STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

FOCAL COMMUNICATIONS CORPORATION OF ILLINOIS	)	
Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois	)	**Docket No. 00-0027**

POST-HEARING ARBITRATION BRIEF OF

FOCAL COMMUNICATIONS CORPORATION OF ILLINOIS

Carrie J. Hightman
Annaliese Fleming
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5657

Attorneys for
FOCAL COMMUNICATIONS CORPORATION OF ILLINOIS

Jane Van Duzer
Paul Rebey
FOCAL COMMUNICATIONS CORPORATION OF ILLINOIS
200 N. LaSalle Street
Suite 1100
Chicago, Illinois 6060
(312) 895-8949

DATED: March 27.2000

INTRODUCTION

On January 13, 2000, Focal Communications Corporation of Illinois ("Focal") filed a petition for arbitration of an interconnectionagreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech"), pursuant to Section 252(b) of the Telecommunications Act of 1996, (the "1996 Act") (47 U.S.C. 252(b)).

Focal has operated under an interconnection agreement with Ameritech that expired on October 28, 1999. Prior to that time, Ameritech advised Focal that Ameritech did not intend to extend the term of the interconnection agreement and it gave Focal written notice that the interconnection agreement would expire on October 27, 1999. Consequently, Focal formally requested that Ameritech initiate negotiations for a new interconnection agreement pursuant to Section 252 of the 1996 Act. (Pet., para. 5)

Focal and Ameritech held numerous meetings to discuss the rates, terms, and conditions of Ameritech's provision to Focal of interconnection, unbundled network elements, and related services and facilities. During these negotiations for a successor interconnection agreement, Ameritech proposed a draft agreement and Focal proposed changes to that draft. Focal and Ameritech held many meetings to negotiate the interconnectionagreement that is the subject of this arbitration. The parties reached agreement on a number of issues. Focal's request for arbitration only raised the most important unresolved issues that are critical to Focal's business. Specifically, Focal sought arbitration of fourteen unresolved issues. Since the time the petition was filed, Focal and Ameritech have reduced the number of unresolved issues that the Commission needs to resolve to five. Those issues are as follows:

ISSUE 1: Focal and Ameritech were unable to agree upon the rate to be paid for reciprocal compensation. [Section 4.7 of the Interconnection Agreement].

ISSUE 2: Whether Focal should be compensated for calls originating on Ameritech's network and delivered to a Focal ISP customer. [Section 4.7 of the Interconnection Agreement].

ISSUE 3: Focal and Ameritech were unable to agree upon the terms and conditions under which Focal would be able to convert existing customer access circuits into a UNE combination which is sometimes referred to as Enhanced Extended Link ("EEL"), as well as the conditions under which Focal can purchase customer access circuits combined with inter-office transport, pursuant to FCC Rule 3 15(b). [Schedule 9.2 of the Interconnection Agreement]

ISSUE 4: Ameritech has proposed language in Section 4.3.12 of the interconnection agreement which would require Focal to maintain network facilities used to provide local service in the geographic area assigned to the central office code and would make Focal solely responsible for the transport between Ameritech's end office and the Focal point of interconnection in the case of one category of service (Virtual Office Service). [Section 4.3.12 of the Interconnection Agreement]

ISSUE 7: Ameritech should not be allowed to make any service-affecting changes or modifications to the components of an already-provisioned xDSL loop without giving Focal reasonable notice of such modifications. [Section 9.5.6 of the Interconnection Agreement]

Attachment A to this Brief is a copy of Focal's proposed contract language for each of the remaining disputed issues.

The most significant disputed issue in this case is Issue 2, which deals with compensation for the transport and delivery by Focal of calls originated on Ameritech's network by Ameritech's local customers and delivered to Focal Internet service provider ("ISP") local customers.' Just one business day before this brief was due, the United States Court of Appeals for the District of Columbia Circuit vacated an FCC order that served as the primary basis for Ameritech's and Staffs position on this issue -- *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensationfor ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in Docket No. 99-68, FCC 99-*38* (rel. Feb. *26,* 1999) *("Declaratory Ruling"). Bell Atlantic Tel. Cos. v. FCC, No.* 99-01094 *and consolidatedcases,* Slip Op. (D.C. Cir. March 24, 2000) *("D.C. Circuit Decision'),* a copy of which is attached hereto as Attachment B. As will be discussed in more detail below, with the vacatur of the *Declaratory Ruling,* the law now requires the Commission to treat Internet-bound calls as local calls, as the Commission historically has done.

This treatment is abundantly reasonable. Focal incus the same costs for calls originating on Ameritech's network that are routed to ISPs as it does for calls terminated to other end users. Therefore, it is Focal's position that reciprocal compensation should be paid for all traffic that is subject to local end-user tariffs as opposed to either interstate or intrastate switched access charges.

'The Commission should be clear that Issue 2 relates only to calls bound for the Internet. It does not cover local calls made to ISPs but not bound for the Internet, such as calls to ISPs' marketing department or to their employees, the latter of which is indisputably local traffic, which would fall under Issue 1. (Tr. 356)

Ameritech, on the other hand, does not believe that it is obligated to pay Focal anything for those calls. If the Commission were to reject Ameritech's position regarding payments for ISP bound traffic, Ameritech would be required to compensate Focal when it uses Focal's network. This simple fact differentiates this issue from nearly every other provision in the interconnection agreement, which entails payments from Focal to Ameritech.

Issue 1 involves the reciprocal compensation rate for all local traffic other than Internet-bound traffic. Focal is entitled to the tandem rate for the transport and termination of this traffic since it meets the FCC's geographic comparability test. While Focal does not agree that any other test must be met, the evidence shows, and Staff agrees, that it meets every test that has been presented.

Issue 3 involves the UNE combinationknown as the enhanced extended link or EEL. While Ameritech and Focal were at odds over the terms and conditions under which Ameritech would offer this combination, the issue now boils down to potentially one term -- whether Focal should be required to collocate in order to obtain the EEL. The evidence shows that the purpose of an EEL is to avoid requirements such as collocation, which have attendant costs. Ameritech has offered no reason for requiring Focal to collocate to obtain an EEL, and such a requirement should not be included in the interconnection agreement.

Issue 4 involves an extra-legal interconnection requirement Ameritech seeks to impose on Focal associated with Focal's provision of a foreign exchange service which competes successfully with Ameritech's foreign exchange service. Ameritech has provided no technical reason for

requiring Focal to add points of interconnection. Ameritech's only rationale is an economic argument, which is belied by the facts. This requirement must be rejected.

Issue 7 involves the integrity of xDSL service. Focal requests only that it be advised in advance of any service affecting changes or modifications that Ameritech makes to an xDSL loop provisioned to Focal.

As the Commission is well aware, this arbitration must be resolved by the standards established in Sections 251 and 252 of the 1996 Act (47 U.S.C. §§ 251 and 252), and the rules adopted by the Federal Communications Commission ("FCC") in *Implementation of the Local Competition Provisions of the Telecommunications Act of* 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 13042 (1996) *("Local Competition Order").* For the reasons described herein, the 1996 Act, the *Local Competition Order*, and controlling law require adoption of Focal's position on the remaining disputed issues.

ARGUMENT

I. FOCAL IS ENTITLED TO RECIPROCAL COMPENSATION FOR LOCAL TRAFFIC AT AMERITECH'S TANDEM RATE.

FOCAL POSITION: Reciprocal compensation should be paid on the transport and termination of all local calls at a cost-based rate. Ameritech should pay Focal a single rate any time Ameritech delivers traffic to Focal's point of interconnection. Focal should pay Ameritech that same rate when Focal delivers traffic to Ameritech's point of interconnection. Focal's switch provides the same (if not greater) geographic coverage as Ameritech's end office and tandem switches provide in combination. Accordingly, the reciprocal compensation rate should be the "tandem" rate and should include at least the following rate elements: end office local termination, tandem switching, tandem transport termination and tandem transport facility mileage.

A. The FCC has Identified the Geographic Comparability Test as the Sole Test for Entitlement to the Tandem Rate for Reciprocal Compensation.

The 1996 Act provides for 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. Such costs are to be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A).

In its *Local Competition Order*, the FCC established presumptive symmetrical reciprocal compensation rates based on the incumbent local exchange carrier's ("ILEC's") costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2). *Local Competition Order*, para. 1085. The FCC concluded that using the ILEC's forward-looking costs and rates for transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers satisfied the requirement of section 252(d)(2) of the 1996 Act that these costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." Specifically, the FCC stated:

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

Local Competition Order, para. 1090 (emphasis added).

The rule promulgated by the FCC to implement paragraph 1090 of the *Local Competition Order* includes only the last, underlined sentence of paragraph 1090. Rule 5 1.711 (a)(3) states as follows:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

47 C.F.R. § 51.71 l(a)(3). This test, the "geographic comparability" standard, articulates the sole criteria for determining whether Focal is eligible to charge Ameritech the "tandem rate" for traffic originated by Ameritech and handed-off to Focal for delivery over Focal's network to a Focal customer.

Contrary to the analysis of the Staff and Ameritech witnesses, who are not attorneys, the FCC did not establish a two-part test for determining the appropriate rate for reciprocal compensationto be charged by a CLEC. Under Staffs and Ameritech's erroneous view, the CLEC's reciprocal compensation rate would be based on a "geographic comparability" test which the FCC codified as 47 C.F.R. Section 5 1.711 (a)(3) plus another independent test for "tandem functionality: a matter which is referred to in only a single sentence in the above-quoted portion of paragraph 1090, but not included in the implementing regulation. Neither the rule nor the statement of the rule in the text of the *Local Competition Order* indicate that any test other than the geographic comparability test should be used to determine a CLEC's entitlement to the tandem rate for reciprocal compensation. It is inconceivable that the FCC would establish a specific standard by rule, and then

establish an additional standard covering the same subject in the text of its *Local Competition Order* which could undercut its rule through inconsistent determinations.

The only logical interpretation of paragraph 1090 of the *Local Competition Order* is that there is a single test -- geographic comparability. If a CLECs' switch meets the applicable standard in the FCC's rule, i.e., it "serves a geographic area comparable to the area served by the incumbent LEC's tandem switch," then the "appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." The statement in paragraph 1090 directing states to consider "whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an ILEC's tandem switch" does not establish a second independent test that also must be met. It merely provides guidance that if a state commission decides to "establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to an end-office switch" (i.e., two distinct reciprocal compensation rates), it must consider that new entrants often utilize new technologies (e.g., fiber-ring or wireless networks) in lieu of the hierarchical tandem office / end office structure traditionally used by ILECs.

Consideration of tandem functionality is relevant only if the CLEC does not meet the geographic comparability test *and* the Commission establishes a two-part reciprocal compensation rate -- that is, a rate that will vary depending upon whether traffic is terminated to an end office or a tandem office. Under those limited circumstances, *a* state commission must consider whether the CLEC utilizes new technologies that perform functions similar to those performed by an ILEC's tandem switch and, thus, whether some or all calls terminating on the new entrant's network should

be priced, under the two-part price schedule, at the tandem rate rather than the end-office rate. This is the only interpretationthat reconciles in a logical and consistent manner Section 5 1.71 l(a)(3) and paragraph 1090 of the *Local Competition Order.*

Not a single state commission has supported the proposition that a carrier can meet the geographic comparability test and therefore qualify to charge the tandem rate as provided under the rule, but then be denied that same authorization because it failed a separate tandem functionality test? See State of North Carolina Public Utilities Commission, *Petition by ICG TeJecom Group, Inc, for Arbitration of Interconnection Agreement with BellSouth Telecommunications,* Inc., Docket No. P-582 Sub 6, released November 4, 1999, *8 (rejecting BellSouth's argument that switch functionality is relevant under Section 51.711 and finding that *the Local Competition Order* "requires only that a [CLEC's] switch serve a geographic area comparable to that served by an ILEC's tandem to qualify for the tandem termination rates")("*North Carolina Order*"); *Alabama Public Service Commission, Petition by ICG TeJecom Group, Inc. for Arbitration of Interconnection with BellSouth Telecommunications* Inc., Final Order on Arbitration, Docket 27069 (*rel.* Feb 3, 2000) pp. 13, 21 (functional equivalency is not a requirement of the FCC's rules)("*Alabama Order*"). Indeed, it is difficult to imagine circumstances in which a carrier can serve a geographic area comparable to that served by an ILEC tandem *without* its network also performing tandem functions.

'While it is true that in its order in *Teleport Communications Group, Inc. Petition For Arbitration,* Docket 96-AB-001, 1996 Ill. PUC LEXIS 616, *13 *(Nov. 4,* 1996) *("TCG Arbitration"), the* Commission made several passing references to tandem functionality, it is also clear that it did not apply a distinct tandem functionality test. Importantly, at the time the *TCG Arbitration* order *was* issued, the FCC's pricing rules were subject to a court-ordered stay. The Commission was therefore not required to apply the FCC's standards nor to interpret them with rigor.

