

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WORLDCOM, INC., f/k/a MFS)	
INTELENET OF WASHINGTON, INC.)	
)	DOCKET NO. UT-980338
Complainant,)	
)	
v.)	
)	THIRD SUPPLEMENTAL ORDER
)	GRANTING WORLDCOM'S COMPLAINT,
GTE NORTHWEST INCORPORATED)	GRANTING STAFF'S PENALTY
)	PROPOSAL; AND DENYING
)	GTE'S COUNTERCLAIM.
Respondent.)	
)	
.....)	

SUMMARY

NATURE OF PROCEEDINGS: This formal complaint against GTE Northwest Incorporated (GTE) seeks enforcement of provisions of the interim Interconnection Agreement (Agreement) between WorldCom, Inc., f/k/a MFS Intelenet of Washington, Inc. (WorldCom), and GTE. Specifically, WorldCom alleges that GTE has violated the terms of that agreement by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of telephone exchange traffic including traffic that is handed off by GTE to WorldCom, for termination by WorldCom to Internet service providers (ISPs) who are end-use customers of WorldCom. GTE counterclaimed that WorldCom is not entitled to compensation under the Agreement for traffic generated after July 15, 1998, because of its failure to begin negotiations 45 days prior to the expiration date of the Agreement, July 15, 1998.

PARTIES: Richard M. Rindler and Michael L. Shor, attorneys, Swidler & Berlin, Chartered, Washington, D.C., represent WORLDCOM, INC., f/k/a MFS Intelenet of Washington, Inc. Kimberly A. Newman and Jennifer L. McClellan, attorneys, Hunton & Williams, Washington, D.C., represent GTE Northwest Incorporated. Gregory J. Trautman, Assistant Attorney General, represents Staff of the Washington Utilities and Transportation Commission (Commission Staff).

DECISION: GTE violated the terms of its interim Interconnection Agreement with WorldCom by failing to make any reciprocal compensation payments to WorldCom for the transport and termination of local calls, including calls to ISPs. GTE subjected WorldCom to unreasonable disadvantage in violation of RCW 80.36.170

when it refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs while it continued to collect and retain money for providing the same service to WorldCom. Accordingly, GTE must pay penalties pursuant to RCW 80.04.380 for its repeated violation of RCW 80.36.170. GTE is not entitled to relief under its counterclaim. GTE is liable for reciprocal compensation under the terms of the Agreement after July 15, 1998.

MEMORANDUM

This proceeding arose out of a complaint brought by WorldCom seeking enforcement of an interim Interconnection Agreement. It concerns GTE's refusal to pay reciprocal compensation to WorldCom for the termination of local exchange traffic that is originated by GTE and terminated by WorldCom to ISPs who are customers of WorldCom. GTE unilaterally decided to stop paying compensation for this service in December 1997, despite the fact that GTE entered into a negotiated interconnection agreement with WorldCom that expressly provides for the payment of compensation for the termination of all local traffic.

I. BACKGROUND

A. Procedural Background.

On August 3, 1998, WorldCom, Inc. f/k/a MFS Intelenet of Washington, Inc. (WorldCom) filed a formal complaint against GTE Northwest Incorporated (GTE) seeking enforcement of provisions of the interim Interconnection Agreement (Agreement) between WorldCom and GTE. Specifically, WorldCom alleges that GTE has violated the terms of that agreement by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of telephone exchange traffic that is handed off by GTE to WorldCom, for termination by WorldCom to Internet service providers (ISPs) who are end-use customers of WorldCom. On August 24, 1998, GTE filed its answer to the complaint and asserted a conditional counterclaim. GTE's counterclaim alleged that if the Commission assumed jurisdiction over the issues identified in the complaint, WorldCom is not entitled to compensation under the Agreement for traffic generated after July 15, 1998, because of its failure to begin negotiations 45 days prior to the expiration date of the Agreement, July 15, 1998.

Pursuant to the Commission's notice of prehearing conference, Commission Staff filed a statement of issues, indicating that Staff might seek penalties against GTE pursuant to RCW 80.04.380. Administrative Law Judge Karen M. Caille (ALJ) presided at the Commission's prehearing conference on October 13, 1998, and set a procedural schedule for the filing of testimony, evidentiary hearings, and post-hearing briefs. On November 10, 1998, the parties stipulated that the matter could be submitted for decision without an evidentiary hearing, on the basis of pre-filed direct and rebuttal testimony and legal briefs. In addition, the parties stipulated that, in the

event the Commission ruled in favor of WorldCom on the complaint, and against GTE on its counterclaim, the total amount set forth in the invoices produced to GTE pursuant to GTE's discovery request, represents amounts due and owing to WorldCom for reciprocal compensation for traffic transported and terminated in Washington. The fourteen invoices, dated September 1997 through October 1998, are admitted into the record.

WorldCom¹ pre-filed the direct and rebuttal testimony of Gary Ball, Vice President for Regulatory Policy Development, and direct testimony of Ruth Durbin, Senior Manager, Local and Access Planning. GTE pre-filed the direct and rebuttal testimony of Steven J. Pitterle, Wholesale Markets Director - Negotiations, and the direct and rebuttal testimony of Howard Lee Jones, Senior Group Marketing Manager - Network Services. Commission Staff prefiled the testimony of Glenn Blackmon, Assistant Director - Telecommunications. The testimony and exhibits are admitted into the record.

The parties each filed initial and reply briefs. In its reply brief, Commission Staff requests that the Commission strike a multi-page "study" by Merrill Lynch, included as Exhibit H to GTE's initial brief. The "study" is a 24-page document by Merrill Lynch entitled "The Mysterious World of ISP-Reciprocal Compensation." Staff points out that the date of the report is October 27, 1998. GTE filed its rebuttal testimony on November 16, 1998. Staff contends that the report is testimony, and that the parties have had no opportunity to review the material, consider or examine its assumptions, or otherwise had any meaningful opportunity to address it. In light of the untimely filing of this material, the Commission grants Commission Staff's request. Exhibit H to GTE's initial brief is stricken from the record.

The parties agreed that this matter be submitted directly to the Commission for decision.

B. Undisputed Facts.

WorldCom, a competitive local exchange carrier (CLEC), and GTE, an incumbent local exchange carrier (ILEC), both operate to provide local exchange service in the state of Washington. Under the Telecommunications Act of 1996 (the Act), local exchange carriers are required to interconnect their networks, to transport and terminate local exchange traffic on those networks, and to make arrangements for mutual compensation for providing those services.

Following these requirements, WorldCom and GTE negotiated the terms

¹During the pendency of this proceeding, WorldCom, Inc., completed its acquisition of MCI Communications Corporation, and WorldCom, Inc., was renamed MCI WorldCom, Inc. For consistency with prior pleadings, MCI WorldCom, Inc., will be referred to as "WorldCom."

of an interim Interconnection Agreement effective July 15, 1996. The Agreement contains the following relevant definitions and terms:

1. "Local Calling Area" is defined as the calling area designated as "local" or "Extended Area Service" in the applicable tariffs of the LEC [Incumbent Local Exchange Carrier] which historically serviced the area prior to the introduction of local exchange competition. Agreement, Section II.R.
2. "Local Exchange Traffic" is defined as "calls made within a Local Calling Area." Agreement, Section II.U.
3. "Switched Access Service" is defined as an offering of facilities for the purpose of the origination or termination of traffic from or to Exchange Service customers in a given area pursuant to a Switched Access tariff. Switched Access Service includes Feature Group A, Feature Group B, Feature Group D, Toll Free Service, and 900 access. Switched Access does not include traffic exchanged between LECs and CLCs [Competitive Local Carrier] for purpose of local exchange interconnection. Agreement, Section II. II.
4. Section V.A. of the Agreement requires GTE and WorldCom to "reciprocally terminate local exchange traffic. . . between each others networks" and, sections B. 1. and 2., require GTE and WorldCom to pay reciprocal compensation to each other for all telephone exchange traffic carried from one party to the other at the rate of \$0.0145 per minute, which rate is applicable to "all local and Extended Area Service traffic." Agreement, Section V.B.1., V.B.2.
5. Section V.B. of the Agreement also specifically makes the reciprocal compensation rates subject to any subsequent order of this Commission. It states:

Notwithstanding the following, the Parties agree to amend this Agreement with regard to compensation for the termination of local calls (as described in this section) in accordance with any further Commission decision(s) regarding compensation for local and /or toll call termination between LECs and CLCs.

