

HOPPING GREEN SAMS & SMITH

PROFESSIONAL ASSOCIATION

ATTORNEYS AND COUNSELORS

123 SOUTH CALHOUN STREET

POST OFFICE BOX 6526

TALLAHASSEE, FLORIDA 32314

(850) 222-7500

FAX (850) 224-8551

FAX (850) 425-3415

Writer's Direct Dial No.

(904) 425-2313

June 30, 1998

ANGELA R. MORRISON
GABRIEL E. NIETO
GARY V. PERKO
MICHAEL P. PETROVICH
DAVID L. POWELL
WILLIAM D. PRESTON
CAROLYN S. RAEPPLE
DOUGLAS S. ROBERTS
GARY P. SAMS
TIMOTHY G. SCHOENWALDER
ROBERT P. SMITH
CHERYL G. STUART
W. STEVE SYKES
T. KENT WETHERELL, II
OF COUNSEL
ELIZABETH C. BOWMAN

JAMES S. ALVES
BRIAN H. BIBEAU
KATHLEEN BLIZZARD
RICHARD S. BRIGHTMAN
KEVIN B. COVINGTON
PETER C. CUNNINGHAM
RALPH A. DEMEO
THOMAS M. DeROSE
RANDOLPH M. GIDDINGS
WILLIAM H. GREEN
KIMBERLY A. GRIPPA
WADE L. HOPPING
GARY K. HUNTER, JR.
JONATHAN T. JOHNSON
ROBERT A. MANNING
FRANK E. MATTHEWS
RICHARD D. MELSON

Ms. Blanca S. Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

ORIGINAL

Re: MCImetro Complaint Re: ISP Compensation --
Docket No. ~~980499-TP~~

971478-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of MCImetro Access Transmission Services, Inc. are the original and fifteen copies of its post hearing brief.

By copy of this letter, this document is being furnished to the parties on the attached service list.

Very truly yours,



Richard D. Melson

RDM/kcg
Enclosures
cc: Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of WorldCom)
Technologies, Inc., against) Docket No. 971478-TP
BellSouth Telecommunications, Inc.)
for breach of approved interconnection)
agreement by failure to pay)
compensation for certain local traffic)

In re: Complaint of Teleport)
Communications Group, Inc., against) Docket No. 980184-TP
BellSouth Telecommunications, Inc.)
for breach of approved interconnection)
agreement by failure to pay)
compensation for certain local traffic)

In re: Complaint of Intermedia)
Communications, Inc., against) Docket No. 980495-TP
BellSouth Telecommunications, Inc.)
for breach of approved interconnection)
agreement by failure to pay)
compensation for certain local traffic)

In re: Complaint of MCImetro Access)
Transmission Service, Inc., against) Docket No. 980499-TP
BellSouth Telecommunications, Inc.)
for breach of approved interconnection)
agreement by failure to pay)
compensation for certain local traffic) Filed: June 30, 1998

MCIMETRO ACCESS TRANSMISSION SERVICES, INC.'s POST HEARING BRIEF

Comes now MCImetro Access Transmission Services, Inc. ("MCImetro") and hereby submits this post-hearing brief to the Florida Public Service Commission ("PSC" or "Commission") requesting that the Commission order BellSouth to pay MCI metro reciprocal compensation pursuant to the terms of the MCImetro/BellSouth Interconnection Agreement

("Agreement"). In particular, MCImetro requests that the Commission order BellSouth to pay reciprocal compensation for traffic terminated to MCImetro's ISP customers.

BellSouth and MCImetro must pay to each other reciprocal compensation for the termination of ISP traffic. MCImetro and BellSouth agreed to the definition of "Local Traffic" contained in Attachment IV, Subsection 2.2.1, of the Agreement. In fact, it was BellSouth which proposed the definition. (Martinez, Tr. 205) MCImetro and BellSouth further agreed to pay reciprocal compensation for telephone calls which meet that definition of local traffic. Telephone calls to an ISP meet that definition. Had an exception been intended for ISP traffic (or for any other subset of local traffic), it would have been expressly included by the parties. No such exception is contained in the Agreement and no such exception was ever suggested by BellSouth.

I. DISCUSSION AND CITATION TO RECORD AND AUTHORITY

Issue 1: Under their Interconnection Agreement, are MFS and BellSouth required to compensate each other for transport and termination of traffic to ISPs? If so, what action, if any, should be taken?

****MCI Position:** No position.**

Issue 2: Under their Interconnection Agreement, are Teleport and BellSouth required to compensate each other for transport and termination of traffic to ISPs? If so, what action, if any, should be taken?

****MCI Position:** No position.**

Issue 3: Under their Interconnection Agreement, are MCImetro Access Transmission Services, Inc., and BellSouth required to compensate each other for transport and termination of traffic to ISPs? If so, what action, if any, should be taken?

****MCI Position:** Yes. BellSouth and MCImetro must pay each other reciprocal compensation for the termination of telephone calls to ISPs. The definition of Local Traffic makes no exception for such calls. Had such an exception been intended, it would have been expressly included by the parties. BellSouth should be ordered to pay reciprocal compensation for such traffic.**

BellSouth and MCImetro must pay each other reciprocal compensation for the termination of telephone calls to ISPs. The definition of Local Traffic in Attachment IV, Subsection 2.2.1, which was included at BellSouth's request, makes no exception for telephone calls terminated to ISPs. Had such an exception been intended, it would have been expressly included by the parties. However, no such exception is contained in the Agreement and no such exception was ever suggested by BellSouth. (Martinez, Tr. 205) BellSouth should be ordered to pay to MCImetro all outstanding charges for reciprocal compensation. Further, on a going forward basis, BellSouth should be ordered to continue to compensate MCImetro for such traffic in accordance with the Agreement.

Reciprocal compensation is the mechanism by which interconnecting parties compensate each other for local traffic terminated on each other's lines. Thus, when a customer calling from a BellSouth line calls a customer on MCImetro's network, BellSouth pays MCImetro to terminate that call. Similarly, when a customer calling from a MCImetro line calls a customer on BellSouth's network, MCImetro pays BellSouth to terminate that call. (Martinez, Tr. 196)

BellSouth has a contractual obligation to pay reciprocal compensation to MCImetro for local traffic originated on BellSouth's lines and terminated on MCImetro's lines. Attachment IV, Subsection 2.2.1 of the Agreement provides in relevant part:

The Parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in this Agreement and the Order of the FPSC. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area (EAS) exchange.

(Ex. 5, Excerpts from the MCImetro/BellSouth Interconnection Agreement) Rates for the exchange of local traffic are set forth in Table 1 of Attachment I to the MCI Agreement. As noted in Attachment I, Subsection 7.1, compensation for the exchange of local traffic is to be billed on a per-minutes-of-use basis and is to be measured in accordance with Attachment IV (i.e., in accordance with the definition in Subsection 2.2.1 quoted above). (Ex. 5) These provisions make it clear that BellSouth is required to pay MCImetro at the agreed-upon rate for all local calls originated on BellSouth's lines and terminated on MCImetro's lines. Since the Agreement is clear and unambiguous, there is no reason to look outside the contract. See, e.g., Pol v. Pol, 705 So.2d 51 (Fla.3d DCA 1997).

a. "Local Traffic" and "Termination"

"Local traffic" is defined in the Agreement in terms of the exchange in which the call originates and the exchange in which the call terminates. Section 2.2.1 of Attachment IV.¹ A "telephone call" placed over the public switched telephone network is "terminated" when it is delivered to the telephone exchange service premise bearing the called telephone number.

Specifically, in its Local Competition Order,² the FCC defined termination "for purposes of

¹ Mr. Hendrix misleadingly implies that local traffic is defined as a call which is a local call or an EAS call under BellSouth's General Subscriber Service Tariff. He states that the Agreement references the BellSouth tariff, and then he quotes the definitions of "local" and "EAS" from Section A1 of the tariff. (Hendrix, Tr. 230-31) The Agreement, however, references only Section A3 (which lists associated exchanges) of the tariff, not Section A1 (which defines BellSouth's call types). Ex. 7, Deposition of Jerry Hendrix, p. 111; Section 2.2.1 of Attachment IV.

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996).

section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." See Local Competition Order at ¶ 1040. MCImetro terminates telephone calls to Internet Service Providers on its network. As a communications service, a call is completed at that point, regardless of the identity or status of the called party. An internet service provider ("ISP") that purchases local service from MCImetro is assigned a telephone number by MCImetro for local service at the ISP's premise. When a BellSouth customer originates a call by dialing that number, that call terminates at the ISP premise, just as any other telephone call terminated when it reaches the premises with the phone number that the end user dialed. (Martinez, Tr. 201) A connection that an ISP may subsequently enable over the internet is between the ISP and its other providers and does nothing to change the inherent local nature of the telephone call to the ISP.