In sum, the only test for entitlement to the tandem rate for reciprocal compensation is the FCC's geographic comparability test. Ameritech and Staff are wrong as a matter of law when they contend that Focal must also meet a functionality test in order to be entitled to the tandem rate for reciprocal compensation.[3]

B. Focal Satisfies the FCC's Geographic Comparability Test.

This arbitration proceeding *is* not the first time the Commission has considered the appropriate reciprocal compensation rates that can be charged by a CLEC, and applied the FCC's test for the tandem rate. In the *TCG Arbitration*, the Commission addressed this issue and authorized TCG to charge the tandem reciprocal compensation rate. The Commission stated:

> The record establishes that TCG serves a geographic area comparable to the area served by Ameritech's tandem switch through a combination of its own network and unbundled elements purchased from Ameritech. If a customer anywhere in the Chicago area wants TCG to provide service, TCG has a network capable of doing so and a switch capable of routing that traffic anywhere in the region. In the process, the TCG switch is capable of and will perform both end-office and tandem switching functions.

TCG Arbitration at * 16. The Commission required that TCG have a network "capable of' providing service to a comparable area served by Ameritech's tandem switch in order to satisfy the geographic comparability test. As Staff witness VanderLaan correctly noted, the Commission did not require

[3]There really should be no issue in this proceeding concerning the proper interpretationof the FCC's rule with regard to local traffic. However, Staff witness Phipps unfortunately perpetuated the erroneous tandem functionality standard in his analysis of the appropriate inter-carrier compensation to be applicable to ISP traffic (Issue 2). In fact, it was the only test that Mr. Phipps applied. Putting aside the recent D.C. Circuit decision which vacated *the* FCC's *Declaratory Ruling*, discussed below, nothing in the 1996 Act, the FCC's orders, or the case law even remotely suggests that it is appropriate to apply a tandem functionality analysis to only a portion of traffic carried on a carrier's network. Staff compounded its error by analyzing (and misunderstanding the composition and structure of) only a portion of Focal's network. These issues are addressed in more detail below.

TCG to have its customer base established in the same manner as Ameritech in order to receive the tandem rate. (Staff Ex. 4.0, pp. 9-l 1)

The evidence establishes that Focal's network is substantially the same as TCG's network at the time of the *TCG Arbitration* order, and that application of the test set forth by the Commission in the TCG arbitration results in the conclusion that Focal, like TCG, is entitled to the tandem rate. (Tr. 15 1) John Barnicle, Focal's Chief Operating Officer, presented extensive testimony describing Focal's network. He stated that Focal's network was capable of providing service to customers throughout MSA 1 and provided a "Focal Coverage Map" (Focal Ex. 1.2) supporting this assertion. (Focal Ex. 1.0, pp. 9-16)

Focal went much further, however, than merely showing that it is *capable* of serving areas comparable to that served by an Atneritech tandem switch. Focal Exhibit 1.3 depicts the areas served by seven Ameritech tandem switches in MSA-1. It is these Ameritech tandem serving areas that form the basis for any comparison with the area served by a Focal switch. Focal Exhibits 1.4 and 1.5 show for Focal's Chicago and Arlington Heights switches, respectively, those Ameritech rate centers served by the Focal switch. These exhibits were prepared using an extremely conservative interpretation of the FCC's phrase "serves a geographic area." A rate center was deemed to be served by the Focal switch only if Focal has a customer physically located in that rate center, as well as physical facilities there to serve that customer. The exhibits exclude from consideration any customers who may have obtained through a foreign-exchange type service a telephone number associated with a rate center, but do not have a physical presence in the rate center. (Focal Ex. 1.0, pp. 14-20)

On the other hand, Ameritech contends that geographic comparability can only be shown by examining the distribution and volume of traffic delivered to the tandem serving areas. It argues that the standard can only be satisfied if the distribution of traffic delivered throughout the geographic area is reasonably comparable to the distribution of traffic in Atneritech Illinois' tandem serving area. (Amer. Ex. 2.0, pp. 22-23)

Of course, there is no indication in the FCC's *Local Competition Order* that volume and distribution of traffic are relevant to the geographic comparability test, because they are not. In the *TCG Arbitration,* the Commission rejected Ameritech's similar contention that a CLEC must show that it had customers in each of the end offices subtending an Ameritech tandem switch. The Commission observed that, "We believe that Ameritech's approach not only improperly emphasizes its own network design but would essentially add a market penetration or customer density standard to the FCC's test." *TCG Arbitration,* * 14-15.

Now that Focal has customers in most of the end offices subtending Ameritech tandem switches, thereby essentially meeting the standard that Ameritech unsuccessfully urged the Commission to adopt for TCG, Ameritech simply raises the bar on its market penetration and customer density standard by arguing that volume and distribution of traffic comparable to Ameritech's volume and density of traffic must be shown. Ameritech tries to differentiate its position in this case from its rejected position in *TCG* by arguing that it is not proposing a market penetration standard because it is only proposing that the distribution of traffic *ratios* should be comparable. That fact does not distinguish its current proposal in any relevant respect from its rejected proposal in *TCG.* The Commission must recognize -- as it did in the *TCG Arbitration* -- that a new entrant is unlikely to be immediately and ubiquitously successful throughout a massive

geographic area such as MSA 1. To suggest that a CLEC must show that it has a distribution of customers or traffic volumes similar to Ameritech's 100 year old monopoly is the *very* essence of a market penetration standard. Ameritech's position is untenable.

In sum, even a cursory visual comparison of Focal's switch serving areas as shown in Focal Exhibits 1.4 and 1.5, to the Ameritech tandem serving areas shown in Focal Exhibit 1.3, inevitably leads to the conclusion that each of the Focal switches serves an area comparable to that served by an Ameritech tandem. In fact, each Focal switch serves an area actually larger than the area served by *several* Ameritech tandems *combined.* For these reasons, Staff concluded that Focal meets the geographic comparability test. The Commission must reach the same conclusion.

C. **Even Were The Commission to Find -- Contrary to the FCC's Rule -- That Focal Must Meet the Tandem Functionality Test to Qualify for the Tandem Rate, It Has Done**

Even if the Commission concludes -- contrary to the law -- that Focal must meet an independent "tandem functionality" test to qualify for the tandem rate, Focal readily satisfies such a standard. Focal demonstrated that its network utilizes new technologies to perform functions similar to those performed by an Ameritech tandem switch and Focal utilizes the very same network and the very same technologies on *all* calls that are carried on Focal's network. Staffs conclusion that Focal's network performs the same functions as Ameritech's tandem switch, and thus Ameritech qualifies for the tandem reciprocal compensation rate is supported by substantial evidence, and should be adopted by the Commission.

Messrs. Barnicle and Starkey described Focal's network architecture. On the customer access side of Focal's network, *i.e.,* on the customer side of Focal's switch, Focal typically acquires DS-3 fiber optic transport extending from the switch to multiplexing equipment at leased hubs

located either at the facilities of third party transport providers such as MCI WorldCom, AT&T or Nextlink, or at Ameritech tandem or end offices. From the hubs, Focal leases T-l lines to the customer premises. The T-1s are commonly configured as ISDN-PRI lines. The T-1s are often multiplexed onto DS-3 facilities. Multiplexing is the use of electronic equipment which allows two or more signals to pass over one communications circuit. Focal also places SONET nodes in buildings and then uses the buildings' cable and riser facilities to connect to the customer's premises. Ameritech switching is not involved. (Focal Ex. 1.11, p. 3; Focal Ex. 1.9; Focal Ex. 2.1, pp. 13-16)

In addition to this typical network configuration, Focal also serves some end users by placing SONET switching equipment in a building and then using the building's cable and riser facilities to connect to the customer's premises. Calls that terminate through this architecture are carried over Focal's interconnection facilities from the point of interconnection ("POP) with the originating carrier to Focal's DMS-500 switch. The traffic is then transported over Focal facilities to the SONET switching node generally located in the basement of the building. The SONET node then passes the traffic from the inter-office transport fiber to the appropriate building cable terminating at the customer premise. (Focal Ex. 1.11, p. 3; Focal Ex. 2.1, pp.13-16)

If a Focal customer collocates in Focal's facilities, which most Focal customers do not do, additional facilities are deployed to connect the customer's facilities to the Focal switch. When traffic is terminated to collocated customers, Focal transports calls from the point of interconnection with the originating carrier to the Focal switch. The traffic is then switched onto facilities connected to the end user's collocated equipment. In some cases, the collocation space may be located near the switch room, and in others, it may be located on a different floor, a different building, or even in a different town. For example, Focal has customers in collocation space located in its Chicago office,

but, in some instances, those customers may receive dial tone from Focal's Arlington Heights switch. Focal also utilizes SONET-based fiber optic transport systems to carry these calls, regardless of the distance of the transport. (Focal Ex. 1.11, p. 4; Focal Ex. 2.1, pp. 13-16)

On the network interconnection side, ie., on the network side of Focal's switch, Focal typically obtains two-way trunk facilities not only between the Focal switch and the Ameritech tandems, but also between numerous Ameritech end offices and the Focal switch. These trunk facilities range from DS-1 connections to DS-3 and higher order optical facilities, depending upon the purpose and volume of traffic. The facilities, like the transport facilities to the customer premises, are obtained by third party transport providers such as MCI WorldCom, AT&T or Nextlink. Focal picks up the traffic at the POI between the two networks and carries it over Focal's transport network to separate trunk ports at the Focal switch. Focal's switch performs the aggregation function from the multiple end offices and other trunk groups onto facilities for the delivery of the traffic to the Focal customer. While the traffic may be handed over to Focal at an Ameritech tandem office because that is where the POI is located, it usually does not traverse an Ameritech tandem switch. In other words, for the vast majority of traffic, it is Focal's switch that performs the traffic aggregation for traffic originating from Ameritech's end offices, *not* the Ameritech tandem switch.4 (Focal Ex. 1.11, pp. 5-6; Focal Ex. 2.1, pp. 13-16)

Staff witness VanderLaan concluded that Focal's network performs tandem functions. (Tr. 591) Indeed, it is so readily apparent that Focal's network performs tandem functions that Ameritech

[4]Focal's extensive network architecture can be contrasted with an architecture in which a CLEC designates its switch as its single point of interconnection (as it may lawfully do). In such a case, Ameritech's originating traffic would have to be transported from the Ameritech customer to an Ameritech end office, and then switched by the Ameritech tandem switch and transported over Ameritech transport facilities to the CLEC's single switch, which may be many miles away.

did not ask one question of Ms. VanderLaan on cross-examination after she stated her conclusion at the evidentiary hearing that Focal meets the tandem functionality test. (*See* Tr. 592-96) Ms. VanderLaan based her conclusion on the Verified Statements of Messrs. Barnicle and Starkey, as well as their live testimony. (Tr. 592)

On the other hand, Ameritech's definition of tandem functionality is designed to ensure that Focal fails the test. Mr. Panfil maintains that "tandem functionality is purely and simply trunk-to-trunk switching, that is, a switching operation that connects two network switches to each other." (Amer. Ex. 2.0, p. 26) Under cross-examination Mr. Panfil acknowledged that CLECs do not have separate end office and tandem switches. (Tr. 408) In light of these facts, he was forced to admit that it would be impossible for CLECs to pass his functionality test because they do not have the same hierarchal network structure that Ameritech has, *i.e.*, both tandem and end office switches. (Tr. 408-09) The only way that Focal could qualify for the tandem rate according to Mr. Panfil would be to "modify its network to make it more like Ameritech's network whereby there are both tandem and end office switching functions." (Tr. 410-l 1) Finally, through cross-examination, Mr. Panfil finally acknowledged that the only facilities that perform tandem functions in the way that Ameritech defines them is a tandem switch. (Tr. 411-12) Thus, the *only* way Focal can meet Ameritech's tandem functionality test would be to *add a tandem switch!*

Ameritech's view of tandem functionality would preclude any CLEC with a modern single switch architecture, rather than Ameritech's hierarchical tandem/end office architecture, to ever qualify for the tandem rate. This result is patently inconsistentwith the FCC's discussionof tandem functions in paragraph 1090 of the *Local Competition Order,* which states that: "states shall also consider whether *new technologies* (e.g., fiber ring or wireless networks) perform functions similar

to those performed by an ILEC's tandem switch." Clearly, the FCC has concludedthat a CLEC need not have a tandem switch to qualify for the tandem rate. Ameritech's position to the contrary must be rejected.

Faced with the persuasive evidence concerning Focal's network architecture, Ameritech claims that Focal is only entitled to reciprocal compensation at the tandem rate if Focal's switch performs the same functions on behalf of Ameritech as the functions performed by Ameritech's *tandem* switch on behalf of Focal. Ameritech claims this can only be established if: (1) Focal demonstrates that Ameritech may, at its option, connect directly to Focal's end office switch functions, thereby avoiding payment to Focal of the tandem interconnection rate; and (2) Focal offers interconnection, defines its switches and applies charges for terminating traffic in the same manner regardless of whether the interconnector is an ILEC or an interexchange carrier ("IX@'). (Amer. Ex. 2.0, p.22) Each of these requirements is flawed.

As a preliminary matter, Mr. Panfil, the Ameritech witness who created these requirements, admitted that they are not stated in any FCC rule or order. (Tr. 402) There simply is no precedent or legal justification for imposition of these requirements.

More specifically, as to the first requirement, Mr. Panfil admitted that it is in effect a request to interconnect at a point other than the mutually agreed designated point of interconnection, *i.* e., Focal's end office. (Tr. 406-08) While Section 252(c)(2)(b) of the 1996 Act requires *incumbent LECs* to interconnect "at any technically feasible point within the carrier's network," non-incumbent LECs such as Focal have no such obligation. 42 U.S.C. 252(c)(2)(b). Thus, adoption of Ameritech's position would impose an obligation on Focal well beyond what is required of CLECs by the Act for purposes of receiving compensation at the tandem interconnection rate. Mr. Panfil agreed that

Focal is not required by the 1996 Act or any FCC or Commission order, to provide interconnection at any technically feasible point. (Tr. 406-08) This additional requirement is unjustified, unprecedented, and should be rejected.