6. With respect to the duration of the Agreement, Section VIII provides in part:

this Agreement shall, if not superseded by an interconnection agreement, expire two years after the effective date of the Agreement. In the event that the Agreement expires after two years, the interconnection arrangements in this Agreement shall remain in place until the Parties are able to negotiate and implement a new interconnection agreement. Negotiations on such a new agreement shall commence no later than 45 days prior to

the expiration of this Agreement.

7. With respect to subsequent Commission decisions, Section XVII of the Agreement provides:

This Agreement shall at all times be subject to such changes or modifications by the Commission as said Commission may, from time to time, direct in the exercise of its jurisdiction. If any such modifications renders the Agreement inoperable or creates any ambiguity or requirement for further amendment to the Agreement, the Parties will negotiate in good faith to agree upon any necessary amendments to the Agreement.

Subsequent to the execution of the Agreement, and in the context of the arbitration of an interconnection agreement by and between MFS and US WEST (*MFS/US WEST Arbitration*) the Commission had occasion to consider and to approve a reciprocal compensation arrangement virtually identical in all material respects to the arrangement set forth in the Agreement here.² Specifically, in the *MFS/US WEST Arbitration*, the parties agreed to transport and to terminate local exchange traffic, as defined therein, and to pay mutual and reciprocal compensation for such transport and termination at negotiated rates.

MFS and US WEST expressly disagreed over whether calls terminating at Enhanced Service Providers (ESPs), of which ISPs are a sub-set, were local calls subject to the reciprocal compensation provisions of that agreement. That dispute was submitted to arbitration and the arbitrator rejected US WEST's arguments and adopted MFS' position. The Arbitrator concluded that the FCC has treated ESP traffic like other local exchange traffic and there was no reason to treat it any differently for reciprocal compensation purposes.

The Commission adopted and incorporated the findings and conclusions of the Arbitrator and approved the MFS/US WEST Agreement as presented.³ US WEST appealed the Commission's decision to the United States District Court for

the Western District of Washington which affirmed the Commission's decision in all

² *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc. Pursuant to 47 USC Section 252*, Docket No. UT-960323.

³ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252*, Docket No. UT-960323, Order Approving Negotiated and Arbitrated Interconnection Agreement (Jan. 8, 1997).

material respects.⁴

WorldCom began billing GTE for reciprocal compensation in September 1997. GTE, by letter dated December 22, 1997, suggested that WorldCom was "billing GTE for more than Local Traffic as defined in the [parties interconnection] agreement. Complaint, Ex. 2. The parties met and communicated over the following months in an effort to resolve the dispute. Through May 10, 1998, WorldCom billed GTE for reciprocal compensation, covering ISP/ESP as well as non-ISP/ESP traffic. To date, none of the billed amounts have been paid.

By letter dated November 4, 1997, WorldCom advised GTE that it was requesting formal negotiations with GTE for a new interconnection agreement for Washington State. Durbin at 4; GTE Post-Hearing Memorandum, Ex. A. Those negotiations continued for several months into 1998, at which time it became apparent that WorldCom and GTE would not be able to resolve their contractual negotiations without a significant devotion of additional resources and personnel.

By letter dated May 29, 1998, GTE advised WorldCom that its Agreement with GTE would expire in 45 days. The letter stated that the Agreement has no renewal clause, but that there is a continuation-of-service agreement during negotiations for a new interconnection agreement. GTE Post-Hearing Memorandum, Ex. B. On July 21, 1998, WorldCom responded to GTE's letter stating that WorldCom was not then in a position to negotiate a permanent agreement. *Id.*, Ex. C. GTE did not receive that letter and again wrote on August 13, 1998, requesting a response to its May 29, 1998 letter. *Id.*, Ex. D. On August 17, 1998, WorldCom wrote GTE that its July 21 letter apparently had not been received by GTE and advised GTE that WorldCom was still not in a position to negotiate another agreement. *Id.*, Ex. E. The Appendix to this Order provides a time line of the sequence of events described above.

II. ISSUES PRESENTED

The primary issue in this proceeding is: Did GTE violate the terms of its interconnection agreement with WorldCom by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of ISP local calls?

The parties have raised the following subsidiary issues:

- A. Is the *MFS/US WEST Arbitration* decision binding on GTE?

⁴*US WEST Communications, Inc. v. MFS Intelenet, Inc.*, C97-222WD (Jan. 7, 1998). US WEST appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit, where the matter is pending.

- B. Does the Agreement require the payment of reciprocal compensation for all local calls, including calls to ISPs?
- C. Does the Commission lack jurisdiction to decide the underlying issue of whether calls terminating to ISPs are local for purposes of the reciprocal compensation provisions of the Agreement?
- D. Should the Commission order GTE to pay penalties pursuant to RCW 80.04.380 for violation of RCW 80.36.170?
- E. Should GTE prevail on its counterclaim?

III. DISCUSSION

The positions of the parties on the issues set forth above are as follows. WorldCom argues that the Commission already has decided this issue in the context of the MFS/US WEST arbitration and the Commission's order is binding on GTE. Alternatively, WorldCom argues that the Agreement is clear and unambiguous. In either case, WorldCom contends it is entitled to reciprocal compensation for calls terminating to ISPs.

Staff urges the Commission to reaffirm the *MFS/US WEST Arbitration* decision, as applied to the specific facts and arguments made in this case. Additionally, Staff argues that GTE should be required to pay penalties, pursuant to RCW 80.04.380, for violation of RCW 80.36.170 (relating to the prohibition of any practice by which a telecommunications company subjects either customers or competing companies to unreasonable disadvantage).

GTE maintains that this Commission does not have jurisdiction to deem ISP traffic "local" for reciprocal compensation purposes. GTE counterclaims that reciprocal compensation cannot be paid under the terms of the Agreement for any period after its expiration date of July 15, 1998. Furthermore, GTE contends that the Commission cannot legally impose penalties on GTE.

A. Is the *MFS/US WEST Arbitration* decision binding on GTE?

WorldCom. WorldCom contends that the Commission has already determined that traffic terminating to ISPs is local in a decision that is binding on GTE. *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc., and US WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252 (MFS/US WEST Arbitration)*, Docket No. UT-960323, November 8, 1996. There, US WEST asked the Commission to exclude traffic terminating to ISPs from the reciprocal compensation provisions of the proposed MFS/US WEST agreement, on the grounds that the traffic was not local. According to WorldCom, the

Commission there saw no reason to exempt ISP traffic from the reciprocal compensation provisions of that agreement. WorldCom argues that having decided the issue once, the long-established principle of *stare decisis* compels that the same conclusion be reached here.⁵

Staff. Commission Staff maintains that there is no reason for the Commission to alter its decision in *MFS/US WEST Arbitration*. Staff asserts that there is no basis to find that somehow calls terminated to an ISP are local if pursuant to an interconnection agreement between MFS and US WEST, but are not local when done if pursuant to an interconnection agreement, similar in all relevant respects, between GTE and WorldCom.

In addition, Staff points out that the GTE/WorldCom Agreement at V. B. provides:

Notwithstanding the following [discussion of rates], the Parties agree to amend this Agreement with regard to compensation for the termination of local calls (as described in this section) in accordance with any further Commission decision(s) regarding compensation for local and/or toll call termination between LECs and CLCs.

