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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket #96-98
[redacted]

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

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

REPLY COMMENTS OF WORLDCOM, INC.

WorldCom, Inc. ("WorldCom"), by its undersigned counsel, submits these reply comments in support of the request by the Association for Local Telecommunications Services ("ALTS")[1] for clarification that nothing in the Commission's *Local Competition Order*[2] requires local telephone calls to Internet service providers (ISPs) to be treated differently than other local traffic under the current regulatory framework regarding reciprocal compensation for the transport and termination of telecommunications. Only certain ILECs oppose the ALTS request, and their arguments are based primarily on a fallacious and clearly inappropriate interpretation of the ESP exemption[3] that would treat a local telephone call that is answered locally by an end user as an interstate telecommunications service.[4] The position asserted by the Commenting ILECs is inconsistent with

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[1] Letter dated June 20, 1997 from Richard Metzger, ALTS, to Regina M. Keeney, Chief, Common Carrier Bureau, Federal Communications Commission ("ALTS letter").

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. Aug. 8, 1996) ("*Local Competition Order*").

[3] *MTS and WATS Market Structure*, Memorandum Opinion and Order, Docket No. 78-72, 97 FCC 2d 682, 711-22. *See also, Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, CC Docket No. 87-25, 3 FCC Rcd 2631 (1988).

[4] Ameritech Comments, Comments of Cincinnati Bell Telephone Company, Comments of the Southern New England Telephone Company, Comments of the United States Telephone

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the language of the Communications Act of 1934, as amended by the 1996 Act ("the Act"), is inconsistent with both longstanding and recent FCC interpretations of the Act, and would create a clearly unintended regulatory gap regarding intercarrier compensation for transport and termination of those calls to ISPs.

The ALTS request is driven by certain ILECs' unilateral action to abrogate their obligations under negotiated or arbitrated interconnection agreements.[5] The ILECs' action prompting ALTS' request is designed to foreclose a growing segment of traffic from CLEC competition. Rather than address the issues by competing in the marketplace with CLECs, the ILECs have apparently decided to utilize their continued monopoly power to simply foreclose the possibility of such competition.[6]

In their comments in this proceeding, the ILECs attempt to divert attention from the anticompetitive purpose and effect of their actions by focusing exclusively on an issue which is not even involved in the ALTS request. The ILECs attempt to wrap their actions in a jurisdictional dissertation on the regulatory status of the Internet. The Commission has ongoing proceedings which address issues related to possible regulation of the Internet.[7] Those proceedings are just that -- ongoing. The Commission should not be distracted by the ILECs misguided attempts to obfuscate

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Association and Member Companies ("Commenting ILECs").

[5] As the Eighth Circuit noted in its recent opinion, unless a state commission fails to act, these contracts will be enforced either by state commissions or the courts, not the FCC. Iowa Utils. Bd. v. Federal Communications Comm'n, Nos. 96-3321 et al. slip op. at 123 (8th Cir. July 18, 1997).

[6] This fact was recognized by the ISPs filing comments in this proceeding. *See* Comments of America Online, Inc., at 4-5, 14-16; Comments of the Commercial Internet eXchange Association, at 1-2; Comments of Compuserve Incorporated, at 3-6.

[7] *Usage of the Public Switched Network by Information Service and Internet Access Providers,* CC Docket No. 96-263, Notice of Inquiry (rel. Dec. 24, 1996) ("*Internet NOI*").

the issue presented by ALTS. Rather, the Commission should clarify that to date it has done *nothing* to change the existing regulatory characterization of the calls by an end user to reach an Internet provider. Calls originated and terminated within the same state defined local calling area are local calls by any current definition of that term.

The current regulatory framework is provided by the Act. While Section 251(b)(5) of the Act requires local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications," it does not expressly limit this obligation or exclude any particular category of traffic.[8] Section 251(g), however, requires continued enforcement of the existing access charge regime, which provides for an alternative system of compensation for the transport and termination of telecommunications carried by two or more carriers.[9] Reading the two sections in relation to each other, it is clear that the reciprocal compensation provision of Section 251(b) was intended to provide compensation for the transport and termination of local traffic carried by two or more carriers -- that is, traffic to which compensation is not already addressed by access charges.

