

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an)
Interconnection Agreement Between) DOCKET NO. UT-003006
))
SPRINT COMMUNICATIONS COMPANY,) FOURTH SUPPLEMENTAL ORDER
L.P.,))
)) ARBITRATORS' REPORT AND
and) DECISION
))
U S WEST COMMUNICATIONS, INC.,))
))
Pursuant to 47 U.S.C. Section 252.)
.....)

I. BACKGROUND

A. Procedural History

- 1 On August 5, 1999, Sprint Communications Company, L.P. (Sprint), requested to negotiate an interconnection agreement (Sprint Agreement) with U S WEST Communications, Inc. (U S WEST). On January 11, 2000, Sprint filed with the Commission a petition for arbitration pursuant to Section 252(b)(1) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.* (Act).
- 2 Sprint is a national provider of long distance interexchange service and is authorized to provide switched and non-switched local exchange and long distance services as a competitive local exchange carrier (CLEC) in Washington. U S WEST is an incumbent local exchange company (ILEC), as defined in 47 U.S.C. § 251(h) and provides local exchange and other telecommunications services throughout the state of Washington. The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251-252 and RCW 80.36.610. The majority of terms in the Sprint Agreement have been negotiated and agreed to by the parties.
- 3 The Commission entered an Order on Arbitration Procedure and appointed Arbitrators on January 21, 2000, and entered a Protective Order on March 6, 2000. U S WEST filed its response on February 7, 2000. On February 16, 2000, a prehearing conference was held to establish a procedural schedule, and on February 28, 2000, Sprint and U S WEST requested the Commission to extend the statutory deadline for resolving arbitration disputes pursuant to the Act.
- 4 Sprint and U S WEST waived all rights either party may have to challenge or otherwise seek to overturn or nullify as untimely the Commission's resolution of the disputed issues between the parties in this arbitration as long as the Commission enters

its order resolving those issues on or before July 5, 2000. The parties further agreed that their waiver, stipulation, and agreement apply in any legal forum whatsoever. A prehearing conference order was entered on March 9, 2000, and the request for extension was granted. Both parties filed direct testimony on April 26, 2000, and rebuttal testimony on May 10, 2000.

5 On May 23, 2000, the parties filed an agreement to cancel the evidentiary hearing scheduled in this arbitration and to have all disputed issues decided based on hearing transcripts from other U S WEST/Sprint arbitrations, written testimony, exhibits, and a stipulation of fact. Pursuant to the agreement, both parties filed surrebuttal testimony on May 26, 2000, and post-hearing briefs on June 2, 2000.

B. Appearances

6 Eric Heath, in-house counsel to Sprint, appeared on behalf of his company, and John Devaney and Mary Rose Hughes, Perkins Coie, LLP, Washington, D.C., appeared for U S WEST. Lisa Anderl, in-house counsel to U S WEST, also is on the company's brief.

C. Unresolved Issues

7 U S WEST and Sprint have engaged in largely successful negotiations toward an interconnection agreement. The parties continued to negotiate during the arbitration proceeding and submitted late in the process a final unresolved issues matrix which presented the issues, positions of the parties, and each party's proposed contract language. This Arbitrators' Report and Decision (Arbitrators' Report) follows a similar sequence in presenting decisions.

8 The legal and factual issues resolved in the Arbitrators' Report are:

- 9 1. Should the Parties Be Required to Make Reciprocal Compensation Payments for Terminating ISP-Bound Traffic? (Issue No. 1; Provision (C)2.3.4.1.3)
- 10 2. Should U S WEST's Obligation to Provide Combinations of UNEs Be Limited to Those Currently Combined and Provided to a Particular Customer at a Particular Location? (Issue No. 2; Provision (E)1.16)
- 11 3. Should U S WEST Be Required to Combine Unbundled Network Elements That Are Not Currently Combined Within its Network? (Issue No. 3; Provision (E)1.16.3).

12 4. Should U S WEST Be Permitted to Impose Nonrecurring Charges for Each
Element to Recover its Costs When Providing Combined UNEs? (Issue No. 10;
Provision (E)1.16.5.2)

13 Issues 2 and 3 address U S WEST's obligation to combine network elements and are
discussed together below.

D. Resolution of Disputes and Contract Language Issue

14 As a general matter, the Arbitrators' Report is limited to the disputed issues presented
for arbitration. 47 U.S.C. § 252(b)(4). The parties were required to present proposed
contract language on all disputed issues to the extent possible, and the Arbitrators
reserved the discretion to either adopt or disregard proposed contract language in
making decisions. Each decision by the Arbitrators is qualified by discussion of the
issue. Contract language adopted pursuant to arbitration remains subject to
Commission approval. 47 U.S.C. § 252(e).

15 This Arbitrators' Report is issued in compliance with the procedural requirements of
the Act, and it resolves all issues that were submitted to the Commission for
arbitration by the parties. The parties are directed to resolve all other existing issues
consistent with the Arbitrators' decisions. If the parties are unable to submit a
complete interconnection agreement due to an unresolved issue they must notify the
Commission in writing prior to the time for filing the Agreement. At the conclusion of
this Report, the Arbitrators address procedures for review to be followed prior to
entry of a Commission order approving an interconnection agreement between the
parties.

