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FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of: MCImetro ACCESS TRANSMISSION SERVICES, INC. to Compel Payment of Reciprocal Compensation,	)	
Complainant,	)	
v.	)	Case No. 00-587-TP-CSS
CINCINNATI BELL TELEPHONE COMPANY,	)	
Respondent.	)	

REPLY BRIEF
OF
MCIMmetro ACCESS TRANSMISSION SERVICES, INC.

I. INTRODUCTION

On October 12, 2000, the parties to this complaint case filed initial briefs. In accordance with the schedule established by the Attorney Examiner, MCImetro Access Transmission Services, Inc. (MCIm) hereby submits its reply to the arguments advanced by respondent Cincinnati Bell Telephone Company (CBT) in its initial brief.

CBT has argued that the facts of this case, principles of contract interpretation, and FCC precedent support a finding that traffic destined to ISPs is not subject to reciprocal compensation payments. CBT is incorrect. The facts of this case, principles of contract interpretation, and Commission precedent compel a finding that CBT has wrongfully withheld reciprocal compensation payments in violation of the terms of the "first generation" interconnection agreement ("agreement") between the parties.

II. FACTS

A. The Operative Facts Regarding The Contract Negotiations

As MCIm noted in its initial brief, many of the basic facts surrounding the negotiation and arbitration of the agreement are not at issue, an observation confirmed by a review of CBT's initial brief. It is undisputed that MCIm presented a proposed agreement to CBT on January 30, 1997, that this agreement was based on the Ameritech/MCIm agreement developed in the Ameritech/MCIm arbitration, Case No. 96-888-TP-ARB, and that CBT returned a "redlined" version of that proposal to MCIm for the purpose of identifying disputed language. MCIm, in turn, used CBT's "redlined" contract to identify arbitration issues for the purposes of its petition in Case No. 97-152-TP-ARB, filed on February 10, 1997. CBT, in its March 7, 1997 response to the MCIm petition, identified an additional 55 issues as disputed issues that MCIm had not listed in its petition. Neither party raised the issue of whether ISP traffic would be included in the definition of "local traffic" subject to reciprocal compensation at any point in the negotiation arbitration process[1] (CBT Brief, 2-3).

Not surprisingly, however, some pivotal facts discussed in MCIm's initial brief are missing from the CBT brief. In particular, while CBT claims that it was totally unaware of MCIm's position on the treatment of ISP traffic for reciprocal compensation purposes, CBT fails to mention that, during the negotiation period, it became aware, *or should have been aware*, of MCIm's position on the subject (Tr. 113). Yet CBT never mentioned the subject or raised it as an arbitration issue, even after it knew, or should have known, MCIm's position (Tr. 101).

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[1] This period was identified by CBT witness Kritzer as February 10, 1997 through April 16, 1997 (Tr. 91).

In response to this undisputed record evidence, CBT seeks to explain its failure to raise this issue by taking the position that it was somehow foreclosed from raising new issues for arbitration after the MCIm petition was filed on February 10, 1997 (CBT Brief, 3), notwithstanding that the Attorney Examiner had, in fact, permitted CBT to raise additional issues in its response in its March 7, 1997 response. CBT cites the March 26, 1997 entry issued by the Commission in Case No. 97-152-TP-ARB, *et al.*, in support of its argument that it would have been foreclosed from raising the ISP issue during the arbitration process. However, that entry certainly does not support such a conclusion. The Commission specifically stated that :

> A review of the additional issues [raised by CBT in its response] indicates that they are *specifically related to the differences of opinion that the parties have for various terms of their interconnection agreement.* The Commission finds that these additional issues, although not specifically set forth in MCI's petition, relate to language that the parties seek to include or exclude from the interconnection agreement. *The overriding goal of the arbitration proceeding is to establish the parties' interconnection agreement by making determinations for disputed issues.*

(Entry, ¶ 7)

Not only is CBT's claim that additional issues could not be identified during the arbitration hearing process not supported by the entry on which CBT relies, it is plainly inconsistent with the Commission's practice in other arbitrations. In Case No. 96-888-TP-ARB, Attorney Examiner Petrucci permitted both MCIm and Ameritech to submit additional issues well after the initial petition and response had been filed through supplemental oral and written testimony (October 28, 1996 Tr. Vol. 2, 139-143).[2] Clearly, CBT could have made a similar request to add a

[2] The Attorney Examiner did disallow one piece of testimony offered by MCI, but permitted numerous additional issues to be added during the hearing process.

absolutely no bearing on the issue at hand, which is whether reciprocal compensation is due to MCIm under the terms of the agreement for calls placed to ISPs by CBT customers. The Attorney Examiner correctly recognized, both in ruling on CBT's motion to compel and at hearing, that MCIm's network configuration and how an ISP handles traffic once it has been switched from MCIm (or any other CLEC) is irrelevant to the issues raised by the complaint.

As to whether the particular traffic for which MCIm is seeking reciprocal compensation is terminated "locally," it is undisputed on the record that such traffic is terminated within the CBT local calling area to UUNET, a WorldCom, Inc. subsidiary served by MCIm's local network. UUNET provides mostly wholesale services to ISPs, which, in turn, provide Internet access to customers in CBT's local service area (CBT Brief, 6). MCIm serves UUNET on its local switched network in the same manner that all CLECs serve ISP providers. As explained by MCIm witness Hussey, MCIm hands the traffic to UUNET at MICm's local switch located in Cincinnati:

> Q. (By Mr. Hart) Okay. Do you know how the traffic that is directed to UUNET gets from the MCI Cincinnati switch to the UUNET network?
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> A. (By Mr. Hussey) My understanding is UUNET has modems on-at the same switch location to take that traffic.
>
> * * *
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> ...I think that the equipment that UUNET uses to take that traffic wherever it's going to go is done right in Cincinnati at our switch location. So we have trunks come off of our drop side of the switch serving our customer who happens to be located in our own building.

