonable restrictions on resale.

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[65] SBC Kansas/Oklahoma Order, ¶ 253.

[66] In New York, the FCC found that termination liabilities for Centrex service was limited to the difference between what the customer would have paid under the shorter term and what the customer actually paid under the long-term contract. *Bell Atlantic New York Order, ¶ 387.*

285 End users should be entitled to assign their CSAs to another party without triggering a termination penalty. The absence of such an arrangement constitutes a presumptively unreasonable restriction on resale. Under such an assignment arrangement, Qwest would continue to receive revenue under the CSA for the rest of the contract term and would not be harmed. The end user would continue to receive service at the same rate without incurring a penalty. The CLEC would be afforded the opportunity to establish a relationship with the end user until the term of the contract expires, and could then negotiate a new arrangement with the end user as a reseller of Qwest retail services using the available wholesale discount, or as a facilities-based provider.

Verification of Compliance

286 In order to meet the requirements of Checklist Item No. 14, BOCs must comply with the Act and FCC rules concerning resale. Through its testimony and exhibits, Qwest asserts that all of its retail offerings are available for resale in compliance with the Act and FCC rules. It asserts that its SGAT and interconnection agreements establish legally binding obligations to provide resale under the Act and the FCC. Based on the Commission's review of the record regarding resale in this proceeding, Qwest is not in compliance with the requirements of Checklist Item No. 14.

287 First, Qwest must modify its SGAT, tariff, and price list, as applicable, to comply with Commission requirements on the issues of quality of service credits and penalties; general restrictions on use of ordering information; per location pricing; Centrex Prime pricing information, and termination liabilities. Second, Qwest must make any and all of its retail services, including rebate programs, available for resale under terms and conditions that comply with the Act, FCC rules, and Commission statutes and regulations. Third, Qwest's compliance is also subject to Commission review and evaluation of audited results of relevant performance measures and Qwest's actual performance following the ROC OSS regional testing process, as well as Commission review and evaluation of Qwest's post-271 performance plan.

FINDINGS OF FACT

288 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases therefor, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

289 (1) Qwest Corporation, formerly U S WEST Communications, Inc., is a Bell operating company (BOC) within the definition of 47 U.S.C. § 153(4), providing local exchange telecommunications service to the public for compensation within the state of Washington.

290 (2) The Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, to verify the compliance of Qwest with the requirements of section 271(c) of the Telecommunications Act of 1996, and to review Qwest's Statement of Generally Available Terms, or SGAT, under Section 252(f)(2) of the Act.

291 (3) Section 271 of the Act contains the general terms and conditions for BOC entry into the interLATA market.

292 (4) Pursuant to 47 U.S.C. § 271(d)(2)(B), before making any determination under this section, the FCC is required to consult with the State commission of any State that is the subject of a BOC's application under Section 271 in order to verify the compliance of the BOC with the requirements of section 271(c).

293 (5) Pursuant to 47 U.S.C. § 252(f)(2), BOCs must submit any statement of terms and conditions that the company offers within the state to the State Commission for review and approval.

294 (6) In October 1997 and in March 2000, the Commission issued Interpretive and Policy Statements addressing the process and evidentiary requirements for the Commission's verification of Qwest's compliance with Section 271(c).

295 (7) On March 22, 2000 and on April 28, 2000, Qwest submitted its SGAT for review and approval by this Commission.

296 (8) On June 6, 2000, the Commission consolidated its review of Qwest's SGAT in Docket No. UT-003040 with its evaluation of Qwest's compliance with the requirements of Section 271(c) in Docket No. UT-003022.

297 (9) During the second workshop in this proceeding held on November 6-8, 10, 2000, November 28 and 29, 2000, and January 3-5, 2001, Qwest and a number of CLECs submitted testimony and exhibits to assist the Commission in evaluating Qwest's compliance with the requirements of Section 271(c) of the Act, as well as the review of Qwest's SGAT pursuant to Section 252(f).