Long distance or interstate phone voice traffic is easily distinguishable from ISP traffic because, in order to make an interstate telephone call, the end user must dial the phone number of the party in the other state. That call terminates at the other party's premises in the other state, and is thus interstate in nature. However, when an end user makes a telephone call to their ISP, they simply dial a local number. Accordingly, the call terminates at the ISP premises, which is in the end user's local area. (Martinez, Tr. 203)

Mr. Hendrix' suggestion that a telephone call to an ISP does not terminate at the ISP local telephone number, but instead terminates on the Internet at some distant website, completely misunderstands the nature of an Internet call. An Internet call is a two step process consisting of: (1) a local telephone call from the end user to the ISP that both originates and terminates in the

local calling area; and, (2) a subsequent connection between the ISP and the Internet. BellSouth's position that a single, long distance telephone call occurs when a user connects to the Internet would hardly explain the ability of an end user to undertake a World Wide Web search and visit multiple websites at many different ultimate destinations. (Martinez, Tr. 203-04) This subsequent connection made by the ISP that provides access to the Internet is an "enhanced service" that is not a telecommunications service. The provision of this enhanced service, after the local telephone call to the ISP has been made, does not change the inherent local nature of that initial telephone call made to the ISP. As the FCC has stated:

ISPs alter the format of the information through computer processing applications such as protocol conversion and interaction with stored data, while the statutory definition of telecommunications only includes transmissions that do not alter the form of the content of the information sent. (footnote omitted) When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.

In the Matter of Federal-State Joint Board on Universal Service, Report and Order, FCC 97-157, CC Docket No. 96-45, rel. May 8, 1997, Para. 789. As with the definition under federal law, the definition of "telecommunications" under the Agreement only includes transmissions that do not alter the form or content of the information sent. Agreement, Part B, page 11.

Mr. Hendrix' claim that a telephone call to an ISP does not terminate at the ISP's premises is also hypocritical. The bottom line for BellSouth seems to be whether they are the one being billed or the one billing. BellSouth claims that when a BellSouth customer calls an MCI ISP customer in the same exchange that it is one continuous transaction. It is not a local call followed by an enhanced service. It is an interstate call to which access charges do not apply.

However, when a customer in a rural area has to make a call beyond his local calling area using an IXC to access an ISP who is a BellSouth customer, it is suddenly two parts again: a long distance call, for which BellSouth can charge access, followed by an enhanced service. It is no longer one continuous interstate call to which access charges do not apply. (Ex.7, Deposition of Jerry Hendrix, pp. 106-07) Why the difference? In the first case, BellSouth is being charged reciprocal compensation. In the second case, BellSouth is charging access.

b. Mutual Consent

BellSouth argues that because the parties never specifically mentioned ISP traffic that they could not have agreed to reciprocal compensation for that traffic. BellSouth's position is without merit. The parties did expressly agree to a definition of local traffic and they did expressly agree to compensate each other for traffic covered by that definition. Since the definition of local traffic encompasses ISP traffic, the parties must compensate each other. In any event, based on prior action of this Commission, it was clear at the time the Agreement was negotiated that ISP traffic was local traffic.

The definition of local traffic contained in the Agreement does not specifically mention any particular class of end users. The whole purpose of general terms and general definitions in contracts is so that the parties do not have to exhaustively list every conceivable item covered. If BellSouth wanted a particular exception to the general definition of local traffic, it had an obligation to raise it. To permit BellSouth to argue otherwise would render the Agreement meaningless. If MCImetro starts winning banks as end users, for example, will BellSouth claim that they never specifically discussed bank traffic with MCImetro and therefore there was no meeting of the minds that local traffic would include termination of calls to banks? Next

BellSouth may claim that it does not have to pay reciprocal compensation for traffic terminated to MCImetro on Mondays because the Agreement does not specifically mention Mondays and the parties never specifically discussed compensation for that particular day of the week. BellSouth is a huge company with legions of lawyers and technical experts. If it wanted any specific exceptions to the general definition of local traffic, it should have raised them.

This obligation to ask for a specific exception is particularly true in this case since the local nature of ISP traffic in Florida at the time the Agreement was negotiated and signed was already firmly established. See Docket No. 880423-TP, Order No. 21815. In its 1989 case on information services, this Commission stated:

Witness Payne [Southern Bell's witness] concludes that such "calls should continue to be viewed as local exchange traffic terminating at the ESP's location. Connectivity to a point out of state through an ESP should not contaminate the local exchange." We agree.

Order No. 21815, p. 24. Both parties to the Agreement are deemed to be aware of the Commission's prior decisions. Further, BellSouth's position of record with the Commission was that this traffic was local. As the BellSouth witness stated to this Commission in Docket No. 880423-TP:

Connections to the local exchange network for purposes of providing information service should be treated like any other local exchange service.

Id. at 25.

Mr. Hendrix attempts to explain away BellSouth's prior position by claiming that a subsequent FCC decision forced BellSouth to change its position. Of course, BellSouth never informed this Commission or MCImetro of any change in position, and Mr. Hendrix' attempted

explanation of that alleged change stretches credulity. He admits that in 1989 the Florida Commission ruled, consistent with the testimony of BellSouth's own witness, that service to ESPs (enhanced service providers, of which ISPs are a subset) was local. Then, Mr. Hendrix states, the FCC subsequently ruled that ESPs had a right to purchase local services at local rates and affirmed its prior ruling that access charges did not apply to ESPs. Amazingly, Mr. Hendrix argues that by so ruling, the FCC found, by implication, that service to ESPs was interstate service, thus contradicting and preempting the Florida Commission's earlier decision. (Ex. 7, Deposition of Jerry Hendrix, p. 100-01) Contrary to Mr. Hendrix' assertions, the FCC's decisions (local rates apply to ESPs and access charges do not apply) are perfectly consistent with Florida's (connections to an enhanced service is local).

In an attempt to bolster his assertion that BellSouth never would have agreed to pay reciprocal compensation for ISP traffic, Mr. Hendrix uses a hypothetical involving a BellSouth customer who uses the internet 2 hours a day where BellSouth is charged \$0.01 per minute in reciprocal compensation. Mr. Hendrix "concludes" that BellSouth could never have agree to pay compensation because it would result in BellSouth being charged \$36.00 per month and thus losing money on the customer. (Hendrix, Tr. 236) In essence, Mr. Hendrix argues that because the provisions BellSouth agreed to turned out to be bad for BellSouth (because the ALECs managed to out compete BellSouth and win a large number of ISP customers), BellSouth could not have intended to agree to them. Mr. Hendrix' argument is fundamentally flawed because it is premised on the belief that BellSouth is capable of seeing the future of the telecommunications market place and is incapable of making a bad business decision.

Further, Mr. Hendrix' example is misleading. The cost based reciprocal compensation rate set by this Commission for termination at an end office, and the rate in the MCI/BellSouth Agreement, is \$0.002 per minute, not \$0.01. (Ex. 7, Deposition of Jerry Hendrix, p. 108) See Attachment I, Table 1-2.³ Thus, Mr. Hendrix's \$36.00 ($\$0.01 \times 120 \text{ minutes} \times 30 \text{ days}$) should be \$7.20 ($\$0.002 \times 120 \times 30$). While one of the other Interconnection Agreements in this case apparently contains a \$0.01 rate, BellSouth apparently voluntarily agreed to this rate. Whether BellSouth agreed to this rate because they mistakenly thought that a rate five times higher than cost would give it some competitive advantage or whether BellSouth agreed to it without thinking at all, it is not the Commission's role to protect BellSouth from itself.

While BellSouth tries to claim that the parties did not mutually agree to treat ISP traffic as local traffic, MCImetro and BellSouth certainly mutually agreed to the definition of "Local Traffic" contained in the Agreement. In fact, it was BellSouth which proposed the definition. (Martinez, Tr. 205) MCImetro and BellSouth further mutually agreed to pay reciprocal compensation for telephone calls which met that definition of local traffic. As already explained, telephone calls to an ISP meet that definition. Had an exception been intended for ISP traffic (or for any other subset of local traffic), it would have been expressly included by the parties. No such exception is contained in the Agreement and no such exception was ever suggested by BellSouth. (Martinez, Tr. 205)

c. BellSouth Treats Traffic to Its Own ISP Customers As Local Traffic.

BellSouth treats phone calls to ISPs that subscribe to BellSouth service (as opposed to

³ \$0.002 is the cost-based rate set by the Commission in Docket No. 960846-TP.

ISPs that subscribe to local service provided by MCImetro) as local calls. BellSouth, like other ILECs, offers its own ISP customers service under local exchange tariffs. This means that an ISP that selects BellSouth as its carrier may purchase business lines from BellSouth's local exchange tariffs just like any other end user. The importance of this fact cannot be overstated -- BellSouth treats its own ISP customers like any other business end user, yet asks this Commission to rule that it may treat the ISP customers of its competitors as interstate access providers.

BellSouth treats traffic to its ISP customers as local for other purposes as well.

When a call originates from a BellSouth customer and terminates within the same local calling area to an ISP customers of BellSouth, BellSouth charges the end user customer for a local call based upon its local service tariff. The costs and revenues associated with service to ISPs and end user calls to ISPs are treated as local for purposes of jurisdictional separations.⁴ Similarly, BellSouth treats calls to ISPs as local calls for purposes of its own accounting and reporting processes. BellSouth's own treatment of ISP traffic makes plain that ISP traffic is local traffic, and as such, should be subject to the reciprocal compensation obligation. (Kouroupas, Tr. 97-98)

d. Like This Commission, The FCC Has Historically Treated ISP Traffic As Local Traffic. Further, Every Other State Commission and Court Which Has Addressed This Matter Has Found This Traffic to be Local.