(Tr. 70-71)

disputed issue to the list in Case No. 97-152-TP-ARB, especially since CBT became aware of the CLEC position, and hence MCIm's position, on the issue well before testimony was filed and the hearings commenced. Moreover, at paragraph 5 of the March 26, 1997, Entry in Case No. 97-152-TP-ARB, the Commission ordered the parties to include in their arbitration packages, due to be filed on April 2, 1997, a list of issues to be arbitrated if that list differed from the unresolved issues lists previously submitted with the petition and the response to petition. Obviously, the Commission considered the arbitration process to be fluid and contemplated that the list of issues to be presented to the arbitration panel for resolution could be updated until the close of the hearing process. Indeed, CBT witness Kritzer supports this interpretation with his comment that the parties continued to negotiate issues in the hearing room as testimony was taken (Tr. 91).

B. The Operative Facts Regarding The Termination of ISP Traffic.

The basis of CBT's refusal to pay reciprocal compensation on ISP traffic is CBT's theory that such calls do not "terminate" at an ISP's location but, rather, terminate on some distant Internet site which could be anywhere in the world. This, of course, is the misguided "one call" theory which, as discussed in more detail later in this brief, was rejected by the Commission in *MCImetro Access Transmission Services, Inc. v. Ameritech Ohio*, Case No. 97-1723-TP-CSS (the "Ameritech case") when advanced by Ameritech. However, during the hearing and on brief, CBT has gone beyond this legal argument and has attempted to create a cloud of suspicion surrounding the particular ISP traffic for which MCIm has requested reciprocal compensation payment. In discovery, CBT requested specific information about, *inter alia*, an ISP being served by MCIm, how MCIm configures its network to provide service to such ISP, and how the ISP receives and handles such traffic. This information, while perhaps interesting to CBT, has

The fact that MCIm refused to respond in discovery to questions regarding UUNET's ISP customers, and the fact that Mr. Hussey did not know the location of these customers, has no relevance whatsoever to this proceeding, as the Attorney Examiner correctly ruled several times during the hearing (Tr. 20-23, 71-73).[3] The record is clear that UUNET is served directly by the MCIm local switch (Tr. 30). CBT presented no contrary evidence showing that the traffic for which MCIm is seeking reciprocal compensation in this case does not physically terminate with UUNET at MCIm's switch location in Cincinnati, nor did CBT present any evidence that the manner in which MCIm provides service to UUNET on its local network in Cincinnati is any different than the manner in which MCIm provides service to ISPs in other calling areas, nor any different than the manner in which any CLEC provides local service to any ISP on the CLEC's network anywhere in the country.

III. ARGUMENT

A. Principles of Contract Interpretation Support the Conclusion That The Definition of Local Traffic Includes ISP Bound Traffic.

By focusing on the premise that CBT believed ISP traffic to be excluded from the definition of "local traffic" during the negotiation and contract period, and ignoring most of the operative record evidence discussed above and in MCIm's initial brief, CBT attempts to "bootstrap" itself into an argument that the parties had no meeting of the minds on the issue.

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[3] CBT attempted to place into evidence a map purporting to be UUNET's network (marked for identification purposes as CBT Ex. 1). The Attorney Examiner sustained objections to any questions directed to Mr. Hussey regarding such document, and he also admitted it into evidence as proffered testimony only. CBT's reference, at page 8 of its brief, to Exhibit 1 as factual evidence is totally improper and should be disregarded.

CBT argues that this failure to reach a meeting of the minds, based on CBT's unilateral mistake in the matter, should cause the Commission to rescind or reform the reciprocal compensation provisions (CBT Brief, 11-14).

CBT's legal arguments and application of Ohio law to the facts presented by this case are completely erroneous. The correct principle of contract interpretation is the Restatement of Contracts §201(2) (1981) discussed by MCIm in its initial brief. That provision of the Restatement of Contracts is directly on point with respect to the different meanings attached to the reciprocal compensation language of the agreement:

> Where the parties have attached different meanings to a promise or agreement of a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
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> (a) that party did not know of any different meaning attached by the first party; or
>
> (b) that party had no reason to know of any different meaning attached by the other, and the other party had reason to know the meaning attached by the first party.

The court in *Maple Heights Teachers Assoc., et. al. v. Maple Heights Board of Education,* Cuyahoga County App. No. 44109, 1982 Ohio App. LEXIS 11316 at *15 (May 20, 1982) found that the meaning attached by the teachers' union to certain language in a collective bargaining agreement was the correct interpretation where the school board had reason to know of the meaning attached to the language by the teachers' union and did not make it known that it attached a different meaning to such language. The court of appeals noted that the disputed language had been advanced by the teachers' union and that:

> ...the fact that one negotiating party proposes language does suggest that the proffered terms are intended to advance that party's position. The source of the language does create an inference of its intended beneficiary. Standing alone the source of the proposed terms may not be sufficient to put the adverse party on notice that the terms have a particular meaning, but the proposals of an adverse party will ordinarily have some meaning favorable to the proponent. If it were otherwise, the proponent would not be likely to raise the issue.

