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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Investigation Into the Treatment of Reciprocal Compensation For Internet Service Provider Traffic	)))	**Case No. 99-941-TP-ARB**

BRIEF CONCERNING THE IMPACT ON THIS PROCEEDING OF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA RELATED TO INTERNET SERVICE PROVIDER TRAFFIC AND REQUEST FOR SUMMARY RELIEF

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INTRODUCTION

Petitioner, CoreComm Newco Inc. ("CoreComm"), and Intervenors, Focal Communications Corporation of Ohio ("Focal"), KMC Telecom III, Inc., and Level 3 Communications, L.L.C. ("Level 3"), submit this brief to address the impact of the decision in *Bell Atlantic Telephone Companies v. FCC*, ("*Bell Atlantic*")[1] on the scope of this proceeding to investigate the treatment of reciprocal compensation for Internet service provider ("ISP") traffic. As discussed more fully below, the decision in *Bell Atlantic* affirms the correctness of the previous conclusion of the Public Utilities Commission of Ohio (the "Commission") that ISP-bound traffic is local traffic subject to the same reciprocal compensation treatment as all other local traffic. Further, because ISP traffic is local traffic, both the Federal Communications Commission (the "FCC") regulations and the Commission's guidelines applicable to determining compensation for the transport and termination of local traffic – including the requirement that compensation be determined on the basis of the incumbent local exchange carrier's ("ILEC's") total element long-run incremental cost ("TELRIC") – govern here. Thus, the issues identified

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[1] *Bell Atlantic Tel. Companies v. FCC*, et al., No. 99-1094, 2000 WL 273383 (D.C. Cir. Mar. 24, 2000). (Attached EX. A).

by the Commission at the start of this proceeding can be resolved as a legal matter and in favor of the competitive local exchange carrier ("CLEC") petitioners and intervenors.

BACKGROUND

On or about August 12, 1999, Time Warner Telecom of Ohio, L.P. ("Time Warner"), ICG Telecom Group, Inc. ("ICG"), CoreComm and Telecommunications Resellers Association ("TRA") (collectively "Petitioners"), filed a Petition to Investigate and Decide the Treatment of Reciprocal Compensation for Internet Service Provider Traffic (the "Petition"). The Petitioners requested that the Commission conduct an open proceeding to investigate the treatment of ISP traffic in accordance with Chapter 4927, Revised Code, and R.C. 4905.04 through 4905.06. The Petitioners sought to avoid repeated disputes over reciprocal compensation for ISP-bound traffic by having the Commission adopt a uniform policy that would govern the issue for all interested parties. Level 3, KMC and Focal, among other CLECs, intervened in the proceeding.

On August 26, 1999, ILECs GTE North Incorporated ("GTE") and Ameritech Ohio ("Ameritech"), opposed the Petition, contending that the Commission lacked legal authority to impose inter-carrier compensation obligations for ISP-bound traffic through a generic proceeding. GTE alleged that the Commission had no jurisdiction to decide the issues raised in the Petition because the Telecommunications Act of 1996 (the "Act"), §§ 47 U.S.C. 251 and 252,[2] "leaves the negotiation of all issues relevant to local interconnection to private, bilateral, negotiations between CLECs and ILECs." (*See* GTE Opposition to Petition at 2.) According to GTE, the Commission has no authority to act, unless the parties to specific negotiations request it to serve as a neutral mediator under §252(a) or petition for arbitration under §252(b). (*See id.* at 2-3). Further, Ameritech argued that the Act does not provide the Commission with authority to

[2] The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§151, *et seq.*

determine inter-carrier compensation for ISP-bound traffic in a generic proceeding. (*See* Responsive Comments of Ameritech at 2). Ameritech also contends that ISP-bound traffic is interstate traffic that the Commission has no authority to regulate. (*See Id.* at 7). Both Ameritech and GTE also alleged that the Commission should defer ruling in a generic proceeding until the FCC completes its rulemaking proceeding on inter-carrier compensation for Internet-bound traffic, and until the United States Court of Appeals for the District of Columbia Circuit completed its review of the FCC's *Declaratory Ruling* [3] on ISP-bound traffic.

In the Commission's Entry of January 13, 2000, it rejected the arguments of GTE and Ameritech and found that "the FCC has held that Sections 251-253 of the 1996 Act afford state commissions substantial authority to regulate not only intrastate services but interstate services as well." (*See* Entry of Jan. 13, 2000 at 3). As the Commission noted, the FCC's decision was upheld by the United States Supreme Court in *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).[4] (*Id.*) The Commission then determined that it would conduct the investigation as an arbitration under the guidelines for mediation and arbitration set forth in Case No. 96-463-TP-UNC (463 guidelines), *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996* (Entry July 18, 1996). (Id. at 4).

Subsequently, on February 3, 2000, a conference was held at which time the parties agreed to engage in mediation. The meditation began on February 15, 2000, but the parties were unsuccessful in reaching agreement. By Entry of March 15, 2000, the Commission set a

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[3] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Proposed Rulemaking in Docket No. 99-68, 14 FCC Rcd. 3689 (1999) (the "*Declaratory Ruling*").

[4] The Commission also found that state law conferred jurisdiction on it to conduct the generic investigation under §§4905.05 and 4905.06, Revised Code, §4905.04(A), Revised Code, and 4905.31, Revised Code.

schedule for further proceedings with a hearing to commence on April 17, 2000. The Entry also identified each of the issues to be addressed in the proceeding as follows:

(a) Discuss the extent of the Commission's jurisdiction to establish the terms and conditions of service regarding compensation for dial-up internet service provider (ISP) traffic? Examine the Commission's jurisdiction to investigate compensation for dial-up ISP traffic in light of pending proceedings at the Federal Communications Commission (FCC) on similar issues? Discuss whether any compensation mechanism developed through this proceeding should terminate at the time the FCC issues an order in its pending proceeding? If so, should the compensation mechanism developed in this docket terminate at the time the FCC renders its decision or await the issuance of a final appealable decision on the issue?

(b) Is it possible to separate dial-up ISP traffic from other types of traffic? If so, explain how. If not, are there reasonable alternatives to actual identification of dial-up ISP traffic? Should the Commission also consider separating other types of traffic that have similar call characteristics as dial-up ISP calls and treat this one subset of calls differently from other locally dialed traffic? Is such a distinction between traffic legally permitted?

(c) Identify the cost elements that contribute to the overall cost of a dial-up ISP call. Do those cost elements vary in any manner from other locally dialed traffic? Does the cost of a dial-up internet call vary depending upon the network configuration of the carrier originating/terminating the call? Explain.

(d) What compensation methodology or mechanism do local exchange carriers utilize today to compensate each other for the exchange of local, non-ISP traffic? Does the originating local exchange carrier compensate the terminating local exchange carrier for completing local, non-ISP calls today? Explain whether or not identical compensation arrangements should be utilized to compensate local exchange carriers for completing a local, dial-up non-ISP call and a local, dial-up ISP call? What is the appropriate compensation mechanism (i.e., reciprocal compensation, bill and keep, or some other compensation mechanism)? Explain the workings of the selected methodology. Should the Commission develop a true-up mechanism that reconciles any compensation mechanism this Commission develops with any compensation mechanism developed by the FCC?

(e) Explain the policy implications and the competitive incentives that exist with each proposed compensation arrangement for providing dial-up ISP traffic.

A discovery deadline of April 3, 2000 was set at a subsequent prehearing conference held on March 17, 2000. Later that same day, Ameritech, GTE and Cincinnati Bell Telephone Company ("CBT") served extensive discovery on each CLEC, requesting information concerning the CLEC's cost of terminating ISP-bound traffic, revenues, network architectures and marketing plans. Each CLEC objected to most of the discovery as not relevant to the instant proceeding. On March 24, 2000, the D.C. Circuit decided the petitions for review of the FCC's *Declaratory Ruling* in *Bell Atlantic.* The D.C. Circuit vacated the FCC's *Declaratory Ruling* and remanded the case for further consideration.[5] In light of the issuance of this important decision, various CLECs filed a motion with the Commission seeking an order modifying the procedural schedule to permit the parties to brief the issue of the impact of the opinion on the issues in this proceeding, or alternatively, for summary judgment in favor of the CLECs. On April 3, 2000, in a telephone conference, the attorney examiner suspended the procedural schedule and ordered briefing of the issue of the impact of the D.C. Circuit decision on the issues previously established in the March 15, 2000 Entry. The attorney examiner's decision was memorialized in an Entry issued on April 6, 2000. The procedural schedule has been stayed and all deadlines cancelled indefinitely.

DISCUSSION

A. The *Bell Atlantic* Decision Reaffirms the Commission's Previous Conclusion that ISP-bound Traffic Should be Treated Like All Other Local Traffic.

The Court of Appeals vacatur of the FCC's ISP order and its analysis and criticisms of that decision, lead to the inevitable conclusion that ISP-bound traffic is to be treated as all other local traffic for reciprocal compensation purposes. The most obvious impact of the decision is that it removes the *Declaratory Ruling* as authority for the ILECs' proposition that ISP-bound

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[5] *See Bell Atlantic* at 8.

traffic is not entitled to reciprocal compensation treatment under 251(b)(5) of the Act, and secondly, it provides significant guidance as to how ISP traffic should be treated for reciprocal compensation purposes. The D.C. Circuit's analysis strongly supports the Commission's previous conclusion that ISP-bound traffic should be treated as local traffic for purposes of reciprocal compensation. In order to understand the full import of the D.C. Circuit's decision to this proceeding, it is necessary to view the decision in light of the issues that were presented to the D.C. Circuit by the parties.

The CLEC petitioner and intervenors in *Bell Atlantic* sought review of the FCC's conclusion in the *Declaratory Ruling* that calls to ISPs are not telephone exchange service and thus, not subject to reciprocal compensation under §251(b)(5) of the Act. In turn, the ILEC petitioners and intervenors challenged the FCC's finding that state commissions could still conclude that ISP-bound traffic is subject to reciprocal compensation, despite the FCC's finding that such traffic was not subject to reciprocal compensation under §251(b)(5). Neither side challenged the FCC's jurisdictional analysis of ISP-bound traffic as interstate. In addressing these issues, the Court was persuaded by the arguments of the CLEC petitioner and intervenors, and it made a number of significant findings that impact this case.

First, the Court determined that the FCC erred when it failed to provide an adequate explanation of why the end-to-end analysis that it used to determine the *jurisdictional* nature of ISP traffic as interstate is relevant to the question of whether ISP-bound traffic is local for purposes of compensation under §251(b)(5) of the Act. Indeed, the court went so far as to indicate that this analysis is incorrect and the conclusions derived from that analysis incorrect as well. The Court stated:

> There is no dispute that the Commission has historically been justified in relying on this method [the end-to-end analysis] when

> determining whether a particular communication is jurisdictionally interstate. But 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.[6]

Thus, the Court criticized the logic of the FCC's analysis, and went on to suggest the appropriate analysis and conclusions.

In that regard, the Court noted that the FCC should have considered the CLEC petitioner and intervenor's argument regarding how local traffic should be defined. The CLEC petitioner and intervenors argued that the FCC's own regulations and decisions define local traffic in a manner that includes ISP-bound calls.[7] Under 47 C.F.R. §51.701(b)(1), telecommunications traffic is defined as local if it, "originates and terminates within a local service area." In turn, in its Local Competition Order, the FCC defines "termination" as "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."[8] As the Court noted,

> *"[c]alls 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'."*[9]

The Court indicated that the FCC conveniently avoided reaching the inevitable conclusion that ISP-bound calls qualify as local traffic by analyzing the communication on an end-to-end basis.[10] It also noted that the cases cited by the FCC to support its analysis were distinguishable and not

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6 *Id.* at 5. (emphasis added).

7 *Id.*

8 *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd 15499, 16015 ¶1040, *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.,* 119 S.Ct. 721 (1999)("Local Competition Order").

9 *Bell Atlantic* at 5. (emphasis added).

supportive. Thus, absent some further rationale, the D.C. Circuit concluded that ISP-bound traffic fall within §251(b)(5) of the Act.[11]

As further grounds for vacating the decision, the Court noted that while conceding on appeal that under the Act traffic falls into two categories, "exchange access," and "exchange service," the FCC failed to provide an adequate explanation of why ISP traffic is "exchange access" rather than "exchange service." Indeed, the Court seemed persuaded by the argument of the CLEC petitioner and intervenors that calls to ISPs do not fit within the statutory definition of "exchange access" because ISPs do not connect to the network for the purpose of originating or terminating telephone toll services, but for the purpose of providing information services. [12]

All in all, the Court's analysis leads to but one conclusion --- ISP-bound traffic qualifies as local traffic because the traffic "terminates" at the ISP and it fits "within the local call model of two collaborating LECs, [instead of] the long distance model of a long distance carrier collaborating with two LECs."[13] This is consistent with this Commission's pre-*Declaratory Ruling* decisions in which it concluded that ISP traffic is not analogous to interexchange traffic, ISPs are end users of telecommunication services, and local calls to ISPs are separate and distinct from the information services provided by the ISP over the packet-switched network.[14]

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10 *Id.* at 5

11 *Id.*

12 *See id.* at 8.

13 *See Bell Atlantic* at 4-5; Local Competition Order at 16013 ¶1034.

14 *See In the Matter of the Complaint of Time Warner Communications of Ohio, L.P. v. Ameritech Ohio*, No. 98-308-TP-CSS, at 8-9 (P.U.C. Ohio October 14, 1998); *In the Matter of the Complaint of ICG Telecom Group, Inc. v. Ameritech Ohio,* Case No. 97-1557-TP CSS, at 10 (P.U.C. Ohio Aug. 27, 1998). As such there is no reason to consider separating these calls from other local calls, even if that were possible or practical.

