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November 18, 2005

**VIA ELECTRONIC FILING**

Ms. Frances Nichols Anglin
Public Utility Commission of Oregon
550 Capitol Street N.E. Suite 215
Salem, Oregon 97301-2551

**Re: ARB 671**

Dear Ms. Nichols Anglin:

Enclosed for filing in the above-captioned matter please find an original and five (5) copies of Universal Telecom, Inc.'s Final Brief. Copies of the same will be electronically filed and served on the parties electronically.

Kindly date-stamp as timely filed the additional copy enclosed and return it to the undersigned in the postage prepaid envelope also enclosed.

Please direct any questions regarding this matter to the undersigned. Thank you for your consideration of this matter.

Sincerely,

K.C. Halm

Enclosures

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**BEFORE THE**
**OREGON PUBLIC UTILITIES COMMISSION**

| In the Matter of the Petition of<br><br>**Qwest Corporation**<br><br>for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecom, Inc. | **ARB 671** |
|---|---|

**FINAL BRIEF**
**OF**
**UNIVERSAL TELECOM, INC.**


UNIVERSAL TELECOM, INC.

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November 18, 2005

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**BEFORE THE**

**OREGON PUBLIC UTILITIES COMMISSION**

| In the Matter of the Petition of<br><br>**Qwest Corporation**<br><br>for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecom, Inc. | **ARB 671** |
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**Final Brief of Universal Telecom, Inc.**

Universal Telecom, Inc. ("Universal") hereby files its final brief, which rebuts certain points made by Qwest Corporation ("Qwest") in its Reply Brief, and submits certain Qwest responses to Universal's data requests which support Universal's position on the disputed issues. Given the applicable page limit, Universal necessarily responds in a summary fashion to Qwest's misleading and erroneous statements.

## I. QWEST'S MISLEADING AND ERRONEOUS STATEMENTS MUST BE REJECTED BY THE COMMISSION

1) Judge Aiken's Factual Findings - Qwest denigrates the federal court's ruling in *Qwest Corp. v. Universal Telecom, Inc.*,[1] stating that Judge Aiken's factual findings are not "absolute truths"[2] and asking the OPUC to ignore her finding that ISP traffic is telecommunications traffic as that term is used in the FCC rules.[3] But Qwest offers no evidence that her findings are wrong, nor any reason why they should not be given substantial deference. In fact, Judge Aiken, after reviewing the same evidence Qwest presents here, found that: "Qwest and Universal have

[1] *Qwest Corp. v. Universal Telecom, Inc.*, 2004 LEXIS 28340 (D. Or., Dec. 15, 2004).

[2] Qwest Reply Brief at 4 (arguing that the facts stated in J. Aiken's opinion are not "absolute truths").

[3] *Id.* (stating that Qwest does not believe Judge Aiken intended to rule that ISP traffic is telecommunications –without offering any explanation of why that decision should be questioned).

interconnected their networks to allow this exchange of ***telecommunications*** traffic."[4]

2) Judge Aiken's Ruling on the Law - Qwest seeks to avoid the impact of Judge Aiken's ruling on the RUF issue by claiming that she merely interpreted the parties current contract, rather than generally applicable law.[5] But Judge Aiken's ruling, on its face, concludes that Qwest's charges – based on its erroneous interpretation of the RUF -- are unlawful ***as a matter of federal law***: "Under [FCC rules] § 51.703(b) and § 51.709(b) Qwest may not impose charges on Universal for facilities used solely to exchange one-way traffic that originated on Qwest's network and terminated on Universal's network."[6]

3) Qwest's Failure to Acknowledge the *Universal* and *Wantel* Rulings - Qwest also claims that Universal fails to address the "substantial body of law in Oregon in which the OPUC has ordered that ISP traffic be removed from a RUF calculation."[7] In fact, Universal fully briefed the OPUC's recent *Wantel* decision which – relying on *Qwest v. Universal*, *supra,* found that ISP traffic should not be excluded from RUF.[8] It is Qwest, not Universal, that has failed to acknowledge that current controlling OPUC law (*Wantel*) and federal law (*Qwest v. Universal*) demolishes its position on ISP traffic.

4) Universal's Legal Authority Includes ISP Traffic – Qwest also argues that all of the cases cited by Universal finding that ILECs can not charge for facilities or traffic on their network are distinguishable because ISP traffic was not at issue in those cases.[9] In fact, Universal's Initial Brief pointed out that ISP traffic was clearly at issue in the Fourth Circuit's

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4 *Qwest v. Universal*, 2004 LEXIS at *2 (emphasis added). Notably, Qwest raised the same arguments regarding the exclusion of ISP traffic before Judge Aiken. Nevertheless, the Judge found that the parties exchange telecommunications traffic and ultimately determined that FCC rules prohibit Qwest's charges.

5 Qwest Reply Brief at 18.

6 *Qwest v. Universal*, 2004 LEXIS at *14-15.

7 Qwest Reply Brief at 8.

8 *See* Universal Reply Brief at 9-10 (citing *Wantel* at 33).

9 Qwest Reply Brief at 15.

*MCImetro* case.[10] Moreover, the FCC's *Worldcom* decision, wherein the FCC said in Paragraph. 67 that "all LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' for termination," indisputably addresses ISP-bound traffic.[11] In addition, in *Qwest v. Universal,* Judge Aiken clearly ruled that this traffic is telecommunications under the FCC rules. That finding is supported by Qwest's statements in discovery responses that the traffic at issue here is delivered over Qwest's telecommunications network facilities via ***telephone*** numbers,[12] over local ***telephone*** "loops",[13] to end office and tandem ***telecommunications*** switches.[14]

5) <u>Qwest Does Not Provide Interconnection "Services" to Universal</u> – Qwest claims that its repeated use of the term local interconnection "services" is not a misnomer.[15] But Qwest clearly admitted in its discovery responses that although the parties have exchanged traffic for four years Universal does not purchase interconnection "services" from Qwest,[16] and that instead Qwest is obligated to interconnect and exchange traffic with Universal pursuant to its obligations under Section 251(c)(2).[17]

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[10] *See* Universal Initial Brief at 14; *citing MCI Metro Access Transmission Servs. v. BellSouth Telecomms., Inc.* 352 F.3d 872 (4th Cir. 2003). Excerpts from the North Carolina Commission's decisions below N.C. PUC LEXIS 398 (NCUC 2001) *and* 2001 N.C. PUC LEXIS 821 (NCUC 2001) are attached hereto to demonstrate ISP traffic clearly was an issue in that case (ISP traffic discussed as Matrix Issue No. 47).

[11] The FCC's WorldCom Arbitration Order addresses ISP-bound traffic in several sections. *See* Intercarrier Compensation Issues I-5 and ¶¶ 244, 246 and 261. *Petition of WorldCom, Inc. et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n*, Memorandum Opinion and Order, Wireline Comp. Bur., 17 FCC Rcd 27039 (2002).

[12] Qwest Response to Universal Data Response UTI 01-3.

[13] *Id.*

[14] *Id.*

[15] Qwest Reply Brief at 25.

[16] Qwest Response to Universal Data Response UTI 01-23.

[17] Qwest Response to Universal Data Response UTI 01-22.

## II. THE COMMISSION CANNOT DENY UNIVERSAL COMPENSATION FOR COSTS IT INCURS UNDER THE ACT

Section 251(b)(5) of the Communications Act, 47 U.S.C. § 251(b)(5), establishes a duty on all telecommunications carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Carriers are free to enter other compensation arrangements pursuant to 47 U.S.C. 252(a)(1),[18] but unless a CLEC voluntarily waives or modifies its statutory right to compensation – for example, by agreeing to a bill and keep arrangement – Section 251(b)(5) governs.[19] Here, of course, Universal has not volunteered to depart from its express federal law rights.[20] Instead, Universal insists that the Commission adopt contract language that hews to Universal's federal law rights.

There can be no doubt that the traffic terminated by Universal is comprised, at least in part, of "telecommunications" as that term is defined in federal law. Mr. Roderick has testified to this in his Pre-Filed Direct Testimony,[21] and Qwest has corroborated as much in its discovery responses.[22] Consistent with 47 U.S.C. § 153(43), Qwest transmits information that its end users choose (here, call set up and tear down information and content, or what Universal termed "bearer traffic" in its interrogatories) between the end user and the point it specifies (the ISP).

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[18] For example, in *Universal*, Judge Aiken found that the party's inclusion of the definition of "local" from Qwest's tariffs meant that only "truly local" ISP-bound traffic was subject to reciprocal compensation under the interconnection agreement at issue. *Qwest Corp. v. Universal Telecom, Inc.*, Civil No. 04-6047-AA, 2004 U.S. Dist. LEXIS 28340, at *25-31 (D. Or. Dec. 15, 2004).

[19] *See, e.g., Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc.*, ARB 589, Order No. 05-088 (issued Feb. 9, 2005).

[20] *See* Pre-filed Testimony of Stephen C. Roderick on behalf of Universal Telecom, Inc., ARB 671 (Oct. 21, 2005) (*Roderick Testimony*) at p.9, lines 13-15; *see also* Universal Reply Brief, ARB 671 at 21-27 (Universal noted that the *ISP Remand Order* was never limited to apply to only "local" ISP-bound traffic, rather it applies to all ISP-bound traffic).

[21] *See Roderick Testimony*, at p.2, lines 11-20.

[22] *See* Direct Testimony of Nancy J. Batz for Qwest Corporation, ARB 671 (Oct. 21, 2005) (*Batz Testimony*) at p. 4, lines 1-23 (describing call routing through the use of telephone numbers, local loops, and telecommunications end office and tandem switches); *see also*, Qwest Responses to Universal Data Requests Nos. UTI 01-3, and UTI 01-27 (describing telecommunications equipment used by Qwest to deliver calls to Universal) (attached hereto).

Further, Qwest does not effect a net change in the form or content of the information as sent and received by its end user.[23] There is no difference between the characteristics of VNXX versus "truly local" ISP-bound traffic; the former merely travels further over Qwest's network before termination by Universal.[24]

As Universal explained in its earlier briefing, the FCC originally subscribed to the notion of distinguishing "local" from "non-local" traffic for purposes of determining the scope of the reciprocal compensation obligation, but that effort was shot down by the D.C. Circuit (in *Bell Atlantic v. FCC,* 206 F.3d 1 (D.C. Cir. 2000) and then repudiated by the agency in the *ISP Remand Order.* And ***that*** ruling's attempt to exclude ISP-bound traffic from the scope of Section 251(b)(5) was struck down in *WorldCom v. FCC.*[25]

In the *ISP Remand Order,* the FCC had ruled that ISP-bound traffic was a species of "information access" traffic, as that term is used in 47 U.S.C. § 251(g);[26] it ruled that "information access" traffic (and other traffic identified in § 251(g)) is "carved out" of the reciprocal compensation obligation of § 251(b)(5);[27] and it exercised its authority under 47 U.S.C. § 201 to establish its interim compensation regime, under which ISP-bound traffic and "normal" traffic are compensated at the same rates, either high or low at the ILEC's option.[28]

In *WorldCom,* the D.C. Circuit said that the second point above was flatly wrong – that

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[23] Qwest Response to Data Request No. UTI 01-12 (acknowledging that "there is no protocol conversion that Qwest undertakes in order to deliver a call to a Universal POI in Oregon"); *and* Qwest Response to Data Request No. UTI 01-5 (stating that "with traffic to an ISP the call [is]... translated into TDM by the modem and delivered in TDM format to the POI");.

[24] *See Roderick Testimony*, at p.10, lines 2-16.

[25] 288 F.3d 429, 434 (D.C. Cir. 2002). The court did not vacate the *ISP Remand Order,* as it had vacated the FCC's earlier effort to deal with this question, 288 F.3d at 434, but it plainly and unequivocally rejected the legal theory on which the FCC had relied to exclude ISP-bound traffic. *Id.* at 430.

[26] *ISP Remand Order* at ¶¶ 42-47.

[27] *Id.* at ¶¶ 34-41.

[28] *Id.* at ¶¶ 52-65 (exercise of § 201 authority); ¶¶ 77-94 (establishing new regime).

the FCC was "precluded" from ruling that Section 251(g) excludes ISP traffic from the compensation regime under Section 251(b)(5).[29] At the same time, however, the court let the FCC's new compensation regime stand – not because it made sense to carve out ISP-bound traffic under §251(g) and then require compensation under §201 (which the FCC had done), but because there is "a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under §§ 251(b)(5) and 252(d)(B)(i))."[30]

Similarly, in *Pacific Bell v. Pac-West Telecomm., Inc.*,[31] the Ninth Circuit held that in light of *WorldCom,* even after the *ISP Remand Order*, "the FCC has yet to resolve whether ISP-bound traffic is 'local' within the scope of § 251," so there was no conflict between federal law and any state-level holding that ISP-bound traffic is "local" for purposes of reciprocal compensation.

Because federal law establishes a duty on Qwest to pay reciprocal compensation for the transport and termination of telecommunications, and because the traffic here is comprised of telecommunications, should the Commission fail to enforce Universal's federal law rights to compensation, this would be an impermissible regulatory taking under the Fifth Amendment of the United States Constitution.

There can be no doubt that the Commission's regulation pursuant to 47 U.S.C. § 251(b) and (c) affects Universal's property rights.[32] Universal owns and operates a "switch" at each of its Portland and Eugene locations.[33] Traffic from Qwest physically occupies Universal's

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29 *WorldCom,* 288 F.3d 430, 432.

30 *Id.* at 434.

31 325 F.3d 1114, 1130-31, n.15 (9th Cir. 2003).

32 In a Fifth Amendment context, Qwest's attempts to distinguish telecommunications from other types of traffic is irrelevant. Qwest's traffic traverses Universal's privately-owned switch and causes Universal to incur costs.

33 *See* Roderick at 2; *Batz Testimony,* p.4, lines 19-23.

switch.[34] Universal incurs costs to switch and terminate the traffic that Qwest originates.[35] Consequently, "[t]he creation of an entitlement in some parties to use the facilities of another, gratis, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)."[36] But even if the Commission's decision to excise certain types of this traffic from reciprocal compensation (*e.g.*, VNXX traffic) is analyzed only under the "essentially ad hoc, factual inquir[y]" used for regulatory takings,[37] a Commission decision that Universal must terminate anything but "truly local" ISP-bound traffic without compensation still amounts to a taking.

Although the Supreme Court has "been unable to develop any 'set formula' " for such regulatory takings, *Penn Central Transp. Co. v. New York City*,[38] it has "identified several factors – such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action – that have particular significance."[39]

Starting with the character of the government action – as in *Kaiser Aetna* – the challengeable action here would be the government's imposition on the property owner of a servitude or easement allowing others to use the property for free. In *Kaiser Aetna*, the government tried to impose a navigational servitude that would have allowed the public free

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[34] *See* Qwest Response to Universal Data Request No.UTI 01-3. (describing Universal equipment used by Qwest to deliver Qwest originated traffic).

[35] *See* Qwest Response to Universal Data Request No.UTI 01-6. *id.* (noting that "costs to Universal related to the two types of traffic can be significantly different ... [because] there are longer hold times for ISP traffic; therefore, more call time would be expended and higher costs for ISP traffic would result"); *see also id.* at Qwest Response to Universal Data Request No.UTI 01-07.

[36] *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 819 F. Supp. 32 at 67 n.10 (Williams, J., dissenting) (internal citation omitted) (D.D.C. 1993).

[37] *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

[38] 438 U.S. 104, 124 (1978).

[39] *Kaiser Aetna*, 444 U.S. at 175.

access to a private marina over the property owner's objections.[40] There, the public – like the traffic originated by Qwest's end users and destined for Universal's switch – was "an interloper with a government license."[41] The Supreme Court found a taking:

> [W]e hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.[42]

The same result would obtain in this case, as Universal faces a federal law duty to interconnect with Qwest (47 U.S.C. 251(a)) and there is no dispute that the traffic from Qwest actually physically "invades" Universal's privately-owned switch.[43]

The economic impact of a Commission decision that Universal must terminate Qwest-originated traffic without compensation is far greater than that of the navigational servitude at issue in *Kaiser Aetna*. There the public would have enjoyed "free access" to the marina "while [the property owners'] agreement with their customers call[ed] for an annual $72 regular fee."[44] Were the Commission to order Universal to terminate 700 million minutes of traffic annually[45] from Qwest, with no reciprocal compensation liability, Qwest would enjoy significant free use of Universal's switch – property rights worth considerably more than the foregone marina fees in

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40 444 U.S. at 169, 178.

