

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

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In the Matter of )  
)  
Request By Association for Local )  
Telecommunications For Clarification )  
of the Commission's Rules Regarding ) CCB/CPD 97-30  
Reciprocal Compensation for )  
Information Service Provider Traffic )  
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COMMENTS OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by counsel, hereby files its Comments in support of the Association for Local Telecommunications Services' ("ALTS") request for clarification of the Commission's rules regarding reciprocal compensation for Information Service Provider ("ISP") traffic. Treating ISP calls as local traffic subject to reciprocal compensation obligations is entirely consistent with the Communications Act, established Commission policy, existing interconnection agreements, and Regional Bell Operating Company ("RBOC") practice. Diversion from this abundant, settled authority will have the singular effect of inhibiting local exchange competition in violation of the Telecommunications Act.

WinStar is a publicly-held company (traded on the NASDAQ) which, among other things, develops, markets, and delivers local telecommunications services in the United States.<sup>1</sup> The

<sup>1</sup> WinStar is authorized to provide facilities-based telecommunications service in the 43 largest metropolitan statistical areas. WinStar's operating companies have been approved to offer competitive local exchange carrier services in 24 jurisdictions, and applications for such authority are pending in several other jurisdictions. In addition, WinStar's affiliates are authorized to operate as competitive access providers in 34 jurisdictions, and have applications pending in several other jurisdictions. A separate WinStar subsidiary provides switched and switchless long distance services

(continued...)

Company, through its operating affiliates, provides facilities-based local telecommunications services on a point-to-point basis principally using wireless, digital millimeter wave capacity in the 38 gigahertz (GHz) band, a configuration referred to by WinStar as Wireless Fiber<sup>SM</sup>.<sup>2/</sup>

## I. INTRODUCTION

Bell Atlantic, NYNEX, and Pacific Bell all have contacted WinStar to announce that they do not intend to pay WinStar reciprocal compensation for local calls terminating at ISPs. This blatantly anticompetitive position flies in the face of abundant authority which regards local calls terminating to ISPs as local traffic and, hence, subject to the 1996 Act's reciprocal compensation obligations. Indeed, so much precedent for treating ISP calls as local traffic exists that there is scarcely need for Commission action at all. It is unfortunately the case, however, that RBOCs are unilaterally attempting to rewrite their reciprocal compensation obligations under federal law and as set out in private interconnection contracts with WinStar by brute force. Widespread RBOC attempts to eviscerate the meaning of the 1996 Act, as well as to stifle local competition, beg Commission action to provide a uniform national interpretation on the appropriate compensation for, and rating of, local calls terminating to ISPs. Even more fundamental, it is critical that the Commission clarify that *all* end user-to-ISP traffic be treated uniformly and consistently, regardless of whether only a single local exchange carrier is included (*e.g.* an RBOC), or two local exchange

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<sup>1/</sup>(...continued)

on a resale basis. WinStar has initiated switched local exchange service on a facilities basis in New York, Chicago, Boston, Los Angeles, San Diego, and currently is in the process of completing switch installation in several additional jurisdictions, including, for example, Dallas and the District of Columbia.

<sup>2/</sup> WinStar's Wireless Fiber<sup>SM</sup> networks are so named because of their ability to duplicate the technical characteristics of fiber optic cable with wireless 38 GHz microwave transmissions.

carriers are involved (e.g. an RBOC and a competitive local exchange carrier). WinStar urges the Commission to issue the clarification which ALTS seeks.

## **II. ISP CALLS CONSTITUTE LOCAL TELECOMMUNICATIONS TRAFFIC CONSISTENT WITH THE COMMUNICATIONS ACT AND ESTABLISHED COMMISSION POLICY, AND AS REFLECTED IN STANDARD RBOC PRACTICE**

### **A. The 1996 Act mandates reciprocal compensation for local calls.**

Section 251(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“1996 Act”), requires reciprocal compensation “for the transport and termination of telecommunications.” In its *Local Competition Order*, the Commission stated that the reciprocal compensation obligation applies to “all LECs in the same state-defined local exchange service areas, including neighboring incumbent LECs that fit within this description.”<sup>2</sup> Clearly, all local calls (whether they terminate at ISP providers, residential end users, or anyone else) are subject to reciprocal compensation, whether between incumbent local exchange carriers (“ILECs”), competitive local exchange carriers (“CLECs”), or both. Certain ILECs call into question whether the assertedly interexchange character of Internet access somehow exempts local calls to ISPs from the reciprocal compensation obligation of the 1996 Act. The plain language of the 1996 Act, as well as long-standing Commission policy, dictate that this is not the case.