B. Every Federal Court to Consider the Issue of The Treatment of ISP-Bound Traffic On the Merits Has Upheld the Finding That ISP-bound Traffic is Subject to Reciprocal Compensation

There is overwhelming support for a determination by this Commission that ISP-bound traffic is to be considered like all other local traffic for reciprocal compensation purposes. Each of the ten federal courts, including three United States Courts of Appeals, that have reviewed the decisions of various state commissions on the merits have refused to overturn the state commissions' determinations that ISP-bound traffic is to be treated as local traffic for purposes of reciprocal compensation. Decisions have been rendered in the United States Courts of Appeal for the Seventh, Ninth and Fifth Circuits, and District Courts in Washington, Texas, Illinois, Oregon, Michigan, Alabama and Oklahoma.[15]

Most recently, on March 30, 2000, the Fifth Circuit concluded that the Texas Commission's determination that reciprocal compensation applies to ISP-bound traffic did not conflict with the Act or with any FCC rule.[16] Fully cognizant of the D.C. Circuit's decision on the FCC's *Declaratory Ruling*, the Fifth Circuit refused to overturn the Texas Commission's finding that Internet service involves multiple components, a telecommunications service

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15 *See Illinois Bell Tel. Co. d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al.*, 179 F.3d 566 (7th Cir. 1999), *affirming Illinois Bell Tel. Co. v. WorldCom Technologies,* No. 98 C 1925, 1998 WL 419493 (N.D. Ill. July 23, 1998); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d. 1112 (9th Cir. 1999) *aff'g U.S. West Communications, Inc. v. MFS Intelenet, Inc., et al.*, No. C97-222WD, 1998 WL 350588 (W.D. Wash. Jan. 7, 1998); *Southwestern Bell Tel. Co., v. Public Utility Comm'n of Texas, et al.*, No. 98-50787, 2000 WL 332062 (5th Cir. March 30, 2000) *aff'g Southwestern Bell Tel. Co. v. Public Utility Comm'n*, No. MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938 (W.D. Tex. June 16, 1998) (Attached EX B); *Southwestern Bell Tel. Co. v. Brooks fiber Communications*, No. 98-CV-468-K(J), Order (N.D. Okla. Oct. 1, 1999) (Attached EX. C); *Michigan Bell Tel. Co. v. MFS Intelenet*, No. 5:98 CV 18, 1999 U.S. Dist. LEXIS 12093 (W.D. Mich. Aug. 2, 1999)(Attached EX. D); *Bell South Telecommunications, Inc. v. ITC DeltaCom Communications, Inc.*, 62 F.Supp. 2d 1302, (M.D. Ala. Aug.18, 1999) *aff'd on recon.* (M.D. Ala. Nov. 15, 1999);*U.S. West Communications, Inc. v. WorldCom Technologies, Inc., et al.*, 31 F.Supp.2d. 819 (D. Or. Dec. 10, 1998).

16 *See Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 2000 WL 332062 at 7.

component and an information service component. Further, the Fifth Circuit found the District Court's "conclusion that modem calls terminate locally for purposes of compensation is both well-reasoned and supported by substantial evidence."[17] Like the D.C. Circuit, the Fifth Circuit found support for its position in the FCC's own rules. The Fifth Circuit stated:

> A 1996 FCC Report defined "termination," for purposes of section 251(b)(5), as "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." (citation omitted). As for the modem calls here at issue, the ISPs are Time Warner's customers, making Time Warner the terminating carrier. So, under the foregoing definition, "termination" occurs when Time Warner switches the call at its facility and delivers the call to the "called party's premises," which is the ISP's local facility. Under this usage, the call indeed "terminates" at the ISP's premises.[18]

Thus, the weight of authority clearly supports a finding that that ISP-bound traffic is to be treated as all other local traffic and is subject to reciprocal compensation.

C. The Bell Atlantic Decision Obviates the Need to Consider Many of the Issues Previously Identified in These Proceedings

1. Issues Concerning the Commission's Jurisdiction to Establish the Terms and Conditions of Service for ISP Traffic Have been Resolved in Favor of Jurisdiction

The Commission correctly determined at the start of these proceedings that it had jurisdiction to establish the rates terms and conditions of service for ISP traffic. (*See* Entry of Jan. 13, 2000). That decision has not been altered by the *Bell Atlantic* decision which did not disturb the FCC's prior rulings concerning the state's authority to decide reciprocal compensation issues. As the Commission noted, the Supreme Court upheld the FCC's conclusion that under the Act state commissions have authority to regulate both interstate and intrastate

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17 *See id.* at 11.

18 *Id.* at 9.

services. (*Id.* at 3). Further, because the local nature of ISP-bound traffic is already settled, there is no need for the Commission to wait for a decision from the FCC on remand or in connection with its rulemaking proceedings. The D.C. Circuit decision makes it clear that ISP traffic should be considered local. The Commission should affirm its prior conclusion that calls to ISPs are subject to the same reciprocal compensation obligations of any other local call.

2. Issues Concerning the Appropriate Elements and Methodology for Determining Rates Applicable to ISP Bound Traffic Have Already Been Established

Because the D.C. Circuit decision leads to the unmistakable conclusion that ISP-bound traffic is local, many of the issues identified in this proceeding can be summarily resolved in favor of the CLEC petitioners and intervenors. The issues identified under "(b)" in the Commission's Entry of March 15, 2000 include consideration of whether dial-up ISP traffic can be separated from other types of traffic and whether such distinction is legally permissible. And, under (c) and (d) the Commission asked the parties to identify the rate elements and compensation methodology applicable to ISP traffic, and whether ISP traffic should be treated differently from non-ISP local traffic. Since ISP traffic is legally entitled to the same treatment as other local traffic, the FCC's rules and Ohio PUC Local Service Guidelines ("Ohio Guidelines"),[19] already identify the applicable rate elements and compensation methodology necessary to determine the appropriate compensation. Consistent with the FCC's regulations, the Commission Guidelines provide:

> Rates for transport and termination of *local traffic* shall be symmetrical unless the non-ILEC carrier (or the smaller of two ILECs) proves to the Commission, on the basis of a forward-looking economic cost study pursuant to Section V.B.4. of these guidelines, that its forward-looking costs for a network efficiently

[19] Ohio PUC Local Service Guidelines and Minimum Telephone Service Standards (1998 ed.)

> configured and operated by such carrier, exceed the costs incurred by the ILEC (or the larger ILEC), and that justifies a higher rate.[20]

The FCC's regulations provide that rates for transport and termination of local traffic shall be symmetrical and:

> symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.[21]

Further, an ILEC's rates for transport and termination of local traffic are to be assessed on the basis of forward-looking economic costs.[22] The applicability of this cost methodology to local traffic is consistent with the Commission's previous rulings where it held that the compensation appropriate for terminating local traffic is at the ILEC's TELRIC –based reciprocal compensation rates.[23] There is nothing to suggest that the ILEC's TELRIC costs vary for calls to ISPs as opposed to any other local call. Therefore, the FCC's regulations, the Ohio Guidelines, and prior Commission rulings establish that rates for ISP-bound traffic, like all other local traffic, shall be symmetrical and based on an ILEC's forward-looking economic cost study. Similarly, there is no need to consider the policy implications and the competitive incentives with each proposed compensation arrangement as identified in issue "(e)" since the compensation

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20 *See Id.* at 28, §IV. D. 2. (emphasis added). The Guidelines go on to describe the element specific rate structure standards, including a requirement that the cost-based price of an element shall be set at a level that allows the providing carrier to recover the sum of the TELRIC of the element and a reasonable allocation of the forward-looking joint and common costs. *See id.* at 39, §V.4.

21 47 CFR §51.711(a) (1997).

22 *See Id.* at §51.705(a)

23 *See ICG Telecom Group v. Ameritech Ohio*, Case No. 97-1557-TP-CSS; *Time Warner Communications of Ohio v. Ameritech*, Case No. 98-308-TP-CSS and *MCImetro Access Transmission Services v. Ameritech Ohio*, Case No. 97-1723-TP-CSS and Panel Report *In the Matter of ICG Telecom Group's Petition for Arbitration*, Case No. 99-1153-TP-ARB (P.U.C. Tex. Jan. 11, 2000).

arrangement is already established by federal law. Moreover, in determining that rates should be established on the basis of the ILEC's TELRIC, the FCC already considered the policy implications and concluded that competition would best be served by use of this method.[24]

CONCLUSION

Based on the foregoing, its is axiomatic that this Commission should continue its treatment of ISP-bound traffic as local traffic, subject to the same reciprocal compensation obligations as all other local traffic. As a consequence, the Commission should conclude that no further inquiry into the applicable methodology for determining compensation for ISP-bound traffic or the compensation elements is necessary. Accordingly, a ruling that compensation for ISP-bound traffic should be provided on the same basis as other local traffic is warranted.

Respectfully submitted,

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[24] *See* Local Competition Order.

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Exhibit A

BELL ATLANTIC TELEPHONE COMPANIES, Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.
Telecommunications Resellers Association, et al., Intervenors.

Nos. 99-1094, 99-1095, 99-1097, 99-1106, 99-1126, 99-1134, 99-1136 and 99-1145.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 22, 1999.

Decided March 24, 2000.

Incumbent local exchange carriers (LECs) and firms which provide local exchange telecommunications services to internet service providers (ISPs) petitioned for review of rulings of the Federal Communications Commission (FCC) determining that calls to ISPs within the caller's local calling area are not "local" so a to be subject to reciprocal compensation requirement applicable to "local telecommunications traffic," and determining that, in the absence of federal regulation, state commissions have the authority to impose reciprocal compensation. The Court of Appeals, Stephen F. Williams, Circuit Judge, held that the FCC failed to adequately explain why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] ... local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," thus requiring remand.

Vacated and remanded

[1] TELECOMMUNICATIONS ⚿336

372k336
Although internet service providers (ISPs) use telecommunications to provide information service, they are not themselves "telecommunications providers," and the Federal Communications Commission (FCC), in ruling that calls to ISPs within the caller's local calling area are not "local" so a to be subject to reciprocal compensation requirement, has not satisfactorily explained why local exchange carriers (LECs) that terminate calls to ISPs are not properly seen as "terminat[ing] ... local telecommunications traffic," nor has it adequately explained the appropriateness of its decision to treat end-to-end analysis, applicable to jurisdictional determinations, as controlling, thus requiring remand. Telecommunications Act of 1996, 47 U.S.C.A. § 251(b)(5); 47 C.F.R. §§ 51.701(a), 64.702(a).
See publication Words and Phrases for other judicial constructions and definitions.

[2] TELECOMMUNICATIONS ⚿336
372k336
The Federal Communications Commission (FCC), in ruling that calls to internet service providers (ISPs) within the caller's local calling area are not "local" so as to be subject to reciprocal compensation requirement, has not satisfactorily explained why such traffic is "exchange access" rather than "telephone exchange service" under the governing statute, thus requiring remand to the FCC. Communications Act of 1934, § 3(16, 47), 47 U.S.C.A. § 153(16, 47); Telecommunications Act of 1996, 47 U.S.C.A. § 251(b)(5); 47 C.F.R. § 51.701(a).

[3] ADMINISTRATIVE LAW AND PROCEDURE ⚿762
15Ak762
Though Court of Appeals reviews agency's interpretation only for reasonableness where Congress has not resolved the issue, where a decision is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service.
On Petitions for Review of a Declaratory Ruling of the Federal Communications Commission.

Mark L. Evans and Darryl M. Bradford argued the causes for petitioners. With them on the briefs were Thomas F. O'Neil, III, Adam H. Charnes, Mark B. Ehrlich, Donald B. Verrilli, Jr., Jodie L. Kelley, John J. Hamill, Emily M. Williams, Theodore Case Whitehouse, Thomas Jones, Albert H. Kramer, Andrew D. Lipman, Richard M. Rindler, Robert M. McDowell, Robert D. Vandiver, Cynthia Brown Miller, Charles C. Hunter, Catherine M. Hannan, Michael D. Hays, Laura H. Phillips, J. G. Harrington, William P. Barr, M. Edward Whelan, III, Michael K. Kellogg, Michael E. Glover, Robert B. McKenna, William T. Lake, John H. Harwood, II, Jonathan J. Frankel, Robert Sutherland, William B. Barfield, Theodore A. Livingston and John E. Muench. Maureen F. Del Duca, Lynn R. Charytan, Gail L. Polivy, John F. Raposa and Lawrence W. Katz entered appearances.

Christopher J. Wright, General Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were Daniel M.

Armstrong, Associate General Counsel, and John E. Ingle, Laurence N. Bourne and Lisa S. Gelb, Counsel. Catherine G. O'Sullivan and Nancy C. Garrison, Attorneys, U.S. Department of Justice, entered appearances.

David L. Lawson argued the cause for intervenors in opposition to the LEC petitioners. With him on the brief were Mark C. Rosenblum, David W. Carpenter, James P. Young, Emily M. Williams, Andrew D. Lipman, Richard M. Rindler, Robert D. Vandiver, Cynthia Brown Miller, Theodore Case Whitehouse, Thomas Jones, John D. Seiver, Charles C. Hunter, Catherine M. Hannan, Carol Ann Bischoff and Robert M. McDowell.

William P. Barr, M. Edward Whelan, Michael E. Glover, Mark L. Evans, Michael K. Kellogg, Mark D. Roellig, Dan Poole, Robert B. McKenna, William T. Lake, John H. Harwood, II, Jonathan J. Frankel, Robert Sutherland, William B. Barfield, Theodore A. Livingston and John E. Muench were on the brief for the Local Exchange Carrier intervenors.

Robert J. Aamoth, Ellen S. Levine, Charles D. Gray, James B. Ramsay, Jonathan J. Nadler, David A. Gross, Curtis T. White, Edward Hayes, Jr., and David M. Janas entered appearances for intervenors

Before: WILLIAMS, SENTELLE and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

***1** The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 151-714, requires local exchange carriers ("LECs") to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Id. § 251(b)(5). When LECs collaborate to complete a call, this provision ensures compensation both for the originating LEC, which receives payment from the end-user, and for the recipient's LEC. By regulation the Commission has limited the scope of the reciprocal compensation requirement to "local telecommunications traffic." 47 CFR § 51.701(a). In the ruling under review, it considered whether calls to internet service providers ("ISPs") within the caller's local calling area are themselves "local." In doing so it applied its so-called "end-to-end" analysis, noting that the communication characteristically will ultimately (if indirectly) extend beyond the ISP to websites out-of-state and around the world. Accordingly it found the calls non-local. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689, 3690 (¶ 1) (1999) ("FCC Ruling").