Staff argues that the holding in the *MFS/US WEST Arbitration*, that calls to Enhanced Service Providers (and hence ISPs) are local calls subject to reciprocal compensation, should apply with equal force to calls originated by GTE and terminated by WorldCom under their interconnection agreement. According to Staff, this is not simply by virtue of the principle of *stare decisis*. Because GTE “agree[d] to amend” the Agreement in accordance with “any further decisions(s) regarding compensation for local and/or toll call termination between LECs and CLCs,” (emphasis added), GTE, in Staff’s view, can hardly now be heard to assert that the decision in *MFS/US West Arbitration* is of no relevance to GTE.

GTE. GTE argues that the decision in *MFS/US WEST Arbitration* is not binding on GTE. GTE contends that the Commission stated in the course of the MFS/US WEST arbitration that its decision was binding only on the parties to that arbitration. See *MFS/US WEST Arbitration*, Arbitrator’s Second Procedural Order on Petition to Intervene (July 16, 1996). GTE further argues that this statement conforms with the Commission’s stated policies on arbitrations. See *In the Matter of*

⁵ *McClaskey v. United States Department of Energy*, 720 F. 2d 583, 587 (9th Cir. 1983) (“generally, an agency must follow its own precedent or explain its reasons for refusing to do so in a particular case.”) *Vergeyle v. Employment Security Department*, 28 Wn. App. 399, 404, 623 P. 2d 736, 739 (1981) (“agencies may not ‘treat similar situations in dissimilar ways.’” quoting, *Jones v. Califano*, 576 F. 2d 12, 20 (2nd Cir. 1978))

Implementation of Certain Provisions of the Telecommunications Act of 1996, Docket No. UT-960269, Interpretative and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (Policy Statement) (June 27, 1996) at 4.

GTE further argues that the doctrine of *stare decisis* is only marginally relevant in the context of administrative agencies. See *R.G. Vergeyle v. Employment Security Department*, 28 Wn. App. 399, 404, 623 P.2d 736, 739 (1981). Moreover, to the extent the doctrine even applies to agency action, it is limited to adjudicative proceedings that “generally provide a guide to action the agency may be expected to take in future cases.” *National Labor Relations Board. V. Wyman-Gordon Co.*, 394 U.S. 759, 766, 89 S.Ct. 1426, 1429 (1969). GTE contends that *MFS/US WEST Arbitration* was not an adjudicative proceeding. See Policy Statement at 4 (“Arbitrations under the 1996 Act will not be deemed adjudicative proceedings under the Washington Administrative Procedure Act”). Thus the doctrine of *stare decisis* has no application whatsoever to the Commission’s non-adjudicative decision in the *MFS/US WEST Arbitration*.

WorldCom responds that GTE’s contention that the *MFS/US WEST Arbitration* decision does not apply because GTE was not a party to that case is a “non-starter.” WorldCom points out that GTE confuses the concepts of *res judicata* and *collateral estoppel* with *stare decisis*. *Res judicata* and *collateral estoppel* bind the parties and their privies and govern what may be put before a court, and, in that context, the fact that GTE was not a party might be relevant. WorldCom emphasizes it does not argue that those doctrines apply in this situation. Instead, WorldCom contends that *stare decisis* governs the outcome of this case and that the doctrine applies not only to those who were parties in a particular case, but to strangers to it as well. WorldCom states that the doctrine of *stare decisis* is based on the long-established principle that similarly situated litigants should be similarly treated. WorldCom notes that GTE does not contend that GTE and WorldCom here are not similarly situated to the litigants MFS and US WEST in the *MFS/US WEST Arbitration*; nor does GTE deny that on the key factual and legal question of the two agreements -- whether calls to ISPs are included within the scope of the Agreement’s reciprocal compensation provisions -- the two agreements are virtually identical.

B. Does the Agreement require the payment of reciprocal compensation for all local calls, including calls to ISPs?

WorldCom. WorldCom contends that even if the Commission decides not to resolve this case as a matter of law by applying the doctrine of *stare decisis*, and chooses to examine the Agreement on its own, the result will be the same. WorldCom submits that the Agreement is clear and unambiguous, and when read in conjunction with *MFS/US WEST* decision, which the Agreement itself plainly requires, it calls for the payment of reciprocal compensation for all local calls, including calls to ISPs.

WorldCom explains that the calls in dispute involve calls by GTE local exchange service end-users to a WorldCom local exchange service end-user that happens to be an ISP. WorldCom asserts that the language in the Agreement unambiguously sets forth the terms and conditions under which the parties will “reciprocally terminate local exchange traffic.” Agreement, Section V. A.1. It also sets forth the rate at which the parties will compensate each other for traffic carried “from MFS to GTE” and “from GTE to MFS” via local interconnection trunks. The telephone numbers of the called ISPs are associated with the calling area designated as “local” or “Extended Area Service,” thereby meeting the definition of Local Exchange Traffic contained in the Agreement. Agreement, Section II. R., U. The Agreement makes no exception for traffic that is terminated by either WorldCom or GTE at an ISP. Since the calls meet the definition of Local Exchange Traffic under the Agreement, reciprocal compensation is owed for the transport and termination of the call.

Furthermore, WorldCom points out that in two separate provisions within the Agreement, the parties acknowledge that the Agreement and its terms are expressly made subject to subsequent decisions of this Commission. In Section V. B., which governs the compensation arrangements at issue here, the parties agreed to “amend this Agreement with regard to compensation for the termination of local calls (as described in this section) in accordance with any further Commission decision(s) regarding compensation for local and/or toll call termination between LECs and CLCs.” Agreement, Section V. B. Similarly, in Section XVII, the Agreement also states that it is expressly subject to any subsequent decisions of the Commission.

WorldCom notes that in January 1997, several months after the Agreement became effective, the Commission did, in fact, issue “a decision regarding compensation for local. . . call termination.” In *MFS/US WEST Arbitration*, the Commission interpreted an interconnection agreement with a provision which is virtually identical, in all material respects, to the provisions at issue here. The decision addressed the scope of reciprocal compensation, concluding that it is owed for all local calls, including calls to ISPs. WorldCom maintains that by its terms, the WorldCom/GTE Agreement expressly incorporated the Commission’s *MFS/US WEST Arbitration* decision and its determination that reciprocal compensation is owed for local calls terminating to ISPs.⁶

GTE. GTE does not directly respond to WorldCom’s argument. GTE does state in its “Statement of Undisputed Facts” that “the parties agreed to reciprocal compensation for local traffic which was actually terminated with the “local “ or “extended service” areas as those terms were historically defined in the tariffs, and “[n]o party

⁶WorldCom attaches as Exhibit B to its initial brief a listing of 29 state commissions which have treated calls to ISPs as local for purposes of determining reciprocal compensation. GTE urges this Commission to ignore these decisions based on the FCC’s *GTE ADSL Order, In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, and GTOC Transmittal No. 1148*, CC Docket 98-79, FCC 98-2992 (October, 1998), discussed *infra*.

contends that the tariffs address traffic to ISPs.” GTE’s Post-Hearing Memorandum at 3. Staff responds that no party needed to make this contention because this is apparent from the fact that both end-users and ISPs obtain service from GTE’s local tariff.

C. Does the Commission lack jurisdiction to decide the underlying issue of whether calls terminating to ISPs are local for purposes of the reciprocal compensation provisions of the Agreement?

GTE. GTE’s principle contention appears to be that this Commission does not have jurisdiction to conclude that local calls terminating at ISPs are within the scope of the reciprocal compensation arrangements of the Agreement because that traffic is jurisdictionally interstate and only the FCC can determine the entitlement to compensation. GTE relies on the FCC’s decision *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, and GTOC Transmittal No. 1148*, CC Docket 98-79, FCC 98-2992 (October, 1998) (*GTE ADSL Order*) as support for its position. GTE acknowledges that the FCC specifically limited its decision to a dedicated ADSL connection as opposed to non-dedicated “dial-up” ISP traffic, but argues that this makes no difference in the analysis. GTE contends that examination of the precedent that served as the basis for the *GTE ADSL Order* demonstrates an unbroken chain of FCC authority which leads to the inevitable conclusion that traffic to ISPs is interstate in nature, whether it is “dial-up” or dedicated. GTE argues that further evidence that ISP traffic is interstate for jurisdictional purposes is the fact that it would be subject to interstate access charges but for a specific exemption granted by the FCC. GTE argues that the FCC’s continued exemption of ISP traffic from access charges demonstrates the agency’s recognition that such traffic is interstate. Because federal access charges apply only to interstate access traffic, the need for an exemption at all is conclusive proof that the FCC considers Internet traffic to be interstate in nature. GTE urges the Commission to reject any invitation to exercise jurisdiction over ISP traffic, in contravention of decades of FCC precedent.

