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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint	)	
of ICG Telecom Group, Inc.	)	
Against Ameritech Ohio Regarding	)	Case No. 97-1557-TP-CSS
The Payment of Reciprocal Compensation	)	

AMERITECH OHIO'S RESPONSE TO COMMENTS OF ICG TELECOM GROUP, INC.

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INTRODUCTION

The issue is whether reciprocal compensation applies to ISP traffic *under the parties' written Agreement*, but one would never suspect that from ICG's Comments. For ICG does not once quote the Agreement, ICG does not once cite the Agreement, ICG does not once refer in any way to what the Agreement says. The Agreement is the last thing ICG wants to address – even though it is what the law requires the Commission to address first. The reason, of course, is that there is one and only one way to read the Agreement, especially in light of the FCC's February 26, 1999, Order: It does not impose reciprocal compensation on ISP traffic because, as Ameritech Ohio demonstrated in its Initial Comments:

- The *written Agreement*, mirroring federal law, imposes reciprocal compensation only on calls that originate on one party's network "for *termination*" on the other party's network, and the FCC has ruled, as a matter of controlling federal law, that ISP calls do *not* terminate on the parties' networks.

- The *written Agreement*, mirroring federal law, imposes reciprocal compensation only on "*Local Traffic*," and the FCC has ruled, as a matter of controlling federal law, that ISP calls are *not* local traffic.

- The *written Agreement*, mirroring federal law, imposes reciprocal compensation only on traffic that is subject to reciprocal compensation under the Telecommunications Act of 1996 ("*As Described in the Act*"), and the FCC has ruled, as a matter of controlling federal law, that ISP calls are *not* subject to reciprocal compensation under the 1996 Act.

Faced with the devastating alliance of the language in the Agreement and the rulings in the FCC Order, ICG seeks to turn this case into a free-for-all about what the parties had in mind for ISP traffic at the time when they (just incidentally, as ICG conceives it) signed the Agreement. But the law forbids ICG's approach. To resolve the issue in this case, the law requires the Commission to look first to the parties' written Agreement. If the Agreement resolves the issue, which it does, the Commission looks no further. For the provisions in the written document are not mere evidence of what the parties agreed. Rather, they ARE the parties' agreement. Only if the written words were ambiguous -- and not just because the parties are fighting over them, but because the words are actually susceptible to different meanings -- would it be permissible for the Commission to look outside the Agreement to determine what the parties meant when they used those words. Here, there is no ambiguity, and thus no legitimate reason to consider extrinsic evidence -- evidence which, in any event, comes nowhere near to showing (as it would have to for ICG to prevail) that the parties meant to pay reciprocal compensation on a class of traffic on which the 1996 Act does not impose it.

ICG's desperate grasping at the flimsy straws scattered among the controlling rulings in the FCC Order is unavailing. It makes no difference that the FCC said it did not mean to interfere with state commission determinations, because the legal consequences of the FCC's rulings are what they are. It makes no difference that the FCC said that if parties agreed to pay reciprocal compensation on ISP calls it was not relieving them of that obligation, because the parties in this case made no such agreement. And it certainly makes no difference what factors the FCC said state commissions might have considered when they interpreted interconnection agreements to impose reciprocal compensation on ISP traffic, because it is the law of contracts that decides that, and the law of contracts says that the only factor that comes into play in this case is the unambiguous language of the Agreement and the federal law it incorporates.

ARGUMENT

I. THE AGREEMENT CLEARLY AND UNAMBIGUOUSLY DOES NOT IMPOSE RECIPROCAL COMPENSATION ON ISP TRAFFIC.

It is black letter law that "[i]f a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm (1995), 73 Ohio St. 3d 107, 108 (quoting Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc. (1984), 15 Ohio St. 3d 321, 322). See also, e.g., State ex rel. Parsons v. Fleming (1994), 68 Ohio St. 3d 509, 511 (same).

Where the terms of a contract are clear and unambiguous, a court cannot find a different intent from that expressed in the contract. E.g., The Russell Realty Co. v. Feghali (1997), 121 Ohio App. 3d 291, 294. The Commission must not look to evidence outside the agreement unless the contract is ambiguous. Id. If the contract is unambiguous, the terms of the agreement are to be applied, not interpreted. Id. Unexpressed intentions are deemed to have no existence. E.g., United States Fidelity and Guaranty Co. v. St. Elizabeth Medical Center (1998), 1998 Ohio App. LEXIS 3136, *18 (Ohio Ct. App. July 10, 1998).

"Contractual language is 'ambiguous' only where its meaning cannot be determined from the four corners of the agreement or where the language is susceptible to two or more reasonable interpretations." Id. See also State ex rel. Cunningham v. Industrial Commission of Ohio (1987), 30 Ohio St. 3d 73, 76 ("Ambiguous language is language which is susceptible to different interpretations or meanings. A word or phrase is ambiguous if it is capable of being interpreted as referring to more than one object or event").

In this case, the Agreement and the law it incorporates provide one and only one answer to every question the Commission might ask about whether the parties are to pay each other reciprocal compensation for ISP traffic:

What traffic is subject to reciprocal compensation under the Agreement?

> *"Reciprocal compensation applies for transport and termination of Local Traffic billable by Ameritech or ICG which . . . originates on Ameritech's or ICG's network for termination on the other Party's network." (Agreement § 5.7.1.)*[1]

What does "termination" mean in the Agreement?

> *The same thing Congress meant in the 1996 Act when it imposed the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" (47 U.S.C. § 251(b)(5)), and when it specified that those arrangements must "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" (id. § 252(d)(2)(A)(i)).*

How does the Agreement make clear that "termination" in section 5.7.1 of the Agreement means the same thing as "termination" in the 1996 Act?

> *Section 5.7.1 appears under a heading that says, "Reciprocal Compensation Arrangements — SECTION 251(b)(5)." The Agreement (§ 1.53) also specifies that "'Reciprocal Compensation' is As Described in the Act." Moreover, the Agreement declares (at p. 1) that it sets forth the "terms and conditions under which the Parties will interconnect their networks and provide other services as required by the Act," and (§ 2.0) that if there is any "conflict or discrepancy between the provisions of the Agreement and the Act, or the definitions contained [in the Agreement] and the definitions contained in the Act, the provisions and definitions of the Act shall govern."*

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1 All emphases are added unless otherwise indicated.

Under the Act, and therefore under the Agreement, where does a communication terminate?

> *The FCC, which has had authority since 1934 to implement federal communications law, recently confirmed that it "traditionally has determined the jurisdictional nature of communications by 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 Order ¶ 10.) That is, "Commission precedent . . . hold[s] that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts." (Id. ¶ 15.) Thus, under longstanding federal law and the Agreement, a communication terminates at its ultimate end point.*

Under the Act, and therefore under the Agreement, where does an ISP call terminate?

> *"Consistent with these precedents, [ISP calls] do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state." (Id. ¶ 12.)*

Are ISP calls subject to reciprocal compensation under the Act?

> *No. The FCC has ruled: "[S]ection 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected local telecommunications traffic. We conclude . . . , however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act . . . do not govern inter-carrier compensation for this traffic." (Id. ¶ 26 n.87.)*

Are ISP calls subject to reciprocal compensation under the Agreement?

> *No. The Agreement clearly and unambiguously imposes reciprocal compensation only on traffic that terminates on the network of the carrier claiming compensation, and traffic terminates under the Agreement where the federal Act, as interpreted by the FCC, says it terminates. Consequently, ISP traffic, which the FCC has ruled terminates on the Internet, clearly and unambiguously is not subject to reciprocal compensation under the Agreement. In addition, the Agreement clearly and unambiguously imposes*

> *reciprocal compensation only on traffic that is subject to reciprocal compensation under the Act and, as the FCC has ruled, that does not include ISP traffic.*

But what if there is evidence that the parties, or one of them, intended for ISP traffic to be subject to reciprocal compensation?

