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August 2, 2002

ORIGINAL

Secretary James P. McNulty
Pennsylvania Public Utility Commission
P.O. Box 3265
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Harrisburg, PA 17101-3265

**RE: Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon-Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996**
**Docket No. A- 310814F7000**

Dear Secretary McNulty:

Enclosed please the original and ten (10) copies, one for time-stamp and return of an Appendix to our Post Hearing Brief filed in the above-references case yesterday.

Please accept our apologies for the tardiness of this filing. If you have any questions, please call me.

Very truly yours,

Linda C. Smith

Linda C. Smith

LCS/sw
Enclosure

cc: ALJ Cocheres
Wanda Montano
Todd Murphy

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**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| **In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon-Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996** | : | **Docket No. A-310814F7000** |

**POST HEARING BRIEF OF**
**US LEC OF PENNSYLVANIA INC.**

# APPENDIX



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Dated: August 1, 2002

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1. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (subsequent history omitted) ("*Local Competition Order*") (excerpts).

2. *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221 (rel. Jun. 16, 2000) ("*Merger Conditions*") (excerpts).

3. *TSR Wireless, LLC. v. U S West Communications, Inc.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194 (rel. June 21, 2000) ("*TSR Wireless*") (emphasis added), *aff'd, Qwest Corp. et al. v. FCC et al*, 252 F.3d 462 (D.C. Cir. 2001).

4. *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (rel. Jun. 30, 2000) ("*Texas 271*") (excerpts).

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

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6. 47 CFR §§ 51.305, 51.321, 51.501, 51.503, 51.505, 51.701, 51.703, 51.709, 51.809.

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7. Memorandum to Director, Division of the Commission Clerk & Administrative Services, from Division of Competitive Services and Division of Legal Services, Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Issue 15(b), Staff Recommendation (Fl. P.S.C. Nov. 21, 2001) (excerpts).

8. *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order (Ky. PSC March 14, 2001).

9. *Complaint of Glenda Bierman against CenturyTel of Michigan, Inc. d/b/a CenturyTel*, Opinion and Order, Case No. U-11821 (Mich. PSC Apr. 12, 1999).

10. *Petition of Coast to Coast Telecommunications, Inc. for arbitration of interconnection rates, terms, conditions, and related arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan*, Case No. U-12382, Order Adopting Arbitrated Agreement (Mich. PSC Aug. 17, 2000).

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12. *Application of Ameritech Michigan to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation*, Case No. U-12696, Opinion and Order (Mich. PSC Jan. 23, 2001)

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15. *Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. P-474, Sub 10, Recommended Arbitration Order (NCUC, adopted April 3, 2001), *aff'd* Order Ruling on Objections and Requiring the Filing of Composite Agreement (NCUC, Aug. 2, 2001) (excerpts).

16. Application of MFS Intelenet of Pennsylvania, Inc., Docket No. A-310203F0002 (Pa. PUC, July 31, 1996).

17. *Petition of Focal Communications Corporation of Pennsylvania for Arbitration Pursuant to Section 252(b) of the Telecommunications act of 1996 to Establish an Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.*, Docket No. A-310630F0002, Opinion and Order (PA PUC Aug. 17, 2000) ("*Focal Arbitration Order*").

18. Opinion and Order, *Petition of Focal Communications Corporation of Pennsylvania for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With Bell Atlantic-Pennsylvania, Inc.*, Docket No. A-310630F0002 (Pa. PUC, Jan. 24, 2001).

19. *Petition of Sprint Communication Company, L.P. for an Arbitration Award of Interconnection Rates, Terms and Conditions Pursuant to 47 U.S.C. § 252(b) and Related Arrangements with Verizon Pennsylvania, Inc.*, Docket No. A-310183F0002, Opinion and Order (Pa. PUC Oct. 12, 2001) ("*Sprint Arbitration Order*") (excerpts).

FCC 96-325

**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| | ) | |
| Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers | ) | CC Docket No. 95-185 |

# FIRST REPORT AND ORDER

Adopted: August 1, 1996 Released: August 8, 1996

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

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telecommunications carrier seeking interconnection only for interexchange services is not within the scope of this statutory language because it is not seeking interconnection for the purpose of providing telephone exchange service. Nor does a carrier seeking interconnection of interstate traffic only – for the purpose of providing interstate services only – fall within the scope of the phrase "exchange access." Such a would-be interconnector is not "offering" access to telephone exchange services. As we stated in the NPRM, an IXC that seeks to interconnect solely for the purpose of originating or terminating its own interexchange traffic is not offering access, but rather is only obtaining access for its own traffic. Thus, we disagree with CompTel's position that IXCs are offering exchange access when they offer and provide exchange access as a part of long distance service. We conclude that a carrier may not obtain interconnection pursuant to section 251(c)(2) for the purpose of terminating interexchange traffic, even if that traffic was originated by a local exchange customer in a different telephone exchange of the same carrier providing the interexchange service, if it does not offer exchange access services to others. As we stated above, however, providers of competitive access services are eligible to receive interconnection pursuant to section 251(c)(2). Thus, traditional IXCs that offer access services in competition with an incumbent LEC (*i.e.*, IXCs that offer access services to other carriers as well as to themselves) are also eligible to obtain interconnection pursuant to section 251(c)(2). For example, when an IXC interconnects at a local switch, bypassing the incumbent LECs' transport network, that IXC may offer access to the local switch in competition with the incumbent. In such a situation, the interconnection point may be considered a section 251(c)(2) interconnection *point*.

## E. Definition of "Technically Feasible"

### 1. Background

192. In addition to specifying the purposes for which carriers may request interconnection, section 251(c)(2) obligates incumbent LECs to provide interconnection within their networks at any "technically feasible point."[400] Similarly, section 251(c)(3) obligates incumbent LECs to provide access to unbundled elements at any "technically feasible point." Thus our interpretation of the term "technically feasible" applies to both sections.

193. In the NPRM, we sought comment on a "dynamic" definition of "technically feasible" that would provide flexibility for negotiating parties and the states in determining interconnection and unbundling points as network technology evolves.[401] We requested

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U.S.C. § 153(16).

[400] 47 U.S.C. § 251(c)(2)(B).

[401] NPRM at paras.56-59, 87-88.

comment on the extent to which network reliability concerns should be included in a technical feasibility analysis, and tentatively concluded that, if such concerns were involved, the incumbent LEC had the burden to support such a claim with detailed information.[402] We also sought comment on the role of other considerations, such as economic burden, in determining technical feasibility under sections 251(c)(2) and 251(c)(3).[403]

194. We also tentatively concluded that interconnection or access at a particular point in one LEC network evidences the technical feasibility of providing the same or similar interconnection or access in another, similarly structured LEC network.[404] Finally, we tentatively concluded that incumbent LECs have the burden of proving the technical infeasibility of providing interconnection or access at a particular point.[405]

### 2. Comments

195. Commenters offer a wide range of interpretations of the term "technically feasible." Many commenters urge the Commission to offer only broad guidelines with respect to technical feasibility and allow the parties and the states to determine the details.[406] Most BOCs and other LECs argue that "technically feasible" does not mean technically possible or imaginable, and that other factors should be considered in determining what points are technically feasible.[407] Other factors offered by the commenters include cost, network reliability and security, space limitations, the existence of operations support systems, quality of service provided, interoperability, field trials, performance standards, industry standards, the need for construction of new facilities, and inherent fairness.[408] USTA, SBC, and others allege that previous

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[402] *Id.* at paras. 56, 88.

[403] *Id.* at paras. 56-59, 87-88.

[404] *Id.* at paras. 57, 87.

[405] *Id.* at paras. 58, 87.

[406] *See, e.g.*, USTA comments at 11; Bell Atlantic comments at 15; U S West comments at 44; BellSouth reply at 18; California Commission comments at 19; Texas Commission comments at 11; Citizens Utilities comments at 8 (parties are in the best position to determine the technical requirements and abilities).

[407] *See, e.g.*, SBC comments at 25; BellSouth comments at 16; USTA comments at 11; U S West reply at 22.

[408] *See, e.g.*, NYNEX comments at 65-66; SBC reply at 17; Ameritech comments at 16; ALLTEL comments at 7-8; Roseville Tel. comments at 5-6; U S West reply at 22; Lincoln Tel. reply at 3; *see also* USTA comments at 10-12; Florida Commission comments at 13-14; DoD comments at 6 (network reliability must be considered in technical feasibility). GVNW believes that interconnection is technically feasible if: (1) the interconnection point is a normal LEC access point for provisioning of service to its customers; (2) the LEC maintains assignment records for the point; (3) LEC personnel access facilities at the point for interconnecting other LEC facilities; (4) cross-connecting the facility at the point does not expose the network to undue damage; and (5) the LEC and requesting carriers can demonstrate the technical proficiency of personnel assigned to work at the interconnect point. GVNW comments at

Commission orders have considered economic issues in technical feasibility analyses.[409] GVNW argues that small LECs should not be required to unbundle if it is economically unreasonable.[410] The Rural Telephone Coalition contends that the Commission should recognize the differences between small and large operations, high-volume and low-volume local networks, and urban and rural carriers and networks.[411] USTA also suggests that the statute only requires incumbent LECs to provide interconnection to their networks as they are configured presently and that it does not require incumbent LECs to take risky or unreasonable steps to construct new facilities or reconfigure their networks in response to competitor requests.[412]

196. Many potential competitors argue that the definition of "technical feasibility" should be extremely broad and dynamic, to encompass the effects of future technical changes.[413] Sprint contends that the Commission should use the plain meaning of the word "feasible" in defining technical feasibility. Sprint states that Webster's Dictionary defines "feasible" as "possible of realization" and any more restrictive reading would unduly restrict the availability of interconnection.[414] Many parties contend that incumbent LECs should have the burden of proving specific points are not technically feasible.[415] Time Warner claims that any point should be presumptively technically feasible and those claiming technical infeasibility should bear the burden of proof.[416] AT&T argues that existing industry standards for interconnection at a point

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18-19.

[409] *See, e.g.*, USTA comments at 12 n.16; SBC comments at 16.

[410] GVNW comments at 21-22.

[411] Rural Tel. Coalition comments at 31.

[412] *See, e.g.*, USTA comments at 11; BellSouth comments at 16; SBC comments at 25; Lincoln Tel. reply at 3; Roseville Tel. comments at 5-6; Office of the Ohio Consumers' Counsel comments at 10; ALLTEL reply at 5-6.

[413] *See, e.g.*, MCI comments at 12-13; MFS comments at 15; Teleport comments at 25; Nortel comments at 7; Continental Cablevision comments at 20; NCTA comments at 32; Time Warner reply at 13 (all points should be presumptively technically feasible and those claiming technical infeasibility should bear the burden of proof); Colorado Commission comments at 18; Michigan Commission comments at 8-9; Attorneys General of Connecticut *et al.* reply at 4 n.2; Hyperion comments at 10; Independent Cable & Telecomm. Ass'n reply at 9.

[414] Sprint reply at 16; ACSI reply at 6.

[415] *See, e.g.*, MCI comments at 11; Continental Cablevision comments at 20; CompTel comments at 41; Sprint comments at 14; Cox comments at 42; AT&T reply at 11; DoJ comments at 19; California Commission comments at 19; Alabama Commission comments at 15; Ohio Commission comments at 25; Colorado Commission comments at 19.

[416] Time Warner reply at 13; MCI reply at 23 (incumbent LECs do not argue that interconnection points are not technically feasible but rather that the Commission reverse its tentative conclusion that the burden of proof falls on incumbent LECs to demonstrate technical infeasibility); Cable & Wireless comments at 13 (technical feasibility can be assessed by examining the type and quality of interconnection an incumbent LEC already provides to itself, its

evidences the technical feasibility of interconnection at such a point.[417] MCI argues that technically feasible points of interconnection may be either physical, for facilities and equipment, or logical, for software and databases.[418] Several parties ask the Commission to make clear that technical feasibility does not require that operations support systems for order processing, provisioning and installation, billing, and other support functions be in place in order to make a specific interconnection point technically feasible.[419] Several competing carriers also contend that economic factors should not be considered in determining technically feasibile points of interconnection and access to unbundled elements. They argue that if incumbent LECs are not required to expend any funds or resources to provide for technically feasible interconnection or access, competing carriers will be limited to the services currently offered by the incumbents.[420]

197. Some parties propose specific definitions of technical feasibility. For example, Sprint defines "technically feasible" as "possible to accomplish without a scientific or technological breakthrough, *i.e.*, without an advance in the state of the art."[421] MFS defines the term as "any point in an [incumbent LEC's] network where suitable transmission, cross-connect or switching facilities are present to permit the routing of traffic to and from another network."[422]

### 3. Discussion

198. We conclude that the term "technically feasible" refers solely to technical or operational concerns, rather than economic, space, or site considerations. We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements. Specific, significant, and demonstrable network reliability concerns associated with providing interconnection or access at a particular point, however, will be regarded as relevant evidence that interconnection or access at that point is technically infeasible. We also conclude that preexisting interconnection or access at a particular point evidences the

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affiliates and co-carriers).

[417] AT&T comments at 33.

[418] MCI comments at 12; IDCMA reply at 6-7.

[419] *See, e.g.*, MCI comments at 12, Sprint reply at 16-17; AT&T reply at 10 (the need for additional investment to make an arrangement available should not result in a determination of technical infeasibility); Time Warner reply at 15, 17; ACTA comments at 10;

[420] *See, e.g.*, AT&T comments at 14-20; MCI reply at 23-29; Sprint reply at 16; Time Warner reply at 16.

[421] Sprint reply at 15-16; Time Warner reply at 13 (any point of interconnection should be presumptively technically feasible).

[422] MFS comments at 15.

technical feasibility of interconnection or access at substantially similar points. Finally, we conclude that incumbent LECs must prove to the appropriate state commission that a particular interconnection or access point is not technically feasibile.

199. We find that the 1996 Act bars consideration of costs in determining "technically feasible" points of interconnection or access. In the 1996 Act, Congress distinguished "technical" considerations from economic concerns. Section 251(f), for example, exempts certain rural LECs from "unduly economically burdensome" obligations imposed by section 251(c) even where satisfaction of such obligations is "technically feasible."[423] Similarly, section 254(h)(2)(A) treats "technically feasible" and "economically reasonable" as separate requirements.[424] Finally, we note that the House committee that considered H.R. 1555 (which was combined with Senate Bill S.652 to form the 1996 Act) dropped the term "economically reasonable" from its unbundling provision. The House committee explicitly addressed this substantive change, reporting that "this requirement could result in certain unbundled . . . elements . . . not being made available."[425] Thus, the deliberate and explained substantive omission of explicit economic requirements in sections 251(c)(2) and 251(c)(3) cannot be undone through an interpretation that such considerations are implicit in the term "technically feasible." Of course, a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit.[426]

200. USTA and SBC cite the Commission's *900 Service* order[427] as support for the contention that costs must be considered in a technical feasibility analysis.[428] In that order, the Commission concluded that "[i]n defining 'technically feasible,' we balance both technical and economic considerations with a view toward providing [900] blocking capability to consumers without imposing undue economic burdens on LECs."[429] Our *900 Service* order, however, has little bearing on our interpretation of the term "technically feasible" in the 1996 Act. As stated

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[423] 47 U.S.C. § 251(f)(1)(A).

[424] 47 U.S.C. § 254(h)(2)(A).

[425] H. Rep. 104-204, 71 (1995).

[426] *See* 47 U.S.C. § 252(d)(1); *see also infra*, Section VII (concluding that requesting carriers must pay incumbent LECs the cost of interconnection or unbundling).

[427] *Policies and Rules Concerning Interstate 900 Telecommunications Services*, Report and Order, 6 FCC Rcd 6166, 6174 (1991) *(900 Service)*.

[428] USTA comments at 12 n.16; SBC reply at 16.

[429] *900 Service* at 6174.

above, the 1996 Act distinguishes technical considerations from the "undue economic burdens" considered in the *900 Service* order. Indeed, Congress used virtually the same language—"unduly economically burdensome"—in drawing the distinction.[430] If, as SBC contends, we are to presume that Congress was aware of the Commission's analysis of the technical feasibility of 900 call blocking,[431] the 1996 Act appears squarely to reject that view of technical feasibility. Moreover, unlike the costs of providing 900 call blocking, which we imposed largely on LECs in the *900 Service* order, as noted above, to the extent incumbent LECs incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers.

201. In addition to economic considerations, section 251(c)(6) distinguishes considerations of "space limitations" from those of "technical reasons," and thus, in general, we believe existing space or site restrictions should not be included within a technical feasibility analysis.[432] Of course, under section 251(c)(6) "space" restrictions are expressly considered along with "technical" considerations in determining whether an incumbent LEC must provide for physical collocation. Where physical collocation is not practical because of "space limitations," however, incumbent LECs must provide for virtual collocation.[433] Section 251 is silent as to whether an incumbent LEC's duty to provide for virtual collocation or other methods of interconnection or access to unbundled elements is dependent on space constraints. We conclude, as a practical matter, that space limitations at a particular network site, without any possibility of expansion, may render interconnection or access at that point infeasible, technically or otherwise. Where such expansion is possible, however, we conclude that, in light of the distinction drawn in section 251(c)(6), site restrictions do not represent a "technical" obstacle. Again, however, the requesting party would bear the cost of any necessary expansion. Nor do we believe the term "technical," when interpreted in accordance with its ordinary meaning as referring to engineering and operational concerns in the context of sections 251(c)(2) and 251(c)(3),[434] includes consideration of accounting or billing restrictions.

202. Several parties also attempt to draw a distinction between what is "feasible" under the terms of the statute, and what is "possible." The words "feasible" and "possible," however, are used synonymously. Feasible is defined as "capable of being accomplished or brought about;

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[430] *See* 47 U.S.C. § 251(f)(1)(A).

[431] SBC reply at 16 ("Presumably Congress was aware of this FCC definition of the term "technically feasible" when Congress chose to use it in the 1996 Act.").

[432] 47 U.S.C. § 251(c)(6).

[433] *Id.*

[434] *See* Random House College Dictionary at 1349 ("6. pertaining to or connected with the mechanical or industrial arts and the applied sciences").

possible."[435] The statute itself provides a more meaningful distinction. Unlike the "technically *feasible*" terminology included in sections 251(c)(2) and 251(c)(3), section 251(c)(6) uses the term "*practical* for technical reasons" in determining the scope of an incumbent LEC's obligation to provide for physical collocation.[436] "Practical" is defined as "manifested in practice or action . . . not theoretical or ideal"[437] or "adapted or designed for actual use; useful," and connotes similarity to ordinary usage.[438] Thus, it is reasonable to interpret Congress's use of the term "feasible" in sections 251(c)(2) and 251(c)(3) as encompassing more than what is merely "practical" or similar to what is ordinarily done. That is, use of the term "feasible" implies that interconnecting or providing access to a LEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment. This interpretation is consistent with the fact that incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network. If incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated. For example, Congress intended to obligate the incumbent to accommodate the new entrant's network architecture by requiring the incumbent to provide interconnection "for the facilities and equipment" of the new entrant. Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements.

203. We also conclude, however, that legitimate threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to incumbent LEC networks. Negative network reliability effects are necessarily contrary to a finding of technical feasibility. Each carrier must be able to retain responsibility for the management, control, and performance of its own network. Thus, with regard to network reliability and security, to justify a refusal to provide interconnection or access at a point requested by another carrier, incumbent LECs must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access. The reports of the Commission's Network Reliability Council discuss network reliability considerations, and establish templates that list activities that

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[435] The American Heritage College Dictionary 499 (1993). Webster's Ninth New Collegiate Dictionary 453 (1989). Both "feasible" and "possible" refer to that which is "capable of being realized" *Id.* at 918.

[436] 47 U.S.C. § 251(c)(6) (emphasis added).

[437] Webster's at 923.

[438] Random House College Dictionary 1040 (rev. ed. 1984).

need to occur when service providers connect their networks pursuant to defined interconnection specifications or when they are attempting to define a new network interface specification.[439]

204. We further conclude that successful interconnection or access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that interconnection or access is technically feasible at that point, or at substantially similar points in networks employing substantially similar facilities. In comparing networks for this purpose, the substantial similarity of network facilities may be evidenced, for example, by their adherence to the same interface or protocol standards. We also conclude that previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality. Although most parties agree with this conclusion, some LECs contend that such comparisons are all but impossible because of alleged variability in network technologies, even where the ultimate services offered by separate networks are the same. We believe that, if the facilities are substantially similar, the LECs' contention is adequately addressed.

205. Finally, because sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs, we conclude that incumbent LECs must prove to the appropriate state commission that interconnection or access at a point is not technically feasible. Incumbent LECs possess the information necessary to assess the technical feasibility of interconnecting to particular LEC facilities. Further, incumbent LECs have a duty to make available to requesting carriers general information indicating the location and technical characteristics of incumbent LEC network facilities. Without access to such information, competing carriers would be unable to make rational network deployment decisions and could be forced to make inefficient use of their own and incumbent LEC facilities, with anticompetitive effects.

206. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, the Rural Telephone Coalition argues that the Commission should set interconnection points in a flexible manner to recognize the differences between carriers and regions. We do not adopt the Rural Telephone Coalition's position because we believe that, in general, the Act does not permit incumbent LECs to deny interconnection or access to unbundled elements for any reason other than a showing that it is not technically feasible. We believe that this interpretation will advance the procompetitive goals of the statute. We also note, however, that section 251(f) of the 1996 Act provides relief to certain small LECs from our regulations implementing section 251.

## F. Technically Feasible Points of Interconnection

[439] *Network Reliability: A Report to the Nation* (1993, National Engineering Consortium); *Network Reliability: The Path Forward* (1996, Internet: http://www.fcc.gov/oet/nrc).

### 1. Background

207. In the NPRM, we requested comment on which points within an incumbent LEC's network constitute "technically feasible" points for purposes of section 251(c)(2).[440] Having defined the phrase "technically feasible" above, we now determine a minimum set of technically feasible points of interconnection.

### 2. Comments

208. Incumbent LECs claim that the specific points of interconnection should either be left to the negotiation process, or that the Commission should require interconnection only at core points, and leave all other points to the negotiation process.[441] For example, Ameritech claims that it is only technically feasible for competitors to interconnect at its end or tandem offices.[442] Bell Atlantic asserts that the trunk- and loop-side of the local switch, transport facilities, tandem facilities, and the signal transfer points (STPs) are the only technically feasible points for interconnection.[443] Potential competitors, on the other hand, argue that interconnection is technically feasible, and should be mandated by the Commission, at numerous points in the incumbent LEC's network.[444] AT&T, for example, argues that interconnection is technically feasible: (1) at the loop concentrator; (2) between the loop feeder element and the competitive provider's switch; (3) between the incumbent LEC's switch and the competitive provider's operator systems; (4) between a competitive provider's switch and a LEC's signaling A link; (5) between a competitive provider's signaling A link and an incumbent LEC's STP; (6) between a competitive provider's dedicated transport and an incumbent LEC's office; and, (7) between incumbent LEC and non-incumbent LEC STPs.[445] MFS argues that, regardless of the specific

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[440] NPRM at paras. 56-59.

[441] *See, e.g.*, USTA comments at 10-11; BellSouth comments at 15-19; NYNEX comments at 65 (points of interconnection should be left to negotiation); Ameritech comments at 13-14; PacTel comments at 21-22; Oregon Commission comments at 25-26.

[442] Ameritech comments at 13-14; Ohio Commission comments at 24.

[443] Bell Atlantic comments at 20-21; Lincoln Tel. comments at 5.

[444] ALTS comments at 18 (interconnection should be available at any technically feasible point regardless of the technical fabric of the network at the requested point); MCI comments at 12-13 (technically feasible points may be either physical, for facilities and equipment, or logical, for software and databases); Time Warner reply at 15 (interconnection should not be limited to "core requirements" because the statute mandates interconnection at any technically feasible point).

[445] Letter from Bruce Cox and Betsy Brady, AT&T, to Regina M. Keeney, Common Carrier Bureau, FCC, March 21, 1996, at 29-32 (AT&T March 21 Letter).

points listed by the Commission, states should be able to expand the list of technically feasible points.[446]

### 3. Discussion

209. We conclude that we should identify a minimum list of technically feasible points of interconnection that are critical to facilitating entry by competing local service providers. Section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points. Section 251(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic. Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect.[447]

210. We conclude that, at a minimum, incumbent LECs must provide interconnection at the line-side of a local switch (at, for example, the main distribution frame), the trunk-side of a local switch; the trunk interconnection points for a tandem switch; and central office cross-connect points in general. This requirement includes interconnection at those out-of-band signaling transfer points necessary to exchange traffic and access call related databases. All of these points of interconnection are used today by competing carriers, noncompeting carriers, or LECs themselves for the exchange of traffic, and thus we conclude that interconnection at such points is technically feasible.

211. A varied group of commenters, including Bell Atlantic and AT&T, agree that interconnection at the line-side of the switch is technically feasible.[448] Interconnection at this point is currently provided to some commercial mobile radio service (CMRS) carriers[449] and may be necessary for other competitors that have their own distribution plant, but seek to interconnect to the incumbent's switch. We also agree with numerous commenters that claim that interconnection at the trunk-side of a switch is technically feasible and should be available upon

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[446] MFS comments at 14.

[447] *See* Robert S. Pendyck and Daniel L. Rubinfeld, Microeconomics (2nd ed. 1992).

[448] *See, e.g.*, Bell Atlantic comments at 20-21; NYNEX comments at 65; BellSouth reply at 23; AT&T March 21 Letter at 30.

[449] AT&T comments in CC Docket No. 95-185 at 6 n.6 (Mar. 4, 1996).

request.[450] Interconnection at this point is currently used by competing carriers to exchange traffic with incumbent LECs. Interconnection to tandem switching facilities is also currently used by IXCs and competing access providers, and is thus technically feasible. Finally, central office cross-connect points, which are designed to facilitate interconnection, are natural points of technically feasible interconnection to, for example, interoffice transmission facilities. There may be rare circumstances where there are true technical barriers to interconnection at the line- or trunk-side of the switch or at central office cross-connect points, however, the parties have not presented us with any such circumstances. Thus, incumbent LECs must prove to the state commissions that such points are not technically feasible interconnection points.

212. We also note that the points of access to unbundled elements discussed below may also serve as points of interconnection (*i.e.*, points in the network that may serve as places where potential competitors may wish to exchange traffic with the incumbent LEC other than for purposes of gaining access to unbundled elements), and thus we incorporate those points by reference here. Finally, as noted above, we have identified a minimum list of technically feasible interconnection points: (1) the line-side of a local switch; (2) the trunk-side of a local switch; (3) the trunk interconnection points for a tandem switch; (4) central office cross-connect points; (5) out-of-band signaling transfer points; and (6) the points of access to unbundled elements. In addition, we anticipate and encourage parties and the states, through negotiation and arbitration, to identify additional points of technically feasible interconnection. We believe that the experience of the parties and the states will benefit our ongoing review of interconnection.

## G. Just, Reasonable, and Nondiscriminatory Rates, Terms, and Conditions of Interconnection

### 1. Background

213. Section 251(c)(2)(D) requires that incumbent LECs provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[451] In the NPRM, we sought comment on whether we should adopt national requirements governing the terms and conditions of providing interconnection. We also sought comment on how we should determine whether the terms and conditions for interconnection arrangements are just, reasonable, and nondiscriminatory, and how we should enforce such rules. In particular, we sought comment on whether we should adopt national guidelines governing installation, service, maintenance, and repair of the incumbent LEC's portion of interconnection facilities.[452]

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[450] *See, e.g.*, Bell Atlantic comments at 20-21; BellSouth reply at 23; NYNEX comments at 65; Lincoln Tel. comments at 5.

[451] 47 U.S.C. §§ 251(c)(2)(D), 251(c)(3).

[452] We discuss the rates for interconnection below in Section VII.

## 2. Comments

214. MCI argues that incumbent LECs should not be permitted to set restrictions on the type of traffic that can be combined on a single trunk group unless signaling requirements dictate the need for separate trunk groups. Rather, MCI argues that incumbent LECs should be required to accept one-way and two-way trunk groups.[453] MCI also urges the Commission to require incumbents and competitors to select one point of interconnection (POI) on the other carrier's network at which to exchange traffic. MCI further requests that this POI be the location where the costs and responsibilities of the transporting carrier ends and the terminating carrier begins.[454] NEXTLINK argues that incumbent LECs should only be permitted to require earnest fees of new entrants if such fees are required of other incumbent LEC customers.[455]

215. Many incumbent LECs, state commissions, and others oppose explicit national rules regarding standards for just, reasonable, and nondiscriminatory terms of interconnection and claim that these issues are best resolved through negotiation and arbitration.[456] Several commenters urge the Commission to adopt a rule that only requires that terms and conditions for interconnection points be nondiscriminatory.[457] BellSouth argues that longstanding nondiscrimination reporting requirements have never revealed a problem in the area of installation, maintenance, and repair.[458] Bell Atlantic contends that all arrangements provided by

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[453] MCI comments at 40-41.

[454] Under MCI's proposal, new entrants would be considered co-carriers with incumbent LECs, and each carrier that seeks to interconnect with an incumbent LEC would be required to designate, for each local calling area, at least one point of interconnection (POI) on the other carrier's network. A carrier could designate more than one POI but could not be required to do so. Interconnection would result in the termination of a competing carrier's traffic at at least the same level of service quality that the incumbent LEC provides for terminating its own traffic, without any additional charge to the competing carrier to obtain that level of service. MCI comments at 40-46.

[455] NEXTLINK comments at 19.

[456] *See, e.g.*, Ameritech comments at 16-17; BellSouth comments at 20; USTA comments at 18; GTE comments at 21; SNET comments at 14; Alabama Commission comments at 15; *California* Commission comments at 20; Oregon Commission comments at 26-27; GVNW comments at 15; MECA comments at 25; Ohio Consumers' Counsel comments at 12 (an effective complaint procedure should be adopted rather than overly specific guidelines). The Ohio Commission and PacTel state that performance standards governing installation, maintenance and repair are unnecessary. PacTel contends that states and industry fora such as the Ordering and Billing Forum (OBF) can establish the necessary rules without Commission intervention. PacTel comments at 29; Ohio Commission comments at 26.

[457] *See, e.g.*, Bell Atlantic comments at 31; BellSouth comments at 20-21; SBC comments at 37; GTE reply at 11; California Commission comments at 20; District of Columbia Commission comments at 18-19; Ohio Consumers' Counsel comments at 12.

[458] BellSouth comments at 20-21; *see also* Bell Atlantic comments at 31 (provisioning interconnection and unbundled elements for new entrants is complicated and requires more work than provisioning simple dial tone; the Commission should not mandate that LECs provide interconnection and unbundled elements using the appropriate

the incumbent LEC for a competitor should be made reciprocal, because new business buildings or residential developments may have only facilities owned by a new entrant. Absent a reciprocity requirement, Bell Atlantic contends that incumbent LECs could be at a competitive disadvantage in competing for those customers. Bell Atlantic also argues that reciprocal interconnection will put a check on potentially unrealistic unbundling requests.[459]

### 3. Discussion

216. We conclude that minimum national standards for just, reasonable, and nondiscriminatory terms and conditions of interconnection will be in the public interest and will provide guidance to the parties and the states in the arbitration process and thereafter. We believe that national standards will tend to offset the imbalance in bargaining power between incumbent LECs and competitors and encourage fair agreements in the marketplace between parties by setting minimum requirements that new entrants are guaranteed in arbitrations. Negotiations between an incumbent and a new entrant differ from commercial negotiations in a competitive market because new entrants are dependent solely on the incumbent for interconnection.

217. Section 202(a) of the Act states that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, . . . facilities, or services for or in connection with like communication service . . . by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person."[460] By comparison, section 251(c)(2) creates a duty for incumbent LECs "to provide . . . any requesting telecommunications carrier, interconnection with a LEC's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[461] The nondiscrimination requirement in section 251(c)(2) is not qualified by the "unjust or unreasonable" language of section 202(a). We therefore conclude that Congress did not intend that the term "nondiscriminatory" in the 1996 Act be synonymous with "unjust and unreasonable discrimination" used in the 1934 Act, but rather, intended a more stringent standard.

218. Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its

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installation, service, and maintenance intervals that apply to LEC customers and services); Rural Tel. Coalition comments at 32-33 (service intervals for small and rural LECs with respect to provision of interconnection should only be equal to those which the LEC achieves for itself).

[459] Bell Atlantic comments at 32.

[460] 47 U.S.C. § 202(a).

[461] 47 U.S.C. § 251(c)(2)(D).

competitors by providing them less favorable terms and conditions of interconnection than it provides itself. Permitting such circumstances is inconsistent with the procompetitive purpose of the Act. Therefore, we reject for purposes of section 251, our historical interpretation of "nondiscriminatory," which we interpreted to mean a comparison between what the incumbent LEC provided other parties in a regulated monopoly environment. We believe that the term "nondiscriminatory," as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be "just" and "reasonable" under section 251(c)(2)(D). Also, incumbent LECs may not discriminate against parties based upon the identity of the carrier (*i.e.*, whether the carrier is a CMRS provider, a CAP, or a competitive LEC). As long as a carrier meets the statutory requirements, as discussed in this section, it has a right to obtain interconnection with the incumbent LEC pursuant to section 251(c)(2).

219. We identify below specific terms and conditions for interconnection in discussing physical or virtual collocation (*i.e.*, two methods of interconnection).[462] We conclude here, however, that where a carrier requesting interconnection pursuant to section 251(c)(2) does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC must accommodate two-way trunking upon request where technically feasible. Refusing to provide two-way trunking would raise costs for new entrants and create a barrier to entry. Thus, we conclude that if two-way trunking is technically feasible, it would not be just, reasonable, and nondiscriminatory for the incumbent LEC to refuse to provide it.

220. Finally, as discussed below,[463] we reject Bell Atlantic's suggestion that we impose reciprocal terms and conditions on incumbent LECs and requesting carriers pursuant to section 251(c)(2). Section 251(c)(2) does not impose on non-incumbent LECs the duty to provide interconnection. The obligations of LECs that are not incumbent LECs are generally governed by sections 251(a) and (b), not section 251(c). Also, the statute itself imposes different obligations on incumbent LECs and other LECs (*i.e.*, section 251(b) imposes obligations on all LECs while section 251(c) obligations are imposed only on incumbent LECs). We do note, however, that 251(c)(1) imposes upon a requesting telecommunications carrier a duty to negotiate the terms and conditions of interconnection agreements in good faith. We also conclude that MCI's POI proposal, permitting interconnecting carriers, both competitors and incumbent LECs, to designate points of interconnection on each other's networks, is at this time best addressed in negotiations and arbitrations between parties.[464] We believe that the record on

[462] *See infra*, Section VI.

[463] *See infra*, Section XI.A.

[464] Of course, requesting carriers have the right to select points of interconnection at which to exchange traffic with an incumbent LEC under section 251(c)(2).

this issue is not sufficiently persuasive to justify Commission action at this time. As market conditions evolve, we will continue to review and revise our rules as necessary.

## H. Interconnection that is Equal in Quality

### 1. Background

221. Section 251(c)(2)(C) requires that the interconnection provided by an incumbent LEC be "at least equal in quality to that provided by the [incumbent LEC] to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection."[465] In the NPRM, we sought comment on how to determine whether interconnection is "equal in quality."

### 2. Comments

222. MFS claims that the incumbent LEC should provide to everyone the highest grade service it makes available to anyone, including neighboring non-competing LECs.[466] MFS also claims that traffic exchange facilities between incumbent LECs and competitors should be designed to meet at least the same technical criteria and grade of service standards (*e.g.*, probability of blocking in peak hours and transmission standards) as used by the incumbent for the inter-office trunks used in its network.[467] Other parties claim that any criteria established by the Commission should not be overly detailed and quantitative or microscopic.[468] The Pennsylvania Commission suggests that "equal in quality" should mean interconnection that is virtually identical to that received by the incumbent LEC itself or its affiliate with no noticeable differences between the two to the end-user.[469] Nortel claims that the definition of "equal in quality" should recognize differences across technologies.[470]

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[465] 47 U.S.C. § 251(c)(2)(C).

[466] MFS comments at 17 (even if higher grade service is offered to a non-competing LEC, the incumbent LEC must offer this service to competitors); Intermedia comments at 4.

[467] MFS comments at 17.

[468] *See, e.g.*, Ameritech comments at 17; Pennsylvania Commission comments at 21; Ohio Consumers' Counsel comments at 13.

[469] Pennsylvania Commission comments at 21.

[470] Nortel comments at 9.

223. Some parties argue that no national standards for "equal in quality" are necessary, and that this determination is best left to a case-by-case determination.[471] GTE claims that it should be acceptable for states to define equal in quality in terms of perception by the end user.[472]

### 3. Discussion

224. We conclude that the equal in quality standard of section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party. We agree with MFS that this duty requires incumbent LECs to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks. Contrary to the view of some commenters, we further conclude that the equal in quality obligation imposed by section 251(c)(2) is not limited to the quality perceived by end users. The statutory language contains no such limitation, and creating such a limitation may allow incumbent LECs to discriminate against competitors in a manner imperceptible to end users, but which still provides incumbent LECs with advantages in the marketplace (*e.g.*, the imposition of disparate conditions between carriers on the pricing and ordering of services).

225. We also note that section 251(c)(2) requires interconnection that is "at least" equal in quality to that enjoyed by the incumbent LEC itself. This is a minimum requirement. Moreover, to the extent a carrier requests interconnection of superior or lesser quality than an incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection arrangement if technically feasible. Requiring incumbent LECs to provide upon request higher quality interconnection than they provide themselves, subsidiaries, or affiliates will permit new entrants to compete with incumbent LECs by offering novel services that require superior interconnection quality. We also conclude that, as long as new entrants compensate incumbent LECs for the economic cost of the higher quality interconnection,[473] competition will be promoted.[474]

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[471] *See, e.g.*, BellSouth comments at 22; USTA comments at 18; GTE comments at 22; Citizens Utilities comments at 11; Alabama Commission comments at 16; Ohio Consumers' Counsel comments at 13 (dispute resolution process should ultimately decide the success or failure of quality-oriented requirements).

[472] GTE comments at 22.

[473] *See infra*, Section VII.

[474] *See also* Section VII.E. (discussion of accommodation of interconnection).

## VI. METHODS OF OBTAINING INTERCONNECTION AND ACCESS TO UNBUNDLED ELEMENTS

542. In this section, we address the means of achieving interconnection and access to unbundled network elements that incumbent LECs are required to make available to requesting carriers.

### A. Overview

#### 1. Background

543. Section 251(c)(2) requires incumbent LECs to provide interconnection with the LEC's network "for the facilities and equipment of any requesting telecommunications carrier."[1321] Section 251(c)(6) imposes upon incumbent LECs "the duty to provide . . . for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the [LEC], except that the carrier may provide for virtual collocation if the [LEC] demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."[1322] In the NPRM, we noted that section 251(c)(6) does not expressly limit the Commission's authority under section 251(c)(2) to establish rules requiring incumbent LECs to make available a variety of methods of interconnection, except in situations where the incumbent can demonstrate to the state commission that physical collocation is not practical for technical reasons or space limitations. We tentatively concluded that the Commission has the authority to require any reasonable method of interconnection, including physical collocation, virtual collocation, and meet point interconnection arrangements.[1323]

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[1321] 47 U.S.C. § 251(c)(2).

[1322] 47 U.S.C. § 251(c)(6).

[1323] NPRM at para. 64. Under the Commission's *Expanded Interconnection* rules, LECs are not required to offer a collocating carrier a choice between physical and virtual collocation. *Special Access Order*, 7 FCC Rcd at 7407; *Switched Transport Order*, 8 FCC Rcd at 7404; *see also Physical Collocation Designation Order*, 8 FCC Rcd 4589 (under our *Expanded Interconnection* rules, LECs must provide virtual collocation where: virtual collocation is available on an intrastate basis; a LEC has negotiated an interstate virtual collocation arrangement; LECs are exempted from providing physical collocation because of space constraints; or a state commission has granted a waiver). Also, *see* Section VI.B.1.b. regarding the definitions of physical and virtual collocation.

### 2. Comments

544. Many parties agree with our tentative conclusion that we have the authority to require any reasonable method of interconnection.[1324] The Illinois Commission states that the purpose of 251(c)(6) is to eliminate any question about the Commission's authority to require physical collocation, and not to limit the type of interconnection incumbent LECs are required to provide under 251(c)(2).[1325]

545. CAPs and IXCs argue that incumbent LECs should be required to offer competitive entrants the choice between physical and virtual collocation, regardless of whether it is practical to offer physical collocation at a particular LEC premises.[1326] Consumer Federation of America and the Consumers Union argue that the Commission can and should order physical and virtual collocation.[1327] MCI contends that interconnectors have the right to choose virtual or physical collocation, or both, and should have the right to switch from one arrangement to another while paying only the actual costs of such a change.[1328] Sprint argues that the authority to require physical collocation necessarily includes the authority to require less invasive forms of collocation, such as virtual.[1329] Hyperion contends that small carriers lack the financial resources to make the economic investment necessary for physical collocation at every end office. Hyperion suggests that permitting new entrants to request virtual or physical collocation, depending upon their requirements would encourage competition.[1330] ACTA asserts that the cost of converting existing virtual collocation arrangements to physical should be borne by the incumbent LEC.[1331]

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[1324] *See, e.g.*, MFS comments at 17-18 (if Congress meant that 251(c)(6) collocation was the exclusive means of obtaining interconnection or access to unbundled elements, then subsections (c)(2) and (c)(3) would not have been required); Teleport comments at 26; Citizens Utilities comments at 11; Illinois Commission comments at 33; Pennsylvania Commission comments at 22; Sprint reply at 21.

[1325] Illinois Commission comments at 33; MFS comments at 18 (no inference can be drawn that Congress intended any limitation on the Commission's authority to require forms of interconnection other than physical collocation, especially in light of section 251(i)).

[1326] *See, e.g.*, AT&T comments at 41; Hyperion comments at 14; MFS comments at 23.

[1327] CFA/CU comments at 14.

[1328] MCI comments at 56.

[1329] Sprint Comments at 19.

[1330] Hyperion comments at 15.

[1331] ACTA comments at 16.

546. Several parties urge the Commission to require interconnection at "meet points."[1332] Teleport states that incumbent LECs currently provide meet point interconnection arrangements between one another's facilities and are thus obligated to provide such arrangements to others.[1333] Teleport also claims that requiring meet point arrangements would be pro-competitive because it would allow competitors the flexibility to construct more efficient networks by eliminating the need to match the incumbent LEC's network.[1334]

547. Incumbent LECs respond that the statute does not give the Commission authority to require virtual collocation in addition to physical collocation.[1335] Ameritech argues that Congress specifically addressed collocation in section 251(c)(6), and that it would be inappropriate to mandate virtual collocation pursuant to the general duty under section 251(c)(2) to provide interconnection. It contends that, under principles of statutory construction, the specific language of section 251(c)(6), which provides for virtual collocation only where physical collocation is not practical, should govern the general language of section 251(c)(2).[1336]

548. GTE claims that section 251(c)(2) does not provide for any Commission role in specifying acceptable forms of interconnection.[1337] Bell Atlantic and BellSouth claim that meet point interconnection arrangements are very complex and should not be mandated by the Commission or the states, but rather left to the negotiation process.[1338] PacTel argues that incumbent LECs should not be required to develop new network capabilities or expand current network facilities to interconnect with competitors.[1339]

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[1332] A meet point is a point, designated by two carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends.

[1333] *Teleport reply at 25; Sprint reply 21-22* (argues for a "mid-span" meet arrangement whereby two carriers' fiber optic cables would be spliced together at a point between two repeaters).

[1334] Teleport reply at 25.

[1335] *See, e.g.*, Bell Atlantic comments at 34; PacTel comments at 36.

[1336] Ameritech comments at 24.

[1337] GTE comments at 22.

[1338] Bell Atlantic comments at 22; BellSouth comments at 23.

[1339] PacTel comments at 19.

### 3. Discussion

549. We conclude that, under sections 251(c)(2) and 251(c)(3), any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements at a particular point. Section 251(c)(2) imposes an interconnection duty at any technically feasible point; it does not limit that duty to a specific method of interconnection or access to unbundled elements.

550. Physical and virtual collocation are the only methods of interconnection or access specifically addressed in section 251. Under section 251(c)(6), incumbent LECs are under a duty to provide physical collocation of equipment necessary for interconnection unless the LEC can demonstrate that physical collocation is not practical for technical reasons or because of space limitations. In that event, the incumbent LEC is still obligated to provide virtual collocation of interconnection equipment. Under section 251, the only limitation on an incumbent LEC's duty to provide interconnection or access to unbundled elements at any technically feasible point is addressed in section 251(c)(6) regarding physical collocation. Unless a LEC can establish that the specific technical or space limitations in subsection (c)(6) are met with respect to physical collocation, we conclude that incumbent LECs must provide for any technically feasible method of interconnection or access requested by a competing carrier, including physical collocation.[1340] If, for example, we interpreted section 251(c)(6) to limit the means of interconnection available to requesting carriers to physical and virtual collocation, the requirement in section 251(c)(2) that interconnection be made available "at any technically feasible point" would be narrowed dramatically to mean that interconnection was required only at points where it was technically feasible to collocate equipment. We are not pursuaded that Congress intended to limit interconnection points to locations only where collocation is possible.

551. Section 251(c)(6) provides the Commission with explicit authority to mandate physical collocation as a method of providing interconnection or access to unbundled elements. Such authority was previously found lacking by the U.S. Court of Appeals for the D.C. Circuit in *Bell Atlantic v. FCC*,[1341] which was decided prior to enactment of the 1996 Act. While section 251(c)(6) limits an incumbent LEC's duty to provide physical collocation in certain circumstances, we find that it does not limit our authority to require, under sections 251(c)(2) and (c)(3), the provision of virtual collocation. We note that under our *Expanded Interconnection* rules, that were amended subsequent to the Bell Atlantic decision, competitive entrants using physical collocation were required by many incumbent LECs to convert to virtual collocation. If the Commission concluded that subsection (c)(6) places a limitation on our authority to require

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[1340] Because we require incumbent LECs to offer virtual collocation in addition to physical collocation, we reject the suggestion of ACTA that the cost of converting from virtual to physical collocation be borne by the incumbent LEC. *See* ACTA comments at 16.

[1341] *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) (Bell Atlantic v. FCC).

virtual collocation, competitive providers would be required to undertake costly and burdensome actions to convert back to physical collocation even if they were satisfied with existing virtual collocation arrangements. We conclude that Congress did not intend to impose such a burden on requesting carriers that wish to continue to use virtual collocation for purposes of section 251(c). Further, the record indicates that this requirement would be costly and would delay competition.[1342] In short, we conclude that, in enacting section 251(c)(6), Congress intended to expand the interconnection choices available to requesting carriers, not to restrict them.

552. We also conclude that requiring incumbent LECs to provide virtual collocation and other technically feasible methods of interconnection or access to unbundled elements is consistent with Congress's desire to facilitate entry into the local telephone market by competitive carriers. In certain circumstances, competitive carriers may find, for example, that virtual collocation is less costly or more efficient than physical collocation. We believe that this may be particularly true for small carriers which lack the the financial resources to physically collocate equipment in a large number of incumbent LEC premises.[1343] Moreover, since requesting carriers will bear the costs of other methods of interconnection or access, this approach will not impose an undue burden on the incumbent LECs.

553. Consistent with this view, other methods of technically feasible interconnection or access to incumbent LEC networks, such as meet point arrangements, in addition to virtual and physical collocation, must be available to new entrants upon request.[1344] Meet point arrangements (or mid-span meets), for example, are commonly used between neighboring LECs for the mutual exchange of traffic, and thus, in general, we believe such arrangements are technically feasible.[1345] Further, although the creation of meet point arrangements may require some build out of facilities by the incumbent LEC, we believe that such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3). In a meet point arrangement, the "point" of interconnection for purposes of sections 251(c)(2) and 251(c)(3)

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[1342] *See* Teleport comments at 32; ALTS comments at 23; Time Warner comments at 42-44 (objecting to non-recurring charges for the reconnection of existing interconnected virtual collocation services to a replacement physical collocation arrangement).

[1343] *See* Hyperion comments at 15.

[1344] *See* Teleport comments at 26-30; *see also* Washington Utilities and Transportation Commission, *Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling*; Granting Complaints, in Part, (Washington Commission Oct. 31, 1995), Docket No. UT-941464, at 45; *Application of Electric Lightwave, Inc., MFS Intelnet of Oregon, Inc., and MCI Metro Access Transmission Services, Inc.*, Public Utility Commission of Oregon Order, Order No. 96-021, (Oregon Commission Jan. 12, 1996), at 68-69; *Rules for Telecommunications Interconnection and Unbundling*, Arizona Corporation Commission Order, Decision No. 59483, (Arizona Commission Jan. 11, 1996), Proposed Rule R14-2-1303 (Attachment E hereto).

[1345] The Michigan Commission recently required Ameritech to provide meet point interconnection. Michigan Public Service Commission, Case No. U-10860 (Michigan June 5, 1996) at 18 n.4.

remains on "the local exchange carrier's network"[1346] (*e.g.*, main distribution frame, trunk-side of the switch), and the limited build-out of facilities from that point may then constitute an accommodation of interconnection.[1347] In a meet point arrangement each party pays its portion of the costs to build out the facilities to the meet point. We believe that, although the Commission has authority to require incumbent LECs to provide meet point arrangements upon request, such an arrangement only makes sense for interconnection pursuant to section 251(c)(2) but not for unbundled access under section 251(c)(3). New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In this situation, the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement. In an access arrangement pursuant to section 251(c)(3), however, the interconnection point will be a part of the new entrant's network and will be used to carry traffic from one element in the new entrant's network to another. We conclude that in a section 251(c)(3) access situation, the new entrant should pay all of the economic costs of a meet point arrangement. Regarding the distance from an incumbent LEC's premises that an incumbent should be required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the Commission to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection.

554. Finally, in accordance with our interpretation of the term "technically feasible," we conclude that, if a particular method of interconnection is currently employed between two networks, or has been used successfully in the past, a rebuttable presumption is created that such a method is technically feasible for substantially similar network architectures. Moreover, because the obligation of incumbent LECs to provide interconnection or access to unbundled elements by any technically feasible means arises from sections 251(c)(2) and 251(c)(3), we conclude that incumbent LECs bear the burden of demonstrating the technical infeasibility of a particular method of interconnection or access at any individual point.

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[1346] 47 U.S.C. § 251(c)(2).

[1347] *See, supra* Section IV.E., above, discussing accommodation of interconnection.

licensed territories, the largest of which is the "Major Trading Area" (MTA).[2479] Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.

1037. We conclude that section 251(b)(5) obligations apply to all LECs in the same state-defined local exchange service areas, including neighboring incumbent LECs that fit within this description. Contrary to the arguments of NYNEX and Pacific Telesis, neither the plain language of the Act nor its legislative history limits this subsection to the transport and termination of telecommunications traffic between new entrants and incumbent LECs. In addition, applying section 251(b)(5) obligations to neighboring incumbent LECs in the same local exchange area is consistent with our decision that all interconnection agreements, including agreements between neighboring LECs, must be submitted to state commissions for approval pursuant to section 252(e).[2480]

1038. Under section 252, neighboring states may establish different rate levels for transport and termination of traffic.[2481] In cases in which territory in multiple states is included in a single local service area, and a local call from one carrier to another crosses state lines, we conclude that the applicable rate for any particular call should be that established by the state in which the call terminates. This provides an administratively convenient rule, and termination of the call typically occurs in the same state where the terminating carrier's end office switch is located and where the cost of terminating the call is incurred.

### (2) Distinction between "Transport" and "Termination"

1039. We conclude that transport and termination should be treated as two distinct functions. We define "transport," for purposes of section 251(b)(5), as the transmission of terminating traffic that is subject to section 251(b)(5) from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party (or equivalent facility provided by a non-incumbent carrier). Many alternative

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[2479] *See* Rand McNally, Inc., *1992 Commercial Atlas & Marketing Guide* 38-39 (1992).

[2480] *See supra*, Section III.D.

[2481] We discuss the methodology states should follow in establishing transport and termination rates *infra*, Section IX.A.3.c.(3).

arrangements exist for the provision of transport between the two networks. These arrangements include: dedicated circuits provided either by the incumbent LEC, the other local service provider, separately by each, or jointly by both; facilities provided by alternative carriers; unbundled network elements provided by incumbent LECs; or similar network functions currently offered by incumbent LECs on a tariffed basis. Charges for transport subject to section 251(b)(5) should reflect the forward-looking cost of the particular provisioning method.

1040. We define "termination," for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises. In contrast to transport, for which some alternatives exist, alternatives for termination are not likely to exist in the near term. A carrier or provider typically has no other mechanism for delivering traffic to a called party served by another carrier except by having that called party's carrier terminate the call. In addition, forward-looking costs are calculated differently for the transport of traffic and the termination of traffic, as discussed above in the unbundled elements section.[2482] As such, we conclude that we need to treat transport and termination as separate functions -- each with its own cost. With respect to GST's contention that separate charges for transport and termination of traffic will allow incumbent LECs to "game" the system through network design decisions, we conclude in the interconnection section above that interconnecting carriers may interconnect at any technically feasible point.[2483] We find that this sufficiently limits LECs' ability to disadvantage interconnecting parties through their network design decisions.

### (3) CMRS-Related Issues

1041. Section 251(b)(5) obligates LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. Although section 252(b)(5) does not explicitly state to whom the LEC's obligation runs, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers. CMRS providers are telecommunications carriers and, thus, LECs' reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers.

1042. We conclude that, pursuant to section 251(b)(5), a LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic. Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that

[2482] *See infra*, Section XI.A.3.c.(3).

[2483] *See supra*, Section VII.B.2.

originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

1043. As noted above, CMRS providers' license areas are established under federal rules, and in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs' local service areas.[2484] We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges.[2485] Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.[2486]

1044. CMRS customers may travel from location to location during the course of a single call, which could make it difficult to determine the applicable transport and termination

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[2484] *See* 47 C.F.R. §§ 22.911, 24.202; *see also* PCIA comments in CC Docket No. 95-185 at 21-22; Letter from Leonard J. Kennedy, on behalf of Comcast Cellular Communications, to William Caton, Acting Secretary, FCC, July 25, 1996.

[2485] "[S]ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is "roaming" in a cellular system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. In this and other situations where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge . . . . Therefore, to the extent that a cellular operator does provide interexchange service through switching facilities provided by a telephone company, its obligation to pay carrier's carrier [*i.e.*, access] charges is defined by § 69.5(b) of our rules." *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR 2d 1275, 1284-85 n.3 (1986). *See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98 (1994) (concluding that there should be no distinction between incumbent LECs' interconnection arrangements with cellular carriers and those with other CMRS providers).

[2486] *See also, supra*, XI.A.2.c.(1).

rate or access charge.[2487] We recognize that, using current technology, it may be difficult for CMRS providers to determine, in real time, which cell site a mobile customer is connected to, let alone the customer's specific geographic location.[2488] This could complicate the computation of traffic flows and the applicability of transport and termination rates, given that in certain cases, the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges. We conclude, however, that it is not necessary for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected. We conclude that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.

1045. As discussed above, pursuant to section 251(b)(5) of the Act, all local exchange carriers, including small incumbent LECs and small entities offering competitive local exchange services, have a duty to establish reciprocal compensation arrangements for the transport and termination of local exchange service. CMRS providers, including small entities, and LECs, including small incumbent LECs and small entity competitive LECs, will receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation for certain traffic that they transmit and terminate to other carriers. We believe that these arrangements should benefit all carriers, including small incumbent LECs and small entities, because it will facilitate competitive entry into new markets while ensuring reasonable compensation for the additional costs incurred in terminating traffic that originates on other carriers' networks. We also recognize that, to implement transport and termination pursuant to section 251(b)(5), carriers, including small incumbent LECs and small entities, may be required to measure the exchange of traffic, but we believe that the cost of such measurement to these carriers is likely to be substantially outweighed by the benefits of these arrangements.[2489]

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[2487] In the *LEC-CMRS Interconnection NPRM*, we observed that a significant amount of LEC-CMRS traffic crosses state lines, because CMRS service areas often cross state lines and CMRS customers are mobile. *LEC CMRS Interconnection NPRM* at para. 112.

[2488] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, RM-8143, Report and Order and Further Notice of Proposed Rulemaking, FCC 96-264 at paras. 8-9 (adopted June 12, 1996, released July 26, 1996).

[2489] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

### 3. Pricing Methodology

#### a. Background

1046. In the NPRM, we sought comment on how to interpret section 252(d)(2) of the Act. Specifically, we asked if we should establish a generic pricing methodology or impose a ceiling to guide the states in setting the charge for the transport and termination of traffic. We also asked whether such a generic pricing methodology or ceiling should be established using the same principles we adopt for interconnection and unbundled elements.[2490] Additionally, we sought comment on the use of an interim and transitional pricing mechanism that would address concerns about unequal bargaining power in negotiations.[2491]

#### b. Comments

1047. Time Warner argues that call termination is an essential element in completing calls and that this last "bottleneck" should be governed by a lower cost standard than elements that are based on a competitor's "make or buy decisions."[2492] MCI contends that the level of compensation for transport and termination should be determined by calculating the TSLRIC incurred by the incumbent in providing the network elements necessary to terminate the local calls originating on the networks of its competitors, and converting that cost to a per-minute rate.[2493] Cox asserts that section 252(d)(2) requires that competing carriers have mutual obligations to terminate traffic that originates on competitors' networks, and that this obligation requires that the rate for transport and termination be less than the rate charged for unbundled elements.[2494] Cox advocates the use of LRIC, as opposed to TSLRIC, methodology to set transport and termination rates because LRIC recognizes only the cost of capital expenditures to provide the additional terminations and transport required by a competitive local service provider, including maintenance and depreciation of those facilities, without any allocation of overhead.[2495]

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[2490] NPRM at para. 234.

[2491] NPRM at para. 244.

[2492] Time Warner comments at 50. "Make or buy decision" is Time Warner's term for deciding between providing services through its own facilities or through resale and/or purchasing unbundled elements.

[2493] MCI comments at 48-49; *see also* NCTA comments at 47-50; Comcast comments at 22; Competition Policy Institute reply at 15.

[2494] Cox comments at 34; *see also* Sprint Spectrum/APC comments at 8-9.

[2495] Cox comments at 25-26; *see also* GST comments at 38-40; MFS comments at 80-81. We note above that TSLRIC is one instance of LRIC where the increment chosen is the provision of the entire service.

1048. BellSouth argues that the recovery of transport and termination costs should include joint and common costs and that no LEC can charge rates for transport and termination in excess of access charges because potential customers would simply choose arrangements under the latter.[2496] The Western Alliance asserts that rates for the transport and termination of traffic must allow rural LECs to recover the incremental cost of local access, a reasonable apportionment of joint and common costs, and any lost contribution to basic, local service rates represented by the interconnecting carriers' service.[2497] The Western Alliance argues that recovery of lost contribution is especially important for smaller LECs because they are unlikely to have alternative sources from which to support basic service rates.[2498] USTA argues rates should be based on existing prices (*i.e.* access charges) because this would not require small and mid-sized incumbent LECs to conduct cost studies that could bog down the interconnection negotiation process.[2499] GTE claims that the "additional costs incurred" language undermines the contention that cost studies must assume the most efficient technology available because costs are incurred using actual network technology, not a theoretical network.[2500]

1049. The Illinois Commission asserts that the two different pricing standards in sections 252(d)(1)(A)(i) and 252(d)(2)(A)(ii) are not mutually exclusive and the text of the two provisions does not prohibit the states from using identical pricing standards for the two categories of service. The Illinois Commission notes that there is some substitutability between unbundled network elements and incumbent LEC transport and termination of a competitor's traffic. Consequently, the Illinois Commission contends that two widely disparate policies for the pricing of these services may have potentially distorting effects.[2501] The Illinois Commission further argues that section 252(d)(2)(B)(ii) does not prohibit rate regulation proceedings to establish transport and termination costs and does not bar a state from requiring carriers to maintain records regarding transport and termination costs, if authority exists independently of the 1996 Act.[2502] GST argues that section 252(d)(2)(B)(ii)'s

[2496] BellSouth comments at 70-72; *see also* MECA comments at 5; and Mass. Commission comments at 8-9.

[2497] Western Alliance comments at 5.

[2498] *Id. at* 7 n. 14.

[2499] USTA comments at 54-55.

[2500] GTE reply at 30; *see also* PacTel reply at 45-46.

[2501] Illinois Commission comments at 76-77; *see also* California Commission comments at 42; ACSI comments at 10-11; Ohio Commission comments at 70-71; Texas Public Utility Counsel comments at 1, 50; Lincoln Tel. comments at 20; Citizens Utilities comments at 32-33.