WorldCom. In response, WorldCom maintains that not only is GTE’s argument misplaced, but it also fails to distinguish between the jurisdictional nature of calls to ISPs and the regulatory treatment of such calls, and fails to take into account the compensation framework established in the Act. WorldCom emphasizes that this is not a case that asks the Commission to decide the jurisdictional nature of calls to ISPs. Instead, it is a case that asks the Commission to interpret the contract between the parties. Moreover, even assuming that calls to ISPs are jurisdictionally interstate, such an assumption would not resolve the compensation issue raised by WorldCom’s complaint. Adopting GTE’s position would result in a class of calls for which no compensation is provided to WorldCom, or to any other terminating LEC, the use of whose facilities are essential to the successful completion of such calls. WorldCom contends that this is totally contrary to the requirement that reciprocal compensation be paid.

WorldCom explains that Section 251(b)(5) of the Act requires local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The Act does not expressly limit this obligation or exclude any particular category of traffic. Section 251(g), however, requires continued enforcement of the existing access charge regime, which (until it is superseded) provides for an alternative system of compensation for the transport and termination of telecommunications carried by three or more carriers. According to WorldCom, the only way to reconcile the two sections to give meaning to both is to interpret Section 251(b) to apply to compensation for the transport and termination of local traffic (or traffic otherwise exempt or not subject to access charges) carried by *two* carriers -- that is, traffic for which compensation is not already provided by access charges.

WorldCom states that this is the conclusion reached by the FCC in its *Local Competition Order*.⁷ The FCC explained that the existing regulatory regime, in which interstate and intrastate interexchange traffic was subject to access charges, is to be maintained pursuant to Section 251(g) of the Act.⁸ Traffic not subject to access charges, i.e., traffic that originates or terminates within a local calling area established by the state, or traffic otherwise not subject to access charges, would be subject to reciprocal compensation obligations.⁹ The simple logic drawn from the Act is that access charges and reciprocal compensation are intended to dovetail to cover all types of traffic carried by two or more carriers; such traffic is to be treated either through reciprocal compensation or access charges, and no traffic is to incur both types of treatment. Thus, the statutory scheme requires, and the FCC has established, that under the Act the termination of traffic carried by two carriers not otherwise subject to access charges is subject to reciprocal compensation.

WorldCom maintains that this dual approach, i.e., jurisdictional nature versus regulatory treatment, was not affected by the FCC's recent order discussing the jurisdictional nature of GTE's ADSL service. According to WorldCom, the *GTE ADSL Order* is not inconsistent with prior decisions of the FCC which, in every decision since the passage of the Act, has made one point clear: notwithstanding any jurisdictional determination that calls to ISPs might be interstate, for regulatory purposes those calls always have been treated as local (if made within the local calling area).

Staff. Commission Staff makes a similar argument. Staff contends that GTE's argument is premised on the fallacious assumption that traffic terminated at ISPs

⁷ *Implementation of the Local Competition Provision in the Telecommunications Act of 1996* ("*Local Competition Order*"), CC Docket No. 96-98, ¶1034 (Aug. 8, 1996)

⁸ *Id.*, ¶1034.

⁹ *Id.*, ¶¶ 1034-1035.

must be either "local" or "interstate." Staff maintains that by erroneously framing the issue, GTE arrives at the wrong result. According to Staff, the proper distinction is not between "local" versus "interstate" traffic. Rather, the distinction is between "local" versus "toll" traffic. Staff maintains that calls which are made from one customer in the local calling area and terminated to another customer in the same local calling area -- even if that customer happens to be an Internet service provider -- are clearly local calls. Blackmon Testimony, at 11. Staff points out that by industry practice, a call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the telephone exchange which bears the called telephone number. By FCC definition, "termination" is "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." 47 C.F.R. §51.701(d); Ball Testimony, at 4-5. Staff argues that neither the Agreement nor applicable law makes a distinction for calls placed by GTE's customers to WorldCom's ISP customers. All of the calls in question terminate within the Local Calling Area under the terms of the Agreement and hence are subject to payment of reciprocal compensation for their completion.

Staff/WorldCom. Both Staff and WorldCom challenge GTE's interpretation of the FCC's *GTE ADSL Order*. GTE contends that the FCC determined therein that calls terminated to an ISP are "interstate" and that this Commission therefore has no jurisdiction over the matter. Staff and WorldCom argue that GTE's contention is simply incorrect. They point out that the FCC in its decision expressly stated that it was only addressing digital subscriber line traffic, rather than dial-up traffic to ISPs:

We emphasize that we decide here only the issue designated in our investigation of GTE's federal tariff for ADSL service, which provides specifically for a dedicated connection, rather than a circuit-switched, dial-up connection, to ISPs and potentially other locations. This issue involves the applicability of Commission rules and precedent regarding the provision by one incumbent local exchange carrier (LEC) of special access service. *This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs.* Unlike GTE's ADSL tariff, the reciprocal compensation controversy implicates: the applicability of the separate body of Commission rules and precedent regarding switched access service, the applicability of any rules and policies relating to inter-carrier compensation when more than one local exchange carrier transmits a call from an end user to an ISP, and the applicability of interconnection agreements under sections 251 and 252 of the Communications Act, as amended by the Telecommunications Act of 1996, entered into by incumbent LECs and competitive LECs that state commissions have found, in arbitration, to include such traffic. Because of these

considerations, we find that this Order does not, and cannot, determine whether reciprocal compensation is owed, either on a retrospective or a prospective basis, pursuant to existing interconnection agreements, state arbitration decisions, and federal court decisions.

GTE ADSL Order at 1-2. (Emphasis supplied.) The FCC indicated that a decision addressing reciprocal compensation issues would be forthcoming.¹⁰

D. Should the Commission order GTE to pay penalties pursuant to RCW 80.04.380 for violation of RCW 80.36.170?

Staff. Commission Staff proposes that the Commission order GTE to pay penalties pursuant to RCW 80.04.380.¹¹ Staff argues that GTE's unilateral refusal to pay reciprocal compensation to WorldCom for the termination of local traffic to ISPs subjects WorldCom to unfair and unreasonable disadvantage in violation of RCW 80.36.170. Staff also recommends that GTE be required to pay WorldCom late-payment charges, as provided in Section V. B. 7. of the interconnection agreement.

RCW 80.36.170 provides in part:

No telecommunications company shall make or give any undue or unreasonable preference or advantage to any person, corporation, or locality, or subject any person, corporation, or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The commission shall have primary jurisdiction to determine whether any rate, regulation, or practice of a

¹⁰Following the filing of briefs and close of this record, the FCC did issue a declaratory ruling addressing reciprocal compensation. *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 No. 96-98 and CC Docket No. 99-68, Declaratory ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (February 26, 1999). The FCC determined that, in the absence of a federal rule regarding the appropriate inter-carrier compensation for ISP-bound traffic, parties should be bound by their existing interconnection agreements, as interpreted by state commissions. *Id.* at 16. The FCC did state, however, that its 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. *Id.* at 17.

¹¹RCW 80.04.380 provides in part:

Any public service company which shall violate or fail to comply with any provision of this title, or which fails, omits or neglects to obey, observe or comply with any order, rule, or any direction, demand or requirement of the commission, shall be subject to a penalty of not to exceed the sum of one thousand dollars for each and every offense.

telecommunications company violates this section.

