STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SOUTHERN PACIFIC COMMUNICATIONS COMPANY	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1970 through February 28, 1981.	:	

Petitioner, Southern Pacific Communications Company, One Stamford Forum, Stamford, Connecticut 06904, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1970 through February 28, 1981 (File No. 800275).

On February 1, 1989, petitioner by its representative, Phyllis K. Hartford, Esq., and the Division of Taxation by William F. Collins, Esq. (James Della Porta, Esq., of counsel) waived a hearing and agreed to have the controversy determined on submission of documents with all briefs to be submitted by June 16, 1989 and a final stipulation of facts to be submitted by October 30, 1989. After due consideration, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether long distance telephone services rendered by petitioner are subject to sales taxes.

FINDINGS OF FACT

Pursuant to 20 NYCRR 3000.7, the Division of Tax Appeals and petitioner entered into a stipulation of facts. At the request of the Administrative Law Judge, this initial stipulation was supplemented with additional facts. The stipulated facts are incorporated in this determination as Findings of Fact "3" through "37". They have been supplemented by additional facts as indicated.

During the period in issue, petitioner, Southern Pacific Communications Company, was a specialized common carrier of communications subject to the jurisdiction of the Federal Communications Commission ("FCC"). As a specialized common carrier, it did not provide the services commonly associated with local telephone companies. It offered a limited microwave system for the transmitting of electrical impulses. This system provided inter-city communications services to the public, offering privateline, restricted switched service and data services to both business and residential customers. In short, petitioner was what is commonly called a long-distance telephone company.

On June 20, 1982, the Division of Taxation issued to petitioner, GTE Sprint Communications Corporation, then known as Southern Pacific Communications Company, and

hereinafter referred to as "GTE Sprint", two notices of determination and demands for payment of sales and use taxes due, asserting additional sales and use taxes plus interest. Notice number S820611019A, dated June 20, 1982, notified GTE Sprint that sales and use taxes in the amount of $584,737.84 plus interest of $350,510.82, for a total of $935,248.66, had been determined to be due for the period September 1, 1970 through August 31, 1977. Notice number S820611020A, also dated June 20, 1982, notified GTE Sprint that sales and use taxes in the amount of $1,450,733.12 plus interest of $377,751.45, for a total of $1,828,484.57, had been determined to be due for the period September 1, 1977 through February 28, 1981.

The first sales tax return filed by GTE Sprint was for the quarter beginning December 1, 1975. Consents to extend the three-year limitation period were periodically executed only for quarters beginning after March 1, 1976. Therefore, the three-year limitation period for the quarter ending February 29, 1976 expired before the issuance of the statutory notice. The notices, as they relate to all other periods assessed, were timely issued.

The $2,035,470.96 total sales and use taxes assessed consisted of sales tax of $634,819.00 and use tax of $1,399,234.97. On September 17, 1987, the Division of Taxation issued a Statement of Proposed Audit Adjustment, following further review of the use tax portion of the assessment. The statement specifically stated that it reflected the results of the use tax audit only. Revised use tax of $984,999.96 plus interest of $1,169,887.57 was proposed for the period September 1, 1970 through February 28, 1981. On September 17, 1987, GTE Sprint's authorized representative submitted to the Division, a Consent to Fixing of the (Use) Tax as proposed. On October 8, 1987, GTE Sprint remitted the use tax of $984,999.96 plus interest of $1,169,887.57 to the Department of Taxation and Finance. As a result of these actions, the only taxes remaining in contention in the instant proceedings are sales taxes totaling $634,819.00, assessed for the period September 1, 1970 through February 28, 1981.

In the stipulations: the word "State" means the State of New York; the phrase "GTE Sprint's physical network" means the tangible communications facilities owned or leased by GTE Sprint and over which it exercised exclusive rights of management and control - the term specifically excludes services or facilities provided by other carriers pursuant to tariff; and the word "period" refers to September 1, 1970 through February 28, 1981.

The Assessed Transactions

The individual items offered by GTE Sprint to its customers in transactions for which sales tax was assessed are set out below, along with the corresponding amounts of sales tax assessed.[1]

ITEM	
Private Line Services:	
1. Monthly mileage service charge	$ 55,944.94
2. Local distribution facilities	60,445.29
3. 4 kilohertz termination charges	43,273.50
4. Modems	529.44
5. Termination at CCSA	6,229.83
6. Outside move charges	794.16

[1]The services listed here as Items 2 through 19 and 23 through 43 are described in Appendix II.