[2502] Illinois Commission comments at 78; *see also* California Commission comments at 43-44.

prohibition against use of cost studies to set transport and termination rates suggests Congress intended for compensation prices to be set on the basis of economically relevant costs, not on the basis of artificial regulatory mechanisms, such as separations, revenue requirements, or a carrier's embedded investment.[2503]

1050. The Ohio Commission asserts that states should establish a price ceiling for transport and termination of local traffic on the basis of an imputation test. The Ohio Commission argues that the ceiling price for transport and termination of local traffic should be such that it allows the incumbent LEC to pass an imputation test for local traffic in the aggregate (*i.e.*, flat-rated, message, and measured local residence and business traffic) at the end user rate levels.[2504] Similarly, MFS suggests that the Commission adopt a rate equal to one half of the retail rate because, as a general rule, call origination and billing can be presumed to be equal to the cost of transport and termination.[2505] Jones Intercable contends that the Commission should establish a presumption that all LECs can offer traffic termination at a rate that is no higher than the lowest rate that has been agreed to (or imposed through arbitration) for such traffic termination by *any* LEC. Jones Intercable adds that such a rule is immensely practical because it relieves competitors of the need to fight the same battle in all fifty states.[2506]

1051. The California Commission asserts that ceilings for transport and termination present problems because a ceiling based on, for example, switched access rates would have to take into account widely varying rates among states. The California Commission is also opposed to price floors for call termination because they may conflict with bill-and-keep arrangements.[2507] GST opposes the use of access charges to set reciprocal transport and termination rates because access charges are fundamentally based on rates of return.[2508] TCI argues that there has been sufficient evidence compiled in state proceedings for the Commission to determine the price ceiling based on existing TSLRIC studies and suggests a price ceiling of 0.4 cents per minute of use.[2509] The Illinois and Maryland commissions have

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[2503] GST comments at 39.

[2504] Ohio Commission comments at 71-72, 78-79.

[2505] MFS comments at 87.

[2506] Jones Intercable comments at 29-30.

[2507] California Commission comments at 43; *see also* Florida Commission comments at 40 (setting charges for the transport and termination of local exchange traffic should be left up to the states because of the unique geographical and demographic characteristics of each state).

[2508] GST comments at 39-40.

[2509] TCI comments at 40-43.

adopted rates for the termination of traffic based on incremental cost studies. The Illinois Commission has adopted a rate equal to 0.5 cents ($0.005) per minute of use for termination from the end office switch. Maryland has adopted a rate equal to 0.3 cents ($0.003) per minute of use for termination from the end office switch. Both commissions adopted slightly higher rates for transport and termination via tandem switches equal to 0.5 cents ($0.005) in Maryland and 0.75 cents ($0.0075) in Illinois.[2510]

1052. Most commenters support the requirement that dedicated transport services be priced on a flat-rated basis.[2511] For example, the Ohio Commission asserts that all LECs should offer a reciprocal compensation structure that consists of both flat-rated elements and usage-sensitive elements, in order to satisfy the requirement that the rate structure reflect the way in which costs are incurred by the providing LEC.[2512] According to Lincoln Telephone, the connection between an incumbent LEC's central office and an interconnector's network should be priced as a flat-rated unbundled network element.[2513] The Massachusetts Attorney General recommends that termination charges be flat-rated and capacity-based.[2514] This capacity-based, flat-rated reciprocal compensation charge would be based on port charges, measured at the peak busy hour of the month, to determine the relative traffic flow over the respective networks. The Massachusetts Attorney General further argues that, in a highly competitive market where services and prices would be continuously changing, rates charged by minutes of use will distort marketing and investment decisions away from the efficient path.[2515] Cox contends capacity-cost approaches should be used as the basic standard for setting transport and termination rates because costs are incurred in that manner.[2516] Additionally, Cox argues a capacity-cost approach addresses peak-load pricing problems because an interconnecting carrier is effectively reserving and paying for a slice of capacity on a full-time basis.[2517] Other carriers support a per-minute charge for transport and

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[2510] These cost studies, and others, are discussed in greater detail in *supra*., Section VII.C.3.

[2511] *See, e.g.*, USTA comments at 80; Time Warner comments at 91-92; NEXTLINK comments at 34-35; Mass. Attorney General comments at 16-17, 22-23; CFA/CU comments at 51; Washington Commission comments at 3; Sprint comments at 79.

[2512] Ohio Commission comments at 68-69.

[2513] Lincoln Tel. comments at 22.

[2514] Mass. Attorney General comments at 15-16.

[2515] Mass. Attorney General comments at 16-17; *see also* CFA/CU comments at 55-56; Washington Commission comments at 3.

[2516] Cox comments at Exhibit 3 (Bargaining Incentives and Interconnection), p. 7.

[2517] *Id.*

termination.[2518] In addition to a rate based on minutes of use, the Maryland Commission does not oppose flat-rated options for termination of traffic based on capacity costs measured at peak hours.[2519] BellSouth adds that usage-based charging is relatively more favorable to smaller competitors and facilities-based charging is relatively more favorable to larger competitors.[2520]

1053. Numerous new entrants and state commissions support the use of an interim pricing mechanism and support the use of bill and keep as such an interim measure.[2521] In the *LEC-CMRS Interconnection* proceeding, most CMRS providers argue in support of an interim pricing approach for transport and termination arrangements while long-term solutions are pursued.[2522] Cincinnati Bell asserts that the suggestion that an interim mechanism may be necessary to offset bargaining power of incumbent LECs incorrectly assumes that the incumbent LEC will always have greater bargaining power in the process of negotiations.[2523] Cincinnati Bell argues that, to the contrary, small and mid-size LECs will be at a disadvantage when they negotiate with large corporations.[2524] LECs generally argue that, under the 1996 Act, the Commission is precluded from creating an interim pricing regime, and point to section 251(d)(3), which preserves state regulations over the obligations of LECs in certain circumstances, to support their argument.[2525]

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[2518] *See, e.g.*, MCI comments at 48-49; SBC comments at 50 n.91.

[2519] Maryland Commission comments at Attachment (Maryland Commission Order No. 72348), p. 33.

[2520] BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 11.

[2521] *See, e.g.*, GST comments at 34-35; AT&T comment at 69; Cox comments at 27-28, 38; Sprint comments at 87; Jones Intercable comments at 28-29; Citizens Utilities comments at 30; Telecommunication Resellers Ass'n comments at 54-55.

[2522] *See, e.g.*, AirTouch comments in CC Docket No. 95-185 at 38-39.

[2523] Cincinnati Bell comments at 25-26.

[2524] *Id.*

[2525] *See, e.g.*, BellSouth comments in CC Docket No. 95-185 at 32.

### c. Discussion

#### (1) Statutory Standard

1054. We conclude that the pricing standards established by section 252(d)(1) for interconnection and unbundled elements, and by section 252(d)(2) for transport and termination of traffic, are sufficiently similar to permit the use of the same general methodologies for establishing rates under both statutory provisions. Section 252(d)(2) states that reciprocal compensation rates for transport and termination shall be based on "a reasonable approximation of the additional costs of terminating such calls."[2526] Moreover, there is some substitutability between the new entrant's use of unbundled network elements for transporting traffic and its use of transport under section 252(d)(2). Depending on the interconnection arrangements, carriers may transport traffic to the competing carriers' end offices or hand traffic off to competing carriers at meet points for termination on the competing carriers' networks. Transport of traffic for termination on a competing carrier's network is, therefore, largely indistinguishable from transport for termination of calls on a carrier's own network. Thus, we conclude that transport of traffic should be priced based on the same cost-based standard, whether it is transport using unbundled elements or transport of traffic that originated on a competing carrier's network. We, therefore, find that the "additional cost" standard permits the use of the forward-looking, economic cost-based pricing standard that we are establishing for interconnection and unbundled elements.[2527]

#### (2) Pricing Rule

1055. States have three options for establishing transport and termination rate levels. A state commission may conduct a thorough review of economic studies prepared using the TELRIC-based methodology outlined above in the section on the pricing of interconnection and unbundled elements.[2528] Alternatively, the state may adopt a default price pursuant to the default proxies outlined below. If the state adopts a default price, it must either commence review of a TELRIC-based economic cost study, request that this Commission review such a study, or subsequently modify the default price in accordance with any revised proxies we may adopt. As previously noted, we intend to commence a future rulemaking on developing proxies using a generic cost model, and to complete such proceeding in the first quarter of 1997. As a third alternative, in some circumstances states may order a "bill and keep" arrangement, as discussed below.

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[2526] 47 U.S.C. § 252(d)(2)(A)(ii).

[2527] *See supra*, Section VII.B.

[2528] *Id.*

### (3) Cost-Based Pricing Methodology

1056. Consistent with our conclusions about the pricing of interconnection and unbundled network elements, we conclude that states that elect to set rates through a cost study must use the forward-looking economic cost-based methodology, which is described in greater detail above, in establishing rates for reciprocal transport and termination when arbitrating interconnection arrangements.[2529] We find that section 252(d)(2)(B)(ii), which indicates that section 252(d)(2) shall not be construed to "authorize the Commission or any State to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls,"[2530] does not preclude states or this Commission from reviewing forward-looking economic cost studies. First, we believe that Congress intended the term "rate regulation proceeding" in section 252(d)(2)(B)(ii) to mean the same thing as "a rate-of-return or other rate-based proceeding" in section 252(d)(1)(A)(i). In the section on the pricing of interconnection and unbundled elements above, we conclude that the statutory prohibition of the use of such proceedings is intended to foreclose the use of traditional rate case proceedings using rate-of-return regulation. Moreover, forward-looking economic cost studies typically involve "a reasonable approximation of the additional cost,"[2531] rather than determining such costs "with particularity," such as by measuring labor costs with detailed time and motion studies.

1057. We find that, once a call has been delivered to the incumbent LEC end office serving the called party, the "additional cost" to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching. The network elements involved with the termination of traffic include the end-office switch and local loop. The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities.[2532] We conclude that such non-traffic sensitive costs should not be considered "additional costs" when a LEC terminates a call that originated on the network of a competing carrier. For the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges.

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[2529] *See supra*, Section VII.B. for a complete discussion of forward-looking economic cost-based methodology.

[2530] 47 U.S.C. § 252(d)(2)(B)(ii).

[2531] 47 U.S.C. § 252(d)(2)(A)(ii).

[2532] The duty to terminate calls that originate on the network of a competitor does not directly affect the number of calls routed to a particular end user and any costs that result from inadequate loop capacity are, therefore, not considered "additional costs."

1058. Rates for termination established pursuant to a TELRIC-based methodology may recover a reasonable allocation of common costs. A rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present. We therefore reject the argument by some commenters that "additional costs" may not include a reasonable allocation of forward-looking common costs. We recognize that, as noted by Time Warner, call termination is an essential element in completing calls because competitors are required to use the incumbent LECs' existing networks to terminate calls to incumbent LEC customers.[2533] The 1996 Act envisions a seamless interconnection of competing networks, rather than the development of redundant, ubiquitous networks throughout the nation. In order to terminate traffic ubiquitously to other companies' local customers, all LECs are given the right to use termination services from those companies rather than construct facilities to everyone. While, on the originating end, carriers have different options to reach their revenue-paying customers -- including their own network facilities, purchasing access to unbundled elements of the incumbent LEC, or resale -- they have no realistic alternatives for terminating traffic destined for competing carriers' subscribers other than to use those carriers' networks. Thus, all carriers -- incumbent LECs as well as competing carriers -- have a greater incentive and opportunity to charge prices in excess of economically efficient levels on the terminating end. To ensure that rates for reciprocal compensation make possible efficient competitive entry, we conclude that termination rates should include an allocation of forward-looking common costs that is no greater proportionally than that allocated to unbundled local loops, which, as discussed above, should be relatively low.[2534] Additionally, we conclude that rates for the transport and termination of traffic shall not include an element that allows incumbent LECs to recover any lost contribution to basic, local service rates represented by the interconnecting carriers' service, because such an element would be inconsistent with the statutory requirement that rates for transport and termination be based on additional costs.[2535] In the section addressing prices for unbundled elements we conclude that the ECPR, which would allow incumbent LECs to recover such lost contributions, or collection of universal service costs through interconnection rates, leads to significant distortions in markets when existing retail prices are not cost-based.[2536]

1059. We also address the impact on small incumbent LECs. For example, the Western Alliance argues that it is especially important for small LECs to recover lost contributions and common costs through termination charges. We have considered the

[2533] Time Warner comments at 50.

[2534] *See supra*, Section VII.C.2.b.(1).

[2535] *See* 47 U.S.C. § 252(d)(2).

[2536] *See supra*, Section VII.B.2.b. for a discussion of the effect application of the ECPR would have on the market for local exchange service.

economic impact of our rules in this section on small incumbent LECs. For example, we conclude that termination rates for all LECs should include an allocation of forward-looking common costs, but find that the inclusion of an element for the recovery of lost contribution may lead to significant distortions in local exchange markets. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

### (4) Default Proxies

1060. As with unbundled network elements, we recognize that it may not be feasible for some state commissions conducting or reviewing economic studies to establish transport and termination rates using our TELRIC-based pricing methodology within the time required for the arbitration process, particularly given some states' resource limitations. Thus, for the time being, we adopt a default price range of 0.2 cents ($0.002) to 0.4 cents ($0.004) per minute of use for calls handed off at the end-office switch. This default price range is based on the same proxies that apply to local switching as an unbundled network element. In establishing end-office termination rates, states may adopt a default termination price that is within our default price range or at either of the end points of the range. States should articulate the basis for selecting a particular price within this range. Thus, in arbitration proceedings, states must set the price for end office termination of traffic by: (1) using a forward-looking, economic cost study that complies with the forward-looking, economic-cost methodology set forth above; or (2) adopting a price less than or equal to 0.4 cents ($0.004) per minute, and greater than or equal to 0.2 cents ($0.002) per minute, pending the completion of such a forward-looking, economic cost study. We observe that the most credible studies in the record before us fall at the lower end of this range, and we encourage states to consider such evidence in their analysis. The adoption of a range of rates to serve as a default price range for interconnection agreements being arbitrated by the states provides carriers with a clearer understanding of the terms and conditions that will govern them if they fail to reach an agreement and helps to reduce the transaction costs of arbitration and litigation. We also find that states that have already adopted end-office termination rates based on an approach other than a full forward-looking cost study, either through arbitration or rulemaking proceedings, may keep such rates in effect, pending their review of a forward-looking cost study, as long as they do not exceed 0.5 cents ($0.005) per minute. As discussed below, a state may also order a "bill and keep" arrangement subject to certain limitations. Additionally, our adoption of a default price range temporarily relieves small and mid-sized carriers from the burden of conducting forward-looking economic cost studies.[2537]

1061. Similarly, in establishing transport rates under sections 251(b)(5) and 252(d)(2),

[2537] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

state commissions should be guided by the price proxies that we are establishing for unbundled transport elements discussed above.[2538] States should explain the basis for selecting a particular default price subject to the applicable ceiling. Specifically, when interconnecting carriers hand off traffic at an incumbent LEC's tandem switch (or equivalent facilities of a carrier other than an incumbent LEC), the rates for the tandem switching and transmission from the tandem switch to end offices -- a portion of the "transport" component of transport and termination rates -- should be subject to the proxies that apply to the analogous unbundled network elements. Thus, for the time being, when states set rates for tandem switching under section 252(d)(2), they may set a default price at or below the default price ceiling that applies to the tandem switching unbundled element as an alternative to reviewing a forward-looking economic cost study using our TELRIC methodology.[2539] Similarly, when states set rates for transmission facilities between tandem switches and end offices, they may establish rates equal to the default prices we are adopting for such transmission, as discussed above in the section on unbundled elements.[2540]

1062. Finally, in establishing the rates for transmission facilities that are dedicated to the transmission of traffic between two networks, state commissions should be guided by the default price level we are adopting for the unbundled element of dedicated transport.[2541] For such dedicated transport, we can envision several scenarios involving a local carrier that provides transmission facilities (the "providing carrier") and another local carrier with which it interconnects (the "interconnecting carrier"). The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, if the providing carrier provides one-way trunks that the interconnecting carrier uses exclusively for sending terminating traffic to the providing carrier, then the interconnecting carrier is to pay the providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier. Under an alternative scenario, if the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the interconnecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the

[2538] *See supra*, Section VII.C.2.b.(3).

[2539] *Id.*

[2540] *Id.*

[2541] *Id.*

proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier. This proportion may be measured either based on the total flow of traffic over the trunks, or based on the flow of traffic during peak periods.[2542] Carriers operating under arrangements which do not comport with the principles we have set forth above, shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of this order.

### (5) Rate Structure

1063. Nearly all commenters agree that flat rates, rather than usage-sensitive rates, should apply to the purchase of dedicated facilities. As discussed in the NPRM, economic efficiency may generally be maximized when non-traffic sensitive services, such as the use of dedicated facilities for the transport of traffic, are priced on a flat-rated basis.[2543] We, therefore, require all interconnecting parties to be offered the option of purchasing dedicated facilities, for the transport of traffic, on a flat-rated basis. As discussed by Lincoln Telephone, the connection between an incumbent LEC's end or tandem office and an interconnecting LEC's network is likely to be a dedicated facility. We recognize that the facility itself can be provided in a number of different ways -- by use of two service providers, by the other carrier, or jointly in a meet-point arrangement. We conclude first that, no matter what the specific arrangements, these costs should be recovered in a cost-causative manner and that usage-based charges should be limited to situations where costs are usage sensitive. In cases going to arbitration and in reviewing BOC statements of terms and conditions, the carrier actually providing the facility should presumptively be entitled to a rate that is set based on the forward-looking economic cost of providing the portion of the facility that is used for terminating traffic that originates on the network of a competing carrier. We recognize that negotiated agreements may incorporate flat-rated charges when it is efficient to do so and find that the presence of the arbitration default rule is likely to lead parties to negotiate efficient rate structures.

1064. We recognize that the costs of transporting and terminating traffic during peak and off-peak hours may not be the same. As suggested by the Massachusetts Attorney General, rates that are the same during peak and off-peak hours may not reflect the cost of using the network and could lead to inefficient use of the network. The differences in the cost of transporting and terminating traffic during peak and off-peak hours, however, are likely to vary depending on the network, and the amount and type of traffic terminated at a particular switch. For example, peak periods may vary within a local service area depending upon whether the switch is located in a business or residential area. As a result, there may be administrative difficulties in establishing peak-load pricing schemes that may outweigh the

[2542] *See infra*, Section XI.A.3.c.(5).

[2543] NPRM at para. 150.

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

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| In re Application of | ) | |
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| GTE CORPORATION, | ) | |
| Transferor, | ) | |
| | ) | |
| and | ) | |
| | ) | CC Docket No. 98-184 |
| BELL ATLANTIC CORPORATION, | ) | |
| Transferee | ) | |
| | ) | |
| For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License | ) | |

## MEMORANDUM OPINION AND ORDER

**Adopted: June 16, 2000** **Released: June 16, 2000**

By the Commission: Commissioners Ness and Tristani issuing separate statements; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements.

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APPENDIX E: GTE April 17, 2000 *Ex Parte* Letter

APPENDIX F: GTE April 28, 2000 *Ex Parte* Letter

agreed to undergo an independent audit of their compliance with our UNE and line sharing rules.[681] These UNE and line sharing compliance audit provisions take virtually the same form as the collocation audit conditions.[682] One difference, however, is that unlike in the collocation compliance plan, there is no separate audit of Bell Atlantic and GTE's UNE and line sharing methods and procedures compliance.[683] In addition, the independent auditor will present its final UNE and line sharing audit report to the Commission, and publicly file a copy with the Secretary, no later than 180 days after the merger closing date, unlike the approximately 220 days after merger closing afforded for submission of the final collocation audit report. Likewise with this audit, we fully expect Bell Atlantic/GTE to implement immediately any necessary corrective action in response to adverse findings by the auditor or we may take any necessary and appropriate action. This additional audit of Bell Atlantic/GTE's compliance with our UNE and line sharing rules will be particularly beneficial in assessing Bell Atlantic/GTE's adherence to these important procompetitive requirements.

299. We find that this condition will make it quicker and easier for the Commission and others to detect non-compliance with our collocation, UNE, and line sharing rules both prior to and following the merger.[684] To the extent that the audits uncover one or more violations of our rules, the Commission's audit staff will refer the matter to the Commission's Enforcement Bureau. These audits thus will assist this Commission and state commissions[685] in reducing barriers to competitive provisioning of local voice and advanced services.

300. *Most-Favored Nation Arrangements.* This condition, designed to facilitate market entry throughout Bell Atlantic/GTE's region as well as the spread of best practices (as that term is understood by Bell Atlantic/GTE's competitors), has two components. First, where it is feasible given technical limitations, Bell Atlantic/GTE will offer telecommunications carriers operating within its service area any interconnection arrangement[686] or UNE that Bell Atlantic/GTE, as a competitive LEC outside of its incumbent service area, secures from the

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[681] *See UNE Remand Order; Line Sharing Order.*

[682] *Compare* Conditions at para. 27c (collocation compliance examination engagement) *with id.* at para. 28a (UNE and line sharing compliance examination engagement). Consistent with the overall audit requirements contained in the conditions, these audits will be conducted in accordance with auditing industry standards. *See* American Inst. of Certified Pub. Accountants, ATTESTATION ENGAGEMENTS, AT § 100; COMPLIANCE ATTESTATION, AT § 500.01.

[683] Rather, the methods and procedures audit will be collapsed into the comprehensive compliance audit. *See* Conditions at para. 28a(6) (the independent auditor will evaluate, *inter alia*, the sufficiency of Bell Atlantic/GTE's methods, procedures, and internal controls for compliance with the Commission's UNE and line sharing rules); *see also* American Inst. of Certified Pub. Accountants, CONSIDERATION OF INTERNAL CONTROL IN A FINANCIAL STATEMENT, AU § 319; COMPLIANCE ATTESTATION, AT § 500.04 (addressing examination of internal controls).

[684] *See, e.g.*, BlueStar et al. Mar. 1, 2000 Comments at 4-5.

[685] *See* Conditions at para. 27c(5) & (7). Pursuant to its delegated authority, the Common Carrier Bureau will work closely with the state commissions in this effort.

[686] This commitment encompasses, both for out-of-region and in-region agreements, entire interconnection agreements or selected provisions from them.

incumbent LEC after the merger closing date,[687] and that was not previously made available by the incumbent.[688] Bell Atlantic/GTE will make the interconnection arrangement or network element available on the same terms and conditions as the incumbent, with prices and performance measures determined on a state-specific basis.

301. Second, where it is feasible given technical limitations, Bell Atlantic/GTE will make available to any requesting telecommunications carrier in any of its in-region states any interconnection arrangement or UNE in any other of its in-region states, that was negotiated voluntarily subsequent to the merger closing date by a Bell Atlantic/GTE incumbent LEC, subject to state-specific pricing and performance measures. In addition, Bell Atlantic/GTE will make the interconnection arrangements or UNEs available on the same terms and conditions as those in the underlying agreement, provided that the interconnection arrangements or UNEs will not be available beyond the last date that they are available in the underlying agreement, and that the requesting carrier accepts all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying agreement.[689]

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[687] We decline IURC request that competing carriers in the Bell Atlantic/GTE region be able to obtain interconnection agreements and UNEs that Bell Atlantic or GTE secured as an out-of-region competitive LEC prior to the merger closing date. *But see* IURC Mar. 1, 2000 Comments at 15-16. Given the unique facts and circumstances of the instant merger, we believe that the post-merger restriction is reasonable. Furthermore, as we stated in the *SBC/Ameritech Order*, the merged entity, "bearing in mind its commitment to implement best practices, will be on notice as to which systems and procedures could become uniform across its region." 14 FCC Rcd at 14914, para. 492.

[688] To assist competitive LECs in exercising their options, each Bell Atlantic/GTE out-of-territory affiliate will post on the Internet all of its relevant interconnection agreements. We agree with the Applicants, however, that these conditions need not be expanded to encompass Internet posting of in-region interconnection agreements. *But see* NEXTLINK Mar. 16, 2000 Reply at 12; CoreComm Mar. 1, 2000 Comments at 47-48 (requesting that the conditions require Bell Atlantic/GTE to publish on Bell Atlantic/GTE websites all effective Bell Atlantic and GTE interconnection agreements and amendments within one month after the merger closing, and detailing other associated requirements). As the Applicants assert, interconnection agreements are available publicly in each state in which they are effective, and no commenter has claimed that it has any difficulty in obtaining access to such agreements. *See* Bell Atlantic/GTE Response to Conditions Comments at 25. *See also* 47 U.S.C. § 252(h) (providing for Internet posting of in-region interconnection agreements by incumbent LECs).

[689] Several commenters take issue with this proviso requiring competitive LECs to accept "all reasonably related terms and conditions" of the underlying agreement. The crux of their concern is that this provision will encourage Bell Atlantic/GTE to attach extraneous terms and conditions to requested interconnection arrangements or network elements, under the guise of Bell Atlantic/GTE deeming such terms and conditions "reasonably related." The inclusion of such "poison pills," these commenters assert, then will deter competitors from exercising their rights under the most-favored nation commitments, or will force competitors to undergo the substantial costs and delays of going to arbitration to have such extraneous terms and conditions removed. *See* NEXTLINK Mar. 16, 2000 Reply at 11-12; *Advanced Telecom Mar. 1, 2000 Comments at 4-5; AT&T Mar. 1, 2000 Opposition at 32; MCI WorldCom* Mar. 1, 2000 Supplemental Comments at 15. In response to these comments, a footnote has been added to the Conditions, clarifying that this proviso is to be read in the context of the *Local Competition Order*, 11 FCC Rcd at 16137-42, paras. 1309-23. *See* Conditions at para. 32. Specifically, the *Local Competition Order* stipulates that in order to prevent discrimination, terms and conditions that an incumbent LEC seeks to require a competitive LEC to accept must be "legitimately related to the purchase of the individual [interconnection arrangement or network] element being sought. By contrast, incumbent LECs may not require . . . agreement to terms and conditions relating to other interconnection, services, or elements in the approved agreement." 11 FCC Rcd at 16139, para. 1315. We (continued....)

When a carrier selects an interconnection arrangement or network element for an in-region state in which no rate for a comparable arrangement or element has been established, Bell Atlantic/GTE will make the arrangement or element available at the rates in the originating state on an interim basis until the requisite rates are developed. Disputes regarding the availability of an interconnection arrangement or unbundled element will be resolved through negotiation between the parties or by the relevant state commission pursuant to section 252.

302. The Applicants revised their original proposal to allow that the most-favored nation commitments encompass in-region arbitrated agreements, provisions, and UNEs.[690] Specifically, where a competing carrier seeks to adopt in an in-region Bell Atlantic/GTE service area any agreements, provisions or UNEs that resulted from an arbitration arising from the Bell Atlantic/GTE service area in another in-region state after the merger closing date,[691] either Bell Atlantic/GTE or the competing carrier may submit the arbitrated agreements, provisions, or UNEs to immediate arbitration in the "importing" state without waiting for the statutory negotiation period of 135 days to expire,[692] where the "importing" state consents to conducting arbitration immediately.

303. This approach towards arbitrated agreements, provisions, and UNEs presents several potential advantages. First, it should remove any disincentive to negotiate that the bulk of the commenters fear would be caused by most-favored nation commitments that are limited to interconnection arrangements and UNEs that are negotiated voluntarily. Second, it will expedite the ability of competing carriers to resolve contested issues in "importing" states.[693] Third, it

(Continued from previous page)
believe that this clarification, to the extent that it tracks the language of the *Local Competition Order*, disposes of the matter.

[690] *See, e.g.*, Bell Atlantic/GTE Mar. 14, 2000 *Ex Parte* Letter at 2. These revisions came in response to the allegations of numerous commenters that unless arbitrated agreements are included in this condition, the Applicants will have an incentive to be recalcitrant in negotiations, in order to prevent extension of interconnection arrangements and UNEs that Bell Atlantic/GTE perceives as unfavorable from one in-region state to another. *See* NEXTLINK Mar. 16, 2000 Reply at 11; Advanced Telecom Mar. 1, 2000 Comments at 3; AT&T Mar. 1, 2000 Opposition at 30-33; BlueStar et al. Mar. 1, 2000 Comments at 10; CompTel Mar. 1, 2000 Comments at 7; CoreComm Mar. 1, 2000 Comments at 26-27, 46-47; Covad Mar. 1, 2000 Comments at 17; IURC Mar. 1, 2000 Comments at 15; MCI WorldCom Mar. 1, 2000 Supplemental Comments at 14.

[691] We observe that nothing in the conditions precludes IURC's argument that carriers seeking to compete in Bell Atlantic/GTE's incumbent service area should have made available to them interconnection arrangements and UNEs resulting from an arbitration involving Bell Atlantic/GTE, as a competitive LEC outside of its incumbent service area, after the merger closing date. *See* IURC Mar. 1, 2000 Comments at 15. In fact, SBC/Ameritech's original out-of-region most-favored nation commitments would have *limited* the out-of-territory arrangements available to in-region competitors to agreements obtained through arbitration initiated by SBC/Ameritech. Though SBC/Ameritech subsequently removed that limitation, it did not preclude making out-of-region arbitrated agreements available to in-region competitors. *See SBC/Ameritech Order*, 14 FCC Rcd at 14873 n.723. We read the conditions to the instant merger the same way.

[692] *See* 47 U.S.C. § 252(b)(1).

[693] *See* Covad Mar. 1, 2000 Comments at 17-18 (expressing that the conditions should provide for a faster means than negotiation between the parties to resolve disputes).

addresses the concern that we expressed in the *SBC/Ameritech Order* that expanding the condition to encompass arbitrated arrangements without qualification could interfere with the state arbitration process under sections 251 and 252 of the Communications Act.[694] We emphasize that Bell Atlantic/GTE must act in good faith in determining whether to agree voluntarily to the importation of such arbitrated agreements, provisions, or UNEs and whether to submit such arbitrated agreements, provisions, or UNEs to immediate arbitration in the "importing" state(s).[695] Thus, Bell Atlantic/GTE may be subject to penalties, fines or forfeitures pursuant to general Commission authority if it attempted, in bad faith, to block or delay adoption in a Bell Atlantic/GTE state of any UNE, whole interconnection agreement, or interconnection agreement provisions arbitrated in any other Bell Atlantic/GTE state after the merger closing date.

304. We reject assertions by NEXTLINK and NorthPoint that the most-favored nation provisions should cover performance measures and standards.[696] Because performance measures are determined by states individually outside of the merger context, we agree with the Applicants that performance measures should not be subject to the most-favored nation provisions, both out-of-region and in-region. As the Applicants explain, many states have adopted performance measures "that are unique to the regulatory environment in that state, including the particular systems, processes and service provisioning systems already implemented in that state. The performance measures that are integral to these systems will simply have no applicability in states with different systems."[697]

305. We also reject the argument of several commenters that any in-region interconnection arrangement or UNE, regardless of whether it was made available prior or subsequent to the merger closing, should be obtainable by requesting carriers in any other in-region service area.[698] Similar to our finding in the *SBC/Ameritech Order*,[699] we find it reasonable for this condition to be implemented across the merged firm's combined region on a going-forward basis only. In this way, Bell Atlantic/GTE will be on notice as to which systems and procedures could become uniform across its region. Moreover, under the conditions to this merger, any voluntarily negotiated, in-region interconnection arrangement or UNE will be made available to requesting carriers in any other in-region service area of the particular legacy

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[694] *See SBC/Ameritech Order*, 14 FCC Rcd at 14914, para. 491. We also noted there, however, that where the merged entity has stipulated in arbitration proceedings that specific arrangements have been determined through negotiation, these arrangements will be available for "most-favored nation" treatment. *Id.*

[695] For example, Bell Atlantic/GTE generally would not require a requesting telecommunications carrier to arbitrate in the "importing" state a provision that previously was arbitrated and decided in that state.

[696] *But see* NEXTLINK Mar. 16, 2000 Reply at 12; NorthPoint Mar. 1, 2000 Comments at 12.

[697] Bell Atlantic/GTE Responses to Specific Conditions Allegations at A-13; Bell Atlantic/GTE Response to Conditions Comments at 26.

[698] *But see* NEXTLINK Mar. 16, 2000 Reply at 11; Covad Mar. 1, 2000 Comments at 17; IURC Mar. 1, 2000 Comments at 15-16; MCI WorldCom Mar. 1, 2000 Supplemental Comments at 14.

[699] 14 FCC Rcd at 14914, para. 492.

company whose interconnection arrangement or UNE is being extended. Thus, for example, interconnection agreement provisions voluntarily negotiated by Bell Atlantic's incumbent LEC in New York prior to the merger closing date will be made available to a requesting carrier seeking to compete in the Bell Atlantic/GTE service area in Maryland, which is a legacy Bell Atlantic service area.

306. *Multi-State Interconnection and/or Resale Agreements.* Negotiating a separate interconnection agreement between the same parties in multiple states can impose substantial unnecessary costs and delays on competitors and provides incumbent LECs with an incentive to game the process.[700] As we discuss above, this merger will increase the merged firm's incentive and ability to impose unnecessary negotiation costs on its competitors. To neutralize this incentive, in addition to promoting market entry and assisting telecommunications carriers that want to operate in more than one Bell Atlantic/GTE state, Bell Atlantic/GTE will offer requesting telecommunications carriers an interconnection and/or resale agreement covering multiple Bell Atlantic and/or GTE states,[701] subject to technical feasibility, state-specific pricing, and the provisions in applicable collective bargaining agreements.[702] Bell Atlantic/GTE will make a sample generic multi-state agreement available to any requesting carrier no later than 60 days after the merger closing. Carriers may elect that generic agreement for any number of Bell Atlantic/GTE states, or may negotiate a different multi-state agreement with Bell Atlantic/GTE. In addition, in conjunction with the in-region most-favored nation conditions described above, carriers that negotiate an interconnection agreement with a Bell Atlantic/GTE incumbent LEC in one state may require Bell Atlantic/GTE to sign the same agreement (exclusive of price) throughout the Bell Atlantic/GTE region.[703] We decline to require that Bell Atlantic/GTE file in each of its in-region states generic terms, such as a statement of generally available terms (SGAT),[704] that include all procompetitive offerings required by the conditions.[705] We find that

[700] *SBC/Ameritech Order*, 14 FCC Rcd at 14873, para. 389.

[701] A multi-state agreement under this condition could extend to any in-region Bell Atlantic/GTE state. Even though Bell Atlantic/GTE will offer to negotiate a multi-state interconnection agreement, the affected Bell Atlantic/GTE incumbent LECs may separately sign the agreement, which shall constitute a separate contract for section 252 purposes.

[702] The Applicants' original proposal contained language, both with respect to this condition and the most-favored nation conditions, to the effect that interconnection arrangements and UNEs may be modified to reflect "differences caused by state regulatory requirements, product definitions, network equipment, facilities, and provisioning, and collective bargaining agreements." Bell Atlantic/GTE Jan. 27, 2000 Proposed Conditions at 35-37, paras. 32-35. In response to WorldCom's objections to this language, however, *see* MCI WorldCom Mar. 1, 2000 Supplemental Comments at 15, the Applicants removed all such language, and replaced it with language clarifying that interconnection arrangements and UNEs are subject to 47 U.S.C. § 251(c) (incumbent LEC interconnection obligations), Paragraph 39 of the Conditions (commitment to continue making UNEs available until the date of a final, non-appealable judicial decision relieving incumbent LECs of UNE provision requirements), and provisions in applicable collective bargaining agreements.

[703] *See SBC/Ameritech Order*, 14 FCC Rcd at 14874, para. 389.

[704] *See* 47 U.S.C. § 252(f).

[705] *But see* IURC Mar. 1, 2000 Comments at 16-19.

# CONDITIONS FOR BELL ATLANTIC/GTE MERGER

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30. Out-of-Region Agreements. Bell Atlantic/GTE shall make available to telecommunications carriers in the Bell Atlantic/GTE Service Area any service arrangements that an incumbent LEC (not a Bell Atlantic/GTE incumbent LEC) develops for a Bell Atlantic/GTE affiliate, at the request of the Bell Atlantic/GTE affiliate, where the Bell Atlantic/GTE affiliate operates as a new local telecommunications carrier. Specifically, if such a Bell Atlantic/GTE affiliate makes a specific request for and obtains any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions from an incumbent LEC that had not previously been made available to any other telecommunications carrier by that incumbent LEC after the Merger Closing Date, then Bell Atlantic/GTE's incumbent LECs shall make available to requesting telecommunications carriers in the Bell Atlantic/GTE Service Area, through good-faith negotiation, the same interconnection arrangement or UNE on the same terms (exclusive of price and state-specific performance measures).[69] Bell Atlantic/GTE shall not be obligated to provide pursuant to this condition any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made and with applicable collective bargaining agreements. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable. The price(s) for such interconnection arrangement or UNE shall be negotiated on a state-specific basis and, if such negotiations do not result in agreement, Bell Atlantic/GTE's incumbent LEC or the requesting telecommunications carrier shall submit the pricing dispute(s), exclusive of the related terms and conditions required to be provided under this Paragraph, to the applicable state commission for resolution under 47 U.S.C. § 252 to the extent applicable. To assist telecommunications carriers in exercising the options made available by this Paragraph, each Bell Atlantic/GTE out-of-region local exchange affiliate shall post on its Internet website all of its interconnection agreements entered into with unaffiliated incumbent LECs.[70]

31. In-Region Post-Merger Agreements.

a. Subject to the Conditions specified in this Paragraph, Bell Atlantic/GTE shall make available to any requesting telecommunications carrier in the Bell Atlantic/GTE Service Area within any Bell Atlantic/GTE State any interconnection arrangement, UNE, or provisions of an interconnection agreement (including the entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions in the Bell Atlantic/GTE Service Area within any other Bell Atlantic/GTE State that (1) was voluntarily negotiated with a telecommunications

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[69] The performance measures applicable to the state where the agreement will be performed will apply.

[70] Links to the agreements must be displayed prominently on the initial page of each Bell Atlantic/GTE out-of-region local exchange affiliate's website or on the initial page of Bell Atlantic/GTE's corporate website for CLECs, or as otherwise directed by the Chief of the Common Carrier Bureau, to ensure easy accessibility.

carrier, pursuant to 47 U.S.C. § 252(a)(1), by a Bell Atlantic/GTE incumbent LEC after the Merger Closing Date and (2) has been made available under an agreement to which Bell Atlantic/GTE is a party after the Merger Closing Date. Terms, conditions, and prices contained in tariffs cited in Bell Atlantic/GTE's interconnection agreements shall not be considered negotiated provisions. Exclusive of price and state-specific performance measures[71] and subject to the Conditions specified in this Paragraph, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), provided that (1) the interconnection arrangements or UNEs shall not be available beyond the last date that they are available in the underlying agreement and that the requesting telecommunications carrier accepts all reasonably related terms and conditions[72] as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement and (2) interconnection arrangements or UNEs voluntarily negotiated or agreed to by a Bell Atlantic or GTE incumbent LEC prior to the Merger Closing Date cannot be extended throughout the Bell Atlantic/GTE Service Areas unless voluntarily agreed to by Bell Atlantic/GTE. The price(s) for such interconnection arrangement or UNE shall be established on a state-specific basis pursuant to 47 U.S.C. § 252 to the extent applicable. Provided, however, that pending the resolution of any negotiations, arbitrations, or cost proceedings regarding state-specific pricing, where a specific price or prices for the interconnection arrangement or UNE is not available in that state, Bell Atlantic/GTE shall offer to enter into an agreement with the requesting telecommunications carrier whereby the requesting telecommunications carrier will pay, on an interim basis and subject to true-up, the same prices established for the interconnection arrangement or UNE in the negotiated agreement. This subparagraph shall not impose any obligation on Bell Atlantic/GTE to make available to a requesting telecommunications carrier any terms for interconnection arrangements or UNEs that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. § 252, or the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. § 252(a)(1). Bell Atlantic/GTE shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made and with applicable collective bargaining agreements. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.

b. In the event that any requesting telecommunications carrier seeks to adopt any interconnection arrangement, UNE, or interconnection agreement provisions that are subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions in the Bell Atlantic/GTE Service Area within any Bell Atlantic/GTE State in the Bell Atlantic/GTE Service Area within any other Bell Atlantic/GTE State that (1) is covered by subparagraph a above (except for the requirement that such agreement be voluntarily negotiated), and (2) was the result of an arbitration conducted

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71 The performance measures applicable to the state where the agreement will be performed will apply.

72 *See Local Competition Order*, 11 FCC Rcd 15499 (1996), ¶¶ 1309-1323.

and decided in the former state under 47 U.S.C. § 252 after the Merger Closing Date, then either party may submit the arbitrated provisions to immediate arbitration in the latter state with the consent of the affected state (without waiting for the statutory negotiation period set out in 47 U.S.C. § 252 to expire).[73]

32. In-Region Pre-Merger Agreements. Subject to the Conditions specified in this Paragraph, Bell Atlantic/GTE shall make available: (1) in the Bell Atlantic Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date and (2) in the GTE Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement subject to 47 U.S.C. § 251(c) that was voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date, provided that no interconnection arrangement or UNE from an agreement negotiated prior the Merger Closing Date in the Bell Atlantic Area can be extended into the GTE Service Area and vice versa. Terms, conditions, and prices contained in tariffs cited in Bell Atlantic/GTE's interconnection agreements shall not be considered negotiated provisions. Exclusive of price and state-specific performance measures[74] and subject to the Conditions specified in this Paragraph, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), provided that the interconnection arrangements or UNEs shall not be available beyond the last date that they are available in the underlying agreement and that the requesting telecommunications carrier accepts all reasonably related[75] terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement. The price(s) for such interconnection arrangement or UNE shall be established on a state-specific basis pursuant to 47 U.S.C. § 252 to the extent applicable. Provided, however, that pending the resolution of any negotiations, arbitrations, or cost proceedings regarding state-specific pricing, where a specific price or prices for the interconnection arrangement or UNE is not available in that state, Bell Atlantic/GTE shall offer to enter into an agreement with the requesting

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[73] Bell Atlantic/GTE will act in good faith in determining whether to agree voluntarily to such arbitrated provisions in the latter state(s) and in determining whether to submit such arbitrated provisions to immediate arbitration in the latter state(s). For example, Bell Atlantic/GTE generally would not require a requesting telecommunications carrier to arbitrate in the latter state(s) a provision that previously was arbitrated and decided in that state(s), except to the extent necessary to preserve its appellate rights or to ask the state to reconsider based on changed or new facts or circumstances. Bad faith attempts by Bell Atlantic/GTE to block or delay adoption in a Bell Atlantic/GTE State of any UNE, whole interconnection agreement, or interconnection agreement provisions arbitrated in any other Bell Atlantic/GTE State after the Merger Closing Date would be considered a violation of this Order and could subject Bell Atlantic/GTE to penalties, fines or forfeitures pursuant to general Commission authority.

[74] The performance measures applicable to the state where the agreement will be performed will apply.

[75] *See Local Competition Order*, 11 FCC Rcd 15499 (1996), ¶¶ 1309-1323.

telecommunications carrier whereby the requesting telecommunications carrier will pay, on an interim basis and subject to true-up, the same prices established for the interconnection arrangement or UNE in the negotiated agreement. This Paragraph shall not impose any obligation on Bell Atlantic/GTE to make available to a requesting telecommunications carrier any terms for interconnection arrangements or UNEs that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. § 252, or the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. § 252(a)(1). Bell Atlantic/GTE shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made and with applicable collective bargaining agreements. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.

## X. Multi-State Interconnection and Resale Agreements

33. Upon the request of a telecommunications carrier, Bell Atlantic/GTE shall negotiate in good faith an interconnection and/or resale agreement covering the provision of interconnection arrangements, services, and/or UNEs subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions in the Bell Atlantic/GTE Service Area in two or more Bell Atlantic/GTE States. Such a multi-state generic agreement may include a separate contract with each Bell Atlantic/GTE incumbent LEC. No later than 60 days after the Merger Closing Date, Bell Atlantic/GTE shall make available to any requesting telecommunications carrier generic interconnection and resale terms and conditions covering the Bell Atlantic/GTE Service Area in all Bell Atlantic/GTE States. Pricing under a multi-state generic agreement shall be established on a state-by-state basis and Bell Atlantic/GTE shall not be under any obligation to enter into any arrangement for a state that is not technically feasible and lawful in that state or is inconsistent with provisions in applicable collective bargaining agreements. Any agreement negotiated under this Section shall be subject to the state-specific mediation, arbitration, and approval procedures of Section 252 of the Communications Act. Approval of the agreement in one state shall not be a precondition for implementation of the agreement in another state where approval has been obtained.

## XI. Carrier-to-Carrier Promotions: Unbundled Loop Discount

34. Bell Atlantic/GTE shall offer the unbundled loop carrier-to-carrier promotion described below in the Bell Atlantic/GTE Service Area. Bell Atlantic/GTE shall implement this promotion by providing each telecommunications carrier with which Bell Atlantic/GTE has an interconnection agreement in a Bell Atlantic/GTE State, no later than 30 days after the Merger Closing Date, a written offer to amend each telecommunications carrier's interconnection agreement in that state to incorporate the promotion. For purposes of this Section, an offer published on Bell Atlantic/GTE's Internet website that can be accessed by telecommunications

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matters of | ) | |
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| TSR WIRELESS, LLC, *et al.*, | ) | |
| | ) | |
| Complainants, | ) | |
| | ) | File Nos. E-98-13, E-98-15 |
| v. | ) | E-98-16, E-98-17, E-98-18 |
| | ) | |
| U S WEST COMMUNICATIONS, INC., *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

## MEMORANDUM OPINION AND ORDER

Adopted: May 31, 2000; Released June 21, 2000

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement; Commissioner Powell concurring and issuing a statement.

1. In this Order, we address five separate formal complaints filed by paging carriers TSR Wireless, LLC (TSR) and Metrocall, Inc. (Metrocall) (hereinafter "Complainants" or "paging carriers") against local exchange carriers (LECs) Pacific Bell Telephone Company (Pacific Bell), U S West Communications, Inc. (U S West), GTE Telephone Operations (GTE), and Southwestern Bell Telephone Company (SWBT) (collectively "Defendants"). The paging carriers allege that the LECs improperly imposed charges for facilities used to deliver LEC-originated traffic and for Direct Inward Dialing (DID) numbers in violation of sections 201(b) and 251(b)(5) of the Communications Act of 1934, as amended,[1] and the Commission's rules promulgated thereunder. We find that, pursuant to the Commission's rules and orders, LECs may not charge paging carriers for delivery of LEC-originated traffic. Consequently, Defendants may not impose upon Complainants charges for facilities used to deliver LEC-originated traffic to Complainants. In addition, we conclude that Defendants may not impose non-cost-based charges upon Complainants solely for the use of numbers. We further conclude that section 51.703(b) of the Commission's rules does not prohibit LECs from charging, in certain instances, for "wide area calling" or similar services where a terminating carrier agrees to compensate the LEC for toll charges that would otherwise have been paid by the originating carrier's customer.

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); 47 U.S.C. §§ 201(b), 251 (1991 & West Supp. 1999).

Accordingly, for the reasons set forth below, we grant in part and deny in part Complainants' claims. We note that the Complainants in this proceeding did not seek compensation for the transport and termination of LEC-originated traffic. Consequently, this order does not address the question of whether or under what circumstances paging carriers are entitled to such compensation.

## I. BACKGROUND

2. Complainants are Commercial Mobile Radio Service (CMRS) carriers that provide telecommunications services, including one-way paging services. They assert that section 51.703(b) of the Commission's rules,[2] the Commission's *Local Competition Order*,[3] and Common Carrier Bureau letters[4] interpreting these provisions, prohibit incumbent LECs from charging paging carriers for telecommunications traffic that originates on a LEC's network.[5] Complainants seek an order prohibiting Defendants from charging for dedicated and shared transmission facilities used to deliver LEC-originated traffic, DID numbers, and "wide area calling service."[6] Defendants assert that the Commission lacks authority under the Act to adjudicate Complainants' claims.[7] They further argue that because the Complainants are one-

[2] 47 C.F.R. § 51.703(b).

[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC, 120 F.3d 753* (8th Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending*.

[4] Letter from Regina M. Keeney, Chief, Common Carrier Bureau to Cathleen A. Massey, AT&T Wireless Services, Inc. (March 3, 1997) (Keeney Letter); Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau to Keith Davis, Southwestern Bell Telephone, DA 97-2726 (Dec. 30, 1997) (Metzger Letter).

[5] Metrocall, Inc.'s Brief on the Merits, at 5-6; Initial Brief of TSR Wireless LLC at 8-10, 14-15.

[6] "Wide area calling," also known as "reverse billing" or "reverse toll," is a service in which a LEC agrees with an interconnector not to assess toll charges on calls from the LEC's end users to the interconnector's end users, in exchange for which the interconnector pays the LEC a per-minute fee to recover the LEC's toll carriage costs. *See, e.g.*, Letter from Gary A. Evenson, Assistant Administrator, Telecommunications Division, Wisconsin Public Service Commission, to James D. Schlichting, Chief, Competitive Pricing Division, Common Carrier Bureau, FCC, February 16, 1998.

[7] Initial Brief of Defendants BellSouth, GTE, Pacific Bell, Southwestern Bell Telephone Company, and U S West, Sept. 11, 1998 (Metrocall Defendants' Brief) at 4-5. The Metrocall Defendants filed joint briefs and pleadings (Metrocall Defendants' Brief and Metrocall Defendants' Reply) to respond to Metrocall's allegations. Metrocall had also filed a complaint on January 20, 1998 against BellSouth Corporation and BellSouth Telecommunications, Inc. alleging the same causes of action as the instant matters (E-98-14). The BellSouth entities had participated in these proceedings until the Commission dismissed Metrocall's case against them on December 13, 1999.

way paging carriers, they are not entitled to the benefit of the Commission's reciprocal compensation regime set forth in the Commission's rules, and therefore must pay for facilities used to deliver LEC-originated traffic.

3. In the *Local Competition Order*, the Commission promulgated section 51.703(b), which provides that: "A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network."[8] In adopting this rule, the Commission stated that "[a]s of the effective date of [the *Local Competition Order*], a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge."[9] The Order further provided that carriers operating under arrangements that do not comport with the Commission's mutual compensation principles "shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of [the *Local Competition Order*]."[10] When the *Local Competition Order* was appealed to the Eighth Circuit, the court specifically held that sections 2(b) and 332(c) of the Act granted the Commission authority to issue rules of special concern to CMRS providers. Consequently, the court permitted section 51.703 to remain in full force and effect as it applied to CMRS providers.[11] Defendants in this proceeding also participated in the appeal of the Eighth Circuit's holding to the Supreme Court, but did not seek review of the Commission's rules relating to CMRS carriers.

4. Section 251(b)(5) of the 1996 Act requires all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[12] The Commission in promulgating regulations to implement that section determined that CMRS providers such as paging carriers offer "telecommunications" as defined in the Act,[13] and that LECs therefore "are obligated, pursuant to section 251(b)(5) ... to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks."[14] The Commission went on to

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8 47 C.F.R. § 51.703(b).

9 *Local Competition Order*, 11 FCC Rcd at 16016.

10 *Local Competition Order*, 11 FCC Rcd at 16028. The Order took effect on November 1, 1996. The Commission's conclusions regarding reciprocal compensation were codified as Sections 51.701-17 of the Commission's rules. 47 C.F.R. §§ 51.701-17.

11 *Iowa Utils. Bd. v. FCC*, 120 F.3d at 800 n.21, 820 n.39.

12 47 U.S.C. § 251(b)(5).

13 *See* 47 U.S.C. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received").

14 *Local Competition Order*, 11 FCC Rcd at 15997.

state that because section 251(b)(5) "does not address charges payable to a carrier that originates traffic," section 251(b)(5) "prohibits charges such as those some incumbent LECs currently impose on CMRS carriers for LEC-originated traffic."[15]

5. On January 30, 1997, concerned that LECs would disconnect their interconnection service for failure to pay for LEC-originated traffic notwithstanding the FCC's regulations, several paging carriers requested that the Bureau "affirm" that section 51.703(b) of the Commission's rules prohibited LECs from charging CMRS providers, including paging providers, for local telecommunications traffic that originated on the LECs' networks.[16] On March 3, 1997, then-Chief of the Common Carrier Bureau Regina Keeney issued a letter responding to these carriers' concerns.[17] The Keeney Letter restated the Commission's conclusions from the *Local Competition Order*, and concluded that because the Act defines the term "telecommunications carrier" to include CMRS providers, "a LEC is prohibited by section 51.703(b) from assessing charges on CMRS providers for local telecommunications traffic that originates on the LEC's network."[18]

6. On December 30, 1997, A. Richard Metzger, Jr., then-Chief of the Common Carrier Bureau issued another letter in response to a request by several carriers for clarification of section 51.703(b) and the *Local Competition Order*.[19] The Metzger Letter stated that the Commission's rules do not allow a LEC to charge a provider of paging services for the cost of "LEC transmission facilities that are used on a dedicated basis to deliver to paging service providers local telecommunications traffic that originates on the LEC's network."[20] In January of 1998, Defendants SWBT, Pacific Bell, and U S West filed Applications for Review of the Metzger Letter.[21] Shortly before and soon after the release of the Metzger Letter, TSR and Metrocall filed the instant complaints seeking the cessation of unlawful conduction and recovery

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15 *Local Competition Order*, 11 FCC Rcd at 16016.

16 Letter from Cathleen A. Massey, AT&T Wireless Services, Inc. to Regina M. Keeney, Chief, Common Carrier Bureau, January 30, 1997.

17 Keeney Letter, *supra* note 4.

18 *Id.* at 2.

19 Metzger Letter, *supra* note 4, at 2.

20 *Id.* at 3.

21 U S West bases its Application for Review on Section 1.115(b)(2)(i) of the Commission's rules, which requires applicants to demonstrate that the action taken pursuant to delegated authority "is in conflict with statute, regulation, case precedent, or established Commission policy." 47 C.F.R. § 1.115(b)(2)(i). U S West Application for Review, at 2, n.2. This Application for Review is pending at the time of this order. On January 30, 1998, SBC also filed a petition for stay of the Metzger Letter pending review of the letter by the Commission.

of the allegedly unlawful charges imposed by Defendants in violation of sections 201(b) and 251 of the Act and section 51.703(b) of the Commission's rules.

## II. FACTS

### A. TSR v. U S West

7. Complainant TSR provides CMRS one-way paging service to its subscribers in Arizona.[22] Defendant U S West is a LEC that provides facilities and services necessary for TSR to connect its CMRS one-way paging systems in Arizona to the public switched telecommunications network.[23] The parties agree that, because TSR currently provides exclusively one-way paging service in Arizona, no calls are conveyed from TSR's paging terminals to U S West's network.[24] A TSR subscriber therefore cannot originate a call to the U S West landline network over TSR's system.

8. U S West had billed and continues to bill TSR for the following types of charges under U S West's Arizona tariff, which TSR contests: 1) monthly recurring charges for DID numbers; 2) monthly recurring charges associated with dedicated Type 1 DID trunks; 3) charges for dedicated T-1 circuits necessary to connect U S West offices to the TSR network for delivery of LEC-originated traffic to TSR's network; 4) installation charges for DID numbers, DID trunks and T-1 circuits; and 5) usage charges described as "transport land to mobile and end office switching" associated with wide area calling service provided by U S West.[25]

9. Beginning in November, 1996, TSR refused to pay the contested charges imposed by U S West based on TSR's position that Commission regulations and decisions prohibit U S West's imposition of these charges against CMRS one-way paging carriers.[26] U S West also informed TSR on more than one occasion that it would "waive" charges for DID numbers retroactive to October 7, 1996, although to date, it has not done so.[27] On June 26, 1997, TSR submitted to U S West a letter requesting a T-1 circuit to handle TSR's Yuma, Arizona, to Flagstaff, Arizona, paging traffic (the Yuma-Flagstaff T-1).[28] The next day, U S West responded

22 TSR and U S West Joint Stipulation of Facts, June 2, 1998, at ¶ 1.

23 *Id.* at ¶ 2.

24 *Id.* at ¶ 5.

25 *Id.* at ¶ 6.

26 *Id.* at ¶ 8.

27 *Id.* at ¶ 10.

28 *Id.* at ¶ 11.

that it would not provide the Yuma-Flagstaff T-1 and that U S West had imposed a "Stop Provisioning Order" against TSR based on TSR's refusal to pay the contested charges, which amounted to $231,927.08 in TSR's May 1997 invoice.[29]

10. TSR filed its complaint with the Commission against U S West on December 24, 1997. TSR also filed a supplemental motion alleging that U S West violated the Commission's *ex parte* rules when representatives of U S West and Commission staff met without inviting TSR on May 26, 1999.[30]

### B. Metrocall v. GTE, Pacific Bell, SWBT, and U S West

11. Shortly after the Commission's *Local Competition Order* took effect on November 1, 1996, Metrocall sent letters to Defendants GTE and Pacific Bell (along with SWBT and U S West hereinafter collectively "Metrocall Defendants") requesting that these carriers cease charging Metrocall for local transport, DID numbers, and facilities used for local transport based on its view that section 51.703(b) of the Commission's rules prohibited such charges.[31] Typical of these letters is Metrocall's November 19, 1996 letter to Jamie Miller of GTE Corporation. In that letter, Metrocall requests that GTE "immediately revise its paging interconnection terms and rates ... in light of Section 252(a) of the Telecommunications Act of 1996 ... and the [Commission's] rules and Orders."[32] The letter stated that "the FCC concluded that a 'LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic,' and, as of the 'effective date' of that FCC Order (August 30, 1996), the LEC 'must provide that [LEC-originated] traffic to the CMRS provider or other carrier without charge."[33] The letter also referenced the Commission's conclusion in the *Local Competition Order* that "local" traffic includes CMRS-LEC traffic that originates and terminates within the same Major Trading Area ("MTA") pursuant to rule 51.701(b)(2), and language from the *Second Local Competition Order*[34] concerning nondiscriminatory access to numbers.[35] The letter concluded with a statement that, if GTE wished to continue assessing the charges, Metrocall "expect[ed] a

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29 *Id.* at ¶ 12.

30 TSR Motion to Impose Sanctions at 4-9.

31 *See* Letter from Frederick M. Joyce, Counsel to Metrocall, Inc. to GTE Corporation, Attention of Jamie Miller (Nov. 19, 1996), Metrocall Complaint Exh. 9 (Miller Letter); and Letter from Frederick M. Joyce, Counsel to Metrocall, Inc. to Pacific Bell Corporation, Attention of Robert Butland (Nov. 19, 1996), Metrocall Complaint Exh. 11.

32 Miller Letter at 1.

33 *Id.* at 1-2.

34 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 19392, 19538 (1996) (*Second Local Competition Order*).

35 Miller Letter at 2.

written explanation, within 30 days of the date of this letter, as to how those charges would not be in violation of the Telecom Act and the FCC's rules."[36]

12. The Metrocall Defendants rejected Complainant's requests, averring that the Commission lacked jurisdiction to enforce section 51.703(b), and that, in any event, section 51.703(b) could only be applied by a state commission during the section 252 arbitration process.[37] Metrocall filed its complaints with the Commission on January 20, 1998.

## III. DISCUSSION

### A. Jurisdiction

13. As an initial matter, we reject Defendants' arguments that the Commission lacks jurisdiction to resolve the issues raised in these formal complaints.[38] Section 208 permits "any person ... complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof" to file a complaint with the Commission.[39] Defendants are common carriers. Complainants allege that Defendants have imposed certain charges upon them in violation of sections 201, and 251-252 of the Act and of the Commission's rules implementing those sections.[40] The Commission stated in the *Local Competition Order* that "[a]n aggrieved party could file a section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of sections 251 and 252, including Commission rules thereunder ... ."[41] Therefore, our authority to decide the complaints arises from sections 201, 208, 251 and 252 of the Act.[42]

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36 *Id.*

37 Metrocall Defendants Brief at 6-10, 22-23.

38 Metrocall Defendants' Brief at 4-5; U S West Brief at 6-9.

39 47 U.S.C. § 208.

40 47 U.S.C. §§ 201, 251-252; TSR Complaint at 18 ¶ 30 (§§ 201, 251-252 of the Act); Metrocall Brief at 2, 5 (§§ 201(b) & 251(b) of the Act).

41 *Local Competition Order* at 15564, ¶ 127. Defendants relied on the Eighth Circuit's opinion in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), to argue that the Commission lacks jurisdiction to adjudicate this complaint. *See, e.g.*, Metrocall Defendants' Brief at 11-12. Because the Supreme Court vacated the Eighth Circuit's decision on that point on ripeness grounds in *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999), the Commission's jurisdictional decision in the *Local Competition Order* controls.