The treatment of ISP traffic as local traffic for purposes of reciprocal compensation is consistent with the FCC's treatment of ISP traffic as local traffic in other areas, such as access charges. For example, the FCC has historically afforded the ISPs an exemption from paying

⁴ "Jurisdictional Separations" refers to the process whereby telecommunications costs are divided between federal and state jurisdictional authority. Crockett Telephone Co. v. FCC, 963 F.2d 1564, 1566 (D.C. Cir. 1992).

interstate access charges and currently authorizes ISPs to purchase service from incumbent local exchange carriers (ILECs) under local exchange tariffs as end users.⁵ Indeed, the FCC recently reaffirmed that ISP calls should not be treated as interexchange access traffic, and that ISPs should be considered end users for purposes of the access charge regime.⁶ By treating ISPs as end users under the existing pricing structure, the FCC has effectively ruled that ISP calls should be treated as local calls for access charge purposes. It is only logical and consistent to treat ISP calls as local calls for purposes of reciprocal compensation as well.

Numerous state commissions have also addressed this issue. All have flatly rejected the argument put forth by BellSouth, and all have found ISP traffic to be local and thus subject to reciprocal compensation. (Martinez, Tr. 196-97; Ex. 7, Deposition of Jerry Hendrix, p. 87)

Recently, the United States District Court for the Western District of Texas affirmed the decision of the Texas Public Utility Commission which found this traffic to be local. Southwestern Bell Telephone Company v. Public Utility Commission, Case No. MO-98-CA-43, U.S.D.C. for the Western District of Texas, Order of June 16, 1998. The Court confirmed that local calls terminating at ISP numbers were local traffic under the State Commission's jurisdiction and were subject to local reciprocal compensation payments.⁷ The judge's ruling rejected all of the

⁵ See, e.g., Amendments of Section 64.702 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4535 (1991); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Services Providers, 3 FCC Rcd 2631 (1988); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Services Providers, 2 FCC Rcd 4305, 4306 (1987).

⁶ See Access Charge Order, at ¶¶ 341-42; see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, First Report and Order and Further Notice of the Proposed Rulemaking, CC Docket No. 96-149, ¶ 120 (rel. Dec. 24, 1996) (ruling that the local call placed to an Information Service Provider is separate from the subsequent information service that is provided the consumer).

⁷ The Court agreed that ISPs were end users of local telecommunications services:

local Bell Company's arguments that connections to ISPs were jurisdictionally interstate and that the State Commission had no authority to approve reciprocal compensation on such connections.

A copy of the Texas District Court's decision is attached hereto as Attachment "A."

Issue 4: Under their Interconnection Agreement, are Intermedia and BellSouth required to compensate each other for transport and termination of traffic to ISPs? If so, what action, if any, should be taken?

MCI Position: No position.

II. CONCLUSION

For the foregoing reasons, the Commission should order BellSouth to pay to MCImetro all outstanding charges for reciprocal compensation. Further, on a going forward basis, BellSouth should be ordered to continue to compensate MCImetro for such traffic in accordance with the Agreement.

Thus, as end users, ISPs may receive *local calls* that *terminate* within the local exchange network. The FCC recognizes that ISPs are "providers of information service [that] use . . . [local exchange] networks to receive *calls* from their customers. Notice of Proposed Rulemaking, 11 F.C.C.R. 21354 at P288 (emphasis added). In the instant case, the "call" from Southwestern Bell's customers to Time Warner's ISPs terminates where the telecommunications service ends at the ISPs' facilities. As a technologically different transmission, the ISPs' information service cannot be a continuation of the "call" of a local customer.

Id. at 22 (emphasis original).

RESPECTFULLY SUBMITTED this 30 day of June, 1998.

HOPPING GREEN SAMS & SMITH, P.A.

By: Richard D. Melson

Richard D. Melson
Post Office Box 6526
123 South Calhoun Street
Tallahassee, FL 32314
904/222-7500

and

Dulaney L. O'Roark III
MCI TELECOMMUNICATIONS CORP.
780 Johnson Ferry Road, Ste. 700
Atlanta, GA 30342

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by *Hand Delivery or U.S. Mail this 1st day of May, 1998.

*Charles J. Pellegrini
FL Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Suite 370
Tallahassee, FL 32399-0850

Patrick K. Wiggins
Wiggins & Villacorta
2145 Delta Boulevard
Suite 200
Tallahassee, Florida 32303

*Nancy White
c/o Nancy Sims
BellSouth Telecommunications
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

Kenneth A. Hoffman
William B. Willingham
Rutledge, Ecenia, Underwood
Purnell & Hoffman
215 South Monroe Street
Suite 420
Tallahassee, FL 32302

Floyd R. Self
Messer Caparello & Self, P.A.
215 South Monroe Street
Suite 701
Tallahassee, FL 32301

Anthony P. Gillman
Kimberly Caswell
c/o Richard M. Fletcher
GTE Florida Incorporated
106 E. College Ave., Ste. 1440
Tallahassee, FL 32301-7704

Richard M. Fletcher

ATTORNEY

Jan-22-98 04:10P Waller Creek Communicatio 512-4857988

JUN -17' 98 (WED) 16:41 ATTORNEY GENERAL NATURAL RESOURC TEL: 512 520 0911
06/17/98 WED 16:32 FAX 5: 20 5838 Bickerstaff Heat

AM

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

FILED

JUN 18 1998

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY SM
DEPUTY CLERK

SOUTHWESTERN BELL)
TELEPHONE COMPANY,)
PLAINTIFF,)
v.)
PUBLIC UTILITY COMMISSION OF)
TEXAS; PAT WOOD, III; JUDY)
WALSH; PATRICIA A. CURRAN;)
TIME WARNER COMMUNICATIONS)
OF AUSTIN, L.P.; TIME WARNER)
COMMUNICATIONS OF HOUSTON,)
L.P.; AND FIBRCOM, INC.,)
DEFENDANTS.)

MO-98-CA-43

ORDER

BEFORE THE COURT, in the above-captioned cause of action, is Plaintiff Southwestern Bell Telephone Company's Complaint for Declaratory and Injunctive Relief, filed March 19, 1998. Also before the Court is Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed May 4, 1998; Defendant Public Utility Commission of Texas and its Commissioners' Proposed Conclusions of Law, filed May 7, 1998; and Defendant Time Warner's Proposed Conclusions of Law, filed May 7, 1998. In a hearing conducted on April 16, 1998, the Court also heard arguments of counsel in this case and denied Plaintiff's Motion for Preliminary Injunction, filed April 1, 1998. After considering the arguments of counsel and amicus curiae, the agency record, and the applicable standard of review, it is the Court's opinion that the following Order is appropriate.

Attachment A

592-P

Jun-22-98 04:11P Waller Creek Communicatio 512-4857988

JUN -17 98 (WED) 16:41 ATTORNEY GENERAL NATURAL RESOURC TEL:512 320 0911
06/17/98 WED 15:32 FAX 51 20 5838 Bickerstaff Heath

P. 004

004

I. BACKGROUND

Plaintiff Southwestern Bell Telephone Company's ("Southwestern Bell") suit for declaratory and injunctive relief is essentially an appeal of the Texas Public Utility Commission's ("PUC") decision of February 27, 1998. In its decision against Southwestern Bell, the PUC (1) characterized connections to Internet Service Providers as "local traffic" and (2) held that Southwestern Bell's interconnection agreement with Time Warner Communications of Austin, L.P.; Time Warner Communications of Houston, L.P.; and Fibrecom, Inc. (collectively, "Time Warner") required Southwestern Bell to compensate Time Warner for "local calls" connecting Southwestern Bell's customers to Time Warner's business customers which are Internet Service Providers ("ISPs"). Southwestern Bell contends that (1) the PUC was without jurisdiction to approve an interconnection agreement involving connections to ISPs, (2) the connections to ISPs are properly classified as "interstate calls" falling under the regulatory jurisdiction of the Federal Communications Commission (the "FCC"), and (3) the PUC erred in finding that Southwestern Bell's interconnection agreement with Time Warner also set rates of compensation for connections to ISPs.

A. Southwestern Bell and Time Warner's Interconnection Agreements

The interconnection agreements between Southwestern Bell and Time Warner are at the heart of the instant case. Southwestern Bell and Time Warner are "local exchange carriers" that provide local telecommunication services within an "exchange" area.¹ 47 C.F.R. §51.5 (1997).

¹Within an exchange, telecommunication customers may make local calls without "0" or "1" being dialed. Abbreviations and Terms Used in Pleadings and Docs. at 1. Furthermore, in this case, Southwestern Bell is the incumbent local exchange carrier and Time Warner is a competitive local exchange carrier seeking to gain a greater share of the local telecommunications market. See 47 C.F.R. §51.5 (1997).

Jun-22-98 04:12P Waller Creek Communicatio 512-4857988

JUN -17 98(WED) 16:42 ATTORNEY GENERAL NATURAL RESOURC TEL:512 320 0911
06/17/98 WED 16:32 FAX 61 20 5838 Bickerstaff HeathP. 005
005

In order for customers of Southwestern Bell and Time Warner to "call" one another, the two telecommunication carriers must "interconnect" their individual telecommunications networks both physically and contractually. Id. Through "reciprocal compensation" provisions in the interconnection agreements, the cost of providing access for a customer's call that originates from one local exchange carrier's network and then terminates in another local exchange carrier's network is attributed to the local exchange carrier from which the call originated. 47 C.F.R. §§ 51.701(e), 51.703 (1997). Such "local" calls are different from long-distance calls which must pass through "interexchange" switches that allow calls to pass from one exchange into another exchange and involve "access charges" instead of reciprocal compensation fees. 47 C.F.R. §69.2 (1997); see also Public Utility Comm'n v. ATT&T Communications, 777 S.W.2d 363 (Tex. 1989) (describing interstate and intrastate access charges).