Moreover, Ameritech's proposal is fundamentally inconsistent with Focal's network architecture, and the way in which the parties have agreed to interconnect. Focal's network is based on a modern single switch architecture, while Ameritech *uses* its traditional "hierarchical" structure. Focal's network does not have end offices as does Ameritech's network or a distinct "end office" side of a switch to which Ameritech can connect. Unlike Ameritech's network, in which its central office and end office switch *is* always physically located within a specific geographically defined rate center, that is not the case on Focal's network. Thus, if Focal carries a call from a Focal customer to an Ameritech customer located in Evanston, the Ameritech end office switch is located within the Evanston rate center. By contrast, if Ameritech carries a call to the Focal switch serving the Evanston rate center, that switch is located in Chicago. If Focal wants to carry a call to the switch serving the Evanston rate center, Focal has to transport it to Evanston. Each Focal switch, like an Ameritech tandem, serves multiple rate centers, extending out geographically beyond the typical 15 miles or so which define an Ameritech rate center. But Ameritech cannot fairly claim that it need only pay Focal the end office rate if it brings traffic to the Evanston end office. This is because there is no Focal end office located in Evanston. (Focal Ex. 1.0, pp. 27-28)

Mr. Panfil's second additional requirement is that Focal demonstrate that it offers interconnection, defines its switches, and applies charges for terminating traffic in the same manner regardless of whether the interconnector is an ILEC or an IXC always has, and always will, provide Ameritech and all other carriers with non-discriminatoryinterconnectionin full compliance with all

applicable state and federal laws and regulations. If Ameritech believes that Focal is providing service on a discriminatory basis, then it is entitled to tile *a* complaint against Focal in the appropriate forum. It has not done so. This requirement is unnecessary. Historically, the applicable rates, terms and conditions for the exchange of interexchange traffic have not always been identical to those applicable to exchange traffic. Ameritech has failed to explain why that should change now.[5] For these reasons, the second additional criteria must also be rejected.

In conclusion, there is no separate "functionality" test which Focal must meet in order to qualify for the tandem reciprocal compensation rate. However, if the Commission concludes -- contrary to the law -- that Focal must also meet the "functionality" test, the evidence establishes it has done so. Staff correctly concluded that Focal's network performs the same functions as Ameritech's tandem switch and that Focal is entitled to the tandem rate. The Commission must adopt Staffs conclusion.

D. Conclusion *Regarding* Issue 1: Reciprocal Compensation.

Focal's switches serve geographic areas comparable to the areas served by Ameritech's tandem switches. Staff agrees,. Therefore, according to 47 C.F.R. Section 51.711 (a)(3), the rule adopted by the FCC to determine the rate for reciprocal compensation, Focal is entitled to a reciprocal compensation rate equal to the rate that Ameritech levies for calls terminated to its tandem. Ameritech's tandem rate consists of four rate elements: end office local termination, tandem switching, tandem transport termination and tandem transport facility mileage. It is the sum of these elements, $0.005175 per minute of use, that Focal seeks authorization to establish as its rate.

[5]Focal also questions whether Ameritech would meet this criteria.

While Focal does not agree that any other test must be met in order to qualify for the tandem rate, if the Commission nevertheless determines to apply the functionality test, the evidence establishes, and Staff agrees, that Focal's network performs functions comparable to functions performed by Ameritech's tandem switch.

The Commission must reject the additional, unsupported, extraordinary requirements created by Ameritech as an obstacle to Focal receiving the tandem rate for reciprocal compensation.

II. AMERITECH MUST PAY FOCAL COMPENSATION FOR ISP-BOUND TRAFFIC AT THE SAME RATE AS AMERITECH PAYS FOCAL TO TERMINATE NON-ISP BOUND LOCAL TRAFFIC – THE TANDEM RATE.

FOCAL POSITION: Focal incurs the same costs for calls originating on the Ameritech network, routed over the Focal network and delivered to a Focal ISP customer as it does for calls terminated to other end users. Focal should be compensated for these costs at the same rate as it is compensated for non-ISP local calls originating *on* Ameritech's network and routed to *a* Focal customer.

Since Focal incurs the same costs for calls originating on Ameritech's network that are routed to ISPs as it does for calls terminated to other end users, reciprocal compensation should be paid for ISP-bound traffic at the same rate that it is paid for other local traffic. Ameritech, on the other hand, does not believe that it is obligated to pay Focal anything for those calls and proposes to not treat ISP traffic as local.

While the FCC concluded in the *Declaratory Ruling* that calls to the Internet are largely interstate calls, that decision was vacated only days ago by the U.S. Court of Appeals for the D.C. Circuit in the *D.C. Circuit Decision.* Thus, there is now no legal authority for Ameritech's and Staffs view that Internet-bound traffic is different than other local traffic, and that Ameritech need not pay Focal the reciprocal compensation rate for local traffic for calls terminated to the Internet. The

Commission's prior view -- that Internet-bound traffic is local traffic for which reciprocal compensation is due -- should be reaffirmed in this arbitration.

In any event, the FCC has acknowledged that all LECs incur costs when delivering traffic to an ISP for which they must be compensated in some manner. Not only does Focal incur costs in transporting and delivering traffic, but Ameritech actually avoids costs by handing off traffic to Focal to be delivered. Yet, Ameritech proposes no compensationto Focal for use of Focal's network to transport and deliver these calls.

Because this traffic is treated as "local" for all other regulatory purposes, it should be treated as local for reciprocal compensation purposes as well. Since Focal will be incurring costs for transport and termination of Ameritech's traffic to ISPs, and by the same token Ameritech will be avoiding costs as Focal incurs them, and because the cost involved in terminating calls to ISPs is no different than the cost of terminating any other local calls, the Commission should utilize the same rate for compensation for these calls as it uses for all other local traffic. This is especially true since there is no economically feasible way of segregating or separately measuring this traffic.

A. The Commission Clearly Has Authority to Address Reciprocal Compensation for ISP-Bound Traffic.

The threshold issue that the Commission must address in deciding whether to require reciprocal compensation for ISP-bound traffic is whether it has the authority to do so. Ever since the FCC's *Declaratory* Ruling that ISP traffic is jurisdictionally interstate -- and even though that Ruling explicitly recognized and endorsed state commissions' continuing jurisdiction over the issue of compensation for termination of ISP-bound traffic -- questions have been raised regarding this issue.[6] Ameritech argues here that, given the *Declaratory Ruling's* finding that ISP-bound calls are

[6]While the Declaratory Ruling was completely clear on this point, the FCC subsequently provided an interpretation of that decision that removed any doubt whatsoever as to the FCC's view on the authority of state commission to address reciprocal compensation for ISP-bound traffic. In *Bell*

jurisdictionally largely interstate, they are outside the scope of the local interconnection provisions of Sections 25 1 and 252 of the 1996 Act. In Ameritech's view, since Section 25 l(b)(5) of the 1996 Act concerns inter-carrier compensation for *local* traffic and the FCC has held that calls to ISPs are jurisdictionally *interstate,* Section 251(b)(5) does not govern inter-carrier compensation for ISP bound calls. Thus, according to Ameritech, this Commission does not have the authority to require reciprocal compensation for ISP-bound calls in a Section 252 arbitration, because Section 252 only gives state commissions jurisdiction over matters that must be negotiated pursuant to Section 25 1.

The entire premise of Ameritech's argument, which is faulty in any event, has been eradicated by the D.C. Circuit's vacation of the *Declaratory Ruling.* There, the D.C. Circuit found that the FCC has advanced no "satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as 'termina[ting] . local telecommunications traffic.. ." *D. C. Circuit Decision,* p. 10. ISP-bound traffic therefore remains local in nature, compensation for termination of that traffic is clearly subject to the requirements of Section 251 and resolution of the dispute regarding

---

Atlantic v. Global NAP, Inc., FCC 99-38 (December 2, 1999), the FCC rejected a federal tariff that included a per-minute charge assessed on originating LECs for the delivery of ISP-bound traffic. Since compensation for the delivery of ISP-bound calls was an open issue before the Massachusetts Department of Telecommunications and Energy ("Mass. DTE"), the FCC found that the tariff was contingent and unclear. *Id.* at 14.

In the course of so holding, the FCC analyzed the *Declaratory Ruling's* discussion of state authority to address reciprocal compensation for ISP-bound traffic. The FCC stated:

> [I]t was within our discretion to direct in the *[Declaratory Ruling]* that, on an interim basis, inter-carrier compensation for ISP-bound traffic should be treated as an "open issue" subject to the state-supervised negotiation/mediation arbitration process set forth in sections 25 1 and 252 of the Act. Accordingly, whether the existing interconnection agreement between Bell Atlantic and Global NAPs does or should provide for inter-carrier compensation for ISP-bound traffic is an appropriate area of inquiry for the Massachusetts DTE under sections 25 1 and 252 of the Act, even though ISP-bound traffic is largely interstate.

Bell Atlantic v. Global NAPS at 12. Obviously, if reciprocal compensation for ISP-bound traffic is an appropriate subject for review by the Mass DTE, it is also appropriate for review by this Commission.

compensability falls within the jurisdiction conferred on the Commission by Section 252.

Whether ISP-bound traffic is subject to reciprocal compensation depends on the relevant provisions of the 1996 Act. The Act defines two types of calls: (1) "exchange access," which is the use of the local network to originate and terminate long-distance calls; and (2) "telephone exchange service," which is the use of the local network to allow a local subscriber to reach another subscriber within the local calling area. 47 U.S.C. § 153(16), 153 (47). The Act literally requires reciprocal compensation for all telecommunications-- which would necessarily include calls to ISPs, no matter how those calls are characterized. 47 U.S.C. § 251(b)(5). In 1996, however, the FCC determined that "exchange access" calls are not subject to the reciprocal compensation obligation because local carriers already receive access charges for their services in originating and terminating long-distance calls. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 16012-13 (¶¶ 1033-1034) (1996) ("*Local Competition Order*"). Thus, the Act was determined to require reciprocal compensation in the case of traffic for which access charges are not paid, *i.e.*, for "telephone exchange service."

Accordingly, for purposes of this reciprocal compensation dispute, the question is whether, in connection with ISP-bound traffic, local carriers provide telephone exchange service. Calls to ISPs are "telephone exchange service" calls when a local ISP customer dials a seven-digit number (or, increasingly, a local ten-digit number) to reach the ISP in the same calling area. The call is delivered to the ISP, which answers the call and establishes the communications link with the Internet user. The ISP, in turn, combines "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." *In the Matter of Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11529 (¶¶ 39, 57), 1153 1 (¶ *63)* (1998) *("Universal Service Report").*

Further, the service used to call an ISP allows a caller to "originate and terminate a telecommunications service," as required by 47 U.S.C. § 153(47)(B). When the call reaches the ISP, telecommunications service to the caller terminates and information services provided by the ISP

begin. As the FCC has found, telecommunicationsand information services are mutually exclusive categories. *See Universal Service Report*, 13 F.C.C.R. at 11530 (¶ 59). As a consequence, the telecommunications service that links the customer to the ISP terminates at the ISP's premises and the service performed by the ISP after that is not telecommunications at all.

This conclusion flows from the FCC's own construction of the word "termination" as used in § 251(b)(5) of the Act: namely, the delivery of traffic "from the switch to the called party's premises." *47* C.F.R. § 51.701(d); *Local Competition Order*, 11 F.C.C.R. at 16016 (¶ 1040). There can be no dispute that the ISP is the called party. After the ISP's telephonenumber is dialed, the call is then switched by the local carrier whose customer is the ISP and delivered to the ISP's local premises.

It is for precisely this reason that Ameritech-originatedcalls delivered by Focal to an ISP are no different from calls delivered to a residential or business customer in either their use of Focal's network or the costs Focal incurs on Ameritech's behalf. As Focal witness Starkey testified:

> [R]egardless of whether the originating customer dials either the Focal business customer or the Focal ISP customer, the call travels from the originating customer's premises to the Ameritech central office switch, which then routes the call to the Ameritech/Focal interconnectionpoint and ultimately to the Focal switch. From the Focal switch the call is then transported to either the residential customer or the ISP customer depending upon the number dialed by the Ameritech customer.

(Focal Ex. 2.0, p. 27) Thus, a "ten minute call originated on the Ameritech network and directed to the Focal network travels exactly the same path, requires the use of exactly the same facilities and generates exactly the same level of cost regardless of whether that call is dialed to a Focal local residential customer or to an ISP provider." (Focal Ex. 2.0, p. 26)

Ameritech's approach in this case is the same end-to-end analysis of telephone calls the D.C. Circuit rejected when it vacated the FCC's *Declaratory Ruling*. Ameritech's analysis treats ISP service analogously to the service provided by a long distance telecommunications carrier for

purposes of determining eligibility for reciprocal compensation. The FCC's end-to-end analysis focused on the end points of the entire communication, and concluded that the calls were non-local because the communicationultimately (albeit indirectly) will extend beyond the ISP to websites out-of-state and around the world. *Declaratory Ruling*, ¶ 1. As the *D. C. Circuit Decision* notes, however, the FCC's analysis impermissibly treated the service provided by the ISP as if it were a continuation of the telecommunications services provided by the telecommunications carriers and, accordingly, found the "end point" of the call to be the website(s) to which the ISP provided access. *D.C. Circuit Decision*, Slip Op., Exhibit A, p. 7.

