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**By Hand**

The Honorable William E. Kennard  
Chairman  
Federal Communications Commission  
1919 M Street, N.W.  
Room 814  
Washington, D.C. 20554



DOCKET FILE COPY ORIGINAL

**Re: Reciprocal Compensation for Internet Traffic**

Dear Chairman Kennard:

ALEC, Inc. has observed with interest the exchange of letters between Bell Atlantic and others regarding reciprocal compensation for calls to Internet Service Providers ("ISPs"). ALEC is a certificated competitive local exchange carrier ("CLEC") in Kentucky that provides service to an ISP within its service territory. ALEC is involved in a dispute with BellSouth at the Kentucky PSC regarding reciprocal compensation for calls to ISPs. ALEC, therefore, has a direct interest in this issue. ALEC's perspective on the question, however, appears to differ not only from Bell Atlantic's, but also in some respects from others who have previously responded to Bell Atlantic's original letter. We offer the discussion below for the Commission's consideration.

To place the matter in perspective, the issue of reciprocal compensation for calls to ISPs arises only because of two positive, pro-competitive developments: (a) the proliferation of CLECs made possible by passage of the Telecommunications Act of 1996 (the "1996 Act"); and (b) the explosive growth of consumer interest in accessing the Internet. These developments both reflect and embody the increasing scope and variety of telecommunications and information services available to American consumers. This problem

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exists, in short, because competition in telecommunications and information services markets is beginning to take root. Indeed, it is precisely for this reason that the matter is of such concern to Bell Atlantic and other incumbent local exchange carriers ("ILECs").

Bell Atlantic's most recent letter claims that reciprocal compensation for calls to the Internet discourages competition and investment. Bell Atlantic's real problem, however, is that competition — and the investments to support it — are not developing in ways that Bell Atlantic and other ILECs anticipated. Bell Atlantic wants the Commission to forestall the competition for which it was not prepared (and to which it is most vulnerable) in order to force its rivals to compete in ways for which Bell Atlantic was prepared (and to which, therefore, it is least vulnerable).

The Commission should decline Bell Atlantic's invitation to micromanage the development of competitive markets in the littoral zone between the public switched network ("PSN") and the Internet. To the contrary, the Commission should frame any ruling it makes on this issue with an eye towards encouraging innovative investment — such as the investments being made by CLECs that serve ISPs and by ISPs seeking to take advantage of the benefits of CLEC status. This is the only result that is consistent with the procompetitive purposes of the 1996 Act.

Bell Atlantic's central claim is that calls to ISPs should not be subject to terminating compensation. On a fundamental economic level, this claim is ludicrous. Bell Atlantic is simply trying to distract the Commission from the business and competitive realities of the situation. To see how this is so, one need only follow the money.

In a monopoly environment, the ILEC collects revenues from end users. That money is intended to recover not only the cost of the end user's line, but also the cost of the use of that line to make local calls. Those costs are, primarily: (a) originating switching; (b) transmission to the terminating switch; and (c) terminating switching. This regime applied before the 1996 Act was passed, and applies today when an ILEC customer calls an ISP that buys its dial-in lines from the ILEC.<sup>1</sup>

In a competitive environment, when a CLEC serves a customer receiving a call, some call termination costs — specifically, terminating switching costs — are lifted from the

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<sup>1</sup> As the Commission has noted in the *Access Reform Order*, if the ILEC's charges to its end users are not high enough to recover those costs, the ILEC should either become more efficient or raise those charges. See *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, First Report and Order*, 12 FCC Rcd 15982 (1997) at ¶¶ 346. That problem, therefore, is independent of the issue of terminating compensation.

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ILEC and borne by the CLEC. The ILEC saves resources because the CLEC is doing some of what was previously the ILEC's work. The ILEC got paid for that work — and will continue to get paid — by the originating customer. The terminating compensation obligation simply ensures that CLECs get paid when they do the work instead.