E. Admission of Exhibits

16 U S WEST and Sprint stipulated to the admission of prefiled and submitted exhibits
into the record in this case. All those exhibits are admitted and are listed in
Appendix A.

II. MEMORANDUM

A. BACKGROUND AND RELATED PROCEEDINGS

1. The Internet

17 The emergence of the Internet as a communications medium used daily by millions of
individual and business subscribers raises novel issues for telecommunications

providers and regulators. A brief description is provided here as background to our later discussion of reciprocal compensation for ISP-bound traffic.

18 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.

19 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 the ISP’s 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 and a modem to connect to the ISP facility. The ISP then converts the analog signal from its customers modems into digital data “packets” that are switched through the Internet and its host computers and servers. Digital information is transmitted back to the ISP, converted into modem-analog form and delivered to the ISP’s customer using the open switched telephone circuit.

2. The Commission’s Generic Cost and Pricing Proceeding

20 As part of its effort to fully implement the Act, the Commission entered an Order on October 23, 1996, initiating a generic proceeding to review cost and pricing issues for interconnection, unbundled network elements, transport and termination, and resale. The Commission stated that rates adopted in the then-pending arbitration proceedings would be interim rates, until permanent rates were established. The Generic

Proceeding is underway.¹ Accordingly, the prices approved in every interconnection agreement are interim rates and are subject to the Commission's decisions in the Generic Proceeding.

3. FCC Proceedings Implementing the Telecommunications Act of 1996

a. The FCC's Declaratory Ruling

21 On February 26, 1999, the Federal Communications Commission (FCC) entered its order on the issue of inter-carrier compensation for ISP-bound traffic (Declaratory Ruling).² 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, CLECs, such as Sprint, contend that this is local traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the Act. ILECs, such as U S WEST, typically 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.

Recently, the United States Court of Appeals for the District of Columbia Circuit vacated the FCC's Declaratory Ruling. *Bell Atlantic Telephone Companies v. FCC*, No. 991094, 2000 WL 273383 (D.C. Cir. March 24, 2000). The Court concluded that the FCC has not provided a satisfactory explanation why the termination of calls to ISPs does not constitute local telecommunications traffic, and remanded the case.

¹ *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket Nos. UT-960369 (general), UT-960370 (U S WEST), and UT-960371(GTE); Order Instituting Investigations; Order of Consolidation; and Notice of Prehearing Conference, November 21, 1996 (Generic Proceeding). On April 16, 1998, the Commission entered an interlocutory order determining costs in Phase I of the Generic Proceeding. The Commission held hearings in October and December 1998 to set permanent prices (8th Supplemental Order). On August 30, 1999, and May 19, 2000, the Commission entered orders determining prices in Phase II of the proceeding and requiring parties to make compliance filings (17th Supplemental Order and 25th Supplemental Order, respectively). On May 4, 2000, the Commission entered its Phase III Order setting deaveraged loop pricing for different geographic zones (24th Supplemental Order). On February 17, 2000, the Commission opened Docket No. UT-003013 to further investigate the cost and pricing of collocation, OSS, line sharing, and to consider all other unresolved cost and pricing issues deferred by the Commission in Docket No. UT-960369, et al.

² *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), *vacated and remanded, Bell Atlantic Tel. Cos. v. FCC*, No. 99-1094, 2000 WL 273383 (D.C. Cir. March 24, 2000).

Even though the FCC's classification of ISP-bound traffic has been vacated, other provisions of the Declaratory Ruling remain pertinent to this proceeding.

22 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.³ The FCC also reiterated that state commission authority over interconnection agreements pursuant to Section 252 of the Act extends to both interstate and intrastate matters, and the mere fact that ISP-bound traffic is considered largely interstate for jurisdictional purposes does not necessarily remove it from the Section 251/252 negotiation and arbitration process.⁴

23 The FCC issued a Notice of Proposed Rulemaking simultaneous with its 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:

[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.

24 The Commission must fulfill its statutory obligation under Section 252 of the Act to resolve the disputes presented by Sprint and U S WEST 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 determination pending completion of the FCC's rulemaking, the Commission's Generic Proceeding, and any subsequent judicial review.

³ Declaratory Ruling, ¶¶ 21-22.