7. LDF end of foreign exchange		1,058.87
8. Special billing	1,094.18	
9. Busy lamp		35.32
10. C-2 conditioning	158.82	
11. Multi-point service drops		653.01
12. Short-haul termination charges		1,023.20
13. Multi-point channel	1,411.85	
14. Signaling equipment		847.13
15. Service charge		141.18
16. Loop		617.67
17. Voice and data arrangement		158.82
18. Traffic analysis - 12 months		1,835.40
19. DTMF to Rotary		229.83
Private Line Services Total		$176,482.44
Switched Services:		
20. Sprint 5 access	$155,780.36	
21. Sprint 5 usage		210,125.86
22. Sprint 5 minimum	33,530.66	
23. Datadial		6,196.22
24. Sprint 1 speedline	2,411.32	
25. Sprint 1 business port		2,251.87
26. Sprint 1 speedline minimum		3,016.29
27. Sprint 1 security code		5.33
28. Sprint 1 WBT line	405.75	
29. Sprint 1 Greenwich dial		352.65
30. Sprint 1 NY site preparation		85.98
31. Sprint 1 NY SP/power		105.16
32. Sprint 2 & 4 general access port		1,910.08
33. Sprint NYC usage	81.10	
Switched Services Total		$416,258.63
"Other"		
34. Modem		$ 7,615.97
35. Traffic analysis - 12 months		1,304.40
36. Installtion		1,472.57
37. Voice and data arrangement		1,178.26
38. Multi-point service drop		2,229.76
39. C-2 conditioning	1,220.23	
40. Baud data term		420.76
41. DTMF to rotary		1,051.81
42. Service charge		25,498.18
43. D-1 conditioning	84.22	
"Other" Total		$ 42,076.16
TOTAL		$634,817.23
Effects of rounding		1.77
ROUNDED TOTAL = Sales tax assessed		$634,819.00

Each of the 43 separate items upon which sales tax was assessed was separately identified on GTE Sprint's customers' bills, and each was assigned a separate charge. When totaled the separate charges reflected the amount due from the customer for the month.

GTE Sprint did not charge or collect any sales tax from its customers for any of the above-described transactions.

The parties stipulate that Items 2 through 19 and 24 through 43 above are for services, and not equipment. Further, these services do not, by themselves, comprise telephone services, but are, instead, component parts of the telephone services provided by GTE Sprint to its customers.

As an additional fact, it is found that on audit, items 24 (Sprint 1 Speedline), 25 (Sprint 1 business port), 26 (Speedline minimum) and 32 (Sprint 2 and 4 general access port) were deemed to be the lease of equipment in New York State and as such were held to be taxable charges.

GTE Sprint was authorized by the FCC to provide only long distance interstate service and GTE Sprint offered only such service during the period at issue. GTE Sprint's customers had the capability of making and did in fact make long distance phone calls between points within the State via GTE Sprint's switched services.

Private Line Services

The term "private line service" generally refers to the provision by a carrier of specific circuits, or lines, dedicated to the sole use of a particular customer. Private lines are sometimes referred to as "tie-lines". GTE Sprint offered telephone-to-telephone ("end-to-end") private line services which were regulated by the Federal Communications Commission (FCC) and offered pursuant to FCC-approved tariffs. Those tariffs described the specific services and enhancements offered, and specified the terms and conditions by which they were provided. Specifically, the items listed above for "private line service" (Items 1 through 19) and "other" (Items 34 through 43) were offered for sale in GTE Sprint's private line tariffs filed with the FCC.

The monthly mileage service charge (Item 1) refers to the charge for private line service which varied according to the length of the line, increasing as the length of the line increased. During the period, all GTE Sprint private lines between points in the State passed physically through the State of New Jersey, although the charge was calculated based upon the airline mileage distance between the in-State points. A customer's private line circuits between points in the State could be, and were, connected to other private line circuits ending out-of-State. Thus, a customer's Albany/New York City circuit could connect to the same customer's New York City/Miami, or Albany/Chicago circuits.

GTE Sprint's physical network comprised only an intermediate part of the private line communication pathways. In order to complete the communication pathways, additional physical facilities were needed to link the customer's telephones at either end to GTE Sprint's intermediate physical network. In addition, certain enhancements of that line could only be performed at one or both ends. As an intermediate carrier, GTE Sprint could not, by itself, provide those enhancements.

The facilities that provided the final "links" in, and enhancements of, the communication pathways were purchased by GTE Sprint from the local exchange telephone companies ("LECs"), and consisted of the items listed above at items 2 through 19 and 34 through 43.

