

MAY 12 1999

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration)	DOCKET NO. UT-980370
of an Interconnection Agreement Between)	
)	
ELECTRIC LIGHTWAVE, INC.,)	ORDER APPROVING
SERVICES, INC. and GTE NORTHWEST)	NEGOTIATED AND ARBITRATED
INCORPORATED)	INTERCONNECTION AGREEMENT
)	
Pursuant to 47 USC Section 252.)	
.....))	

I. INTRODUCTION

1. Procedural History

1. On May 1, 1998, Electric Lightwave, Inc. (ELI), requested negotiations with GTE Northwest Incorporated (GTE) for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 U.S.C. § 151 et seq. (1996) (Telecom Act).

2. Negotiations between the parties resolved the vast majority of issues regarding their prospective interconnection agreement (Agreement). On October 7, 1998, ELI, timely filed a Petition for Arbitration with the Washington Utilities and Transportation Commission (Commission)¹ pursuant to 47 USC § 252(b)(1). The matter was designated Docket No. UT-980370.

3. On October 15, 1998, the Commission entered an Order on Arbitration Procedure establishing certain procedural requirements, and Lawrence Berg was appointed as Arbitrator for this proceeding on October 27, 1998. GTE filed its response to the ELI petition on November 2, 1998.

4. On December 1, 1998, the Arbitrator approved a joint request by the parties that the statutory deadline for resolution of disputed issues be extended, and they waived all rights to challenge the timeliness of a Commission decision dated on or before March 8, 1999. Opening testimony was filed on December 1, 1998, and reply testimony was filed on January 4, 1999.

5. On January 20, 1999, the Arbitrator approved a stipulation to admit prefiled testimony and exhibits into evidence, to waive the scheduled hearing, and to submit briefs on the unresolved issues. Opening briefs were filed on January 27, 1999, and reply briefs were filed on February 1, 1999.

¹In this decision, the Washington Utilities and Transportation Commission is referred to as the Commission. The Federal Communications Commission is referred to as the FCC.

6. On February 25, 1999, the Arbitrator approved an additional joint request extending the statutory deadline to March 22, 1999, to allow for supplemental briefs which the parties filed on March 8, 1999. On March 22, 1999, the Arbitrator's Report and Decision (Report) was filed resolving the disputed issues presented in the briefs. *See attached, Appendix A.* The parties were instructed to submit the Agreement in accordance with the Report within 14 days.

7. On April 12, 1999, the parties filed the Agreement (including disputed language at the beginning of Article VII) and GTE filed its Memorandum in Opposition to Approval. GTE's Memorandum challenged decisions by the Arbitrator and disclosed that other unresolved issues existed. On April 14, 1999, ELI filed its Request for Commission Approval of the Agreement, and on April 19, 1999, the parties filed responses and statements regarding unresolved issues.

8. On May 4, 1999, the Commission convened a hearing at its offices in Olympia, Washington, to consider the requests for approval of the Agreement. The Commission reviewed the record of the proceeding; the Arbitrator's Report; the Agreement; written comments by the parties; the written Commission Staff memorandum; and all oral comments made at the hearing by Timothy O'Connell for GTE, Gregory Kopta for ELI, and Jeffrey Goltz of the Attorney General's Office and David Griffith for Commission Staff. Commission Staff did not make any recommendations related to the issue of reciprocal compensation for ISP-bound traffic, but otherwise recommended that the Agreement be approved without GTE's proposed revision of Article VII.

9. At the conclusion of the hearing, the Commission took the matter under advisement. After full deliberation and discussion as summarized herein, the Commission approves all provisions of the Interconnection Agreement as submitted, except GTE's proposed revision of Article VII.

2. Negotiations and Arbitrations Under the Telecommunications Act of 1996

10. On February 8, 1996, the federal Act became law. The purpose of the Telecom Act is to:

[P]rovide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition

H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996). Under the Telecom Act, incumbent local exchange companies (ILECs), such as GTE, must allow new entrants or competitive LECs (CLECs), such as ELI, access to their networks or services in order to provide local telephone service.

11. The Telecom Act provides for this access in three ways. First, it requires ILECs to interconnect their networks with CLECs "at any technically feasible point." 47 U.S.C. § 251(c)(2). Such interconnection provided by the ILEC must be "at least equal in quality" to the interconnection it provides to itself. Id. Second, the Telecom Act requires ILECs to provide nondiscriminatory, unbundled access to network elements in a manner that allows competitive providers to combine the elements in order to provide telecommunications services. 47 U.S.C. § 251(c)(3). A "network element" is a facility or equipment used in the provision of telecommunications service. 47 U.S.C. § 153(29). Third, an ILEC must offer for resale, at wholesale rates, any telecommunications service it offers at retail to subscribers who are not telecommunications carriers. 47 U.S.C. § 251(c)(4).

12. The Telecom Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between CLECs and ILECs, 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). The ILEC and the requesting CLEC are required to negotiate interconnection agreements in good faith. Id. If the parties are unable to resolve all issues through negotiation, a party to the negotiation may request the state commission to arbitrate the open issues. 47 U.S.C. § 252(b)(1).

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

13. The Telecom Act contemplates certain duties for state commissions as well. One duty is to arbitrate unresolved issues in interconnection agreements. 47 U.S.C. § 252(b). In addition to the general procedures for arbitrations set forth in Section 252 of the Telecom Act, the Commission implemented additional procedures for conducting arbitrations under the Act. In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996, Interpretative and Policy Statement, WUTC Docket No. UT-960296, 170 PUR4th 367 (June 28, 1996). In arbitrating disputed issues, the Commission has exclusive authority to set the prices for interconnection, unbundled network elements, transport and termination, and the wholesale prices for resold telecommunications services. 47 U.S.C. § 252(d).

14. Each interconnection agreement must be submitted to the state commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated, in whole or in part, by the state commission. 47 U.S.C. § 252(e)(1). The Agreement between ELI and GTE is the result of that process.

4. The Commission's Generic Cost and Pricing Proceeding

15. On October 23, 1996, the Commission entered an order 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 arbitrations would be

interim rates, pending the completion of the generic proceeding. That proceeding is underway.²

16. Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which proposal offers a more reasonable interim rate. This determination is based on cost evidence specifically submitted in this proceeding, our recent actions regarding cost studies, and our expertise as regulators. The findings and conclusions with respect to price proposals and supporting information are made in this context and do not necessarily indicate Commission approval or rejection of cost and price proposals for purposes of the generic case.

5. FCC Proceedings Implementing the Telecommunications Act of 1996

17. 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).³ On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit stayed operation of the FCC Rules relating to pricing and the "pick and choose" provisions.⁴

18. On July 18, 1997, the Eighth Circuit issued an order vacating several of the FCC Rules.⁵ 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 issued a decision holding that the FCC Rules, with the exception of 47 C.F.R. §51.319, are consistent with the Telecom Act.⁶ FCC Rule 51.319 states a list of network elements that an incumbent LEC is required to provide on an unbundled basis. At the same time, the Supreme Court reinstated FCC Rule 51.315 requiring ILECs to provide combinations of unbundled network elements to other requesting telecommunications carriers.

² *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, UT-960369 (general), UT-960370 (USWC), 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. The Commission held hearings in October and December 1998 to set permanent prices. The Commission expects to issue a final pricing decision in June, 1999.

³ *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.

⁴ *Iowa Utilities Bd. v. Federal Communications Comm'n*, 109 F.3d 418 (8th Cir. 1996).

⁵ *Iowa Utilities Bd. v. Federal Communications Comm'n*, 120 F.3d 753 (8th Cir. 1997).

⁶ *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

19. On February 26, 1999, the FCC entered its long-awaited order on the issue of inter-carrier compensation for ISP-bound traffic (Declaratory Ruling).⁷ 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, such as ELI, contend that this is local traffic subject to the reciprocal compensation provisions of section 251(b)(5) of the Telecom Act. ILECs, such as GTE, 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.⁸

20. The FCC noted that it has no rule governing inter-carrier compensation for ISP-bound traffic,⁹ and stated that the mere fact that ISP-bound traffic is considered largely interstate does not necessarily remove it from the negotiation and arbitration process in section 252 of the Telecom Act.¹⁰

21. The FCC issued a Notice of Proposed Rulemaking (NPRM) simultaneous with 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 to arbitrate interconnection disputes 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.

22. The Commission must fulfill its statutory obligation under section 252 of the Telecom Act to resolve the disputes presented by ELI and GTE in this proceeding, and to decide whether an inter-carrier compensation mechanism should be established. The Commission's 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.

