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IN THE SUPREME COURT OF OHIO

CASE NO. 99-1240

AMERITECH OHIO,	)	Appeal from The Public Utilities Commission of Ohio
Appellant,	)	
v.	)	The Public Utilities Commission of Ohio - Case No. 97-1557-TP-CSS
THE PUBLIC UTILITIES COMMISSION OF OHIO,	)	
Appellee.	)	

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NOTICE OF APPEAL OF AMERITECH OHIO

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FILED
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MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO
CASE NO. __________

AMERITECH OHIO,	)	
	)	Appeal from The Public
Appellant,	)	Utilities Commission of Ohio
	)	
v.	)	
	)	The Public Utilities Commission
	)	of Ohio - Case No. 97-1557-TP-CSS
THE PUBLIC UTILITIES	)	
COMMISSION OF OHIO,	)	
	)	
Appellee.	)	

NOTICE OF APPEAL OF AMERITECH OHIO

Appellant Ameritech Ohio, pursuant to Revised Code §§4903.11 and 4903.13, hereby gives notice of its appeal to the Supreme Court of Ohio from the Opinion and Order of the Public Utilities Commission of Ohio ("Commission") in Case No. 97-1557-TP-CSS, adopted and entered in its journal on August 27, 1998 ("Opinion and Order"), as affirmed during the rehearing phase of Case No. 97-1557-TP-CSS by the Commission's Entry on Rehearing adopted and entered in its journal on May 5, 1999.

Pursuant to Revised Code §4903.10, Appellant timely filed an application for rehearing of the Commission's Opinion and Order on September 28, 1998. With respect to the issues on appeal set forth below, Appellant's application for rehearing was denied by the Commission's Entry on Rehearing adopted and entered in its journal on May 5, 1999. No applications for rehearing were filed by any party from the May 5, 1999 Entry.

Appellant respectfully submits that Appellee's August 27, 1998 Opinion and Order, as affirmed by the Appellee's subsequent Entry on Rehearing on May 5, 1999 in Case No. 97-

1557-TP-CSS, is unlawful, unreasonable, and unjust in the following respects, as Appellant argued on rehearing.

1. In deciding a complaint case brought by ICG Telecom Group, Inc. (ICG), the Commission erred by misinterpreting the clear and unambiguous interconnection agreement (the Agreement) between Appellant and ICG by ordering Appellant to pay "reciprocal compensation" -- a form of compensation that by law and the terms of the Agreement applies only to <u>local</u> telecommunications traffic that originates and terminates within a local service area -- on non-local calls terminating at distant Internet "web sites" located throughout the nation and the world. Among its errors, the Commission disregarded that:

a. the 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 Federal Communications Commission (FCC) has ruled, as a matter of controlling federal law, that Internet calls do not terminate on the parties' networks;

b. the Agreement, mirroring federal law, imposes reciprocal compensation only on "Local Traffic," and the FCC has ruled, as a matter of controlling federal law, that Internet calls are not local traffic;

c. the 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 Internet calls are not subject to reciprocal compensation under the Act; and

d. The Agreement of parties to a written contract must be ascertained from the language of the instrument, and there can be no intendment or implication inconsistent with the express terms thereof.

2. The Commission's interpretation of the Agreement is erroneous as matter of law, contrary to the express terms of the Agreement and to orders of FCC, and contrary to Ohio and federal law, including but not limited to, the Telecommunications Act of 1996.

3. The Commission's decision misconstrued both general FCC precedent regarding call termination, and specific FCC precedent relating to Internet calls, all of which were most recently reaffirmed by the FCC in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic, FCC 99-38 Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (February 26, 1999).

4. The Commission impermissibly imposed a burden of proof on Appellant instead of first analyzing whether the Complainant ICG sustained its burden of proving Internet calls to be local traffic under the Agreement.

5. The Commission erred in finding the exemption of Internet traffic from interstate access charges to require it to be treated as "local traffic" for purposes of reciprocal compensation.

6. The Commission's determination violates Section 251(g) of the Telecommunications Act of 1996 by awarding reciprocal compensation in contravention of FCC Orders.

7. The Commission's determination violates controlling federal law which assigns exclusive jurisdiction over interstate communications to the FCC.

8. The Commission's determination effectively creates and/or amends the Agreement in a manner that violates procedural requirements of the Telecommunications Act of 1996.

WHEREFORE, Appellant Ameritech Ohio respectfully submits that the Commission's August 27, 1998 Opinion and Order and May 5, 1999 Entry on Rehearing, are unlawful, unreasonable and unjust, and should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal of Ameritech Ohio was filed with the Public Utilities Commission of Ohio and served upon the Commission in accordance with Section 4903.13, and served by First Class U.S. Mail upon counsel of record this 2nd day of July, 1999.

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Daniel R. Conway, Counsel of Record

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COLUMBUS/728113 v.01

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

The Commission, having considered the testimony and exhibits presented at the hearing in this matter, hereby issues its opinion and order.

APPEARANCES:

Muldoon & Ferris, by Boyd Ferris, 2733 West Dublin-Granville Road, Columbus, Ohio 43235, and Swidler & Berlin, by Richard M. Rindler and Michael Fleming, 3000 K Street, N.W., Washington D.C. 20007, on behalf of ICG Telecom Group, Inc., complainant.

Porter, Wright, Morris & Arthur, by Daniel R. Conway and Mark S. Stemm, 41 South High Street, Columbus, Ohio 43215-6194, and Michael T. Mulcahy, Ameritech Ohio, 45 Erieview Plaza, Suite 1400, Cleveland, Ohio 44114, on behalf of Ameritech Ohio, respondent.

OPINION:

I. Background

On November 26, 1997, ICG Telecom Group, Inc. (ICG or complainant) filed a complaint pursuant to Section 4905.26, Revised Code, and the applicable provision of the interconnection agreement (interconnection agreement or agreement) between itself and Ameritech Ohio (Ameritech or respondent) seeking enforcement of the parties' interconnection agreement entered into pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (1996 Act). The agreement was executed by the parties on June 14, 1996, and approved by the Commission in *Application for Approval of an*

Agreement between Ameritech Ohio and ICG Access Services, Inc., Case No. 96-611-TP-UNC, on September 19, 1996.

In its complaint, ICG alleges that Ameritech has breached the agreement by failing to pay ICG reciprocal compensation for the transport and termination of local exchange traffic from Ameritech end users to ICG local exchange end users that happen to be internet service providers (ISPs). Ameritech's refusal is both unreasonable and unlawful pursuant to the complaint provisions of Section 4905.26, Revised Code, ICG avers. By entry issued December 15, 1997, a prehearing conference was scheduled for January 5, 1998, to discuss, among other items, potential settlement of this matter without the need for an evidentiary hearing. The prehearing conference was held as scheduled; however, the parties were unable to reach an amicable resolution of this matter. By entry dated February 3, 1998, the examiner set this matter for evidentiary hearing to commence on February 17, 1998. Prior to the hearing, prefiled testimony was submitted on February 10, 1998, by ICG and Ameritech. On March 3, 1998, following the hearing, briefs were filed by ICG, Ameritech, and numerous *amici curiae*.[1] Reply briefs were filed on March 13, 1998. Since the closing of the briefing schedule, the parties and *amici curiae* have filed numerous notices of supplemental authority updating the Commission's record on the status of this issue throughout the country. With the receipt of the briefs and closing of the record, the case is now ready for decision by the Commission.