This is the same conclusion reached by the FCC in its *Local Competition Order*. The FCC explained that the existing regulatory regime, in which interstate and intrastate interexchange traffic was subject to access charges, was to be maintained pursuant to Section 251(g) of the Act.[10] Traffic not subject to access charges, i.e., traffic that originates or terminates within a local calling area

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[8] 47 U.S.C. § 251(b)(5).

[9] 47 U.S.C. § 251(g).

[10] *Local Competition Order*, ¶ 1034.

established by the state, would be subject to reciprocal compensation obligations.[11] The simple logic drawn from the Act was that access charges and reciprocal compensation were intended to dovetail to cover all types of traffic carried by two or more carriers; such traffic was to be treated either through reciprocal compensation or access charges, and no traffic was to incur both types of treatment. Thus, the FCC clearly established that, under the Act, the termination of traffic carried by two or more carriers not otherwise subject to access charges would be subject to reciprocal compensation.

At the same time, the FCC said nothing that differentiated traffic based on whether it terminated to any particular category of end users of telecommunications services, including ISPs. Indeed, none of the Commenters have identified language in the *Local Competition Order* that exempts local exchange traffic from reciprocal compensation obligations based upon the identity of either the calling or the called party. In short, the *Local Competition Order* did not alter in any way the existing regulatory framework for the treatment of local traffic delivered to ISPs. As a result, like all other local traffic, the transport and termination of such local traffic to ISPs requires the payment of reciprocal compensation under the clear terms of the Act.

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[11] *Id.*, ¶¶ 1034- 1035.

This regulatory framework has been accepted and adopted by the states[12], competitive local exchange carriers, and incumbent local exchange carriers. Under this system, which is reflected in interconnection agreements approved by state commissions and local exchange tariffs filed by local exchange carriers, ISPs purchase local exchange service[13] so that their customers may utilize an ISP's services merely by dialing a local telephone number. The local call is answered by the ISP, and the ISP's customer (the calling party) is then able to request information which the ISP may retrieve from numerous sources including the Internet. These are the simple mechanics of traffic from end users to ISPs, and they are employed by CLECs and ILECs alike. There is no question that ILECs provide local exchange service to their own ISP customers[14] or that they consider this traffic

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[12] Since the initial comments, the NYPSC issued an order affirming Staff's position by ordering New York Telephone and Rochester Telephone to continue paying reciprocal compensation pending further investigation. *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic,* Case 97-C-1275 *et al.*, Order Denying Petition and Instituting Proceeding, at 4 (July 17, 1997). The Colorado Public Utilities Commission affirmed its rejection of US West's efforts to exclude ISP traffic from reciprocal compensation by rejecting such a provision in a proposed US West tariff. *The Investigation and Suspension of Tariff Sheets Filed by U S West Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services,* Docket No. 96A-331T, Commission Order, at 8 (Colo. P.U.C. July 16, 1997). And in MFS' complaint proceeding against Bell Atlantic, the Staff of the Maryland Public Service Commission recommended that the Commission order Bell Atlantic to continue paying reciprocal compensation to MFS for traffic terminated to ISPs. *MFS Intelenet of Maryland, Inc.*, TE-2126, TE-2216, Comments of the Telecommunications Division, at 3 (July 15, 1997). Copies of these decisions are attached.

[13] The right of ISPs, as end users, to use local exchange service for the provision of their information service offering has been reaffirmed as recently as May 16, 1997. *In the Matter of Access Charge Reform,* First Report and Order, CC Docket No. 96-262 (rel. May 16, 1997), paras. 342, 348 ("*Access Charge Reform Order*").

[14] *See* Comments of CompuServe Incorporated at 2, 6.

to be intrastate for the purposes of separations. Neither CLECs nor ILECs have special requirements for terminating local exchange service based upon the identity of the customer using the service.

Despite this regulatory and operational history, the commenting ILECs have now taken the position that they should not pay reciprocal compensation to competing LECs when the competing LEC provides transport and termination for local calls originated by an ILEC end user and destined for an ISP served by a CLEC. They have withheld or threatened to withhold payment of such reciprocal compensation in a unilateral effort to change the existing system. By withholding the payment of reciprocal compensation for local traffic that resembles all other local traffic -- but for the newly minted argument seeking excuse from their obligations based upon an unfounded interpretation of the ESP exemption[15] -- the ILECs have unilaterally hammered a hole in the otherwise gapless structure for the compensation for transport and termination of traffic carried by two or more carriers created by sections 251(b)(5) and 251(g). Adoption of the ILEC position would have the wholly unintended and unsupportable result of creating, under existing regulations, a class of calls for which a competing carrier would not be compensated for its transport and termination of traffic. This result is in clear violation of the Act.[16] The Commission must reject the reactionary attempt by the ILECs to create a class of subscribers that are subject to disparate treatment in the