> *That would make no difference. "Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence."* *__Aultman Hosp. Ass'n v. Community Mut. Ins. Co.__ (1989), 46 Ohio St. 3d 51, 53.*[2]

II. IT WOULD BE UNLAWFUL FOR THE COMMISSION TO DETERMINE THAT THE PARTIES MUST PAY EACH OTHER RECIPROCAL COMPENSATION BASED ON ICG'S EXTRINSIC EVIDENCE.

The first thing ICG says about this Commission's Initial Order exposes why that Order cannot survive the FCC's February 26 Order. ICG states:

> In the August 27, 1998 *ICG Decision*, the Commission held that calls originated by an Ameritech end-user customer, handed off to ICG, and transported and *terminated by ICG* to its end-user customer that happens to be an ISP are eligible for reciprocal compensation under the terms of the interconnection agreement negotiated by the parties and approved by the Commission. (ICG Comments at 2.)

ICG's downfall, of course, is that ISP traffic, under the controlling federal law that the parties incorporated in their Agreement, is *not* "terminated by ICG to its end-user customer."

Accordingly, ICG, unwilling to face up to the actual language of the Agreement, tries to save the Initial Order by leap-frogging immediately to extrinsic evidence that, ICG argues, shows

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[2] See also Agreement § 28.21: "The terms contained in this Agreement and any Schedules, Exhibits, tariffs and other documents or instruments referred to herein, which are incorporated into this Agreement by this reference, constitute the entire agreement between the Parties with respect to the subject matter hereof, superseding all prior understandings, proposals and other communications, oral or written."

that "the most likely interpretation of what the parties intended" was that ISP traffic "was meant to be considered as local traffic, and thus, subject to reciprocal compensation." (Id. at 3, quoting Initial Order at 8.) But the Commission cannot properly consider ICG's extrinsic evidence and, even if it could, the evidence does not support a determination that the Agreement imposes reciprocal compensation on ISP traffic.

A. Extrinsic Evidence Cannot Be Considered.

Ameritech Ohio has already demonstrated that the law prohibits the Commission from considering ICG's extrinsic evidence (see Ameritech Ohio's Initial Comments at 16-18; supra at 3-6), and will not repeat that demonstration here. ICG, however, relies on the discussion in the FCC Order concerning the extrinsic evidence that, in the FCC's view "could have led those [state] commissions to their determinations" that ISP traffic is subject to reciprocal compensation under particular interconnection agreements. (ICG Comments at 8-10.) ICG's reliance on the FCC's dicta concerning how to interpret contracts is terribly misplaced. Authoritatively as the FCC speaks on matters of substantive law under the 1996 Act (subject only to review by the United States Courts of Appeals), the FCC speaks with no particular authority when it comes to matters of contract interpretation. Indeed, as the FCC itself has recognized:

> The Commission has consistently held that private disputes are beyond our regulatory jurisdiction and must be resolved in a local court of competent jurisdiction... The Commission does not possess the resources, *expertise*, or jurisdiction to adjudicate such issues and will defer determinations regarding the interpretation and enforcement of contracts . . . to state and local courts.

State Street Bank and Trust Co. v. Arrow Communications, Inc., 833 F. Supp. 41, 45 (D. Mass. 1993), quoting FCC ruling in the same matter.[3]

The FCC's acknowledgment that it has no special expertise in matters of contract interpretation is in line with judicial authority, which holds that that is true of federal administrative agencies in general. E.g., Chicago Tribune Co. v. NLRB, 974 F.2d 933, 938 (7th Cir. 1992) (rejecting National Labor Relations Board's interpretation of a collective bargaining agreement, holds "[t]he Board is not an expert in contract interpretation"); Pennzoil Co. v. FERC, 645 F.2d 360, 385-86 (5th Cir. 1981) ("[Federal agency] possesses expertise with respect only to technical matters, not with respect to the correct application of the same contract interpretation principles that courts use to fathom the parties' intent. . . . While [federal agency] has special expertise to interpret the regulation itself, the question of the parties' intent is a different matter altogether").

No court would attach weight to the dicta in the FCC Order concerning contract interpretation, and this Commission should not either. It is from the law of contracts that this Commission must take its guidance on that subject, and the law of contracts says that ICG's extrinsic evidence cannot be considered.

ICG, citing a statute and a case, contends (at 11) that the Commission may look to "usage of trade" to interpret the Agreement. ICG is wrong. The Commission could consider evidence

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3 Ameritech Ohio quotes the FCC for its recognition that it does not have special expertise to decide contract interpretation issues, not for its comments concerning its jurisdiction. The question whether the FCC has jurisdiction to adjudicate claims for alleged breaches of interconnection agreements is beyond the scope of this submission.

of trade usage, like extrinsic evidence generally, only if the Agreement were ambiguous. ICG goes wrong by relying on law that is unique to sales of goods, and that therefore does not apply here. The statute ICG cites, Ohio Rev. Code Ann § 13.01.11, is a section of the Uniform Commercial Code ("UCC") as adopted in Ohio. The UCC rules on trade usage are peculiar to the UCC. And the case ICG cites, Abram & Tracy, Inc. v. Smith (1993), 88 Ohio App. 3d 253, was a UCC case that, as ICG notes, applied O.R.C. § 1301.11. But Ohio's UCC provisions apply "only to transactions in goods," and its rules governing consideration of trade usage "[are] not applicable in the present case." Consulting & Management Services, Inc. v. Champion Serv. Corp., 1986 WL 2673, at *2-3 (Ohio Ct. App. Feb. 26, 1986); see also Ohio Rev. Code Ann. § 1302.02.

Where, as here, general contract law applies, rather than the UCC, evidence of trade usage, just like other extrinsic evidence, may be considered only when the contract is unambiguous. "[U]sage may be admissible to explain what is doubtful, but never to contradict what is plain." Kaufman Iron & Metal Co. v. Pennsylvania RR. Co. (1959), 110 Ohio App. 325, 328. See also M.B. Simpson, Inc. v. Globe Corp., 1982 WL 9268, at *2 (Ohio Ct. App. Dec. 29, 1982) (where the contract is clear and unambiguous, "[t]here is simply no room . . . to argue custom and usage of the trade"); Construction Advancement Program v. A. Bentley & Sons Co. (1975), 45 Ohio App. 2d 13, 18 (trade usage may be considered only "[i]f the intention of the parties cannot be determined from the language used"); 92 Ohio Jur. 3d (1986??), Usages and Customs, Section 33 ("Custom or usage cannot be admitted to contradict the clear and unambiguous terms of a contract, but custom or usage may be introduced to explain or aid in the interpretation of a contract where the meaning of he contract as expressed in writing is doubtful, as consistent with the parol evidence rule").

B. The Extrinsic Evidence Does Not Establish That The Agreement Imposes Reciprocal Compensation On ISP Traffic In Any Event.

As Ameritech Ohio demonstrated in its Initial Comments (at 18-19), it was Ameritech's understanding on the day it entered the Agreement that the FCC precedents held that ISP traffic was interstate access traffic, not local traffic, and that the jurisdiction of all traffic, including ISP traffic, must be determined on an end-to-end basis. In light of that understanding, it was not Ameritech's intent to treat ISP traffic as Local Traffic for purposes of Reciprocal Compensation. And, of course, the FCC has now confirmed that Ameritech's reading of the precedents was correct.

ICG ignores that evidence, and focuses instead on evidence that, according to ICG, shows that the parties intended to impose reciprocal compensation on ISP traffic. We address ICG's evidence — but briefly, so as not to lose sight of the fact that the Commission cannot properly consider it anyway.

ICG relies first on evidence that "Ameritech treats traffic to its own ISP customers as local for purposes of booking revenues, separations and ARMIS reporting." (ICG Comments at 3, quoting Initial Order at 9.) As Ameritech Ohio demonstrated in its Initial Comments, however (at 20), the evidentiary record in this case *and* the FCC Order both make clear that Ameritech Ohio's and the FCC's treatment of ISP traffic "as if" it were local are by-products of the FCC's exemption of ISP traffic from interstate access charges, and neither the FCC's nor Ameritech's treatment of this interstate traffic as if it were local transforms the traffic into local traffic or indicates that the FCC or Ameritech has ever understood ISP traffic to actually *be* local. Similarly, Ameritech Ohio's Initial Comments explained (at 21), based on the record, why Ameritech's payment of reciprocal compensation bills in full during the first year of the Agreement, when it did not know that the bills included ISP calls, does not suggest that Ameritech intended the reciprocal compensation provisions in the Agreement to apply to ISP traffic.