Having thus taken the calls to ISPs out of § 251(b)(5)'s provision for "reciprocal compensation" (as it interpreted it), the Commission could nonetheless itself have set rates for such calls, but it elected not to. In a Notice of Proposed Rulemaking, CC Docket 99-68, the Commission tentatively concluded that "a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation," FCC Ruling, 14 FCC Rcd at 3707 (¶ 29), but for the nonce it left open the matter of implementing a system of federal controls. It observed that in the meantime parties may voluntarily include reciprocal compensation provisions in their interconnection agreements, and that state commissions, which have authority to arbitrate disputes over such agreements, can construe the agreements as requiring such compensation; indeed, even when the agreements of interconnecting LECs include no linguistic hook for such a requirement, the commissions can find that reciprocal compensation is appropriate. FCC Ruling, 14 FCC Rcd at 3703-05 (¶¶ 24-25); see § 251(b)(1) (establishing such authority). "[A]ny such arbitration," it added, "must be consistent with governing federal law." FCC Ruling, 14 FCC Rcd at 3705 (¶ 25).

***2** This outcome left at least two unhappy groups. One, led by Bell Atlantic, consists of incumbent LECs (the "incumbents"). Quite content with the Commission's finding of § 251(b)(5)'s inapplicability, the incumbents objected to its conclusion that in the absence of federal regulation state commissions have the authority to impose reciprocal compensation. Although the Commission's new rulemaking on the subject may eventuate in a rule that preempts the states' authority, the incumbents object to being left at the mercy of state commissions until that (hypothetical) time, arguing that the commissions have mandated exorbitant compensation. In particular, the incumbents, who are paid a flat monthly fee, have generally been forced to provide compensation for internet calls on a per-minute basis. Given the average length of such calls the cost can be substantial, and since ISPs do not make outgoing calls, this compensation is hardly "reciprocal."

Another group, led by MCI WorldCom, consists of firms that are seeking to compete with the incumbent LECs and which provide local exchange telecommunications services to ISPs (the "competitors"). These firms, which stand to receive reciprocal compensation on ISP-bound calls, petitioned for review with the complaint that the Commission erred in finding that the calls weren't covered by § 251(b)(5).

The end-to-end analysis applied by the Commission here is one that it has traditionally used to determine whether a call is within its interstate jurisdiction. Here it used the analysis for quite a different purpose, without explaining why such an extension made sense in terms of the statute or the Commission's own regulations. Because of this gap, we vacate the ruling and remand the case for want of reasoned decisionmaking.

* * *

*3 In February 1996 Congress passed the Telecommunications Act of 1996 (the "1996 Act" or the "Act"), stating an intent to open local telephone markets to competition. See H.R. Conf. Rep. No. 104-458, at 113 (1996). Whereas before local exchange carriers generally had state-licensed monopolies in each local service area, the 1996 Act set out to ensure that "[s]tates may no longer enforce laws that impede[ ] competition," and subjected incumbent LECs "to a host of duties intended to facilitate market entry." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 726, 142 L.Ed.2d 835 (1999).

Among the duties of incumbent LECs is to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2). ("Telephone exchange service" and "exchange access" are words of art to which we shall later return.) Competitor LECs have sprung into being as a result, and their customers call, and receive calls from, customers of the incumbents.

We have already noted that § 251(b)(5) of the Act establishes the duty among local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Thus, when a customer of LEC A calls a customer of LEC B, LEC A must pay LEC B for completing the call, a cost usually paid on a per-minute basis. Although § 251(b)(5) purports to extend reciprocal compensation to all "telecommunications," the Commission has construed the reciprocal compensation requirement as limited to local traffic. See 47 CFR § 51.701(a) ("The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers."). LECs that originate or terminate long-distance calls continue to be compensated with "access charges," as they were before the 1996 Act. Unlike reciprocal compensation, these access charges are not paid by the originating LEC. Instead, the long-distance carrier itself pays both the LEC that originates the call and links the caller to the long distance network, and the LEC that terminates the call. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 16013 (¶ 1034) (1996) ("Local Competition Order").

The present case took the Commission beyond these traditional telephone service boundaries. The internet is "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world." Reno v. ACLU, 521 U.S. 844, 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Unlike the conventional "circuit-switched network," which uses a single end-to- end path for each transmission, the internet is a "distributed packet-switched network, which means that information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." In the Matter of Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, 11532 (¶ 64) (1998) ("Universal Service Report "). ISPs are entities that allow their customers access to the internet. Such a customer, an "end user" of the telephone system, will use a computer and modem to place a call to the ISP server in his local calling area. He will usually pay a flat monthly fee to the ISP (above the flat fee already paid to his LEC for use of the local exchange network). The ISP "typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls." FCC Ruling, 14 FCC Rcd at 3691 (¶ 4).

In the ruling now under review, the Commission concluded that § 251(b)(5) does not impose reciprocal compensation requirements on incumbent LECs for ISP-bound traffic. FCC Ruling, 14 FCC Rcd at 3690 (¶ 1). Faced with the question whether such traffic is

"local" for purposes of its regulation limiting § 251(b)(5) reciprocal compensation to local traffic, the Commission used the "end-to-end" analysis that it has traditionally used for jurisdictional purposes to determine whether particular traffic is interstate. Under this method, it has focused on "the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." FCC Ruling, 14 FCC Rcd at 3695 (¶ 10). We save for later an analysis of the various FCC precedents on which the Commission purported to rely in choosing this mode of analysis.

***4** Before actually applying that analysis, the Commission brushed aside a statutory argument of the competitor LECs. They argued that ISP-bound traffic must be either "telephone exchange service," as defined in 47 U.S.C. § 153(47), or "exchange access," as defined in § 153(16). [FN1] It could not be the latter, they reasoned, because ISPs do not assess toll charges for the service (see id., "the offering of access ... for the purpose of the origination or termination of telephone toll services"), and therefore it must be the former, for which reciprocal compensation is mandated. Here the Commission's answer was that it has consistently treated ISPs (and ESPs generally) as "users of access service," while treating them as end users merely for access charge purposes. FCC Ruling, 14 FCC Rcd at 3701 (¶ 17).

Having decided to use the "end-to-end" method, the Commission considered whether ISP-bound traffic is, under this method, in fact interstate. In a conventional "circuit-switched network," the jurisdictional analysis is straightforward: a call is intrastate if, and only if, it originates and terminates in the same state. In a "packet-switched network," the analysis is not so simple, as "[a]n Internet communication does not necessarily have a point of 'termination' in the traditional sense." FCC Ruling, 14 FCC Rcd at 3701-02 (¶ 18). In a single session an end user may communicate with multiple destination points, either sequentially or simultaneously. Although these destinations are sometimes intrastate, the Commission concluded that "a substantial portion of Internet traffic involves accessing interstate or foreign websites." Id. Thus reciprocal compensation was not due, and the issue of compensation between the two local LECs was left initially to the LECs involved, subject to state commissions' power to order compensation in the "arbitration" proceedings, and, of course to whatever may follow from the Commission's new rulemaking on its own possible ratesetting.

* * *

***5** The issue at the heart of this case is whether a call to an ISP is local or long-distance. Neither category fits clearly. The Commission has described local calls, on the one hand, as those in which LECs collaborate to complete a call and are compensated for their respective roles in completing the call, and long-distance calls, on the other, as those in which the LECs collaborate with a long-distance carrier, which itself charges the end-user and pays out compensation to the LECs. See Local Competition Order, 11 FCC Rcd at 16013 (¶ 1034) (1996).

Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long- distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP. The Commission's ruling rests squarely on its decision to employ an end-to-end analysis for purposes of determining whether ISP-traffic is local. There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate. But 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.

In fact, the extension of "end-to-end" analysis from jurisdictional purposes to the present context yields intuitively backwards results. Calls that are jurisdictionally intrastate will be subject to the federal reciprocal compensation requirement, while calls that are interstate are not subject to federal regulation but instead are left to potential state regulation. The inconsistency is not necessarily fatal, since under the 1996 Act the Commission has jurisdiction to implement such provisions as § 251, even if they are within the traditional domain of the states. See AT&T Corp., 119 S.Ct. at 730. But it reveals that arguments supporting use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this context.

In attacking the Commission's classification of ISP-bound calls as non-local for purposes of reciprocal compensation, MCI WorldCom notes that under 47 CFR § 51.701(b)(1) "telecommunications traffic" is local if it "originates and terminates within a local

service area." But, observes MCI WorldCom, the Commission failed to apply, or even to mention, its 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." Local Competition Order, 11 FCC Rcd at 16015 (¶ 1040); 47 CFR § 51.701(d). 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."

In its ruling the Commission avoided this result by analyzing the communication on an end-to-end basis: "[T]he communications at issue here do not terminate at the ISP's local server ..., but continue to the ultimate destination or destinations." FCC Ruling, 14 FCC Rcd at 3697 (¶ 12). But the cases it relied on for using this analysis are not on point. Both involved a single continuous communication, originated by an end-user, switched by a long- distance communications carrier, and eventually delivered to its destination. One, Teleconnect Co. v. Bell Telephone Co., 10 FCC Rcd 1626 (1995), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593 (D.C.Cir.1997) ("Teleconnect"), involved an 800 call to a long-distance carrier, which then routed the call to its intended recipient. The other, In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, 7 FCC Rcd 1619 (1992), considered a voice mail service. Part of the service, the forwarding of the call from the intended recipient's location to the voice mail apparatus and service, occurred entirely within the subscriber's state, and thus looked local. Looking "end-to-end," however, the Commission refused to focus on this portion of the call but rather considered the service in its entirety (i.e., originating with the out-of-state caller leaving a message, or the subscriber calling from out-of-state to retrieve messages). Id. at 1621 (¶ 12).

***6** [1] ISPs, in contrast, are "information service providers," Universal Service Report, 13 FCC Rcd at 11532-33 (¶ 66), which upon receiving a call originate further communications to deliver and retrieve information to and from distant websites. The Commission acknowledged in a footnote that the cases it relied upon were distinguishable, but dismissed the problem out-of-hand: "Although the cited cases involve interexchange carriers rather than ISPs, and the Commission has observed that 'it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs,' Access Charge Reform Order, 12 FCC Rcd at 16133, the Commission's observation does not affect the jurisdictional analysis." FCC Ruling, 14 FCC Rcd at 3697 n.36 (¶ 12). It is not clear how this helps the Commission. Even if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation. Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long-distance carriers).

In this regard an ISP appears, as MCI WorldCom argued, 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. Comments of WorldCom, Inc. at 7 (July 17, 1997). Of course, the ISP's origination of telecommunications as a result of the user's call is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service). But this does not imply that the original communication does not "terminate" at the ISP. 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.

The Commission nevertheless argues that although the call from the ISP to an out-of-state website is information service for the end-user, it is telecommunications for the ISP, and thus the telecommunications cannot be said to "terminate" at the ISP. As the Commission states: "Even if, from the perspective of the end user as customer, the telecommunications portion of an Internet call 'terminates' at the ISP's server (and information service begins), the remaining portion of the call would continue to constitute telecommunications from the perspective of the ISP as customer." Commission's Br. at 41. Once again, however, the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not "terminate" at the ISP. However sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation.

***7** Adding further confusion is a series of Commission rulings dealing with a class, enhanced service providers ("ESPs"), of which ISPs are a subclass. See

FCC Ruling, 14 FCC Rcd at 3689 n.1 (¶ 1). ESPs, the precursors to the 1996 Act's information service providers, offer data processing services, linking customers and computers via the telephone network. See MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1138 (D.C.Cir.1995). [FN2] In its establishment of the access charge system for long-distance calls, the Commission in 1983 exempted ESPs from the access charge system, thus in effect treating them like end users rather than long-distance carriers. See In the Matter of MTS & WATS Market Structure, 97 F.C.C.2d 682, 711-15 (¶ 77-83), 1983 WL 183026 (1983). It reaffirmed this decision in 1991, explaining that it had "refrained from applying full access charges to ESPs out of concern that the industry has continued to be affected by a number of significant, potentially disruptive, and rapidly changing circumstances." In the Matter of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4534 (¶ 54) (1991). In 1997 it again preserved the status quo. In the Matter of Access Charge Reform, 12 FCC Rcd 15982 (1997) ("Access Charge Reform Order"). It justified the exemption in terms of the goals of the 1996 Act, saying that its purpose was to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." Id. at 16133 (¶ 344) (quoting 47 U.S.C. § 230(b)(2)).

This classification of ESPs is something of an embarrassment to the Commission's present ruling. As MCI WorldCom notes, the Commission acknowledged in the Access Charge Reform Order that "given the evolution in [information service provider] technologies and markets since we first established access charges in the early 1980s, it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs [inter-exchange carriers]." 12 FCC Rcd at 16133 (¶ 345). It also referred to calls to information service providers as "local." Id. at 16132 (¶ 342 n.502). And when this aspect of the Access Charge Reform Order was challenged in the 8th Circuit, the Commission's briefwriters responded with a sharp differentiation between such calls and ordinary long-distance calls covered by the "end-to-end" analysis, and even used the analogy employed by MCI WorldCom here--that a call to an information service provider is really like a call to a local business that then uses the telephone to order wares to meet the need. Brief of FCC at 76, Southwestern Bell v. FCC, 153 F.3d 523 (8th Cir.1998) (No. 97-2618). When accused of inconsistency in the present matter, the Commission flipped the argument on its head, arguing that its exemption of ESPs from access charges actually confirms "its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary." FCC Ruling, 14 FCC Rcd at 3700 (¶ 16). This is not very compelling. Although, to be sure, the Commission used policy arguments to justify the "exemption," it also rested it on an acknowledgment of the real differences between long-distance calls and calls to information service providers. It is obscure why those have now dropped out of the picture.