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[15] The commenting ILECs assert that the ESP access charge exemption somehow resolves the question of the jurisdictional treatment of discrete telephone services employed by ESPs in producing their information services. They are wrong. In the *Computer II* decision, the Commission decided ESPs are end users and not common carriers subject to Title II regulations. *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, Docket No. 20828 (rel. May 2, 1980), at para. 119. 47 C.F.R. § 64.702(a). The extent of the Commission's Title I or Title II authority over the Internet is central to the Commission's *Internet NOI*.

[16] 47 U.S.C. §§ 201, 202, 252(d)(2)(A).

provision of local exchange services, and must not create a class of telecommunications traffic carried by two or more carriers that goes uncompensated.

Not only would the ILECs position create a regulatory chasm, it ignores the fact that the FCC has specifically decided that the existing regulatory environment with respect to the calls at issue - local calls to reach an ISP - should *not* be changed without the development of a more thorough record. In its *Access Charge Reform Order*, the Commission considered the arguments asserted by the ILECs that they were under compensated under the current system and decided that their arguments were without merit sufficient to impose an alternative regulatory regime.[17] Moreover, consistent with its view that the calls at issue are local, the Commission advised the LECs to address their concerns with under compensation to state commissions.[18]

The FCC decided to consider the general implications of usage of the public switched telecommunications network for obtaining connections to the Internet in its ongoing *Internet NOI*. Until such time as the FCC determines there is a need for a change to the existing regulatory framework through normal agency notice and rulemaking procedure, the current regulatory system is to remain in place. To answer the question presented by ALTS, this means that the Commission should make clear that nothing in the Commission's *Local Competition Order* was intended to alter the existing regulatory regime that subjects all traffic carried by more than one carrier to either

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[17] *Access Charge Reform Order*, paras. 346-347. The Commission rejected outright the ILECs proposal to apply access charges, designed for basic voice telephony over a circuit-switched network, to ISPs. *Access Charge Reform Order*, para. 348. The Commission determined that comparisons of ISPs to interexchange carriers regarding the use of the public switched network were not appropriate either. *Id.*, para. 345.

[18] *Id.*, para. 346.

access charges or reciprocal compensation, and that local exchange traffic, including the traffic at issue here, is subject to reciprocal compensation.

The ALTS request is largely unaffected by the decision of the United States Court of Appeals for the Eighth Circuit, Iowa Utilities Board v. Federal Communications Commission, Nos. 96-3321 et al. slip op. (8th Cir. July 18, 1997), that was rendered after the opening comments in this matter were filed. That decision vacated a number of the Commission's rules implementing the local competition elements of the Telecommunications Act of 1996 on the grounds that the Commission exceeded its jurisdiction with respect to pricing intrastate telecommunications services. Although the FCC rule[19] cited by the Commission in its request for comments in this proceeding was vacated by the Eighth Circuit, WorldCom's initial comments were based on arguments not affected by the Eighth Circuit opinion. In particular, in its initial comments, WorldCom argued, *inter alia*, that the *Universal Service Order*, the *Access Charge Reform Order*, and the *Non-Accounting Safeguards Order* illustrate that the Commission has already decided that the local call to the ISP is a separate transmission that is distinguishable from any subsequent information service provided by the ISP.[20] The FCC's rejection of the ILEC allegations of under compensation in its *Access Charge Reform Order* provides even further support for this argument. In all of those recent decisions under the

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[19] 47 C.F.R. § 51.701.

[20] Comments of WorldCom, Inc., at 8-9; *Universal Service Order*, paras. 83, 788-789 ("When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, the connection is a telecommunications service and distinguishable from the Internet service provider's service offering."); *Access Charge Reform Order*, paras. 344-348, n.502; *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*"), para. 120.

1996 Act, the Commission recognized the severability of the local telecommunications service used to reach the ISP from the subsequent Internet information service. The authority of the Commission to make these determinations under the Act is not affected by the Eighth Circuit decision and, therefore, this matter may be decided in favor of ALTS without implicating that decision.