41 *Florida Power*, 480 U.S. at 253.

42 *Kaiser Aetna*, 444 U.S. at 179-80 (internal citations and footnotes omitted); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (state could not, without paying compensation, require beachfront property owners to grant an easement allowing members of the public to pass across their property).

43 *See* Qwest Response to Universal Data Request No.UTI 01-6, 7 (discussing relative costs to Universal from switching Qwest originated traffic).

44 444 U.S. at 180.

45 *See Batz Testimony* at p.8, lines 17-18 (stating that "[i]n the past 13 months, Qwest has delivered in excess of 1 billion minutes of traffic to Universal in Oregon ...").

*Kaiser Aetna*, using the FCC's current reciprocal compensation rate for ISP-bound traffic.

Finally, there is the matter of Universal's reasonable, investment-backed expectations. Since 1999 Universal has invested significant sums in its facilities to comply with 47 U.S.C. § 251(a) and to be able to terminate traffic from Qwest and other carriers. These investments have created the opportunity, *inter alia*, for Qwest's end users to reach the Internet in an efficient and cost-effective manner. Depriving Universal of the ability to recover its costs for terminating all traffic would upset reasonable, investment-backed expectations and violate basic norms of fairness. The same sort of private investment predicated on announced government policy moved the Court in *Kaiser Aetna* to hold that the government could not subsequently compel free public access to the developer's private marina, and would instead have to pay just compensation.[46]

The Fifth Amendment does not prohibit Congress from enacting laws that take private property; it prohibits Congress from doing so without paying just compensation.[47] It is for this reason that the Taking Clause principles described above need not raise the same concerns with respect to such telecommunications policies as leased access for cable television system operators, or the interconnection, unbundling, and resale obligations imposed on telephone Local Exchange Carriers by the Telecommunications Act of 1996, or the regime of common carriage in general. Unlike a compulsory bill and keep arrangement, none of those programs imposes regulatory obligations without compensation for the use of the company's facilities. Leased

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[46] 444 U.S. at 169 (rejecting government's argument that petitioners' development of the marina "convert[ed] into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond"); *see also id.* at 167-69, 180 (detailing property owners' reliance on government's prior position).

[47] *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 342 n.1 (1986) (citation omitted) ("The Fifth Amendment provides 'nor shall private property be taken for public use, without just compensation.' The Fifth Amendment prohibition applies against the States through the Fourteenth Amendment."). *See, e.g., FirstEnglish Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

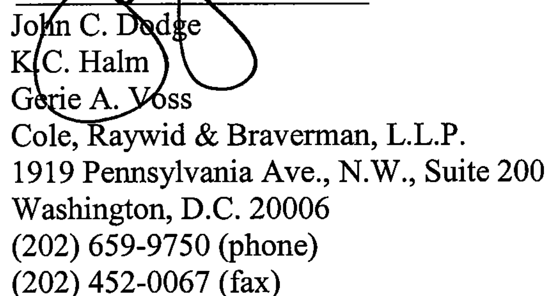
access allows a cable operator to receive payments, while interconnection, unbundling and resale are governed by the TELRIC rate-setting method supervised by the FCC.[48]

Universal respectfully submits that the *ISP Remand Order* avoids the perils of a regulatory taking precisely (or perhaps even inadvertently) because the FCC did not distinguish between types of (*i.e.*, VNXX vs. truly local) ISP-bound traffic subject to reciprocal compensation. Consequently, "[t]he line which separates [the *ISP Remand Order*] from *Loretto* is the unambiguous distinction" between a paying customer "and an interloper with a government license."[49] This Commission cannot Constitutionally undo what the FCC has done, namely, fashion a reciprocal compensation regime for ISP-bound traffic that pays just compensation for *all* ISP-bound traffic.

## III. CONCLUSION

For the reasons stated herein, the Arbitrator should adopt Universal's proposed contract language, and reject Qwest's proposed language.

Respectfully submitted,



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November 18, 2005

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48 *See Verizon Communications v. FCC*, 535 U.S. 467 (2002). In this regard, while FCC rules permit states to order bill-and-keep arrangements, such a result is only permissible when the state can find that the traffic will be roughly balanced in both directions. *See* 47 C.F.R. § 51.713(b). This is not a taking because the "roughly balanced" requirement means that each carrier is paid, in effect, in kind: each gets "credit" for traffic it terminates for the other, and uses that "credit" to pay for the traffic it originates.

49 *Florida Power*, 480 U.S. at 252-53.

# EXHIBIT 1 Qwest Responses to Universal Data Requests UTI 01-03, 06, 07, 12, 22, 23 and 27

Oregon
ARB 671
UTI 01-003

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 003

With respect to the "traffic" identified in Ms. Batz's testimony (see, e.g., p. 4, lines 1-23), please describe the separate component parts of an individual communication from the Qwest end user subscriber to the point of interconnection and hand off to Universal. Include in such description a statement with respect to each of the following component elements of an individual communication: extent of bearer traffic, any associated call set up and tear down functions, SS7 or other signaling, and any other associated element, or component part, of the communication.

RESPONSE:

Qwest hereby objects to Request No. 3 on the ground that it is not calculated to lead to the discovery of relevant evidence and the reference to "separate component parts," "bearer traffic," and "set up and tear down functions" are undefined and ambiguous. Without waiving those objections, Qwest responds as follows:

In general terms, using the Astoria example used by Ms. Batz, the end user customer located in the Astoria local calling area (who is simultaneously a customer of Qwest for local exchange service and an ISP served by Universal for his or her Internet access), the following are, in general terms, the component elements of such call:

1. The telephone number dialed by the end user customer is obtained by Universal from North American Numbering Plan Administration ("NANPA") and assigned by Universal to its ISP customers to serve such end user customers in the Astoria local calling area;

2. Through the end user customer's computer, the end user customer would go through a log-on procedure, which would include the end user customer's computer dialing the Astoria telephone number associated with the Universal's ISP customer;

3. The transmission of this information would use the local loop which facilitates the connection between the end user computer and the end office switch serving that customer;

4. Qwest's end office switch that serves the Astoria end user customer would recognize the call by the terminating telephone number (or Local Routing Number if the terminating telephone number is ported) dialed by the end user customer's computer as a call terminating to a Universal customer and, based on this interpretation, would attempt to route the call from the end office over Qwest interoffice facilities to Portland. The inter-switch transmission of that information would generally use the Signaling System 7 ("SS7"), an out-of-band signaling system;

5. The SS7 network would make a determination that a routing path is available beyond the point of interconnection ("POI") with Universal in the Pittock Building in Portland to the Universal

switching entity that is designated as Universal's Signaling Switching Point ("SSP") with the Destination Point Code (DPC) previously designated by Universal;

6. If the Universal's customer line is available and an inter-switch path is available the call would be transported over the inter-office facilities that are used to transport public switched traffic between switches;

7. Depending on traffic conditions and the location of the switch that is interconnected with the Universal POI located at the Pittock Building and other possible factors, the path could be a direct path set up using interoffice facilities that are connected to Universal's POI located in the Pittock Building or set up from the end office that serves the end user customer's computer over interoffice facilities to a tandem switch and then over interoffice facilities connected to Universal's POI.

While Qwest has described different components of this call, these various functions are completed in a manner that is imperceptible to the end user.

The service referred to in Ms. Batz's testimony is currently provided to Universal by Qwest from the end office in Astoria to the end office serving the Pittock Building is known as Direct Trunked Transport ("DTT") and the service from the end office serving the Pittock Building to the POI is known as an Entrance Facility ("EF"). In some cases, Qwest may provide a service known as multiplexing, which most likely occurs in the end office serving the Pittock Building.

Because the term "bearer traffic" is not used customarily by Qwest to describe interconnection between carriers, Qwest cannot respond to the "extent of bearer traffic" involved in such a call.

Oregon
ARB 671
UTI 01-006

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 006

Please identify and describe any technical reasons why Universal's costs of switching terminating traffic (as described generally in Ms. Batz's testimony), would differ as between terminating voice traffic and ISP-bound traffic?

RESPONSE:

Qwest hereby objects to Request No. 6 on the ground that it is not calculated to lead to the discovery of relevant evidence and the reference to "technical reasons" is undefined and ambiguous. Without waiving those objections, Qwest responds as follows:

Although Qwest has no specific information related to Universal's cost structure, it would be reasonable to assume that there are fundamental differences in cost between terminating voice traffic and ISP traffic.

Qwest has no reason to believe that Universal's per-minute switching costs to switch an ISP call would differ from Universal's costs of switching a voice call (although the latter is purely hypothetical since it does not appear that Universal switches voice calls). However, other costs to Universal related to the two types of traffic can be significantly different. One factor contributing to the costs difference would be the time spent on the call(s). The amount of usage and the hold times per call impact the costs of transport terminations as well as the cost of setting up the call and the conversation minutes. Generally, there are longer hold times for ISP traffic; therefore, more call time would be expended and higher costs for ISP traffic would result.

The following uses the Astoria example used in Ms. Batz's testimony. If, hypothetically, Universal provided local exchange service in Astoria, Oregon, and a Qwest customer in Astoria placed a local call to a Universal customer physically located in Astoria, Qwest would deliver the call to Universal's POI in Portland. At that point, Universal would bear the financial obligation to deliver the traffic back to its customer in Astoria, which is over 70 miles from Portland. This, of course, would require Universal to build or lease transport facilities from Portland to Astoria. In the case of ISP traffic, it is Qwest's understanding from Universal's testimony in the federal court litigation that an ISP call from an Astoria customer, once it is delivered to Universal's POI in Portland by Qwest, is answered by the modems provided by Universal which are located near the POI (a few feet away in the same building). Universal servers and routers at the same location then deliver the call to the Internet. Based on Universal's testimony, Universal leases a facility that allows traffic to be routed to the Internet to which Universal interconnects in the Pittock building. Thus, to deliver the ISP call to the Internet, Universal must transport the call a few feet, while to terminate the voice call to Astoria, Universal would need to build or lease over 70 miles of transport facilities. It is reasonable to conclude that the cost to transport the traffic to Astoria would be significantly higher than to deliver the traffic to an Internet facility located a few feet from Universal's

modems, servers, and routers in the Pittock Building.

If the call originated and terminating within the same LCA, Universal's termination costs may also differ depending on the length of the local loop connecting the terminating customer to Universal's equipment.

Oregon
ARB 671
UTI 01-007

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 007

Please identify and describe any technical reasons why Universal's costs of switching terminating traffic (as described generally in Ms. Batz's testimony), would differ as between VNXX and truly local traffic?

RESPONSE:

Qwest hereby objects to Request No. 7 on the ground that it is not calculated to lead to the discovery of relevant evidence and the reference to "technical reasons" is undefined and ambiguous. Without waiving those objections, Qwest responds as follows:

See Qwest's response to Request No. 6.

In addition, the cost of switching between VNXX and truly local traffic could differ based on length of the call, which may be a function of whether the CLEC provides both ISP traffic and voice traffic; in that case, the difference would be primarily due to the fact that the some traffic (ISP) typically has longer holding times than voice traffic.

While the switching costs for similar traffic may not be different on a per minute basis., as noted, in the response to Request No. 6, the cost to terminate the traffic could be very different depending on location and type of traffic.

Oregon
ARB 671
UTI 01-012

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 012

Describe any protocol conversion that Qwest undertakes in delivering a call to Universal, before Qwest hands the call off to Universal.

RESPONSE:

Qwest hereby objects to Request No. 12 on the ground that it is not calculated to lead to the discovery of relevant evidence, calls for a legal conclusion, and the reference to "protocol conversion" is undefined and ambiguous. Without waiving these objections, Qwest responds as follows:

> On the assumption that the phrase "protocol conversion" refers to a conversion from, for example, TDM to IP or IP to TDM, there is no protocol conversion that Qwest undertakes in order to deliver a call to a Universal POI in Oregon.

Oregon
ARB 671
UTI 01-022

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 022

Admit or deny that pursuant to 47 U.S.C. § 251(c)(2), Qwest has a duty to provide for the facilities and equipment of Universal, interconnection with Universal's network for the transmission and routing of telephone exchange service and exchange access.

RESPONSE:

Qwest hereby objects to Request No. 22 on the ground that it calls for a legal conclusion and is therefore an inappropriate subject for a request for admission. Without waiving that objection, Qwest hereby responds as follows: Section 251(c)(2) speaks for itself. The request is a partial quotation of section 251(c)(2). Including all subparts, Qwest admits that, as an ILEC, it is subject to section 251(c)(2).

Oregon
ARB 671
UTI 01-023

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 023

With respect to the statement in Qwest's Initial Brief in ARB 671, at the bottom of page 9, that "Universal also purchases multiplexing ("Mux") service"; please identify all services that Universal "also purchases" from Qwest, and proof of any remuneration by Universal of any services identified here.

RESPONSE:

Given that, with limited exceptions, Universal has not paid for LIS services, Qwest's statement should more appropriately have stated that Universal "has ordered and received multiplexing ("Mux") services" from Qwest.

Oregon
ARB 671
UTI 01-027

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 027

Please describe the functionality, technical characteristics and use of the following elements of Qwest's network, as described by Ms. Batz on page 4, lines 1-23 of her testimony:

a) Qwest local loops (Batz at 4,line 7); and

b) Qwest end office switch (id.); and

c) Qwest tandem switch (Id., at lines 20-21).

RESPONSE:

a) In general terms, a loop is the dedicated line between a home or business and the customer's serving end office. A loop may be twisted copper pair, or a combination of copper and fiber optics facilities. Its purpose is to connect an end-user customer to a serving end office so that the customer can have access to the public switched telephone system in order to make and receive calls.

b) In general terms, an end office switch is a switch that serves customers and to which loops are connected. The general purpose of an end office switch is to connect lines to lines, lines to trunks and trunks to lines. When an end-user makes a call, his or her end office switch makes the initial decision, based on the number called, whether to connect that line to another line or connect that line to a trunk.

c) In general terms, a tandem switch is an intermediate switch that connects only to other switches and not to end-user loops. The general purpose of a tandem switch is to connect trunks to trunks. When an end-user makes a call and the end office switch connects the customer's line to a trunk that is connected to a tandem, the tandem will then connect that trunk to a trunk that is connected to another switch. This is done based on instructions received from the end office switch to where the end user originated the call.

**EXHIBIT 2** **North Carolina Utility Commissions MCI Arbitration Order, 2001 N.C. PUC LEXIS 398 (2001); and 2001 N.C. PUC LEXIS 821 (2001) (Recon.). [Highlighted Sections Discuss ISP Traffic]**

In the Matter of Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996
RECOMMENDED ARBITRATION ORDER

DOCKET NO. P-474, SUB 10

North Carolina Utilities Commission

*2001 N.C. PUC LEXIS 398*

April 3, 2001

[*1] APPEARANCES: FOR MCIMETRO ACCESS TRANSMISSION SERVICES, INC., A SUBSIDIARY OF WORLDCOM, INC.: Ralph McDonald, Bailey & Dixon, L.L.P., Post Office Box 1351, Raleigh, North Carolina 27610 Kennard B. Woods and Dulaney L. O'Roark, III, WorldCom, Inc., 6 Concourse Parkway, Suite 3200, Atlanta, Georgia 30328
FOR BELLSOUTH TELECOMMUNICATIONS, INC.: Edward L. Rankin, III, General Counsel, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230 Bennett Ross, General Counsel, and Mike Twomey, General Counsel, BellSouth Telecommunications, Inc., 675 West Peachtree Street, NE, Atlanta, Georgia 30375
FOR THE USING AND CONSUMING PUBLIC: Lucy E. Edmondson, Staff Attorney, and Robert S. Gillam, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

**PANEL:** BEFORE: Commissioner Sam J. Ervin, IV, Presiding; Chairman Jo Anne Sanford, and Commissioners Ralph A. Hunt, Judy Hunt, J. Richard Conder, and Robert V. Owens, Jr. Commissioner Sam J. Ervin, IV, concurs in part and dissents in part. Commissioner Judy Hunts joins in Commissioner Ervin's Concerning and dissenting opinion.