Unlike the carriers whose service is considered in the conventional end-to-end analysis (local exchange carriers and long distance carriers), ISPs are not telecommunications providers. *Id.* Rather, they are "information service providers" who purchase telecommunications in order to provide their services. *Id.* at 6; *In the Mutter of Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11529 (¶¶ 39, 57), 11532-33 (¶ 66) (1998) (*"niversal Service Report"*). The *D.C. Circuit Decision* concluded that while the FCC might have believed that this difference between ISPs and traditional long-distance carriers was irrelevant for jurisdictional purposes, it certainly appeared relevant for purposes of reciprocal compensation. *D. C. Circuit Decision*, p. 6.

The D.C. Circuit rejected the FCC's explanation that, although the call from the ISP to an out-of-state website is "information service" for the end-user, it is "telecommunications"for the ISP and that the telecommunications involved could not, therefore, be said to "terminate" at the ISP. The *D. C. Court Decision* states that "the mere fact that the ISP originates further telecommunications does not imply that the *original* telecommunication does not terminate at the ISP" and that the "subsequent communication [between the ISP and out-of-state websites] is not really a continuation, in the conventional sense, of the initial call to the ISP. *Id.* at 6. The Court summarized the deficiency in the FCC's *Declaratory Ruling* as follows:

> [A]n ISP appears, as MCI WorldCom argued, no different from many businesses, such as "pizza delivery firms, travel reservationagencies, credit card verification

> firms, or taxicab companies," which use a variety of communication services to provide their goods or services to their customers. . . . Of course, the ISP's origination of telecommunications as a result of the user's call is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service). But this does not imply that the original communication does not "terminate" at the ISP. The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, "simply a communications-intensive business end user selling a product to other consumer and business end-users."

Id. (citations omitted).

The Court did not stop there, however, finding that an independent ground required remand; namely the FCC's failure to articulate any basis under which a call to an ISP constitutes "exchange access service" for which reciprocal compensation would not be due. *Id.* at 10. As the D. C. Circuit pointed out, a call is "exchange access" if offered "for the purpose of origination or termination of telephone toll services." *Id.* at 9 (quoting 47 U.S.C. §153(16)). "Telephone toll service," typically a long-distance call, is "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153 (48). Calls to ISP, therefore, can be "exchange access" calls only if ISPs provide telephone toll services. As the FCC has, found, however, ISPs provide information service which is mutually exclusive from telecommunications service. *In re Implementation of the Non-Accounting Safeguards of Section 271 & 272,* 11 F.C.C.R. 21905, 22023-24 (¶ 248) (1996). Accordingly, ISPs connect to the local network for the purpose of providing information services, not originating or terminating telephone toll services. Thus, calls to ISPs terminate at the ISP's premise and are, under the 1996 Act's provisions, telephone exchange service calls subject to

reciprocal compensation.

That the telephone service at issue in ISP-bound calls is local is well-recognized. As the FCC has stated: "To maximize the number of subscribers that can reach them through a local call, most ISPs have deployed points of presence." *In re Access Charge Reform,* 12 F.C.C.R. 15982, 16132 (¶ *342* n.502)(1997) *("Access Charge Order")*(emphasis added). Indeed, it is well-established that dial-up calls to ISPs are subject to local intrastate tariffs. *Southwestern Bell Tel. Co. v. FCC,* 153 F.3d *523,543* (8th Cir. 1998); *Access Charge Order,* 12 F.C.C.R. at 16134-35 (¶ 348).

Since it is clear that the telecommunicationsservice at issue -- calls to ISPs -- are local calls, they fall under Section 25 1 of the 1996 Act. The Act requires, and the parties have agreed, that they will pay one another reciprocal compensation for local calls. Yet Ameritech would have functionally identical calls to ISPs go completely uncompensated. Its position is contrary to the express language of Section 251. As with Ameritech-originated local calls delivered to business or residential customers, Focal is entitled to recover the costs it incurs on Ameritech's behalf when it delivers a call to an ISP. The Commission has no choice but to conclude that reciprocal compensation must be paid for the transport and termination of these calls at the same rate it is paid for all other local calls (per Issue 1).

B. Focal is Entitled to the Tandem Rate for Calls Originated on Ameritech's Network and Delivered bv Focal to an ISP.

As the foregoing demonstrates, in light of the D.C. Circuit's reversal of the FCC's *Declaratory Ruling,* there is no legal basis for the Commission to find that Focal is not entitled to be reimbursed for the costs that it incurs in delivering ISP-bound traffic originated on Ameritech's network at the same rate that is paid for all other local traffic. However, Ameritech will likely argue

that such a basis exists. Such an argument would be contrary to the substantial record developed which establishes that sound economic and public policy considerations also dictate that the Commission should require reciprocal compensation for ISP-bound traffic.

1. Allowing Focal to Recover its Costs of Delivering to a Focal ISP Customer Calls Originated on Ameritech's Network Makes Economic Sense.

a. Calls to the Internet Are No Different, Either Functionally or Economically. From Local Calls.

The evidence establishes that calls to ISPs are functionally indistinguishable from all other local calls. As Focal witness Starkey testified:

> [R]egardless of whether the originating customer dials either the Focal business customer or the Focal ISP customer, the call travels from the originating customer's premises to the Ameritech central office switch, which then routes the call to the Ameritech/Focal interconnection point and ultimately to the Focal switch. From the Focal switch the call is then transported to either the residential customer or the ISP customer depending upon the number dialed by the Ameritech customer.

(Focal Ex. 2.0, p. 27; see *also* Diagram 1 (showing that calls from an Ameritech customer to a Focal business customer and to a Focal ISP customer are identical in their use of Focal's network)) Thus, a "ten minute call originated on the Ameritech network and directed to the Focal network travels exactly the same path, requires the use of exactly the same facilities, and generates exactly the same level of cost regardless of whether that call is dialed to a Focal local residential customer or to an ISP provider." A comparison of the two call path diagrams included in Focal witness Starkey's testimony underscores the lack of functional difference between ISP-bound calls and other local calls. (Focal Ex. 2.0, pp. 26-3 1)

Just as with other local calls, there is no question that when an Ameritech customer places a call to an ISP served by Focal, Focal incurs costs, and Ameritech avoids costs, to deliver that call. (Focal Ex. 2.0, pp. 10, 26-27) As Staff pointed out, the FCC has acknowledged that CLECs incur costs to complete these calls. (Staff Ex. 2.0, p. 9) Even Ameritech witness Harris concedes that Focal incurs costs to route traffic originated on Ameritech's network and delivered to a Focal ISP customer. (Tr. 236) As Mr. Panfil stated, if Ameritech were responsible for terminating all ISP traffic, it would need to reinforce its network to accommodate this growing category of traffic. (Tr. 363-64) Since calls made to a residential customer and to an ISP are functionally identical, the costs incurred to deliver these types of calls are also identical. Both calls require transport from the point of interconnection to the Focal switch and then from the Focal switch to the residential/business customer or the ISP. (Focal Ex. 2.0, pp. 10, 26-27)

Ameritech witness Panfil agreed that local calls and ISP-bound calls travel over the same facilities, are routed in the same manner and require the same network capacity. (Tr. 359-61,363) He further conceded that they "have essentially the same or similar cost characteristics." *(Id.)* Moreover, while Ameritech seeks to distinguish ISPs from other customers by virtue of the fact that they receive more inbound traffic than outbound traffic, Mr. Panfil also agreed that there are many types of customers that generate more inbound than outbound calls, e.g., mail order companies and large corporations. (Tr. 357) Moreover, he agreed that with respect to, for example, calls to corporate LANs, these calls may be of similar duration as calls to the Internet. (Tr. 359-63)

The Act requires, and the parties have agreed, that they will pay one another reciprocal compensation for local calls. Yet Ameritech proposes that it compensate Focal for only some of those calls (non-ISP calls) and not compensate Focal for those other calls (ISP calls), all of which

are functionally identical. Ameritech's position flies in the face of the most basic economic principle -- if the cost to terminate calls made to residential or business customers and to ISP customers are identical, the rates to recover those costs should also be identical. (Focal Ex. 2.0, p. 28) The Alabama Commission ordered that reciprocal compensation be paid for BP-bound traffic and agreed with ICG's argument that::

> [It is] irrelevant that once the call reaches the ISP, it continues on to its ultimate destination, an Internet website. . It is the portion of the call that is carried on ICG's facilities that is relevant. . That segment of the call is identical to any local voice call in terms of how ICG's network is used. There is no basis for treating ISP-bound calls differently than calls to any other local exchange customer when the costs to deliver the calls made to the residential customer and the ISP customer are identical.

Alabama Order, p. 9. This Commission must reach the same decision.

In sum, as with Ameritech-originated calls delivered to business or residential customers, Focal is entitled to recover the costs it incurs on Ameritech's behalfwhen it delivers a call to an ISP.

b. Since Ameritech's Customer Causes Costs on Focal's Network, Ameritech is the Appropriate Party From Whom to Recover Those Costs.

When an Ameritech customer places a call to an ISP, it does so by using Ameritech's network, on which it generates those costs. If the ISP is an Ameritech customer, Ameritech incurs all the costs of handling the call. If, however the ISP is served by Focal, Ameritechpasses the costs of delivering the call to Focal. This is because Ameritech avoids the terminating switching costs it would have incurred had Focal not completed the call. (Focal Ex. 2.0, p. 31) It is therefore appropriate for Focal to look to Ameritech for the cost recovery that Focal cannot obtain directly from the caller.

Staff agreed that Ameritech should pay the costs associated with transporting and delivering calls to Focal ISP customers. Staff witness Phipps explained:

> The fact that a great majority of traffic associated with a certain customer is inbound as opposed to outbound does not mean that Ameritech should not provide compensation for this traffic. The fact remains that Focal incurs costs for routing traffic that originates on Ameritech's network.

(Staff Ex. 2.0, p. 14)

Significantly, Ameritech does not dispute that Focal incurs costs on Ameritech's behalf when it delivers an Ameritech-originated call to an ISP customer. (Tr. 363-64) Nor does Ameritech contend that Focal is not entitled to recover those costs. (Tr. 368) Instead, Ameritech argues that Focal should look to Focal's ISP customer for its cost recovery, instead of Ameritech. (Amer. Ex. 1.0, pp. 8, 18-19; Tr. 366) This argument is untenable for numerous reasons.

(1) <u>The Ameritech Customer Causes the Costs to he Incurred.</u>

Relying upon the testimony of its witness, Dr. Harris,[7] Ameritech contends that the caller is acting as a customer of the ISP when it places the call and thus it is the ISP -- not Ameritech -- to whom Focal should look for cost recovery. Dr. Harris' extraordinary theory did not hold up under cross examination.

Dr. Harris was forced to admit that the vast majority of dial-up calls to Focal ISP customers are made by Ameritech customers and that had the Ameritech customer not made the call in the first place, the costs would not be incurred. (Tr. 240) Dr. Harris was unable to explain in any way related to the provision of the telecommunications service why inbound calls into corporate LANs or

[7] Dr. Harris is an "ILEC witness." He has never testified on behalf of a CLEC in a state regulatory proceeding in this country. Nor has he ever proposed that a CLEC be permitted on a permanent basis to recover compensation from an ILEC for delivering ISP traffic. (Tr. 233-34)

automated banking systems are any different from calls to ISPs. Moreover, he could not explain why, when an Ameritech caller calls an ISP, the ISP is the cost-causer, but when the same customer calls his bank to conduct an electronic transaction, the bank is not the cost-causer. (*See* Tr. 240-47; 257-61) Yet Dr. Harris is not proposing that the costs of terminating local calls to these types of customers be recovered from the corporation providing the LAN or the bank through a price that "reflects" that "the whole purpose of the service is to terminate a lot of calls under a modem." (Tr. 238) Dr. Harris' position can be characterized as nothing other than results-oriented.

Not only is Dr. Harris' theory internally inconsistent, but it is inconsistent with the well-established method of pricing telecommunicationsservices. The costs of terminating local calls are recovered from the originating party through local usage rates.[8] (Focal Ex. 2, p. 39) In other words, the terminating party is not asked to pay the cost of terminating calls. (Tr. 367) Instead, it is the originator of the call that pays the termination costs. (*Id.*) This is also true for ISP customers. See *Declaratory* Ruling, ¶ 4 (typically an ISP "purchases business lines from a LEC for which it pays a flat monthly fee that allows unlimited incoming calls"). Neither has Ameritech ever asked this Commission to recover the costs of terminating local calls through basic local service rates from the terminating party. (Tr. 366) Thus, if Dr. Harris' theory is accepted and Ameritech's proposal in this

---

'Ameritech has claimed that it does not have the ability to recover these costs from its local customers who pay flat-rate pricing. Ameritech contends that because residential customers pay a flat rate for the usage they generate even though costs are often generated on a per minute of use basis, Ameritech may recover less revenue from those customers than the cost the customers generate. First, this problem is substantially mitigated here in Illinois where only Band A local calls are flat-rated. All other local calls are priced on a per minute structure. Second, this argument highlights a problem with Ameritech's local rate structure, not inter-carrier compensation for ISP-bound traffic. If Ameritech's position is adopted, it would require Focal to help subsidize Ameritech's local customers whose usage exceeds their flat-rated revenues. Such a result would be totally irrational. (Focal Ex. 2.0, pp. 35-37)

case is adopted, Focal's ISPs would be the only customers asked to pay the costs of calls to them. (Tr. 368)

Staff rejected Dr. Harris' cost causation theory as "flawed" and noted that it would produce an "unrealistic outcome." (Staff Ex. 2.0, p. 13) The Commission must reach the same conclusion. The evidence overwhelmingly demonstrates that it is Ameritech who should be responsible for reimbursing Focal for the costs that Focal incurs on Ameritech's behalf when it delivers calls originated by Ameritech's local customers, as is the case with call made by all other callers..

