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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket # 96-98
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In the Matter of)
)
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS)
)
Request for Clarification of the)
Commission's Rules Regarding Reciprocal)
Compensation for Information)
Service Provider Traffic)

File No. CCB/CPD 97-30

To the Commission:

REPLY COMMENTS OF AMERICAN COMMUNICATIONS SERVICES, INC.

American Communications Services Inc. ("ACSI"), by its attorneys, hereby respectfully submits these reply comments pursuant to the rules and regulations of the Federal Communications Commission ("FCC" or "Commission").

Introduction

On June 20, 1997, the Association for Local Telecommunications ("ALTS") asked the Commission to clarify that, under the Commission's existing rules and policies, calls routed to Internet Service Providers ("ISPs") are "local" calls subject to reciprocal compensation agreements. On July 17, 1997, ACSI filed comments in support of ALTS's request. In its comments, ACSI asserted that "under the Commission's existing policies and rules, ISP

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traffic must be treated as 'local' traffic and compensation must be paid where calls placed to ISPs are exchanged between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs")."¹ ACSI noted that there are only two possible sources of compensation to LECs for terminating calls to ISPs -- the ISPs who receive the traffic and the LECs who deliver the traffic. However, since the Commission has decided that access charges may not be assessed against ISPs, the LECs with whom the ISP traffic is exchanged are the only possible source of compensation. If, as the ILECs claim, calls placed to ISPs are "interexchange" calls, but such calls are not subject to access charges, CLECs will be providing a free service to their competitors, an outcome which is plainly antithetical to both law and policy.

As a CLEC, ACSI is alarmed by the concerted efforts of ILECs including Bell Atlantic, NYNEX, Southwestern Bell, BellSouth, and Ameritech, to avoid compensating CLECs for the substantial costs associated with terminating calls to ISPs. The Commission should promptly clarify that calls to ISPs are not "interexchange" calls, and, therefore, that ILEC efforts to deny compensation to CLECs for terminating calls to ISPs pursuant to existing interconnection agreements are unlawful.

I. CLECs Must Be Compensated For Terminating ISP Traffic

The anti-competitive intent of the ILECs in refusing to compensate CLECs for terminating calls to ISPs is clear. As most of the commenters observed, if the ILECs prevail in their refusal to compensate CLECs for terminating calls to ISPs, the market serving ISPs

¹ Comments of ACSI, p.1.

will be radically distorted.² As the ILECs must be aware, denying CLECs compensation for terminating calls to ISPs makes it economically infeasible for CLECs to serve ISP customers. Therefore, by default, the ILECs will be the only carriers capable of serving that market segment, ending competition in one of the fastest growing markets for telecommunications in the world.

II. The ILECs Should Not Be Permitted To Unilaterally Change Long-Standing Commission Policy Regarding The Treatment of ISPs For Purposes of Compensation

While, as the Eighth Circuit Court of Appeals recently noted, the FCC has no authority to regulate telecommunications pricing for local telephone services, the FCC has exclusive jurisdiction over interstate and international telecommunications services, and the access charge structure that regulates the exchange of calls between the local and the interstate telephone networks.³ This access charge structure provides for the recovery of the ILECs' costs assigned to the interstate jurisdiction and dictates "the precise manner in which [ILECs] may assess charges on interexchange carriers and end users."⁴

In 1983, when the Commission first considered whether ISPs should be required to pay interstate access charges, the FCC determined that they should not. More recently,

² See, e.g., Comments of Vanguard Cellular Systems, Inc., p. 7-8; Comments of Focal Communications Corporation, p. 9; Comments of MCI Telecommunications Corp., p. 5-6; Comments of KMC Telecom, Inc., p. 9-10; Comments of Sprint Corporation, p. 4; Comments of Teleport Communications Group, Inc., p. 9; Comments of AT&T, p. 4-5.

³ See *Iowa Util. Bd. v. FCC*, No. 96-3321 (8th Cir. July 18, 1997); 47 U.S.C. § 152(a).

