ORIGINAL

RECEIVED-FPSC

00 MAY -2 PM 4:32

RECORDS AND REPORTING

Legal Department

A. LANGLEY KITCHINGS
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0765

May 2, 2000

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

Re: 991854-TP (Intermedia Arbitration)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence, which we ask that you file in the above-captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

A. Langley Kitchings

A. Langley Kitchings

AFA
APP
CAF
CMU
CTR
EAG
LEG
MAS
OPC
RRR
SEC 1
WAW
OTH

cc: All parties of record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

DOCUMENT NUMBER-DATE
05480 MAY-2 8
FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Docket No. 991854-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 2nd day of May, 2000 to the following:

Timothy Vaccaro
Staff Counsel
Florida Public Service
  Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6181

Carl Jackson
Senior Director
Intermedia Communications, Inc.
360 Interstate North Parkway
Suite 500
Atlanta, Georgia 30339

Scott Saperstein
Senior Policy Counsel
Intermedia Communications, Inc.
3625 Queen Palm Drive
Tampa, Florida 33619
Ph. (813) 829-4093
Fax (813) 349-9802

Wiggins Law Firm
Charles J. Pellegrini (##)
2145 Delta Boulevard
Suite 200
Tallahassee, FL 32302
Tel. No. (850) 385-6007
Fax. No. (850) 385-6008

A. Langley Kitchings

A. Langley Kitchings

(##) Signed Protective Agreement

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	Docket No. 991854-TP
	)	Filed: May 2, 2000

BELLSOUTH TELECOMMUNICATIONS, INC.
BRIEF OF THE EVIDENCE

NANCY B. WHITE
MICHAEL P. GOGGIN
150 West Flagler Street
Suite 1910
Miami, Florida 33130
(305) 347-5558

R. DOUGLAS LACKEY
A. LANGLEY KITCHINGS
675 West Peachtree Street
Suite 4300
Atlanta, Georgia 30375
(404) 335-0765

ATTORNEYS FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

TABLE OF CONTENTS

STATEMENT OF THE CASE

The Telecommunications Act of 1996 ("1996 Act") requires interconnection negotiations between local exchange companies and new entrants. Parties that cannot reach a satisfactory resolution of their negotiations are entitled to seek arbitration of the unresolved issues by the appropriate state commission. 47 U.S.C. § 252(b)(1).

On or about July 1, 1996, BellSouth Telecommunications, Inc. ("BellSouth") and Intermedia Communications, Inc. ("Intermedia") entered into an interconnection agreement. The Florida Public Service Commission ("Commission") approved the interconnection agreement. That agreement expired on July 1, 1998, but the parties mutually agreed to extend it until December 31, 1999. Negotiations for a successor agreement failed, and on December 7, 1999, BellSouth filed a Petition for Arbitration, seeking the assistance of the Commission in resolving the remaining unresolved issues. The Petition enumerated a total of ten issues. On January 3, 2000, Intermedia filed an "Answer and New Matter" in response to BellSouth's Petition for Arbitration, introducing thirty-eight new issues. Since the date of those filings, a substantial number of issues have been resolved by the parties, and two were removed from consideration by the Commission.

The hearing in this matter was held on April 10, 2000. At the hearing, BellSouth submitted the direct and rebuttal testimony of Alphonso J. Varner and W. Keith Milner. The hearing produced a transcript of 477 pages and 16 exhibits.

This Brief of the Evidence is submitted in accordance with the post-hearing procedures of Rule 25-22.056, Florida Administrative Code. A summary of BellSouth's position on each issue to be resolved in this docket is set forth in the following pages and marked with a double asterisk.

STATEMENT OF BASIC POSITION

Each of the individually numbered issues in this docket represent a specific dispute between BellSouth and Intermedia as to what should be included in the Interconnection Agreement between the parties. As to these issues, BellSouth's position is the more consistent with the 1996 Act, the pertinent rulings of the Federal Communications Commission ("FCC") and the rules of this Commission. Therefore, the Commission should sustain each of BellSouth's positions.

With respect to the Issue 2(a)[1], BellSouth asserts that Internet-bound traffic should not be included in the definition of "local traffic" for purposes of the parties' reciprocal compensation obligations. Not only has the FCC historically classified traffic based on the end points of the call, the FCC specifically found this traffic to be jurisdictionally interstate in its Declaratory Ruling in CC Docket No. 96-98 on February 26, 1999, and it has also established a rulemaking procedure (CC Docket No. 99-68) to determine the appropriate mechanism for inter-carrier compensation for interstate ISP-bound traffic.[2] BellSouth believes that Internet-bound traffic is,

---

[1] For convenience and ease of reference, BellSouth will use the Issue numbers as contained in the Prehearing Order, issued March 29, 2000.

[2] On March 24, 2000, the United States Court of Appeals for the District of Columbia Circuit, in *Bell Atlantic Telephone Companies v. Federal Communications Commission*, Case No. 99-1094, 2000 WL 273383 (D.C. Cir. March 14, 2000), vacated and remanded the FCC's Declaratory Ruling. In its decision, the D.C. Circuit recognized that, under the FCC's regulations, reciprocal compensation is due on calls to the Internet if, and only if, such calls "terminate" at the ISP's local facilities. Slip Op. at 9-11. The D.C. Circuit held, however, that the FCC had not adequately explained its conclusion that calls to an ISP do not terminate at the ISP's local point of presence but instead at a distant website. It thus remanded the matter to permit the FCC to explain the point more fully. *See id.* at 15 (remanding the case to allow the FCC to provide a "satisfactory explanation.") BellSouth is confident that the FCC will provide such support, and the determination that ISP-bound calls are jurisdictionally interstate will stand. The FCC has already indicated informally that it believes that it can provide the needed clarification and reach the same conclusion that it has previously – that is, that Internet-bound calls do not terminate locally. *See* Telecommunications Report, "FCC Stands By Conclusion That Calls To ISPs Are Interstate, Despite Court's Nixing 1999 Order," March 27, 2000 (noting that FCC Common Carrier Chief Lawrence Strickling does not "read this decision as telling us we made a mistake," but only requiring that the FCC "take the confusing precedents and make clear to the court why [Internet traffic] is interstate traffic.")

Of course, BellSouth maintains that there are other FCC Rulings which remain in full force and effect that, in essence, find that ISP-based traffic is exchange access service. (See, e.g., Tr. 26-28; 78-80).

interstate traffic, and therefore there is no reason to include such in the definition of "local traffic."

With respect to the issue of tandem switching (Issue 3), the Commission should conclude that Alternative Local Exchange Companies ("ALECs") are entitled to the tandem switching elemental rate only in those circumstances where the ALEC switch actually performs the same tandem switching functions as the Incumbent Local Exchange Carrier ("ILEC") switch and actually serves a geographic area comparable to the ILEC switch. BellSouth submits that Intermedia's switches fail both prongs of this two-pronged test, and therefore, Intermedia's request for the tandem switching rate should be denied.

Issue 10 deals with the question of whether BellSouth's policies regarding conversion of virtual to physical collocation are reasonable. BellSouth believes that its policies regarding conversion of virtual to physical collocation are reasonable. The terms and conditions that should apply for converting virtual to physical collocation should be consistent with the terms and conditions of the assessment and provisioning of physical collocation. BellSouth's policies regarding this type of conversion are consistent, reasonable, non-discriminatory, and are in compliance with the FCC's collocation rules. This Commission should approve BellSouth's policies for inclusion in the Interconnection Agreement between BellSouth and Intermedia.

Issue 12 deals with the question of what is the appropriate definition of "currently combines." BellSouth believes that it's obligation should be limited to combinations that currently exist to serve a particular customer at a particular location. This position is in alignment with the FCC's requirements, and this Commission should concur.

Issues 13(a) and (b) concern the provision of access to enhanced extended links ("EELs") and the conversion of special access service to EELs at Unbundled Network Element ("UNE") rates. Again, BellSouth believes that its obligation should be limited to combinations that currently exist to serve a particular customer at a particular location. As to the conversion of existing special services to EELs at UNE rates, BellSouth believes that such a conversion at UNE rates is constrained until the FCC completes its Fourth Notice of Proposed Rulemaking. Until that Rulemaking is complete, Intermedia may not convert special services to EELs at UNE rates unless Intermedia uses combinations of network elements to provide a significant amount of local exchange service to that customer.

Issue 18(c) deals with the question of whether BellSouth should be required to provide access to packet switching on an unbundled basis. There is no requirement under the Telecommunications Act of 1996 (the "Act") or in FCC Orders which mandates the provision of packet switching on an unbundled basis as Intermedia advocates. To the contrary, the FCC, in its UNE Remand Order, expressly declined to require the unbundling of packet switching. Intermedia presented no evidence in this docket which should cause the Commission to find contrary to the FCC's determination.

With regard to Issue 22, BellSouth's provision of interoffice transmission facilities, BellSouth has proposed language which is consistent with Section 51.319(d) of the FCC's rules promulgated in its UNE Remand Order. BellSouth has also proposed interim rates subject to true-up for interoffice transmission facilities. BellSouth's language and proposed rates should be adopted by the Commission.

Issue 25, which concerns access to certain components of Frame Relay Service, is a straightforward issue. BellSouth is simply not legally required to offer any components of Frame Relay as UNEs under the Act or any FCC Order. Intermedia provided no compelling evidence to the Commission to the contrary. The Commission should not require BellSouth to provide any components of Frame Relay as UNEs to Intermedia.

Regarding Issue 26, which deals with the parties' ability to establish their own local calling areas and assigning of numbers for local use, BellSouth avers that when an ALEC assigns numbers having the same NPA/NXX to customers both inside and outside the BellSouth local calling area where the NPA/NXX is homed, it would be extremely difficult, if not impossible, for BellSouth to determine whether BellSouth's end users are making a local or a long distance call when BellSouth's end user calls the ALEC's end user. Consequently, BellSouth can't tell whether access or reciprocal compensation should apply to the resulting traffic.

As to Issue 29, which deals with situations when Intermedia selects multiple tandem access ("MTA"), the question arises as to whether Intermedia must establish points of interconnection at all BellSouth access tandems where Intermedia's NXX's are "homed." BellSouth believes that if Intermedia elects BellSouth's MTA offer, Intermedia must designate for each of Intermedia's switches the BellSouth tandem at which BellSouth will receive traffic originated by Intermedia's end user customers.

Issue 30(a) concerns whether Intermedia must be required to designate a "home" local tandem for each assigned NPA/NXX. BellSouth believes that if more than one BellSouth local tandem serves a particular local calling area, Intermedia must establish one of the BellSouth local tandems as a home local tandem for each of its NPA/NXXs.

Issue 30(b) is related to 30(a), but questions whether Intermedia must establish points of interconnection at BellSouth access tandems within the LATA on which Intermedia has NPA/NXXs homed. Again, BellSouth believes Intermedia must interconnect at each access tandem where its NPA/NXXs are homed for Intermedia's exchange access traffic. Failure to do so may cause calls to go incompleted, and inevitably result in customer dissatisfaction.

Issue 31 concerns the issue of how intraLATA toll traffic should be defined for purposes of compensation. BellSouth believes intraLATA toll traffic should be defined as any telephone call that is not local or switched access, and has proposed language to that effect to Intermedia. The Commission should adopt BellSouth's proposed language regarding this issue.

Similar to Issue 31, Issue 32 relates to how the term "Switched Access Traffic" should be defined. Switched Access Traffic should be defined in accordance with BellSouth's access tariff and should include IP telephony. BellSouth has proposed language in accordance with the foregoing, and BellSouth respectfully requests that the Commission should approve same.

Issue 37, although framed as whether packet data within a Virtual Circuit that originates and terminates within a LATA should be classified as local traffic, is, in reality, another question regarding the applicability of reciprocal compensation for such traffic. BellSouth believes that such traffic should not be subject to reciprocal compensation.

Issue 39(a)-(d) deals with question of appropriate charges for various frame relay piece-parts. BellSouth proposes the use of nonrecurring and recurring charges set forth in its interstate access tariff, as BellSouth is not required to make frame relay available as a UNE. TELRIC pricing is, therefore, not appropriate for these components of frame relay.

The final issue, Issue 45, concerns the question of whether the Interconnection Agreement should specifically state that the agreement does not address or alter either party's provision of Exchange Access Frame Relay Service or InterLATA Frame Relay Service. The parties recently resolved this issue (after the hearing on April 10), and respectfully request that the Commission remove this issue from consideration in this arbitration.

STATEMENT OF POSITION ON THE ISSUES

Issue 2: Should the definition of "Local Traffic" for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act include the following?

a) ISP traffic?

**Position: (a) "Local traffic" should be defined as set forth in Mr. Varner's prefiled direct testimony (Tr. 23). The definition should expressly exclude traffic to Internet Service Providers, which is interstate traffic.

With respect to the Issue 2(a), BellSouth asserts that Internet-bound traffic should not be included in the definition of "local traffic" for purposes of the parties' reciprocal compensation obligations. (Tr. 23-31; 385-394; Exhibit 7) Not only did the FCC find this traffic to be jurisdictionally interstate in its Declaratory Ruling in CC Docket No. 96-98 on February 26, 1999, it has also established a rulemaking procedure (CC Docket No. 99-68) to determine the appropriate mechanism for inter-carrier compensation for interstate Internet Service Provider ("ISP") bound traffic.[3]

Regardless of the foregoing, requiring payment of reciprocal compensation for Internet-bound traffic is not good public policy, and does not make good business sense. Two examples illustrate why it is not appropriate to require reciprocal compensation for Internet-bound traffic.

First, it is necessary to distinguish between local exchange service and exchange (or, switched) access service. Local exchange service represents telephone calls that originate and terminate in either the same exchange or other exchange within the same local calling area associated with the originating exchange. An exchange access (long distance) call, of course, terminates in a different exchange from that in which the call is originated.

[3] *See* footnote 2 *supra*.

Subscribing to local exchange service alone does not provide an end user customer with access to the Internet. The end user must also subscribe to an ISP and pay a monthly rate (generally flat-rated, sometimes usage-sensitive) to the ISP. In turn, the ISP pays its local service provider for the exchange (switched) access service it receives, albeit at local business exchange rates as ordered by the FCC in Access Reform Orders.

Similarly, subscribing to local exchange service alone does not provide an end user with long distance service. The user must select a long distance carrier and pay per minute rates to that carrier in order to complete long distance (exchange access) calls. In turn, the long distance carrier pays the local service provider switched access charges.

In both examples above, exchange access service—not local exchange service—is being provided to the end user -- to the ISP and to the long distance carrier. The local service provider receives compensation for the exchange access service from the ISP and from the long distance carrier. This is true whether BellSouth or an ALEC is providing the access service. Therefore, the local service provider has already been compensated for providing access service to ISPs and to long distance carriers. Inappropriately providing the local service provider with reciprocal compensation for ISP-bound traffic simply creates a windfall to the local service provider. (See, Tr. 27, 389-390).

BellSouth, of course, recognizes that the Commission has previously ruled on issues very similar to this in previous dockets. (Order No. PSC-00-0128-FOF-TP, BellSouth/ICG arbitration; Order No. PSC-99-2009-FOF-TP, MediaOne/BellSouth arbitration). The Commission should, however, note that this is a case involving the <u>definition</u> of local traffic, not the question or an inter-carrier compensation mechanism. BellSouth also recognizes that the Commission has established a docket to consider the appropriate method(s) to compensate carriers for the exchange of traffic subject to Section 251 of the Act. This issue may be better addressed there. Nevertheless, BellSouth believes that Section 251 of the Act does not require development of a compensation mechanism for this traffic and urges the Commission to reject the notion that the definition of local traffic should include ISP-bound traffic. (Tr. 28-29).

Issue 3: Should Intermedia be compensated for end office, tandem, and transport elements, for purposes of reciprocal compensation?

> **Position: Intermedia should be compensated for those functions it provides. If a call is not handled by Intermedia's switch on a tandem basis, it is not appropriate to pay Intermedia reciprocal compensation for the tandem switching function.

A tandem switch connects one trunk to another trunk and is an intermediate switch or connection between the switch where a telephone call originates and the switch that terminates the call. (Tr. 32.) An end office switch, on the other hand, connects trunks and customer lines, and allows a call to be originated or terminated. (Id.) If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. (Id.)

Intermedia has a total of five switches in Florida, located in the cities of Miami, Tampa, Jacksonville and Orlando. Intermedia has installed a single switch in Miami, Tampa and Jacksonville. Since these three switches are located in three different calling areas (indeed, in three different LATAs) there is no doubt that none of these three switches is performing local tandem functions for any other Intermedia switch in those three locations since there is no other Intermedia switch on whose behalf the purported tandem switching could be done. This is easily proved by answering the simple question of whether the single Intermedia switch in Miami, for example, establishes local trunk-to-trunk connections. A trunk-to-trunk connection would be established between one Intermedia local switch and another Intermedia local switch. Since in Miami, Tampa and Jacksonville there is no second Intermedia local switch, it is not even possible for the one Intermedia switch in each these three locations to be handling local traffic on a tandem basis, regardless of whether the switch itself is technologically capable of handling such a function. The relevant question here is not whether Intermedia's switches are technologically capable of performing a certain function (tandem switching in this case) but rather whether Intermedia's switches are actually performing such a function. Clearly, Intermedia's switches in Miami, Jacksonville and Tampa are not performing local tandem switching. It is important to keep in mind that the issue here is whether Intermedia's switches are performing <u>local</u> tandem switching, not <u>toll</u> tandem switching.

In Orlando, Intermedia claims to own and operate two local switches. The Common Language Location Identification (CLLI) codes shown in the Local Exchange Routing Guide (LERG) for the two switches are ORLDFLOEDS0 and ORLDFLOE01W. The first four (4) characters denote the city (for example, "ORLD" is Orlando). The next two (2) characters denote the state (for example, "FL" is Florida). The next two characters indicate the building (for example, "OE" is Intermedia's designation for its building in Orlando). The last three (3) characters denote the Traffic Unit (for example, "DSO" denotes a host digital switch). As can be seen above, only the CLLI code for ORLDFLOEDS0 denotes the presence of a host switch. The second Intermedia CLLI code of ORLDFLOE01W is assigned the Traffic Unit designation of 01W. Intermedia denotes this Traffic Unit in the LERG as a Signal Transfer Point (STP) rather than as an end office switch. An STP is an element of a signaling network and is a signaling point with the function of transferring signaling messages from one signaling link to another. The STP does not provide dialtone, does not provide any circuit switching function or any other functionality generally understood to be that provided by an end office switch. Therefore, in Orlando, where Intermedia inappropriately claims to be operating two local switches, Intermedia in fact has only a single local switch, that is, the switch referred to as ORLDFLOEDS0. Here again, then, it is impossible for Intermedia's single local switch in Orlando to be providing local tandem switching functionality. Intermedia is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide. (Tr. 32)

Under Section 251(b)(5) of the 1996 Act, all local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). The terms and conditions for reciprocal compensation must be "just and reasonable," which requires the recovery of a reasonable approximation of the "additional cost" of terminating calls that originate on the network of another carrier. 47 U.S.C. § 252(d)(2)(A). According to the FCC, the "additional costs" of transporting terminating traffic vary depending on whether or not a tandem switch is involved. *See* First Report and Order, *In re: Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, CC Docket No. 96-98, ¶ 1090 (Aug. 8, 1996) (hereinafter referred to as "*First Report and Order*"). As a result, the FCC determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. *Id.*

The FCC directed state commissions to consider two factors in determining whether an ALEC should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch. First, the FCC directed state commissions to "consider whether new technologies (*e.g.*, fiber ring or wireless network) performed functions similar to those performed by an incumbent LEC's tandem switch and thus whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." *First Report and*

Order ¶ 1090. Second, in addition to the functionality comparison, the FCC instructed state commissions to consider whether the new entrant's switch serves a geographic area comparable to that served by the incumbent local exchange carrier's tandem switch, in which case the appropriate proxy for the new carrier's costs is the incumbent's tandem interconnection rate. *Id.*; *see also* 47 CFR § 51.711(a)(3). Therefore, in order to evaluate whether an ALEC should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch, *"it is appropriate to look at both the function and geographic scope of the switch at issue." See U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp. 2d 968, 978 1999 U.S. Dist. LEXIS 16224 (D. Minn. 1999) (emphasis added) (copy attached as Exhibit A).

Turning first to the issue of geographic comparability, the evidence in this record (or lack thereof) on the question of whether Intermedia's switches serve a comparable geographic area is similar to the record evidence confronted by the federal district court in *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.*, 1999 U.S. Dist. LEXIS 11418, *19 (N.D. Ill, June 22, 1999) (copy attached as Exhibit B). In that case, MCI argued that it should be compensated at the tandem rate for its switch in Bensonville, Illinois. The Illinois Commerce Commission ("ICC") rejected MCI's argument, finding that MCI had

failed to provide sufficient evidence to support a conclusion that it was entitled to the tandem interconnection rate.[4]

[4] Although the ICC did not make express findings regarding the comparable functions of MCI's switch and Ameritech's tandem switches or the comparative geographical areas served by the various switches, the ICC did discuss the evidence offered by each party on these issues. *Id.* at *20. According to the district court, "[t]he issue of comparable functionality apparently was not in serious dispute" as MCI presented evidence that its switch performed similar functions as Ameritech's tandem switches -- evidence that Ameritech did not dispute. *Id.* Indeed,

In affirming the ICC on the tandem switching issue, the federal district court found that MCI's "intentions for its switch" were "irrelevant." According to the court, MCI was required to identify the location of its customers and the geographical area "actually serviced by MCI's switch," which MCI had utterly failed to do. *Id.* at *22-23 n.10. The district court reasoned that:

> The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. These are questions that MCI could have addressed, but did not. . . . In short, *MCI offered nothing but bare, unsupported conclusions that its switch currently served an area comparable to Ameritech tandem switch or was capable of serving such an area in the future.* The ICC's determination that "MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate" was not arbitrary and capricious.

Id. at *22-23 (emphasis added).

The district court's reasoning applies equally here. Intermedia has offered nothing but "bare, unsupported conclusions" from Mr. Jackson that its Florida switches currently serve an area comparable to BellSouth's tandem switch. (See, e.g., Tr. 262.) Indeed, Mr. Jackson does not believe it is even necessary to look at the areas served by Intermedia's switches, simply because Intermedia's network is designed differently than BellSouth's. (Id.) Mr. Jackson is wrong. Intermedia did not provide the location of its customers in Florida, a fact which would be essential for the Commission to determine the geographic area Intermedia's Florida switches actually serve and whether that area is comparable to the area served by BellSouth's tandem

---

Ameritech did not even raise the comparable functionality issue on appeal, which led the district court to conclude switch. On cross examination, it was clear that Mr. Jackson could not affirm that Intermedia actually served customers in each local calling area Intermedia purports to serve. (Tr. 319.) Lack of evidence on this key point alone should doom Intermedia's request that the Commission grant it the tandem switching rate.

To illustrate the importance of this point, assume Intermedia has ten customers in Florida, all of which are located in a single office complex located next door to an Intermedia switch in Miami. Under no set of circumstances could Intermedia seriously argue that in such a case its switch serves a comparable geographic area to BellSouth's switch. *See* Decision 99-09-069, *In re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom*, Application 99-03-047, 1999 Cal. PUC LEXIS 652, *21-*24 (Sept. 16, 1999) (finding "unpersuasive" MFS's showing that its switch served a comparable geographic area when many of MFS's ISP customers were actually collocated with MFS's switch) (Attached as Exhibit C). Absent such evidence, Intermedia has clearly failed to satisfy its burden of proof on this issue.

Finally, Mr. Jackson's claim that Intermedia has eleven collocations in BellSouth's serving area in Florida (Tr. 322) does not resurrect Intermedia's claim. BellSouth has two hundred four (204) central offices in Florida. Collocation locations do not equate with the notion that switching is being performed therein. Moreover, even if switching were being performed by Intermedia in those eleven locations (and it is not), that represents approximately 5% of all BellSouth central offices. That fact does not support the notion of geographic comparability.

Turning to the issue of functionality, several federal district court and state commission decisions plainly hold that the functions performed by another carrier's switch should be

---

that "only at issue is the geographical areas served by the respective switches." *Id.*

considered in determining whether that carrier is entitled to receive compensation for end-office, tandem, and transport elements in transporting terminating traffic. *See, e.g., U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp. 2d at 977; *U.S. West Communications, Inc. v. Public Service Commission of Utah*, 75 F. Supp. 2d 1284, 1999 U.S. Dist. LEXIS 18148, *13-*16 (D. Utah, Nov. 23, 1999) (affirming commission requirement that U.S. West compensate Western Wireless at the tandem switching rate after concluding that Western Wireless's "switches perform comparable functions and serve a larger geographic area") (copy attached as Exhibit D); *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc., 1999 U.S. Dist. LEXIS 11418 at *19* (in deciding whether MCI was entitled to the tandem interconnection rate, the commission correctly applied the FCC's test to determine whether MCI's switch "performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch").

Moreover, despite Mr. Jackson's protestations to the contrary, while Intermedia's switch may be <u>capable</u> of performing tandem switching functions when connected to an end-office switch, capability is not the issue. The issue is whether Intermedia's switches <u>actually</u> perform those functions for local calls. (Tr. 396-397.)

The relevance of the functions the switch is actually performing is that reciprocal compensation is not paid for loop costs, but rather only for the cost of transporting and terminating local calls. (Tr. at pp. 48-49; *First Report and Order*, ¶ 1057.) Specifically, the FCC held that the "costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. We conclude that such non-traffic sensitive costs should not be considered 'additional costs' when a LEC terminates a call that originated on the network of a competing carrier." (*First Report and Order*, ¶ 1057.) By inappropriately claiming its end office switches are tandem switches, Intermedia is seeking unwarranted compensation from BellSouth for loop facilities between Intermedia's end office and its collocation space. (Tr. 34-35.)

This Commission has previously reached the same conclusion recommended by BellSouth here in the Commission's Metropolitan Fiber Systems of Florida, Inc. ("MFS") and Sprint arbitration orders. The Commission determined that "MFS should not charge Sprint for transport because MFS does not actually perform this function." (Order No. PSC-96-1532-FOF-TP, issued December 16, 1996.). The Commission reaffirmed this conclusion when it issued its Order in the MCI/Sprint arbitration case in Docket No. 961230-TP. (Order No. PSC-97-0294-FOF-TP, issued April 14, 1997.) The circumstances in the MFS/Sprint arbitration case can be logically extended to the issue raised by Intermedia in this arbitration proceeding. The evidence in this record does not support Intermedia's position that its switch actually provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually provide the network facility for which it seeks compensation.

