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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 30, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Mail Stop Code 1170
Washington, D.C. 20544

RE: Ex Parte Presentation
Advanced Wireline Services, CC Dkt. No. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91 and CCB/CPD No. 98-15, RM-9244

Dear Ms. Roman Salas:

Pursuant to the requirements of Sections 1.1200 et seq. of the Commission's Rules, you are hereby notified that Dan Gonzalez, Director of NEXTLINK Communications, Inc. and I met yesterday with Kevin Martin, Legal Advisor to Commissioner Furchtgott-Roth regarding the above-referenced docket. We provided Mr. Martin the attached materials summarizing NEXTLINK's views regarding NEXTLINK's right under Section 252(i) of the Communications Act to any reciprocal compensation in any existing and approved interconnection agreement. Should there be any questions regarding this matter, please contact the undersigned.

Sincerely,

Cathy Massey

Cathleen A. Massey
Public Policy & Assistant General Counsel

cc: Mr. Kevin Martin

1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, D.C. 20036
202.721.0999
fax: 202.721.0995

NEXTLINK®

October 21, 1998

Re: Ameritech's Attempt To Impose a Waiver of Entitlement to Reciprocal Compensation for ISP Traffic as a Condition On NEXTLINK Communications, Inc.'s Request to Adopt an Approved Interconnection Agreement under Section 252(i) of the Act Is Contrary to state and Federal law.

The History of the Negotiations: NEXTLINK Communications, Inc. attempted for more than five months to negotiate interconnection agreements with Ameritech for the states of Wisconsin, Indiana and Michigan. The Ameritech interconnection team engaged in a series of tactics that virtually foreclosed the possibility of a successful conclusion to the negotiations. These tactics are outlined in the attached October 8, 1998 letter from Gerry Salemme, NEXTLINK Senior Vice President to Edward Wynn, Ameritech General Counsel for Information Industry Services. Ameritech has not responded to the letter.

NEXTLINK's Request To Adopt Under Section 252(i): Further negotiations appeared to be futile and Ameritech's team stated that the company would not process collocation or rights of way requests without a signed interconnection agreement in place. Because its plans to enter the Michigan market next year would otherwise be endangered, on October 20, 1998 the NEXTLINK negotiation team told the Ameritech negotiation team that NEXTLINK intended to invoke its rights under Section 252(i) of the Act and adopt Ameritech's interconnection agreement with MCImetro Access Transmission Services, Inc. ("MCI") that was filed with the Michigan Public Service Commission (the "MPSC") on June 17, 1997 and subsequently approved by the MPSC. NEXTLINK also decided to cease negotiations in Wisconsin and Indiana for the time being.

The Conditions Ameritech Imposed on Adoption: Ameritech's negotiation team responded to NEXTLINK's request to adopt the MCI Agreement by stating that it is Ameritech's policy that NEXTLINK's right to adopt an agreement under Section 252(i) does not include a right to any reciprocal compensation provision in any existing and approved interconnection agreement. Ameritech's team sent NEXTLINK a fax, which is attached, that included the text of two footnotes that Ameritech's team stated must be added to the MCI Agreement before Ameritech will sign the adopted agreement. One footnote reserves Ameritech's rights to challenge the MCI Agreement. The second footnote, discussed below, is Ameritech's attempt to rewrite the reciprocal compensation provision of the MCI Agreement while simultaneously insisting that NEXTLINK must accept the MCI Agreement in its entirety.

1730 Rhode Island Avenue, N.W.
Suite 1000
Washington, D.C. 20036
202.721.0999
fax: 202.721.0995

Waiver of Entitlement to Reciprocal Compensation: Section 4.7.1 of the MCI Agreement plainly states that the parties will compensate each other for the transport and termination of local traffic. Under the agreement all local traffic, including ISP traffic is subject to reciprocal compensation. Unlike some other CLECs, NEXTLINK has not built its ISP marketing plans around the receipt of reciprocal compensation from the ILEC. Consequently, when the question of reciprocal compensation under the MCI Agreement arose, NEXTLINK's negotiation team indicated that NEXTLINK would be willing to enter into a "bill and keep" arrangement with Ameritech. Ameritech's negotiation team stated that "bill and keep" was not an option. Nor was Ameritech willing to meet its obligation under Michigan and federal law to pay reciprocal compensation to NEXTLINK for ISP traffic. In Ameritech's view, Section 252(i) entitles NEXTLINK to adopt only the interconnection, UNE and resale terms and conditions of the MCI agreement. In the attached fax to NEXTLINK, Ameritech states that it "is willing to let NEXTLINK adopt more than 252(i) contemplates, including the reciprocal compensation provisions to the MCI Agreement on the condition that NEXTLINK agree to include the following footnote in the MCI Agreement." The footnote reads as follows:

> 'This Agreement is the result of NEXTLINK's adoption in its entirety of the MCI Agreement as defined in Footnote ___ on the signature page. Ameritech maintains (and NEXTLINK does not dispute) that it was not Ameritech's intention in entering the MCI Agreement nor should the MCI Agreement be interpreted as requiring that the Parties pay each other Reciprocal Compensation for ISP traffic (including Internet traffic) which originates on a Party's network, is transported and handed off to the other Party and routed to an ISP Point of Presence. Accordingly, the Parties agree that such ISP traffic transported and handed off to the other Party and routed to an ISP Point of Presence is not subject to Reciprocal Compensation under this Agreement between Ameritech and NEXTLINK.'

Ameritech's Position that it is not Required to Provide Reciprocal Compensation Under Section 252 is inconsistent with Federal law:

- By insisting that NEXTLINK accept the MCI Agreement in its entirety, while simultaneously asserting that it has the right to modify the Agreement's reciprocal compensation provision, Ameritech is attempting to impose a perverse form of "pick and chose" upon the adoption process. It was never the intent of Congress or the Commission to allow ILECs to require that requesting carriers modify existing and approved agreements as a precondition to adoption under Section 252(i). Ameritech has no right to insist on such changes to the MCI Agreement.

- **Section 252(i)** requires that Ameritech make available to NEXTLINK "any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." There are no exceptions to this obligation.

Because both the Act and the MCI Agreement itself make clear that reciprocal compensation for the termination of telecommunications traffic is an integral part of interconnection, Section 252(i) requires that Ameritech make the MCI Agreement available to NEXTLINK in its entirety, including the provisions relating to reciprocal compensation.

- **Section 251** is entitled "Interconnection" governs the interconnection obligations between telecommunications carriers.

  - **Section 251(b)(5)** requires all LECs to establish reciprocal compensation arrangements.

  - **Section 251(c)(1)** requires ILECs to negotiate in good faith reciprocal compensation arrangements.

  - **Section 251(c)(2)** is entitled "Interconnection" and states that ILECs have a duty to provide interconnection "on rates, terms, and conditions that are just reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of [section 251] and section 252." Since Section 251 imposes the obligation on all LECs to establish reciprocal compensation arrangements, these arrangements are an indispensable part of ILECs duty to provide interconnection.

- Ameritech previously has recognized that reciprocal compensation is integral to interconnection. Both the MCI Agreement and the draft agreements provided by Ameritech to NEXTLINK in the interconnection process include reciprocal compensation provisions in sections entitled "Interconnection" that specifically reference section 251(c)(2) of the Act.

- Ameritech's attempt to exclude reciprocal compensation from the provisions of Section 252(i) is contrary to the requirements of the Act and therefore must fail.