42 We note that section 1, 47 U.S.C. §151, also provides us with authority "to execute and enforce the provisions" of the Act. An additional basis for authority for the action we take here exists under section 332 of the

## B. Res Judicata and Collateral Estoppel

14. Metrocall contends that the doctrines of res judicata and collateral estoppel prohibit Defendants from challenging Sections 51.701-17 of the Commission's rules in this proceeding.[43] Defendants counter that they may mount a challenge to the rules as applied to them in an enforcement proceeding pursuant to *Functional Music, Inc. v. FCC*,[44] and *Geller v. FCC*,[45] and that the Eighth Circuit Court of Appeals did not address the precise issues raised in this complaint proceeding.[46] In *Iowa Utils. Bd.*, the Eighth Circuit struck down the majority of the Commission's local competition rules on jurisdictional grounds, but upheld the rules at issue here as a valid exercise of the Commission's authority under section 332(c) of the Act.[47] Defendants herein filed comments in the *Local Competition* proceeding, and participated in the appeals of that order to the Eighth Circuit Court of Appeals and Supreme Court. TSR and Metrocall did not directly file comments in the *Local Competition* proceeding before the Commission, although Personal Communications Industry Association (PCIA), which represents the paging industry, did file comments.[48] The Court of Appeals considered the merits of section 51.703(b) and its application to paging carriers, and the Commission's other reciprocal compensation rules adopted by the *Local Competition Order*.[49] Defendants vigorously litigated the issue of the Commission's jurisdiction, but chose not to appeal the Court of Appeals' conclusions concerning reciprocal compensation for paging carriers.

15. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.[50] Under

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Act, 47 U.S.C. §332. *See supra* note 11.

[43] Metrocall Brief at 4 n.4. Although it does not label its argument as res judicata or collateral estoppel, TSR makes a related argument that, because the Court of Appeals upheld the Commission's LEC-CMRS interconnection rules, the rules are binding upon Defendants and must be followed. TSR Brief at 17-18.

[44] 274 F.2d 543 (D.C. Cir. 1958).

[45] 610 F.2d 973 (D.C. Cir. 1979).

[46] *See, e.g.*, Metrocall Defendants' Brief at 7 n.8.

[47] *See Iowa Utils. Bd.*, 120 F.3d at 800 n.21, 820 n.39; *see also supra* note 11.

[48] *Local Competition Order*, 11 FCC Rcd at 16185, 16189.

[49] *See* Brief for Intervenors CMRS Providers in Support of Respondents, filed December 23, 1996, in No. 96-3321, *Iowa Utils. Bd. v. FCC*, at 4-6 (arguing in favor of validity of §§ 51.701(b), 51.703, 51.709(b), 51.711(a), 51.715(d), and 51.717 of the Commission's rules); *see also* Reply Brief of the Mid-sized Local Exchange Carriers, filed January 6, 1997, in No. 96-3321, *Iowa Utils. Bd. v. FCC*, at 34 (arguing against LEC-CMRS interconnection regime adopted in the *Local Competition Order*).

[50] 1B J. Moore, Federal Practice ¶ 0.405[1], pp. 622-24 (2d ed. 1974)(quoted in *Parklane Hosiery Co. v. Shore*,

the doctrine of collateral estoppel, a judgment in a prior suit precludes relitigation by the same parties of issues actually litigated and necessary to the outcome of the first action.[51] The record does not indicate whether TSR and Metrocall are PCIA members, and Complainants do not assert that they are "privies" of PCIA for purposes of res judicata. Although Complainants were neither parties nor privies to the *Local Competition Order* and its appeals, they may still estop the Defendants from challenging the validity of the Commission's rules by invoking the doctrine of collateral estoppel, as recognized by the Supreme Court in *Parklane Hosiery Co. v. Shore*.[52] *Parklane Hosiery Co.* provides courts with discretion to allow a non-party to a particular proceeding to prevent a party to that proceeding from re-litigating issues adversely decided against that party based primarily on fairness concerns.[53] Thus, once an issue is raised and determined, the doctrine of collateral estoppel precludes the entire issue, not just the particular arguments raised in support of it in the first case.[54] Accordingly, a litigant may not raise a new argument in a second proceeding regardless of whether it was made in the first proceeding; so long as the argument could have been made, it is precluded.[55] And, even when an opinion is silent on a particular issue, issue preclusion is applicable if resolution of that issue was necessary to the judgment.[56]

16. We find that it is fair for Complainants to invoke collateral estoppel against Defendants here, given that the Defendants were parties to the appeal of the *Local Competition Order* and possessed strong incentives to litigate these issues in that appeal.[57] In the *Local Competition Order* the Commission considered issues identical to those Defendants raise here: namely, whether CMRS carriers, and specifically, paging carriers should be included within the Commission's reciprocal compensation framework.[58] The Court of Appeals upheld the LEC-CMRS interconnection rules in a proceeding in which Defendants herein participated. Defendants possessed ample opportunity to argue to the Supreme Court that the Commission

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439 U.S. 322, 327 (1979)).

51 *Id.*

52 439 U.S. 322 (1979).

53 *Parklane Hosiery Co. v. Shore*, 439 U.S. at 331.

54 *Yamaha Corp. v. U.S.*, 961 F.2d 245, 254 (D.C. Cir. 1992).

55 *See Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir. 1990).

56 *American Iron & Steel Ass'n v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989).

57 *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21, 820 n.39 (8th Cir. 1997), *rev'd in part sub. nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *see also supra* note 11.

58 *See Local Competition Order*, 11 FCC Rcd at 15993-16058.

acted arbitrarily and capriciously in adopting these rules, but chose not to do so.[59] Accordingly, we find Defendants to be estopped from relitigating these issues that the Commission considered in the *Local Competition Order* and that were subsequently affirmed by the Eighth Circuit. This estoppel precludes Defendants from asserting that the Commission acted arbitrarily and capriciously in extending application of its reciprocal compensation rules to CMRS carriers, including paging carriers, and from challenging the decision to apply section 51.703(b) even in the absence of an interconnection agreement.[60] Moreover, under relevant precedent, the Eighth Circuit's judgement upholding the rules retains its preclusive effect even though the decision contains no detailed discussion of the merits of the rules.[61] The parties litigated the merits of the rules before this Commission[62] and, as the briefs submitted in that proceeding indicate, before the Eighth Circuit as well.[63] Defendants attempt to raise new arguments as to why the rules may be invalid, and the doctrine of collateral estoppel does not permit such tactics.[64] We conclude, however, that this estoppel does not bar Defendants from litigating issues that the *Local Competition Order* did not address, such as whether section 51.703(b) prohibits LECs from charging Complainants for wide area calling service, or for DID numbers.

17. We further find Defendants' reliance on *Functional Music* and *Geller* to be misplaced. *Functional Music* and *Geller* enable a party in an enforcement proceeding to file a

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[59] At the same time, Defendants retain the opportunity in the various petitions for reconsideration of the *Local Competition Order* and applications for review of the Metzger Letter to argue their position. The reconsideration petitions and applications for review of the Metzger Letter provide a forum for defendants to argue, for instance, that paging carriers should be excluded from the Commission's reciprocal compensation framework, or that they should not be considered to be telecommunications carriers. We expect to rule in these pending proceedings in the near future and our action here is without prejudice to action in such proceedings.

[60] The *Local Competition Order* made the Commission's reciprocal compensation policy requiring carriers to deliver LEC-originated traffic at no charge effective "as of the date of this [*Local Competition*] order." *See Local Competition Order*, 11 FCC Rcd at 16027-16028. The Order further provided that carriers operating under arrangements that do not comport with the Commission's mutual compensation principles "shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of this [*Local Competition Order*]." *Id.* at 16028. We therefore find that Defendants were on notice that the Commission intended that the rules should apply immediately, and that the rules could be invoked even before a carrier made a formal request for interconnection negotiations pursuant to §§ 251 and 252 of the Act.

[61] *Yamaha Corp.*, 961 F.2d at 254; *Securities Indus. Ass'n*, 900 F.2d at 364; *American Iron & Steel Ass'n*, 886 F.2d at 397.

[62] *See Local Competition Order*, 11 FCC Rcd at 16008-16058.

[63] *See* Brief for Intervenors CMRS Providers in Support of Respondents, filed December 23, 1996 at 22 (arguing that the Commission properly applied section 251(b)(5)'s reciprocity requirement to paging companies); *see also* Reply Brief of the Mid-Sized Incumbent Local Exchange Carriers, filed January 6, 1997 at 34 (arguing against symmetrical pricing for LEC-CMRS interconnection).

[64] *Securities Indus. Ass'n*, 900 F.2d at 364.

challenge to an administrative rule after the limitations period for challenging the rule otherwise would have expired.[65] For instance, the rule of these decisions would permit a party that did not participate in the litigation concerning the validity of the rules before the Court of Appeals to challenge those rules in an enforcement proceeding, notwithstanding that the limitations period for challenging the *Local Competition Order* otherwise would have run. *Functional Music* and *Geller* do not, however, award a "second bite of the apple" to parties, such as Defendants that participated in the litigation but failed to raise these arguments in that appeal.[66] Consequently, we find that the Defendants' opportunity to challenge the validity of the Commission's rules at issue here has expired.

### C. May Defendants charge one-way paging carriers for delivery of LEC-originated traffic to the paging carrier's point of interconnection?

18. The gravamen of many of the Defendants' arguments is that the reciprocal compensation regime established by section 51.703(b) and the Commission's other reciprocal compensation rules do not apply to the Complainants.[67] For the reasons stated below, we reject those arguments and find that the Commission's reciprocal compensation rules, including section 51.703(b), are applicable and that the Defendants cannot charge Complainants for the delivery of LEC-originated, intraMTA traffic to the paging carrier's point of interconnection.

#### 1. Applicability of the Commission's Reciprocal Compensation Rules to One-Way Paging Carriers

19. The *Local Competition Order* provides that LECs must establish reciprocal compensation arrangements with paging carriers:

> Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of "telecommunications." Under section 3(43), "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." All CMRS providers offer telecommunications. Accordingly, LECs are obligated, pursuant to section 251(b)(5) ... to enter into reciprocal compensation arrangements with all CMRS providers, *including paging providers*, for the transport and

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65 *See Functional Music*, 274 F.2d at 546; *see also Geller*, 610 F.2d at 978.

66 *See Public Citizen v. Nuclear Regulatory Commission*, 901 F.2d 147, 153 n.3 (D.C. Cir. 1990); *Western Coal Traffic League v. Interstate Commerce Commission*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

67 *See, e.g.*, Metrocall Defendants Brief at 18-23; U S West Brief at 13-16.

> termination of traffic on each other's networks, pursuant to the [Commission's rules governing reciprocal compensation.][68]

There is no ambiguity in the Commission's language concerning the applicability of section 251(b)(5) and the rules promulgated thereunder to paging carriers. As stated in the *Local Competition Order*, and re-stated in both the Keeney and Metzger letters, paging carriers, as carriers of "telecommunications," are entitled to the benefit of the Commission's reciprocal compensation rules,[69] including section 51.703(b) of the rules.[70]

20. Defendants make no effort to distinguish the *Local Competition Order*'s multiple, clear statements that the Commission intended to permit paging carriers to benefit from its reciprocal compensation framework. Instead, they argue that a conflict exists between the *Local Competition Order* and the rules that it adopted.[71] According to Defendants, section 51.701(e) of the Commission's rules, which contains the definition of reciprocal compensation, presupposes that both carriers receive compensation, and therefore, "by definition" a one-way carrier is not entitled to reciprocal compensation.[72] They further argue that the reciprocal compensation rules should not apply to one-way paging carriers because only one of the carriers, in this case, the paging carrier, receives termination compensation, and that section 51.701(e) must govern over any contrary language contained in the *Local Competition Order*.[73]

21. We disagree that any conflict exists here between the Order and the rules. Section 51.701(e) must be read in conjunction with the rest of the Order and section 51.703(a). Section 51.703(a) states that "[e]ach LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting

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[68] *Local Competition Order*, 11 FCC Rcd at 15997 (emphasis supplied).

[69] 47 C.F.R. § 51.701, *et seq.*

[70] Section 51.703(b) of the rules affords carriers the right not to pay for delivery of local traffic originated by the other carrier. However, Complainants are required to pay for "transiting traffic," that is, traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the paging carrier's network. *See Local Competition Order*, 11 FCC Rcd at 16016-17. In addition, the paging carrier would be responsible for paying charges for facilities ordered from the LEC to connect points on the paging carrier's side of the point of interconnection, such as facilities ordered to connect the paging terminal with its antennas.

[71] *See* Metrocall Defendants' Brief at 22.

[72] *Id.* at 19. Rule 51.701(e) provides that "a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier."

[73] Metrocall Defendants' Brief at 19, 21-22.

telecommunications carrier."[74] Like the text of the Order, which states that "paging carriers" shall be entitled to request reciprocal compensation arrangements, section 51.703(e) draws no distinction between one-way and two-way carriers. Indeed, section 51.703(a) specifically states that "*any* ... telecommunications carrier" may request a reciprocal compensation arrangement with a LEC.[75] As stated previously, paging carriers, including those that provide only one-way service, are "telecommunications carriers" under the Act. Absent a specific *exclusion* in the rules, there is no basis upon which to presume that such carriers should not be included within the scope of these provisions. Section 51.701(e) does not, as Defendants argue, require that compensation actually flow in both directions between carriers. It requires only that, to the extent that local telecommunications traffic originates on the network facilities of one carrier and terminates on the facilities of another, compensation shall be paid to the terminating carrier.[76] In fact, the Commission's regulation defining reciprocal compensation and its interpretation of those regulations was recently upheld in *Pacific Bell v. Cook Telecom, Inc.*[77] The Ninth Circuit concluded that the Commission's "interpretation of 'reciprocal' [was] a plausible and permissible interpretation of an ambiguous statutory term" and that our interpretation was entitled to deference.[78] Accordingly, we reject Defendants' arguments that section 51.703(b) of the Commission's rules does not apply to one-way carriers..

### 2. Whether one-way paging carriers "switch" traffic within the meaning of the Commission's rules

22. The *Local Competition Order* states that paging providers "transport," "switch," and "terminate" traffic.[79] Moreover, our rules do not require that a carrier possess a particular switching technology as a prerequisite for obtaining reciprocal compensation. Section 51.701(d) defines termination as "the switching of local telecommunications traffic at the terminating carrier's end office switch, *or equivalent facility,* and delivery of such traffic to the called party's premise."[80] By using the phrase "switch or equivalent facility," the rules contemplate that a

74 47 C.F.R. § 51.703(a).

75 *See* 47 C.F.R. § 51.703(a) (emphasis added).

76 Indeed, Defendants' argument, if adopted, would lead to the peculiar result that a carrier that delivered a single call to the incumbents' network would pay essentially nothing for the interconnection facilities (*i.e.*, where 99.9 percent of the traffic originates on the incumbent's network) while a carrier that does not deliver any calls to the incumbent's network would pay for the entire interconnection facilities.

77 197 F.3d 1236 (9th Cir. 1999).

78 *Id.* at 1245.

79 *See, e.g., Local Competition Order*, 11 FCC Rcd at 16043 ("[U]sing LEC costs for termination of voice calls thus may not be a reasonable proxy for paging costs as the types of switching and transport that paging carriers perform are different from those of LECs and other voice carriers.").

80 47 C.F.R. § 51.701(d) (emphasis supplied).

carrier may employ a switching mechanism other than a traditional LEC switch to terminate calls. A paging terminal performs a termination function because it receives calls that originate on the LEC's network and transmits the calls from its terminal to the pager of the called party. This is the equivalent of what an end office switch does when it transmits a call to the telephone of the called party. To perform this function, the terminal first directs the page to an appropriate transmitter in the paging network, and then that transmitter delivers the page to the recipient's paging unit. The terminal and the network thus perform routing or switching and termination. Because a paging terminal performs switching functions akin to an end office switch, we find unpersuasive Defendants' argument that a paging *terminal* does not qualify as a "switch or equivalent facility" as defined by the Commission's rules. Consequently, we reject Defendants' argument that Complainants fall outside of our reciprocal compensation framework because paging terminals allegedly do not perform a switching function, and, therefore, do not constitute a "switch or equivalent facility" as defined in the Commission's rules.

23. We similarly reject Defendants argument that paging carriers do not truly provide a call termination function because the paging terminal does not establish a direct communication path between the originating caller and the paging customer.[81] As authority for this proposition Defendants cite Newton's Telecom Dictionary, which defines switching as "[c]onnecting the calling party to the called party."[82] We find Defendants reliance on Newton's Telecom Dictionary's definition of switching to be misplaced. There is no requirement in the statute or the Commission's rules that a two-way communications path must be established in order for switching to occur. In fact, a number of packet switching protocols, including internet protocols, make use of "connectionless" switching.[83] With these protocols, a sender sends the network one or more packets with a destination address, and the network delivers one packet at a time to the destination. We conclude that there are two reasons why the Commission chose to include "equivalent facilit[ies]" in addition to switches in section 51.701(d)'s definition of termination. First, by including equivalent facilities as well as switches, the rule ensures that CMRS carriers that employ Mobile Transport and Switching Offices or paging terminals to perform functions equivalent to end office switching will fall within the definition. The second is to ensure that the definition of termination will remain relevant as technology changes. To

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81 Metrocall Defendants' Brief at 20-21.

82 Metrocall Defendants' Brief at 20 (citing *Newton's Telecom Dictionary*, 578 (11th ed. 1996). Complainant TSR obtains both Type 1 and Type 2 interconnection from U S West. TSR Joint Stipulation of Facts at 4.

83 *Newton's Telecom Dictionary* defines "connectionless network" as:

> A type of communications network in which no logical connection (*i.e.*, no leased line or dialed-up channel) is required between sending and receiving stations. Each data unit ... is sent and addressed independently, and, thereby, is independently survivable .... Connectionless networks are becoming more common in broadband city networks now increasingly offered by phone companies.

*Newton's Telecom Dictionary*, 178 (14th ed. 1998).

adopt Defendants' view would improperly exclude these networks from the Commission's reciprocal compensation framework based on the technology they employ to channel their traffic to their end users, in contravention of the Act's goals of promoting the development of new technologies and compensating network owners for traffic termination that does not originate on their network.

24. Finally, we reject Defendants' argument that carriers such as Complainants that employ Type 1 interconnection do not perform call termination functions and should therefore be excluded from our reciprocal compensation framework.[84] Citing the *Third Radio Common Carrier Order*, a pre-1996 Act case, Defendants argue that for Type 1 interconnection, the LEC switch actually "terminates" the call.[85] As Defendants point out, prior to enactment of the 1996 Act, the Commission described Type 1 as an interconnection option whereby the LEC switch performs, in the case of two-way communications, both call origination and termination functions. The same order describes Type 2 as the interconnection option where the CMRS provider owns the switch and provides call origination and termination functions. We find, however, that section 51.701(d)'s definition of termination is broad enough to encompass Type 1 interconnection. Simply put, for the LEC's customers' calls to reach the paging carrier's customers, more is required than mere delivery by the LEC of traffic to the paging terminal. For Type 1 interconnection, the paging terminal must still route these calls and distribute them over the paging carrier's network so that they reach the called party.[86] Because paging carriers

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[84] The Commission has previously described Type 1 and Type 2 interconnection as follows:

> Type 1 service involves interconnection to a telephone company end office similar to that provided to a private branch exchange (PBX). Under Type 1 interconnection, the telephone company owns the switch serving the [CMRS] network and, therefore, performs the origination and termination of both incoming and outgoing calls. Under Type 2, the [CMRS provider] owns the switch, enabling it to originate outgoing calls and to terminate incoming calls.

*Third Radio Common Carrier Order*, 4 FCC Rcd at 2372, n. 16. TSR currently obtains both Type 1 and Type 2 service from U S West. TSR and U S West Joint Statement of Uncontested Facts at ¶ 4.

[85] *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services* (*Third Radio Common Carrier Order*), Memorandum Opinion and Order on Reconsideration, FCC 89-60, 4 FCC Rcd. 2369 (1989). *See* Metrocall Defendants' Brief at 21.

[86] A PBX trunk is a connection between and end user premise and the LEC switch. A Type 1 connection, in contrast, links the LEC to the Mobile Telephone Switching Office, or its equivalent facility, in this case the paging terminal, which is not an end user premise. *Bell Atlantic Telephone Companies*, 6 FCC Rcd 4794, 4795 (1991). Although Type 1 interconnection is somewhat analogous to that provided to a PBX, the paging carrier performs a significant switching function by broadcasting the call over its network to enable its customer to receive messages. In addition, as a carrier of "telecommunications," the paging carrier is responsible for obtaining necessary regulatory authorizations and building a network sufficient to serve its customers. In contrast, the PBX owner is an end user customer of the LEC who has purchased a PBX and, accordingly, would not be entitled to co-carrier status. *See id.* (noting that treating Type 1 connections like a PBX would not conform to the Commission's LEC-CMRS interconnection policies).

receiving Type 1 interconnection carry calls from their "switch, or equivalent facility," and deliver them to the called party's premises, these carriers terminate calls within the meaning of section 51.701(d). This same rationale applies to paging carriers that utilize the more sophisticated Type 2 interconnection to interconnect with LEC networks, as such carriers also must route and distribute the LEC customer's calls to enable them to reach the called party.

### 3. Does section 51.703(b) contemplate a distinction between "traffic" and "facilities"?

25. Defendants argue that section 51.703(b) governs only the charges for "traffic" between carriers and does not prevent LECs from charging for the "facilities" used to transport that traffic.[87] We find that argument unpersuasive given the clear mandate of the *Local Competition Order*. The Metzger Letter correctly stated that the Commission's rules prohibit LECs from charging for facilities used to deliver LEC-originated traffic, in addition to prohibiting charges for the traffic itself. Since the traffic must be delivered over facilities, charging carriers for facilities used to deliver traffic results in those carriers paying for LEC-originated traffic and would be inconsistent with the rules. Moreover, the Order requires a carrier to pay for dedicated facilities only to the extent it uses those facilities to deliver traffic that it originates.[88] Indeed, the distinction urged by Defendants is nonsensical, because LECs could continue to charge carriers for the delivery of originating traffic by merely re-designating the "traffic" charges as "facilities" charges.[89] Such a result would be inconsistent with the language and intent of the Order and the Commission's rules.

26. Nor are we persuaded by the LEC arguments that the reference to "transmission facilities" in section 51.709(b) compels the conclusion that 51.703(b) is limited to "traffic charges."[90] Section 51.709(b) applies the general principle of section 51.703(b) – that a LEC

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87 Metrocall Defendants Brief at 17.

88 *Local Competition Order*, 11 FCC Rcd at 16027-28.

89 GTE argues that the Metzger Letter does not apply to it, asserting that the literal terms of that letter only prohibit charges for dedicated facilities. GTE states that it only uses shared facilities to deliver its traffic to Complainants. Metrocall Defendants Brief at 18. We reject this argument because section 51.703(b) prohibits charges for LEC-originated traffic, regardless of whether the facilities used to deliver such traffic are dedicated or shared.

90 *See, e.g.*, Metrocall Defendants' Brief at 17. Section 51.709(b) provides that:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

47 C.F.R. § 51.709(b).

may not impose on a paging carrier any costs the LEC incurs to deliver LEC-originated, intraMTA traffic, regardless of how the LEC chooses to characterize those costs – to the specific case of dedicated facilities. Thus, the promulgation of the more specific rule in section 51.709(b) supports, rather than undercuts, our conclusion regarding the effect of section 51.703(b).

#### 4. Are Complainants entitled to the benefits of section 51.703(b) absent a section 252 interconnection agreement?

27. Defendants assert that, even if section 51.703(b) requires LECs to deliver LEC-originated traffic to complainants without charge, CMRS providers may only obtain that benefit by engaging in the section 252 agreement process. According to Defendants, Complainants possess two options when seeking to terminate LEC-originated traffic: they may either purchase service from Defendants' state tariffs and thereby forgo their rights under section 51.703(b) of the rules, or they may formally request interconnection under sections 251 and 252 and obtain those rights either through negotiation or arbitration. Defendants assert that, because Complainants did not make a formal request for interconnection negotiations under section 252, they are not entitled to the benefits available under section 251(b)(5) of the Act and section 51.703(b) of the Commission's rules.[91] The Defendants argue that the Act "does not authorize the Commission to impose the reciprocal compensation duties of section 251(b)(5) – one of the statutory bases for section 51.703(b) – outside the context of negotiations undertaken pursuant to the procedures established in section 252 of the Act."[92] They offer as support for this proposition the Eighth Circuit's decision, which they describe as holding that the "sole avenue for enforcement and review of the provisions of sections 251 and 252 is the negotiation and arbitration procedures established in section 252."[93] The Supreme Court, however, vacated the Eighth Circuit's decision limiting the Commission's section 208 authority by concluding that the issue was not ripe for adjudication. It also explicitly held that the Commission has "jurisdiction to make rules governing matters to which the 1996 Act applies."[94] Given Defendant's argument relies on a vacated holding, the Commission will afford it no weight. Rather, the Defendants' obligations in this matter are governed by the Commission's *Local Competition Order*.

28. The *Local Competition Order* states that, "*[a]s of the effective date of this order*, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge."[95] The

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91 Metrocall Defendants' Brief at 4.

92 Metrocall Defendants' Brief at 11.

93 *Id.* at 12.

94 *AT&T v. Iowa Utilities*, 119 S. Ct. at 730.

95 *See Local Competition Order*, 11 FCC Rcd at 16016 (emphasis supplied). The reference to "terminating LEC-originated traffic" refers to the fact that, among other things, LECs also had imposed charges on CMRS carriers for facilities used solely to deliver the LEC-originated traffic to the CMRS carrier's point of

Keeney and Metzger letters re-iterated this position.[96] Consequently, Defendants' argument that the benefits of section 51.703(b) of the Commission's rules are available only through a section 252 interconnection agreement process is incorrect.[97]

29. The Commission's *Local Competition Order* clearly calls for LECs immediately to cease charging CMRS providers for terminating LEC-originated traffic; the order does not require a section 252 agreement before imposing such an obligation on the LEC.[98] Defendants claim further that ceasing to charge for LEC-originated traffic would violate their pricing obligations under state tariffs by compelling them to provide certain state tariffed interconnection services free of charge. The *Local Competition Order* made clear, however, that as of the order's effective date, LECs had to provide LEC-originated traffic to CMRS carriers without charge.[99] Accordingly, any LEC efforts to continue charging CMRS or other carriers for delivery of such traffic would be unjust and unreasonable and violate the Commission's rules, regardless of whether the charges were contained in a federal or a state tariff. On its effective date, given the clear language of the *Local Competition Order*, Defendants should not have doubted their obligation to cease charging Complainants for the facilities at issue here, regardless of whether Complainants subsequently requested interconnection negotiations pursuant to sections 251 and 252 of the Act.

### D. Does section 51.703(b)'s prohibition against charges for LEC-originated traffic prohibit LECs from charging paging carriers for wide area calling services?

30. TSR asserts that rule 51.703(b) prohibits U S West from charging for "wide area calling" service.[100] We disagree. We find persuasive U S West's argument that "wide area

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interconnection.

96 *See* Keeney Letter at 1-2 (citing *Local Competition Order*, ¶ 1042); Metzger Letter at 2 (same).

97 While not required to be addressed by this order, to the extent that other Commission rules promulgated under the *Local Competition Order* were not made "effective immediately," we would expect that requesting carriers would utilize the interconnection agreement process of sections 251 and 252 to obtain services under section 251. Moreover, it is clear that requesting carriers may negotiate and agree to terms other than those established by sections 251(b) and (c) and the Commission's implementing rules. *See* 47 U.S.C. § 252(a). In particular, requesting carriers, including CMRS carriers, may agree to forgo rights established by section 251 and the Commission's rules, for instance, in return for other consideration from the ILEC. Thus, we anticipate that the sections 251 and 252 interconnection agreement process will utilize the sections 251(b) and (c) obligations and the Commission's implementing rules as a starting point for negotiations and that requesting carriers may negotiate different terms through that process.

98 *See Local Competition Order*, 11 FCC Rcd at 16016.

99 *Id.*

100 TSR Brief at 10-11.

calling" services are not necessary for interconnection or for the provision of TSR's service to its customers.[101] We conclude, therefore, that Section 51.703(b) does not compel a LEC to offer wide area calling or similar services without charge. Indeed, LECs are not obligated under our rules to provide such services at all; accordingly, it would seem incongruous for LECs who choose to offer these services not to be able to charge for them.

31. Section 51.703(b) concerns how carriers must compensate each other for the transport and termination of calls. It does not address the charges that carriers may impose upon their end users. Section 51.703(b), when read in conjunction with Section 51.701(b)(2),[102] requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated, with the exception of RBOCs, which are generally prohibited from delivering traffic across LATA boundaries.[103] MTAs typically are large areas that may encompass multiple LATAs, and often cross state boundaries. Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules.[104] Such traffic falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier.[105] This may result in the same call being viewed as a local call by the carriers and a toll call by the end-user. For example, to the extent the Yuma-Flagstaff T-1 is situated entirely within an MTA,[106] does not cross a LATA boundary, and is used solely to carry U S West-originated traffic, U S West must deliver the traffic to TSR's network without charge. However, nothing prevents U S West from charging its end users for toll calls completed over the Yuma-Flagstaff T-1.[107] Similarly, section 51.703(b) does not preclude TSR and U S West from entering into wide area calling or reverse billing arrangements whereby TSR can "buy down" the cost of such toll calls to make it appear to end users that they have made a local call rather than a toll call. Should paging providers and LECs decide to enter into wide area calling or reverse billing arrangements, nothing in the

101 U S West Brief at 16.

102 Section 51.701(b)(2) defines "local telecommunications traffic" as "[t]elecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in §24.202(a) of this chapter." MTA service areas are based on the Rand McNally *1992 Commercial Atlas & Marketing Guide*, 123rd Edition, at pages 38-39, with several exceptions and additions set forth in Section §24.202(a). 47 C.F.R. §24.202(a).

103 *See* 47 C.F.R. § 51.703(b); *see also* 47 C.F.R. § 51.701(b)(2).

104 *See* 47 C.F.R. § 51.701(b)(2); *see also Local Competition Order*, 11 FCC Rcd at 16016-17.

105 *Local Competition Order*, 11 FCC Rcd at 16016-17.

106 *See* TSR Brief at 5.

107 We assume for the sake of this argument that a call from Yuma, Arizona to Flagstaff, Arizona would be billed as a toll call to the caller placing the call.

Commission's rules prohibits a LEC from charging the paging carrier for those services.[108]

### E. DID Number and Code Opening Charges

32. Metrocall contends that section 51.703(b) prohibits Defendants from charging it for DID numbers.[109] TSR asserts that the *Second Local Competition Order*[110] and the *1986 Interconnection Order*[111] prohibit imposition of recurring charges for numbers or for central office (CO) "code opening."[112] In its reply brief in the TSR case, U S West asserts no controversy exists, as U S West has stated it would provide a credit to TSR for such charges, effective retroactively to October 7, 1996.[113]

33. The *1986 Interconnection Order* permits telephone companies to impose "a reasonable initial connection charge to compensate the costs of software and other changes associated with new numbers."[114] The order also provides, however, that telephone companies "may not impose recurring charges solely for the use of numbers."[115] The *Second Local Competition Order* "explicitly forbid[s] incumbent LECs from assessing unjust, discriminatory, or unreasonable charges for activating [central office] codes" and re-iterates that telephone companies may not impose recurring charges solely for the use of numbers.[116] Metrocall has submitted evidence purporting to show that Pacific Bell and GTE have imposed recurring charges solely for the use of numbers.[117] The Commission's previous orders make clear that such

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[108] U S West asserts that TSR's allegations extend to the provision of FX services. U S West Brief at 16. However, TSR's complaint does not refer to FX service and there is no indication in its pleadings that such service is encompassed by its complaint. Therefore, we need not address in this proceeding whether TSR or U S West must pay for such service.

[109] Metrocall Brief at 4.

[110] *Second Local Competition Order*, 11 FCC Rcd at 19538.

[111] *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, 59 RR2d 1275, 1284 (1986) (*1986 Interconnection Order*).

[112] Code opening charges are charges imposed by a LEC for activating numbers associated with a particular a particular central office.

[113] U S West Reply at 7-8.

[114] *Id.*

[115] *Id.*

[116] *Second Local Competition Order*, 11 FCC Rcd at 19538.

[117] *See* Metrocall Complaint Exhibit 10, p. 2, GTE invoice for service from December 16, 1997 to January 16, 1998 ("direct-in-dial 20 numbers 125 at 10.00 ... $1250.00"). *See* Metrocall Complaint Exhibit 15, p. 1, Pacific Bell invoice ( "'Paging Service Connection Arrangement 1st 100 numbers' for $ .41, 'add'l block of 100 #s' for $7.79").

recurring charges may not be assessed by incumbent LECs, and accordingly, Complainants are entitled to refunds of any recurring charges assessed solely for the use of numbers. U S West has agreed to refund its recurring DID number charges retroactive to October 7, 1996. If the parties are unable to agree upon the amount to which Complainants are entitled, we will consider this during the damages phase of this bifurcated proceeding.

### F. Takings

34. According to Defendants, the *Local Competition Order*'s regulatory regime, which requires carriers to pay for facilities used to deliver their originating traffic to their co-carriers, represents a physical occupation of Defendants property without just compensation, in violation of the Takings Clause of the Constitution.[118] We disagree. The *Local Competition Order* requires a carrier to pay the cost of facilities used to deliver traffic originated by that carrier to the network of its co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then terminate the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.

35. The instant dispute arose because Defendants believe that Complainants, as one-way paging carriers, should not be entitled to the benefits of the Commission's reciprocal compensation regime. In sum, Complainants argue that Defendants seek to deny them status as telecommunications carriers, and instead to treat them as customers who must pay for the facilities that the LECs use to deliver LEC-originated traffic. Defendants basically argue that they should be permitted to charge Complainants for facilities that, since they are used solely to deliver Defendants' originating traffic, are part of Defendants' own network. Defendants possess other options for recovering these costs, such as recovering these costs from the end users that originates the calls. We disagree that prohibiting Defendants from charging Complainants for Defendants' portion of the network resembles in any way the physical occupation of property that the Supreme Court found violative of the Constitution in *Loretto*.

### G. Sanctions

[118] Metrocall Defendants Brief at 24 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). In *Loretto* the Supreme Court struck down a New York law requiring landlords to permit cable television providers to install cable television wires on the landlords' property upon the payment of a modest fee. The court found the New York law constituted a taking because it caused a permanent, physical occupation of landlords' property without just compensation.

36. TSR seeks the imposition of fines and forfeitures upon U S West for its "willful and repeated violations of the Act and the Commission's Rules."[119] Metrocall requests the Commission determine the appropriate amount of "damages and sanctions" for the Metrocall Defendants' unreasonable, unjust and discriminatory practices in violation of the Communications Act and Commission rules and orders.[120] Section 208 of the Act provides for private remedies for individuals aggrieved by carriers, while section 503 gives the Commission the discretion to assess forfeitures. If the Commission determines that Defendants' violations warrant the issuance of a Notice of Apparent Liability for Forfeiture under section 503, the Commission will do so in a separate proceeding.[121] To the extent requested, we will address Complainant's request for punitive damages in the damages phase of this bifurcated proceeding.

## H. TSR's *Ex Parte* Allegation

37. Under the Commission's *ex parte* rules, formal complaint proceedings are "restricted" proceedings, in which *ex parte* presentations to Commission decision-making personnel are prohibited.[122] However, because TSR's and Metrocall's formal complaints raised the issue of the applicability of reciprocal compensation to paging carriers, a matter that is also the subject of pending petitions for reconsideration filed in the *Local Competition* proceeding, the Common Carrier Bureau issued a public notice modifying the *ex parte* rules for this proceeding. The Bureau's *Public Notice* provided that presentations on policy questions concerning reciprocal compensation to paging carriers would be subject to the permit-but-disclose procedures under section 1.1206.[123]

38. TSR alleges that U S West violated the *ex parte* rules with respect to TSR's formal complaint proceeding in connection with a May 26, 1999 meeting and a September 27, 1999 meeting (to which it was not invited) between representatives of U S West and Commission

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[119] TSR Complaint ¶ 32.

[120] Metrocall Complaint pp. 13-14.

[121] *See Halprin v. MCI Telecommunications Corp.*, 13 FCC Rcd. 22568, ¶ 31 (rel. Nov. 10, 1998); *see also* 47 U.S.C. §§ 208, 503((b); *see also* 47 C.F.R. § 1.80(e).

[122] *See* 47 C.F.R. § 1.1208; *see also* 47 C.F.R. § 1.1202(a) (defining in relevant part a "presentation" as "[a] communication directed to the merits or outcome of a proceeding ... ."); 47 C.F.R. § 1.1202(b) (a written *ex parte* presentation is one that "is not served on the parties to the proceeding"; an oral *ex parte* presentation is one that is "made without advance notice to the parties and without opportunity for them to be present").

[123] Public Notice, *Ex Parte* Procedures Established for Formal Complaints Filed by TSR Paging against U S West (File No. E-98-13) and by Metrocall, Inc. against Various LECs (File Nos. E-98-14-18), and for Petitions for Reconsideration of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 13 FCC Rcd 2866 (1998) (*Public Notice*). Under the permit-but-disclose procedures, ex parte presentations to Commission decision-making personnel are permissible provided they are properly disclosed under section 1.1206.

staff.[124] Specifically, TSR claims that U S West made oral and written presentations to Commission staff that discussed "all aspects of LEC-paging interconnection – not just the issue of the 'applicability of reciprocal compensation to paging carriers[,]'" in violation of section 1.1208.[125] TSR also contends that U S West's June 1, 1999 letter notifying the Commission of the *ex parte* presentations concerning the May 26 meeting was filed late and failed to reference TSR's formal complaint proceeding.[126] U S West maintains that its *ex parte* presentations were permissible under the *ex parte* rules.[127]

39. We conclude that U S West's presentations concerning general paging interconnection issues raised in the *Local Competition* proceeding, as well as the specific issue of the applicability of reciprocal compensation to paging carriers were permissible.[128] As U S West observes, although the *Public Notice* expands the ability of the parties in the complaint proceedings to address the reciprocal compensation issue by making them subject to permit-but-disclose procedures, the *Public Notice* made no change in the rights of the parties to make presentations on all other issues within the scope of the rulemaking proceeding on a permit-but-disclose basis. We find, however, that U S West failed to disclose its May 26 presentation in accordance with the requirements of section 1.1206 for purposes of the *Local Competition* proceeding and the formal complaint proceedings.[129] U S West states that it was not obvious to it

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[124] TSR Motion to Impose Sanctions (filed July 7, 1999) at 4-9; TSR Second Motion to Impose Sanctions (filed Oct. 28, 1999) at 3-7. At the May 26 meeting were Jeffry A. Brueggeman and Kenneth T. Cartmell from U S West, and the following members of the Commission's staff: Jim Schlichting (Deputy Chief of the Wireless Telecommunications Bureau (WTB)), Nancy Boocker (Deputy Chief of the WTB's Policy Division), Jeanine Poltronieri (the WTB's Senior Counsel), and Peter Wolfe (Senior Attorney of the WTB's Policy Division). At the September 27 meeting were Mr. Brueggeman, Sheryl Fraser, and Melissa Newman from U S West, and the following members of the Commission's staff: Sarah Whitesell (Legal Advisor to Commissioner Gloria Tristani), Adam Krinsky (Acting Legal Advisor to Commissioner Tristani), and Rebecca Beynon (Legal Advisor to Commissioner Harold Furchtgott-Roth).

[125] TSR Motion to Impose Sanctions at 4 and TSR Second Motion to Impose Sanctions at 5. At the May 26 meeting, U S West provided the Commission with a written outline of its oral presentation and a "white paper" entitled "LEC/Paging Interconnection: The FCC's Role and Rules" and "Paging/LEC Interconnection: The FCC's Role and Rules", respectively. At the September 27 meeting, U S West provided the Commission with a written outline of its oral presentation and a white paper, both of which are entitled "LEC/Paging Interconnection: The FCC's Role and Rules". The white papers submitted in connection with the May 26 and September 27 meetings are substantively identical.

[126] Letter from Kenneth T. Cartmell, Esq., U S West, Inc., to Magalie Roman Salas, Secretary, FCC (dated and date-stamped June 1, 1999) (June 1, 1999 letter).

[127] Opposition of U S West Communications, Inc. to Motion to Impose Sanctions (filed July 14, 1999); Opposition of U S West Communications, Inc. to Second Motion to Impose Sanctions (filed Nov. 4, 1999).

[128] *See* U S West's written outline and "white paper" filed in connection with the May 26 and September 27 presentations.

[129] *See* June 1, 1999 letter (referencing the *Local Competition* proceeding) and June 23, 1999 letter from Kenneth

that it had to make disclosure of its May 26 presentation in the complaint proceedings, but that it has done so out of an abundance of caution. The *Public Notice*, however, clearly states that any presentation concerning the issue of reciprocal compensation to paging carriers should be disclosed in *both* the rulemaking proceeding and the complaint proceedings.[130] Moreover, U S West's *ex parte* submissions filed in connection with the May 26 presentation were not filed on a timely basis. Although U S West now asserts that it will provide timely *ex parte* notices in the complaint proceedings if it has further meetings with Commission staff regarding the rulemaking proceeding, U S West is admonished to exercise particular care to insure that all appropriate steps are indeed timely taken to comply with the provisions of our *ex parte* rules in the future. We note that U S West disclosed its September 27 presentation on a timely basis and in accordance with the requirements of section 1.1206 for purposes of the Local Competition proceeding and the formal complaint proceedings.[131] In light of this fact and our determination on this issue, it appears that no further action is warranted at this time with respect to TSR's *ex parte* contentions.

## IV. CONCLUSION

40. Based on our analysis above, we conclude that: 1) Defendants may not impose upon Complainants charges for the facilities used to deliver LEC-originated traffic to Complainants; 2) Defendants may not impose non-cost-based charges upon Complainants solely for the use of numbers; 3) section 51.703(b) of the Commission's rules does not prohibit LECs from charging, in certain instances, for "wide area calling" or similar services where a terminating carrier agrees to compensate the LEC for toll charges that would otherwise have been paid by the originating carrier's customer; and 4) to the extent TSR's Yuma-Flagstaff T-1 is situated entirely within an MTA, defendant U S West must provide this facility at its own expense.

## V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, pursuant to §§ 1, 4(i), 201, 251, 252, and 332 of the Act, 47 U.S.C. §§ 1, 4(i), 201, 251, 252, 332, that the formal complaints filed by complainant Metrocall, Inc. against defendants Pacific Bell, U S West, GTE, and SWBT ARE GRANTED IN PART and DENIED IN PART, as provided in this Order;

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T. Cartmell, Esq., U S West, Inc., to Magalie Roman Salas, Secretary, FCC (referencing TSR's and Metrocall's formal complaint proceedings). Under the permit-but-disclose rules, a person who makes an ex parte presentation should file a summary of the presentation one business day after the presentation. 47 C.F.R. § 1.1206(b).

130 *Public Notice* ("[i]f such a presentation is made in the *Local Competition Order* proceeding, the required disclosure of such presentation under section 1.1206 should be made in that rulemaking proceeding and both formal complaint proceedings").

131 *See* September 28, 1999 letter from Melissa Newman to Magalie Roman Salas, Secretary, FCC.

42. IT IS FURTHER ORDERED, pursuant to §§ 1, 4(i), 201, 251, 252, and 332 of the Act, 47 U.S.C. §§ 1, 4(i), 201, 251, 252, 332, that the formal complaint filed by complainant TSR defendant U S West IS GRANTED IN PART and DENIED IN PART, as provided in this Order;

44. IT IS FURTHER ORDERED, pursuant to § 1.722 of the Commission's rules, 47 C.F.R. § 1.722, that Complainants MAY FILE within 60 days any supplemental complaint for damages.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

**In the Matters of TSR Wireless, LLC, *et al.*, Complainants, v. U S West Communications, Inc., *et al.*, Defendants**

**Dissenting Statement of Commissioner Harold W. Furchtgott-Roth**

I dissent from this Memorandum Opinion and Order. I do so on the ground that the application and enforcement of regulations promulgated under section 251, absent the existence of any interconnection agreement, guts the reticulated procedures for the creation and review of such agreements in section 252. Accordingly, I would read section 51.703 of our rules to govern the conduct of local exchange carriers (LECs) only in the context of a negotiated and arbitrated interconnection agreement. I would not understand that regulation to impose a free-standing federal duty upon all LECs, as the majority does.

* * *

This case presents the question whether the statutory duties of section 251 apply generally to all LECs, even where the complaining party has not sought to secure the performance of those duties in an interconnection agreement as provided in section 252.[1] In light of the entire statutory scheme concerning interconnection established by the Telecommunications Act of 1996, I think the answer is no. Accordingly, the soundest construction of the instant regulation is that it does not apply outside the context of an approved interconnection agreement.

As I explained in a recent proceeding involving an application to provide long distance service, the statutory plan for interconnection agreements makes clear that

> not all section 252 contracts need comply with [section 251] in order to be valid under the Act. In particular, section 252 contracts may be voluntarily entered into "*without regard* to the standards set forth in subsections (b) and (c) of section 251," [47 U.S.C.] 252(a)(1), which impose the major substantive duties under the Act, such as resale, interconnection, unbundling, and collocation, on [LECs].

Concurring Statement of Commissioner Harold W. Furchtgott-Roth, *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295 (rel. Dec. 22, 1999) (emphasis added).

Similarly, if voluntary agreements approved pursuant to section 252 are exempt from the requirements of section 251, then so too must be entirely private arrangements such as traditional tariffed provisioning. For section 252 shows, as I have said, that "Congress clearly meant to allow noncompulsory agreements on interconnection,

[1] Here, there is no dispute that TRS takes service from US West exclusively out of Arizona tariffs, and that it has rejected the suggestions of US West to pursue interconnection agreements.

recognizing the advantages of allowing parties to contract around [federal] rules and tailor their contracts to individualized needs." *Id.*

Clearly, then, the duties of LECs under section 251 are not universal ones. They apply not to all such carriers, but only to those who are party to arbitrated and approved interconnection agreements. Conversely, section 251 does not automatically vest in all telecommunications carriers the full panoply of rights described therein, but guarantees carriers the ability to include those rights in interconnection agreements with LECs. Indeed, the language of section 251 specifically ties interconnection duties to the existence of statutory interconnection agreements: it refers to an incumbent LEC's "negotia[tion]. . . in accordance with section 252 [of] the particular terms and conditions of agreements to fulfill the duties described [in section 251(b) and (c)]." 47 U.S.C. section 251(c)(1).

But if interconnection can occur outside the requirements of section 251, as the foregoing statutory language indicates, then section 251(b)(5) and its implementing regulations *cannot* be self-effectuating. For if the regulations created free-standing federal duties on the part of all LECs, then those carriers would violate federal law every time they provided interconnection pursuant to contracts or any other commercial arrangements that fall short of section 251. That result, however, would contradict the provisions of the Act clearly establishing the ability of parties to contract for less than what section 251 might provide. [2]

Moreover, if section 251 regulations created LEC duties independent of the existence of any interconnection agreements, there would be little reason for telecommunications carriers ever to enter into an agreement with a LEC. Nor would there be any point in having State Commissions and federal courts review the agreements for compliance with section 251. *See* section 252(e). The telecommunications carriers would *already* – solely by operation of our regulations promulgated under section 251 – be entitled to everything that section 251 provides. No proper contract would be necessary to establish or enforce the rights made available by section 251. Thus, instead of going through negotiation, arbitration, and review under section 252, parties could sidestep that process by coming, as has TRS, directly to the Commission. Section 252 and its carefully delineated procedures for creation and approval of interconnection agreements would be drastically undermined, if not obliterated. Whether or not section 252's implementation plan is convenient, it is the plan that Congress adopted, and we should not disable that plan by creating a different one that bypasses it entirely. [3]

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[2] Even the Commission Order adopting the regulations under section 251 implied that they have no such general effect. The Order declined to announce the unlawfulness of existing CMRS-LEC contracts that did not go to the outer limits of section 251; instead, the Order pointed out the availability of negotiation and arbitration procedures for future contracts as a means for securing section 251 guarantees. *See Local Interconnection Order*, 11 FCC Rcd 15499 at paras. 170, 1024 (1996).

[3] None of this is to say that the Commission lacked jurisdiction to adopt section 51.703(b) in the first place; clearly, the statute directed the Commission to make rules pursuant to section 251 to flesh out the meaning of the statutory duties. Rather, my argument is that the purpose of the regulation was to set

Given the undisputed lack of an interconnection agreement between the parties, the ultimate effect of this Order is to preempt the Arizona tariffs pursuant to which TRS took its service from US West. I do not believe that Congress intended to require all state tariffs, which set the prices for customers generally, to comply with the minimum requirements of section 251. Rather, as described above, that section seems to have been enacted for the much more limited purpose of giving individual carriers the option of securing certain terms in contracts pursued according to section 252. As interpreted by the Commission, however, our section 251 regulations seem to set a federal floor to which all state tariffs must now arise.

* * *

In sum, the Commission's understanding of the scope of section 51.703(b) is inconsistent with the statutory scheme for the creation and enforcement of interconnection rights. Specifically, by creating a federal regulatory process that is wholly outside of, and apart from, the carefully defined plan of section 252, this Order makes that provision a redundant afterthought. In order to avoid undermining section 252 in this manner, we should read 51.703(b) to create rights in telecommunications carriers, as against LECs, that are enforceable in the context of a negotiated and arbitrated interconnection agreements. We should not understand it to create independent federal duties on the part of LECs absent any such agreement. Because I would not interpret the rule to operate outside the context an interconnection agreement, I see no duty to enforce it under section 208 in this case, where there is no such agreement. Accordingly, I would dismiss the instant complaint.

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out the rights available to telecom carriers in the arbitration process, not to create generally applicable duties for LECs regardless of the existence of an interconnection agreement.

# SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING

**In the Matters of TSR Wireless, LLC, *et al.* v. U.S. WEST Communications, Inc., File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, *Memorandum Opinion and Order***

Although I support this enforcement action, I do so reluctantly. Section 51.703(b) of the Commission's rules is a current, enforceable rule, duly promulgated by the Commission and upheld in court. We have jurisdiction to enforce it and we should enforce it. However, I write separately to raise a concern that the Commission has set up, through this rule and ones like it, a scheme that tends to undermine the interconnection regime established by Congress in the Telecommunications Act of 1996. Our rules should be reexamined so that, in the future, all telecommunications carriers clearly understand their respective duties and obligations under the key interconnection provisions of the 1996 Act.

Specifically, under section 251(a) of the Communications Act, 47 U.S.C. § 251(a), interconnection is a duty of all telecommunications carriers, including paging carriers like the complainants in this case. Under section 251(b)(5), all local exchange carriers (LECs) have the duty to establish reciprocal compensation "arrangements" for transport and termination. These provisions are not by their terms simply discretionary or suggested conditions. Moreover, when dealing with incumbent local exchange carriers, like the defendants in this case, Congress imposed additional obligations, including the duty to negotiate in good faith interconnection terms and conditions in accordance with section 252 of the Communications Act. *See* 47 U.S.C. § 251(c)(1). Interestingly, the statute also places a duty on the requesting telecommunications carrier to negotiate in good faith the terms and conditions of interconnection agreements. Section 252 sets forth in some detail the negotiation process and the points in the process where negotiating carriers may request government intervention.

The rule we enforce by this Order allows certain telecommunications carriers to bypass this process. Section 51.703(b) was adopted "pursuant to section 251(b)(5)."[1] Undoubtedly, after *Iowa Utilities*, the Commission can establish rules to carry out the provisions of the Communications Act, including sections 251 and 252, at least for purposes of "guid[ing] the state-commission judgments."[2] In this case, LECs, by rule, were required to cease charging CMRS providers or other carriers for terminating LEC-originated traffic and must provide that traffic to CMRS providers or other carriers without charge. No negotiation or even a request to the LEC is necessary under the rule.

However, in their proper context, a better reading of section 251 and the negotiation provisions is that Congress wanted there to be a fair opportunity for parties, through negotiation, to work out the terms and conditions of their interconnection relationship in the market, rather than by regulatory mandate -- the section is entitled "Development of Competitive Markets." I

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16016 (1996).

[2] *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 733 (1999).

see the specific duties in 251(b) and (c) as general backstops should negotiations fail. Indeed, the preference for the "market" is revealed by the fact that the contract can supercede any and all these obligations.[3]

Therefore, the quandary in my mind is that, if the Commission, over time, develops its own rules and regulations about interconnection, why should a party have to slog through the statutory process to get what it is entitled to under the rule? If the rule is favorable to a requesting party, why would it ever concede that term to an ILEC in negotiation and, thus, isn't the process a waste? I think the answer is that ILECs have a right under the statute to try to bargain away those duties by offering something of greater value to the requesting carrier. Moreover, it is entirely conceivable that a requestor would forgo some "regulatory rights" in exchange for other things. Thus, it is at least plausible that the terms of the rule would not ultimately prevail in negotiation. In light of this, while section 51.703 of our rules should be enforced, we should expeditiously reexamine its effects on the market-based negotiation process and, based on the interconnection negotiations that *have* taken place and other circumstances, determine whether or not it should be modified to fit better within the statutory scheme.[4]

As a related matter, the complainants in this case have invoked Section 208 to complain *to this Commission* that ILECs have, *inter alia*, violated sections 251 and 252, and the rules promulgated thereunder. While this item properly applies the enforcement policy embodied in the *Local Competition Order*, I am concerned this approach all but swallows the carefully crafted mechanisms for dispute resolution set forth in the 1996 Act. I would suggest that the issue of our authority under section 208 to enforce the general provisions of sections 251 and 252 are now ripe for judicial review.[5]

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[3] *See* 47 U.S.C. 252(a)(1).

[4] I note that there are several long-pending reconsideration petitions and applications for review that address this and other reciprocal compensation rules. It would behoove us to act on these quickly.

[5] *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 803 (8th Cir. 1997), *rev'd AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct 721, 733 (1999).

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Application by SBC Communications Inc., | ) | |
| Southwestern Bell Telephone Company, | ) | CC Docket No. 00-65 |
| And Southwestern Bell Communications | ) | |
| Services, Inc. d/b/a Southwestern Bell Long | ) | |
| Distance | ) | |
| | ) | |
| Pursuant to Section 271 of the | ) | |
| Telecommunications Act of 1996 | ) | |
| To Provide In-Region, InterLATA Services | ) | |
| In Texas | ) | |

# MEMORANDUM OPINION AND ORDER

**Adopted:** June 30, 2000 **Released:** June 30, 2000

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

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### B. Discussion

60. We conclude that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in Texas. Specifically, we find that AT&T, Birch, CoServ, ETS, Optel, Sage, and KMC all provide telephone exchange service either exclusively or predominantly over their own facilities to residential subscribers and to business subscribers.[109] The Texas Commission also concludes that SWBT has met the requirements of section 271(c)(1)(A).[110] None of the commenting parties, including the competitors cited by SWBT in support of its showing, challenge SWBT's assertion in this regard.

## V. CHECKLIST COMPLIANCE

### A. Checklist Item 1 – Interconnection

#### 1. Non-Pricing Aspects of Interconnection

##### a. Background

61. Section 271(c)(2)(B)(i) of the Act requires a section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[111] Section 251(c)(2) imposes a duty on incumbent LECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[112] In the *Local Competition First Report and Order*, the Commission concluded that interconnection referred "only to the physical linking of two networks for the mutual exchange of traffic."[113] Section 251 contains three requirements for the provision of interconnection. First, an incumbent LEC must provide interconnection "at any technically feasible point within the carrier's network."[114] Second, an incumbent LEC must provide

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[109] Texas Commission Texas I Comments at 96.

[110] Texas Commission Texas I Comments at 95-96. Although the Department of Justice does not address business and residential subscribers separately, it states that competitive LECs have a total of approximately 840,000 – 890,000 access lines, representing approximately eight percent of SWBT's Texas market. Department of Justice Texas I Evaluation at 9.

[111] 47 U.S.C. § 271(c)(2)(B)(i); *see Bell Atlantic New York Order*, 15 FCC Rcd at 3977-78, para. 63; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640, para. 61; *Ameritech Michigan Order*, 12 FCC Rcd at 20662-63, para. 222.

[112] 47 U.S.C. § 251(c)(2)(A).

[113] *Local Competition First Report and Order*, 11 FCC Rcd at 15590, para. 176. Transport and termination of traffic are therefore excluded from the Commission's definition of interconnection. *See Id.*

[114] 47 U.S.C. § 251(c)(2)(B). In the *Local Competition First Report and Order*, the Commission identified a minimum set of technically feasible points of interconnection. *See Local Competition First Report and Order*, 11 FCC Rcd at 15607-09, paras. 204-211.

interconnection that is "at least equal in quality to that provided by the local exchange carrier to itself."[115] Finally, the incumbent LEC must provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of the agreement and the requirements of [section 251] and section 252."[116]

62. To implement the equal-in-quality requirement in section 251, the Commission's rules require an incumbent LEC to design and operate its interconnection facilities to meet "the same technical criteria and service standards" that are used for the interoffice trunks within the incumbent LEC's network.[117] In the *Local Competition First Report and Order*, the Commission identified trunk group blockage and transmission standards as indicators of an incumbent LEC's technical criteria and service standards.[118] In prior section 271 applications, the Commission concluded that disparities in trunk group blockage indicated a failure to provide interconnection to competing carriers equal-in-quality to the interconnection the BOC provided to its own retail operations.[119]

63. In the *Local Competition First Report and Order*, the Commission concluded that the requirement to provide interconnection on terms and conditions that are "just, reasonable, and nondiscriminatory" means that an incumbent LEC must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function to its own retail operations.[120] The Commission's rules interpret this obligation to include, among other things, the incumbent LEC's installation time for interconnection service[121] and its provisioning of two-way trunking arrangements.[122] Similarly, repair time for troubles affecting interconnection trunks is useful for determining whether a BOC provides

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[115] 47 U.S.C. § 251(c)(2)(C).

[116] 47 U.S.C. § 251(c)(2)(D).

[117] *Local Competition First Report and Order*, 11 FCC Rcd at 15613-15, paras. 221-225; *see Bell Atlantic New York Order*, 15 FCC Rcd at 3978, para. 64; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20641-42, paras. 63-64.

[118] *Local Competition First Report and Order*, 11 FCC Rcd at 15614-15, paras. 224-25.

[119] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3978, para. 64; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20648-50, paras. 74-77; *Ameritech Michigan Order*, 12 FCC Rcd at 20671-74, paras. 240-45. The Commission has relied on trunk blockage data to evaluate a BOC's interconnection performance. Trunk group blockage indicates that end users are experiencing difficulty completing or receiving calls, which may have a direct impact on the customer's perception of a competitive LEC's service quality.

[120] *Local Competition First Report and Order*, 11 FCC Rcd at 15612, para. 218; *see also Bell Atlantic New York* Order, 15 FCC Rcd at 3978, para. 65; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20642, para. 65.

[121] 47 C.F.R. § 51.305(a)(5).

[122] Our rules require an incumbent LEC to provide two-way trunking upon request, wherever two-way trunking arrangements are technically feasible. 47 C.F.R. § 51.305(f); *see also Bell Atlantic New York* Order, 15 FCC Rcd at 3978-79, para. 65; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20642, para. 65; *Local Competition First Report and Order*, 11 FCC Rcd 15612-13, paras. 219-220.

interconnection service under "terms and conditions that are no less favorable than the terms and conditions" the BOC provides to its own retail operations.[123]

64. Competing carriers may choose any method of technically feasible interconnection at a particular point on the incumbent LEC's network.[124] Incumbent LEC provision of interconnection trunking is one common means of interconnection. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements.[125] The provision of collocation is an essential prerequisite to demonstrating compliance with item 1 of the competitive checklist.[126] In the *Advanced Services First Report and Order*, the Commission revised its collocation rules to require incumbent LECs to include shared cage and cageless collocation arrangements as part of their physical collocation offerings.[127] To show compliance with its collocation obligations, a BOC must have processes and procedures in place to ensure that all applicable collocation arrangements are available on terms and conditions that are "just, reasonable, and nondiscriminatory" in accordance with section 251(c)(6) and our implementing rules.[128] Data showing the quality of procedures for processing applications for collocation space, as well as the timeliness and efficiency of provisioning collocation space, helps the Commission evaluate a BOC's compliance with its collocation obligations.[129]

### b. Discussion

65. We conclude, as described below, that SWBT demonstrates it provides equal-in-quality interconnection on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of sections 251(c)(2) and as specified in section 271. We further find that SWBT meets its burden of proof that it designs its interconnection facilities to

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[123] 47 C.F.R. § 51.305(a)(5).

[124] *Local Competition First Report and Order*, 11 FCC Rcd at 15779, paras. 549-50; *see Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, para. 61.

[125] 47 C.F.R. § 51.321(b); *Local Competition First Report and Order*, 11 FCC Rcd at 15779-82, paras. 549-50; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, para. 62.

