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January 10, 2000

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition by ICG TELECOM GROUP, INC. for Arbitration of an Interconnection Agreement with BELLSOUTH TELECOMMUNICATIONS, INC. pursuant to Section 252(b) of the Telecommunications Act of 1996*
Docket No. 99-00377

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Post-Hearing Brief. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

FILE

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: ***Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996***

Docket No. 99-00377

BELLSOUTH TELECOMMUNICATIONS, INC.'S POST-HEARING BRIEF

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Post-Hearing Brief in the above-referenced proceeding. Despite good faith negotiations by BellSouth and ICG Telecom Group, Inc. ("ICG"), there were certain issues concerning the parties' interconnection agreement upon which the parties were unable to agree. It is these few issues on which the parties seek a decision from the Tennessee Regulatory Authority (the "Authority"). Each of the individually numbered issues in this docket represent a specific dispute between BellSouth and ICG as to what should be included in the Interconnection Agreement between the parties. BellSouth respectfully requests that the Authority adopt BellSouth's position on each issue.

SUMMARY

The first issue (numerical Issue 1), whether dial-up calls to Internet Service Providers should be treated as if they were local calls for purposes of reciprocal compensation, was consolidated for hearing purposes with Docket No. 99-00430, the ITC^DeltaCom Arbitration. The issue was fully addressed in BellSouth's brief in that docket (filed December 7, 1999) and will not be further addressed herein, except to incorporate by reference those portions of that brief which address the issue. (*See, e.g.*, pp. 20-30). The next issue (numerical Issue 4) regarding the availability of Enhanced Extended Loops ("EELs") is one of the subjects of the FCC's recent Order in the UNE Remand Docket (CC Docket 96-98) (hereinafter "*Third Report and Order*") wherein the FCC developed the national list of UNEs to be provided by the Incumbent Local Exchange Companies ("ILECs"). In light of the FCC's findings, the Authority should deny ICG the relief it seeks on this issue and order the parties to simply comply with the FCC's Order.

With respect to the issue of tandem switching (numerical Issue 7), the Authority should conclude that Competitive Local Exchange Carriers ("CLECs") are entitled to the tandem switching elemental rate only in those circumstances where the CLEC switch actually performs the same tandem switching functions as the ILEC switch and actually serves a geographic area comparable to the ILEC switch. BellSouth submits that ICG's switch fails this two-pronged test, and therefore, ICG's request should be denied.

As to the next issue, binding forecasts (numerical Issue 11), such forecasts are not required under Section 251 or Section 252 of the 1996 Act. Thus, ICG is not entitled to forecasts under Section 252 of the 1996 Act and the Authority should deny the relief requested by ICG.

The final issues (numerical Issues 5 and 19-26) concern performance measures and performance penalties/liquidated damages. BellSouth believes that its Service Quality Measurements ("SQMs") are more substantively appropriate and more likely to lead to the further development of competition in Tennessee than the

"Texas Plan" put forth by ICG. With respect to performance penalties, the Authority does not have the authority to impose penalties on BellSouth for failure to meet performance measures. Even if the Authority concludes it has such authority, ICG's proposal is arbitrary and unsupportable and thus should not be adopted.

DISCUSSION

Issue 4: ***Should a local loop combined with dedicated transport be provided as a UNE? If so, what is the proposed rate?***

The combination of a local loop with dedicated transport is commonly referred to as the "Enhanced Extended Loop" or "EEL." For a variety of reasons, the Authority should not require BellSouth to provide the EEL to ICG in this arbitration. First, the FCC recently considered the EEL in its *Third Report and Order*. Specifically, the FCC held that

> [w]e decline to define the EEL as a separate network element in this Order. As discussed above, the Eighth Circuit is currently reviewing whether rules 51.315(c) – (f) should be reinstated. We see no reason to decide now whether the EEL should be a separate network element, in light of the Eighth Circuit's review of those rules.

Third Report and Order, ¶ 478. In light of this finding by the FCC, the Authority should not conclude otherwise.

Second, the Eighth Circuit Court of Appeals ("Eighth Circuit") vacated the FCC's rules requiring LECs to combine UNEs for CLECs. Thus, there is no legal obligation for ILECs to combine UNEs on behalf of CLECs. The Eighth Circuit currently is reviewing whether Rules 51.315(c) through (f) (in pertinent part dealing with the issue of combining UNEs) should be reinstated. Until the Eighth Circuit updates its review, there is no legal basis upon which to find that the EEL is a separate UNE. (Varner, Tr. Vol. 1B at p. 215). ICG does not dispute the fact that the EEL is a combination of UNEs. Specifically, ICG witness Holdridge testified:

> The EEL is simply a local loop combined with transport through a cross-connect. The local loop runs from a customer's premise to a serving BellSouth central office combined with transport from that serving central office to another BellSouth central office where ICG is collocated.

(Holdridge, Vol. 1A at p. 19).

BellSouth must provide combinations of loops and transport only where they are "currently combined." (Varner, Vol. 1B at p. 216). There is only one potential circumstance where that combination may currently exist: where ICG has previously purchased special access service to provide local service and terminated that in its collocation space. (*Id.*) Otherwise, the loop and transport are not "currently combined." The FCC's conclusion in the *Third Report and Order* is consistent with this view. Specifically, the FCC held that "[t]o the extent an unbundled loop is *in fact* connected to unbundled dedicated transport, the statute and our rule 51.315(b) require the incumbent to provide such elements to requesting carriers in combined form." *Third Report and Order*, ¶ 480. The FCC explicitly declined to adopt the definition of "currently combined" that includes all elements that are "ordinarily combined" in the incumbent's network. *Third Report and Order*, ¶ 480 ("although in this Order, we neither define the EEL as a separate unbundled network element nor interpret rule 51.315(b) as requiring incumbents to combine unbundled network elements that are 'ordinarily combined'"....).

Thus, BellSouth only is obligated to provide combinations of elements that are in fact connected -- *i.e.* those elements already in place for the customer the

CLEC wants to serve. As explained above, in BellSouth's network, there are very few, if any, instances in which the elements ICG wants are already in place for the customer ICG wants to serve. In fact, Mr. Varner testified that "the facility requested by ICG must be created by BellSouth. It does not already exist." (Varner Pre-Filed Direct at p. 11). ICG provided no competent evidence to suggest that the EEL is a combination of UNEs currently combined in BellSouth's network. To the contrary, Mr. Varner explained that the EEL does not exist in currently combined form because: "There is no facility currently in place that would convert a BellSouth customer to ICG's collocation space. If a customer is connected to ICG's space, the customer is receiving service from ICG, not BellSouth." (*Id.*). What ICG wants is for the facility to be connected to <u>its</u> network in its collocation space. If the facilities sought by ICG are not currently connected to ICG's collocation space, ICG is not entitled to purchase those facilities as a UNE combination.

ICG complains that it needs the EEL to be able to serve customers who otherwise might not have competitive alternatives. (Holdridge, Vol. 1A at p. 20). Despite the fact that he did not mention it in his prefiled testimony, Mr. Holdridge acknowledged on cross-examination that resale was available for similar situations, such as those where it would not be economically efficient to deploy facilities. (Holdridge, Vol. 1A at p. 28). He was adamant, however, that resale was not "economically viable." (*Id.* at pp. 28-29). Mr. Holdridge apparently is unaware of the fact that there are approximately 45 CLECs providing resold services today in Tennessee. Most of those resellers are presumably making money reselling those services. His vehement protestations about the lack of feasibility of resale carry little weight in light of a viable resale market in Tennessee.

In summary, the FCC has issued an order addressing the UNE issues, including the EEL. In addition, ICG acknowledges that BellSouth has offered to provide the EEL through a professional service arrangement outside of the parameters of the interconnection agreement and 1996 Act. (Holdridge, Vol. 1A at p. 21). BellSouth submits that the prudent course of action for the Authority is to reject ICG's request and order BellSouth to comply with the *Third Report and Order* of the FCC. To do otherwise subjects the Authority to the unnecessary risk of issuing an Order that conflicts with FCC Rule 51.319.

Issue 7: ***Should ICG be compensated for end office, tandem, and transport elements of termination, for purposes of reciprocal compensation, when ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch? If so, according to what schedule or at what rate?***

A tandem switch interconnects end offices. (Varner, Pre-Filed Rebuttal at p. 8). An end office switch, on the other hand, connects trunks to customer lines. (Varner, Pre-Filed Rebuttal at p. 6). If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. (Varner, Pre-Filed Direct at 17). In other words, ICG's switch is an end-office switch, and is handling calls that originate from or terminate to customers served by that local switch. Thus, it is not providing a tandem function. (Varner, Tr. at Pre-Filed Direct at 17). ICG is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide. (Varner, Tr. at 17).

Under Section 251(b)(5) of the 1996 Act, all local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). The terms and conditions for reciprocal compensation must be "just and reasonable," which requires the recovery of a reasonable approximation of the "additional cost" of terminating calls that originate on the network of another carrier. 47 U.S.C. § 252(d)(2)(A). According to the FCC, the "additional costs" of transporting terminating traffic vary depending on whether or not a tandem switch is involved. *See* First Report and Order*, In re: Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, CC Docket No. 96-98, ¶ 1090 (Aug. 8, 1996) (hereinafter referred to as "*First Report and Order*"). As a result, the FCC determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. *Id.*

The FCC directed state commissions to consider two factors in determining whether a CLEC should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch. First, the FCC directed state commissions to "consider whether new technologies (*e.g.*, fiber ring or wireless network) performed functions similar to those performed by an incumbent LEC's tandem switch and thus whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." *First Report and Order* ¶ 1090. Second, in addition to the functionality comparison, the

FCC instructed state commissions to consider whether the new entrant's switch serves a geographic area comparable to that served by the incumbent local exchange carrier's tandem switch, in which case the appropriate proxy for the new carrier's costs is the incumbent's tandem interconnection rate. *Id.; see also* 47 CFR § 51.711(a)(3). Therefore, in order to evaluate whether a CLEC should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch, *"it is appropriate to look at both the function and geographic scope of the switch at issue." See U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp. 2d 968, 977 (D. Minn. 1999) (emphasis added) (copy attached).

Turning first to the issue of geographic comparability, the evidence in this record (or lack thereof) on the question of whether ICG's switch serves a comparable geographic area is similar to the record evidence confronted by the federal district court in *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.*, 1999 U.S. Dist. LEXIS 11418, *19 (N.D. Ill, June 22, 1999) (copy attached). In that case, MCI argued that it should be compensated at the tandem rate for its switch in Bensonville, Illinois. The Illinois Commerce Commission ("ICC") rejected MCI's argument, finding that MCI had failed to provide sufficient evidence to support a conclusion that it was entitled to the tandem interconnection rate.[1]

[1] Although the ICC did not make express findings regarding the comparable functions of MCI's switch and Ameritech's tandem switches or the comparative geographical areas served by the various switches, the ICC did discuss the evidence offered by each party on these issues. *Id.* at *20. According to the district court, "[t]he issue of comparable functionality apparently was not in serious dispute" as MCI presented evidence that its switch performed similar functions as

In affirming the ICC on the tandem switching issue, the federal district court found that MCI's "intentions for its switch" were "irrelevant." According to the court, MCI was required to identify the location of its customers and the geographical area "actually serviced by MCI's switch," which MCI had utterly failed to do. *Id.* at *22-23 n.10. The district court reasoned that:

> The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. These are questions that MCI could have addressed, but did not.... In short, *MCI offered nothing but bare, unsupported conclusions that its switch currently served an area comparable to Ameritech tandem switch or was capable of serving such an area in the future.* The ICC's determination that "MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate" was not arbitrary and capricious.

Id. at *22-23 (emphasis added).

The district court's reasoning applies equally here. ICG has offered nothing but "bare, unsupported conclusions" from its consultant (who is not an employee of ICG) that its single Tennessee switch currently serves an area comparable to BellSouth's tandem switch. (See, e.g., Starkey Pre-Filed Direct at p. 10 and Starkey Pre-Filed Rebuttal at p. 3). ICG did not provide the location of its customers in Tennessee, which would be essential for the Authority to determine

Ameritech's tandem switches -- evidence that Ameritech did not dispute. *Id.* Indeed, Ameritech did not even raise the comparable functionality issue on appeal, which led the district court to conclude that "only at issue is the geographical areas served by the respective switches." *Id.*

the geographic area ICG's Tennessee switch actually serves and whether that area is comparable to the area served by BellSouth's tandem switch. For example, assume ICG has ten customers in Tennessee, all of which are located in a single office complex located next door to ICG's single switch. Under no set of circumstances could ICG seriously argue that in such a case that its switch serves a comparable geographic area to BellSouth's switch. *See* Decision 99-09-069, *In re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom*, Application 99-03-047, 9/16/99, at 15-16 (finding "unpersuasive" MFS's showing that its switch served a comparable geographic area when many of MFS's ISP customers were actually collocated with MFS's switch). Absent such evidence, ICG has clearly failed to satisfy its burden of proof on this issue.

Turning to the issue of functionality, several federal district court and state commission decisions plainly hold that the functions performed by another carrier's switch should be considered in determining whether that carrier is entitled to receive compensation for end-office, tandem, and transport elements in transporting terminating traffic. *See, e.g., U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp. 2d at 977; *U.S. West Communications, Inc. v. Public Service Commission of Utah*, 1999 U.S. Dist. LEXIS 18148, *12 (D. Utah, Nov. 23, 1999) (affirming commission requirement that U.S. West compensate Western Wireless at the tandem switching rate after concluding that Western Wireless's "switches perform comparable functions and serve a larger geographic area") (copy attached); *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc., Id.* (in deciding whether MCI was entitled to the tandem interconnection rate, the commission correctly applied the FCC's test to determine whether MCI's switch "performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch") (copy attached).

Here, ICG again depends on the unsubstantiated testimony of Mr. Starkey to assert that ICG's switch performs the same functionality as BellSouth's tandem. (Starkey, Vol. 1A at p. 104). However, Mr. Starkey has not observed the functionality, he merely relied on conversations with ICG engineers upon which to "base his opinion." (Starkey, Vol. 1A at pp. 114-115). Indeed, responding to questioning from Mr. Carsie Mundy of the TRA Staff regarding his diagram 3, Mr. Starkey acknowledged that calls from an ICG customer served out of ILEC central office D to a customer served out of ILEC central office B might not even pass through the ICG switch. (Starkey, Vol. 1A at p. 124). In that instance, no switching would occur at all.

At the most basic level, however, one switch cannot operate as a tandem switch -- the very nature of a tandem switch requires that the network have at least two switches. ICG has only one switch in Tennessee. (Varner, Vol. 1B at p. 217). Moreover, Mr. Starkey's protestations to the contrary notwithstanding, while ICG's switch may be capable of performing tandem switching functions when connected to an end-office switch, ICG's 5ESS switch does not perform the functions identified by BellCore as tandem switching functions. (Varner, Pre-Filed Rebuttal at p. 7). Most importantly, ICG does not interconnect end offices or perform trunk-to-trunk switching; rather, ICG performs line-to-trunk or trunk-to-line switching. (*Id.*). As Mr. Starkey's diagram 3 demonstrates, all ICG is doing is sending end user customer lines, in the form of long loops, to its switch from its collocation sites -- "[l]ong loop facilities do not qualify as facilities over which local calls are transported and terminated as described by the Act and therefore are not eligible for reciprocal compensation." (Varner, Pre-Filed Rebuttal at p. 8). Collocation arrangements simply are not switching points or end offices. (Varner, Pre-Filed Rebuttal at p. 9). Again, Mr. Mundy's questions of Mr. Starkey, referenced above, bear out this important point.

The relevance of the functions the switch is performing is that reciprocal compensation is not paid for loop costs, but rather only for the cost of transporting and terminating local calls. (Varner, Pre-Filed Rebuttal at pp. 9-10; *First Report and Order*, ¶ 1057). Specifically, the FCC held that the "costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. We conclude that such non-traffic sensitive costs should not be considered 'additional costs' when a LEC terminates a call that originated on the network of a competing carrier." (*First Report and Order*, ¶ 1057). Thus, the loops that ICG uses to serve its customers do not qualify for compensation because they are not "additional costs" incurred in transporting or terminating local calls. (Varner, Pre-Filed Rebuttal at pp. 11-12). ICG is, therefore, seeking unwarranted compensation.

The Florida Public Service Commission has previously reached the same conclusion recommended by BellSouth in the Commission's Metropolitan Fiber Systems of Florida, Inc. ("MFS") and Sprint arbitration orders. The Commission determined that "MFS should not charge Sprint for transport because MFS does not actually perform this function." (Order No. PSC-96-1532-FOF-TP, issued December 16, 1996.) The Commission reaffirmed this conclusion when it issued its Order in the MCI/Sprint arbitration case in Docket No. 961230-TP. (Order No. PSC-97-0294-FOF-TP, issued April 14, 1997.) The circumstances in the MFS/Sprint arbitration case can be logically extended to the issue raised by ICG in this arbitration proceeding. The evidence in the record does not support ICG's position that its switch provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually provide the network facility for which it seeks compensation.[2]

More recently and in this identical case, by voice vote on December 21, 1999, the Florida Commission re-affirmed its above-stated position in BellSouth's arbitration with ICG and found in favor of BellSouth on this issue. In doing so, the Florida Commission expressly considered the functions performed and geographical area served by ICG's switch. The Commission thus approved its Staff's Recommendation, denying the request of ICG as follows.

> *Recommendation:* *No. The evidence of record does not show that ICG's switch will serve an area comparable to the area served by BellSouth's tandem switch. In addition, the evidence does not show that ICG's switch will perform the same functions as a BellSouth*

[2] For purposes of a complete record, it is important to note that the Alabama and North Carolina Public Service Commissions have ruled against BellSouth on this issue, although the North Carolina decision is only a recommended decision rather than a final decision. BellSouth objected to the North Carolina decision on this issue, and, in fact, on January 3, 2000, the Public Staff recommended that the Commission reconsider and reverse its findings on this issue. A copy of the Staff's Response is attached. In Alabama, BellSouth filed a motion for reconsideration of the Alabama Commission's Order, and a final decision is pending.

tandem switch. Therefore, staff recommends, for the purposes of reciprocal compensation, that ICG not be compensated for the tandem element of terminating calls on their network which originated on BellSouth's network. However, staff does recommend that ICG be compensated for the transport and end office elements of termination.[3]

The California Public Utilities Commission also reached a conclusion similar to Florida on this issue. In an arbitration proceeding before MFS/WorldCom and Pacific Bell, the CPUC held that "a party is entitled to tandem and common transport compensation only when the party actually provides a tandem or common transport function." *See* Decision 99-09-069, *In re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom*, Application 99-03-047, 9/16/99, at 16. The CPUC further found unpersuasive MFS/WorldCom's argument that its network served a geographic area comparable in size to that served by Pacific Bell's tandem switch.

For the foregoing reasons, this Authority should deny ICG's request for tandem switching compensation when ICG proved neither that its switch is performing tandem switching nor that its switch serves a geographic area comparable to BellSouth's switch.

Issue 11: ***Should BellSouth commit to the requisite network buildout and necessary support when ICG agrees to a binding forecast of its traffic requirements in a specified period?***

The Authority should not create a duty or obligation that is not delineated in Section 251 of the 1996 Act in an arbitration proceeding under Section 252 of the 1996 Act. Specifically, Section 252(c) requires that:

[3] The Florida Public Service Commission ruled in favor of BellSouth's position in this arbitration on almost every issue. BellSouth hereby attaches a copy of the voice vote record for the Authority's use, and will submit a written order when it is received.

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission, pursuant to Section 251;

Clearly, BellSouth is not required by Section 251 of the 1996 Act to commit to binding forecasts with any CLEC, including ICG.

Although not required under the Act or by FCC rules, BellSouth recently has completed development of a service (Trunk Port Commitment Service), whereby BellSouth will commit to provisioning the necessary DS1 trunk ports when the parties agree to the requirements of a CLEC-provided DS1 trunk port forecast. BellSouth is now in the process of developing implementation procedures and contract language, upon completion of which, it will begin offering the service. (Varner Pre-Filed Direct at p. 21).

BellSouth is agreeable to continue to negotiate with ICG to meet their forecasting needs. It should be noted, however, that at this point in time, BellSouth is not offering binding forecast commitments for network services and facilities other than DS1 trunk ports. (Varner Pre-Filed Direct at p. 22).

The simple fact remains, however, that binding forecasts are not required by Sections 251 or 252 of the 1996 Act. Consequently, binding forecasts are outside the scope of BellSouth's requirements under the law, and the Authority should reject the imposition of such on BellSouth.

