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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
CC Docket #96-98
~~CCB/CPD 97-30~~

In the Matter of)
)
Request By ALTS for Clarification) CCB/CPD 97-30
of the Commission's Rules Regarding)
Reciprocal Compensation For Information)
Service Provider Traffic)

**REPLY COMMENTS OF THE
NATIONAL CABLE TELEVISION ASSOCIATION**

The National Cable Television Association, Inc. ("NCTA") hereby files its reply to comments on the Petition of the Association for Local Telecommunications Service ("ALTS") for expedited clarification of the Commission's Rules regarding the rights of a competitive local exchange carrier ("CLEC") to receive reciprocal compensation pursuant to section 251(b)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"), for the transport and termination of traffic to CLEC subscribers that are information service providers ("ISPs").¹

NCTA is the principal trade association of the cable television industry in the United States, representing cable operators serving over 80 percent of the Nation's cable television households and more than 100 cable programming networks. Cable operators and their affiliates are currently offering both local exchange and competitive access services, and, as facilities-based providers of competitive telecommunications services, NCTA's members have a vital

¹ See "Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic," Public Notice, CCB/CPD 97-30, released July 2, 1997, and Order, CCB/CPD 97-30, released, July 22, 1997 (extending reply comment deadline).

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interest in assuring that the mandate of the 1996 Act is fulfilled. As a result, NCTA urges the Commission to grant the ALTS Petition.

INTRODUCTION

Section 251(b)(5) of the Communications Act requires all local exchange carriers (“LECs”) “to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” In its Local Competition Order,² the Commission adopted Section 51.701(a) of its Rules (since vacated) which limited this obligation to “local telecommunications traffic.” Section 51.701(b)(1), also vacated, defined “local telecommunications traffic” as traffic that “originates and terminates within a local service area established by the state commission” in cases involving the exchange of traffic between LECs and non-CMRS providers. Finally, the Local Competition Order specifically concluded that “interexchange traffic” is excluded from the scope of reciprocal compensation arrangements.³

In its Petition, ALTS requested clarification that, where local calls to information service providers are exchanged between incumbent local exchange carriers (“ILECs”) and CLECs, nothing in the Local Competition Order requires that such information service traffic be treated differently from other local traffic, for purposes of reciprocal compensation agreements. The ALTS Petition was prompted because some ILECs had refused to treat calls to ISPs as “local” for purposes of reciprocal compensation, arguing that they were “overwhelmingly interexchange, not local” and therefore subject to the “interexchange” exclusion cited above.⁴

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, released August 8, 1996 vacated in part, Iowa Utilities Board v. FCC, Case No. 96-3321(8th Cir., July 18, 1997).

³ Id. at ¶ 1034

⁴ ALTS Petition at 4.

The comments filed in the initial round of this proceeding demonstrate without question that the ALTS Petition must be granted. The comments overwhelmingly support the ALTS view that, whatever the current status of the relevant portions of the Local Competition Order, the passages relied upon by the ILECs are irrelevant to reciprocal compensation. Moreover, they demonstrate that, as a matter of sound policy, as well as of law, traffic terminating at ISPs should be subject to a LEC's reciprocal compensation obligations. The arguments of the lone dissenters -- three ILECs and the local telephone trade association⁵ -- are without merit.

I. AS A MATTER OF LAW, THE ILEC ARGUMENTS ARE WITHOUT MERIT

As ALTS observed in its Petition, “[t]he Local Competition Order’s exclusion of interexchange traffic from reciprocal compensation arrangements is grounded on the need to prevent disruptions in access charge revenues, and the need to protect state authority over local calling areas, neither of which is implicated by local calls to ISPs.”⁶ This view is shared by ISPs⁷, interexchange carriers⁸, competitive LECs⁹ and CMRS providers.¹⁰ Even the New York State Department of Public Service, which urges the Commission to refrain from asserting jurisdiction over “this matter of local telecommunications traffic,” agrees with ALTS that

⁵ Comments of the Southern New England Telephone Company; Comments of Cincinnati Bell Telephone Company; Ameritech Comments; Comments of the United States Telephone Association and its Member Companies.

⁶ Id.

⁷ See, e.g., AOL at 7-10; CompuServe at 4;

⁸ See, e.g., AT&T at 3; MCI at 2-3; Sprint at 3-4.

⁹ See, e.g., Hyperion at 3-5, KMC Telecom at 4-5, GST Telecom at 2; Brooks Fiber at 5.

¹⁰ See, e.g., AirTouch at 3-4.

