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EX PARTE OR LATE FILED

CC Docket #96-98

March 15, 1998

RECEIVED
AUG 12 1998

Ex Parte

Ms. Magalie R. Salas
Secretary
Federal Communication Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 80-286, Jurisdictional Separations Reform and Referral to the Federal-State Joint Board

CC Docket No. 96-45, Federal-State Joint Board on Universal Service

CC Docket No. 96-262, Access Charge Reform

CCB/CPD CC Docket No. 97-30, Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic

Dear Ms. Salas:

This is in reference to the February 27 meeting among representative of the Commission, Southwestern Bell Telephone Company (SWBT), and SBC Telecommunications, Inc. concerning SBC Communications Inc. (SBC) jurisdictional adjustments for Internet usage. I am providing additional information pertaining to that matter.

This information, in the form of case or order citations, conclusively demonstrates that the Commission has already asserted jurisdiction over Internet Service Provider (ISP) traffic, that the Commission has never considered ISP traffic to be a local service, that ISP traffic is predominately interstate in nature and, therefore, that it is necessary and appropriate that such traffic be assigned to the interstate jurisdiction in Part 36 jurisdictional separations procedures. This information also demonstrates that, despite claims made to the contrary by others, this assignment is required by the end-to-end interstate nature of Internet traffic in light of the Commission's current separations rules concerning "mixed-use" facilities.

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On March 19, 1998, in the United States District Court for the Western District of Texas (Midland – Odessa Division), SWBT filed an appeal of the Texas Public Utility Commission decision on the Time Warner complaint regarding Internet traffic as local. SWBT will provide the Commission a copy of supplemental filings in that appeal that will contain information and case law that bear on the jurisdiction of Internet traffic.

Finally, two cardinal principles which underlie the very purpose of the Part 36 Jurisdictional Separations process support SBC's approach. The first is that the authority of each of two regulators must be confined "to its own proper province" and the second is that, as between the two jurisdictions, neither intrastate nor interstate ratepayers shall be forced to "bear undue burden." *Smith v. Illinois, 282 U.S. 133, 149, 151 (1930).* The Commission has already asserted jurisdiction over the subject of ESP (including Internet) traffic, and cannot now deny the interstate nature of such traffic. Moreover, recognizing the interstate nature of such traffic ensures that intrastate ratepayers do not bear an improper burden, in the form of costs allocated to them, that should be imposed on the interstate jurisdiction, wherein the true costs are situated.

This matter should be referred to the Joint Board so that an acceptable industry approach designed to fully identify and measure all Internet traffic may be pursued in an efficient and practical fashion by all affected parties.

SBC thanks the Commission for its attention to this very important matter. An original and one copy of this letter are being submitted. Acknowledgment and date of receipt of this transmittal are requested. A duplicate transmittal letter is attached for this purpose.

Please include this letter in the record of this proceeding in accordance with Section 1.1206(a)(2) of the Commission's Rules.

Sincerely,

Attachment

CC: Lynn Vermillera
Kaylene Shannan
Chuck Needy
Tamara Preiss
Ken Moran

DETERMINATION OF INTERNET ACCESS AS INTERSTATE

I. Jurisdiction Over Internet Traffic

II. Internet Traffic Always Considered Interstate Access

III. Internet Service Provider Traffic As Interstate Traffic

I. Jurisdiction Over Internet Traffic

Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, Notice of Proposed Rule Making and Order, 6 FCC Rcd 174 (1990):

"Section 3(a) of the Act gives the Commission jurisdiction over interstate communications 'between the points of origin and reception.'" (n. 101) (emphasis added)

Southern Pacific Communications Company Tariff FCC No. 4, Memorandum Opinion and Order, 61 FCC 2d 144 (1976):

