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July 17, 2000

BY HAND DELIVERY

Blanca Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Complaint of MCImetro -- Docket No. 991755-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI WORLDCOM are the original and fifteen copies of the rebuttal testimony of Mr. Mark Argenbright.

By copies of this letter, this testimony has been furnished to the parties on the attached service list.

Very truly yours,

Richard D. Melson

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cc: Parties of Record

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following by U.S. Mail or Hand Delivery (*) this 17th day of July, 2000:

Tim Vaccaro (*)
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Florida Public Service Commission
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150 South Monroe Street
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Tallahassee, FL 32301-1556

Attorney

141660.1

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

REBUTTAL TESTIMONY OF MARK ARGENBRIGHT

ON BEHALF OF

MCImetro ACCESS TRANSMISSION SERVICES, LLC

AND MCI WORLDCOM COMMUNICATIONS, INC.

DOCKET NO. 991755-TP

JULY 17, 2000

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Mark E. Argenbright. My business address is Six Concourse Parkway, Suite 3200, Atlanta, Georgia 30328.

Q. ARE YOU THE SAME MARK ARGENBRIGHT WHO FILED PRE-FILED DIRECT TESTIMONY IN THIS DOCKET ON JUNE 16, 2000?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my Rebuttal Testimony is to address several statements made by BellSouth witness Cynthia Cox in her Direct Testimony filed in this docket. I will address these statements in the context of the four issues presented in this case.

Issue 1: Under FCC Rule 51.711, would MCIm and MWC be entitled to be compensated at the sum of the tandem interconnection rate and the end office interconnection rate for calls terminated on their switches if those

switches serve a geographic area comparable to the area served by BellSouth's tandem switches?

Q. AT PAGES 3 AND 4 OF HER DIRECT TESTIMONY, MS. COX CONTENDS THAT FCC RULE 51.711 SUPPORTS BELLSOUTH'S PROPOSED TWO-PRONGED TEST. DO YOU AGREE?

A. No. Ms. Cox omits from her discussion of FCC Rule 51.711 any mention of Rule 51.711(a)(3) concerning geographic comparability. As I stated in my Direct Testimony, this geographic comparability provision was adopted without exception or qualification. Ms. Cox simply chooses to ignore this point.

Q. AT PAGE 5 OF HER DIRECT TESTIMONY, MS. COX ASSERTS THAT THE FCC'S LOCAL COMPETITION ORDER SETS FORTH A TWO-PRONGED TEST. PLEASE COMMENT.

A. For the reasons stated in my Direct Testimony at pages 10-13, it is clear that the Local Competition Order did not create a two-pronged, tandem functionality/geographic comparability test, but rather stated that an ALEC is entitled to the tandem interconnection rate (in addition to the end office interconnection rate) whenever the ALEC's switch serves an area comparable to the area served by an ILEC tandem switch. This reading is confirmed by the FCC Rule 51.711(a)(3), which contains no tandem functionality requirement.

Q. MS. COX CONTENDS THAT PRIOR ORDERS OF THIS COMMISSION SUPPORT BELLSOUTH'S POSITION. DO YOU AGREE?

A. No. Ms. Cox refers to three of the Commission's arbitration orders: the Final Order on Arbitration concerning Sprint and MCI, Order No. PSC-97-0294-FOF-TP, Docket No. 961230-TP (March 14, 1997) ("MCI/Sprint Order"); the Order on Petition for Arbitration concerning MFS and Sprint, Order No. PSC-96-1532-FOF-TP, Docket No. 960838-TP (December 16, 1996) ("MFS/Sprint Order"); and the Final Order on Arbitration concerning ICG and BellSouth , Order No. PSC-00-0128-FOF-TP, Docket No. 990691-TP (January 14, 2000) ("ICG/BellSouth Order"). I note that although Ms. Cox uses slightly different order and docket numbers at page 5 of her Direct Testimony than I do with respect to the MCI/Sprint Order, it appears we are referring to the same Order.

Q. AT PAGE 5 OF HER DIRECT TESTIMONY, MS. COX QUOTES THE MCI-SPRINT ORDER FOR THE PROPOSITION THAT AN ALEC IS NOT ENTITLED TO BE COMPENSATED FOR TRANSPORT AND TANDEM FUNCTIONS THAT IT DOES NOT ACTUALLY PERFORM. PLEASE COMMENT.

A. The Commission's ruling in the MCI-Sprint Order was similar to its decision in the MCI/BellSouth arbitration order. As I stated in my Direct Testimony, the Commission noted in the MCI/BellSouth arbitration that the FCC rules forming the basis for MCI's position on the symmetry issue were then stayed. Likewise, in the MCI/Sprint Order, the Commission stated that it would not rely on the stayed FCC rules and stayed portions of the Local Competition Order as a basis for its decision. The Commission's decision in the MCI/Sprint Order therefore

does not apply here, because MCIm and MWC in this docket are requesting the Commission to make its decision based on the reinstated FCC pricing rules that the Commission did not rely upon in its previous rulings.

Q. AT PAGE 6 OF HER TESTIMONY, MS. COX CITES THE MFS-SPRINT ORDER TO SUPPORT BELLSOUTH'S POSITION. IS THAT ORDER GERMANE HERE?

A. No. Like the MCI/Sprint Order, the MFS/Sprint Order was made when the FCC's pricing rules were stayed. In the MCI/Sprint Order, the Commission stated that "[w]hile we did discuss the merits of the FCC Rules and Order in our decision in the MFS/Sprint arbitration, they were not a basis for our decision." (This quotation is from page 6 of the MCI/Sprint Order as it appears on the Commission's web site.) The Commission's ruling in the MFS/Sprint Order therefore has no bearing here.

Q. MS. COX ALSO POINTS TO THE MORE RECENT ICG/BELLSOUTH ORDER TO SUPPORT BELLSOUTH'S PROPOSED TWO-PRONGED TEST. DO YOU AGREE?

A. No. Ms. Cox misreads the Commission's decision. The Commission noted that ICG had no facilities in place and therefore concluded that the Commission could not determine if ICG's network would serve a geographic area comparable to one served by a BellSouth tandem switch. The Commission also considered whether ICG's network would include tandem switches or provide a tandem functionality, and concluded that it would not. The Commission did not suggest that ICG had to prove both geographic comparability ***and*** tandem functionality. Rather, its

discussion was consistent with the principle that an ALEC seeking to recover the tandem interconnection rate must prove geographic comparability ***or*** tandem functionality. In short, the ICG Order supports the conclusion that an ALEC showing only geographic comparability is entitled to the tandem interconnection rate.

Q. ARE YOU FAMILIAR WITH DECISIONS ON THE GEOGRAPHIC COMPARABILITY ISSUE IN OTHER STATES?

A. Yes. I am familiar with decisions in North Carolina, Ohio, Washington and Illinois.

Q. PLEASE DESCRIBE THE NORTH CAROLINA DECISION.

A. In the ITC^DeltaCom/BellSouth arbitration, the North Carolina Utilities Commission rejected BellSouth's argument that an ALEC must satisfy both a functionality test and a geographic comparability test. The North Carolina Commission arbitration panel concluded:

> After careful and extensive review of the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090, the Commission believes that the language in the FCC's Order clearly contemplates that exact duplication of the ILEC's network architecture is not necessary in order for the CLP [ALEC] to be eligible to receive reciprocal compensation at the tandem switching rate. Further, we believe that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the

> requirement that the equipment utilized by both parties covers the same basic geographic area. We further believe that the Rule and the Order language are not, for this reason, in conflict in the manner described by BellSouth and the Public Staff.

Recommended Arbitration Order, Docket No. P-500, Sub 10 (April 20, 2000). A copy of this Order printed from the North Carolina Commission's web site is attached as Exhibit ___ (MEA-7). The quotation is from page 15 of that exhibit. Although styled a "Recommended Arbitration Order," this order in fact constitutes the arbitration panel's ruling in the case.

Q. PLEASE EXPLAIN THE OHIO DECISION.

A. In its January 1, 1997 Arbitration Award in the MCI/Ameritech case (Case No. 96-888-TP-ARB), the Public Utilities Commission of Ohio made clear that an ALEC is entitled to the tandem interconnection rate based on a showing of geographic comparability alone. The Commission stated:

> How a non-incumbent LEC's switch functions is not the relevant criteria to determine the compensation rate. The Commission's guidelines specify that, where a switch of a non-incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the non-incumbent LEC is the incumbent LEC's tandem interconnection rate.

An excerpt of this decision is attached as Exhibit ___ (MEA-8). The quotation is from page 18 of the exhibit.

Q. PLEASE DESCRIBE DECISIONS IN WASHINGTON.

A. In the arbitration between Electric Lightwave, Inc. and GTE Northwest (Docket No. 980370), the arbitrator rejected an argument similar to the one being made by BellSouth here. In his March 22, 1999 decision, the arbitrator stated that "[t]he functional similarity between a CLEC switch and an incumbent LEC's tandem switch is not relevant where the evidence supports a finding that they serve a geographically comparable area." A copy of the Electric Lightwave order is attached as Exhibit ___ (MAE-9). The quotation is from page 15 of the exhibit.

BellSouth relies on Ninth Circuit decision in *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), which arose from a Washington arbitration that preceded the Electric Lightwave case. The Ninth Circuit held simply held that the Washington Commission was not arbitrary or capricious when it ruled that MFS was entitled to the tandem interconnection rate, and in so ruling considered whether MFS's switch performed similar functions and served a geographic area comparable to U.S. West's tandem switch. The Ninth Circuit did not hold that an ALEC must prove both tandem functionality and geographic comparability. The Electric Lightwave arbitration decision demonstrates that Washington does require such proof either.

Q. PLEASE DESCRIBE THE ILLINOIS DECISION.

A. Ms. Cox cites *MCI Telecommunications Corporation v. Illinois Bell Telephone Company* (Case No. 97 C 2225, June 22, 1999) to support BellSouth's two-pronged test. Ms. Cox's reliance is misplaced. The district court did not reach the issue of whether a two-pronged test is consistent with FCC Rule 51.711 or the Local Competition Order. In any event, the functionality point was essentially moot, because there was no dispute that MCI's switches provided functionality comparable to Ameritech's tandem switches.

Q. **CAN YOU ELABORATE FURTHER ON THE RELATIONSHIP BETWEEN GEOGRAPHIC COMPARABILITY AND TANDEM FUNCTIONALITY?**

A. Yes. The concept of a single, geographic scope test was adopted largely because the FCC recognized that when an ALEC switch covers a geographic area that is comparable to the area covered by an ILEC tandem switch, the ALEC switch is necessarily providing similar functionality. Although a functionality test is not required or appropriate when geographic comparability has been established, it is useful to discuss how the MCIm/MWC network operates to understand why geographic coverage and functionality go hand in hand.

The Orlando and South Florida networks I described in my Direct Testimony consist of some basic components: switches, fiber transport, local nodes, collocations, and on-net buildings. The physical connectivity between the MCIm and MWC switches and the customers served by those switches is accomplished

in a variety of ways. First, a customer can be served via a facility, such as a DS1, that extends from the switch directly to the customer. Typically this facility is leased from BellSouth and is used to provide service to customers that are not located in an on-net building or close to the MCIm/MWC fiber transport system.

Alternatively, a customer could be served by extending a facility from a collocation space to the customer. In this case the facility would be connected to multiplexing equipment that would place that customer's traffic on a high capacity transport system (e.g. OC-48 SONET system) to be transported to the switch. This situation allows traffic from multiple customers to be combined onto the higher capacity transport system.

Another situation is involved when a customer is located in an on-net building. Here, MCIm and MWC can place add/drop multiplexing equipment in the building that is connected to the high capacity fiber ring. MCI and MWC then use the building's inside wire and riser cable to connect the customer to the multiplexing equipment that ultimately provides connectivity to the switch.

On the interconnection side of the switch, trunking facilities are installed between the switch and BellSouth tandems as well as various BellSouth end offices. These are typically at a DS1 level but can vary in capacity based on traffic needs. In addition to local and intraLATA traffic, trunking arrangements are established for such things as operator traffic, directory assistance, E911, and long distance traffic. When traffic is originated on BellSouth's network, MCIm and MWC pick

that traffic up at the point of interconnection between the two networks, bring that traffic into their local switches and then route the traffic across the extensive fiber transport network, digital cross connects and multiplexers (or, in some cases over the direct trunk facilities between the switches and the customers) for delivery to the customer. Essentially MCIm and MWC switches serve as aggregation points for traffic originated from BellSouth direct-trunked end offices and destined to MCIm's and MWC's customers.

Issue 2: Do MCIm's and MWC's switches serve geographic areas comparable to those served by BST tandem switches?

Q. **AT PAGE 9 OF HER TESTIMONY, MS. COX STATES THAT MCIm AND MWC HAVE NOT OFFERED PROOF THAT THEY CURRENTLY SERVE AREAS COMPARABLE TO THE AREAS SERVED BY BELLSOUTH TANDEMS. PLEASE RESPOND.**

A. At pages 14-16 of my Direct Testimony, I provided information about the MCIm network in the Orlando area and the MCIm/MWC network in the South Florida area. In addition, I attached maps showing the geographic areas covered by MCIm's and MWC's switches. As I stated in my Direct Testimony, these areas are comparable to the areas served by BellSouth's tandems. MCIm and MWC have served discovery requests on BellSouth requesting, among other things, maps showing the geographic coverage of its tandems so that a ready comparison can be made at the hearing in this docket.

Q. PLEASE PROVIDE ADDITIONAL INFORMATION, WITH RESPECT TO THE ORLANDO AREA, REGARDING THE SERVICE MCIm PROVIDES TODAY.

A. In the Orlando market, MCIm has a network configured and equipped to serve fourteen rate centers, and MCIm currently has customers in nine of these rate centers. MCIm's Orlando switch has a current equipped capacity of approximately [redacted] DS0s, and currently provides customers with more than [redacted] local circuits. Through its fiber network, the Orlando switch serves [redacted] on-net buildings in [redacted] cities. In addition, MCI has established [redacted] collocation arrangements in [redacted] BellSouth and Sprint wire centers. These collocation arrangements are connected to the switch via SONET transport systems that ride our fiber facilities. Additional SONET transport systems provide internodal transport between and among the local nodes and the switch.

Q. PLEASE PROVIDE ADDITIONAL INFORMATION, WITH RESPECT TO THE SOUTH FLORIDA AREA, REGARDING THE SERVICE MCIm PROVIDES TODAY.

A. In the South Florida area, the MCIm/MWC network has had three switches and has been configured and equipped to serve twelve rate centers. (Since I filed my Direct Testimony, we have added a fourth switch in the South Florida area. The information I describe below does not include the capacity of this new switch.) Combined, the current total equipped capacity of these switches is approximately [redacted] DS0s. MCIm and MWC currently have customers in eleven of these rate centers. MCIm and MWC provide these customers with more than [redacted] local

circuits. Through the fiber network these switches serve [redacted] on-net buildings in [redacted] cities. [redacted] collocation arrangements have been established in [redacted] BellSouth wire centers. As in Orlando, these collocation arrangements are connected to the appropriate switches via SONET transport systems that ride our fiber facilities, and additional SONET transport systems provide internodal transport between and among the local nodes and the switch.

Issue 3: Should BellSouth be required, pursuant to Part A Section 2.2 or 2.4 of the interconnection agreement, to execute amendments to its interconnection agreements with MCIm and MWC requiring BellSouth to compensate MCIm and MWC at the sum of the tandem interconnection rate and the end office interconnection rate for calls terminated on their switches that serve a geographic area comparable to the area served by BellSouth's tandem switches?

Q. **DOES MS. COX CHALLENGE MCIm'S AND MWC'S UNDERSTANDING OF PART A SECTION 2.2 AND 2.4?**

A. No. Ms. Cox simply restates BellSouth's position that the parties' Interconnection Agreements are consistent with FCC Rule 51.711 and Orders of this Commission. For the reasons I stated in my Direct Testimony, the Interconnection Agreements should be amended as MCIm and MWC are requesting in this docket.

Issue 4: Are MCIm and MWC entitled to a credit from BellSouth equal to the additional per minute amount of the tandem interconnection rate from January 25, 1999 to the earlier of (i) the date such amendments are approved by the Commission, or (ii) the date the interconnection agreements are terminated?

Q. MS. COX STATES THAT IF THE COMMISSION AWARDS A REFUND IN THIS CASE, THE RETROACTIVE DATE SHOULD NOT BE JANUARY 25, 1999. PLEASE RESPOND.

A. As I noted in my Direct Testimony, I am not a lawyer. MCIm's and MWC's position is that the credit should date back to January 25, 1999, the date of the applicable Supreme Court decision. Otherwise, BellSouth would be allowed to retain funds that it collected in violation of the Supreme Court's decision. MCIm and MWC will address the legal issues further in their post-hearing briefs.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes, it does.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-500, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition by ITC^DeltaCom Communications, Inc. For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)	RECOMMENDED ARBITRATION ORDER

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on October 18-20, 1999

BEFORE: Commissioner Sam J. Ervin, IV, Presiding, and Commissioners Judy Hunt and William R. Pittman

APPEARANCES:

FOR ITC^DELTACOM COMMUNICATIONS, INC.:

Charles C. Meeker and Henry C. Campen, Jr., Parker, Poe, Adams & Bernstein, L.L.P., First Union Capitol Center, Suite 1400, 150 Fayetteville Street Mall, Raleigh, North Carolina 27602-0389

Nanette S. Edwards - Senior Manager and Regulatory Attorney, 700 Boulevard South, Suite 101, Huntsville, Alabama 35802

David I. Adelman, Sutherland, Asbill & Brennan, L.L.P., 999 Peachtree Street, NE, Atlanta, Georgia 30309-3996

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Edward L. Rankin, III, General Counsel - North Carolina, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

Thomas B. Alexander, General Attorney and Bennett L. Ross, General Attorney, BellSouth Telecommunications, Inc., 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375-0001

FOR THE USING AND CONSUMING PUBLIC:

Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission pursuant to Section 252(b) of the Telecommunications Act of 1996 (TA96 or the Act) and Section 62-110(f1) of the North Carolina General Statutes. On June 14, 1999, ITC^DeltaCom Communications, Inc. (DeltaCom) filed a Petition for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. (BellSouth) in this docket which initiated this proceeding. By its Petition, DeltaCom requested that the Commission arbitrate certain terms and conditions with respect to interconnection between itself as the petitioning party and BellSouth.