⁷ *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).

⁸ Declaratory Ruling, ¶¶ 19-20.

⁹ Declaratory Ruling, ¶¶ 21-22.

¹⁰ Declaratory Ruling, ¶ 25, citing the *Local Interconnection Order*, 11 FCC Rcd at 15544.

6. The Internet

23. The Internet "is an international network of interconnected computers." *Reno. v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 2334 (1997).

[A]ccess to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant . . . are electronic mail ("e-mail"), automatic mailing list services . . ., "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium . . . located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet. *Id.*, 117 S.Ct. at 2335.

24. Essentially, the "Internet is a distributed packet-switched network, which means that information [being transported within the network] is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination."¹¹ Generally, individuals contract with an ISP for a flat monthly fee to gain access to the Internet. ISPs pay their own local exchange carrier for the telecommunications services that allow its customers to call it. If an ISP is located in the same "local" calling area as a customer, the customer may dial a seven-digit number using the public switched telephone network to connect to the ISP facility. The ISP's modem then converts the analog messages from its customers into data "packets" that are switched through the Internet and its host computers and servers. Digital information is transmitted back to the ISP to be converted into analog form and delivered to the ISP's customer.

II. ARBITRATED ISSUES

1. Should GTE and ELI compensate each other for ISP-bound traffic originating on their respective networks?

A. Background

25. Section 251(b)(5) of the Telecom Act requires all LECs, including incumbent LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." As a legal matter, the transport and termination of local traffic are different services than access service for long distance telecommunications. The FCC concluded that the reciprocal compensation obligations

¹¹ *Report to Congress, In Re Federal-State Joint Board on Universal Service, FCC 98-67*, at ¶ 64 (April 10, 1998).

of section 251(b)(5) should apply only to traffic that originates and terminates within a local area as defined by state commissions.¹² Reciprocal compensation for calls is intended for a situation in which two carriers collaborate to complete a local call. The calling party pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call.

B. Arbitrator's Decision

26. The Arbitrator found that ISP-bound traffic constitutes a local-interstate hybrid. Report, pp. 9-11. Reciprocal compensation must be based on costs where incurred by carriers. LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network, and the terminating LEC does not directly receive any revenue from the customer who originates the call. Even though "local-interstate" traffic is not addressed by section 251(b)(5) of the Telecom Act, the Arbitrator determined that the FCC's policy of treating ISP-bound traffic as local for purposes of interstate access charges leads to the equitable conclusion that ISP-bound traffic also should be treated as local for purposes of reciprocal compensation charges.

C. GTE's Position

27. GTE argues that LECs are required to hand off interstate traffic to ISPs without compensation as a cost of doing business by virtue of the FCC's decisions. The FCC has determined that ISP-bound traffic is interstate in character; however, GTE is not entitled to collect access charges on this interstate traffic because the FCC has established an exemption. It is inequitable to deprive GTE of the access revenue to which it should be entitled and, instead, require GTE to incur an expense for compensating ELI. Nonpayment of reciprocal compensation for ISP-bound traffic is not discriminatory because GTE would be treated precisely the same way.

D. ELI's Position

28. In ELI's view, GTE is compensated for providing service to its customers through its tariffed rates. Local service includes the ability to make local calls without restriction. When GTE completes a local call from a GTE customer to an ISP that is also a GTE customer, GTE gets compensated. When that same GTE customer places a local call to an ISP that is an ELI customer, GTE still gets compensated. However, under the GTE proposal ELI would not receive any compensation even though it would incur a cost. The record does not establish any cost differential between ISP-bound traffic and voice telephony. Therefore, GTE should pay reciprocal compensation for ISP-bound traffic in the same manner that it pays for other local traffic.

¹² Local Competition Order, ¶¶ 1033-1035.

E. Discussion and Decision

29. The FCC determined that ISP-bound traffic is jurisdictionally mixed, but predominantly interstate.¹³ At the same time, the FCC acknowledges that, no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LECs network.¹⁴ Furthermore, the FCC notes 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.¹⁵

30. The FCC local Interconnection Order, at ¶ 1033, states:

Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications.

Packet-switched networking brings the underlying costs for the transport and termination of local and long distance traffic closer to its ultimate convergence. The FCC has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, but exempted ESPs from the payment of certain interstate access charges and since 1983 has treated ISP-bound traffic as though it were local.¹⁶ Thus, ISP-bound traffic can be characterized as "local-interstate".

31. Local-interstate traffic also exists in cases where territory in multiple states is included in a single local service area, and a local call crosses state lines. Two examples of such local service areas are Pullman, WA - Moscow, ID, and Clarkston, WA - Lewiston, ID. 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), and the applicable rate

¹³ The Commission disagrees with this premise, but accepts it as binding until other legal precedent is established.

¹⁴ FCC's NPRM, ¶ 29.

¹⁵ FCC's Declaratory Order, ¶ 25.

¹⁶ Declaratory Ruling, ¶¶ 5 and 23.

should be determined by the state where the terminating carrier's end office switch is located.¹⁷ ISPs are end-users, not telecommunication carriers.

32. 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.

33. GTE's argument is not persuasive. GTE receives compensation when end-users on its network call an ISP that is also a GTE customer. Non-discrimination principles dictate that compensation should be paid when GTE's customers originate ISP-bound traffic that terminates on another LEC's network. For these reasons, the Commission adopts the discussion and decision on this issue in the Arbitrator's Report.

2. How Should the Termination of ISP-Bound Traffic Be Compensated?

A. Background

34. Section 251(d)(2)(a)(i) of the Telecom Act provides for "recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." Reciprocal compensation rates for transport and termination shall be based on "a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2). The FCC found that incumbent LECs' costs serve as reasonable proxies for other carriers' costs of transport and termination for purposes of reciprocal compensation and directed state commissions to establish presumptive symmetrical rates on that basis when arbitrating disputes under section 252(d)(2).¹⁸

35. As an additional option for reciprocal compensation arrangements for termination services, the FCC concluded that state commissions may impose bill and keep arrangements if the volume of traffic originating and terminating on two respective networks is approximately equal.¹⁹ Furthermore, the FCC also concluded that a bill and keep approach for termination of traffic does not preclude a positive flat-rated charge for transport of traffic between carriers' networks.²⁰

¹⁷ This outcome is consistent with the *Local Interconnection Order*, at ¶ 1038: "In cases in which territory in multiple states is included in a single local service area . . . we conclude that the applicable rate for any particular call should be that established by the state in which the call terminates."

¹⁸ Local Competition Order, ¶¶ 1085 and 1089.

¹⁹ Local Competition Order, ¶ 1111.

²⁰ Local Competition Order, ¶ 1096.

B. Arbitrator's Decision

36. The Arbitrator found that GTE's proposal that the Commission adopt separate reciprocal compensation mechanisms for the transport and termination of ISP-bound local-interstate and non-ISP local traffic is inappropriate and inequitable because there is no evidence that those termination costs differ. Insofar as the parties negotiated a minute-of-use (MOU) based reciprocal compensation mechanism for local traffic in the Agreement (outside the scope of the arbitration), the Arbitrator found it unnecessary to further evaluate GTE's alternative proposals. The parties were directed to apply the same MOU-based reciprocal compensation mechanism used for non-ISP local traffic to ISP-bound local-interstate traffic on an interim basis.

C. GTE's Position

37. GTE believes that bill and keep is the most appropriate mechanism for ISP-bound traffic, but also considers a capacity-based charge to be more appropriate than MOU. The FCC states that pure MOU pricing structures are not likely to reflect accurately how costs are incurred for delivering ISP-bound traffic. GTE argues that the Commission is entitled to presume that local traffic is in balance, and states that the parties have been exchanging traffic on a bill and keep basis for a substantial period of time. GTE states that it is willing to consider capacity-based mechanisms other than its proposed formulation if the Commission agrees with its position and reverses the Arbitrator's ruling on this issue.

D. ELI's Position

38. ELI historically recounts that the Commission began the process to identify the proper mutual compensation mechanism for the transport and termination of local traffic prior to passage of the Telecom Act. Bill and keep (when traffic was in balance) and MOU have become the tried and true methods of compensation, in spite of the Commission's efforts to persuade industry to devise an appropriate capacity-based charge for compensation.

39. ELI states, in the abstract, that a capacity-based charge would be acceptable if it were correctly calculated and applied to all traffic. However, insofar as the FCC is ultimately going to dictate how ISP-bound traffic should be compensated, the cost of developing and implementing an interim mechanism would consume valuable resources on an unduly speculative basis. Any such effort should be undertaken as an industry-wide generic proceeding, and not in the context of an arbitration between two parties.