Finally, contrary to the ILEC comments, a ruling in favor of ALTS would in no way cede the authority of the Commission over the Internet. At issue here is whether the Commission intended, in its *Local Competition Order,* to alter the existing regulatory regime whereby ISPs obtain local exchange service from LECs and competing LECs are compensated for the transport and termination of each other's local exchange traffic. The clear answer is that the Commission intended no such revision. The Commission has made clear in the *Internet NOI* and the *Access Charge Reform Order* that any inquiry into the usage of the public switched telecommunications network by ISPs will be addressed in other proceedings.

Thus, the ALTS request should be granted, and the FCC should declare that nothing in its *Local Competition Order* was intended or requires traffic to ISPs that purchase local exchange

service from CLECs to be treated differently than other local traffic for the purposes of calculating reciprocal compensation for the transport and termination of telecommunications.

Respectfully submitted,

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Dated: July 31, 1997

199165.1

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on June 10, 1997

COMMISSIONERS PRESENT:

John F. O'Mara, Chairman
Eugene W. Zeltmann
Thomas J. Dunleavy
Maureen O. Helmer

CASE 97-C-1275 - Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic.

CASE 93-C-0033 - Petition of Rochester Telephone Corp. for Approval of a New Multiyear Rate Stability Agreement.

CASE 93-C-0103 - Petition of Rochester Telephone Corp. for Approval of a Proposed Restructuring Plan.

CASE 97-C-0895 - Complaint of MFS Intelenet of New York, Inc. Against New York Telephone Company Concerning Alleged Breach of Interconnection Terms.

CASE 97-C-0918 - Complaint of ACC National Telecom Corp. Against New York Telephone Company Concerning Alleged Breach of the Terms of its P.S.C. Tariff No. 914.

CASE 97-C-0979 - Complaint of Cablevision Lightpath, Inc. Against New York Telephone Company Concerning Alleged Intention to Deny Reciprocal Compensation Payments for Certain Local Traffic.

ORDER DENYING PETITION AND INSTITUTING PROCEEDING

(Issued and Effective July 17, 1997)

BY THE COMMISSION:

In May 1997, Rochester Telephone Corp. (RTC) filed a petition to exclude internet traffic from the reciprocal compensation arrangement contained in RTC's Open Market Plan (OMP) until the Commission concludes its examination of

intrastate access charges in Cases 94-C-0095 and 28425[1] (the access charge proceeding) and sets rates for network elements in Case 95-C-0657[2] (the network elements proceeding). Under the terms of the OMP, competing local exchange providers in the Rochester market pay each other $.0221 per minute for terminating local traffic. RTC petitioned to set the rate at zero for local traffic routed to internet providers pending completion of these cases. In support of its petition, RTC alleges that this structure creates a perverse revenue incentive for new market entrants to attract large volumes of inbound local traffic originating from the incumbent carrier rather than generating revenue by providing an array of services to customers. RTC further alleges that this situation has caused network blockage and required RTC to incur significant costs to upgrade its network to avert further blockages.

In addition, New York Telephone Company (NYT) recently took unilateral action to attempt to exclude internet traffic from the reciprocal compensation arrangements contained in its tariff(s) and in its interconnection agreements with other competitive local exchange companies. In April 1997, NYT sent letters to all of the competitive local exchange carriers with whom it exchanges traffic, notifying the carriers that it would not pay terminating access for traffic delivered to internet service providers retroactive to February 1997. NYT's justification for the exclusion of internet traffic was that such traffic was interstate in nature, and therefore not eligible for reciprocal compensation.

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[1]Cases 94-C-0095 and 28425 - Access Charges and Universal Service.

[2]Cases 95-C-0657, 94-C-0095, and 91-C-1174 - Network Elements and Resale Service.

Several parties subsequently filed complaints or sent letters[1] alleging that NYT's action was a breach of the terms of NYT's P.S.C. No. 914 tariff and/or individual interconnection agreements. By a letter from the Acting Director of the Communications Division, NYT was advised that its unilateral action regarding internet traffic had not been approved by the Commission and that NYT should cease its attempts to avoid payment for such traffic.

RTC believes the issue is best addressed in either the access charge or network elements proceeding. However, although RTC recently filed limited testimony in the access charges proceeding (proposing that access charges be levied on internet service providers directly for calls terminated to them), no other party filed testimony on the issue, and no internet service providers have participated in that proceeding. Consequently, it does not appear that the issue will be fully developed in the current phase of the access charge proceeding. Nor is the issue currently under review in the network elements proceeding.