**OPINION:** HEARD IN: Commission Hearing [*2] Room, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, beginning August 28, 2000 and ending August 30, 2000

BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission (Commission) pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (TA96 or the Act), *North Carolina General Statute 62-110(f1)* of the North Carolina General Statutes, House Bill 161, and various Commission Orders. MCImetro Access Transmission Services, LLC (MCIm), a subsidiary of WorldCom, Inc. filed a Petition for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. (BellSouth) on April 6, 2000, in this docket, which initiated this proceeding. By its Petition, MCIm requested that the Commission arbitrate certain terms and conditions with respect to interconnection between itself as the petitioning party and BellSouth.

With its Petition, MCIm filed the testimony of witnesses Gary Ball, Michael Messina, Marsha Emch, and Ronald Martinez.

On April 18, 2000, BellSouth filed a Motion to Resolve Certain Issues in the arbitration by addressing them in generic proceedings pending before the Commission. On April 20, [*3] 2000, MCIm filed its Response to BellSouth's Motion. On April 26, 2000, MCIm filed its Supplemental Response to BellSouth's Motion. On April 27, 2000, an Order Resolving Issues was issued.

On April 20, 2000, the Commission issued an Order Setting Hearing, which consolidated this arbitration proceeding with Docket No. P-55, Sub 1167, a complaint previously filed by MCIm against BellSouth.

On April 26, 2000, MCIm filed a Motion to Modify Testimony Filing Schedules. By Order dated April 27, 2000, the Commission modified certain filing dates.

On May 1, 2000, BellSouth filed its Response to MCIm's Petition for Arbitration, together with an issues matrix and

**EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11**

**MATRIX ISSUE NO. 36:** Does MCIm, as the requesting carrier, have the right pursuant to the Act, the FCC's First Interconnection Order, and FCC regulations, to designate the network point (or points) [*98] of interconnection at any technically feasible point?

**POSITIONS OF PARTIES**

**MCIm:** Yes. MCIm has the right pursuant to the Act, the FCC's Local Competition Order, and FCC regulations to designate the network point (or points) of interconnection at any technically feasible point. This includes MCIm's right to designate a single point of interconnection (such as at BellSouth's access tandem) for termination of traffic throughout the LATA.

**BELLSOUTH:** MCIm has the right to designate the point of interconnection at any technically feasible point for its originating traffic. However, MCIm should bear the cost of any facilities that BellSouth must provide on MCIm's behalf in order to extend BellSouth's local network to the point of interconnection that MCIm designates. BellSouth's position is consistent with the position advocated by MCIm in comments filed with the FCC in 1996.

**PUBLIC STAFF:** Each party should be allowed to designate no more than one point of interconnection per local calling area for its originating traffic and should be responsible for the cost of delivering the traffic to that point. MCIm does not have the right to designate the point of interconnection for [*99] both parties' traffic.

**DISCUSSION**

In the final analysis, this issue requires a determination of which party, MCIm or BellSouth, will be financially responsible for paying the costs of transporting a call when the POI is within the LATA, but outside the local calling area in which the call originates, and vice versa. When a BellSouth customer in a local calling area originates a call to an MCIm customer within the same local calling area, but the MCIm POI is outside the local calling area of the parties, there remains the question of who incurs the cost of transport facilities. The calls that utilize the facilities in question are calls that originate in one BellSouth local calling area and are intended to be completed in that same local calling area but have to be routed out of that local calling area because of MCIm's network design.

This issue exists because MCIm and BellSouth have each built and intend to utilize totally separate and different networks for the provision of local service in North Carolina. Each carrier's local network was designed to be the most efficient and cost effective for that carrier. BellSouth's system consists of a number of local networks that have [*100] developed over time, and each BellSouth local network is generally characterized by the use of multiple local switches and relatively short loops to serve its customers in a given local calling area. MCIm, on the other hand, has a single switch in North Carolina to serve its customers. As a result, while BellSouth has numerous switches in North Carolina, MCIm proposes to have one POI per LATA, with each company delivering its traffic to the other carrier for termination. BellSouth does not quibble with MCIm's proposal, except it contends that MCIm should bear the cost for transport of BellSouth's traffic if MCIm's designated POI is outside of the local calling area where the BellSouth traffic originates. The Public Staff supports BellSouth's position.

MCIm believes that based on Federal law, MCIm has the right to choose the point of interconnection for local traffic exchanged by MCIm and BellSouth. As presented by MCIm, the Act provides that BellSouth has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . at any technically feasible point within the local exchange carrier's [*101] network". Section 251(c)(2) of the Act. MCIm stated that the Act does not give BellSouth a choice as to where the interconnection point will be; BellSouth must allow the requesting carrier to interconnect at any technically feasible point. MCIm believes that in implementing the Act, the FCC emphasized this principle in the First Interconnection Order at Paragraph 172, stating:

> The interconnection obligation of section 251(c)(2) . . . allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carrier's cost of, among other things, transport and termination of traffic.

MCIm stated that exchanging traffic involves each party sending traffic to the other. Thus, MCIm argued it is entitled to select the POI for both Parties' originating traffic.

MCIm pointed out that, more recently, the FCC has ruled in its Texas 271 Order that a CLP may choose to interconnect with an ILEC at a single point. The FCC stated that: "Section 251, and our implementing rules, require an incumbent LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only [*102] one technically feasible point in each LATA". MCIm proposed that, if a CLP has the right to interconnect with the ILEC's network at only one point, clearly the ILEC does not have the right to designate additional points for its own originating traffic. MCIm stated that the Texas Commission also has affirmed a CLP's right to designate a single point of interconnection per LATA. The Public Utility Commission of Texas (Revised Arbitration Award, Docket No. 22315, September 27, 2000), found that a single POI is technically feasible, that technical feasibility refers solely to technical and operational concerns, rather than economic, space, or site considerations, and that SWBT (an ILEC) cannot compel AT&T (a CLP) to interconnect at multiple points.

According to MCIm, MCIm's right under the Act to choose a single POI (and thus the POI for both parties' traffic) has been affirmed by every court to review the issue. To illustrate this point, MCIm pointed to the United States District Court for the Middle District of Pennsylvania's affirmation of a Magistrate's decision establishing MCIm's right to interconnection at a single technically feasible POI and reversing a decision by the Pennsylvania [*103] Commission specifying multiple points of interconnection. MCI v. Bell Atlantic-Pennsylvania, Civil No. 1:CV-97-1857, Memorandum and Order, p. 14 (M.D. Pa. June 30, 2000). Furthermore, as presented by MCIm, the Ninth Circuit upheld provisions in an MFS contract permitting a single POI per LATA, citing Section 251(c)(2) of the Act and noting that "the plain language requires local exchange carriers to permit interconnection at any technically feasible point within the carrier's network". *U.S. West v. MFS Intelenet, 193 F.3d 1112 (9th Cir. 1999).*

According to MCIm, BellSouth expressed concern about MCIm having the right to choose the POI with regard to situations in which MCIm serves a customer in one local calling area with a switch in another local calling area designated as the POI. MCIm stated that under this situation, MCIm could choose the POI for its originating traffic. MCIm remarked that it would be responsible for building facilities or using the facilities of BellSouth or another carrier for the transport of MCIm's customers' originating calls from the POI to the local calling area in question. MCIm reasoned that its right to choose the POI [*104] for its originating traffic would be rendered meaningless as a practical matter under BellSouth's proposal. According to MCIm, BellSouth believes that it should be free to establish a POI in each local calling area. MCIm stated that this position would make MCIm responsible for transporting calls originating from BellSouth's customers from those POIs back to MCIm's network.

MCIm stated that its proposal complies with the law and is fair to both Parties. According to MCIm, it would be entitled to choose the point or points of interconnection, but of course would be required to do so at a point on BellSouth's network. Furthermore, MCIm would establish an interconnection point in each LATA in which it originates traffic; with each party being responsible for bringing its originating traffic to the POI and each party would be responsible for transporting and terminating the other party's traffic from the POI. MCIm stated that it would start out with a single POI within a LATA and then grow the business as the customers dictate.

BellSouth pointed out that this issue requires a determination of whether MCIm or BellSouth is going to be financially responsible for certain facilities needed [*105] to carry local traffic from a BellSouth local calling area to a distant single POI established by MCIm in each LATA. BellSouth stated that the calls that utilize the facilities in question are calls that originate in one BellSouth local calling area and are intended to be completed in that same local calling area, but that have to be routed out of that local calling area because of MCIm's network design. BellSouth noted that in the Public Staff's Proposed Recommended Arbitration Order in the BellSouth v. AT&T case, Docket Nos. P-140, Sub 73 and P-646, Sub 7, the Public Staff asserted that each party should be responsible for the cost of delivering its originating traffic to the point of interconnection within each local calling area.

As stated by BellSouth, this issue exists because MCIm and BellSouth have each built and intend to utilize totally separate and different networks for the provision of local service in North Carolina. Each carrier's local network was designed to be the most efficient and cost-effective for that carrier. BellSouth stated that its system consists of a number of local networks that have developed over time and each local network is characterized by the [*106] use of multiple local switches. Also, as commented on by BellSouth, MCIm has a single switch in North Carolina.

According to BellSouth, MCIm and BellSouth cannot agree on who should pay for the facilities necessary to get to and from BellSouth customers. As stated by BellSouth, when MCIm deliberately, and for its own purposes, chooses to have a single POI in a LATA, the question is who should pay for the consequences of that decision. BellSouth asserted that these facilities are the responsibility of MCIm. As pointed out by BellSouth, MCIm maintained that BellSouth is

responsible for collecting all of the originating BellSouth local traffic, wherever that may be, and for transporting such traffic at no cost to MCIm to MCIm's single POI.

BellSouth stated that MCIm can determine its own local calling area for its subscribers and that this is not at issue. As contended by BellSouth, the issue involves facilities that are used to carry traffic between BellSouth's subscribers in a BellSouth local calling area and MCIm's POI that is located in a different BellSouth local calling area in the LATA. BellSouth stated that MCIm is free to designate its local calling area for calls originated [*107] by its subscribers.

As stated by BellSouth, MCIm suggested that the Commission resolve this issue by requiring BellSouth to bear the cost of any facilities used to haul BellSouth's traffic from one local calling area to another -- facilities that are only necessary as a result of MCIm's network design. According to BellSouth, MCIm has chosen the most economical way for it to provide local service in North Carolina. However, BellSouth stated that allowing MCIm to shift costs to BellSouth as a result of that design is neither equitable nor fair.

According to BellSouth, part of MCIm's argument is that adopting BellSouth's proposal would force MCIm to build facilities to every BellSouth local calling area, which BellSouth countered as being absolutely inaccurate. BellSouth pointed out that MCIm can lease facilities from BellSouth or any other entity to collect traffic from local calling areas in which its POIs are found. BellSouth stated that nothing in BellSouth's proposed solution to this issue would require MCIm to build another foot of cable devoted to local service in North Carolina beyond that required to establish a single POI in the LATAs MCIm chooses to serve.

BellSouth stated [*108] that when viewing the equities of the situation, it is clear that BellSouth's position that MCIm should be financially responsible for these facilities is the most equitable. Additionally, BellSouth stated that MCIm has caused these facilities to be needed and this cost to be incurred and that it should pay for those facilities.

In its Proposed Order, the Public Staff stated that each Party should be able to designate the POIs where it hands off its originating traffic. The Public Staff maintained that there is no justification for treating an ILEC any differently from a competing carrier on this issue. As stated by the Public Staff, BellSouth should be allowed to designate a POI in each local calling area and should not be required to transport the call to an interconnection point outside of the local calling area without compensation for such transport. As stated by the Public Staff, clearly there are costs associated with the transport of calls between local calling areas. The Public Staff argued that MCIm had not presented adequate justification for requiring BellSouth to bear the costs of transport that would arise if there were no interconnection point within a local calling [*109] area.

Based upon a careful consideration of the entire record, the Commission concludes that there is no case or principle that is legally dispositive of the result on this issue. Rather, the law allows, and the greater equity demands, that, if MCIm interconnects at points within the LATA but outside BellSouth's local calling area from which traffic originates, MCIm should be required to compensate BellSouth for, or otherwise be responsible for, transport beyond the local calling area. The Commission further concludes that this holding does not violate any FCC rule or case law and that is more equitable than not and in the greater public interest. The Commission believes that it would be inequitable to allow MCIm to choose POIs that minimize its costs while ignoring the effect of such choices on BellSouth.

This is not to imply that MCIm should be required to establish a POI in every local calling area. The Commission is aware of several cases that hold that such a requirement is contrary to TA96 and FCC rules n4, and we concur in that MCIm has a wide array of choices for the location of its POIs. However, when it chooses the site of the POIs, it must consider the total cost of each [*110] alternative, not merely the direct costs, but also those of BellSouth that should properly be assigned to MCIm. While MCIm may avoid the cost of transport entirely by establishing a POI in each BellSouth local calling area, it certainly may choose instead to have one POI per LATA and pay the transport for calls originating in another local calling area than the one where the POI is located.

n4 U.S. West Communications, Inc. v. Hix, et al., No. C97-D-152, (D. Colo., June 23, 2000); *U.S. West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 31 F.Supp.2d 839* (D. Or. Dec. 10, 1998), rev'd in part, vacated in part on other grounds, *U.S. West Communications, Inc. v. Hamilton, 224 F.3d 1049,* (9th Cir.(Or.) September 13, 2000)

The questions addressed above, especially the question of responsibility for transport costs, were also dealt with exhaustively in the AT&T/BellSouth arbitration proceeding (Docket Nos. P-140, Sub 73 and P-646, Sub 7). The issues

raised here are clearly analogous to those raised in that proceeding, and there is no need to repeat our analysis here. That analysis, [*111] including our discussion of and conclusions regarding relevant case law as well as the applicability of FCC Rule 51.703(b), is hereby incorporated by reference. Accordingly, the Commission believes that the POI and associated transport issues should be resolved in the same way as in the AT&T/BellSouth proceeding.

**CONCLUSIONS**

The Commission concludes that, if MCIm interconnects at points within the LATA but outside of BellSouth's local calling area from which traffic originates, MCIm should be required to compensate BellSouth for, or otherwise be responsible for, transport beyond the local calling area. The Commission further concludes that this holding does not violate any FCC rules or case law and that it is equitable and in the public interest. However, if MCIm should feel aggrieved by the ruling in this Order, the Commission suggests that MCIm may wish to seek a declaratory ruling from the FCC, so that a more definitive statement of this issue may be received from that source.

**EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12**

**MATRIX ISSUE NO. 37**: Should BellSouth be permitted to require MCIm to fragment its traffic by traffic type so it can interconnect with BellSouth's [*112] network?

**POSITIONS OF PARTIES**

**MCIm:** No. MCIm should have the right to require the use of two-way trunks and to combine local, intraLATA, and transit traffic on one trunk group.

**BELLSOUTH:** The Parties generally agree on the different trunk groups that should be used to interconnect their respective networks. The only dispute concerns transit traffic, which BellSouth believes should be carried on separate trunk groups in order to ensure the correct billing of such traffic.

**PUBLIC STAFF:** BellSouth's obligation to accommodate two-way trunking when requested by a CLP if it is technically feasible and there is not sufficient traffic to justify one-way trunks does not affect its right to choose the point of interconnection for its originating traffic. There is insufficient evidence in the record to make a determination on the issue of transit traffic on one-way or two-way trunks. BellSouth and MCIm refer to billing and traffic type identification problem with no clear statements of what problem actually exists. BellSouth and MCIm should file reports with the Commission, within 14 days from the date of the Commission's Order, as to the specific reasons transit traffic can or [*113] cannot be aggregated with local and intraLATA toll traffic on two-way trunks.