The purpose of this arbitration proceeding is for the Commission to resolve the issues set forth in the Petition and Responses. 47 U.S.C.A. Section 252(b)(4)(C). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission (FCC) regulations pursuant to Section 252. Additionally, the Commission shall establish rates according to the provisions

in 47 U.S.C.A. Section 252(d) for interconnection, services or network elements, and shall provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C.A. Section 252(c).

Pursuant to Section 252 of TA96, the FCC issued its First Report and Order in CC Docket Numbers 96-98 and 95-185 on August 8, 1996 (Interconnection Order). The Interconnection Order adopted a forward-looking incremental costing methodology for pricing unbundled network elements (UNEs) which an incumbent local exchange company (ILEC) must sell new entrants, adopted certain pricing methodologies for calculating wholesale rates on resold telephone service, and provided proxy rates for State Commissions that did not have appropriate costing studies for UNEs or wholesale service. Several parties, including this Commission, appealed the Interconnection Order and on October 15, 1996, the United States Court of Appeals for the Eighth Circuit issued a stay of the FCC's pricing provisions and its "pick and choose" rule pending the outcome of the appeals.

The July 18, 1997 ruling of the Eighth Circuit, as amended on rehearing October 14, 1997, was largely in favor of state regulatory commissions and local phone companies and adverse to the FCC and potential competitors, primarily long distance carriers. The Eight Circuit held that 47 U.S.C.A. Sections 251 and 252 "authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act." The Court of Appeals also vacated the FCC's "pick and choose rule." Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

On January 25, 1999, the United States Supreme Court entered its Opinion in AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999). The Supreme Court held, in pertinent part, that (1) the FCC has jurisdiction under Sections 251 and 252 of the Act to design a pricing methodology and adopt pricing rules; (2) the FCC's rules governing unbundled access are, with the exception of Rule 319, consistent with the Act; (3) it was proper for the FCC in Rule 319 to include operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided by competitors; (4) the FCC did not adequately consider the Section 251(d)(2) "necessary and impair" standards when it gave requesting carriers blanket access to network elements in Rule 319; (5) the FCC reasonably omitted a facilities-ownership requirement on requesting carriers; (6) FCC Rule 315(b), which forbids ILECs to separate already-combined network elements before leasing them to competitors, reasonably interprets Section 251 (c)(3) of the Act, which establishes the duty to provide access to network elements on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements; and (7) FCC Rule 809 (the "pick and choose" rule), which tracks the pertinent language in Section 252(i) of the Act almost exactly, is not only a reasonable interpretation of the Act, it is the most readily apparent. The Supreme Court remanded the cases back to the Eighth Circuit Court of Appeals for proceedings consistent with its opinion.

On June 10, 1999, the Eighth Circuit Court of Appeals entered an Order on remand in response to the Supreme Court's decision which, in pertinent part, reinstated FCC Rules 501-515, 601-611, and 701-717 (the pricing rules), Rule 809 (the "pick and choose" rule), and Rule 315(b) (ILECs shall not separate requested network elements which are currently combined). The Eighth Circuit also vacated FCC Rule 319 (specific unbundling requirements). The Court set a schedule for briefing and oral argument of those issues which it did not address in its initial opinion because of its ruling on the jurisdictional issues. The Court also requested the parties to address whether it should take any further action with respect to FCC Rules 315(c) - (f) regarding unbundling requirements. Iowa Utilities Board v. FCC, F.3d (Order Filed June 10, 1999).

By Order dated June 29, 1999, the Commission set this matter for hearing on October 18, 1999.

On July 9, 1999, BellSouth filed its prefiled direct testimony as well as its Response to DeltaCom's Petition for Arbitration.

On July 26, 1999, DeltaCom prefiled its rebuttal testimony.

On September 27, 1999, the Public Staff of the North Carolina Utilities Commission filed a Notice of Intervention in this proceeding.

On October 1, 1999, BellSouth filed a Motion to Resolve Issues. In its Motion, BellSouth requested that certain arbitration issues concerning UNEs and collocation be transferred to Docket No. P-100, Sub 133d, the Commission's generic UNE docket, and Docket No. P-100, Sub 133j, the Commission's generic collocation docket. On October 8, 1999, DeltaCom filed its Opposition to BellSouth's Motion to Resolve Issues.

On October 11, 1999, the Commission issued its Order Concerning UNEs and Collocation Issues. The [illegible] from the arbitration proceeding which concerned UNEs or collocation

On October 13, 1999, DeltaCom filed a Motion for Clarification and to Defer Issues in which DeltaCom asked the Commission: (1) to clarify that its existing Interconnection Agreement with BellSouth will remain in effect until all issues deferred to the generic dockets have been decided and (2) to defer consideration of the issues relating to the reciprocal compensation associated with Internet Service Providers (ISPs) pending the Commission's decision in the ICG Telecom Group, Inc. (ICG) arbitration docket, Docket No. P-582, Sub 6. Specifically, DeltaCom was concerned with the 449 extended loops in service serving current customers in North Carolina and the status of the extended loops regarding additional customers.

On October 14, 1999, BellSouth prefiled redacted testimony.

On October 15, 1999, the Public Staff filed its Reply to DeltaCom's Motion for Clarification and to Defer Issues. With respect to the deferral of issues, the Public Staff supported the request of DeltaCom, saying that it is clearly in the public interest that there is no service disruption for DeltaCom customers receiving service via extended loops during the pendency of these issues. With respect to the deferral of a hearing concerning reciprocal compensation issues until a decision is issued in the pending arbitration between BellSouth and ICG, the Public Staff supported deferral of the reciprocal compensation issues to a generic proceeding.

On October 15, 1999, BellSouth filed its Response to DeltaCom's Motion. BellSouth argued that DeltaCom's Motion regarding continued operation under the existing Interconnection Agreement should be denied as unnecessary, and it stated that it did not oppose DeltaCom's Motion to defer consideration of issues related to inter-carrier reciprocal compensation as long as such consideration occurs within the context of a general proceeding as requested by BellSouth, and not within the pending ICG arbitration.

By Order dated October 15, 1999, the Commission concluded that good cause existed to defer consideration of issues in this docket relating to reciprocal compensation. The Commission reserved the question of deferring the reciprocal compensation issue pending the issuance of an Order in the ICG/BellSouth arbitration docket or pending the conclusion of a generic docket such as that proposed by BellSouth. The Commission further concluded that a decision regarding DeltaCom's Motion concerning continued operation under the existing Interconnection Agreement should be deferred pending further argument and clarification from the Parties at the beginning of the hearing scheduled for October 18, 1999.

This matter came on for hearing as scheduled on October 18, 1999. At the beginning of the hearing, the Commission Panel heard oral arguments for reconsideration of its decision to defer consideration of the reciprocal compensation issues. The Commission concluded that it would hear evidence on the issue of reciprocal compensation in the hearing. The Commission Panel also heard arguments from BellSouth and DeltaCom concerning DeltaCom's Motion to hold its existing Interconnection Agreement in effect pending implementation of a further agreement. The arguments concerned BellSouth's provision of extended loops to existing and prospective customers.

Following the preliminary oral argument, the hearing commenced. DeltaCom offered the direct and rebuttal testimony of Christopher J. Rozycki, Director of Regulatory Affairs for DeltaCom; the direct and rebuttal testimony of Michael Thomas, Director - Information Services for DeltaCom; and the direct and rebuttal testimony of Thomas Hyde, Senior Manager - Industry Relations for DeltaCom. The direct testimony of Don J. Wood was entered into the record by stipulation. BellSouth offered the direct testimony of Dr. William E. Taylor, Senior Vice President of National Economic Research Associates, Inc.; the direct testimony of Alphonso J. Varner, Senior Director - Regulatory Policy and Planning for BellSouth; the direct testimony of Ronald M. Pate, Director - Interconnection Services for BellSouth; the direct testimony of David P. Scollard, Manager - Wholesale Billing for BellSouth Billing, Inc., a subsidiary of BellSouth; and the direct testimony of W. Keith Milner, Senior Director - Interconnection Services for BellSouth.

In response to the oral argument held on October 18, 1999, the Commission entered an Order on October 19, 1999, requesting that BellSouth and DeltaCom each make a filing by October 22, 1999, setting forth: (1) a concise restatement of their arguments, (2) citations and text of relevant sections of the existing Interconnection Agreement, (3) the substance of the terms of the oral agreement between the Parties concerning continuation of service referred to at the October 18, 1999 oral argument, (4) the rates applicable to the extended loops and collocation service and authority therefor, and (5) each party's "bottom line" concerning the terms and conditions under which a continuation of service as to extended loops to new and existing customers would be effected.

On October 21, 1999, the Commission issued its Post-Hearing Order wherein the Commission instructed the Parties to work with each other to arrive at a common list of remaining disputed issues consistently numbered

and identified. The Commission further requested the Parties to prepare a post-hearing matrix to be submitted at the same time as Proposed Orders and Briefs.

DeltaCom and BellSouth both submitted their filings on October 22, 1999 in compliance with the Commission's October 19, 1999 Order. DeltaCom's "bottom line" position was that the Interconnection Agreement provided for continuation of extended loop service for new customers in North Carolina until the Commission ruled on this issue in the generic docket. BellSouth's "bottom line" position was that it is under no obligation under either the Agreement or the FCC rules to combine unbundled elements with BellSouth's retail services. BellSouth argued that the extended loops were provided to DeltaCom in error by BellSouth employees unfamiliar with the terms of the Agreement. To avoid a complete disruption of DeltaCom's service, however, BellSouth reached an oral agreement with DeltaCom by which BellSouth would continue to provision these extended loops until such time as DeltaCom could establish collocation arrangements in the affected central offices. Until these collocation arrangements are completed, BellSouth also agreed to accept orders from DeltaCom for extended loops to serve new customers, but only for those central offices with existing extended loops and for which collocation requests had been submitted. Further, under the oral agreement, BellSouth will not process any requests for DeltaCom for extended loops involving other central offices.

On November 2, 1999, the Commission entered an Order Concerning Continuation of Service. Through this Order, the Commission provided an interim solution to the dispute of the status of new and existing DeltaCom customers with regard to extended loops. Pursuant to the Order, existing DeltaCom customers who are receiving or have received extended loop service shall be able to receive extended loop service out of central offices already providing service by extended loops. New customers shall be able to receive extended loop service out of central offices already providing service by extended loops. DeltaCom has no obligation to initiate or continue the collocation process at this time in those central offices already providing service to DeltaCom customers by extended loops. BellSouth is under no obligation to provide extended loop service to new customers out of central offices which provide no extended loops service to DeltaCom customers. DeltaCom has the option of converting any extended loop arrangement at central offices where some service is provided to DeltaCom customers via extended loops to a collocation arrangement. The interim solution, which applies only to extended loop arrangements, is subject to prospective revision and change based upon the Commission's generic consideration of issues related to extended loops in Docket No. P-100, Sub 133d.

On December 1, 1999, BellSouth and DeltaCom provided their Notification of Resolved and Unresolved Issues for Purposes for Arbitration.

On December 2, 1999, BellSouth filed a Motion for Reconsideration of the Commission's November 2, 1999 Order concerning continuation of service.

On December 6, 1999, BellSouth and DeltaCom filed their Proposed Orders and Briefs. On that same day, the Public Staff filed its Proposed Order.

On December 13, 1999, DeltaCom filed its Response to BellSouth's Motion for Reconsideration concerning continuation of service.

On December 16, 1999, the Commission issued its Order Denying Motion for Reconsideration.

On December 20, 1999, DeltaCom filed its Motion for Leave to File a Supplemental Brief. DeltaCom stated in its Motion that the Public Staff, in its Proposed Order, raised two issues concerning the tandem switch rate which DeltaCom had not anticipated would be raised. DeltaCom argued that it had not previously briefed the issues and needed to brief the issues now.

On December 21, 1999, BellSouth filed its Response to DeltaCom's Motion. On December 23, 1999, the Public Staff filed its Response to DeltaCom's Motion.

By Order dated December 29, 1999, the Commission allowed Supplemental Briefs.

On December 29, 1999, DeltaCom filed its Supplemental Brief. On January 5, 2000, BellSouth filed its Supplemental Brief.

On January 5, 2000, the Public Staff filed its Response to DeltaCom's Supplemental Brief.

By Order dated January 20, 2000, the Commission required DeltaCom and BellSouth to submit as late-filed exhibits certain information concerning the issue of whether DeltaCom's switches serve a comparable geographic area to BellSouth's tandem switches.

On February 21, 2000, DeltaCom and BellSouth made separate filings in compliance with the Commission's January 20, 2000 Order.

By Order dated February 29, 2000, the Commission sought additional information as late-filed exhibits concerning the tandem switching issue in addition to the maps already provided.

On March 7, 2000, DeltaCom filed its late-filed exhibits in response to the Commission's February 29, 2000 Order. On March 14, 2000, BellSouth filed its Response to DeltaCom's March 7, 2000 late-filed exhibits.

A glossary of the acronyms referenced in this Order is attached hereto as Appendix A.

WHEREUPON, based upon a careful consideration of the entire record in this arbitration proceeding, the Commission now makes the following

FINDINGS OF FACT

1. It is more appropriate to consider DeltaCom's proposed performance measurements and performance guarantees in the generic docket (Docket No. P-100, Sub 133k) established to address such issues. Further, the Commission concludes that it is appropriate for the Parties to include BellSouth's most recent Service Quality Measures (SQMs) in their Interconnection Agreement on an interim basis until a Final Order is issued by the Commission in the generic Docket No. P-100, Sub 133k, concerning performance measurements and enforcement mechanisms.

2. BellSouth is not required at this time to map Electronic Data Interchange (EDI) to the Direct Order Entry (DOE) system for all commonly ordered services requested by DeltaCom on behalf of its retail customers. However, the Commission is concerned about the lack of parity demonstrated in this proceeding and expects BellSouth to take appropriate action within a reasonable time frame to ensure that parity is reached in the instances noted in this proceeding. Finally, it is not appropriate to include any additional language in the Interconnection Agreement setting out BellSouth's obligation for providing UNEs and Operations Support Systems (OSS).

3. The appropriate reciprocal compensation rate for local traffic is the sum of the permanent rates for the individual network elements actually used to handle the call as established in Docket No. P-100, Sub 133d. The overall rate, including tandem switching, is approximately $.003 per minute. Further, dial-up ISP traffic should be subject to an interim inter-carrier compensation mechanism and the relevant rates should mirror those used for reciprocal compensation for local traffic. Such rates shall be subject to true-up at such time as the Commission has ruled pursuant to the FCC's anticipated order on the subject.

4. For reciprocal compensation purposes, DeltaCom should be compensated at BellSouth's tandem interconnection rate.

5. The Parties should incorporate into their new Interconnection Agreement the existing local interconnection arrangements pertaining to the following matters until or unless the Parties reach agreement otherwise: (1) definition of local traffic, (2) reconfiguration charges for new installations at existing points of interconnection, (3) payment of nonrecurring charges as a result of network redesigns/reconfigurations initiated by BellSouth, (4) trunking options available to the Parties, (5) the routing of traffic by the least costly method, (6) cross-connection charges applicable in a collocation arrangement at the BellSouth wire center, (7) the loading and testing of NXX codes, and (8) the delivery of traffic between DeltaCom, BellSouth, and a third party. The Commission declines to include any proposed provisions, in this regard, that are not contained in the current local interconnection arrangements. However, the Commission encourages BellSouth and DeltaCom to continue to negotiate on the matter of binding forecasts.

6. It is reasonable and appropriate to adopt BellSouth's proposed language providing that the party requesting an audit should be responsible for paying for the audit; however, a party overstating Percent Local Usage (PLU) or Percent Interstate Usage (PIU) by 20% or more shall pay for the cost of the audit.

7. The Commission declines to require the inclusion of language obligating the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement to pay the cost of the litigation.

8. The Commission declines to require the insertion of a tax liability provision in the Interconnection Agreement but encourages the Parties to continue negotiations on this issue.

9. The Commission declines to require the inclusion of a provision establishing compensation for a material breach of contract in the Interconnection Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

MATRIX ISSUE NO. 1(a): Should BellSouth be required to comply with the performance measures and guarantees for pre-ordering/ordering, resale and UNEs, provisioning, maintenance, interim number portability and local number portability, collocation, coordinated conversions, and the bona fide request process as set forth fully in Attachment 10 of Exhibit A to DeltaCom's Petition?

POSITIONS OF PARTIES

DELTACOM: Yes. DeltaCom argued that although the Commission has recently established a generic docket concerning performance measures and guarantees, DeltaCom believes that interim measures should be adopted in this arbitration because it may be some time before a final order is issued in the generic docket. DeltaCom argued that nothing in TA96 gives the Commission authority to preclude certain issues from arbitration simply because those issues affect more than one carrier or because those issues may be considered at a later date. DeltaCom maintained that TA96 specifically mandates that all issues be resolved. DeltaCom argued that this Federal mandate is particularly important in this instance where inadequate service by BellSouth will cause DeltaCom to lose customers and likely damage DeltaCom's reputation. DeltaCom posited that performance measures and guarantees are essential for three primary reasons: (1) BellSouth has competitive and financial incentives to block entry of DeltaCom into the North Carolina market; (2) as the owner of the local loop, BellSouth has the means to limit DeltaCom's ability to provide quality service; and (3) seeking redress through the regulatory complaint procedure or through the courts would be wasteful and ineffective in a competitive environment. DeltaCom stated that performance measures and guarantees are necessary and in the public interest because such provisions would create meaningful incentives for BellSouth to perform. DeltaCom stated that it proposes a three-tier set of performance measures and guarantees. The first tier calls for the waiver of nonrecurring charges when BellSouth fails to provide the ordered service in a timely fashion. The second tier of guarantees is triggered when BellSouth fails to meet a measurement in two out of three months during a quarter. Where such a "Specified Performance Breach" occurs, BellSouth is required to provide compensation of $25,000. The third level of DeltaCom's proposed performance guarantees is triggered only in the cases of extreme and extraordinary nonperformance, where BellSouth fails to meet a single measure five times during a six-month period. For those extreme cases, BellSouth must pay $100,000 for each default, for each day the default continues. Also, DeltaCom is recommending that the second- and third-tier guarantees, if assessed, be paid to a public interest fund. DeltaCom concluded that although the generic docket will provide consistent guidance in this area on a state-wide basis, the Commission should be concerned that several months may elapse before a final order is issued in the generic docket. Therefore, DeltaCom recommended that the Commission find that the performance measures and guarantees contained in Exhibit A at Attachment 10 be in place until the Commission issues a final and nonappealable order in the generic proceeding.