<u>Issue 5</u>: ***Should BellSouth be subject to liquidated damages for failing to meet the time intervals for provisioning UNEs? If so, what level of damages, concessions or remedies are appropriate? What time intervals?***

Issue 19: ***Should BellSouth be required to pay liquidated damages when BellSouth fails to install, provision, or maintain any service in accordance with the due dates set forth in an interconnection agreement between the Parties?***

Issue 20: ***Should BellSouth continue to be responsible for any cumulative failure in a one-month period to install, provision, or maintain any service in accordance with the due dates specified in the interconnection agreement with ICG?***

Issue 21: ***Should BellSouth be required to pay liquidated damages when BellSouth's service fails to meet the requirements imposed by the interconnection agreement with ICG (or the service is interrupted causing loss of continuity or functionality)?***

Issue 22: ***Should BellSouth continue to be responsible when the duration of service's failure exceeds certain benchmark?***

Issue 23: ***Should BellSouth be required to pay liquidated damages when BellSouth's service fails to meet the grade of service requirements imposed by the interconnection agreement with ICG?***

Issue 24: ***Should BellSouth continue to be responsible when the duration of service's failure to meet the grade of service requirements exceeds certain benchmarks?***

Issue 25: ***Should BellSouth be required to pay liquidated damages when BellSouth fails to provide any data in accordance with the specifications of the interconnection agreement with ICG?***

Issue 26: ***Should BellSouth continue to be responsible when the duration of its failure to provide the requisite data exceeds certain benchmark?***

The parties do not dispute the importance of or need for performance measurements in the parties' interconnection agreement. The only dispute is which performance measures should be included. BellSouth submits that the appropriate performance measures are BellSouth's Service Quality Measurements ("SQMs"), which are comprehensive measures covering BellSouth's performance in nine separate categories: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair; (5) billing; (6) operator services and directory assistance; (7) E911; (8) trunk group performance; and (9) collocation. BellSouth's SQMs were developed as a result of proceedings before several state Public Service Commissions (particularly Georgia and Louisiana) and input from the CLECs. (Coon, Pre-Filed Direct at pp. 3-4).

ICG is advocating the implementation of performance measurements based on a plan adopted by Texas Public Service Commission (Rowling, Vol. 1A at p. 39).[4] The Authority should decline to adopt performance measurements based upon a proposal in Texas that has no relevance to BellSouth, particularly when the Louisiana and Georgia Public Service Commissions and numerous interested parties have devoted countless hours to developing comprehensive performance measures suitable to the industry in BellSouth's region.

As a result of these countless hours, BellSouth's SQMs are available to ICG and every other CLEC in Tennessee today. The same cannot be said about ICG's proposed performance measurements. In a similar arbitration between BellSouth and ITC^DeltaCom in South Carolina, the fact that BellSouth's SQMs have

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4 At the hearing, Chairman Malone requested that the parties clarify the posture of the "Texas Plan." That is, he questioned whether the plan was something ordered by the Texas Commission or whether it was voluntarily adopted (Malone, Vol. 1B at p. 212). BellSouth's witness on this issue, Mr. David Coon, spoke with the Director of Performance Measurements at Southwestern Bell. That person identified the effort as a "collaborative process that the Commission approved." BellSouth believes the Texas Plan resulted from a proceeding similar to the one currently ongoing in Louisiana. This would appear to be consistent with Ms. Rowling's testimony on the subject. (See, e.g., Rowling, Vol. 1B at pp. 207-208).

undergone rigorous review and are currently available for use were reasons cited by the South Carolina Public Service Commission for adopting BellSouth's SQMs rather than DeltaCom's proposed performance measures. Exhibit 1, Order No. 1999-690, *In re: Petition of ITC^DeltaCom Communications for Arbitration with BellSouth Telecommunications, Inc.*, Docket No. 1999-259-C, at 11 (Oct. 4, 1999) ("*South Carolina Order*"). The South Carolina Commission found that the SQMs "have undergone two years of review and formulation by the FCC and several state commissions and input from various CLECs. As such, the Commission recognizes that these performance measurements are in place and ready to be implemented within the context of this agreement until the Commission can conclude its generic proceedings." *Id.* at 11-12.

Finally, as was demonstrated in late filed Exhibit 3, the comparison of the SQMs and the "Texas plan," BellSouth's proposal clearly includes all relevant and important measures. The SQMs are comprehensive, compare favorably to the Texas measures and should be adopted.

Turning to the issue of "performance guarantees," BellSouth has previously briefed the Authority's power to adopt such performance guarantees, in Docket 99-00430, *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*, which is incorporated herein by reference. However, even assuming the Authority has the power to impose ICG's proposed "performance guarantees" in this arbitration (which BellSouth submits is not the case), there are compelling reasons why the Authority should decline to do so.

First, ICG's proposed "performance guarantees" are not tied to cost or based on actual damages suffered by ICG. ICG's witness on this topic, Ms. Gwen M. Rowling, admitted as much on cross examination:

> Q. Has ICG done any cost studies to justify the amounts that it has in the proposal for penalties?
>
> A. No, we have not.
>
> (Rowling, Vol. 1A at p. 59).
>
> Q. My question was, these amounts are not tied to any estimate of actual damages ICG would incur in the event of a breach of contract, are they?
>
> A. Not particular to ICG, no, that's correct.
>
> (Rowling, Vol. 1A at p. 608).

Second, ICG's proposed "performance guarantees" would take effect irrespective of whether the fault was BellSouth's, ICG's, the customer's, or no one in particular. Even if rewritten to apply only when fault can be unambiguously ascertained, the measures do not compare the service BellSouth supplies other CLECs or its own retail customers with the service it provides ICG, and the measures do not account for statistical variation in those measures. As a result, under ICG's proposal, BellSouth would pay "performance guarantees" when even the level of service it supplies ICG is the same as that which it supplies itself.

Third, adopting ICG's proposed "performance guarantees" would be inconsistent with prior decisions of this agency rejecting similar proposed "performance guarantees." In the NEXTLINK arbitration, the Authority declined to adopt NEXTLINK's proposal for "self-executing remedies" that would have applied in the event BellSouth failed to meet performance measures or loop provisioning intervals to which the parties had agreed. First Order of Arbitration Award, Docket No. 98-00123, at 16 (May 18, 1999). Without reaching the issue of whether self-executing remedies were appropriate, the Authority concluded that it was not possible to fashion remedies based on the evidentiary record developed in the arbitration proceeding.

The same is true here, as the evidentiary record in this arbitration is indistinguishable from the record in the NEXTLINK arbitration. Like NEXTLINK, ICG has simply proposed a series of performance measures and a corresponding series of "performance guarantees." ICG has not bothered to explain in any real detail how those guarantees were developed for Tennessee. ICG seems to rely simply on the fact that the guarantees were developed in Texas, and that ought to be good enough for this Authority. Moreover, ICG has not established that its guarantees are reasonable or are in any way logically related to BellSouth providing nondiscriminatory access as required by the 1996 Act.

Prior to its decision in the NEXTLINK arbitration, the Authority also declined to adopt MCI's proposal for a system of penalties and credits that would have applied in the event BellSouth failed to meet certain performance measures. *See* Second and Final Order of Arbitration Awards, Docket No. 96-01271 (Jan. 23, 1997). The Authority concluded that "MCI's proposed system of non-performance credits and penalties is wholly unnecessary, redundant, and not required by law." Brief of the Tennessee Regulatory Authority, Case No. 3-97-0616, at 25 (filed April 13, 1998). According to the Authority, there is no legal requirement mandating the creation of a supplement enforcement scheme for arbitrated interconnection agreements and, in view of the reasonableness and adequacy of remedies available in the event of a breach of such agreement, the Authority's "refusal to require a system of penalties and credits, as requested by MCI, was eminently reasonable ...." (*Id.* at 26).

The Authority's reasoning in the MCI arbitration applies equally here. In the event BellSouth fails to comply with its obligations under the interconnection agreement with ICG, ICG has adequate remedies under Tennessee and federal law and is free to seek relief from this Authority or the courts. Although ICG claims that it presented the Texas Plan in order "to protect and foster" competition in Tennessee (Rowling, Vol. 1A at p. 42), the current lack of "performance guarantees" in Tennessee has not hindered local competition in Tennessee. Indeed, such competition has been robust, at least in those market segments where competitors have chosen to compete.

ICG's claims that "[l]itigation on a case-by-case, CLEC-by-CLEC basis is extremely "inefficient" ring hollow (Rowling Vol. 1A at p. 41). CLEC complaints filed with the Authority concerning BellSouth's performance have been relatively few and far between, notwithstanding the absence of "performance guarantees" in Tennessee since the local market was opened to competition in 1995.[5] Furthermore, rather than reducing litigation, adopting ICG's "performance guarantees" would likely have the opposite effect. Given the substantial sums at risk, the parties would have substantial incentive to litigate whether the conditions have been satisfied so as to warrant the large payments envisioned by ICG. Consequently, adopting ICG's "performance guarantees" will not save the parties time and money, but rather will only change the type of regulatory proceeding upon which time and money must be spent. In fact, ICG's witness conceded this point, in pertinent part, on cross-examination:

> Q. And if there's money on the line, there's probably going to be disagreement among those exclusions; correct?
>
> A. There could be, yes, there could be.
>
> (Rowling, Vol. 1A, at p. 69 – non-responsive portion of answer omitted).

In summary, BellSouth's SQMs comply with decisions of two of the Authority's sister commissions on the issue of performance measurements. Because the SQMs are presumably sufficient for the CLEC industry in Georgia and Louisiana as a whole, they should be sufficient for ICG in Tennessee as well. It is important to remember also that ICG accepted BellSouth's SQMs in Georgia, arguing only over the alleged need for "performance guarantees." (Rowling, Vol. IA at pp. 45-48). ICG has not articulated any legitimate bases for adopting an individualized set of performance measurements that would apply only to ICG, particularly when performance measurements should be consistent across all CLECs in order for the Authority to monitor whether BellSouth is providing nondiscriminatory access. Accordingly, the Authority should resolve this issue by

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[5] The exception has been complaints filed by various CLECs against BellSouth over the payment of reciprocal compensation for Internet-bound traffic. Nothing in ICG's "performance guarantee" proposal would address this issue.

directing the parties to incorporate BellSouth's SQMs into their interconnection agreement and reject ICG's request for performance penalties.

Notwithstanding all the foregoing, however, BellSouth has clearly stated that it is willing to include enforcement mechanisms in its agreement with ICG. (Varner, Vol. 1B at p. 220). While not required under Section 251 or 252, the FCC has clearly expressed an interest in self-effectuating enforcement mechanisms in the context of the public interest standard in Section 271 of the Act. As a result, BellSouth has been working with the FCC to develop a set of performance penalties that BellSouth would offer voluntarily, and that would only be effective <u>coincident with a grant of 271 relief</u> in a state. (*Id.*). BellSouth has recently submitted a new proposal to the FCC Staff that was well received. (*See* BellSouth's supplement to Late Filed Exhibit AJV-1, filed December 20, 1999, in this Docket and Docket No. 99-00430). Consequently, BellSouth is finalizing the contract language for this proposal and will begin to include this proposal in its interconnection agreements, and would like an opportunity to include this proposal in its agreement with ICG. As the Authority can clearly see from the late-filed Exhibit, the enforcement mechanism offered by BellSouth is quite substantial, and will include significant payments and fines (up to $23 million annually in Tennessee, and up to $208 million on a regionwide basis), as well as a voluntary suspension of additional marketing and sales of interLATA services triggered by one month of significantly poor performance. (BellSouth supplement to Late-Filed Exhibit AJV-1). At this time, when BellSouth is on the verge of offering contract language with regard to such a substantial enforcement mechanism, it would not be productive or appropriate for this Authority to reach out, in a Section 252 arbitration, and address what is more logically a Section 271 issue. Rather, BellSouth urges the Authority to allow parties to voluntarily include the terms of an enforcement mechanism in interconnection agreements, so that everyone involved can be assured that such a plan is sufficient to satisfy the FCC's concerns under Section 271 of the Act.

CONCLUSION

For the reasons set forth above, BellSouth requests that the Authority (1) find that reciprocal compensation is not due for ISP-bound traffic; (2) reject ICG's request for enhanced extended links; (3) reject ICG's request for tandem switching compensation when tandem switching is not performed; (4) reject the notion that BellSouth should be required to commit to binding forecasts with ICG; and (5) reject ICG's request for performance measurements, performance penalties and/or liquidated damages.

Respectfully submitted this 10th day of January, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

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55 F. Supp. 2d 968 printed in FULL format.

US West Communications, Inc., Plaintiff, vs. Minnesota Public Utilities Commission, Edward A. Garvey, Chairman, Joel Jacobs, Commissioner, Marshall Johnson, Commissioner, Gregory Scott, Commissioner, and Don Storm, Commissioner (In Their Official Capacities as Past or Present Commissioners of the Minnesota Public Utilities Commission); and AT&T Wireless Services, Inc., Defendants.

File No. Civ. 98-914 ADM/AJB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

55 F. Supp. 2d 968; 1999 U.S. Dist. LEXIS 16224

March 30, 1999, Decided

March 31, 1999, Filed

DISPOSITION: US West's request Court find MPUC's determinations concerning US West-AWS Agreement violates *47 U.S.C.* §§ *251* and 252 GRANTED IN PART, DENIED IN PART and DENIED WITHOUT PREJUDICE IN PART.

CORE TERMS: network, carrier, incumbent, interconnection, switch, tandem, unbundled, telecommunication, burden of proof, arbitration, collocation, state commission, local telephone, negotiation, technically, feasible, switching, entrant, directory, takings claim, state law, rebuttal testimony, traffic, geographic area, wireless, transit, Telecommunications Act, telephone, vacated, duty

COUNSEL: For US West Communications, Inc., Plaintiff: Geoffrey P. Jarpe, Martha J. Keon, Maun & Simon, PLC, Kevin J. Saville, US West Communications, Inc., Wendy M. Moser, Norton Cutler, Blair A. Rosenthal, US West, Inc.

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For AT&T Wireless Services, Inc., Defendant: Mark J. Ayotte, Darrin M. Rosha, Briggs and Morgan, P.A.

JUDGES: Ann D. Montgomery, UNITED STATES DISTRICT JUDGE.

OPINIONBY: Ann D. Montgomery

OPINION: [*970] MEMORANDUM OPINION AND ORDER

Plaintiff US West Communications, Inc., ("US West") brought this action pursuant to the Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), specifically *47 U.S.C.* § *252*(e)(6), seeking judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). US West has named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual commissioners and the MPUC, itself, will be referred to collectively as the MPUC.

The above-captioned case is one of eight cases involving review of determinations made by the MPUC presently before this Court. On December 10, 1997, this Court issued an Order in US WEST Communications, Inc. v. Garvey, No. 97-913 ADM/AJB, slip op. at 3 (D.Minn. Dec. 10, 1997), determining the scope of review for cases brought pursuant to § 252(e)(6). The Court found the scope of review limited to an appellate review of the record established before the MPUC. Id. On May 1, 1998, the Court filed an Order addressing the standard of review in the eight Telecommunications Act cases. AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998). Questions of law will be subject to de novo review while questions of fact and mixed questions of fact and law will be subject to the arbitrary and capricious standard. Id. at 11-13.

[*971] I. BACKGROUND

Before 1996, local telephone companies, such as US West, enjoyed a regulated monopoly in the provision of local telephone services to business and residential customers within their designated service areas. *AT&T Communications of the Southern States v. BellSouth Telecomms., Inc., 7 F. Supp. 2d 661, 663 (E.D.N.C. 1998).* In exchange for legislative approval of this scheme, the local monopolies ensured universal telephone service. Id. During this monopolistic period, the local telephone companies constructed extensive telephone networks in their service areas. Id.

Congress passed the Telecommunications Act of 1996, in part, to end the monopoly of local telephone markets and to foster competition in those markets. *Iowa Utilities Bd. v. FCC, 120 F.3d 753, 791 (1997),* rev'd in part sub nom., *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999); GTE North, Inc. v. McCarty, 978 F. Supp. 827, 831* (citing Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 104-458, at 113 (1996)). Because the local monopolies, or incumbent local exchange carriers ("ILECs" or "incumbent LECs"), had become so entrenched over time through their construction of extensive facilities, Congress opted "not to simply issue a proclamation opening the markets," but rather constructed a detailed regulatory scheme to enable new competitors to enter the local telephone market on a more equal footing. *AT&T Communications of the Southern States, 7 F. Supp. 2d at 663.* The Act obligates the incumbent LECs, like US West: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it (interconnection); (2) to provide competing carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell any telecommunication service to competing carriers at a wholesale rate so that the competing carriers can resell the service (resale). *Iowa Utils. Bd., 120 F.3d at 791* (citing *47 U.S.C.A.* § *251* (c)(2)-(4)). In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiation and arbitration. *47 U.S.C.* § *252.* Two sections of the Act, *47 U.S.C.* §§ *251* and 252, explain the basic structure of the overall scheme for opening up the local markets.

Section 251

Section 251 describes the three relevant classes of participants effected by the Act: (1) telecommunications carriers, (2) local exchange carriers, and (3) incumbent local exchange carriers. *47 U.S.C.* § *251*(a), (b), and (c). A telecommunications carrier is a provider of telecommunications services, *47 U.S.C.* § *153*(44), telecommunication services being "the offering of telecommunications for a fee directly to the public . . . ," *47 U.S.C.* § *153*(46), and telecommunications being "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *47 U.S.C.* § *153*(43). Both US West and Defendant AT&T Wireless Services, Inc., ("AWS") qualify as telecommunications carriers. A local exchange carrier ("LEC") is "any person that is engaged in the provision of telephone exchange service or exchange access," *47 U.S.C.* § *153*(26), within an exchange area. *47 U.S.C.* § *153*(47). An incumbent local exchange carrier is a company that was an existent local exchange carrier on February 8, 1996, and was deemed to be a member of the exchange carrier association. *47 U.S.C.* § *252*(h). In this action, only US West qualifies as an incumbent LEC.

Section 251 establishes the duties and obligations of these categories of participants. For example, all telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications [*972] carriers," *47 U.S.C.* § *251*(a); local exchange carriers have a duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." *47 U.S.C.* § *251*(b); and incumbent LECs have a duty to negotiate in good faith with telecommunications carriers seeking to enter the local service market, as well as a duty to "offer for resale at wholesale prices any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." *47 U.S.C.* § *251*(c). Section 251 requires an incumbent LEC to provide interconnection that is at least equal in quality to that provided by the incumbent LEC to itself at any technically feasible point, *47 U.S.C.* § *251*(c)(2); to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, *47 U.S.C.* § *251*(c)(3); and to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. *47 U.S.C.* § *251*(c)(6).

Section 252

Section 252 delineates the procedures for the negotiation, arbitration, and approval of an interconnection agreement that permits a new carrier's entry into the local telephone market. *47 U.S.C.* § *252.* Once an incumbent LEC receives a request for an interconnection agreement from a new carrier, the parties can negotiate and enter into a voluntary binding agreement without regard to the majority of the standards set forth in § 251 of the Act. *47 U.S.C.* § *252*(a). If the parties cannot reach an agreement by means of negotiation, after a set number of days, a party can petition a State commission, here the MPUC, to arbitrate unresolved open issues. *47 U.S.C.* § *252*(b)(1).

An interconnection agreement adopted by either negotiation or arbitration must be submitted for approval to the State commission. *47 U.S.C.* § *252*(e)(1). The State commission must act within 90 days after the submission of an agreement reached by negotiation or after 30 days of an agreement reached by arbitration. *47 U.S.C.* § *252*(e)(4). The State commission must approve or reject the agreement, with written findings as to any deficiencies. *47 U.S.C.* § *252*(e)(1).

FCC Regulations

47 U.S.C. § *251*(d)(1) directs the FCC to promulgate regulations implementing the Act's local competition provisions within six months of February 8, 1996. "Unless and until an FCC regulation is stayed or overturned by a court of competent jurisdiction, the FCC regulations have the force of law and are binding upon state PUCs [Public Utility Commissions] and federal district courts." *AT&T Communications of California v. Pacific Bell, 1998 U.S. Dist. LEXIS 10103, 1998 WL 246652,* at *2 (N.D.Cal. May 11, 1998) (citing *Anderson Bros. Ford. v. Valencia, 452 U.S. 205, 219-20, 68 L. Ed. 2d 783, 101 S. Ct. 2266 (1981))*. Review of FCC rulings is committed solely to the jurisdiction of the United States Court of Appeals pursuant to *28 U.S.C.* § *2342*(1) and *47 U.S.C.* § *402*(a).