[126] 47 U.S.C. § 251(c)(6) (requiring incumbent LECs to provide physical collocation); *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, paras. 61-62.

[127] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999) *vacated in part, GTE Services Corp. V. FCC*, Nos. 99-1176 *et al.* (D.C. Cir. Mar. 17, 2000) (*Advanced Services First Report and Order or Advanced Services First Report and Order and FNPRM*).

[128] *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, paras. 183-84 ; *BellSouth Carolina Order*, 13 FCC Rcd at 649-51, para. 62.

[129] *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *see Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, paras. 61-62.

meet "the same technical criteria and service standards" that are used for the interoffice trunks within its own network. We also find that SWBT makes interconnection available at any technically feasible point, and that it is providing collocation in Texas in accordance with the Commission's rules. We note that the Texas Commission finds that SWBT has satisfied all aspects of this checklist item.[130]

### (i) Interconnection Trunking

66. Based on our review of the record, we are persuaded that SWBT provides competing carriers with interconnection trunking that is equal-in-quality to the interconnection SWBT provides to its own retail operations, and on terms and conditions that are just, reasonable, and nondiscriminatory.[131] SWBT makes interconnection available in Texas through interconnection agreements, including its state-approved T2A agreement.[132] SWBT receives orders for interconnection trunks through the Access Service Request (ASR) process, and accepts ASRs through an electronic application-to-application interface, through a proprietary OSS system, and through manual orders.[133] SWBT provides performance data to measure the quality of interconnection service provided to competing carriers.[134]

67. *Trunk Blockage.* In prior section 271 applications, we relied on trunk blockage data to evaluate a BOC's interconnection quality.[135] SWBT's performance data demonstrates that in the months leading up to its Texas II application, SWBT provided interconnection that is

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[130] Texas Commission Texas I Comments at 10-22.

[131] For certain interconnection performance metrics, the Texas Commission established a benchmark standard for evaluating SWBT's performance (*e.g.*, percent of trunk blockage and average interconnection trunk installation intervals). For other interconnection measurements, such as percent missed due dates for installation, a parity standard is applied.

[132] SWBT Texas I Application App. B (providing interconnection agreements between SWBT and competing carriers); SWBT Texas I Application at 74, 77, 80; Texas Commission Texas I Comments at 10. Several competitive LECs raised complaints regarding receipt from SWBT of notices of termination of the T2A. *See* ALTS and CLEC Coalition Texas II Comments at 14-16; Allegiance Texas II Comments at 3; Z-Tel Texas II Comments at 5-6; Allegiance Texas II Reply Comments at 2. SWBT states that by the terms of the T2A it was required to send such notices six months prior to expiration of the T2A (which would expire after one year if SWBT's application for section 271 authority were not granted). Because SWBT's application is herein granted, the T2A will remain in effect for an additional three years. *See* SWBT Texas II Reply at 47-48.

[133] Texas Commission Texas I Comments at 10.

[134] SWBT Dysart Texas I Aff. at para. 548 and Attach. A, Measurements 70-78, (Performance Measurement Business Rules) (Version 1.6). SWBT has implemented nine Texas Commission-approved performance measures relating to this checklist item, including measures that compare trunk blockage between SWBT and competitive LECs (PM 70), measures that capture missed due dates for trunk installations (PM 73), and measures that provide data on average installation intervals (PM 78). *Id.*; *see also* SWBT Aggregated Performance Measurement Data No. 70-78 at 271-No. 70-71-78 (showing performance measurement data for January 2000 through March 2000).

[135] *Bell Atlantic New York Order*, 15 FCC Rcd at 3981-83, paras. 69-72; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20649-50, para. 76; *Ameritech Michigan Order*, 12 FCC Rcd at 20669-74, paras. 236-245.

equal-in-quality to the interconnection it provides in its own network. Specifically, SWBT's statewide performance data measuring the percentage of calls blocked on outgoing traffic (trunk blockage from SWBT end office and tandem to competitive LEC end office) demonstrates that in the three months immediately preceding its Texas II section 271 application, SWBT was in compliance with the relevant benchmark established in Texas (*i.e.*, blockage not to exceed one percent on these trunks).[136]

68. We find that allegations of some competitive LECs, that they have been unable to obtain the number of interconnection trunks they requested in a timely manner appear to be the exception rather than the rule. Indeed, as we discuss throughout this section, we find that SWBT's performance data indicate that it is providing nondiscriminatory interconnection trunking. To the extent there may have been some problems with trunk provisioning,[137] we agree with the Department of Justice that such issues have been adequately resolved.[138]

69. Competitive LECs allege that they have encountered problems ordering trunks from SWBT which has resulted in blockage on competitive LEC networks, in some cases leading to customer complaints and lost or forgone sales.[139] TWTC, which provided the most extensive

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[136] For SWBT end office to competitive LEC end office, SWBT's statewide data indicate zero (0.0%) trunk blockage for the months of January through March. For SWBT tandem to competitive LEC end office, SWBT's data indicate blockage well below the benchmark, 0.1 % for January and February, 0.0% blockage for March. *See* SWBT Aggregated Performance Data, No. 70-01, 70-02 at 271-No. 70-71 (showing performance measurement data for January 2000 through March 2000). The Texas Commission applied blockage criteria of one percent as a benchmark to ensure that the competitive LEC's network traffic does not experience the same blockage as SWBT's network (citing the disproportionate impact of blocked trunks on new entrants). Texas Commission Texas I Comments at 14; *see also* SWBT Texas I Dysart Aff. at paras. 543-547.

[137] The Department of Justice initially raised concerns in the Texas I application, which were also raised by the competitive LECs themselves, that some competitive LECs had been unable to obtain the number of interconnection trunks they needed and that these competitive LECs had difficulty ordering trunks. *See* Department of Justice Texas I Evaluation at 44-49; *see also* Department of Justice Texas I March 20, 2000 *ex parte* at 1, n.2.

[138] In its Evaluation of SWBT's Texas II application, the Department of Justice stated that "the efforts of SBC, competitive local exchange carriers and the Texas PUC appear to have led to improvements in SBC's interconnection trunking performance and to a better understanding of trunk provisioning by the various parties to the process." Department of Justice Texas II Evaluation at 5. The Texas Commission reviewed SWBT's trunk utilization, forecasting, ordering and provisioning processes, as well as plans to relieve blockage through proper cooperative planning between SWBT and competitive LECs. As a result of this review, SWBT agreed to implement improvements relating to trunk forecasts, data collection, application of exclusions, and the process for ordering trunks. SWBT was also permitted to apply certain exclusions in calculating the performance measurements (*e.g.*, customer not ready exclusion). Texas Commission Texas I Comments at 14; SWBT Deere Texas I Reply Aff. at para. 11; SWBT Laurie Leathers Texas I Aff. (filed Dec. 14, 1999 in Docket 16251); SWBT Deere Texas I Reply Aff. at para. 19; SWBT Dysart Texas I Aff. at para. 56, Attach. K Dysart Aff. (filed Dec. 14 in Docket 16251), *see also* Texas Commission Dec. 16 Open Meeting Transcript at 26-27; 32.

[139] CLEC Coalition Texas I Comments at 7-12, TWTC Nick Summit Texas I Aff. as Attach. 4 to CLEC Coalition Texas I Comments; TWTC Kelsi Reeves Texas I Aff. as Attach. 5 to CLEC Coalition Texas I Comments; ALTS Texas I Comments at 17-23, e.spire Texas I Comments at 3, George Wong Texas I Aff. at 2-4 as Attach. to e.spire Texas I Comments; CompTel Texas I Comments at 10-12, CapRock Jere Thompson Texas I Aff. as Exhibit B to (continued....)

history of its blockage problems, stated that its most severe blockage occurred in Houston during the conversion of the SWBT and TWTC interconnection facilities from one-way to two-way trunks during the second half of 1999.[140] TWTC acknowledges that the blocking ended in mid-October, 1999.[141] Furthermore, we note that SWBT implemented improvements approved by the Texas Commission during supplemental proceedings in November and December 1999 to respond to competitive LEC concerns. As stated above, SWBT meets the state benchmark for PM 70 for January, February, March and April.[142] We also note that, as of October, over 75% of the trunks provisioned in Texas were two-way trunks.[143] In the future, if competitive LECs allege that blocking is occurring on outgoing calls from the competitive LEC network to the BOC network, and that such blockage is not being captured by the state-approved performance measure, then competitive LECs should provide evidence, such as reliable performance data, along with a showing of why the BOC is responsible for the blockage. Should such evidence develop in the future in Texas, we will consider whether enforcement action pursuant to section

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CompTel Texas I Comments; NTS Mitch Elliott Texas I Aff. as Exhibit C to CompTel Texas I Comments; Sprint Texas I Comments at 62-64.

[140] TWTC Reeves Texas I Aff. at paras. 17-24; TWTC Summit Texas I Aff. at paras. 12-14.

[141] TWTC Summit Texas I Aff. at para. 11. SWBT Texas I Application at 79; SWBT Dysart Texas I Aff. at paras. 549-559. *See also* Texas Commission Texas I Comments at 10-22. SWBT modified its trunk ordering guidelines in December 1999. SWBT agreed to accept orders of 12 DS1s per competitive LEC per day (an increase from eight DS1s per day) in each of the four market areas in Texas. This modification was approved by the Texas Commission at its December 16, 1999 Open Meeting. SWBT Deere Reply Aff. at paras. 7-9. SWBT's Deere Attach. A to Reply Aff. (confidential) reflects all occasions on which SWBT has provisioned eight or more DS1s per day, per competitive LEC, per market area from January 1 to February 11, 2000. It shows SWBT has provided 12 or more DS1s per day on at least 18 different occasions. SWBT has also agreed to accept quarterly forecasts from competitive LECs (instead of only semi-annual forecasts accepted previously). According to the business rule for PM 70 (Version 1.6), if a competitive LEC exceeds 25% of its most recent forecast (which must have been provided within the last six months), an exclusion applies. SWBT has agreed to measure the 25% exclusion against forecasts provided by competitive LECs on a quarterly basis. SWBT Deere Texas I Reply Aff. at para. 12; SWBT Dysart Texas I Reply Aff. at para. 64; Texas Commission Texas I Reply Comments at 15-16. *See also* March 8, 2000 *ex parte* letter from SWBT to Magalie Roman Salas, Secretary, Federal Communications Commission.

[142] SWBT Aggregated Performance Measurement Data No. 70-01, 70-2 at 271-No. 70-71 (showing performance measurement data for January 1999 through December 1999). e.spire makes general allegations concerning blockage caused by SWBT and SWBT's lack of assistance to e.spire. e.spire Wong Texas I Aff. paras. 8-12. e.spire's allegations, however, do not disprove the submitted data showing that SWBT met the benchmark on the trunk blocking performance measure (PM 70), as detailed above.

[143] Texas Commission Texas I Comments at 11. We also note that TWTC acknowledged that the conversion from one-way to two-way trunks in Austin "was a huge success for both companies." TWTC Reeves Texas I Aff. at para. 17. This is significant because where a competitive LEC does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC must accommodate two-way trunking upon request wherever technically feasible. Refusing to provide two-way trunking would raise costs for new entrants and create a barrier to entry. The provisioning of two-way trunking arrangements is among the obligations that the Commission concluded in the *Local Competition Order* demonstrated an incumbent LEC was providing interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function to its own retail operations. *Local Competition First Report and Order*, 11 FCC Rcd at 15612-613, paras. 217-220; *see also* 47 C.F.R. § 51.305(f).

271(d)(6) is warranted.

70. *Missed Due Dates.* We find that other aspects of SWBT's performance data further indicate it is providing nondiscriminatory interconnection trunking in Texas. SWBT's performance data concerning the percentage of missed due dates for provisioning of interconnection trunks show that in the months preceding its Texas II application, SWBT provided parity or better performance to competitors.[144] Recently implemented modifications in reporting give us added assurance that SWBT will continue to provide timely installation of interconnection trunks. In response to competitive LEC concerns that the performance measurement does not capture "held orders,"[145] the Texas Commission implemented a new measure, PM 73.1, to capture the percentage of held interconnection trunk orders greater than 90 calendar days.[146] SWBT asserts that there were no held orders greater than 90 days between January and March.[147] We find that SWBT has satisfied the benchmark. Further, commenters

[144] SWBT's percentage of missed due dates:

| PM 73: Missed Due Dates | | | |
|---|---|---|---|
| | Jan | Feb | Mar |
| CLEC | 10.4% | 4.4% | 4.1% |
| SWBT | 60.3% | 27.6% | 22.5% |

*See* SWBT Aggregated Performance Measurement Data PM 73 at 271-No.73-76 (showing performance measurement data for January 2000 through March 2000). SWBT continues to meet the benchmark in April.

[145] "Held orders" are orders that SWBT does not process due to lack of interconnection facilities. A lack of interconnection facilities, in turn, could mean that SWBT could not satisfy its interconnection obligation.

[146] Texas Commission Texas I Comments at 15. The interim measure will be finalized as part of the Texas Commission's six-month review of performance measurements which began in April 2000. *See* Texas Commission Dec. 16, 1999 Open Meeting Transcript at 29-31. CapRock and NTS alleged that the pre-planning process that occurs before SWBT officially counts a competitive LEC's request as an order (*e.g.* scheduling of initial planning meeting and preparation by SWBT of a Service Planning Document summarizing the requirements specified by a competitive LEC), further delays their ability to obtain interconnection trunks (and is not tracked by performance measurements). CompTel Texas I Comments at 10-11, Exhibit C, NTS Mitch Elliot Aff., Exhibit B, Caprock Jere Thompson Aff. SWBT responds that this supposed delay is no more than timely contract preparation. SWBT Texas I Reply Comments at 49. The Texas Commission stated that NTS and Caprock had never brought their complaints to the attention of the Texas Commission, and it did not believe that based on the evidence developed in the Section 271 proceeding that the complaints of NTS and CapRock indicate systemic problems. Inasmuch as the Texas Commission had little opportunity to investigate those complaints and develop a factual record, we accord them little weight. Texas Commission Texas I Reply Comments at 13-14.

[147] *See* SWBT Texas I March 17 *ex parte* Attach. 3; SWBT Texas I February 18 *ex parte* at 5-6; SWBT Dysart Texas I Aff. Attach. K at 11. NTS' allegation that the orders it submitted in December in Amarillo were held for lack of facilities does not constitute evidence demonstrating that SWBT fails to meet the checklist item. Specifically, NTS alleged that when it submitted properly forecasted orders on December 23, 1999, SWBT claimed it did not have enough multiplexing equipment available to fulfill NTS's order and that as of its Texas I filing, the trunks were still not installed. SWBT responded that on December 23, 1999, NTS ordered a single DS-3 facility to support its interconnection trunks in Amarillo. SWBT stated that it responded to NTS the same day explaining that SWBT lacked facilities to provision the DS-3, but offered to fill the order using DS-1s to provide the same capacity. SWBT Texas I *ex parte* letter of March 22, 2000. SWBT stated that NTS ordered the DS-1s on January 4, 2000, but twice delayed provisioning of these trunks on the basis that NTS was not ready to receive them. SWBT stated that most (continued....)

have not raised any new allegations of inadequate or overlong trunk provisioning. We note that the Department of Justice agrees that SWBT's performance is satisfactory with respect to this measurement.[148]

71. *Average Installation Intervals.* SWBT's performance data that measure the average time for installation of interconnection trunks demonstrate that SWBT meets the state benchmark in February, March and April.[149] We have considered the concerns of the Telecommunications Resellers Association and others in addition to the Department of Justice, and find that the extensive review by the Texas Commission of SWBT's operational processes and empirical performance data satisfactorily addresses their concerns.[150] We therefore reject the concerns raised in the record regarding SWBT's average installation interval performance as those concerns relate largely to last year's performance. The data submitted as part of the instant application indicate SWBT meets the state benchmark.

72. In conclusion, our decision that SWBT satisfies the requirements of this checklist item is based on the following: its trunk group blockage rates for competitors pass the state benchmark, its rate of missed due dates for trunk installations is lower for service to competitors than for service to itself, and its average time to install interconnection trunks passes the state benchmark.

(Continued from previous page)
recently, the trunks were scheduled for delivery between March 14 and March 16, but that NTS indicated on each of these dates that it was not ready to accept the trunks. SWBT Texas I *ex parte* letter of March 22,2000. The Texas Commission noted on Reply that it will work with SWBT, NTS [and CapRock] in Docket 20400 to ascertain if there are problems. However, based on the evidence developed in the section 271 proceeding, the Texas Commission did not believe that the complaints of NTS [and CapRock] indicate systemic problems." Texas Commission Texas I Reply. We agree.

[148] Department of Justice Texas II Evaluation at 5, stating that PM 73.1 reports very few orders held for lack of facilities for March 2000.

[149] In February, March, and April, SWBT met the 20 business day benchmark with an average installation interval of 16.5, 17.4, and 17.3 business days respectively for competitive LECs. The Texas Commission established a benchmark instead of a parity measure because SWBT installs more trunks for competitive LECs than for its retail side. Texas Commission Texas I Comments at 16.

[150] Department of Justice Texas I Evaluation at 47; Telecommunications Resellers Association Texas I at 9-10, 13; Sprint Texas I at 62-64; Sprint Texas II Comments at 46; CompTel Texas II Comments at 2. We also note that the performance measures will be reviewed by SWBT, competitive LECs and the Texas Commission every six months, beginning in April 2000, "to determine whether they are properly reflecting the behaviors and results needed for a sustainable competitive market." Texas Commission Texas I Comments at 4. We disagree with the allegation of Pontio that its interconnection dispute with SWBT disqualifies SWBT from receiving section 271 authority. Specifically, Pontio alleges that SWBT will not provide requested interconnection trunks unless Pontio agrees to an amended interconnection agreement that would impose per minute local switching charges. *See* Texas II Comments of @Link, BlueStar, DSLnet et. al. at 23. SWBT states that the trunks at issue were provisioned on May 11, 2000 and the terms to recover the appropriate costs for the use of those facilities are subject to ongoing negotiations with Pontio. *See* SWBT Texas II Reply at 50. We believe Pontio's alleged difficulties are best resolved through the section 252 negotiation and arbitration process.

### (ii) Collocation

73. SWBT has demonstrated that its collocation offering in Texas satisfies the requirements of sections 271 and 251 of the Act. SWBT provides physical and virtual collocation through a state-approved tariff.[151] In its application, SWBT indicates that shared, cageless, and adjacent collocation options are available in Texas, and that it has taken other steps to implement the collocation requirements contained in the *Advanced Services First Report and Order*.[152] SWBT provides terms for physical collocation in its physical collocation tariff, as well as in a physical collocation handbook that it incorporates into the tariff by reference.[153] SWBT's collocation performance data indicate that SWBT processed requests for collocation within time frames established by the Texas Commission. SWBT stated that it has provided 655 physical collocation arrangements in 166 different SWBT central offices in Texas. Except where a competitive LEC places a large number of collocation orders in the same 5-business day period, SWBT responds to each request within 10 days.[154] SWBT provides three measurements (disaggregated into various submeasures) for collocation: Percentage of Missed Collocation Due Dates (PM 107), Average Delay Days for SWBT Missed Due Dates (PM 108), and Percent of Requests Processed within the Tariffed Timelines (PM 109). Where data points are available, SWBT's data indicates it meets the measures for the months of January, February, and March.[155]

74. SWBT makes virtual collocation available through its virtual collocation tariff, with notification and installation intervals for all tariffed equipment established in SWBT's Interconnector's Collocation Services Handbook for Virtual Collocation.[156] In addition, SWBT states that competitive LECs may negotiate custom-tailored interconnection arrangements on

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[151] SWBT's physical and virtual collocation tariffs were revised in connection with the Texas Commission's collaborative process and workshops designed to address competitive LEC concerns. The revised physical and virtual collocation tariffs became effective upon state approval October 29, 1999. *See* Texas Commission Texas I Comments at 16. SWBT's physical collocation tariff contained a 50 square foot minimum space requirement for shared cage collocation. However, our rules provide that an ILEC must make shared collocation space available in single-bay increments or their equivalent, *i.e.*, a competing carrier can purchase space in increments small enough to collocate a single rack, or bay, of equipment. 47 CFR § 51.323 (k)(1). We note that SWBT eliminated the minimum space requirement and notified competitive LECs through an Accessible Letter of February 29, 2000 that it had removed the minimum space requirement. *See* SWBT Accessible Letter of February 29, 2000 "Clarification of minimum cage size for Caged and Shared Cage collocation Kansas, Missouri, Oklahoma, Texas ," No. CLEC00-050.

[152] SWBT Texas I Application at 73-78; *see also* Texas Commission Texas I Comments at 16-22.

[153] SWBT Texas I Application at 74.

[154] SWBT Texas I Application at 75, SWBT Dysart Texas I Aff. at para. 629, SWBT Auinbauh Texas I Aff. at paras. 44-45.

[155] *See* SWBT Aggregated Performance Measurement Data PMs 107-109 at 271-No. 107a –109b (showing performance measurement data for January 2000 through March 2000).

[156] SWBT Texas I Application at 77. SWBT states that it has completed 40 virtual collocation arrangements in Texas.

request.[157] The Texas Commission agrees that SWBT's revised physical collocation offerings comply with the *Advanced Services Order*.[158] Further, SWBT's collocation offering underwent an active and thorough review at the state level. The Texas Commission addressed the provisioning of collocation space and established standard provisioning intervals for caged, cageless, and virtual collocation.[159]

75. We disagree with ALTS and the CLEC Coalition that SWBT's practice of walling in its own equipment as a "reasonable security measure" violates our collocation rules.[160] Our rules as they existed at the time of filing did not explicitly prohibit this practice.[161] Therefore, we find that these allegations do not rise to the level of non-compliance for this checklist item.[162] In addition, we believe that Metromedia Fiber Network Services' (MFNS) alleged difficulties negotiating collocation arrangements with SWBT are best resolved through the section 252 negotiation and arbitration process or through the section 208 complaint process.[163]

### (iii) Technically Feasible Points of Interconnection

76. We conclude that SWBT provides interconnection at all technically feasible points, and therefore demonstrates compliance with the checklist item. SWBT asserts that it makes each of its standard methods of interconnection available at the line side or trunk side of

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[157] SWBT Texas I Application at 78.

[158] "SWBT's physical and virtual collocation tariffs have been revised in conformance with the Texas Commission recommendations, and address the myriad competitive LEC concerns discussed at length in the Texas Commission's collaborative process and workshops." Texas Commission Texas I Comments at 16.

[159] Texas Commission Texas I Comments at 17-18.

[160] ALTS and the CLEC Coalition objected to SWBT's practice of walling in its own equipment as a "reasonable security measure" associated with cageless collocation and then charging competitive LECs for the construction. The competitive LECs contended this practice is not contemplated by the Commission's *Advanced Services First Report and Order*. ALTS Texas I Comments at 24; CLEC Coalition Texas I Comments at 12; *see also* AT&T's DeYoung Texas I Aff. at para. 327 n.240. Pending completion of the Texas Commission's rate proceedings, the interim rate for security for cageless collocation is zero, subject to true-up. SWBT argues therefore that as a practical matter there is no genuine issue. *See* pricing discussion *infra* at section V.A.2; SWBT's Auinbauh Texas I Reply Aff. at para. 32; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3987-88, para. 79.

[161] *See* Petition for Partial Reconsideration or Clarification filed June 1, 1999, Sprint Corporation requests that we clarify and further strengthen the collocation rules adopted in the *Advanced Services First Report and Order*.

[162] On March 17, 1999, the D.C. Circuit vacated and remanded certain aspects of the *Advanced Services First Report and Order*, including the relevant sections at issue here. *See GTE Service Corp. v. FCC*, Nos. 99-1176 *et al.* (D.C. Cir. Mar. 17, 2000).

[163] *See* MFNS Texas I Comments and Reply Comments. *See also* Auinbauh Texas I Reply Aff. at paras. 25-26. MFNS filed a section 208 complaint with the Commission's Enforcement Bureau on February 15, 2000 requesting that SWBT be directed to provide its Competitive Alternate Transport Terminal "CATT" interconnection. That complaint was dismissed without prejudice for failure to comply with the Commission's complaint requirements. *See* February 28, 2000 Letter from Radhika V. Karmarkar, Enforcement Bureau, to Karen Nations (MFNS), Jonathan E. Canis and David A. Konuch (Kelley Drye & Warren) and Christine Jines (SBC).

the local switch, the trunk connection points of a tandem switch, central office cross-connect points, out-of-band signaling transfer points, and points of access to UNEs.[164] SWBT demonstrates that it has an approved state interconnection agreement that spells out readily available points of interconnection, and provides a process for requesting interconnection at additional, technically feasible points.[165]

77. We disagree with AT&T that SWBT has violated its obligation to permit competing carriers to select interconnection points.[166] The existing language in the interconnection agreement between SWBT and AT&T states that "in each SWBT exchange area in which AT&T offers local exchange services, the parties will interconnect their network facilities at a minimum of one mutually agreeable point of interconnection."[167] This portion of the interconnection agreement between SWBT and AT&T, however, was negotiated and, therefore, does not have to comply with section 251.[168] Consequently, AT&T's experience does not constitute evidence of a failure by SWBT to provide interconnection at all technically feasible points for purposes of section 271 review.[169]

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[164] SWBT Deere Texas I Aff. at paras. 14; 20-21. SWBT will provide other technically feasible alternatives using the Special Request Procedure set forth in the T2A. *Id.* at 14.

[165] SWBT Texas I Application at 73-78. SWBT's state approved T2A requires SWBT to provide other collocation arrangements that have been demonstrated to be technically feasible and in compliance with the *Advanced Services Order*. The T2A provides a rebuttable presumption of technical feasibility when a collocation arrangement has been deployed by any incumbent LEC. *Id.* at 17.

[166] Specifically, AT&T objects to SWBT's requirement that AT&T establish direct trunks to each central office in the Dallas exchange area, which is not served by a local tandem, instead of allowing AT&T to interconnect at the access tandem serving the central offices in the Dallas exchange area. AT&T alleged that SWBT's requirement led to a three-month delay in AT&T's final testing of its telephony-over-cable service in the Dallas area. *See* AT&T Texas I Comments at 59-60; AT&T Texas I DeYoung Aff. at paras. 20-26; AT&T *ex parte* of March 8, 2000; AT&T Texas II Reply Comments at 49; *but see* SWBT Deere Texas I Reply Aff. at 24-25; SWBT Texas II *ex parte* of April 26; SWBT Texas II Reply Comments at 50-54. *See also* AT&T Texas II *ex parte* letter of June 13, 2000.

[167] *See* SWBT Deere Texas II Reply Aff., App. A-4 at 5-7; AT&T Texas II Reply Comments, DeYoung/Fettig Decl., at 5 n.7.

[168] SWBT Texas II Reply Comments at 53. SWBT notes that the issues raised by AT&T will be debated before the Texas Commission in a pending arbitration between SWBT and AT&T. SWBT Deere Texas II Reply Aff. App. A-4 at 7. We believe that AT&T's issue is appropriately resolved through the Texas Commission's arbitration process. *See AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications, Inc's Response to Southwestern Bell Telephone Company's Petition for Arbitration*, Tex. PUC Docket 22315 at 13-17 (filed April 17, 2000).

[169] In addition, we find that SWBT satisfactorily addresses AT&T's concern that SWBT does not allow virtual collocation if space for physical collocation is available. AT&T's DeYoung Texas I Aff. at para. 332; *see also* AT&T's March 8, 2000 *ex parte* at 2-3. SWBT confirms that sections 25 and 26 of SWBT's Virtual Collocation Tariff make virtual collocation available to competitive LECs regardless of the availability of physical collocation; the restriction to which AT&T refers involves a maintenance and repair option for virtually collocated equipment, and such language does not deny virtual collocation as alleged by AT&T. SWBT Texas I Reply Comments at 51; Auinbauh Texas I Reply Aff. at paras. 34-35.

78. Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.[170] The incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it proves to the state public utility commission that interconnection at that point is technically infeasible.[171] Thus, new entrants may select the "most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination."[172] Indeed, "section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point in the network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points."[173] We note that in SWBT's interconnection agreement with MCI (WorldCom), WorldCom may designate "a single interconnection point within a LATA."[174] Thus, SWBT provides WorldCom interconnection at any technically feasible point, and section 252(i) entitles AT&T, or any requesting carrier, to seek the same terms and conditions as those contained in WorldCom's agreement, a matter any carrier is free to take up with the Texas Commission.[175]

### 2. Pricing of Interconnection

#### a. Background

79. As discussed above, checklist item 1 requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[176] Section 251(c)(2)

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[170] *See* 47 U.S.C § 251(c)(2),(3); *see also* 47 C.F.R. §51.305(a)(2); *see, e.g., Memorandum of the Federal Communications Commission as Amicus Curiae, US West Communications, Inc., vs. AT&T Communications of the Pacific Northwest, Inc. et. al*, No. CV 97-1575 JE.

[171] 47 C.F.R Section 51.305(e); *see also Local Competition First Report and Order*, 11 FCC Rcd at 15602, 15605-06, paras. 198, 203, 205.

[172] *See Local Competition First Report and Order*, 11 FCC Rcd at 15588, para. 172.

[173] *Local Competition First Report and Order*, 11 FCC Rcd at 15608, para. 209.

[174] *See* SWBT Texas II Application , App. 5, Tab 45, MCI(WorldCom) Agreement Attach. 4, § 1.2.2. Section 1.2.2 of the WorldCom Agreement states: "MCI(WorldCom) and SWBT agree that MCI(WorldCom) may designate, at its option, a minimum of one point of interconnection within a single SWBT exchange where SWBT facilities are available, or multiple points of interconnection within the exchange, for the exchange of all traffic within that exchange. If WorldCom desires a single point for interconnection within a LATA, SWBT agrees to provide dedicated or common transport to any other exchange within a LATA requested by WorldCom, or WorldCom may self-provision, or use a third party's facilities." SWBT Texas II Application , App. 5, Tab 45, WorldCom Agreement Attach. 4, § 1.2.2

[175] *See* 47 U.S.C. § 252(i). Section 252(i) makes these terms and conditions available to all requesting carriers despite SWBT's statement that it requires competitive LECs to interconnect in every local exchange area. *See* SWBT Texas II Reply at 50.

[176] 47 U.S.C. § 271(c)(2)(B)(i).

requires incumbent LECs to provide interconnection "at any technically feasible point within the carrier's network ... on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[177] Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.[178]

80. Interconnection trunking, physical and virtual collocation, and meet-point arrangements are among the technically feasible methods of interconnection.[179] Shared cage and cageless collocation arrangements must be part of an incumbent LEC's physical collocation offerings.[180] To comply with its collocation obligations, an incumbent LEC must make collocation arrangements available on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[181] The Commission's pricing rules require, among other things, that incumbent LECs provide collocation based on the total element, long-run, incremental cost (TELRIC).[182]

81. Although the U.S. Court of Appeals for the Eighth Circuit stayed the Commission's pricing rules in 1996,[183] the Supreme Court restored the Commission's pricing authority on January 25, 1999.[184] In reaching its decision, the Court acknowledged that section 201(b) "explicitly grants the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."[185] Furthermore, the Court determined that section 251(d) also provides evidence of an express jurisdictional grant by requiring that "the Commission [shall] complete all actions necessary to establish regulations to implement the requirements of this section."[186] The Court

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[177] 47 U.S.C. § 251(c)(2).

[178] 47 U.S.C. § 252(d)(1).

[179] 47 C.F.R. § 51.321(b); *Local Competition First Report and Order*, 11 FCC Rcd at 15779-81, paras. 549-53. In a physical collocation arrangement, an interconnecting carrier has physical access to space in the LEC central office to connect to the incumbent LEC network. *Id.* at 15784, para. 559, and n.1361. In a virtual collocation arrangement, interconnectors designate central office transmission equipment dedicated to their use, but have no right to enter the central office and do not pay for incumbent LEC floor space. *Id.* In a meet-point arrangement, the parties negotiate a point at which one carrier's responsibility for service ends and the other carrier's begins. *See id.* at 15778, n.1332.

[180] *Advanced Services First Report and Order*, 14 FCC Rcd at 4783-85, paras. 40-42.

[181] *See* 47 U.S.C. § 251(c)(6); 47 C.F.R. §§ 51.305(a)(5), 51.321(a)-(b); *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para 66.

[182] *See* 47 C.F.R. §§ 51.501-07, 51.509(g); *Local Competition First Report and Order*, 11 FCC Rcd at 15812-16, 15844-61, 15874-76, 15912, paras. 618-29, 674-712, 743-51, 826.

[183] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800, 804, 805-06 (1997).

[184] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[185] *Id.* at 380.

[186] *Id.* at 382.

also held that the pricing provisions implemented under the Commission's rulemaking authority do not inhibit the establishment of rates by the states.[187] The Court concluded that the Commission has jurisdiction to design a pricing methodology to facilitate local competition under the 1996 Act, including pricing for interconnection and unbundled access, as "it is the States that will apply those standards and implement that methodology, determining the concrete result."[188]

### b. Discussion

82. Based on the evidence in the record, we find that SWBT offers interconnection in Texas to other telecommunications carriers at just, reasonable, and nondiscriminatory rates, in compliance with checklist item 1.[189] SWBT states that it provides interconnection at TELRIC-based rates that are just, reasonable, and nondiscriminatory.[190] SWBT provides terms for physical collocation in its physical collocation tariff, as well as in a physical collocation handbook that it incorporates into the tariff by reference.[191] SWBT makes virtual collocation available through its virtual collocation tariff.[192] SWBT says it will also negotiate custom-tailored interconnection arrangements on request.[193] According to SWBT, TELRIC-based charges apply to custom work even if no rate has been established previously.[194] SWBT states that it pro-rates its site preparation charges and allocates them based on the percentage of the total space each competitive LEC uses.[195] SWBT also says that it pro-rates its collocation charges so that the first competitive LEC to enter the premises is not responsible for all the site preparation costs.[196]

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187 *Id.* at 384.

188 *Id.*

189 We note that other unbundled network elements are required pursuant to the checklist, but we discuss them in the context of other checklist items. Additionally, we discuss UNE pricing, including both recurring and non-recurring charges, in checklist item 2; rates for access to poles, ducts, and conduits in checklist item 3; the pricing of directory assistance and operator services in checklist item 7; reciprocal compensation rates in checklist item 13; and resale rates in checklist item 14.

190 SWBT Texas I Application at 72, 80; SWBT Texas I Auinbauh Aff at para. 148.

191 *See* SWBT Texas I Application at 74, 80.

192 *Id.* at 77.

193 *Id.* at 78.

194 *Id.* at 80; SWBT Texas I Auinbauh Aff. at para. 149.

195 SWBT Texas I Application at 80; SWBT Texas I Auinbauh Aff. at paras. 59-60, 63.

196 SWBT Texas I Application at 80; SWBT Texas I Auinbauh Aff. at para. 59-60, 63.

83. The Texas Commission states in its evaluation that SWBT has satisfied the requirements of checklist item 1.[197] According to the Texas Commission, SWBT provides interconnection trunking at just, reasonable, and nondiscriminatory terms and conditions.[198] The state commission says that SWBT makes interconnection available through the Texas Commission-approved 271 agreement, and that the Texas-approved physical and virtual collocation tariffs comply with sections 251 and 271 of the Act.[199]

84. We stress that we place great weight on the Texas Commission's active review of SWBT's pricing elements in its 271 application. The Texas Commission has encouraged active and open participation by all carriers in setting rates through numerous proceedings, reviewed costs studies and conflicting testimonies, arbitrated pricing issues and incorporated its findings into interconnection agreements, and has demonstrated its commitment to applying the pricing standards of sections 251 and 252 of the Act as implemented by our rules.[200]

85. As the Texas Commission explains, "[t]he collocation tariffs contain interim rates, subject to true-up, for all aspects and methods of available collocation."[201] AT&T argues that the interim nature of these rates proves fatal to SWBT's application in light of our discussion of interim rates in the *Bell Atlantic New York Order*.[202] We disagree. In that order, we stated that:

> a BOC's application for in-region interLATA authority should not be rejected solely because permanent rates may not yet have been established for each and every element or nonrecurring cost of provisioning an element. We believe that this question should be addressed on a case-by-case basis. If the uncertainty caused by the use of interim rates can be minimized, then it may be appropriate, at least for the time being, to approve an application based on the interim rates contained in the relevant tariff.[203]

86. We concluded that the interim nature of Bell Atlantic's xDSL rates posed no obstacle to the approval of its application. We reasoned that the xDSL rate dispute was relatively new, that the New York Commission has a track record of setting other prices at TELRIC rates,

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[197] Texas I Commission Comments at 10.

[198] *Id.*

[199] *Id.* at 10, 16, 21.

[200] *See* Texas I Commission Comments at 80; Texas II Commission Comments at 55-58; Letter from Donna Nelson, Director-Telecommunications, Legal Division, Texas Public Utility Commission to Magalie Roman Salas, CC Docket No. 00-65, Attach. 5, Interim Award at 17 (filed June 19, 2000) (Texas Commission June 19 *Ex Parte*).

[201] Texas I Commission Comments at 21.

[202] AT&T Texas I Comments at 41; AT&T Texas I DeYoung Aff. at paras. 317-18, 328.

[203] *Bell Atlantic New York Order*, 15 FCC Rcd at 4090, para. 258.

and that the interim rates would be subject to a refund or true-up once final rates were set.[204] Although we noted that competitive "[u]ncertainty will be minimized if the interim rates are for a *few* isolated ancillary items," we did not say that the disputed items must be ancillary in character to ensure compliance with the checklist.[205]

87. This case again presents the question of the significance of interim rates for purposes of adjudicating a section 271 application. We again conclude that the section 271 process could not function as Congress intended if we adopted a general policy of denying any section 271 application accompanied by unresolved pricing and other intercarrier disputes. Our experience has demonstrated that, at any given point in time at which a section 271 application might be filed, the rapidly evolving telecommunications market will have produced a variety of unresolved, fact-specific disputes concerning the BOC's obligations under sections 251 and 252. BOCs and their competitors can be expected to take opposite positions in those disputes, and the adjudicated resolution ultimately will often fall somewhere in between the positions of the opposing parties. If uncertainty about the proper outcome of such disputes were sufficient to undermine a section 271 application, such applications could rarely be granted. Congress did not intend such an outcome.

88. The 1996 Act authorizes the state commissions to resolve specific carrier-to-carrier disputes arising under the local competition provisions, and it authorizes the federal district courts to ensure that the results of the state arbitration process are consistent with federal law.[206] Although we have an independent obligation to ensure compliance with the checklist, section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by the state commissions, particularly now that the Supreme Court has restored our pricing jurisdiction and has thereby directed the state commissions (and the federal courts on review) to follow our pricing rules in their disposition of those disputes. For those reasons, the mere presence of interim rates will not generally threaten a section 271 application so long as an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set.[207] As discussed below, the interim rates in dispute here meet that standard.

89. AT&T argues that the interim nature of SWBT's collocation rates demands that we deny the section 271 application.[208] We disagree. As we explained in the *Bell Atlantic New*

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[204] *Bell Atlantic New York Order*, 15 FCC Rcd at 4091, para. 259.

[205] *Compare Bell Atlantic New York Order*, 15 FCC Rcd at 4090-91, para. 258 with *id.* at 4091, para. 259.

[206] 47 U.S.C. §§ 252(c), (e)(6); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[207] *See* para. 84, *supra* (discussion of Texas Commission's commitment to apply pricing standards of sections 251 and 252 of the Act).

[208] AT&T Texas I DeYoung Aff. at paras. 320, 328.

*York Order*, we examine interim rates under section 271 on a case-by-case basis.[209] We conclude that the state has made reasonable efforts to set interim collocation rates in accordance with the Act and the FCC's rules. The Texas Commission set the interim rates pursuant to TELRIC standards so that competitive LECs could obtain collocation while the state incorporated the Commission's findings in the March 31, 1999, *Advanced Services Order*.[210] AT&T argues that the interim caged collocation rates are not TELRIC-based, and stem instead from outdated tariffs that include costs for things such as asbestos removal and separate entryways that the FCC has since deemed improper.[211] AT&T admits, however, that the Texas Commission reduced one of the elements of the caged collocation rates by 30 percent to accommodate that fact.[212] AT&T argues that the reduction is insufficient to conform the caged collocation rates to TELRIC standards,[213] but we view it as a reasonable attempt by the state commission to set an interim TELRIC-based rate pending its final determination. Moreover, the Texas Commission based the majority of the interim rates, at least with regard to physical collocation, from a TELRIC model developed by AT&T and MCI, albeit with some modifications.[214]

90. The Texas Commission has set up a schedule to set permanent rates, and has indicated to the parties that the interim rates are subject to a refund or true-up, an approach apparently urged by AT&T.[215] AT&T acknowledges that the Texas Commission has directed use of the AT&T/MCI model in setting permanent physical and virtual collocation rates.[216] Further cost studies were due April 12, 2000, and a hearing was scheduled for June 15-16, 2000.[217] Based on the record, we believe that the Texas Commission has taken a reasonable approach. We conclude that the uncertainty surrounding the interim rates has been minimized, and we have

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[209] *Bell Atlantic New York Order*, 15 FCC Rcd at 4090-91, para. 258.

[210] SWBT Texas I Auinbauh Aff. at paras. 6, 40, 149; SWBT Texas I Shelley Aff. at paras. 44-46; SWBT Texas I Reply at 50; SWBT Texas I Auinbauh Reply Aff. at paras. 12, 27-28. *See Advanced Services Order*, 14 FCC Rcd at 4771-94, paras. 19-60.

[211] AT&T Texas I Comments at 41-42; AT&T Texas I DeYoung Aff. at paras. 320-21, 328 & nn.230, 233.

[212] AT&T Texas I DeYoung Aff. at para. 321.

[213] AT&T Texas I DeYoung Aff. at para. 322. According to AT&T, a competitive LEC acquiring a 100-square-foot caged space would pay $4,166 in interim non-recurring charges and $64 per month in interim recurring charges, compared to no non-recurring charges and a maximum of $42.01 per month in recurring charges under the AT&T/MCI cost model. *Id.* AT&T says that SWBT's own rate comparison indicates that the interim rates, prior to the 30 percent reduction, are approximately twice those produced by the AT&T/MCI model, representing a difference of about $14,000 in non-recurring charges for a 100 square-foot cage. *Id.* at 323 & nn.235-236.

[214] AT&T Texas I DeYoung Aff. at para 320 & n.231.

[215] *See* SWBT Texas I Reply at 50; SWBT Texas I Auinbauh Reply Aff. at paras. 27-29.

[216] AT&T Texas I DeYoung Aff. at para. 325.

[217] Texas I Commission Comments at 21.

confidence that the Texas Commission will set permanent rates that are in compliance with the Act and our rules. Consequently, we find that SWBT has met its obligations under this checklist item.[218]

### B. Checklist Item 2 – Unbundled Network Elements

91. Our analysis under checklist item 2 addresses whether SWBT satisfies its obligation to provide nondiscriminatory access to unbundled network elements pursuant to section 251(c), at prices that meet the requirements of section 252(d). As discussed above, the Commission has identified a number of UNEs, including operations support systems (OSS), that incumbent LECs must make available under section 251(c)(3) as of the filing date of this application.[219] In this section, we address whether SWBT provides access to OSS and to combinations of UNEs in accordance with section 251(c)(3) and our rules.[220] We recognize, as we have in prior section 271 orders, that the duty to provide nondiscriminatory access to OSS functions is embodied in other terms of the competitive checklist as well.[221] Aside from OSS, the other UNEs that SWBT must make available under section 251(c)(3) are also listed as separate items on the competitive checklist, and are addressed below in separate sections for each checklist item.[222]

#### 1. Operations Support Systems

##### a. Background

92. Incumbent LECs use a variety of systems, databases, and personnel (collectively referred to as OSS) to provide service to their customers.[223] The Commission consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition.[224] For example, new entrants must have access to the functions performed by the incumbent's OSS in order to formulate and place orders for network elements or resale services, to install service to their customers, to maintain and repair network facilities, and to bill

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[218] We also observe that in any context in which prices are not set in accordance with our rules and the Act, we retain the ability to take a variety of enforcement actions and will not hesitate to do so. *See* 47 U.S.C. § 271(d)(6).

[219] *See* section III.B.1, *supra; UNE Remand Order* at para. 15.

[220] 47 U.S.C. § 51.315(b).

[221] *See, e.g., Bell Atlantic New York Order*, 15 FCC Rcd at 3990, para. 84.

[222] *See* 47 U.S.C. § 271(c)(2)(B) (for example, unbundled loops, transport and switching are listed separately as checklist items iv, v and vi).

[223] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3989-90, para. 83; *BellSouth South Carolina Order*, 13 FCC Rcd at 585.

[224] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3990, para. 83; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20653; *BellSouth South Carolina Order*, 13 FCC Rcd at 547-48, 585.

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Developing a Unified Intercarrier Compensation Regime | ) | CC Docket No. 01-92 |
| | ) | |

# NOTICE OF PROPOSED RULEMAKING

**Adopted:** April 19, 2001 **Released:** April 27, 2001

**Comment Date:** 90 days after publication in the Federal Register
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By the Commission: Chairman Powell and Commissioner Ness issuing separate statements; Commissioner Furchtgott-Roth concurring and issuing a statement

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## I. INTRODUCTION

1. With this *Notice of Proposed Rulemaking (NPRM)*, we begin a fundamental re-examination of all currently regulated forms of intercarrier compensation. We intend to test the concept of a unified regime for the flows of payments among telecommunications carriers that result from the interconnection of telecommunications networks under current systems of regulation. Specifically, we seek comment on the feasibility of a bill-and-keep approach for such a unified regime. We also seek alternative comment on modifications to existing intercarrier compensation regimes. In sum, we seek to move forward from the transitional intercarrier compensation regimes to a more permanent regime that consummates the pro-competitive vision of the Telecommunications Act of 1996 ("1996 Act").[1]

2. As discussed below, there are currently two general intercarrier compensation regimes: (1) access charges for long-distance traffic; and (2) reciprocal compensation.

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

We believe it essential to re-evaluate these existing intercarrier compensation regimes in light of increasing competition and new technologies, such as the Internet and Internet-based services, and commercial mobile radio services ("CMRS"). We are particularly interested in identifying a unified approach to intercarrier compensation—one that would apply to interconnection arrangements between all types of carriers interconnecting with the local telephone network, and to all types of traffic passing over the local telephone network. The purpose of this *NPRM* is to seek comment on the broad universe of existing intercarrier compensation arrangements. In issuing this *NPRM*, we do not expect that we will extend intercarrier compensation rules to Internet backbones, on which we do not currently impose rate-making regulation. Neither do we expect to extend compensation rules to other interconnection arrangements that are not currently subject to rate regulation and that do not exhibit symptoms of market failure.[2] We do, however, seek comment on whether imposing any particular unified intercarrier compensation regime only with respect to rates that we currently regulate would lead to distortions or other problems that would undermine the benefits of that regime. We emphasize at the outset that we seek an approach to intercarrier compensation that will encourage efficient use of, and investment in, telecommunications networks, and the efficient development of competition. Consistent with the deregulatory goals of the 1996 Act, we seek an approach to intercarrier compensation that minimizes the need for regulatory intervention, both now and as competition continues to develop.

3. In a related order that we are adopting today ("*ISP Intercarrier Compensation Order*"),[3] we address intercarrier compensation for traffic that is specifically bound for Internet service providers ("ISPs"). We adopt interim measures that, for the next three years, will significantly reduce, but not altogether eliminate, the flow of intercarrier payments associated with delivery of dial-up traffic to ISPs. In another order that we are adopting today ("*CLEC Access Charge Order*"),[4] we address the access charges that long-distance carriers pay to competitive local exchange carriers (CLECs). We adopt another three-year interim measure, under which CLECs may file tariffs establishing access rates only if their rates are at or below a benchmark rate, to bring CLEC rates closer to incumbent local exchange carrier ("ILEC") rates.

4. In this *NPRM*, we envision that a bill-and-keep regime would fulfill the goals of the two interim measures, combined with the larger goal of a unified regime. We seek comment on our proposal to adopt a bill-and-keep rule to govern local exchange carrier ("LEC") recovery of costs associated with the delivery of ISP-bound traffic after the three-year interim period. We also seek comment on the potential adoption of a bill-and-keep approach to reciprocal compensation payments governed by section 251 of the 1996 Act, and the eventual application of bill and keep to interstate access charges regulated under section 201 of the Communications Act of 1934, as amended ("Communications Act"). With respect to all categories of currently-

[2] Thus, we do not contemplate a need to adopt new rules governing CLEC-to-CLEC, IXC-to-IXC, CMRS-to-CMRS or CMRS-to-IXC arrangements.

[3] In the Matter of Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Order on Remand and Report and Order*, FCC 01-131 (rel. Apr. 27, 2001) ("*ISP Intercarrier Compensation Order*").

[4] In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, *Seventh Report and Order*, FCC 01-146 (rel. Apr. 27, 2001) ("*CLEC Access Charge Order*").

regulated intercarrier compensation, we also seek comment on alternative reform measures that would build upon current requirements for cost-based intercarrier payments.

## II. BACKGROUND

### A. Existing Intercarrier Compensation Regimes

5. Interconnection arrangements between carriers are currently governed by a complex system of intercarrier compensation regulations. These regulations treat different types of carriers and different types of services disparately, even though there may be no significant differences in the costs among carriers or services. The interconnection regime that applies in a particular case depends on such factors as: whether the interconnecting party is a local carrier, an interexchange carrier, a CMRS carrier or an enhanced service provider; and whether the service is classified as local or long-distance, interstate or intrastate, or basic or enhanced.

6. Existing intercarrier compensation rules may be categorized as follows: *access charge rules*, which govern the payments that interexchange carriers ("IXCs") and CMRS carriers make to LECs to originate and terminate long-distance calls; and *reciprocal compensation rules*, which govern the compensation between telecommunications carriers for the transport and termination of local traffic. Such an organization is clearly an oversimplification, however, as both sets of rules are subject to various exceptions (*e.g.*, long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption).[5]

7. The access charge rules can be further broken down into *interstate* access charge rules that are set by this Commission, and *intrastate* access charge rules that are set by state public utility commissions. Both the interstate and intrastate access charge rules establish charges that IXCs must pay to LECs when the LEC originates or terminates a call for an IXC, or transports a call to, or from, the IXC's point of presence ("POP"). CMRS carriers also pay access charges to LECs for CMRS-to-LEC traffic that is not considered local and hence not covered by the reciprocal compensation rules. Other customers carrying traffic to or from points within an exchange area to points outside the exchange area may also pay access charges to the LEC. These access charges may have different rate structures—*i.e.*, they may be flat-rated or traffic-sensitive. In general, where a long-distance call passes through a LEC circuit switch, a

[5] The phrases "Internet telephony" and "Internet Protocol telephony" ("IP telephony") refer to similar, but distinct concepts. IP telephony involves the provision of a telephony service or application using Internet Protocol. IP telephony may be provided over the public Internet or over a private IP network. In contrast, Internet telephony is a subset of IP telephony that is distinguished by the fact that it is provided over the public Internet and uses the domain-name system for routing. *See, e.g.*, In the Matter of Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd. 11501, 11541-51 ¶¶ 83-104 ("*Stevens Report*") (discussing Internet and IP telephony); HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 378 (14th ed. 1998). For simplicity, the text will refer generally to the broader concept of IP telephony.

IP telephony can also be categorized by the equipment used to provide the service. For example, IP telephony may be provided using two personal computers ("computer-to-computer" IP telephony); the service may be provided between a computer and a standard telephone using a single IP gateway ("computer-to-phone" IP telephony); or it may be provided using two standard telephones that connect through two IP gateways ("phone-to-phone" IP telephony). *See, e.g., Stevens Report*, 13 FCC Rcd. at 11543-44 ¶¶ 87-89.

per-minute charge is assessed. In order to keep local telephone rates low, access charges have traditionally exceeded the forward-looking economic costs of providing access.[6]

8. Section 251(b)(5) imposes on all LECs a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[7] Under current Commission rules interpreting the reciprocal compensation obligations of *incumbent* LECs, the calling party's LEC must compensate the called party's LEC for the additional costs associated with transporting the call from the carriers' interconnection point to the called party's end office, and for the additional costs of terminating the call to the called party.[8] The Commission's rules further require that the charges for both transport and termination must be set at forward-looking economic costs.[9] The Commission's rules permit a state public utility commission ("PUC") to impose a bill-and-keep arrangement, provided that the traffic exchanged between the interconnecting carriers is relatively balanced and neither party has rebutted the presumption of symmetric rates.[10]

9. Existing access charge rules and the majority of existing reciprocal compensation agreements require the calling party's carrier, whether LEC, IXC or CMRS, to compensate the called party's carrier for terminating the call. Hence, these interconnection regimes may be

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[6] *See* In the Matter of Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776 (1997) ("*Universal Service Order*"). *See also* GERALD W. BROCK, TELECOMMUNICATION POLICY FOR THE INFORMATION AGE: FROM MONOPOLY TO COMPETITION 189-93 (1994); PETER W. HUBER, MICHAEL K. KELLOGG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW 552 (2d ed. 1999). Following the passage of the 1996 Act, the Commission, in addition to implementing the local competition provisions and reforming existing universal service subsidies, also initiated a proceeding to reform access charges. Specifically, in May 1997, the Commission concluded that it would, in the first instance, allow market forces to drive interstate access charges to economic cost. As a back-stop, however, the Commission ordered price cap ILECs to file forward-looking economic cost studies on or before February 8, 2001. *See* In the Matter of Access Charge Reform, *First Report and Order*, 12 FCC Rcd. 15982, 16003 ¶ 48 (1997) ("*Access Charge Reform*"). *See also* In the Matter of Access Charge Reform, CC Docket No. 96-262, *Sixth Report and Order*, 15 FCC Rcd. 12962 (2000) ("*CALLS Order*") (adopting CALLS proposal and allowing price cap ILECs to opt out of CALLS in anticipation of completion of cost study proceeding).

[7] 47 U.S.C. § 251(b)(5). In addition, section 252(d)(2) imposes additional requirements on reciprocal compensation agreements involving an ILEC. 47 U.S.C. § 252(d)(2).

[8] 47 U.S.C. § 252(d)(2)(A). *See also* In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499, 16024-25 ¶¶ 1056-59 (1996) ("*Local Competition Order*"), aff'd in part and vacated in part sub nom. *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and remanded, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In the *Local Competition Order*, the Commission also concluded that "the new transport and termination rules should be applied to LECs and CMRS providers." *Local Competition Order*, 11 FCC Rcd. at 16016-17 ¶ 1043.

[9] 47 C.F.R. § 51.705. *See also Local Competition Order*, 11 FCC Rcd. at 16054-58 ¶¶ 1111-18. Carriers are permitted to receive compensation only for "the traffic-sensitive components of local switching," and not for local loop costs, which are not considered traffic sensitive. *Local Competition Order*, 11 FCC Rcd. at 16024-25 ¶ 1057.

[10] *Local Competition Order*, 11 FCC Rcd. at 16054-58 ¶¶ 1111-18; 47 U.S.C. § 252(d)(2)(B). For purposes of this *NPRM*, we define a bill-and-keep arrangement as an intercarrier compensation mechanism in which there are no termination charges—*i.e.*, a mechanism in which the called party's carrier is not allowed to recover any of the cost of the called party's loop or local switch from an interconnecting carrier. As will become clear below, the treatment of transport costs may vary.

referred to as "*calling-party's-network-pays*" (or "CPNP"). Such CPNP arrangements, where the calling party's network pays to *terminate* a call, are clearly the dominant form of interconnection regulation in the United States and abroad.[11] An alternative to such CPNP arrangements, however, is a "*bill-and-keep*" arrangement. Because there are no termination charges under a bill-and-keep arrangement, each carrier is required to recover the costs of termination (and origination) from its own end-user customers.[12] As previously noted, under the Commission's rules, state PUCs may impose bill-and-keep arrangements on interconnection agreements involving an ILEC, provided that the traffic between the carriers is relatively balanced and neither carrier has rebutted the presumption of symmetrical rates. In addition, bill-and-keep arrangements are found in interconnection agreements between adjacent ILECs.[13] Finally, some Internet backbones have voluntarily negotiated interconnection agreements that resemble bill-and-keep arrangements.[14]

10. Finally, when entities connect to telephone networks as end users rather than as interconnecting networks, they do not pay usage-sensitive access or reciprocal compensation charges. For example, residential customers typically pay flat-rated subscription charges (or occasionally, local measured service rates), while business customers typically pay a flat monthly charge, plus a per-minute or per-call charge for originating calls. ESPs, including ISPs, are charged pursuant to the same rules that apply to local end users and are exempt from access and reciprocal compensation charges, even though the calls they send and receive generally travel outside the local service area.[15] We also note that paging networks, which primarily *receive* traffic, are treated as networks under our existing reciprocal compensation rules.[16] Payphone companies, which primarily *originate* traffic, are treated as end-user customers.[17]

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[11] JEAN-JACQUES LAFFONT & JEAN TIROLE, COMPETITION IN TELECOMMUNICATIONS 4-8 (2000).

[12] As discussed below, there are a number of alternative ways to allocate transport costs under a bill-and-keep arrangement. *See infra* Section III.B.2.

[13] *See* Comments of Time Warner Communications Holdings Inc., CC Docket No. 96-98 at 100 (May 16, 1996); Comments of American Communications Services, Inc., CC Docket No. 96-98 at 23 (May 16, 1996).

[14] *See* Michael Kende, *The Digital Handshake: Connecting Internet Backbones* at 4-8 (Federal Communications Commission, OPP Working Paper No. 32, Sept. 2000).

[15] The Commission has stated that the reciprocal compensation provisions of the 1996 Act, 47 U.S.C. § 251(b)(5), do not apply to ISP-bound traffic, but has allowed the states to require reciprocal compensation under existing interconnection agreements. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd. 3689, 3703-06 ¶¶ 21-27 (1999). The D.C. Circuit reversed and remanded it to the Commission. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In an order released today, the Commission adopts an interim measure that aims to move away from the current reciprocal compensation regime for ISP-bound traffic, over a three-year period. *See ISP Intercarrier Compensation Order, supra* note 3.

[16] *Local Competition Order*, 11 FCC Rcd. at 16043 ¶ 1092.

[17] *Id.* at 15936 ¶ 876.

### 6. Bill and Keep for Traffic Subject to Section 251(b)(5)

69. In light of the current imbalances in traffic exchanged among interconnected networks, and the potential for inefficient incentives under the existing per-minute reciprocal compensation rates, we generally seek comment on the relative benefits of bill and keep for all traffic subject to section 251(b)(5),[88] versus the current per-minute reciprocal compensation rates imposed by most states. We seek comment from state commissions, in particular, regarding the benefits of either approach. We ask that parties discuss the incentives provided by each approach to intercarrier compensation. We also seek comment on the benefits of each approach in promoting competition and negating the effects of market power. We ask that commenters discuss the relative benefits of bill-and-keep and per-minute reciprocal compensation with respect to the pricing signals provided, and the relation between actual costs and prices determined under each approach. We seek comment on how the Commission should weigh the benefits of implementing bill and keep against any disadvantages that commenters may identify. We also seek comment on the disadvantages of applying a bill-and-keep arrangement to any particular type of traffic currently exchanged among interconnected carriers.

70. We seek comment on the best method for allocating transport responsibilities and costs among interconnected carriers under a mandatory bill-and-keep approach to reciprocal compensation. Under our current rules, the originating telecommunications carrier bears the costs of transporting traffic to its point of interconnection with the terminating carrier. If carriers must recover their transport costs from their end users, does this rule still make sense? What incentives does this rule create regarding location and number of points of interconnection (POIs)? Is there a more appropriate way to allocate transport costs?

71. Qwest argues, for example, that a bill-and-keep arrangement does not work when three carriers are involved in the transport and termination of traffic, because the middle carrier that transports the traffic from one LEC to the other does not really have a "customer" involved in the call from which it can recover costs.[89] Qwest therefore argues that the Commission should allow LECs to continue charging each other for delivering transiting traffic that originates on the networks of other carriers.[90] We ask commenters to address this and other issues related to the transport obligations of interconnected LECs under a bill-and-keep regime. CMRS carriers also originate and terminate three-carrier calls, some of which are governed by reciprocal compensation. We seek comment on the issues or problems that the current intercarrier compensation rules present for three-carrier calls. We seek comment on how bill and keep might affect such calls.

72. Under our current rules, interconnecting CLECs are obligated to provide one POI per LATA.[91] Under a bill-and-keep regime, should this rule still apply? How should carriers

[88] *See supra* note 7 and accompanying text.

[89] Qwest *ex parte* in CC Docket No. 99-68, Appendix B, at ii (filed Nov. 22, 2000).

