

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

NEXTLINK WASHINGTON, INC.,)	DOCKET NO. UT-990340
)	
Petitioner,)	
)	COMMISSION ORDER ADOPTING
v.)	RECOMMENDED DECISION, IN
)	PART, AND MODIFYING
U S WEST COMMUNICATIONS, INC.,)	RECOMMENDED DECISION, IN
Respondent.)	
)	
.....)	

BACKGROUND

Procedural History: On May 5, 1999, NEXTLINK Washington, Inc. (NEXTLINK), filed with the Commission and served on U S WEST Communications, Inc. (U S WEST), a *Petition for Enforcement of Interconnection Agreement* pursuant to WAC 480-09-530 (Petition). NEXTLINK is a competitive local exchange carrier (CLEC), and U S WEST is a incumbent local exchange carrier (ILEC). The Commission previously approved a negotiated interconnection agreement (Agreement) between the parties pursuant to 47 U.S.C. § 252 of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) (Telecom Act).¹ NEXTLINK requested and U S WEST agreed to make available the entire arbitrated agreement previously approved by the Commission between TCG Seattle and U S WEST (Agreement).²

On May 12, 1999, U S WEST answered NEXTLINK’s Petition and raised numerous procedural issues. On May 24, 1999, NEXTLINK filed its *Response to Jurisdictional Issues*. On June 1, 1999, U S WEST filed its *Reply to Jurisdictional Issues*.

¹ *In the Matter of the Request for the Adoption of An Approved Interconnection Agreement Between NEXTLINK Washington L.L.C. and U S WEST Communications, Inc.*, Docket No. UT-960356, Order Approving Adoption of Approved Interconnection Agreement (April 30, 1997).

² *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between TCG SEATTLE and U S WEST Communications, Inc.*, Docket No. UT-960326, Commission Order Approving Agreement (January 29, 1997) (TCG agreement).

On June 23, 1999, the presiding officer (ALJ) entered the Third Supplemental Order (Third Order) resolving procedural disputes and scheduling further proceedings. In the Third Order, the ALJ determined that additional pleadings and submissions were necessary regarding NEXTLINK's request for relief under Section 252(i) of the Telecom Act.

On June 30, 1999, NEXTLINK filed its *Memorandum on Section 252(i) Issues*. On July 8, 1999, U S WEST filed its *Answer on Section 252(i) Issues*. On July 14, 1999, NEXTLINK filed its *Reply on Section 252(i) Issues*.

NEXTLINK complied with traffic measurement data requests from U S WEST on or about July 1, 1999. U S WEST completed its review of NEXTLINK's data on or about July 15, 1999. A prehearing conference was convened on July 22, 1999. The parties stated that NEXTLINK's data allows all but a small percentage of traffic to be broken down into non-ISP and ISP-bound traffic. U S WEST stated that it had no reason to dispute the accuracy of NEXTLINK's traffic measurements. On July 28, 1999, the ALJ entered the Fifth Supplemental Order concluding that there was sufficient information in the record to resolve all issues, and that no further proceedings were required.

On August 12, 1999, the ALJ entered the Sixth Supplemental Order resolving issues (Recommended Decision). The Recommended Decision also provided notice of a hearing for oral arguments by the parties, after which the Commission could adopt, modify, or reject all or part of the Recommended Decision. On August 13, 1999, the Commission requested a presentation by Commission Staff at the hearing. U S WEST and NEXTLINK both filed comments seeking review of the Recommended Decision on August 19, 1999.

Commission Staff presented a written recommendation and the parties made oral arguments regarding the Recommended Decision at a special open public meeting on August 25, 1999.

Appearances: Gregory Kopta, attorney, appeared on behalf of NEXTLINK, and Lisa Anderl, attorney, appeared on behalf of U S WEST.

NEXTLINK's Petition: NEXTLINK petitions for enforcement of its Agreement with U S WEST, alleging that U S WEST has failed to comply with two separate provisions. Article VIII, Section 2, of the Agreement provides, in relevant part:

2. The following compensation rates shall apply for traffic carried from USWC to NEXTLINK:
 - a. Local calls

For all Local Traffic, the Parties agree to mutual traffic exchange without explicit compensation.

NEXTLINK may seek compensation for local traffic exchanged between the parties if NEXTLINK can establish that such traffic is out of balance by more than 10%. No explicit compensation shall be required until the Commission has approved an alternate compensation plan.

Definition 33 in the Agreement provides:

"Local Traffic" means traffic originated on the network of a LEC in a LATA and completed directly between that LEC's network and the network of another LEC in that same LATA, within the same local calling area as is provided by the incumbent LEC for local calls in that LATA.

Article XXVIII of the Agreement provides,

The Parties agree that the provisions of Section 252(i) of [the Telecommunications Act of] 1996 shall apply, including state and federal interpretive regulations in effect from time to time.

NEXTLINK seeks relief as a matter of contractual right or, alternatively, as a matter of statutory right. The Commission preliminarily notes that under either approach, NEXTLINK's preferred outcome is the same. NEXTLINK requests, as a contractual right, that the Commission approve an alternate compensation plan and require U S WEST to compensate NEXTLINK for the exchange of local traffic, including Internet service provider (ISP) traffic, according to the rates, terms, and conditions approved by the Commission in the MFS-U S WEST interconnection agreement.³ Alternatively, NEXTLINK requests that it receive the same reciprocal compensation arrangement, including the treatment of ISP-bound traffic, as approved in the MFS agreement, pursuant to its statutory rights under Section 252(i).

³ *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between MFS Communications Company, Inc., and U S WEST Communications, Inc.*, Docket No. UT-960323, Order Approving Negotiated and Arbitrated Interconnection Agreement (January 8, 1997) (MFS agreement).

WAC 480-09-530: WAC 480-09-530 establishes an expedited process wherein a telecommunications company that is a party to an interconnection agreement with another telecommunications company may petition under the rule for enforcement of the agreement. NEXTLINK's Petition is the first to be filed with the Commission. NEXTLINK's Petition also is the first instance of a request that an arrangement from another interconnection agreement be made available on a "pick-and-choose" basis under Section 252(i) of the Telecom Act and 47 C.F.R. 51.809.

In a proceeding to enforce the provisions of an interconnection agreement under WAC 480-09-530, the presiding officer has broad discretion to conduct the proceeding in a manner that best suits the nature of the petition. The enforcement proceeding concludes when the presiding officer has sufficient information to resolve the issues. The presiding officer must serve a recommended decision on the parties within seventy-five days of the date the petition was filed, or twenty-one days after the last session or submission, whichever is later.