**DISCUSSION**

This issue concerns trunk fragmentation, which is the separation of different types of traffic onto different trunk groups. MCIm's proposed language in Section 2.2.7 of Attachment 4 to the Interconnection Agreement would prohibit trunk group fragmentation by traffic types except as specified in the Interconnection Agreement. More specifically, this issue concerns whether transit traffic should be on a separate trunk group as proposed by BellSouth or whether the transit traffic should be on the same trunk group with local traffic and certain toll traffic as proposed by MCIm. Transit traffic is traffic that originates on one carrier's network, is switched and transported by BellSouth, and then is sent to another carrier's network.

MCIm witness Olson testified that there is no technical requirement to segregate local, intraLATA interexchange (toll) traffic, and transit traffic on separate trunk groups and that MCIm proposed to combine these three traffic types on one trunk group for network efficiency reasons. He explained that because these types of traffic are "rated" differently, the receiving [*114] carrier would either have to have a way to discern the jurisdiction of the traffic or rely on reporting by the sending carrier, via a "percent local usage" (PLU) or similar reporting mechanism. Under cross-examination by BellSouth counsel, witness Olson testified that with today's billing systems, BellSouth really should not have a problem telling what kind of traffic is on a trunk group. However, with respect to billing for traffic handled over a combination trunk, witness Olson later testified under cross-examination by Public Staff counsel that he thought BellSouth has a billing problem. He elaborated that MCIm had offered to share billing tapes with BellSouth to make sure BellSouth can properly bill and collect what BellSouth is owed due to a recording problem in many BellSouth switches. Finally, in a deposition on August 14, 2000, before the Georgia Public Service Commission in Docket No. 11901-U, witness Olson

MCIm FX customers are to be considered local and, therefore, subject to reciprocal compensation.

**CONCLUSIONS**

The Commission concludes that calls within a LATA originated by BellSouth customers to MCIm FX customers are to be considered local and, therefore, subject to reciprocal compensation.

**EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18**

**MATRIX ISSUE NO. 47:** Should reciprocal compensation payment be made for ISP-bound traffic?

**POSITIONS OF PARTIES**

**MCIm:** Yes. Reciprocal compensation payments should be applicable to calls made from one carrier's customers to the ISP customer of the other carrier. The terminating carrier incurs the cost of termination for ISP-bound calls in the same way as for any other local call.

**BELLSOUTH:** No. Reciprocal compensation should not apply to ISP-bound traffic. Based on the Act and the FCC's First Report and Order, reciprocal compensation obligations under Section 251(b)(5) only apply to local traffic. ISP-bound [*175] traffic constitutes exchange access service, which is clearly interstate and not local traffic. Nevertheless, without waiving its rights, BellSouth is willing to abide by the prior Commission decisions on this issue until the FCC establishes an inter-carrier compensation mechanism for ISP-bound traffic.

**PUBLIC STAFF:** Yes. Reciprocal compensation is due on calls terminated to an ISP at the same rate and in the same manner as local traffic subject to true-up based on the ultimate decision by the FCC regarding methodology.

**DISCUSSION**

The Commission recognizes that the FCC has rendered an opinion that ISP-bound traffic is essentially non-local interstate traffic. The Commission has been careful to defer to this ruling in any arbitration concerning "new" interconnection agreements -- i.e., agreements entered into subsequent to the FCC's Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No 99-68, issued February 26, 1999 (Declaratory Ruling) -- by requiring an interim inter-carrier compensation mechanism subject to true-up based on the FCC's ultimate decision regarding methodology. The Commission has continued to do this even in spite [*176] of the fact that the D.C. Circuit Court of Appeals vacated and remanded the FCC's Declaratory Ruling and so cast it into limbo, at least for the time being See *Bell Atlantic Tel. Co. v. FCC, 206 F.3d 1 (D.C. Cir. 2000).*

The Commission continues to view the establishment of an interim inter-carrier compensation mechanism for ISP-bound traffic -- which is otherwise identical to that for non-ISP-bound traffic but which is subject to true-up once the FCC has decided upon a methodology and the Commission has implemented it--as a fair method to resolve this contentious issue. The Commission notes that BellSouth is willing to abide by this decision.

**CONCLUSIONS**

The Commission concludes that the Parties should establish an interim inter-carrier compensation mechanism for ISP-bound traffic which is identical to that for non-ISP-bound traffic but which is subject to true-up once the FCC has decided upon a methodology for ISP-bound traffic and the Commission has implemented it.

**EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 19**

**MATRIX ISSUE NO. 51:** Under what circumstances is BellSouth required to pay tandem charges when MCIm terminates BellSouth [*177] local traffic?

**POSITIONS OF PARTIES**

**MCIm:** BellSouth is required to pay tandem charges whenever MCIm's network provides functionality equivalent to that of a tandem switch. In particular, such compensation is required when a MCIm local switch covers a geographic area comparable to the area served by a BellSouth tandem.

In the Matter of Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996

DOCKET NO. P-474, SUB 10

North Carolina Utilities Commission

*2001 N.C. PUC LEXIS 821*

August 2, 2001, Issued

**PANEL:** [*1] BEFORE: Commissioner Sam J. Ervin, IV, Presiding; Chairman Jo Anne Sanford and Commissioners Judy Hunt, J. Richard Conder, Robert V. Owens, Jr., and Lorinzo L. Joyner. Commissioner Sam J. Ervin, IV dissents in part by separate opinion. Commissioner Judy Hunt joins in Commissioner Ervin's separate dissenting opinion. Commissioner James Y. Kerr, II, did not participate.

**OPINION:** ORDER RULING ON OBJECTIONS AND REQUIRING THE FILING OF THE COMPOSITE AGREEMENT

BY THE COMMISSION: This proceeding involves a petition filed by MCImetro Access Transmission Services, LLC (MCIm) seeking arbitration of an interconnection agreement with BellSouth Telecommunications, Inc. (BellSouth). On April 3, 2001, the Commission entered a Recommended Arbitration Order (RAO) in this docket. As part of that Order, the Commission made the following

FINDINGS OF FACT

1. BellSouth may impose manual operations support systems (OSS) nonrecurring charges (NRCs) when MCIm orders unbundled network elements (UNEs) manually and BellSouth, itself, does not have the capability to order electronically for its own retail operation or when BellSouth has an electronic interface and has provided MCIm with comparable capability to order UNEs [*2] electronically, and MCIm instead chooses to order manually. Conversely, BellSouth may not impose manual OSS NRCs when BellSouth has the capability to order electronically, but is not offering such comparable capability to MCIm to order UNEs electronically. Further, the Parties are encouraged to continue their negotiations to develop mutually agreed upon language for inclusion in the Interconnection Agreement that is consistent with the foregoing.

2. If any service contained in the Access Tariff is offered primarily or substantially to end users rather than interexchange carriers (IXCs), BellSouth must make the service available to local carriers at wholesale rates, for the purpose of resale.

3. BellSouth is not required to provide operator services and directory assistance (OS/DA) as a UNE because it is currently providing customized or selective routing which would enable MCIm to use an alternative OS/DA provider. The Parties should continue testing these routing methods and, if the testing is successful, then the Parties should include language in the Interconnection Agreement outlining how the service will be provisioned. The Parties are encouraged to strive to successfully negotiate [*3] a mutually agreed upon price for this service.

4. To the extent BellSouth has substantially different loop offerings which do not have national technical specifications, BellSouth may use its technical standards. However, to the extent BellSouth's loop offerings are substantially the same as those for which national technical standards have been established, BellSouth must use the national technical specifications for that particular loop. Additionally, MCIm may, at its discretion, file a complaint with the Commission if at any point it believes BellSouth is imposing improper terms and conditions through its technical specifications.

5. BellSouth should transmit Automatic Numbering Identification (ANI)-II digits to MCIm via Feature Group D signaling when MCIm acquires the unbundled network element platform (UNE-P) except where it is not technically feasible. The Interconnection Agreement between the Parties should identify those instances in which technical limitations

The Public Staff stated that, in its view, this language indicates that the FCC did not intend to require an ILEC to accommodate two-way trunking when the requesting CLP's network does "carry a sufficient amount of traffic to justify separate one-way trunks." Consequently, the Public Staff recommended that the Commission should not adopt the position of the Georgia and Florida Commissions, but should adhere to its present position. The Public Staff noted that the Georgia Commission's order indicates that it did not take paragraph 219 of the Interconnection Order into consideration at all, and the Florida Commission does not appear to have given that paragraph sufficient weight.

The Public Staff stated it agrees with the Florida Commission that this issue is essentially one of sound engineering practices. The Public Staff noted that the Florida Commission stated at page 69 of its [*23] March 30, 2001 order: "WorldCom's and BellSouth's trunk engineers should cooperatively work together to decide when to use two-way trunking on a case-by-case basis that is mutually beneficial for both parties. We note that both parties agree with this suggestion." The Public Staff contended that there should be no presumption that either one-way or two-way trunks are appropriate. Instead, the Public Staff contended that the Parties should confer and determine which type of trunking will be more efficient under the circumstances in a given fact situation. The Public Staff stated that if they are then unable to agree, the Commission can resolve the issue. The Public Staff expressed confidence that in almost all situations the Parties will be able to reach agreement by focusing on efficiency and sound engineering practices.

**DISCUSSION**

The Commission agrees with the Public Staff's assessment of the FCC's language in paragraph 219 of the Interconnection Order that the FCC did not intend to require an ILEC to accommodate two-way trunking when the requesting CLP's network does "carry a sufficient amount of traffic to justify separate one-way trunks." We, therefore, believe that our [*24] decision in the RAO on this issue is correct and that BellSouth is obligated to utilize two-way trunks upon MCIm's request, but only where it is technically feasible and there is not sufficient traffic to justify one-way trunks.

In addition, the Commission agrees with the Public Staff that the Parties should not presume that either one-way or two-way trunks are appropriate in a given fact situation, but should instead confer and determine which type of trunking will be more efficient by focusing on efficiency and sound engineering practices. If the Parties are unable to reach agreement, they can then request the Commission to resolve the issue.

**CONCLUSIONS**

The Commission affirms and upholds its original decision that BellSouth is obligated to utilize two-way trunks upon MCIm's request, but only where it is technically feasible and there is not sufficient traffic to justify one-way trunks.

**FINDING OF FACT NO. 11 - MATRIX ISSUE NO. 36:** Does MCIm, as the requesting carrier, have the right pursuant to the Act, the FCC's First Interconnection Order, and FCC regulations, to designate the network point (or points) of interconnection at any technically feasible point?

**INITIAL [*25] COMMISSION DECISION**

The Commission concluded that MCIm may designate its own points of interconnection (POIs) with BellSouth's network. Further, if MCIm interconnects at points within the local access and transport area (LATA) but outside of BellSouth's local calling area from which the traffic originates, MCIm should be required to compensate BellSouth for, or otherwise be responsible for, transport beyond the local calling area.

**OBJECTIONS**

**BELLSOUTH:** BellSouth did not object to this Finding of Fact.

**ITCDELTACOM:** ITCDeltaCom did not comment on this Finding of Fact.

**MCIm:** While the Commission appears to have agreed with MCIm that it has the right to choose the POI between its network and that of BellSouth, the Commission erred in finding MCIm responsible for the transport of traffic originated inside the LATA but outside the BellSouth local calling area for the reasons as generally stated in Commissioner Ervin's dissent, joined in by Commissioner Judy Hunt.

**RESPONSES**

**BELLSOUTH:** BellSouth stated in its Response that the Commission has correctly ruled on this issue for the reasons as generally set forth in the Recommended Arbitration Order. BellSouth also [*26] referred to Paragraph 209 of the FCC's Local Interconnection Order where the FCC stated that "because competing carriers usually compensate incumbent LECs for additional costs incurred in providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect." The Commission's decision was just and equitable.

**ITCDELTACOM:** ITCDeltaCom did not address this issue in its comments.

**MCIm:** MCIm was the objector and therefore did not provide a Response.

**PUBLIC STAFF:** The Public Staff noted that MCIm had bought forth no new authority or argument that the Commission has not previously considered. Moreover, the FCC has indicated that the question is far from definitively settled and in its Unified Intercarrier Compensation Notice of Proposed Rulemaking (Paragraphs 112-114) earlier this year has called for comments. The Commission's finding in this issue is well-reasoned and should stand.

**DISCUSSION**

This issue was addressed both within this docket and Docket No. P-140, Sub 73 and Docket No. P-646, Sub 7 (AT&T/BellSouth Arbitration). In the AT&T/BellSouth Order Ruling on Objections and Requiring the Filing of the Composite [*27] Agreement, with reference to this issue, the Commission justly observed that "this issue has been one of the most exhaustingly analyzed and briefed issues the Commission has ever dealt with in an arbitration proceeding."

The Commission went on to observe that no new arguments had been brought forward on reconsideration by the competition; that it believed that the law was hardly dispositive in the competitor's favor; and that, indeed, fairness required in this case the opposite result from that favored by the competitor. The Commission also noted that the FCC has solicited comments on the issue in its Notice of Proposed Rulemaking in CC Docket No. 01-92, issued on April 27, 2001. To the Commission, this was a further indication that the proposition that the CLP should bear no transport costs in the instant context is less obvious than some parties believe.

The very same considerations apply here. MCIm has brought forward no new evidence or arguments that would persuade the Commission to reconsider its decision on this issue. Accordingly, for the reasons stated above and in the original RAO, the Commission reaffirms its decision herein.

**CONCLUSIONS**

The Commission upholds and affirms [*28] its original decision on this matter.

**FINDING OF FACT NO. 12 (MATRIX ISSUE NO. 37):** Should BellSouth be permitted to require MCIm to fragment its traffic by traffic type so it can interconnect with BellSouth's network?

**INITIAL COMMISSION DECISION**

In its RAO, the Commission noted that this issue primarily concerns whether transit traffic should be on a separate trunk group from other traffic, as proposed by BellSouth, or whether transit traffic should be on the same trunk group with local and intraLATA toll traffic, as proposed by MCIm. Transit traffic is traffic that originates on one carrier's network, is switched and transported by BellSouth, and then is sent to another carrier's network.

The Commission pointed out that BellSouth and MCIm had referred to billing and traffic type identification problems, but they had not provided a clear statement of what problems actually exist, if any. Therefore, the Commission concluded that there was insufficient evidence in the record to make a determination on this issue. The RAO directed BellSouth and MCIm to negotiate further on this issue. If they could not reach agreement after further negotiation, the RAO stated that BellSouth [*29] and MCIm should file a report in this docket by May 3, 2001, as to the specific reasons why transit traffic can or cannot be aggregated on a single trunk group.

**OBJECTIONS**

**BELLSOUTH:** BellSouth objected to Finding of Fact No. 12 and stated that the fragmentation of transit traffic from local traffic on separate trunk groups is necessary and essential in order to ensure proper billing. BellSouth also reported

BellSouth argued that if ITCDeltaCom's position were adopted, CLPs could collect reciprocal compensation for calls originating in North Carolina and terminating in New York or Chicago. BellSouth maintained that clearly the reciprocal compensation created by TA96 for the exchange of local traffic was never intended to apply to such interstate calls.

BellSouth noted that while ITCDeltaCom attempts to distinguish the FCC's decision in the New York Telephone Company - *Exchange System Access Line Terminal Charge for FX and CCSA Service, Memorandum Opinion and Order, 76 F.C.C. 2d 349 (1980),* ITCDeltaCom offered no rebuttal to the other state commission decisions such as Maine, Texas, and Illinois cited [*62] by BellSouth which support BellSouth's position. BellSouth noted that the decisions in the states mentioned are more restrictive than the Commission's decision in the RAO.

BellSouth recommended that the Commission overrule ITCDeltaCom's objection and adopt the decision in the RAO for Finding of Fact No. 17 as final.