[90] *Id.*

[91] 47 C.F.R. § 51.321; *see also* In the Matter of Application by SBC Communications Inc. *et al.* to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, *Memorandum Opinion and Order*, FCC 00-238 at ¶ 78, n.174 (rel. June 30, 2000).

select points of interconnection? If a CLEC chooses a point of interconnection outside a local calling area, should the LEC be obligated to meet the CLEC there? Or, should the CLEC be required to locate in every local calling area, or pay the ILEC transport and/or access charges if it does not? CMRS carriers may have several switches per MTA, which can comprise several states and multiple LATAs. Should originating carriers be required to deliver calls to all of a CMRS carrier's POIs? Should the Commission promulgate rules governing the technical requirements of interconnection, as it does for interconnection between CPE and the public switched telephone network?[92] We seek comment on how the costs of interconnection should be allocated between carriers in this context. We seek comment on how carriers will allocate the costs of actual interconnection facilities. In addition, we seek comment on how the costs for internal network upgrades necessary for interconnection should be allocated.[93]

73. Section 251(b)(5) provides that each LEC has the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[94] In addition, section 252(d)(2) states that, for the purpose of ILEC compliance with section 251(b)(5), the terms and conditions for reciprocal compensation must: (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the carrier"; and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[95] Section 252(d)(2)(B)(i) further provides that the foregoing language shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep)."[96] The legislative history of the 1996 Act indicates that the term "mutual and reciprocal recovery of costs" includes "a range of compensation schemes, such as in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements)."[97]

74. In the *Local Competition Order*, the Commission rejected claims that the Commission and states lack the authority to mandate bill-and-keep arrangements under any circumstances.[98] It instead found that in some circumstances, bill-and-keep arrangements can be imposed in the context of the arbitration process for termination of traffic.[99] The Commission

[92] *See generally* 47 C.F.R. Part 68.

[93] *See* Atkinson-Barnekov, *supra* note 43, at 13-14 (showing that the incremental cost of interconnection includes internal provisioning necessary to handle traffic exchanged with the interconnecting carrier).

[94] 47 U.S.C. § 251(b)(5).

[95] 47 U.S.C. § 252(d)(2).

[96] 47 U.S.C. § 252(d)(2)(B)(i).

[97] *See* S. Rep. No. 230, 104th Cong., 2nd Sess. 125 (1996), *reprinted in* A&P S. Rep. 104-230, 125 (1996).

[98] *Local Competition Order*, 11 FCC Rcd. at 16054. *See also* BellSouth Local Competition Comments in CC Docket No. 96-98 at 73-75; GTE Local Competition Comments in CC Docket No. 96-98 at 56-59; SBC Local Competition Comments in CC Docket No. 96-98 at 51-53.

[99] *Local Competition Order*, 11 FCC Rcd. at 16054.

of various implementation problems,[175] however, the Commission has never ordered a peak-load pricing rate structure, though it has permitted such rate structures. In implementing the reciprocal compensation provisions of the 1996 Act, for example, the Commission permitted states to adopt alternative rate structures, including: (1) a higher rate for peak periods; (2) a uniform per-minute rate; (3) a capacity-based rate; or (4) a bill-and-keep arrangement, provided that traffic is relatively balanced.[176] States, however, in applying the Commission's rules governing reciprocal compensation, have generally adopted average per-minute rates. Similarly, with respect to interstate access charges, the Commission has permitted ILECs to charge either a uniform per-minute rate to recover the costs of switching, or a two-part tariff consisting of a call setup charge and a per-minute charge.[177] The Commission has also sought comment on whether it should adopt capacity-based charges to recover switching costs.[178]

110. Our recent experience with ISP reciprocal compensation issues suggests certain questions about the use of uniform per-minute charges to recover the traffic-sensitive costs of termination. In particular, it appears that the Commission may have underestimated the inefficiencies associated with the use of uniform per-minute prices. Accordingly, we seek comment first on whether an average per-minute rate structure can efficiently recover the traffic sensitive costs of interconnection, whether for reciprocal compensation or for access charges. If parties believe that such a rate structure is inherently inefficient, then we ask them to propose alternative, more efficient rate structures. We also seek comment on whether the Commission overestimated the practical difficulties associated with peak-load pricing arrangements. In particular, we seek comment on: (1) how to deal with the practical, implementation problems associated with peak-load pricing; and (2) whether a peak-load pricing structure can eliminate the regulatory arbitrage opportunities of the existing interconnection pricing regimes.

111. We also invite comment on whether alternative rate structures would be more efficient, and whether they would eliminate some of the problems we are currently experiencing. For example, we ask parties to comment on the advantages and disadvantages of using a capacity-based rate structure, and a multi-part rate structure that includes both a call set-up charge and a per-minute charge. Finally, we invite parties to propose alternative rate structures that they believe would be more efficient, and to explain the basis for their belief.

### c. Single Point of Interconnection Issues

112. As previously mentioned, an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a

[175] The practical difficulties associated with peak-load pricing schemes include: (1) that peak traffic volumes may occur at different times in different areas (*e.g.*, between a downtown business area and a residential suburb); (2) that peak periods may change over time (*e.g.*, in response to increasing Internet use); and (3) that implementing a peak-load pricing scheme may cause a shift in the peak.

[176] *See* 47 C.F.R. §§ 51.507(c), 51.713; *Local Competition Order*, 11 FCC Rcd. at 15878-79 ¶¶ 755-757, 16028-29 ¶¶ 1063-64.

[177] *See* 47 C.F.R. § 69.106.

[178] *Pricing Flexibility Order and NPRM*, 14 FCC Rcd. at 14328-30 ¶¶ 211-16.

single POI per LATA.[179] Our current reciprocal compensation rules preclude an ILEC from charging carriers for local traffic that originates on the ILEC's network.[180] These rules also require that an ILEC compensate the other carrier for transport[181] and termination[182] for local traffic that originates on the network facilities of such other carrier.[183] Application of these rules has led to questions concerning which carrier should bear the cost of transport to the POI, and under what circumstances an interconnecting carrier should be able to recover from the other carrier the costs of transport from the POI to the switch serving its end user. In particular, carriers have raised the question whether a CLEC, establishing a single POI within a LATA, should pay the ILEC transport costs to compensate the ILEC for the greater transport burden it bears in carrying the traffic outside a particular local calling area to the distant single POI.[184] Some ILECs will interconnect at any POI within a local calling area; however, if a CLEC wishes to interconnect outside the local calling area, some LECs take the position that the CLEC must bear all costs for transport outside the local calling area.[185] CLECs hold the contrary view, that our rules simply require LECs to interconnect at any technically feasible point within a LATA, and that each carrier must bear its own transport costs on its side of the POI.[186]

113. If a carrier establishes a single POI in a LATA, should the ILEC be obligated to interconnect there and thus bear its own transport costs up to the single POI when the single POI is located outside the local calling area? Alternatively, should a carrier be required either to interconnect in every local calling area, or to pay the ILEC transport and/or access charges if the location of the single POI requires the ILEC to transport a call outside the local calling area? Further, if we should determine that a carrier establishing a single POI outside a local calling area must bear some portion of the ILEC's transport costs, do our regulations permit the imposition of access charges for calls that originate and terminate within one local calling area but cross local calling area boundaries due to the placement of the POI?[187]

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[179] *See supra* note 91 and accompanying text.

[180] *See* In the Matter of Joint Application by SBC Communications, Inc. *et al.* for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, *Memorandum Opinion and Order*, FCC 01-29 at ¶ 235 (rel. Jan. 22, 2001) ("*Kansas/Oklahoma 271 Order*") (citing 47 C.F.R. § 51.703(b); In the Matters of TSR Wireless, LLC *et al.* v. U.S. West, 15 FCC Rcd. 11166 (2000), *pet. for review docketed sub nom., Qwest v. FCC*, No. 00-1376 (D.C. Cir. Aug. 17, 2000)).

[181] 47 C.F.R. § 51.701(c).

[182] 47 C.F.R. § 51.701(d).

[183] 47 C.F.R. § 51.701(e).

[184] *See Kansas/Oklahoma 271 Order, supra* note 180, at ¶¶ 232-34.

[185] SBC Reply in CC Docket No. 00-217, at 83-84.

[186] AT&T Comments in CC Docket No. 00-217, Attachment 2, Fettig Declaration, at 26-27.

[187] *See ISP Intercarrier Compensation Order* at ¶¶ 24-30 (discussing relationship between reciprocal compensation and access charges).

114. Finally, we are concerned that the interplay of our single POI rules and reciprocal compensation rules may lead to the deployment of inefficient or duplicative networks. By requiring an ILEC to interconnect with a requesting carrier at any technical feasible point in a LATA of that carrier's choosing, are we compelling inefficient network design by forcing the LEC to provision extra transport? Or, by requiring carriers to pay ILECs for transport outside a local calling area, are we forcing the competitive carrier into an inefficient replication of the ILEC network? Assuming that the ILEC receives reciprocal compensation for transporting terminating traffic, how precisely does a distant POI unfairly burden the LEC? Is the efficiency concern limited to those instances in which traffic between two networks is unbalanced and/or where transport is required beyond a certain distance? We seek comment on these questions, and any other issues related to the interplay between our single POI rules and our reciprocal compensation rules.

### d. Virtual Central Office Codes

115. We seek comment on the use of virtual central office codes (NXXs),[188] and their effect on the reciprocal compensation and transport obligations of interconnected LECs. Commenters in this proceeding have indicated that some LECs are inappropriately using virtual NXXs to collect reciprocal compensation for traffic that the ILEC is then forced to transport outside of the local calling area.[189] We note that the Commission has delegated some of its authority to state public utility commissions in order that they may order the North American Numbering Plan Administrator (NANPA) to reclaim NXX codes that are not used in accordance with the Central Office Code Assignment Guidelines.[190] The Maine Public Utility Commission recently addressed the issue of virtual NXXs when it directed the NANPA to reclaim the NXX codes that Brooks Fiber used to provide "unauthorized interexchange service" as opposed to "facilities-based local exchange service."[191] In light of these developments, we seek comment on the following issues: (1) Under what circumstances should a LEC be entitled to use virtual NXX codes? (2) If LECs are permitted to use virtual NXX codes, what is the transport obligation of the originating LEC? (3) Should the LEC employing the virtual NXX code be required to provide transport from the central offices associated with those NXX codes?

## 2. Can CPNP Regimes Resolve the Existing Interconnection Issues and Will They Be Administratively Feasible?

116. We seek comment on how, if the Commission declines to adopt bill and keep, the existing CPNP regimes could be modified to deal with the issues presented by existing

[188] Virtual NXX codes are central office codes that correspond with a particular geographic area that are assigned to a customer located in a different geographic area.

[189] *See, e.g.,* BellSouth *ex parte* in CC Docket No. 99-68 at 2 (Nov. 7, 2000).

[190] *See* In the Matter of Numbering Resource Optimization, CC Docket No. 99-200, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 7574, 7678-7682 (2000).

[191] Investigation into the Use of Central Office Codes (NXXs) by New England Fiber Communications, LLC d/b/a Brooks Fiber Docket No. 98-758, Order Requiring Reclamation of NXX Codes and Special ISP Rates by ILECs, Order No. 4, at 4 (Maine PUC June 30, 2000).

interconnection regimes, and whether CPNP regimes can be modified so that regulators can administer them easily. We also seek comment on how existing CPNP rules could be modified to address situations of regulatory arbitrage. To the extent that certain regulatory arbitrage opportunities arise from the disparities between existing interconnection regimes, we seek comment on the costs and benefits of moving to a uniform CPNP regime.

117. We also seek comment on how, under a unified CPNP regime, regulators should deal with the terminating access monopoly problem. In this regard, we ask parties to discuss the administrative feasibility of any proposed solution to this problem. For example, is there any way that regulators can avoid having to regulate the access rates of all local carriers? If the rates of all local carriers must be regulated, is there any way to simplify the form of regulation? For example, should we simply prohibit CLECs from charging terminating access charges that exceed those of the ILEC?

118. Parties should also address whether a CPNP regime increases the possibility of predatory price squeezes, particularly against long-distance carriers, and how this problem could be addressed. In this context, and to the extent that parties contend we should drop the presumption of symmetrical reciprocal compensation rates, we seek comment on how we can minimize the administrative burdens of setting multiple interconnection rates.

119. With respect to the problem of inefficient end-user charges, we seek comment on how existing CPNP rules can be modified to reduce this problem. For example, would this problem disappear if we moved to a capacity-based intercarrier compensation scheme? We also invite comment on how we can modify the existing intercarrier compensation scheme to eliminate any regulatory inefficiencies that might cause an entity to claim to be a network rather than a subscriber. Similarly, we seek comment on whether CPNP regimes create an incentive for carriers to discriminate between on-net and off-net calls, and whether this could increase any tendency toward tipping into monopoly.

120. Finally, we ask parties to comment on the administrative costs or regulatory burdens associated with reforming the existing CPNP regimes and making them more uniform. We also ask parties to discuss whether, under a CPNP regime, regulatory intervention can be reduced. For example, can rules be adopted that provide incentives for carriers to reveal their true costs of termination in a regulatory or arbitration process? Alternatively, if we will be unable to eliminate regulatory intervention, can we simplify the regulations?

### D. Other Issues

#### 1. Legal Authority

121. In Section II.B.6 above, we seek comment on whether the Commission has legal authority to establish bill-and-keep arrangements for reciprocal compensation between telecommunications carriers. With respect to any modification to the existing intercarrier compensation rules discussed herein or proposed by any party, we seek comment on whether the Commission has legal authority to adopt such a modification. In particular, with respect to bill-and-keep arrangements, we seek comment on whether the Commission has legal authority to modify our existing interstate access rules to move them into a bill-and-keep regime. Additionally, we seek comment (particularly from state public utility commissions) on whether

**§51.305 Interconnection.**

(a) An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network:

(1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both;

(2) At any technically feasible point within the incumbent LEC's network including, at a minimum:

(i) The line-side of a local switch;

(ii) The trunk-side of a local switch;

(iii) The trunk interconnection points for a tandem switch;

(iv) Central office cross-connect points;

(v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and

(vi) The points of access to unbundled network elements as described in §51.319;

(3) That is at a level of quality that is equal to that which the incumbent LEC provides itself, a subsidiary, an affiliate, or any other party, except as provided in paragraph (4) of this section. At a minimum, this requires an incumbent LEC to design interconnection facilities to meet the same technical criteria and service standards that are used within the incumbent LEC's network. This obligation is not limited to a consideration of service quality as perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier;

(4) That, if so requested by a telecommunications carrier and to the extent technically feasible, is superior in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the incumbent LEC provides interconnection. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier; and

(5) On terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of Sections 251 and 252 of the Act, and the Commission's rules including, but not limited to, offering such terms and conditions equally to all requesting telecommunications carriers, and offering such terms and conditions that are no less favorable than the terms and conditions upon which the incumbent LEC provides such interconnection to itself. This includes, but is not limited to, the time within which the incumbent LEC provides such interconnection.



USLEC 2

(b) A carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to Section 251(c)(2) of the Act.

(c) Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(d) Previous successful interconnection at a particular point in a network at a particular level of quality constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, at that level of quality.

(e) An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.

(f) If technically feasible, an incumbent LEC shall provide two-way trunking upon request.

(g) An incumbent LEC shall provide to a requesting telecommunications carrier technical information about the incumbent LEC's network facilities sufficient to allow the requesting carrier to achieve interconnection consistent with the requirements of this section.

Historical Note

Subsection (g) added by order in Docket Nos. 96-98, 95-185 and 92-237, effective November 15, 1996, 61 FR 47284. For Second Report and Memorandum Opinion see 4 CR 484.

**§51.321 Methods of obtaining interconnection and access to unbundled elements under Section 251 of the Act.**

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:

(1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and

(2) Meet point interconnection arrangements.

(c) A previously successful method of obtaining interconnection or access to unbundled network elements at a particular premises or point on any incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points. A requesting telecommunications carrier seeking a particular collocation arrangement, either physical or virtual, is entitled to a presumption that such arrangement is technically feasible if any LEC has deployed such collocation arrangement in any incumbent LEC premises.

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.

(f) An incumbent LEC shall submit to the state commission, subject to any protective order as the state commission may deem necessary, detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations. These floor plans or diagrams must show what space, if any, the incumbent LEC or any of its affiliates has reserved for future use, and must describe in detail the specific future uses for which the space has been reserved and the length of time for each reservation. An incumbent LEC that contends space for physical collocation is not available in an incumbent

LEC premises must also allow the requesting carrier to tour the entire premises in question, not only the area in which space was denied, without charge, within ten days of the receipt of the incumbent's denial of space. An incumbent LEC must allow a requesting telecommunications carrier reasonable access to its selected collocation space during construction.

(g) An incumbent LEC that is classified as a Class A company under §32.11 of this chapter and that is not a National Exchange Carrier Association interstate tariff participant as provided in part 69, subpart G, shall continue to provide expanded interconnection service pursuant to interstate tariff in accordance with §§64.1401, 64.1402, 69.121 of this chapter, and the Commission's other requirements.

(h) Upon request, an incumbent LEC must submit to the requesting carrier within ten days of the submission of the request a report describing in detail the space that is available for collocation in a particular incumbent LEC premises. This report must specify the amount of collocation space available at each requested premises, the number of collocators, and any modifications in the use of the space since the last report. This report must also include measures that the incumbent LEC is taking to make additional space available for collocation. The incumbent LEC must maintain a publicly available document, posted for viewing on the incumbent LEC's publicly available Internet site, indicating all premises that are full, and must update such a document within ten days of the date at which a premises runs out of physical collocation space.

(i) An incumbent LEC must, upon request, remove obsolete unused equipment from their premises to increase the amount of space available for collocation.

Historical Note

Subsections (c) and (f) amended and (h) and (i) added by order in Docket No. 98-147, effective June 1, 1999 (except subsections (f) and (h) are effective June 1, 1999), 64 FR 23229, 29598, 34137. For First Report see 15 CR 553.

Subsection (f) amended by order in Docket No. 98-147, effective October 10, 2000, 65 FR 54433, 57291. For Order on Reconsideration see 21 CR 1026.

Subsection (h) amended by order (FCC 01-204) in Docket No. 98-147, effective September 19, 2001, 66 FR 43516. For Fourth Report see 24 CR 417.

## Subpart F - Pricing of Elements

**§51.501 Scope.**

(a) The rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation.

(b) As used in this subpart, the term "element" includes network elements, interconnection, and methods of obtaining interconnection and access to unbundled elements.

**§51.503 General pricing standard.**

(a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

(b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§51.507 and 51.509, and shall be established, at the election of the state commission--

(1) Pursuant to the forward-looking economic cost-based pricing methodology set forth in §§51.505 and 51.511; or

(2) Consistent with the proxy ceilings and ranges set forth in §51.513.

(c) The rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, or on the type of services that the requesting carrier purchasing such elements uses them to provide.

**§51.505 *Forward-looking economic cost.***

(a) In general. The forward-looking economic cost of an element equals the sum of:

(1) The total element long-run incremental cost of the element, as described in paragraph (b); and

(2) A reasonable allocation of forward-looking common costs, as described in paragraph (c).

(b) Total element long-run incremental cost. The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.

(1) Efficient network configuration. The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing

location of the incumbent LEC's wire centers.

(2) Forward-looking cost of capital. The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.

(3) Depreciation rates. The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.

(c) Reasonable allocation of forward-looking common costs.

(1) Forward-looking common costs. Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.

(2) Reasonable allocation.

(i) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

(ii) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC's total network, so as to provide all the elements and services offered.

(d) Factors that may not be considered. The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:

(1) Embedded costs. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts;

(2) Retail costs. Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in §51.609;

(3) Opportunity costs. Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carriers that purchase elements; and

(4) Revenues to subsidize other services. Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

(e) Cost study requirements. An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of

providing the element, using a cost study that complies with the methodology set forth in this section and §51.511.

(1) A state commission may set a rate outside the proxy ranges or above the proxy ceilings described in §51.513 only if that commission has given full and fair effect to the economic cost based pricing methodology described in this Section and §51.511 in a state proceeding that meets the requirements of paragraph (e)(2) of this section.

(2) Any state proceeding conducted pursuant to this section shall provide notice and an opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review. The record of any state proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study.

## Subpart H - Reciprocal Compensation for Transport and Termination of Telecommunications Traffic

### §51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.

(b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131, paragraphs 34, 36, 39, 42-43); or

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in §24.202(a) of this chapter.

(c) Transport. For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to Section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) Termination. For purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) Reciprocal compensation. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.

Historical Note
Section amended by order (FCC 01-131) in Docket Nos. 96-98 and 99-68, effective June 14, 2001, 66 FR 26800. For Order on Remand and Report see 23 CR 678.

### §51.703 Reciprocal compensation obligation of LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

**§51.709 Rate structure for transport and termination.**

(a) In state proceedings, a state commission shall establish rates for the transport and termination of telecommunications traffic that are structured consistently with the manner that carriers incur those costs, and consistently with the principles in §§51.507 and 51.509.

(b) The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network. Such proportions may be measured during peak periods.

Historical Note

Subsection (a) amended by order (FCC 01-131) in Docket Nos. 96-98 and 99-68, effective June 14, 2001, 66 FR 26800. For Order on Remand and Report see 23 CR 678.

**§51.809 Availability of provisions of agreements to other telecommunications carriers under Section 252(i) of the Act.**

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to Section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

(b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.

(c) Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under Section 252(f) of the Act.

Virtual NXX Case

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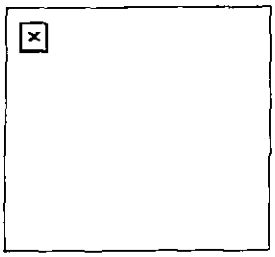
State of Florida

Staff Recommendation

- SINGLE POI
- Transport & POI
- VNXX



# Public Service Commission

**Capital Circle Office Center 2540 Shumard Oak Boulevard**

**Tallahassee, Florida 32399-0850**

## -M-E-M-O-R-A-N-D-U-M-

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**DATE:** November 21, 2001

**TO:** DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

**FROM:** DIVISION OF COMPETITIVE SERVICES (HINTON, BLOOM)

DIVISION OF LEGAL SERVICES (KEATING, BANKS)

**RE:** DOCKET NO. 000075-TP - INVESTIGATION INTO APPROPRIATE METHODS TO COMPENSATE CARRIERS FOR EXCHANGE OF TRAFFIC SUBJECT TO SECTION 251 OF THE TELECOMMUNICATIONS ACT OF 1996.

**AGENDA:** 12/05/01 - SPECIAL AGENDA - POST HEARING DECISION - PARTICIPATION IS *TO COMMISSIONERS AND STAFF*

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\000075.RCM

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**CASE BACKGROUND**

On January 21, 2000, this docket was established to investigate the appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of

Telecommunications Act of 1996 (the Act). On December 20, 2000, Order No. PSC-00-2452-PCO-TP provided, in part, that Issues 1-9 would be addressed in the March 7-8, 2001 hearing (Phase 1) and Issues 10-17 would be addressed in the July 5-6, 2001 hearing (Phase 2). A pre-hearing conference was held on June 13, 2001, in which it was decided that Issue 11 would be removed from consideration at the administrative hearing. Due to the fact that Issue 11 was for informational purposes only, no decision by the Commission would be required. An administrative hearing on the remaining issues delineated for Phase 2 in this docket was held July 5-6, 2001. recommendation addresses the Phase 2 issues.

## DISCUSSION OF ISSUES

ISSUE 10: Pursuant to the Telecommunications Act of 1996 (Act), the FCC's rules and orders, and Florida Statutes, what is the Commission's jurisdiction to specify the rates, terms, and conditions governing compensation for transport and delivery or termination of traffic subject to Section 251 of the Act?

**RECOMMENDATION:** Staff believes that the Commission has jurisdiction to specify rates, terms and conditions governing compensation for transport and delivery or termination of traffic pursuant to Section 251 of the Act, the FCC's rules and orders, and Sections 364.161 and 364.162, Florida Statutes, so long as not inconsistent with the FCC's rules and orders, and the Act. Further, staff believes that Section 120.80(d), Florida Statutes, authorizes the Commission to employ procedures necessary to implement the Act. **(BANKS)**

## POSITION OF PARTIES

BELLSOUTH: The Commission has jurisdiction to set rates, terms and conditions for traffic subject to Section 251(b)(5) of the Act.

VERIZON: This Commission currently has jurisdiction to establish a reciprocal compensation scheme for traffic subject to section 251 of the Act, but the FCC will address this same matter in its unified intercarrier compensation rulemaking. As such, this Commission should defer any ruling until the federal approach has been defined.

SPRINT: The FCC has jurisdiction to establish rules governing the transport and delivery or termination of local traffic, pursuant to the Act. The Commission has jurisdiction to implement the FCC rules for the transport and delivery or termination of local traffic.

JOINT ALEC (Global NAPs, MCI WorldCom, e.spire Communications, US LEC, Time Warner,

that it is serving this area either through its own facilities, or a combination of its own facilities and leased facilities connected to its collocation arrangements in ILEC central offices.

**ISSUE 13**: How should a "local calling area" be defined, for purposes of determining the applicability of reciprocal compensation?

**RECOMMENDATION**: Staff recommends that parties be permitted to negotiate the definition of local calling area for the purposes of reciprocal compensation to be contained in their interconnection agreements. However, if negotiations fail, staff recommends that "local calling area" for the purposes of reciprocal compensation be defined as "all calls that originate and terminate in the same LATA." **(HINTON)**

**POSITION OF PARTIES**

BELLSOUTH: For reciprocal compensation purposes, carriers should be able to define their own local calling areas.

VERIZON: For purposes of applying reciprocal compensation, "local calling area" should be defined through mutual agreement, pursuant to the terms of the parties' interconnection contract. If the parties cannot agree, then the ILEC's tariffed definition should apply.

SPRINT: The ILEC's local calling scope, including mandatory EAS, should define the appropriate local calling scope for reciprocal compensation purposes for wireline carriers. This should not affect the ability of an ALEC to designate its own flat-rated calling scope for its retail services provided to its end user customers.

JOINT ALEC: ALECs should be allowed to establish their own local calling areas may or may not be the same as the ILEC's.

AT&T, TCG, & MEDIAONE: ALECs should be allowed to establish their own local calling areas which may or may not be the same as the ILEC's.

ALLEGIANCE & LEVEL 3: ALECs should be allowed to establish their own local calling areas which may or may not be the same as the ILEC's.

XO: ALECs should be allowed to establish their own local calling areas which may or may not be the same as the ILEC's. Local competition will be enhanced by allowing ALECs that wish to do so to operate without the constraints of traditional ILEC local calling areas or rate centers that can serve to hamper the ability of ALECs offer innovative calling plans and services.

**STAFF ANALYSIS**

The issue before the Commission is to determine how a local calling area should be defined for the purposes of applying reciprocal compensation. Staff notes that the purpose of this issue is not to establish local calling areas for retail purposes, but rather for the application of intercarrier compensation. However, staff acknowledges that the definition of local calling area for the purposes of reciprocal compensation could affect how a particular carrier structures its retail calling offerings.

Verizon witness Beauvais states that Verizon is not attempting to limit how an ALEC defines its local calling scope for retail customers. (TR 337) However, he argues that for intercarrier compensation purposes, an ALEC should not be authorized to circumvent the access charge regime established by the Commission (and the FCC) by establishing a different retail calling area. (TR 337) Witness Beauvais asserts "[o]ne aspect that should be beyond contention is that to be eligible for compensation purposes, the call must be local under the definitions in place; that is, the call must both originate and terminate in the local calling scope agreed to by the parties." (TR 311) Witness Beauvais suggests that the local calling area for the purposes of reciprocal compensation should be established through negotiations between carriers. (TR 338)

Similarly, BellSouth witness Ruscilli states that "local calling area," for the purposes of reciprocal compensation, should be defined as mutually agreed to by the parties and pursuant to the terms and conditions contained in the parties' negotiated agreements. (TR 35) BellSouth witness Taylor explains:

The most appropriate mechanism by which to determine the local interconnection calling area for compensation purposes is the use of negotiations between interconnecting carriers. Interconnecting parties themselves are in the best position to negotiate where and how interconnection should occur between their respective networks and whether local interconnection or access charges should be the basis for inter-carrier compensation. (TR 256)

ALECs have also supported the position that negotiations are the appropriate venue for establishing local calling areas for the purposes of intercarrier compensation. In its brief, Level 3 (jointly with Allegiance Telecom) states that because of the

proliferation of local calling plans offered by carriers, the Commission should permit parties to negotiate the local calling area that will determine which calls qualify for reciprocal compensation in their interconnection agreements. (BR 10) However, Level 3 witness Gates testifies that a call should be deemed local by comparing the NPA/NXX codes of the called and calling parties. He contends that proposal would work for all carriers regardless of their local calling area definition. (TR 757)

AT&T witness Follensbee states that each ALEC should be free to establish its own local calling area, and the Commission should not mandate a single definition for local calling area for determining the applicability of reciprocal compensation. 961) However, Sprint witness Maples disagrees with the above mentioned proposals. states that "this is one of the most contentious areas of the negotiation process. Sprint believes that the industry is best served by the Commission's adoption of a minimum standard for the definition of a 'local calling area.'" (TR 526) Witness Maples suggests that the Commission should base this standard upon the ILEC's local calling scope, including any non-optional or mandatory extended area service (EAS). (TR 526) He states that this is not intended to place any restrictions on an ALEC's ability to define its own retail local calling area. (TR 526) Nor is this an to require ALECs to mirror the ILEC's local calling area. (TR 536) However, witness Maples contends that the existing boundaries used by the industry to determine the applicability of local or toll charges should also be used to determine the applicability of reciprocal compensation. He states that failure to do so would result in situations in which competing carriers could incur different costs for same call. (TR 536-537)

BellSouth witness Ruscilli agrees that the local calling area for reciprocal compensation purposes should be based upon the ILEC local calling area, if negotiations fail. However, he disagrees with Sprint witness Maples on one point, stating that EAS is a substitute for paying toll charges. Witness Ruscilli suggests that the definition of local calling area be based upon the ILEC "basic local calling area," which would not include EAS or LATA-wide retail offerings. (TR 108-109)

Verizon witness Beauvais concurs with Sprint witness Maples, stating that if negotiations fail, the local calling areas contained in the ILEC tariffs should be the basis for reciprocal compensation. (TR 338) Witness Beauvais explains that his recommendation is not based upon a superiority inherent in the ILEC definitions, rather the fact that ILECs are not completely at liberty to adjust their calling areas at will. (TR 338) In its brief, Verizon states that the ILECs' local calling areas were defined over the years by either the Commission or by the ILEC with Commission approval. (BR 9) In addition, witness Beauvais states that the ILEC calling areas are defined for all carriers to examine, which will hopefully help facilitate the negotiation process. (TR 338)

Joint ALEC witness Selwyn disagrees, arguing that ALECs should not be constrained the traditional ILEC local calling areas which would hamper their ability to offer innovative calling plans. (TR 628) He contends:

The significant decrease in the cost of telephone usage, coupled with the elimination of distance as a cost driver, makes the local/toll distinction largely obsolete as a technical matter. It certainly eliminates the traditional cost basis for using "rate centers" as a device for calculating the (no-longer-technically-required) distance attribute. The persistence of rate centers in today's and tomorrow's telecommunications market is thus an *anachronism*, a holdover from the past that is neither required nor appropriate in the modern telecommunications market environment. (emphasis in original)(TR 625)

The Joint ALEC position is that ALECs should be allowed to establish their own calling areas which may or may not be the same as the ILECs. (BR 13) Witness Selwyn states that establishing different local calling areas is one way in which an ALEC can differentiate its product from that of an ILEC. (TR 612) This may even include extended area services such as LATA-wide local dialing. (BR 13) Witness Selwyn argues that ILECs are attempting to preserve their retail pricing regime by reciprocal compensation payments to calling areas as they define them, regardless how the ALECs define local calling areas. In addition, he states that ILECs want to apply access charges to calls terminated by ALECs outside of the ILEC's local calling area. (TR 682) He explains:

So, for example, if an ALEC wanted to offer LATA-wide outward calling type of service, the ILECs seem to agree that the ALEC has the right to do that, but would charge the ALEC an access charge for termination beyond the ILEC's local calling area. That charge would make it an economic impossibility for the ALEC to introduce this type of distance and [sic] sensitive pricing. (TR 682-683)

Witness Selwyn suggests that it would be preferable if ALECs did not have to pay access charges for any intraLATA calls. He states that this is the rule today in York and Massachusetts. (TR 616) Witness Selwyn explains that this arrangement not compel a carrier to make any particular choices with regard to local calling areas, but it would eliminate the economic pressure on ALECs to conform to ILEC local calling areas. (TR 616) He states that conforming to ILEC local calling areas is a rational strategy that some ALECs may pursue, but they simply should not be forced to do so. (TR 616)

AT&T witness Follensbee states that "AT&T and BellSouth have agreed to define local calls as any calls that originate and terminate within the LATA. Thus, the local calling area is LATA-wide." (TR 960) However, he does not suggest that this should necessarily be the same for all ALECs; rather, he states that each ALEC should be free to establish its own local calling area. (TR 961) BellSouth witness Ruscilli acknowledges that BellSouth has some agreements where regardless of the actual calling areas, the parties compensate each other with reciprocal compensation for all calls within a LATA. (TR 211)

However, Verizon argues that if the Commission considers doing away with the local/toll distinction, then it must concurrently consider the effects of

eliminating toll and access subsidy flows to basic local rates. (BR 10) In BellSouth witness Taylor argues that undoing the distinction between toll and local calls will create arbitrage opportunities between reciprocal compensation and carrier access charges. (TR 266)

Analysis

As staff has noted, the purpose of this issue is not to establish a definition of local calling area for retail purposes. However, the crux of this issue appears to be the problems inherent in establishing an intercarrier compensation mechanism to apply to two carriers that have established different local calling areas for purposes. BellSouth suggests that the Commission should allow each party to establish their own local calling area for reciprocal compensation purposes. However, the originating carrier's local calling area should determine whether reciprocal compensation is due for a particular call. (BR 9-10) In other words, if the originating carrier treats a call as local, then it would be treated as local for intercarrier compensation purposes as well. This would seem to be a reasonable approach to this issue. However, staff believes that the proliferation of different local calling plans being offered by carriers today gives rise to disputes, as evidenced by the fact that this particular issue has consistently appeared before the Commission in arbitrations between carriers.

Many parties to this proceeding have argued that the definition of local calling area for the purposes of reciprocal compensation is best left to the parties to negotiate in their interconnection agreements. (BellSouth TR 35; Verizon TR 338; Level 3 and Allegiance BR 10) However, staff believes that parties have shown through repeatedly arbitrating this issue that negotiations have often failed on this point. Hence, this issue is being addressed in a generic docket. Staff agrees with Sprint witness Maples that this is a rather contentious issue, and the Commission should establish a standard for defining local calling areas for the purpose of reciprocal compensation. (TR 526) While staff agrees that negotiations between parties should be the primary means of establishing local calling areas to be contained in individual interconnection agreements, staff believes that the Commission should establish a default definition that will apply when negotiations fail. Otherwise, staff believes the Commission will continue to be presented with this issue in arbitrations.

That being the case, the matter remains of determining what definition of local calling area should be established as a default. ILECs argue that the definition of local calling area for the purposes of reciprocal compensation should be based upon the ILEC local calling areas. (BellSouth TR 108-109; Verizon TR 338; Sprint TR 526) Verizon witness Beauvais contends that Verizon's local calling areas were established by the Commission, or with Commission approval, and should continue to be applied for the purposes of reciprocal compensation. (TR 338) However, as BellSouth witness Ruscilli concedes during cross examination, the ILEC local areas were established prior to the Telecommunications Act of 1996 and were not defined for the purposes of interconnection with competitive carriers. (TR 208-209) Staff agrees with Joint ALEC witness Selwyn that ALECs should not be forced to mirror ILEC local calling areas, for retail or intercarrier compensation purposes. (TR 616) In addition, staff does not believe that establishing a default definition

based upon ILEC local calling areas will inspire ILECs to compromise during negotiations; rather, staff believes this would merely serve to increase the ILECs' negotiating power.

With the proliferation of different calling plans being offered in the market staff believes that a broader definition of local calling area for the purposes of reciprocal compensation should be established, if for no other reason than administrative ease. AT&T witness Follensbee testifies that AT&T and BellSouth have agreed to define local calls as any calls that originate and terminate within the same LATA. In other words, their local calling area for the purposes of reciprocal compensation is LATA-wide. (TR 960) BellSouth witness Ruscilli confirms this, stating that BellSouth has entered into "some agreements where regardless of the actual local calling areas, we compensate each other with reciprocal comp for all calls within a LATA." (TR 211) Staff believes this is a reasonable approach. Ruscilli states that due to the fact that ALECs can adopt these LATA-wide pursuant to Section 252(i) of the Act, BellSouth would not object if the Commission were to determine that local calling should be defined as LATA-wide for reciprocal compensation purposes. (TR 213) Witness Ruscilli also acknowledges that there could be some administrative efficiencies to having one definition of a local calling for purposes of intercarrier compensation. (TR 213)

Staff acknowledges Verizon's concerns regarding doing away with the local/toll distinction, and the access subsidy flows to basic local rates. (BR 10) However, a LATA-wide local calling area for the purposes of reciprocal compensation will not necessarily necessitate changes in how it sets retail rates. If a Verizon customer places what is a long distance call for that customer, Verizon still collects toll charges from that customer. The only difference is that Verizon will pay reciprocal compensation to whatever local carrier terminates that call within the LATA. In addition, staff does not believe this will impact access charges assessed upon an interexchange carrier (IXC) that may transport a call from a Verizon customer to customer of another local carrier. In that situation, the IXC would still pay charges to the originating and terminating carriers for the use of their networks. LATA-wide local calling for reciprocal compensation purposes only applies when a call is originated by one local carrier and handed off directly to another local carrier for termination.

Staff would also note, as is pointed out by Sprint witness Maples (TR 512), that Commission has the authority to determine what geographic areas should be local for the purpose of applying reciprocal compensation. In its *Local Competition Order* (FCC 96-325), at ¶1035, the FCC states:

With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5) consistent with the state commissions' historical practice of defining local areas for wireline LECs. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different.

Conclusion

Staff recommends that parties be permitted to negotiate the definition of local calling area for the purposes of reciprocal compensation to be contained in their interconnection agreements. However, if negotiations fail, staff recommends that "local calling area" for the purposes of reciprocal compensation be defined as "all calls that originate and terminate in the same LATA."

**ISSUE 14:** (a) What are the responsibilities of an originating local carrier to transport its traffic to another local carrier?

(b) For each responsibility identified in part (a), what form of compensation, if any, should apply?

**RECOMMENDATION:** (a) An originating carrier has the responsibility for delivering traffic to the point(s) of interconnection designated by the alternative local exchange company (ALEC) in each LATA for the mutual exchange of traffic. **(BLOOM)**

(b) An originating carrier is precluded by FCC rules from charging a terminating carrier for the cost of transport, or for the facilities used to transport the originating carrier's traffic, from its source to the point(s) of interconnection a LATA. These rules require an originating carrier to compensate the terminating carrier for transport and termination of traffic through intercarrier compensation. **(BLOOM)**

**POSITION OF PARTIES**

*BELLSOUTH:*

The FCC determined that each originating carrier has the right to designate its POI on the ILEC's network. Thus, if an ALEC wants BellSouth to bring BellSouth's originating traffic to a point designated by the ALEC, then that ALEC should pay those additional facilities.

SPRINT:

a) It is the responsibility of the originating carrier to transport its traffic to the Point of Interconnection (POI) where it will be delivered to the terminating carrier. The ALEC has the right to designate the location of this POI for both the receipt and delivery of local traffic with the ILEC at any technically feasible location within the ILEC's network.

b) The appropriate compensation mechanism would assign responsibility between the ILEC and the ALEC based on a combination of minutes of traffic and distance between the local calling area and the point of interconnection, so long as the ALEC determines the point of interconnection and no more than one point of interconnection per local calling area is required.

VERIZON:

The originating carrier's obligations to transport traffic to an interconnecting carrier are to be specified in the carriers' interconnection agreement.

JOINT ALEC:

a) An ILEC must allow a requesting ALEC to interconnect at any technically feasible point, including the option to interconnect at a single point of interconnection point per LATA. Once a point of interconnection is established, each carrier is responsible for delivering originating traffic to the point of interconnection.

b) FCC rules and orders preclude an originating carrier from charging a terminating carrier for the cost of switching and transporting traffic originated on its to the point of interconnection. These rules also require the originating carrier compensate the terminating carrier for transport and termination of such traffic through the payment of intercarrier compensation.

AT&T, TCG, & MEDIAONE:

a) An ILEC must allow a requesting ALEC to interconnect at any technically feasible

point, including the option to interconnect at a single point of interconnection point per LATA. Once a point of interconnection is established, each carrier is responsible for delivering originating traffic to the point of interconnection.

b) FCC rules and orders preclude an originating carrier from charging a terminating carrier for the cost of switching and transporting traffic originated on its to the point of interconnection. These rules also require the originating carrier compensate the terminating carrier for transport and termination of such traffic through the payment of intercarrier compensation.

ALLEGIANCE & LEVEL 3:

An ILEC must allow interconnection for the exchange of traffic at any technically feasible point on its network selected by the ALEC, including at a single POI per LATA. An originating carrier may not charge a terminating carrier for delivering traffic from the originating carrier's end user to the POI.

XO:

a) Section 251(c)(2) of the Act and FCC Rules and Orders obligate each ILEC to interconnection by an ALEC at any technically feasible point on the ILEC's network that is designated by the ALEC for the transmission and routing of telephone exchange service and exchange access. An ILEC must allow a requesting ALEC to interconnect at any technically feasible point, including the option to at a single point of interconnection per LATA. Once a point of interconnection is established, each carrier is responsible for delivering originating traffic to the point of interconnection.

b) FCC Rules and Orders preclude an originating carrier from charging a terminating carrier for the costs of switching and transporting traffic originated on its network to the point of interconnection. This was recently reaffirmed by the FCC in the Notice of Proposed Rulemaking released on April 27, 2001, in CC Docket No. 01-92, in which the FCC stated at Paragraph 112 that: "Our current reciprocal compensation rules preclude an ILEC from charging carriers for local traffic that originates on the ILEC's network." These Rules also require the originating carrier to compensate the terminating carrier for transport and termination of such traffic through the payment of intercarrier compensation.

**STAFF ANALYSIS**

The parties advocate conflicting schemes for designating the point(s) of interconnection (POI) in a LATA and the parties disagree over when - or even if - compensation is appropriate under specific circumstances stemming from the an decision to interconnect at a single POI per LATA. The parties do not dispute their respective obligations to interconnect under the Act, which imposes on all telecommunications carriers a duty to, "interconnect directly or indirectly with facilities and equipment of other telecommunications carriers," under Section 251 (1), and more specific obligations on ILECs in Section 251(c)(2). For the most the parties agree an ALEC has the right to determine a single, technically point of interconnection (POI) in each LATA for the mutual exchange of traffic, although BellSouth witness Ruscilli offers testimony that appears self- (TR 36; TR 87) on this point, which will be discussed later in this recommendation.

The shared position of the ALECs in this proceeding is as follows: An originating party is responsible for the cost of bringing its traffic to the POI, and the originating carrier is responsible for compensating the terminating carrier for its traffic through the payment of intercarrier compensation. (AT&T BR p.3; Joint ALEC BR p. 16-17; Level 3 BR p. 10-11)

The positions of the ILECs differ:

BellSouth argues an ILEC is entitled to compensation when, as the originating carrier, it is required to carry traffic from a local calling area to a distant local calling area where the ALEC-designated POI is located. (BellSouth BR p.10) BellSouth witness Ruscilli offers a specific compensation scheme linked to distance and traffic volumes that he contends provides an equitable balance. (TR 87-88)

The essential elements of witness Ruscilli's proposal are:

- The initial POI in a LATA shall be established by mutual agreement of the parties. If the parties are unable to agree, each originating party may establish a single interconnection point per LATA for delivery of its traffic.
- Additional POIs within a LATA may be established through mutual agreement of the parties.
- An ALEC would not be required to compensate BellSouth for transport costs between local calling areas until the volume of the traffic exceeded 8.9 million minutes (equivalent to a DS-3) of local traffic or ISP-bound traffic per month for three consecutive months during the busy hour.
- BellSouth agrees not to designate a POI at a central office where physical or virtual collocation space or BellSouth fiber connectivity is not available.
- BellSouth agrees not to designate more than one POI per local calling area unless the local calling area exceeds 60 miles in any one direction. (TR 87-102-103)

Sprint's direct and rebuttal testimony on this issue are in conflict. In direct testimony, Sprint witness Hunsucker addressed the issue of an originating carrier's responsibility accordingly:

Sprint maintains that it is the responsibility of the originating carrier to transport its traffic to the point of interconnection (POI) where it will be delivered to the terminating carrier. The ALEC has the right to designate the location of this POI for both the receipt and delivery of local traffic with the ILEC at any technically feasible location within the ILEC's network. Furthermore, is the responsibility of both parties to build facilities to that physical meet point. Specifically, the FCC has stated in Paragraph 553 of the First Report and Order (FCC Order No. 96-325) that ILECs have an obligation for some build-out as a reasonable accommodation for interconnection. (TR 513-514)

On the issue of compensation, witness Hunsucker provided the following direct testimony:

Once the traffic is delivered to the terminating carrier at the POI, the carrier must pay the terminating carrier reciprocal compensation for the transport and termination of their traffic from the POI to the terminating switch. (TR 514)

In rebuttal testimony, however, witness Hunsucker adopts a version of BellSouth's proposal that leaves the selection of interconnection points to the ALEC (TR 531) but adopts BellSouth's proposed compensation scheme:

The ALEC would be financially responsible for the transport costs between the local calling area and the ALEC point of interconnection when the relevant traffic is greater than 8.9 million minutes of use per month and the distance between the calling area and the point of interconnection is greater than 20 miles and not located in the same local calling area. (TR 532)

During cross examination, Sprint witness Maples, who adopted witness Hunsucker's direct and rebuttal testimony, was asked to explain the difference in Sprint's positions: "I think the rebuttal testimony that was filed supports the BellSouth proposal with two modifications which, in effect, I think contradicts this to some degree. I mean, I won't say contradict, but it is in addition to that, modifies position." (TR 540) BellSouth witness Ruscilli testifies he does not agree with the modifications proposed by Sprint witness Hunsucker. (TR 114)

In its brief, Verizon asserts that while it supports neither BellSouth nor Sprint's

position on a compensation scheme, it believes some sharing of transport costs is appropriate, but that any arrangement between parties should be reached through negotiation. (Verizon BR p.15)

While the question of which party has the right to designate the POI in a LATA for the mutual exchange of traffic was not explicitly posed in this proceeding, a of parties chose to address the issue. Staff acknowledges a resolution of which party has the authority to designate POIs is inextricably linked to the resolution of a carrier's interconnection responsibilities and what compensation mechanism, if any, should be imposed by the Commission. Staff's intention, therefore, is to present the arguments on the POI issue, followed by a discussion of the respective carrier's responsibilities, concluding with the proposed compensation schemes.

Point of Interconnection Designation

BellSouth witness Ruscilli presents what appears to be two positions on the POI designation issue. Witness Ruscilli proposes contract language that reads in part:

Pursuant to the provisions of this Attachment, the location of the initial Interconnection Point in a given LATA shall be established by mutual agreement of the parties. If the Parties are unable to agree to a mutual initial Interconnection Point, each Party, as originating Party, may establish a single Interconnection Point in the LATA for the delivery of its originated Local Traffic, ISP-bound Traffic, and intraLATA Toll Traffic to the other Party for call transport and termination by the terminating Party. (TR 87)

During cross examination, however, witness Ruscilli agrees that the Act allows to choose any technically feasible point in a LATA at which to interconnect and the FCC's rationale for giving ALECs this discretion is to minimize the costs of transport and termination. (TR 118) As noted previously, witness Ruscilli said he does not agree with modifications to his proposal advanced by Sprint witness Hunsucker, which would give ALECs the exclusive right to designate POIs in a LATA. (TR 114)

A possible explanation for the apparent dichotomy in witness Ruscilli's position lie in his efforts to distinguish between a POI and an interconnection point in his direct testimony. (TR 38) Witness Ruscilli testifies:

The term "Point of Interconnection" describes the point(s) where BellSouth's and ALEC's networks physically connect. In its First Report and Order, at Paragraph the FCC defined the term "interconnection" by stating that:

We conclude that the term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic.

Therefore, the Point of Interconnection is simply the place, or places, on BellSouth's networks where that physical linking of the ALEC's networks takes (TR 38)

Witness Ruscilli testifies the term "interconnection point" is used by ALECs and BellSouth to define the place where financial responsibility for a call changes one carrier to the other. He concludes, "The 'Point of Interconnection' and the 'interconnection point' can be at the same physical point or they can be at different points." (TR 38) Witness Ruscilli does not provide any references to the Act, or FCC orders or rules, to support this distinction.

Witness Ruscilli's efforts to separate a POI from an interconnection point are apparently not shared by Sprint, which in its brief observes, "BellSouth attempts make a weak argument that there is a difference between a 'point of as provided in the FCC rules and an 'interconnection point' established by the parties for the exchange of their respective traffic. However, there is no support for this position anywhere in the FCC rules or orders..." (Sprint BR p.10)

Verizon witness Beauvais believes "The cleanest method from Verizon's point of view would be to have a POI in each of its local exchange/rate centers," although he recognizes that ALECs would not agree to multiple POIs per LATA. (TR 325) Witness Beauvais testifies that because the circumstances of interconnection vary widely, negotiation should play a role in resolving these issues:

It well may be the case that a single POI is the most efficient way to exchange traffic in many situations. In others it may not be. Thus, the reliance on negotiation between carriers to arrange for a mutually advantageous outcome should be the initial mechanism to establish the points of physical interconnection of the networks. (TR 335)

Level 3 witness Hunt testifies portions of the Act render unacceptable BellSouth's proposal to unilaterally designate POIs or to demand equal authority in the designation of POIs in a LATA:

Congress placed the requirement to provide technically feasible POIs in Section 251 (c)(2), which applies only to incumbent LECs. If Congress wanted to have ALECs bear the same duty in establishing POIs as incumbent LECs bear, it would have specifically stated that outcome, rather than separating out the interconnection obligations to apply only to incumbent LECs under Section 251(c)(2). Although an

ALEC has an obligation under Section 251(a) to interconnect directly or indirectly with an ILEC, the Act places no obligation on an ALEC to provide an ILEC interconnection at any technically feasible point, nor does it give an ILEC any right to select POIs at its whim. (TR 718-719)

Joint ALEC witness Selwyn testifies the nature of interconnection obligations imposed under the Act and by subsequent FCC orders are deliberately asymmetrical 629-630), creating extensive responsibilities for ILECs that do not exist for (TR 631) As an example, witness Selwyn juxtaposes the ILEC obligations under 251(c)(2) of the Act with 47 C.F.R. 51.223(a), which "specifically forbids states from imposing upon ALECs the obligations that Section 251(c) imposes upon ILECs." (TR 632) Further, witness Selwyn believes, the FCC stated in a 1998 amicus curiae brief (Memorandum of the FCC as Amicus Curiae at 20-21, US West Communications Inc. v. AT&T Communications of the Pacific Northwest, Inc., [D.Or.1998] No. CV-1575-JE):

Nothing in the 1996 Act or binding FCC regulations require a new entrant to interconnect at multiple locations within a single LATA. Indeed, such a requirement could be so costly to new entrants that it would thwart the Act's fundamental goal of opening local markets to competition. (Emphasis by the witness, TR 632)

Level 3 witness Gates testifies the FCC has made clear on a number of occasions the designation of interconnection points is a right that is vested exclusively competitive carriers, beginning with FCC 96-325, ¶172, the relevant portion of reads, "The interconnection obligation of Section 251(c)(2), discussed in this section, allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competitive carriers' costs of, among other things, transport and termination of traffic." (TR 770)

Witness Gates asserts FCC 96-325, ¶4, should be read to exclude ILECs from making POI decisions because to do otherwise would thwart one of the goals of competition, which he testifies is to prevent the ability of ILECs to impede competition. (TR 771). The portion of ¶4 quoted by witness Gates reads:

Competition in the local exchange and exchange access markets is desirable, not because of the social and economic benefits competition will bring to consumers of local services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition. Under section 251, incumbent local exchange carriers (LECs), including Bell Operating Companies (BOCs), are mandated take several steps to open their networks to competition, including providing interconnection , offering access to unbundled elements of their networks, and making their retail services available at wholesale rates so that they can be resold. (TR 771)

Witness Gates contends, "If an ILEC were allowed to identify POIs for originating traffic it would be able to disadvantage ALECs by imposing additional and unwarranted costs on new entrants." (TR 772)

Witness Gates also relies on ¶78 of the FCC's decision to grant Southwestern Bell Telephone Company interLATA relief in Texas (FCC Order No. 00-238), which reads "Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that competitive LEC has the option to interconnect at only one technically feasible point in a LATA." (TR 803) Witness Gates concludes from this paragraph that, "The FCC's intent was to give ALECs a clear, low cost path of entry into the local market." (TR 803)

Originating Carrier Obligations

There appears to be agreement among some parties on the responsibilities of an originating carrier to deliver its traffic to an ALEC-designated point of interconnection within a LATA. (AT&T BR p.3; Allegiance/Level 3 BR p.10; Joint ALEC BR p.16; Sprint BR p.9) Verizon, in its brief, appears to suggest that while an has the right to designate a POI for interconnection purposes, how traffic arrives at that POI is conditional, based on compensation mechanisms determined through negotiations between the parties. (Verizon BR 11) BellSouth witness Ruscilli that BellSouth's network is not a single network at all, but a series of disparate networks, each of which requires separate interconnection. (TR 36)

Witness Ruscilli and Level 3 witness Gates disagree on the responsibilities of an originating carrier to deliver traffic to a POI, and both witnesses reference the FCC's decision in the TSR Wireless Order (TSR Wireless, LLC, et al, Complainants, US West Communications, et al, Defendants, Memorandum and Order, June 21, 2000). 78; TR 145-147; TR 773-775; TR 978)

BellSouth witness Ruscilli testifies the TSR Order determined that an ILEC is obligated to deliver its originated traffic to a wireless carrier without charge anywhere within the wireless carrier's major trading area (MTA) as defined by 47 C.F.R. 51.701(b)(2). (TR 78) Witness Ruscilli argues that when FCC Rule 51.701(b) is read in conjunction with FCC Rule 51.703(b), which addresses reciprocal compensation obligations of ILECs, and in conjunction with the TSR Wireless Order, it can be concluded that the ILEC's obligation is to deliver traffic without charge only within the local calling area in which the call originated. (TR 79) Witness Ruscilli contends the TSR Wireless Order has no applicability in this proceeding because BellSouth does not dispute its obligation to deliver its originated traffic without charge in the local calling area from which the traffic originates. (TR 79)

During cross examination, BellSouth witness Ruscilli acknowledged that another interpretation of the TSR Wireless Order is possible. (TR 147) Responding to a

series of questions from counsel for AT&T, witness Ruscilli agreed the focus of the TSR Wireless Order could be read to assert that it is the local calling area by the ALEC that is the basis for determining when compensation is paid, not the local calling area defined by the ILEC. (TR 147)

Level 3 witness Gates testifies the TSR Wireless Order is relevant, contending its meaning is, "Each carrier is responsible, financially and operationally, to deliver traffic to the POI." (TR 773) Witness Gates relies on ¶34 of the TSR Order, part of which reads:

In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and is responsible for paying the cost of delivering the call to the network of the cocarrier, who will then the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. (TR 775)

Witness Gates asserts that if an ALEC is forced to deploy or lease facilities from an ILEC's local calling area to a POI, the ILEC will be "getting a free ride" for its traffic, which is inconsistent with the TSR Wireless Order. (TR 776)

Verizon witness Beauvais does not address the TSR Wireless order in his testimony concerning the obligations of an originating carrier, but appears to agree an originating carrier has the responsibility of bringing traffic to a POI. (TR 334-335) Witness Beauvais advocates negotiation to resolve differences over compensation. (TR 335)

Compensation Responsibilities

The dichotomy between ILEC and ALEC positions on the issue of compensation are clearly articulated: ILECs believe they are entitled to compensation if they are required to transport a call to a POI located outside the local calling area from which the call originated (BellSouth BR pp.16-17; Sprint BR pp.9-10; Verizon BR p.15), and ALECs contend an originating carrier is financially responsible for bringing its local traffic to the POI. (AT&T BR p.26; Allegiance/Level 3 BR p.11; Joint ALEC BR p.17; XO BR p.8)

While the ILEC positions are consistent in seeking compensation for traffic

originating in one local calling area and terminating in another, variations exist among the individual ILECs, and the testimony of BellSouth witness Ruscilli appears to suggest differing compensation rates.

BellSouth witness Ruscilli offers direct testimony suggesting the appropriate rates for transporting traffic between a local calling area and a POI in a distant local calling area are DS1 rates. (TR 48) In rebuttal testimony, however, witness recommends ALECs pay nothing such for transport until traffic reaches the DS3 level (TR 87), at which time ALECs should pay DS3 rates. (TR 215)

Compensation is warranted when BellSouth is required to transport traffic between local calling areas, witness Ruscilli testifies, because local calling rates do not cover these costs. (TR 44-45) Witness Ruscilli testifies such compensation is contemplated in FCC Order 96-325, ¶199, a portion of which he quotes in his direct testimony: "A requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to Section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit. (TR 46-47, emphasis by the witness) The witness quotes further from ¶209 of FCC Order 96-325, which reads:

Section 252(c)(2) lowers barriers to competitive entry for carriers that have not deployed ubiquitous networks by permitting them to select the points in an LEC's network at which they wish to deliver traffic. Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect. (TR 47, emphasis by the witness)

During cross examination, witness Ruscilli acknowledges ¶198 of FCC Order 96-325 explicitly bars consideration of economic, space or site considerations stemming from interconnection decisions, and that the term "technically feasible" refers solely to technical or operational concerns. (TR 131) Also during cross witness Ruscilli agrees that FCC Order No. 01-132, ¶112, precludes an ILEC from charging carriers for local traffic and requires an ILEC to compensate a co-carrier for transport and termination. (TR 153)

Sprint witness Maples concurs with BellSouth witness Ruscilli that when an ILEC is the originating carrier, and the distance from the originating local calling area more than 20 miles from the ALEC POI in a distant local calling area, the ALEC should pay ILECs for transport costs. (TR 538) During cross examination, witness Maples acknowledges that in previous dockets, Sprint has argued that ILECs should bear the transport costs when the ALEC point of interconnection is located in a local calling area distant from the local calling area from which the ILEC traffic originated. (TR 541) While conceding "It can be argued both ways," Sprint witness Maples does not specify at what rate compensation should be paid for purposes of this proceeding. (TR 541)

Verizon witness Beauvais testifies he believes an ILEC should receive compensation when it is required to haul traffic from one local calling area to a POI in a

distant local calling area (TR 323), but argues variables such as distances and traffic volumes should be resolved in negotiations between parties. (TR 313-314). Ultimately, witness Beauvais testifies, "In the simplest arrangement, I would argue for matching the intercompany compensation arrangement to the end user rate structure most prevalent in the local calling area. In the case of Verizon Florida, that suggests a zero marginal price for usage -- the bill-and-keep arrangement that I have already recommended. If that is the case, no explicit nominal compensation need take place for the transport facilities between the carriers on a usage sensitive basis." (TR 314)

Level 3 witness Gates argues ILECs are barred from seeking compensation for delivering their traffic to a POI as a result of the FCC's TSR Wireless Order. (TR 774) Witness Gates makes specific reference to ¶34 of the TSR Wireless Order, part of which reads:

The *Local Competition Order* requires a carrier to pay the cost of facilities used deliver traffic originated by that carrier to the network of the co-carrier, who then terminates that traffic and bills the originating carrier for termination compensation. In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user and is responsible for paying the cost of delivering the call to the network of the co-carrier who will then the call. Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls. This regime represents "rules of the road" under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company. 775; emphasis by the witness)

Witness Gates also cites ¶78 of the FCC's Texas 271 Order (Application by SBC Communications Inc, Pursuant to Section 271 of the Telecommunications Act of 1996 *Provide In-Region, InterLATA Services In Texas, Order No. FCC 00-238), which reads,* "Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA." (TR 803) Witness Gates testifies the combined effect of these statements in separate rulings by the FCC is to prohibit ILECs from charging for delivery of their originated traffic anywhere within a LATA. (TR 805)

AT&T witness Follensbee believes Section 252(d)(2)(A) of the Act assigns and terminating costs to the originating carrier:

[A] a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless...such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that

originate on the network facilities on the other carrier. (TR 962)

Witness Follensbee asserts that in order to meet the FCC's "just and reasonable" test, transport and termination obligations must be comparable, which he contends will not be the case if an ALEC is required to pay a portion of an ILEC's originating costs. (TR 963) Witness Follensbee also establishes that in Order No. 01-29, ¶232, the FCC made clear that allowing ALECs to establish a single POI per LATA is a condition for receiving interLATA relief, as was the case with *Southwestern Bell's application in Kansas and Oklahoma*. (TR 979)

BellSouth witness Ruscilli appears not to agree that the cost of ILEC facilities used to deliver traffic to an ALEC between local calling areas are recovered by rates charged to ILEC customers. (TR 44-45) Witness Ruscilli does not quantify the extent to which local exchange rates fall short of handling local calls and the following reason for why cost data is not part of this proceeding:

I don't think cost data is necessary nor could it be effectively or efficiently produced. The cost itself is simply the costs that were filed in the UNE cost which has been approved by this Commission for dedicated interoffice transport. To do a function of the cost itself would be dependent on CLECs providing us data on how much traffic they intend to put in various local calling areas and what will be necessary to resize the trunk groups, and that has not occurred. (TR 138)

BellSouth witness Taylor supports witness Ruscilli's assertion that compensation should be paid when a call leaves the local calling area from which it originates. (TR 266) Witness Taylor asserts that when a BellSouth customer makes a call that does not leave a local calling area, the cost is recovered by BellSouth. (TR 267) instances where the BellSouth customer's call leaves the local calling area from which it originates and goes to an ALEC POI in a distant local calling area, in the local exchange rate regime covers BellSouth's cost. (TR 267)

Joint ALEC witness Selwyn does not agree that ILEC transport costs for traffic within a LATA are unrecovered. (TR 668) Witness Selwyn acknowledges that while most interconnection agreements between ALECs and ILECs do not include distance-rate elements, he asserts that distance-sensitive costs of interoffice and interexchange transport are small and could be covered by non-distance-sensitive compensation. (TR 668) To arrive at his conclusion, witness Selwyn uses the DS3 of $4.17 per mile supplied by BellSouth in Docket No. 990649-TP as the basis for calculations; he then assumes a DS3 circuit has a capacity of 672 DS0 voice-grade equivalents with each carrying about 12,000 minutes per month. (TR 670) This means fully loaded DS3 can carry about 8 million minutes of traffic per month, according to witness Selwyn. (TR 670) [BellSouth witness Ruscilli testifies 8.9 million minutes of traffic per month is "typically equivalent" to a DS3 level. (TR 88)] his figures, witness Selwyn calculates, "At $4.17 per mile, that works out to $0.000000517 per mile per minute (that's about 5 one-hundred-thousandths of a penny per mile per minute)." Using BellSouth witness Ruscilli's example of a call transported 60 miles to a POI, witness Selwyn testifies, this would create a cost

the ILEC of $0.000031. (TR 670)

Witness Selwyn concludes, "I do not believe there is any basis on the record in proceeding by which the Commission can affirmatively determine that this almost immeasurably small $0.000031 'additional' transport cost is not in fact already fully embraced within the existing tandem reciprocal compensation rate." (TR 67-

Verizon witness Beauvais concurs with witness Selwyn that transport costs on a per-minute basis have dropped because, "capacity has grown so large and a lot of the transport costs are, in fact, driven by the electronics on the end. However, I it is also true that an additional mile of transport facilities costs - five miles costs more than four miles." (TR 371)

Neither BellSouth witness Ruscilli nor Sprint witness Maples address witness Selwyn's cost related assertions. In its brief, however, BellSouth contends, "If amount to be assessed in additional transport costs are 'immeasurably small,' then requiring the ALECs to reimburse BellSouth for this cost should not be a burden on the ALECs." (BellSouth BR p.13)

Analysis

Point of Interconnection Designation

The ILECs present three separate views on how POIs should be designated, only one which staff believes can be substantiated by the record of the proceeding.