Because the Commission has not supplied a real explanation for its decision to treat end-to-end analysis as controlling, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); 5 U.S.C. § 706(2)(A), we must vacate the ruling and remand the case.

***8** [2] There is an independent ground requiring remand--the fit of the present rule within the governing statute. MCI WorldCom says that ISP-traffic is "telephone exchange service[ ]" as defined in 47 U.S.C. § 153(16), which it claims "is synonymous under the Act with the service used to make local phone calls," and emphatically not "exchange access" as defined in 47 U.S.C. § 153(47). Petitioner MCI WorldCom's Initial Br. at 22. In the only paragraph of the ruling in which the Commission addressed this issue, it merely stated that it "consistently has characterized ESPs as 'users of access service' but has treated them as end users for pricing purposes." FCC Ruling, 14 FCC Rcd at 3701 (¶ 17). In a statutory world of "telephone exchange service" and "exchange access," which the Commission here says constitute the only possibilities, the reference to "access service," combining the different key words from the two terms before us, sheds no light. "Access service" is in fact a pre-Act term, defined as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." 47 CFR § 69.2(b).

If the Commission meant to place ISP-traffic within a third category, not "telephone exchange service" and not "exchange access," that would conflict with its concession on appeal that "exchange access" and "telephone exchange service" occupy the field. But if it meant that just as ESPs were "users of access service" but treated as end users for pricing purposes, so too ISPs are users of exchange access, the Commission has not provided a satisfactory explanation why this is the

case. In fact, in In the Matter of Implementation of the NonAccounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 22023 (¶ 248) (1996), the Commission clearly stated that "ISPs do not use exchange access." After oral argument in this case the Commission overruled this determination, saying that "non-carriers may be purchasers of those services." In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 99-413, at 21 (¶ 43) (Dec. 23, 1999). The Commission relied on its preAct orders in which it had determined that non-carriers can use "access services," and concluded that there is no evidence that Congress, in codifying "exchange access," intended to depart from this understanding. See id. at 21-22 (¶ 44). The Commission, however, did not make this argument in the ruling under review.

Nor did the Commission even consider how regarding noncarriers as purchasers of "exchange access" fits with the statutory definition of that term. A call is "exchange access" if offered "for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). As MCI WorldCom argued, ISPs provide information service rather than telecommunications; as such, "ISPs connect to the local network 'for the purpose of' providing information services, not originating or terminating telephone toll services." Petitioner MCI WorldCom's Reply Br. at 6.

[3] The statute appears ambiguous as to whether calls to ISPs fit within "exchange access" or "telephone exchange service," and on that view any agency interpretation would be subject to judicial deference. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). But, even though we review the agency's interpretation only for reasonableness where Congress has not resolved the issue, where a decision "is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service." SEC v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943). See also Acme Die Casting v. NLRB, 26 F.3d 162, 166 (D.C.Cir.1994); Leeco, Inc. v. Hays, 965 F.2d 1081, 1085 (D.C.Cir.1992); City of Kansas City v. Department of Housing and Urban Development, 923 F.2d 188, 191-92 (D.C.Cir.1991).

* * *

***9** Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] ... local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission. We do not reach the objections of the incumbent LECs-- that § 251(b)(5) preempts state commission authority to compel payments to the competitor LECs; at present we have no adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.

So ordered.

FN1. "Telephone exchange service" is defined as:
(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.
47 U.S.C. § 153(47). "Exchange access" is defined as:
the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.
Id. § 153(16).

FN2. The regulatory definition states that ESPs offer "services ... which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 CFR § 64.702(a).

END OF DOCUMENT

Exhibit B

SOUTHWESTERN BELL TELEPHONE CO., Plaintiff-Appellant,
v.
PUBLIC UTILITY COMMISSION OF TEXAS; Pat Wood III; Judy Walsh; Brett Pearlman; Time Warner Communications of Austin, L.P.; Time Warner Communications of Houston, L.P.; and Fibrcom, Inc., Defendants-Appellees.

No. 98-50787.

United States Court of Appeals,
Fifth Circuit.

March 30, 2000

Incumbent local exchange carrier (LEC) brought action challenging decision of state public utilities commission (PUC) that modem calls made by LEC's customers to competitor's customers that were Internet service providers (ISPs) constituted local traffic and thus triggered LEC's reciprocal compensation obligations under parties' interconnection agreements. The United States District Court for the Western District of Texas, Lucius Desha Bunton, III, J., upheld PUC's decision, and LEC appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) PUC had jurisdiction to interpret and enforce interconnection agreements; (2) district court had jurisdiction to review PUC's interpretation and enforcement of agreements; (3) court would review federal issues de novo, but would review state law issues under arbitrary-and-capricious standard; and (4) modem calls made by customers of LEC to competitor's customers that were ISPs constituted local traffic that triggered LEC's reciprocal compensation obligations.

Affirmed.

[1] TELECOMMUNICATIONS ⚿267

372k267
Statutory authority of state public utilities commission (PUC) to approve or disapprove interconnection agreements among local exchange carriers (LECs) included authority to interpret and enforce provisions of agreements approved by PUC, regardless of any interstate aspect of the subject telecommunications. Telecommunications Act of 1996, 47 U.S.C.A. § 252.

[2] TELECOMMUNICATIONS ⚿263
372k263
District court's jurisdiction, under Telecommunications Act, to review state public utilities commission (PUC) decisions relating to interconnection agreements between local exchange carriers (LECs) extends not only to PUC's approval or rejection of such agreements but also to PUC's interpretation and enforcement of approved agreements. Telecommunications Act of 1996, 47 U.S.C.A. § 252(e)(6).

[3] TELECOMMUNICATIONS ⚿263
372k263
Federal court reviews de novo decision of state public utilities commission (PUC) as to whether interconnection agreements between local exchange carriers (LECs) comply with Federal Telecommunications Act, and federal court may also review questions of state law addressed by PUC, but those questions are reviewed under an arbitrary-and-capricious standard. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251, 252, 252(e)(6).

[4] TELECOMMUNICATIONS ⚿267
372k267
Ruling of state public utilities commission (PUC) that calls made from customer of one local exchange carrier (LEC) to customers of another LEC that were Internet service providers (ISPs) constitute local traffic, thus triggering reciprocal compensation obligations under LECs' interconnection agreement, did not conflict with Telecommunications Act or with regulations or rulings of the Federal Communications Commission (FCC). Telecommunications Act of 1996, 47 U.S.C.A. §§ 251, 252.

[5] FEDERAL COURTS ⚿433
170Bk433
Whether interconnection agreement of local exchange carriers (LECs) required that modem calls made from customer of one LEC to customers of another LEC that were Internet service providers (ISPs) be treated as local traffic, thus triggering parties' reciprocal compensation obligations, was question governed not by federal law, but by agreements themselves and by state law principles.

[6] TELECOMMUNICATIONS ⚿267
372k267
Under interconnection agreement between local exchange carriers (LECs), modem call made from one LEC's customer to Internet service provider (ISP) that was customer of another LEC terminated at ISP's facility, and thus constituted local traffic, thereby triggering parties' reciprocal compensation obligations under interconnection agreement.

[7] CONTRACTS ⚿143(1)
95k143(1)
Under Texas law, unambiguous contracts must be enforced as written, with the intent of the parties being derived from the agreement itself.

[7] CONTRACTS ⚿147(2)
95k147(2)
Under Texas law, unambiguous contracts must be enforced as written, with the intent of the parties being derived from the agreement itself.

[8] CONTRACTS ⚿147(1)
95k147(1)
Under Texas law, beyond the four corners of the parties' agreement, their intent may be evidenced from the surrounding facts and circumstances when the contract was entered; the court may consider ordinary terms, customs and usages then in effect.

[8] CONTRACTS ⚿169
95k169
Under Texas law, beyond the four corners of the parties' agreement, their intent may be evidenced from the surrounding facts and circumstances when the contract was entered; the court may consider ordinary terms, customs and usages then in effect.

[8] CUSTOMS AND USAGES ⚿15(1)
113k15(1)
Under Texas law, beyond the four corners of the parties' agreement, their intent may be evidenced from the surrounding facts and circumstances when the contract was entered; the court may consider ordinary terms, customs and usages then in effect.

[9] ADMINISTRATIVE LAW AND PROCEDURE ⚿669.1
15Ak669.1
The failure to raise an issue at the administrative level waives the right to appellate review of that issue.

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Mark Witcher, Austin, TX, for Teleport Communications Group, Inc., Amicus Curiae.

Appeal from the United States District Court for the Western District of Texas.

Before WIENER and STEWART, Circuit Judges. [FN1]

WIENER, Circuit Judge:

*1 This appeal involves a dispute between two interconnecting telephone companies ("carriers") in the same local calling areas about whether modem calls placed by local customers of one carrier to the Internet Service Provider ("ISP") customers of another carrier should be charged for as a "local" call. The contracts between the carriers that are parties to this appeal specify that local calls placed by customers of one carrier to customers of the other are to be "reciprocally compensated." In the district court, Plaintiff-Appellant Southwestern Bell Telephone Co. ("Southwestern Bell") disavowed any obligation to compensate Defendants-Appellees Time Warner Communications of Austin, L.P. (collectively "Time Warner"), for calls made by Southwestern Bell's customers to Time Warner's ISP customers as local calls. The district court, like the Texas Public Utilities Commission ("PUC") before it, held that the carriers' contracts require such calls to be treated as local calls and as such, to be compensated for reciprocally. The procedural history of this case also presents thorny jurisdictional questions at the state regulatory commission and federal district court levels. Concluding that the PUC and the district court had jurisdiction to adjudicate the merits of this case, and agreeing with their dispositions of it, we affirm.

I.
FACTS AND PROCEEDINGS

In the interest of opening previously monopolistic local telephone markets to competition, the Federal

Telecommunications Act of 1996 (the "Act") requires all telecommunications carriers to interconnect their networks so that customers of different carriers can call one another. 47 U.S.C. § 251(a)(1) (West Supp.1999). Both Southwestern Bell and Time Warner are local exchange carriers ("LECs"). Having historically held monopolies in the subject markets, Southwestern Bell is the incumbent LEC or ILEC, and Time Warner is a competing LEC or CLEC. The Act requires ILECs to negotiate reciprocal compensation arrangements or interconnection agreements with CLECs to establish the terms by which they will compensate each other for the use of the other's networks. 47 U.S.C. § 251(b)(5), (c)(1). When an LEC's customer places a local call to a customer of another LEC, the LEC whose customer initiated the call compensates the receiving LEC for transporting and terminating the call through its network. See 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701(e) (1998).

In two reciprocal compensation agreements (one executed in 1996 and the other in 1997), Time Warner and Southwestern Bell agreed to base reciprocal compensation on minutes of use. That way each party would pay the other a fixed rate for each minute that one of its customers used the other's network for "Local Traffic." The instant dispute originated when Southwestern Bell refused to pay Time Warner reciprocal compensation for modem calls that Southwestern Bell's customers made to Time Warner's ISP customers. (ISPs typically purchase local business phone service from LECs for a flat monthly fee that allows unlimited incoming calls.) An Internet user can, through use of a modem, dial an ISP's local phone number without incurring long-distance tolls, but can nevertheless access websites around the globe. Southwestern Bell based its refusal to pay reciprocal compensation to Time Warner on the theory that, because modem calls to ISPs involve the continuous transmission of information across state lines, such calls are interstate and thus should not be billed as Local Traffic.

*2 In response, Time Warner filed a complaint with the PUC alleging that Southwestern Bell breached its interconnection agreements when it refused to pay reciprocal compensation for those calls that its customers made to Time Warner's ISP customers. The PUC sided with Time Warner, ruling that calls made by Southwestern Bell's customers to Time Warner's ISP customers are Local Traffic, and as such generate reciprocal compensation obligations.

Southwestern Bell then sought relief in the district court, continuing to insist that Internet calls are not "local" and therefore should not fall under the reciprocal compensation provisions of the interconnection agreements applicable to local calls. The district court upheld the PUC's decision, agreeing that, under the interconnection agreements, "Local Traffic" includes calls to ISPs. Both the PUC and the district court were impressed by the notion that a "call" from a Southwestern Bell's customer to a Time Warner ISP customer terminates locally at the ISP's facility. They considered such telecommunication service to be a component of the call separate and distinct from the information service, which begins at the ISP's facility and continues to distant websites.

Subsequent to the filing of this appeal, the FCC handed down a ruling pertinent to reciprocal compensation for ISP-bound calls, entitled Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689, 1999 WL 98037 (1999) (the "Reciprocal Compensation Ruling"). Holding that it has jurisdiction over calls to ISPs as interstate calls, the FCC declined to separate ISP-bound traffic into two distinct components (intrastate telecommunications service, provided by the LEC, which goes from a user's modem to the local ISP, and interstate information service, provided by the ISP, which goes from the ISP to the websites). Reciprocal Compensation Ruling ¶¶ 1, 13. Although the FCC determined the jurisdictional nature of the ISP-bound traffic by the end-to-end analysis of the transmission (from the user to the Internet), it held that LECs are nevertheless controlled by interconnection agreements that include ISP-bound traffic in their reciprocal compensation provisions in the same manner as they include other local traffic. Id. ¶¶ 13, 16, 18, 22-24. Taking a hands-off approach, the FCC announced that it will not interfere with state commission determinations of whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic. Id. ¶¶ 21-22. [FN2]

II.
ANALYSIS

A. Jurisdiction

*3 The substantive question that we are asked today is whether, for purposes of one LEC paying reciprocal compensation to another, a call from the first LEC's customer to the second LEC's ISP customer in the same local exchange area is "Local Traffic" as the term is used in these LECs' interconnection agreements.

Before addressing that question, though, we must answer several questions regarding jurisdiction.

The easy one is appellate jurisdiction: We clearly have it under 28 U.S.C. § 1291. Jurisdictional questions arising from the presence of this case first before the PUC and subsequently before the district court are not so simple.

[1] As a general proposition, jurisdiction to entertain such matters is conferred on the district court by the judicial review provisions of the Act, which state:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section [252].