“neither the Act nor the [Local Competition] Order changed the long-standing rules regarding reciprocal compensation for the exchange of local traffic.”¹¹

The majority of the commenters also agree that the ILECs’ “argument that local calls to ISPs are ‘overwhelmingly interexchange’ deliberately confuses calls that are ‘interexchange’ for the purpose of the Commission’s jurisdiction, with the entirely distinct category of calls that are ‘interexchange’ for the purpose of paying Part 69 access charges.”¹² As Brooks Fiber explains:

The weakness of the ILEC’s position is underscored by the irrelevance of the authorities they cite in support of their position. The ILECs cite no case or regulation suggesting that a completed local call to an ISP facility is transformed into an interexchange call when the ISP connects the caller with a distant data facility. (In fact, this Commission expressly has found that there is not such transformation.) Instead, the ILECs cite two cases asserting the familiar principle that the FCC may regulate an intrastate facility or service to the extent that it is used to provide an interstate service. The ILECs then assert that these cases stand for the principle that “[i]t is the ultimate destination that must be used to jurisdictionalize a call.” Unfortunately, the ILECs simply ignore the fact that the issue presented by reciprocal compensation under the 1996 Act -- i.e., whether a call is local or interexchange -- is entirely separate from the question of distinguishing state from federal jurisdiction.¹³

As a factual matter, the commenters also demonstrate that, while the “traffic” which runs from the end user consumer to the ultimate Internet site may be “interstate,” it is the “call” from the individual end user to the ISP point of presence which should determine whether that call is “local” for reciprocal compensation purposes. And, in most cases, such calls are generally in the

¹¹ Comments of the New York State Department of Public Service at 2. As WorldCom points out in its comments(at 11), at least five state regulatory agencies have rejected the ILEC argument that ISP traffic should be excluded from reciprocal compensation arrangements. See also, Teleport at 5-7, Brooks Fiber at 5-6, KMC at 7 and US Xchange at 7-8 (all citing state rejection of ILEC argument).

¹² ALTS Petition at 5. See e.g., CompuServe at 4-5; Adelphia at 20-23.

¹³ Brooks Fiber at 6-7 (emphasis in original; footnotes omitted).

same landline local calling area.¹⁴ The call placed to an ISP by an end user in the same local landline calling area “terminates” when it is answered by the ISP in that same local calling area and should be subject to the same reciprocal compensation obligations as are other local calls. In this scenario, the call to the ISP is separate and distinct from the ISP’s provision of access to information services on the Internet’s packet-switched network.¹⁵

The commenters also raise other persuasive objections to the ILECs’ claims that local calls to ISPs are “interexchange” calls for purposes of reciprocal compensation. As one commenter put it, if the ILEC contentions were correct,

then several things would be true that demonstrably are not true today. Local calls to ISPs would be tariffed and billed as interexchange calls, and ISPs would pay access charges to LECs for handling those calls. The ILECs themselves would not continue to define local calls handled jointly with adjacent ILECs as “local” in their interconnection agreements with those companies. And finally, if local calls to ISPs were in fact interexchange calls, then local calls to the BOCs’ ISP services would be unlawful, in-region interexchange services offered in defiance of the 1996 Act. None of these things is true today because the state commissions, the FCC and the ILECs themselves know that these calls are local and treat them accordingly.¹⁶

II. THE ILEC CLAIMS MUST BE REJECTED AS A MATTER OF SOUND POLICY

Even if the correct answer to the legal question regarding the status of ISP calls for purposes of reciprocal compensation was in doubt (which it is not), sound public policy reasons dictate subjecting ISP calls to the reciprocal compensation provisions of the 1996 Act. First, such a conclusion is consistent with the pro-competitive goals of the 1996 Act and the Commission’s orders in the Local Competition and Access Charge proceedings. Failure to require reciprocal compensation for ISP calls would be contrary to the efforts of the Congress

¹⁴ See Comments of Adelphia at 20-21; WorldCom at 6-8; Teleport at 4-5; ACC at 6, Focal Communications at 5-6, US Xchange at 4; RCN at 3; Cox at 9.

¹⁵ See RCN Comments at 5-6.

¹⁶ Brooks Fiber Comments at 7.

and the Commission to replicate, to the greatest extent possible, the conditions of a competitive market. If the ILEC position were correct, LECs who terminate calls at an ISP would not be compensated for the costs of so doing, thereby reducing the incentive for CLECs to compete for ISP business.¹⁷

Moreover, if CLECs are not compensated by ILECs for terminating calls to ISPs, the costs to both CLECs and ISPs will inevitably increase at the same time that ILECs are competing with CLECs for ISP traffic and with ISPs for Internet access customers. The inevitable result will be to stunt the growth of advanced services, contrary to the goals of the 1996 Act.¹⁸

Finally, given the manner in which ILECs treat ISP calls for their own purposes, the differing treatment they seek to accord CLECs constitutes unlawful discrimination¹⁹ and anticompetitive conduct which should not be tolerated. As other commenters point out, (1) Bell Atlantic has taken the position in other proceedings that calls terminated to ISPs constitute local traffic for which compensation is required²⁰ and that its own Internet access service plan suggests that a call to an ISP premises is a local call provided under local tariff²¹; (2) ISP traffic is not excluded from reciprocal compensation arrangements in Interconnection Agreements between adjacent LECs²²; (3) LEC ISP customers access the public switched network under the LECs'

¹⁷ See e.g., AOL Comments at 10.

