

DILWORTH PAXSON LLP

LAW OFFICES

DIRECT DIAL NUMBER:
(717) 236-4812

Linda C. Smith
smithlc@dilworthlaw.com

July 25, 2002

SRB

VIA HAND DELIVERY

Administrative Law Judge Louis G. Cocheres
Pennsylvania Public Utility Commission
2nd Floor West
Commonwealth Keystone Building
Harrisburg, PA 17120

DOCUMENT

**RE: 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**

Dear Administrative Law Judge Cocheres:

Enclosed please find US LEC of Pennsylvania, Inc.'s Best and Final Offer in the above-referenced case.

Copies have been served on the parties listed on the attached certificate of service.

Very truly yours,



Linda C. Smith

LCS/sw
Enclosure

cc: Secretary James P. McNulty (w/letter only)
Wanda G. Montano (w/letter only)
Michael Shor, Esq. (w/letter only)

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305 N. FRONT STREET • SUITE 403 • HARRISBURG PA 17101-1236
(717) 236-4812 • FAX (717) 236-7811 • www.dilworthlaw.com

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Cocheres, Louis

From: Cocheres, Louis
Sent: Wednesday, July 31, 2002 4:03 PM
To: Aaron Panner; Angstreich, Scott; ANTHONY E. GAY (E-mail); Cohn, Robin F.; JULIA A. CONOVER (E-mail); LINDA C. SMITH (E-mail); Michael L. Shor; Paiva, Suzan D.; Rindler, Richard M.
Subject: A-310814F7000

Ms. Smith

I have just received your letter, dated July 31, 2002, enclosing a copy of the certified record from the MFS II case. In response to your inquiry about providing copies to the Secretary or the court reporter, I note that, because the court reporter has already filed the transcript, it would be appropriate for you to provide two copies to the Secretary for inclusion in the record.

ALJ Cocheres

pc: File Room
All parties

Please update your contacts with my new e-mail address lcocheres@state.pa.us

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

A. 310814

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. A310814F7000

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PA PUBLIC UTILITY COMMISSION
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POST-HEARING BRIEF OF VERIZON PENNSYLVANIA INC.

Julia A. Conover
Verizon Pennsylvania Inc.

Of Counsel

Anthony E. Gay
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103
(215) 963-6023

Aaron M. Panner
Scott H. Angstreich
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Attorneys for Verizon Pennsylvania Inc.

August 1, 2002

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FOLDER

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

POST-HEARING BRIEF OF VERIZON PENNSYLVANIA INC.

Verizon Pennsylvania Inc. ("Verizon"), by counsel and pursuant to Prehearing Order No. 2, files this Post-Hearing Brief concerning the remaining open issues in the Petition for Arbitration of US LEC of Pennsylvania, Inc. ("US LEC").

SUMMARY

The Commission should resolve the principal issues in this proceeding in Verizon's favor for two basic reasons. First, with respect to each disputed issue, Verizon's proposal is the only proposal consistent with the requirements of federal law, the Federal Communications Commission's ("FCC") rules and orders, and this Commission's (and other state commissions') interpretation of that federal agency guidance. Second, and just as important, Verizon's proposals are consistent with sound regulatory policy, while US LEC's proposals are intended to benefit US LEC at the expense of real competition in local telecommunications markets. As the FCC has explained, "viable, long-term competition among efficient providers of local exchange and exchange access services" requires that carriers compete "on the basis of the quality and efficiency of the services they provide, [not] on the basis of their ability to shift costs to other carriers." *ISP Remand Order*, ¶ 71.¹

¹ Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound*

Verizon has established that US LEC's proposals here, most notably with respect to interconnection architecture (Issues 1 and 2) and treatment of Virtual FX traffic (Issue 6), are intended to create regulatory arbitrage opportunities for US LEC – *i.e.* to permit US LEC to “compete” by shifting costs to Verizon. To adopt US LEC's proposals would discourage, not promote, competition on the merits.

I-II. Issues 1 and 2 concern allocation of the costs that result from US LEC's choice of network architecture. Under US LEC's proposal, Verizon would be forced to bear costs – without compensation – that result from US LEC's decision to serve callers in a local calling area from a switch located far outside that local calling area. Yet, while Verizon would not be compensated for the costs it must bear in transporting traffic from a distant local calling area to US LEC's switch, US LEC can and does receive compensation from its customers when it must transport the traffic back from its switch to the distant local calling area. Thus, US LEC's proposal would create a regulatory arbitrage opportunity, enabling it to compete by transferring costs to Verizon.

Verizon's proposal would permit Verizon to receive compensation, based on the cost-based rates this Commission has established, when it incurs such costs as a result of US LEC's interconnection choices. Moreover, Verizon's proposal is consistent with decisions of the FCC, this Commission, the Third Circuit, and other state commissions, all of which have recognized, as this Commission has, that US LEC's proposal here would have “both expensive and

Traffic, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”) (Verizon App. Tab 14), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

inefficient” results and would require Verizon to act “solely for [the CLEC’s] convenience.”

MCI Metro Arbitration Order at 11 (emphasis added).²

III. Although Issues 3 and 4 both involve Voice Information Services traffic, the two issues are essentially unrelated. With respect to Issue 3, Verizon seeks merely to establish that reciprocal compensation is not owed on Voice Information Services traffic *to the extent that* such traffic is “interstate or intrastate exchange access, information access, or exchange services for such access.” 47 C.F.R. § 51.701(b)(1) (Verizon App. Tab 35). That restriction simply tracks federal law. To the extent that US LEC argues that it is *impossible* for Voice Information Services traffic to qualify as information access or exchange services for such access, its position is inconsistent with federal law.

IV. With respect to Issue 4, Verizon is attempting to ensure that, for that subset of Voice Information Services traffic for which the Voice Information Services provider seeks to bill the calling party a distinct charge – typically 556 and 976 numbers – US LEC establish separate trunks to deliver any such traffic to Verizon if it chooses to do so. Notably, US LEC currently *blocks* all such traffic. So this is a matter of little concern to US LEC, but of significant public policy concern, because the separate-trunking requirement is necessary to ensure that these pay-per-call services can be accurately billed – or blocked – by Verizon.

V. The FCC has repeatedly held, over a course of decisions dating back 15 years and more, that traffic that local exchange carriers deliver to enhanced services providers (“ESPs”) does not “terminate” at the enhanced services provider’s premises, but continues on to its

² Opinion and Order, *Joint Application of Bell Atlantic-Pennsylvania, Inc. and MCI Metro Access Transmission Services, Inc., for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, A-310236F0002 (Pa. PUC Sept. 3, 1997) (emphasis added) (“*MCI Metro Arbitration Order*”) (Verizon App. Tab 22), *rev’d on other grounds, MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3d Cir. 2001).

ultimate destination. US LEC's claim – that it “terminates” traffic that it delivers to an Internet service provider (“ISP”) (for example) – is contrary to federal law. *But the Commission need not resolve this issue here.* Verizon has proposed a neutral, *accurate*, and readily understandable term – “receives” – to describe the broad class of traffic that local carriers may exchange. Because US LEC's term is legally wrong, and Verizon's proposal is both fair and straightforward, the Commission should adopt Verizon's position.

VI. The record in this proceeding leaves no doubt that US LEC's proposal to base reciprocal compensation on the NPA-NXX code of the dialed number, rather than on the physical location of the called party, cannot be adopted. *First*, US LEC's attempt to reap reciprocal compensation payments on “Virtual FX” traffic is inconsistent with federal law, which provides that reciprocal compensation does not apply to interexchange traffic.

Second, payment of such compensation would be wholly inappropriate, where the unrebutted evidence establishes that Verizon bears the bulk of the costs of providing that service, while US LEC charges its customers hundreds of dollars each month for it. To permit US LEC to *charge* Verizon for the delivery of Virtual FX traffic would turn sound regulatory policy upside down.

Third, US LEC's language cannot be accepted where the customer to whom a particular number is assigned could be located literally *anywhere* in US LEC's 14-state service area. US LEC seeks to collect reciprocal compensation not only for intraLATA interexchange traffic, but also for interLATA and interstate interexchange traffic. In each case, US LEC's proposal is inconsistent with federal law and sound regulatory policy.

Fourth, any objection to Verizon's proposal based on the supposed practical difficulty of distinguishing Virtual FX traffic from local traffic should be rejected. The record in *this*

proceeding establishes that it is a relatively inexpensive and straightforward matter accurately to estimate the volume of such traffic. The recent determination of the FCC's Wireline Competition Bureau ("Bureau") requiring parties to base reciprocal compensation on NPA-NXX codes rather than physical location of the calling and the called party – a determination based exclusively on this supposed practical difficulty – therefore has no application here.

VIII. US LEC's effort to impose terms to govern intercarrier compensation for ISP-bound traffic, in the event that the current federal rule is vacated, has no basis in law. The parties have included change-of-law language in their agreement that makes clear that the parties must conform their obligations to changes in applicable law. US LEC cites no statutory basis for the imposition of an obligation that is potentially inconsistent with such governing law, and is based on what US LEC wants governing law to be, not on what it is.

IX. Verizon's proposal with respect to tariffed charges is eminently reasonable. Where there is a generally applicable rate for a service, effective under the laws of Pennsylvania or federal law, and subject to the rigorous process of regulatory review provided for under state and federal law, that rate should govern. US LEC's effort to portray this provision as giving Verizon "unbridled discretion" to modify rates contained in the agreement is fundamentally incorrect. Under Verizon's proposal, only tariffs that this Commission or the FCC have allowed to go into effect can supercede a rate contained in the agreement.

ISSUE-BY-ISSUE ARGUMENT

Issues 1 and 2:

(Glossary, Section 2.45; Interconnection Attachment, Sections 7.1.1.1, 7.1.1.1.1, 7.1.1.2, 7.1.1.3)

Issue 1: Is US LEC permitted to select a single Interconnection Point (“IP”) per Local Access and Transport Area (“LATA”), to select the interconnection method, and to require Verizon to bear the financial responsibility to deliver its originating traffic to the IP chosen by US LEC?

Issue 2: Should Verizon be permitted to force US LEC to designate its collocation site at a Verizon end office as the US LEC-IP where Verizon will deliver its traffic?

VERIZON’S PROPOSED ALLOCATION OF THE COSTS OF US LEC’S INTERCONNECTION CHOICES IS EQUITABLE, AS IT ENSURES THAT US LEC CANNOT FORCE VERIZON TO BEAR UNCOMPENSATED EXPENSES THAT RESULT FROM US LEC’S CHOICES, AND IS CONSISTENT WITH FEDERAL LAW AND THIS COMMISSION’S DECISIONS

These issues raise the question of how the costs that result from US LEC’s choice of network architecture should be allocated between the parties. Verizon has proposed interconnection language, known as Virtual Geographically Relevant Interconnection Points (“VGRIP”), that provides US LEC with an array of interconnection options, but that also requires US LEC to bear at least some of the costs that result from its choices. US LEC, on the other hand, contends that it has the right to require Verizon, at its own expense, to transport all calls by Verizon customers to US LEC customers to a single point (US LEC’s switch) in each of the LATAs in which US LEC operates. As the record demonstrates, under US LEC’s proposal, Verizon would incur real costs in transporting traffic to US LEC’s switch – costs that Verizon would otherwise *not* incur – for which it would receive no compensation from US LEC or from its customers. Yet the FCC has found that “viable, long-term competition among efficient providers of local exchange and exchange access services” requires that carriers compete “on the

basis of the quality and efficiency of the services they provide, [not] on the basis of their ability to shift costs to other carriers.” *ISP Remand Order* ¶ 71. Accordingly, US LEC’s proposal on Issues 1 and 2 – as with its proposals on other issues – should be rejected because it would create an opportunity for regulatory arbitrage by allowing US LEC to shift costs that result from US LEC’s chosen network architecture onto Verizon. In contrast, Verizon’s VGRIP proposal should be adopted, because it provides a reasonable and fair allocation of the costs that result from US LEC’s interconnection choices.

This Commission, the FCC, other state commissions, and the Third Circuit have all found that competitive local exchange carriers (“CLECs”) should bear the costs of their interconnection choices and not have them subsidized by incumbent LECs. Indeed, as far back as 1997, this Commission found that a proposal similar to US LEC’s would be “both *expensive and inefficient*” and would require Verizon to send traffic “to one central point, solely for [the CLEC’s] convenience.” *MCI/metro Arbitration Order* at 11 (emphasis added). US LEC, however, will no doubt claim that the recent *Virginia Arbitration Order*³ requires the adoption of its proposal here. That decision was rendered by the Bureau, an entity within the FCC, and not by the FCC itself. It is still subject to FCC review and is neither entitled to the deference normally accorded to a federal agency’s interpretation of a statute that it administers nor in any way binding on this Commission. Moreover, the Bureau did not even do what it said it was doing – applying current FCC rules and precedents. Instead, the Bureau ignored relevant FCC decisions, which both this Commission and the Third Circuit have found require CLECs to bear

³ Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, *et al.*, DA 02-1731 (Wireline Comp. Bur. rel. July 17, 2002) (“*Virginia Arbitration Order*”) (Verizon App. Tab 10).

the costs that result from their interconnection choices. In any event, the Bureau did not hold, as US LEC has claimed here, that VGRIP is contrary to federal law. Indeed, the FCC has expressly ruled otherwise.

Finally, it is important to recognize that these issues are *not* about whether US LEC has the right to establish a single point of interconnection (“POI”) per LATA “at any technically feasible point within [Verizon’s] network.” 47 U.S.C. § 251(c)(2)(B) (Verizon App. Tab 34). This is clearly the law, and neither party disputes it. *See Texas 271 Order* ¶ 78;⁴ *MCI Telecomm.*, 271 F.3d at 517-18. As US LEC’s witness admitted during the hearing, under Verizon’s VGRIP proposal, US LEC can choose the location of its POI(s) and the method by which it establishes those POI(s).

Q. Is it correct that under Verizon’s proposed contract language that, USLEC may cho[ose] any technically feasible point of interconnection?

A. Yes, that is my understanding.

Q. So, in fact, USLEC may cho[ose] whatever physical point [of] interconnection it wishes to under the terms proposed by Verizon?

A. Yes.

....

Q. Okay. Is it correct that under the terms proposed by Verizon that USLEC may select from several different interconnection methods?

A. Yes.

Q. Including, for example, co-location or using an entrance facility or a mid-stand meet, those different methods?

A. Yes.

Q. Are you aware of any different methods that USLEC might want to use?

A. No, I’m not.

....

⁴ Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354 (2000) (“*Texas 271 Order*”) (Verizon App. Tab 4).

Q. So there is nothing in this agreement that compels you to establish a co-location arrangement within 30 days; is that right?

A. Not if I'm willing to accept a lower compensation rate than has been agreed to in the interconnection agreement; correct.

July 17, 2002 Hearing Transcript ("Trans.") at 43:13-20, 44:1-11, 49:6-11. These concessions make clear that, although the majority of US LEC's discussion of Issues 1 and 2 in its petition and pre-filed testimony objected to its purported obligations under VGRIP to change its network architecture and the costs that these purported obligations would entail, this issue is not about network engineering, but instead is about how costs shall be allocated.

A. Verizon's VGRIP Proposal Fairly Compensates Verizon for the Additional Costs That it Incurs When US LEC Selects a Single Interconnection Point Per LATA

As explained above, US LEC contends that it also should be able to select a single interconnection point ("IP") per LATA – which is at its switch – and to require Verizon, at Verizon's expense, to transport locally rated calls⁵ to that IP and to pay US LEC reciprocal compensation. Although US LEC asserts that it might not be "expensive" for Verizon to transport traffic from throughout the LATA to US LEC's switch, *see* Hoffman Testimony at 15-16; Montano Rebuttal Testimony at 3-4, there is no question that Verizon would be required, under US LEC's proposal, to provide transport and tandem switching for which it receives no compensation.

1. Verizon Would Incur Additional Costs Under US LEC's Proposal for Which It Would Receive No Compensation

For example, if one Verizon customer in Allentown calls another Verizon customer in Allentown, Verizon bears the costs of switching the traffic in an end office located in the Allentown local calling area and, if necessary, of transporting the call between two end offices in

⁵ Locally rated calls are calls for which the calling party pays no toll charges, normally when the calling party and the called party have telephone numbers associated with the same local calling area.

that local calling area; it would not normally transport the call outside of that local calling area. *See* Trans. at 28:22 - 32:3.⁶ If the Verizon customer in Allentown instead called another Allentown resident who was a US LEC customer, Verizon would no longer have to perform the terminating switching function involved in completing that call. Instead, it would be performed by US LEC, and Verizon would compensate US LEC through the payment of reciprocal compensation.

Q. And USLEC would be compensated for that terminating switching through reciprocal compensation; is that correct?

A. Yes.

Q. So to the extent that Verizon didn't have to do the terminating switching anymore, it would be paying USLEC to perform that function; is that correct?

A. Yes.

Id. at 33:7-14.

However, although US LEC would be compensated by Verizon for the switching function that Verizon no longer performs, Verizon would receive no compensation for the additional actions that Verizon would have to take, under US LEC's proposal, to complete that call. Specifically, Verizon would have to transport the call from the Allentown local calling area to US LEC's switch in Philadelphia, possibly through one or more tandem switches. *See id.* at 32:18 - 33:10. Because the two people in Allentown would have telephone numbers associated with the same local calling area, Verizon would not be able to collect toll charges from its customer – as it would if that customer placed a call to a US LEC customer with a Philadelphia telephone number. US LEC also would not compensate Verizon for that transport and switching. *See, e.g., id.* at 35:17 - 36:1. Finally, under its current price cap plan, Verizon cannot raise its

⁶ The situation would be the same if these customers were located in any local calling area in the LATAs in which US LEC operates other than the Philadelphia and Pittsburgh local calling areas, where US LEC's switches are located.

retail rates in order to recover these additional costs. See Opinion and Order, *Joint Petition of Nextlink Pennsylvania, Inc., et al.*, No. P-00991648 & P-00991649, at 194-95 (Pa. PUC Sept. 30, 1999) (“*Global Order*”) (Verizon App. Tab 23), *aff’d*, *Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm’n*, 763 A.2d 440 (Pa. Commw. Ct. 2000), *appeal granted sub nom. MCI WorldCom, Inc. v. Pennsylvania Pub. Util. Comm’n*, 793 A.2d 911 (Pa. 2001).

2. VGRIP Fairly Compensates Verizon for Those Additional Costs

For this reason, Verizon’s VGRIP proposal provides that US LEC must perform these additional tasks itself – by arranging for the transport of the traffic from a Verizon tandem or end office – or must compensate Verizon for performing those tasks. If US LEC chooses not to perform those tasks itself, the VGRIP proposal provides that the amount it charges Verizon for reciprocal compensation shall be reduced by:

Verizon’s transport rate (calculated by taking the dedicated transport per mile rate multiplied by the average mileage between the originating end offices and the CLEC POI plus the fixed dedicated transport rate and dividing the total by the average minutes of use for a DS1), tandem switching rate (to the extent the traffic is tandem switched), and other costs (to the extent Verizon purchases such transport from US LEC or a third party), from Verizon’s originating End Office to US LEC’s IP.

Verizon Proposal Interconnection § 7.1.1.1.1; *accord id.* §§ 7.1.1.2, 7.1.1.3. The three components listed here – transport, switching (if performed), and other costs (if incurred) – are precisely the additional costs that Verizon would incur only because of US LEC’s choice to serve callers in a local calling area from a switch located well outside that local calling area. Moreover, the first two components – transport and switching – utilize the cost-based, UNE rates that this Commission has established.⁷

⁷ The third component is based on the actual costs Verizon incurred in purchasing transport from US LEC or a third party.

Indeed, US LEC's witness admitted that this Commission has established rates, under the Telecommunications Act of 1996 ("1996 Act") and the FCC's pricing rules, for the transport and switching functions involved.

Q. . . . Do you agree that state public utility commissions have proceedings in which they determine the costs associated with the various network functions that you and I have been talking about?

A. I am familiar with proceedings where the Commission will set rates, but not that they necessarily establish costs.

Q. Okay. But you would agree that the Commissions have established rates based on pricing standards in the 1996 Act and FCC regulations?

A. Yes, it is my understanding that the Commission approves Verizon rates subject to those orders and rules and regulations.

Trans. at 34:5-19. Those rules require that the rates be based on the forward-looking cost of providing those services. *See* 47 U.S.C. § 252(d)(1)(A)(i) (Verizon App. Tab 34); 47 C.F.R. § 51.505 (Verizon App. Tab 35). US LEC's witness also admitted that those rates could be used to calculate the additional costs that Verizon bears as a result of US LEC's proposal.

Q. Okay. So it would be correct then that one could using those Commission established rates [to] determine the difference in costs to Verizon of delivering a call from, say, caller A to caller B in the example on VZ-2 and the cost to Verizon of transporting a call from Verizon customer A to USLEC switch in Philadelphia; is that correct?

A. Yes, I would assume that one could use the rates and underlying costs to compare those types of scenarios. . . .

Trans. at 34:20 - 35:4.

3. Under US LEC's Proposal, Verizon Would Receive No Compensation for These Costs, While US LEC Would Be Fully Compensated

As explained above, Verizon compensates US LEC for the terminating switching function that it performs through payment of reciprocal compensation. Moreover, if US LEC, after receiving a call at its switch in Philadelphia, transports that call to a customer located in Allentown, US LEC can and does receive compensation for that transport from its own customer.

Under US LEC's tariff, it charges its customers more based on their distance from US LEC's switch.

Q. Now, is it correct that your rate schedule is dependent on the distance of the customer's serving wire center from the USLEC switch?

....

A. It appears from the tariff that it is.

Trans. at 102:12 - 104:4 & Hearing Ex. VZ-4. US LEC's tariff contains three pricing schedules, based on whether its customer is located 0-10 miles from US LEC's switch, 10-16 miles from its switch, or more than 16 miles from its switch. *See* US LEC Local Exchange Tariff § 4.2 (US LEC Hearing Ex. 5). US LEC charges higher prices to customers located further away from its switch. *See, e.g., id.* § 6.1. Thus, US LEC clearly recognizes that transporting calls over long distances imposes real costs, and has sought compensation for those costs when it performs those functions for its own customers – compensation that Verizon would be denied under US LEC's proposal.

However, US LEC might not incur the costs of transporting the call back to Allentown. Instead, US LEC could have assigned an Allentown telephone number to an end user with no physical presence in the Allentown local calling area. As US LEC has admitted, six customers in Pennsylvania have telephone numbers in local calling areas where they are not physically located; at least one of those customers is, in fact, located only 5 miles from US LEC's switch. *See* Trans. at 150:19 - 151:5, 183:20-24.⁸ Thus, in the example above, under US LEC's proposal, if a Verizon customer located in Allentown calls a number associated with the Allentown local calling area – but assigned to a US LEC customer actually located only 5 miles from US LEC's switch in Philadelphia – Verizon would still have to bear uncompensated costs

⁸ The question of the proper treatment of such calls for purposes of reciprocal compensation is addressed below in Issue 6.

in transporting the call to Philadelphia, but US LEC would not bear the costs of transporting the call from Philadelphia to Allentown. Instead, US LEC would transport the call only the 5 miles between its switch and its customer. In this way, US LEC's proposal would enable its customer to receive toll calls at Verizon's expense.⁹

B. Verizon's VGRIP Proposal Is Consistent with Decisions of the FCC, This Commission, the Third Circuit, and Other State Commissions

1. The FCC Has Held That CLECs Must Bear the Cost of "Expensive" Interconnection Choices and That Verizon's Proposal Complies with Its Existing Rules

In the *Local Competition Order*,¹⁰ the FCC held that "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." *Local Competition Order* ¶ 199 (emphasis added).¹¹ The FCC explained further that, "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." *Id.* ¶ 209 (emphasis added). Relying on this discussion

⁹ Although US LEC has stated that these six customers are not ISPs, the same is not necessarily true of other CLECs operating in Pennsylvania, who would be entitled to opt into the agreement that results from this arbitration. See 47 U.S.C. § 252(i) (Verizon App. Tab 34); Trans. at 150:23 - 152:4, 162:6 - 163:18. Nor does anything stop US LEC from attracting ISP customers in the hope of exploiting this arbitrage opportunity. As Verizon has explained, ISPs often obtain numbers in many local calling areas other than the one in which they are physically located and the volumes of incoming traffic that Verizon would have to transport without compensation would likely be very large. See D'Amico Rebuttal Testimony at 2.

¹⁰ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted) (Verizon App. Tab 3).

¹¹ In her rebuttal testimony, Ms. Montano states, without explanation, her "understanding" that the requirement that CLECs bear the cost of expensive interconnection choices is "a very narrow exception." Montano Rebuttal Testimony at 3. Nothing in the *Local Competition Order* supports that claim and, as shown below, the FCC has not agreed with it.

in the *Local Competition Order*, the FCC has argued in court that, “consistent with the *FCC Order*,” an incumbent LEC may “obtain additional compensation if a specific request for interconnection warrants it,” and noted that the Oregon Public Utility Commission (“PUC”), in the decision under review in that case, had so provided.¹² Verizon’s VGRIP proposal similarly enables Verizon to receive compensation if US LEC makes interconnection choices that, as demonstrated above, are expensive in that they require Verizon to bear costs that it would not otherwise incur and for which it is not compensated.

Similarly, in approving Verizon’s section 271 application in Pennsylvania, the FCC rejected challenges to Verizon’s GRIP proposal, which, like VGRIP, “permits carriers to *physically* interconnect at a single point of interconnection (POI),” but “distinguish[es] between the physical POI and the point at which Verizon and an interconnecting competitive LEC are responsible for the cost of interconnection facilities.” *Pennsylvania 271 Order* ¶ 100 & n.341.¹³ Moreover, the FCC also rejected CLECs’ claims, which are similar to US LEC’s claims here, that “Verizon’s policies in regard to the financial responsibility for interconnection facilities fail to comply with its obligations under the Act.” *Id.* Thus, although the FCC noted that Verizon would have to comply with any *new* rules the FCC adopts in its *Intercarrier Compensation*

¹² Memorandum of the Federal Communications Commission as Amicus Curiae, *US WEST Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, No. CV 97-1575 JE, at 22 & n.17 (D. Or. filed Aug. 16, 1998) (“FCC Amicus Brief”) (Verizon App. Tab 37). The Oregon PUC found that “a reasonable argument can be made that additional compensation should be required of a carrier that seeks to interconnect in a manner that is extremely inefficient” and held that U S WEST would be permitted to demonstrate that it should be entitled to such compensation based on the actual POIs requested. *See Order No. 97-003, Petition of AT&T Communications of the Pacific Northwest, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, ARB 3 & ARB 6, at 4 (Or. PUC Jan. 6, 1997) (Verizon App. Tab 26).

¹³ Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 (2001) (“*Pennsylvania 271 Order*”) (Verizon App. Tab 5).

NPRM,¹⁴ it expressly found that “Verizon’s policies *do not represent a violation of our existing rules.*” *Pennsylvania 271 Order* ¶ 100 & n.346 (emphasis added).

2. Both this Commission and the Third Circuit Have Agreed With the FCC’s Conclusion and this Commission Has Also Adopted VGRIP-like Proposals

As Verizon has explained, this Commission’s past decisions also support choosing Verizon’s VGRIP proposal over US LEC’s proposed interconnection language. In 1997, the Commission found that a CLEC network with only one point of interconnection per LATA would be “both *expensive and inefficient*” and would require Verizon to send a CLEC’s traffic “to one central point, solely for [the CLEC’s] convenience.” *MCImetro Arbitration Order* at 11 (emphasis added). Although the Third Circuit ultimately rejected the Commission’s ruling that a CLEC must establish multiple POIs in a LATA, that court did not take issue with this Commission’s finding that a proposal such as US LEC’s could lead to an “expensive and inefficient” network architecture. Instead, that court held, in a decision that is binding on this Commission, that, “[t]o the extent . . . [a CLEC’s] decision on interconnection points may prove more expensive to Verizon, the PUC should consider shifting costs to [that CLEC].” *MCI Telecomm.*, 271 F.3d at 518 (citing *Local Competition Order* ¶ 209).¹⁵

Similarly, in a recent arbitration, the Commission specifically recognized that, under federal law, “CLECs that choose a technically feasible but expensive interconnection point must

¹⁴ Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) (“*Intercarrier Compensation NPRM*”) (Verizon App. Tab 12).

¹⁵ In her rebuttal testimony, Ms. Montano claims that this quotation from the Third Circuit’s opinion “supports US LEC’s position that Verizon must be required to ‘prove’ its costs.” Montano Rebuttal Testimony at 4:18-19. Quite obviously, the meaning of “prove” in that sentence is “turns out to be” rather than “is proven by Verizon to be.” In any event, as shown below, the evidence in this case demonstrates that US LEC’s proposed interconnection architecture would impose on Verizon costs for which it is not compensated.

bear the costs of that interconnection.” *Sprint Arbitration Order* at 55 n.37.¹⁶ Moreover, the interconnection agreement that the Commission approved in that arbitration contains features similar to Verizon’s VGRIP proposal – Sprint is obligated in certain circumstances to establish additional POIs, but if Sprint does not do so a virtual IP will be created and Sprint will have to compensate Verizon for the transport of traffic from the virtual IP to the POI. *See Verizon-Sprint Agreement Interconnection* § 1.2.3.1.3.6. The Commission noted that these features “would assist in alleviating the unreasonable transport costs that Verizon must pay today under other interconnection agreements.” *Sprint Arbitration Order* at 56.¹⁷

Although US LEC has pointed to this Commission’s *Focal Arbitration Order*¹⁸ to support its position here, *see* US LEC Petition at 6, that decision is inconsistent with both the earlier *MCImetro Arbitration Order* and the later *Sprint Arbitration Order* – as well as with the Third Circuit’s recent decision – all of which recognize that CLECs should be required to bear the costs of selecting a technically feasible, but expensive POI, *see* Response at 13-14 & n.17. Accordingly, those decisions, and not the *Focal Arbitration Order*, should control the outcome here.

¹⁶ Opinion and Order, *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.*, A-310183F0002 (Pa. PUC Oct. 12, 2001) (“*Sprint Arbitration Order*”) (Verizon App. Tab 25).

¹⁷ Verizon has previously explained that the cutoff mark that the Commission selected – equivalent to the amount of traffic carried over a DS-3 facility – will be of limited utility in preventing CLECs from requiring Verizon to bear the vast majority of the costs incurred by CLECs’ chosen POIs and, therefore, should not be adopted here. *See* Response at 10 n.8. US LEC has not addressed this issue.

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.*, A-310630F0002 (Pa. PUC Aug. 17, 2000) (“*Focal Arbitration Order*”) (Verizon App. Tab 24).

3. Other State Commissions Have Also Reached the Same Conclusion

Numerous other state commissions have also found that it is appropriate to require CLECs to bear the costs of their interconnection choices. For example, the South Carolina Commission specifically found that, although “AT&T’s network design is a matter best left to AT&T,” “it would be neither equitable nor fair for this Commission to permit AT&T to shift costs to BellSouth as a result of that network design.” *South Carolina (AT&T) Arbitration Order* at 22.¹⁹ That commission recognized that it was “AT&T’s interconnection choices [that] require[] the transport of local calls from one local calling area to another local calling area where AT&T’s POI is located” and that, because “AT&T has contributed to the need and costs of these facilities, AT&T should pay for use of the facilities.” *Id.* at 24. That commission also found that requiring AT&T to bear these costs is consistent with the requirement that an ILEC “be allowed to recover the added costs created by a CLEC’s ‘expensive interconnection,’” because otherwise “a CLEC could select a POI that is more expensive in the aggregate simply because the CLEC need not take into account the costs that it avoids because the costs are transferred to the ILEC.” *Id.* (quoting *Local Competition Order* ¶ 199). That commission recently reaffirmed this holding in another arbitration proceeding, in which it approved Verizon’s GRIP proposal.²⁰

Similarly, the North Carolina Utilities Commission found that “it is equitable and in the public interest” to require AT&T “to compensate BellSouth for, or otherwise be responsible for,

¹⁹ Order on Arbitration, *Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Docket No. 2000-527-C, Order No. 2001-079 (S.C. PSC Jan. 30, 2001) (“*South Carolina (AT&T) Arbitration Order*”) (Verizon App. Tab 28).

²⁰ See Order on Arbitration, *Petition of HTC Communications, Inc. for Arbitration of an Interconnection Agreement with Verizon South Inc.*, Docket No. 2002-66-C, Order No. 2002-450 at 58-59 (S.C. PSC June 12, 2002) (Verizon App. Tab 29).

transport beyond the local calling area,” when AT&T elects to “interconnect[] at points within the LATA but outside of BellSouth’s local calling area from which traffic originates.” *North Carolina Arbitration Order* at 15.²¹ The Public Utilities Commission of Ohio recently reached the same decision, concluding that ILECs should be permitted to charge a CLEC for transporting traffic outside a local calling area to a CLEC’s POI so that the CLEC “will have to balance costs and benefits rationally when designing and deploying its network in accordance with the Act and the FCC’s . . . rules.” *Ohio Arbitration Order* at 7.²² That commission also rejected a CLEC’s “assertion that [an ILEC’s] costs to provide transport are *de minimis*.” *Id.*²³

In light of these various decisions, it is clear that US LEC’s proposal should be rejected and Verizon’s proposal adopted.

C. The Wireline Competition Bureau’s Recent *Virginia Arbitration Order* Is Not Relevant Here

In the *Virginia Arbitration Order*, the Wireline Competition Bureau, a subdivision within the FCC, ruled on a number of disputes between Verizon and three CLECs operating in Virginia regarding the content of their interconnection agreements. Although such disputes are normally

²¹ See Recommended Arbitration Order, *Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc., and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket Nos. P-140, Sub 73 & P-646, Sub 7, at 15 (N.C. Utils. Comm’n Mar. 9, 2001) (“*North Carolina Arbitration Order*”) (Verizon App. Tab 31), *aff’d*, Order Ruling on Objections and Requiring the Filing of the Composite Agreement, Docket Nos. P-140, Sub 73 & P-646, Sub 7 (N.C. Utils. Comm’n June 19, 2001).

²² See Arbitration Award, *Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio d/b/a Sprint and Ameritech Ohio*, Case Nos. 01-2811-TP-ARB, *et al.* (Ohio PUC May 9, 2002) (“*Ohio Arbitration Order*”) (Verizon App. Tab 15), *reh’g denied*, Entry on Rehearing, Case Nos. 01-2811-TP-ARB, *et al.* (Ohio PUC July 18, 2002).

²³ These state commissions have also rejected the claim, repeated here by US LEC, that VGRIP-like proposals violate 47 C.F.R. § 51.703(b) (Verizon App. Tab 35). See *South Carolina (AT&T) Arbitration Order* at 25-26; *North Carolina Arbitration Order* at 14; *Ohio Arbitration Order* at 6.

presented to state commissions in the first instance, the FCC took jurisdiction over the arbitration petitions filed before the Virginia State Corporation Commission (“SCC”) by these three CLECs after the SCC declined to act on those petitions. *See* 47 U.S.C. § 252(e)(5) (Verizon App. Tab 34). Among the issues the Bureau resolved were disputes similar to Issue 1, between the CLECs’ interconnection proposals and Verizon’s GRIP and VGRIP proposals. The Bureau “adopt[ed] the [CLEC’s] proposed interconnection language, rather than Verizon’s proposed language implementing its ‘GRIPS’ and ‘VGRIPS’ proposal.” *Virginia Arbitration Order* ¶ 51. The Bureau explained that it found that the CLECs’ “proposed language more closely conforms to our existing rules and precedent than do Verizon’s proposals.” *Id.* ¶ 53. Although US LEC is likely to rely heavily on the Bureau’s conclusion, the instant dispute between Verizon and US LEC should instead be resolved consistently with the decisions of the FCC itself, this Commission, and the Third Circuit.

First, as noted above, the *Virginia Arbitration Order* was not issued by the FCC, but rather by its Wireline Competition Bureau. Indeed, the Bureau’s decision is subject to review by the full Commission. *See* 47 C.F.R. § 1.115(a) (Verizon App. Tab 35). Moreover, the Bureau interpretation of federal law is not entitled to the deference normally accorded to a federal agency’s interpretation of a statute that it administers. *See Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988) (refusing to defer when interpretation rendered by official who was “not the head of the agency”). Therefore, the *Virginia Arbitration Order* is entitled to no more weight than a comparable recommended decision in an arbitration conducted in another state that has yet to be reviewed by the full state commission.

Second, the Bureau’s decision fails to address or to distinguish relevant FCC decisions, which favor Verizon’s position, not US LEC’s. To start, the order never addresses the FCC’s

holding in the *Local Competition Order*, discussed above, that “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.” *Local Competition Order* ¶ 199. As described above, the FCC has relied on this very passage in arguing that an incumbent LEC may “obtain additional compensation if a specific request for interconnection warrants it.”²⁴ The Bureau’s failure, in the *Virginia Arbitration Order*, to address paragraph 199 and the FCC’s prior interpretation of that paragraph is especially noteworthy, because the Bureau found that “Verizon raises serious concerns about the apportionment of costs caused by a competitive LEC’s choice of points of interconnection.” *Virginia Arbitration Order* ¶ 54.²⁵ Accordingly, under a proper understanding of the FCC’s rules implementing federal law, the Bureau should have permitted Verizon to recover those costs through VGRIP or GRIP.

Moreover, although the Bureau acknowledged that the FCC itself had addressed Verizon’s GRIP proposal in approving Verizon’s section 271 application in Pennsylvania, it concluded that the “*Pennsylvania 271 Order* is not determinative of the question we address here, which is whether Verizon’s or petitioners’ language is more consistent with the Act and our rules,” because the FCC has not “required that all ‘new and unresolved interpretive disputes about the precise content of an incumbent LEC’s obligations’ be resolved in a Bell Operating Company’s (BOC) favor in order for the BOC’s section 271 application to be granted.” *Virginia*

²⁴ FCC Amicus Brief at 22.

²⁵ The Bureau similarly fails to address the FCC’s statement that, “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.” *Local Competition Order* ¶ 209.

Arbitration Order ¶ 53 n.123 (quoting *Kansas/Oklahoma 271 Order* ¶ 19²⁶). But the FCC, in the *Pennsylvania 271 Order*, resolved this issue *in Verizon's favor* – as explained above, although it noted that Verizon would have to comply with any new rules adopted in its *Intercarrier Compensation NPRM*, it expressly found that “Verizon’s policies *do not represent a violation of our existing rules.*” *Pennsylvania 271 Order* ¶ 100 & n.346 (emphasis added).

Thus, the Bureau erroneously concluded that it was faced with two competing proposals, each of which is consistent with federal law. As a subordinate body within the FCC, the Bureau then attempted to ascertain which of these two the FCC would find is “more consistent” with federal law.²⁷ Given the Bureau’s failure to grapple with the FCC’s recognition that CLECs must bear the cost of “expensive” interconnection choices, its conclusion that the CLECs’ “proposed language more closely conforms to our existing rules and precedent than do Verizon’s proposals” should not control here. *Virginia Arbitration Order* ¶ 53. Instead, this Commission’s choice between the two proposals here should be guided by its own past decisions on this matter and by the Third Circuit’s conclusion, which is binding on this Commission, that, “[t]o the extent . . . [a CLEC’s] decision on interconnection points may prove more expensive to Verizon, the PUC should consider shifting costs to [that CLEC].” *MCI Telecomm.*, 271 F.3d at 518 (citing *Local Competition Order* ¶ 209).

²⁶ Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 (“*Kansas/Oklahoma 271 Order*”) (Verizon App. Tab 8), *aff’d in part and remanded*, *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

²⁷ Verizon notes that the Bureau stopped well short of US LEC’s claim here, which is that Verizon’s VGRIP proposal is contrary to federal law and the FCC’s rules, finding only that the CLECs’ proposals were more compatible with the FCC’s rules than were Verizon’s. Indeed, US LEC’s claim is squarely precluded by the FCC’s holding in the *Pennsylvania 271 Order*.

D. US LEC's Proposal Violates Federal Law By Imposing Transport Obligations on Verizon Beyond the Point of Interconnection Between the Two Parties' Networks

Even if Verizon's VGRIP proposal is not adopted, US LEC's best and final offer must be rejected, as it is contrary even to US LEC's understanding of the requirements of federal law. Under that proposal, US LEC would be able to designate an IP that "is not at the same location as [its] POI" and Verizon would be required to "transport[] its originating traffic to [US LEC's] IP," which is its switch. US LEC Best and Final Offer at 2-3 (§§ 2.1.5.3, 7.1.1.1). US LEC, however, has previously argued that, "under FCC decisions, the default rule is that the physical connection of the Parties' networks and the demarcation of financial responsibility are at the same point." Montano Testimony at 4:22 - 5:1. Indeed, Ms. Montano "clarif[ied]" at the hearing that, "for traffic that Verizon terminates to USLEC, both the POI and the IP are at our switch." Trans. at 86:22-24.²⁸ US LEC's best and final offer thus vitiates US LEC's earlier claim that, under federal law, POIs and IPs must necessarily be at the same location.

Under US LEC's best and final offer, however, its POI could be on Verizon's network, as Mr. Hoffman testified it is (*see supra* note 28), while its IP would still be its switch. Under federal law, Verizon's responsibility to transport traffic ends at the POI.²⁹ Indeed, the supposed problem with VGRIP identified by the Wireline Competition Bureau is that a CLEC's financial responsibility for transporting traffic "onto the competitive xLEC's network would begin at the Verizon-designated competitive LEC IP, *rather than at the point of interconnection.*" *Virginia*

²⁸ US LEC's position here is not clear. Mr. Hoffman, US LEC's "technical, or network" expert, Hoffman Testimony at 4, stated three times during the hearing that, "[f]or traffic delivered from Verizon to US LEC," US LEC's POI and IP are currently in different locations – with the POI at Verizon's access tandem and the IP at US LEC's switch, Trans. at 40; *see id.* at 20, 38.

²⁹ This same incompatibility with federal law is implicit in US LEC's initial offer, which requires Verizon to transport traffic to US LEC's IP, irrespective of where US LEC's POI is located. *See* US LEC Petition, Attach. B at 62, Interconnection Attachment § 7.1.1.1.

Arbitration Order ¶ 53 (emphasis added). Although US LEC is permitted to charge Verizon reciprocal compensation for US LEC's transport of certain types of traffic from the POI to US LEC's switch, *see* 47 C.F.R. § 51.701(c) (Verizon App. Tab 35), Verizon is not obligated to perform that transport, as US LEC proposes in its best and final offer. *See* US LEC Best and Final Offer at 3 ("Verizon may meet this transport obligation by purchasing a US LEC entrance facility . . . or by . . . delivering its traffic on its owned or leased facilities to US LEC.").³⁰

E. US LEC's Objections to Verizon's Proposed Section 7.1.1.2 Are Meritless

The dispute with respect to Issue 2 is based on US LEC's misunderstanding of Verizon's proposed section 7.1.1.2. As Verizon explained in its response to US LEC's petition and in the filed testimony of Peter D'Amico, Verizon does not claim to be able to "force" US LEC to designate a collocation site as a geographically relevant IP. *See* Response at 17-18; D'Amico Testimony at 12-14; D'Amico Rebuttal Testimony at 7. Although Verizon is entitled to make such a request under section 7.1.1.2, US LEC is equally entitled to refuse that request. As noted above, US LEC's witness candidly admitted as much. *See* Trans. at 49:6-11, 58:13-22. Indeed, US LEC's actual dispute here ultimately turns not on whether it can refuse Verizon's request – which it clearly can – but on the financial consequences of such a refusal, which is the subject of Issue 1. *See* Hoffman Rebuttal Testimony at 3; Trans. at 96:3-11.

Moreover, US LEC's dispute with respect to Issue 2 is entirely hypothetical. Section 7.1.1.2 applies *only* if US LEC establishes a collocation site at a Verizon end office, and US LEC

³⁰ The Bureau noted that parties are permitted to "agree[] that the incumbent may deliver its traffic to a different point or additional points that are more convenient for it," *Virginia Arbitration Order* ¶ 71, but this is simply because parties have the right to negotiate agreements "without regard to the standards set forth in [section 251(b) and (c)]," 47 U.S.C. § 252(a)(1) (Verizon App. Tab 34). The fact that Verizon and US LEC could agree to establish a POI for Verizon-originated traffic on US LEC's network does not mean that US LEC has the right to require Verizon to transport that traffic beyond the POI to US LEC's switch.

has repeatedly stated that it currently has no collocation sites in Pennsylvania and that it has no plans to establish any such sites during the life of this agreement. *See* US LEC Petition at 9; Hoffman Testimony at 10; Trans. at 73:11-13, 91:24 - 92:1, 92:13-19, 96:14-17.³¹ Although this dispute is therefore hypothetical with respect to US LEC, it is not hypothetical with respect to other CLECs operating in Pennsylvania that have established collocation arrangements at Verizon end offices. Under federal law, these CLECs are entitled to opt into the agreement that results from this arbitration. *See* 47 U.S.C. § 252(i) (Verizon App. Tab 34). Therefore, because adopting Verizon's proposed language would have no effect on US LEC, but rejecting that language could harm Verizon, this issue should be resolved by adopting Verizon's proposed language for section 7.1.1.2.

Issue 3: (Glossary, Section 2.75; Additional Services Attachment, Section 5.1; Interconnection Attachment, Section 7.3.7)

Issue: Is US LEC entitled to reciprocal compensation for terminating "Voice Information Services" traffic?

VERIZON'S PROPOSED TREATMENT OF VOICE INFORMATION SERVICES TRAFFIC FOR RECIPROCAL COMEPNSATION PURPOSES TRACKS FEDERAL LAW PRECISELY

Under binding FCC regulations, reciprocal compensation is not required for any telecommunications traffic that is "interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b)(1) (Verizon App. Tab 35).

Accordingly, to the extent Voice Information Services traffic, as defined in the agreement, falls within one of those enumerated categories of traffic, it is not subject to reciprocal compensation as a matter of federal law. That is precisely what the proposed language in Verizon's Best and

³¹ Although one of US LEC's witnesses expressed a "concern . . . that Verizon could force us to do this," she could point to no language in the agreement to substantiate that interpretation of Verizon's proposed section 7.1.1.2. Trans. at 93:10 - 96:2.

Final Offer provides – it does not attempt to modify in any respect the plain requirements of binding FCC regulations. The Commission should therefore adopt it.

US LEC's claim that Voice Information Services traffic can *never* constitute "interstate or intrastate exchange access, information access, or exchange services for such access" is incorrect as a matter of law. As the FCC made clear in the *ISP Remand Order*, reciprocal compensation does not apply to "traffic destined for an information service provider" because such traffic falls into the category of "information access." *ISP Remand Order* ¶ 44.³² The FCC further held that "Congress's reference to 'information access' in section 251(g) was intended to incorporate the meaning of the phrase 'information access' as used in the AT&T Consent Decree" set forth in *United States v. AT&T*.³³ The Consent Decree defined "information access" as "the provision of specialized exchange telecommunications services . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services."³⁴ And "information services" were in turn defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications."³⁵ The definition of Voice Information Services in the proposed agreement at the very least *includes* such traffic, because

³² Although the D.C. Circuit Court of Appeals remanded the *ISP Remand Order* to the FCC, the court explicitly declined to vacate the order, which thus remains binding federal law. See *WorldCom*, 288 F.3d at 434; see also Memorandum Opinion and Order, *Joint Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, ¶ 272 (2002) (rules adopted in the *ISP Remand Order* "remain in effect") (Verizon App. Tab 7).

³³ See *ISP Remand Order* ¶ 44 (citing *United States v. AT&T*, 552 F. Supp. 131, 196, 229 (D.D.C. 1982)).

³⁴ See *ISP Remand Order* ¶ 44.

³⁵ *United States v. AT&T*, 552 F. Supp. at 229.

(among other things) that definition includes calls that are intended to retrieve “recorded voice announcement *information.*” US LEC Petition, Attach. B, at 43, Additional Services Attachment § 5.1 (emphasis added). Moreover, there is no reason that a voice information service could not be set up to operate on an interLATA basis, with “local” access numbers in a variety of cities. Traffic destined for such services would undoubtedly constitute exchange access traffic. Accordingly, Verizon’s proposed language is both correct and covers a meaningful class of traffic, and the Commission should adopt it.

Issue 4: (Additional Services Attachment, Section 5.3)

Issue: Should US LEC be required to provide dedicated trunking at its own expense for Voice Information Service traffic that originates on its network for delivery to Voice Information Service providers served by Verizon?

SEPARATE TRUNKING OF 976-TYPE TRAFFIC IS ESSENTIAL TO PERMIT VERIZON TO CONTROL ACCESS TO THOSE SERVICES

The question of how to route 556 and 976 traffic has almost nothing to do with the issue of reciprocal compensation. Rather, as Verizon’s Best and Final Offer clarifies, Verizon’s concern here is not with information services traffic generally, but only with that separate subclass of traffic for which the Voice Information Service provider imposes a separate charge on the calling party. See Verizon’s Best and Final Offer at 5. Such traffic raises special concerns, because where a carrier provides billing service to its voice information service provider subscriber, it must be able accurately to bill such traffic, and block delivery of such traffic where there is no mechanism for billing the calling party – where, for example, there is no agreement between the originating carrier and the carrier serving the information services provider for end-user billing. US LEC has effectively acknowledged the validity of these concerns: in modifying Verizon’s proposed language on this issue, US LEC nonetheless maintained language that would

obligate the originating carrier to enter into an agreement with the carrier serving a Voice Information Service provider committing to “collect from its Customer and remit to [the receiving carrier] the Voice Information Service provider’s charges” or to pay the charges itself. US LEC Petition, Attach. B at 43, Additional Services Attachment § 5.3.

By contrast, US LEC has no legitimate basis for objecting to Verizon’s proposed separate trunking requirement as set forth in Verizon’s Best and Final Offer, because US LEC itself does not permit its customer to place such calls. The record demonstrates that US LEC *blocks* all traffic to Verizon’s “caller-paid information services” under the terms of its tariff. *See* US LEC Local Exchange Tariff, Section 4, Original Page 1 (Hearing Ex. VZ-4). The separate trunking requirement is intended to ensure that Verizon can continue to accurately account for and control such traffic. Since US LEC does not permit its customers to place such calls, it can have no legitimate objection to the clarified language in Verizon’s Best and Final Offer.

Issue 5: (Glossary, Section 2.56; Interconnection Attachment, Sections 2.1.2, 8.5.2, and 8.5.3)

Issue: Should the term “terminating party” or the term “receiving party” be employed for purposes of traffic measurement and billing over interconnection trunks

BECAUSE IT IS, AT A MINIMUM, DISPUTED WHETHER ALL OF THE TRAFFIC RECEIVED BY A LEC FOR DELIVERY TO ITS CUSTOMERS IS TERMINATED BY THE LEC, THE TERM “RECEIVING PARTY,” NOT “TERMINATING PARTY” SHOULD BE USED

The traffic that competing local telephone companies exchange with one another includes both conventional local traffic and traffic bound for information service providers, including traffic bound for ISPs.³⁶ The parties agree that the receiving carrier terminates conventional local voice traffic. But Verizon does not agree that the receiving carrier terminates traffic

³⁶ Whether US LEC in particular serves ISPs in Pennsylvania is beside the point since the language of the Agreement potentially applies to all CLECs.

delivered to ISPs and other information service providers. Rather, as the FCC has repeatedly held over a course of nearly two decades, local carriers do *not* terminate such traffic; rather, such traffic is delivered to information service providers for onward transmission. That is the basis for the FCC's repeated determination that such traffic is *access* traffic – *i.e.*, traffic that travels beyond the local exchange:

Among the variety of users of access service are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, *enhanced service providers*,³⁷ and other private line and WATS customers, large and small, who “leak” traffic into the exchange. *In each case the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area.*

Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 78 (1983) (emphasis added).

The FCC has thus long recognized that calls to the locations of ESPs do not terminate there but “transit” those locations to their ultimate destination. *Id.* Indeed, the Commission recognized that an ESP “might *terminate* few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities.” *Id.* (emphasis added). The Commission has repeatedly confirmed this analysis in the past 15 years.³⁸

³⁷ Enhanced Services under the FCC's terminology and Information Service Provider under the consent decree are equivalent – thus traffic bound for ESPs and information access traffic are essentially the same. ISPs are both ESPs and Information Service Providers.

³⁸ See Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, ¶ 7 (1987) (ESP, “like facilities-based interexchange carriers and resellers, use the local network to provide interstate services”) (Verizon App. Tab 11); Order, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, ¶ 2 (1988) (describing ESPs as “providers of interstate service[]” and “exchange access users”) (Verizon App. Tab 13); First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, ¶ 341 (1997) (“*Access Charge Reform Order*”) (ISPs “may use incumbent LEC facilities to originate and terminate interstate calls”) (Verizon App. Tab 2); Memorandum Opinion and Order, *GTE Tel. Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶ 19 (1998) (“*GTE Tariff*”).

Verizon is *not* asking the Commission to rule on or apply the definition of “termination” to any particular class of traffic. Rather, Verizon includes this brief summary of the ample FCC authority on this point simply to establish that US LEC’s claim – that all the reciprocal compensation traffic that the parties exchange is terminated by them – is incorrect. The Commission should therefore adopt a neutral, *accurate*, and readily understandable term to describe the broad class of traffic that local carriers may exchange, and refer to the party that receives such traffic as the “receiving party.” It is beyond serious dispute that the carrier receives the traffic – if it did not, there would be nothing for it to deliver to its customer. And it is, at a minimum, hotly contested whether all of that traffic is terminated by the receiving carrier.

Issue 6: (Glossary, Section 2.56; Interconnection Attachment, Section 7.2)

- Issue:
- (A) Should the parties be obligated to compensate each other for calls to numbers with NXX codes associated with the same local calling area?
 - (B) Should Verizon be able to charge originating access to US LEC on calls going to a particular NXX code if the customer assigned the NXX is located outside of the local calling area associated with that NXX code?

PAYMENT OF RECIPROCAL COMPENSATION ON INTEREXCHANGE TRAFFIC IS INCONSISTENT WITH FEDERAL LAW AND SOUND REGULATORY POLICY

The disagreement between the parties is whether the determination that a given call is subject to inter-carrier compensation should be based on the originating and terminating points of the complete end-to-end communication, as Verizon proposes, or whether such compensation should be based on the NPA-NXX of the called party, as US LEC proposes. So long as a carrier assigns customers telephone numbers that are associated with the customer’s physical location,

Order”) (Internet-bound calls “do not terminate at the ISP[] . . . but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user.”) (Verizon App. Tab 6).

the two proposals lead to the same result. The disagreement arises when the called party's carrier assigns its customer a number that is *not* associated with the called party's location. If, in that circumstance, the called party's assigned number, not the called party's physical location, were to control the payment of inter-carrier compensation, CLECs could manipulate the inter-carrier compensation system at will. US LEC's proposal thus invites regulatory arbitrage and discourages local competition. And, at least as important, US LEC's proposal is inconsistent with federal law.

