

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

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  
COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

The Commercial Internet eXchange Association ("CIX"), by its attorneys, hereby replies to the comments filed in response to the Association for Local Telecommunications Service's ("ALTS") request for clarification.<sup>1</sup> ALTS requested clarification of a fairly reasonable and straightforward point: an information service provider is an "end user," and not an interexchange carrier; therefore, when a PSTN call is made from a customer to an ISP within a given local calling area, such a call is "local" and is not "interexchange."<sup>2</sup> Despite the incumbent LECs' efforts to complicate these issues, CIX agrees with the majority of commenters that the Bureau should expeditiously issue a letter consistent with the ALTS request.

CIX agrees with the plethora of other commenters that ISPs are end users. This regulatory classification is now years-long Commission precedent, in both the Commission's

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<sup>1</sup> These reply comments represent the views of CIX as a trade organization and may not reflect the views of the individual members.

<sup>2</sup> As discussed below, the Eighth Circuit decision in Iowa Util. Bd. v. FCC, Case No. 96-3321 (op. July 18, 1997) does not in any way implicate the Commission's authority to interpret its precedent regarding enhanced and information service providers.

access charge decisions and in the Commission's Computer III<sup>3</sup> and ONA<sup>4</sup> proceedings that form the underpinnings of incumbent LEC entry into the enhanced services markets. Just recently, in both the Universal Service Order<sup>5</sup> and in the Access Charge Reform Order,<sup>6</sup> the Commission upheld this regulatory paradigm for ISPs in light of the 1996 Telecommunications Act. As several commenters pointed out, the incumbent LECs themselves treat information service providers as end users.

In the face of this precedent and industry practice, however, the incumbent LECs argue that ISP traffic is now "interstate in nature."<sup>7</sup> Incumbent LECs argument is based on the proposition that the following two communications should, in fact, be treated as one end-to-end communication: (a) the telecommunications to and from the customer to the ISP local office, and (b) the information service communications that occur between the ISP and other data networks. This argument is based on flawed premises which obfuscates the real issue in the ALTS' request for clarification -- the status of the telecommunications service between ISPs and LECs/CLECs.

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<sup>3</sup> See, e.g., Third Computer Inquiry, Phase I, Report and Order, 104 F.C.C. 2d 958, 1042 (1986) (subsequent history omitted) (CEI requirements treat enhanced service competitor as any other end user, and such protections must be available to "any particular class of customer or enhanced service competitor.").

<sup>4</sup> Id. at 1064-65 (ONA unbundled elements are available through tariff to any enhanced service provider or end-user customer of the incumbent LEC).

<sup>5</sup> See, Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-147 at ¶ 789 (rel. May 8, 1997) ("When a subscriber obtains a connection to an Internet service provider via a voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.").

<sup>6</sup> In the Matter of Access Charge Reform, First Report and Order, CC Dkt. No. 96-262, et al., FCC 97-158 at ¶¶ 344-48 (rel. May 16, 1997).

<sup>7</sup> See Comments of SNET at 4; Comments of USTA at 4.

Contrary to the incumbent LECs' argumentation, ALTS has not asked the Bureau for clarification of the jurisdictional nature of ISP service, and especially Internet service. The ALTS request concerns the nature of the telecommunications services offered by LECs and CLECs to end users, including ISPs. Ordinarily, this would be a simple issue, since those same telecommunications services are purchased by ISPs and their customers under the LEC's tariff for intrastate services, and both parties are in the same local calling area. Clarification is needed only because, in the face of local telecommunications competition for ISPs, the incumbent LECs have re-characterized the Commission's precedent to find that local telecommunications to an ISP are somehow interexchange calls.