In order to consider these issues expeditiously, we will institute a proceeding to examine the issues raised by NYT's actions and by the RTC petition. Initially, written comments will be solicited on these issues, including:

1) The specific characteristics of internet calling and the unique costs associated with originating and terminating such traffic;

2) Whether and why calls placed to a local number of an internet service provider should be treated differently from local calls placed to other numbers generally; and

3) What basis exists to support the contentions of network congestion peculiar to internet services.

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[1]All letters previously received by the Commission since April 1997 regarding this matter will be considered in this proceeding. There is no need to resubmit such communication as a formal complaint.

In the interim, RTC's petition to modify the Open Market Plan is denied at this time. Both NYT and RTC shall not attempt to change or deviate from the existing reciprocal compensation structures contained in their respective tariffs, interconnection agreements, and incentive plans without prior Commission approval.

ADMINISTRATIVE CHANGE

In addition to the RTC Petition for Modification, several parties filed complaints or sent letters opposing NYT's action. For administrative purposes, the previously filed complaints and letters will be incorporated into this newly instituted proceeding.

The Commission orders:

1. A proceeding is hereby instituted to investigate the issues described herein.

2. Until the Commission makes a determination to change the treatment of internet traffic, both New York Telephone Company and Rochester Telephone Corp. shall continue to pay other local exchange carriers for the exchange of such traffic based upon the approved reciprocal compensation structures contained in their respective tariffs and interconnection agreements, and incentive plans.

3. Rochester Telephone Corp.'s petition for a modification of Section III.E. of the Open Market Plan is denied.

4. Interested parties shall notify the Secretary to the Commission, within ten days of the date of this order, if they intend to participate in this proceeding and wish to receive copies of comments and responses in this proceeding. Parties can fax their letter to (518) 473-2929. A list of active parties wil e compiled and distributed accordingly.

5. Interested parties shall file with the Secretary to the Commission 15 copies of comments on the issues listed herein,

clearly identified by topic, and serve a copy to each party on the active parties list within 30 days of the date of this order.

6. Responding parties shall file with the Secretary to the Commission 15 copies of reply comments, clearly identified by topic, and serve a copy to each party on the active parties list within 15 days of service.

7. The substance of Rochester Telephone Corp.'s Petition for Modification of the Open Market Plan Contained in Opinion 94-25, and Cases 97-C-0895, Complaint of MFS Intelenet of New York, Inc. Against New York Telephone Company Concerning Alleged Breach of Interconnection Terms; 97-C-0918, Complaint of ACC National Telecom Corp. Against New York Telephone Company Concerning Alleged Breach of the Terms of its P.S.C. Tariff No. 914; and 97-C-0979, Complaint of Cablevision Lightpath, Inc. Against New York Telephone Company Concerning Alleged Intention to Deny Reciprocal Compensation Payments for Certain Local Traffic, are consolidated in this proceeding and the three individual complaint cases are closed.

8. Cases 93-C-0033, 93-C-0103 and 97-C-1275 are continued.

By the Commission,

(SIGNED)

JOHN C. CRARY
Secretary

Decision No. C97-739

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 96A-331T

RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY U S WEST COMMUNICATIONS, INC. WITH ADVICE LETTER NO. 2617, REGARDING TARIFFS FOR INTERCONNECTION, LOCAL TERMINATION, UNBUNDLING AND RESALE OF SERVICES.

COMMISSION ORDER

Mailed Date: July 28, 1997
Adopted Date: July 16, 1997

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b. The Commission notes that in the FCC, in its First Report and Order, FCC 97-158, *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line*, concluded that the FCC should not mandate a peak-rate pricing structure for local switching. The FCC stated that significant practical difficulties may make it difficult or impossible to establish and enforce a rational, efficient, and fair peak-rate structure.

c. As for the Staff's proposal for peak and off-peak switching rates, we will deny the request because we believe the record was insufficient for the Commission to properly consider whether such a change is justified. The Commission does not believe CLEC local switching rates should be carved-out for peak and off-peak pricing when the other services such as IXC access, which have a significant impact on USWC's switching facilities, would not be subject to peak pricing.