⁴ Declaratory Ruling, ¶ 25, citing the *Local Interconnection Order*, 11 FCC Rcd at 15544.

b. The FCC's combination of unbundled network elements rule

- 25 Among the rules initially vacated by the Eighth Circuit Court of Appeals was the UNE combination rule, 47 C.F.R. § 51.315(c)-(f). Later, the court also vacated 47 C.F.R. §51.315(b).⁵ Rule 315(b) prohibits an ILEC from separating requested network elements that the incumbent currently combines. Rule 315(c)-(f) requires an ILEC to perform the functions necessary to combine other elements upon request. The Eighth Circuit invalidated Rule 315(b) using the same rationale it employed to invalidate Rule 315(c)-(f). The United State Supreme Court granted writs of certiorari for review of the Eighth Circuit Court decision. Unlike the Eighth Circuit's decision with regard to Rule 315(b), however, its decision with regards to Rule 315(c)-(f) was not before the Supreme Court.
- 26 The Supreme Court rejected arguments by ILECs that the Telecommunications Act requires CLECs to combine network elements for themselves and reversed the Eighth Circuit's decision that Rule 315(b) violates the Act.⁶ Although the Eighth Circuit Court presently is considering the validity of Rule 315(c)-(f), the U. S. Court of Appeals for the Ninth Circuit recently considered the Supreme Court's decision regarding UNE combinations in two separate decisions (the MFS and MCI cases).⁷
- 27 In the MFS case, U S WEST appealed the decision of the Commission approving the MFS Agreement and the decision of the federal district court granting summary judgment on all issues to the Commission and MFS, including U S WEST's obligation to combine UNEs. The Ninth Circuit Court relied on the Telecommunications Act and the Supreme Court's interpretation of the Act, and affirmed the provision in the MFS Agreement that broadly requires U S WEST to combine elements at the request of MFS.⁸ Most recently, U S WEST's petition for writ of certiorari in the MFS case was denied by the United States Supreme Court.
- 28 In the MCI case, the Ninth Circuit Court again held that the Supreme Court's interpretation of the Act makes "absolutely clear" that a state requirement that U S

⁵ *Iowa Util. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997)

⁶ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 736-738, 142 L. Ed. 834 (1999) (*AT&T Corp.*).

⁷ *U S WEST Communications v. MFS Intelenet, Inc., et al.*, 193 F.3d 1112 (9th Cir. 1999) (MFS case) and *MCI Telecommunications Corporation, et al., v. U S WEST Communications, et al.*, 2000 U S App. LEXIS 3139 (March 2, 2000) (MCImetro case), respectively.

⁸ *Id.* at 1121.

WEST combine network elements consistent with Rule 315(c)-(f) does not violate the Act. The Ninth Circuit Court decisions are discussed in greater detail below.

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

29 Two central goals of the Telecommunications Act are the nondiscriminatory treatment of carriers and the promotion of competition.⁹ The Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between ILECs and CLECs, which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act. 47 U.S.C. § 251(c)(1). Each interconnection agreement must be submitted to the Commission for approval, whether the agreement was negotiated or arbitrated, in whole or in part. 47 U.S.C. § 252(d).

5. Standards for Arbitration

30 The Telecommunications Act provides that in arbitrating interconnection agreements, 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).

B. ISSUES, DISCUSSION, AND DECISIONS

1. Should the Parties Be Required to Make Reciprocal Compensation Payments for Terminating ISP-Bound Traffic? (Issue No. 1; Provision (C)2.3.4.1.3)

a. Introduction.

31 The FCC's February 26, 1999 Declaratory Ruling on the issue of inter-carrier compensation for ISP-bound traffic concluded, among other things, that ISP-bound traffic is jurisdictionally mixed, but predominately interstate. The FCC declared further, however, that its jurisdictional conclusion did not, in itself, determine whether reciprocal compensation is required in any particular instance.¹⁰ The FCC stated that it had not established a rule governing inter-carrier compensation for ISP-bound traffic,¹¹

⁹ Local Competition Order, 11 FCC Rcd at 16139, ¶ 1315.

¹⁰ Declaratory Ruling, ¶¶ 19-20.

¹¹ Declaratory Ruling, ¶¶ 20-21.

and though it simultaneously issued a Notice of Proposed Rulemaking for that purpose, it also said that:

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

Declaratory Ruling, ¶ 28.

- 32 Less than three months after the FCC's Declaratory Ruling, the Commission took up the question of inter-carrier compensation for ISP-bound traffic in connection with the arbitration of an interconnection agreement between ILEC GTE Northwest Incorporated and CLEC Electric Lightwave, Inc. The Commission determined that a minute-of-use reciprocal compensation mechanism is appropriate on an interim basis between these carriers pending completion of the FCC's rulemaking.¹²
- 33 Thirteen months after the FCC's Declaratory Ruling, and before the FCC issued a final rule on the subject of inter-carrier compensation for ISP-bound traffic, the United States Court of Appeals vacated and remanded the Declaratory Ruling.¹³ In the meantime, the Commission opened Docket No. UT-003013, in which the subject of reciprocal compensation is one of several issues that will be considered on a generic basis. Thus, assuming the FCC revisits the subject of inter-carrier compensation for ISP-bound traffic in the near term, as various public statements suggest, that will be in tandem with the Commission's generic consideration of the same issue.
- 34 The initiation of generic processes at the state and federal levels does not relieve us of the responsibility to go forward here and now under Section 252 of the Act. Under the time constraints that apply to this case, we must decide by July 5, 2000, whether U S WEST should be required to pay reciprocal compensation to Sprint for ISP-bound traffic and, if so, what should be the level of that compensation. Given the ongoing generic processes described above, however, and considering also that U S WEST and Sprint have stipulated in this proceeding that "the costs, recovery mechanism, and permanent rate associated with the delivery of Internet traffic to ISPs should be determined by the WUTC in Docket No. UT-003013," we again are faced with the need only for an interim solution pending the outcomes of the more thoroughgoing generic processes at the state and federal levels. Based on our discussion below, we determine that U S WEST is required to pay reciprocal

¹² *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc., and GTE Northwest Incorporated*, Order Approving Negotiated and Arbitrated Interconnection Agreement, Docket No. UT-980370 (May 12, 1999).

