



the PAO's ultimate recommendation. Accordingly, the paragraph in question should be deleted. The Commission should not make a questionable factual finding when the finding is unnecessary to its resolution of the issues in the case.

Ameritech Illinois agrees with the PAO's rejection of Staff's proposal to require Ameritech Illinois immediately to accept or decline the FCC rate caps for ISP-bound traffic. Again, however, Ameritech Illinois takes exception to one part of the PAO's discussion of Staff's proposal, namely, the conclusion that the Commission can entertain the proposal in this proceeding. Ameritech Illinois urges the Commission to hold that Staff's proposal, in addition to being unlawful, is not within the Commission's jurisdiction to consider in this arbitration. If the Commission is not prepared to go that far, Ameritech Illinois then urges the Commission to express no view one way or the other on the jurisdictional question.

In compliance with 83 Ill. Adm. code 200.830(b), Ameritech Illinois offers, at the end of its discussion of each exception, substitute language for the Commission's order.

#### **STATEMENT OF EXCEPTIONS AND ARGUMENTS IN SUPPORT**

**EXCEPTION 1:** Contrary to the finding in the PAO, the evidence shows that Ameritech Illinois' proposed bifurcated rates are better aligned with underlying costs than the reciprocal compensation rates in the Focal Agreement, not just for ISP-bound traffic, but for 251(b)(5) traffic as well. A finding on the merits of bifurcated rates is not a necessary predicate to the PAO's recommendation on the language the parties' agreement should contain, however, and the Commission therefore should simply make no finding concerning the merits of bifurcated rates.

#### **ARGUMENT IN SUPPORT OF EXCEPTION 1**

The PAO states, at page 7:

[W]hile Ameritech has raised legitimate concerns regarding intercarrier compensation *for ISP-bound calls*, it has not demonstrated, *with respect to 251(b)(5) traffic*, that the rates in its Appendix RC are better aligned with underlying costs than the reciprocal compensation rates in the Focal Agreement. The fundamental premise on which Ameritech builds its critique of existing reciprocal compensation rates is that "[t]he nature of the traffic on the networks

of local service providers has changed dramatically, *driven primarily by the explosion in Internet access traffic.*” Ameritech Init. Brief, at 6 (emphasis added). More particularly, Ameritech asserts that the longer “hold times” associated with ISP-bound traffic have not been factored into the rates applicable to typically shorter 251(b)(5) calls (resulting in beneficial arbitrage opportunities for some CLECs). *Id.* Assuming that Ameritech’s critique is sound, it shows a mismatch between ISP-bound traffic and applicable rates, not between 251(b) traffic and reciprocal compensation rates. Thus, by proposing new reciprocal compensation rates *for 251(b)(5) traffic*, in order to better reflect the cost of *ISP-bound traffic*, Ameritech is potentially introducing, not alleviating, misalignment between the cost of delivering 251(b)(5) traffic and reciprocal compensation rates.

The PAO is incorrect in finding that the evidence does not show that Ameritech Illinois’ proposed bifurcated rates are better aligned with the costs of terminating 251(b)(5) traffic than are Ameritech Illinois’ current reciprocal compensation rates. In reality, the same evidence that shows that the bifurcated rates better reflect the costs of terminating ISP-bound traffic likewise show that they better reflect the costs of terminating 251(b)(5) traffic – even if less dramatically than for ISP-bound traffic.

As Ameritech Illinois has demonstrated in exhaustive detail, the reciprocal compensation rates in the Focal Agreement reflect an averaging of call set-up costs that assumes, in effect, that all categories of calls to which reciprocal compensation applies average approximately 3.5 minutes.<sup>1</sup> As a result of this averaging method, compensation for longer-than-average calls is too high, and compensation for shorter-than average calls is too low. The bifurcated rates that Ameritech Illinois proposed eliminate the averaging, so that the termination charge for each and every call to which reciprocal compensation rates apply would reflect the actual duration of that call.

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<sup>1</sup> See Ameritech Illinois’ Initial Post-Hearing Brief at 4-8 and testimony cited therein; 10-14; Ameritech Illinois’ Post-Hearing Reply Brief at 9-11.

ISP-bound calls are, on average, much longer than the 3.5 minutes assumed in the current reciprocal compensation rate structure – about seven times as long.<sup>2</sup> As a result, the gap between termination costs for ISP-bound calls and termination charges for ISP-bound calls is very large, and the elimination of that gap by the introduction of bifurcated rates would be commensurately dramatic.