(2) Focal Would be Unable to Recover These Costs from its ISP Customers.

Even if it were rational to look to the ISP for cost-recovery -- which it is not -- Focal is effectively prohibited from doing so by a confluence of regulatory policy and market forces that prevent it from raising its rates to its ISP customers. Since Focal must compete with Ameritech -- who until recently had monopoly control over the marketplace and still retains almost totally dominant market position -- in order to win ISP customers, the prices that Ameritech charges its ISP customers function as a price ceiling for Focal.

Under the regulatory framework established by the FCC, enhanced service providers ("ESPs"), which includes ISPs, are treated as end users for ratemaking purposes. This means that ISPs do not pay access charges. Moreover, the FCC has required LECs to provide service to ESPs and ISPs from their local business service tariffs. *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order,* 3 FCC Rcd. 2631, ¶2 n.8, ¶20 n.53. As a result, LECs are prohibited from charging ISPs a rate higher than the rate they charge other local business customers. *See Declaratory Ruling,* ¶ 5. Therefore, even if Focal were to ignore the FCC's mandate

and create a separate, higher-priced ISP rate which recovers terminationcosts, its ISPs would simply bypass that rate and buy service out of Focal's business tariffs.

While Dr. Harris proposes that Focal look to ISPs for cost recovery, he was forced to admit in cross examination that Focal cannot currently recover these costs from ISPs through access charges. He further agreed that ISPs must be allowed to obtain access to the public switched network through standard business tariffs. (Tr. 237-39)

The only other way for Focal to recover these costs from its ISP customers is to raise its standard business rates. However, that is not a viable option since that would result in Focal's business rates no longer being competitive with Ameritech's business rates. This is because Ameritech's business rates do not recover termination costs. (Tr. 370, 374) Thus, adoption of Ameritech's proposal would leave Focal at a competitive disadvantage, and essentially shut Focal out of the entire business market in Illinois.[9]

In sum, since Focal is effectively unable to raise its rates to ISPs to provide recovery of its costs, Ameritech's proposal provides no opportunity for Focal to recover these costs. The proposal must be rejected.

2. Requiring Reciprocal Compensation for ISP-Bound Traffic Is Sound Public Policy.

ISPs and other technologically advanced customers are a natural entry point into the local exchange marketplace for competitive providers such as Focal. As Mr. Starkey testified, in marketplaces undergoing a transition towards competition, new entrants are usually most successful in attracting customers that: (1) are most disaffected by the services or quality offered by the

'Even though Focal offers its ISP customers a package of services unmatched by Ameritech, it is a reality of the marketplace that Focal must compete first and foremost on price.

incumbent; (2) have technological capabilities or other specific requirements that are not easily met by the incumbent's often overly-generic service offerings; and (3) do not have a long history of taking service from the incumbent. (Focal Ex. 2.0, p. 22) Thus, losing the ability to serve the very customers that it is best poised to serve would be particularly devastating to Focal.

Moreover, the evidence shows that it would likely be devastating to ISPs to be forced to take service from Ameritech. Many ISPs have been unable to reach agreement with incumbent LECs in areas such as pricing for high capacity lines, provisioning intervals, collocation of their equipment in ILEC central offices or even, in some circumstances, the ability to purchase service in sufficient quantity and in reasonable time frames sufficient to meet their own customer demands. ISPs have flocked to new entrant CLECs in increasing numbers to fill this void. CLECs have worked with ISPs to design new and innovative services and have provided ISPs the capacity they need to meet their customers' increasing demands. (Focal Ex. 2.0, pp. 22-23)

This relationship between CLECs and ISPs is the direct result of the competitive market working properly. Carriers who are unwilling to meet the demands of their customers -- ILECs -- lose those customers to carriers who are more accommodating. Likewise, CLECs have been successful in attracting a number of ISP customers because they have offered those customers innovations and reasonably priced advanced services at a level of customer care that Ameritech was unable or unwilling to provide. (Focal Ex. 2.0, pp. 23-24)

The success of Focal and other CLECs in attracting ISP customers away from Ameritech and other ILECs has resulted in the ISP "market segment exhibiting some of the most competitive characteristics of any segment in the local market." (Focal Ex. 2.0, p. 25) If Focal and other CLECs cannot recover their costs associated with their ISP customers, those customers will "immediately

turn from valued customers to customers that are likely to be unprofitable." (Focal Ex. 2.0, p. 26) In other words, Ameritech will have succeeded in turning one of the CLECs' most notable competitive successes into a defeat, at the expense of both the CLECs and the ISPs.

3. Allowing Focal to Recover Reciprocal Compensation for ISP-Bound Traffic Would be Consistent With the Commission's Prior Determination on this Issue, as well as the Determinations of the Vast Majority of State Commissions and Federal Courts that Have Addressed the Issue.

Focal's position is consistent with the Commission's prior determination on this issue, in *Re Teleport Communications Group Inc., et* al., Docket Nos. 97-0404, 97-05 19 and 97-0525 (cons.), issued March 11, 1998, which was affirmed on appeal *(Illinois Bell Telephone Co. v. WorldCom Technologies, Inc., 179* F.3d 566 (7th Cir. 1999)), in which it concluded that reciprocal compensation should be paid for Internet-bound traffic. The Commission recently stated its continued belief that reciprocal compensation should be paid on Internet-bound traffic, in its comments to the FCC in response to the now vacated *Declaratory Ruling,* in which it urged the FCC to reconsider the *Declaratory Ruling.* The Commission stated its belief that the FCC erred in determining that Internet-bound traffic is interstate and explicitly noted that it stood by its ruling in Docket Nos. 97-0404, 97-0519 and 97-0525. (See Tr. 353) As the D.C. Circuit held, the Commission was correct. Thus, adoption of Ameritech's position now would be a 1 80° reversal of the Commission's long-standing position.

The Commission is not alone in its conclusion that ISP traffic should be treated no differently than other local traffic. In all, at least thirty-three of the thirty-six state commissions that have considered this issue have concluded that BP-bound traffic is local traffic for the purposes of reciprocal compensation. In fact, most of the state commissions that have considered the issue have

rejected the very same arguments that Ameritech asserts here and ruled that incumbent LECs are obligated to pay reciprocal compensation for all local traffic -- including calls bound for ISPs. See *Complaint of MFS Intelenet of Maryland, Inc. Against Bell Atlantic-Maryland, Inc. For Breach of Interconnection Terms and Requestfor Immediate Relief* Order, Case No. 8731 (Md. P.S.C., June 11, 1999); *Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation,* Order Instituting Proceeding to Reexamine Reciprocal Compensation, No. 99-C-0529 (N.Y.P.S.C., Apr. *15,* 1999); *Petition of Global NAPs South, Inc. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlcmtic-Delaware, Inc., No. 98-540* (De. P.U.C., March 9, 1999).

If the ILECs had any chance of succeeding in their effort to avoid paying the costs of traffic originated on their networks and terminated to ISPs served by CLECs, that was during the period after the Declaratory *Ruling* was issued but prior to its vacatur, *i.e.*, from February 26, 1999 until March 24, 2000. However, their argument was rejected by nearly every regulatory and judicial body that considered the *issue* during that time frame -- twenty-six in total. Notable among these affirmations that ISP traffic is subject to reciprocal compensation are decisions from the United States Court of Appeals for the Seventh Circuit,[10] and the Middle District of Alabama," and state commissions *in* Alabama,'* California,[13] Colorado,"' Delaware," Florida,[16] Hawaii," Indiana,'*

"Illinois Bell Telephone Co. v. WorldCom Technologies, Inc., 179 F. 3d 566 (7'" Cir., 1999).

[11] *BellSouth Telecommunications, Inc. v. ITC DeltaCom Communications, Inc.,* 62 F.Supp. 2d 1302 (M.D. Ala., 1999).

'Emergency Petitions of ICG Telecom Group, Inc. and ITC Deltacom Communications, Inc. for a Declaratory Ruling, Alabama P.S.C., Docket No. 26619 (March 4, 1999), *appealpending,* Case No.

Kentucky,'" Maryland,[20] Minnesota:' Missouri;' Nebraska,[23] Nevada,[24] New York,[25] Ohio,[26] Oregon,[27] Pennsylvania: Rhode Island,[29] Tennessee:' and Washington.? In each instance, the court or regulatory body rejected the exact same arguments Ameritech asserts here.

CV-99-D-287-N (M.D. Ala), aff'd, *BellSouth Telecommunications Inc. v. ITC DeltaCom Communications Inc.,* 62 F.Supp.2d 1801 (M.D. Ala. 1999).

[13] *Petition by Pacific Bell for Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc. pursuant to Section 256(b) of the Telecommunications Act of 1996),* Application 98-l l-024, Opinion, Decision 99-06-088, (Ca. P.U.C., June *24, 1999); Order Instituting Rulemaking and Investigation on Commission's Own Motion For Local Exchange Service, Nos. 95-04-043* and 95-*04-044* (Ca. P.U.C. July 22, 1999).

[14] *ICG Telecom Group, Inc. v. US West Communications,* Inc., Docket No. 98F-299T, Order (Co. P.U.C., Aug. 17, 1999).

"Petition of Global NAPs South, Inc. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc., No. 98-540 (De. P.U.C., March 9, 1999), rev'd on other grounds, *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc., 77* F. Supp. 2d 492 (D. Del. 1999); Order No. 5092 and Findings and Opinion to Accompany Order, *Matter of Application of Global NAPS South for Arbitration of Unresolved Issues From The Interconnection Negotiations with BellAtlantic-Delaware,* Docket No. 98-540 (Del. P.S.C. June 22, 1999).

[16] *In re Request for Arbitration Concerning Complaint of American Communication Services of Jacksonville, Inc., d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. Against BellSouth Telecommunications, Inc. Regarding Reciprocal Compensation for Traffic Terminated to Internet Service Providers,* Docket No. 981008-TP, Post-Hearing Decision (April 6,1999), *reconsideration denied,* Order No. PSC-99-1453-FOF-TP (Fla. P.S.C., July *26,* 1999); *Request For Arbitration Concerning Complaint of Intermedia Against GTE Florida,* Docket No. 9809-86-TP (Fla. P.S.C. July 30, 1999).

"Petition of GTE Hawaiian Telephone Company, Inc. for a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation, Docket No. 99-0067, Decision and Order No. 16975 (Ha. P.U.C., May 6, 1999).

"Complaint of Time Warner Communications of Indiana, L.P., Against Indiana Bell Telephone Company, Inc., d/b/a Ameritech Indiana, for Violation of the Terms of the Interconnection Agreement, Order on Reconsideration, *Cause No. 41097* (Ind. U.R.C. June 9, 1999).

"Petition By ICG Telecom Group, Inc. For Arbitration Of An Interconnection Agreement With BellSouth Telecommunications, Inc. Pursuant To Sections 252(b) Of The Telecommunications Act of 1996, Case No. 98-218 (Ky. Pub. Serv. Comm'n March 2, 2000).

[20] *Complaint of MFS Intelenet of Maryland Inc. Against Bell Atlantic-Maryland, Inc. For Breach of Interconnection Terms and Request For Immediate Relief*, Order, Case No. 873 1 (Md. P.S.C., June 11, 1999)), app. dismissed, *Bell Atlantic-Maryland Inc. v. MFS Intelenet of Maryland, Inc.*, No. S 99-2061, 1999 U.S. Dist. Lexis 16477 (D. Md. 1999), app. pending in 4"' Cir.

[21] *USWC's Petition for a Determination that ISP Traffic is not Subject to Reciprocal* Compensation *Payments Under the MFS/U SWEST Interconnection Agreewcent,* Docket No. P3167, 421/M-99-529, (Minn. P.U.C., August 3, 1999)(from the bench, no written decision available).

" Petition of Birch Telecom of Missouri, Inc. For Arbitration of the Rates, Terms, Conditions, and Related Arrangements for Interconnection with Southwestern Bell Telephone Company, Order Clarifying Arbitration Order, Case No. TO-98278 (MO. P.S.C. Apr. 6, 1999) (effectively suspending SBC's payment obligation pending the FCC NPRM without altering its conclusion that some reciprocal compensation *is* owed).

[23] *Re Interstateor Local Characteristics of Internet Service Provider,* Appl. No. C-1960/PI-25 (Neb. Pub. Serv. Comm'n Dec. 7, 1999).

[24] *Petition of Pat-West Telecomm, Inc. for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Nevada Bell,* Order Adopting Revised Arbitration Decision, Docket Nos. 98-l 0015 and 99-1007 (Nev. P.U.C., April 8, 1999);

"Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation, Order Instituting Proceeding to Reexamine Reciprocal Compensation, No. 99-C-0529 (N.Y.P.S.C., Apr. 15, 1999); Order and Opinion Concerning Reciprocal Compensation, *Proceeding On Motion Of Commission To Reexamine Reciprocal Compensation,* Case No. 99-C-0529 (N.Y.P.S.C. Aug. 26, 1999).