¹³ *Bell Atlantic Tel. Cos. v. FCC*, *supra* note 2.

compensation for ISP-bound traffic at the same rate for terminating local traffic, pending further developments of industry-wide significance.

b. Discussion and Decision.

35 On the basis of the FCC’s now vacated Declaratory Ruling, and on the basis of its witnesses’ extensive and detailed testimony regarding the nature and technical attributes of ISP-bound traffic, U S WEST urges us to agree that ISP-bound traffic is primarily interstate in nature. U S WEST argues that if we make such a finding, it follows that U S WEST should not be required to pay reciprocal compensation for ISP-bound traffic. USW Brief at 7.

36 U S WEST also acknowledges, however, that even before the FCC’s Declaratory Ruling was vacated, the FCC did not preclude states from requiring payment of reciprocal compensation for ISP traffic. USW Brief at 5. On the other hand, as U S WEST argues, the Declaratory Ruling allowed states to “not require the payment of reciprocal compensation for this traffic and to adopt another compensation method.” *Id.* at 6 (quoting Declaratory Ruling at ¶ 26). The FCC said, in effect, that whether ISP-bound traffic is primarily interstate in nature simply does not control state commission determinations in arbitration proceedings under the Act. Thus, even had the FCC’s Declaratory Ruling not been vacated, there would be no need for us to opine one way or the other about the interstate or local nature of ISP-bound traffic. Even if we accept, *arguendo*, that such traffic is primarily interstate, what follows is not the conclusion that U S WEST urges upon us, but rather the conclusion that the Commission remains free to either require payment of reciprocal compensation for ISP-bound traffic, or not, as it deems appropriate given other considerations.

37 It is in this context that we consider Sprint’s argument that focuses on the Commission’s prior orders on the subject of reciprocal compensation for ISP-bound traffic. As Sprint points out, “[t]his Commission has considered the issue of reciprocal compensation for ISP traffic both generically and in specific interconnection arbitration and enforcement proceedings, and has established that reciprocal compensation is due for such traffic.” Sprint Brief at 3. The Commission discussed the subject generically in its 17th Supplemental Order in Docket Nos. UT-960369, 960370, and 960371.¹⁴ There the Commission concluded:

This Commission has authority to resolve this issue pending a FCC rule requiring one outcome or another. The FCC currently exempts ISP-bound traffic from access charges [footnote omitted], so the

¹⁴ *In the Matter of the Pricing Proceeding for Interconnection, Unbundled Element, Transport and Termination, and Resale, et al.*, Docket Nos. UT-960369, 960370, and 960371.

resolution most consistent with existing FCC rules is to require reciprocal compensation. The FCC's conclusion that ISP-bound traffic is primarily interstate is not dispositive because neither the Act nor FCC rules preclude interstate traffic from reciprocal compensation. The Commission concludes that ISP-bound traffic should remain subject to reciprocal compensation.

17th Supplemental Order at ¶ 54.

- 38 As Sprint also relates, in interconnection agreement arbitration and enforcement proceedings the Commission uniformly has adhered to the view that ISP-bound traffic should be subject to reciprocal compensation. Sprint Brief at 4 (citing *Worldcom, Inc., f/k/a MFS Intelenet of Washington, Inc. v. GTE Northwest, Incorporated*, UT-980338; *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc. and GTE Northwest Incorporated*, Docket No. UT-980370; and *Nextlink Washington v. U S West Communications, Inc.*, Docket No. UT-990340). Sprint argues that U S WEST has failed to reconcile its position here with our prior determinations that are contrary to U S WEST's advocacy. We agree with Sprint. In fact, U S WEST urges us to determine a result that is squarely at odds with what we have required or approved on an interim basis for other carriers, pending a generic determination by the Commission or a preclusive federal rule or statute.
- 39 In agreeing with Sprint that we should adhere to the Commission's prior analyses and determinations on this subject, we do not ignore the substantial body of evidence and argument that U S WEST presents to support its conclusion that ISP-bound traffic is primarily interstate in nature. The Commission previously has found that such traffic does have technical characteristics that are analogous, at least, to traditional interstate telephone service. In connection with that, however, the Commission also has found that ISP-bound traffic exhibits technical characteristics that are analogous to traditional local telephone service. Hence, in a prior order, the Commission accepted the characterization from its Arbitrator's report that ISP-bound traffic is "local-interstate." *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc., and GTE Northwest, Incorporated*, Order Approving Negotiated and Arbitrated Interconnection Agreement, Docket No. UT-980370 (May 12, 1999). That is, the Commission has recognized that such traffic has attributes of both interstate and local service and does not fit neatly into either category; in some ways, ISP-bound traffic is nothing less than unique. The Commission may address this fact in its ongoing generic proceeding in Docket No. UT-003013.