II. The Law

Section 4905.26, Revised Code, requires that the Commission set for hearing a complaint against a public utility whenever reasonable grounds appear that:

> any rate, fare, charge, ... or service rendered, charged ... is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by said public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained.

ICG[2] and Ameritech are telephone companies as defined by Section 4905.03(A)(2), Revised Code, and public utilities by virtue of Section 4905.02, Revised Code. ICG and

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1 *Amici curiae* briefs were filed by MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc.; America Online, Inc.; The Ohio Cable Telecommunications Association; Cablevision LIGHTPATH-Ohio, Inc.; The Ohio Telecommunications Industry Association; GTE North Incorporated; and jointly by Time Warner Communications of Ohio, L.P., TCG Ohio, Brooks Fiber Communications of Ohio, Inc., and AT&T Communications of Ohio, Inc.

2 ICG was certified to provide local exchange service in Ohio in *Application of ICG Access Services, Inc. for a Certificate of Public Convenience and Necessity*, Case No. 95-814-TP-ACE, by Opinion and Order issued July 3, 1996. ICG's authority was further modified in *Application of ICG Telecom Group to Expand its Service Territory*, Case No. 96-1336-TP-AAC, on January 16, 1997.

Ameritech are, therefore, subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code. In complaint proceedings such as this one, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d. 189.

III. Discussion

A. Description of ISP Traffic

Prior to discussing the merits of the parties' positions, a description of the traffic at issue in this matter is necessary. An internet service provider is a commercial or non-profit entity that provides its customers (end users) the ability to reach the internet or other on-line information services (ICG Ex. 1, at 3). The most widespread method by which an on-line service end user connects to an ISP is via the public switched telephone network or PSTN. This occurs when an end user dials a local telephone number corresponding to a telephone exchange service which the ISP has purchased from a local exchange carrier (LEC) operating in the on-line service user's local calling area (*Id.* at 4). It is the traffic corresponding to this means of connection (end user to ISP) for which Ameritech has withheld reciprocal compensation payments (*Id.* at 4). To obtain this service, an ISP purchases from the LEC standard business local exchange services, typically PBX trunks at a digital DS1 level or ISDN service. This standard business local exchange service can be purchased out of either ICG's or Ameritech's local exchange tariff (*Id.* at 4, 5). The local traffic is routed over "local intraLATA trunks" established between ICG and Ameritech pursuant to Sections 4.0 and 5.0 of the Agreement (*Id.* at 9, 10).

As an example of a scenario giving rise to this complaint, a local telephone call is initiated by an Ameritech end user which goes through an Ameritech switch to a point of interconnection established between Ameritech and ICG. The call is then handed off to ICG who routes, transports, and terminates the call to the ICG customer who is an ISP. The ISP then routes the call to the internet, a world-wide network of interconnected computers which serve as data bases and web sites for use by the end user.

B. ICG's Position

In support of its position that Ameritech has breached the agreement by failing to pay reciprocal compensation for local calls originated by Ameritech end users that terminate to ISP's on ICG's network, ICG states that the agreement clearly requires the payment of reciprocal compensation for calls billed as local traffic. Because Ameritech bills its own customers for calls to ISPs under its local tariffed rates, ICG asserts that those ISP local calls which are transported by ICG and terminated at the ISP's premise must be subject to the reciprocal compensation provisions of the agreement. ICG also observes that treating calls that terminate to ISPs as local calls is consistent with the manner in which Ameritech treats this traffic for rate, accounting, and billing purposes. On brief, ICG avers that Ameritech's reliance on the Commission's decision in *In the Matter of Ohio Direct Communications*, Case No. 95-819-TP-CSS, Opinion and Order, May 23, 1997, defies imagination. According to ICG, the *Ohio Direct* decision bears no similarity whatsoever to the instant proceeding. Moreover, during the *Ohio Direct* proceeding Ameritech strenuously argued that the operations of *Ohio Direct* were readily distinguishable from the operations of an ISP, ICG observes.

Ms. Cindy Z. Schonhaut, Senior Vice President of Government and External Affairs and principal in the negotiations between ICG and Ameritech, presented testimony on behalf of ICG which was marked as ICG Ex. 1. Ms. Schonhaut testified that at no time during the negotiation of the interconnection agreement with Ameritech did Ameritech indicate to ICG that it was unwilling to include calls to ISP's within the definition of local calls (*Id.* at 12). Further, the agreement does not provide for the exclusion of reciprocal compensation based upon the fact that a call is being terminated to an ISP (*Id.* at 13). The first clear indication to ICG that ISP traffic would not be treated to reciprocity was in a letter dated October 27, 1997, from Mr. Lamb of Ameritech in which he declared that the traffic is exchange access traffic and it is not subject to reciprocal compensation (*Id.* at 13). However, Ms. Schonhaut testified directly that by "definition a local telephone call to an ISP does not meet the definition of exchange access. In order for a call to an ISP to be an exchange access call, the information services provided by ISPs would have to be telephone toll services" (*Id.* at 14). According to the witness, this argument has been rejected by every other state public utility commission considering the issue (*Id.*).

Ms. Schonhaut further testified that, initially, following the execution and approval of the agreement by the Commission, Ameritech did pay reciprocal compensation for calls terminating at ISPs serviced by ICG. Likewise, Ameritech billed ICG for reciprocal compensation for calls to ISPs serviced by Ameritech (*Id.* at 14). At some point, Ameritech reconsidered its opinion of this billing and unilaterally revised its position. In August 1997, ICG received correspondence from Ameritech in which Ameritech, for the first time, disputed an invoice for July 1997 that ICG had sent to Ameritech. Ameritech requested that ICG verify its billing to Ameritech and exclude from that billing traffic destined to ISP customers of ICG. On October 29, 1997, Ameritech advised ICG by letter that "approximately 95.52% of ICG's Reciprocal Compensation for Ohio's billings incorrectly include traffic destined for Internet Service Providers." On a going forward basis, Ameritech unilaterally refused to pay that percentage of ICG's bills for reciprocal compensation in Ohio (Complainant Ex. A). Ms. Schonhaut testified that, at the time ICG filed its complaint in November 1997, Ameritech was in arrears to ICG in an amount exceeding one million dollars. That amount, according to the witness, increased to more than two million dollars as of the date of the hearing (ICG Ex. 1, at 15).

In her testimony Ms. Schonhaut stated that other state jurisdictions and the Federal Communications Commission (FCC) have spoken on this very issue. The FCC in its universal service order characterized the connection from the end user to the ISP as local traffic. ICG further contended that what has sometimes been referred to as the FCC's "exemption policy" was a misnomer and is not really an exemption policy because the FCC has not classified ISP's as telecommunication common carriers (ICG Ex. 1, at 17).

As a final matter, ICG contends that Ameritech's refusal to pay reciprocal compensation has significant anticompetitive implications (ICG Brief at 25). In support of this argument, ICG avers that Ameritech presently controls most of the originating traffic within its territory. Thus, a ruling in Ameritech's favor would force ICG and the other new entrant providers to terminate these ISP calls without compensation. The inevitable result being, according to ICG, that no NEC will be able to furnish service to an ISP thus leaving Ameritech with a *de facto* monopoly. This anticompetitive effect is further aggravated by the fact, according to ICG, that Ameritech is now offering its own internet access service to consumers in Ohio through a separate, wholly-owned subsidiary. By gaining monopoly power over local exchange service to ISPs coupled with the potential of increasing ISPs' costs for network access, Ameritech will be in a position to drive competing ISPs out of the local market, thereby leaving Ameritech with a *de facto* monopoly over access to the internet as well (*Id.*).