The introduction of bifurcated rates presumably would not have an equally dramatic effect on the gap between termination costs and termination charges for 251(b)(5) traffic, but that is only because the gap presumably is not so great for 251(b)(5) calls.<sup>3</sup> It is indisputable, however, that the gap does exist for certain categories of section 251(b)(5) calls, because there are categories of 251(b)(5) calls that are characteristically longer or shorter than average. (*See Ameritech Illinois’ Initial Post-Hearing Brief at 6 and testimony cited therein.*) For such calls, the replacement of current reciprocal compensation rates with bifurcated rates would better align payments with costs. This is just as true for longer-than-average and shorter-than-average 251(b)(5) calls as it is for ISP-bound calls, even if the variance from the average (and thus the impact of moving to bifurcated rates) is less for 251(b)(5) calls than for ISP-bound calls.<sup>4</sup>

Thus, the rates in Ameritech Illinois’ Appendix Reciprocal Compensation are, contrary to the PAO, better aligned with underlying costs for 251(b)(5) traffic than the reciprocal compensation rates in the Focal Agreement, just as they are better aligned with underlying costs for ISP-bound traffic. Ameritech Illinois does not, however, ask the Commission to so find.

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<sup>2</sup> Ameritech Illinois’ Initial Post-Hearing Brief at 6.

<sup>3</sup> We say “presumably” because there is no evidence in the record quantifying the average duration of any category of 251(b)(5) calls.

<sup>4</sup> The PAO suggests that the introduction of bifurcated rates could introduce, rather than alleviate, a misalignment between the cost of delivering 251(b)(5) traffic and reciprocal compensation rates, but there is no basis for that suggestion. The duration of some 251(b)(5) calls is, of course, average. For such calls, the use of bifurcated rates would make no difference.

Rather, Ameritech Illinois proposes only that the Commission delete the objectionable paragraph, and thus not address the merits of bifurcated rates as applied to 251(b)(5) traffic. It is injudicious for a tribunal to make a factual finding that may be wrong (is wrong, Ameritech Illinois maintains) when there is no reason for a finding in the first place. And that is the case here, because the merits of bifurcated rates are irrelevant to the decision recommended in the PAO.

The logic in the PAO concerning what language will appear in the parties' interconnection agreement is:

- XO elected to opt into the Focal Agreement under section 252(i) of the 1996 Act. (PAO at 5.)
- XO, having made that election, is entitled to the reciprocal compensation provisions in the Focal Agreement, unless Ameritech Illinois established that the resulting reciprocal compensation rates are actually deficient under section 252(d)(2)(A) of the 1996 Act – in which event the requirements of section 252(d)(2)(A) might trump XO's rights under section 252(i). (*Id.* at 6.)
- Ameritech Illinois has not, however, established that the reciprocal compensation rates that XO obtains by adoption from the Focal Agreement are deficient under section 252(d)(2)(A), in part because section 252(d)(2)(A) requires only that reciprocal compensation rates reflect a "reasonable approximation" of costs, not necessarily the best possible approximation of costs. (*Id.*)
- XO is therefore entitled to the reciprocal compensation provisions of the Focal Agreement, *whether or not the bifurcated rates Ameritech Illinois proposes more accurately reflect costs than do the rates in the Focal Agreement.* (*Id.*)

Plainly, the paragraph in the PAO quoted at the beginning of this section is extraneous to the PAO's recommendation for the content of the parties' agreement. Accordingly, and also because the paragraph is at least arguably in error, the Commission should exclude the paragraph from its order.

## PROPOSED SUBSTITUTE LANGUAGE FOR EXCEPTION 1

Delete from the Proposed Arbitration Order the first full paragraph on page 7 in its entirety (“Moreover, while . . . reciprocal compensation rates.”)

EXCEPTION 2: The Commission should not adopt the PAO’s determination that Staff’s recommendation was properly before the Commission.

### ARGUMENT IN SUPPORT OF EXCEPTION 2

Staff proposed that the Commission require Ameritech Illinois immediately to accept or reject the FCC rate caps for ISP-bound traffic. Ameritech Illinois opposed Staff’s recommendation on the merits, but also demonstrated that Staff’s proposal could not properly be considered in this docket.