GTE Sprint purchased those items from the LECs and then charged its customers for those very same items. The LECs' provision of these items was regulated by the FCC, and was subject to the terms and conditions of the LECs' tariffs filed with that agency. Those tariffs were entitled "Local Distribution Circuits For Patrons of the Other Common Carriers". No customer could make communications solely through the employment of those items. Rather, the addition of the GTE Sprint physical network and LEC-provided facilities at the distant end was necessary to establish the end-to-end communication pathway, and to place into effect the enhancements.

Under the LECs' tariffs, neither GTE Sprint nor its customers could designate, specify, design, own, control, test, repair, maintain, move, change, or in any other way assert dominion or control over the physical facilities (i.e., cable, structures, protective features, poles, plug-in units, etc.) used by the LEC to complete and enhance the communication pathway to and from the GTE Sprint physical network. The design and assignment or routing of specific facilities and equipment items to meet the service requirement as requested by GTE Sprint was performed exclusively by the LEC. Although GTE Sprint was responsible for the end-to-end service, it was required to notify the LEC of problems with the LEC portion of the pathway, and the LEC would perform any necessary repairs at no charge to GTE Sprint.

The private line monthly mileage service charges were calculated on the basis of connecting two points, such that a separate charge would be made for a Buffalo/Albany circuit and for a New York City/Miami circuit. The charges for each circuit would be calculated pursuant to GTE Sprint's FCC tariffs.

GTE Sprint provided private line services on a telephone-to- telephone basis. The charges for those services were determined by the circuit mileage, the access arrangements, or "links", employed, and by the circuit enhancements ordered. All of the access arrangements and circuit enhancements necessary to service a customer's needs were purchased by GTE Sprint from the LECs and were then sold to the end users by GTE Sprint. These access arrangements and enhancements, provided in connection with private line services, are listed at items 2-19 and 34-43 of Finding of Fact "7".

Switched Services

The term "switched services" generally refers to the provision by a carrier of services over any available line selected by the carrier's switch. If all of the lines are "busy", the call cannot go through. Unlike the dedicated private line networks, all customers "share" the switched networks. Most residential and business customers use the switched networks. GTE Sprint's end-to-end switched services were regulated by the FCC, and were offered pursuant to FCC-approved tariffs. Those tariffs described the basic switched services and features offered, and specified the applicable terms and conditions. Specifically, the items listed above for "switched services" (Items 20 through 33) were offered for sale in those switched service tariffs.

The Sprint 5 usage charge (Item 21) and Datadial charge (Item 23) refer to the charges for switched services which varied according to the distance, duration, and time of day of the telephone communication, increasing as the distance and duration increased. During the period, all GTE Sprint switched service communications that might have been between points in the State passed physically through the State of New Jersey, although the charge was calculated based upon the airline mileage distance between the GTE Sprint physical network entry point and the location where the communication was received.

As was the case for private line services, GTE Sprint's physical network comprised only an intermediate part of the switched communications' pathways. In order to complete the communications pathways, additional physical facilities were needed to link the telephones at

either end to GTE Sprint's intermediate physical network. The facilities that provided the final "links" in the communication pathway were purchased by GTE Sprint from the LECs. The LECs provision of these links was regulated by the FCC, and was subject to the terms and conditions of the LECs' tariffs filed with that agency. Those tariffs were entitled "Exchange Network Facilities For Interstate Access" ("ENFIA").

These ENFIA services provided by the LECs did not provide GTE Sprint with information identifying the telephone number, and thus the location (state), from which calls originated. This information, known as automatic number identification ("ANI") was made available by the LECs only to themselves for traffic billed by them. Therefore, while the LECs were able to determine the location of the origin of calls billed by them, no such information was available to GTE Sprint during the period. This information is now available to companies like Sprint as a result of the provision by the LECs of "equal access", which was mandated by the court decree divesting AT&T of its LECs.

The Sprint 5 access charge (Item 20) was $10.00 per customer per month. For this charge, the customer was given "access" to the GTE Sprint network. That is, the customer was given a list of the telephone numbers to dial in order to access the GTE Sprint network, along with a personal identification number which, when dialed, would identify the caller to the GTE Sprint switch as a valid GTE Sprint customer. However, the charge was imposed whether or not telephone calls were made, so long as the personal identification number was maintained in the system. Separate and additional charges were imposed for any telephone calls actually made by the customers, without credit for the $10.00 access charge. The access charge allowed GTE Sprint to charge less for telephone calls than it would have had to charge were no access charge imposed.