More recently, by Order dated January 14, 2000, this Commission re-affirmed its above-stated position in BellSouth's arbitration with ICG and found in favor of BellSouth on this issue. In doing so, the Commission expressly considered the functions performed <u>and</u> the geographic area served by ICG's switch. The Commission thus approved its Staff's Recommendation, denying the request of ICG as follows:

> Because ICG currently does not have a network in place in Florida, we cannot determine if ICG's network will, in fact, serve a geographic area comparable to one that is served by a BellSouth tandem switch ... Similarly, the evidence of record in this arbitration does not show that ICG will deploy both a tandem and end office switch in its network. In addition, since tandem switching is

> described by both parties as performing the function of transferring telecommunications between two trunks as an intermediate switch or connection, we do not believe this function will or can be performed by ICG's single switch. As a result, we cannot at this time require that ICG be compensated for the tandem element of termination.[5]

The California Public Utilities Commission also reached a conclusion similar to this Commission on this issue. In an arbitration proceeding before MFS/WorldCom and Pacific Bell, the CPUC held that "a party is entitled to tandem and common transport compensation only when the party actually provides a tandem or common transport function." *See* Decision 99-09-069, *In re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom*, Application 99-03-047, 1999 Cal. PUC LEXIS 652 at *23. The CPUC further found unpersuasive MFS/WorldCom's argument that its network served a geographic area comparable in size to that served by Pacific Bell's tandem switch. Id. at *24.

For the foregoing reasons, this Commission should deny Intermedia's request for tandem switching compensation when Intermedia proved neither that its switch is actually performing tandem switching nor that its switch serves a geographic area comparable to BellSouth's switch.

<u>Issue 10</u>: Are BellSouth's policies regarding conversion of virtual to physical collocation reasonable?

> **<u>Position</u>: Yes. BellSouth will convert virtual collocation arrangements to physical collocation arrangements upon Intermedia's request. However, if BellSouth determines in a nondiscriminatory manner that the arrangement must be relocated, Intermedia should pay the cost of such relocation.

The collocation polices at issue here concern conversion of virtual collocation to physical collocation without moving the equipment from one point in a BellSouth central office to another point. BellSouth's policies regarding conversion of virtual to physical collocation are

[5] Order, *In re Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.*, Docket No. 990691-TP, Order No. PSC-00-0128-FOF-TP, at 10-11 (Fla. Pub. Serv. Comm. 1/14/00).

reasonable. BellSouth believes that the terms and conditions that apply for those conversions should be consistent with the same terms and conditions used in establishing physical collocation. Thus, an application for the conversion of virtual to physical collocation should be evaluated in like fashion to an application for physical collocation. (Tr. 160).

BellSouth allows the conversion of the virtual collocation arrangements to physical without requiring the relocation of the equipment where three conditions are met. Those conditions are: 1) That there is no change in the amount of equipment or the configuration of the equipment that was in the virtual collocation arrangement. 2) That the conversion of the virtual collocation arrangement would not cause the equipment or the results of that conversion to be located in the space that BellSouth has reserved for its own future needs. 3) That due to the location of the virtual collocation arrangement the converted arrangement does not limit BellSouth's ability to secure its own equipment and facilities. (Tr. 161).

Intermedia, on cross, seemed to acknowledge the validity of the three conditions outlined above. Mr. Jackson acknowledged that a "change in place" would involve no change in the amount of equipment or the configuration of the equipment. (Tr. 330). Mr. Jackson also acknowledged that the FCC allowed ILECs, such as BellSouth, the right to reserve space for its own use in the future. (Tr. 328). Finally, Mr. Jackson acknowledged that the FCC gave ILECs the right to take appropriate steps to ensure the security of its own equipment. (Tr. 328-329).

Given the foregoing, it is obvious that BellSouth's above-referenced collocation policies are reasonable. BellSouth believes that the Commission should so find. Moreover, it is also clear that, if a collocator makes a request for conversion from virtual to physical collocation, the collocator should be responsible for any cost incurred. (Tr. 435).

Issue 12: What is the appropriate definition of "currently combines" pursuant to FCC Rule 51.315(b)?

**Position: BellSouth's obligation should be limited to combinations that currently exist to serve a particular customer at a particular location.

BellSouth will provide combinations to Intermedia at cost-based prices if the elements are already combined and providing service to a particular customer. (Tr. 43-44). Intermedia wants to expand upon BellSouth's offer; Intermedia believes that if combinations of elements can be ordered as a service from BellSouth, then it considers those elements "customarily combined" and subject to availability as UNEs. (Tr. 272). Intermedia's position is overreaching, and goes beyond what the FCC required in its UNE Remand Order.

The FCC, in its UNE Remand Order, confirmed that BellSouth presently has no obligation to combine network elements for ALECs, when those elements are not currently combined in BellSouth's network. The FCC also confirmed that "except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b).

The FCC also made clear in its UNE Remand Order that Rule 315(b) applies to elements that are "in fact" combined. In that Order, the FCC found that "to the extent an unbundled loop is in fact connected to unbundled dedicated transport the statute and our rule 315(b) require the incumbent to provide such elements to requesting carriers in combined form." (Para. 480—emphasis added). However, the FCC declined to adopt a definition of "currently combined" that would include all elements "ordinarily combined" in the incumbent's network, which is apparently the definition advocated by Intermedia. *Id.* (Tr. 44-45).

The Commission should not ignore the FCC's findings as outlined above. (Tr. 403).

Issue 13: Should BellSouth be required to:

a) provide access to enhanced extended links ("EELs") at UNE rates; and

b) allow Intermedia to convert existing special services to EELs at UNE rates?

**Position: (a) BellSouth's obligation should be limited to combinations that are currently combined. (b) An ALEC is not permitted to convert special access facilities to EELs at UNE rates unless the carrier currently uses the special access facilities to provide a significant amount of local exchange service.

This issue is similar to, and related to, Issue 12 stated above regarding the definition of "currently combined." The FCC declined to define the EEL as a separate network element in its UNE Remand Order. (Para. 478). Therefore, except to the extent where currently combined elements in BellSouth's network that comprise an EEL are located, BellSouth currently has no obligation to provide ALECs with the EEL.

Part (b) of this issue is interwoven with part (a). On the surface, it would appear that when an ALEC has purchased currently combined elements that may comprise the EEL, the ILEC would have to provide that combination at cost-based prices. An ALEC's ability to convert special access facilities to unbundled elements, however, is constrained at least until the FCC completes its Fourth Notice of Proposed Rulemaking. (Para. 489). The FCC ordered such constraints in order to allow itself time to develop an adequate record to examine the concern "that allowing requesting carriers to obtain combinations of loop and transport unbundled network elements based on forward-looking cost would provide opportunities for arbitrage of special access services," and thereby negatively impact universal service. (UNE Remand Order, Para. 494; November 24, 1999 Supplemental Order, Para 4). Until that rulemaking is complete, the FCC has made clear that carriers may not convert special access services to combinations of unbundled network elements unless the carrier uses combinations of network elements to provide significant amount of local exchange service, in addition to exchange access service to a particular customer. (November 24, 1999 Supplemental Order Paras. 2 & 4) (Tr. 45-46).

The Commission, of course, should also take note that it has ruled previously on this issue. In Order No. PSC-00-0128-FOF-TP, dated January 14, 2000, the Commission denied ICG's request for EELs to be made available in its Interconnection Agreement with BellSouth. (Tr. 46). Intermedia has not provided any evidence which should cause the Commission to alter its prior decision on this issue.

Issue 18(c): Should BellSouth be required to provide access on an unbundled basis in accordance with, and as defined in, the FCC's UNE Remand Order to packet switching capabilities?

> **Position: There is no requirement under Section 251 of the Telecommunications Act of 1996 for unbundling of packet switching capabilities. Further, in its UNE Remand Order, the FCC expressly declined "to unbundle specific packet switching technologies incumbents LECs may have deployed in their networks." (Para. 311)

BellSouth contends that neither the 1996 Act nor the FCC's Rules require it to unbundle packet switching. In its UNE Remand Order, the FCC expressly declined "to unbundle specific packet switching technologies incumbents LECs may have deployed in their networks." (Para. 311). The FCC adopted "one limited exception" to this rule, however, the FCC specifically rejected "e.spire/Intermedia's request for a packet switching or frame relay unbundled element." (Para. 312). Indeed, the FCC concluded that "e.spire/Intermedia have not provided any specific information to support a finding that requesting carriers are impaired without access to unbundled frame relay." Id. Given that Intermedia has provided no additional support for its request, the Commission should not require BellSouth to offer access to packet switching capabilities on an unbundled basis.

The "limited exception" is set forth in FCC Rule 51.319(c)(5), which sets forth four conditions. If each condition is satisfied, then an ILEC would be required to unbundle packet switching. Each of these conditions, however, do not exist in BellSouth's network. (Id.).

The FCC went on to state in its UNE Remand Order that "no party alleged that packet switching was proprietary within the meaning of section 251(d)(2)" and "that the record provides no basis for withholding packet switching from competitors based on proprietary considerations or subjecting packet switching to the more demanding 'necessary' standard set forth in section 251(d)(2)(A)." (Para. 305). The FCC found it appropriate to examine packet switching under the "impair" standard of section 251(d)(2)(B). (Tr. 54).

The FCC determined that competing carriers would not be impaired without unbundled access to the incumbent LEC's packet switching functionality. (Para. 306). The FCC recognized that there are numerous carriers providing service with their own packet switches, and that "competitors are actively deploying facilities used to provide advanced services to serve certain segments of the market—namely, medium and large business—and hence they cannot be said to be impaired in their ability to offer service." Id. (Tr. 54-55).

It is true that the FCC empowered state commissions to unbundle specific network elements used to provide frame relay (e.g. packet switching), but only to the extent that a competing carrier convinces the state commission that it is impaired without access to those elements. Intermedia failed to make any such showing at the FCC. (Tr. 55).

In the immediate proceeding, Intermedia has not produced a single shred of evidence which would indicate that it is impaired without access to packet switching on an unbundled basis. This Commission, as it did before in the BellSouth/ICG arbitration,[6] should reject this request.

Issue 22: Should BellSouth be required to provide nondiscriminatory access to interoffice transmission facilities in accordance with, and as defined in, the FCC's UNE Remand Order?

---

[6] Order No. PSC-00-0128-FOF-TP, dated January 14, 2000.

**<u>Position</u>: BellSouth agrees that it is required to provide nondiscriminatory access to interoffice transmission facilities and has proposed language which it believes is consistent with § 51.319(d) of the FCC's UNE Remand Order and with Intermedia's proposed language.

BellSouth has agreed to provide nondiscriminatory access to interoffice facilities in accordance with the FCC's UNE Remand Order. In fact, BellSouth has proposed the following language to Intermedia, which is consistent with Section 51.319 (d) of the FCC's UNE Remand Order:

> BellSouth shall provide nondiscriminatory access, in accordance with FCC Rule 51.311 and Section 251(c)(3) of the Act, to interoffice transmission facilities on an unbundled basis to Intermedia for the provision of a telecommunications service at the rates set forth in this Attachment.
>
> Interoffice transmission facility network elements include:
>
> i) Dedicated transport, defined as BellSouth's transmission facilities, including all technically feasible capacity-related services including, but not limited to, DS1, DS3 and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers or switches owned by BellSouth, or between wire centers and switches owned by BellSouth and Intermedia;
>
> ii) Dark Fiber transport, defined as BellSouth's optical transmission facilities without attached multiplexing, aggregation or other electronics;
>
> iii) Shared transport, defined as transmission facilities shared by more than one carrier, including BellSouth, between end office switches, between end office switches and tandem switches, and between tandem switches, in BellSouth's network.
>
> BellSouth shall:
>
> i) Provide Intermedia exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or shared use of the features, functions, and capabilities of interoffice transmission facilities shared by more than one customer or carrier;
>
> ii) Provide all technically feasible transmission facilities, features, functions, and capabilities that Intermedia could use to provide telecommunications services;

iii) Permit, to the extent technically feasible, Intermedia to connect such interoffice facilities to equipment designated by Intermedia, including but not limited to, Intermedia's collocated facilities; and

iv) Permit, to the extent technically feasible, Intermedia to obtain the functionality provided by BellSouth's digital cross-connect systems in the same manner that BellSouth provides such functionality to interexchange carriers. (Tr. 57-58).

BellSouth proposes that the rates admitted into the record as Exhibit 5 submitted should be approved by the Commission and subject to true-up when Florida-specific rates, to be proposed in April, are adopted by the Commission. (Tr. 58-59).

Intermedia does not oppose BellSouth's proposed rates. On cross-examination, Intermedia's witness, Mr. Jackson, stated that all Intermedia wants to do is make sure the interim rates are "correct." (Tr. 346).

Therefore, this issue, in the main, appears to be resolved. Intermedia proposed no rates of its own and did not challenge BellSouth's proposed rates. BellSouth requests that the Commission approve the rates submitted for interoffice transmission facilities. BellSouth further requests that the Commission require that the parties adopt the language proposed by BellSouth.

Issue 25: Should BellSouth be required to furnish access to the following as UNEs: (i) User to Network Interface ("UNI"); (ii) Network-to-Network Interface ("NNI") and (iii) Data Link Control Identifiers ("DLCI"), at Intermedia-specified committed information rates ("CIR")?

**Position: No. BellSouth is not legally required to offer the indicated components of Frame Relay as UNEs under Section 251.

This issue addresses specific components of Frame Relay service, and whether BellSouth is required to furnish access to these components as UNEs. Frame Relay is a form of packet switching. As stated above, the FCC declined to unbundle the packet switching functionality, of which frame relay is a type, except in limited circumstances. Each of the elements included in

Issue 25 (UNI, NNI and DLCI) are parts of frame relay. Those circumstances do not apply to BellSouth. Therefore, BellSouth requests this Commission find that BellSouth is not required to provide access to these elements at TELRIC-based rates. BellSouth has a tariffed Frame Relay service which is available for interconnection of the parties' frame relay networks. (Tr. 59).

Issue 26: Should parties be allowed to establish their own local calling areas and assign numbers for local use anywhere within such areas, consistent with applicable law?

> **Position: ALEC's should be required to assign numbers having the same NPA/NXX as the local calling area where the NPA/NXX is homed. Otherwise, BellSouth will not able to determine whether calls to Intermedia customers are local or toll, or whether access or reciprocal compensation should apply to the resulting traffic.

BellSouth believes that Intermedia should use its NPA/NXXs in such a way that BellSouth can distinguish local traffic from intraLATA toll traffic and interLATA toll traffic for BellSouth originated traffic. When an ALEC assigns numbers having the same NPA/NXX to customers both inside and outside the BellSouth local calling area where the NPA/NXX is homed, it would be extremely difficult, if not impossible, for BellSouth to determine whether BellSouth's end users are making a local or a long distance call when BellSouth's end user calls the ALEC's end user. (Tr. 60).

Contrary to Intermedia's assertion, BellSouth is indifferent to the manner in which Intermedia defines its local calling areas for its own end users. In order to properly route traffic, however, all telecommunications service providers must inform all other telecommunications service providers as to where traffic for a given NPA/NXX code should be delivered for completion of the calls. (Tr. 61).

Telecommunications service providers build translations and routing instructions based on NPA/NXX code information. For example, the ALEC may, if it chooses, interconnect at the local tandem for exchange of local traffic. When more than one local tandem exists in a local calling area, the ALEC must designate a "home" local tandem for its NPA/NXX codes and interconnect at that tandem. The ALEC may deliver local traffic to all BellSouth NPA/NXX codes in the local calling area by connecting to any one of the local tandems. (Id.).

Alternatively, the ALEC may choose to establish trunk groups directly between its switch(es) and each of the other local service providers' switch(es) instead of delivering its traffic via the tandem. BellSouth's interest in knowing Intermedia's NPA/NXX code homing arrangements is in no way an effort to limit Intermedia's flexibility in how it designs and operates its network. BellSouth's interest is simply in ensuring that calls are successfully routed, completed and billed. This can not be accomplished without Intermedia's informing BellSouth and other service providers of how and where to deliver and receive traffic to and from Intermedia's customers. (Tr. 61-62).

An example that Mr. Varner gave in his rebuttal testimony is helpful in understanding the problem faced by BellSouth if Intermedia's position is adopted in this proceeding.

> For example, if Intermedia assigns 904-495-1111 to an end user within BellSouth's local calling area and 904-495-2222 to an end user outside BellSouth's local calling area, it is not possible for BellSouth to determine, solely based on the NPA-NXX (e.g., 904-495), whether access charges or reciprocal compensation should apply. Switches route calls based on the NPA/NXX and are not arranged to route based on the entire telephone number. (Tr. 406).

Clearly, if Intermedia prevails on this issue, the appropriate routing of a call will be a serious concern. Intermedia's offer of calling party number identification ("CPNI") to alleviate the problem is not sufficient. The issue of whether a call is, in fact, local, would not be addressed by the provision of CPNI. (Tr. 408-409).

Issue 29: In the event Intermedia chooses multiple tandem access ("MTA"), must Intermedia establish points of interconnection at all BellSouth access tandems where Intermedia's NXXs are "homed"?

**Position: Yes. If Intermedia elects BellSouth's multiple tandem access ("MTA") offer, Intermedia must designate for each of Intermedia's switches the BellSouth tandem at which BellSouth will receive traffic originated by Intermedia's end user customers.

MTA is an interconnection option available to all ALECs, including Intermedia. The MTA option obviates the need for an ALEC to establish interconnection trunking at access tandems where the ALEC has no NPA/NXX codes homing. (Tr. 437-438). NPA/NXX code homing arrangements are published in the Local Exchange Routing Guide ("LERG"), however, so that all telecommunications companies in the industry will know where in the network to send calls and where the calls originate (Tr. 188).

The ALEC must, nevertheless, interconnect with BellSouth's network where its NPA/NXX codes home. (Id.). BellSouth's witness Mr. Milner provided an explanation of the purpose of this requirement:

> For example, if Intermedia assigns its NPA/NXXs to a BellSouth Exchange Rate Center, Intermedia must home such NPA/NXXs on the BellSouth access tandem serving that BellSouth Exchange Rate Center. Correspondingly, in order for BellSouth to deliver terminating IXC switched access traffic to the Intermedia switch serving those Intermedia NPA/NXXs, Intermedia must establish a trunk group to that BellSouth access tandem switch. This is normal NPA/NXX homing and network traffic routing practice within the industry. (Id.).

Stated simply, BellSouth is in no way attempting to limit Intermedia's flexibility regarding its network or numbering scheme. All telecommunications carriers, however, including BellSouth, must know where Intermedia's NPA/NXX codes are homed. If not, required translations and routing of calls will not be possible. The Commission should adopt BellSouth's position on this important issue.

Issue 30: Should Intermedia be required to:

a) designate a "home" local tandem for each assigned NPA/NXX; and

b) establish points of interconnection to BellSouth access tandems within the

LATA on which Intermedia has NPA/NXXs homed?

> **Position: (a) Yes. If more than one BellSouth local tandem serves a local calling area, Intermedia must establish one of the BellSouth local tandems as a home local tandem for each of its NPA/NXXs. (b) Yes. Intermedia must interconnect at each access tandem where its NPA/NXXs are homed for Intermedia's exchange access traffic.

BellSouth's position on these issues is that Intermedia may interconnect its network to BellSouth's network at one or more access tandems in the LATA for delivery and receipt of its access traffic. However, Intermedia must interconnect at each access tandem where its NPA/NXX codes are homed. As stated above (and as similar to Issue 29), telecommunications service providers inform all other telecommunications service providers where traffic for a given NPA/NXX code should be delivered for completion of calls. Telecommunications service providers then build translations and routing instructions based on that information to ensure the proper handling of calls. (Tr. 189-190).

BellSouth's local tandems were created for efficient tandem switching of local traffic served by those local tandems. By interconnecting to a BellSouth local tandem, Intermedia may deliver its originated local traffic to BellSouth end offices (and third party end offices) subtending that BellSouth local tandem. If more than one BellSouth local tandem serves a particular BellSouth local calling area, and Intermedia elects to interconnect at BellSouth's local tandem(s) for Intermedia's local traffic, Intermedia must establish one or more of the BellSouth local tandems as a home local tandem for its NPA/NXXs and establish interconnection to the BellSouth local tandem(s) on which Intermedia homed its NPA/NXXs. Again, as stated previously, if telecommunications service providers do not know where Intermedia's NPA/NXX codes are homed, then it is impossible for proper translations and routing instructions to be created and implemented. As a result, calls to and from Intermedia's end user customers cannot be completed and customer complaints are sure to follow. (Tr. 190).

Issue 31: For purposes of compensation, how should intraLATA Toll Traffic be defined?

> **Position: IntraLATA Toll Traffic should be defined as any telephone call that is not local or switched access per the parties' agreement.
>
> BellSouth has proposed the following definition of intraLATA toll traffic to Intermedia:
>
> IntraLATA toll traffic is defined as any telephone call that is not local or switched access per this Agreement. (Tr. 62.)

The language is proposed for insertion into Attachment 3, Section 6, which deals exclusively with interconnection compensation. BellSouth's proposed definition is straightforward. The only "limitation" (Intermedia complained BellSouth's language would be "limiting") on this traffic is related to compensation. That is, BellSouth is simply making clear that IntraLATA toll traffic is not subject to reciprocal compensation obligations. (Tr. 410).

Issue 32: How should "Switched Access Traffic" be defined?

> **Position: Switched Access Traffic should be defined in accordance with BellSouth's access tariff and should include IP Telephony.
>
> BellSouth has proposed the following definition of "Switched Access Traffic":
>
> Switched Access Traffic is as defined in the BellSouth Access Tariff. Additionally, IP telephony traffic will be considered switched access traffic. (Tr. 63.)

BellSouth believes that, because switched access traffic is already defined in BellSouth's access tariff, there is no need for an additional definition in the Interconnection Agreement. (Id.) Because Intermedia insists upon such a definition, however, the above is BellSouth's proposal. It should be noted, however, that the Interconnection Agreement is for local terms, conditions and services.

Nevertheless, in an effort to accommodate Intermedia, BellSouth is willing to put the same definition of switched access traffic that is contained in BellSouth's Access Services Tariff

(Section E6.1) in the Interconnection Agreement as long as IP telephony traffic is also considered (and defined) as switched access traffic.

It is important to include IP telephony in the definition, if any definition is included, to avoid confusion. Due to the increasing use of IP technology mixed with traditional analog and digital technology to transport long distance telephone calls, it is important to specify that such traffic is switched access traffic rather than local traffic. (Tr. 63.)

It is also important to note that even though IP telephony and ISP traffic both have the word "Internet" in their name, they are very different services. (Tr. 65.) The FCC has indicated that IP telephony is a telecommunications service, not an information or enhanced service. IP telephony is not exempt from paying access charges for use of the local network. (Tr. 66). BellSouth must assess access charges on all long distance calls; to do otherwise would discriminate between long distance carriers that use IP telephony and those that do not. (Id.)

Issue 37: Should all framed packet data transported within a Virtual Circuit ("VC") that originate and terminate within a LATA or classified as local traffic?

> **Position: BellSouth agrees that all framed packet data transported within a VC that originate and terminate within a LATA will be classified as local traffic. However, BellSouth contends that frame relay traffic originated and terminated in the LATA is not subject to reciprocal compensation.
>
> BellSouth has proposed the following language to Intermedia:
>
> Frame Relay framed packet data is transported within Virtual Circuits ("VC"). If all the data packets transported within a VC originate and terminate within the LATA, then for purposes of establishing interconnections between the Parties, such traffic will be treated the same as local circuit switched traffic ("Local VC"). This traffic will not be treated as Local Traffic for any other purpose under this Agreement, including but not limited to reciprocal compensation. (Tr. 69).

Voice traffic travels over a connection between at least two points, and can be measured on a minutes of use basis. Frame relay utilizes packet switching, where packets or "bursts" of information are sent in groups. Even Intermedia agrees that there is no continuous connection, and therefore there can be no "minutes of use" measurement. (Tr. 357.)

Because there is no meaningful way to measure the traffic in virtual circuits, it is appropriate and logical to exclude frame relay traffic, to the extent that it is local in nature, from the requirements of reciprocal compensation.

Issue 39: What are the appropriate charges for the following:

a) interconnection trunks between the parties' frame relay switches,

b) frame relay network-to-network interface ("NNI") parts,

c) permanent virtual circuit ("PVC") segment (i.e., Data Link Connection Identifier ("DLCI") and Committed Information Rates ("CIR"), and

d) requests to change a PVC segment or PVC service order record.

**Position: BellSouth proposes use of the nonrecurring and recurring charges set forth in its interstate access tariff.

Each of the items listed above in this issue are components of Frame Relay. (Tr. 412). As discussed earlier, BellSouth is not required to unbundle packet switching under Section 251 of the Act, or by any FCC Order (Tr. 412-413). Thus, the rates for these components are not subject to TELRIC pricing methodology. (Id.)

BellSouth's position is that the appropriate charges for frame relay interconnection trunks are from BellSouth's Access Tariff because frame relay is typically transporting interLATA traffic. Currently, charges for interconnection trunks that carry typical voice grade traffic on an interLATA basis are billed from the interstate access tariff, and there is no reason to treat frame relay service any differently. Therefore, the appropriate charge for all of the components listed above are found in BellSouth's Interstate Access Tariff. (Tr. 72-73).

Issue 45: Should the interconnection agreement specifically state that the agreement does not address or alter either party's provision of Exchange Access Frame Relay Service or interLATA Frame Relay Service?

> **Position: Yes. The purpose of this language is to make clear that the parties' obligations with respect to access service are not affected by this local interconnection agreement.

The parties recently agreed to resolve this issue. BellSouth respectfully requests that the Commission allow its withdrawal from consideration in this arbitration.

CONCLUSION

For the foregoing reasons, BellSouth requests that the Commission sustain and adopt each of BellSouth's positions on the issues enumerated hereinabove.