47 U.S.C. § 252(e)(6) (emphasis ours). [FN3] With respect to the interconnection agreements, the Act confers jurisdiction on the district court to review the PUC's determination for compliance with the Act, specifically sections 251 and 252. Our chore today is to determine whether the Act, which admittedly provides for federal district court review of some state commission dispositions implicating interconnection agreements, provides for such review in this instance. This determination comprises two parts: (1) the PUC's own jurisdiction to determine the questions presented to it, and (2) the scope of federal review. As to the first part, the Act provides commission jurisdiction in cases "in which a State commission makes a determination under this section," meaning section 252. That section sets forth procedures for negotiation, arbitration, and approval of interconnection agreements. It also requires LECs to enter into interconnection agreements with each other, through either voluntary negotiation or compulsory arbitration. 47 U.S.C. § 252(a), (b). The Act specifies that, regardless of how they are confected, all interconnection agreements must be approved by the appropriate state commission. 47 U.S.C. § 252(e)(1). Here, the parties had voluntarily negotiated their interconnection agreements, and the PUC had approved them; no one is here seeking district court review of those approvals. It was not until several months after the PUC granted its approvals that Time Warner filed the complaint with the PUC pertaining to reciprocal compensation under those agreements, precipitating the declaratory action in federal court and ultimately this appeal.

The Act's reference to "a State commission ... determination under this section [252]," could, if construed quite narrowly, limit state commission jurisdiction to decisions approving or disapproving, or arbitrating, an interconnection agreement. Under such a narrow construction, commission jurisdiction would not extend to interpreting or enforcing a previously approved contract. We do not think so narrow a construction was intended. Rather, we are satisfied that the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir.1997), aff'd in part, rev'd in part on other grounds, [FN4] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). We believe that the FCC plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete. See, e.g., Reciprocal Compensation Ruling ¶ 22 (noting that parties are bound by their interconnection agreements "as interpreted and enforced by the state commissions") (emphasis ours); id. ¶ 21 (referring to state commission "findings" as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic); id. ¶ 24 (discussing factors state commissions should consider when "construing the parties' agreements"); see also Illinois Bell Tel. Co. v. Worldcom Techs., Inc., 179 F.3d 566, 573 (7th Cir.1999) (noting that in determining contractual intent under interconnection agreements, a state commission "was doing what it is charged with doing" in the Act and the FCC's Reciprocal Compensation Ruling). Deferring to the pronouncements of the FCC and its reasonable interpretations of the Act, see, e.g., Illinois Bell Tel. v. Worldcom, 179 F.3d at 571, we hold that the PUC acted within its jurisdiction in addressing the questions pertaining to interpretation and enforcement of the previously approved interconnection agreements at issue here.

Southwestern Bell poses yet another challenge to the PUC's jurisdiction, urging that, because Internet traffic is interstate, as a matter of federal law state commissions such as the PUC lack jurisdiction to impose reciprocal compensation liability for such traffic. We disagree. The Supreme Court has recognized that the Act cannot divide the world of domestic telephone service "neatly into two hemispheres," one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction. Louisiana Pub. Serv.

Comm'n v. FCC, 476 U.S. 355, 360, 106 S.Ct. 1890, 1894, 90 L.Ed.2d 369 (1986). Rather, observed the Court, "the realities of technology and economics belie such a clean parceling of responsibility." Id. The FCC too has rejected the argument advanced by Southwestern Bell, noting that "state commission authority over interconnection agreements pursuant to section 252 'extends to both interstate and intrastate matters.' " Reciprocal Compensation Ruling ¶ 25, quoting Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15499 ¶ 84, 1996 WL 452885 (1996). Accordingly, we hold that here the PUC properly exercised its jurisdiction regardless of any interstate aspect of the subject telecommunications. [FN5]

*4 [2] We also hold that the district courts have jurisdiction to review such interpretation and enforcement decisions of the state commissions. See Iowa Utilities Bd., 120 F.3d at 804 & n. 24 (holding that federal court review in section 252(e)(6) encompasses review of enforcement decisions of state commissions and is the exclusive means of obtaining review of such determinations). We will not read section 252(e)(6) so narrowly as to limit its grant of federal district court jurisdiction to review decisions of state commissions only to those decisions that either approve or reject interconnection agreements. We conclude that federal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and that such jurisdiction is not restricted to mere approval or rejection of such agreements. See also Illinois Bell Tel. v. Worldcom, 179 F.3d at 571 (recognizing exclusive federal jurisdiction to review "actions" by state commissions).

[3] A similar jurisdictional question asks whether subsection 252(e)(6) limits federal review of a state commission's actions with respect to an interconnection agreement to those commission decisions that concern only compliance with the requirements of sections 251 and 252 of the Act, and does not extend to review of a commission's actions implicating compliance with state law. In this case the parties have framed issues of both federal and state law. Our focus, however, concerns only the clause of the Act granting jurisdiction over an "action ... to determine whether the agreement ... meets the requirements of section 251 [and section 252]." 47 U.S.C. § 252(e)(6). Time Warner urges us to read section 252(e)(6) literally and narrowly, so as to limit federal review to only the issue whether the interconnection agreements, as interpreted by the PUC, meet the requirements of federal law, specifically, sections 251 and 252. These sections impose specific fair compensation requirements. [FN6] Under such a narrow construction, section 252(e)(6) would limit federal court review of the PUC's decision to such questions as whether the PUC's interpretation of the Time Warner/Southwestern Bell interconnection agreements adequately allow the parties to recover their costs. A federal court lacks jurisdiction, insists Time Warner, to address state law matters such as, for example, a contractual dispute regarding meeting of the minds.

The Act obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements. 47 U.S.C. § 252(e)(3), (f)(2). But whether, in addition to jurisdiction to review for compliance with requirements of the Act, a federal court is authorized to review any and every question of state law that a state commission may have addressed is an issue on which the circuits are split. The Seventh Circuit takes the position that in examining a state commission order, the court's task is "not to determine whether [state commission] correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation." Illinois Bell Tel. v. Worldcom, 179 F.3d at 572. Under this reading, our scope of review would be quite narrow indeed; the only issue before us would be whether the PUC, in determining that the parties intended for calls to ISPs to be subject to reciprocal compensation, violated federal law. See id. at 571. Any issues of state law, such as contract interpretation, would remain open for determination in another forum. [FN7] The Seventh Circuit also finds significant the contrast in the Act between state commission determinations (subsections 252(e)(3) and (f)(2), allowing consideration of state law questions) and federal court determinations (subsection 252(e)(6), allowing consideration of only "whether the agreement or statement meets the requirements of section 251 and this section"). To the Seventh Circuit, this juxtaposition confirms that federal courts "may review a state commission's actions with respect to an agreement only for compliance with the requirements of § 251 and § 252 of the [FTA], and not for compliance with state law." MCI Telecomms. Corp. v. Illinois Commerce Comm'n, 168 F.3d 315, 320 (7th Cir.) (emphasis ours), amended on reh'g by 183 F.3d 558 (7th Cir.), reh'g granted, 183 F.3d 567 (7th Cir.1999)(on Eleventh Amendment grounds).

*5 The Ninth and Fourth Circuits have taken a more expansive view of federal jurisdiction under the Act, narrowed only by the proper standard of review. These circuits would permit district courts to consider de novo whether the agreements are in compliance with the Act and the implementing regulations, but to review all other issues decided by a state commission under a more deferential standard, either arbitrary and capricious or substantial evidence. See U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1117, 1124 n. 15 (9th Cir.1999) (considering de novo agreement's compliance with the Act and regulations and considering "all other issues" under arbitrary and capricious standard); GTE South, Inc. v. Morrison, 199 F.3d 733, 745 (4th Cir.1999) (reviewing de novo the state commission's interpretations of the Act and reviewing state commission fact finding under the substantial evidence standard). [FN8]

In the case now before us, the district court embraced the broader view, considering de novo whether the agreements comply with sections 251 and 252, and reviewing "all other issues" under an arbitrary-and-capricious standard. We find this approach appropriate. This standard comports with United States v. Carlo Bianchi and Co., 373 U.S. 709, 715, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963), and Abbeville General Hospital v. Ramsey, 3 F.3d 797, 802-03 (5th Cir.1993) (conducting de novo review of procedural question whether state agency made finding required by federal law and arbitrary-and-capricious review of the findings themselves). We shall therefore review de novo whether the interconnection agreements as interpreted by the PUC meet the requirements of the Act, but our review of the PUC's state law determinations will be under the more deferential arbitrary-and-capricious standard.

B. The Merits

*6 We first examine the PUC order to see whether it violates federal law, as reflected in the Act and in the FCC's regulations or rulings. We conduct this examination de novo.

[4] The PUC concluded that "a call between two end users in the same local calling area is local traffic." Agreeing with the FCC's then-prevailing view that providing of Internet service involved "multiple components," [FN9] the PUC declared that "it is the telecommunications service component, rather than the information service component, that constitutes the basis for determining the jurisdiction of the traffic involved in calls to ISPs. When a transmission path is established between two subscribers in the same mandatory calling area, traffic carried on that path is local traffic, with the telecommunications service component of the call terminating at the ISP location."

The FCC has now definitively established that modem calls to ISPs constitute jurisdictionally mixed, largely interstate, traffic. Reciprocal Compensation Ruling ¶¶ 1, 13, 18-19. In its 1999 ruling, the FCC concluded that ISP-bound traffic for "jurisdictional purposes [is] a continuous transmission from the end user to a distant Internet site." Id. ¶ 13. Having thus determined its own jurisdiction over ISP calls, the FCC then discussed regulation of the calls, beginning with the proclamation that it "has no rule governing inter- carrier compensation for ISP-bound traffic." Id. ¶ 9. The FCC continued: "We find 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." Id. ¶ 21. [FN10] The FCC reasoned that "parties should be bound by their existing interconnection agreements, as interpreted by state commissions." Id. ¶ 1.

Clearly, then, whether voluntarily negotiated or confected through arbitration, commission-approved agreements requiring payment of reciprocal compensation for calls made to ISPs do not conflict with §§ 251 and 252 of the Act or with the FCC's regulations or rulings. Even if ISP traffic is largely interstate, a state commission may lawfully interpret an agreement as requiring reciprocal compensation for such traffic. See id. at ¶ 26 ("Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances."); Illinois Bell Tel. v. Worldcom, 179 F.3d at 572 ("The FCC could not have made clearer that ... a state agency's interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law.").

*7 Additionally, the FCC acknowledged that it had historically "directed states to treat ISP traffic as if it were local." Reciprocal Compensation Ruling ¶ 21. Nothing in the Reciprocal Compensation Ruling prohibits a call from being "a local call for some, but not all, purposes." Illinois Bell Tel. v. Worldcom, 179 F.3d at 574. Finally, the FCC understood that its "policy of treating ISP-bound traffic as local for

purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that [reciprocal] compensation is due for that traffic." Reciprocal Compensation Ruling ¶ 25 (emphasis added).

Accordingly, we hold that the PUC's determination that reciprocal compensation obligations encompass ISP-bound traffic does not conflict with the Act or with any FCC rule regarding such traffic. As the Seventh Circuit observed,

> The FCC could not have made clearer its willingness--at least until the time a rule is promulgated--to let state commissions make the call. We see no violation of the Act in giving such deference to state commissions; in fact, the Act specifically provides state commissions with an important role to play in the field of interconnection agreements.... In short, nothing in what the [state commission] said violates federal law in existence at this time.

Illinois Bell Tel. v. Worldcom, 179 F.3d at 574. It follows that we should affirm the district court's ruling that the order of the PUC did not violate federal law.

[5] That brings us to the substantive question whether the PUC correctly interpreted the interconnection agreements. A threshold issue bearing on our standard of review is whether federal or state law controls this interpretation. [FN11] We therefore begin by examining how the state law issues pertaining to the interpretation of contracts relate to the Act and to FCC pronouncements, for example, with respect to the definitions of key terms such as "local" and "terminate."

Southwestern Bell contends that the proper understanding of these contracts turns on whether Internet communications are "local" under federal law and that the definition of "local traffic" in section 251(b)(5) of the Act should govern the contract. In another argument Southwestern Bell urges that the Act and the FCC's rulings on whether reciprocal compensation is required for Internet traffic determine whether, as a matter of federal law, reciprocal compensation is due under the contracts. Southwestern Bell argues that the language in the agreements [FN12] parallels the reciprocal compensation requirement in section 251(b)(5) of the Act [FN13]; that the FCC has declared that Internet traffic is not encompassed within section 251(b)(5) of the Act [FN14]; ergo, as a matter of federal law, the calls are not "local" and reciprocal compensation is therefore not required. We disagree.

*8 As the Seventh Circuit said, in succinctly rejecting a similar argument, "[t]he syllogism is an oversimplification."

> That the Act does not require reciprocal compensation for calls to ISPs is not to say that it prohibits it. The Act simply sets out the obligations of all local exchange carriers to provide for reciprocal compensation.... Then in § 252(d)(2) state commissions are instructed that terms and conditions for reciprocal compensation are not to be considered reasonable unless they provide "for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" and that the costs be determined on the basis of a "reasonable approximation of the additional costs of terminating such calls." The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out.

Illinois Bell Tel. v. Worldcom, 179 F.3d at 573 (emphasis added). The FCC expressly ruled that "parties may voluntarily include [ISP-bound] traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic ... they are bound by those agreements, as interpreted and enforced by the state commissions." Reciprocal Compensation Ruling ¶ 22.

In light of the foregoing, we hold that the agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions. We therefore decline Southwestern Bell's invitation to determine the contractual issues as a facet of federal law. [FN15] Also, in accordance with the standards discussed above, we defer to the PUC's determinations on such issues, upholding them unless they are arbitrary and capricious or unsupported by substantial evidence.

[6] As for interpretation of the contracts, we begin by noting that the Time Warner/Southwestern Bell interconnection agreements require the payment of reciprocal compensation for "Local Traffic." "Local traffic" is defined by the agreements as traffic that both "originates" and "terminates" in the same local calling area. [FN16] Where a modem call "originates" is not disputed. In contrast, where such a call to an ISP "terminates" is the nub of the argument.