The Sprint 5 minimum usage charge (Item 22) was $25.00 per customer per month. If the customer used more than $25.00 in telephone service, no minimum usage charge would apply. However, if the customer used less than $25.00 in telephone service, he or she would be subject to all or part of the minimum usage charge. For example, if the actual usage was $20.00, the customer would be subject to a minimum usage charge in the amount of $5.00, and $5.00 would be treated by the Division of Taxation as subject to the sales tax. Minimum usage charges were imposed to recover administrative expenses associated with maintaining records for nonperforming customers, and to assure that inactive customers would take steps to cancel their accounts.

Sprint 1 speedline (Item 24) and business port (Item 25) allowed customers who called the same number often the ability to be automatically connected to that number upon accessing the GTE Sprint network. The Sprint 1 speedline minimum usage charge (Item 26) was similar to the Sprint 5 minimum usage charge, above. Other charges (Items 27 through 31 and Item 33) were for special services provided to particular customers. The Sprint 1 & 4 general access port services provided customers with dedicated "links", over facilities provided by the LECs, into the GTE Sprint network access number and personal identification number.

The switched service charges included in items 20 through 26 and item 32 were all imposed for services offered by GTE Sprint pursuant to the terms and conditions specified in its FCC tariffs.

Origination of Calls

Calls could be made from out-of-State locations which would enter GTE Sprint's physical network in New York State. In some cases GTE Sprint charged for the in-State and out-of-State portions of these interstate calls, while in other cases another company might

charge for the out-of-State portion.

The cross-border local exchange situation was one case where GTE Sprint would render the entire charge for an out-of-State call entering its network in-State. Thus, when a caller was across the State border, but within an exchange partly located in New York, he or she utilized cross-border exchange access services to enter the GTE Sprint network in New York. In this case, FCC rules placed the responsibility for the entire telephone-to-telephone transmission upon GTE Sprint, and GTE Sprint was required to pay the local telephone company for the cross-border access portion. GTE Sprint priced its telephone-to-telephone service to recover the cross-border access costs (which, overall, comprise roughly 25% to 50% of the company's nationwide operating expenses), and billed the customer accordingly. In sum, a single charge was applied by GTE Sprint to the whole of a call across state lines.

The split-billing scenario, on the other hand, is illustrated by an example where New York offers the closest Sprint network entry point for an out-of-State Sprint customer (as was often the case during the audit period). Here, an LEC (in partnership with AT&T's Long Lines Department) would impose a separate interstate toll charge for the portion of the call from the out-of-State telephone to the GTE Sprint switching computer in New York, the remainder of the interstate call being billed by GTE Sprint. In this case, then, two separate charges were applied to the whole interstate call, one by the LEC and the other by GTE Sprint.

Audit Method

The Division of Taxation treated the private line monthly service charge (Item 1) as subject to sales tax when made for private line circuits between two points in the State. This was so, regardless of whether the customer was billed to an out-of-State address or whether the the in-State circuit was connected to a circuit ending out-of-State. Tax was not assessed for circuits between a point in the State and a point in another state.

Sprint 5 usage charges (Item 21) and Datadial usage charges (Item 23) were treated by the Division as subject to sales tax when made for switched service communications entering GTE Sprint's physical network in the State and also received in the State. This was so, regardless of whether the customer's billing address was in or out of State. Tax was not assessed on communications entering GTE Sprint's physical network in another state and received in-State. Likewise, tax was not assessed on communications entering GTE Sprint's network in-State, but received in another State.

Sprint 5 access charges (Item 20) and Sprint 5 minimum charges (Item 22) were treated by the Division as taxable if the customer's billing address was located in the State, without regard to whether that customer made any communications, whether the communications made entered GTE Sprint's network in the State or elsewhere, or whether the communications made were received in-State or elsewhere. These charges were also deemed subject to sales tax even if the customer's address was out of state and the customer was billed to an address located out of State, if the customer's bill indicated that more than 50 percent of its calls entered GTE Sprint's physical network in-State. The Sprint 5 access charges and minimum charges represent fees for the privilege of having the capability of making long distance telephone calls over GTE Sprint's telecommunications systems. The fees were due regardless of whether the customer ever used GTE Sprint's telecommunications systems.

All other charges (Items 2 through 19 and 24 through 43) were treated by the Division as subject to sales tax if the charge was made for activity occurring within the State. This was so, regardless of whether the customer's billing address was located in the State or elsewhere. The Division deemed the providing of these items to be a transaction subject to sales tax.

The Division used two methods to determine the taxability of charges billed by GTE Sprint for items 2 through 19 and 24 through 43. The first was to identify GTE Sprint billing invoices which had a New York billing address. The Division assessed sales tax on all charges on these invoices, excepting those charges made for calls entering GTE Sprint's physical network in states or countries that were different from the calls' destination state or country, and excepting those charges made for calls entering GTE Sprint's physical network in the same state as the calls' destination state if that state was not New York.

The second method focused on GTE Sprint billing invoices which had non-New York billing addresses. The examiners identified the invoices with non-New York billing addresses which contained charges for calls entering GTE Sprint's physical network in New York. Sales tax was assessed on the charges made for all of the calls billed out of State which entered GTE Sprint's physical network in New York when the calls also had New York destinations. In addition, sales tax was assessed on the minimum, access and other charges if more than 50 percent of all of the calls on an invoice entered GTE Sprint's physical network in New York, (calculated without regard to whether those calls had New York or out-of-State destinations).

The parties stipulate to the authenticity of the diagram included as Appendix I, describing the communication pathways for a communication between New York City and San Francisco.

CONCLUSIONS OF LAW

A. Tax Law § 1105(b) imposes a sales tax upon the receipts from every sale other than sales for resale of telephony and telegraphy and telephone and telegraph service of whatever nature except interstate and international telephony and telegraphy and telephone and telegraph services. In challenging the sales tax assessment, petitioner primarily argues that all of its telephone services were interstate in nature within the meaning of the section 1105(b) exception and thus not subject to sales tax. It is useful to emphasize that petitioner has not launched a constitutional challenge to the Division's assessment of tax on the charges for private line services (Items 1 through 19 and 34 through 43) or for switched services usage charges (Items 21 and 23 through 33). Petitioner's only argument as to these items is that the services provided were interstate telephone services as that phrase is used in section 1105(b). Thus, the first question presented is one of statutory construction: What did the Legislature mean when it excepted interstate telephone services from taxation?

There is neither a statutory nor regulatory definition of the statutory phrase "interstate and international telephone and telegraphy service". In the absence of such a definition, the term "interstate" must be given its "precise and well settled meaning in the jurisprudence of the state" (McKinney's Cons Laws of NY, Book 1, Statutes § 233). Thus, the inquiry begins with a review of the relevant caselaw. From the standpoint of physical movement, it has long been held that a transaction is interstate whenever there is a crossing of a state line (e.g., Central Greyhound Lines v. Mealey, 334 US 653, 68 S Ct 1260, 1262). The understanding that that which crosses state lines is interstate in nature applies to communication as well as to freight and people (see, e.g., United States Transmission System v. Board of Assessment Appeals, 715 P2d 1249 [Colo]).

There is no legislative history to suggest that there was an intent to depart from this longstanding and commonly accepted definition of the term interstate when section 1105(b) was adopted. It does not follow, however, that there is an interstate transaction merely because state lines are crossed. Where the very purpose of a transaction is to connect two points within a state, the mere fact that a state line is crossed does not transform an essentially intrastate activity into an interstate one. Thus, in Matter of Callanan Mar. Corp. v. State Tax Commn. (98 AD2d

555, 471 NYS2d 906), the court held that vessels which incidentally crossed into New Jersey waters were not engaged in interstate commerce where the origin and destination of each trip was in New York State (see also, Matter of Western Union Telegraph Co., State Tax Commission, February 3, 1983 [where the Commission determined that charges for messages originating and terminating in New York were not interstate in nature merely because they passed through the taxpayer's computer bank in New Jersey]).

In contrast, a taxpayer's activities may be interstate in nature even though the taxed activities occur wholly within New York's boundaries. In Matter of M & G Convoy v. State Tax Commn. (55 AD2d 204, 389 NYS2d 656, affd 42 NY2d 1017), the taxpayer was a New York corporation engaged in transporting automobiles and trucks to dealers in New York and other states. The taxpayer maintained three terminals in New York where vehicles were brought from out of state, unloaded and placed in bay areas where they were reloaded for delivery to dealers in New York and throughout the Northeast. Tax was assessed under section 184 of the Tax Law on those receipts from the movement of vehicles from a terminal in New York to a delivery point in New York. In upholding the assessment, the State Tax Commission found that all of the receipts assessed were derived from business conducted by the taxpayer in New York; hence the assessment was held not to violate the statutory exclusion from franchise tax for "business of an interstate character". The Appellate Division annulled the Commission's determination, holding that the taxpayer's activities in New York constituted merely a link in an overall interstate activity. The court noted that there is no constitutional restraint barring the assessment but construed the tax statute as not permitting a tax where the overall activity is found to be essentially interstate in nature, even if it is possible to segregate an intrastate portion of the overall activity.

A similar result was reached in Matter of Moran Towing & Transportation v. State Tax Commn. (72 NY2d 166, 521 NYS2d 885), a Court of Appeals decision. There, the taxpayer was in the business of leasing tugboats and using them to provide towing services to larger vessels engaged in interstate commerce. The Division of Taxation took the position that unless 50 percent of the receipts from towing and docking services were generated on trips which required the tugboats to enter interstate or international waters the tugs were not "primarily engaged in interstate or foreign commerce" and were not entitled to the exemption provided by Tax Law § 1105(c)(3) or by Tax Law § 1115(a)(8). In its review of the governing caselaw, the court stated:

> "Historically, interstate commerce has been defined by reference to the origin and destination of what is moved in commerce. That the taxpayer's activities were conducted entirely within the waters of the State of New York does not affect the interstate character of those activities. The focus is on what the actor does, not where he does it" (citations omitted) (Matter of Moran Towing & Transportation v. State Tax Commn., supra at 887).

The court held that the tugboats were engaged in interstate commerce when they propelled or directed interstate vessels into and out of New York harbor, although the tugboats themselves never left New York waters.

Only one New York case directly addresses the issues of interstate telecommunication under consideration here, Davidson v. Rochester Telephone Corp. and New York State Dept. of Taxation and Finance (Sup Ct, Albany County, April 10, 1989, Prior, J.). In that case, the plaintiff brought an action challenging the collection of sales tax by an LEC (Rochester Telephone Company) on End User Common Line (EUCL) charges. Essentially, these were charges imposed by the LEC for the service of linking the LEC customer to a long-distance telephone company. In sustaining without discussion the position of the Division of Taxation, the court relied strongly on an Advisory Opinion of the Commissioner of Taxation and Finance

(January 5, 1988 [TSB-A-88(8)S]), holding that the opinion accurately interpreted section 1105(b) of the Tax Law. Therefore, it is appropriate to look closely at the logic of the advisory opinion and its application to the instant matter.

The issue raised in the Commissioner's opinion was whether EUCL charges which New York Telephone Company assessed its customers in partial recovery of the company's costs in connecting the customer to a long-distance telephone service were subject to sales tax. The telephone company furnished each of its customers with an access line directly connecting each customer's premises with the telephone company's central offices. The customer's local, intrastate and interstate communications all passed through this access line. Pursuant to tariffs filed with the FCC, the telephone company recovered some of its costs in providing interstate access services through a flat rate EUCL charge imposed on the customer. It recovered the remainder of its costs through charges levied on interexchange carriers, such as GTE Sprint, which incorporated these charges into their tariffed rates for interstate service. The Commissioner determined that the EUCL charges were not charges for interstate telephone services, although the access lines in question were a necessary component of providing each customer with the ability to transmit and receive interstate calls. The Commissioner's logic in arriving at this conclusion is instructive. First, several facts were noted. Customers could not purchase local service without receiving the ability to access interstate services. Also, the EUCL charges were not transactionally based; that is, the charge was assessed regardless of whether the customer made or received any long-distance interstate telephone calls, and the charge did not vary regardless of the number of such calls made or received. Finally, the telephone company's central offices and the company's customers were located in New York. Based on these facts, the Commissioner determined that the service of "linking" the New York customer's phone with an interstate exchange carrier was part and parcel of the basic telephone service supplied by New York Telephone to its customers. Citing the holding in Matter of Penfold v. State Tax Commn. (114 AD2d 696, 494 NYS 2d 552), the Commissioner found that under Tax Law § 1101(b)(3) any sale in which the components cannot be separately purchased must be treated as a single sale even if the components can be separately listed and charged. Since access to an interstate exchange carrier could not be purchased separately, the EUCL charges were deemed to be an inseparable component of the telephone company's charge for basic service. That service was deemed to be essentially local in nature, although it allowed a customer access to interstate services.

B. In view of the governing caselaw, it is concluded that during the audit period, GTE Sprint provided interstate telephone services excepted from sales tax under Tax Law § 1105(b). This conclusion is based on the principles established in the caselaw outlined above. The State may not isolate and impose tax on activity which begins and ends in New York if that activity is merely an intrastate strand of an overall interstate operation (Matter of M & G Convoy v. State Tax Commn., supra); and in determining whether the overall operation is interstate, the focus must be on the overall nature of the operation and not merely on whether a state boundary is crossed (Matter of Moran Towing and Transportation v. State Tax Commn., supra).

There can be no doubt that the services provided by GTE Sprint were interstate in character. The stipulated facts state: "GTE Sprint was authorized by the FCC to provide only long distance interstate service and GTE Sprint offered only such service during the period at issue." It may have been possible for a customer to purchase only long-distance intrastate telephone services during the audit period. However, the stipulation indicates that this rarely if ever occurred, and, in practice, GTE Sprint's customers purchased intrastate telephone services only in connection with their purchase of interstate services. This was so whether the specific service purchased was a private line service or a switched call service. Because the telephone service sold was essentially interstate, isolation of the purely intrastate portion of the overall activity is by necessity arbitrary. This is illustrated by examples drawn from the actual audit.

The Division assessed tax on the private line monthly service charge when a charge was imposed for connecting private line circuits between two points in the State, even if the customer was billed to an out-of-state address. These intrastate circuits were connected to private line interstate circuits; that is, the intrastate portion of the service was purchased in connection with the purchase of interstate services. In the private line situation, GTE Sprint could not and did not monitor actual usage, so no charge was made on a transactional basis. Since a customer's New York circuits were connected to out-of-state circuits, the New York circuits inevitably must have been used to transmit calls to an out-of-state destination, i.e., to make interstate calls. Furthermore, because the charges were not transactionally based, it is not possible to segregate that portion of total usage which was purely intrastate.

It was possible to isolate switched service calls entering GTE Sprint's network in New York and destined for a receiver in New York. But even here individual taxed transactions inevitably must have included some interstate activity. Callers located outside New York's borders, but in an exchange partly located in New York, used cross-border exchange services to enter the GTE Sprint network in New York. GTE Sprint purchased these services from the LEC, but recovered the entire cost of "linking" its equipment with the customer's out-of-state equipment from the customer. During the audit period, the LECs did not provide GTE Sprint with information identifying the telephone number, hence the location, from which calls originated. Presumably then, the Division could not distinguish a cross-border situation from that in which the caller, the GTE Sprint physical facilities and the call's recipient were all located in New York. This discussion is not an attempt to demonstrate that the Division's methodology resulted in the erroneous inclusion of interstate transactions in the assessment. Rather, the illustrations demonstrate the inherently interstate character of the telephone services provided by GTE Sprint.

C. In some ways, the situation described in the Commissioner's Advisory Opinion (supra) is the inverse of that under consideration here. The Commissioner was asked to consider the taxability of charges an LEC imposed on its customers for the service of linking the customer with a long-distance carrier. Here, we are considering, in part, a charge imposed for linking the GTE Sprint customer to GTE Sprint's physical network, but in this case, the charge was imposed by GTE Sprint to recover the cost of payments GTE Sprint made to the LECs for this service. Since the charge was for a similar service, it might be argued that the result should be the same in both circumstances. Such an argument ignores the logic underlying the Commissioner's opinion.

The result reached in the Commissioner's opinion is premised on two factors. First, the Commissioner found that the EUCL charge, although separately stated, could not be separately purchased and hence was an integral component of the LEC local basic service. That service was found to be inherently intrastate in character because all of the services offered were rendered in the same in-State locality. Although GTE Sprint's charges for linking the customer's equipment with the GTE Sprint physical network were separately stated, they could not be separately purchased, and hence they must be viewed as integral component parts of the overall service rendered by GTE Sprint. Viewed as a whole, that service was interstate in character.

D. It must be emphasized that the analysis of this case has been limited to a consideration of what is allowable under New York's Tax Law. Petitioner challenged the assessment of tax on Sprint 5 minimum usage and access charges on the ground that the assessment violated the Commerce Clause of the United States Constitution. Having determined that all services provided by GTE Sprint were excepted from taxation under Tax Law § 1105(b), there is no need to consider the constitutional argument. In fact, a review of recent United States Supreme Court cases leads to the conclusion that New York might impose a sales tax on interstate communications if it fairly apportioned the tax (see, GTE Sprint Communications Corp. v.

Sweet, 57 USLW 470; Complete Auto Transit, Inc. v. Brady, 430 US 274, 97 S Ct 1076; see Chesapeake and Potomac Telephone Company of West Virginia v. Tax Commr., 307 SE2d 620 [W Va] for a review of the relevant Supreme Court opinions in the context of a state tax statute similar to the one in issue). While it may appear counter-intuitive, New York's courts have interpreted the statutory phrase "interstate" in such a manner as to prohibit the taxation of certain activities even under circumstances in which the United States Constitution raises no bar to taxation.

E. As stipulated by the parties, the only taxes in contention in this proceeding are sales taxes assessed for the period September 1, 1970 through February 28, 1981 in the amount of $634,819.00. In accordance with the above discussion, this assessment will be canceled.

F. The petition of Southern Pacific Communications Company is granted to the extent indicated in Conclusion of Law "E", and the notices of determination and demands for payment of sales and use taxes due are canceled.