On August 8, 1996, the FCC issued its First Report and Order, which contains the Agency's findings and rules pertaining to the local competition provisions of the Act. *Iowa Utils. Bd., 120 F.3d at 792* (citing First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the *Telecommunications Act of 1996, 11 FCC Rcd 15499,* CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order")). Soon after the release of the First Report and Order, incumbent LECs and State Commissions across the country filed motions to stay the implementation of the Order, in whole or in part. The cases were consolidated in front of the Eighth Circuit. In Iowa Utilities Board, the Eighth Circuit decided that "the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service." Id. The Eighth Circuit [*973] also vacated the FCC's "pick and choose" rule as being incompatible with the Act. Id. at 801. Other provisions of the First Report and Order were upheld by the Eighth Circuit.

On August 8, 1996, the FCC also promulgated the Second Report and Order, which contains additional FCC comments and regulations concerning provisions of the Telecommunications Act of 1996 that were not addressed in the First Report and Order. *The People of the State of California v. FCC, 124 F.3d 934, 939 (8th Cir. 1997),* rev'd in part sub nom., *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999).* Again many local exchange carriers and state commissions filed suit challenging the order. Several cases were combined in front of the Eighth Circuit, which issued another order addressing the FCC's rules. Id.

On January 25, 1999, the Supreme Court reversed a significant portion of the Eighth Circuit's decisions. *AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. at 721.* The Supreme Court ruled that the FCC does have jurisdiction to implement local pricing rules and the FCC's rules governing unbundled access, with the exception of Rule 319, are consistent with the Act. Id. at 738. In addition, the Supreme Court upheld the FCC's "pick and choose" rule as a reasonable, and possibly the most reasonable, interpretation of § 252(i) of the Act. Id.

Procedural History

In this case, AWS, a Commercial Mobile Radio Service ("CMRS"), sent a letter dated October 3, 1996, to US West making a request for the partes to negotiate an Interconnection Agreement pursuant to the Act. (A1, Ex. 1). The parties failed to reach accord on all issues and AWS petitioned the MPUC for arbitration on March 7, 1997. (A1). In its Petition for Arbitration, AWS noted eleven open issues for arbitration. (A1; Petition for Arbitration at 7-23). On April 1, 1997, US West submitted its response to the MPUC. (A7).

On April 17, 1997, the MPUC granted AWS's petition and established procedures for the arbitration. (A11; MPUC Order Granting Petition at 1-5). The MPUC referred the matter to the Office of Administrative Hearings n1 to designate an Administrative Law Judge (ALJ) to conduct the arbitration proceedings and issue a recommendation. (A11; MPUC Order Granting Petition at 4). In its order, the MPUC noted that the Minnesota Department of Public Service ("DPS") n2 and the Residential Utilities Division of the Office of the Attorney General ("RUD-OAG") n3 had a right under state law to intervene in all MPUC proceedings. (A11; MPUC Order Granting Petition at 6).

n1 The Office of Administrative Hearings is an independent state agency which employs administrative law judges to conduct impartial hearings on behalf of other state agencies. Minn. Stat. §§ 14.48 and 14.50.

n2 The Minnesota Department of Public Service is a state agency charged with the responsibility of investigating utilities and enforcing state law governing regulated utilities, as well as enforcing the orders of the MPUC. The DPS is authorized to intervene as a party in all proceedings before the MPUC. Minn. Stat. § 216A.07.

n3 The Attorney General of Minnesota is "responsible for representing and furthering the interests of residential and small business utility consumers through participation in matters before the Public Utilities Commission involving utility rates and adequacy of utility services to residential or small business utility consumers." Minn. Stat. § 8.33, subd. 2.

The MPUC ordered that: "The burden of production and persuasion with respect to all issues of material fact shall be on US WEST. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute." (A11; MPUC Order Granting Petition at 10). The MPUC reasoned that the federal Telecommunications Act and the Minnesota Telecommunications Act of 1995 [*974] are designed to create competitive entry into the local telephone market and placing the burden of proof on US West facilitates this purpose. (A11; MPUC Order Granting Petition at 10). The MPUC further explained that US West controlled most of the key information relevant to the proceedings. (A11; MPUC Order Granting Petition at 10).

On May 2, 1997, AWS and US West submitted a matrix of twelve key issues to ALJ Allen Giles and the MPUC. (A15). Those issues included:

1) Access to Service Agreements;
2) Points of Interconnection;
3) Pricing of Services;
4) Application of Access Charges;
5) Reciprocal Compensation/Symmetrical Compensation;
6) Access to Unbundled Network Elements;
7) Items Specific to Paging;
8) Access to Poles, Ducts, Conduits, and Rights of Way;
9) Reciprocal Compensation Effective Date and Rates;
10) Contract Language;
11) Service Quality Standards; and
12) Transit Traffic.

(A15; Positions on Key Issues at 1-7). US West withdrew from its original list of open issues Wide Area Inbound Calling; Access to Numbering Resources; Dialing Parity; and Procedure for Notice of Change, because those issues were no longer in dispute. (A15; Positions on Key Issues at 5).

ALJ Giles presided over the arbitration hearing on May 6 and 7, 1997. (A17-A19). Attorneys for US West, AWS, and the DPS were present, as well as a member of the MPUC staff. (A17; ALJ Hearing Transcript at 2). Eight witnesses were called and various exhibits were entered. (A17-A19). AWS called Kerri M. Landeis, Director of External Affairs for AWS, (A20); Russell Thompson, Director of Network Planning for AWS, (A22); and Dr. Thomas M. Zepp, economist and Vice-President of Utility Resources, Inc., (A25), as expert witnesses. (A17-A18). US West called Thomas G. Londgren, Director of the Minnesota Regulatory Group for US West, (A28); Denyce Jennings, US West's Manager of Wireless Interconnection, (A30); Craig Wiseman, a member of US West's technical staff in the Interconnection Planning Group, (A18; ALJ Hearing at 261); and Dean Buhler, a member of US West's technical staff in Information Technologies, (A18; ALJ Hearing at 312), as expert witnesses. (A17-A19). US West also submitted the rebuttal testimony of Robert Harris, Principal at the Law and Economics Consulting Group and Professor Emeritus of Business and Public Policy in the Haas School of Business, University of California, Berkeley. (A39). The DPS called Susan Peirce, Public Utilities Rates Analyst for the MPUC, as an expert witness. (A40, Ex. A). The parties, including the DPS, submitted post-hearing briefs. (A45-A50). On June 6, 1997, the ALJ issued a Report and Recommended Arbitration Decision. (A51).

In early June, both US West and AWS filed exceptions to the Recommended Arbitration Decision. (A53); (A54). By letter dated June 11, 1997, the DPS noted no exceptions would be filed as the ALJ's recommendations were consistent with the positions advocated by the DPS. (A55). The MPUC heard a staff briefing and oral arguments on June 30 and July 2, 1997. (A57). Pursuant to its vote at the July 2 meeting, the MPUC issued its Order Resolving Arbitration Issues on July 30, 1998. (A58). In its Order, the MPUC took judicial notice of the stayed FCC rules and made the FCC methodologies part of the record. (A58; Order Resolving Arbitration Issues at 2). The MPUC ruled on the following issues:

1) Bill & Keep;
2) Interim Prices;
3) Compensation to AWS from Third-Party Carriers;
[*975] 4) Compensation for Traffic Terminated at AWS' Mobile Switching Center (MSC);

5) Access Charges for Intra-Major Trading Area (MTA) Roaming Calls;
6) Compensation for Terminating Paging Calls;
7) Dedicated Paging Facilities;
8) The Effective Date for Reciprocal Compensation;
9) Rates to Be Applied Between Commencement of Reciprocal Compensation and the Issuance of an Order;
10) "Pick and Choose" Option;
11) Points of Interconnection;
12) Limitation on Distance as to Mid-span Meet Point;
13) Collocation of AWS' Remote Switching Units (RSUs) and Digital Loop Carrier Systems (DLCs) at US West's Premises;
14) The Definition of "Collocated Premises";
15) Denial of Access Due to Space Exhaustion;
16) Nondiscriminatory Access to Unbundled Network Elements;
17) Access to Operational Support Systems (OSS);
18) Remedies for Service Quality Violations;
19) Access to Poles, Ducts, Conduits, and Rights of Way;
20) Adoption of Proposed Contract as Template; and
21) Arbitration Costs.

(A58; Order Resolving Arbitration Issues at 4-33). The MPUC ordered the parties to submit a final contract, containing all the arbitrated and negotiated terms, no later that 30 days from the service date of the MPUC's Order. (A58; Order Resolving Arbitration Issues at 34). On August 27, 1997, the parties submitted a CMRS Interconnection Agreement in accordance with the Order, but expressly reserved all rights in connection with any future challenges to the Order. (A48; Letter of Mark Ayotte at 2). The parties were unable to resolve the issue of special construction for interconnection facilities and therefore submitted two alternative versions for the portion of the Agreement addressing that issue. (A48; Letter of Mark Ayotte at 2).

On August 11, 1997, AWS filed a Petition for Reconsideration. (A59). On September 18, 1997, the Petition for Reconsideration and the Proposed Contract came before the MPUC. (A66; Order Resolving Issues After Reconsideration at 1). On September 29, 1997, the MPUC issued its Order Resolving Issues After Reconsideration, Examining Interconnection Agreement, and Requiring Compliance Filing. (A66). In that Order, the MPUC granted in part and denied in part AWS' Petitions for Reconsideration; the MPUC was persuaded that the compensation rate for AWS-terminated traffic should be the tandem switching rate rather than calculated on a per call basis. (A66; Order Resolving Issues After Reconsideration at 3, 11). The MPUC also corrected an error in its calculation of prices. (A66; Order Resolving Issues After Reconsideration at 4). The MPUC adopted the language submitted by AWS concerning special construction for interconnection facilities as the final contract language. (A66; Order Resolving Issues After Reconsideration at 11). The MPUC required a few further amendments and modifications to the Agreement, such as the addition of a notice provision and a provision concerning US West Dex. (A66; Order Resolving Issues After Reconsideration at 6-11). The MPUC found the rest of the agreement to be generally consistent with the federal Act, Minnesota law, and the public interest. (A66; Order Resolving Issues After Reconsideration at 6).

The MPUC ordered the parties to submit a final contract that complied with its Order within 30 days; the MPUC noted [*976] that a final contract with the proposed modifications would meet all applicable legal requirements, and therefore would be approved and effective as of September 18, 1997. (A66; Order Resolving Issues After Reconsideration at 11). The final US West-AWS Agreement was filed with the MPUC on October 30, 1997. (A68). On December 15 and March 4, 1997, the MPUC issued two memorandums noting that the parties filed an Agreement that complied with its Order of September 29, 1997. (A69); (A73).

On March 13, 1998, pursuant to *47 U.S.C.* § *252*(e)(6), US West filed the instant action seeking review of the MPUC's Orders. US West alleges nine counts in its complaint: (1) Count I, the MPUC violated US West's due process rights and the dictates of the Act and Minnesota law by placing the burden of proof on US West; (2) Count II, the MPUC violated *47 U.S.C.* §§ *252*(b)(1) and (b)(4)(A) by considering issues not included in AWS' petition or US West's response; (3) Count III, the MPUC violated *47 U.S.C.* § *252*(d)(2) and (d)(A)(ii) by treating AWS's Mobile Switching Center ("MSC") as a tandem switch for the purpose of compensation; (4) Count IV, the MPUC violated *47 U.S.C.* § *251*(c)(6) when it required US West to collocate RSUs and DLCs on its premises; (5) Count V, the MPUC violated *47 U.S.C.* § *252*(i) by ordering the inclusion of a provision in the Interconnection Agreement referencing the "unsettled state of the law" concerning the "pick and choose" rule; (6) Count VI, the MPUC violated § 251(c)(2) when it ordered US West to provide interconnection at any technically feasible point, even if construction is involved; (7) Count VII, the MPUC exceeded its authority when it imposed conditions on US West Dex; (8) Count VIII, the MPUC exceeded its authority under § 252(b)(4)(C) and (c) of the Act when it imposed requirements not expressly contained in the Act or state law; and (9) Count IX, the MPUC violated the Takings Clause by taking US West's property without just compensation.

II. OPERATIONAL SUPPORT SYSTEMS AS AN OPEN ISSUE

US West argues that the MPUC improperly required US West to provide AWS access to its operational support systems ("OSS"). US West alleges the MPUC had no authority to require this access because this was not an open issue before the MPUC.

Section 252(c) ("Standards for arbitration") states that:

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall-

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 U.S.C. § *252*(c) (emphasis added). Standing alone, this provision could arguably be read as ambiguous concerning the MPUC's ability to impose any condition of its choosing. However, when read in conjunction with *47 U.S.C.* § *252*(b) ("Agreements arrived at through compulsory arbitration"), there is a clear indication that any condition that the MPUC decides to impose on the agreement must relate to an "open issue," that is an issue raised by the parties themselves. Section 252(b)(4)(A) states that "the State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any . . . ." This subsection indicates that the MPUC cannot independently [*977] raise an issue not raised by one of the parties. This interpretation is further reinforced by subsection (b)(4)(C) which states that "the State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement . . . ." In this context, the imposition of conditions is expressly limited to resolving open issues. Therefore, § 252(c) cannot be read as a grant of authority to a state commission to impose any requirement of its choosing; under § 252(c) state commissions are limited to arbitrating open issues.

The MPUC and AWS argue, in turn, that the issue of access to unbundled network elements was clearly before the MPUC as an open issue and that because the OSS is a network element to be made available to new entrants on an unbundled basis according to 47 C.F.R. § 15.319, the issue of access to the OSS was also clearly before the MPUC.

After the MPUC issued its order and the parties submitted their briefs in this case, the Supreme Court vacated § 15.319. *AT&T Corp., 119 S. Ct. at 736.* The Supreme Court stated that the FCC, in determining which network elements an incumbent LEC must make available, should give greater weight to the terms "necessary" and "impair" in § 252(d)(2). Id. The issue of access to OSS was an open issue only to the extent it could be considered a network element to be made available on an unbundled basis. In light of the Supreme Court's decision vacating 47 C.F.R. § 15.319, whether OSS can be considered an unbundled network element is now in doubt and § 15.319 cannot serve as the basis for its being considered such. Because the singular basis asserted by the MPUC for its considering access to OSS an open issue has now been removed by the Supreme Court, this Court concludes that the MPUC lacked authority under § 252(c) to require US West to make access to its OSS available to AWS. This issue is remanded to the MPUC for further consideration in light of this Order. n4

n4 As was noted by the Eastern District of North Carolina, the Act does not explain what should occur if a district court finds that an Interconnection Agreement violates the Act. *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F. Supp. 2d 661, 668 (E.D.N.C. 1998).* Given the appellate nature of the proceeding, a remand to the state commission is the most appropriate option. Id.

III. TANDEM TRANSPORT AND TERMINATION

US West argues that a provision of the Agreement imposed by the MPUC unlawfully compensates calls terminated at AWS's MSC at the tandem switching rate. US West alleges that the MPUC failed to consider actual function, that is that the MSC actually operates like an end-office switch rather than a tandem switch, in making its determination.

Section 251(b)(5) of the Act directs that all local exchange carriers are obligated to establish reciprocal compensation arrangements for the transport and termination of telecommunications. *47 U.S.C.* § *251*(b)(5). The terms and conditions for reciprocal compensation must be just and reasonable and, to meet this standard, they must allow for the recovery of a reasonable approximation of the "additional cost" of transporting and terminating a call begun on another carrier's network. *47 U.S.C.* § *252*(d)(2)(A). The FCC found that the "additional cost" will vary depending on whether or not a tandem switch is involved. First Report and Order, P 1090. The FCC, therefore, determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. Id. The FCC directed state commissions to "consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's [*978] tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." Id. The FCC further instructed that where the new carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the new carrier's costs is the LEC tandem interconnection rate. First Report and Order, P 1090; 47 C.F.R. § 51.711(a)(3). n5 Therefore, in order to evaluate whether a switch performs as a tandem switch, it is appropriate to look at both the function and geographic scope of the switch at issue.

n5 The Eighth Circuit vacated 47 C.F.R. § 51.711(a)(3) on the ground that the FCC lacked jurisdiction to issue pricing rules. *Iowa Utils. Bd., 120 F.3d at 800, 819 n.39.* However, the Supreme Court reversed this determination and reinstated the FCC's pricing rules, including 47 C.F.R. § 51.711, finding that "the Commission has jurisdiction to design a pricing methodology." *AT&T Corp., 119 S. Ct. at 733.*

Whether a switch performs as a tandem or end-office switch is a factual determination that has been expressly delegated to the state commissions by the FCC. Because this is a question of fact, the MPUC's determination is reviewed using the arbitrary and capricious standard of review. AT&T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998) (order denying motions to dismiss and determining standard of review); see *TCG Milwaukee, Inc. v. Public Service Commission of Wisconsin, 980 F. Supp. 992, 1004 (W.D.Wisc. 1997).*

The fundamental technical differences between wireless and landline telephone systems greatly complicate the comparison of the functions of their component elements. It is to some extent like comparing the proverbial apples and oranges.

Russell Thompson, Director of Network Planning for the Western Region of AWS, testified that the MSC performs duties similar to both a tandem and an end-office switch. (A23; Rebuttal Testimony of Russell Thompson at 1). Thompson described landline networks as being characterized by hierarchical switching centers with both tandem and end-office switches often being involved in the routing of calls. (A23; Rebuttal Testimony of Russell Thompson at 2). Wireless networks were explained as being hierarchical involving IS 41 Tandems, Cell Site Control ("CSC") switches, and cell sites in the routing of calls. (A23; Rebuttal Testimony of Russell Thompson at 2). The IS 41 and CSC are both located in the MSC. (A23; Rebuttal Testimony of Russell Thompson at 2). The CSC switches and cell sites together perform end office-like functions, (A23; Rebuttal Testimony of Russell Thompson at 7-8), while the IS 41 Tandem provides tandem-switch functions. (A23; Rebuttal Testimony of Russell Thompson at 3). "Tandem switching systems perform trunk switching and generally provide two basic network functions - traffic concentration and centralization of services." (A23; Rebuttal Testimony of Russell Thompson at 9 (citing BOC Notes on Network, Section 4, Network Design and Configuration, 4.1.3.3, Tandem Switching Systems, pp. 4-6)). Thompson testified that the IS 41 Tandem performs both these functions. (A23; Rebuttal Testimony of Russell Thompson at 9).

Thomas Zepp, economist and Vice President of Utility Resources, Inc., confirmed Thompson's assessment that the MSC functions as a tandem switch. (A25; Direct Testimony of Thomas Zepp at 38-41). Zepp gave a number of examples as to how a MSC performs tandem functions, for example storing the location of and tracking a wireless customer in a "Home Location Register," routing calls to another MSC while a customer is in transit, and routing phone calls to a landline in the most cost-effective manner. (A25; Direct Testimony of Thomas Zepp at 38-40).

US West, in turn, presented strong evidence that the MSC functions as an end-office [*979] switch rather than a tandem switch. (A42; Direct Testimony of Craig Wiseman at 9). US West's expert Craig Wiseman, a member of US West's technical staff in the Interconnection Planning Group, testified that the MSC only connected AWS subscribers to each other or to other local service provider networks in order to deliver calls to or receive calls from AWS subscribers. (A42; Direct Testimony of Craig Wiseman at 9). AWS depends on US West tandems to send calls to or receive calls from the vast majority of subscribers in Minnesota and the rest of the United States. (A42; Direct Testimony of Craig Wiseman at 9). Wiseman also testified that other wireless companies, such as GTE Mobilenet, SouthWestco, and Aliant, had recognized their switching offices as end offices in arbitrated agreements, and that other state arbitration panels had determined that wireless companies are not entitled to tandem switching and transport compensation. (A42; Directory of Craig Wiseman at 13).

On the issue of the geographic scope of the switches, there was evidence that the MSC serves a geographic area similar to that of a landline tandem switch. US West's tandem switches are limited by the LATA n6 boundaries in Minnesota and therefore there are several tandem switches within the state. (A18; ALJ Hearing at 209-10). AWS' MSC directly serves sixty-six percent of Minnesota's population. (A17; ALJ Hearing at 33). Although percentage of population is not precise as to geographic area covered, it indicates that the MSC covers at least an area comparable to one of Minnesota's LATAs and therefore covers an area comparable to a US West tandem switch. US West argues that AWS' MSC fails to reach the same geographic area as all of US West's tandem switches. (A42; Direct Testimony of Craig Wiseman at 11-12). However, that comparison is irrelevant. The issue is not whether the MSC covers the same geographic area as all of the tandem switches in Minnesota, but rather whether it covers the same geographic area as one tandem switch.

n6 A Local Access and Transport Area ("LATA") is "a contiguous geographic area" established by a Bell operating company pursuant to a consent decree. *47 U.S.C. § 153*(25). Generally a state will have more than one LATA.