ICG next contends (ICG Comments at 4) that if Ameritech Ohio had really intended to exclude ISP traffic from reciprocal compensation under the Agreement, Ameritech would have seen to it that the Agreement did so expressly. ICG bases its argument on the Commission's observation that ISP traffic is not expressly included on the list of Switched Exchange Access Services -- from which the Initial Order inferred that Ameritech must not have intended to exclude ISP traffic from reciprocal compensation. (Initial Order at 7). This notion that Ameritech should have put ISP traffic on the list of Switched Exchange Access Services is like arguing that a veterinarian who contracts to treat all of a zoo's primates had better expressly exclude squirrels if he wants to be sure he doesn't have to treat them too. The veterinarian does not have to expressly exclude squirrels, because squirrels are not primates. Likewise, Ameritech Ohio did not have to expressly exclude ISP traffic, because ISP traffic is not local traffic, is not terminated by ICG on ICG's network, and therefore is not subject to reciprocal compensation in the first place.

There is an even deeper flaw in ICG's theory that if Ameritech Ohio wanted to exclude ISP traffic from reciprocal compensation it would have made sure that the Agreement specifically said so. ICG's theory assumes that Ameritech Ohio must prove that when it signed the Agreement, it affirmatively intended that ISP traffic would not be subject to reciprocal compensation. That assumption is wrong. This is not a mystery story about what the parties were thinking about ISP traffic when they entered the Agreement. On the contrary, Ameritech Ohio wins this case *even if it was not thinking anything one way or the other about ISP traffic* when it entered the Agreement. That is because the parties' written Agreement is that they will pay reciprocal compensation on local traffic that originates on one of their networks for termination on the other's network, *whatever that may turn out to include*. And, it does not include ISP traffic.[4]

Even if the Commission could properly consider it, ICG's "usage of trade" evidence falls woefully short of establishing that the parties understood that ISP traffic terminates "when the ISP answers the incoming call from an end user." (ICG Comments at 11.) ICG's evidence, which consists of a single sentence of testimony by an ICG employee, simply cannot stand up to the FCC's refutation:

> A call "terminates," according to [one commenter], when one station on the PSTN dials another station, and the second station answers. Under this view, the "call" associated with Internet traffic ends at the ISP's local premises.

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4 ICG's related argument, that Ameritech Ohio would have had to expressly exclude ISP traffic in order to obtain ICG's cooperation in segregating out that traffic (ICG Comments at 4) is silly. ICG knows who its ISP customers are, and given that reciprocal compensation does not apply to calls routed through those customers, it was ICG's responsibility not to bill Ameritech Ohio for those calls in the first instance.

> *We find that this argument is inconsistent with Commission precedent . . . holding that communications should be analyzed on an end-to-end basis*, rather than by breaking the transmission into component parts. The examples cited by CLECs to support the argument that calls end at the called number are not dispositive. The statutory sections upon which they rely were written to apply to specific situations, all of which . . . involve traditional telephony connections between two called numbers, as opposed to the novel circumstance of Internet traffic. (FCC Order ¶¶ 14-15.)

In other words, the sentence of testimony on which ICG relies to establish trade usage is directly at odds with the FCC's controlling understanding of trade usage, based on its own precedents.

Finally, ICG claims that Ameritech is just trying to undo a bad bargain. (ICG Comments at 5.) This, of course, is rhetoric, not argument. From Ameritech Ohio's point of view, Ameritech is trying to enforce its bargain.

III. NOTHING IN THE FCC ORDER SUPPORTS ICG'S POSITION THAT THE AGREEMENT IMPOSES RECIPROCAL COMPENSATION ON ISP TRAFFIC.

The written Agreement is not the only important thing that ICG's Comments do not talk about. ICG also cannot bring itself to say a single word about the portions of the FCC Order in which the FCC ruled that ISP traffic is non-local, interstate traffic (¶ 26 n.87); that that conclusion is not altered by the fact that ISPs have been treated as end users of telecommunications services (¶ 16); that the nature of an Internet communication, like all other communications, must be determined by looking at its ultimate endpoints (¶¶ 12, 18); that ISP traffic terminates on the Internet, and not at the ISP (¶ 12); and that ISP traffic is not subject to reciprocal compensation under the 1996 Act (¶ 26 n. 87).

Instead, ICG focuses on the portions of the FCC Order in which the FCC, acutely aware of the inevitable consequences of its rulings for cases like this (see Ameritech Ohio's Initial

Comments at 14, quoting statements of Commissioner Powell and Commissioner Furchtgott-Roth), sought to soften the blow — even if only by the use of sympathetic dicta — for competing LECs and state commissions that it feared would be dismayed by its rulings.

First, ICG relies on the FCC's observation (¶ 21) that it found "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic." For the reasons set forth in our Initial Comments (at 15), that observation is of no legal consequence. The inescapable fact of the matter is that the rulings in the FCC Order eviscerate ICG's position. To be sure, the FCC could not directly interfere with state commission determinations, because it did not have those determinations before it. But the FCC's rulings have the consequences that the law and the parties' Agreement ascribe to them. The FCC cannot block those consequences by disclaiming an intention to bring them to pass.

ICG then talks about the FCC's historical exemption of ISPs from access charges, its treatment of ISPs as end users of telecommunications, and its treatment of ISP traffic "as though it were local." (ICG Comments at 6.) It is difficult to tell exactly what ICG's point is, but surely it cannot be that the FCC's treatment of ISP traffic "as though it were local" somehow made the traffic local — or meant that it actually terminated at the ISP's facilities on local exchange carriers' networks — or even meant that the FCC's precedents suggested that ISP traffic was actually local. For the FCC made crystal clear that its historical treatment of ISP traffic did *not* have any of those effects:

> Nor are we persuaded by CLEC arguments that, because the Commission has treated ISPs as end users for purposes of the ESP exemption, an Internet call

> must terminate at the ISP's point of presence. The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service.... The fact that ESPs are exempt from access charges and purchase their PSTN links through local tariffs does not transform the nature of the traffic routed to ESPs. That the Commission *exempted* ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary.

(FCC Order ¶ 16) (emphasis in original).

ICG next cites to the FCC's observations that there is no FCC rule governing inter-carrier compensation for ISP traffic; that in the absence of such a rule, parties can agree to pay each other reciprocal compensation for ISP traffic; and that if parties did so agree, they should be held to their bargain. (ICG Comments at 7.) Of course. But Ameritech Ohio did not so agree. (See Ameritech Ohio Initial Comments at 15-16.)

In fact, the passage of the FCC Order that ICG relies on actually cuts against its position. That passage reads:

> Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this 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 within their 251 and 252 interconnection agreements, they are bound by those agreements as interpreted and enforced by the state commissions.

(FCC Order ¶ 22.) What the FCC is saying is that parties negotiating interconnection agreements, being aware that reciprocal compensation does not apply to ISP traffic "as a matter of law," may have voluntarily subjected ISP traffic to reciprocal compensation in their agreements nonetheless. Two inferences can fairly be drawn from that view: First, parties negotiating interconnection agreements should have been aware, as Ameritech was, that ISP traffic was not subject to reciprocal compensation under the 1996 Act as a matter of law. Second, in order to impose reciprocal compensation on ISP traffic, an interconnection agreement would have had to expressly include it, *not*, as ICG has maintained, the other way around. As we have demonstrated, however, the parties' Agreement, far from imposing reciprocal compensation on any class of traffic on which the Act does not impose it, hammers home that reciprocal compensation under the Agreement is limited to traffic that is subject to reciprocal compensation under the Act.