(1982 LEXIS at *11-*12)

The same Restatement of Contracts section was relied upon by the Sixth Circuit court of appeals in *P.F. Manley v. Plasti-Line, Inc.*, 808 F.2d 468 (6th Cir., 1987), wherein the Court overturned summary judgment in favor of the defendant and remanded the case for further findings on the factual issue of whether the defendant had reason to know of the meaning attached to contractual language by the plaintiff in a dispute over a consulting contract. The Commission should rely on the Restatement standard to determine the intent of the parties in this case.

It is undisputed that MCIm proposed the draft agreement used by the parties as the basis for negotiations and arbitration. Thus, CBT should have been on notice that all sections of the agreement proposed by MCIm could have meanings which would be adverse to the interests of CBT. Indeed, the list of arbitration issues presented to the panel in Case No. 97-152-TP-ARB makes it clear that CBT attached adverse meanings to many of the sections proposed by MCIm. Even if CBT truly believed at the outset of negotiations on January 30, 1997 that MCIm agreed with its interpretation of "local traffic" as excluding ISP traffic, CBT was put on notice on March 24, 1997, that this belief was not correct. Yet CBT remained silent as the terms of the agreement were arbitrated. As in the case of the school board in *Maple Heights Teachers Association, supra*, once CBT was put on notice that the meaning attached by MCIm to the reciprocal

compensation language that MCIm had proposed was potentially adverse to CBT's interests, CBT was required to raise the issue. Having failed to do so, CBT cannot now be heard to complain that there was not a meeting of the minds.

The contract interpretation principles cited by CBT are not applicable to the factual situation herein, nor do such principles support CBT's position. At page 13 of its brief, CBT argues that a contract may be rescinded when a party makes a "unilateral mistake" which has "material effect" on the mistaken party, citing *Aviation Sales, Inc. v. Select Mobile Homes* (1988), 48 Ohio App. 3d 90. In that case, the seller of an airplane miscalculated the final amount of cash owed by the buyer of an airplane where the parties had negotiated all elements of the transaction, the seller had simply made a mathematical mistake, and the buyer was aware that the seller had made a mistake. The court found that the contract could be reformed based on equitable principles. Similarly, the factual situation in *Snedgar v. Midwestern Indemnity Company* (1988), 44 Ohio App. 3d 64 involved an insurance contract wherein the purchaser of the contract intended that the insurance would cover both business and personal use of an automobile, such intent had been expressed to the insurance company, and yet the policy was issued in the name of the business rather than the driver of the automobile and his family. The court in that case found, based on a body of insurance law and contract interpretation principles, that the insurance agreement could be reformed so that injuries sustained by a family member would be included under the terms of the agreement. *Rulli v. Fan Company* (1997), 79 Ohio St. 3d 374, is equally unhelpful to CBT. The Ohio Supreme Court held in that case that a settlement agreement should not be enforced by a trial court without holding an evidentiary hearing as to disputed language of the agreement (79 Ohio St. 3d at 377).

Indeed, the contract interpretation principle of "unilateral mistake" is not applicable at all to the present situation. However, if CBT did make a "mistake" with respect to the interpretation of the reciprocal compensation language of the agreement, it was a "mistake of law" and not a "mistake of fact." CBT has made it clear that its interpretation that "local traffic" for reciprocal compensation purposes did not include ISP traffic is based on pronouncements by the FCC with respect to such traffic.[4] That analysis proved to be faulty, which constitutes a mistake of law, not of fact.

Ohio law is clear that unilateral mistakes of law do not give rise to contract reformation or recission. The court in *Consol. Mgt., Inc. v. Hardee Marts, Inc.* (Cuyahoga Cty, 1996), 109 Ohio App.3d 185, concisely set out the doctrine of mistake of law in concluding that the contract under consideration would not be reformed to allow the return of payments made by a lessee:

> ... a 'mistake of law' happens when a person, having full knowledge of the facts comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of judgment on facts as they are real. 73 Ohio Jurisprudence 3d, supra, Section 74.
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> Money paid as a result of mistake of law is not recoverable, as recited by 73 Ohio Jurisprudence 3d, supra, at 295-298, Section 74.

(109 Ohio App. 3d at 189).

The fact that CBT has wrongfully withheld reciprocal compensation payments to MCIm, rather than making such payments and then seeking a refund, does not change the contract interpretation principle discussed by the court. CBT is not entitled to withhold payment, then

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[4] CBT discusses its legal interpretation of the term "local traffic" at numerous places in its brief. This particular statement is illustrative: "Mr. Hussey acknowledged that two parties can read the same FCC order and think it means two different things" (CBT Brief, 3). CBT came to a legal conclusion based on an FCC order.

claim that such payment is not owed due to a "mistake" in a legal interpretation of the agreement under which such payment is required.

CBT has presented no compelling evidence which would explain why, after being put on notice that MCIm considered ISP traffic to be local for reciprocal compensation purposes, the issue was never raised with MCIm or added to the list of issues included in its arbitration package for submission to the arbitration panel. In accordance with the Restatement of Contracts §202(2) and well-settled principles of contract interpretation, the Commission should conclude that MCIm's understanding of the meaning of "local traffic" to include ISP traffic is controlling under the circumstances of this case.