Ameritech is Required Under Michigan Law to Pay Reciprocal Compensation for ISP Traffic

The MPSC issued an Order January 28, 1998 requiring Ameritech to pay more than $6 million in back charges for calls made to ISPs and to pay all reciprocal compensation for such calls in the future. Ameritech has appealed the Order to District Court.[1]

[1] Brooks Fiber et al v. Ameritech, In re Application for Approval of an Interconnection Agreement, Case No. U-11-78 (Mich. Pub. Serv. Com. Jan. 28, 1998); Michigan Bell Telephone Co. v. MFS Intelenet of Michigan, Inc. 1998 WL 413749 (W.D.Mich.)

NEXTLINK

October 8, 1998

Mr. H. Edward Wynn
General Counsel, Information Industry Services
Ameritech Information Industry Services
350 North Orleans, Floor 3
Chicago, IL 60654

VIA Federal Express

Re: Interconnection Negotiations between NEXTLINK Communications, Inc. and Ameritech Information Industry Services for the states of Wisconsin, Indiana and Michigan

Dear Mr. H. Edward Wynn:

As you may be aware, NEXTLINK Communications, Inc. ("NEXTLINK") has been attempting for the past five months to negotiate interconnection agreements with Ameritech for the states of Wisconsin, Indiana and Michigan. NEXTLINK has significant experience negotiating with each of the Bell Operating companies for interconnection agreements, including previous successful negotiations with Ameritech for an interconnection agreement in Illinois. NEXTLINK is, therefore, perplexed and concerned that during its current round of negotiations with Ameritech, the Ameritech negotiation team is engaging in a series of novel tactics that virtually foreclose the possibility of a successful conclusion to the negotiation. I am calling this to your attention to ask whether NEXTLINK's experience outlined below is consistent with Ameritech's interconnection negotiation procedures.

The interconnection negotiations with Ameritech have been flawed in three significant respects. First, Ameritech has many times throughout negotiations, unilaterally and without explanation changed substantial portions of what Ameritech's negotiation team refers to as Ameritech's "standard" interconnection agreement. These new changes simply appear in the

next draft of the contract and often result in changes to whole sections of the agreement that had not previously been under discussion by the parties. It is Ameritech's view, according to its negotiators, that it has the right to unilaterally rewrite its "standard" contract at any point during the negotiations. Second, Ameritech's policies apparently preclude its negotiators from considering or engaging in any meaningful discussion of terms not already encompassed by the latest version of Ameritech's "standard" contract, thereby barring true negotiation or consideration of many of NEXTLINK's concerns. Ameritech requires its negotiators to take this approach even when Ameritech's subject matter experts express a willingness to accommodate NEXTLINK. Finally, Ameritech has caused unending delay by refusing to discuss NEXTLINK's concerns unless NEXTLINK detailed them in writing days in advance of negotiation meetings. Ameritech's negotiators refused, however, to provide their responses in writing and often either failed to respond or provide an inadequate response.

When NEXTLINK questioned Ms. Susan Lord, Ameritech's primary negotiator, regarding these issues, Ms. Lord indicated that she conducted negotiations with NEXTLINK in a manner completely consistent with Ameritech's policies. Assuming this to be the case, our complaint is not with Ms. Lord, but with Ameritech's recently implemented interconnection policies. Unless we hear from you otherwise, we will be forced to conclude that these tactics reflect Ameritech's standard approach to negotiations. NEXTLINK will then have no choice but to cease negotiations and consider other options available to it under the Telecommunications Act of 1996 ("the Act").

1. **Unilaterally Altering Negotiated Drafts of the Interconnection Agreement Based on Changes in Ameritech Policy.**

On April 30, 1998, after receiving NEXTLINK's request for interconnection negotiations, Ameritech's negotiators sent NEXTLINK a copy of Ameritech's "standard" interconnection agreement, informing NEXTLINK that interconnection negotiations must revolve around that standard agreement. NEXTLINK thereupon engaged in an intensive legal and technical review of that agreement and the parties began negotiations centered on that language.

On August 5, 1998, Ameritech's negotiators sent NEXTLINK a new version of the "standard" agreement that contained Ameritech's unilateral revisions to portions of the agreement that the parties had never previously discussed. Confused about the derivation of these new terms, NEXTLINK asked Ameritech's negotiators for clarification. The response was that internal Ameritech policy changes mandated changes in its standard agreement; therefore, the language that Ameritech had previously offered NEXTLINK was no longer available. Presented with no other option, NEXTLINK engaged in yet another intensive legal and technical review, this time of Ameritech's August 5th draft. Negotiations proceeded based upon the new draft.

On August 20, Ameritech sent yet another new version of its "standard" agreement. As before, this contract included new language that the parties had never previously discussed. Again, Ameritech's negotiators informed NEXTLINK that changes in company policy mandated changes in its standard contract. This occurred two more times. On August 24th and September 18th, NEXTLINK received additional drafts of Ameritech interconnection agreements.

Ameritech's view that it was perfectly appropriate to unilaterally revise substantial sections of the interconnection agreement without warning or discussion underscores Ameritech's high-handed approach to the interconnection negotiation process. The August 5th draft, for example, was sent to NEXTLINK without forewarning and explanation even though it contained 117 unilateral changes by Ameritech to substantive portions of the agreement. Although its negotiators were often unable or unwilling to explain Ameritech's need for the unilateral changes, they also were unwilling to consider NEXTLINK's request that the original "standard" terms be reinserted in the document. The negotiations became almost comical in their futility. Not only would Ameritech's negotiators refuse to consider NEXTLINK's preferred wording of portions of the agreement, they would also refuse to consider what had been just days before Ameritech's own words. Moreover, new issues came up based upon the new language. In one instance, for example, the changed language was at odds with the published decisions of the state commissions of Michigan, Wisconsin and Indiana. Yet, Ameritech's negotiators consistently maintained that Ameritech policy barred them from significantly departing from these new "standard" terms even if they differed from previous drafts and were at odds with governing law. Ameritech's negotiators suggested that if NEXTLINK was dissatisfied with the new language, it should arbitrate the matter.

It became an impossible job to successfully negotiate an agreement when Ameritech changed its "standard" proposal every few weeks. The negotiation became an endless game of "catch-up" as NEXTLINK tried to press forward with its issues while reworking or examining for the first time sections of new "standard" agreements that had been acceptable upon first, second, third or fourth review. These tactics raise serious doubt about Ameritech is conducting these negotiations in good faith.

2. Unwilling to Negotiate NEXTLINK's Concerns By Refusing to Discuss Terms not Encompassed by Ameritech's Standard Interconnection Agreement.

In reviewing the various iterations of Ameritech's "standard" agreement, NEXTLINK discovered that a number of issues affecting NEXTLINK's market entry were not encompassed by Ameritech's standard terms. Consistent with the Act's requirement that Ameritech enter into good faith negotiations with interconnecting carriers, NEXTLINK requested discussion of these issues. Ameritech's negotiators responded, however, by stating that while they would listen to what NEXTLINK had to say, Ameritech's policy barred them from entertaining requests pertaining to services and functions not already encompassed by

Ameritech's standard contract. This scenario repeated itself throughout the parties' negotiations.

Ameritech's negotiator's refusal to consider negotiated changes to the contract even encompassed situations where Ameritech's own subject matter experts expressed willingness to accommodate NEXTLINK's requested changes. In a few such instances, Ameritech's negotiators tried to appease NEXTLINK by agreeing to propose language memorializing the subject matter experts' mutual agreement that language was warranted. Invariably, however, the language Ameritech's negotiators proposed was non-binding, non-negotiable and so lacking in detail as to be meaningless.