**ITCDELTACOM:** ITCDeltaCom objected to this Finding of Fact and, therefore, did not provide a response.

**MCIm:** MCIm did not address this issue in its Response.

**PUBLIC STAFF:** The Public Staff did not address this issue in its Response.

**DISCUSSION**

The Commission notes that its conclusion in the RAO limiting its decision to calls within a LATA originated by BellSouth customers to MCIm FX customers was due primarily to MCIm's own witness' testimony during the hearing. As the RAO noted, MCIm witness Price agreed during cross-examination at the hearing that a call from a BellSouth customer in Lenoir, North Carolina to a MCIm FX customer in Denver, Colorado is not a local call by virtue of the fact that the call crosses LATA boundaries. Further, witness Price stated that MCIm would be willing to agree to never assign an NPA/NXX code to a customer physically [*63] located outside of the LATA if it would resolve this issue. In this arbitration docket, MCIm's own witness agreed that a call from a BellSouth customer in Lenoir, North Carolina to a MCIm FX customer in Denver, Colorado is not a local call by virtue of the fact that the call crosses LATA boundaries. Therefore, it was completely logical for the Commission with this record to limit its decision to calls within the LATA.

The Commission also notes that the RAO specifically states that its decision in this regard was based on the evidence presented in this case.

Based on the comments of ITCDeltaCom and a review of the RAO, the Commission finds it appropriate to clarify that the decision reached by the Commission in this docket is based solely on the evidence produced in this record and is made without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for reciprocal compensation.

**CONCLUSIONS**

The Commission upholds and affirms its original decision in this regard, subject to the clarification that its decision is made without prejudice to future proceedings concerning the eligibility of FX calls that cross LATA boundaries for [*64] reciprocal compensation.

**FINDING OF FACT NO. 18 - MATRIX ISSUE NO. 47:** Should reciprocal compensation payments be made for ISP-bound traffic?

**INITIAL COMMISSION DECISION**

The Commission concluded that the Parties should establish an interim inter-carrier compensation mechanism for Internet Service Provider (ISP)-bound traffic which is identical to that for non-ISP-bound traffic but which is subject to true-up once the FCC has decided upon a methodology for ISP bound traffic and the Commission has implemented it.

**OBJECTIONS**

**BELLSOUTH:** BellSouth objected to this Finding of Fact and asked the Commission to take into consideration the FCC's recent Order on Remand and Order in CC Docket 96-98, released on April 27, 2001 (ISP Traffic Remand Order), in which the FCC concluded that carriers do not owe reciprocal compensation for ISP-bound traffic and adopted an interim

inter-carrier compensation mechanism to address the concerns it identified. The interim mechanism establishes a specific schedule for diminishing compensation for ISP-bound traffic over a three-year period. The Commission should order the Parties to include in their final agreement language conforming to [*65] the ISP Traffic Remand Order.

**ITCDELTACOM:** ITCDeltaCom did not object to this Finding of Fact.

**MCIm:** MCIm did not object to this Finding of Fact.

**RESPONSES**

**BELLSOUTH:** BellSouth objected to this Finding of Fact and, therefore, did not provide a Response.

**ITCDELTACOM:** ITCDeltaCom did not address this issue in its comments.

**MCIm:** MCIm stated in its Response that, because the Commission has not yet determined how, if at all, it will implement the FCC's decision, BellSouth's request that the Parties be directed to include in their interconnection agreement language conforming to the FCC's decision is premature. MCIm cited to the Commission's May 11, 2001 Order Requesting Comments in Docket No. P-100, Sub 133m.

**PUBLIC STAFF:** The Public Staff agreed with BellSouth that the FCC's interim reciprocal compensation mechanism should apply as dictated by the FCC, effective on or after 30 days after publication of the FCC's decision in the Federal Register. Docket No. P-100, Sub 133m has to do with the appropriate treatment of traffic exchange prior to that time.

**DISCUSSION**

The Commission concurs with BellSouth that, pursuant to the FCC's ISP Traffic Remand [*66] Order, the Parties should be required to include in their final agreement language which conforms to that Order. The FCC's ISP Traffic Remand Order became effective on June 14, 2001, or 30 days after publication in the Federal Register. Docket No. P-100, Sub 133m is concerned with traffic exchanged prior to that date and, more specifically, whether the true-up requirement previously instituted by the Commission remains viable. It therefore has no direct bearing on the implementation of the latest FCC Order.

**CONCLUSIONS**

The Commission concludes that this issue should be reconsidered and that the Parties should be required to include in their final agreement language conforming to the ISP Traffic Remand Order. Accordingly, Finding of Fact No. 18 (Matrix Issue No. 47) should be amended to read as follows:

> The Parties shall include in their final agreement language conforming to the FCC's ISP Traffic Remand Order.

**FINDING OF FACT NO. 23 (MATRIX ISSUE NO. 80):** Should BellSouth be required to provide an application-to-application access service order inquiry process?

**INITIAL COMMISSION DECISION**

The Commission concluded that BellSouth had failed to demonstrate that it [*67] provided MCIm with nondiscriminatory access to existing pre-ordering and ordering interfaces when Digital Signal Level One (DS1) combos are being ordered. The Commission was concerned about the lack of parity and concluded that it was appropriate to refer the issues MCIm had raised in Issue No. 23 (Matrix Issue No. 80) of this docket to the Change Control Process (CCP) for further action. Further, the Commission ordered MCIm and BellSouth to file separate CCP status reports every three months, beginning on June 29, 2001. Finally, the Commission found it appropriate to require that the initial reports identify each specific CCP issue which MCIm raised in this proceeding and briefly describe the progress which had been made in the preceding three months in discussing and resolving each issue and that as issues are resolved to the satisfaction of both MCIm and BellSouth, they may be dropped from the reports.

**OBJECTIONS**

LEXSEE 2003 U.S. DIST. LEXIS 2473

**MCIMETRO ACCESS TRANSMISSION SERVICES LLC, a Delaware corporation, Plaintiff, v. BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia corporation; the NORTH CAROLINA UTILITIES COMMISSION; JOANNE SANFORD, in her official capacity as Chair of the North Carolina Utilities Commission; and JUDY HUNT, J. RICHARD CONDER, ROBERT V. OWENS, JR., SAM J. ERVIN, IV, LORINZO L. JOYNER, and JAMES Y. KERR, II, in their official capacities as Commissioners of the North Carolina Utilities Commission, Defendants.**

**No. 5:01-CV-921-H(4)**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION**

***2003 U.S. Dist. LEXIS 2473***

**January 21, 2003, Decided**
**January 21, 2003, Filed**

**SUBSEQUENT HISTORY:** Reversed by, in part, Vacated by, in part, *Remanded by MCIMetro Access Transmission Servs. v. BellSouth Telcoms., Inc., 352 F.3d 872, 2003 U.S. App. LEXIS 25782* (4th Cir. N.C., 2003)

**DISPOSITION:** Motion for summary judgment granted, and case closed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff and defendant filed cross-motions for summary judgment in an action in which plaintiff sought review of the compliance of an agreement with federal law that had been approved by the North Carolina Utilities Commission (NCUC) after the parties found themselves unable to agree on all terms of an interconnection agreement.

**OVERVIEW:** Plaintiff challenged the NCUC's interpretation of federal law in ordering and approving the final agreement. The first challenge to the ruling involved plaintiffs' access to "two-way trunking." The NCUC limited defendant's obligation to provide two-way trunking to certain conditions. Plaintiff contended that the resolution of the issue was controlled by F.C.C. Rule 305(f). The court found that the rule required an incumbent carrier to provide two-way trunking where the competing carrier had insufficient traffic to justify use of separate one-way trunks and two-way trunking was technically feasible. The court found no error in the NCUC's ruling in the issue. Plaintiff also challenged the NCUC's imposition of certain costs for calls originating from defendant's local calling area based on plaintiff's chosen points of interconnection. The court held that the finding of cost-shifting was consistent with the F.C.C. rules. The F.C.C. explicitly held that cost-shifting for an expensive interconnection was appropriate.

**OUTCOME:** The court denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment.

**LexisNexis(R) Headnotes**

***Civil Procedure > Summary Judgment > Summary Judgment Standard***
[HN1] Summary judgment is appropriate pursuant to Fed. R. Civ. P. 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

***Governments > Courts > Judicial Precedents***
[HN2] The Fourth Circuit has held that federal Courts should accord no deference to the state commission's interpretations of federal law.

***Administrative Law > Judicial Review > Standards of Review > Standards Generally***
[HN3] Established legal precedent requires federal courts to give an agency's interpretation of its own regulation controlling weight unless it is plainly erroneous or inconsistent with the regulation.

***Communications Law > Telephony > Local Exchange Carriers***
[HN4] F.C.C. Rule 305 requires an incumbent carrier to provide two-way trunking where the competing carrier has insufficient traffic to justify use of separate one-way

trunks and two-way trunking is technically feasible.

***Communications Law > Federal Acts > Telecommunications Act***
[HN5] The Telecommunications Act of 1996 permits competitive local exchange carriers to interconnect at any technically feasible point within the carrier's network, *47 U.S.C.S. § 251*(c)(2)(B), and on terms that are just, reasonable, and nondiscriminatory. *47 U.S.C.S. § 251*(c)(2)(D).

***Administrative Law > Agency Rulemaking > Rule Application & Interpretation***
[HN6] *47 U.S.C.S. § 155*(c)(3) clearly states that decisions made by the Wireline Competition Bureau pursuant to a delegation of authority under *47 U.S.C.S. § 155*(c)(1) have the same "force and effect" as a decision by the Federal Communications Commission itself.

***Communications Law > Federal Acts > Telecommunications Act***
[HN7] Use restrictions on unbundled network elements are permissible if they do not impair the ability of the requesting carrier to offer a telecommunications service.

**COUNSEL:** [*1] For MCIMETRO ACCESS TRANSMISSION SERVICES LLC, plaintiff: Richard Allen Vinroot, Charlotte, NC.

For BELLSOUTH TELECOMMUNICATIONS, INC., defendant: M. Gray Styers, Jr., Kilpatrick Stockton, Raleigh, NC.

For NORTH CAROLINA UTILITIES COMMISSION, JOANNE SANFORD, JUDY HUNT, J. RICHARD CONDER, ROBERT V. OWENS, JR., SAM J. ERVIN, IV, LORINZO L. JOYNER, JAMES Y. KERR, II, defendants: Margaret A. Force, N.C. Department of Justice, Raleigh, NC.

**JUDGES:** MALCOLM J. HOWARD, United States District Judge.

**OPINIONBY:** MALCOLM J. HOWARD

**OPINION:**

**ORDER**

This matter is before the court on the cross-motions of plaintiff MCImetro Access Transmission Services LLC ("WorldCom") and defendant BellSouth Telecommunications, Inc. ("BellSouth") for summary judgment. The parties have responded and this matter is ripe for adjudication.

**STATEMENT OF THE CASE**

The court considers this case pursuant to the judicial review provisions of the federal Telecommunications Act of 1996 ("the 1996 Act" or "the Act"). The 1996 Act is intended to create a "pro-competitive, de-regulatory" framework for the provision of telecommunications services. S. Conf. Rep. No. 104-230, at 1 (1996). The Act expressly preempts state [*2] laws limiting competition in local telephone service, permitting new entrants to compete in those markets. See *47 U.S.C. § 253*. Additionally, the 1996 Act places certain affirmative duties on incumbent local exchange carriers ("ILECs"). ILECs, such as BellSouth, are companies that have traditionally provided telecommunications in particular geographic areas. The affirmative duties recognized in the 1996 Act are designed to create a "level playing field," thereby permitting new entrants, such as WorldCom, to compete in local markets. See In re Implementation of the Local Competition Provisions in the *Telecommunications Act of 1996, 11 F.C.C.R. 15499, 15576, P152* ("Local Competition Order"). These new entrants are referred to as competitive local exchange carriers ("CLECs").

Among the duties imposed upon ILECs by the 1996 Act is the obligation to offer nondiscriminatory "interconnection" with the ILEC's network. *47 U.S.C. § 251*(c)(2). This interconnection allows CLEC customers to place calls to, and receive calls from, ILEC customers in a given area. This interconnection may be accomplished through the use of interconnection [*3] "trunks" that connect the facilities of the two carriers. The 1996 Act also requires ILECs such as BellSouth to provide access to "unbundled network elements" ("UNEs") - various component parts of their telephone networks - under some circumstances. *47 U.S.C. § 251*(d)(2)(B).

These 1996 Act duties are implemented through "interconnection agreements" between the ILEC and the CLEC. The parties are free to negotiate the terms of interconnection, but if they cannot agree either party may seek arbitration before a state public utilities commission. *47 U.S.C. § 252*(b). If the state commission declines to act, arbitration may be sought before the Federal Communications Commission ("FCC"). *47 U.S.C. § 252*(c). In the arbitration proceeding, the commission must apply the requirements of the federal statute and any controlling FCC rules. *47 U.S.C. § 252*(c)(1). The terms ultimately produced through arbitration must then be incorporated into an interconnection agreement that is submitted to the commission for approval. Id.

On April 6, 2000, WorldCom and BellSouth found themselves unable to agree [*4] on all terms of an interconnection agreement, and WorldCom petitioned the North Carolina Utilities Commission ("NCUC") for arbitration. After various objections by WorldCom and

pursuant to orders by the NCUC, the parties submitted their final Composite Interconnection Agreement on November 21, 2001. After the NCUC approved this agreement, WorldCom filed this action pursuant to *47 U.S.C. § 252*(e)(6), seeking review of the compliance of the agreement with federal law.

**COURT'S DISCUSSION**

**I. Standard of Review**

[HN1] Summary judgment is appropriate pursuant to *Fed. R. Civ. P. 56* when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

WorldCom challenges the NCUC's interpretation of federal law in ordering and approving the final Composite Interconnection Agreement. [HN2] The Fourth Circuit has held that federal Courts should accord no deference to the state commission's interpretations" of federal law. *AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, 197 F.3d 663, 668 (4th Cir. 1999).* Accordingly, [*5] the court reviews de *novo* the legal conclusions of the NCUC. See id.; *GTE South, Inc. v. Morrison, 199 F.3d 733, 745 (4th Cir. 1999).* The court's review is guided by the 1996 Act, as well as rules and regulations issued by the FCC that implement the Act. See *Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 321 (2d Cir. 2000).*

**II. Access to Two-Way Trunking**

WorldCom's first challenge to the NCUC's ruling involves WorldCom's access to - "two-way trunking" - lines that carry telecommunications traffic in two directions. The NCUC limited BellSouth's obligation to provide two-way trunking to conditions where (1) two-way trunking is technically feasible, and (2) there is insufficient telephone traffic to justify one-way trunking. Recommended Arbitration Order, Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale under the *Telecommunications Act of 1996, 43, 2001 N.C. PUC LEXIS 398* (N.C.U.C. Apr. 3, 2001) ("First Arbitration Order"); Order Ruling on Objections and Requiring the Filing of the Composite Agreement, [*6] Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale under the *Telecommunications Act of 1996, 11, 2001 N.C. PUC LEXIS 821* (N.C.U.C. Aug. 2, 2001) ("Second Arbitration Order"). WorldCom argues that under controlling regulations, its access to two-way trunking should be limited only by technical feasibility and not by the volume of traffic.

WorldCom contends that the resolution of this issue is controlled by FCC Rule 305(f), which states: "If technically feasible, an incumbent LEC shall provide two-way trunking upon request." *47 C.F.R. § 51.305(f)*. According to WorldCom, this rule limits a CLEC's access to two-way trunking only on the grounds of technical feasibility, and any and all additional restrictions on two-way trunking are *per se* unlawful. In response, BellSouth defends the NCUC's reliance on the FCC decision that promulgated Rule 305(f) and referred to another potential limitation: "We conclude here . . . that where a carrier requesting interconnection pursuant to section 251(c)(2) does *not carry a sufficient amount* [*7] *of traffic to justify separate one-way trunks*, an incumbent LEC must accommodate two-way trunking where technically feasible." *Local Competition Order, 11 F.C.C.R. at 15612, P219* (emphasis added). Thus, the essential dispute between the parties on this issue is whether the FCC's contemporaneous interpretation of a rule while in the process of promulgating it should be considered in later applying the rule.