In some sense, it's that simple. As long as Bell Atlantic and other ILECs continue to charge their end users for making local calls to ISPs — whether as part of a fixed-charge unlimited usage package, part of an increased SLC on second lines, or in individual message units or measured service charges — it is unfair — a form of unjust enrichment — to allow them to shed the terminating switching *cost*, but keep the money.<sup>2</sup>

The regime Bell Atlantic apparently endorses — no terminating compensation for calls to ISPs — would dampen, not encourage, investment in the telecommunications infrastructure. If Bell Atlantic is to be believed, dozens if not hundreds of ISPs and their CLEC confederates have deployed switches, routers or similar devices to be able to receive incoming calls from the PSN. Bell Atlantic apparently disapproves of this investment, and would prefer that its competitors make other investments (*e.g.*, in standard Class 5 switches or copper loops).

Bell Atlantic, however, is not entitled to second-guess the market, and the Commission should not do so either. The new investments that competitors are actually making promote increased integration between ISPs in particular (and the Internet in general) on the one hand, and the PSN on the other. In this sense, this situation is simply another facet of the same economic phenomenon that is driving ILECs and CLECs alike to develop and invest in xDSL technology. The market has recognized that the Internet — and widespread access to it — is critically important to the nation's communications infrastructure, and — as markets do — it is voting with its money. The intense investment

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<sup>2</sup> The hard fact — that Bell Atlantic basically ignores — is that when a *CLEC* terminates calls to an ISP, it is performing a function for which the *ILEC* gets paid by its customers. Fairness requires that a portion of that revenue be passed on to the CLEC, which is, in effect, what Section 251(b)(5) requires as well. It is no answer to this fact to complain, as Bell Atlantic does, that connecting to the CLEC entails new trunking and related transmission costs. The calls that are carried over the newly established trunks are no longer carried over ILEC facilities connecting the ILEC's originating switch to the ILEC's (former) terminating switch. As a result, the need to expand those facilities is deferred or avoided altogether. And the more calls that get carried over facilities running to the CLEC, the greater the savings (in the form of deferred expansion) on the embedded facilities. At bottom, if Bell Atlantic had not spent the money needed to route calls its customers make to ISPs via CLECs, it would have had to spend money to beef up the capacity of its own inter-switch network. The need to spend that money is driven by increasing consumer interest in calling the Internet, not by the terminating compensation obligation.

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and competitive focus on areas of interface between the Internet and the PSN may not have been the conventional wisdom about how markets would develop when the 1996 Act was passed, but that only shows that competition is difficult to predict.<sup>3</sup>

This brings us to the somewhat metaphysical debate about whether calls to ISPs are really "interstate" or not. In its most recent letter, for example, Bell Atlantic boldly proclaims that "Internet traffic is interstate and interexchange" and asks the Commission to so rule. As described below, Bell Atlantic is — at most — half right.

No one will dispute that the passage of Sections 251 and 252 of the Act created something of a jurisdictional muddle; this is the key issue before the Supreme Court in its review of the 8th Circuit's order in the *Iowa Utilities Board* case. In the new and complex legal regime established by the 1996 Act, therefore, blithe generalities such as that put forward by Bell Atlantic can only confuse matters. What is required here is not bold but vague statements, but, instead, a careful parsing of both the language of the Act and the technical realities of dial-up access to the Internet.

Section 251(b)(5) requires all LECs to enter into reciprocal compensation arrangements "for the transport and termination of telecommunications." Section 252(d)(2)(A)(i) and (ii) show that the reciprocal compensation obligation applies to "calls" that one LEC hands off to another for termination. The statutory question, therefore, is whether the "call" that an ILEC's customer makes to a local ISP "terminates" at the ISP's location.<sup>4</sup>

While the term "call" is not defined in the Communications Act, it is used throughout Title II in a manner that shows that the straightforward, common meaning applies: a "call" is what happens when two stations on the PSN are connection to each other.<sup>5</sup> A call

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<sup>3</sup> If the only activities allowed under the 1996 Act are those that conform to the conventional wisdom at the time of its passage, then (among other post-1996-Act developments) Bell Atlantic should never have been allowed to buy NYNEX, and should not be allowed to merge with GTE.

<sup>4</sup> Bell Atlantic uses of the generic term "traffic" to describe communications between an ILEC's customer and the Internet. While this generic term is acceptable in some contexts, here the generic term confuses rather than clarifies the appropriate analysis.