C. Changes to Section 3 of Local Network Interconnection and Service Resale Tariff (Colo. P.U.C. No. 17).

1. In light of our decision regarding call termination, USWC shall make the following changes to its tariff:

a. **Section 3.1, Sheet 1 - Description.** This section will be revised to indicate that bill and keep shall continue in accordance with Rule 4.8.

b. **Section 3.4(A)1(a), Sheet 5 - Rate Structure.** This section shall also be revised to indicate that bill and keep shall continue in accordance with Rule 4.8. Likewise, the language concerning the five percent traffic balance and joint traffic audits shall be removed.

c. **Section 3.4(A)1(b), Sheet 5 - Rate Structure.** This section shall be removed. The Commission has previously ruled in the arbitration decisions that enhanced service traffic is local traffic and should not be exempted from reciprocal compensation mechanisms.

d. **Section 3.4(A)2(b), Sheet 6 - Rate Structure.** This section shall be clarified to indicate that the CLEC's rates for transport rate elements need not be the same as USWC's transport rates.

e. **Section 3.4(A)2(c), Sheet 6 - Rate Structure.** This section shall include a DS0 level direct-trunked transport facility.

Post-it® Fax Note 7671	Date 7/29 pages 5
To John Padden	From Sue Thomas
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OF MARYLAND
IVICE COMMISSION

Number TE-2126, TE-2216
Date: 7/15/97
Mail Log No. 56959, 57589

TO: H. Russell Frisby, Jr., Chairman
Claude M. Ligon, Commissioner
E. Mason Hendrickson, Commissioner
Susanne Brogan, Commissioner
Gerald L. Thorpe, Commissioner

FROM: Gregory V. Carmean, Executive Director GVC.

RE: MFS Intelenet of Maryland, Inc.

Description of Application:

MFS Intelenet of Maryland, Inc. ("MFS") alleges that Bell Atlantic - Maryland, Inc. ("BA-MD" or "Bell Atlantic") has breached its Interconnection Agreement with MFS and requests immediate relief from the Commission. Mail Log No. 57589 (TE-2216) is BA-MD's response to the complaint.

Groups which should receive copy of Staff Recommendation:

Applicant, Bell Atlantic - Maryland, Inc.

Recommended Action (Including Conditions):

Staff recommends that the Commission direct Bell Atlantic to forward all payments that have been withheld over this dispute to MFS within 15 days, and that all future interconnection payments be forwarded in a timely manner.

Steve Molnar
Steve Molnar, Director
Telecommunications Division

Andrew S. Katz
Andrew S. Katz
Staff Counsel

Commission Action on _____

Approved _____ Disapproved _____ Accept for filing _____

cc: Bryan G. Moorhouse, General Counsel
Daniel P. Gahagan, Executive Secretary
O. Ray Bourland, III, Chief Hearing Examiner
Chrys Wilson, Manager of External Relations

COMMENTS OF THE TELECOMMUNICATIONS DIVISION

Description of Filing

On May 22, 1997, MFS Intelenet of Maryland, Inc. filed a complaint with the Commission alleging that BA-MD was about to breach certain terms of the Interconnection Agreement in effect between the two parties.[1] In particular, BA-MD had informed MFS that it would withhold payments for traffic that originated on BA-MD's network and terminated at an Internet Service Provider ("ISP") on MFS' network.[2] BA-MD also intended to seek refunds of payments that had already been made for this purpose. The reason given by BA-MD for these actions was based upon BA-MD's belief that traffic to an ISP is interstate traffic and, therefore, not subject to the reciprocal compensation arrangements required for the exchange of local traffic by both the FCC and the Maryland PSC. MFS included documentation which confirmed the decisions made by regulatory authorities in Oregon, Washington, Minnesota, Arizona, and Colorado supporting its position in those states. New York subsequently took similar action (see attached).

On July 2, 1997, BA-MD filed its response to MFS' complaint. BA-MD asserts that traffic delivered to ISPs is interstate traffic and subject to the jurisdiction of the FCC. BA-MD states that Internet traffic does not terminate in the exchange where it is delivered, but is forwarded by the ISP to other locations around the country or even around the world via the Internet. BA-MD cites several decisions made by the FCC which BA-MD believes support its position. BA-MD states that the Commission should not rely on the decisions reached by commissions in other States on this issue.