40 We also are mindful of U S WEST's policy arguments. In light of our agreement with the Parties' stipulation in this proceeding that our determination should be interim in nature given the Commission's and the FCC's generic proceedings, however, it would be inappropriate to consider these arguments in detail or to attempt to resolve them in the context of this arbitration proceeding. Briefly, U S WEST's policy arguments are as follows:

- 41 1. Application of reciprocal compensation to Internet traffic conflicts with the basic economic principle of cost causation (*i.e.*, that those who cause a cost to be incurred should pay that cost);
- 42 2. Subjecting ISP traffic to reciprocal compensation creates an implicit subsidy for ISP traffic and the Internet subscribers who generate that traffic;
- 43 3. Sprint has other means to recover the costs it incurs delivering Internet traffic to ISPs;
- 44 4. The application of reciprocal compensation to Internet traffic raises significant issues of distributive justice; and
- 45 5. Sprint's claim that it will be placed at a competitive disadvantage if it does not receive reciprocal compensation for Internet traffic ignores the economic impacts that paying reciprocal compensation imposes on U S WEST.

46 These policy arguments, and the evidence U S WEST puts forth in connection with them, suggest that absent preclusive action at the federal level, the Commission should consider whether a new model for compensation is required to address fully the unique attributes of ISP-bound traffic. The generic proceedings in Docket No. UT-003013 may be the appropriate vehicle for that discussion and determination. We thus decline U S WEST's implicit invitation to lead that policy discussion through this Arbitrators' Report and Decision. Instead, for the time being, we will adhere to the Commission's current policy of requiring reciprocal compensation for ISP-bound traffic.

47 This brings us to the question of what should be the level of reciprocal compensation for ISP-bound traffic. In prior cases, the Commission has adopted the minute-of-use methodology and set the per minute rate for delivering ISP-bound calls equal to that established to terminate traditional local voice calls. The so-called voice rate, however, actually is based on the average cost to originate and terminate traffic including not only traditional voice calls, but also other forms of traffic that could not be distinguished from such calls, including calls that connect to Internet service providers. In part, this was done because the Commission had no data from the

industry to support consideration of alternative models that might capture systemic differences between traditional local voice calls and ISP-bound traffic.

48 In this proceeding, U S WEST presents substantial evidence that it now may be possible to distinguish between voice calls and high-speed modem traffic. U S WEST asserts that with some refinement, the systems it has implemented may be able to achieve an even greater level of granularity and distinguish between calls to the Internet via ISPs and other types of high-speed modem traffic such as calls from telecommuters to local area networks operated by their employers. USW Brief at 14-16. U S WEST argues that since this is the case, it is both possible and desirable that the Commission “should establish a separate rate that recognizes the differences in cost between Internet and voice traffic.” USW Brief at 16. Sprint disputes the value that this evidence may have in terms of contributing to the development of a separate reciprocal compensation rate for ISP-bound traffic. Sprint Brief at 20-25. Again in deference to the pending generic proceedings, and consistent with the Parties’ stipulation in this proceeding, we are not required to consider this evidence in detail or resolve the Parties’ arguments with respect to it. That is, we agree with the Parties’ stipulation that “the costs, recovery mechanism, and permanent rate associated with the delivery of Internet traffic to ISPs should be determined by the WUTC in Docket No. UT-003013.”

49 It follows that we need to make only very limited findings and conclusions here. It is undisputed that Sprint incurs costs when it delivers to one of its ISP customers a dial-up modem connection call initiated on U S WEST’s system. To that extent, the situation is identical to that considered in detail just over a year ago when the Commission arbitrated this issue for Electric Lightwave, Inc., and GTE. In that arbitration proceeding, the Commission required payment of reciprocal compensation, at least on an interim basis. As related in the Commission’s Order in the Electric Lightwave arbitration:

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.

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc., and GTE Northwest Incorporated, supra note 12, at 7.

50 The Commission approved and adopted the Arbitrator's findings and conclusions, as quoted above. There is nothing in the law currently that precludes the same result here, nor have the equitable considerations changed. Accordingly, we determine here that, on an interim basis, the parties should be required to pay each other reciprocal compensation for ISP-bound traffic on a minute-of-use basis at the same rate they compensate each other for terminating local traffic.

2. Should U S WEST's Obligation to Provide Combinations of UNEs Be Limited to Those Currently Combined and Provided to a Particular Customer at a Particular Location? (Issue No. 2; Provision (E)1.16)

3. Should U S WEST Be Required to Combine UNEs That Are Not Currently Combined Within its Network? (Issue No. 3; Provision (E)1.16.3)

a. Introduction.

51 The unresolved issues regarding combinations of UNEs are interrelated and their joint discussion and decision is necessary. Arguments by the parties regarding unresolved Issue Nos. 2 and 3 (also referred to as Issues B and C) are based on whether U S WEST is required to combine UNEs consistent with Rule 315(c)-(f).

