commissions in other jurisdiction, and of this Commission itself. GTE is also trying to justify its refusal to abide by the terms of the Interconnection Agreement by arguing that the provisions about payment of invoices even under dispute somehow do not pertain to this dispute. Similar anti-competitive conduct by GTE has resulted in at least one other commission levying penalties against it. This Commission should rule now, on the pleadings before it, that calls to ISP providers are local calls subject to reciprocal compensation under the Agreement and require GTE to live up to its obligations under the Interconnection Agreement by paying Cox the amounts that are long past due.

II. This Commission has jurisdiction to decide this dispute.

On February 26, 1999, the FCC released its Declaratory Ruling concerning the treatment of Internet-bound traffic delivered to Internet Service Providers ("ISPs"). GTE's Memorandum of Law contorts the Declaratory Ruling such that GTE would have one believe that the FCC had asserted exclusive jurisdiction mandating that such traffic was to have been non-compensable, interstate access traffic for purposes of all interconnection agreements filed with state commissions under the Telecommunications Act of 1996, 47 U.S.C. §252(e). An accurate reading of the Declaratory Ruling reveals another story entirely.

The FCC conducted an end-to-end analysis of end-user calls to ISPs and determined that the ultimate destination of such calls, when treated as a single call, was often a server or website located in another state, or even another country, Declaratory Ruling, paragraphs 12 and 18, from that of the calling party. The FCC did not, however, conclude that this analysis had any bearing on the compensation that was due the carrier who delivered the initial dial-up segment to the ISP. Indeed, the FCC explicitly stated that such traffic had historically been treated as local and initiated its rulemaking only to determine if a different

treatment might be called for in the future. See Declaratory Ruling p.17, paragraph 25 and p.18, paragraph 27.

Nowhere does the Declaratory Ruling determine that the interstate nature of its end-to-end analysis of ISP bound traffic requires FCC jurisdiction over compensation for such traffic. Historically, the FCC has exempted interstate Enhanced Service Providers ("ESPs") from being treated as interexchange carriers ("IXCs") and allowed them to order their services from the local business tariffs of LECs. See Declaratory Ruling at pp.4-5, paragraph 5. In this manner, ESPs (of which ISPs are a subgroup) avoid treating their dial-up services as long distance, which would require that the ESP be a toll carrier and charge callers toll rates and then compensate the connecting and terminating LECs via those carriers' access tariffs. Such a toll arrangement would be prohibitively expensive to end-users. Customers would be billed at long distance rates for every minute spent on line and they would still have to pay their ISP separately for its services. The Internet would not be useful and never would have developed as it has at such a price.

Contrary to GTE's assertions, the FCC never intended that its exemption of ESP from access tariffs would cause ESP-bound traffic to be non-compensable. See Declaratory Ruling at p.7, paragraph 9, and p.15, paragraph 21. Where access tariffs do not apply, interconnection agreements do. Any interexchange interstate traffic that is treated as local is compensated as local. No traffic should go uncompensated. Where ESPs take service from local tariffs, a call delivered to the ESP by LECs is treated as any other local call. If the two interconnecting LECs have a bill and keep arrangement, the originating LEC keeps all revenue billed to the calling party. If the LECs have a reciprocal compensation arrangement, the

receiving LEC is owed compensation for delivering the call to the ESP in the same manner it is compensated for delivering any other call. *Id. paragraph 9.*

The continuing treatment of ISP-bound traffic as if it were local is illustrated by the recent letter (May 18, 1999) from the FCC's Common Carrier Bureau to SBC concerning separations and ARMIS reporting of such traffic (a copy is attached as Appendix A). As the third paragraph of the letter indicates, SBC had no reason to classify its ISP-bound traffic as interstate for the years 1997 and 1998. The letter reconfirmed that the FCC's allowing ISPs to acquire their connections from local business tariffs meant that the associated revenues were intrastate and the associated costs must also be accounted for as intrastate.

GTE's assertion that ISP-bound traffic is interstate may have some significance in the future, but only in a prospective manner. The FCC did initiate a rulemaking for CC Docket No. 99-68, of the Declaratory Ruling, commencing at paragraph 28. The FCC tentatively concluded that commercial negotiations are ideal for establishing the treatment of such traffic. At paragraph 28, the FCC held, "Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic." The remainder of the order invites comments and replies upon a proposed federal policy that the inter-carrier compensation for ISP-bound traffic be governed by the negotiated or arbitrated interconnection agreements of the carriers. Unresolved disputes would be arbitrated by state commissions. An alternative proposal was for the FCC to adopt a set of federal rules governing compensation for ISP-bound traffic pursuant to which the parties would negotiate rates, terms, and conditions. No final rules have been adopted, but it is clear that the FCC has no intention of altering the long-standing treatment of ISP-bound traffic as local during the years prior to any federal rules, and

that the FCC intends for state commissions to determine compensation for past traffic and to play a major role in determining compensation for future traffic.

The ink was barely dry on the Declaratory Ruling when GTE and other ILECs sought to overturn it in the United States Court of Appeals for the District of Columbia. GTE's Memorandum of Law relegated the significance of the appeal to footnote 7 at p. 5. Footnote 7 is remarkable not for what it says but for what it says about the audacity of GTE. It first states that GTE appealed the FCC to a Circuit Court of Appeals, not for what the agency concluded or ruled, but for what the agency said in dicta. Appellate courts review substance and judgments, not extraneous supporting statements. What GTE really seeks to overturn is the FCC's conclusion that states could and should determine if ISP-bound traffic is compensable.

Footnote 7 concludes by informing this Commission that it has jurisdiction over only intrastate matters by virtue of federal law. However, Article IX of the Virginia Constitution, Title 56 of the Code of Virginia, and sections 2(a) and (b) of the Communications Act of 1934, 47 U.S.C. §152 (a) and (b), do not place such limitations on the Virginia State Corporation Commission. Section 2 (b) of the 1934 Act codified the long-standing authority state governments had granted their regulatory commissions and section 2(a) gave the newly created FCC authority over <u>only</u> interstate and international traffic. Indeed, the state commissions exercise jurisdiction over interstate traffic that is classified as local. This is readily apparent in the SCC's regulation of cross-border calling from Virginia customers to nearby exchanges in Maryland, the District of Columbia, Delaware, West Virginia, Kentucky, Tennessee, and North Carolina.

Other courts have not had GTE's difficulty understanding the FCC's ruling. The U.S. Circuit Court of Appeals for the Seventh Circuit, in *Ameritech v. Worldcom Technologies,*

Inc.,et al, 1999 U.S. App. Lexis 13668 (7th Cir. June 18, 1999), held that state commissions had the authority to determine if ISP-bound traffic were compensable under interconnection agreements. On March 11, 1998, the Illinois Commerce Commission ("ICC") had ruled that the various interconnection agreements of Ameritech required reciprocal compensation for ISP traffic. The U.S. District Court for the Northern District of Illinois affirmed that ruling on August 4, 1998. In affirming yet again, the 7th Circuit gave a close analysis of the Declaratory Ruling and gave deference to the FCC's pronouncements. *Id. at p.5.* The court noted that the FCC's end-to-end analysis classified ISP-bound traffic as interstate, but that the FCC had acknowledged its long-standing treatment of such traffic as local, and that negotiations for interconnection likely reflected that local treatment.

> In fact, the FCC recognized that agreements negotiated prior to the February ruling, as the ones at issue here were, were negotiated in the "context of this Commission's long-standing policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements." At 15 P 24.

Id., at pp.7-8. The court's explanation shed additional light on the significance of the FCC's ruling as to types of traffic subject to reciprocal compensation:

> There is nothing in the FCC ruling on reciprocal compensation which would prohibit a call from being a local call for some, but not all, purposes. The ICC considered relevant factors in evaluating the agreements, including the situation at the time the agreements were negotiated. Other relevant factors are that Ameritech's customers do not pay toll charges for calls to their ISP; Ameritech bills the customer for a local call. Customers dial a local number. The calls are routed over local lines, not long-distance lines. Also quite telling from our point of view is that in the agreements, the parties specifically granted to the ICC the right to define local traffic for reciprocal compensation purposes.

> The FCC could not have made clearer its willingness—at least until the time a rule is promulgated—to let state commissions make the call.

Id. at p. 8.

Similar holdings were made more recently by the U.S. District Court for the Eastern District of Virginia, Alexandria Division in *Bell Atlantic-Virginia, Inc. v. Worldcom Technologies of Va. Inc, Civil Action No. 99-275-A (slip opinion July 1, 1999).* Bell Atlantic brought suit alleging that Worldcom had improperly billed it for ISP traffic, and had improperly received reciprocal compensation for the completion of such calls. Worldcom challenged the court's jurisdiction, asserting that such disputes regarding interconnection agreements must be determined initially in the state commissions and that federal court jurisdiction only attached for review of the state commission's determination.

The court agreed with Worldcom and granted its motion, dismissing the case. In determining that it did not have original jurisdiction, the court affirmed that the SCC is the forum for resolving, in the first instance, disputes arising from interconnection agreements. In discussing this primary jurisdiction, the court cited to and relied upon *Ameritech,* supra; *US West Communications, Inc. v. Worldcom Tec., Inc.*, 31 F. Supp.2d 819 (D. Or. 1998); and *US West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, 1998 WL 350588 (W.D. Wash. Jan. 7, 1998). The court also discussed this Commission's prior exercise of jurisdiction in determining that ISP traffic is compensable under the Cox/Bell Atlantic agreement, *Petition of Cox Virginia Telcom, Inc., for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet Service Providers,* Case No. PUC970069, (Final Order Oct. 24, 1997). ("Cox/BA-VA Order"). *Id. at p. 13.* The court found as follows:

> This Court finds that the Telecommunications Act was designed to allow the state commission to make the first determination. See Indiana Bell, 30 F. Supp.2d at 1104. Circumventing the state commission's initial review undermines the review process established by Congress in the Telecommunications Act. For those reasons, the Court holds that it lacks subject matter jurisdiction over this dispute until the Virginia Commission makes an initial determination.

Id. at p. 13. See also Iowa Utilities Board v. FCC, 120 F.3d 753, 804 ("We believe that the state commission's plenary authority to accept or reject [interconnection agreements] necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved."), *rev'd in part and remanded on other grounds sub nom. AT&T Corp. v. Iowa Utilities Board,* 119 S. Ct. 721 (1999). As a result, the courts have agreed with the FCC: it is up to the state commissions to decide the issue of compensation for ISP-bound traffic. This is even more crucial in states such as Virginia where regulations have been adopted governing reciprocal compensation. See 20 VAC5-400-180, G.1.-4., effective December 13, 1995.

Finally, seeking redress before this Commission is consistent with the terms of the Interconnection Agreement itself. Section XIX.M.7 provides that ". . .neither Party waives the right to file a complaint, or otherwise seek enforcement of this Agreement, with the [State Corporation] Commission as to regulated public service obligations." That is what Cox has done in the present case.

III. The Cox/GTE Agreement requires compensation for ISP-bound traffic.

As shown above, GTE and other ILECs have not succeeded in convincing the FCC or reviewing courts that end-to-end treatment of ISP-bound calls as interstate traffic translates to an exemption of such traffic from reciprocal compensation. Having failed to convince on its misreading of the FCC's jurisdictional analysis in the Declaratory Ruling, GTE is now

confronted with the Cox/GTE Agreement and the reality that it was negotiated to include, and does in fact, include, ISP traffic as compensable.

The fact that the Agreement included ISP-bound traffic as local traffic is clear, especially given the law at the time the Cox/GTE Agreement was negotiated and executed. Contrary to what GTE now claims, in March of 1997, when the Agreement was submitted for SCC approval, calls to ISPs were considered local. The FCC's Declaratory Ruling itself confirms this:

> While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

Id. at p.17, paragraph 25. The FCC also confirmed that such payments would not be contrary to the Act:

> Although reciprocal compensation is mandated under Section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding – or a subsequent state commission decision that those obligations encompass ISP-bound traffic – does not conflict with any Commission rule regarding ISP-bound traffic.

Id at pp.17-18, paragraph 26. Turning to the Cox/GTE Agreement, nothing in it gives calls to ISPs special treatment or otherwise carves them out of the category of local calls. Section V, Local Interconnection Trunk Arrangement, at pp. 15-18, treats traffic between Cox and GTE as either toll or local. See V.C.1. Compensation for Call Termination. Moreover, V.C.5. calls for quarterly reporting of traffic usage volumes. V.C.5.a. requires total volume to be described

". . . by call type (local, toll, and other). . ." and V.C.5.b. requires breakdown by Percentage Local Usage and PIU.[2] Local is the only category open since the Agreement contains no special category for calls to ISPs and they have never been treated as toll. Moreover, the traffic tracking or measuring mechanisms in the Agreement contain no criteria for separating ISP-bound calls from other local traffic. Thus, ISP-bound calls are local calls under the Agreement.

Neither the Agreement nor the tariffs of GTE and Cox treat ISPs different from any other business customer. As the Declaratory Ruling pointed out, ISPs (and ESPs) have always been permitted to subscribe to local service under local tariffs and have never been treated as long distance carriers. Functionally, ISPs are no different from other business customers who receive a great volume of incoming traffic. This was well known in 1996-1997 when interconnection agreements were being negotiated or arbitrated. ILECs were familiar with such customers and had experience with the hand off of such traffic. Well before 1996, telephone companies with adjoining territories in a single local calling area, such as GTE and BA-VA, had experienced asymmetrical traffic. If an ESP or ISP were located in BA-VA's territory and GTE's customers placed calls to the ISP, GTE would not transport a similar number of calls back to its customers.

From a signaling and billing perspective, calls to ISPs "terminate" locally. The call is not completed for billing purposes until answer supervision confirms that the called party answered the call. Any call to an ISP that receives a "busy" or "rings, does not answer", is not billed. On the other hand, a toll call that encounters a "busy" or "rings, does not answer" generates access billing for the originating and terminating LECs. Signalling also is strictly local

[2] The term PIU is not defined in the Agreement, but probably means a ratio between interLATA, interstate usage and total interLATA usage.

because the calling customer uses a local sequence of seven or ten digits, entirely different from the toll dialing sequences; e.g. 1+ or 00+, 1-800, or 1010-XXX.

The Seventh Circuit in *Ameritech* reviewed these and several other factors as part of its analysis in concluding that ISP-bound traffic is local traffic. For example, the parties to the interconnection agreement there allowed tariffs to determine that traffic. Similarly, in the present case, GTE and Cox allowed the SCC tariffs to determine local traffic. Definition 49 at p.7 of the Agreement defines "Local Exchange Traffic" as ". . .any traffic that is defined by Local Calling Area." In turn, Definition 46 at p.6 defines "Local Calling Area" as ". . . the Extended Area Service ("EAS") and Extended Local Service ("ELS") calling area for each exchange as defined in GTE's local tariff, at the date of this agreement." (*Emphasis added).* Other factors noted in *Ameritech* are also applicable here: (a) GTE's customers do not pay toll charges for calls to their ISP, instead, GTE bills its customers for local calls; (b) GTE's customers dial a local number; and (c) the calls are routed over local lines or trunks, not over long-distance facilities. In short, there can be no dispute that ISP-bound calls are treated as any other local call. As a result, they are the subject of reciprocal compensation under the Agreement.

Other states have encountered no difficulty accepting the FCC's invitation to treat ISP-bound traffic as compensable. A sampling of the criteria examined by various state commissions who, since the Declaratory Ruling have determined that reciprocal compensation is owed for ISP traffic is set forth in the footnote below.[3] Thus, ISP-bound traffic constitutes local calls for which reciprocal compensation is due.

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[3] *WorldCom,Inc. v. GTE Northwest, Inc., Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim*, Docket No. UT-980338 (Wa. U.T.C., May 12, 1999):
(1) A non-toll call originates with one LEC and terminates to a second LEC, all within a single Local Calling Area;
(2) GTE's classification as access exempt interstate would create a class of calls for which there was no compensation.

Rather than compete with Cox for ISPs, GTE would rather complete calls from its customers to ISPs that are Cox's customers without paying Cox anything. In other words, GTE is attempting to use Cox's system at no cost to GTE. As the Nevada State Commission

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In the Matter of the Complaints of ICG Telecom Group Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom of Ohio, L.P. v. Ameritech Ohio, Case No. 97-1557-TP-CSS, et al (Ohio P.U.C., May 5, 1999):
(1) The FCC exempts these calls from access and allows costs to be accounted for at the local level;
(2) The Parties' conduct indicates treatment as local;
(3) ISPs are furnished service from local tariffs;
(4) Revenues from ISPs are accounted for as local;
(5) Charges paid by calling end-users are from local tariffs.

Electric Lightwave, Inc. v. U.S. West Communications, Inc., Order No. 99-285 (Or. P.U.C., Apr. 26, 1999):
(1) Calls are routed via local, seven digit dialing;
(2) The agreement has no provision for segregating ISP-bound traffic as toll or some form of unique traffic;
(3) There is no provision for an alternate form of compensation for such traffic;
(4) When the agreement was created, the FCC treated ISP-bound traffic as local;
(5) If reciprocal compensation does not apply, ISP traffic will be a class of traffic for which there is no compensation.

In Re Petition of Pac-West Telecomm, Inc. For arbitration Pursuant toSection 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Nevada Bell, Order Adopting Revised Arbitration Decision, Docket Nos. 98-10015 and 99-1007 (Nev. P.U.C., April 12, 1999):
(1) Parties were not able to show what portion of calls "terminated " to ISPs remained local;
(2) Parties provided no plausible way to distinguish between traffic bound for an ISP and traffic bound for a non-ISP or business customer;
(3) No party provided a plausible way to identify and separate Internet traffic by jurisdiction;
(4) Local access pricing for ISPs is the local business line rate;
(5) Denial of reciprocal compensation would be a discriminatory application of a local rate element available for traffic to business line customers.

Request for arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications , Inc. v. BellSouth Telecommunications, Inc. regarding Traffic Terminated to Internet Service Providers, Docket No. 981008-TP, Order No. PSC—99-0658-FOF-TP 9 (Fla. P.S.C., April 6, 1999):
(1) Circumstances at the time the contract was made indicated the parties did not intend to exclude ISP traffic from "local traffic";
(2) Neither party had the capability of tracking traffic to ISPs;
(3) BellSouth notified CLECS that it would neither pay nor bill reciprocal compensation for ISP traffic more than a year after it entered into the interconnection agreement;
(4) BellSouth treats its own ISP traffic as local by charging all such calls under its local tariffs, treating them as local for separations and rate cases, treating them as local when exchanged among adjacent ILECs, and routing them to CLECs over interconnection trunks reserved for local calling;
(5) If the parties had intended other than local treatment, they would have set out an explicit exception in the Agreement's definition of local calls.

In Re: Emergency Petition of ICG Telecom Group, Inc. and ITC Deltacom Communications, Inc. for a Declaratory Ruling, Docket No. 26619 (Ala. P.S.C., March 4, 1999):
(1) At the time the agreements were made, ISP traffic was treated as local by charging ISP customers local business line rates, by rating and billing such calls just as any other local call placed via a seven digit local telephone number, and by not assessing toll charges for calls to ISPs;
(2) BellSouth advises consumers subscribing to its Internet service that acces is achieved via a local call;
(3) BellSouth records such calls as local for ARMIS and separations reporting purposes;
(4) BellSouth did not seek to explicitly exclude ISP traffic from being treated as local;
(5) BellSouth had no mechanism to track, separate, and exclude ISP traffic from the local billing records of the CLECs.

observed, ILECs should be motivated to compete for ISP customers, not get a free ride on the backs of CLEC's. The same applies in the present case. *In Re Petition of Pac-West Telecomm, Inc. For arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Nevada Bell, Order Adopting Revised Arbitration Decision,* Docket Nos. 98-10015 and 99-1007 (Nev. P.U.C., April 12, 1999) (slip opinion at p.2).

IV. <u>This Commission's Cox/BA-VA Order is applicable</u>.

This Commission, too, has held that ISP calls are local calls. GTE's error concerning this Commission's jurisdiction is compounded by its claim that the Cox/BA-VA Order is inapplicable because the order's legal basis has been invalidated and because the underlying agreement is different from the Cox/GTE agreement. Neither argument is persuasive.

First, as shown above, the SCC's legal authority to determine if ISP traffic is compensable has been reaffirmed, not only by the FCC, but also by all courts who have addressed the question.

Second, the relevance of the Cox/Bell Atlantic agreement to the Cox/GTE agreement is easily determined by judicial notice. Both agreements have been approved by the Commission pursuant to § 252(e) of the Act are on file as public records pursuant to § 252(h), and it need only examine the two agreements side-by-side to see that on crucial elements they are much more similar than dissimilar. The two definitions of local traffic are substantially the same. The Cox/GTE agreement, at p. 7, defines local exchange traffic as any traffic that is defined by Local Calling Area. That term is defined at p. 6 to mean "...the Extended Area Service (EAS) and Extended Local Service (ELS) calling area for each exchange as defined in GTE's local tariff at the date of this agreement. For purposes of this agreement, Extended Area

Calling (EAC) and optional Local Calling Plans are not considered local." The Cox/BA-VA agreement also defines local traffic by reference to the SCC's filed BA-VA tariffs. At p. 7, it defines local traffic to mean "...traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ("EAS") area, as defined in BA's effective Customer tariffs, or, if the Commission has defined local calling areas applicable to LECs, then as so defined by the Commission." Thus, the classification of local calls is similar.

The BA Reciprocal Compensation Arrangements, at p.20 , provide, in §5.7.3, "The Reciprocal Compensation arrangements...are not applicable to Switched Exchange Access Service. All Switched Exchange Access Service and all Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state Tariffs." At §5.7.5 (p.21), it states, "The designation of Traffic as Local or Toll for purposes of compensation shall be based on the actual originating and terminating points of the complete end-to-end call, regardless of the carrier(s) involved in carrying any segment of the call." Similarly, GTE's §V Local Interconnection Trunk Arrangement, compensates for traffic in one manner for local and in another for toll. No separate category is created for ISP traffic. Toll traffic is compensated through the access tariffs and ISPs are not treated as toll carriers under those tariffs. Thus, § V.C.1. (p.17) provides three categories of compensation: a. Local Calls, b. Toll Call Rate, and c. Transit Rate, each of which is set out in Exhibit B of the Agreement. In turn, Exhibit B, at item 1a, gives rates for out-of-balance local traffic per minute of use; at item 1b, refers to GTE's switched access tariff for toll calls; and, at item 1c, gives a tandem transit rate for each minute Cox uses GTE's tandem to transit a call to a third local or wireless carrier.

In sum, the two agreements are quite similar on the crucial issue of whether ISP traffic is compensated as local traffic or as toll traffic. Neither agreement creates a third or hybrid classification for ISP traffic. Neither attempts to treat it as toll traffic or to treat ISPs as toll carriers. Neither agreement carves out an exception for non-compensable traffic. GTE cannot distinguish the two agreements on the essential elements that determine compensable local traffic. The Commission's decision is the Virginia law on compensation for ISP traffic. As demonstrated above, the FCC has not decided to the contrary, even taking great pains to assure States that they had the authority to construe interconnection agreements in light of the long-standing practice of treating ISP traffic as local. No court has reversed the Cox/BA-VA Order and all courts that have reviewed similar determinations have affirmed the state commissions.

V. Conclusion on ISP Traffic Classification.

The Commission need go no further than the pleadings in this case, together with taking judicial notice of the Cox/GTE and Cox/BA-VA agreements, in order to rule as a matter of law that ISP-bound traffic is compensable as local traffic—the same ruling that it made nearly two years ago in the Cox/ BA-VA Order.

VI. Assessment of Compensation Owed

Predictably, GTE continues to side-step its obligations under the Agreement, this time the provisions that require it to pay or dispute invoices from Cox. The Agreement could not be clearer. Section XIX.G. (p.36) provides that the parties ". . .agree to exchange all information to accurately, reliably, and properly bill for features functions, and services rendered. . . ." The very next segment, section XIX.G.1., states: "If a Party disputes a billing statement, that Party shall notify the other Party in writing regarding the nature and basis of the dispute within thirty...

days. . .or the dispute shall be waived." (*Emphasis added*). GTE's letter of December 7, 1998, in which GTE disclosed its perception that Cox was billing ". . .for more than local traffic as defined in that Agreement," did not adequately notify Cox regarding the mandatory nature and basis of the dispute.

GTE's Memorandum of Law, at page 10, attempts to duck this obligation to describe the nature and basis of the dispute. GTE asserts the dispute is about Agreement coverage rather than billing amounts. That is a distinction with no difference. GTE is attempting to rewrite this portion of the Agreement just as it tried to rewrite Section V regarding reciprocal compensation. Even if Agreement coverage disputes were somehow unrelated to billing disputes, XIX.G.1. of the Agreement requires GTE to explain the ". . .nature and basis of the [coverage] dispute . . . ."

The first hint of a coverage dispute explanation was GTE's December 7 letter that Cox's bill was, ". . .for more than local traffic. . . ." If that cryptic message was intended to mean that GTE would pay for all out-of-balance, switched, dial-up traffic other than toll and ISP-bound, it begged further explanation. GTE could only assert that its notion that local traffic had remained within the ±10% balance range if it had some objective measuring device for local traffic that culled out the ISP-bound traffic from the rest of its customers' locally dialed calls. And were this, in fact, the case, GTE should have raised the issue at the time the parties agreed that local traffic was out-of-balance by more than 10%.

The only hint at such measuring and separating sophistication is contained in Ms. Lowery's January 6, 1999 letter (pertinent part set out at pp.11 & 12 of GTE Memorandum of Law) which proposed distinguishing the two types of traffic based upon "industry average hold times." Such a classification technique is utterly arbitrary. It assumes that voice conversations

last only about five minutes and that dial-up modem conversations, with ISPs last for about an hour. This inability to clearly distinguish the two versions of traffic indicates that they are functionally the same. They are a single form of traffic, not two.

Moreover, although GTE may dispute Cox's assessment of billing charges, withholding payment is strictly contrary to Section XIX.M.6 of the Agreement, which states:

> Continuous Service. Each Party shall continue to provide services to the other Party during the pendency of any dispute resolution procedure, and GTE shall continue to perform its obligation (including making payment) in accordance with this Agreement.

(*Emphasis added*). GTE's response to this is to quibble that it is not disputing the amount billed but whether any reciprocal payment was due. In truth, GTE is belatedly disputing the amount of Cox's invoice because it claims the bills are too high. Not until December of 1998 did GTE assert a claim that Cox's invoices contained more than local traffic. There is no exemption from GTE's clear obligation to make payments during the pendency of a dispute. No such provision appears in the Agreement, and GTE should not be allowed to insert one now.

Although the Agreement provides otherwise, GTE has refused to pay Cox anything. This type of behavior is not new for GTE. It followed the same *modus operandi* in Washington where the Washington Utilities and Transportation Commission sanctioned GTE, finding that it "subjected its competitor, WorldCom, to unfair and unreasonable disadvantage" when it refused to pay reciprocal compensation for ISP-bound traffic. The commission there noted:

> In essence, GTE cut off the money supply to its competitor while it continued to collect and retain money for providing the same service to GTE. As Staff points out, an incumbent's ability to restrict the cash flow of new entrants into the market would create substantial barriers to entry for small, startup companies. Thus, not only are competitors harmed by unreasonable disadvantage

> imposed contrary to RCW 80.36.170, but customers are ultimately harmed as well.

WorldCom,Inc. v. GTE Northwest, Inc., Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim, Docket No. UT-980338 (Wa. U.T.C., May 12, 1999) (slip opinion at p.28). Although this Commission does not have the same statutory sword as did its counterpart in Washington, it should, at a minimum, immediately require that GTE make payments to Cox pursuant to the terms of the Agreement.

VII. Comments on Consolidation.

Cox is not opposed to consolidation of the two cases. Cox believes that this and the Starpower case can be concluded by a Commission holding that the pleadings now before it in both proceedings demonstrate that calls to ISPs must be treated as local and, hence, are compensable as a matter of law. Such a ruling would avoid delay and assure Cox and Starpower the payment of amounts due. No further proceedings would be anticipated.

GTE seeks an evidentiary hearing, a process that could lead to delays and further damage to Cox as GTE continues its refusal to pay anything. If the Commission chooses to receive evidence and conduct a hearing, consolidation would still present no problem as long as Cox and Starpower are afforded the opportunity to develop the facts that relate to each case. For instance, Cox's agents and employees have personal knowledge of the matters involved in the negotiation and arbitration of the Cox/GTE Agreement. Starpower, by contrast, adopted the MFS Intelenet/GTE Agreement pursuant to § 252(i) of the Act. Yet, Cox would request that the Commission expedite any such procedure. Again, Cox's primary concern is a quick resolution since money is owed and payment is being withheld.

VIII. Overall Conclusion

GTE is attempting to rewrite its Agreement with Cox by fiat. GTE has only recently (1998) found it financially beneficial to attempt the reclassification of its customers' dial-up, ISP-bound traffic from treatment as local to treatment as a type of long distance interexchange call, which is not carried by an interexchange carrier and for which no access charges are paid to originating and terminating exchange carriers. The legal arguments supporting this financially-driven classification are weak and transparent. Regulators and judges who have studied the subject have recognized GTE's monetary, anti-competitive agenda (including here a unilateral refusal to pay any of Cox's invoices) and have refused to alter the time honored, consistent treatment of ISP traffic.

As shown above, this Commission has no reason to alter course. GTE has not demonstrated and cannot demonstrate that ISP traffic is legally prohibited from being compensated. Further, GTE cannot demonstrate any manner in which it treats ISP traffic differently from other local traffic. Nor can GTE provide any indication the parties intended that ISP traffic be treated differently for reciprocal compensation purposes. GTE has not demonstrated and cannot demonstrate an empirical method to reliably differentiate ISP traffic from other dial-up, non-toll traffic. Accordingly, Cox respectfully requests that the Commission rule, upon the basis of the pleadings and matters judicially noticeable, that Cox is owed reciprocal compensation on all terminating traffic invoices submitted to GTE together with interest as provided in section XIX.G. of the Cox/GTE Interconnection agreement.

Alternatively, if the Commission determines additional facts should be placed in the record, Cox requests expeditious discovery and resolution of such facts.

Respectfully submitted,

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Date: July 19, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered or mailed first class postage pre-paid this 19th day of July, 1999, on each of the following:

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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

PETITION OF

COX VIRGINIA TELCOM, INC.

v. **CASE NO. PUC990046**

GTE SOUTH, INC.

For enforcement of interconnection agreement for reciprocal compensation for the termination of local calls to Internet Service Providers

Reply of Cox Virginia Telcom, Inc. to
GTE's Additional Comments

Cox Virginia Telcom, Inc. ("Cox"), by counsel, pursuant to this Commission's August 9, 1999, Second Preliminary Order, responds to the Additional Comments submitted by GTE South, Inc. ("GTE") in which GTE asks for an evidentiary hearing in this matter.

I. There is no need for an evidentiary hearing because there are no material facts in dispute.

GTE seeks in vain to establish the existence of a material, disputed fact. There is none. The Commission may take judicial notice of the Cox/GTE interconnection agreement to observe that it neither segregates ISP traffic from its definition of "local traffic" nor refers to a mechanism by which such traffic could even be tracked. Moreover, GTE cannot deny (1) that the FCC itself has noted its policy of treating ISP-bound traffic as local and has exempted it from interstate access charges, (2) that GTE

served ISPs out of its Virginia local tariffs, (3) that its revenue for ISP or ESP traffic has been counted as "local" for separations purposes, (4) that GTE has no method of metering or segregating ISP traffic from local traffic, (5) that its message or measured local exchange customers are billed as such for seven digit dialed calls they place to ISPs, and (6) that ISP-bound traffic would go uncompensated if it were treated as other than local. See, FCC Declaratory Ruling[1] at paragraph 24, pp.15-16; Reply of Cox Virginia Telcom, Inc. to Answer and Memorandum of Law of GTE South, Inc., ("Cox Reply of July 19, 1999") pp. 8-13.[2] The parties' intent is conclusively established by these factors.

GTE has attempted to raise a factual question by framing the issue as whether the two parties expressly agreed to include ISP traffic in their interconnection agreement. See, GTE's July 7, 1999 Memorandum of Law at p. 8 and Additional Comments at p.2. Its argument is based on GTE's misreading of paragraphs 21-27 of the FCC Declaratory Ruling. GTE implies that the FCC requires state commissions to take evidence in order to find that the parties intended ISP traffic to be expressly included for compensation. Instead, those paragraphs practically invite state commissions to continue treating ISP traffic as local and compensable unless and until the FCC rulemaking concludes differently. In fact, paragraph 27, at p.18 concludes, ". . . nothing in this Declaratory

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[1]Declaratory Ruling and Notice of Proposed Rulemaking, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68 (Released February 26, 1999) ___F.C.C. R____, (hereafter "Declaratory Ruling").

[2] Since the filing of Cox's Reply, yet another state commission has ruled that it has jurisdiction to resolve the dispute as to whether ISP in-bound calls constitute local traffic and that such calls do constitute local traffic. *See In re: NEVD of Rhode Island, LLC Petition For Declaratory Judgment that Internet Traffic Be Treated as Local Traffic Subject to Reciprocal Compensation* - Docket No. 2935, Order (Rhode Island P.U.C. July 21, 1999) (a copy of which is attached as Exhibit 1). The Rhode Island Public Utilities Commission cited many of the same factors Cox noted in its Reply to determine the intention of the parties to the interconnection agreement in question, apparently without conducting the type of evidentiary hearing that GTE seeks.

Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below." The Virginia law enables this Commission to determine compensation on contractual principles without a hearing. [Also, ¶ 24 discusses that commissions have the opportunity to consider all relevant facts, including the conduct of the parties pursuant to those agreements. Nothing GTE has done during or since those negotiations gives credence to their arguments]

II. Virginia law holds that contracts which are unambiguous are enforced without the use of extrinsic evidence.

Virginia courts will not admit extraneous evidence to interpret and enforce an unambiguous contract. As the Supreme Court of Virginia stated in *Ross v. Craw*, 231 Va. 206, 212, 343 S.E.2d. 312, 316 (1986), "A well-settled principle of contract law dictates that 'where an agreement is complete on its face and is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself.'" (Citations omitted). The question of whether an agreement is ambiguous is one of law, not fact, and contracts are not rendered ambiguous merely because the parties or their attorneys do not agree upon the meaning of the language used to express the agreement. *Doswell Limited Partnership v. Virginia Electric and Power Co.*, 251 Va. 215, 222-223, 468 S.E.2d. 84, 88 (Va.1996)[3]. In the present case, as explained at pages 9 and 10 of the

[3] This legal principle is even incorporated into the Agreement itself, at § XIX. N., p.40 as follows: This Agreement constitutes the entire agreement of the Parties pertaining to the subject matter of the Agreement and supersedes all prior agreements, negotiations, proposals, and representations, whether written or oral, and all contemporaneous oral agreements, negotiations, proposals, and representations concerning such subject matter. No representations, understandings, agreements, or warranties, expressed or implied, have been made or relied upon in the making of the Agreement other than those specifically set forth herein.

Cox Reply, July 19, 1999, Section V.C.1. of the Agreement treats traffic between Cox and GTE as either toll or local. Calls to ISPs are clearly not toll (except for those unfortunate customers who must dial long distance to reach an ISP). As a result, no evidentiary hearing is needed for this Commission to conclude the obvious: that the Interconnection Agreement's use of the term "local calls" includes ISP-bound traffic.

The custom and industry use of the term "local calls" confirms this conclusion. In Virginia, contracts that use terms of art are read to incorporate the industry custom and usage for such terms. See, *Westmoreland-LG & E Partners v. Virginia Electric and Power Co., 254 Va.1, 486 S.E.2d. 289 (Va.1997)* and *Doswell*, supra. In the telecommunications industry, local calls have always included ISP-bound traffic. Contrary to GTE's continued assertions, the FCC's Declaratory Ruling confirms this:

> Since [1983], the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end-users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP traffic as intrastate for separations purposes. (footnote omitted).
>
> Against this backdrop, and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic.

Declaratory Ruling at ¶23 and ¶24, p. 15 (emphasis added). Therefore, there can be no question but that the term "local calls" under the Interconnection Agreement included ISP-bound traffic.

The Declaratory Ruling notes other factors that show ISP traffic to be local. One indicator is "whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation." Declaratory Ruling at ¶24, p.16. Here, the Interconnection Agreement is silent on either metering or segregating ISP bound traffic from local traffic. Moreover, GTE has admitted that it had no means to do so. GTE's July 7, 1999 Memorandum of Law, at pp.11-12, sets out the pertinent part of Ms. Ann Lowery's (GTE's Manager-Interconnections/Negotiations) January 6, 1999 letter which for the first time describes a segregation and measuring methodology. Her letter states, "GTE proposes that compensation be paid based upon terminating volumes and industry average hold times for the type of traffic terminated (e.g. local, Internet)." In other words, as of January this year, GTE could not distinguish Internet-bound traffic from local except by indulging an assumption that any customer call that remains connected for an extended period of time must have been routed ultimately to the Internet. Therefore, since the parties neither envisioned segregating these ISP traffic from local calls nor had the ability to do so, ISP bound traffic must have been included as local calls.

Additional indicators noted by the FCC include: (1) whether incumbent LECs serving ESPs (including ISPs), have done so out of intrastate or interstate tariffs; (2) whether revenues associated with those services were counted as intrastate or interstate