BELLSOUTH: No. BellSouth maintained that despite having made numerous requests early during the negotiations, BellSouth did not receive a copy of Attachment 10 from DeltaCom until the day after the negotiations ended. BellSouth stated that it does not believe that the so-called performance measures and performance guarantees in Attachment 10 to the Petition are appropriate. BellSouth stated that the Parties do not dispute the importance of or need for performance measurements in their Interconnection Agreement, only which performance measures should be included. BellSouth argued that it has offered in its negotiations with DeltaCom comprehensive performance measures that will ensure that BellSouth provides DeltaCom with nondiscriminatory access consistent with the requirements of TA96 and FCC orders and rules known as BellSouth's SQMs. BellSouth further noted that the Commission issued a November 4, 1999 Order establishing a generic docket to address performance measurements and enforcement mechanisms and that docket may be the more appropriate place for a decision regarding this issue. BellSouth recommended that the Commission require the Parties to incorporate BellSouth's SQMs into their Interconnection Agreement as may be subsequently modified consistent with future decisions by the Commission in its recently established generic docket to address performance measurements and enforcement mechanisms. With respect to performance guarantees, BellSouth argued that DeltaCom's proposed

performance guarantees constitute financial penalties, which the Commission lacks the statutory or jurisdictional authority under state law to unilaterally award without a hearing and absent BellSouth's prior consent. BellSouth recommended that the Commission specifically decline to adopt any of the performance guarantees offered by DeltaCom, but note that the subject of appropriate enforcement mechanisms will be taken up in Docket No. P-100, Sub 133k.

PUBLIC STAFF: No. The Public Staff stated that on November 4, 1999, the Commission established a generic docket, Docket No. P-100, Sub 133k, for the consideration of performance measures and enforcement mechanisms. The Public Staff maintained that the issues of performance measures and an enforcement mechanism are more appropriate for consideration in that docket. The Public Staff argued that consideration in a generic docket would lead to a uniform decision which would apply to all competing local providers (CLPs) and ILECs operating in North Carolina. The Public Staff recommended that the Commission deny any request by DeltaCom that it establish performance measures and an enforcement mechanism in this case on an interim basis and defer the issue to the generic proceeding since it would be of greater benefit to decide this issue on an industry-wide basis rather than to consider individual cases and make decisions in a piecemeal fashion.

DISCUSSION

The Commission notes that by Order dated November 4, 1999, the Commission established a generic docket to consider performance measurements and enforcement mechanisms which stemmed from the BellSouth/ICG arbitration proceeding (Docket No. P-582, Sub 6). In its Order, the Commission requested the industry, the Public Staff, the Attorney General, and other interested parties to form a Task Force. The Commission notes that, after being granted extensions of time, the Task Force is to file a report with the Commission by not later than May 3, 2000, which outlines specific issues agreed to by the Task Force as well as any issues on which the Task Force is unable to reach agreement. The Commission believes that it would be more appropriate for DeltaCom to actively participate on the Task Force established to address these issues on a statewide level rather than adopting DeltaCom's proposed set of performance measurements in this docket. Further, the Commission believes that BellSouth's proposal to include BellSouth's SQMs on an interim basis until an Order is issued in the generic proceeding in the Interconnection Agreement is a reasonable and appropriate recommendation. However, the Commission's decision is not intended to preclude the Parties from negotiating guarantees as referenced by BellSouth witness Varner during cross-examination by DeltaCom (See Transcript Volume 3, Page 117).

CONCLUSIONS

The Commission concludes that it is more appropriate to consider DeltaCom's proposed performance measurements and performance guarantees in the generic docket established to address such issues. Further, the Commission concludes that it is appropriate for the Parties to include BellSouth's most recent SQMs in their Interconnection Agreement on an interim basis until a Final Order is issued by the Commission in the generic Docket No. P-100, Sub 133k, concerning performance measurements and enforcement mechanisms.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

MATRIX ISSUE NO. 2: Is BellSouth providing services including OSS and UNEs to DeltaCom at parity with that which it provides to itself?

POSITIONS OF PARTIES

DELTACOM: No. DeltaCom argued that its access to OSS must be at parity with BellSouth's access. DeltaCom maintained that its evidence showed that for a customer desiring to switch from BellSouth to DeltaCom and add several commonly ordered services, DeltaCom submits the order for the customer to BellSouth electronically through EDI. DeltaCom stated that by design, such order falls out when it reaches BellSouth and that when the same order is placed by BellSouth to provide the same services with BellSouth as the retail service provider, the order is processed electronically. DeltaCom argued that this example reflects the underlying problem of BellSouth's failure to map EDI to the DOE system. DeltaCom maintained that BellSouth's systems must provide access to OSS for DeltaCom at least equal to that enjoyed by BellSouth. DeltaCom stated that both companies initially enter orders manually - DeltaCom through EDI and BellSouth through DOE - but it is only DeltaCom's orders that must be re-entered by BellSouth personnel. DeltaCom stated that its orders fall out while BellSouth's orders do not. DeltaCom maintained that it is technically feasible for BellSouth to map EDI to DOE and avoid this problem and that the Commission should require BellSouth to do so. DeltaCom recommended that the Commission find that the intent of the parity requirement is that the service really be equal and, therefore, BellSouth should map fully between the EDI and DOE systems for all commonly ordered services requested by

DeltaCom on behalf of its retail customers.

BELLSOUTH: Yes. BellSouth stated that it denies that it does not offer OSS and UNEs to DeltaCom at parity. BellSouth stated that it has offered to include language in the Interconnection Agreement consistent with TA96 and the FCC's rules regarding parity of services. BellSouth maintained that TA96 does not require BellSouth to provide DeltaCom with service at levels greater than BellSouth provides to its own end users. BellSouth argued that it is not clear what relief DeltaCom is seeking under this issue that is not already subsumed under other issues. BellSouth stated that FCC Rule 51.311 specifically provides: "The quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an ILEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the ILEC provides to itself." Therefore, BellSouth stated that it is already obligated, by TA96 and the FCC's rules, to provide DeltaCom and any other CLP nondiscriminatory access to telecommunications services, UNEs, and interconnection. BellSouth noted that it currently provides CLPs with nondiscriminatory electronic interfaces to access BellSouth's OSS including: the Local Exchange Navigation System (LENS) and the Telecommunications Access Gateway (TAG) for pre-ordering, ordering, and provisioning; EDI for ordering and provisioning; Trouble Analysis and Facilities Interface (TAFI) for maintenance and repair; Electronic Communications Trouble Administration (ECTA) for maintenance and repair; and Optional Daily Usage File (ODUF), Enhanced Optional Daily Usage File, and Access Optional Daily Usage File for billing. BellSouth asserted that it also offers CLPs manual interfaces to its OSS. BellSouth maintained that these interfaces allow CLPs to perform pre-ordering, ordering, provisioning, maintenance and repair, and billing functions for resale service in substantially the same time and manner as BellSouth does for itself, and, in the case of UNEs, provide a reasonable competitor with a meaningful opportunity to compete, which is all that is required. Further, BellSouth stated that although DeltaCom complains that more than 50% of its orders submitted electronically "fall out" for manual handling, that complaint must be put in proper perspective. BellSouth stated that it would be unfair to attribute every "fall out" to BellSouth and that obviously DeltaCom is having difficulty submitting complete and accurate orders. Also, BellSouth maintained that DeltaCom markets complex business services to its customers and such orders are designed to fall out for manual handling using the same processes that BellSouth uses to handle the same orders for its retail customers. BellSouth noted that its witness Pate testified that "[t]his 'fall out' has nothing to do with any supposed inadequacies in BellSouth's systems, but results from the fact that the requested services are complex." BellSouth also pointed out that witness Pate testified that the manual processes are in compliance with TA96 and the FCC's Rules. In conclusion, BellSouth recommended that the Commission conclude that from the record evidence BellSouth is providing parity of service, as required by TA96 and the FCC's rules, to DeltaCom with respect to access to BellSouth's OSS and to the provision of UNEs. BellSouth recommended that the Commission decline to grant DeltaCom any relief with respect to this issue.

PUBLIC STAFF: Yes. The Public Staff argued that the FCC and the Act effectively set out BellSouth's obligations for providing UNEs and OSS and that, therefore, no further language on this issue is necessary for inclusion in an arbitrated Interconnection Agreement. The Public Staff maintained that BellSouth is not required to give CLPs the same access it has to its OSS, but functionally equivalent access. The Public Staff further stated that it is not satisfied that the language suggested by either party, DeltaCom's "parity equal to or greater in quality" or BellSouth's "meaningful opportunity to compete," completely captures the essence of the Act or the FCC Rules. The Public Staff opined that DeltaCom's requested language could be seen as an invitation to further muddy the waters and that the language appears to raise the standard above that required by the FCC. The Public Staff recommended that the Commission not include additional language in the Interconnection Agreement setting out BellSouth's obligations for providing UNEs and OSS.

DISCUSSION

The Commission agrees with BellSouth that it is not clear from the record what relief DeltaCom is seeking under this issue that is not already subsumed under other issues. First, based on the Proposed Orders and Briefs of BellSouth and the Public Staff, it appears that DeltaCom is requesting that the language "parity equal to or greater in quality" be included in the Interconnection Agreement while BellSouth has suggested the language "meaningful opportunity to compete." DeltaCom requested in its Proposed Order that the Commission require BellSouth to map EDI to the DOE system for all commonly ordered services requested by DeltaCom on behalf of its retail customers.

The Commission notes that BellSouth has stated that it has offered to include language in the Interconnection Agreement consistent with TA96 and the FCC's Rules regarding parity of services. The Commission further notes that it agrees with BellSouth that TA96 does not require BellSouth to provide DeltaCom with service at levels greater than BellSouth provides to its own end users and that the FCC's language refers to service "at least equal in quality to" that which BellSouth provides to itself. Therefore, the Commission does not find it appropriate to include additional language in the Interconnection Agreement setting out BellSouth's obligations for providing

UNEs and OSS.

Additionally, the Commission notes that DeltaCom has requested that the Commission require BellSouth to map EDI to the DOE system for all commonly ordered services requested by DeltaCom on behalf of its retail customers. DeltaCom uses EDI to enter orders while BellSouth uses DOE to enter orders. DeltaCom maintained that by design, orders entered into EDI fall out when they reach BellSouth and that when the same order is placed by BellSouth to provide the same services with BellSouth as the retail service provider, the order is processed electronically. Therefore, DeltaCom maintained, BellSouth's systems are not providing access at least equal to that enjoyed by BellSouth in compliance with TA96 and the FCC. BellSouth asserted that it would be unfair to attribute every "fall out" to BellSouth and that obviously DeltaCom is having difficulty submitting complete and accurate orders. Also, BellSouth maintained that DeltaCom markets complex business services to its customers and such orders are designed to fall out for manual handling using the same processes that BellSouth uses to handle the same orders for its retail customers.

The Commission does not believe parity is obtained through BellSouth's OSS when DeltaCom's orders submitted through EDI fall out when they reach BellSouth for manual handling as evidenced in this record. Nevertheless, the Commission does not find it appropriate at this time to require BellSouth to map EDI to DOE as requested by DeltaCom. The Commission is concerned about the lack of parity demonstrated in this proceeding and expects BellSouth to take appropriate action within a reasonable time frame to ensure that parity is reached in the instances noted in this proceeding. However, the Commission is not inclined at this time to dictate specifically what action BellSouth should take to correct this lack of parity.

CONCLUSIONS

The Commission concludes that BellSouth should not be required to map EDI to the DOE system at this time for all commonly ordered services requested by DeltaCom on behalf of its retail customers. However, the Commission is concerned about the lack of parity demonstrated in this proceeding and expects BellSouth to take appropriate action within a reasonable time frame to ensure that parity is reached in the instances noted in this proceeding. Finally, the Commission concludes that it is not appropriate to include any additional language in the Interconnection Agreement setting out BellSouth's obligation for providing UNEs and OSS.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

MATRIX ISSUE NO. 3: What should be the rate for reciprocal compensation? Should BellSouth be required to pay reciprocal compensation to DeltaCom for all calls that are properly routed over local trunks, including calls to ISPs?

POSITIONS OF PARTIES

DELTACOM: Yes, reciprocal compensation should be paid. Calls to ISPs are the same as calls to local customers and cause the same costs. As a result, reciprocal compensation should be paid for these calls. DeltaCom has proposed a compromise reciprocal compensation rate of $.0045 per minute pending final ruling by the FCC. This rate is approximately one-half the rate in the Parties' current Interconnection Agreement.

BELLSOUTH: With respect to the first issue, the appropriate rate for reciprocal compensation is the sum of the individual network elements that are actually used to handle the call such as transport or switching. The rates for each of these network elements have previously been established by the Commission in its generic UNE cost proceeding.

With respect to the second issue, calls to ISPs, even if routed over local interconnection trunks, are not subject to TA96's requirement of reciprocal compensation. The FCC's recent Declaratory Ruling in CC Docket Nos. 96-98 and 99-68, released on February 26, 1999, confirmed unequivocally that the FCC had, will retain, and will exercise jurisdiction over ISP traffic because it is interstate in nature, not local. Under the provisions of TA96 and the FCC's Orders and Rules, only local traffic is subject to the reciprocal compensation requirements. Thus, reciprocal compensation is clearly not applicable to ISP-bound traffic. In addition to being contrary to the law, treating ISP-bound traffic as local for reciprocal compensation purposes is contrary to sound public policy.

PUBLIC STAFF: The appropriate rates for reciprocal compensation are the interim UNE rates, subject to true-up upon issuance of final rates in Docket No. P-100, Sub 133d. The same rates should apply to ISP-bound traffic as an interim inter-carrier compensation mechanism.

DISCUSSION

This issue includes two parts. The first is the appropriate reciprocal compensation rate for local traffic generally. The second is whether there should be an interim inter-carrier compensation mechanism rate applied to dial-up ISP calls and, if so, at what rate.

With respect to the first part, the Commission agrees with BellSouth and the Public Staff that the appropriate reciprocal compensation rate for local traffic is the sum of the individual network elements actually used to handle the call.See footnote 1 These rates were set by Order dated March 13, 2000, in Docket No. P-100, Sub 133d.

With respect to the second part, the Commission concurs with the Public Staff that dial-up ISP traffic should be subject to an interim inter-carrier compensation mechanism and that the relevant rates should mirror those used for reciprocal compensation for local traffic. This matter has been exhaustively treated in the Commission's Recommended Arbitration Order in Docket No. P-582, Sub 6 (ICG/BellSouth Arbitration), and subsequent rulings related to that docket. There is no need to repeat that discussion here since no new evidence has been introduced for the Commission to reconsider its prior ruling. The Commission believes that the decision in that docket, on this matter, should apply to subsequent arbitrations, including a true-up once the Commission has ruled pursuant to the FCC's anticipated order on the subject.

CONCLUSIONS

The Commission concludes that the appropriate reciprocal compensation rate for local traffic is the sum of the permanent rates for the individual network elements actually used to handle the call as established in Docket No. P-100, Sub 133d. The overall rate, including tandem switching, is approximately $.003See footnote 2 per minute.

It is further concluded that dial-up ISP traffic should be subject to an interim inter-carrier compensation mechanism and that the relevant rates should mirror those used for reciprocal compensation for local traffic. Such rates shall be subject to true-up at such time as the Commission has ruled pursuant to the FCC's anticipated Order on the subject.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

MATRIX ISSUE NO. 3: Should reciprocal compensation include the tandem switching function?

POSITIONS OF PARTIES

DELTACOM: Yes. As in the ICG arbitration, DeltaCom's compensation should include end-office, tandem, and transport elements of termination where its switches serve a geographic area similar to the area served by BellSouth's tandem switches.

BELLSOUTH: No. It is BellSouth's position that, consistent with FCC Rules and industry standards, DeltaCom does not qualify for tandem switching and common transport because its network design does not perform these functions. If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function.

PUBLIC STAFF: No. DeltaCom is not entitled to compensation for tandem switching because it has failed to prove that its switches provide the same functions as BellSouth's tandem switches and serve the same geographic areas.

DISCUSSION

DeltaCom witness Rozycki testified that if BellSouth wishes to charge DeltaCom for transport, end-office switching, and tandem switching on its terms, then DeltaCom should be able to charge BellSouth for the same elements. Witness Rozycki further testified that DeltaCom has designed a network where its switches perform the same functions as the BellSouth end-office and tandem switches. DeltaCom uses multifunction switches which serve large geographic areas in a manner similar to BellSouth's tandem switches, and represent precisely the situation contemplated in Section 51.711(a)(3).

In its Proposed Order, DeltaCom again contended that its compensation should include end-office, tandem, and transport elements of termination where such switches serve a geographic area similar to the area served by BellSouth's tandem switch. DeltaCom stated that, in view of the interim rate proposed by DeltaCom, detailed discussion of this issue is not required in the Commission Order, and that the rationale of the ICG/BellSouth Recommended Arbitration Order applies here as well.

BellSouth witness Varner testified that if a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem interconnection rate only if DeltaCom's switch is identified in the Local Exchange Routing Guide (LERG) as a tandem. Witness Varner explained that a tandem switch connects one trunk to another trunk and is an intermediate switch or connection between an originating call location and the final destination of the call. An end-office switch connects a line to a trunk enabling the subscriber to originate or terminate a call. If DeltaCom's switch is an end-office switch, then it is handling calls that originate from or terminate to customers served by that local switch, and thus BellSouth argued that DeltaCom's switch is not providing the tandem function. It is BellSouth's opinion that DeltaCom is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide.