[26] *Complaints of ICG Telecom Group, Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom v. Ameritech Ohio,* Case No. 97-1557-TP-CSS et al (Ohio P.U.C., May 5, 1999).

[27] Order 99-218, *Matter of Petition of Electric Lightwave for Arbitration of Interconnection with GTE Northwest,* ARB 91 (Or. Publ. Util. Comm'n March 17, 1999).

**Joint Motion of Chairman Quain and Commissioners Rolka, Brownell & Wilson, *Joint Petition for Adoption of Partial Settlement Resolving Pending Telecommunications Issues,* PO0991 648 and P-00991649 (Penn. Pub. Util. Comm'n August 26, 1999); Opinion and Order, *Joint Petition for Adoption of Partial Settlement Resolving Pending Telecommunications Issues,* PO0991648 and P-00991649 (Penn. Pub. Util. Comm'n September 30, 1999).

[29] *In re NEVD of Rhode Island, LLC Petition for Declaratory Judgment That Internet Traffic Be Treated As Local Traffic Subject to Reciprocal Compensation,* Docket No. 2935, Order (R.I. P.U.C.,

The post -*Declaratory Ruling* state commission decisions fall into two categories. First, and most directly relevant, are those that have been decided in the context of an arbitration proceeding for a new interconnection agreement. To date, ten states have reached the merits of reciprocal compensation for ISP-bound traffic in this context. Of those, nine decisions -- including the *North Carolina Order* and the *Alabama Order,* and decisions in California, Georgia, New Mexico, New York, Oregon, Pennsylvania, and West Virginia -- have held that reciprocal compensation is required. The only state in this category to rule to the contrary is South Carolina.

The second category *ofpost-Declaratory Ruling* state commission decisions consists of those interpreting existing agreements. Twenty-five state commissions have issued rulings on the merits. Twenty-two of those commissions found that the agreements in question required the payment of reciprocal compensation for BP-bound traffic."

Similarly all four federal courts that have issued *post-Declaratory Ruling* decisions addressing appeals of state commission decisions requiring reciprocal compensation for BP-bound

---

July 21, 1999).

"First Order of Arbitration Award, *Petition of Nextlink for Arbitration of Interconnection with BellSouth,* Docket No. 98-00123 (Tenn. Reg. Auth. May 18, 1999).

[31] *Petition for Arbitration of an Interconnection Agreement between Electric Lightwave, Inc. and GTE Northwest Incorporated Pursuant to 47 USC Section* 252, Arbitrator's Report and Decision, Docket *No.* UT-980370 at 11 (Wa. U.T.C., Mar. 22, 1999); *WorldCom, Inc. v. GTE Northwest Inc.*, Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim, Docket No. UT-980338 (Wa. U.T.C., May 12, 1999).

[32] The twenty-two states are: Alabama, California, Colorado, Delaware, Florida, Georgia, Hawaii. Indiana, Kentucky, Maryland, Minnesota, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Washington and West Virginia.

traffic have upheld the state commission's determination. The four courts include the United States Courts of Appeals for the Fifth, Seventh and Ninth Circuits, and one District Court.[33]

As support for its position, Ameritech relies on the decisions of four state commissions -- Louisiana, Massachusetts, New Jersey and South Carolina -- that have elected not to require reciprocal compensation for BP-bound traffic. Those decisions represent a minority view which is contrary to this Commission's clear and unwavering position on the issue. Those decisions provide no new basis upon which the Commission could justify a departure from its long-held view on this issue.

C. The Appropriate Measure of the Costs that Focal Incurs on Behalf of Ameritech in Delivering Ameritech-Originated Traffic to Focal's ISP Customers is Ameritech's Tandem Reciprocal Compensation Rate for Local Calls of $0.005175 per Minute of Use, Which Consists of Ameritech's Current Tariff Rates for End-Office Local Termination, Tandem Switching, Tandem Transport Termination, and Tandem Transport Facility Mileage.

1. Only the Tandem Rate Meets the 1996 Act's Requirements as Interpreted by the FCC, and Properly Compensates Focal for the Costs it Incurs Completing Ameritech's Customers' Calls to ISPs.

The Commission should set the reciprocal compensation rate to be paid by Ameritech to Focal for ISP-bound traffic at the same level as reciprocal compensationrate for all other local calls. For the reasons described above, the appropriate rate is the tandem rate, which is $0.005175 per minute of use.

---

[33] *U.S. West Communications v. MFS Telenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999); *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7"' Cir. 1999); *Taylor Communications Group v. Southwestern Bell*, 172 F.3d *385* (5th Cir. 1999); *BellSouth Telecommunications, Inc. v. ITC DeltaCom Communications, Inc.*, 62 F.Supp. 2d 1302 (M.D. Ala. 1999).

Section 252(d)(2) of the 1996 Act states in pertinent part that "a State commission shall not consider the terms and conditions for reciprocal compensation [for transport and termination] to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of another carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A).

The FCC has found that reciprocal compensation rates should be symmetrical and that the incumbent LEC's forward-looking costs should be used to "establish the symmetrical rate." *Local Competition Order,* para. 1085. The FCC has also found that incumbent LECs' costs "serve as reasonable proxies for other carriers' costs of transport and termination for the purpose of reciprocal compensation". *Id.* at para. 526. In so holding, the FCC explicitly found that "the forward looking economic costs should be similar in most cases." *Id.* at para. 1085. The FCC therefore found that "using the incumbent LEC's cost studies as proxies for reciprocal compensation is consistent with section 252, which prohibits 'establishing with particularity the additional costs of transporting or terminating calls.'" *Id.* Thus, the FCC concluded that "[g]iven the advantages of symmetrical rates, we direct states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2)." *Id.* at para. 1088.

Given the D.C. Circuit's vacatur of the FCC's *Declaratory Ruling,* there is absolutely no basis for not applying the requirements of Section 252(d)(2) as set forth by the FCC in its *Local Competition Order* to Internet-boundtraftic. Indeed, this conclusion would be true even without the vacatur, since the FCC has indicated that state commissions should treat ISP-bound traffic as if it were local for reciprocal compensation purposes (Tr. 349) and ISP-bound traffic is functionally indistinguishable from local traffic (see Section II. B. 3 above).

While Focal proposes using Ameritech's costs for determining Focal's compensation, that will likely understate Focal's costs. Ameritech's reciprocal compensation rate is based on its TELRIC costs. See 47 C.F.R § 1.705(a)(1). By definition, TELRIC costs are long-run forward-looking costs that assume the most efficient network architecture. 47 C.F.R. § 51.505(b)(l). As a new entrant, whose switch has a lower utilizationrate than Ameritech's, it is very likely that Focal's costs are equal to or greater than Ameritech's TELRIC costs. (Focal Ex. 2.0, p. 47) The FCC recognized this possibility, when it stated that CLECs "will encounter generally greater direct costs per subscriber when provisioning their own switches, particularly in the early stages of entry when requesting carriers may not have the large number of customers that is necessary to increase their switch utilization rates significantly." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking,* CC Docket *96-96,* FCC *99-238, (rel. Nov. 5, 1999) ¶ 260 ("UNE Remand Order").* The FCC went on to find that "competitors' switching costs per minute at a 10% penetration level

are slightly more than twice the cost of an incumbent LEC serving the remaining 90% of the market with its own switch. *Id.* Thus, if anything, Ameritech's local reciprocal compensation rates will under-compensate Focal for the costs it incurs in delivering ISP-bound traffic.[34]

Thus, the appropriate measure of the costs that Focal incurs on behalf of Ameritech when Focal delivers Ameritech-originated traffic to its ISP customers is Ameritech's reciprocal compensation rate for local calls. As described in detail in Section I, above, both Focal and Staff agree that the appropriate rate of compensation to Focal for the transport and delivery of local calls is Ameritech's tandem rate. Specifically, Focal should be authorized to charge Ameritech a composite, postalized, intercarrier compensation rate of $0.005 175 per minute of use, which consists of Ameritech's current tariff rates for end-office local termination, tandem switching, tandem transport termination, and tandem transport facility mileage.

2. Staffs and Ameritech's Alternative Compensation Proposals Are Flawed, Would Produce Results that are Contrary to Law, and Must be Rejected.

Staff witness Phipps provided testimony addressing Issue 2. He apparently prepared his analysis in a vacuum, without consideration of Staffs analysis of Issue 1, which was prepared by

[34] Ameritech will likely argue that Focal has not prepared its own cost study because such a study would show that its costs are lower than Ameritech's. Such an argument would be entirely inconsistent with the *Local Competition Order*, which expressly provides for CLECs to utilize ILEC cost studies. In fact, the FCC found that permitting CLECs to rely on incumbent LEC cost studies is reasonable because "larger LECs are generally in a better position to conduct a forward-looking economic cost study than smaller carriers." *Local Competition Order*, para. 1085. Thus, the FCC held that CLECs should not have to bear the burden of conducting expensive, time-consumingcosts studies. *Id.* at para. 1088 ("[i]n addition, symmetry will avoid the need for small businesses to conduct forward-looking economic cost studies in order for the states to arbitrate reciprocal compensation disputes.") Thus, the Commission should reject any such argument.

Staff witness VanderLaan. While Ms. VanderLaan reached the conclusion that Focal's network meets the tandem functionality test, Mr. Phipps nevertheless concluded that Focal did not meet the tandem *functionality* test for ISP traffic. He failed to agree with Ms. VanderLaan even though Focal's network architecture is used to the same extent and in precisely the same manner for every call carried on Focal's network, including ISP calls. Mr. Phipps' reached the untenable conclusion that the compensation for Internet-bound traffic should be a mere $.001333, which amounts to a discount of nearly 75% off of the current tandem interconnectionrate and 65% off the end office rate that Ameritech currently charges Focal for terminating local traffic. (Focal Ex. 2.1, p. 4) Mr. Phipps' analysis is flawed for several reasons, and must be rejected.

As a preliminary matter, Mr. Phipps' position in support of a rate other than the reciprocal compensation rate for indisputably local traffic was premised on the FCC's *Declaratory Ruling.* Indeed, the FCC's conclusion that ISP traffic is largely interstate in the *Declaratory Ruling* is the first basis Mr. Phipps provides for his rejection of Mr. Starkey's analysis. (Staff Ex. 2.0, p. 10) Now that the *Declaratory Ruling* has been vacated, there is no premise for Mr. Phipps' position.

The starting point for Mr. Phipps' analysis was Ameritech's end office reciprocal compensation rate. He concluded that the tandem rate was not an appropriate starting point due to his determination that Focal does not meet the tandem functionality test. Staff witness Phipps correctly stated the gist of paragraph 1090 of the *Local Competition Order* and the discussion of tandem functionality:

> Thus, the FCC's language provides that a tandem interconnection rate can apply to traffic terminated by CLECs even in cases where the

> CLEC does not utilize a hierarchical tandem/end office switch network architecture like that deployed by the incumbent LEC. CLECS are eligible for the tandem rate if the competitive carrier's switch serves a geographical area comparable to the area served by the incumbent LEC's tandem switch, and new transmission and/or technologies perform functions similar to those performed by an incumbent LEC's tandem switch.

(Staff Ex. 2.0, p. 8) Amazingly, he failed to comply with the FCC's clear directive when he reached the conclusion that "Focal's *switch* does not serve as a tandem switch for terminating ISP-bound traffic." (*Id.* at p. 12)(emphasis added) In other words, in the absence of the hierarchical network in which there are both tandems and end offices, Mr. Phipps believes that Focal cannot establish its network performs the tandem functionality. This is because he fails to accept that Focal's extensive *transport facilities* perform the aggregation function, which is the primary function performed by tandem switches. (Focal Ex. 1.2, p. 20)

Mr. Phipps' misapplicationof the FCC's standardresults in part because he wrongly focused on only a portion of Focal's network, the facilities on the customer side of the switch, to the exclusion of the vast transport facilities on the network side of Focal's switch. He then assumed that the majority of Focal's ISP customers are collocated, which is not in fact the case, and then incorrectly under-estimated the facilities need to deliver calls to these customers. In fact, the same type of transport used to transport calls between central offices is used by Focal to transport calls to collocated ISPs, i.e., a stand-alone, internal OC-48 SONET fiber transport network. (Focal Ex. 2.1, pp. 1 I-12)

With regard to ISPs that are not collocated, Mr. Phipps incorrectly assumed that Focal uses only "local loops" to deliver these calls. As a prefatory matter, loops are not transport facilities. In fact, Focal uses a combination of SONET transport facilities, fiber optic facilities leased from third parties, and multiplexing and channel mileage features and functions. While Mr. Phipps appeared to believe that the fiber optic facilities upon which Focal relies to establish tandem functionality are simply intra-office facilities, he admitted in cross-examinationthat Focal in fact has extensive inter-office transport facilities. Thus, it is clear that Mr. Phipps simply does not understand Focal's network when he claims that Focal does not have the type of transport facilities specifically identified by the FCC in paragraph 1090 of the *Local Competition Order.* (Focal Ex. 2.1, pp. 12-18; Tr. 532-43, 547-48, 562-63)