3. Causing Continual Delay by Barring Discussion of Questions Not Provided Previously in Writing and Refusing to Prepare Comprehensive Responses.

From the beginning, NEXTLINK hoped that negotiations would involve a free exchange of ideas and open discussion of interconnection agreement terms. However, as discussed above, Ameritech has been unwilling to address issues falling outside of its standard terms. Moreover, Ameritech's negotiators refused to address issues that NEXTLINK did not present to them in writing days in advance of a negotiations session. This demand created substantial delay in the parties' negotiations. Questions NEXTLINK posed in discussion often remain unanswered for days or weeks.

In addition, while requiring NEXTLINK to submit questions in writing prior to a negotiations session, Ameritech's negotiators refused to respond in writing, even when NEXTLINK explained that written responses would enable NEXTLINK to gain a better understanding of Ameritech's position, better prepare for discussion of the issues and, thus, permit negotiations to progress more efficiently. This pattern persisted even when Ameritech's subject matter experts indicated in discussions that they had drafted written responses that they had forwarded to Ameritech's negotiators. When NEXTLINK requested copies of the answers, Ameritech's negotiators barred Ameritech personnel from providing the documents to NEXTLINK.

Finally, while NEXTLINK took the time to submit detailed questions related to NEXTLINK's concerns in writing, Ameritech's negotiators failed on numerous occasions to provide answers. In many cases, it was plainly obvious that Ameritech's negotiators had not reviewed the NEXTLINK questions they demanded NEXTLINK provide, nor distributed them to appropriate technical representatives for a response. And, Ameritech's negotiators often required repeated submission of written questions to Ameritech before they would respond.

This letter outlines the problems NEXTLINK has experienced in the current interconnection negotiations. I would be happy to provide additional detail related to these

difficulties, including dates and specific substantive disputes. Of course, I hope you will contact me with a proposal that will address these deficiencies and bring NEXTLINK's negotiations with Ameritech in line with the Act's requirements. As you may expect, NEXTLINK will weigh all its options under the Act in determining what course to pursue if it is deprived of the obvious choice of negotiating an agreement. Please feel free to call me if you think a discussion of this matter would be helpful.

Sincerely,

R. Gerard Salemme
Senior Vice President

Legal Department
Marketing and Product Development
225 W. Randolph St., HQ-27B
Chicago, Illinois 60606

Date: 10/20/98

To: Patricia A. Raskin, Esq.
Davis, Wright, Tremaine, L.L.P.
phone: 206/628-7745
fax: 206/628-7699

From: Susan M. Lord, Esq.
phone: 312/727-2781
fax: 312/845-8871

Pages: 3 (including the cover sheet)

PLEASE DELIVER AS SOON AS POSSIBLE.

COMMENTS: As per our discussion today, the two footnotes which would be included in the MCI Agreement for Michigan.

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE MAY BE CONFIDENTIAL AND/OR LEGALLY PRIVILEGED INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED BELOW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY COPYING, DISSEMINATION OR DISTRIBUTION OF CONFIDENTIAL OR PRIVILEGED INFORMATION IS STRICTLY PROHIBITED. IF HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AT 312/727-7281, AND WE WILL ARRANGE FOR THE RETURN OF THE FACSIMILE. THANK YOU.

Draft as of 10/20/98
For Discussion Purposes Only
Does Not Represent an Offer

Footnote on signature page:

This Agreement is the result of NextLINK's adoption in its entirety of the terms of that certain arbitrated Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 dated _____ by and between Ameritech Michigan and MCImetro Access Transmission Services, Inc., as amended ("MCI Agreement") that was approved by the Commission as an effective Agreement in the state of Michigan in Docket No. _____ (the "MCI Arbitration"). This Agreement does not represent a voluntary or negotiated agreement under Section 252 of the Act but instead merely represents Ameritech's compliance with NextLINK's statutory rights under Section 252(I) of the Act. Filing and performance by Ameritech of this Agreement does not in any way constitute a waiver by Ameritech of its position of the illegality or unreasonableness of any rates, terms or conditions set forth in this Agreement, nor does it constitute a waiver by Ameritech of all rights and remedies it may have to seek review of this Agreement or the MCI Agreement, or to petition the Commission, other administrative body, or court for reconsideration or reversal of any determination made by the Commission pursuant to the MCI Arbitration, or seek review in any way of any provisions included in this Agreement as a result of NextLINK's election under Section 252(i) of the Act.

Neither Ameritech nor NextLINK's execution of this Agreement and compliance with the terms and conditions of this Agreement shall be construed as or is intended to be a concession or admission by either Party that any contractual provision required by the Commission in the MCI Arbitration or any provision in this Agreement or the MCI Agreement complies with the rights and duties imposed by the Act, a decision by the FCC or the Commission, a decisions of the courts, or other Applicable Law, and both Ameritech and NextLINK specifically reserve their respective full rights to assert and pursue claims arising from or related to this Agreement.. Ameritech further contends that certain provisions of the Agreement may be void or unenforceable as a result of the July 18, 1997 and October 14, 1997 decisions of the United States Court of Appeals for the Eighth Circuit. Should NextLINK attempt to apply such conflicting provisions, Ameritech reserves its right, notwithstanding anything to the contrary in this Agreement, to seek appropriate legal and/or equitable relief. The MCI Agreement that NextLINK adopts here is considered to be the original agreement between Ameritech and MCI plus any modifications or amendments to that agreement as of the date this Agreement is executed by Ameritech and NextLINK. NextLINK is not bound by any future modifications or amendments to the MCI Agreement made after October ___, 1998. Notwithstanding the foregoing, to the extent any provisions in the MCI Agreement are modified as a result of any order or finding by the FCC, the Commission or a court of competent jurisdiction (other than an order subject to Section 29.3), either Party shall have the right to modify the corresponding provision of this Agreement, consistent with such order or finding. In no event shall any of the rates, terms or conditions set forth in this Agreement apply to any products or services purchased by NextLINK prior to the later of (i) the date the Commission approves this Agreement under Section 252(e) of the Act and (ii) absent such Commission approval, the date this Agreement is deemed approved under Section 252(e)(4) of the Act.

Draft as of 10/20/98
For Discussion Purposes Only
Does Not Represent an Offer

Section 252(i) entitles NextLINK to adopt only the interconnection, UNE and resale terms and conditions of the MCI Agreement in Michigan. Ameritech, however, is willing to let NextLINK adopt more than 252(i) contemplates, including the reciprocal compensation provisions in the MCI Agreement, on the condition that NextLINK agree to include the following footnote in the MCI Agreement:

Insert this Footnote at the end of the first sentence in Section 4.7.1:

"This Agreement is the result of the NEXTLINK's adoption in its entirety of the MCI Agreement as defined in Footnote _____on the signature page. Ameritech maintains (and NEXTLINK does not dispute) that it was not Ameritech's intention in entering the MCI Agreement nor should the MCI Agreement be interpreted as requiring that the Parties pay each other Reciprocal Compensation for ISP traffic (including Internet traffic) which originates on a Party's network, is transported and handed off to the other Party and routed to an ISP Point of Presence. Accordingly, the Parties agree that such ISP traffic transported and handed off to the other Party and routed to an ISP Point of Presence is not subject to Reciprocal Compensation under this Agreement between Ameritech and NEXTLINK."

mciisp/agrmts

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

QST COMMUNICATIONS, INC.	:	
-vs-	:	
AMERITECH ILLINOIS	:	
	:	
Complaint pursuant to Sections 10-108 and 13-514 of the Public Utilities Act for Ameritech's refusal to execute an interconnection agreement with QST upon the same terms and conditions as between Ameritech and MCImetro Access Transmission Services, Inc.	:	**98-0603**

HEARING EXAMINERS' WRITTEN DECISION

By the Commission:

I. INTRODUCTION

On August 24, 1998, QST Communications, Inc. filed a verified complaint with the Illinois Commerce Commission ("Commission") pursuant to Section 10-108 of the Illinois Public Utilities Act ("Act"), 220 ILCS 5/10-108, alleging that Ameritech Illinois ("Ameritech") has violated Section 13-504 of the Federal Telecommunications Act of 1996 ("TA96" or "Federal Act") by refusing to make available to QST the Commission approved interconnection agreement between Ameritech and MCImetro Access Transmission Services, Inc. ("MCI"). In the Complaint and in a Memorandum in Support of Motion for Emergency Relief, QST also requested that the Commission grant it emergency relief under Section 13-515(e) directing Ameritech to immediately execute the interconnection agreement to QST that had already been executed by QST. On August 26, 1998, after considering the response of Ameritech and the reply of QST, the Commission entered the following order:

> Accordingly, we order Ameritech to execute the existing interconnection agreement with QST that QST has already signed and to do so within fifteen (15) days of the date of this Order. We further order that the QST/Ameritech interconnection agreement shall have the same termination date as the MCI/Ameritech interconnection agreement.

Subsequent to the entry of that order, a status hearing was held during which the parties agreed that there were no facts in dispute and that this case could be resolved with briefs from the parties. Pursuant to the schedule set by the Hearing Examiners, QST, Ameritech and the Staff filed initial briefs and reply briefs. Ameritech requested and was granted permission to file a surreply brief.

The issue raised in this proceeding is a dispute over Section 252(i) of the Federal Act, which sets forth a procedure for new competitive local exchange carriers ("CLECs") to adopt interconnection agreements already entered into by incumbent local exchange carriers and other CLECs. Under Section 252, CLECs may request that the incumbent carrier enter into good faith negotiations for interconnection and failing to reach an agreement, may arbitrate disputed provisions before the local public utility commission. Alternatively, CLECs can request the adoption of an agreement already entered into by the incumbent. The pertinent section provides as follows:

> (i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS.— A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C. 252(i)

II. UNDISPUTED FACTS

There are no disputed facts in this proceeding. On October 17, 1997, QST requested that Ameritech enter into negotiations for an interconnection agreement. On May 21, 1998, QST notified Ameritech that it wished to exercise its rights under Section 252(i) to adopt the agreement between Ameritech and MCI dated May 5, 1997 and approved by this Commission in Docket No. 97-AA002. Initially, Ameritech forwarded an agreement identical to the MCI Agreement to QST for approval and acceptance. Upon its review and approval, QST signed the interconnection agreement forwarded by Ameritech and sent it back to Ameritech for Ameritech's signature.

On July 21, 1998 the Federal District Court of the Northern District of Illinois affirmed the Commission's decision in Teleport Communications Group, Inc. et al., vs. Illinois Bell Telephone Company, ICC Docket No. 97-0404, 97-0519, 97-0525 (Consol., March 11,1998). that the agreements between Ameritech and several CLECs (MCI, TCG, and WorldCom) require the payment of reciprocal compensation for calls terminated with Internet service providers ("ISPs") Illinois Bell Telephone Company v. WorldCom Technologies, Inc. et al., No. 98 C 1925, Memorandum Opinion and Order.

Shortly after the issuance of that decision and after receipt of the signed QST agreement, Ameritech notified Counsel for QST that the MCI agreement as it was signed by Ameritech and MCI and approved by this Commission was no longer available. Instead, Ameritech insisted that QST allow Ameritech to modify the MCI agreement with an amendment precluding reciprocal compensation for calls terminated with ISPs. A copy of Ameritech's proposed and objected to footnote language to its interconnection agreement with QST is attached to this Order.

After providing Ameritech with the required notification under Section 13-515 of the Illinois Public Utilities Act, QST filed this complaint.

III. POSITIONS OF THE PARTIES

QST

QST argues that Ameritech's demand that QST accept an amendment that removes calls to ISPs from the reciprocal compensation scheme is in direct conflict with the Federal Act. QST states that under the terms of the Federal Act, Ameritech must make the MCI agreement available to QST "upon the same terms and conditions as those provided in the agreement." QST states that the amendment proposed by Ameritech would make a significant change to the terms and conditions of a key provision of the MCI agreement, and ignore the rulings of the Commission and the Federal District Court interpreting those terms and conditions. QST argues that by refusing to allow QST to exercise its rights under Section 252(i) of the Federal Act, Ameritech is in violation of federal law.

QST states that Ameritech's attempt to evade the reciprocal compensation provisions of the MCI agreement is based on the same "pick and choose" interpretation of the Federal Act that the Eighth Circuit Court of Appeals found to be improper. In Iowa Utilities Board et al. v. FCC, 120 F.3d 753 (Eighth Cir., 1997), the court vacated portion of the rules enacted by the FCC that interpreted 252(i) to allow carriers to pick one set of provisions from one agreement between an incumbent LEC and a CLEC and a second set of provisions from an agreement between the same incumbent LEC and a different CLEC. Ameritech and the other incumbent LECs had argued that the FCC interpretation was improper because it would allow a later entrant to select the favorable terms of a prior approved agreement without being bound by the corresponding tradeoffs that were made in exchange for the favorable provisions sought by the new entrant. As summarized by the court: "The petitioners assert that section 252(i) allows requesting carriers the option to select the terms and conditions of prior agreements only as a whole, not in a piecemeal fashion." Id. at 800.

QST argues that Ameritech's insistence that QST accept an amendment to the MCI agreement that grafts Ameritech's "intention" onto that agreement is a transparent attempt to evade the pick-and-chose prohibition that Ameritech obtained from the Eighth Circuit. QST states that this attempt by Ameritech to pick-and-chose from its

own agreement is particularly egregious when, as here, Ameritech's "intention" is contrary to the findings of this Commission and the Northern District of Illinois. QST states that this Commission and the Federal District Court held that irrespective of Ameritech's intentions now or in the past, the MCI agreement requires the payment of reciprocal compensation for calls terminated with ISPs. QST states that those Orders should be given effect for all carriers that are willing to accept all the terms of the MCI agreement.

QST also states that by insisting on amending the MCI agreement before adoption by QST, Ameritech is intentionally attempting to stifle competition and is therefore in violation of Section 13-514 of the Act. Section 13-514 states that "[a] telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition:

> (1) unreasonably refusing or delaying interconnections or providing inferior connections to another telecommunications carrier;...
>
> (6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers;...
>
> (8) violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the Federal Telecommunications Act of 1996 in a manner that unreasonably delays or impedes the availability of telecommunications services to consumers.

220 ILCS 5/13-514.

QST states that Ameritech's demand that QST accept a modified version of the MCI agreement is damaging QST by delaying its ability to provide service to customers pursuant to the terms of the MCI interconnection agreement with Ameritech. This Commission agreed in the Order for emergency relief that irreparable harm would occur: "We believe that without an enforceable interconnection agreement, QST would not provide service to its customers." ICC Docket No. 98-0603 at 3 (Order issued on August 26, 1998). QST also states that refusal to allow the adoption of the MCI agreement puts QST at a disadvantage vis a vis MCI and other CLECs that have already adopted the MCI agreement without Ameritech's new amendment. Under Ameritech's discriminatory treatment, some carriers would be allowed access to agreements with favorable terms and conditions, while other carriers would be relegated to second class status by being denied the benefits of such agreements.

STAFF

Staff takes the position that Ameritech's demand for the insertion of a footnote to the agreement violates the mandatory terms of section 252(i) of TA96 because they constitute a refusal to make interconnection, service, and network elements available to QST on the same terms and conditions as those provided in the MCI Agreement. Staff further contends that Ameritech's violation of Section 252(i) of TA96 constitutes an impediment to competition and, therefore, violates Section 13-514 of the PUA. Staff notes that Section 13-514 explicitly states that carriers' unreasonable actions that delay or have adverse affects on the ability of other carriers to provide service are per se impediments to competition. Citing 220 ILCS 5/13-514(1), (6). Staff maintains that Ameritech's refusal to make the MCI Agreement available to QST has unreasonably delayed the speed with which QST can provide telecommunications services to customers. Staff argues that the delay caused by Ameritech is unreasonable because it is the result of Ameritech's violation of section 252(i) of TA96. Accordingly, Staff argues that Ameritech's actions violate Section 13-514's provisions by constituting per se impediments to competition as described in sections 13-514(1) and 13-514(6) of the PUA.

Staff disagrees with QST that Ameritech's actions constitute a violation of section 13-514(8) which states as follows:

> violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the Federal Telecommunications Act of 1996 in a manner that unreasonably delays or impedes the availability of telecommunications services to customers.

220 ILCS 5/13-514(8)(emphasis added). Staff asserts that at the time QST filed its complaint, QST and Ameritech had not entered into an interconnection agreement pursuant to Section 252. Rather, QST had merely requested to enter into an interconnection agreement with Ameritech pursuant to section 252(i). Staff contends that Ameritech could not have violated the terms of or unreasonably delayed implementation of an interconnection agreement into which it had not entered.

Staff also responds to Ameritech's allegation that reciprocal compensation is not interconnection, services or unbundled elements as defined by TA96. Staff contends that the Commission should reject Ameritech's attempt to limit the terms and conditions upon which it must make the MCI Agreement available to QST. Staff notes that section 252(i) allows QST to obtain "interconnection, service, or network element[s] ... upon the same terms and conditions" as those provided in the MCI Agreement. 47 U.S.C. 252(i). Staff asserts that section 252(i) does not limit the phrase "terms and conditions" to those that specifically address interconnection, service and network elements. Rather, Staff argues that section 252(i) states that the terms and conditions upon which a pre-existing agreement is to be made available are to be the terms and

conditions of the pre-existing agreement, without limitation. Therefore, Staff states that the MCI Agreement's reciprocal compensation provisions are terms and conditions upon which Ameritech makes interconnection, service and network elements available to MCI and Ameritech must make interconnection, service and network elements available to QST upon the same reciprocal compensation terms and conditions.

Staff maintains that in this case, the MCI Agreement's charges for the transport and termination of traffic were arrived at through voluntary negotiation and, therefore, were not determined in accordance with section 252(d). Accordingly, Staff argues that the Commission should reject Ameritech's attempt to prevent QST from adopting the MCI Agreement based on the fact that its charges for the transport and termination of traffic are not determined pursuant to section 252(d).

Staff also argues that the Commission should reject Ameritech's argument that QST must pursue its claim in accordance with Section 252's arbitration procedures. Staff notes that section 252(a) allows incumbent carriers to voluntarily negotiate agreements with requesting carriers. Citing 47 U.S.C. 252(a)(1). Further, section 252(b) allows any party involved in negotiating an agreement to require the other negotiating party to submit open issues to a State commission for arbitration. 47 U.S.C. 252(b)(1). Staff asserts that carriers can forego the negotiation of new agreements pursuant to section 252(a)(1) by adopting pre-existing agreements pursuant to section 252(i). Accordingly, Staff contends that carriers' rights to arbitrate open issues do not attach when carriers adopt pre-existing agreements under section 252(i). Staff argues that there is no reason for carriers' arbitration rights to attach when carriers are proceeding under section 252(i) because no "open issues" exists when requesting carriers adopt pre-existing agreements. Rather, Staff states that the terms of the pre-existing agreements will have been finalized through 252's negotiation, mediation and/or arbitration procedures when the original parties to the pre-existing agreements adopted their terms.

Staff also asserts that the Commission should reject Ameritech's argument that section 252(i) does not allow QST to adopt the Commission's interpretation of the MCI Agreement's language. Staff argues that Ameritech does not have the right to change the terms of the pre-existing MCI Agreement based on the pretext that it is clarifying the interpretation that should be given to the pre-existing agreement's original terms. Staff argues that QST is entitled to adopt the MCI Agreement in its entirety.

<u>AMERITECH</u>

Ameritech contends that while Section 252(i) does entitle QST to adopt the terms and conditions of the MCI Agreement that govern (i) interconnection, (ii) access to unbundled network elements and (iii) resale of telecommunications services, Section 252(i) does <u>not</u> entitle QST to adopt the provisions of the MCI Agreement that govern reciprocal compensation. Ameritech argues that there are two separate reasons for this.

First, Ameritech argues that Section 252(i), by its terms, does not extend to reciprocal compensation. Ameritech argues that this Section does not require incumbent local exchange carriers ("ILECs"), like Ameritech Illinois, to make available to requesting local exchange carriers, like QST, the reciprocal compensation provisions of their agreements with other carriers.

Ameritech argues that Section 252(i) does not require a local exchange carrier to make previously approved agreements available to a requesting carrier:

> A local exchange carrier shall make available any *interconnection, service, or network element provided under an agreement* approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C. 252(i) (emphasis added).

Ameritech contends that Section 252(i), by its terms, does not entitle QST to the MCI Agreement. Rather, Ameritech contends that it entitles QST only to obtain any Section 251 (c)(2) interconnection, any Section 251 (c)(3) network element, or any Section 251 (c)(4) service provided by Ameritech Illinois in the MCI Agreement upon the same terms and conditions as those provided in the MCI Agreement. Ameritech argues that the reciprocal compensation arrangements separately required by section 251 (b)(5) are not interconnections, telecommunications services or network elements. Accordingly, Ameritech argues that Section 252(i) does not entitle QST to the reciprocal compensation provisions in the MCI Agreement, and QST's complaint must be denied.

Ameritech further contends that the exclusion of reciprocal compensation from Section 252(i) is consistent with the mandatory pricing standard for reciprocal compensation in Section 252(d)(2) of the Act. Ameritech states that under Section 252(d)(2), the reciprocal compensation rates that one carrier charges another must be based on the costs that the first carrier incurs for transporting and terminating traffic that originates on the second carrier's network.

Ameritech states that Section 252(d)(2) of the Act specifies the standard for setting reciprocal compensation rates. It provides:

> (A) IN GENERAL. - For the purposes of compliance by an incumbent local exchange carrier with section 251 (b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation 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 the other 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) (emphasis added).

Ameritech contends that the plain meaning of this provision dictates the following: (1) each carrier must be compensated for transporting and terminating traffic that originates on the other carrier's network; and (2) the rates that carrier charges for the transport and termination of traffic must be based on that carrier's own transport and termination costs. Ameritech argues that the Act requires that the reciprocal compensation rates that QST charges Ameritech Illinois must be based on QST's costs. Ameritech argues that unless and until QST establishes that its costs are the same as those of MCI, the Act prohibits QST from charging Ameritech Illinois reciprocal compensation at the same rate as MCI charges Ameritech Illinois. Secondly, Ameritech argues that the Commission erroneously interpreted the MCI Agreement to require the payment of reciprocal compensation on calls made to the Internet by Ameritech Illinois customers via Internet service providers that are customers of MCI. Ameritech states that this was not Ameritech Illinois' intent when it entered into the MCI Agreement. Ameritech argues that to the extent that QST would otherwise be entitled to adopt the reciprocal compensation provisions of the MCI Agreement, Ameritech Illinois would be entitled to clarify in the QST Agreement that it is not Ameritech Illinois' intent for those reciprocal compensation provisions as they would appear in the QST Agreement to require the payment of reciprocal compensation on Internet traffic.

Ameritech further contends that the MCI Agreement's reciprocal compensation provisions are ambiguous because the Commission looked to extrinsic evidence to determine their meaning in Docket 97-0525. In order to resolve this claimed ambiguity, Ameritech argues that the QST Agreement "must" reflect Ameritech's intent with respect to the provisions. Ameritech asserts that the agreement cannot be entered into unless the provisions' alleged ambiguity is made unambiguous through the inclusion of a new provision.

Finally, Ameritech argues that it would be bad policy to bind it in perpetuity to the Commission's interpretation of the MCI Agreement. Ameritech states that if the Commission's interpretation of the MCI Agreement is assumed to be correct, then Ameritech Illinois made a mistake in the reciprocal compensation provisions in the MCI Agreement. Ameritech argues that although Ameritech Illinois would then be bound to honor its mistake in the MCI Agreement itself, it would be improper to subject Ameritech Illinois to the consequences of its mistake each and every time that a requesting carrier decided to adopt the MCI Agreement.

Furthermore, Ameritech states that sound economic policy mandates that Ameritech Illinois not be perpetually bound by the Commission's interpretation of the reciprocal compensation provisions in the MCI Agreement. Ameritech states that as it stands, the Commission's ruling provides an incentive for MCI to provide free local service to ISPs, or even to pay ISPs to allow MCI to provide their local service. Ameritech argues that if QST is granted the windfall of the Commission's interpretation, then QST will be similarly motivated to exploit the reciprocal compensation provisions contained in the agreement. Ameritech asserts that such manipulation of telecommunication customers, rates and services cannot be considered sound economic policy and should not be sanctioned by this Commission.

QST AND STAFF'S REPLIES TO AMERITECH'S ARGUMENTS

With regard to Ameritech's argument that Section 252(i) only applies to the interconnection, network elements and services discussed in those agreements, QST and Staff assert that reciprocal compensation provisions are "terms or conditions" of interconnection and are therefore part of the agreement that can be adopted under Section 252(i). QST notes that when Ameritech cited the Act, it omitted language of the Federal Act that obligates incumbent local exchange carriers to provide interconnection:

> on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

43 U.S.C. 251(c)(1)(D) (emphasis added)

QST states that the "terms and conditions" of interconnection must include the obligations set forth in Sections 251 and 252. Among those obligations is the one set forth in Section 251(b)(5) that all local exchange carriers establish reciprocal compensation arrangements.

Addressing Ameritech's argument that the separate listing as checklist items in Section 271 of the Federal Act means that reciprocal compensation is not a term and condition of interconnection, QST notes that several of the other fourteen checklist items are redundant. For example, the second item on the checklist is nondiscriminatory access to the full range of network elements required under Section 251(c)(3) and 252(d)(1). Yet items four, five and six require Bell Operating Companies to provide a particular types of network elements. QST states that following Ameritech's chain of logic, none of these network elements could be required under sections 251(c)(3) or 252(d)(1) and none of these elements could be adopted under Section 252(i) because Congress saw fit to list them separately from network elements in Section 271. QST notes that this conclusion would be inconsistent with the Federal Act in general and the definition of network elements in particular.

QST and Staff both noted in their initial briefs that Ameritech's argument that interconnection agreements cannot be adopted as a whole is inconsistent with the order of the Eighth Circuit Court of Appeals in Iowa Utilities Board v. Federal Communications Commission, 120 F.3d 753 (Eighth Cir., 1997). In that case, the Court accepted the argument of Ameritech and the other petitioners that "252(i) allows requesting carriers the option to select the terms and conditions of prior agreements only as a whole, not in a piecemeal fashion." QST and Staff both noted that the Court found that Congress had a "preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements." The Court also noted that incumbent LECs had an "interest in avoiding the costs of prolonged negotiations or arbitrations. . ." QST and Staff argue that acceptance of Ameritech's position would result in a situation in which no carrier would be able to avoid the possibility of prolonged negotiations or arbitration by opting into a previously approved interconnection agreement. QST adds that because Ameritech argues that any obligation imposed upon it by Section 251(b) of the Federal Act cannot be part of an adopted agreement, then no carrier could avoid negotiation and arbitration of resale, number portability, dialing parity and access to rights-of-way.

In response to Ameritech's argument that QST cannot adopt the MCI reciprocal compensation rates because Section 252(d)(2) of the Federal Act requires that QST must prove its costs of transport and termination, QST states that Ameritech is applying the wrong standard. QST notes that the Ameritech/QST agreement would be treated as a negotiated agreement when this Commission considers its approval under to Section 252(e) of the Federal Act. Section 252(e)(2) provides that a state commission may reject a negotiated agreement only if it finds that:

> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity . . .

QST notes that none of those standards authorize the Commission to require carriers to prove their costs of providing transport and termination. QST that a review of contends the OCI order shows that the Commission does not inquire into CLECs' costs when it considers negotiated agreements.

Furthermore argues Staff states that section 252(a)(1) allows carriers to negotiate and enter into agreements "without regard to the standards set forth in sections (b) and (c) of section 251." 47 U.S.C. 252(a)(1). Staff thus argues that section 252(d)'s pricing standards are not applicable to this agreement.

QST states that under its agreement with Ameritech, MCI is charging the rates

set by this Commission in Docket 96-0486. In other words, MCI is not charging rates based on its own costs. It is charging rates based on Ameritech's costs. QST argues that requiring it to charge rates based on its costs would thus impose an additional requirement not expected of MCI - again in violation of Section 252(i) and a form of discrimination against a similarly situated carrier.

QST concludes that the pricing standards in Section 252(d) apply to arbitrated agreements, not negotiated ones. QST adds that Ameritech's insistence that QST provide proof of its costs should be seen for what it is - a roadblock being thrown up by Ameritech to prevent QST from receiving reciprocal compensation for calls terminated with ISPs. QST states that it is not aware of any CLEC that has been required to prove its costs for purposes of setting reciprocal compensation. QST states that because Ameritech's argument must also apply to any negotiated agreement presented to this Commission, requiring QST to prove its costs here would create a precedent for future carriers that hope to file negotiated agreements that use symmetrical rates for reciprocal compensation.

QST argues that Ameritech should not be allowed to "clarify" its intent by amending the MCI agreement before it is presented to QST. QST states that nothing in the Federal Act allows Ameritech to revise an agreement about to be adopted pursuant to Section 252(i) by adding its "intent" to selected provisions in the original agreement. Such a procedure would be contrary to the purpose of this Section of the Federal Act to assist carriers in avoiding negotiations and arbitration by being able to adopt other carriers agreements in their entirety. QST states that this purpose would be frustrated if incumbent CLECs were allowed to add self serving "intent" to any agreement other carriers attempt to adopt. QST also argues that adding a footnote to the QST agreement in order to show Ameritech's "intentions" cannot reverse the findings of this Commission and the Federal District Court that calls to ISPs are local exchange traffic that should be subject to reciprocal compensation payments.

QST argues that Ameritech's intent has as little relevance in this proceeding as it had in the TCG proceeding, where this Commission found that calls terminated with ISPs are local traffic without reference to Ameritech's intent.

Addressing Ameritech's argument that the Commission implicitly found that the MCI/Ameritech agreement was ambiguous when it considered the testimony of a witness on the industry practice regarding call termination, QST argues that Ameritech has no right to "clarify" the agreement by amending it, even if the original agreement was ambiguous. QST also argues that the Commission already found that the MCI agreement was "unambiguous," and payment to ISPs is required by the "plain reading of the interconnection agreements." QST also notes that the evidence in that case merely addressed the "plain and obvious meaning of the language" and thus does not need a finding of ambiguity in order to be admissible. Koester v. Weber, Cohn & Riley, Inc. (1989), 193 Ill. App. 3d 1045, 1049, 550 N.E.2d 1004, 1005. Finally, QST notes that because Ameritech did not object to the introduction of that testimony, it has

waived any claim that the testimony could be taken only if the agreement was ambiguous. Objections to evidence should be made as soon as the ground for the objection becomes apparent. People v. Trefonas, 9 Ill. 2d, 136 N.E2d 817 (1956).

Addressing Ameritech's argument that it would be bad policy to bind Ameritech "in perpetuity to the Commission's interpretation of the MCI Agreement" because the company made a mistake in entering into that agreement, QST states that it will not be bound to the Commission's interpretation of the MCI agreement in perpetuity. The agreement that has been signed by the parties has a the same termination date as the MCI agreement, May 4, 2000. After that date, MCI and QST will need to negotiate new agreements with Ameritech. At that time, Ameritech can raise the issue of reciprocal compensation for calls terminated with ISPs.

QST also argues that if Ameritech truly believed it made a "mistake" when it entered into the MCI agreement, it should have presented such evidence in TCG. To the extent that its evidence in that case could be construed as attempting to prove it had made a mistake, the Commission has rejected that evidence and found that the agreement required the payment of reciprocal compensation for calls terminated with ISPs. Absent a finding of this Commission or a court that the MCI agreement is voidable as a mistake, then Ameritech must allow carriers to adopt it pursuant to Section 252(i). QST adds that a review of the Commission's order in TCG shows that Ameritech cannot meet the legal standard for rescission of the MCI contract because of a "mistake" or "impracticality."

QST concludes that in any event, Ameritech's arguments regarding its true intent in the MCI agreement have already been considered and rejected by this Commission and the Federal District Court. More particularly, in rejecting the interim solution proposed by Ameritech as a rewrite of the original interconnection agreement, this Commission stated that "Ameritech Illinois had every opportunity to present such a proposal in the [interconnection agreement] arbitrations but did not do so." QST states that the inclusion of ISP traffic in reciprocal compensation was therefore reasonably foreseeable and commercial frustration is not applicable.

AMERITECH REPLY TO STAFF AND QST ARGUMENTS

Ameritech argues that Staff and QST improperly rest their arguments on the phrase "terms and conditions" as it appears in Section 252(i). Ameritech disagrees with QST and Staff that "252(i) does not limit the phrase 'terms and conditions' to those that specifically address interconnection, service, and network elements."

Ameritech argues that Section 252(i) does not require local exchange carriers to make available "terms and conditions." Ameritech argues that it requires local exchange carriers to make available any "interconnection, service, or network element." Ameritech further argues that these terms and conditions are not "without limitation." Ameritech states that the statute contains express limitations: (i) local exchange

carriers must make available only "any interconnection, service, or network element," and (ii) these things must be provided "upon the same terms and conditions as those provided in the agreement."

Ameritech asserts that the plain language of Section 252(i) requires Ameritech Illinois to make available to QST interconnection, services and network elements on the same terms and conditions that interconnection, services and network elements are made available in the MCI Agreement. Ameritech states that Section 252(i) does not require Ameritech Illinois to make available to QST reciprocal compensation on the same terms and conditions that reciprocal compensation is made available in the MCI Agreement, and it would be unlawful for this Commission to impose such a requirement.

Ameritech also takes exception to the argument that the MCI Agreement's reciprocal compensation provisions are terms and conditions upon which Ameritech makes interconnection, service and network elements available to MCI, and therefore, Ameritech must make interconnection, service and network elements available to QST upon the same reciprocal compensation terms and conditions.

Ameritech asserts that reciprocal compensation - as Congress used the term and as the FCC understands it - is not a term or condition of interconnection under the 1996 Act. Ameritech contends that the duty of local exchange carriers to establish reciprocal compensation arrangements is set forth in Section251(b)(5)of the Act. Section251(c) then sets forth additional duties of incumbent local exchange carriers, including (i) the duty to provide interconnection, (ii) the duty to provide access to unbundled network elements, and (iii) the duty to offer telecommunications services for resale at wholesale rates. Ameritech notes that Section 251 (c)(2), entitled "Interconnection," Section 251 (c)(3), entitled "Unbundled Access," and Section 251 (c)(4), entitled "Resale," impose duties *additional to* the duty to establish reciprocal compensation, and none of those sections makes any reference to reciprocal compensation. Thus, Ameritech argues, Congress plainly did not make reciprocal compensation a term or condition of interconnection, access to network elements, or resale of telecommunications services.

Ameritech further states that Congress's intent that reciprocal compensation is not a term or condition of interconnection, network elements or resale of services is manifest throughout the 1996 Act. Ameritech contends that Section 251 (c)(1) makes clear that reciprocal compensation, far from *being* a term or condition of interconnection, network elements or resale, is itself a contract matter that has its own terms and conditions.

Ameritech asserts that other provisions in the Act corroborate that Congress regarded reciprocal compensation as a stand-alone contract matter, not a term or condition of interconnection, network elements or resale. For example, Ameritech notes that the pricing standard for reciprocal compensation, set forth in Section

252(d)(2), is separate and distinct from the pricing standards for interconnection and network elements, set forth in Section 252(d)(1), and for resale services, set forth in Section 252(d)(3). Ameritech further notes that the "Competitive Checklist" of requirements for BOC entry into long distance, set forth in Section 27 1 (c)(2)(B), lists interconnection (item i), network elements (item ii) and resale services (item xiv) separately from reciprocal compensation arrangements (item xiii). If reciprocal compensation were a term or condition of interconnection, network elements or services, Congress would not have given it this distinctive treatment.

Ameritech also argues that reliance on Iowa Utilities Board is misplaced. Ameritech states that the Iowa Utilities Board holding on the FCC's pick and choose rule (and the discussion supporting that holding) means only that Section 252(i) does not allow a requesting carrier to selectively choose preferred bits and pieces of an approved agreement at its whim; it does not mean that Section 252(i) allows the requesting carrier to adopt an entire agreement.