In its Proposed Order, BellSouth argued that the FCC has identified two requirements that a CLP such as DeltaCom must meet in order to be compensated at the tandem interconnection rate: (1) DeltaCom's network must perform functions similar to those performed by BellSouth's tandem switch; and (2) DeltaCom's switch must serve a geographic area comparable to BellSouth's. BellSouth argued that DeltaCom cannot meet either of these requirements. BellSouth maintained that while DeltaCom's switch may be capable of performing tandem switching functions when connected to end-office switches, DeltaCom has presented no evidence in this record that proves that DeltaCom's switches perform such functions. BellSouth argued that, for example, there is not any evidence in this record that: (1) DeltaCom interconnects end-offices or performs trunk-to-trunk switching; (2) DeltaCom switches BellSouth's traffic to another DeltaCom switch; or (3) DeltaCom's switch provides other centralization functions, namely call recording, routing of calls to operator services, and signaling conversion for other switches, as BellSouth's tandem switches do and as is required by the FCC's Rules.

BellSouth further argued in its Proposed Order that even assuming DeltaCom's switch performs the same functions as BellSouth's tandem switch (which is not the case), there is no evidence in the record that DeltaCom's switch serves a geographic area comparable to BellSouth's. DeltaCom did not identify where the customers it serves in North Carolina are located -- information that would be essential to support a finding that DeltaCom's switch serves a comparable geographic area.

The Public Staff stated in its Proposed Order that under FCC Rule 51.711, DeltaCom failed to meet its burden of proof by showing that its switches performed similar functions to and served a comparable geographic area as BellSouth's tandem switches. The Public Staff contended that DeltaCom presented a "paucity of evidence" on this issue in this case. Other than DeltaCom witness Rozycki's testimony that DeltaCom's switches performed similar functions to and served a comparable geographic area as BellSouth's tandem switches, in the Public Staff's opinion there appears to be no further showing from DeltaCom as to details of these switches which DeltaCom contends should be treated as tandem switches.

The Public Staff cautioned in its Proposed Order that the FCC has set a high standard of proof on this issue and that it is infeasible, impracticable, and subjective for the Commission to determine whether one geographic area is comparable to another and whether one switch performs similar functions as another. Given the large number of wire centers in the state, there are innumerable permutations and combinations with which the Commission could be presented. The Public Staff opined that rendering a judgment on such issues would demand a substantial amount of Commission time, resources, and technical expertise.

On December 20, 1999, DeltaCom filed a Motion for Leave to File a Supplemental Brief regarding issues concerning the tandem switch rate. An Order Allowing Supplemental Briefs was issued on December 29, 1999.

In its Supplemental Brief, filed December 29, 1999, DeltaCom stated that the Public Staff has misinterpreted Rule 51.711 in a manner which, if adopted by this Commission, would impose a burden of proof on DeltaCom which has no legal basis, and which could result in an improper finding on a crucial issue in this docket. DeltaCom argued that the plain language of FCC Rule 51.711(a)(3) controls this issue. DeltaCom maintained that the Rule does not discuss functional equivalency, nor does it limit the type of switches used by non-ILECs that are entitled to the ILEC's tandem interconnection rate. DeltaCom stated that the Commission is required to adhere to the language of Rule 51.711

DeltaCom further stated in its Supplemental Brief that the Public Staff erred when it asserted that DeltaCom had the burden of demonstrating that its switches performed similar functions to BellSouth's switches. DeltaCom stated that FCC Rule 51.711(a)(3) makes no mention of tandem functionality, nor does it imply that CLP switches must be functionally equivalent to ILEC tandem switches. If anything, the FCC's language implies an understanding that CLP network design and switch placement could vastly differ from traditional ILEC network design. DeltaCom argued that Rule 51.711 was crafted to ensure that CLPs were not financially penalized or discouraged from designing networks differently than that designed by the incumbent.

DeltaCom also argued in its Supplemental Brief that its testimony reflects that its local switch in North Carolina _ located in Greensboro _ serves the entire state of North Carolina, a geographic area "comparable" to the area served by BellSouth's tandem switches. DeltaCom stated that it has on file with this Commission a price list which states the geographic area by exchange available to its facilities-based customers served by its North Carolina switch, and the price list shows that DeltaCom serves 73 exchanges located throughout North Carolina from its switch in Greensboro. DeltaCom argued that this arrangement is an example of the types of radically different network designs envisioned in FCC Rule 51.711(a)(3), and also demonstrates why the FCC made no reference to the switches performing "similar functions." DeltaCom argued that its network is fundamentally different from that of BellSouth. Rule 51.711(a)(3) requires only that the Commission consider whether a "comparable" geographic area is served _ there simply is no functionality comparison to be made.

DeltaCom contended in its Supplemental Brief that BellSouth did not meet the burden of demonstrating that DeltaCom's switch does not serve such a geographical area, indeed, it is undisputed that DeltaCom's switch in Greensboro serves the entire State of North Carolina. DeltaCom maintained that BellSouth's argument that DeltaCom does not identify its switch in the LERG specifically as a tandem switch is of no legal consequence, because identification of a switch as a tandem in the LERG is not a requirement of FCC Rule 51.711(a)(3). (In a footnote, DeltaCom indicated the tandem function performed by DeltaCom's switch is a local tandem function with the access tandem function performed by a different switch. DeltaCom indicated that it is in the process of listing its North Carolina switch as a local tandem switch in the LERG.)

DeltaCom further contended that the language of Rule 51.711(a)(3) demonstrates that DeltaCom's switch does not have to serve as a tandem. DeltaCom argued that the Rule refers to "the switch of a carrier other than an ILEC" serving a comparable geographic area to the area served by "the ILEC's tandem switch." If the FCC intended to require non-ILECs to have tandem switches in order to be entitled to an ILEC's tandem interconnection rate, it would have said so. DeltaCom stated its argument is validated by the fact that the FCC specifies the ILEC switch as a "tandem," but uses the broad, unqualified word "switch" when referring to non-ILECs' equipment.

BellSouth stated in its Supplemental Brief that it agrees that Rule 51.711(a)(3) controls this issue. However, BellSouth maintained that the Rule cannot be read in a vacuum, but must be read in the broader context of TA96 and the FCC's Order adopting the Rule, both of which fully support the Public Staff's analysis of DeltaCom's burden of proof on the tandem switching issue.

BellSouth further contended in its Supplemental Brief that the FCC directed state commissions to consider two factors in determining whether a CLP should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch. First, the FCC directed state commissions to "consider whether new technologies (e.g., fiber ring or wireless network) performed functions similar to those performed by an ILEC'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 ILEC's tandem switch." Second, in addition to the functionality comparison, the FCC instructed state commissions to consider whether the new entrant's switch serves a geographic area comparable to that served by the ILEC's tandem switch, in which case the appropriate proxy for the new carrier's costs is the incumbent's tandem interconnection rate.

BellSouth stated in its Supplemental Brief that the Public Staff's conclusion that DeltaCom failed to satisfy its burden of proof on the tandem switching issue is abundantly correct, particularly given that the record evidence from DeltaCom on the tandem switching issue consisted of slightly more than one page of prefiled testimony in addition to witness Rozycki's responses to four questions from the Public Staff on the issue at the hearing. BellSouth argued that DeltaCom's latest filing should not obscure the inescapable truth that it failed to produce any evidence upon which this Commission could find in DeltaCom's favor on the tandem switching issue.

BellSouth contended in its Supplemental Brief that if the Commission were to conclude that DeltaCom was only required to prove that its switch serves a comparable geographic area to BellSouth's tandem switch (which BellSouth does not believe is the appropriate test), DeltaCom utterly failed to satisfy this burden of proof as well.

BellSouth further contended that DeltaCom does not and cannot point to a single shred of evidence in this record that establishes what geographic area its Greensboro switch currently serves and whether that area is comparable to the geographic area served by BellSouth's tandem switch. BellSouth stated that neither DeltaCom's tariffs nor its network map were entered into evidence. Furthermore, BellSouth asserted that even if considered by the Commission, neither DeltaCom's tariffs nor its network map demonstrate what geographic area DeltaCom's switch actually serves in North Carolina. BellSouth maintained that the issue is whether DeltaCom's Greensboro switch "serves" a comparable geographic area, not whether its switch is technically capable of serving a particular geographic area. *See* 47 C.F.R. Paragraph 51.711(a)(3); *see also MCI Telecommunications Corp. (MCI) v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.,* 1999 U.S. Dist. LEXIS 11418 (N.D. Ill. June 22, 1999).

BellSouth stated that the evidence in this record (or lack thereof) on the question of whether DeltaCom's switch serves a comparable geographic area is similar to the record evidence confronted by the federal district court in *MCI v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.* In that case, MCI argued that it should be compensated at the tandem rate for its switch in Bensonville, Illinois. The Illinois Commerce Commission (ICC) rejected MCI's argument, finding that MCI had failed to provide sufficient evidence to support a conclusion that it was entitled to the tandem interconnection rate.

The Public Staff, in its Response to DeltaCom's Supplemental Brief, stated that DeltaCom failed to demonstrate that its switch performs tandem functions in terminating a call delivered to it by a local exchange company (LEC). The Public Staff argued that the determination of whether DeltaCom's switch performs the tandem functionality on calls delivered to it by BellSouth is central to the Commission's decision as to whether DeltaCom should be compensated for the tandem switching and transport elements. The Public Staff argued that even if it could be construed that DeltaCom's switch serves an area comparable to that served by BellSouth's tandem switch, that determination, standing alone, is insufficient to qualify DeltaCom to receive compensation for the tandem switching and transport elements.

The Public Staff further stated in its Response to DeltaCom's Supplemental Brief that it is clear in reading Paragraph 1090 of the FCC's First Report and Order as a whole, and as an indication of the FCC's intent in promulgating Section 51.711 of its Rules, that the functionality of the interconnecting carrier's network must be considered for the purpose of determining whether the carrier should be compensated for tandem switching. The Public Staff maintained that in Paragraph 1090, the FCC makes it clear that states may establish transport and termination rates which vary according to whether the traffic is routed through a tandem switch or directly to the end office switch. However, the Public Staff opined that the FCC specifically directs the states to consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an ILEC's tandem switch. The Public Staff stated that if the only requirement were that the interconnecting carrier's switch serve an area comparable to the LEC's tandem switch, any consideration of the new technologies would be completely irrelevant.

The Public Staff stated that if the Commission were to adopt DeltaCom's position that the rule should be read in isolation without any consideration of Paragraph 1090, then a CLP with a switch serving a geographic area comparable to that served by the LEC's tandem would be entitled only to reciprocal compensation for tandem switching and for no other functions such as end-office switching or transport. The Public Staff stated that it did not believe this is the result that was intended by the FCC or desired by DeltaCom. The Public Staff stated that a major theme of TA96 is that rates should be cost-based, and this is the principle underlying the FCC Rule. The Public Staff maintained that it is unreasonable to conclude that a switch that performs no tandem functions should be compensated as if it did, merely because it serves a comparable geographic area. According to the Public Staff, the functionality of the switch is a key element which cannot be overlooked.

The Public Staff submitted that a diagram handed out by DeltaCom as an exhibit to its counsel's opening statement to show the geographic coverage of DeltaCom's network, and the unsupported assertions of its witness Rozycki as to geographic coverage and functionality, do not rise to the level necessary to support DeltaCom's position on this issue.

In conclusion, in its Response to DeltaCom's Supplemental Brief, the Public Staff submitted that to qualify for reciprocal compensation for tandem switching and transport, the CLP must show that its network performs the same functions as the incumbent LEC's tandem switch in terminating calls directed to it by the interconnecting LEC and that the CLP's switch serves a comparable geographic area. The Public Staff further submitted that DeltaCom has not met its burden of proof on either of these two elements.

On February 21, 2000, in response to Commission Order, DeltaCom filed a map of its switch coverage in North Carolina vs. BellSouth's local tandems which depicted that DeltaCom's Greensboro switch covers the

Greensboro, Raleigh, and Asheville Local Access and Transport Areas (LATAs), and its Columbia, South Carolina switch covers the Charlotte LATA. DeltaCom also filed a list of DeltaCom's collocations in BellSouth central offices in North Carolina, and a list of Common Language Location Identifier (CLLI) Codes for BellSouth central offices served by BellSouth local tandems. BellSouth filed LATA tandem serving area maps for its Asheville LATA Tandem, Asheville LATA Local Tandem, Charlotte LATA Tandem, Charlotte LATA Local Tandem, Greensboro LATA Tandem, Greensboro LATA Local Tandem, Raleigh LATA Tandem, Raleigh LATA Local Tandem, Wilmington LATA Tandem, and Wilmington LATA Local Tandem.

On March 7, 2000, in response to Commission Order dated February 29, 2000, DeltaCom filed a description of its switches and network architecture in North Carolina. DeltaCom described its network architecture as "super switches," and stated that these super switches perform many functions similar to the BellSouth end office and local tandem switches as well as also performing long distance or interexchange switching and access tandem switching functions. DeltaCom further stated that its "super switches" switch originating and terminating local traffic, sending the traffic to or receiving it from Traffic Concentration Nodes (TCNs) in the DeltaCom network. For local calls, the TCN gathers or concentrates originating local traffic in an area, and sends that traffic to the DeltaCom switch, thus performing a function similar to a BellSouth end office subtending a BellSouth tandem.

DeltaCom also filed four Exhibits as support. Exhibit 1 illustrated DeltaCom's North Carolina network, showing 17 Points of Presence (POPs). Exhibit 2 illustrated examples of North Carolina local calls that DeltaCom's Greensboro, North Carolina and Columbia, South Carolina switches handle today. DeltaCom contended that together, Exhibits 1 and 2 demonstrated that with the advent of fiber optic transport facilities and the enormous switching capacity available in today's switching platforms, the economics of the switch/transport tradeoff have changed. DeltaCom argued that competing local exchange companies (CLECs) today are able to perform many of the same functions with a single switch that may be performed by at least two switches in the BellSouth network.

In Exhibit 3, DeltaCom provided their number of customers and location. In Exhibit 4, DeltaCom illustrated a small sample of the calling to DeltaCom customers in Charlotte, originated by customers of BellSouth and other North Carolina LECs.

In its Response to DeltaCom's Exhibits filed on March 7, 2000, BellSouth contended that DeltaCom has failed to demonstrate that it incurs any "additional costs" beyond its end office switching function that would justify BellSouth paying DeltaCom the tandem interconnection rate. BellSouth further contended that the technology and concentration nodes referred to by DeltaCom as TCNs are used to multiplex traffic, not to switch traffic. Therefore, BellSouth stated that contrary to DeltaCom's claim, TCNs are simply multiplexing nodes on DeltaCom's transport facilities, not traffic switching points. According to BellSouth, DeltaCom's equipment provides long (or extended) loops, but does not perform a switching function.

BellSouth summarized its opposition as follows:

1. SONET loop concentration nodes are not switches, nor do they perform functions even similar to an end office switch.
2. While DeltaCom attempts to define the loops between the DeltaCom end user and the DeltaCom switch as trunks on "common transport" facilities, these facilities are nothing more than long loops.
3. To the extent that DeltaCom utilizes SONET technology and loop concentration nodes for its loops, either short or long, such costs are prohibited by the FCC from being recovered in reciprocal compensation for local traffic.
4. Contrary to DeltaCom's claims, the DeltaCom switch performs only end office loop-to-trunk port switching and does not perform local tandem switching functions.

The Commission concluded, in *Petition of ICG Telecom Group, Inc. for Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc.,* Docket No. P-582, Sub 6, that ICG had met its burden of proof in regard to both geographic coverage and similar functionality. That decision, based primarily on the testimony of ICG witness Starkey, was upheld and reaffirmed in the Commission's Order Ruling on Objections, Request for Clarification, Reconsideration, and Composite Agreement issued March 1, 2000. In the same Order, the Commission concluded that although it chose not to make a decision in the ICG case on the principal difference in the positions of the parties - whether FCC Rule 51.711 prevails or if the attendant discussion in Paragraph 1090 of the FCC Order should also be considered - parties arbitrating this issue in future proceedings should file maps and provide substantial testimony in the record including information as to location of actual customersSee footnote 3, description of equipment and associated technology, and other relevant information.

After careful and extensive review of the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090, the Commission believes that the language in the FCC's Order clearly contemplates that exact duplication of the ILEC's network architecture is not necessary in order for the CLP to be eligible to receive reciprocal compensation at the tandem switching rate. Further, we believe that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the requirement that the equipment utilized by both parties covers the same basic geographic area. We further believe that the Rule and the Order language are not, for this reason, in conflict in the manner described by BellSouth and the Public Staff.

Based on the information filed by DeltaCom including the map and the description of its network, the Commission believes that DeltaCom has met its burden of proof that its switches cover a comparable area to that covered by BellSouth's switches and that, for reciprocal compensation purposes, DeltaCom is entitled to compensation at BellSouth's tandem interconnection rate.

CONCLUSIONS

The Commission concludes that, for reciprocal compensation purposes, DeltaCom should be compensated at BellSouth's tandem interconnection rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

MATRIX ISSUE NO. 5: Should the Parties continue operating under existing local interconnection arrangements?

POSITIONS OF PARTIES

DELTACOM: Yes. The Parties' existing Interconnection Agreement addresses each of the following topics, and the existing language in this regard should remain in place. Specifically, the current Interconnection Agreement language concerning cross-connect fees, reconfiguration charges, network redesign, NXX translation, the definitions of the terms "local traffic" and "trunking options", and the parameters establishing routing of originating traffic and each party's exchange of transit traffic should remain.

BELLSOUTH: BellSouth does not understand this issue and needs clarification from DeltaCom. The fact that DeltaCom has filed for arbitration with BellSouth and listed some 73 issues, many of which contain multiple questions, belies DeltaCom's request to maintain its existing arrangements with BellSouth. Additionally, DeltaCom proposed a new Interconnection Agreement attached as Exhibit A to the Petition rather than relying upon the existing Agreement. BellSouth has negotiated with DeltaCom in good faith and will continue to do so in an effort to reach a new Interconnection Agreement. This issue is not appropriate for arbitration.