The recommended decision is subject to the approval of the Commission, which hears the arguments of the parties regarding the recommended decision within ten days after it is served, or as soon thereafter as the Commissioners' schedules permit. The parties may submit written comments, and the Commission has discretion to request a presentation from Commission Staff. The Commission serves a final order on the petition for enforcement within ninety days of the date the petition was filed, or fifteen days after the review hearing, whichever is later.

The Recommended Decision: The Recommended Decision discusses and decides several substantive issues, as follows: (1) the definition of "local traffic" in the Agreement includes ISP-bound traffic as a contractual matter; (2) legal and equitable considerations in support of reciprocal compensation payments for ISP-bound traffic in other proceedings are addressed; (3) reciprocal compensation payments for ISP-bound traffic are part of the arrangement in the MFS agreement and are subject to the Commission's orders in the generic cost and pricing proceeding⁴ and the FCC NRPM;⁵ (4) a carrier that is a party to an existing interconnection agreement may request arrangements from any agreement previously or subsequently approved by the Commission (5) a CLEC must allow an ILEC a reasonable period of time to consider a request under §252(i) before filing a petition for enforcement but is not required to negotiate; (6) NEXTLINK's request under §252(i) was made within a reasonable period of time; and, (7) no compensation for local traffic exchanged between the parties is required prior to the Commission's approval of an alternate compensation plan or NEXTLINK's §252(i) request in this proceeding.

⁴ See Section I.A., below.

⁵ See Section I.B., below.

Because the ALJ granted NEXTLINK's *Petition for Enforcement of Interconnection Agreement* pursuant to its §252(i) request, he found it unnecessary to address any remaining issues relating to the approval of an alternate compensation plan under Article VIII, § A.2.a. of the Agreement.

NEXTLINK's Request for Review: NEXTLINK generally supports the Recommended Decision, but requests that the Commission order U S WEST to implement the reciprocal compensation ordered in the Recommended Decision as of no later than May 5, 1999, the date that NEXTLINK filed its Petition.

U S WEST's Request for Review: U S WEST supports the decision that any provisions requiring reciprocal compensation must be submitted to the Commission and approved before they are effective, but disagrees with several other decisions. U S WEST argues that: (1) the definition of "local traffic" in the Agreement does not include ISP-bound traffic; (2) reciprocal compensation should not be required for ISP-bound traffic on a contractual, legal, or equitable basis; (3) carriers with existing agreements may only request arrangements from subsequently approved agreements; (4) NEXTLINK failed to negotiate with U S WEST prior to requesting enforcement of its rights under the Agreement or §252(i); and, (5) NEXTLINK did not make its request under §252(i) within a reasonable period of time.

Summary of Commission Order: The Commission adopts the Recommended Decision's conclusion that an alternate compensation plan, as requested by NEXTLINK, constitutes an amendment to the Agreement and requires Commission approval before becoming effective.

The Commission adopts the Recommended Decision's conclusion that the definition of "local traffic" in the Agreement includes ISP-bound traffic based on the record in the TCG-U S WEST arbitration and other factors. The Commission also finds that the treatment of ISP-bound traffic as local traffic is part of the requested reciprocal compensation arrangement in the MFS agreement.

The Commission finds that U S WEST's immediate rejection of NEXTLINK's request to receive an alternate compensation plan consistent with the reciprocal compensation arrangement in the MFS Agreement relieved NEXTLINK of any further duty to specifically identify the arrangement or negotiate prior to filing its petition. The Commission adopts the Recommended Decision's conclusion that a CLEC with an existing interconnection agreement must allow the ILEC a reasonable period of time to consider a request pursuant to §252(i) before filing a petition for enforcement, but is not subject to the WAC 480-09-530 duty to negotiate.

The Commission finds that NEXTLINK is entitled to reciprocal compensation for local traffic, including ISP-bound traffic, consistent with the rates, terms, and conditions approved by the Commission in the MFS agreement, pursuant to

provisions in NEXTLINK's Agreement with U S WEST. This decision also is consistent with the Commission's 17th Supplemental Order in the Generic Case.⁶

⁶ *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, UT-960369 (general), UT-960370 (U S WEST), UT-960371(GTE); 17th Supplemental Order: Interim Order Determining Prices; Notice of Prehearing Conference, ¶¶ 421-424 (August 30, 1999) (17th Supplemental Order).

Finally, the Commission finds that arrangements approved as the result of arbitration, as well as negotiation, are subject to requests under Section 252(i). The Commission concurs in the Recommended Decision's finding that NEXTLINK is entitled to receive the reciprocal compensation arrangement from the MFS agreement, including the treatment of ISP-bound traffic, pursuant to section §252(i). However, the Recommended Decision is modified by narrowly basing this finding on the facts of this case. This modification does not reject the discussion or decisions relating to §252(i) in the Recommended Decision; the broader interpretation and implementation of §252(i) shall be considered in other relevant proceedings.

MEMORANDUM

I. Relevant Proceedings

A. The Commission's Generic Cost and Pricing Proceeding

1. As part of its effort to fully implement the Telecom Act, the Commission entered an Order on October 23, 1996, declaring that a generic proceeding would be initiated in order to review costing and pricing issues for interconnection, unbundled network elements, transport and termination, and resale. The Commission stated that rates adopted in the pending arbitration proceedings being conducted pursuant to the Telecom Act would be interim rates, pending completion of the generic proceeding. That proceeding is underway.⁷ Accordingly, the prices approved in every interconnection agreement are interim rates and are subject to the Commission's decisions in the Generic Case.

B. FCC Proceedings Implementing the Telecommunications Act of 1996

⁷ *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, UT-960369 (general), UT-960370 (U S WEST), UT-960371(GTE); Order Instituting Investigations; Order of Consolidation; and Notice of Prehearing Conference, November 21, 1996 (Generic Case). On April 16, 1998, the Commission entered an interlocutory order determining costs in Phase I of the Generic Case. The Commission held hearings in October and December 1998 to set permanent prices. On August 30, 1999, the Commission entered an Order determining prices in Phase II of the proceeding. Phase III of the Generic Case has been commenced to further investigate the cost and pricing of collocation, to consider deaveraged loop pricing proposals for different geographic zones, and to consider all other unresolved cost and pricing issues deferred by the Commission in the 17th Supplemental Order.