[HN3] Established legal precedent requires federal courts to give an agency's interpretation of its own regulation "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Stinson v. United States, 508 U.S. 36, 45, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993);* see also *Electronic Engineering Co. v. FCC, 329 U.S. App. D.C. 326, 140 F.3d 1045, 1049 (D.C. Cir. 1998); United States v. Hoechst Celanese Corp., 128 F.3d 216, 221 (4th Cir. 1997)* n1 Indeed, in a case analogous to this one, the Supreme Court found that a limitation discussed by the FCC in its Local Competition Order but not explicitly incorporated into a final rule was nevertheless relevant to the application of the rule. See *Verizon Communications Inc. v. FCC, 535 U.S. 467, 152 L. Ed. 2d 701, 122 S. Ct. 1646, 1686 (2002).* [*8] In Verizon, the Court addressed FCC Rule 315(c), which requires ILECs to combine certain network elements for CLECs. Although the final rule did not condition this obligation on the inability of CLECs to combine these facilities for themselves, the Court found such a condition to exist. The court based this finding on language in the Local Competition Order, which stated that an ILEC was obligated to combine only "if the carrier is unable to combine the elements." Id. quoting *Local Competition Order, 11 F.C.C.R. at 15647, P294).*

n1 The FCC itself has also suggested that rules promulgated by the Local Competition Order should, if possible, be "read in conjunction with the rest of the Order." *TSR Wireless, LLC v. US West*

*Communications, Inc., 15 F.C.C.R. 11166, 11177-78, PP20-21 (2000).*

In light of this legal framework, the court reads Rule 305(f) in light of the FCC's discussion in the Local Competition Order. The court finds that [HN4] the rule requires "an incumbent [*9] carrier to provide two-way trunking where the competing carrier has insufficient traffic to justify use of separate one-way trunks and two-way trunking is technically feasible." *US West Communications v. MFS Intelnet, Inc., 193 F.3d 1112, 1124 (9th Cir. 1999)* (dictum); see also *Local Competition Order, 11 F.C.C.R. 15612, P219.* This interpretation merely supplements the final regulation, and is neither plainly erroneous nor inconsistent with it. Furthermore, the court finds no evidence in the record that this interpretation will "create a barrier to entry" for CLECs such as WorldCom, see *Local Competition Order, 11 F.C.C.R. at 15612, P219,* or that it is unjust, unreasonable, or discriminatory. See *47 U.S.C. § 251*(c)(3). Accordingly, the court finds no error in the NCUC's ruling on this issue.

**III. Compensation Based on Points of Interconnection**

WorldCom also challenges the NCUC's imposition of certain costs for calls originating from BellSouth's local calling area based on WorldCom's chosen points of interconnection. Specifically, the NCUC ruled that WorldCom "may designate its own points [*10] of interconnection (POIs) within BellSouth's network." Second Arbitration Order at 12; First Arbitration Order at 49. However, if WorldCom "interconnects at points within the LATA [Local Access and Transport Area] but outside BellSouth's local calling area from which traffic originates, [WorldCom] should be required to compensate BellSouth for, or otherwise be responsible for, transport beyond the local calling area." First Arbitration Order at 49. In other words, WorldCom would be allowed to interconnect with BellSouth's network wherever it chooses, but might be required to pay part of the cost for transporting calls to that point of interconnection if it is beyond BellSouth's local calling area.

WorldCom argues that the portion of the NCUC's ruling requiring WorldCom to compensate BellSouth for transport to a POI beyond the local calling area violates FCC regulations. WorldCom and BellSouth agree that [HN5] the 1996 Act permits CLECs to interconnect "at any technically feasible point within the carrier's network," *47 U.S.C. § 251*(c)(2)(B), and on terms that are just, reasonable, and nondiscriminatory. *47 U.S.C. § 251*(c)(2)(D). [*11] This provision lowers barriers to competitive entry for CLECs by allowing them "to choose the most efficient points at which to exchange traffic with incumbent LECs . . . " *Local Competition Order 11 F.C.C.R. at 15688, P172.* Furthermore, in implementing the 1996 Act's "reciprocal compensation" scheme, the FCC ruled that an ILEC "may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the [ILEC's] network." *47 C.F.R. § 51.703(b).* WorldCom contends that this regulatory language prohibits any requirement that WorldCom compensate BellSouth for any portion of the transportation of calls originating in BellSouth's network.

The NCUC found the FCC's prior orders on the particular issue here inconclusive, and noted that the FCC had solicited comments on the issue in a notice of proposed rulemaking. Second Arbitration Order at 13. However, WorldCom insists that a division of the FCC has since issued a decision settling the matter. In July 2002, the Wireline Competition Bureau, conducting an arbitration on behalf of the FCC and in the place of a state commission, n2 held that requiring an ILEC to bear the [*12] cost of transporting traffic all the way to the POI, regardless of location, was "more consistent with the [FCC's] rules" than requiring the CLEC to pay for transportation beyond the LATA. In re Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the *Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes With Verizon Virginia, Inc. and for Expedited Arbitration, 16 F.C.C.R. 6224, 2002 WL 1576912, P53* ("Virginia Arbitration Order"). WorldCom argues that this interpretation evinces the unlawfulness of the NCUC's ruling.

n2 Such delegations of authority are permitted by *47 U.S.C. § 155*(c)(1).

In response, BellSouth argues that the NCUC's ruling is supported by the FCC itself, and that the Virginia Arbitration Order is not controlling. BellSouth first notes language from the Local Competition Order, in which the FCC stated that "competing carriers must usually compensate incumbent LECs [*13] for the additional costs incurred by providing interconnection." *Local Competition Order, 11 F.C.C.R. at 15608, P209.* The FCC further explained that a CLEC "that wishes a 'technically feasible' but expensive interconnection would . . . be required to bear the cost of that interconnection." *Id. 11 F.C.C.R. at 15603, P199.* As BellSouth points out, the FCC later relied on this language in its own *amicus curiae* brief, arguing that "consistent with the [Local Competition Order]," an ILEC may "obtain additional compensation if a specific request for interconnection warrants it." Memorandum of the Federal Communications Commission as Amicus Curiae, *US*

*West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., 31 F. Supp. 2d 839, & n. 17 (1998).* n3 Additionally, the FCC held in 2001 that an ILEC's policies requiring CLECs to pay transportation costs beyond the LATA did "not represent a violation" of FCC rules. Memorandum Opinion and Order, Application of Verizon Pennsylvania Inc., et al. for Authorization to Provide In-Region InterLATA Services in *Pennsylvania, 16 F.C.C.R. 17419, 17474, P100 (2001).* Following [*14] these FCC precedents, the Third and Ninth Circuits have held that state commissions may lawfully require CLECs such as WorldCom to pay for additional costs resulting from their choice of expensive POIs. See *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 518 (3d Cir. 2001),* cert. denied, *123 S. Ct. 340 (2002)* (holding that "to the extent... [a CLEC's] decision on interconnection points may prove more expensive to Verizon, the [state commission] should consider shifting costs to [that CLEC]"); *US West Communications, Inc. v. Jennings, 304 F.3d 950, 961 (9th Cir. 2002)* (agreeing with the Third Circuit).

n3 Although the court to which the brief was addressed found that the state commission had not adequately addressed the issue, it appears to have adopted the FCC's position in guiding the state commission's future analysis: "In determining how many points of interconnection are required, and the *compensation payable to the ILEC,* the [state commission] may properly consider relevant factors, including whether a CLEC is purposely structuring its point(s) of interconnection to maximize the cost to the ILEC or otherwise gain an unfair competitive advantage." *US West Communications, Inc. v. AT&T Communications of Pacific Northwest, Inc., 31 F. Supp. 2d 839, 853 n.8 (D. Or. 1998),* reversed in part, vacated in part on other grounds by, *224 F.3d 1049 (9th Cir. 2000)* (emphasis added).

[*15]

The court finds itself challenged to reconcile the interpretation endorsed by the Wireline Competition Bureau in the Virginia Arbitration Order (each party bearing all costs for transportation to and from the 201) and that endorsed by the FCC and the Third and Ninth Circuits n4 (state commissions may lawfully shift costs for expensive POIs to the CLEC). BellSouth argues that the Bureau's authority is undermined by the fact that it is a subdivision of the FCC, and not the FCC itself. However, [HN6] *47 U.S.C. § 155*(c)(3) clearly states that decisions made by the Bureau pursuant to a delegation of authority under *47 U.S.C. § 155*(c)(1) have the same "force and effect" as a decision by the FCC itself. Because the Bureau was acting pursuant to such a delegation when it issued the Virginia Arbitration Order, the order must be given equal weight as the authorities presented by BellSouth.

n4 The court notes that the Ninth Circuit's decision in Jennings was issued subsequently to the Virginia Arbitration Order, but did not address it. It is unclear whether the Ninth Circuit had no notice of the Virginia Arbitration Order, or simply ignored it.

[*16]

After thoroughly considering all of the authorities proffered by the parties, the court declines to adopt WorldCom's position. The Bureau's decision in the Virginia Arbitration Order adopted the interconnection language proposed by the CLEC in that case because it found that language "more consistent" with FCC rules. The Bureau did not hold, however, that the position of the ILEC in that case *violated* FCC rules. Indeed, under prior and subsequent decisions, a state commission *may* shift transportation costs in some circumstances; it is not *required* to do so. The decision of a state commission (or in that case, the Bureau acting in place of a state commission) not to shift costs does not necessarily make cost-shifting unlawful.

To the extent that the Bureau did intend to declare cost-shifting "inconsistent" with FCC rules, the court declines to follow the Bureau's interpretation and instead follows the majority of decisions to have addressed the issue. The Bureau's decision appears to be something of an aberration. All other courts addressing the issue appear to have found cost-shifting quite consistent with the FCC rules. In the Local Competition Order, the FCC [*17] explicitly held that cost-shifting for an expensive interconnection was appropriate. The FCC and numerous federal courts have subsequently endorsed this holding. Indeed, the Ninth Circuit's holding in Jennings adhered to this interpretation even after the Virginia Arbitration Order). n5 In the absence of a clear ruling from the FCC or a federal appellate court to the contrary (which, in this court's opinion, the Virginia Arbitration Order is not), this court cannot conclude that cost-shifting in this context violates federal law.

n5 The court finds support for the practical reasonableness of this interpretation in *In re AT&T Communications of Southern States, Inc., 2001 S.C. PUC LEXIS 7, 2001 WL 872914,* *9-*13 (S.C.P.S.C. Jan 30, 2001). In that case, the South Carolina Commission discussed in detail the practical "equities" of the two positions asserted by the parties here, and concluded that the cost-switching

> interpretation was the most reasonable. Although that commission's findings are by no means binding on this court, the commission's practical discussion of this issue is persuasive.

[*18]

**IV. Restrictions on Switched Access**

Finally, WorldCom claims that the NCUC erred by concluding that WorldCom could route long-distance switched access traffic over BellSouth local interconnection trunks only if "the switched access is being provided to [a WorldCom] local exchange customer. First Arbitration Order at 62-63. WorldCom argues that 1996 Act confers upon CLECs the right to use network elements to originate or terminate long-distance calls, even when WorldCom is not providing local telephone service to the customers at issue. WorldCom contends that the NCUC's limits on this "exchange access" constitute unlawful restrictions on WorldCom's use of BellSouth's network elements.

As previously stated, the 1996 Act requires ILECs to provide just, reasonable, and nondiscriminatory access to UNEs for the - provision of telecommunications service, including exchange access in some situations. See *47 U.S.C. § 251*(c)(3); *Local Competition Order, 11 F.C.C. R. at 15679, P356.* Furthermore, regulations implementing the Act state that "an incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled [*19] network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner that requesting telecommunications carrier intends." *47 C.F.R. § 51.309(a).* WorldCom interprets this regulation as prohibiting the imposition of any restriction on a CLEC's use of a UNE.

In support of this interpretation, WorldCom cites a paragraph from a 1999 FCC ruling, in which it stated:

> In the Local Competition First Report and Order, the Commission found that section 251(c)(3) "permits interexchange carriers and all other requesting carriers, to purchase unbundled elements for the purpose of offering exchange access services to themselves in order to provide interexchange services to consumers." In particular, the Commission found that its conclusion not to impose restrictions on the use of unbundled network elements was compelled by the plain language of the 1996 Act" . . . This conclusion that the Act does not permit usage restrictions was codified in Rule 51.309(a) . . That rule was not challenged in court by any party.

*In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 F.C.C.R. 3696, 3884, P484 (1999)* [*20] ("UNE Remand Order"). WorldCom reads this passage to grant requesting carriers the federal right to provide exchange access services for calls to all customers, not just their own. WorldCom insists that this right is essential to effective competition with ILECs, who now claim a majority of customers in their service areas.

BellSouth contends that the restriction in question is tailored to prevent CLECs from gaining an unfair advantage over ILECs, and that UNE Remand Order is not controlling on this issue. Before the issuance of the UNE Remand Order, the FCC explicitly held that requesting carriers did have a right to provide exchange access to its own customers, In re Implementation of the Local Competition Provisions in the *Telecommunications Act of 1996, 12 F.C.C.R. 12460, 12483, P38* ("the Third Order"), but reserved the question of whether such a right existed as to other carriers' customers. *Id. 12 F.C.C.R. at 12495-6, P61.* In fact, the FCC solicited comment on proposed rule-making on the issue. Id. While the UNE Remand Order addressed requesting carriers' rights to exchange access services in broad terms, it did not explicitly resolve [*21] the question reserved in the Third Order.

Furthermore, the propriety of those broad statements in the UNE Remand Order has been brought into doubt by subsequent federal cases. In *Competitive Telecommunications Ass'n. v. FCC, 309 F.3d 8 (D.C. Cir. 2002)* ("CompTel"), the D.C. Circuit reviewed an FCC decision. that expressly permitted a use restriction similar to the one at issue in this case. See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Supplemental Order, 15 F.C.C.R. 1760 (1999)* ("Supplemental Order"). The FCC had limited the use of a combination of network elements, known as enhanced extended links ("EELs"), to circumstances where the CLEC was providing "a significant amount of local exchange service." *CompTel, 309 F.3d at 10-11; Supplemental Order, 15 F.C.C.R. 1760 at P2.* The CLEC in that case, like WorldCom, argued that this limitation was unlawful because the 1996 Act prohibited all use restrictions. The court rejected this argument. Specifically, the D.C. Circuit held that while *47 U.S.C. § 251*(c) (3) provided CLECs with [*22] the right to use UNEs for the "provision of *a* telecommunications service," it did not confer the right to use the UNE for *any* service. *CompTel, 309 F.3d at 12.* The court therefore concluded that service-by-service restrictions were

not prohibited by the Act. A contrary holding, the court reasoned,

> would mean that once the Commission found a single purpose as to which an 'element' met the impairment [of the provision of services] standard, no matter how limited, it would be forced to mandate provision of the element for all, no matter how little potential impairment was involved in the remainder of the telecommunications field. CompTel never explains what logic could have persuaded Congress to lock the Commission into such a scheme.

*Id. 309 F.3d 8 at 13.*

The court concluded by dismissing the argument that the UNE Remand Order required a different result. The court noted the FCC's recognition that the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999),* abrogated any prior rulings that prohibited all use restrictions. Although the UNE Remand Order followed Iowa Utilities Board, [*23] the D.C. Circuit found that the order did not reaffirm a prohibition on all use restrictions. On the contrary, the UNE Remand Order simply recounted past FCC conclusions, and ultimately suggested that the issue was unsettled. Thus, the D.C. Circuit found the FCC's interpretation of the issue in the Supplemental Order (permitting appropriate use restrictions) to be proper in light of Iowa Utilities Board, and accordingly affirmed that interpretation.

In light of the D.C. Circuit's assessment of the current law, this court cannot conclude that the NCUC violated federal law in permitting the use restriction at issue. While WorldCom argues that the holding of CompTel was limited to permitting use restrictions only as to EELs, it is clear from the D.C. Circuit's language that the doors have been opened to other appropriate use restrictions. The general rule that the court gleans from CompTel and *47 C.F.R. § 51.309(a)* is that [HN7] use restrictions on UNEs are permissible if they do not impair the ability of the requesting carrier to offer a telecommunications service. It is not evident from the record that the restriction on exchange access in [*24] this case to non-WorldCom customers would so impair WorldCom's ability to offer services as to make it unlawful. Nor does it appear, in light of CompTel, that such access restrictions are unlawfully discriminatory. Accordingly, the court finds no error in the NCUC's ruling on this issue.