ICG also is not playing straight with the Commission when it quotes the FCC's statement that "our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." (ICG Comments at 7-9.) ICG lifted the quoted statement from the FCC's discussion of what a state commission might consider in an *arbitration* over whether an interconnection agreement *should* impose reciprocal compensation on ISP traffic. (See FCC Order ¶ 25.) Obviously, policy considerations that a state commission might bring to bear when it *arbitrates* the terms of an interconnection agreement have nothing to do with what the existing Agreement at issue in this case means. ICG compounds the offense by quoting the same FCC language in the Conclusion to its Comments — again without explaining that the FCC was talking about policy considerations that might come into play in an arbitration.

Finally, that the Agreement does not provide for reciprocal compensation for non-local ISP traffic, in addition to being entirely irrelevant to its interpretation, does not lead to any inequity. The Agreement simply places ICG in the same position as Ameritech Ohio. Because the FCC exempts ISPs from paying access charges, which both Ameritech and ICG would otherwise receive as compensation for the use of their networks for ISP traffic, Ameritech has long been denied inter-carrier compensation for such calls, and has been required to recoup the cost of carrying such traffic solely through the fees it receives from its customers. See Access Charge Reform Order, 12 F.C.C. Rcd. at 16132, ¶ 342, aff'd, Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 542 (8th Cir. 1998). ICG's real grievance is that the Agreement subjects it to the same consequences of the ISP access charge exemption with which Ameritech is already saddled. Whatever its merits, that system is the law. Id. There is nothing unreasonable about applying the same rules to ICG as to Ameritech Ohio.

Furthermore, it is ICG's reading of the Agreement that would lead to the true inequity. It would require Ameritech to pay out thirteen (13) times more in reciprocal compensation than it receives in revenue on average for each ISP call of typical duration. (See Confidential Pre-filed Direct Testimony of Eric Panfil at 7, 25, and Attachment 5 thereto.) ICG's position does not yield the *sharing* of *some* revenue; it yields the turnover of all the revenue thirteen-fold and more.[5]

Thus, what ICG really seeks is to maintain the reciprocal compensation "boondoggle" that provides it with enormous profits for doing almost no work. See Communications Daily, Sept. 17, 1998, at 4. (Exhibit 1). ICG's interpretation of the Agreement gives it "arguably the single greatest arbitrage opportunity and hence market distortion in the telecom sector today";

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[5] This analysis does not account for the revenue ICG also receives from its ISP customers for the business lines it provides -- revenue which Ameritech Ohio once received when it had the ISP as a customer.

"[n]o other place in the sector can companies reap as much as 4,000 percent arbitrage for minimal, value-added service." Scott C. Cleland, Reciprocal Comp for Internet Traffic – Gravy Train Running Out of Track (June 24, 1998) (See Attachment B to Ameritech Ohio's Application for Rehearing). Accordingly, the question is not whether ICG will receive a modicum of compensation. (It will – from its ISP customers.) The question is whether ICG will continue to benefit from an unearned "gravy train." Id.

CONCLUSION

As of the date of this brief, two state commissions, addressing the question after the FCC issued its February 26, 1999, Order, have ruled that reciprocal compensation does not apply to ISP traffic under the 1996 Act. (See Exhibits 2 and 3 hereto.)[6] For the reasons set forth above and in Ameritech Ohio's Initial Comments, Ameritech Ohio respectfully urges the Commission

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[6] One state commission, Alabama's, has ruled that reciprocal compensation does apply to ISP traffic. ICG's reliance on that decision (ICG Comments at 10) is misplaced, because the Alabama PSC started its analysis with (i) a whopping mistake, and (ii) a determination that does not apply here. The PSC stated: "Although the interconnection agreements . . . seem rather straight forward with regard to the definition of local traffic and the reciprocal compensation obligations of the parties, none of those agreements address with specificity ISP traffic or the meaning of the word 'terminates' as used in each agreement's definition of local traffic. The silence of the agreements on these important matters does give rise to some reasonable ambiguity concerning the interpretation of the agreements." The PSC's mistake, of course, was to decide that the agreements were ambiguous merely because they did not address reciprocal compensation on ISP traffic in so many words. Reprising an illustration that we used in the text above, this is like deciding that a contract to treat all of a zoo's primates is rendered ambiguous by failing to exclude squirrels. And, as to the meaning of the word "terminates," the Agreement in this case, for one, could not make any clearer that that word means what it means in the 1996 Act.

to join those commissions, vacate its August 27, 1998, decision in this docket and rule that reciprocal compensation does not apply to ISP traffic under the parties' Agreement.

Respectfully submitted

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing response comments were served upon the following by regular U.S. Mail, this 29th day of March, 1999:

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TELEPHONY

FCC proposed Wed. to remove barrier to faster modem speeds by allowing digital 56 kbps modems to use more network power. Change suggested in notice of proposed rulemaking would relax 2-decade-old rule that limited amount of signal power that can be transmitted through phone network. If adopted, proposal would allow for "moderately" higher modem speeds (true 56 kbps instead of current 53.6 kbps) from ISPs to consumers, FCC said. Action is latest in Commission's biennial review, in which agency must examine rules and eliminate or streamline those it finds outdated. Power limitations were contained in Part 68 of Commission rules that set technical parameters for terminal equipment and limited power levels to prevent electrocution, malfunctions, interference. FCC said it thinks signal power limitations can be relaxed without causing interference or technical problems, but it asked for comment on "any benefits and harms" that might result. It said that while proposal would produce "somewhat higher" modem speeds, it still intends to remove other impediments to faster data transmission when it's in "public interest." Chmn. Kennard said proposed change is "common-sense move" and is "just a small part of the FCC's ongoing effort to end the worldwide wait." Comr. Furchtgott-Roth approved rules, but reiterated his belief that scope of biennial review is too narrow and should encompass all FCC regulations. Comments on proposal are due at FCC 30 days from when it is published in Federal Register. Reply comments are due 15 days later.

Unit of Nextel leapfrogged Intel Global in bidding for almost every major license in 2nd round of FCC's 220 MHz spectrum auction Wed. Nextel outbid Intel for 2 of 3 national licenses, all 6 regional licenses and spectrum in all top 10 markets except San Francisco. Sophia License bid topped Intel for 3rd national license, FCC said. However, total top bids for auction increased just 2.3% to $5.58 million. Commission's spectrum auctions often last for weeks. Licenses in 220 MHz block are used primarily for mobile data services and paging.

Reciprocal compensation should be abolished for calls to Internet service providers because it reduces incentive for competitive LECs (CLECs) to upgrade to high-speed network, Covad Communications Chmn. Chuck McMinn said Tues. in speech to Economic Strategy Institute in Washington. "I think reciprocal compensation is a boondoggle," he said, and incumbent LECs (ILECs) have "legitimate point." McMinn also said he fully supported recent FCC notice of proposed rulemaking on Telecom Act Sec. 706 to allow ILECs to enter data services market through separate subsidiary. If ILECs are "forced to deal with their own bureaucracy, they'll simplify, streamline and eliminate" process for obtaining capacity on digital subscriber line (DSL) networks, he said. Covad is CLEC providing DSL service in San Francisco area with upcoming service planned for L.A., N.Y. McMinn said DSL is "fundamentally an interstate service" and encouraged FCC to "exercise their authority" to develop set of consistent, national standards. He said local market still is heavily regulated --even for CLECs -- and until this year Covad employed more lawyers than marketers.

Nortel is cutting 3,500 employees as part of plan to shift business from making traditional network equipment to advanced equipment, company announced. It said layoffs, representing 3% of work force, will allow it to focus on "growth opportunities in data networking." Workforce will be reduced in each of Nortel's units except for recently acquired Bay Networks. Company said it will eliminate managers, seek "additional operational efficiencies," realign units. Meanwhile, GTE approved Nortel access equipment for its network and deployed equipment in Cal., Fla., Tex. Nortel also said it extended its integrated service to wireless users, allowing them to move between private office system and public wireless network.

U S West introduced call management service to prevent Web users with single phone line from missing calls. Using technology developed by eFusion, U S West said service identifies caller and allows option of accepting call, sending call to voice mail or transferring call to another number. Service will be available to U S West customers in Omaha, Minneapolis and St. Paul by year-end, with plans to expand to other major markets in 1999.

Objective Communications signed reseller agreement with TDS Datacom, Madison, Wis., for delivery of video services, including videoconferencing and video-on-demand.