"[T]he states do not have jurisdiction over interstate communications.... 'The key issue in determining this question before us is the nature of the communications which pass through the facilities, not the physical location of the lines. *United States v. Southwestern Cable Co., 392 U.S. 157, 168-9 (1968).* As we have often recognized, this Commission's jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination. *U.S. v. AT&T, 57 F. Supp. 451 (S.D.N.Y. 1944).*'" (para. 6) (emphasis added)

Petition for Emergency Relief and Declaratory Ruling filed by the BellSouth Corp., Memorandum Opinion and Order, 7 FCC Rcd 1619 (1992):

"Our jurisdiction does not end at the local switch but continues to the ultimate termination of the call. 'The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology.' 'Jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination.' .... 'An out-of-state call to BellSouth's voice mail service is a jurisdictionally interstate communication, just as is any other out-of-state call to a person or service." (para. 12) (emphasis added)

II. Internet Traffic Always Considered Interstate Access

Beginning in 1983 with CC Docket No. 78-72 to the present, the Commission has never considered traffic for Internet service, an enhanced service, to be local. On the contrary, enhanced service provider (ESP) calls are considered as interstate access subject to access charges with the only question being when to apply access charges.

MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 682 (1983):

A primary objective of Phase I of CC Docket No. 78-72: "elimination of unreasonable discrimination and undue preferences among rates for interstate services". (para. 3)

ESPs use local exchange facilities to complete interstate calls. "Among the variety of users of access service are ... enhanced service providers.... In each case the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location... ... [An] enhanced service provider might terminate a few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities to access its customers." (para. 78) (emphasis added)

The nature of communication determines jurisdiction. If it is not practical to separate the interstate from intrastate traffic, then traffic is interstate. "Since the nature of the communications determines jurisdiction. Ward v. Northern Ohio Telephone Company 300 F. 2d 816 (6th Cir. 1962), it would be most difficult to show that any switched private line within a state is not jurisdictionally interstate since it is not practical to separate the interstate from the intrastate traffic." (n. 58) (emphasis added)

The Commission ordered a transition to avoid rate shock while developing a comprehensive plan to identify usage. Once procedures in are place, access charges could be applied to all users on an equal basis. "Other users who employ exchange service for jurisdictionally interstate communications, including ... enhanced service providers ... would experience severe rate impacts were we immediately to assess carrier access charges upon them. The case for a transition to avoid this rate shock is made more compelling by our recognition that it will take time to develop a comprehensive plan for detecting all such usage and imposing charges in an evenhanded manner." (para. 83) (emphasis added)

WATS-Related and Other Amendments of Part 69 of Commission's Rules, Second Report and Order 1986 FCC LEXIS 2788, 60 Rad. Reg. 2d (P&F) 1542 (1986):

Eliminate the exemption from access charges for resellers and data and telex carriers. Rate shock was no longer sufficient justification for exemption. The "...carriers generally paid the local business line rate for their access lines in lieu of being assessed carrier's carrier charges." "We noted that the rate shock concerns that had initially prompted us to exempt ... carriers from paying access charges no longer provided sufficient justification for the exemption." (para. 2)

ESP exemption was only to give transitional relief. "...[T]elex and data carriers, like carriers...use ordinary subscriber lines and end office facilities through their dial-up connections, and should therefore pay the same charges as those assessed on other interexchange carriers for their use of these local switched access facilities. Our intention in adopting the exemption ... was not to exempt carriers who provide non-MTS/WATS-type services permanently from carrier access charges, but only to grant them some transitional relief." (para. 11)

The rule change did not affect the ESP access charge exemption. The sudden imposition of access could have severe impacts on ESPs; therefore, the need for transition to access charges arose. "We also recognized...the sudden imposition of access charges could have a severe economic impact on these enhanced service providers and that there might be a need for an access charge transition for these entities." (para. 15)

Amendments of Part 69 of the Commission's Rules Relating To Enhanced Service Providers, Notice of Proposed Rule Making, 2 FCC Rcd 4305 (1987):