Based on the evidence before the ALJ and the MPUC, it appears that the MSC performs functions comparable to both end-office and tandem switches. Although there was conflicting evidence concerning the function of the MSC, the testimony of Thompson and Zepp provided a sufficient basis for the MPUC's finding that the MSC performs a tandem switch function. n7 This is particularly true in light of the FCC's admonition to consider the capabilities of new technology such as wireless networks. While there may be no exact corollaries between the wireless and landline systems, there is evidence to suggest that the MSC has capabilities and reach that are of a certain equivalence to a tandem switch. The evidence also indicates that the MSC covers a geographic area comparable to that covered by a tandem switch. Pursuant to the FCC rules, this alone provides sufficient grounds for a finding that the appropriate rate for the MSC is the tandem switch rate. n8

n7 US West indicated that the MPUC should have been limited by the definition of tandem switch found in 47 C.F.R. § 51.319(c)(2). However, since the MPUC made its decision, 47 C.F.R. § 51.319 was vacated by the Supreme Court. *AT&T Corp., 119 S. Ct. at 736.* US West's argument is now moot in light of the Supreme Court's recent decision.

n8 The MPUC stated that it did not base its final decision on FCC Rule 51.711(a)(3) and the geographic reach of the switches, although its preliminary ruling may have taken geographic reach into consideration. (MPUC's Brief at 4). Even though the MPUC may not have relied on FCC Rule 51.711(a)(3), the reinstated rule and the comparable geographic reach of the switches reinforces the MPUC's final decision.

The MPUC's finding that calls terminated at AWS's MSC should be compensated [*980] at the tandem switching rate is not arbitrary and capricious.

IV. COLLOCATION OF EQUIPMENT

US West argues that the MPUC erred by requiring US West to permit AWS to physically collocate RSUs on US West's premises because such equipment is not necessary for access to unbundled network elements under § 251(c)(6). n9

n9 US West briefed only the issue of collocating RSUs, although its complaint referenced both RSUs and DLCs in connection with this issue.

Section 251(c)(6) states that an incumbent LEC has a duty to provide "for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ." *47 U.S.C. § 251*(c)(6) (emphasis added). The FCC found that § 251(c)(6) "generally requires that incumbent LECs permit the collocation of equipment used for interconnection or access to unbundled network elements." First Report and Order, P 579. In reaching that conclusion, the FCC interpreted and defined the term "necessary": "Although the term 'necessary,' read most strictly, could be interpreted to mean 'indispensable,' we conclude that for the purposes of section 251(c)(6) 'necessary' does not mean 'indispensable' but rather 'used' or 'useful.'" Id. The FCC decided that a more expansive interpretation of the term "necessary" would further the competitive motivation behind the Act. Id.

The FCC then determined whether specific equipment could or could not be collocated on the incumbent LEC's premises, essentially deciding whether the equipment is "useful" for interconnection or access to unbundled elements. Id. P 580-82. Concerning the collocation of switching equipment, the FCC stated:

At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute, that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

Id. P 581. The FCC left the factual determination as to whether "switching equipment" is used for interconnection to the discretion of the state commissions.

When allotting the burden of proof, the FCC placed the burden on the incumbent LEC to prove that specific equipment is not "necessary," meaning useful, for interconnection to unbundled network elements. Id. P 580. In explaining this standard, the FCC stated that:

Whenever a telecommunication carrier seeks to collocate equipment for purposes within the scope of Section 251(c)(6), the incumbent LEC shall prove to the state commission that such equipment is not "necessary," as we have defined that term, for interconnection or access to unbundled network elements.

Id. P 580.

In addition to defining "necessary" in the context of § 251(c)(6), the FCC also interpreted the term "necessary" in relation to § 251(d)(2). n10 The FCC determined [*981] that within the context of § 251(d)(2) the term "necessary" means "that an element is a prerequisite for competition. " First Report and Order, P 282. Without a necessary element, a new entrant's "ability to compete would be significantly impaired or thwarted." Id. The FCC stated that finding that a proprietary element is not "necessary" for purposes of § 251(d)(2)(A), requires an incumbent LEC to establish that "a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network." Id. P 283. The FCC would view the "necessary" requirement as having been met even if the "'requesting carriers can obtain the requested proprietary element from a source other than the incumbent,'" since "'requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.'" *AT&T Corp., 119 S. Ct. at 735* (citing First Report and Order, P 283). By means of these lexicographical permutations, the FCC created a similar definition for the term "necessary" within the context of § 251(d)(2) and § 251(c)(6); in both cases, the word means something akin to "useful."

n10 *47 U.S.C.* § *251*(d)(2) provides:

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether- (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. (emphasis added).

In AT&T Corp., the Supreme Court vacated the FCC's interpretation of the word "necessary" within the context of § 251(d)(2), finding that the FCC had given the term too broad a definition and robbed it of all of its teeth as a limiting standard. *AT&T Corp., 119 S. Ct. at 736.* The Court stated that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do. " Id.

By rejecting the FCC's definition of the term "necessary" within the context of § 251(d)(2), the Supreme Court implicitly rejected the same overly broad definition given to the word by the FCC in relation to § 251(c)(6). "Presumptively, 'identical words used in different parts of the same act are intended to have the same meaning.'" *United States National Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 460, 124 L. Ed. 2d 402, 113 S. Ct. 2173 (1993)* (quoting *Commissioner v. Keystone Consol. Industries, Inc., 508 U.S. 152, 159, 124 L. Ed. 2d 71, 113 S. Ct. 2006 (1993)).* As "necessary" does not mean "useful" in the context of § 251(d)(2), it cannot mean "useful" in § 251(c)(6). In making its factual determination about whether to permit the collocation of RSUs, the MPUC utilized the "used" or "useful" standard originally promulgated by the FCC. n11 In light of the rejection of this standard by the Supreme Court, collocation must be remanded to the MPUC for redetermination using a more stringent meaning of the term "necessary."

n11 In its Order, the MPUC stated that it will allow the collocation of RSUs and DLCs on US West's premises "consistent with its reasoning and action in the Consolidated Arbitration Order." (A58; Order Resolving Arbitration Issues at 22). In the Consolidated Arbitration Order, the MPUC ordered collocation of RSUs and DLCs based on US West's failure "to meet its burden of proving that these types of equipment are not 'necessary,' as interpreted by the FCC, for interconnection or access to unbundled elements." (A168 from US West Communications, Inc. v. Garvey, No. 97-913 ADM/AJB; Consolidated Arbitration Order at 16) (emphasis added).

V. "PICK AND CHOOSE" PROVISION

In its reply brief, US West seeks to withdraw, without prejudice, its Count V request for declaratory relief concerning AWS's rights under § 252(i)'s most favored nation provision. (Pl.'s Reply Brief at 1 n.1). Therefore, the Court will dismiss Count V without prejudice. It should be noted, however, that in light of the recent Supreme Court ruling, the provision concerning § 252(i) that the MPUC chose now seems prescient.

[*982] VI. INTERCONNECTION AT ANY TECHNICALLY FEASIBLE POINT

The MPUC ruled that US West must build facilities necessary for AWS to connect to US West's network at any technically feasible point of AWS's choosing. (A66; Order Resolving Issues After Reconsideration at 7). n12 The MPUC approved the following language in the US West-AWS Agreement: "USWS shall provide the facilities and arrangements herein described to AWS in order to establish the physical connection and permit the interchange of traffic between the Parties, as well as any other facilities AWS may require for operation of AWS's System." (A68; CMRS Interconnection Agreement at § 2.B). The MPUC also approved § 2.D of the Agreement, which would require US West to build a DS1 or DS3 facility any place where one is not available. (A68; CMRS Interconnection Agreement at § 2.D).

n12 The parties do not dispute that AWS would pay for the construction of any new facilities.

US West claims that the MPUC erred when it required US West to construct new facilities. US West argues that this requirement over extends the Act's directive that incumbent LECs need to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself." *47 U.S.C.* § *251*(c)(2)(C).

The MPUC claims that § 251(c)(2)(C) is not controlling and urges that the focus should instead be on the Act's directive that incumbent LECs must provide interconnection to new entrants "at any technically feasible point within the [incumbent] carrier's network." *47 U.S.C.* § *251*(c)(2)(B). In support of the MPUC's ruling that US West must build facilities, AWS similarly cites to § 251(c)(2)(B), as well as relying on the FCC's order stating that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." First Report and Order, P 198.

Section 251(c)(2) states that an incumbent LEC has:

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network-

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; . . .

47 U.S.C. § *251*(c)(2). The FCC originally interpreted § 252(c)(2)(C) as requiring incumbent LECs to provide superior quality interconnection when such interconnection was requested by new entrants. *Iowa Utils. Bd., 120 F.3d at 812.* The Eighth Circuit, however, vacated this FCC interpretation of § 251(c)(2)(C), finding that it was not supported by the Act's language. Id. The Eighth Circuit explained that:

Although we strike down the Commission's rules requiring incumbent LECs to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements."

Id. at 813 n.33 (quoting First Report and Order, P 198). The Eighth Circuit specifically upheld the FCC's definition of the term "technically feasible" from § 251(c)(2)(B). *Id. at 810.* In defining "technically feasible," the FCC stated:

[*983] Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except the space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible.

47 C.F.R. § 51.5.

In reaching its decision concerning the construction of facilities, the MPUC stated that the issue was not whether AWS can demand a superior quality interconnection, but rather whether US West can be required to modify its network to permit interconnection at existing quality levels. (A66; Order Resolving Issues After Reconsideration at 7). The MPUC did not rely on the FCC's vacated interpretation of § 251(c)(2)(C), but rather what it considered to be the FCC's upheld interpretation of § 251(c)(2)(B).

The MPUC is correct that construction of a new facility does not necessarily mean superior interconnection. New facilities could be necessary just to create equivalent quality interconnection and access. Therefore, in making its ruling, the MPUC did not violate § 251(c)(2)(C).

The question therefore becomes did the MPUC have the power under § 251(c)(2)(B) to order US West to provide new facilities upon request or did the construction of new facilities exceed the modifications envisioned by the FCC in its interpretation of "technically feasible." The answer is dependent on whether the concept of modifying facilities is interpreted broadly or narrowly. Three factors favor a broad construction. First, the FCC stated that site concerns should not be determinative of technical feasibility except to the extent space could not be expanded. In this statement that site concerns should not be determinative, there is an implication that the parties should look beyond any specific site, e.g. to new facilities, when resolving interconnection issues. In addition, construction of new facilities falls under the rubric of space expansion and therefore ensures technical feasibility. Second, so long as the new entrant pays for the costs associated with the new facility, the incumbent LEC should not be unduly burdened. Third, the purpose of the Act is to promote the opening up of local telephone markets to competition in a speedy manner. Because the incumbent LEC has the relevant expertise and knowledge for building facilities to interconnect with its network, it would be expedient to require it to build the facilities.

Based on the foregoing, the Court concludes that the MPUC had the necessary authority under § 251(c)(2)(B) to order US West to provide new facilities on request.

VII. US WEST DEX

US West claims the MPUC exceeded its authority when it rejected the parties' agreement to defer directory and yellow page issues to later negotiations and instead required the parties to adopt a provision that regulated US West Dex. US West argues that the MPUC does not have the authority, under either state law or the Act, to impose obligations on US West Dex.

In response, the MPUC and AWS claim that the Commission did not directly regulate US West Dex. They argue that the MPUC did what it was required to do by the Act, ensure that AWS had nondiscriminatory access to telephone numbers and [*984] listings, and that US West provide AWS with services that are "at least equal in quality to that provided by the incumbent LEC to itself." First Report and Order, P 970.

US West Communications, Inc., the party in this case, and US West Dex are wholly owned subsidiaries of US West, Inc. ("US West Parent"). *MCI Telecomms. Corp. v. US West Communications, Inc., 1998 U.S. Dist. LEXIS 21585,* *30, Case No. C97-1508R (July 21, 1998 W.D.Wash.). US West Dex is the publishing branch of the parent company and publishes US West's white and yellow page directories. *1998 U.S. Dist. LEXIS 21585,* *30. US West Dex is not a named party to the underlying Agreement in this case.

Contrary to the MPUC's and AWS's argument, the Commission did regulate US West Dex. The MPUC required the parties to include language in the Agreement that placed a direct obligation on US West Dex: "US WEST Dex will give the Carrier the same opportunity to provide directory listings as it provides to US WEST (for example, through some type of bidding process)." (A56; Order Denying Reconsideration at 11). While other portions of the MPUC's Order were explicitly directed only at US West, the MPUC did seek to control US West Dex's business and contract agreements, and therefore to regulate US West Dex: "US WEST shall make its contracts with US WEST DEX available for review by the Carrier, as necessary, to ensure that the Carrier is receiving the same services at the same terms as US WEST." (A56; Order Denying Reconsideration at 11). The question becomes whether the MPUC had the authority to regulate US West Dex under either state law or the Act, or whether it assumed authority it never had as the Plaintiff claims.

Under state law, the MPUC has only the "powers expressly delegated by the legislature and those fairly implied by and incident to those expressly delegated." In the *Matter of Northwestern Bell Telephone Co., 371 N.W.2d 563, 565 (Minn.Ct.App. 1985)* (citing *Great Northern Railway Co. v. Public Service Comm'n, 284 Minn. 217, 169 N.W.2d 732, 735 (Minn. 1969))*. Implied powers must be fairly evident from the express powers. Id. (quoting *Peoples Natural gas Co. v. Minnesota Public Utilities Comm'n, 369 N.W.2d 530 (Minn. 1985))*. As the Minnesota Supreme Court held, Chapter 237 was created to resolve issues concerning public utility telephone companies; a business that publishes directories is not a telephone company and therefore does not fall under the regulatory powers of the MPUC. In the *Matter of Northwestern Bell Telephone Co., 367 N.W.2d 655, 660 (Minn. 1985)*. US West, as a utility, is regulated by the MPUC, while US West Dex, which is in the business of publishing directories, is not. See id. The MPUC does not have the power under state law to regulate US West Dex. The Court must therefore analyze federal law as the possible basis of authority for the MPUC's action regulating US West Dex.

The Act states that local exchange carriers have the duty to provide competitors with nondiscriminatory access to telephone numbers, directory assistance, and directory listings. *47 U.S.C. § 251*(b)(3). US West Dex is not a local exchange carrier because it does not engage in providing telephone exchange service or exchange access. See *47 U.S.C. § 153*(26). As US West Dex is not a covered entity under the Act, the MPUC cannot use the statute to regulate US West Dex or impose an obligation on it. See *MCI Telecomms. Corp. v. US West Communications, Inc., 1998 U.S. Dist. LEXIS 21585*, *25, Case No. C97-1508R (July 21, 1998 W.D.Wash.). n13

n13 The FCC concluded that the term "directory listings" encompasses directory listings published by a telecommunication carrier and its "affiliates," but then never defines the term "affiliate." 47 C.F.R. § 51.5. Given the Act's express limitation of covered entities to telecommunications carriers, a telecommunications carrier's control of an entity must be a prerequisite for finding that the entity is an affiliate within the meaning of the FCC's rules. Although US West and US West Dex share a parent company that does not equate to exerting control over one another. Without some evidence of US West's control of US West Dex, the Court cannot conclude that US West Dex is an affiliate of US West.

[*985] Because it lacked the power under both state law and the Act to regulate US West Dex, the MPUC exceeded its authority by ordering the addition of a provision to § 11 requiring US West Dex to treat US West and its competitors the same with respect to yellow page advertising and white page directory listings. These matters are remanded to the MPUC for further deliberations.

VIII. RECORDING AND BILLING SERVICES

US West argues that the MPUC violated § 252(b)(4) and (c) by requiring US West to make its recording and billing services available to AWS to facilitate AWS's collection of termination charges when a third party originates calls that transit US West's network and are then terminated on AWS's network. US West argues that the MPUC did not have the authority under the Act to impose such a requirement.

AWS argues that the MPUC had the necessary authority under § 252(b)(4)(C) as well as § 251(b)(5). The MPUC argues that its authority derived from § 253(b) and state law.

After a request for negotiations has been made, the parties have a duty to negotiate an Interconnection Agreement pursuant to § 251 of the Act. *47 U.S.C. § 252*(a)(1). During their negotiations, the parties are not bound by the directives of subsections (b) and (c) of § 251. Id. Essentially, the parties can create an Interconnection Agreement of their choosing that covers any desired aspect of interconnection. In their discussions, the parties are not limited to those matters explicitly enumerated in § 251 or the FCC's rules. If the parties are unable to resolve the issues that formed the subject of their negotiations, § 252(b)(1) provides that a party "to the negotiation may petition a State commission to arbitrate any open issues." (emphasis added). The parties can bring any unresolved interconnection issue before the state commission for arbitration. The parties are again not limited to issues explicitly enumerated in § 251 or the FCC's rules, but rather are limited to the issues which have been the subject of negotiations among themselves.

Section 252(b)(4)(C) provides the authority for a state commission to act during arbitration proceedings, "the State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement . . . ." Section 252(c) ("Standards for arbitration") states that:

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall-

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 U.S.C. § 252(c).

Section 252(b)(4)(C) expressly provides that a state commission "shall resolve each issue set forth in the petition and the response." If an issue has been designated by the parties as in need of resolution by the MPUC, the MPUC has an obligation to address that issue and, as was noted above, the parties may raise any issue concerning which they have attempted [*986] to negotiate a resolution. The language of § 252(c)(1) stating that the state commission shall ensure that the resolution of open issues meets the requirements of § 251, does not confine the resolution of the issues to the requirements of § 251. If a state commission ensures that the resolution meets the requirements of a section, it is merely certifying that the resolution meets the affirmative requirements of the section while simultaneously determining that it does not conflict with or violate the section's affirmative and negative requirements. Not every issue included in the resolution necessarily involves the affirmative requirements of § 251. Thus, the only limitations that § 252(b)(4)(C) and (c) place upon any individual issue addressed by a state commission during arbitration are that the issue must be: (1) an open issue and (2) that resolution of the issue does not violate or conflict with § 251.

Transit traffic was an issue presented by the parties to the ALJ and the MPUC in their matrix of twelve key issues. (A15; Positions on Key Issues at 5). As part of the transit traffic issue, the parties discussed including transit traffic as part of their "bill and keep" arrangement. AWS argued that it should be part of the arrangement and US West argued that it would not be appropriate to include it because transit traffic does not involve a US West customer originating the call. (A15; Positions on Key Issues at 5). The billing of transit traffic was an open issue between the parties and was expressly presented to the MPUC for resolution. Furthermore, as the billing of transit traffic is not expressly addressed by § 251 or the FCC rules, the MPUC's decision to require US West to make its recording and billing services available to AWS does not conflict with or violate § 251. Because this issue met the two requirements of § 252(b)(4)(C) and (c), the MPUC had the authority under the Act to resolve this open issue.

IX. BURDEN OF PROOF

The MPUC created the following burden of proof for the parties: "The burden of production and persuasion with respect to all issues of material fact shall be on US WEST . . . . The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute." (A3) (MPUC Order Granting Petition at 10).

When Congress establishes the burden of proof or production to be applied in an administrative proceedings, the courts must defer to Congress. *Steadman v. S.E.C., 450 U.S. 91, 95-96, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981)*. However, when Congress is silent as to the issue, it is left to the judiciary to resolve the question. *450 U.S. at 95, 101 S. Ct. at 1004.*

The provisions of the Act and the FCC rules, which address the issue, place the burden of proof on the incumbent LEC. See 47 C.F.R. §§ 51.5 ("An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.") and 51.321(d) ("An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible."). There appears to be no section of the Act or FCC rules that places the burden of proof on the new entrant. The MPUC has admittedly placed a heavy burden of proof on the incumbent LEC, but no evidence has been adduced that such a standard conflicts [*987] with the Act or the FCC rules. n14 To the extent Congress and the FCC have spoken to the burden of proof, the MPUC's position does not conflict with their directives.

n14 The one apparent exception involves the issue of technical feasibility of interconnection. The FCC rules create a clear and convincing standard in relation to this issue while the MPUC created a preponderance of the evidence standard. As this apparent conflict is not relevant to this case, it will not be addressed here.

