ORDER NO. 99-397

ENTERED JUN 22 1999

This is an electronic copy. Appendices and Footnotes may not appear.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 91

In the Matter of the Petition of Electric Lightwave, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with GTE Northwest Incorporated, Pursuant to the Telecommunications Act of 1996.	)))))	ORDER

DISPOSITION: INTERCONNECTION AGREEMENT APPROVED;
ELI APPLICATION FOR RECONSIDERATION GRANTED

Procedural History

On October 7, 1998, Electric Lightwave, Inc. (ELI), filed a petition with the Public Utility Commission of Oregon (Commission) to arbitrate a contract for network interconnection with GTE Northwest Incorporated (GTE) pursuant to 47 U.S.C. §§251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act). GTE filed a response to the petition on November 2, 1998.

Prehearing conferences were held on October 23 and November 12, 1998, to establish a procedural schedule. Opening testimony was filed November 30, 1998. Reply testimony was filed January 4, 1999.

A third prehearing conference was held on January 11, 1999. At the conference, the parties agreed to stipulate the prefiled testimony and exhibits into evidence, waive the scheduled hearing, and submit briefs on the outstanding issues. Opening briefs were filed on January 25, 1999. Reply briefs were filed on February 1, 1999.

On February 12, 1999, the Arbitrator issued his decision in this proceeding. GTE filed exceptions to the decision on February 22, 1999.

On February 26, 1999, the Federal Communications Commission (FCC) issued a Declaratory Ruling and Notice of Proposed Rulemaking[1] addressing inter-carrier compensation for the exchange of traffic bound for Internet Service Providers (ISPs). On March 4, 1999, the Arbitrator convened a telephone conference to discuss the Declaratory

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68 (rel. February 26, 1999) (hereafter "Declaratory Ruling").

Ruling. On March 8, 1999, ELI and GTE filed additional comments regarding the Declaratory Ruling.

On March 17, 1999, the Commission issued Order No. 99-218, adopting the Arbitrator's decision, as revised. On April 16, 1999, ELI filed an interconnection agreement (Agreement) as required by Order No. 99-218.

On April 26, 1999, GTE filed a brief objecting to the Agreement filed by ELI. GTE alleges that those sections of the Agreement which incorporate the Commission's decision to require reciprocal compensation for ISP-bound traffic are in error and should be rejected. GTE proposes that the contract provisions included in its response to ELI's petition for arbitration should instead be inserted in the Agreement. In addition, GTE states that Article VII of the interconnection agreement should be revised to take into account a change in law resulting from the U.S. Supreme Court decision vacating 47 C.F.R. §51.319. *AT&T Corp. vs. Iowa Utilities Board*, 535 U.S. __, 119 S. Ct. 721 (1999) (hereafter *"AT&T Corp."*)

On May 6, 1999, ELI filed a response to GTE's brief. ELI opposes GTE's proposed modifications to the Agreement.

On May 7, 1999, ELI filed an application for reconsideration of Order No. 99-218. ELI contends that the Commission erred by concluding that 47 C.F.R. §51.711(a)(3) was not reinstated by the Supreme Court's decision in AT&*T Corp.*

On May 13, 1999, a telephone conference was held to clarify issues relating to the GTE and ELI filings. At the conference, GTE explained that its brief should not be considered as an application for reconsideration of Order No. 99-218. ELI requested that the Commission issue separate orders addressing GTE's proposed modifications of the interconnection agreement and ELI's application for reconsideration.

On May 25, 1999, GTE filed a brief in opposition to ELI's application for reconsideration.

Oregon Administrative Rule 860-016-0030. OAR 860-016-0030 sets forth procedures for reviewing interconnection agreements filed in response to arbitration decisions made by the Commission pursuant to §252 of the Telecommunications Act of 1996. The rule provides that the Commission will issue an order approving or rejecting an interconnection agreement within 30 days of filing. If the Commission does not issue an order, the agreement is deemed approved.

The circumstances of this case are unusual, however, because ELI has filed both an interconnection agreement for approval *and* an application for reconsideration of that agreement. In order to accommodate the 30-day time period in OAR 860-016-0030, ELI proposes that the Commission issue an order approving the interconnection agreement and a second order addressing ELI's application for reconsideration. Put another way, ELI is asking the Commission to approve a final contract at the same time that it is asking the Commission to revise terms of that agreement.

The approval process in OAR 860-016-0030 is designed to impart finality to interconnection agreements. The Commission will not approve an agreement while an application for reconsideration of that agreement is pending. The procedure recommended by ELI does not provide the parties with a final resolution and is wasteful of the parties' and the Commission's resources. We find that the filing of an application for reconsideration effectively suspends the 30-day approval period in OAR 860-016-0030.

Compensation for ISP-Bound Traffic. Article II, §1.49 of the Agreement addresses compensation for ISP-bound traffic. It reflects the Commission's decision in Order No. 99-218 that reciprocal compensation should apply to ISP-bound traffic on an interim basis until the FCC promulgates a rule to govern this type of traffic. GTE maintains that ISP-bound traffic is not local telecommunications traffic subject to reciprocal compensation, but is rather interstate telecommunications subject to FCC jurisdiction. GTE asserts that Article II, §1.49 is contrary to the Act and various provisions in FCC's First Report and Order.[2] It also maintains that requiring reciprocal compensation for ISP-bound traffic violates the agreement negotiated by the parties and is inconsistent with sound public policy.