B. In Interpreting Identical Contract Language, the Commission Has Previously Determined That ISP Traffic Is Included Within the Definition of Local Traffic for Reciprocal Compensation Purposes.

CBT has taken a position identical to that taken by Ameritech in the ISP complaint cases by advancing the now familiar argument that the "plain language" of the agreement supports a finding that ISP traffic is "exchange access" traffic rather than "local traffic" (CBT Brief, 7-11). Arguing first that the definition of "local traffic" contained in the agreement is being used "out of context" by MCIm for the purposes of identifying traffic eligible for reciprocal compensation purposes -- an argument which has absolutely no support in the record -- CBT next posits that ISP traffic cannot be considered to be local because it does not "terminate locally," but rather originates with the end user customer and "terminates" not with the ISP but at some distant point on the Internet. Having thus concluded that ISP traffic is not local, CBT argues that such traffic must be "switched exchange access service" under Section 4.7.2 of the agreement, which is the only other category of traffic identified in the agreement. At page 10 of its brief, CBT advances

the theory that ISP traffic appears to "fit" within its tariff description of Feature Group A (FGA) access, a form of switched exchange access service, and therefore would not be eligible for reciprocal compensation payments.

This analysis has already been rejected by the Commission. Ameritech, at pages 20-22 of its initial brief in Case No. 97-1723-TP-CSS, made the same arguments, theorizing that:

> At the time that Ameritech Ohio negotiated its Interconnection Agreement with MCI there was a substantial body of law and regulatory practice that supported two important points. First, both Commission and federal precedents confirm that the jurisdictional character of a communication is based on an end-to-end analysis. Second, the federal precedents compel a conclusion that Internet communications are non-local in nature and that the carriage of such communications by LECs from the Internet end user's location to the ISP's POP is switched exchange access, not local, service.

The Commission disagreed with Ameritech, stating:

> A review of the interconnection agreement shows that the parties specifically identified the switched exchange access services, including Feature Group A, that were not subject to reciprocal compensation. Although Ameritech now argues that Feature Group A is analogous to ISP service (Ameritech Ex. 2A, at 18-20), its failure to include ISP service in the list of exchange services not subject to reciprocal compensation is an indication that Ameritech is attempting to rewrite the interconnection agreement to coincide with its position in this case. Had Ameritech truly believed that ISP traffic was exchange access traffic at the time the inter connection agreement was negotiated, Ameritech should have identified it as such.

(Order, October 14, 1998, at 7).

Like Ameritech, had CBT truly believed that ISP traffic was exchange access traffic similar to FGA, CBT should have included such a description in section 4.7.2 or requested that the definition of "Switched Exchange Service" contained in Schedule 1.2 be changed to

accommodate its understanding that ISP traffic was switched exchange access traffic not subject to reciprocal compensation.[5] The record is clear that CBT did nothing of the kind. CBT has raised no new issues in this case with its FGA argument that have not already been considered in the Ameritech case. Indeed, Ameritech used the *Ohio Direct Communications, Inc.* case (Case No. 95-819-TP-CSS) in the same manner that CBT has used the example of UUNET in an attempt to show that MCIm is merely handing off interstate traffic to another "carrier" to be transported out of the local serving area (Ameritech Brief in Case No. 97-1723-TP-CSS, 27-30). The Commission, at pages 7-8 of the above-cited Order, rejected Ameritech's analogy to the Ohio Direct case, and thus rejected any notion that ISP traffic is somehow "analogous" to FGA exchange access traffic.

Additionally, contrary to CBT's lengthy arguments at pages 14-27 of its brief, FCC decisions at the time of the negotiations do not support a finding by this Commission that ISP traffic was non-local for reciprocal compensation purposes. CBT has argued that FCC precedent at that time dictated that ISP traffic be considered to be interexchange traffic exempt from access charges (*MTS and WATS Market Structure,* Memorandum Opinion and Order, 97 FCC 2d 682 [1983]; *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 [1987]); that this precedent was affirmed by the FCC with its Declaratory Ruling (*In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for*

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[5] The definition of "switched exchange access service" in the agreement is the same as the definition in the MCIm/Ameritech agreement. A copy of the pertinent page from the CBT/MCIm interconnection agreement, containing the definition of "switched exchange access service," is attached hereto as Attachment A. Like the definition of "local traffic," CBT did not propose changes to this definition, nor was it placed on the list of arbitration issues.

ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68 [rel. Feb. 26, 1999]); and that the reversal and remand of the Declaratory Ruling by the D.C. Circuit Court of Appeals (*Bell Atlantic Tel. Cos. v. FCC,* 206 F3d. 1 [D.C. Cir. 2000]) (*Bell Atlantic*) has had no impact on the finding of the Declaratory Ruling that ISP traffic is not subject to reciprocal compensation.

MCIm has already responded to these arguments in its initial brief at pages 15-19, and would note that each of the above FCC rulings cited by CBT, with the exception of the Court of Appeals decision in *Bell Atlantic,* has been previously analyzed by the Commission in the Ameritech complaint cases and found to support the diametrically opposite position: that ISP traffic should be treated as local for reciprocal compensation purposes. CBT has presented the Commission with absolutely no reason to reconsider these decisions or to come to a different conclusion as the facts in this case surrounding the contract negotiations and the contract language are identical to the facts and contract language under consideration in the previous Ameritech complaint cases.