The factual record on this issue is clear. By definition, the traffic that is the subject of the dispute is interexchange traffic, that is, traffic that travels from one local calling area or "exchange" to another. *See* Haynes Testimony at 10:8-10. If a Verizon customer located in one Verizon local calling area – say, in Allentown – calls a US LEC customer located in another local calling area in the same LATA – say, in Philadelphia – such a call is ordinarily an intraLATA toll call. *See id.* at 6:2-4. US LEC admitted that such a call is not a local call. *Trans.* at 177:9, 11. But US LEC maintains that if US LEC simply assigns its Philadelphia customer a telephone number associated with the Allentown local calling area, the identical transmission is transformed into a local call for reciprocal compensation purposes. *Id.* at 177:24 - 178:4.

The problem does not end there. US LEC does not limit its assignment of numbers to customers that are located in the same LATA, or even the same state as the local calling area with which the assigned number is associated. *Id.* at 181:10 - 182:3. A Verizon customer in Allentown might call a US LEC customer in South Carolina, and, under US LEC's proposed language, US LEC would *still* claim reciprocal compensation for the interstate long-distance call, so long as US LEC had chosen to assign its South Carolina customer an Allentown number. Even US LEC did not defend this result (*see id.* at 180:4-8) and it is directly contrary to binding

FCC precedent (*see* Haynes Testimony at 8:16 - 9:6). Yet the same reasons for which it is flatly inappropriate to treat an interLATA interexchange call as a local call for inter-carrier compensation purposes also apply to intraLATA interexchange calls.

The Commission should accordingly accept Verizon's proposed language and reject US LEC's proposed language for four basic reasons. *First*, US LEC's proposal is inconsistent with federal law, which explicitly provides that reciprocal compensation does not apply to interexchange traffic. *Second*, US LEC's proposal would create unacceptable regulatory arbitrage opportunities and discourage true local competition. *Third*, US LEC's proposal fails to deal properly with interLATA FX-type traffic. *Fourth*, Verizon has explained that the parties can accurately and inexpensively distinguish FX and Virtual FX traffic from local traffic for inter-carrier compensation purposes.

A. Federal Law Does Not Require Payment of Reciprocal Compensation for Interexchange Traffic

The FCC's rules have always made clear that reciprocal compensation under 47 U.S.C. § 251(b)(5) "do[es] not apply to the transport and termination of interstate or intrastate interexchange traffic." *Local Competition Order* ¶ 1034.³⁹ The FCC confirmed that result in its April 2001 *ISP Remand Order*, in which it held that reciprocal compensation does not apply to "interstate or intrastate exchange access, information access or exchange services for such access." 47 C.F.R. § 51.701(b)(1) (Verizon App. Tab 35). The FCC has made clear that this exclusion covers all interexchange communications: whenever a LEC provides service "in order to connect calls *that travel to points – both interstate and intrastate – beyond the local*

³⁹ This portion of the *Local Competition Order* has never been challenged and remains binding federal law.

exchange,” it is providing an access service. *ISP Remand Order* ¶ 37 (emphasis added).

“Congress excluded all such access traffic from the purview of section 251(b)(5).” *Id.*

The FCC’s determination on this point binds this Commission and requires it to rule in Verizon’s favor on Issue 6. It is undisputed that the calls at issue here “travel to points . . . beyond the local exchange.” *Id.*; see Haynes Testimony at 10:8-10. Accordingly, such traffic simply is not subject to reciprocal compensation under federal law.

The weight of state commission authority is in agreement with this analysis, holding that reciprocal compensation does not apply to virtual NXX traffic because it does not physically originate and terminate in the same local calling area. These state commissions include those in Ohio,⁴⁰ Florida,⁴¹ Connecticut,⁴² Illinois,⁴³ Texas,⁴⁴ South Carolina,⁴⁵ Tennessee,⁴⁶ Georgia,⁴⁷ and Missouri.⁴⁸

⁴⁰ See *Ohio Arbitration Order* at 8, 11.

⁴¹ See Staff Memorandum, *Investigation into Appropriate Methods to Compensate Carriers for Exchange Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Issue 15, at 69, 72, 96-97 (Fla. PSC Nov. 21, 2001) (Verizon App. Tab 33), approved at Florida PSC Agenda Conference (Dec. 5, 2001).

⁴² Decision, *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried over Foreign Exchange Service Facilities*, Docket No. 01-01-29, at 44 (Conn. Dep’t Pub. Util. Control Jan. 30, 2002) (“The purpose of mutual compensation is to compensate the carrier for the cost of terminating a local call” and “since these calls are not local, they will not be eligible for mutual compensation.”) (emphasis added) (Verizon App. Tab 19).

⁴³ Arbitration Decision, *TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Co. d/b/a Ameritech Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 01-0338, at 48 (Ill. Commerce Comm’n Aug. 8, 2001) (Verizon App. Tab 17); Arbitration Decision, *Level 3 Communications, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, Docket No. 00-0332, at 9 (Ill. Commerce Comm’n Aug. 30, 2000) (“FX traffic does not originate and terminate in the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation.”) (Verizon App. Tab 16).

The *Virginia Arbitration Order* – in adopting language allowing the NPA-NXX of the called party to govern payment of reciprocal compensation – does not call this conclusion into question. The Bureau never even addressed the basic question whether Virtual FX traffic is subject to reciprocal compensation under federal law. Instead, the Bureau simply suggested that, in the absence of a concrete proposal for distinguishing Virtual FX traffic from local traffic for billing purposes, the parties would not be compelled to give effect to that distinction, irrespective of the requirements of federal law. *Virginia Arbitration Order* ¶ 301. The Bureau’s failure to respect the limitations on Verizon’s reciprocal compensation obligations was both inconsistent with federal law and unsupported on the record, but in any event it has no application here,

⁴⁴ Revised Arbitration Award, *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Docket No. 21982, at 18 (Tex. PUC Aug. 31, 2000) (finding FX-type traffic “not eligible for reciprocal compensation” to the extent it does not terminate within a mandatory local calling scope) (Verizon App. Tab 32).

⁴⁵ Order on Arbitration, *Petition of Adelpia Business Solutions of South Carolina, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 2000-516-C, Order No. 2001-045, at 7 (S.C. PSC Jan. 16, 2001) (“Applying the FCC’s rules to the factual situation in the record before this Commission regarding this issue of ‘virtual NXX,’ this Commission concludes that reciprocal compensation is not due to calls placed to ‘virtual NXX’ numbers as the calls do not terminate within the same local calling area in which the call originated.”) (Verizon App. Tab 27).

⁴⁶ Interim Order of Arbitration Award, *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948, at 42-44 (Tenn. Regulatory Auth. June 25, 2001) (Verizon App. Tab 21).

⁴⁷ Final Order, *Generic Proceeding of Point of Interconnection and Virtual FX Issues*, Docket No. 13542-U, at 10-12 (Ga. PSC July 23, 2001) (“The Commission finds that reciprocal compensation is not due for Virtual FX traffic.”) (Verizon App. Tab 20).

⁴⁸ Arbitration Order, *Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, at 44 (Mo. PSC June 7, 2001) (finding VFX traffic “not be classified as a local call”) (Verizon App. Tab 18).

because, as discussed below, Verizon *has* presented evidence that carriers *can and do* accurately estimate the volume of FX and Virtual FX traffic exchanged between them. Thus, the *Bureau Order* provides no basis for failing to implement the clear requirements of federal law here.

B. Payment of Reciprocal Compensation on Virtual FX Traffic Would Contribute to Regulatory Arbitrage

Even if federal law did not clearly resolve this question – and it does – the Commission should adopt Verizon’s proposal because it is consistent with sound regulatory policy. When a US LEC customer subscribes to a Virtual FX service, it pays an extra charge to US LEC in order to be able to receive calls originated in a distant exchange without a toll charge being imposed on the calling party. *See* US LEC’s “Enhanced Local Services,” at 2 (Hearing Ex. VZ-6) (US LEC describing “Foreign exchange” as involving “an inbound-only call, toll-free to the calling party, which is paid for by the called party”). US LEC is thus paid by *its* subscriber precisely to ensure that Verizon will *not* be paid any toll charges by *its* subscriber for an interexchange call. There is nothing necessarily wrong with that, so long as US LEC compensates Verizon appropriately for the service that Verizon continues to provide. But it would be deeply inconsistent with regulatory policy and basic fairness to require Verizon to *pay* US LEC, when Verizon continues to bear the same costs of originating and transporting the interexchange call, when Verizon is deprived of the toll charges that would ordinarily apply, and when US LEC is already receiving compensation from its customers. US LEC’s proposal thus amounts to an extraordinarily clear example of attempted regulatory arbitrage – that is, a situation in which US LEC will earn revenues (both from its subscribers and from Verizon) while Verizon is forced to bear the bulk of the real costs of providing the service and is deprived of toll revenues to boot.

Each of these points is clearly established in the record.

First, US LEC charges its Virtual FX customers a \$1000 fixed charge and \$500 per month in Pennsylvania, with additional charges added on. *See* Trans. at 175:17-19. Yet US LEC provided no evidence that it incurs any additional costs in providing Virtual FX service as compared to ordinary local exchange service. To the contrary, Ms. Montano testified that when US LEC provides Virtual FX service, its customers are generally located close to US LEC's switch:

Q. Do you know whether any of USLEC's FX customers in Pennsylvania are located near the USLEC switch?

A. Yes, I believe they are.

Q. What's that distance?

A. I believe it is less than five miles.

Trans. at 182:20-24. Ms. Montano could think of no example in which a Virtual FX customer is located more than 12 miles from the US LEC switch. *Id.* at 183:4. Moreover, US LEC advertises its Virtual FX service as in-bound only, so that US LEC will never bear the cost of transporting a Virtual FX customer's traffic to Verizon's distant point of interconnection.

Second, US LEC justifies these charges purely on the basis of the subscriber's ability to receive calls from parties located in a foreign exchange without those calling parties incurring any toll charge. US LEC's "Enhanced Local Services," at 2 (Hearing Ex. VZ-6). Indeed, US LEC explicitly informs its Foreign exchange subscribers that they are paying those toll charges through their payments to US LEC. *Id.*

Third, the "toll charges" that US LEC requires its subscribers to pay in order to receive Foreign Exchange service are precisely those toll charges that Verizon does not receive because of US LEC's manipulation of number assignments. Haynes Rebuttal Testimony at 12:4-5.

Fourth, US LEC insists that Verizon should be required to deliver traffic originated LATA-wide to its switch. In that arrangement, Verizon is bearing the cost of originating a call

and transporting it across the LATA – the very interexchange service for which US LEC is being paid by its customer, and for which Verizon is no longer being paid by its customer. Haynes Rebuttal Testimony at 8:10-19.

Under these circumstances, the only sensible result is that US LEC should compensate Verizon for the services that it continues to provide – *i.e.*, Verizon should continue to receive at least a portion of the toll charges that it would otherwise receive from its customer in the form of access charges paid by US LEC.⁴⁹ Indeed, there is no situation, and US LEC cites none, in which a carrier both charges its subscriber toll charges – as US LEC admits it does – and receives inter-carrier compensation. In every such circumstance, the inter-carrier compensation flows the other way, from the carrier who is receiving the toll charges to the carrier who is providing the access but receiving no revenue from its subscriber for the call.

This is not only a matter of fairness between the parties, it is also fundamental to the structure of basic service rates, and the “decades-old public policy goal of assuring widespread availability of affordable telephone service.” Haynes Testimony 6:7-8. Traditionally, basic local exchange rates only entitle an end user to service *within the exchange*. *Id.* at 5:16-18. If the end user wishes to make a call outside the end user’s local calling area, the end-user must generally pay a toll charge, which the LEC either keeps (if it is providing the interexchange service) or receives a part of in the form of access charges. *Id.* at 5:16 - 6:7. Some dialing arrangements – such as toll-free 800 numbers – allow the calling party to make an interexchange call without incurring the toll charges that would normally apply. *Id.* at 6:9-12. But the LEC

⁴⁹ By the same token, if a US LEC customer originates a call to a Verizon FX customer, Verizon should pay intrastate access charges. Verizon has offered to do just that. Trans. at 235:10-11.

continues to be compensated for providing access to the local exchange – in the case of 800 numbers, through access charges. Haynes Rebuttal Testimony at 11:22 - 12:12.

In the case of Virtual FX traffic, US LEC wants to offer its customers the benefit of access to a foreign exchange without the necessity of deploying any facilities serving customers in that exchange. *See id.* at 9:13-14 (noting that US LEC seeks “to take advantage of Verizon’s ‘ubiquitous network’” (Montano Testimony at 28:19) without constructing facilities of its own). US LEC should not be able to take money *away* from the subscribers in the local exchange rather than *contribute* to the support of the local exchange in this circumstance. Otherwise, Verizon and its subscribers would, in effect, be required to sponsor US LEC’s provision of Virtual FX services to US LEC’s subscribers. That result turns basic principles of telecommunications regulation on their head. *Id.* at 8:10-23.

C. US LEC’s Proposed Language Would Authorize Reciprocal Compensation on InterLATA FX Traffic, a Result Contrary to Binding Federal Law

US LEC’s proposed language governing this issue would provide that designation of traffic as subject to reciprocal compensation “shall be based on the originating NPA-NXX rate center and the terminating NPA-NXX rate center.” US LEC Petition, Attach. B at 64, Interconnection Attachment § 7.2. But even US LEC does not defend this language in the case of *interLATA* calls. *See* Trans. at 180:8-9. Nor could it: the FCC has specifically ruled that interstate FX service is subject to access charges. *See AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, ¶ 71 (1998) (“*AT&T v. BA-PA*”) (Verizon App. Tab 1), *reconsideration denied*, 15 FCC Rcd 7467 (2000). Accordingly, it cannot be subject to reciprocal compensation. *See* 47 C.F.R. § 51.701(b)(1) (Verizon App. Tab 35).

US LEC at first attempted to deny that it provides *interLATA* FX service to its customers. *See* Trans. at 180:8-9. But US LEC’s website advertises a service that provides

precisely this functionality: its “Local Toll-Free” service “lets [customers] establish local phone number across the US LEC footprint.” US LEC’s “Local Toll-Free Service,” at 2 (Hearing Ex. VZ-5). The “US LEC footprint” includes 14 states. Trans. at 181:22. Thus when Verizon delivers a call originated by its customer to the US LEC switch, US LEC may, in turn, deliver that call to any location in the area that it serves.

US LEC’s “Local Toll-Free” service thus provides a dramatic illustration that US LEC’s proposed contract language leads to the wrong result by requiring payment of reciprocal compensation where access charges apply. But the same reasons that the FCC has insisted that interstate access charges be governed by the actual physical location of the parties applies equally in the intraLATA context. Assignment of phone numbers is easily manipulated and reflects nothing about underlying costs. The only way for this Commission to ensure that regulatory policy is correct and consistent is to concern itself with the substance of the service arrangement – *i.e.*, the actual path of the call.

D. The Record Establishes that FX and Virtual FX Traffic Can Be Practically Distinguished from Local Traffic for Inter-carrier Compensation Purposes

Federal law, sound policy, and basic fairness compel adoption of Verizon’s proposed language. Whatever practical difficulties the parties may face in implementing that language would provide no basis for permitting the severe market distortions that adoption of US LEC’s proposal would cause. But the record establishes that there need not be any significant problems with implementing Verizon’s proposal, because a practical method for distinguishing FX and Virtual FX traffic from traffic that is subject to reciprocal compensation has already been proposed in other states and could inexpensively be implemented in Pennsylvania.

As Terry Haynes testified, it is a relatively straightforward matter to do a traffic study, based on an analysis of known FX and Virtual FX numbers, to determine the proportion of calls

exchanged between the parties that are not subject to reciprocal compensation but that should be subject to access charges. *See* Trans. at 232:10-25, 234:4-14, 236:16 - 240:1. That testimony made clear that performing such studies is “easy to do” and “fairly inexpensive.” *Id.* at 237:3, 17. If it is easy for an incumbent LEC to perform such a study on a base of three million customers (*see id.* at 238:22-23), then it should be positively trivial for US LEC, which claims to provide Virtual FX service to six customers in Pennsylvania. *Id.* at 79:1.

In sum, the record establishes that there is no practical obstacle to implementing Verizon’s proposed language.

Issue 8: (Interconnection Attachment, Sections 8.1 and 8.1.1; General Terms and Conditions, Section 50.2)

Issue: What compensation framework should govern the parties’ exchange and termination of ISP-bound traffic in the event the FCC’s Internet Order is vacated or reversed on appeal?

THE PARTIES’ RECIPROCAL COMPENSATION OBLIGATIONS MUST BE GOVERNED BY APPLICABLE FEDERAL LAW

As noted above, the D.C. Circuit has remanded the *ISP Remand Order*, but expressly refused to vacate that order; as a result, the rules the FCC adopted remain in effect pending further FCC proceedings on remand.⁵⁰ That order sets forth a specific intercarrier compensation regime that governs the exchange of Internet-bound traffic between Verizon and US LEC during the course of this arbitrated agreement. If there is a subsequent change of law on this point, the

⁵⁰ Verizon notes that three petitions for rehearing and rehearing en banc have been filed requesting that the Court issue an order vacating the *ISP Remand Order*. The D.C. Circuit has requested a response to one of those petitions, and the FCC and a group of Intervenors (including Verizon) have filed a response defending the FCC’s decision. Verizon will keep this Commission apprised of any further developments in this matter. As explained below, however, the possibility that the D.C. Circuit may still decide to vacate the *ISP Remand Order* is not a reason for adopting US LEC’s proposal.

parties' obligations will conform to that change pursuant to the change of law clause in the agreement. See US LEC Petition, Attach. B, at 3, General Terms and Conditions § 4.6.

In any event, US LEC's proposed provision, if applied, would lead to the wrong result. Under US LEC's proposed provision the FCC's "growth cap and new market provisions" in the *ISP Remand Order* would have been eliminated as a result of the D.C. Circuit's decision to remand the FCC's order for further proceedings. However, as noted above, in *WorldCom Inc. v. FCC*, the D.C. Circuit expressly decided to leave those rules in effect. US LEC's proposal, therefore, would have yielded results contrary to governing federal law.

Federal law does not obligate Verizon, or entitle this Commission, to impose rules to address potential contingencies with respect to the meaning of federal law. Nor will Verizon agree to pay any compensation for ISP-bound traffic not strictly required by federal law, which governs the issue. Because US LEC's proposed language has no basis in law, this Commission should reject it; the parties' obligations should simply conform to those imposed by federal law.

Issue 9: (Pricing Attachment, Section 1.5)

Issue: Should Verizon be permitted to change its non-tariffed charges during the term of the agreement, or must such charges remain fixed for the entire term?

GENERALLY APPLICABLE TARIFF PROVISIONS, WHICH ARE SUBJECT TO SEARCHING REGULATORY REVIEW, SHOULD SUPERCEDE PRICING TERMS IN THE AGREEMENT

In negotiating the present agreement, Verizon has attempted to conform all of the agreement's terms to the requirements of applicable law. This principle applies with respect to pricing in particular: the rates set forth in the agreement are either based on generally applicable tariffs or reflect this Commission's rate-setting under section 252(d) of the Communications Act.

In general, the pricing provisions of Verizon's agreements within a particular state are uniform, reflecting the generally applicable rates set by regulators in appropriate adversary proceedings.

For this reason, it is both fair and appropriate that, if the generally applicable charges for a particular service change, the charges under the agreement should change along with them. The principle that the charges for services provided to CLECs should be non-discriminatory is deeply embedded both in the history of telecommunications regulation and in the 1996 Act in particular: federal law specifically requires that charges for interconnection unbundled network elements, services offered for resale, and collocation must be "just, reasonable, and *nondiscriminatory*." 47 U.S.C. § 251(c)(2), (3), (4), (6) (emphasis added) (Verizon App. Tab 34); *see also id.* § 252(d)(1). By providing that applicable tariffs and other charges that are mandated or approved by the FCC or this Commission should supersede any charges set forth in the agreement, Verizon's proposed language gives effect to the letter and the spirit of these non-discrimination provisions. Otherwise, a carrier may be at a permanent advantage by the mere fortuity of when the carrier executed the governing interconnection agreement.

US LEC claims that Verizon's proposed language would give Verizon "unbridled discretion to modify its rates at will." US LEC Petition at 28. This is nonsense. Verizon is not free to modify its generally applicable charges unilaterally. Those charges will change in one of two ways. The first possibility is that Verizon will publicly file a tariff with the appropriate state or federal commission – tariffs that do not go into effect until interested parties have had an opportunity to raise a challenge to them – in which case US LEC will have every opportunity to participate in the process of agency review. *See generally* 47 U.S.C. § 203(b)(1) (no change to a tariff unless the change has been "filed and published [after] . . . notice") (Verizon App. Tab 34); 47 C.F.R. § 61.58 (establishing federal notice requirements for tariff filings) (Verizon App. Tab

35); *id.* § 1.773 (establishing procedure for petitions to reject proposed tariff); 52 Pa. Code §§ 53.31, 53.59 (requiring notice to public of tariff filings) (Verizon App. Tab 36); *id.* § 5.21 (establishing procedures for formal complaints against tariff provisions). The second possibility is that the industry or some segment of it will participate in a generic ratemaking proceeding of some other type; again, in that circumstance, US LEC would presumably be able to participate in the proceedings and ensure that such new rates are just, reasonable, and in conformance with applicable law.

The Arbitrator provided a perfect illustration of the result that Verizon seeks. The Arbitrator noted that dark fiber is not currently subject to tariff in Pennsylvania; if it does become subject to tariff, the agreement should be “flexible enough” to incorporate a “change to a tariffed item” when the “tariff has been subjected to the regulatory review process.” July 23, 2002 Conference Call Transcript at 302:15-24. That is precisely what Verizon’s proposed language provides, and Verizon will never have an opportunity to unilaterally change a rate under its proposed contract language without having that rate be subject to regulatory review through the state or federal tariffing process.

Accordingly, US LEC has no legitimate reason to resist Verizon’s proposed language, and Verizon has every reason to be concerned about arbitrage. So long as the rates contained in the interconnection agreement place a CLEC at an advantage, it will exploit those rates, but if a new generally applicable rate is lower, the CLEC will likely claim that it is entitled to purchase service out of the tariff, notwithstanding the existence of an agreement. In this way, a CLEC hopes to gain the benefit of rate reductions without facing any risk that other charges will increase under applicable law.

Faced with a comparable problem, the New York Public Service Commission ruled that “it is better to allow the new agreement between AT&T and Verizon to absorb tariff amendments and changes that are intended to implement substantial telecommunications policy initiatives than to freeze it at its inception.”⁵¹ The PSC noted that “the tariff process promote[s] comparable interconnections for competitive carries and unbundled access on similar terms” and that “[t]he tariff process permits ample opportunity for interested persons to participate and seek changes (or even the rejection) of proposed tariffs before they become effective.”⁵² The same reasoning argues in favor of adopting Verizon’s proposed language here.

⁵¹ Order Resolving Arbitration Issues, *Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc.*, Case 01-C-0095, at 5 (N.Y. PSC July 30, 2001) (Verizon App. Tab 30).

⁵² *Id.* at 4.

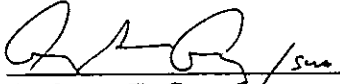
CONCLUSION

For the foregoing reasons, the disputed issues should be resolved in Verizon's favor.

Respectfully submitted,

Julia A. Conover
Verizon Pennsylvania Inc.

Of Counsel


Anthony E. Gay
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103
(215) 963-6023

Aaron M. Panner
Scott H. Angstreich
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

August 1, 2002

Attorneys for Verizon Pennsylvania Inc.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Petition of US LEC of Pennsylvania : Docket No. A-10814F7000
Inc. for Arbitration with Verizon Pennsylvania :
Inc. Pursuant to Section 252(b) of the :
Telecommunications Act of 1996 :

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POST-HEARING BRIEF OF VERIZON PENNSYLVANIA INC.

APPENDIX

Julia A. Conover
Verizon Pennsylvania Inc.

Of Counsel

Anthony E. Gay
Verizon Pennsylvania Inc.
1717 Arch Street, 32N
Philadelphia, PA 19103
(215) 963-6023

Aaron M. Panner
Scott H. Angstreich
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Attorneys for Verizon Pennsylvania Inc.

August 1, 2002

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

AT&T CORPORATION,)	
MCI TELECOMMUNICATIONS)	
CORPORATION, <i>et al.</i> ,)	
)	
Complainants,)	
)	
v.	)	File Nos. E-95-006, E-95-007,
	)	E-95-009, E-95-010, E-95-015, E-95-016,
BELL ATLANTIC - PENNSYLVANIA,	)	E-95-017, E-95-018, E-95-021, E-95-022,
<i>et al.</i>,	)	E-95-030, E-95-035
)	
Defendants.)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1998

Released: December 9, 1998

By the Commission:

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line by each. Because two calls originate or terminate over the subscriber's common line, both properly incur a CCL charge.

70. Nor can we agree with MCI's contention that the LECs' imposition of two CCL charges on the subscriber's end of a three-way calling configuration results in double recovery where one call is an interstate call and the other is subject to an intraLATA toll charge or other intrastate charge paid to the LEC for the option. As mentioned above, three-way calling involves two distinct calls *using the same line*, even though each call originates or terminates over the same common line. Therefore it is proper for a LEC to assess a CCL charge on an IXC for the interstate call, even if the LEC collects other intrastate charges for the intrastate call.

f. Foreign Exchange (FX) Service

i. Description and Contentions

71. Foreign Exchange (FX) service connects a subscriber ordinarily served by a local (or "home") end office to a distant (or "foreign") end office through a dedicated line from the subscriber's premises to the home end office, and then to the distant end office. The "home" end is known as the closed end, while the "foreign" end is known as the open end. In effect, this gives the subscriber a dial tone presence in the distant exchange without additional toll charges.¹⁷⁵ In interLATA FX service, which is offered by AT&T but not MCI,¹⁷⁶ the home and foreign end offices are in different LATAs, connected by the IXCs' interstate private lines. In intraLATA FX service, which is offered by the LECs, the home and foreign end offices are in the same LATA, connected by the LEC's intraLATA, interoffice lines.¹⁷⁷

72. The IXCs contend that the LECs impose improper CCL charges on originating or terminating calls that transit an interLATA FX service subscriber's closed end. The IXCs, noting that the link between the subscriber and the home end office is special access and that the link from there to the foreign end office is a private line (*i.e.*, together comprising the FX closed end), argue that the links cannot be considered as a common line and so should not be subject to CCL charges. The IXCs support this characterization of the closed-end as private or dedicated by reference to court decisions¹⁷⁸ and statements or omissions by the LECs themselves.¹⁷⁹ The IXCs

¹⁷⁵ AT&T Br. at 18-20.

¹⁷⁶ See Letter from Frank W. Krogh, Counsel, MCI, to Gerald H. Chakerian, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau, Federal Communications Commission (November 26, 1996).

¹⁷⁷ See, *e.g.*, AT&T Br. at 6-7; BellSouth Br. 35-36.

¹⁷⁸ AT&T Br. at 20 (citing, *inter alia*, *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 737 F.2d 1095, 1105 (D.C. Cir. 1984) (*NARUC v. FCC*)).

also contend that there is no other common line forming part of this service that links a premises in the foreign LATA to the foreign end office. Accordingly, they conclude, no CCL charge for any part of the closed end is appropriate.¹⁸⁰

73. BellSouth and GTE object to any consideration of AT&T's claims regarding interLATA FX service, arguing that AT&T did not allege any violations involving interLATA FX service in its complaint and raised them for the first time in its briefs.¹⁸¹ Bell Atlantic, on the other hand, states that *only* issues pertaining to interLATA FX service are raised in AT&T's complaint.¹⁸²

74. Regarding the merits of AT&T's claim, BellSouth argues that CCL charges for interLATA FX service are properly imposed at the distant end office¹⁸³ because the Commission has not exempted calls between interstate switched access services from CCL charges.¹⁸⁴ Other LECs argue that the three-LATA scenario described in Attachments 1 and 2 to AT&T's brief is not the most efficient or cost effective means for making interLATA calls, and is so rare that it is virtually nonexistent.¹⁸⁵ In addition, the LECs state that CCL charges are properly assessed at the open end of an interLATA FX call,¹⁸⁶ and that they do not assess CCL charges at the

¹⁷⁹(...continued)

¹⁷⁹ *Id.* (citing, e.g., Bell Atlantic's Answer at para. 5; US West response to Interrogatories at 8); MCI Br. at 6-7.

¹⁸⁰ AT&T Reply at 18-20; MCI Reply at 9. AT&T does not clearly distinguish these two possible locations of the unjustified common line charge. It describes the following FX scenario in Attachments 2 and 3 to its main brief: A subscriber in home LATA 2 obtains a telephonic presence in foreign LATA 1 by purchasing interLATA FX service, and places a call to, or receives a call from, a party in LATA 3. AT&T apparently contends that for calls following this pattern, the LECs impose CCL charges, either originating charges for calls initiated by the subscriber or terminating charges for calls received by the subscriber, at the foreign end office in LATA 1, even though no common line facilities are employed in that LATA. AT&T Br. at 19. At other points, however, AT&T seems to argue that the LECs impose CCL charges at what traditionally has been termed the "closed end" -- the private lines connecting the subscriber to the home end office and, possibly, on to the foreign end office. AT&T Reply at 19-20.

¹⁸¹ BellSouth Reply at 13-14; GTE Reply at 12 n.21.

¹⁸² Bell Atlantic Br. at 10 n.22.

¹⁸³ This is LATA 1 in AT&T's three-LATA example described in note 180, *supra*.

¹⁸⁴ BellSouth Reply at 14 n.43 (*i.e.*, the closed end is special access and the open end is Feature Group A switched access).

¹⁸⁵ Ameritech Reply at 10; US West Reply at 8; *cf.* NYNEX Reply at 14.

¹⁸⁶ Bell Atlantic Br. at 10; Ameritech Reply at 9-10; NYNEX Reply at 13; SWBT Reply at 12. SWBT, for example, notes that a CCL charge at the foreign end office is required by Section 69.105(b)(2); SWBT Reply at 14-15.

closed end.¹⁸⁷

75. IntraLATA FX service, in contrast to interLATA FX service, is provided by the LECs, and the subscriber and distant end office are within the same LATA.¹⁸⁸ The IXC's assert that the LECs unlawfully apply CCL charges at the distant end office point because private lines connect the subscriber to the home end office, and private lines also run between the two end offices.¹⁸⁹ The IXC's claim that, because the lines connecting the subscriber to the home end office cannot be used to make calls without also using the intraLATA FX function, such lines are not common facilities.¹⁹⁰

76. The LECs contest the IXC's characterization of the connection between the intraLATA FX service subscriber and the home end office -- and in some cases the link from there to the foreign end office -- as a "private line." They maintain that an FX service subscriber purchases basic local exchange service, including common line, and that FX service merely extends the subscriber's local loop to a different local calling area within the same LATA.¹⁹¹ Thus, the LECs argue that intraLATA FX service is a type of local exchange service. They assert that, although dial tone and other functions are performed at the distant end office, the subscriber's connection to the home end office is, ultimately, used for local as well as interexchange access.¹⁹² Moreover, some LECs state that they assess CCL charges for the line between the subscriber and the home end office, not the private line connecting the two end offices.¹⁹³

77. The LECs emphasize that intraLATA FX service is a local exchange service, and they argue that the authorities on which AT&T relies for its claim that all FX services use private lines are distinguishable because these sources involve interstate, interLATA FX service.¹⁹⁴ BellSouth, for instance, contends that an end user's selection of the FX option does not alter the fact that the subscriber's premises are connected to a Class 5 office in the home LATA, or the

¹⁸⁷ See, e.g., Ameritech Reply at 9; SWBT Reply at 12.

¹⁸⁸ See, e.g., AT&T Br. at 19.

¹⁸⁹ *Id.* at 19-21.

¹⁹⁰ *Id.* at 21. MCI does not clearly distinguish between interLATA and intraLATA FX, but it incorporates by reference all of AT&T's arguments on both types. MCI Br. 6-7; MCI Reply at 9.

¹⁹¹ Ameritech Br. at 18; Ameritech Reply at 10; BellSouth Br. at 41; SWBT Br. at 10; Pacific Br. at 6-7; GTE Reply at 11.

¹⁹² See NYNEX Reply at 14-15; BellSouth Br. at 41-42; SWBT Reply at 13, 15; Pacific Br. at 6-7.

¹⁹³ SWBT Reply at 13; *cf.* NYNEX Reply at 15 (records usage associated with the common line to subscriber, not at distant end office as indicated in AT&T Br. at Attachments 4 and 5).

¹⁹⁴ BellSouth Reply at 15-16.

fact that the option is basically local exchange service.¹⁹⁵ Finally, SWBT argues that CCL charges are warranted because FX calls use the home end office switching equipment.¹⁹⁶

ii. Discussion

78. First, we disagree with BellSouth and GTE that AT&T failed to raise allegations concerning interLATA FX service in its complaints. Although AT&T's complaints could have been clearer on this point, we find that it raised both interLATA and intraLATA FX service sufficiently to put the LECs on notice that both services were at issue. We note that AT&T included diagrams in its complaint depicting both services, and, reading the text of the complaint in conjunction with these diagrams, we believe it is clear that AT&T complained of both services.¹⁹⁷ Moreover, the remaining LECs did not object on this ground in their briefs, and several responded to AT&T's allegations on the merits as to both services.¹⁹⁸

79. There is no question that the closed end of interLATA FX service is a dedicated facility -- consisting of LEC special access and other dedicated LEC or IXC components -- that is directly linked to the foreign central office, because the line cannot be used to call anyone within the home LATA without incurring interLATA toll charges. Accordingly, the LEC should not impose a CCL charge specifically attributable to this facility as if it were a common line to the foreign office, and, it appears, none of the LECs do.

80. On the other hand, a CCL charge is appropriate at the open end of an interLATA FX line. A call with one terminus at the closed end transits the foreign central office on the open end and ultimately may link over a common line to any station in the foreign exchange or, potentially, to any station on the entire public switched network. Thus any completed interLATA FX call, whether originating or terminating on the FX subscriber's closed end, will have an actually-used common line at the terminus of the open end. Our conclusions here are consistent with Section 69.105(b)(iii) of the Commission's rules, which provides that "[a]ll open end minutes on calls with one open end (e.g., an 800 or FX call) shall be treated as terminating minutes." This rule recognizes that the sole CCL charge for an FX call is the one attributable to the common line of the non-subscriber who originates a call to, or receives a call from, the FX subscriber, and it provides that, even if a call originates at the open end, the single CCL charge

¹⁹⁵ BellSouth Br. at 41; *see* BellSouth Br. at 42-46 (discussing the local service nature of intraLATA FX service).

¹⁹⁶ SWBT Br. at 10; SWBT Reply at 15.

¹⁹⁷ *See, e.g.*, US West Complaint at 8-9 & Attachment D.

¹⁹⁸ In addition, MCI's complaint against Ameritech does appear to raise the interLATA FX service issue. MCI Complaint at 10, para. 9(d). (Because MCI does not offer interLATA FX service, it could not be in the position of the IXC for the FX customer who originates a call from the home LATA 2 to the foreign LATA 1 in AT&T's three-LATA scenario. MCI could, however, be in the position of the IXC carrying a call originating in LATA 3 to the FX customer's dial-tone presence in foreign LATA 2 in that scenario.)

should be deemed as terminating in order to be charged at the higher terminating rate. We note, however, that calls placed according to AT&T's three-LATA scenario are not subject to CCL charges for the link between the foreign end office and the IXC's POP in LATA 1 on the side enroute to LATA 3, because it is not a common line; the only common line on the open end is the termination in LATA 3.

81. As to intraLATA FX service, we find that the IXCs have not demonstrated that the LECs are violating Section 69.105(a) of our rules. We disagree with the IXCs' characterization of the line between the subscriber and the LEC as a "private" line. Unlike the case of an interLATA FX line, the intraLATA FX line connects an end user to a LEC end office in the same LATA and can be used in common for local exchange, intraLATA toll, and interLATA toll calls. The various authorities that the IXCs cite to support their characterization of FX service as a private line service address only interLATA FX.¹⁹⁹ Those decisions do not discuss or define the nature of intraLATA FX service. In addition, the subscriber's inability to make local calls without also triggering the intraLATA FX service function, a point on which AT&T heavily relies, is not dispositive. It appears that in many cases, the subscriber may indeed make toll-free calls within the entire LATA.²⁰⁰ In any event, we think that this factor may aid in understanding the call configuration, the role of the LECs, and the difference between interLATA and intraLATA FX service, but it does not mean that the connection necessarily functions as a private line for the purpose of CCL charge analysis.

82. Therefore, we agree with the LECs' view that the connection between the subscriber and the home end office in intraLATA FX service, however it may be denominated, is the functional equivalent of a common line for purposes of determining CCL charge liability. It is a dedicated line used merely to extend the subscriber's connection to a more distant end office in the same LATA, in order to obtain dialtone and various other features available in that distant office. Our findings are also consistent with the Common Carrier Bureau's approach to intraLATA FX service in *Bill Correctors*.²⁰¹ In that case, the defendant LEC was assessing two EUCL charges on intraLATA FX calls: one based on the line between the end user and the home end office, and a second based on the line connecting the home and distant end offices. In ruling that only one EUCL charge was appropriate, the Bureau stated that in the case of intraLATA FX service, "it is clear that only one access point exists; the access point has simply been linked to the customer's serving office by a regular loop joined to an FX line."²⁰²

¹⁹⁹ See, e.g., *NARUC v. FCC*, 737 F.2d at 1105.

²⁰⁰ See *BellSouth Br. at Exhibit 10* (affidavit of Richard Merriman, Manager, Pricing, Bell South Telecommunications, Inc.).

²⁰¹ *Bill Correctors, Inc. v. Pacific Bell*, 10 FCC Rcd at 2305.

²⁰² *Id.* at 2308.

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

In the Matter of)	
)	
Access Charge Reform	)	CC Docket No. 96-262
)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
)	
End User Common Line Charges	)	CC Docket No. 95-72
)	

FIRST REPORT AND ORDER

Adopted: May 7, 1997

Released: May 16, 1997

Comment Date: June 26, 1997

Reply Date: July 11, 1997

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

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340. We are also unpersuaded by suggestions that access charges should be imposed on unbundled elements because provision of competitive service by rebundling the same network elements used by the incumbent LEC to provide access is equivalent to resale of a retail service.⁴⁹⁴ First, in the *Local Competition Order*, we recognized major differences between competition through the use of unbundled network elements and competition through resale of an existing retail service offered by an incumbent LEC. We explained, for example, that an entrant relying on unbundled elements rather than resale has the flexibility to offer all telecommunications services made possible by using network elements but also assumes the risk that end users will not generate sufficient demand to justify the investment. The entrant using a resale strategy, however, is limited to offering the retail service itself without the attendant investment risk.⁴⁹⁵ Thus, we reject the notion that the rebundling of network elements is equivalent to resale. Second, although we concluded in the *Local Competition Order* that IXCs must continue to pay access charges to incumbent LECs for access services when the end user is served by a competitive carrier reselling the incumbent LEC's retail services, our conclusion was based on the resale provisions of the 1996 Act which limit resale to retail services offered to subscribers or other customers who are not telecommunications carriers.⁴⁹⁶ The resale provision does not apply to non-retail services, including access services, that may be offered using the same facilities.⁴⁹⁷ Unlike the provision of local exchange services, access services are not services that LECs provide directly to end users on a retail basis. To impose access charges on the sale of unbundled elements would contravene the terms of the resale provision by effectively treating exchange access as a service provided on a retail basis.

B. Treatment of Interstate Information Services

1. Background

341. In the 1983 *Access Charge Reconsideration Order*, the Commission decided that, although information service providers⁴⁹⁸ (ISPs) may use incumbent LEC facilities to originate

⁴⁹⁴ BellSouth Comments at 13; PacTel Reply at 8-10.

⁴⁹⁵ 11 FCC Rcd at 15667-68.

⁴⁹⁶ 47 U.S.C. § 251(c)(4)(A).

⁴⁹⁷ 11 FCC Rcd at 15982-83.

⁴⁹⁸ The term "enhanced services," which includes access to the Internet and other interactive computer networks, as well as telemessaging, alarm monitoring, and other services, appears to be quite similar to the term "information services" in the 1996 Act. "Enhanced services" are defined in § 64.702(a) of our rules: "For the purposes of this subpart, the term *enhanced services* shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act

and terminate interstate calls, ISPs should not be required to pay interstate access charges.⁴⁹⁹ In recent years, usage of interstate information services, and in particular the Internet and other interactive computer networks, has increased significantly.⁵⁰⁰ Although the United States has the greatest amount of Internet users and Internet traffic, more than 175 countries are now connected to the Internet.⁵⁰¹ As usage continues to grow, information services may have an increasingly significant effect on the public switched network.

342. As a result of the decisions the Commission made in the *Access Charge Reconsideration Order*, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.⁵⁰² The business line rates are significantly lower than the equivalent interstate access charges, given the ISPs' high volumes of usage.⁵⁰³ ISPs typically pay incumbent LECs a flat monthly rate for their connections regardless of the amount of usage they generate, because business line rates typically include usage charges only for outgoing traffic.

343. In the *NPRM*, we tentatively concluded that ISPs should not be required to pay interstate access charges as currently constituted. We explained that the existing access charge system includes non-cost-based rates and inefficient rate structures. We stated that there is no

on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional different, or restructured information; or involve subscriber interaction with stored information." The 1996 Act defines "information services" as offering the capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). For purposes of this order, providers of enhanced services and providers of information services are referred to as ISPs.

⁴⁹⁹ MTS and WATS Market Structure, Memorandum Opinion and Order, Docket No. 78-72, 97 FCC 2d 682, 711-22 (*Access Charge Reconsideration Order*). See also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (*ESP Exemption Order*).

⁵⁰⁰ The number of U. S. households with Internet access more than doubled over the past year, and approximately 38.7 million Americans over the age of 18 have accessed the Internet at least once. Jared Sandberg, "U.S. Households with Internet Access Doubled to 14.7 Million in Past Year, *Wall Street Journal*, October 21, 1996, at B11.

⁵⁰¹ Network Wizards Internet Domain Survey, January 1997, available on the World Wide Web at <<http://www.nw.com/zoneWWW/top.html>>.

⁵⁰² *ESP Exemption Order*, 3 FCC Rcd at 2631 nn.8, 53. To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence.

⁵⁰³ CIEA Comments at 5-6.

reason to extend such a system to an additional class of customers, especially considering the potentially detrimental effects on the growth of the still-evolving information services industry. We explained that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use incumbent LEC networks to receive calls from their customers.⁵⁰⁴ We solicited comment on the narrow issue of whether to permit incumbent LECs to assess interstate access charges on ISPs.⁵⁰⁵ In the companion *Notice of Inquiry (NOI)*, we sought comment on broader issues concerning the development of information services and Internet access.⁵⁰⁶

2. Discussion

344. We conclude that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs. We think it possible that had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid. Maintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry⁵⁰⁷ and advances the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."⁵⁰⁸

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

346. We also are not convinced that the nonassessment of access charges results in

⁵⁰⁴ NPRM at para 288.

⁵⁰⁵ *Id.*

⁵⁰⁶ See *In the Matter of Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-263, Notice of Inquiry, FCC 96-488 (rel. December 24, 1996) (*NOI*).

⁵⁰⁷ See, e.g., CompuServe/Prodigy Comments at 11; Information Industry Association Comments at 4; Minnesota Internet Services Trade Association Reply at 1.

⁵⁰⁸ 47 U.S.C. § 230(b)(2).

ISPs imposing uncompensated costs on incumbent LECs. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.

347. Finally, we do not believe that incumbent LEC allegations about network congestion warrant imposition of interstate access charges on ISPs.⁵⁰⁹ The Network Reliability and Interoperability Council has not identified any service outages above its reporting threshold attributable to Internet usage, and even incumbent LEC commenters acknowledge that they can respond to instances of congestion to maintain service quality standards. Internet access does generate different usage patterns and longer call holding times than average voice usage. However, the extent to which this usage creates congestion depends on the ways in which incumbent LECs provision their networks, and ISPs use those networks. Incumbent LECs and ISPs agree that technologies exist to reduce or eliminate whatever congestion exists; they disagree on what pricing structure would provide incentives for deployment of the most efficient technologies.⁵¹⁰ The public interest would best be served by policies that foster such technological evolution of the network. The access charge system was designed for basic voice telephony provided over a circuit-switched network, and even when stripped of its current inefficiencies it may not be the most appropriate pricing structure for Internet access and other information services.

348. Thus, in our review of the record filed in response to the *NOI*, we will consider solutions to network congestion arguments other than the incumbent LECs' recommendation that we apply access charges to ISPs' use of circuit-switched network technology. We intend rather to focus on new approaches to encourage the efficient offering of services based on new network configurations and technologies, resulting in more innovative and dynamic services than exist today. In the *NOI*, we will address a range of fundamental issues about the Internet and other information services, including ISP usage of the public switched network.⁵¹¹ The *NOI* will give us an opportunity to consider the implications of information services more broadly, and to craft proposals for a subsequent NPRM that are sensitive to the complex economic, technical, and legal questions raised in this area. We therefore conclude

⁵⁰⁹ See, e.g., USTA Comments at 81-82.

⁵¹⁰ SWBT Comments at 20; PacTel Reply at 26; Internet Access Coalition Reply at 11-12; America On-Line Reply at 7-9.

⁵¹¹ In particular, we requested data about alleged network congestion, rates paid by ISPs today, alternative network access technologies, and additional services desired by ISPs. *NOI* at ¶¶ 313-317.

that ISPs should remain classified as end users for purposes of the access charge system.

C. Terminating Access

349. In the NPRM, we requested comment regarding the regulation of terminating access. We noted that, unlike originating access, the choice of an access provider for terminating access is made by the recipient of the call. The call recipient generally does not pay for the call and, therefore, is not likely to be concerned about the rates charged for terminating access. We suggested that neither the originating caller nor its long-distance service provider can exert substantial influence over the called party's choice of terminating access provider.⁵¹² Thus, even if competitive pressures develop at the originating end as new entrants offer alternatives, the terminating end of a long-distance call may remain a bottleneck, controlled by the LEC providing access for a particular customer.⁵¹³ We also recognized, however, that excessive terminating access charges could furnish an incentive for IXCs to enter the access market in order to avoid paying excessive terminating access charges.⁵¹⁴

1. Price Cap Incumbent LECs

a. Background

350. We requested comment on various alternative special methods for regulating the terminating access rates of price cap LECs. For instance, we sought comment on whether to establish a ceiling on the terminating access rates of price cap LECs equal to the forward-looking economic cost of providing the service. We suggested alternative methods for measuring forward-looking economic cost, including reference to prices in reciprocal compensation arrangements for the transport and termination charges of telecommunications under sections 251(b)(5) and 252(d)(2) or a requirement that terminating rates be based on a TSLRIC study or other acceptable forward-looking cost-based model.⁵¹⁵

b. Discussion

351. We believe that new entrants, by purchasing unbundled network elements or providing facilities-based competition, will eventually exert downward pressure on originating

⁵¹² NPRM at ¶ 271.

⁵¹³ *Id.*

⁵¹⁴ *Id.* at ¶ 272.

⁵¹⁵ NPRM at ¶ 274.

FCC 96-325

Before the
Federal Communications Commission
Washington, DC 20554

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

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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I. INTRODUCTION, OVERVIEW, AND EXECUTIVE SUMMARY

A. The Telecommunications Act of 1996 - A New Direction

1. The Telecommunications Act of 1996¹ fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition.

2. The 1996 Act also recasts the relationship between the FCC and state commissions responsible for regulating telecommunications services. Until now, we and our state counterparts generally have regulated the jurisdictional segments of this industry assigned to each of us by the Communications Act of 1934. The 1996 Act forges a new partnership between state and federal regulators. This arrangement is far better suited to the coming world of competition in which historical regulatory distinctions are supplanted by competitive forces. As this Order demonstrates, we have benefitted enormously from the expertise and experience that the state commissioners and their staffs have contributed to these discussions. We look forward to the continuation of that cooperative working relationship in the coming months as each of us carries out the role assigned by the 1996 Act.

3. Three principal goals established by the telephony provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition. In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in all

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *to be codified at* 47 U.S.C. §§ 151 *et seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in the United States Code unless otherwise indicated.

telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.

4. These three goals are integrally related. Indeed, the relationship between fostering competition in local telecommunications markets and promoting greater competition in the long distance market is fundamental to the 1996 Act. Competition in local exchange and exchange access markets is desirable, not only 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 the Bell Operating Companies (BOCs), are mandated to 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. Under section 271, once the BOCs have taken the necessary steps, they are allowed to offer long distance service in areas where they provide local telephone service, if we find that entry meets the specific statutory requirements and is consistent with the public interest. Thus, under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.

5. The Act also recognizes, however, that universal service cannot be maintained without reform of the current subsidy system. The current universal service system is a patchwork quilt of implicit and explicit subsidies. These subsidies are intended to promote telephone subscribership, yet they do so at the expense of deterring or distorting competition. Some policies that traditionally have been justified on universal service considerations place competitors at a disadvantage. Other universal service policies place the incumbent LECs at a competitive disadvantage. For example, LECs are required to charge interexchange carriers a *Carrier Common Line* charge for every minute of interstate traffic that any of their customers send or receive. This exposes LECs to competition from competitive access providers, which are not subject to this cost burden. Hence, section 254 of the Act requires the Commission, working with the states and consumer advocates through a Federal/State Joint Board, to revamp the methods by which universal service payments are collected and disbursed.² The present universal service system is incompatible with the statutory mandate to introduce efficient competition into local markets, because the current system distorts competition in

² *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking and Order Establishing Joint Board, FCC 96-93 (rel. Mar. 8, 1996) (*Universal Service NPRM*).

those markets. For example, without universal service reform, facilities-based entrants would be forced to compete against monopoly providers that enjoy not only the technical, economic, and marketing advantages of incumbency, but also subsidies that are provided only to the incumbents.

B. The Competition Trilogy: Section 251, Universal Service Reform and Access Charge Reform

6. The rules that we adopt to implement the local competition provisions of the 1996 Act represent only one part of a trilogy. In this Report and Order, we adopt initial rules designed to accomplish the first of the goals outlined above -- opening the local exchange and exchange access markets to competition. The steps we take today are the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252. Given the dynamic nature of telecommunications technology and markets, it will be necessary over time to review proactively and adjust these rules to ensure both that the statute's mandate of competition is effectuated and enforced, and that regulatory burdens are lifted as soon as competition eliminates the need for them. Efforts to review and revise these rules will be guided by the experience of states in their initial implementation efforts.

7. The second part of the trilogy is universal service reform. In early November, the Federal/State Universal Service Joint Board, including three members of this Commission, will make its recommendations to the Commission. These recommendations will serve as the cornerstone of universal service reform. The Commission will act on the Joint Board's recommendations and adopt universal service rules not later than May 8, 1997, and, we hope, even earlier. Our universal service reform order, consistent with section 254, will rework the subsidy system to guarantee affordable service to all Americans in an era in which competition will be the driving force in telecommunications. By reforming the collection and distribution of universal service funds, the states and the Commission will also ensure that the goals of affordable service and access to advanced services are met by means that enhance, rather than distort, competition. Universal service reform is vitally connected to the local competition rules we adopt today.

8. The third part of the trilogy is access charge reform. It is widely recognized that, because a competitive market drives prices to cost, a system of charges which includes non-cost based components is inherently unstable and unsustainable. It is also well-recognized that access charge reform is intensely interrelated with the local competition rules of section 251 and the reform of universal service. We will complete access reform before or concurrently with a final order on universal service.

9. Only when all parts of the trilogy are complete will the task of adjusting the regulatory framework to fully competitive markets be finished. Only when our counterparts at the state level complete implementing and supplementing these rules will the complete

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 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

⁴⁰⁰ 47 U.S.C. § 251(c)(2)(B).

⁴⁰¹ NPRM at paras. 56-59, 87-88.

⁴⁰² *Id.* at paras. 56, 88.

⁴⁰³ *Id.* at paras. 56-59, 87-88.

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 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

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 18-19.

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

⁴¹⁰ GVNW comments at 21-22.

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 evidences the technical feasibility of interconnection at such a point.⁴¹⁷ MCI argues that technically feasible points of interconnection may be either

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 & Telcomm. 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 affiliates and co-carriers).

⁴¹⁷ AT&T comments at 33.

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 feasible 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 technical feasibility of interconnection or access at substantially similar points.

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.

Finally, we conclude that incumbent LECs must prove to the appropriate state commission that a particular interconnection or access point is not technically feasible.

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* order⁴²⁷ 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,

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.

however, has little bearing on our interpretation of the term "technically feasible" in the 1996 Act. As stated 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.

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").

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; 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

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).

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 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

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>).

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

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

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).

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 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

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).

⁴⁴⁶ MFS comments at 14.

⁴⁴⁷ See Robert S. Pindyck 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.

point is currently provided to some commercial mobile radio service (CMRS) carriers⁴⁴⁹ 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 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 IXC's 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,

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

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).

through their network design decisions.²⁴⁶⁶

1032. In addition, Sprint contends that section 251(b)(5) arguably applies to transport and termination of toll traffic as well as local traffic.²⁴⁶⁷ Sprint contends, however, that in the context of section 252(d)(2), which establishes a pricing rule for reciprocal compensation where one of the carriers is an incumbent LEC, it appears that Congress intended to confine to local traffic the obligation of transport and termination.²⁴⁶⁸ Several other commenters also maintain that toll traffic should remain subject to access charges and not section 251(b)(5) obligations, at least until access charge reform can be implemented.²⁴⁶⁹ RTC argues that Congress made it clear that it did not intend the Act to change the access charge regime.²⁴⁷⁰ Frontier, however, contends that Sprint's reliance on the wording of section 252(d)(2) as limiting the scope of section 251(b)(5) is simply misguided.²⁴⁷¹ Frontier argues that, at best, section 252(d)(2)'s silence regarding the pricing by an incumbent LEC simply meant that Congress did not intend to constrain the Commission decisions in the pricing of transport and termination by a non-incumbent LEC under section 252(d)(2).²⁴⁷² In sum, Frontier contends that the general principles of mutual and reciprocal compensation under section 251(b)(5) would apply to all traffic, while section 252(d)(2) applies to incumbent LEC pricing of mutual compensation involving any additional costs of transport and termination.²⁴⁷³

c. Discussion

(1) Distinction between "Transport and Termination" and Access

1033. We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a

²⁴⁶⁶ GST comments at 35-38.

²⁴⁶⁷ Sprint comments at 76.

²⁴⁶⁸ *Id.* at 76-77.

²⁴⁶⁹ See, e.g., Alabama Commission comments at 32-33; PacTel comments at 95-96, 98, reply at 48; MFS comments at 76.

²⁴⁷⁰ RTC reply at 9.

²⁴⁷¹ Frontier reply at 19.

²⁴⁷² *Id.*

²⁴⁷³ *Id.*

legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.

1034. We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area, as defined in the following paragraph. We disagree with Frontier's contention that section 251(b)(5) entitles an IXC to receive reciprocal compensation from a LEC when a long-distance call is passed from the LEC serving the caller to the IXC. Access charges were developed to address a situation in which three carriers -- typically, the originating LEC, the IXC, and the terminating LEC -- collaborate to complete a long-distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service.²⁴⁷⁴ By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call. This reading of the statute is confirmed by section 252(d)(2)(A)(i), which establishes the pricing standards for section 251(b)(5). Section 251(d)(2)(A)(i) provides for "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."²⁴⁷⁵ We note that our conclusion that long distance traffic is not subject to the transport and termination provisions of section 251 does not in any way disrupt the ability of IXCs to terminate their interstate long-distance traffic on LEC networks. Pursuant to section 251(g), LECs must continue to offer tariffed interstate access services just as they did prior to enactment of the 1996 Act. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.

1035. 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 service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local

²⁴⁷⁴ In addition, both the caller and the party receiving the call pay a flat-rated interstate access charge -- the end-user common line charge -- to the respective incumbent LEC to whose network each of these parties is connected.

²⁴⁷⁵ 47 U.S.C. § 252(d)(2)(A)(i).

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. This approach is consistent with a recently negotiated interconnection agreement between Ameritech and ICG that restricted reciprocal compensation arrangements to the local traffic area as defined by the state commission.²⁴⁷⁶ Continental Cablevision, in an *ex parte* letter, states that many incumbent LECs offer optional expanded local area calling plans, in which customers may pay an additional flat rate charge for calls within a wider area than that deemed as local, but that terminating intrastate access charges typically apply to calls that originate from competing carriers in the same wider area.²⁴⁷⁷ Continental Cablevision argues that local transport and termination rates should apply to these calls. We lack sufficient record information to address the issue of expanded local area calling plans; we expect that this issue will be considered, in the first instance, by state commissions. In addition, we expect the states to decide whether section 251(b)(5) reciprocal compensation provisions apply to the exchange of traffic between incumbent LECs that serve adjacent service areas.

1036. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5).²⁴⁷⁸ Different types of wireless carriers have different FCC-authorized 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

²⁴⁷⁶ See letter from Albert H. Kramer, Dickstein, Shapiro, Morin & Oshinsky LLP to John Nakahata, Senior Legal Advisor to the Chairman, FCC, July 11, 1996.

²⁴⁷⁷ Letter from Brenda L. Fox, Vice President, Federal Relations, Continental Cablevision, to Robert Pepper, Chief, Office of Plans and Policy, FCC, July 22, 1996, attached to Letter from Donna N. Lampert, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., to William F. Caton, Acting Secretary, FCC, July 22, 1996.

²⁴⁷⁸ See also *infra*, Section XI.A.c.3.

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

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 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

²⁴⁸⁰ See *supra*, Section III.D.

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

²⁴⁸² See *infra*, Section VII.B.2.

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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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

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

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 55. 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; Auinbaur 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)

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

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.

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

In the Matter of)
)
Application of Verizon Pennsylvania Inc.,)
Verizon Long Distance, Verizon Enterprise) CC Docket No. 01-138
Solutions, Verizon Global Networks Inc., and)
Verizon Select Services Inc. for Authorization)
To Provide In-Region, InterLATA Services in)
Pennsylvania)
)

MEMORANDUM OPINION AND ORDER

Adopted: September 19, 2001

Released: September 19, 2001

By the Commission: Commissioner Copps dissenting and issuing a statement.

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expanded DSL resale that became effective on September 1, 2001 and the information contained in Verizon's August 31 *Ex Parte* Letter.³³⁴ We recognize that "a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."³³⁵ Under the present circumstances, however, we conclude that this test is satisfied. Special circumstances exist that satisfy the first prong of the waiver test. First, these tariff revisions are virtually identical to those previously filed for Connecticut, with the exception of the order processing provisions. As a result, they place a very limited additional analytical burden on the staff. The tariff revisions filed by VADI also constitute positive action that will actively facilitate the development of competition. In addition, modifying the VADI and Verizon internal order processing systems to accommodate these resale obligations is relatively complex,³³⁶ and the Commission did not address the extent of Verizon's DSL resale obligations in light of the *ASCENT* decision until after this application was filed.³³⁷ We also find that grant of this waiver to allow consideration of late-filed information and recent developments will serve the public interest under the present circumstances by avoiding the administrative delay inherent in rejecting an otherwise persuasive application for failure to demonstrate compliance with this checklist item. In light of the fact that Verizon now has ample notice of the Commission's determination concerning its DSL resale obligations, we do not expect to grant similar waivers to Verizon in the context of future section 271 applications.

B. Other Items

1. Checklist Item 1 – Interconnection

99. Section 271(c)(2)(B)(i) requires the BOC to provide equal-in-quality interconnection on terms and conditions that are just, reasonable and nondiscriminatory in accordance with the requirements of sections 251 and 252.³³⁸ Based on our review of the record, we conclude that Verizon demonstrates that it is in compliance with the requirements of this checklist item.³³⁹ We also note that the Pennsylvania Commission found that Verizon satisfied

³³⁴ We did not request comment on Verizon's August 31 *Ex Parte* Letter since it simply committed to accelerate the implementation schedule for expanded DSL resale which Verizon had agreed to in a filing made prior to the comment date. See Verizon July 9 *Ex Parte* Letter. We also note that interested parties were free to file *ex parte* comments on Verizon's accelerated implementation schedule.

³³⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

³³⁶ This is a natural consequence of the Commission's prior determination in the *GTE/Bell Atlantic Merger Order* requiring Verizon to provide advanced services through a separate corporate affiliate. See *GTE/Bell Atlantic Merger Order*, 15 FCC Rcd 14032 at Appendix D.

³³⁷ The court did not issue the mandate in the *ASCENT* case until March 6, 2001, and the Commission released the *Verizon Connecticut Order* addressing the scope of Verizon's DSL resale obligations on July 20, 2001, after this application was filed.

³³⁸ See Appendix C at paras. 17-24.

³³⁹ Verizon Application at 17-22; Verizon Lacouture/Ruesterholz Decl. at paras. 9-96; Verizon Reply at 16-20; Verizon Lacouture/Ruesterholz Reply Decl. at paras. 105-124.

this checklist item³⁴⁰ and that no commenters raised any issues concerning Verizon's performance for the provisioning of interconnection.

100. Although several commenters assert that Verizon does not permit interconnection at a single point per LATA, we conclude that Verizon's policies do not represent a violation of our existing rules.³⁴¹ Verizon states that it does not restrict the ability of competitors to choose a single point of interconnection per LATA because it permits carriers to *physically* interconnect at a single point of interconnection (POI).³⁴² Verizon acknowledges that its policies distinguish between the physical POI and the point at which Verizon and an interconnecting competitive LEC are responsible for the cost of interconnection facilities.³⁴³ The issue of allocation of financial responsibility for interconnection facilities is an open issue in our *Intercarrier Compensation NPRM*.³⁴⁴ We find, therefore, that Verizon complies with the clear requirement of our rules, i.e., that incumbent LECs provide for a single *physical* point of interconnection per LATA.³⁴⁵ Because the issue is open in our *Intercarrier Compensation NPRM*, we cannot find

³⁴⁰ Pennsylvania Commission Comments at 23-49.

³⁴¹ The commenting parties claim that Verizon's inclusion of language requiring a "Geographically Relevant Interconnection Point (GRIP)" in interconnection agreements effectively denies competing carriers the right to select a single point of interconnection because GRIP requires competitive carriers to build additional and unnecessary interconnection points. Or, alternatively, the competitive LEC is required to bear the costs of Verizon's transport from Verizon's designated interconnection point (IP), which is usually its end office of tandem, to the actual competitive LEC physical point of interconnection (POI), thereby improperly shifting to competing carriers inflated transport and switching costs associated with such an arrangement. See Sprint Comments at 2-8; WorldCom Comments at 30-31; Broadslate Joint Reply at 24-27; Letter from A. Renée Callahan, legal counsel for Sprint Communications Company L.P., to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-138 (filed August 16, 2001) at 1 (Sprint Aug. 16 *Ex Parte* Letter); Letter from Sue D. Blumenfeld, legal counsel for Sprint Communications Company L.P., to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-138 (filed September 13, 2001) at 3 (Sprint Sept. 13 *Ex Parte* Letter).

³⁴² Verizon Lacouture/Ruesterholz Decl. at para. 9 (emphasis added); Verizon Lacouture/Ruesterholz Reply Decl. at para. 107; Letter from Dee May, Assistant Vice President, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-138, at 2-3 (filed September 10, 2001) (Verizon Sept. 10 *Ex Parte* Letter).

³⁴³ Verizon Lacouture/Ruesterholz Reply Decl. at paras. 107-111. Verizon distinguishes the POI from the IP, which it defines as the point where traffic is dropped off for billing purposes. Traditionally, the physical point of interconnection is the same as the billing point. See Pennsylvania Commission Comments at 42-43 n.136 (noting the crux of the issue lies in Verizon's distinction between the POI and the IP); Sprint Comments at 3-4 n.3.

³⁴⁴ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9634-9635, 9650-9652, paras. 72, 112-114 (2001) (*Intercarrier Compensation NPRM*).

³⁴⁵ We note that Verizon currently is appealing the decision by the U.S. District Court of the Middle District of Pennsylvania ordering the Pennsylvania Commission to modify its arbitration decision approving an interconnection agreement that allowed a single point of interconnection per tandem instead of per LATA. See Verizon Application App. B, Tab O, Subtab 17 (*MCI v. Bell Atlantic-Pennsylvania*, No. CV-97-1857, slip op. at 14-15 (M.D. Pa. Jun. 30, 2000)); see also Sprint Comments at 5-7; WorldCom Comments at 31. In the future, to the extent that Verizon (continued....)

that Verizon's policies in regard to the financial responsibility for interconnection facilities fail to comply with its obligations under the Act.³⁴⁶

101. Covad claims that Verizon's process for migrating virtual collocation arrangements to physical collocation arrangements violates section 251(c)(6) of the Act.³⁴⁷ Our collocation rules do not explicitly address the appropriate terms and conditions for collocation migration, but we note that the incumbent LEC has a statutory duty to provide for physical collocation at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.³⁴⁸ The record before us is insufficient to show that Verizon's migration process violates section 251(c)(6), and thus in turn, affects section 271 compliance. Covad's claim is a fact-specific dispute concerning Verizon's statutory obligations. We find, therefore, that a complaint brought before the Commission through the section 208 complaint process is the more appropriate place for this allegation to be examined. As the Commission has found in past proceedings, given the time constraints, the section 271 process simply could not function if we were required to resolve every interpretive dispute between a BOC and each competitive LEC about the precise content of the BOC's obligations to its competitors.³⁴⁹

102. In addition, we reject Sprint's contention that Verizon impermissibly attempts to impose a collocation obligation on competitive LECs through the negotiation of interconnection agreements.³⁵⁰ Although the 1996 Act does not impose a collocation obligation on non-incumbent LECs,³⁵¹ we find no evidence in the record that Verizon has conditioned its provision of collocation on a competitive LEC's agreement to provide collocation to Verizon.³⁵²

(Continued from previous page)

required competitive LECs to physically interconnect with Verizon at every tandem area (a smaller geographic area than a LATA), Verizon would not be in compliance with our rules.

³⁴⁶ We note, however, that Verizon will have to comply with any rule adopted in the *Intercarrier Compensation* proceeding in order to remain in compliance with section 271.

³⁴⁷ See Letter from Jason Oxman, Senior Counsel, Covad, to Michelle Carey, Chief, Policy and Program Planning Division, Common Carrier Bureau and Alexander Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, Federal Communications Commission, CC Docket No. 01-138 (filed August 3, 2001) (Covad Aug. 3 *Ex Parte* Letter).

³⁴⁸ 47 U.S.C. § 251(c)(6).

³⁴⁹ See, e.g., *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6355, para. 230; *SWBT Texas Order*, 15 FCC Rcd at 18366-67, paras. 22-27.

³⁵⁰ Sprint Comments at 23; Sprint Aug. 16 *Ex Parte* Letter at 2; Sprint Sept. 13 *Ex Parte* Letter at 4.

³⁵¹ *Local Competition First Report and Order*, 11 FCC Rcd at 16109, para. 1247.

³⁵² Verizon has requested permission to collocate (*i.e.*, self-provision its own transport facilities to Sprint's POPs to deliver Sprint's local traffic) at Sprint's switch centers in its interconnection negotiations but it acknowledges that Sprint is not legally obligated to do so under the Act. Verizon also notes that it is currently in arbitration on this issue with Sprint before the Pennsylvania Commission. See Verizon Reply at 19 n.13; Verizon Lacouture/Ruesterholz Reply Decl. at paras. 117-118; Verizon Sept. 10 *Ex Parte* Letter at 3; see also Sprint Aug. 16 *Ex Parte* Letter at Attach. 3.

103. Finally, parties assert that an independent audit report demonstrates that Verizon does not comply with all of the Commission's collocation rules.³⁵³ In response, Verizon states that it has modified and improved its collocation procedures to address the issues raised in the audit and by the commenters and is thus now in compliance with this checklist item.³⁵⁴ There is no evidence in the record to suggest that Verizon's current collocation procedures have not addressed any section 271 concerns raised by the audit cited by these commenters. Moreover, we note that audit results are not a legal determination of Verizon's section 271 compliance.³⁵⁵ Based on the record in this proceeding, we believe that Verizon has demonstrated compliance with this checklist item.

a. Pricing of Interconnection

104. Checklist item 1 requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."³⁵⁶ The Commission's pricing rules require, among other things, that in order to comply with its collocation obligations, an incumbent LEC provide collocation based on TELRIC.³⁵⁷ Based on the record, we find that Verizon offers interconnection in Pennsylvania to other telecommunications carriers at just, reasonable and nondiscriminatory rates and is therefore in compliance with checklist item 1. The Pennsylvania Commission concludes that Verizon currently provides collocation under approved interconnection agreements and tariffs, consistent with Commission and Pennsylvania Commission orders.³⁵⁸

³⁵³ See CompTel Comments at 23; Covad Comments at 15-16; see also January 29, 2001 Report of Independent Public Accountants, Arthur Andersen LLP. This audit was conducted pursuant to conditions of the Commission's order approving the merger application of Bell Atlantic and GTE. CompTel and Covad claim that Verizon has failed to timely report space-exhausted offices on its website and failed to submit the appropriate information on space-exhausted offices to the Pennsylvania Commission before declaring that a central office was space-exhausted. CompTel Comments at 23; Covad Comments at 16. Covad also claims that Verizon requires competitive LECs to collocate with an intermediate point of interconnection, e.g., point of termination (POT) bay, instead of direct connection to the incumbent's network when technically feasible. See Covad Comments at 16. In addition, Covad asserts that Verizon did not collect collocation application fees from its advanced services affiliate or charge its advanced services affiliate for completed virtual collocation arrangements. *Id.* at 15.

³⁵⁴ Verizon Lacouture/Ruesterholz Decl. at paras. 86-96; Verizon Lacouture/Ruesterholz Reply Decl. at paras. 121-124.

³⁵⁵ We are aware that the Enforcement Bureau has recently issued a Consent Decree following an investigation for possible violations of the Commission's rule requiring incumbent local exchange carriers promptly to post notices of premises that have run out of collocation space. See Verizon Communications, Inc., Consent Decree, File No. EB-01-IH-0236, DA-01-2079 (rel. Sept. 14, 2001). Therefore, we believe that the Enforcement Bureau, in its review prior to the issuance of the Consent Decree, has appropriately addressed the concerns raised in the audit.

³⁵⁶ 47 U.S.C. § 271(c)(2)(B)(i).

³⁵⁷ 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.

³⁵⁸ Pennsylvania Commission Comments at 38-39, 49.

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

In the Matter of)	
)	
GTE Telephone Operating Cos.	)	CC Docket No. 98-79
GTOC Tariff No. 1)	
GTOC Transmittal No. 1148)	

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1998;

Released: October 30, 1998

By the Commission: (Commissioners Furchtgott-Roth and Tristani dissenting in part and issuing a joint statement)

I. INTRODUCTION

1. In this Order, we conclude our investigation of a new access offering filed by GTE that GTE calls its DSL Solutions-ADSL Service ("ADSL service"). We find that this offering, which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level.¹ In addition, we reject the argument of Northpoint that the possibility of a price squeeze warrants the Commission's transfer to the states of its ratemaking authority with respect to interstate DSL services such as the one at issue here.

2. We emphasize that we decide here only the issue designated in our investigation of GTE's federal tariff for ADSL service, which provides specifically for a dedicated connection, rather than a circuit-switched, dial-up connection, to ISPs and potentially other locations. This issue involves the applicability of Commission rules and precedent regarding the provision by one incumbent local exchange carrier (LEC) of special access service. This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service

¹ We emphasize that our decision concerning the jurisdictional treatment of GTE's ADSL service is limited to the transport of data from an end user over GTE's frame relay network. Regulation of circuit switched voice and data calls carried over the same ADSL-conditioned loop, as part of the end user's standard residential or business service, is unaffected by GTE's offering and this decision.

15. Many competitive LECs and ISPs urge the Commission to treat Internet traffic delivered via GTE's ADSL service offering as one intrastate "local" call terminating at the ISP's local server, followed by a second, separate transmission from the ISP server to the Internet.⁴⁸ Specifically, these commenters argue that, for jurisdictional purposes, the end-to-end ADSL communication consists of two distinct components: an intrastate "telecommunications service," which ends at the ISP's local server, and an interstate "information service," which begins where the telecommunications service ends.⁴⁹ In addition, many competitive LECs observe that, because ISPs are permitted to purchase services from incumbent LECs under the same intrastate tariffs available to end users, ISP traffic delivered via GTE's ADSL service offering constitutes local traffic for separations purposes.⁵⁰ Therefore, competitive LECs argue that such traffic must terminate at the ISP's point of presence.⁵¹ Finally, several commenters maintain that GTE's ADSL service offering must be tariffed on the state level, because it does not qualify as an "access service" under section 69.2 of the Commission's rules.⁵²

III. DISCUSSION

16. We agree that GTE's DSL Solutions-ADSL service offering is an interstate service that is properly tariffed at the federal level.⁵³ Section 2(a) of the Act grants the Commission

⁴⁸ See, e.g., ICG Opposition at 4; ALTS Opposition at 5; Hyperion Opposition at 8; Intermedia/e.spire Opposition at 4; and RCN Comments at 5; see also Washington Commission Comments at 1.

⁴⁹ See, e.g., Focal Comments at 4-5 ("The telecommunications from the end user to the ISP terminates at the ISP because the ISP is an end user of telecommunications and a provider of information services. . . . The *information service* provided by the ISP is wholly separate from the local exchange *telecommunications service* provided by the local exchange carrier.") (Emphases in original); see also Washington Commission Comments at 1; ICG Opposition at 4-6; ALTS Opposition at 5; Hyperion Opposition at 3; MCI/Worldcom Comments at 5; and ITC/KMC Opposition at 3. The Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20) (emphasis added). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

⁵⁰ See, e.g., CompTel Opposition at 2-3; CIX Comments at 3; ICG Opposition at 5; ALTS Opposition at 5; Washington Commission Comments at 1; and Hyperion Opposition at 5, 8.

⁵¹ See, e.g., CompTel Opposition at 2-3; CIX Comments at 3; ICG Opposition at 5; ALTS Opposition at 5; and Hyperion Opposition at 5, 8.

⁵² See ALTS Opposition at 4, 18-19; see also ICG Opposition at 6-7; Hyperion Opposition at 3; and ITC/KMC Opposition at 3.

⁵³ See, e.g., GTE Direct Case at 7; Ameritech Comments at 9; Time Warner Comments at 4; US West Comments at 1; Southwestern Bell, *et al.*, Comments at 1; and Bell Atlantic Comments at 2. See also Northpoint

jurisdiction over "all interstate and foreign communication by wire."⁵⁴ Traffic is deemed interstate "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia."⁵⁵

17. As many commenters note,⁵⁶ the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers. In *BellSouth MemoryCall*, for example, the Commission considered the jurisdictional nature of traffic that consisted of an incoming interstate transmission (call) to the switch serving a voice mail subscriber and an intrastate transmission of that message from that switch to the voice mail apparatus.⁵⁷ The Commission determined that the entire transmission constituted one interstate call, because "there is a continuous path of communications across state lines between the caller and the voice mail service."⁵⁸

18. Similarly, in *Teleconnect*, the Bureau examined whether a call using Teleconnect's "All-Call America" (ACA) service, a nationwide 800 travel service that uses AT&T's Megacom 800 service, is a single, end-to-end call.⁵⁹ Generally, an ACA call is initiated by an end user from a common line open end; the call is routed through a LEC to an AT&T Megacom line, and is then transferred from AT&T to Teleconnect by another LEC.⁶⁰ At that point, Teleconnect routes the call through the LEC to the end user being called.⁶¹ The Bureau rejected the argument that the

Comments at 1; USTA Comments at 2; ACI/Firstworld Comments at 4.

⁵⁴ 47 U.S.C. § 152(a).

⁵⁵ Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 9173 (1997) (*Universal Service Order*); see also *Universal Service Report to Congress*, 13 FCC Rcd at 11555.

⁵⁶ See, e.g., GTE Direct Case at 11-14; PacBell Rebuttal at 6-7; see also Ameritech Comments at 7; Time Warner Comments at 3-4; GTE Rebuttal at 2; USTA Comments at 3; U S West Comments at 5; Bell Atlantic Comments at 5; MCI/Worldcom Comments at 5; Covad Comments at 3; and ACI/Firstworld Comments at 4.

⁵⁷ *BellSouth MemoryCall*, 7 FCC Rcd at 1620.

⁵⁸ *Id.*

⁵⁹ *Teleconnect Company v. Bell Telephone Company of Penn.*, E-88-83, 10 FCC Rcd 1626, 1628 (1995) (*Teleconnect*).

⁶⁰ *Id.* at 1627.

⁶¹ *Id.* at 1627-28.

(ACA) 800 call used to connect to an interexchange carrier's (IXC's) switch was a separate and distinct call from the call that was placed from that switch.⁶² The Commission affirmed, noting that "both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, we regulate an interstate wire communication under the Communications Act from its inception to its completion."⁶³ The Commission concluded that "an interstate communication does not end at an intermediate switch. . . . The interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities."⁶⁴ In addition, in *Southwestern Bell Telephone Company*,⁶⁵ the Commission rejected the argument that "a credit card call should be treated for jurisdictional purposes as two calls: one from the card user to the interexchange carrier's switch, and another from the switch to the called party" and concluded that "switching at the credit card switch is an intermediate step in a single end-to-end communication."⁶⁶

19. Consistent with these precedents, we conclude that the communications at issue here do not terminate at the ISP's local server, as some competitive LECs and ISPs contend, but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user.⁶⁷ The fact that the facilities and apparatus used for GTE's ADSL service offering may be located within a single state does not affect our jurisdiction. As the Commission stated in *BellSouth Memory Call*, "this Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls."⁶⁸ Indeed, in the vast majority of cases, the facilities that incumbent LECs use to provide interstate access are located entirely within one state.⁶⁹

⁶² *Id.* at 1629.

⁶³ *Id.* (citing *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (concluding that a physically intrastate in-WATS line, used to terminate an end-to-end interstate communication, is an interstate facility subject to Commission regulation)). See also *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944); *New York Telephone Company*, 76 FCC 2d 349, 352 (1980).

⁶⁴ *Id.*

⁶⁵ *Southwestern Bell Telephone Company*, 3 FCC Rcd at 2339.

⁶⁶ *Id.* at 2341.

⁶⁷ See, e.g., Ameritech Comments at 9; Bell Atlantic Comments at 5; see also ¶ 21, 26, *infra*.

⁶⁸ *BellSouth Memory Call*, 7 FCC Rcd at 1621 (citing *MTS/WATS Market Structure*).

⁶⁹ *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) ("The dividing line between the regulatory jurisdictions of the FCC and states depends on the nature of the communications which pass through the facilities

20. We disagree with those commenters who argue that, for jurisdictional purposes, an end-to-end ADSL communication must be separated into two components: an intrastate telecommunications service, provided in this instance by GTE, and an interstate information service, provided by the ISP.⁷⁰ As discussed above, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication.⁷¹ The Commission previously has distinguished between the "telecommunications services component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to universal service.⁷² Although the Commission concluded that ISPs do not appear to offer "telecommunications service," and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund,⁷³ it has never found that "telecommunications" ends where "enhanced" information service begins. To the contrary, in the context of open network architecture (ONA) elements, the Commission stated that "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II."⁷⁴ Under the definition of information service added by the 1996 Act, an information service, while not a telecommunications service itself, is provided via telecommunications.⁷⁵ As explained in the *Universal Service Report to Congress*, because information services are offered via telecommunications, they necessarily require a transmission component in order for users to

[and not on] the physical location of the lines." (citations omitted)).

⁷⁰ See, e.g., Focal Comments at 4-5; ICG Opposition at 6; Splitrock Opposition at 3.

⁷¹ See *United States v. AT&T*, 57 F. Supp. 451, 453-55 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945).

⁷² *Universal Service Order*, 12 FCC Rcd at 9180, 9181.

⁷³ *Id.* at 9180. We confirmed this view in the *Universal Service Report to Congress*. *Universal Service Report to Congress*, 13 FCC Rcd at 11522.

⁷⁴ See *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 141 (1988) ("when an enhanced service is interstate (that is, when it involves communications or transmissions between points in different states on an end-to-end basis), the underlying basic services are subject to Title II regulation.") See, e.g., *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 2 FCC Rcd 3072, 3080 (1987) ("carriers must provide efficient nondiscriminatory access to the basic service facilities necessary to support their competitors's enhanced services. . .") See also *BellSouth MemoryCall*, 7 FCC Rcd at 1621 (rejecting "two call" argument as applied to interstate call to voicemail apparatus, even though voicemail is an enhanced service).

⁷⁵ See 47 U.S.C. § 153(20) ("Information service" means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . .") (emphasis added); see also 47 C.F.R. § 64.702(a) (enhanced services are provided "over common carrier transmission facilities used in interstate communications.")

access information.⁷⁶ We, therefore, analyze ISP traffic as a continuous transmission from the end user to a distant Internet site.

21. Nor are we persuaded by competitive LEC arguments that, because the Commission has treated ISPs as end users for purposes of the ESP exemption, an Internet call must terminate at the ISP's point of presence.⁷⁷ As discussed above, GTE's ADSL service offering is designed to be used by ISPs as part of their end-to-end Internet access service.⁷⁸ The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service.⁷⁹ In the *MTS/WATS Market Structure Order*, for instance, the Commission concluded that ESPs are "among a variety of users of access service" in that they "obtain local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area."⁸⁰ The fact that ESPs are exempt from certain access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs. That the Commission exempted ESPs from access charges indicates its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary.⁸¹ We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes does not affect the Commission's ability to exercise jurisdiction over such traffic.

22. Having concluded that the jurisdictional treatment of GTE's ADSL service offering is determined by the nature of the end-to-end transmission between an end user and the Internet website accessed by the end user, we now must decide whether that transmission does in fact constitute an interstate telecommunication. Generally, a call that originates and terminates in a

⁷⁶ *Universal Service Report to Congress*, 13 FCC Rcd at 11529.

⁷⁷ See, e.g., CompTel Opposition at 3; PacWest Direct Case at 6-10.

⁷⁸ GTE Direct Case at 4.

⁷⁹ See, e.g., *MTS/WATS Market Structure Order*, 97 FCC 2d at 711; Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, 2 FCC Rcd 4305 (1987).

⁸⁰ *Id.*; see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking, 2 FCC Rcd at 4305 (1987) ("We . . . intended to impose interstate access charges on enhanced service providers for their use of local exchange facilities to originate and terminate their interstate offerings."); *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53 (1988) ("we granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers.")

⁸¹ See, e.g., *id.* See also Access Charge Reform, Notice of Proposed Rulemaking, Notice of Inquiry, 11 FCC Rcd 21354, 21478 (1996) ("although ESPs may use incumbent LEC facilities to originate and terminate interstate calls, ESPs should not be required to pay interstate access charges.") (emphasis added).

single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate.⁸² An Internet communication does not necessarily have a point of "termination" in the traditional sense. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various state or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country,⁸³ and may do so either sequentially or simultaneously. Accordingly, we recognize that some of the ISP traffic carried by GTE's ADSL service may be destined for intrastate or even local Internet websites or databases.

23. GTE argues that its ADSL service is properly tariffed at the federal level on the ground that it is similar to existing special access services that are subject to federal regulation under the mixed-use facilities rule because more than ten percent of the traffic is interstate.⁸⁴ The mixed-use facilities rule was introduced in a 1989 proceeding involving the re-examination of the separations treatment of "mixed-use" special access lines.⁸⁵ Specifically, in the *MTS/WATS Market Structure Order*, the Commission adopted the Joint Board's recommendation that "mixed-use" special access lines (*i.e.*, lines carrying both intrastate and interstate traffic) are subject to the Commission's jurisdiction where it is not possible to separate the uses of the special access lines by jurisdiction.⁸⁶ The Commission found that special access lines carrying more than *de minimis* amounts of interstate traffic to private line systems should be assigned to the interstate jurisdiction.⁸⁷ Interstate traffic is deemed *de minimis* when it amounts to ten percent or less of the total traffic on a special access line.⁸⁸

⁸² *Universal Service Order*, 12 FCC Rcd at 9173.

⁸³ See, e.g., Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper No. 29, at 45 (Mar. 1997).

⁸⁴ See, e.g., GTE Rebuttal at 15.

⁸⁵ *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660 (1989) (*MTS/WATS Market Structure Separations Order*).

⁸⁶ *Id.*

⁸⁷ *Id.* at 5660, 5661. A private line service is a service for communications between specified locations for a continuous period or for regularly recurring periods at stated hours. 47 C.F.R. Pt 36, App. For example, high volume voice telephony customers purchase private line services as a means of obtaining direct access to interexchange carrier (IXC) networks.

⁸⁸ *Id.* at 5660.

24. GTE contends that its ADSL service is similar to special access lines currently subject to federal regulation under the mixed-use facilities rule, and, thus, its ADSL service should be similarly regulated at the federal level.⁸⁹ Section 69.2 of the Commission's rules defines "access service" as including "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."⁹⁰ There are two categories of access service: switched and special. Switched access services share the local switch to route originating and terminating interstate toll calls. Special access services, by contrast, generally provide a dedicated path between an end user and an IXC's point of presence. The special access category includes a wide variety of facilities and services, such as wideband data, video, and program audio services.⁹¹

25. We agree that GTE's ADSL service is a special access service, thus warranting federal regulation under the "ten percent" rule. Like the point-to-point private line service high volume telephony customers purchase for direct access to IXCs' networks, GTE's ADSL service provides end users with a direct access to their selected ISPs, over a connection that is dedicated to ISP access.⁹² This dedicated access enables end users to avoid the problems associated with circuit-switched, dial-up access, such as long holding times and inability to connect to the Internet due to network congestion. The ADSL service also is similar to traditional private line services in that both services may carry interstate and intrastate traffic, and both services provide direct access from an end user to a service provider's (ISP or IXC) point of presence.

26. We are not persuaded by ALTS's argument that ADSL service does not fall within the definition of special access because it does not constitute "interstate telecommunications."⁹³ As stated above, we disagree with ALTS's suggestion that the "telecommunications" service ends where the "information service" begins.⁹⁴ Furthermore, as discussed above, we conclude that more than a *de minimis* amount of Internet traffic is destined for websites in other states or other countries, even though it may not be possible to ascertain the destination of any particular transmission. For these reasons, we conclude that GTE's ADSL service is subject to federal jurisdiction under the Commission's mixed-use facilities rule.

⁸⁹ GTE Direct Case at 19.

⁹⁰ 47 U.S.C. § 69.2(b).

⁹¹ See Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part I, FCC 85-70, 57 Rad. Reg. 2d 1459, 1465 (Com. Car. Bur. 1985).

⁹² GTOC Description and Justification at 1.

⁹³ See ALTS Opposition at 4, 18-19; see also ICG Opposition at 6-7; Hyperion Opposition at 3; and ITC/KMC Opposition at 3.

⁹⁴ See ¶ 20, *supra*.

27. We emphasize that we believe federal tariffing of ADSL service is appropriate where the service will carry more than a *de minimis* amount of inseparable interstate traffic.⁹⁵ Should GTE or any other incumbent LEC offer an xDSL service that is intrastate in nature, for example, a "work-at-home" application where a subscriber could connect to a corporate local area network, that service should be tariffed at the state level.⁹⁶

28. Several parties further argue that because it is difficult, if not impossible, to separate intrastate and interstate Internet traffic, federal regulation of this traffic is appropriate pursuant to the inseverability doctrine.⁹⁷ Under the inseverability doctrine, pre-emption of state regulation is permissible "where it is not possible to separate the interstate and the intrastate components of the asserted FCC regulation."⁹⁸ The Commission bears the burden of demonstrating that state regulation "negates the exercise by the FCC of its own lawful authority over interstate communications."⁹⁹ In light of our finding that GTE's ADSL service is subject to federal jurisdiction under the Commission's mixed use facilities rule and properly tariffed as an interstate service, we need not reach the question of whether the inseverability doctrine applies.

29. Many commenters urge the Commission to clarify that any conclusion on the jurisdictional nature of GTE's ADSL service has no bearing on the jurisdictional nature of circuit-switched traffic, particularly dial-up calls to the local ISP platform.¹⁰⁰ These parties contend that characterizing GTE's ADSL service as interstate would allow incumbent LECs to avoid their obligations to pay reciprocal compensation to competitive LECs for the transport and termination

⁹⁵ See, e.g., GTE Rebuttal at 15 (GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate).

⁹⁶ See GTE Rebuttal at 15-16 (if ADSL "traffic warrants state tariffing, GTE will do so").

⁹⁷ GTE Direct Case at 18; Time Warner Comments at 2; USTA Comments at 6-7; Covad Comments at 3-7; and Bell Atlantic Comments at 3-4.

⁹⁸ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986); see also *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977).

⁹⁹ *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (citing *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir.) (where Commission acted within its authority to permit subscribers to provide their own telephones, pre-emption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used exclusively in interstate service upheld since state regulation would negate the federal tariff), cert. denied, 434 U.S. 874 (1977)).

¹⁰⁰ See, e.g., ICG Opposition at 11; ALTS Opposition at 22; Intermedia/e.spire Opposition at 5; Splitrock Opposition at 3; Time Warner Comments at 2, 9; ITC/KMC Opposition at 8; Ohio Commission Comments at 7; and AT&T Opposition at 8.

of circuit switched, dial-up calls from end users to ISPs.¹⁰¹ As stated above, our decision in this proceeding relates only to the jurisdictional treatment of the high speed access connection between an end user subscriber and an ISP, as described in GTE's tariff. We make no determination in this Order concerning whether incumbent LECs should be required to pay reciprocal compensation when they exchange Internet traffic with competitive LECs.¹⁰²

30. Finally, we reject the argument advanced by some commenters that the Commission should defer the tariffing of DSL services to the states in order to lessen the possibility of a price squeeze.¹⁰³ These commenters argue that federal tariffing of DSL services will subject competitors to a price squeeze, because the federally tariffed DSL rate may be lower in some states than the sum of the prices of unbundled network element inputs, such as loops and collocation, that competitive LECs must purchase to offer competing services.¹⁰⁴ They suggest that the Commission should either: (1) require GTE to impute to its ADSL service charges for loops, collocation, and transport elements that it imposes on its competitors; or (2) defer tariffing of DSL services to the states, which have jurisdiction over the pricing of network elements.¹⁰⁵

31. We do not agree that the possibility of a price squeeze warrants transfer of our ratemaking authority over DSL services to the states. First, it is not clear that fear of a price squeeze is well-founded. Northpoint's argument is premised on its assertion that GTE's rate for its ADSL service "is less than the price it charges competitive LECS for the loops, collocation and transport necessary to provide DSL service,"¹⁰⁶ but this is not an apt comparison. When a requesting carrier purchases these unbundled network elements, the facilities in question are capable of supporting a variety of services in addition to ADSL, such as local exchange service and access services. Competitors need not recover their costs from ADSL service alone; they have the same opportunity as GTE to recover the costs of network elements from all of the services they offer using those facilities.¹⁰⁷ Thus, a carrier choosing to offer only data service over a facility that is capable of carrying more, such as GTE's ADSL offering, may not reap the entire

¹⁰¹ See, e.g., ICG Opposition at 11; ALTS Opposition at 22; Intermedia/e.spire Opposition at 5; Splitrock Opposition at 3; Time Warner Comments at 2, 9; ITC/KMC Opposition at 8; and AT&T Opposition at 8.

¹⁰² See ¶ 2, *supra*.

¹⁰³ See, e.g., Northpoint Response at 5; ALTS Opposition at 14.

¹⁰⁴ Northpoint Response at 3.

¹⁰⁵ *Id.* at 4-5.

¹⁰⁶ *Id.* at 4.

¹⁰⁷ See e.g., Bell Atlantic Comments at 11.

revenue stream that the facility has to offer. Moreover, taken to its logical conclusion, Northpoint's reasoning would suggest that all interstate access services be regulated by the states, because those services can be provided by competitors through the use of unbundled network elements priced by the states.¹⁰⁸ Such an outcome is neither necessary nor contemplated by the Act.¹⁰⁹

32. This Commission is well-versed in addressing the price squeeze concerns of new entrants and has in the past successfully forestalled attempts by incumbent LECs to shift costs to monopoly services in order to justify rates that effect a price squeeze.¹¹⁰ We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable.¹¹¹ Moreover, although states have jurisdiction to determine the prices of unbundled network elements, those prices are a matter of public record that the Commission may examine in the context of determining the reasonableness of DSL rates or in the event of a complaint alleging a price squeeze. We conclude, therefore, that federal tariffing of interstate DSL services, such as the one at issue here, is appropriate, and we will address any price squeeze concerns as they arise.

IV. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED, pursuant to Section 204(b) of the Communications Act of 1934, 47 U.S.C. § 204(b), that GTOC Transmittal No. 1148, proposing to offer GTE DSL Solutions-ADSL Service, is an interstate access service subject to this Commission's jurisdiction.

¹⁰⁸ GTE Direct Case at 25-26; Ameritech Comments at 26.

¹⁰⁹ See, e.g., *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (upholding Commission decision to allow incumbent LECs for interim period to collect access charges from interconnecting carriers for all interstate minutes traversing the incumbent LECs' local switches, for which the carriers pay unbundled local switching charges).

¹¹⁰ See, e.g., *INFONXX, Inc. v. New York Telephone Company*, Memorandum Opinion and Order, 13 FCC Rcd 3589 (1997); *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668 (1997); see also ACI/Firstworld Comments at 9.

¹¹¹ E.g., 47 U.S.C. §§ 204-205.

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

In the Matter of)	
)	
Joint Application by BellSouth Corporation,)	
BellSouth Telecommunications, Inc.,	)	CC Docket No. 02-35
And BellSouth Long Distance, Inc for)	
Provision of In-Region, InterLATA Services)	
In Georgia and Louisiana)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 2002

Released: May 15, 2002

By the Commission: Commissioner Copps issuing a statement.

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APPENDIX A–LIST OF COMMENTERS

APPENDIX B–GEORGIA PERFORMANCE METRICS

APPENDIX C–LOUISIANA PERFORMANCE METRICS

APPENDIX D–STATUTORY FRAMEWORK

I. INTRODUCTION

1. On February 14, 2002, BellSouth Corporation and its subsidiaries, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, BellSouth) filed this application pursuant to section 271 of the Communications Act of 1934, as amended,¹ for authority to provide in-region, interLATA service originating in the states of Georgia and Louisiana. Although BellSouth initially filed for in-region, interLATA authority for the states of Georgia and Louisiana on October 2, 2001,² that application was subsequently withdrawn by

¹ We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act or the Act. See 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. See Telecommunications Act of 1006, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² See *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Georgia and Louisiana*, CC Docket No. 01-277 (filed October 2, 2001) (BellSouth GALA I (continued....))

estimates that the difference between flat-rate and measured-rate local calling areas accounts for approximately 0.17 percent of the minutes-of-use by WorldCom's UNE-P customers in Georgia.¹⁰⁶¹ We note that BellSouth and WorldCom have agreed to settle compensation issues for the call traffic affected by this local calling area differential.¹⁰⁶² We also note that this does not in any way impair WorldCom's customers, who are still able to choose WorldCom for their intraLATA toll carrier and have benefited from an expanded local calling area.¹⁰⁶³ Because this dispute has a limited commercial impact and no other competitive LEC raises this issue, we do not find that this problem warrants a finding of noncompliance. Although not decisional to our analysis, we also note that BellSouth plans to remedy its systems to eliminate this problem.¹⁰⁶⁴ To the extent that WorldCom disputes that this fix was improperly scheduled or is not clearly documented for sufficient understanding, WorldCom should address its concerns through the change management process.¹⁰⁶⁵ Should this intraLATA routing issue prove to be a systemic problem with BellSouth's OSS, or should the scheduled July fix prove to cause carriers competitive harm, the Commission may take appropriate enforcement action.

270. AT&T contends that BellSouth fails to satisfy checklist item 12 because BellSouth markets and assigns special "oddball" NXX code numbers to retail customers that cannot be dialed by competitive LEC customers.¹⁰⁶⁶ We address this concern in our discussion of checklist item 11, *supra*.

I. Checklist Item 13 – Reciprocal Compensation

271. Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."¹⁰⁶⁷ In turn, section 252(d)(2)(A) specifies when a state commission may consider the terms and

(Continued from previous page)

is carried over the UNE-P facilities leased from BellSouth and billed as a local call rather than an intraLATA toll call. BellSouth May 7 *Ex Parte* Letter at 1 & Attach. at 2. This problem is further limited to only those competing carriers that have not chosen to provide their UNE-P customers with the LATA-wide local calling area. BellSouth May 7 *Ex Parte* Letter at 2.

¹⁰⁶¹ Letter from Kathy B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-35 (filed May 10, 2002) (BellSouth May 10 *Ex Parte* Letter); BellSouth May 7 *Ex Parte* Letter at 2 (stating that only 0.15% of WorldCom's minutes of use are affected when end users that had the larger measured rate as customer of BellSouth are excluded).

¹⁰⁶² BellSouth is reviewing one year's worth of WorldCom's calling records and states that the two parties are actively negotiating settlement of this issue. BellSouth May 7 *Ex Parte* Letter, Attach. at 3-4. See BellSouth GALA II Ruscilli/Cox Aff. at para. 9.

¹⁰⁶³ BellSouth May 7 *Ex Parte* Letter at 1-2 & Attach. at 1-2.

¹⁰⁶⁴ BellSouth May 7 *Ex Parte* Letter at 1-2 & Attach. at 3-4.

¹⁰⁶⁵ WorldCom May 10 *Ex Parte* Letter at 3-5.

¹⁰⁶⁶ AT&T GALA I Comments at 38-39; AT&T GALA II Comments at 1.

¹⁰⁶⁷ 47 U.S.C. § 271(c)(2)(B)(xiii); see Appendix C at para. 66.

conditions for reciprocal compensation to be just and reasonable.¹⁰⁶⁸ Based on the record, we conclude that BellSouth demonstrates that it provides reciprocal compensation as required by checklist item 13.

272. We reject US LEC's assertions regarding reciprocal compensation for ISP-bound traffic.¹⁰⁶⁹ As a preliminary matter, we note the record shows that US LEC and BellSouth entered into a settlement agreement on October 4, 2001, that "resolves all past disputes over reciprocal compensation."¹⁰⁷⁰ Regardless, under a prior Commission order, ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2).¹⁰⁷¹ This decision was reaffirmed by the Commission on remand.¹⁰⁷² Although the D.C. Court has remanded this latest Commission decision, the court did not vacate it and our rules remain in effect.¹⁰⁷³ Therefore, we continue to find that whether a carrier pays such compensation is "irrelevant to checklist item 13."¹⁰⁷⁴ We conclude that BellSouth has met its obligations under checklist item 13.

¹⁰⁶⁸ 47 U.S.C. § 252(d)(2)(A).

¹⁰⁶⁹ See US LEC GALA I Comments at 36-40; US LEC and XO GALA II Comments at 41-45; see also Letter from Patrick J. Donovan, Counsel to US LEC, to Magalie R. Salas, Federal Communications Commission, CC Docket No. 01-277 (November 29, 2001). In its comments, US LEC cites past disputes with BellSouth regarding reciprocal compensation for ISP-bound traffic and whether the tandem interconnection rate was applicable. US LEC concedes these disputes were resolved by the Georgia Commission. See Complaint of US LEC of Georgia, Inc. Against BellSouth Telecommunications, Inc., Georgia Public Service Commission, Docket No. 9577-U, Order (June 15, 2000) and Order to Determine Interconnection Rate (May 21, 2001) and Order on Tandem Interconnection Rate in Georgia Commission Docket No. 9577-U (May 21, 2001). To the extent reciprocal compensation disputes remained following the Georgia Orders, US LEC has now settled all such disputes with BellSouth on October 4, 2001. See BellSouth GALA I Ruscilli/Cox Reply Aff. at para. 32. In addition, commenters state that an identical issue involving XO is presently being arbitrated before the Georgia Commission. See US LEC and XO GALA II Comments at 44. As we have previously stated, we do not "preempt the orderly disposition of intercarrier disputes by state commissions." *Verizon Massachusetts Order*, 16 FCC Rcd. at 9102, para. 203. Accordingly, this information is not relevant to our evaluation of BellSouth's current compliance with checklist item 13.

¹⁰⁷⁰ BellSouth GALA I Reply at 109-110; BellSouth GALA I Ruscilli/Cox Reply Aff. at para. 32.

¹⁰⁷¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 96-98, 14 FCC Rcd 3689 at 3706, para. 26 n.87 (1999) (*Reciprocal Compensation Declaratory Ruling*), *rev'd and remanded sub nom. Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

¹⁰⁷² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9167, 9171-72, paras. 35, 44 (2001).

¹⁰⁷³ *WorldCom v. FCC*, No. 01-1218 (D.C. Cir. May 3, 2002).

¹⁰⁷⁴ *Verizon Pennsylvania Order*, 16 FCC Rcd at 17484, para. 119; *Bell Atlantic New York Order*, 15 FCC Rcd at 4142, para. 377.

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In the Matter of)
)
Joint Application by SBC Communications)
Inc., Southwestern Bell Telephone Company,)
and Southwestern Bell Communications) CC Docket No. 00-217
Services, Inc. d/b/a Southwestern Bell Long)
Distance for Provision of In-Region,)
InterLATA Services in Kansas and Oklahoma)
)

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 2001

Released: January 22, 2001*

By The Commission: Chairman Kennard issuing a statement; Commissioner Ness concurring and issuing a statement; Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a statement; Commissioner Powell approving in part, dissenting in part, and issuing a statement.

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* The final version of this order was approved by the Commission on January 19, 2001.

evidence offered by SWBT to demonstrate that its OSS is, indeed, the same as in Texas, is "ambiguous and incomplete" in several respects. The Department of Justice also urges the Commission to establish the kind of evidentiary showing that will be expected of future applicants who seek to rely, as SWBT does, on findings from prior section 271 proceedings.⁴⁹

III. PROCEDURAL AND ANALYTICAL FRAMEWORK

18. The terms of the competitive checklist generally incorporate by reference the core local competition obligations that sections 251 and 252 impose on all incumbent LECs. In a variety of proceedings since 1996, the Commission has discharged its statutory authority to issue comprehensive rules and orders giving specific content to those obligations. In determining whether a BOC applicant has met the local competition prerequisites for entry into the long-distance market, therefore, we evaluate its compliance with our rules and orders in effect at the time the application was filed. We emphasize that a BOC must comply with all of the Commission's rules implementing the requirements of section 251 and 252 beginning on the dates specified by those rules.⁵⁰

19. As the Commission stated in the *SWBT Texas Order*, despite the comprehensiveness of our local competition rules, there will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors – disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.⁵¹ Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability.⁵² Second, such a requirement would undermine the congressional intent of section 271 to give the BOCs an incentive to open their local markets to competition. That incentive would largely vanish if a BOC's opponents could effectively doom any section 271 application by raising a host of novel interpretive disputes in their comments and demanding that authorization be denied unless each one of those disputes is resolved in the BOC's favor. Finally, simply as a matter of statutory construction, few of the

⁴⁹ *Id.* at 29-30.

⁵⁰ *SWBT Texas Order*, 15 FCC Rcd at 18368, para. 29.

⁵¹ *See American Tel. and Tel. Co. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000).

⁵² As the D.C. Circuit has held, "[A]llowing collateral challenges could change the nature of section 271 proceedings from an expedited process focused on an individual applicant's performance into a wide-ranging, industry-wide examination of telecommunications law and policy." *American Tel. and Tel. Co. v. FCC*, 220 F.3d at 631.

substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules.⁵³

A. Procedural Framework

20. In the context of section 271's adjudicatory framework, the Commission has established certain procedural rules governing BOC section 271 applications.⁵⁴ Among other things, these rules provide an opportunity for parties other than the Department of Justice and the relevant state commission to comment on section 271 applications.

21. These procedural rules have served the Commission well by deterring incomplete section 271 filings by the BOCs. In particular, they are designed to prevent applicants from presenting part of their initial *prima facie* showing for the first time in reply comments.⁵⁵ We do not expect that a BOC, in its initial application, will anticipate and address every argument its opponents might make in their comments. Based on the state proceedings, however, the BOCs should be able to identify most of the significant arguments and allegations that parties are likely to make in their filings before the Commission.⁵⁶ Thus, the rules provide that when an applicant files new information after the comment date, the Commission reserves the right to start the 90-day review period again or to accord such information no weight in determining section 271 compliance.⁵⁷ An exception to this approach exists for new information that is directly responsive to allegations raised in the comments. The Commission has also strictly limited the consideration of developments that occur after the date for filing comments.⁵⁸

22. In this proceeding, we waive these procedural requirements on our own motion pursuant to section 1.3 of the Commission's rules,⁵⁹ to the extent necessary to consider rate

⁵³ *SWBT Texas Order*, 15 FCC Rcd at 18367, para. 27.

⁵⁴ See, e.g., *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708 (Dec. 6, 1996) (Dec. 6, 1996 Public Notice); *Revised Comment Schedule for Ameritech Michigan Application, as amended, for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, DA 97-127 (Jan. 17, 1997) (Jan. 17, 1997 Public Notice); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 13 FCC Rcd 17457 (Sept. 19, 1997) (Sept. 19, 1997 Public Notice); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA-99-1994 (Sept. 28, 1999) (Sept. 28, 1999 Public Notice).

⁵⁵ *Ameritech Michigan Order*, 12 FCC Rcd at 20573, para. 54.

⁵⁶ *Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 36; *Ameritech Michigan Order*, 12 FCC Rcd at 20575, para.

⁵⁷ Sept. 28, 1999 Public Notice at 3.

⁵⁸ *Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 36.

⁵⁹ 47 CFR § 1.3.

Common Carrier, Specialized Services
Competition, Common Carriers
Reconsideration, Petitions for, Grant of
Rules, Amendment of
Wide Area Telephone Services (WATS).

Petitions for reconsideration of MTS and WATS Market Structure with respect to compensation of operators of local exchanges for using local telephone exchange facilities to originate or terminate interstate or foreign telecommunications granted to an extent and otherwise denied.

—*MTS/WATS Market Structure*
CC Docket No. 78-72

FCC 83-356

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
MTS and WATS
Market Structure

CC Docket
No. 78-72
Phase I

MEMORANDUM OPINION AND ORDER

Adopted July 27, 1983; Released August 22, 1983

BY THE COMMISSION: COMMISSIONER QUELLO ISSUING A SEPARATE
STATEMENT; COMMISSIONER DAWSON CONCURRING
IN PART AND ISSUING A STATEMENT.

I. *Introduction*

1. On December 22, 1982, we adopted the *Third Report and Order* in this docket ("*Access Charge Order*"),¹ in which we prescribed rules for calculating the charges that end users and interexchange carriers would pay a telephone company after December 31, 1983, for using its facilities with part of all of their costs allocated to the interstate jurisdiction. We now have before us thirty-five petitions asking that we reconsider or

¹ FCC 82-579, released February 28, 1983.

69. In view of the possible ambiguity in our rules with respect to the filing of comments by elements of the current integrated Bell System, we have concluded that the public interest would not be served by striking these particular filings from the record in this docket. We have also concluded that we should not accept separate ATTIX filings in Commission proceedings in the future. Requiring the parent company to speak with one voice in our proceedings should produce more orderly proceedings. The selection of that voice is, of course, the prerogative of the AT&T management. If the AT&T management wishes to assign responsibility to the ATTIX organization for the preparation of some or all comments or other documents that will be filed on behalf of AT&T, it may do so.⁵¹

2. *The Usage Measurement.*

70. Section 69.105 of the access charge rules describes the computation and assessment of the Carrier Common Line usage charges. That rule states that "conversation minutes" of "use of any local exchange switch" are to be used for that purpose.

71. The AT&T petition notes two problems with that rule. First, usage of the local exchange switch includes switching at the closed end of a WATS service that does not use a common line. Second, the term "conversation minute" is not defined.

72. AT&T has proposed an amendment to Section 69.105 that would expressly exclude closed end WATS usage of the local switch from the usage that is counted in order to compute and assess the Carrier Common Line usage charges. We have decided to adopt that proposal in order to make the rule conform with our actual intent. Common Line usage charges obviously should reflect common line usage and should not include usage of WATS access lines.

73. AT&T and Centel have suggested a definition of "conversation minutes" that could be used for the Carrier Common Line usage charge and other access charges that are computed and assessed on the basis of "conversation minutes." They would ascribe two different meanings to the term depending on whether the minutes are being measured at the originating or the terminating end of the call. Only in the latter case would they apply the usual meaning to the term "conversation minute," i.e., the usage arising from the time the end user at the terminating end picks up the telephone until a party disconnects. For carrier's carrier charges, they would propose that chargeable usage begin on the originating end as soon as the interexchange carrier's facility at the

⁵¹ This decision should not be interpreted as foreclosing Bell Operating Companies including Cincinnati Bell and Southern New England Telephone Company from joining an AT&T filing and filing separate supplemental comments of their own.

originating end of the call acknowledges receipt of the transmission.⁵² The OCCs recommend that we replace "conversation minutes" with "billed minutes" as the basis for assessing carrier's carrier charges.⁵³

74. Both proposals have positive and negative facets. The telephone companies' proposal would base charges on data that the exchange carriers themselves can collect and verify. Because the measure they propose is similar to holding time minutes, it also ties charges more closely to cost causation. Its principal drawback, as the OCCs emphasize, is that it would increase the costs of access for OCCs with no concomitant improvement in the quality of access services they receive. *See, e.g.*, USTS Reply at 12-16. The increases would, in fact, be directly attributable to the inferior interconnection that these carriers now receive. *See id.* The use of "billed minutes" would avoid increased charges to OCCs arising because of their inferior interconnection to the originating exchange network. We have found the meaning of that term, however, to be the subject of seemingly endless dispute under the ENFIA tariffs. *See, e.g., American Telephone and Telegraph Company*, 91 FCC 2d 1079 (1982), *on reconsideration*, FCC 2d (FCC 83-125, April 25, 1983), *affirmed in part, remanded on other grounds sub nom. MCI v. FCC*, ___ F.2d ___ (D.C. Cir. 1983). For this reason we believe that as a basis for assessing usage charges on interexchange carriers, "billed minutes" would be undesirable. We conclude that on balance the telephone companies' proposal offers the better long term solution. Accordingly, we shall require that the Carrier Common Line charge assessed on each interexchange carrier be based on a measure of usage that we call "access minutes."⁵⁴ On the originating end of an interstate call, access minutes of use charged to an interexchange carrier shall begin when the originating end user's call is acknowledged as received by the interexchange carrier's facility in that exchange area. On the terminating end of an interstate call, access minutes of use charged to the interexchange carrier shall begin when the call is received by the called end user and thus completed end-to-end. At each end, access minutes will terminate when the calling or called party hangs up, whichever event is first recognized by the exchange facilities at that end.

⁵² *See* AT&T Petition at 24-25; Centel Petition at 11-12.

⁵³ *See* MCI Petition at 17-21; USTS Petition, Attachment 3 at 26-30; Opposition filed by SBS ("SBS Opposition") at 4-5; SPC Opposition at 4-5; Western Union Opposition at 7-9.

⁵⁴ We have used the term "access minute" for this unit of measure because we find the use of the term "conversation minute" to be a confusing misnomer for the kind of usage on which interexchange carrier's monthly Carrier Common Line charge will be based. We are also amending the rules for computing the charges associated with the Line Termination, Local Switching and Intercept access elements to require that these charges too be based on access minutes.

75. Section 69.2(a) of the access charge rules presently defines "access service" to include the origination or termination of any interstate or foreign telecommunication that is subject to or exempt from tariff regulation. Several petitioners have asked us to clarify the application of particular carrier charges to resellers, enhanced service providers and other users of access service.

76. Inasmuch as most of our rules that describe the assessment of particular elements, including the Carrier Common Line usage charge, speak of charges that are assessed upon "interexchange carriers", there is some uncertainty as to whether these rules would apply to entities which may not be considered carriers, such as enhanced service providers and operators of sharing networks, but which also use access service. Our intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers and enhanced service providers other than those, such as hotels, who provide their communications service solely at their own premises, or where the service is intended for internal administrative purposes.

77. We agree that our rules require clarification in this regard. In the course of sorting through and attempting to classify all of the entities that use access service, and taking into account some of the identification and measurement difficulties involved, it has become apparent to us that several important modifications to the charging scheme are needed if the Commission is ultimately to achieve its objective of distributing the costs of exchange access in a fair and reasonable manner among all users of access service, irrespective of their designation as carrier or private customer. We shall now describe these modifications and explain why we believe the revised plan offers the soundest means of distributing the cost burden. We outline below procedures to be used in the near term that are designed to achieve a rough equity among access service users, but which reflect a number of constraints on achieving greater uniformity immediately, including concern over customer impact. We also set in motion a program that we hope can hasten the time when, as operational problems are overcome and innovative ratemaking procedures can be introduced, all exchange access users will be charged on the same basis.

78. Among the variety of users of access service are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, enhanced service providers, and other private line and WATS customers, large and small, who "leak" traffic into the exchange. In each case the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area. At its own location the user connects the local exchange call to another service or facility over which the call is carried

out of state. These may consist either of owned or leased transmission capacity or a specific message service such as WATS. Depending upon the nature of its operation, a given private line or WATS user may or may not make significant use of local exchange service for interstate access. Thus, in the case in which a user connects an interstate private line to a PBX, some traffic may originate and terminate at the user location and other traffic may "leak"⁵⁵ into the exchange in order that the calls can be completed at another location. A facilities-based carrier, reseller or enhanced service provider might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities to access its customers. Hereafter we shall use the term "leaky PBX" to denote the generic problem just described, whether the "leak" occurs through a PBX or through another mechanism or instrumentality.

79. Of the many entities that now use access service, some are currently paying relatively high carrier usage charges, through either the settlements/division of revenues process or ENFIA rates, while others are obtaining exchange access at ordinary business local exchange service rates, which can be quite low in comparison, particularly in areas which have not implemented local measured service.

80. Leaky PBX traffic is far more significant in amount than the name would suggest. Large private systems, including CCSA and EPSCS-type networks and tandem-dial private systems originate and terminate vast quantities of interstate and intrastate toll traffic through the use of exchange telephone service paid for at local state rates. We had originally observed in the *Access Charge Order*⁵⁶ that leaky PBX traffic would diminish as increasing flat end user charges reduced the incentive to substitute private line for MTS. Now that the movement toward maximum end user flat charges will be somewhat more gradual, we must reevaluate our earlier conclusion that we need not levy specific additional charges on private line customers. Inasmuch as Carrier Common Line charges will be higher than anticipated as a result of the slowed transition to end user charges, failure on our part to include leaky PBX users in the access charge plan might actually prompt customers to rely even more on leaky PBX configurations to avoid message service rates which incorporate full access costs. Since our intention in this proceeding is to have all interstate users of exchange access pay the same charge for the same service, we must develop a strategy to address the leaky PBX situation commensurate with this goal. As we explain below, we have developed a transition plan to ensure that those responsible for leaky PBX traffic bear

⁵⁵ The leaky PBX phenomenon was described in the Second Supplemental Notice. 77 FCC 2d 224.241.

⁵⁶ *Id.* at para. 127.

some share of interstate access costs. We recognize that private lines have proved beneficial to many users, and our plan is not meant to discourage or limit those uses. Our purpose here is only to ensure that those private line users who do access local exchanges contribute a fair share to the support of those exchanges.

81. To place the leaky PBX problem into a rate perspective, it is important to understand why the incentive to use private line/exchange service networks in lieu of direct interstate access via MTS, WATS or OCC message services remains strong. The current access charge plan is geared primarily toward carrier providers of MTS/WATS equivalents, i.e., those paying ENFIA rates, and the telephone companies which pay through the separations procedures for their joint use of local telephone company plant. If no change were made in the plan, these groups would incur almost all of the non-user-assigned costs associated with interstate use of local exchange service. A large privately owned or leased system, on the other hand, using an array of services including switched private line and local exchange telephone lines would pay only local telephone rates. In many cases, that local rate is flat, regardless of the amount of use on the line to satisfy its interstate calling needs. There, it could be argued that no charge whatsoever is assessed for interstate use of local services since the flat rate comprehends local service only. In cases where the local rate is metered, notably in urban business areas, an incremental charge is for additional usage on the local exchange line so that some payment is made towards defraying the costs of operating the local exchange network.⁵⁷ This charge, however, is not applied to recovery of the interstate revenue requirement where the local exchange is used to originate or terminate interstate calls. In searching for a way to include leaky PBX use in the access charge plan, we are mindful that it will be difficult to devise a plan which specifically identifies interstate use of local exchange service and charges for such use on a discrete basis. We are not aware, for example, of any current practical means whereby interstate traffic can be distinguished from local or intrastate traffic on a private line. In many cases for example, the interstate private line extends between points in the same state making it very likely that some indeterminate amount of solely intrastate traffic on such line is jurisdictionally interstate.⁵⁸ Even if this could be done, however, each private line

⁵⁷ Under the current ENFIA tariff arrangements such payments are credited back to the customers.

⁵⁸ However, where two PBXs in the same state are tied together by private lines, in almost all cases such private lines are jurisdictionally interstate since the potential exists to handle interstate communications on such lines by switching to WATS, MTS, private lines or other transmission services which extend to out-of-state points. *People of the State of California v. FCC*, 567 F.2d 84 (D.C.Cir. 1977), *cert. denied* 434 U.S. 1010 (2978). Since the nature of the communications determines jurisdiction, *Ward v. Northern Ohio*

would have to be metered,⁵⁹ and some determination would have to be made of what percentage of local exchange traffic was interstate in order to avoid double charging, i.e., payment of a local metered charge plus an interstate per minute access charge. Clearly, if lines are not metered, there is no way to determine what percentage of traffic over exchange lines is interstate or local. Because of the increasing convergence of interstate and intrastate network and the ensuing difficulty of separating interstate communications from local and other intrastate communications, it would be most difficult in the long run to maintain a dichotomy between exchange service charges for interstate and for intrastate use. Until such time, therefore, as the leaky PBX problem can be resolved through ratemaking or facilities changes in private line, local exchange, or both, or by such other reasonably non-discriminatory means as the exchange carriers may devise, we find that a reasonable means of addressing the existing discrimination is to develop a surcharge on private lines to assure some contribution from all leaky PBX users. This charge is intended to be a surrogate for the carrier common line charges or similar charges we would otherwise impose.

82. We have decided, therefore, to require the imposition of surcharges on all jurisdictionally interstate private lines provided by exchange carriers. In the interest of consistency with our access charge scheme, we will include the closed end of WATS among the lines to which the surcharge should be assessed. This will also serve to reflect, in a representative and fair way, the fact that WATS, as a service which offers bulk calling capability at a declining usage rate, creates incentives among large users, resellers, enhanced service providers and sharers to access WATS from remote locations over local exchange or private lines. This latter arrangement is commonly found in large switched private line networks, such as the one used by the airlines for reservation and other services. At present, however, it would not be worthwhile to access MTS⁶⁰

Telephone Company, 300 F.2d 816 (6th Cir. 1962), it would be most difficult to show that any switched private line within a state is not jurisdictionally interstate since it is not practical to separate the interstate from the intrastate traffic. It should also be pointed out that a private line which extends between points in different states can carry jurisdictionally intrastate communications. See Section 3(e) of the Act.

⁵⁹ Private line service is a leased channel dedicated service. It can be distinguished from message, common access, or allocated service, e.g., MTS, principally by the fact that it is not currently metered or measured as a matter of course. See, for example, Private Line Rate Structure and Volume Discount Practices, Notice of Inquiry and Proposed Rulemaking (Docket No. 79-246), 74 FCC 2d 226, at 231 (1979).

⁶⁰ There are of course occasions where a telephone subscriber will call a business office location to obtain MTS access, commonly through conferencing arrangements on telephone or key telephone handsets. This is done, however, principally to transfer the expense of the MTS call to a business rather than residential account, and not to achieve a lower rate for the call.

from remote locations via local exchange service since the user can originate a call at the user's premises at the same rate without incurring any local exchange charges.

83. Before determining the level at which the surrogate surcharge should be set, we will determine under what circumstances the surcharge should be applied. At present, resellers and other carriers pay carrier-type access charges in the form of ENFIA rates when they resell private line service in their provision of MTS/WATS-type services. We believe that it is reasonable similarly to require that carrier access charges be applied to any private line reseller to which ENFIA would have applied. Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. One of our paramount concerns in fashioning a transition plan is the customer impact or market displacement that any proposed remedy might cause. Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability. The case for a transition to avoid this rate shock is made more compelling by our recognition that it will take time to develop a comprehensive plan for detecting all such usage and imposing charges in an evenhanded manner. We would envision that once a procedure is implemented by which the exchange carriers charge all access service users for their usage on an equal basis, the level of carrier access charges in general should fall as the universe of liable entities is expanded. For this reason also, it would be unreasonable immediately to increase as much as tenfold the charges paid by customers who do not presently come under the coverage of the current ENFIA tariff. In contrast, those carriers which are presently subject to carrier-type charges under the ENFIA tariff have already experienced the transition to ENFIA-type charges and have had time to adjust their operations.

84. Our decision to continue to apply carrier access charges to private line resellers, however, does not mean that we are oblivious to the difficulties that might be encountered in attempting to identify resellers for purposes of imposing charges which are not paid by the general public. For one, resellers are no longer required to file tariffs with this Commission. *Competitive Carrier Rulemaking* (Second Report and Order), 91 FCC 2d 59 (1982), recon. FCC 83-69 (released March 1, 1983). Further, the line between resellers and sharers has always been difficult to administer, as is evident from a reading of our *Private Line Resale*

and Shared Use decision in which these terms were defined, and will be made even more difficult as a result of new technologies and modes of operation, regulatory developments, and different rate incentives.⁶¹ In addition, there are other factors that might make it very difficult to distinguish resellers from enhanced service providers and private systems. A reseller, for example, could attempt to change over to an enhanced form of operation or disguise itself as a private user by simply not advertising, or by integrating its network with that of a very large single-company network. In any event we emphasize that efforts made by exchange carriers to identify resellers must be of a reasonably consistent and nondiscriminatory nature.⁶² To the extent that certain resellers cannot be identified, as may be the case, the surcharge which applies to all private line users will apply to them as well, and will similarly serve as a temporary surrogate for interstate access charges. We do not intend for carrier's potential failure to identify resellers through reasonable means to become grounds on which either exchange or interexchange carriers can justify reasonable terms or conditions in their tariffs, or can otherwise restrict beneficial uses of service, in the interest of controlling resale activities.

85. The transitional considerations do apply, however, to resellers and other OCCs to the extent they resell WATS. ENFIA charges do not apply to WATS resale. Rather, WATS resellers pay for their own associated local exchange service on the basis of rates filed in the state tariffs. Therefore, those carriers using resold WATS in conjunction with local exchange service as some part of their operations would experience a severe rate impact were they required to pay full carrier usage charges at the outset. Here, too, we think the better course is to assess the surcharge upon all WATS special access lines during 1984.⁶³ As provided in paras. 88

⁶¹ Docket No. 20097, Resale and Shared Use, 60 FCC 2d 261 (1976) *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). Here, the key line drawn between resellers and sharers involved the need to determine whether a profit motive exists. The profit, moreover, must derive from the resale of the underlying carrier's service, and not from other service features or functions added to these services. Also, it is possible that a manager of a sharing group could be a profit-making entity. Up to now resellers have had an incentive to retain common carrier status in order to avail themselves of services which are not available to the general public (See, for example, the 19 Bell System Operating Companies' Facilities for Other Common Carriers tariffs filed with this Commission). Once that incentive is changed, the resellers might attempt to alter the nature of its operation or do whatever it could to avoid interstate access charges.

⁶² For example, a consistent set of criteria for identifying resellers could be used, so long as these criteria did not become a vehicle for expanding the definition of resale or including other classifications of users.

⁶³ Consistent with the scope of the ENFIA tariff, we are limiting initial application of carrier access charges to situations in which private lines are resold to form OCC MTS-

and 90. *infra.* we will reassess the appropriate level of the surcharge for WATS lines and for all other private lines after 1984, and if necessary we will make appropriate adjustments.

86. Having determined which entities will be required to pay a surcharge, we now determine the appropriate level at which the surcharge should be set. Ideally, the surrogate private line WATS surcharge should be set at a level which yields overall revenues representative of the revenues forgone on account of users obtaining access services at local telephone service rates. In other words, the aggregate surcharge revenues serve as a surrogate for the interstate access charges which would be collected if leaky PBX usage could be quantified and identified as to source. However, in order to protect those private line customers with relatively low leaky PBX usage, we will be conservative in our estimate of these forgone revenues. For the plan to work, we are requiring that the surcharge be applied to all interstate WATS lines without exception and to all private lines⁶⁴ except those which are used by carriers in MTS/WATS-like configuration where carrier's carrier access charges will already

EATS-type services. Resellers or facility-based OCCs who also resold MTS, WATS or OCC MTS-WATS-type services should be charged business local exchange service rates rather than carrier access charges, since ENFIA by its terms does not apply to the resale of MTS and WATS provided by AT&T, nor to resold OCC MTS or WATS-type services. See *AT&T- Applicability of ENFIA to Certain OCC Services*, 91 FCC 2nd 568, 575-77 (1982), *appeal pending sub nom. U.S. Telephone Communication, Inc. v. FCC*. No. 82-2324 (D.C. Cir.) This treatment will avoid any duplication of charges or unreasonable discrimination which might otherwise have resulted. However, resellers of OCC WATS-type service will pay a private line surcharge since a dedicated line to the OCC premises is generally required. In circumstances where carrier's carrier charges apply, such dedicated lines are to be furnished as Dedicated Transport Facilities in circumstances where carrier's carrier charges will not apply the dedicated facilities are to be furnished as private lines or WATS OPS to which a surcharge is applicable. For purposes of delineating the applicability of local business rates as opposed to carrier access charges, we will rely generally on the terms of the current ENFIA tariff as interpreted by Commission decisions. We shall address any controversies that may arise in this regard on a case-by-case basis.

⁶⁴ By private lines we mean dedicated transmission services including nominal 4 kHz voice grade lines; digital voice capacity channels generally 56 kbps; all data transmission channels, e.g., 2.4.4.8.9.6 kbps; and higher capacity analog and digital channels, e.g., groups, supergroups, 1,544 Mbps, and 6.3 Mbps channels all of which have the potential to be subdivided into channels which can access the local exchange switched network. Where channels are of higher than voice bandwidth, the surcharge will be applied based on the number of voice capacity analog or digital channels to which the higher capacity channel is equivalent. To illustrate, a 48 kHz analog channel is equivalent to twelve 4kHz channels and thus the surcharge multiplied by twelve applies to each channel. Similarly, a 1,544 Mbps channel is equivalent to 24 voice channels. Since the local exchange network is made up of voice transmission and switching equipment, any private line below voice capacity, e.g., 1.2 or 2.4 kbps provided over analog or digital transmission lines, will be charged the full voice-capacity surcharge. Such lower bandwidth or lower speed lines impose the same burdens on the local network as a full voice line. We will

apply, and those which cannot practically be used to access the local exchange network or otherwise be used to avoid interstate access charges. We believe it is reasonable to include as part of this latter exception radio and television program transmission and Telex lines. In addition access lines associated with the open end of foreign exchange service offered by carriers will not be subject the surcharge since Carrier Common Line charges will be imposed on the open end and, therefore, no uncompensated leakage can occur. The same is true for CCSA ONALs and their equivalents. We would also permit such other exceptions or modifications which are shown to be reasonable and supported by actual operating practicalities and limitations.⁶⁵ In addition to exchange carrier-provided private lines and WATS lines, we shall allow exchange carriers to develop reasonable, nondiscriminatory surcharges on interconnected use of exchange services by carriers' publicly-offered interstate services using radio and other facilities (e.g. DTS), and privately-owned microwave relay systems, satellite transmission systems, and other interstate private facilities that would otherwise not be subject to either the surcharge or carriers access charges (that is, that will not employ any end links obtained from the exchange carriers to which private line surcharges would apply). In such cases, we are prepared to consider carriers' proposals for a surcharge to the individual exchange telephone lines⁶⁶ which can be connected to such systems. Such a surcharge would have to be filed in tariffs with this Commission.

87. In employing the surcharge approach to the leaky PBX situation, and access charge avoidance generally, we recognize that different customers employ private lines in different ways. This in turn translates into different amounts of use of local exchange service per equivalent voice-grade private line. Certain customers, for example, use private lines in unswitched configurations such that the preponderance of traffic is intracompany. Others use private lines in conjunction with local exchange service almost exclusively to avoid toll charges. Application of the surcharge on a general basis, however, is unavoidable since neither this Commission nor the exchange carriers themselves currently have any reliable way of determining how private lines are internally configured and interconnected on a customer premises, and thus do not know with

consider allowing local exchange carriers to charge twice the per channel surcharge in cases where the voice-equivalent channel is four-wire instead of two-wire.

⁶⁵ For example, multipoint private lines that include large numbers of stations may be shown to be capable of generating far less "leaky PBX" traffic than the total amount of surcharges would appear to indicate.

⁶⁶ It would not be practicable at this time to apply such a surcharge on the basis of the entity's interexchange transmission capacity since the exchange carrier appears to have no reliable way of determining how many usable voice equivalent communications channels terminate on a private customer's premises.

certainty how they are used.⁶⁷ We believe, however, that by sizing the surcharge on a conservative basis, exchange carriers will recover a reasonable amount of interstate access revenues which would otherwise have been lost, without any undue impact on private line users or on the orderliness of the marketplace. Generally, private line users could satisfy their communications needs equally well if they were to replace private lines with their message service counterparts. The MTS network, for example, can be and is today employed for voice, graphic, written record, facsimile and data transmission. Further, as noted earlier, private line is largely a substitute for telephone toll service, as evidenced by the fact that a few very large private users who have CCSA and EPSCS systems account for a major share of all private lines. There is no question, then, that as a result of any increases in the private lines rates service to customers would not be curtailed or impaired in any significant way. See *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), cert. denied 101 S. Ct. 1998 (1981). To the extent private line service is uniquely essential to business operations, e.g., remote telemetering and the like, the value of private line service is measured by such customers in terms of internal operating capabilities rather than in terms of saving money on long distance telephone bills. Most likely, therefore, a nominal surcharge will not appreciably reduce the attractiveness of private line service where it is essential by virtue of the business function which it performs. Finally, even were many private line users to switch to public message network services over a short period of time, the transmission plant used for private line service is in almost all cases fungible with the plant used for public message service, insuring continued ability to provide service. We believe, therefore, that no unreasonable impact will result from the surcharges.⁶⁸

88. We are also requiring exchange carriers to develop their own methods of calculating suitable surcharges to act as a surrogate for

⁶⁷ We would expect as a general matter that under the surcharge pricing scheme, customers most likely to generate large amounts of "leakage" will pay more proportionally than customers who will generate smaller amounts. This is true because switched networks of the CCSA-type or tandem dial PBX variety employ an array of trunks interconnecting switching machines and access lines connecting switching machines to customer stations. Thus, a point-to-point communications path established on a switched network will generally transit three or more separate private lines rather than one, as would be the case, for example, in a simple ring-down non-switched arrangement. Since, under current telephone company rate structures one surcharge will generally apply to each access line and two surcharges will apply to each trunk, it can be seen that a charge multiplication effect takes place in some proportion to the amount of PBX leakage.

⁶⁸ We in no way wish to indicate a lack of support for the efficient use of private lines. We emphasize that maximum economically efficient utilization of these lines is to be encouraged. Rather, the surcharge is designed solely to compensate for the use of the local exchange.

revenues forgone as a result of avoidance of carrier access charges and services, such as MTS, which incorporate these charges. This could be done, for example, by various means of estimation from company records and available industry studies as well as customer surveys. It could also be done by sampling the amount of increase in local exchange traffic which comes about as a result of adding intrastate and interstate private lines to customer networks, or by such other reasonable means as may be devised by exchange carriers. We recognize, however, that little time remains between now and October, 1983 when access tariffs are to be filed. Accordingly, we shall use our best judgment to develop an initial surcharge level, pending development of such charges by the carriers. First, we note that private lines attached to a PBX are capable of "leaking" into the local exchange. Because most private lines are connected to PBXs, most private lines are capable of leaking. Although one might assume that all private lines would leak if capable of doing so, we are aware of some private lines connected to PBXs that actually may not be used in connection with local exchange services to make interstate calls. We believe a fair estimate of the number of such lines would be 20 percent of all private lines. Thus, we estimate that 80 percent of all private lines do leak through a PBX or other patching or switching device. We shall assume that 8 percent of all communications made over such lines are interstate, based on the latest data available to us on average subscriber line usage for interstate MTS and WATS services.⁶⁹ Eight percent of 80 percent is 6.4 percent, which represents the proportion of all private line usage that "leaks" into the local exchange. We further assume, based on estimates submitted in this proceeding, that nonpremium carriers would pay approximately \$400-\$500 in monthly carrier usage charge under the access charge plan.⁷⁰ Taking 6.4 percent of these figures, we arrive at a range of approximately \$25-\$32 per month per line. We will select the lower end of this range, \$25, as a conservative estimate of what the interim surcharge should be.⁷¹ In cases where the surcharge

⁶⁹ Separations Analysis, Form DR9999, AT&T Long Lines (June 1980). We have not been able to find data on the proportion of interstate to intrastate traffic over private lines. We recognize that the 8 percent figure may seem to be overly conservative. First, the 8 percent figure for subscriber line usage does not include interstate calls made over private networks, since such traffic is not currently measured, nor does it include OCC interstate services. Second, it appears that the proportion of interstate to intrastate usage has been increasing since 1980. Third, we recognize that the proportion of interstate usage is actually much higher for many private line users.

⁷⁰ If this estimate of non-premium carrier usage charges does not survive our tariff review process, we shall adjust the surcharges accordingly.

⁷¹ We will allow, for good cause shown, a reasonable degree of variation in the level of the surcharge and its associated pricing structure provided a good faith effort is made by the exchange carrier to obtain revenues which in aggregate at least equal the revenues which would have accrued if the surcharge were applied in the prescribed manner. In

is levied, no transport switching or other carrier access charges will be imposed for associated local exchange service. Customers instead will remain subject to business local exchange service charges for the line between the reseller or sharer switch, enhanced service node or PBX and the telephone company's local switch. In addition, all switching functions will continue to be subsumed under the local business rate. The exchange carriers will be required to transmit surcharge revenues to the Exchange Carrier Association monthly in 1984, 1985, and 1986; these revenues will be used to defray carrier common line revenue requirements. In the absence of further action by the Commission, in 1987 and beyond such revenues shall be used to reduce the revenue requirement associated with the Local Switching elements. Based on our estimate that there are between 750,000 and 1,000,000 WATS access lines, and 750,000 and 1,000,000 private lines not currently subject to ENFIA charges,⁷² the surcharge would yield annual revenues of between \$675 and \$900 million. In addition, of the more than 3,000,000 private lines now on file in state tariffs, a very conservative estimate would be that at least one-third of these are clearly interstate in nature.⁷³ This would add an additional \$300 million yielding total estimated surcharge revenue of between \$975 million and \$1.2 billion.

89. A special formula will be required to apply the surcharge as described above, to facility based and resale carriers who use a combination of resold WATS (which is to be treated under this surcharge approach) and leased private line or carrier-owned transmission plant (which is to be treated under carrier's carrier charges). Carriers such as MCI, for example, use WATS lines to supplement their own facility-based operations while resellers may use WATS to supplement resold private line-based operations. The Bell System Operating Companies are current-

this way, exchange carriers will, among other things, be able to make reasonable adjustments to, for example, temper customer impact within and among individual private line services.

⁷² A surcharge would effectively apply at each end of an interstate private line because of the fact that station terminals or local distribution channels are generally required at each end to connect the intercity channel to a local area station.

⁷³ As it now stands, where customers do not have end-to-end switched network service, e.g., CCSA, from AT&T, the local channels connecting customer-provided PBX-type equipment to stations within the same exchange area are generally obtained under state tariffs. This is true for other types of interstate private line channels as well. *See, e.g., Department of Defense v. The Chesapeake and Potomac Telephone Companies*, 75 FCC 2d 45 (1979); *AFA Protective Systems, Inc., v. New Jersey Bell Telephone Company*, File No. TS 1-78, Common Carrier Bureau, May 15, 1980. When the October 1983 tariffs are filed, all of the intracity channels now included in AT&T's interstate tariffs for CCSA, EPSCS, and AUTOVON will have to be unbundled and obtained from the exchange carriers. We anticipate that at such time, at least these local area or intracity channels which terminate in switched interstate networks will be filed with the Commission.

ly using a billing arrangement, BSOC Tariff FCC No. 11, which enables them to distinguish local exchange usage generated by WATS resale from similar usage caused by facility-based or resold private line-based operations. This is done in order to distinguish between lines which are charged under local business line rates, i.e., those associated with WATS, and those to which ENFIA rates apply. We believe a similar formula would be an appropriate means of implementing our decision.

90. For the future, we are requiring exchange carriers to make concerted efforts to develop charges which reflect actual use of local exchange service by all customers, regardless of their designation as OCC, enhanced service provider, or privately owned or leased system. As we have already explained at length, a wide variety of entities use local exchange service in much the same way as OCCs.⁷⁴ Initially all will not pay the same charges for their access services. We are acutely aware of the obstacles to rapid achievement of a permanent solution of the leaky PBX problem and interstate access charge avoidance in general. We believe that in view of such difficulties, the surcharge plan is a reasonable interim approach to achieving some degree of equilibrium among the levels of contributions various customers must make towards defraying interstate access costs. We will henceforth monitor exchange carrier activities to ensure that they are making reasonable efforts to effect a means of charging all users for interstate access in a reasonably nondiscriminatory fashion. We believe the plan we have adopted gives exchange carriers the incentives to pursue various reasonable means, both in the state and interstate service areas, to achieve whatever ratemaking reforms are needed to overcome the interstate access charge avoidance. We will entertain any reasonable, nondiscriminatory proposals which these carriers make in the future and afford such support as we are empowered to give in order to achieve reasonable solutions. Following one year's time from issuance of this order, we will review the progress made by exchange carriers and, if necessary, make further rate level or rate structure adjustments or institute on our own an appropriate proceeding to develop such access charge mechanisms as needed to ensure that all users pay a fair and equitable share of the costs which their usage imposes on the telephone exchange network.

⁷⁴ It can be argued that AT&T uses local exchange service in a way similar to OCCs. It must be recognized, however, that AT&T's use of local exchange service differs in operational terms from all others because of its premium access arrangements. This situation will continue until such time as equal access is provided by exchange carriers to all interexchange carriers.

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

In the Matter of)	
)	
In the Matter of Petition of WorldCom, Inc.)	
Pursuant to Section 252(e)(5) of the)	
Communications Act for Preemption of the	)	CC Docket No. 00-218
Jurisdiction of the Virginia State Corporation)	
Commission Regarding Interconnection)	
Disputes with Verizon Virginia Inc., and for)	
Expedited Arbitration)	
)	
In the Matter of Petition of Cox Virginia)	
Telcom, Inc. Pursuant to Section 252(e)(5) of)	
the Communications Act for Preemption of the	)	CC Docket No. 00-249
Jurisdiction of the Virginia State Corporation)	
Commission Regarding Interconnection)	
Disputes with Verizon-Virginia, Inc. and for)	
Arbitration)	
)	
In the Matter of Petition of AT&T)	
Communications of Virginia Inc., Pursuant to)	
Section 252(e)(5) of the Communications Act	)	CC Docket No. 00-251
for Preemption of the Jurisdiction of the)	
Virginia Corporation Commission Regarding)	
Interconnection Disputes With Verizon)	
Virginia Inc.)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 2002

Released: July 17, 2002

By the Chief, Wireline Competition Bureau:

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Verizon from assessing charges for traffic subject to reciprocal compensation that originates on Verizon's network. In lieu of Verizon's language, petitioners propose language implementing their own view of the Commission's rules.⁷⁴ Verizon raises additional specific objections to AT&T's proposed language, designated as Issues VII-1, VII-3 and VII-4, which we address at the end of this section.

39. As set forth below, we adopt petitioners' language and reject Verizon's. In making our determination on this issue, we look to the Commission's orders and rules governing interconnection and reciprocal compensation, particularly the Commission's *Local Competition First Report and Order* and Commission Rules 51.305 and 51.703.⁷⁵

b. Point of Interconnection (Issues I-1 and VII-4)

(i) Positions of the Parties

40. AT&T contends that Verizon's VGRIPs proposal would enable Verizon to select the locations where each parties' traffic is delivered to the other's network for termination, and would transfer a substantial amount of the costs for Verizon's originating traffic, such as Verizon's originating transport costs, to AT&T.⁷⁶ AT&T argues that these features of VGRIPs render it inconsistent with the Act and the Commission's rules. AT&T also objects to Verizon's language lowering its reciprocal compensation payments to AT&T if AT&T does not allow Verizon to deliver traffic to AT&T at a Verizon-designated end office (the AT&T IP).⁷⁷ According to AT&T, this is another way of transferring Verizon's costs of delivering traffic onto AT&T, by circumventing Verizon's obligations to pay reciprocal compensation to AT&T.⁷⁸

41. AT&T states that both the Act and the Commission's rules provide that new entrants may interconnect at any technically feasible point.⁷⁹ AT&T relies in part on the Commission's *SWBT Texas 271 Order*, citing it for the proposition that section 251 and the Commission's implementing rules "require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point," including "the option to interconnect at only one

⁷⁴ See AT&T's November Proposed Agreement, Sch. 4; WorldCom's November Proposed Agreement, Attach. IV, §§ 1.1 through 1.1.3.3, and 1.3 through 1.3.2; and Cox's November Proposed Agreement, Sec. 4.2.2.

⁷⁵ See *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) (*Local Competition First Report and Order*); 47 C.F.R. § 51.305; 47 C.F.R. § 51.703.

⁷⁶ See AT&T Brief at 12. AT&T's objections are directed at Verizon's VGRIPs proposal only, which AT&T states was the only Verizon interconnection proposal put at issue with respect to AT&T. See *id.* at 12 and n.24.

⁷⁷ See AT&T Brief at 71.

⁷⁸ See *id.* at 72.

⁷⁹ See *id.* at 6.

technically feasible point in each LATA.⁸⁰ AT&T further states that under the Commission's rules each carrier is responsible for its costs to deliver originating local traffic to the point of interconnection.⁸¹ Specifically, AT&T states that the Commission's rules implementing the reciprocal compensation provisions in section 252(d)(2)(A) preclude an incumbent LEC from charging carriers for local traffic that originates on the incumbent LEC's network.⁸²

42. AT&T contends that, as provided in its proposal, each party should be financially responsible for (1) transporting its own originating traffic to the point of interconnection on the terminating party's network; and (2) paying for any transport and termination of the traffic to the end user on the terminating party's network.⁸³ Accordingly, AT&T rejects Verizon's claims that the petitioners' interconnection proposals require Verizon to subsidize virtually all of the costs of interconnection. AT&T argues that Verizon has presented no evidence of the extent of the additional costs (such as the cost of transporting originating traffic to a competitive LEC's POI) that Verizon claims it must bear as a result of the petitioners' interconnection proposals. AT&T further argues that, while Verizon may in fact pay incrementally more to transport its traffic in a competitive market than it would if it were the sole service provider, the Act does not insulate Verizon from all costs that result from opening local telecommunications markets to competition.⁸⁴

43. AT&T also disputes the claim that its proposed language implicitly endorses the concept of an IP. According to AT&T, the AT&T language Verizon cites is simply a reflection of the Commission's rules defining transport for purposes of reciprocal compensation. AT&T states that its language, consistent with these rules, reflects the fact that the POI is the location where the transport portion of reciprocal compensation begins.⁸⁵ Finally, AT&T also disputes Verizon's claim that AT&T's arguments regarding points of interconnection represents, somehow, an impermissible change of position.⁸⁶

⁸⁰ See *id.* at 7, citing *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*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18390, para. 78 (2000) (*SWBT Texas Order*).

⁸¹ See AT&T Brief at 5.

⁸² See *id.* at 9, citing 47 C.F.R. § 51.703(b) (for traffic subject to reciprocal compensation, prohibiting any LEC from charging other telecommunications carriers for traffic originating on the LEC's network). See also 47 U.S.C. § 252(d)(2)(A).

⁸³ See AT&T Reply at 2.

⁸⁴ See *id.* at 3.

⁸⁵ See *id.* at 34-35, citing 47 C.F.R. § 51.701(c).

⁸⁶ See AT&T Brief at 66-67.

44. Cox also disagrees with Verizon's proposals, offering objections similar to those of AT&T.⁸⁷ According to Cox, section 251(c)(2) of the Act and Commission Rule 51.305(a)(2) require that competitive LECs be allowed to select any technically feasible point of interconnection within an incumbent LEC's network.⁸⁸ As did AT&T, Cox argues that Commission Rule 51.703(b) prevents an incumbent LEC from evading this requirement by imposing on a competitive LEC charges for transporting the incumbent LEC's traffic to the competitive LEC.⁸⁹ Cox argues that, as the Commission's *TSR Wireless Order* demonstrates, Verizon's GRIPs and VGRIPs proposals violate these provisions of the Act and the Commission's rules. Cox states that, in the *TSR Wireless Order*, the Commission held that a LEC cannot avoid its obligations to deliver traffic to another carrier's point of interconnection by charging the carrier for delivering traffic to the point of interconnection, regardless of how the LEC characterizes those charges.⁹⁰ According to Cox, Verizon's GRIPs and VGRIPs proposals violate the Commission's holding in the *TSR Wireless Order*, because Verizon's proposals would make Cox, rather than Verizon, responsible for the costs of delivering Verizon-originated traffic to Cox.⁹¹

45. Additionally, Cox argues that Verizon's proposals would limit Cox to collecting the end office rate for reciprocal compensation, rather than the tandem rate, for traffic Verizon delivers to Cox for termination.⁹² According to Cox, these provisions violate the Commission's rules governing the treatment of competitive LEC switches for the purposes of calculating reciprocal compensation.⁹³ Cox also argues that Verizon has not clarified its proposed offset of transport and other costs against competitive LEC charges for delivery of Verizon's originating traffic. Cox asserts it is unclear precisely what would offset the competitive LEC charges under Verizon's proposal.⁹⁴ In addition, Cox argues that some elements of Verizon's proposals are

⁸⁷ Cox believes that Verizon has formally offered only its GRIPs proposal to Cox, and not its VGRIPs proposal. See Cox Objection and Request for Sanctions at 1-3. Nonetheless, while preserving its procedural objection to Verizon's VGRIPs language, Cox's post-hearing briefs address substantive concerns with both proposals. See Cox Brief at n.3.

⁸⁸ See Cox Brief at 7; 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a)(2).

⁸⁹ See Cox Brief at 7; 47 C.F.R. § 51.703(b).

⁹⁰ See Cox Brief at 7-8, citing *TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCC Rcd 11166 (2000) (holding that LECs may not charge for either transport or facilities for traffic they deliver to paging companies), *aff'd sub nom. Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

⁹¹ See Cox Brief at 7.

⁹² See *id.* at 9.

⁹³ See *id.* at 9, citing 47 C.F.R. § 51.711(a)(3). Both AT&T and WorldCom raise similar objections to proposed Verizon language under Issue III-5, *infra*.

⁹⁴ See Cox Brief at 12-13, citing Tr. at 1361-63.

arbitrary and unreasonable.⁹⁵ For example, Cox states that Verizon's own witness admitted that, under its GRIPs proposal, the 25-mile threshold triggering Verizon's selection of IPs is a number without basis in any engineering principle.⁹⁶ Cox also states that, while Verizon's VGRIPs proposal provides for competitive LEC compensation of Verizon's originating transport costs in a single-tandem LATA, Verizon regularly bears the costs of transport within its own network to a distant tandem in a single-tandem LATA.⁹⁷

46. WorldCom objects to Verizon's GRIPs and VGRIPs proposals for similar reasons to those offered by AT&T and Cox. Specifically, WorldCom also believes Verizon's proposals contravene WorldCom's right under the Commission's rules to select any technically feasible point of interconnection and not to be charged for delivery of Verizon's traffic to the point of interconnection.⁹⁸ WorldCom states that, although Verizon purports to recognize the competitive LEC's right to select the point or points of interconnection, Verizon's proposals ignore one critical aspect of that principle: the carrier that originates traffic is financially responsible for transporting the traffic to the point of interconnection with the other carrier's network. Instead, according to WorldCom, Verizon's proposal relieves Verizon of its obligation to deliver its originating traffic to the network of a co-carrier, and shifts to the co-carrier Verizon's cost of facilities used to deliver its originating calls.⁹⁹ WorldCom also objects that Verizon's proposals are non-mutual, shifting financial responsibility only when WorldCom receives Verizon's originating traffic, without any corresponding shift when WorldCom delivers traffic to Verizon.¹⁰⁰

47. In addition, WorldCom objects to provisions in Verizon's GRIPs and VGRIPs proposals which it argues would allow Verizon to transform WorldCom collocation arrangements into physical points of interconnection. WorldCom argues that collocation arrangements, which are quite expensive to establish, are typically not established by WorldCom for interconnection but for access to unbundled network elements (UNEs).¹⁰¹ WorldCom also objects to provisions in Verizon's proposals allowing Verizon to reduce its reciprocal compensation payments in those instances where WorldCom does not agree to a Verizon-designated IP.¹⁰² WorldCom objects that this language effectively permits Verizon to charge

⁹⁵ See Cox Brief at 13-16.

⁹⁶ See *id.* at 13.

⁹⁷ See *id.* at 13.

⁹⁸ See WorldCom Brief at 6.

⁹⁹ See *id.* at 10.

¹⁰⁰ See *id.* at 14; WorldCom Reply at 12-13.

¹⁰¹ See WorldCom Brief at 11-12.

¹⁰² Specifically, Verizon's proposal would reduce reciprocal compensation by the amount of its end office rate less transport and tandem switching rates. See WorldCom Brief at 12-13.

transport and tandem switching to WorldCom for Verizon's originating traffic,¹⁰³ and contravenes WorldCom's right to receive symmetrical reciprocal compensation.¹⁰⁴

48. Verizon objects to the petitioners' interconnection proposals on the grounds that they require Verizon to bear the entire cost of transporting traffic to competitive LEC points of interconnection, even though these transport costs are the result of the competitive LECs' *interconnection and network architecture choices*.¹⁰⁵ Verizon states that its local traffic bound for a competitive LEC's customer often must leave the Verizon legacy local calling area before reaching the competitive LEC's customer. Verizon states that it must incur the cost to transport the call to the competitive LEC's chosen point of interconnection, which may be outside the originating local calling area. Verizon claims that this problem is exacerbated when competitive LECs offer "virtual FX" or virtual foreign exchange service, by assigning NPA-NXX codes associated with a particular rate center or local calling area to customers physically located outside of that rate center or local calling area. This allows these customers to receive calls rated as local rather than toll even though the FX customer is located in a different local calling area than the caller.¹⁰⁶ According to Verizon, it incurs costs to transport traffic bound for a competitive LEC's virtual FX customer in another local calling area, yet it would not receive toll revenues from its own end user, nor would it receive compensation for originating access service from the competitive LEC. Instead, Verizon would be required to pay reciprocal compensation to the competitive LEC, for what it regards as toll traffic.¹⁰⁷

49. Verizon contends that its VGRIPs proposal, which it maintains it has offered to all three petitioners, represents the most reasonable solution to the operational and cost issues raised by the competitive LECs' interconnection choices.¹⁰⁸ Verizon argues that the contract should explicitly differentiate between the terms "POI" (referring to a physical point of interconnection) and "IP" (referring to the demarcation point for financial responsibility). Verizon suggests that, notwithstanding AT&T's objections to Verizon's use of these two terms, AT&T's proposed language implicitly contains the same distinction. Specifically, Verizon states that AT&T's language would allow it to designate an AT&T collocation at a Verizon tandem as

¹⁰³ See *id.* at 12-13.

¹⁰⁴ See *id.* at 15.

¹⁰⁵ See Verizon Network Architecture Brief at 2.

¹⁰⁶ Verizon states that many of the competitive LECs' virtual FX customers are internet service providers (ISPs). See Verizon Network Architecture Brief at 2. The parties deal more fully with the issues of virtual FX service and assignment of NPA-NXX codes in Issue I-6, *infra*.

¹⁰⁷ See Verizon Network Architecture Brief at 2-3.

¹⁰⁸ See *id.* at 2.

Verizon's POI, but financially obligate Verizon to transport its traffic to the terminating AT&T switch.¹⁰⁹

50. Verizon does not dispute that competitive LECs can determine where they will physically interconnect with Verizon's network. Accordingly, it explains that its VGRIPs proposal provides each party with a menu of interconnection options, and would allow petitioners to select one technically feasible point of interconnection in a LATA, if they chose to configure their network in that manner.¹¹⁰ Verizon states that the competitive LEC IPs are the points beyond which the competitive LEC would be *financially* responsible for the further transport of traffic to its network. According to Verizon, its VGRIPs proposal, by establishing competitive LEC IPs, merely shifts onto competitive LECs some of the costs Verizon incurs to transport traffic to the point of interconnection.¹¹¹ Verizon adds that, under the terms of its VGRIPs proposal, a competitive LEC's IP may very well be outside the Verizon local calling area in which traffic originates; in such circumstances, Verizon would absorb the transport costs it incurs to carry traffic to the IP. According to Verizon, this aspect of VGRIPs represents a significant compromise for Verizon.¹¹² Verizon maintains that its proposal is consistent with the Commission's *Local Competition First Report and Order*, which stated that "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."¹¹³ Verizon cites interconnection arbitration orders by the South Carolina Public Service Commission (South Carolina Commission) and the North Carolina Utilities Commission (North Carolina Commission) approving incumbent LEC interconnection proposals similar to Verizon's VGRIPs proposal.¹¹⁴ Verizon also states that the U.S. Court of Appeals for the Third Circuit has recognized that state commissions may consider shifting onto a competitive LEC the costs that a competitive LEC's choice of points of interconnection would otherwise impose on the incumbent LEC.¹¹⁵

¹⁰⁹ See *id.* at 20-21, citing AT&T's November Proposed Agreement to Verizon, Sch. 4, Part A, § 1.5.

¹¹⁰ See Verizon Network Architecture Brief at 5-6 and 21.

¹¹¹ See *id.* at 5-8.

¹¹² See *id.* at 6.

¹¹³ See *id.* at 8, quoting *Local Competition First Report and Order*, 11 FCC Red at 15603, para. 199.

¹¹⁴ See Verizon Network Architecture Brief at 12-16, citing South Carolina Commission, *Petition of AT&T Communications of the Southern States, Inc., for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. 2000-527-C, Order on Arbitration, Order No. 2001-079 (2001); North Carolina Commission, *In the Matter of Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc., and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996*, Docket Nos. P-140, Sub 73, P-646, Sub 7 (2001).

¹¹⁵ See Verizon Network Architecture Brief at 16, citing *MCI Telecommunications Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 518 (3rd. Cir. 2001).

(ii) Discussion

51. We adopt the petitioners' proposed interconnection language, rather than Verizon's proposed language implementing its "GRIPS" and "VGRIPS" proposals.¹¹⁶ We find that petitioners' language more closely conforms to the Commission's current rules governing points of interconnection and reciprocal compensation than do Verizon's proposals. Because we adopt the petitioners' proposals, rather than Verizon's, we also determine that WorldCom's motion and Cox's objection are moot with respect to Issue I-1.

52. Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point.¹¹⁷ This includes the right to request a single point of interconnection in a LATA.¹¹⁸ The Commission's rules implementing the reciprocal compensation provisions in section 252(d)(2)(A) prevent any LEC from assessing charges on another telecommunications carrier for telecommunications traffic subject to reciprocal compensation that originates on the LEC's network.¹¹⁹ Furthermore, under these rules, to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic. The interplay of these rules has raised questions about whether they lead to the deployment of inefficient or duplicative networks.¹²⁰ The Commission is currently examining the interplay of these rules in a pending rulemaking proceeding.¹²¹ As the Commission recognized in that proceeding, incumbent LECs and competitive LECs have taken opposing views regarding application of the rules governing interconnection and reciprocal compensation.¹²²

¹¹⁶ With respect to AT&T, we adopt AT&T's November Proposed Agreement, §§ 4.1 *et seq.* and 4.2 *et seq.*, and Schedule 4 (except for certain provisions modified or rejected elsewhere in this Order, such as in Issue III-3/III-3-a and Issue V-1/V-8); and reject Verizon's November Proposed Agreement, §§ 1.45(a), 1.63, 4.1 *et seq.*, 4.2 *et seq.*, 5.7.3 and 5.7.6 *et seq.* With respect to Cox, we adopt Cox's November Proposed Agreement, § 4.2 *et seq.*; and reject Verizon's November Proposed Agreement, § 4.2.2 *et seq.* With respect to WorldCom, we adopt WorldCom's November Proposed Attachment IV, §§ 1.1 through 1.1.3.3, and 1.3 through 1.3.2; and reject Verizon's November Proposed Agreement, Part B, §§ 2.49 and 2.71, and Interconnection Attachment, §§ 2.1 *et seq.*, 2.5, 7.1 *et seq.* and 7.5 *et seq.*

¹¹⁷ See 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a)(2).

¹¹⁸ See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9634, 9650, paras. 72, 112 (2001) (*Intercarrier Compensation NPRM*); *SWBT Texas 271 Order*, 16 FCC Rcd at 18390, para. 78 n.174.

¹¹⁹ See 47 C.F.R. § 51.703(b).

¹²⁰ See *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9617, para. 14.

¹²¹ See *id.*, 16 FCC Rcd at 9650-52, paras. 112-14.

¹²² See *id.*, 16 FCC Rcd at 9650, para. 112.

53. We find that the petitioners' proposed language more closely conforms to our existing rules and precedent than do Verizon's proposals.¹²³ Verizon's interconnection proposals require competitive LECs to bear Verizon's costs of delivering its originating traffic to a point of interconnection beyond the Verizon-specified financial demarcation point, the IP. Specifically, under Verizon's proposed language, the competitive LEC's financial responsibility for the further transport of Verizon's traffic to the competitive LEC's point of interconnection and onto the competitive LEC's network would begin at the Verizon-designated competitive LEC IP, rather than the point of interconnection.¹²⁴ By contrast, under the petitioners' proposals, each party would bear the cost of delivering its originating traffic to the point of interconnection designated by the competitive LEC. The petitioners' proposals, therefore, are more consistent with the Commission's rules for section 251(b)(5) traffic, which prohibit any LEC from charging any other carrier for traffic originating on that LEC's network; they are also more consistent with the right of competitive LECs to interconnect at any technically feasible point.¹²⁵ Accordingly, we adopt the petitioners' proposals.

54. Verizon raises serious concerns about the apportionment of costs caused by a competitive LEC's choice of points of interconnection, such as, for example, the apportionment of costs for virtual FX traffic transported to distant points of interconnection.¹²⁶ As we have noted, the Commission is currently examining similar concerns on an industry-wide basis in a pending rulemaking proceeding.¹²⁷ Should the Commission's rules governing interconnection and reciprocal compensation change during that proceeding, we expect the agreements' change of law provisions to apply. As we indicate above, however, in this proceeding, we will decide the issues presented based on the Commission's existing rules, and the petitioners' interconnection proposals more closely conform to those rules than do Verizon's proposals.

¹²³ We note that the Commission declined to find that policies similar to GRIPs and VGRIPs violated the Act in the *Verizon Pennsylvania 271 Order*. See *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, 16 FCC Rcd 17419, 17474-75, para. 100 (2001) (*Verizon Pennsylvania 271 Order*). The Commission has not, however, required that all "new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations" be resolved in a Bell Operating Company's (BOC) favor in order for the BOC's section 271 application to be granted. See *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6246-47, para. 19 (2001) (*SWBT Kansas/Oklahoma 271 Order*). Thus, the *Verizon Pennsylvania 271 Order* is not determinative of the question we address here, which is whether Verizon's or petitioners' language is more consistent with the Act and our rules.

¹²⁴ See *Verizon Network Architecture Brief* at 6. Verizon states that a competitive LEC could discharge that financial responsibility, for example, by purchasing UNE transport from Verizon. See *id.* at 6.

¹²⁵ 47 C.F.R. § 51.703(b).

¹²⁶ For a more extensive discussion of Verizon's concerns regarding virtual FX traffic, see *infra*, Issue I-6.

¹²⁷ See *Intercarrier Compensation NPRM* at 9634-38, 9650-52, paras. 69-77, 112-15.

- We reject Verizon's arguments that AT&T's language allowing it to interconnect at any technically feasible point, including a customer premises (*i.e.*, intra-building interconnection), discriminates against other carriers. Technically feasible interconnection is the right of every competitive entrant. The fact that AT&T in some instances, by the development of historical events, maintains wire centers on the same premises as Verizon hardly renders its proposed language discriminatory against other carriers.

2. Issues I-2/VII-5 (Distance-Sensitive Rates and Transport of Verizon Traffic from the IP to the POI)

a. Introduction

58. Verizon proposes language that would preclude petitioners from charging it distance-sensitive rates for "entrance facilities," in order to limit its transport costs in the event that it does not prevail on Issue I-1. These "entrance facilities" are interconnection facilities petitioners provide to Verizon that are used to transport Verizon-originated traffic to the petitioners' networks.¹⁴² Verizon argues its proposed language would limit its transport costs in LATAs where a petitioner establishes only one, or few, points of interconnection (POIs). With respect to WorldCom, and as discussed in Issue I-1, Verizon seeks to include language requiring WorldCom to establish an interconnection point (IP) with Verizon, separate from the physical POI. The IP, rather than the POI, would serve as the demarcation of Verizon's financial responsibility for further transport of traffic.¹⁴³ Petitioners oppose Verizon's proposed language.¹⁴⁴ We reject Verizon's proposed language.

¹⁴² The following sections of Verizon's proposed contracts raise the distance-sensitive rate issue. With respect to AT&T, under Issue VII-5: Verizon's November Proposed Agreement to AT&T, § 4.2.7; *see* Verizon Network Architecture (NA) Brief at 17, n.32. At the hearing, counsel for Verizon stated that Issue VII-5 is the same as Issue I-2. *See* Tr. at 2708-09. With respect to Cox for Issue I-2: Verizon's November Proposed Agreement to Cox, §§ 4.3.8, 4.5.3; *see* Verizon NA Brief at 17, n.32; *see also* Cox Objection and Request for Sanctions at Exhibit 3. Verizon's November Proposed Contract to Cox, § 4.2.4, which Cox also identifies as at issue (*see* Second Revised Joint Decision Point List, Network Architecture (Nov. 2, 2001), at 26), was withdrawn by Verizon in its November contract filing. *See* Verizon November Proposed Agreement to Cox, at 17-18. With respect to WorldCom: Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 2.1.3.5.1; *see* Verizon NA Brief at 17, n.32. WorldCom explains, however, that the "distance-sensitive rate" aspect of Issue I-2 is inapplicable to it because Verizon brings traffic on its own facilities to the point of interconnection with WorldCom. *See* n.165, *infra*. WorldCom also contests Verizon's proposed § 2.1.3.5.1 as part of the general language contested under Issue I-1. *See* Second Revised Joint Decision Point List, Network Architecture, Issue I-1, at 17.

¹⁴³ As discussed below, WorldCom frames its Issue I-2 differently than AT&T and Cox and, accordingly, challenges under Issue I-2 a different portion of Verizon's proposed contract, which it also challenges under Issue I-1. *See* Second Revised Joint Decision Point List, Network Architecture, Issue I-1, at 18-19 (challenging Verizon proposed §§ 7.1.1.2, 7.1.1.3, 7.1.1.3.1, 7.1.3), Issue I-2, at 24-25 (same).

¹⁴⁴ In November, Verizon modified its proposed language to Cox. *See* Verizon's November Proposed Agreement to Cox, § 4.5.3; *see also* Cox Objection and Request for Sanctions at Exhibit 3 (comparing Issue I-2 language in (continued....))

b. Positions of the Parties

59. AT&T opposes Verizon's language; it proposes no language of its own. AT&T believes that Issue I-2 presents the question of price caps for competitive LEC services, which, it argues under Issue I-9, are inconsistent with law.¹⁴⁵ Thus, AT&T argues that it should be able to recover its distance-sensitive charges for any transport it provides from Verizon's network to its own.¹⁴⁶ As in Issue I-1, AT&T argues that each party has the financial obligation to deliver its originating traffic to the POI. This means that Verizon must fully compensate AT&T for costs that AT&T incurs to deliver Verizon-originated traffic to that point (*i.e.*, if Verizon uses AT&T entrance facilities for this purpose).¹⁴⁷ Accordingly, AT&T objects to Verizon's proposed language that precludes distance-sensitive rates.¹⁴⁸ Verizon's complaint that it is hostage to paying AT&T transport ignores the reality that Verizon is the incumbent with the ubiquitous network and rarely needs to lease facilities from any carrier, a point which Verizon conceded at the hearing.¹⁴⁹

60. Cox argues that Verizon's proposal would create an asymmetrical relationship. Verizon would bar Cox from charging distance-sensitive rates for the transport of Verizon-originated traffic over Cox facilities,¹⁵⁰ but would still charge Cox distance-sensitive rates for carrying Cox-originated traffic over Verizon's transport facilities.¹⁵¹ Cox argues that asymmetrical rates are not justified in this matter for three reasons. First, Cox notes that it has proposed language under which Verizon could self-provision transport up to the "entrance facility point" for Cox's switching offices (*i.e.*, up to the Verizon wire center closest to the Cox

(Continued from previous page)

Revised Joint Decision Point List with Issue I-2 language in Second Revised Joint Decision Point List). Cox filed an Objection and Request for Sanctions, arguing that this language introduces a new approval requirement. See Cox Objection and Request for Sanctions at 2, 11-12.

¹⁴⁵ With respect to Issue I-2, AT&T consistently has cross-referenced its Issue I-9 argument. See, e.g., AT&T Ex. 4 (Direct Testimony of R. Kirchberger), at 3; AT&T Statement of Unresolved Issues at 280-81. Neither AT&T nor Verizon identified in any of the Joint Decision Point Lists any language from either party's proposed contract as at issue under Issue I-2. As noted, at the hearing, counsel for Verizon stated that Issue VII-5, which is a Verizon-designated AT&T issue, is the same as Issue I-2. See Tr. at 2708-09.

¹⁴⁶ See Tr. at 2707.

¹⁴⁷ See AT&T Brief at 73.

¹⁴⁸ See Verizon's November Proposed Agreement to AT&T, § 4.2.7.

¹⁴⁹ AT&T Brief at 73 n.247, citing Tr. at 1237-38. Moreover, as discussed with respect to Issue V-2, AT&T claims that, when the situation is reversed and AT&T purchases transport from Verizon for the same purpose, Verizon wants to charge AT&T distance-sensitive, market-based exchange access rates – Verizon's highest tariffed rate. *Id.* This, AT&T argues, is clearly inequitable. *Id.*

¹⁵⁰ See Cox Brief at 17.

¹⁵¹ See Cox Brief at 17, citing Tr. at 1255-56; Verizon Ex. 18 (Rebuttal Testimony of D. Albert and P. D'Amico), at 12.

switch).¹⁵² Cox estimates that in Virginia the distance between its switch and the nearest Verizon serving wire center does not exceed four miles.¹⁵³ Thus, if Verizon chooses this alternative, it would pay Cox no more than a four-mile entrance facility charge. Verizon's witness acknowledged that this is a reasonable distance for which to pay transport charges.¹⁵⁴ Second, Cox argues, the fact that the current and proposed agreements both allow for mid-span meets largely eliminates Verizon's concerns because Verizon can control when and if it will pay distance-sensitive rates to Cox.¹⁵⁵ Third, although Verizon argues that elimination of mileage-sensitive rates is essential to protect it from the situation in which a competitive LEC chooses a single POI in a LATA and places it far distant from the Verizon end-office, Cox has already agreed to multiple IPs in Virginia. Accordingly, Cox asserts, the problem of the single POI does not exist with respect to Cox.¹⁵⁶ Allowing Verizon to charge Cox distance-sensitive rates, while denying Cox the same opportunity, forces Cox to subsidize Verizon's services.¹⁵⁷

61. Moreover, Cox argues, several regulatory control mechanisms already ensure that Cox's rates are reasonable. These include common carrier rules requiring nondiscriminatory rates and state and federal regulatory oversight of Cox's rates and practices.¹⁵⁸ Verizon has admitted that it does not deem any of Cox's rates to be unreasonable and has never challenged them before a regulatory body.¹⁵⁹

62. Finally, Cox argues, Verizon's November VGRIPs language, which also would give Verizon the sole right to designate IPs (while continuing to limit Cox to non-distance-sensitive charges),¹⁶⁰ violates two settled Commission policies.¹⁶¹ First, it is contrary to the Commission's determination that competitive LECs are permitted to choose their POIs.¹⁶²

¹⁵² See Tr. at 1021-23; Cox Ex. 1 (Direct Testimony of F. Collins), at 11-12; see also Cox November Proposed Agreement to Verizon, § 4.3.4.

¹⁵³ Cox Brief at 17, citing Cox Ex. 2 (Rebuttal Testimony of F. Collins), at 13; Tr. at 1028-29.

¹⁵⁴ Cox Brief at 17-18, citing Tr. at 1259.

¹⁵⁵ Cox Brief at 18, citing Tr. at 1022-24.

¹⁵⁶ Cox. Brief at 18, citing Tr. at 1252-53.

¹⁵⁷ Cox Brief at 19.

¹⁵⁸ Cox Reply at 11-12.

¹⁵⁹ Cox Reply at 12, citing Cox Exhibits 22-24 (the only Cox rate Verizon deems unreasonable is a late fee; Verizon has not filed a complaint against Cox but would do so if it deemed Cox rates unreasonable).

¹⁶⁰ See Cox Objection and Request for Sanctions at Exhibit 3 (comparing Issue I-2 language in Revised Joint Decision Point List with Issue I-2 language in Second Revised Joint Decision Point List).

¹⁶¹ Cox Reply at 11.

¹⁶² See Cox Brief at 19, citing *Local Competition First Report and Order*, 11 FCC Rcd at 15608-09; 47 C.F.R. § 51.305(a); Cox Reply at 11.

Second, it would require the Commission to revise its policy of treating Cox and Verizon as co-carriers and treat Cox as a subservient carrier.¹⁶³ Cox contends the Commission has stated that each carrier derives a benefit from interconnection and each should be required to bear the reasonable cost of it.¹⁶⁴

63. According to WorldCom, Issue I-2 is different from Cox's Issue I-2 and does not concern distance-sensitive charges.¹⁶⁵ WorldCom states that, in a co-carrier environment, Verizon is responsible for delivering its traffic to the physical POI.¹⁶⁶ Under Verizon's proposed section 7.2 to WorldCom, however, WorldCom would be obligated to receive Verizon-originated traffic at points that Verizon designates as "WorldCom IPs" and then would be required to provide transport and termination of Verizon's traffic from that point.¹⁶⁷ Under Verizon's proposal, typically, a "WorldCom IP" would be at a point on Verizon's network before the POI, and WorldCom would not be able to assess charges other than reciprocal compensation for terminating traffic from the WorldCom IP.¹⁶⁸ Accordingly, WorldCom would have to provide "free transport" to Verizon between the WorldCom IP and the POI.¹⁶⁹ Reciprocal compensation does not reimburse WorldCom for the cost of this transport between the WorldCom IP and the POI,¹⁷⁰ because reciprocal compensation only recovers the cost of

¹⁶³ Cox Reply at 11, citing *Local Competition First Report and Order*, 11 FCC Rcd at 15981[sic. 15781, para. 553].

¹⁶⁴ Cox Brief at 17, citing *Local Competition First Report and Order*, 11 FCC Rcd at 15981[sic. 15781, para. 553].

¹⁶⁵ WorldCom Brief at 18 n.12. WorldCom explains that under the parties' current arrangement, Verizon is "able to self-provision facilities for the delivery of its traffic to WorldCom, and there is no factual basis for its proposal to limit WorldCom's transport charges to a non-distance-sensitive charge." WorldCom Reply at 19. Accordingly, Verizon's proposal to limit transport charges to a non-distance-sensitive charge is inapplicable to WorldCom.

¹⁶⁶ WorldCom Brief at 19 n.13.

¹⁶⁷ See WorldCom Brief at 18 & n.12; Verizon's November Proposed Agreement to WorldCom, Interconnection Attach., § 7.2 (compensation for transport and termination of § 251(b)(5) traffic shall be at the rates stated in the Pricing Attachment which "are to be applied at the MCI-IP for traffic delivered by Verizon for termination by MCI-IP Except as expressly specified in this Agreement, no additional charges shall apply for the termination from the IP to the customer" of such traffic). Section 7.2 was not identified by either party in the Joint Decision Point Lists as at issue under either Issue I-1 or I-2.

¹⁶⁸ See WorldCom Brief at 18, citing WorldCom Ex. 3 (Direct Testimony of D. Grieco and G. Ball) at 28. The IP is either a Verizon end office or multiple Verizon tandems. These are not the POI in a multi-tandem LATA. WorldCom Brief at 18-19, citing WorldCom Ex. 3, at 29.

¹⁶⁹ WorldCom Brief at 18, citing WorldCom Ex. 3, at 28.

¹⁷⁰ *Id.*

tandem switching by the terminating carrier, transport from that carrier's tandem to the terminating office, and end-office switching.¹⁷¹

64. Verizon argues that if the Commission does not accept the VGRIPs proposal, it should permit Verizon to address its legitimate transport concerns by preventing the petitioners from charging it distance-sensitive rates for transport.¹⁷² It claims that its proposal protects it from being penalized if a competitive LEC locates only one or a limited number of POIs in the LATA.¹⁷³ Through its proposal, Verizon seeks options, just as the competitive LECs have options, to limit the costs of interconnection. If the competitive LECs can unilaterally dictate the location of the POI without assuming any financial responsibility for that choice, refuse to provide collocation,¹⁷⁴ and unilaterally dictate how to establish the mid-span meet,¹⁷⁵ Verizon has no options other than to purchase transport from the competitive LECs.¹⁷⁶ Verizon's proposal would preclude petitioners from charging excessive rates when Verizon delivers its traffic to a distant competitive LEC POI.¹⁷⁷

65. In response to Cox's claim that it should be treated as a co-carrier, Verizon argues that Cox only wants such treatment when it is to Cox's benefit.¹⁷⁸ Verizon should be given the same choices as competitive LECs.¹⁷⁹ Consistent with petitioners' desire to be treated as "co-carriers," they should be willing to offer Verizon the same opportunities they have to limit

¹⁷¹ *Id.* at 19. Moreover, WorldCom argues, if it were, for example, to provide transport of Verizon traffic between a Verizon end-office (one potential manifestation of the WorldCom IP) and the POI at the Verizon tandem -- an average distance of ten miles in Virginia -- WorldCom should be able to charge for this transport service. WorldCom Brief at 19, citing WorldCom Ex. 3, at 28-29; WorldCom Reply at 20, citing WorldCom Ex. 15 (Rebuttal Testimony of D. Grieco and G. Ball), at 30-31. Further, any restriction on such a charge, such as limiting it to a non-distance-sensitive charge, would be unreasonable. *See* WorldCom Reply at 20. WorldCom would be providing transport over some distance, and limiting WorldCom's ability to levy a reasonable charge would force WorldCom to provide transport at below cost rates. *See id.*

¹⁷² Verizon NA Brief at 16.

¹⁷³ Verizon NA Brief at 16-17, citing Tr. at 1255, 18; *see also* Tr. at 2708-05.

¹⁷⁴ *See infra*, Issue I-3.

¹⁷⁵ Verizon says if it were able to establish mid-span meets with competitive LECs on terms and conditions agreeable to Verizon, then the mid-span meet would obviate the need for Verizon to collocate, but argues that the competitive LECs also want the unilateral ability to dictate how to accomplish the mid-span meet. Verizon NA Reply at 11, citing Issue III-3.

¹⁷⁶ Verizon NA Brief at 17; Verizon NA Reply at 11 n.32.

¹⁷⁷ *See* Verizon NA Brief at 17.

¹⁷⁸ Verizon NA Reply at 10, citing Cox Brief at 17.

¹⁷⁹ Verizon NA Reply at 11.

interconnection costs.¹⁸⁰ Otherwise, petitioners should not be permitted to charge Verizon distance-sensitive rates for transport because Verizon's choice as to where it may deliver traffic is limited.¹⁸¹ Verizon's lack of interconnection choices, combined with the competitive LECs' option to choose whatever interconnection method they desire, could operate to maximize Verizon's costs.¹⁸²

c. Discussion

66. Consistent with our decisions on Issues I-1 and I-9, we rule for petitioners on this issue. In Issue I-1, we rejected Verizon's GRIPs and VGRIPs proposals. Accordingly, and for the reasons we articulate under Issue I-1, we reject Verizon's proposal to WorldCom to establish an IP that is distinct from the POI.¹⁸³ We also will not prohibit distance-sensitive rates when Verizon uses petitioners' facilities to transport traffic originating on its network to petitioners' networks. Accordingly, we reject Verizon's proposed language.¹⁸⁴

67. Verizon's contract proposals on Issue I-2 arise out of its complaints about the rules concerning where a carrier must deliver traffic originating on its network to the terminating carrier. Specifically these rules establish that: (1) competitive LECs have the right, subject to questions of technical feasibility, to determine where they will interconnect with, and deliver their traffic to, the incumbent LEC's network¹⁸⁵; (2) competitive LECs may, at their option, interconnect with the incumbent's network at only one place in a LATA¹⁸⁶; (3) all LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting

¹⁸⁰ *Id.* at 12.

¹⁸¹ *Id.* at 11.

¹⁸² *Id.* at 18.

¹⁸³ Thus, we reject section 4.5.3 of Verizon's November Proposed Agreement to Cox, which requires Cox to provide additional IPs in a LATA upon request. Because we reject Verizon's VGRIPs proposal, and find in favor of petitioners on Issue I-2, we deny as moot Cox's Objection and Request for Sanctions with respect to this issue. Further, because we reject Verizon's VGRIPs proposal, we also reject Verizon's proposed language to WorldCom in section 7.2. See Verizon's November Proposed Agreement to WorldCom, Interconnection Attach., § 7.2.

¹⁸⁴ Thus, in addition to the VGRIPs language we reject above, we reject Verizon's November Proposed Agreement to AT&T, § 4.2.7; Verizon's November Proposed Agreement to Cox, §§ 4.3.8 and 4.5.3; and Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., §§ 2.1.3.5.1 and 7.2. Because we reject Verizon's VGRIPs proposal, and find in favor of petitioners on Issue I-2, we deny as moot Cox's Objection and Request for Sanctions with respect to this issue.

¹⁸⁵ 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a); *Local Competition First Report and Order*, 11 FCC Rcd at 15608, para. 209.

¹⁸⁶ See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9634, 9650-51, paras. 72, 112 (2001) (*Intercarrier Compensation Rulemaking*); *SWBT Texas 271 Order*, 15 FCC Rcd 18354, 18390 at para. 78 & n.170.

LECs' networks for termination¹⁸⁷; and (4) competitive LECs may refuse to permit other LECs to collocate at their facilities.¹⁸⁸

68. One result of these rules, which Verizon addresses in Issue I-2, is that sometimes Verizon must pay petitioners for transporting Verizon-originated traffic from the place where petitioners interconnect with Verizon's network to the petitioners' networks.¹⁸⁹ Thus, using Cox as an example, because Cox has statutory rights to choose the point where it interconnects with Verizon, and to collocate at a Verizon facility, the interconnection facility between Verizon's network and Cox's network may be owned by Cox. But, Verizon complains, because it does not have reciprocal statutory rights, if Cox is unwilling to let it collocate, Verizon cannot build its own interconnection facility to deliver its traffic to Cox's network.¹⁹⁰ In that case, in order to deliver its traffic to Cox, Verizon may have to purchase transport from Cox and pay a distance-sensitive rate component. Verizon complains about the distance-sensitive pricing of these transport facilities in Issue I-2. Because Cox chooses the interconnection point between the two networks, Verizon cannot control the distance over which it may be required to purchase transport.

69. Although we recognize, as we did in Issue I-1, that Verizon raises serious concerns about the apportionment of costs caused by competitive LECs' choice of points of interconnection,¹⁹¹ we do not believe that limiting competitive LECs' transport charges for carrying Verizon-originated traffic is the appropriate way to address these concerns. Rather, we

¹⁸⁷ This precept stems from rules 51.703(b) and 51.709(b), which on the one hand preclude all LECs from charging other carriers for local traffic that the LEC originates, 47 CFR § 51.703(b), and on the other hand permit carriers providing transmission facilities between two networks to recover from the interconnecting carrier "only the costs of the proportion of that trunk capacity used by [the] interconnecting carrier to send traffic that will *terminate* on the providing carrier's network." 47 CFR § 51.709(b)(emphasis added); *see also Local Competition First Report and Order*, 11 FCC Rcd at 16027-28, para. 1062.

¹⁸⁸ *See infra*, Issue III-3.

¹⁸⁹ As discussed in Issue I-1, Verizon argues that the place where the competitive LECs interconnect with Verizon's network is not necessarily the location where Verizon would choose to route its traffic, particularly if that location is distant from the place where the traffic originates on Verizon's network. Thus, in Issue I-1, Verizon argues that it could be inconvenient and expensive for Verizon to route, across its own facilities, all traffic destined for the place where the competitive LEC chooses to interconnect with Verizon (which could also be, at the competitive LECs' option, the only point of interconnection in that LATA). In Issue I-1, Verizon seeks to limit transport over its own facilities. Specifically, in Issue I-1, and with respect to WorldCom in Issue I-2, Verizon seeks to require the competitive LECs either to physically pick up the Verizon traffic at an earlier point on Verizon's network or to pay Verizon for carrying the Verizon traffic across its own network to the competitive LEC network. In Issue I-1, we rejected this aspect of Verizon's proposal.

¹⁹⁰ *See Tr.* at 1134-36; Verizon NA Brief at 17-18; Verizon NA Reply at 9-10. We note that the Verizon witness testified that it need not always collocate to interconnect at the CLEC switch. *See Tr.* at 1143-44; *see generally id.* at 1137-44.

¹⁹¹ *See supra*, Issue I-1.

agree with AT&T that, by limiting the rates that petitioners charge for facilities that are used by Verizon to transport Verizon-originated traffic, Verizon's proposal would effectively constitute a price cap for competitive LEC services. As we discuss with respect to Issue I-9, however, the Bureau, acting as the Virginia Commission in this proceeding, is authorized by section 252 to determine just and reasonable rates to be charged by Verizon, not petitioners.¹⁹² Accordingly, here, we cannot limit petitioners' rates for these transport facilities. To the extent that it believes that petitioners' rates for these facilities, including the distance-sensitive rate component, are unjust and unreasonable, Verizon may challenge them in proceedings before the Virginia Commission.¹⁹³ Also, Verizon may advocate alternative payment regimes before the Commission in the pending *Intercarrier Compensation Rulemaking* docket.¹⁹⁴

70. Moreover, although Verizon complains that it should not be forced to buy transport from petitioners, we note that this is not the only method that Verizon uses to deliver its traffic to them. Cox presented evidence showing that, under its current agreement with Verizon, the parties interconnect and exchange a substantial amount of traffic through a mid-span meet, under which each party transports its own traffic up to the meet point.¹⁹⁵ Cox also states that it has agreed with Verizon to include mid-span meet interconnection provisions in the parties' new agreement, which will permit Verizon to continue to control its costs and engineer and provision its own facilities.¹⁹⁶ The Verizon witness did not dispute this testimony.¹⁹⁷ In Issue III-3, we decide the terms under which AT&T and WorldCom may establish mid-span meets with Verizon.¹⁹⁸

71. Finally, although it is true that the statute permits competitive LECs to choose where they may deliver their traffic to the incumbent,¹⁹⁹ carriers do not always deliver originating traffic and receive terminating traffic at the same place.²⁰⁰ The "single point of interconnection"

¹⁹² See *infra*, Issue I-9.

¹⁹³ See *id.* As we note in our discussion of Issue I-9, Verizon has presented no evidence that any of the petitioners are charging it unreasonable rates and, with respect to Cox, has admitted it would challenge any unreasonable rates.

¹⁹⁴ *Intercarrier Compensation Rulemaking*, 16 FCC Rcd 9610.

¹⁹⁵ See Tr. at 1022; 1260; Cox Ex. 2, at 13.

¹⁹⁶ See Cox Ex. 1, at 12, citing Cox Proposed Agreement to Verizon at § 4.4. Cox also demonstrated that it currently offers two interconnection points in the Norfolk LATA, which is one of two LATAs in Virginia where these carriers currently interconnect. See Tr. at 1252-53; see also Cox's November Proposed Agreement to Verizon at § 4.2.3.

¹⁹⁷ See Tr. at 1260.

¹⁹⁸ See *infra*, Issue III-3.

¹⁹⁹ 47 U.S.C. § 251(c)(2).

²⁰⁰ The Commission's rules define "interconnection" as the "linking of two networks for the mutual exchange of traffic." 47 C.F.R. § 51.5. The parties' respective obligations to interconnect with each other, however, arise from (continued....)

rule benefits the competitive LEC by permitting it to interconnect for delivery of *its* traffic to the incumbent LEC network at a single point. It does not preclude the parties from agreeing that the incumbent may deliver its traffic to a different point or additional points that are more convenient for it. It appears from the record that AT&T and Cox have offered to negotiate such additional points with Verizon.²⁰¹ WorldCom already permits Verizon to self-provision transport to WorldCom's facility.²⁰² To the extent that Verizon seeks prophylactically to "address future situations as well as other CLECs adopting this agreement,"²⁰³ we do not think that is appropriate in this proceeding, particularly given the evidence presented, and thus decline to do so.

3. Issue I-3 (Reciprocal Collocation)

a. Introduction

72. Section 251(c)(6) of the Act requires incumbent LECs to permit the collocation of equipment at the incumbent's premises.²⁰⁴ Verizon seeks the reciprocal right to collocate equipment at the premises of AT&T, Cox, and WorldCom, so that it can reduce its costs of transporting traffic to their networks.²⁰⁵ The petitioners oppose this request. We reject Verizon's proposal.

(Continued from previous page) _____
different provisions of the Act. Incumbent LECs are required by section 251(c)(2) to permit any requesting telecommunications carrier to interconnect "for the transmission and routing of telephone exchange service and exchange access" with the incumbent's network "at any technically feasible point within the [incumbent] carrier's network." Non-incumbent carriers, on the other hand, are required by section 251(a)(1) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."

²⁰¹ For example, AT&T's contract permits the parties to mutually agree to points where Verizon may interconnect with AT&T for delivery of its traffic, in addition to AT&T's switch. See AT&T's November Proposed Agreement to Verizon, Sch. 4, Part A, § 1.3, Part B § 2; see also AT&T Ex. 3 (Direct Testimony of D. Talbott & J. Schell, Jr.), at 139. Cox's witness testified that, in Virginia, Cox is willing to accept Verizon traffic from Verizon facilities within four miles from the Cox switch. See Tr. at 1021-23; see also Cox's November Proposed Agreement to Verizon at § 4.3.4. Verizon's witness agreed that was a reasonable distance. Tr. at 1259. In this regard we note that both parties have a duty to negotiate in good faith the terms and conditions of interconnection agreements. 47 U.S.C. § 251(c)(1).

²⁰² See WorldCom Reply at 19.

²⁰³ See Tr. at 1261-62.

²⁰⁴ 47 U.S.C. § 251(c)(6).

²⁰⁵ Verizon's November Proposed Agreement to AT&T, §§ 4.2.2.3, 13.5; Verizon's November Proposed Agreement to Cox, §§ 4.3.4 (to the extent it addresses collocation), 4.3.5, 13.10; Verizon's November Proposed Agreement to WorldCom, Part C, Interconnection Attach., §§ 2.1.3.3-2.1.3.4. See also Tr. at 1265-66 (testimony of Verizon witness Albert).

285. We disagree with Verizon's criticism of Cox's language implementing the growth cap for 2002.⁹⁴⁵ Verizon asserts that "the number of ISP-bound minutes for which [Cox] is entitled to compensation in 2001 may be *less* than the 2001 cap itself."⁹⁴⁶ While that may be true, the calculation of minutes to which Cox was entitled to compensation in 2002 is the product of the cap in 2001 and the 10 percent growth factor. The *ISP Inter-carrier Compensation Order* established a baseline – the first quarter of 2001 – as a starting point for all subsequent calculations. The growth cap for 2002 does not reflect a calculation independent of the first quarter of 2001, based on actual traffic for the whole of 2001.

2. Issue I-6 (Toll Rating and Virtual Foreign Exchanges)

a. Introduction

286. The parties disagree over how to determine whether a call passing between their networks is subject to reciprocal compensation (traditionally referred to as "local") or access charges (traditionally referred to as "toll"). The petitioners advocate a continuation of the current regime, which relies on a comparison of the originating and terminating central office codes, or NPA-NXXs, associated with a call. Verizon objects to the petitioners' call rating regime because it allows them to provide a virtual foreign exchange ("virtual FX") service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between Verizon's legacy rate centers. This virtual FX service also denies Verizon the toll revenues that it would have received if it had transported these calls entirely on its own network as intraLATA toll traffic. Verizon argues simply that "toll" rating should be accomplished by comparing the geographical locations of the starting and ending points of a call.

287. Of particular importance to this issue is a comparison of the two sides' FX services. When Verizon provides FX service ("traditional FX"), it connects the subscribing customer, via a dedicated private line for which the subscriber pays, to the end office switch in the distant rate center from which the subscriber wishes callers to be able to reach him without incurring toll charges. Verizon then assigns the FX subscriber a number associated with the distant switch. By contrast, when the petitioners provide their virtual FX service, they rely on the larger serving areas of their switches to allow callers from a distant Verizon legacy rate center to reach the virtual FX subscriber without incurring toll charges. Thus, the petitioners simply assign the subscriber an NPA-NXX associated with the rate center the subscriber designates and rely on their switches' broad coverage, rather than a dedicated private line, to transport the calls between legacy rate centers.

⁹⁴⁵ Accordingly, we also adopt Cox's proposed section 5.7.7.4(b), but revise it by replacing the last sentence with the following: "The cap for total Internet Traffic minutes for 2002 is calculated by increasing the cap for total Internet Traffic minutes for 2001 by ten percent." Finally, we adopt Cox's proposed sections 5.7.7.4(c)-(e) without revision.

⁹⁴⁶ See Verizon IC Brief at 10 n.4.

288. We adopt the petitioners' proposed language for this issue. Verizon has failed to propose a workable method for rating calls based on their geographical end points, and it has alleged no abuse in Virginia of the process for assigning NPA-NXX codes.

b. Positions of the Parties

289. AT&T notes that Verizon itself compares originating and terminating NPA-NXXs when it decides whether to charge reciprocal compensation for completing calls from another carrier's customer to Verizon's FX subscribers.⁹⁴⁷ If the two relevant NPA-NXXs are within the same rate center, Verizon charges reciprocal compensation for its completion of the call, regardless of where a caller is actually located.⁹⁴⁸ AT&T argues that section 251(b)(5) similarly obligates Verizon to pay reciprocal compensation for calls to AT&T's virtual FX customers when the Verizon customer's NPA-NXX falls within the same rate center as the virtual FX subscriber's number does.⁹⁴⁹

290. AT&T disagrees with Verizon's argument that section 251(g) exempts virtual FX traffic from section 251(b)(5)'s reciprocal compensation obligation.⁹⁵⁰ According to AT&T, section 251(g) merely grandfathered pre-existing rules governing exchange access and information access, and there were no such rules relating to the category of traffic at issue here.⁹⁵¹ AT&T further asserts that virtual FX traffic is not exchange access traffic, which involves, by definition, the origination and termination of telephone toll calls.⁹⁵² AT&T notes that telephone toll service is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."⁹⁵³ Because AT&T does not impose a separate charge for its virtual FX service, AT&T argues that it is not a toll service. Accordingly, AT&T argues, it falls within the section 251(b)(5) reciprocal compensation regime rather than being subject to Verizon's access tariffs.⁹⁵⁴

291. AT&T also argues that its proposal does not impose any additional costs upon Verizon, whether or not virtual FX is involved, because AT&T designates a single POI for an NPA-NXX and Verizon's responsibility for transporting a call ends there, regardless of the

⁹⁴⁷ AT&T Brief at 88-89.

⁹⁴⁸ *Id.* at 89.

⁹⁴⁹ *Id.* at 92, citing 47 U.S.C. § 251(b)(5).

⁹⁵⁰ *Id.* at 90-93.

⁹⁵¹ *Id.* at 92-93.

⁹⁵² *Id.* at 93, citing 47 U.S.C. § 153(16).

⁹⁵³ *Id.*, citing 47 U.S.C. § 153(48).

⁹⁵⁴ *Id.*

physical location of the AT&T customer.⁹⁵⁵ AT&T argues that it would be redundant and inefficient for it to mimic Verizon's traditional FX service by purchasing a dedicated private line, as Verizon proposes. AT&T asserts that such an arrangement would leave it at a serious competitive disadvantage.⁹⁵⁶

292. AT&T defends the structure of its virtual FX service, noting that Verizon does not claim that the petitioners are receiving NPA-NXX code assignments in exchanges where they do not actually serve customers of their own.⁹⁵⁷ AT&T distinguishes the Maine Commission decision upon which Verizon relies, noting that such numbering abuse is not at issue between AT&T and Verizon in Virginia.⁹⁵⁸ AT&T further asserts that, under Verizon's proposal, AT&T would have to obtain NPA-NXX code assignments in every rate center where it has a customer, even though customers in some rate centers may be satisfied with numbers from another Verizon rate center.⁹⁵⁹ AT&T argues that this itself would unnecessarily waste numbering resources.⁹⁶⁰

293. AT&T further notes that, if Verizon were to prevail in treating AT&T's virtual FX traffic as toll traffic, there would have to be some way to segregate the virtual FX traffic from section 251(b)(5) traffic.⁹⁶¹ AT&T asserts that there is currently no way to accomplish this by, as Verizon suggests, comparing the physical end points of a call.⁹⁶² Furthermore, AT&T argues that a traffic study to determine the relative percentages of virtual FX and section 251(b)(5) traffic would be costly and overly burdensome.⁹⁶³

294. WorldCom asserts that every carrier in the country, including Verizon, rates calls by comparing originating and terminating NPA-NXX codes and that no state has devised a

⁹⁵⁵ *Id.* at 89-90.

⁹⁵⁶ *Id.* at 96. AT&T notes that this interoffice transport is unnecessary according to AT&T's network architecture of a single switch with a single POI. *Id.* at 96 n.323, citing Tr. at 1908.

⁹⁵⁷ *Id.* at 93-94; *id.* at 94 n.317, citing Tr. at 1909.

⁹⁵⁸ AT&T Reply at 49, citing AT&T Ex. 8 at 56-57. The Maine Commission revoked NPA-NXX assignments when it found that a competitive LEC was receiving numbering assignments for exchanges where the competitive LEC served no customers. See *Investigation Into Use of Central Office Codes (NXXs) by New England Fiber Communications, Inc., LLC*, Dkt No. 98-78, Maine PUC (rel. June 30, 2000). AT&T notes that, in any case, this Maine decision was concerned with abuses related to ISP-bound traffic during the era before adoption of the Commission's *ISP Inter-carrier Compensation Order*. AT&T Reply at 49.

⁹⁵⁹ AT&T Brief at 94.

⁹⁶⁰ *Id.*

⁹⁶¹ *Id.*

⁹⁶² *Id.* at 95, citing Tr. at 1813, 1815, 1905.

⁹⁶³ AT&T Reply at 47, citing Verizon IC Brief at 19.

different method to distinguish between “local” and toll traffic.⁹⁶⁴ WorldCom asserts that the Commission has never held that the physical locations of the calling and called parties determine whether a call is “local”; it has left the determination of “local” calling areas to the states.⁹⁶⁵ WorldCom also notes that Verizon’s billing system cannot identify the physical location of a calling or called party, even though Verizon proposes to base its intercarrier compensation regime on that foundation.⁹⁶⁶ WorldCom notes that Verizon’s network is not the only one providing transport to and from virtual NPA-NXXs.⁹⁶⁷ According to WorldCom, it often hauls traffic for much longer distances than does Verizon.⁹⁶⁸ In any case, WorldCom notes, its virtual FX service does not change the average transport distance for Verizon because the incumbent LEC still must transport the traffic to WorldCom’s POI.⁹⁶⁹

295. WorldCom takes issue with Verizon’s assertion that it loses toll revenues because of virtual FX service. WorldCom notes that the basic enticement of a virtual FX is that it enables a calling party to call a business in a distant location without incurring a toll charge. Absent a virtual local number, WorldCom argues, the caller would typically find a similar vendor that has a local number.⁹⁷⁰ Thus, according to WorldCom, without its virtual FX offering, the call to the distant location likely would not take place at all.⁹⁷¹

296. WorldCom argues that it should not be required to purchase a dedicated private line from Verizon and provide traditional FX service. According to WorldCom, this would eliminate competitive pressure and freeze rates at their current levels because the competitive LEC would essentially replace all the private-line revenue that Verizon would otherwise have lost when it lost the FX customer.⁹⁷² WorldCom argues that Verizon’s proposed requirement also would prevent WorldCom from exploiting the advantages of its unique network architecture: Verizon’s traditional FX service transports calls between two switches, while WorldCom typically serves an equivalent area with one switch.⁹⁷³

⁹⁶⁴ WorldCom Brief at 82.

⁹⁶⁵ WorldCom Reply at 76, citing *Local Competition Order*, 11 FCC Rcd. at 16013-14, para. 1035.

⁹⁶⁶ WorldCom Brief at 84.

⁹⁶⁷ *Id.* at 87.

⁹⁶⁸ *Id.* at 88.

⁹⁶⁹ *Id.*

⁹⁷⁰ *Id.* at 89.

⁹⁷¹ *Id.*

⁹⁷² *Id.*

⁹⁷³ *Id.*

297. Cox argues that Verizon is trying to force it to match Verizon's network architecture.⁹⁷⁴ Cox further asserts that Verizon's end-to-end compensation regime is infeasible and that Verizon makes no workable proposal for determining the originating and terminating points of a call.⁹⁷⁵ Cox argues that Verizon compares apples to oranges when it complains that it receives compensation for transporting calls to Verizon's FX customers, but not for transporting virtual FX calls to Cox's switch.⁹⁷⁶ Cox asserts that Verizon's costs for delivering traffic to Cox have nothing to do with the nature of the underlying service, but rather with the distance to Cox's switch.⁹⁷⁷ The difference in compensation, Cox notes, arises from the dedicated private line charge that Verizon imposes on its traditional FX customers—a charge that Verizon obviously cannot impose on Cox's customers.⁹⁷⁸

298. Finally, Cox notes that Verizon need not be concerned about NPA-NXX code assignment abuses, because state commissions have acted quickly to correct such abuses, and Verizon has not shown evidence of any abuse here.⁹⁷⁹ According to Cox, this arbitration is not the appropriate forum to evaluate compliance with such regulatory requirements.⁹⁸⁰

299. Verizon argues that the petitioners are effectively trying to thwart Verizon's access regime by treating toll traffic as "local" traffic.⁹⁸¹ Verizon asserts that the *ISP Inter-carrier Compensation Order* supports its position that a call's jurisdiction is based on its end points.⁹⁸² Accordingly, Verizon argues, there is no difference between a virtual FX call and a toll call.⁹⁸³ In contrast to virtual FX, Verizon asserts that its traditional FX service is an alternative pricing structure for toll service, rather than a "local" service as claimed by the petitioners.⁹⁸⁴ Verizon

⁹⁷⁴ Cox Brief at 35. Verizon admits, Cox notes, that requiring a competitive LEC to duplicate Verizon's network architecture is inefficient and unnecessarily costly. *Id.* at 36-37, citing Tr. at 1822-23.

⁹⁷⁵ Cox Brief at 39, citing Tr. at 1811-12; Cox Reply at 27-28, citing Tr. at 1812-14.

⁹⁷⁶ Cox Brief at 37.

⁹⁷⁷ *Id.* at 37. Notably, Cox asserts that Verizon does not split access revenues for traditional FX calls with Cox or other competitive LECs. Cox Reply at 26.

⁹⁷⁸ Cox Brief at 37-38.

⁹⁷⁹ *Id.* at 40.

⁹⁸⁰ *Id.*

⁹⁸¹ Verizon IC Brief at 16.

⁹⁸² *Id.*, citing *ISP Inter-carrier Compensation Order*, 16 FCC Rcd at 9159-60, 9163, paras. 14, 25.

⁹⁸³ *Id.* at 17.

⁹⁸⁴ *Id.* at 18.

argues that the petitioners should assume financial responsibility for virtual FX traffic by paying Verizon for transport from the calling area of the Verizon caller to the petitioner's POI.⁹⁸⁵

300. Verizon acknowledges that virtual FX traffic cannot be distinguished from "local" traffic at Verizon's end office switches.⁹⁸⁶ Verizon proposes, however, that the petitioners conduct a traffic study or develop a factor to identify the percentage of virtual FX traffic.⁹⁸⁷ Verizon would then exchange the identified proportion of traffic either pursuant to the governing access tariff or on a bill and keep basis under its VGRIP proposal.⁹⁸⁸ Finally, Verizon notes that several state commissions, including Maine, Connecticut, Missouri, Texas and Georgia, have found that virtual FX traffic is not subject to reciprocal compensation.⁹⁸⁹

c. Discussion

301. We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls according to their geographical end points.⁹⁹⁰ Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide.⁹⁹¹ The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.⁹⁹²

302. Verizon proposed, late in this proceeding, that the petitioners should conduct a traffic study to develop a factor to account for the virtual FX traffic that appears to be "local"

⁹⁸⁵ Verizon IC Reply at 11.

⁹⁸⁶ Verizon IC Brief at 19.

⁹⁸⁷ *Id.* at 19.

⁹⁸⁸ *Id.*

⁹⁸⁹ *Id.* at 19-21.

⁹⁹⁰ Thus, we adopt WorldCom's November Proposed Agreement to Verizon, Attachment I, § 4.2.1.2 (subject to modifications accomplished below in connection with Issue IV-35); Cox's November Proposed Agreement to Verizon, §§ 5.7.1 and 5.7.4; and AT&T's November Proposed Agreement to Verizon, § 1.51. We have previously rejected the proposals that Verizon offers to AT&T with respect to this issue. *See supra* Issues I-1 and VII-4 (rejecting Verizon's November Proposed Agreement to AT&T, § 5.7.3); Issue I-5, subsection (d) (rejecting Verizon's November Proposed Agreement to AT&T, § 1.68a). We reject Verizon's November Proposed Agreement to WorldCom, Part B, § 2.81; we have previously rejected Verizon's Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7.2. *See supra* Issue I-2. We reject the last sentence of Verizon's November Proposed Agreement to Cox, § 5.7.1; we have previously rejected Verizon's November Proposed Agreement to Cox, § 1.60a. *See supra* Issue I-5.

⁹⁹¹ *See* Tr. at 1889-1900.

⁹⁹² *See* AT&T Brief at 95; WorldCom Brief at 84; Cox Brief at 39; Tr. at 1812-13.

traffic. However, Verizon's contract fails to lay out such a mechanism in any detail. Most importantly, Verizon concedes that currently there is no way to determine the physical end points of a communication, and offers no specific contract proposal to make that determination.⁹⁹³

303. Additionally, we note that state commissions, through their numbering authority, can correct abuses of NPA-NXX allocations. As discussed earlier, the Maine Commission found that a competitive LEC there was receiving NPA-NXXs for legacy rate centers throughout the state of Maine although it served no customers in most of those rate centers.⁹⁹⁴ To the extent that Verizon sees equivalent abuses in Virginia, it can petition the Virginia Commission to review a competitive LEC's NPA-NXX allocations.

3. Issue III-5 (Tandem Switching Rate)

a. Introduction

304. In the *Local Competition First Report and Order*, the Commission found that the costs of transport and termination are likely to vary depending on whether traffic is routed through a tandem switch or routed directly to an end-office switch.⁹⁹⁵ It concluded, therefore, that states may establish different transport and termination rates for tandem-routed traffic that reflect the additional costs associated with tandem switching.⁹⁹⁶ It also recognized, however, that new entrants might employ network architectures or technologies different than those employed by the incumbent LEC.⁹⁹⁷ It thus adopted a rule stating that "[w]here the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than the incumbent LEC is the incumbent LEC's tandem interconnection rate."⁹⁹⁸ Recently, in the *Intercarrier Compensation NPRM*, the Commission clarified that in order to receive the tandem rate under section 51.711(a)(3), a competitive LEC need only demonstrate that it serves a geographic area comparable to that of the incumbent LEC; it need not establish functional equivalency.⁹⁹⁹

⁹⁹³ See Tr. at 1812-13.

⁹⁹⁴ See *Investigation Into Use of Central Office Codes (NXXs) by New England Fiber Communications, Inc., LLC d/b/a/ Brooks Fiber*, Docket No. 98-78, Maine PUC (rel. June 30, 2000).

⁹⁹⁵ *Local Competition First Report and Order*, 11 FCC Rcd at 16042, para. 1090.

⁹⁹⁶ *Id.*

⁹⁹⁷ *Id.*

⁹⁹⁸ 47 C.F.R. § 51.711(a)(3).

⁹⁹⁹ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9648, para. 105 (2001) (*Intercarrier Compensation NPRM*); see also Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, FCC and Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC to Charles McKee, Senior Attorney, Sprint PCS (May 9, 2001) (clarifying that geographic comparability alone is sufficient).

In the Matter of Amendments of Part 69 of the Commission's
Rules Relating to Enhanced Service Providers

CC Docket No. 87-215

FEDERAL COMMUNICATIONS COMMISSION

2 FCC Rcd 4305; 1987 FCC LEXIS 3482

RELEASE-NUMBER: FCC 87-208

July 17, 1987 Released; Adopted June 10, 1987

ACTION: **[**1]** NOTICE OF PROPOSED RULE MAKING

JUDGES:

By the Commission

OPINION:

[*4305] I. INTRODUCTION

1. In 1983 we adopted a comprehensive "access charge" plan for the recovery by local exchange carriers (LECs) of the costs associated with the origination and termination of interstate calls. n1 At that time, we concluded that the immediate application of this plan to certain providers of interstate services might unduly burden their operations and cause disruptions in provision of service to the public. Therefore, we granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers. Three years later, in the Second Report and Order in CC Docket No. 86-1, in which we eliminated the exemption for resale carriers, we announced our intention to reexamine the exemption granted to enhanced service providers after our consideration of certain related issues in the Computer III proceeding. n2 We recently completed that consideration. n3 We issue this Notice of Proposed Rule Making to consider whether interstate access charges should be assessed on enhanced service providers. We tentatively conclude that it is now appropriate **[**2]** that enhanced service providers, like providers of interstate basic services, be assessed access charges for their use of local exchange facilities, and we propose amendments to our rules to accomplish that end.

n1 *MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 682 (1983)* (hereinafter First Reconsideration).

n2 *WATS-Related and Other Amendments of Part 69 of the Commission's Rules, Second Report and Order, CC Docket No. 86-1, FCC 86-377, para. 15 (released August 26, 1986)* (hereinafter 86 - 1 Second Report and Order).

n3 We concluded in our Computer III proceeding that protocol processing would continue to be treated as an enhanced service. Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, CC Docket No. 85-229, FCC 87-102 (released May 22, 1987) (hereinafter Phase II Order). That decision had the effect of continuing to exempt from access charges a major class of service providers -- the VANs (value added network providers), which offer protocol processing combined with packet-switched data services. See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Supplemental Notice of Proposed Rule Making, CC Docket No. 85-229, FCC 86-253 (released June 16, 1986), para. 46, n. 56. **[**3]**

II. BACKGROUND

2. In the access charge proceeding, the first of our four primary goals was the "elimination of unreasonable discrimination and undue preferences among rates for interstate services." n4 Specifically, our objective has been to distribute the costs of exchange access in a fair and reasonable manner among all users of exchange access service,

irrespective of their designation as carriers, non-carrier service providers, or private customers. n5 We noted in 1983 that although many entities used exchange access service, some were paying high carrier usage charges, while others were paying local business rates. n6 We endeavored to establish a more equitable sharing of costs, and initially intended to impose interstate access charges on enhanced service providers for their use of local exchange facilities to originate and terminate their interstate offerings. n7 Interstate enhanced services often use common lines and local exchange switches in the same manner as MTS and some MTS equivalent services. To the extent that this is the case, we concluded that equity and efficiency require that those enhanced service providers pay the same charges for exchange access.

n4 See, e.g., First Reconsideration, supra note 1, at para. 3.

n5 Id. at para. 77.

n6 Id. at para. 79.

n7 Id. at para. 76. [**4]

3. In the discussion of the application of access charges to enhanced service providers in the First Reconsideration, we said that we wanted to develop a rate structure under which all exchange access users were charged on the same basis. n8 In the pre-access charge environment, facilities-based interstate carriers other than AT&T (other common carriers or OCCs) were paying carrier-type access charges in the form of ENFIA rates, while WATS resellers, enhanced service providers, and sharers were paying much lower local business rates. n9 Despite our resolve to distribute the costs of exchange access among all users of access service, we recognized that the immediate imposition of interstate access charges on all users of exchange access would have some undesirable consequences. For example, we said that because WATS resellers and enhanced service providers were currently paying local business rates for their interstate access, the immediate imposition of interstate access charges would have a substantial and sudden impact on their costs, which could undermine their ability to continue to provide service while they were adjusting their operations in response to the new access [**5] charge rules. n10

n8 Id. at para. 77.

n9 Id. at para. 83.

n10 Id. at paras. 83-85.

4. Because of these concerns about rate shock, we exempted certain exchange access users from the payment of certain interstate access charges in the First Reconsideration. n11 At that time, we did not intend those exemptions to be permanent, n12 and we have since eliminated several of them. For example, in CC Docket No. 86-1, we considered the question of access charge exemptions for resellers. In the First Report and Order in that docket, we eliminated the exemptions from all access charges for WATS resellers and from traffic-sensitive access charges for MTS resellers, on the grounds that these exemptions were uneconomic and inequitable and could no longer be supported by a rate shock rationale. n13 We said there that our goal was to promote competition, not to protect competitors, and we regarded the elimination of the exemptions as another step toward an economically rational pricing scheme. n14

n11 See 47 C.F.R. § 69.5 (1985).

n12 First Reconsideration, supra note 1, at para. 83.

n13 WATS-Related and Other Amendments of Part 69 of the Commission's Rules, Report and Order, CC Docket 86-1, FCC 86-115, paras. 26-27 (released March 21, 1986) (hereinafter First Report and Order). To the extent enhanced service providers resell MTS or MTS-equivalent services in offering their services, we propose that they be treated like MTS resellers -- that is, that they be assessed the traffic-sensitive access elements, but not the carrier common line charge. See infra Appendix section 69.105(c).

n14 Id. at para. 26. The amendment of the rule deleting the exemption for WATS resellers became effective June 1, 1986. We also provided a short transition period for WATS resellers. The rule changes applied as of June 1, 1986, to

all traffic on resold WATS lines put in service after the order was adopted. For traffic carried on resold WATS lines already in service as of the adoption date of the order, we required resellers to pay all traffic-sensitive access charges, effective June 1, 1986, but deferred their payment of carrier common line charges until January 1, 1987. [**6]

5. In the 86 - 1 Second Report and Order, we eliminated the exemption for private line resellers that offer non-MTS/WATS services, which are, in general, data and telex carriers. In that order, we said that data and telex carriers, like carriers offering MTS/WATS-type services, use local exchange facilities to originate and terminate interstate traffic and should pay the same charges as those assessed on other interexchange carriers for their use of the same facilities. n15 We also noted that our purpose in adopting the exemption for data and telex carriers in the first place had been to grant transitional rather than permanent relief. n16 Finally, we said that our decisions to apply access charges to these resellers, as well as to resellers of MTS and WATS, represented another step toward our objective of distributing the costs of exchange access service in a fair and reasonable manner. n17

n15 Second Report and Order, supra note 2, at para. 11. The amendment of the rule deleting the exemption for non-MTS/WATS resellers became effective January 1, 1987.

n16 Id. at para. 11.

n17 Id. at para 14.

[*4306] III. THE PROPOSED CHANGES IN THE ACCESS CHARGE [**7] TREATMENT OF ENHANCED SERVICE PROVIDERS

6. When we modified our access charge plan in the First Reconsideration, we granted enhanced service providers an exemption from the payment of such charges because we were concerned about rate shock. We feared that if we imposed full interstate access charges on enhanced service providers, which were then paying local business rates for their interstate access, they would face large increases in their operating costs and might no longer be viable. n18 Therefore, instead of immediately applying access charges to enhanced service providers, we decided to fashion a transition plan to avoid the severe rate impact of assessing such charges at the outset. n19 As a result, enhanced service providers currently pay local business rates and subscriber line charges for their switched access connections to local exchange company central offices. n20

n18 First Reconsideration, supra note 1, at para. 83.

n19 Id.

n20 See 47 C.F.R. § 69.5(a). Because enhanced service providers are not carriers, they are treated as end users for the purposes of Part 69. See 47 C.F.R. § 69.2(m). To the extent that they purchase special access, enhanced service providers also pay special access surcharges. 47 C.F.R. § 69.5(c). [**8]

7. We are concerned that the charges currently paid by enhanced service providers do not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public. As we have frequently emphasized in our various access charge orders, our ultimate objective is to establish a set of rules that provide for recovery of the costs of exchange access used in interstate service in a fair, reasonable, and efficient manner from all users of access service, regardless of their designation as carriers, enhanced service providers, or private customers. n21 Enhanced service providers, like facilities-based interexchange carriers and resellers, use the local network to provide interstate services. To the extent that they are exempt from access charges, the other users of exchange access pay a disproportionate share of the costs of the local exchange that access charges are designed to cover.

n21 See First Reconsideration, supra note 1, at para. 77.

8. As we stated in the Notice initiating the CC Docket No. 86-1 proceeding, "concerns with 'rate shock' cannot sustain an uneconomic pricing structure in perpetuity." n22 Accordingly, in [**9] previous orders in that docket, we have concluded that such concerns no longer justify providing WATS resellers or resellers of other services with exemptions from access charges. Similarly, we tentatively conclude today that a rate shock rationale no longer justifies an access charge exemption for enhanced service providers. Enhanced service providers have had ample notice of our ultimate

intent to apply interstate access charges to their operations and ample opportunity to adjust their planning accordingly. n23 We discussed our intent to impose access charges on enhanced service providers almost four years ago in the First Reconsideration in CC Docket No. 78-72. n24 The access charge plan itself has now been in place for almost three years. Moreover, in the Second Report and Order in CC Docket No. 86-1, we stated that after the resolution of certain issues with regard to enhanced service providers in Computer III, we would consider initiating a further Rule Making to consider the application of access charges to enhanced service providers. Furthermore, we propose that the application of access charges to enhanced service providers become effective on January 1, 1988. [**10] This should provide additional time for enhanced service providers to incorporate this change into their business planning. In sum, concerns over rate shock may justify a temporary, but not a permanent, exemption, and it now appears to us that the temporary period during which an access charge exemption was appropriate has lapsed.

n22 WATS-Related and Other Amendments of Part 69 of the Commission's Rules, Notice of Proposed Rule Making, CC Docket No. 86-1, FCC 86-1, para. 11 n. 27 (released January 6, 1986), (hereinafter Notice).

n23 See, e.g., First Reconsideration, supra note 1, at para. 76.

n24 Id. "Our intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers and enhanced service providers. . . ."

9. In addition, the financial impact on enhanced service providers from the imposition of interstate access charges will be substantially smaller than it would have been at the time of the implementation of the access charge plan and will decrease in the immediate future. As the end user contribution to common line costs through subscriber line charges increases, the contribution from carriers and enhanced service providers [**11] through carrier common line (CCL) charges decreases. In May of 1984, the CCL charge for both originating and terminating traffic was 5.24 cents per minute of use. n25 Currently, the terminating charge is 4.33 cents per minute of use, and the originating charge is .69 cents per minute. This decline in CCL charges represents a sizeable drop in the costs of interstate access charges, and will mitigate the impact of the imposition of those charges on enhanced service providers. With additional increases in subscriber line charges scheduled for December 1988 and April 1989, the CCL charge for both originating and terminating traffic should decrease even further. n26 We are aware that, under our rules, many enhanced service providers would be assessed terminating CCL charges. n27

n25 MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Recommended Decision and Order, CC Docket Nos. 78-72 and 80-286, FCC 87J-1, para. 43 (released March 31, 1987) (hereinafter Recommended Decision and Order).

n26 MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Report and Order, CC Docket Nos. 78-72 and 80-286, FCC 87-133 (released May 19, 1987). On July 1, the subscriber line charge cap increased from \$2.00 to \$2.60; the charge is scheduled to increase in December 1988 to \$3.20; and in April 1989 to \$3.50 per month. In addition to the direct reduction in CCL charges from the implementation of SLCs, the associated stimulation of usage of the network will further reduce such charges. Enhanced service providers would of course also pay traffic sensitive charges. Although these charges vary by jurisdiction, the average nationwide traffic sensitive rate is currently 3.12 cents per access minute of use. See Tier I Tariff Review Plan (from October 3, 1986 tariffs).

n27 Many enhanced services are provided pursuant to a network configuration in which a call originates over an "open" end and terminates over a "closed" end. Our rules provide that terminating CCL charges apply on the "open" end where a call has only such end. CCL charges are not assessed on "closed" ends of calls. See First Report and Order, supra note 13, paras. 50-53; see also 47 C.F.R. § 69.207. [**12]

10. Parties are free to comment upon our tentative conclusions about rate shock. Such comments should be accompanied by detailed data supporting the arguments advanced therein. Commenters addressing the rate shock issue should provide information on network configurations used by enhanced service providers and possible reconfigurations, as well as data on industry rates, revenues, and growth rates going back at least five years (which would include a period prior to the adoption of our access charge plan). For example, we request comment on the types of interstate transmission and exchange access facilities that enhanced service providers are currently using, and on the types of enhanced service providers that would be affected by the elimination of the exemption from interstate access

charges. Parties should also discuss ways in which affected enhanced service providers might reconfigure their networks in response to rule changes of the kind proposed. In addition, we request comment on the rates that enhanced service providers have charged customers, as well as on industry revenues during that period. If possible, commenters should provide data on the demand for services [**13] and the revenues in the entire enhanced service provider sector (including, but not limited to, the value added networks and data base services), and on the possible effect of the proposed rule changes on demand and revenues. Finally, commenters should provide information on the growth rates of the various segments of the enhanced services industry, and the way in which those growth rates might be affected by the proposed rule changes. To the extent that a commenter proposes that application of access charges to enhanced service providers be implemented on a date later than January 1, 1988, such proposal should present specific arguments justifying the continuation of the current special treatment of enhanced service providers for the extended period. n28

n28 We note that the application of full access charges to WATS resellers was accomplished pursuant to a modest phase-in. See First Report and Order, supra note 13, at para. 2. In that instance, however, we concluded that a phase-in was warranted because of another significant change in our access charge plan, that is, inclusion of WATS closed end lines in the special access category, that was made concurrently with our decision to remove the resellers' exemption. Similar circumstances do not appear to exist in the instant situation. [**14]

11. In addition, we request comment on issues involving implementation of the proposal to assess interstate access charges on enhanced service providers. We invite parties to comment on the method of determining interstate and intrastate usage of enhanced services for access charge billing. Parties that address the measurement issue are requested to comment on the possibility of using the Entry/Exit Surrogate (EES) method currently used to [*4307] estimate jurisdictional usage for Feature Group A and Feature Group B services. n29 Finally, parties are of course free to identify any other implementation problems they think the Commission should address prior to applying access charges to enhanced service providers and to suggest possible approaches to resolving these problems.

n29 This Commission has generally provided for the use of this surrogate pending a decision by the Federal/State Joint Board in CC Docket No. 85-124. See Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service, Supplemental Notice of Proposed Rule Making, CC Docket No. 85-124 (released December 9, 1986). That Joint Board is considering a permanent resolution for the proper allocation of costs and revenues between the state and federal jurisdictions for FGA and FGB. [**15]

IV. PAPERWORK REDUCTION ACT

12. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public. n30

n30 We hereby certify that the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1982), is not applicable to this proceeding. We have previously determined that the formal provisions of the Regulatory Flexibility Act are not applicable to proceedings to adopt or revise access charge rules because local exchange carriers, the parties directly subject to the access charge rules, do not fall within the Act's definition of a small entity. Id. sec. 601. See *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985); Notice at para. 33, n. 54; and *MTS and WATS Market Structure, Third Report and Order*, 93 FCC 2d 241, paras. 358-62 (1983). While we have not applied the formal procedures of the Regulatory Flexibility Act in this proceeding, we have considered and will consider the effects of rule changes on enhanced service providers, some of which are small businesses, just as we considered the effects of rule changes on resellers in CC Docket No. 86-1. We will also consider the impact of rule changes upon small telephone companies. See WATS Related and Other Amendments of Part 69, Memorandum Opinion and Order, para. 29, CC Docket No. 86-1 (released January 15, 1987). In accordance with the provisions of section 605 of the Regulatory Flexibility Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this NPRM in the Federal Register. [**16]

V. PROCEDURAL MATTERS

13. Pursuant to 47 U.S.C. §§ 154(i), 154(j), 201-05, 218, and 403, and 5 U.S.C. § 553, NOTICE IS HEREBY GIVEN of the proposed adoption of new or modified rules. n31

n31 If we adopt the rules proposed in Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It With Part 36, Jurisdictional Separations Procedures, Notice of Proposed Rule Making, CC Docket No. 87-113 (released May 1, 1987), we would, of course, revise the rules proposed in this notice to ensure consistency.

14. All interested persons MAY FILE comments on the issues and proposals discussed herein not later than August 24, 1987 and replies may be filed not later than September 14, 1987. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, an original and five copies of all statements, briefs, comments, or replies shall be filed with the Federal Communications Commission, Washington, D.C., 20054, and all such filings will be available for public inspection in the Docket Reference Room at the Commission's Washington, D.C. Office. In reaching [**17] its decision, the Commission may consider information and ideas not contained in filings, provided that such information is reduced to writing and placed in the public file, and provided that the fact of the Commission's reliance on any such information or ideas is noted in the Order.

15. For purposes of this nonrestricted notice and comment Rule Making proceeding, members of the public are advised that ex parte contacts are permitted until the time a public notice is issued stating that a substantial disposition of the matter is to be considered in a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever occurs earlier. In general, an ex parte presentation is any written or oral communications (other than formal written comments, pleadings, and oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff that addresses the merits of the proceeding.

16. Any person who submits a written ex parte presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral ex parte presentation [**18] addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation, and that written summary must be served on the Commission's Secretary for inclusion into the public file, with a copy to the Commission official receiving the oral presentation. Each ex parte presentation described above must state on its face that Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rule, 47 C.F.R. § 1.1231.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico

Secretary

APPENDIX:

APPENDIX A

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 69 -- ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, and 410 of the Communications Act as amended; 47 U.S.C. 154, 201, 202, 203, 205, 218, 403, and 410.

47 CFR Part 69 is amended to read as follows:

2. Section 69.2 is amended by revising paragraphs (m) and (gg), and adding a new paragraph (nn), to read as follows:

§ 69.2 [**19] Definitions.

* * *

(m) "End user" means any customer of an interstate or foreign telecommunications service that is not a carrier or an enhanced service provider except that a carrier other than a telephone company or an enhanced service provider shall be deemed to be an "end user" when such carrier or enhanced service provider uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller;

* * *

(gg) "Access minutes" or "access minutes of use" is that usage of exchange facilities in interstate or foreign service for the purpose of calculating chargeable usage. On the originating end of an interstate or foreign call, usage is to be measured from the time the originating end user's call is delivered by the telephone company and acknowledged as received by the interexchange carrier or enhanced service provider's facilities connected with the originating exchange. On the terminating end of an interstate or foreign call, usage is to be measured from the time the [**20] call is received by the end user in the terminating exchange. Timing of usage at both the originating and terminating end of an interstate or foreign call shall terminate when the calling or called party disconnects, whichever event is recognized first in the originating and terminating end exchanges, as applicable.

* * *

(nn) "Enhanced service provider" means a person providing "enhanced services" as defined in Section 64.702(a) of these rules.

3. Section 69.5 is amended by revising paragraph (b) to read as follows:

§ 69.5 Persons to be assessed.

* * *

(b) Carrier's carrier charges shall be computed and assessed upon all interexchange carriers or enhanced service providers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services or enhanced services.

* * *

4. Section 69.105 is amended by revising paragraphs (a) and (c) to read as follows:

§ 69.105 Carrier common line.

(a) A charge that is expressed in dollars and cents per access minute of use shall be assessed upon all interexchange carriers or enhanced service providers that use local exchange common line facilities for the provision of interstate or foreign [**21] telecommunications services or enhanced services.

* * *

(c) Any interexchange carrier or enhanced service provider providing interstate or foreign telecommunications services or enhanced services shall receive a credit for Carrier Common Line charges to the extent that it resells services for which these charges have already been assessed (e.g., MTS or MTS-type service of other common carriers).

5. Section 69.106 is amended by revising paragraphs (a) to read as follows:

§ 69.106 Line termination.

(a) A charge that is expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers or enhanced service providers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services or enhanced services.

6. Section 69.107 is amended by revising paragraph (a) to read as follows:

§ 69.107 Local switching.

(a) Charges that are expressed in dollars and cents per access minute of use shall be assessed upon all interexchange carriers or enhanced service providers that use local exchange switching facilities for the provision of interstate or foreign telecommunications or enhanced services. [**22]

7. Section 69.108 is amended by revising paragraph (a) to read as follows:

§ 69.108 Intercept.

(a) A charge that is expressed in dollars and cents per access minute of use shall be assessed upon all interexchange carriers or enhanced service providers that use local exchange switching facilities for the provision of interstate or foreign telecommunications or enhanced services.

8. Section 69.111 is amended by revising paragraph (a) to read as follows:

§ 69.111 Common transport.

(a) A charge that is expressed in dollar and cents per access minute shall be assessed upon all interexchange carriers or enhanced service providers that use switching or transmission facilities that are apportioned to the Common Transport element for purposes of apportioning net investment.

9. Section 69.112 is amended by revising paragraphs (b) (1) and (c) to read as follows:

§ 69.112 Dedicated transport.

(b) Appropriate subelements shall be established for the use of interface arrangements. Charges for such subelements shall be assessed and computed as follows: (1) Such charges shall be assessed upon all interexchange carriers or enhanced service providers for the [**23] interface arrangements they use to provide interstate or foreign telecommunications or enhanced services;

(c) A charge for the use of voice grade transmission facilities shall be assessed upon interexchange carriers or enhanced service providers that use such facilities to provide interstate or foreign telecommunications or enhanced services. Such charges shall be expressed in dollars and cents per unit of capacity. Total units of capacity provided to an interexchange carrier or enhanced service provider shall be measured by ascertaining the number of conversations that could be transmitted simultaneously without producing blocking in the dedicated transport facilities. The capacity unit charge for carriers that offer MTS shall be weighted by a distance factor that reflects the airline distance between the entry switch and the interexchange facility. The capacity unit charged for other carriers or enhanced service providers shall be weighted by a distance factor that reflects the lesser or least of the airline distance between the entry switch and such carrier or enhanced service provider's interexchange facility or the airline distance between the entry switch and any [**24] interexchange facility of carriers that offer MTS that is located within 5 miles of such carrier or enhanced service provider's interexchange facility.

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

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

NOTICE OF PROPOSED RULEMAKING

Adopted: April 19, 2001

Released: April 27, 2001

Comment Date: 90 days after publication in the Federal Register

Reply Comment Date: 135 days after publication in the Federal Register

By the Commission: Chairman Powell and Commissioner Ness issuing separate statements;
Commissioner Furchtgott-Roth concurring and issuing a statement

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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 transport¹⁸¹ and termination¹⁸² 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

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 Inter-carrier 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).

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

CC Docket No. 87-215

In the Matter of

Amendments of Part 69
of the Commission's Rules
Relating to Enhanced Service
Providers

ORDER

Adopted: April 19, 1988;

Released: April 27, 1988

By the Commission:

I. INTRODUCTION

1. On June 10, 1987, we adopted a Notice of Proposed Rule Making in this docket to consider whether providers of interstate enhanced services should be assessed interstate access charges.¹ We sought comment from interested parties on this issue, and asked for detailed data on the state of the enhanced services industry. The record in this proceeding indicates that, as a result of a number of complex and interrelated factors, the enhanced services industry is entering a unique period of rapid and substantial change. First, the Open Network Architecture (ONA) Plans required in our *Computer III* proceeding² were filed on February 1, 1988, but have not yet been implemented. Second, the District Court overseeing the Modification of Final Judgment (MFJ) in the Bell System divestiture case has recently modified the restriction in the decree that had previously prevented the Bell Operating Companies (BOCs) from offering any information services.³ These regulatory and judicial events make this an unusually volatile period for the enhanced service industry. We have decided not to eliminate the exemption from interstate access charges currently permitted enhanced service providers at this time. Under the circumstances, we also find that any discrimination that exists by reason of the exemption remains a reasonable one so long as the enhanced services industry remains in the current state of change and uncertainty.⁴ While we could simply keep this docket open until these changes have run their course, this approach could add to the substantial uncertainty already confronting the enhanced services industry. Accordingly, we will terminate this Rule Making proceeding. We will continue to observe the effects of these factors, and at some appropriate future date, we can revisit the issue. We would, of course, commence any such proceeding by issuing another Notice of Proposed Rule Making.

II. BACKGROUND

2. In 1983 we adopted a comprehensive "access charge" plan for the recovery by local exchange carriers (LECs) of the costs associated with the origination and termination of interstate calls.⁵ The four primary goals of the access charge proceeding include the "elimination of unreasonable discrimination and undue preferences among rates for interstate services."⁶ Specifically, in pursuing this goal we have sought to distribute the costs of exchange access service fairly among all users of exchange access, regardless of their designation as carriers, non-carrier service providers, or private customers.⁷ At the time we adopted the original access charge plan, however, we concluded that the immediate application of that plan to certain providers of interstate services might unduly burden their operations and cause disruptions in providing service to the public. Therefore, we granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers.⁸ We did not intend those exemptions to be permanent,⁹ and we have since eliminated several of them. For example, in CC Docket No. 86-1 we eliminated the access charge exemptions for resellers.¹⁰ In the *Notice* initiating this docket, we expressed concern that the charges currently paid by enhanced service providers may not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public. We observed that to the extent enhanced service providers are exempt from switched access charges, other users of exchange access are forced to bear a disproportionate share of the local exchange costs that access charges are designed to cover. We reiterated our view that rate shock, which provided the original basis for the special treatment of enhanced service providers, justified a temporary but not a permanent exemption, and we tentatively concluded that an access charge exemption was no longer appropriate.¹¹ We asked interested parties to comment on this tentative conclusion and to provide detailed data on the state of this industry.¹² We also invited comment on implementation issues arising from our proposal.¹³

III. COMMENTS AND REPLIES

3. We received comments from 129 parties, reply comments from 35 parties, and many informal comments and letters.¹⁴ In general, LECs, state public utility commissions, and some consumer groups support eliminating the exemption from interstate access charges for enhanced service providers. Enhanced service providers, telecommunications equipment manufacturers, and users of enhanced services generally oppose elimination of the exemption.

4. The BOCs, with the exception of NYNEX, generally support eliminating the exemption, either immediately or with a transition. The BOCs and other LECs that support the proposal generally conclude that its adoption would further the goals of the access charge proceeding,¹⁵ and that enhanced service providers use the local network in the same way as other entities that currently pay interstate access charges.¹⁶ Ameritech, Centel, and NTCA argue that the possibility of rate shock no longer justifies special treatment, since enhanced service providers have had notice that interstate access charges might be assessed.¹⁷ However, Centel, as well as other LECs, advocate a gradual transition to full interstate access charges for enhanced services.¹⁸ NYNEX, on the other hand, proposes deferring

resolution of the issue until after ONA implementation. NYNEX claims that enhanced service providers will no doubt have to reconfigure their networks in response to the BOCs' ONA offerings and thus it would be unwise to impose access charges on these users in advance of that time.¹⁹

5. The D.C. People's Counsel, the Michigan PSC, the Florida PSC, the New York Attorney General, and the National Consumers League support elimination of the exemption. These state and consumer entities argue that all users of the local exchange should pay a fair share of the costs of the local network, and that because of the exemption, other users of the local exchange now pay a disproportionate share of the costs.²⁰ The New York Attorney General and the National Consumers League say that the present exemption may result in users of voice services subsidizing users of data services.²¹

6. Enhanced service providers strongly oppose the proposal to eliminate their exemption from interstate access charges. CompuServe, Telenet, and Tymnet argue that the imposition of interstate access charges would increase rates for enhanced services, depress demand, and impede the growth of a mass market for enhanced services at a critical time in the development of enhanced services.²² AD-APSO, Dialcom, Teleconnect, GE, IIA, and Trintex argue that implementing the proposal would have adverse effects on the enhanced services industry, which they assert is still at an infant stage of development, and indirectly harm other industries dependent on the enhanced services industry.²³ A large number of enhanced service providers argue that assessing interstate access charges on enhanced service providers would make only a minor contribution toward reducing LEC interstate revenue requirements, and consequently would not result in any noticeable decrease in rates for voice services.²⁴ Finally, some enhanced service providers assert that they did not have sufficient notice that this Commission intended eventually to require them to pay interstate access charges.²⁵

7. Telecommunications equipment manufacturers filing comments also oppose elimination of the exemption. Apple, DEC, EIA, IBM, and Tandy argue that adoption of the proposal in the *Notice* would seriously injure enhanced service providers and their customers.²⁶ Groups representing both large and small users assert that we should consider the social and economic benefits of broadly available enhanced services before we act in this area.²⁷ Users generally object to the proposal to eliminate the exemption, and argue that rates for enhanced services would increase.²⁸

8. A number of parties suggest, like NYNEX, that we postpone consideration of the enhanced services exemption from interstate access charges until after ONA has been implemented. For example, CompuServe argues that, even if we accept none of its other arguments for maintaining the exemption, we should nevertheless defer further consideration of our proposal pending full implementation of ONA by the LECs.²⁹ Similarly, the Alarm Industry while generally opposing the imposition of access charges on enhanced services, also argues that, at the very least, this action should not be taken now because of uncertainty regarding the effects of ONA implementation on this industry.³⁰ The Boston Computer Society recommends that we continue the exemption until the implementation of ONA and, at that time, begin a transition to full interstate access charges over a period of 24 months.³¹ Tymnet agrees with NYNEX that that en-

hanced service providers may well have to reconfigure their networks in order to use ONA services, and suggests that a change in the access charge rules might result in temporary reconfigurations that would be a waste of resources.³²

9. Enhanced service providers state generally that the industry is fragile because it is still relatively new, with rapid growth rates, many new entrants, and market segments that are just beginning to emerge from the experimental stage. Thus they conclude that the immediate imposition of interstate access charges could be quite disruptive.³³ NTIA, for example, argues strenuously against the immediate imposition of access charges on enhanced service providers on the ground that despite rapid growth, the market for information services is still in a very early stage of development, and that the public interest would be served by fostering further development of this market by continuing the current exemption.³⁴ Some enhanced service providers argue in their comments that the specific segments of the industry in which they participate are in the formative stages of development and growth.³⁵ A number of parties state that the emerging consumer-oriented services, while still small in scope,³⁶ are in a particularly dramatic phase of growth.³⁷

10. 3M Media Services objects to immediate imposition of interstate access charges on enhanced service providers on the grounds that access charges may decrease in the future.³⁸ 3M argues that a sudden application of access charges at their current levels would disrupt the industry, and that if access charges do decrease, this disruption will have been unnecessary, at least in part.

11. California also opposes immediate assessment of interstate access charges on enhanced service providers, and argues that we should await further judicial action on BOC provision of information services in *United States v. Western Electric Co.*³⁹ before considering whether to adopt the proposed rule changes. California contends that the extent of BOC participation in the information services sector remains unclear, and suggests that we defer consideration of our proposal until we are able to assess the relevance of this important factor.⁴⁰

12. Finally, Telenet recommends in its reply comments that this proceeding be terminated, asserting that the mere pendency of the proceeding has had an adverse impact on the enhanced services industry. Telenet argues that since this Commission proposed to eliminate the enhanced service exemption from interstate access charges, many users and providers of enhanced services have delayed plans for expansion of existing services, as well as plans for new offerings.⁴¹

IV. DISCUSSION

13. Although the telecommunications industry in general has been characterized by substantial change in recent years, the record in this proceeding indicates that the enhanced services industry is in a uniquely complex period of transition. This Commission is currently in the process of reviewing ONA plans that may have a substantial effect on the manner and the terms under which enhanced service providers will originate and terminate their interstate traffic. Moreover, the MFJ Court has recently ruled that the BOCs may provide certain types of information services, raising other important questions about how enhanced services will be provided to the public. The interrelationship of these factors, which is still

unfolding, and their potential effects on the provision of enhanced services to the public lead us to conclude that this is not an appropriate time to assess interstate access charges on providers of enhanced services.

14. The ONA requirements we adopted in the *Computer III* proceeding⁴² will enable the enhanced service operations of the BOCs and their competitors to interconnect to specific basic service elements (BSEs) and interfaces on an unbundled and "equal access" basis.⁴³ As required in the *Phase I Order*,⁴⁴ the BOCs and AT&T filed ONA plans in CC Docket No. 88-2 on February 1, 1988. We anticipate extensive public comment on these plans, which are lengthy and complex, to be followed by careful review by Commission staff. Moreover, after Commission approval of their ONA plans, the BOCs may take up to one year to implement their initial sets of BSEs. Thereafter, deployment of BSEs in BOC service areas will occur according to schedules in the BOCs' ONA plans to be approved by this Commission. As NYNEX and Tymnet note in their comments, ONA may well require enhanced service providers to reconfigure their networks in order to take full advantage of the unbundled BSEs. At the very least, as the Alarm Industry suggests, there is some uncertainty in the enhanced services industry as to the pricing and technical effects of the implementation of ONA. We concur with the assessment of such parties that it would be prudent to defer consideration of our proposal to remove the enhanced service access charge exemption until we are more certain of the effects of ONA in this context.

15. Moreover, we agree with California that the actions of the MFJ Court regarding BOC provision of information services could substantially affect the enhanced services industry in ways that presently are unclear. The MFJ contains a restriction on BOC provision of "information services," a category that appears to be substantially equivalent to this Commission's regulatory category of "enhanced services."⁴⁵ In its decision following the first triennial review of the MFJ restrictions, the MFJ Court retained the decree restriction on BOC provision of services involving the generation of information content, but stated that it was prepared to exempt from the restriction BOC transmission of information generated by others.⁴⁶ In its *March 7 Decision*, the MFJ Court reaffirmed the prohibition on BOC "information content" services, but also said that the BOCs will be permitted to "engage in the transmission of information as part of a gateway to an information service," and to provide "voice storage and retrieval services."⁴⁷

16. While the *March 7 Decision* could have substantial effects on the enhanced service industry, the extent and nature of those effects are difficult to ascertain precisely at the present time. Because the BOCs already provide local exchange service to much of the country, BOC entry into the markets for the services permitted by the *March 7 Decision* will presumably require many other enhanced service providers to adjust their activities to meet the new competition that the BOCs provide. Moreover, to the extent that enhanced service providers use the gateway services that the *March 7 Decision* permits the BOCs to offer, such gateways may both promote the growth of the industry and affect significantly the manner in which enhanced service providers access their customers.

17. We believe that given the combined effects of the impending ONA implementation and the entry of the BOCs into certain aspects of information service, the imposition of access charges at this time is not appropriate

and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired.⁴⁸

18. Few of the parties who advocate eliminating the enhanced service exemption from interstate access charges urge immediate implementation. Bell Atlantic, Centel, Pacific Telesis, US West, the Florida PSC, and the National Consumers League all suggest that a transition would be appropriate.⁴⁹ Many of the arguments that support a transition also support deferral of consideration of our proposal to assess interstate access charges on enhanced service providers.⁵⁰ We have elected to terminate this proceeding at this time, rather than simply leave the docket open and defer taking action, because we believe the latter course would result in undue confusion and little increased public benefit. We are also not inclined to allow the record developed in this docket to grow stale.⁵¹

19. A number of parties challenge our tentative conclusion in the *Notice* concerning the discriminatory aspects of the access charge exemption for enhanced service providers on the ground that their use of the local network differs from that of entities that are currently subject to those charges. We need not, however, resolve that issue in this order. We conclude for the reasons discussed above that, to the extent the exemption for enhanced service providers may be discriminatory, it remains, for the present, not an unreasonable discrimination within the meaning of Section 202(a) of the Communications Act of 1934.⁵²

20. Accordingly, as we have concluded that this is not an appropriate time to assess interstate access charges on the enhanced services industry,⁵³ we will terminate this Rule Making proceeding.

V. ORDERING CLAUSE

21. Pursuant to Sections 1, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 201-205, this DOCKET IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

PARTIES FILING COMMENTS

1. Ad Hoc Telecommunications Users Committee (Ad Hoc)
2. ADAPSO
3. Alarm Industry FCC Advisory Committee (Alarm Industry)
4. American Airlines
5. American Association of Community and Junior Colleges (AACJC)
6. American Bar Association (ABA)
7. American Council on Education

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

In the Matter of)	
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
)	

ORDER ON REMAND AND REPORT AND ORDER

Adopted: April 18, 2001

Released: April 27, 2001

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

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I. INTRODUCTION

1. In this Order, we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs). We previously found in the *Declaratory Ruling*¹ that such traffic is interstate traffic subject to the jurisdiction of the Commission under section 201 of the Act² and is not, therefore, subject to the reciprocal compensation provisions of section 251(b)(5).³ The Court of Appeals for the District of Columbia Circuit held on appeal, however, that the *Declaratory Ruling* failed adequately to explain why our jurisdictional conclusion was relevant to the applicability of section 251(b)(5)

¹ 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 (1999) (*Declaratory Ruling* or *Intercarrier Compensation NPRM*).

² See 47 U.S.C. § 201, Communications Act of 1934 (the Act), as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act). Hereinafter, all citations to the Act and to the 1996 Act will be to the relevant section of the United States Code unless otherwise noted.

³ 47 U.S.C. § 251(b)(5).

and remanded the issue for further consideration.⁴ As explained in more detail below, we modify the analysis that led to our determination that ISP-bound traffic falls outside the scope of section 251(b)(5) and conclude that Congress excluded from the "telecommunications" traffic subject to reciprocal compensation the traffic identified in section 251(g), including traffic destined for ISPs. Having found, although for different reasons than before, that the provisions of section 251(b)(5) do not extend to ISP-bound traffic, we reaffirm our previous conclusion that traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and we establish an appropriate cost recovery mechanism for the exchange of such traffic.

2. We recognize that the existing intercarrier compensation mechanism for the delivery of this traffic, in which the originating carrier pays the carrier that serves the ISP, has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets. As we discuss in the *Unified Intercarrier Compensation NPRM*,⁵ released in tandem with this Order, such market distortions relate not only to ISP-bound traffic, but may result from any intercarrier compensation regime that allows a service provider to recover some of its costs from other carriers rather than from its end-users. Thus, the *NPRM* initiates a proceeding to consider, among other things, whether the Commission should replace existing intercarrier compensation schemes with some form of what has come to be known as "bill and keep."⁶ The *NPRM* also considers modifications to existing payment regimes, in which the calling party's network pays the terminating network, that might limit the potential for market distortion. The regulatory arbitrage opportunities associated with intercarrier payments are particularly apparent with respect to ISP-bound traffic, however, because ISPs typically generate large volumes of traffic that is virtually all one-way -- that is, delivered to the ISP. Indeed, there is convincing evidence in the record that at least some carriers have targeted ISPs as customers merely to take advantage of these intercarrier payments. Accordingly, in this Order we also take interim steps to limit the regulatory arbitrage opportunity presented by ISP-bound traffic while we consider the broader issues of intercarrier compensation in the *NPRM* proceeding.

⁴ See *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*).

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

⁶ "Bill and keep" refers to an arrangement in which neither of two interconnecting networks charges the other for terminating traffic that originates on the other network. Instead, each network recovers from its own end-users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives from the other network. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16045 (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) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *aff'd in part and rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (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); *further recon. pending*. Bill and keep does not, however, preclude intercarrier charges for transport of traffic between carriers' networks. *Id.*

II. EXECUTIVE SUMMARY

3. As presaged above, we must wrestle with two difficult issues in this Order: first, whether intercarrier compensation for ISP-bound traffic is governed by section 251 or section 201; and, if the latter, what sort of compensation mechanism should apply. The first question is difficult because we do not believe it is resolved by the plain language of section 251(b)(5) but, instead, requires us to consider the relationship of that section to other provisions of the statute. Moreover, we recognize the legitimate questions raised by the court with respect to the rationales underlying our regulatory treatment of ISPs and ISP traffic. We seek to respond to those questions in this Order. Ultimately, however, we conclude that Congress, through section 251(g),⁷ expressly limited the reach of section 251(b)(5) to exclude ISP-bound traffic. Accordingly, we affirm our conclusion in the *Declaratory Ruling* that ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5).

4. Because we determine that intercarrier compensation for ISP-bound traffic is within the jurisdiction of this Commission under section 201 of the Act, it is incumbent upon us to establish an appropriate cost recovery mechanism for delivery of this traffic. Based upon the record before us, it appears that the most efficient recovery mechanism for ISP-bound traffic may be bill and keep, whereby each carrier recovers costs from its own end-users. As we recognize in the *NPRM*, intercarrier compensation regimes that require carrier-to-carrier payments are likely to distort the development of competitive markets by divorcing cost recovery from the ultimate consumer of services. In a monopoly environment, permitting carriers to recover some of their costs from interconnecting carriers might serve certain public policy goals. In order to promote universal service, for example, this Commission historically has capped end-user common line charges and required local exchange carriers to recover any shortfall through per-minute charges assessed on interexchange carriers.⁸ These sorts of implicit subsidies cannot be sustained, however, in the competitive markets for telecommunications services envisioned by the 1996 Act. In the *NPRM*, we suggest that, given the opportunity, carriers always will prefer to recover their costs from other carriers rather than their own end-users in order to gain competitive advantage. Thus carriers have every incentive to compete, not on basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers, a troubling distortion that prevents market forces from distributing limited investment resources to their most efficient uses.

5. We believe that this situation is particularly acute in the case of carriers delivering traffic to ISPs because these customers generate extremely high traffic volumes that are entirely one-directional. Indeed, the weight of the evidence in the current record indicates that precisely the types of market distortions identified above are taking place with respect to this traffic. For example, comments in the record indicate that competitive local exchange carriers (CLECs), on average, terminate eighteen times more traffic than they originate, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is

⁷ 47 U.S.C. § 251(g).

⁸ Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 15998-99 (1997) (*Access Charge Reform Order*), *aff'd*, *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

for ISP-bound traffic.⁹ Moreover, the traffic imbalances for some competitive carriers are in fact much greater, with several carriers terminating more than forty times more traffic than they originate.¹⁰ There is nothing inherently wrong with carriers having substantial traffic imbalances arising from a business decision to target specific types of customers. In this case, however, we believe that such decisions are driven by regulatory opportunities that disconnect costs from end-user market decisions. Thus, under the current carrier-to-carrier recovery mechanism, it is conceivable that a carrier could serve an ISP free of charge and recover all of its costs from originating carriers. This result distorts competition by subsidizing one type of service at the expense of others.

6. Although we believe this arbitrage opportunity is particularly manifest with respect to ISP-bound traffic, we suggest in the *NPRM* that any compensation regime based on carrier-to-carrier payments may create similar market distortions. Accordingly, we initiate an inquiry as to whether bill and keep is a more economically efficient compensation scheme than the existing carrier-to-carrier payment mechanisms. Alternatively, the record developed in that proceeding may suggest modifications to carrier-to-carrier cost recovery mechanisms that address the competitive concerns identified above. Based upon the current record, however, bill and keep appears the preferable cost recovery mechanism for ISP-bound traffic because it eliminates a substantial opportunity for regulatory arbitrage. We do not fully adopt a bill and keep regime in this Order, however, because there are specific questions regarding bill and keep that require further inquiry, and we believe that a more complete record on these issues is desirable before requiring carriers to recover most of their costs from end-users. Because these questions are equally relevant to our evaluation of a bill and keep approach for other types of traffic, we will consider them in the context of the *NPRM*. Moreover, we believe that there are significant advantages to a global evaluation of the intercarrier compensation mechanisms applicable to different types of traffic to ensure a more systematic, symmetrical treatment of these issues.

7. Because the record indicates a need for immediate action with respect to ISP-bound traffic, however, in this Order we will implement an interim recovery scheme that: (i) moves aggressively to eliminate arbitrage opportunities presented by the existing recovery mechanism for ISP-bound by lowering payments and capping growth; and (ii) initiates a 36-month transition towards a complete bill and keep recovery mechanism while retaining the ability to adopt an alternative mechanism based upon a more extensive evaluation in the *NPRM*

⁹ See, e.g., Letter from Robert T. Blau, BellSouth, to Magalie Roman Salas, Secretary, FCC (November 6, 2000); see also Verizon Remand Comments at 2 (Verizon will be billed more than one billion dollars in 2000 for Internet-bound calls); Letter from Richard J. Metzger, Focal, to Deena Shetler, Legal Advisor to Commissioner Gloria Tristani, FCC (Jan. 11, 2001)(ILECs owed \$1.98 billion in reciprocal compensation to CLECs in 2000). On June 23, 2000, the Commission released a Public Notice seeking comment on the issues raised by the court's remand. See Comment Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit, CC Docket Nos. 96-98, 99-68, Public Notice, 15 FCC Rcd 11311 (2000) (*Public Notice*). Comments and reply comments filed in response to the *Public Notice* are identified herein as "Remand Comments" and "Remand Reply Comments," respectively. Comments and replies filed in response to the 1999 *Inter-carrier Compensation NPRM* are identified as "Comments" and "Reply Comments," respectively.

¹⁰ See, e.g., Verizon Remand Comments at 11, 21.

proceeding. Specifically, we adopt a gradually declining cap on the amount that carriers may recover from other carriers for delivering ISP-bound traffic. We also cap the amount of traffic for which any such compensation is owed, in order to eliminate incentives to pursue new arbitrage opportunities. In sum, our goal in this Order is decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end-users, consistent with the tentative conclusion in the *NPRM* that bill and keep is the appropriate intercarrier compensation mechanism for ISP-bound traffic. In this regard, we emphasize that the rate caps we impose are not intended to reflect the costs incurred by each carrier that delivers ISP traffic. Some carriers' costs may be higher; some are probably lower. Rather, we conclude, based upon all of the evidence in this record, that these rates are appropriate limits on the amounts recovered from other carriers and provide a reasonable transition from rates that have (at least until recently) typically been much higher. Carriers whose costs exceed these rates are (and will continue to be) able to collect additional amounts from their ISP customers. As we note above, and explain in more detail below, we believe that such end-user recovery likely is the most efficient mechanism.

8. The basic structure of this transition is as follows:

* Beginning on the effective date of this Order, and continuing for six months, intercarrier compensation for ISP-bound traffic will be capped at a rate of \$.0015/minute-of-use (mou). Starting in the seventh month, and continuing for eighteen months, the rate will be capped at \$.0010/mou. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further Commission action (whichever is later), the rate will be capped at \$.0007/mou. Any additional costs incurred must be recovered from end-users. These rates reflect the downward trend in intercarrier compensation rates contained in recently negotiated interconnection agreements, suggesting that they are sufficient to provide a reasonable transition from dependence on intercarrier payments while ensuring cost recovery.

* We also impose a cap on total ISP-bound minutes for which a local exchange carrier (LEC) may receive this compensation. For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation for ISP-bound minutes up to a ceiling equal to the 2002 ceiling. These caps are consistent with projections of the growth of dial-up Internet access for the first two years of the transition and are necessary to ensure that such growth does not undermine our goal of limiting intercarrier compensation and beginning a transition toward bill and keep. Growth above these caps should be based on a carrier's ability to provide efficient service, not on any incentive to collect intercarrier payments.

* Because the transitional rates are *caps* on intercarrier compensation, they have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps or on a bill and keep basis (or otherwise have not required payment of

compensation for this traffic). The rate caps are designed to provide a transition toward bill and keep, and no transition is necessary for carriers already exchanging traffic at rates below the caps.

* In order to limit disputes and costly measures to identify ISP-bound traffic, we adopt a rebuttable presumption that traffic exchanged between LECs that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to the compensation mechanism set forth in this Order. This ratio is consistent with those adopted by state commissions to identify ISP or other convergent traffic that is subject to lower intercarrier compensation rates. Carriers that seek to rebut this presumption, by showing that traffic above the ratio is not ISP-bound traffic or, conversely, that traffic below the ratio is ISP-bound traffic, may seek appropriate relief from their state commissions pursuant to section 252 of the Act.

* Finally, the rate caps for ISP-bound traffic (or such lower rates as have been imposed by states commissions for the exchange of ISP-bound traffic) apply only if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate. An incumbent LEC that does not offer to exchange section 251(b)(5) traffic at these rates must exchange ISP-bound traffic at the state-approved or state-negotiated reciprocal compensation rates reflected in their contracts. The record fails to demonstrate that there are inherent differences between the costs of delivering a voice call to a local end-user and a data call to an ISP, thus the "mirroring" rule we adopt here requires that incumbent LECs pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic.

III. BACKGROUND

9. In the *Declaratory Ruling* released on February 26, 1999, we addressed the regulatory treatment of ISP-bound traffic. In that order, we reached several conclusions regarding the jurisdictional nature of this traffic, and we proposed several approaches to intercarrier compensation for ISP-bound traffic in an accompanying *Inter-carrier Compensation NPRM*. The order, however, was vacated and remanded on appeal.¹¹ This Order, therefore, again focuses on the regulatory treatment of ISP-bound traffic and the appropriate intercarrier compensation regime for carriers that collaborate to deliver traffic to ISPs.

10. As we noted in the *Declaratory Ruling*, an ISP's end-user customers typically access the Internet through an ISP server located in the same local calling area.¹² Customers generally pay their LEC a flat monthly fee for use of the local exchange network, including connections to their local ISP.¹³ They also generally pay their ISP a flat monthly fee for access to the Internet.¹⁴ ISPs then combine "computer processing, information storage, protocol

¹¹ See *Bell Atlantic*, 206 F.3d 1.

¹² *Declaratory Ruling*, 14 FCC Rcd at 3691.

¹³ *Declaratory Ruling*, 14 FCC Rcd at 3691.

¹⁴ *Declaratory Ruling*, 14 FCC Rcd at 3691.

argued that calls to ISPs are predominantly interstate for jurisdictional purposes because they terminate at the ultimate destination of the traffic in a distant website or e-mail server (*i.e.*, the "one call theory"). On the other hand, the court notes, the Commission has defended the ESP exemption by analogizing an ISP to a high-volume business user, such as a pizza parlor or travel agent, that has different usage patterns and longer call holding times than the average customer.⁵⁵

The court questioned whether any such differences should not, as some commenters argued, lend support to treating this traffic as "local" for purposes of section 251(b)(5). As discussed in further detail below, while we continue to believe that retaining the ESP exemption is important in order to facilitate growth of Internet services, we conclude in section IV.C.1, *infra*, that reciprocal compensation for ISP-bound traffic distorts the development of competitive markets.

30. We respond to the court's concerns, and seek to resolve these tensions, by reexamining the grounds for our conclusion that ISP-bound traffic falls outside the scope of section 251(b)(5). A more comprehensive review of the statute reveals that Congress intended to exempt certain enumerated categories of service from section 251(b)(5) when the service was provided to interexchange carriers or information service providers. The exemption focuses not only on the nature of the service, but on to whom the service is provided. For services that qualify, compensation is based on rules, regulations, and policies that preceded the 1996 Act and not on section 251(b)(5), which was minted by the Act. As we explain more fully below, the service provided by LECs to deliver traffic to an ISP constitutes, at a minimum, "information access" under section 251(g) and, thus, compensation for this service is not governed by section 251(b)(5), but instead by the Commission's policies for this traffic and the rules adopted under its section 201 authority.⁵⁶

2. Section 251(g) Excludes Certain Categories of Traffic from the Scope of "Telecommunications" Subject to Section 251(b)(5)

a. Background

31. Section 251(b)(5) imposes a duty on all local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."⁵⁷ On its face, local exchange carriers are required to establish reciprocal

⁵⁵ *Access Charge Reform Order*, 12 FCC Rcd at 16134 ("Internet access does generate different usage patterns and longer call holding times than average voice usage.").

⁵⁶ Some critics of the Commission's order may contend that we rely here on the same reasoning that the court rejected in *Bell Atlantic*. We acknowledge that there is a superficial resemblance between the Commission's previous order and this one: Here, as before, the Commission finds that ISP-bound traffic falls outside the scope of section 251(b)(5)'s reciprocal compensation requirement and within the Commission's access charge jurisdiction under section 201(b). The rationale underlying the two orders, however, differs substantially. Here the Commission bases its conclusion that ISP-bound traffic falls outside section 251(b)(5) on its construction of sections 251(g) and (i) -- not, as in the previous order, on the theory that section 251(b)(5) applies only to "local" telecommunications traffic and that ISP-bound traffic is interstate. Furthermore, to the extent the Commission continues to characterize ISP-bound traffic as interstate for purposes of its section 201 authority, it has sought in this Order to address in detail the *Bell Atlantic* court's concerns.

⁵⁷ 47 U.S.C. § 251(b)(5).

compensation arrangements for the transport and termination of *all* "telecommunications" they exchange with another telecommunications carrier, without exception. The Act separately defines "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."⁵⁸

32. Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic, -- *i.e.*, whenever a local exchange carrier exchanges telecommunications traffic with another carrier. Farther down in section 251, however, Congress explicitly exempts certain telecommunications services from the reciprocal compensation obligations. Section 251(g) provides:

On or after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier . . . shall provide exchange access, *information access*, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the [Federal Communications] Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.⁵⁹

33. The meaning of section 251(g) is admittedly not transparent. Indeed, section 251(g) clouds any plain reading of section 251(b)(5). Nevertheless, the Commission believes the two provisions can be read together consistently and in a manner faithful to Congress's intent.⁶⁰

b. Discussion

34. We conclude that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5).⁶¹ Thus, the statute does not mandate reciprocal compensation for "exchange

⁵⁸ 47 U.S.C. § 153(43).

⁵⁹ 47 U.S.C. § 251(g) (emphasis added).

⁶⁰ See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) ("It would be a gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. . . . But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency. . . . We can only enforce the clear limits that the 1996 Act contains.").

⁶¹ In the *Declaratory Ruling*, the Commission did not explain the relevance of section 251(g) nor discuss the categories of traffic exempted from reciprocal compensation by that provision, at least until the Commission should act otherwise. Reflecting this omission in the underlying order, the *Bell Atlantic* court does not mention the relationship of sections 251(g) and 251(b)(5), nor the enumerated categories of services referenced by subsection (g). Rather, the court focuses its review on the possible categorization of ISP-bound traffic as "local," terminology we now find inappropriate in light of the more express statutory language set forth in section 251(g).

access, information access, and exchange services for such access" provided to IXCs and information service providers. Because we interpret subsection (g) as a carve-out provision, the focus of our inquiry is on the universe of traffic that falls within subsection (g) and *not* the universe of traffic that falls within subsection (b)(5). This analysis differs from our analysis in the *Local Competition Order*, in which we attempted to describe the universe of traffic that falls within subsection (b)(5) as all "local" traffic. We also refrain from generically describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g).

35. We agree with the court that the issue before us requires more than just a jurisdictional analysis. Indeed, as the court recognized, the 1996 Act changed the historic relationship between the states and the federal government with respect to pricing matters.⁶² Instead, we focus upon the statutory language of section 251(b) as limited by 251(g). We believe this approach is not only consistent with the statute, but that it resolves the concerns expressed by the court in reviewing our previous analysis. Central to our modified analysis is the recognition that 251(g) is properly viewed as a limitation on the scope of section 251(b)(5) and that ISP-bound traffic falls under one or more of the categories set forth in section 251(g). For that reason, we conclude that ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5). We reach that conclusion regardless of the compensation mechanism that may be in place for such traffic under the ESP exemption.

36. We believe that the specific provisions of section 251(g) demonstrate that Congress did not intend to interfere with the Commission's pre-Act authority over "nondiscriminatory interconnection . . . obligations (including receipt of compensation)"⁶³ with respect to "exchange access, information access, and exchange services for such access" provided to IXCs or information service providers. We conclude that Congress specifically exempted the services enumerated under section 251(g) from the newly imposed reciprocal compensation requirement in order to ensure that section 251(b)(5) is not interpreted to override either existing or future regulations prescribed by the Commission.⁶⁴ We also find that ISP-bound traffic falls within at least one of the three enumerated categories in subsection (g).

⁶² *Bell Atlantic*, 206 F.3d at 6; see also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 377-87.

⁶³ Authority over rates (or "receipt of compensation") is a core feature of "equal access and nondiscriminatory interconnection" obligations. Indeed, one of the Commission's primary goals when designing an access charge regime was to ensure that access users were treated in a nondiscriminatory manner when interconnecting with LEC networks in order to transport interstate communications. See *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1101-1108, 1130-34 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985) (*NARUC v. FCC*).

⁶⁴ This view is consistent with previous Commission orders construing section 251(g). The Commission recognized in the *Advanced Services Remand Order*, for example, that section 251(g) preserves the requirements of the AT&T Consent Decree (see *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (hereinafter AT&T Consent Decree or Modification of Final Judgment ("MFJ")), but that order does not conclude that section 251(g) preserves *only* MFJ requirements. Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 et al., Order on Remand, 15 FCC Rcd 385, 407 (1999) (*Advanced Services Remand Order*). Indeed, the ultimate issue addressed in that part of the order was *not* the status or scope of section 251(g) as a carve-out provision at all, but rather the question -- irrelevant for our purposes here -- whether "information access" is a (continued....)

37. This limitation in section 251(g) makes sense when viewed in the overall context of the statute. All of the services specified in section 251(g) have one thing in common: they are all access services or services associated with access.⁶⁵ Before Congress enacted the 1996 Act, LECs provided access services to IXCs and to information service providers in order to connect calls that travel to points – both interstate and intrastate – beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time. It makes sense that Congress did not intend to disrupt these pre-existing relationships.⁶⁶ Accordingly, Congress excluded all such access traffic from the purview of section 251(b)(5).

38. At least one court has already affirmed the principle that the standards and obligations set forth in section 251 are not intended automatically to supersede the Commission's authority over the services enumerated under section 251(g). This question arose in the Eighth Circuit Court of Appeals with respect to the access that LECs provide to IXCs to originate and terminate interstate long-distance calls. Citing section 251(g), the court concluded that the Act contemplates that "LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the *pre-Act* regulations and rates."⁶⁷ In

(Continued from previous page)

category of service that is mutually exclusive of "exchange access," as the latter term is defined in section 3(16) of the Act. See *id.* at 407-08; see also *infra* para. 42 & note 76. By contrast, when the Commission first addressed the scope of the reciprocal compensation obligations of section 251(b)(5) in the *Local Competition Order*, it expressly cited section 251(g) in support of the decision to exempt from those obligations the tariffed interstate access services provided by all LECs (not just Bell companies subject to the MFJ) to interexchange carriers. 11 FCC Rcd at 16013. The *Bell Atlantic* court did not take issue with the Commission's earlier conclusion that section 251(b)(5) is so limited. 206 F.3d at 4. The interpretation we adopt here – that section 251(g) exempts from section 251(b)(5) information access services provided to information service providers, as well as access provided to IXCs – thus is fully consistent with the Commission's initial construction of section 251(g), in the *Local Competition Order*, as extending beyond the MFJ to *our own* access rules and policies.

⁶⁵ The term "exchange service" as used in section 251(g) is not defined in the Act or in the MFJ. Rather, the term "exchange service" is used in the MFJ as part of the definition of the term "exchange access," which the MFJ defines as "the provision of exchange services for the purpose of originating or terminating interexchange telecommunications." *United States v. AT&T*, 552 F. Supp. at 228. Thus, the term "exchange service" appears to mean, in context, the provision of services in connection with *interexchange* communications. Consistent with that, in section 251(g), the term is used as part of the longer phrase "exchange services for such [exchange] access to interexchange carriers and information service providers." The phrasing in section 251(g) thus parallels the MFJ. All of this indicates that the term "exchange service" is closely related to the provision of exchange access and information access.

⁶⁶ Although section 251(g) does not itself compel this outcome with respect to *intrastate* access regimes (because it expressly preserves only *the Commission's* traditional policies and authority over *interstate* access services), it nevertheless highlights an ambiguity in the scope of "telecommunications" subject to section 251(b)(5) -- demonstrating that the term must be construed in light of other provisions in the statute. In this regard, we again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because "it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms." *Local Competition Order*, 11 FCC Rcd at 15869.

⁶⁷ *CompTel*, 117 F.3d at 1073 (emphasis added). The court continued that the Commission would be free under section 201 to alter its traditional regulatory treatment of interstate access service in the future, but that the standards set out in sections 251 and 252 would *not* be controlling. *Id.*

CompTel, the IXCs had argued that the interstate access services that LECs provide properly fell within the scope of "interconnection" under section 251(c)(2), and that, notwithstanding the carve-out of section 251(g), access charges therefore should be governed by the cost-based standard of section 252(d)(1), rather than determined under the Commission's section 201 authority. The Eighth Circuit rejected that argument, holding that access service does not fall within the scope of section 251(c)(2), and observing that "it is clear from the Act that Congress did *not* intend all access charges to move to cost-based pricing, at least not immediately."⁶⁸ Neither the court nor the parties in *CompTel* distinguished between the situation in which *one* LEC provides access service (directly linking the end-user to the IXC) and the situation here in which *two* LECs collaborate to provide access to either an information service provider or IXC. In both circumstances, by its underlying rationale, *CompTel* serves as precedent for establishing that pre-existing regulatory treatment of the services enumerated under section 251(g) are carved out from the purview of section 251(b).

39. Accordingly, unless and until the Commission by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g). These services thus remain subject to Commission jurisdiction under section 201 (or, to the extent they are *intrastate* services, they remain subject to the jurisdiction of state commissions), whether those obligations implicate pricing policies as in *CompTel* or reciprocal compensation.⁶⁹ This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic. Section 251(g) expressly preserves the Commission's rules and policies governing "access . . . to information service providers" in the same manner as rules and policies governing access to IXCs.⁷⁰ As we discuss in more detail

⁶⁸ *CompTel*, 117 F.3d at 1072 (emphasis added).

⁶⁹ For further discussion of the jurisdictionally interstate nature of ISP-bound traffic, see *infra* paras. 55-64. See also *NARUC v. FCC*, 737 F.2d at 1136 (determining that traffic to ESPs may properly constitute interstate access traffic); Access Billing Requirements for Joint Service Provision, CC Docket 87-579, Memorandum Opinion and Order, 4 FCC Rcd 7183 (1989).

⁷⁰ The Commission has historically dictated the pricing policies applicable to services provided by LECs to information service providers, although those policies differ from those applicable to LEC provision of access services to IXCs. Prior to the 1996 Act, it was the Commission that determined that ESPs either may purchase their interstate access services from interstate tariffs or (at their discretion) pay a combination of local business line rates, the *federal* subscriber line charges associated with those business lines, and, where appropriate, the *federal* special access surcharge. See note 105, *infra*. We conclude that section 251(g) preserves our ability to continue to dictate the pricing policies applicable to this category of traffic. We do not believe, moreover, that section 251(g) extends only to those specific carriers providing service on February 7, 1996. At the very least, subsection (g) is ambiguous on this point. On the one hand, the first sentence of this provision states that its terms apply to "each local exchange carrier, to the extent that it provides wireline services," without regard to whether it may be a BOC or a competitive LEC. 47 U.S.C. § 251(g). On the other hand, that same sentence refers to restrictions and obligations applicable to "such carrier" prior to February 8, 1996. *Id.* We believe that the most reasonable interpretation of that sentence, in this context, is that subsection (g) was intended to preserve pre-existing regulatory treatment for the enumerated categories of carriers, rather than requiring disparate treatment depending upon whether the LEC involved came into existence before or after February 1996.

below, ISP-bound traffic falls under the rubric of "information access," a legacy term carried over from the MFJ.⁷¹

40. By its express terms, of course, section 251(g) permits the Commission to supersede pre-Act requirements for interstate access services. Therefore the Commission may make an affirmative determination to adopt rules that subject such traffic to obligations different than those that existed pre-Act. For example, consistent with that authority, the Commission has previously made the affirmative determination that certain categories of interstate access traffic should be subject to section 251(c)(4).⁷² Similarly, in implementing section 251(c)(3), the Commission has required incumbent LECs to unbundle certain network elements used in the provision of xDSL-based services.⁷³ In this instance, however, for the reasons set forth below,⁷⁴ we decline to modify the restraints imposed by section 251(g) and instead continue to regulate ISP-bound traffic under section 201.

41. Some may argue that, although the Commission did not analyze subsection (g) in the *Declaratory Ruling*, a passing reference to section 251(g) in one paragraph of the Commission's brief filed with the court in that proceeding suggests that the argument we make here has been specifically rejected by the court. We disagree. Because our analysis of subsection (g) was not raised in the order, the court, under established precedent, probably did not consider the argument when rendering its decision.⁷⁵ Indeed, subsection (g) is not mentioned in the court's opinion.

3. ISP-Bound Traffic Falls within the Categories Enumerated in Section 251(g)

42. Having determined that section 251(g) serves as a limitation on the scope of "telecommunications" embraced by section 251(b)(5), the next step in our inquiry is to determine whether ISP-bound traffic falls within one or more of the categories specified in section 251(g): exchange access, information access, and exchange services for such access provided to IXCs and information service providers. Regardless of whether this traffic falls under the category of

⁷¹ See *United States v. AT&T*, 552 F. Supp. at 229; *Advanced Services Remand Order*, 15 FCC Rcd at 406-08.

⁷² See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237 (1997), *petition for review pending*, *Ass'n of Communications Enterprises v. FCC*, D.C. Circuit No. 00-1144. In effect, we have provided for concurrent authority under that provision and section 201 by permitting a party to purchase the same service under filed tariffs or to proceed under interconnection arrangements to secure resale services.

⁷³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3775 (1999). See also *Advanced Services Remand Order*, 15 FCC Rcd at 385, 386. We emphasize that these two examples are illustrative and may not be the only instances where the Commission chooses to supersede pre-Act requirements for interstate access services.

⁷⁴ See *infra* paras. 67-71.

⁷⁵ See, e.g., *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

"exchange access" -- an issue pending before the D.C. Circuit in a separate proceeding⁷⁶ - - we conclude that this traffic, at a minimum, falls under the rubric of "information access," a legacy term imported into the 1996 Act from the MFJ, but not expressly defined in the Communications Act.

a. Background

43. Section 251(g) by its terms indicates that, in the provision of exchange access, information access, and exchange services for such access to IXCs and information service providers, various pre-existing requirements and obligations "including receipt of compensation" are preserved, whether these obligations stem from "any court order, *consent decree*, or regulation, order or policy of the Commission." (Emphasis added.) Similarly, in discussing this provision, the Joint Explanatory Statement of the Committee of Conference explicitly refers to preserving the obligations under the "AT&T Consent Decree."⁷⁷

b. Discussion

44. We conclude that Congress's reference to "information access" in section 251(g) was intended to incorporate the meaning of the phrase "information access" as used in the AT&T Consent Decree.⁷⁸ The ISP-bound traffic at issue here falls within that category because it is traffic destined for an information service provider.⁷⁹ Under the consent decree, "information access" was purchased by "information service providers" and was defined as "the provision of specialized exchange telecommunications services . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services."⁸⁰ We conclude that this definition of "information access" was meant to include all access traffic that was routed by a LEC "to or from" providers of information services, of which ISPs are a subset.⁸¹ The record in this

⁷⁶ See *Worldcom, Inc. v. FCC*, No. 00-1022 et al. (D.C. Cir.). In that proceeding, the Commission has argued that the category previously labeled "information access" under the MFJ is a subset of those services now falling under the category "exchange access" as set forth in section 3(16) of the Act, 47 U.S.C. 153(16), while incumbent LECs and others have argued that the two categories are mutually exclusive. We need not reargue here whether "information access" is a subset of "exchange access" or whether instead they are mutually exclusive categories. The only issue relevant to our section 251(g) inquiry in this case is whether ISP-bound traffic falls, at a minimum, within the legacy category of "information access." Both the Commission and incumbent LECs have agreed that the access provided to ISPs satisfies the definition of information access.

⁷⁷ *Joint Explanatory Statement of the Committee of Conference*, S. Conf. Rep. No. 230, 104th Cong., 2d Session at 123 (February 1, 1996).

⁷⁸ *United States v. AT&T*, 552 F. Supp. at 196, 229.

⁷⁹ See Letter from Gary L. Phillips, SBC, to Jon Nuechterlein, Deputy General Counsel, FCC, at 9 (Dec. 14, 2000) (stating that section 251(g) applies by its very terms to "information access").

⁸⁰ *United States v. AT&T*, 552 F. Supp. at 196, 229.

⁸¹ This finding is consistent with our past statements on the issue. In the *Non-Accounting Safeguards Order*, we found that the access that LECs provide to enhanced service providers, including ISPs, constitutes "information access" as the MFJ defines that term. Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed (continued....)

proceeding also supports our interpretation.⁸² When Congress passed the 1996 Act, it adopted new terminology. The term "information access" is not, therefore, part of the new statutory framework. Because the legacy term "information access" in section 251(g) encompasses ISP-bound traffic, however, this traffic is excepted from the scope of the "telecommunications" subject to reciprocal compensation under section 251(b)(5).

45. We recognize, as noted earlier, that based on the rationale of the *Declaratory Ruling*, the court indicated that the question whether this traffic was "local or interstate" was critical to a determination of whether ISP-bound traffic should be subject to reciprocal compensation.⁸³ We believe that the court's assessment was a result of our statement in paragraph nine of the *Declaratory Ruling* that "when two carriers collaborate to complete a *local call*, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act."⁸⁴ We were mistaken to have characterized the issue in that manner, rather than properly (and more naturally) interpreting the scope of "telecommunications" within section 251(b)(5) as being limited by section 251(g). By indicating that all "local calls," however defined, would be subject to reciprocal compensation obligations under the Act, we overlooked the interplay between these two inter-related provisions of section 251 -- subsections (b) and (g). Further, we created unnecessary ambiguity for ourselves, and the court, because the statute does not define the term "local call," and thus that term could be interpreted as meaning either traffic subject to local rates or traffic that is *jurisdictionally* intrastate. In the context of ISP-bound traffic, as the court observed, our use of the term "local" created a tension that undermined the prior order because the ESP

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Rulemaking, 11 FCC Rcd 21905, 22024 & n.621 (1996). Although we subsequently overruled our statement in that order that ISPs do not also purchase "exchange access" under section 3(16), we have not altered our finding that the access provided to enhanced service providers (including ISPs) is "information access." *Advanced Services Remand Order*, 15 FCC Rcd at 404-05.

⁸² See, e.g., Letter from Gary L. Phillips, SBC, to Jon Nuechterlein, Deputy General Counsel, FCC, at 9 (Dec. 14, 2000). Some have argued that "information access" includes only certain specialized functions unique to the needs of enhanced service providers and does not include basic telecommunications links used to provide enhanced service providers with access to the LEC network. See, e.g., Brief of WorldCom, Inc., D.C. Circuit No. 00-1002, *et al.*, filed Oct. 3, 2000, at 16 n.12. The MFJ definition of information access, however, includes the telecommunications links used for the "origination, termination, [and] transmission" of information services, and "where necessary, the provision of network signalling" and other functions. *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). Others have argued that the "information access" definition engrafts a geographic limitation that renders this service category a subset of telephone exchange service. See Letter from Richard Rindler, Swindler, Berlin, to Magalie Roman Salas, Secretary, FCC, at 3 (Apr. 12, 2001). We reject that strained interpretation. Although it is true that "information access" is necessarily initiated "in an exchange area," the MFJ definition states that the service is provided "in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services" *United States v. AT&T*, 552 F. Supp. at 229 (emphasis added). Significantly, the definition does not further require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic.

⁸³ *Bell Atlantic*, 206 F.3d at 5.

⁸⁴ *Declaratory Ruling*, 14 FCC Rcd at 3695 (emphasis added).

exemption permitted ISPs to purchase access through local business tariffs,⁸⁵ yet the jurisdictional nature of this traffic has long been recognized as interstate.

46. For similar reasons, we modify our analysis and conclusion in the *Local Competition Order*.⁸⁶ There we held that "[t]ransport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 251(d)(2)." We now hold that the telecommunications subject to those provisions are all such telecommunications not excluded by section 251(g). In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase "local traffic" created unnecessary ambiguities, and we correct that mistake here.

47. We note that the exchange of traffic between LECs and commercial mobile radio service (CMRS) providers is subject to a slightly different analysis. In the *Local Competition Order*, the Commission noted its jurisdiction to regulate LEC-CMRS interconnection under section 332 of the Act⁸⁷ but decided, at its option, to apply sections 251 and 252 to LEC-CMRS interconnection.⁸⁸ At that time, the Commission declined to delineate the precise contours of or the relationship between its jurisdiction over LEC-CMRS interconnection under sections 251 and 332,⁸⁹ but it made clear that it was not rejecting section 332 as an independent basis for jurisdiction.⁹⁰ The Commission went on to conclude that section 251(b)(5) obligations extend to traffic transmitted between LECs and CMRS providers, because the latter are telecommunications carriers.⁹¹ The Commission also held that reciprocal compensation, rather than interstate or intrastate access charges, applies to LEC-CMRS traffic that originates and terminates within the same Major Trading Area (MTA).⁹² In so holding, the Commission expressly relied on its "authority under section 251(g) to preserve the current interstate access charge regime" to ensure that interstate access charges would be assessed only for traffic "currently subject to interstate access charges,"⁹³ although the Commission's section 332 jurisdiction could serve as an alternative basis to reach this result. Thus the analysis we adopt in this Order, that section 251(g) limits the scope of section 251(b)(5), does not affect either the

⁸⁵ This is the compensation mechanism chosen by the ISPs. See note 105, *infra*.

⁸⁶ *Local Competition Order*, 11 FCC Rcd at 1033-34.

⁸⁷ 47 U.S.C. § 332; *Local Competition Order*, 11 FCC Rcd at 16005-06.

⁸⁸ *Local Competition Order*, 11 FCC Rcd at 16005-06; see also *Iowa Utils. Bd. v. FCC*, 120 F.3d at 800 n. 21 (finding that the Commission had jurisdiction under section 332 to issue rules regarding LEC-CMRS interconnection, including reciprocal compensation rules).

⁸⁹ We seek comment on these issues in the *NPRM*.

⁹⁰ *Local Competition Order*, 11 FCC Rcd at 16005.

⁹¹ *Id.* at 16016.

⁹² *Id.* at 16016-17.

⁹³ *Id.* at 16017.

application of the latter section to LEC-CMRS interconnection or our jurisdiction over LEC-CMRS interconnection under section 332.

4. Section 251(i) Preserves the Commission's Authority to Regulate Interstate Access Services

48. Congress also included a "savings provision" – subpart (i) – in section 251, which provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."⁹⁴ Under section 201, the Commission has the authority to regulate the *interstate* access services that LECs provide to connect end-users with IXCs or information service providers to originate and terminate calls that travel across state lines.

49. We conclude that subpart (i) provides additional support for our finding that Congress has granted us the authority on a going-forward basis to establish a compensation regime for ISP-bound traffic.⁹⁵ When read as a whole, the most natural reading of section 251 is as follows: subsection (b) sets forth reciprocal compensation requirements for the transport and termination of "telecommunications"; subsection (g) excludes certain access services (including ISP-bound traffic) from that requirement; and subsection (i) ensures that, on a going-forward basis, the Commission has the authority to establish pricing for, and otherwise to regulate, interstate access services.

50. When viewed in the overall context of section 251, subsections (g) and (i) serve compatible, but different, purposes. Subsection (g) preserves rules and regulations that existed at the time Congress passed the 1996 Act, and thus functions primarily as a "backward-looking" provision (although it does grant the Commission the authority to supersede existing regulations). In contrast, we interpret section 251(i) to be a "forward-looking" provision. Thus, subsection (i) expressly affirms the Commission's role in an evolving telecommunications marketplace, in which Congress anticipates that the Commission will continue to develop appropriate pricing and compensation mechanisms for traffic that falls within the purview of section 201. This reading of section 251 is consistent with the notion that section 251 generally broadens the Commission's duties, particularly in the pricing context.⁹⁶

51. We expect that, as new network architectures emerge, the nature of telecommunications traffic will continue to evolve. As we have already observed, since Congress passed the 1996 Act, customer usage patterns have changed dramatically; carriers are sending traffic over networks in new and different formats; and manufacturers are adding creative features and developing innovative network architectures. Although we cannot

⁹⁴ 47 U.S.C. § 251(i).

⁹⁵ See also Letter from Gary L. Phillips, SBC, to Jon Nuechterlein, Deputy General Counsel, FCC, at 8 (Dec. 14, 2000).

⁹⁶ For example, section 251 has expanded upon our historic functions by providing us with the authority to set the framework for pricing rules applicable to unbundled network elements, purchased under interconnection agreements.

local service, we now embrace a different conceptualization that we believe more accurately reflects the nature of ISP service.

65. For the foregoing reasons, consistent with our longstanding precedent, we find that we continue to have jurisdiction under section 201, as preserved by section 251(i), to provide a compensation mechanism for ISP-bound traffic.

C. Efficient Intercarrier Compensation Rates and Rate Structures

66. Carriers currently recover the costs of call transport and termination through some combination of carrier access charges, reciprocal compensation, and end-user charges, depending upon the applicable regulatory regime. Having concluded that ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5), we must now determine, pursuant to our section 201 authority, what compensation mechanism is appropriate when carriers collaborate to deliver calls to ISPs. In the companion *NPRM*, we consider the desirability of adopting a uniform intercarrier compensation mechanism, applicable to all traffic exchanged among telecommunications carriers, and, in that context, we intend to examine the merits of a bill and keep regime for all types of traffic, including ISP-bound traffic. In the meantime, however, we must adopt an interim intercarrier compensation rule to govern the exchange of ISP-bound traffic, pending the outcome of the *NPRM*. In particular, we must decide whether to impose (i) a "calling-party's-network-pays" (CPNP) regime, like reciprocal compensation, in which the calling party's network pays the network serving the ISP; (ii) a bill and keep regime in which all networks recover costs from their end-user customers and are obligated to deliver calls that originate on the networks of interconnecting carriers; or (iii) some other cost recovery mechanism. As set forth more fully below, our immediate goal in adopting an interim compensation mechanism is to address the market distortions created by the prevailing intercarrier compensation regime, even as we evaluate in a parallel proceeding what longer-term intercarrier compensation mechanisms are appropriate for this and other types of traffic.

1. CPNP Regimes Have Distorted the Development of Competitive Markets

67. For the reasons detailed below, we believe that a bill and keep approach to recovering the costs of delivering ISP-bound traffic is likely to be more economically efficient than recovering these costs from originating carriers. In particular, requiring carriers to recover the costs of delivering traffic to ISP customers directly from those customers is likely to send appropriate market signals and substantially eliminate existing opportunities for regulatory arbitrage. As noted above, we consider issues related to the broader application of bill and keep as an intercarrier compensation regime in conjunction with the *NPRM* that we are adopting concurrently with this Order. In this Order, however, we adopt an interim compensation mechanism for the delivery of ISP-bound traffic that addresses the regulatory arbitrage opportunities present in the existing carrier-to-carrier payments by limiting carriers' opportunity to recover costs from other carriers and requiring them to recover a greater share of their costs from their ISP customers.

68. In most states, reciprocal compensation governs the exchange of ISP-bound traffic

between local carriers.¹²⁷ Reciprocal compensation is a CPNP regime in which the originating carrier pays an interconnecting carrier for "transport and termination," *i.e.*, for transport from the networks' point of interconnection and for any tandem and end-office switching.¹²⁸ The central problem with any CPNP regime is that carriers recover their costs not only from their end-user customers, but also from *other carriers*.¹²⁹ Because intercarrier compensation rates do not reflect the degree to which the carrier can recover costs from its end-users, payments from other carriers may enable a carrier to offer service to its customers at rates that bear little relationship to its actual costs, thereby gaining an advantage over its competitors. Carriers thus have the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic that will generate high reciprocal compensation payments.¹³⁰ To the extent that carriers offer these customers below cost retail rates subsidized by intercarrier compensation, these customers do not receive accurate price signals. Moreover, because the originating LEC typically charges its customers averaged rates, the originating end-user receives inaccurate price signals as the costs associated with the intercarrier payments are recovered through rates averaged across all of the originating carrier's end-users. Thus no subscriber faces a price that fully reflects the intercarrier payments. An ISP subscriber with extensive Internet usage may, for example, cause her LEC to incur substantial reciprocal compensation obligations to the LEC that serves her ISP, but that subscriber receives no price signals reflecting those costs because they are spread over all of her LEC's customers.

69. The resulting market distortions are most apparent in the case of ISP-bound traffic due primarily to the one-way nature of this traffic, and to the tremendous growth in dial-up Internet access since passage of the 1996 Act. Competitive carriers, regardless of the nature of their customer base, exchange traffic with the incumbent LECs at rates based on the incumbents' costs.¹³¹ To the extent the traffic exchange is roughly balanced, as is typically the case when LECs exchange voice traffic, it matters little if rates reflect costs because payments in one direction are largely offset by payments in the other direction. The rapid growth in dial-up Internet use, however, created the opportunity to serve customers with large volumes of

¹²⁷ In the *Declaratory Ruling*, we stated that, pending adoption of a federal rule governing intercarrier compensation for ISP-bound traffic, state commissions would determine whether reciprocal compensation was due for such traffic. *Declaratory Ruling*, 14 FCC Rcd at 3706. Since that time, most, though not all, states have ordered the payment of reciprocal compensation for ISP-bound traffic.

¹²⁸ 47 C.F.R. § 51.703(a).

¹²⁹ Recovery from other carriers is premised on the economic assumption that the carrier whose customer originates the call has "caused" the transport and termination costs associated with that call, and the originating carrier should, therefore, reimburse the interconnecting carrier for "transport and termination." The companion *NPRM* evaluates the validity of that assumption and tentatively concludes that it is an incorrect premise.

¹³⁰ *Cf. Local Competition Order*, 11 FCC Rcd at 16043 (symmetrical termination payments to paging providers based on ILECs' costs "might create uneconomic incentives for paging providers to generate traffic simply in order to receive termination compensation").

¹³¹ 47 C.F.R. § 51.705 (an incumbent LEC's rates for transport and termination shall be established on the basis of the forward-looking economic costs of such offerings); 47 C.F.R. § 51.711 (subject to certain exceptions, rates for transport and termination shall be symmetrical and equal to those that the incumbent LEC assesses upon other carriers for the same services).

exclusively *incoming* traffic. And, for the reasons discussed above, the reciprocal compensation regime created an incentive to target those customers with little regard to the costs of serving them – because a carrier would be able to collect some or all of those costs from *other* carriers that would themselves be unable to flow these costs through to their own customers in a cost-causative manner.

70. The record is replete with evidence that reciprocal compensation provides enormous incentive for CLECs to target ISP customers. The four largest ILECs indicate that CLECs, on average, terminate eighteen times more traffic than they originate, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic.¹³² Verizon states that it sends CLECs, on average, twenty-one times more traffic than it receives, and some CLECs receive more than forty times more traffic than they originate.¹³³ Although there may be sound business reasons for a CLEC's decision to serve a particular niche market, the record strongly suggests that CLECs target ISPs in large part because of the availability of reciprocal compensation payments.¹³⁴ Indeed, some ISPs even seek to become CLECs in order to share in the reciprocal compensation windfall, and, for a small number of entities, this revenue stream provided an inducement to fraudulent schemes to generate dial-up minutes.¹³⁵

71. For these reasons, we believe that the application of a CPNP regime, such as reciprocal compensation, to ISP-bound traffic undermines the operation of competitive markets.¹³⁶ ISPs do not receive accurate price signals from carriers that compete, not on the basis of the quality and efficiency of the services they provide, but on the basis of their ability to shift costs to other carriers. Efficient prices result when carriers offer the lowest possible rates based on the costs of the service they provide to ISPs, not when they can price their services without regard to cost. We are concerned that viable, long-term competition among efficient providers of local exchange and exchange access services cannot be sustained where the intercarrier compensation regime does not reward efficiency and may produce retail rates that do not reflect the costs of the services provided. As we explain in greater detail in the companion *NPRM*, we

¹³² Letter from Robert T. Blau, BellSouth, to Magalie Roman Salas, Secretary, FCC (November 6, 2000); *see also* Verizon Remand Comments at 2 (Verizon will be billed more than one billion dollars in 2000 for Internet-bound calls); Letter from Richard J. Metzger, Focal, to Deena Shetler, Legal Advisor to Commissioner Gloria Tristani, FCC (Jan. 11, 2001)(ILECs owed \$1.98 billion in reciprocal compensation to CLECs in 2000).

¹³³ Verizon Remand Comments at 11, 21. Verizon also cites extreme cases of CLECs that terminate in excess of *eight thousand* times more traffic than they originate. *Id.* at 21. *See also* Letter from Robert T. Blau, BellSouth; Melissa Newman, Qwest; Priscilla Hill-Ardoin, SBC; and Susanne Guyer, Verizon, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC (Nov. 9, 2000).

¹³⁴ *See, e.g.*, Verizon Remand Comments at 15 (citing case of CLEC offer of free long distance service to dial-up Internet customers, an offer it did not extend to its customers that accessed the Internet via cable modem or DSL service); SBC Remand Comments at 45 (citing examples of CLEC offering free service to ISPs that collocated in its switching centers and CLECs offering to share reciprocal compensation revenues with ISPs).

¹³⁵ *See, e.g.*, Verizon Remand Comments at 17-18.

¹³⁶ The *NPRM* that we adopt in conjunction with this Order seeks comment on the degree to which a modified CPNP regime might address these concerns.

believe that a compensation regime, such as bill and keep, that requires carriers to recover more of their costs from end-users may avoid these problems.

72. We acknowledge that we did not always hold this view. In the *Local Competition Order*, the Commission concluded that state commissions may impose bill and keep arrangements for traffic subject to section 251(b)(5) *only* when the flow of traffic between interconnected carriers is roughly balanced and is expected to remain so.¹³⁷ The Commission reasoned that "bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to overuse competing carriers' *termination* facilities by seeking customers that primarily *originate* traffic."¹³⁸ The concerns about the opportunity for cost recovery and economic efficiency are not present, however, to the extent that traffic between carriers is balanced and payments from one carrier will be offset by payments from the other carrier. In these circumstances, the Commission found that bill and keep arrangements may minimize administrative burdens and transaction costs.¹³⁹

73. Since that time, we have observed the development of competition in the local exchange market, and we now believe that the Commission's concerns about economic inefficiencies associated with bill and keep missed the mark, particularly as applied to ISP-bound traffic. The Commission appears to have assumed, at least implicitly, that the calling party was the sole cost causer of the call, and it may have overstated any incentives that a bill and keep regime creates to target customers that primarily originate traffic. A carrier must provide originating switching functions and must recover the costs of those functions from the originating end-user, not from other carriers. Originating traffic thus lacks the same opportunity for cost-shifting that reciprocal compensation provides with respect to serving customers with disproportionately incoming traffic. Indeed, it has become apparent that the obligation to pay reciprocal compensation to interconnecting carriers may give rise to uneconomic incentives. As the current controversy about ISP-bound traffic demonstrates, reciprocal compensation encourages carriers to overuse competing carriers' *origination* facilities by seeking customers that *receive* high volumes of traffic.

74. We believe that a bill and keep regime for ISP-bound traffic may eliminate these incentives and concomitant opportunity for regulatory arbitrage by forcing carriers to look only to their ISP customers, rather than to other carriers, for cost recovery. As a result, the rates paid by ISPs and, consequently, their customers should better reflect the costs of services to which they subscribe. Potential subscribers should receive more accurate price signals, and the market should reward efficient providers.¹⁴⁰ Although we do not reach any firm conclusions about bill and keep as a permanent mechanism for this or any other traffic, our evaluation of the record evidence to date strongly suggests that bill and keep is likely to provide a viable solution to the

¹³⁷ *Local Competition Order*, 11 FCC Rcd at 16054-55; see also 47 C.F.R. § 51.713(b).

¹³⁸ *Local Competition Order*, 11 FCC Rcd at 16055 (emphases added).

¹³⁹ *Id.* at 16055.

¹⁴⁰ We also note that bill and keep arrangements are common among entities providing Internet backbone services, where the larger carriers engage in so-called "peering" arrangements.

market distortions caused by the application of reciprocal compensation to ISP-bound traffic. We take that observation into account, below, as we fashion an interim compensation mechanism for this traffic.

75. Bill and keep also may address the problem regulators face in setting intercarrier compensation rates that correlate to the costs carriers incur to carry traffic that originates on other networks. The record suggests that market distortions appear to have been exacerbated by the prevalence of excessively high reciprocal compensation rates. Many CLECs argue that the current traffic imbalances between CLECs and ILECs are the product of greediness on the part of ILECs that insisted on above-cost reciprocal compensation rates in the course of negotiating or arbitrating initial interconnection agreements.¹⁴¹ CLECs argue that, because these rates were artificially high, they naturally responded by seeking customers with large volumes of incoming traffic. If the parties or regulatory bodies merely set cost-based rates and rate structures, they argue, arbitrage opportunities and the resulting windfalls would disappear.¹⁴² They note that reciprocal compensation rates have fallen dramatically as initial agreements expire and the parties negotiate new agreements.¹⁴³

76. We do not believe that the solution to the current problem is as simple as the CLECs suggest.¹⁴⁴ We seek comment in the accompanying *NPRM* on the potential for a modified CPNP regime, such as the CLECs advocate, to solve some of the problems we identify here. We are convinced, however, that intercarrier payments for ISP-bound traffic have created severe market distortions. Although it would be premature to institute a full bill and keep regime before resolving the questions presented in the *NPRM*,¹⁴⁵ in seeking to remedy an exigent market problem, we cannot ignore the evidence we have accumulated to date that suggests that a bill and keep regime has very fundamental advantages over a CPNP regime for ISP-bound traffic. Contrary to the view espoused by CLECs, we are concerned that the market distortions caused by applying a CPNP regime to ISP-bound traffic cannot be cured by regulators or carriers simply attempting to "get the rate right." A few examples may illustrate the vexing problems regulators face. Reciprocal compensation rates have been determined on the basis of the ILEC's average costs of transport and termination. These rates do not, therefore, reflect the costs incurred by any

¹⁴¹ Time Warner Remand Comments at 15-16.

¹⁴² Time Warner Remand Comments at 16. Some parties suggest that a bifurcated rate structure (a call set-up charge and a minute of use charge) would ensure appropriate cost recovery. See Sprint Remand Comments at 2-4. We seek comment on this approach in the *NPRM*.

¹⁴³ See *infra* note 158.

¹⁴⁴ We note that many CLECs expressed the same view following adoption of the *Declaratory Ruling* in 1999, yet the problems persist. See, e.g., Cox Reply Comments at 6 (If termination "rates are too high, this is entirely at the ILEC's behest, and should be remedied in the next round of negotiations.").

¹⁴⁵ A number of questions must be resolved before we are prepared to implement fully a bill and keep regime where most costs are recovered from end-users. (We say most, not all, costs are recovered from end-users because a bill and keep regime may include intercarrier charges for transport between networks.) These questions include, for example, the allocation of transport costs between interconnecting carriers and the effect on retail prices of adopting a bill and keep regime that is not limited to ISP-bound traffic. We seek comment on these and other issues in the accompanying intercarrier *NPRM*.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of Global NAPs,)
 Inc. for Arbitration of Interconnection Rates,)
 Terms, and Conditions and Related Arrange-) Case No. 01-2811-TP-ARB
 ments with United Telephone Company of)
 Ohio dba Sprint.)

In the Matter of the Petition of Global NAPs,)
 Inc. for Arbitration of Interconnection Rates,) Case No. 01-3096-TP-ARB
 Terms, and Conditions and Related Arrange-)
 ments with Ameritech Ohio.)

ARBITRATION AWARD

The Commission, considering the arbitration petitions, the evidence of record, posthearing briefs, the arbitration panel report and the exceptions and replies thereto, and being otherwise fully advised, hereby issues its arbitration award.

APPEARANCES:

Bricker & Eckler, LLP, by Mr. Thomas O'Brien, 100 South Third Street, Columbus, Ohio 43215 and Mr. William J. Rooney, Jr., 10 Merrymount Road, Quincy, Massachusetts 02169, on behalf of Global NAPs, Inc.

Mr. Joseph R. Stewart, 50 West Broad Street, Suite 3600, Columbus, Ohio 43215, on behalf of United Telephone Company of Ohio dba Sprint.

Porter, Wright, Morris & Arthur, by Messrs. Mark S. Stemm and Andrew C. Emerson, 41 South High Street, Columbus, Ohio 43215, on behalf of Ameritech Ohio.

ARBITRATION AWARD:

I. Background

On March 2, 2001, and May 23, 2001, Global NAPs, Inc. (GNAPs) served, respectively, upon Ameritech Ohio (Ameritech) and United Telephone Company of Ohio dba Sprint (Sprint) a written request to negotiate the terms of an interconnection agreement. GNAPs served its written requests pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the Act).¹ Section 252(b)(1) of the Act provides that, if the parties are unable to reach an agreement on the terms and conditions for interconnection, a requesting carrier may petition a state commission to arbitrate any unresolved issues. On July 18, 1996, this Commission established guidelines to carry out its duties under Section 252 of the Act. See, *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC (July 18, 1996). Under those guidelines, an arbitration panel, composed of

¹ Codified at 47 U.S.C. 151 et seq.

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- (4) Can GNAPs assign to its customers NXX codes that are "homed" in a central office switch outside of the local calling area in which the customer resides?
- (5) Is it reasonable for the parties to include language in the agreement that expressly requires the parties to renegotiate reciprocal compensation obligations if current law is overturned or otherwise revised?

The arbitration hearing was held on February 19, 2002. At the hearing, GNAPs presented the testimony of Mr. Scott C. Lundquist. Sprint presented the testimony of Mr. Michael R. Hunsucker. Ameritech presented the testimony of Mr. Craig Mindell. In lieu of oral argument, the parties, as agreed during the prehearing conference, filed post-hearing briefs.

On March 28, 2002, the Panel issued a report of recommendations for resolving the issues presented for arbitration. GNAPs and Sprint filed timely exceptions on April 4, 2002. GNAPs filed exceptions to issues numbered 2 and 4. Sprint filed exceptions or, depending upon the Panel's intent, a request for clarification of the Panel's recommendation for issue 2. Ameritech did not file exceptions. The parties filed replies to exceptions on April 11, 2002.

II. Issues for Arbitration

1. Should GNAPs Be Required to Install More than One Point of Interconnection per LATA?

The Panel determined this issue to be resolved and recommended GNAPs be permitted to establish one POI per LATA. The Panel noted that its recommendation was consistent with Commission precedent and the Local Service Guidelines adopted in Case No. 95-845-TP-COI (845). None of the parties filed exceptions to the Panel's recommendation.

The Commission adopts the Panel's recommendation. It is consistent with this Commission's Local Service Guidelines and previous Commission arbitration awards in Case Nos. 96-1011-TP-ARB² and 00-1188-TP-ARB,³ as well as 47 C.F.R. §51.305.

2. Should Each Party Be Responsible for the Costs Associated with Transporting Telecommunications Traffic to the Single POI?

The Panel recommended that the Commission permit Ameritech and Sprint to charge GNAPs for the transportation of calls originating in local calling areas where

² *In the Matter of the Petition of Sprint Communications Company L.P. for Arbitration of Interconnection Rates, Terms, Conditions and Prices from Ohio Bell Telephone Company dba Ameritech Ohio.*

³ *In the Matter of AT&T Communications of Ohio, Inc.'s and TCG Ohio's Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ameritech Ohio.*

GNAPs has no POI to a different local calling area containing GNAPs' POI. In addition to Commission precedent, the Panel cites Local Service Guideline IV.A.3, §251 of the Act, and the Federal Communication Commission's (FCC's) Interconnection Rules in support of its recommendation. The Panel also rejected GNAPs' assertion that Ameritech's or Sprint's costs to provide transport are *de minimus*. The Panel reasoned that GNAPs' supporting calculations did not consider the architecture, points of interconnection, or traffic volumes of Ameritech's, Sprint's, or GNAPs' networks.

GNAPs takes exception to the Panel's recommendation for Issue 2. First, GNAPs asserts that the Panel's reliance on Local Service Guideline IV.A.3 is misplaced. GNAPs believes that the Commission should clarify that parties cannot charge transport for traffic that originates on their own networks. Second, GNAPs argues that the Panel ignored 47 C.F.R. §51.703, which GNAPs contends states that a LEC cannot charge for transport and termination of traffic originated on its own network. In support of these arguments, GNAPs cites an Order by the New York State Public Service Commission in an arbitration proceeding between AT&T and Verizon New York⁴. Next, GNAPs states that the Panel's rejection of GNAPs' argument that transport costs are *de minimus* had no basis because Ameritech and Sprint did not deny that they were deploying fiber. Also, GNAPs contends that the Panel's recommendation "fails to come to grips with the analysis presented purporting to show how these incumbent costs are thousands--and tens of thousands--of times the cost of other providers" (GNAPs Exceptions, at 5). Finally, GNAPs asserts that the Commission's adoption of the Panel's recommendation will compel it to mirror Ameritech's and Sprint's network topologies. GNAPs finds that such construction would be duplicative and wasteful.

In its Exceptions, Sprint seeks a clarification of what it terms ambiguous language in the Panel's recommendation. Sprint states that the Panel did not adequately differentiate between Ameritech's and Sprint's proposals in its recommendation. Sprint contends that, upon examination of the Panel's recommendation, the Panel intended to grant Sprint the transport cost recovery that it proposed for adoption. If its contention is correct, Sprint requests that the Commission clarify the issue within the Award to reflect that the Panel's recommendation is consistent with Sprint's proposal.

In its Reply, Ameritech states that the Panel correctly resolved this issue based on Commission and FCC precedent. First, Ameritech asserts the Panel's recommendation will ensure that GNAPs will have to account for relevant switching and transport costs in contemplating the design of its network architecture. Also, Ameritech states that GNAPs puts forth no new arguments and continues to rely improperly on 47 C.F.R. §51.703(b)(3). Next, Ameritech contends that GNAPs' arguments in its Exception regarding Ameritech's transport and termination costs lack record support and deserve no response. Ameritech also argues that the Panel's recommendation would not compel GNAPs to mirror Ameritech Ohio's network. Instead, Ameritech asserts that the Panel's recommendation is consistent with the basic economic principle that costs should be assigned to the activity

⁴ Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunication Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York, Inc., Case 01-C-0095, Order Resolving Arbitration Issues at 27-28 (July 26, 2001).

that causes them and will only motivate GNAPs to design its network according to fundamental economic concepts.

In its Reply, Sprint states that GNAPs presents no new arguments absent a citation of a New York Public Service Commission Order. Sprint asserts that the arguments put forth by GNAPs in its Exception are unsupported by law and the record in this proceeding. Moreover, Sprint concludes that GNAPs' arguments go against sound public policy. Sprint argues that GNAPs' claim that the Panel did not consider 47 C.F.R. §51.703 in its recommendation is of little merit in light of the FCC's Verizon 271 Order⁵, in which the FCC did not find fault with Verizon Pennsylvania's interconnection policy, which is notably similar to Sprint's proposal. Sprint asserts that both it and Ameritech adequately confuted GNAPs' claim that their transport costs are *de minimus*. Sprint also contests GNAPs' claim that the Panel's recommendation would require GNAPs to mirror the ILECs' networks. Sprint states that the Panel's recommendation would simply require GNAPs to be responsible for the portion of additional transport costs caused by GNAPs' network design and POI location choices. Finally, Sprint holds GNAPs' citation to the New York Public Service Commission Order merits little consideration because it is inconsistent with decisions by other state commissions and is inconsistent with the FCC's Verizon 271 Order.

Arbitration Award

The Commission accepts the Panel's recommendation and shall issue an award in favor of Ameritech and Sprint. It is clearly evident that both this Commission's and the FCC's precedent state that ILECs may charge to transport and terminate intrastate and interstate exchange access traffic over their facilities. The words "intrastate and interstate exchange access traffic" were not included in the Panel's recommendation, but the idea that carriers may charge for such traffic is implicit. The Commission's decision is consistent with the FCC's Interconnection Rules, the FCC's Pennsylvania §271 decision, the Ohio Local Service Guidelines, and the Commission's previous arbitration awards in Case Nos. 96-1011-TP-ARB and 00-1188-TP-ARB.

The Panel's use of Local Service Guideline IV.A.3 to support its recommendation is not misplaced. Local Service Guideline IV.A.3 simply establishes that carriers are eligible to receive compensation for the use of network facilities they own or have obtained to transport and terminate traffic originated on the network facilities of other telecommunications carriers. However, the Commission agrees that the language "originated on the network facilities of other telecommunications carriers" obscures the relationship of Local Service Guideline IV.A.3's applicability to the Panel's position. To this end, the Commission will add further support to its conclusion by addressing GNAPs' claims using Subpart H of the FCC's Interconnection Rules (47 C.F.R. §51).

⁵ In the Matter of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania, CC Docket No. 01-138, FCC 01-269, released September 19, 2001.

47 C.F.R. §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, 26, 39, 42-43).

47 C.F.R. §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 traffic that originates on the LEC's network.

The provisions in 47 C.F.R. §51.701 and 47 C.F.R. §51.703 are both in Subpart H- Reciprocal Compensation for Transport and Termination of Telecommunications Traffic. Read together, these provisions lead to the conclusion that a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access, that originates on the LEC's network. It is §51.701's definition of telecommunications traffic which nullifies GNAPs' interpretation of §51.703. Given §51.701 and its relationship to §51.703, ILECs are entitled to assess charges for exchange access traffic.

Traffic from one local calling area to another local calling area in the same LATA is intraLATA exchange access, and traffic from one local calling area to another local calling area in a different LATA is interLATA exchange access. Exchange access traffic is subject to intrastate and interstate transport and termination charges in the State of Ohio. Naturally, Ameritech, Sprint, and GNAPs would be eligible to receive revenue if they transported and/or terminated such traffic for another carrier on the facilities they own or have otherwise obtained. The Commission notes that GNAPs would not have to pay intrastate and interstate transport and termination charges if it owned or leased its own

facilities. It is GNAPs' choice whether to employ facilities, pay intrastate and interstate exchange access charges, or otherwise compensate a carrier for intrastate and interstate exchange access transport and/or termination.

The Commission assigns no merit to the New York Public Service Commission Order because the decision is not consistent with Commission or FCC precedent. The Commission concurs with the Panel's rejection of GNAPs' assertion that Ameritech's or Sprint's costs to provide transport are *de minimus*. We agree that GNAPs' supporting analysis employed assumptions from other states that are not demonstratively applicable to Sprint's or Ameritech's networks in Ohio.

Awarding this issue to Ameritech and Sprint will not result in GNAPs being forced to mirror the ILECs' networks. Instead, this Award will merely ensure that GNAPs will have to balance costs and benefits rationally when designing and deploying its network in accordance with the Act and the FCC's interconnection, transport, termination, and pricing rules. The Act, the FCC, and this Commission's Local Service Guidelines allow CLECs to interconnect at a single point in a LATA, purchase unbundled network elements to provide their own transport to a point of interconnection, and purchase transport from the ILEC at wholesale prices to do the same. These three provisions by themselves do much to ensure that CLECs do not have to mirror an incumbent carrier's architecture. Since the Panel's recommendation is consistent with existing federal and state precedent and not against the aforementioned provisions, GNAPs' claim that the Commission's adoption of the Panel's recommendation will force GNAPs to mirror the ILECs' network architecture is of little merit.

In deciding this issue in favor of Ameritech and Sprint, the Commission recognizes that Ameritech and Sprint each had unique proposals for this issue. Both proposals are consistent with FCC and Commission guidelines, but differ in the way they would recover their costs for the applicable transport. To be clear, the Commission approves both Ameritech's and Sprint's proposals. However, the Commission's approval of Sprint's proposal is contingent upon Sprint's rates for transport and termination being less than its intrastate and interstate exchange access rates. The Commission recapitulates the Panel's statement that Sprint's transport and termination rates are not Commission-approved total element long-run incremental cost (TELRIC) rates and are applicable on an interim basis. The Commission notes that GNAPs did not present alternative proposals. Instead, GNAPs maintained the position that it should not have to pay anything for transport from a local calling area to a distant POI.

3. **Should the ILECs Local Calling Area Boundaries be Imposed on GNAPs or May GNAPs Broadly Define its Own Local Calling Areas?**

4. Can GNAPs Assign to its Customers NXX Codes that Are "Homed" in a Central Office Switch Outside of the Local Calling Area in Which the Customer Resides?

Regarding issue 3, the Panel found that GNAPs may define its own local calling area boundaries based on the Commission's Local Service Guideline Appendix A II D.2 which states:

Local Calling Areas

NECs may establish their own local calling areas. NECs may change their local calling areas, once established, by filing an updated map with the Commission in the carrier's TRF docket which accurately depicts the revised local calling area.

In regard to issue 4, the Panel found that virtual NXX-type services permit customers in one telephone exchange or rate center to have a telephone number in another exchange or rate center. Such services allow customers to place local calls to a virtual NXX customer that would otherwise be a toll call. The Panel agreed with Ameritech and Sprint that the appropriate guidance for resolution of this issue can be found in the Commission's Local Service Guideline IV.C, which states in pertinent part as follows:

Local and Toll Traffic Determination

As NECs establish operations within individual ILEC service areas, the perimeter of ILEC local calling area, as revised to reflect EAS [extended area service], shall constitute the demarcation for differentiating local and toll call types for the purpose of traffic termination compensation. Any end-user call originating and terminating within the boundary of such local calling area, regardless of the LEC at the originating or terminating end, shall be treated as a local call.

Consistent with the Commission's award in Case No. 01-724-TP-ARB⁶ (01-724), the Panel found that to the extent that a non-ISP bound⁷ call to a customer utilizing virtual NXX service provided by either Ameritech, Sprint, or GNAPs originates and terminates within Ameritech's or Sprint's local calling territory as revised to reflect EAS, the call is considered local and reciprocal compensation is due. To the extent that the call to a customer utilizing virtual NXX service originates or terminates outside of Ameritech's or Sprint's local calling area, as revised to reflect EAS, the Panel stated that the call is considered toll or interexchange. Compensation is based on the originating or terminating party's access charges.

⁶ *In the Matter of the Petition of Allegiance Telecom of Ohio, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ohio Bell Telephone Company dba Ameritech Ohio.*

⁷ In 01-724, the Commission determined that the FCC's ISP Remand Order governs calls to ISPs.

Furthermore, the Panel found, as stated previously, virtual NXX-type services permit customers in one telephone exchange or rate center to have a telephone number in another exchange or rate center. The incumbent offers a similar service in the form of foreign exchange (FX) service. However, there appears to be one important difference between the traditional FX service and virtual NXX. As confirmed by Sprint's witness, Mr. Hunsucker, virtual NXX allows one NXX to be used across multiple rate centers while the numbers assigned to traditional FX service are unique to that rate center. While the Panel confirmed the ability of GNAPs to define its own local calling area consistent with the Commission's Local Service Guidelines, the Panel was concerned that the widespread use of virtual NXX codes may not be consistent with the FCC rules regarding local number portability and number assignment. GNAPs' witness, Mr. Lundquist, was not able to dispute these concerns. The Panel reminded GNAPs that, pursuant to the Commission's Local Service Guidelines, all facilities-based local exchange carriers in Ohio are required to provide local number portability to their customers (Local Service Guideline XIV.A.).

With respect to issue 4, GNAPs takes exception to the Panel's conclusion. GNAPs argues that Local Service Guideline IV.C does not require imposition of access charges. GNAPs states that the Panel construes Local Service Guideline IV.C to require the imposition of access charges when a call originates and terminates in different ILEC local calling areas. According to GNAPs, this construction ignores the fact that although Local Service Guideline IV.C mandates that a call originating and terminating in an ILEC local calling area be treated as a local call, there is no parallel language mandating that a call that does not originate and terminate in the ILEC local calling area must be treated as a toll call. This provision may simply be seen as a "safe haven" provision, mandating local treatment under some circumstances but silent as to others.

According to GNAPs, the Panel's recommendation is inconsistent with the Act. The Panel's Report mechanically imposes access charges whenever a call originates and terminates in different ILEC defined local calling areas. GNAPs argues that access charges may be imposed, however, only where a carrier offers exchange access. GNAPs states that exchange access is defined by the Act as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." GNAPs also states that "telephone toll service" is itself defined in the Act, referring to service between separate "exchanges" for which a separate charge is made over and above whatever charge applies for "plain old" local service, which, in the language of the Act, is "telephone exchange service." Consequently, access charges can only apply where the end-user must pay toll charges.

GNAPs believes the Panel's recommendation prohibits FX service in Ohio. GNAPs states that the Panel's recommendation would impose access charges on any FX call or any virtual NXX call that originates and terminates in different ILEC local calling areas. Since access charges can only apply to toll calls, charges must be imposed on the calling party (except in certain cases, such as 800-service). According to GNAPs, any other outcome would be inconsistent with the definition of "exchange access." GNAPs believes that by converting the existing FX and virtual NXX arrangement into an access/toll arrangement, the Commission would essentially destroy the service. This is true because this service has traditionally been treated as local. GNAPs points out that such a prohibition is

inconsistent with the best interests of Ohio consumers and, at the very least, should only be adopted in the context of a generic docket for which all affected parties may participate.

Sprint agrees that the Panel correctly applied the Commission's Local Service Guidelines to determine which calls are local and which calls are toll. According to Sprint, GNAPs sole point of disagreement concerns the Panel's determination that the Commission's Local Service Guideline IV.C is dispositive of whether a call is local (and thus eligible for reciprocal compensation) or toll (and thus subject to access charges). Sprint disagrees with GNAPs' assertion that GNAPs' own local calling area should determine whether reciprocal compensation or access charges should apply. Sprint states that GNAPs relies upon a tortured reading of Local Service Guideline IV.C, makes the novel claim that the Act prohibits access charges if GNAPs does not charge its end user a toll charge, and alleges that the Panel's recommendation would prohibit FX service in Ohio. Sprint states that none of these arguments has any merit. Sprint believes that GNAPs strained reading of Local Service Guideline IV.C is nothing new; GNAPs made the identical claim in its initial brief. Sprint effectively rebutted this claim in its reply brief noting that GNAPs ignores the mandatory language contained in the first sentence of Local Service Guideline IV.C.

According to Sprint, GNAPs cites no authority from the FCC, any state regulatory commission, or any court to support its claim that the Act prohibits the imposition of access charges in connection with a virtual NXX call that is physically terminated in a different ILEC local calling area than the one in which it originates. Sprint believes that GNAPs' argument in this regard also ignores the Commission's recent award in 01-724.

Sprint points out that GNAPs' final argument is the unsubstantiated claim that the Panel Report "prohibits FX service in Ohio." According to Sprint, not only does GNAPs fail to support this argument with any case citations, it also makes several factual assertions for which no support is provided. For example, GNAPs makes the claim that "the Commission would essentially destroy the service (FX)." GNAPs also states that "[i]n the case of FX, the end user pays the carrier some premium for the service but not as much as the customer would pay if toll charges were imposed." Sprint believes that for these reasons alone, the argument should be rejected.

In response, Ameritech believes GNAPs begins this exception by repeating its tortured interpretation of Local Service Guideline IV.C. According to Ameritech, GNAPs again argues that the second sentence of the Guideline establishes an odd asymmetrical "safe haven" that requires certain calls to be treated as local calls but does not require other calls that do not originate and terminate in an ILEC local calling area to be treated as toll calls. Ameritech points out that this argument ignores the plain language of the first sentence of Local Service Guideline IV.C which mandates that the ILEC's local calling area "...shall constitute the demarcation for differentiating local and toll call types for the purpose of traffic termination compensation" (emphasis added).

Ameritech notes that GNAPs contends that access charges can only apply under the Act when the calling party is charged a toll ("except in certain cases, such as 800-service"). Ameritech points out the parenthetical 800-service "exception" GNAPs acknowledges is

directly analogous to the virtual NXX scenario at issue in this arbitration. Ameritech states that access charges in the virtual NXX context are appropriate under the Act, Local Service Guideline IV.C, and the Commission's award 01-724. Ameritech urges the Commission to join the Panel in rejecting GNAPs' attempt to manipulate the rules for intercarrier compensation.

Arbitration Award

In regard to issue 3, the parties did not file exceptions; however, GNAPs did supply a footnote that was related to issue 3 in its exception to issue 4. Thus, the Commission's award for issue 4 will also support the Panel's recommendation for issue 3. The Commission agrees with the Panel's recommendation for issue 4. We find that the Panel's recommendation is consistent with the Commission's Local Service Guidelines and the Commission's award in 01-724. With issue 4, there appears to be some confusion on the part of GNAPs with regard to the interpretation of the language in Local Service Guideline IV.C. Consistent with the Commission's award in 01-724 and the first sentence in Local Service Guideline IV.C, we believe that Ameritech's and Sprint's local calling areas, as revised to reflect EAS, shall be used to determine whether a call is local for the purpose of local traffic termination compensation. GNAPs has asserted no argument or facts that convince us to render a different conclusion.

Furthermore, the Commission notes the Panel's number portability concerns with virtual NXX service. We again remind GNAPs that it is required to provide local number portability consistent with the Commission's Local Service Guideline, XIV.A. GNAPs must deploy its virtual NXX services such that it is compliant with this rule and the FCC rules regarding number assignment and number pooling in FCC Docket 99-200.

Finally, in its Exceptions, GNAPs requests that the Commission, at a minimum, review Guideline IV.C as part of a generic proceeding. The Commission notes that the Commission's carrier-to-carrier rules are currently under review in Case No. 99-998-TP-COI.⁸ Further, the Commission finds that GNAPs, in its Exceptions to the Panel Report, offers no new arguments or any compelling reasons for the Commission to overturn the Panel's recommendation or our decision in 01-724.

5. Is it Reasonable for the Parties to Include Language in the Agreement that Expressly Requires the Parties to Renegotiate Reciprocal Compensation Obligations if Current Law is Overturned or Otherwise Revised?

To resolve this issue, GNAPs proposed specific language to address changes in the law governing ISP-bound traffic. Sprint, on the other hand, proposed that the parties rely on a general provision within the proposed agreement that encompasses changes in the law and the parties' respective rights to renegotiate. The Panel ruled in favor of GNAPs. The Panel found no harm in including language that would lend greater specificity and

⁸ *In the Matter of the Commission Ordered Investigation of the Existing Local Exchange Competition Guidelines.*

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Level 3 Communications, Inc. :
 :
Petition for Arbitration Pursuant to : 00-0332
Section 252 (b) of the Telecommunications :
Act of 1996 to Establish an Interconnection :
Agreement with Illinois Bell Telephone :
Company d/b/a Ameritech Illinois. :

ARBITRATION DECISION

DATED: August 30, 2000

2. Deployment of NXX Codes

- a. Whether Level 3 should be required to compensate AI for interexchange transport and switching associated with its FX/virtual NXX service.
- b. Whether an FX or NXX call that would not be local based on the distance it travels, is subject to reciprocal compensation.
- c. Whether the parties' agreement should include Appendix FGA.

Level 3's Position

Level 3 would delete Appendices FX and FGA and related language included elsewhere in the contract that require it to pay AI for the use of unspecified facilities at unidentified tariffed rates for FX, FX-like, FGA and FGA-like services. Level 3 claims that AI has not defined "FX-like" or "FGA-like" services nor has it demonstrated that any additional compensation should be paid based on customer location. It opposes the suggestion that it pay some undefined amount for the facilities and services AI ostensibly provides in getting calls to virtual NXX customers.

Level 3 also takes issue with AI's Section 2.7 of the Appendix, Reciprocal Compensation, which specifies that Level 3 cannot receive reciprocal compensation when its customer is physically located outside the local calling area of the calling party.

Ameritech's Position

AI should not have to provide free interexchange transport and switching to subsidize Level 3's competing Foreign Exchange ("FX") services. It proposes contract language that would require each party to be compensated for the portion of the FX service it actually provides. Level 3 should not be permitted to charge reciprocal compensation on FX calls because such calls are, by definition, not local exchange calls. Level 3 also must have some revenue-sharing arrangement in place for Feature Group A ("FGA") service and it has offered no alternative to the Appendix FGA.

Discussion

NXX codes (the first three digits of a seven-digit number) are assigned to specific geographic areas. Carriers' billing systems will classify a call as toll or local by comparing the caller's NXX with the terminating party's NXX. FX service allows a customer physically located in one exchange to have a telephone number with an NXX code that is associated with a different exchange in a different geographic area. In giving a customer a number with an NXX code from a distant geographic area, FX service allows callers from that distant area to reach the FX customer for the price of a

local call. To a billing system, such a call appears to be within a single NXX area, while in reality it travels a distance which would normally require toll charges. FX service is attractive to customers, such as ISPs, that want persons located in various geographic locations to reach them for the price of a local call.

Both AI and Level 3 provide FX services. AI asserts that the need for the Appendix FX and specific inter-carrier compensation arrangements with respect to FX services arises from the manner in which Level 3 is able to obtain an undue financial advantage through use of this service. AI explains that when it provides an FX service, its FX customer pays for the transport and switching costs incurred in carrying the call from the caller's rate center to the FX customer's physical location. In contrast, when Level 3 provides FX service, AI provides the very same interexchange transport and switching to carry the call from the caller's rate center to Level 3's point of interconnection ("POI"). Unlike AI's FX customer, however, neither Level 3 nor its customer pays anything for use of AI's network. As a result, AI maintains, Level 3 enjoys a "free ride" on AI's interexchange network which gives it an unearned cost advantage because it can offer its customers a rate with no interexchange transport or switching costs whereas AI must recover those costs from its FX customer. Even more egregiously, AI contends, Level 3 charges AI reciprocal compensation on calls to Level 3's FX customers, on the theory that these are "local" calls.

AI indicates, for example, that a call from an AI customer in Elgin to downtown Chicago travels a distance of some 40 miles and would normally constitute an intra-LATA toll call. If, however, the recipient of the call in Chicago is an FX customer assigned to the same NXX code as the originating caller in Elgin, the originating Elgin caller would be billed only for a local call because AI's billing systems recognize an intra-NXX call as a local call.

AI maintains that allowing a competitive local exchange carrier ("CLEC") this "free ride" distorts all of its incentives to invest and undermines the integrity of the competitive process. AI also contends that nothing in its proposals prevents Level 3 from providing FX service to whomever it wants. It simply would require Level 3 to pay something for its use of AI's network in providing this service. AI's witness explained that, if CLECs do not have to compensate AI for the use of its network in providing FX services, Level 3 will have little or no incentive to construct its own transport facilities. So too, AI maintains, other CLECs competing with Level 3 in the provision of FX services would face a competitive disadvantage vis-a-vis Level 3 unless they also took advantage of the free ride on AI's network instead of constructing their own facilities. Accordingly, facilities-based competition would be further reduced.

AI further points out that at least two state commissions have agreed with AI's position in their recent decisions and cites to relevant language on the issue set out by the Maine Public Service Commission on June 30, 2000, and the California Public Utility Commission on September 8, 1999. Both of these state commissions agreed, in

essence, that reasonable interexchange intercarrier compensation is warranted for the routing of FX traffic.

Level 3 argues that AI's position that virtual NXX calls are actually toll calls was rejected by this Commission in the Focal arbitration. Also, according to Level 3, a Michigan Arbitration Panel concluded that virtual NXX calls are "local" and rejected provisions proposed by AI to impose additional transport costs on CLECs.

Level 3 contends that AI is responsible only for carrying a virtual NXX call to the Level 3 POI - just as it does for every other local call. Once AI delivers the call to the POI, it is Level 3's responsibility to terminate the call wherever the customer may be physically located, such that there is no additional transport based upon the customer's location. As such, Level 3 sees no difference between physical local calls and virtual or FX calls.

Level 3 contends that putting the focus on the location of the called party is meaningless to a determination of how much responsibility each carrier actually bears in transporting a given call. It claims that customer location will not cause AI's costs or function to differ in the context of a call placed by an AI customer.

Level 3 maintains that AI's costs are the same whether the call terminates to a virtual or physical NXX customer served by Level 3. When one looks at how calls are always delivered to the POI irrespective of customer location, there is no "free ride" according to Level 3.

Level 3 opposes AI's efforts to restrict or inhibit the assignment of NXX codes by referring to customers' physical locations. It claims that AI's proposal would permit AI to avoid payment of reciprocal compensation to Level 3 by reclassifying these calls as toll and preventing its own customers from placing local calls.

According to Level 3, if AI succeeds in impairing Level 3 or any other CLEC from providing virtual NXXs by actually making CLECs pay AI for such calls, not only would AI customers no longer be able to reach their ISPs by dialing a local number but, because calls to the ISP effectively would be reclassified as toll calls, AI no longer would be obligated to pay the reciprocal compensation associated with local calls.