According to Staff, this section prohibits any practice by which a telecommunications company subjects either customers or competing companies to unreasonable disadvantage. Staff emphasizes that it is critically important that an incumbent's competitors receive comparable treatment, in comparison to how the incumbent treats itself. Staff maintains that when this principle is violated, not only the competitor suffers, but ultimately, customers do as well.

Staff argues that GTE violated RCW 80.36.170 when it unilaterally refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs. Staff contends that, in effect, GTE cut off the money supply to its competitor while it continued to collect and retain money for providing the same service. Staff explains that ISPs served by GTE obtain service under GTE's local exchange services tariff. When a GTE telephone exchange service customer places a call to an ISP within the caller's local exchange area, GTE bills such customer for a local call pursuant to the terms of GTE's local tariff. Ball direct testimony, at 11-12. By contrast, GTE charges toll rates for calls to ISPs outside of the caller's local calling area. Blackmon testimony, at 10.

Staff further explains that, within the GTE network, GTE's customers continued to pay charges for local telephone service and to use that service to make calls to ISPs. Those local service revenues compensated GTE, in part, for the cost of terminating the calls on the switches serving the ISPs. Where the ISP was served by a GTE switch, that revenue was rightfully retained by GTE, since it incurred the cost of installing and operating the switch. Where that ISP was served by a WorldCom switch, that revenue was unreasonably retained by GTE, even though it incurred no cost of installing or operating the switch. According to Staff, for GTE to have treated WorldCom comparably, it would have had to cut off its own money supply at the same time that it cut off WorldCom's money supply. It should have reduced rates to local service customers to reflect the fact that terminating traffic to the Internet was a service for which, apparently, no price existed. Staff notes that not only did GTE fail to reduce its own revenues comparable to the reduction imposed on WorldCom, but it also kept the WorldCom revenues to which it clearly was not entitled.

Staff further argues, referencing Dr. Blackmon's testimony, that an incumbent's ability to restrict the cash flow of new entrants into the market would create substantial barriers to entry for small, startup companies. Dr. Blackmon's testimony points out that here, the interconnection agreement actually is not with WorldCom, but with MFS Intelenet. MFS was acquired by WorldCom at the end of 1996, and MFS was a much smaller company than the WorldCom that exists today. The amounts at issue here probably are quite significant relative to MFS' revenues in this state, and that is the relevant frame of reference. Blackmon testimony, at 12. Thus, not only are competitors

harmed by unreasonable disadvantage imposed contrary to RCW 80.36.170, but customers are ultimately harmed as well.

Staff recommends that the Commission impose penalties on GTE, pursuant to RCW 80.04.380, for its repeated violation of RCW 80.36.170 up to July 15, 1998. Staff recommends that each month's obligation be treated as a separate transaction, and that each month of nonpayment be treated as a separate violation. GTE should incur a separate penalty of \$1000 per month, dating from the month of the invoice to the present, for each invoice that it has unilaterally refused to pay. (For example, GTE's failure to pay a September 1997 invoice should incur penalties of \$1000 per month until it is paid.)

Staff also recommends that GTE be required to pay WorldCom late-payment charges, as provided for in Section V. B. 7. of the interconnection agreement. These charges should be calculated at 1.5 percent per month, as set forth in WorldCom's tariff. Staff argues that GTE's refusal to pay reciprocal compensation for the termination of calls to ISPs is unreasonable and contrary to the terms of its tariff. Staff reasons that if GTE believed it had a legitimate basis to dispute the charges, it could have used the dispute resolution mechanism set forth in Section XXIII of the Agreement to ask the Commission to rule on the issues, rather than unilaterally withhold payment.

GTE. GTE characterizes the basis for Staff's penalty proposal to be "GTE's purported failure to abide by the terms of its interconnection agreement and state law." GTE then argues that Staff's penalty proposal must be rejected for three reasons. First, GTE contends that Staff has confused the *MFS/US WEST Arbitration* decision as an expression of state law, much like a rule or regulation. GTE argues that if the Commission wished to promulgate a regulation regarding the jurisdictional nature of ISP traffic, it certainly could do so, but only after providing appropriate notice of its proposed action and review of comments by interested parties. GTE argues that the Commission cannot impose penalties based on a single decision in an arbitration in which GTE was neither a party nor had the opportunity to be heard.

Second, GTE argues even if the *MFS/US WEST* decision was deemed a regulation, rule or order, then it should have been served on GTE pursuant to RCW 80.04.160. According to GTE, if this procedure had been utilized, GTE would have been given the opportunity to object to the decision on ISP traffic. Moreover, GTE would have been given the opportunity to present evidence on the issue and to participate in the full hearing required by law under RCW 80.04.160.

Lastly, GTE asserts that penalties under RCW 80.04.380 cannot be

imposed by the Commission in this proceeding. GTE references RCW 80.04.400¹² and contends that since the procedure set forth in that statute has not been invoked, any imposition of damages in this proceeding would be unlawful.

In its reply brief, GTE argues that the penalties sought by Staff should not be imposed under RCW 80.36.170. GTE maintains that “[t]he contention that GTE’s objection to paying reciprocal compensation for ISP traffic is somehow anti-competitive is simply wrong.” GTE also references Mr. Pitterle’s testimony and contends that the FCC has recognized that the impact of such a position on consumers is negligible because the issue “has nothing to do with consumer Internet charges.” Pitterle reply testimony, at 11.

E. Should GTE prevail on its Counterclaim?

GTE. GTE argues that regardless of the Commission’s ruling with respect to reciprocal compensation to be paid under the interim Interconnection Agreement prior to July 15, 1998, nothing in the Act or the Agreement permits WorldCom to collect reciprocal compensation for any traffic after July 15, 1998. GTE maintains that the Agreement was intended to be an interim agreement until such time as a permanent interconnection agreement in compliance with 47 U.S.C. §251 was determined either through negotiation or arbitration as required by the Act.

In support of its position, GTE references page 1 of the interim Interconnection Agreement:”

WHEREAS the Parties intend to negotiate a *permanent* interconnection agreement pursuant to Section 251 of the Telecommunications Act of 1996, but desire to enter into an *interim* interconnection agreement pending completion of the permanent agreement under federal law;

WHEREAS this Agreement is not intended by either Party to constitute compliance with the interconnection requirements of Section 251 of the Telecommunications Act of 1996;

See Exhibit F, GTE’s Post-Hearing Memorandum. (Emphasis supplied). GTE argues that, in accordance with this intention, the parties further stipulated to the following language governing the expiration of the Agreement:

¹²RCW 80.04.400 provides in part:

Actions to recover penalties under this title shall be brought in the name of the state of Washington in the superior court of Thurston county, or in the superior court of any county in or through which such public service company may do business. In all such actions the procedure and rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided.

MFS and GTE agree to interconnect with each other pursuant to the terms defined in this Agreement until it is superseded by an interconnection agreement negotiated between the Parties pursuant to Section 251 of the Telecommunications Act of 1996. Notwithstanding the foregoing, this Agreement shall, if not superseded by an interconnection agreement, expire two years after the effective date of the Agreement. In the event that the Agreement expires after two years, the *interconnection arrangements* in this Agreement shall remain in place until the Parties are able to negotiate and implement a new interconnection agreement. Negotiations on such a new agreement shall commence *no later than 45 days prior to the expiration of this Agreement*.

Id., Section VIII, p. 19. (Emphasis supplied). GTE argues that the above provision contemplates that WorldCom had to initiate negotiations for a permanent interconnection agreement in accordance with the Act at least 45 days before the expiration of the interim Interconnection Agreement. According to GTE, once negotiations were initiated by WorldCom, WorldCom was then bound by the temporal limitations set forth in the Act to complete those negotiations or to arbitrate. See 47 U.S.C. §252(c)(1). GTE contends that under no rational interpretation of this provision can it be said that GTE agreed to pay indefinitely reciprocal compensation to WorldCom at the rates contemplated in the interim Interconnection Agreement. Nor can it be said that GTE agreed to leave in place the interconnection arrangements contemplated by the interim Interconnection Agreement beyond the deadlines contemplated by the Act.