C. Ameritech's Position

Ameritech agrees that the fundamental issue in this complaint is whether internet calls from Ameritech end users routed through an ISP served by ICG to reach the internet are local calls subject to reciprocal compensation under the agreement between ICG and Ameritech. Ameritech also agrees that, under the agreement, reciprocal compensation only applies to local calls and not to exchange access calls. In order to determine whether a call should be classified as local or exchange access under the agreement, Ameritech maintains it is necessary to analyze the end-to-end characteristics of the call. Through its witnesses, Ameritech advances the position that, in fact, calls through an ISP and destined for the internet are not local calls but rather a continuous call which most often is terminated at some distant interstate or international point. In this regard, Ameritech likens an ISP call to a traditional long distance call. To make its point, Ameritech compares schematically an internet service provider call to a traditional long distance call (Ameritech Brief at 9-13). Both types of calls traverse the telecommunications network in a similar manner Ameritech maintains. This Commission has heretofore recognized, according to Ameritech, that, in order to establish the jurisdictional nature of a call, one must examine the end-to-end nature of the call. See, *Ohio Direct, supra.*

Mr. Panfil, Director of Local Exchange Competition issues for Ameritech, discussed the different services provided to an ISP (Ameritech Ex. 5 and 5a). The three different services provided by a LEC are a business local exchange service, a ISP interconnection to the PSTN, and a FGA service connection to the PSTN provided to an interexchange carrier (IXC). Mr. Panfil stated that, in each case, the service provided by the LEC "terminates" at the equipment on the premises of the business subscriber, ISP, or IXC. This termination location is generally referred to as a point-of-presence (POP). The service definition of "call termination" is the same for all three, because the service actually provided by the LEC to its customers (the business end user, the ISP, or the IXC), and for which the LEC will bill its customer, is the same. However, Ameritech contends that the meaning of call termination does not control the jurisdiction under which the LEC will provide the service to its customer, and the tariffs and other regulatory rules that will apply to the provision of that service. In order to identify the jurisdictional definition of call termination, it is necessary to know how the service is being used by the LEC's customer (*Id.* at 17).

Ameritech further contends that the scenario for an ISP is virtually identical to that of an IXC, except that internet calls are inherently interstate (eliminating the need for call-by-call analysis). When an end user's computer connects to the ISP's computer and associated network, it essentially receives a second dial tone that allows the user to address his or her data communications messages or requests using the addressing capabilities of the standard addressing protocol used on the internet. This data dial tone, according to Ameritech, allows the end user to establish a continuous connection with other computers. Ameritech states that the ISP does not merely provide access to the internet; the ISP is part of the internet (*Id.* at 19). Fundamentally, Ameritech does not agree with ICG that ISP traffic is local. Ameritech argues that the "local service calls definition" referred to in the agreement is not to distinguish local traffic from jointly provided interstate traffic such as FGA service or ISP access, but that its purpose is to distinguish local traffic from intraLATA toll traffic, for which the parties to the agreement compensate each other at different rates than for local traffic (*Id.* at 21). Regarding the numerous state decisions that are counter Ameritech's position, Ameritech contends that the decisions are contrary to past FCC precedent and that the pending FCC docket, *In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, CC Docket 97-30, will "inevitably" render those decisions as moot (*Id.* at 22).

There are also unwarranted financial implications, according to Ameritech, should this traffic be deemed local traffic subject to reciprocal compensation (*Id.* at 25). Due to the FCC's access charge exemption policy, handling ISP traffic is a losing proposition for all LECs, including Ameritech, because the local rate structure is not compensatory for calls with long holding times as are typical of internet calls. In support of this position, Mr. Panfil provided data in an attempt to show the financial burden imposed on Ameritech by "typical internet traffic" (*Id.*). Ameritech points out that, as a result, the overall cost of basic residential local service will be affected if reciprocal compensation must be paid for ISP calls (*Id.*). Ameritech states that the revenue imbalance will also impact the incentive for new LEC's to serve residential customers if the "market price" for residential service is substantially below the cost of providing such service and will "further retard the potential placement of new technology in the network" (*Id.*).

Ameritech contends that it never intended to treat internet calls as local traffic for purposes of reciprocal compensation (*Id.* at 2). Mr. H. Edward Wynn, at the time Vice President and General Counsel of Ameritech Information Industries Services and who served as Ameritech Ohio's principal negotiator of the agreement with ICG, testified that, based on his experiences as a telecommunications lawyer and his extensive knowledge of both the federal and the Ohio regulatory view on the nonlocal jurisdictional character of ISP traffic, he had no reason to suspect that ICG disputed the proper jurisdictional classification of such calls as switched exchange access traffic (Ameritech Ex. 1, 3-8). In its brief, Ameritech described the FCC's history regarding the treatment of ISP traffic. According to Ameritech, the FCC adopted a comprehensive access charge plan for the recovery by LECs of the costs associated with the origination and termination of interstate calls. At the time, the FCC concluded that the immediate application of that plan to certain providers of interstate services might unduly burden their operations. As a result, the FCC granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers.[3] *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682. In 1987, the FCC in *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd 4305, considered but refused to end the exemption from access charges for enhanced service providers.

Ameritech also disputes ICG's substantive arguments relative to the nature of ISP traffic. First, Ameritech claims that it treats calls terminated to ISPs as local calls for billing and rating purposes solely due to the FCC's access charge exemption for ISPs (Ameritech Ex. at 15). This effect is the same one that flows from Feature Group A access service arrangements. According to Mr. Panfil, in neither the ISP nor the Feature Group A situation does this have any bearing on the jurisdictional status of the underlying internet or long distance communication (*Id.*). Further, in Ameritech's view, had the FCC concluded that ISP traffic is local traffic, the FCC would not have had the authority to decide whether or not ISP's should be required to pay access charges.

In the event that this Commission decides to address the issues on the merits now and concludes that some form of compensation is required, Ameritech proposes a solution that could mitigate the impacts of any revenue shortfall (Ameritech Initial Brief at 33). That solution would be for ICG and Ameritech to pool the revenues that the internet traffic does generate and share those available revenues equitably. Ameritech's witnesses explained on cross-examination how such a measure might be devised. Those witnesses explained that the parties could model such a revenue sharing mechanism on the meet-point billing provisions that are routinely used to share access charge revenues in situations where two LECs jointly provide exchange access service to access customers. See, Tr. 103 (Wynn); Tr. 171-172 (Panfil); and Tr. 125-126 (Springsteen).

IV. Commission Analysis

The parties agree that the fundamental issue in this complaint is whether internet calls from Ameritech end users routed through an ISP served by ICG to reach the internet are local calls subject to reciprocal compensation under the interconnection

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3 The FCC recently explained that the term "enhanced service provider" includes access to the internet and other interactive computer networks. *Access Charge Reform*, CC Docket 96-262, First Report and Order, at ¶341 at note 498 (rel. May 16, 1997).

agreement between ICG and Ameritech. The parties also agree that, under the interconnection agreement, reciprocal compensation only applies to local calls and not exchange access calls. Thus, the case before us, as presented by the parties, asks us to interpret and enforce the terms of the parties agreement. This Commission's jurisdiction to interpret and enforce the terms of the involved agreement pursuant to Section 252 of the 1996 Act is not disputed. See, *Iowa Utilities Board v. FCC*, 120 F.3d 753 (Eighth Circuit 1997).