2. On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order (Local Competition Order), including Appendix B - Final Rules (FCC Rules).⁸ On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit stayed operation of the FCC Rules relating to pricing of interconnection and the “pick-and-choose” provisions.⁹

3. On July 18, 1997, the Eighth Circuit entered an order vacating several of the FCC Rules.¹⁰ On October 14, 1997, the Court entered an order on rehearing vacating additional FCC Rules. The Eighth Circuit decisions were thereafter appealed to the U. S. Supreme Court. On January 25, 1999, the Supreme Court entered a decision holding that the FCC Rules, with the exception of 47 C.F.R. §51.319, are consistent with the Telecom Act.¹¹ On June 10, 1999, the Eighth Circuit entered an order reinstating 47 C.F.R. 51.809 (the “pick-and-choose” rule).¹²

4. On February 26, 1999, the FCC entered its long-awaited order on the issue of inter-carrier compensation for ISP-bound traffic (Declaratory Ruling).¹³ The Declaratory Ruling was in response to a number of requests to clarify whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic it delivers to an Internet service provider (ISP). Generally, CLECs contend that this is local traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the Telecom Act. ILECs contend that this is interstate traffic beyond the scope of Section 251(b)(5). The Declaratory Ruling concluded that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate, but further held that this conclusion does not in itself determine whether reciprocal compensation is due in any particular instance.¹⁴

5. The FCC noted that it has no rule governing inter-carrier compensation for ISP-bound traffic,¹⁵ and recognized that parties entering into interconnection

⁸ *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, First Report and Order (August 8, 1996) (Local Competition Order), Appendix B- Final Rules.

⁹ *Iowa Utilities Bd. v. Federal Communications Comm’n*, 109 F.3d 418 (8th Cir. 1996).

¹⁰ *Iowa Utilities Bd. v. Federal Communications Comm’n*, 120 F.3d 753 (8th Cir. 1997).

¹¹ *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

¹² *Iowa Utilities Bd. v. Federal Communications Comm’n*, ___ F.3d ___ (8th Cir. June 10, 1999).

¹³ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38 (February 26, 1999) (Declaratory Ruling and NPRM, respectively).

¹⁴ Declaratory Ruling, ¶¶ 19-20.

¹⁵ Declaratory Ruling, ¶¶ 21-22.

agreements may reasonably have agreed (or state commissions may have ordered), for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic.

When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of [the FCC's] longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements. . . . [S]tate commissions . . . are the arbiters of what factors are relevant in ascertaining the parties' intentions.

Declaratory Ruling, ¶ 24.

6. The FCC issued a Notice of Proposed Rulemaking (NPRM) simultaneous with entry of the Declaratory Ruling for the purpose of adopting a rule regarding inter-carrier compensation for ISP-bound traffic. In the interim, the duty of state commissions encompasses the resolution of disputed issues relating to ISP-bound traffic, consistent with governing federal law:

Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for [ISP-bound] traffic.

Declaratory Ruling, ¶ 28. The Commission must fulfill its statutory obligation under Section 252 of the Telecom Act to resolve the disputes presented by NEXTLINK and U S WEST in this proceeding, and to decide whether an alternate compensation plan should be established. The decision that a minute-of-use reciprocal compensation mechanism is appropriate on an interim basis between these parties pending completion of the FCC's rulemaking may later have to be revised to comply with subsequent federal law.

C. The Commission's Duty Under the Telecommunications Act of 1996

7. The primary goals of the Telecom Act are the nondiscriminatory treatment of carriers and the promotion of competition.¹⁶ The Telecom Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between ILECs and CLECs, which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act. 47 U.S.C. § 251(c)(1). Each interconnection agreement must be submitted to the Commission for approval, regardless of whether the agreement was negotiated or arbitrated, in whole or in part. 47 U.S.C. § 252(d).

¹⁶ Local Competition Order, ¶ 1315.

8. Section 252(i) of the Telecom Act permits third parties to obtain access to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under Section 252.¹⁷ The FCC concluded that Section 252(i) entitles all parties with interconnection agreements to “most favored nation” status, and adopted 47 C.F.R. § 51.809, enabling requesting carriers to “pick-and-choose” arrangements contained in any agreement that is approved by a state commission.¹⁸

9. The FCC further concluded that requesting carriers must be permitted to obtain their statutory rights on an expedited basis, and left to state commissions in the first instance the details of implementing expedited procedures for making arrangements available.¹⁹ In addition to being the first petition filed with the Commission pursuant to WAC 480-09-530, NEXTLINK’s petition for enforcement of its interconnection agreement with U S WEST also is the first expedited review of a contested Section 252(i) request submitted to the Commission. The process established in WAC 480-09-530 is well suited to meet the Commission’s duty to expedite review of Section 252(i) disputes on behalf of carriers who also are parties to existing interconnection agreements, even though Section 252(i) does not impose the same duty to negotiate as the Commission’s rule.

D. Petition for Declaratory Order or Interpretive and Policy Statement;

WUTC

10. On June 15, 1999, a joint petition was filed for a Declaratory Order or Interpretive and Policy Statement on the applicability of 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809, commonly known as the “pick-and-choose” rule, to existing Commission-approved interconnection agreements (Section 252(i) Proceeding).²⁰ On June 29, 1999, the Commission served a Notice of Receipt of Petition for Declaratory Order or Interpretive and Policy Statement and Opportunity to Submit Statement of Fact and Law by July 16, 1999, on interested persons (Notice). Responses to the Notice are being reviewed by the Commission.

11. The applicability of the “pick-and-choose” rule in the instant Order is limited to the specific facts presented in this case, and general policy issues relating to the rule will be addressed in the Section 252(i) Proceeding.

¹⁷ Local Competition Order, ¶ 1314.

¹⁸ Local Competition Order, ¶ 1316.

¹⁹ Local Competition Order, ¶ 1321.

²⁰ *In the Matter of the Petition of Advanced Telecom Group, Inc., NEXTLINK Washington, Inc., Electric Lightwave, Inc., Frontier Local Services, Inc., and Frontier Telemangement, Inc., for a Declaratory order or Interpretive and Policy Statement on 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809*, Docket No. UT-990355, Petition (filed June 15, 1999).

II. ISSUES, DISCUSSION, AND DECISIONS

A. Does an Alternate Compensation Plan , as Requested by

NEXTL

1. U S WEST's Position

12. NEXTLINK's Agreement with U S WEST states that "[n]o explicit compensation [for local traffic exchanged between the parties] shall be required until the Commission has approved an alternate compensation plan."²¹ U S WEST interprets the Agreement to provide that an alternate compensation plan between the parties must be approved by the Commission in this proceeding before explicit compensation is required.

2. NEXTLINK's Position

13. NEXTLINK argues that it is entitled to receive either a bill-and-keep or minute-of-use (MOU) reciprocal compensation plan because those are the only two types of alternate compensation plans approved by the Commission in prior proceedings.