Respectfully submitted this 2nd day of May, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White (JW)

NANCY B. WHITE
MICHAEL P. GOGGIN
c/o Nancy Sims
150 South Monroe Street, #400
Tallahassee, Florida 32301
(305) 347-5558

R. Douglas Lackey (JW)

R. DOUGLAS LACKEY
A. LANGLEY KITCHINGS
675 West Peachtree Street, #4300
Atlanta, Georgia 30375
(404) 335-0763

207021

55 F. Supp. 2d 968 printed in FULL format.

US West Communications, Inc., Plaintiff, vs. Minnesota Public Utilities Commission, Edward A. Garvey, Chairman, Joel Jacobs, Commissioner, Marshall Johnson, Commissioner, Gregory Scott, Commissioner, and Don Storm, Commissioner (In Their Official Capacities as Past or Present Commissioners of the Minnesota Public Utilities Commission); and AT&T Wireless Services, Inc., Defendants.

File No. Civ. 98-914 ADM/AJB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

55 F. Supp. 2d 968; 1999 U.S. Dist. LEXIS 16224

March 30, 1999, Decided
March 31, 1999, Filed

DISPOSITION: [**1] US West's request Court find MPUC's determinations concerning US West-AWS Agreement violates 47 U.S.C. @@ 251 and 252 GRANTED IN PART, DENIED IN PART and DENIED WITHOUT PREJUDICE IN PART.

CORE TERMS: network, carrier, incumbent, interconnection, switch, tandem, unbundled, telecommunication, burden of proof, arbitration, collocation, local telephone, negotiation, technically, feasible, switching, state commission, entrant, directory, takings claim, state law, rebuttal testimony, traffic, geographic area, wireless, transit, Telecommunications Act, telephone, vacated, duty

COUNSEL: For US West Communications, Inc., Plaintiff: Geoffrey P. Jarpe, Martha J. Keon, Maun & Simon, PLC, Kevin J. Saville, US West Communications, Inc., Wendy M. Moser, Norton Cutler, Blair A. Rosenthal, US West, Inc.

For MPUC and the Commissioners, Defendants: Dennis D. Ahlers, Megan J. Hertzler, Assistant Attorneys General.

For AT&T Wireless Services, Inc., Defendant: Mark J. Ayotte, Darrin M. Rosha, Briggs and Morgan, P.A.

JUDGES: Ann D. Montgomery, UNITED STATES DISTRICT JUDGE.

OPINIONBY: Ann D. Montgomery

OPINION: [*970] MEMORANDUM OPINION AND ORDER

Plaintiff US West Communications, Inc., ("US West") brought this action pursuant to the Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), specifically 47 U.S.C. @ 252(e)(6), seeking judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). US West has named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual [**2] commissioners and the MPUC, itself, will be referred to collectively as the MPUC.

The above-captioned case is one of eight cases involving review of determinations made by the MPUC presently before this Court. On December 10,

Exhibit A

1997, this Court issued an Order in US WEST Communications, Inc. v. Garvey, No. 97-913 ADM/AJB, slip op. at 3 (D.Minn. Dec. 10, 1997), determining the scope of review for cases brought pursuant to @ 252(e)(6). The Court found the scope of review limited to an appellate review of the record established before the MPUC. Id. On May 1, 1998, the Court filed an Order addressing the standard of review in the eight Telecommunications Act cases. AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998). Questions of law will be subject to de novo review while questions of fact and mixed questions of fact and law will be subject to the arbitrary and capricious standard. Id. at 11-13.

[*971] I. BACKGROUND

Before 1996, local telephone companies, such as US West, enjoyed a regulated monopoly in the provision of local telephone services to business and residential customers [**3] within their designated service areas. AT&T Communications of the Southern States v. BellSouth Telecomms., Inc., 7 F. Supp. 2d 661, 663 (E.D.N.C. 1998). In exchange for legislative approval of this scheme, the local monopolies ensured universal telephone service. Id. During this monopolistic period, the local telephone companies constructed extensive telephone networks in their service areas. Id.

Congress passed the Telecommunications Act of 1996, in part, to end the monopoly of local telephone markets and to foster competition in those markets. Iowa Utilities Bd. v. FCC, 120 F.3d 753, 791 (1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999); GTE North, Inc. v. McCarty, 978 F. Supp. 827, 831 (citing Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 104-458, at 113 (1996)). Because the local monopolies, or incumbent local exchange carriers ("ILECs" or "incumbent LECs"), had become so entrenched over time through their construction of extensive facilities, Congress opted "not to simply issue a proclamation opening [**4] the markets," but rather constructed a detailed regulatory scheme to enable new competitors to enter the local telephone market on a more equal footing. AT&T Communications of the Southern States, 7 F. Supp. 2d at 663. The Act obligates the incumbent LECs, like US West: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it (interconnection); (2) to provide competing carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell any telecommunication service to competing carriers at a wholesale rate so that the competing carriers can resell the service (resale). Iowa Utils. Bd., 120 F.3d at 791 (citing 47 U.S.C.A. @ 251 (c)(2)-(4)). In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiation and arbitration. 47 U.S.C. @ 252. Two sections of the Act, 47 U.S.C. @@ 251 and 252, explain the basic structure of the overall scheme for [**5] opening up the local markets.

Section 251

Section 251 describes the three relevant classes of participants effected by the Act: (1) telecommunications carriers, (2) local exchange carriers, and (3) incumbent local exchange carriers. 47 U.S.C. @ 251(a), (b), and (c). A telecommunications carrier is a provider of telecommunications services, 47 U.S.C. @ 153(44), telecommunication services being "the offering of telecommunications for a fee directly to the public . . . ," 47 U.S.C. @ 153(46), and telecommunications being "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). Both US West and Defendant AT&T Wireless Services, Inc., ("AWS") qualify as telecommunications carriers. A local exchange carrier ("LEC") is "any person that is engaged in the provision of telephone exchange service or exchange access," 47 U.S.C. @ 153(26), within an exchange area. 47 U.S.C. @ 153(47). An incumbent local [**6] exchange carrier is a company that was an existent local exchange carrier on February 8, 1996, and was deemed to be a member of the exchange carrier association. 47 U.S.C. @ 252(h). In this action, only US West qualifies as an incumbent LEC.

Section 251 establishes the duties and obligations of these categories of participants. For example, all telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications [*972] carriers," 47 U.S.C. @ 251(a); local exchange carriers have a duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." 47 U.S.C. @ 251(b); and incumbent LECs have a duty to negotiate in good faith with telecommunications carriers seeking to enter the local service market, as well as a duty to "offer for resale at wholesale prices any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. @ 251(c). Section 251 requires an incumbent LEC to provide interconnection that [**7] is at least equal in quality to that provided by the incumbent LEC to itself at any technically feasible point, 47 U.S.C. @ 251(c)(2); to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, 47 U.S.C. @ 251(c)(3); and to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. 47 U.S.C. @ 251(c)(6).

Section 252

Section 252 delineates the procedures for the negotiation, arbitration, and approval of an interconnection agreement that permits a new carrier's entry into the local telephone market. 47 U.S.C. @ 252. Once an incumbent LEC receives a request for an interconnection agreement from a new carrier, the parties can negotiate and enter into a voluntary binding agreement without regard to the majority of the standards set forth in @ 251 of the Act. 47 U.S.C. @ 252(a). If the parties cannot reach an agreement by means of negotiation, after a set number of days, a party can petition a State commission, [**8] here the MPUC, to arbitrate unresolved open issues. 47 U.S.C. @ 252(b)(1).

An interconnection agreement adopted by either negotiation or arbitration must be submitted for approval to the State commission. 47 U.S.C. @ 252(e)(1). The State commission must act within 90 days after the submission of an agreement reached by negotiation or after 30 days of an agreement reached by arbitration. 47 U.S.C. @ 252(e)(4). The State commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. @ 252(e)(1).

FCC Regulations

47 U.S.C. @ 251(d)(1) directs the FCC to promulgate regulations implementing the Act's local competition provisions within six months of February 8, 1996. "Unless and until an FCC regulation is stayed or overturned by a court of competent jurisdiction, the FCC regulations have the force of law and are binding upon state PUCs [Public Utility Commissions] and federal district courts." AT&T Communications of California v. Pacific Bell, 1998 U.S. Dist. LEXIS 10103, 1998 WL 246652, at *2 (N.D.Cal. May 11, 1998) (citing Anderson Bros. Ford. v. Valencia, 452 U.S. 205, 219-20, 68 L. Ed. 2d 783, 101 S. Ct. 2266 (1981)). [**9] Review of FCC rulings is committed solely to the jurisdiction of the United States Court of Appeals pursuant to 28 U.S.C. @ 2342(1) and 47 U.S.C. @ 402(a).

On August 8, 1996, the FCC issued its First Report and Order, which contains the Agency's findings and rules pertaining to the local competition provisions of the Act. Iowa Utils. Bd., 120 F.3d at 792 (citing First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order")). Soon after the release of the First Report and Order, incumbent LECs and State Commissions across the country filed motions to stay the implementation of the Order, in whole or in part. The cases were consolidated in front of the Eighth Circuit. In Iowa Utilities Board, the Eighth Circuit decided that "the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service." Id. The Eighth Circuit [*973] also vacated the FCC's "pick and choose" rule as being incompatible with the Act. Id. at 801. Other [**10] provisions of the First Report and Order were upheld by the Eighth Circuit.

On August 8, 1996, the FCC also promulgated the Second Report and Order, which contains additional FCC comments and regulations concerning provisions of the Telecommunications Act of 1996 that were not addressed in the First Report and Order. The People of the State of California v. FCC, 124 F.3d 934, 939 (8th Cir. 1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999). Again many local exchange carriers and state commissions filed suit challenging the order. Several cases were combined in front of the Eighth Circuit, which issued another order addressing the FCC's rules. Id.

On January 25, 1999, the Supreme Court reversed a significant portion of the Eighth Circuit's decisions. AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. at 721. The Supreme Court ruled that the FCC does have jurisdiction to implement local pricing rules and the FCC's rules governing unbundled access, with the exception of Rule 319, are consistent with the Act. Id. at 738. In addition, the Supreme [**11] Court upheld the FCC's "pick and choose" rule as a reasonable, and possibly the most reasonable, interpretation of @ 252(i) of the Act. Id.

Procedural History

In this case, AWS, a Commercial Mobile Radio Service ("CMRS"), sent a letter dated October 3, 1996, to US West making a request for the partes to negotiate an Interconnection Agreement pursuant to the Act. (A1, Ex. 1). The parties failed to reach accord on all issues and AWS petitioned the MPUC for arbitration on March 7, 1997. (A1). In its Petition for Arbitration, AWS noted eleven open issues for arbitration. (A1; Petition for Arbitration at 7-23). On April 1, 1997, US West submitted its response to the MPUC. (A7).

On April 17, 1997, the MPUC granted AWS's petition and established procedures for the arbitration. (A11; MPUC Order Granting Petition at 1-5). The MPUC referred the matter to the Office of Administrative Hearings n1 to designate an Administrative Law Judge (ALJ) to conduct the arbitration proceedings and issue a recommendation. (A11; MPUC Order Granting Petition at 4). In its order, the MPUC noted that the Minnesota Department of Public Service ("DPS") n2 and the Residential Utilities Division of [**12] the Office of the Attorney General ("RUD-OAG") n3 had a right under state law to intervene in all MPUC proceedings. (A11; MPUC Order Granting Petition at 6).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The Office of Administrative Hearings is an independent state agency which employs administrative law judges to conduct impartial hearings on behalf of other state agencies. Minn. Stat. @@ 14.48 and 14.50.

n2 The Minnesota Department of Public Service is a state agency charged with the responsibility of investigating utilities and enforcing state law governing regulated utilities, as well as enforcing the orders of the MPUC. The DPS is authorized to intervene as a party in all proceedings before the MPUC. Minn. Stat. @ 216A.07.

n3 The Attorney General of Minnesota is "responsible for representing and furthering the interests of residential and small business utility consumers through participation in matters before the Public Utilities Commission involving utility rates and adequacy of utility services to residential or small business utility consumers." Minn. Stat. @ 8.33, subd. 2.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[**13]

The MPUC ordered that: "The burden of production and persuasion with respect to all issues of material fact shall be on US WEST. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute." (A11; MPUC Order Granting Petition at 10). The MPUC reasoned that the federal Telecommunications Act and the Minnesota Telecommunications Act of 1995 [*974] are designed to create competitive entry into the local telephone market and placing the burden of proof on US West facilitates this purpose. (A11; MPUC Order Granting Petition at 10). The MPUC further explained that US West controlled most of the key information relevant to the proceedings. (A11; MPUC Order Granting Petition at 10).

On May 2, 1997, AWS and US West submitted a matrix of twelve key issues to ALJ Allen Giles and the MPUC. (A15). Those issues included:

1) Access to Service Agreements;
2) Points of Interconnection;
3) Pricing of Services;
4) Application of Access Charges;
5) Reciprocal Compensation/Symmetrical Compensation;
6) Access to Unbundled Network [**14] Elements;
7) Items Specific to Paging;
8) Access to Poles, Ducts, Conduits, and Rights of Way;

9) Reciprocal Compensation Effective Date and Rates;
10) Contract Language;
11) Service Quality Standards; and
12) Transit Traffic.

(A15; Positions on Key Issues at 1-7). US West withdrew from its original list of open issues Wide Area Inbound Calling; Access to Numbering Resources; Dialing Parity; and Procedure for Notice of Change, because those issues were no longer in dispute. (A15; Positions on Key Issues at 5).

ALJ Giles presided over the arbitration hearing on May 6 and 7, 1997. (A17-A19). Attorneys for US West, AWS, and the DPS were present, as well as a member of the MPUC staff. (A17; ALJ Hearing Transcript at 2). Eight witnesses were called and various exhibits were entered. (A17-A19). AWS called Kerri M. Landeis, Director of External Affairs for AWS, (A20); Russell Thompson, Director of Network Planning for AWS, (A22); and Dr. Thomas M. Zepp, economist and Vice-President of Utility Resources, Inc., (A25), as expert witnesses. (A17-A18). US West called Thomas G. Londgren, Director of the Minnesota Regulatory Group for US West, (A28); Denyce Jennings, US West's Manager [**15] of Wireless Interconnection, (A30); Craig Wiseman, a member of US West's technical staff in the Interconnection Planning Group, (A18; ALJ Hearing at 261); and Dean Buhler, a member of US West's technical staff in Information Technologies, (A18; ALJ Hearing at 312), as expert witnesses. (A17-A19). US West also submitted the rebuttal testimony of Robert Harris, Principal at the Law and Economics Consulting Group and Professor Emeritus of Business and Public Policy in the Haas School of Business, University of California, Berkeley. (A39). The DPS called Susan Peirce, Public Utilities Rates Analyst for the MPUC, as an expert witness. (A40, Ex. A). The parties, including the DPS, submitted post-hearing briefs. (A45-A50). On June 6, 1997, the ALJ issued a Report and Recommended Arbitration Decision. (A51).

In early June, both US West and AWS filed exceptions to the Recommended Arbitration Decision. (A53); (A54). By letter dated June 11, 1997, the DPS noted no exceptions would be filed as the ALJ's recommendations were consistent with the positions advocated by the DPS. (A55). The MPUC heard a staff briefing and oral arguments on June 30 and July 2, 1997. (A57). Pursuant to its vote at the [**16] July 2 meeting, the MPUC issued its Order Resolving Arbitration Issues on July 30, 1998. (A58). In its Order, the MPUC took judicial notice of the stayed FCC rules and made the FCC methodologies part of the record. (A58; Order Resolving Arbitration Issues at 2). The MPUC ruled on the following issues:

1) Bill & Keep;
2) Interim Prices;
3) Compensation to AWS from Third-Party Carriers;
[*975] 4) Compensation for Traffic Terminated at AWS' Mobile Switching Center (MSC);
5) Access Charges for Intra-Major Trading Area (MTA) Roaming Calls;
6) Compensation for Terminating Paging Calls;
7) Dedicated Paging Facilities;
8) The Effective Date for Reciprocal Compensation;
9) Rates to Be Applied Between Commencement of Reciprocal Compensation and the Issuance of an Order;
10) "Pick and Choose" Option;
11) Points of Interconnection;

12) Limitation on Distance as to Mid-span Meet Point;
13) Collocation of AWS' Remote Switching Units (RSUs) and Digital Loop Carrier Systems (DLCs) at US West's Premises;
14) The Definition of "Collocated Premises";
15) Denial of Access Due to Space Exhaustion;
16) Nondiscriminatory Access to Unbundled Network Elements;
17) Access to Operational Support [**17] Systems (OSS);
18) Remedies for Service Quality Violations;
19) Access to Poles, Ducts, Conduits, and Rights of Way;
20) Adoption of Proposed Contract as Template; and
21) Arbitration Costs.

(A58; Order Resolving Arbitration Issues at 4-33). The MPUC ordered the parties to submit a final contract, containing all the arbitrated and negotiated terms, no later that 30 days from the service date of the MPUC's Order. (A58; Order Resolving Arbitration Issues at 34). On August 27, 1997, the parties submitted a CMRS Interconnection Agreement in accordance with the Order, but expressly reserved all rights in connection with any future challenges to the Order. (A48; Letter of Mark Ayotte at 2). The parties were unable to resolve the issue of special construction for interconnection facilities and therefore submitted two alternative versions for the portion of the Agreement addressing that issue. (A48; Letter of Mark Ayotte at 2).

On August 11, 1997, AWS filed a Petition for Reconsideration. (A59). On September 18, 1997, the Petition for Reconsideration and the Proposed Contract came before the MPUC. (A66; Order Resolving Issues After Reconsideration at 1). On September 29, 1997, the [**18] MPUC issued its Order Resolving Issues After Reconsideration, Examining Interconnection Agreement, and Requiring Compliance Filing. (A66). In that Order, the MPUC granted in part and denied in part AWS' Petitions for Reconsideration; the MPUC was persuaded that the compensation rate for AWS-terminated traffic should be the tandem switching rate rather than calculated on a per call basis. (A66; Order Resolving Issues After Reconsideration at 3, 11). The MPUC also corrected an error in its calculation of prices. (A66; Order Resolving Issues After Reconsideration at 4). The MPUC adopted the language submitted by AWS concerning special construction for interconnection facilities as the final contract language. (A66; Order Resolving Issues After Reconsideration at 11). The MPUC required a few further amendments and modifications to the Agreement, such as the addition of a notice provision and a provision concerning US West Dex. (A66; Order Resolving Issues After Reconsideration at 6-11). The MPUC found the rest of the agreement to be generally consistent with the federal Act, Minnesota law, and the public interest. (A66; Order Resolving Issues After Reconsideration at 6).

The MPUC ordered [**19] the parties to submit a final contract that complied with its Order within 30 days; the MPUC noted [*976] that a final contract with the proposed modifications would meet all applicable legal requirements, and therefore would be approved and effective as of September 18, 1997. (A66; Order Resolving Issues After Reconsideration at 11). The final US West-AWS Agreement was filed with the MPUC on October 30, 1997. (A68). On December 15 and March 4, 1997, the MPUC issued two memorandums noting that the parties filed an Agreement that complied with its Order of September 29, 1997. (A69); (A73).

On March 13, 1998, pursuant to 47 U.S.C. @ 252(e)(6), US West filed the instant action seeking review of the MPUC's Orders. US West alleges nine counts in its complaint: (1) Count I, the MPUC violated US West's due process rights and the dictates of the Act and Minnesota law by placing the burden of proof on US West; (2) Count II, the MPUC violated 47 U.S.C. @@ 252(b)(1) and (b)(4)(A) by considering issues not included in AWS' petition or US West's response; (3) Count III, the MPUC violated 47 U.S.C. @ 252(d)(2) and (d)(A)(ii) by treating [**20] AWS's Mobile Switching Center ("MSC") as a tandem switch for the purpose of compensation; (4) Count IV, the MPUC violated 47 U.S.C. @ 251(c)(6) when it required US West to collocate RSUs and DLCs on its premises; (5) Count V, the MPUC violated 47 U.S.C. @ 252(i) by ordering the inclusion of a provision in the Interconnection Agreement referencing the "unsettled state of the law" concerning the "pick and choose" rule; (6) Count VI, the MPUC violated @ 251(c)(2) when it ordered US West to provide interconnection at any technically feasible point, even if construction is involved; (7) Count VII, the MPUC exceeded its authority when it imposed conditions on US West Dex; (8) Count VIII, the MPUC exceeded its authority under @ 252(b)(4)(C) and (c) of the Act when it imposed requirements not expressly contained in the Act or state law; and (9) Count IX, the MPUC violated the Takings Clause by taking US West's property without just compensation.

II. OPERATIONAL SUPPORT SYSTEMS AS AN OPEN ISSUE

US West argues that the MPUC improperly required US West to provide AWS access to its operational support systems ("OSS"). US West alleges [**21] the MPUC had no authority to require this access because this was not an open issue before the MPUC.

Section 252(c) ("Standards for arbitration") states that:

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall-

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 U.S.C. @ 252(c) (emphasis added). Standing alone, this provision could arguably be read as ambiguous concerning the MPUC's ability to impose any condition of its choosing. However, when read in conjunction with 47 U.S.C. @ 252(b) ("Agreements arrived at through compulsory arbitration"), there is a clear indication that any condition that the MPUC decides to impose on [**22] the agreement must relate to an "open issue," that is an issue raised by the parties themselves. Section 252(b)(4)(A) states that "the State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any . . . ." This subsection indicates that the MPUC cannot independently [*977] raise an issue not raised by one of the parties. This interpretation is further reinforced by subsection (b)(4)(C) which states that "the State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement . . . ." In this context, the

imposition of conditions is expressly limited to resolving open issues. Therefore, @ 252(c) cannot be read as a grant of authority to a state commission to impose any requirement of its choosing; under @ 252(c) state commissions are limited to arbitrating open issues.

The MPUC and AWS argue, in turn, that the issue of access to unbundled network elements was clearly before the MPUC as an open issue and that because the OSS [**23] is a network element to be made available to new entrants on an unbundled basis according to 47 C.F.R. @ 15.319, the issue of access to the OSS was also clearly before the MPUC.

After the MPUC issued its order and the parties submitted their briefs in this case, the Supreme Court vacated @ 15.319. AT&T Corp., 119 S. Ct. at 736. The Supreme Court stated that the FCC, in determining which network elements an incumbent LEC must make available, should give greater weight to the terms "necessary" and "impair" in @ 252(d)(2). Id. The issue of access to OSS was an open issue only to the extent it could be considered a network element to be made available on an unbundled basis. In light of the Supreme Court's decision vacating 47 C.F.R. @ 15.319, whether OSS can be considered an unbundled network element is now in doubt and @ 15.319 cannot serve as the basis for its being considered such. Because the singular basis asserted by the MPUC for its considering access to OSS an open issue has now been removed by the Supreme Court, this Court concludes that the MPUC lacked authority under @ 252(c) to require US West to make access to its OSS available to AWS. This issue [**24] is remanded to the MPUC for further consideration in light of this Order. n4

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 As was noted by the Eastern District of North Carolina, the Act does not explain what should occur if a district court finds that an Interconnection Agreement violates the Act. AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F. Supp. 2d 661, 668 (E.D.N.C. 1998). Given the appellate nature of the proceeding, a remand to the state commission is the most appropriate option. Id.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

III. TANDEM TRANSPORT AND TERMINATION

US West argues that a provision of the Agreement imposed by the MPUC unlawfully compensates calls terminated at AWS's MSC at the tandem switching rate. US West alleges that the MPUC failed to consider actual function, that is that the MSC actually operates like an end-office switch rather than a tandem switch, in making its determination.

Section 251(b)(5) of the Act directs that all local exchange carriers are obligated to establish reciprocal compensation [**25] arrangements for the transport and termination of telecommunications. 47 U.S.C. @ 251(b)(5). The terms and conditions for reciprocal compensation must be just and reasonable and, to meet this standard, they must allow for the recovery of a reasonable approximation of the "additional cost" of transporting and terminating a call begun on another carrier's network. 47 U.S.C. @ 252(d)(2)(A). The FCC found that the "additional cost" will vary depending on whether or not a tandem switch is involved. First Report and Order, P 1090. The FCC, therefore, determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. Id. The FCC directed state commissions to "consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's [*978] tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." Id. The FCC [**26] further instructed that where the new carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the new carrier's costs is the LEC tandem interconnection rate. First Report and Order, P 1090; 47 C.F.R. @ 51.711(a)(3). n5 Therefore, in order to evaluate whether a switch performs as a tandem switch, it is appropriate to look at both the function and geographic scope of the switch at issue.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 The Eighth Circuit vacated 47 C.F.R. @ 51.711(a)(3) on the ground that the FCC lacked jurisdiction to issue pricing rules. Iowa Utils. Bd., 120 F.3d at 800, 819 n.39. However, the Supreme Court reversed this determination and reinstated the FCC's pricing rules, including 47 C.F.R. @ 51.711, finding that "the Commission has jurisdiction to design a pricing methodology." AT&T Corp., 119 S. Ct. at 733.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Whether a switch performs as a tandem or end-office switch is a factual determination that has been expressly delegated [**27] to the state commissions by the FCC. Because this is a question of fact, the MPUC's determination is reviewed using the arbitrary and capricious standard of review. AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998) (order denying motions to dismiss and determining standard of review); see TCG Milwaukee, Inc. v. Public Service Commission of Wisconsin, 980 F. Supp. 992, 1004 (W.D.Wisc. 1997).

The fundamental technical differences between wireless and landline telephone systems greatly complicate the comparison of the functions of their component elements. It is to some extent like comparing the proverbial apples and oranges.

Russell Thompson, Director of Network Planning for the Western Region of AWS, testified that the MSC performs duties similar to both a tandem and an end-office switch. (A23; Rebuttal Testimony of Russell Thompson at 1). Thompson described landline networks as being characterized by hierarchical switching centers with both tandem and end-office switches often being involved in the routing of calls. (A23; Rebuttal Testimony of Russell Thompson at 2). Wireless networks [**28] were explained as being hierarchical involving IS 41 Tandems, Cell Site Control ("CSC") switches, and cell sites in the routing of calls. (A23; Rebuttal Testimony of Russell Thompson at 2). The IS 41 and CSC are both located in the MSC. (A23; Rebuttal Testimony of Russell Thompson at 2). The CSC switches and cell sites together perform end office-like functions, (A23; Rebuttal Testimony of Russell Thompson at 7-8), while the IS 41 Tandem provides tandem-switch functions. (A23; Rebuttal Testimony of Russell Thompson at 3). "Tandem switching systems perform trunk switching and generally provide two basic network functions - traffic concentration and centralization of services." (A23; Rebuttal Testimony of Russell Thompson at 9 (citing BOC Notes on Network, Section 4, Network Design and Configuration, 4.1.3.3, Tandem

Switching Systems, pp. 4-6)). Thompson testified that the IS 41 Tandem performs both these functions. (A23; Rebuttal Testimony of Russell Thompson at 9).