The Commission is not persuaded by these arguments. Our decision on this issue is consistent with the FCC's Declaratory Ruling. That decision acknowledges that ISP-bound traffic has historically been treated by the FCC as local traffic subject to reciprocal compensation. The FCC further acknowledges that state commissions may choose to continue requiring reciprocal compensation for this traffic pending development of a permanent rule to govern ISP-bound traffic.

As we observed in Order No. 99-218, reciprocal compensation is the most logical and reasonable approach for dealing with ISP-bound traffic on an interim basis. This is particularly true given the fact that the FCC did not adopt an emergency rule and has stated that it will not consider the payment of access charges for ISP-bound traffic. If access charges are removed from consideration, the only other compensation proposals made in this case are the bill and keep and flat rate compensation approaches forwarded by GTE. We find those proposals unacceptable for the reasons stated by the Arbitrator.

GTE's argument is premised on the assumption that the FCC overstepped its authority by allowing state commissions to continue requiring reciprocal compensation on an interim basis pending adoption of a permanent FCC rule. This issue will no doubt be decided in federal court. Until that time, we adhere to our decision in Order No. 99-218.

Access to Unbundled Network Elements. GTE states that Article VII, §1 of the Agreement must be modified to reflect an intervening change in the law resulting from the *AT&T Corp.* decision. GTE recommends including the language set forth in Appendix A of this Order. Under GTE's proposal, it will provide the "Old Rule 319 UNEs" until the FCC adopts a new UNE rule, provided that ELI agrees not to request any

[2] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, Appendix B (1996) ("First Report and Order").

"UNE combinations." GTE maintains that this approach is necessary to preserve the *status quo* until such time as issues relating to FCC rules 315(b), 317 and 319 are resolved. ELI objects to GTE's proposal.

The Commission finds that it is unnecessary to include the contract language proposed by GTE. Article VII, §2.3.2 of the Agreement provides, in part:

> GTE has no obligation to combine any unbundled network elements for ELI; Provided, however, that to the extent that GTE may be specifically required to combine unbundled network elements and/or provide unbundled network elements in existing combinations pursuant to a final and effective decision that is binding on GTE. GTE will negotiate with ELI regarding the provisioning of such elements in accordance with that decision.

Article VII, §2.3.2 is a clear statement of GTE's obligations as they pertain to providing "UNE combinations," and renders the language in Appendix A unnecessary. We interpret §2.3.2 to mean that GTE has no obligation to combine network elements or provide existing combinations of network elements to ELI unless there is a final and effective decision that imposes this obligation on GTE.

Section 2.3.2 does not specify what the parties consider to be a "final and effective decision" for purposes of triggering GTE's obligation to provide UNE combinations. To prevent future disputes regarding this issue, GTE and ELI should define this term. For example, the parties could conclude that a "final and effective decision" for purposes of §2.3.2 shall be the effective date of the FCC rule(s) promulgating "new" UNEs in accordance with the Supreme Court's decision in *AT&T Corp.*[3]

ELI Application for Reconsideration. The Arbitrator concluded that the *AT&T Corp.* decision reinstated FCC Rule 711(a)(3), which, under the facts in this case, requires that ELI receive tandem rate compensation for use of its switch. The Commission reversed, holding that the Supreme Court decision does not automatically reinstate Rule 711(a)(3). ELI contends that the Commission erred by reversing the Arbitrator's decision on this issue.

On June 10, 1999, the Eighth Circuit issued an *Order On Remand From the Supreme Court of the United States* in response to the decision in *AT&T Corp.*[4] The Eighth Circuit's order reinstates various FCC rules, including Rule 711, and effectively

[3] The effective date of the FCC's "new UNE rule" would be a logical "final and effective" date for purposes of §2.3.2. Recently, the U.S. District Court found that the Supreme Court's decision reinstating FCC Rule 315(b) in *AT&T Corp.* involves complex technical questions which require that the matter be remanded to the Commission for further review. Shortly before the Court's decision, the Commission held that matters relating to UNE combinations should be deferred until the FCC issues revised rules in accordance with the *AT&T Corp.* decision. *See, MCI Telecommunications Corp., and MCIMetro Access Transmission Services, Inc. v. GTE Northwest, Inc., et al.,* Civil No. 97-1687-JE, Opinion and Order, March 17, 1999 at 48-51; Order No. 99-194 at 2.

[4] Iowa Utilities Board v. FCC, et. al. *Order On Remand from the Supreme Court of the United States*, (8th Cir., June 10, 1999).

disposes of the issue before us. Accordingly, ELI's application for reconsideration is granted. ELI shall be compensated for use of its switch in accordance with FCC Rule 711(a)(3).

ORDER

IT IS ORDERED that:

1. The interconnection agreement filed by ELI on April 16, 1999, is approved. Within five days of the date of this order, each party shall execute the agreement or submit a written statement affirming that it has read the agreement and will abide by its terms.

2. ELI and GTE shall enter into negotiations to define the term "final and effective decision" as set forth in Article VII, §2.3.2 of the interconnection agreement. If the parties agree upon a definition, it shall be incorporated into the interconnection agreement. If the parties cannot agree, the matter may be submitted to the Commission for determination.

3. The application for reconsideration filed by ELI on May 7, 1999, is granted.

Made, entered, and effective _____.

_____
Ron Eachus
Chairman

_____
Roger Hamilton
Commissioner

_____
Joan H. Smith
Commissioner

A party may appeal this order pursuant to applicable law.

p:/administrative hearings/petrillo/ARB91 June99 order