### **B. Established Commission policy regards local ISP calls as local traffic.**

Established Commission policy is clear that local calls to ISPs constitute local telecommunications traffic. Access to the Internet and other interactive computer networks provided

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<sup>2</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499, ¶ 1037 (1996) (“*Local Competition Order*”), *partial stay granted on other grounds pending review sub nom. Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996).

by ISP's constitute "enhanced services" within the meaning of the Commission's rules.<sup>4/</sup> Since the Commission's *Computer II* decision, it has been clear that the services provided by ISPs are not subject to regulation as common carriage under Title II of the Communications Act, and thus, as a legal matter, are not considered a part of the local call made by the ISP subscriber.<sup>5/</sup>

The Commission's policy regarding regulatory treatment of ISP calls has remained consistent over the last decade-and-a-half. In 1983, the Commission determined that ISPs are exempt from Part 69 interstate access charges. The Commission emphasized that the exemption applied *even though ISPs may use ILEC facilities to originate and terminate interstate calls.*<sup>6/</sup> The Commission affirmed ISPs' interstate access charge exemption in this Spring's *Access Charge Reform Order*, and unambiguously characterized the connection from the end user to the ISP as local traffic: "To maximize the number of subscribers that can reach them *through a local call*, most ISPs have deployed points of presence."<sup>7/</sup> Similarly, in this Spring's *Universal Service Order*, the Commission characterized Internet access as consisting of severable components: the connection to the ISP via the public switched network and the information service provided by the ISP.<sup>8/</sup> In other words,

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<sup>4/</sup> First Report and Order, *Access Charge Reform*, CC Docket No. 96-262, ¶ 341 n.498.

<sup>5/</sup> *Second Computer Inquiry*, 77 F.C.C. 2d 384, ¶¶ 119-32 (1980); see 47 C.F.R. § 64.702(a) (Commission does not regulate enhanced services under Title II of the Communications Act). This Commission policy also is consistent with Congress' express policy *not* to regulate the Internet. 47 U.S.C. § 230(b)(2).

<sup>6/</sup> Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, 97 FCC 2d 682, 711-22 (1983).

<sup>7/</sup> *Access Charge Reform Order*, n.502 (emphasis added).

<sup>8/</sup> Report and Order, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, ¶¶ 83, 788-89 (rel. May 8, 1997) ("*Universal Service Order*").

Internet access consists of a local call coupled with an “enhanced service.” Moreover, the Commission distinguished ISPs from interstate carriers by excluding ISPs from the obligation to contribute to the Universal Service Fund.

### **III. ILECS WILL VIOLATE THE COMMUNICATIONS ACT AND INDIVIDUAL INTERCONNECTION AGREEMENTS IF ISP TRAFFIC IS NOT CONSIDERED LOCAL**

If Section 251(b) is not read to regard ISP calls as local rather than interstate, RBOCs will immediately be in violation of the 1996 Act and numerous interconnection agreements throughout the nation. Specifically, those RBOCs which now provide ISP service themselves would immediately violate Section 271(a)’s prohibition on RBOC provision of interLATA service without Commission authority to do so. In addition, if RBOCs are permitted to interpret Section 251(b) to exclude ISP calls from reciprocal compensation obligations, they will more than likely violate Section 202(a)’s prohibition on discriminatory practices. It strains credulity to believe that RBOCs rate information services calls that they provide to their own end users or to adjacent RBOCs’ end users as anything but local calls, and in fact there is specific information in the public record that RBOCs today rate and charge for such calls as local traffic.<sup>29</sup> If RBOCs rate CLEC information services calls as interstate, while equivalent RBOC information services calls involving an RBOC end user calling an ISP served by the RBOC are rated as local, RBOCs will unjustly and unreasonably discriminate against classes of ISP customers, as well as other party local exchange carriers. Neither the Communications Act, nor the Commission’s policies contemplate such a result.

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<sup>29</sup> See May 29, 1997 Letter from Allan Bausback, Acting Director, N.Y. D.P.S. Communications Division to William Allan, Vice President, New York Telephone Co. (appended to ALTS Request for Expedited Letter Clarification) (*Bausback Letter*).

Exemption of ISP calls from reciprocal compensation obligations of the 1996 Act also would violate WinStar's interconnection agreements with ILECs. All of WinStar's interconnection agreements define the reciprocal compensation obligation to correspond to the obligation to treat ILEC end user-originated calls terminating with a WinStar end user, when both users are in the same local calling area,<sup>10/</sup> as local. Those agreements make no distinction that the calls must somehow be treated differently when an end user is an ISP.<sup>11/</sup> RBOCs should not be permitted to change interconnection agreements by fiat simply because they believe that those agreements may now no longer suit their interests. Neither this Commission nor state commissions have an obligation to reinterpret RBOC obligations to relieve them of what they now may consider to have been bad bargains.<sup>12/</sup> If RBOCs wish to renegotiate state interconnection agreements with WinStar when the initial term of those agreements terminate, the RBOCs are free to do so.

#### IV. CONCLUSION

Neither the Communications Act, Commission policy, nor WinStar's interconnection agreements support the RBOCs' novel interpretation of the treatment of local calls terminating at ISPs. Regrettably, CLECs must come before the Commission yet again to seek assistance against RBOC efforts to impede local competition development. Commission clarification in this instance

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<sup>10/</sup> In New York, intraLATA calls not involving a third-party carrier, i.e., a carrier other than NYNEX and WinStar, also are subject to the reciprocal compensation formula.

<sup>11/</sup> The New York Department of Public Service takes a similar view. *See Bausback Letter*.

<sup>12/</sup> *See Arkansas Natural Gas Co. v. Arkansas Railroad Comm'n*, 261 U.S. 379, 382 (1923) (power to regulate utilities does not extend to power "to relieve a contracting party from the burdens of an improvident undertaking" in violation of the Contracts Clause to the U.S. Constitution).

is necessary to prevent the RBOCs from deciding unilaterally to deny CLECs of essential terminating local traffic revenues.

Respectfully submitted,



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