The agreements neither define "terminate" nor

specifically mention the Internet or ISPs. Southwestern Bell insists that the term "Local Traffic" does not include modem calls to ISPs because they do not terminate locally at the ISP's facility; however, both the PUC and the district court determined that such calls do terminate at the ISP facility.

[7] Under Texas law, unambiguous contracts must be enforced as written, with the intent of the parties being derived from the agreement itself. Intratex Gas Co. v. Puckett, 886 S.W.2d 274, 277-78 (Tex.App.-El Paso 1994). The first agreement between these parties specifies that calls "originated by one Party's end users and terminated to the other Party's end users shall be classified as Local Traffic under this Agreement if the call originates and terminates in the same [Southwestern Bell] exchange area ... or originates and terminates within different [Southwestern Bell] exchanges which share a common mandatory local calling area." An "End User" is defined as "a third-Party residence or business that subscribes to telecommunications services provided by either of the Parties." The parties' second agreement adds the phrase "or by another telecommunications service provider."

***9** These contractual provisions lend additional support to the conclusions of the PUC and the district court. The ISPs, as business subscribers to Time Warner services, are indeed end users under the agreements. The PUC classified "a call between two end users in the same local calling area" as "Local Traffic" and concluded that the interconnection agreements unambiguously include ISP traffic within the definition of "Local Traffic." The PUC ruled that, "[w]hen a transmission path is established between two subscribers in the same mandatory calling area, traffic carried on that path is local traffic, with the telecommunications service component of the call terminating at the ISP location." The district court noted that "as end users, ISPs may receive local calls that terminate within the local exchange network." (emphasis in original). The court concluded that a modem call to an ISP terminates at the ISP's facility within the local exchange network, basing its conclusion in part on the FCC's treatment of ISPs as end users lying within the local exchange. The FCC treats ISPs as "end users" for pricing purposes, permitting them to purchase telephone service at local business rates rather than interstate access tariffs. Reciprocal Compensation Ruling ¶¶ 5, 17, 23. We conclude that the PUC's consideration of the end-user status of an ISP is appropriate in light of the contractual provision mentioning "termination to [an] end user[ ]."

[8] Both of the instant interconnection agreements provide that undefined terms--such as "terminate"--are to be "construed in accordance with their end user usage in the telecommunications industry as of the effective date of [these] Agreement[s]." This provision, which is common to both agreements, tracks well-established rules of contract interpretation. See KMI Continental Offshore Prod. Co. v. ACF Petroleum Co., 746 S.W.2d 238, 241 (Tex.App.-Houston (1 Dist.) 1987), writ denied. "Beyond the four corners of the parties' agreement, their intent may be evidenced from the surrounding facts and circumstances when the contract was entered. The court may consider ... ordinary terms, customs and usages then in effect...." Intratex Gas, 886 at 278. The parties obviously agreed that "terminate" would mean whatever the telecommunications industry took it to mean at the time they signed the agreements, i.e., in 1996 and 1997.

A 1996 FCC Report defined "termination," for purposes of section 251(b)(5), as "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." [FN17] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15,499 ¶ 1040, 1996 WL 452885 (1996), aff'd in part, vacated in part on other grounds, Iowa Utils. Bd., 120 F.3d 753. As for the modem calls here at issue, the ISPs are Time Warner's customers, making Time Warner the terminating carrier. So, under the foregoing definition, "termination" occurs when Time Warner switches the call at its facility and delivers the call to "the called party's premises," which is the ISP's local facility. Under this usage, the call indeed "terminates" at the ISP's premises.

***10** Both the FCC and Southwestern Bell have heretofore embraced a custom of treating calls to ISPs as though they were local, terminating within the same local exchange network. The FCC recognized that agreements negotiated prior to the Reciprocal Compensation Ruling, as were the ones at issue here, had been negotiated in the "context of this Commission's longstanding policy of treating this traffic as local." Reciprocal Compensation Ruling ¶ 24. [FN18] In fact, the FCC noted that its historic "policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that [reciprocal] compensation is due for that traffic."

Id. ¶ 25 (emphasis added).

We are convinced that the PUC considered ample evidence that both the telecommunications industry as a whole and the parties to this dispute in particular treated ISP-bound calls as terminating locally at the time the interconnection agreements were being negotiated. By the end of 1996, five State commissions had already ruled that modem calls to ISPs are subject to reciprocal compensation. For years, Southwestern Bell had recorded calls made to ISPs as "local" in internal reports and bookkeeping records. Southwestern Bell did not change this practice until 1998, well after entering the instant interconnection agreements. An internal Southwestern Bell memorandum acknowledged that, under then-current FCC rulings, it expected to pay reciprocal compensation for modem calls: "As long as the 'ESP' exemption [FN19] remains in tact we can anticipate ... that we will compensate other [LECs] for traffic they terminate to internet access providers." And for some time Southwestern Bell has run an ISP of its own, despite the fact that as an incumbent LEC it is forbidden to offer long-distance/interstate service. It has justified its running of an ISP to the FCC by arguing that ISPs provide local, not interstate, service.

Southwestern Bell makes much over the fact that the PUC and the district court divided Internet traffic into two "components," one local and one interstate, to determine where the call "terminates." Despite its recent Reciprocal Compensation Ruling that Internet traffic is a continuous transmission for jurisdictional purposes--not terminating at the ISP's local server--the FCC recognized that, for purposes other than jurisdiction, [FN20] such calls can be treated in the same manner as local traffic. Reciprocal Compensation Ruling ¶ 12, 24. Perceiving such calls as terminating locally for compensation purposes is clearly condoned by the FCC.

***11** We note finally that the FCC listed several factors that state commissions may consider in deciding whether an interconnection agreement should be construed to classify calls to ISPs as local for purposes of reciprocal compensation. Id. ¶ 24. The PUC has already considered most of the factors. Moreover, the FCC declared that "state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions." Id. at ¶ 24.

The district court held that the PUC did not act arbitrarily and capriciously because a reasonable interpretation of the interconnection agreements is that the parties were to treat calls to ISPs like calls to other end users. We agree. The conclusion that modem calls terminate locally for purposes of compensation is both well-reasoned and supported by substantial evidence. We therefore affirm the PUC's decision to include ISP-bound traffic within the reciprocal compensation provisions of the subject interconnection agreements.

[9] Undaunted, Southwestern Bell goes on to contend on appeal that there was no meeting of the minds with regard to the issue of reciprocal compensation for local calls made to ISPs. A review of the record reveals that Southwestern Bell did not raise this issue during the administrative hearing so as to preserve it for judicial review. [FN21] The failure to raise an issue at the administrative level waives the right to appellate review of that issue. See Institute for Tech. Dev. v. Brown, 63 F.3d 445, 449 n. 3 (5th Cir.1995). Except to the extent that we have already discussed the parties intentions, we will not review separately the meeting-of-the-minds argument that was waived by Southwestern Bell.

III.
CONCLUSION

For the foregoing reasons, we hold that the PUC had jurisdiction to determine the issues discussed above, and that the district court had jurisdiction under the Act to hear the matters presented to it. On the merits, we affirm the district court's order denying Southwestern Bell's request for declaratory and injunctive relief. And, like the district court before us, we affirm the PUC's order requiring Southwestern Bell to comply with reciprocal compensation provisions in the instant interconnection agreements with respect to termination of calls to ISPs.

AFFIRMED.

FN1. Senior District Judge John M. Shaw of the Western District of Louisiana was a member of the panel who heard oral argument on this case. Because of his death on December 24, 1999, he did not participate in this decision. This appeal has been decided by a quorum pursuant to 28 U.S.C. § 46(d).

FN2. Less than a week ago the Court of Appeals for the District of Columbia decided Bell Atlantic Telephone Companies v. FCC, --- F.3d ----, 2000 WL 273383 (D.C. Cir.2000) March 24, 2000, vacating this ruling and remanding it to the FCC with instructions to provide a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as

terminating local telecommunications traffic, and why such traffic is "exchange access" rather than "telephone exchange service." The focus of that opinion is the unexplained (or underexplained) use of the "end-to-end" analysis to determine whether calls to ISPs are interstate or intrastate. Given the FCC's hands-off policy, even if the FCC should continue to deem such calls to be interstate and should satisfy the D.C. Circuit following remand, we do not view the court's remand as necessarily forecasting a different result on the question of PUC jurisdiction over such calls in the context of interpreting and enforcing existing reciprocal compensation agreements. This would be doubly so if the remand eventually results in the FCC's concluding that local calls to ISPs are intrastate.

FN3. The mention of a statement refers to "a statement of the terms and conditions that [an LEC] generally offers within that State to comply with the requirements of section 251." 47 U.S.C. § 252(f)(1).

FN4. The part of the Circuit Court's decision eventually reversed pertained to the conclusion that the FCC does not have jurisdiction under 47 U.S.C. § 208 to hear appeals of state commission decisions (and that 47 U.S.C. § 252(e)(6) confers this power exclusively on federal district courts). Iowa Utils., 120 F.3d at 804. The Supreme Court reversed in part, ruling that the issue was not yet ripe for review. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 733, 142 L.Ed.2d 835 (1999).

FN5. The district court was of the opinion that if calls to ISPs were not local, the PUC would have no jurisdiction, and jurisdiction would be exclusive in the FCC. This was erroneous but harmless dicta, because the district court ultimately concluded, as we do today, that the PUC had jurisdiction.

FN6. For example, the Act requires that
a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
(I) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other character; and
(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.
47 U.S.C. § 252(d)(2)(A).

FN7. The Seventh Circuit recognized that this allocation of authority "has a potential to cause problems," but would leave them to Congress to resolve:

Federal jurisdiction under § 252(c)(6) is exclusive when it exists. Thus every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer "no." This system may not have much to recommend it, but, as the Supreme Court observed in Iowa Utilities Board, the 1996 Act has its share of glitches, and if this is another, then legislature can provide a repair.
Illinois Bell Tel. v. Worldcom, 179 F.3d at 574 (Westmate* version only).

FN8. The Fourth Circuit expressed its awareness that other courts have used the "arbitrary and capricious" standard of review, quoting, inter alia, U.S. West v. MFS Intelenet, 193 F.3d at 1116, but stated that, as regarding review of fact findings, "there is no meaningful difference between this standard and the substantial evidence standard we apply." GTE South, 199 F.3d at 745 n. 5.

FN9. The PUC quoted the FCC's Report and Order on Universal Service, CC Docket No. 96-45, FCC 97-157 at ¶ 83 (1997), noting, however, that the FCC had recognized that its position should be reviewed in a future FCC proceeding.

FN10. In the Reciprocal Compensation Ruling, the FCC gave notice of a proposed rulemaking regarding inter-carrier compensation for ISP-bound traffic. The obligation to pay such compensation in existing interconnection agreements could be altered by future rules promulgated by the FCC. See U.S. West v. MFS Intelenet, 193 F.3d at 1123 n. 10.

FN11. As determined above, we review the interconnection agreements for compliance with the Act de novo, and for compliance with state law matters under the more deferential abuse of discretion standard.

FN12. Under both agreements, reciprocal compensation applies to transport and termination of "Local Traffic."

FN13. Section 251(b)(5) imposes on LECs the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

FN14. In the Reciprocal Compensation Ruling, the FCC concluded that "ISP- bound traffic is non-local interstate traffic," and noted that "the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, subpart H (Reciprocal Compensation for Transport and Termination of Local

Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic." Reciprocal Compensation Ruling n. 87.

FN15. Although we may refer to FCC pronouncements as part of our consideration of what is usage or custom in the telecommunications industry, we do so only as the contracts and state law might require.

FN16. "Local Traffic" is defined in the first agreement as "traffic which originates and terminates within a [Southwestern Bell] exchange including mandatory local calling arrangements. Mandatory Local Calling Area is an arrangement that requires end users to subscribe to a local calling area beyond their basic exchange serving area." The second agreement provides similarly that "Local Traffic, for purposes of intercompany compensation, is if (i) the call originates and terminates in the same [Southwestern Bell] exchange area; or (ii) originates and terminates within different [Southwestern Bell] Exchanges that share a common mandatory local calling area."

FN17. More recently, in discussing where a modem call "terminates," the FCC has remarked, "An Internet communication does not necessarily have a point of 'termination' in the traditional sense." Reciprocal Compensation Ruling ¶ 18. But the FCC's view at the time of these agreements was clear, as discussed next.

FN18. The FCC also acknowledged that it had historically "directed states to treat ISP traffic as if it were local." Id. ¶ 21.

FN19. The FCC has exempted Enhanced Service Providers, a category which includes ISPs, from payment of interstate access charges.

FN20. We are cognizant of the fact that the PUC used its two-component theory as the basis both for determining jurisdiction as well as for determining reciprocal compensation. To view the call as two components for jurisdictional purposes runs counter to the FCC's Reciprocal Compensation Ruling as discussed above. Nevertheless, we have today held for different reasons that the PUC properly exercised its jurisdiction in spite of any interstate aspect of the telecommunications. In this part of our opinion, we are addressing only the compensation aspect of the PUC's analysis.

FN21. Southwestern Bell points for support to a few sentences in the PUC arbitrator's initial opinion in which the arbitrator questioned whether there had been a meeting of the minds between the parties with respect to the issue of reciprocal compensation. The record reveals, however, that the language in the arbitrator's opinion was mere dicta, and that the arbitrator was not addressing any arguments actually raised by the parties. The Act limits the issues that may be decided in arbitration to those set forth by the parties. 47 U.S.C. § 252(b)(4)(A). Southwestern Bell's argument that it has preserved the issue is unconvincing.