Interconnection Findings of Fact

298 (10) Qwest's SGAT addresses indemnification in section 5.9 of the general terms and conditions section, but does not address indemnification in Section 7, concerning interconnection.

299 (11) SGAT sections 7.1.2.1 and 7.1.2.3 prohibit the use of interconnection through entrance facilities and mid-span meets, to access unbundled network elements, or UNEs, although several of Qwest's interconnection agreements with CLECs in Washington state provide for interconnection at any technically feasible point, including for the purpose of accessing UNEs.

300 (12) SGAT section 7.3.1.2.1 prohibits the use of interconnection tie pairs for interconnection service, but allows their use for access to UNEs.

301 (13) SGAT section 7.1.2.1 provides that when DS1s or DS3s are used to provision interconnection trunks, entrance facilities will be charged at Qwest's private line rate.

302 (14) Paragraph 340 of the Commission's Thirteenth Supplemental Order in Docket No. UT-003013 requires Qwest to file rates for entrance facilities.

303 (15) SGAT section 7.1.2.2 provides that when a CLEC chooses to use collocation as the method of interconnection, the CLEC will be charged Expanded Interconnection Channel Termination (EICT) rates for the facility connecting the CLEC's collocation point of interconnection to Qwest's switch.

304 (16) SGAT section 7.1.2.3 provides that each party is responsible for providing the facilities up to the point of interconnection.

305 (17) Qwest's policy for a single point of presence, or SPOP, allows the exchange of local traffic at the toll tandem and eliminates the interLocal Calling Area facilities proposal made by Qwest during the first workshop. Qwest's SPOP policy is set forth in a different document than the SGAT, although SGAT section 7.2.2.9.6.1 does allow exchange of local traffic at the access tandem under certain circumstances.

306 (18) SGAT section 7.2.2.1.2.1 allows interconnection through one-way and two-way trunk groups. Under this section, if a CLEC chooses one-way trunking, Qwest will determine the POI and choose the route of traffic flowing from Qwest to the CLEC.

307 (19) SGAT section 7.2.2.1.5 provides that CLECs must build a mid-span trunk on all direct-trunked transport over 50 miles where neither the CLEC nor Qwest have facilities in place.

308 (20) SGAT section 7.2.2.6.3 allows CLECs to order interconnection trunks with multi-frequency signaling if the Qwest central office switch does not have SS7 signaling capability.

309 (21) Qwest has deployed SS7 signaling capability in all of its central offices in the state of Washington, and each central office equipped with SS7 capability has diverse routing with a minimum of two links to the SS7 network.

310 (22) SGAT sections 7.2.2.8.6 and 7.2.2.8.6.1 require CLECs to pay up-front deposits before Qwest will build interconnection trunk facilities if the CLEC's actual trunk utilization over the preceding 18 month period is 50 percent or less of its forecasted trunk utilization. Qwest requires a 100 percent refundable deposit to build trunks at the CLECs forecasted utilization if that forecast is higher than Qwest's.

311 (23) Qwest's Exchange and Network Services Tariff, WN U-40, provides that Qwest will retain ownership of facilities constructed at customer expense, e.g., line extensions. Qwest's SGAT does not provide for CLEC ownership of facilities for which CLECs pay deposits or special construction charges.

312 (24) SGAT section 7.2.2.9.3.2 prohibits commingling of exchange service traffic with switched access traffic on the same trunk group. However, Qwest has agreed to allow commingling of exchange service traffic with switched access traffic on the same trunk group

313 (25) SGAT sections 7.2.2.9.6 and 7.2.2.9.6.1 require CLECs to terminate local traffic either on Qwest local tandem or end office switches and to order trunking to those same points, and allow CLECS to terminate local traffic at Qwest's access tandem switch only if there is no local tandem switch serving an end office.

314 (26) SGAT sections 4.11.2 and 7.3.4.2.1 provide that if a switch switches traffic once, a party will receive only the tandem switching rate, whereas if the switch switches traffic twice, the party will receive the tandem rate, the tandem transmission rate, and the end office call termination rate.