52 This is not the first case in which U S WEST's obligation to combine UNEs has been discussed. In a recent arbitration proceeding between U S WEST and American Telephone Technology, Inc. (ATTI), the Commission discussed the Ninth Circuit Court decision in the MFS case, and ordered U S WEST to perform the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from U S WEST's network, or in combination with network elements possessed by ATTI.¹⁵ The Ninth Circuit Court held that under the Supreme Court's rationale in *AT&T Corp.* the requirement that U S WEST combine unbundled network elements at MFS's request must be affirmed.

53 In *AT&T Corp.*, the Supreme Court held that the statutory language requiring ILECs to "provide such unbundled network elements in a manner that allows requesting

¹⁵ *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between American Telephone Technology, Inc., and U S WEST Communications, Inc.*, Commission Order Adopting Arbitrator's Report, In Part; Modifying Report, In Part; and Approving Negotiated and Arbitrated Interconnection Agreement, Docket No. UT-990385 (February 2, 2000) (ATTI case).

carriers to combine such elements in order to provide such telecommunications service” indicates that network elements may be leased in discrete parts, but “does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form.” *AT&T Corp.*, 119 S. Ct. at 737. The Ninth Circuit Court held that it necessarily follows from *AT&T Corp.* that requiring U S WEST to combine unbundled network elements is not inconsistent with the Act.¹⁶

54 The Ninth Circuit Court also stated:

Although the Supreme Court did not directly review the Eighth Circuit’s invalidation of 47 C.F.R. §51.315(c)-(f), its interpretation of 47 U.S.C. §251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court’s reading of the Act despite the Eighth Circuit’s prior invalidation of the nearly identical FCC regulation.¹⁷

55 Likewise, the Commission’s Order in the ATTI case affirms that we must follow the Ninth Circuit Court’s decision. U S WEST’s petition for writ of certiorari to review the decision in the MFS case has been denied, and the Ninth Circuit Court’s MFS decision is final and binding.

56 Subsequent to the Commission’s Order in the ATTI case, the Ninth Circuit Court issued its decision in *MCI v. U S WEST*. In that case, The Commission approved an interconnection agreement that also required U S WEST to combine separate network elements at MCImetro’s request. The Ninth Circuit Court noted that the Eighth Circuit’s decision to vacate FCC Rule 315(c)-(f) still stands but, in light of the Supreme Court’s *AT&T Corp.* decision, the Eighth Circuit’s decision merely signifies that the Act does not currently mandate a provision requiring combination. The Ninth Circuit Court held that the Supreme Court’s interpretation of the Act makes “absolutely clear” that a provision requiring UNE combinations is not inconsistent with the Act.

b. Discussion and Decision.

57 Sprint seeks Commission approval of contract provisions consistent with FCC Rule 315 in its entirety. U S WEST argues that only Rule 315(b) is legally effective, and that Rule 315(b) only requires that U S WEST provide combinations of UNEs corresponding to finished services which are being offered by U S WEST to a

¹⁶ *U S WEST v. MFS* at 1121.

¹⁷ *Id.*

particular customer at the time Sprint orders such UNEs for that same customer at that same location. In other words, U S WEST argues that its obligation to combine UNEs only arises when a customer seeks to change its local service provider from U S WEST to Sprint, and that the only UNEs required to be provided in combination are those in place for the customer at the time of the requested change. U S WEST Brief at 18.

- 58 Sprint argues that under the relevant law in the Ninth Circuit, the Act requires U S WEST to provide combinations of UNEs in its network to requesting carriers without reference to whether a given combination actually exists for the end user that is the subject of the service request. Sprint Brief at 31-32.
- 59 U S WEST also argues that Sprint's proposed language is more expansive than language previously approved by the Commission. Sprint's proposed language here would require U S WEST to combine UNEs in any manner, provided that the UNE combination is technically feasible and would not impair the ability of other carriers to obtain access to UNEs or to interconnect with U S WEST. U S WEST Brief at 23-24. Sprint's proposed language is taken nearly verbatim from FCC Rule 315(c).
- 60 The Commission consistently has required U S WEST to perform the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from U S WEST's network, or with network elements possessed by requesting carriers. U S WEST's arguments that the Commission should deviate from its prior rulings are unpersuasive. Further, U S WEST's definition of the phrase "currently combines" is wholly inconsistent with prior Commission orders.
- 61 U S WEST's argument that Sprint's proposed language is more expansive than language previously approved by the Commission is erroneous and misinterprets prior Commission orders. In addition to the requirement that U S WEST perform the functions necessary to combine requested UNEs in any technically feasible manner, the Commission also has required U S WEST to combine UNEs ordinarily combined in its network in the manner they are typically combined. This second requirement does not limit U S WEST's obligation to combine any network elements in any manner, rather it prohibits U S WEST from imposing different standards when combining network elements for other carriers than those it employs for itself.
- 62 The parties are required to incorporate language into their interconnection agreement that is consistent with FCC Rule 315 in its entirety. Further, U S WEST may not impose different standards when combining network elements for other carriers than those it employs for itself.