Based on this total misapprehension of the *Local Competition Order,* Mr. Phipps then developed his proposed compensation rate in a wholly inappropriate manner, by performing an incomplete and therefore incorrect cost adjustment based on faulty data. Specifically, Mr. Phipps adjusted one output of Ameritech's TELRIC cost study to account for the fact that Internet-bound calls are typically longer in duration (26.6 minutes) than other local calls (3.3 minutes). However, the cost study he used is a study of all local usage, not just ISP traffic. Mr. Phipps then uses this information to apply to one small category of traffic. As Mr. Starkey stated, as the study is used to estimate costs for smaller and smaller subsets of the date for which the results were intended, the results of the analysis necessarily lose relevance. (Focal Ex. 2.1, p. 29)

Mr. Phipps' analysis also failed to take into account other differences between these calls which would impact the actual cost of completing ISP calls. For example, he failed to consider the impact on the busy hour of this growing category of traffic, and how that impacts Ameritech's costs. In addition, the analysis failed to reflect the higher allocated switch resources for ISP traffic, which necessarily impacts the cost of these calls. He simply changed a single assumption (holding times) in a model that requires thousands of inputs. (Focal Ex. 2.1, pp. 29-32)

Mr. Phipps' analysis also ignores several important facts. First, the reciprocal compensation rate is an average rate that reflects the fact that some calls will be of longer duration and others of shorter duration. Thus, the rate already accounts for the disparity between calls of different durations. In addition, Mr. Phipps ignores the fact that other local calls are likely to exhibit longer holding times than the average local call. While Mr. Phipps tried to downplay the other cost differences which are not reflected in his analysis, he was forced to admit that he had no idea how large a difference they would actually make. (Focal Ex. 2.1, pp. 6-8; Tr. 521-22)

The absurdity of Mr. Phipps' conclusion is apparent by comparison to the rate for Ameritech's transiting service. That service involves passing traffic within an Ameritech tandem switch between two non-Ameritech companies. This requires use of only Ameritech's tandem switch, and little if any transport. Ameritech charges $.004836 for this service. This can be compared to the $.001333 that Mr. Phipps calculated as compensation for both transporting and terminating ISP traffic." (Focal Ex. 2.1, p. 33)

[35]The absurdity of Mr. Phipps' proposal is also evidenced by a comparison with the compensation

In sum, Mr. Phipps' reliance on Ameritech's cost study for determining the cost of ISP calls was misplaced since the study was never meant to estimate the costs of ISP traffic. Mr. Phipps did not prepare a complete cost study. (Tr. 5 19) Mr. Starkey testified that a more appropriate way to address the problems identified by Mr. Phipps would be for Ameritech to perform a new cost study, rather than adjusting a single cost output from its 1996 study.[36] (Focal Ex. 2.1, p. 10) In the absence of such a study, Mr. Phipps' incomplete proposal must be rejected, and the tandem rate proposed by Focal must be adopted.[37]

3. Ameritech's Proposal for Delay is Totally Unsupported, and Would Deny Focal Cost Recovery to Which it is Now Entitled.

Ameritech suggested in its Response and Verified Statements that one course for the Commission is to simply do nothing until the FCC issues a final rule in the rulemaking proceeding on reciprocal compensation for ISP-bound traffic that the FCC initiated in *the Declaratory Ruling.*

---

rates approved by other state commissions for the termination of local traffic, including ISP traffic. Those rates range from $.003 to $.005 per minute. (Focal Ex. 2.1, pp. 33-34)

[36]Mr. Starkey also offered a modified version of Mr. Phipps' proposal, in the event the Commission concludes -- contrary to the law, its prior determinations and the evidence -- that some adjustment to the reciprocal compensation rate is needed to account for the longer holding times of ISP-bound traffic. Mr. Starkey proposed that a single rate continue to be used for all traffic, both ISP-bound and other local traffic. His alternative to Mr. Phipps is based on the tandem rate, and includes both transport termination and mileage, the latter of which was adjusted to reflect the percentage of ISPs that are collocated with Focal. Mr. Starkey's calculation includes the new average holding time for all local traffic (5.1 minutes) as opposed to the average holding time (3.3 minutes) assumed in Ameritech's 1996 cost studies. Finally, Mr. Starkey added in shared and common costs, which were inadvertently excluded by Mr. Phipps. Mr. Starkey's alternative to Mr. Phipps' proposal resulted in a rate of $.004171. (Focal Ex. 2.1, pp. 24-28)

[37]Mr. Panfil also provided a revised proposal in response to Mr. Phipps' proposal. Mr. Panfil's alternative is a tandem only rate of $.000946. (Amer. Ex. 2.5, pp. 9-16) It fails to provide compensation for the tandem transport function, which he acknowledged (Tr. 395) *is* performed of Focal's network, and termination that occurs on Focal's network. (See Amer. Ex. 2.5, pp. 9-16)

(Response, pp. 7-9) Now that the *Declaratory Ruling* has been vacated, the very premise for the FCC's initiation of the rulemaking – that ISP-bound calls are interstate in nature-exists no more. However, Ameritech will likely respond to the vacatur by suggesting that this delay should last until the FCC issues its remand order. This proposal would be even more unreasonable, and less supportable, than its original proposal.

Moreover, this proposal would absolve Ameritech of the obligation to pay compensation now. As the North Carolina commission found, this "would be entirely inconsistent with the competitive principles underlying the Act" not to provide Focal with a mechanism to recover those costs as they are incurred. *Norfh Carolina Order* at 14. It is also worth noting that it took the FCC almost two years to respond to the June 1997 request for clarification that led to the *Declaratory Ruling.* There is no reason to believe that the FCC will necessarily act more expeditiously in promulgating a final rule than it did in releasing the *Declaratory Ruling.*

In any event, adoption of Ameritech's proposal is not possible, since it would require Focal to track ISP-bound traffic during the interim period so that any compensationmechanism ultimately adopted by the FCC can be applied retroactively. Focal's Chief Operating Officer testified that Focal is not able to separately track Internet traffic, for several reasons. First, Focal, like Ameritech, does not require its customers to state the purpose for which they are using the service. At least some portion of the incoming traffic to Focal ISP customers for purposes other than reaching the Internet, including dial-up corporate LAN hosting, customer service call centers, and general corporate telephone services. The same line which is used for an Internet call may also be used for these other calls. Therefore, it is not sufficient to merely identify lines sold to ISPs and assume that traffic over those lines is Internet-bound. Any attempt to segregate Internet-bound traffic can be nothing more

than a rough estimate. Finally, even during calls where an Ameritech end user has dialed into a local modem connected to equipment that polls from and sends information to the Internet, there is no way to determine the portion of such a session that is actually devoted to communications through the Internet, as opposed to a mere connection to the local modem. Thus, even for those customers that Focal believes to be ISPs, Focal has no mechanism to determine the proportion of lines and minutes used by those customers solely for the provision of Internet access. (Focal Ex. 1.11, pp. 7-8)

As an alternative, Ameritech proposes a "transitionplan" under which the rate for reciprocal compensation for ISP-bound traffic initially would be set by adjusting Ameritech's end office local termination rate for what Ameritech contends are the longer hold times for ISP-bound calls. That rate would then be ratcheted down by 25% per quarter until it reached zero at the end of a year. (Amer. Resp., pp. 26-27) With the vacatur of the *Declaratory Ruling*, there is not a shred of legal authority upon which the Commission could rely in order to terminate reciprocal compensation over time, as Ameritech proposes.

Moreover, this proposal is predicated on Ameritech's belief that the appropriate rate of compensation for BP-bound traffic is zero. This belief flies in the face of its witness' acknowledgment that Focal incurs costs to terminate such calls. As Focal has demonstrated, however, reciprocal compensation is the appropriate (and only) mechanism by which Focal is able to recover the costs it incurs on behalf of Ameritech when it delivers a call from an Ameritech customer to one of Focal's ISP customers. Those costs will be no less real in a year than they are now. The fact that under Ameritech's proposal, Focal's right to reciprocal compensation for ISP-bound traffic will be phased-out over time does not make it any more palatable than an outright denial of compensation.

Ameritech's phase-out transition plan is unlawful and unsupported, and should be rejected.

D. Conclusion Regarding Issue 2: Compensation for Internet-Bound Traffic.

At the time of the filing of this case, the law strongly supported adoption of Focal's position that it is entitled to compensation for traffic it delivers to ISPs at a rate equal to the rate paid for all other local traffic. The only support for adoption of Ameritech and Staffs position that a different rate should be applicable to traffic delivered to ISPs than to all other traffic was the FCC's *Declaratory Ruling. Now* that the *Declaratory Ruling* has been vacated, there is absolutely no basis for adoption of Ameritech's and Staffs position. The law and the evidence support adoption of Focal's position that it be compensated at Ameritech's tandem rate, or $0.005 175 per minute of use.

III. THE COMMISSION SHOULD REJECT AMERITECH'S PROPOSAL TO REQUIRE EELS PURCHASED BY FOCAL FROM AMERITECH TO TERMINATE IN A COLLOCATION SPACE.

FOCAL POSITION: Ameritech has agreed to convert loop/transport combinations which are currently provided via customer access circuits priced at special access rates to the UNE combination sometimes referred to as an EEL at TELRIC-based rates pursuant to the UNE Remand Order. This combination should not have to terminate in a collocation space.

Ameritech must make available to Focal combinations of unbundled network elements that are "currently combined" in Ameritech's network. Section 5 1.3 15(b) of the FCC's rules states that "except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines" 47 C.F.R. § 5 1.3 15(b). While Section 5 1.3 15(b) had been vacated by the United States Court of Appeals for the Eighth Circuit, it was reinstated by the Supreme Court's January 25, 1999 decision in *AT&T Corp. v. Iowa Utilities Board,* 119 S.Ct. 721 (1999), and is controlling federal law.

Enhanced extended link ("EEL") are combinations of transport and aggregation UNEs – typically local loops, end office multiplexing, and interoffice transport – that are critical to the development of facilities-based competition for local services. An EEL is functionally equivalent to a special access circuit. (Tr. 59) Under the Third Report and Order, the FCC directed that EELs be made generally available, without restriction. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1* 996, CC Docket *96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking* (rel. *Nov.* 5, 1999). By *means* of this UNE combination, Focal will be able to serve customers with unbundled loops without having to collocate in the central office from which the unbundled loops are provided. (Focal Ex. 2.0, p. 60) In fact, the fundamental purpose of an EEL is to reduce the number of collocations that CLECs must make. (Tr. 61-62)

Apparently in an attempt to protect the ILECs from a dramatic and immediate loss of Special Access revenues, the FCC issued its Supplemental Order, which adopted use restrictions for EELs. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket 96-98, Supplemental Order (rel. Nov. 24, 1999). Specifically, the FCC found that ILECs would be required to provide EELs only if the requesting carrier self-certified that the EEL would be used to transport and terminate a "significant amount of local exchange service." *Id.* at ¶ 5.

During negotiations, Focal requested that Ameritech make the EEL available to Focal. Initially, Ameritech refused to allow Focal to acquire EELs on terms and conditions that were acceptable to Focal. Thus, Focal identified the issue as being in dispute and asked the Commission to resolve the issue.

On February 28, 2000, a group of five ILECs and four CLECs, including Focal and Ameritech, submitted a letter to the FCC setting forth the parties' common understanding of how the FCC's orders to date apply to CLECs' use of EELs ("February 28"' Letter"). The February 28"' Letter defined three circumstances in which a requesting CLEC currently may obtain EELs under Federal law. Under Option 3, collocation is not necessary, while under Options 1 and 2, the ILECs and CLECs agreed that the CLEC must be "collocated in an ILEC office." (See Schedule PFK-2)

This language is quite different than the position Ameritech took in its negotiations with Focal -- that all EELs must terminate in collocation space. (See Petition, p. 9; Focal Ex. 2.0, p. 66) Ameritech has not argued, and has offered no evidence, in this case that EELs purchased by Focal from Ameritech must terminate in a collocation space. (See Response; see *a/so* Amer. Exs. 5 and 6) In fact, on cross-examination Ameritech witness Auinbauh acknowledged that the loop/transport combination can be provisioned without collocation. (See Tr. 489-90; Auimbauh Cross Ex. 1) Therefore, if Ameritech were still requesting this requirement, it would not be "based upon a technological or valid public policy concern . . [but instead would be] transparently aimed at protecting the extent to which Focal can use the EEL to compete with Ameritech." (Focal Ex. 2.0, p. 67) If Ameritech were to prevail, Focal's ability to compete with Ameritech would undoubtedly be affected, given the "significant up-front *expenses* associated with collocation." (*Id., p. 62)* As Staff witness Garvey stated, the fundamental purpose of an EEL would be mitigated by the reduced flexibility associated with requiring additional collocations. (Tr. 63)

Now that the parties have executed the February 28th Letter, Focal assumes that Ameritech has dropped its argument that EELs must terminate in a collocation space. This assumption would be consistent with Ameritech's failure to present any testimony regarding this requirement. If

Ameritech is still seeking to impose the requirement, there is no evidence in the record supporting this Commission's adoption of the requirement. The additional costs that a collocation requirement would cause Focal to incur compels rejection of this restriction. Therefore, the Commission should make clear that EELs purchased by Focal from Ameritechneed not terminate in a collocationspace, by adopting Focal's proposed language for Section 9.2.2 of the new interconnection agreement.

IV. FOCAL SHOULD NOT BE REQUIRED TO ADD ADDITIONAL POINTS OF INTERCONNECTION SOLELY TO BE ABLE TO OFFER FOREIGN EXCHANGE SERVICE. AS AMERITECH PROPOSES.