In view of the evidence presented by the parties and the applicable precedent at the time the involved Agreement was negotiated, the Commission finds that the calls in question qualify as local traffic under the involved agreement for which Ameritech has an obligation to remit reciprocal compensation to ICG. In making this determination, we specifically note that we are deciding this case solely on our interpretation of what the parties understood at the time the Agreement was negotiated. This decision should not be viewed by anyone as an opinion on the broader policy implications involved, many of which Ameritech makes in support of its position in this matter. We also recognize that the FCC is in the process of considering arguments addressing these broader policy implications. The FCC's deliberations could, therefore, have an impact on this Commission's view of the issues presented by the parties in this complaint. We specifically reserve our rights to consider these policy implications in a future proceeding.

Turning to the gravamen of the complaint before us, we find that based upon the circumstances at the time this matter was negotiated, the most likely interpretation of what the parties intended was that the end user traffic in question was meant to be considered as local traffic and, thus, subject to reciprocal compensation. Under section 5.7.1 of the agreement, ICG and Ameritech agreed that reciprocal compensation would be paid for the termination of all local traffic, as follows:

> 5.7.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or ICG which a Telephone Exchange Service Customer originates on Ameritech's or ICG's network for termination on the other Party's network.

Under section 1.40 of the interconnection agreement, "Local Traffic means local service area calls as defined by the Commission." The Commission has defined local traffic in the Local Service Guidelines (Case No. 95-845-TP-COI [February 20, 1997]), and that definition is as follows:

> As NECs establish operations within individual ILEC service areas, the perimeter of ILEC local calling area, as revised to reflect EAS, shall constitute the demarcation for differentiating local and toll call types for the purpose of traffic termination compensation. Any end user call originating and terminating with the

> boundary of such local calling area, regardless of the LEC at the originating or terminating end, shall be treated as a local call.

The only exception to the payment of reciprocal compensation is contained in section 5.7.3 of the interconnection agreement, which states that "[t]he Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service." The interconnection agreement at section 1.56 then defines "Switched Exchange Access Service," as follows:

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

The Commission can find no legal basis under this Agreement for treating ISP traffic different than other local traffic originated by an end user for purposes of reciprocal compensation. Ameritech's witnesses testified that they had no reason to believe that ICG doubted that ISP calls were exchange access calls. However, a review of the interconnection agreement reflects that the parties were very specific in indentifying services that were not subject to reciprocal compensation. Had Ameritech truly believed that ISP traffic was exchange access traffic at the time the interconnection agreement was negotiated, Ameritech should have identified it as such. Moreover, Ameritech's own actions as to how it treats end user to ISP traffic is revealing. For instance, Ameritech treats traffic to its own ISP customers as local for purposes of booking revenues, separations, and ARMIS reporting. Furthermore, the record reveals that an Ameritech end user making a similar call to an ISP served by Ameritech and within Ameritech's local calling area will not be assessed toll charges for that call.

It is also undisputed that Ameritech paid ICG reciprocal compensation for traffic to ICG ISP customers From September 1996 to October 1997. In October 1997, the record reveals that Ameritech unilaterally began to withhold reciprocal compensation due ICG. Another factor supporting our decision herein is that, during negotiation of the involved interconnection agreement, ICG requested bill and keep as the compensation methodology for local traffic compensation purposes. However, Ameritech refused bill and keep and, instead, chose reciprocal compensation based upon a minutes of use methodology. By its argument in this proceeding, Ameritech is attempting to undo what it bargained for in the negotiations involving the interconnection agreement.

We also note that this determination is in accord with existing FCC authority (*See, Access Charge Reform, Price Cap Performance Review, Transport Rate Structure and Pricing, Usage of the Switched Network by Information Service and Internet Access Providers,* CC Docket Nos. 96-262, 94-1, 91-213, 96-263, First Report and Order, adopted May 7, 1997; released May 16, 1997) as recently affirmed by the Eighth Circuit Court of

Appeals in *Southwestern Bell Tel. Co. v. FCC*, F.3d, 1998 W.L. 485377 (8th Cir. August 19, 1998). Further, contrary to the argument raised by Ameritech, our decision in this matter does not conflict with our decision in *Ohio Direct, supra*. Ameritech cites *Ohio Direct, supra,* in order to argue that the Commission has recognized that the correct approach to determining call jurisdiction is to evaluate the end-to-end characteristics of the entire communication. We disagree. The holding in *Ohio Direct* was that the service being offered by Ohio Direct to the public qualified the company as a telephone company which had to make appropriate compensation arrangements with the involved local exchange carriers. In order to make that determination the Commission found that Ohio Direct held itself out to its customers as the provider of service, advertised its service, addressed complaints and concerns of its customers and charged a fee and collected payments for the service it rendered. In addition, the Commission found that Ohio Direct was holding itself out to end users as a common carrier for hire. The facts presented by the case now before us are clearly distinguishable from the *Ohio Direct* situation. The dispute before us in this matter is not about whether ICG should be a regulated entity nor about investigating whether a service offered by ICG would qualify as a regulated service or not. ICG is not, through the completion of a local telephone call to an ISP over the public-switched network, marketing some unique stand-alone service to end users. Also, unlike an ISP which must manipulate the transmission in order to retrieve the requested information, Ohio Direct was not engaged in any transmission manipulation.

In finding that the call to an ISP is a local call, the Commission is also in agreement with the FCC and all state commissions which, when faced with the same issue, have failed to find that internet traffic is analogous to interexchange traffic. While there is no dispute that the FCC is currently considering various issues regarding internet communications, the initiation of that proceeding provides an insufficient basis for deferring a decision here. It is possible that the FCC may reverse itself and institute some type of access charge or other compensation. However, it is also quite plausible that the FCC may conclude that the current situation, so recently affirmed by the Eighth Circuit Court of Appeals, should remain undisturbed. At this time, the overwhelming weight of FCC precedent reflects that ISPs are end users of telecommunication services provided by ILECs and competitive LECs and that calls to ISPs' local numbers are not subject to interexchange access charges. Moreover, the FCC has explicitly recognized that local calls to ISPs over the public switched telephone network are separate and distinct from the information services provided by the ISP over the packet-switched network. The FCC has stated:

> We agree with the Joint Board's determination that internet access consists of more than one component. Specifically, we recognize that internet access includes a network component, which is the connection over a LEC network from a subscriber to an internet service provider, in addition to the underlying information service.

...

> When a subscriber obtains a connection to an internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the internet service provider's service offering.

Universal Service Order, 12 FCC at 8822.

In addition, while not binding on this Commission's determination regarding reciprocal compensation for ISP traffic, we note that, to date, state commissions in at least 20 states have similarily held when interpreting interconnection agreements that ISP traffic is local (Cablevision LIGHTPATH - OH *Amicus Curiae* Brief at 4).