14. According to NEXTLINK, the provision that no explicit compensation shall be required until the Commission approves an alternate compensation plan means approved in *any proceeding*, and does not mean approved *in this proceeding*. On that basis, NEXTLINK argues that an alternative compensation plan has already been approved in the MFS agreement, that the provisions of Article VIII, § A.2.a. in NEXTLINK's agreement are self-executing, and that NEXTLINK is entitled to explicit compensation from U S WEST as of November 1998 (the date NEXTLINK claims it provided notice that the exchange of local traffic was out of balance). NEXTLINK also argues that Section 252(i) requests are self-executing and effective on the date that a request is made.

15. Alternatively, NEXTLINK seeks transport and termination compensation from U S WEST as of May 5, 1999, the date on which NEXTLINK filed its Petition for Enforcement. NEXTLINK argues that there is no legitimate basis for U S WEST's denial of its alternate compensation plan request, and that U S WEST is unfairly rewarded unless compensation is retroactive.

3. Discussion and Recommended Decision

²¹ NEXTLINK Agreement, Article VIII, § A.2.a.

16. NEXTLINK began measuring traffic and submitting billing statements to U S WEST in November 1998, and seeks compensation as of that date. However, NEXTLINK's Agreement plainly states that explicit compensation shall not be required until the Commission has approved an alternate compensation plan.

17. NEXTLINK's interpretation of the Agreement, Article VIII, § A.2.a., is unpersuasive. The MFS agreement (including its reciprocal compensation plan for local traffic) was approved by the Commission on January 8, 1997. The TCG agreement (which NEXTLINK requested and received, in its entirety) was approved by the Commission on February 7, 1997, thirty days later. Although the TCG agreement states that no explicit compensation shall be required *until* the Commission has approved an alternate compensation plan, the Commission had *already* approved such a plan in the MFS case. In our view, use of the preposition "until," as a conditional term, does not refer to other agreements in a global sense; rather it refers to a Commission approval of a modification or amendment to the Agreement itself. To reach NEXTLINK's interpretation, the wording of Article VIII, Section A.2.a., should have been along the lines of: "No explicit compensation shall be required *unless* the Commission has approved an alternate compensation plan *in this or some other proceeding*."

18. Furthermore, NEXTLINK's interpretation of Article VIII, Section A, is tantamount to a conditional exercise of rights under Section 252(i) of the Telecom Act. In essence, NEXTLINK argues that Article VIII, Section A.2.a., entitles it to "pick-and-choose" compensation plans approved by the Commission in other proceedings. However, NEXTLINK must establish as a condition precedent before it may seek an alternate compensation plan that local traffic is out-of-balance. NEXTLINK's interpretation that Article VIII establishes a conditional right to "pick-and-choose" compensation plans in other agreements is inconsistent with Article XXVIII, affirming NEXTLINK's unconditional rights under Section 252(i).

19. The Commission's Order approving the negotiated agreement between NEXTLINK and U S WEST states that in the event that the parties modify or amend their approved Agreement, the modified or revised Agreement is deemed to be a new Agreement and must be submitted to the Commission for approval, prior to taking effect. The Commission's requirement that every modification or amendment to an existing interconnection agreement be submitted for approval also is consistent with the Local Competition Order.²² Accordingly, we reject NEXTLINK's argument that its request (either that an alternate compensation plan be effected, or that the MFS-U S WEST reciprocal compensation arrangement be made available) was self-executing.

²² Local Competition Order, ¶ 1321.

20. NEXTLINK's right to amend the Agreement when traffic is out-of-balance by more than ten percent exists separate from, and in addition to, its legal right to seek modification of the Agreement pursuant to Section 252(i) of the Telecom Act. However, the end result of NEXTLINK's two alternative theories of relief are the same, and relief under either theory only becomes effective on approval by the Commission.

21. The complexity of the issues raised in this case is readily apparent from NEXTLINK's joint submission of a petition for a declaratory order or interpretive and policy statement in the Section 252(i) Proceeding subsequent to NEXTLINK's filing of its Petition for Enforcement, raising several of the same issues. At the same time that NEXTLINK criticizes U S WEST for not honoring its request in a timely fashion, it offers no adequate explanation for the seven-month delay between determining that traffic was out-of-balance and filing its Petition. Even though U S WEST does not prevail in this proceeding, U S WEST acted in good faith in response to NEXTLINK's request.

B. Does the Definition of "Local Traffic" in the Agreement Include ISP-

bound

1. U S WEST's Position

22. U S WEST disagrees with NEXTLINK's assertion that "local traffic" as defined in the underlying TCG agreement, includes ISP-bound traffic, and argues that the Commission did not address the issue.

23. In response to NEXTLINK's request that it make available the treatment of ISP-bound traffic as part of the reciprocal compensation arrangement from the MFS agreement, U S WEST argues that the Arbitrator's rationale in favor of MFS' position was based on the FCC's historical treatment of such traffic as local. U S WEST argues that the historical precedent is no longer controlling, and that the treatment of ISP-bound traffic in the MFS agreement should not be made available because it is superseded by the FCC's Declaratory Ruling.

24. U S WEST argues that ISP-bound traffic is non-local because after a call is delivered to the ISP, it is further routed to (presumably) non-local destinations. According to U S WEST, unless the web site address being accessed is functionally located within the local calling area, ISP-bound traffic is not local and reciprocal compensation for terminating traffic is not appropriate.

2. NEXTLINK's Position

25. NEXTLINK argues that the Arbitrator in the TCG case implicitly concluded that local traffic includes ISP-bound traffic, by adopting TCG's position on the arbitrated issue and by adopting TCG's definition of "local traffic." According to NEXTLINK, its position is consistent with the Commission's contemporaneous decision in the MFS case, which provides that ISP-bound traffic is subject to reciprocal compensation obligations.

26. NEXTLINK argues that the recent FCC Declaratory Ruling²³ does not preclude reciprocal compensation for ISP-bound traffic, and cites the Commission's decision in the ELI/GTE case in support of its request. According to NEXTLINK, all local traffic (including ISP-bound traffic) originating on U S WEST's network and terminating on NEXTLINK's network is transported on trunk groups separate from intraLATA toll traffic in accordance with the Agreement, and is readily measurable.

27. Alternatively, NEXTLINK requests that U S WEST make available the meaning of "local traffic" as that term is used in the MFS agreement pursuant to the Commission's order in Docket No. UT-960323, as part of the reciprocal compensation plan arrangement it proposes for approval under Section 252(i).