The cases cited by the incumbent LECs' arguments, however, do not support the conclusion that the customer's call to the ISP within the local calling area is somehow an interstate, interexchange call. For example, in the Georgia Preemption<sup>8</sup> case, the Commission found that the enhanced service (voice mail) was accessed using interstate telecommunications "in a continuous two-way transmission path,"<sup>9</sup> rejecting Georgia's argument that the interstate call to the LEC switch and the routing from the switch to the voicemail apparatus were two severable communications. By contrast, the only *telecommunications service* at issue here is decidedly local, and not interstate as in Georgia Preemption. The information service, which the incumbent LECs wrongly lump together with the telecommunications service, is not a "transmission path" or a "telecommunications service."<sup>10</sup> Therefore, ALTS' request does not

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<sup>8</sup> Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., Memorandum Opinion and Order, 7 FCC Rcd. 1619 (1992) ("Georgia Preemption").

<sup>9</sup> Id. at 1620.

<sup>10</sup> For this reason, USTA's assertion that "intermediate switching and/or transport" does not determine the nature of the call is irrelevant because, by definition, information service providers do not engage merely in switching and transport. Comments of USTA at 5.

ultimately rest on a "'two call' jurisdictional theory."<sup>11</sup> Instead, at issue here are two severable and distinct communications -- one is a local telecommunications "call" and the other is not.

Moreover, the incumbent LECs' arguments amount to an invitation for the Bureau to revisit, once again, the Commission's regulatory treatment of ISPs.<sup>12</sup> However, ALTS has not asked for such an investigation. More important, the Commission, as recently as the Access Charge Reform order, has declined that invitation, and the Bureau should do the same. Indeed, the 1996 Telecommunications Act itself indicates a Congressional policy against Commission jurisdiction and regulation of the ISPs and Internet service providers. 47 U.S.C. § 230(b)(1); *id.* at § 153(44) (common carrier regulation extends only to those offering telecommunications services). The Commission has also recognized that its jurisdiction over enhanced service providers is "ancillary" in nature; it has broadly forborne from exercising that jurisdiction for over a decade.<sup>13</sup> For these reasons, the Bureau should decline to turn the ALTS request on its head and initiate yet more regulatory uncertainty into the highly competitive market for Internet services.

Finally, we note that the recent decision in the Iowa Utilities Board case does not cast doubt on the Commission's authority to clarify the status of ISPs as "end users" under the Commission's existing enhanced services precedent. The Eighth Circuit decision does not overturn or in any way call into question that precedent. The requested clarification does not involve the Commission in the pricing provisions of Sections 251 and 252 which, according to

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11 Comments of USTA at 5.

12 In essence, the incumbent LECs seek to have ISPs treated as interexchange carriers, which is exactly their position in the access charge reform proceeding.

13 Second Computer Inquiry, Final Decision, 77 F.C.C. 2d 384, 432-33 (1980), *aff'd*, CCIA v. FCC, 693 F.2d 198, 209-214 (D.C. Cir. 1982); 47 C.F.R. § 64.702(a) ("Enhanced services are not regulated under title II of the Act.").

the Court, are left for implementation and enforcement by the states and, when the states fail to act, by the Commission. Rather, the Court, in the companion case CompTel v. FCC,<sup>14</sup> upheld the Commission's Local Competition Order decisions that maintained the existing access charge regime pursuant to Section 251(g) and the Commission's interpretation of the meaning of Section 251 "interconnection." Thus, even if the requested clarification may have implications for state reciprocal compensation disputes, the recent court decisions indicate that the Bureau may clarify the federal access charge scheme and resolve definitional disputes arising from Section 251 and 252 of the Act which do not intrude on the states' rights to set prices in accordance with the Communications Act for intrastate services.

#### **Conclusion**

For the foregoing reasons, and to expedite true local telecommunications competition for all end users, including ISPs and their customers, CIX supports the ALTS request.

Respectfully submitted,

Robert D. Collet  
Chairman of the Board  
Commercial Internet eXchange  
Association

Barbara A. Dooley  
Executive Director  
Commercial Internet eXchange  
Association



Ronald Z. Plesser  
Mark J. O'Connor  
Piper & Marbury L.L.P.  
1200 Nineteenth Street, N.W., Suite 700  
Washington, D.C. 20036  
202-861-3900

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<sup>14</sup> Competitive Telecommunications Association v. FCC, Case No. 96-3604 (8th Cir. op. rel. June 27, 1997).