In the instant case, Southwestern Bell and the Time Warner defendants entered into two interconnection agreements on July 17, 1996, and on August 19, 1997.² The most relevant portions of the agreements help define the nature of Southwestern Bell's reciprocal compensation plan with Time Warner. First, both interconnection agreements define Southwestern Bell's and Time Warner's customers as "end users":

§1.19 End User - means a third-party residence or business that subscribes to telecommunications services provided by either of the Parties. (First Agreement).

²The July 17, 1996 agreement was between Southwestern Bell and Time Warner Communications of Austin, L.P. Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, July 17, 1996 ("First Agreement"). The Texas PUC approved the agreement on October 11, 1996. The second agreement modified some of the provisions of the first agreement and added Time Warner Communications of Houston, L.P.; and Fiberoptics, Inc. to the interconnection agreement. The parties submitted the second agreement for PUC approval on August 19, 1997. Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, August 19, 1997 ("Second Agreement").

Jun-22-98 04:14P Waller Creek Communicatio 512-4857988

P.06

JUN -17 98 (WED) 16:42 ATTORNEY GENERAL NATURAL RESOURC TEL: 512 320 0911
06/17/98 WED 16:32 FAX 512 70 5834 Bickerstaff Heath

P.006

006

§1.31 End User -- means a third-Party residence or business that subscribes to telecommunications services provided by either of the Parties, or by another telecommunications service provider. (Second Agreement).

Second, both agreements define "local traffic" based upon the origination and termination of telephone calls within a local calling area or exchange:

§1.31 Local Traffic --means traffic which originates and terminates within a SWBT exchange including mandatory local calling area arrangements. Mandatory Local Calling Area is an arrangement that requires end users to subscribe to a local calling area beyond their basic exchange serving area. (First Agreement).

§1.33 Local Traffic --Local Traffic, for purposes of intercompany compensation, is if (i) the call originates and terminates in the same SWBT exchange area; or (ii) originates and terminates within different SWBT Exchanges that share a common mandatory local calling area, e.g., mandatory Extended Area Service (EAS), mandatory Extended Local Calling Service (ELCS), or other like types of mandatory local calling scopes." (Second Agreement).

Third, the First and Second Agreements provide for reciprocal compensation for the transport and termination of local traffic between Southwestern Bell's and Time Warner's end users on a per-minute-of-usage rate.² First Agreement §5.05; Second Agreement §5.3.2.

Respectively on July 17, 1996, and on August 19, 1997, Southwestern Bell and Time Warner presented their negotiated agreements for the Texas PUC's approval stating that no outstanding issues existed between the parties requiring arbitration.⁴ However, Southwestern Bell contends that in June of 1997, during the negotiation of the Second Agreement, it sent letters to

²The per-minute-of-usage rate ("MOU") is \$0.00975 per MOU for tandem-routed traffic and \$0.00720 per MOU for end-office-routed traffic. First Agreement §5.05; Second Agreement §5.3.2.

⁴Joint Application of Southwestern Bell Telephone Co. and Time Warner Comm. of Austin, L.P., for Approval of Interconnection Agreement under the Federal Act and EUBA 95 at 1 (July 17, 1996); Application of Time Warner Comm. of Austin, L.P., Time Warner Comm. of Houston, L.P., Fibronet, Inc. and Southwestern Bell Telephone Co. for Approval of Interconnection Agreement under EUBA and the Federal Act at 2 (August 19, 1997).

Jun-22-98 04:15P Waller Creek Communicatio 512-4857988

JUN. -17' 98 (WED) 16:42 ATTORNEY GENERAL NATURAL RESOURC TEL: 512 320 0911
06/17/98 WED 15:33 FAX 512 4857988 Bickerstaff HeathP. 007
007

both the PUC and Time Warner stating that Internet calls were not local traffic, and therefore were not subject to the provisions of the First Agreement requiring compensation for the termination of local calls. See Southwestern Bell Telephone Co.'s Original Complaint for Declaratory and Injunctive Relief Ex. 1 at 2 (letter of June 9, 1997, from Jack Frith of Southwestern Bell to Tom Staebell, Director of Interconnect Management for Time Warner Communications). Nevertheless, the parties failed to include provisions in the Second Agreement dealing with telecommunications to ISPs. Indeed, neither interconnection agreement explicitly includes provisions for Internet connections nor even mentions the Internet. Subsequently, Southwestern Bell refused to pay termination fees for calls that its customers had made to Time Warner's ISP customers.

B. The Internet

The Internet "is an international network of interconnected computers." Reno v. ACLU, 117 S.Ct. 2329, 2334 (1997). Essentially, the "Internet is a distributed packet-switched network, which means that information [traveling along the network] is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." Report to Congress, In Re Federal-State Joint Board on Universal Service, FCC 98-67, at ¶ 64 (Released April 10, 1998). "Even two packets from the same message may travel over different physical paths through the network . . . [which] enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the server where the information resides." Id.; Reno, 117 S.Ct. at 2335.

Today, the Internet "enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." Reno, 117 S.Ct. at 2334. To access the Internet, individuals can subscribe to the services of ISPs. The ISPs pay their own

Jun-22-98 04:23P Waller Creek Communicatio 512-4857988

P.02

JUN. -17' 98 (WED) 16:42

ATTORNEY GENERAL NATURAL RESOURC

TEL:512 320 0911

P.008

06/17/98 WED 15:33 FAX 512 40 5638

Bickerstaff Heath

006

telecommunications service provider for the telecommunications services that allow an ISP's customers to call it. If an ISP is located in the same "local" calling area, an ISP's customer may dial a seven-digit number over ordinary telephone lines to the ISP facility for a flat monthly fee or on a usage-sensitive basis.⁵ The ISP's modem then converts the analog messages from its customers into data "packets" that are sent through the Internet and its host computers and servers. See App. A to Pl.'s Application for Prelim. Inj. Ex. 45 at 3 (January 16, 1998 letter of America Online, Inc.). Finally, when the host computers and servers send information back to the ISP, the ISP converts the information back to analog form to be transmitted over the telephone network back to the ISP's customer. *Id.*

C. The Texas PUC Decision

On October 7, 1997, Time Warner filed a Complaint and Request for Expedited Ruling with the Texas PUC and against Southwestern Bell. Time Warner alleged that Southwestern Bell had breached its interconnection agreements when it refused to pay termination charges for Internet traffic initiated by Southwestern Bell customers and directed to the ISPs that were Time Warner customers. Southwestern Bell, however, alleged that the PUC did not have jurisdiction to arbitrate the ISP issue because the ISP traffic was jurisdictionally interstate in nature and that the interconnection agreements excluded "calls" to ISPs from the reciprocal compensation provisions.

The PUC referred Time Warner's complaint to an administrative law judge, who was

⁵ See Haran Craig Resbas, *The Impact of Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers*, 16 TEMP. ENVTL. L. & TECH. J. 49, 57-60, 68-70 (1997) (describing local telephone connections to ISPs).

Jun-22-98 04:24P Waller Creek Communicatio 512-4857988

JUN. -17' 98(WED) 16:43 ATTORNEY GENERAL NATURAL RESOURC TEL:512 520 0911
06/17/98 WED 16:33 FAX 512 0 8638 Bickerstaff Heath P. 009
008

designated by the PUC to act as Arbitrator on the question of how Internet traffic should be treated. On January 7, 1998, the Arbitrator ruled in favor of Southwestern Bell that the ISP traffic was jurisdictionally interstate, not local, and therefore Southwestern Bell did not owe Time Warner any transport and termination charges for Internet calls. Arbitration Award, PUC Docket No. 18082, at 4-5 (January 7, 1998) ("Arbitration Award"). Furthermore, the Arbitrator found that Southwestern Bell had not agreed in its interconnection agreements to treat Internet traffic as local, and that Southwestern Bell had not waived its contentions by failing to seek arbitration of the issue. Id. at 23-26.

On February 27, 1998, the PUC issued its Order reversing the Arbitrator's ruling. Specifically, the PUC concluded that "Internet service via the traditional telecommunications network involves multiple components." PUC Order, PUC Docket No. 18082, at 4 (February 27, 1998) ("PUC Order"). The PUC determined that Internet service is divided into an information service component and a traditional telecommunications component. Id. Thus, in cases where the ISP location is within the local calling area, the PUC had jurisdiction over the "telecommunications service component, rather than the information service component," of the Internet connection. Id. Furthermore, the PUC held that the interconnection agreements were not ambiguous because the "language in dispute clearly hinge[d] upon the definition of 'local traffic' and an interpretation of the point at which traffic 'terminates.'" Id. at 5. Thus, the PUC ordered Southwestern Bell to pay reciprocal compensation fees to Time Warner prospectively and retroactively, with interest, for the "local calls that terminate to [Time Warner] customers, including such customers that are ISPs." Id.