3. Discussion and Recommended Decision

28. The definition of "local traffic" in paragraph 33 of the TCG agreement encompasses ISP-bound traffic.²⁴ Paragraph 33 pertains to traffic originated on the network of a LEC and completed directly between that LEC's network and the network of another LEC. U S WEST's argument that ISP-bound traffic does not meet this definition because "ISP-bound traffic from U S WEST's customers is not completed on NEXTLINK's network"²⁵ is too narrowly drawn. Although the FCC considers the complete routing of an Internet message to be one call, NEXTLINK terminates circuit-switched ISP-bound traffic to its non-LEC ISP-customers. The subsequent routing of that traffic by the ISP over a packet-switched network to its ultimate destination does not alter the fact that circuit-switched messages originating on U S WEST's network are completed on NEXTLINK's network. This is the essential transaction that was considered by the Arbitrator and the Commission in the TCG-U S WEST arbitration for purposes of determining appropriate Inter-carrier compensation.

²³ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38 (February 26, 1999) (Declaratory Ruling and NPRM, respectively).

²⁴ " 'Local Traffic' means traffic originated on the network of a LEC in a LATA and completed directly between that LEC's network and the network of another LEC in that same LATA, within the same local calling area as is provided by the incumbent LEC for local calls in that LATA." TCG Agreement, Definitions section, paragraph 33, at page 5.

²⁵ U S WEST's Comments Regarding Recommended Decision, at p. 4.

29. In the TCG-U S WEST arbitration, TCG argued that all local traffic should be exchanged on a bill-and-keep basis, and it did not make a distinction between non-ISP and ISP-bound traffic. U S WEST argued in favor of measured compensation for local traffic, but also requested that ISP-bound traffic be treated separately and exchanged on a bill-and-keep basis. Transcript, at 153-158 and 307-311. The Commission adopted TCG's position that all local traffic should be exchanged on a bill-and-keep basis,²⁶ and also adopted TCG's definition of "local traffic."

30. It was unnecessary for the Commission to distinguish between non-ISP and ISP-bound traffic, because both parties agreed that the ISP-bound portion of local traffic should be exchanged on a bill-and-keep basis. The Commission intended that both non-ISP and ISP-bound traffic exchanged between two carriers in the same calling area be treated as local. This conclusion also is supported by provisions in the Agreement that require segregated trunk groups for different types of traffic. ISP-bound traffic is routed over local interconnection trunk groups just like other local traffic that is assigned a seven-digit phone number. Furthermore, the parties have transported and exchanged ISP-bound traffic in the same manner as other local traffic during the effective term of the Agreement, and U S WEST serves ISPs out of intrastate tariffs. Thus, the conduct of the parties demonstrates an intent that ISP-bound traffic be treated as local.

31. U S WEST's argument that the FCC Declaratory Order supersedes the Commission's decision the TCG-U S WEST arbitration is unpersuasive. Although the treatment of ISP-traffic was discussed in the FCC Declaratory Ruling, the FCC's determination that a substantial portion of dial-up ISP-bound traffic is interstate is not dispositive of the disputed issues in this case.²⁷ The Commission agrees with the recent State of Pennsylvania Public Utility Commission (PA-PUC) decision that its treatment of ISP-bound traffic as local for the purpose of inter-carrier compensation is consistent with the FCC's determination that ISP-bound traffic is largely interstate.²⁸

The FCC did not conclude, however, that reciprocal compensation should not be paid on such calls. To the contrary, the FCC held that

²⁶ The Commission also adopted the FCC requirement that bill-and-keep arrangements must either include provisions that impose compensation obligations if traffic becomes significantly out-of-balance, or permit parties to request that the state commission impose such compensation obligations. See Local Competition Order, ¶ 1113.

²⁷ Declaratory Ruling, ¶ 20.

²⁸ Pennsylvania Public Utility Commission, *Joint Petition of Senators Fumo, Madigan and White; The Pennsylvania Cable & Telecommunications Association; and 7 Competitive Local Exchange Carriers for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, P-00991648, and *Joint Petition of Bell-Atlantic-Pennsylvania, Inc.; Connectiv Communications, Inc.; Network Access Solutions; and The Rural Telephone Company Coalition for Resolution of Global Communications*, P-00991649, Joint Motion of Chairman Quain and Commissioners Rolka, Brownell & Wilson (August 26, 1999) (PA-PUC Order).

each state should continue to determine how it would treat such calls for purposes of reciprocal compensation and other intrastate purposes.

PA-PUC Order, at Section XII, paragraph 2. Just as in Pennsylvania, this Commission already has ruled that calls destined for an Internet service provider that are dialed within a local calling area should be considered “local” for purposes of reciprocal compensation arrangements.

32. In the ELI-GTE arbitration, the Commission’s Order emphasized that LECs incur a cost when delivering traffic to an ISP that originates on another LEC’s network.²⁹

Although the Declaratory Ruling concludes that ISP-bound local-interstate traffic does not terminate at the ISP’s local server, it does not necessarily terminate at a local carrier’s end-office switch in some other state either. However, a cost of “terminating the call” occurs at the end-user ISP’s local server (where the traffic is routed onto a packet-switched network) . . .

In the case of ISP-bound traffic, the terminating carrier incurring costs is the carrier that delivers traffic to the ISP. In the context of ISP-traffic, the “call” actually consists of gaining “access” to a packet-switched network. While a packet-switched network may enable users to replicate a circuit-switched call, Internet access is an amorphous medium and should not be considered a “call” in the switched-circuit sense.

ELI-GTE Order, at pp. 8-9. The ISP-bound traffic at issue in the ELI-GTE arbitration cases is the same ISP-bound traffic at issue in this case. The impact of the FCC’s Declaratory Ruling was carefully considered by the Commission, including the argument that the FCC’s decision that ISP-bound traffic is largely interstate precludes the payment of reciprocal compensation. However, the Declaratory Ruling also states that the FCC policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.³⁰

²⁹ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc., and GTE Northwest Incorporated*, Docket No. UT-980370, Order Approving Negotiated and Arbitrated Interconnection Agreement, ¶¶ 29-33, relying, in part, on the FCC NPRM ¶ 29 (May 12, 1999) (ELI/GTE Order).

³⁰ Declaratory Ruling, ¶ 25.

33. The FCC's NPRM states:

We acknowledge that, no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network.