Discussion

There has been a great deal of recent debate over the issue of requiring ISPs to pay access charges. Advocates of this position point to the similarities between ISPs and long distance carriers in terms of how they use the network. As discussed by BA-MD, ISPs forward incoming traffic to the Internet where information in retrieved and exchanged among users almost instantaneously. Local carriers also contend that ISP traffic is causing congestion on the network and creating costs that are not being fully recovered. They believe that some form of access charge responsibility would alleviate these problems.

The exemption of ISPs from the payment of access charges was recently re-affirmed by the FCC in its decision in FCC 97-158, First Report and Order, Released 5/16/97. The FCC explicitly prohibited local exchange carriers ("LECs") from imposing interstate access charges on ISPs (see para. 344). The FCC concluded that if access charges had been in place over the last several years, the growth of the

[1] The Commission approved the interconnection agreement between BA-MD and MFS on October 9, 1996, Case No. 8731, Phase (a), Order No. 72939.

[2] BA-MD has informed Staff that it has actually begun withholding payments for traffic terminated at ISPs.

Internet would have been stymied. The FCC also asserted that the "inefficient rate structures" that make up the access charge system would disrupt the "evolving information services industry." The issue of how ISPs use the local network also did not persuade the FCC to alter its regulatory treatment of ISPs. For example, it was noted that other groups of customers may have operating characteristics similar to ISPs but are still considered end users and not carriers.

Although the FCC declined to make ISPs subject to access charges in its Access Charge Reform proceeding, the issue is still under investigation. In the Internet Access & Information Service Provider Notice of Inquiry issued on December 24, 1996, the FCC sought comments from parties that address issues associated with the use of the public network by ISPs. The comment periods are now closed and a decision is pending.

Staff would also like to emphasize that the relationship between BA-MD and MFS is not exclusively one of "business - customer" but also one of "competitor - competitor". The ability of BA-MD to unilaterally withhold payment from MFS creates a financial advantage for BA-MD that could deter the development of local competition if this activity is not carefully monitored.

Conclusion

BA-MD believes that traffic that originates and terminates within a local calling area should not be considered local if that traffic terminates at an ISP. Staff does not agree with this position. Ever since the access charge system was established by the FCC in 1983, enhanced service providers, including ISPs, have been classified as "end users" and not "carriers". It is for this reason that ISPs are not subject to access charges that traditional carriers pay to local telephone companies. ISPs purchase business lines from their local carrier and pay the same rates as any other business customer. Therefore, *under the current access charge scheme*, calls that are placed within a local calling area from one end user to another end user should be considered a local call.

In Case No. 8584 - Phase II, the Commission determined that termination rates for the exchange of local traffic among local carriers should be reciprocal (Order No. 72348, page 28). Since a call from an end-user to an ISP within the end-user's local calling area is a local call, the established call termination rates should be applied.

Recommendation

Staff recommends that the Commission direct Bell Atlantic to forward all payments that have been withheld over this dispute to MFS within 15 days, and that all future interconnection payments be forwarded in a timely manner.

Prepared by: Steve Melman

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May 29, 1997

Mr. William Allan
Vice President
Regulatory Matters
New York Telephone Company
158 State Street
Albany, NY 12207

Dear Mr. Allan:

We have received a number of formal complaints from interconnecting local exchange carriers objecting to New York Telephone Company's (NYT) pronouncement advising carriers that traffic delivered by NYT to interconnecting local exchange carriers for termination to Internet Service Providers is interstate in nature and is not eligible for reciprocal compensation. The interconnecting local exchange carriers were informed of this via letters from Patrick Garzillo dated April 15 and 16, 1997.

Please be advised that the interpretation expressed in NYT's letters has not been approved by the Public Service Commission and is at odds with NYT's own treatment of this traffic as intrastate in its assessment of usage charges to other customers.

As you know, the Commission has procedures to address changes to existing tariffs or Commission policies on a prospective basis. If NYT believes such changes are necessary to address any reciprocal compensation matter, it should use those avenues. In the interim, we expect NYT to pay compensation to local exchange carriers for traffic delivered by NYT to the interconnecting carriers for termination to any Internet Service Providers, and to pay withheld compensation for any such previously delivered traffic.

Sincerely,

Allan Bausback

Allan Bausback
Acting Director
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July 1997, copies of REPLY COMMENTS OF WORLDCOM, INC. were hand delivered to those parties marked with an asterisk. All others were served by first class mail.

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