E. Discussion and Decision

40. This case is an anomaly insofar as negotiation and arbitration by the parties occurred contemporaneously with the FCC's proceeding that culminated with its Declaratory Ruling and NPRM. Consequently, the parties were not fully informed regarding evolving regulatory standards and did not engage in a single set of

negotiations regarding rates, terms, and conditions for interconnected traffic.²¹ The negotiated term of the Agreement, providing for an MOU reciprocal compensation mechanism for non-ISP local traffic, influences the Commission's decision in this case. Given that circumstance, the Commission addresses this issue in the most equitable manner possible, consistent with federal and state law and the Agreement between the parties.

41. In prior interconnection-related proceedings, the Commission identified bill and keep or capacity-based charges as the preferred outcome for local call termination compensation.²² Bill and keep is appropriate where the exchange of telecommunications traffic is balanced; however, the very nature of the instant dispute is indicative that the relevant traffic is not in balance between the parties.

42. The interim nature of state commission authority on this issue is an influential factor in our decision. Not only is this decision subordinate to the FCC's pending NPRM but it is also subject to the outcome in the Commission's generic cost and pricing docket, which encompasses the determination of an appropriate reciprocal compensation methodology. Although the Commission has sought to provide incentives for the local exchange carrier industry to develop a legally sufficient capacity-based reciprocal compensation mechanism, the industry to date has not developed such a mechanism. The cost of developing and implementing a capacity-based charge for one segment of interconnection traffic on an interim basis constitutes a significant financial risk that is not consistent with the public interest, convenience, and necessity.

43. The record in this case is insufficient to determine that GTE is unduly disadvantaged by the payment of reciprocal compensation for ISP-bound traffic based upon MOU. It is known that greater costs are incurred in the initiation and termination of circuit switched calls; however, the actual impact of longer holding times for ISP-calls remains vague and uncertain. MOU-based reciprocal compensation for ISP-bound traffic is not ideal, but it is reasonable under the totality of circumstances on an interim basis, in light of the Agreement and consistent with the Telecom Act.

44. This decision is limited to the specific facts of this case. As an interim arrangement, our decision carries no weight regarding the determination of a preferred long-term compensation mechanism. Furthermore, our decision should not be interpreted as an indication of the prospective outcome in the Commission's generic

²¹ The FCC's NPRM tentatively concludes that inter-carrier compensation for ISP-bound traffic should be governed prospectively by agreements negotiated and arbitrated under sections 251 and 252 of the Telecom Act. The FCC states: "This proposal could help facilitate the policy goals set forth above by forcing the parties to hold a single set of negotiations regarding rates, terms, and conditions for interconnected traffic and to submit all disputes regarding interconnected traffic to a single arbitrator." NPRM, ¶ 30.

²² *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996, 170 PUR 4th 367, Appendix B (June 27, 1996).

cost case or our policy-related positions before the FCC. For these reasons, the Commission adopts the discussion and decision on this issue in the Arbitrator's Report.

3. Should GTE Compensate ELI for Terminating Local Traffic at the Tandem Switch Rate?

A. Background

45. The FCC concluded that state commissions may establish transport and termination rates that vary according to whether traffic is routed through a tandem switch or directly to the end-office switch.²³ Generally speaking, a tandem switch is like a "hub" that routes traffic between end-office switches, thus avoiding the necessity for every end-office to be connected to every other end-office. This design adds a cost to the transport and termination function, but saves overall expense. Thus, the tandem switching rate is higher than the end-office switching rate.

B. Arbitrator's Decision

46. The Arbitrator found that there is substantial overlap between GTE's and ELI's service areas, that ELI's overall service area is comparable to GTE,²⁴ and that the FCC's rules do not require that ELI serve the same geographic area as GTE. The Arbitrator also stated that the functional similarity between a CLEC switch and an incumbent LEC's tandem switch is not relevant where the evidence supports a finding that they serve a geographically comparable area, but concluded that ELI's switch performs the function of aggregating and routing traffic along its interlocking fiber optic rings similar to a tandem switch.

C. GTE's Position

47. GTE argues that pursuant to FCC Rule 51.711(a)(3), the standard for determining a CLEC's entitlement to the ILEC's tandem switching rate is whether the area served by the CLEC is comparable to the specific area served by the ILEC. GTE represents that ELI only provides service within only four of the 13 exchanges subtended by GTE's local tandem. It is not relevant that ELI's service area encompasses a significant portion of U S WEST's territory, according to GTE.

D. ELI's Position

48. ELI describes the core issue as technological neutrality. If GTE uses its tandem switch to complete a call within a local calling area, ELI is entitled to the same compensation for completing the same call between the same points. The FCC Local Competition Order and Rule 51.711 are concerned with equivalent cost recovery.

²³ Local Competition Order, ¶ 1090.

²⁴ Exhibit 8.

To the extent that geographic areas are relevant, the standard is whether the respective service areas are comparable in terms of total size, not overlapping boundaries.

E. Discussion and Decision

49. We find that the proper rate for the transport and termination of traffic by ELI is the "tandem," rather than the "end-office," rate for two reasons: 1) the ELI and GTE networks perform equivalent functions; and 2) they serve comparable geographic areas.

i. Functional Equivalency Standard

50. The FCC rule, and the policy behind it, emphasizes a functional test. The Telecom Act provides for "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" on terms that reasonably approximate the additional costs of terminating such calls. 47 U.S.C. § 252(d)(2)(A). Tandem switching costs more than end-office switching because it entails an additional switching function. Recognizing this, the FCC concluded that "states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch." FCC Local Competition Order, ¶ 1090. Paragraph 1090 continues:

[S]tates shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnection carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate."

51. This language was discussed by the United States District Court on judicial review of the Commission's order approving an interconnection agreement between AT&T Wireless Services, Inc. (AWS), and U S WEST.²⁵ The District Court determined that the rate for a switch should be determined by whether it functions like a tandem switch, and geography should be considered. Rates for transport and termination of traffic should be symmetrical when the same kind of service is rendered.

²⁵ *U S WEST Communications, Inc., v. Washington Utilities and Transportation Commission, et al.*, Order on Motions for Summary Judgment, No. C97-5686BJR (W.D.Wash. Sept. 4, 1998), reviewing In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Wireless Services, Inc., and U S WEST Communications, Inc., *Commission Order Adopting Arbitrator's Report and Approving Interconnection Agreement*, Docket No. UT-960381 (October 6, 1997).

52. ELI's network architecture is based on interlocking and concentric fiber rings, in contrast to the hub-and-spoke configuration of GTE's network. While some switching operations performed by ELI may require fewer total costs than those incurred by GTE, other switching operations require greater costs because of the additional costs of transporting traffic on ELI's network. GTE has a greater network investment in its switches, but ELI has a great network investment in its fiber optic facilities. ELI's network performs the function of aggregating and routing traffic similar to a tandem switch, and GTE could not deliver traffic within ELI's service area without utilizing tandem switching. Accordingly, ELI incurs additional costs within its network that are consistent with the use of a tandem switch, and it is entitled to the tandem switch rate for terminating traffic originating on GTE's network.

ii. Comparable Geographic Service Area Standard

53. Consistent with FCC regulations, the geographic area served by ELI is "comparable" to the geographic area served by GTE. 47 C.F.R. § 51.711(a)(3) provides that where the switch of a carrier other than an ILEC serves a geographic area comparable to the area served by the ILEC's tandem switch, the appropriate rate for the carrier other than an ILEC is the ILEC's tandem interconnection rate. ELI serves a geographic area comparable to GTE in two respects: 1) the congruent area served; and 2) the total area served. Exhibit 8 is a map that portrays the respective (and overlapping) service areas of ELI and GTE; however, that map is not reliable because it unreasonably exaggerates GTE's service area. For example, the portrayal of the total area served by GTE in Exhibit 8 is inconsistent with other Exchange and Base Rate Area Maps filed by GTE pursuant to its tariffs.²⁶

54. Additionally, those maps disclose that the base-rate area in which GTE's subtended end-offices are located are geographically closer to the exchange area boundaries served by ELI than otherwise suggested. This is relevant because the overall comparison between the two networks is based on the location of GTE's facilities that interconnect tandem and end-office switches, and not the location of its most remote customer. For this same reason, the fact that ELI may provide service in less than a majority of GTE exchanges is not determinative of geographic comparability.