In 1983 FCC adopted a comprehensive "access charge" plan. Tentatively conclude now appropriate that ESPs like providers of interstate basic services pay access. "At that time, we concluded that immediate application of this plan to certain providers of intestate services might unduly burden their operations and cause disruptions in provision of service to the public. Therefore, we granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers....We tentatively conclude that it is now appropriate that enhanced service providers, like providers of interstate basic services, be assessed access charges for their use of local exchange facilities." (para. 1) (emphasis added)

"In the access charge proceeding, the first of our four primary goals was the 'elimination of unreasonable discrimination and undue preferences among rates for interstate services.' Specifically, our objective has been to distribute the costs of exchange access in a fair and reasonable manner among all users of exchange access service ....We...initially intended to impose interstate access charges on enhanced service providers for their use of local exchange facilities to originate and terminate their interstate offerings. Interstate enhanced services often use common lines and local exchange switches in the same manner as MTS and some MTS equivalent services." (para. 2) (emphasis added)

The access charge exemption was not intended to be permanent. "Because of these concerns about rate shock, we exempted certain exchange access users from the payment of certain interstate access charges in the First Reconsideration. At that time, we did not intend those exemptions to be permanent, and we have since eliminated several of them. For example, in CC Docket No. 86-1, we considered the question of access charge exemption for resellers. In the First Report and Order in that docket, we eliminated the exemption from all access charges for WATS resellers and from traffic-sensitive access charges for MTS resellers, ... We said there that our goal was to promote competition, not to protect competitors." (para. 4) (emphasis added)

"[I]n the First Reconsideration, we granted enhanced service providers an exemption .... As a result, enhanced service providers currently pay local business rates ... for ... switched access connections to local exchange company central offices." (para. 6)

The FCC objective is a set of rules that provide for recovery of costs of exchange access used in interstate service in a fair reasonable and efficient manner regardless of designation as carriers, enhanced service providers, or private customers. The Commission expressed concern that local business rates paid by enhanced service providers do not contribute sufficiently to costs of exchange access facilities they use to offer services to the public. "Enhanced service providers, like facilities-based interexchange carriers and resellers, use the local network to provide interstate services." (para. 7) (emphasis added)

The FCC restated that "concerns with 'rate shock' cannot sustain an uneconomic pricing structure in perpetuity." (para. 8)

In effort to resolve the difficult issue of measuring ESP usage, FCC asked parties to comment on the method of determining interstate and intrastate usage of enhanced services. Parties were specifically asked to comment on the possibility of using Entry/Exit Surrogate method like that used to estimate jurisdictional usage for Feature Group A and Feature Group B services. (para.11) (emphasis added)

Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order 3 FCC Rcd 2631 (1988):

Even though in 1987 the intention was to remove the ESP exemption, because regulatory and judicial events made it an unusually volatile period for the enhanced service industry, the Commission decided to not eliminate the exemption from interstate access charges for enhanced service providers at that time. " [A]ny discrimination that exists by reason of the exemption remains a reasonable one so long as enhanced services industry remains in the current state of change and uncertainty." (para.1)

Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rule Making, 4 FCC Rcd 3983 (1989):

The Commission analyzed the impact of allowing the existing exemption of enhanced service providers from interstate access charges to remain. The analysis discussed the impact on the jurisdictional allocation of costs to interstate that result from not measuring the use of local exchange facilities for accessing ESP services.