Thomas Zepp, economist and Vice President of Utility Resources, Inc., confirmed Thompson's assessment that the MSC functions as a tandem switch. (A25; Direct Testimony of Thomas Zepp at 38-41). Zepp gave a number of examples [**29] as to how a MSC performs tandem functions, for example storing the location of and tracking a wireless customer in a "Home Location Register," routing calls to another MSC while a customer is in transit, and routing phone calls to a landline in the most cost-effective manner. (A25; Direct Testimony of Thomas Zepp at 38-40).

US West, in turn, presented strong evidence that the MSC functions as an end-office [*979] switch rather than a tandem switch. (A42; Direct Testimony of Craig Wiseman at 9). US West's expert Craig Wiseman, a member of US West's technical staff in the Interconnection Planning Group, testified that the MSC only connected AWS subscribers to each other or to other local service provider networks in order to deliver calls to or receive calls from AWS subscribers. (A42; Direct Testimony of Craig Wiseman at 9). AWS depends on US West tandems to send calls to or receive calls from the vast majority of subscribers in Minnesota and the rest of the United States. (A42; Direct Testimony of Craig Wiseman at 9). Wiseman also testified that other wireless companies, such as GTE Mobilenet, SouthWestco, and Aliant, had recognized their switching offices as end offices in arbitrated agreements, [**30] and that other state arbitration panels had determined that wireless companies are not entitled to tandem switching and transport compensation. (A42; Directory of Craig Wiseman at 13).

On the issue of the geographic scope of the switches, there was evidence that the MSC serves a geographic area similar to that of a landline tandem switch. US West's tandem switches are limited by the LATA n6 boundaries in Minnesota and therefore there are several tandem switches within the state. (A18; ALJ Hearing at 209-10). AWS' MSC directly serves sixty-six percent of Minnesota's population. (A17; ALJ Hearing at 33). Although percentage of population is not precise as to geographic area covered, it indicates that the MSC covers at least an area comparable to one of Minnesota's LATAs and therefore covers an area comparable to a US West tandem switch. US West argues that AWS' MSC fails to reach the same geographic area as all of US West's tandem switches. (A42; Direct Testimony of Craig Wiseman at 11-12). However, that comparison is irrelevant. The issue is not whether the MSC covers the same geographic area as all of the tandem switches in Minnesota, but rather whether it covers the same geographic [**31] area as one tandem switch.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n6 A Local Access and Transport Area ("LATA") is "a contiguous geographic area" established by a Bell operating company pursuant to a consent decree. 47 U.S.C. @ 153(25). Generally a state will have more than one LATA.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Based on the evidence before the ALJ and the MPUC, it appears that the MSC performs functions comparable to both end-office and tandem switches. Although there was conflicting evidence concerning the function of the MSC, the testimony of Thompson and Zepp provided a sufficient basis for the MPUC's finding that the MSC performs a tandem switch function. n7 This is particularly true in light of the FCC's admonition to consider the capabilities of new technology such as wireless networks. While there may be no exact corollaries between the wireless and landline systems, there is evidence to suggest that the MSC has capabilities and reach that are of a certain equivalence to a tandem switch. The evidence also indicates that the MSC covers a geographic [**32] area comparable to that covered by a tandem switch. Pursuant to the FCC rules, this alone provides sufficient grounds for a finding that the appropriate rate for the MSC is the tandem switch rate. n8

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n7 US West indicated that the MPUC should have been limited by the definition of tandem switch found in 47 C.F.R. @ 51.319(c)(2). However, since the MPUC made its decision, 47 C.F.R. @ 51.319 was vacated by the Supreme Court. AT&T Corp., 119 S. Ct. at 736. US West's argument is now moot in light of the Supreme Court's recent decision.

n8 The MPUC stated that it did not base its final decision on FCC Rule 51.711(a)(3) and the geographic reach of the switches, although its preliminary ruling may have taken geographic reach into consideration. (MPUC's Brief at 4). Even though the MPUC may not have relied on FCC Rule 51.711(a)(3), the reinstated rule and the comparable geographic reach of the switches reinforces the MPUC's final decision.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The MPUC's finding that calls terminated at AWS's MSC should [**33] be compensated [*980] at the tandem switching rate is not arbitrary and capricious.

IV. COLLOCATION OF EQUIPMENT

US West argues that the MPUC erred by requiring US West to permit AWS to physically collocate RSUs on US West's premises because such equipment is not necessary for access to unbundled network elements under @ 251(c)(6). n9

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n9 US West briefed only the issue of collocating RSUs, although its complaint referenced both RSUs and DLCs in connection with this issue.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Section 251(c)(6) states that an incumbent LEC has a duty to provide "for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ." 47 U.S.C. @ 251(c)(6) (emphasis added). The FCC found that @ 251(c)(6) "generally requires that incumbent LECs permit the collocation of equipment used for interconnection or access to unbundled network elements." First Report and Order, P 579. In reaching that conclusion, the [**34] FCC interpreted and defined the term "necessary": "Although the term 'necessary,' read most strictly, could be interpreted to mean 'indispensable,' we conclude that for the purposes of section 251(c)(6) 'necessary' does not mean 'indispensable' but rather 'used' or 'useful.'" Id. The FCC decided that a more expansive interpretation of the term "necessary" would further the competitive motivation behind the Act. Id.

The FCC then determined whether specific equipment could or could not be collocated on the incumbent LEC's premises, essentially deciding whether the equipment is "useful" for interconnection or access to unbundled elements. Id. P 580-82. Concerning the collocation of switching equipment, the FCC stated:

At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is [**35] in dispute, that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

Id. P 581. The FCC left the factual determination as to whether "switching equipment" is used for interconnection to the discretion of the state commissions.

When allotting the burden of proof, the FCC placed the burden on the incumbent LEC to prove that specific equipment is not "necessary," meaning useful, for interconnection to unbundled network elements. Id. P 580. In explaining this standard, the FCC stated that:

Whenever a telecommunication carrier seeks to collocate equipment for purposes within the scope of Section 251(c)(6), the incumbent LEC shall prove to the state commission that such equipment is not "necessary," as we have defined that term, for interconnection or access to unbundled network elements.

Id. P 580.

In addition to defining "necessary" in the context of @ 251(c)(6), the FCC also interpreted the term "necessary" in relation to @ 251(d)(2). n10 The FCC determined [*981] that within the context of @ 251(d)(2) the term "necessary" means "that an element is a prerequisite for competition. [**36] " First Report and Order, P 282. Without a necessary element, a new entrant's "ability to compete would be significantly impaired or thwarted." Id. The FCC stated that finding that a proprietary element is not "necessary" for purposes of @ 251(d)(2)(A), requires an incumbent LEC to establish that "a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network." Id. P 283. The FCC would view the "necessary" requirement as having been met even if the "'requesting carriers can obtain the requested proprietary element from a source other than the incumbent,'" since "'requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.'" AT&T Corp., 119 S. Ct. at 735 (citing First Report and Order, P 283). By means of these lexicographical permutations, the FCC created a similar definition for the term "necessary" within the context of @ 251(d)(2) and @ 251(c)(6); in both cases, [**37] the word means something akin to "useful."

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n10 47 U.S.C. @ 251(d)(2) provides:

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether- (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. (emphasis added).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In AT&T Corp., the Supreme Court vacated the FCC's interpretation of the word "necessary" within the context of @ 251(d)(2), finding that the FCC had given the term too broad a definition and robbed it of all of its teeth as a limiting standard. AT&T Corp., 119 S. Ct. at 736. The Court stated that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do. [**38] " Id.

By rejecting the FCC's definition of the term "necessary" within the context of @ 251(d)(2), the Supreme Court implicitly rejected the same overly broad definition given to the word by the FCC in relation to @ 251(c)(6). "Presumptively, 'identical words used in different parts of the same act are intended to have the same meaning.'" United States National Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 460, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993) (quoting Commissioner v. Keystone Consol. Industries, Inc., 508 U.S. 152, 159, 124 L. Ed. 2d 71, 113 S. Ct. 2006 (1993)). As "necessary" does not mean "useful" in the context of @ 251(d)(2), it cannot mean "useful" in @ 251(c)(6). In making its factual determination about whether to permit the collocation of RSUs, the MPUC utilized the "used" or "useful" standard originally promulgated by the FCC. n11 In light of the rejection of this standard by the Supreme Court, collocation must be remanded to the MPUC for redetermination using a more stringent meaning of the term "necessary."

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n11 In its Order, the MPUC stated that it will allow the collocation of RSUs and DLCs on US West's premises "consistent with its reasoning and action in the Consolidated Arbitration Order." (A58; Order Resolving Arbitration Issues at 22). In the Consolidated Arbitration Order, the MPUC ordered collocation of RSUs and DLCs based on US West's failure "to meet its burden of proving that these types of equipment are not 'necessary,' as interpreted by the FCC, for interconnection or access to unbundled elements." (A168 from US West Communications, Inc. v. Garvey, No. 97-913 ADM/AJB; Consolidated Arbitration Order at 16) (emphasis added).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[**39]

V. "PICK AND CHOOSE" PROVISION

In its reply brief, US West seeks to withdraw, without prejudice, its Count V request for declaratory relief concerning AWS's rights under @ 252(i)'s most favored nation provision. (Pl.'s Reply Brief at 1 n.1). Therefore, the Court will dismiss Count V without prejudice. It should be noted, however, that in light of the recent Supreme Court ruling, the provision concerning @ 252(i) that the MPUC chose now seems prescient.

[*982] VI. INTERCONNECTION AT ANY TECHNICALLY FEASIBLE POINT

The MPUC ruled that US West must build facilities necessary for AWS to connect to US West's network at any technically feasible point of AWS's choosing. (A66; Order Resolving Issues After Reconsideration at 7). n12 The MPUC approved the following language in the US West-AWS Agreement: "USWS shall provide the facilities and arrangements herein described to AWS in order to establish the physical connection and permit the interchange of traffic between the Parties, as well as any other facilities AWS may require for operation of AWS's System." (A68; CMRS Interconnection Agreement at @ 2.B). The MPUC also approved @ 2.D of the Agreement, which would [**40] require US West to build a DS1 or DS3 facility any place where one is not available. (A68; CMRS Interconnection Agreement at @ 2.D).

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n12 The parties do not dispute that AWS would pay for the construction of any new facilities.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

US West claims that the MPUC erred when it required US West to construct new facilities. US West argues that this requirement over extends the Act's directive that incumbent LECs need to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself." 47 U.S.C. @ 251(c)(2)(C).

The MPUC claims that @ 251(c)(2)(C) is not controlling and urges that the focus should instead be on the Act's directive that incumbent LECs must provide interconnection to new entrants "at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. @ 251(c)(2)(B). In support of the MPUC's ruling that US West must build facilities, AWS similarly cites to @ 251(c)(2)(B), as well as relying [**41] on the FCC's order stating that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." First Report and Order, P 198.

Section 251(c)(2) states that an incumbent LEC has:

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; . . .

47 U.S.C. @ 251(c)(2). The FCC originally interpreted @ 252(c)(2)(C) as requiring incumbent LECs to provide superior quality interconnection when such interconnection was requested by new entrants. Iowa Utils. Bd., 120 F.3d at 812. The Eighth Circuit, however, vacated this FCC interpretation of @ [**42] 251(c)(2)(C), finding that it was not supported by the Act's language. Id. The Eighth Circuit explained that:

Although we strike down the Commission's rules requiring incumbent LECs to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements."

Id. at 813 n.33 (quoting First Report and Order, P 198). The Eighth Circuit specifically upheld the FCC's definition of the term "technically feasible" from @ 251(c)(2)(B). Id. at 810. In defining "technically feasible," the FCC stated:

[*983] Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, [**43] or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except the space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible.

47 C.F.R. @ 51.5.

In reaching its decision concerning the construction of facilities, the MPUC stated that the issue was not whether AWS can demand a superior quality interconnection, but rather whether US West can be required to modify its network to permit interconnection at existing quality levels. (A66; Order Resolving Issues After Reconsideration at 7). The MPUC did not rely on the FCC's vacated interpretation of @ 251(c)(2)(C), but rather what it considered to be the FCC's upheld interpretation of @ 251(c)(2)(B).

The MPUC is correct that construction of a new facility does not necessarily mean superior interconnection. New facilities could be necessary just to create equivalent quality interconnection and access. Therefore, [**44] in making its ruling, the MPUC did not violate @ 251(c)(2)(C).

The question therefore becomes did the MPUC have the power under @ 251(c)(2)(B) to order US West to provide new facilities upon request or did the construction of new facilities exceed the modifications envisioned by the FCC in its interpretation of "technically feasible." The answer is dependent on whether the concept of modifying facilities is interpreted broadly or narrowly. Three factors favor a broad construction. First, the FCC stated that site concerns should not be determinative of technical feasibility except to the extent space could not be expanded. In this statement that site concerns should not be determinative, there is an implication that the parties should look beyond any specific site, e.g. to new facilities, when resolving interconnection issues. In addition, construction of new facilities falls under the rubric of space expansion and therefore ensures technical feasibility. Second, so long as the new entrant pays for the costs associated with the new facility, the incumbent LEC should not be unduly burdened. Third, the purpose of the Act is to promote the opening up of local telephone markets to competition [**45] in a speedy manner. Because the incumbent LEC has the relevant expertise and knowledge for building facilities to interconnect with its network, it would be expedient to require it to build the facilities.

Based on the foregoing, the Court concludes that the MPUC had the necessary authority under @ 251(c)(2)(B) to order US West to provide new facilities on request.

VII. US WEST DEX

US West claims the MPUC exceeded its authority when it rejected the parties' agreement to defer directory and yellow page issues to later negotiations and instead required the parties to adopt a provision that regulated US West Dex. US West argues that the MPUC does not have the authority, under either state law or the Act, to impose obligations on US West Dex.

In response, the MPUC and AWS claim that the Commission did not directly regulate US West Dex. They argue that the MPUC did what it was required to do by the Act, ensure that AWS had nondiscriminatory access to telephone numbers and [*984] listings, and that US West provide AWS with services that are "at least equal in quality to that provided by the incumbent LEC to itself." First Report and Order, P 970.

US West Communications, Inc., [**46] the party in this case, and US West Dex are wholly owned subsidiaries of US West, Inc. ("US West Parent"). MCI Telecomms. Corp. v. US West Communications, Inc., 1998 U.S. Dist. LEXIS 21585, *30, Case No. C97-1508R (July 21, 1998 W.D.Wash.). US West Dex is the publishing branch of the parent company and publishes US West's white and yellow page directories. 1998 U.S. Dist. LEXIS 21585, *30. US West Dex is not a named party to the underlying Agreement in this case.

Contrary to the MPUC's and AWS's argument, the Commission did regulate US West Dex. The MPUC required the parties to include language in the Agreement that placed a direct obligation on US West Dex: "US WEST Dex will give the Carrier the same opportunity to provide directory listings as it provides to US WEST (for example, through some type of bidding process)." (A56; Order Denying Reconsideration at 11). While other portions of the MPUC's Order were explicitly directed only at US West, the MPUC did seek to control US West Dex's business and contract agreements, and therefore to regulate US West Dex: "US WEST shall make its contracts with US WEST DEX available for review by the Carrier, as necessary, to ensure that the Carrier is receiving the same services at [**47] the same terms as US WEST." (A56; Order Denying Reconsideration at 11). The question becomes whether the MPUC had the authority to regulate US West Dex under either state law or the Act, or whether it assumed authority it never had as the Plaintiff claims.

Under state law, the MPUC has only the "powers expressly delegated by the legislature and those fairly implied by and incident to those expressly delegated." In the Matter of Northwestern Bell Telephone Co., 371 N.W.2d 563, 565 (Minn.Ct.App. 1985) (citing Great Northern Railway Co. v. Public Service Comm'n, 284 Minn. 217, 169 N.W.2d 732, 735 (Minn. 1969)). Implied powers must be fairly evident from the express powers. Id. (quoting Peoples Natural gas Co. v. Minnesota Public Utilities Comm'n, 369 N.W.2d 530 (Minn. 1985)). As the Minnesota Supreme Court held, Chapter 237 was created to resolve issues concerning public utility telephone companies; a business that publishes directories is not a telephone company and therefore does not fall under the regulatory powers of the MPUC. In the Matter of Northwestern Bell Telephone Co., 367 N.W.2d 655, 660 (Minn. 1985). [**48] US West, as a utility, is regulated by the MPUC, while US West Dex, which is in the business of publishing directories, is not. See id. The MPUC does not have the power under state law to regulate US West Dex. The Court must therefore analyze federal law as the possible basis of authority for the MPUC's action regulating US West Dex.

The Act states that local exchange carriers have the duty to provide competitors with nondiscriminatory access to telephone numbers, directory assistance, and directory listings. 47 U.S.C. @ 251(b)(3). US West Dex is not a local exchange carrier because it does not engage in providing telephone exchange service or exchange access. See 47 U.S.C. @ 153(26). As US West Dex is not a covered entity under the Act, the MPUC cannot use the statute to regulate US West Dex or impose an obligation on it. See MCI Telecomms. Corp. v. US West Communications, Inc., 1998 U.S. Dist. LEXIS 21585, *25, Case No. C97-1508R (July 21, 1998 W.D.Wash.). n13

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n13 The FCC concluded that the term "directory listings" encompasses directory listings published by a telecommunication carrier and its "affiliates," but then never defines the term "affiliate." 47 C.F.R. @ 51.5. Given the Act's express limitation of covered entities to telecommunications carriers, a telecommunications carrier's control of an entity must be a prerequisite for finding that the entity is an affiliate within the meaning of the FCC's rules. Although US West and US West Dex share a parent company that does not equate to exerting control over one another. Without some evidence of US West's control of US West Dex, the Court cannot conclude that US West Dex is an affiliate of US West.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[**49]

[*985] Because it lacked the power under both state law and the Act to regulate US West Dex, the MPUC exceeded its authority by ordering the addition of a provision to @ 11 requiring US West Dex to treat US West and its competitors the same with respect to yellow page advertising and white page directory listings. These matters are remanded to the MPUC for further deliberations.

VIII. RECORDING AND BILLING SERVICES

US West argues that the MPUC violated @ 252(b)(4) and (c) by requiring US West to make its recording and billing services available to AWS to facilitate AWS's collection of termination charges when a third party originates calls that transit US West's network and are then terminated on AWS's network. US

West argues that the MPUC did not have the authority under the Act to impose such a requirement.

AWS argues that the MPUC had the necessary authority under @ 252(b)(4)(C) as well as @ 251(b)(5). The MPUC argues that its authority derived from @ 253(b) and state law.

After a request for negotiations has been made, the parties have a duty to negotiate an Interconnection Agreement pursuant to @ 251 of the Act. 47 U.S.C. @ 252(a)(1). During [**50] their negotiations, the parties are not bound by the directives of subsections (b) and (c) of @ 251. Id. Essentially, the parties can create an Interconnection Agreement of their choosing that covers any desired aspect of interconnection. In their discussions, the parties are not limited to those matters explicitly enumerated in @ 251 or the FCC's rules. If the parties are unable to resolve the issues that formed the subject of their negotiations, @ 252(b)(1) provides that a party "to the negotiation may petition a State commission to arbitrate any open issues." (emphasis added). The parties can bring any unresolved interconnection issue before the state commission for arbitration. The parties are again not limited to issues explicitly enumerated in @ 251 or the FCC's rules, but rather are limited to the issues which have been the subject of negotiations among themselves.

Section 252(b)(4)(C) provides the authority for a state commission to act during arbitration proceedings, "the State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the [**51] parties to the agreement . . . ." Section 252(c) ("Standards for arbitration") states that:

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall-

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 U.S.C. @ 252(c).

Section 252(b)(4)(C) expressly provides that a state commission "shall resolve each issue set forth in the petition and the response." If an issue has been designated by the parties as in need of resolution by the MPUC, the MPUC has an obligation to address that issue and, as was noted above, the parties may raise any issue concerning which they have attempted [*986] to negotiate a resolution. The language of @ 252(c)(1) stating that the state [**52] commission shall ensure that the resolution of open issues meets the requirements of @ 251, does not confine the resolution of the issues to the requirements of @ 251. If a state commission ensures that the resolution meets the requirements of a section, it is merely certifying that the resolution meets the affirmative requirements of the section while simultaneously determining that it does not conflict with or violate the section's affirmative and negative requirements. Not every issue included in the resolution necessarily involves the affirmative requirements of @ 251. Thus, the only limitations that @ 252(b)(4)(C) and (c) place upon any individual issue addressed by a state commission during arbitration are that the issue must be: (1) an open issue and (2) that resolution of the issue does not violate or conflict with @ 251.

Transit traffic was an issue presented by the parties to the ALJ and the MPUC in their matrix of twelve key issues. (A15; Positions on Key Issues at 5). As part of the transit traffic issue, the parties discussed including transit traffic as part of their "bill and keep" arrangement. AWS argued that it should be part of the arrangement and US West argued [**53] that it would not be appropriate to include it because transit traffic does not involve a US West customer originating the call. (A15; Positions on Key Issues at 5). The billing of transit traffic was an open issue between the parties and was expressly presented to the MPUC for resolution. Furthermore, as the billing of transit traffic is not expressly addressed by @ 251 or the FCC rules, the MPUC's decision to require US West to make its recording and billing services available to AWS does not conflict with or violate @ 251. Because this issue met the two requirements of @ 252(b)(4)(C) and (c), the MPUC had the authority under the Act to resolve this open issue.

IX. BURDEN OF PROOF

The MPUC created the following burden of proof for the parties: "The burden of production and persuasion with respect to all issues of material fact shall be on US WEST . . . . The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute." (A3) (MPUC Order Granting Petition at 10).

When Congress establishes the burden [**54] of proof or production to be applied in an administrative proceedings, the courts must defer to Congress. Steadman v. S.E.C., 450 U.S. 91, 95-96, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981). However, when Congress is silent as to the issue, it is left to the judiciary to resolve the question. 450 U.S. at 95, 101 S. Ct. at 1004.

The provisions of the Act and the FCC rules, which address the issue, place the burden of proof on the incumbent LEC. See 47 C.F.R. @@ 51.5 ("An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.") and 51.321(d) ("An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible."). There appears to be no section of the [**55] Act or FCC rules that places the burden of proof on the new entrant. The MPUC has admittedly placed a heavy burden of proof on the incumbent LEC, but no evidence has been adduced that such a standard conflicts [*987] with the Act or the FCC rules. n14 To the extent Congress and the FCC have spoken to the burden of proof, the MPUC's position does not conflict with their directives.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n14 The one apparent exception involves the issue of technical feasibility of interconnection. The FCC rules create a clear and convincing standard in relation to this issue while the MPUC created a preponderance of the evidence standard. As this apparent conflict is not relevant to this case, it will not be addressed here.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

As for the burden of proof for the remainder of the statute, normally when a federal statute is silent as to the burden of proof in an administrative proceeding, a court would turn to the Administrative Procedure Act (APA) to fill the void. However the APA does not apply to these proceedings because the MPUC is not a federal [**56] agency. Franklin v. Massachusetts, 505 U.S. 788, 800, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992). Typically an applicable state statute would determine the proper burden of proof for proceedings before a state agency like the MPUC. In fact, US West argues that the MPUC should have applied the burden of proof for contested case proceedings found in Minnesota Rule 1400.7300, subp. 5. However, because this is a sui generis proceeding, a state agency applying federal law to review telecommunications agreements, at the time of the hearing there was no state law explicitly on point. n15 The MPUC was thus left the task of developing an appropriate burden of proof.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n15 After the hearing, the MPUC adopted Minnesota Rule 7812.1700, subp. 23 to govern the arbitration of intercarrier negotiations. Minnesota Rule 7812.1700, subp. 23 contains the same burden of proof as the one used by the MPUC in this case. Minnesota Statute @ 237.16 authorized the MPUC to promulgate rules governing local competition and to define the procedures for competitive entry and exit. Minn. Stat. @ 237.16, subd. 8.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[**57]

The burden of proof the MPUC selected is in accord with the procompetitive purposes of the Act and realistically reflects the parties access to and control of information. Generally, under federal and Minnesota common law, the proponent of an issue - that is the one who wants to prove the affirmative - has the burden of proof as to that issue. Newport News Shipbuilding and Dry Dock Co. v. Loxley, 934 F.2d 511, 516 (4th Cir. 1991) (citing Selma, Rome & C. Railroad v. United States, 139 U.S. 560, 567, 35 L. Ed. 266, 11 S. Ct. 638 (1891); Fleming v. Harrison, 162 F.2d 789, 792 (8th Cir. 1947)); Holman v. All Nation Insurance Co., 288 N.W.2d 244, 248 (Minn. 1980). However, under both federal and Minnesota common law, questions of fairness, such as the control of information, can alter the disposition of the burden of proof. Fleming, 162 F.2d at 792; Holman, 288 N.W.2d at 248.

In this case, placing the burden of proof on the competitive local exchange carrier ("CLEC") would present an insurmountable barrier to entry into the local telephone market. As the MPUC accurately noted, US West [**58] has held a monopoly in the local telephone market for an extended period of time and as a result largely controls the information about the market. It knows the operation and function of various component elements of its system as well as the costs involved. Thus, fairness supports leveling the playing field by allocating the burden of proof onto the incumbent LEC, the party with the historical advantage.

In addition, the burden of proof established by the MPUC permits for the shifting of the burden in appropriate circumstances, e.g. when the CLEC controls the relevant information. Flexibility is provided to accommodate situations where it would be unjust to leave the burden of proof on the incumbent LEC. Given this flexibility and in light of the control of information as well as the purpose of the Act, the burden of proof standard chosen by the MPUC was appropriate.

X. TAKINGS CLAIM

US West makes a general claim that if the US West-AWS Agreement is upheld, [*988] it will result in a taking of US West's property. US West also alleges that requiring US West to permit collocation of RSUs, access to its OSS, and interconnection and access to unbundled elements is a physical [**59] occupation of its property, and therefore constitutes a "per se taking under the Fifth Amendment."