**CONCLUSION**

For the foregoing reasons, the court DENIES plaintiff's motion for summary judgment and GRANTS defendants' motion for summary judgment. Because this ruling effectively eliminates plaintiff's right to relief against the individual defendants, summary judgment is GRANTED in their favor as well. The clerk is directed to close this case.

This 21st day of January, 2003.

MALCOLM J. HOWARD

United States District Judge

At Greenville, NC

LEXSEE 352 F.3D 872

**MCIMETRO ACCESS TRANSMISSION SERVICES, INCORPORATED, a Delaware Corporation, Plaintiff-Appellant, v. BELLSOUTH TELECOMMUNICATIONS, INCORPORATED, A Georgia Corporation; JOANNE SANFORD, in her official capacity as Chair of the North Carolina Utilities Commission; J. RICHARD CONDER; ROBERT V. OWENS, JR.; SAM J. ERVIN, IV; LORINZO L. JOYNER; JAMES Y. KERR, II; MICHAEL S. WILKINS, in their official capacities as Commissioners of the North Carolina Utilities Commission, Defendants-Appellees, and NORTH CAROLINA UTILITIES COMMISSION, Defendant.**

**No. 03-1238**

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**352 F.3d 872; 2003 U.S. App. LEXIS 25782**

**October 30, 2003, Argued**
**December 18, 2003, Decided**

**PRIOR HISTORY:** [**1] Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. (CA-01-921-5). Malcolm J. Howard, District Judge. MCImetro Access Transmission Servs. LLC v. Bellsouth Telecomms., Inc., 2003 U.S. Dist. LEXIS 2473 (E.D.N.C., Jan. 21, 2003)

**DISPOSITION:** REVERSED IN PART, VACATED IN PART, AND REMANDED.

**LexisNexis(R) Headnotes**

**COUNSEL:** ARGUED: Michael Brian DeSanctis, JENNER & BLOCK, L.L.C., Washington, D.C., for Appellant.

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**JUDGES:** Before LUTTIG, WILLIAMS, and KING, Circuit Judges. Judge Williams wrote the opinion, in which Judge Luttig and Judge King joined.

**OPINIONBY:** WILLIAMS

**OPINION:** [*874] WILLIAMS, Circuit Judge:

In this appeal, MCImetro Access Transmission Services LLC (MCI) challenges the legality, under the Telecommunications Act of 1996 (the 1996 Act), *see* 47 U.S.C.A. § § 251 [**2] -276 (West 2001 & Supp. 2003), of three aspects of the interconnection agreement between it and BellSouth Telecommunications, Inc. (BellSouth) that the North Carolina Utilities Commission (NCUC) arbitrated and approved. Specifically, MCI argues (1) that the provision in the interconnection agreement allowing BellSouth to charge MCI the incremental cost of transporting calls originating on BellSouth's network from the originating caller's local calling area to MCI's distant point of interconnection violates 47 C.F.R. § 51.703(b) (2002); (2) that the provision in the interconnection agreement restricting MCI's use of BellSouth's unbundled network elements under certain circumstances violates various FCC rules; and (3) that the provision in the interconnection agreement limiting BellSouth's obligation to provide access to two-way trunking to only those circumstances where there is insufficient traffic to support one-way trunks violates 47 C.F.R. § 51.305(f) (2002). MCI initiated this action in the United States District Court for the Eastern District of North Carolina pursuant to the 1996 Act's judicial review procedure. *See* 47 U.S.C.A. § 252 [**3] (e)(6). The district court found the challenged provisions to be consistent with federal law and accordingly granted summary judgment in favor of BellSouth. MCI appeals, and for the reasons that follow, we reverse in part, vacate in part, and remand for further proceedings.

I.

Prior to the passage of the 1996 Act, the laws of the various states governed the provision of local telephone service, and almost without exception, each state conferred an exclusive franchise to a single company to provide such service. Under the protection of these state-conferred monopolies, each of these companies, called Local Exchange Carriers (LECs), built the infrastructure necessary to provide local telephone services, including elements such as the local loops (wires connecting telephones to switches), the switches (computerized equipment routing calls to their destinations), and the transport trunks (high capacity wires transmitting traffic between switches). *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). Thus, not only were these LECs the only entities allowed by law to provide local telephone service, they were the only entities with the networks [**4] necessary to do so.

Through the 1996 Act, Congress sought to supplant the system of state-sanctioned monopoly in favor of a system of free competition. In addition to pre-empting the state laws that protected existing LECs n1 from competition, *see* 47 U.S.C.A. § 253, Congress, recognizing both that the provision of local service required significant infrastructure and that the prohibitive cost of duplicating an incumbent LEC's infrastructure would be an insuperable barrier to entry, imposed on incumbents a number of affirmative duties intended to facilitate market entry by potential competitors. *See* 47 U.S.C.A. § 251(c) (West [*875] 2001). Two of these duties are relevant to the issues MCI raises in this appeal.

n1 In the parlance of the 1996 Act, the LECs that existed prior to February 8, 1996 are called "incumbents" or "incumbent LECs." *See* 47 U.S.C.A. §

251(h)(1) (West 2001). We use those terms interchangeably here.

First, Congress [**5] required incumbent LECs to "interconnect" their networks with the new networks constructed by the new entrants, known as competing LECs (CLECs). *See* 47 U.S.C.A. § 251(c)(2). Such interconnection is necessary to the viability of the multi-provider system envisioned by the 1996 Act because, absent interconnection, customers of different LECs in the same local calling area would not be able to call each other, and CLECs consequently would never attract customers. Under this provision, an incumbent must allow a CLEC to select any point of interconnection (POI) with the incumbent's network that is "technically feasible," 47 U.S.C.A. § 251(c)(2)(B), and must provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory," 47 U.S.C.A. § 251(c)(2)(D). Pursuant to the Federal Communications Commission's (FCC) regulations, just, reasonable, and nondiscriminatory interconnection requires incumbents to provide access to "two-way trunking" upon request for interconnection where technically feasible. A two-way trunk is a single trunk connecting the CLEC's switch to the incumbent's [**6] switch for transmission of traffic both to and from the incumbent, as opposed to two separate trunks, each dedicated to transmitting traffic in one direction.

Second, Congress required incumbents to lease the constituent elements of their local networks (*e.g.*, loops, switches, etc.) to CLECs on a separately priced, or "unbundled" basis. 47 U.S.C.A. § 251(c)(3). The incumbents also must allow the CLECs to use leased unbundled network elements (UNEs) to provide any "telecommunications service," *see id.*, a term defined by statute as "the offering of telecommunications for a fee," 47 U.S.C.A. § 153(46) (West 2001). As with interconnection, incumbents must make UNEs available "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C.A. § 251(c)(3).

The 1996 Act likewise imposes obligations on all LECs, incumbents and CLECs alike, *see* 47 U.S.C.A. § 251(b), one of which is relevant here. Under § 251(b)(5), each LEC has the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Reciprocal compensation [**7] agreements must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C.A. § 252(d)(2)(A). In other words, for calls generated on one LEC's network and bound for a destination on another LEC's network, the receiving LEC may charge the originating LEC for the cost of transporting the call from the POI to its destination and terminating that call with the intended recipient.

In addition to imposing these and other substantive requirements, Congress established a procedural framework through which incumbents and CLECs are to negotiate the CLECs' entry into the incumbent's market. First, the parties must attempt to establish terms of interconnection through negotiation. *See* 47 U.S.C.A. § 252(a)(1). To the extent they cannot reach agreement, either LEC may ask the governing state utility commission to conduct an arbitration to resolve the disputed issues. *See* 47 U.S.C.A. § 252(b)(1). The results of that arbitration are then memorialized [**8] in an "interconnection agreement" between the LECs, which is then submitted for approval to the state utility commission. 47 U.S.C.A. § 252(e). A party aggrieved by the state utility commission's resolution of disputed issues may seek review [*876] of that decision in federal district court, which has exclusive jurisdiction over such matters. 47 U.S.C.A. § 252(e)(6).

In this case, MCI challenges aspects of its most recent interconnection agreement with BellSouth that resulted from arbitration before the NCUC. MCI and BellSouth began negotiating their first interconnection agreement in North Carolina in 1996, shortly after passage of the 1996 Act. As this interconnection agreement approached expiration, the parties began negotiating a new interconnection agreement, and on April 6, 2000, MCI petitioned the NCUC to arbitrate unresolved issues. On April 3, 2001, the NCUC issued its Recommended Arbitration Order. *See In re Petition of MCImetro Access Transmission Services LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications* [**9] *Act of 1996*, Docket No. P-474, Sub. 10, Recommended Arbitration Order (NCUC Apr. 3, 2001) (*First Arbitration Order*). (J.A. at 143.) MCI filed objections to the *First Arbitration Order*, contesting, *inter alia*, the issues it raises here. On August 2, 2001, the NCUC ruled on MCI's objections and required the parties to file a composite agreement. *See In re Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under Telecommunications Act of 1996*, Order Ruling On Objections and Requiring The Filing of The Composite Agreement, Docket No. P-474, Sub. 10 (NCUC Aug. 2, 2001) (*Second Arbitration Order*). (J.A. at 263.) On November 7, 2001, following the aforementioned ruling, the parties filed their final Composite Interconnection Agreement.

On November 21, 2001, MCI filed suit in the district court challenging three aspects of the interconnection agreement that the NCUC had arbitrated and approved: (1) the NCUC's decision to allow BellSouth to charge MCI the incremental cost of transporting calls generated on BellSouth's [**10] network from the originating caller's local calling area to MCI's distant POI; (2) the decision to restrict MCI's use of BellSouth's unbundled network elements under certain circumstances; and (3) the decision to require BellSouth to provide access to two-way trunking, if technically feasible, only where there is insufficient traffic to support one-way trunking. After briefing on cross-motions for summary judgment, the district court granted summary judgment to BellSouth on all issues. MCI now appeals.

II.

We review de novo both the district court's grant of summary judgment and the NCUC's interpretation of the 1996 Act and the federal regulations enacted pursuant thereto, and accord no deference to the NCUC's interpretations of federal law. *AT&T Comms. of Va., Inc. v. Bell Atlantic-Virginia, Inc.*, 197 F.3d 663, 668 (4th Cir. 1999). We note that the parties challenge neither the NCUC's findings of fact nor the legality of the FCC's regulations.

A.

The first issue we consider is whether BellSouth can charge MCI for the cost of transporting local calls originating on BellSouth's network to MCI's chosen POI, when that POI happens to be outside of the local calling [**11] area where the call originated. Because this issue is a by-product of the differences between BellSouth's and MCI's respective network architectures, a brief word about those architectures is helpful in understanding the [*877] legal question before us. According to the NCUC,

> this issue exists because [MCI] and BellSouth have each built and intend to utilize totally separate and different networks for the provision of local service in North Carolina. Each carrier's local

> network was designed to be the most efficient and cost-effective for that carrier. BellSouth stated that its system consists of a number of local networks that have developed over time and each local network is characterized by the use of multiple local switches. Also, as commented on by BellSouth, [MCI] has a single switch in North Carolina.

*First Arbitration Order* at 47. (J.A. at 189.)

In exercising its right under § 251(c)(2)(B) to designate a technically feasible POI, MCI decided to interconnect with BellSouth's network at only one point in the North Carolina local access and transport area (LATA), through its single North Carolina switch. Therefore, all traffic between MCI and BellSouth customers [**12] must pass through that one POI, regardless of the locations of the two customers. This arrangement means, for example, that when a BellSouth customer wants to call her neighbor, an MCI customer, BellSouth must transport that call through MCI's one POI, even though that POI might be hundreds of miles away. Thus, as a consequence of MCI's independent decision respecting network construction and interconnection -- *i.e.*, the decision to use one switch in North Carolina rather than multiple switches, and to interconnect through that one switch alone -- BellSouth must incur greater costs for transporting routine local traffic. In arbitration before the NCUC, BellSouth proposed to resolve this perceived inequity by requiring MCI to pay it the incremental cost n2 of transporting traffic destined for MCI's network from the relevant local calling area to the POI. The NCUC adopted BellSouth's proposal and ordered the cost-shifting provision be included in the final interconnection agreement.

> n2 BellSouth proposed, and the NCUC approved, a charge only for the incremental cost of transporting traffic outside the local calling area. In other words, BellSouth would transport the call from the customer to the edge of the local calling area without charge to MCI. The charge would reflect the cost of transporting the call the additional distance from the edge of the local calling area to the POI.

[**13]

MCI argues that this provision in the interconnection agreement is contrary to federal law. MCI points specifically to FCC Rule 51.703(b), one of the several rules comprising the FCC's regime governing reciprocal compensation for the transport and termination of telecommunications traffic as required by 47 U.S.C.A. § 251(b)(5). *See* 47 C.F.R. § § 51.701-51.717. Rule 703(b) states, "[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b). Because BellSouth's cost-shifting provision is an assessment of charges for traffic that originates on BellSouth's own network, MCI argues, the provision is contrary to Rule 703(b) and thus is illegal. Moreover, MCI notes, the Wireline Communications Bureau (the Wireline Bureau), a subdivision of the FCC, in a case concerning interconnection in Virginia, has rejected a similar cost-shifting provision as being discordant with Rule 703(b). *See In re Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., and for Expedited Arbitration*, 17 F.C.C.R. 27039 (2002) [**14] (*Virginia Arbitration Order*).

[*878] BellSouth counters that the proposed cost-shifting is not reciprocal compensation, but rather a form of reimbursement for the cost of interconnection that BellSouth submits is permissible under FCC rules. In support of its position, BellSouth points to the 1996 Report and Order wherein the FCC adopted initial rules to implement the 1996 Act. *See In re Implementation Of The Local Competition Provisions In The Telecommunications Act Of 1996*, 11 F.C.C.R. 15499 (1996) (*Local Competition Order*). BellSouth notes that, in paragraph 199 of this order, the FCC, in concluding that cost was not a relevant factor in determining whether a CLEC's requested point of interconnection was "technically feasible," stated, "of course, a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit." n3 *Id.* at 15603 P 199. And, later in that same order, the FCC, in discussing its rules for the physical act of interconnection, noted that, "*because competing carriers must usually compensate* [**15] *incumbent LECs for the additional costs incurred by providing interconnection*, competitors have an incentive to make economically efficient decisions about where to interconnect." *Id.* at 15608 P 209 (emphasis added). These statements, BellSouth argues, show that the FCC intended for incumbents to be able to shift the cost of interconnection to CLECs. Because the provision at issue here relates to the cost of interconnection, BellSouth's argument goes, it is not governed by the reciprocal compensation regime at all, and Rule 703(b) is thus inapplicable.

n3 Section 252(d) sets forth the criteria that state utilities commissions are to consider when negotiating the "just and reasonable rate for the interconnection of facilities and equipment."

BellSouth points to a decision by the FCC in a proceeding arising under 47 U.S.C.A. § 271 as evidence that its cost-shifting provision is acceptable. *See In re Application Of Verizon Pennsylvania Inc., et al. For Authorization To Provide In-Region, InterLATA Services In Pennsylvania*, 16 F.C.C.R. 17419, [**16] 17474-75 PP 99-100 (2001) (*Pennsylvania 271 Order*). The *Pennsylvania 271 Order* addressed the application of Verizon, a former Bell Operating Company and incumbent LEC in Pennsylvania, under 47 U.S.C.A. § 271 to provide long distance services in Pennsylvania. This order is relevant, BellSouth argues, because under § 271, former Bell Operating Companies who intend to provide long distance service must satisfy a number of requirements, one of which being that they allow interconnection with their local exchange networks in accordance with § 251 and § 252. 47 U.S.C.A. § 271(c)(2). In conducting its review of Verizon's application to provide long-distance service in Pennsylvania, the FCC concluded that Verizon had satisfied its interconnection obligations, even though Verizon was imposing a charge like the one at issue here. This ruling, BellSouth asserts, proves the legality of its cost-shifting provision.