PUBLIC STAFF: Yes. The Parties should continue to operate under the existing local interconnection arrangements until or unless the Parties reach agreement otherwise. The Commission should decline to include any proposed provisions not contained in the current local interconnection arrangements.

DISCUSSION

In addressing this issue, DeltaCom witness Hyde testified that at the time of the filing of DeltaCom's Petition, BellSouth was reviewing DeltaCom's proposed language. Thus, in order to preserve these issues, witness Hyde generically requested the same interconnection language that is in the current Interconnection Agreement as part of Issue 5. Witness Hyde testified that DeltaCom listed each section of the proposed language that it provided to BellSouth that it understood as open and under review as an unresolved issue in DeltaCom's Exhibit B matrix attached to its Petition.

In its Post-Hearing Brief, DeltaCom addressed this issue by dividing it into four subtopics which were included in DeltaCom's Exhibit B matrix, among others. DeltaCom stated that the existing Interconnection Agreement addresses, at least in part, each of the subtopics with the exception of binding forecasts. DeltaCom noted that the Parties have been able to negotiate all the other provisions concerning local interconnection with the exception of the following four subtopics: **(a)** "Should the current Interconnection Agreement language continue regarding cross-connect fees, reconfiguration charges, or network redesigns and NXX translations?"; **(b)** "What should be the definition of the terms 'local traffic' and 'trunking options'?"; **(c)** "What parameters should be

established to govern routing DeltaCom's originating traffic and each party's exchange of transit traffic?"; and **(d)** "Should the Parties implement a procedure for binding forecasts?"

In regard to DeltaCom's subtopics a, b, and c, DeltaCom noted that the Parties had been unable to negotiate any alternative arrangements. Thus, DeltaCom proposed that the language which is in the existing Interconnection Agreement relating to these subtopics should remain in place. DeltaCom noted that BellSouth agreed to the language that is in the existing Agreement and that this Commission approved that Agreement approximately two years ago as compliant with the Act and consistent with the public interest as required by Section 252(e)(2)(A) of the Act. DeltaCom stated that the terms and conditions in the previously approved Interconnection Agreement have enabled DeltaCom to enter the North Carolina local exchange market and have encouraged DeltaCom to make significant investments in facilities in North Carolina. DeltaCom believes that the current language related to DeltaCom's subtopics a, b, and c should be renewed and incorporated into the Interconnection Agreement resulting from this proceeding. DeltaCom argued that BellSouth has not provided any evidence that these requirements are no longer appropriate for the Interconnection Agreement between the Parties and the Parties have been unable to negotiate any alternative arrangements. Thus, absent a compelling reason to remove the existing language related to these subtopics a, b, and c, DeltaCom argued that the existing related language should remain in the Agreement.

BellSouth witness Varner testified that BellSouth's position on this issue is that negotiations take place in order to incorporate new language and terms into an Interconnection Agreement based upon new situations, governing law, processes, and technologies. Furthermore, witness Varner stated that this is not an arbitrable issue due to the fact that there is no contract language attached to this issue. Witness Varner noted that as stated in DeltaCom's position on this issue, the current arrangement has worked well for the past two years. However, DeltaCom's supporting testimony and petition seem to infer otherwise. Further, witness Varner testified that in order to ensure that DeltaCom and BellSouth have the most beneficial agreement for both Parties, new negotiations need to take place.

In its Proposed Order, BellSouth stated that for reasons that are not readily apparent, DeltaCom is asking this Commission to decide that DeltaCom should be permitted to operate under certain terms of its expired local Interconnection Agreement, while at the same time asking this Commission to arbitrate numerous disputes concerning proposed terms for a new Interconnection Agreement. Furthermore, BellSouth argued that DeltaCom attempted to expand the scope of this issue after the Petition for Arbitration was filed, by seeking to add an issue concerning binding forecasts and other newly raised matters. BellSouth objects to DeltaCom being permitted to do so. BellSouth noted that under the Act, DeltaCom is required to state the unresolved issues in its Petition. It is BellSouth's position that DeltaCom is attempting to expand those issues and it should not be allowed to do so.

In its Proposed Order, the Public Staff noted that Exhibit B to the Petition for Arbitration contains 19 particular references to DeltaCom's proposed Interconnection Agreement which pertain to this issue. The Public Staff noted that the record contains little substantive information on this issue. However, the Public Staff pointed out that if the current local interconnection arrangements cease and no substitute exists, service disruptions may well occur. Thus, the Public Staff stated that it is necessary to continue the current arrangements unless the Parties have reached agreement otherwise. Further, the Public Staff also stated that if the provision is not included in the current local interconnection arrangements, then the Commission should decline to order the inclusion of the proposed language.

The Commission disagrees with BellSouth's assertion that this is not an arbitrable issue because no contract language was attached. DeltaCom filed its Petition for Arbitration on June 14, 1999, and attached three exhibits to its Petition as follows: Exhibit A-Proposed Interconnection Agreement, Exhibit B-Matrix of Unresolved Issues, and Exhibit C-Verification. In its Exhibit B attached to the Petition, DeltaCom raised 19 items under this issue and specifically cited where the proposed related language was set forth in its proposed Interconnection Agreement. Based on DeltaCom's Proposed Order, it now appears that 10 of these items have been negotiated and that nine items remain unresolved. These nine items relate to the following matters: (1) definition of local traffic, (2) reconfiguration charges for new installations at existing points of interconnection, (3) payment of nonrecurring charges as a result of network redesigns/reconfigurations initiated by BellSouth, (4) trunking options available to the Parties, (5) the routing of traffic by the least costly method, (6) cross-connection charges applicable in a collocation arrangement at the BellSouth wire center, (7) the loading and testing of NXX codes, (8) the delivery of traffic between DeltaCom, BellSouth, and a third party, and (9) binding forecasts with liquidated damages. Of these nine items, all but one which relates to binding forecasts, have existing provisions that are in the current local interconnection arrangements.

The Commission agrees with the Public Staff that if the current local interconnection arrangements cease and no substitute exists, service disruptions may well occur. That, of course, is an undesired outcome. The local

interconnection arrangements outline how the Parties exchange and account for different traffic. Accordingly, the Commission believes that in order to avoid service disruptions, it is appropriate to require the Parties to incorporate into their new Interconnection Agreement their current local interconnection arrangements as they relate to the foregoing items, excluding binding forecasts, unless they negotiate other mutually acceptable provisions.

In regard to the implementation of a procedure for binding forecasts, DeltaCom urged the Commission to direct BellSouth to form a binding forecast capability that gives DeltaCom the assurance of having available facilities when needed and as forecasted. DeltaCom noted that with binding forecasts, BellSouth can build out its network without fearing that it will not be able to recoup its investments. DeltaCom stated its willingness to be bound by its forecasts. DeltaCom is willing to pay an underutilization charge for any trunks that are constructed by BellSouth for DeltaCom as a result of a binding forecast. Furthermore, DeltaCom stated that binding forecasts and the requirement that suppliers be made whole where purchasers over-forecast needs are procedures that have worked and continue to work well in the interexchange industry, and should be applied to the local exchange industry.

DeltaCom stated that it has been negotiating this matter of binding forecasts with BellSouth for almost a year. DeltaCom stated that it was approached by the BellSouth account team to implement binding forecasts on the assumption by at least some at BellSouth that binding forecasts had been agreed to and were needed to efficiently govern the relationship between the companies. DeltaCom stated that it is perplexed by BellSouth's refusal to agree to binding forecasts because of the benefits such a program will provide to BellSouth. Further, DeltaCom noted that BellSouth has not clearly opposed binding forecasts and still seems to be analyzing the issue. DeltaCom believes that binding forecasts should be implemented as one means to facilitate orderly and efficient local competition. It is DeltaCom's position that through the forecasts, BellSouth will be assisted in knowing what facilities need to be constructed and will not be harmed since DeltaCom will be required to pay an underutilization fee on any trunks that are not put into service.

BellSouth witness Varner testified that although not required under the Act or by FCC Rules, BellSouth is currently analyzing the possibility of providing a service whereby BellSouth commits to provisioning the necessary network buildout and support when a CLP agrees to enter into a binding forecast of its traffic requirements. Further, witness Varner testified that while BellSouth has not yet completed the analysis needed to determine if this is a feasible offering, BellSouth is willing to discuss the specifics of such an arrangement with DeltaCom.

In its Proposed Order, BellSouth argued that the Commission should deny DeltaCom's request for binding forecasts. BellSouth stated that Section 251 of the Act does not impose a duty nor an obligation on the part of an incumbent to enter into binding forecasts, which makes this issue inappropriate for arbitration. Further, BellSouth argued that DeltaCom's proposal for binding forecasts is ill-defined and administratively unworkable. Although DeltaCom would be willing to compensate BellSouth if DeltaCom fails to meet its forecast, the specifics of how this compensation would work are not spelled out in DeltaCom's proposal. Additionally, DeltaCom's proposal may make it difficult for BellSouth to serve other carriers that may require trunking capacity that has been reserved for DeltaCom pursuant to a binding forecast. For example, under DeltaCom's proposal, BellSouth would be prohibited from allowing other carriers to take advantage of these existing trunks, even though DeltaCom is not using, and may never use the trunks.

The Commission believes that it should decline to decide at this time whether the Act mandates a binding forecast requirement of the sort requested by DeltaCom, consistent with the Commission Recommended Arbitration Order in Docket No. P-582, Sub 6, involving ICG and BellSouth. However, the Commission does note that DeltaCom's request for this type of requirement does not appear to be inappropriate. In fact, such a provision can be found in BellSouth's Revised Statement of Generally Available Terms (SGAT). The Commission also agrees with the Public Staff that since this provision for binding forecasts is not included in the current local interconnection arrangements, then the Commission should decline to order the inclusion of the proposed language. However, BellSouth witness Varner testified that BellSouth was still analyzing this proposal and that BellSouth was willing to discuss the specifics of such an arrangement with DeltaCom. Accordingly, the Commission encourages BellSouth and DeltaCom to continue to negotiate on the matter of binding forecasts.

CONCLUSIONS

The Commission concludes that the Parties should incorporate into their new Interconnection Agreement the existing local interconnection arrangements pertaining to the following matters until or unless the Parties reach agreement otherwise: (1) definition of local traffic, (2) reconfiguration charges for new installations at existing points of interconnection, (3) payment of nonrecurring charges as a result of network redesigns/reconfigurations

initiated by BellSouth, (4) trunking options available to the Parties, (5) the routing of traffic by the least costly method, (6) cross-connection charges applicable in a collocation arrangement at the BellSouth wire center, (7) the loading and testing of NXX codes, and (8) the delivery of traffic between DeltaCom, BellSouth, and a third party. The Commission declines to include any proposed provisions, in this regard, that are not contained in the current local interconnection arrangements. However, the Commission encourages BellSouth and DeltaCom to continue to negotiate on the matter of binding forecasts.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

MATRIX ISSUE NO. 7(b)(iv): Who pays for the audit?

POSITIONS OF PARTIES

DELTACOM: DeltaCom argued that the party requesting the audit should pay for it. DeltaCom stated that this approach is simple and avoids any dispute as to who ultimately is responsible for the expense of the audit.

BELLSOUTH: BellSouth maintained that the issue is relatively straightforward: should one carrier that inaccurately reports information to a significant extent to another carrier be required to pay for the costs of the audit that uncovers the inaccurate information. BellSouth stated that it agrees that the party requesting an audit should be responsible for the costs of the audit, except that BellSouth would add that if the audit reveals that either party is found to have overstated the PLU or PIU by 20% or more, then that party should be required to reimburse the other party for the costs of the audit. Therefore, if a BellSouth-requested audit reveals that DeltaCom has overstated PLU/PIU percentages by 20% or more, DeltaCom should pay for the audit; otherwise, BellSouth would be required to do so. BellSouth maintained that this is a fair and reasonable provision for the protection of both Parties. BellSouth maintained that DeltaCom's argument that "each Party should pay for their own audits regardless of the outcome otherwise it would constitute a 'penalty'" is inconsistent with basic principles of cost causation. BellSouth further stated that paying the costs of an audit is not akin to a "penalty" as DeltaCom argued, since BellSouth would only be entitled to recover its actual costs incurred in conducting the audit, not fines or punitive damages. BellSouth argued that including such a provision in the Interconnection Agreement is reasonable and would create an incentive for DeltaCom to report accurately PLU/PIU information in the first place. Therefore, BellSouth recommended that the Commission conclude that it is reasonable to require the inclusion of a provision for audit rights in the Interconnection Agreement such that if one party is found to have overstated the PLU/PIU percentages by 20% or more, then that party should be required to pay for the entire audit.

PUBLIC STAFF: The Public Staff maintained that both Parties agree that, generally, the party requesting an audit should pay for it. The Public Staff further stated that one reason a party would request an audit is if it believed that reports provided by the other party were inaccurate or overstated. The Public Staff argued that should this belief be borne out by the audit, it is equitable that the party in error should pay the costs of the audit. The Public Staff maintained that including such language in the Interconnection Agreement encourages the Parties to deal with each other honestly and to ensure that information provided to each other is accurate. The Public Staff, therefore, recommended that the Commission accept BellSouth's proposed language providing that each party bears the cost of an audit; however, a party overstating PLU/PIU by 20% or more will bear the other party's audit costs.

DISCUSSION

The Commission notes that the Parties agree that the party requesting an audit should be responsible for paying for the audit. In addition, the Commission believes that it is reasonable and appropriate to adopt the additional language proposed by BellSouth that if an audit reveals that a party reported PLU/PIU in error and overstated such percentages by 20% or more, the party in error should pay for the cost of the audit. The Commission agrees with BellSouth and the Public Staff that inclusion of such language would encourage the Parties to deal with each other honestly and provide accurate information to each other.

CONCLUSIONS

The Commission concludes that it is reasonable and appropriate to adopt BellSouth's proposed language providing that the party requesting an audit should be responsible for paying for the audit; however, a party overstating PLU/PIU by 20% or more shall pay for the cost of the audit.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

MATRIX ISSUE NO. 8(b): Should the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement be required to pay the costs of such litigation?

POSITIONS OF PARTIES

DELTACOM: Yes. The losing party should pay the costs of such proceeding and litigation. Such a provision will deter frivolous claims, and encourage both Parties to resolve disputes informally. The Parties' present Interconnection Agreement contains this provision.

BELLSOUTH: No. BellSouth believes that the inclusion of a "loser pays" provision would have a chilling effect on both Parties to the extent that even meritorious claims may not be filed. TA96 is barely three years old and clearly represents an evolving area of rules and regulation. It is inevitable that complaints will be brought by various parties seeking clarification as issues emerge. Often times there is no clear "winner" or "loser," thus further complicating the use of a "loser pays" clause. A negative provision like "loser pays" should not be included in the agreement.

PUBLIC STAFF: No. It is not within the Commission's province to order the payment of attorney's fees and other costs by one party to another. While such a provision might indeed reduce litigation and encourage settlement and fair play, there is a real danger of even more controversy erupting as to whether a party can unequivocally be denominated as a winner.

DISCUSSION

DeltaCom witness Rozycki testified that a provision in the contract as to whether the losing party to an enforcement proceeding or a proceeding for breach of the Interconnection Agreement should be required to pay the costs of litigation would not encourage "forum shopping." First, DeltaCom stated that the proposed language is in the Parties' existing Interconnection Agreement so BellSouth has agreed to this language previously. Second, according to DeltaCom, the purpose of this provision is to encourage Parties to meet their commitments under this Agreement. Witness Rozycki further testified that he believed this provision actually encourages Parties to settle rather than face a negative decision. The Interconnection Agreement between DeltaCom and BellSouth which was previously approved contains a "loser pays" provision. DeltaCom simply seeks to continue that provision for two more years.

BellSouth witness Varner testified that it is inevitable that complaints will be brought by various parties seeking clarification as issues emerge. Often times there is no clear "winner" or "loser," thus further complicating the use of a "loser pays" clause. BellSouth stated that a negative provision like "loser pays" should not be included in the Agreement. Witness Varner further testified that BellSouth will agree to appropriate language regarding jurisdictional issues that would allow the Parties to seek damages under the Agreement from the courts since that would be a matter outside the Commission's jurisdiction. It is BellSouth's position that the Parties should determine at the time they enter the Interconnection Agreement where disputes will be resolved. BellSouth asserted that this is standard contract language and for good reason. It gives certainty as to how and where disputes will be resolved and it helps prevent the potential for "forum shopping" as well as the potential for inconsistent decisions under the Agreement.

The Public Staff recommended that the Commission encourage the Parties to continue negotiation of this issue and to consider seeking redress in another forum.

The Commission concurs with the Public Staff that it is not appropriate to require the inclusion of language obligating the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement to pay the cost of the litigation.

CONCLUSIONS

The Commission declines to require the inclusion of language obligating the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement to pay the cost of the litigation.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

MATRIX ISSUE NO. 8(e): Whether language covering tax liability should be included in the Interconnection

. Agreement and, if so, whether that language should simply state that each party is responsible for its tax liability?

POSITIONS OF PARTIES

DELTACOM: No. A statement concerning tax liability need not be included. DeltaCom has proposed a compromise, supplying tax language acceptable to it to BellSouth which was less verbose and more understandable. BellSouth has not responded. In any event, the Agreement needs no provision relating to tax liability, which is an issue between the respective Parties and the relevant taxing authorities. DeltaCom noted that BellSouth had not put forward its suggested language into the record.

BELLSOUTH: Yes. BellSouth has proposed language for the Interconnection Agreement based upon BellSouth's experiences with tax matters and liability issues in connection with the Parties' obligations under interconnection agreements. A variety of taxes are imposed upon telecommunications carriers, both directly and indirectly (collected from end-users and other carriers). As would be expected, problems and disputes over the application and validity of these taxes will and do occur. The Interconnection Agreement should clearly define the respective rights and duties for each party in the handling of such tax issues so that they can be resolved fairly and quickly.

PUBLIC STAFF: No. Each party should be responsible for its own tax liability outside the Interconnection Agreement. However, if the Parties desire a provision on tax liability in the Agreement, such a provision should simply state that each party shall be responsible for its own tax liability.