FOCAL POSITION: The language proposed by Ameritech in Section 4.3.12 would impose additional, unlawful and unreasonable interconnection obligations on Focal that would impair Focal's ability to offer Virtual Office Service. This language should be rejected.

In the case of one category of service, foreign exchange ("FX") service, Ameritech seeks to impose unduly stringent requirements on Focal regarding the establishment of POIs. Under Ameritech's proposed section 4.3.12, Focal would be required to construct or lease interconnection facilities solely for the purpose of transporting FX traffic, regardless of whether such interconnections are warranted by overall traffic volume or other network reasons. Instead POIs would be added within fifteen miles of the rate center from which an FX customer is assigned a phone number.

Under the implementation plans developed by Focal and Ameritech, when the customer of one carrier originates a call it is the obligation of that carrier to bring that traffic to the POI associated with (and probably closest to) the terminating number. Once the call is handed off, it is the other carrier's responsibility to deliver the call to the called party. On the other hand, under Ameritech's proposal, when a customer of Ameritech originates a call to Focal's FX customer,

Ameritech would not be required to transport that call to the POI if that POI is outside of the caller's geographic area. (Focal Ex. 3.0, p. 13) Ameritech's proposal would reduce Ameritech's obligations to Focal for a single category of service, FX service.

Ameritech contends that its proposal is necessary to prevent Focal from receiving a "free ride" on Ameritech's network. This argument is belied by how traffic is exchanged between Ameritech and Focal. When the customer of one carrier originates a call it is the obligation of that carrier to bring that traffic to the point of interconnection associated with *the terminating number.* Once the call is handed off, it is the other carrier's responsibility to deliver the call to the called party.[38] (Focal Ex. 3.0, pp. 13-15)

For example, if an Ameritech customer calls a Focal customer who is physically located in Kankakee, Ameritech's obligation is to deliver the call to the point of interconnection associated with Kankakee because it is a Kankakee number that is being called. If Ameritech's customer in Kankakee calls a Focal customer who is physically located in Chicago but has a foreign exchange derived phone number in Kankakee, Ameritech's obligation is *exactly the same,* to deliver that call to the point of interconnection associated with Kankakee. In both cases, it is Focal's responsibility to carry the call from the point of interconnection to its switch. In both cases, Ameritech carries a call the same distance and *incurs the same transport costs* regardless of whether the Ameritech customer calls a Focal customer who resides in the same rate center or a Focal customer who only has a foreign exchange number in the rate center. Thus, Ameritech's claim that Focal receives some

[38] "Moreover the cost for transport is only $.0000013 per minute. (Focal Ex. 3.0, p. 12) This is the only mileage-sensitive transport rate element. (Tr. 333)

free ride on Ameritech's network in the context of foreign exchange services is simply false, and its proposal is discriminatory. (Focal Ex. 3.0, pp. 13-15)

As a general matter, Focal does in fact establish multiple POIs in the areas it serves, and these POIs are usually within the 15 mile distance advocated by Ameritech. Both historically and currently, Focal's and Ameritech's network engineers have worked together on an ongoing basis to manage or "groom" the parties' networks. (Tr. 328-3 1,414-l 5) New POIs are added from time to time in accordance with sound engineering practice, as traffic volumes increase. In fact, Focal and Ameritech established nineteen POIs for the exchange of traffic under their first interconnection agreement, and under the implementation plan for the new interconnection agreement, Focal has agreed to establishmore than 100 POIs. (Focal Ex. 3.0, pp. 1 l-l 5) Even Mr. Panfil agreed that few if any CLECs have as many POIs as Focal has. (Tr. 419) Nor was he aware of any particular difficulties between Ameritech's and Focal's network engineers who operate and configure the network and keep it functioning. (Tr. 426-27)

There is no justification to impose different interconnection obligations on FX service than on all other local service. Ameritech's proposal that POIs must be established within a fixed distance from each Ameritech Rate Center is clearly inefficient. If Ameritech had a single customer who called one of Focal's foreign exchange customers located outside of the 15 mile area, Focal would have to constructor lease interconnectionfacilities simply to serve that one customer. Yet the same would not be true for Focal's non-FX customers. In that case, Ameritech would continue to be obligated to transport the local call to the closest Focal POI, regardless of its distance from the calling party. Ameritech'sproposal is simply "a crude attempt to isolate a single category of service (FX service) in which [presumably] its competitors have been more successful than Ameritech in

the marketplace, and then to dictate network configurations in such a way as to impair its competitor's ability to provide that service." (Focal Ex. 3.0, p. 13)

Ameritech is apparently concerned that a CLEC may have only one POI, which would mean that Ameritech may have an extensive transport obligation since it would be required to bring all local traffic to the one POI, which may be clear across the MSA. Ameritech apparently is concerned that when a carrier does not have facilities in an exchange it is adding insult to injury because in addition to being required to transport the call to the POI, Ameritech is also limited to charging its retail customer for a local call. Ameritech admits that its proposal is based on no more than an economic analysis. (Tr. 455) On the other hand, if Focal's position is adopted, the parties' engineers can continue to establish POIs based on traffic patterns and reasonable engineering practices, which reflects the parties' actual practices. Focal's proposal provides both parties with optimal flexibility to continue managing the network architecture in the way they have done for several years -- based on sound network practices and traffic flow patterns.

In late 1998, Ameritech tiled a complaint against Focal raising a number of allegations concerning Focal's Virtual Office service. Ameritech alleged that Focal improperly charged Ameritech reciprocal compensation for calls that should be properly classified as toll service. In addition, Ameritech alleged that Focal's use of Virtual Office exacerbates the problem of area code exhaust, circumvents the Commission's pay-per-call rules, and impedes competition in the market for telecommunicationsservices in Illinois. The complaint was assigned Docket No. 98-0526. After thoroughly reviewing Ameritech's allegations and the pertinent facts, Staff pretiled the testimony of three witnesses. Days after service of the Staff testimony, without explanation and without asking leave to do so, Ameritech filed a "Notice of Withdrawal of Complaint." The Commission duly

dismissed the complaint. (Focal Ex. 3.0, p. 18) One can only conclude that the Staff testimony caused Ameritech to conclude that it would not succeed on the merits. The Commission should not condone Ameritech's blatant "Staff-shopping."

The Commission should adopt Focal's position, and order Ameritech to delete proposed Section 4.3.12 from the interconnection agreement.

V. AMERITECH SHOULD NOT BE ALLOWED TO CHANGE ANY COMPONENT OF AN ALREADY-PROVISIONED XDSL LOOP WITHOUT GIVING FOCAL REASONABLE NOTICE.

FOCAL POSITION: Ameritech should not be allowed to make any service-affecting changes or modifications to the components of an already-provisioned xDSL loop without giving Focal reasonable notice of such modifications.

Ameritech claims that it has the right to re-engineer or modify its outside plant architecture without first notifying Focal or any other CLEC as to the affect such revision might have on services provided over Ameritech's unbundled loops. For example, Focal may have purchased from Ameritech a "clean" copper loop that includes no load coils or bridged tap, for purposes of providing xDSL services. According to Ameritech, it could place load coils or bridged tap on the loop without first consulting Focal as to the consequences such actions might have on Focal's services. (Focal Ex. 2.0, pp. 88-89) This position is what gave rise to Issue 7.

Staff witness Graves described some of the negative impacts this type of change could have, and noted that changing a sub-element of the loop could render DSL service using that sub-element inoperable. He stated that temporary disruptions of "always on" services such as xDSL could have a significant impact on end-users. To make matters worse, Focal may be liable for damages to its customer for failing to provide service in the event of a service interruption. Moreover, to reinstate

DSL service, Ameritechmight need to condition the loop at a cost of several hundred dollars. (Staff Ex. 1, pp. 4-5)

Focal's position on this issue is very straightforward and reasonable. Ameritech should be required to notify Focal in advance before altering any component of an xDSL loop already provisioned to Focal, if the alteration could possibly affect the service Focal provides to its local customers. Ameritech's refusal to agree to such language is unreasonable, inconsistent with the FCC's rules and anti-competitive. When Ameritech performs maintenance or alterations on its network that may result in degradation or disruption or service, regardless of whether the disruption is attributable to Ameritech, Focal's local customers will fault Focal for any inconvenience they incur. Thus, Focal's customers will be dissatisfied with the local services they receive from Focal even where Focal is not at fault. Recognizing the potential for anti-competitive conduct, the FCC adopted Rule 51.325, which states that "an incumbent local exchange carrier must provide public notice regarding any network change that: (1) Will affect a competing service provider's performance or ability to provide service; or (2) Will affect the incumbent LEC's interoperability with other service providers." 47 C.F.R. § 51.325. Focal is simply requesting that it be provided notice of network modifications to loops already provisioned to it to avoid the harm that Section 51.325 clearly seeks to prevent, i.e., disruption to Focal customers without any knowledge on Focal's part of the source of the disruption or its potential duration, and without Focal having any opportunity to notify its customers.

In order to ensure that the interconnectionagreement falls squarely within applicable federal law, Focal is no longer asking that Ameritech request and receive permission from Focal before

Ameritech performs its modifications, only that Focal be notified in advance of any expected service disruptions. Focal's proposal merely reflects the FCC's rule.

Although the verified statements of Staff and Ameritech discuss various ways to mark or flag xDSL loops, none of the proposals adequately address the problem Focal has raised. Flagging an xDSL loop may highlight for Ameritech technicians that they should be cautious when working on or around such loops, but it does absolutely nothing for Focal or its customers. The Commission should adopt Focal's proposed language that reflects federal law and protects consumer's interests.

CONCIXJSION

The Commission has had -- at all times since this case was pending -- the legal authority to order Ameritech to compensate Focal for the transport and termination of calls to Focal's ISP customers. But the question of the Commission's legal authority before today is academic, given the *D.C.* Circuit *Decision.* It is now clear that this Commission is required to direct Ameritech to pay reciprocal compensation to Focal for *all* local traffic, including Internet-bound calls, not just a portion of local traffic. Moreover, the evidence supports such a conclusion, since Internet-bound calls are no different functionally or economically from other local traffic.

The Commission must set the appropriate reciprocal compensation rate. The evidence shows, and Staff agrees, that rate is the tandem rate. Now that there is no basis for singling out ISP traffic for a different rate, the tandem rate is the reciprocal compensation rate at which Focal must be compensated for all local traffic.

The Commission must also conclude that Ameritech cannot limit its provision of EELs to those that terminate in collocation space.

The Commission must reject Ameritech's "economic" rationale for requiring Focal to install

points of interconnection that are neither needed nor appropriate under current "grooming" arrangements. The parties should continue to work together to agree on points of interconnection based on network needs, not Ameritech's desire to quash Focal's Virtual Office FX product.

Finally, the Commission should enforce the FCC's rule which prohibits Ameritech from maintaining provisioned xDSL loops in a manner that could degrade the service Focal provides over those loops, without first notifying Focal of such activities. This is an eminently reasonable proposal, which the Commission should accept.

Respectfully submitted,

Carrie J. Hightman
Annaliese Fleming
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5657

Attorneys for
FOCAL COMMUNICATIONS CORPORATION OF ILLINOIS

Jane Van Duzer
Paul Rebey
FOCAL COMMUNICATIONS CORPORATION OF ILLINOIS
200 N. LaSalle Street
Suite 1100
Chicago, Illinois 6060
(312) 895-8949

CERTIFICATE OF SERVICE

The undersigned attorney for Focal Communications Corporation of Illinois hereby certifies that she caused copies of the attached Post-Hearing Arbitration Brief of Focal Communications Corporation of Illinois to be served on each of the persons listed below electronically on March 27, 2000 and in the manner indicated for delivery on March 28, 2000:

Donald L. Woods
Hearing Examiner
Illinois Commerce Commission
527 East Capitol Avenue
PO Box 19280
Springfield, IL 62706
[VIA FEDERAL EXPRESS]

William J. Showtis
Hearing Examiner
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62706
[VIA FEDERAL EXPRESS]

Theresa P. Larkin
Illinois Bell Telephone Company
555 E. Cook Street
Floor 1 E
Springfield, IL 62721
[VIA FEDERAL EXPRESS]

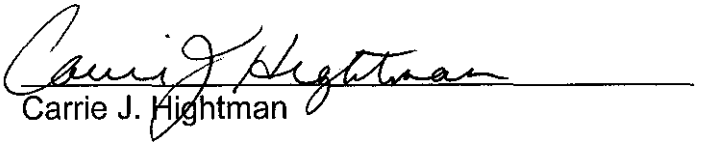
Nancy H. Wittebort
Ameritech Illinois
225 W. Randolph
Suite 27C
Chicago, IL 60606
[VIA MESSENGER]

Matthew L. Harvey
Illinois Commerce Commission
160 N. LaSalle Street
Suite C-800
Chicago, IL 60601
[VIA MESSENGER]

Dennis G. Friedman
Christian F. Binnig
Mayer, Brown & Platt
190 So. La Salle Street
Chicago, IL 60603
[VIA MESSENGER]

Julie VanderLaan
Illinois Commerce Commission
Telecommunications Division
527 East Capitol Avenue
P.O. Box 19280
Springfield, IL 62706
[VIA FEDERAL EXPRESS]

Jeff Hoagg
Illinois Commerce Commission
Telecommunications Division
527 East Capitol Avenue
P.O. Box 19280
Springfield, IL 62706
[VIA FEDERAL EXPRESS]



Carrie J. Hightman

Attorney for
FOCAL COMMUNICATIONS CORPORATION
OF ILLINOIS