Lucent selected Equant's global services management system to provide additional services and support in 55 countries for its international data network.

BEFORE THE PUBLIC UTILITIES COMMISSION OF NEVADA

Docket No. 98-10015

In re petition of PAC-WEST TELECOMM, INC.

for arbitration pursuant to Section 252 of the

Telecommunications Act of 1996 to establish an

Interconnection Agreement with Nevada Bell.

Docket No. 99-1007

In re petition of ADVANCED TELCOM GROUP,

INC. for arbitration of an Interconnection

Agreement with Nevada Bell pursuant to Section

252(b) of the Telecommunications Act of 1996.

ARBITRATION DECISION

The Public Utilities Commission of Nevada ("Commission") makes the following findings of fact and conclusions of law:

Procedural History:

1. On October 12, 1998, Pac-West Telecomm, Inc. ("Pac-West") filed a Petition for Arbitration to establish an Interconnection Agreement with Nevada Bell. The petition was filed pursuant to Chapters 703 and 704 of the Nevada Revised Statutes ("NRS") and the Nevada Administrative Code ("NAC"), the regulations adopted by the Commission in Docket No. 96-12001 (later promulgated at NAC 703.280 et seq.), and 47 U.S.C. §251 et seq. This matter was designated as Docket No. 98-10015. Pac-West is currently authorized to provide resold intrastate interexchange, alternative operator and competitive local exchange services within Nevada pursuant to Certificate of Public Convenience and Necessity ("CPC") 2036 sub 3.
2. Pac West requests that the Commission arbitrate the following issue: whether a party receiving traffic from the other for termination to an Internet Service Provider ("ISP") is entitled to receive reciprocal compensation from the other pursuant to 47 U.S.C. §251(b)(5).
3. On October 22, 1998, the Commission issued a Notice of Petition for Arbitration and Notice of Prehearing Conference for Docket No. 98-10015.
4. On November 6, 1998, Nevada Bell filed its Response to the Petition.
5. By November 18, 1998, the Commission received Notices of Intent to Comment from AT&T Communications of Nevada, Inc. ("AT&T"), GTE California Incorporated, d/b/a GTE of Nevada ("GTE"), the Attorney General's Bureau of Consumer Protection - Utility Consumers'

EXHIBIT

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Advocate ("UCA"), Advanced Telcom Group, Inc. ("ATG"), and Sprint Communications Company L.P.

6. On November 30, 1998, the Commission held a duly noticed Prehearing Conference. Appearances were made by ATG, AT&T, GTE, Nevada Bell, Pac-West, Sprint Communications Company L.P., the Regulatory Operations Staff ("Staff") of the Commission, and the UCA. At the prehearing conference, all parties involved agreed to waive the 9-month deadline for resolution of the unresolved issues as required in 47 U.S.C. §252(b)(4)(C). In its place, the parties proposed a procedural schedule in which the Arbitration Decision would be filed on March 4, 1999, and a final Commission decision would be issued no later than April 5, 1999. On December 10, 1998, the Commission issued a Procedural Order in Docket No. 98-10015. Also, on December 10, 1998, the Commission issued a Notice of Hearing in Docket No. 98-10015.
7. On January 8, 1999, ATG filed a Petition for Arbitration to establish an Interconnection Agreement with Nevada Bell. The petition was filed pursuant to Chapters 703 and 704 of the NRS and NAC, 47 U.S.C. §251 et seq., and, in particular, NAC 703.280 et seq. This matter was designated as Docket No. 99-1007. ATG is currently authorized to provide resold local and intrastate long distance services within Nevada pursuant to CPC 2400.
8. ATG requests that the Commission arbitrate the following issue: whether a party receiving traffic from the other for termination to an ISP is entitled to receive reciprocal compensation from the other pursuant to 47 U.S.C. §251(b)(5).
9. On January 8, 1999, ATG also filed a Motion to Consolidate Hearings on Arbitration of Common Issue pursuant to NAC 703.550 et seq. and 47 U.S.C. §252(b). On January 15, 1999, Staff filed a Joinder in the Motion. No other comments were filed. On January 19, 1999, the Commission issued an Order consolidating Docket Nos. 98-10015 and 99-1007.
10. On January 8, 1999, prefiled direct testimony was filed by ATG and Pac-West. On January 15, 1999, prefiled direct testimony was filed by Nevada Bell. On January 22, 1999, prefiled direct testimony was filed by Staff. On January 29, 1999, prefiled rebuttal testimony was filed by ATG.
11. On January 19, 1999, the Commission issued a Notice of Petition for Arbitration; Notice of Prehearing Conference; Notice of Hearing in Docket No. 99-1007.
12. On February 3, 1999, Notices of Intent to Comment were filed in Docket No. 99-1007 by GTE and Sprint Communications Company, L.P. and Central Telephone Company - Nevada d/b/a Sprint of Nevada (collectively, "Sprint").
13. On February 10, 1999, the Commission held a prehearing conference for Docket Nos. 98-10015 and 99-1007. Appearances were made by ATG, Nevada Bell, Pac-West, and Staff.
14. On February 10, 1999, the Commission commenced a hearing in the consolidated matter of Docket Nos. 98-10015 and 99-1007. Appearances were made by ATG, Nevada Bell, Pac-West, and Staff. The hearing lasted two days which included 385 pages of transcript and 14 exhibits admitted into evidence. At the close of the hearing the Presiding Officer questioned the parties whether the final decision in this matter by the Commission could be extended to April 8, 1999. No party expressed an opposition to the change.
15. On February 18, 1999, post-hearing briefs were filed by ATG, Nevada Bell, Pac-West, Sprint, and Staff.
16. On February 26, 1999, the Federal Communications Commission ("FCC") released a Declaratory Ruling in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-38. The FCC concluded that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. In addition, the FCC concluded that reciprocal compensation obligations should only apply to local traffic

that originates and terminates within state defined local calling areas. Finally, the issue of reciprocal compensation for ISP-bound traffic was left to the discretion of state commissions in the exercise of their authority to arbitrate interconnection disputes.

Statutory Guidelines:

17. Pursuant to the Telecommunications Act of 1996 [Pub. L. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, United States Code)] and, in particular, 47 U.S.C. §252(b)(2)(i), the Presiding Officer has been presented with one issue to resolve in this arbitration: **Whether a party receiving traffic from the other for termination to an ISP is entitled to receive reciprocal compensation from the other pursuant to 47 U.S.C. §251(b)(5)**?
18. Pursuant to 47 U.S.C.§251(b)(5), each local exchange carrier ("LEC") has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.
19. Pursuant to 47 U.S.C. §251(c)(2)(D), each incumbent local exchange carrier ("ILEC") has the duty to provide for interconnection with the local exchange carrier's network on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.
20. For the purposes of compliance with section 47 U.S.C. §251(b)(5) by an ILEC , the Commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless 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 carrier. 47 U.S.C. §252(d)(2)(A)(i).

Position of the Parties:

Pac-West and ATG:

21. Pac-West states that over the past sixteen years, the FCC has consistently yielded to state jurisdiction over switched calls to Enhanced Service Providers, including ISPs. Without exception, the provision of such services has been deemed an intrastate endeavor. (Pac-West Post-Hearing Brief at 6).
22. While Nevada Bell argues that the FCC has asserted jurisdiction over dial-up access to the Internet through an FCC memorandum decision, Nevada Bell neglected to cite the portion of the decision (Tr. at 275-276), where the FCC makes it unambiguously clear that the order did not consider or address issues regarding whether LECs were entitled to receive reciprocal compensation when they deliver to ISPs circuit-switched dial-up traffic originated by interconnecting LECs. [GTE Operating Cos., CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 (rel. 10/30/98) at ¶2].
23. In addition, ATG states that the FCC's Part 36 Separations Rules do not support Nevada Bell's claim that the FCC requires calls made to ISPs to be assigned to the interstate jurisdiction of the FCC. (ATG Post-Hearing Brief at 13). The FCC ten percent rule applies only to private line and WATS lines; it does not apply to switched lines; and no rule in Part 36 applies the FCC's ten percent rule to the circuit-switched services which are at issue in this proceeding. (Tr. at 269-270).
24. Even if the FCC were to reverse its earlier decisions to leave regulation of circuit- switched ISP traffic to the states, this Commission is nevertheless bound by the Telecommunications Act of 1996 to order the payment of reciprocal compensation for the completion of calls to ISPs until the FCC adopts contrary regulations. (Pac-West Post-Hearing Brief at 8).
25. Pac-West intends to locate a switch in Las Vegas and provide access to ISPs (also located in

Las Vegas) via the switch in Las Vegas. Under this scenario, a Nevada Bell customer located in Reno would connect with an ISP in Las Vegas via a switch located in Las Vegas. (Tr. at 8 - 9). Reno and Las Vegas are located in different local access and transport areas (interLATA). Nevertheless, Pac-West is seeking to have reciprocal compensation apply to interLATA calls simply because the customer will access the ISP via a local number.