315 (27) SGAT sections 7.5.4 and 7.6.3 apply a reciprocal charge for certain call and transit records sent in an EMR mechanized format. Interconnection

agreements between Qwest and AT&T and WorldCom include similar provisions.

316 (28) SGAT sections 4.5.7, 4.3.9, 7.3.1.1.3.1, and 7.3.2.2 include the term "phone to phone IP telephony" in defining meet-point billing and jointly switched access service.

Number Portability Findings of Facts

317 (29) Qwest has deployed long-term number portability within the schedule set by the FCC.

318 (30) Some CLEC customers have experienced service outages, including loss of access to E-911 service, when Qwest has disconnected its loop at the predetermined time set by the 10-digit trigger for number porting, because the CLEC loop is not in place or some other problem has occurred.

319 (31) Verification and test query systems for better coordination between CLECs and ILECs of loop provisioning and number portability have not yet been developed.

320 (32) SGAT section 10.2.2.4 allows for a coordinated cutover process when provisioning a Qwest unbundled loop with number porting, but requires CLECs to use a more involved "managed cutover" process when provisioning CLEC loops with number porting.

321 (33) Qwest's SGAT requires due date intervals for provisioning LNP that do not sufficiently reflect the amount of time required for provisioning LNP for different classifications of service.

Resale Findings of Fact

322 (34) FCC rules require BOCs to make telecommunications services available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).

323 (35) SGAT sections 6.2.3.1 and 6.2.3.2, concerning quality of service credits and penalties, limit the service quality credits Qwest will pay to a CLEC reseller to a wholesale amount, avoid payment of service quality credits, fines or penalties to CLECs if the CLEC is not subject to Commission requirements for such credits, preclude payments to CLECs unless the CLEC pays a credit to its end-user customer, limit the amount Qwest must pay CLECs in service quality

credits, and preclude CLECs from receiving payment or credit for the same service quality incident from more than one program.

324 (36) Qwest's wholesale discount is based on the costs that Qwest avoids when reselling retail services, such as billing and collection and customer contact.

325 (37) Qwest is subject to quality of service requirements under its network services tariff WN U-40, a service quality performance program approved in the U S WEST-Qwest merger proceeding in Docket No. UT-991358, and will be subject to a post-271 performance plan under development in ROC-sponsored workshops. Neither the tariff program nor the merger program exclude application to resold services.

326 (38) CLECs who resell Qwest's retail offerings are subject to the quality of service provisions in Qwest's tariff.

327 (39) SGAT sections 6.4.1 and 12.3.8.1.5 include provisions precluding Qwest or CLECs from discussing products and services, making disparaging remarks about each other, or using calls for marketing purposes when end users calls the other party in error or for repairs.

328 (40) Qwest's Interconnection Agreement with Sprint prohibits Qwest from marketing products during inadvertent contacts from Sprint customers.

329 (41) Qwest's SGAT does not contain a provision to prevent the use of resale ordering information for marketing purposes.

330 (42) SGAT sections 6.2.2.9.1 and 6.2.2.9.2 contain per location restrictions on Centrex pricing.

331 (43) The Commission has prohibited per location pricing restrictions for Centrex station lines, but has lifted the restriction on per location pricing for Centrex features.

332 (44) Qwest does not publish or provide a standard pricing scheme for Centrex Prime that would allow resellers to determine essential information for offering Centrex Prime at resale.

333 (45) Confidential documents provided by Qwest under order reveal a rebate program to certain Centrex customers.

334 (46) Qwest's SGAT provides that a customer under a contract with Qwest for a customer specific arrangement (CSA) would pay an early termination liability for switching service to a CLEC, but does not address whether the termination liability would apply if the customer assigns its CSA contract to another party.

CONCLUSIONS OF LAW

335 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

336 (1) The Commission has jurisdiction over the subject matter of this proceeding and the parties to the proceeding.

Interconnection Conclusions of Law

337 (2) The issue of Qwest's obligations to indemnify CLECs is not yet ripe for review, as the matter is more appropriately addressed when considering the general terms and conditions of the SGAT and the review of Qwest's post 271 performance plan.