DISCUSSION

The Commission believes that, while it may be desirable as a business practice to have provisions in a contractual agreement which spell out tax liability, the Commission should not itself impose such a provision, absent mutual agreement by the Parties. In his rebuttal testimony, DeltaCom witness Rozycki agreed with BellSouth that the Interconnection Agreement should clearly define the Parties' rights and duties in handling tax issues. The Parties did not agree, however, on the specific language to be included in the Agreement. While DeltaCom in negotiations proposed no language on taxes, witness Rozycki, in his direct testimony, did suggest language. The Commission believes that the Parties should continue their negotiations on this issue and arrive at a mutually agreeable provision, even if it is one that simply states that each party shall be responsible for its own tax liability.

CONCLUSIONS

The Commission declines to require the insertion of a tax liability provision in the Interconnection Agreement but encourages the Parties to continue negotiations on this issue.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

MATRIX ISSUE NO. 8(f): Should BellSouth be required to compensate DeltaCom for breach of material terms of the contract?

POSITIONS OF PARTIES

DELTACOM: Yes. There should be a provision establishing liability for a material breach of contract.

BELLSOUTH: The issue of penalties or liquidated damages is not an appropriate subject of arbitration. The Commission lacks the statutory or jurisdictional authority to award or order monetary damages or financial penalties. Even if a penalty or liquidated damage award could be arbitrated, it is completely unnecessary. State law and Commission complaint procedures are available, and are more than sufficient, to address or remedy any breach of contract situation should it occur. Furthermore, nothing in TA96 nor in any order of the FCC requires the inclusion of a liquidated damages provision in an Interconnection Agreement.

PUBLIC STAFF: The Commission should decline to include a provision in the Interconnection Agreement that requires either party to compensate the other party for the breach of material terms of the contract.

DISCUSSION

The Commission concurs with the Public Staff that the Commission should decline to include a provision establishing compensation for a material breach of contract. Further, the Commission notes that the Parties presented Section 11 - Resolution of Disputes in Part A of Exhibit A - Interconnection Agreement Between DeltaCom and BellSouth filed with DeltaCom's June 14, 1999 Petition for Arbitration.

CONCLUSIONS

The Commission declines to require the inclusion of a provision establishing compensation for a material breach of contract in the Interconnection Agreement. The Parties are referred to Section 11 of the Parties' Interconnection Agreement.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth and DeltaCom shall prepare and file a Composite Agreement in conformity with the conclusions of this Order not later than June 5, 2000. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996 Order in Docket Nos. P-140, Sub 50, and P-100, Sub 133, concerning arbitration procedure (Arbitration Procedure Order).

2. That, not later than May 22, 2000, a party to the arbitration may file objections to this Order consistent with paragraph 3 of the Arbitration Procedure Order.

3. That, not later than May 22, 2000, any interested person not a party to this proceeding may file comments concerning this Order consistent with paragraphs 5 and 6, as applicable, of the Arbitration Procedure Order.

4. That, with respect to objections or comments filed pursuant to decretal paragraphs 2 or 3 above, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages single-spaced or three pages double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of a party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.

5. That parties or interested persons submitting Composite Agreements, objections or comments shall also file those Composite Agreements, objections or comments, including the executive summary required in decretal paragraph 4 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in WordPerfect format.

ISSUED BY ORDER OF THE COMMISSION.

This the 20th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

bc041900.01

APPENDIX A

GLOSSARY OF ACRONYMS
Docket No. P-500, Sub 10

Act	Telecommunications Act of 1996
BellSouth	BellSouth Telecommunications, Inc.
CLLI	Common Language Location Identifier
CLP	Competing Local Provider
CLEC	Competing Local Exchange Company (Carrier)
Commission	North Carolina Utilities Commission
DeltaCom	ITC^DeltaCom Communications, Inc
DOE	Direct Order Entry

ECTA	Electronic Communications Trouble Administration
EDI	Electronic Data Interchange
FCC	Federal Communications Commission
ICC	Illinois Commerce Commission
ICG	ICG Telecom Group, Inc.
ILEC	Incumbent Local Exchange Company (Carrier)
ISP	Internet Service Provider
LATA	Local Access and Transport Area
LEC	Local Exchange Company (Carrier)
LENS	Local Exchange Navigation System
LERG	Local Exchange Routing Guide
MCI	MCI Telecommunications Corp.
MOU	Minute of Use
NXX	Used to symbolize telephone numbers not yet determined
ODUF	Optional Daily Usage File
OSS	Operations Support Systems
PIU	Percent Interstate Usage
PLU	Percent Local Usage
POP	Point of Presence
Public Staff	Public Staff-North Carolina Utilities Commission
SGAT	Statement of Generally Available Terms
SQMs	Service Quality Measures
TA96	Telecommunications Act of 1996
TAFI	Trouble Analysis and Facilities Interface
TAG	Telecommunications Access Gateway
TCN	Traffic Concentration Node
UNE	Unbundled Network Element

Footnote: 1 The issue of whether tandem switching should be included is addressed in Finding of Fact No. 4.

Footnote: 2 The actual rates are: End Office Switching, $.0017 per minute of use (mou); Tandem Switching, $.0009 per mou; Common Transport, $.00001 per mile per mou; and Common Transport Facilities Termination, $.00034 per mou.

Footnote: 3 The Commission concluded in the ICG Order that although it could find no basis in the FCC Rule or discussion that location of actual customers *is essential,* the Commission did not rule out such information as being relevant or useful.

Exhibit _____ (MEA-8)
Witness: Argenbright
Docket No. 991755-TP

award issued 1/9/97

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of MCI Telecommunications Corporation for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio.	))))))	Case No. 96-888-TP-ARB

ARBITRATION AWARD
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Ameritech's 60-minute interval. However, the panel agreed with MCI that the provisioning of unbundled local loops should be subject to close scrutiny to ensure that Ameritech does not delay the loop cut-over of competitors.

MCI takes exception to the panel's recommendation. MCI contends that untimely cut-overs may significantly impair MCI's ability to efficiently offer service using unbundled loops. MCI also notes that, during the service disruption period, safety services (i.e., 911 service) will not be available. MCI also alleges that its five-minute window is consistent with the assumption used by Ameritech in its cost studies for completing such a task. Moreover, MCI noted that the parties already agree that other conversion times may be agreed upon for more complicated cut-overs (Schedule 9.5, ¶¶2.2.5 and 4.2.4).

Ameritech argues that there is nothing in the record in this proceeding that warrants a departure from the FCC's decision or warrants a five-minute loop cut-over requirement. Ameritech also states that there is more to be done than simply moving a jumper wire on a main distribution frame. Moreover, Ameritech states that its cost study used a five-minute interval as an estimate for the labor involved in simply pulling the jumper wire, but pulling the jumper wire is not all that must be done. Ameritech states that the Commission should adopt the panel's recommendation.

Arbitration Award: The cut-over process described by Ameritech requires manual work and coordination between the two companies. MCI, however, only mentions the single task of moving the jumper wires to justify its five-minute conversion interval. To the Commission, it does seem appropriate for Ameritech, prior to a live cut-over, to coordinate the cut-over with MCI's representative, to verify that the loop is indeed connected to the line that MCI requested, or to verify that the additional paths are installed correctly when number porting is requested. The Commission also notes that MCI will not be the only customer of Ameritech with which it needs to coordinate loop cut-overs. The evidence supports the 60-minute interval recommended by the panel.

V. Rates for Traffic Exchange and Unbundled Network Elements

What are appropriate compensation rates for transport and termination of local traffic (Petition, Ex. D.I.2.)?

Is Ameritech required to pay MCI the tandem office interconnection rate for transport and termination of calls on MCI's network (Petition, Ex. D.I.2.B.)?

What are the appropriate rates for the following UNEs: voice grade analog loops, DS-1 level loops, local switching, tandem switching and transport, loop distribution, and dark fiber (Petition, Ex. D.II.3.)?

Should Ameritech be able to recover nonrecurring and implementation costs (Petition, Ex. D.V.7.)?

The panel, recognizing that Ameritech's cost studies were severed from this arbitration proceeding, did an evaluation of the cost information presented by both parties. The panel determined that prices should be set at forward-looking economic costs, namely TELRIC, and a reasonable allocation of forward-looking joint and common costs. The panel evaluated both parties' cost information under the Commission's guidelines. The panel looked at Ameritech's TELRICs, plus joint and common costs, and then calculated a percentage adjustment, based upon the areas in which there were concerns. A 21 percent downward adjustment to the TELRICs was derived. The panel adjusted Ameritech's interim rate proposals by that percentage. Based upon these determinations, the panel recommended interim rates for transport and termination of local traffic, transit traffic, unbundled loops, unbundled ports, unbundled local switching, dedicated transmission links, shared transmission facilities, tandem-switching, nonrecurring charges, and virtual and physical collocation. Also, the panel recommended that a "true-up" mechanism be instituted if the interim rates differ from the rates that will be established by the Commission in 96-922.

MCI and Ameritech both filed exceptions to various portions of the panel's interim rate recommendations. MCI argues that the panel erred in five respects. First, MCI contends that the panel did not make a recommendation as to whether Ameritech is required to pay MCI the tandem office interconnection rate for transport and termination of calls originated on Ameritech's network and terminated on MCI's network. MCI believes that, where its switch serves a comparable geographic area to that served by Ameritech's tandem switch, Ameritech must pay MCI a symmetrical rate to that which MCI pays for transport and termination through Ameritech's tandem switch. MCI states that its switch currently serves a comparable geographic area and provides the same essential functions as Ameritech's tandem switch. Second, MCI believes that the panel's concerns with respect to its cost model are incorrect and its cost model should be adopted by the Commission. Third, MCI states that the Commission should determine that, once the interim rates will be replaced by the rates developed by the Commission in 96-922, no further "true-up" will be allowed. Fourth, MCI contends that its proposed end office termination rate ($.002 per minute-of-use (MOU)) should be adopted by the Commission, rather than the panel's recommendation of $.004 per MOU. In the alternative, MCI states that the Commission should set the interim rate at the mid-point, $.003 per MOU. Fifth, MCI strenuously objects to the panel's recommendation to use Ameritech's tariffed rates for nonrecurring charges for new service orders ($25.50) and line connection ($24.35). MCI states that the Commission should not adopt Ameritech's tariffed rates but, instead, make adjustments to Ameritech's proposed TELRIC nonrecurring charges. MCI made specific recommendations as to how each of those nonrecurring charges should be adjusted for determining interim rates.

Ameritech believes that the panel's interim rate recommendations should not be adopted for essentially seven reasons. First, Ameritech argues that the panel's concerns with the modified assumptions utilized by Ameritech in its TELRIC studies are misplaced. Second, Ameritech contends that interim rates should be determined without reference to the proxy rate ceilings or floors set by the FCC. Further, Ameritech believes that the panel report contains an incorrect rate for end office local termination on page 21 and fails to include a recommendation for an interim rate for tandem switching (Ameritech recommends that the interim tandem switching rate be $.0015 per MOU). Fourth, Ameritech maintains that the Commission should not use three weighted averages for unbundled loops prices (one for each of the three access areas/rate zones) because the costs associated with the eight loop types vary significantly from one another and since the weighted averages are not based upon forecasts appropriate to a weighted average price structure. Ameritech believes that the panel's recommended weighted average rate structure will encourage carriers to purchase only high cost loops, leaving Ameritech undercompensated. Ameritech suggests that the Commission, if it accepts the panel's adjustments, could decrease each of Ameritech's proposed loop rates by 21 percent.

Fifth, Ameritech states that the panel's recommended interim unbundled port rate is based upon costs from a prior study that involved ports with different features and functionalities than what Ameritech will unbundle for MCI and the costs associated with those features and functionalities will not be recovered through the unbundled local switching element. As with loops, Ameritech suggests that the Commission, if it accepts the panel's adjustments, could decrease each of Ameritech's proposed port rates by 21 percent. Sixth, Ameritech took exception to the panel's recommendation to use the FCC's approach, which converts dedicated transport rates into a per MOU rate, rather than establishing dedicated transport rates based upon a division of costs among the sharing carriers. Finally, Ameritech argues that the Commission should use Ameritech's TELRIC cost studies as the basis for setting rates for nonrecurring charges associated with provisioning UNEs, rather than its current tariffed rates, as the panel suggested.

Moreover, Ameritech states that Section 252(d)(2(A) of the 1996 Act requires that the rates paid by Ameritech to MCI for local transport and termination should not be symmetrical, but based upon the costs of providing interconnection. Ameritech argues that, until MCI demonstrates an ability to serve the geographic area reached by Ameritech's tandem switch (which it did not do in this proceeding), the default rate must be the end office rate for local transport and termination. Therefore, Ameritech states that the Commission should deny MCI's request for the tandem interconnection rates for all local transport and termination of calls originated on Ameritech's network. Lastly, Ameritech states that MCI's new nonrecurring rates should not be adopted as MCI has just presented them in its exceptions and they are based on invalid premises.

Arbitration Award: Ameritech submits that, at page 21 of the panel's report, the panel inadvertently reported an end office local termination rate of $.0015 per MOU

and, instead, should have reflected a rate of $.004 per MOU. The Commission agrees with Ameritech's correction and recognizes that the panel is recommending an end office local termination rate of $.004 and a tandem switching rate at $.0015 per MOU.

MCI proposes that compensation for transport and termination be based on the functionality of MCI's switch. How a non-incumbent LEC's switch functions is not the relevant criteria to determine the compensation rate. The Commission's guidelines specify that, where a switch of a non-incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the non-incumbent LEC is the incumbent LEC's tandem interconnection rate. The fundamental question then becomes: does MCI's switch located in Cleveland serve an area comparable to that served by Ameritech's tandem switch. We turn our attention to MCI's conditional certificate approved in Case No. 94-2012-TP-ACE, wherein the Commission granted MCI authority to provide local telecommunications service in Cuyahoga, Franklin, and Montgomery counties. We will presume, given the start-up nature of MCI's operations, that MCI shall serve the area for which we found it worthy of a certificate. In our view, that is a comparable service area. MCI's request that Ameritech pay MCI the tandem office interconnection rate for transport and termination of calls on MCI's network is granted. The reciprocal compensation rate for the term of the interconnection agreement for transport and termination is the panel's recommended interim tandem switching rate of $.0015 per MOU, until revised in our 96-922 proceeding. We have reached this conclusion on the basis of the information in this proceeding. We are deciding the issue on the best information we have. We expect the parties to provide regular reports to the Commission's telecommunications staff so that we may receive ongoing information.

Ameritech expressed its concern with the panel's recommendation on the prices for unbundled loops as those prices are based on weighted averages. The Commission supports the panel's recommendation requiring Ameritech to sell loops with a weighted average rate structure. We believe that applying a weighted average to all eight different types of loops, rather than developing eight separate rates for each access area, is a more appropriate method for interim rate setting. Furthermore, with the weighted averaging, we maintain consistency with Ameritech's alternative regulation plan for the setting of interim rates in access areas B, C, and D.

With regard to the other interconnection and recurring UNEs interim rates, MCI continues to believe its Hatfield Model should be used as the basis for setting rates in this proceeding. MCI specifically mentions that its proposed end office termination rate of $.002 per MOU should be adopted or, alternatively, a rate no greater than $.003 per MOU. The Hatfield Model, as noted by the panel, however, does not estimate nonrecurring costs and, accordingly, MCI did not propose any charges for nonrecurring costs. Nevertheless, MCI in its exceptions to the arbitration panel report attempted to develop interim nonrecurring charges for service ordering and line connection. Ameritech, likewise, argues that the panel's concerns with its TELRIC assumptions are misplaced and its TELRICs, as submitted, should be the basis to set rates. Ameritech also takes

exception to the panel's monthly unbundled line port rate derived from a prior Ameritech LRSIC study. We adopt the panel's recommendations on rates for interconnection and UNEs. We note that our findings are solely for the purpose of setting interim rates and that these issues will be fully explored in the 96-922 proceeding. We also believe that, with the expedited nature of the cost proceeding and our mechanism for a true-up, neither party will be significantly disadvantaged by these interim rates during this period. We believe that, despite MCI's and Ameritech's exceptions, the panel's basis for setting these interim rates was appropriately determined and neither party's interim rates nor the exceptions raised by the parties provide a sufficient basis to reject the panel's recommended rates.

With regard to the true-up mechanism, MCI requests the Commission make clear that, when the interim rates are replaced by permanent rates, these permanent rates should be derived in the 96-922 proceeding and that no further true-ups will be allowed. We have previously stated that the interim rates set in this proceeding will be fully explored in the 96-922 cost proceeding. In this proceeding, we will not prejudge the issue or preclude the future possibility of true-up adjustments. Rates to be used other than the interim rates, as well as any need for a true-up, will be addressed at the appropriate time in the 96-922 proceeding.

VI. Resale Issues

A. Wholesale/Resale Discount Methodology

What is the appropriate calculation of the wholesale/resale discount rate (Petition, Ex. D.III.2.)?

What is the appropriate methodology to apply the discount rate (Petition, Ex. D.III.3.)?

MCI and Ameritech used different approaches to determining the appropriate discount to use in setting wholesale prices. While both companies' approaches derive from the FCC's rules, MCI proposed across-the-board discount percentages of either 28.88 percent or 21.42 percent, depending on whether MCI uses Ameritech's directory assistance (DA) and operator services (OS). Ameritech proposed non-uniform discounts across its wholesale services, which, when aggregated, result in a composite discount of 15.9 percent. The panel found that it was unable to conclude that Ameritech's study was not a "bottom up" study and rejected Ameritech's approach. However, the panel noted that some of Ameritech's assumptions in identifying nonproduct-specific costs were reasonable. Nevertheless, the panel found MCI's model to be straight-forward and consistent with the FCC's Order and this Commission's guidelines. The panel recommended that MCI's model be used, subject to several adjustments regarding the ARMIS report used, assumptions for avoided uncollectible expenses, and assumptions for avoided customer service expenses. With those adjustments, the panel recommended that the resale discount, applied in an across-the-board fashion, be 25 percent when MCI

Exhibit _____ (MEA-9)
Witness: Argenbright
Docket No. 991755-TP

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between	)	DOCKET NO. UT-980370
ELECTRIC LIGHTWAVE, INC., and GTE NORTHWEST INCORPORATED	)	ARBITRATOR' S REPORT AND DECISION
Pursuant to 47 USC Section 252.	)	

I. MEMORANDUM

A. Procedural History.

On May 1, 1998, Electric Lightwave, Inc. (ELI), requested to negotiate an interconnection agreement with GTE Northwest Incorporated (GTE). On October 7, 1998, ELI, timely filed a Petition for Arbitration with the Washington Utilities and Transportation Commission ("Commission")[1] pursuant to 47 USC § 252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 U.S.C. § 151 et seq. (1996) (Telecom Act). The matter was designated Docket No. UT-980370.