<sup>5</sup> See, e.g., references to "calls," "called telephone numbers," and similar usage in 47 U.S.C. § 222(d)(3); § 223(a)(1); § 223(b)(1)(A); § 225(d)(1)(D); § 226, *passim*; § 227, *passim*, including, specifically: § 227(a)(1)(A); § 227(b)(1)(A); § 227(b)(2)(C); § 227(c)(3)(G); § 227(d)(3)(B); § 228, *passim*; § 229; § 271(c)(2)(B)(vii)(III); § 271(c)(2)(B)(x); § 271(j); § 274(i)(7); § 275(d); (continued...)

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"terminates," therefore, when one station on the PSN dials another station, and the second station answers.

In literal statutory terms, any particular "call" is an instance either of "telephone exchange service" as defined in 47 U.S.C. § 153(47) (when the two PSN stations are within the same local calling area) or of "telephone toll service" as defined in 47 U.S.C. § 153(48) (when they are not). In the former case – telephone exchange service – the call is a local call. In the latter case it is a toll call.

In the case of a call to an ISP, if the calling party and the ISP are in the same local calling area, the call is local. It is, therefore, subject to reciprocal compensation. As with the basic economics of the situation, discussed above, it really is that simple. No matter how one characterizes what the ISP does with the information the end user sends over the local connection, *the connection itself* is a local call subject to terminating compensation.

This is true even if an end user in Washington, D.C. obtains a World Wide Web page from a computer in California (or, for that matter, in Calcutta). Whatever the packet-switched transactions amongst the ISP, various backbone providers, and the host computers may be, they are not, by any stretch of the imagination, a "call." In this regard, the Commission has properly and repeatedly noted that the ISP's functions in dealing with the Internet are reasonably distinguishable from the plain vanilla POTS call that the end user makes to the ISP.<sup>6</sup>

As a result, it actually doesn't matter whether the signals carried between the end user and the Internet are jurisdictionally interstate or not. The idea that it *does* matter arises from a confusion between: (a) the distinction between local calls and toll calls (embodied in 47 U.S.C. §§ 153(47) and 153(48)); and (b) the distinction between intrastate and interstate communications embodied in 47 U.S.C. § 153(22).

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<sup>5</sup>(...continued)

and § 276(b)(1)(A). See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905 (1996) at ¶ 107 (noting that a "telephone call" takes place over a "basic transmission path"). The connection between and end user and an ISP is a "basic transmission path." The Internet is not.

<sup>6</sup> See, e.g., Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45 (released May 8, 1997) at ¶¶ 788-90; Federal-State Joint Board on Universal Service, *Report To Congress*, CC Docket No. 96-45 (April 10, 1998) at ¶¶ 13, 21, 105.

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The Commission's jurisdiction extends to interstate communications. A "communication" (by wire or radio) is:

the transmission ... of writing, signs, signals, pictures and sounds of all kinds [and] all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

See 47 U.S.C. §§ 153(33) (radio communication) and 153(51) (wire communication). When the communication is between different states (or between a state and a foreign country), the communication is jurisdictionally interstate; when it remains within a single state, the communication is jurisdictionally intrastate.

What matters here – and what Bell Atlantic ignores – is that the definition of "communication" under the Act is much, much broader than the definition of "telecommunications," and broader still than the particular *type* of telecommunications represented by local calls and toll calls under 47 U.S.C. §§ 153(47) and 153(48). The broad definition of "communication" encompasses the entirety of the Commission's subject matter jurisdiction, and includes, for example, radio and television broadcast signals and cable television service. Most relevant here, it also includes information services such as those provided by ISPs and other entities involved in the Internet.