V. Conclusion

In conclusion the Commission finds that, under the involved interconnection agreement, the call to the ISP by the end user of a competitive LEC or ILEC is a local call that terminates at the ISP and is, therefore, subject to reciprocal compensation. This finding is based on a contract negotiated by extremely experienced and knowledgeable parties and FCC precedent at the time this agreement was negotiated. In addition, as noted above, while not binding on the Commission for purposes of this outcome, it is instructive that every state commission to address this issue has ruled in the same manner on the issue of reciprocal compensation for ISP traffic. Accordingly, ICG has met the burden of proof required by Section 4905.26, Revised Code, and has sustained its complaint. Ameritech should reinstitute the payment of reciprocal compensation and distribute to ICG with interest, within 60 days of this order, the payments held in escrow.

<u>FINDINGS OF FACT AND CONCLUSIONS OF LAW:</u>

(1) On November 26, 1997, ICG Telecom Group, Inc. filed a complaint with the Commission against Ameritech Ohio, alleging that Ameritech, since July 1997, has wrongly refused to pay certain reciprocity compensation payments as required by the interconnection agreement.

(2) Pursuant to Section 4905.26, Revised Code, and Section 252(e)(1) of the Telecommunications Act of 1996, the Commission has jurisdiction to hear and determine the issues set forth in the complaint.

(3) Notice of the complaint was properly made.

(4) A hearing was held on February 17, 1998.

(5) ICG Telecom Group, Inc. has met its burden of proof.

(6) The subject calls of the complaint from ILECs and competitive LECs to ISPs are local calls and subject to reciprocal compensation as provided by the interconnection agreement.

(7) Ameritech should now pay the retained compensation held in escrow, and continue to pay the reciprocal compensation to ICG Telecom Group, Inc.

ORDER:

It is, therefore,

ORDERED, That ICG's complaint against Ameritech is granted. It is, further,

ORDERED, That Ameritech pay to ICG reciprocal compensation payments held in escrow as directed above. It is, further,

ORDERED, That a copy of this order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

Jolynn Barry Butler

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason NAY
See dissent

WFB/JRJ;geb

Entered in the Journal
AUG 27 1998

A True Copy

Gary E. Vigorito
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DISSENTING OPINION OF DONALD L. MASON

My concern with the majority opinion is that it discourages new entrant carrier/competitive local exchange carrier (NEC/CLECs) from enrolling residential customers. I appreciate that the residential line is not attractive to the NEC/CLEC. As Commissioners, we are faced with inquiries from members of the media and political leaders asking as to why there is not competition for the residential customer and when do we anticipate such competition. Our regulatory system is established upon a framework of uniform pricing to support universal service. Whether we are talking about business rates being higher than residential rates for the same service or rural customers paying the same rates as urban customers, the tradition has been to treat similar services alike when convenient while also treating them differently when convenient. These differences have had a long-term positive effect on providing universal service in Ohio.

The problem we are dealing with is one where we struggle to maintain a regulated system while trying to encourage opportunity and competition on an even playing field. We have held public hearings where some testimony has supported the fact that we will never have competition until we have true facilities-based NEC/CLECs. I am concerned that to interpret the interconnection agreement in favor of ICG ultimately discourages them from enrolling residential customers and encourages cream skimming of business customers and ISPs. While seeing the NEC/CLECs create a customer base is good, my concern is that it does not appear that they will be encouraged to sequentially follow up with rolled out marketing efforts to residential customers.

Furthermore, I am bothered by several aspects of the case.

ICG stated that they entered into the contract and then decided upon their marketing strategy with the goal of maximizing their return. ICG would make less revenue by having the residential customer (who is presently the ILEC customer) as a customer. Therefore, to rule in favor of ICG is anticompetitive in the sense that it could discourage true facilities-based residential competition.

The FCC has ruled that Internet traffic is to be "exempted" from access charges. In order to do so, the FCC must have believed that these calls were subject to access fees. Therefore, they are not local calls. The exact language used is found in *Access Charge Reform,* CC Docket No. 96-262, First Report and Order (May 16, 1997) at paragraph 430: "Because we decide to retain the ISP exemption, and do not permit the LEC's to impose access charges on ISPs at this time...". If Internet calls were local, then the FCC would not have jurisdiction to rule on the applicability of access charges.

We should look to the origination and the destination of the traffic, determining if LATA boundaries are being crossed. My interpretation of the Internet is that it is truly global in nature. There are many components, and to argue that the Internet is to be considered as a local service defies the uniqueness of the technology.

Perhaps the biggest problem I have is that ICG asks us to assume the communication is from the ILEC customer to the NEC's ISP customer and disregard the fact that the message generally goes past the ISP to a NEC or ILEC customer beyond the local switches. It ignores the fact the chat rooms and gamers are online simultaneously and, therefore, to assume that call supervision is at the ISP is factually wrong and misleading. The fact is that electrons move from state to state carrying messages. Many software companies are packaging games that allow for true Internet interactive play. The software for these games resides at the property of the software company. Customers access the software company's computers through their Internet providers but the actual gaming takes place across LATA boundaries. We cannot ignore that these types of calls are long in usage time. I have personally downloaded software from sites in California that have taken over four hours to complete. I have difficulty in considering this activity to be local when it involved interstate commerce.

Now that we have ruled on the ICG/Ameritech agreement, I encourage the Commission to be aggressive in establishing a customized approach to dealing with Internet traffic reciprocal compensation issues within state jurisdiction on a long-term basis. It is not in Ohio's long-term interest to try to treat the traffic the same as either local or long distance telephony. It is neither. Either a Commission ordered investigation or the creation of a collaborative would be good approaches as first steps towards creating a long-term methodology which can encourage the responsible use of the Internet without negatively impacting the NEC/CLECs.

Entered in the Journal
AUG 27 1998

A True Copy

Gary E. Vigorito
Secretary

Donald L. Mason

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of ICG Telecom Group, Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom of Ohio, L.P., Complainants, v. Ameritech Ohio, Respondent. Regarding the Payment of Reciprocal Compensation.	)	Case No. 97-1557-TP-CSS Case No. 97-1723-TP-CSS Case No. 98-308-TP-CSS

ENTRY ON REHEARING

The Commission finds:

(1) On August 27, 1998 and October 14, 1998, the Commission rendered three nearly identical decisions in complaints brought against Ameritech Ohio (Ameritech) by three competitive local exchange carriers namely, ICG Telecom Group, Inc. (ICG), MCImetro Access Transmission Services, Inc. (MCImetro), and Time Warner Telecom of Ohio, L.P. (Time Warner).[1] Through those opinion and orders, the Commission found that, at the time the parties negotiated the involved interconnection agreements, the parties deemed end user calls made over the public switched telephone network to an internet service provider (ISP) as local calls subject to the reciprocal compensation provisions of the applicable interconnection agreements.

The Commission also found that the involved interconnection agreements were negotiated by extremely experienced and knowledgeable parties who were keenly aware of and familiar with telecommunications precedent and policies at the time the interconnection agreements were negotiated. The Commission emphasized, however, that its decision

1 ICG Opinion and Order issued August 27, 1998, MCImetro Opinion and Order issued October 14, 1998, and Time Warner Opinion and Order issued October 14, 1998.

"should not be viewed by anyone as an opinion on the broader policy implications involved," many of which Ameritech cited in support of its position in these matters. Finally, the involved Commission orders recognized that the Federal Communications Commission (FCC) was in the process of considering arguments addressing these broader policy issues and that the FCC's deliberations could have an impact on the issues presented by the parties.