END OF DOCUMENT

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOUTHWESTERN BELL TELEPHONE COMPANY, Plaintiff, v. BROOKS FIBER COMMUNICATIONS OF OKLAHOMA, INC.; BROOKS FIBER COMMUNICATIONS OF TULSA, INC.; ED APPLE, CHAIRMAN, BOB ANTHONY, VICE CHAIRMAN, AND DENISE BODE, COMMISSIONER (IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE OKLAHOMA CORPORATION COMMISSION); AND OKLAHOMA CORPORATION COMMISSION, Defendants.	ENTERED ON DOCKET DATE OCT 01 1999 Case No. 98-CV-468-K (J)

FILED
SEP 29 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before this Court is Plaintiff's appeal of the Oklahoma Corporation Commission ("OCC") Order No. 423626 in Cause No. PUD 970000548 ("OCC Order"), enforcing an interconnection agreement approved under 47 U.S.C. § 252 (the "Interconnection Agreement").

Brief History of Case

Plaintiffs filed this appeal on June 1, 1998. In the January 14, 1999, scheduling order, the Court provided for the filing of Plaintiff's Initial Brief on the Merits on February 22, followed by a response and a reply. The Plaintiffs filed this summary judgment motion in the place of the Initial Brief on the Merits, and the Court will treat the motion, responses, and reply as the appeal briefs outlined in the scheduling order. The Court is therefore empowered to enter judgment in favor of the Defendants, if appropriate, despite the fact that defendants did not move for summary judgment.

35

Subject Matter Jurisdiction & Standard of Review

The Court has jurisdiction to review a state commission's interpretation of an interconnection agreement but only to determine its compliance with 47 U.S.C. §§ 251, 252. Section 252(e)(6) provides,

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

The OCC accepted the parties' Interconnection Agreement under section 252(e)(1) and has issued the current order in an attempt to enforce that agreement. At least one circuit has held that the federal district court has the jurisdiction to review orders enforcing agreements under this section. *See Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999); *cf. Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, — F.3d —, —, No. 98-2228, 1999 WL 618061, at *7 (1st Cir. Aug. 19, 1999) (finding that section 252(e)(6) requires at least a substantial nexus between the state commission's determination and the interconnection agreement). This review is limited to determining compliance with 47 U.S.C. §§ 251, 252. *See* 47 U.S.C. § 252(e)(6). Therefore, this Court will not review the OCC's application of contract law. *See Puerto Rico Tel. Co.*, 1999 WL 618061, at *13 (federal court can only review state commission's application of state law to extent it conflicts with sections 251 and 252); *Illinois Bell*, 179 F.3d at 571, 572 (refusing to review state commission's actions for compliance with state law). Federal courts will give deference to FCC pronouncements and interpretations of its own regulations. *See Farmers Tel. Co. v. FCC*, 184 F.3d 1241, —, Nos. 97-9522, 97-9547, 1999 WL 507633, at *5 (10th Cir. July 19, 1999); *Illinois Bell*, 179 F.3d at 571.

Discussion

Both sides in this appeal wish to take advantage of a recent FCC ruling, Declaratory Ruling in CC Docket No. 96-98 & Notice of Proposed Rulemaking in CC Docket No. 99-68 ("FCC Declaratory Ruling"), 14 F.C.C.R. 3689 (1999). Plaintiff relishes that the ruling adopts its perception of ISP-bound traffic as largely interstate. *See id.* ¶ 1. Defendants take comfort where it concludes that existing interconnection agreements, as interpreted by state commissions, are still binding until the FCC issues a rule on this subject. *See id.* Not surprisingly, then, neither side can agree whether this ruling mandates an affirmance or vacation of the OCC Order.

Plaintiff argues that the OCC Order rested on an erroneous understanding of the Telecommunications Act of 1996[1] and FCC decisions. More specifically, Plaintiff argues that the OCC based its decision on the mistaken belief that federal law views calls to ISPs as telecommunications that terminate at the ISP, as opposed to information services which travel from the ISP to points beyond. Plaintiff is correct that the OCC Order makes this distinction. *See* OCC Order, at 7-8. Moreover, the FCC recently rejected this telecommunications-information services interpretation of ISP-bound traffic. *See* FCC Declaratory Ruling ¶¶ 12, 13. This determination, while based on precedent and consistency with the 1996 Act, is the first FCC ruling on this specific issue. The FCC recognizes this when it notes that some state commissions may decide to re-examine those determinations "based on a finding that [ISP-bound] traffic terminates at an ISP server." *Id.* ¶ 27. The parties, however, dispute whether the OCC Order rests on this interpretation of federal law.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 15 U.S.C. 79z-5c, 47 U.S.C. §§ 160-61, 222, 230, 251-76, 336, 363, 549, 560-73, 613-14).

While containing statements that could be construed in Plaintiff's favor, the OCC Order's overall form indicates that the OCC made these determinations of federal law in order to establish the context in which the parties formed the Interconnection Agreement. Following its discussion of information services versus telecommunications, the OCC Order states that "federal law dictates that the termination point of a call to an ISP for reciprocal compensation purposes is the location of the ISP." OCC Order, at 8. "Thus," the Order continues,

> where an interconnection agreement defines local traffic as traffic which originates and terminates within a given local calling area (as does the SWBT-Brooks interconnection agreement), calls from an end-user to an ISP located in the same local calling area are subject to the reciprocal compensation rate specified for local traffic.

Id. However, referring back to this discussion, the OCC Order states that the Interconnection Agreement should be interpreted in the context of the "policy established by the FCC and followed by SWBT" that "ISPs be treated as end-users." *Id.* After further analysis, the OCC Order then finds that these calls are "terminating traffic" under the Interconnection Agreement. *Id.* at 8-9. After examining several factors forming the context around the agreement, the OCC continues to find this the most reasonable construction of the Agreement. *See id.* At 8-11.

It is on this context-based analysis that Defendants hinge their argument for affirmance. In its Declaratory Ruling, the FCC notes that it has no rule governing inter-carrier compensation in this instance and that parties negotiating, and state commissions interpreting, interconnection agreements in the past had to determine as a matter of first impression how to compensate interconnecting carriers for ISP-bound traffic. *See* FCC Declaratory Ruling ¶ 9. The FCC finds "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." *Id.* ¶ 21. Parties reasonably could have decided to treat ISP-bound traffic as local traffic for reciprocal compensation purposes against the backdrop of the FCC's prior policy, certain incumbent local exchange carriers' ("LECs") prior practices, and the absence of a FCC rule. *See id.* ¶ 24.

The FCC notes that state commissions are the arbiters of what constitutes relevant factors but mentions several illustrative factors it considers relevant. *See id.* These factors include the following: (1) negotiation of the agreement in the context of the FCC's long-standing policy of treating ISP-bound traffic as local; (2) conduct of the parties pursuant to the interconnection agreement; (3) whether LECs serve ISPs out of intra- or interstate tariffs; (4) whether LECs count revenues from services to ISPs as intra- or interstate; (5) whether LECs segregate ISP-bound traffic from local traffic; (6) whether LECs include ISP-bound calls in local telephone charges; and (7) whether LECs would be compensated for ISP-bound traffic if it were not included in the local traffic reciprocal compensation. *See id.*

As mentioned above, the OCC Order interprets the Interconnection Agreement in the context of the FCC policy mentioned in factor one. *See* OCC Order, at 8, 9. Like FCC factor three, the OCC Order also notes that Plaintiff offers local exchange services to ISPs and charges them at intrastate local tariff rates. *See id.* at 9. Similar to factor six, the OCC finds that the parties' treat calls from an end-user to an ISP within the same local calling area as a local, rather than toll, call. *See id.* Finally, mirroring FCC factor seven, the OCC order notes that, absent this interpretation, the OCC would have to find that the parties agreed to no compensation for ISP calls. *See id.* at 10. The OCC also considers other factors in its decision, such as the number dialed by a calling party and the overall structure of a contract containing various compensation rates for different types of traffic.

including local and interexchange. *See id.* at 8, 11. The OCC Order concludes that is more reasonable to infer ISP calls are local traffic than to infer an implied no-compensation agreement in these circumstances. *See id.* at 11.

The OCC rejected Plaintiff's claim that federal law requires calls to ISPs be viewed as non-local. *See* OCC Order, at 9. While the FCC has not accepted the OCC's interpretation of federal law and, in fact, adopted Plaintiff's theory, the FCC has also noted that its decision does not *require* a state commission to find that a reciprocal compensation agreement does not cover ISP-bound traffic. *See* Declaratory Ruling ¶ 21; *see also Illinois Bell*, 179 F.3d at 574 ("it seems clear that the FCC would not agree . . . that it has had a long-standing policy against treating calls to ISPs as local calls").

There is ample evidence that the OCC considered several factors in order to interpret the parties' Interconnect Agreement and did not allow a misapprehension of federal law to control its decision. Moreover, the agreement, as interpreted by the OCC, does not violate current federal law. The OCC, as "arbiters of what factors are relevant in ascertaining the parties' intentions," FCC Declaratory Ruling ¶ 24, focused on several it found probative and determined the most reasonable construction of the agreement. Therefore, the Court will affirm the OCC Order.[2]

[2]Defendants Brooks Fiber Communications of Tulsa, Inc. and Brooks Fiber Communications of Oklahoma, Inc. request remand if the Court finds the OCC Order deficient. Plaintiff strongly opposes remand. Having found the OCC's interpretation of the Interconnection Agreement consistent with federal law, the Court feels that remand is unnecessary in this case.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment (# 14) is DENIED. Oklahoma Corporation Commission Order No. 423626 in Cause No. PUD 970000548 is AFFIRMED.

ORDERED this 28 day of September, 1999.

TERRY C. KERN, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOUTHWESTERN BELL TELEPHONE COMPANY, Plaintiff, v. BROOKS FIBER COMMUNICATIONS OF OKLAHOMA, INC.; BROOKS FIBER COMMUNICATIONS OF TULSA, INC.; ED APPLE, CHAIRMAN, BOB ANTHONY, VICE CHAIRMAN, AND DENISE BODE, COMMISSIONER (IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE OKLAHOMA CORPORATION COMMISSION); AND OKLAHOMA CORPORATION COMMISSION, Defendants.	ENTERED ON DOCKET DATE OCT 01 1999 Case No. 98-CV-468-K (J) FILED SEP 23 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of Plaintiff's Motion for Summary Judgment (# 14). The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED that judgment is hereby rendered for Defendants Brooks Fiber Communications of Oklahoma, Inc.; Brooks Fiber Communications of Tulsa, Inc.; Ed Apple, Chairman, Bob Anthony, Vice Chairman, and Denise Bode, Commissioner (in their official capacities as commissioners of the Oklahoma Corporation Commission); and Oklahoma Corporation Commission and against Plaintiff, Southwestern Bell Telephone Company.

ORDERED this 28 day of September, 1999.

TERRY C. KERN, Chief
United States District Judge

*1999 U.S. Dist. LEXIS 12093, **

MICHIGAN BELL TELEPHONE CO., d/b/a Ameritech Michigan, Inc., Plaintiff, v MFS INTELENET OF MICHIGAN, INC., TCG DETROIT, BROOKS FIBER COMMUNICATIONS OF MICHIGAN, INC., MCI TELECOMMUNICATIONS CORP., MCIMETRO ACCESS TRANSMISSION SERVICES, INC., AT&T COMMUNICATIONS OF MICHIGAN, INC., BRE COMMUNICATIONS, LLC, JOHN G. STRAND, JOHN C. SHEA, and DAVID A. SVANDA, Commissioners of the Michigan Public Service Commission, in their official capacities, Defendants.

File No. 5:98 CV 18

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1999 U.S. Dist. LEXIS 12093

August 2, 1999, Decided
August 2, 1999, Filed

DISPOSITION: [*1] Plaintiff's Motion for Summary Judgment ("Supplemental Brief") (dkt. no. 132) DENIED. Defendants' Motions for Summary Judgment ("MPSC Brief in Opposition" and "Carrier Defendants' Joint Supplemental Merits Brief") (dkt. nos. 133 and 134) GRANTED; judgment entered for Defendants and against Plaintiff as to counts I, II, and III of Plaintiff's complaint; counts IV and V of Plaintiff's complaint dismissed without prejudice.

CORE TERMS: reciprocal, traffic, state commission, interconnection, carrier, federal law, deference, telecommunications, interstate, originates, fill, gap, summary judgment, internet, withholding, termination, coordinated, regulations, transport, customer, network, cease, Telecom Act, contract interpretation, substantial portion, extrinsic evidence, contract law, defer

COUNSEL: For MICHIGAN BELL TELEPHONE COMPANY, plaintiff: Theodore A. Livingston, Mayer, Brown & Platt, Chicago, IL.

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For MICHIGAN BELL TELEPHONE COMPANY, plaintiff: Edward R. Becker, John M. Dempsey, Dickinson Wright, PLLC, Lansing, MI.

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For MFS INTELENET OF MICHIGAN, INC., BROOKS FIBER COMMUNICATIONS OF MICHIGAN, INC., defendants: Darryl M. Bradford, Jenner & Block, Chicago, IL.

For TCG DETROIT, defendant: Douglas W. Trabaris, Teleport [*2] Communications Group,

Inc., Chicago, IL.

For TCG DETROIT, defendant: Roderick S. Coy, Stephen J. Videto, Clark Hill, P.L.C., Okemos, MI.

For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., defendants: Albert Ernst, Dykema Gossett, Lansing, MI.

For AT&T COMMUNICATIONS OF MICHIGAN, INC., defendant: Arthur J. LeVasseur, George Hogg, Jr., Sidney M. Berman, Fischer, Franklin & Ford, Detroit, MI.

For BRE COMMUNICATIONS, L.L.C., defendant: Richard C. Gould, Grandville, MI.

For JOHN G. STRAND, defendant: David M. Gadaleto, Jennifer M. Granholm, Attorney General, Liquor Control Division, David A. Voges, Asst. Atty. Gen., Jennifer M. Granholm, Attorney General, Public Service Division, Lansing, MI.

For JOHN C. SHEA, DAVID A. SVANDA, defendants: David M. Gadaleto, David A. Voges, Asst. Atty. Gen., Lansing, MI.

JUDGES: RICHARD ALAN ENSLEN, Chief Judge.