Declaratory Ruling, ¶ 29. If ISP-bound traffic is not treated as local and subject to reciprocal compensation, NEXTLINK would not be compensated for this traffic. Based on the record in the TCG-U S WEST arbitration and other factors discussed, the Commission finds that the parties intended that ISP-bound traffic be treated as local under the terms of the Agreement. The Commission's determination also is consistent with other language in the FCC's Declaratory Ruling.³¹ The parties should continue doing so until further order of this Commission or until the FCC mandates a different compensation mechanism for ISP-bound traffic.

34. Alternatively, the Commission finds that the treatment of ISP-bound traffic as local traffic is part of the reciprocal compensation arrangement in the MFS agreement. In the MFS arbitration, the parties disagreed whether to compensate each other for the transport and termination of ISP-bound traffic, and the issue was submitted to the Commission for determination. MFS argued that the FCC previously treated ISP-bound traffic like other local traffic. U S WEST sought exemption for ISP-bound traffic from reciprocal compensation arrangements.

35. Both parties acknowledged that the FCC was engaged in proceedings that could supersede the Commission's resolution of the dispute. The Commission decided to retain the treatment of ISP-bound traffic as local traffic for purposes of inter-carrier compensation until a later date. U S WEST argues that it is time to change the treatment of ISP-bound traffic under the MFS-agreement because of the FCC's Declaratory Ruling; however, the pending FCC NPRM expressly seeks comment on a proposal that it adopt a set of federal rules governing inter-carrier compensation for ISP-bound traffic.³² Thus, the Commission's decision that it is premature to change the treatment of ISP-bound traffic remains unchanged.

C. Did NEXTLINK Comply with its Duty to Negotiate with U S WEST

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³¹ The FCC states: "[N]othing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal *or equitable considerations*, that reciprocal compensation is an appropriate interim inter-carrier compensation rule . . ." Declaratory Ruling, ¶ 27 (emphasis added). The weight of equity favors granting the request of NEXTLINK in all respects, and the Commission's authority to base its determinations on equitable considerations is an essential tool in order to meet its duties under state and federal law.

³² Declaratory Ruling, ¶ 31.

1. U S WEST's Position

36. U S WEST asserts that NEXTLINK is not entitled to receive the MFS reciprocal compensation arrangement pursuant the Agreement, Article VIII, Section 2.a. or Section 252(i) because it did not properly request or attempt to negotiate terms and conditions pursuant to WAC 480-09-530.

2. NEXTLINK's Position

37. NEXTLINK cites affidavits filed by U S WEST in support of its claim that U S WEST knew of the NEXTLINK request for an alternate compensation plan consistent with the reciprocal compensation arrangement in the MFS Agreement. On March 10, 1999, a NEXTLINK representative faxed selected pages from the MFS agreement to U S WEST. NEXTLINK argues that U S WEST's contention that good faith negotiations did not occur is an improper attempt to re-argue a procedural issue that has already been decided in the Third Order, and that neither the Telecom Act nor FCC Rules require negotiation as a prerequisite to exercising rights under §252(i) or 47 C.F.R. § 51.809.

3. Discussion and Recommended Decision

38. The FCC leaves to state commissions in the first instance the details of the procedures for making arrangements available to requesting carriers on an expedited basis.³³ The availability of the expedited process under WAC 480-09-530 to modify or amend an agreement approved by the Commission pursuant to a §252(i) request was discussed and affirmed in the Third Order. Although there are exceptions to the obligation of incumbent carriers to make arrangements available to requesting carriers that may lead to inquiry by the Commission, good faith negotiations of a §252(i) request only requires that a CLEC formally notify the ILEC of the specific arrangement being requested.

39. A CLEC must allow an ILEC a reasonable period of time to consider the request before filing a petition for enforcement. FCC Rule 51.809 states that an ILEC must make arrangements available on request "without unreasonable delay." A reasonable period of time may vary depending on the nature of the request, but it must be no longer than necessary to specifically identify the arrangement to be made available and to determine whether any bona fide exceptions exist.

³³ Local Competition Order, ¶ 1321.

40. In the instant case, U S WEST's immediate rejection of NEXTLINK's request to receive an alternate compensation plan consistent with the reciprocal compensation arrangement in the MFS Agreement relieved NEXTLINK of any further duty to specifically identify the arrangement or further negotiate prior to filing its petition.³⁴

D. What Alternate Compensation Plan Should the Commission

Appro

1. U S WEST's Position

41. U S WEST did not present an alternate compensation plan to the current bill-and-keep arrangement for the exchange of local traffic as defined in the Agreement. U S WEST states that it has no reason to dispute the accuracy of NEXTLINK's traffic measurements, but argues that ISP-bound traffic should not be treated as local for purposes of inter-carrier compensation and that bill-and-keep be retained for its exchange.

2. NEXTLINK's Position

42. NEXTLINK requests that the Commission approve an alternate compensation plan consistent with the reciprocal compensation arrangement previously approved by the Commission in the MFS case pursuant to Article VIII, Section 2, of the Agreement.

3. Discussion and Recommended Decision

43. In the NEXTLINK-U S WEST arbitration, the Commission required that the Agreement establish a contractual right allowing either party to seek an alternate compensation plan to the bill-and-keep mechanism if it established that local traffic was out of balance by more than 10%. NEXTLINK has met its burden.

³⁴ After initiating this proceeding, NEXTLINK identified the arrangement to be made available as the reciprocal compensation arrangements in Article V, § D, Appendix A - Local Call Termination rates, and associated terms from the MFS agreement.

44. In the Generic Case, the Commission encouraged the parties to address the appropriateness of relying on bill-and-keep arrangements or some other mechanism for compensating each other for the exchange of traffic under interconnection agreements.³⁵ The Commission concurred in Commission Staff's longstanding recommendation that a flat-rate capacity charge would better reflect the cost structure of the telecommunications network.³⁶ However, the Commission did not accept Staff's proposal that the capacity charge be mandated whenever parties are unable jointly to reach agreement.³⁷ The Commission, to the greatest extent possible, should arbitrate disputed issues and, where feasible, adopt a rate structure that is proposed by one of the parties. In the instant case, neither the public interest nor prevailing law requires that we adopt a rate structure that is not sponsored by either party.

45. The rate structure proposed by NEXTLINK has been reviewed and approved by the Commission on several occasions. Most recently, the Commission approved a negotiated interconnection agreement between Televerse, LLC, and U S WEST for the provision of all arrangements contained in the MFS agreement (including the reciprocal compensation arrangement that NEXTLINK requests).³⁸ NEXTLINK's request that the Commission approve an alternate compensation plan consistent with the reciprocal compensation arrangement previously approved by the Commission in the MFS agreement is granted. The alternate compensation plan approved also is subject to Commission orders in the Generic Case and the FCC NPRM.