338 (3) Entrance facilities, mid-span meets, and interconnection ties pairs are technically feasible methods of interconnection and of obtaining access to UNEs. Qwest must allow any technically feasible method of obtaining nondiscriminatory access to UNEs at any point requested by the CLEC. Under FCC rules, Qwest may not impose restrictions on the use of UNEs that may impair a CLECs ability to offer service in the manner the CLEC intends. Qwest may not preclude the use of entrance facilities, mid-span meets, and ITPs for interconnection to access UNEs.

339 (4) Qwest is responsible for building and paying for the costs of facilities on its side of the point of interconnection, consistent with SGAT section 7.1.2.3. Qwest may not, therefore, charge CLECs for an EICT or ITP on the Qwest side of the POI when the CLEC chooses collocation as the method of interconnection.

340 (5) Qwest's performance in provisioning the SPOP is an issue of performance to be discussed in workshop sessions addressing Qwest's post–entry performance plan and the results of the ROC third-party OSS testing.

341 (6) Qwest should be able to determine the POI and the route for one-way trunking flowing from Qwest to the CLEC. No change in the SGAT is necessary to bring Qwest into compliance with Section 271 or FCC rules and orders.

342 (7) In paragraph 553 of the *Local Competition First Report and Order*, the FCC recognizes that ILECs have a responsibility of "limited build-out" in mid-span meet arrangements. In balancing the right of CLECs to select interconnection at any technically feasible point, and Qwest's responsibility for the cost of facilities on its side of a meet point, it is reasonable to impose a distance limit on Qwest's obligation to build facilities to a meet-point. A distance limit is also consistent with the Arbitrator's Report and Decision in Docket No. UT-960310, approved by the Commission. No change to the SGAT is necessary to bring Qwest into compliance with Section 271 or FCC rules and orders.

343 (8) Qwest's network provides sufficient diverse routing in every central office such that no additional SGAT language is necessary to address CLEC concerns about signaling failure, or to bring Qwest into compliance with Section 271.

344 (9) Both Qwest and CLECs bear a burden to ensure that there is efficient use of resources and sufficient capacity on Qwest's network to avoid blocked calls. In order to balance the burden between the parties, it is reasonable to require CLECs to provide deposits when forecasting if the CLEC has not met prior forecasts. However, Qwest may not base deposits on underutilization of trunks in other geographic areas. Qwest must guarantee the availability of the forecasted trunks for which CLECs pay a deposit.

345 (10) It is reasonable for Qwest to retain ownership of facilities for which CLECs provide forecasts and pay a deposit, and for which CLECs pay special construction charges, as the burden may fall to Qwest ratepayers if Qwest were to build facilities for CLECs that were underused or non-revenue bearing due to poor CLEC forecasts. Consistent with the FCC's findings in paragraph 258 of its *Local Competition First Report and Order*, no change to the SGAT is necessary to bring Qwest into compliance with Section 271.

346 (11) Consistent with the FCC's conclusions that interconnection at the access tandem is technically feasible and that CLECs may choose the point of interconnection, Qwest must permit interconnection for the exchange of local traffic at the point determined by the CLEC, including the access tandem switch, and must not limit CLECs to interconnection at the local tandem. Qwest must provide interconnection at the access tandem even if capacity at the access tandem is exhausted or forecasted to exhaust unless Qwest agrees to provide interconnection facilities to the local tandem or end office switches

served by the access tandem at the same cost to the CLEC as interconnection at the access tandem.

347 (12) Qwest's SGAT sections 4.11.2 and 7.3.4.2.1 concerning treatment of tandem switches preclude the Commission from exercising its judgment with respect to how factors of geography and function of a particular switch may affect its treatment. These SGAT sections do not comply with the requirements of Checklist Item Nos. 1, 13, or Section 252(f)(2).

348 (13) Qwest's requirement that parties pay a reciprocal charge when providing certain call and transit records is reasonable given Qwest's experience under existing interconnection agreements. No change to the SGAT is necessary to bring Qwest into compliance with Section 271.

