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**Commissioner Josiah L. Neeper, Dissenting:**

I dissent from the majority decision because the arbitrator's final report defies the interstate nature of Internet Service Provider (ISP) traffic, violates the Telecommunications Act of 1996 on reciprocal compensation, and otherwise, as a public policy, establishes an unjustified and potentially detrimental reciprocal compensation policy.

Section 251(b)(5) of the Act specifies the duty to establish reciprocal compensation for the transport and termination of telecommunications. However, this reciprocal compensation requirement only applies to the transport and termination of local traffic<sup>1</sup>; and ISP-bound traffic is not local. The Federal Communications Commission has concluded that " the communications at issue here [i.e., ISP-bound traffic] do not terminate at the ISP's local server, as CLECs [competitive local exchange carriers] and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state."<sup>2</sup>

The FCC's position on the definition of ISP-bound traffic is unambiguous. Even if the facilities and equipment used to deliver traffic to the ISP's local servers are located within a single state, the FCC has concluded that it retains jurisdiction, and that the communication is interstate. (FCC Declaratory Ruling, paragraph 12.) Furthermore, ISP-bound traffic is not composed of two components as the decision (Decision 98-10-057) upon which the arbitrator's report relies states: i.e., an intrastate telecommunications

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<sup>1</sup> 47 U.S.C. Section 251(b)(5) and 47 C.F.R. Section 51.701.

<sup>2</sup> In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Inter-Carrier Compensation for ISP-Bound Traffic. CC Docket Nos. 96-98 and 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in Docket No. 99-68, adopted February 25, 1999, paragraph 12. Hereinafter "Declaratory Ruling."

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service (provided by the telecommunications carrier) and an interstate information service (provided by the ISP). Rather, it is one communication with the terminating point being the accessed Web sites. Thus, the central basis of the majority's decision, (i.e., that ISP-bound traffic is local) has been invalidated by the FCC when it concluded that calls to ISPs and beyond are one call, and are interstate.

We have no evidence in this arbitration that ISP-bound calls carried by Pac-West terminate within the local area. Even Pac-West's unconventional scheme of rating calls as local while having them delivered to distant locations cannot make the calls local. They are not local because the FCC has ruled that ISP-bound calls terminate at Web sites, which may be local, interstate or international. There is no evidence here to support a claim that all, most, or even some, of these calls terminate at web sites within the local area. Absent evidence to the contrary, the record of this case only shows that ISP-bound traffic is interstate.

Still, I believe that the issues raised by the definition of ISP traffic are important and do merit the Commission's full and thorough investigation to decide whether reciprocal compensation ought to be required as a matter of law, or for a public policy objective, and if so under what conditions. Clearly, federal law does not require reciprocal compensation for ISP-bound traffic. So there is no legal requirement per se that compensation be authorized. The question is more akin to determining whether it is legal (i.e., not violative of federal and state law) to require reciprocal compensation for ISP-bound traffic. Only after determining its legality should the Commission consider requiring reciprocal compensation. And then if lawful, the Commission must first fully

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consider what specific public policy purpose reciprocal compensation will serve, whether reciprocal compensation is needed, if so who should pay and whether the general body of customers should subsidize the cost. In all these respects the record of this arbitration case is devoid of a shred of evidence that has any probative value to resolve these issues. Given this, my preference is to have this matter brought before the Commission with full participation by all carriers and affected parties, with a more developed record in a forum which will allow the Commission to entertain a range of options to resolve the issues.

For all the above reasons, I dissent.

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Josiah L. Neeper  
Commissioner

San Francisco, California  
June 24, 1999