As for the burden of proof for the remainder of the statute, normally when a federal statute is silent as to the burden of proof in an administrative proceeding, a court would turn to the Administrative Procedure Act (APA) to fill the void. However the APA does not apply to these proceedings because the MPUC is not a federal agency. *Franklin v. Massachusetts, 505 U.S. 788, 800, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992).* Typically an applicable state statute would determine the proper burden of proof for proceedings before a state agency like the MPUC. In fact, US West argues that the MPUC should have applied the burden of proof for contested case proceedings found in Minnesota Rule 1400.7300, subp. 5. However, because this is a sui generis proceeding, a state agency applying federal law to review telecommunications agreements, at the time of the hearing there was no state law explicitly on point. n15 The MPUC was thus left the task of developing an appropriate burden of proof.

n15 After the hearing, the MPUC adopted Minnesota Rule 7812.1700, subp. 23 to govern the arbitration of intercarrier negotiations. Minnesota Rule 7812.1700, subp. 23 contains the same burden of proof as the one used by the MPUC in this case. Minnesota Statute § 237.16 authorized the MPUC to promulgate rules governing local competition and to define the procedures for competitive entry and exit. Minn. Stat. § 237.16, subd. 8.

The burden of proof the MPUC selected is in accord with the procompetitive purposes of the Act and realistically reflects the parties access to and control of information. Generally, under federal and Minnesota common law, the proponent of an issue - that is the one who wants to prove the affirmative - has the burden of proof as to that issue. *Newport News Shipbuilding and Dry Dock Co. v. Loxley, 934 F.2d 511, 516 (4th Cir. 1991)* (citing *Selma, Rome & C. Railroad v. United States, 139 U.S. 560, 567, 35 L. Ed. 266, 11 S. Ct. 638 (1891); Fleming v. Harrison, 162 F.2d 789, 792 (8th Cir. 1947)); Holman v. All Nation Insurance Co., 288 N.W.2d 244, 248 (Minn. 1980).* However, under both federal and Minnesota common law, questions of fairness, such as the control of information, can alter the disposition of the burden of proof. *Fleming, 162 F.2d at 792; Holman, 288 N.W.2d at 248.*

In this case, placing the burden of proof on the competitive local exchange carrier ("CLEC") would present an insurmountable barrier to entry into the local telephone market. As the MPUC accurately noted, US West has held a monopoly in the local telephone market for an extended period of time and as a result largely controls the information about the market. It knows the operation and function of various component elements of its system as well as the costs involved. Thus, fairness supports leveling the playing field by allocating the burden of proof onto the incumbent LEC, the party with the historical advantage.

In addition, the burden of proof established by the MPUC permits for the shifting of the burden in appropriate circumstances, e.g. when the CLEC controls the relevant information. Flexibility is provided to accommodate situations where it would be unjust to leave the burden of proof on the incumbent LEC. Given this flexibility and in light of the control of information as well as the purpose of the Act, the burden of proof standard chosen by the MPUC was appropriate.

X. TAKINGS CLAIM

US West makes a general claim that if the US West-AWS Agreement is upheld, [*988] it will result in a taking of US West's property. US West also alleges that requiring US West to permit collocation of RSUs, access to its OSS, and interconnection and access to unbundled elements is a physical occupation of its property, and therefore constitutes a "per se taking under the Fifth Amendment."

In relation to its takings claim, US West states that it is not seeking compensation for the alleged taking but rather that it wishes an injunction to prevent a taking without just compensation. US West appears to be alleging a violation of the jurisdictional grant of the Act. In making its argument, US West relies on *Bell Atlantic Tel. Cos. v. FCC, 306 U.S. App. D.C. 333, 24 F.3d 1441 (D.C.Cir. 1994).* In Bell Atlantic, the D.C. Circuit determined that *47 U.S.C. § 201* did not vest the FCC with the necessary authority to order LECs to provide physical collocation of equipment upon demand. *24 F.3d at 1444-47.* It found that because the particular statute did not expressly authorize an order of physical collocation, the FCC could not impose it. Id. at 1447. Bell Atlantic is, however, inapposite to the present case, because, unlike the general Communications statute at issue in Bell Atlantic, *47 U.S.C. § 251*(c)(6) expressly provides for limitations being placed on the LECs' property rights, including the requirement that incumbent LECs have a duty to provide for the physical collocation of equipment. See *47 U.S.C. § 251*(c)(6). In fact, Congress was aware of the Bell Atlantic decision when it authorized the imposition of physical collocation:

Paragraph 4(B) [of section 251] mandates actual collocation, or physical collocation, of equipment necessary for interconnection at the premises of a LEC, except that virtual collocation is permitted where the LEC demonstrates that actual collocation is not practical for technical reasons or because of space limitations. . . . Finally, this provision is necessary to promote local competition, because a recent Court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See *Bell Atlantic Tel. Co. v. Federal Communications Commission, 306 U.S. App. D.C. 333, 24 F.3d 1441 (1994))*.

House Rep. No. 104-204, at 73 (1995). Therefore, Congress clearly intended to vest the agencies with authority to place limitations on the LECs' property rights.

US West has not only challenged the MPUC's authority to impose these limitations on US West's property, but also claimed that the Agreement approved by the MPUC does not fully compensate US West for the taking of its property. This is a traditional takings claim allegation and the Court will therefore apply a traditional takings claim analysis.

The defendants argue that US West's taking claim must fail because: (1) it exceeds the scope of this Court's jurisdiction, which is limited by *47 U.S.C. § 252*(e)(6); (2) the claim is not ripe for review; and (3) the agreement contains provisions which allow for full cost recovery by US West.

The Eighth Circuit explicitly noted that a takings claim can be presented to a federal district court under the review provisions of subsection 252(e)(6). *Iowa Utils. Bd., 120 F.3d at 818.* Therefore, this Court has jurisdiction to hear the takings claim.

In order for a takings claim to be ripe, two elements must be met: (1) the administrative agency has reached a final, definitive position as to how it will apply the regulation at issue, and (2) the plaintiff has attempted to obtain just compensation through the procedures provided by the State. *Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172, 191, 194, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).* Here, neither of these elements have been satisfied.

The Fifth Amendment states that, "private property [shall not] be taken for public use without just compensation." The Takings Clause is not meant to limit [*989] the government's ability to interfere with an individual's property rights, but rather to ensure compensation when a legitimate interference that amounts to a taking occurs. *Glosemeyer v. Missouri-Kansas-Texas Railroad, 879 F.2d 316, 324 (8th Cir. 1989)* (quoting *First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987))*. The compensation does not have to precede the taking; a process for obtaining compensation simply has to exist at the time of the taking. Id. (citing *Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984))*. If US West ultimately receives just compensation then there has been no violation of the Takings Clause.

Public utilities, which have a hybrid public and private status, must be analyzed in a slightly different manner than other entities under the Takings Clause. n16 *Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 102 L. Ed. 2d 646, 109 S. Ct. 609 (1989).*

The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. *Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597, 17 S. Ct. 198, 205-206, 41 L. Ed. 560 (1896)* (A rate is too low if its is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); *FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S. Ct. 736, 742, 86 L. Ed. 1037 (1942)* ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutionial sense"); *FPC v. Texaco Inc., 417 U.S. 380, 391-392, 94 S. Ct. 2315, 2329, 41 L. Ed. 2d 141 (1974)* ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level").

488 U.S. at 308. If the state fails to provide sufficient compensation, then the state has taken the use of a utility without just compensation and thereby violated the Takings Clause. Id. The particular theory used to determine whether a rate is fair does not matter. *Id. at 310* (citing *FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 88 L. Ed. 333, 64 S. Ct. 281 (1944))*. If the overall effect cannot be said to be unreasonable then judicial inquiry is at an end. Id. (citing *FPC v. Hope*

Natural Gas Co., 320 U.S. 591, 602, 88 L. Ed. 333, 64 S. Ct. 281 (1944)). Whether a rate is unfair depends on what is a fair rate of return given "the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return." Id. "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid . . . ." *Hope Natural Gas, 320 U.S. at 605.*

n16 Although the traditional public utility rate model is not a perfect model for § 252(e)(6) cases, it is informative. See J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, *71 N.Y.U. Law Rev. 851, 954 (Oct. 1996).*

The purpose of the Telecommunications Act of 1996 is, in part, to foster competition in the local telephone market. *GTE North, Inc. v. McCarty, 978 F. Supp. 827, 831 (N.D.Ind. 1997)* (citing Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 104-458, at 113 (1996)). Under the Act, US West provides services to its competitors rather than the public. *47 U.S.C. § 251*(c). The end goal is not a fair rate of return as in the traditional rate-setting paradigm, but rather the equitable opening up of a market. Neither party to the Agreement is expected to profit in the interconnection or resale processes. See *47 U.S.C. § 251*(c)(4)(A) ("to offer for resale at wholesale rates . . ."). Because these transactions are not designed to be profitable, [*990] the analysis cannot be fair rate of return as to any individual provision concerning the sale or access of services to the CLECs. Rather the query must be whether any provision or provisions of the Agreement negatively affect the overall operation of the incumbent LEC to such a degree that it can no longer receive a fair rate of return from its investment.

In this case, it is premature to ask this question for two reasons. First, the MPUC has not reached a final decision concerning the prices for unbundled elements; they are still subject to a true-up procedure at the end of the Generic Cost Investigation. Until the MPUC reaches a decision on that issue, the overall effect of the Agreement cannot be determined and the takings claim is not ripe for review. Second, the incumbent LEC still has an opportunity to have its public rates increased in light of the MPUC's Orders made pursuant to §§ 251 and 252. If US West is not earning a sufficient return on its investment in Minnesota, it can petition the MPUC for a rate change. See Minn. Stat. § 237.075. The MPUC is obligated to implement a rate base upon which a telephone company can earn a fair rate of return. See id., subd. 6. US West will not have exhausted its state remedies until it has taken this final step. It would only be after such a hearing that a court could determine whether the overall utility rates are "inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." *Duquesne Light Co. v. Barasch, 488 U.S. 299, 312, 102 L. Ed. 2d 646, 109 S. Ct. 609 (1989).* The MPUC's actions under the Act establish LECs relationships with one another; the equation is not complete until the economic relationship with the public is determined in light of the intercarrier relationships. Because Minnesota offers an opportunity to US West to have its rates readjusted, US West has not yet exhausted its state remedies and its takings claim is ripe for review. US West's takings claim is therefore dismissed without prejudice.

CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. US West's request that this Court find that the MPUC's determinations concerning the US West-AWS Agreement violates *47 U.S.C. §§ 251* and 252 is GRANTED IN PART, DENIED IN PART, and DENIED WITHOUT PREJUDICE IN PART. It is granted with respect to: (1) Count I (operational support systems as an open issue); (2) Count IV (the collocation of RSUs); and (3) Count VII (the regulation of US West Dex). It is denied without prejudice with respect to Count IX (US West's takings claim) and Count V (the "pick and choose" provision). It is denied in all other respects. The matter is remanded to the MPUC for further determinations consistent with this decision.

Ann D. Montgomery

UNITED STATES DISTRICT JUDGE

DATED: March 30, 1999

1999 U.S. Dist. LEXIS 11418 printed in FULL format.

MCI TELECOMMUNICATIONS CORPORATION, a Delaware Corporation, and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Delaware CORPORATION, Plaintiffs, v. ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, INC., an Illinois Corporation, the ILLINOIS COMMERCE COMMISSION; and DAN MILLER, RICHARD HOLHAUSER, RUTH KRETSCHMER, KARL McDERMOTT and BRENT BOHLEN, in their official capacities as Commissioners of the Illinois Commerce Commission, Defendants.

NO. 97 C 2225

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1999 U.S. Dist. LEXIS 11418

June 22, 1999, Decided

June 28, 1999, Docketed

DISPOSITION: [*1] Illinois Commerce Commission's decision of December 17, 1996 affirmed in part and reversed in part.

COUNSEL: For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., plaintiffs: Terri Lynn Mascherin, Darryl Mark Bradford, Eric Andrew Sacks, Andrew Malen Spangler, Jr., David Charles Layden, Kristina Marion Entner, John J. Hamill, Jr., David Zev Smith, Jenner & Block, Chicago, IL.

For ILLINOIS BELL TELEPHONE COMPANY, defendant: Theodore A. Livingston, Matthew Aloysius Rooney, Christian Frederick Binnig, Dennis G. Friedman, Kira Elizabeth Druyan, Mayer, Brown & Platt, Chicago, IL.

For ILLINOIS BELL TELEPHONE COMPANY, counter-claimant: Theodore A. Livingston, Matthew Aloysius Rooney, Christian Frederick Binnig, Dennis G. Friedman, Kira Elizabeth Druyan, Mayer, Brown & Platt, Chicago, IL.

For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., counter-defendants: Terri Lynn Mascherin, Darryl Mark Bradford, Jenner & Block, Chicago, IL.

For UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, intervenor plaintiffs: AUSA, United States Attorney's Office, Chicago, IL.

For UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS [*2] COMMISSION, intervenor plaintiffs: Theodore C. Hirt, Jonathan T. Foot, United States Department of Justice, Washington, DC.

Deborah A. Golden, AMERITECH CORPORATION, Chicago, IL.

Thomas R. Stanton, ILLINOIS COMMERCE COMMISSION, Chicago, IL.

JUDGES: Suzanne B. Conlon, United States District Judge.

OPINIONBY: Suzanne B. Conlon

OPINION: DECISION ON THE MERITS

MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, "MCI") sue Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc. ("Ameritech"), the Illinois Commerce Commission (the "ICC"), and five ICC commissioners in their official capacities under § 252(e)(6) of the Telecommunications Act of 1996 ("the Act"), *47 U.S.C.* § *252*(e)(6). n1 Ameritech asserts a counterclaim against MCI and a cross-claim against the ICC and the individual commissioners under § 252(e)(6) of the Act.

n1 The Act is codified in scattered sections of Title 47 of the United States Code. Citations to sections of the Act are references to the corresponding sections of the Code.

[*3]

BACKGROUND

Historically, local telecommunications services were dominated by state-sanctioned monopolies granted to local exchange carriers such as Ameritech. H. R. Rep. No. 104-204, at 49 (1995) (hereafter, "H. Rep."). The Act imposes a scheme designed to end monopolies in local telecommunications services. The Act recognizes that incoming exchange carriers must be able to make use of the incumbent carrier's existing network in order to compete effectively. Id. The primary mechanisms for opening access to the incumbent carrier's network are found in §§ 251 and 252. Section 251 establishes three methods that the incoming exchange carriers may use to access the incumbent carrier's network. The first method, called "interconnection," allows incoming carriers to construct their own networks and interconnect with the incumbent carrier's facilities on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *47 U.S.C.* § *251*(c)(2). The second method requires incumbent carriers to provide incoming carriers with "nondiscriminatory access to network elements on an unbundled basis." Id. at § 251(c)(3). However, the incumbent [*4] carrier need make available unbundled network elements only if the failure to provide access to the network element would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Id. at § 251(d)(2)(B). Finally, the Act allows "resale," by which incoming carriers may purchase the incumbent carrier's services at wholesale rates and resell the services to retail customers under a different brand name. Id. at § 251(c)(4).

Section 252 establishes the procedures for determining the terms under which incoming carriers will access the incumbent carrier's network. First, incumbent carriers must negotiate in good faith over the terms of interconnection, access to network elements, and resale. Id. at §§ 251(c)(1) and 252(a)(1). If the parties reach a satisfactory agreement, any open issues are submitted to compulsory arbitration conducted by state public utility commissions. Id. at § 252(b). The state commissions are required to apply the substantive requirements of the Act and any implementing regulations in resolving open issues. Id. at § 252(c). Once an agreement has been reached through negotiation and arbitration, [*5] the proposed agreement must be submitted to the state commission for final approval. Id. at § 252(e)(1). A party who believes the state commission failed to properly apply the Act may seek judicial review of the commission's determinations. Id. at § 252(e)(6).

On March 26, 1996, MCI requested negotiations with Ameritech, the incumbent carrier, for access to Ameritech's network in the Chicago area. Def. Br. at Ex. 2, p. 1-2. On August 30, 1996, MCI filed a petition with the ICC for arbitration of unresolved issues. Pl. Br. at Ex. 6. Ameritech filed a timely response. Def. Br. at Ex. 2, p. 2. The ICC assigned a hearing examiner, who conducted an evidentiary hearing and issued a proposed arbitration decision. Id. Both MCI and Ameritech filed exceptions to the proposed decision. Id. On December 17, 1996, the ICC issued an arbitration decision. Id. On January 28, 1997, MCI presented a proposed interconnection agreement for the ICC's approval. Pl. Br. at 12; Def. Br. at 5. The ICC determined the proposed agreement could only be approved if it was amended in certain respects. The parties submitted an amended interconnection agreement in accordance with the ICC's directives. [*6] Pl. Br. at Ex. 11.

MCI brings this action under § 252(e)(6) challenging specific aspects of the agreement. First, MCI contends the agreement does not require Ameritech to provide MCI with nondiscriminatory access to the network element "shared transport" or "common transport." n2 In order to fully understand MCI's claim, it is necessary to briefly describe the structure of the local telephone network. n3 A telephone customer's home is connected to the network through wires called a "local loop." The local loop connects the customer's home to an "end office," which consists largely of a "local switch." The local switch serves a routing function - it reads the telephone number dialed by the customer and, based on programmed instructions, directs the call on a transmission path to its final destination. If the party receiving the call is connected to the same end office as the caller, the local switch connects the call directly. However, if the caller and the receiving party are connected to different end offices, the call must be "transported" from one end office to another. End offices are connected to one another by "interoffice transmission facilities," which generally consist of [*7] fiber-optic cables capable of carrying hundreds of calls at once. End offices are also connected to "tandem switches" by a type of interoffice transmission facility called a "trunk." Tandem switches are connected to numerous end offices in a hub-and-spoke arrangement, and connect end offices that are not directly connected. MCI's request for "shared transport" refers to Ameritech's interoffice transmission facilities.

n2 The precise meanings of these terms are disputed, as explained below.

n3 The following description of a local telephone network is gleaned from the parties' briefs and from statements at oral argument. Because these foundational facts are not in dispute, the court will forego cumbersome citations to the record.

Although Ameritech agreed to provide MCI with "shared transport," the parties could not agree on the meaning of that term. Ameritech argued that "shared transport" refers only to interoffice transmission facilities purchased on a dedicated basis and shared by other carriers or customers, [*8] but not the incumbent carrier. MCI argued that "shared transport" refers to interoffice facilities shared by customers and other carriers including the incumbent - what the industry refers to as "common transport." At the heart of the parties' dispute is the interpretation of "shared transport" as used by the Federal Communications Commission (FCC) in 47 C.F.R. § 51.319 ("Rule 319"). The ICC determined the FCC regulations were ambiguous. Pl. Br. at Ex. 7, p. 28. Accordingly, the ICC concluded MCI was entitled to shared transport as defined by Ameritech, but MCI could seek access to common transport only through a bona fide request process set out in the interconnection agreement. Id. at Ex. 7, p. 29. MCI contends the ICC violated the Act by requiring it to submit to a lengthy request process in order to gain access to common transport.

MCI's second claim concerns the Act's requirement that local exchange carriers "establish reciprocal compensation arrangements for the party's transport and termination on telecommunications." *47 U.S.C. § 251*(b)(5). In other words, MCI must pay Ameritech a fee when an MCI customer calls an Ameritech customer, and Ameritech [*9] must pay MCI a fee when an Ameritech customer calls an MCI customer. MCI argued before the ICC that it was entitled to the "tandem interconnection rate" set out in the interconnection agreement. However, the ICC determined that MCI was entitled only to the lower "end office switching rate," concluding that MCI had failed to produce sufficient evidence showing it should be paid the higher rate. MCI contends the ICC decision violates § 251(c)(2)(D), which requires that reciprocal compensation be paid on just, reasonable, and nondiscriminatory terms.

MCI asserts in its third claim that the ICC violated § 251(c)(3) when it accepted Ameritech's proposal regarding the amount of time allowed for Ameritech to provide MCI access to local loops. MCI's proposal gave Ameritech two to five days, depending on the number of requests. Ameritech proposed a five to seven day period. The ICC accepted Ameritech's proposal.

MCI's fourth claim is that the ICC imposed unjust, unreasonable, and discriminatory terms on MCI when it approved Ameritech's proposal for a bona fide request process. The bone fide request process is the vehicle by which MCI may request access to additional network elements. [*10] Ameritech proposed a request procedure that could take up to four months to conclude. MCI's proposal involved a significantly shorter time period. According to MCI, Ameritech's proposal needlessly and intentionally delays MCI's access to necessary network elements.