IV. COMMISSION ANALYSIS AND CONCLUSION

This case presents a pure question of statutory construction. The issue is whether Section 252(i) of the Telecommunications Act of 1996 require that Ameritech Illinois make available to QST the reciprocal compensation provisions in the MCI Agreement.

When entering the order granting QST its request for emergency relief, this Commission stated that it believed that QST will be successful for the following reasons:

> QST is entitled to reciprocal compensation no differently than MCI; 2) no court of competent jurisdiction has found that MCI's agreement is invalid or that QST would not be entitled to reciprocal compensation; 3) we find no ambiguity in the Teleport decision of the Commission requiring the payment of reciprocal compensation to internet providers; 4) the Ameritech argument of an implied ambiguity is inconsistent with the clear language of the Teleport decision. Finally, we would note Section 252(I) which states:
>
> AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS.–A local exchange carrier shall make available to any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement

> In the instant proceeding, clearly Ameritech must provide interconnection to QST under the same terms and conditions that it has to MCI. Ameritech proposed footnote change to the QST interconnection agreement does not do so and, thus, it is improper.

ICC Docket No. 98-0603, Order, August 26, 1998.

None of the arguments presented by Ameritech convinces the Commission that it should change the above stated conclusion. Contrary to Ameritech's claim, the Federal Act does not preclude carriers from adopting the reciprocal compensation provisions of an agreement that has already been approved by this Commission. Reciprocal compensation provisions are "terms or conditions" of interconnection and are therefore part of the agreement that can be adopted under Section 252(i). The Federal Act obligates incumbent local exchange carriers to provide interconnection:

> on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement <u>and the requirements of this section and section 252</u>.

47 U.S.C. 251(c)(1)(D) (emphasis added). The "terms and conditions" of interconnection must include the obligations set forth in Sections 251 and 252, which include the Section 251(b)(5) requirement that all local exchange carriers establish reciprocal compensation arrangements. For the reasons stated by QST, our finding is consistent with the FCC's First Report and Order and is consistent with Section 271 of the Federal Act.

Ameritech's argument that interconnection agreements cannot be adopted as a whole is inconsistent with the order of the Eighth Circuit Court of Appeals in <u>Iowa Utilities Board v. Federal Communications Commission</u>, 120 F.3d 753 (Eighth Cir., 1997). In that case, the Court accepted the argument of Ameritech and the other petitioners that "252(i) allows requesting carriers the option to select the terms and conditions of prior agreements only as a whole, not in a piecemeal fashion." <u>Id</u>. at 800. The Court found that Congress had a "preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements." <u>Iowa Utilities Board</u>, 120 F.3d at 801. The Court also noted that incumbent LECs had an "interest in avoiding the costs of prolonged negotiations or arbitrations. . ." <u>Id</u>. Acceptance of Ameritech's position would result in a situation in which no carrier would be able to avoid the possibility of prolonged negotiations or arbitration by opting into a previously approved interconnection agreement.

The Commission rejects Ameritech's argument that QST cannot adopt the MCI reciprocal compensation rates because Section 252(d)(2) of the Federal Act requires that QST must prove its costs of transport and termination. TA96 does not require QST's reciprocal compensation prices to be determined in accordance with section 252(d). In relevant part, section 252(d) states:

> (2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC
>
> (A) IN GENERAL. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation 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 the other 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)(i), (ii)(emphasis added). Section 252(d)'s provisions governing charges for transport and termination of traffic only apply to carriers' charges for the transport and termination of traffic under section 251(b)(5). However, section 252(a)(1) allows carriers to negotiate and enter into agreements "without regard to the standards set forth in sections (b) and (c) of section 251." 47 U.S.C. 252(a)(1)(emphasis added). As a result, section 252(d)'s pricing standards are not applicable to agreements negotiated under section 252(a)(1). Further, section 252(d)'s pricing standards are not applicable to agreements adopted under section 252(i) to the extent that the underlying, pre-existing agreement's charges are not determined in accordance with section 252(d).

In this case, MCI Agreement's charges for the transport and termination of traffic were arrived at through voluntary negotiation and, therefore, were not determined in accordance with section 252(d). See, ICC Docket No. 96 AB-006(arbitration proceeding not addressing the issue); ICC Docket No. 97 AA-002(approving MCI Agreement without determining charges for the transport and termination of traffic pursuant to section 252(d)). Similarly, the charges for the transport and termination of traffic in the QST Agreement do not need to comply with section 252(d)'s pricing standards because QST is adopting the MCI Agreement. Accordingly, Ameritech's argument is rejected.

The Commission rejects Ameritech's argument that it be allowed to "clarify" its intent by amending the MCI agreement before it is presented to QST. Nothing in the Federal Act allows Ameritech to revise an agreement about to be adopted pursuant to

Section 252(i) by adding its "intent" to selected provisions in the original agreement. Such a procedure would be contrary to the purpose of this Section of the Federal Act to assist carriers in avoiding negotiations and arbitration by being able to adopt other carriers agreements in their entirety. Ameritech's "intentions" cannot reverse the findings of this Commission and the Federal District Court that calls to ISPs are local exchange traffic that should be subject to reciprocal compensation payments.

The Commission rejects Ameritech's argument that it would be bad policy to bind Ameritech "in perpetuity to the Commission's interpretation of the MCI Agreement" because the company made a mistake in entering into that agreement. This Commission already addressed this issue in the order granting QST's request for emergency relief. In that order, we directed that the QST/Ameritech agreement must have the same termination date as the MCI/Ameritech agreement. Whether or not Ameritech made a mistake when it entered into the MCI agreement, the fact remains that this Commission has found that the agreement requires the payment of reciprocal compensation for calls terminated with ISPs. QST must be granted the same rights under the Federal Act.

Again, QST must have the same rights as MCI. If MCI is entitled to target ISPs, QST should be able to do the same. In conclusion, this Commission finds that by refusing to allow QST to adopt in its entirety the MCI/Ameritech interconnection agreement, including the provisions in that agreement for reciprocal compensation, Ameritech has violated Section 152(i) of the Federal Act and Sections 13-514(1) and (6).

V. SUMMARY

In Summary, we find the following:

(1) Illinois Bell Telephone Company, d/b/a Ameritech Illinois, and QST Communications Inc. are Illinois corporations engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, are telecommunications carriers within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(2) This Commission has jurisdiction over the parties and the subject matter herein;

(3) Ameritech Illinois has entered into an interconnection agreement with MCImetro Access Transmission Services, Inc. pursuant to Section 152 of the Federal Act. Exercising its authority under that section, this Commission has approved that agreement;

(4) QST Communications Inc. made a request pursuant to Section 252(i) of the Federal Act to adopt in its entirety the MCI/Ameritech interconnection

agreement and Ameritech refused to grant that request without making certain changes to the agreement;

(5) The recital of facts and conclusions thereon set forth in the prefatory portion of this order are supported by the evidence of record and are hereby adopted as findings of fact and conclusions of law;

(6) Ameritech Illinois has violated Section 252(i) of the Federal Act and Sections 13-514(1) and (6) of the Illinois Public Utilities Act by failing to allow QST to adopt the MCI/Ameritech agreement in its entirety;

(7) Ameritech Illinois and QST are directed to file with this Commission for its approval under Section 252(e) of the Federal Act the interconnection agreement that has been executed by both parties, pursuant to this Commission's order dated August 26, 1998.

ORDER DATED: October 23, 1998

Hearing Examiners
Michael Guerra
Mark L. Goldstein