The Commission entered an Order on Arbitration Procedure and appointed an arbitrator on October 27, 1998. GTE filed its response with the Commission on November 2, 1998.[2]

On November 13, 1998, a prehearing conference was held to establish a procedural schedule. On November 25, 1998, the parties jointly requested that the statutory deadline for resolution of disputed issues be extended and they waived all rights to challenge a Commission decision dated on or before March 8, 1999, on the basis of timeliness. On December 1, 1998, the First Supplemental Order on Prehearing Conference approving the joint request was entered. Opening testimony was filed on December 1, 1998. Reply testimony was filed January 4, 1999.

On January 13, 1999, a second prehearing conference was held. At the conference the parties agreed to stipulate the prefiled testimony and exhibits into

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[1] In this decision, the Washington Utilities and Transportation Commission is referred to as the Commission. The Federal Communications Commission is referred to as the FCC.

[2] The ELI Petition, including its proposed interconnection agreement, and GTE's Response, although not separately marked as hearing exhibits, are deemed a part of the record and properly before the Arbitrator and the Commission.

evidence, waive the scheduled hearing, and submit briefs on the unresolved issues. Opening briefs were filed on January 27, 1999. Reply briefs were filed on February 1, 1999.

On February 24, 1999, the parties jointly requested an additional extension of the statutory deadline to March 22, 1999, and for permission to file supplemental briefs. The requests were granted. Supplemental briefs were filed on March 8, 1999.

B. Presentation of Issues.

The parties presented three issues for resolution in this proceeding. GTE raised an additional issue in its Supplemental Brief. The issues are:

1. Should GTE and ELI Compensate Each Other under Their Agreement for the Costs of Transport and Termination for Traffic Exchanged Between Their Networks over Local Interconnection Facilities That Terminate to Internet Service Providers?

2. What Compensation Mechanism Should Be Applied for the Costs of Transport and Termination for Traffic Exchanged Between Networks over Local Interconnection Facilities That Terminate to ISPs?

3. Should GTE Compensate ELI for Traffic Exchanged Between Their Networks at the Tandem Switching Rate or at the End Office Switching Rate?

4. Should the Commission Shorten the Negotiated and Agreed to Term of the Agreement or Establish Procedures to Clarify or Modify Interim Rules for Inter-carrier Compensation?

C. Resolution of Disputes and Contract Language Issue.

On December 1, 1998, the First Supplemental Order on Prehearing Conference was entered and stated that "final offer" arbitration would not control dispute resolution. In preparing the arbitration report in this matter, the arbitrator was not required to choose between the parties' last proposals as to each unresolved issue. The arbitrator considered the parties' arguments and made decisions consistent with the requirements of state and federal law and the Commission on an issue-by-issue basis.

As a general matter, this decision is limited to the disputed issues presented for arbitration. 47 U.S.C. § 252(b)(4). Each decision of the arbitrator is subject to and qualified by the discussion of the issue. The arbitrator reserves the discretion to either adopt or disregard proposed contract language in making decisions. However, adoption of one party's position generally implies that the parties should use

that party's contract language incorporating the advocated position in preparing a final agreement. Contract language adopted remains subject to Commission approval. 47 U.S.C. § 252(e).

This Arbitrator's Report and Decision is issued in compliance with the procedural requirements of the Telecom Act, and it resolves all issues which were submitted to the Commission for arbitration by the parties. At the conclusion of this Report and Decision, the Arbitrator addresses the approval procedure to be followed in furtherance of the issuance of a Commission order approving an interconnection agreement between the parties.

C. Generic Pricing Proceeding

On October 23, 1996, the Commission entered an order in other arbitration dockets declaring that a generic proceeding would be initiated in order to review costing and pricing issues for interconnection, unbundled network elements, transport and termination, and resale.[3] The Commission stated that rates adopted in the pending arbitrations would be interim rates, pending the completion of the generic proceeding. That proceeding is underway.[4] Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate. The conclusions of the arbitrator with respect to price proposals and supporting information are made in this context and do not necessarily indicate Commission approval or rejection of cost and price proposals for purposes of the Generic Case.

D. The Eighth Circuit Order and the FCC Rules

On August 8, 1996, the FCC issued its First Report and Order (Local Interconnection Order), including Appendix B - Final Rules (FCC Rules).[5] On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit stayed operation of the FCC Rules relating to pricing and the "pick and choose" provisions.[6]

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[3] Order on Sprint's Petition to Intervene and to Establish Generic Pricing Proceeding (October 23, 1996) (Generic Pricing Order).

[4] *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, UT-960369 (general), UT-960370 (USWC), UT-960371(GTE); Order Instituting Investigations; Order of Consolidation; and Notice of Prehearing Conference, November 21, 1996 (Generic Case).

[5] *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B- Final Rules.

[6] *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996).

On July 18, 1997, the Eighth Circuit issued an order vacating several of the FCC Rules. On October 14, 1997, the Court entered an order on rehearing vacating additional FCC Rules. The Eighth Circuit decisions were thereafter appealed to the U. S. Supreme Court. On January 25, 1999, the Supreme Court issued a decision holding that the FCC Rules, with the exception of §51.319, are consistent with the Telecom Act.[7]

E. The FCC's Declaratory Order

On February 26, 1999, the Federal Communications Commission (FCC) entered its long awaited order on the issue of inter-carrier compensation for ISP-bound traffic (Declaratory Ruling).[8] The Declaratory Ruling was in response to a number of requests to clarify whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic it delivers to an Internet service provider. Generally, competitive LECs (CLECs), such as ELI, contend that this is local traffic subject to the reciprocal compensation provisions of section 251(b)(5) of the Telecom Act. Incumbent LECs (ILECs), such as GTE, contend that this is interstate traffic beyond the scope of section 251(b)(5). The Declaratory Ruling concluded that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate, but further held that this conclusion does not in itself determine whether reciprocal compensation is due in any particular instance.

The FCC noted that it has no rule governing inter-carrier compensation for ISP-bound traffic, and found no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.[9] The FCC also reiterated that state commission authority over interconnection agreements pursuant to 252 of the Telecom Act extends to both interstate and intrastate matters, and the mere fact that ISP-bound traffic is considered largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process.[10]

The FCC issued a Notice of Proposed Rulemaking simultaneous with the Declaratory Ruling for the purpose of adopting a rule regarding inter-carrier compensation for ISP-bound traffic. In the interim, the duty of state commissions to arbitrate interconnection disputes encompasses the resolution of disputed issues relating to ISP-bound traffic, consistent with governing federal law:

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[7] *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

[8] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, FCC 99-38 (February 26, 1999).

[9] Declaratory Ruling, ¶¶ 21-22.

[10] Declaratory Ruling, ¶ 25, citing the *Local Interconnection Order*, 11 FCC Rcd at 15544.

> . . . [N]othing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate *interim inter-carrier compensation rule* [for ISP-bound traffic] pending completion of the rulemaking we initiate below. Declaratory Ruling, ¶ 27 (Emphasis added).
>
> * * * *
>
> Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for [ISP-bound] traffic. Declaratory Ruling, ¶ 28.

The Commission must fulfill its statutory obligation under section 252 of the Telecom Act to resolve the disputes presented by ELI and GTE in this proceeding, and to decide whether an inter-carrier compensation mechanism should be established. As discussed in this report, the decision that reciprocal compensation is appropriate as inter-carrier compensation is an interim rule pending completion of the FCC's rulemaking and must vary to comply with subsequent federal rules.

F. The Internet

The Internet "is an international network of interconnected computers." *Reno. v. ACLU*, 117 S.Ct. 2329, 2334 (1997).

> [A]ccess to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant . . . are electronic mail ("e-mail"), automatic mailing list services . . ., "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium . . . located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet. *Id.*, 117 S.Ct. at 2335.

Essentially, the "Internet is a distributed packet-switched network, which means that information [being transported within the network] is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." *Report to Congress*, In Re Federal-State Joint Board on Universal Service, FCC 98-67, at ¶ 64 (April 10, 1998). Generally, individuals contract with an Internet Service Provider (ISP) for a flat monthly fee to access the Internet. ISPs pay their own local exchange carrier for the telecommunications services that allow its customers to call it. If an ISP is located in the same "local" calling area as a customer, the customer may dial a seven-digit using the public switched telephone network to

connect to the ISP facility. The ISP's modem then converts the analog messages from its customers into data "packets" that are switched through the Internet and its host computers and servers. Digital information is transmitted back to the ISP to be converted into analog form and delivered to the ISP's customer.

G. Standards for Arbitration

The Telecommunications Act states that in resolving by arbitration any open issues and imposing conditions upon the parties to the agreement, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c).

II. RESOLUTION OF DISPUTED ISSUES

1. Should GTE and ELI Compensate Each Other under Their Agreement for the Costs of Transport and Termination for Traffic Exchanged Between Their Networks over Local Interconnection Facilities That Terminate to Internet Service Providers?

A. GTE's Position

GTE argues that the FCC's Declaratory Ruling requires that ISP-bound traffic should not be the subject of mutual compensation under the interconnection agreement in this proceeding. GTE states that it is incumbent upon the Arbitrator to resolve this issue in the context of the largely negotiated interconnection agreement between the parties (Agreement).[11]

The Agreement provides that the parties shall reciprocally terminate local, intraLATA toll, optional EAS, and jointly provided Interexchange Carrier traffic originating on each other's networks. Agreement, Art. V, §3.1. The Agreement also provides that charges for the transport and termination of non-local traffic, including optional EAS, intraLATA toll, and interexchange traffic shall be in accordance with the parties' respective intrastate or interstate access tariffs or price lists. Agreement, Art. V, §3.2.1. According to GTE, there is no other provision in the Agreement for compensation of interstate traffic.

GTE argues that the FCC determined Internet traffic to be jurisdictionally interstate. Thus, ISP-bound traffic is non-local and not subject to reciprocal

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[11] *Petition of Electric Lightwave, Inc.*, Docket No. UT-980370, Exhibit B; Interconnection, Resale and Unbundling Agreement Between GTE Northwest Incorporated and Electric Lightwave, Inc.

compensation obligations under the negotiated terms of the Agreement. Furthermore, GTE argues that prior Commission decisions upholding reciprocal compensation for ISP-bound traffic should not be accorded any weight as precedent.

B. ELI's Position

ELI states that the FCC found ISP-bound traffic to be jurisdictionally mixed and largely interstate. However (contrary to GTE's position), ELI argues that the Declaratory Ruling provides that reciprocal compensation for ISP-bound traffic is lawful, despite the fact that it is jurisdictionally mixed. ELI argues that the Commission previously concluded that traffic terminated to ISPs is subject to reciprocal compensation, and in the absence of a contrary federal rule, the Commission should not depart from that precedent.[12]

ELI also argues that reciprocal compensation presents the most equitable mechanism for inter-carrier compensation. Carriers are typically compensated for terminating interstate traffic through access charges and local traffic through reciprocal compensation. However, ISPs do not pay access charges as a result of the FCC's "Enhanced Service Provider (ESP) exemption". Nevertheless, ELI contends that carriers must be compensated for the termination of traffic. Accordingly, reciprocal compensation is the logical alternative for ISP-bound traffic.

C. Discussion

Previous arbitration decisions by the Commission favoring reciprocal compensation for ISP traffic were made with the foreknowledge that the issue would be addressed by the FCC at a later date. GTE's argument that those decisions should not be accorded any weight as precedent in light of the FCC's Declaratory Ruling has merit. However, GTE's argument that ELI is estopped from receiving reciprocal compensation for ISP-bound traffic by the terms of the negotiated Agreement and the FCC's Declaratory Ruling is rejected as too narrow an interpretation. The parties submitted the issue to be arbitrated as:

> Should GTE and ELI compensate each other under this Agreement for the costs of transport and termination for traffic exchanged between their networks over local interconnection facilities that terminate to Internet Service Providers ("ISPs")?[13]

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[12] *Order Approving Negotiated and Arbitrated Interconnection Agreement*, In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. (MFS), and U S WEST Communications, Inc., Docket No. UT-960323 (January 8, 1997) (MFS Arbitration).

[13] Exhibit 9.

GTE does not dispute that ISP-bound traffic is terminated over local interconnection facilities, and ISPs continue to be entitled to purchase their public switched telephone network links through local tariffs rather than interstate access tariffs.[14] The FCC found that ISP-bound traffic is jurisdictionally mixed and a substantial portion of dial-up ISP-bound traffic is interstate.

GTE argues that the negotiated provisions of the Agreement should be strictly construed and that ELI is implicitly estopped from receiving reciprocal compensation by the Declaratory Ruling. The Agreement provides that charges for the transport and termination of non-local traffic shall be in accordance with access tariffs or price lists. GTE maintains that the FCC's determination that ISP traffic is substantially interstate requires ELI to pursue compensation under the access tariffs, suggesting that the FCC exemption of ISPs from access charges is an unrelated issue.

ELI's statement of the disputed issue in its briefs differs from Exhibit 9:

> [Should the Commission] direct the parties to compensate each other under the reciprocal compensation mechanism contained in the interconnection agreement for the costs of termination of traffic to Internet Service Providers . . ..

GTE relies on the phrase "under the Agreement" to argue that the Commission is precluded from determining, pursuant to legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule for ISP-bound traffic. However, the FCC's Declaratory Ruling recognized that the non-local character of ISP-bound traffic is not determinative of the compensation issue. The parties submitted their agreed upon statement of disputed issues prior to the FCC's Declaratory Order and GTE unreasonably relies on form over substance.

Although opening arguments by the parties focus on whether ISP-bound traffic was local or interstate, the underlying issue is whether reciprocal compensation should be exchanged. GTE witness Steve Pitterle acknowledged that the primary issue is whether the FCC's Declaratory Ruling provides that the ISP reciprocal compensation issue remains under the jurisdiction of this Commission. Exh. 3, p. 7. The Declaratory Ruling unambiguously provides that state commissions retain jurisdiction to determine whether reciprocal compensation is an appropriate interim inter-carrier compensation rule. To the extent the negotiated terms of the Agreement conflict with federal law, FCC rules, or the Commission's duty to arbitrate interconnection disputes under the Telecom Act, they will be rejected when submitted for approval pursuant to section 252(e)(2)(A)(ii).

The Declaratory Ruling, ¶ 27, states:

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[14] Declaratory Ruling, ¶ 20.

> [N]othing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.

Accordingly, resolution of this issue requires determination of whether such other legal or equitable considerations exist.

While the FCC's Declaratory Ruling specifically addresses issues raised by various parties regarding compensation for transport and termination of ISP-bound Internet traffic, the underlying functionality provided by ISPs is the interconnection of a circuit-switched network with a packet-switched network. These two networks are fundamentally different; circuit switching reserves network resources to route messages whereas packet switching utilizes network resources based upon availability. Historically, the jurisdictional separation between circuit-switched local and long distance traffic is determined by the state in which a call originates and terminates. That distinction also reflects the additional costs incurred in reserving network resources over long distance. The jurisdictional analysis is less straightforward for the packet-switched network environment of the Internet.[15]

The FCC local Interconnection Order, at ¶ 1033, states:

> Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications.

Packet-switched networking brings the underlying costs for the transport and termination of local and long distance traffic closer to its ultimate convergence. The FCC has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, but exempted ESPs from the payment of certain interstate access charges and treated ISP-bound traffic as though it were local since 1983.[16] Thus, ISP-bound traffic can be characterized as "local-interstate".

Local-interstate traffic also exists in cases where territory in multiple states is included in a single local service area, and a local call crosses state lines. Two examples of such local service areas are Pullman, WA - Moscow, ID, and Clarkston, WA - Lewiston, ID. Although the Declaratory Ruling concludes that ISP-bound local-

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[15] Declaratory Ruling, ¶ 18.

[16] Declaratory Ruling, ¶¶ 5 and 23.

interstate traffic does not terminate at the ISP's local server, it does not necessarily terminate at a local carrier's end-office switch in some other state either. However, a *cost* of "terminating the call" occurs at the end-user ISP's local server (where the traffic is routed onto a packet-switched network), and the applicable rate should be determined by the state where the terminating carrier's end office switch is located.[17] ISPs are end-users, not telecommunication carriers.

In the case of ISP-bound traffic, the terminating carrier incurring costs is the carrier that delivers traffic to the ISP. In the context of ISP-traffic, the "call" actually consists of acquiring "access" to a packet-switched network. While a packet-switched network may enable users to replicate a circuit-switched call, Internet access is an amorphous medium and should not be considered a "call" in the switched-circuit sense.

D. Decision

Inter-carrier compensation for local-interstate traffic should be governed by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Telecom Act. A single set of negotiations regarding rates, terms, and conditions is more likely to lead to a process that is market-driven and efficient outcomes for all traffic exchanged by the parties. The Commission is not precluded from determining that reciprocal compensation is an appropriate interim inter-compensation rule for ISP-bound traffic by either the FCC's Declaratory Ruling or the Agreement.

The duty of local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications must be based upon compensating costs where they are incurred. LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network and the terminating LEC does not directly receive any revenue from the customer who originates the call. Even though local-interstate traffic is not addressed by section 251(b)(5) of the Telecom Act, the FCC's policy of treating ISP-bound traffic as local for purposes of interstate access charges leads to the equitable conclusion that it also should be treated as local for purposes of reciprocal compensation charges. The only other alternative would be to apply interstate terminating access charges.

2. What Compensation Mechanism Should Be Applied for the Costs of Transport and Termination for Traffic Exchanged Between Networks over Local Interconnection Facilities That Terminate to ISPs?

A. GTE's Position

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[17] This outcome is consistent with the *Local Interconnection Order*, at ¶ 1038: "In cases in which territory in multiple states is included in a single local service area . . . we conclude that the applicable rate for any particular call should be that established by the state in which the call terminates."