In relation to its takings claim, US West states that it is not seeking compensation for the alleged taking but rather that it wishes an injunction to prevent a taking without just compensation. US West appears to be alleging a violation of the jurisdictional grant of the Act. In making its argument, US West relies on Bell Atlantic Tel. Cos. v. FCC, 306 U.S. App. D.C. 333, 24 F.3d 1441 (D.C.Cir. 1994). In Bell Atlantic, the D.C. Circuit determined that 47 U.S.C. @ 201 did not vest the FCC with the necessary authority to order LECs to provide physical collocation of equipment upon demand. 24 F.3d at 1444-47. It found that because the particular statute did not expressly authorize an order of physical collocation, the FCC could not impose it. Id. at 1447. Bell Atlantic is, however, inapposite to the present case, because, unlike the general Communications statute at issue in Bell Atlantic, 47 U.S.C. @ 251(c)(6) expressly provides for limitations being placed on the LECs' property rights, including the requirement [**60] that incumbent LECs have a duty to provide for the physical collocation of equipment. See 47 U.S.C. @ 251(c)(6). In fact, Congress was aware of the Bell Atlantic decision when it authorized the imposition of physical collocation:

Paragraph 4(B) [of section 251] mandates actual collocation, or physical collocation, of equipment necessary for interconnection at the premises of a LEC, except that virtual collocation is permitted where the LEC demonstrates that actual collocation is not practical for technical reasons or because of space limitations. . . . Finally, this provision is necessary to promote local competition, because a recent Court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See Bell Atlantic Tel. Co. v. Federal Communications Commission, 306 U.S. App. D.C. 333, 24 F.3d 1441 (1994)).

House Rep. No. 104-204, at 73 (1995). Therefore, Congress clearly intended to vest the agencies with authority to place limitations on the LECs' property rights.

US West has not only challenged the MPUC's authority to impose these limitations on US West's [**61] property, but also claimed that the

Agreement approved by the MPUC does not fully compensate US West for the taking of its property. This is a traditional takings claim allegation and the Court will therefore apply a traditional takings claim analysis.

The defendants argue that US West's taking claim must fail because: (1) it exceeds the scope of this Court's jurisdiction, which is limited by 47 U.S.C. @ 252(e)(6); (2) the claim is not ripe for review; and (3) the agreement contains provisions which allow for full cost recovery by US West.

The Eighth Circuit explicitly noted that a takings claim can be presented to a federal district court under the review provisions of subsection 252(e)(6). Iowa Utils. Bd., 120 F.3d at 818. Therefore, this Court has jurisdiction to hear the takings claim.

In order for a takings claim to be ripe, two elements must be met: (1) the administrative agency has reached a final, definitive position as to how it will apply the regulation at issue, and (2) the plaintiff has attempted to obtain just compensation through the procedures provided by the State. Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172, 191, 194, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). [**62] Here, neither of these elements have been satisfied.

The Fifth Amendment states that, "private property [shall not] be taken for public use without just compensation." The Takings Clause is not meant to limit [*989] the government's ability to interfere with an individual's property rights, but rather to ensure compensation when a legitimate interference that amounts to a taking occurs. Glosemeyer v. Missouri-Kansas-Texas Railroad, 879 F.2d 316, 324 (8th Cir. 1989) (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987)). The compensation does not have to precede the taking; a process for obtaining compensation simply has to exist at the time of the taking. Id. (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984)). If US West ultimately receives just compensation then there has been no violation of the Takings Clause.

Public utilities, which have a hybrid public and private status, must be analyzed in a slightly different manner than other entities under the Takings Clause. n16 Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 102 L. Ed. 2d 646, 109 S. Ct. 609 (1989). [**63]

The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597, 17 S. Ct. 198, 205-206, 41 L. Ed. 560 (1896) (A rate is too low if its is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S. Ct. 736, 742, 86 L. Ed. 1037 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutionial sense"); FPC v. Texaco Inc., 417 U.S. 380, 391-392, 94 S. Ct. 2315, 2323, 41 L. Ed. 2d 141 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level").

488 U.S. at 308. If the state fails to provide sufficient compensation, then

the state has [**64] taken the use of a utility without just compensation and thereby violated the Takings Clause. Id. The particular theory used to determine whether a rate is fair does not matter. Id. at 310 (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 88 L. Ed. 333, 64 S. Ct. 281 (1944)). If the overall effect cannot be said to be unreasonable then judicial inquiry is at an end. Id. (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 88 L. Ed. 333, 64 S. Ct. 281 (1944)). Whether a rate is unfair depends on what is a fair rate of return given "the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return." Id. "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid . . . ." Hope Natural Gas, 320 U.S. at 605.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n16 Although the traditional public utility rate model is not a perfect model for @ 252(e)(6) cases, it is informative. See J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U. Law Rev. 851, 954 (Oct. 1996).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[**65]

The purpose of the Telecommunications Act of 1996 is, in part, to foster competition in the local telephone market. GTE North, Inc. v. McCarty, 978 F. Supp. 827, 831 (N.D.Ind. 1997) (citing Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, at 113 (1996)). Under the Act, US West provides services to its competitors rather than the public. 47 U.S.C. @ 251(c). The end goal is not a fair rate of return as in the traditional rate-setting paradigm, but rather the equitable opening up of a market. Neither party to the Agreement is expected to profit in the interconnection or resale processes. See 47 U.S.C. @ 251(c)(4)(A) ("to offer for resale at wholesale rates . . ."). Because these transactions are not designed to be profitable, [*990] the analysis cannot be fair rate of return as to any individual provision concerning the sale or access of services to the CLECs. Rather the query must be whether any provision or provisions of the Agreement negatively affect the overall operation of the incumbent LEC to such a degree that it can no longer receive a fair rate of return from its investment.

In [**66] this case, it is premature to ask this question for two reasons. First, the MPUC has not reached a final decision concerning the prices for unbundled elements; they are still subject to a true-up procedure at the end of the Generic Cost Investigation. Until the MPUC reaches a decision on that issue, the overall effect of the Agreement cannot be determined and the takings claim is not ripe for review. Second, the incumbent LEC still has an opportunity to have its public rates increased in light of the MPUC's Orders made pursuant to @@ 251 and 252. If US West is not earning a sufficient return on its investment in Minnesota, it can petition the MPUC for a rate change. See Minn. Stat. @ 237.075. The MPUC is obligated to implement a rate base upon which a telephone company can earn a fair rate of return. See id., subd. 6. US West will not have exhausted its state remedies until it has taken this final step. It would only be after such a hearing that a court could determine whether the overall utility rates are "inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." Duquesne Light Co. v. Barasch, 488 U.S. 299, 312, 102 L. Ed. 2d 646, 109 S. Ct. 609 (1989). [**67] The MPUC's actions under the Act establish LECs relationships with one another; the equation is not complete until the economic relationship with the public is determined in light of the intercarrier relationships. Because Minnesota offers an opportunity to US West to have its rates readjusted, US West has not yet exhausted its state remedies and its takings claim is ripe for review. US West's takings claim is therefore dismissed without prejudice.

CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. US West's request that this Court find that the MPUC's determinations concerning the US West-AWS Agreement violates 47 U.S.C. @@ 251 and 252 is GRANTED IN PART, DENIED IN PART, and DENIED WITHOUT PREJUDICE IN PART. It is granted with respect to: (1) Count I (operational support systems as an open issue); (2) Count IV (the collocation of RSUs); and (3) Count VII (the regulation of US West Dex). It is denied without prejudice with respect to Count IX (US West's takings claim) and Count V (the "pick and choose" provision). It is denied in all other respects. The matter is [**68] remanded to the MPUC for further determinations consistent with this decision.

Ann D. Montgomery

UNITED STATES DISTRICT JUDGE

DATED: March 30, 1999

MCI TELECOMMUNICATIONS CORPORATION, a Delaware Corporation, and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Delaware CORPORATION, Plaintiffs, v. ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, INC., an Illinois Corporation, the ILLINOIS COMMERCE COMMISSION; and DAN MILLER, RICHARD HOLHAUSER, RUTH KRETSCHMER, KARL McDERMOTT and BRENT BOHLEN, in their official capacities as Commissioners of the Illinois Commerce Commission, Defendants.

NO. 97 C 2225

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1999 U.S. Dist. LEXIS 11418

June 22, 1999, Decided
June 28, 1999, Docketed

DISPOSITION: [*1] Illinois Commerce Commission's decision of December 17, 1996 affirmed in part and reversed in part.

CORE TERMS: carrier, network, incumbent, fiber, transport, interconnection, dark, switch, customer, incoming, bona fide, tandem, unbundled, arbitration, loop, telecommunications, nondiscriminatory, impair, provide access, negotiation, comparable, regulation, interoffice, transmission, impairment, feasible, public utilities, geographical area, connected, favorable

COUNSEL: For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., plaintiffs: Terri Lynn Mascherin, Darryl Mark Bradford, Eric Andrew Sacks, Andrew Malen Spangler, Jr., David Charles Layden, Kristina Marion Entner, John J. Hamill, Jr., David Zev Smith, Jenner & Block, Chicago, IL.

For ILLINOIS BELL TELEPHONE COMPANY, defendant: Theodore A. Livingston, Matthew Aloysius Rooney, Christian Frederick Binnig, Dennis G. Friedman, Kira Elizabeth Druyan, Mayer, Brown & Platt, Chicago, IL.

For ILLINOIS BELL TELEPHONE COMPANY, counter-claimant: Theodore A. Livingston, Matthew Aloysius Rooney, Christian Frederick Binnig, Dennis G. Friedman, Kira Elizabeth Druyan, Mayer, Brown & Platt, Chicago, IL.

For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., counter-defendants: Terri Lynn Mascherin, Darryl Mark Bradford, Jenner & Block, Chicago, IL.

For UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, intervenor plaintiffs: AUSA, United States Attorney's Office, Chicago, IL.

For UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS [*2] COMMISSION, intervenor plaintiffs: Theodore C. Hirt, Jonathan T. Foot, United States Department of Justice, Washington, DC.

Deborah A. Golden, AMERITECH CORPORATION, Chicago, IL.

Exhibit B

Thomas R. Stanton, ILLINOIS COMMERCE COMMISSION, Chicago, IL.

JUDGES: Suzanne B. Conlon, United States District Judge.

OPINIONBY: Suzanne B. Conlon

OPINION: DECISION ON THE MERITS

MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, "MCI") sue Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc. ("Ameritech"), the Illinois Commerce Commission (the "ICC"), and five ICC commissioners in their official capacities under @ 252(e)(6) of the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. @ 252(e)(6). n1 Ameritech asserts a counterclaim against MCI and a cross-claim against the ICC and the individual commissioners under @ 252(e)(6) of the Act.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 The Act is codified in scattered sections of Title 47 of the United States Code. Citations to sections of the Act are references to the corresponding sections of the Code.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*3]

BACKGROUND

Historically, local telecommunications services were dominated by state-sanctioned monopolies granted to local exchange carriers such as Ameritech. H. R. Rep. No. 104-204, at 49 (1995) (hereafter, "H. Rep."). The Act imposes a scheme designed to end monopolies in local telecommunications services. The Act recognizes that incoming exchange carriers must be able to make use of the incumbent carrier's existing network in order to compete effectively. Id. The primary mechanisms for opening access to the incumbent carrier's network are found in @@ 251 and 252. Section 251 establishes three methods that the incoming exchange carriers may use to access the incumbent carrier's network. The first method, called "interconnection," allows incoming carriers to construct their own networks and interconnect with the incumbent carrier's facilities on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. @ 251(c)(2). The second method requires incumbent carriers to provide incoming carriers with "nondiscriminatory access to network elements on an unbundled basis." Id. at @ 251(c)(3). However, the incumbent [*4] carrier need make available unbundled network elements only if the failure to provide access to the network element would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Id. at @ 251(d)(2)(B). Finally, the Act allows "resale," by which incoming carriers may purchase the incumbent carrier's services at wholesale rates and resell the services to retail customers under a different brand name. Id. at @ 251(c)(4).

Section 252 establishes the procedures for determining the terms under which incoming carriers will access the incumbent carrier's network. First, incumbent carriers must negotiate in good faith over the terms of interconnection, access to network elements, and resale. Id. at @@ 251(c)(1) and 252(a)(1). If the parties reach a satisfactory agreement, any open issues are submitted to compulsory arbitration conducted by state public utility commissions. Id. at @ 252(b). The state commissions are required to apply the substantive requirements of the Act and any implementing regulations in resolving open issues. Id. at @ 252(c). Once an agreement has been reached through negotiation and arbitration, [*5] the proposed agreement must be submitted to the state commission for final approval. Id. at @ 252(e)(1). A party who believes the state commission failed to properly apply the Act may seek judicial review of the commission's determinations. Id. at @ 252(e)(6).

On March 26, 1996, MCI requested negotiations with Ameritech, the incumbent carrier, for access to Ameritech's network in the Chicago area. Def. Br. at Ex. 2, p. 1-2. On August 30, 1996, MCI filed a petition with the ICC for arbitration of unresolved issues. Pl. Br. at Ex. 6. Ameritech filed a timely response. Def. Br. at Ex. 2, p. 2. The ICC assigned a hearing examiner, who conducted an evidentiary hearing and issued a proposed arbitration decision. Id. Both MCI and Ameritech filed exceptions to the proposed decision. Id. On December 17, 1996, the ICC issued an arbitration decision. Id. On January 28, 1997, MCI presented a proposed interconnection agreement for the ICC's approval. Pl. Br. at 12; Def. Br. at 5. The ICC determined the proposed agreement could only be approved if it was amended in certain respects. The parties submitted an amended interconnection agreement in accordance with the ICC's directives. [*6] Pl. Br. at Ex. 11.

MCI brings this action under @ 252(e)(6) challenging specific aspects of the agreement. First, MCI contends the agreement does not require Ameritech to provide MCI with nondiscriminatory access to the network element "shared transport" or "common transport." n2 In order to fully understand MCI's claim, it is necessary to briefly describe the structure of the local telephone network. n3 A telephone customer's home is connected to the network through wires called a "local loop." The local loop connects the customer's home to an "end office," which consists largely of a "local switch." The local switch serves a routing function - it reads the telephone number dialed by the customer and, based on programmed instructions, directs the call on a transmission path to its final destination. If the party receiving the call is connected to the same end office as the caller, the local switch connects the call directly. However, if the caller and the receiving party are connected to different end offices, the call must be "transported" from one end office to another. End offices are connected to one another by "interoffice transmission facilities," which generally consist of [*7] fiber-optic cables capable of carrying hundreds of calls at once. End offices are also connected to "tandem switches" by a type of interoffice transmission facility called a "trunk." Tandem switches are connected to numerous end offices in a hub-and-spoke arrangement, and connect end offices that are not directly connected. MCI's request for "shared transport" refers to Ameritech's interoffice transmission facilities.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n2 The precise meanings of these terms are disputed, as explained below.

n3 The following description of a local telephone network is gleaned from the parties' briefs and from statements at oral argument. Because these foundational facts are not in dispute, the court will forego cumbersome citations to the record.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Although Ameritech agreed to provide MCI with "shared transport," the parties could not agree on the meaning of that term. Ameritech argued that "shared transport" refers only to interoffice transmission facilities purchased on a dedicated basis and shared by other carriers or customers, [*8] but not the incumbent carrier. MCI argued that "shared transport" refers to interoffice facilities shared by customers and other carriers including the incumbent - what the industry refers to as "common transport." At the heart of the parties' dispute is the interpretation of "shared transport" as used by the Federal Communications Commission (FCC) in 47 C.F.R. @ 51.319 ("Rule 319"). The ICC determined the FCC regulations were ambiguous. Pl. Br. at Ex. 7, p. 28. Accordingly, the ICC concluded MCI was entitled to shared transport as defined by Ameritech, but MCI could seek access to common transport only through a bona fide request process set out in the interconnection agreement. Id. at Ex. 7, p. 29. MCI contends the ICC violated the Act by requiring it to submit to a lengthy request process in order to gain access to common transport.

MCI's second claim concerns the Act's requirement that local exchange carriers "establish reciprocal compensation arrangements for the party's transport and termination on telecommunications." 47 U.S.C. @ 251(b)(5). In other words, MCI must pay Ameritech a fee when an MCI customer calls an Ameritech customer, and Ameritech [*9] must pay MCI a fee when an Ameritech customer calls an MCI customer. MCI argued before the ICC that it was entitled to the "tandem interconnection rate" set out in the interconnection agreement. However, the ICC determined that MCI was entitled only to the lower "end office switching rate," concluding that MCI had failed to produce sufficient evidence showing it should be paid the higher rate. MCI contends the ICC decision violates @ 251(c)(2)(D), which requires that reciprocal compensation be paid on just, reasonable, and nondiscriminatory terms.

MCI asserts in its third claim that the ICC violated @ 251(c)(3) when it accepted Ameritech's proposal regarding the amount of time allowed for Ameritech to provide MCI access to local loops. MCI's proposal gave Ameritech two to five days, depending on the number of requests. Ameritech proposed a five to seven day period. The ICC accepted Ameritech's proposal.

MCI's fourth claim is that the ICC imposed unjust, unreasonable, and discriminatory terms on MCI when it approved Ameritech's proposal for a bona fide request process. The bone fide request process is the vehicle by which MCI may request access to additional network elements. [*10] Ameritech proposed a request procedure that could take up to four months to conclude. MCI's proposal involved a significantly shorter time period. According to MCI, Ameritech's proposal needlessly and intentionally delays MCI's access to necessary network elements.

Finally, MCI claims the ICC erred when it approved provisions limiting Ameritech's liability to MCI for breaches of the interconnection agreement. The liability limitations were never a subject of arbitration. Instead, the ICC imposed the provisions at Ameritech's request during the approval stage of the negotiation and arbitration process. According to MCI, the ICC had no authority under @ 252(e)(2) to impose the liability limitations at that point in the process. MCI also contends the liability limitations violate @ 251(c) because the provisions are not just, reasonable, and nondiscriminatory.

Ameritech's counterclaim arises from the ICC's decision to grant MCI access to "dark fiber." Dark fiber is simply optical fiber that has been physically placed in the network but is not attached to electronics that are necessary to "illuminate" the fiber and enable it to carry telecommunications. n4 Ameritech contends the ICC [*11] had no authority to grant MCI access to dark fiber because the issue was never submitted to the ICC in arbitration. Ameritech next argues the ICC had no authority to identify dark fiber as a network element after the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999) (hereafter, "IUB"). Finally, Ameritech argues that even if the ICC had authority to grant MCI access to dark fiber, its decision violated the Act because the ICC failed to determine that denial of access to MCI would impair MCI's ability to provide telecommunications services, as required by @ 251(d)(2)(B).

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 As explained at oral argument, dark fiber is used to save resources. The process of burying cable in the ground or suspending it along poles is very expensive. Therefore, when an exchange carrier lays new cable in the network, it frequently lays more cable than is required. The excess cable is dark fiber, which can be activated if additional carrying capacity is needed.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*12]

DISCUSSION

The parties agree that the applicable standard of review of the ICC's decisions depends on whether a particular issue is one of fact or of law. Determinations of fact are entitled to substantial deference unless they are arbitrary and capricious. Questions of law are subject to de novo review.

I. Shared Transport

In the preliminary negotiations between Ameritech and MCI, Ameritech agreed to provide MCI access to interoffice transport facilities on a "shared" basis. n5 At arbitration, the parties disputed the meaning of the word "shared," and looked to Rule 319 for the appropriate definition. Def. Supp. Br. at 6. The ICC concluded Rule 319 was ambiguous, and ultimately adopted Ameritech's proposed contract language. n6 The ICC ruled that if MCI wanted access to common transport, it could seek access through the bona fide request process. After the ICC reached its decision, the FCC issued its Third Reconsideration Order, which left no doubt that "shared transport" under Rule 319 encompassed the industry understanding of "common transport." The FCC explained that incumbents must offer access "to the same interoffice transport facilities that [*13] the incumbent uses for its own traffic." Pl. Br. at Ex. 4, P 22. The Third Reconsideration Order also amended the text of Rule 319 to expressly include the concept of common transport within the meaning of the term "shared." MCI argues that the Third Reconsideration Order clearly indicates the ICC's decision was erroneous. n7

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 Although Ameritech has not expressly admitted this assertion, MCI has repeatedly advanced the argument. See Supp. Resp. at 2; Tr. Apr. 15, 1999 at

9-10. Ameritech has not challenged MCI's position.

n6 The ICC's decision was a determination of law, and therefore is subject to de novo review.

n7 Ameritech argues that this court should not consider the Third Reconsideration Order after the Supreme Court's order in Ameritech Corp. v. FCC, 119 S. Ct. 2016, 143 L. Ed. 2d 1029, 1999 WL 116994 (U.S. 1999). Ameritech Corp. vacated the Eighth Circuit's decision in Southwestern Bell Tel. Co. v. FCC, 153 F.3d 597 (8th Cir. 1998), which affirmed the Third Reconsideration Order. However, Ameritech Corp. did not vacate the Third Reconsideration Order, nor did it instruct the Eighth Circuit to do so. The Supreme Court merely vacated the judgment and remanded for further consideration in light of IUB. Ameritech Corp., 119 S. Ct. 2016, 143 L. Ed. 2d 1029, 1999 WL 116994 (U.S. 1999). The Third Reconsider Order is still valid.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*14]

Ameritech responds that because Rule 319 was vacated by the Supreme Court in IUB, there is no basis for reversing the ICC's decision. But the vacation of Rule 319 is irrelevant to the question before this court. MCI need not look to Rule 319 for the authority to compel Ameritech to provide access to shared transport, because Ameritech agreed to do so in preliminary negotiations. Rule 319 merely serves as an external source of definition of the terms in the negotiated interconnection agreement. IUB has no effect on the function of Rule 319 in this case. n8

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n8 If the continued vitality of Rule 319 were necessary to compel Ameritech to provide access to shared transport, Ameritech presumably would challenge its obligation to provide MCI access to any type of "shared transport," however that term is defined. The fact that Ameritech challenges only its obligation to provide common transport bolsters the conclusion that Ameritech's obligation to provide shared transport stems from the preliminary negotiations rather than from Rule 319.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*15]

Ameritech also argues that MCI failed to exhaust its administrative remedies because it did not seek common transport through the bona fide request process recommended by the ICC. But the basis of MCI's claim is that it should not have to undergo the bona fide request process in order to gain access to common transport. Ameritech seeks to bootstrap its way out of MCI's claim by assuming that the ICC's decision to require MCI to undertake a bona fide request is valid. Ameritech's argument is without merit.

Finally, Ameritech contends that the Third Reconsideration Order changed existing law, and that MCI must therefore pursue its remedies under @ 29.3 of the interconnection agreement. Section 29.3 provides:

In the event of . . . any final and nonappealable legislative, regulatory, judicial order, rule or regulation or other legal action that revises and reverses . . . the FCC's First Report and Order [which promulgated Rule 319] . . . either party may . . . require that the affected provisions be renegotiated in good faith and this agreement be amended accordingly.

Pl. Br. at Ex. 11, @ 29.3. But the Third Reconsideration Order did not change [*16] Rule 319 as that Rule relates to the present issue. The Third Reconsideration Order merely clarified the definition of "shared transport" already contained in Rule 319. As the FCC made clear in the Introduction to the Third Reconsideration Order, "the [First Report and Order] required incumbent [exchange carriers] to provide requesting carriers with access to the same transport facilities . . . that incumbent [exchange carriers] use to carry their own traffic." Pl. Br. at Ex. 4, P 2 (emphasis added). In discussing the issue in depth, the FCC stated:

Some parties have argued that certain aspects of the rules adopted last August were ambiguous which, in our view, were clear. Specifically, in the [First Report and Order], we expressly required incumbent [exchange carriers] to provide access to transport facilities "shared by more than one customer or carrier." The term "carrier" includes both an incumbent [exchange carrier] as well as a requesting telecommunications carrier. We, therefore, conclude that "shared transport," as required by the [First Report and Order] encompasses a facility that is shared by multiple carriers, including the incumbent [*17] [exchange carrier.]

Id. at Ex. 4, P 22 (citing 47 C.F.R. @ 51.319) (emphasis added). The above quotation makes clear that Rule 319's definition of shared transport, as it existed at the time of the ICC's decision, encompassed the concept of common transport.

One might argue, of course, that the ICC was correct in its conclusion that Rule 319 was ambiguous. Even assuming the ICC was correct, there is no need to force MCI to undergo a lengthy bona fide request process. The ICC emphasized that it was "unwilling to conclude that the FCC . . . intended to preclude the provision of 'common transport' as a network element." Pl. Br. at Ex. 7, p. 28. Indeed, the ICC deferred any final resolution of the question until MCI filed a bona fide request so as "to enable the Commission to evaluate the competing contentions of the parties within a more meaningful context." Id. at Ex. 7, p. 29. In other words, the ICC indicated it could not determine the meaning of "shared transport" under Rule 319 on the evidence and arguments before it. The question left open by the ICC has since been answered in the Third Reconsideration Order. To force MCI to undertake a [*18] bona fide request would unjustifiably delay MCI's access to common transport. Delaying access to a network element to which MCI is clearly entitled is inconsistent with the basic purpose of the Act.

Accordingly, the ICC's decision denying MCI access to shared transport without undertaking a bona fide request is reversed.

II. Tandem Interconnection Rate

The Act requires a local exchange carrier to pay mutual and reciprocal compensation for the cost of transporting and terminating calls on another carrier's network. 47 U.S.C. @@ 251(b)(5), 252(d)(2). A variety of methods has been proposed for determining the rates one carrier may charge another. Pl. Br. at 23 (and citation therein). One aspect of the rates the ICC imposed in the Ameritech / MCI interconnection agreement is the "tandem interconnection rate." Id. The tandem interconnection rate is a function of other rates set out in the agreement, including the tandem switching rate, a charge for transport and termination, and the end office switching rate. Id. The tandem interconnection rate is higher than the "end office rate," which includes only the end office switching rate and a [*19] charge for transport and termination. Id.