(2) Section 4903.10, Revised Code, states that any party who has made an appearance in a Commission proceeding may file an application for rehearing within 30 days of the journalization of a Commission decision.

(3) Applications for rehearing were timely filed by Ameritech in each of the involved complaint proceedings. Memoranda contra the applications for rehearing were timely filed by ICG, MCImetro, and Time Warner. Given the similarity of the issues involved and the decisions rendered in the three opinion and orders in these matters, the Commission finds that consolidation of these three matters for purposes of issuing a decision on rehearing is warranted.

(4) Ameritech raises a number of arguments in support of its applications for rehearing. Primarily, however, those arguments can be categorized as follows: (1) reiteration of arguments previously made through testimony and through briefs; and (2) statements of position and decisions made on a federal level subsequent to the Commission's August 27, 1998 and October 14, 1998 orders in these three proceedings.

(5) In its first general rehearing category, Ameritech asserts that the Commission erred in finding that Internet calls from Ameritech end users routed through an ISP served by the complainants to reach the Internet are local calls subject to the reciprocal compensation provisions under the involved interconnection agreements. Ameritech argues that the Commission impermissibly imposed the burden on Ameritech to prove that Internet calls fall within the definition of switched exchange access service without first analyzing whether the complainants proved that such calls could be characterized as local traffic under the involved interconnection agreements.

Ameritech further argues that the Commission erred in concluding that calls to the Internet through ISPs are no different than other local traffic. Ameritech maintains that, for purposes of Internet traffic, what is important is the jurisdiction of the traffic, which in this instance is interstate in nature. Ameritech analogizes this traffic to Feature Group A calls. Moreover, the Commission's misplaced reliance upon the distinction between telecommunications and information services is erroneous as a matter of law Ameritech observes. The Commission also erred, according to Ameritech, by failing to address any of the FCC precedent existing at the time the parties negotiated the involved interconnection agreements. This precedent, in Ameritech's view, stands for the proposition that calls to the Internet are not local but rather interexchange carrier calls subject to exchange access.

(6) Regarding its second rehearing category, Ameritech asserts that rehearing is warranted because, since the issuance of the August 27, 1998 and October 14, 1998 orders, certain events on the national level directly affects the Commission's orders in these three proceedings. One such event, according to Ameritech, is that the FCC released a decision on October 30, 1998, which confirmed that Internet calls are not local but interstate because those calls do not terminate until those calls reach the distant databases.[2] Ameritech also points to a November 11, 1998 Resolution adopted by the National Association of Regulatory Utility Commissioners (NARUC) for the prospect that the states themselves recognize that traffic over the Internet is jurisdictionally mixed. Notwithstanding its early arguments, Ameritech asserts that these later events warrant granting rehearing to reconsider these matters.

(7) ICG, MCImetro, and Time Warner posit that many of Ameritech's arguments raised on rehearing are merely a restatement of arguments thoroughly briefed, considered, and, thereafter, rejected by the Commission. MCImetro and Time Warner did, however, specifically address Ameritech's reliance on the FCC's *GTE ADSL* decision. In fact in the *GTE ADSL* order, MCImetro and Time Warner note, the FCC specifically disclaimed that its order acted as precedent

2 The FCC order Ameritech cites in support of this argument is *In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Adopted October 30, 1998; Released October 30, 1998 (hereafter *GTE ADSL* order).

in carrier-to-carrier reciprocal compensation disputes under interconnection agreements between carriers. The FCC further limited, according to MCImetro and Time Warner, its decision concerning the jurisdictional treatment to the transport of data from an end user over GTE's frame relay network.

(8) With the exception of the arguments concerning the *GTE ADSL* order and, to a lesser extent, the NARUC Resolution, Ameritech's assignments of error raise no arguments on rehearing not fully considered by the Commission in the August 27, 1998 and October 14, 1998 orders. Therefore, rehearing based upon those assignments of error is denied.

In rendering the August 27, 1998 and October 14, 1998 orders, the Commission noted that our decisions were based solely on our interpretation of what the parties understood at the time the involved interconnection agreements were negotiated. In making those decisions we looked at the provisions defining the terms "local traffic" and "switched exchange access service." Based in part on our understanding that the parties had clearly identified switched exchange access service and did not include in that definition ISP traffic, the Commission found ISP traffic to be local traffic and thus eligible for reciprocal compensation. In addition, the Commission noted that it is also revealing to know that Ameritech treats its own ISP customer traffic as local for purposes of booking revenues, separations, and ARMIS reporting. Further, the Commission noted that an Ameritech end user making a similar call to an ISP served by Ameritech and within Ameritech's local calling area will not be assessed toll charges for that call.

The Commission also found relevant to our decisions in the involved orders, that Ameritech had paid reciprocal compensation to ICG and MCImetro for ISP traffic for some period of time. Subsequently, the record reveals that Ameritech unilaterally began to withhold reciprocal compensation rather than attempt to resolve the dispute under the dispute resolution procedures set forth in the negotiated agreements. Another factor that supported the Commission's decision was that, during negotiation of the involved interconnection agreements, the complainant's had requested bill and keep as the compensation methodology for local traffic compensation purposes. However, Ameritech refused bill and keep and, instead, insisted on compensation based on a minutes-of-use methodology. The Commission found that, by its argument in these proceedings, Ameritech was attempting to undo what it had bargained for in the negotiations involving the interconnection agreements.

The Commission also noted that our decisions were in accord with existing FCC authority (See, *Access Charge Reform, Price Cap Performance Review, Transport Rate Structure and Pricing, Usage of the Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, First Report and Order, adopted May 7, 1997; released May 16, 1997), as affirmed by the Eighth Circuit Court of Appeals in *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d, 523 (8th Cir. 1998), as well as the FCC's *Universal Service Order*. We further noted that the FCC had explicitly recognized that local calls to ISPs over the public switched telephone network are separate and distinct from the information services provided by the ISP over the packet-switched network. The FCC has stated:

> We agree with the Joint Board's determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network component, which is the connection over a LEC network from a subscriber to an Internet service provider, in addition to the underlying information service.
>
> ***
>
> When a subscriber obtains a connection to an internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the internet service provider's service offering.
>
> *Universal Service Order, 12 FCC at 8822.*

Having had an additional opportunity to consider the arguments Ameritech previously raised concerning the appropriate interpretation of the parties' involved interconnection agreements, the Commission finds that Ameritech has raised no new arguments upon which the Commission should grant rehearing.

(9) As further support for its applications for rehearing, Ameritech pointed to two subsequent pronouncements at the federal level which, in Ameritech's view, warrant granting rehearing. The first is the *GTE ADSL* decision. In that decision, issued on October 30, 1998, the FCC, according to Ameritech, revisited and reaffirmed its existing precedent involving Internet traffic. More specifically, the FCC affirmed that Internet communications are inherently interstate in nature and that the jurisdictional nature of every Internet communication is determined by its end points, thereby rejecting the notion that a communication is divided at intermediate routing or switching points such as the ISP's local server. The *GTE ADSL* decision also clarifies the FCC's *Universal Service Order* by noting that the distinction that the FCC drew was solely for the purpose of determining which entities are required to contribute to universal service according to Ameritech.