26. Pac-West and ATG seek to have the Commission define local calls by comparing the rate center of the NXX codes, rather than by comparing the physical location of the calling and called parties within the local calling area. (Pac-West Petition for Arbitration at 3; ATG Petition for Arbitration at 3).
27. Pac-West states that contrary to Staff's suggestion, there really is no issue of potentially adverse impacts on the local versus toll calling structure since very few toll calls would ever typically be made by consumers for the purpose of accessing ISPs. Thus, Pac-West's service would not be displacing any carrier's toll revenues. Instead, the real issue is merely whether Pac-West should be permitted to push the envelope a little bit in the extent to which local-rated ISP access is made available to consumers in outlying areas. (Pac-West Post-Hearing Brief at 15).
28. Pac-West believes that the best interests of Nevadans lie in allowing Pac-West to provide its services on a foreign exchange basis. (Id. at 15-16).
29. ATG states that even with Nevada Bell's proposal to monitor the usage of phone lines for Internet traffic (Tr. at 257-59), Nevada Bell still has not proposed a way to determine which traffic is terminating at ISPs. (ATG Post-Hearing Brief at 14). The end user requests may only request information from the ISP, and never go anywhere else, or may request information that is held in cache memory by the ISP and not need to go beyond the ISP. (Tr. at 176-77, 197-98, 229-30).
30. ATG believes that an Internet call is two calls. One is a call from the end user to the ISP, over which this Commission has jurisdiction and for which reciprocal compensation applies. The other call is an unregulated Internet data exchange called Internet Service, and is provided without Nevada regulation by entities such as America On Line and Nevada Bell Internet. (ATG Post-Hearing Brief at 16). Consequently, when a call from the public switched network reaches the first ISP modem bank, it ceases to be a telecommunications service provided by a common carrier. (Ex. 4 at 4).
31. ATG states that there is nothing in 47 U.S.C. §251 et seq. or the FCC's implementing rules which would prevent this Commission from finding that all local traffic is subject to the obligation of reciprocal compensation. There is no FCC decision in any proceeding which would limit or prohibit the Commission from making this finding. (ATG Post-Hearing Brief at 10).
32. ATG and Pac-West state that the purpose of reciprocal compensation is to compensate carriers for carrying out call termination functions. When an ILEC terminates a call on a CLEC's network, the ILEC should pay the costs of terminating the call. If reciprocal compensation is not applied to calls to ISPs, the ILEC avoids the costs of terminating the call on its own network and avoids reciprocal compensation payment to terminate its customer's call on another carrier's network. (Tr. at 32). This gives the ILEC a competitive advantage over competing carriers.
33. ATG states that fundamental fairness dictates that ILECs and CLECs should each pay the other to terminate all local switched telecommunications traffic. (Ex. 3 at 5-6; ATG Post-Hearing Brief at 2).
34. ATG states that Nevada Bell is profiting handsomely from the growth in data traffic, and both revenues and earnings are outstripping the growth in number of access lines. (Ex. 4 at 19-20).

The bottom line under any analysis is that revenue growth to Nevada Bell from Internet related sales is dwarfing any real or imagined expense from reciprocal compensation. (ATG Post-Hearing Brief at 7).

35. In addition, Nevada Bell has the same opportunity as do the CLECs to avoid paying reciprocal compensation, if it makes an effort to compete for the business of the ISPs. If Nevada Bell were to win ISP companies as customers or even retain the ones it has, then it too would receive reciprocal compensation from other carriers for ISP traffic, as it undoubtedly must if local independents' customers are dialing into ISPs in the Nevada Bell territory. (Ex. 4 at 6).

36. Pac-West stipulated that based on November 1998 data, its ratio of originating calls to terminating calls will be 1:69, while the ratio of originating minutes of use to terminating minutes of use will be 1:683. (Tr. at 51). However, ATG explains that the reason for the discrepancy in numbers between calls terminated on the CLECs' network and the ILEC's network is due to the relative size of the companies and their customer bases. (ATG Post-Hearing Brief at 2).

37. Pac-West states that Nevada Bell's reciprocal compensation payments for any local call, whether to an ISP or any other end user, should equal, dollar for dollar, the costs that Nevada Bell avoids by not having to transport and terminate the call itself. If there is, in fact, no equality between reciprocal compensation payments and avoided costs under the agreement, Nevada Bell, alone, is at fault for attempting to somehow game the system or otherwise failing to accurately state its costs. Id. at 12.

38. However, Nevada Bell has not contended that the UNE prices are faulty. Therefore, it must be concluded that the UNE prices set forth in the agreement are accurate and, as a consequence, that Nevada Bell is truly indifferent, from a long run cost perspective, as to whether it terminates local traffic or whether Pac-West terminates such traffic. (Pac-West Post-Hearing Brief at 12).

39. Strong considerations of law, public policy, and fundamental fairness to various competitive market entrants compel a finding by this Commission that all exchange of local traffic, including voice and data, should be subject to local reciprocal compensation. Fundamentally, reciprocal compensation is a competitively neutral, fair, just, and reasonable mechanism for compensating termination of calls, and no good reason exists to exclude calls terminated to ISPs. This fundamental reasoning has led commissions in some 27 other states to the same conclusions, with no state commission finding otherwise. (ATG Post-Hearing Brief at 10-11).

Nevada Bell:

40. Nevada Bell believes that ISP calls are jurisdictionally interstate in nature. Nevada Bell cites an FCC order covering GTE's offering of a DSL service which stated that the communications between an end user and an ISP is not made up of an intrastate portion and an interstate portion, but is one communication. [Nevada Bell Post-Hearing Brief at 3 citing GTE Operating Cos., CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292 (rel. 10/30/98) at ¶¶1, 17].

41. Nevada Bell also states that because the FCC allowed ISP to access the public switched network via a business line at state tariff rates, the FCC asserted jurisdiction over Internet usage, making the call jurisdictionally interstate. (Tr. at 241). Since ISP calls are jurisdictionally interstate in nature, they should be excluded from the compensation provisions of an agreement for the interconnection of local traffic. (Nevada Bell Post-Hearing Brief at 11).

42. In addition, the communication does not terminate at the ISP's modem, but continues on to the website. [Nevada Bell Post-Hearing Brief at 3 citing GTE Operating Cos., CC Docket No.

98-79, Memorandum Opinion and Order, FCC 98-292 (rel. 10/30/98) at ¶¶19-20; Ex. 8 at 16-17]. This continuous transmission may traverse both state lines and national borders. (Nevada Bell Post-Hearing Brief at 4). Without significant administrative expense to develop a jurisdictional reporting, auditing, and verification procedure for all of the parties handling the calls, or significant investment in measuring equipment by all of the parties, the end-to-end jurisdiction of the call cannot be determined. (Id. at 13-14).