55. While the record does not include statistical evidence of the dispersion of customers among GTE's various exchanges, it is apparent that ELI serves a comparable geographic area comprising the majority of customers within GTE's service area. More importantly, the total ELI service area is geographically comparable to GTE's service area (ELI serves areas outside of GTE's territory). In this important

²⁶ Cf., GTE's WN U-2 Tariff, Adv. No. 214, 4th revision of sheet 2050, Exchange and Base Rate Area Map, Sultan, Washington, and Adv. No. 238, 2nd revision of sheet 1630, Exchange and Base Rate Area Map, Granite Falls, Washington. In both instances, the exchange area served by GTE is significantly smaller than the areas represented on Exhibit 8. These maps are made part of the record as Exhibit Nos. 10 and 11, respectively.

respect, ELI incurs costs to deliver traffic within its service area comparable to those incurred by GTE utilizing its tandem switch.

56. Even if these geographic areas were not "comparable," the FCC policy favoring a functional test would control. Rule 51.711 does not prohibit tandem rates when geographic areas are not comparable. 47 C.F.R. § 51.711(a)(3) states that the tandem rate is the appropriate rate when the geographic service areas are comparable, but it does not mandate the reverse. The rule does not state a bright-line test to be applied when the areas are not comparable. In such a case, or if that were the case here, the functional test would apply. In every respect, ELI is entitled to GTE's tandem switching rate for the termination of local traffic originating on GTE's network. For these reasons, the Commission adopts the discussion and decision on this issue in the Arbitrator's Report.

III. NON-ARBITRATED ISSUES

1. Should the Interconnection Agreement Include Terms and Conditions under Which GTE must Provide Unbundled Network Elements?

A. Background

57. GTE requests that the Commission resolve an issue that was not presented to the Arbitrator and arising subsequent to the Arbitrator's Report and Decision. GTE proposes contract language setting forth terms and conditions under which it will provide unbundled network elements (UNEs) to ELI as a result of the Supreme Court decision vacating 47 C.F.R. § 51.319 (specifying UNE requirements) and reinstating 47 C.F.R. § 51.315(b) (requiring ILECs to provide combinations of UNEs). Under section 251(d)(2) of the Telecom Act, the FCC was required to determine what UNEs should be made available, and it listed them in the now-vacated FCC Rule 51.319. GTE is concerned about possible ambiguities in its duty to comply with Rule 51.315 while Rule 51.319 is under remand to the FCC.

58. Article VII of the Agreement (providing for the provision of UNEs), was negotiated and agreed to by the parties. Article VII, section 1, states that GTE will provide UNEs in accordance with the Agreement to the extent it is not inconsistent with the Telecom Act, or state or federal law. The parties disagree regarding GTE's obligation pending FCC action to reestablish the list of UNEs that ILECs must provide.

B. GTE's Position

59. GTE argues that it is under no obligation to provide UNEs unconditionally. GTE states its willingness to provide UNEs in accordance with FCC Rule 51.319 while the matter of redesignating UNEs is addressed on remand by the FCC, but relief from Rule 51.315(b) is necessary to equitably preserve the status quo. GTE conditions its ongoing provision of UNEs consistent with the vacated Rule 51.319 upon ELI waiving its right to request combinations of UNEs under Rule 51.315.

C. ELI's Position

60. ELI argues that GTE negotiated and agreed to the UNEs that it would provide to ELI as part of the Agreement and that it is improper for GTE to raise additional issues at this stage of the process. Furthermore, ELI states that the Agreement itself provides a mechanism by which either party can seek to modify the Agreement to reflect changes in the governing law or resolve disputes.

D. Discussion and Decision

61. GTE's proposed language is not necessary to effectuate a complete interconnection agreement between the parties. The Agreement itself contains terms and conditions governing dispute resolution procedures affording the parties a means to modify or enforce their respective rights and duties.²⁷ Consequently, the Commission need not address this issue within this arbitration process.²⁸ GTE's proposed language in Article VII is rejected.

62. In all other respects, the Commission adopts the Arbitrator's Report and Decision. Having considered the Arbitrator's Report and Decision, the arbitrated Interconnection, Resale, and Unbundling Agreement, and accompanying requests for approval 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:

IV. FINDINGS OF FACT

63. 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.

64. 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, under Sections 251 and 252 of the Act.

65. This arbitration and approval process was conducted pursuant to and in compliance with the Commission's *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996*, Docket No. UT 960269, June 27, 1996.

²⁷ The Agreement, Article III, Section 14, states comprehensive procedures for dispute resolution.

²⁸ Indeed, the Telecom Act limits the authority of the Commission to consideration of the issues raised in the parties' petition and response. 47 U.S.C. § 252(b)(4)(A).

66. On March 22, 1999, pursuant to the Commission's Order On Arbitration Procedure in this docket, the Arbitrator issued a Report and Decision resolving the disputed issues between the parties to this proceeding, ELI and GTE. See Appendix A.

67. On April 12, 1999, the parties submitted an Interconnection, Resale and Unbundling Agreement (Agreement) to the Commission for approval in part, and on April 19, 1999, an executed signature page was submitted for substitution into the Agreement. The Agreement properly incorporates the decisions of the Arbitrator as to the disputed issues. To the extent the final provisions vary from specific decisions of the Arbitrator, pursuant to agreement of the parties, the provisions are treated as negotiated provisions.

68. The Commission has reviewed and analyzed the staff recommendation, the Arbitrator's Report and Decision, the Agreement, the filings of the parties, and the record herein, including the oral comments made at the open meeting. The Commission hereby adopts and incorporates by reference the findings and conclusions of the Arbitrator's Report and Decision.

69. GTE's proposed language in Article VII of the Agreement is not necessary to effectuate a complete interconnection agreement between the parties. The Agreement itself contains terms and conditions governing dispute resolution procedures affording the parties a means to modify or enforce their respective rights and duties.

V. CONCLUSIONS OF LAW

70. The arbitrated provisions of the Agreement meet the requirements of Section 251 of the Telecommunications Act of 1996, including the regulations prescribed by the Federal Communications Commission pursuant to Section 251 which have not been stayed, and the pricing standards set forth in Section 252(d) of the Act.

71. The negotiated provisions of the Act do not discriminate against a telecommunications carrier not a party to the agreement and are consistent with the public interest, convenience, and necessity.

72. The Agreement is otherwise consistent with Washington and federal law, and with the orders and policies of this Commission and the FCC.

ORDER

IT IS ORDERED that:

73. The Interconnection, Resale and Unbundling Agreement for the State of Washington between Electric Lightwave, Inc., and GTE Northwest, Incorporated, is approved.

74. The economic terms contained in the Agreement are interim, subject to modification or replacement by the Commission's Final Order in the generic cost and price proceeding, Docket No. UT 960369 et al., and by FCC orders in CC Docket No. 99-68.

75. In the event that the parties 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 USC § 252(e)(1) and relevant provisions of state law, prior to taking effect.

76. On or before May 17, 1999, ELI shall submit a revised Article VII in accordance with the Commission's decision and findings of fact to be substituted into the previously filed Agreement. The Agreement shall be effective as of the date of this Order.

DATED at Olympia, Washington and effective this 12th day of May 1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



MARILYN SHOWALTER, Chairwoman



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner

APPENDIX A

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration)	DOCKET NO. UT-980370
of an Interconnection Agreement Between)	
)	
ELECTRIC LIGHTWAVE, INC.,)	ARBITRATOR'S REPORT
and GTE NORTHWEST INCORPORATED)	AND DECISION
)	
Pursuant to 47 USC Section 252.)	
.....))	

I. MEMORANDUM

A. Procedural History.

On May 1, 1998, Electric Lightwave, Inc. (ELI), requested to negotiate an interconnection agreement with GTE Northwest Incorporated (GTE). On October 7, 1998, ELI, timely filed a Petition for Arbitration with the Washington Utilities and Transportation Commission ("Commission")¹ pursuant to 47 USC § 252(b)(1) of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 U.S.C. § 151 et seq. (1996) (Telecom Act). The matter was designated Docket No. UT-980370.

The Commission entered an Order on Arbitration Procedure and appointed an arbitrator on October 27, 1998. GTE filed its response with the Commission on November 2, 1998.²

On November 13, 1998, a prehearing conference was held to establish a procedural schedule. On November 25, 1998, the parties jointly requested that the statutory deadline for resolution of disputed issues be extended and they waived all rights to challenge a Commission decision dated on or before March 8, 1999, on the basis of timeliness. On December 1, 1998, the First Supplemental Order on Prehearing Conference approving the joint request was entered. Opening testimony was filed on December 1, 1998. Reply testimony was filed January 4, 1999.