Finally, MCI claims the ICC erred when it approved provisions limiting Ameritech's liability to MCI for breaches of the interconnection agreement. The liability limitations were never a subject of arbitration. Instead, the ICC imposed the provisions at Ameritech's request during the approval stage of the negotiation and arbitration process. According to MCI, the ICC had no authority under § 252(e)(2) to impose the liability limitations at that point in the process. MCI also contends the liability limitations violate § 251(c) because the provisions are not just, reasonable, and nondiscriminatory.

Ameritech's counterclaim arises from the ICC's decision to grant MCI access to "dark fiber." Dark fiber is simply optical fiber that has been physically placed in the network but is not attached to electronics that are necessary to "illuminate" the fiber and enable it to carry telecommunications. n4 Ameritech contends the ICC [*11] had no authority to grant MCI access to dark fiber because the issue was never submitted to the ICC in arbitration. Ameritech next argues the ICC had no authority to identify dark fiber as a network element after the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)* (hereafter, "IUB"). Finally, Ameritech argues that even if the ICC had authority to grant MCI access to dark fiber, its decision violated the Act because the ICC failed to determine that denial of access to MCI would impair MCI's ability to provide telecommunications services, as required by § 251(d)(2)(B).

n4 As explained at oral argument, dark fiber is used to save resources. The process of burying cable in the ground or suspending it along poles is very expensive. Therefore, when an exchange carrier lays new cable in the network, it frequently lays more cable than is required. The excess cable is dark fiber, which can be activated if additional carrying capacity is needed.

[*12]

DISCUSSION

The parties agree that the applicable standard of review of the ICC's decisions depends on whether a particular issue is one of fact or of law. Determinations of fact are entitled to substantial deference unless they are arbitrary and capricious. Questions of law are subject to de novo review.

I. Shared Transport

In the preliminary negotiations between Ameritech and MCI, Ameritech agreed to provide MCI access to interoffice transport facilities on a "shared" basis. n5 At arbitration, the parties disputed the meaning of the word "shared," and looked to Rule 319 for the appropriate definition. Def. Supp. Br. at 6. The ICC concluded Rule 319 was ambiguous, and ultimately adopted Ameritech's proposed contract language. n6 The ICC ruled that if MCI wanted access to common transport, it could seek access through the bona fide request process. After the ICC reached its decision, the FCC issued its Third Reconsideration Order, which left no doubt that "shared transport" under Rule 319 encompassed the industry understanding of "common transport." The FCC explained that incumbents must offer access "to the same interoffice transport facilities that [*13] the incumbent uses for its own traffic." Pl. Br. at Ex. 4, P 22. The Third Reconsideration Order also amended the text of Rule 319 to expressly include the concept of common transport within the meaning of the term "shared." MCI argues that the Third Reconsideration Order clearly indicates the ICC's decision was erroneous. n7

n5 Although Ameritech has not expressly admitted this assertion, MCI has repeatedly advanced the argument. See Supp. Resp. at 2; Tr. Apr. 15, 1999 at 9-10. Ameritech has not challenged MCI's position.

n6 The ICC's decision was a determination of law, and therefore is subject to de novo review.

n7 Ameritech argues that this court should not consider the Third Reconsideration Order after the Supreme Court's order in *Ameritech Corp. v. FCC, 119 S. Ct. 2016, 143 L. Ed. 2d 1029, 1999 WL 116994 (U.S. 1999).* Ameritech Corp. vacated the Eighth Circuit's decision in *Southwestern Bell Tel. Co. v. FCC, 153 F.3d 597 (8th Cir. 1998),* which affirmed the Third Reconsideration Order. However, Ameritech Corp. did not vacate the Third Reconsideration Order, nor did it instruct the Eighth Circuit to do so. The Supreme Court merely vacated the judgment and remanded for further consideration in light of *IUB. Ameritech Corp., 119 S. Ct. 2016, 143 L. Ed. 2d 1029, 1999 WL 116994 (U.S. 1999).* The Third Reconsider Order is still valid.

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Ameritech responds that because Rule 319 was vacated by the Supreme Court in IUB, there is no basis for reversing the ICC's decision. But the vacation of Rule 319 is irrelevant to the question before this court. MCI need not look to Rule 319 for the authority to compel Ameritech to provide access to shared transport, because Ameritech agreed to do so in preliminary negotiations. Rule 319 merely serves as an external source of definition of the terms in the negotiated interconnection agreement. IUB has no effect on the function of Rule 319 in this case. n8

n8 If the continued vitality of Rule 319 were necessary to compel Ameritech to provide access to shared transport, Ameritech presumably would challenge its obligation to provide MCI access to any type of "shared transport," however that term is defined. The fact that Ameritech challenges only its obligation to provide common transport bolsters the conclusion that Ameritech's obligation to provide shared transport stems from the preliminary negotiations rather than from Rule 319.

[*15]

Ameritech also argues that MCI failed to exhaust its administrative remedies because it did not seek common transport through the bona fide request process recommended by the ICC. But the basis of MCI's claim is that it should not have to undergo the bona fide request process in order to gain access to common transport. Ameritech seeks to bootstrap its way out of MCI's claim by assuming that the ICC's decision to require MCI to undertake a bona fide request is valid. Ameritech's argument is without merit.

Finally, Ameritech contends that the Third Reconsideration Order changed existing law, and that MCI must therefore pursue its remedies under § 29.3 of the interconnection agreement. Section 29.3 provides:

In the event of . . . any final and nonappealable legislative, regulatory, judicial order, rule or regulation or other legal action that revises and reverses . . . the FCC's First Report and Order [which promulgated Rule 319] . . . either party may . . . require that the affected provisions be renegotiated in good faith and this agreement be amended accordingly.

Pl. Br. at Ex. 11, § 29.3. But the Third Reconsideration Order did not change [*16] Rule 319 as that Rule relates to the present issue. The Third Reconsideration Order merely clarified the definition of "shared transport" already contained in Rule 319. As the FCC made clear in the Introduction to the Third Reconsideration Order, "the [First Report and Order] required incumbent [exchange carriers] to provide requesting carriers with access to the same transport facilities . . . that incumbent [exchange carriers] use to carry their own traffic." Pl. Br. at Ex. 4, P 2 (emphasis added). In discussing the issue in depth, the FCC stated:

Some parties have argued that certain aspects of the rules adopted last August were ambiguous which, in our view, were clear. Specifically, in the [First Report and Order], we expressly required incumbent [exchange carriers] to provide access to transport facilities "shared by more than one customer or carrier." The term "carrier" includes both an incumbent [exchange carrier] as well as a requesting telecommunications carrier. We, therefore, conclude that "shared transport," as required by the [First Report and Order] encompasses a facility that is shared by multiple carriers, including the incumbent [*17] [exchange carrier.]

Id. at Ex. 4, P 22 (citing 47 C.F.R. § 51.319) (emphasis added). The above quotation makes clear that Rule 319's definition of shared transport, as it existed at the time of the ICC's decision, encompassed the concept of common transport.

One might argue, of course, that the ICC was correct in its conclusion that Rule 319 was ambiguous. Even assuming the ICC was correct, there is no need to force MCI to undergo a lengthy bona fide request process. The ICC emphasized that it was "unwilling to conclude that the FCC . . . intended to preclude the provision of 'common transport' as a network element." Pl. Br. at Ex. 7, p. 28. Indeed, the ICC deferred any final resolution of the question until MCI filed a bona fide request so as "to enable the Commission to evaluate the competing contentions of the parties within a more meaningful context." Id. at Ex. 7, p. 29. In other words, the ICC indicated it could not determine the meaning of "shared transport" under Rule 319 on the evidence and arguments before it. The question left open by the ICC has since been answered in the Third Reconsideration Order. To force MCI to undertake a [*18] bona fide request would unjustifiably delay MCI's access to common transport. Delaying access to a network element to which MCI is clearly entitled is inconsistent with the basic purpose of the Act.

Accordingly, the ICC's decision denying MCI access to shared transport without undertaking a bona fide request is reversed.

II. Tandem Interconnection Rate

The Act requires a local exchange carrier to pay mutual and reciprocal compensation for the cost of transporting and terminating calls on another carrier's network. *47 U.S.C.* §§ *251*(b)(5), 252(d)(2). A variety of methods has been proposed for determining the rates one carrier may charge another. Pl. Br. at 23 (and citation therein). One aspect of the rates the ICC imposed in the Ameritech / MCI interconnection agreement is the "tandem interconnection rate." Id. The tandem interconnection rate is a function of other rates set out in the agreement, including the tandem switching rate, a charge for transport and termination, and the end office switching rate. Id. The tandem interconnection rate is higher than the "end office rate," which includes only the end office switching rate and a [*19] charge for transport and termination. Id.

In deciding whether MCI was entitled to the tandem interconnection rate, the ICC applied a test promulgated by the FCC to determine whether MCI's single switch in Bensonville, Illinois, performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch. n9 Id. at 23-24. The ICC determined that MCI was entitled only to the end office rate. MCI contends the ICC's decision imposes reciprocal compensation on terms that are unjust and unreasonable in violation of § 251(c)(2)(d). Because the parties agree that the ICC applied the proper legal standard, its decision rests on factual determinations that are reviewed under an arbitrary and capricious standard.

n9 MCI contends the Supreme Court's decision in IUB affects resolution of the tandem interconnection rate dispute. It does not. IUB upheld the FCC's pricing regulations, including the "functionality / geography" test. *119 S. Ct. at 733.* MCI admits that the ICC used this test. Pl. Br. at 24. Nevertheless, in its supplemental brief, MCI recharacterizes its attack on the ICC decision, contending the ICC applied the wrong test. Pl. Supp. Br. at 7-8. But there is no real dispute that the ICC applied the functionality / geography test; the dispute centers around whether the ICC reached the proper conclusion under that test.

[*20]

The ICC did not make express findings regarding the comparable functions of MCI's switch and Ameritech's switches or the comparative geographical areas served by the various switches. However, the ICC did discuss the evidence offered by each party on these issues, and concluded from the "totality of the evidence" that MCI had failed to establish it was entitled to the tandem interconnection rate. Pl. Br. at Ex. 7, p. 12. The issue of comparable functionality apparently was not in serious dispute. MCI presented evidence and arguments that its switch served to aggregate calls that could then be distributed to any MCI customer within the switch's service area, and that Ameritech's tandem switches served the same function. Id. at Ex. 7, p. 10. Ameritech offered no counter-arguments to the ICC, nor does it offer any to this court. See Id. at Ex. 7, p. 11 (discussing Ameritech's arguments and evidence only as to the question of geographical area); Def. Resp. at 23-25. Therefore, only at issue is the geographical areas served by the respective switches. The ICC summarized MCI's evidence regarding the geographical area served by its switch as follows:

MCI maintains that its [*21] switch in Bensonville, Illinois serves a geographical area comparable to the area served by [Ameritech's] tandem switch. MCI is authorized to provide local exchange service in the Chicago [service area.] MCI plans to use it Bensenville switch to provide service to any customer in the Chicago [service area] where such service is feasible. [Ameritech] currently serves the Chicago [service area] with three tandem switches . . . . Thus, MCI claims that its switch covers approximately the same geographic area as three . . . Ameritech tandem switches.

Id. at Ex. 7, p. 10 (emphasis added). As the highlighted portions of the quotation make clear, much of MCI's evidence focused on the company's intentions for its switch, which of course are irrelevant to the question whether the switch is capable of servicing the area as intended. However, MCI argued that because its switch currently served the entire Chicago area - the same area that Ameritech served with three tandem switches -- its switch must serve an area comparable to any one of Ameritech's switches.

MCI's argument has surface appeal, but fails under closer scrutiny. During arbitration, [*22] MCI had less than 50,000 customers in the Chicago area. Id. at Ex. 7, p. 11. The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. Pl. Br. at Ex. 28, p. 207. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch. Or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. n10 These are questions that MCI could have addressed, but did not. The ICC compared MCI's proof with the proof offered by an incoming exchange carrier in a different case, noting that the other carrier produced "a map showing geographically widespread deployment of various nodes in its network" and "some discussion of the location of [the carrier's] local exchange customers." Id. at Ex. 7, p. 12. In contract, MCI had expressly refused to provide "specific empirical data, including maps, [*23] to demonstrate that it serves an area comparable to Ameritech's tandem network." Id. at Ex. 21, p. 13. In short, MCI offered nothing but bare, unsupported conclusions that its switch currently served an area comparable to an Ameritech tandem switch or was capable of serving such an area in the future. The ICC's determination that "MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate" was not arbitrary and capricious.

n10 MCI argues that it is patently unfair to look to the number of customers served by the switch, since Ameritech, as a long time beneficiary of a state-sanctioned monopoly, will almost always have more customers than incoming exchange carriers. However, nothing in the ICC's opinion indicates that it improperly relied on the number of MCI customers in reaching its decision. Furthermore, as the discussion in the text makes clear, identification of MCI customers is relevant to the question of the location of the customers and the geographical area actually serviced by MCI's switch.

[*24]

III. Timing of Connections to Local Loops

"Local loops" are the portions of the network connecting the exchange carrier's end office or switch to the customer's premises. Ameritech submitted to the ICC a proposal allowing Ameritech five to seven days to provide MCI with local loops. MCI's proposal allowed Ameritech two to five days to provide local loops. MCI contends the ICC violated the Act by adopting Ameritech's proposal. MCI argues that the time required to obtain local loops is critical because it determines how long a customer must wait before being switched to MCI's service. During the change-over interval, MCI contends the customer will be subjected to Ameritech's targeted efforts to win back the customer. According to MCI, the ICC's decision violates *47 U.S.C. § 251*(c)(3), which requires an incumbent carrier to provide unbundled network elements on "just, reasonable, and nondiscriminatory" terms, and 47 C.F.R. § 51.313 ("Rule 313"), which requires an incumbent carrier to provide access to network elements on terms "no less favorable" than the terms under which the incumbent carrier provides the elements to itself. n11

n11 In its reply, MCI argues that § 51.311(b) ("Rule 311"), which requires that elements given an incoming carrier must be "equal in quality" to the elements the incumbent carrier supplies itself, also applies to timing of access to local loops. But Rule 313 specifically refers to "the time within which the incumbent [exchange carrier] provisions such access to unbundled network elements," while Rule 311 refers generally to the "quality" of access to unbundled network elements. Rule 313 provides the applicable standard for determining whether the ICC's acceptance of Ameritech's proposal is permissible under the Act.

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Rule 313(b) provides,

Where applicable, the terms and conditions pursuant to which an incumbent [exchange carrier] offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent [exchange carrier] provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent [exchange carrier] provides such elements to itself.

47 C.F.R. § 51.313(b). For present purposes, the most important phrase in Rule 313 is the qualifier "where applicable." This phrase makes the "no less favorable" standard conditional on the applicability of the regulation. The difficult question is whether the incoming carrier bears the burden of demonstrating the regulation applies, or whether the incumbent carrier bears the burden of demonstrating the regulation does not apply. In this court's view, the regulation places the burden on the incoming carrier. In understanding this conclusion, it is helpful to contrast Rule 313 with the closely analogous Rule 311. Rule 311 requires incumbent carriers to provide incoming carriers [*26] access to network elements "equal in quality" to the access the incumbent carrier provides to itself. 47 C.F.R. § 51.311(b). However, the incumbent carrier is held to this strict standard only when it is "technically feasible" to provide access of equal quality. Id. If the incumbent carrier does not provide access meeting the requisite standard, Rule 311 unequivocally places the burden of demonstrating technical infeasibility on the incumbent carrier - "the incumbent carrier must prove to the state commission that it is not technically feasible . . ." Id. Rule 311 demonstrates that in crafting the rules regarding parity of access to network elements, the FCC carefully considered which party should bear the burden of proof. Rule 311 also demonstrates that the FCC chose when to place that burden on the incumbent carrier. Yet Rule 313, a companion to Rule 311, contains no comparable language placing the burden on the incumbent; Rule 313 simply mandates provisioning intervals to be congruent "where applicable." The sharp contrast between the language of these two closely analogous rules indicates the FCC did not intend that the incumbent carrier bear the burden of showing [*27] Rule 313 is inapplicable.

This conclusion comports with common sense when one considers the differences between the quality of access addressed in Rule 311 and the timing of access addressed in Rule 313. In considering quality of access, it is difficult to imagine a situation in which an incumbent carrier could not provide incoming carriers access to network elements equal in quality to that the incumbent provides itself. The quality of access presumably is a function of the technologies, services, and physical facilities that comprise the network element. There is no apparent reason why the quality of the technologies, services, or physical facilities would decline simply because the facilities are to be used by a different telecommunications carrier. Therefore, Rule 311 properly forces the incumbent to prove it cannot provide access equal in quality to that which it provides itself. But the timing of access to network elements presents an entirely different situation. As Ameritech points out, it does not unbundle local loops, or any other network element, for its own use. See Def. Resp. at 28. The process of providing access to unbundled network elements to competing carriers [*28] that often operate on a different network is different, and presumably more time-consuming, than the process of provisioning network elements for the incumbent's own use. MCI's witness recognized there are differences between processing orders for unbundled network elements and processing orders for retail services. Def. Resp. at Ex. 15, p. 155; Pl. Br. at Ex. 7, p. 57. Of course, some network elements might be provided to incoming carriers through the same processes through which the incumbent carrier supplies itself. Rule 313 logically places the burden on incoming carriers to demonstrate that the incumbent carrier can provide unbundled elements to the competing carrier in the same time frame that the incumbent provides elements to itself.

The ICC concluded MCI did not sufficiently demonstrate that Ameritech could feasibly provide access to local loops in two to five days. n12 MCI admitted that its pleadings in the arbitration proceedings lacked data supporting its proposal. Def. Resp. at Ex. 15, p. 180. MCI merely argued that Ameritech should be forced to provide access to unbundled local loops in a comparable amount of time to that required to provide local loops for resale. Pl. [*29] Br. at Ex. 7, p. 57. The ICC stated that "MCI does little more than point to its own proposals and allege in the most general of terms that they are necessary for 'parity' or 'nondiscrimination' or that [Ameritech's] proposals are 'inadequate.'" Pl. Br. at Ex. 7, p. 62. The ICC concluded that "MCI's claims regarding provisioning benchmarks mix apples and oranges" because the "procedures for provisioning an unbundled loop and a resale loop are different and the respective provisioning intervals are not comparable." Id. The ICC's decision was not erroneous under Rule 313.

n12 The ICC's decision is a mixed determination of law and fact, and is subject to de novo review.

IV. Timing of Bona Fide Request Process

Both MCI and Ameritech presented the ICC with proposals for a "bona fide request" process by which MCI could request access to additional network elements not specified in the interconnection agreement. MCI proposed an 85-day process, while Ameritech proposed 120 days. MCI's proposal allowed [*30] Ameritech fifteen days from the time of the request to determine if the request was technically feasible. Pl. Br. at 33 (and citations therein). If Ameritech determined the request was technically feasible, it would provide MCI a price quote within an additional twenty business days. Id. MCI would then have thirty days to accept or reject the quote. Id. In the event of a dispute, the ICC would decide within twenty days of Ameritech's response whether Ameritech should be required to provide the element. Id. at 34. Ameritech proposed a more lengthy process. Under Ameritech's plan, Ameritech would have thirty days to evaluate whether a request was required by the Act and, if so, whether the request was technically feasible. Def. Br. at 32 (and citations therein). If Ameritech determined the request was feasible, it then would have ninety days to prepare a quote that includes a complete product description, proposed rates, ordering intervals, methods and procedures for ordering the requested item, and a statement of Ameritech's development costs. Id. Ameritech also agreed to completely process certain less complicated bona fide requests within thirty days of receipt. [*31] Id. MCI would have thirty days to accept or reject the quote, or to seek a remedy under the dispute resolution terms of the interconnection agreement. Pl. Br. at 34 (and citations therein). Dispute resolution could occupy as much as an additional thirty days. Id. Under Ameritech's plan, Ameritech would not be required to provide unbundled network elements until more than four months after MCI's initial request. Id. The ICC ultimately rejected MCI's proposal and adopted Ameritech's proposal. MCI claims the ICC violated § 251(c)(3) of the Act because Ameritech's proposal was not "just, reasonable, and nondiscriminatory."