Indeed, the decision of the court in *Bell Atlantic* has strengthened the Commission's conclusion in the Ameritech cases that FCC precedent compelled a finding that ISP traffic was intended by the parties to be local traffic for reciprocal compensation. The FCC's holding, set forth in the Declaratory Ruling, that ISP traffic is "largely interstate in nature," has been reversed by the D.C. Circuit Court and remanded to the FCC. The Circuit Court rejected the FCC's end-to-end analysis of a call placed to an ISP provider, stating:

> However sound the end-to-end analysis may be for jurisdictional purposes, the [FCC] has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation.

(206 F 3d. at 19).

The D.C. Circuit Court began its discussion of the Declaratory Ruling by noting that Section 251(b)(5) of the Telecom Act creates the duty among local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications," but that by regulation the FCC has limited the scope of the reciprocal compensation requirement to "local telecommunications traffic." 47 CFR §51.701 (*id.*, 3). The court explained that in the Declaratory Ruling, the FCC concluded that Section 251(b)(5) does not impose reciprocal compensation on ILECs for ISP-bound traffic because, using an "end-to-end" analysis, the traffic was interstate. While admitting that an internet end user may communicate with multiple destination points, some of which could be intrastate, the FCC concluded that "a substantial portion of internet traffic involves accessing interstate or foreign websites." Declaratory Ruling, 14 FCC Rcd at 3701-02 (p. 18) (*id.*).

The D.C. Circuit Court immediately recognized that "arguments supporting the use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this context," yielding "intuitively backwards results" (*id.*, 14). The court noted that the FCC has historically used the end-to-end analysis when determining whether a particular communication is jurisdictionally interstate, but that "it has yet to provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs" (*id.* 13-14). Furthermore, the FCC failed to consider its own definition of "termination", namely "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." 47 CFR §51.701(d). The court stated that "calls to ISPs appear to fit this definition:

the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party'" (*id.*, 15). Because ISPs are "information service providers" rather than telecommunications carriers, the court agreed with WorldCom's arguments that ISPs are "no different from many businesses, such as 'pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies,' which use a variety of communication services to provide their goods or services to their customers. [citing Comments of WorldCom, Inc. at 7(July 17, 1997)]... The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, 'simply a communications-intensive business end user selling a product to other consumer and business end-users'. " (*id.*, 17-18).

The D.C. Circuit Court has made it clear that the "end-to-end" analysis, which led the FCC to the conclusion that ISP traffic was not local for reciprocal compensation purposes, is not a viable approach, and that, pursuant to the FCC's own definition of "termination," calls to ISPs terminate with the ISP. The court admonished the FCC that such calls appear to be no different than other local traffic. Thus, ISP-bound traffic is clearly subject to the federal reciprocal compensation requirement. It is important to note that the 5th Circuit has also joined the D.C. Circuit in determining that calls to ISPs terminate at the ISP in accordance with the FCC's own regulations. *Southwestern Bell Telephone Co. v. Pub. Utils. Comm.* 208 F. 3d 475, 483 (5th Cir. 2000).

MCIm will discuss in greater detail below the numerous commission and federal court decisions which support the Commission's finding in the Ameritech cases that ISP-bound traffic is subject to reciprocal compensation. Suffice it to say that CBT has presented no compelling arguments which should cause the Commission to reconsider its previous interpretation of prior FCC orders addressing the subject, including the Declaratory Ruling.

C. MCIm's Position That ISP-Bound Traffic is Subject to Reciprocal Compensation Pursuant to the Terms of the Agreement Is Amply Supported By Commission Decisions in Other Jurisdictions, By Federal Court Decisions, and By Industry Custom and Practice.

At page 8 of the October 14, 1998 Order in the Ameritech case, the Commission noted that "state commissions in at least 20 states have similarly held when interpreting interonncection agreements that ISP traffic is local." Since that time, additional state commissions have reached the same conclusion, and several commission decisions have been affirmed by the federal courts. Currently three federal courts of appeals, six federal district courts, and over 30 state utilities commissions have agreed that reciprocal compensation is due for calls to ISPs under interconnection agreements virtually identical to the one at issue here. *Southwestern Bell Tel. Co. v. Public Utils. Comm'n, supra*; *US West Communications v. MFS Intelenet,* 193 F.3d 1112, 1112-23 (9th Cir. 1999); *Illinois Bell Tel. Co. v. WorldCom Technologies,* 179 F.3d 566, 573-74 (7th Cir. 1999); *Southwestern Bell Tel. Co. v. Connect Communications Corp.,* 72 F. Supp. 2d 1043, 1050 (E.D. Ark. 1999); *Michigan Bell Tel. Co. v. MFS Intelenet*, No. 5:98-CV-18, 1999 U.S. Dist. LEXIS 12093 at *9, *11 (W.D. Mich. Aug. 2, 1999) ; *Illinois Bell Telephone Co. v. WorldCom Technologies*, No. 98 C 1925, 1998 WL 419493 at *13 (N.D. Ill. July 21, 1998); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, No. MO-98-CA-43, 1999 U.S. Dist. LEXIS 12938 at *46 (W.D. Texas June 16, 1998) aff'd 208 F.3d 475 (5th Cir. 2000) ; *cf. BellSouth Telecommunications v. ITC Deltacom Communications*, 62 F. Supp. 2d 1302, 1314 (M.D. Ala. 1999). The state commissions deeming calls to ISPs to be local calls include: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, [Ohio

with the Ameritech cases], Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. Only four state commissions have determined that reciprocal compensation ought not to apply to calls to ISPs.