In deciding whether MCI was entitled to the tandem interconnection rate, the ICC applied a test promulgated by the FCC to determine whether MCI's single switch in Bensonville, Illinois, performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch. n9 Id. at 23-24. The ICC determined that MCI was entitled only to the end office rate. MCI contends the ICC's decision imposes reciprocal compensation on terms that are unjust and unreasonable in violation of @ 251(c)(2)(d). Because the parties agree that the ICC applied the proper legal standard, its decision rests on factual determinations that are reviewed under an arbitrary and capricious standard.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n9 MCI contends the Supreme Court's decision in IUB affects resolution of the tandem interconnection rate dispute. It does not. IUB upheld the FCC's pricing regulations, including the "functionality / geography" test. 119 S. Ct. at 733. MCI admits that the ICC used this test. Pl. Br. at 24. Nevertheless, in its supplemental brief, MCI recharacterizes its attack on the ICC decision, contending the ICC applied the wrong test. Pl. Supp. Br. at 7-8. But there is no real dispute that the ICC applied the functionality / geography test; the dispute centers around whether the ICC reached the proper conclusion under that test.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*20]

The ICC did not make express findings regarding the comparable functions of MCI's switch and Ameritech's switches or the comparative geographical areas served by the various switches. However, the ICC did discuss the evidence offered by each party on these issues, and concluded from the "totality of the evidence" that MCI had failed to establish it was entitled to the tandem interconnection rate. Pl. Br. at Ex. 7, p. 12. The issue of comparable functionality apparently was not in serious dispute. MCI presented evidence and arguments that its switch served to aggregate calls that could then be distributed to any MCI customer within the switch's service area, and that Ameritech's tandem switches served the same function. Id. at Ex. 7, p. 10. Ameritech offered no counter-arguments to the ICC, nor does it offer any to this court. See Id. at Ex. 7, p. 11 (discussing Ameritech's arguments and evidence only as to the question of geographical area); Def. Resp. at 23-25. Therefore, only at issue is the geographical areas served by the respective switches. The ICC summarized MCI's evidence regarding the geographical area served by its switch as follows:

MCI maintains that its [*21] switch in Bensonville, Illinois serves a geographical area comparable to the area served by [Ameritech's] tandem switch. MCI is authorized to provide local exchange service in the Chicago [service area.] MCI plans to use it Bensenville switch to provide service to any customer in the Chicago [service area] where such service is feasible. [Ameritech] currently serves the Chicago [service area] with three tandem switches . . . . Thus, MCI claims that its switch covers approximately the same geographic area as three . . . Ameritech tandem switches.

Id. at Ex. 7, p. 10 (emphasis added). As the highlighted portions of the quotation make clear, much of MCI's evidence focused on the company's intentions for its switch, which of course are irrelevant to the question whether the switch is capable of servicing the area as intended. However, MCI argued that because its switch currently served the entire Chicago area - the same area that Ameritech served with three tandem switches -- its switch must serve an area comparable to any one of Ameritech's switches.

MCI's argument has surface appeal, but fails under closer scrutiny. During arbitration, [*22] MCI had less than 50,000 customers in the Chicago area. Id. at Ex. 7, p. 11. The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. Pl. Br. at Ex. 28, p. 207. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch. Or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. n10 These are questions that MCI could have addressed, but did not. The ICC compared MCI's proof with the proof offered by an incoming exchange carrier in a different case, noting that the other carrier produced "a map showing geographically widespread deployment of various nodes in its network" and "some discussion of the location of [the carrier's] local exchange customers." Id. at Ex. 7, p. 12. In contract, MCI had expressly refused to provide "specific empirical data, including maps, [*23] to demonstrate that it serves an area comparable to Ameritech's tandem network." Id. at Ex. 21, p. 13. In short, MCI offered nothing but bare, unsupported conclusions that its switch currently served an area comparable to an Ameritech tandem switch or was capable of serving such an area in the future. The ICC's determination that "MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate" was not arbitrary and capricious.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n10 MCI argues that it is patently unfair to look to the number of customers served by the switch, since Ameritech, as a long time beneficiary of a state-sanctioned monopoly, will almost always have more customers than incoming exchange carriers. However, nothing in the ICC's opinion indicates that it improperly relied on the number of MCI customers in reaching its decision. Furthermore, as the discussion in the text makes clear, identification of MCI customers is relevant to the question of the location of the customers and the geographical area actually serviced by MCI's switch.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*24]

III. Timing of Connections to Local Loops

"Local loops" are the portions of the network connecting the exchange carrier's end office or switch to the customer's premises. Ameritech submitted to the ICC a proposal allowing Ameritech five to seven days to provide MCI with local loops. MCI's proposal allowed Ameritech two to five days to provide local loops. MCI contends the ICC violated the Act by adopting Ameritech's proposal. MCI argues that the time required to obtain local loops is critical because it determines how long a customer must wait before being switched to MCI's service. During the change-over interval, MCI contends the customer will be subjected to Ameritech's targeted efforts to win back the customer. According to MCI, the ICC's decision violates 47 U.S.C. @ 251(c)(3), which requires an incumbent carrier to provide unbundled network elements on "just, reasonable, and nondiscriminatory" terms, and 47 C.F.R. @ 51.313 ("Rule 313"), which requires an incumbent carrier to provide access to network elements on terms "no less favorable" than the terms under which the incumbent carrier provides the elements to itself. n11

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n11 In its reply, MCI argues that @ 51.311(b) ("Rule 311"), which requires that elements given an incoming carrier must be "equal in quality" to the elements the incumbent carrier supplies itself, also applies to timing of access to local loops. But Rule 313 specifically refers to "the time within which the incumbent [exchange carrier] provisions such access to unbundled network elements," while Rule 311 refers generally to the "quality" of access to unbundled network elements. Rule 313 provides the applicable standard for determining whether the ICC's acceptance of Ameritech's proposal is permissible under the Act.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*25]

Rule 313(b) provides,

Where applicable, the terms and conditions pursuant to which an incumbent [exchange carrier] offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent [exchange carrier] provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent [exchange carrier] provides such elements to itself.

47 C.F.R. @ 51.313(b). For present purposes, the most important phrase in Rule 313 is the qualifier "where applicable." This phrase makes the "no less favorable" standard conditional on the applicability of the regulation. The difficult question is whether the incoming carrier bears the burden of demonstrating the regulation applies, or whether the incumbent carrier bears the burden of demonstrating the regulation does not apply. In this court's view, the regulation places the burden on the incoming carrier. In understanding this conclusion, it is helpful to contrast Rule 313 with the closely analogous Rule 311. Rule 311 requires incumbent carriers to provide incoming carriers [*26] access to network elements "equal in quality" to the access the incumbent carrier provides to itself. 47 C.F.R. @ 51.311(b). However, the incumbent carrier is held to this strict standard only when it is "technically feasible" to provide access of equal quality. Id. If the incumbent carrier does not provide access meeting the requisite standard, Rule 311 unequivocally

places the burden of demonstrating technical infeasibility on the incumbent carrier - "the incumbent carrier must prove to the state commission that it is not technically feasible . . ." Id. Rule 311 demonstrates that in crafting the rules regarding parity of access to network elements, the FCC carefully considered which party should bear the burden of proof. Rule 311 also demonstrates that the FCC chose when to place that burden on the incumbent carrier. Yet Rule 313, a companion to Rule 311, contains no comparable language placing the burden on the incumbent; Rule 313 simply mandates provisioning intervals to be congruent "where applicable." The sharp contrast between the language of these two closely analogous rules indicates the FCC did not intend that the incumbent carrier bear the burden of showing [*27] Rule 313 is inapplicable.

This conclusion comports with common sense when one considers the differences between the quality of access addressed in Rule 311 and the timing of access addressed in Rule 313. In considering quality of access, it is difficult to imagine a situation in which an incumbent carrier could not provide incoming carriers access to network elements equal in quality to that the incumbent provides itself. The quality of access presumably is a function of the technologies, services, and physical facilities that comprise the network element. There is no apparent reason why the quality of the technologies, services, or physical facilities would decline simply because the facilities are to be used by a different telecommunications carrier. Therefore, Rule 311 properly forces the incumbent to prove it cannot provide access equal in quality to that which it provides itself. But the timing of access to network elements presents an entirely different situation. As Ameritech points out, it does not unbundle local loops, or any other network element, for its own use. See Def. Resp. at 28. The process of providing access to unbundled network elements to competing carriers [*28] that often operate on a different network is different, and presumably more time-consuming, than the process of provisioning network elements for the incumbent's own use. MCI's witness recognized there are differences between processing orders for unbundled network elements and processing orders for retail services. Def. Resp. at Ex. 15, p. 155; Pl. Br. at Ex. 7, p. 57. Of course, some network elements might be provided to incoming carriers through the same processes through which the incumbent carrier supplies itself. Rule 313 logically places the burden on incoming carriers to demonstrate that the incumbent carrier can provide unbundled elements to the competing carrier in the same time frame that the incumbent provides elements to itself.

The ICC concluded MCI did not sufficiently demonstrate that Ameritech could feasibly provide access to local loops in two to five days. n12 MCI admitted that its pleadings in the arbitration proceedings lacked data supporting its proposal. Def. Resp. at Ex. 15, p. 180. MCI merely argued that Ameritech should be forced to provide access to unbundled local loops in a comparable amount of time to that required to provide local loops for resale. Pl. [*29] Br. at Ex. 7, p. 57. The ICC stated that "MCI does little more than point to its own proposals and allege in the most general of terms that they are necessary for 'parity' or 'nondiscrimination' or that [Ameritech's] proposals are 'inadequate.'" Pl. Br. at Ex. 7, p. 62. The ICC concluded that "MCI's claims regarding provisioning benchmarks mix apples and oranges" because the "procedures for provisioning an unbundled loop and a resale loop are different and the respective provisioning intervals are not comparable." Id. The ICC's decision was not erroneous under Rule 313.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n12 The ICC's decision is a mixed determination of law and fact, and is subject to de novo review.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

IV. Timing of Bona Fide Request Process

Both MCI and Ameritech presented the ICC with proposals for a "bona fide request" process by which MCI could request access to additional network elements not specified in the interconnection agreement. MCI proposed an 85-day process, while Ameritech proposed 120 days. MCI's proposal allowed [*30] Ameritech fifteen days from the time of the request to determine if the request was technically feasible. Pl. Br. at 33 (and citations therein). If Ameritech determined the request was technically feasible, it would provide MCI a price quote within an additional twenty business days. Id. MCI would then have thirty days to accept or reject the quote. Id. In the event of a dispute, the ICC would decide within twenty days of Ameritech's response whether Ameritech should be required to provide the element. Id. at 34. Ameritech proposed a more lengthy process. Under Ameritech's plan, Ameritech would have thirty days to evaluate whether a request was required by the Act and, if so, whether the request was technically feasible. Def. Br. at 32 (and citations therein). If Ameritech determined the request was feasible, it then would have ninety days to prepare a quote that includes a complete product description, proposed rates, ordering intervals, methods and procedures for ordering the requested item, and a statement of Ameritech's development costs. Id. Ameritech also agreed to completely process certain less complicated bona fide requests within thirty days of receipt. [*31] Id. MCI would have thirty days to accept or reject the quote, or to seek a remedy under the dispute resolution terms of the interconnection agreement. Pl. Br. at 34 (and citations therein). Dispute resolution could occupy as much as an additional thirty days. Id. Under Ameritech's plan, Ameritech would not be required to provide unbundled network elements until more than four months after MCI's initial request. Id. The ICC ultimately rejected MCI's proposal and adopted Ameritech's proposal. MCI claims the ICC violated @ 251(c)(3) of the Act because Ameritech's proposal was not "just, reasonable, and nondiscriminatory."

In support of its position, MCI relies heavily on a statement in a report of the House of Representatives that the Act was designed to promote competition in local telecommunications markets "as quickly as possible." See H. Rep. at 89. According to MCI, the ICC applied a "commercial reasonableness" standard to the bona fide request issue. n13 Pl. Rep. at 16. MCI contends the commercial reasonableness standard is inconsistent with the purpose of the Act because it allows the ICC to approve a procedure that does not resolve disputes as quickly as [*32] possible. MCI goes so far as to say that "a [bona fide request] provision cannot, as a matter of law, satisfy the 1996 Act unless it is as short as possible." Pl. Rep. at 17 (emphasis added). MCI's argument proves too much, and demonstrates that the statement in the House Report cannot be taken literally. It would be possible to resolve bona fide requests in a matter of days or weeks by requiring all parties to immediately dedicate their full attention and resources to the problem. But such a requirement is neither practical nor reasonable. MCI implicitly recognizes that it is not entitled to resolution "as quickly as possible" in its own proposal, which allows a maximum time of eighty-five days. The statement in the House Report reflects a general policy or purpose of the Act, but it does not mean that a bona fide request provision cannot satisfy the Act as a matter of law unless the resolution period is as short as possible. Nor does the statement in the House Report override the plain language of the Act, which requires access to network elements on terms that are just, reasonable, and nondiscriminatory. MCI's attempt to read an "as quickly as possible" [*33] standard into @ 251(c)(3) of the Act does not comport with common sense, the plain language of the statute, or MCI's own proposal. The ICC applied an appropriate analysis.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n13 Apparently, the ICC did not expressly articulate the commercial reasonableness standard, but cited with approval another interconnection arbitration decision that applied the standard. Pl. Rep. at 16.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Having determined that the ICC did not apply an erroneous standard to the issue of the bona fide request process, the court must now determine whether the ICC's factual determination that Ameritech's proposal was more commercially reasonable than MCI's was arbitrary or capricious. MCI argues that Ameritech failed to adduce evidence sufficient to support a finding that the four month period was reasonable. But Ameritech presented the ICC with ample evidence sufficient to support the conclusion that Ameritech's proposal was commercially reasonable. Ameritech presented evidence regarding the unpredictable number, timing, and complexity of [*34] the bona fide requests it receives from various competing exchange carriers. Def. Br. at 34-35 (and citations therein). Ameritech also presented evidence regarding similar time frames approved by the FCC and other state commissions in analogous situations. Id. at 35-36. In contrast with Ameritech's presentation, MCI presented little evidence in support of its own proposal. MCI's witness conceded that MCI did not do "any type of empirical analysis of the processes, resources, [or] costs" that Ameritech might incur in responding to bona fide requests, but instead "worked backwards" from Ameritech's 120-day proposal. n14 Def. Resp. at Ex. 23, p. 593. The ICC's determination that Ameritech's proposal was the more reasonable of the two plans was not arbitrary and capricious.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n14 Significantly, MCI presents nothing to this court in defense of its plan. MCI merely attacks Ameritech's proposal as unjust, unreasonable, and discriminatory.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

MCI also presents, in a footnote, an argument that Ameritech's proposal [*35] is discriminatory in violation of @ 251(c)(3). Pl. Br. at 37, n. 10. MCI contends that @ 251(c)(3) requires Ameritech to provide network elements to MCI on the same terms and conditions that it provides the elements to itself. According to MCI, the bona fide request provision is discriminatory because it forces MCI to wait for access to Ameritech's network elements longer than Ameritech must wait. But the "nondiscriminatory" language of @ 251(c)(3) has no application here. To say that MCI is entitled to nondiscriminatory access to network elements presupposes that MCI is entitled to any access to the elements. MCI is not entitled to access to network elements beyond those provided for in the interconnection agreement until it successfully completes the bona fide request process. The purpose of the bona fide request process is to determine whether, and on what terms, Ameritech is required to provide access to additional network elements not addressed in the interconnection agreement. Only after MCI obtains the right to access additional network elements through the bona fide request process does @ 251(c)(3) forbid nondiscriminatory access to those elements. [*36]

V. Limitations of Liability

The Act contemplates two distinct functions of state public utilities commissions. First, state commissions conduct arbitration pursuant to @ 252(b)(1). Second, state commissions evaluate negotiated or arbitrated agreements against the standards set out in @ 252(e)(2) and either approve or reject the agreement. At the approval stage, the state commission's authority is limited to determining whether the agreement meets the requirements of @ 252(e)(2). See e.g., TCG Milwaukee, Inc. v. Public Serv. Comm'n of Wisconsin, 980 F. Supp. 992, 999 (W.D. Wis. 1997). It is undisputed that liability limitations were not considered until the approval stage; MCI and Ameritech did not agree on liability limitations during preliminary negotiations, nor did they arbitrate the issue. Therefore, unless Ameritech prevails on one of its arguments in support of the ICC's decision to incorporate liability limitations into the agreement, the limitations must be stricken. The court reviews the ICC's decision de novo.

Ameritech first argues that the ICC's decision was appropriate under @ 252(e)(3), which allows state commissions to enforce requirements [*37] of state law in reviewing an agreement. In support of its assertion, Ameritech cites In re Illinois Bell Switching Station, 161 Ill. 2d 233, 641 N.E.2d 440, 448-49, 204 Ill. Dec. 216 (Ill. 1994). But Illinois Bell does not establish a state law requiring limitations on Ameritech's liability. In Illinois Bell, a single justice of the Illinois Supreme Court states that limitations of liability are an "important part" of a utility company's contracts. 641 N.E.2d at 449 (Miller, J., concurring). This unremarkable statement does not even suggest that limitations of liability must be included in a utility company's contracts. Ameritech's argument is without merit.

Ameritech next contends the ICC was required to include liability limitations under @ 252(e)(2)(B) because without the limitations, the pricing provisions of the agreement would violate the standards of @ 252(d). Section 252(d) requires that prices set out in interconnection agreements must be based on the incumbent carrier's costs of providing the network elements at issue. According to Ameritech, the prices in the interconnection agreement would not accurately reflect Ameritech's costs unless Ameritech's [*38] liability was limited. Ameritech initially contended that its liability exposure was a component of its costs. See Def. Resp. at 41-42. However, MCI correctly argued the Act mandates that prices be set according to forward-looking costs, and not according to a rate-of-return analysis. 47 U.S.C. @ 252(d)(1)(A)(ii); see also, 47 C.F.R. @ 51.105. Under the Act's pricing scheme, the cost of Ameritech's liability to MCI is not recoverable in the prices of unbundled network elements. Recognizing this difficulty, Ameritech changed its strategy and now argues that the liability limitations represent the cost of "gold-plating" Ameritech's network to ensure the network will not fail. Def. Supp. Resp. at 5-6. But the costs of gold-plating the network and the costs of liability are two sides of the same coin. The costs of gold-plating a network element are extraordinary costs incurred solely to avoid liability, and are otherwise unrelated to the cost of producing or supplying the network elements. It is incongruous to say that Ameritech may not charge MCI for the additional cost of Ameritech's liability to MCI, but may charge MCI for the additional cost of avoiding [*39] that liability. The pricing regulations do not allow Ameritech to recover the cost of gold-plating through the prices it charges MCI.

Ameritech next argues that the ICC was authorized to impose liability limitations under @ 252(e), which permits state commissions to reject agreements that discriminate against carriers that are not parties to the agreements. All of Ameritech's interconnection agreements with incoming carriers in Illinois contain liability limitations similar to those Ameritech proposed to the ICC in this case. Ameritech argues that if the ICC approved the MCI agreement without limiting Ameritech's liability, the agreement would discriminate against other Illinois carriers. Ameritech's argument proves too much. Under Ameritech's view of the Act, any provision in an interconnection agreement that is favorable to the incoming carrier is impermissible unless that provision is contained in all the incumbent's other interconnection agreements. Taking Ameritech's argument to its absurd extreme, every interconnection agreement within a region must be identical. Furthermore, the template for all subsequent interconnection agreements would be established by the first incoming [*40] carrier to negotiate with the incumbent. This result would be at odds with @ 252, which contemplates individualized negotiations between the incumbent and each incoming carrier.

Nevertheless, the absence of liability limitations in MCI's agreement with Ameritech clearly gives MCI an advantage over other incoming carriers. But the anti-discrimination language of @ 252(e) does not prevent MCI from gaining this competitive advantage. Whatever the parameters of the discrimination targeted by @ 252(e), that section cannot be read to preclude interconnection agreements that give an incoming carrier a competitive advantage over other incoming carriers. n15 As noted above, this interpretation conflicts with the Act's vision of individualized negotiations between the incumbent and each incoming carrier. More importantly, Ameritech's interpretation of @ 252(e) is at odds with the very purpose of the Act. The Act was designed to open local telecommunications markets to competition. Iowa Utilities Board v. FCC, 120 F.3d 753, 816 (8th Cir. 1997), rev'd in part by AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). In a free market, [*41] incoming local exchange carriers would compete with each other as well as with the incumbent. Yet under Ameritech's view, @ 252 stifles vigorous competition between incoming carriers. The meaning of "discrimination" under @ 252(e) is elusive, but that section does not prevent an incoming carrier from gaining a competitive advantage over other incoming carriers by negotiating a more favorable interconnection agreement. n16

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n15 In light of the overall purpose of the Act, it is likely that Congress intended @ 252(e) to forbid anticompetitive discrimination, i.e., collusive discrimination or oligopolistic behavior among the incumbent and one or more incoming carriers.

n16 Even assuming the absence of liability limitations in MCI's interconnection agreement discriminates against other incoming carriers, Ameritech does not have standing to raise the claims of other carriers.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Finally, Ameritech argues that MCI waived any challenge to the liability limitations. When MCI protested the imposition of liability [*42] limitations, the ICC declared it would not approve the agreement without the limitations. MCI was presented with a choice: it could either accept the liability limitations to gain ICC approval, or it could repeat the entire negotiation and arbitration process by refusing the limitations. Ameritech argues that because MCI elected to go forward, it waived its right to challenge the ICC's decision. Ameritech's argument lacks merit. The Act provides for judicial review of state public utilities commission decisions in @ 252(e)(6). If liability limitations were improperly imposed on MCI during the approval stage, MCI's remedy is to challenge the ICC's decision in this court. It is inconsistent with the Act's procedural scheme to conclude that the ICC may deprive MCI of its right to judicial review by forcing MCI either to accept terms that were not arbitrated or to forfeit the considerable time and resources already expended. MCI did not waive its right to challenge the liability limitations.

For the foregoing reasons, the limitations on liability erroneously imposed by the ICC must be stricken.

VI. Dark Fiber

The ICC ordered Ameritech to provide MCI with access to "dark fiber" [*43] as an unbundled network element. "Dark fiber" is optical fiber that is not attached to electronics that are necessary to "illuminate" the fiber and enable it to carry telecommunications. Ameritech launches a three-pronged attack against the ICC's ruling. First, Ameritech contends the ICC had no jurisdiction to grant MCI access to dark fiber because the issue was never raised before the ICC in arbitration. Under @ 252(b)(4)(A), the ICC was bound to "limit its consideration of any petition . . . (and any response thereto) to the issues set forth in the petition and the response, if any . . . ." (emphasis added). Ameritech contends MCI's petition did not set forth dark fiber as an issue for arbitration. MCI responds that it raised the issue of dark fiber under the rubric of "dedicated interoffice transmission" and "shared interoffice transmission." Pl. Resp. at 3. The court need not resolve this dispute, because Ameritech plainly raised the issue of dark fiber in its response to MCI's petition. n17 See Pl. Resp. at 3-4 (and citations therein). Ameritech concedes that its response "discussed" dark fiber. Def. Rep. at 7. However, Ameritech contends it was forced to do so only because [*44] "it was impossible for Ameritech to be certain that the ICC was not going to address dark fiber" because it was "extremely difficult to tell from MCI's vague Petition just what issues MCI was setting forth." Id. Ameritech contends it faced a dilemma: it could decline to address dark fiber and run the risk that the ICC would erroneously decide the issue without Ameritech having a chance to present its position, or it could address the merits of the dark fiber issue and risk a later ruling that the response set forth the issue for arbitration. Id. Ameritech chose the latter course, thereby raising the dark fiber issue for arbitration under @ 252(b)(4)(A). In essence, Ameritech maintains it could argue the merits of the dark fiber issue before the ICC and yet claim in this court that the issue was not before the ICC. Section 252(b)(4)(A) forbids this result.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n17 This fact distinguishes this case from MCI Telecommunications, Inc. v. Pacific Bell, 1998 U.S. Dist. LEXIS 17556, No. C 97-0670 SI (N.D. Cal. Sept. 29, 1998), in which the court found that MCI failed to raise the issue of dark fiber in an arbitration petition identical to the petition before the ICC. Ameritech claims MCI is collaterally estopped from arguing it raised the dark fiber issue in its arbitration petition. Collateral estoppel is inapplicable because here, unlike Pacific Bell, the response set forth dark fiber as an arbitration issue.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -
[*45]

Ameritech next argues the ICC had no authority to identify dark fiber as a network element after the Supreme Court's decision in IUB, which vacated Rule 319. Rule 319 enumerated several specific network elements that must be unbundled under the Act. The Court vacated Rule 319 as inconsistent with @ 251(d)(2) of the Act. Section 251(d)(2) provides:

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Court examined the FCC's methodology in promulgating Rule 319, and concluded that the agency had failed to properly apply the "necessary and impair" standard. 119 S. Ct. at 734-35.

47 C.F.R. @ 51.317 (hereafter, "Rule 317") is a companion to Rule 319. Rule 317 sets forth the standards state public utilities commissions are to apply in determining what network elements [*46] other than those specified in Rule 319 must be unbundled. Although IUB did not expressly vacate Rule 317, the rule purports to allow state commissions to apply the same erroneous standard that was fatal to Rule 319. Therefore, the reasoning of IUB applies with equal force to Rule 317. Ameritech contends that Rule 317 was "the sole asserted source of any State commission authority to identify network elements that must be unbundled." Def. Supp. Br. at 9. Because Rule 317 is now a dead letter, Ameritech contends the ICC had no authority to order it to unbundle dark fiber. However, Rule 317 does not grant state public utilities commissions the power to name additional elements. The rule presupposes that such power exists, and establishes the standards under which the power must be exercised. n18 Nothing in IUB suggests that state public utilities commissions lack power to name additional network elements to be unbundled.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n18 Indeed, Rule 317 is entitled "Standards for identifying network elements to be made available."