Section 252(b)(4)(A) of the 1996 Act confines the arbitrator to the issues set forth in the petition and the response. Neither XO’s petition nor Ameritech Illinois’ response raised the question whether Ameritech Illinois should be required to declare whether it accepts the FCC rate caps. Nor does that question need to be addressed in order to resolve the issues the parties did present. The Commission therefore cannot properly entertain Staff’s proposal in this arbitration. (*See* Ameritech Illinois’ Initial Post-Hearing Brief at 23-24; Ameritech Illinois’ Post-Hearing Reply Brief at 11-12.)

Another reason that Staff’s proposal cannot properly be considered here is that the only questions that can be addressed in an arbitration under section 252(b) of the 1996 Act are questions having to do with the parties’ rights and obligations under section 251. The FCC rate caps for ISP-bound traffic have nothing to do with section 251; rather, the FCC promulgated those rate caps in its capacity as regulator of interstate telecommunications under section 201 of the Communications Act of 1934. Thus, the question whether Ameritech Illinois should be

required to accept or reject the rate caps could not be considered in this proceeding even if it had been raised in the parties' pleadings. (*See* Ameritech Illinois' Initial Post-Hearing Brief at 24-25; Ameritech Illinois' Post-Hearing Reply Brief at 12-13.)

The PAO rejects Staff's proposal on the merits, and correctly so. Before reaching the merits, however, the PAO concludes (at 10) that the Commission has jurisdiction to entertain Staff's proposal in this arbitration. The PAO's rationale for this conclusion is:

The Commission generally agrees with Staff that subsections 252(b) and (c) empower us to craft the conditions by which the parties to an arbitrated interconnection agreement shall fulfill their duties under section 251. In our judgment, this certainly includes conditions pertaining to the reciprocal compensation requirement in subsection 251(b)(5).

That rationale fails, because Staff's proposal, whatever its merits, was not offered as a condition by which the parties (or either of them) would fulfill their duties under section 251.

The 1996 Act is clear on what the arbitrator is empowered to do:

- “resolve each issue set forth in the petition and the response” (47 U.S.C. § 252(b)(4)(C));
- “ensure that such resolution . . . meet[s] the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251” (47 U.S.C. § 252(c)(1));
- “establish any rates for interconnection, services, or network elements according to subsection [252](d)” (47 U.S.C. § 252(c)(2));
- “provide a schedule for implementation” (47 U.S.C. § 252(c)(3)); and
- “impos[e] appropriate conditions as required to implement subsection [252](c)” (47 U.S.C. § 252(b)(4)(C)).

None of those five items encompasses Staff's proposal. The language from the PAO quoted above seems to be invoking the fifth item. But the only “appropriate conditions” that that item contemplates are conditions “required to implement” subsection 252(c) – in other words, to implement the three preceding items. What Staff was proposing was not a condition to

implement 252(c). Staff never argued, and no one could not plausibly argue, that Staff's proposal was designed to ensure that the parties' agreement complied with section 251 of the 1996 Act, or to establish rates that conformed with subsection 252(d), or to provide an implementation schedule.

Thus, Ameritech Illinois was correct in its contention that the Commission could not properly consider Staff's proposal in this proceeding, and the Commission should so hold. At a minimum, if the Commission is not willing to take that step, the Commission should not include in its order the paragraph from page 10 of the PAO quoted above.

#### PROPOSED SUBSTITUTE LANGUAGE FOR EXCEPTION 2

Alternative 1: To hold, as Ameritech Illinois proposes, that the Commission could not properly consider Staff's proposal in this proceeding, modify the two paragraphs on page 10 of the Proposed Arbitration Order set forth below as indicated, by deleting the language shown with strikethrough and adding the underscored language:

The Commission generally agrees with Staff that subsections 252(b) and (c) empower us to craft the conditions by which the parties to an arbitrated interconnection agreement shall fulfill their duties under section 251. ~~In our judgment, this certainly includes conditions pertaining to the reciprocal compensation requirement in subsection 251(b)(5).~~ However, Staff's proposal, whatever its merits, is not a condition by which the parties would fulfill their duties under section 251. Rather, it is a condition by which Ameritech would remove certain uncertainties from CLECs' business planning. Thus, we do not believe that subsection 252(b) or (c) empowers us to act on Staff's proposal, and we agree with Ameritech that the proposal is not properly before us in this proceeding, for reasons "First" and "Second" summarized above.