BellSouth witness Ruscilli proposes shared decision making between an ILEC and an ALEC in determining where in a LATA parties will interconnect. (TR 87) If agreement is not possible, witness Ruscilli advocates the parties should be free to choose separate POIs. (TR 87) Further, witness Ruscilli argues, a difference exists POIs and interconnection points, with the former existing for the physical joining of networks and the latter for determining compensation. (TR 38) In its brief, Sprint describes witness Ruscilli's attempt to distinguish between a POI and an interconnection point as "a weak argument" that lacks support from FCC rules or orders. While staff would have chosen a different adjective to describe witness Ruscilli's efforts to separate a POI from an interconnection point, staff agrees argument suffers from a lack of corroborative citations. Similarly, witness offers nothing to support his position that an ILEC has a right to designate POIs a LATA for the purpose of interconnection. Lacking a foundation in the Act, FCC orders, rules or decisions, staff cannot recommend the Commission adopt witness

Ruscilli's proposals.

BellSouth's brief is confusing to staff on this issue. In its brief, filed August 10, 2001, BellSouth states, "As noted, two FCC rules bear on this position. The first is 47 C.F.R. §51.702(b)..." (BellSouth BR p.14) Staff notes that there is no §51.702(b) in the FCC rules. Based on the language of the rule cited in BellSouth's brief, staff believes the reference is to Rule 51.703(b), which the brief quotes as follows, "a LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on a LEC's network." (BellSouth BR p.14) Staff is puzzled as to why BellSouth failed to note in its brief changes to C.F.R. 51.703(b), which Commission staff counsel raised during cross examination of BellSouth witness Ruscilli during the hearing July 5. (TR 218) The effect of the FCC's change is to eliminate the word "local" when it appears in the phrase "local telecommunications traffic." (TR 218) During the July 5, 2001, hearing, BellSouth witness Ruscilli said he had no opinion on the FCC changes and had not read them prior to the hearing. (TR 218)

Verizon witness Beauvais asserts that the designation of POIs between an ALEC and ILEC in an interconnection agreement should be determined through negotiations. (TR 335) Staff agrees with witness Beauvais that negotiation is preferable to confrontation in a regulatory climate. However, this issue exists in the context of a generic proceeding because the Commission has been asked repeatedly to reconcile the interconnection differences between parties during a series of recent arbitrations (Docket Nos. 000649, WorldCom/BellSouth; 000731 AT&T/BellSouth; 000907 Level 3/BellSouth; 000828 Sprint/BellSouth). Additionally, as is the case with witness Ruscilli's argument, witness Beauvais offers no provision of the Act or any FCC order or rule that gives an ILEC the authority to designate a POI in a LATA.

In its brief, Sprint states "The ALEC has the right to designate the location of POI for both the receipt and delivery of local traffic with the ILEC at any technically feasible location within the ILEC's network." (Sprint BR p.9) Sprint maintains its position is consistent with FCC Order No. 96-325, ¶553, which witness Hunsucker testifies, creates an obligation for some build-out as a reasonable accommodation for interconnection. (TR 513-514)

Joint ALEC witness Selwyn contends the Act is deliberately asymmetrical on the of interconnection, creating obligations for ILECs that do not exist for ALECs in order to spur competition. (TR 629-630) Further, witness Selwyn argues, FCC rules prohibit the imposition of interconnection obligations by state commissions on ALECs, and the FCC has made clear that nothing in the Act can be construed to require a new entrant to interconnect at multiple locations in a LATA. (TR 632)

Level 3 witness Gates cites FCC Order No. 96-325, ¶172, to support his testimony that ALECs can select technically feasible POIs to lower their transport and termination costs (TR 770), and the FCC's Order No. 00-238, ¶78, that affirms an ALEC need only designate one POI per LATA. (TR 803)

AT&T witness Follensbee contends the FCC Order granting Southwestern Bell interLATA authority in Kansas and Oklahoma makes clear that the ILEC must abide by single, technically feasible, interconnection points, chosen by the ALEC.

Originating Carrier Obligations

There appears to be little dispute among the parties that the Act imposes on all carriers the obligation of interconnecting to facilitate the flow of telecommunications traffic. It also appears that the parties do not dispute the obligation of an originating carrier to deliver its traffic to the network of a terminating co-carrier. The disputes emerge when the dialogue turns to where the exchange of traffic will take place, which is addressed in the POI designation section of this recommendation, the distance the traffic will have to travel, which is addressed in Issue 13 of this recommendation, and what compensation -- if any -- applies, which is dealt with later in this recommendation.

Compensation Responsibilities

Staff observes that the disputes among the parties on the issue of compensation in this docket parallel issues on which the FCC is seeking comment on the development of a unified intercarrier compensation regime (Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132). Specifically, ¶113 of the Notice reads as follows:

If a carrier establishes a single POI in a LATA, should the ILEC be obligated to interconnect there and thus bear its own transport costs up to the single POI when the single POI is located outside the local calling area? Alternatively, should a carrier be required either to interconnect in every local calling area, or to pay the ILEC transport and/or access charges if the location of the single POI requires the ILEC to transport a call outside the local calling area? Further, if we should determine that a carrier establishing a single POI outside a local calling area bear some portion of the ILEC's transport costs, do our regulations permit the imposition of access charges for calls that originate and terminate within one calling area but cross local calling area boundaries due to the placement of the POI?

While the ultimate outcome of the FCC's proceedings may result in a seismic restructuring of intercarrier compensation rules, staff believes such a conclusion may not be reached for a number of years.

Staff is persuaded by the record that an originating local exchange carrier is

financially responsible for bringing its traffic to the POI in a LATA. AT&T witness Follensbee points out that Section 252(d)(2)(A) establishes a "just and reasonable" standard for compensation that requires "mutual and reciprocal recovery" by each carrier for costs associated with transport and termination. (TR 962) Staff cannot reconcile the compensation proposals advocated by BellSouth witness Ruscilli (TR 88), Sprint witness Maples (TR 532) and Verizon witness Beauvais (TR 312-313) with the Act's requirement for "mutual and reciprocal recovery." If the ILEC proposals are adopted, a terminating carrier would be responsible for paying a portion of the transport costs of an originating carrier's traffic. Staff believes such a system would provide for asymmetrical recovery and, in addition, would appear to be contrary to 47 C.F.R. 51.703(b), which prohibits a LEC from assessing charges on other carrier for traffic originating on the LEC's network. Witness Ruscilli contends FCC Order No. 96-325, ¶199, which discusses technically feasible but expensive interconnections, justifies the compensation scheme he proposes. (TR 46-47) He acknowledges, however, that the same FCC order limits consideration of technical feasibility to operational or technical concerns and excludes the use of economic factors. (TR 131) Neither witness Beauvais nor witness Maples provide any additional cites to support their positions.

Witness Ruscilli also alludes to the portion of FCC Order No. 96-325, ¶209, that reads, "Moreover, because competing carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to
47) From this language, witness Ruscilli concludes the FCC expects an ALEC to pay the additional costs it causes ILECs to incur. (TR 47)

ALEC witness Selwyn contends the additional costs referred to by witness Ruscilli are "immeasurably small" and may be covered by the tandem reciprocal compensation rate. (TR 670-671)

Portions of the TSR Wireless Order cited by Level 3 witness Gates appear to substantiate AT&T witness Follensbee's position: The order places the financial burden of the cost of the facilities used to deliver traffic to a co-carrier on the originating carrier. (TR 775)

BellSouth witness Ruscilli's efforts to refute the application of the TSR Wireless Order in this proceeding appear to be contingent on his belief that the order must be read in context with 47 C.F.R. 51.701(b)(2) and 51.703(b). (TR 79) Witness Ruscilli testifies the effect of this interpretation is to require an ILEC to deliver its originated traffic without charge to the network of a co-carrier only the POI is within the local calling area in which the call originates. As noted in the analysis of POI issues earlier in this recommendation, the definition in Rule 51.703(b) on which witness Ruscilli relies in his testimony and on which BellSouth relies in its brief was changed by the FCC in Order No. 01-131. Asked during the hearing if he had an opinion on what the FCC intended by these changes, witness Ruscilli responded, "No I don't. This is the first time I have looked at this." (TR 218) As staff noted earlier in the analysis section, BellSouth's brief does not reflect the FCC's change. (BellSouth BR p.14)

Conclusion

Point of Interconnection Designation

Neither BellSouth witness Ruscilli nor Verizon witness Beauvais provide any basis which staff could author a recommendation supporting the right of an ILEC to have authority in designating POIs. Staff specifically rejects BellSouth witness Ruscilli's argument that a point of interconnection and an interconnection point separate entities because the distinction lacks any discernable authority. Conversely, Sprint witness Hunsucker and ALEC witnesses Selwyn, Gates and Follensbee, offer specific citations to the Act, FCC orders and rules in support of their position. Staff finds persuasive the extensive authority cited by Sprint witness Hunsucker and the ALEC witnesses, and therefore, staff recommends that have the exclusive right to unilaterally designate single POIs for the mutual exchange of telecommunications traffic at any technically feasible location on an incumbent's network within a LATA. Nothing in this recommendation should be construed as an infringement on an ALEC's ability to negotiate this prerogative in exchange for other considerations.

Originating Carrier Obligations

The parties do not dispute their respective obligations under Section 251(a)(1) or Section 251(c)(2)(A) of the Act. Therefore, staff recommends that an originating carrier has the responsibility for delivering its traffic to the point(s) of interconnection designated by the alternative local exchange company (ALEC) in each LATA for the mutual exchange of traffic.

Compensation Responsibilities

Staff finds nothing in the record to support the imposition by this Commission of the intercarrier compensation scheme advocated by the ILEC witnesses. Staff the concerns expressed by the ALEC witnesses are valid and that the mandated of originating carrier transport costs proposed by the ILEC witnesses potentially conflicts with the requirements of Section 252(d)(2)(A) of the Act. Additionally, ALEC witnesses cite recent interpretations of the FCC's rules at paragraph 34 of TSR Wireless Order, and in FCC Order No. 01-132, ¶112, that appear to prohibit an originating carrier from imposing any originating costs on a co-carrier.

The undisputed testimony in the record is that the transport costs identified as

being at issue in this proceeding are *de minimus*. Whether or not these costs are covered by an ILEC's local calling rates or tandem switching rates paid by ALECs is debatable, but not reconcilable by the record evidence.

Based on the foregoing, staff believes an originating carrier is precluded by FCC rules from charging a terminating carrier for the cost of transport, or for the facilities used to transport the originating carrier's traffic, from its source to the point(s) of interconnection in a LATA. These rules require an originating carrier to compensate the terminating carrier for transport and termination of traffic through intercarrier compensation.

While this recommendation is intended to stand alone, staff notes that if the Commission adopts staff's recommendation for LATA-wide calling as a default compensation mechanism for purposes of intercarrier compensation, the ILEC position on this issue would be moot.

**ISSUE 15**: (a) Under what conditions, if any, may carriers assign telephone numbers to end users physically located outside the rate center in which the telephone number is homed?

(b) Should the intercarrier compensation mechanism for calls to these telephone numbers be based upon the physical location of the customer, the rate center to which the telephone number is homed, or some other criterion?

**RECOMMENDATION**: (a) Staff recommends that carriers be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is homed, within the same LATA. **(HINTON)**

(b) Staff recommends that intercarrier compensation for calls to these numbers be based upon the end points of the particular calls. However, staff does not that the Commission mandate a particular intercarrier compensation mechanism for virtual NXX/FX traffic. Since non-ISP virtual NXX/FX traffic volume may be relatively small, and the costs of modifying the switching and billing systems may be great, staff believes it is best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual interconnection agreements. While not recommending a particular compensation mechanism, staff does recommend that virtual NXX traffic and FX be treated the same for intercarrier compensation purposes. **(HINTON)**

**POSITION OF PARTIES**

BELLSOUTH:

Carriers should assign NPA/NXXs outside the rate centers to which they are homed only if the carrier can identify the physical endpoint of the call so that the appropriate compensation can be determined by the other carriers involved in the completion of the call.

VERIZON:

Carriers should not be permitted to assign telephone numbers to end users outside the rate center to which the numbers are homed. Intercarrier compensation should continue to depend upon the physical location of the customer. Otherwise, it will impossible to maintain the distinction between local and toll calls.

SPRINT:

(a) Carriers should be permitted to assign NPA/NXX codes to end users outside the rate center in which the NPA/NXX is homed.

(b) It should be the responsibility of the originating carrier to deliver its traffic to the rate center in which the NPA/NXX is homed.

JOINT ALEC:

(a) Carriers should be allowed to assign telephone numbers to end users physically located outside the rate center in which the telephone [number] is homed anytime carrier deems appropriate.

(b) Reciprocal compensation obligations should apply without regard to whether the physical location of the called customer is located within the originating rate center of the ILEC. The appropriate method to determine whether such traffic is local is to compare the calling and called parties NPA/NXXs.

AT&T, TCG, & MEDIAONE:

(a) Carriers should be allowed to assign telephone numbers to end users physically located outside the rate center in which the telephone [number] is homed anytime carrier deems appropriate.

(b) *Reciprocal compensation obligations should apply without regard to whether the* physical location of the called customer is located within the originating rate center of the ILEC. The appropriate method to determine whether such traffic is local is to compare the calling and called parties NPA/NXXs.

ALLEGIANCE & LEVEL 3:

(a) If an ALEC establishes a POI within the LATA, it may offer service in any rate center in the LATA, assign telephone numbers to end users physically located the rate center to which the number is homed, and terminate calls dialed to that rate center at any location.

(b) *Reciprocal compensation obligations should apply without regard to whether the* physical location of the called customer is within the originating rate center of the ILEC. The appropriate method to determine whether such traffic is local is to compare the calling and called party's NPA/NXXs.

XO:

(a) Carriers should be allowed to assign telephone numbers to end users physically located outside the rate center in which the telephone is homed anytime the carrier deems appropriate. Both ILECs and ALECs should be allowed to define both their outward and inward local calling areas. ALECs should be allowed to offer customers competitive alternatives to the local calling areas that are embodied in the ILEC's services. The costs that the ILEC incurs in transporting originating traffic to an ALEC are entirely unaffected by the location at which the ALEC delivers the calls the ALEC's end user customer. As long as the ALEC establishes a point of interconnection within the LATA, it should be allowed to offer service in any rate center in the LATA and terminate calls dialed to that rate center at any location wishes.

(b) *Reciprocal compensation obligations should apply without regard to whether the* physical location of the called customer is located within the originating rate center of the ILEC. The appropriate method to determine whether such traffic is local is to compare the calling and called party's NPA/NXXs.

**STAFF ANALYSIS**

In this issue the Commission is presented with two matters for determination. the Commission is to determine under what conditions carriers may assign telephone numbers to end users physically located outside the rate center in which the telephone number is homed. Second, the Commission is to determine whether intercarrier compensation for calls to these numbers should be based upon the physical location of the calling and called parties or upon a comparison of the NPA/NXXs assigned to them. Staff notes that due to the FCC's recent *ISP Remand Order*, which removes ISP-bound traffic from state jurisdiction, this issue is limited to intercarrier compensation arrangements for traffic that is delivered to non-ISP customers. (Level 3 BR 27) Sprint witness Maples explains that when you ISP-bound traffic out of the equation, any real voice FX traffic is going to be minor. (TR 571) Nevertheless, no party to this proceeding has suggested that a Commission decision on this issue is no longer needed. Staff merely notes that the volume of traffic that will be subject to the Commission's decision on this issue has potentially decreased considerably since this docket was originally opened.

This issue centers around the ALECs' use of so-called "virtual NXXs." A virtual NXX is the practice of assigning NPA/NXXs to end users physically located outside of rate center to which the NPA/NXX is homed. This is done in order to give virtual customers a local dialing presence in rate centers other than the rate center in which they are physically located. In other words, end users located in a rate center can dial a NPA/NXX that is local to them, but it in fact connects them to a virtual NXX customer physically located outside of the rate center traditionally associated with that NPA/NXX.

Verizon witness Haynes argues that carriers should not be permitted to assign NPA/NXXs to end users located outside of the rate center to which the NPA/NXX is homed unless foreign exchange service is ordered. (TR 420) He explains that a customer's telephone number (NPA/NXX) serves two separate but related functions: proper call routing and rating. Telephone numbers serve to provide the network with specific information necessary to route calls correctly from the caller to the intended destination, as well as identifying the exchanges of the originating and the called party to provide for proper rating of calls. (TR 385-386) Witness Haynes states that assigning virtual NXXs does not affect the routing of calls. (TR 388) However, he contends that the proper rating of calls is at the heart of the virtual NXX issue.(TR 386)

Witness Haynes states that "a major public policy goal that has guided regulators and the telecommunications industry for many decades has been the widespread availability of affordable telephone service." (TR 386) He explains that to achieve this objective certain pricing conventions or principles were adopted. The primary principle is that basic exchange access rates typically provide unlimited calls within a confined geographic area at modest or no additional charge. He states that this "confined geographic area consists of the customer's 'home' exchange area and additional surrounding exchanges, together designated as the customer's 'local calling area.'" (TR 386-387) Witness Haynes states that calls outside of this local calling area are subject to an additional "toll" charge. He explains that toll service is generally priced higher on a usage-sensitive basis. In order to ensure

that basic local phone service is universally available and affordable, local exchange companies are permitted to use revenues gained from toll service to hold down the price of basic local service. (TR 387)

Witness Haynes states that a second pricing principle is that the calling party to complete a call, with no charge levied on the called party. (TR 387) However, he explains that there are a few exceptions to this principle, such as where a called party agrees to pay toll charges in lieu of those charges being assessed upon the calling party (e.g., 1-800 calling, collect calling, and third party billing). Another suggested exception is where both the calling and called parties share the cost of the call, as with Foreign Exchange (FX) service. (TR 387)

Witness Haynes describes Verizon's FX service as a "toll substitute service." (TR 398) He explains that FX is a private line service designed so that a calling party may place what appears to be a local call, to a FX customer located outside the caller's local calling area. He states that if this was truly a local call, the called party would not be subject to a charge for the call. However, the FX (the called party) agrees to pay the additional charges which the calling party would otherwise have to pay to transport the call beyond the caller's local calling area, to the exchange where the FX customer is physically located. (TR 398) Witness Haynes explains that FX service provides a customer with the appearance of a presence in another local calling area. He states that the FX customer achieves by "subscribing to basic exchange service from the 'foreign' switch and having its calls from that local calling area transported over a private line, *which it also pays for, from the distant local calling area to its own premises.*" (emphasis in original) (TR 398) Witness Haynes explains that en route, the call is transported through the end office to which the FX customer is connected, without being switched, to the FX customer's local loop. (TR 398)

With regards to the proper rating of calls, witness Haynes explains:

the local exchange carrier tariff billing systems use the NXX codes of the calling and called parties to determine the originating and terminating rate centers and exchange areas of the call. This information, in turn, is used to properly rate and subsequently bill the call. If the rate center or exchange area of the called party as determined by the called numbers NXX code is included in the originating subscriber's local calling area, then the call is rated as a local call.

If the rate center exchange area of the called party, again determined by the NXX code of the called number, is outside of the local calling area then the call is determined to be toll. Thus the rate centers of calling and called parties as expressed in the unique NXX codes assigned to each rate center are absolutely essential for LECs to properly rate calls as either local or toll. (TR 421-422)

He argues that "the ALEC's virtual NXX codes scheme completely undermines the of a call as local or toll, thereby denying Verizon compensation for the transport costs it incurs to deliver the calls to the [ALECs]." (TR 422)

Witness Haynes defines a virtual NXX as an entire exchange code, consisting of 10,000 NPA/NXXs, obtained by a carrier and assigned to a rate center in which that carrier has no facilities or customers. The carrier then uses this exchange code to serve customers that are physically located in exchanges other than that to which the code is assigned. (TR 392) He states that in essence, virtual NXXs sever the connection between exchange areas and their corresponding exchange codes preventing ILECs from collecting for toll calls and inhibiting their ability to maintain affordable basic local service. (TR 393-394) In addition, witness Haynes contends that ALECs use virtual NXXs to make the call appear to be local to both caller and the caller's carrier, and thereby claim reciprocal compensation for the call. (TR 392)

Witness Haynes asserts that the term "virtual NXX" was coined a few years ago by ALECs to describe the arrangement they devised to provide their customers ISPs) with a one-way/inward 800-type service. However, he argues:

Had the [ALECs] legitimately provided their ISP customers with a one-way/inward toll-free number service, the customer with the toll-free 800, 877 or 888 number (i.e., the ISP) would pay to receive all incoming calls, the terminating carrier (the [ALEC]) would pay the originating carriers (e.g., Verizon, independent telephone companies) carrier access charges, and the callers would reach the ISP free of charge. However, under the virtual NXX scheme employed by some, [ALECs] receive an 800-like arrangement, with Verizon bearing the costs to transport their traffic without compensation. (TR 394)

BellSouth witness Ruscilli also draws a comparison between virtual NXX service and 1-800 toll-free service. He states that virtual NXX and 800 service are similar toll-free services in which an interexchange toll call is made by a consumer who does not pay toll charges. He explains that the subscriber receiving the call pays to haul the call outside of the local calling area in which the call originates. 90)

Verizon witness Haynes raises an additional issue regarding the use of a virtual as he has defined it: number conservation. He argues that an ALEC's request of numbers for rate centers in which they have no customers appears to be a waste of numbering resources. (TR 410) Witness Haynes cites a June 2000 decision by the Public Utilities Commission (PUC) in support of this position. He explains that an ALEC in Maine had requested 54 NXX codes for use outside the rate center in which their switch resided. These codes were used to provide interexchange service from across Maine to a single exchange within the state. He states that the Maine PUC ordered the return of these 54 codes since they were not used to serve local customers. He explains that over 500,000 numbers had been "stranded" with little chance of being utilized since the ALEC was only providing service in one rate center. (TR 410; EXH 16) In its brief, Verizon states that even if virtual NXX call rating problems could be allayed, the number conservation issues will remain. (BR 24)

Level 3 witness Gates disagrees that the use of virtual NXXs has a negative impact on numbering resources. He argues that if virtual NXX calls do impact the availability of numbers, then the ILEC's FX service, extended reach, Cyber DS-1, other systems have impacted the number resources of Florida for decades. (TR 833) Witness Gates also contends that ALECs don't always have to obtain NPA/NXX codes in blocks of 10,000 as stated by Verizon witness Haynes. Witness Gates states that in jeopardy situations, companies can obtain codes broken down into 1,000, 500, even 100 number blocks. (TR 865) He argues that there is no proof that virtual NXXs have impacted the numbering resources of Florida, and it would be wrong to limit the availability of service based on a fact that is not in evidence. (TR 889)

Level 3 witness Gates also disagrees with ILEC contentions that virtual NXX calls are similar to 1-800 service. He explains that 8XX NPAs are not associated with a particular geographic area. In other words, callers from many geographic areas can place a toll-free call by dialing the same 8XX, while toll-free virtual NXX calls can only be placed from the rate center in which the customer's NPA/NXX is homed. (TR 782) In addition, he states that a 1-800 call has always been a toll call, as portrayed by the dialing pattern of 1-8XX-NXX-XXXX. He explains that when the call is dialed, the local switch recognizes the call as toll by the 1+ toll indicator, and routes the call to the access tandem for additional routing instructions. (TR 782) In contrast, virtual NXX calls are routed by the local switch like any other local call. (TR 783)

Witness Gates contends that the ALEC's virtual NXX service is a competitive to the FX service that ILECs have provided for decades. (TR 843) However, witness Gates states that because ALEC and ILEC networks are so different, virtual NXX is provided a little different than FX service. He explains that ILEC networks, such BellSouth's or Verizon's, have central offices in every exchange. When they provide FX service, they provide a private line from the foreign exchange (in which the NPA/NXX is homed) to the home exchange in which the FX customer is physically located. The ILEC then charges the FX customer for that private line. However, do not have central offices in every exchange. Witness Gates states that it is physically impossible for ALECS to offer a private line between exchanges. Therefore, ALECs provide this service via number assignment, hence the virtual NXX. (TR 843) Witness Gates asserts that "[t]he use of virtual NXX codes is not unlawful or in any other way improper." (TR 781) He states:

Customers want to use these so-called virtual NXX codes because it allows them to take advantage of state-of-the-art, currently available technologies that allow consumers to reach their businesses without the disincentive of a toll call. It allows businesses and organizations to provide service in other areas before they actually have facilities or offices in those areas. Absent such calling plans, consumers would have to wait for carriers to build out their networks - which could take years and millions of dollars. (TR 779)

Witness Gates contends that carriers use virtual NXXs because they allow them to respond to customer demand for new and innovative services, and a prohibition from using virtual NXXs would constitute an artificial impediment to the natural

progression of competitive markets. He states that this will deny Florida residents the benefits associated with competitive development. (TR 780) Witness Gates describes what he contends are three negative impacts of prohibiting the use of virtual NXXs. First, he states that "ILECs would be able to evade the intercarrier compensation arrangements they have negotiated with ALECs." (TR 784) He explains that classifying virtual NXX calls as toll would make it nearly impossible and much more economically burdensome for ALECs to utilize virtual NXXs in the provision of service to customers. (TR 785) Second, witness Gates states that restrictions on use of virtual NXXs would have a negative impact on the competitive deployment and use of affordable dial-up internet services in Florida. (TR 784-785) Finally, he argues that restrictions placed on virtual NXXs, and not on the ILEC's FX service, would give ILECs a competitive advantage over ALECs. (TR 785)

On the other hand, witness Gates suggests several benefits of permitting the use of virtual NXXs. He asserts that these benefits include: (1) providing ALEC customers with a local presence in additional local calling areas; (2) allowing short-term business expansion while carriers build-out their facilities over time; (3) ISPs to provide cost-effective dial-up internet access throughout the state without the need for offices in every local calling area; (4) allowing consumers in lightly populated areas with low-cost dial-up access to the internet; (5) treating virtual NXX calls consistently with the way ILEC FX and other services are treated; and (6) providing a competitive alternative to ILEC FX service. (TR 793-794) In the end, witness Gates contends that this issue is really about a competitive loss for He argues:

Total market dominance is a valuable asset, although it is not necessarily in the public interest. It would make sense for an ILEC to protect and preserve its monopoly by proposing language that would make it uneconomic for Level 3 to chip away at its monopoly market share. (TR 790)

Joint ALEC witness Selwyn agrees that virtual NXX is a competitive response to the ILECs' FX service. He explains that the idea of terminating a call in a rate center that is different than that to which the customer's NPA/NXX is homed was not invented by ALECs. (TR 662) He argues that "ILECs have been offering foreign exchange ("FX") service for decades, and FX service accomplishes essentially the same result, although it is provisioned in a different way." (TR 662) Witness explains that a caller in exchange B dials the FX number as a local call to B, but the call is actually delivered to the FX customer physically located in exchange A. He states that this is "pretty much what happens under the 'virtual approach that is used by some ALECs." (TR 662)

Witness Selwyn suggests that ILECs also enable a customer to have a local presence in a different exchange to which they are physically located through remote call forwarding (RCF). (TR 663) He explains that instead of utilizing a leased channel between exchange A and exchange B, as is done in FX service, with RCF calls placed to the exchange B NPA/NXX are forwarded by the central office switch in exchange B to the customer's phone number in exchange A. He states that the call still appears to be local to the calling party located in exchange B, while the RCF customer located in exchange A pays the toll charge for the call. (TR 663) Witness Selwyn contends that with both the FX and RCF services, "the exchange A customer's inward

local calling area has been expanded to include exchange B." (emphasis in original) (TR 663)

Witness Selwyn contends that since ALECs do not have switching facilities in every ILEC local calling area, ALECs need to develop alternative means for providing the equivalent functionality to their customers. He states:

And that alternative to the ILECs' creation of a virtual presence for their FX customers in the "foreign exchange" is for the ALECs to use NXX codes rated in exchanges other than the one at which the incoming call will ultimately be - which is exactly the same as what happens in the case of an ILEC FX or RCF call. (TR 665)

Witness Selwyn argues that prohibiting the use of virtual NXXs would penalize the ALECs for their lack of ubiquity while at the same time permitting ILECs to providing their customers with a "virtual presence" in an existing ILEC NXX code. states that this amounts to protecting ILECs from ALEC incursion into the FX/RCF market. (TR 667) Witness Selwyn argues that carriers should be allowed to define both their outward and inward local calling areas. More specifically, he states "ALECs should be allowed to offer customers competitive alternatives to the local calling areas that are embodied in the ILEC's services." (TR 637)

Verizon witness Haynes agrees that ALECs should be permitted to determine their own outward-dialing calling scopes. He states that a company's ability to offer different calling scopes is an important way to differentiate its services in the market. (TR 406) However, he argues that this "does not mean that an ALEC can arbitrarily expand the local dialing scope of an ILEC customer, as they propose to do here with a service that resembles 1-800 inward dialing, at least without appropriate compensation to the ILEC handling the call." (TR 406-407)

BellSouth witness Ruscilli agrees. He states that an ALEC is free to design local calling area it wants for its own customers; however, it is not free to determine the local calling area for BellSouth customers. (TR 55) He argues:

What the ALEC is doing is offering a service that allows customers of other LECs (i.e., BellSouth) to place toll-free calls to selected customers of the ALEC who physically located in a different local calling area...the ALEC is attempting to redefine BellSouth's local calling area, but only in those instances in which a BellSouth end user places a call to the ALEC's selected end users. (emphasis in original) (TR 54-55)

Witness Ruscilli states that BellSouth is not asking the Commission to limit an

ALEC's ability to assign NPA/NXXs in whatever manner it sees fit. However, requests that the Commission find that a call terminated to a virtual NXX customer physically located outside the local calling area of the rate center to which the NPA/NXX is homed, is not a local call. (TR 67)

Witness Ruscilli states that "BellSouth's position is that regardless of the an ALEC assigns to its end users, BellSouth should only pay reciprocal compensation on calls that originate and terminate within the same local calling area." (TR 50) He argues that carriers should utilize NPA/NXXs in such a way that other carriers are able to distinguish local traffic from toll traffic. (TR 50) He states:

BellSouth is asking that ALECs separately identify any number assigned to an ALEC end user whose physical location is outside the local calling area associated with the NPA/NXX assigned to that end user, so that BellSouth will know whether to treat the call as local or long distance. Providing that an ALEC will separately identify such traffic, for purposes of billing and intercarrier compensation, BellSouth not object to an ALEC assigning numbers out of an NPA/NXX to end users located outside the local calling area with which that NPA/NXX is associated. (TR 50)

Witness Ruscilli argues that without this information, ILECs have no way of knowing which calls are local and which calls are toll. (TR 50)

Witness Ruscilli explains that local traffic, for which reciprocal compensation is due, is traffic that originates and terminates in the same local calling area. On the other hand, intraLATA toll traffic, for which access charges apply, is traffic that originates in one local calling area and terminates in another local calling area. (TR 50) He states that ALECs are free to assign NPA/NXXs to end users physically located outside of the local calling area of the rate center to which NPA/NXX is homed, but calls originated by BellSouth end users to those numbers are not local calls. Consequently, calls to these virtual NXXs are not local traffic reciprocal compensation does not apply. (TR 50-51)

Witness Ruscilli provides an example of what occurs when an ALEC disassociates the physical location of a customer with a particular phone number from the rate center where that NPA/NXX code is homed. In his example, an ALEC takes a NPA/NXX that is homed in Jacksonville and assigns it to an end user physically located in Lake He explains that if a BellSouth end user in Jacksonville dials this NPA/NXX, BellSouth would bill its Jacksonville customer for a local call. BellSouth would hand off the call to the ALEC, and the ALEC would then carry the call from that point to its end user in Lake City. Witness Ruscilli contends that "[t]he end of that call are in Jacksonville and Lake City, and therefore, the call is a long distance call." (TR 52) Witness Ruscilli also provides a more extreme example in which the ALEC could assign that Jacksonville NPA/NXX to an end user in New York. states that in the same way, this call from Jacksonville to New York would be to BellSouth's customer as a local call even though it is clearly a long distance call. In addition, witness Ruscilli argues that BellSouth would be billed compensation for these calls, which are clearly long distance calls and not subject

to reciprocal compensation. (TR 53)

Witness Ruscilli contends that the FCC has made it clear that traffic jurisdiction is determined based upon the originating and terminating end points of a call. (TR 53) He states the Feature Group A (FGA) access service is one example of this. He explains that with FGA, a customer would dial a 7 (or 10) digit number and receive dial tone from a distant office. The customer would then dial a long distance number. Witness Ruscilli contends that even though the customer dials a number that appears local, no one disputes that this FGA traffic is switched access with to jurisdiction and compensation between the involved companies. (TR 53)

Witness Ruscilli also suggests that BellSouth's FX service is another example of jurisdiction based upon end points of the call. He explains:

FX service is exchange service furnished to a subscriber from an exchange other the one from which the subscriber would normally be served. Here again, it appears to the originating customer that a local call is being made when, in fact, the terminating location is outside the local calling area (i.e., long distance). Further, because the call to the FX number appears local and the calling and called NPA/NXXs are assigned to the same rate center, the originating end user is not billed for a toll call. Despite the fact that the calls appear to be local to the originating caller, FX service is clearly a long distance service. The reason the originating end user is not billed for a toll call is that the receiving end user has already paid for the charges from the real NPA/NXX office to the FX office. There are charges for this function and they are being paid by the customer that is benefitting from the FX service. (TR 54)

Witness Ruscilli states that prior to February 23, 2001, BellSouth billed compensation for calls from ALEC end users to BellSouth's FX customers, except for ISPs. (TR 57) However, he states that BellSouth has implemented a process to ensure that reciprocal compensation is not charged for any calls to its FX customers. (TR 58) He explains that BellSouth built a database of all existing FX numbers, to newly assigned FX numbers are added as they are assigned. He states that this database is used to prevent billing reciprocal compensation for calls to BellSouth FX customers. (Tr 58-59)

Witness Ruscilli states that BellSouth requests the Commission find that calls placed to NPA/NXXs assigned to customers physically located outside of the local calling area to which the NPA/NXX is assigned are not local calls, based upon the end points of these calls. In addition, witness Ruscilli contends that the Commission should find that ALECs must identify calls to these numbers as long distance, and pay BellSouth for the originating switched access service that BellSouth provides on those calls. (TR 67) He argues that a call to a virtual NXX not local, so it is not subject to reciprocal compensation; instead, BellSouth is entitled to access charges because it is providing the ability for ALECs to have customers in BellSouth's local calling area make long distance calls on ALEC networks. (TR 170-171) Witness Ruscilli explains:

When a BellSouth end user calls a person located outside of that end user's basic local calling area, BellSouth receives compensation in addition to the basic local rates it charges to its customers. When BellSouth carries an intraLATA toll call, for instance, BellSouth collects toll charges from its customer who placed the When a BellSouth customer places an interLATA call, BellSouth collects originating access from the IXC. When BellSouth carries an intraLATA call from a BellSouth end user to a BellSouth FX customer, BellSouth receives compensation for the FX service (including the toll component of that service) from its FX customer. Similarly, BellSouth carries calls to a BellSouth customer with an 800 number, BellSouth receives compensation for the 800 service (including the toll component of that service) from its 800 service customer. (TR 56-57)

He contends that in each of these cases BellSouth receives compensation for calls placed to points outside of the local calling area from some source other than the local rates charged to its customers making the call. (TR 57)

Verizon witness Haynes agrees that ILECs are not compensated for virtual NXX calls. He argues that the use of virtual NXXs by ALECs makes an inward toll call appear local, thereby denying Verizon the opportunity to collect just compensation for the transport it provides to ALECs on that call. (TR 389) Witness Haynes contends that virtual NXX calls are terminated by the ALEC to end users located outside of the local calling area of the originating customer, in which case toll charges would normally apply. He asserts that ALECs then claim that these calls are local, and bill Verizon for reciprocal compensation for the calls. (TR 390) Witness Haynes contends that Verizon incurs the transport costs related to these calls, yet is denied an opportunity to recover its costs from either its originating subscriber the ALEC, due to misapplication of proper NXX codes. (TR 390)

Verizon witness Haynes also argues that reciprocal compensation is not appropriate for virtual NXX calls. He states that under the Act, reciprocal compensation is only for local calls. He states that "reciprocal compensation was predicated on reciprocity - the assumption that carriers would be exchanging local traffic." (TR 395) He argues that since virtual NXX calls are not local, but rather toll calls, reciprocal compensation does not apply. (TR 422-423)

Witness Haynes agrees with BellSouth witness Ruscilli that end points determine jurisdiction, stating that "the determining factor for rating a call as local in instances is the location of the calling and called parties within the same local calling area." (TR 395) He argues that if the ALEC's virtual NXX customer is outside of the local calling area of the Verizon caller, the call is not local regardless of whether the ALEC has assigned a number that appears to be within the Verizon customer's local calling area. (TR 392)

Sprint witness Maples supports an ALEC's right to assign NPA/NXXs to end users outside the rate center in which the NPA/NXX is homed. (TR 515) However, he agrees

that the end points of a call determine its jurisdiction. He states that the jurisdiction of voice traffic for purposes of establishing intercarrier obligations should be based on the definition of local calling areas and the physical end points of the call. (TR 538) Witness Maples suggests that the physical end points of a call in relation to the definition of local calling area has historically driven intercarrier compensation. (TR 573)

Level 3 witness Gates disagrees. He argues that "[h]istorically, the telecommunications industry has compared NXX codes to determine the appropriate treatment of calls as local or toll." (TR 759) He states that calls are conventionally rated and routed throughout the industry based upon the NXX codes of the originating and terminating numbers. (TR 818-819) Witness Gates argues that under the proposals of BellSouth and Verizon, virtual NXX calls would still be as local for retail purposes since no ILEC has proposed to assess toll charges on its own customers, even though they claim these calls are toll for intercarrier compensation purposes. (TR 819)

In addition, witness Gates states that virtual NXX calls are routed to the point of interconnection (POI) and handed off to the ALEC just as any other local call. (TR 819) Witness Gates explains that there is no additional cost to an ILEC when it originates a call to an ALEC's virtual NXX customer, because the ILEC carries the call the same distance to the POI and incurs the same facilities cost regardless of the physical location of the virtual NXX customer. (TR 786) He states that "the ILEC's obligations and costs are the same in delivering a call originated by one of its customers, regardless of whether the call terminates at a so-called 'virtual' 'physical' NXX behind the ALEC switch." (TR 786) He argues that there is "no economic, engineering, factual or policy basis for making intercarrier compensation depend on the actual location of the terminating carrier's customer." (TR 758)

Witness Gates also asserts that since the physical location of the customer is irrelevant to the costs incurred by the ILEC in delivering a virtual NXX call, it would not be justified in assessing originating access charges for these calls. (TR 795-796) He explains:

The so-called virtual NXX calls are locally-dialed calls. They are treated as local at retail by the ILECs. They are routed as local over interconnection facilities, specifically the local interconnection trunks. The ILEC has no more responsibility for originating these calls than it does for any other local call, yet the ILECs want to deny the ALECs reciprocal compensation for these calls, and to add insult injury, want to charge the ALECs originating access charges, as well. (TR 832)

. . .

Access charges have not and should not apply to locally-dialed calls as they have nothing to do with the costs associated with routing locally-dialed calls. These

virtual NXX calls are local, they do not increase the incumbents' costs one iota, and they provide a valuable service to consumers. Incumbents should pay reciprocal compensation on all locally dialed calls. (TR 833)

Joint ALEC witness Selwyn agrees, stating that an ILEC's costs are not affected by the physical location of the ALEC's customer to whom it delivers a call. (TR 637) argues that the ILEC only transports a virtual NXX call to the POI, and "the location where the ALEC ultimately delivers the call has no effect whatsoever upon the ILEC's work or its costs." (TR 643) Witness Selwyn contends that the only cost an ILEC will possibly incur as a result of virtual NXX is a competitive loss. He explains that when a customer dials a number that is rated to one exchange but delivered to another, under the ILEC's tariff a toll charge may apply. However, an ALEC may, in an effort to differentiate its service, offer features that are not offered by the ILEC, such as treating these calls as local and thus not imposing a specific charge for the call. (TR 646) He states:

If, as a result of the ALEC's offering, some of the ILEC's customers are persuaded to switch over to the ALEC's service, the ILEC will sustain a loss of both local toll revenue. *Such a loss of business is a direct and inescapable outcome of competition;* the ILEC can either respond by reducing or eliminating its own (toll) charge for these calls (thereby sustaining some revenue loss), or risk losing customers to the less expensive ALEC service (thereby also sustaining some revenue loss). The issue here is entirely one of *pricing and competitive response*, not one of policy. (emphasis in original)(TR 646-647)

Verizon witness Haynes challenges these conclusions, arguing that ILECs "would lose revenue not through legitimate competition, but because an ALEC inappropriately assigned numbers to customers located in rate centers outside of the local calling area." (TR 413) BellSouth witness Ruscilli agrees, stating that when an ALEC a Jacksonville NPA/NXX to a Lake City end user, no local competition is created in Jacksonville. He argues that BellSouth customers dialing virtual NXX numbers remain BellSouth's local customers. Witness Ruscilli contends that "[t]here is nothing the ALEC is providing in this case that even resembles local service." (TR 65-66)

BellSouth witness Taylor asserts that treating virtual NXX calls as local instead toll "would represent a regulatory anomaly or loophole, not a competitive 263) He explains that when the ILEC responds to customer demand for toll-free calling, it offers FX service that allows customers to dial a local number while FX customer pays for the cost of the service. Since the call is a toll call, no reciprocal compensation is paid when an ALEC end user calls the FX customer. He argues that in contrast, virtual NXX service is free to both the calling and called parties. In addition, ALECs want to charge reciprocal compensation for these calls. (TR 263-264) Witness Taylor states:

While both the ILEC and the ALEC are free to offer FX-like services under any pricing structure they want, it is important that both ALEC and ILEC services be subject to the same regulatory treatment. Since the call originates and terminates

in different local calling areas, it is not a local call and neither ALEC nor ILEC should pay reciprocal compensation when its subscriber dials such a number. (TR

Level 3 witness Gates argues that denying reciprocal compensation for virtual NXX traffic, and imposing access charges, would make it uneconomical for ALECs to provide this service. (TR 829) However, Verizon witness Haynes contends that the Commission should require ALECs to recover their costs from their own virtual NXX customers, rather than ILECs. He states that "[t]his would be consistent with the way Verizon recovers its costs for its own FX service - from its FX customer, the *called* party." (TR 402) BellSouth witness Ruscilli agrees, stating that ALECs are free to charge its virtual NXX customers for the service provided to them, similar to how BellSouth charges its FX customers. (TR 91)

Verizon witness Haynes also disagrees with the ALEC position that it is industry practice to determine jurisdiction of calls based upon the NXX of the calling and called parties. He argues that national numbering policy requires that numbers be provided to carriers with the understanding that they will be used to serve customers physically located within the rate center for which they are being requested. He contends that virtual NXX service violates these guidelines because the ALEC is not providing local service within the exchanges to which the NPA/NXXs are homed. (TR 410)

Witness Gates argues that locally dialed calls are treated as local regardless of the location of the terminating customer because that is the way the network works. He argues that ALEC and ILEC switches are set up to treat locally dialed calls as local traffic. (TR 853) Level 3 argues in its brief that treating virtual NXX calls as toll calls would impose costs on all LECS by requiring billing system changes. (BR 30) Witness Gates suggests that "we keep the status quo," and not require changes be made to the switches and switching architecture that has been deployed throughout the United States. (TR 854)

Sprint witness Maples suggests a similar conclusion. He proposes that an industry task force be established to examine the ramifications of this before a decision is made. (TR 575) He explains that when you take ISP-bound traffic out of the virtual NXX issue, what is left is a relatively small amount of traffic. If the Commission were to decide that access charges are due for virtual NXX/FX traffic, then modifications would have to be made to the billing systems in order to accommodate that. (TR 574) Witness Maples questions whether the industry would want to incur this cost for a relatively small amount of voice virtual NXX/FX traffic. (TR 574-575) He suggests that more evidence should be gathered before a ruling be made that would require these modifications. For example, if the non-ISP traffic is small and the necessary modifications to the billing system are large, the industry may want to just pay reciprocal compensation for this traffic as a compromise. On the other hand, if the volume of non-ISP traffic is large, then perhaps reciprocal compensation should not be paid. (TR 575) Nevertheless, witness Maples agrees that jurisdiction is determined by the end points of a call, and access charges would apply to long distance traffic. (TR 575)

Parties to this proceeding have cited several decisions by other state commissions in support of their respective positions regarding virtual NXXs. In its brief, 3 cites decisions in North Carolina, Kentucky, and Michigan. (BR 32-34) In the Carolina decision, the North Carolina Utilities Commission (NCUC) ruled that calls to MCIm's virtual NXX customers should be treated as local, and reciprocal compensation should be paid. The NCUC stated that determining whether a call was local or not based upon the NPA/NXX dialed was reasonable and appropriate. (BR 32) In the Kentucky decision cited by Level 3, the Kentucky Public Service Commission (KPSC) found that virtual NXXs should be treated the same as FX service. In addition, the KPSC stated that both FX and virtual NXX service should be treated as local traffic when delivered within the same LATA. (BR 33) Finally, in a Michigan Public Service Commission (MPSC) decision, the MPSC decided not to reclassify FX service as exchange access traffic exempt from reciprocal compensation. (BR 33) In second Michigan decision cited by Level 3, the MPSC found that virtual NXX arrangements do not impact an ILEC's financial or operational responsibilities, stating that the ILEC's costs are "the same as when the call is undisputedly local." (BR 33-34)

In their joint brief, the ALECs cite an additional decision by the California Utilities Commission. (BR 25-26) In that decision, the CPUC stated that the rating of a call should be determined based upon the designated NXX prefix. The CPUC found that abandoning the linkage between the NXX prefix and its associated rate center would undermine the ability of customers to know whether they are making a local or toll call, as well as the service expectations of the called party (ISPs). (BR 25)

BellSouth witness Ruscilli cites several state commission decisions as well. (TR 65) Witness Ruscilli states that the Public Service Commission of South Carolina (SCPSC) reached a decision on this issue in the recent BellSouth/Adelphia arbitration case on January 16, 2001 (Docket No. 2000-516-C, Order No. 2001-045). explains that the SCPSC adopted BellSouth's proposed language that specifies that virtual NXX traffic that originates in one local calling area and terminates in another local calling area is not local traffic. In addition, the SCPSC ruled that reciprocal compensation was not due for this traffic, and that BellSouth was entitled to collect access charges from Adelphia when BellSouth originates virtual NXX traffic. (TR 59) Witness Ruscilli also refers to a February 6, 2001, decision the Tennessee Regulatory Authority (TRA), in which the TRA ruled that "the calls to an NPA/NXX in the local calling area outside the rate center where the NPA/NXX is homed should be treated as intrastate interexchange toll traffic for purposes of intercarrier compensation and are subject to access charges." (TR 61)

Witness Ruscilli also cites a July 5, 2000, decision by the Georgia Commission in BellSouth's arbitration with Intermedia (Docket No. 11644-U). In this decision the Georgia Commission ordered that Intermedia be permitted to assign NPA/NXXs in accordance with its local calling areas, provided that it furnish the necessary information for other carriers to properly route and rate calls to those numbers as either toll or local. (TR 61) This is similar to a decision that was reached by the Florida Commission (FPSC) in the BellSouth/Intermedia arbitration (Docket No. 991854-TP, Order No. PSC-00-1519-FOF-TP dated August 22, 2000). In that decision FPSC decided that Intermedia would not be permitted to assign NPA/NXXs outside the areas to which they are traditionally assigned until such time as it could provide information necessary for the proper routing and rating of calls. (TR 60) Witness Ruscilli states that since this decision, BellSouth has identified a means to

the rating issue identified by the FPSC. He explains that BellSouth proposes not to charge its customers for long distance calls, even though a long distance call has been made to a virtual NXX. He contends that this is similar to how BellSouth rates calls by its customers to 800 numbers. Witness Ruscilli states that similar to 800 service, the ALEC is incurring the long distance costs, and if it chooses to do so it may recover these costs from the end user that subscribes to the ALEC service. However, he emphasizes that, like 800 service, virtual NXX is a long distance service. (TR 60-61)

In addition, witness Ruscilli refers to decisions made outside of BellSouth's in Maine, Texas, and Illinois. He asserts that these states found that the virtual NXX call scenario is not local service. He also states that Texas and Illinois further found that reciprocal compensation should not apply in virtual NXX situations. (TR 62) Witness Ruscilli explains that in the Illinois Commerce Commission (ICC) decision in Docket 00-0332, dated August 30, 2000, the ICC stated that since FX/virtual NXX traffic does not originate and terminate in the same rate center, as a matter of law it cannot be subject to reciprocal compensation. 63-64) The Public Utilities Commission of Texas reached a similar conclusion in its decision in Docket No. 21982, dated July 13, 2000. (TR 64)

Analysis

In keeping with the issues as presented for determination, the first question to consider is under what circumstances a carrier may be permitted to assign NPA/NXXs to end users physically located outside the rate center in which the NPA/NXX is homed. Verizon witness Haynes contends that ALECs should not be permitted to assign numbers in such fashion unless FX service is ordered. (TR 420) One of witness Haynes' arguments in support of a prohibition on the use of virtual NXXs is number conservation. He contends that the practice of obtaining entire NXX codes for exchanges in which an ALEC has no customers appears to be a sheer waste of resources. (TR 410) As an example, witness Haynes cites a decision in which the Maine Commission ordered the recall of 54 codes from which only a limited number of NPA/NXXs were assigned to customers through virtual NXX. (TR 410)

While staff shares the concern that entire NXX codes could be obtained for the purpose of actually utilizing only a small percentage of the numbers, there is no evidence in the record that this has taken place in Florida. Staff agrees with 3 witness Gates that a decision to prohibit the practice of virtual NXXs should not be based upon evidence not in the record. (TR 889) However, if at some time in the future facts are presented that prove this practice is in fact adversely affecting number conservation in Florida, staff believes that the Commission should exercise its authority to reclaim NXX codes that have not been utilized to serve customers, or have only been utilized to serve a select few customers while leaving the remaining numbers from that code to lie dormant. Staff agrees that in those situations, this practice would be a waste of numbering resources.

Level 3 witness Gates argues that ALEC virtual NXX service is a competitive

to ILEC FX service. (TR 843) He states that it is provisioned differently because the networks of ALECs and ILECs are designed differently. He explains that ILECs provision FX service through private lines, made possible by the presence of end offices in every exchange. Since ALECs do not have end offices in every exchange, witness Gates contends that the only way ALECs can offer this service is through number assignment. (TR 843) Joint ALEC witness Selwyn concurs, stating that the practice of terminating a call in an exchange that is different than the exchange which the NPA/NXX is assigned is nothing new. He contends that ILECs have been providing this service for decades through their FX service. (TR 662)

Staff agrees. Staff believes that virtual NXX is a competitive response to FX service, which has been offered in the market by ILECs for years. Differing network architectures necessitate differing methods of providing this service; staff believes that virtual NXX and FX service are similar "toll substitute services." (TR 398) Therefore, staff believes carriers should be permitted to NPA/NXXs in a manner that enables them to provision these competitive services. However, staff believes the practice of assigning NPA/NXXs to customers outside of the rate centers to which they are homed raises additional issues that must be addressed.

Several arguments have been made by parties regarding the virtual NXX issue, and staff has considered them all in framing its recommendation. However, staff the primary point of controversy is determining the proper jurisdiction of virtual NXX/FX traffic for the purposes of intercarrier compensation. BellSouth witness Ruscilli states that BellSouth is not asking that the Commission limit an ALEC's ability to assign NPA/NXXs in whatever manner it sees fit, but that the Commission should find that calls terminated to NPA/NXXs assigned to customers located outside of the rate center to which the NPA/NXX is homed are not local calls. (TR 67) This argument appears to be the crux of Verizon's contention that virtual NXX should not be permitted. As Verizon witness Haynes suggests, this is a rating issue. (TR 386) He argues that virtual NXX service undermines the rating of a call as local or (TR 422)

Fundamentally staff believes this issue should not hinge upon how carriers provision/route virtual NXX/FX traffic, or upon the retail services purchased by users. Instead, staff believes the resolution of this issue should be based on the premise of what is a local call for intercarrier compensation purposes. This leads us to the second subpart of this issue, which is whether intercarrier compensation for calls to virtual NXX/FX traffic should be based upon the end points of the call or upon the NPA/NXX assigned to the calling and called parties. Level 3 witness Gates contends that the telecommunications industry has historically compared NXX codes to determine the appropriate treatment of calls as local or toll. (TR 759) He argues that virtual NXX calls are locally dialed, and treated as local by the incumbents. He explains that because calls are routed based upon NPA/NXX, virtual NXX calls travel over the ILEC's local interconnection trunks. (TR 852) Witness Gates contends that these calls are locally dialed and should be treated as local calls. (TR 852)

In their joint brief, the ALECs contend that Verizon presently treats FX traffic as local, charging reciprocal compensation for terminating calls to its FX customers.

(BR 20-21) Level 3 witness Gates argues that the only reason that BellSouth now separates its FX traffic so that reciprocal compensation is not charged for these calls is because ALECs have had some success with their virtual NXX service. (TR 853)

On the other hand, Sprint witness Maples states that the end points of a call in relation to the definition of local calling area have historically driven intercarrier compensation. (TR 573) BellSouth witness Ruscilli agrees, contending that the FCC has made it clear that traffic jurisdiction is determined based upon the originating and terminating end points of a call. (TR 53)

In an extreme example of the problems associated with determining intercarrier compensation based upon the NXXs assigned to the calling and called parties, Ruscilli gives an example of a Jacksonville NPA/NXX being assigned to an ALEC virtual NXX customer physically located in New York. (TR 53) He argues that based upon a comparison of NPA/NXXs, if a BellSouth customer in Jacksonville calls this virtual NXX number, BellSouth would be charged reciprocal compensation even though long distance call has clearly been made. (TR 53) While Level 3 witness Gates that this is "a ridiculous hypothesis," he states that this would still be a local call. (TR 858-859) Witness Gates contends that the ILEC's responsibilities would change. He states that the ILEC technical and financial responsibilities would end at the POI, and the ALEC would be responsible for transporting the call 1500 miles to New York. (TR 859) Witness Gates argues that this call is technically feasible, but would never happen. He states that a virtual NXX is usually an intraLATA offering, and Level 3 has other services that they offer for 1500 miles of transport.

Staff acknowledges that this scenario is somewhat unlikely, but it does illustrate the controversy related to this issue. Staff disagrees with the ALEC position that jurisdiction of traffic should be determined based upon the NPA/NXXs assigned to calling and called parties. Although presently in the industry switches do look at the NPA/NXXs to determine if a call is local or toll, staff believes this practice was established based upon the understanding that NPA/NXXs were assigned to customers within the exchanges to which the NPA/NXXs are homed. Level 3 witness Gates conceded during cross examination that historically the NPA/NXX codes were geographic indicators used as surrogates for determining the end points of a call. (TR 851-852)

Staff believes that a comparison of NPA/NXXs is used as a proxy for determining the actual physical location of the particular customer being called. In other words, the NPA/NXX provides a reasonable presumption of the physical location of a as being within the calling area to which the NPA/NXX is homed. Therefore, carriers have been able to determine whether a call is local or toll by comparing the NPA/NXXs of the calling and called parties. However, this presumption may no longer be valid in an environment where NPA/NXXs are disassociated from the rate centers which they are homed.

Staff believes that the classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call. Staff believes this is true regardless of whether a call is rated as local for the originating end user (e.g., 1-800 service is toll traffic even though the originating customer does not pay the toll charges). Staff acknowledges that an ILEC's costs in originating a virtual NXX call do not necessarily differ from the costs incurred originating a normal local call. (Gates TR 786) However, staff does not believe that a call is determined to be local or toll based upon the ILEC's costs in originating the call. In addition, staff does not believe that the proper application of a particular intercarrier compensation mechanism is based upon the costs incurred by a carrier in delivering a call, but rather upon the jurisdiction of a call as being either local or long distance.

This raises the issue of whether reciprocal compensation or access charges should applied to virtual NXX/FX traffic. Staff agrees with BellSouth witness Ruscilli calls to virtual NXX customers located outside of the local calling area to which the NPA/NXX is assigned are not local calls for purposes of reciprocal (TR 67) As such, staff believes that they are not subject to reciprocal compensation. In their brief, the Joint ALECs point to the recently revised FCC 51.701(b)(1) in support of their argument. (BR 22-23) This rule previously stated that telecommunications traffic that is subject to reciprocal compensation is defined as:

Telecommunications traffic between a LEC and a telecommunications carrier other a CMRS provider that originates and terminates within a local service area established by the state commission.

However, in its recent *ISP Remand Order*, the FCC amended this rule to state:

Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is or intrastate exchange access, information access, or exchange services for such access (*see* FCC 01-131, paras 34, 36 39, 42-43). (FCC Rule 51.701(b)(1))

The Joint ALECs assert that the revised rule clearly eliminates as a requirement reciprocal compensation the previous language that a call be terminated within a local calling area established by the state commission. That being the case, the Joint ALECs contend that the ILEC position, that a virtual NXX call is not subject to reciprocal compensation because it is not "local telecommunications traffic," been eliminated. (BR 23) However, staff agrees with Verizon witness Haynes that the FCC's revision of Rule 51.701 has no effect on the jurisdiction of virtual NXX traffic. (TR 498) Staff agrees with witness Haynes that traffic that originates in one local calling area and terminates in another local calling area would be considered *intrastate exchange access* under the FCC's revised Rule 51.701(b)(1). 498) As such, staff believes virtual NXX/FX traffic would not be subject to reciprocal compensation pursuant to Rule 51.701(b)(1).