In *Illinois Bell Tel. Co. v. WorldCom Technologies*, 179 F.3d 566 (7th Cir. 1999), the Seventh Circuit affirmed the Illinois state commission's order requiring reciprocal compensation for calls to ISPs under the parties' interconnection agreements. Like the Agreement at issue here, the agreements in *Illinois Bell* required reciprocal compensation for "Local Traffic" that "originates" and "terminates" within a local calling area. Id. at 572. In requiring reciprocal compensation to be paid for calls to ISPs under the agreements, the Seventh Circuit expressly noted that these agreements "were negotiated in the 'context of this Commission's [FCC's] longstanding policy of treating this [ISP-bound] traffic as local.'" Id. at 573 (quoting ISP Order ¶ 24). Several other federal courts have also acknowledged the established custom, usage, and practice of treating ISPs calls as local traffic that terminates at the ISP. *See, e.g., BellSouth Telecommunications v. ITC Deltacom Communications,* 62 F. Supp. 2d 1302, 1314 (M.D. Ala. 1999) (approving state commission finding regarding "prevailing local treatment afforded to ISP traffic by industry participants"); *Illinois Bell,* 1998 WL 419493 at *14 (relying on state commission finding that calls to ISPs terminate at the ISP under industry definition of "termination").

In addition, numerous state commissions have expressly recognized that, under firmly rooted industry custom, usage, and practice, calls to ISPs are local traffic that terminate at the ISP. That over thirty state commissions have found calls to ISPs to be local traffic entitled to reciprocal compensation is compelling evidence that under the telecommunications industry's

custom, usage, and practice, calls to ISPs terminate locally. *See, e.g. Southwestern Bell*, 208 F.3d at 487 (noting five state commission decisions as part of the "ample evidence" demonstrating that under industry practice, calls to ISPs terminate locally). State commissions across the country have been unequivocal that calls to ISPs terminate locally under industry custom, usage, and practice.[6] There is simply no reason for the Commission to split with this overwhelming and persuasive authority or to abandon the position taken in the Ameritech cases.

The same industry custom and practice factors that the Declaratory Ruling outlined and the Commission identified in the October 14, 1997, Order and May 5, 1999, Entry on Rehearing

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[6] *See, e.g.*, Order, *In the matter of MFS Intelenet's Complaint*, Case No. 8731, Order No. 75280 (Md. Pub. Serv. Comm'n. June 11, 1999) ("recognizing the prevailing local treatment of ISP traffic at the time the agreement was executed, we conclude that the regulatory and industry custom at that time dictated that ISP traffic be treated as local, and therefore, subject to reciprocal compensation"); Opinion and Order, *Petition for Declaratory Order of TCG Delaware Valley*, P-001256 (Penn. Pub. Util. Comm'n June 16, 1998); Motion of Commissioner D. Rolka (Voted on May 21, 1998) (construing "the industry understanding and practice involving reciprocal compensation for calls to ISPs . . . Local Traffic, eligible for reciprocal compensation, included traffic from [ILEC's] end-user customers to ISPs"); Order, *In re ICG's and ITC's Emergency Petitions for a Declaratory Ruling*, Docket 26619 (Alabama Public Service Commission, March 4, 1999) ("we note that at the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants including the F.C.C."); Findings and Conclusions, *In the Matter of the Application of the NPSC, on its own Motion, to conduct Investigation of the Interstate or Local Characteristics of ISP Traffic*, C-1960/PI-25 (Neb. Pub. Serv. Comm'n Dec. 7, 1999) ("At the time the agreements were entered into, ISP traffic was treated as local in virtually every respect by the industry and the FCC"); Order, *In the Matter of a Complaint against US West by Nextlink*, Docket No. 99-049-44 (Utah Pub. Serv. Comm'n Oct. 28, 1999) ("At the time the Initial Interconnection Agreement was entered into by the parties, the treatment of ISP bound traffic as local traffic was well established"); Opinion and Order, *In the Matter of Petition of Electric Lightwave to Establish Interconnection Agreement with US West*, Docket No. T-01051B-98-0689 (Ariz. Corp. Comm'n Nov. 2, 1999) ("it was typical in the industry at the time to consider ISP-bound traffic as terminating with the ESP"); Opinion, *In the Matter of Pacific Bell's Petition for Arbitration*, Application 98-11-024 (Cal. Pub. Util. Comm'n June 24, 1999) ("Pacific [Bell] proposes a definition of local calls [to exclude calls to ISPs] that is inconsistent with Commission and industry practice"); Order Modifying and Denying Application for Rehearing of Decision 98-10-057.

in the Ameritech cases were identified on the record of this case as well and addressed by MCIm at page 12 of its initial brief. CBT has disputed that these factors should compel a finding in this case that ISP traffic is subject to reciprocal compensation (CBT brief, 32-33), but has not disputed that virtually the same record evidence presented in the Ameritech case exists on this record as well. Instead, CBT has tried to divert the Commission's attention from examining those factors at all.