43. Therefore, where it is difficult to determine through measurements or reporting, the jurisdiction of the calls using a service, the service is considered to be "contaminated" (a service handling both interstate and intrastate calls) and may be directly assigned to interstate if the station-to-station or end-to-end interstate usage is more than ten percent of the total usage of the service. If the interstate usage is less than ten percent, the usage and costs for the service are assigned to intrastate. (Ex. 8 at 15 - 16).
44. However, if the calls, usage, and costs are intrastate, they are under the jurisdiction of the Commission. (Ex. 5 at 15).
45. Nevada Bell stated that the term "local call" denotes a call made within a geographical area, where both the originating and terminating party are located, and where there are no toll or other costs beyond the local exchange service rates. (Id. at 1-2). Nevada Bell agrees with Staff that the traditional definition of a local call should be used in this matter. (Nevada Bell Post-Hearing Brief at 16-17).
46. Nevada Bell believes that using the definition of a "local call" proposed by Pac-West and ATG, would overturn years of industry custom and practice. It would also enable Pac-West and ATG to avoid paying access charges for toll-free type service and even avoid access charges for interLATA services offered to their customers. (Id. at 16).
47. Nevada Bell stated that the FCC rejected the "two call" theory and found that ISP Internet calls do not end or terminate at the ISP but are a single, continuous, end-to-end communications that is originated by a customer, transported to an ISP who then transports that call to a site on or beyond the Internet termination. (Id. at 9).
48. Nevada Bell states that given the nature and current uses of the Internet, it is not possible to identify or separate most Internet traffic by jurisdiction because the customer does not dial 1+ or 0+, but normally dials only seven digits to reach an ISP. Many interconnected companies may be involved in handling the ISP Internet call which may be terminated anywhere in the United States or the world. (Id. at 13).
49. Nevada Bell states that the FCC has determined that reciprocal compensation only applies to local communications:

> Transport and termination of local traffic for purposes of reciprocal compensation are governed by Sections 251(b)(5) and 252(d)(2) while access charges for interstate long-distance traffic are governed by Sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long distance traffic. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. 8/8/96) at ¶1033].

The FCC went on to add:

> We conclude that Sections 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area as defined in the following paragraph . . . We find that reciprocal compensation provisions

> of Section 252(b)(5) for transport and termination of traffic do not apply to transport or termination of interstate or intrastate interexchange traffic. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. 8/8/96) at ¶1034].

These holdings eliminate any application of reciprocal compensation to interstate or interexchange traffic. (Nevada Bell Post-Hearing Brief at 8).

50. Nevada Bell asserts that applying reciprocal compensation to dial up calls to ISPs discourages local competition. (Tr. at 7). If reciprocal compensation is permitted, CLECs could begin to use such payments for Internet traffic to fund payments to ISPs for traffic delivered to the ISPs. CLECs could remit some of their reciprocal compensation payments to pay these ISPs for connecting to the CLECs in the first place. Further, Nevada Bell states that it "is prohibited by law from charging its end users, ISPs, or other carriers, access charges for the interstate access costs they are causing." (Nevada Bell Post-Hearing Brief at 20). Therefore, Nevada Bell would be forced to subsidize the CLECs and their interconnecting ISPs for the interstate communications originating from Nevada Bell customers. (Id. at 20).
51. The subsidy arises because Nevada Bell is forced to bear all the costs of originating these calls on its network, is not permitted to charge end users to recover all these costs, and, under Pac-West's and ATG's interpretation, is forced to pay all of the costs of terminating these calls to the ISPs. (Id. at 20).

Staff:

52. Staff believes that if a call to an ISP is an intrastate call, the Commission clearly has jurisdiction to regulate that call. (Staff Post-Hearing Brief at 4). Staff states that the intent of the end user in making a call is irrelevant when determining whether a call is jurisdictionally interstate or intrastate. A call is interstate because it crossed state boundaries while the converse is also true. Therefore, intent cannot be the basis for determining whether a call to an ISP is jurisdictionally interstate. (Id. at 4-5).
53. Any concern regarding interstate and intrastate separations is irrelevant to the determination of whether the Commission has rate-making authority over calls to ISPs. (Id. at 4). The FCC, by allowing ISPs to access the public switched network via a business line at state tariff rates, in effect granted states rate-making authority which includes the authority to determine whether reciprocal compensation should apply to calls to ISPs. (Id.).
54. Staff believes that a local call should be defined on the basis of the physical locations of the calling and called party. This is the traditional definition of local calling as currently used for rate-making purposes in Nevada. (Ex. 14 at 8).
55. While Pac-West and ATG propose including interLATA calls as local calls for reciprocal compensation purposes, Nevada Bell is currently prohibited from carrying interLATA traffic. Therefore, the Commission should not define calls which must cross interLATA boundaries as local. (Staff Post-Hearing Brief at 6).
56. Staff states that a call to an ISP is viewed as comprising two discrete elements, one being a telecommunications service by which the end user connects to the ISP modem through a local call, the second being an information service by which the ISP converts the customer's analog messages into data packets which are individually routed through its modem to host computer networks located throughout the world. [Ex. 14 at 4 citing California Public Utilities Commission, R-95-04-043 & I-95-04-044, Order (rel. 10/22/98)].

57. Staff believes that when the dial up call to the ISP is a local call, reciprocal compensation should apply, as it does with all other local calls. (Staff Post-Hearing Brief at 6). The failure to apply reciprocal compensation to dial up calls to ISPs would discourage local competition. (Ex. 14 at 12). There is no technical reason to treat calls to ISPs any differently from other voice calls since both types of calls use the same telecommunications network functions. (Id. at 12).
58. The guiding principles to be employed by the Commission should be whether the ILEC and CLEC compete on an equal playing field, and whether the public interest is served. (Id. at 3). The only imbalance, if any does exist, would be due to the fact that Nevada Bell is a monopoly or dominant firm having most of the local telephone customers. (Id. at 11).
59. Staff believes Nevada Bell's primary concern seems to be that Nevada Bell would pay large amounts of money in reciprocal compensation payments if reciprocal compensation were to apply to dial up calls to ISPs. (Ex. 8 at 7-8). Yet, if Nevada Bell's negotiated reciprocal compensation rate is equal to the forward-looking cost of terminating the local call, then Nevada Bell avoids the same cost when its customers' calls are terminated on another carrier's network. (Ex. 14 at 16). Therefore, the appropriate solution to any perceived problem in overpayment by Nevada Bell would be to adjust the reciprocal compensation rates, not eliminating the application of reciprocal compensation. (Tr. at 379 - 380).

Presiding Officer Discussion:

60. The issue before the Presiding Officer is whether Pac-West and ATG are entitled pursuant to 47 U.S.C. §251(b)(5) to receive reciprocal compensation from Nevada Bell when they receive traffic from Nevada Bell that Pac-West and ATG terminate to an ISP? In order to decide this issue, the Presiding Officer believes four determinations must be made: (A) Does the Commission have jurisdiction to make a decision in this matter? (B) What is a local call? (C) What is the nature of a call "terminated" to an ISP? (D) Should reciprocal compensation apply to a call "terminated" to an ISP?

A. Jurisdiction

61. As the FCC observed, state commission authority over interconnection agreements pursuant to 47 U.S.C. §252 extends to both interstate and intrastate matters. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, FCC 99-38 (rel. 2/26/99) at ¶25 citing CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15544 (1996)]. In the absence of a federal rule regarding the appropriate inter-carrier compensation for this traffic, the Presiding Officer finds that the Commission has jurisdiction to determine the issue of reciprocal compensation for these interconnection agreements pursuant to the Commission's statutory obligations under the Telecommunications Act of 1996 (47 U.S.C. §252). As long as the carriers are located in the boundaries of the State of Nevada, the Commission has jurisdiction over that agreement.
62. Furthermore, if a call to an ISP is an intrastate call, the Commission has jurisdiction because the call was made and completed within the boundaries of the state of Nevada.
63. Finally, the Presiding Officer agrees with Staff that the FCC, by allowing ISPs to access the public switched network via a business line at state tariff rates, in effect granted states rate-making authority which includes the authority to determine whether reciprocal compensation should apply to calls to ISPs.

B. Local Call

64. The Presiding Officer finds that a local call is based on the physical location of the originating and terminating parties where there are no toll or other costs beyond the local exchange

service rates.(1) To define a local call based on the rate center of the NXX codes as proposed by Pac-West and ATG would subvert industry custom and practice. It could allow them to avoid access charges for toll calls and interLATA calls as well.