Witness Ruscilli requests that the Commission find that ALECs must identify calls virtual NXX customers as long distance and pay BellSouth for originating switched access for these calls. (TR 657) Although it seems reasonable to apply access charges to virtual NXX/FX traffic that originates and terminates in different local calling areas, staff believes that separately identifying virtual NXX traffic for the purpose of applying switched access charges raises additional issues that must be considered.

Level 3 witness Gates states that virtual NXX/FX traffic is treated as local ALEC and ILEC switches are set up to treat locally-dialed calls as local. (TR 853) Level 3 contends that treating virtual NXX calls as toll would impose costs on all LECs by requiring billing system changes. (BR 30) Witness Gates suggests we "keep the status quo," and not require these costly changes be made to the switching architecture. (TR 854)

Sprint witness Maples raises an additional point that staff believes to be compelling. He explains that when ISP-bound traffic is removed from the virtual NXX issue, what is left is a relatively small amount of traffic. (TR 574) Witness questions whether the industry would want to incur the cost of billing system modifications for a relatively small amount of voice virtual NXX/FX traffic. (TR 574-575) He explains that if the volume of non-ISP traffic is small and the modifications are large, the industry may want to pay reciprocal compensation for this traffic as a compromise. On the other hand, if the volume of traffic is large, then perhaps reciprocal compensation should not be paid. (TR 575)

Staff is troubled that Verizon insists that reciprocal compensation should not be applied to virtual NXX traffic, while at the same time charging reciprocal compensation for its own FX traffic. (TR 433, 436) However, staff recognizes that witness Haynes attributes this to the fact that Verizon's billing systems are presently configured to determine whether a call is local or not, based upon the number dialed. He states that Verizon has not as of yet examined the possibility of separating FX traffic from local traffic dialed to the same NPA/NXX. (TR 492-493) While BellSouth has shown that this approach is technically feasible by developing its own database to separate FX traffic, staff is hesitant in recommending that the Commission mandate the development of such a database by all LECs.

Neither does staff recommend that the Commission establish an industry task force examine this matter, as witness Maples suggests. However, staff does believe that the balance between costly modifications and traffic volumes should be considered when determining what, if any, intercarrier compensation should be applied to virtual NXX/FX traffic. Unfortunately, this factual information is not in the record. Staff believes that whether reciprocal compensation or access charges apply to virtual NXX/FX traffic is better left for parties to negotiate in individual interconnection agreements. Staff notes that while virtual NXX calls terminate outside of the local calling area associated with the rate center to the NPA/NXX is homed are not local calls, and therefore carriers are not obligated to pay reciprocal compensation, parties are free to negotiate intercarrier compensation terms in their agreements that reflect the most efficient means of

interconnection. If parties decide to continue to pay reciprocal compensation instead of making costly modifications to their networks and billing systems, staff believes this is reasonable. Staff also believes parties are free to agree to pay compensation for virtual NXX/FX traffic, or apply access charges, as they deem fit for the purposes of their interconnection agreements.

Conclusion

Staff recommends that carriers be permitted to assign telephone numbers to end physically located outside the rate center to which the telephone number is homed. In addition, staff recommends that intercarrier compensation for calls to these numbers be based upon the end points of the particular calls. This approach will ensure that intercarrier compensation will not hinge on a carrier's provisioning routing method, nor an end user's service selection. Staff believes that calls terminated to end users outside the local calling area in which their NPA/NXXs are homed are not local calls for purposes of intercarrier compensation; therefore, staff believes that carriers are not obligated to pay reciprocal compensation for this traffic. Although this unavoidably creates a default for determining intercarrier compensation, staff does not recommend that the Commission mandate a particular intercarrier compensation mechanism for virtual NXX/FX traffic. Since non-ISP virtual NXX/FX traffic volumes may be relatively small, and the costs of modifying the switching and billing systems to separate this traffic may be great, staff believes it is best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual interconnection agreements. While not recommending a particular compensation mechanism, staff does recommend that virtual NXX traffic and FX traffic be treated the same for intercarrier compensation purposes.

**ISSUE 16**: (a) What is the definition of Internet Protocol (IP) telephony?

(b) What carrier-to-carrier compensation mechanism, if any, should apply to IP telephony?

**RECOMMENDATION**: Staff recommends the Commission find that this issue is not ripe consideration at this time. Staff believes this is a relatively nascent technology, with limited application in the present marketplace. As such, staff recommends that the Commission reserve any generic judgement on this issue until the market for IP telephony develops further. **(HINTON)**

**POSITION OF PARTIES**

BELLSOUTH:

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|---|---|---|
| THE PETITION OF LEVEL 3 COMMUNICATIONS, LLC FOR ARBITRATION WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 | ) ) ) ) ) ) | CASE NO. 2000-404 |

O R D E R

Level 3 Communications, LLC ("Level 3") petitioned for arbitration of several issues in its proposed interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). BellSouth filed its response to the August 4, 2000 petition, the parties have participated in an informal conference, and a public hearing was held January 4, 2001. Post hearing briefs have been filed. There are four issues in dispute: one concerning interconnection and three concerning compensation.

I. HOW SHOULD THE PARTIES DEFINE THE INTERCONNECTION POINTS FOR THEIR NETWORKS? SHOULD EACH CARRIER BE REQUIRED TO PAY FOR THE USE OF INTERCONNECTION TRUNKS ON THE OTHER CARRIER'S NETWORK?

Level 3 asserts that this issue has two components. First is whether BellSouth may designate a separate point of interconnection ("POI") for its originating traffic or require a POI in each local calling area. The second issue is whether, if Level 3 designates a single POI per LATA, BellSouth may charge Level 3 for facilities used to carry BellSouth's originating traffic from each local calling area to the POI. The Telecommunications Act, 47 U.S.C. § 251(c)(2)(B), requires BellSouth to interconnect at any "technically feasible point." Here BellSouth is not arguing that the points selected

by Level 3 are infeasible, but rather that BellSouth should receive compensation for carrying its own originating traffic to Level 3's POI if it is outside of BellSouth's local calling area.

BellSouth asserts that Level 3 should be responsible for paying for the transport necessary for BellSouth to carry the portion of the call originated by BellSouth's customers which traverses the local calling area boundary. Level 3 argues that it should not be required to pay for BellSouth-originated traffic based on Federal Communications Commission ("FCC") Rule 51.703 (b), which states that "[a] LEC ["local exchange carrier"] may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." This rule, according to Level 3, means that BellSouth must deliver its originating traffic to Level 3's POI at no charge to Level 3.

According to TSR Wireless, LLC et al. v. U.S. West Communications Inc. et al., File Nos. E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. June 21, 2000),

> Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility, because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.

Thus, the Commission finds that Level 3 has the right to establish a minimum of one POI per LATA. Fewer POIs per new entrant will encourage competitors to solicit customers throughout the LATA rather than in just the most densely populated areas. However, the Commission recognizes the potential for abuse in this arrangement and therefore requires Level 3 to establish another POI when the amount of traffic passing

through a BellSouth access tandem switch reaches an OC-3 level. This result reasonably weighs the balance between [1] the efficiencies to be gained by not requiring new entrants to deploy a POI in every local calling area and [2] the incumbent's interest in paying minimal originating traffic costs.

In contrast, BellSouth's proposal to charge Level 3 for a dedicated facility from the local calling area boundary to the POI as an alternative to requiring an additional POI is unjustified. According to FCC rules and decisions, carriers must pay for their own originating traffic. BellSouth argues that the rule requiring the originating carrier to pay for originating traffic applies only within a unified local calling area. However, FCC Rule 51.701(b)(1) defines local telecommunications traffic to include traffic that originates and terminates within a local service area defined by the state commission. BellSouth offers local service in Kentucky which includes LATA-wide calling. BellSouth thus equates a LATA and a local calling area in its own tariffs. Moreover, in TRS Wireless, supra, the FCC stated that LECs must bear the cost of transporting originating traffic to anywhere within an MTA (major trading area), an area generally larger than a LATA. BellSouth has failed to establish the costs incurred to reach Level 3's POI and has failed to establish that the rates BellSouth charges its own customers do not cover those costs. In the absence of such a showing, the Commission will not deviate from the well-established principle that the carrier must pay the originating costs of its own traffic.

Level 3 will be paying its own originating traffic costs and, as competition develops, BellSouth and Level 3's traffic should become more equalized. The Commission finds that the public interest, as well as incumbent and competitive carriers,

will benefit from continuing the long-established policy that the originating carrier pays for its own costs of origination.

BellSouth further asserts that Level 3 should pay for the trunking facilities used by BellSouth to deliver BellSouth originating traffic from the edge of the local calling area to Level 3's POI if Level 3 has placed a POI in a different local calling area. However, as the Commission has concluded that carriers are responsible for paying for their own originating traffic to the POI of a competitor, this issue is moot. The Commission may revisit this issue should circumstances dictate.

II. SHOULD THE DEFINITION OF "SERVING WIRE CENTER" PRECLUDE LEVEL 3 FROM RECEIVING SYMMETRICAL COMPENSATION FROM BELLSOUTH FOR LEASED FACILITY INTERCONNECTION?

Level 3 requests symmetrical compensation for providing dedicated transport to the end office switching destination for traffic originated by BellSouth. Thus, according to Level 3, BellSouth's argument is that it should receive greater compensation than Level 3 for providing terminating transport. The dispute surrounds the appropriate rate of compensation that applies when one party leases the facilities from the other.

BellSouth's communication system is a legacy system built over decades. It hauls traffic through multiple wire centers and rates the call based upon the number of wire centers traversed. Level 3, on the other hand, has a network designed to offer service to multiple rate centers/local calling areas from one switch. By hauling traffic in this fashion, its network transports messages at a lower cost. The result is that even if both parties provide an identical number of transport miles between two points, BellSouth's charges would be higher than Level 3's. This lack of symmetry is inappropriate.

In general, 47 CFR § 51.701(e) states that, "a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." Both parties agree that such compensation arrangement includes the provision of transport for traffic originated by the other party. 47 C.F.R. § 51.711(a) provides that "[r]ates for transport and termination of local telecommunications traffic shall be symmetrical." Furthermore, symmetrical rates are defined by 47 C.F.R. § 51.711(a)(1) as rates that are charged by both carriers for the same services.

Despite the differences in network configuration, the Commission concludes that Section 51.711(a)(1) of the FCC's rules requires symmetrical compensation for the same service. Having decided that rates must be symmetrical, the Commission must now decide the rate carriers are to charge each other. Level 3's current network permits it to carry a message at lower cost. However, BellSouth should not be penalized for continued use of a network that has ably served its customers for decades. Accordingly, symmetrical compensation shall be paid at the BellSouth rate.

III. SHOULD THE PARTIES BE REQUIRED TO PAY RECIPROCAL COMPENSATION ON TRAFFIC ORIGINATING FROM OR TERMINATING TO AN ENHANCED SERVICE PROVIDER, INCLUDING AN INTERNET SERVICE PROVIDER?

Level 3 and BellSouth acknowledge that the Commission has already determined the issue of whether parties should be required to pay reciprocal compensation on calls terminating to an enhanced service provider, including an Internet service provider

("ISP"). In Case Number 99-218, the Commission decided this issue.[1] There, the Commission concluded that:

> "ISP-bound traffic should be eligible for reciprocal compensation, pending a final determination by the FCC. The FCC has indicated that this Commission has the legal authority to order a reciprocal compensation arrangement in this proceeding. Equity precludes this Commission from denying ICG any compensation from BellSouth for carrying BellSouth's traffic on ICG's network. Furthermore, it is logical to consider a call to an ISP to be a call that is "terminated" locally, at the ISP server, because a protocol conversion occurs before the information is passed on to the Internet. In the wake of the FCC's pending determination, the most reasonable method for compensation is at the current rate for local calls. However, in addition the parties should track the minutes of use for calls to ISPs and be prepared to "true-up" the compensation consistent with the FCC's decision. Thus, the compensation ordered herein for ISP-bound traffic should be retroactively "trued-up" to the level of compensation ultimately adopted by the FCC."[2]

Though BellSouth disagrees with the Commission's conclusion that ISP-bound traffic should be eligible for reciprocal compensation, it does find that the "track and true-up" approach is reasonable. Level 3 has presented insufficient evidence to eliminate the tracking requirement at this time. The Commission may revisit this issue should any decision that the FCC may reach on this issue warrant such review.

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[1] Case No. 99-218, A Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1996, Order dated March 2, 2000.

[2] Id. at 3.

## IV. SHOULD BELLSOUTH BE PERMITTED TO DEFINE ITS OBLIGATION TO PAY RECIPROCAL COMPENSATION TO LEVEL 3 BASED UPON THE PHYSICAL LOCATION OF LEVEL 3'S CUSTOMERS?

Level 3 asserts that the payment of reciprocal compensation is due for traffic that is delivered to a customer who has subscribed to a local telephone number in a calling area in which the customer has no physical presence. Both utilities offer a local telephone number to a person residing outside the local calling area. BellSouth's service is called foreign exchange ("FX") service and Level 3's service is called virtual NXX service. The traffic in question is dialed as a local call by the calling party. BellSouth agrees that it rates such foreign exchange traffic as local traffic for retail purposes. These calls are billed to customers as local traffic. If they were treated differently here, BellSouth would be required to track all phone numbers that are foreign exchange or virtual NXX type service and remove these from what would otherwise be considered local calls for which reciprocal compensation is due. This practice would be unreasonable given the historical treatment of foreign exchange traffic as local traffic.

Accordingly, the Commission finds that foreign exchange and virtual NXX services should be considered local traffic when the customer is physically located within the same LATA at the calling area with which the telephone number is associated. While it may be possible from a network standpoint for Level 3 to assign a customer physically residing in New York a Kentucky number and consider all traffic to that point to be local, such a result would be unreasonable. In order to weigh the balance of the public interest involved in such services with the need for developing appropriate inter-carrier compensation arrangements, the Commission will require the

virtual NXX service to be provided within the LATA in order to be considered local traffic.

The Commission, having considered the petition of Level 3, BellSouth's response thereto, the evidence of record in this proceeding, and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. Each carrier shall establish at least one POI per LATA and the originating carrier shall pay to transport its own customers' calls to that POI.

2. Level 3 shall establish another POI when the amount of traffic passing through a BellSouth access tandem reaches an OC-3 level.

3. The parties shall establish symmetrical compensation for providing dedicated transport to each other's end office switching destinations for traffic originated by the other party, such compensation to be at the BellSouth rate.

4. Each party shall pay reciprocal compensation for calls terminating to enhanced service providers, including ISPs, who are customers of its competitor.

5. Reciprocal compensation shall be paid at the current rate for local calls, and the parties shall track the minutes of use for calls to ISPs so that true-up consistent with any FCC decision may take place if necessary.

6. Each party shall consider the other's FX or virtual NXX service to be local traffic when the customer is physically located within this same LATA as the calling area with which the telephone number is associated.

7. Within 30 days of the date of this Order, the parties shall submit their executed interconnection agreement complying with the Commission's decisions ordered herein.

Chairman Huelsmann's partial dissent to reciprocal compensation decisions in Sections III and IV follows.

Done at Frankfort, Kentucky, this 14th day of March, 2001.

By the Commission

Dissenting Opinion of Chairman Martin J. Huelsmann

I write separately to voice my dissent to the decisions in Sections III and IV relating to the payment of reciprocal compensation for termination of calls. While I am cognizant of the Commission's earlier opinions which require mutual measured payments for call termination, I cannot help but believe that, given the continuing uncertainty in this area of the law, bill and keep arrangements should be imposed in those instances where carriers cannot agree on a compensation arrangement.

In 1999, the FCC entered its order apparently claiming jurisdiction over the reciprocal compensation issue as it pertains to calls to ISPs.[1] Last year the Circuit Court of Appeals for the District of Columbia Circuit vacated and remanded the ruling for

[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic,* 14 F.C.C.R. 3689 (1999), vacated and remanded *sub nom Bell Atlantic Tel. Co. v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000).

"want of reasoned decision-making."[2]Since that time, the states have attempted to deal with this highly contentious and complex issue in the aura of uncertainty following the FCC and D.C. Circuit's decisions. Despite the passage of many months, the importance of the issue, Congressional debates on the subject, and the uncertainty of the carriers and the states, the FCC has yet to issue a definitive ruling on remand.

In Kentucky, we have imposed measured reciprocal compensation but have kept a weather eye on the FCC, knowing that its decision might vacate what we have done here. As a result, carriers operating in this Commonwealth have been instructed to expend precious resources tracking minutes of use to calls to ISPs so that amounts paid may be retroactively "trued up" when the FCC reaches its decision.

Because I believe that simple bill and keep arrangements would fully comply with the Act's requirement that local exchange carriers "establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. § 251(b)(5), I respectfully dissent from those portions of this Order that continue the Commission's practice of imposing upon carriers administrative burdens necessary to achieve a result that may be preempted.

Martin J. Huelsmann
Chairman
Kentucky Public Service Commission

ATTEST:

Executive Director

[2] *Bell Atlantic Tel. Co. v. F.C.C.*, 206 F3d 1,9 (D.C. Cir. 2000)

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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| In the matter of the complaint of<br>**GLENDA BIERMAN** against<br>**CENTURYTEL OF MICHIGAN, INC.,**<br>d/b/a **CENTURYTEL.** | )<br>)<br>)<br>)<br>) | Case No. U-11821 |

At the April 12, 1999 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner

## OPINION AND ORDER

## I.

## HISTORY OF PROCEEDINGS

On October 16, 1998, Glenda Bierman filed a complaint against CenturyTel of Michigan, Inc., (CenturyTel) alleging that, in violation of its tariff, the company had billed her more than $2,500 in toll charges for local calls placed from her home in CenturyTel's Newport Exchange to the Monroe Exchange. The complaint also alleged that, in violation of the Michigan Telecommunications Act (MTA), MCL 484.2101 et seq.; MSA 22.1469(101) et seq., CenturyTel had discriminated by treating other calls to the Monroe Exchange as local.

On November 5, 1998, a prehearing conference was held before Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ). At a prehearing conference on November 24, 1998, the ALJ

granted the petition for leave to intervene filed by BRE Communications L.L.C., d/b/a Phone Michigan, (Phone Michigan). The Commission Staff (Staff) also participated in the case.

Evidentiary hearings were held on January 19 and 20, 1999. The record consists of four volumes of transcripts totaling 368 pages and 15 exhibits. The complainant, CenturyTel, the Staff, and Phone Michigan filed briefs and reply briefs.

On March 12, 1999, the ALJ issued a Proposal for Decision (PFD). On March 19, 1999, CenturyTel, the Staff, and Phone Michigan filed exceptions. By March 26, 1999, the complainant, CenturyTel, the Staff, and Phone Michigan filed replies to exceptions.

## II.

## DISCUSSION

Local Calls

Ms. Bierman resides in Newport, Michigan, where CenturyTel provides basic local exchange service. She purchased Internet service from MSEN, an Internet service provider (ISP), in July 1998. From July 27 to August 21, 1998, Ms. Bierman accessed MSEN at the number (734) 349-8100, which is assigned to Phone Michigan in the Monroe Exchange. Ms. Bierman's phone bill dated August 16, 1998 showed 11,323 minutes of toll calls, most to MSEN, at a cost of $2,038.14. Exhibit S-2. Ms. Bierman's phone bill dated September 16, 1998 showed another 3,010 minutes of toll calls, most to the same number, at a cost of $541.80. Exhibit S-2. Ms. Bierman testified that she has made numerous calls from Newport to Monroe and, except for the calls to MSEN, has never been assessed toll charges. She also testified that when she signed up with MSEN, she was advised that the calls would be local. After receiving the bills with toll charges, Ms. Bierman returned to her former ISP.

Ms. Bierman argues that CenturyTel violated its tariff, which shows the local calling area for the Newport Exchange as including Monroe. Exhibit S-1. She also argues that the average customer looking at the information in the telephone directory would conclude that service between Newport and Monroe is local, particularly because most customers are not sufficiently informed to know the meaning of the NXX[1] listings in the directory. Exhibit R-9. Ms. Bierman asserts that it is a violation of Section 502 of the MTA for CenturyTel to fail to inform its customers of the toll charges and to mislead customers into believing that all calls to the Monroe Exchange will be treated as local. Ms. Bierman also argues that it is a violation of Section 305 of the MTA for CenturyTel to discriminate by treating calls to Ameritech Michigan's customers in Monroe as local.

The Staff argues that the MTA, prior Commission orders, and CenturyTel's tariff do not permit the exclusion of any customer from the designated local calling area and that CenturyTel's tariff provides that the local calling area for the Newport Exchange includes both the Newport and Monroe exchanges. Exhibit S-1. The Staff says that CenturyTel's omission of Phone Michigan's NXX from the list of local NXXs in the telephone directory does not mean that toll rates should apply. The Staff also denies that the 11 digit dialing arrangement imposed by CenturyTel for calls to Phone Michigan's NXX means that toll rates should apply. The Staff argues that the 11 digit dialing requirement is an inferior interconnection prohibited by Section 305 of the MTA and Section 251(b)(3) of the federal Telecommunications Act of 1996, 47 USC 251(b)(3).

The Staff denies that the termination of the calls to MSEN, a customer whose equipment is collocated at Phone Michigan's switch in Flint, means the calls must be treated as toll. The Staff argues that the calls should be rated based on termination in the Monroe NXX for several reasons.

[1]NXX refers to the first three digits of the telephone number.

First, calls are traditionally rated on the basis of the NXX. Second, treating all calls to a particular NXX as toll is an overly broad solution to the claimed problem that some of the calls to that NXX are routed to a customer located elsewhere. Third, some calls to Ameritech Michigan's customers with Monroe NXXs are routed beyond Monroe but CenturyTel rates those calls as local.

Finally, the Staff argues that the status of interconnection arrangements between CenturyTel and Phone Michigan is irrelevant to whether CenturyTel must rate the calls as local. The Staff argues that the routing and rating of a call are separate matters. The Staff argues that although the Commission has reviewed and approved the terms and conditions under which local or toll rates apply, it has seldom if ever specified the routing of a call. The Staff also argues that interconnection may be provided by tariff or agreement and that, when an agreement is used, the Commission has not required any particular agreement. The Staff asserts that CenturyTel and Ameritech Michigan are providing EAS pursuant to tariff and that the existing tariffs, which are available to any provider, are adequate to permit Phone Michigan to complete EAS calls from Newport to Monroe.

Phone Michigan argues that CenturyTel's tariff does not specify that the EAS offered between Newport and Monroe applies only to calls to Ameritech Michigan's customers. Phone Michigan argues that there is no reference in the tariff to the 1962 or 1985 EAS agreements between CenturyTel and Ameritech Michigan and, in any event, those agreements have been terminated and do not require CenturyTel to rate the calls to Phone Michigan's NXX as toll. It also argues that CenturyTel's actions are anticompetitive and discriminatory because Ameritech Michigan receives preferential treatment in the rating of calls to its customers.

CenturyTel argues that calls to MSEN terminate in Flint and are not local as defined by Section 102(o) of the MTA or its tariff and that its tariff must be interpreted on the basis of the Commission's 1962 order in Case No. U-846, which found a community of interest between the

adjacent exchanges of Newport and Monroe, not Newport and Flint. It also argues that Phone Michigan lacks authority to provide basic local exchange service in the Monroe Exchange because it has not filed the required maps and tariffs defining the geographic area served. As a result, CenturyTel argues that Phone Michigan's Monroe Exchange is not legitimate and cannot be treated as part of the local calling area for Newport. It further asserts that toll rates must apply until Phone Michigan has an EAS agreement with it. On the other hand, CenturyTel expresses sympathy for Ms. Bierman's situation and is willing to reduce the toll charges to $30.00, the cost for two months of service under the Adjacent Exchange Toll Calling Plan (AETCP).

The ALJ found that CenturyTel's tariff failed to inform customers that calls from the Newport Exchange to the Monroe Exchange would be rated as toll calls when Phone Michigan serves the party being called. Further, the ALJ found that there was no notice in the tariff that toll charges would apply unless the provider serving the called party had an interconnection arrangement. Rather, he noted that the tariff shows Monroe as within the local calling area for Newport. In addition, he noted the MTA defines the local calling area as "a geographic area encompassing 1 or more local communities as described in maps, tariffs, or rate schedules filed with and approved by the commission." MCL 484.2102(o); MSA 22.1469(102)(o).

The ALJ rejected the argument that the calls were not local because they were routed to Flint. He agreed with the Staff's assessment that the routing of a call is separate from the rating of a call. He also noted that the disputed phone bills show Monroe as the city called. He concluded that the calls originated in Newport and terminated in Monroe, just as calls to Ameritech Michigan's customers that are similarly routed outside of the Monroe Exchange are considered local. In that context, he acknowledged that Ameritech Michigan pays Feature Group A charges to CenturyTel for those calls but, again, noted that the tariff does not disclose that arrangement.

Finally, the ALJ rejected the argument that information in the telephone directory determines whether a call is local. First, he noted that the listing of local calling areas in a telephone directory is not required by the statute. Rather, the MTA required maps, tariffs, and rate schedules to be filed with and approved by the Commission. Second, he noted that the telephone directory, unlike a tariff, cannot be kept current to include new NXXs and NXXs for which the rating may change. The ALJ concluded that the tariff rather than the directory governed and the calls must be billed as local.

CenturyTel excepts to the ALJ's conclusion.

The Commission concludes that the complaint must be resolved by reference to the tariff under which CenturyTel provides basic local exchange service to its customers. That tariff defines the local calling area for the Newport Exchange as including the Monroe Exchange. CenturyTel argues, notwithstanding the language of the tariff and a long tradition of local calling to the Monroe Exchange, that calls to only certain customers of certain providers with certain NXXs are local calls and that the customer must determine for herself, at the risk of receiving an unexpected bill for thousands of dollars, whether a particular call will be treated as local or toll. The plain language of the tariff does not support CenturyTel's position. Nevertheless, CenturyTel offers several reasons that its tariff should not be implemented as written.

CenturyTel argues that the Commission's order in Case No. U-846 authorized CenturyTel's predecessor to offer EAS to the Monroe Exchange only in conjunction with Ameritech Michigan and only pursuant to the EAS agreement that was before the Commission. CenturyTel misunderstands the order. The Commission did not conclude that the "community of interest" between Newport and Monroe, which justified the offering of EAS, depended to any extent on the identity of the providers of basic local exchange service in either exchange, a fact that CenturyTel implicitly acknowledges by its exercise of the authority granted to a predecessor company to offer EAS in the

Newport Exchange. Furthermore, the Commission did not approve any particular manner of providing that service. Although the parties had placed an agreement before the Commission, the order did not require that EAS be provided only under that agreement, another fact that CenturyTel implicitly acknowledges by having entered into a new agreement with Ameritech Michigan in 1985 and continuing to offer EAS after Ameritech Michigan terminated that agreement. The tariff properly reflects the Commission's decision that CenturyTel is to offer EAS to its customers regardless of the identity of the provider serving the customers in the Monroe Exchange.

CenturyTel argues that its telephone directory specifies the NXXs to which EAS is offered and the list does not include the NXX for Phone Michigan. Information provided in a telephone directory cannot prevail over the language of the tariff, at least when it is detrimental to customers. Furthermore, the argument proposes an entirely unworkable system. CenturyTel is willing to provide EAS for calls to Ameritech Michigan's customers (or at least most of them), but if Ameritech Michigan were to obtain a new NXX in the Monroe Exchange, this argument presumably means that CenturyTel would not permit EAS for calls to customers with the new NXX until CenturyTel published a new directory. Likewise, the argument means that CenturyTel would not permit EAS for calls to customers of a new provider until it published a new directory. The argument is even more untenable in light of CenturyTel's position that EAS is not available for calls to all customers with an NXX assigned to the Monroe Exchange, but only for calls that terminate in the exchange.[2] Its argument means that it would have to determine on a number-by-number basis which of the telephone numbers in the Monroe Exchange would be treated as local, its directory (and directory assistance) would have to be kept current with that information, customers would

[2]CenturyTel views it as improper for an EAS call from Newport to Monroe to be forwarded outside the Monroe Exchange. 4 Tr. 362.

have to periodically consult that list or risk paying toll charges, and CenturyTel would be able to change the status of a number only as often as it published a new directory. The proposal is entirely unworkable as well as inconsistent with the tariff.

CenturyTel argues that calls to MSEN required the dialing of 11 digits, which informed the customer that the calls would be treated as toll calls. Again, the argument is inconsistent with the tariff and is unworkable. With the proliferation of NXXs, area code splits, and new providers, dialing arrangements do not determine whether a call is local or toll. Further, the argument is unpersuasive because CenturyTel determined for its own reasons that customers would be required to dial 11 digits for calls to the NXX assigned to Phone Michigan. There is no technical reason for that dialing arrangement. 4 Tr. 349.

CenturyTel argues that MSEN does not have a physical presence within the Monroe Exchange because the calls are terminated to equipment in Flint. Again, the tariff does not specify that an EAS call must terminate within the exchange, and the argument ignores the fact that routing and rating need not be the same. In fact, the bills sent to Ms. Bierman show the calls as made to Monroe, not Flint, despite the routing and termination of the calls. In any event, the rating for the calls was determined not by the routing but by CenturyTel. 4 Tr. 337. Furthermore, the argument is a red herring because CenturyTel would rate calls to Phone Michigan's customers as toll even if the customers had a presence within the Monroe Exchange. 4 Tr. 313-314. Its position is that until it has an acceptable interconnection agreement with Phone Michigan, it will not rate the calls as local regardless of where the customers are located.[3]

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[3]It is likely that CenturyTel is discriminating against Phone Michigan. Although the record is not conclusive, it is doubtful that CenturyTel has tried to determine on a line-by-line basis where calls to Ameritech Michigan's customers terminate or to rate calls on the basis of the presence (or lack thereof) of Ameritech Michigan's customers. 4 Tr. 303-308.

CenturyTel argues that Phone Michigan does not have an interconnection agreement with it. Again, the tariff does not state that requirement, and CenturyTel and Ameritech Michigan do not have an interconnection agreement that governs EAS. Their 1962 agreement was replaced by a 1985 agreement, and Ameritech Michigan gave notice, as it had the right to do, that it was terminating that agreement. Further, if there were an agreement in place today, Ameritech Michigan would be required to file it for Commission approval. It has not done so. While it may be true that the same facilities are in use as in 1962, that does not mean the agreement is still in effect. In any event, CenturyTel concedes that the important matter of interconnection rates is governed by tariff, not by the terminated interconnection agreements. 4 Tr. 317-318.

In short, none of these arguments can overcome the effect of the plain language of the tariff that governs CenturyTel's relationship to its customers. Consequently, the disputed calls were local calls and must be billed as such. There is no basis for CenturyTel's suggestion that it be permitted to bill the complainant for two months of AETCP service, which is not available for calls from the Newport Exchange to the Monroe Exchange. Exhibit S-7. The Commission therefore orders CenturyTel to rebill Ms. Bierman on the basis that the calls were local and to provide 90 days for her to pay any amount still due after the recalculation of her bill.

Interconnection

It is apparent that the root cause of the filing of this complaint is a dispute between CenturyTel and Phone Michigan. CenturyTel argues that Phone Michigan does not have the interconnection agreement needed to permit CenturyTel's customers to complete EAS calls from the Newport Exchange to Phone Michigan's Monroe Exchange and is not currently authorized to provide service

in the Monroe Exchange. It is not apparent why CenturyTel let that disagreement become a reason to bill one of its own customers in violation of its tariff.

The ALJ concluded that Section 303 of the MTA requires an interconnection agreement between CenturyTel and Phone Michigan. The ALJ did not agree with the Staff's position that interconnection may also be accomplished by tariff. The ALJ acknowledged that Ameritech Michigan had provided notice that it was canceling its EAS agreement with CenturyTel (although CenturyTel disputed the effectiveness of that notice) and might therefore no longer have an agreement with CenturyTel. He nevertheless concluded that Phone Michigan needed an interconnection agreement because he found a distinction between Ameritech Michigan having once had an interconnection agreement and Phone Michigan never having had such an arrangement.

Phone Michigan excepts and argues that Section 303 does not require it to have an interconnection agreement because it is not providing basic local exchange service to customers in CenturyTel's Newport Exchange. It says that CenturyTel and Ameritech Michigan provide EAS pursuant to tariff and that it seeks to do the same. It says that interconnection occurred, because the disputed calls were successfully completed, and that compensation should occur pursuant to tariff, as is done between CenturyTel and Ameritech Michigan.

The Staff also excepts and argues that the MTA permits the provision of interconnection services pursuant to tariff (in fact, requires the filing of such tariffs because interconnection services are regulated), that almost all incumbent local exchange carriers and most competitive local exchange carriers have such tariffs, that the terms of those tariffs must be available to all providers on a nondiscriminatory basis, that the services provided under the tariffs of CenturyTel and Ameritech Michigan and the interconnection agreement between Phone Michigan and Ameritech Michigan are adequate to permit Phone Michigan to complete EAS calls to its customers, that Ameritech

Michigan completes EAS calls from CenturyTel's customers in the Newport Exchange pursuant to tariff, and that the same tariff must be made available to Phone Michigan without any requirement that it negotiate an agreement with CenturyTel.

The Commission agrees with the Staff that interconnection can be accomplished by agreement or tariff. It may be true, as CenturyTel asserts, that there are many issues that must be addressed to arrive at a proper interconnection arrangement and that the tariff primarily addresses the issue of pricing, but it cannot be disputed that the technical arrangements needed to complete the calls are functional because Ms. Bierman's calls were completed. If CenturyTel is dissatisfied with the arrangement available under the tariffs, there are lawful remedies available through negotiation, arbitration, or the filing of an application or complaint. Failing to comply with its basic local exchange tariff, which requires that it provide EAS to the Monroe Exchange for its customers, is not a lawful response to its dispute with Phone Michigan.

Discrimination

CenturyTel argues that it has not discriminated against Phone Michigan or its customers because discrimination requires that similarly situated persons be treated differently. CenturyTel argues that Phone Michigan and Ameritech Michigan are not similarly situated for the following reasons: (1) calls to Ameritech Michigan's customers originate and terminate in the Newport and Monroe exchanges; (2) Ameritech Michigan has entered into interconnection arrangements with CenturyTel; (3) the Commission has approved an EAS arrangement for the customers of CenturyTel and Ameritech Michigan in the Newport and Monroe exchanges; and (4) Ameritech Michigan pays Feature Group A toll access revenues to CenturyTel for calls from the Newport Exchange that do not terminate in the Monroe Exchange.

The ALJ agreed that CenturyTel had not discriminated against Phone Michigan.

The Staff excepts and notes that if a CenturyTel customer in the Newport Exchange calls an Ameritech Michigan customer in the Monroe Exchange, the customer dials seven digits and the call is rated as local. If the customer calls a Phone Michigan customer instead, the customer must dial 11 digits and the call is rated as toll. The Staff says that this discrimination is not permissible. It also notes that CenturyTel permits Ameritech Michigan to provide EAS under a tariff, but will not let Phone Michigan do the same.

Phone Michigan also excepts and says that CenturyTel has discriminated by failing to deliver traffic to Phone Michigan's customers without toll charges when it delivers the same traffic to Ameritech Michigan's customers without toll charges.

The Commission concludes that CenturyTel has discriminated by requiring 11 digit dialing to the NXX assigned to Phone Michigan's Monroe Exchange. There is no reason based on technology to subject Phone Michigan or its customers to that disadvantage. The reason appears to be based more on an intent to single out a competitor and to disadvantage it and its customers by a less convenient dialing pattern and to avoid payment of charges that apply only to local calls. Further, the fact that CenturyTel and Ameritech Michigan once had an interconnection agreement does not justify CenturyTel's position that it may discriminate against Phone Michigan, Phone Michigan's customers, and its own customers who call Phone Michigan's customers in the Monroe Exchange.

The Commission also concludes that Phone Michigan's failure to file tariff sheets defining the boundary of its Monroe Exchange, while a violation of the MTA, does not prevent the Commission from finding that CenturyTel has discriminated.[4] Phone Michigan's failure to file tariff sheets is not

[4]CenturyTel relies on the "wrongful conduct" rule in Orzel v Scott Drug Co, 449 Mich 550; 537 NW2d 208(1995), which bars relief to a plaintiff whose own wrongdoing contributes to the injury.

a violation of a criminal or penal statute, is not a causal factor in CenturyTel's discrimination, is not as serious as CenturyTel's discrimination, and does not remove Phone Michigan or Century Tel's own customers from the protections of the MTA against discriminatory and anticompetitive conduct.

Remedies and Penalties

The Commission finds it appropriate in this case to fine CenturyTel for assessing toll charges on local calls in violation of its tariff and for discriminating by requiring 11 digit dialing to the NXX assigned to Phone Michigan. CenturyTel's conduct in the first instance was aimed at an innocent party with whom it has no dispute and in both instances is inconsistent with the competitive purposes of the MTA. Because each of the two violations was continuing and most directly affected those with whom it has no dispute, the Commission will assess a fine of $500 per day for each violation for the 26 days that the record shows CenturyTel to have been in violation. The Commission also finds it appropriate to require CenturyTel to pay the reasonable attorney fees and costs of the complainant and Phone Michigan.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. CenturyTel violated its tariff when it assessed toll charges for local calls.

c. CenturyTel discriminated by requiring 11 digit dialing for call to the NXX assigned to Phone Michigan.

THEREFORE, IT IS ORDERED that:

A. CenturyTel of Michigan, Inc., shall rebill Glenda Bierman on the basis that the disputed calls are local calls and shall permit her 90 days to pay any amount due upon rebilling.

B. CenturyTel of Michigan, Inc., shall make refunds consistent with the findings of this order to each of its similarly situated customers.

C. CenturyTel of Michigan, Inc., shall cease and desist from violating the Michigan Telecommunications Act by rating local calls as toll calls and discriminating against competitive local exchange carriers and their customers.

D. CenturyTel of Michigan, Inc., shall pay a fine of $26,000 for the violations of the Michigan Telecommunications Act established on this record.

E. CenturyTel of Michigan, Inc., shall pay the reasonable attorney fees and costs of Glenda Bierman and BRE Communications L.L.C., d/b/a Phone Michigan.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(SEAL)

/s/ David A. Svanda
Commissioner

By its action of April 12, 1999.

/s/ Dorothy Wideman
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman

_____

Commissioner

By its action of April 12, 1999.

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Its Executive Secretary

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| In the matter of the complaint of<br>**GLENDA BIERMAN** against<br>**CENTURYTEL OF MICHIGAN, INC.,**<br>d/b/a **CENTURYTEL.** | )<br>)<br>)<br>)<br>) | Case No. U-11821 |

Suggested Minute:

"Adopt and issue order dated April 12, 1999 finding that CenturyTel of Michigan, Inc., has violated the Michigan Telecommunications Act in its billing of Glenda Bierman, requiring CenturyTel of Michigan, Inc., to cease and desist from violating the Michigan Telecommunications Act, and imposing penalties, as set forth in the order."

virtual NXX
notebook

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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| In the matter of the petition of<br>**COAST TO COAST TELECOMMUNICATIONS, INC.**, for arbitration of interconnection rates, terms, conditions, and related arrangements with **MICHIGAN BELL TELEPHONE COMPANY, d/b/a AMERITECH MICHIGAN.** | ) | Case No. U-12382 |

At the August 17, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

**ORDER ADOPTING ARBITRATED AGREEMENT**

On February 12, 2000, Coast to Coast Telecommunications, Inc., (Coast) filed a petition seeking arbitration of an interconnection agreement with Ameritech Michigan pursuant to Section 252 of the federal Telecommunications Act of 1996 (the federal Act), 47 USC 252, the federal rules promulgated pursuant to the federal Act, and the Commission's July 16, 1996 order in Case No. U-11134, which established procedures for arbitrating interconnection agreements. According to the petition, the parties are currently operating under an interconnection agreement executed on

March 17, 1997 and approved by the Commission on June 25, 1997 in Case No. U-11375.[1] The petition listed 40 issues.

On April 19, 2000, Administrative Law Judge George Schankler appointed himself, Tom Saghy, and Margaret Wallin to the arbitration panel.

On May 8, 2000, Ameritech Michigan filed a response to the petition, in which it raised two additional issues.

On May 22, 2000 the parties submitted a joint filing that set out the proposed contract language in dispute and provided a status matrix of issues. That matrix revealed that little progress had been made in negotiations. On May 24, 2000, the panel met with the parties and directed them to meet (with each side represented by persons with authority to agree to terms) in an effort to resolve some of the numerous outstanding issues. That meeting occurred on June 1, 2000 after which the number of issues had been reduced to 10.

On June 8, 2000, the parties presented their respective positions before the arbitration panel concerning specific issues for which the panel had requested presentations. At that time, the parties indicated that two additional issues had been resolved. Following their presentations, the parties each filed a Proposed Decision of the Arbitration Panel (PDAP) on June 20, 2000, which indicated that an additional issue had been resolved. On July 5, 2000, the arbitration panel issued the Decision of the Arbitration Panel (DAP).

On July 17, 2000, Ameritech Michigan filed objections to the recommendations of the arbitration panel on which it did not prevail. Those issues are addressed below.

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[1] The three-year term of that agreement has been extended pursuant to the May 1, 2000 amendment (the third amendment), which was approved by the Commission on June 5, 2000.

Additional Points of Interconnection

The parties disagreed concerning whether Ameritech Michigan should be permitted to require Coast to allow additional points of interconnection at any Coast central office upon written notice from Ameritech Michigan that it would do so. Coast objected to Ameritech Michigan's proposed language because it desired to retain the right to review requests for interconnection prior to implementation. The panel agreed with Coast on this issue, based on its determination that Coast should be permitted to retain a right to review any proposed interconnections to its network. The panel further stated its belief that, as a practical matter, Ameritech Michigan would be able to interconnect with Coast in a manner that meets its needs, but that should a dispute arise, Ameritech Michigan could bring the issue before the Commission for resolution.

Ameritech Michigan objects and argues that the panel failed to adequately consider the lack of merit to Coast's opposition to Ameritech Michigan's proposed language. Ameritech Michigan argues that Coast's objections are without substance and that any costs to Coast would be minimal. It states that Coast's original objection to this language, its belief that Ameritech Michigan might impose on Coast the obligation to create a joint fiber meet, is dispelled by noting contract language requiring both parties' agreement for joint fiber meets. Ameritech Michigan argues that Coast's admitted preference that additional trunks come directly from an end office rather than from the tandem should have led the panel to adopt Ameritech Michigan's language.

Ameritech Michigan further argues that the panel failed to consider or address the legal arguments that Ameritech Michigan raised. The company maintains that the federal Act does not preclude Ameritech Michigan from connecting an additional switch in its network to the parties' existing points of interconnection. Moreover, Ameritech Michigan argues, it has a right under the federal Act to "retain responsibility for the management, control and performance of its own

network." FCC First Report and Order, ¶203.[2] In order for it to fully realize that right, Ameritech Michigan argues, the proposed language must be included in the contract. Moreover, Ameritech Michigan argues, this language merely makes additional interconnections equally available to both parties.

Finally, Ameritech Michigan argues that if the Commission allows this result to stand, Ameritech Michigan will be forced to negotiate or litigate with each competitive local exchange carrier (CLEC) on the design of Ameritech Michigan's network. It projects that a CLEC could arbitrarily refuse to allow Ameritech Michigan to establish appropriate network connections, which, Ameritech Michigan argues, would negatively affect network design and reliability.

The Commission finds that the arbitration panel appropriately rejected Ameritech Michigan's arguments and adopted Coast's position on this issue. As noted by the Federal Communications Commission (FCC), Section 251 of the federal Act imposes additional requirements on incumbent local exchange carriers (ILEC), including the requirement to permit interconnection at any technically feasible point on the ILEC's network. See 47 USC 251(c). Ameritech Michigan cites no similar provision for CLECs.

Although Ameritech Michigan argues that its only intentions are to protect its network functioning, the language it proposed did not limit its ability to demand interconnection to instances in which such interconnection is needed or desirable for handling local traffic. Rather, Ameritech Michigan proposed language that would give it absolute power to determine whether additional interconnection is necessary. There is no limiting language requiring the request to be reasonable or supported by any particular criteria. The Commission finds that Ameritech Michi-

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[2] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC Order No. 96-325, 11 Fccr 15449 (1996).

gan's proposed broad language is not required for it to maintain control of its network. Although Ameritech Michigan is correct that there is no provision in the Act that would prohibit incorporating this provision in the interconnection agreement, the company cites no provision that would require allowing the ILEC to impose unwanted interconnection on the CLEC at the former's unfettered discretion.

Foreign Exchange (FX) Service

As described in the DAP, FX service allows a customer to obtain an NXX code[3] for a geographic area different from the area where the customer is actually located. Calls made from persons in the geographic area assigned to that NXX code are able to reach the FX customer for the price of a local call because Ameritech Michigan's billing system recognizes intra-NXX calls as local. Ameritech Michigan took the position that its "Appendix FX" should be added to the contract. That appendix would require either that Coast compensate Ameritech Michigan for these calls and remove them from the category of calls for which Ameritech Michigan pays reciprocal compensation or that Coast establish a point of interconnection in each local calling area associated with an NXX assigned to a Coast FX customer. In that manner, Ameritech Michigan argued, the costs of interexchange transport will be borne appropriately by Coast and its FX customer.

The arbitration panel rejected Ameritech Michigan's position. It reasoned that the following facts supported its decision:

1. Coast currently provides service to its customers through one switch, which is located in Pontiac. This current configuration is authorized under [the federal Act].

[3] The NXX code is the first three digits of the seven-digit telephone number.

2. Ameritech [Michigan] is obligated to deliver all of Coast's traffic to its Pontiac switch.

3. Ameritech [Michigan]'s billing system identifies NXX to NXX calls as local and cannot distinguish such calls by ultimate destination.

4. Ameritech agrees that it incurs no additional costs related to what it refers to as FX calls under the current Coast configuration. (Tr. 60)

5. Ameritech [Michigan] admits that "There's been a definition of a local call. From NXX to NXX is a local call." (Tr. 64)

DAP, pp. 9-10.

The arbitration panel noted that because all calls terminated on Coast's network must be delivered to Coast's switch in Pontiac, the costs to Ameritech Michigan to deliver an FX call to Coast is the same as when the call is undisputedly local. Thus, the panel reasoned, Ameritech Michigan's argument that Coast receives a free ride for FX service must be rejected, citing the May 8, 2000 decision of the Illinois Commerce Commission (ICC) regarding an arbitrated agreement between Focal Communications Corporation of Illinois (Focal) and Ameritech Illinois. The panel further noted Coast's stated plans to build additional facilities, which the panel believed would alleviate some of Ameritech Michigan's concerns. Finally, the arbitration panel rejected Ameritech Michigan's alternative that Coast should be required to establish an additional point of interconnection (POI) in each area for which it has an NXX that it has assigned to an FX customer.

Ameritech Michigan objects to the arbitration panel's conclusions and argues that the panel effectively ruled that Ameritech Michigan must (1) forgo intraLATA toll revenues to which it would otherwise be entitled, (2) pay for the transport of what is marketed as a local call, but is not truly a local call, and (3) continue to pay reciprocal compensation on what is actually an interexchange call. Ameritech Michigan claims that each of these effects is erroneous and contrary to law.

Ameritech Michigan states that although it does not dispute the truth of the facts relied upon by the arbitration panel in reaching its decision, it does dispute the relevance of those facts. In Ameritech Michigan's view, FX service is not local exchange service, but is an interexchange service and should be rated as such between carriers. It cites and heavily relies upon the reasoning of the Maine Public Utilities Commission (Maine PUC) in New England Fiber Communications, LLC, d/b/a Brooks Fiber, Docket No. 99-593, issued June 30, 2000.

Ameritech Michigan reiterates that these are essentially toll calls that merely look like local calls to the end-user because of the assignment of the NXX associated with the area. Ameritech Michigan states that the FX customer customarily bears the cost of the FX service, because it is the party benefitting from the fiction that toll calls to it appear to the calling party to be local. When transporting calls across two networks, argues Ameritech Michigan, the carrier providing the FX service compensates the originating carrier for the use of its network in provisioning the FX service and then charges its FX customer accordingly.

As in the Maine case, Ameritech Michigan argues, Coast does not create a different, greater local area through its FX service, nor does it provide competing local exchange service in any meaningful sense. Ameritech Michigan urges the Commission to hold, as the Maine Commission did, that the CLEC "is free to offer calling areas of its own design so long as, when it uses the facilities of others to accomplish that end, it pays for those facilities on the basis of how their owners define them for wholesale purposes (interexchange or local). . . . What Brooks is doing . . . is offering free interexchange calling to customers of other LECs . . . in effect attempting to redefine the local calling areas of other LECs." Id., p. 14.(emphasis in original.) Ameritech Michigan argues that the Commission should not equate the rating of calls for end-users with the appropriate rating of calls between carriers. It argues that merely because Coast may not charge

the caller for this FX service does not require a finding that Coast should not pay for the service provided by Ameritech Michigan to permit the call to be completed.

Ameritech Michigan goes on to state that if the arbitration panel's result is adopted, Coast will enjoy an unfair competitive advantage. It argues that Coast may offer FX service to information service providers (ISPs) or other customers for much less than other carriers can, because it will not be paying the full costs of the service. Moreover, although Coast stated it has plans to expand its number of POIs in Michigan, the result reached by the arbitration panel will create a disincentive for Coast to implement those plans.

Finally, Ameritech Michigan argues that the precedents relied upon by the arbitration panel are distinguishable from the instant case. It points out that the ICC decision does not address the Appendix FX, which Ameritech Michigan seeks to have added to the contract in this case. Moreover, Ameritech Michigan argues, the Commission's April 12, 1999 decision in Case No. U-11821, a complaint case involving CenturyTel, does not dictate the arbitration panel's result. In that case, argues Ameritech Michigan, the Commission fined CenturyTel for violating its tariffs when it billed the end-user for toll charges associated with her ISP traffic to an adjacent exchange, despite the tariff's listing that NXX as local. In that context, says Ameritech Michigan, the Commission found that routing and rating need not be the same. But, Ameritech Michigan argues, the decision relates to the CLEC's relationship to the end-user. Likewise, says Ameritech Michigan, the Commission's February 22, 2000 order in Case No. U-12090, a complaint case involving Coast and GTE North Incorporated (GTE), does not relate to FX service and relies upon GTE's local calling tariffs for the premise that a call made by a GTE end-user to the Coast ISP customer located within GTE's extended area service (EAS) area should be rated as a local call, regardless of how it is routed. Ameritech Michigan points out that, in the present case, the issue

relates to the appropriate compensation between carriers, not end-users, and there is neither an interconnection agreement nor a tariff to determine how these calls should be rated.

The Commission finds that the arbitration panel's decision on this issue should be affirmed. Commission precedent on the issue of the appropriate rating of a call to a customer located outside the geographic area associated with the NXX assigned to that customer has consistently found that intra NXX calls are to be considered local for rating purposes, despite their actual routing. See, the April 12, 1999 order in Case No. U-11821, Bierman v CenturyTel of Michigan, Inc., and the February 22, 2000 order in Case No. U-12090, Coast to Coast v GTE North Incorporated et al.

The arbitration panel adopted the reasoning of the ICC in its May 8, 2000 decision involving an arbitration agreement between Focal and Ameritech Illinois. In that case, Ameritech Illinois requested language that would have required Focal to establish a point of interconnection within 15 miles of the rate center for any NXX code that Focal used to provide FX service. The ICC determined that nothing in state or federal law required adoption of the proposal and it rejected Ameritech Illinois' arguments concerning the alleged "free ride" that Focal would obtain without the requirement. That free ride argument appears to be the same as one of the arguments that Ameritech Michigan poses in this case. In the ICC's view, the manner in which the parties currently handle traffic belied Ameritech Illinois' argument, because Ameritech Illinois would not be required to carry traffic any further or incur any extra expense based on the nature of the call being FX service. Rather, Ameritech Illinois delivers the call to the point of interconnection associated with the NXX, after which, Focal delivers the call to the FX customer, wherever that customer might be located.

Contrary to Ameritech Michigan's assertions, the DAP reflects the arbitration panel's adoption of the ICC's reasoning that there is really no free ride to remedy, and thus, no compelling reason to

incorporate the proposed language. Admittedly, the ICC did not address the Appendix FX proposed in this case. But both the proposed Appendix FX and the alternative of requiring a POI within a short distance of a rating center for which the CLEC obtains an NXX are intended to address the same perceived problem, which the ICC held did not exist as a practical matter.

The Commission is not persuaded that it should follow the result of the Maine PUC's decision concerning Brooks Fiber (Brooks). In its June 30, 2000 order, the Maine PUC determined that 54 NXXs that had been assigned to Brooks should be returned to the North American Numbering Plan Administrator (NANPA) because, in the Maine commission's view, those NXXs were not being used to provide local exchange service. Rather, Brooks was using those NXXs to allow customers, located in areas from which a call to Portland would be a toll call, to reach an ISP located in Portland by dialing a "local number." Brooks desired to have these calls treated as local, both for the originator of the call and for purposes of determining the appropriate compensation between Brooks and the ILEC. The Maine PUC found that Brooks was not providing a broader area for legitimate basic local exchange service, but rather was attempting to redefine the local calling area of another LEC by merely changing the designation of what would otherwise be interexchange calls through this "FX-like" service. It stated that if Brooks desired to provide a local calling area greater than that afforded by the ILEC, Brooks must compensate the ILEC for use of the network.

That decision is contrary to the position that this Commission has previously taken. See, the Commission's June 25, 1997 order in Case No. U-11340, in which the Commission found that Ameritech Michigan's historic boundaries for local calling should not dictate what may constitute a local calling area for competing providers and that calls within calling areas established as local by the CLEC should be treated as local for reciprocal compensation purposes. Ameritech

Michigan's arguments suggest that Coast is not providing local exchange service to an expanded local area, but using this service to retain ISPs as customers. However, the Commission notes that under the amended version of the Michigan Telecommunications Act, MCL 484.2101 et seq., MSA 22.1469 (101) et seq., basic local exchange licensees must, within two years, market basic local exchange service to all persons located within the geographic area for which the provider has a license, or risk losing the license or having its geographic area restricted. See, MCL 484.2303(1); MSA 22.1469(303)(1). Although MCL 484.2203(16); MSA 22.1469(203)(16) provides that the new law does not "amend, alter, or limit" any case commenced before its effective date, the interconnection agreement will take effect after the new law and Coast will be required to comply with MCL 484.2303(1); MSA 22.1469(303)(1).

The Commission finds that the arguments raised by Ameritech Michigan concerning the likely effect of the Commission's holdings on a competitive environment may deserve further study. However, it would be unwise for the Commission to reverse its position on this issue in an arbitration case, without the ability to grant other parties that might be significantly affected by such a reversal an opportunity to participate. Additionally, the Commission notes that a portion of the recent amendments to the MTA requires that calls made to a local calling area adjacent to the caller's local calling area shall be considered a local call and shall be billed as a local call. MCL 484.2304(11); MSA 22.1469(304)(11). The appropriate implementation of this provision is currently the subject of Commission proceedings in Case No. U-12528, which was commenced by the Commission's July 17, 2000 order. The conclusions reached in that case may affect the Commission's position concerning the appropriate treatment and rating for FX and ISP calls.

Reciprocal Compensation for ISP Traffic

The parties disagreed about whether compensation between carriers should be paid on ISP traffic. Coast took the position, supported by substantial Commission precedent, that calls to ISPs within the local calling area are local calls requiring reciprocal compensation. Ameritech Michigan took the position that the FCC's decisions require finding that calls to ISPs are not local calls because they terminate on the internet, not within the local calling area. Thus, it argued, the reciprocal compensation provision in 47 USC 251(b)(5) does not apply.

The arbitration panel indicated that its review of previous Commission orders on this point led to the conclusion that calls to ISPs within the local calling area are local calls for purposes of reciprocal compensation between carriers. In the panel's view, because the Commission has continuously and repeatedly found in favor of the position taken by Coast, there was no reason to adopt Ameritech Michigan's language on this issue.

Ameritech Michigan objects and argues that the arbitration panel's decision should be reversed. It argues, as it has in prior cases, that the reciprocal compensation duty of 47 USC 251(b)(5) does not apply to ISP traffic, because the FCC has ruled that ISP traffic does not originate and terminate in the same local exchange area, but instead is predominantly interstate traffic. It also reiterates its arguments that the Commission does not have jurisdiction to determine whether these calls are local and thus subject to reciprocal compensation, because the FCC has exclusive jurisdiction over the issue. Moreover, Ameritech Michigan argues that despite whatever decision the Commission may make, the final outcome of the pending FCC Docket 99-68 , In the

matter of Inter-Carrier Compensation for ISP-Bound Traffic,[4] will control the parties' conduct. Further, Ameritech Michigan argues, no reciprocal compensation should be required on this traffic based on cost causation principles. Ameritech Michigan insists that when a call is placed to an ISP, it is the ISP that is the cost causer, not the originator of the call.

The Commission finds that the arbitration panel's conclusions with regard to this issue should be affirmed. In its January 28, 1998 order in Cases Nos. U-11178 et al., the Commission held that calls to ISPs within the local calling area are local calls. Thus, the Commission found, reciprocal compensation was required under the interconnection agreements at hand. The Commission's determination that calls to ISPs located within the local calling area are local calls for purposes of reciprocal compensation has been repeated in later orders. See, e.g., the Commission's April 12, 1999 order in Case No. U-11821, the February 22, 2000 order in Case No. U-12090, and the June 5, 2000 order in Case No. U-12284. In those orders, the Commission rejected Ameritech Michigan's arguments that the Commission lacks jurisdiction over this issue and that calls to ISPs are not local, including Ameritech Michigan's argument that the FCC's February 26, 1999 decision in CC Docket 96-98 supports the ILEC's position on this issue. Specifically, the Commission's February 22, 2000 order in Case No. U-12090, at pp. 4-6 fully addressed this argument, finding it baseless. See also, the Commission's June 5, 2000 order in Case No. U-12284, pp. 4-7. Ameritech Michigan raises no new arguments that persuade the Commission to reach a different conclusion in this case. The fact that the present case is an arbitration agreement rather than a

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[4]The FCC's February 26, 1999 decision in Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-38, in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket 96-98, vacated and remanded in Bell Atlantic Telephone Companies v FCC, 206 F 3d 1 (DC Cir, 2000).

complaint seeking interpretation of a tariff or interconnection agreement provision does not alter the basis for finding that ISP calls within the local calling area are local for purposes of rating and intercarrier compensation. The Commission acknowledges that the parties could have reached an agreement not to compensate each other for these calls. However, they did not, and the Commission finds that it should not impose such a provision on Coast.

Finally, Ameritech Michigan complains that the arbitration panel failed to address the issue of the appropriate rate for intercarrier compensation for ISP calls. It insists that any compensation for this traffic should be lower than the reciprocal compensation for terminating voice calls because it costs Coast less to deliver Internet traffic to its ISP customers than it costs either party to terminate local traffic to non-ISP customers. Ameritech Michigan states its belief that the compensation rate should be zero, or a declining rate that, over a 12-month period, would be reduced to zero.

As a separate alternative, Ameritech Michigan argues that the Commission should, either in this case or a separate docket, examine and set the appropriate rates for ISP calls, the results of which should apply retroactively to the effective date of the parties' agreement. If the Commission determines a rate in this case, Ameritech Michigan argues, it should be bifurcated into two rate elements, one for initial set-up charge and the other to recover the per minute usage costs of each call. It states that based on the cost studies approved in the Commission's November 16, 1999 order in from Case No. U-11831, the rate structure should be $.00733 for the set-up charge and $.000778 for a per minute of use charge, or a melded charge of $0.001034 per minute, which assumes an average holding time of 28.7 minutes per call. See Verified Statement of Eric L. Panfil, p. 17. Additionally, Ameritech Michigan took the position that Coast should not receive the tandem switching and transport rate associated with this traffic, because Coast generally serves

ISPs that are either located very close to its switch or collocated at the switch itself. Thus, Ameritech Michigan argued, Coast does not incur transport costs of any significance.

The arbitration panel rejected Ameritech Michigan's alternative positions. In the panel's view, arbitration procedures require the panel to choose between the two positions of the parties, not an array of alternatives. In this case, the panel chose the language proposed by Coast, and rejected the language proposed by Ameritech Michigan. It found no reason to also address the appropriate rate for these calls.