GTE argues that in its subsequent correspondence pertaining to the permanent interconnection agreement, WorldCom acknowledged and invoked the temporal limitations set forth in the Act. On November 4, 1997, Ruth Durbin wrote to GTE the following:

[P]ursuant to Section 251(c)(1) of the Telecommunications Act, WorldCom Technologies, Inc., on behalf of itself and affiliated operating companies providing telecommunications services in Washington (WorldCom) requests that GTE Northwest Incorporated (GTE) commence good faith negotiations to reach agreement for the following terms. (terms omitted). In light of the need to engage in meaningful negotiations before the expiration of the 135 days provided in the Act for voluntary negotiations, WorldCom requests a response by Friday, November 14th.

See Exhibit A, GTE's Post-Hearing Memorandum. GTE argues that this correspondence started the statutory clock for the parties to complete their negotiations. Accordingly, WorldCom was required by the end of April 1998, to petition this

Commission for arbitration in order to secure a permanent interconnection agreement. GTE argues that the deadlines set forth in the Act are jurisdictional and therefore cannot be waived by either agreement of the parties or by order of a state commission. GTE contends the Act required WorldCom to begin negotiations all over again. WorldCom, however, failed to initiate negotiations again before the expiration of the interim Interconnection Agreement, which called for negotiations under the Act to begin no later than 45 days before the expiration of the interim Interconnection Agreement. GTE points out that it even reminded WorldCom of the impending July 15, 1998, deadline by letter dated May 29, 1998.

GTE contends that WorldCom's view that these preliminary negotiations extended the life of the interim Interconnection Agreement fails for three reasons. First, it is evident, by the reference to the Act, that GTE was agreeing to no more time than the Act would otherwise allow, provided that good faith negotiations towards a permanent interconnection agreement began no more than 45 days before the expiration of the interim Interconnection Agreement. That way, parties could predict with certainty when a permanent interconnection agreement would be in place once negotiations were commenced, because the Act permits 135 days of negotiations and 25 days more to petition a state commission for arbitration and then the state commission to reach a decision thereafter within nine months 47 U.S.C. §252 *et seq.*

Second, Section VIII does not bind GTE to pay any of the rates set forth in the interim Interconnection Agreement after the agreement expires. According to GTE, Section VIII expressly contemplates that "[i]n the event that the Agreement *expires after two years, the interconnection arrangements in this Agreement shall remain in place* until the Parties are able to negotiate and implement a new interconnection agreement" (Emphasis supplied.) GTE contends that this sentence contemplates that the interim Interconnection Agreement would expire and that only the interconnection arrangements set forth in the Agreement would remain in place -- not the Agreement itself. GTE insists that it merely agreed in this provision to continue transporting traffic once the Agreement expired, subject to whatever compensation the parties agreed to pay, or were required to pay as a result of an arbitration, in the permanent interconnection agreement.

Third, the 1996 Act requires all parties to negotiate in good faith. 47 U.S.C. §251(c)(1). GTE argues that WorldCom has failed to negotiate at all, much less in good faith. GTE notes that Ms. Durbin admitted that she agreed to provide GTE with drafts of proposed language for the contemplated permanent interconnection agreement by March 1998, but was unable to meet that deadline. Durbin testimony, at 5-6. Ms. Durbin also admitted receipt of GTE's reminder of May 29, 1998. *Id.* at 6. In her July 21, 1998, response to GTE's May 29, 1998 letter, Ms. Durbin admitted that WorldCom was still not in a position to negotiate a permanent interconnection agreement with GTE. See Exhibit C, GTE's Post-Hearing Memorandum.

GTE suggests that WorldCom has no one but itself to blame for the fact that the parties have neither negotiated nor arbitrated a permanent interconnection agreement. According to GTE, WorldCom has rebuffed all its attempts to renegotiate. GTE emphasizes that WorldCom's behavior is what the jurisdictional deadlines set forth in the Act were designed to prevent. GTE contends it should prevail on its counterclaim as a result, regardless of what this Commission decides with respect to WorldCom's claim for compensation prior to July 16, 1998.

WorldCom. WorldCom does not dispute that the specific agreement expired by its terms on July 15, 1998. WorldCom, however, disagrees with GTE's interpretation of Section VIII of the Agreement concerning the effect of that expiration. WorldCom contends that by the very terms of the Agreement, the interconnection arrangements continue in place, until a new agreement is implemented.

WorldCom argues that Section VIII of the Agreement establishes two independent obligations. First, the parties were required to start negotiations on a new agreement no later than 45 days before the expiration of the existing Agreement and, second, if the Agreement expired before a new agreement was in place, the interconnection arrangements, without qualification or exception, remained in place. According to WorldCom, the facts demonstrate that these obligations were satisfied. The parties did commence negotiations no later than 45 days prior to the expiration of the existing Agreement. Negotiations began in October 1997 and ran, intermittently, through March 1998. WorldCom contends that, for reasons entirely unrelated to its desire to renegotiate an agreement with GTE for Washington, the negotiations have been in hiatus for a period of time. Consequently, the expiration date in the Agreement arrived before negotiations on a new agreement were complete. By its terms, the interconnection arrangements were to continue in place. WorldCom states that the rationale for providing continuation of the interconnection arrangements during negotiations was to prevent disruption to each other's customers.

WorldCom contends that GTE takes these same contract terms and the same facts and conjures up an interpretation that bears no resemblance to the contract itself. WorldCom argues that GTE's interpretation imposes obligations, conditions, and limitations that do not exist in the language of the contract. As an example, WorldCom references GTE's argument that the negotiation/arbitration time periods set forth in Section 252 of the Telecom Act supersede the express language of the contract. WorldCom argues that GTE is confusing two entirely separate, unrelated principles: a contractual principle that addresses the conditions for negotiating a new agreement and a statutory directive that deals with a framework for instituting and concluding negotiations or arbitration. WorldCom acknowledges that the Telecom Act sets forth a time-table for negotiating and arbitrating an interconnection agreement, but maintains that the statutory time-table is separate and distinct from, and entirely unrelated to, any requirement under the Agreement between these parties governing the time period when negotiations for a new agreement must begin. WorldCom contends that the fact that the parties might have to begin negotiations all over again does not nullify the fact

that, for the purposes of the contract, the parties commenced negotiations in a timely manner.

WorldCom argues that GTE's position regarding the interconnection arrangements suffers the same defect. GTE interprets that portion of Section VIII of the Agreement as meaning that the parties would "continue transporting traffic once the interim Agreement expired, subject to whatever compensation the parties agreed to pay, or were required to pay as a result of an arbitration, in the permanent interconnection agreement." WorldCom contends that no word or phrase in Section VIII supports this conclusion.

According to WorldCom, nowhere is it written in the Agreement that the obligation to transport traffic survives but the obligation to pay for the use of WorldCom's facilities for the benefit of GTE's customers does not. Nowhere is it written that WorldCom's obligation to pay for the use of GTE's facilities for the benefit of WorldCom's customers survives but GTE's obligation to pay for the use of WorldCom's facilities does not. Nowhere is it written that any rates negotiated or arbitrated under a new agreement will relate back to the date the initial Agreement expired. WorldCom also observes that GTE fails to inform the Commission that GTE is billing WorldCom for post-July 15, 1998, reciprocal compensation and is being paid for those invoices.

WorldCom also argues that GTE is estopped from claiming that it is not obligated to compensate WorldCom for traffic transported and terminated after the July 15, 1998, expiration date. WorldCom contends that it is black-letter law that if GTE accepts the benefits of its contract with WorldCom, even after it contends that the contract, or certain terms thereunder, has expired, it must accept the burdens of that contract, including the compensation obligations.