Jun-22-98 04:25P Waller Creek Communicatio 512-4857988

JUN -17' 98 (WED) 16:43 ATTORNEY GENERAL NATURAL RESOURC TEL:512 520 0911
06/17/98 WED 16:34 FAX 512 4857988 Bickerstaff Reath

D. Southwestern Bell's Application for Preliminary Injunction

On April 1, 1998, Southwestern Bell filed an Application for Preliminary Injunction with this Court asserting that the PUC's ruling would require Southwestern Bell to pay as much as \$421 monthly in termination fees for Internet calls by Southwestern Bell customers to ISPs who are Time Warner customers although Southwestern Bell receives only about \$12 per month in regulated rates from its basic residential customers. Southwestern Bell further alleged that the PUC's ruling would amount to losses for Southwestern Bell of \$400,000 a month.⁴ The PUC and Time Warner opposed Southwestern Bell's request for preliminary injunctive relief, asserting that the PUC's decision to treat calls to ISPs as local was legally correct, but also contending that Southwestern Bell had not shown irreparable harm or otherwise met the standards for temporary injunctive relief. At an extensive hearing on April 16, 1998, the Court denied Southwestern Bell's application for temporary injunction. On April 29, 1998, the parties filed a stipulation as to the contents of the PUC's administrative record and the other evidence now before the Court, and stated that no party intended to present additional testimony. Accordingly, the Court is now rendering a final decision disposing of all remaining issues in this case.

II. STANDARD OF REVIEW

Congress has provided that the federal district courts have jurisdiction to review a State agency's approval, rejection, or arbitration of an interconnection agreement. GTE Northwest, Inc. v. Nalson, 969 F.Supp. 654, 656 (W.D. Wash 1997); U.S. West Communication, Inc. v. His,

⁴Southwestern Bell also asserts that other carriers situated similarly to Time Warner have or will seek the benefit of the PUC's Time Warner Internet ruling, either as precedent, or through 'most favored nation' rights, and that the end result of these actions may be as much as \$60 million in unrecoverable losses for Southwestern Bell in the coming year.

Jun-22-98 04:26P Waller Creek Communicatio 512-4857988

JUN -17 98 (WED) 16:43 ATTORNEY GENERAL NATURAL RESOURC TEL:512 320 0911
06/17/98 WED 18:34 FAX 612 0 8638 Bickerstaff Heath

986 F.Supp. 13, 15 (D. Colo. 1997). Thus, 47 U.S.C. §252(e)(6) mandates that:

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. §252(e)(6) (Supp. 1998) (emphasis added).

Congress does not explicitly state the full scope or standard of review which courts retain over state agency interconnection decisions. *Id.* However, the language of §252(e)(6) appears "clear in limiting [a] court's jurisdiction to determining whether the agreement meets the requirements of the [Telecommunications] Act [of 1996]." GTE Northwest Inc. v. Hamilton, 971 F.Supp. 1350, 1354 (D. Ore. 1997). Furthermore, "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [the Supreme] Court has held that consideration is to be confined to the administrative record and that no de novo proceeding may be held." United States v. Carlo Bianchi and Co., 373 U.S. 709, 715 (1963); Woods v. Fed. Home Loan Bank Bd., 826 F.2d 1400, 1406 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988). The Supreme Court has noted that a "fundamental principle[] of judicial review of agency action" is to place the "focal point for judicial review [upon] the administrative record already in existence, not some new record made initially in the reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985). Thus, the scope of this Court's review is limited to determining whether the PUC complied with the mandates of the based upon the state agency record. See TCG Milwaukee, Inc. v. Pub. Serv. Comm'n of Wisconsin, 980 F.Supp. 992, 998 (W.D. Wis. 1997) ("Generally, review proceedings are confined to the record created in the administrative agency.").

Jun-22-98 04:28P Waller Creek Communicatio 512-4857988

JUN -17' 98 (WED) 16:44

ATTORNEY GENERAL NATURAL RESOURC

TEL:512 320 0911

06/17/98 WED 15:34 FAX 512 0 8638

Bickerstaff Heath

P.012

012

Furthermore, in appeals of agency decisions limited to the administrative record, a court has essentially two standards of review. First, a court must review *de novo* issues of federal law. Abbeville Gen. Hosp. v. Ramsey, 3 F.3d 797, 803 (5th Cir. 1993), *cert. denied*, 511 U.S. 1032 (1994). Generally, "federal courts do not defer to state agencies on questions of federal law since such agencies are not subject to Congressional oversight and they lack expertise in interpreting and implementing federal law." U.S. West Communication Inc. v. Hix, 986 F.Supp. 13, 16 (D. Colo. 1997); Abbeville Gen. Hosp., 3 F.3d at 803.⁷ Therefore, using *de novo* review, the Court's "first inquiry . . . in reviewing the interconnection agreements approved by the PUC is whether the PUC's action was procedurally and substantively in compliance with the [Telecommunications] Act [of 1996] and the implementing regulations." U.S. West Communication, Inc., 986 F.Supp. at 19; Abbeville Gen. Hosp., 3 F.3d at 803.

Second, if the agency acted in compliance with federal law, the Court's standard of review is whether the administrative agency acted in an arbitrary or capricious manner, unsupported by substantial evidence. Carlo Bianchi and Co., 373 U.S. at 715 (1963); Abbeville Gen. Hosp., 3 F.3d at 804. In United States v. Carlo Bianchi and Co., 373 U.S. 709, 715 (1963), the Supreme Court observed that "the standards of review adopted in the Wunderlich Act - 'arbitrary,' 'capricious,' and 'not supported by substantial evidence' - have frequently been used by Congress and have consistently been associated with a review limited to the administrative record." *Id.* Moreover, "[t]he term 'substantial evidence' in particular has become a term of art to describe the

⁷ Unlike review of state agency decisions, federal courts give a more "deferential review of a federal agency's interpretation of federal law [because of] its 'expertise and familiarity . . . with [the] subject matter of its mandate and the need for coherent and uniform construction of federal law nationwide.'" Abbeville Gen. Hosp. v. Ramsey, 3 F.3d 797, 803 (5th Cir. 1993) (quoting Turner v. Paralee, 869 F.2d 140 (2d Cir. 1989)).

Jun-22-98 04:29P Waller Creek Communicatio 512-4857988

P.07

JUN -17' 98 (WED) 16:44

ATTORNEY GENERAL NATURAL RESOURC

TEL:512 520 0911

P.013

06/17/98 WBO 16:36 FAX 617 70 5038

Bickerstaff Heath

2013

basis on which an administrative record is to be judged by a reviewing court." *Id.* "This standard goes to the reasonableness of what the agency did on the basis of the evidence before it, for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body." *Id.* Thus, "[i]f the PUC's action is found to be in compliance with federal law and regulations, then the PUC will be given deference, through application of the arbitrary and capricious standard, as to all other issues." U.S. West Communication, Inc., 986 F.Supp. at 19; see, e.g., Abbeville Gen. Hosp., 3 F.3d at 804 (applying arbitrary and capricious standard to state agency findings if agency acted in compliance with federal law).

III. DISCUSSION

"[W]e realize that attempting to apply established trademark law in the fast-developing world of the internet is somewhat like trying to board a moving bus."

—Judge Van Graafeiland in Bensusan Restaurant Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997).

A. The Telecommunications Act of 1996

Congress enacted the Telecommunications Act of 1996 (the "Act") to "promote competition in the local telephone service market." Reno v. ACLU, 117 S.Ct. 2329, 2338 (1997); GTE Northwest Inc. v. Hamilton, 971 F.Supp. 1350, 1352 (D. Ore. 1997); W. PCS II v. Extraterritorial Zoning Auth., 957 F.Supp. 1230, 1237 (D.N.M. 1997); GTE South Inc. v. Morrison, 957 F.Supp. 800, 801 (E.D.Va. 1997).⁶ Therefore, "[t]he Act mandates that existing local exchange carriers . . . allow interconnecting services providers access to local networks in

⁶See Gary J. Guzzi, Note, Breaking Up the Local Telephone Monopolies: The Local Provisions of the Telecommunications Act of 1996, 39 B.C.L. Rev. 151, 151-58 (1997) (describing how the 1996 Act supports local competition).

order to provide competing local telephone service." GTE South, Inc., 957 F.Supp. at 802; 47 U.S.C. 251(c) (Supp. 1998). Specifically, the Act requires that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. §251(a)(1) (Supp. 1998). Moreover, the Act mandates that incumbent local exchange carriers and competing local exchange carriers negotiate in good faith with each other regarding agreements to interconnect their telecommunication networks. 47 U.S.C. §251(c) (Supp. 1998).⁹

To oversee the implementation of the Act's interconnection mandate, Congress has specifically authorized the States to review the interconnection agreements that incumbent local exchange carriers make with competing local exchange carriers. 47 U.S.C. §252 (Supp. 1998). The telecommunications carriers may either (1) enter voluntary negotiations with each other for interconnection agreements, or (2) enter interconnection agreements through arbitration by a State commission. 47 U.S.C. §252 (a), (b) (Supp. 1998). In either case, however, any

⁹Title 47 U.S.C. §251(c) states that each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith . . . the particular terms and conditions of agreements to fulfill the duties described in [47 U.S.C. §251(b), (c)]. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [47 U.S.C. §§ 251, 525].