349 (14) Consistent with the findings and conclusions made in paragraphs 199 and 200 of the Revised Initial Order in this proceeding concerning the status of ISP traffic and payment for that traffic, Qwest must strike all references in the SGAT to phone to phone IP telephony.

350 (15) Until Qwest modifies its SGAT provisions concerning interconnection as discussed above, and subject to Commission review and evaluation of the audited results of the ROC OSS regional testing on performance measures, Qwest is not in compliance with the requirements of 47 U.S.C. § 271(c)(2)(B)(i), Checklist Item No. 1 concerning interconnection, and the Commission will not approve Qwest's SGAT.

Number Portability Conclusions of Law

351 (16) Qwest's SGAT provisions concerning coordination of loop provisioning and number porting do not sufficiently allow customers to retain existing telephone numbers without impairment in quality, reliability, or convenience, as required by the FCC.

352 (17) Qwest's SGAT provisions concerning coordinated and managed cutovers of loops provisioned with number porting are discriminatory and anti-competitive as they deny CLECs the same option available to Qwest.

353 (18) Qwest has not demonstrated that its due date intervals for provisioning LNP are reasonable or provide a meaningful opportunity to compete with Qwest, as required by the FCC.

354 (19) Until Qwest modifies its SGAT provisions concerning number portability as discussed above, and subject to Commission review and evaluation of the audited results of the ROC OSS regional testing on performance measures, Qwest is not in compliance with the requirements of 47 U.S.C. § 271(c)(2)(B)(xi), Checklist Item No. 11, and the Commission will not approve Qwest's SGAT.

Resale Conclusions of Law

355 (20) Qwest's SGAT provisions restricting the application of service quality credits and penalties result in unreasonable restrictions to resale under Section 251(c)(4) and do not provide resale arrangements as required by Section 271(c)(2)(B)(xiv).

356 (21) Qwest's SGAT provisions and interconnection agreements provide CLECs with the opportunity to prevent Qwest from using inadvertent calls from CLEC customers for marketing opportunities in compliance with FCC rules, orders and the requirements of Checklist Item No. 14.

357 (22) Qwest's SGAT is not consistent with the provisions of 47 U.S.C. § 222 as it lacks any provision preventing the use of ordering information for marketing purposes.

358 (23) Qwest's SGAT provision imposing per location pricing on Centrex station lines violates previous Commission orders and is an unreasonable restriction on resale contrary to Section 251(c)(4). Qwest's SGAT provision imposing similar restrictions on Centrex features is consistent with Commission orders and is not an unreasonable restriction on resale.

359 (24) Qwest's failure to publish its prices for Centrex Prime sufficiently to allow resellers to determine essential information for offering Centrex Prime at resale is an unreasonable restriction on resale in violation of Section 251(c)(4).

360 (25) Qwest's rebate program violates RCW 80.36.110, RCW 80.36.130, and RCW 80.36.150 and constitutes an unreasonable restriction on resale in violation of Section 251(c)(4).

361 (26) Unless Qwest's SGAT provides for assignment of CSA contracts without a termination liability, Qwest's SGAT provisions concerning termination liability act as an unreasonable restriction on resale in violation of Section 251(c)(4).

362 (27) Until Qwest modifies its SGAT provisions concerning resale as discussed above, and subject to Commission review and evaluation of the audited results of the ROC OSS regional testing on performance measures, Qwest is not in compliance with the requirements of 47 U.S.C. § 271(c)(2)(B)(xiv), Checklist Item No. 14, and the Commission will not approve Qwest's SGAT.

ORDER

363 Based on the findings of fact and conclusions of law set forth above, the Administrative Law Judge enters the following order:

Interconnection Order Provisions

364 (1) The issues of Qwest's obligations to indemnify CLECs and its performance in provisioning its policy of a single point of presence are deferred until the workshop addressing general terms and conditions of the SGAT, the results of the ROC third party OSS testing, and the review of Qwest's post 271 performance plan.