On January 13, 1999, a second prehearing conference was held. At the conference the parties agreed to stipulate the prefiled testimony and exhibits into

¹In this decision, the Washington Utilities and Transportation Commission is referred to as the Commission. The Federal Communications Commission is referred to as the FCC.

² The ELI Petition, including its proposed interconnection agreement, and GTE's Response, although not separately marked as hearing exhibits, are deemed a part of the record and properly before the Arbitrator and the Commission.

evidence, waive the scheduled hearing, and submit briefs on the unresolved issues. Opening briefs were filed on January 27, 1999. Reply briefs were filed on February 1, 1999.

On February 24, 1999, the parties jointly requested an additional extension of the statutory deadline to March 22, 1999, and for permission to file supplemental briefs. The requests were granted. Supplemental briefs were filed on March 8, 1999.

B. Presentation of Issues.

The parties presented three issues for resolution in this proceeding. GTE raised an additional issue in its Supplemental Brief. The issues are:

1. Should GTE and ELI Compensate Each Other under Their Agreement for the Costs of Transport and Termination for Traffic Exchanged Between Their Networks over Local Interconnection Facilities That Terminate to Internet Service Providers?
2. What Compensation Mechanism Should Be Applied for the Costs of Transport and Termination for Traffic Exchanged Between Networks over Local Interconnection Facilities That Terminate to ISPs?
3. Should GTE Compensate ELI for Traffic Exchanged Between Their Networks at the Tandem Switching Rate or at the End Office Switching Rate?
4. Should the Commission Shorten the Negotiated and Agreed to Term of the Agreement or Establish Procedures to Clarify or Modify Interim Rules for Inter-carrier Compensation?

C. Resolution of Disputes and Contract Language Issue.

On December 1, 1998, the First Supplemental Order on Prehearing Conference was entered and stated that "final offer" arbitration would not control dispute resolution. In preparing the arbitration report in this matter, the arbitrator was not required to choose between the parties' last proposals as to each unresolved issue. The arbitrator considered the parties' arguments and made decisions consistent with the requirements of state and federal law and the Commission on an issue-by-issue basis.

As a general matter, this decision is limited to the disputed issues presented for arbitration. 47 U.S.C. § 252(b)(4). Each decision of the arbitrator is subject to and qualified by the discussion of the issue. The arbitrator reserves the discretion to either adopt or disregard proposed contract language in making decisions.

However, adoption of one party's position generally implies that the parties should use that party's contract language incorporating the advocated position in preparing a final agreement. Contract language adopted remains subject to Commission approval. 47 U.S.C. § 252(e).

This Arbitrator's Report and Decision is issued in compliance with the procedural requirements of the Telecom Act, and it resolves all issues which were submitted to the Commission for arbitration by the parties. At the conclusion of this Report and Decision, the Arbitrator addresses the approval procedure to be followed in furtherance of the issuance of a Commission order approving an interconnection agreement between the parties.

C. Generic Pricing Proceeding

On October 23, 1996, the Commission entered an order in other arbitration dockets 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.³ The Commission stated that rates adopted in the pending arbitrations would be interim rates, pending the completion of the generic proceeding. That proceeding is underway.⁴ Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate. The conclusions of the arbitrator with respect to price proposals and supporting information are made in this context and do not necessarily indicate Commission approval or rejection of cost and price proposals for purposes of the Generic Case.

D. The Eighth Circuit Order and the FCC Rules

On August 8, 1996, the FCC issued its First Report and Order (Local Interconnection Order), including Appendix B - Final Rules (FCC Rules).⁵ On October 15, 1996, the U. S. Court of Appeals, Eighth Circuit stayed operation of the FCC Rules relating to pricing and the "pick and choose" provisions.⁶

³ Order on Sprint's Petition to Intervene and to Establish Generic Pricing Proceeding (October 23, 1996) (Generic Pricing Order).

⁴ *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, UT-960369 (general), UT-960370 (USWC), UT-960371(GTE); Order Instituting Investigations; Order of Consolidation; and Notice of Prehearing Conference, November 21, 1996 (Generic Case).

⁵ *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B- Final Rules.

⁶ *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996).

On July 18, 1997, the Eighth Circuit issued an order vacating several of the FCC Rules. 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 issued a decision holding that the FCC Rules, with the exception of §51.319, are consistent with the Telecom Act.⁷

E. The FCC's Declaratory Order

On February 26, 1999, the Federal Communications Commission (FCC) entered its long awaited order on the issue of inter-carrier compensation for ISP-bound traffic (Declaratory Ruling).⁸ 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. Generally, competitive LECs (CLECs), such as ELI, contend that this is local traffic subject to the reciprocal compensation provisions of section 251(b)(5) of the Telecom Act. Incumbent LECs (ILECs), such as GTE, 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.

The FCC noted that it has no rule governing inter-carrier compensation for ISP-bound traffic, and found no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.⁹ The FCC also reiterated that state commission authority over interconnection agreements pursuant to 252 of the Telecom Act extends to both interstate and intrastate matters, and the mere fact that ISP-bound traffic is considered largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process.¹⁰

The FCC issued a Notice of Proposed Rulemaking simultaneous with 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 to

⁷ *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

⁸ 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).

⁹ Declaratory Ruling, ¶¶ 21-22.

¹⁰ Declaratory Ruling, ¶ 25, citing the *Local Interconnection Order*, 11 FCC Rcd at 15544.

arbitrate interconnection disputes encompasses the resolution of disputed issues relating to ISP-bound traffic, consistent with governing federal law:

. . . [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* [for ISP-bound traffic] pending completion of the rulemaking we initiate below. Declaratory Ruling, ¶ 27 (Emphasis added).

* * * *

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 ELI and GTE in this proceeding, and to decide whether an inter-carrier compensation mechanism should be established. As discussed in this report, the decision that reciprocal compensation is appropriate as inter-carrier compensation is an interim rule pending completion of the FCC's rulemaking and must vary to comply with subsequent federal rules.

F. The Internet

The Internet "is an international network of interconnected computers." *Reno. v. ACLU*, 117 S.Ct. 2329, 2334 (1997).

[A]ccess to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant . . . are electronic mail ("e-mail"), automatic mailing list services . . . , "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium . . . located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet. *Id.*, 117 S.Ct. at 2335.

Essentially, the "Internet is a distributed packet-switched network, which means that information [being transported within the network] is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." *Report to Congress*, In Re Federal-State Joint Board on Universal Service, FCC 98-67, at ¶ 64 (April 10, 1998). Generally, individuals contract with an Internet Service Provider (ISP) for a flat monthly fee to access the Internet. ISPs pay

their own local exchange carrier for the telecommunications services that allow its customers to call it. If an ISP is located in the same "local" calling area as a customer, the customer may dial a seven-digit using the public switched telephone network to connect to the ISP facility. The ISP's modem then converts the analog messages from its customers into data "packets" that are switched through the Internet and its host computers and servers. Digital information is transmitted back to the ISP to be converted into analog form and delivered to the ISP's customer.

G. Standards for Arbitration

The Telecommunications Act states that in resolving by arbitration any open issues and imposing conditions upon the parties to the agreement, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c).

II. RESOLUTION OF DISPUTED ISSUES

1. **Should GTE and ELI Compensate Each Other under Their Agreement for the Costs of Transport and Termination for Traffic Exchanged Between Their Networks over Local Interconnection Facilities That Terminate to Internet Service Providers?**

A. GTE's Position

GTE argues that the FCC's Declaratory Ruling requires that ISP-bound traffic should not be the subject of mutual compensation under the interconnection agreement in this proceeding. GTE states that it is incumbent upon the Arbitrator to resolve this issue in the context of the largely negotiated interconnection agreement between the parties (Agreement).¹¹

The Agreement provides that the parties shall reciprocally terminate local, intraLATA toll, optional EAS, and jointly provided Interexchange Carrier traffic originating on each other's networks. Agreement, Art. V, §3.1. The Agreement also provides that charges for the transport and termination of non-local traffic, including optional EAS, intraLATA toll, and interexchange traffic shall be in accordance with the parties' respective intrastate or interstate access tariffs or price lists. Agreement, Art. V, §3.2.1. According to GTE, there is no other provision in the Agreement for compensation of interstate traffic.

¹¹ *Petition of Electric Lightwave, Inc.*, Docket No. UT-980370, Exhibit B; Interconnection, Resale and Unbundling Agreement Between GTE Northwest Incorporated and Electric Lightwave, Inc.