The second pronouncement that Ameritech relies on is a NARUC Resolution adopted on November 11, 1998. Ameritech argues that through this resolution the NARUC members recognized that: "[t]he traffic over the Internet is jurisdictionally mixed and the jurisdictional nature of the traffic may be discovered in the future." Ameritech points to this language to dispel the notion that all traffic terminates locally at the ISP switch.

(10) Ameritech's reliance on the *GTE ADSL* order as justification for its argument on the status of Internet traffic is misplaced. The FCC's order in no way alters the logic, reasoning, or the conclusions set forth in the Commission's decisions in these matters. In the *GTE ADSL* decision, the FCC found that GTE's proposed ADSL service was an interstate offering properly tariffed on an interstate basis. In arriving at that decision, however, the FCC distinguished between the dedicated data links being offered by GTE and the circuit-switched, dial-up connections from end users to ISPs which are the focus of the Commission's orders from which Ameritech has sought rehearing.

Moreover, the FCC disclaimed that its decision in *GTE ADSL* acted as precedent in carrier-to-carrier reciprocal compensation disputes involving interconnection agreements between carriers. The FCC specifically limited the breadth of its decision by stating that:

> [T]his Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs . . . . We find that this Order does not and cannot determine whether reciprocal compensation is owed, on either a retrospective or prospective basis, pursuant to existing interconnection agreements, state arbitration decisions, and federal court decisions. We therefore intend ... to issue a separate order specifically addressing reciprocal compensation issues.
>
> *GTE ADSL* Order, ¶2.

(11) Similarly, regarding the NARUC Resolution, the Commission disagrees with Ameritech that the resolution represents grounds for reconsidering the August 27, 1998 and October 14, 1998 orders. Initially, we note that a NARUC Resolution issued after a substantive decision in an Ohio complaint case has been rendered has no binding effect whatsoever on this Commission. Just as we found in the initial orders in these three complaint cases that other state commission decisions have no legally binding effect on us, a NARUC Resolution holds no greater weight over us.

Even if we were to find that the NARUC Resolution is entitled to weight in these cases, we do not agree with Ameritech's proposition that this resolution provides grounds for rehearing. Rather, in our view, a fair reading of the NARUC Resolution is that the resolution is directed toward the relationship and subsequent orders of the FCC in the wake of the *GTE ADSL* decision. We also note that, at the time of the *GTE ADSL* decision, the FCC had not rendered a formal opinion on the reciprocal compensation issue for Internet traffic over the public switched network. However, the FCC did intimate that its future decision, addressed in more detail below, would not retroactively impact state decisions rendered on the interconnection agreements which have already been litigated before the state commissions.[3]

(12) On February 25, 1999, the FCC issued a decision intended to clarify whether a local exchange carrier is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an ISP. See, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68* (hereafter *Declaratory Ruling*), released February 26, 1999. By entry issued on March 5, 1999, the attorney examiner afforded the parties in these complaint cases an opportunity to submit comments and reply comments on the impact, if any, of the FCC's *Declaratory Ruling*. ICG, MCImetro, Time Warner, and Ameritech timely submitted initial and reply comments.

(13) In its initial and reply comments, Ameritech argues that the FCC's *Declaratory Ruling* refutes the underpinnings of the Commission's August 27, 1998 and October 14, 1998 orders and those orders should now be vacated. In support of this argument, Ameritech claims that the FCC, in its *Declaratory Ruling*, found that Internet traffic does not terminate at the ISP's local server and, consequently, Internet traffic is not subject to reciprocal compensation under Section 251(b)(5) of the Telecommunications Act of 1996 (1996 Act). Ameritech continues that the *Declaratory Ruling* confirmed FCC precedent dating back to at least 1983 that enhanced service provider (ESP) traffic, including ISP traffic, is non-local interstate traffic that, for public policy purposes, has been exempted from the payment of interstate access charges.

Ameritech claims that it was aware of this precedent at the time the involved interconnection agreements were negotiated and, since there was no question in Ameritech's view that the proper classification of ISP traffic, based on long-standing FCC policy, is exchange access, rather than local, it was not necessary to address the proper classification of ISP

3 In a speech before the same NARUC commissioners who adopted the November 11, 1998 Resolution discussed herein, FCC Chairman Kennard stated, when discussing the issue of reciprocal compensation between local carriers handling Internet traffic, "I believe that those states have been right to decide that issue (reciprocal compensation for Internet traffic) when it has been presented to them and I do not believe it is the role of FCC (sic) to interfere with those state decisions in any way." Remarks of William E. Kennard, Chairman of the Federal Communications Commission to the National Association of Regulatory Utility Commissioners, Orlando, Florida, and November 11, 1998.

traffic in the involved agreements. Ameritech avers that, since the involved interconnection agreements are clear and unambiguous regarding ISP traffic, the Commission is foreclosed from considering extrinsic evidence outside of the four corners of the agreements in order to arrive at a determination that the parties must pay each other reciprocal compensation on Internet traffic.

(14) The complainants, ICG, MCImetro, and Time Warner, claim that nothing in the FCC's *Declaratory Ruling* warrants reconsideration or modification of the August 27 1998 or October 14, 1998 orders.[4] ICG contends that Ameritech's arguments ignore the clear distinction in the FCC's *Declaratory Ruling* between a jurisdictional analysis and regulatory treatment. Ameritech's selective interpretation of the FCC's *Declaratory Ruling*, ICG maintains, ignores a significant portion of what the FCC actually said. Contrary to Ameritech's argument, the complainants point out that the FCC specifically abstained from interfering with state decisions on regulatory treatment in the absence of an FCC rule governing inter-carrier compensation. In fact, MCImetro points out that the FCC expressly rejected the claim of incumbent local exchange carriers, like Ameritech, that only the FCC has jurisdiction over this issue and that the 1996 Act and FCC rules preclude state commissions from interpreting interconnection agreements to require reciprocal compensation for ISP-bound traffic.

Further, MCImetro maintains that the FCC specifically noted that whether the parties reached an agreement regarding ISP-bound traffic is a question of fact, not law, based on the circumstances. Under well-established principles of contract construction, the parties' intent is determined at the time of contracting, not at some subsequent date, MCImetro observes. ICG also observes that Ameritech's argument constitutes an impermissible collateral attack on the *Declaratory Ruling*. Such an attack on the *Declaratory Ruling* can only be made at the United States Court of Appeals for the District of Columbia Circuit that is reviewing the FCC decision. Finally, the complainants maintain, four

4 Following the issuance of the examiner's March 5, 1999, entry, AT&T Communications of Ohio, Inc. (AT&T) and TCG Ohio filed comments in the three above-captioned complaint cases as amici curiae. The arguments raised by AT&T and TCG Ohio are addressed in the arguments made by ICG, MCImetro, and Time Warner. Therefore, the Commission need not separately address the arguments raised by AT&T and TCG Ohio.

state commissions have rendered decisions after the FCC's *Declaratory Ruling*. In each case, the state commission found that the *Declaratory Ruling* did not alter the state commission's authority to find that reciprocal compensation was required for ISP traffic under an interconnection agreement.

(15) The March 5, 1999, attorney examiner's entry afforded the parties a brief opportunity to submit initial and reply comments on the impact, if any, of the FCC's February 26, 1999 *Declaratory Ruling*. Having thoroughly reviewed the *Declaratory Ruling* as well as the submitted comments, the Commission finds that the *Declaratory Ruling* does not affect our earlier decisions interpreting and enforcing the interconnection agreements already in force. Moreover, we find that the *Declaratory Ruling* provides explicit support for the reasoning underlying the Commission orders.