47 U.S.C. §251(c) (Supp. 1998).

Jun-22-98 04:32P Waller Creek Communicatio 512-4857988

P.09

JUN -17' 98 (WED) 16:44

ATTORNEY GENERAL NATURAL RESOURC

TEL: 512 520 0911

P. 015

06/17/98 WED 16:36 FAX 51 20 5836

Bickerstaff Heath

016

"interconnection agreements adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. §252(e)(1) (Supp. 1998). When the interconnection agreement or any portion of it has been adopted by negotiation, the State commission may only reject the agreement if "the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or . . . the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." 47 U.S.C. §252(e)(2)(A) (Supp. 1998). An arbitrated agreement, however, must conform to the requirements of 47 U.S.C. §251 and §252(d). 47 U.S.C. §252(e)(2)(B) (Supp. 1998).

Therefore, the Telecommunications Act of 1996 governs the case at bar. Southwestern Bell is a telecommunications carrier, a local exchange carrier, and an incumbent local exchange carrier under federal law. 47 U.S.C. §§153 (26), (44), and 251(a)-(c) (Supp. 1998). Moreover, Time Warner is a telecommunications carrier and local exchange carrier. 47 U.S.C. §§153 (26), (44) (Supp. 1998). The Act also classifies the PUC as a "state commission" which "has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. §153(41) (Supp. 1998). And finally, the instant case involves a dispute over the terms of *negotiated interconnection agreements* allowing Southwestern Bell customers to "call" Time Warner customers over their connected networks. 47 U.S.C. §§251, 252 (Supp. 1998). Accordingly, the Court will examine (1) whether the PUC complied with federal law when it ruled that the interconnection agreements governed "local" phone calls from Southwestern Bell's customers to Time Warner's ISP customers, and (2) whether the PUC acted arbitrarily and capriciously when it ruled that the interconnection agreements did not exclude calls to ISPs.

JUN -17 98 (WED) 16:45

ATTORNEY GENERAL NATURAL RESOURC

TEL: 512 320 0911

06/17/98 WED 16:36 FAX 512 20 5838

Bickerstaff Heath

015
P. 10P. 016
010

B. Jurisdiction of PUC: Interstate or Local?

The Plaintiff contends that the PUC lacked the jurisdiction under federal law to regulate and set rates for communications accessing the Internet. Furthermore, the Plaintiff contends that Internet connections must be treated as interstate calls, not local calls. The Court will consider these contentions together because --like the local telecommunication networks of the parties in this case-- the Plaintiff's arguments are necessarily interconnected. The 1996 Act clearly requires state commissions like the Texas PUC to approve the interconnection agreements of local phone service companies. 47 U.S.C. §252(e)(1) (Supp. 1998). Furthermore, "the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved." Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997), cert. granted, 118 S.Ct. 879 (1998). However, if telecommunication connections to ISPs are *not* considered local phone calls, then only the FCC, not the PUC, had jurisdiction over the instant case. See 47 U.S.C. § 151 (Supp. 1998) (Congress created the FCC to regulate "interstate and foreign commerce in communication by wire and radio."). Thus, this Court must determine *de novo* whether federal law treats Internet connections as either interstate or local intrastate phone calls.

Whether modem links to ISPs should be considered local telephone calls presents an issue of first impression for this Court. However, the Court is not without any guidance. Generally, unlike the review of state agency decisions, a federal court will give much deference to the FCC's interpretation of the Telecommunications Act of 1996. See Pas. Gas Transmission Co. v. Fed. Energy Regulation Comm'n, 998 F.2d 1303, 1308 (5th Cir. 1993) (citing Cheyton U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S.

Jun-22-98 04:35P Waller Creek Communicatio 512-4857988

JUN -17' 98 (WED) 16:45 ATTORNEY GENERAL NATURAL RESOURC TEL: 512 320 0911
06/17/98 WED 15:38 FAX 512 1 8638 Bickerstaff HeathP. 017
017

1, 16-17 (1965)) (federal courts give federal agencies much deference in the interpretation of their own regulations, rulings, and enabling statutes); Citizens for Fair Util. Reg. v. U.S. Nuclear Reg. Comm'n., 898 F.2d 51, 54 (5th Cir. 1990), cert. denied, 498 U.S. 896 (1990). Moreover, as is often the case with new technology, the Internet has increasingly become a presence in the federal courts. See, e.g., Reno v. ACLU, 117 S.Ct. 2329 (1997) (applying First Amendment analysis to Internet communications); Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997) (dealing with personal jurisdiction and trademark law over the Internet).

1. Interstate Characteristics of the Internet

Because of the Internet's ability to efficiently transmit information all over the world, transactions over the Internet may involve interstate commerce. For example, in United States v. Carroll, 105 F.3d 740 (1st Cir. 1997), cert. denied, 117 S.Ct. 2424 (1997), the First Circuit Court of Appeals found that transmitting sexually explicit photographs over the Internet satisfied the "interstate commerce" requirement of the federal child pornography statutes. Id. at 742. The circuit court reasoned that "[t]ransmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." Id.; See also United States v. Tucker, 136 F.3d 763, 763-64 (11th Cir. 1998) (downloading sexually explicit photos over Internet supported interstate commerce requirement). Moreover, in trademark infringement cases, the federal courts have recognized that firms using the Internet to conduct business in other states may subject themselves to the personal jurisdiction of those states. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997); Bensusan Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997); Planned Parenthood Fed'n of Am., Inc. v. Bucci, 1997 WL 133313 at *3 (S.D.N.Y. 1997) ("The nature of the Internet indicates that

Jun-22-98 04:36P Waller Creek Communicatio 512-4857988

JUN -17' 98 (WED) 16:45 ATTORNEY GENERAL NATURAL RESOURC TEL: 512 320 0911
09/17/88 WED 16:36 FAX 512 70 8036 Bickerstaff Heath

establishing a typical home page on the Internet, for access to all users, would satisfy the Lanham Act's 'in commerce' requirement.").

To further determine whether a communication service is properly "interstate" and accordingly under the jurisdiction of the FCC, courts generally examine the "nature" of the communication, rather than focusing upon the physical location of the communication facilities used to complete a call. For instance, in National Ass'n of Regulatory Utility Commissioners v. Federal Communications Commission, 746 F.2d 1492 (D.C. Cir. 1984), the District of Columbia Circuit Court of Appeals held that the FCC had the authority to regulate the use of intrastate Wide Area Telecommunications Services ("WATS") used to complete interstate communications. *Id.* at 1501. The D.C. Circuit emphasized that the "dividing line between the regulatory jurisdictions of the FCC and states depends on 'the nature of the communications which pass through the facilities [and not on] the physical location of the lines.'" *Id.* at 1498. "Thus purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use." *Id.*; see also Sprint Corp. v. Evans, 846 F.Supp. 1497, 1500-01 (M.D. Ala. 1994) (800-number calls originating within one state and being completed in other states "involve interstate communications within the meaning of the Communications Act."); United States v. AT&T Co., 57 F.Supp. 451, 453-3 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945) (despite two-step process first connecting call to local telephone service and then connecting call to out-of-state destination, the call was considered a single interstate communication regulated by the FCC).

The FCC has likewise rejected arguments that certain telephone calls using intrastate components to complete interstate calls should be treated as if consisting of two different

jurisdictional transactions. For example, in In Re Southwestern Bell Telephone Co., CC Docket No. 88-180 (Released April 22, 1988). Southwestern Bell argued that "a credit card call should be treated for jurisdictional purposes as two calls: one from the card user to the (interexchange carrier's) switch, and another from the switch to the called party." *Id.* at ¶25. The FCC, however, rejected Southwestern Bell's reasoning and concluded that "[s]witching at the credit card switch is an *intermediate step in a single end-to-end communication.*" *Id.* at ¶28 (utilizing rationale of Nat'l Ass'n of Regulatory Util. Comm'rs v. Fed. Communications Comm'n., 746 F.2d 1492 (D.C.Cir. 1984)) (emphasis added). Also, in In Re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 F.C.C.R.1619 (FCC 1992), the Georgia Public Service Commission argued that "BellSouth's voice mail service is a purely or predominantly intrastate service . . . [because] when the voice mail service is accessed from out-of-state, two jurisdictional transactions take place: one from the caller to the telephone company switch that routes the call to the intended recipient's location, which is interstate, and another from the switch forwarding the call to the voice mail apparatus and service, which is purely intrastate." *Id.* at ¶8 (citations omitted). Nevertheless, the FCC found that the "fact that the facilities and apparatus used to provide BellSouth's voice mail service may be located within a single state [did] not affect [the FCC's] jurisdiction." *Id.* at ¶12. The FCC reasoned that an "out-of-state call to BellSouth's voice mail service is a jurisdictionally interstate communication, just as is any other out-of-state call to a person or service." *Id.*

2. FCC's Treatment of the Internet: A Unique Creature

In the instant case, the Plaintiff contends that an analysis of the "nature" of the communication, rather than the physical location of the communication facilities used to complete