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*47]

Nevertheless, Ameritech's argument has some merit. Although state public utilities commissions have the power to name network elements to be unbundled, they must do so under the standards set forth in the Act as interpreted by the FCC. See IUB, 119 S. Ct. at 730, n. 6, and Id. at 729-33 (questioning "whether it will be the FCC or the federal courts that draw the lines to which [state commissions] must hew" and concluding that 47 U.S.C. @ 201(b) grants the FCC rulemaking authority under the Act). Those standards were set out in rule 317, which no longer governs. In the absence of a standard guiding the state public utilities commission's exercise of its power, the commission might not be able to exercise its power. This court need not decide whether a state public utilities commission may anticipate FCC-promulgated standards and itself undertake to interpret the mandates of the Act. When the ICC rendered its decision on Ameritech's dark fiber, there was a standard in place, albeit the erroneous standard set out in Rule 317. Therefore, Ameritech's attack on the ICC's authority to name dark fiber as a network element is nothing more than an argument [*48] that the ICC applied the wrong standard in making its determination - precisely the argument Ameritech uses as the third prong of its attack on the ICC's decision.

In the initial briefs on the dark fiber issue, Ameritech maintained that the ICC failed to apply the necessary and impair test in any fashion, concluding its discussion after it determined dark fiber was a network element. Def. Br. at 15. MCI responded that even if the ICC did not articulate a finding of impairment, the evidence provided a reasonable basis for the ICC to conclude that without access to Ameritech's dark fiber, MCI would be impaired under the standards set out in Rule 317. Pl. Resp. at 17-18. But assuming MCI is correct, the ICC applied an erroneous standard under the Act after IUB.

Recognizing this difficulty, MCI urges the court to defer its decision on the dark fiber issue until the FCC promulgates new regulations interpreting the necessary and impair standard under the doctrine of primary jurisdiction. The goals of the doctrine of primary jurisdiction include ensuring nationally uniform application of the law and promoting deference to agency expertise. United States v. Western Pacific R.R. Co., 352 U.S. 59, 65, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956). [*49] The doctrine does not apply here, because this court can render a decision without infringing on the FCC's province. If the court were required to interpret the Act's necessary and impair requirement in order to resolve the dark fiber issue, MCI's argument might have some merit. But the court agrees with Ameritech that the ICC engaged in no analysis of necessity and impairment. The ICC's discussion focuses solely on the question whether dark fiber is a network element; it does not even make passing mention of the necessary and impair standard. Def. Br. at Ex. 2, p. 26-27. The court is not persuaded by MCI's argument that because MCI presented evidence of impairment, and because the law required the ICC to undertake a necessary and impair analysis, a finding of impairment is implicit in the ICC's decision. Pl. Resp. at 17-18. MCI's argument begs the question whether the ICC in fact considered MCI's evidence of impairment as the law required. If MCI's position were correct, there could never be a finding that a state commission failed to apply the necessary and impair test if evidence of impairment was presented. This result would be absurd.

Because the ICC failed to make any determination [*50] of necessity and impairment as required by 47 U.S.C. @ 251(d)(2), its decision compelling Ameritech to provide MCI access to dark fiber was erroneous and must be reversed.

CONCLUSION

The ICC's decision is affirmed in part and reversed in part. The ICC's decisions to adopt Ameritech's proposals regarding the time frame for providing access to local loops, to adopt Ameritech's proposed schedule for a bona fide request process, and to deny MCI the tandem interconnection rate are affirmed. The ICC's decisions to deny MCI access to shared transport without undertaking a bona fide request, to incorporate liability limitations in the interconnection agreement, and to grant MCI access to Ameritech's dark fiber are reversed.

ENTER:

Suzanne B. Conlon

United States District Judge

June 22, 1999

2ND CASE of Level 1 printed in FULL format.

In the Matter of the Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom Pursuant to Section 252(b) of the Telecommunications Act of 1996

Decision No. 99-09-069, Application No. 99-03-047 (Filed March 22, 1999)

California Public Utilities Commission

1999 Cal. PUC LEXIS 652

September 16, 1999

CORE TERMS: tandem, arbitration, trunk, logical, traffic, reciprocal, transport, interconnection, carrier, switching, conform, tariff, collocation, network, switch, incur, contract language, negotiation, customer, pricing, volume, toll, telecommunications, comparable, switched, serving, state commission, nine-month, interstate, approve

PANEL:
[*1] Richard A. Bilas, President, Henry M. Duque, Josiah L. Neeper, Joel Z. Hyatt, Carl W. Wood, Commissioners

OPINION

I. Summary

By this decision and pursuant to Section 252 of the Telecommunications Act of 1996 (Act), we approve an interconnection agreement between MFS/WorldCom (MFSW) and Pacific Bell (Pacific). This agreement was filed with the Commission pursuant to an Arbitrator's Report issued on August 4, 1999.

II. Procedural Background

Pacific filed a Petition for Arbitration (Petition) on March 22, 1999 to institute an arbitration proceeding with MFSW. This Petition was filed pursuant to @ 252 of the Act and Commission Resolution ALJ-174 (ALJ-174). On April 19, 1999, MFSW filed its response to the petition. On May 22, 1999 Pacific and MFSW filed a revised statement of unresolved issues as required by Rule 3.7 of ALJ-174, which notes on an issue-by-issue basis where the parties have reached agreement subsequent to the filing of the Petition and where disagreement still exists. This revised statement of unresolved issues defines the universe of disputed issues for which arbitration is sought in this proceeding.

An initial arbitration meeting was held on May 5, 1999, [*2] pursuant to Rule 3.8 of ALJ-174. The initial arbitration meeting was solely concerned with the schedule for the proceeding, the opportunity for additional discovery and the nature of the record that would be utilized to resolve this proceeding. All parties on the larger service list utilized at the initial stages of an arbitration were given adequate notice of the adopted schedule and process and the opportunity to indicate their interest in participation in the proceeding.

Exhibit C

A. Senate Bill 960 and Senate Bill 779

The schedule and procedural elements mandated for arbitrations pursuant to @ 252 of the Act are incompatible with the schedule and other procedural requirements imposed by Senate Bill (SB) 960 (Ch. 856, Stats. 1996). The requirements of the Act require much faster processing of petitions for arbitration and shorter intervals between steps than does SB 960, but retains comparable opportunities for Commissioner involvement. For these reasons, while the purposes behind SB 960 are fully supported, arbitrations will necessarily be conducted under the requirements of the Act and ALJ-174, rather than under the requirements established to implement SB 960.

This decision comes [*3] before the Commission subsequent to the effective date of SB 779 (Ch. 886, Stats. 1998). This bill, in addition to a variety of other provisions, requires that a Commission agenda item not meeting specified criteria must be served on the parties and made available for public review and comment for a minimum of 30 days before the Commission may vote on the matter. (Pub. Util. Code @ 311(g).) The Act requires that agreements submitted by parties that have been arrived at as a result of an arbitration conducted pursuant to the Act must be approved or rejected by the Commission within 30 days after the agreement is submitted. (@ 252(e)(4).) This establishes a conflict between the requirements of the Act and SB 779.

Pursuant to Rule 81 of the Commission's Rules of Practice and Procedure, this qualifies as an "unforeseen emergency situation" meaning it is a matter "that requires action or a decision by the Commission more quickly than would be permitted if advance publication were made on the regular meeting agenda." It qualifies as such by involving "deadlines for Commission action imposed by legislative bodies, courts, other administrative bodies or tribunals, the office of the [*4] Governor, or a legislator." (Rule 81(g).)

B. Schedule and Conduct of the Arbitration

Pursuant to the Act, @ 252(b)(1), petitions for arbitrations must be filed between day 135 and day 160 after the initiation of negotiations between the parties. Once the arbitration petition is filed with the state commission, all issues are required to be resolved by the end of the ninth month following the initiation of negotiations. Pursuant to the discussion in Resolution ALJ-168 n1, the resolution of all issues is deemed to have occurred when the parties file an agreement with the Commission that conforms with the resolutions contained in the Final Arbitrator's Report (FAR). (Res. ALJ-168, @ 3.11, at pp. 7-8.) In this proceeding the petition indicates that MFSW's request to initiate renegotiation was sent to Pacific by letter dated August 15, 1998. To give the parties more time to negotiate, both parties agreed to extend the window for arbitration to be from February 28, 1999 until, and including, March 25, 1999. Pacific's Petition for Arbitration was, therefore, timely.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 ALJ-168 was an earlier Commission resolution establishing arbitration rules pursuant to Section 252 of the Telecommunications Act of 1996. ALJ-174 is the current version, but definitions in the earlier version are still generally applicable.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

- [*5]

By letter to the Arbitrator dated June 28, 1999, both Pacific and MFSW indicated they agree to waive the nine-month arbitration resolution requirement contained in @ 252(b)(4)(c) of the Act. The waiver is for a period ending not later than September 9, 1999. Parties state that this waiver is made with knowledge of @ 252(b)(4)(c) and the remedies for failure to comply with it, and is made voluntarily at the parties' request.

The language setting forth the nine-month conclusion requirement is as follows:

"The State Commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section." (@ 252(b)(4)(c).)

In the event that this Commission "fails to act to carry out its responsibility under this section in any proceeding or other matter under this section" then the potential effect is for the Federal Communications Commission (FCC) "to issue an order preempting the State commission's [*6] jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice of such failure)...." (@ 252(e)(4).)

The intent of this provision is to protect the parties, particularly the petitioner, from the risk of a state commission failing to act in a timely fashion. In this arbitration, there is no question that the California Public Utilities Commission could and would resolve this matter within the imposed time limits. However, if the party for whom the protection is established wishes to knowingly, voluntarily and explicitly waive that protection for a reasonable purpose, such a waiver seems clearly permissible.

A schedule that would accommodate the requirements of the Act was discussed by the Arbitrator with the parties at the initial arbitration meeting on May 5, 1999. Opening testimony was submitted by Pacific on March 22, 1999, with rebuttal testimony on May 10, 1999. Pacific also presented a "Revised Issues Matrix" which reflected partial settlement of certain issues contained in the previously submitted matrix, as well as the addition of the new issues identified by MFSW as being in dispute. MFSW submitted its opening testimony on April 16, 1999, with [*7] rebuttal submitted on May 24, 1999.

Evidentiary hearings were held June 1 through 10, 1999. Concurrent briefs were filed on June 18, 1999. The Draft Arbitrator's Report (DAR) was filed on July 6, 1999, disposing of the contested issues as set forth below. Comments on the DAR were filed on July 19, 1999, by Pacific and MFSW. The comments were taken into account as appropriate in finalizing the Arbitrator's Report.

The FAR was filed and served on August 4, 1999 and directed the parties to file their Interconnection Agreement within seven days. Pursuant to Ordering Paragraph 1 of the FAR, parties were required to file and serve an interconnection agreement which conforms with the decisions reached in the FAR. On August 11, 1999, an Interconnection Agreement which conformed to the FAR was filed with the Commission subject to resolution of certain conflicting appendix provisions.

Both Pacific and MFSW also filed statements on August 11, 1999, regarding their remaining disagreements with the resolution reached in the FAR. As discussed below, Pacific seeks Commission authorization to amend the Agreement to reverse the FAR's findings on Internet Service Provider (ISP) issues. With the exception [*8] of the resolution of ISP issues, however, Pacific believes that the findings reached in the FAR are not inconsistent with the Act (although Pacific still argues that its proposals provide a more appropriate outcome).

MFSW claims that although the Agreement does not comply with the Act, FCC and Commission rules in certain respects, MFSW does not ask that the Agreement be rejected on these grounds. MFSW states that the noncompliant issues are not immediately critical to MFSW's specific facilities-based business plan and are being or will be addressed in other Commission proceedings. MFSW does not challenge the Agreement in these respects for purposes of this arbitration, without prejudice to its rights to challenge them in other pending or future Commission or FCC proceedings. MFSW does, however, seek Commission authorization for amendment of the filed interconnection agreement in certain limited areas, as outlined in Section IV below.

Pacific and MFSW both submit that the negotiated positions of the Agreement do not discriminate against a telecommunications carrier not a party to the proceeding and are consistent with the public interest, convenience and necessity.

III. Standard [*9] for Review

Pursuant to @ 252(e)(1) an interconnection agreement adopted by negotiation or arbitration for operation in California must be submitted for approval to this Commission, which shall approve or reject the agreement, providing written findings as to any deficiencies. Grounds for rejection of an agreement reached as a result of arbitration conducted under @ 252(b) are limited to the Commission finding that the agreement does not meet the requirements of @ 251, including the regulations prescribed by the FCC pursuant to section 251, or does not meet the standards set forth in @ 252(d), which relates to pricing standards.

The standards contained in @ 251 relate to the obligations of local exchange carriers in responding to requests for negotiation and interconnection with carriers desiring access and interconnection. Among the duties identified are those for interconnection, @ 252(c)(2), and unbundled access, @ 252(c)(3), which read as follows:

"(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 [*10] 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 this section and section 252.

(3) Unbundled access.--The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

Pursuant to @ 252(e)(4), if the state commission [*11] does not act to approve or reject an agreement within 30 days after submission by the parties of an agreement adopted by arbitration, the agreement shall be deemed approved.

IV. Issues Presented for Arbitration

When initially filed, 82 separate issues were presented by Pacific as being in dispute. By the time the testimony was filed, some of these items had been resolved by the parties while new issues had been added by MFSW. Parties ultimately identified 163 issues to be decided, but subsequently settled 41 issues.

The most significant issue presented in this arbitration is the correct treatment of calls passed from Pacific to MFSW and then to an ISP. There are, however, other issues that the Commission must also resolve, which can generally be categorized as follows: (1) Correct definition of local calls subject to reciprocal compensation; (2) Digital Subscriber Line (DSL) capable loops; (3) Extended Loop; (4) General Terms and Conditions; (5) Collocation; (6) Network Interconnection; (7) Directory Assistance; and (8) Miscellaneous issues.

We have reviewed the FAR, and conclude that its resolution of the disputed issues properly conforms to the provisions of the Act and of [*12] Commission rules. We address below the disputed issues raised by parties in their comments on the FAR.

A. ISP Issues

The single most significant controversy in this arbitration is whether calls terminated by MFSW which originate from Pacific's customers to MFSW's ISP customers should be subject to reciprocal compensation. Pacific takes issue with the FAR's finding that such calls should be subject to reciprocal compensation. Pacific argues that the proposed resolution is not consistent with the Act.

1. Pacific's Position n2

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 MFSW filed no comments on the FAR's disposition of ISP issues since the MFSW position was adopted.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Pacific argues that @ 251(b)(3) of the Act requires a local carrier to pay reciprocal compensation to another local carrier only for local calls - that is, calls that actually terminate on the neighboring carrier's network within the same local calling area. In discussing ISP-bound calls, the FCC concluded "that the communications at issue here do not terminate at the ISP's local server, [*13] as [competing carriers] and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state." n3 The FCC concluded that because "a substantial portion of Internet traffic involves accessing interstate or foreign websites," n4 such ISP-bound traffic is nonlocal interstate traffic." n5

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 Re Local Competition Implementation, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of proposed Rulemaking, FCC N. 99-38, CC Dkts. 96-98 and 99-68, (rel. Feb. 26, 1999) ("Declaratory Ruling").

n4 Id. at P 18.

n5 Id. at P 26 n. 87.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -"

Pacific argues that the FCC's determination that ISP-bound traffic is non-local and therefore not subject to @ 251(b)(5)'s reciprocal compensation obligation compels the conclusion that this Commission may not require Pacific, in an arbitration conducted pursuant to @ 252, to pay reciprocal compensation for ISP-bound traffic. Pacific contends there is no statutory authority for [*14] the Commission to impose reciprocal compensation on Pacific other than full accordance with the terms of @ 252(d)(2)(A)(i).

2. Discussion

We uphold the findings of the FAR with respect to its resolution of reciprocal compensation for ISP-bound calls. We acknowledge, as does the FAR, that the FCC has ruled that ISP calls are largely interstate and do not "terminate" at the ISP modem for purposes of determining the FCC's jurisdiction over such traffic. The FCC, however, has not yet rendered a definitive conclusion concerning how carriers must compensate each other for the exchange of such traffic. In the meantime, the FCC has continued to give discretion to state commissions to make this determination. Thus, we find no inconsistency with the Act insofar as the FAR prescribes reciprocal compensation for ISP-bound calls.

The FCC stated that, although ISP-bound traffic was deemed jurisdictionally mixed and appears to be largely interstate, "such conclusion does not in itself determine whether reciprocal compensation is due in any particular instance." (Declaratory Ruling P 1.) Moreover, the FCC stated that its determination that a portion of dial-up ISP-bound traffic is interstate [*15] is not dispositive of interconnection disputes currently before state commissions. (Id., P 20.)

The FCC has not asserted exclusive jurisdiction over inter-carrier compensation for all ISP-bound traffic. (Declaratory Ruling, Footnote 73.) The FCC declared that: "until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic." (Id., P 28.)

Thus, while @ 251(b)(5) of the Act may not require a LEC to pay reciprocal compensation for ISP calls, discretion is still accorded to the states to apply reciprocal compensation to such calls. The FAR properly based its resolution on generic Commission policy on reciprocal compensation in D.98-10-057. The Commission has also concluded in D.99-07-047 that the FCC's subsequent ruling on the jurisdictionally mixed nature of ISP-bound calls does not negate D.98-10-057 with respect to its reciprocal compensation policy.

We also uphold the FAR's finding that as long as the respective rate centers of the telephone number assigned to the calling party and to the ISP are within the same local calling area, the call shall be defined as a local call, and subject to the reciprocal compensation [*16] provisions as prescribed in Issue 1 above. Although the California Public Utilities Commission is considering generic rating/routing policy issues concerning inter-carrier compensation for this type of call within the Local Competition Docket (R.95-04-043), it has not yet issued an order. Thus, the issue must be decided for interim purposes in the context of this arbitration. The Commission has addressed the issue of the proper definition of calls utilizing different rating and routing points on a more limited basis in a complaint case involving Pac-West. In D.99-02-096 issued in that case, the CPUC determined that a call is determined to be local based on the distance between rate centers of the assigned NXX prefixes.

Based on the Commission's holdings in that decision, it is reasonable to define in a similar fashion the calls terminated to MFSW's ISP customers which utilize a similar foreign exchange arrangement to that of Pac-West.

B. Disputes Over Conforming Contract Language

There are two issues where the parties have each proposed conflicting contract language in attempting to conform to the FAR's directives. The Interconnection Agreement filed and served on August 11, [*17] 1999, by Pacific in conformance with the FAR was marked in Appendix ITR, Section 1.2, and in Appendix Pricing, Section 4, to show competing language between Pacific and MFSW. Pacific's versions are attached hereto as Attachments 1 and 3, and MFSW's versions are attached hereto as Attachments 2 and 4. Pacific claims the language drafted by Pacific conforms to the FAR, while the language proposed by MFSW does not conform to the FAR.

1. Use of Logical Trunk Groups

a) Parties' Positions

The parties presented conflicting versions of conforming contract language for Appendix ITR - relating to Issue 48 (use of logical trunk groups). The FAR finds that if MFSW wants to exercise its right to use a single point of interconnection (POI) to serve an entire LATA, it must establish logical trunk groups to each access tandem and pay Pacific additional transport costs. If MFSW thereby causes Pacific to incur higher costs, it must reimburse

Pacific for those costs.

The FAR notes that at the time the arbitration was submitted, MFSW had failed to provide appropriate contract language regarding its proposed use of "logical trunk groups." n6 The FAR's discussion of this issue concludes as [*18] follows:

MFSW is authorized to use "logical trunk groups" in the manner it has proposed, provided that MFSW produces the requisite contract language which clearly explains this arrangement, and accurately reflects the prices which it must pay to compensate Pacific for its additional costs resulting from use of a single POI. Unless MFSW produces the additional requisite language, it will be required to subtend every access tandem, as proposed by Pacific. n7

Although MFSW has subsequently offered draft language for Appendix ITR concerning "logical trunk groups," Pacific claims the language MFSW proposes does not clearly provide for reimbursement of Pacific's additional costs resulting from this serving arrangement. Pacific has proposed alternative Appendix ITR language which it claims would provide appropriate reimbursement for its additional costs. Pacific argues that the Commission should either adopt the language Pacific has proposed which requires "logical trunk groups" to every access tandem and provides for compensation associated with Pacific's additional costs associated with "logical trunk groups," or, alternatively, require MFSW to subtend at every access tandem.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n6 FAR, p. 47. [*19]

n7 Id., p. 47.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Pacific claims the language proposed by MFSW does not conform to the FAR in that MFSW attempts to reserve the right to not agree that logical trunk groups must be utilized. In addition, Pacific claims MFSW's proposed language does not clearly recognize its obligation to pay Pacific's additional transport costs associated with the logical trunk group arrangement in the context of local traffic. For these reasons, Pacific argues its proposed language conforms with the FAR and must be adopted.

MFSW claims that its proposed language conforms to the FAR's conclusion that "logical trunk groups" may be used by MFSW "in the manner it has proposed," while Pacific's does not. Pacific's language would require the parties to establish direct logical trunk groups to a tandem even when the amount of traffic to that tandem does not justify a direct logical trunk group. MFSW's language, by contrast, agrees to direct logical trunk groups only whenever traffic volumes justify a direct trunk. MFSW agrees to compensate Pacific for all of the additional costs Pacific incurs if no direct logical trunk is [*20] established because of insufficient traffic volumes. MFSW claims the only additional cost incurred by Pacific in this circumstance is an additional tandem switching event. MFSW's language requires it to pay Pacific for both local and intraLATA toll calls, if no direct logical trunk group is established due to insufficient traffic volumes. MFSW argues the FAR contemplates the possibility of two tandem occurrences, since it specifically addresses the need for MFSW to provide contract language for the logical trunk group proposal which addresses the pricing for the arrangement, "including extra tandem costs involved." n8

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n8 FAR at 46.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

b) Discussion

We shall adopt MFSW's proposed version of Section 1.2 of Appendix ITR relating to logical trunk groups. The FAR authorized MFSW to use logical trunk groups provided it produced the additional requisite contract language. We find the proposed language offered by MFSW for Section 1.2 of Appendix ITR to be responsive to that directive. MFSW's proposed language provides [*21] for a more efficient outcome than does that of Pacific since it would only require the use of logical trunk groups when calling volume made it economical to do so. Pacific's proposed language would require parties to establish a direct logical trunk group at every access tandem irrespective of traffic volumes, thereby tying up valuable capital resources of both parties, even when the limited calling volume failed to justify incurring such additional costs.

Pacific objects to MFSW's language concerning the use of logical trunk groups because it fails to provide for payment of additional transport costs for local calls. Yet, as MFSW explained in its comments on the DAR, the logical trunking is intended as a concession relative to the routing of toll traffic, not local traffic. The prices set forth in Pacific's intrastate switched access tariff fairly compensate Pacific for its tandem switching and transport costs incurred to transport MFSW toll calls to a tandem sector where MFSW does not provide a physical connection.

2. Reciprocal Compensation Rate Elements

a) Parties' Positions

Pacific and MFSW offer conflicting versions of Section 4 of the Appendix Pricing relating [*22] to reciprocal compensation for termination of local traffic. This dispute was resolved in the FAR under Issue 83. The FAR adopted Pacific's position for issue 83. Pursuant to the FAR's resolution, MFSW is entitled to seek compensation only for costs MFSW incurs.

The FAR found that where MFSW provides no tandem or common transport functions and thus incurs no such costs, it is not entitled to compensation for those functions and costs. The FAR concluded that MFSW's switches do not serve the same or comparable area as Pacific, and thus MFSW's claim that it is entitled to reciprocal compensation for those functions was rejected. Pacific argues that MFSW incurs no greater costs using Pacific's tandems and common transport than it would if it were directly trunked to a Pacific end office.

MFSW takes issue with the FAR's resolution of reciprocal compensation pursuant to Issue 83. MFSW argues that MFSW and Pacific are providing one another essentially identical transport and termination services, with the only difference being that the network architecture of MFSW uses a single switch with SONET fiber rings, transport nodes and long loops to provide transport and termination rather than [*23] a hierarchy of tandem and end office switches. MFSW claims the FAR's result violates the Act and FCC implementing regulations by denying MFSW reciprocal compensation for the provision of these transport and termination services, but instead allows MFSW to recover only Pacific's end office switching rate. MFSW claims the FAR completely ignores the fact that MFSW's network of fiber rings, switching and transport nodes transports local calls which traverse several serving wire center territories to get between a customer and the serving switch, allowing MFSW to serve a geographic area comparable in size to the areas served by Pacific's tandem switch.

b) Discussion

We shall adopt the version of Appendix Pricing, Section 4, as proposed by Pacific. Pacific's version properly conforms to the FAR, clearly specifying that a party is entitled to tandem and common transport compensation only when the party actually provides a tandem or common transport function. MFSW's proposed version of the Appendix Pricing conflicts with the outcome of the FAR, and would provide tandem and common transport compensation to MFSW even when Pacific does not incur such costs.

MFSW's disagreement is premised [*24] on its claim that the MFSW fiber ring network serves a comparable geographic area to that of Pacific, thereby justifying payment to MFSW of the same reciprocal compensation rate elements which it pays to Pacific. Contrary to MFSW's claim, the FAR did not ignore MFSW's argument that the MFSW network serves a geographic area comparable in size to the areas served by Pacific's tandem switch. The FAR acknowledged MFSW's showing on this issue as presented by witness Sigle, but found MFSW's showing unpersuasive. As concluded in the FAR, any similarity in the size of serving areas will soon go away when MFSW's new switches are in place. Moreover, many of MFSW's customers are not served by fiber rings. For example, the ISPs served by MFSW are actually collocated with MFSW's switch. We find that the FAR has properly supported its resolution of Issue 83. Therefore, we affirm the resolution of the FAR on this issue and, accordingly, approve Pacific's version of Appendix Pricing, Section 4, since it conforms to the FAR, while MFSW's version does not.

C. Collocation Prices

1. Position of MFSW

MFSW objects to the FAR's adoption of Pacific's position with respect to treatment of collocation [*25] pricing whereby contract prices are based on Pacific's tariffs with no true-up provision. MFSW argues that the incorporation of Pacific's tariffed prices for collocation without any true-up, violates the pricing standard of Section 252(d) of the Act. MFSW claims the prices for collocation in Pacific's collocation tariffs are not based on Total Element Long Run incremental Coasts (TELRIC) as required by the Act, FCC and Commission rules, and that Pacific has proposed completely different TELRIC-based prices in the collocation phase of OANAD. Thus, MFSW argues that the interconnection agreement must be amended to provide for a true-up of tariffed collocation prices to be in conformance with the Act.