The Commission finds that the rate to be paid for reciprocal compensation for ISP calls should not be altered in this arbitration proceeding. Although Ameritech Michigan proffers numbers that it claims are "based on" its approved cost studies, the Commission notes that Ameritech Michigan did not propose a separate, lower rate for calls to its ISP customers in that case. If it sought to recognize lower per minute costs based on longer holding times for ISP calls, or to bifurcate the rate for all calls to ameliorate the difference between calls held for long periods, its latest cost study case would have been an appropriate time to examine the issue. To allow Ameritech Michigan to now alter the reciprocal compensation rate only for ISP calls would effectively sanction the company's altering only a portion of its cost studies, contrary to the directives in the Commission's November 16, 1999 order in Case No. U-11831, p. 40, in which the Commission directed that new cost studies must be proposed only for the company's entire system, except for new services. Calls to ISPs do not fall within that exception. That requirement is intended to prevent inequities associated with piecemeal changes.

Contract Services

The parties submitted several issues concerning the terms under which Coast would be allowed to assume contracts that Ameritech Michigan has with certain end-users. Among other things, Coast sought inclusion of language in the interconnection contract that would require Ameritech Michigan to produce upon request a validly executed copy of its contract with the end-user customer within 10 business days. Upon Ameritech Michigan's failure to produce a copy within the specified period, Coast argued, the contract with the end-user should be considered null and void and not binding on Coast. Coast asserted that it should not be required to assume all responsibilities under the contract without first having fair notice of what those liabilities might be.

Ameritech Michigan argued that a provision in a contract between Coast and Ameritech Michigan could not lawfully nullify a contract that Ameritech Michigan has with an end-user customer.

The arbitration panel determined that Coast should be entitled to receive a copy of any contract within 10 business days of its request. Failure to produce the contract would entitle Coast to treat the customer as a new customer, not subject to any contractual obligations or the lower assumed contract discount rate.

Ameritech Michigan objects and argues that the arbitration panel has adopted a position unsupported by law. Moreover, Ameritech Michigan argues, the issue is not even properly before the panel because it has no connection with any request for interconnection, service, or network element arising under the federal Act. In Ameritech Michigan's view, Coast should in the first instance be required to obtain a copy of the contract from the end-user customer rather than Ameritech Michigan. If the end-user customer does not have a copy, says Ameritech Michigan, the customer could contact Ameritech Michigan's retail business unit to obtain a copy. In the

alternative, Ameritech Michigan states, Coast could obtain the needed information from the customer service record at the Ameritech Michigan preordering interface.

The Commission finds that the decision of the arbitration panel should be affirmed. At the outset, the Commission finds that this is an issue properly before the arbitration panel because it deals with the terms and conditions of resale services, as provided in Section 251 of the federal Act. Moreover, the Commission finds that if, as Ameritech Michigan has argued (and the arbitration panel agreed), Coast must be willing to sign an agreement to be bound by the terms of an assumed contract between Ameritech Michigan and an end-user customer, Coast should be able to review a copy of the contract that created those obligations. Without the ability to review such a contract, Coast would be unable to determine precisely what obligations it is taking on, thus placing the CLEC in a position that might require litigating what contract rights actually exist. Further, the Commission finds that should Ameritech Michigan be unable or unwilling to produce a copy of the contract within a reasonable time (10 business days), Ameritech Michigan should not be permitted to insist on Coast's performance under that contract. Rather, under those circumstances, the Commission finds that Coast should be allowed to treat the customer as a new customer. Contrary to Ameritech Michigan's argument, this decision does nothing to alter the rights and responsibilities of the parties to the original contract for services. It merely relieves Coast of any obligation to perform under a contract that it cannot review.

Right to Purchase from Tariff or Contract

Ameritech Michigan sought inclusion of contract language that would effectively prohibit Coast from purchasing products or services that are described in Sections 251 and 252 of the federal Act, 47 USC 251 and 252, pursuant to any effective tariff. Ameritech Michigan argued that

the proposed language was necessary to prevent Coast from seeking to extend, modify, or otherwise change the terms of the contract by purchasing from a tariff products or services covered by the agreement. Further, Ameritech Michigan argued that adopting Coast's position would violate the Sierra-Mobile doctrine[5], which Ameritech Michigan argues prevents a party to a contract from choosing different terms off a tariff. Finally, Ameritech Michigan argued that prohibiting Coast from purchasing products covered by the contract off of an Ameritech Michigan tariff would make business sense and would bring stability to the parties' business relationship.

The arbitration panel rejected Ameritech Michigan's position and found Coast's proposed language to be more reasonable and more consistent with promoting competition within the state. The panel took the position that tariffed services should be available to providers, regardless of whether there is an interconnection agreement. The panel found that adopting Coast's language would not violate the Sierra-Mobile doctrine or any other state or federal law or precedent. Moreover, the panel found that its decision was consistent with the Commission's January 3, 2000 order in Case No. U-12035 and its February 9, 2000 order in Case No. U-12043. It found Ameritech Michigan's proposed language overly broad in that it might preclude Coast from purchasing a product or service available through tariff that might be included in the cited federal Act sections, but that was not mentioned in the interconnection agreement.

The arbitration panel was unpersuaded that the language proposed by Coast would permit it to impermissibly mix terms of the agreement with terms available in a tariff. Rather, the panel pointed out that Coast would be required to choose whether to purchase products or services pursuant to all of the related terms or conditions in the contract or the applicable tariff. The panel

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[5] United Gas Pipeline Co v Mobile Gas Service Corp, 350 US 332; 76 S Ct 353; 100 L Ed 373 (1956) and FPC, v Sierra Pacific Power Co, 350 US 348; 76 S Ct 368; 100 L Ed 388 (1956).

concluded that adoption of Coast's language would likely reduce delays in Coast's ability to obtain and offer new products and services.

Ameritech Michigan objects and restates the arguments that it brought before the arbitration panel.

The Commission finds that the arbitration panel's decision should be affirmed on this issue for the reasons stated by the panel in its decision. Ameritech Michigan's arguments fail to persuade the Commission that a different result is required.

Collocation Indemnification

Coast proposed language for Section 12.10.7 of the interconnection agreement that would require Ameritech Michigan to indemnify Coast and hold it harmless for any injuries to persons or property that occur due to work performed in the collocation space by Ameritech, its employees, agents, or vendors. The proposed language mirrors and would make mutual the obligation language, in which Coast has already agreed to indemnify Ameritech Michigan. Ameritech Michigan rejected this proposed mutuality of indemnification, arguing that Coast's presence in the collocated space increases risk to Ameritech Michigan, but the fact that Coast is collocated does not increase Coast's risk.

The arbitration panel determined that the language proposed by Coast should be included in the interconnection agreement.

Ameritech Michigan objects and argues that Article 24 of the interconnection agreement, to which the parties have already agreed, protects each party against the results of negligence or intentional misconduct by the other. What Ameritech Michigan sought to protect itself against in Section 12.10.7 was a perceived additional risk not covered in Article 24. It states that Coast's

presence on Ameritech Michigan's property increases the risk of loss to Ameritech Michigan but not Coast. In fact, Ameritech Michigan states, its collocation rates do not include the costs of insuring Coast for virtually any loss in the collocation context, even without proven fault on Ameritech Michigan's part.

The Commission finds that the arbitration panel's decision making the indemnification obligation mutual should be affirmed. As the panel noted, there is a risk to Coast, once it has collocated in an Ameritech Michigan space whenever Ameritech Michigan performs work in the area. Ameritech Michigan actions that might not amount to negligence may cause great loss to the CLEC. If Coast is required to indemnify Ameritech Michigan, it is only appropriate that the obligation should be mutual. Ameritech Michigan's argument that this risk was not included in its cost study for determining collocation rates is not persuasive. Ameritech Michigan presented no evidence concerning the likely magnitude of such costs. The Commission finds that they are likely to be minimal. Moreover, it is not clear whether Coast's agreement to indemnify Ameritech Michigan would not offset any costs for Ameritech Michigan to indemnify Coast.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The interconnection agreement proposed by the decision of the arbitration panel should be approved.

c. Within 10 days from the date of this order, the parties should file an executed interconnection agreement consistent with the DAP.

THEREFORE, IT IS ORDERED that:

A. The Decision of the Arbitration Panel is adopted.

B. Within 10 days of the date of this order, Coast to Coast Communications, Inc., and Ameritech Michigan shall submit an executed interconnection agreement that is consistent with the Decision of the Arbitration Panel.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(SEAL)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of August 17, 2000.

/s/ Dorothy Wideman
Its Executive Secretary

c. Within 10 days from the date of this order, the parties should file an executed interconnection agreement consistent with the DAP.

THEREFORE, IT IS ORDERED that:

A. The Decision of the Arbitration Panel is adopted.

B. Within 10 days of the date of this order, Coast to Coast Communications, Inc., and Ameritech Michigan shall submit an executed interconnection agreement that is consistent with the Decision of the Arbitration Panel.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

Chairman

_____

Commissioner

_____

Commissioner

By its action of August 17, 2000.

_____

Its Executive Secretary

In the matter of the petition of )
**COAST TO COAST TELECOMMUNICATIONS,** )
**INC.**, for arbitration of interconnection rates, ) Case No. U-12382
terms, conditions, and related arrangements with )
**MICHIGAN BELL TELEPHONE COMPANY,** )
**d/b/a AMERITECH MICHIGAN.** )
)

Suggested Minute:

"Adopt and issue order dated August 17, 2000 adopting the decision of the arbitration panel establishing interconnection arrangements between Coast to Coast Telecommunications, Inc., and Ameritech Michigan, as set forth in the order."

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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| In the matter of the petition of **LEVEL 3 COMMUNICATIONS, LLC**, for arbitration pursuant to Section 252 of the federal Telecommunications Act of 1996 to establish an interconnection agreement with **AMERITECH MICHIGAN**. | ) | Case No. U-12460 |

At the October 24, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

**OPINION AND ORDER**

On May 8, 2000, Level 3 Communications, LLC, (Level 3) filed a petition for arbitration of an interconnection agreement with Ameritech Michigan pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, 47 USC 252(b), (FTA) and the procedures adopted by the Commission in its July 26, 1996 order in Case No. U-11134. The petition listed 37 issues.

On June 30, 2000, Ameritech Michigan filed its response to the petition. An arbitration panel was appointed, which included Administrative Law Judge Daniel E. Nickerson, Jr., and Commission staff members Robin Ancona and Dan Kearney.

On July 16, 2000, a prehearing conference was held before the arbitration panel, during which a schedule was set. The arbitration panel directed the parties to continue negotiations and to file a joint statement of resolved and unresolved issues by August 1, 2000.

On August 22, 2000, the parties appeared before the arbitration panel and made presentations concerning issues as requested by the arbitration panel. Those issues included reciprocal compensation, foreign exchange service/deployment of NXX codes, unbundled network element (UNE) combinations or platforms, enhanced extended loops (EELs), local loop definition, dedicated transport, points of interconnection, and trunk utilization. Thereafter, the parties filed proposed decisions of the arbitration panel.

On September 27, 2000, the arbitration panel issued its decision (DAP) on the 16 issues remaining unresolved by the parties. The arbitration panel's decision permitted objections to be filed no later than October 2, 2000. No replies to objections were provided for.

On October 2, 2000, the parties filed objections. Level 3's objections generally seek correction of inadvertent or typographical errors contained in two sections of the DAP. Ameritech Michigan, on the other hand, raises objections on 13 of the substantive issues decided by the arbitration panel.

Level 3's Objections

a. Assignments

Level 3 states that in its discussion and findings on Issue 17, related to assignments, the arbitration panel stated: "The [p]anel agrees with Level 3's assessment that such written approval should not be reasonably withheld." DAP, p. 15. Level 3 asserts that the arbitration panel intended to state that written approval should not be unreasonably withheld.

The Commission agrees with Level 3 that the DAP contains a typographical error in the cited sentence and should be read as prohibiting unreasonable withholding of approval of an assignment.

b. EELs

Level 3 seeks clarification of the arbitration panel's reference made to exhibits to the proposed interconnection agreement. The DAP states: "Ameritech [Michigan's] certification form is included in Exhibit C of the proposed interconnection agreement." DAP, p. 18. It further stated that the arbitration panel "finds that Exhibits B and C to the proposed interconnection agreement, SBC's certification, should be rejected." However, Level 3 states, Exhibits B and C, related to the certification form at issue, were attached to Level 3's petition for arbitration, not attached to the interconnection agreement. It states that Exhibit B to its petition is an *ex parte* letter from Ameritech Michigan to the Federal Communications Commission (FCC) addressing the definition of "significant local traffic." Level 3 states that Exhibit C attached to its petition is Ameritech Michigan's certification form intended to implement the FCC's order in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96098, Supplemental Order rel'd November 24, 1999 (Supplemental Order). Level 3 states that Ameritech Michigan seeks to incorporate Exhibit C into the contract by reference, and Exhibit B constitutes Ameritech Michigan's interpretation of the contract provisions regarding "significant local traffic."

The Commission agrees with Level 3 that the reference to Exhibits B and C in the portion of the DAP related to EELs was intended by the arbitration panel to refer to those exhibits attached to the petition for arbitration rather than the proposed interconnection agreement.

Ameritech Michigan's Objections

a. Reciprocal Compensation for Internet Service Provider (ISP) Traffic

Despite its recognition that the Commission has repeatedly ruled that calls to ISP customers are local calls, Ameritech Michigan again argued in this case that the Commission's previous rulings are contrary to federal law. Ameritech Michigan insisted that ISP traffic is interstate in nature and thus, should not be subject to the reciprocal compensation requirements of the FTA. 47 USC 251(b)(5). Moreover, Ameritech Michigan argued, any reciprocal compensation paid must be based on Level 3's costs for those calls.

The arbitration panel concluded that it should follow Commission precedent on this issue. It quoted from the Commission's June 5, 2000 order in Case No. U-12284, a complaint case involving Baraga Telephone Company and Ameritech Michigan. Following an extensive discussion of previous decisions discussing the issues raised and rejecting Ameritech Michigan's arguments, the Commission stated in that order:

> The Commission therefore concludes, as it has in the orders discussed above and for the reasons set out in those orders, that calls placed to an ISP within a customer's local calling area are local calls for which the originating carrier owes reciprocal compensation to the terminating carrier pursuant to any applicable interconnection agreement or tariff.

Order, p. 7.

Ameritech Michigan objects and argues that the arbitration panel erred in adopting Level 3's position on the applicability of intercarrier compensation and failed to determine the appropriate rate to be applied for any such compensation. In an apparent attempt to preserve the issue for appeal purposes, Ameritech Michigan attaches its "ISP Appendix" in which it raises the same arguments rejected by the Commission in myriad previous orders.

The Commission again rejects Ameritech Michigan's arguments on this issue, based on the reasons more fully expressed in the following Commission orders: April 12, 1999 order in Case No. U-11821, the February 22, 2000 order in case No. U-12090, the June 5, 2000 order in Case No. U-12284, and the August 17, 2000 order in Case No. U-12382.

Ameritech Michigan further argues that if it is required to pay reciprocal compensation on ISP traffic originating on its network, the competitive local exchange carrier (CLEC) should not be permitted to adopt Ameritech Michigan's reciprocal compensation rate for voice traffic as a proxy rate. It points to Section 252(d)(2)(A)(i) of the FTA as support for its position that Level 3 should receive a rate intended to compensate it for the actual costs involved in terminating ISP calls. It asserts that the arbitration panel's decision allows Level 3 to impose a reciprocal compensation rate that exceeds the CLEC's costs.

Ameritech Michigan argues that Level 3's reliance on Rule 711(a)(1)[1] to support its adoption of Ameritech Michigan's reciprocal compensation rate as a proxy is misplaced. First, Ameritech Michigan states, an administrative rule cannot override the clear meaning of the statute, which Ameritech Michigan insists permits a CLEC to recover no more than its own costs, not the costs of the incumbent. Moreover, Ameritech Michigan argues, Rule 711(a)(1) provides for adoption of the incumbent's reciprocal compensation rate only when the incumbent provides like service. In this case, Ameritech Michigan argues, there is no dispute that Level 3 does not transport or terminate voice traffic and does not terminate ISP traffic over a wide geographic area. Rather, Ameritech Michigan asserts, Level 3 terminates calls only to ISPs that are collocated on its switch. Thus, Ameritech Michigan, argues Level 3 does not provide the same service as Ameritech

[1] 47 CFR 51.711(a)(1).

Michigan and should not be permitted to charge reciprocal compensation that is equal to that of Ameritech Michigan, which terminates voice and data traffic over a wide geographic area.

Ameritech Michigan argues that Level 3 had the burden to demonstrate what it costs to transport and terminate traffic on its network, but failed to produce any evidence on that issue. Ameritech Michigan insists that ISP traffic to Level 3 is similar to paging traffic, which the FCC has held should receive a different intercarrier compensation rate than regular wireline voice traffic. Ameritech Michigan states that it demonstrated in this case that there are significant differences between the costs associated with terminating ISP traffic and the costs associated with terminating local voice traffic.

The Commission finds that the arbitration panel's decision with regard to this issue should be affirmed. There is no persuasive argument that the Commission's determination in Case No. U-12382 and the many other previous cases in which this issue has been repeatedly decided should not be followed here. Pursuant to 47 USC 251(b)(5), all local exchange providers have the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 USC 252(d)(2) provides:

> For purposes of compliance by an incumbent local exchange carrier with 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless,
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier, and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

To implement this section, the FCC established Rule 711, which provides:

> (a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c).
>
> (1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.
>
> * * *
>
> (b) A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the incumbent LEC . . . proves to the state commission on the basis of a cost study . . . that the forward-looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC . . . exceed the costs incurred by the incumbent LEC, . . . and, consequently, that such a higher rate is justified.

47 CFR 51.711[2]

Thus, with certain exceptions not applicable here, reciprocal compensation rates are to be symmetrical based on the costs of the incumbent LEC for the same service. Rule 711(a) allows Level 3 to adopt Ameritech Michigan's transport and termination rates for purposes of reciprocal compensation. Ameritech Michigan does not have a separate rate for transport and termination of calls to ISPs on its system, and the Commission rejects any suggestion that it should now create a different rate for such calls. See, the Commission's August 17, 2000 order in Case No. U-12382, p. 15.

Further, the Commission rejects Ameritech Michigan's argument that Level 3's costs should be at issue in this case based on the FCC's determinations concerning paging services. The Commission notes that Rule 711(c) provides specifically for treating reciprocal compensation with

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[2] Subsection (c) provides an exception for paging services and narrow band personal communications services.

regard to licensees that provide paging services differently. There is no similar provision for ISP service.

Finally, the Commission rejects Ameritech Michigan's assertion that Level 3 should be treated differently because its business serves only ISPs. The Commission notes that Level 3 claims to provide 15 types of service, including certain advanced services. Ameritech Michigan did not demonstrate otherwise on this record. Moreover, the Commission notes that Level 3's license to provide basic local exchange service requires it to offer service to all residential and commercial customers within the area served. Failure to do so within a reasonable time may result in the revocation of its license or other adverse action. MCL 484.2303; MSA 22.1469(303).

b. Foreign Exchange Service

Foreign exchange service (FX service), or virtual NXX service, allows a customer to obtain an NXX code[3] for a geographic area different from the area where the customer is actually located. Calls made from persons in the geographic area assigned to that NXX code are able to reach the FX customer for the price of a local call because Ameritech Michigan's billing system recognizes intra-NXX calls as local.

Ameritech Michigan took the position that its "Appendix FX" should be added to the interconnection agreement. That appendix would require either that Level 3 compensate Ameritech Michigan for these calls and remove them from the category of calls for which Ameritech Michigan pays reciprocal compensation or that Level 3 establish a point of interconnection in each local calling area associated with an NXX assigned to a Level 3 customer. In that

[3]The NXX code is the first three digits of the seven-digit telephone number.

manner, Ameritech Michigan argued, the costs of interexchange transport would be borne appropriately by Level 3 and its FX customer.

The arbitration panel rejected Ameritech Michigan's position based in large part on the Commission's August 17, 2000 order in Case No. U-12382 on this issue. Ameritech Michigan excepts and argues that the arbitration panel's determination will require it to forgo compensation for what would otherwise be intraLATA toll calls, receive no compensation for transporting these calls, and pay reciprocal compensation for interexchange calls. It argues that the decision is contrary to federal law and should be rejected.

A review of Ameritech Michigan's objections reveals no new arguments or significant differences that persuade the Commission that its ultimate determination in Case No. U-12382 must be altered in this case. See the Commission's August 17, 2000 order in Case No. U-12382, pp. 9-11. The Commission therefore affirms the arbitration panel's determination on this issue.

As noted in the August 17 order, the Commission finds that the arguments raised by Ameritech Michigan concerning the likely effect of the Commission's holdings on a competitive environment may deserve further study. However, it would be unwise for the Commission to reverse its position on this issue in an arbitration case, without the ability to grant other parties that might be significantly affected by such a reversal an opportunity to participate. Additionally, recent amendments to the MTA require that calls made to a local calling area adjacent to the caller's local calling area shall be considered a local call and shall be billed as a local call. MCL 484.2304(11); MSA 22.1469(304)(11). The appropriate implementation of that provision is currently the subject of Commission proceedings in Case No. U-12528, which was commenced by the Commission's July 17, 2000 order. The conclusions reached in that case may affect the Commission's position concerning the appropriate treatment and rating for FX and ISP calls.

c. Charges for CLEC Name Changes

Ameritech Michigan sought to include contract language that would allow it to impose on Level 3 unspecified charges for processing any name changes that the company requests. Level 3 took the position that the costs for updating accounts and programming changes related to name changes should be borne by the respective parties to the agreement. It argued that including Ameritech Michigan's provision in the contract would lead to the possibility of holding corporate changes up in an attempt to collect disputed charges for the name change.

Moreover, Level 3 argued, the activities required to effect a name change appear to be minimal and confined to the operational support system (OSS) functions. Level 3 further argued that Ameritech Michigan failed to demonstrate that it is not already collecting sufficient revenues to cover these expenses through its recurring and nonrecurring OSS charges. To the extent that these activities are not fully automated, argued Level 3, Ameritech Michigan should not be permitted to impose charges on LECs for functions that could be eliminated through the use of automated functions.

The arbitration panel rejected Ameritech Michigan's proposed language and agreed with Level 3 that Ameritech Michigan had failed to substantiate a need to impose additional charges to recover these costs. Thus, the arbitration panel reasoned, pending future determinations to the contrary, the costs must be considered minimal and merely part of the cost of doing business, to be borne by the respective parties to the agreement.

Ameritech Michigan argues that the arbitration panel erred when it determined that Ameritech Michigan had failed to substantiate the costs associated with name changes. It states that it set forth the type of costs it incurs to implement a CLEC name change: updating records for billing, maintenance and branding, and programming the mechanized service order systems and updating

affected accounts. Ameritech Michigan asserts that it offered to provide cost studies detailing anticipated charges for CLEC name changes for carriers obtaining UNEs, and for carriers obtaining resale services.

Ameritech Michigan argues that the arbitration panel's determination completely disregards the company's right to cost recovery. Although the cost to change a CLEC's name may be an ordinary cost of business for the CLEC, Ameritech Michigan argues, it should not be an ordinary cost of business borne by Ameritech Michigan. It argues that the arbitration panel's decision forces Ameritech Michigan to bear the costs of its competitors' business decisions.

The Commission finds that the arbitration panel's decision should be affirmed. If Ameritech Michigan desired to impose a separate charge to recover the costs associated with this function, its latest cost study case, Case No. U-11831, would have provided an appropriate time to examine this issue. To allow Ameritech Michigan to now impose an unspecified charge for its OSS functions related to name changes effectively alters a portion of its cost studies, contrary to the directives in the Commission's November 16, 1999 order in Case No. U-11831, p. 40, which directs that new cost studies must be proposed only for the company's entire system, except for new services. Name changes for CLECs do not fall within that exception. That requirement is intended to prevent inequities associated with piecemeal changes. Thus, the Commission will assume that Ameritech Michigan's recurring and nonrecurring charges for its OSS functions are currently sufficient to cover the costs associated with name changes.

d. Term of the Agreement

Ameritech Michigan proposed that this interconnection agreement have a one-year term. It reasoned that with technology changing at a rapid pace, the parties should not be locked into an

agreement with terms that might be disadvantageous. It asserted that if the parties desired to continue the contract after the proposed one-year term, they need merely renew the agreement.

Level 3 proposed a three-year term, arguing that it needs the certainty and stability of the longer term to deploy its network in an efficient, reliable, and cost-effective manner.

The arbitration panel adopted Level 3's proposed three-year term. It reasoned that a one-year term would require an inefficient use of the parties' and the Commission's resources. The arbitration panel noted that should there be material changes in the law governing interconnection, a separate part of the contract provides for renegotiation. It further concluded that renegotiation due to major changes in technology had been provided for in the good faith provisions of the FTA.

Ameritech Michigan objects to the arbitration panel's determination on this issue. It argues that major changes in the regulations governing interconnection have occurred, with regulations having been issued, stayed, invalidated, reinstated, invalidated again by reviewing courts, and modified and refined by the FCC. Ameritech Michigan says that these changes and the newly developing services have created change in the market that is difficult to track. It argues that at the current rate of change, the parties are not likely to realize the savings envisioned by the arbitration panel when it adopted the longer contract term. Ameritech Michigan argues that the Commission approved an interconnection agreement between Vectris and Ameritech Michigan, which provided for a one-year term in Case No. U-12375. Ameritech Michigan argues that the Commission should either adopt the incumbent LEC's proposal for a one-year term, or adopt a two-year term as contemplated by the arbitration panel, but rejected because neither party proposed a middle ground.

The Commission finds that the arbitration panel's decision should be affirmed. The arbitration panel performed its responsibility to choose between two competing positions. Ameritech

Level 3 argued that the entire section related to deposits for resale services and UNEs should be removed from the agreement. It asserts that its $8.6 billion in assets should be sufficient to demonstrate that it is capable of paying its bills to Ameritech Michigan. Moreover, Level 3 argued that Ameritech Michigan's proposed criteria for "good credit history," which would forgive the necessity for deposits, could be subject to substantial abuse. In any event, Level 3 argued, Ameritech Michigan is protected from nonpayment by the billing and payment of charges provisions of the agreement. As an alternative, Level 3 argued that all deposit, billing, and payment provisions should apply equally to each party.

The arbitration panel determined that Level 3's position concerning deposits was the most reasonable. It reasoned that Level 3 and its associates, with combined available assets of $8.6 billion, pose only a remote risk of defaulting on payments owed. It noted that Ameritech Michigan has available other protections in Sections 8.1.5, 9.2, and 9.6 of the proposed agreement, which permit interest assessments on late payments and the ability to disconnect services. In the arbitration panel's view, these provisions give Ameritech Michigan sufficient financial protection. Further, the arbitration panel found that Ameritech Michigan's "good credit history" provision is too subjective. It concluded that the potential for manipulation of delinquency notices could result in the application of subjective criteria in a rating system that should be objective.

Ameritech Michigan objects and argues that the arbitration panel's decision confuses net worth (the ability to pay) and creditworthiness (the willingness to pay on time). It states that the purpose of its deposit requirements is to protect itself against financial losses created by CLECs that receive services for which they are either unable or unwilling to pay. It argues that the system of late payment charges and the assessment of interest are not sufficient to protect Ameritech Michigan. It states that it had 12 major disconnections in 1999 and 2000, which resulted in a loss

of over $2 million. Moreover, Ameritech Michigan argues, the arbitration panel failed to explain how Level 3 could be considered a remote risk for nonpayment when the company owed Ameritech Michigan $1 million in May, of which $900,000 was past due. Ameritech Michigan argues that until Level 3 demonstrates a better ability or willingness to pay its bills in a timely manner, it should not be exempt from deposit requirements.

The Commission finds that the arbitration panel's decision should be affirmed. Given Level 3's total assets, it is unlikely that Ameritech Michigan will be unable to collect monies owed. The provisions in Sections 8 and 9 of the agreement will provide Ameritech Michigan sufficient protection against losses associated with slow payment. Moreover, the Commission is not persuaded that Level 3's payment record requires a different result. Although the amounts due appear substantial, the Commission finds no indication that the amount Ameritech Michigan claimed as overdue from Level 3 was an amount not subject to dispute or a claim of setoff. Nor is there an indication that the amount currently remains outstanding.

2. Billing Disputes

Ameritech Michigan sought inclusion of a provision that would require a nonpaying party to give notice to the billing party of disputed amounts prior to the bill due date, including the rationale for why those items are disputed. Ameritech Michigan argued that this provision, which allows 30 days for the billed party to dispute charges, is consistent with commercial practices. It argued that Level 3's proposal effectively would allow the company 90 days to pay its bills.

Level 3 argued that it should not be required to provide notice of a dispute before the billing due date. Rather, Level 3 sought inclusion of a provision that would allow at least 60 days from the bill due date to research and provide a detailed explanation of the dispute. Further, Level 3 argued that it should have at least 30 days from the notice of unpaid amounts to place funds in

escrow and perform the other actions required by Sections 9.2 and 9.3 of the agreement. Additionally, Level 3 argued that its willingness to place disputed amounts in escrow and furnish evidence of that deposit on request should negate any need to require evidence of an escrow deposit prior to an amount being deemed in dispute.

The arbitration panel determined that Level 3's position on this issue was more reasonable than Ameritech Michigan's position. It found that it would not be practical to require Level 3 to assemble, analyze, fully document, and articulate the rationale for billing disputes prior to the bill due date. It concluded that the 60 days after the billing date as proposed by Level 3 for this activity would be satisfactory under the circumstances. In so finding, the arbitration panel noted that generally the vast majority of the billing amount is undisputed. Thus, the arbitration panel reasoned, a 60-day period for notice of the specifics of a dispute should not be an undue financial burden on Ameritech Michigan.

Ameritech Michigan objects and argues that the arbitration panel's decision should be reversed. It argues that there is no factual basis for finding it not practical for Level 3 to assemble, analyze, fully document, and articulate the rationale for billing disputes prior to the bill due date. Ameritech Michigan argues that at some point before the bill due date, the CLEC must undertake an analysis of the charges to determine whether to pay them all, and if not, how much is in dispute. Ameritech Michigan states that the purpose of this provision is to give the billing party some indication of why it is not getting paid on or before the due date. Such notice, it argues, will allow the billing party to correct the situation or begin the dispute resolution process promptly.

The Commission concurs with Ameritech Michigan that it is not unreasonable to require that Level 3 provide notice of the amount not in dispute by the bill due date. However, the specifics of any dispute and documentation to back up the CLEC's position may require more than the 30 days

that Ameritech Michigan's proposed language provides for the bill due date. It is likely that the company will require additional detailed information from Ameritech Michigan concerning what may be legitimately disputed amounts. It is for that reason that it may not be practical for Level 3 to comply with the entirety of Ameritech Michigan's proposed provisions on this issue. An additional 60 days to document and provide notice to Ameritech Michigan concerning the specifics of any dispute is not unreasonable. However, any disputed amounts should be paid into an interest bearing escrow account by the bill due date, as provided in Section 9.3.3, and undisputed amounts should be paid by the bill due date, as provided in Section 9.

3. Late Payment Remedies

Level 3 objected to Ameritech Michigan's proposed language for remedies available when payment is not made according to the contract. It argued that Level 3 should be given a reasonable opportunity to investigate discrepancies, to dispute amounts, and to seek a cure from Ameritech Michigan before Ameritech Michigan is permitted to begin terminating service under the contract.

The arbitration panel agreed with Level 3 that the entire Section 9.5 of the General Terms and Conditions (Section 9.5) proposed by Ameritech Michigan should be deleted from the contract. The arbitration panel reasoned that the interruption of customer service is serious and in some cases irreparable. It further found that the deleted section conflicted with less onerous provisions of the agreement regarding billing, deposits, and payments. In the arbitration panel's view, proposed Section 9.5 would permit Ameritech Michigan to impose unreasonable conditions on Level 3. The arbitration panel found "sufficient authority for the termination of service which adequately protects Ameritech Michigan financially without resort to Section 9.5 language." DAP, pp. 11-12.

Ameritech Michigan objects to the arbitration panel's determination that proposed Section 9.5 should be deleted from the agreement. Ameritech Michigan argues that, in so doing, the arbitration panel stripped Ameritech Michigan of its ability to assess late payment charges, require deposits, refuse to accept new orders, or discontinue service in the event that Level 3

> [F]ails to (i) pay any undisputed amount by the Bill Due Date, (ii) pay the disputed portion of a past due bill into an interest bearing account with a Third Party escrow agent, (iii) pay any revised deposit or (iv) make a payment in accordance with the terms of any mutually agreed upon payment arrangement. . . .

Section 9.5. Ameritech Michigan argues that the arbitration panel has left the company unprotected should Level 3 decide to not pay its bills.

Proposed Section 9.5 would permit Ameritech Michigan to present a written demand for payment upon the failure of the CLEC to take the prescribed actions listed above. If the written demand is not honored within five business days, the section would permit Ameritech Michigan a number of options, including the refusal to honor new orders or complete pending orders and termination of service. In its proposed decision of the arbitration panel, Level 3 appears to object most to the five-day time period in which to satisfy Ameritech Michigan's demand to pay. It states that it should be given at least 60 days from the bill due date before service is disconnected to end user customers or Ameritech Michigan's refusal to process new or pending orders.

The Commission finds that failure to pay undisputed amounts may legitimately lead to imposition of late charges or charges for any check returned for insufficient funds, at a minimum. Moreover, the Commission finds that the other remedies are not unreasonable unless implemented in the extremely short time period contemplated in the language Ameritech Michigan proposes. Thus, the Commission modifies the arbitration panel's findings to permit inclusion of Section 9.5, but increasing to 60 days the time period within which Level 3 must comply before Ameritech

Michigan may take action to refuse to process new or pending orders or terminate service. The language in 9.5.1.3 should be modified to provide the additional time. In that manner, Ameritech Michigan will have sufficient procedures and remedies to protect itself from nonpayment, and Level 3 will have sufficient time to investigate any dispute it may have.

However, the Commission further agrees with the arbitration panel that late fees and interest penalties should accrue equally for either party failing to pay undisputed amounts, as provided in Level 3's proposed Sections 8.2. and 8.3 of the General Terms and Conditions. Additionally, the contract language should clarify that no termination of service or refusal to complete new or pending orders may be predicated on nonpayment of a disputed amount.

f. Third Party Intellectual Property Rights

The parties disputed the extent to which Ameritech Michigan must provide and warrant intellectual property rights of third parties for the unbundled network elements used by Level 3. Level 3 claimed that Ameritech Michigan's proposed language does not meet the full obligation stated in the FCC's Intellectual Property Order, Order 00-139 in Docket No. CC 96-98,[4] (IP Order). In Level 3's view, Ameritech Michigan's proposed language limits the incumbent's duty to negotiate intellectual property rights to obtain rights that the incumbent actually uses, even if the incumbent has obtained additional rights. Level 3 argued that the language thus conflicts with the FCC's determination that an incumbent has a duty to use best efforts to obtain coextensive intellectual property rights from the third party vendor on behalf of the requesting carrier. Level 3 further objected to Ameritech Michigan's proposal that the CLEC indemnify the incumbent for any

[4] Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate Licence or Right-to-Use Agreements Before Purchasing Unbundled Elements, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, rel'd April 27, 2000.

claims of infringement of intellectual property rights arising out of Level 3's use of unbundled elements. Rather, Level 3 proposed that Ameritech Michigan should indemnify Level 3 and hold it harmless for any claims of infringement within the scope of the license to Ameritech Michigan.

Ameritech Michigan proposed Section 14.5.1, which states:

> Subject to [Ameritech Michigan's] obligations under any Commission decisions, it is the sole obligation of CLEC to obtain any consents, authorizations, or licenses to or for any Third Party Intellectual Property rights that may be necessary for CLEC's use of Interconnection, Network Elements, functions, facilities, products and services furnished under this agreement.

In Section 14.5.2, Ameritech Michigan proposed language that expressly states that it conveys no license and makes no warranties concerning Level 3's use of property rights. Section 14.5.3 states that subject to Ameritech Michigan's obligations under any Commission decisions, it will not indemnify, defend, or be in any manner responsible for claims or losses associated with actual or alleged infringement of intellectual property rights. The following section places indemnification responsibilities on Level 3 for any losses Ameritech Michigan might occasion from such infringement claims. Level 3 seeks to delete these sections entirely.

The arbitration panel found Level 3's interpretation of the FCC's IP Order to be generally more accurate than Ameritech Michigan's, with one exception. The arbitration panel found that Ameritech Michigan need not obtain intellectual property rights beyond those that it has negotiated for itself. The arbitration panel quoted the FCC's IP Order as follows:

> To the extent that the requesting carrier intends to use the element in a different manner (e.g., in combination with some other element not contemplated by the incumbent LEC's particular license), the requesting carrier is solely responsible for obtaining this right from the vendor.

IP Order, ¶ 16.

The arbitration panel further stated that Ameritech Michigan must obtain third party intellectual property rights that are "equal in quality to the terms and conditions under which the incumbent LEC has obtained these rights." IP Order ¶2. Thus, the arbitration panel reasoned, if Ameritech Michigan has a right to a functionality that it is not currently using, Level 3 is entitled to the intellectual property right of the use of that functionality, provided it is contemplated by the license to Ameritech Michigan. Thus, the arbitration panel found, Level 3 is not required to duplicate the intellectual property rights in the license to Ameritech Michigan by obtaining those same rights from the vendor. The arbitration panel further determined that the general indemnity provisions would sufficiently protect Ameritech Michigan on any infringement claim and concluded that Sections 14.5.2, 14.5.3, and 14.5.4 could be deleted.

Ameritech Michigan objects to the arbitration panel's conclusions and argues that the language Ameritech Michigan proposes on this issue has already withstood CLEC challenges before the FCC. According to Ameritech Michigan, the FCC held the same language to adequately address the incumbent's obligations pursuant to the IP Order in the context of a Section 271 application of Southwestern Bell Telephone Company (SWBT). Moreover, Ameritech Michigan states, the Illinois Commerce Commission has found that this language is consistent with the FCC's IP Order, citing the Level 3/Ameritech Arbitration decision in Illinois Commerce Commission Docket No. 00-0332, issued August 30, 2000. The company further asserts the Texas Public Utilities Commission has rejected the claim that Ameritech Michigan should be required to provide indemnity for intellectual property infringement.

The Commission concludes that neither party has proposed language that adequately and accurately reflects the holdings in the IP Order. The Commission finds that the order requires that Ameritech Michigan use its best efforts to obtain intellectual property rights for Level 3 that are

coextensive with the rights that Ameritech Michigan has obtained for itself, which might be more than the rights it currently uses. The Commission notes that the incumbent's obligation does not guarantee that the third party vendor will grant the rights sought. However, it is expected that the incumbent's good faith best efforts will be able to extend the incumbent's license to include the CLEC's use of the UNE in the same manner contemplated by the license originally obtained by the incumbent. It is further expected that those efforts will result in terms and conditions equal in quality to the terms and conditions under which the incumbent LEC has obtained these rights, which presumably will be at a lower cost than the requesting carrier might be able to obtain for itself. Moreover, the FCC's IP Order requires that the incumbent provide the CLEC with necessary information concerning the extent to which the incumbent is entitled to use a particular element, and the parties need to negotiate a reasonable method of conveying the necessary information. To the extent that Level 3 seeks to use UNEs in a manner not contemplated by the agreement between the vendor and the incumbent LEC, Level 3 is on its own to obtain the additional permissions.

Nothing in the IP Order requires that the incumbent indemnify the CLEC for costs arising out of infringement claims. On the other hand, nothing in that order requires that the CLEC should be required to indemnify the incumbent. In the Commission's view, Level 3 is not entitled to a blanket contract provision requiring Ameritech Michigan to indemnify it for all damages arising out of intellectual property infringement challenges. But neither should it be held necessarily responsible for indemnifying the incumbent.

The Commission will not re-write the agreement for the parties. It therefore directs the parties to negotiate language that comports with the findings of this order within the period provided for submission of the interconnection agreement. If the parties are unable to reach an agreement, they

shall each submit their last best offer and the Commission will determine which of the provisions best meets the findings and discussion above.

g. Assignment

The parties disagreed concerning whether either should be required to obtain written approval from the other prior to assigning or transferring the agreement, and whether notice of a pending assignment should be provided 30 or 90 days prior to consummation of the transfer. Ameritech Michigan took the position that it should have a unilateral right to determine whether to consent to any transfer proposed by Level 3 90 days in advance of the proposed transfer. Assignments to a Level 3 affiliate would require 90 days' notice to Ameritech Michigan, without the specific need for consent. Level 3 proposed altering the time frame to 30 days' notice and making all of the notice and consent requirements mutual.

The arbitration panel found that Level 3's position was the more reasonable and should be adopted for this interconnection agreement.

Ameritech Michigan objects to the arbitration panel's decision. It contends that the parties are not similarly situated, either in obligations under the FTA or in the number of carriers with whom they interconnect. Thus, Ameritech Michigan argues, the notice and approval obligations need not be mutual to be fair.

The Commission is not persuaded that the arbitration panel's decision must be reversed. The arbitration panel reasonably chose between two alternatives provided by the parties, for the reasons stated in the DAP. The Commission, therefore, affirms the decision of the arbitration panel and adopts Level 3's proposed language for Sections 29.1, 29.2 and 29.3 of the General Terms and Conditions.

h. UNE Combinations with Other Services

In Section 2.9.8 of the Appendix UNE, Ameritech Michigan proposed language to prohibit Level 3 from combining UNEs with Ameritech Michigan access service or other tariffed service offerings, with the exception of tariffed collocation services. Although Level 3 agreed that it may not combine UNEs with access service, it sought to delete the prohibition against combining UNEs with other tariffed services as going beyond the holdings of the FCC.

The arbitration panel rejected Ameritech Michigan's proposed language, quoting from ¶28 of the FCC's Supplemental Order Clarification,[5] which states:

> We emphasize that the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services.

The arbitration panel concluded that because the FCC had not specifically prohibited the combination of UNEs with tariffed services other than special access services, the Commission should not do so by incorporating Ameritech Michigan's proposed language. It therefore adopted Level 3's position and found that Section 2.9.8 of the Appendix UNE should be deleted.[6]

Ameritech Michigan objects and argues that the arbitration panel's determination imposes on the company requirements beyond those specified in the FTA. In Ameritech Michigan's view, the purpose of an arbitration is to decide disputed issues in the manner required by the FTA. It argues that nothing in the FTA or in the FCC's regulations affirmatively entitles Level 3 to combine

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[5]CC Docket 96-98, FCC-00-183, rel'd June 2, 2000.

[6]Apparently the arbitration panel believed that Level 3's position was that the entire section be removed. According to the Joint Resolved and Unresolved Issues List, Level 3 sought to remove the phrase "or other [Ameritech Michigan] tariffed service offerings."

UNEs with tariffed services other than tariffed collocation services. It argues that Level 3 provided no support for its position to the contrary.

Ameritech Michigan points out that when the FCC recently set out three options for CLECs to qualify to lease existing loop-transport combinations, the FCC stated in each option: "this option does not allow loop-transport to be connected to the incumbent LEC's tariffed services." Supplemental Order Clarification, ¶ 22. Ameritech Michigan argues that the FCC had previously declined to address certain CLECs' request to combine UNEs with resale services in the First Report and Order, ¶¶ 327 and 341.[7]

Ameritech Michigan argues that Rule 309(a), 47 CFR 51.309(a), relied upon by the arbitration panel, cannot be read as broadly as the arbitration panel's reasoning suggests. Ameritech Michigan argues that the rule applies only to UNEs, not UNEs combined with services. According to Ameritech Michigan, if the FCC read its own rule as broadly as the arbitration panel did, the FCC would not have imposed restrictions on combining UNEs with services as it did in the Supplemental Order Clarification. It further argues that the Illinois Commerce Commission rejected Level 3's position on the same argument. Relying on ¶28 of the Supplemental Order Clarification, the Illinois Commission found that "given this particular choice of words, the FCC appears to tell us that, as of now, UNEs may not be combined with tariffed services." Illinois Commission's August 30, 2000 order in Docket No. 00-0332, p. 17.

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[7]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Docket No. CC-96-98, First Report and Order, rel'd August 8, 1996, aff'd in part and vacated in part sub nom Competitive Telecommunications Ass'n v FCC, 117 F 3d 1068 (CA8, 1997), aff'd in part and remanded, AT&T v Iowa Utilities Bd, 119 S Ct 721 (1999), Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997).

The Commission finds that the arbitration panel's determination should be affirmed.

Section 251 (c)(3) of the FTA provides that it is the duty of an incumbent LEC to:

> [P]rovide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 USC 251(c)(3).

47 CFR 51.309(a) provides:

> An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting carrier intends.

It is apparent that the FCC's Supplemental Order Clarification creates an exception to the prohibition in Rule 309. Taken as a whole, that FCC order reflects an intent to preserve the status quo with regard to the manner in which carriers may obtain special access service and to preserve special access charges until the FCC can resolve the myriad issues involved in a manner that would fairly and adequately administer the FTA without causing instability in the provision of telecommunication services. It intended to do so with a temporary prohibition of combining loop-transport with access services. The ultimate outcome of what may be prohibited has not been prejudged by the FCC.

The language that Level 3 seeks to remove from Section 2.9.8 of the General Terms and Conditions would leave intact the prohibition against combining loop and transport combinations with special access. Ameritech Michigan does not explain how allowing Level 3 to combine UNEs with other tariffed services (other than special access) would create the same problems the

FCC was attempting to avoid in its Supplemental Order Clarification. In the Commission's view, Level 3 should be allowed to combine loop-transport UNEs with other tariffed services without disturbing the FCC's intent to stabilize the industry until it can resolve the many and complex issues related to UNE combinations to avoid special access services charges.

The Commission rejects Ameritech Michigan's argument that Rule 309 does not apply to UNE combinations with tariffed services. Pursuant to Rule 309, Ameritech Michigan may not restrict Level 3's use of UNEs. The FCC's order sets out an exception to that rule that the remaining language in Section 2.9.8 upholds. Therefore, the Commission finds that the arbitration panel's decision should be affirmed with the modification that the phrase "or other [Ameritech Michigan] tariffed service offerings" should be deleted from the otherwise included Section 2.9.8 of the General Terms and Conditions.

i. EELs

The parties disagreed about the circumstances under which Ameritech Michigan should be required to provide loop/transport UNE combinations, commonly referred to as enhanced extended loops or links (EELs)[8]. Level 3 took the position that Ameritech Michigan is obliged to provide EELs without the limitations imposed by Ameritech Michigan. Level 3 apparently conceded that Ameritech Michigan is under no general obligation to provide UNE combinations. However, it asserted that the FCC has directed that, to the extent an unbundled local loop is connected to unbundled dedicated transport, the incumbent is required to provide those elements to requesting carriers in combined form. In other words, the incumbent may not separate already combined

[8]The parties differ as to the definition of EELs. Ameritech Michigan uses that term to refer only to new combinations of loop/transport, while Level 3 uses the term to describe converted (from existing special access service) as well as new loop/transport combinations. This order adopts Level 3's definition.

elements. 47 CFR 51.315(b). Therefore, the CLEC requested that Ameritech Michigan be required to provide only EELs that currently exist in its network and only where Level 3 certifies that the combination will be used to provide a significant amount of local exchange service to a particular end-user.

The parties disputed whether the certification form proposed by Ameritech Michigan should be permitted as a prerequisite for obtaining the EELs. First, Ameritech Michigan took the position that the CLEC must use the combination only to provide significant local exchange service to the end-user. And Ameritech Michigan insisted that ISP traffic is not local exchange service. Second, the form would require Level 3 to disclose customer names and addresses, number of lines, circuit numbers, and other information. In Level 3's view, the form goes well beyond the certification requirements set out in the FCC's Supplemental Order Clarification.

The parties further disputed whether Level 3 should be required to pay full termination fees and nonrecurring costs for each constituent network element to obtain an EEL. Level 3 asserted that it will continue to make use of the circuit, which is converted from identical pre-existing service, and thus there should be no termination costs or more than one nonrecurring charge for the single billing change.

Ameritech Michigan took the position that new EELs are only available where the combination already exists and when it will be used to provide a significant amount of local exchange service to a particular end-user. Ameritech Michigan further took the position that telecommunications services to an ISP are not local exchange services. It insisted that the applicable federal standard requires the CLEC to provide the required percentage of "local *voice* traffic." Ameritech Michigan's PDAP, p. 27, (emphasis in original), citing the FCC's Supplemental Order Clarification. Because Level 3's service is essentially data service, Ameritech Michigan argued, it cannot

meet the standard percentage of local voice traffic. As to the remaining required information on the certification form, Ameritech Michigan stated that there is a purpose for each requested item of information. Each item, Ameritech Michigan claimed, seeks to ensure that Level 3's certification is a bona fide statement that its planned use of the combination comports with federal law. As to termination charges applicable to conversion of a special access circuit to a UNE combination, Ameritech Michigan argued that, according to the FCC's UNE Remand Order, Ameritech Michigan should be permitted to recoup any applicable termination charges and nonrecurring charges. Further Ameritech Michigan objected to the language proposed by Level 3 as creating a requirement for Ameritech Michigan to affirmatively create new loop/transport combinations, rather than merely converting existing combinations from special access to UNE combined loop and transport.

The arbitration panel determined that the interconnection agreement should be revised to recognize that Ameritech Michigan is required to offer existing special access loop and transport service combinations at UNE prices where Level 3 can certify that the combination will be used to provide a significant amount of local exchange service to a particular end-user, as defined in the FCC's Supplemental Order Clarification. It further concluded that a Level 3 drafted letter to Ameritech Michigan is a permissible certification of its eligibility. The arbitration panel further noted the Commission's prior classification of ISP traffic as local for purposes of reciprocal compensation. It therefore found that Ameritech Michigan's proposed certification form should be rejected.

As to applicable termination fees, the arbitration panel found that Level 3 should be required to pay any appropriate termination penalties. However, the arbitration panel reasoned, the Commission's November 5, 1999 order in Case No. U-11525 prohibits Ameritech Michigan from

imposing termination penalty provisions for the sole reason that a customer desires to switch basic local exchange service providers. Thus, the arbitration panel found, no termination penalties are appropriate.

Finally, the arbitration panel noted the Commission's August 31, 2000 order in Case No. U-11831, in which the Commission determined that for nonrecurring costs associated with migration, whether by resale, transfer to or between local exchange carriers, or any other manner, the migration cost determined in the prior order applies. Thus, that charge should be the only nonrecurring charge for the migration. In other words, the nonrecurring charge for one individual UNE is appropriate for a newly converted EEL combination. Id., p. 10.

Ameritech Michigan objects to the arbitration panel's determinations as contrary to federal law. It reiterates the arguments stated above.

The Commission finds that the decision of the arbitration panel should be affirmed for the reasons stated in the panel's decision.

j. Unbundled Dedicated Transport

The arbitration panel agreed with Level 3's position that Ameritech Michigan should be required to provide unbundled dedicated transport between Ameritech Michigan wire centers, its switches, Level 3's switches, and wire centers owned by other carriers at which Level 3 is collocated, but has no switch of its own.

Ameritech Michigan argues that the holding of the arbitration panel is contrary to federal law. According to Ameritech Michigan, unbundled dedicated transport is required only between the locations designated by the FCC in its Rule 319(d)(1), 47 CFR 51.319(d)(1), which, the company argues, does not include third parties' central offices, even one in which Level 3 has a presence. In Ameritech Michigan's view, the arbitration panel's determination has impermissibly altered the

FCC definition of "'dedicated transport,' which it cannot do without a full fact-intensive 'necessary and impair' analysis under FCC Rule 317. . . ." Ameritech Michigan's objections to the DAP, p. 35. Ameritech Michigan goes on to state that the arbitration panel improperly relies on Rule 319(d)(2), which is not relevant to the definition of dedicated transport.

The Commission finds that Ameritech Michigan's objections should be rejected. Rule 319(d)(1) provides:

> Interoffice transmission facilities are defined as incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

47 USC 319(d)(1).

The Commission finds that the definition provided above clearly contemplates that dedicated transport may be shared between carriers or customers, both plural. Thus, despite the emphasis that Ameritech Michigan desires to place on the phrase "owned by," the Commission concludes that the FCC did not intend to preclude unbundled dedicated transport from being provided to an otherwise qualified facility (i.e., a switch or wire center) in which the requesting carrier has a legitimate presence. To find otherwise would do damage to the FCC's intent, and mandate a series of questions concerning when a wire center is owned by the requesting carrier within the meaning of the rule. (Must the requesting carrier own the real estate in fee simple, or will a lease arrangement be sufficient? Must sharing carriers own the property jointly? What percentages of ownership will suffice?) In the Commission's view, if the point of presence is the equivalent of a switch or wire center and the requesting carrier has a legitimate presence within that structure, it sufficiently meets the definitional requirements of Rule 319 to entitle the CLEC to obtain unbundled dedicated transport to that location.

It appears that Ameritech Michigan's concerns relate to whether that dedicated transport will be used for unlawful purposes. However, as pointed out by Level 3, there are other provisions in the contract that prohibit the CLEC from using unbundled dedicated transport in an unlawful manner. The Commission therefore concludes that the decision of the arbitration panel should be affirmed.

k. Diversity[9]

Ameritech Michigan seeks clarification of the arbitration panel's determinations concerning this issue. It states that it does not necessarily disagree with the arbitration panel's conclusion that Level 3 should be charged cost-based rates for creating diversity that does not currently exist. However, the company argues, it cannot determine in advance the costs of providing diversity until it knows what the CLEC desires in that regard.

> The arbitration panel agreed with Level 3 that the contract language should "make clear that the charges imposed for physical diversity should be the applicable cost-based rates for unbundled dedicated transport, which is included in the pricing appendix. Therefore, additional diversity should also be available at cost-based rates developed in accordance with the FTA. Level 3 should not be required to pay a different rate for physical diversity on an individual case basis.

DAP, p. 28.

There is no disagreement that, where diversity is already present, the cost-based rates for unbundled local transport include the cost of that diversity. The issue is, if Level 3 requests additional diversity, or physical diversity that does not already exist, whether Ameritech Michigan is entitled to compute a charge for that diversity based on the specific CLEC request. Level 3 does not dispute whether Ameritech Michigan should recover the costs of providing additional

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[9]Diversity, as used inthis order, referes to the provision of an alternate path that may be used if the primary path is interrupted.

diversity. It merely desires to clarify that the charge should be cost-based and not vary on an individual cost basis.

The Commission finds that when Level 3 purchases unbundled dedicated transport as a UNE, that UNE includes the provision of diversity. Additional diversity requested by the CLEC should be provided, dependent upon the CLEC agreeing to reimburse the incumbent for the costs of providing the additional diversity. It appears to the Commission that the language proposed by Ameritech Michigan accomplishes that goal, while preventing any delay in Level 3's agreement to pay the additional costs from becoming an issue concerning whether Ameritech Michigan is meeting applicable performance standards. The Commission therefore reinstates Ameritech Michigan's proposed language in Section 9.4.2 of the Appendix UNE .

l. Points of Interconnection

Although the parties agreed that Level 3 should be permitted to initially establish one point of interconnection (POI) in each LATA in which it provides service, they disagreed concerning what traffic level should trigger the need for Level 3 to establish additional POIs. Level 3 asserted that it should be permitted to continue with a single POI in each LATA, with added POIs at an Ameritech Michigan access tandem when the traffic exchange between Level 3 and Ameritech Michigan with respect to that tandem and subtending end offices exceeds an OC-12 level, which is equivalent to about 8,000 trunks.

Ameritech Michigan contended that in a multiple tandem LATA, Level 3 should be required to establish additional POIs at an Ameritech Michigan tandem when the traffic exchanged between Level 3 and Ameritech Michigan with respect to that tandem and subtending end offices meets or exceeds one DS-3, which is equivalent to about 672 trunks. It contended that the level proposed

by Level 3 is too high and requires that Ameritech Michigan bear an unreasonable share of the costs to transport traffic to Level 3.

Ameritech Michigan explained that each party is responsible for the cost of the facilities to the place at which the CLEC physically links its network to Ameritech Michigan's network. At present, Level 3 has a single point of interconnection in the Detroit LATA in Southfield. Ameritech Michigan stated that it carries traffic to Level 3's POI in Southfield from as far away as Applegate, about 68 miles. It would be a shorter distance (and thus cost less) for Ameritech Michigan to hand over that traffic at the Pontiac tandem, rather than the Southfield tandem. Ameritech Michigan argued that its proposal is consistent with ¶199 of the First Report and Order in that it provides an equitable sharing of costs. It stated that although switching costs diminish with one point of interconnection, transport costs rise.

Ameritech Michigan further argued that adopting Level 3's position would create serious network architecture problems. It stated that if CLECs are permitted to establish only one POI in a multiple tandem LATA until traffic levels reach OC-12, they will probably choose to interconnect at the most populated areas that are already experiencing high traffic volumes. Ameritech Michigan insisted that if CLECs are required to establish POIs at each tandem when a DS-3 level is reached, the problem of premature tandem exhaust will be alleviated.

The arbitration panel found for Level 3 on this issue, and determined that the CLEC should be allowed to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network rather than obligating it to transport traffic to less convenient or efficient interconnection points.

The arbitration panel noted Level 3's agreement that, at some point, the traffic would justify additional points of interconnection, but that point had not yet arrived. It further noted that the

parties had operated under an agreement pursuant to which they had mutually worked out changes to the network as traffic increased.

Ameritech Michigan objects to the arbitration panel's conclusions and repeats the arguments made above.

The Commission notes that the contract language submitted by the parties does not speak to the two proposed traffic levels at which additional points of interconnection would be required. Rather, Ameritech Michigan's proposed language would require a CLEC to have a POI at each tandem in any multiple tandem LATA. Level 3's language essentially leaves the determination that additional points of interconnection are needed to another time. Of those two options, the Commission finds that the language as modified by Level 3 is more reasonable. Should the parties be unable to agree when additional POIs are needed, either or both may submit the issue to the Commission.

m. Indemnity

Ameritech Michigan states that although it agrees that the arbitration panel correctly decided this issue in Ameritech Michigan's favor, it seeks clarification of the exception cited by the arbitration panel. That exception, Ameritech Michigan states, relates to the arbitration panel's statement that when Ameritech Michigan upgrades its OSS interfaces, those updates "must be performed in a manner that either provides sufficient advance notice to Level 3 of its need to update its system, or must incorporate provisions for existing technology." DAP, p. 37. Ameritech Michigan states that it already sufficiently addresses the arbitration panel's concern by complying with Section 251(c)(5) of the FTA, 47 USC 251(c)(5), which requires that it "provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would

affect the interoperability of those facilities and networks." Ameritech Michigan therefore argues that no change in contract language is necessary to effect the arbitration panel's decision. It seeks affirmation that its position is correct.

After reviewing the parties' positions, the proposed contract language, and the arbitration panel's decision, the Commission concludes that the arbitration panel intended that Level 3's proposed deletion in Section 3.11 of the Appendix UNE be adopted. The deleted language refers to documents or interface requirements subsequently generated by the incumbent. If damage is caused by Level 3 employees in that manner, Ameritech Michigan must rely on the general indemnity provisions found in the General Terms and Conditions portion of the contract. The Commission affirms the arbitration panel's determination.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The decision of the arbitration panel should be affirmed, as modified by this order.

c. Within 30 days, the parties should submit an interconnection agreement consistent with the conclusions of this order.

THEREFORE, IT IS ORDERED that:

A. The decision of the arbitration panel is affirmed, as modified by this order.

B. Within 30 days, the parties shall submit an interconnection agreement consistent with the conclusions of this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(SEAL)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of October 24, 2000.

/s/ Dorothy Wideman
Its Executive Secretary

B. Within 30 days, the parties shall submit an interconnection agreement consistent with the conclusions of this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

Chairman

_____

Commissioner

_____

Commissioner

By its action of October 24, 2000.

_____

Its Executive Secretary

In the matter of the petition of )
**LEVEL 3 COMMUNICATIONS, LLC**, for )
arbitration pursuant to Section 252 of the ) Case No. U-12460
federal Telecommunications Act of 1996 to )
establish an interconnection agreement with )
**AMERITECH MICHIGAN**. )
)

Suggested Minute:

"Adopt and issue order dated October 24, 2000 affirming, with modifications, the decision of the arbitration panel and requiring Level 3 Communications, LLC, and Ameritech Michigan to file an interconnection agreement consistent with this order, as set forth in the order."

## IV.

## CONCLUSION

Therefore, for the reasons enumerated above, the Panel recommends that the Commission approve of the interconnection agreement as modified by the Decision of the Arbitration Panel.

THE ARBITRATION PANEL

_____
Daniel E. Nickerson, Jr.

_____
Dan Kearney

_____
Robin Ancona

September 25, 2000
Lansing, Michigan
dp

ISSUED AND SERVED: September 27, 2000