In support of its position, MCI relies heavily on a statement in a report of the House of Representatives that the Act was designed to promote competition in local telecommunications markets "as quickly as possible." See H. Rep. at 89. According to MCI, the ICC applied a "commercial reasonableness" standard to the bona fide request issue. n13 Pl. Rep. at 16. MCI contends the commercial reasonableness standard is inconsistent with the purpose of the Act because it allows the ICC to approve a procedure that does not resolve disputes as quickly as [*32] possible. MCI goes so far as to say that "a [bona fide request] provision cannot, as a matter of law, satisfy the 1996 Act unless it is as short as possible." Pl. Rep. at 17 (emphasis added). MCI's argument proves too much, and demonstrates that the statement in the House Report cannot be taken literally. It would be possible to resolve bona fide requests in a matter of days or weeks by requiring all parties to immediately dedicate their full attention and resources to the problem. But such a requirement is neither practical nor reasonable. MCI implicitly recognizes that it is not entitled to resolution "as quickly as possible" in its own proposal, which allows a maximum time of eighty-five days. The statement in the House Report reflects a general policy or purpose of the Act, but it does not mean that a bona fide request provision cannot satisfy the Act as a matter of law unless the resolution period is as short as possible. Nor does the statement in the House Report override the plain language of the Act, which requires access to network elements on terms that are just, reasonable, and nondiscriminatory. MCI's attempt to read an "as quickly as possible" [*33] standard into § 251(c)(3) of the Act does not comport with common sense, the plain language of the statute, or MCI's own proposal. The ICC applied an appropriate analysis.

n13 Apparently, the ICC did not expressly articulate the commercial reasonableness standard, but cited with approval another interconnection arbitration decision that applied the standard. Pl. Rep. at 16.

Having determined that the ICC did not apply an erroneous standard to the issue of the bona fide request process, the court must now determine whether the ICC's factual determination that Ameritech's proposal was more commercially reasonable than MCI's was arbitrary or capricious. MCI argues that Ameritech failed to adduce evidence sufficient to support a finding that the four month period was reasonable. But Ameritech presented the ICC with ample evidence sufficient to support the conclusion that Ameritech's proposal was commercially reasonable. Ameritech presented evidence regarding the unpredictable number, timing, and complexity of [*34] the bona fide requests it receives from various competing exchange carriers. Def. Br. at 34-35 (and citations therein). Ameritech also presented evidence regarding similar time frames approved by the FCC and other state commissions in analogous situations. Id. at 35-36. In contrast with Ameritech's presentation, MCI presented little evidence in support of its own proposal. MCI's witness conceded that MCI did not do "any type of empirical analysis of the processes, resources, [or] costs" that Ameritech might incur in responding to bona fide requests, but instead "worked backwards" from Ameritech's 120-day proposal. n14 Def. Resp. at Ex. 23, p. 593. The ICC's determination that Ameritech's proposal was the more reasonable of the two plans was not arbitrary and capricious.

n14 Significantly, MCI presents nothing to this court in defense of its plan. MCI merely attacks Ameritech's proposal as unjust, unreasonable, and discriminatory.

MCI also presents, in a footnote, an argument that Ameritech's proposal [*35] is discriminatory in violation of § 251(c)(3). Pl. Br. at 37, n. 10. MCI contends that § 251(c)(3) requires Ameritech to provide network elements to MCI on the same terms and conditions that it provides the elements to itself. According to MCI, the bona fide request provision is discriminatory because it forces MCI to wait for access to Ameritech's network elements longer than Ameritech must wait. But the "nondiscriminatory" language of § 251(c)(3) has no application here. To say that MCI is entitled to nondiscriminatory access to network elements presupposes that MCI is entitled to any access to the elements. MCI is not entitled to access to network elements beyond those provided for in the interconnection agreement until it successfully completes the bona fide request process. The purpose of the bona fide request process is to determine whether, and on what terms, Ameritech is required to provide access to additional network elements not addressed in the interconnection agreement. Only after MCI obtains the right to access additional network elements through the bona fide request process does § 251(c)(3) forbid nondiscriminatory access to those elements. [*36]

V. Limitations of Liability

The Act contemplates two distinct functions of state public utilities commissions. First, state commissions conduct arbitration pursuant to § 252(b)(1). Second, state commissions evaluate negotiated or arbitrated agreements against the standards set out in § 252(e)(2) and either approve or reject the agreement. At the approval stage, the state commission's authority is limited to determining whether the agreement meets the requirements of § 252(e)(2). See e.g., *TCG Milwaukee, Inc. v. Public Serv. Comm'n of Wisconsin, 980 F. Supp. 992, 999 (W.D. Wis. 1997)*. It is undisputed that liability limitations were not considered until the approval stage; MCI and Ameritech did not agree on liability limitations during preliminary negotiations, nor did they arbitrate the issue. Therefore, unless Ameritech prevails on one of its arguments in support of the ICC's decision to incorporate liability limitations into the agreement, the limitations must be stricken. The court reviews the ICC's decision de novo.

Ameritech first argues that the ICC's decision was appropriate under § 252(e)(3), which allows state commissions to enforce requirements [*37] of state law in reviewing an agreement. In support of its assertion, Ameritech cites *In re Illinois Bell Switching Station, 161 Ill. 2d 233, 641 N.E.2d 440, 448-49, 204 Ill. Dec. 216 (Ill. 1994)*. But Illinois Bell does not establish a state law requiring limitations on Ameritech's liability. In Illinois Bell, a single justice of the Illinois Supreme Court states that limitations of liability are an "important part" of a utility company's contracts. *641 N.E.2d at 449* (Miller, J., concurring). This unremarkable statement does not even suggest that limitations of liability must be included in a utility company's contracts. Ameritech's argument is without merit.

Ameritech next contends the ICC was required to include liability limitations under § 252(e)(2)(B) because without the limitations, the pricing provisions of the agreement would violate the standards of § 252(d). Section 252(d) requires that prices set out in interconnection agreements must be based on the incumbent carrier's costs of providing the network elements at issue. According to Ameritech, the prices in the interconnection agreement would not accurately reflect Ameritech's costs unless Ameritech's [*38] liability was limited. Ameritech initially contended that its liability exposure was a component of its costs. See Def. Resp. at 41-42. However, MCI correctly argued the Act mandates that prices be set according to forward-looking costs, and not according to a rate-of-return analysis. *47 U.S.C. § 252*(d)(1)(A)(ii); see also, 47 C.F.R. § 51.105. Under the Act's pricing scheme, the cost of Ameritech's liability to MCI is not recoverable in the prices of unbundled network elements. Recognizing this difficulty, Ameritech changed its strategy and now argues that the liability limitations represent the cost of "gold-plating" Ameritech's network to ensure the network will not fail. Def. Supp. Resp. at 5-6. But the costs of gold-plating the network and the costs of liability are two sides of the same coin. The costs of gold-plating a network element are extraordinary costs incurred solely to avoid liability, and are otherwise unrelated to the cost of producing or supplying the network elements. It is incongruous to say that Ameritech may not charge MCI for the additional cost of Ameritech's liability to MCI, but may charge MCI for the additional cost of avoiding [*39] that liability. The pricing regulations do not allow Ameritech to recover the cost of gold-plating through the prices it charges MCI.

Ameritech next argues that the ICC was authorized to impose liability limitations under § 252(e), which permits state commissions to reject agreements that discriminate against carriers that are not parties to the agreements. All of Ameritech's interconnection agreements with incoming carriers in Illinois contain liability limitations similar to those Ameritech proposed to the ICC in this case. Ameritech argues that if the ICC approved the MCI agreement without limiting Ameritech's liability, the agreement would discriminate against other Illinois carriers. Ameritech's argument proves too much. Under Ameritech's view of the Act, any provision in an interconnection agreement that is favorable to the incoming carrier is impermissible unless that provision is contained in all the incumbent's other interconnection agreements. Taking Ameritech's argument to its absurd extreme, every interconnection agreement within a region must be identical. Furthermore, the template for all subsequent interconnection agreements would be established by the first incoming [*40] carrier to negotiate with the incumbent. This result would be at odds with § 252, which contemplates individualized negotiations between the incumbent and each incoming carrier.

Nevertheless, the absence of liability limitations in MCI's agreement with Ameritech clearly gives MCI an advantage over other incoming carriers. But the anti-discrimination language of § 252(e) does not prevent MCI from gaining this competitive advantage. Whatever the parameters of the discrimination targeted by § 252(e), that section cannot be read to preclude interconnection agreements that give an incoming carrier a competitive advantage over other incoming carriers. n15 As noted above, this interpretation conflicts with the Act's vision of individualized negotiations between the incumbent and each incoming carrier. More importantly, Ameritech's interpretation of § 252(e) is at odds with the very purpose of the Act. The Act was designed to open local telecommunications markets to competition. *Iowa Utilities Board v. FCC, 120 F.3d 753, 816 (8th Cir. 1997)*, rev'd in part by *AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*. In a free market, [*41] incoming local exchange carriers would compete with each other as well as with the incumbent. Yet under Ameritech's view, § 252 stifles vigorous competition between incoming carriers. The meaning of "discrimination" under § 252(e) is elusive, but that section does not prevent an incoming carrier from gaining a competitive advantage over other incoming carriers by negotiating a more favorable interconnection agreement. n16

n15 In light of the overall purpose of the Act, it is likely that Congress intended § 252(e) to forbid anticompetitive discrimination, i.e., collusive discrimination or oligopolistic behavior among the incumbent and one or more incoming carriers.

n16 Even assuming the absence of liability limitations in MCI's interconnection agreement discriminates against other incoming carriers, Ameritech does not have standing to raise the claims of other carriers.

Finally, Ameritech argues that MCI waived any challenge to the liability limitations. When MCI protested the imposition of liability [*42] limitations, the ICC declared it would not approve the agreement without the limitations. MCI was presented with a choice: it could either accept the liability limitations to gain ICC approval, or it could repeat the entire negotiation and arbitration process by refusing the limitations. Ameritech argues that because MCI elected to go forward, it waived its right to challenge the ICC's decision. Ameritech's argument lacks merit. The Act provides for judicial review of state public utilities commission decisions in § 252(e)(6). If liability limitations were improperly imposed on MCI during the approval stage, MCI's remedy is to challenge the ICC's decision in this court. It is inconsistent with the Act's procedural scheme to conclude that the ICC may deprive MCI of its right to judicial review by forcing MCI either to accept terms that were not arbitrated or to forfeit the considerable time and resources already expended. MCI did not waive its right to challenge the liability limitations.

For the foregoing reasons, the limitations on liability erroneously imposed by the ICC must be stricken.

VI. Dark Fiber

The ICC ordered Ameritech to provide MCI with access to "dark fiber" [*43] as an unbundled network element. "Dark fiber" is optical fiber that is not attached to electronics that are necessary to "illuminate" the fiber and enable it to carry telecommunications. Ameritech launches a three-pronged attack against the ICC's ruling. First, Ameritech contends the ICC had no jurisdiction to grant MCI access to dark fiber because the issue was never raised before the ICC in arbitration. Under § 252(b)(4)(A), the ICC was bound to "limit its consideration of any petition . . . (and any response thereto) to the issues set forth in the petition and the response, if any . . . ." (emphasis added). Ameritech contends MCI's petition did not set forth dark fiber as an issue for arbitration. MCI responds that it raised the issue of dark fiber under the rubric of "dedicated interoffice transmission" and "shared interoffice transmission." Pl. Resp. at 3. The court need not resolve this dispute, because Ameritech plainly raised the issue of dark fiber in its response to MCI's petition. n17 See Pl. Resp. at 3-4 (and citations therein). Ameritech concedes that its response "discussed" dark fiber. Def. Rep. at 7. However, Ameritech contends it was forced to do so only because [*44] "it was impossible for Ameritech to be certain that the ICC was not going to address dark fiber" because it was "extremely difficult to tell from MCI's vague Petition just what issues MCI was setting forth." Id. Ameritech contends it faced a dilemma: it could decline to address dark fiber and run the risk that the ICC would erroneously decide the issue without Ameritech having a chance to present its position, or it could address the merits of the dark fiber issue and risk a later ruling that the response set forth the issue for arbitration. Id. Ameritech chose the latter course, thereby raising the dark fiber issue for arbitration under § 252(b)(4)(A). In essence, Ameritech maintains it could argue the merits of the dark fiber issue before the ICC and yet claim in this court that the issue was not before the ICC. Section 252(b)(4)(A) forbids this result.

n17 This fact distinguishes this case from *MCI Telecommunications, Inc. v. Pacific Bell, 1998 U.S. Dist. LEXIS 17556,* No. C 97-0670 SI (N.D. Cal. Sept. 29, 1998), in which the court found that MCI failed to raise the issue of dark fiber in an arbitration petition identical to the petition before the ICC. Ameritech claims MCI is collaterally estopped from arguing it raised the dark fiber issue in its arbitration petition. Collateral estoppel is inapplicable because here, unlike Pacific Bell, the response set forth dark fiber as an arbitration issue.

[*45]

Ameritech next argues the ICC had no authority to identify dark fiber as a network element after the Supreme Court's decision in IUB, which vacated Rule 319. Rule 319 enumerated several specific network elements that must be unbundled under the Act. The Court vacated Rule 319 as inconsistent with § 251(d)(2) of the Act. Section 251(d)(2) provides:

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Court examined the FCC's methodology in promulgating Rule 319, and concluded that the agency had failed to properly apply the "necessary and impair" standard. *119 S. Ct. at 734-35.*

47 C.F.R. § 51.317 (hereafter, "Rule 317") is a companion to Rule 319. Rule 317 sets forth the standards state public utilities commissions are to apply in determining what network elements [*46] other than those specified in Rule 319 must be unbundled. Although IUB did not expressly vacate Rule 317, the rule purports to allow state commissions to apply the same erroneous standard that was fatal to Rule 319. Therefore, the reasoning of IUB applies with equal force to Rule 317. Ameritech contends that Rule 317 was "the sole asserted source of any State commission authority to identify network elements that must be unbundled." Def. Supp. Br. at 9. Because Rule 317 is now a dead letter, Ameritech contends the ICC had no authority to order it to unbundle dark fiber. However, Rule 317 does not grant state

public utilities commissions the power to name additional elements. The rule presupposes that such power exists, and establishes the standards under which the power must be exercised. n18 Nothing in IUB suggests that state public utilities commissions lack power to name additional network elements to be unbundled.

n18 Indeed, Rule 317 is entitled "Standards for identifying network elements to be made available."

[*47]

Nevertheless, Ameritech's argument has some merit. Although state public utilities commissions have the power to name network elements to be unbundled, they must do so under the standards set forth in the Act as interpreted by the FCC. See *IUB, 119 S. Ct. at 730, n. 6,* and Id. at 729-33 (questioning "whether it will be the FCC or the federal courts that draw the lines to which [state commissions] must hew" and concluding that *47 U.S.C.* § *201*(b) grants the FCC rulemaking authority under the Act). Those standards were set out in rule 317, which no longer governs. In the absence of a standard guiding the state public utilities commission's exercise of its power, the commission might not be able to exercise its power. This court need not decide whether a state public utilities commission may anticipate FCC-promulgated standards and itself undertake to interpret the mandates of the Act. When the ICC rendered its decision on Ameritech's dark fiber, there was a standard in place, albeit the erroneous standard set out in Rule 317. Therefore, Ameritech's attack on the ICC's authority to name dark fiber as a network element is nothing more than an argument [*48] that the ICC applied the wrong standard in making its determination - precisely the argument Ameritech uses as the third prong of its attack on the ICC's decision.

In the initial briefs on the dark fiber issue, Ameritech maintained that the ICC failed to apply the necessary and impair test in any fashion, concluding its discussion after it determined dark fiber was a network element. Def. Br. at 15. MCI responded that even if the ICC did not articulate a finding of impairment, the evidence provided a reasonable basis for the ICC to conclude that without access to Ameritech's dark fiber, MCI would be impaired under the standards set out in Rule 317. Pl. Resp. at 17-18. But assuming MCI is correct, the ICC applied an erroneous standard under the Act after IUB.

Recognizing this difficulty, MCI urges the court to defer its decision on the dark fiber issue until the FCC promulgates new regulations interpreting the necessary and impair standard under the doctrine of primary jurisdiction. The goals of the doctrine of primary jurisdiction include ensuring nationally uniform application of the law and promoting deference to agency expertise. *United States v. Western Pacific R.R. Co., 352 U.S. 59, 65, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956).* [*49] The doctrine does not apply here, because this court can render a decision without infringing on the FCC's province. If the court were required to interpret the Act's necessary and impair requirement in order to resolve the dark fiber issue, MCI's argument might have some merit. But the court agrees with Ameritech that the ICC engaged in no analysis of necessity and impairment. The ICC's discussion focuses solely on the question whether dark fiber is a network element; it does not even make passing mention of the necessary and impair standard. Def. Br. at Ex. 2, p. 26-27. The court is not persuaded by MCI's argument that because MCI presented evidence of impairment, and because the law required the ICC to undertake a necessary and impair analysis, a finding of impairment is implicit in the ICC's decision. Pl. Resp. at 17-18. MCI's argument begs the question whether the ICC in fact considered MCI's evidence of impairment as the law required. If MCI's position were correct, there could never be a finding that a state commission failed to apply the necessary and impair test if evidence of impairment was presented. This result would be absurd.

Because the ICC failed to make any determination [*50] of necessity and impairment as required by *47 U.S.C.* § *251*(d)(2), its decision compelling Ameritech to provide MCI access to dark fiber was erroneous and must be reversed.

CONCLUSION

The ICC's decision is affirmed in part and reversed in part. The ICC's decisions to adopt Ameritech's proposals regarding the time frame for providing access to local loops, to adopt Ameritech's proposed schedule for a bona fide request process, and to deny MCI the tandem interconnection rate are affirmed. The ICC's decisions to deny MCI access to shared transport without undertaking a bona fide request, to incorporate liability limitations in the interconnection agreement, and to grant MCI access to Ameritech's dark fiber are reversed.

ENTER:

Suzanne B. Conlon

United States District Judge

June 22, 1999

1999 U.S. Dist. LEXIS 18148 printed in FULL format.

U S WEST COMMUNICATIONS, INC., a Colorado corporation, Plaintiff, v. PUBLIC SERVICE COMMISSION OF UTAH; STEPHEN F. MECHAM, CONSTANCE B. WHITE, CLARK D. JONES, Commissioners of the Public Service Commission of Utah; and WESTERN WIRELESS CORPORATION, a Washington corporation, Defendants.

Case No. 2: 97 CV 558

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

1999 U.S. Dist. LEXIS 18148

November 23, 1999, Decided

DISPOSITION: [*1] Western's motion for summary judgment GRANTED. US West's motion for summary judgment DENIED. Matter dismissed.

COUNSEL: For U S WEST COMMUNICATIONS, INC., plaintiff: David J. Jordan, Gregory B Monson, Mr., STOEL RIVES LLP, SALT LAKE CITY, UT.

For STEPHEN F. MECHAM, CONSTANCE WHITE, CLARK JONES, PUBLIC SERVICE COMMISSION UT, defendants: Sandy J Mooy, Mr., PUBLIC SERVICE COMMISSION, Michael L Ginsberg, Mr., UTAH ATTORNEY GENERAL'S OFFICE, SALT LAKE CITY, UT.

For WESTERN WIRELESS, defendant: Alan L Sullivan, Mr., Bradley R. Cahoon, SNELL & WILMER LLP, SALT LAKE CITY, UT.

For WESTERN WIRELESS, defendant: Joseph A. Boyle, KELLEY DRYE & WARREN, PARSIPPANY, NJ.

For WESTERN WIRELESS, defendant: Douglas P. Lobel, Charles M. Oliver, KELLEY DRYE & WARREN, WASHINGTON, DC.

JUDGES: DALE A. KIMBALL, United States District Judge.

OPINIONBY: DALE A. KIMBALL

OPINION: ORDER

Before the Court are the cross motions for summary judgment of Plaintiff US West Communications, Inc. ("US West") and Defendant Western Wireless Corporation ("Western").

BACKGROUND

On February 8, 1996, Congress passed the Telecommunications Act of 1996 (the "Act") to promote competition and reduce regulation in the [*2] local telephone market. As part of the Act, existing telephone service providers like US West, referred to as "incumbent local exchange carriers," "incumbent LECs," or "ILECs," are obligated to interconnect with new entrants into the telecommunications market, including wireless or mobile carriers like Western, referred to as "Commercial Mobile Radio Service Providers" or "CMRS providers." Towards that end, the Act obligates ILECs to enter into "reciprocal compensation arrangements" with entrants pursuant to which each carrier compensates the other for local telephone traffic that is transported and terminated on the other carrier's network. *47 U.S.C. § 251*(b)(5). Prior to the Act, incumbent LECs were not legally required to compensate other carriers for such usage, but other carriers were required to compensate incumbent LECs.