Although the *Declaratory Ruling* did opine on the jurisdictional nature of Internet calls, the FCC did not, contrary to Ameritech's position, conclude that its resolution of the jurisdictional nature of ISP-bound traffic resolved the issue of whether reciprocal compensation is owed for that traffic. Rather, the FCC divided its analysis into two major components. The first component focuses on the nature of ISP-bound traffic for the purpose of resolving jurisdictional issues and the second component addressing what regulatory treatment should apply to such calls. In fact the FCC repeatedly emphasized that its examination was intended to resolve only the jurisdictional issues. This decoupling of the FCC's jurisdictional analysis from its regulatory treatment is not new and is illustrated by the very existence of the ESP exemption from interstate access charges. The ability of the FCC to make this jurisdictional/regulatory distinction has been challenged by Ameritech and affirmed by the United States Court of Appeals in the *Access Charge Reform Order*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982; *aff'd sub nom. Southwestern Bell Tel. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

The FCC expressly recognized, in the *Declaratory Ruling*, that its jurisdictional conclusions did not resolve the question of whether reciprocal compensation is owed for this traffic. Consequently, the FCC stated that "[N]othing in this

Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate [in the Declaratory Ruling]." *Declaratory Ruling* at ¶27.

It is beyond dispute that the FCC currently has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a federal rule, the FCC recognized that "state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation." *Id.* at ¶26. The FCC expressly recognized that its existing rules could not resolve this issue. *Id.* Until there is a federal rule in place, this Commission had, and continues to have, an obligation to resolve this issue.

The FCC in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order ¶83, first announced this Commission's authority, pursuant to the 1996 Act, to regulate interstate services under certain circumstances. As a result, the FCC concluded, and the United States Supreme Court agreed, that the state commissions have parallel jurisdiction under which they may regulate, in proper circumstances, interstate traffic over which the FCC may also have jurisdiction. See, *Id.* at ¶85; see also, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

The *Declaratory Ruling* is clear. This Commission had an obligation to interpret the interconnection agreements that are the subject of these complaints. Ameritech has argued that the relevant language of the involved interconnection agreements is clear and unambiguous. We disagree. Ameritech has not cited to, and we have not found, one sentence in the involved interconnection agreements that address ISP-bound traffic. Nor have there been any allegations that the parties ever agreed on treating ISP traffic different from all other locally dialed traffic.

In the absence of such an agreement, the Commission was left with attempting to determine the parties' intent at the time the interconnection agreements were entered into. In determining that, at the time the interconnection agreements were entered into, ISP-bound traffic would be treated as local traffic and subject to reciprocal compensation, the Commission looked at a variety of factors. Those factors included the FCC's existing policies of exempting ISP traffic from access charges but permitting the costs to be incurred at the local level; the conduct of the parties pursuant to their interconnection agreement; the practice of serving ISPs out of the local intrastate tariffs; the manner in which the revenues from ISP traffic were accounted for; and how end user charges are determined. In its *Declaratory Ruling*, the FCC set forth a non-exhaustive list of factors upon which state commissions properly might determine that the parties to an interconnection agreement had decided to treat ISP traffic as subject to reciprocal compensation. The factors this Commission considered and the non-exhaustive list set for in ¶24 of the FCC's *Declaratory Ruling* are nearly identical.

For all of the foregoing reasons, the Commission finds that the FCC *Declaratory Ruling* supports affirmance of the Commission's August 27, 1998 and October 14, 1998 orders that, under the existing interconnection agreements, ISP traffic is subject to reciprocal compensation. Ameritech has raised no argument or assignment of error which warrants rehearing in these matters. Consequently, the applications for rehearing filed by Ameritech are denied.

(16) On March 29, 1999, Ameritech filed, in each of the complaint cases, a motion for oral argument. In support of its motion, Ameritech notes that "[G]iven the significance of the recent developments and the legal and financial implications of this case, Ameritech Ohio urges the Commission to grant the parties an opportunity to present oral argument and answer any remaining questions the Commission may have before this rehearing concludes." This oral argument, according to Ameritech, should prove helpful to the Commission's final deliberations and will assure the parties a full and meaningful opportunity to be heard. On April 2, 1999, ICG and Time Warner filed memoranda contra Ameritech's motion for oral argument. ICG claims that Ameritech's request is nothing more than an additional bad faith effort by Ameritech to further delay this proceeding.

Time Warner maintains that nothing has transpired which would compel this Commission to reach decisions contrary to those previously rendered. Thus, Time Warner continues, additional oral argument at this point can only be cumulative and, hence, unnecessary.

(17) Ameritech's motion for a scheduled oral argument before the Commission is denied. In making our decision in this matter, the Commission has had the benefit of an extensive record including sworn testimony, several rounds of detailed written arguments, and one oral argument concerning reciprocal compensation for ISP traffic before the Commissioners prior to the initial orders being issued. Ameritech has made no suggestion that the presentation of prepared oral remarks before the Commission will add anything to the Commission's record in this matter not heretofore already presented. Therefore, the Commission can find little value in proceeding with scheduled oral arguments. This determination on the request for scheduled oral arguments does not, however, foreclose the Commission from addressing questions to the parties in the context of our deliberations at a duly scheduled Commission meeting.

(18) The final matter with which we must deal, based upon our determination to deny the applications for rehearing, is Ameritech's requests, in the ICG and MCImetro cases, for a temporary stay of Ameritech's obligations to remit payment to ICG and MCImetro. The purpose for granting a temporary stay would be to allow Ameritech a fair opportunity to secure a preliminary judicial ruling on the motion for stay it will file with its appeal. Ameritech commits to, during the pendency of this temporary stay, remitting the disputed amounts into interest bearing escrow accounts for the benefit of ICG and MCImetro.

(19) Ameritech's request for a temporary stay of our decision on rehearing in order to seek a judicial stay during the pendency of a future appeal is denied. In our view, it is appropriate to afford the complainants a level of finality now that the proceedings before us have concluded. Therefore, we direct the parties to reconcile the amounts owed and

Ameritech should remit payment to ICG and MCImetro within 45 days of this entry on rehearing.[5]

It is, therefore,

ORDERED, That the applications for rehearing filed by Ameritech are denied as set forth in the entry on rehearing. It is, further,

ORDERED, That Ameritech's motion for an oral argument is denied as set for herein. It is, further,

ORDERED, That Ameritech's request for a temporary stay is denied in accordance with Finding (19). It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties of record, their counsel, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

ABSTAIN
Alan R. Schriber, Chairman

Ronda Hartman Fergus

Craig A. Glazer

Judith A. Jones

Donald L. Mason
DISSENT

JRJ/vrh

Entered in the Journal
MAY 5 1999
A True Copy
Gary E. Vigorito
Secretary

5 Under the relevant terms of the Time Warner/Ameritech interconnection agreement, the parties agreed to measure local traffic for some period of time and then, at some future date if traffic was out of balance, compensate the other party for the traffic imbalance. Time Warner and Ameritech should apply the Commission's decision on the subject of Internet traffic and follow the relevant terms of their interconnection agreement for traffic imbalances, if any.