4. Should U S WEST Be Permitted to Impose Nonrecurring Charges for Each Element to Recover its Costs When Providing Combined UNEs? (Issue No. 10; Provision (E)1.16.5.2)

a. Introduction.

63 Section 252(d)(1) of the Act provides that interconnection and network element charges shall be (i) based on provisioning costs, (ii) nondiscriminatory, and (iii) may include a reasonable profit. The Commission consistently has required that requesting carriers pay for the functions necessary to combine requested UNEs. Further, Rule 315(b) requires that U S WEST not separate requested network elements that it currently combines.

b. Discussion and Decision.

64 U S WEST proposes to recover costs incurred in providing UNE combinations through nonrecurring charges on a per element basis, including pre-existing UNE combinations. U S WEST Brief at 25-26. U S WEST argues that it incurs operational and systems costs to provide pre-existing UNE combinations, such as costs to changes to its billing system, to re-tag central office circuits, and to change records to facilitate the UNE provisioning.

65 Sprint acknowledges that U S WEST will incur costs for billing system changes but argues that nonrecurring charges on a per element basis results in payment for costs not incurred. Sprint believes that the only legitimate work performed by U S WEST when combining network elements is labor, and that U S WEST already recovers its labor costs when providing elements that are currently combined in its network. Sprint Brief at 38-39. A typical scenario would be where a U S WEST customer requests to change its local service provider to Sprint, but its service otherwise remains unchanged. In that situation, Sprint argues that the only new cost incurred by U S WEST would be a record change or administrative cost to switch combined elements to Sprint.

66 It is unnecessary for the Commission to review and approve each nonrecurring charge proposed by U S WEST. U S WEST is entitled to recover costs incurred in combining UNEs at the request of another carrier or providing pre-existing combinations. However, there is insufficient evidence in the record to support U S WEST's position that the cost it incurs when providing network elements separately is the same as the cost incurred when providing combined network elements.

67 U S WEST is not entitled to a separate nonrecurring charge on a per element basis, but is entitled to a just and reasonable rate for combining UNEs, including the

provision of pre-existing combinations, based on actual work performed. Further disagreement between the parties regarding specific nonrecurring rates should be resolved pursuant to dispute resolution provisions in their agreement or the Commission's process for enforcing interconnection agreements, WAC 480-09-530.

68 The Commission also is considering nonrecurring charges in its new generic proceeding, Docket No. UT-003013. Both Sprint and U S WEST are parties to that case and have participated in conferences to identify specific issues to be addressed, and either party may raise relevant disputes in the new generic proceeding.

C. IMPLEMENTATION SCHEDULE

69 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 preparing an agreement for submission to the Commission for approval, the parties may include an implementation schedule. In this case the parties did not submit specific alternative implementation schedules. Specific provisions to the agreement, however, may contain implementation time-lines. The parties must implement the agreement according to the schedule provided in its provisions, and in accordance with the Telecommunications Act, the applicable FCC Rules, and the orders of this Commission.

D. CONCLUSION

70 The foregoing resolution of the disputed issues in this matter meets the requirements of 47 U.S.C. § 252(c). The parties are directed to submit an interconnection agreement to the Commission for approval pursuant to the following requirements.

1. Petitions for Review and Requests for Approval

71 The parties may petition for Commission review of the Arbitrators' Report and Decision. Petitions for review must be in the form of a brief or memorandum, and must state all legal and factual bases in support of arguments that the Arbitrators' Report should be modified.

72 The parties also must file a request that the Commission approve negotiated terms, arbitrated terms for which review is not requested, and terms requested pursuant to Section 252(i) which are not disputed. Parties filing a petition for review must present their request for approval in the same pleading.

73 Parties that request approval of negotiated terms must summarize those provisions of the agreement, and state why those terms do not discriminate against other carriers,

are consistent with the public interest, convenience, and necessity, and are consistent with applicable state law requirements, including relevant Commission orders.

74 Parties that request approval of arbitrated terms must summarize those provisions of the agreement, and state how the agreement meets each of the applicable requirements of Sections 251 and 252, including relevant FCC regulations, and applicable state requirements, including relevant Commission orders.

75 The petition for review and/or request for approval may reference or incorporate previously filed briefs or memoranda. Copies of relevant portions of any such briefs or memoranda must for the convenience of the Commission. The parties are not required to file a proposed form of order.

a. Petitions for review and/or requests for approval must be filed on or before July 19, 2000.

76 Petitions for review must be filed with the Secretary of the Commission in the manner provided in WAC 480-09-120. In addition, petitions must be served on all parties who have requested service (the list is available from the Commission Records Center). The Commission's service rules set forth in WAC 480-09-120 and -420 apply except as modified by the Commission or Arbitrators. Unless filed jointly, post-hearing pleadings and any accompanying materials should be served on the opposing party by delivery on the day of filing.

77 The parties must file an original and six (6) copies of all post-hearing briefs or pleadings. **All post-hearing briefs or pleadings also must be filed on diskette formatted in WordPerfect version 5.1 through 8.0.** Attachments or exhibits to pleadings and briefs that do not pre-exist in an electronic format do not need to be converted.