GTE argues that ISP-bound traffic should not be treated as if it were local and that no compensation for transport and termination is appropriate. GTE argues that minutes-of-use (MOU) based compensation is inappropriate for ISP-bound traffic, and bill and keep or flat-rate compensation are the only alternatives that should be considered.

GTE witness Dr. Edward Beauvais emphasizes that it is inefficient to allow flat-rated local service for end users and require local carriers to pay reciprocal compensation for exchanging traffic based upon MOU. The result would be prices for local usage set at a level below the incremental cost of providing the end-to-end call. Dr. Beauvais contends that end user charges and carrier compensation charges must complement each other, and a usage-based compensation approach should not be approved and adopted in this arbitration unless this Commission is willing to re-examine the associated issues of end user pricing on a measured basis. GTE argues that economic distortions caused by the FCC's exemption of ISPs from access charges would be exacerbated if ISP-bound traffic also is made subject to reciprocal compensation.

GTE also argues that MOU-based compensation could lead to substantial unwarranted "subsidies" between carriers because of the long hold times associated with ISP traffic, and has nothing to do with the true costs for providing that service. GTE witness R. Kirk Lee contends that the expense of reciprocal compensation for traffic with longer average call duration has not been built into GTE's retail rate structure. GTE witness Steven Pitterle claims that GTE will be unable to recover its costs if it is required to compensate ELI for ISP-bound traffic on a usage basis.

GTE states that bill and keep is preferable to both MOU and flat-rated compensation methods as an interim mechanism. Bill and keep is a reasonable approximation of costs and a preferred outcome in Washington. Mr. Pitterle contends that bill and keep is an appropriate and equitable mechanism to maintain a consistent relationship between revenues received from flat-rated end users and potential compensation payments to ELI. A bill and keep mechanism would maintain the status quo between the parties until the FCC completes its rulemaking.

Alternatively, GTE proposes a flat-rated pricing system that more closely tracks the costs associated with ISP-bound traffic, and the revenues to be received to cover those costs. As explained by Mr. Lee, non-ISP local traffic would still be subject to the MOU compensation structure in the negotiated Agreement. GTE argues that the flat-rate per trunk charge calculated by Mr. Lee is a straightforward use of the costs developed by the Commission in the Generic Cost/Pricing Case.

B. ELI's Position

ELI proposes that the parties compensate each other for ISP-bound traffic under the MOU based reciprocal compensation mechanism contained in the Agreement. ELI argues that GTE's proposal for a different compensation mechanism

for ISP-bound traffic should be rejected because GTE failed to provide any evidence that there is a cost difference between terminating traffic to ISP and non-ISP end users. ELI witness Timothy Peters contends that ELI incurs the same costs to terminate a call from a GTE customer regardless of whether that call is made to an ELI ISP customer or any other customer within the local calling area.

ELI argues that GTE's revenues are unrelated to the proper determination of an appropriate reciprocal compensation mechanism. The Telecom Act requires that prices be established based upon the cost of transporting and terminating traffic. Furthermore, ELI contends that GTE promotes pricing methodologies which the FCC determined to be inconsistent with section 252(d)(1) of the Telecom Act.

ELI opposes a bill and keep mechanism because traffic between GTE and ELI is not balanced, as the parties acknowledged by agreeing to MOU compensation for the transport and termination of local traffic. The only reason GTE is advocating a different mechanism for ISP-bound traffic is because that traffic is also imbalanced, but in favor of ELI.

ELI states that there is nothing inherently wrong with using a properly calculated flat-rated port charge for reciprocal compensation purposes; however, GTE proposes a flat-rate to be applied only to ISP-bound traffic, yet GTE does not demonstrate that the costs of terminating ISP traffic differs from other local traffic.

C. Discussion

The reciprocal compensation mechanism and rates to be established in this arbitration are interim in two respects: 1) they are interim pending the determination of permanent rates in the Commission's Generic Cost/Pricing Case; and 2) they are interim pending the FCC's NPRM. GTE's proposal for alternative reciprocal compensation mechanisms are all predicated on different mechanisms for ISP local-interstate traffic and non-ISP local traffic, even though there is no evidence in the record that the costs for transport and termination differ. GTE seeks to retain MOU-based compensation for local traffic that is potentially imbalanced in its favor, but seeks to minimize (or avoid) any expense for ISP-bound traffic which is potentially imbalanced in ELI's favor. Furthermore, the GTE proposal does not allow for offsetting imbalances in one type of traffic with the other.

While it may be economically efficient to implement measured rates for local service as discussed by Dr. Beauvais, the existing statutory scheme and long standing regulatory policy in the state of Washington favors flat-rate local service, and this arbitration is not a proper proceeding to implement that kind of change. Due to the prevailing flat-rate retail structure and the lack of substantive evidence of differing costs for the transport and termination of ISP local-interstate and non-ISP local traffic, it is inappropriate and inequitable to adopt separate reciprocal compensation mechanisms in this arbitration.

The Commission has previously identified both bill and keep and capacity-based charge mechanisms as preferred outcomes for local call termination compensation. Nevertheless, GTE and ELI negotiated a MOU-based reciprocal compensation mechanism for local traffic in the Agreement. Furthermore, GTE considers that negotiated Agreement provision to be outside of the scope of this arbitration. The Commission approves negotiated agreements pursuant to section 252(e)(2)(A) of the Telecom Act, and there are no grounds to reject the reciprocal compensation mechanism for local traffic in the Agreement.

As the market for telecommunication services changes, traditional assumptions underlying retail rate structures may require revision as well. If GTE's retail rates do not provide sufficient revenues to offset expenses because of a shift in its end user calling patterns, a reasonable response would be to request rate relief based upon new cost studies rather than shift the burden onto other interconnecting carriers. Another reasonable response would be to support capacity based charges for the transport and termination of all traffic entitled to local treatment, not just the traffic that generates an undesirable imbalance under measured usage.

D. Decision

GTE's proposals that the Commission adopt separate reciprocal compensation mechanisms for the transport and termination of ISP-bound local-interstate and non-ISP local traffic are inappropriate and inequitable because there is no evidence that those traffic costs differ. Insofar as the parties have negotiated an MOU-based reciprocal compensation mechanism for local traffic in the Agreement and GTE considers that provision outside of the scope of this arbitration, it is unnecessary to further evaluate GTE's alternative proposals. The parties should apply the same MOU-based reciprocal compensation mechanism to ISP-bound local-interstate traffic that is used for non-ISP local traffic exchanged between their networks over local interconnection facilities.

3. Should GTE Compensate ELI for Traffic Exchanged Between Their Networks at the Tandem Switching Rate or at the End Office Switching Rate?

A. GTE's Position

GTE disputes ELI's claim that it serves a comparable geographic area to that served by GTE's tandem switch. GTE argues that the coverage of its tandem is substantially larger in GTE's service area than the area served by ELI's switch. GTE contends that the coverage must be equivalent or similar to the ILECs specific tandem at issue, and not a comparison between non-overlapping service areas.

GTE points to the pending installation of ELI's second switch and argues that ELI's claim that its network incurs more "transport" costs and less "switching" costs (thus, justifying the tandem rate) is negated. GTE argues that the second switch will

bring switching closer to ELI's end user customers making GTE's end office switching rate more appropriate. By increasing switching, ELI proportionately reduces the transport for which the FCC designated the tandem rate as a proxy in the FCC Rules. 47 C.F.R. section 51.711(a)(3) states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

GTE also argues that ELI's fiber optic rings constitute long local loops, not transport.

GTE witness Howard Jones defines and contrasts the functionality of a tandem switch with an end office switch. A tandem switch performs two basic functions: 1) it collects traffic from incoming trunk groups according to common destination points and then switches that traffic to a single outgoing trunk group to the common destination; and 2) it performs only trunk to truck switching. An end office switch performs line to line, line to trunk, and trunk to line (but not trunk to trunk) switching. Mr. Jones characterizes the ELI switch as an end office switch because all ELI customers are connected to the line side of the ELI switch.

B. ELI's Position

ELI argues that the reason for a rule regarding comparable service areas is that the coverage area best represents a reasonable approximation of the carrier's cost of switching traffic. According to ELI the term comparable indicates that the size of the areas served by the respective carrier's switch must be similar and not necessarily overlapping. Mr. Peters describes ELI's network as a single switch that is connected to interlocking fiber optic rings. ELI covers a comparable area, but with a single switch and extensive transport, rather than multiple switches. ELI's switch effectively acts as both a tandem and end-office switch. Mr. Peters states that ELI's network configuration is more efficient for its operations, but it does not necessarily incur any less cost to terminate local traffic in its geographic service area than GTE incurs.

ELI states that the sole reason for the installation of a second switch is that ELI's current switch is out of capacity and proximity to end users has no relation to the pending installation. ELI contends that it will incur increased switching costs in order to serve the same geographic area and urges the Commission to reject GTE's position because it fails to recognize the overall symmetry between the parties' costs of transport and termination.

Finally, ELI argues that the Commission's decision in the MFS Arbitration adopted MFS's proposal that its fiber optic ring network was entitled to tandem treatment for its single switch, and rejected arguments made by U S WEST that are identical to those now forwarded by GTE.

C. Discussion

In the paragraph explaining the effect of 47 C.F.R. § 51.711(a)(3), the FCC made it clear that it was utilizing a tandem rate as "the approximate proxy for the interconnecting carrier's additional costs" where an interconnecting carrier's switch serves a comparable geographic area. *Local Interconnection Order,* ¶ 1090. Although GTE argues that the forward-looking economic costs should be similar for an incumbent LEC and an interconnecting carrier providing service in the same geographic area, it offers no economic rationale in opposition to ELI's argument that the objective is to reasonably approximate the symmetrical cost of switching traffic.

In the MFS case, U S WEST argued that the MFS network did not coincide with its extensive geographic service area. MFS argued that if it serviced customers in U S WEST's central and eastern Washington exchanges it would have to absorb the cost of construction, leasing, or purchasing unbundled network elements to provide facilities. Identical circumstances exist relating to GTE's rural central Washington exchanges.

There is substantial overlap between ELI's and GTE's service area and ELI's overall service area is comparable to GTE.[18] New entrants to the market will be unable to match the economies of scope and scale enjoyed by GTE, and the FCC's rules do not require that ELI serve the same area as GTE.

The functional similarity between a CLEC switch and an incumbent LEC's tandem switch is not relevant where the evidence supports a finding that they serve a geographically comparable area. Nevertheless, the record indicates that ELI's switch performs the function of aggregating and routing traffic along its interlocking fiber optic rings similar to a tandem switch. Network upgrades to increase switching capacity do not impact the analysis of functional similarity of switches in alternative network configurations.

D. Decision

GTE should compensate ELI at the tandem switching rate.

4. Should the Commission Shorten the Negotiated and Agreed to Term of the Agreement or Establish Procedures to Clarify or Modify Interim Rules for Inter-carrier Compensation?

A. GTE's Position

GTE acknowledges its obligation to enter into an interconnection agreement while the FCC rulemaking opened in the Declaratory Ruling is pending.

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[18] Exhibit 8.

GTE argues that the FCC limited state commission authority to devise inter-carrier compensation rules by providing that a Commission decision is interim pending completion of the rulemaking. GTE believes that an unfair result will occur if it is bound by the Commission's decision after its legal obligations are clarified or modified by the FCC, and seeks to lay the groundwork for review at this time.

GTE expresses its willingness to renegotiate inter-carrier compensation either upon the issuance of final rules in FCC Docket No. 99-68, or after one year.

B. ELI's Position

ELI states that the parties negotiated and agreed to modify the rates, terms, and conditions of the interconnection agreement in order to conform with a change in law, including federal rules pertaining to the appropriate reciprocal compensation mechanism for ISP-bound traffic. Accordingly, ELI argues that GTE will not be deprived of future regulatory decisions as a result of any current, lawful decision of this Commission. If the FCC's rulemaking concludes with the adoption of a rule that conflicts with the interconnection agreement's compensation mechanism, those provisions are subject to change in accordance with federal rules pursuant to the terms of the Agreement.

C. Discussion

The Commission's authority to reject any portion of an interconnection agreement adopted by negotiation is governed by section 252(e)(2) of the Telecom Act. GTE and ELI have negotiated and agreed to an effective term of the Agreement (Article III, Section 2), and they did not request arbitration of the effective term as a disputed issue. The parties have also adopted by negotiation terms for resolving disputes arising during the effective term of the Agreement (Article III, Section 14), and for modification of the Agreement to comply with changes in law during the effective term (Article III, Sections 32 and 40). These portions of the Agreement do not discriminate against a third party telecommunications carrier, and implementation of these provisions is consistent with the public interest, convenience, and necessity. The terms of the Agreement sufficiently address GTE's concern that an unfair result may occur if subsequent FCC rules differ from the Commission's interim rules in this case.

D. Decision

The Commission should not shorten the negotiated and agreed to term of the Agreement or establish other procedures to clarify or modify interim rules for inter-carrier compensation.

III. IMPLEMENTATION SCHEDULE

Pursuant to 47 U.S.C. § 252(c)(3), the arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." In this case the parties did not submit specific alternative implementation schedules. Specific contract provisions, however, may contain implementation time lines. The parties shall implement the agreement pursuant to the schedule provided for in the contract provisions, and in accordance with the 1996 Act, the applicable FCC rules, and the orders of this Commission.

In preparing a contract for submission to the Commission for approval, the parties may include an implementation schedule.

IV. CONCLUSION

The foregoing resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 252(c). Insofar as the parties have largely negotiated an interconnection agreement, and few issues were submitted for arbitration, there is good cause to shorten the time for filing the Agreement with the Commission.

The parties are directed to submit an agreement consistent with the terms of this report to the Commission for approval within 14 days, pursuant to the following requirements of the Interpretive and Policy Statement, as modified:[19]

A. Filing and Service of Agreements for Approval

1. An interconnection agreement shall be submitted to the Commission for approval under Section 252(e) within 14 days after the issuance of the Arbitrators's Report, in the case of arbitrated agreements, or, in the case of negotiated agreements, within 30 days after the execution of the agreement. The 14 day deadline may be extended by the Commission for good cause. The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) as including the approval process.

2. Requests for approval shall be filed with the Secretary of the Commission in the manner provided for in WAC 480-09-120. In addition, the request for approval shall be served on all parties who have requested service (List available from the Commission Records Center. See Section II.A.2 of the Interpretive and Policy Statement) by delivery on the day of filing. The service rules of the Commission set forth in WAC 480-09-120 and 420 apply except as modified in this interpretive order or by the Commission or arbitrator. Unless filed jointly by all parties, the request for

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[19] *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (June 27, 1996) ("Interpretive and Policy Statement").

approval and any accompanying materials should be served on the other signatories by delivery on the day of filing.

3. A request for approval shall include the documentation set out in this paragraph. The materials can be filed jointly or separately by the parties to the agreement, but should all be filed by the 14-day deadline set out in paragraph 1 above.

B. Negotiated Agreements

a. A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified, including a statement as to why the agreement does not discriminate against non-party carriers, is consistent with the public interest, convenience, and necessity, and is consistent with applicable state law requirements, including Commission interconnection orders.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. A proposed form of order containing findings and conclusions.

C. Arbitrated Agreements

a. A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified; and containing a separate explanation of the manner in which the agreement meets each of the applicable specific requirements of Sections 251 and 252, including the FCC regulations thereunder, and applicable state requirements, including Commission interconnection orders. The "request for approval" brief may reference or incorporate previously filed briefs or memoranda. Copies should be attached to the extent necessary for the convenience of the Commission.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. Complete and specific information to enable the Commission to make the determinations required by Section 252(d) regarding pricing standards, including but not limited to supporting information for (1) the cost basis for rates for interconnection and network elements and the profit component of the proposed rate; (2) transport and termination charges; and (3) wholesale prices.

d. A proposed form of order containing findings and conclusions.

D. Combination Agreements (Arbitrated/Negotiated)

a. Any agreement containing both arbitrated and negotiated provisions shall include the foregoing materials as appropriate, depending on whether a

provision is negotiated or arbitrated. The memorandum should clearly identify which sections were negotiated and which arbitrated.

b. A proposed form of order is required, as above.

4. Any filing not containing the required materials will be rejected and must be refiled when complete. The statutory time lines will be deemed not to begin until a request has been properly filed.

E. Confidentiality

1. Requests for approval and accompanying documentation are subject to the Washington public disclosure law, including the availability of protective orders. The Commission interprets 47 U.S.C. § 252(h) to require that the entire agreement approved by the Commission must be made available for public inspection and copying. For this reason, the Commission will ordinarily expect that proposed agreements submitted with a request for approval will not be entitled to confidential treatment.

2. If a party or parties wishes protection for appendices or other materials accompanying a request for approval, the party shall obtain a resolution of the confidentiality issues, including a request for a protective order and the necessary signatures (Exhibits A or B to standard protective order) prior to filing the request for approval itself with the Commission.

F. Approval Procedure

1. The request will be assigned to Commission Staff for review and presentation of a recommendation at the Commission public meeting. The Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act. Commission Staff who participated in the mediation process for the agreement will not be assigned to review the agreement.

2. Any person wishing to comment on the request for approval may do so by filing written comments with the Commission no later than 10 days after date of request for approval. Comments shall be served on all parties to the agreement under review. Parties to the agreement file written responses to comments within 7 days of service.

3. The request for approval will be considered at a public meeting of the Commission. Any person may appear at the public meeting to comment on the request for approval. The Commission may in its discretion set the matter for consideration at a special public meeting.

4. The Commission will enter an order, containing findings and conclusions, approving or rejecting the interconnection agreement within 30 days of request for approval in the case of arbitrated agreements, or within 90 days in the case of negotiated agreements. Agreements containing both arbitrated and negotiated provisions will be treated as arbitrated agreements subject to the 30 day approval deadline specified in the Act.

G. Fees and Costs

1. Each party shall be responsible for bearing its own fees and costs. Each party shall pay any fees imposed by Commission rule or statute.

DATED at Olympia, Washington and effective this 22nd day of March 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

LAWRENCE J. BERG
Arbitrator