For example, with regard to the evidence that CBT charges its own customers local rates to place calls to ISPs, CBT makes the nonsensical statement that "MCIm does not suggest any basis upon which CBT would be entitled to charge its end users anything to place calls to ISPs" (*id.*, 33). Of course, this has nothing to do with of the Commission's inquiry into matters which would assist in determining the intent of the parties at the time of the negotiations. The reason that the manner in which an ILEC bills its own customers for ISP traffic is relevant to the inquiry is because if calls placed by end users to ISPs are traditionally treated by the ILECs as local calls (as CBT does), it would be logical for the parties to negotiations to assume that such calls would be treated as local for reciprocal compensation purposes. Similarly, the fact that the revenues and expenses generated by such calls are booked by the ILECs as local for FCC accounting purposes (as CBT does) would logically lead parties to the conclude that such calls would be treated as local for reciprocal compensation purposes. These factors support MCIm's reasonable understanding of the definition of "local traffic" in the agreement as including ISP traffic, and also support the fact that MCIm could not have known that CBT did not have the same understanding as to the treatment ISP traffic unless CBT raised this issue. This CBT failed to do.

CBT's other attempts to distinguish this case from the Ameritech complaint case are equally unpersuasive. Mr. Kritzer agreed that the only difference between the two sets of circumstances is that CBT never paid reciprocal compensation for ISP bound traffic to any CLECs (Tr. 117), and, although CBT repeats this fact throughout its brief, it has yet to come up with any other other factual differences. At page 30 of its brief, CBT also discusses MCIm witness Hussey's testimony that CBT insisted upon separate trunk groups for MCIm's ISP traffic (a "network overlay"), but admits that the purpose of such a requirement was to prevent ISP traffic from blocking voice traffic on the public switched network. MCIm would also note that CBT required the network overlay several years after the contract negotiation period, and, therefore, this information has little probative value for the purposes of determining the intent of the parties. There is no evidence that CBT required such separate trunking for ISP traffic at the time of the contract negotiations, or that CBT imposes such a requirement specifically for the purpose of tracking ISP traffic for billing purposes, or that CBT imposes such a requirement on all CLECs.

D. The Commission Should Order CBT To Pay MCIm the Reciprocal Compensation Amounts Currently Owed.

In the concluding sections of its brief, CBT again argues that due to the conflicting interpretations ascribed by the parties to the definition of "local traffic," the Commission should conclude that there was no meeting of the minds on the subject, that the entire issue should *now* be treated as an arbitration issue, and that the results of either the Commission's generic arbitration proceeding (Case No. 99-441-TP-ARB) or future FCC "generic" proceedings should be adopted as the outcome of this case (CBT brief, 35-37). Not only is CBT's argument based on the same incorrect application of Ohio contract law discussed in section III. A. above, but it is

grounded on a blatant misrepresentation of the facts in this case. CBT makes the totally misleading statements on page 36 that "had CBT been aware of MCIm's interpretation of Local Traffic, CBT would have sought arbitration on the reciprocal compensation provision. Enforcing the MCIm interpretation on CBT would deny CBT the opportunity to advocate its position on why reciprocal compensation should not be required on ISP traffic." It bears repeating that CBT became aware of the CLEC/MCIm position on the treatment of ISP traffic for reciprocal compensation purposes no later than March 24, 1997, when there was still ample opportunity for CBT to raise the issue in the CBT/MCIm arbitration.[7] The equities in this case lie with MCIm. CBT is the party that sat on its hands and made no effort to advise MCIm that it had a different interpretation of "local traffic." Recission or reformation of the agreement at this point would be patently unfair to MCIm, which obviously would have added the issue to the arbitration list had CBT voiced its understanding of the contract language at the relevant time.

Finally, CBT has argued that the Commission should not order the payment of the amount of reciprocal compensation payments owed to MCIm and sponsored by Mr. Hussey in his direct testimony. CBT has made this argument partially because Mr. Hussey did not have specific knowledge about whether the amounts being withheld CBT might include other billing disputes, but primarily because the amount calculated by MCIm is based on CBT's interim TELRIC rates and would be subject to later revision. If the Commission agrees with that position, then there is

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[7] Despite CBT's assertions that at the time negotiations commenced on January 30, 1997 it had no knowledge of the general CLEC/MCIm position that ISP traffic would be subject to reciprocal compensation and could lead to traffic imbalances, that precise issue was actually addressed by parties filing comments in the FCC's *Local Competition* docket, CC Docket 96-98, in 1996. Bell Atlantic argued against adoption of "bill and keep" by noting that, if reciprocal compensation rates were set too high, a "new entrant . . . will sign up customers whose calls are predominantly inbound, such as credit card authorization centers *and internet access providers.*" Reply Comments of Bell Atlantic, CC Docket No. 96-98 (May 30, 1996) at 21) (Attached hereto as Attachment B). CBT was a party to that FCC docket and filed comments and reply comments.

no point in CBT and MCIm exchanging payments for anything under the terms of the interconnection agreement because *all of CBT's TELRIC rates are interim and subject to true-up.* The Commission should simply order CBT to pay all reciprocal compensation amounts currently owed to MCIm for traffic terminated to ISP providers on its local network, including all past due amounts and all amounts owed on a going-forward basis. To the extent that there are other amounts in dispute which are not reciprocal compensation for ISP traffic, the parties can work to resolve these disputes as they would under any circumstances.