365 (2) In order for the Commission to find Qwest in compliance with 47 U.S.C. § 271(c)(2)(B)(i), Checklist Item No. 1 - interconnection, and for the Commission to approve Qwest's SGAT, Qwest must modify its SGAT to:

(a) Allow CLECs to use entrance facilities and mid-span meets for interconnection and to obtain nondiscriminatory access to UNEs at any technically feasible point of interconnection chosen by the CLEC;
(b) Apply the rates for entrance facilities ordered in Docket No, UT-003013;
(c) Eliminate the application of EICT and ITP rates on facilities on Qwest's side of the POI when a CLEC chooses to use collocation to interconnect and access UNEs;
(d) Eliminate the requirement that CLECs make deposits for interconnection trunk facilities based upon the underutilization of trunks in other geographic areas;
(e) Guarantee the availability of forecasted trunks for which CLECs pay a deposit;
(f) Remove the prohibition on commingling exchange service traffic with switched access traffic on the same trunk group;
(g) Permit interconnection for the exchange of local traffic, by any technically feasible method at any point requested by the CLEC, including the access tandem switch, and must not limit CLECs to interconnection at the local tandem;

(h) Allow for a factually-based consideration of geography and function when determining whether to treat CLECs switches at tandem switches; and
(i) Remove all references to phone-to-phone IP telephony.

Number Portability Order Provisions

366 (3) In order for the Commission to find Qwest in compliance with 47 U.S.C. § 271(c)(2)(B)(xi), Checklist Item No. 11, and for the Commission to approve Qwest's SGAT, Qwest must modify its SGAT to:

(a) extend the time that the 10-digit trigger and customer translations are removed until 11:59 p.m. of the day following the due date for number porting;
(b) allow CLECs the option of using the coordinated cutover process or managed cutover process when provisioning CLEC provided loops and porting numbers; and
(c) include AT&T's proposed due date intervals for provisioning LNP, including provisioning LNP within three business days when no unbundled loop is involved.

Resale Order Provisions

367 (4) In order for the Commission to find Qwest in compliance with 47 U.S.C. § 271(c)(2)(B)(xiv), Checklist Item No. 14, and for the Commission to approve Qwest's SGAT, Qwest must modify its SGAT to:

(a) eliminate the application of the wholesale discount or other limits to service quality credits or fines payable to CLECs, and include a provision allowing a credit to CLECs of the lesser of Qwest's monthly service charge or the monthly service charge the CLEC pays to its end user;
(b) eliminate the restriction on payment to CLECs if a CLEC is not subject to the Commission's service quality requirements;
(c) eliminate the restriction on paying service quality credits to CLECS only if they pass through the credits to end users;
(d) eliminate the provision precluding CLECs from receiving payment or credit for the same service quality incident from more than one service quality program;
(e) include language prohibiting Qwest from using for marketing purposes any information received during a CLEC request for subscriber information or ordering;
(f) eliminate the provision applying per location pricing restrictions on Centrex station lines for resale; and

(g) include a provision allowing for assignment of CSA contracts without termination liabilities or penalties.

368 (5) In order for the Commission to find Qwest in compliance with 47 U.S.C. § 271(c)(2)(B)(xiv), Checklist Item No. 14, and for the Commission to approve Qwest's SGAT, Qwest must:

(a) not apply its SGAT to exclude resold services from the retail services covered under the Service Quality Performance Program approved in the merger between US WEST and Qwest;
(b) publish its standard pricing schedule for Centrex Prime either in its tariff or in the SGAT; and
(c) correct the way the company offers rebates to Centrex customers to avoid anti-competitive behavior and violation of Washington statutes.

369 (6) Qwest must submit to the Commission the audited results of performance testing relating to Checklist Items No. 1, 11, and 14, and associated testimony concerning the audited results as soon as the results are available. The Commission will not find Qwest in compliance with Checklist Items No. 1, 11, and 14 until after its review of the results.

370 (7) The Commission retains jurisdiction to implement the terms of this order.

DATED at Olympia, Washington, and effective this __th day of February, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge