STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **AMERITECH MICHIGAN** to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation.	Case No. U-12696

At the January 23, 2001 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On October 27, 2000, Ameritech Michigan filed an application for approval to revise its reciprocal compensation rates and rate structure. The application further requests that the Commission classify foreign exchange (FX) service as non-local exchange traffic and exempt it from reciprocal compensation.

In a letter to Ameritech Michigan dated November 9, 2000, the Commission's Executive Secretary directed Ameritech Michigan to issue a notice of opportunity to comment on the application to the Attorney General and all licensed local exchange carriers (LECs) operating in Michigan as of October 31, 2000. The letter set a deadline of January 4, 2001 for filing comments.

On January 4, 2001, AT&T Communications of Michigan, Inc., and TCG Detroit (collectively,

AT&T), MCImetro Access Transmission Services, Inc. (WorldCom), Coast to Coast Telecommunications, Inc. (Coast), Focal Communications Corporation of Michigan (Focal), MichTel, Inc., TelNet Worldwide, Inc. (TelNet), Thumb Cellular (Thumb), and the Commission Staff (Staff) filed comments.

Procedural Objections

AT&T and the other competitive LEC (CLEC) parties object to Ameritech Michigan's application on procedural grounds. They argue that, by proposing changes to existing interconnection agreements, Ameritech Michigan is attempting to circumvent several recent arbitration decisions, which are binding. AT&T says that, under federal law, if Ameritech Michigan cannot accept the outcome of an interconnection proceeding, its remedy is to file suit in federal court, see 47 USC 252(e)(6), and not to file an application with the Commission that seeks to relitigate prior determinations. Coast and MichTel say that if the Commission is inclined to grant Ameritech Michigan's application on its merits, it should state that the changes do not affect existing interconnection agreements.

The Staff notes that existing interconnection agreements speak for themselves regarding the appropriate rates to charge if the Commission were to modify the rate structure.

The Commission rejects the view that once it makes a determination in an interconnection proceeding, it can never reconsider that decision or make prospective changes to the rates, terms, and conditions of a particular interconnection service. As for existing interconnection agreements, the Commission agrees with the Staff that the reciprocal compensation rates and provisions of those agreements are subject to change only as provided in those agreements.

Reciprocal Compensation Rate Structure

Ameritech Michigan filed its current tariff rates for terminating other LECs' local traffic to comply with the Commission's August 31, 2000 order in Case No. U-11831. The current rates, applied to minutes of use, are as follows:

End office local termination	$0.001004 per minute
Tandem switching	$0.000262 per minute
Tandem transport termination	$0.000175 per minute
Tandem transport facility mileage	$0.000002 per minute per mile

Under the interconnection agreements between Ameritech Michigan and some CLECs, the CLECs charge Ameritech Michigan the same rates to terminate the local traffic that Ameritech Michigan originates. In those instances, a change in Ameritech Michigan's reciprocal compensation rates could affect both the compensation those CLECs pay to have their traffic terminated by Ameritech Michigan as well as the charges they bill to Ameritech Michigan for terminating its traffic.

Ameritech Michigan claims that current rates recover costs on the basis of an assumed average holding time of 4.6 minutes per call. According to Ameritech Michigan, this assumption does not adequately account for the fact that actual call durations can vary widely and may greatly exceed the average, particularly when placed from a computer modem to an Internet service provider (ISP). Ameritech Michigan claims that Internet calls originating on its network have an average duration of 28.7 minutes.

Ameritech Michigan says that each call incurs two types of costs, setup costs and duration costs. It incurs setup costs to connect a call, and those costs, unlike duration costs, do not vary with the length of the call. Because current rates are applied to minutes of use, they overcollect the average setup costs factored into the per-minute charge whenever the call exceeds the 4.6-minute

assumed holding time of an average voice call (and, conversely, undercollect those costs on shorter calls). Ameritech Michigan claims that this rate structure gives CLECs an economic incentive to focus on providing service to ISPs with large volumes of lengthy incoming calls, so that the resulting traffic imbalance means that Ameritech Michigan pays far more in reciprocal compensation than the costs assumed in the rate structure. Ameritech Michigan claims that the average holding time of traffic for which it pays reciprocal compensation to CLECs is 24 minutes.

In this application, Ameritech Michigan proposes to modify the reciprocal compensation rate structure as a means of reflecting more accurately how it incurs the underlying costs of providing termination. Its proposed charges are as follows:

End office local termination:	
Setup charge	$0.001885 per call
Duration charge	$0.000605 per minute
Tandem switching:	
Setup charge	$0.000131 per call
Duration charge	$0.000234 per minute
Tandem transport termination:	
Setup charge	$0.000087 per call
Duration charge	$0.000156 per minute
Tandem transport facility mileage	$0.000002 per minute per mile

In effect, Ameritech Michigan is proposing a bifurcated rate structure that would reduce the current charges applied to minutes of use and shift the recovery to a setup charge that applies to each call, without regard to duration. Ameritech Michigan requests that the Commission authorize it to tariff the charges and order that existing interconnection agreements providing reciprocal compensation rates based on total element long run incremental cost be modified to reflect the new charges.

Ameritech Michigan claims that the proposed charges are based on the total service long run incremental cost (TSLRIC) studies approved in Case No. U-11831 and that no new cost studies are

necessary. It says that its proposal would reduce the incentives for CLECs to achieve traffic imbalances, which, it suggests, could be further aggravated by the expansion of local calling areas in Case No. U-12528. It maintains that its proposed rate structure is consistent with, if not required by, the cost causation principles of federal and Michigan law and that other states have adopted similar reforms.

AT&T and other CLECs argue that changing the rate structure for reciprocal compensation would be contrary to the Commission's directives regarding cost study revisions in the November 17, 1999 order in Case No. U-11831. That order states that Ameritech Michigan may not file revised cost studies less than two years after its last round of cost studies unless there is a fundamental change in circumstances. It further states that any revised studies must cover the provider's entire network, unless the studies address new services. The CLECs argue that Ameritech Michigan did not propose a bifurcated rate structure in Case No. U-11831, that the order in that case precludes Ameritech Michigan from revising its cost studies on a piecemeal basis, and that any change must await appropriate cost study revisions in the future.

AT&T further contends that the proposed rates cannot be reconciled with current cost studies, as approved in Case No. U-11831. AT&T asserts that the markup over cost is more than would be permitted in the cost studies. It says that the holding time assumptions cited in the application do not appear in the studies and that AT&T's own experience suggests that an average holding time of 24 minutes for terminations to CLECs is overstated. TelNet says that the application does not provide enough information for it to verify whether the proposed rates are consistent with the cost studies.

The CLECs claim that if a bifurcated rate structure is in fact justified by calling patterns, Ameritech Michigan must apply the same type of rate structure to all other services or offerings

that use the same switching elements, e.g., access to unbundled local switching.[1] They say that the cost characteristics distinguishing setup and usage are true for all switching functions and that it would be unfair for Ameritech Michigan to charge a bifurcated rate structure only when it is to its financial advantage.

AT&T and WorldCom say that the Federal Communications Commission (FCC) has previously found that charging for reciprocal compensation on the basis of uniform minutes of use is just and reasonable. AT&T and MichTel suggest that it might be appropriate to defer action on these matters until after the FCC issues its anticipated declaratory ruling relating to inter-carrier compensation.

AT&T contends that the current rate structure promotes competition. It says that even if some CLECs do focus their marketing efforts on attracting ISPs and other customers with high volumes of incoming calls, those traffic patterns have compelled Ameritech Michigan to reduce its reciprocal compensation rates, which in turn benefits other CLECs with more balanced calling patterns. MichTel suggests that Ameritech Michigan's efforts to reduce its rates may have succeeded in foreclosing CLECs from recovering their actual costs of terminating the traffic.

Thumb, a commercial mobile radio service (CMRS) provider, observes that Ameritech Michigan's proposed rates are slightly higher than the TSLRICs approved in Case No. U-11831 if it is assumed, as Ameritech Michigan indicated, that the average holding time is 4.6 minutes per

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[1]WorldCom claims that it supports the general principle of charging nontraffic-sensitive and traffic-sensitive costs as separate rate elements and that it has promoted it as the basis for pricing unbundled local switching. It says that its objection is to Ameritech Michigan's effort to apply this approach selectively to reciprocal compensation.

call. Thumb argues that if Ameritech Michigan is to revise the rate structure for reciprocal compensation, it should also restructure the TSLRIC-based rates for transit service.[2]

The Staff says that the proposed rate structure is reasonable and that the rates are a reasonable reflection of the costs approved in Case No. U-11831.

The Commission finds that ~~Ameritech Michigan~~'s proposal for changing the rate structure for reciprocal compensation should be adopted. Ameritech Michigan's showing that a rate structure predicated upon dual charges for per-call setup and per-minute usage better reflects cost causation has not been rebutted by the other carriers. Moreover, the revenue effects are largely neutral to the extent that the traffic being exchanged does reflect the average holding time used to set the charges.[3] No party has provided specific documentation that would undermine the holding time assumption as applied to Ameritech Michigan's network. Because the other cost assumptions are consistent with the TSLRICs in Case No. U-11831, the Commission finds no violation of the procedures set forth in Case No. U-11831 for performing cost studies and making rates consistent with TSLRIC. In addition, the revised rate structure should blunt any incentive that may now exist to manipulate the calling patterns of the traffic exchanged with Ameritech Michigan.

If some parties believe that Ameritech Michigan's support for modifying the rate structure in light of cost differences is selective and arbitrary as applied solely to reciprocal compensation, they should pursue appropriate applications or complaints to address other services or unbundled elements that they believe require similar treatment. The Commission applied similar cost

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[2] According to Thumb, transiting permits an originating LEC to route a call through Ameritech Michigan's network to another LEC for termination.

[3] Although Thumb contends that the rate changes produce a revenue increase based on an assumed holding time of 4.6 minutes, the increase is slight and appears to be the result of rounding.

causation principles in determining that a greater proportion of unbundled local switching costs was not usage-sensitive in Ameritech Michigan's most recent cost studies. November 16, 1999 order, Case No. U-11831, at 16-17. Thumb's stated concerns related to CMRS are beyond the scope of this application.

As noted above, the changes approved in this order will affect or not affect existing interconnection agreements in accordance with the terms of those agreements. Thus, the reciprocal compensation rates and arrangements provided in an existing agreement will remain in effect for the term of the agreement, unless the agreement provides differently.

As several parties have noted, it is widely believed that the FCC is actively considering how to restructure reciprocal compensation, although it is unclear when or how it may do so. The Commission recognizes that the rate structure it approves in this order may be subject to different considerations if and when the FCC acts. After a definitive FCC order issues, the Commission will review the effect of the changes brought about by that order on reciprocal compensation arrangements in Michigan and, if appropriate, conduct new proceedings on an application or complaint or open a proceeding on its own motion.

Foreign Exchange

For purposes of this application, Ameritech Michigan defines FX as a service that enables an end-user in one exchange to place a call to the customer of the service, who is located in another exchange, without incurring toll charges. Ameritech Michigan says that FX service is in fact a form of interexchange service, and not basic local exchange service. Therefore, Ameritech Michigan proposes that calls routed through an FX arrangement to the connecting LEC's customer not be classified as local traffic, so that those calls would not be subject to reciprocal compensa-

tion. In practice, this would free Ameritech Michigan from making reciprocal compensation payments when its retail customers make Internet calls that use some form of FX service to connect through a CLEC to an ISP located in a distant exchange.

The CLECs say that Ameritech Michigan's attempts to distinguish FX service from the exchange of local traffic ignore technological differences relating to how incumbent LECs (ILECs) and CLECs switch and terminate their traffic. The CLECs explain that, unlike Ameritech Michigan's ubiquitous network of switches serving relatively small rate centers, a CLEC typically configures its network with a fewer number of larger switches serving larger geographic areas. AT&T says that its investment in modern technology as well as the geographical dispersion and traffic patterns of its customer base makes this network architecture more efficient than reproducing Ameritech Michigan's network. Coast agrees and adds that some CLECs, including itself, are able to provide service by installing only one switch as a point of interconnection with the ILEC's network in a given LATA.

The FX service that Ameritech Michigan traditionally offered to its customers used a dedicated line to connect the customer to callers in distant exchanges.[4] In contrast, a typical CLEC network enables it to terminate calls to any location within the larger area served by one of its switches, even though some of those calls may cross from one Ameritech Michigan rate center to another and would incur additional costs if terminated on the incumbent's network. Thus, the CLECs say that what Ameritech Michigan regards as a form of FX service is often the equivalent in cost of connecting a local call when performed by a CLEC. Focal notes that if the CLEC did not

[4] Ameritech Michigan explains that FX service is typically provided to a customer by assigning a telephone number with an NXX that is associated with the distant exchange, so that calls placed with that number are rated as local.

exist and the called party were a customer of Ameritech Michigan, Ameritech Michigan would be required to invest in the facilities and incur the costs necessary to terminate the call. Focal suggests that adopting Ameritech Michigan's position would in turn force the CLECs to raise their retail rates (or exit the market), to the detriment of ISPs and other customers that benefit from the wider calling areas.

Focal further questions whether Ameritech Michigan's FX proposal is feasible. Because Ameritech Michigan's network segregates and bills retail calls as local or toll on the basis of the dialed NXX code assigned to the rate center, and not the actual routing of the call, Focal claims that Ameritech Michigan would not be able to identify an FX-like call placed by one of its customers to a telephone number with a local NXX code. At a minimum, Focal suggests, carriers are not equipped to segregate FX and local calling for purposes of billing reciprocal compensation and would incur administrative expense in making the necessary modifications to their billing systems.

The Staff opposes Ameritech Michigan's proposal to reclassify FX calls. It says that the proposal would withhold any recovery of the terminating costs, even though LECs do incur those costs when they terminate FX calls. The Staff also notes that reclassifying FX calls for billing purposes would be costly. The Staff says that the Commission should affirm its current treatment of these calls.

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.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The reciprocal compensation rates proposed in the application should be approved.

c. The proposed reclassification of FX service for reciprocal compensation purposes should be denied.

THEREFORE, IT IS ORDERED that:

A. The reciprocal compensation rates proposed in the application filed by Ameritech Michigan are approved, subject to the provisions of existing interconnection agreements.

B. The request in Ameritech Michigan's application to reclassify foreign exchange service for reciprocal compensation purposes is denied.

C. Ameritech Michigan shall file tariff sheets to implement this order within 10 days.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman, abstaining.

(SEAL)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of January 23, 2001.

/s/ Dorothy Wideman
Its Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman, abstaining

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Commissioner

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Commissioner

By its action of January 23, 2001.

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Its Executive Secretary

In the matter of the application of **AMERITECH MICHIGAN** to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation.

Case No. U-12696

Suggested Minute:

"Adopt and issue order dated January 23, 2001 granting the request of Ameritech Michigan to revise its reciprocal compensation rates, but denying the application in all other respects, as set forth in the order."

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Re TDS Metrocom, Inc.
Case No. U-12952

Michigan Public Service Commission
September 7, 2001

Before Chappelle, chairman, and Svanda and Nelson, commissioners.

BY THE COMMISSION:

OPINION AND ORDER

*1 On May 18, 2001, TDS Metrocom, Inc., (TDS) filed a petition seeking arbitration of an interconnection agreement with Ameritech Michigan, pursuant to Section 252(b) of the federal Telecommunications Act of 1996 (federal Act), 47 USC 252(b). The petition identified more than 50 issues and included a statement of position, supporting arguments, and numerous appendices detailing the parties' negotiations.

An arbitration panel was appointed, which included Administrative Law Judge George Schankler and Commission Staff members Louis Passariello and Margaret Wallin (arbitration panel).

On June 12, 2001, Ameritech Michigan filed its response to the petition, which included a double red-lined version of the interconnection agreement and several verified statements from various persons in support of Ameritech Michigan's position on the issues. The parties noted that the same issues had been previously arbitrated in both Wisconsin [FN1] and Illinois [FN2] and that the parties had used a consistent numbering system for issues raised in all three states. In keeping with that convention, the discussion portion of this order will follow the numbering system used by the parties and the arbitration panel.

The parties met with the arbitration panel on June 19, 2001, at which time the arbitration panel set a schedule for the proceeding and encouraged the parties to settle issues. Pursuant to the directions of the arbitration panel, the parties filed their respective Proposed Decision of the Arbitration Panel (PDAP) on July 13, 2001. At that time, the parties submitted 38 issues for decision, having settled the remainder.

On July 19, 2001, TDS submitted a hearing examiner's Proposed Arbitration Decision for the Illinois arbitration case between the parties as supplemental authority for the arbitration panel to consider. In response, on August 1, 2001, Ameritech Michigan filed the exceptions to that proposed decision that each party's Illinois affiliate had filed in that proceeding.

On August 6, 2001, the arbitration panel issued its Decision of the Arbitration Panel (DAP). On August 16, 2001, Ameritech Michigan filed its objections to the DAP, contesting the results of 21 of the issues that the arbitration panel decided. TDS filed a statement indicating that it would not be filing objections.

Discussion

Although Ameritech Michigan's introduction indicates its displeasure with the

rbitration panel's decision on certain issues, the issues discussed most fully in the introduction do not appear among those issues to which Ameritech Michigan formally objects. Ameritech Michigan asserts that the percentage of issues decided in favor of TDS should lead the Commission to suspect bias against the incumbent local exchange carrier (ILEC). It further states its belief that the arbitration panel did not use the decisions available from Wisconsin and Illinois on an even-handed basis. It argues that the result is a decision that is discriminatory and unfair.

*2 The Commission is not persuaded that the arbitration panel rendered a decision that is discriminatory or unfair to Ameritech Michigan, regardless of the percentage of issues decided in favor of TDS. Rather, the arbitration panel's decision is generally founded on, and consistent with, principles established in prior Commission orders and on sound reasoning. This order addresses the formally contested issues in the following sections.

Issue TDS-19 Notification of Change in Tariff Provisions

TDS proposed that the interconnection agreement include language that would require Ameritech Michigan to provide TDS two-weeks' advance notice 'of any tariff or filing which concerns a tariff referenced in this Agreement.' General Terms & Conditions, Section 38.3. TDS pointed out in its PDAP that the Wisconsin arbitration panel had agreed with this language and that Ameritech Michigan had not filed any objections to that finding. The Michigan arbitration panel determined that TDS's position on this issue should be adopted.

Ameritech Michigan objects to the decision of the arbitration panel. It states that although TDS framed the issue as whether notice should be provided for changes to tariffs 'incorporated' into the agreement, the language proposed uses a broader term, 'referenced,' in the agreement. Ameritech Michigan complains that although the arbitration panel found this provision 'only fair,' it did not explain why it was fair. Ameritech Michigan suggests that because the arbitration panel did not provide a sufficient rationale for its decision, the Commission should reverse it without further inquiry.

Moreover, Ameritech Michigan argues, TDS's proposed language is not fair or reasonable. It states that the parties' Appendix Resale references Ameritech Michigan's resale tariff, which will change whenever Ameritech Michigan determines to change its retail tariff. Thus, inclusion of this language, argues Ameritech Michigan, will require it to provide notice to TDS every time it amends its retail tariffs. It argues that TDS will be the only competitive local exchange carrier (CLEC) in Michigan getting such notice, making this provision discriminatory.

Ameritech Michigan further argues that to provide advance notice to TDS of changes in Ameritech Michigan's retail rates would prejudice Ameritech Michigan. It argues that if it must notify TDS two weeks in advance of such a change, TDS would be able to begin discounting resold service to its own customers in advance of Ameritech Michigan's ability to employ the lower rates for its retail customers. It argues that such a scheme would be a deterrent to Ameritech Michigan ever discounting its retail rates.

In Ameritech Michigan's view, the DAP imposes a substantial and unnecessary burden on Ameritech Michigan. Any time the ILEC desired to alter its tariffs in any manner, it argues, it would be required to check the interconnection agreement to see if that tariff is referenced and thereby requires notice. If notice is required, Ameritech Michigan argues, it then may have to delay filing

The proposed tariff alteration, even though 'most of the filings in question would have no effect on TDS at all.' Ameritech Michigan's objections, p. 11.

*3 Finally, Ameritech Michigan argues, if the arbitration panel merely desired to protect TDS from unilateral changes to the contract by virtue of tariff changes, its concern was misplaced. It states that Section 38.2 ensures that Ameritech Michigan may not alter the parties' contractual commitments by virtue of a tariff change.

After reviewing the materials presented during the arbitration, the Commission finds that the arbitration panel's decision should be upheld. As mentioned above, this issue appeared also in the Wisconsin arbitration. In that proceeding, TDS proposed broader language than it did in the present case. Ameritech Michigan's Wisconsin affiliate objected to including the proposed language, but suggested that if the Wisconsin panel determined that it should adopt TDS's position, it should revise the contract language to require notice be provided only for tariffs referenced in the agreement. The Wisconsin panel awarded TDS the issue, but revised the language as suggested by Ameritech Wisconsin. Ameritech Wisconsin did not object to the resolution of that issue. The issue was apparently settled before submission in the Illinois arbitration, because it is not addressed in either the Illinois proposed decision or the Illinois Commerce Commission's Arbitration Decision for TDS and Ameritech Illinois.

In the present case, TDS proposed language similar to that adopted by the Wisconsin panel and not objected to by Ameritech Wisconsin. The arbitration panel found for TDS, thereby adopting the result that was reached in Wisconsin without objection.

The Commission concludes that two weeks' notice of any change in tariffs that are referenced in the agreement is not unreasonable. It will provide sufficient notice to TDS of coming changes so that it may have an opportunity to deal with them. Nor is the Commission persuaded that this provision places an undue burden on Ameritech Michigan. It is a relatively simple task to compile a list of all referenced tariffs to be cross-checked before a tariff filing. The Commission further rejects Ameritech Michigan's argument that the provision is discriminatory. A provision need not appear in every interconnection agreement within a state to avoid being discriminatory.

The Commission further finds that this provision should not materially affect Ameritech Michigan's ability to compete. Resale tariffs are based on retail tariffs, but do not change for a promotional rate. Thus, Ameritech Michigan may lower its rates as a promotional program, without the need for notifying TDS of a tariff change.

Finally, the Commission finds that this provision does not abrogate Ameritech Michigan's obligation to follow the procedure for tariff changes in the March 7, 2001 order in Case No. U-12540.

Issue TDS-30 Appropriate Limits on Use of Unbundled Network Elements (UNEs)

Ameritech Michigan acknowledges that the arbitration panel's decision is consistent with Commission precedent. [FN3] However, to preserve the issue for appellate purposes, the company objects to that decision as being contrary to federal law. Ameritech Michigan asserts that its proposed language is consistent with the Federal Communications Commission's (FCC) limitations that Ameritech Michigan argues prohibit the connection of UNEs with other tariffed services, except collocation.

*4 The Commission notes that Ameritech lost this issue before both the Wisconsin arbitration panel and the Illinois Commerce Commission.

The Commission finds that the decision of the arbitration panel should be ffirmed. Even though Ameritech Michigan was on notice of the Commission's prior decisions on this issue, it continued to propose language that is overly broad and would potentially prohibit combinations that do not violate the federal roscription against a CLEC's providing access service to permit Interexchange arriers (IXCs) to avoid the ILEC's access tariffs. See, Supplemental Order Clarification in CC Docket No. 96-98, Implementation of the Local Competition rovisions of the Telecommunications Act of 1996, FCC 00-183 (rel'd June 2, 000). Ameritech Michigan further proposed its language cognizant of the Commission's arbitration procedures. Thus, Ameritech Michigan should not now be heard to complain about losing the issue, having taken that risk knowingly.

Issues 33 through 40 Off-site Adjacent Collocation Access to UNEs

TDS originally sought provisions for this interconnection agreement that would permit it to obtain off-site adjacent collocation access to UNEs consistent with he availability of that service in California. It proposed language that omewhat altered the conditions of the California offering. Ameritech Michigan opposed permitting TDS to utilize off-site adjacent collocation.

During the course of the arbitration proceedings, the arbitration panel met ith the parties in an attempt to narrow the issues before it. At that time, the panel noted that Ameritech Michigan had a tariff on file in Michigan for off-site adjacent collocation, and suggested that the parties should be able to tle the issue. Thereafter, TDS notified Ameritech Michigan and the itration panel that it would accept a provision in the contract that permitted it to use the Michigan tariff for off-site adjacent collocation. oting that the provision had been appealed by Ameritech Michigan, TDS proposed anguage that also permits Ameritech Michigan to invoke the change of law provision of the contract should the ILEC be successful on that appeal.

Ameritech Michigan opposed permitting TDS to alter its position from that which t took in the petition for arbitration. It stated that if off-site adjacent collocation is permitted at all, it should be limited to the language originally required in California.

Although generally baseball style arbitration requires the choice between the wo parties' proposals, the arbitration panel noted that in order to prevent an unjust or unreasonable outcome, it could award something other than one of the arties' initial proposals. Therefore, it determined that to prevent such a esult it would adopt TDS's proposal that the agreement include language referencing the Michigan tariff. Moreover, the arbitration panel found that its decision was consistent with the Commission's resolution of a similar issue in ase No. U-12465, an arbitration of an interconnection agreement between meritech Michigan and AT&T Communications of Michigan, Inc. The arbitration panel further found that Ameritech Michigan had engaged in bad faith negotiation ecause it represented to TDS and the arbitration panel that off- site adjacent ollocation was available only in California, under the terms in the master contract in that state.

*5 Ameritech Michigan objects to the arbitration panel's decision and initially rgues that the Commission should reverse that decision because 'this trumped-up finding of bad faith was the sole basis for the DAP on this issue.' Ameritech Michigan's objections, p. 17 (emphasis in original).

Further, Ameritech Michigan argues that it responded to TDS's proposed language just as required under the rules of arbitration in Michigan. It states that it provided testimony on the issue of whether TDS should be allowed off- site adjacent collocation under the rules applicable in California. Ameritech Michigan asserts that TDS created the allegation of bad faith to provide the arbitration panel a reason to grant TDS's new position despite the lack of record evidence supporting it. Therefore, Ameritech Michigan strongly urges the Commission to reverse the arbitration panel's determination that the ILEC acted in bad faith. It argues that the California provisions that TDS sought to incorporate into this agreement are far different from the Michigan off-site adjacent collocation tariff provisions.

Moreover, Ameritech Michigan argues, TDS could have discovered the publicly available collocation tariff had it perused Ameritech Michigan's tariffs with a modicum of diligence.'

Ameritech Michigan's objections, p. 20. Ameritech Michigan argues that it cannot be held to have acted in bad faith for its failure to point the CLEC to a tariff for a service that it had no indication that the CLEC desired.

Ameritech Michigan further argues that it did not engage in bad faith when it argued that the arbitration panel should not consider the tariff. It states that it merely took the position that the panel and the parties should stick to the arbitration procedures approved by the Commission.

Finally, Ameritech Michigan argues that the Commission's requirement that Ameritech Michigan file the tariff in question was inconsistent with the federal law. Ameritech Michigan now invites the Commission to find that the off-site adjacent collocation tariff is contrary to federal law and thus cannot be included in the interconnection agreement. Moreover, Ameritech Michigan argues, the off-site adjacent collocation arrangements violate state law.

The Commission finds that Ameritech Michigan exhibited bad faith in its negotiations on this issue.

Bad faith is defined in Black's Law Dictionary, 4th ed, p. 176 as:

The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill Some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

Commercial Union Ins Co v Liberty Mutual Ins Co, 137 Mich App 381, 390; 357 NW 2d 861 (1984). Despite Ameritech Michigan's dubious argument that it had no idea that the Michigan tariff would satisfy TDS, and that TDS could have reviewed Ameritech Michigan's tariffs to discover the information, Ameritech Michigan has failed to adequately answer why, when confronted with the available tariff and TDS's willingness to incorporate that tariff as satisfying its desire to have off-site adjacent collocation available, Ameritech Michigan refused that compromise position. TDS, like any CLEC, has a right to obtain desired services pursuant to the terms and conditions of any Ameritech Michigan tariff. Ameritech Michigan's refusal to provide off-site adjacent collocation pursuant to the tariff it has on file is a 'neglect or refusal to fulfill some duty ..., not prompted by an honest mistake ..., but by some interested ... motive,'

*6 Further, Ameritech Michigan's argument that it should not be required to incorporate the terms of an unlawful tariff is frivolous. It has a tariff on file, which is valid until found not to be so in an appropriate forum. That

ariff is available to all takers when its conditions are satisfied. Moreover, the language offered by TDS includes language permitting a change should Ameritech Michigan prevail on its appeal of the order requiring the tariff iling. There simply is no just or reasonable basis for excluding off-site djacent collocation from the contract under the terms available to all through the tariff.

Moreover, the Commission rejects Ameritech Michigan's invitation to conduct a eview of its tariff in the present case. The tariff was filed as a result of the Commission's order in a separate, unrelated case that is currently on ppeal. Collateral attack of that decision is not appropriate.

The Commission further finds that, contrary to Ameritech Michigan's arguments, the arbitration panel relied on more than the finding of bad faith to support its decision. The arbitration panel found that this case represented an instance n which choosing one or the other of the parties' original positions would be learly unreasonable or contrary to the public interest. The Commission agrees. The arbitration panel's determination on this issue is affirmed.

Issue TDS-78 Collocated Equipment Provisions

Ameritech Michigan proposed language that would limit the type of equipment that TDS may collocate. It argued that its proposed language is consistent with he FCC's rules and that it provides important parameters relating to the type f equipment that Ameritech Michigan is required to permit TDS to collocate or hat the ILEC has voluntarily agreed to collocate. Ameritech Michigan argued that TDS's proposal to merely reference the FCC's or the Commission's rules uld not provide sufficient clarity to prevent disputes over the type of ipment that TDS may collocate.

TDS objected and argued that Ameritech Michigan's proposed language would limit he equipment permitted to be collocated well beyond the limits established by he FCC. In TDS's view, Ameritech Michigan's language would implement the ILEC's inaccurate view of the FCC's findings with regard to collocated equipment. TDS argued that the result of Ameritech Michigan's proposed language would be to lace the burden on TDS to justify a particular piece of equipment, rather than place the burden on Ameritech Michigan to show that the equipment does not meet the requirements of the federal Act.

The arbitration panel found in favor of TDS on this issue, reasoning that nclusion of Ameritech Michigan's proposed language would put the burden on TDS to demonstrate that a particular piece of equipment complied, rather than on Ameritech Michigan to demonstrate that the rejected piece of equipment did not omply with the 'necessary' element of 47 USC 251(c)(6), as provided for in 47 CFR 51.323(b). The arbitration panel found that Ameritech Michigan's proposed language attempted to circumvent the FCC's process. It further noted that the isconsin panel deleted the language to which TDS objected, and concluded that he same result should be reached here. Finally, the arbitration panel noted that its decision would be consistent with the Commission's November 20, 2000 rder in Case No. U-12465.

*7 Ameritech Michigan objects to the arbitration panel's resolution of this issue and argues that the basis for that resolution is an erroneous conclusion hat allocating the burden of proof between the parties (as to whether a articular piece of equipment meets the standard for collocation) was the crux of the issue. It argues that the proposed language has nothing to do with the den of proof. Even if the issue could be viewed as a proof issue, Ameritech

ichigan argues, the arbitration panel erred in concluding that the FCC intended to place the burden on ILECs to demonstrate to a state commission that a piece of equipment does not meet the statutory test. It argues that the FCC has placed the burden on the ILEC to prove that a particular piece of equipment that meets the federal Act's eligibility standard for collocation will not actually be used by the CLEC for one of the purposes set forth in that standard. Ameritech Michigan claims that the FCC has never suggested that the ILEC also must bear the burden to prove to a state commission that a piece of equipment does not meet the eligibility standard in the first place.

Ameritech Michigan insists that its proposed language is consistent with the FCC's regulations and the federal Act. It argues that the types of equipment listed in Ameritech Michigan's proposed language for Appendix Collocation, Sections 6.1 through 6.8 are not necessary for interconnection or access to UNEs. It argues that TDS does not point to any portion of the proposed language that it claims is inconsistent with 47 CFR 51.323(b) or (c) or any other rule.

The Commission finds that the decision of the arbitration panel to adopt the language proposed by TDS should be affirmed. The Commission notes that on July 2, 2001, the FCC adopted its Fourth Report and Order in CC Docket No. 98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability, (rel'd August 8, 2001), in which the FCC reevaluated provisions of its collocation rules on remand from the United States Court of Appeals for the District of Columbia. [FN4] In that order, the FCC determined that a piece of equipment is necessary for interconnection or access to UNEs within the meaning of Section 251(c)(6) if, absent deployment, the requesting carrier would, as a practical, economic, or operational matter, be precluded from obtaining 'equal in quality' interconnection or 'nondiscriminatory access' to UNEs from the ILEC. The Commission finds that the language proposed by Ameritech Michigan is not consistent with the FCC's July 12, 2001 order. For example, the proposed language for Section 6.2 states that multifunctional equipment is not 'necessary' for interconnection or access to UNEs. That statement contradicts the FCC's order at P 41, in which the FCC stated in part:

> In finding that in certain circumstances collocation of multi-functional equipment is consistent with the statutory language and purposes, we reject, on the one hand, positions that would result in a blanket prohibition of multi-functional equipment, and on the other hand, proposals that would result in the adoption of a standard without real limiting principles. Specifically, we reject Bell South's, SBC's, and Verizon's argument that an [I]LEC must be allowed to preclude collocation of any equipment that includes one or more functionalities whose deployment is 'unnecessary' for interconnection or access to [UNEs]. We find this approach to be unreasonably narrow and disconnected from the statutory purposes.

Id.

*8 Further, the Commission finds that there may be Some 'ancillary equipment' that would meet the standards expressed in the FCC's July 12, 2000 order on this issue. Ameritech Michigan's proposed language states, to the contrary, that ancillary equipment is not necessary, and would, if adopted, negate any duty on Ameritech Michigan's part to permit collocation of that type of equipment. The Commission finds that the more reasonable alternative here is to adopt

TDS's proposed language, which merely incorporates by reference the definition of necessary equipment that is adopted by the FCC.

Issue TDS-90 Application and Construction Intervals

Ameritech Michigan proposed language granting it longer provisioning intervals when there are multiple applications for collocation space. Generally, an ILEC must accept or deny a collocation application within 10 days. However, Ameritech Michigan argues, the FCC stated that the incumbents 'have had ample time since the enactment of Section 251 (c)(6) to develop internal procedures sufficient to meet this deadline, absent the receipt of an extraordinary number of complex collocation applications within a limited time frame.' Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, CC Docket Nos. 96-98 and 98-147, FCC 00-297, (rel'd August 10, 2000) (Collocation Remand Order), P 24. Ameritech Michigan argues that because the 10-day period is part of the 90-day period for provisioning collocation, it follows that the 90-day interval must also be extended by a corresponding amount when TDS submits a large number of applications in a limited timeframe. Ameritech Michigan argues that this is all that its proposed language intends to do. It says that its proposed language has been adopted by state commissions in Kansas, Oklahoma, Texas, California, Connecticut, and Illinois. [FN5]

Moreover, Ameritech Michigan argues, the FCC has recognized that longer intervals may be appropriate. Ameritech Michigan asserts that the Collocation Remand Order does not set a fixed interval of 90 days for filling collocation requests, when the order actually holds that states are free to set their own intervals.

The Commission finds that the decision of the arbitration panel should be upheld on this issue. In the Commission's view, Ameritech Michigan has interpreted the FCC's Collocation Remand Order too broadly. A review of the cited portions reflects the FCC's acknowledgement that a longer interval might be appropriate if the CLEC submits an 'extraordinary number of complex' applications for collocation. However, the order also notes that ILECs have had 'extensive experience with handling large numbers of collocation applications on an ongoing basis.' Id., P 28. Although the FCC order allows states to set a different interval, it concludes that an ILEC should be able to complete 'all, or virtually all, physical collocation arrangements in no more than 90 calendar days.' Id.

The Commission finds that the burden should be on the ILEC to demonstrate the need for an extension of time beyond the generally applicable 90-day interval. There is nothing in the submitted materials to suggest that six requests within a five-day period is so extraordinary or necessarily complex that Ameritech Michigan must be granted an additional five days to provision the collocation request. The record provides no insight as to the relationship between the number of requests submitted and the time needed to respond, or the underlying facts to support the alleged relationship. In short, the Commission is not persuaded that Ameritech Michigan should always be granted an extension of the provisioning interval based solely on the number of requests.

*9 Moreover, there is no indication on this record that TDS has engaged in the feared 'dumping' of numerous complex collocation requests. However, to prevent any incentive for the CLEC to 'dump' requests on Ameritech Michigan, the Commission finds that the parties should include a provision that permits Ameritech Michigan to seek an extension of the provisioning interval in

xtraordinary circumstances. If the parties cannot agree, they should each submit their last best offer for language, and the Commission will resolve the dispute.

Issue TDS-96 Conditions Under Which TDS May Increase the Size of Its Collocation Space

Ameritech Michigan proposed language for Appendix Collocation, Section 10.11 hat would limit the CLEC's right to request additional collocation space to ircumstances in which the CLEC already uses at least 60% of the collocation space that the CLEC currently rents. TDS, on the other hand, proposed that it hould be permitted to increase its collocation space whenever there is space vailable.

The arbitration panel determined the language proposed by Ameritech Michigan to be arbitrary and potentially problematic and confusing. In its view, whatever roblems might occur with the CLEC attempting to 'warehouse' space could better be dealt with in the complaint and dispute resolution procedures provided in the agreement.

Ameritech Michigan objects and argues that the FCC has recognized the ILEC's ight to impose reasonable restrictions on warehousing of unused space by CLECs, citing 47 CFR 51.323(f)(6) and the FCC's Second Report and Order in CC Docket o. 93-162, Local Exchange Carriers' Rates, Terms, and Conditions for Expanded nterconnection Through Physical Collocation for Special Access and Switched Transport, (rel'd June 13, 1997), PP 330-333. It states that the FCC has specifically approved the type of restriction that Ameritech Michigan offers ere. It argues that its proposed language provides a reasonable method to avoid premature exhaust of central office space. In addition, Ameritech Michigan argues that it should not be required to build additional space for the use of ther CLECs or itself when there is unused space that would otherwise be vailable.

Further, Ameritech Michigan argues, the arbitration panel erred when it found hat the complaint and dispute resolution processes would be sufficient to guard meritech Michigan's interests in having collocation space used efficiently. Ameritech Michigan argues that should it attempt to use the complaint and dispute resolution procedures, TDS would likely defend itself by claiming that t was merely exercising its rights under the contract. Ameritech Michigan nsists that a concrete rule as to when TDS may request additional space is necessary to avoid the need for invoking the complaint and dispute resolution rocesses.

Moreover, Ameritech Michigan argues, the arbitration panel vaguely alluded to 'problems and confusion' that it foresaw if Ameritech Michigan's proposal was adopted. However, it argues, the arbitration panel did not adequately express hat those problems might be. It asserts that the only example cited is based on faulty logic and ignores the present record. Contrary to the discussion in the DAP, Ameritech Michigan argues, TDS would not be prevented from obtaining dditional space should it submit a number of augment requests within a elatively short period of time. It argues that the proposed language specifically permits a CLEC to begin the application process prior to reaching he 60% utilization rate if the CLEC expects to achieve 60% utilization before he process is complete. Thus, Ameritech Michigan argues, the CLEC can pursue all of its applications, as long as it is using 60% of its space by the time the ocess to provision its augment request is complete. Ameritech Michigan further

otes that TDS did not argue for a lower percentage to be used, but merely argued that no limits should be placed on its ability to obtain additional collocation space.

***10** The Commission finds that the arbitration panel's decision on this issue should be affirmed. Although the Commission is not opposed to imposing some restrictions on CLEC's obtaining additional collocation space, or provisions that would permit the ILEC to reclaim areas to fill a need when the CLEC is not using its area efficiently, Ameritech Michigan has not adequately explained how it would measure the 60% utilization factor. Nor has it explained why 60% is a relevant number or how many central offices are experiencing anything close to the exhaustion of facilities. There is no evidence that TDS has ever unreasonably warehoused collocation space or that Ameritech Michigan has actually had to build facilities where the need is based only on the failure of CLECs to efficiently use space.

Therefore, the Commission joins the Wisconsin panel and the Illinois Commerce Commission in rejecting Ameritech Michigan's proposed language. The decision of the arbitration panel on this issue is affirmed.

Issues TDS-101 and 102 Notice Requirements for Major Construction Projects, and AC or DC Power Work.

Ameritech Michigan proposed language in Appendix Collocation, Section 17.1 that would require it to provide five business days' notice to TDS before undertaking a major construction project. It proposed in Section 17.3 to provide 10 business days' notice before any scheduled AC or DC power work or related activity that might cause an outage or power disruption. TDS sought 20 business days' notice for each of these activities.

The arbitration panel determined that TDS had the more reasonable position on both issues.

Ameritech Michigan objects and argues that the arbitration panel relied on language included in the Ameritech Interconnector's Collocation Service Handbook (Handbook) to support its conclusion, without recognizing that the 20 days' notice provided in the Handbook is limited to those instances in which it is feasible to provide it. Ameritech Michigan states that logic dictates that if the Handbook is to be relied upon, the phrase 'where feasible' should also appear. However, Ameritech Michigan argues, that was never TDS's position. Ameritech Michigan further argues that the verified statement of Roy R. Debatz provides record support for the company's claim that 20 days' notice is not always feasible. He stated that the need for major construction can arise within a few days. Ameritech Michigan argues that forcing it to wait 20 days to begin a necessary project is a disservice to Ameritech Michigan's customers and to other CLECs.

On the other hand, Ameritech Michigan argues, TDS provided no evidence concerning why it needs 20 business days' notice to implement whatever precautions it finds necessary in response to Ameritech Michigan's scheduled work in the general area of its collocation space. In fact, Ameritech Michigan argues, TDS did not provide evidence that it would need to take any precautionary steps at all. Similarly, Ameritech Michigan argues, TDS did not provide evidence to support its need for 20 business days' notice for power work. Ameritech Michigan points out that the remainder of Section 17.3 requires that Ameritech Michigan provide TDS with an alternate plan to provide power in the case of an outage and make reasonable accommodations to allow TDS to provide

lternate power if Ameritech Michigan does not have a plan. Thus, Ameritech Michigan concludes that its proposed language provides ample protection to TDS and its customers in this situation, and it should not be required to provide an additional 10 business days' notice or to incur otherwise unnecessary burdens concerning scheduling.

*11 The Commission finds that the decision of the arbitration panel should be affirmed. The Commission agrees with the Illinois Commerce Commission that adequate notice for proposed major construction projects and AC or DC power work that might cause an outage is critical to the ability of the CLEC to compete. This is so because the CLEC must be permitted sufficient time to ensure continued service to its customers and to arrange its own scheduling of installations so that it does not interfere with the ILEC's schedule. The Commission finds that 5 business days' notice of major construction projects and 10 business days' notice of AC or DC power work likely will not be sufficient for those purposes. Between the two options, TDS's proposed language is the more reasonable. [FN6]

Issue TDS-103 Insurance Provisions for Collocation

Ameritech Michigan proposed language for Appendix Collocation, Section 18, that establishes insurance requirements in addition to those within the General Terms & Conditions of the inter-connection agreement. Ameritech Michigan took the position that TDS creates special risks in its collocating within Ameritech Michigan's property. Thus, it reasons, TDS should purchase the insurance to cover all such risks to its own property and to hold Ameritech Michigan harmless for any damages to that property. The proposed provisions would also require that TDS agree to make whatever changes Ameritech Michigan's property insurer might recommend for safety or reduction of hazards. The language further requires TDS's insurance to be primary.

TDS opposed the inclusion of Appendix Collocation, Section 18. It argued that the insurance requirements of the General Terms & Conditions sufficiently dealt with insurance needs and this proposed section was unnecessary. Moreover, TDS argued, the proposed provisions are one-sided and discriminatory. For example, Section 18.2 requires TDS to purchase insurance to cover losses occasioned by the negligence of 'SBC-13 STATE, its agents, directors, officers, employees, independent contractors, and other representatives,' and requires that TDS waive all right of recovery from SBC-13 STATE or its agents, directors, officers, employees, independent contractors, and other representatives.' TDS argued that no reciprocal provision requires Ameritech Michigan to waive its rights to collect for damages done to its property. TDS further noted that the Wisconsin arbitration panel had found in the CLEC's favor on this issue and that Ameritech Wisconsin had not objected.

The present arbitration panel agreed with TDS, reasoning that Ameritech Michigan was merely seeking to absolve itself of liability and to have TDS pay for damages that Ameritech Michigan might cause. The arbitration panel stated that the insurance requirements are unnecessary in addition to those found in the General Terms & Conditions, and rejected Ameritech Michigan's proposed language.

Ameritech Michigan objects and argues that its proposed Section 18 would establish reasonable insurance requirements given the nature of collocation. It argues that it is required by the federal Act to open its premises to all comers so they can install telecommunications equipment and use that equipment to

ompete with the ILEC. Moreover, Ameritech Michigan states, it must permit competitors' employees to enter those premises to service the physically collocated equipment. It states: 'One CLEC's equipment is next to another's, and ll of it is near the ILEC's.' Ameritech Michigan's objections, p. 43.

*12 Ameritech Michigan further argues that none of its proposed Section 18 is repetitious of, or contradictory to, the provisions found in the General Terms & onditions. Rather, Ameritech Michigan argues, these insurance provisions are pecifically tailored to the risks associated with collocation. Ameritech Michigan readily admits that the provisions are one-sided, but defends that haracteristic as being a natural consequence of the origin and nature of ollocation.

The Commission finds that the decision of the arbitration panel should be affirmed. Generally, the Commission has rejected liability and insurance rovisions that attempt to remove an ILEC's liability for its own negligence. hese proposed provisions do just that. The Commission is not persuaded that the origin or nature of collocation requires inclusion of these provisions or that he General Terms & Conditions are not adequate with regard to insurance for ollocation purposes. Although it may be expected that TDS will provide insurance for its own interests in property and any damage it may cause, the ommission does not agree that it should be required to waive any right to btain redress from Ameritech Michigan for damage caused by the ILEC's negligence.

Moreover, the Commission rejects Ameritech Michigan's interpretation of the oted portion of the transcript from the Illinois arbitration proceeding. ely because a TDS witness might find reasonable a hypothetical recommendation to spray insulation on electrical connections to reduce fire probability by 40%, oes not support a finding that it would be reasonable for TDS to agree to all ecommendations of Ameritech Michigan's insurer. Some recommendations might significantly alter either or both sides of the cost/benefit analysis from that of the hypothetical posed to the witness. The Commission is not persuaded that TDS should be required to perform every such recommendation, despite whether it might find the recommendation reasonable. The Commission finds that TDS's interest in preserving its own property should provide sufficient incentive for t to voluntarily take reasonable steps to protect its property and the property round it.

The Commission further notes that not only will these provisions be deleted rom the Wisconsin interconnection agreement (as noted above, the Wisconsin rbitration panel awarded this issue to TDS and Ameritech Wisconsin did not object), but the Illinois Commerce Commission order also awards this issue to TDS.

Issue TDS-107 Reciprocal Compensation for **Foreign Exchange** (FX) Service

Ameritech Michigan proposed Appendix Reciprocal Compensation, Section 2.7, which would exclude FX calls from reciprocal compensation requirements. meritech Michigan argued that reciprocal compensation is due only on local raffic. It went on to argue that FX traffic is not local traffic because an FX call does not originate and terminate in the same local service area. Ameritech ichigan argued that pursuant to the FCC's recent Order on Remand and Report and rder in CC Dockets 96-98 and 99-68, (rel'd April 27, 2001) (ISP Remand Order), X calls are not subject to reciprocal compensation because they are exchange cess or are subject to intrastate access regulations. In Ameritech Michigan's

iew, the ISP Remand order abrogated the Commission's previous findings with regard to this issue.

*13 TDS pointed out that the Commission has decided this issue recently in its anuary 23, 2001 order in Case No. U-12696, Ameritech Michigan's application to lter its reciprocal compensation rate structure. In that case, the Commission denied Ameritech Michigan's request to exempt FX service from reciprocal ompensation requirements. TDS argued that Ameritech Michigan had not provided a ufficient basis in this case for the Commission to reverse its prior decision, because the FCC order upon which Ameritech Michigan relied related to ISPs, not X service.

The arbitration panel found in favor of TDS on this issue. In so doing, it rejected Ameritech Michigan's argument that the ISP Remand Order required the Commission to reach a different result than it has in past cases. [FN7] The rbitration panel further concluded that Ameritech Michigan read too much into he FCC's ISP Remand Order as that order does not address FX service.

Ameritech Michigan objects and argues that the previous Commission orders inding that FX calls are subject to reciprocal compensation under 47 USC 251 b)(5) did so based on the finding that FX calls are local. That finding, Ameritech Michigan argues, is contrary to current law. It argues that the ISP emand Order ruled that the question of whether traffic is or is not subject to eciprocal compensation under Section 251(c)(5) does not turn on whether the raffic is local. Rather, Ameritech Michigan argues, the FCC amended 47 CFR 51.701 by deleting the word 'local' from the rule and establishing new eterminants for whether particular traffic is subject to reciprocal pensation. Although Ameritech Michigan acknowledges that the ISP Remand Order did not specifically discuss the effect of the new rule on FX calls, it argues hat the FCC changed the rules and the analysis to be undertaken when etermining this issue. It argues that the arbitration panel failed to reconsider the question under the rules that now apply.

Moreover, Ameritech Michigan argues, the DAP makes another fatal error in that t references questions raised in Case No. U-12696 as to whether Ameritech Michigan's proposal to exclude FX traffic from reciprocal compensation was even feasible and that the Commission Staff had noted that reclassifying these calls or rating purposes would be costly. Ameritech Michigan objects to these eferences as a violation of its due process rights, because, in its view, the arbitration panel impermissibly reached into the record of a separate roceeding, which cannot lawfully form the basis (or part of the basis) for a ommission decision. Thus, Ameritech Michigan argues, the arbitration panel's rationale must be set aside and Ameritech Michigan's proposed language removing FX traffic from the requirement to pay reciprocal compensation should be ncluded in the interconnection agreement.

The Commission finds that the decision of the arbitration panel should be affirmed on this issue. In the ISP Remand Order, the FCC amended 47 CFR 51.701 cope of Transport and Termination Pricing Rules, which (as amended) reads in art:

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

(b) Telecommunications traffic. For purposes of this subpart, t ecommunications 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.

Although exempting information access from these requirements takes care of ISP traffic, the Commission does not agree that non-ISP FX traffic is exempt from reciprocal compensation requirements on the basis of the newly amended rule. FX is not intrastate exchange access service as argued by Ameritech Michigan. Exchange access service is defined by 47 USC 153(16) as 'the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.' Telephone toll service is defined in 47 USC 153(48) as 'service between Stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.' When an end-user dials a number that belongs to an FX customer, there is no separate charge made. Therefore, by definition, FX service is not a toll service and is not included Within the exemption from reciprocal compensation. Moreover, the Commission has consistently held that FX calls are to be treated as local for rating purposes.

Further, the Commission is not moved to reverse its prior orders based on Ameritech Michigan's argument concerning the arbitration panel's mentioning certain facts asserted in Case No. U-12696, First, it is apparent to the Commission that the arbitration panel had a firm basis for its findings without the added concern about the feasibility of altering the compensation scheme for FX service. It properly relied on prior Commission precedent, which has not been abrogated or preempted by anything cited to the Commission. However, to avoid any misunderstanding the Commission affirmatively states that it has not considered the disputed facts in its rendering of a decision on this issue.

Issue TDS-123 Limitations and Liabilities Associated with Use of Electronic Interfaces

In Appendix OSS, Section 3.2.1, [FN8] TDS agrees to use the electronic interfaces described in that section only for proper purposes. It further agrees to comply with certain security policies and guidelines. Ameritech Michigan proposed language that would permit the ILEC to summarily terminate TDS's access to the OSS for failure to follow those agreed upon security guidelines. Additionally, Ameritech Michigan sought language imposing liability on TDS for any

...cost, expense or liability relating to any unauthorized entry or access into, or use or manipulation of [Ameritech Michigan's] OSS from [TDS's] systems, workstations or terminals or by CLEC employees or agents or any third party gaining access through information and/or facilities obtained from or utilized by [TDS] and shall pay [Ameritech Michigan] for any and all damages caused by unauthorized entry.

***15** Id. Ameritech Michigan took the position that TDS is in the best position to guard against unauthorized use through its own terminals or workstations and should be held accountable for any damages resulted from such unauthorized use or misuse of the system.

TDS objected to the proposed language and argued that it would vest too much authority with Ameritech Michigan to be permitted to summarily terminate the CLEC's ability to use the electronic interfaces and to hold it strictly liable for all damages, regardless of whether TDS is at fault. Moreover, TDS argued,

he proposed language does not require use of the dispute resolution process or specify a period of time after which access would be restored. It argued that such summary termination would effectively put TDS out of business within meritech Michigan's service territory.

Further, TDS argued, there is no need for this added language. In TDS's view, the liability provisions of the General Terms & Conditions are sufficient to nsure that TDS Will pay for damage it causes to Ameritech Michigan or its ystems.

The arbitration panel found that the language Ameritech Michigan sought to nclude was overly broad. Based on TDS's agreement to honor the security olicies and guidelines, and the additional safeguards embodied in the dispute resolution process, the arbitration panel found the provisions proposed by meritech Michigan to be unnecessary.

Ameritech Michigan objects and argues that the proposed language appropriately makes TDS responsible for any harm suffered by Ameritech Michigan's OSS systems when it is accessed from TDS's systems, workstations or erminals.' Ameritech Michigan's objections, p. 53. In Ameritech Michigan's iew, this assignment of responsibility is fair and reasonable in exchange for permitting TDS the right to access Ameritech Michigan's OSS. It argues that the ationale that TDS should not be held liable for damages not its fault should be ejected. It states that if harm is caused by someone who gains access to Ameritech Michigan's OSS through TDS's equipment, TDS may not be at fault, but Ameritech Michigan certainly is not at fault. Ameritech Michigan argues that in tuations like that, it is fair to impose liability on the one in the best osition to avoid harm, which would be TDS.

The Commission finds that the decision of the arbitration panel should be odified on this issue. There are essentially two issues embodied in the two isputed sentences. The first sentence reads: 'Failure to comply with such security guidelines may result in forfeiture of electronic access to OSS functionality.' The Commission agrees with the arbitration panel that this entence is overly broad for the protection that Ameritech Michigan may reasonably seek. The Commission notes that Ameritech Michigan's objections make it appear that this sentence is not a matter of dispute. However, the PDAPs and he DAP make it clear that this is the biggest source of objection for TDS. hould Ameritech Michigan determine (based on unknown, unlisted criteria) that a problem has arisen with access gained through TDS, this sentence might appear to ive the ILEC the right to summarily terminate TDS's access to OSS. Taking such n action would effectively foreclose the CLEC's ability to serve new customers or market its services within Ameritech Michigan's service territory. The Commission finds that the first disputed sentence should be stricken from the nterconnection agreement. The Commission notes that the Illinois Commerce Commission and the Wisconsin arbitration panel reached the same conclusion.

*16 However, the Commission is not persuaded that Ameritech Michigan should be precluded from seeking recovery from TDS for damages incurred due to access gained through TDS. It appears to the Commission that TDS is in the best position to ensure that its equipment and access to the OSS are not abused or misused. Even if a situation arose in which unauthorized access could not be said to be TDS's direct fault, if the access is gained through TDS's equipment or personnel, TDS should be responsible for the damages that may result. The Commission notes that its decision on this portion of the issue does not match

either the Illinois Commerce Commission or the Wisconsin arbitration panel's resolution. [FN9]

Issues TDS 153 and TDS-155 Terms for Use of Ameritech Michigan's Operator Services [FN10] (OS)

TDS proposed language in Appendix OS, Section 8.1 that would permit it to terminate use of these services on 30 days' notice to Ameritech Michigan. Ameritech Michigan proposed language for that section that would require TDS to choose Ameritech Michigan for its sole provider of OS for TDS's local serving areas. Ameritech Michigan further proposed that if TDS should terminate its use of Ameritech Michigan's OS before the term of the agreement expires, TDS should pay the charges that would have been imposed for the remainder of the term of the agreement in addition to charges for services already rendered.

The arbitration panel found in favor of TDS on this issue. It reasoned that, in a competitive market, TDS should be free to choose another OS provider, as long as it provided reasonable notice to Ameritech Michigan. It further found Ameritech Michigan's proposed payment on premature termination to be an unreasonable penalty provision. Therefore, the arbitration panel adopted the language proposed by TDS and rejected that proposed by Ameritech Michigan.

Ameritech Michigan objects and now argues that terms for providing OS are not properly subject to arbitration pursuant to the federal Act. Ameritech Michigan argues that nothing in the federal Act, FCC regulations, or any other source of law requires Ameritech Michigan to provide OS to TDS. Ameritech Michigan argues that the FCC found 'significant evidence of a wholesale market in the provision of OS/DA [Operator Services and Directory Assistance] services and opportunities for self-provisioning' these services. FCC Order 99-238, Third Report and Order and Fourth Notice of Proposed Rulemaking, Docket No. 96-98, (rel'd November 5, 1999) (UNE Remand Order). Ameritech Michigan further states that the FCC held that ILECs are no longer required to provide OS or directory assistance (DA) on an unbundled basis under the federal Act. Because there is no duty to provide OS as a UNE, Ameritech Michigan argues, the Commission may not properly undertake to resolve these disagreements about Appendix OS. According to Ameritech Michigan, the Illinois Commerce Commission and the Wisconsin arbitration panel agreed with the ILEC on this issue.

*17 Ameritech Michigan acknowledges that it did not raise this argument with the arbitration panel. However, it argues that this is a jurisdictional issue that may not be waived by the parties.

The Commission finds that the decision of the arbitration panel should be affirmed. In the March 19, 2001 order in Case No. U-12622, the Commission rejected Ameritech Michigan's request to discontinue providing OS/DA on an unbundled basis at rates based on total service long run incremental cost (TSLRIC). The Commission agreed with the administrative law judge's findings concerning the infeasibility and limited usefulness of the customized routing proposed by Ameritech Michigan. The Commission specifically found that Ameritech Michigan's proposed alternative 'would be costly, inefficient, and burdensome.' Id., p. 21. The Commission further found that it had authority under the Michigan Telecommunication Act, MCL 484.2101 et seq., to require OS/DA to be offered on an unbundled basis and to ensure reasonable access to competitive alternatives.

The Commission further stated:

Ameritech Michigan has interpreted the customized routing conditions of the

NE Remand Order as requiring less of it than the FCC intended. The justification that the FCC provided for changing its approach was that competitive OS/DA had become widely available on a national basis and could be readily accessed if the ILEC provided appropriate customized routing arrangements. However, the FCC did not suggest that an ILEC could arbitrarily implement any form of customized routing it desired, without regard to whether that arrangement provided meaningful access to competitive OS/DA alternatives. The FCC emphasized instead that 'customized routing is necessary to access alternative sources of OS/DA for competitors not deploying their own switches,' and that '[l]ack of a customized routing solution that enables competitors to route traffic to alternative OS/DA providers would therefore effectively preclude competitive LECs from using such alternative providers.' UNE Remand Order, 15 FCCR at 3902, para. 462.

* * *

The Commission finds that Ameritech Michigan must continue to offer OS/DA as a NE at TSLRIC-based rates. The obligation to provide unbundled OS/DA will continue in effect until Ameritech Michigan provides reasonable accommodations for the problems presented by dedicated end-office trunking and other technological issues that inflate the CLECs' cost of obtaining access to competitive OS/DA services. When Ameritech Michigan believes that it meets the requirements relating to providing access to competitive OS/DA services, it may file an application for authorization to remove OS/DA from its list of UNEs. However, it may not remove OS/DA from UNE status without prior Commission authorization.

March 19, 2001 order, Case No. U-12622, pp. 21-22.

Ameritech Michigan has not yet obtained Commission authorization and, therefore, it is still bound to provide OS/DA services on an unbundled basis. Thus, Ameritech Michigan must still list OS/DA as a UNE, and the issue is properly within the purview of this arbitration case.

***18** As to the arguments concerning the proposed contract language, the Commission agrees with the arbitration panel that TDS's proposed language is more reasonable than that proposed by Ameritech Michigan. Should an alternative OS provider actually become feasible, TDS should have the opportunity to take advantage of that option, without undue penalties to deter it from doing so. Moreover, the Commission finds that Ameritech Michigan's attempt to establish the full remaining contract price as the payment for ending the OS contract before the interconnection agreement ends is not reasonable, as it does not take into account any savings that the ILEC may incur by not actually providing the service after termination. Therefore, the decision of the arbitration panel should be affirmed.

Issue TDS-158 Use of the Joint SONET for the CLEC's Portion of the Signaling Links

TDS proposed language in Appendix SS7, Section 2.5, that would permit TDS to provide its portion of the signaling links using the joint SONET when it purchases SS7 services from Ameritech Michigan. Ameritech Michigan objected to this language, claiming that it would actually require a portion of the cost of providing the link to be assumed by Ameritech Michigan. Moreover, Ameritech Michigan argued, the parties had already agreed to the permissible uses for the

oint SONET, and signaling links was not one of those purposes.
The arbitration panel adopted the language proposed by TDS. In so doing, it rejected Ameritech Michigan's contention that the parties' agreed language in ppendix NIM, Section 3.4.2 precluded provisioning signaling links over the oint SONET. Rather, the panel opined that the signaling links, being similar to ancillary services, for which use of the joint SONET is permitted, should also e included in the permissible uses of the SONET.
Ameritech Michigan argues that the arbitration panel's decision ignores the contradiction created with the plain meaning of the language in NIM 3.4.2, a ection to which the parties have agreed. That provision limits the use of the oint SONET to interconnection trunks and trunks used to provide ancillary ervices 'described in Section 5 of Appendix ITR.' Id. Ameritech Michigan states that signaling links are neither interconnection trunks nor trunks used to rovide ancillary services. It says that ancillary services include 800/8YY ervice, E911 services, high volume call-in services, and OS/DA services. Ameritech Michigan states that Section 5 makes no reference to SS7 trunks, ecause SS7 is not an ancillary service.
The Commission finds that the conclusion of the arbitration panel should be reversed on this issue. After reviewing the cited sections of the interconnection agreement, the Commission concludes that adopting the rbitration panel's decision would create a contradiction within the interconnection agreement between Appendix SS7, Section 2.5, and the previously agreed to Appendix NIM, Section 3.4.2. Although SS7 is mentioned within the text Appendix ITR, Section 5, as an expected part of providing certain ancillary rvices, signaling links are generally not part of the trunk or trunk groups. Therefore, they are not 'trunks used to provide ancillary services.' Nor are ignaling links interconnection trunks. The parties have agreed that those are he only two permissible uses for the joint SONET.
***19** The Commission notes that the parties currently permit signaling over the oint SONET in Wisconsin. And the Wisconsin arbitration panel composed language hat would enable those links to remain as they are now, but require future ignaling links to be provided outside of the joint SONET. However, Ameritech Michigan points out that in Michigan, TDS has no such arrangement already in lace and no saving language is required.
The Commission concludes that the language proposed by TDS should not be included in the interconnection agreement.

ssue TDS-196 Acceptance Testing

TDS proposed language for Appendix DSL, Section 8.2 that would require meritech Michigan to verify 'the absence of load coils, excessive bridge taps, oreign voltage, grounds, pair gain devices, repeaters and line splitters or other disturbers which would normally be removed in conditioning a loop for xDSL ervice.' Ameritech Michigan objected to this proposal and proposed its own anguage that would limit acceptance testing to 'basic loop metallic parameters, continuity or pair balance.'
Ameritech Michigan argued that the extent of, and procedures for, acceptance esting have already been addressed in detail and resolved in the Commission's ecent order in Case No. U-12320. In its view, TDS was attempting to expand ceptance testing' so that it includes conditioning the loop to provide

dvanced services. It asserted that conditioning services were already addressed in a separate portion of the interconnection agreement. Ameritech Michigan argued that to approve TDS's proposed language would effectively require the ILEC to perform conditioning services for which there had been no order or payment.

TDS argued that this section applies only to testing of DSL loops, not all loops. Further, it argued, testing does not require conditioning, but will confirm whether conditioning has been done. TDS asserted that it had experienced difficulties with Ameritech Wisconsin not providing conditioning that had been ordered and paid for.

The arbitration panel found that contrary to Ameritech Michigan's arguments, the testing requested by TDS would not require line conditioning without payment, but would confirm if conditioning that had been ordered had been performed. The panel stated that, according to TDS, the test will merely determine if disturbers are present. Once the results are known, the parties may determine how to deal with it, based on the contract and what was requested and paid for.

Ameritech Michigan objects and argues that TDS's proposed language does not belong in Section 8.2, which deals with acceptance testing. Ameritech Michigan states that it has no objection to performing the indicated tests, but it argues that they cannot be properly performed as part of acceptance testing as defined in Section 8. Further, Ameritech Michigan states, there is no indication that TDS cares when the tests are done, as long as they are done.

Ameritech Michigan explains that when TDS orders a DSL loop from the ILEC, TDS may have Ameritech Michigan condition the loop. It states that conditioning means making a regular, plain old telephone service (POTS) loop suitable for DSL use by removing excessive bridge taps and load coils, among other things. If TDS requests Ameritech Michigan to do the conditioning, it argues, the conditioning is done to TDS's specifications. After the loop is conditioned, but before acceptance testing, Ameritech Michigan says it will verify the absence of load coils, etc. It argues that acceptance testing comes later, just before turning over the line to TDS.

***20** Ameritech Michigan argues that the procedure for acceptance testing is set forth in detail in the agreed Appendix DSL, Section 8.3. That section, Ameritech Michigan argues, makes no reference to testing for the things contained in TDS's proposed language for Section 8.2. It argues that the testing TDS desires is not part of provisioning the loop to TDS, but is intended to ensure that the conditioning has been done. Therefore, Ameritech Michigan argues, the proposed language does not belong where TDS proposes.

Ameritech Michigan goes on to argue that the placement of TDS's proposed language would suggest that all DSL loops must be tested for the absence of load coils, excessive bridge taps, etc. But actually, Ameritech Michigan argues, only those loops for which TDS has requested conditioning should require testing. Ameritech Michigan argues that if TDS has not requested conditioning, it makes no sense to test to assure that conditioning has occurred.

Ameritech Michigan now proposes that the Commission accept the testing desired by TDS, but order the parties to place the requirement in some other place in the contract, not in relation to acceptance testing. However, Ameritech Michigan argues, if the Commission finds that its baseball style arbitration rules prevent that resolution, the Commission should reject the proposed language

ltogether.
The Commission finds that the arbitration panel's resolution of this issue should be affirmed with one modification. Ameritech Michigan has taken a new osition with its argument that it may be alright to include the language, but omewhere else. TDS has not had an opportunity to respond to that new position, and the Commission finds it should be rejected. TDS presented testimony that it as had experience with frequently receiving DSL loops for which it has equested conditioning that are not in fact conditioned. Therefore, the Commission finds that it is reasonable to test for conditioning as a part of the cceptance testing at the conclusion of the provisioning process. However, the ommission finds that it is not reasonable for Ameritech Michigan to perform hese tests if TDS has not requested conditioning of the loop in question. The Commission therefore concludes that the parties should be permitted to agree to anguage that limits this portion of the acceptance testing to those DSL loops or which TDS has ordered and paid for conditioning. In that manner, Ameritech Michigan cannot argue that it has been required to condition lines without ayment.
Should the parties be unable to reach agreement concerning the appropriate language to use, they may submit their respective last best offers to the Commission for a decision.
The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; e Communications Act of 1934, as amended by the Telecommunications Act of 6, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 t seq.

b. The decision of the arbitration panel should be affirmed, except as modified in this order.

***21** THEREFORE, IT IS ORDERED that:

. The decision of the arbitration panel is affirmed, except as modified by this rder.

. Within 60 days of this order, the parties shall file a signed agreement onforming to the findings of this order.

The Commission reserves jurisdiction and may issue further orders as necessary.
(SEAL)
By its action of September 7, 2001.

FOOTNOTES

FN1 The Wisconsin arbitration proceeding is docketed as 05-MA-123. The most recent decision is that of the Wisconsin arbitration panel (Wisconsin panel), ssued March 12, 2001. A Commission decision is pending.

The Illinois Commerce Commission issued its Arbitration Decision in 01-338

n August 8, 2001.

FN3 Ameritech Michigan cites the Commission's October 24, 2000 order in Case No. -12460.

FN4 The case was remanded to the FCC in GTE Serv Corp v FCC, 205 F3d 416 (DC, 000).

FN5 The Commission assumes that the reference to Illinois' acceptance of this anguage is to a case other than the TDS arbitration proceeding. Both the rbitrator and the Illinois Commerce Commission (as well as the Wisconsin panel) awarded this issue to TDS.

N6 The Wisconsin panel awarded language providing for a middle ground of 10 ays' notice for major construction and 15 days' notice for the power work.

N7 In addition to the case already cited, the Commission has decided this issue onsistently in several arbitration cases. See, e.g., the October 24, 200 order in Case No. U-12460 and the August 17, 2000 order in Case No. U- 12382.

N8 OSS refers to Operations Support Systems, which are systems used for pre-ordering, ordering, etc.

9 Because Ameritech Wisconsin did not object to this issue in Wisconsin, it is kely that TDS's position will prevail in the final order in that state.

N10 As defined by Appendix OS, the services provided under this agreement would nclude, for example, the ability to obtain operator assistance in placing a call, automated systems for using a credit card to place a call, or billing to called or third party, the ability to reach emergency services by dialing 'O', nd the ability to check functioning of a line that has a busy signal.

PUR Slip Copy, 2001 WL 1335639 (Mich.P.S.C.)
ND OF DOCUMENT

recip comp decisions.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 99-10

CASE 99-C-0529 - Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation.

OPINION AND ORDER CONCERNING RECIPROCAL COMPENSATION

Issued and Effective: August 26, 1999

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CASE 99-C-0529 - Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation.

OPINION NO. 99-10

OPINION AND ORDER
CONCERNING RECIPROCAL COMPENSATION

(Issued and Effective August 26, 1999)

BY THE COMMISSION:

INTRODUCTION AND BACKGROUND

By order issued April 15, 1999, we instituted this proceeding "to reexamine reciprocal compensation, particularly costs and rate structures applicable to large-volume call termination to single customers."[1] "Reciprocal compensation" refers to an arrangement between two local exchange carriers in which each carrier compensates the other for the transport and termination on the second carrier's network facilities of calls originating on the first carrier's facilities. These arrangements, introduced in New York in 1995, are now governed by the federal Telecommunications Act of 1996 (the 1996 Act) and various rules and decisions of the Federal Communications Commission (FCC).

The present inquiry grows out of an unanticipated development: a substantial imbalance in traffic flows (and, in consequence, revenue streams) between incumbent local exchange carriers (ILECs) and some competing local exchange carriers (CLECs) having a preponderance of customers, such as

[1] Case 99-C-0529, Order Instituting Proceeding to Reexamine Reciprocal Compensation (issued April 15, 1999)(the Instituting Order), p. 4.

Internet service providers (ISPs), that receive far more calls than they make. To put the matter in context, it is necessary to describe in some detail the history and legal framework of reciprocal compensation in general.

Early New York Decisions

In our 1995 "Framework Order,"[2] we adopted a reciprocal compensation plan under which local exchange carriers (LECs) were to compensate one another for calls terminated on one another's networks. The compensation mechanism was to be cost-based (i.e., was to exclude the contribution to universal service costs included in the access charges paid by inter-exchange carriers to LECs completing calls on their behalf), mutual, and symmetrical. These cost-based arrangements were to be available only to facilities-based full-service providers (FSPs), who, by the nature of their operations, directly supported universal service; other carriers would be required to pay the higher carrier access charges for call termination.

In adopting the reciprocal compensation regime, we considered and rejected an alternative, termed "bill-and-keep," under which carriers would not pay one another for completing calls but would simply bill their own end-users and retain the resulting revenues. (In general, CLECs had favored bill-and-keep, fearing that they would send more calls to the incumbent's network for completion than they would receive and therefore be net losers under a reciprocal compensation arrangement; ILECs, sharing the same assumptions, had favored reciprocal compensation.) We rejected bill-and-keep as less cost-based, inasmuch as it would reflect actual costs only if traffic flows between carriers were at least roughly in balance. Finally, we noted that carriers could negotiate terms differing from those we adopted, as those terms were

[2] Case 94-C-0095, Competition II Proceeding, Order Instituting Framework for Directory Listings, Carrier Interconnection and Intercarrier Compensation (issued September 27, 1995).

made available to other carriers on a non-discriminatory basis.

The 1996 Act as Interpreted by the FCC

To state the matter most generally, the federal reciprocal compensation provisions, like those we had adopted earlier, call for mutual reimbursement of termination costs measured by reference to the incremental costs of the ILEC, which are to serve as a proxy for the CLEC's costs unless the CLEC proves its costs are, in fact, higher. More specifically, the 1996 Act imposes on all local exchange carriers "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[3] The terms for reciprocal compensation are to be set forth in inter-carrier interconnection agreements, reviewed or arbitrated by the state commissions, pursuant to the general scheme of the 1996 Act. In addition, the competitive checklist that must be met under the 1996 Act by a Bell Operating Company seeking authority to provide long-distance service includes reciprocal compensation arrangements that meet the 1996 Act's pricing standards.[4]

Those pricing standards specify that terms and conditions for reciprocal compensation may be considered just and reasonable only if they "(i) . . . provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination of calls that originate on the network facilities of the other carrier; and (ii) . . . determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[5] These requirements, however, do not preclude "the mutual recovery of costs through the offsetting of reciprocal

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[3] 47 U.S.C. §251(b)(5).

[4] 47 U.S.C. §271 (c)(2)(B)(xiii).

[5] 47 U.S.C. §252(d)(2)(A).

obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)"[6]; but the FCC has determined that bill-and-keep may be imposed by a state commission only "if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates."[7] In addition, the statutory requirements do not "authorize the [FCC] or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls."[8]

The FCC has determined as well that reciprocal compensation rates, like those for unbundled network elements generally, must be set on the basis of forward-looking economic costs, estimated in accordance with the Total Element Long-Run Incremental Cost (TELRIC) method.[9] In most cases, however, payments to a CLEC for terminating calls originating on an ILEC network are not to be set on basis of the CLECs own costs; instead, they are to be set symmetrically, on the basis of the ILEC's costs unless a CLEC presents a cost study showing its own costs to be higher and thereby rebutting the

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[6] 47 U.S.C. §252(d)(2)(B)(i).

[7] CC Docket No. 96-98, et al., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, et al., First Report and Order (released August 8, 1996)(Local Competition Order), ¶1112.

[8] 47 U.S.C. §252(d)(2)(B)(ii).

[9] Local Competition Order, ¶1056. We have done so; existing reciprocal compensation rates are based on the TELRIC costs of the underlying network elements as determined in the First Network Elements Proceeding (Cases 95-C-0657 et al.) and subject to reexamination in the Second Network Elements Proceeding (Case 98-C-1357). For that reason, the present proceeding considers what equipment may be used to terminate particular types of traffic but does not attempt to determine unit costs of any such equipment. States may also use a default proxy set by the FCC, not pertinent here, or, in appropriate situations, bill-and-keep arrangements.

presumption of symmetry. In reaching that decision, the FCC reasoned, among other things, that the ILEC's costs would be a reasonable presumptive proxy for those of the CLEC inasmuch as both would be serving in the same geographic area; that symmetric compensation might reduce an ILEC's ability to use its bargaining strength to negotiate termination charges that were seriously asymmetric in its favor; and that symmetrical rates would be administratively easier to manage and would avoid requiring CLECs to perform costly forward-looking economic cost studies (unless they undertook to do so in an effort to rebut the presumption of symmetry and show their costs exceeded the ILEC's).[10]

The FCC further noted that the "additional costs" referred to in the statute as recoverable are primarily the traffic-sensitive component of local switching, together with a reasonable allocation of common costs.[11] Costs will vary, however, depending on the type of switching involved, and states may establish rates that differ on that basis.[12] In traditional ILEC network architecture, customers are connected to end office switches, groups of which are connected to each other through tandem switches. The tandems reduce the need for inter-office transport facilities and make the system correspondingly more efficient. CLECs, however, may use different technologies to perform functions equivalent to those performed by an ILEC through the use of tandem switches; a CLEC with a particular number and dispersion of customers, for example, may find it efficient to substitute transmission facilities for tandem switching in a manner that would be inefficient for an ILEC. The FCC therefore concluded that

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[10] Local Competition Order, ¶¶1085-1090.

[11] Ibid., ¶¶1057-1057.

[12] Ibid., ¶1090. Bell Atlantic-New York takes the position that while the FCC spoke explicitly only of separate rates for tandem and end-office termination (next defined), it did not preclude disparate rates for other categories, as long as they are applied symmetrically.

"where the [CLEC's] switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the [CLEC's] additional costs is the [incumbent's] tandem interconnection rate,"[13] which will be higher than its end-office interconnection rate. These two rates--the tandem switching rate and the end-office switching rate--along with the concept of "functional equivalence" between an ILEC's tandem switch and a CLEC's differently configured network capable of serving the same geographic area, figure prominently in the proposals under consideration in this case.

The FCC also determined that reciprocal compensation arrangements apply only to local traffic, and that long-distance traffic remains subject to the carrier access charge regime. It allowed the states to determine the areas to be considered local for these purposes.[14]

More recently, in February 1999, the FCC determined that traffic directed to an ISP was, in fact, largely interstate (in that it did not terminate at the ISP's local server but continued to Internet websites often in other states) and therefore not subject to its reciprocal compensation rule. It instituted proposed rulemaking on the subject but determined, at least for the time being, that carriers remained bound by their existing interconnection agreements, as interpreted by state commissions, and that states remained free to apply reciprocal compensation to ISP traffic.[15] (Nearly all states that have considered the matter

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[13] Id.

[14] Ibid., ¶¶1034-1035.

[15] CC Docket No. 96-98, Local Competition Provisions of the Telecommunications Act of 1996, and CC Docket No. 99-68, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking (released February 26, 1999)(FCC ISP Ruling). Bell Atlantic-New York and its affiliates have brought suit against this aspect of the FCC's decision, contending that state commissions lack authority to impose reciprocal

have continued to apply reciprocal compensation to this traffic. The sole exceptions to date are Massachusetts, which, having initially applied reciprocal compensation on the premise that the traffic was intrastate, reversed itself in light of the contrary FCC decision,[16] and New Jersey.)

The Current Situation

Consistent with these legal requirements, the tariffs of New York Telephone Company d/b/a Bell Atlantic-New York (Bell Atlantic-New York) provide for reciprocal compensation at the higher tandem or lower end-office rate (termed, respectively, "Meet Point B" and "Meet Point A"), depending on the nature and location of the interconnection. A Meet Point A interconnection (at an end-office switch) will permit a CLEC to hand off traffic for delivery to any customer served by the end-office switch. A Meet Point B interconnection (at a tandem switch) will permit the handing off of traffic for delivery to any customer served by any of the end offices subtending the tandem. The Meet Point A (end-office) rate is equal to the sum of the rates for switch usage and a common trunk port. The Meet Point B (tandem) rate is equal to the sum of the rates for a tandem trunk port, end-office-to-tandem common trunking and associated trunk port costs, tandem switch usage, and end-office switch usage.

The rates for both types of connection are based on costs as determined in the First Network Elements Proceeding, and are subject to modification in light of the conclusions to be reached in the Second Network Elements Proceeding. Most (but not all) interconnection agreements between Bell Atlantic-New York and CLECs defer to the tariffed rates, some

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compensation plans for Internet-bound traffic. Bell Atlantic-New York's Initial Brief, p. 14, n. 32.

[16] MCI WorldCom Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Mass. D.T.E. 97-116. The Massachusetts case was decided by a 3-2 vote.

of them providing for a "blended" rate lying between those parameters and, in some cases, subject to change as the CLEC's network evolves; any change in the tariffed rates resulting from this proceeding would flow through to the rates charged under those agreements. Reciprocal compensation for Frontier Telephone of Rochester (Frontier) is governed by its 1994 Open Market Plan (OMP), which incorporates a negotiated, above-cost rate that will remain in place (except where otherwise provided in particular interconnection agreements) until the OMP expires, or unless we decide in this proceeding to modify it.[17]

The effects of reciprocal compensation as now structured have been greatly affected by the unexpectedly rapid growth of the Internet and of other services (such as "chatlines") that generate very large volumes of traffic inbound to individual customers who produce far smaller volumes of outbound traffic. (This type of traffic is sometimes referred to as "convergent.") Many Internet service providers and chatlines are served by CLECs; as a result, ILECs, whose own customers direct many calls to ISPs and chatlines but receive very few in return, may end up paying out much more in reciprocal compensation than they take in. In the most extreme situations, discussed below, it is alleged that some CLECs are nothing more than ISPs that have adopted the trappings of CLECs solely to receive a reciprocal compensation revenue stream. Even in less extreme situations, it is argued that some CLECs are serving a niche market that is made lucrative by a perverse regulatory anomaly rather than by the underlying economics of the situation.

[17] Cases 95-C-0657 et al. and 93-C-0033 et al., First Network Elements Proceeding and Rochester Telephone Corp. - Rate Stability Agreement, Opinion No. 99-8 (issued July 22, 1999), mimeo pp. 25-27. To avoid terminological confusion, it should be noted that Frontier, in contrast to other parties, generally associates "tandem switching" with the lower of the two reciprocal compensation rates; it characterizes the higher rate as recovering the costs of tandem switching plus end office switching and termination.

These developments, and efforts by Bell Atlantic-New York and Frontier to discontinue reciprocal compensation payments associated with Internet traffic, led us to institute an inquiry in July 1997 (the ISP Case). Bell Atlantic-New York contended, among other things, that because calls to ISPs did not in fact terminate at the ISP but were ultimately delivered to host computers, many of which were out-of-state, the calls should be seen as interstate and, accordingly, not subject to reciprocal compensation. We rejected that view, determining that a call to an ISP, like a call to a radio call-in program or any other large volume call recipient, was a local call,[18] billed at local rates, and therefore subject to reciprocal compensation. We went on to reject various other arguments, based on cost characteristics or network congestion, for treating calls to ISPs differently from other calls, and we simply closed the proceeding.[19]

The issue arose again in the contest of chatlines. In an order directed primarily to chatline blocking, we noted the existence of compensation arrangements under which carriers shared their reciprocal compensation revenues with information providers (IPs). We inferred on that basis that the reciprocal compensation revenues exceeded the termination costs they were supposed to cover, and we cited as well the traffic imbalances already noted. We invited carriers to file cost and rate information that might warrant a different compensation system for the calling at issue, though we noted we would examine only tariffed rates and would leave existing interconnection agreements intact.[20]

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[18] As noted, the FCC has recently taken a different view; its decision is discussed below.

[19] Case 97-C-1275, Reciprocal Compensation Related to Internet Traffic, Order Closing Proceeding (issued March 19, 1998).

[20] Case 98-C-1273 et al., Blocking Obligations for Chatline Services (Chatline Proceeding), Order Directing Carriers to File Tariffs for Chatline Services and Related Actions (issued February 4, 1999).

Bell Atlantic-New York responded to that invitation and petitioned for a reopening of the ISP Case, reconsideration of the decision reached there, and interim relief. After considering responsive comments and the recent FCC action, we found a basis for reexamining "whether existing reciprocal compensation arrangements are affected by the termination of large-volume call termination traffic to single customers."[21] We declined to reopen the ISP case; denied interim relief as, in effect, a distraction from the more important process of setting permanent rates; and instituted this proceeding for that purpose, directing that it be conducted on an expedited basis.

PROCEDURAL HISTORY

Following a prehearing conference on April 21, 1999, Administrative Law Judge Joel Linsider issued a ruling defining the scope of the proceeding and adopting procedures and a schedule for the hearings.[22] Among other things, he identified various issues properly within the proceeding (including the relationship between the rates that may be set here and those included in interconnection agreements), and he noted that costing of the components of the various network configurations had been or will be handled in the First or Second Network Element Proceeding and should not be repeated or anticipated here. He reserved judgment on whether the burden of proof rested entirely on the ILECs, in the traditional manner, or was shared with CLECs; but he asked all parties, CLECs included, to submit threshold testimony describing the facilities they use to serve ISPs and chatlines and setting forth specified data on their traffic patterns.[23]

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[21] Instituting Order, p. 3.

[22] Case 99-C-0529, Ruling on Procedure and Schedule (issued April 27, 1999).

[23] The Judge later ruled that parties not submitting threshold testimony would not be permitted to submit later rounds of testimony or to cross-examine, though they would be

Numerous parties submitted testimony; they are identified (by full name and short description used in this opinion) in Appendix B. Hearings before Judge Linsider were held in Albany on June 21-22, 1999; cross-examination was waived as to all witnesses except those sponsored by Bell Atlantic-New York and Frontier. The record comprises 793 pages of stenographic transcript and 64 exhibits; portions of that record have been designated as proprietary.[24]

Briefs and reply briefs were invited; parties submitting them also are identified in Appendix B. Following the conclusion of the hearings, parties were asked, in a letter from Dan Martin of the Office of Communications dated June 24, 1999, to include with their briefs their replies to a series of questions; several parties responded to those questions instead of submitting briefs.

OVERVIEW OF PARTIES' POSITIONS AND THIS OPINION

The ILECs (primarily Bell Atlantic-New York and Frontier) and CPB propose substantial changes to the existing reciprocal compensation arrangements. Among the CLECs, Time Warner proposes a substantial change, and MCIW offers a modest change as a less favored alternative to maintenance of the status quo. All other CLECs would maintain the status quo, though they differ in their arguments for doing so.

Putting the matter in its most general terms, Bell Atlantic-New York begins its brief by announcing "the current reciprocal compensation regime is broken, and needs to be fixed," and Frontier refers to the ILECs' "hemorrhage of cash

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permitted to file briefs. He also clarified that parties who, by their nature, had no threshold data to submit (such as industry organizations and the State Consumer Protection Board) were not subject to this requirement. Case 99-C-0529, Ruling Concerning Parties Not Filing Threshold Testimony (issued May 20, 1999).

[24] Consistent with usual practice, this material has been designated proprietary on a provisional basis. The Judge's ruling determining the final status of each item is pending.

in the form of reciprocal compensation."[25] In stark contrast, CTSI et al. state unequivocally that "this proceeding is about [Bell Atlantic-New York's] great distaste for paying its competitors to provide termination services for local telecommunications traffic initiated by [Bell Atlantic-New York's] customers"[26]; and Global NAPs sees this case as the latest battle in the ILECs' ongoing war to frustrate the competitive evolution contemplated by the Telecommunications Act of 1996. With "resale moribund" and "[unbundled network element]/collocation hobbled," Global NAPs charges, Bell Atlantic-New York is now

> seeking protection from the meager interconnection-based competition that has thus far developed. Bell Atlantic[-New York] complains that its competitors are niche-based, ignore the residential market, and are "abusing" the system by exercising their rights under the [1996] Act and expecting the ILECs to comply with their duties. As Bell Atlantic[-New York] sees it, this outrageous behavior must be ended, and quickly, by jiggering the rules to eliminate even the niche competition that has been able to develop. This, of course, is anticompetitive nonsense.[27]

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[25] Bell Atlantic-New York's Initial Brief, p. 1; Frontier's Initial Brief, p. 1.

[26] CTSI et al.'s Initial Brief, p. 1.

[27] Global NAPs' Reply Brief, pp. 3-4.

As is apparent, Time Warner is not far off the mark when it refers, in its reply brief, to the heavily rhetorical nature of the initial briefs.[28]

For purposes of this overview, parties are grouped on the basis of whether they propose changes (even modest changes as a less favored alternative) or fully endorse the status quo.

Parties Proposing Changes

Bell Atlantic-New York contends that CLECs serving a preponderance of customers with convergent traffic flows avoid many of the costs that are incurred by full-service providers (CLECs and ILECs alike) and therefore should not receive reciprocal compensation at rates that reflect those costs. Providing such above-cost compensation to CLECs, in its view, requires ILECs to finance their competitors; beyond that, it encourages CLECs to seek out niche markets rather than becoming full-service providers, thereby harming customers by denying them the benefits of true competition, and creates disincentives to introducing more efficient arrangements for Internet access.

Bell Atlantic New York offers four proposed remedies:

> remove from intercarrier compensation rates all costs associated with vertical switching features[29]
>
> deny a CLEC reciprocal compensation at tandem (Meet Point B) rates for the delivery of convergent traffic if the CLEC does not offer

[28] This is not to say, as Time Warner goes on to worry, that "the Commission has been left to its own devices to reconcile a difficult and often conflicting record, providing a poor basis upon which to reach a reasoned decision." Time Warner's Reply Brief, p. 1. The results we have reached are reasonable and are supported by substantial evidence.

[29] "Vertical" features are all switching functions other than those used in the simple routing and delivery of traffic.

a tandem interconnection option

deny all reciprocal compensation for the delivery of Internet-bound traffic; or, if compensation is provided, limit it to "direct variable cost"[30]

require all local exchange carriers to provide "geographically relevant interconnection points" (GRIPs) when they assign customers numbers outside the rate centers in which the customers are located.[31]

Frontier describes what it considers to be the current regime's disastrous effects on ILECs and undesirable results for society as a whole. It goes on to propose that Internet traffic be excluded from reciprocal compensation and treated on a bill-and-keep basis, as the Commission is legally permitted to do. Termination of non-Internet convergent traffic should be compensated on the basis of the CLEC's own costs rather than the ILEC's, which Frontier believes to be legally permissible; if the ILEC's costs are to be used, they should be limited to the ILEC's "tandem switching cost, not [including] its local switching and termination costs."[32]

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[30] Direct variable cost excludes (in addition to vertical features) depreciation, return, and any allocation of joint and common costs.

[31] Users, such as ISPs, may request such service in order to establish a presence outside their geographic areas, making it possible for their own customers to call them without incurring toll charges.

[32] Frontier's Initial Brief, p. 10. As noted, Frontier uses "tandem costs" to refer to the lower of the alternatives.

Time Warner stresses the variation among CLECs with respect to business plans, network configuration, and traffic patterns. Asserting that its own traffic imbalance is less extreme and less relevant than that of some other CLECs, it argues that what it terms "responsible CLECs"[33] design their networks to carry originating as well as terminating traffic and build those networks to serve a broad range of customers. In its view, the optimal reciprocal compensation rate is a negotiated blended rate (such as those in Time Warner's own interconnection agreements) falling between the ILEC's tandem and end-office rate; the blend takes account of both carriers' network design, customer types, and traffic patterns. Time Warner urges us to avoid disturbing blended rate arrangements; but where these arrangements are inappropriate (because the CLEC does not build out its network and serve two-way traffic), it would establish a sliding scale framework that ties the reciprocal compensation rate to the CLEC's traffic patterns and number of interconnection points.

MCIW favors maintenance of the status quo and denies that traffic patterns are a proper indicator of costs. It suggests, however, that an extreme traffic imbalance (an incoming to outgoing ratio of 100:1 or more) could trigger an audit of the CLEC's network configuration to determine whether it in fact met the functional equivalence test for receiving reciprocal compensation at the tandem rather than the end-office rate.

CPB regards traffic patterns as a fair indicator of functional equivalence (or its absence) and suggests a below-tandem rate where the incoming to outgoing ratio is 5:1 or more. But it would apply that remedy only after it had been shown that the local market was, in fact, open to competition, to avoid the risk that the CLEC's traffic pattern (or, more fundamentally, its serving only the convergent traffic niche market) may have been caused by the ILEC's failure to open the

[33] Time Warner's Initial Brief, p. 4.

market in a manner that permits CLECs to become full-service providers.

Parties Favoring the Status Quo

CLECs other than those identified in the foregoing section generally urge maintenance of the status quo, offering a variety of arguments in its support. They contend, among other things, that no showing has been made of pertinent differences between how traffic is handled by ILECs and by CLECs, and that traffic imbalances say nothing about a carrier's costs or about whether a CLEC's network is functionally equivalent to an ILEC's. Indeed, some say, reciprocal compensation contemplates a traffic imbalance; and ILECs, which initially sought reciprocal compensation rather than bill-and-keep because they thought the imbalance would favor them, should not be heard to change their position simply because the imbalance in fact turned out to work against them. They note that ILECs benefit, through avoided costs, when CLECs deliver calls; and they warn against denying CLECs the opportunity to recover their costs and, where those costs are, in fact, less than the CLEC's, to enjoy the benefits of their innovations and efficiencies.

Some CLECs warn against depriving carriers of legitimate opportunities to pursue niche markets as a means of entry or growth, and some suggest that barriers to broader entry leave them no choice but to seek out convergent traffic. They note in particular the unfairness that would result from taking away those opportunities after they had acted in reliance on them. Some CLECs deny that traffic imbalances imply any abuse of the system; others, as already noted, distance themselves from putative abusers, and urge that any remedy be properly targeted.

With regard to non-Internet traffic, some CLECs contend any change from the existing arrangements would violate applicable legal constraints, including the FCC's commitments to functional equivalence as the measure of

whether the tandem rate should be allowed and to TELRIC as the measure of costs. With regard to Internet traffic, CLECs recognize the FCC ISP Ruling has provided the states more discretion (though some raise legal concerns about deaveraging by type of customer) but urge maintenance of the status quo on policy grounds.

Finally, CLECs object to specific aspects of the various proposals for change, raising both legal and policy issues.

The Attorney General, whose office filed only a reply brief, asks us to "consider[,] as [our] first order of concern, how or if any . . . changes [to the existing reciprocal compensation regime] would adversely affect availability of affordable internet access for New York consumers." He therefore urges us to "move with extreme caution" in considering whether to make any such changes.[34]

This Opinion

We begin with the question of burden of proof, unusual in this case because the rates at issue are the CLECs' but the costs on which they are based are the ILECs'. We then consider the parties' views on the broad question of whether the existing system is broken and in need of repair. We next present, one by one, the specific proposals for change and the arguments for and against them. Finally, we evaluate the record and describe the remedies we are adopting.

In view of the large number of CLECs filing briefs, it is not surprising that many cover the same ground and present the same arguments. We present the pertinent arguments that have been offered, but we make no attempt to summarize each individual brief or to attribute each argument to each party making it.

BURDEN OF PROOF

[34] Attorney General's Reply Brief, p. 3.

The issue of burden of proof arose at the prehearing conference, where the CLECs generally saw the burden as resting with the ILECs, as in a traditional rate case, while the ILECs saw the burden as shared. In his ensuing ruling, the Administrative Law Judge declined to resolve conclusively questions that might require further briefing but, as already discussed, required the CLECs to provide threshold information.[35]

In its brief, Bell Atlantic-New York contends that the rates at issue here are the CLECs' and that, accordingly, they bear the burden of proof, even with respect to proposals made by ILECs. It cites the Public Service Law's (PSL's) provision that

> at any hearing involving a change or a proposed change of rates, the burden of proof to show that the change or proposed change if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be upon the utility.[36]

It adds that it makes sense for the CLEC to bear the burden of proof inasmuch as it has the best information related to its rates, including how it serves its customers and how it realizes efficiencies by specializing in convergent traffic. Asserting that the CLECs have offered no analysis in support of their slogan that "a minute is a minute," i.e., that all types of traffic impose the same switching and transport costs, Bell Atlantic-New York contends that the proposition must be rejected on burden of proof grounds alone. Frontier,

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[35] Case 99-C-0529, Ruling on Procedure and Schedule (issued April 27, 1999), p. 3.

[36] PSL §92(2)(f). Bell Atlantic-New York notes that in 1921, the statute was amended to impose on the utility the burden of proof with respect to all proposed rate changes, not merely rate increases proposed by the utility itself. It observes as well that CLECs come within the statute's definition of a utility.

meanwhile, sees the CLECs' failure to provide information on their actual costs as warranting an inference that those costs are over-recovered by reciprocal compensation rates based on the ILEC's TELRIC.

In response, CTSI et al. argue that the purpose of the proceeding is not necessarily to reduce rates but, quoting from the Instituting Order, "to reexamine whether existing reciprocal compensation rates are affected" by convergent traffic. The first step in that reexamination is to determine whether there are differences in network costs that warrant a different rate, and the burden of that showing is on Bell Atlantic-New York, as the party that instituted the proceeding and that advocates a change in the existing regulatory regime. The CLECs' own costs, they continue, are not at issue, given that the ILECs's costs are used as a proxy. CTSI et al. add that Bell Atlantic-New York has not borne its burden, in view of, among other things, the CLECs' "uncontroverted evidence that they utilize the same facilities to terminate all types of traffic and that their costs to terminate traffic are the same regardless of the nature of their traffic."[37]

The PSL's imposition of the burden of proof on the utility defending its existing rate or proposing a higher one does not resolve the matter here, for it contemplates a very different kind of proceeding, in which the utility's costs, concerning which it has by far the greatest access to pertinent information, come under scrutiny in an attempt to determine their reasonableness and prudence. Here, in contrast, the configurations of the CLECs' systems are pertinent, which is why the CLECs were directed to provide system descriptions, but the reasonableness of the actual costs incurred by CLECs in constructing their networks are not at issue. Moreover, what is at issue is less the CLECs' rates than the proper way to understand and apply the regulatory structure pursuant to which those rates are set. The parties

[37] CTSI et al.'s Reply Brief, p. 15.

advocating changes (the ILECs, Time Warner, and CPB) have, at a minimum, the burden of going forward and making at least a prima facie case that change is needed and, even more, that their specific proposals represent reasonable responses to problems that have been identified. And, in the face of substantive responses to their prima facie cases, they face a substantial burden of persuasion as well.[38]

When all is said and done, however, this case should not be decided on the basis of burden of proof. In a traditional rate case, if a consumer group goes forward with a prima facie showing that forecast tree-trimming expense, for example, should be reduced, the utility's burden of proof means it must respond persuasively to that showing or risk suffering a reduction in its allowance for that item. Here, in contrast, the issue is one of broader policy development and application, and we have the authority to range further afield to craft a just and reasonable result, based on substantial evidence in the record but less tied to burden of proof considerations than a traditional rate case decision might have been.

THE ALLEGED NEED FOR RELIEF

The ILECs' Claims[39]

Frontier sums up the ILECs' view of the situation as follows:

> The battle lines in this proceeding are well-drawn. The incumbents are experiencing a hemorrhage of cash in the

[38] As added warrant for imposing the burden of proof on the parties proposing changes, CTSI et al. cite State Administrative Procedure Act (SAPA) §306, which provides that the burden of proof shall be on the party who initiated the proceeding. That provision is not pertinent here, however, since this is not an adjudicatory proceeding subject to Article 3 of SAPA.

[39] These presentations of parties' positions include, on occasion, responsive points as well.

> form of reciprocal compensation, and the more they pay in reciprocal compensation, the more they have to invest in facilities to carry the traffic to their competitors in order to pay even more. The competitors are earning tremendous profits on this traffic, because they charge rates all out of proportion to their actual costs. The customers who are creating all this incoming traffic are also sharing in the gravy train, and some are receiving free service or even being paid to take service merely because they generate large amounts of incoming traffic. A whole industry is growing up to feed on the revenue stream from the incumbents, and the focus of local exchange competition is shifting to the attraction of one-way incoming service.[40]

Frontier goes on to compare the incentives provided to CLECs by reciprocal compensation arrangements to those offered to qualifying energy producing facilities by the federal Public Utility Regulatory Policies Act of 1978 and New York's "Six Cent Law," both of which, it suggests, encourage the production of otherwise uneconomic products. Frontier warns of disastrous impacts on ILECs and alleges adverse effects on society in general. These include the invention of services such as chatlines, which, Frontier says, we found were not necessarily beneficial; the creation of disincentives to the provision by CLECs of service to flat-rate residential customers, whose monthly payments to their LEC will likely just exceed the LECs reciprocal compensation payments on their account; and the need for uneconomical investments on the part of the ILEC to carry traffic originated by their flat rate customers for delivery to CLECs' customers.

Frontier contends further that the existing arrangements encourage CLECs to charge discriminatory rates to benefit convergent customers and to invest in switches that otherwise would not be economic; it cites a CLEC that has installed two switches, one a tandem and the other a local

[40] Frontier's Initial Brief, p. 1 (footnote omitted).

exchange switch, alongside its voice mail platform in Rochester "in an attempt to charge reciprocal compensation for incoming traffic and to obtain the lion's share of access revenues for incoming toll calls."[41] Frontier disputes the premise that society benefits from CLECs reducing rates to ISPs, contending that any such benefit is simply a poorly thought through, unnecessary, and anti-competitive subsidy.

Relief from this situation is warranted, Frontier continues, because reciprocal compensation makes sense only where, in its absence, the originating LEC would receive compensation for the call and the terminating LEC would not, and where the costs borne by both LECs are nearly equal. Internet traffic, it argues, does not meet these conditions, inasmuch as most of it originates from flat rate residential subscribers who pay no additional charges for their calls to ISPs. Meanwhile, even in the absence of reciprocal compensation, the CLEC receives incremental revenues from its ISP customer, while the ILEC is required not only to pay reciprocal compensation but to incur substantial expenses for the Internet traffic it carries.[42] (CPB responds that these costs, attributable to the demands imposed by Frontier's own customers, are irrelevant to the proper level of reciprocal compensation.)

Bell Atlantic-New York presents similar arguments. It cites statements, drawn from CLEC web sites and submitted in Bell Atlantic-New York's comments in the Chatline Proceeding, to the effect that many CLECs seek customers with convergent traffic "simply for the purpose of collecting

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[41] Frontier's Initial Brief, p. 4, n. 11.

[42] Frontier observes that the party actually responsible for the costs is the ISP, which charges its end users for its services and, in some situations, receives from the CLEC a portion of the reciprocal compensation revenues received by the CLEC on its account. Frontier suggests that ISPs should, in fact, be regarded as carriers who, rather than receiving compensation from ILECs, should be obligated to pay carrier access charges.

intercarrier compensation payments from incumbent LECs. Indeed, in many cases intercarrier compensation has become the principal line of business for such carriers."[43] Noting that during the first quarter of 1999, the aggregate measured traffic flow from Bell Atlantic-New York to CLECs was more than ten times greater than the flow in the reverse direction,[44] Bell Atlantic-New York contends that the market is being shaped by regulation, that ILECs are being forced to finance their competitors, and that customers are injured because CLECs are discouraged from becoming the kind of full service providers who will bring the benefits of true competition.

Bell Atlantic-New York goes on to describe the FCC's symmetry and functional equivalence principles for reciprocal compensation, and it argues that though the FCC ISP Ruling permits states to apply those requirements to ISP traffic, it does not require them to. It points as well to the Framework Order and urges us to reaffirm and apply the Framework Order's principles of universal service (which Bell Atlantic-New York sees as favoring "intercarrier compensation rules that provided incentives for provision of a broad range of services to a wide variety of customers"[45]); symmetry (meaning that the ILEC's rate levels should apply to the CLEC as well, the question being which rate applies under which circumstances); functional equivalence, defined as "the ability to terminate calls to all customers served by a carrier's unique, stand alone network by delivery to a single point of interconnection[46]"); and efficient interconnection (requiring, as a further condition of charging tandem rates, that CLECs "provide the incumbent appropriate interconnection options

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[43] Bell Atlantic-New York's Initial Brief, p. 1.

[44] Tr. 96, 165-166.

[45] Bell Atlantic-New York's Initial Brief, p. 15.

[46] Framework Order, p. 6, n. 1, cited at Bell Atlantic-New York's Initial Brief, p. 16, n. 40.

within their network that would allow the incumbent access to more efficient connections"[47]). Bell Atlantic-New York adds that the symmetry principle, as we and the FCC have adopted it, makes actual CLEC costs irrelevant.

As discussed in more detail in connection with its specific proposals, Bell Atlantic-New York maintains that the termination of convergent traffic enjoys efficiencies that are unavailable when more broadly dispersed traffic is terminated. The CLECs respond that these claims are unsubstantiated.

The CLECs' Positions

Although the CLECs' briefs vary in their treatment of the issues, several common themes may be identified. This section is organized around those themes.

1. The Significance of Carrying Convergent Traffic

AT&T, among others, argues that traffic imbalances say nothing about the proper level of reciprocal compensation and that reciprocal compensation, in fact, contemplates traffic imbalances, without which the simpler bill-and-keep system could have been adopted. It contends as well that Bell Atlantic-New York overlooks other traffic imbalances that run in its favor, such as its termination of 2.7 times as many minutes of wireless traffic as CLECs terminate for it. Mid-Hudson/Northland and MCI, among others, note that it was the ILECs that, over the CLECs' objection, favored creation of the reciprocal compensation mechanism; these parties urge that the ILECs be required to accept the consequences of their tactics and not be bailed out now that their bet has gone sour.

Looking to the genesis of the traffic imbalance rather than its implications, several CLECs, such as CTSI et al., attribute the tendency of some CLECs to seek convergent traffic customers to Bell Atlantic-New York's continued

[47] Framework Order, p. 6, cited at Bell Atlantic-New York's Initial Brief, p. 16.

imposition of barriers to more broad-based market entry. CTSI et al. assert that

> If Bell Atlantic effectively denies access to loops, and it is cost-prohibitive for the entrant to deploy them, serving customers that require fewer loops is clearly rational business behavior. If Bell Atlantic provides woefully inadequate operations support systems that make large-scale ordering and provisioning completely unreliable, providing services that are less dependent on effective OSS interfaces is also logical. If Bell Atlantic neglects a market segment by failing to offer collocation arrangements that customers in that market segment want, providing those collocation arrangements is one way to compete. And if Bell Atlantic makes it extremely difficult to transition a customer from Bell Atlantic to a CLEC, targeting customers that are establishing businesses is also logical. In all of these cases, ISPs are excellent customers for CLECs.[48]

CPB responds that reciprocal compensation rates should be cost-based regardless of who pays whom.

Some CLECs broaden this point, asserting that pursuing niche markets is not merely a reaction to barriers erected by ILECs but is a proper strategy for entering the market, either enroute to becoming a full-service provider or as an inherently reasonable business plan in itself. Mid-Hudson/Northland, TRA, and others urge us to avoid making changes that would undermine the expectations of small, innovative carriers who had relied in good faith on the existing regulatory structure to provide them revenue streams from niche markets--and especially not to do so in order to protect ILEC monopolists from the consequences of their own mistakes in favoring reciprocal compensation. (Bell Atlantic-New York challenges the premise of reliance, asserting that CLECs recognized the possibility that the existing rules might

[48] CTSI et al.'s Initial Brief, pp. 10-11.

change; for that reason, among others, it sees no need for a transition period before new arrangements are introduced.)

Mid-Hudson/Northland add that the sharing by CLECs of revenues with ISP customers (which Bell Atlantic-New York cites as evidence that reciprocal compensation revenues that were improperly above cost) is nothing more than the sharing of cost savings with end user customers, in a manner conceptually the same as an ILEC's attracting a prospective customer with an individual case basis pricing arrangement substantially below the tariffed price. Since the beneficiaries of the practice are end users, Mid-Hudson/Northland suggest, the practice should be encouraged, not discouraged.[49]

Reinforcing the propriety of pursuing of niche markets, MCIW, the Cable Association, and others assert that Bell Atlantic-New York itself does so, citing its recent introduction of Internet Protocol Routing Service (IPRS) to attract ISP customers. The Cable Association notes that the service was introduced following our denial of Bell Atlantic-New York's request for immediate relief from reciprocal compensation obligations relating to ISP-bound traffic; and it suggests that granting the request, which the Cable Association characterizes as one for protection from competitive forces, would have vitiated Bell Atlantic-New York's incentive to introduce the new service. In response, Bell Atlantic-New York denies that IPRS was a reaction to our decision, arguing it could never have been planned and introduced that quickly. More broadly, it objects to the premise that it should be encouraged to compete to retain its customers by being required to subsidize its competitors.

In contrast to the CLECs who emphasize the propriety of pursuing niche markets, others point to the distinctions among CLECs, some of which are, or aspire to be, full service providers. They urge us to do nothing in this proceeding that

[49] Mid-Hudson/Northland's Initial Brief, p. 17.

would interfere with their ability to function in that capacity. Without suggesting that a focus on ISP or convergent traffic is inherently abusive, they argue that CLECs that may be found to be abusing the existing regulatory structure should be pursued separately, in a manner that does not protect the ILECs from competition by full service, facilities-based providers. CTSI et al., for example, cite testimony that they have not limited themselves to high volume convergent traffic customers, and they object to a one-size-fits-all approach.[50]

The point is emphasized by Time Warner and Lightpath. Lightpath contends that it serves a diverse customer base and points to the blended reciprocal compensation rate in its interconnection agreement with Bell Atlantic-New York, which permits it to receive reciprocal compensation based on end-office rates for traffic terminated via end-office trunks and on tandem rates for traffic terminated via tandem trunks.[51] It charges that Bell Atlantic-New York's effort to seek broad changes in existing reciprocal compensation arrangements rather than pursuing the few CLECs who allegedly abuse the system represents an effort to use the regulatory system to undermine competitive carriers in the one area where they have succeeded in eroding Bell Atlantic-New York's market share.[52] It asks us "to maintain the status quo--especially with respect to full-service, facilities-based carriers. . . ."[53]

Time Warner, meanwhile, urges recognition of the variation in CLECs' business plans and operating networks, asserting that "responsible CLECs, those that design their networks and their points of interconnection . . . based on

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[50] CTSI et al.'s Initial Brief, p. 21.

[51] Lightpath's Initial Brief, p. 16.

[52] Ibid., pp. 5-6. The Cable Association argues to similar effect. Cable Association's Initial Brief, p. 4.

[53] Lightpath's Reply Brief, p. 3.

sound engineering principles for the flow of both originating and terminating traffic, have built their networks to serve a broad range of local telephone customers."[54] It adds that "the ILECs have offered no evidence to dispute the fact that responsible CLECs have built out, and continue to augment, their networks as necessary to handle actual and anticipated two-way traffic volumes among providers."[55] Recognizing this degree of variation among CLECs, and attempting to provide incentives for CLECs to build out their networks, Time Warner offers its own proposed modification, described in detail below, to the existing reciprocal compensation scheme.

Bell Atlantic-New York responds that there is no basis for distinguishing among CLECs in this way and that its proposals are intended not to punish vice or reward virtue but only to reflect the fact that it costs less to deliver convergent traffic than to deliver traffic to numerous, widely dispersed customers. It therefore would apply its proposals to the convergent traffic carried by FSPs as well as to niche players.

[54] Time Warner's Initial Brief, p. 4, footnotes omitted.

[55] Ibid., p. 5.

2. Relationship between Traffic Ratios and Costs

Many CLECs assert that the ILECs have shown no relationship between the type of traffic carried and the costs incurred to terminate it; they insist that "a minute is a minute," regardless of the type of traffic being carried.[56] CompTel, for example, cites Bell Atlantic-New York's witness's confirmation that it uses the same network facilities for all types of traffic, and e-Spire/Intermedia note the witness's statement that network components are not related to traffic imbalances.[57] Bell Atlantic-New York disputes these characterizations of its witness's testimony, contending, among other things, that the use of similar facilities, referred to by the witness, does not mean the facilities are identical.[58]

MCIW similarly contends that Bell Atlantic-New York failed to show that CLECs' costs are lower than ILECs' because they provide service to convergent customers; it cites its own witness's statement that

> virtually all of the CLECs in this case provided information that, in aggregate, demonstrates that ISP traffic is being routed through the same interconnection, transport, and circuit switching equipment that all other traffic is being routed over. [Bell Atlantic-New York] provided similar testimony stating that, to the extent that it could identify ISPs separately from other end users, calls to those ISPs are also being routed through the same interconnection, transport, and switching equipment and facilities as any other type of end user call.[59]

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[56] TRA's Initial Brief, pp. 3-4.

[57] CompTel's Initial Brief, p. 4, citing Tr. 296, 307, 308; e-Spire/Intermedia's Initial Brief, pp. 6-7, citing Tr. 297-298.

[58] Bell Atlantic-New York's Reply Brief, p. 15, n. 30.

[59] Tr. 722, cited in MCIW's Initial Brief, p. 4.

CTSI et al. cite in particular what they characterize as Bell Atlantic-New York's testimony that the length of the loop has nothing to do with the carrier's terminating costs.[60] Lightpath, apparently distinguishing full-service CLECs from others, states that "despite extensive testimony filed by both incumbent and competitive carriers, no evidence has been presented to demonstrate that terminating large volumes of calls to single customers is more cost effective for full service, facilities-based providers than terminating other types of traffic."[61]

Several CLECs stress the centrality of the functional equivalence determination in deciding whether the rate should be set at the tandem or end-office level or at some point in between. AT&T notes our statement in the Framework Order that functional equivalence does not depend on a CLEC's network architecture as long as the CLEC can terminate calls to all customers served by its network through a single point of interconnection. Disputing Bell Atlantic-New York's suggestion that CLECs' use of a single-switch network architecture may provide them efficiencies and lower costs that would warrant withholding reciprocal compensation at tandem rates, AT&T explains that a CLEC must use the single-switch network architecture in the early stages of competition until it gains volumes that would warrant the installation of additional end- office and tandem switches.[62] CompTel notes the FCC's determination that a CLEC is entitled to a tandem rate in cases where its switch serves a geographic area comparable to that served by the ILECs tandem switch. MCIW see the functional equivalence doctrine as permitting a state commission to determine whether a particular CLEC is entitled to the tandem rate on the basis of "economically

[60] Tr. 178, cited in CTSI et al.'s Initial Brief, pp. 8-9.

[61] Lightpath's Initial Brief, p. 2.

[62] AT&T's Initial Brief, p. 8.

relevant considerations, mainly the geographic coverage that the CLEC's switch supports"[63] instead of on the basis of such irrelevant considerations as traffic ratios. Lightpath argues that its system meets both the FCC's geographic area standard and our single point of interconnection standard and that its consequent tandem functionality is not vitiated by the fact that it serves some convergent customers. It asserts that

> once a CLEC has made the necessary investment to build out a full facilities-based network that meets the commissions' [i.e., FCC's and PSC's] definitions of tandem functionality, it is entitled to be compensated for its costs using tandem switching as a proxy. . . Thus, a CLEC's right to receive tandem termination rates is based on the overall functionality of the switch with respect to calls and all customers served by the CLEC's switch, and not on the characteristics of a particular call or type of traffic.[64]

In response, CPB maintains that tandem functionality is not needed to terminate calls to a small number of large-volume customers and that such customers can be served using high-capacity facilities having a lower cost-per-minute than the low-capacity facilities used to serve a large number of widely dispersed customers. It urges us to reflect these cost differences in the reciprocal compensation rates applicable to traffic terminated to large-volume customers. Frontier asserts that these differences mean that a lower compensation rate for this type of traffic would be consistent with the federal requirements, and it points to Time Warner's recognition of cost differences between convergent and other traffic.

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[63] MCIW's Initial Brief, p. 5.

[64] Lightpath's Initial Brief, pp. 14-15 (emphasis in original).

3. Other Cost-Related Issues

Several CLECs argue that the cost calculus should recognize the fact ILECs avoid costs when CLECs terminate traffic that they originate. AT&T states, for example, that

> [Bell Atlantic-New York's] own TELRIC costs form the basis for the existing rates. If [Bell Atlantic-New York] terminates less in- bound ISP traffic because such traffic is terminated instead by CLECs, [Bell Atlantic-New York] saved the costs of delivering such traffic. As long as such costs are appropriately calculated, [Bell Atlantic-New York] suffers no loss and cannot complain that an "imbalance" in traffic or payments represents a basis for altering rates.[65]

TRA adds that the ILEC's retail rates recover termination costs and that allowing an ILEC to avoid responsibility for those costs, by delivering traffic to a CLEC for termination without paying full compensation, would unjustly enrich the ILEC and represent "a classic monopoly abuse of the ILEC's customers."[66]

Some CLEC's respond to Bell Atlantic-New York's concern that its reciprocal compensation payments exceed the revenues it receives from end-users that place calls to ISPs. CTSI et al., for example, note that any averaged rate structure contemplates customers that generate more costs than revenues being offset by others that generate more revenues than costs; that if Bell Atlantic-New York's residential retail rate is inadequate, it should be examined elsewhere; that dial-up access to the Internet generates other sources of revenues for an ILEC, such as additional lines and vertical features; and that the existence of Bell Atlantic-New York's own ISP (Bell Atlantic.net) suggests that its end-user rate structure supports dial-up access to ISPs, for if it did not,

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[65] AT&T's Initial Brief, p. 7.

[66] TRA's Initial Brief, pp. 4-5.

its provision of a competitive ISP service would be unlawfully subsidized by its monopoly ratepayers.[67] Lightpath argues that any mismatch between revenues from calls with long holding times and the costs of carrying those calls should not be solved through adjustments to reciprocal compensation; to do so, it says, would force CLECs to subsidize calls with long holding times originated by ILECs.

Finally, several CLECs, including Global NAPs, assert that even if it made more sense to recover ISP termination costs through carrier access charges (on the premise that ISPs are analogous to carriers rather than final destinations for traffic), doing so is precluded. The only way to recover those costs, accordingly, is through reciprocal compensation.

4. Legal and Procedural Points

Lightpath, among others, contends that the existing reciprocal compensation framework is legally binding for local (i.e., for purposes of this case, non-ISP) traffic, pointing to the doctrine of functional equivalence as determinative. Bell Atlantic-New York does not really dispute that point, though it takes a very different view of what "functional equivalence" entails. CTSI et al. cite the provision of the FCC's rules that prohibit an ILEC from charging a CLEC element rates that "vary on the basis of the class of customers served by the requesting carrier, or on the type of service that the requesting carrier purchasing such elements uses them to provide."[68] Bell Atlantic-New York responds that it is proposing to distinguish among types of traffic, not types of customer,[69] and that such distinctions are clearly permitted, as evidenced by the authorization to apply different rates to

[67] CTSI et al.'s Initial Brief, pp. 25-26.

[68] 47 C.F.R. §51.503(c).

[69] The exception is for ISP customers, no longer subject to the FCC's rule.

tandem-routed and end-office-routed traffic.

In addition, Lightpath, CTSI et al., and others assert that regardless of what may otherwise be decided in this case, existing interconnection agreements should prevail at least until the ends of their terms.

Bell Atlantic-New York responds that its proposals should be incorporated into existing agreements only to the extent those agreements, by their own terms, require or allow that incorporation. The proposals, in its view, should guide interconnection negotiations, be incorporated in LEC tariffs, and be applied in resolving disputes, but should not alter existing agreements.

On a more specific matter, Bell Atlantic-New York observed in its initial brief that "agreements already in force should be interpreted in accordance with normal principles of contract interpretation."[70] Citing its comments in the Chatline Proceeding, it went on to assert that those agreements, properly interpreted, would not provide for inter-carrier compensation for Internet traffic, presumably because such traffic does not "terminate" on the receiving carrier's network (consistent with the FCC's finding in its ISP Ruling). In its reply brief, Lightpath strongly disputes that reading, insisting its agreement with Bell Atlantic-New York was intended to include Internet traffic, and it asks us to clarify that Bell Atlantic-New York must continue to honor its contractual agreements until they expire.[71]

Positions of State Agencies

1. CPB

CPB attributes traffic imbalances to multiple factors: like the CLECs, it sees the imbalances as resulting from the ILECs' failure to open markets adequately and from

[70] Bell Atlantic-New York's Initial Brief, p. 5.

[71] This specific issue, along with others, is resolved below, in the "Discussion and Conclusions" section.

the CLECs' own logical business plans; but, like the ILECs, it also assigns a role to the incentives provided by the reciprocal compensation structure. It suggests that excessive reciprocal compensation rates artificially discourage competition for customers that originate telephone calls, such as residential and small business customers, and it therefore sees a need to adjust the existing system while still providing compensation for all call termination. (Its proposal is described in detail below.) To ensure, however, that the traffic imbalances that are dealt with by its proposal do not result from the ILECs' failure to open their markets to CLECs, it would defer application of its remedy until the ILECs' local market is fully open to competition.[72]

In response, Bell Atlantic-New York argues that if the market is not yet fully open (a premise it rejects) continuing to make niche markets artificially attractive will work against the development of local competition, not in favor of it. And even if its actions prevented CLECs from maturing to tandem functionality (another premise it rejects), that would be no reason to provide reciprocal compensation at above-cost levels. AT&T, citing CPB's statement that "one reason for the current imbalance in the exchange of traffic between ILECs and CLECs is that ILECs' local markets are not yet open to competition," asserts that "as recognized by the CPB, the real reason for the current imbalance in traffic flows is that [Bell Atlantic-New York] has not yet opened the local market to broad based competition."[73]

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[72] CPB's Initial Brief, p. 19.

[73] Id.; AT&T's Reply Brief, p. 8 (emphasis supplied in both quotations).

2. The Attorney General

As noted, the Attorney General emphasizes the need to avoid any steps that would impede widely available Internet access.

SPECIFIC PROPOSALS

Bell Atlantic-New York's Proposals

1. Exclusion of Vertical Feature Costs

Bell Atlantic-New York proposes to exclude from the Phase 1 switching costs on the basis of which reciprocal compensation rates are set all costs associated with "vertical features," such as call waiting, which are not used in the simple routing and delivery of traffic. Acknowledging that the amount to be excluded cannot be determined on the basis of the record in Phase 1 of the First Network Elements Proceeding, it suggests a reduction of 30%, subject to true-up following a closer examination of the issue in the Second Network Elements Proceeding. Characterizing the proposal as a "modest" one that "has been inexplicably controversial,"[74] it suggests that parties opposing it have misunderstood the purpose of the Phase 1 studies, which were concerned with switching costs in general and not their relationship to intercarrier compensation rates, in connection with which disaggregation of switching costs into "originating" and "terminating" components is warranted.

Several CLECs, including AT&T, Lightpath, and Global NAPs, suggest that the vertical features proposal, which applies to all traffic, not only to large-volume traffic to single customers, is beyond the scope of this case and may or should be examined elsewhere. Lightpath and CTSI et al. assert as well that Bell Atlantic-New York has offered no support for its proposal, either to show that vertical features are not used in call termination or to show that the 30% adjustment is a reasonable place holder pending further

[74] Bell-Atlantic-New York's Initial Brief, p. 17.

inquiry in the Second Network Elements Proceeding.

Some CLECs question the motivation for Bell Atlantic-New York's proposal. CTSI et al. suggest that Bell Atlantic-New York is contriving to remove these costs from reciprocal compensation (so it will pay less) while leaving them in network element rates (so it will receive more). Global NAPs suggests that Bell Atlantic-New York has become concerned that reciprocal compensation rates may be too high only in light of its realization that it will have to pay compensation, not merely receive it. It sees this as a benefit of the present system's imposition on Bell Atlantic-New York of competitive pressures to establish the lowest reasonable call termination rate.[75] Frontier, in its reply brief, accepts that challenge and urges reduction of the rate to zero, that is, its replacement by bill-and-keep.

2. Non-ISP Convergent Traffic

Bell Atlantic-New York proposes to allow Meet Point B (tandem-rate) reciprocal compensation to be charged "only when traffic is being delivered or terminated (a) through a tandem point of interconnection, or (b) through facilities that are 'functionally equivalent' to a tandem. This rule should be applied symmetrically to all carriers, both CLECs and incumbents. It would call for different results, however, depending upon the type of network architecture used by the carrier in question."[76] More specifically, a CLEC would be paid tandem-rate reciprocal compensation if, like Bell Atlantic-New York itself, it installed one or more tandem switches, used them to provide an actual tandem functionality, and offered other carriers the option of interconnecting either at the tandem or at the end office. In addition, tandem rate compensation would be paid

[75] Global NAPs' Initial Brief, p. 2, n. 3.

[76] Bell Atlantic-New York's Initial Brief, p. 20 (emphasis in original, footnote omitted).

to a CLEC that did not use tandem switching but whose facilities were nevertheless functionally equivalent to a tandem switch. As the wording of its proposal suggests, Bell Atlantic-New York sees it as consistent with the doctrines of functional equivalence and symmetry, properly understood. In Bell Atlantic-New York's view, however, the functional equivalence test cannot be met for large volume one-way traffic.

The claim of functional equivalence for a tandemless network is based on the premise that long loops, SONET rings, and other facilities take the place of the tandem and provide similar functionality. But Bell Atlantic-New York maintains that such wide area functionality need not be used in delivering traffic to a small number of large volume customers (in contrast to a widely dispersed base including substantial numbers of small customers). In the former instance, the delivering carrier can use high capacity facilities having a lower per-minute cost than the voice grade facilities needed to deliver traffic to a widely dispersed group of customers. In addition, Bell Atlantic-New York cites Global NAPs' witness's statement that ISP-bound traffic makes more efficient use of switching and transport capacity than does conventional voice telephony.[77] Beyond these factors, Bell Atlantic-New York continues, delivery of traffic to a small number of large volume customers permits a carrier to avoid the costs associated with substantial numbers of idle distribution facilities.

To show that its proposal is consistent with the FCC's rule, Bell Atlantic-New York points to the rule's statement that a CLEC is entitled to tandem interconnection rates when its switch "serves a geographic area comparable to the area served by the incumbent ILEC's tandem switch"[78]; and

[77] Ibid., p. 24, citing Tr. 649. (Bell Atlantic-New York refers to the witness as Cablevision's rather than Global NAPs'.)

[78] 47 C.F.R. §51.711(a)(3) (emphasis supplied).

it maintains that "'serving' an area does not merely entail delivering traffic to a few customers located within that area, no matter how large it may be."[79] It may be significant in this regard that AT&T refers to the FCC's standard not as "functional equivalence," which it attributes only to our Framework Order, but as "geographic equivalence," perhaps intending in this way to counter Bell Atlantic-New York's multi-faceted view (comprising nature of service as well as geography) of functional equivalence.

Recognizing that start-up CLECs will use fewer switches and an extended loop distribution architecture as the functional equivalent of a mature ILEC network using tandems, Bell Atlantic-New York nevertheless contrasts a start-up CLEC intending to be a full service provider with one targeting large volume convergent customers. It asserts that the former will necessarily install more extensive and less efficiently used facilities and will eventually be required to install tandem switching as its network begins to resemble that of a mature ILEC; the niche player, in contrast, will not be required to make these investments. And even if the niche player changed its strategy and began to seek a general customer base, the portion of its network designed to serve convergent customers would remain more efficient.

Further reducing the cost of serving large-volume convergent customers, Bell Atlantic-New York argues, is the ability to use shorter connections between the CLEC switch and the customer, perhaps even reducing that distance to zero through collocation.

To translate the foregoing analysis into rates, Bell Atlantic-New York would use traffic ratios as a measure of functional equivalence: a high ratio would be taken to imply that the CLEC was serving a high proportion of convergent customers; a ratio close to one would suggest that the CLEC, like Bell Atlantic-New York, itself, was serving a

[79] Bell Atlantic-New York's Reply Brief, pp. 12-13.

representative distribution of customers. It proposes a ratio of 2:1 as the dividing line: Meet Point A (end-office) rates would apply where the ratio was 2:1 or greater; Meet Point B (tandem) rates would apply only where the ratio was less than 2:1. The proposal would apply to all types of convergent traffic, not merely that directed to the Internet. In Bell Atlantic-New York's view, reference to the traffic imbalance is reasonable because such an imbalance can arise only if one carrier is serving customers that receive more traffic than they originate; and it entails little administrative cost, since traffic flows in each direction are already billed. It regards the 2:1 threshold as generous, since, in principle, it would be reasonable to charge the lower rate for all traffic in excess of a 1:1 ratio.[80]

Finally, Bell Atlantic-New York denies that its proposal unfairly penalizes CLECs; it applies, it says, not to particular carriers but to particular traffic. A CLEC serving that type of traffic would receive the end-office rate; a CLEC serving a broader and more dispersed group of customers might receive the tandem rate. Bell Atlantic-New York characterizes its proposal not as a penalty imposed on CLECs that focus their efforts on ISP customers, but as a means of insuring that they are not rewarded by being over compensated for their efforts.

As already suggested, CLECs take the position that Bell Atlantic-New York's understanding of functional equivalence violates the FCC's rule. CTSI et al., for example, dispute the premise that a CLEC could receive the tandem rate only if it served thousands of customers within the pertinent geographic area. They assert that "if a CLEC has facilities in place that provide tandem switch functionality capable of serving many customers in a geographic area comparable to that served by [Bell Atlantic-New York's] tandem switch, that is sufficient. Nothing more

[80] Bell Atlantic-New York's Reply Brief, p. 17.

is required under the FCC's test."[81] In addition, they complain Bell Atlantic-New York is proposing to charge CLECs different rates on the basis of the types of customers they serve, contrary to the FCC's rules.[82] Lightpath maintains the efficiencies CLECs allegedly enjoy on account of serving a small number of large customers have no application to full service providers, whose networks are built to serve a wide customer base, even if they serve ISPs as well.[83] Global NAPs, meanwhile, maintains that the number of customers served by the CLEC has no bearing on whether it meets the functional equivalence standard. Beyond that, it contends a CLEC can "serve" a wide geographic area by allowing its customers to collocate with it, even without constructing a fiber network traversing the area: "a CLEC may 'serve' a wide geographic area. . . by incurring the costs associated with allowing its customers that need to receive calls from such an area to collocate at [its] switch, by incurring the costs associated with deploying physical facilities to customer locations in different local calling areas throughout the LATA, or some combination of both."[84] It warns against penalizing the smallest and newest CLECs or motivating them to sign up a handful of customers in diverse locations merely to qualify for the tandem rate.

CLECs also challenge Bell Atlantic-New York's use of a 2:1 ratio as the demarcation point between the two rates, claiming it has shown no link between that traffic ratio and a CLECs termination costs. CTSI et al. cite a Maryland proceeding in which Bell Atlantic-Maryland's counsel acknowledged the ratio was "arbitrary."[85] Lightpath similarly

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[81] CTSI et al.'s Reply Brief, p. 9.

[82] 47 C.F.R. §51.503(c).

[83] Lightpath's Reply Brief, pp. 4-5.

[84] Global NAPs' Reply Brief, p. 14.

[85] CTSI et al.'s Reply Brief, p, 7, citing Complaint of MFS

sees no factual support for the 2:1 ratio, disputing what it characterizes as Bell Atlantic-New York's view that "the interests of full-service, facilities-based CLECs are accommodated by its ratio approach."[86] It reiterates the claim that its switches serve an area at least as large as that served by a typical Bell Atlantic-New York tandem and that Bell Atlantic-New York can reach all its customers through a single point of interconnection; it therefore sees itself as meeting our test of tandem functionality as well as the FCC's, regardless of its traffic ratio.

Finally, MCIW pursues a somewhat different line of reasoning, arguing that Bell Atlantic-New York's proposal would, in effect, improperly force CLECs to install tandem switches and build inefficient networks simply to satisfy Bell Atlantic-New York's requirements.

3. ISP Traffic

Given the flexibility afforded the states by the FCC's determination that Internet traffic is exempt from reciprocal compensation, Bell Atlantic-New York argues that we would be justified in setting compensation for that traffic at zero. It cites in this regard the Massachusetts decision, noted above, that declined to mandate payment of reciprocal compensation for Internet traffic and left it to the parties to negotiate their own arrangements; it asserts that the New Jersey Commission recently reached a similar conclusion. Should we decline to take so drastic a step, Bell Atlantic-New York would recommend a rate equal to what it terms "direct variable costs."

In support of its zero-compensation proposal, Bell Atlantic-New York contends that, in principle, ISPs are interstate carriers who should pay carrier access charges.

Intelenet of Maryland Against Bell Atlantic of Maryland, Case No. 8731, Hearing Proceedings (April 14, 1999) Tr. 167-168.

[86] Lightpath's Reply Brief, p. 6.

Because the FCC has exempted them from access charges, however, both the originating and terminating LECs are undercompensated. Asserting, with illustrations, that Bell Atlantic-New York's revenues from its customers who place calls to ISPs tend to be below cost, it argues that requiring it to pay intercarrier compensation to the terminating carrier makes a bad situation worse and requires "ILECs [to] remit to CLECs revenues that they never receive";[87] it would be better in its view "for the Commission to restrict both LECs to the local exchange revenues each receives from its customer (in the case of the originating LEC, the local charges the Internet user pays; in the case of the LEC delivering the call to the ISP, the local charge the ISP pays). This proposal is competitively neutral as between the two involved LECs."[88] Bell Atlantic-New York regards a zero rate as further justified by the abusive tactics of those CLECs using ISP traffic to generate reciprocal compensation revenue streams, as discussed earlier. Noting the claim that CLECs' termination of calls enables ILECs to avoid the cost of termination, Bell Atlantic-New York contends that intercarrier compensation is not based on avoided costs; it is designed to compensate the terminating carrier for the costs it incurs.

Bell Atlantic-New York's alternative proposal for ISP traffic would take the current Meet Point A and Meet Point B rate levels (reduced to eliminate vertical feature costs in accordance with its first proposal) and adjust them to remove investment costs (depreciation and return) and joint and common costs, all of which are included in the TELRIC analysis that forms the basis for the existing rates. (It denies such rates would be confiscatory, inasmuch as the CLEC could recover its costs from its ISP customer.) The precise rate levels would be determined in the Second Network Elements

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[87] Bell Atlantic-New York's Reply Brief, p. 20.

[88] Bell Atlantic-New York's Initial Brief, p. 36 (emphasis in original).

Proceeding, but Bell Atlantic-New York suggests interim rates based on the record of the First Network Elements Proceeding. Noting that CLECs have argued that reduced compensation rates for Internet traffic would deter Internet growth, Bell Atlantic-New York asserts that ISPs already benefit from their exemption from interstate access charges, and it cites the Massachusetts Commission's observations that the Internet is powerful enough to stand on its own and that eliminating the subsidies produced by regulatory distortion would encourage efficient investment in Internet and other technology.

Administering these proposals would require a means to identify Internet traffic, and Bell Atlantic-New York, consistent with its view of burden of proof in this case, would impose the burden of identifying the traffic on the CLEC. In the absence of a showing by the CLEC, Bell Atlantic-New York would presume all convergent traffic (i.e., all traffic in excess of its proposed 2:1 ratio discussed in the previous section) to be Internet traffic.

CLECs press various arguments in response. e.spire/Intermedia dispute the premise that states are free to set below-TELRIC rates for ISP traffic, contending that the FCC ISP Ruling granted them, until a final federal rule is promulgated, only "the authority under section 252 of the [1996] Act to determine intercarrier compensation rates for ISP-bound traffic."[89] In its view, the reference to §252 requires TELRIC-based rates for ISP traffic. CTSI et al. and Global NAPs dispute Bell Atlantic-New York's reference to the Massachusetts ISP decision, the former noting that the portions it relies on are disputed dicta and the latter citing the many states that, in contrast to Massachusetts (and, more recently New Jersey), have held ISPs to be no different from other calls with regard to reciprocal compensation. CTSI et al. also note the FCC's statement in its ISP ruling that CLECs

[89] e.spire/Intermedia's Initial Brief, p. 11, citing the FCC ISP Ruling, ¶25 (emphasis supplied).

incur costs to deliver ISP traffic and that some compensation is warranted to enable them to recover those costs.[90]

Global NAPs disputes the relevance of Bell Atlantic-New York's allegations that it fails to recover its costs of originating ISP-bound calls, arguing that they are no different in this regard from all other local calls with longer-than-average holding times. In its view, the only pertinent question is whether local calling revenues overall suffice to recover the costs of local calling; it charges that Bell Atlantic-New York would have "CLECs . . . made into indentured servants for Bell Atlantic-New York's end-users who, after all, are the source of both the costs and the revenues at issue here."[91] (Bell Atlantic-New York maintains, however, that its local calling rates were set before the advent of the Internet and are now capped under its Performance Regulation Plan.) Global NAPs argues as well that if all CLECs that served ISP customers disappeared, Bell Atlantic-New York's costs would increase by more than it would save by avoiding reciprocal compensation payments, for it would have to augment its own network to complete the calls directed to ISPs. Bell Atlantic-New York's proposal therefore

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[90] FCC ISP Ruling, ¶29.

[91] Global NAPs' Reply Brief, p. 15. Global NAPs supports reciprocal compensation in part on the premise that local calling is "sent paid," that is, the originating carrier is to collect from the end-user revenues adequate to deliver the call to its destination. If a different carrier terminates that call, those revenues should be shared so the terminating carrier can recover its costs. (Global NAPs' Initial Brief, pp. 3-4.) BA takes the view that any such sharing, if applied pro rata (on the basis of each carrier's costs) to existing originating revenues would produce reciprocal compensation payments below current end-office rates. It therefore regards Global NAPs reasoning as suggesting a remedy that, while not a substitute for its own proposal, "at least would eliminate the absurd and anti-competitive requirement that originating ILECs remit to CLECs revenues that they never receive and that are below the originating ILECs' costs." (Bell Atlantic-New York's Reply Brief, p. 20.)

would grant Bell Atlantic-New York a windfall by permitting it to continue to avoid those costs while freeing it of any (or most) of its reciprocal compensation obligation.

Finally, the Attorney General asserts that by entering the market for ISP-bound traffic, CLECs have contributed to the greater availability of Internet access to end-users. He suggests that "changing or abandoning reciprocal compensation for ISP-bound traffic could have the detrimental effect of limiting consumer choice in securing internet access, and increasing the price of such service, which in turn might limit the number of New York consumers who can avail themselves of internet access. The Commission should avoid this result."[92]

[92] Attorney General's Reply Brief, p. 6.

4. Geographically Relevant Interconnection Points

ISPs often ask their local exchange carriers to assign them "virtual local numbers," i.e., numbers associated with each of the local calling areas in which their customers might be located regardless of whether the ISP itself or the carrier serving it has facilities in those areas. The ISPs do so to make it convenient and cheap for their customers to place calls with long holding times to them. Bell Atlantic-New York contends that these arrangements, though not unlawful, can result in the carrier serving the ISP passing on to another carrier--usually the originating ILEC--the cost of transporting the virtual local call from the ISP's customer's local calling area to the area in which the ISP is physically located. For example, if a call is originated on Bell Atlantic-New York's network and directed to an ISP served by a CLEC, and the CLEC declines to provide Bell Atlantic-New York a point of interconnection (POI) within the originating local calling area, Bell Atlantic-New York must carry the call (and install the facilities needed to do so) to the local area in which the CLEC has a POI even though Bell Atlantic-New York "receives only local usage rates from the originating end user and nothing at all from either the CLEC or the ISP. (Indeed, far from being compensated by the CLEC for transporting its call, [Bell Atlantic-New York] is actually required to pay the CLEC intercarrier compensation for the privilege of transporting its interexchange call for free, and is being prevented by the CLEC's numbering practices from being compensated by its end user through toll charges.)"[93]

To remedy the situation, Bell Atlantic-New York requests that all LECs be required to establish, upon the

[93] Bell Atlantic-New York's Initial Brief, p. 44 (emphasis in original). Bell Atlantic-New York adds that no such unfairness is imposed in the converse situation where a CLEC hands a call off to Bell Atlantic-New York for termination, inasmuch as Bell Atlantic-New York offers CLECs a POI at each of its switches.

request of any interconnected LEC, a geographically relevant interconnection point (GRIP) in every rate center in which it assigns telephone numbers, unless the interconnecting carriers negotiate alternative arrangements. The requirement would apply to all interconnections; but Bell Atlantic-New York nonetheless considers it proper to consider the matter in this proceeding, inasmuch as the underlying problems typically arise in connection with delivery of ISP and other convergent traffic. The requirement could be fulfilled either by establishing an actual physical POI or by purchasing dedicated transport from Bell Atlantic-New York at approved rates, thereby avoiding the alleged need for CLECs to deploy uneconomic new transport facilities in order to satisfy the GRIP requirement.

NYSTA, perceiving a related problem, objects more generally to the use of virtual local numbers. In its view, they improperly convert what should be a toll call into a local call, thereby denying LECs and inter-exchange carriers the toll and access charges that would be associated with a toll call. NYSTA would regard the location of the end-user requesting the NXX code (and not, as in the GRIPs proposal, the location of the POI) as determining whether to treat the call as local or toll. CTSI et al. respond that the general matter of virtual NXX codes is beyond the scope of this proceeding and that, in any event, Bell Atlantic-New York has acknowledged that their use is lawful.

CPB objects to the GRIPs proposal on the grounds that it would require CLECs to undertake substantial investments in areas where they have few customers, frustrating the development of efficient CLEC networks. It nevertheless observes that Bell Atlantic-New York's underlying concern "appears valid,"[94] and it suggests a more efficient way to deal with it would be to allow Bell Atlantic-New York to charge a TELRIC-based per-mile fee for any additional trunking

[94] CPB's Initial Brief, p. 22.

costs Bell Atlantic-New York incurs to deliver the calls at issue to CLECs. Taking strikingly different views of CPB's position, AT&T responds by asserting that CPB joins it in regarding the GRIPs proposal as anti-competitive and inefficient; Bell Atlantic-New York says "the statutory representative of the State's consumers" recognizes the problem Bell Atlantic-New York raises and "offers a solution not inconsistent with [Bell Atlantic-New York's own] proposal."[95] It adds that the rates contemplated by CPB are the interoffice transport rates set in the First Network Elements Proceeding.

Several CLECs object strenuously to both GRIPs and the mileage-fee alternative. Global NAPs sees them as efforts to undermine the pro-competitive regime established by the 1996 Act, which offsets the ILECs' market advantages by allowing CLECs to decide whether to interconnect at one point or many, denying that choice to the ILECs (meaning that an ILEC can be required to deliver all traffic to a single point designated by the CLEC), and forbidding an ILEC to charge a CLEC for the privilege of receiving its traffic. Meanwhile, Bell Atlantic-New York is obligated to deliver to a CLEC traffic originated by its own customers and directed to the CLEC's customers, and it cannot complain of the costs of doing so (though it is free, Global NAPs suggests, to charge its end-users a rate that covers those costs). Global NAPs (and other CLECs) add that the cost of transporting traffic is, in any event, modest; Bell Atlantic-New York acknowledges that transport costs are insensitive to distance but contends it incurs fixed costs in delivering the traffic over dedicated trunks.

[95] AT&T's Reply Brief, p. 11, Bell Atlantic-New York's Reply Brief, p. 21.

Frontier's Proposals[96]

1. Internet Traffic

Citing the flexibility afforded the states with regard to Internet traffic by the recent FCC decision and the absence of any "basis in law or policy to require ILECs to subsidize ISPs by allowing ISPs to water at the reciprocal compensation trough,"[97] Frontier proposes that there be no reciprocal compensation for traffic to ISPs on any network and that such traffic be handled on a bill-and-keep basis. Beyond that, it urges us to prohibit the discriminatory offering of discounted local exchange services to ISPs on the basis of their incoming traffic patterns as well as the discriminatory sharing of reciprocal compensation payments between carriers and ISPs.

Should we reject this primary proposal, Frontier would recommend compensation for Internet traffic priced at the ILECs "incremental (TELRIC) tandem switching cost."[98] As a further alternative, Frontier suggests that where the incoming to outgoing traffic ratio is 2:1 or greater for three successive months, reciprocal compensation be reduced to the tandem switching rate (as defined in the preceding footnote) until the ratio has dropped below 2:1 for three successive months.

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[96] Relatively few parties respond specifically to Frontier, for the arguments directed at Bell Atlantic-New York's proposals for the most part apply to Frontier's as well. Accordingly, no specific responses are reported in this section; but it should not be inferred that Frontier's proposals are unopposed.

[97] Frontier's Initial Brief, p. 8.

[98] As already suggested, Frontier seems to be referring here to the narrowly defined tandem switching cost itself, thereby intending to exclude the trunking, trunk port, and end office switch usage components of, for example, Bell Atlantic-New York's Meet Point B (tandem) rate; because of efficiencies of scale, per-unit tandem switch usage, so limited, is less costly than per-unit end-office switch usage. This accounts for Frontier's reference to tandem

2. Other Convergent Traffic

Refusing to concede as a legal matter that we are obligated to set reciprocal compensation rates for convergent traffic on the basis of the ILEC's costs, Frontier urges us to do so on the basis of the CLECs costs, reduced by the monthly revenues paid by the ISP to the CLEC for incoming traffic. (The premise of that reduction appears to be that the rates paid by a customer, including an ISP, are intended to cover both incoming and outgoing calling. Because an ISP imposes no costs related to outgoing traffic, the full amount of its payment defrays the termination costs that reciprocal compensation is also intended to cover.)

Should we nevertheless continue to use the ILEC's costs as the basis for reciprocal compensation, Frontier would set the rate at the ILEC's tandem switching costs (once again as defined above), on the premise that when a CLEC terminates traffic to a convergent customer's platform, the CLEC switch is acting as a tandem: it receives traffic only from other switches and terminates the traffic using large trunk-side connections. Frontier regards these as the hallmarks of tandem, not end-office switching and it sees "no reason for the Commission to pretend that the CLEC is performing anything like the widely-distributed and far-flung end-office switching that the ILEC performs when terminating small volumes of traffic to the thousands of customers and large service territories served by most ILEC switches."[99]

Time Warner's Proposal

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cost as a lower rather than a higher figure; it portrays the higher alternative (analogous to Bell Atlantic-New York's Meet Point B rate) as "tandem switching plus local switching." (Frontier's Reply Brief, p. 1. See also Bell Atlantic-New York's Reply Brief, p. 11, n. 19.)

[99] Frontier's Initial Brief, pp. 10-11.

Time Warner regards the ideal to be a blended rate negotiated between the two carriers; by its very nature, a blended rate, which is adjusted downward as the CLEC's network evolves, fully accounts for that evolution and for traffic flows. Time Warner suggests that "the fact that a CLEC has accepted a blended rate provides solid evidence that it has adequately and responsibly built out its network in support of its originating traffic and the public switched network."[100]

Where a negotiated blended rate does not apply, Time Warner suggests a framework for dealing with convergent traffic that takes account of both the CLEC's network configuration and its traffic ratio. It distinguishes among CLEC networks on the basis of their points of interconnection with the ILEC, and, for each level, uses a different traffic ratio to determine whether the reciprocal compensation rate is to be at the tandem or at the lower, convergent traffic, rate.

CLECs at Level 1, new to a LATA, will have only a single point of interconnection (POI) and their traffic ratios will likely be out of balance even if they do not serve primarily convergent customers. Accordingly, reciprocal compensation would be at the tandem rate for traffic within a 5:1 ratio; traffic above that ratio would be assumed to be convergent and the lower, convergent rate would apply. At Level 2, a CLEC would have three or four points of interconnection, and compensation for traffic exchanged at those POI's would be at the end-office rate. For traffic exchanged at tandems, the tandem rate would apply only where there was a traffic ratio less than 10:1; in other instances, the convergent rated would apply. Finally, where the CLEC has more than five points of interconnection (Level 3), the convergent rate would apply to traffic delivered at a tandem only when the traffic ratio exceeded 15:1. Time Warner suggests that the Level 2 and Level 3 arrangements would apply

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100 Time Warner's Initial Brief, p. 8 (footnote omitted).

relatively rarely, since in most of those instances the carriers would have negotiated a blended rate.

Time Warner asserts that its proposal is consistent with both state and federal law and with our goal of encouraging competition in the local exchange market. It reasons that we are free to determine that different proxy rates may apply to different network configurations, which may impose different costs. By taking into account traffic ratios and points of interconnection, Time Warner continues, its proposal "also promotes investment in facilities-based networks, which ultimately benefits consumers through increased real competition."[101] Time Warner stresses that it uses the traffic ratios not to directly infer information about traffic termination costs but only as a proxy to determine the likelihood that convergent traffic exists. It recognizes the tentative nature of the traffic ratios and point-of-interconnection trigger points used in its proposal, and offers to participate in any forum we may wish to convene to reach consensus on modifications to its proposal.

Finally, Time Warner objects to any proposed reciprocal compensation rate of zero, noting that carriers incur real costs when terminating any type of traffic.

In response, Bell Atlantic-New York "applaud[s] Time Warner's recognition that a problem exists,"[102] but says the proposal does little to alleviate it. In general, Bell Atlantic-New York believes the deployment of multiple interconnection points would not affect its showing that convergent traffic is less costly to deliver; specifically, it believes the number of interconnection points used by Time Warner is too low and its traffic exchange ratios too high.

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101 Time Warner's Initial Brief, p. 17.

102 Bell Atlantic-New York's Reply Brief, p. 18.

MCI's Proposal

Although MCI's primary position is to favor maintenance of the reciprocal compensation status quo, it suggests that extremely high traffic ratios could be used to trigger an audit, which would then determine whether the CLEC's network configuration warranted allowing it to charge the tandem rate for reciprocal compensation. It suggests that a traffic imbalance exceeding 100:1 (including all minutes exchanged, not just local minutes) could trigger such an audit.[103] MCI notes that this proposal would be consistent with the FCC's rule that allows a state commission to determine whether an individual CLEC is entitled to the tandem rate, taking account of economically relevant considerations--primarily the geographic coverage of the CLECs switch.[104] It would go no further than this, however, in ascribing significance to traffic ratios.

Time Warner responds that MCI's proposal, like its own, uses traffic ratios as a trigger. But it believes the individual audits that would be triggered under MCI's proposal would create uncertainty and impose administrative burdens, while failing to facilitate low-cost competitive entry.

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103 MCI's Initial Brief, p. 5.

104 47 C.F.R. §51.711.

CPB's Proposal

CPB reaffirms that reciprocal compensation rates should be based on TELRIC and should be symmetrical. In its view, however, they also "should be deaveraged to reflect the significant differences in the underlying costs of terminating various types of traffic."[105] It cites record evidence[106] that termination of traffic to ISPs requires at most a single switch instead of the multiple switches required by tandem functionality and that, in such instances, tandem rate elements should not be applicable.

Because of the administrative burdens and costs of determining the functionality associated with the termination of costs to each customer or type of customer for each CLEC, CPB proposes, instead, what it characterizes as "a variant of the traffic flow imbalance approach proposed by [Bell Atlantic-New York] and implicit in questions posed by Staff."[107] It suggests that where a carrier's incoming to outgoing traffic ratio exceeds some threshold, perhaps 5:1, reciprocal compensation would not be set on the basis of tandem functionality unless the carrier could show that it was providing tandem functionality notwithstanding its traffic ratio. CPB regards traffic imbalance as a suitable proxy for identifying tandem functionality because carriers having high traffic ratios "serve predominantly ISPs and other large volume customers, instead of a large number of geographically dispersed customers. Compensation received by such carriers should not include tandem rate elements."[108]

An importantly distinguishing feature of CPBs proposal is that it would not use traffic imbalance to

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105 CPB's Initial Brief, p. 17.

106 Ibid., p. 16, citing Tr. 199-200. See also Tr. 180, to the effect that CLECs commonly use a single-switch architecture.

107 CPB's Initial Brief, p. 18.

108 Id.

determine the reciprocal compensation rate until the ILEC's local market was fully open to competition. Only then, CPB reasons, will CLECs be able to attract a large volume of customers, including those who originate call to ISPs; and only then, therefore, will it be possible to infer the absence of tandem functionality from the existence of a traffic imbalance.

CPB urges as well that any new reciprocal compensation arrangement be preceded by a transition period sufficient to prevent unnecessary disruption of CLECs' businesses and avoid penalizing them for having responded to incentives created by the previous regulatory structure. CPB suggests that the transition period could be as short as six months if the new arrangements were delayed until ILEC markets are fully open to competition; if the change were made before markets are fully opened, the transition period should last at least one year. Stressing its unique status as a non-industry party, CPB maintains its proposal is fair to all concerned--CLECs, ILECs, customers originating calls, and customers receiving them.

As already noted, both AT&T and Bell Atlantic-New York stress the aspects of their respective positions that CPB appears to endorse.

DISCUSSION AND CONCLUSIONS

In General

In assessing the significance of the traffic imbalances that are so much at issue here, one must begin with the very basic point that reciprocal compensation was chosen over bill-and-keep in part because some imbalances were seen as likely. The ILECs' earlier advocacy of reciprocal compensation over bill-and-keep does not legally estop them from now urging changes in reciprocal compensation, or even its total abandonment; but it does suggest at least that the existence of imbalances should not be seen by them as a complete surprise. Of course, the imbalances are greater than

those that were anticipated, clearly producing unexpectedly large flows of revenues in one direction, and the question is what, if anything, to do about it.

The parties have presented two related ways of looking at that question. The first emphasizes the economic soundness (and legal requirement) that reciprocal compensation rates be grounded in costs and attempts to determine what, if anything, the traffic imbalances imply about those costs. The other point of view looks to the causes of the imbalances and attempts to assess their virtue: the ILECs accuse the CLECs of having found a way to game the system, and the CLECs protest that the ILECs' intransigence about opening mass markets has left them no choice but to pursue a profitable niche--either as an end in itself or as a means of gaining the strength needed to attempt full entry. The second type of analysis is related to the first; for when all is said and done, changes in rates can and should be made primarily with an eye to costs. But it maintains, nonetheless, that these decisions should take account of the players' motivations.

In this regard, CPB provides useful perspective in its presentation of the many factors underlying the traffic imbalances. CLECs have pursued ISP and other convergent traffic customers for multiple reasons: because reasonable and honest business plans might suggest doing so; because ILECs may not have opened mass markets as quickly and effectively as they might have; and because current reciprocal compensation arrangements may unintendedly overcompensate carriers that terminate calls to convergent customers. From the perspective of this proceeding, however, it is this last factor that is primary. We have no need to judge motives; and the ILECs' alacrity in opening markets is under review in other cases. What we must do here, simply, is to determine whether the current regulatory regime provides for reciprocal compensation at rates that fail to properly track costs, thereby skewing the market by creating unintended, uneconomic incentives to the pursuit of ISP and other convergent customers as a means

by which CLECs can draw above-cost revenues from ILECs.

The record as a whole suggests that the costs of serving a small number of large, convergent customers will likely be lower than the costs of serving a mass market. This is not to say that every CLEC with a traffic imbalance has, in fact, lower costs; much will depend on the configuration of the CLEC's network and the customers it is designed to serve (as distinct from those it actually serves at a particular time). As a general rule, however, large convergent customers can be served via more efficient, higher capacity facilities, and those facilities will likely have less idle time. Bell Atlantic-New York correctly argues that "functional equivalence" does not require conclusively presuming that the costs of serving a small number of large customers located around a geographic area are no less than the costs of serving the mass market within that geographic area; notwithstanding AT&T's characterization of the standard as "geographic equivalence," it remains one of "functional equivalence," taking account, as Bell Atlantic-New York suggests, of how the CLEC "serves" the area and not merely of the area's size.

This is not to say, of course, that each CLEC's costs must be examined. For good reason, the pertinent costs are those of the ILEC, unless the CLEC chooses to come in with a study showing its costs are higher. But if a CLEC's network is one that is not functionally equivalent to an ILEC's tandem, the law permits, and economic policy suggests, that the CLEC not be compensated at tandem rates. And there may be situations in which a traffic imbalance suggests an absence of tandem functionality.

In sum, the reciprocal compensation system is not fundamentally broken, but neither is it operating wholly satisfactorily. There is need for adjustment short of total overhaul, and the proposals in this proceeding should be assessed in that light.

Vertical Features

Bell Atlantic-New York's vertical features proposal makes considerable sense in the abstract; if these features are not used in terminating traffic, their costs should not be reflected in reciprocal compensation rates. Bell Atlantic-New York itself recognizes that the costs at issue cannot be measured until the conclusion of the Second Network Elements Proceeding and it therefore proposes a placeholder estimate of 30%. But it offers no support for that placeholder, and we see no basis for accepting it.

Accordingly, the proposal is rejected for now. It may be considered again at the conclusion of the Second Network Elements Proceeding, in which the costs associated with vertical features can be further considered. In addition, Bell Atlantic-New York may propose, in its compliance filing in this proceeding, a better supported placeholder for immediate use in removing the costs of vertical features from reciprocal compensation rates. Other parties will be permitted to comment on any such proposal, and, if the support for the placeholder is persuasive, the rates will be adjusted accordingly.

Convergent Traffic

As already suggested, a significant traffic imbalance suggests a preponderance of convergent traffic. There may be, of course, other reasons for traffic imbalances, particularly in the case of relatively new CLECs; and the 2:1 traffic ratio proposed by Bell Atlantic-New York is not high enough to trigger remedial action. Once the ratio reaches 3:1, however, the inference of predominantly convergent traffic becomes stronger and, in turn, implies, without demonstrating conclusively, greater efficiency and lower costs in the termination of traffic. That inference of lower costs cannot be disregarded if compensation is to be cost-based; at the same time, it is not conclusive enough to have a definitive effect on rates.

An inference of this sort can be effectively handled

by a rebuttable presumption, in a manner similar to that suggested by CPB. If a carrier's incoming to outgoing traffic ratio exceeds 3:1 for the most recent three-month period, it is fair to presume that a substantial portion of its traffic is convergent, costing less to terminate, and that delivery of that traffic therefore should be compensated at end-office (in the Bell Atlantic-New York context, Meet Point A) rather than tandem (Meet Point B) rates. The end-office rate should apply to the portion of the traffic that exceeds the stated ratio, and the tandem rate should continue to apply to the portion of the traffic below that ratio. (In effect, the compensation would be at the blended rate characteristic of many interconnection agreements.)

The CLEC whose compensation is so adjusted will be permitted, however, to rebut the presumption with a suitable showing that its network and service are such as to warrant tandem-rate compensation for all traffic. Most of the factors to be considered in any such showing would go to the carrier's overall network design and take account of whether the network has tandem-like functionality that enables it to send, as well as receive, traffic. The network design factors to be considered include, but are not limited to:

> the number and capacity of central office switches;
>
> the number of points of interconnection offered to other local exchange carriers;
>
> the number of collocation cages;
>
> the presence of SONET rings and other types of transport facilities;
>
> the presence of local distribution facilities such as coaxial cable and/or unbundled loops.

The presence of some or all of these network components in substantial quantities would demonstrate that the carrier in question was investing in a network with tandem-like functionality, designed to both send and receive

customer traffic. Multiple interconnection points, collocation cages, SONET rings and other types of transport facilities in various combinations are all evidence of a network being built out to reach a dispersed customer base. Collocation cages along with the use of unbundled loops are a clear indication the carrier intends to serve residential and small business customers. The presence of the network design features would be more important than actual numbers of residential and business customers served given the newness of the competitive local exchange market.

If a carrier subject to the presumption succeeds in rebutting it, the compensation paid to the carrier will revert to its previous, higher, level. In addition, the carrier will be made whole for the difference between the higher and lower compensation rates for the interval going back to its filing of its rebuttal presentation. These arrangements should be set forth in all tariffs that contain reciprocal compensation provisions.

ISP Traffic

Even if the FCC ISP Ruling affords us the discretion to adopt either of Bell Atlantic-New York's proposals, we see no sound reason to treat ISP traffic differently from other convergent traffic. For one thing, the FCC ISP Ruling is not the FCC's last word on the subject, and a regulatory regime based on it might have to be changed yet again before too long. More substantively, Bell Atlantic-New York has shown no reason to treat ISP traffic differently from other convergent traffic, and its specific proposals are similarly unsupportable. To deny all compensation for ISP termination would be to unfairly ignore the indisputable fact that CLECs completing these calls incur costs in doing so; and even if ISPs in concept resemble interexchange carriers that should recover their costs through carrier access charges, current federal law prevents them from doing so. Meanwhile, Bell Atlantic-New York's direct variable cost proposal, though less

harsh, is poorly supported. There appears to be no reason to abandon TELRIC costing in this context, and the rebuttable presumption regime adopted for convergent traffic in general can address any legitimate concerns associated with ISP traffic. At the same time, it would be wrong to exempt ISP traffic from this remedy to promote Internet access, as the Attorney General may be suggesting. For all these reasons, no special reciprocal compensation rates will be set for Internet-bound traffic; it will be treated the same as other convergent traffic (i.e., in accordance with the remedy adopted under the preceding heading).

GRIPs

NYSTA's broad concern related to virtual NXX codes goes beyond the scope of this proceeding and need not be considered further. Bell Atlantic-New York's more limited proposal, to require CLECs to establish GRIPs or else reimburse Bell Atlantic-New York for the cost of hauling traffic from the virtual NXX to the interconnection point, is properly within the proceeding, for it bears directly on reciprocal compensation levels.

On its face, Bell Atlantic-New York makes a good case for the fairness of its proposal, which is designed to spare it the cost of, in effect, subsidizing a CLEC's use of virtual NXXs. The CLECs respond that federal law gives them, for good pro-competitive reasons, considerable discretion with regard to selecting points of interconnection and requires the originating carrier to bear the cost of hauling traffic to the point of interconnection. But while federal law likely affords us more discretion here than the CLECs say,[109] there appears to be no need to superimpose a GRIPs-type remedy on

[109] For example, the FCC has said that "a requesting carrier that wished a 'technically feasible' but expensive interconnection would . . . be required to bear the cost of that interconnection, including a reasonable profit." (Local Competition Order ¶199.)

the convergent traffic remedy already adopted. Any additional benefits to Bell Atlantic-New York would be relatively minor, and the unintended effects on access to the Internet from remote areas could be substantial. The GRIPs proposal therefore will be rejected, at least for now, though it may be raised again in the Second Network Elements Proceeding.

Time Warner's Proposal

Time Warner's proposal, though creative, would require considerably more elaboration and refinement before its adoption could be considered. (Time Warner itself seems to recognize as much in its offer to participate in further forums regarding the proposal.) It appears, however, that those additional efforts are unnecessary, inasmuch as the course of action we are taking here adequately deals with the deficiencies identified in the existing reciprocal compensation regime. Accordingly, Time Warner's proposal will not be further pursued at this time.

Implementation

CPB suggests deferring any action until we are satisfied that local markets have been fully opened to competition, but there appears to be no need to impose any such condition on a remedy growing out of an immediate concern. Bell Atlantic-New York's opening of its market, of course, is under review in Case 97-C-0271, which provides adequate oversight of the matter, and Frontier's actions likewise are being considered in other proceedings.

The need for a transition period, advocated by most CLECs, also is questionable at best. Carriers have been on notice at least since this case began that changes might be in the offing, and those changes can take effect without any further transition period.

Finally, we emphasize that the decisions reached in this proceeding do not modify the terms of existing contracts except to the extent those contracts, by their own terms,

incorporate or defer to the tariffs affected by the determinations reached here. Contracts (and parties to them) being what they are, there may be some disputes about how that rule is applied, but there is no way we can anticipate all such disputes or attempt to resolve them in advance. On the specific issue of ISP traffic, however, as raised in the exchange between Bell Atlantic-New York and Lightpath, we see no basis for excluding ISP traffic from reciprocal compensation pursuant to an existing interconnection agreement unless the agreement explicitly so provides. Without such an explicit provision, there is no reason to assume that the parties intended their agreement to be modified by a regulatory decision regarding the character of ISP traffic.

The Commission orders:

1. Within 10 days after the date of this opinion and order, any local exchange carrier whose tariffs contain provisions related to reciprocal compensation shall file amendments to those tariffs consistent with this opinion and order and shall serve a copy of those amendments on each active party to this proceeding. Such tariff amendments shall not take effect on a permanent basis until approved by the Commission; but, except as provided in the next ordering clause, such amendments shall take effect on a temporary basis, subject to refund or reparation, not later than 15 days after the date of this opinion and order. Except as provided in the next ordering clause, any party wishing to comment on any compliance filing may do so within 15 days after the date of the filing, submitting 15 copies of its comments.

2. If New York Telephone Company d/b/a Bell Atlantic-New York includes in its compliance filing a revised proposal to remove from reciprocal compensation rates the costs of vertical switching services, comments on that proposal will be due not later than 30 days after the date of the filing. Any party filing such comments should submit 15 copies. No such proposal shall take effect without the

approval of the Commission.

3. For good cause shown pursuant to Public Service Law §92(2), newspaper publication of the tariff amendments filed in accordance with this opinion and order is waived.

4. This proceeding is continued.

By The Commission,

(SIGNED)

DEBRA RENNER
Acting Secretary

APPEARANCES

FOR NORTHLAND NETWORKS LTD., AND MID-HUDSON COMMUNICATIONS, INC.:

Roland, Fogel Koblenz & Petroccione, LLP (by Keith J. Roland, Esq.), One Columbia Place, Albany, New York 12207.

FOR FRONTIER CORPORATION:

Gregg C. Sayre, General Attorney, 180 South Clinton Avenue, Rochester, New York 14646.

FOR BELL ATLANTIC-NEW YORK:

Joseph A Post, Esq. and Lindal L. Scott, Esq., 1095 Avenue of the Americas, New York, New York 10036.

FOR NEW YORK STATE CONSUMER PROTECTION BOARD:

Timothy S. Carey, Executive Director and Ann Kutter, Deputy Directory (by Ann F. Curtin, Esq.), 5 Empire State Plaza, Albany, New York 12245.

FOR AT&T COMMUNICATIONS OF NEW YORK, INC.:

Philip S. Shapiro, Attorney, 111 Washington Avenue, Albany, New York 12210.

Palmer & Dodge, L.L.P. (by Kenneth W. Salinger, Esq.), One Beacon Street, Boston, Massachusetts 02108-3190.

FOR CITIZENS TELECOMMUNICATIONS COMPANY OF NEW YORK, INC.:

Richard M. Tettlebaum, Esq., 1400 16th Street, Suite 500, Washington, DC 20036.

FOR CTSI, INC., FOCAL COMMUNICATIONS OF NEW YORK, WINSTAR WIRELESS OF NEW YORK, LLC., RCN TELECOM OF NEW YORK, INC., AND PAETEC COMMUNICATIONS:

Swidler, Berlin, Shereff, Friedman, LLP (by Richard Rindler, Esq. and Michael W. Fleming, Esq.), 3000 K Street, N.W., Suite 300, Washington, DC 20007.

FOR INTERMEDIA COMMUNICATIONS, ALLEGIANCE TELECOM OF NEW YORK, INC., AND e.SPIRE COMMUNICATIONS, INC.,:

Kelley, Drye & Warren (by Michael B. Hazzard, Esq.), 1200 19th Street N.W., Washington, DC 20036.

APPEARANCES

FOR MCI WORLDCOM, INC.:

Cynthia Carney Johnson, Attorney, 5 International Drive, Rye Brook, New York 10573.

FOR CABLEVISION LIGHTPATH, INC.:

David Ellen, Senior Counsel, 1111 Stewart Avenue, Bethpage, New York 11714.

Couch White, LLP (by Barbara S. Brenner, Esq.), 340 Broadway, Albany, New York 12201.

FOR TIME WARNER COMMUNICATIONS HOLDINGS, INC.:

LeBoeuf, Lamb, Leiby & MacRae, (by Brian Fitzgerald, Esq.), One Commerce Place, Albany, New York 12210-2820.

FOR GLOBAL NAPs, INC.:

William J. Rooney, Jr., Vice President, 10 Merrymount Road, Quincy, Massachusetts 02169.

Cole, Rayard & Braverman, LLP (by Christopher W. Savage, Esq.), 1914 Pennsylvania Avenue, N.W., Washington, DC 20006.

FOR NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC.:

Louis Manuta, Esq., 100 State Street, Albany, New York 12207.

FOR SPRINT TELECOMMUNICATIONS COMPANY LP:

Karen R. Sistrunk, Regulatory Counsel, 1850 M Street, NW, Suite 1101, Washington, DC 20036.

FOR NEW YORK STATE ATTORNEY GENERAL:

Jill Sanford, Assistant Attorney General, 120 Broadway, New York, New York 10271-0332.

FOR WARWICK VALLEY TELEPHONE COMPANY:

Fred M. Knipp, 47 Main Street, Warwick, New York 10990.

FOR INTERNET COMMUNICATION LLC:

Joseph Hernandez, 28 N. Main Street,

Bainbridge, New York 13733.

APPEARANCES

FOR COMPETITIVE TELECOMMUNICATIONS ASSOCIATION:

Terry Monroe, 1900 M Street, NW, Suite 800, Washington, DC 20036.

FOR TELECOMMUNICATIONS RESELLERS ASSOCIATION:

Roland, Fogel, Koblenz & Petroccione, LLP, (by Usher Fogel, Esq.), One Columbia Place, Albany, New York 12207.

PARTIES AND THEIR FILINGS
(An "X" indicates the party submitted the filing in question; see Endnote for information on joint filings)

PARTY[110]	SHORT DESIGNATION	THRESHOLD TESTIMONY	INITIAL TESTIMONY	RESPONSIVE TESTIMONY	INITIAL BRIEF	REPLY BRIEF
AT&T Communications of New York, Inc.	AT&T	X	X	X	X	X
NYS Attorney General	Attorney General					X
New York Telephone Company d/b/a Bell Atlantic-New York	Bell Atlantic-New York	X	X	X	X	X
Cable Television and and Telecommunications Association of New York, Inc.	Cable Association		X		X	
Citizens Telecommunications Company of New York, Inc.	Citizens	X	X			X
Competitive Telecommunications Association	CompTel				X	
NYS Consumer Protection Board	CPB				X	X
CTSI, Inc.	CTSI	X	X	X	X	X
e.spire Communications Inc.	e.spire	X	X	X	X	X
Focal Communications Corporation	Focal	X	X	X	X	X
Frontier Telephone of Rochester, Inc.	Frontier	X	X		X	X

[110] This list is alphabetized by Short Designation

PARTIES AND THEIR FILINGS
(an "X" indicates the party submitted the filing in question;
see Endnote for information on joint filings)

PARTY	SHORT DESIGNATION	THRESHOLD TESTIMONY	INITIAL TESTIMONY	RESPONSIVE TESTIMONY	INITIAL BRIEF	REPLY BRIEF
Global NAPs, Inc.	GNAPs	X	X	X	X	X
Intermedia Communications, Inc.	Intermedia	X	X	X	X	X
Internet Communication LLC	Internet	X				
Cablevision Lightpath, Inc.	Lightpath	X	X	X	X	X
MCI WorldCom, Inc.	MCIW	X	X	X	X	X
Mid-Hudson Communications, Inc.	Mid-Hudson	X	X		X	
Northland Networks, Ltd	Northland				X	
NYS Telecommunications Association, Inc.	NYSTA				X	X
PaeTec Communications, Inc.	PaeTec	X	X		X	X
RCN Telecom Services, Inc.	RCN	X	X	X	X	X
Sprint Communications	Sprint	[111]			X	

[111] Responded to request by noting that it neither pays nor receives

Company L.P.

CASE 99-C-0529

APPENDIX B

PARTIES AND THEIR FILINGS
(an "X" indicates the party submitted the filing in question;
see Endnote for information on joint filings)

PARTY	SHORT DESIGNATION	THRESHOLD TESTIMONY	INITIAL TESTIMONY	RESPONSIVE TESTIMONY	INITIAL BRIEF	REPLY BRIEF
Time Warner Telecom, Inc.	Time Warner	X	X	X	X	X
Telecommunications Resellers Association	TRA				X	
Warwick Valley Telephone Co.	Warwick	X				

ENDNOTE

CTSI, Focal, PaeTec, and RCN submitted joint briefs; they are referred to as "CTSI et al."
e.spire and Intermedia submitted joint briefs; they are referred to as "e.spire/Intermedia."
Mid-Hudson and Northland submitted a joint brief; they are referred to as "Mid-Hudson/Northland."

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reciprocal compensation in New York inasmuch as it does not yet operate as a competitive local exchange carrier within the State.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-474, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996	)))))	ORDER RULING ON OBJECTIONS AND REQUIRING THE FILING OF THE COMPOSITE AGREEMENT

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; Chairman Jo Anne Sanford and Commissioners Judy Hunt, J. Richard Conder, Robert V. Owens, Jr., and Lorinzo L. Joyner

BY THE COMMISSION: This proceeding involves a petition filed by MCImetro Access Transmission Services, LLC (MCIm) seeking arbitration of an interconnection agreement with BellSouth Telecommunications, Inc. (BellSouth). On April 3, 2001, the Commission entered a Recommended Arbitration Order (RAO) in this docket. As part of that Order, the Commission made the following

FINDINGS OF FACT

1. BellSouth may impose manual operations support systems (OSS) nonrecurring charges (NRCs) when MCIm orders unbundled network elements (UNEs) manually and BellSouth, itself, does not have the capability to order electronically for its own retail operation or when BellSouth has an electronic interface and has provided MCIm with comparable capability to order UNEs electronically, and MCIm instead chooses to order manually. Conversely, BellSouth may not impose manual OSS NRCs when BellSouth has the capability to order electronically, but is not offering such comparable capability to MCIm to order UNEs electronically. Further, the Parties are encouraged to continue their negotiations to develop mutually agreed upon language for inclusion in the Interconnection Agreement that is consistent with the foregoing.

2. If any service contained in the Access Tariff is offered primarily or substantially to end users rather than interexchange carriers (IXCs), BellSouth must make the service available to local carriers at wholesale rates, for the purpose of resale.

3. BellSouth is not required to provide operator services and directory assistance (OS/DA) as a UNE because it is currently providing customized or selective

routing which would enable MCIm to use an alternative OS/DA provider. The Parties should continue testing these routing methods and, if the testing is successful, then the Parties should include language in the Interconnection Agreement outlining how the service will be provisioned. The Parties are encouraged to strive to successfully negotiate a mutually agreed upon price for this service.

4. To the extent BellSouth has substantially different loop offerings which do not have national technical specifications, BellSouth may use its technical standards. However, to the extent BellSouth's loop offerings are substantially the same as those for which national technical standards have been established, BellSouth must use the national technical specifications for that particular loop. Additionally, MCIm may, at its discretion, file a complaint with the Commission if at any point it believes BellSouth is imposing improper terms and conditions through its technical specifications.

5. BellSouth should transmit Automatic Numbering Identification (ANI)-II digits to MCIm via Feature Group D signaling when MCIm acquires the unbundled network element platform (UNE-P) except where it is not technically feasible. The Interconnection Agreement between the Parties should identify those instances in which technical limitations exist.

6. BellSouth is obligated to provide unbundled dedicated transport throughout its network between locations and equipment designations (including interoffice transmission facilities to network nodes connected to MCIm switches, or to wire centers of other requesting carriers) so long as the facilities are existing and used to provide telecommunications services. Furthermore, BellSouth is not obligated to construct new transport facilities at a competing local provider's (CLP's) request along routes where BellSouth has not deployed facilities for its own use.

7. MCIm should have the option of routing its OS/DA traffic using the customized routing methods offered by BellSouth or in the same manner that BellSouth routes its own traffic. The Parties are encouraged to continue their negotiations to develop mutually agreed upon language for inclusion in the Interconnection Agreement and the appropriate prices, where applicable.

8. MCIm's right to dedicated transport as a UNE includes SONET rings; however, BellSouth should not be required to construct special facilities for MCIm if it has not deployed those services for its own use.

9. BellSouth is not required to provide the calling name (CNAM) database via electronic download, magnetic tape, or via similar convenient media as requested by MCIm. However, based on the record of evidence, the Parties are instructed to attempt to negotiate a price for an electronic download of the CNAM database.

10. BellSouth is obligated to utilize two-way trunks upon MCIm's request, but only where it is technically feasible and there is not sufficient traffic to justify one-way trunks.

11. MCIm may designate its own points of interconnection (POIs) with BellSouth's network. Further, if MCIm interconnects at points within the local access and transport area (LATA) but outside of BellSouth's local calling area from which traffic originates, MCIm should be required to compensate BellSouth for, or otherwise be responsible for, transport beyond the local calling area.

12. There is insufficient evidence in the record to make a determination on the issue of transit traffic on one-way or two-way trunks. BellSouth and MCIm are encouraged to further negotiate this issue. If BellSouth and MCIm cannot resolve this issue after such further negotiations, BellSouth and MCIm should file a report in this docket by May 3, 2001, as to the specific reasons transit traffic can or cannot be aggregated with local and intraLATA toll traffic on two-way trunks.

13. The current procedures used by BellSouth and MCIm, whereby Wireless Type 2A traffic transiting BellSouth's network is treated as BellSouth-originating or BellSouth-terminating traffic for compensation purposes, should continue for the present time. However, the Parties should develop and deploy a meet-point billing arrangement applicable to this traffic as soon as possible in order to assess appropriate compensation amounts. BellSouth and MCIm should be allowed to continue to use their existing compensation procedures for transiting Wireless Type 1 traffic. Furthermore, the Commission finds no reasonable basis upon which to require BellSouth to pass on reciprocal compensation payments received from MCIm to wireless carriers prior to implementation of a meet-point billing arrangement; unless, of course, BellSouth has a contractual obligation between itself and wireless carriers to do so. However, in that case, any issue of nonpayment would be between BellSouth and the wireless carriers, rather than BellSouth and MCIm.

14. Because of the uncertainty surrounding the issue of Internet Protocol (IP) telephony, the Commission declines to require a definition of switched access traffic that specifically includes IP telephony at this time, and, further, for the same reason the Commission declines to address the appropriate treatment of IP telephony, as it pertains to reciprocal compensation.

15. To the extent that MCIm is not utilizing local interconnection trunks solely for originating or terminating its interexchange traffic, MCIm may combine switched access and local traffic on interconnection trunks, provided that the switched access is being provided to an MCIm local exchange customer. Further, MCIm must provide adequate billing records to BellSouth to enable it to bill switched access to the appropriate CLPs.

16. Interconnection agreements should define the terms of reciprocal compensation in instances where a third party is involved in the exchange of local traffic; however, BellSouth has no legal obligation to perform as may be required under MCIm's proposed language in sections 9.7.1 and 10.7.1.1 in Attachment 4 of the Interconnection Agreement. Therefore, the Commission rejects MCIm's proposed language in these sections. If requested by MCIm to deal with a third party on reciprocal compensation issues, BellSouth should be entitled to compensation for any extraordinary functions that it performs. This issue may signal the need for MCIm to negotiate interconnection agreements with other carriers with which it exchanges local traffic.

17. Calls within a LATA originated by BellSouth customers to MCIm foreign exchange (FX) customers are to be considered local and, therefore, subject to reciprocal compensation.

18. The Parties should establish an interim inter-carrier compensation mechanism for Internet Service Provider (ISP)-bound traffic which is identical to that for non-ISP-bound traffic but which is subject to true-up once the Federal Communications Commission (FCC) has decided upon a methodology for ISP-bound traffic and the Commission has implemented it.

19. For reciprocal compensation purposes, MCIm should be compensated at BellSouth's tandem interconnection rate. MCIm's proposal that MCIm and BellSouth agree on a figure that represents the average mileage of all end offices subtending the applicable BellSouth tandem office is rejected.

20. MCIm's proposed language regarding license for rights-of-ways is rejected. MCIm is advised in particular cases to pursue obtaining an easement for the protection it seeks. BellSouth, however, should be obligated to provide reasonable notice to MCIm of the sale or conveyance of property on which MCIm has installed facilities.

21. In accordance with BellSouth's standard license agreement applicable to all CLPs, BellSouth may require that payments for make-ready work be made in advance.

22. There is insufficient evidence in the record to make a determination on this issue with regard to exchange service resold by MCIm; thus the Parties are encouraged to further negotiate this aspect of the issue. When exchange service is offered by MCIm through UNEs or through the use of MCIm's own facilities, then BellSouth should bill the charges for collect calls, third-party calls, or other operator-assisted calls to the end user. The Parties are required to include mutually agreed upon language in the Interconnection Agreement which clearly indicates that the carriers must provide adequate billing information so that the end user can be billed clearly, accurately, and in a timely manner.

23. BellSouth has failed to demonstrate that it provides MCIm with nondiscriminatory access to existing pre-ordering and ordering interfaces when DS1 combos are being ordered. It is appropriate to refer the issues MCIm has raised in Matrix Issue No. 80 of this docket to the change control process (CCP) for further action. MCIm and BellSouth are required to file separate CCP status reports every three months, beginning on June 29, 2001, on the progress the CCP has had in addressing and resolving these issues.

24. BellSouth should be required to provide a service order inquiry capability for local services. It is appropriate to refer the issues MCIm has raised in Matrix Issue No. 81 of this docket to the CCP for further action. MCIm and BellSouth are required to file separate CCP status reports every three months, beginning on June 29, 2001, on the progress the CCP has made in addressing and resolving these issues.

25. BellSouth may disconnect MCIm for nonpayment provided that BellSouth notifies the Commission and Public Staff of any proposed disconnection at the same time it notifies MCIm.

26. BellSouth has not provided sufficient justification for changing the format for providing call billing records. Therefore, BellSouth should continue to provide complete billing information with all Electronic Message Interchange (EMI) standard fields to MCIm.

27. The Commission declines to rule on the issue of whether BellSouth should be required to give written notice when a central office conversion will take place before midnight or after 4:00 a.m. but instructs the Parties to continue to negotiate on this matter.

28. Since MCIm compensates or is willing to compensate BellSouth for providing operator services to MCIm's customers, BellSouth operators should ask each MCIm customer for his or her carrier of choice when he or she requests a rate quote or time and charges. If the chosen carrier is an Operator Transfer Service (OTS) subscriber, the call should be transferred and the applicable OTS rate should apply. If BellSouth is unable to transfer a customer because either the long distance carrier of choice is not a subscriber to BellSouth's OTS service or BellSouth does not have facilities to that long distance carrier, BellSouth should advise the customer to contact his or her long distance carrier directly for rate quotes and time and charges.

29. BellSouth is required to provide shared transport in connection with the provision of custom branding. BellSouth and MCIm are required to negotiate the rates, terms, and conditions for equipment and/or facilities modifications, etc., if any, that may be required with respect to, or associated with, BellSouth's network to allow it to provide the shared transport that MCIm has requested, that is, to the extent such matters are not now governed by existing lawfully approved tariffs or enforceable contracts.

30. The Commission declines to require inclusion of MCIm's proposed language concerning damages in the Interconnection Agreement. The Parties will be given the option, through mutual agreement, of either including Sections 11.1.1 and 11.1.2 ("Liability Cap") in the Agreement without the language proposed by MCIm or deleting those sections altogether.

31. The disputed language regarding specific performance need not be included in the Interconnection Agreement.

32. MCIm is allowed to obtain rates, terms, and conditions by "opting in" provisions of other interconnection agreements, with such provisions to be effective on an interim basis upon filing with the Commission an agreement between MCIm and BellSouth to adopt such provisions. Further, BellSouth is not required to provide MCIm with copies of BellSouth's interconnection agreements with third parties within 15 days of filing such agreements with the Commission or to put such agreements on the Internet.

33. BellSouth is required to take "all reasonable actions necessary" to avoid disclosure of MCIm's confidential information, and MCIm bears the burden of proving BellSouth's guilt in the event of disclosure.

On April 27, 2001, MCIm filed a letter stating that Findings of Fact Nos. 2, 25, 27, 30, and 32 (Matrix Issue Nos. 3, 94, 96, 107, and 109) had been resolved between MCIm and BellSouth. On May 1, 2001, MCIm filed a letter stating that Finding of Fact No. 24 (Matrix Issue No. 81) had been resolved between MCIm and BellSouth. On May 2, 2001, MCIm filed a letter stating that Finding of Fact No. 22 (Matrix Issue No. 75) had been resolved between MCIm and BellSouth.

On May 3, 2001, BellSouth filed objections to Findings of Fact Nos. 6, 8, 12, 15, 18, 23, and 29 (Matrix Issue Nos. 18, 23, 37, 42, 47, 80, and 101). On that same day, MCIm filed objections to Findings of Fact Nos. 3, 7, 10, 11, 12, 13, 15 (Matrix Issue Nos. 5, 19, 34, 36, 37, 39, and 42).

On May 7, 2001, ITC^DeltaCom Communications Inc. (ITC^DeltaCom) filed Comments on the RAO regarding Finding of Fact No. 17 (Matrix Issue No. 46).

On May 7, 2001, the Commission entered an Order in this docket soliciting responses to the objections.

On May 17 and 18, 2001, MCIm filed letters stating that Findings of Fact Nos. 3, 5, 7, 8, and 29 (Matrix Issue Nos. 5, 15, 19, 23, and 101) had been resolved between MCIm and BellSouth.

On June 11, 2001, BellSouth, MCIm, and the Public Staff filed responses to the objections.

Discussions and Commission conclusions regarding the issues raised by BellSouth, MCIm, and ITC^DeltaCom in their objections and comments are set forth below. These matters are addressed below by reference to the specific Findings of Fact which coincide with those findings set forth in the RAO entered in this docket on April 3, 2001, which are the subject of said objections and comments.

A glossary of acronyms is attached hereto as Appendix A.

FINDING OF FACT NO. 6 (MATRIX ISSUE NO. 18): Is BellSouth required to provide all technically feasible unbundled dedicated transport between locations and equipment designated by MCIm so long as the facilities are used to provide telecommunications services, including interoffice transmission facilities to network nodes connected to MCIm switches and to the switches or wire centers of other requesting carriers?

INITIAL COMMISSION DECISION

The Commission concluded that BellSouth is obligated to provide unbundled dedicated transport throughout its network between locations and equipment designations (including interoffice transmission facilities to network nodes connected to MCIm switches, *or to wire centers of other requesting carriers) so long as the facilities are existing and* used to provide telecommunications services. BellSouth is not obligated to construct new transport facilities at a CLP's request along routes where BellSouth has not deployed facilities for its own use.

OBJECTIONS

BELLSOUTH: The Commission should clarify its Order to find that BellSouth is not required to construct new transport facilities for MCIm, irrespective of whether BellSouth has facilities along the route requested by MCIm. Also, BellSouth requested that the Commission reconsider its conclusion and limit MCIm's right to unbundled dedicated transport to transport between (1) a BellSouth switch or central office and an MCIm switch or central office or (2) between two BellSouth switches or central offices.

ITC^DELTACOM: ITC^DeltaCom did not comment on this Finding of Fact.

MCIm: MCIm did not comment on this Finding of Fact.

trunks should be limited in accordance with paragraph 38 of the *Third Order*. Furthermore, the Commission agrees with the Public Staff that if BellSouth wishes to audit MCIm's records concerning traffic routed over interconnection facilities to determine whether any of the traffic came from customers who do not obtain local service from MCIm, it should be permitted to do so. The interconnection agreement should be modified to permit such audits if they are not now allowed.

CONCLUSIONS

The Commission upholds and affirms its original decision in this regard. In addition, the Commission concludes that the interconnection agreement should be modified to permit audits as discussed by the Public Staff, if they are not now allowed. Accordingly, Finding of Fact No. 15 (Matrix Issue No. 42) should be amended to read as follows:

> To the extent that MCIm is not utilizing local interconnection trunks solely for originating or terminating its interexchange traffic, MCIm may combine switched access and local traffic on interconnection trunks, provided that the switched access is being provided to an MCIm local exchange customer. Further, MCIm must provide adequate billing records to BellSouth to enable it to bill switched access to the appropriate CLPs. The Parties' interconnection agreement should be modified to permit audits if they are not now allowed.

FINDING OF FACT NO. 17 (MATRIX ISSUE NO. 46): Under what conditions, if any, should the Parties be permitted to assign an NPA/NXX code to end users outside of the rate center in which the NPA/NXX code is homed?

INITIAL COMMISSION DECISION

The Commission concluded that calls within a LATA originated by BellSouth customers to MCIm foreign exchange (FX) customers are to be considered local and, therefore, subject to reciprocal compensation.

OBJECTIONS

BELLSOUTH: BellSouth did not object to this Finding of Fact.

ITC^DELTACOM: ITC^DeltaCom filed comments on the RAO on May 7, 2001. ITC^DeltaCom stated that its comments are wholly concerned with the Commission's conclusion that only "calls within a LATA originated by BellSouth customers to MCIm FX customers are to be considered local, and, therefore, subject to reciprocal compensation." ITC^DeltaCom maintained that the Commission correctly concluded that a telephone call from a BellSouth customer physically located in one rate center to a MCIm customer

physically located in a different rate center but who has an NPA/NXX code from the same rate center as the caller placing the call is a local call and that reciprocal compensation would be due. However, ITC^DeltaCom argued that the Commission circumscribed its conclusion by restricting it only "to the extent [the calls] are within a LATA." ITC^DeltaCom asserted that this restriction is unwarranted and does not logically or necessarily follow from the premises upon which the Commission's conclusion is based. ITC^DeltaCom recommended that the Commission remove this unnecessary restriction from its final Order for a number of reasons. However, ITC^DeltaCom stated that alternatively, the Commission should expressly limit its decision in this matter to the Parties in the case without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

ITC^DeltaCom stated in its comments that the Commission should remove the unnecessary restriction of "to the extent [the calls] are within a LATA" from its final Order in this matter for the following reasons:

(1) It was not necessary for the Commission to address the question of whether reciprocal compensation would be owed for FX calls that traversed a LATA boundary because MCIm conceded that "MCIm would be willing to agree to never assign an NPA/NXX code to a customer physically located outside the LATA if it would resolve this issue." As MCIm was not seeking compensation for FX calls crossing LATA boundaries, there was no reason for the Commission to reach this decision. The Commission's announcement of a LATA restriction in this case has the unfortunate, and presumably unintended, consequence of potentially binding other parties based on a record that is not fully developed on this issue. It would be more appropriate for the Commission to reach the decision of whether reciprocal compensation is owned for FX calls crossing LATA boundaries when presented with this question by parties who have a genuine dispute over the issue or, otherwise, through a generic industry proceeding where all interested parties have the opportunity to comment. If it were believed necessary in the instant matter, the Commission could impose the restriction expressly and uniquely on MCIm based on its concession without attaching the restriction to the conclusion that the calls are local based on a logical analysis of the FX service.

(2) LATAs were established to expressly delineate where the Regional Bell Operating Companies (RBOCs) could offer service. There has never been a restriction on CLPs from transporting traffic across LATA boundaries. CLPs have not been confined to the LATA boundaries, at least in part, because of Congress' intent to introduce competition into what had been a

protected monopoly market. By limiting its Finding of Fact No. 17 to calls within a LATA, the Commission would be applying a RBOC-specific restriction to all carriers.

(3) The Commission's LATA qualification potentially conflicts with its earlier decisions on reciprocal compensation. The Commission has repeatedly honored the principle that a call is "terminated" when it is "delivered to the telephone exchange service bearing the called telephone number." In this case, given that the Commission has required MCIm to have in place either owned or leased dedicated facilities between the FX customer's premises and the switch, the calls to MCIm's FX subscribers are delivered to the telephone exchange service bearing the called telephone number at the switch. Where a CLP switch is located in the same local calling area as the calling party, there is no question that under the Commission's previous decisions the call is a local call regardless of where the FX subscriber chooses to transport the call. As the Public Staff appropriately analyzed in its Proposed Order, a call from a BellSouth customer in Lenoir to a MCIm customer with a Lenoir NPA/NXX code is local, regardless of whether the FX customer's physical premises is in Charlotte or Denver.

(4) The Commission also grounds its decision on what it believes to be the FCC's ruling in a 1980 decision. However, the Commission's reliance on that ruling to draw a distinction between intraLATA and interLATA FX calls is misplaced. In the New York Telephone Company case, New York Telephone failed to file an intrastate tariff with the New York Public Service Commission to add a surcharge on interstate FX and CCSA subscribers amounting to $75.00 per month initially and increasing to $160.00 per month after nine months. By contrast, physically intrastate FX service subscribers paid a charge of $9.23 in addition to the local business line rate. Faced with this confiscatory surcharge on out-of-state FX customers only, the FCC relied upon the fact that FX service consists of both private lines and local exchange service as part of an overall, integrated end-to-end service to reach its conclusion that any charges concerning the local distribution of FX and CCSA services that apply to interstate customers only are subject to the jurisdiction of the FCC and must be filed with the FCC.

(5) It is not true, as BellSouth asserts, that "there is no authority . . . for the proposition that a telephone call which is originated in one local calling area and terminates outside of that local calling area is subject to the payment of reciprocal compensation." Under previous Commission decisions, FX calls terminate when they are delivered to the local exchange service bearing the called number, not when they reach some other destination chosen by the FX subscriber. The Michigan Public Service Commission ruled in

January 2001 that calls routed to FX subscribers outside of a local calling area constitute local calls subject to reciprocal compensation obligations.

(6) Although not expressly stated by the Commission in its RAO, it appears that the Commission may have been concerned with the equity of permitting MCIm to receive reciprocal compensation for interLATA FX calls while BellSouth could not do the same thing based on its inability to provide interLATA long distance.

Based on the foregoing, ITC^DeltaCom requested that the Commission conclude in its final Order that all FX calls, whether intraLATA or interLATA, be considered local and, therefore, subject to reciprocal compensation or, alternatively, that the Commission expressly limit its decision in this matter to the Parties in this case without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

MCIm: MCIm did not object to this Finding of Fact.

RESPONSES

BELLSOUTH: BellSouth stated in its Response that the Commission did not fully adopt BellSouth's position on this issue in its RAO, however, neither BellSouth nor MCIm submitted an Objection on this issue. BellSouth noted that, rather, ITC^DeltaCom filed an objection to the Commission's conclusion that interLATA FX-type calls would not qualify for reciprocal compensation.

BellSouth stated that while it does not necessarily agree with the Commission's ruling to the extent that it permits non-local, intraLATA calls to qualify for reciprocal compensation, there is certainly no justification for ITC^DeltaCom's request that the Commission extend the reciprocal compensation obligation to include interLATA and perhaps interstate calls. BellSouth argued that if ITC^DeltaCom's position were adopted, CLPs could collect reciprocal compensation for calls originating in North Carolina and terminating in New York or Chicago. BellSouth maintained that clearly the reciprocal compensation created by TA96 for the exchange of local traffic was never intended to apply to such interstate calls.

BellSouth noted that while ITC^DeltaCom attempts to distinguish the FCC's decision in the New York Telephone Company - Exchange System Access Line Terminal Charge for FX and CCSA Service, Memorandum Opinion and Order, 76 F.C.C. 2d 349 (1980), ITC^DeltaCom offered no rebuttal to the other state commission decisions such as Maine, Texas, and Illinois cited by BellSouth which support BellSouth's position. BellSouth noted that the decisions in the states mentioned are more restrictive than the Commission's decision in the RAO.

BellSouth recommended that the Commission overrule ITC^DeltaCom's objection and adopt the decision in the RAO for Finding of Fact No. 17 as final.

ITC^DELTACOM: ITC^DeltaCom objected to this Finding of Fact and, therefore, did not provide a response.

MCIm: MCIm did not address this issue in its Response.

PUBLIC STAFF: The Public Staff did not address this issue in its Response.

DISCUSSION

The Commission notes that its conclusion in the RAO limiting its decision to calls within a LATA originated by BellSouth customers to MCIm FX customers was due primarily to MCIm's own witness' testimony during the hearing. As the RAO noted, MCIm witness Price agreed during cross-examination at the hearing that a call from a BellSouth customer in Lenoir, North Carolina to a MCIm FX customer in Denver, Colorado is not a local call by virtue of the fact that the call crosses LATA boundaries. Further, witness Price stated that MCIm would be willing to agree to never assign an NPA/NXX code to a customer physically located outside of the LATA if it would resolve this issue. In this arbitration docket, MCIm's own witness agreed that a call from a BellSouth customer in Lenoir, North Carolina to a MCIm FX customer in Denver, Colorado is not a local call by virtue of the fact that the call crosses LATA boundaries. Therefore, it was completely logical for the Commission with this record to limit its decision to calls within the LATA.

The Commission also notes that the RAO specifically states that its decision in this regard was based on the evidence presented in this case.

Based on the comments of ITC^DeltaCom and a review of the RAO, the Commission finds it appropriate to clarify that the decision reached by the Commission in this docket is based solely on the evidence produced in this record and is made without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

CONCLUSIONS

The Commission upholds and affirms its original decision in this regard, subject to the clarification that its decision is made without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

FINDING OF FACT NO. 18 - MATRIX ISSUE NO. 47: Should reciprocal compensation payments be made for ISP-bound traffic?

IT IS, THEREFORE, ORDERED as follows:

1. That, in accordance with the Commission's January 24, 2001 and November 3, 2000 Orders issued in Docket No. P-100, Sub 133, MCIm and BellSouth shall jointly file a Composite Agreement by no later than Friday, August 31, 2001.

2. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

3. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 6 (Matrix Issue No. 18), but clarifies and modifies that finding of fact to read as follows:

> BellSouth is obligated to provide unbundled dedicated transport throughout its network between locations and equipment designations (including interoffice `` `` `` `` `` `` `` `` `` `` `` facilities to network nodes connected to MCIm switches, or to wire centers of other requesting carriers) so long as the facilities are existing and used to provide telecommunications services. Furthermore, BellSouth is not obligated to construct new transport facilities at a competing local provider's (CLP's) request along routes where BellSouth has not deployed facilities for its own use or along routes where no facilities are in place or where BellSouth does not have existing facilities.

4. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 10 (Matrix Issue No. 34 and Matrix Issue No. 35).

5. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 11 (Matrix Issue No. 36).

6. That Finding of Fact No. 12 (Matrix Issue No. 37) shall be amended to read as follows:

> BellSouth should be required to allow MCIm to combine local transit traffic on the same local trunks that carry other local traffic. Further, the Parties should resolve the issue of switched access transit traffic consistent with the Commission's decision on Matrix Issue No. 42.

7. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 13 (Matrix Issue No. 39), as clarified hereinabove.

8. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 15 (Matrix Issue No. 42), but clarifies and amends that finding of fact to read as follows:

To the extent that MCIm is not utilizing local interconnection trunks solely for originating or terminating its interexchange traffic, MCIm may combine switched access and local traffic on interconnection trunks, provided that the switched access is being provided to an MCIm local exchange customer. Further, MCIm must provide adequate billing records to BellSouth to enable it to bill switched access to the appropriate CLPs. The Parties' interconnection agreement should be modified to permit audits if they are not now allowed.

9. That the Commission upholds and affirms its original decision concerning Finding of Fact No. 17 (Matrix Issue No. 46), subject to the clarification that its decision is made without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

10. That Finding of Fact No. 18 (Matrix Issue No. 47) shall be amended to read as follows:

The Parties shall include in their final agreement language conforming to the FCC's ISP Traffic Remand Order.

11. That Finding of Fact No. 23 (Matrix Issue No. 80) shall be amended to read as follows:

BellSouth is required to implement, in a timely manner, an ordering process enabling the CLPs to electronically order UNE EELs /DS1 combos using the LSR. It is appropriate to refer the issues MCIm has raised in Matrix Issue No. 80 of this docket to the CCP for further action and implementation. MCIm and BellSouth are required to file separate CCP status reports every three months, beginning on September 28, 2001, concerning the progress the CCP has made in addressing and resolving these issues.

ISSUED BY ORDER OF THE COMMISSION.

This the 2nd day of August, 2001.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

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Commissioner Sam J. Ervin, IV dissents in part by separate opinion.
Commissioner Judy Hunt joins in Commissioner Ervin's separate dissenting opinion.
Commissioner James Y. Kerr, II did not participate.

DOCKET NO. P-474, SUB 10

COMMISSIONER SAM J. ERVIN, IV, DISSENTING IN PART: As is apparent from an examination of the Commission's order, the majority has overruled MCIm's objection to that portion of the Recommended Arbitration Order requiring MCIm to bear the cost of delivering BellSouth-originated local traffic from a BellSouth local calling area to a point of interconnection designated by MCIm within the same LATA and outside the BellSouth local calling area within which the call originated. For the reasons which I stated in more detail in my dissents from the Commission's decisions with respect to this issue in In re Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc., and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc., Docket Nos. P-140, Sub 73, and P-676, Sub 7, Recommended Arbitration Order (March 9, 2001); In re Petition of MCImetro Access Transmission Services, L.L.C., For Arbitration of Proposed Agreement with BellSouth Telecommunications, Inc., Docket No. P-474, Sub 10, Recommended Arbitration Order (April 3, 2001); and In re Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc., and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc., Docket Nos. P-140, Sub 73, and P-646, Sub 7, Order Ruling on Objections and Requiring the Filing of Composite Agreement (June 19, 2001), I continue to believe that the Commission's decision is inconsistent with the Telecommunications Act of 1996 and FCC's interconnection regulations; that the fact that the FCC has solicited comments concerning the interrelationship between its decisions authorizing competing carriers to select a single point of interconnection and its reciprocal compensation rules in the context of developing a unified system for intercarrier compensation in In re Matter of Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking, CC Docket 01-92 (April 27, 2001), does not support a decision authorizing a result which I believe to be expressly forbidden by the literal language of the FCC's decisions and interconnection regulations; and that the "equity" argument upon which the Commission has repeatedly relied in addressing this issue assumes the point in dispute, supports a result different from the one which the Commission actually reaches, and is not competitively neutral. As a result of my continued disagreement with the Commission's decision with respect to this issue and the fact that the issues raised at this stage of this proceeding are being decided by the full Commission, In re Petition of Sprint Communications Company, L.P., for Arbitration with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. P-294, Sub 23, Recommended Arbitration Order (July 5, 2001)(Ervin, Commissioner, concurring in the result), I respectfully dissent from the Commission's decision with respect to this issue. I do, however, fully concur in the remainder of the Commission's decision.

\s\ Sam J. Ervin, IV
COMMISSIONER SAM J. ERVIN, IV

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-474, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996	)	RECOMMENDED ARBITRATION ORDER

HEARD IN: Commission Hearing Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, beginning August 28, 2000 and ending August 30, 2000

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; Chairman Jo Anne Sanford, and Commissioners Ralph A. Hunt, Judy Hunt, J. Richard Conder, and Robert V. Owens, Jr.

APPEARANCES:

FOR MCIMETRO ACCESS TRANSMISSION SERVICES, INC., A SUBSIDIARY OF WORLDCOM, INC.:

Ralph McDonald, Bailey & Dixon, L.L.P., Post Office Box 1351, Raleigh, North Carolina 27610

Kennard B. Woods and Dulaney L. O'Roark, III, WorldCom, Inc., 6 Concourse Parkway, Suite 3200, Atlanta, Georgia 30328

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

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

Bennett Ross, General Counsel, and Mike Twomey, General Counsel, BellSouth Telecommunications, Inc., 675 West Peachtree Street, NE, Atlanta, Georgia 30375

carriers are involved, the originating carrier is responsible for compensating the terminating carrier for completion of the call on the terminating carrier's network. However, the Public Staff pointed out that this arrangement becomes complicated when a third party is required for the completion of the call. The third party is neither the originating nor the terminating carrier, but only serves as an intermediate carrier providing transport for the call between the originating and terminating carriers. The Public Staff stated that in this instance, the issue is who bills the applicable reciprocal compensation to the originating carrier and pays it to the terminating carrier.

The Public Staff recommended that the Commission conclude that interconnection agreements should define the terms of reciprocal compensation in instances where a third party is involved in the transport and termination of a local call. In the event MCIm is required to terminate a call for a carrier with which it does not have an interconnection agreement, or to originate a call to such a carrier, the Public Staff believes this should clearly signal the need for the two carriers to negotiate an agreement that will include terms for reciprocal compensation. Further, the Public Staff recommended that the Commission should also conclude that MCIm may request BellSouth to serve as a 'billing agent' in recovering costs in situations where no interconnection agreement existed between MCIm and the other carrier. However, the Public Staff stated that BellSouth is under no legal obligation to perform such a function for MCIm. If requested by MCIm to deal with a third party on reciprocal compensation issues, the Public Staff opined that BellSouth should be entitled to compensation for any extraordinary functions that it performs.

The Commission agrees with BellSouth and the Public Staff on this issue.

CONCLUSIONS

The Commission concludes that interconnection agreements should define the terms of reciprocal compensation in instances where a third party is involved in the exchange of local traffic; however, BellSouth has no legal obligation to perform as may be required under MCIm's proposed language in sections 9.7.1 and 10.7.1.1 in Attachment 4 of the Interconnection Agreement. Therefore, the Commission rejects MCIm's proposed language in these sections. If requested by MCIm to deal with a third party on reciprocal compensation issues, BellSouth should be entitled to compensation for any extraordinary functions that it performs. This issue may signal the need for MCIm to negotiate interconnection agreements with other carriers with which it exchanges local traffic.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

MATRIX ISSUE NO. 46: Under what conditions, if any, should the Parties be permitted to assign an NPA/NXX code to end users outside of the rate center in which the NPA/NXX code is homed?

POSITIONS OF PARTIES

MCIm: The Parties should be permitted to assign NPA/NXX codes to end users anywhere within the LATA. BellSouth does this today with respect to services such as FX service and its primary rate ISDN Extended Reach Service (ERS). BellSouth should not be permitted to impose restrictions on MCIm's ability to assign NPA/NXX codes to MCIm's end users. Additionally, BellSouth should not be allowed to treat MCIm's FX service as a toll service.

BELLSOUTH: BellSouth is not attempting to restrict MCIm's ability to allocate numbers out of its assigned NPA/NXX codes to its end users. However, if MCIm gives a telephone number to a customer who is physically located in a different local calling area than the local calling area where that NPA/NXX is assigned, calls originated by BellSouth end users to those numbers are not local calls and thus no reciprocal compensation would apply. Furthermore, MCIm should identify such long distance traffic and pay BellSouth for the originating switched access service BellSouth provides on those calls. There is no authority, and MCIm cites none, for the proposition that a telephone call which originates in one local calling area but terminates outside of that local calling area is subject to the payment of reciprocal compensation. Such calls are simply not "local", as all of the authorities to consider the issue uniformly hold.

PUBLIC STAFF: MCIm should be free to offer FX service to its end users. If there is a dedicated facility from MCIm's dialtone office to its customer's premises, BellSouth owes MCIm reciprocal compensation for completion of a call from a BellSouth customer to an NPA/NXX code that is within the local calling area of the BellSouth caller, regardless of the physical location of the FX customer's premises.

DISCUSSION

This issue centers around the classification as local or long distance of a call from a BellSouth customer physically located in one rate center to a MCIm customer physically located in a different rate center but with a NPA/NXX code from the same rate center as the BellSouth customer. If the call is determined to be a local call, MCIm would bill and BellSouth would pay reciprocal compensation. If the call is determined to be a long distance call, BellSouth would bill and MCIm would pay access charges.

MCIm explained in its Proposed Order that FX service involves providing service to a customer physically located outside of the rate center for which his NPA/NXX code is assigned. MCIm contended that in this issue, BellSouth is attempting to include language in the Interconnection Agreement which would treat FX traffic in some respects as if it were toll traffic. MCIm argued that BellSouth's proposed language should be rejected for the following reasons: (1) FX traffic is local and should be treated as such for all purposes;

(2) BellSouth treats its own FX service as local; and (3) treating CLPs' FX service as a toll service would prevent competition for FX service.

MCIm asserted in its Proposed Order that whether a call is local or not depends on the NPA/NXX code dialed, not the physical location of the customer. MCIm quoted a September 2, 1999 Order of the California Commission wherein the California Commission held that it is the applicable rate center as identified by telephone number prefix, not the physical location of the calling or called party that is used to rate calls. MCIm further opined that BellSouth's proposal is that it would route a FX service call as if it were local (using its own facilities rather than delivering the call to the caller's intraLATA toll provider), but charge MCIm as if MCIm were an intraLATA toll provider.

Further, MCIm contended in its Proposed Order that BellSouth treats its own FX service offering as local. MCIm argued that BellSouth is attempting to treat MCIm's FX offering differently than BellSouth treats its own FX service. MCIm quoted two sections of BellSouth's General Subscriber Service Tariff for North Carolina concerning FX service as follows:

> A.9.1.1 Foreign exchange service is exchange service furnished to a subscriber from an exchange other than the one from which he would normally be served. This service may only be provided where all facilities and serving points are located in the same LATA.
>
> A.9.1.3.A.7 The local service area of, and long distance rates to and from main stations, Centrex Type Services stations or PBX systems connected for foreign exchange service are the same as regularly apply to stations located in the foreign exchange area.

MCIm also addressed in its Proposed Order BellSouth's assertion that when MCIm assigns NPA/NXX codes to provide FX service it is not seeking to define its own local calling area but rather is attempting to define the local calling area of BellSouth's customers. MCIm claimed that BellSouth's argument is incorrect. Using a Raleigh-Chapel Hill example, MCIm stated that when it provides a NPA/NXX code associated with the Chapel Hill rate center to MCIm's customer physically located in Raleigh, MCIm is providing its customer with a local presence in Chapel Hill because that is what the customer wants. MCIm maintained that it is providing the same type of service BellSouth offers to its customers and that when MCIm does so, it is not redefining the local calling area of BellSouth's customers in Chapel Hill. MCIm argued that its FX service provides a local presence for the customer just as BellSouth's FX offering does.

MCIm further maintained in its Proposed Order that BellSouth's proposal to classify MCIm's FX service as toll service and to assess access charges will effectively prohibit MCIm from offering FX service in competition with BellSouth. MCIm argued that this position is anticompetitive, limits choices available to consumers, and is inconsistent with the notion of parity. MCIm further stated that BellSouth's proposal for access charges would force end users who currently access their ISP via FX service to seek another provider of Internet access, assuming a choice of ISPs exists.

MCIm stated in its Proposed Order that BellSouth's proposal would also eliminate competition with BellSouth's Primary Integrated Services Digital Network (ISDN) ERS. MCIm quoted the portion of BellSouth's General Subscriber Service Tariff which describes ERS service:

> A42.3.1.P ERS is designed to "extend the reach" of the Inward Data Option customer from a centrally located metropolitan local calling area into the areas of the LATA which are "non-local" to the metropolitan area. The ERS customer purchases telephone numbers within each desired "non-local" calling area to allow their clients to call them without incurring intraLATA Long Distance Message Telecommunications Service charges.

MCIm argued that when BellSouth offers ERS service it engages in exactly the same practice that it seeks to prohibit a CLP from engaging in. MCIm contended that elimination of competition for the ERS service should be viewed as particularly troubling, since it is a service favored by ISPs so they can establish a point of presence in a single metropolitan area and then have their customers reach them from foreign exchanges on a local call basis. MCIm argued that BellSouth's proposal will change the treatment of many calls to the Internet which are currently treated as local calls.

MCIm rebutted in its Proposed Order BellSouth's attempt to equate FX service by CLPs with Feature Group A or 800 service. MCIm stated that BellSouth's Feature Group A service is a switched access service provided to requesting IXCs and involves the assignment of a BellSouth 10-digit telephone number to the IXC and provides for a variety of optional, BellSouth-provided features such as hunt groups from a specific end office. MCIm maintained that since the CLP has a local switch, it would not rely on the BellSouth local switch to provide additional features as an IXC would. MCIm asserted that BellSouth should not be allowed to re-categorize as toll, traffic that has historically been viewed as local and pretend that a CLP is an IXC.

MCIm concluded in its Proposed Order that BellSouth is attempting to avoid paying reciprocal compensation, to receive access charges from MCIm for local calls, and to shield itself from competition in FX service. MCIm requested that the Commission reject

BellSouth's proposed language and find that the proper method for determination of traffic jurisdiction is to compare the rate centers associated with the originating and terminating NPA/NXX codes.

MCIm witness Price stated on cross-examination by BellSouth that in addition to the question of compensation concerning this issue, MCIm is also concerned that this issue is an attempt by BellSouth to restrict the way in which MCIm is able to assign NPA/NXX codes throughout the area that MCIm serves. During cross-examination of witness Price, BellSouth used an example of a MCIm NPA/NXX code of (828) 123 which is assigned to the Lenoir rate center. In the example, MCIm takes the (828) 123 number and assigns it to a customer physically located in the Charlotte rate center. Witness Price testified that for a call from a BellSouth customer, physically located in Lenoir, to a MCIm customer, physically located in Charlotte, but with a Lenoir rate center NPA/NXX code, the termination point for the customer receiving that call is not physically within the Lenoir local calling area, although the NPA/NXX code being called is associated with the Lenoir rate center. Therefore, witness Price testified, the call would be considered a local call from a rating perspective.

During cross-examination of MCIm witness Price, BellSouth provided another example wherein MCIm assigned the Lenoir rate center NPA/NXX code of (828) 123 to a MCIm customer physically located in Denver, Colorado. Witness Price testified that MCIm would not expect BellSouth to pay reciprocal compensation for a call from a BellSouth customer, physically located in Lenoir, North Carolina, to a MCIm customer, physically located in Denver, Colorado, but with a Lenoir rate center NPA/NXX code. Witness Price explained that the Lenoir to Denver example depicted a situation which has existed for years called interLATA FX service. Witness Price testified that to his knowledge, a call from Lenoir to Denver would be provided by MCIm long distance because it involves interLATA transport. Witness Price agreed that the call to Denver is not a local call by virtue of the fact that the call crosses LATA boundaries. Further, witness Price stated that MCIm would be willing to agree to never assign an NPA/NXX code to a customer physically located outside of the LATA if it would resolve this issue.

Witness Price further agreed during cross-examination by BellSouth that when MCIm sends BellSouth a bill for reciprocal compensation for traffic going to the (828) 123 NPA/NXX, BellSouth has no way of knowing where the customer to whom that number has been assigned is physically located. However, witness Price testified, the same thing would take place on the other side for reciprocal compensation bills that BellSouth renders to MCIm. Witness Price testified that MCIm would have no way of knowing where the BellSouth end users are located.

Witness Price was asked whether there is any functional difference between what MCIm is proposing in the way of assigning an NPA/NXX code from Lenoir to a customer physically located in Charlotte versus a 1-800 service that a BellSouth end user in Lenoir

could utilize. Witness Price testified that a 1-800 service does not have the same billing characteristics since the user that picks up the phone and dials 1-800 knows that the call is associated with toll-free calling. Witness Price stated that a BellSouth customer in Lenoir calling a Lenoir NPA/NXX code which is associated with an MCIm customer physically located in Charlotte believes that he is placing a local call to a local, Lenoir NPA/NXX number.

BellSouth asserted in its Proposed Order that it is not attempting to restrict MCIm's ability to allocate numbers out of its assigned NPA/NXX codes to its end users, however, BellSouth wants MCIm to use its NPA/NXX codes in such a way that BellSouth can distinguish local traffic from intraLATA toll traffic and interLATA toll traffic for BellSouth originated calls. Further, BellSouth argued that MCIm should not be permitted to collect reciprocal compensation for calls terminating to a customer physically located outside of the local calling area, since such a call would not "originate and terminate" within the local calling area so as to trigger the obligation to pay reciprocal compensation.

BellSouth maintained in its Proposed Order that it is concerned that through the NPA/NXX assignment issue, MCIm will attempt to collect reciprocal compensation for calls that are not local and are in fact long distance. BellSouth stated that according to MCIm, the type of call at issue is akin to BellSouth's FX service. However, BellSouth asserted, even assuming that were true, the FCC has firmly held that FX service, to the extent it involves a call originating and terminating in two different LATAs, is interstate in nature.

BellSouth referenced a 1980 FCC Order in which the petitioners challenged an intrastate New York Telephone tariff imposing a charge on the local exchange service used by out-of-state customers of FX and Common Control Switching Arrangement (CCSA) services. BellSouth stated that the service allowed an end user in New York to call a customer located out of state by dialing a local number and paying local rates. BellSouth stated that, for example, a FX service purchased by a Washington, D.C. business would allow a New York City resident to call that business's out-of-state premises by dialing the local New York City number associated with the local exchange portion of service. BellSouth explained that notwithstanding the fact that the originating caller could access the service by dialing a local number and paying local charges, and despite the fact that the FX customer had to purchase local exchange service from New York Telephone, the FCC concluded that the service as a whole was interstate and thus, subject to FCC jurisdiction. BellSouth commented that the FCC concluded that the Communications Act did not reserve the right of state jurisdiction over the local exchange portion of interstate services. BellSouth noted that the fact that a New York City customer could call a local number to reach an out-of-state business in Washington, D.C. did not alter the interstate nature of the call.

BellSouth further stated in its Proposed Order that the Maine Public Utilities Commission concluded by Order dated June 30, 2000, that a service utilizing the

assignment of NPA/NXX codes to customers outside the local calling area was plainly an interexchange service.

Further, BellSouth noted in its Proposed Order that two other state commissions have considered this issue and have concluded that reciprocal compensation is not owed for calls made to telephone numbers associated with a particular rate center but assigned to customers physically located outside of that rate center. BellSouth commented that the Texas Commission found that reciprocal compensation is not due when a CLP uses such an arrangement which the Texas Commission equated to FX service. Specifically, the Texas Commission ruled, "The Commission finds that to the extent that FX-type and 8YY traffic do not terminate within a mandatory local calling scope, they are not eligible for reciprocal compensation."

Finally, BellSouth noted in its Proposed Order that the Illinois Commission reached the same conclusion, ruling 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."

BellSouth concluded in its Proposed Order that there is no authority, and MCIm cannot cite any, for the proposition that a telephone call which is originated in one local calling area and terminates outside of that local calling area is subject to the payment of reciprocal compensation. BellSouth maintained that the issue is not whether MCIm can offer an FX-type service to its own customers. BellSouth stated that clearly MCIm can offer such service. However, BellSouth argued that it should not be required to pay reciprocal compensation to MCIm under such an arrangement.

BellSouth witness Varner explained, in his summary at the hearing, that this issue has not been before the Commission before this point. Witness Varner explained that "very simply, the issue is about whether reciprocal compensation should apply to long distance calls."

During cross-examination by MCIm, witness Varner explained that for FX service, dedicated facilities exist between the customer's physical premises and a switch in the rate center from which the customer has an NPA/NXX code. Witness Varner testified that the customer would pay the basic local exchange rate for the rate center in which they have an NPA/NXX code and, additionally, a charge for a dedicated facility from their physical premise to a switch in the rate center from which their NPA/NXX code belongs.

On cross-examination by MCIm, witness Varner was presented with a hypothetical situation where a BellSouth FX customer located in Chapel Hill has an NPA/NXX code from the Raleigh rate center. The situation presented to witness Varner was that where a MCIm customer in Raleigh called a BellSouth customer, physically located in Chapel Hill, but with a Raleigh NPA/NXX code. Witness Varner testified that BellSouth would not have

to pay MCIm originating access charges for that call since the FCC has determined that there would not be any access charges applicable from an end user to the dial-tone office where the number is located. Further, witness Varner testified that BellSouth should not bill MCIm for reciprocal compensation. Witness Varner stated that he has not checked bills to make sure BellSouth is not billing reciprocal compensation for these sort of calls but that if BellSouth is billing in this circumstance, it would be billing in error.

In responding to questions from Commissioner Ervin, witness Varner explained that MCIm could provide the same service as BellSouth provides, as FX service by building a dedicated link or leasing such a dedicated link between the customer's physical premises and the rate center from which the customer has an NPA/NXX code. Witness Varner explained that BellSouth is not attempting to restrict MCIm from providing FX service or from allowing MCIm to assign its NPA/NXX codes as it wants, BellSouth just does not want to pay reciprocal compensation for calls that are long distance calls. Further, witness Varner answered that BellSouth would not be billing MCIm access charges or reciprocal compensation for calls from a MCIm customer to a BellSouth FX customer.

The Public Staff explained in its Proposed Order that the crux of this issue rests in determining the applicability of reciprocal compensation in the provisioning of FX service. The Public Staff stated that traditionally, FX service allows a customer to have a NPA/NXX code assignment from an exchange that is not the exchange in which the customer is physically located. The Public Staff pointed out that if a customer with FX service calls another end user in the same local calling area as that of the exchange from which his dialtone is furnished, the call should be considered a local call and should be subject to reciprocal compensation. The Public Staff noted that this issue concerns calls in the opposite direction - i.e., from any local exchange customer to the FX customer.

The Public Staff further maintained in its Proposed Order that although the record is not clear, it assumes that the FX service MCIm intends to provide would include a dedicated facility from its Cary switch (the dialtone office) to its FX customer's premises. The Public Staff stated that if this is the case, the Public Staff believes BellSouth would owe MCIm reciprocal compensation for completion of a call from a BellSouth customer to a NPA/NXX code that is within the local calling area of the BellSouth caller, regardless of the physical location of the FX customer's premises. The Public Staff noted that this is illustrated in the record as a call from a BellSouth customer in Lenoir to a MCIm customer with a Lenoir NPA/NXX code and premises in either Charlotte or Denver. The Public Staff asserted that a call to a local Lenoir NPA/NXX code in either of these locations is just as much a local call as a call from a BellSouth customer in Lenoir to a MCIm customer with a Lenoir NPA/NXX code in Lenoir.

The Public Staff recommended that the Commission conclude that MCIm should be free to offer FX service to its end users. Further, the Public Staff recommended that the Commission find that if there is a dedicated facility from MCIm's dial-tone office to its

customer's premises, BellSouth should owe MCIm reciprocal compensation for completion of a call from a BellSouth customer to a NPA/NXX code that is within the local calling area of the BellSouth caller, regardless of the physical location of the FX customer's premises.

The Commission agrees with the Public Staff that MCIm should be free to offer FX service to its end users, although the Commission does not believe that this is the true issue to be addressed. The Commission believes that the question which the Commission needs to decide in this issue is whether a telephone call from a BellSouth customer physically located in one rate center to a MCIm customer physically located in a different rate center but who has a NPA/NXX code from the same rate center as the caller placing the call is a local call or a long distance call. The Commission believes that based on the evidence presented in this case, and assuming that MCIm has in place either owned or leased dedicated facilities between the FX customer's premises and the switch, the calls in question to the extent they are within a LATA should be classified as local and, therefore, subject to reciprocal compensation. The Commission notes that NPA/NXX codes were developed to rate calls and, therefore, MCIm's assertion that whether a call is local or not depends on the NPA/NXX dialed, not the physical location of the customer, is reasonable and appropriate. Further, based on the FCC's 1980 ruling in the New York Telephone case and MCIm witness Price's testimony at the hearing, the Commission believes that these calls should be classified as local as long as they are originated and terminated within a LATA. Therefore, the Commission concludes that calls within a LATA originated by BellSouth customers to MCIm FX customers are to be considered local and, therefore, subject to reciprocal compensation.

CONCLUSIONS

The Commission concludes that calls within a LATA originated by BellSouth customers to MCIm FX customers are to be considered local and, therefore, subject to reciprocal compensation.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

MATRIX ISSUE NO. 47: Should reciprocal compensation payment be made for ISP-bound traffic?

POSITIONS OF PARTIES

MCIm: Yes. Reciprocal compensation payments should be applicable to calls made from one carrier's customers to the ISP customer of the other carrier. The terminating carrier incurs the cost of termination for ISP-bound calls in the same way as for any other local call.