In any event, even if Staff's proposal could be entertained in this proceeding ~~However,~~ the Commission agrees with Ameritech that we cannot impose the particular condition Staff proposes. The FCC could have, but did not, establish a deadline by which ILECs must declare their intentions with respect to rate caps. Nor did the FCC signal that the imposition of a deadline was left to the state commissions. The FCC was clearly aware of timing issues, since it described its compensation scheme for ISP-bound traffic as an *interim* measure, intended to curtail "market distortions" while it "consider[s] the desirability of adopting a uniform carrier compensation mechanism, applicable to all traffic

exchanged among telecommunications carriers." ISP Order, para. 66. Implicitly, the FCC has thus rejected a deadline for electing its rate caps. This Commission has no authority to revise or supplement - much less, overrule - the implicit decision of a superior sovereign.

Alternative 2: To implement Ameritech Illinois' alternative suggestion that the Commission not address the jurisdictional question, modify the two paragraphs on page 10 of the Proposed Arbitration Order set forth below as indicated, by deleting the language shown with strikethrough and adding the underscored language:

~~The Commission generally agrees with Staff that subsections 252(b) and (c) empower us to craft the conditions by which the parties to an arbitrated interconnection agreement shall fulfill their duties under section 251. In our judgment, this certainly includes conditions pertaining to the reciprocal compensation requirement in subsection 251(b)(5).~~

Normally, we would address jurisdictional concerns, such as those raised by Ameritech Illinois' grounds "First" and "Second" above, before reaching the merits of a question. In this instance, however, we find the jurisdictional concerns considerably more thorny than the merits of Staff's recommendation. Accordingly, we decide Staff's recommendation without reaching the jurisdictional concerns. However, ~~t~~ The Commission agrees with Ameritech that we cannot impose the particular condition Staff proposes. The FCC could have, but did not, establish a deadline by which ILECs must declare their intentions with respect to rate caps. Nor did the FCC signal that the imposition of a deadline was left to the state commissions. The FCC was clearly aware of timing issues, since it described its compensation scheme for ISP-bound traffic as an *interim* measure, intended to curtail "market distortions" while it "consider[s] the desirability of adopting a uniform carrier compensation mechanism, applicable to all traffic exchanged among telecommunications carriers." ISP Order, para. 66. Implicitly, the FCC has thus rejected a deadline for electing its rate caps. This Commission has no authority to revise or supplement - much less, overrule - the implicit decision of a superior sovereign.

**CONCLUSION**

For the foregoing reasons, Ameritech Illinois respectfully urges the Commission to modify the PAO as set forth above.

Dated: September 26, 2001

Respectfully submitted,

AMERITECH ILLINOIS

Dennis G. Friedman  
Mayer, Brown & Platt  
190 S. LaSalle Street  
Chicago, Illinois 60603  
(312) 701-7319

By: \_\_\_\_\_  
Nancy J. Hertel  
Ameritech Illinois  
225 W. Randolph St.  
Chicago, Illinois 60606  
(312) 727-4517

**CERTIFICATE OF SERVICE**

I, Dennis G. Friedman, an attorney, hereby certify that I caused a copy of the foregoing **AMERITECH ILLINOIS' BRIEF ON EXCEPTIONS** to be delivered to each person as listed below via e-mail and messenger or overnight delivery on this 26<sup>th</sup> day of September, 2001.

Ross A. Buntrock  
Kelley, Drye & Warren  
1200 19th Street, N.W. - 4th  
Floor  
Washington, DC 20036

Carol Pomponio  
Manager, Regulatory Affairs  
XO Illinois, Inc.  
303 East Wacker Drive  
Concourse Level  
Chicago, IL 60601

David Gilbert  
Administrative Law Judge  
Illinois Commerce Commission  
160 North LaSalle Street  
Suite C-800  
Chicago, IL 60601

David L. Nixon  
Office of General Counsel  
Illinois Commerce Commission  
160 North LaSalle Street  
Suite C-800  
Chicago, IL 60601

Stephen J. Moore  
Thomas H. Rowland  
Rowland & Moore  
77 West Wacker Drive  
Suite 4600  
Chicago, IL 60601

Jim Zolnierek  
Illinois Commerce Commission  
527 East Capital Avenue  
P.O. Box 19280  
Springfield, IL 62701

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Dennis G. Friedman