IV. CONCLUSION

CBT has been unable to provide any persuasive argument which should lead this Commission to a conclusion that the precedent established in the Ameritech case should not be applied here. Clearly the Commission did intend to make case-by-case determinations in complaint cases involving reciprocal compensation for ISP traffic. However, the operative facts of this proceeding and applicable legal analysis compel only one result, and that is that under the terms of the October 14, 1997 agreement between CBT and MCIm, CBT owes MCIm reciprocal compensation payments for traffic terminated to ISPs on MCIm's local network.

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ATTORNEYS FOR MCImetro ACCESS TRANSMISSION SERVICES, INC.

ATTACHMENT A

"Subsequent Billing Company" or **"SBC"** means the Local Exchange Carrier which provides a segment of transport or switching services in connection with Feature Group B or D switched access service. For purposes of this Agreement, CBT is initially the SBC.

"Switched Access Detail Usage Data" means a category 1101XX record as defined in the EMR Bellcore Practice BR 010-200-010.

"Switched Access Summary Usage Data" means a category 1150XX record as defined in the EMR Bellcore Practice BR 010-200-010.

"Switched Exchange Access Service" means the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access Services.

"Switching Center" serves as a Routing Point for Switched Exchange Access and Interconnection Access Service.

"Synchronous Optical Network" or **"SONET"** means an optical interface standard that allows inter-networking of transmission products from multiple vendors. The base rate is 51.84 Mbps (OC-1/STS-1) and higher rates are direct multiples of the base rate, up to 13.22 Gpbs.

"Technical Reference Schedule" is the list of technical references set forth in **Schedule 2.3**.

"Technically Feasible Point" is As Described in the Act.

"Telecommunications" is As Defined in the Act.

"Telecommunications Act" means the Telecommunications Act of 1996, and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission having authority to interpret the Act within its state of jurisdiction.

"Telecommunications Assistance Program" means any means-tested or subsidized Telecommunications Service offering, including Lifeline, that is offered only to a specific category of subscribers.

"Telecommunications Carrier" is As Defined in the Act.

"Telecommunications Service" is As Defined in the Act.

"Telephone Exchange Service" is As Defined in the Act.

"Telephone Relay Service" means a service provided to speech-and hearing-impaired callers that enables such callers to type a message into a telephone set equipped with a keypad

ATTACHMENT B

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

REPLY COMMENTS OF BELL ATLANTIC

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May 30, 1996

recovering their total costs would constitute an unauthorized taking of the LECs' property. Epstein Decl. at 2 (attached as Exh. 2). Nonetheless, the proponents of incremental cost pricing claim that there can be no taking when revenues are lost to competition. Perhaps so. But that is not the issue here. The issue here is whether government regulators can mandate prices that deny LECs the ability to recover costs they have actually incurred. They cannot. See, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299. 308 (1989); Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168, 1178 (D.C. Cir. 1987) (en banc)

VII. Prices for Reciprocal Compensation Cannot Be Set At Zero

The most blatant example of a plea for a government handout comes from those parties who urge the Commission to adopt a reciprocal compensation price of zero, which they euphemistically refer to as "bill and keep." A more appropriate name, however, would be "bilk and keep," since it will bilk the LECs' customers out of their money in order to subsidize entry by the likes of AT&T, MCI, and TCG. As we demonstrated in our opening comments, a regulatorily mandated price of zero -- by any name -- would violate the Act, the Constitution, and sound economic principles. See Bell Atlantic Br. at 40-42.

Indeed, the proponents of bill and keep appear to recognize the flaws in their proposal, and shift their focus here to arguing that the FCC should mandate bill and keep as an "interim" pricing mechanism, and as a default price when parties do not agree to a different rate. AT&T Br. at 69; MCI Br. at 52-53; TCG Br. at 83-84.[19] This will create a "threat point," so the

[19] Some parties also have suggested that the cost to terminate calls during off-peak periods is very low, and that setting prices at zero during those periods is close enough. In reality, while setting different peak and off-peak prices may make sense in some contexts, here it would merely encourage providers to find ways to modify their traffic flows -- and thereby effectively change the peak -- in order to take advantage of the zero rates while forcing LECs to incur peak load costs. Under these circumstances, peak and off-peak users must share the costs

argument goes, that will encourage LECs to negotiate reasonable rates for reciprocal compensation. But whether they are termed interim or permanent, mandatory bill and keep arrangements suffer from the same flaws, and simply cannot be squared with the Act's mandate that LECs be permitted to recover their costs absent a voluntary waiver of that right. Bell Atlantic Br. at 42. Nor will adopting bill and keep as a mandatory solution encourage parties to negotiate a reasonable price. It will do the opposite So long as competitors know that they can get a zero rate if they do not agree to something else, the result will be bill and keep in every case.

Moreover, the notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and internet access providers. The LEC would find itself writing large monthly checks to the new entrant. By the same token, setting rates too low will merely encourage new entrants to sign up customers whose calls are predominantly outbound, such as telephone solicitors. Ironically, under these circumstances, the LECs' current customers not only would subsidize entry by competitors, but would subsidize low rates for businesses they may well not want to hear from.

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of capacity, and it would be irrational to set a price of zero during any period. See Kahn, The Economics of Regulation, Vol. 1 at 91-93.

CONCLUSION

The Commission should adopt rules consistent with the foregoing.

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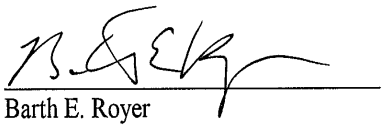
CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Reply Brief to the parties listed below by first class U.S. mail, postage prepaid, this 27th day of October 2000.



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