In its analysis, the Commission states that the "...present treatment of the interstate traffic of ESPs appears to be providing significant benefits to ESPs while minimizing disruption of state policies." (para. 33) (emphasis added)

"Maintaining the current exemption arguably places some burden on ordinary interstate ratepayers since ESP customers do not contribute to the interstate share of local exchange NTS costs to the same extent that customers of other interstate services do....[W]hile the

present ESP exemption affects the NTS charges paid by other access customers, it does not seem to have a substantial effect on TS charges. Unlike NTS costs, which are separated between the interstate and intrastate jurisdictions on the basis of a flat-rate allocator, TS costs are separated on the basis of relative usage. ESP traffic over local business lines is classified as local traffic for separations purposes, with the result that TS costs associated with ESP traffic are apportioned to the intrastate jurisdiction, and are recovered through intrastate charges paid by ESPs and other purchasers of intrastate services. Thus, assuming there is an approximate match between interstate TS costs and rates, the present ESP exemption would not seem to have a significant impact on interstate TS access charges." (para. 34) (emphasis added)[1]

"As stated *supra*, para. 34, traffic over 'local' business lines is treated as intrastate for purposes of separating local exchange TS costs. A reclassification of ESP traffic would therefore increase the interstate revenue requirement for TS access elements." (n. 84) (emphasis added)

The Commission's analysis in Paragraph 34, above, also demonstrated the outcome when it becomes difficult to measure the jurisdiction of traffic transported over the local exchange network to a local business line purchased by an ESP. The measurement difficulty is the result of decisions to allow the ESP to use the LEC network to provide a very traffic intensive service at a flat-rate charge and be exempt from access charges. Like Feature Group A traffic, calls that use local exchange facilities to access an enhanced service providers facility appear to be local and, if not identified and jurisdictionally reclassified, this residual traffic will cause additional TS costs to be apportioned to the intrastate jurisdiction for recovery through charges for intrastate services.

In discussing jurisdictional measurements, the Commission stated that for "...FGA and FGB access arrangements, LECs generally lack the technical ability to identify and measure jurisdictional usage. The users of FGA and FGB...generally supply this

[1] A February 4, 1998 letter addressed to Mr. Moran of the FCC from the Association for Local Telecommunications Services (ALTS) incorrectly characterized a sentence in Paragraph 34, above, as the Commission's "long recognized" determination that ESP traffic over local business lines was intrastate local service. ALTS took the sentence out of context, as clearly demonstrated by a more complete reading of the Commission's document. In fact, ALTS' characterization is contrary to prior and subsequent determinations of the Commission. Considering the balance of the FCC document referred to by ALTS shows that the Commission was merely analyzing the impact of the interstate access charge exemption on interstate traffic sensitive access charges, and noting that until measurement procedures were in place, the ESP usage would be incorrectly assigned by separations measurement procedures to local. (see *MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 682 (1983), para. 82*)

information by reporting the percentage of interstate use (PIU) of their traffic.... The *Federal-State Joint Board in CC Docket No. 85-124* recently recommended that the Entry/Exit Surrogate (EES) method be used to determine the originating location of a call for purposes of computing a PIU for FGA and FGB traffic. ESPs that purchase FGA and FGB connections in lieu of local business lines, apparently provide LECs with PIUs." (para. 27)

"Under the EES method of jurisdictional determination, calls that enter an IXC network in the same state as that in which the called station is located are deemed to be intrastate, and calls that terminate in a different state from their IXC point of entry are considered interstate." (n. 65)

The jurisdictional measurement of ESP traffic is difficult. The Commission recognized..."that jurisdictional measurement of enhanced service traffic may present particular difficulties. ESPs may not always be able to discern the ultimate destination of a call (for example, when traffic is transmitted from one packet network to another) and there may be questions concerning whether a single call can have both interstate and intrastate components (for example, when a computer user during a single session interacts sequentially with a number of data bases in different states). Nevertheless, we think the EES method, perhaps with some reasonable accommodations for special circumstances presented by certain types of enhanced traffic, should be workable for ESPs." (n. 67) (emphasis added)

III. Internet Service Provider Traffic As Interstate Traffic

Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended, 11 FCC Rcd 21905 (1996):

The Internet is an "interconnected global network of thousands of interoperable packet-switched networks" by which the ISP "connects the end-user to an Internet backbone provider that carries traffic to and from other Internet host sites." (n. 291)

MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 682 (1983):

"Among the variety of users of access service are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, enhanced service provides, and other private line and WATS customers, large and small, who 'leak' traffic into the exchange. In each case the user obtains local exchange services or facilities which transit its location and, commonly, another location in the exchange area. At its own location the user connects the local exchange call to another service or facility over which the call is carried out of state... A facilities-based carrier, reseller or enhanced service provider might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities to access its customers." (para. 78) (emphasis added)

Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers, 11 FCC Rcd. 21354 (1996):

The Commission makes reference to: "interstate information service providers, such as Internet service providers." (para. 19) (emphasis added)

"Usage of interstate information services, and in particular the Internet and other interactive computer network, has increased dramatically in recent years." (para. 282) (emphasis added)

"[A]lthough enhanced service providers (ESPs) may use incumbent LEC facilities to originate and terminate interstate calls, ESPs should not be required to pay interstate access charges." (para. 284) (emphasis added)

While continuing the enhanced services exemption from interstate access charges, the Commission has been concerned about the impact on the PSTN because "...virtually all residential users today connect to the Internet...through incumbent LEC switching facilities designed for circuit-switched voice calls. The end-to-end dedicated channels created by circuit switches are unnecessary and even inefficient when used to connect an end user to an ISP. We seek comment on how our rules can most effectively create incentives for the deployment of services and facilities to allow more efficient transport of data traffic to and from end users." (para. 313)

There has been concern about the ability to measure Internet communications, end-to-end. In 1996, the Commission sought... "comment on jurisdictional, metering, and billing questions, given the difficulty of applying jurisdictional divisions or time-sensitive rates to packet-switched networks such as the Internet." (para. 315)

Digital Tornado: The Internet and Telecommunications Policy, FCC Office of Plans and Policy, OPP Working Paper Series 29 (March 1997):

"[I]t would be difficult to claim that the Internet does not, at some level, involve interstate communications." (page 29) (emphasis added)

CONCLUSION: Access to the Internet is predominately interstate traffic over which the Commission has jurisdiction. Any conclusion that Internet service is understood by the FCC to be "local" is contrary to this Commission's view dating back to 1983. In orders dealing with whether ESPs should pay the same kind of access charges that other interstate carriers pay for using the local carrier's network to originate and terminate calls, the FCC has made it clear that communications involving enhanced services is

interstate in nature, not local. The Commission has methodically proceeded to address the application of access charges, i.e. MTS/WATS, ENFIA, Private Network surcharge, telex data, and resellers of WATS/MTS. The Commission has always recognized that ESPs use local exchange facilities for interstate access. During a transition period, ESPs have been exempted from access charges. The Commission intended no discrimination or undue preference in rates for entities using local exchange facilities for access to enhanced services. The ESPs have been exempted from access charges, not because they were local providers outside FCC's jurisdiction, but rather as a matter of policy to protect new businesses from rate shock during a vulnerable start-up time. The FCC has repeatedly held that the jurisdiction of communications are evaluated on an end-to-end basis. The end-users do not make separate communication to the ISP and then to the ultimate Internet site they seek access. The Internet user is merely using the Internet as a means of transmitting data or voice to a distant site, just as the end-user can use a circuit-switched long distance service to reach a final destination. In both cases, the end-user requires the intermediate service provider (ISP or IXC) to complete the connection to the customer's desired destination. In neither case does the end-user's communication terminate at the intermediate service provider.

The FCC order cited by ALTS is not contrary to the FCC decisions that Internet service is not local. The FCC order dealt not with whether ESP traffic should be treated as local or interstate, but rather with the impact on interstate traffic sensitive access charges caused by the ESP access charge exemption. The FCC has been consistent in decisions treating Internet as interstate and in decisions that the jurisdictional nature of a call is based on its ultimate origination and termination, and not its intermediate routing. It is appropriate that Internet usage be assigned to interstate.