E. Should the Commission Approve NEXTLINK's Section 252(i)

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1. U S WEST's Position

46. U S WEST argues that Section 252(i) requires only that negotiated arrangements approved by state commissions be made available to other carriers; arbitrated provisions approved need not be made available. U S WEST further argues that a carrier may request arrangements from previously approved interconnection agreements as part of an initial request for approval of an interconnection agreement, but

³⁵ 17th Supplemental Order, ¶ 409, citing paragraph 443 of the Generic Case's 8th Order.

³⁶ Commission Staff presented this recommendation in the TCG-U S WEST arbitration, and was guided a great deal in its analysis by the Commission's position in its own pre-Telecom Act interconnection case. See *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between TCG SEATTLE and U S WEST Communications, Inc.*, Docket No. UT-960326, comments of Dr. Glenn Blackmon, Transcript Volume 3, page 479, lines 3-24 (January 13, 1997).

³⁷ 17th Supplemental Order, ¶ 424.

³⁸ *In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 Between Televerse, LLC, and U S WEST Communications, Inc.*, Docket No. UT-990348, Order Approving Adoption of Arbitrated Interconnection Agreement (June 9, 1999).

once approved, the carrier only may request arrangements from subsequently approved agreements.

47. U S WEST states that its obligation to make arrangements available for a reasonable period of time after their approval constitutes a separate limitation under FCC Rule 51.809(c). U S WEST acknowledges that the FCC does not define a "reasonable period of time," but argues that carriers seeking new interconnection agreements may avail themselves of the provisions of existing agreements for six months after their approval, or so long as their remaining term is greater than 12 months. U S WEST states that arrangements from the MFS agreement are no longer available to other carriers because the agreement expired on July 7, 1999.

48. U S WEST contends that NEXTLINK could have requested to receive the terms and conditions of the MFS agreement in April 1997, when it instead choose to request the TCG agreement. Therefore, NEXTLINK is not entitled to pick-and-choose arrangements in the MFS agreement subsequent to the reinstatement of FCC Rule 51.809. U S WEST also argues that NEXTLINK should not be allowed to retroactively exercise pick-and-choose rights subsequent to reinstatement of the rule as an equitable matter, because U S WEST might not have been willing to trade off certain terms for others during its negotiations if the enforceability of the rule had been known at the time.

2. NEXTLINK's Position

49. NEXTLINK argues that neither Section 252(i) nor Rule 809 place any temporal conditions on the Commission-approved agreement provisions that ILECs must make available to requesting carriers, other than the FCC's requirement that those provisions must be available for a "reasonable period of time." NEXTLINK argues that the FCC's requirement of a "reasonable period of time" denotes flexibility to accommodate individual circumstances, not the rigid deadlines proposed by U S WEST. NEXTLINK disagrees that arrangements from the MFS agreement are no longer available to other carriers. Although the initial 2-½ year term may have expired, NEXTLINK argues that the MFS agreement provides that it remains in full force and effect until a new agreement becomes effective between the parties; therefore, arrangements in the agreement should be made available to other carriers.

50. NEXTLINK also argues that under the unique circumstances of this particular case, it is entitled to receive the MFS reciprocal compensation agreement under section 252(i). U S WEST did not make arrangements available on a pick-and-choose basis when NEXTLINK sought to enter the market, and in the interest of expediency and efficiency, NEXTLINK made the best business decision that was made available.

3. Discussion and Recommended Decision

51. Although the Commission declines to decide in this proceeding whether all carriers subject to an existing agreement should be allowed to request arrangements from previously approved agreements, the Commission finds that NEXTLINK is entitled to the MFS reciprocal compensation arrangement under Section 252(i) based on equitable considerations, in addition to its entitlement under contractual principles. The Commission also finds that arrangements approved as the result of arbitration, as well as negotiation, are subject to requests under Section 252(i). If this were not the case, ILECs (which are unwilling sellers to begin with) would have no incentive to negotiate arrangements with CLECs. Although U S WEST argues that the retroactive application of pick-and-choose also undermines the negotiating process, U S WEST fails to cite any specific instance where concessions have been made during negotiation that otherwise would be frustrated by application of the pick-and-choose rule. Further, U S WEST has jointly requested Commission approval of arbitrated arrangements in other agreements on numerous occasions.

52. To review relevant chronology on this issue, the Eighth Circuit Court of Appeals stayed operation of the FCC's pick-and-choose rule in October 1996. The MFS and TCG agreements were approved by the Commission on January 8, 1997, and January 29, 1997, respectively. Subsequent to the stay of Rule 51.809, U S WEST did not make pick-and-choose available. At the time the Commission considered requests for approval of the TCG agreement, the Commission was swayed by the Eighth Circuit Court stay and declined to support pick-and-choose as a matter of state policy.³⁹ In April 1997, NEXTLINK sought to enter the local market, and along with U S WEST jointly requested approval of an interconnection agreement based on the TCG agreement. The NEXTLINK Agreement was approved on April 30, 1997.

53. On January 25, 1999, the U.S. Supreme Court held that the FCC's pick-and-choose rule is consistent with the Telecom Act. On May 5, 1999, NEXTLINK filed its Petition in the instant proceeding, and on June 10, 1999, the Eighth Circuit Court formally reinstated FCC Rule 51.809. NEXTLINK acted promptly to exercise its rights under Rule 51.809, and under these circumstances the NEXTLINK request was made within a reasonable period of time.

54. Furthermore, on May 24, 1999, U S WEST and Televerse, LLC, filed their joint request for approval of an agreement consisting of the arrangements provided in the MFS agreement, in its entirety. Thus, the Televerse request and the NEXTLINK request were pending at the same time, except that U S WEST supported one and opposed the other. On that basis, the Commission places no weight on U S WEST's claim that NEXTLINK's request is untimely because the MFS agreement has expired.

³⁹ *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between TCG SEATTLE and U S WEST Communications, Inc.*, Docket No. UT-960326, comments of Chairman Nelson, Commissioner Hemstad, and Commissioner Gillis, Transcript Volume 3, page 484-490 (January 13, 1997).

55. In light of the totality of the circumstances surrounding NEXTLINK's original request for approval of an interconnection agreement and its most recent petition for enforcement, the Commission concurs in the Recommended Decision's conclusion that NEXTLINK is entitled to receive the reciprocal compensation arrangement from the MFS agreement, including the treatment of ISP-bound traffic, pursuant to §252(i). However, the Recommended Decision is modified by narrowly basing this finding on equitable principles and the facts of this case. The Commission intends to consider the broad discussion of substantive issues relating to §252(i) in other relevant proceedings, and our modification of the Recommended Decision is not intended as a rejection of its findings and conclusions.