Staff. Commission Staff notes that should the Commission determine that GTE is not required to pay reciprocal compensation under the terms of the Agreement after July 15, 1998, it does not follow that GTE should be obligated to pay nothing at all. Staff suggests that, in that event, the Commission may determine what rates are appropriate for the post-July 15, 1998 period. Staff proposes that the Commission could apply the rates to be approved in the generic interconnection pricing proceeding, Docket No. UT-960369. Alternatively, the Commission should address this issue as part of the negotiation, and, if necessary, arbitration of a new interconnection agreement between the parties. Staff recommends that at a minimum, the Commission should hold that GTE will be obligated to pay a to-be-determined compensation rate for the termination of traffic to ISPs.

In opposition to such a proposal, GTE argues that the Commission cannot impose unarbitrated terms upon GTE. GTE contends that Section 252 (e)(1) authorizes the Commission to approve or reject negotiated agreements. It does not give the Commission the authority to impose terms on an unwilling party. The Commission can only do so when it conducts an arbitration under Section 252(b) of the Act. Here, the

matter is not before the Commission pursuant to an arbitration. Consequently, the Commission has no authority to unilaterally impose a new agreement on GTE or to order that compensation be paid after July 15, 1998.

COMMISSION DISCUSSION AND DECISION

Jurisdiction. Initially, we find that the Commission has jurisdiction to interpret the terms and conditions of the Agreement, including those pertaining to the payment of reciprocal compensation for the termination of local traffic. Section 251(a) of the Act sets forth the duty of telecommunications carriers to interconnect with the facilities and equipment of other carriers. Section 252(a)(1) allows for voluntary agreements to be negotiated between companies. The interim Interconnection Agreement negotiated by WorldCom and GTE and dated July 15, 1996, is a negotiated agreement. The terms of the Agreement specifically provide for the right of either party to petition the Commission "in the event of a default or violation hereunder, or for any dispute arising under this Agreement."¹³ The Commission has jurisdiction over this complaint pursuant to RCW 80.01.040 (general powers of the Commission) and RCW 80.04.110, which provides that when two or more public service corporations are engaged in competition in any locality in the state, either may make complaint against the other that its practices are unreasonable, unremunerative, discriminatory, illegal, unfair, or intending or tending to oppress the complainant. The Commission also has jurisdiction pursuant to RCW 80.36.170, which provides the Commission with primary jurisdiction to determine whether any practice of a telecommunications company subjects a corporation to unreasonable disadvantage.

We are not persuaded by GTE's arguments that only the FCC can decide the issue of whether local calls terminating at ISPs are within the scope of the Agreement's reciprocal compensation arrangements. GTE's argument is based on the premise that the *GTE/ADSL Order* determines that traffic to ISPs is jurisdictionally interstate. We agree with WorldCom and Staff that GTE's argument is misplaced. This case does not ask the Commission to decide the jurisdictional nature of calls to ISPs. It asks the Commission to interpret the Agreement and enforce that contract between the parties. The Commission has clear jurisdiction to do so.

Foundation of Decision. WorldCom urges us to resolve this complaint as a matter of law by applying the doctrine of *stare decisis*. Alternatively, WorldCom proposes that we examine the Agreement on its own and read it in conjunction with the MFS/US WEST decision, which the Agreement require. WorldCom maintains that the language in the Agreement is clear and unambiguous. In either case, WorldCom contends it is entitled to be paid reciprocal compensation for the termination of all local calls, including calls to ISPs. We grant WorldCom's complaint based on our reading of

¹³Agreement at Section XXIII.

on the contract before us and the facts and circumstances associated with the contract. Our decision is entirely consistent with the *MFS/US WEST Arbitration* decision, as discussed below.

Reciprocal Compensation. We agree with WorldCom's analysis that, taking into consideration the compensation framework established in the Act, the termination of traffic carried by two carriers not otherwise subject to access charges is subject to reciprocal compensation. As WorldCom points out, Section 251(b)(5) of the Act requires local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 251(g), however, requires continued enforcement of the existing access charge regime until it is superseded. That regime provides for an alternative system of compensation for the transport and termination of telecommunications carried by *three or more carriers*. As WorldCom suggests, the only way to reconcile the two sections to give meaning to both, is to interpret the reciprocal compensation provision of Section 251(b) as intended to apply to compensation for the transport and termination of local traffic (or traffic otherwise exempt or not subject to access charges) carried by *two* carriers; that is, traffic for which compensation is not already provided by access charges. Based on this analysis, the Commission properly concluded in the *MFS/US WEST Arbitration* that it would be inappropriate to exclude calls to ISPs from the reciprocal compensation provision of that agreement.

We also find persuasive Staff's distinction between "local" versus "toll" traffic. As Staff explains, calls made from one customer in the local calling area and terminated to another customer in the same local calling area, even if that customer happens to be an Internet service provider, are clearly local calls. Examining the Agreement, all of the calls in question terminate within the Local Calling Area as defined in the Agreement and thus are subject to payment of reciprocal compensation for their completion. Adopting GTE's position would result in a class of calls for which no compensation is provided to WorldCom, or to any other terminating LEC, the use of whose facilities are essential to the successful completion of the call. Accordingly, GTE owes WorldCom reciprocal compensation for the transportation and termination of local calls, including calls to ISPs, at the rates negotiated under the Agreement.

Counterclaim. GTE counterclaims that WorldCom is not entitled to compensation under the Agreement for traffic generated after July 15, 1998, because of WorldCom's failure to begin negotiations 45 days prior to the Agreement's expiration date. The record shows that WorldCom did begin negotiations in November, 1997, and the parties engaged in negotiations through February 1998. In March, 1998, WorldCom was to provide draft issues, but failed to do so. Forty-six days prior to the expiration of the interim Agreement, GTE wrote to WorldCom asking about negotiations on the permanent interconnection agreement. WorldCom's July 21, 1998 response was not received by GTE until August 13, 1998. WorldCom responded that it was not in a position to negotiate a permanent interconnection agreement with GTE. GTE contends

that the Act's statutory clock required WorldCom to petition this Commission for arbitration by the end of April 1998; otherwise WorldCom had to begin negotiations again. GTE further contends that WorldCom's actions indicate that WorldCom failed to negotiate in good faith and GTE should prevail on its counterclaim.

We note that under the terms of the interim Agreement, WorldCom did begin negotiations forty-five days prior to the expiration of the Agreement. Those negotiations, however, never reached a conclusion. Section 252(b)(1) of the Act provides that either party may request resolution of disputes through arbitration. Contrary to GTE's assertion, the obligation to seek arbitration did not rest solely on WorldCom. GTE could have requested arbitration as well. The Act's process for negotiating and arbitrating interconnection agreements encourages speedy resolution of disputes. The record before us shows that both parties failed in their obligations under the Act to negotiate in good faith.

Obligations After Termination Date. In further support of its counterclaim, GTE argues that the Agreement's Section VIII provision that the *interconnection arrangements* remain in place until the parties are able to negotiate a new agreement, refers only to the physical connection between the parties' networks. GTE contends that this sentence contemplates that the Agreement would expire and that only the physical interconnection arrangements would remain in place. The compensation for those arrangements would be dictated by the subsequent interconnection agreement. WorldCom interprets the phrase as encompassing the physical connection between the parties' networks and the compensation for those arrangements as set forth in the interim Agreement.

We find WorldCom's interpretation of the *interconnection arrangements* to be the more reasonable one. Section VIII specifically provides that the "interconnection arrangements *in this Agreement*" shall remain in place should the expiration date pass without implementation of a new agreement. The phrase "interconnection arrangements" is broad in scope, yet is specifically tied to the arrangements *in this Agreement*. We read it to include all existing arrangements in the interim Agreement. Otherwise, we would be imposing new terms on the parties -- as GTE's proposal would. Adopting GTE's proposal would impose a one-way obligation on WorldCom, to provide service without compensation.¹⁴ We find no justification for such an outcome. We conclude that the terms of the interim Agreement continue until a new agreement takes its place. All arrangements remain in place; the physical connection between the parties' networks, the compensation for those arrangements, and the parties' obligation to negotiate a permanent interconnection agreement. Accordingly, GTE's obligation for

¹⁴ We note that were we to interpret the Agreement as GTE would have us do, we would then be confronted with the issue of the application of the principle of *quantum meruit* for the period subsequent to July 15, 1998, with the possible outcome that the reciprocal compensation rates of the Agreement would continue to apply. We do not reach this issue in view of our interpretation of the Agreement.

the payment of reciprocal compensation under the terms of the interim Agreement continues until a new agreement is in place.