¹⁸ Id. at 14-16. See also, Cox at 5-7, Teleport at 9-10, RCN at 9-10, Adelphia at 6-11, Brooks Fiber at 4, Focal at 8-9, KMC at 9-10, US Xchange at 9-10, ACC at 6, CompuServe at 5; AT&T at 4-5, MCI at 5-6, WorldCom at 12-13, Intermedia at 5-6.

¹⁹ See e.g., AOL at 11-13, AT&T at 4, MCI at 4-5, Sprint at 4, WorldCom at 10, Teleport at 7, Cox at 10.

²⁰ Cox at 3-4.

²¹ Id. at 4; Teleport at 7; WorldCom at 10.

²² MCI at 4-5, Sprint at 4, Business Telecom at 3-4.

local business tariffs²³; and (4) LECs classify their own business line revenues, expenses and investment arising out of ISP traffic as local for purposes of interstate separations.²⁴

For these reasons as well, the Commission should grant the ALTS Petition.

III. THE IOWA UTILITIES BOARD DECISION HAS NO BEARING ON THE ALTS PETITION

The Commission extended the time for filing reply comments in this proceeding in light of the decision of the United States Court of Appeals for the Eighth Circuit in the Iowa Utilities Board case vacating a number of FCC rules adopted to implement the local competition provisions of the 1996 Act. Since the court's decision rested in large part on a holding that the Commission did not have jurisdiction over many of the local competition provisions of the 1996 Act, including that calling for reciprocal compensation, the Commission asked for comment on the "impact" of the decision on this proceeding. As discussed below, given the nature of the ALTS request, the impact is minimal.

At the outset, it should be noted that the ALTS Petition asks the Commission to clarify that nothing in the Local Competition Order "altered the Commission's long standing rule that calls to an [ISP] made within a local calling area must be treated as local calls by any and all LECs involved in carrying those calls."²⁵ To the extent that the ILECs exclude ISP traffic from reciprocal compensation based upon that Order, the Court's decision to vacate major parts of the Order only weakens the ILECs' argument. In the absence of the Local Competition Order, the sole authority addressing the status of ISP calls is what ALTS has correctly termed the FCC's "long standing rule," and that rule treats these calls as "local."

²³ Teleport at 7, Cox at 10, AT&T at 4.

²⁴ AT&T at 4, WorldCom at 10, ACC at 5.

²⁵ ALTS Petition at 1.

Some might argue that, since the court held that implementation of the reciprocal compensation provisions of the 1996 Act is within the sole jurisdiction of the states, and because it vacated the rules the FCC adopted to implement those provisions, the FCC has no authority to act on the ALTS Petition. That argument has superficial appeal, but it is wrong.

The ALTS Petition does not involve the rates for reciprocal compensation - an issue the court held rests with the states. Nor does the Petition raise questions about the terms of particular interconnection agreements that call for compensation for local calls to ISPs -- a matter for dispute resolution under the terms of the 1996 Act. The FCC's jurisdiction over the ALTS Petition derives from the Commission's undisputed authority to establish rules applicable to interstate exchange access and enhanced service providers, not from the local competition provisions of the 1996 Act.

The FCC's determination that ISP traffic is "local" should be viewed as a determination that it is "not exchange access." ISP traffic should be deemed local because transport of that traffic is not exchange access, a determination that the FCC has the authority to make. Under well-established Commission precedent, decided well before the 1996 Act was passed and which was not affected by the Act, the Commission has sole jurisdiction over enhanced services such as those involving ISP traffic.²⁶ For more than 10 years, the FCC has exercised its jurisdiction over exchange access to exempt enhanced service providers, including ISPs, from the payment of access charges.²⁷ Instead, the Commission required that all calls to ISPs originating within a local calling area be charged pursuant to local tariffs.

²⁶ See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) aff'd, Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

²⁷ See MTS and WATS Market Structure, 97 FCC 2d 682, 711-22 (1983); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, n. 8

The determination that the transport of this traffic is not exchange access but is "local" is a logical extension of long-standing policy and is within the FCC's unchallenged authority over interstate access. It does not rest on the validity or vel non of FCC of jurisdiction over the local competition provisions of the 1996 Act.

In sum, to grant the ALTS Petition, the Commission need not assert any jurisdiction that the Eighth Circuit held it does not have; rather it only need clarify -- under its long-standing authority over exchange access and enhanced service provider traffic -- that what ALTS calls the FCC's "ISP rule" applies to the exchange between all LECs, including between ILECs and CLECs, of local calls to ISPs.

CONCLUSION

For the reasons stated above, the Commission should grant the ALTS Petition and hold that calls terminating at ISPs are local calls for the purpose of reciprocal compensation obligations of LECs.

Respectfully submitted,



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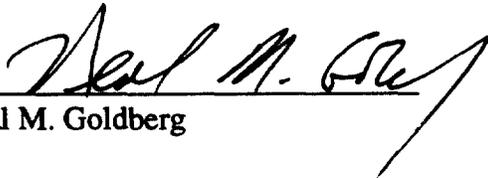
CERTIFICATE OF SERVICE

I, Neal M. Goldberg, do hereby certify that on this 31st day of July 1997, have served the foregoing "Reply Comments of the National Cable Television Association," by messenger.

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