GTE argues that the FCC determined Internet traffic to be jurisdictionally interstate. Thus, ISP-bound traffic is non-local and not subject to reciprocal compensation obligations under the negotiated terms of the Agreement. Furthermore, GTE argues that prior Commission decisions upholding reciprocal compensation for ISP-bound traffic should not be accorded any weight as precedent.

B. ELI's Position

ELI states that the FCC found ISP-bound traffic to be jurisdictionally mixed and largely interstate. However (contrary to GTE's position), ELI argues that the Declaratory Ruling provides that reciprocal compensation for ISP-bound traffic is lawful, despite the fact that it is jurisdictionally mixed. ELI argues that the Commission previously concluded that traffic terminated to ISPs is subject to reciprocal compensation, and in the absence of a contrary federal rule, the Commission should not depart from that precedent.¹²

ELI also argues that reciprocal compensation presents the most equitable mechanism for inter-carrier compensation. Carriers are typically compensated for terminating interstate traffic through access charges and local traffic through reciprocal compensation. However, ISPs do not pay access charges as a result of the FCC's "Enhanced Service Provider (ESP) exemption". Nevertheless, ELI contends that carriers must be compensated for the termination of traffic. Accordingly, reciprocal compensation is the logical alternative for ISP-bound traffic.

C. Discussion

Previous arbitration decisions by the Commission favoring reciprocal compensation for ISP traffic were made with the foreknowledge that the issue would be addressed by the FCC at a later date. GTE's argument that those decisions should not be accorded any weight as precedent in light of the FCC's Declaratory Ruling has merit. However, GTE's argument that ELI is estopped from receiving reciprocal compensation for ISP-bound traffic by the terms of the negotiated Agreement and the FCC's Declaratory Ruling is rejected as too narrow an interpretation. The parties submitted the issue to be arbitrated as:

Should GTE and ELI compensate each other under this Agreement for the costs of transport and termination for traffic exchanged between

¹² *Order Approving Negotiated and Arbitrated Interconnection Agreement*, In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. (MFS), and U S WEST Communications, Inc., Docket No. UT-960323 (January 8, 1997) (MFS Arbitration).

their networks over local interconnection facilities that terminate to Internet Service Providers ("ISPs")?¹³

GTE does not dispute that ISP-bound traffic is terminated over local interconnection facilities, and ISPs continue to be entitled to purchase their public switched telephone network links through local tariffs rather than interstate access tariffs.¹⁴ The FCC found that ISP-bound traffic is jurisdictionally mixed and a substantial portion of dial-up ISP-bound traffic is interstate.

GTE argues that the negotiated provisions of the Agreement should be strictly construed and that ELI is implicitly estopped from receiving reciprocal compensation by the Declaratory Ruling. The Agreement provides that charges for the transport and termination of non-local traffic shall be in accordance with access tariffs or price lists. GTE maintains that the FCC's determination that ISP traffic is substantially interstate requires ELI to pursue compensation under the access tariffs, suggesting that the FCC exemption of ISPs from access charges is an unrelated issue.

ELI's statement of the disputed issue in its briefs differs from Exhibit 9:

[Should the Commission] direct the parties to compensate each other under the reciprocal compensation mechanism contained in the interconnection agreement for the costs of termination of traffic to Internet Service Providers . . .

GTE relies on the phrase "under the Agreement" to argue that the Commission is precluded from determining, pursuant to legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule for ISP-bound traffic. However, the FCC's Declaratory Ruling recognized that the non-local character of ISP-bound traffic is not determinative of the compensation issue. The parties submitted their agreed upon statement of disputed issues prior to the FCC's Declaratory Order and GTE unreasonably relies on form over substance.

Although opening arguments by the parties focus on whether ISP-bound traffic was local or interstate, the underlying issue is whether reciprocal compensation should be exchanged. GTE witness Steve Pitterle acknowledged that the primary issue is whether the FCC's Declaratory Ruling provides that the ISP reciprocal compensation issue remains under the jurisdiction of this Commission. Exh. 3, p. 7. The Declaratory Ruling unambiguously provides that state commissions retain jurisdiction to determine whether reciprocal compensation is an appropriate interim inter-carrier compensation rule. To the extent the negotiated terms of the Agreement

¹³ Exhibit 9.

¹⁴ Declaratory Ruling, ¶ 20.

conflict with federal law, FCC rules, or the Commission's duty to arbitrate interconnection disputes under the Telecom Act, they will be rejected when submitted for approval pursuant to section 252(e)(2)(A)(ii).

The Declaratory Ruling, ¶ 27, states:

[N]othing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.

Accordingly, resolution of this issue requires determination of whether such other legal or equitable considerations exist.

While the FCC's Declaratory Ruling specifically addresses issues raised by various parties regarding compensation for transport and termination of ISP-bound Internet traffic, the underlying functionality provided by ISPs is the interconnection of a circuit-switched network with a packet-switched network. These two networks are fundamentally different; circuit switching reserves network resources to route messages whereas packet switching utilizes network resources based upon availability. Historically, the jurisdictional separation between circuit-switched local and long distance traffic is determined by the state in which a call originates and terminates. That distinction also reflects the additional costs incurred in reserving network resources over long distance. The jurisdictional analysis is less straightforward for the packet-switched network environment of the Internet.¹⁵

The FCC local Interconnection Order, at ¶ 1033, states:

Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications.

Packet-switched networking brings the underlying costs for the transport and termination of local and long distance traffic closer to its ultimate convergence. The FCC has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, but exempted ESPs from the payment of certain interstate

¹⁵ Declaratory Ruling, ¶ 18.

access charges and treated ISP-bound traffic as though it were local since 1983.¹⁶ Thus, ISP-bound traffic can be characterized as "local-interstate".

Local-interstate traffic also exists in cases where territory in multiple states is included in a single local service area, and a local call crosses state lines. Two examples of such local service areas are Pullman, WA - Moscow, ID, and Clarkston, WA - Lewiston, ID. 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), and the applicable rate should be determined by the state where the terminating carrier's end office switch is located.¹⁷ ISPs are end-users, not telecommunication carriers.

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 acquiring "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.

D. Decision

Inter-carrier compensation for local-interstate traffic should be governed by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Telecom Act. A single set of negotiations regarding rates, terms, and conditions is more likely to lead to a process that is market-driven and efficient outcomes for all traffic exchanged by the parties. The Commission is not precluded from determining that reciprocal compensation is an appropriate interim inter-compensation rule for ISP-bound traffic by either the FCC's Declaratory Ruling or the Agreement.

The duty of local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications must be based upon compensating costs where they are incurred. LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network and the terminating LEC does not directly receive any revenue from the customer who originates the call. Even though local-interstate traffic is not addressed by section

¹⁶ Declaratory Ruling, ¶¶ 5 and 23.

¹⁷ This outcome is consistent with the *Local Interconnection Order*, at ¶ 1038: "In cases in which territory in multiple states is included in a single local service area . . . we conclude that the applicable rate for any particular call should be that established by the state in which the call terminates."

251(b)(5) of the Telecom Act, the FCC's policy of treating ISP-bound traffic as local for purposes of interstate access charges leads to the equitable conclusion that it also should be treated as local for purposes of reciprocal compensation charges. The only other alternative would be to apply interstate terminating access charges.

2. **What Compensation Mechanism Should Be Applied for the Costs of Transport and Termination for Traffic Exchanged Between Networks over Local Interconnection Facilities That Terminate to ISPs?**

A. **GTE's Position**

GTE argues that ISP-bound traffic should not be treated as if it were local and that no compensation for transport and termination is appropriate. GTE argues that minutes-of-use (MOU) based compensation is inappropriate for ISP-bound traffic, and bill and keep or flat-rate compensation are the only alternatives that should be considered.

GTE witness Dr. Edward Beauvais emphasizes that it is inefficient to allow flat-rated local service for end users and require local carriers to pay reciprocal compensation for exchanging traffic based upon MOU. The result would be prices for local usage set at a level below the incremental cost of providing the end-to-end call. Dr. Beauvais contends that end user charges and carrier compensation charges must complement each other, and a usage-based compensation approach should not be approved and adopted in this arbitration unless this Commission is willing to re-examine the associated issues of end user pricing on a measured basis. GTE argues that economic distortions caused by the FCC's exemption of ISPs from access charges would be exacerbated if ISP-bound traffic also is made subject to reciprocal compensation.

GTE also argues that MOU-based compensation could lead to substantial unwarranted "subsidies" between carriers because of the long hold times associated with ISP traffic, and has nothing to do with the true costs for providing that service. GTE witness R. Kirk Lee contends that the expense of reciprocal compensation for traffic with longer average call duration has not been built into GTE's retail rate structure. GTE witness Steven Pitterle claims that GTE will be unable to recover its costs if it is required to compensate ELI for ISP-bound traffic on a usage basis.