Amounts Owed. The parties have stipulated that should we rule in favor of WorldCom on the complaint and against GTE on its counterclaim, the total amount set forth in the invoices WorldCom produced and filed on November 12, 1998 represents the amounts due and owing to WorldCom for reciprocal compensation for traffic transported and terminated in Washington. The fourteen invoices date from September 20, 1997 to October 10, 1998, and total \$1,458,925.48, including late-payment charges. We direct GTE to comply with the stipulation. GTE must also continue to pay WorldCom under the interim Agreement rates for any other reciprocal compensation owed subsequent to October 10, 1998, and to continue reciprocal compensation payments at the interim Agreement rate until a new agreement is in place.

Penalty. Staff recommends that we impose penalties against GTE because it has subjected its competitor, WorldCom, to unfair and unreasonable disadvantage in violation of RCW 80.36.170. We adopt Staff's recommendation. GTE violated RCW 80.36.170 when it unilaterally refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs. In essence, GTE cut off the money supply to its competitor while it continued to collect and retain money for providing the same service to GTE. As Staff points out, an incumbent's ability to restrict the cash flow of new entrants into the market would create substantial barriers to entry for small, startup companies. Thus, not only are competitors harmed by unreasonable disadvantage imposed contrary to RCW 80.36.170, but customers are ultimately harmed as well. GTE's arguments against the imposition of penalties recommended by Staff are non-responsive. GTE mischaracterizes the basis for Staff's penalty proposal as GTE's failure to comply with the *MFS/US WEST Arbitration* decision. GTE contends that Staff confuses the *MFS/US WEST Arbitration* decision as an expression of state law, much like a rule or regulation. GTE then claims that if it was expected to comply with a rule, it was entitled to participate in the Commission's procedures for adopting rules and regulations under RCW 80.04.160. We find GTE's arguments against imposition of penalties unpersuasive.

Pursuant to RCW 80.04.380, we adopt Staff's proposal that each month's obligation be treated as a separate violation. GTE should incur a penalty of \$1000 per month, dating from the month of the invoice to 30 days past July 15, 1998, for each invoice that it has unilaterally refused to pay. GTE owes \$66,000 in penalties.

We also accept Staff's recommendation that GTE be required to pay WorldCom late-payment charges, as provided for in Section V. B. 7 of the Agreement. These charges should be calculated at 1.5 percent per month, as set forth in WorldCom's tariff. GTE offered no response to Staff's late-payment charge proposal. We observe that the fourteen invoices submitted by WorldCom include late-payment charges. We find that late-payment charges are also due on any other outstanding

invoices subsequent to October 10, 1998, that GTE has failed to pay WorldCom.

Having discussed above in detail the documentary evidence concerning all material matters, and having stated findings and conclusions upon contested issues, the Commission now augments those findings and conclusions with the following general statements on the evidence of record. Those portions of the preceding detailed findings and conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

FINDINGS OF FACT

1. The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates, rules, regulations, practices, accounts, securities and transfers of public service companies including telecommunications companies.
2. WorldCom is engaged in the business of furnishing telecommunications service to the public within the state of Washington.
3. GTE is engaged in the business of furnishing telecommunications service to the public within the state of Washington.
4. GTE and WorldCom executed an interim Interconnection Agreement on July 15, 1996.
5. The interim Interconnection Agreement between WorldCom and GTE expired on July 15, 1998, however, pursuant to Section VIII of the Agreement, the interconnection arrangements remain in place until a new agreement is negotiated and implemented. Interconnection arrangements mean all arrangements including physical connection between the parties' networks, compensation for the arrangements, and the obligation of the parties to negotiate a new agreement.
6. WorldCom initiated negotiations for a permanent interconnection Agreement in November 1997. Negotiations continued through February 1998 but were never completed. Neither GTE nor WorldCom requested arbitration of their disputed issues. Both WorldCom and GTE failed to negotiate in good faith.
7. On August 3, 1998, WorldCom filed a formal complaint against GTE seeking enforcement of provisions of the parties' interim Interconnection Agreement. The complaint alleged that GTE violated the terms of that agreement by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of telephone exchange traffic, handed off by GTE to WorldCom, for termination by WorldCom to its end-use customers, including Internet Service Providers.

8. GTE violated the terms of its interim Interconnection Agreement with WorldCom by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of local calls, including calls to ISPs.

9. GTE should pay WorldCom reciprocal compensation under the terms of the interim Interconnection Agreement in the amount of \$1,458,925.48 for the period from September 20, 1997 through October 10, 1998, pursuant to the stipulation of the parties. In addition, GTE should pay WorldCom under the terms of the interim Agreement for any outstanding invoices subsequent to October 10, 1998, until a new agreement is in place.

10. GTE subjected its competitor, WorldCom, to unreasonable disadvantage in violation of RCW 80.36.170 when it refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs, while it continued to collect and retain money for providing the same service to WorldCom.

11. GTE should pay penalties pursuant to RCW 80.04.380, for its repeated violation of RCW.80.36.170. GTE should incur a penalty of \$1000 per month, dating from the month of the invoice to 30 days past July 15, 1998, for each invoice that it has unilaterally refused to pay. Based on the fourteen invoices which are the subject of the stipulation, the penalty due is \$66,000.

12. GTE should pay late-payment charges on any outstanding invoices subsequent to October 10, 1998, as provided for in Section V.B.7. of the Agreement. These charges should be calculated at 1.5 percent per month, as set forth in WorldCom's tariff.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and all parties to this proceeding.

2. The interim Interconnection Agreement between WorldCom and GTE expired on July 15, 1998, however, pursuant to Section VIII of the Agreement, the interconnection arrangements remain in place until a new agreement is negotiated and implemented. Interconnection arrangements mean all arrangements including physical connection between the parties' networks, compensation for the arrangements, and the obligation of the parties to negotiate a new agreement.

3. GTE violated the terms of its interim Interconnection Agreement with WorldCom by failing to make any payments to WorldCom for reciprocal compensation for the transport and termination of local calls, including calls to ISPs.

4. GTE must pay WorldCom reciprocal compensation under the terms of the interim Interconnection Agreement as set forth in Finding 9.

5. GTE subjected its competitor, WorldCom, to unreasonable disadvantage in violation of RCW 80.36.170 when it refused to pay reciprocal compensation to WorldCom for terminating local calls to ISPs, while it continued to collect and retain money for providing the same service to WorldCom.

6. GTE must pay penalties pursuant to RCW 80.04.38, for its repeated violation of RCW 80.36.170 as set forth in Finding 11.

7. GTE must pay late-payment charges on any outstanding invoices subsequent to October 10, 1998, as set forth in Finding 12.

8. GTE's counterclaim is denied. GTE is liable for the reciprocal compensation rates in the Agreement after July 15, 1998, as set for in Finding 9.

ORDER

THE COMMISSION ORDERS:

1. The Complaint filed by WorldCom, Inc. f/k/a MFS Intelenet of Washington, Inc. against GTE Northwest, Inc. on August 3, 1998 alleging violation of the terms of the interim Interconnection Agreement is granted.

2. GTE is ordered to pay WorldCom reciprocal compensation as set forth in Finding 9.

3. GTE is ordered to pay penalties pursuant to 80.04.380 as set forth in Finding 11.

4. GTE is ordered to pay late payment charges as set forth in Finding 12.

5. GTE's counterclaim is denied.

6. The payments, penalties and late charges required by this order shall be made within thirty days of this order.

DATED at Olympia, Washington, and effective this day of May 1999.

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner

NOTICE TO PARTIES: This is a final Order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this Order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).