Jun-22-98 04:39P Waller Creek Communicatio 512-4857988

JUN -17 98 (WED) 16:46 ATTORNEY GENERAL NATURAL RESOURC TEL: 512 520 0911
06/17/98 WED 16:37 FAX 51 20 5838 BICKERSTAFF Heath P. 021
020

a call, logically leads to the conclusion that all aspects of Internet communications, including the seven-digit modem "dial up" to ISPs, must be considered "interstate" and within the jurisdiction of the FCC. The Court, however, disagrees. Contrary to the FCC's treatment of voice mail and other telephone services, the FCC has *not* explicitly categorized Internet use via local phone connections as a single end-to-end communication. Indeed, the FCC appears to define the very nature of Internet connections differently from interstate long-distance calls. For example, in the FCC's Report and Order, In Re Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776 (Released May 8, 1997) ("Report and Order"), the FCC concluded that "Internet access consists of more than one component." *Id.* at ¶ 83. The FCC reasoned that "Internet access includes a network transmission component, which is the connection over a [local exchange] network from a subscriber to an Internet Service Provider, in addition to the underlying information service." *Id.* Thus, the Texas PUC in the case at bar concluded that it had jurisdiction over "the telecommunications service component, rather than the information service component," of an Internet subscriber's access to the Internet. PUC Order at 4.¹⁰

The two separate components do not exist merely as a matter of semantics. Very real

¹⁰Other state commissions have made similar determinations. See, e.g., In Re Brooks Fiber Communications of Michigan, Case No. U-11178 at 17 (Mich. Pub. Serv. Comm'n 1998) ("A call using a local seven-digit telephone number to reach an ISP is local traffic subject to reciprocal compensation under the interconnection agreements for all minutes of use."); Pet. of the S. New England Tel. Co. for a Declaratory Ruling Concerning Internet Serv. Provider Traffic, Docket No. 97-05-22 at 11 (Conn. Dept. of Publ. Util. Control 1997) ("There is no difference between an ISP and SNET's other local exchange customers. Traffic carried between SNET's end user customers and ISPs within the same local calling area is local in nature and, therefore, subject to the mutual compensation arrangements."); Final Order of Pet. of Cox Virginia Telecom. Inc., Case No. PUC970069 at 2 (Va. St. Corp. Comm'n 1997) ("Calls that are placed to a local ISP are dialed by using the traditional local-service, seven-digit dialing sequence. Local service provides the termination of such calls at the ISP, and any transmission beyond that point presents a new consideration of service(s) involved.")

Jun-22-98 04:41P Waller Creek Communicatio 512-4857988

JUN -17' 98 (WED) 16:46
06/17/98 WED 16:37 FAX 512 20 5638

ATTORNEY GENERAL NATURAL RESOURC
Bickerstaff Heath

TFI: 512 320 0911

P. 022
021

technological differences underlie the FCC's two-component treatment of Internet activity.¹¹ Under the 1996 Act, Congress has defined "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153 (43) (Supp. 1998). On the other hand, an "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153 (20) (Supp. 1998).

Utilizing Congress's definitions for "telecommunications" and "information services," the FCC has found that "Internet access services are appropriately classed as information, rather than telecommunications, services." Report to Congress, In Re Federal-State Joint Bd. on Universal Serv., FCC 98-67 at ¶ 73 (Released April 10, 1998) ("Report to Congress"). "Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport." *Id.* Moreover, unlike a telecommunications service, "[t]he Internet is a distributed packet-switched network . . . [where] information is split up into small chunks or 'packets' that are individually routed through the

¹¹In its decision to not apply interstate access charges to ISPs, the FCC noted that, "given the evolution in ISP technologies and markets since we first established [interstate per-minute] access charges in the early 1990s, it is not clear that ISPs use the public switched network [in a manner analogous to LDCs [long-distance interexchange carriers]]." First Report and Order, In Re Access Charge Reform, 12 F.C.C.R. 15982 at ¶345 (Released May 16, 1997). Thus, one cannot describe Internet access as equivalent to long-distance interexchange charges simply because of the ability to use the Internet to gather information from around the world.

Jun-22-98 04:43P Waller Creek Communicatio 512-4857988

JUN -17' 98(WED) 16:47

ATTORNEY GENERAL NATURAL RESOURC

TEL: 512 320 0911

06/17/98 WED 16:37 FAX 51 20 5838

Bickerstaff Heath

most efficient path to their destination." *Id.* at ¶ 64.¹² Indeed, although the Internet provides individuals with the ability to perform a multitude of tasks like "e-mail" which may resemble telecommunications, the FCC has determined that the Internet technologically still remains as an information service:

Internet access providers typically provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsgroups, electronic mail clients, Telnet applications, and others. When subscribers store files on Internet service provider computers to establish "home pages" on the World Wide Web, they are, without question, utilizing the provider's "capability for . . . storing . . . or making available information" to others. The service cannot accurately be characterized from this perspective as "transmission, between or among points specified by the user"; the proprietor of a Web page does not specify the points to which its files will be transmitted, because it does not know who will seek to download its files. Nor is it "without change in the form or content," since the appearance of the files on a recipient's screen depends in part on the software that the recipient chooses to employ. When subscribers utilize their Internet service provider's facilities to retrieve files from the World Wide Web, they are similarly interacting with stored data, typically maintained on the facilities of either their own Internet service provider (via a Web page "cache") or on those of another. Subscribers can retrieve files from the World Wide Web, and browse their contents, because their service provider offers the "capability for . . . acquiring . . . retrieving (and) utilizing . . . information."

Id. at ¶ 76 (citations omitted); Report and Order, 12 F.C.C.R. 8776 at ¶83. Thus, despite the ability to use the Internet for clearly interstate transactions which Congress may choose to

¹²The FCC has noted the technological uniqueness of the Internet:

The Internet is a distributed packet-switched network, which means that information is split up into small chunks or "packets" that are individually routed through the most efficient path to their destination. Even two packets from the same message may travel over different physical paths through the network. Packet switching also enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the server where the information resides.

Report to Congress, In Re Federal-State Joint Board on Universal Service, FCC 98-67, at ¶ 64 (Released April 10, 1998).

Jun-22-98 04:44P Waller Creek Communicatio 512-4857988

JUN -17' 98 (WED) 16:47
09/17/95 WED 15:38 FAX 51 20 5838ATTORNEY GENERAL NATURAL RESOURC
Bickerstaff Heath

TEL: 512 320 0911

P. 024
0203

regulate,¹³ the FCC recognizes that ISPs are not similar to interstate telephone services which are merely "intermediate step[s] in a single end-to-end communication." In Re Southwestern Bell Telephone Co., CC Docket No. 88-180 at ¶28.

In the FCC's eyes, ISPs are actually end-users that may lie within the local exchange in the same way residential customers or businesses are end-users in the local market for telephone service:

[W]e have found that providers of pure transmission capacity to support Internet services are providers of 'telecommunications.' Internet service providers and other information service providers also use telecommunications networks to reach their subscribers, but they are in a *very different business from carriers*. Internet service providers provide their customers with value-added functionality by means of computer processing and interaction with stored data. *They leverage telecommunications connectivity to provide these services, but this makes them customers of telecommunications carriers rather than their competitors.*

Report to Congress, In Re Federal-State Joint Board on Universal Service, CC Docket No. 96-45 at ¶103 (April 10, 1998) (emphasis added).¹⁴ In fact, the FCC has treated ISPs as end-users since the early 1980s when it determined that ISPs should not be subjected to interstate access charges:

¹³ See, e.g., United States v. Carmel, 105 F.3d 740 (1st Cir. 1997) (involving federal anti-child pornography statutes); Renusson Restaurants Corp. v. King, 125 F.3d 25 (2d Cir. 1997) (involving federal trademark law and Internet activity).

¹⁴ The Plaintiff asserts that the Defendants' "two-component" argument is foreclosed by the FCC's statement that its classification of Internet service providers "ma[ke]s no discrimination . . . on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic . . . [because that] issue . . . does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider." Report to Congress, In Re Federal-State Joint Board on Universal Service, FCC 98-67 at ¶106 n. 220 (April 10, 1998) ("Report to Congress"). However, the FCC's statement in context actually refers to whether "information service providers [are entitled to] some or all of the rights accorded by section 251 to requesting telecommunications carriers." *Id.* The instant case, however, does not question whether information service providers like ISPs are entitled to reciprocal compensation. Instead, the present case deals with whether a telecommunications carrier like Time Warner that is clearly governed by 47 U.S.C. §251, 252, is entitled to reciprocal compensation for the use of its local lines to access ISPs. Indeed, the FCC explicitly recognizes that "Internet service providers are not treated as carriers for purposes of interstate access charges, interconnection rights under section 251, and universal service contribution requirements." *Id.* at ¶106.

Jun-22-98 04:46P Waller Creek Communicatio 512-4857988

JUN -17'98 (WED) 16:47

ATTORNEY GENERAL NATURAL RESOURC

TF 512 320 0911

P. 025

06/17/98 WED 16:39 FAX 51 20 5039

Bickerstaff Heath

024

We tentatively conclude that information service providers should not be required to pay interstate access charges as currently constituted. . . . Although our original decision in 1983 to treat [enhanced service providers like ISPs] as end users rather than carriers was explained as a temporary exception, we tentatively conclude that the current pricing structure should not be changed so long as the existing access charge system remains in place. The mere fact that providers of information services use incumbent LEC networks to receive calls from their customers does not mean that such providers should be subject to an interstate regulatory system designed for circuit-switched interexchange voice telephony.

Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, In Re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, 11 F.C.C.R. 21354 at ¶288 (Released December 24, 1996) ("Notice of Proposed Rulemaking"); see also First Report and Order, In Re Access Charge Reform, 12 F.C.C.R. 15982 at ¶345 (Released May 16, 1997) (concluding that ISPs should not be subject to interstate access charges) ("First Report and Order").

Thus, as end users, ISPs may receive local calls that terminate within the local exchange network. The FCC recognizes that ISPs are "providers of information services [that] use . . . [local exchange] networks to receive calls from their customers." Notice of Proposed Rulemaking, 11 F.C.C.R. 21354 at ¶288 (emphasis added). In the instant case, the "call" from Southwestern Bell's customers to Time Warner's ISPs terminates where the telecommunications service ends at the ISPs' facilities. As a technologically different transmission, the ISPs' information service cannot be a continuation of the "call" of a local customer.¹³ Southwestern Bell is bound by its

¹³The Plaintiff contends that the FCC's decision to make ISPs exempt from interstate access charges actually demonstrates the FCC's jurisdiction over the seven-digit number "calls" made to ISPs. However, the Court finds that the FCC's exception appears to apply to the interstate information component of Internet connections. Indeed, the FCC itself recognizes that ISPs are not equivalent to interexchange carriers. See supra note 11, at 19. The bottom line is that the telecommunications component of Internet service consists only of the local call that the local exchange carriers collaborate to make.

591-KK

JUN -17 98 (WED) 16:47 ATTORNEY GENERAL NATURAL RESOURC TEL: 512 320 0911
03/17/98 WED 16:38 FAX 51 20 5838 Bickerstaff Heatt

P. 026
025

interconnection agreements because "reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call [where] the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call." First Report and Order In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 at ¶1034 (Released August 8, 1996) (emphasis added).¹⁶

Furthermore, the fact that telephone traffic to ISPs may be of high volume and for long periods of time does not change the unique technological qualities of the Internet. In fact, in making its determination that ISPs do not need to pay interstate access charges, the FCC considered arguments from incumbent local exchange carriers that exempting ISPs from such charges would "impos[e] uncompensated costs on incumbents [local exchange carriers]." First Report and Order, 12 F.C.C.R. 15982 at ¶346. The FCC simply responded that ISPs actually do compensate incumbent local exchange carriers through purchases of telecommunication services that are *regulated by the states*:

We also are not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs [local exchange carriers]. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. *To the extent that some intrastate rate structures fail to compensate incumbents LECs adequately for providing service to customers with high volumes of incoming calls, incumbents LECs may address their concerns to state regulators.*

¹⁶ Access charges apply to long-distance traffic where "the long-distance caller pays long-distance charges to the IXC [interexchange carrier], and the IXC must pay [local exchange carriers] for originating and terminating access service." First Report and Order In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 at ¶1034 (Released August 8, 1996) (emphasis added).

JUN -17 98 (WED) 16:48 ATTORNEY GENERAL NATURAL RESOURC TEL: 512 320 0911
06/17/98 WED 16:38 FAX 51 20 5838 BICKERSTAFF Heath

P.027
020

Id. at 346 (emphasis added).¹⁷

The monster of technology arises with the death of common sense; the law cannot ignore reality. The FCC recognizes that the Internet is a unique creature, and that the "nature" of an Internet communication is unlike the telephone services falling under the FCC's interstate jurisdiction.¹⁸ The PUC, in the instant case, is not attempting to regulate the Internet. Rather, the PUC is merely regulating that which it has power to regulate—the seven-digit local telephone calls that Internet customers make to "dial up" their Internet Service Providers. Unlike a long-distance call, the administrative record reveals, and Southwestern Bell acknowledges, that Internet customers have no control over the multitude of paths that an Internet connection might make. Internet customers are often unaware of the geographic location of the stored information they seek to retrieve from the Internet. Moreover, Time Warner and Southwestern Bell have no control over the ISPs who enable Internet customers to log onto the Internet. The ISPs are merely business customers of the local exchange carriers which provide an information service via telecommunications.

Finally, this Court's agreement with the Texas PUC's decision that modem calls to ISPs are "local," and not interstate, does not ignore nor contradict case law finding that Internet transactions may involve interstate commerce or that the "nature" of a communication, not the

¹⁷See also Harsh Craig Rasket, The Impact of Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers, 16 TEMP. ENVTL. L. & TECH. J. 49, 69 (1997) (describing local telephone services which ISPs use).

¹⁸Of course, as technology changes, information and telecommunication technologies may no longer be distinguishable. See Sprint Unwells One-Line Communications System, Midland Reporter-Telegram, June 3, 1998, at B1C (Sprint Corp. unveils system purporting to combine circuit-switching technology with high-speed data transmissions).

Jun-22-98 04:51P Waller Creek Communicatio 512-4857988

P. 21

JUN -17 98 (WED) 16:48
07/17/98 WED 15:39 FAX 512 79 8638ATTORNEY GENERAL NATURAL RESOURC
Bickerstaff Heath

TF1: 512 320 0911

P. 028
121027

physical location of telecommunication facilities, is the determinative factor in determining FCC jurisdiction. Indeed, because the PUC is merely regulating the local telecommunications component of Internet access, the FCC and Congress still have interstate jurisdiction over the Internet's information service component and the "transactions" that occur over it.¹⁹ The FCC has recognized that an identifiable technological line divides Internet service into an information and a telecommunications component.²⁰ It is that same line that also creates jurisdiction for the PUC in this case.

C. Contract Interpretation

Under Texas contract law, "a contract is not ambiguous if it can be given a definite or certain meaning as a matter of law." Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex. 1996). "A contract, however, is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning." Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983). However, "[t]he failure to include more express language of the parties' intent does not create an ambiguity when only one reasonable interpretation exists." Columbia Gas Transmission Corp., 940 S.W.2d at 591. Thus, the Court must decide whether the PUC acted arbitrarily and capriciously, without substantial evidence, when it found that Southwestern Bell and Time Warner's interconnection agreements did not

¹⁹ Other courts have also found "local" aspects to Internet transactions. For example, in Brimman Restaurant Corp. v. King, 126 F.3d 25 (2d Cir. 1997), the Second Circuit recognized both that transactions over the Internet could be interstate in nature and that a business on the Internet can still remain primarily "local" in character and outside of a state's long-arm personal jurisdiction statutes. *Id.*, at 29.

²⁰ Compare United States v. Southwestern Cable Co., 393 U.S. 157, 169 (1968) (FCC had jurisdiction over community antenna television systems that were engaged in interstate commerce where "the stream of communication [was] essentially uninterrupted and properly indivisible.") (emphasis added).

JUN -17' 98 (WED) 16:48

ATTORNEY GENERAL NATURAL RESOURC

TF1:512 320 0911

P. 029

06/17/98 WED 15:39 FAX 51 20 8839

Bickerstaff Heath

2025

exclude calls to ISPs from the reciprocal compensation provisions for local traffic.³¹

In the instant case, the Court finds that the Texas PUC had substantial evidence to conclude that the Southwestern Bell-Time Warner interconnection agreements applied reciprocal compensation fees to the termination of calls accessing ISPs. As a matter of law, with respect to ISP traffic, this Court agrees with the PUC's finding that "[w]hen a transmission path is established between two subscribers in the same mandatory calling area, traffic carried on that path is local traffic, with the telecommunications service component of the call terminating at the ISP location." PUC Order at 4. Moreover, based on a reasonable interpretation of the interconnection agreements, the PUC appropriately found that the agreements were not ambiguous and "that the definition of 'local traffic' in the applicable interconnection agreements includes ISP traffic that otherwise conforms to the definition." Id. at 5.

Indeed, although Southwestern Bell contends that, prior to the Second Agreement's enactment, it had communicated to Time Warner its misgivings about the application of reciprocal compensation fees for ISP calls, the parties still failed to specifically *exclude* ISP calls from the definition of local traffic. The interconnection agreements fail to even mention "ISPs" or the "Internet" throughout the provisions. Thus, the Texas PUC did not act arbitrarily and capriciously because a reasonable interpretation of the interconnection agreements is that Southwestern Bell and Time Warner were to treat calls to ISPs as equal to calls made to other end-users or customers of either telecommunications service.

³¹ "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Carrier v. Sullivan, 944 F.2d 243, 245 (5th Cir. 1991) (*per curiam*).

JUN -17 98 (WED) 16:49

ATTORNEY GENERAL NATURAL RESOURC

TEL: 512 520 0911

P. 050

06/17/98 WED 16:40 FAX 51 20 6038

Bickerstaff Heatl.

020

IV. CONCLUSION

The Court will deny Southwestern Bell's request for declaratory and injunctive relief against the Texas PUC. The PUC correctly determined that it had jurisdiction over the telecommunications component of Internet access and the local calls made to ISPs. Furthermore, the PUC correctly interpreted the Southwestern Bell-Time Warner interconnection agreement as unambiguous, and it correctly ordered Southwestern Bell to comply with the agreement's reciprocal compensation terms for termination of local traffic.

Accordingly,

IT IS ORDERED that Plaintiff Southwestern Bell Telephone Company's Request for Declaratory and Injunctive Relief is hereby **DENIED**.

SIGNED this 16 day of June, 1998.



**HONORABLE LUCIUS D. BUNTON, III
SENIOR U.S. DISTRICT JUDGE**