DATED: Troy, New York
March 22, 1990

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE

APPENDIX II

Description of Items 2 through 19 and 23 through 43

2. Local distribution facilities - the basic charge made by GTE Sprint to recover the costs of the LEC - provided access "link" portion of the private line circuits, that is, the portion of the circuit that connects the Sprint network entry-exit points to the subscriber's telephones. The charge is partly fixed and partly sensitive to the distance from the customer's premises to the GTE Sprint facility.

3. 4 Kilohertz termination charge - the charge made by GTE Sprint to recover the costs of LEC-provided multiplexing services. Multiplexing is the process of breaking a single radio channel into several circuits so that numerous conversations may simultaneously be carried over that single channel.

4. Modems - charges are for LEC-supplied conversions of signals from analog (wave) form to digital form, such as when a digital computer signal is converted to an analog signal for transmission over GTE Sprint's (then) analog network.

5. Termination at CCSA - charges imposed for GTE Sprint circuits terminating onto LEC-supplied "common control switching arrangement" facilities, which are used by the LECs to provide their very large customers (such as Ford) with virtually private networks, while utilizing the resources of the public switched network.

6. Outside move - charges for LEC's movements of facilities located "outside" their central office facilities, such as when the LEC moves a customer circuit from one location to another.

7. LDF end of foreign exchange - Foreign exchange services permit a company to maintain a local telephone number in a city far away from the company's office. For example, an airline may subscribe to foreign exchange services which permit its reservation agents in Minneapolis to pick up calls to a local New York City telephone number. The Minneapolis LEC's access services linking GTE Sprint's Minneapolis facilities to the customer's Minneapolis facilities is called the LDF end of the foreign exchange.

9. Busy Lamp - tells a customer whether his/her private line is already in use. As with the other items, the lamp is supplied by the LEC to GTE Sprint under tariff and GTE Sprint supplies it to the end user, also under tariff.

10. C-2 conditioning - a type of circuit conditioning (e.g., frequency response, attenuation, distortion, delay characteristics) necessary in order for a circuit to carry certain types of data transmissions. The LEC provides the conditioned circuits.

11. Multi-point service drops - this is where a subscriber would have, for example, a private line terminating in NYC and also might have offices located in midtown. The subscriber requires that one circuit connect both locations (i.e., a private line between multiple locations). To provide this service GTE Sprint would order facilities or access from the local exchange provider.

12. Short haul termination charges - this describes the rate schedule which exists for short haul service versus long haul service, which has a different rate structure.

13. Multi-point channel - similar to multi-point service drops. Involves a private line service that serves multiple points. A subscriber may have one point of service in NYC, another in

Philadelphia and a third and fourth in Baltimore and Washington, DC. All four of these points are connected to the same private line channel.

16. Loop-transmitting loop - like a local distribution facility, but it is used to connect one of GTE Sprint's locations to one of its other locations or one customer location to another customer location in the same area.

17. Voice and data arrangement - type of conditioning. Service leased by GTE Sprint from a local exchange provider for resale to its subscriber.

18. Traffic analysis - 12 months- traffic analysis usage recording and analysis service on GTE Sprint's private line facilities.

19. DTMF to Rotary - refers to a rotary converter used to convert touch tone signaling to rotary signaling.

23. Datadial - similar to GTE Sprint access, usage and minimum charges but for data rather than voice transmittal.

24. Sprint 1 Speedline - an arrangement whereby GTE Sprint provides customers with the ability to be connected to a pre-selected location without dialing any digits after accessing the network.

25. Sprint 1 business port - denotes a switch port designed to enable a subscriber to enter or exit the GTE Sprint network to or from an off network location via a local telephone company provided business line.

26. Sprint 1 speedline minimum - a minimum charge billed to the customer for speedline service whether or not the customer uses the service.

27. Sprint 1 Security code - this is a service requested by a customer to prevent unauthorized usage of a service.

32. Sprint 2 & 4 general access port - denotes entrance or exit device on a switching machine which provides a means of connection between that switching machine and a termination point of the service.

34. Modem - see item #4.

35. Traffic analysis - 12 months- provided where there was a private line.

37. Voice and data arrangement - equipment to provide a voice alternate data service.

38. Multi-point service drop - a piece of equipment (i.e., a bridge) required to provide a multi-point configuration.

39. C-2 conditioning - see item #10.

40. Baud data term - equipment associated with a modem.

41. DTMF to rotary - converts touch tone signaling to rotary dial pulse type signaling required for private line service.

43. D-1 conditioning - type of conditioning similar to C-2 conditioning.