C. Call "Terminated" to an ISP

65. The Internet is an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world. 47 U.S.C. §230.
66. For purposes of this discussion, Internet calling is a communication that begins with an end user in Nevada dialing a local telephone number in Nevada for connection to an ISP. The call passes through Nevada Bell's central office and is placed on an interconnection trunk for completion through a CLEC's switch. At the CLEC's switch, the call is then placed on another trunk and sent to an ISP's router, which may be located in another LATA. At the ISP's router, the connection remains open and the caller can communicate through the Internet with data bases in other states and countries.
67. The FCC has traditionally determined jurisdictional nature of a communication by the end points of the communication. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, FCC 99-38 (rel. 2/26/99) at ¶10]. When a call is "terminated" to an ISP, the FCC has concluded that the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state. (Id. at ¶12).
68. The Presiding Officer finds that a call "terminated" to an ISP consists of two parts: the telecommunications service and information service. Those two parts comprise one communication.

D. Reciprocal Compensation

69. Reciprocal compensation compensates one company for allowing another company to use its facilities. It covers the cost so that the prior company does not have to duplicate construction and equipment used to complete the call.
70. Pursuant to 47 U.S.C.§251(b)(5), reciprocal compensation obligations should apply only to traffic that originates and terminates within state-defined local calling areas. [Id. at ¶24 citing CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16013 (1996)]. Therefore, reciprocal compensation should not be applied to interstate calls, interLATA calls, or intraLATA calls that are not local calls.
71. The Presiding Officer finds that the communications at issue here do not necessarily terminate at the ISP's local server, as ATG and Pac-West contend. Instead, the communications may continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another LATA, state, or country.
72. From the record presented to the Commission, the parties were unable to show what portion of calls "terminated" to an ISP remain local. In a single Internet communication, an Internet user may, for example, request information that is held locally in cache memory by the ISP, access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, FCC 99-38 (rel. 2/26/99) at ¶18].
73. Furthermore, no party provided a plausible way to identify and separate Internet traffic by

jurisdiction. Once the traffic reaches the ISP modem, nobody knows for sure what is local or long distance after that point. (Tr. at 229-230). The FCC concluded that although some Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites. [Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, FCC 99-38 (rel. 2/26/99) at ¶18]. Therefore, the Presiding Officer finds that unless a party can show that a local call "terminated" to an ISP remains local during the communication, consideration of reciprocal compensation is not warranted.

74. The Presiding Officer finds that any Internet traffic that can be shown to remain local is subject to reciprocal compensation if it can also be shown to be just, and reasonable.
75. Pac-West stipulated that based on November 1998 data, its ratio of originating calls to terminating calls will be 1:69, while the ratio of originating minutes of use to terminating minutes of use will be 1:683. (Tr. at 51). The Presiding Officer does not agree with ATG's explanation that the discrepancy is due to the relative size of the companies. Instead, the Presiding Officer believes the discrepancy is based on the fact that the CLEC's customers, predominantly ISPs, are on average receiving 69 times more inbound communications than they are making outbound. In addition, each inbound communication lasts ten times as long as the average outbound one.
76. Given this huge disparity, the Presiding Officer believes that the ISPs, ATG and Pac- West, are setting up in part as CLECs to reap the windfall of potential payouts by Nevada Bell for reciprocal compensation. Nevada Bell would receive little, if any, revenue from Pac-West or ATG because their primary focus would be on the provision of call termination services to ISPs, paging companies, and other companies generating large volumes of inbound traffic. (Ex. 1 at 2). As a result, Nevada Bell would be forced to essentially subsidize Internet Service. This is not just or reasonable. ATG and Pac-West have not proven to the Presiding Officer that they will effectively provide local service. Instead, the Presiding Officer believes they are attempting to provide service to business customers for Internet Service with only token local service in an attempt to meet the reciprocal compensation criteria.
77. The Presiding Officer finds that the record built by ATG and Pac-West has not met the just and reasonable standard established pursuant to 47 U.S.C. §252(d)(2)(A)(I) to receive reciprocal compensation for Nevada Bell calls terminated on the networks of ATG and Pac-West.
78. Notwithstanding, Pac-West and ATG are still set up to make a profit. ATG stated that it will still recover its costs over the long run from its ISP end users and other end users without the benefit of reciprocal compensation. (Tr. at 77-79).
79. In conclusion, Section 252(b)(2)(A) of the Telecommunications Act of 1996 was written to promote local competition, not Internet service. Reciprocal compensation is for local calls, not those that terminate on the Internet outside of the local calling area.

THEREFORE, based on the foregoing, it is HEREBY ORDERED that:

1. Pursuant to NAC 703.288(4)(b) this Arbitration Decision shall be served on Nevada Bell, Advanced Telcom Group, Inc. and Pac-West Telcomm, Inc., the Regulatory Operations Staff of the Commission, and the Attorney General's Bureau of Consumer Protection.

2. Pursuant to NAC 703.288(4)(c) this Arbitration Decision shall be provided to AT&T Communications of Nevada, Inc., GTE of California Incorporated d/b/a GTE of Nevada, and Sprint Communications Company L.P. and Central Telephone Company - Nevada d/b/a Sprint of Nevada.

3. The Presiding Officer retains jurisdiction for the purpose of correcting any errors which may have occurred in the drafting or filing of this Arbitration Decision.

By the Presiding Officer,
DONALD SODERBERG, Commissioner and Presiding Officer

Dated: 3/4/99 Carson City, Nevada

1. The Presiding Officer notes Nevada Bell's argument that the "intent" of the calling party determines whether the call is an interstate call. (Tr. at 87, 95-100). While ATG, Pac-West, and Staff were forced to expend resources addressing this contention, the Presiding Officer believes that delving into the mental beliefs of a calling party during these proceedings is preposterous.

3/11/99

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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service Commission held at its office in Jefferson City on the 9th day of March, 1999.

In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection with Southwestern Bell Telephone Company.

Case No. TO-98-278

ORDER DENYING APPLICATION FOR REHEARING

On April 23, 1998, the Commission issued an Arbitration Order bearing an effective date of April 24. The Arbitration Order resulted from a petition filed with the Commission by Birch Telecom of Missouri, Inc. (Birch). Birch asked the Commission to arbitrate terms of an interconnection agreement between Birch and Southwestern Bell Telephone Company (SWBT).

The only issue presented for arbitration was whether calls made within the same local calling scope to an Internet service provider (ISP) are local in nature and subject to the payment of reciprocal compensation. The Commission's Arbitration Order does not make a final decision concerning the nature of the traffic to an ISP. Instead the Commission chose to defer to an anticipated decision by the Federal Communications Commission (FCC) regarding the nature of that traffic. The Commission's order does provide that until the FCC makes a ruling on that issue, Birch and SWBT are to compensate each other for traffic to ISPs

EXHIBIT

3

"in the same manner that local calls to non-ISP end users are compensated, subject to a true-up following the Federal Communication Commission's determination on the issue if it becomes possible to implement a Commission approved tracking plan in the interim." SWBT filed an Application for Rehearing on April 30[1].

On February 26, 1999, the FCC released a Declaratory Ruling in CC Docket No. 96-98. That ruling declared that traffic delivered to an ISP is interstate in character, thus falling within the primary jurisdiction of the FCC. Section 386.500, RSMO (1994) provides that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." Given the fact that the FCC has now resolved the issue in dispute between the parties, there is no longer any need for this Commission to address that matter. Therefore, there is no sufficient reason to grant SWBT's application for rehearing. The Application for Rehearing will be denied.

IT IS THEREFORE ORDERED:

1. That the Application for Rehearing filed by Southwestern Bell Telephone Company is denied.

1 The Arbitration Order was issued on April 23 and given an effective date of April 24. Section 386.500.2, RSMo 1994, requires that any application for rehearing be filed before the effective date of the order and SWBT's application was filed six days after the effective date. Nevertheless, the Commission will rule on SWBT's application for rehearing on its merits.

2. That this order shall become effective on March 9, 1999.

BY THE COMMISSION

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton and Drainer, CC., concur
Murray and Schemenauer, CC., absent

Woodruff, Regulatory Law Judge