OPINIONBY: RICHARD ALAN ENSLEN

OPINION: OPINION

Introduction

The subject of this litigation is whether reciprocal compensation between local exchange carriers ("LECs") is due for calls made to internet service providers ("ISPs"). As described in an earlier Opinion in this matter, the Telecommunications [*3] Act of 1996, Pub. L. 104-104, 1996 U.S.C.C.A.N. (110 Stat. 56) 10 (codified as amended in scattered sections of Title 47 of the United States Code) (hereinafter "the Telecom Act" or "the Act"), was designed to inject competition into the traditionally monopolistic area of local telephone service. To effectuate that goal, the Act requires, among other things, that incumbent LECs enter into interconnection agreements with competing LECs.

In 1997, as a result of the mandate imposed by the Act, Plaintiff Ameritech entered into a number of interconnection agreements with various competing LECs. Those agreements included provisions requiring the Parties to pay reciprocal compensation to one another for local calls initiated by the customer of one Party which were terminated by a customer of the other Party, as also required by the Act. *See* 47 U.S.C. § 251(b)(5). Section 251(b)(5) provides that all LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The corresponding regulations define reciprocal compensation as an "arrangement between two carriers . . . in which each of the two carriers [*4] receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e) (1998). "The reciprocal compensation system functions in the following manner: a local caller pays charges to her LEC which originates the call. In turn, the originating carrier must compensate the terminating LEC for completing the call. . . . Reciprocal compensation applies only to 'local telecommunications traffic.' 47 C.F.R. § 51.701(a) (1998). Local telecommunications traffic is defined as traffic that 'originates and terminates within a local service area established by the state commission.'" *Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*, 1998 U.S. Dist. LEXIS 11344, No. 98 C 1925, 1998 WL 419493, *4 (N.D. Ill. July 23, 1998) ("*Illinois Bell I*").

For over a year, both Ameritech and the Defendant competing LECs ("Defendant LECs" or

"Carrier Defendants") paid such compensation for calls made to ISPs from an end user within the same local calling area. This case arose when Ameritech, asserting that all calls to ISPs are interstate calls, stopped [*5] paying reciprocal compensation to the Defendant competing LECs for those calls.

In response to Plaintiff's unilateral decision to cease payment, each of the Defendant LECs either filed individual complaints with the Michigan Public Service Commission ("MPSC") or intervened in such actions. Ultimately, the complaints were consolidated and the Commissioners found in favor of the Defendant LECs. On January 28, 1998, the Commissioners issued an Order instructing Plaintiff Ameritech to "cease and desist" withholding reciprocal compensation from the competing LECs for calls made to ISPs. The Commissioners ordered Plaintiff to release over $ 6 Million in back compensation within 10 days, to pay all future charges, and to pay the competing LECs' attorneys fees. In response to the MPSC Order, Plaintiff filed this action, pursuant to 47 U.S.C. § 252(e)(6). This action is in the nature of an appeal of the MPSC Order. n1 *See* *AT & T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 661, 668 (E.D.N.C. 1998).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Though it is not precisely an appeal. *See infra* note 2.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*6]

This matter was stayed on August 26, 1998, pending the FCC's issuance of a declaratory ruling on the question whether reciprocal compensation was due on calls made to ISPs. On February 26, 1999, the FCC issued its *Declaratory Ruling in in CC Docket No. 99-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68* (Feb. 26, 1999) ("Ruling"). The parties have since filed briefs in which they appear to seek final disposition of this matter in light of the FCC Ruling. n2

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 The parties have not addressed the procedural posture of the briefs they have filed. Each, however, seeks a final resolution of this matter. The Plaintiff asks the Court to "vacate" the MPSC order, Defendants request that the MPSC order be "affirmed." The Court will construe the documents as cross-motions for summary judgment under Fed. R. Civ. P. 56.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Reciprocal Compensation

Plaintiff's primary argument is that its agreements with the Defendant carriers are to be construed in accordance with federal law, and that the Ruling establishes [*7] as federal law that ISP-bound traffic is not local, and, therefore, is not subject to reciprocal compensation. This is only half of the story, however. The other half is that the FCC Ruling also establishes as federal law that until the FCC promulgates rules on this issue, prior state commission determinations on the issue may remain undisturbed. Plaintiff asks the Court to defer to the FCC's determination regarding the nature of ISP-bound traffic, but not to its determination that state commission decisions should control in the interstitial period before rulemaking.

While there are many technical, regulatory, and contractual issues at play here, which are described in detail in the parties' thorough briefing and in cases such as *Illinois Bell I*, the real issue is simply one of deference. As Plaintiff notes, Courts have generally applied a *de novo* standard of review to the legal conclusions of state commissions under the act. *See, e.g.*, *U.S. West Communications, Inc. v. Hix*, 986 F. Supp. 13, 19 (D. Colo. 1997). The question of whether ISP-bound calls are "local traffic" subject to reciprocal compensation appears to demand such a legal conclusion. Accordingly, [*8] Plaintiff would have the Court perform *de*

novo review of the MPSC's determination, employing the FCC's new ruling, as well as other materials, in concluding whether it was legally correct. The FCC's new ruling, however, not only presents its opinion on the status of ISP-bound traffic, but, in essence, incorporates state commission determinations on the issue into the federal law of reciprocal compensation, at least for the time being. The question then becomes, has the FCC somehow relieved state commission determinations on this issue from *de novo* district court review? The Court concludes that it has achieved that effect by cloaking state commission determinations within the deference this Court must show to FCC determinations. In other words, while the parties brief extensively what the MPSC *should* have determined, the Court need go little further than what it *did*.

"'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) [*9] (quoting *Morton v. Ruiz*, 415 U.S. 199, 231, 39 L. Ed. 2d 270, 94 S. Ct. 1055 (1974)). The Telecom Act was not so specific as to address whether ISP-bound traffic was subject to the Act's reciprocal compensation provisions. Thus, a gap remained for the FCC to fill. The FCC did not hasten to fill it, however, and it was addressed, instead, by state commissions reviewing interconnection agreements. These commissions largely concluded that ISP-bound traffic was local traffic for which reciprocal compensation was required. *See Michigan Bell Tel. Co. v. MFS Intelenet of Michigan*, 16 F. Supp. 2d 828, 832 (W.D. Mich. 1998).

In the FCC's February 26, 1999 ruling, it took a step towards filling this particular gap. The FCC determined that "although some Internet traffic is intrastate, a substantial portion of internet traffic involves accessing interstate or foreign websites." Ruling at P 18. Thus, while "jurisdictionally mixed," Ruling at P 19, ISP-bound traffic "appears to be largely interstate." Ruling at P 1. Since reciprocal compensation is due only for local telecommunications traffic, it thus appears that reciprocal compensation may not be due for at [*10] least "a substantial portion" of ISP-bound traffic. The FCC continued, however, to state that its ruling on the interstate nature of the calls is not "dispositive of interconnection disputes currently before state commissions." Ruling at P 20. Instead, the FCC left the reciprocal compensation question to the LECs and the state commissions, stating that "where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, *as interpreted and enforced by the state commissions*." Ruling at P 22 (emphasis added).

Plaintiff asks the Court to simply disregard this fundamental part of the FCC Ruling as "inapplicable." It contends that (a) it did not agree to pay reciprocal compensation for ISP-traffic and (b) the MPSC's interpretive discretion regarding interconnection agreements is limited by state contract law and cannot be guided by what Plaintiff calls "extrinsic evidence."

Plaintiff argues that its interconnection agreements with the Carrier Defendants provide for reciprocal compensation only "as described in the Act." The Act is defined in the agreements "as from time to time interpreted in the duly authorized [*11] rules and regulations of the FCC or the Commission having authority to interpret the Act within its state of jurisdiction." As noted above, the Plaintiff embraces the FCC's interpretation of the Act, insofar as it determines that ISP traffic "appears to be largely interstate." The Ruling also interprets the Act, however, to provide reciprocal compensation for ISP traffic when a state commission has so interpreted an interconnection agreement. Thus, the interconnection agreements, interpreted in accordance with the Act, currently require reciprocal compensation for ISP traffic.

The FCC has given state commissions wide latitude in interpreting agreements. As noted in the FCC Ruling, the determination of the parties' intentions is left to the state commissions. Thus, Plaintiff's assertion of its intentions is largely irrelevant. What is important is what the MPSC determined its intentions to be, and whether it made that determination in an appropriate manner. The FCC Ruling describes a wide range of matters which may be considered by a state

commission in determining the propriety of reciprocal compensation for ISP-bound traffic. As noted by Defendants, the MPSC considered many of the [*12] same matters considered relevant by the FCC. Moreover, even if it had not, the items listed by the FCC were described as "illustrative only; state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions." Ruling at P 24. Furthermore, "even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic." n3 Ruling at P 25. Thus, the Act and the FCC permit state commissions to perform broad interpretation, which may extend beyond the precise language of the agreements themselves. Plaintiff argues that the FCC is not due deference in matters of contract interpretation. This may be true. The construction of interconnection agreements, however, involves not only bare contract interpretation, but policymaking, which is clearly a part of the FCC's and state commissions' domains. The MPSC was not limited to the "four corners" of the contract, and could, indeed, rely on "extrinsic evidence" in determining the [*13] scope of the parties' interconnection agreements.

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n3 It does not seem significant that this matter arises from an enforcement proceeding rather than an arbitration proceeding. *See* Michigan Bell Tel. Co. v. Strand, 26 F. Supp. 2d 993, 999 (W.D. Mich. 1998).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This Court's conclusion finds support in *Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566, 1999 WL 436474 (7th Cir. 1999) ("*Illinois Bell II*"). There, the Seventh Circuit stated:

> Now that the FCC has issued its ruling, and noting again that we defer to its reasonable interpretations of the Act, our task is to examine the ICC order, not to determine whether the ICC correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation.
>
> The short answer is that it does not. The FCC could not have made clearer that in the absence of a rule, a state agency's interpretation [*14] of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law.

Id. at *6.

Importantly, the Seventh Circuit referred to the FCC determination that state commission decisions should remain in force as part of "the FCC's interpretation of the Act." *Id.* at *7. As such an interpretation, it is entitled to deference. Furthermore, the court stated that it saw "no violation of the Act in giving such deference to state commissions; in fact, the Act specifically provides state commissions with an important role to play in the field of interconnection agreements." *Id.* at *8. This jibes with the principle that *Chevron* deference is particularly appropriate for administrative interpretations involving "a technical area that is highly specialized and requires coordinated management in all its phases." Indep. Community Bankers Assoc. of South Dakota, Inc. v. Bd. of Govs. of the Fed. Reserve Sys., 838 F.2d 969, 975 (8th Cir. 1988). Here, the FCC is engaged in such an area, and has interpreted the Act to provide for a broad range of compensation schemes, consistent with its pursuit of coordinated management.

The [*15] Plaintiff has submitted to the Court, as supplemental "authority," a petition for rehearing in the Seventh Circuit of *Illinois Bell II*. The petitioner there describes the panel's

opinion as providing "federal courts exclusive jurisdiction over an entire class of cases while withholding the power to decide them." (Petition of Ameritech Illinois for Rehearing at 1.) It *does no such thing. Instead, the panel decided, as does this Court,* that the FCC Ruling provides, in part, the law by which state commission determinations must be evaluated. The Ruling is apposite authority which guides the determination of "whether the state commission interpretation is correct." (Petition of Ameritech Illinois for Rehearing at 8.) It is true that the FCC Ruling establishes, as a matter of federal law, that essentially all state commission interpretations on this subject are presumptively correct. While that Ruling stands, however, it provides the rule by which courts, following *Chevron*, must decide the issues before them. The *Illinois Bell II* panel and this Court both decide the legality of state commission determinations by applying federal law, which includes, very prominently, FCC interpretations. [*16]

The Court concludes that the MPSC acted within the law, and that its Order should stand. The Court will therefore enter judgment for the Defendants on counts I, II, and III of Plaintiff's complaint.

State Law Claims

Under 28 U.S.C. § 1367(c)(3), the district court may decline to exercise supplemental jurisdiction over a claim if it "has dismissed all claims over which it has original jurisdiction[.]" Indeed, "'if the federal claims are dismissed before trial, . . . the state claims [generally] should be dismissed as well.'" *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130, (1966)).

The Court concludes that the MPSC's award of attorneys' fees is a matter of state law, reserved to the MPSC by § 252(e)(3). Plaintiff's contention that the MPSC's Order is in violation of state administrative law is, of course, also a state law claim. The Court, therefore, in its discretion, will dismiss without prejudice Plaintiff's state claims contained in counts IV and V of its complaint.

DATED in Kalamazoo, MI: [*17]

Aug 2, 1999

RICHARD ALAN ENSLEN

Chief Judge

JUDGMENT

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment ("Supplemental Brief") (dkt. no. 132) is **DENIED;**

IT IS FURTHER ORDERED that Defendants' Motions for Summary Judgment ("MPSC Brief in Opposition" and "Carrier Defendants' Joint Supplemental Merits Brief") (dkt. nos. 133 and 134) are **GRANTED;**

IT IS FURTHER ORDERED that judgment is entered for Defendants and against Plaintiff as to counts I, II, and III of Plaintiff's complaint;

IT IS FURTHER ORDERED that counts IV and V of Plaintiff's complaint are dismissed without prejudice.

DATED in Kalamazoo, MI:

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief Concerning The Impact On This Proceeding Of The Decision Of The United States Court Of Appeals For The District Of Columbia Related To Internet Service Provider Traffic And Request For Summary Relief were served upon the following parties via Hand Delivery on this 14th day of April, 2000.

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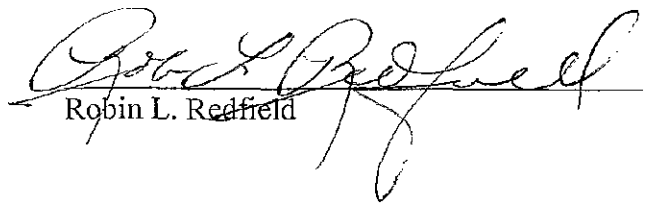

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