When an entrant asks an incumbent to provide interconnection, the Act obligates both parties to negotiate in good faith to accomplish the requirements of the Act. Id. at §§ 251(c)(1), 252(a)(1). The Act provides further that any entrant with a preexisting agreement with an incumbent may request re-negotiation of the agreement [*3] to conform it with the Act. To the extent issues remain unresolved, either party may request arbitration by the state public utilities commission. Id. at § 252(b). The final agreement between the incumbent and the entrant, whether arrived at through negotiation or arbitration, must be approved by the state commission. Id. at § 252(e)(1). Either party may seek review in federal district court. Id. at § 252(e)(6). If the state commission fails to act within the timetables provided in the Act, the Federal Communications Commission ("FCC") assumes the state commission's responsibilities. Id. at §

252(e)(5).

Prior to the passage of the Act, US West and Western had entered into an interconnection agreement that provided a rate for Western's use of US West's lines and services. On March 29, 1996, Western petitioned US West to renegotiate their agreement to conform with the Act. Negotiations ensued, and, on September 6, 1996, the open issues were submitted to the Utah State Public Service Commission (the "Commission") for arbitration. On January 2, 1997, the Commission ruled that Western was entitled to receive reciprocal compensation retroactively beginning March 29, 1996, the [*4] date Western requested renegotiation. The Commission also found that Western's mobile switching center ("MSC") should be treated as equivalent to US West's tandem switch system for the purpose of setting the rate of reciprocal compensation US West must pay Western.

US West then filed this lawsuit, challenging the Commission's finding on those two points, namely: (1) the effective date from which Western is entitled to interim reciprocal compensation and (2) the interconnection rate Western is entitled to receive for the transportation and termination on its system of calls originated on US West's system, the "going forward rate." n1

n1 Initially, US West also asserted that an unconstitutional taking had occurred. During oral argument of the motions, counsel for US West stated that US West no longer asserts a Fifth Amendment takings claim as an independent cause of action.

STANDARD OF REVIEW

The parties agree that questions of law, such as whether a state commission procedurally and substantively complied [*5] with the Act, are to be reviewed de novo, in accordance with the standard of review enunciated in U S West Communications, Inc. v. Hix, 986 F. Supp.13, 18 (D. Colo. 1997). US West and Western disagree as to the standard of review to be applied to other questions, particularly questions involving a state commission's interpretation of the Act.

US West argues that the state commissions are not entitled to deference as are federal agencies pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)* (according deference to federal agency's statutory interpretation when Congressional intent is not clear from statute's express language). US West urges this Court to follow Hix in this regard. The Hix court concluded that state commissions do not function analogously to federal agencies under the Act because they are not subject to continuous Congressional oversight and do not have "extensive experience or expertise in the specific mandate of the Act -- promoting competition in the local exchange market." *Hix, 986 F. Supp. at 17-18.* The Hix court also noted that affording deference [*6] to the state commissions would be antithetical to the coherent and uniform construction of the Act. *Id. at 17.*

Western argues that Hix has been superceded in this regard. Western's argument is based on a footnote in *AT & T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999),* in which the Supreme Court noted that the Act's delegation of federal policymaking to state administrative agencies created a unique scheme and left open many attendant issues. The Supreme Court said, "Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law are novel as well." *119 S. Ct. at 733 n.10.*

This Court recognizes that the Supreme Court did not substantively address the issue of the amount of deference district courts are to afford the state commissions. But, in acknowledging the uniqueness of the Act's scheme, the Supreme Court left open the possibility that application of a deferential standard could be warranted. Two considerations persuade this Court to do so, notwithstanding the distinctions between the state commissions and federal [*7] agencies drawn in Hix.

First is the fact that Congress specifically charged the state commissions with interpreting and carrying out the Act in the first instance. At the very least, this suggests that Congress viewed the state commissions as having relevant expertise. Second is the fact that if the FCC were to act for a state commission that did not accept its responsibilities under the Act, a reviewing court would give deference to the FCC, as a federal agency, under Chevron. Application of a deferential standard to the state commission's interpretations of the Act avoids this anomaly.

DISCUSSION

A. Did the Commission lawfully set the effective date from which Western is entitled to interim reciprocal compensation as March 26, 1996?

US West challenges the Commission's application of one of the administrative rules issued by the FCC to implement the Act. The rules were released on August 8, 1996, but were not effective until November 1, 1996. See In re Implementation of the Local Competition Provisions in the *Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996)* ("First Report and Order"). Section 51.717, commonly known as the interim reciprocal [*8] compensation rule, provides that, as of the date a competing carrier petitions an incumbent LEC to negotiate a new agreement until the time that an interconnection agreement is approved by the state, the competing carrier may charge the incumbent LEC the same rates for termination of telecommunications traffic that the incumbent LEC charges the competing carrier. 47 C.F.R. § 51.717(b) (1998). n2

n2 In its entirety, 47 C.F.R. 51.717 provides:

(a) Any CMRS provider that operates under an arrangement with an LEC that was established before August 8, 1996, and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties.
(b) From the date that a CMRS provider makes a request under paragraph (a) of this section until a new arrangement has been either arbitrated or negotiated and has been approved by a state PCS, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for the transport and termination of local telecommunications traffic that the LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement.

[*9]

US West argues that the Commission improperly interpreted and applied § 51.717 to require US West to provide reciprocal compensation to Western retroactively to a date that pre-dates the effective date of the rule, namely, March 29, 1996, the date Western petitioned US West to renegotiate the existing agreement.

US West argues that on March 29, 1996, there was no obligation to provide reciprocal compensation to a CMRS provider until after an agreement was approved by a state commission, citing *Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988),* in which the Supreme Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id. at 207.*

US West points out that the statutory provisions authorizing the FCC to make implementing rules do not authorize retroactive rulemaking and that the FCC indicated in the First Report and Order that the obligation to provide reciprocal compensation was to attach "as of the effective date of the rules we adopt [*10] pursuant to this order." P 1094. As further support for its position, US West argues that retroactive application of § 51.717 is precluded by the language used in the provision itself, which states that a CMRS provider shall be entitled to interim reciprocal compensation from the date a request is made "under paragraph (a) of this section."

Western argues that the effective date of § 51.717 is irrelevant inasmuch as the express language of the Act gives CMRS providers the right to interim reciprocal compensation. Western argues that § 251(b)(5), which was effective on the date on which the Act was signed into law, February 8, 1996, provides that each local exchange carrier has the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." According to Western, § 51.717 merely specifies a date from which each CMRS provider may receive interim reciprocal compensation, a term that does not appear in the Act itself.

Since the Act itself requires reciprocal compensation, the question of when, after the passage of the Act, an incumbent LEC's duty to provide reciprocal compensation begins does not present a question concerning [*11] the Commission's compliance with the Act. Thus, this Court applies a deferential standard of review to the Commission's interpretation of § 51.717. The Commission's interpretation meets this standard. This is the conclusion reached by three other district courts that have considered the issue -- New Mexico, North Dakota, and Montana. n3

n3 U.S. West Communications, Inc. v. Reinbold, No. Al-97-025 (D.N.D. May 14, 1999); US West Communications, Inc. v. Serna, Civ. No. 97-124 JP/JHG (D.N.M. Aug. 25, 1999); US West Communications, Inc. v. Anderson, CV 97-9-H-CCL (D. Mont. Sept. 14, 1999).

B. Did the Commission act lawfully in requiring US West to compensate Western for the services Western provides to US West at the same rate that Western compensates US West?

As explained above, the Act requires interconnecting carriers to establish reciprocal compensation arrangements for the transport and termination of traffic on each others' networks. *47 U.S.C. § 251*(b)(5). The parties [*12] do not dispute that the tandem switches utilized by US West are different from the MSC switches utilized by Western, and more expensive to operate.

Tandem switches are routing switches and never operate alone. In simplified terms, a tandem switch is used to interconnect "end offices" in a common geographic area. An end office switch generally connects calls from one caller to another within a smaller geographic area. So, any call delivered to US West's tandem switch must pass through both a tandem switch and an end office switch before reaching its destination.

Western always delivers calls originating on its system and destined for an end user on US West's system to US West's tandem switch. Thus, US West always incurs two switching costs to deliver a call originating on Western's system. In contrast, Western's MSCs only have one switch. So, when a US West customer calls a Western customer's cellular phone, Western incurs only one switching cost.

The Commission adopted a requirement that US West compensate Western for the services Western provides to US West at the same rate that Western compensates US West for the use of US West's tandem switches. The Commission did so after concluding [*13] that Western's switches perform comparable functions and serve a larger geographic area.

US West's attack begins with the proposition that § 252(d)(2)(A) requires state commissions to arrive at a reasonable approximation of the costs of each carrier associated with the transport and termination on each carrier's facilities of calls originating on the other carrier's network. US West then argues that the fact that Western's system serves a geographic area that is at least as large as the geographic area served by US West is an insufficient basis upon which to sustain the Commission's ruling and that the required functional similarity analysis performed by the Commission was arbitrary and capricious.

At least one court has agreed with US West that a geographic analysis alone is an insufficient basis upon which to uphold a rate determination and that "the rate for a wireless switch should be determined by whether it functions like a tandem switch, and geography should be considered." US West Communications, Inc. v. Washington Utils. and Transp. Comm'n, No. C97-5686BJR, slip op. at 6 (W.D. Wash. Sept. 3, 1998). This Court also agrees.

US West argues that the functional similarity [*14] analysis performed by the Commission was arbitrary and capricious because the Commission compared Western's MSCs, on the one hand, with US West's tandem switches and US West's end operating switches, as they operate together, on the other hand, in violation of the First Report and Order, which, US West argues, instructed the Commission to compare Western's MSCs with US West's tandem switches standing alone.

The First Report and Order provides:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced [*15] the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

P 1090 (emphasis added). US West asks this Court to remand the matter to the Commission to require the Commission to determine whether Western's MSCs perform the same function as US West's tandem switches alone.

In the view of this Court, US West approaches the matter too myopically. The First Report and Order directs "states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2)." P 1089. A forward-looking cost study is necessary only when an entrant wants to rebut that presumption by establishing that its costs are greater than the incumbents. Id.

In light of these principles, US West has not shown that there is insufficient evidence upon which the Commission could base its conclusion that Western's costs approximate [*16] US West's. Nor is this Court convinced that the only permissible interpretation of P 1090 is the one advanced by US West, namely, that in performing a functional similarity analysis state commissions are limited to considering only the first layer of an ILEC's system.

CONCLUSION

For the reasons set forth herein, Western's motion for summary judgment is HEREBY GRANTED. US West's motion for summary judgment is HEREBY DENIED. The matter is dismissed; the parties are to bear their own costs.

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FILED

JAN 0 3 2000

Clerk's Office
N.C. Utilities Commission

DOCKET NO. P-582, SUB 6

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

Petition by ICG Telecom Group, Inc., for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996	))))	PUBLIC STAFF'S RESPONSE TO REQUEST FOR RECONSIDERATION

Clark
Watson
Sanford
Owens
Ervin
Long
AG
Gerwink
Duffy
Hoover
Kite
Steel
Lessons
Ecreck

NOW COMES THE PUBLIC STAFF - North Carolina Utilities Commission, by and through its Executive Director, Robert P. Gruber, and responds to the Objections and Request for Clarification and Reconsideration of portions of the Recommended Arbitration Order entered in this docket on November 4, 1999, which were filed on December 6, 1999, by BellSouth Telecommunications, Inc., (BellSouth), and the Opposition of ICG Telecom Group, Inc. (ICG) to the Request filed on December 22, 1999.

The single issue in these filings which the Public Staff wishes to address is whether ICG should be compensated for tandem switching. The Public Staff did not address this issue in its proposed recommended order in this docket. However, the Public Staff now believes that the Commission should reconsider and reverse its finding on this issue on the grounds that ICG failed to demonstrate that its switch provides the tandem function in terminating a call delivered to it by a LEC. The determination of whether ICG's switch performs the tandem functionality on calls delivered to it by BellSouth must be part of the Commission's determination of whether ICG should be compensated for the tandem switching and transport elements. Even if it could be construed that ICG's switch serves an area comparable to that served by BellSouth's tandem switch, that determination, standing alone, is insufficient to qualify ICG to receive compensation for the tandem switching and transport elements.

Reading Paragraph 1090 of the FCC's First Report and Order in CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, as a whole, and as an indication of the FCC's intent in promulgating Section 51.711 of its Rules, it is clear that the functionality of the interconnecting carrier's network must be considered for the purpose of determining whether the carrier should be compensated for tandem switching. The FCC specifically directs the states to consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch. If the only requirement were that the interconnecting carrier's switch serve an area comparable to the LEC's tandem switch, any consideration of the new technologies would be completely irrelevant.

While ICG did indicate that it uses a fiber ring in serving its customers, the ring is apparently a means of connecting its switch to its customers. Fiber rings can also be used to interconnect end office switches and to reroute traffic in the event that an interoffice circuit is cut. Such is the case with BellSouth. ICG's ring, on the other hand, does not extend between switches, but between ICG customers, and between ICG customers and the ICG switch from which dial tone is provided. Under normal circumstances, in the termination of a call delivered to ICG by BellSouth, the ICG ring does not perform a function even remotely similar to that of a tandem switch. It actually serves as the loop between the ICG switch, where end office switching is done, and the ICG customer. Tandem switching, if it was involved, would occur at the other end of the circuit, even before the call reached the end office from which dial tone is provided.

ICG's assertions that its switch qualifies as a tandem because it serves as a point of interconnection for traffic to and from IXCs, and as ICG's access point for operator services for its customers are not persuasive. Even if these are considered tandem functions for some purposes, they have no bearing on the issue at hand unless they are actually employed in the process of terminating calls delivered to ICG by BellSouth. Since they are not so employed, they do not qualify ICG for tandem switching and transport compensation.

The principle of symmetry in the service and service area of tandem switching on the one hand and "new technologies" on the other, as a prerequisite for the use of the rates of the one as a proxy for the rates of the other, is more than a simple rule of thumb. In Paragraph 1085 First Report and Order the FCC notes,

> Both the incumbent LEC and the interconnecting carriers usually will be providing service in the same geographic area, so the forward-looking economic costs should be similar in most cases. We also conclude that using the incumbent LEC's forward-looking costs for transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers satisfies the requirement of section 252(d)(2) that costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls."

Thus parity of service and service area provides both the rational and the legal basis for the use of proxy rates. The Commission should insist that a party requesting such treatment clearly demonstrate this parity. This, ICG has not done.

The Public Staff therefore recommends that the Commission reconsider and reverse Finding of Fact Number Two and Ordering Paragraph Number Two of the Recommended Order dated November 4, 1999.

Compensation for tandem switching is also an issue in Docket No. P-500, Sub 10. The Public Staff is confident that the Commission will wish to treat this issue consistently and therefore suggests that the Commission consider this issue in conjunction with its deliberations in that docket.

Respectfully submitted this the 3rd day of January, 2000.

PUBLIC STAFF
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CERTIFICATE OF SERVICE

I certify that I have served a copy of this pleading on all parties of record by placing a copy of the same in the United States Mail, postage prepaid.

This the 3rd day of January, 2000.

Robert B. Cauthen, Jr.

FLORIDA PUBLIC SERVICE COMMISSION

VOTE SHEET

DECEMBER 21, 1999

RE: DOCKET NO. 990691-TP - Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.

Issue 1: Until the FCC and the FPSC adopt a rule with prospective application, should dial-up access to the Internet through Internet Service Providers (ISPs) be treated as if it were a local call for purposes of reciprocal compensation?
Primary Recommendation: Yes. Until the FCC and the FPSC adopt a rule with prospective application, dial-up access to the Internet through Internet Service Providers (ISPs) should be treated as if it were a local call for purposes of reciprocal compensation.

DENIED

RECEIVED
JAN 4 2000
LEGAL DEPARTMENT

COMMISSIONERS ASSIGNED: DS CL JC

COMMISSIONERS' SIGNATURES

MAJORITY

Susan F. Clark

J. Terry Deason

DISSENTING

(ONLY ISSUE 1)

REMARKS/DISSENTING COMMENTS: Commissioner Jacobs dissented on Issue 1.

PSC/RAR33 (5/90)

DOCUMENT NUMBER-DATE
15612 DEC 21 99
FPSC-RECORDS/REPORTING

VOTE SHEET
DECEMBER 21, 1999
DOCKET NO. 990691-TP - Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.

(Continued from previous page)

Alternative Recommendation: Staff recommends that the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on whether reciprocal compensation is due for ISP-bound traffic because the FCC has retained jurisdiction over this traffic.

APPROVED The Commission reconsidered this issue and reaffirmed its original vote.
Commissioner Jacobs dissented.

Issue 2: Should the following packet-switching capabilities be made available as UNEs:
a) user-to-network interface (UNI) at 56 kbps, 64 kbps, 128 kbps, 256 kbps, 384 kbps, 1.544 Mbps and 44.736 Mbps.
b) network-to-network interface (NNI) at 56 kbps, 64 kbps, 1.544 Mbps and 44.736 Mbps
c) data link control identifiers ("DLCIs") at committed information rates ("CIRs") of 0 kbps, 8 kbps, 9.6 kbps, 16 kbps, 19.2 kbps, 28 kbps, 32 kbps, 56 kbps, 64 kbps, 128 kbps, 192 kbps, 256 kbps, 320 kbps, 384 kbps, 448 kbps, 512 kbps, 576 kbps, 640 kbps, 704 kbps, 768 kbps, 832 kbps, 896 kbps, 960 kbps, 1.024 Mbps, 1.088 Mbps, 1.152 Mbps, 1.216 Mbps, 1.280 Mbps, 1.344 Mbps, 1.408 Mbps, 1.472 Mbps, 1.536 Mbps, 1.544 Mbps, 3.088 Mbps, 4.632 Mbps, 6.176 Mbps, 7.720 Mbps, 9.264 Mbps, 10.808 Mbps, 12.350 Mbps, 13.896 Mbps, 15.440 Mbps, 16.984 Mbps, 18.528 Mbps and 20.072 Mbps.
Recommendation: No. The packet-switching capabilities ICG has requested should not be provided as UNEs. However, BellSouth has agreed to provide these packet-switching capabilities to ICG; therefore, the parties should negotiate the price. Staff also recommends that the evidence of record is insufficient to determine whether interoffice transport should be provided as a UNE; therefore, it should not be provided as a UNE.

APPROVED

VOTE SHEET
DECEMBER 21, 1999
DOCKET NO. 990691-TP - Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.

(Continued from previous page)

Issue 3: Under the Telecommunications Act of 1996, should "Enhanced Extended Link" Loops (EELs) be made available to ICG in the interconnection agreement as UNEs?
Recommendation: No. Enhanced Extended Link Loops (EELs) should not be made available to ICG in the interconnection agreement as UNEs. However, BellSouth has agreed to provide EELs to ICG; therefore, the parties should negotiate the price for the EEL.

APPROVED

Issue 4: Should volume and term discounts be available to ICG for UNEs?
Recommendation: No. There is insufficient evidence in the record to require BellSouth to provide volume and term discounts for Unbundled Network Elements (UNEs) to ICG.

APPROVED

Issue 5: For purposes of reciprocal compensation, should ICG be compensated for end office, tandem, and transport elements of termination where ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch?
Recommendation: No. The evidence of record does not show that ICG's switch will serve an area comparable to the area served by BellSouth's tandem switch. In addition, the evidence does not show that ICG's switch will perform the same functions as a BellSouth tandem switch. Therefore, staff recommends, for the purposes of reciprocal compensation, that ICG not

APPROVED

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be compensated for the tandem element of terminating calls on their network which originated on BellSouth's network. However, staff does recommend that ICG be compensated for the transport and end office elements of termination.

APPROVED

Issue 6: (A) Should BellSouth be required to enter into a binding forecast of future traffic requirements for a specified period?
(B) If so, are they then required to provision the requisite network buildout and necessary support?
Recommendation: (A) No. BellSouth should not be required to enter into a binding forecast of future traffic requirements for a specified period with ICG. There is no such requirement in the Telecommunications Act of 1996 nor in any FCC order or rule.
(B) If the Commission approves staff's recommendation in Issue 6(A), BellSouth would not be required to provision the requisite network buildout and necessary support, because 6(B) would be rendered moot.

APPROVED

VOTE SHEET
DECEMBER 21, 1999
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Issue 7: Should this docket be closed?
Recommendation: No. The parties should be required to submit a signed agreement that complies with the Commission's decisions in this docket for approval within 30 days of issuance of the Commission's order. This docket should remain open pending Commission approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

APPROVED