56. In all other respects, the Commission adopts the Recommended Decision. Having considered the Recommended Decision and accompanying comments filed by the parties, the entire record herein, and all written and oral comments made to the Washington Utilities and Transportation Commission, the Commission makes the following findings and conclusions:

FINDINGS OF FACT

Having discussed in detail the evidence concerning all material matters and having stated our findings of fact and conclusions of law in the text of the Order, the Commission now makes the following abridged summary of those comprehensive determinations. Those portions of the preceding detailed findings and conclusions pertaining to the Commission's ultimate findings and conclusions in this matter are incorporated by this reference.

57. The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state.

58. The Washington Utilities and Transportation Commission is designated by the Telecommunications Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to Sections 251 and 252 of the Telecom Act.

59. U S WEST is engaged in the business of furnishing telecommunications services, including, but not limited to, basic local exchange service within the state of Washington, and is a local exchange carrier as defined in the Telecom Act.

60. NEXTLINK is a telecommunications carrier as defined in the Telecom Act, and is operating within the state of Washington, and provides basic local exchange services within the U S WEST service area.

61. The Commission previously approved a negotiated interconnection agreement (Agreement) between the parties pursuant to 47 U.S.C. § 252 of the Telecom Act on April 30, 1997.

62. An expedited proceeding for enforcement of interconnection agreement was conducted pursuant to WAC 480-09-530 in Docket No. UT-990340 before a presiding officer and concluded on July 22, 1999. On August 12, 1999, the presiding officer's Recommended Decision was issued resolving disputed issues. The parties were instructed to submit comments in accordance with Commission regulations.

63. On August 19, 1999, the parties each filed comments seeking review of the Recommended Decision, requesting approval, expressing objections, and requesting modifications to the Recommended Decision. Commission Staff and the parties addressed the Recommended Decision at an open meeting on August 25, 1999.

64. The Commission has previously determined that the provisions of the Agreement: meet the requirements of Section 251 and 252 of the Telecom Act; do not discriminate against a telecommunications carrier not a party to the agreement; and are consistent with the public interest, convenience, and necessity.

65. In the event that the parties modify or amend their approved Agreement pursuant to rights established in the agreement or by statute, the modified or revised Agreement is deemed to be a new Agreement and must be submitted to the Commission for approval, prior to taking effect.

66. The definition of "local traffic" in paragraph 33 of the Agreement encompasses ISP-bound traffic.

67. The treatment of ISP-bound traffic as local traffic is part of the reciprocal compensation arrangement in the MFS agreement previously approved by the Commission.

68. The FCC leaves to state commissions in the first instance the details of the procedures for making arrangements available to requesting carriers under §252(i) on an expedited basis.

69. Good faith negotiations of a request under §252(i) requires only that a CLEC formally notify the ILEC of the specific arrangement being requested.

70. In March 1999, NEXTLINK requested that U S WEST make available the reciprocal compensation arrangement in the MFS-U S WEST interconnection agreement.

71. U S WEST immediately rejected NEXTLINK's request to receive an alternate compensation plan consistent with the reciprocal compensation arrangement in the MFS Agreement.

72. The exchange of local traffic, including ISP-bound traffic, between NEXTLINK and U S WEST is out-of-balance greater than 10%.

73. NEXTLINK's request that the Commission approve a reciprocal compensation arrangement consistent with the MFS agreement is the only alternate compensation plan proposed in this proceeding.

CONCLUSIONS OF LAW

74. The Commission has jurisdiction over the subject matter and parties to this proceeding.

75. U S WEST is engaged in the business of furnishing telecommunications services, including, but not limited to, basic local exchange service within the state of Washington, and is a local exchange carrier as defined in the Telecom Act.

76. NEXTLINK is a telecommunications carrier as defined in the Telecom Act, and is operating within the state of Washington, and provides basic local exchange services within the U S WEST service area.

77. The Washington Utilities and Transportation Commission is designated by the Telecom Act as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to Sections 251 and 252.

78. Pursuant to Section 252(i) of the Telecom Act, a local exchange carrier must make available any interconnection, service, or network element provided under an agreement approved under Section 252, to which it is a party, to any other requesting telecommunications carrier on the same terms and conditions as those provided in the agreement.

79. NEXTLINK's request to substitute an alternate compensation plan for the exchange of local traffic, including ISP-bound traffic, in the Agreement is not self-executing and requires Commission approval in order to become effective.

80. Based on the record in the TCG-U S WEST arbitration and other factors, the parties intended that ISP-bound traffic be treated as local traffic for purposes of inter-carrier compensation under the Agreement.

81. WAC 480-09-530 establishes an appropriate expedited process to modify or amend an agreement approved by the Commission pursuant to a §252(i) request .

82. U S WEST's immediate rejection of NEXTLINK's request that it make available an alternate compensation plan consistent with the reciprocal compensation arrangement in the MFS Agreement relieved NEXTLINK of any further duty to specifically identify the arrangement or further negotiate prior to filing its petition.

83. Based on contractual principles, the Commission grants NEXTLINK's request for approval of an alternate compensation plan consistent with the reciprocal compensation arrangement in the MFS agreement.

84. Based on equitable considerations, the Commission also grants NEXTLINK's request that U S WEST make available the reciprocal compensation arrangement in the MFS agreement, including the treatment of ISP-bound traffic as local, under Section 252(i).

85. The alternate compensation plan approved is subject to further order of this Commission, including orders in the Generic Case, and the FCC NPRM.

ORDER

THE COMMISSION ORDERS:

86. NEXTLINK's request that the Commission approve an alternate compensation plan consistent with the reciprocal compensation arrangement in the MFS agreement, based on its contractual and statutory rights, is granted, and is effective on the date this Order is entered.

87. The alternate compensation plan approved is subject to further order of this Commission, including orders in the Generic Case, and the FCC NPRM.

88. The parties shall execute and file a revised interconnection agreement incorporating the alternate compensation plan approved by the Commission within seven days of service of this Order.

89. In the event that the parties further revise, modify, or amend the Agreement approved herein, the revised, modified, or amended Agreement shall be

deemed a new negotiated agreement under the Telecommunications Act and shall be submitted to the Commission for approval, pursuant to 47 U.S.C. § § 252(e)(1) and relevant provisions of state law, prior to taking effect.

DATED at Olympia, Washington, and effective this 9th day of September 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

WILLIAM R. GILLIS, Commissioner