2. Discussion

We affirm the resolution reached by the FAR concerning the reference to collocation tariffs. The referencing of tariffs in the agreement is not unfair to MFSW. Pacific does not have unilateral control over the pricing and terms of its collocation tariffs. As previously noted, if MFSW disagrees with elements contained in Pacific's tariff, MFSW has the right to protest those elements. The tariffs will not become effective until the CPUC has approved them, after due review, [*26] together with consideration of any protests relating to compliance of the tariff with the Act and other applicable FCC and Commission rules.

Findings of Fact

1. The petition for arbitration was filed on March 22, 1999.

2. MFSW filed its response to the petition on April 19, 1999.

3. A revised statement of unresolved issues was filed on May 22, 1999.

4. An initial arbitration meeting was held on May 5, 1999.

5. The Act requires matters submitted for arbitration to be concluded within nine months after the initiation of negotiations.

6. The Act requires the Commission to approve or reject an interconnection agreement arrived at through arbitration within 30 days after the interconnection agreement is filed.

7. The parties commenced negotiations on August 15, 1998 and agreed to extend the window for arbitration to be from February 28 to March 25, 1999.

8. The Commission was prepared to conclude this arbitration within the nine-month time limit established by the Act.

9. On June 28, 1999, MFSW and Pacific provided explicit written waivers of the nine-month time resolution requirement noting their acceptance of a scheduled conclusion date not later than September 9, 1999, and that [*27] such acceptance was with full knowledge of the time limit established in @ 252(b)(4)(c) and was entered into voluntarily and at their own request.

10. A Draft Arbitrator's Report was filed and served on July 6, 1999.

11. Comments on the Draft Arbitrator's Report were served and filed on July 19, 1999, by Pacific and MFSW.

12. The Final Arbitrator's Report was filed and served on August 4, 1999, and directed the parties to file their interconnection agreement within seven days.

13. On August 11, 1999, an interconnection agreement which conformed to the Final Arbitrator's Report was filed with the Commission.

14. The primary disputed issues in this arbitration is whether Pacific should be required to pay reciprocal compensation for calls made by its customers to ISPs who are customers of MFSW.

15. Parties also disputed the arbitrator's resolution of appropriate rate elements payable for reciprocal compensation, obligations to interconnect at access tandems, and reliance on tariffs for pricing of collocation.

Conclusions of Law

1. Arbitrations are conducted under the schedule requirements of @ 252 of the Act, which generally requires faster processing times than required by SB [*28] 960 or SB 779.

2. This matter comes before the Commission as an unforeseen emergency situation pursuant to Rule 81 due to the conflict between the agenda schedule requirements of Pub. Util. Code @ 311(g) and those of @ 252(e)(4) of the Act.

3. Waiver of the nine-month time limit for concluding arbitrations under the Act is permissible if approved by the party for whom the time limit protection is provided - the petitioning party - and if done voluntarily and with full knowledge of the consequences of such waiver.

4. Section 252(e)(2)(A)(ii) of the Act, cited by MFSW as a standard for measure of the agreement filed in this proceeding, is set out as a standard applicable to agreements reached through negotiation and not through arbitration.

5. Grounds for rejection of an agreement reached as a result of arbitration conducted under @ 252(b) of the Act are limited to the Commission finding that the agreement does not meet the requirements of @ 251, including the regulations prescribed by the FCC pursuant to section 251, or does not meet the standards set forth in @ 252(d), which relates to pricing standards.

6. Arbitrations are by their mandated schedules expeditious proceedings intended [*29] to resolve the limited issues identified by the parties.

7. Participation in arbitration conferences and hearings is strictly limited to the parties that were negotiating and agreement pursuant to @@ 251 and 252 of the Act.

8. Agreements reached through arbitration are subject to modification in the event the Commission resolves a related matter on an generic basis.

9. The Act requires a local exchange carrier to make available any interconnection, service, or network element provided under an agreement approved under @ 252 to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

10. Although the FCC has concluded that ISP-bound traffic is jurisdictionally mixed and largely interstate, the FCC has left discretion to state commissions to determine whether reciprocal compensation is due in any particular instance.

11. While Section 251(b)(5) of the Act may not require payment of reciprocal compensation for ISP calls, there is no prohibition under the Act or FCC rules against a state commission requiring reciprocal compensation for such calls.

12. The Arbitrator acted within the bounds of the Act [*30] in finding that ISP calls shall be subject to reciprocal compensation, including those ISP calls to NXX prefixes routed from a different local exchange but rated as a local call.

13. The version of Appendix Pricing, Section 4, as proposed by Pacific (set forth in Attachment 3 hereto) properly conforms to the FAR, clearly specifying that a party is entitled to tandem and common transport compensation only when the party actually provides a tandem or common transport function.

14. MFSW's proposed version of the Appendix Pricing, Section 4, (set forth in Attachment 4 hereto) conflicts with the outcome of the FAR, and would provide tandem and common transport compensation to MFSW even when Pacific does not incur such costs.

15. The FAR properly concluded that the MFSW fiber ring network does not serve a comparable geographic area to that of Pacific.

16. The FAR authorized MFSW to use logical trunk groups provided it produced the additional requisite contract language.

17. The proposed language offered by MFSW for Section 1.2 of Appendix ITR (set forth in Attachment 2 hereto) is responsive to the FAR's directive.

18. MFSW's proposed language for Appendix ITR provides for a more efficient [*31] outcome than does Pacific's language since it would only require the use of logical trunk groups when calling volume made it economical to do so.

19. The referencing of collocation tariffs in the Agreement is appropriate since MFSW retains the right to formally protest any tariff filing and to raise any pertinent issues concerning conformance of prices to the Act.

20. The executed agreement filed by the MFSW and Pacific on August 11, 1999, incorporating the contract provisions set forth in Attachments 2 and 3, conforms to the requirements of the Act and should be approved.

ORDER

IT IS ORDERED that:

1. The fully executed arbitrated interconnection agreement filed on August 11, 1999, in response to the Final Arbitrator's Report dated August 4, 1999, between MFS WorldCom. and Pacific Bell, incorporating the contract provisions set forth in Attachments 2 and 3, is approved pursuant to the requirement of the Telecommunications Act of 1996, and effective as of the date of this order.

2. The parties shall within 10 days provide to the Director of the Telecommunications Division a copy of the executed agreement.

3. Application 99-03-047 is closed.

This order is effective today.

Dated [*32] September 16, 1999, at San Francisco, California

ATTACHMENT 1

ATTACHMENT 1--Pacific's proposed version of Section 1.2 of Appendix ITR

(Underscoring highlights key provisions of Pacific's proposal.)

1.2. Tandem Trunking--Multiple Tandem LATAs

Where PACIFIC has more than one Access Tandem in a LATA, IntraLATA Toll and Local traffic shall be combined on a single Local Interconnection Trunk Group at every PACIFIC tandem for calls destined to or from all End Offices that "home" on each tandem. At such time as CLEC offers originating local service with corresponding NXX codes in any rate centers which subtend an access tandem as to which no physical POI has been previously established, CLEC and PACIFIC will establish a physical POI within the serving area of that tandem using the Mid-Span Fiber Meet target architecture in Appendix NIM, Section 1.1. Where no physical POI has been established and such physical POI is not required by the preceding sentence, CLEC agrees to designate "logical trunk group(s)" from a POI agreed to by the parties to interconnect its switches with every PACIFIC access tandem within a LATA. For intraLATA toll traffic carried over these "logical [*33] trunk group(s)" Pacific shall receive switched access compensation as specified in Appendix Reciprocal Compensation, Section 5 (specifically, local switching and tandem switching plus tandem switched (i. e common) transport measured from the POI to the terminating Pacific end office). For local traffic carried over these "logical trunk group(s)", Pacific shall receive compensation based on rate elements specified in Appendix Pricing, Section 4 (specifically, tandem switching (where used), end office switching and common transport), except that in this case common transport shall be measured from the POI to the terminating PACIFIC end office. All local/IntraLata trunk groups (except as noted in 1.5 below) will be two-way and will utilize Signaling System 7 ("SS7") signaling or MF protocol where required.

ATTACHMENT 2

ATTACHMENT 2 -- WorldCom's proposed version of Section 1.2 of Appendix ITR

(Underscoring indicates key additions by Worldcom that are objectionable to Pacific. WorldCom also made deletions from Pacific's version which are objectionable to Pacific. Since WorldCom deleted some of Pacific's language, such language is, therefore, not shown on this WorldCom [*34] version, but is shown on Attachment 1 (which is Pacific's version).)

1.2. Tandem Trunking--Multiple Tandem LATAs

Where PACIFIC has more than one Access Tandem in a LATA, CLEC will migrate to an arrangement in which IntraLATA Toll and Local traffic shall be comibned on a single Local Interconnection Trunk Group at every PACIFIC tandem for calls destined to or from all End Offices that "home" on each tandem. At such time as CLEC offers originating local service with corresponding NXX codes in any rate centers which subtend an access tandem as to which no physical POI has been previously established, CLEC and PACIFIC will establish a physical POI within the serving area of that tandem using the Mid-Span Fiber Meet target architecture in Appendix NIM, Section 1.1. Where parties agree that traffic is sufficient and no physical POI has been established and such physical POI is not required by the preceding sentence, CLEC agrees to designate "logical trunk group(s)" from a POI agreed to by the parties to interconnect its switches with PACIFIC's access tandems within a LATA. For intraLATA toll traffic carried over these "logical trunk group(s)" Pacific shall receive switched [*35] access compensation as specified in Appendix Reciprocal Compensation, Section 5 (specifically, local switching and tandem switching plus tandem switched (i.e. common) transport measured from the POI to the terminating Pacific end office). Until such time as logical trunk groups are established, for intraLATA traffic Pacific shall receive the switched access compensation as specified in Appendix Reciprocal Compensation, Section 5 (specifically, the same charges specified in the immediately preceding sentence, plus an additional tandem switching charge) and for local traffic, Pacific shall receive the compensation specified in Appendix Pricing, Section 4. All local/IntraLata trunk groups (except as noted in 1.5 below) will be two-way and will utilize Signaling System 7 ("SS7") signaling or MF protocol where required.

ATTACHMENT 3

ATTACHMENT 3--Pacific's proposed version of Section 4 of Appendix Pricing

(Underscoring highlights key provisions of Pacific's proposal.)

4. RECIPROCAL COMPENSATION FOR TERMINATION OF LOCAL TRAFFIC

Rate Elements

4.1 Tandem Switching-- (where used) compensation for the use of tandem switching functions: [Note that [*36] Pacific's proposal provides tandem compensation only when the party actually provides the tandem function as per the FAR.]

(i) $ 0.00113/Setup per Call, and
(ii) $ 0.00067/MOU

4.2 Common Transport ("where used") - compensation for the transmission facilities between the local tandem and the End Offices subtending that tandem. [Note that Pacific's proposal provides common transport compensation only when the party actually provides the tandem function as per the FAR.]

(i) $ 0.001330/Fixed Mileage and
(ii) $ 0.000021/Variable Mileage

4.3 Basic Switching-Interoffice Terminating (end office switching)

(i) $ 0.007000/Call Setup;
(ii) $ 0.00187/MOU

4.4 Transiting Rate

(i) $ 0.00113/Call setup
(ii) $ 0.00277/MOU

ATTACHMENT 4

ATTACHMENT 4--WorldCom's proposed version of Section 4 of Appendix Pricing

(Underscoring indicates key changes by WorldCom that are objectionable to

Pacific. WorldCom also made deletions from Pacific's version which are objectionable to Pacific. Since WorldCom deleted some of Pacific's language, such language is, therefore, not shown on this WorldCom version, but is shown on Attachment 3 (which is Pacific's [*37] version).)

4. RECIPROCAL COMPENSATION FOR TERMINATION OF LOCAL TRAFFIC

Rate Elements

4.1 Tandem Switching for Pacific or CLEC Terminated when Interconnection is through Pacific's Tandem Switching: [Note that under WorldCom's version, WorldCom receives tandem switching compensation when Pacific incurs the tandem costs.]

(i) $ 0.00113/Setup per Call, and
(ii) $ 0.00067/MOU
(In the event that Pacific is required to double tandem a local call, Pacific but not CLEC shall receive such compensation for each tandem occurrence.)

4.2 Common Transport for Pacific or CLEC Terminated Calls when Interconnection is through Pacific's Tandem Switch or directly from the point of interconnection to a Pacific end office. [Note that under WorldCom's version, WorldCom receives common transport compensation when Pacific incurs the common transport costs!]

(i) $ 0.001330/Fixed Mileage/MOU and
(ii) $ 0.000021/Variable Mileage/MOU

4.3 End Office Switching for Pacific or CLEC Terminated when Interconnection is not through a Pacific Tandem Switch.

(i) $ 0.007000/Call Setup;
(ii) $ 0.00187/MOU

4.4 Transiting Rate

(i) $ 0.00113/Setup per Call, [*38] and
(ii) $ 0.00277/MOU

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. PUBLIC SERVICE COMMISSION OF UTAH; STEPHEN F. MECHAM, CONSTANCE B. WHITE, CLARK D. JONES, Commissioners of the Public Service Commission of Utah; and WESTERN WIRELESS CORPORATION, a Washington corporation, Defendants.

Case No. 2: 97 CV 558

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

75 F. Supp. 2d 1284; 1999 U.S. Dist. LEXIS 18148

November 23, 1999, Decided

DISPOSITION: [**1] Western's motion for summary judgment GRANTED. US West's motion for summary judgment DENIED. Matter dismissed.

CORE TERMS: switch, tandem, incumbent, carrier, reciprocal, termination, provider, transport, compensate, traffic, entrant, network, geographic area, interim, telecommunications, deference, state commission, effective date, interconnection, standard of review, switching, federal agencies, interconnecting, summary judgment, wireless, arbitration, originating, renegotiate, deferential, similarity

COUNSEL: For U S WEST COMMUNICATIONS, INC., plaintiff: David J. Jordan, Gregory B Monson, Mr., STOEL RIVES LLP, SALT LAKE CITY, UT.

For STEPHEN F. MECHAM, CONSTANCE WHITE, CLARK JONES, PUBLIC SERVICE COMMISSION UT, defendants: Sandy J Mooy, Mr., PUBLIC SERVICE COMMISSION, Michael L Ginsberg, Mr., UTAH ATTORNEY GENERAL'S OFFICE, SALT LAKE CITY, UT.

For WESTERN WIRELESS, defendant: Alan L Sullivan, Mr., Bradley R. Cahoon, SNELL & WILMER LLP, SALT LAKE CITY, UT.

For WESTERN WIRELESS, defendant: Joseph A. Boyle, KELLEY DRYE & WARREN, PARSIPPANY, NJ.

For WESTERN WIRELESS, defendant: Douglas P. Lobel, Charles M. Oliver, KELLEY DRYE & WARREN, WASHINGTON, DC.

JUDGES: DALE A. KIMBALL, United States District Judge.

OPINIONBY: DALE A. KIMBALL

OPINION: [*1285] ORDER

Before the Court are the cross motions for summary judgment of Plaintiff US West Communications, Inc. ("US West") and Defendant Western Wireless Corporation ("Western").

BACKGROUND

Exhibit D

On February 8, 1996, Congress passed the Telecommunications Act of 1996 (the [*1286] "Act") to promote competition and reduce regulation in the [**2] local telephone market. As part of the Act, existing telephone service providers like US West, referred to as "incumbent local exchange carriers," "incumbent LECs," or "ILECs," are obligated to interconnect with new entrants into the telecommunications market, including wireless or mobile carriers like Western, referred to as "Commercial Mobile Radio Service Providers" or "CMRS providers." Towards that end, the Act obligates ILECs to enter into "reciprocal compensation arrangements" with entrants pursuant to which each carrier compensates the other for local telephone traffic that is transported and terminated on the other carrier's network. 47 U.S.C. @ 251(b)(5). Prior to the Act, incumbent LECs were not legally required to compensate other carriers for such usage, but other carriers were required to compensate incumbent LECs.

When an entrant asks an incumbent to provide interconnection, the Act obligates both parties to negotiate in good faith to accomplish the requirements of the Act. Id. at @@ 251(c)(1), 252(a)(1). The Act provides further that any entrant with a preexisting agreement with an incumbent may request re-negotiation of the agreement [**3] to conform it with the Act. To the extent issues remain unresolved, either party may request arbitration by the state public utilities commission. Id. at @ 252(b). The final agreement between the incumbent and the entrant, whether arrived at through negotiation or arbitration, must be approved by the state commission. Id. at @ 252(e)(1). Either party may seek review in federal district court. Id. at @ 252(e)(6). If the state commission fails to act within the timetables provided in the Act, the Federal Communications Commission ("FCC") assumes the state commission's responsibilities. Id. at @ 252(e)(5).

Prior to the passage of the Act, US West and Western had entered into an interconnection agreement that provided a rate for Western's use of US West's lines and services. On March 29, 1996, Western petitioned US West to renegotiate their agreement to conform with the Act. Negotiations ensued, and, on September 6, 1996, the open issues were submitted to the Utah State Public Service Commission (the "Commission") for arbitration. On January 2, 1997, the Commission ruled that Western was entitled to receive reciprocal compensation retroactively beginning March 29, 1996, the [**4] date Western requested renegotiation. The Commission also found that Western's mobile switching center ("MSC") should be treated as equivalent to US West's tandem switch system for the purpose of setting the rate of reciprocal compensation US West must pay Western.

US West then filed this lawsuit, challenging the Commission's finding on those two points, namely: (1) the effective date from which Western is entitled to interim reciprocal compensation and (2) the interconnection rate Western is entitled to receive for the transportation and termination on its system of calls originated on US West's system, the "going forward rate." n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Initially, US West also asserted that an unconstitutional taking had occurred. During oral argument of the motions, counsel for US West stated that US West no longer asserts a Fifth Amendment takings claim as an independent cause of action.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

STANDARD OF REVIEW

The parties agree that questions of law, such as whether a state commission procedurally and substantively complied [**5] with the Act, are to be reviewed de novo, in accordance with the standard of review enunciated in U S West Communications, Inc. v. Hix, 986 F. Supp.13, 18 (D. Colo. 1997). US West and Western disagree as [*1287] to the standard of review to be applied to other questions, particularly questions involving a state commission's interpretation of the Act.

US West argues that the state commissions are not entitled to deference as are federal agencies pursuant to Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (according deference to federal agency's statutory interpretation when Congressional intent is not clear from statute's express language). US West urges this Court to follow Hix in this regard. The Hix court concluded that state commissions do not function analogously to federal agencies under the Act because they are not subject to continuous Congressional oversight and do not have "extensive experience or expertise in the specific mandate of the Act -- promoting competition in the local exchange market." Hix, 986 F. Supp. at 17-18. The Hix court also noted that affording deference [**6] to the state commissions would be antithetical to the coherent and uniform construction of the Act. Id. at 17.

Western argues that Hix has been superceded in this regard. Western's argument is based on a footnote in AT & T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999), in which the Supreme Court noted that the Act's delegation of federal policymaking to state administrative agencies created a unique scheme and left open many attendant issues. The Supreme Court said, "Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law are novel as well." 119 S. Ct. at 733 n.10.

This Court recognizes that the Supreme Court did not substantively address the issue of the amount of deference district courts are to afford the state commissions. But, in acknowledging the uniqueness of the Act's scheme, the Supreme Court left open the possibility that application of a deferential standard could be warranted. Two considerations persuade this Court to do so, notwithstanding the distinctions between the state commissions and federal [**7] agencies drawn in Hix.

First is the fact that Congress specifically charged the state commissions with interpreting and carrying out the Act in the first instance. At the very least, this suggests that Congress viewed the state commissions as having relevant expertise. Second is the fact that if the FCC were to act for a state commission that did not accept its responsibilities under the Act, a reviewing court would give deference to the FCC, as a federal agency, under Chevron. Application of a deferential standard to the state commission's interpretations of the Act avoids this anomaly.

DISCUSSION

A. Did the Commission lawfully set the effective date from which Western is entitled to interim reciprocal compensation as March 26, 1996?

US West challenges the Commission's application of one of the administrative rules issued by the FCC to implement the Act. The rules were released on August 8, 1996, but were not effective until November 1, 1996. See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) ("First Report and Order"). Section 51.717, commonly known as the interim reciprocal [**8] compensation rule, provides that, as of the date a competing carrier petitions an incumbent LEC to negotiate a new agreement until the time that an interconnection agreement is approved by the state, the competing carrier may charge the incumbent LEC the same rates for termination of telecommunications traffic that the incumbent LEC [*1288] charges the competing carrier. 47 C.F.R. @ 51.717(b) (1998). n2

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n2 In its entirety, 47 C.F.R. 51.717 provides:

(a) Any CMRS provider that operates under an arrangement with an LEC that was established before August 8, 1996, and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties.
(b) From the date that a CMRS provider makes a request under paragraph (a) of this section until a new arrangement has been either arbitrated or negotiated and has been approved by a state PCS, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for the transport and termination of local telecommunications traffic that the LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[**9]

US West argues that the Commission improperly interpreted and applied @ 51.717 to require US West to provide reciprocal compensation to Western retroactively to a date that pre-dates the effective date of the rule, namely, March 29, 1996, the date Western petitioned US West to renegotiate the existing agreement.

US West argues that on March 29, 1996, there was no obligation to provide reciprocal compensation to a CMRS provider until after an agreement was approved by a state commission, citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988), in which the Supreme Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Id. at 207.

US West points out that the statutory provisions authorizing the FCC to make implementing rules do not authorize retroactive rulemaking and that the FCC indicated in the First Report and Order that the obligation to provide reciprocal compensation was to attach "as of the effective date of the rules we adopt [**10] pursuant to this order." P 1094. As further support for its position, US West argues that retroactive application of @ 51.717 is precluded by the language used in the provision itself, which states that a

CMRS provider shall be entitled to interim reciprocal compensation from the date a request is made "under paragraph (a) of this section."

Western argues that the effective date of @ 51.717 is irrelevant inasmuch as the express language of the Act gives CMRS providers the right to interim reciprocal compensation. Western argues that @ 251(b)(5), which was effective on the date on which the Act was signed into law, February 8, 1996, provides that each local exchange carrier has the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." According to Western, @ 51.717 merely specifies a date from which each CMRS provider may receive interim reciprocal compensation, a term that does not appear in the Act itself.

Since the Act itself requires reciprocal compensation, the question of when, after the passage of the Act, an incumbent LEC's duty to provide reciprocal compensation begins does not present a question concerning [**11] the Commission's compliance with the Act. Thus, this Court applies a deferential standard of review to the Commission's interpretation of @ 51.717. The Commission's interpretation meets this standard. This is the conclusion reached by three other district courts that have considered the issue -- New Mexico, North Dakota, and Montana. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 U.S. West Communications, Inc. v. Reinbold, No. A1-97-025 (D.N.D. May 14, 1999); US West Communications, Inc. v. Serna, Civ. No. 97-124 JP/JHG (D.N.M. Aug. 25, 1999); US West Communications, Inc. v. Anderson, CV 97-9-H-CCL (D. Mont. Sept. 14, 1999).

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*1289] B. Did the Commission act lawfully in requiring US West to compensate Western for the services Western provides to US West at the same rate that Western compensates US West?

As explained above, the Act requires interconnecting carriers to establish reciprocal compensation arrangements for the transport and termination of traffic on each others' networks. 47 U.S.C. @ 251(b)(5). The parties [**12] do not dispute that the tandem switches utilized by US West are different from the MSC switches utilized by Western, and more expensive to operate.

Tandem switches are routing switches and never operate alone. In simplified terms, a tandem switch is used to interconnect "end offices" in a common geographic area. An end office switch generally connects calls from one caller to another within a smaller geographic area. So, any call delivered to US West's tandem switch must pass through both a tandem switch and an end office switch before reaching its destination.

Western always delivers calls originating on its system and destined for an end user on US West's system to US West's tandem switch. Thus, US West always incurs two switching costs to deliver a call originating on Western's system. In contrast, Western's MSCs only have one switch. So, when a US West customer calls a Western customer's cellular phone, Western incurs only one switching cost.

The Commission adopted a requirement that US West compensate Western for the services Western provides to US West at the same rate that Western compensates US West for the use of US West's tandem switches. The Commission did so after concluding [**13] that Western's switches perform comparable functions and serve a larger geographic area.

US West's attack begins with the proposition that @ 252(d)(2)(A) requires state commissions to arrive at a reasonable approximation of the costs of each carrier associated with the transport and termination on each carrier's facilities of calls originating on the other carrier's network. US West then argues that the fact that Western's system serves a geographic area that is at least as large as the geographic area served by US West is an insufficient basis upon which to sustain the Commission's ruling and that the required functional similarity analysis performed by the Commission was arbitrary and capricious.

At least one court has agreed with US West that a geographic analysis alone is an insufficient basis upon which to uphold a rate determination and that "the rate for a wireless switch should be determined by whether it functions like a tandem switch, and geography should be considered." US West Communications, Inc. v. Washington Utils. and Transp. Comm'n, No. C97-5686BJR, slip op. at 6 (W.D. Wash. Sept. 3, 1998). This Court also agrees.

US West argues that the functional similarity [**14] analysis performed by the Commission was arbitrary and capricious because the Commission compared Western's MSCs, on the one hand, with US West's tandem switches and US West's end operating switches, as they operate together, on the other hand, in violation of the First Report and Order, which, US West argues, instructed the Commission to compare Western's MSCs with US West's tandem switches standing alone.

The First Report and Order provides:

We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration [*1290] process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced [**15] the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

P 1090 (emphasis added). US West asks this Court to remand the matter to the Commission to require the Commission to determine whether Western's MSCs perform the same function as US West's tandem switches alone.

In the view of this Court, US West approaches the matter too myopically. The First Report and Order directs "states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2)." P 1089. A forward-looking cost study is necessary only when an entrant wants to rebut that presumption by establishing that its costs are greater than the incumbents. Id.

In light of these principles, US West has not shown that there is insufficient evidence upon which the Commission could base its conclusion that Western's costs approximate [**16] US West's. Nor is this Court convinced that the only permissible interpretation of P 1090 is the one advanced by US West, namely, that in performing a functional similarity analysis state commissions are limited to considering only the first layer of an ILEC's system.

CONCLUSION

For the reasons set forth herein, Western's motion for summary judgment is HEREBY GRANTED. US West's motion for summary judgment is HEREBY DENIED. The matter is dismissed; the parties are to bear their own costs.

DATED this 23rd day of November, 1999.

BY THE COURT:

DALE A. KIMBALL

United States District Judge