Analysis and Conclusion

(a.) The record indicates that FX service was developed in the context of a single-provider environment. In such times, the cost of an incoming call to the FX customer simply would be recovered from the FX customer. Now, however, with the opening of the local exchange market to competition, the carrier providing the FX service may differ from the carrier of the party calling the FX customer. That is the very situation in this case and AI is proposing that inter-carrier compensation, such as is commensurate

with each carrier's degree of participation in the provisioning of FX or FX-like service (NXX), be required.

We note that AI's proposal in this case is different from that presented in the Focal arbitration. In that case, our finding was based on the question of whether Focal should be required to establish a POI within 15 miles of the rate center for any NXX code that it uses to provide FX service and our consideration of the Focal evidence as to the number of POIs being established. Here, AI is asserting that the lack of POIs requires it to carry a call long distances with no compensation for the haul.

From the evidence presented, we note a number of economic and policy perspectives that drive AI's proposal. While Level 3 does not address these concepts *directly* it has set out its own policy-based arguments. In particular, it maintains that through the use of virtual NXX assignments, Level 3 and other CLECs provide a valuable service which allows ISPs to provide low-cost advanced services to their customers who can gain Internet access by dialing a local number. Neither party tells us enough about the technological and economic underpinnings in the NXX or FX situation, such as were afforded the California Public Utilities Commission, Decision No. 99-09-029 (September 2, 1999).

Level 3 opposes paying AI any additional compensation for calls based on customer location. It maintains that when an AI customer originates a call, AI's responsibility for the call ends when it delivers the call to the POI it has established with the CLEC. Once the call is handed off at the POI, the CLEC is responsible for the costs of delivering the call to the terminating number.

In other words, Level 3 tells us that AI is providing transport in the NXX situation no different from that which it is otherwise legally obligated to provide. On balance, AI offers policy considerations of some merit. Some of those concerns, Level 3 observes, will fall away given our findings in Issue 27 below. We agree. Moreover, Level 3 maintains, the FCC's "rules of the road" as set out in TSR Wireless, LLC v. U.S. West Communications, Inc., Memorandum Opinion and Order, FCC 00-194 (June 21, 2000) make clear that the originating carrier is responsible for the cost of delivering the call to the network of the co-carrier who will terminate the call. On the basis of this legal authority, and the limited record before us, we find in favor of Level 3 on the first of the three questions before us.

(b.) The reciprocal compensation portion of the issue is straightforward. The FCC's regulations require reciprocal compensation only for the transport and termination of "local telecommunications traffic," which is defined as traffic "that originates and terminates within a local service area established by the state commission." 47 C.F.R. 51.701 (a)-(b)(1). FX traffic does not originate and terminate in the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation. Whether designated as "virtual NXX," which Level 3 uses, or as "FX," which AI prefers, this service works a fiction. It allows a caller to believe that he is making a local call

and to be billed accordingly when, in reality, such call is travelling to a distant point that, absent this device, would make the call a toll call. The virtual NXX or FX call is local only from the caller's perspective and not from any other standpoint. There is no reasonable basis to suggest that calls under this fiction can or should be considered local for purposes of imposing reciprocal compensation. Moreover, we are not alone in this view. The Public Utility Commission of Texas recently determined that, to the extent that FX-type calls do not terminate within a mandatory local calling area, they are not eligible for reciprocal compensation. See, Docket No. 21982, July 13, 2000. On the basis of the record, the agreement should make clear that if an NXX or FX call would not be local but for this designation, no reciprocal compensation attaches.

(c.) Finally, with respect to Appendix FGA, the only proposal on the table is that of AI, and Level 3 has not apprised us fully as to the specifics of its objections. Hence, on the understanding that the FCC requires such action, which Level 3 does not dispute, the AI language should be adopted subject to the deletion of "FGA-like" language and replacing the language with "FGA."

3. (Resolved)

4. (Resolved)

5. **Charges for CLEC Name Changes**

Who should bear the costs for changes to the records, systems and data bases if the CLEC changes its name during the course of the agreement?

Level 3's Position:

AI should not be able to charge Level 3 on an individual case basis for processing name changes. To the extent that AI absorbs the cost of processing customer name changes as a cost of business in the retail context, Level 3 maintains that there is no principled reason for it to impose the costs of processing name changes on its wholesale customers. Level 3's brief on exceptions asks this Commission to adopt a ruling by the Texas Commission and a proposed ruling by the California Commission that name change costs should be borne by AI as a cost of doing business. Level 3 is like any other large corporate client and should be treated the same.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

TDS Metrocom, Inc. :
 :
Petition for Arbitration of :
Interconnection Rates, Terms and :
Conditions and Related :
Arrangements with Illinois Bell : 01-0338
Telephone Company d/b/a :
Ameritech Illinois Pursuant To :
Section 252(b) of the :
Telecommunications Act of 1996. :

ARBITRATION DECISION

August 8, 2001

TDS on this issue. Ameritech notes that TDS set forth no issue concerning Internet Calls in its petition. Ameritech continues that TDS, in the redlined agreement submitted as an attachment to its petition, showed as agreed language in Section 2.6 of the Appendix Reciprocal Compensation to the effect that the parties would compensate each other for Internet Calls in accordance with the order of the Public Service Commission of Wisconsin ("PSCW") in its Docket 05-TI-283, a generic docket on the treatment of Internet Calls.

Ameritech agrees the parties' Illinois agreement will provide that the parties will compensate each other for Internet Calls in accordance with the PSCW's decision in Docket 05-TI-283. Ameritech therefore does not take issue with TDS' presentation of Section 2.6 as an agreed provision (although Ameritech has, in the redline submitted herewith, "cleaned up" Section 2.6 in non-substantive respects that Ameritech believes TDS will agree do not change the import of Section 2.6 as it appeared in the TDS redline).

Ameritech does, however, set forth for arbitration one limited issue that relates to intercarrier compensation on Internet Calls: On April 27, 2001 (after TDS filed its petition), the FCC released its Order on Remand and Report and Order in CC Dockets 96-98 and 99-68 ("FCC ISP Order"). In that Order, the FCC established an interim cost recovery mechanism for delivery of Internet Calls. Ameritech believes that the parties' agreement, having provided that the parties will compensate each other for Internet Calls in accordance with the PSCW's decision in Docket 05-TI-283, should further provide that either party may invoke the FCC ISP Order as an Amended Rule under section 4.1 of the General Terms and Conditions of their agreement, whether or not the FCC ISP Order would qualify as an Amended Rule as that term is defined in section 4.1. Accordingly Ameritech proposes to add a footnote to Section 2.6 of the Appendix Reciprocal Compensation that so provides.

C. Staff Position

Staff did not take a position on this issue.

D. Commission Analysis and Conclusion

The Commission agrees with Ameritech and directs the parties to include Ameritech's proposed version of Reciprocal Compensation 2.6 in their Agreement. The parties should also adhere to the FCC ISP order to the extent it is mandatory.

Issue No. 25: (TDS-107) Is TDS entitled to charge reciprocal compensation for terminating FX calls? (Appendix Reciprocal Compensation, Section 2.7)

A. TDS Position

TDS argues that as a fundamental operational matter, there is no way for it to know which calls are foreign exchange ("FX") and which are not. TDS further argues that the entire reason for having FX service is that a call that might otherwise originate outside of a local calling area should appear to be for all intents and purposes a local call. Additionally, from the standpoint of the network, these calls look exactly like local calls being routed between Ameritech and TDS local switches. TDS asserts that while it may be possible to identify FX calls, it would be a very manual and expensive process.

TDS still would view these calls as local calls and in fact, argues that so would Ameritech. TDS asserts that Ameritech will bill the customer for calls originated to an FX customer as local calls and an Ameritech customer in making an FX call will be billed for a local call not an intraLATA toll call. TDS argues that Ameritech does treat these as local calls for their own retail billing purposes. TDS argues that because TDS interconnects at each end office where it has NXXs, TDS and Ameritech each incur exactly the same costs for terminating an FX call from Ameritech as any other local call. The fact that TDS may or may not choose to transport that call over its own facilities to a customer located a distance away is essentially invisible from an operational standpoint.

TDS notes that in an FX scenario under the Ameritech Appendix FX, Ameritech would bill a premium charge for transport and then treat all calls by that customer as local. However, according to TDS, in the area of reciprocal compensation Ameritech wants to change the story and characterize these calls as non-local so it is not required to pay the commensurate reciprocal compensation. This, coupled with the fact that operationally the terminating carrier cannot differentiate a local call from an FX call, clearly supports the fact that reciprocal compensation should be paid on FX calls.

TDS cites *In the Matter of Application of Ameritech Michigan to Revise its Reciprocal Rate Structure and to Exempt Foreign Exchange Service from Payment of Reciprocal Compensation, Case No. U-12696*, where in the Michigan Public Service Commission found:

The Commission rejects the proposal to reclassify FX calls as non-local for reciprocal compensation purposes. Ameritech Michigan has not explained whether, or how, the means of routing a call placed by one LEC's customer to another LEC's point of interconnection affects the costs that the second LEC necessarily incurs to terminate the call. As a matter of historical convention, the routing of that call, i.e., whether or not it crosses exchange boundaries, has not been equated with its rating, i.e., whether local or toll. Moreover, the discretion that CLECs exercise in designing their local calling areas is a competitive innovation that enables them to provide valuable alternatives to an ILEC's traditional service. The Commission finds no reason to change these standards, particularly if the end result would be an unnecessary restriction on the services that

customers want and need. Moreover, the application does not address how the carriers would make the necessary changes to their billing systems or whether the changes would be technically feasible at an affordable cost for both Ameritech Michigan and the CLECs.

B. Ameritech Position

Ameritech argues that TDS misunderstands this issue. Ameritech notes that by its terms, that language exempts from reciprocal compensation only "calls delivered to numbers that are assigned to an exchange within a common mandatory local calling area but where the receiving party is physically located outside the common mandatory local calling area of the exchange to which the number is assigned." So Issue TDS-107 actually has nothing to do with calls made from such numbers.

Ameritech states that even though the disputed language makes clear that Issue TDS-107 has only to do with calls made to customers with FX service, TDS' position on Issue TDS-107 is based on mistaken premise that the issue has to do with calls made from such customers. Ameritech asserts that TDS' misses the mark entirely, because Ameritech agrees that when an Ameritech customer with an FX arrangement calls a TDS customer, TDS is entitled to charge reciprocal terminating compensation for terminating the call and Ameritech's proposed language for Reciprocal Compensation Section 2.7 does not suggest otherwise.

Ameritech argues that it is not correct for the calls that are the subject of Issue TDS-107. It is true that if an Ameritech customer with FX service makes a call to a TDS customer, TDS has no way of knowing that the Ameritech customer who made the call is using FX service but again, the issue has nothing to do with calls of that sort. Rather, according to Ameritech, the issue has to do with calls made by an Ameritech customer to a TDS customer who has FX service. Ameritech asserts that TDS can identify those calls, because TDS is providing the FX service to its customer.

Ameritech agrees with this Commission has already ruled that "FX traffic does not originate and terminate in the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation." TDS' own description of what makes a call subject to reciprocal compensation, coupled with this Commission's correct determination that FX traffic does not meet that description, lead inevitably to the conclusion recommended by Staff: Ameritech's recommended language for Reciprocal Compensation Section 2.7 should be adopted.

C. Staff Position

Staff agrees with Ameritech that calls on which Ameritech is saying it is not required to pay reciprocal compensation are calls from an Ameritech customer to a TDS customer with FX service. Staff notes that in ICC Docket No. 00-0332 (August 30, 2000), the Commission concluded that "FX traffic does not originate and terminate in

the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation." Staff further notes that there is a clear inconsistency with respect to TDS' argument in Issue TDS-219 and how it relates to this issue. Staff asserts that Issue TDS-219, TDS objects to the inclusion of the FX and Feature Group A ("FGA") appendices in the interconnection agreement since TDS is currently not offering any FX service or using any FGA service. According to Staff, in Issue TDS-107, TDS contends that Ameritech should pay TDS reciprocal compensation when TDS terminates calls to TDS customers with FX service. Staff concludes that TDS is asking for payments on services that it does not plan to offer in the immediate future. Staff views TDS' position as inconsistent and recommends Ameritech's proposed language be adopted by the Commission.

D. Commission Analysis and Conclusion

Most recently this issue was visited by this Commission in Dockets 00-0027 and 00-0332, the Matter of Focal and the Matter of Level 3 Communications, Inc., respectively. The Commission determined, after considering the same issues, that FX traffic does not originate and terminate in the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation. There is no evidence in this record that would change the Commission's prior opinion at this time. The language proposed by Ameritech is accepted.

Issue No. 26: (TDS-112) What process and rate should apply when Ameritech is the mandatory Primary Toll Carrier ("PTC")? (Appendix Reciprocal Compensation, Section 6.4)

A. TDS Position

TDS asserts that Ameritech has sought to limit TDS to charging a rate for intraLATA toll that is no more than Ameritech's rate.

TDS argues that in a case prior to its recent access order, the FCC specifically held that the current ILEC rate is not a cap on access rates, and the access rates as charged by CLECs must be paid, unless a carrier makes an affirmative showing that such rates are not just and reasonable.

TDS submits that this is the better-reasoned holding, and the one to which the FCC should return upon reconsideration of its recent access order. Of course the FCC order only applies to interstate access charges, and this Commission should exercise its jurisdiction and discretion and decline to follow the FCC in its error with respect to intrastate access charges.

TDS asserts that the FCC correctly noted that carriers of toll traffic are purchasing access services from the ILEC. However, according to TDS, the FCC fails to acknowledge is that the FCC order may now require a CLEC to sell its access

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI



In the Matter of the Application of AT&T Communications)
of the Southwest, Inc., TCG St. Louis, Inc., and TCG)
Kansas City, Inc., for Compulsory Arbitration of Unresolved)
Issues With Southwestern Bell Telephone Company)
pursuant to Section 252(b) of the Telecommunications Act)
of 1996.)

Case No. TO-2001-455

ARBITRATION ORDER

Issue Date: June 7, 2001

Effective Date: June 14, 2001

10. Should traffic be routed in a manner that is consistent with each party's Local Exchange Routing Guide (LERG) entries?

SWBT proposes that traffic be routed pursuant to the LERG and that traffic on end-office trunks should only be for the end office and that the end office should not perform any tandem functions. AT&T agrees that traffic should be routed pursuant to each party's LERG entries and objects to SWBT's proposed language as unnecessary because the parties have already agreed to such language at Attachment 11—Network Interconnection Architecture, Part C, Section 22.0. Staff agrees with SWBT, but would modify SWBT's proposed language by removing multistate references. The M2A at Section 1.1.1 of Attachment 12—Compensation, requires that traffic be routed pursuant to the LERG unless the Commission orders otherwise.

The Commission will resolve this DP by directing the parties to adopt the position and language proposed by Staff. There is no dispute among the parties that the LERG should govern traffic routing. There is also no dispute among the parties that traffic on an end-office trunk should be limited to traffic intended for that end office. The only dispute appears to be AT&T's argument that, if SWBT's LERG is properly programmed, then the language concerning the end office trunks is surplusage. The Commission believes that the language, if indeed surplusage, does no harm and is useful in defining the appropriate use of end office trunks.

12. Should AT&T be required to duplicate SWBT's network architecture to provide local exchange?

SWBT has proposed language at Section 15.0 of Part C that would assign responsibility for facilities transporting foreign exchange (FX) traffic. SWBT maintains that AT&T should be responsible for all facilities that carry AT&T's FX traffic. At hearing, SWBT

suggested an example in which AT&T assigned a New Madrid NPA NXX code number to a St. Louis customer in order to permit that customer to receive toll free calls from New Madrid callers.¹⁰⁷ SWBT states that, while it does not object to that practice, it wants to ensure that AT&T bears the associated costs. AT&T, in turn, argues that its network architecture is fundamentally different from SWBT's and that SWBT should deliver all traffic destined for the same NPA NXX to the same AT&T switch. AT&T will then transport the traffic to the end user and charge the same reciprocal compensation rate, regardless of the physical location of the customer. Staff recommends adoption of a modified version of SWBT's language. Under the M2A, at Section 1.1 of Attachment 12—Compensation, a call such as described in the example would not be classified as a local call.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff.

16. Is SWBT's language requiring that trunk migration from one-way to two-way or from two-way to one-way be "agreed" appropriate for inclusion in the attachment?

The parties dispute over Section 5.0(c) of Part E is limited to a single word. SWBT contends that the word "agreed" should appear in the section at issue to reflect SWBT's position that migration is not mandatory. AT&T argues that the word "agreed" is inappropriate because it could prevent AT&T from using one-way trunks. Staff agrees with AT&T. The M2A, at Section 2.1.1 of Attachment 11—Network Interconnection Architecture, follows the Commission's decision in TO-97-40, which ordered two-way trunking where feasible.

¹⁰⁷ Tr. 991-996.



STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 01-01-29 DPUC INVESTIGATION OF THE PAYMENT OF MUTUAL
COMPENSATION FOR LOCAL CALLS CARRIED OVER
FOREIGN EXCHANGE SERVICE FACILITIES

January 30, 2002

By the following Commissioners:

Jack R. Goldberg
John W. Betkoski, III
Donald W. Downes

DECISION

beyond the effective date of the ISP Order. Nevertheless, the ISP Order does not preempt state commissions from addressing compensation for ISP-bound traffic for the period of time prior to the effective date of the interim regime adopted by the FCC. ISP Order, ¶82. Consequently, the following analysis and resulting orders will apply to the ISP-bound traffic carried over FX facilities prior to the effective date of the ISP Order.

B. MUTUAL COMPENSATION

The Telcom Act requires that telecommunications carriers establish reciprocal or mutual compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(B)(5). Additionally, the FCC concluded that reciprocal compensation obligations should only apply to traffic that originates and terminates within a local calling area. The FCC has also permitted the states to determine what geographic areas should be considered "local areas" for reciprocal compensation obligations under 47 U.S.C. §251(B)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. Moreover, the FCC concluded that traffic originating or terminating outside of the applicable local calling area would be subject to interstate and intrastate access charges. FCC First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers, CC Docket No. 95-185, (First Report and Order) released August 1, 1996, ¶¶, 1034 and 1036.

Similarly, in its January 17, 1996 Decision in Docket No. 94-10-02, the Department limited the payment of reciprocal compensation to the termination of local traffic. However, the Department indicated in that Decision that it would not allow the incumbent provider to dictate the definition of local service for these purposes. Rather, local service would be considered the tariffed service that offers a subscriber dial access to a prescribed set of contiguous central office prefixes that would be determined by each respective provider without imposition of any additional charge associated with distance. January 17, 1996 Decision, Docket No. 94-10-02, pp. 71 and 72.

Finally, the Department has determined that there is no difference between an ISP and the Telco's other local exchange customers relative to the payment of mutual compensation. September 17, 1997 Decision, Docket No. 97-05-22, p. 12. The Department also concluded that traffic carried between the Telco's end user customers and ISPs within the same local calling area (emphasis added) is local in nature and should be subject to the mutual compensation arrangements outlined in the January 17, 1996 Decision in Docket No. 94-10-02. Id.

C. LOCAL EXCHANGE SERVICE TRAFFIC

The Department reaffirms its requirement that traffic between end user customers and ISPs within the same local calling area be subject to the mutual compensation arrangements outlined in the January 17, 1996 Decision in Docket No. 94-10-02. The Department also reaffirms its requirement that the payment of mutual

compensation be limited to local calls that originate and terminate within the caller's local calling area.

Relative to FX service, the Department is of the opinion that it is an interexchange service that is provided from an exchange that is different from one that normally serves the area in which the subscriber is located. In particular, FX service routes calls from one exchange to another. From a subscriber's point of view, FX is a toll substitute affording callers the benefit(s) of a local call. The Department indicated in its January 17, 1996 Decision in Docket No. 94-10-02, that the payment of mutual compensation would be required for all calls that originate and terminate within the same local calling area. While telephone calls made to FX service subscribers allow their customers to call without incurring toll charges, for purposes of payment of mutual compensation, such calls are non-local in nature; and therefore, they are not subject to mutual compensation. The Department recognizes the use of FX service by carriers as an economic means of serving large areas with a minimum number of switches. The Department is concerned however, when these same carriers then seek compensation for traffic that is clearly outside the boundaries for the payment of mutual compensation established by the FCC in its First Report and Order and the Department's Decisions in Docket Nos. 94-10-02 and 97-05-22.

The Department, by this Decision has not deviated from its earlier ruling that Internet calls be subject to mutual compensation. Rather, this Decision reaffirms the Decisions in Dockets Nos. 94-10-02 and 97-05-22 to ensure compensation for local calls. The Department notes that some of the participants are against its involvement in this matter arguing that Internet calls are interstate calls under the FCC's jurisdiction. See for example, AT&T Comments, p. 4. Notwithstanding the ISP Order, the Department disagrees. The Department continues to believe that Internet traffic (when meeting the FCC and Department standards) should be subject to mutual compensation. However, if the Department were to accept carriers' suggestions for a "hands-off" approach in this matter, the Department would be placed in the position of policing the ISP-subscriber traffic and other FX service subscribers in order to determine what traffic should be subject to mutual compensation. The Department also questions whether non-Internet traffic carried over other subscribers' FX facilities would be subject to compensation or as proposed by the Telco, subject to originating access charges. The Department refuses to be placed in this situation and will require that mutual compensation be due only for those calls that originate and terminate in the same local service area where the originating end user is physically located.

The Department also notes that the record of this proceeding is replete with statements by CLECs indicating that they not be held to the same local calling areas as the Telco. See for example Cablevision Comments, p. 2; MCIW Comments, p. 3; AT&T Brief, pp. 7-10; RCN Comments, p. 9. All CLECs have been afforded the opportunity to establish their own local calling areas in Connecticut. The Department recognizes the economic factors underlying the CLECs decisions against deploying facilities and defining their own local calling areas.²¹ Nevertheless, most, if not all CLECs have not

²¹ The Department concurs with the ISP Order is on point. Specifically, carriers will always prefer to recover their costs from other carriers rather than their own end-users in order to gain competitive advantage. Additionally, carriers have every incentive to compete, not on basis of quality and

established their own local calling areas and instead, have chosen to mirror the Telco's LCAs.²² In the opinion of the Department, these CLECs have made a decision to mirror the Telco's LCAs and offer their subscribers large local calling areas via FX service. The Department takes no issue with the carriers' use of FX service in this matter. However, the Department finds the carriers' requests for compensation in these cases unsupportable in light of the FCC and Department rulings (including the ability to define their own local calling areas) and their decision against deploying facilities that would make these calls truly local and eligible for mutual compensation. The purpose of mutual compensation is to compensate the carrier for the cost of terminating a local call on their respective network. The Department is of the opinion that since these calls are not local, they will not be eligible for mutual compensation. Therefore, the Department will require, through the effective date of the ISP Order, for those cases where a CLEC chooses to mirror the Telco's LCA, and offers to provide the FX service in a larger "local" calling area, that such FX service calls be ineligible for compensation.

In Written Exceptions and during Oral Argument PaeTec and WCI argued that the draft Decision violated federal law by abrogating binding interconnection agreements. PaeTec Written Exceptions, pp. 5-7; WCI Written Exceptions, pp. 13-17; Tr. 01/23/02, pp. 13, 19 and 20. The Department notes that the instant Decision does not supersede any terms and conditions specifically addressing compensation for local traffic (i.e., compensation for local calls provided over foreign exchange facilities) that may be addressed in existing ILEC/CLEC interconnection agreements. The Department is of the opinion that if this issue has been addressed in existing ILEC/CLEC interconnection agreements, then the parties are bound by the terms and conditions of those agreements and this Decision would not apply. However, in the event that the agreements are silent regarding this issue, then the provisions of this Decision will apply.

Additionally, in the March 29, 2001 Draft Decision, the Department required that interexchange traffic not subject to mutual compensation be subject to the payment of originating switched access charges to the ILEC. March 29, 2001 Draft Decision, p. 21. Cablevision states that ILECs should not be permitted to charge CLECs for a service that they are not purchasing. Cablevision April 20, 2001 Written Exceptions, p. 10. Cablevision also states that FGA involves the telephone number assignment of an ILEC and provides for optional features from a specific end office. Further, Cablevision states that just like the Telco, and unlike an interexchange carrier, when a CLEC provides FX service, it does so as a local provider, assigning its own NXX to the end user.²³ *Id.* Finally, Cablevision claims that unlike an IXC purchasing FGA, a CLEC has its own local switch and therefore does not rely on the ILEC local switch to provide additional features. *Id.* Moreover, WCI maintains that it is entitled to recover the costs associated with terminating calls that originate on the Telco's network from the Telco. In the opinion of WCI, if the calls in question are interexchange in nature, then CLECs have

efficiency, but on the basis of their ability to shift costs to other carriers and the resulting outcome that prevents market forces from distributing limited investment resources to their most efficient uses. ISP Order, ¶4.

²² See for example, MCImetro Access Transmission Services Connecticut D.P.U.C. Tariff No. 4, p. 50.1.1; Sprint Communications Connecticut DPUC Tariff No. 1, p. 70; and AT&T Communications of New England, Inc. D.P.U.C. Tariff No. 8, Section 3, p. 2.

²³ Citing WCI's October 16, 2000 Reply Brief, p. 10.

the right to bill the Telco terminating access charges. WCI April 20, 2001 Written Exceptions, p. 22. Lastly, AT&T argues that imposition of access charges would place long distance carriers in the unpalatable position of charging end users for toll calls which today are local calls in order to recoup their access expenses. Moreover, AT&T argues that any attempt to collect toll charges from such users is further exacerbated where the carrier in question may not have a clear customer/carrier relationship with the end users originating these calls. AT&T April 20, 2001 Written Exceptions, pp. 9-14.

The CLECs points in this matter are well taken. While the Department believes that it is inappropriate that calls of this nature be subject to mutual compensation, the imposition of access charges on these calls is similarly improper. In the opinion of the Department, imposition of access charges on these calls would clearly not be in the public interest due to the level of customer confusion that would most likely be generated as well as the costs incurred by the CLECs in resolving those complaints. In addition, if the ILECs are permitted to impose originating access charges for these calls, fairness would dictate that the CLECs also be permitted to apply terminating access charges as well. The public interest clearly would not be served. Accordingly, the Department will deny the Telco's request to impose FGA access charges on the carriers for these calls.

Finally, the Department reaffirms its requirement that all provisions of Telco/CLEC interconnection agreements be adhered to, or if necessary, modified when mutually agreed to by the parties. The Department notes that the Telco has requested that the Scope of this proceeding be broadened to address some of the CLECs' improper routing of traffic over POTS trunk groups. See the Telco's August 19, 1999 Written Comments, pp. 9-11, Telco Brief, pp. 22-24. According to the Telco, its Interconnection Agreements clearly identify the use of the POTS trunk in questions and that the terms and conditions of these interconnection agreements have been violated by CLEC's unauthorized routing of certain calls. *Id.* In the opinion of the Department, the Telco and CLECs have agreed to these provisions in approved Interconnection Agreements. Consequently, such provisions must be adhered to until they are either modified or superseded. Absent any changes, the provisions of these agreements (i.e., POTS trunks are to only be used for the termination of traffic), must be adhered to by the respective parties. Alleged deviations by either party should be resolved following the procedures outlined in the agreements and ultimately by the Department if appropriate.

D. COMPENSATION TRUE-UP

According to the Telco, it has been improperly billed for local mutual compensation for FX service calls. Request, p. 1. Consequently, the Telco has requested that carriers be ordered to provide all relevant data necessary for the Company to determine the level of virtual FX traffic incurred since January 15, 1999, so that a true-up of such traffic can be calculated.²⁴ The Telco has also requested that this data be provided within 10 days of issuance of the Decision. The Telco further requests

²⁴ The Telco did not specify the data that it believed was necessary to make this determination. Therefore, the Telco will be required below to submit an exhibit detailing its requirements in advance of those CLECs that provide this information to the Company.

Docket No. 13542-U

In Re: **Generic Proceeding on Point of Interconnection and Virtual FX Issues**

FINAL ORDER

BY THE COMMISSION:

The Georgia Public Service Commission ("Commission") initiated this docket to consider the following two issues: whether requesting carriers have the right to designate network point or points of interconnection at any technically feasible point and whether ILECs should be permitted to impose restrictions on a CLEC's ability to assign NPA/NXX codes to the CLEC's end-users.

**I.
INTRODUCTION**

A. Background

In Docket No. 11901-U¹, the Commission voted to consider Issues 36 and 46 from that petition for arbitration in a generic proceeding. Issue 36 was presented in the petition for arbitration as follows:

Does [a CLEC], as the requesting carrier, have the right pursuant to the Act, the FCC's Local Competition Order, and FCC regulations, to designate the network point (or points) of interconnection at any technically feasible point?

Issue 46 involved the following dispute:

Should [an ILEC] be permitted to impose restrictions on [a CLEC's] ability to assign NPA/NXX codes to [its] end-users?

¹ Docket No. 11901-U, *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996.*

traffic that originates on the incumbent ILEC's network." ¶ 238. Not only has the FCC not expressly altered an ILEC's reciprocal compensation responsibilities in the wake of its Texas 271 Order, but it has removed any potential ambiguity that the Texas 271 Order changed the prohibition on ILEC's charging carriers for local traffic that originates on its own network.

The obligation to pay for traffic originating on its own network applies, according to the terms of FCC Rule 51.703(b), to "local telecommunications traffic." If the calls in question fell outside the FCC Rule's definition of "local telecommunications traffic," then the obligation may not apply. FCC Rule 51.701(b)(1) defines "local telecommunications traffic" to mean "telecommunications traffic between a LEC and a telecommunications carrier . . . that originates and terminates within a local service area established by the state commission." In the hypothetical discussed earlier, where a BellSouth customer in Columbus calls a CLEC customer in Columbus, the call originates and terminates in the same local service area, regardless of whether it leaves the local service area to travel to the CLEC's POI. BellSouth still has the obligation to pay for the facilities to transport the call.

BellSouth makes the point that the *Intercarrier Compensation NPRM* is seeking comment on this issue. However, as stated above, this NPRM makes clear that the FCC rules currently require the originating carrier to bear the costs of hauling its traffic to the terminating carrier's POI. ¶ 70. If the FCC alters this responsibility through the rulemaking process, this Commission will take any and all necessary and appropriate action. The Commission finds that pursuant to the Federal Act, the FCC Rules and FCC Orders, BellSouth is responsible for the costs of transporting its originating traffic to the CLEC's POI.

Separate and apart from its legal analysis, the Commission finds that holding BellSouth financially responsible for transporting its originating traffic to a CLEC's POI is a sound policy. CLECs must bear financial responsibility for their originating traffic so requiring BellSouth to do the same does not place it at a disadvantage. The difference in volume between BellSouth and an individual CLEC does not affect the fairness of the resolution because BellSouth should be recovering the costs of its facilities through the rates it charges its customers. The Commission's determination on this issue is symmetrical, fair and consistent with the Federal Act's intent to promote competition. Of course, the Commission's decision does not prohibit individual CLEC's from agreeing to BellSouth's threshold proposal should BellSouth extend such an offer.

Issue 2: Should [an ILEC] be permitted to impose restrictions on [a CLEC's] ability to assign NPA/NXX codes to [its] end-users?

A. Positions of the Parties

1. *BellSouth*

BellSouth states four primary reasons in its Brief in support of its position that that reciprocal compensation is not due for Virtual FX traffic, and that BellSouth should be entitled to bill the CLECs access charges for these calls. First, BellSouth argues that the originating and terminating points of FX traffic are in different local calling areas. (BellSouth Brief, p. 10).

BellSouth also points out that it does not charge CLECs reciprocal compensation for its FX service.

A recent FCC decision recently held that certain types of traffic are excluded from the reciprocal compensation requirements of the Federal Act. *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 98-98, and *In re: Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68 (April 27, 2001) ("Reciprocal Compensation Order"). BellSouth argues that FX traffic is within the category of calls that the FCC excluded from the reciprocal compensation requirements. (BellSouth Brief, p. 12).

Finally, BellSouth directs the Commission's attention to the decisions of other state commissions that have considered this issue and determined that reciprocal compensation is not due for this type of traffic. Specifically, BellSouth references state commissions in Texas, Illinois, South Carolina, Kentucky and Tennessee.

BellSouth offered a compromise position on this issue. BellSouth testified that it would offer CLECs the option to treat calls within the LATA as local for purposes of interconnection and reciprocal compensation. (Tr. 184-85).

2. *AT&T*

AT&T argues that FX traffic should be rated based on the NPA-NXX assigned to the customer, rather than the physical location of the customers. This is consistent with the toll and local rating. (AT&T Brief, p. 28). AT&T states further that it does not cost BellSouth any more to terminate calls to FX-type customers. *Id.* at 29. AT&T argues that intercarrier compensation arrangements for FX-type service should be the same as the arrangements for wireless service, where BellSouth pays reciprocal compensation for BellSouth originated traffic regardless of the physical location of the wireless customer. *Id.* at 29-30.

3. *BroadRiver*

BroadRiver states that "a CLEC must retain the unrestricted and unilateral right to assign its NPA/NXX codes to its customers." (BroadRiver Brief, p. 4). BroadRiver also states that reciprocal compensation should be due CLECs for terminating calls that originated within the same LATA as the CLEC POI, where the calls are terminated. *Id.*

4. *Global Naps*

Global Naps states that it would agree to an arrangement in which if a CLEC chooses to limit local calls for the purposes of interconnection and reciprocal compensation to calls that originate and terminate within the same BellSouth local calling area, and chooses to have access charges apply to calls between BellSouth and CLEC customers in different local calling areas, then FX traffic would be treated in accordance with these choices. (Global Naps Brief, p. 19). It should also be the CLEC's prerogative to choose to have all intraLATA circuit-switched traffic

treated as local for purposes of interconnection. If a CLEC makes this decision, then reciprocal compensation should apply for FX traffic. *Id.* at 19-20.

5. *Sprint*

Sprint's position is that an ILEC should not be allowed to restrict a CLEC's ability to assign NPA/NXX codes to its end-users. Sprint states that ILECs and CLECs should share the transport costs between the virtual POI in a local calling area and the physical POI. (Sprint Brief, p. 9).

6. *WorldCom*

WorldCom claims that BellSouth's proposal will provide BellSouth with an unfair competitive advantage. (WorldCom Brief, p. 12). WorldCom argues that the test for whether a call is local or not should be based on the originating and terminating NPA/NXXs. WorldCom states that this test is consistent with the industry standard for determining the jurisdiction of traffic. *Id.*

B. Discussion

While this issue is phrased in terms of whether BellSouth should be entitled to put restrictions on a CLEC's ability to assign NPA/NXX codes for its customers, the underlying dispute is whether reciprocal compensation should apply to Virtual FX traffic. BellSouth is not attempting to prohibit CLECs from assigning to their customers NPA/NXX codes associated with a different local calling area, but BellSouth is not willing to pay reciprocal compensation to CLECs for terminating Virtual FX traffic. This dispute turns on the question of what determines whether a call is local. If the physical location of the foreign exchange customer governs, then Virtual FX traffic is not a local call and access charges are due. If it is the end-user's phone number that dictates whether a call is local, then reciprocal compensation should be paid for FX traffic.

The first argument BellSouth raises in its Brief is that the FX traffic does not originate and terminate within the same local calling area. (BellSouth Brief, p. 10). Although questioning its relevance, no party disputed the truth of this assertion. The Georgia Act defines "local exchange services" to mean "services offered for the transmission and utilization of two-way interactive communications and associated usage with the local calling area." O.C.G.A. § 46-5-162(11). The Georgia Act defines "local interconnection services" to mean "that part of switched interconnection service provided for the purpose of originating or terminating a call which *originates and terminates within the local calling area.*" O.C.G.A. § 46-5-162(12) (emphasis added). Since Virtual FX traffic does not originate and terminate within the same local calling area, it does not meet the definition of a local interconnection service.

The Georgia Act's definitions of the terms "switched access" and "toll service" establish that access charges, not reciprocal compensation are due for Virtual FX traffic. "Toll service" means the transmission of two-way interactive switched communications between local calling areas." O.C.G.A. § 46-5-162(19). Virtual FX traffic travels between local calling areas, and

falls within the definition of a toll service. “‘Switch access’ means that part of switched interconnection service provided for the purpose of originating or terminating a toll service.” O.C.G.A. § 46-5-162(14). As a toll service, switched access would apply to Virtual FX calls.

Determining the nature of Virtual FX traffic based on the physical location of the callers is consistent with the end-to-end analysis endorsed by the FCC. The FCC has stated that “both court and [FCC] decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications.” *In the Matter of Teleconnect Company v. The Bell Telephone Company of Pennsylvania*, 10 FCC Rcd 1626, 1995 FCC LEXIS 966 (1995); *aff’d sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997); see, e.g., Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 10. Application of an end-to-end analysis to Virtual FX calls focuses on this traffic travelling between local calling areas, and leads to a conclusion that reciprocal compensation is not due for these calls.

The conclusion that access charges are due for Virtual FX is not inconsistent with the Commission’s previous decisions in cases involving calls to internet service providers (“ISPs”).⁷ In deciding whether the parties to interconnection agreements were obligated to pay reciprocal compensation for ISP-traffic, the Commission considered whether an ISP call involved one call or two. The Commission determined that two calls took place. The first call was the one placed by the BellSouth customer that dialed the NPA-NXX number within the same local calling area. The Commission found that this call was terminated once delivered to the telephone exchange service number. (See, e.g., Docket No. 8196-U; *In Re: Complaint of MFS Intelenet of Georgia, Inc. Against BellSouth Telecommunications, Inc., and Request for Immediate Relief*, Order Affirming and Modifying the Hearing Officer’s Decision). The Commission decided that the ISP providing access to the packet-switched Internet was irrelevant to whether the first call was terminated locally. (See, e.g., Docket No. 6865-U; *In Re: Petition of MCImetro for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*; Order Deciding Complaint, December 28, 1998). The Commission’s determination that the call outside the local calling area was a separate call was crucial to the Commission’s determination that the call from the BellSouth customer to the ISP was local. That the Commission entered into this analysis demonstrates that the physical location where the call was terminated was relevant to the whether reciprocal compensation was due.

The Commission finds that reciprocal compensation is not due for Virtual FX traffic. The Commission also finds that consistent with its own testimony in this proceeding, BellSouth should offer CLECs the option to treat intraLATA calls as local for purposes of interconnection and reciprocal compensation.

III.

⁷ In several dockets, the Commission decided that ISP-traffic is jurisdictionally local. The FCC recently issued its *Reciprocal Compensation Order*, in which it decided that ISP-bound traffic is not subject to the reciprocal compensation obligations of 47 U.S.C. 251(b)(5). The relevance of the ISP cases to the issue in this proceeding is limited to that in both the ISP cases and this docket, the Commission considered the physical location where the call originated and terminated in its determination of whether the call constituted local traffic.

ORDERING PARAGRAPHS

The Commission finds and concludes that the terms and conditions as discussed in the preceding sections of this Order should be adopted pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE, it is

ORDERED, that all findings conclusions, statements and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, that pursuant to FCC orders, a CLEC may choose the point of interconnection, and may choose to interconnect with an incumbent's network at a single point within a LATA.

ORDERED FURTHER, that for calls that originate and terminate within the same local calling area, BellSouth is responsible for the costs of transporting its originating traffic to the CLEC's POI in the LATA, regardless of whether the CLEC's POI is in the same local calling area as the call originates and terminates.

ORDERED FURTHER, that reciprocal compensation is not due for Virtual FX traffic.

ORDERED FURTHER, that BellSouth shall offer CLECs the option of treating intraLATA calls as local for purposes reciprocal compensation.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 23rd day of July, 2001.

Reece McAlister
Executive Secretary

Lauren McDonald, Jr.
Chairman

Date

Date

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

JUNE 25, 2001

IN RE:)
)
PETITION FOR ARBITRATION OF THE) DOCKET NO. 99-00948
INTERCONNECTION AGREEMENT BETWEEN)
BELLSOUTH TELECOMMUNICATIONS, INC.)
AND INTERMEDIA COMMUNICATIONS, INC.)
PURSUANT TO SECTION 252(b) OF THE)
TELECOMMUNICATIONS ACT OF 1996)

INTERIM ORDER OF ARBITRATION AWARD

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

A. Positions of the Parties

While BellSouth maintains that it is indifferent to the manner in which Intermedia defines its local calling areas for Intermedia's endusers, BellSouth argues that the real dispute is whether or not reciprocal compensation is due when a call is actually non-local. BellSouth states that it is extremely difficult to determine whether BellSouth endusers are making a local or a long distance call when a BellSouth enduser calls a CLEC enduser located outside a BellSouth local calling area that has a number with an NPA/NXX that is the same as the NPA/NXX assigned to endusers located inside the same local calling area. BellSouth claims this causes BellSouth and other local exchange carriers to: (1) lose valid toll and/or switched access revenue; (2) incur costs that are not recovered; and (3) inappropriately pay reciprocal compensation as if the traffic were local. BellSouth also maintains that the FCC has made it clear that traffic jurisdiction is determined by the originating and terminating points of a call and not the NPA/NXXs of the respective numbers.

Intermedia argues that it should have the ability and discretion to assign NPA/NXXs to customers not physically present in rate centers with which BellSouth associates the NPA/NXX. Additionally, Intermedia maintains that BellSouth previously allowed Intermedia to assign numbers as Intermedia requests in this arbitration, but now wants to restrict that activity. Intermedia further argues that BellSouth has done for years what it attempts to prevent Intermedia from doing today through BellSouth's FX service.⁹⁰ BellSouth FX service allows subscribers to have local presence and two-way communications in an exchange different from their own.

Intermedia avers that if the Arbitrators adopt the language proposed by BellSouth, then Intermedia would not be able to offer FX type service and, as a result, would be at a significant disadvantage relative to BellSouth.

B. Deliberations and Conclusions

The Arbitrators' review of this Issue reveals that there are actually four issues presented for consideration. First, the Arbitrators must determine whether either party has a right to assign an NPA/NXX to an enduser not physically located in the local calling area in which the NPA/NXX is typically homed. The second issue is whether calls made from one local calling area to a completely different local calling area are local or non-local? The third and fourth determinations are whether intercarrier compensation should be paid for these types of calls, and, if so, whether reciprocal compensation is the proper type of intercarrier compensation.

As to whether both parties have the right to assign an NPA/NXX to an enduser not physically located in the calling area in which the NPA/NXX is typically homed, the Arbitrators are persuaded by Intermedia's position that assigning NPA/NXXs across multiple rate centers is beneficial because it helps alleviate numbering resource problems. This benefit, along with the fact that BellSouth has engaged in this same practice for years through its FX service, convinces the Arbitrators that Intermedia should be allowed to engage in this practice as well. Therefore, the Arbitrators find that both parties should have the right to assign NPA/NXXs to customers not physically located in the local calling area to which the NPA/NXXs are typically homed. The Arbitrators also notify the parties that this arrangement shall not prevent calls made between two points in the same county in Tennessee from being toll-free as required by Tenn. Code Ann. § 65-21-114.

⁹⁰ The acronym FX stands for "Foreign Exchange."

The Arbitrators can best answer the question of whether calls made from one local calling area to a completely different local calling area are local or non-local by utilizing the FX service analogy presented by Intermedia. BellSouth subscribers have historically used FX service as a mechanism to call adjacent or non-adjacent local calling areas without incurring a toll or long distance charge. The FX subscriber does not have to use FX service, but has other alternatives such as accepting collect calls from its customers or subscribing to WATS.⁹¹ The decision to utilize FX service is a business decision based upon the number of long distance calls the subscriber receives from customers each month and which service is more economical. BellSouth charges its FX service subscribers \$87.00 per month for the first mile and \$1.45 for each additional mile of interexchange channel associated with each FX subscriber's service. The fees BellSouth collects from the FX subscribers each month is revenue BellSouth uses to offset the loss of toll revenue that BellSouth would normally collect from customers calling the FX service subscriber. Based on this characterization, the Arbitrators find that FX service is no different than an intrastate, interexchange service.

The Arbitrators find that the scenario described above will exist when Intermedia assigns a telephone number to an enduser physically located in a different local calling area than in the local calling area where the NPA/NXX is homed or assigned. In the *First Report and Order*, the FCC stated that 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) of the Act.⁹² The Arbitrators find that calls to a NPA/NXX in a local calling area outside the local calling area where the NPA/NXX is homed, should be treated as intrastate,

⁹¹ The acronym WATS stands for "Wide Area Telephone Service."

⁹² *First Report and Order*, ¶ 1035.

interexchange traffic and, therefore, agree with BellSouth that calls to and from such calling areas are non-local.

Having answered this question, the next issues are whether intercarrier compensation should be paid for these types of calls and, if so, whether reciprocal compensation is the proper type of intercarrier compensation. Intermedia points out that BellSouth has admitted that it charged Intermedia and other CLECs reciprocal compensation for calls made to BellSouth FX service subscribers. This indicates that BellSouth considers or did consider such traffic as local.

After careful examination of Intermedia's FX service analogy, the Arbitrators are convinced that BellSouth is wrong to do so. The FCC has found that the reciprocal compensation provisions of Section 251(b)(5) for the transport and termination of traffic do not apply to the transport and termination of interstate or intrastate, interexchange traffic.⁹³ Thus, because BellSouth is completing the equivalent of an intrastate, interexchange call over a BellSouth interexchange facility that terminates on BellSouth's local network and originates on Intermedia's local network, BellSouth should actually pay Intermedia originating access charges for a call of this type. Likewise, Intermedia should pay BellSouth originating access charges if the FX service subscriber is Intermedia's customer, the interexchange facility belongs to Intermedia, and a BellSouth local customer places the call. This position is supported by the FCC's statement that "[t]raffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges."⁹⁴

Based on the above findings and conclusions, the Arbitrators voted unanimously that the parties may establish their own local calling areas and assign numbers for local use anywhere

⁹³ See *id.* ¶ 1034.

⁹⁴ *Id.* ¶ 1035.

within such areas as long as the parties properly rate, time, and compensate each other and other carriers for the mutual exchange of such traffic. Additionally, the Arbitrators voted unanimously that calls to an NPA/NXX in a local calling area outside the local calling area where the NPA/NXX is homed shall be treated as intrastate, interexchange toll traffic for purposes of intercarrier compensation and, therefore, are subject to access charges. Finally, the Arbitrators voted unanimously that nothing in this ruling exempts either party or any other carrier from the provisions of Tenn. Code Ann. § 65-21-114 which requires all carriers to provide county-wide calling.

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
HARRISBURG, PA 17105-5265

Public Meeting held August 28, 1997

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
John Hanger
David W. Rolka
Nora Mead Brownell

Joint Application of Bell Atlantic-
Pennsylvania, Inc. and MCI Metro Access
Transmission Services, Inc., for Approval
of an Interconnection Agreement Under
Section 252(e) of the Telecommunications
Act of 1996

A-310236F0002

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration is the Joint Application of Bell Atlantic - Pennsylvania, Inc. and MCI Metro Access Transmission for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996 (Joint Application). This filing is made pursuant to the Commission's Order implementing the Telecommunications Act of 1996, 47 U.S.C. §252, et seq. (Act), and the requirements of the Act. See In re: Implementation of the Telecommunications Act of 1996, Docket No. M-00960799, (Order entered June 3, 1996; Order on reconsideration entered September 9, 1996).

In sum, MCI's position is that the true nature of this issue involves reciprocity and symmetry. The FCC has defined symmetrical compensation arrangements as "those in which the rate paid by an incumbent LEC to another telecommunications carrier for transport and termination of traffic originated by the incumbent LEC, is the same as the rate the incumbent LEC charges to transport and terminate traffic originated by the other telecommunications carrier." (MCI Position Paper at 5 citing FCC Local Competition Order Para. 1069).

In conclusion, MCI notes that Bell's position fails to recognize the difference between the two distinct networks involved and that on procedural grounds, Bell was on notice of MCI's position on this issue as early as August 30, 1996. At this time, when MCI filed its Arbitration Petition, it included within that petition a white paper entitled Network Implementation: Requirements for Interconnection, Access to Unbundled Elements and Collocation. Within that white paper, MCI discussed the issue of each party paying to bring traffic to the IP. MCI observes that Bell filed a response to its Arbitration Petition on September 25, 1996, and nowhere in said response did Bell state that it disagreed with MCI's assessment regarding each party paying to bring traffic to the other's IP. (MCI Position Paper at 7).

Disposition of Unresolved Issue

On consideration of the positions of the parties, we must make a very difficult decision concerning who pays for the cost of the transport from the point of interconnection to MCI's switch, to terminate Bell traffic to an MCI customer. It appears to us that the reciprocal situation of Bell terminating MCI's traffic is less costly because Bell has an access tandem located in two different geographical areas. Thus, the cost of transport for MCI is less as compared to the situation where Bell would have to pay transport from one end of the

LATA to the other end of the LATA where MCI's switch is located (point of interconnection). We conclude that the interconnection agreement should be as economically neutral as possible for transport costs to each company's switch for termination of traffic.

On balance, we find that Bell's position conforms with present and reasonable network configuration. The present configuration, with two tandem areas in the Philadelphia LATA and two in the Pittsburgh LATA, is both a logical and efficient network arrangement. To oblige MCI, Bell would have to send each tandem's area MCI traffic to one central point, solely for MCI's convenience. To accomplish this, Bell would need to effectuate an expensive and inefficient reconfiguration of the network.

Consequently, MCI's position would require Bell to reconfigure the network to conform with MCI's existing arrangement - a network with only one point of interconnection per tandem area. As discussed above, this would be both expensive and inefficient, from an overall public switched network perspective. Therefore, we determine that MCI must accept the present network arrangement and make an effort to conform to it. This should apply to other new local service providers as they come "on line."

We are disappointed that the issue has not been addressed and resolved to this point, given the fact that it was raised in the August, 1996 white paper of MCI. However, we are cognizant of the complex technical and practical problems which are not able to be foreseen until local exchange competition becomes fully implemented as a basis for the failure of the parties to resolve this issue until now.

We would offer one final thought on this issue. Since MCI's long distance partner, MCI Telecommunications, has established points of presence in each access tandem serving areas in the Philadelphia and Pittsburgh LATAs (switches), we believe that MCI

could use these switches for the termination of Bell Atlantic traffic to MCI customers which originates in the respective access tandem serving area without experiencing substantial additional costs.

We have researched a similar issue in Maryland between Bell Atlantic-Maryland and MCI. Our research has discovered that as early as 1995, the Maryland Commission, in its MFS Intelenet docket, had established guidelines for the termination of traffic by Bell Atlantic-Maryland and MFS, which would ultimately apply to MCI and future competitive local exchange carriers.

We shall selectively quote from the Maryland Commission Order:

The parties identify several unresolved, non-price related issues. The first one that we will discuss relates to points of interconnection ("POI"). Staff and BA-MD propose that at a minimum, new entrants interconnect their networks with Bell Atlantic's at the access tandem serving the area where the call will terminate. This requirement mirrors one applicable to interexchange carriers for delivery of toll calls to BA-MD network.

The Maryland Order further states:

...After considering this issue, we believe that network interconnection should be structured pursuant to staff's proposed guidelines. We recognize that this will require co-carriers to make some investments that they otherwise would not have made. However, MFS-MD's proposal would result in routing protocols for local calls different from those contained in the Local Exchange Routing Guide ("LERG") that governs delivery of interexchange toll calls. We find that there is insufficient

information in the record to justify deviation from LERG for local calls...

(Re Application of MFS Intelenet of Maryland, Inc., Case No. 8584, Phase II, 96 MD PSC 467, p. 71, 73.)

Based on our review of the position statements filed in the negotiations in the instant docket, we will adopt the proposed language of Bell Atlantic-Pennsylvania, Inc. regarding MCI's responsibility to provide two points of interconnection, one each at geographical access tandem serving areas.

We further note that by Order No 75168, entered on January 28, 1997, the Maryland Commission accepted the Agreement and Stipulation extending the time for the MCI/BA-MD negotiations. On June 4, 1997, MCI and Bell Atlantic filed a Joint Petition for Expedited Hearing on Remaining Unresolved issues, noting that only three of the previously enumerated 15 issues remained unresolved at that time. On June 12, 1997, the Maryland Commission delegated this matter to the Hearing Examiner Division, and further required that an expeditious hearing be held. In essence, the Hearing Examiner's Order which becomes the official action of the commission unless appealed, states that for the purpose of the MCI/BA-MD proceeding, they will rely on the findings of the previously mentioned 1995 case (Case No. 8584-II) for determining the proper approach to parties responsibilities' for Point Interconnection (PI) for termination of traffic by the CLEC from the incumbent LEC.

In the 1995 case, the Maryland Commission adopted the position of BA-MD and its own Staff concerning the responsibility for PIs for CLECs for terminating the incumbent LEC's traffic. The Maryland Commission appears to be reaffirming their earlier order that states that the CLEC must provide point interconnection at each of Bell Atlantic's access tandem serving areas instead of their position that they need only one per LATA.

Based upon our evaluation of this matter, we shall adopt the Bell language for points of interconnection responsibility. The parties are required to adopt the said language and refile the proposed interconnection agreement within 30 days of the entry date of this Order.

D. Disposition of Interconnection Agreement

Upon consideration of the Joint Application and the Interconnection Agreement, we acknowledge that the parties desire to bring closure to the interconnection process set forth in the Act. Our review of the Interconnection Agreement discloses that the issues resolved through the arbitration process are set forth consistent with the December 20, 1996 Order. This final agreement continues the interim rates for unbundled loops. Also, we have resolved the responsibility for the language for points of interconnection for terminating traffic.

In our June 3, 1996 Implementation Order, we envisioned that a final adjudication phase would take place at the end of a negotiation and/or arbitration phase which would bring all issues together in a final interconnection agreement document. Said final interconnection agreement, upon Commission approval, is to be made available for public inspection and copying. See Implementation Order, slip op. at 33-34.

In large part, the Joint Application as revised by the July 9, 1997 filing is consistent with the intent of our Implementation Order and this Commission's interpretation of the requirements of Section 252 of the Act. Yet, the Interconnection Agreement, because it reflects the interim unbundled loop rates established in MFS - Phase II, will ultimately be revised in the near future. This Commission shall set permanent rates for unbundled loops in our disposition of the pending MFS - Phase III proceeding. (Application of MFS Intelenet of Pennsylvania, Inc., et al. Docket No. A-310203F0002 (Interim Order re: Phase III entered