2. Filing of an Interconnection Agreement for Approval

78 The parties must file a complete copy of the signed interconnection agreement, including any attachments or appendices, incorporating all negotiated terms, all terms requested pursuant to Section 252(i), and all terms intended to fully implement arbitrated decisions. The Agreement must clearly identify arbitrated terms by bold font style and identify by footnote the arbitrated issue that relates to the text. **The Agreement must be filed at the same time as requests for approval on July 19, 2000.**

3. Approval Procedure

- 79 The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) to include the approval process. Further, the Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act.¹⁸
- 80 Any person who wishes to comment on a request for approval may do so by filing written comments with the Commission no later than 10 days after the date of request for approval. Comments must be served on all parties to the Agreement, and parties to the Agreement may file written responses to comments within 7 days of service.
- 81 The requests for approval will be considered by the Commission at an open public meeting. Any person may appear at the public meeting to comment on the requests. The Commission may in its discretion set the matter for consideration at a special public meeting.
- 82 The Commission will enter an order containing findings and conclusions, approving or rejecting the Agreement, within 30 days of its being filed. Agreements containing both negotiated and arbitrated provisions are treated as arbitrated agreements subject to the 30-day approval deadline specified in the Telecommunications Act.

DATED at Olympia, Washington, and effective this day of July 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

LAWRENCE J. BERG
Arbitrator

DENNIS J. MOSS
Arbitrator

¹⁸ *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996*, Docket No. UT-960269, In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996 (June 28, 1996).

APPENDIX A

EXHIBIT LIST

Docket No. UT -003006

NUMBER	WITNESS	A/R	DATE	DESCRIPTION
101-T	Larry Brotherson – USW	A		Redacted -- Direct Testimony -- 4/26/00
C-101-T	“	A		Confidential -- Direct Testimony – 4/26/00
102	“	A		LBB-1; ISP Traffic Analogous to Access Traffic
C-103	“	A		LBB-2; Final Report on ISP Identification Project
C-104	“	A		LBB-3; Modem Identifier Design Documentation
C-105	“	A		LBB-4; WA USW/CLEC Traffic Exchange Data
106	“	A		LBB-5; Imbalance of Traffic
107-RT	“	A		Rebuttal Testimony -- 5/10/00
108-ST	“	A		Redacted -- Surrebuttal Testimony -- 5/26/00
C-108-ST	“	A		Confidential -- Surrebuttal Testimony -- 5/26/00
111-T	Dr. William Taylor – USW	A		Direct Testimony -- 4/26/00
112	“	A		WET-1; Vitae
113-RT	“	A		Rebuttal Testimony – 5/10/00
114	“	A		WET-1; Colorado PUC Arb. Decision – Sprint/USW
115-ST	“	A		Surrebuttal Testimony – 5/26/00

EXHIBIT LIST

Docket No. UT-003006

NUMBER	WITNESS	A/R	DATE	DESCRIPTION
121-T	Joseph Craig – USW	A		Redacted -- Direct Testimony -- 4/26/00
C-121-T	“	A		Confidential -- Direct Testimony – 4/26/00
122	“	A		Exhibit A; Local Call Diagram
123	“	A		Exhibit B; Long Distance Call Diagram
124	“	A		Exhibit C; HP Website and Access7 System Search
125-RT	“	A		Rebuttal Testimony – 5/10/00
131-T	Perry W. Hooks – USW	A		Direct Testimony – 4/26/00
132-RT	“	A		Rebuttal Testimony – 5/10/00
C-141	U S WEST	A		Confidential Sprint Response to USW DR 29 in AZ

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EXHIBIT LIST**Docket No. UT-003006**

NUMBER	WITNESS	A/ R	DATE	DESCRIPTION
201-T	David E. Stahly - Sprint	A		Direct Testimony - 4/26/00
202-RT	"	A		Redacted -- Rebuttal Testimony - 5/10/00
C- 202-RT	"	A		Confidential -- Rebuttal Testimony - 5/10/00
203-ST	"	A		Redacted -- Surrebuttal Testimony - 5/26/00
C- 203-ST	"	A		Confidential -- Surrebuttal Testimony - 5/26/00
204	Sprint	A		USW Response to Data Request -- SPR 02-047
205	"	A		USW Response to Data Request -- SPR 02-050
206	"	A		USW Response to Data Request -- SPR 02-052
207	"	A		USW Response to Data Request -- SPR 02-053
208	"	A		USW Response to Data Request -- SPR 02-054
209	"	A		USW Response to Data Request -- SPR 02-064

210	"	A		USW Response to Data Request -- SPR 02-067
211	"	A		USW Response to Data Request -- SPR 02-068
212	"	A		USW Response to Data Request -- SPR 02-069
301	Joint Submission	A		Transcript - Colorado PUC Docket No. 00B-011T
C-302	"	A		Confidential Portion of CO PUC Transcript (Exh. 301)
303	"	A		Transcript - Arizona CC Docket No. T-02432B-00-0026
C-304	"	A		Confidential Portion of AZ CC Transcript (Exh. 303)