BellSouth's attempts to evade the unambiguous language of Rule 703(b) n4 are ultimately unavailing. First, to accept BellSouth's position that the provision here is a permissible charge for the cost of interconnection, the term [**17] "interconnection" must be interpreted broadly to include not only the physical act of connecting the networks, but also the ongoing state of interconnectivity. So interpreted, the cost of transporting traffic to a distant interconnection [*879] point is a "cost of interconnection" because it is necessitated by the ongoing state of interconnectivity at MCI's

chosen POI. The FCC, however, squarely rejected such a broad interpretation of that term in the *Local Competition Order*. *See* 11 F.C.C.R. at 15590 P 176. In its Notice of Proposed Rulemaking (NPRM) preceding the issuance of the *Local Competition Order*, the FCC sought comment on whether the term "interconnection" might refer "only to the physical linking of two networks or to both the linking of facilities and the transport and termination of traffic." *Id.* at 15588-46 Wash. 1, 89 P 174. The FCC adopted the former definition: "We conclude that the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic." *Id.* at 15590 P 176. Therefore, because the cost of interconnection is only the one-time cost associated with the [**18] physical act of linking one network to another and not the recurring cost of transport and termination of traffic, the charge imposed by BellSouth here cannot be characterized as a "cost of interconnection" that is permitted by FCC rules. n5

n4 Neither party asserts that Rule 703(b) is an unreasonable application of § 251 and we thus accept it as binding in this action.

n5 BellSouth notes that the Third and Ninth Circuits have cited paragraphs 199 and 209 of the *Local Competition Order* in interconnection cases, *see MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 518 (3d Cir. 2001), *US West Comms., Inc. v. Jennings*, 304 F.3d 950, 961 (9th Cir. 2002), and argues that the language those courts employed supports its position here. These decisions both address the issue of whether a CLEC can be required to establish multiple points of interconnection in a single local access and transport area. Accordingly, the statements regarding the cost of interconnection, to the extent that they refer to anything more than the cost of physical linkage, are mere dicta and not persuasive here.

[**19]

Furthermore, contrary to BellSouth's assertions, the FCC's decision in the *Pennsylvania 271 Order* does not validate the legality of its cost-shifting proposal. In the brief portion of *Pennsylvania 271 Order* that addresses the issue, the FCC fails to mention Rule 703(b) even once and addresses the propriety of cost-shifting only obliquely through reference to an Intercarrier Compensation NPRM:

> Verizon acknowledges that its policies distinguish between the physical POI and the point at which Verizon and an interconnecting competitive LEC are responsible for the cost of interconnection facilities. The issue of allocation of financial responsibility for interconnection facilities is an open issue in our Intercarrier Compensation NPRM . . . Because the issue is open in our Intercarrier Compensation NPRM, we cannot find that Verizon's policies in regard to the financial responsibility for interconnection facilities fail to comply with its obligations under the Act.

*Pennsylvania 271 Order*, 16 F.C.C.R. at 17474, 141 Cal. 534, 75 P. 100 (footnote omitted). In the *Intercarrier Compensation NPRM*, the FCC does recognize and describe the tension between Rule 703(b) [**20] and the ability of CLECs to select a single POI per LATA, and it invites comment respecting the action that should be taken to resolve that tension. *See In re Developing a Unified Intercarrier*

*Compensation Regime*, 16 F.C.C.R. 9610, 9635 P 72, 9650-51 PP 112-14 (2001) (*Intercarrier Compensation NPRM*). But, it is important to note that the FCC's invitation for comment on the issue is motivated by its own recognition that Rule 703(b), by its plain terms, prohibits the type of cost-shifting that BellSouth advocates here. *Id.* at 9650 P 112 ("Our current reciprocal compensation rules preclude an [incumbent] from charging carriers for local traffic that originates on the [incumbent]'s network."). Thus, whatever the implications of the *Pennsylvania 271 Order*, it provides thin support [*880] for the proposition that the cost-shifting here is not governed by Rule 703(b). n6

> n6 The FCC's rather cursory treatment of the cost-shifting issue in the Pennsylvania case is likely the result of the fact that the FCC considers § 271 proceedings to be "inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability." *See In re Joint Application of SBC Communications, Inc., et al. For Provision Of In-Region, InterLATA Services In Kansas And Oklahoma*, 16 F.C.C.R. 6237, 6246 P 19 (2001).

[**21]

We also recognize that the FCC has not ruled definitively that cost-shifting is prohibited. The *Virginia Arbitration Order*, the FCC decision upon which MCI relies, is the only occasion where the FCC has addressed cost-shifting in the § 252 context. In that case, the Wireline Bureau, standing in the shoes of a state utilities commission, n7 arbitrated a dispute between an incumbent and a CLEC virtually identical to the dispute here, with the incumbent advocating cost-shifting and several CLECs resisting. The Wireline Bureau ultimately decided not to implement the incumbent's cost-shifting provision, but notably stopped short of declaring such a provision illegal:

> We find that the [CLECs'] proposed language *more closely conforms* to our existing rules and precedent than do [the incumbent]'s proposals. [The incumbent]'s interconnection proposals require competitive LECs to bear [the incumbent]'s costs of delivering its originating traffic to a point of interconnection beyond the [incumbent]-specified financial demarcation point[.] . . . Specifically, under [the incumbent]'s proposed language, the competitive LEC's financial responsibility for the further [**22] transport of [the incumbent]'s traffic to the competitive LEC's point of interconnection and onto the competitive LEC's network would begin at the [incumbent]-designated [demarcation point], rather than the point of interconnection. By contrast, under the [CLECs'] proposals, each party would bear the cost of delivering its originating traffic to the point of interconnection designated by the competitive LEC. The [CLECs'] proposals, therefore, are *more consistent with* the Commission's rules for section 251(b)(5) traffic, which prohibit any LEC from charging any other carrier for traffic originating on that LEC's network; they are also *more consistent with* the right of competitive LECs to interconnect at any technically feasible point.[FN 125]

[FN 125] 47 C.F.R. § 51.703(b)

17 F.C.C.R. at 27064-65 P 53 (emphases added). The FCC's n8 choice of words (*i.e.*, "more closely conforms" and "more consistent [*881] with") is, at the very least, curious, and seems to reflect a reticence on the part of the FCC to declare cost-shifting in this context illegal, perhaps because, in the *Virginia Arbitration Order* [**23] , that conclusion was not required in arbitrating the parties' dispute. n9

n7 The Wireline Bureau performed the same function that the NCUC performed here. Under 47 U.S.C.A. § 252(e)(5), the FCC is required to assume the responsibilities of state commissions to conduct arbitration proceedings under the 1996 Act if a state commission "fails to act to carry out its responsibility" under § 252. In 47 U.S.C.A. § 155(c)(1), Congress explicitly granted the FCC the authority to delegate its functions to a subdivision. In the Virginia case, the Virginia State Corporation Commission declined to arbitrate the dispute, the parties petitioned the FCC to conduct the arbitration, and the FCC delegated its authority to the Wireline Bureau.

n8 BellSouth argues that the Wireline Bureau's decision here should not be given the deference we normally give decisions by the FCC, because it is a subdivision and not the commission itself. This argument lacks merit. When a federal agency delegates its decision-making authority to a subdivision and Congress has expressly permitted such delegation by statute, the decision of the subdivision is entitled to the same degree of deference as if it were made by the agency itself. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 n.9, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980). Although the Wireline Bureau's decision has limited relevance for the reasons described in text, because the delegation was pursuant to 47 U.S.C. § 155(c)(1), we accord it the same deference as if it had been rendered by the FCC itself. [**24]

n9 We note that the Fifth Circuit has described the *Virginia Arbitraion Order* as "confirming that . . . an [incumbent] is prohibited from imposing charges for delivering its local traffic to a POI outside the [incumbent's] local calling area." Southwestern Bell Tel. Co. v. Publ. Utils. Comm'n of Tex., 348 F.3d 482, No. 03-50107, 2003 WL 22390281, *2 (5th Cir. Oct. 21, 2003).

In sum, we are left with an unambiguous rule, the legality of which is unchallenged, that prohibits the charge that BellSouth seeks to impose. Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions. Although we find some surface appeal in BellSouth's suggestion that the charge here is not reciprocal compensation, but rather the permissible shifting of costs attending interconnection, the FCC, as noted above, has endorsed cost-shifting related to interconnection only as it relates to the one-time costs of physical linkage, and in doing so, expressly declined the invitation to extend [**25] the definition of "interconnection" to include the transport and termination of traffic. *See Local Competition Order*, 11 F.C.C.R. at 15588-89 P 176. Furthermore, the FCC recognized that such a broad interpretation of the concept of interconnection would interfere with its reciprocal compensation regulations: "Including the transport and termination of

traffic within the meaning of section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish 'reciprocal compensation arrangements for the transport and termination of telecommunications,' under section 251(b)(5)." *Id.* As a consequence, the FCC's rules cannot fairly be interpreted in the manner necessary to allow the limited construction of Rule 703(b) that BellSouth seeks. While, as a matter of good telecommunications policy, there may be legitimate reasons to allow cost-shifting in this context, *see Intercarrier Compensation NPRM*, 16 F.C.C.R. at 9650-51, PP 112-14, it is the province of the FCC and not the federal courts to implement such a policy. Our task here is simply to assess the interconnection agreement under existing federal law. Because the [**26] interconnection agreement allows BellSouth to charge MCI for traffic originating on the BellSouth network, it violates the 1996 Act as implemented by the FCC's current rules. Accordingly, we reverse the district court's grant of summary judgment in favor of BellSouth on this issue, and direct the district court to enter summary judgment in favor of MCI on this issue. *See AT&T*, 197 F.3d at 671 n.4.

B.

The second issue that MCI raises on appeal is whether the provision in the interconnection agreement restricting, under certain circumstances, MCI's use of BellSouth's UNEs (*e.g.*, trunks and switches) for the provision of "switched access" service violated federal law. MCI desires to provide switched access service using BellSouth UNEs to customers in North Carolina, regardless of whether the switched access customer is an MCI local exchange customer. The NCUC allowed MCI to use BellSouth UNEs to provide switched access service, but only to MCI local exchange customers. (J.A. at 204-05; 286.) MCI now argues both that this limitation violates FCC rules prohibiting incumbents from placing any restrictions on the use of UNEs and that the limitation is discriminatory. [**27]

Shortly before oral argument in this case, the FCC substantially altered its [*882] rules respecting the unbundling obligations of incumbent LECs. *See In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, F.C.C.R. , 2003 WL 22175730 (F.C.C. Aug. 21, 2003) (*Triennial Review Order*). Both MCI and BellSouth submitted letters pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure and our Local Rule 28(e) advising us of the *Triennial Review Order*, and both parties argue that it supports their respective positions. Because the *Triennial Review Order* alters significantly the federal regulatory framework that governs this issue, and because the parties do not agree on the import of that order, prudence dictates that we vacate the award of summary judgment and remand this issue to the district court so that the issue can be developed fully in light of the FCC's new rules.

C.

The final issue we consider is the legality of the NCUC's conclusion that BellSouth is obligated to use two-way trunks upon MCI's request only in circumstances [**28] where two-way trunking is both technically feasible and there is not sufficient traffic to justify one-way trunks. In implementing the interconnection provision of the 1996 Act, the FCC adopted Rule 305(f), which states that "if technically feasible, an incumbent LEC shall provide two-way trunking upon request." 47 C.F.R. § 51.305(f) (2002). MCI argues that the NCUC violated this provision by allowing BellSouth to impose a condition on the provision of two-way trunking not contained in the regulation, that condition being the lack of traffic sufficient to justify one-way trunks.

In implementing the provision in question, the NCUC relied on the FCC's explanation in

the *Local Competition Order* of the rationale behind the two-way trunking rule. In paragraph 219 of that order, the FCC explained:

> We identify below specific terms and conditions for interconnection in discussing physical or virtual collocation (i.e., two methods of interconnection). *We conclude here, however, that where a carrier requesting interconnection pursuant to section 251(c)(2) does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC* [**29] *must accommodate two-way trunking upon request where technically feasible.* Refusing to provide two-way trunking would raise costs for new entrants and create a barrier to entry. *Thus, we conclude that if two-way trunking is technically feasible, it would not be just, reasonable, and nondiscriminatory for the incumbent LEC to refuse to provide it.*

11 F.C.C.R. at 15612-72 Cal. 120, 13 P 219 (emphases added) (footnotes omitted). Relying presumably on the second sentence of that paragraph, the NCUC held as follows: "The [NCUC] believes that it is clear from the above that an [incumbent] must accommodate two-way trunking upon request where technically feasible. However, the FCC has not required that an [incumbent] allow two-way trunking when there is sufficient traffic to justify one-way trunking." *First Arbitration Order*at 43. (J.A. at 185.)

We are required to give an agency's interpretation of its own regulations "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Stinson v. United States*, 508 U.S. 36, 45, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993); *see United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 221 (4th Cir. 1997). [**30] And, the FCC has stated that rules promulgated pursuant to the *Local Competition Order* should be "read in conjunction with the rest of the Order." *TSR Wireless, LLC v. US West Communications,* [*883] *Inc.*, 15 F.C.C.R. 11166, 11177-78 PP 20-21 (2000).

However, notwithstanding the fact that the *Local Competition Order* can be a legitimate source of amplification for FCC rules implemented thereby, the amplification inferred by the NCUC is not justified by the text of paragraph 219. Read in isolation, the second sentence of that paragraph might support the NCUC's conclusion that the FCC intended to condition the requirement to provide access to two-way trunking on the lack of traffic sufficient to support one-way trunks, but the paragraph in its entirety suggests that the scenario mentioned in the second sentence is but one of any number of scenarios where the denial of two-way trunking would render the terms of interconnection unjust. Otherwise, the last sentence of the paragraph, where the FCC conspicuously excludes any mention of sufficiency of the traffic being a condition for the provision of two-way trunking, makes no sense. Stated differently, if the second sentence [**31] were meant to define the entire set of situations where incumbents must provide two-way trunking, then the FCC's statement, both in the last sentence of the paragraph and in Rule 305(f) itself, defining a much broader set of circumstances where access to two-way trunking is essential for the terms of interconnection to be "just, reasonable, and non-discriminatory" is in direct contradiction. If, however, we interpret the second sentence as an example of one scenario where the provision of two-way trunking is essential for the terms of interconnection to be "just, reasonable, and non-discriminatory," the entire paragraph is harmonious. Furthermore, the fact that the FCC expressly contemplated the insufficient traffic scenario and then declined to include an

insufficient traffic condition in the final rule suggests that the FCC did *not* intend for such a condition to be read into its otherwise unambiguous rule.

Because the NCUC's decision to condition BellSouth's provision of two-way trunking to those situations where there is insufficient traffic to support one-way trunks allows BellSouth to refuse to provide two-way trunking in situations where it is technically feasible, it violates [**32] Rule 305(f). Accordingly, we reverse the district court's grant of summary judgment in favor of BellSouth on this issue, and direct the district court to enter summary judgment in favor of MCI. *See AT&T*, 197 F.3d at 671 n.4.

III.

To summarize, (1) we reverse the district court's conclusion that Rule 703(b) does not prohibit the provision in the interconnection agreement allowing BellSouth to charge MCI for the incremental cost of transporting BellSouth-originating traffic destined for MCI's network from the relevant local calling area to the point of interconnection and direct the district court to enter summary judgment in favor of MCI on that issue; (2) in light of the FCC's recent rule changes, we vacate the district court's summary judgment on the issue of the propriety of restricting MCI from using BellSouth UNEs to provide switched access service to customers other than MCI local exchange customers and remand for further proceedings; and (3) we reverse the district court's conclusion that conditioning the provision of two-way trunking on the lack of traffic sufficient to justify one-way trunks was consistent with Rule 305(f) and direct the district court to [**33] enter summary judgment in favor of MCI on that issue.

*REVERSED IN PART, VACATED IN PART, AND REMANDED*

## CERTIFICATE OF SERVICE

I, K.C. Halm, hereby certify that on 18th day of November, I caused copies of forgoing Final Brief of Universal Telecom Inc. to be sent by electronically to the following parties:

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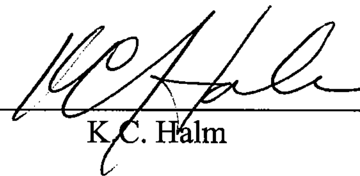

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