GTE states that bill and keep is preferable to both MOU and flat-rated compensation methods as an interim mechanism. Bill and keep is a reasonable approximation of costs and a preferred outcome in Washington. Mr. Pitterle contends that bill and keep is an appropriate and equitable mechanism to maintain a consistent relationship between revenues received from flat-rated end users and potential compensation payments to ELI. A bill and keep mechanism would maintain the status quo between the parties until the FCC completes its rulemaking.

Alternatively, GTE proposes a flat-rated pricing system that more closely tracks the costs associated with ISP-bound traffic, and the revenues to be received to cover those costs. As explained by Mr. Lee, non-ISP local traffic would still be subject to the MOU compensation structure in the negotiated Agreement. GTE argues that the flat-rate per trunk charge calculated by Mr. Lee is a straightforward use of the costs developed by the Commission in the Generic Cost/Pricing Case.

B. ELI's Position

ELI proposes that the parties compensate each other for ISP-bound traffic under the MOU based reciprocal compensation mechanism contained in the Agreement. ELI argues that GTE's proposal for a different compensation mechanism for ISP-bound traffic should be rejected because GTE failed to provide any evidence that there is a cost difference between terminating traffic to ISP and non-ISP end users. ELI witness Timothy Peters contends that ELI incurs the same costs to terminate a call from a GTE customer regardless of whether that call is made to an ELI ISP customer or any other customer within the local calling area.

ELI argues that GTE's revenues are unrelated to the proper determination of an appropriate reciprocal compensation mechanism. The Telecom Act requires that prices be established based upon the cost of transporting and terminating traffic. Furthermore, ELI contends that GTE promotes pricing methodologies which the FCC determined to be inconsistent with section 252(d)(1) of the Telecom Act.

ELI opposes a bill and keep mechanism because traffic between GTE and ELI is not balanced, as the parties acknowledged by agreeing to MOU compensation for the transport and termination of local traffic. The only reason GTE is advocating a different mechanism for ISP-bound traffic is because that traffic is also imbalanced, but in favor of ELI.

ELI states that there is nothing inherently wrong with using a properly calculated flat-rated port charge for reciprocal compensation purposes; however, GTE proposes a flat-rate to be applied only to ISP-bound traffic, yet GTE does not demonstrate that the costs of terminating ISP traffic differs from other local traffic.

C. Discussion

The reciprocal compensation mechanism and rates to be established in this arbitration are interim in two respects: 1) they are interim pending the determination of permanent rates in the Commission's Generic Cost/Pricing Case; and 2) they are interim pending the FCC's NPRM. GTE's proposal for alternative reciprocal compensation mechanisms are all predicated on different mechanisms for ISP local-interstate traffic and non-ISP local traffic, even though there is no evidence in the record that the costs for transport and termination differ. GTE seeks to retain

MOU-based compensation for local traffic that is potentially imbalanced in its favor, but seeks to minimize (or avoid) any expense for ISP-bound traffic which is potentially imbalanced in ELI's favor. Furthermore, the GTE proposal does not allow for offsetting imbalances in one type of traffic with the other.

While it may be economically efficient to implement measured rates for local service as discussed by Dr. Beauvais, the existing statutory scheme and long standing regulatory policy in the state of Washington favors flat-rate local service, and this arbitration is not a proper proceeding to implement that kind of change. Due to the prevailing flat-rate retail structure and the lack of substantive evidence of differing costs for the transport and termination of ISP local-interstate and non-ISP local traffic, it is inappropriate and inequitable to adopt separate reciprocal compensation mechanisms in this arbitration.

The Commission has previously identified both bill and keep and capacity-based charge mechanisms as preferred outcomes for local call termination compensation. Nevertheless, GTE and ELI negotiated a MOU-based reciprocal compensation mechanism for local traffic in the Agreement. Furthermore, GTE considers that negotiated Agreement provision to be outside of the scope of this arbitration. The Commission approves negotiated agreements pursuant to section 252(e)(2)(A) of the Telecom Act, and there are no grounds to reject the reciprocal compensation mechanism for local traffic in the Agreement.

As the market for telecommunication services changes, traditional assumptions underlying retail rate structures may require revision as well. If GTE's retail rates do not provide sufficient revenues to offset expenses because of a shift in its end user calling patterns, a reasonable response would be to request rate relief based upon new cost studies rather than shift the burden onto other interconnecting carriers. Another reasonable response would be to support capacity based charges for the transport and termination of all traffic entitled to local treatment, not just the traffic that generates an undesirable imbalance under measured usage.

D. Decision

GTE's proposals that the Commission adopt separate reciprocal compensation mechanisms for the transport and termination of ISP-bound local-interstate and non-ISP local traffic are inappropriate and inequitable because there is no evidence that those traffic costs differ. Insofar as the parties have negotiated an MOU-based reciprocal compensation mechanism for local traffic in the Agreement and GTE considers that provision outside of the scope of this arbitration, it is unnecessary to further evaluate GTE's alternative proposals. The parties should apply the same MOU-based reciprocal compensation mechanism to ISP-bound local-interstate traffic that is used for non-ISP local traffic exchanged between their networks over local interconnection facilities.

3. Should GTE Compensate ELI for Traffic Exchanged Between Their Networks at the Tandem Switching Rate or at the End Office Switching Rate?

A. GTE's Position

GTE disputes ELI's claim that it serves a comparable geographic area to that served by GTE's tandem switch. GTE argues that the coverage of its tandem is substantially larger in GTE's service area than the area served by ELI's switch. GTE contends that the coverage must be equivalent or similar to the ILECs specific tandem at issue, and not a comparison between non-overlapping service areas.

GTE points to the pending installation of ELI's second switch and argues that ELI's claim that its network incurs more "transport" costs and less "switching" costs (thus, justifying the tandem rate) is negated. GTE argues that the second switch will bring switching closer to ELI's end user customers making GTE's end office switching rate more appropriate. By increasing switching, ELI proportionately reduces the transport for which the FCC designated the tandem rate as a proxy in the FCC Rules. 47 C.F.R. section 51.711(a)(3) states:

Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

GTE also argues that ELI's fiber optic rings constitute long local loops, not transport.

GTE witness Howard Jones defines and contrasts the functionality of a tandem switch with an end office switch. A tandem switch performs two basic functions: 1) it collects traffic from incoming trunk groups according to common destination points and then switches that traffic to a single outgoing trunk group to the common destination; and 2) it performs only trunk to trunk switching. An end office switch performs line to line, line to trunk, and trunk to line (but not trunk to trunk) switching. Mr. Jones characterizes the ELI switch as an end office switch because all ELI customers are connected to the line side of the ELI switch.

B. ELI's Position

ELI argues that the reason for a rule regarding comparable service areas is that the coverage area best represents a reasonable approximation of the carrier's cost of switching traffic. According to ELI the term comparable indicates that the size of the areas served by the respective carrier's switch must be similar and not necessarily overlapping. Mr. Peters describes ELI's network as a single switch that is connected to interlocking fiber optic rings. ELI covers a comparable area, but with a single switch and extensive transport, rather than multiple switches. ELI's switch

effectively acts as both a tandem and end-office switch. Mr. Peters states that ELI's network configuration is more efficient for its operations, but it does not necessarily incur any less cost to terminate local traffic in its geographic service area than GTE incurs.

ELI states that the sole reason for the installation of a second switch is that ELI's current switch is out of capacity and proximity to end users has no relation to the pending installation. ELI contends that it will incur increased switching costs in order to serve the same geographic area and urges the Commission to reject GTE's position because it fails to recognize the overall symmetry between the parties' costs of transport and termination.

Finally, ELI argues that the Commission's decision in the MFS Arbitration adopted MFS's proposal that its fiber optic ring network was entitled to tandem treatment for its single switch, and rejected arguments made by U S WEST that are identical to those now forwarded by GTE.

C. Discussion

In the paragraph explaining the effect of 47 C.F.R. § 51.711(a)(3), the FCC made it clear that it was utilizing a tandem rate as "the approximate proxy for the interconnecting carrier's additional costs" where an interconnecting carrier's switch serves a comparable geographic area. *Local Interconnection Order*, ¶ 1090. Although GTE argues that the forward-looking economic costs should be similar for an incumbent LEC and an interconnecting carrier providing service in the same geographic area, it offers no economic rationale in opposition to ELI's argument that the objective is to reasonably approximate the symmetrical cost of switching traffic.