⁴ *Access Charge Reform*, First Report and Order, CC Docket No. 96-262, ¶ 22 (rel. May 16, 1997) ("*Access Charge Reform Order*").

when the FCC adopted its *Access Charge Reform Order*, the FCC, noting the "potentially detrimental effects on the growth of the still-evolving information services industry[.]"⁵ reaffirmed its long-standing policy that "ISPs should not be subject to interstate access charges."⁶

By excluding calls to ISPs from the access charge regime, the FCC has determined that ISPs are not to be treated like "carriers" and that ISP traffic is not to be treated like "interexchange" traffic.⁷ As a result, ISP traffic must be treated like "local" traffic subject to reciprocal compensation because, as one commenter states, under existing Commission policy, "*requiring* terminating compensation for calls to the Internet is the only way to harmonize the treatment of ISPs and the Internet generally in the *Local Interconnection Order*, the *Universal Service Order*, and the *Access Charge Order*."⁸

USTA and the ILECs misunderstand the nature of the issue involved with the classification of ISP traffic. For instance, Cincinnati Bell states: "[t]he fact that [enhanced service providers ("ESPs")] are exempt from access charges for policy reasons does not change the jurisdictional nature of the traffic. In creating the ESP exemption, the Commission did not determine that ESP traffic is local. Instead, it merely allowed ESPs to purchase services from local tariffs."⁹ Similarly, USTA states:

⁵ *Access Charge Reform Order* ¶ 343 (emphasis added).

⁶ *Access Charge Reform Order* ¶ 345.

⁷ Importantly, nothing in the decision of the Eighth Circuit affects the FCC's determination that ISP traffic is not subject to access charges, and, therefore, is not "interexchange" traffic.

⁸ Comments of Adelphia Communications, p. 4.

⁹ Comments of Cincinnati Bell Telephone Company, p. 2.

[i]f the Commission decides to eliminate (or, indeed, if it decides to continue) the access charge exemption in the Internet NOI, it will be able to do so because Internet traffic is access traffic that is jurisdictionally interstate and thus within the power of the Commission to apply (or exempt) Part 69 access charges. In any event, such a decision will have no impact on the jurisdictional nature of ISP traffic.¹⁰

The ILEC argument misapprehends the current jurisdictional classification by focusing solely on the fact that ISPs often bridge calls placed by end users to a destination in another state. The capability of ISPs to connect end users to another state is irrelevant because the FCC has opted to treat ISPs as end users, and calls placed to them as "local" dial up traffic which is not subject to the assessment of interstate access charges.

The ILEC argument is belied by the ILECs' own consistent past practice of classifying calls placed to ISPs as "local" calling. Specifically, ILECs have always treated ILEC traffic as "local" traffic by: (1) charging all such calls using local tariffs; (2) treating such calls as local in separations reports and state rate cases; (3) treating such calls as local in ARMIS reports; and (4) treating such calls as local when they are exchanged among adjacent ILECs. Thus, when it served their interests, ILECs routinely treated calls placed to ISPs as local calls, but they seek to reclassify such calling when they can use such a redefinition to lock competitors out of an important market.

Although ILECs may disagree with the Commission's policy to treat local calls to ISPs as local calls regardless of whether the ISP reformats or retransmits information received over such calls to or from further interstate destinations, they may not change it unilaterally. Until such time (if ever) that the Commission decides to require ISPs to pay

¹⁰ Comments of USTA, p. 4 (emphasis in original).

access charges to LECs, there is no alternative to classifying access calls placed to ISPs as "local" for compensation purposes.

Conclusion

ILECs, who are required to treat calls placed to ISPs as "local" calls for access charge purposes, should not be permitted to apply a different definition for use in determining reciprocal compensation obligations. ACSI respectfully requests that the Commission promptly clarify that calls placed to ISPs are subject to reciprocal compensation pursuant to local interconnection agreements.

Respectfully submitted,

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