In the MFS case, U S WEST argued that the MFS network did not coincide with its extensive geographic service area. MFS argued that if it serviced customers in U S WEST's central and eastern Washington exchanges it would have to absorb the cost of construction, leasing, or purchasing unbundled network elements to provide facilities. Identical circumstances exist relating to GTE's rural central Washington exchanges.

There is substantial overlap between ELI's and GTE's service area and ELI's overall service area is comparable to GTE.¹⁸ New entrants to the market will be unable to match the economies of scope and scale enjoyed by GTE, and the FCC's rules do not require that ELI serve the same area as GTE.

The functional similarity between a CLEC switch and an incumbent LEC's tandem switch is not relevant where the evidence supports a finding that they

¹⁸ Exhibit 8.

serve a geographically comparable area. Nevertheless, the record indicates that ELI's switch performs the function of aggregating and routing traffic along its interlocking fiber optic rings similar to a tandem switch. Network upgrades to increase switching capacity do not impact the analysis of functional similarity of switches in alternative network configurations.

D. Decision

GTE should compensate ELI at the tandem switching rate.

4. Should the Commission Shorten the Negotiated and Agreed to Term of the Agreement or Establish Procedures to Clarify or Modify Interim Rules for Inter-carrier Compensation?

A. GTE's Position

GTE acknowledges its obligation to enter into an interconnection agreement while the FCC rulemaking opened in the Declaratory Ruling is pending. GTE argues that the FCC limited state commission authority to devise inter-carrier compensation rules by providing that a Commission decision is interim pending completion of the rulemaking. GTE believes that an unfair result will occur if it is bound by the Commission's decision after its legal obligations are clarified or modified by the FCC, and seeks to lay the groundwork for review at this time.

GTE expresses its willingness to renegotiate inter-carrier compensation either upon the issuance of final rules in FCC Docket No. 99-68, or after one year.

B. ELI's Position

ELI states that the parties negotiated and agreed to modify the rates, terms, and conditions of the interconnection agreement in order to conform with a change in law, including federal rules pertaining to the appropriate reciprocal compensation mechanism for ISP-bound traffic. Accordingly, ELI argues that GTE will not be deprived of future regulatory decisions as a result of any current, lawful decision of this Commission. If the FCC's rulemaking concludes with the adoption of a rule that conflicts with the interconnection agreement's compensation mechanism, those provisions are subject to change in accordance with federal rules pursuant to the terms of the Agreement.

C. Discussion

The Commission's authority to reject any portion of an interconnection agreement adopted by negotiation is governed by section 252(e)(2) of the Telecom Act. GTE and ELI have negotiated and agreed to an effective term of the Agreement (Article III, Section 2), and they did not request arbitration of the effective term as a

disputed issue. The parties have also adopted by negotiation terms for resolving disputes arising during the effective term of the Agreement (Article III, Section 14), and for modification of the Agreement to comply with changes in law during the effective term (Article III, Sections 32 and 40). These portions of the Agreement do not discriminate against a third party telecommunications carrier, and implementation of these provisions is consistent with the public interest, convenience, and necessity. The terms of the Agreement sufficiently address GTE's concern that an unfair result may occur if subsequent FCC rules differ from the Commission's interim rules in this case.

D. Decision

The Commission should not shorten the negotiated and agreed to term of the Agreement or establish other procedures to clarify or modify interim rules for inter-carrier compensation.

III. IMPLEMENTATION SCHEDULE

Pursuant to 47 U.S.C. § 252(c)(3), the arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." In this case the parties did not submit specific alternative implementation schedules. Specific contract provisions, however, may contain implementation time lines. The parties shall implement the agreement pursuant to the schedule provided for in the contract provisions, and in accordance with the 1996 Act, the applicable FCC rules, and the orders of this Commission.

In preparing a contract for submission to the Commission for approval, the parties may include an implementation schedule.

IV. CONCLUSION

The foregoing resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 252(c). Insofar as the parties have largely negotiated an interconnection agreement, and few issues were submitted for arbitration, there is good cause to shorten the time for filing the Agreement with the Commission.

The parties are directed to submit an agreement consistent with the terms of this report to the Commission for approval within 14 days, pursuant to the following requirements of the Interpretive and Policy Statement, as modified:¹⁹

¹⁹ *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (June 27, 1996)

A. Filing and Service of Agreements for Approval

1. An interconnection agreement shall be submitted to the Commission for approval under Section 252(e) within 14 days after the issuance of the Arbitrators's Report, in the case of arbitrated agreements, or, in the case of negotiated agreements, within 30 days after the execution of the agreement. The 14 day deadline may be extended by the Commission for good cause. The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) as including the approval process.

2. Requests for approval shall be filed with the Secretary of the Commission in the manner provided for in WAC 480-09-120. In addition, the request for approval shall be served on all parties who have requested service (List available from the Commission Records Center. See Section II.A.2 of the Interpretive and Policy Statement) by delivery on the day of filing. The service rules of the Commission set forth in WAC 480-09-120 and 420 apply except as modified in this interpretive order or by the Commission or arbitrator. Unless filed jointly by all parties, the request for approval and any accompanying materials should be served on the other signatories by delivery on the day of filing.

3. A request for approval shall include the documentation set out in this paragraph. The materials can be filed jointly or separately by the parties to the agreement, but should all be filed by the 14-day deadline set out in paragraph 1 above.

B. Negotiated Agreements

a. A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified, including a statement as to why the agreement does not discriminate against non-party carriers, is consistent with the public interest, convenience, and necessity, and is consistent with applicable state law requirements, including Commission interconnection orders.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. A proposed form of order containing findings and conclusions.

C. Arbitrated Agreements

a. A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified; and containing a separate

("Interpretive and Policy Statement").

explanation of the manner in which the agreement meets each of the applicable specific requirements of Sections 251 and 252, including the FCC regulations thereunder, and applicable state requirements, including Commission interconnection orders. The "request for approval" brief may reference or incorporate previously filed briefs or memoranda. Copies should be attached to the extent necessary for the convenience of the Commission.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. Complete and specific information to enable the Commission to make the determinations required by Section 252(d) regarding pricing standards, including but not limited to supporting information for (1) the cost basis for rates for interconnection and network elements and the profit component of the proposed rate; (2) transport and termination charges; and (3) wholesale prices.

d. A proposed form of order containing findings and conclusions.

D. Combination Agreements (Arbitrated/Negotiated)

a. Any agreement containing both arbitrated and negotiated provisions shall include the foregoing materials as appropriate, depending on whether a provision is negotiated or arbitrated. The memorandum should clearly identify which sections were negotiated and which arbitrated.

b. A proposed form of order is required, as above.

4. Any filing not containing the required materials will be rejected and must be refiled when complete. The statutory time lines will be deemed not to begin until a request has been properly filed.

E. Confidentiality

1. Requests for approval and accompanying documentation are subject to the Washington public disclosure law, including the availability of protective orders. The Commission interprets 47 U.S.C. § 252(h) to require that the entire agreement approved by the Commission must be made available for public inspection and copying. For this reason, the Commission will ordinarily expect that proposed agreements submitted with a request for approval will not be entitled to confidential treatment.

2. If a party or parties wishes protection for appendices or other materials accompanying a request for approval, the party shall obtain a resolution of the confidentiality issues, including a request for a protective order and the necessary signatures (Exhibits A or B to standard protective order) prior to filing the request for approval itself with the Commission.

F. Approval Procedure

1. The request will be assigned to Commission Staff for review and presentation of a recommendation at the Commission public meeting. The Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act. Commission Staff who participated in the mediation process for the agreement will not be assigned to review the agreement.

2. Any person wishing to comment on the request for approval may do so by filing written comments with the Commission no later than 10 days after date of request for approval. Comments shall be served on all parties to the agreement under review. Parties to the agreement file written responses to comments within 7 days of service.

3. The request for approval will be considered at a public meeting of the Commission. Any person may appear at the public meeting to comment on the request for approval. The Commission may in its discretion set the matter for consideration at a special public meeting.

4. The Commission will enter an order, containing findings and conclusions, approving or rejecting the interconnection agreement within 30 days of request for approval in the case of arbitrated agreements, or within 90 days in the case of negotiated agreements. Agreements containing both arbitrated and negotiated provisions will be treated as arbitrated agreements subject to the 30 day approval deadline specified in the Act.

G. Fees and Costs

1. Each party shall be responsible for bearing its own fees and costs. Each party shall pay any fees imposed by Commission rule or statute.

DATED at Olympia, Washington and effective this 22nd day of March
1999.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



LAWRENCE J. BERG
Arbitrator