From this perspective, the Commission probably does have statutory jurisdiction over a communication that starts with an end user in Washington that (in various formats) traverses the Internet to a host computer in California (or Calcutta). But that doesn't mean that the connection between the end user and the ISP down the street is anything other than a local call. To the contrary, the gravamen of the Commission's rulings on this issue is that the overall communication in such a case can reasonably be broken down into a local call and an information service. The local call to the ISP is subject to terminating compensation under Sections 251(b)(5) and 252(d)(2)(A). Nothing in the language of those sections (or anything else in the Act) suggests that the status of the underlying communication as interstate or intrastate affects this conclusion.<sup>7</sup>

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<sup>7</sup> This conclusion also does not violate the so-called "one call" rule. If, when all the dust settles, the communication at issue is a POTS call linking an exchange station on the PSN in one local calling area with an exchange station on the PSN in another local calling area, the existence of intermediate connections does not somehow exempt the communication from the statutory definition of "telephone toll service," which is the connection (by whatever means) of exchange stations in different exchange areas. See 47 U.S.C. § 153(48). But in the case of dial-in access to the Internet, we have a local POTS call connecting two local exchange stations (the end user's and the ISP's), combined with an information service — the latter being replete with data storage,

(continued...)

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The Commission should also be aware that, as a purely technical matter, for the vast majority of the time that a typical dial-up customer is on line, the signals being exchanged do not either come from or go to "the Internet" as such. Instead, most signals begin and end with the end user's and the ISP's customer premises equipment ("CPE"). Once the end user's modem and the ISP's modem are connected, they talk to each other constantly. This constant CPE-to-CPE exchange of information is needed to keep the two devices synchronized so that the maximum possible amount of data can be sent over analog exchange lines.<sup>8</sup> These signals are neither noise on the line nor mere communications overhead. To the contrary, they are carefully structured communications devised by the modem equipment, and are critical to the integrity of the connection. These signals continue constantly, even when higher-level information is not being transmitted. For the vast majority of the duration of an average dial-in session with an ISP, these purely local signals are the only traffic being exchanged.<sup>9</sup>

Moreover, many ISPs have configured their systems so that even higher-level information, supposedly from "the Internet," is actually stored and retrieved locally. For example, when a customer receives email, the message is sent to the customer's ISP, which maintains a local email server — a computer on the ISP's premises that stores email messages. When a customer logs on to check his or her email, the messages are downloaded from the ISP's local email server to the customer's computer. These are purely local data transmissions.<sup>10</sup>

As another example, the World Wide Web is basically a system for identifying files of interest to end users and downloading them (*i.e.*, a massive, jointly-provided

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<sup>7</sup>(...continued)

interaction with stored data, packet switching, etc. There is no reason to think that the "one call" rule should apply to this situation, and it does not.

<sup>8</sup> Improved intelligence in modems, reflected in more complex encoding of information within the signals the modems send to each other, is what has allowed the rate of data transmission over an analog modem line to increase from 9600 bits per second in the early- to mid-1980s to nearly 30,000 bits per second today. This can be improved to a download rate of more than 50,000 bits per second if the ISP has a digital (as opposed to analog) link between its modems and the LEC switch providing the ISP's connections to the PSN.

<sup>9</sup> This occurs because end users typically take a certain amount of time to review the data they get before requesting more data. The modems continue with their synchronization signals even when previously downloaded files are being reviewed by the end user — a process that can take much longer than the downloading itself.

<sup>10</sup> This applies to newsgroups and lists as well, which are essentially a form of group email.

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information service). When an end user clicks on a Web page's URL, what really happens is that a short message is sent to the end user's ISP requesting a copy of the files that make up the Web page. In an increasing number of cases, ISPs are implementing caching arrangements where the ISP maintains current local copies of the Web pages that the ISP (aided by software) believes that its customers are most likely to request. If the ISP correctly anticipates these requests, it will already have on hand, locally, at least some of the Web pages that its customers want to visit. When this occurs, the customer receives the requested Web page in an entirely local communication.

The predominantly local nature of the signals sent between end users and their ISPs merely emphasizes the critical distinction between: (a) the issue of whether the dial-in connection to an ISP is a local call subject to terminating compensation (it is) and (b) the issue of whether the FCC has statutory jurisdiction over communications between and among end users, ISPs, the Internet backbone, and distant Web sites (maybe, but it doesn't matter to the question at hand). In statutory terms, whether a local call (subject to terminating compensation) has occurred is determined by applying Section 153(47) (defining "telephone exchange service"). Whether the underlying *communication* is interstate or intrastate is determined by applying Sections 153(33) or 153(51) (defining radio or wire communications) and Section 153(22) (defining "interstate" communication). These are distinct statutory inquiries that must be undertaken separately, precisely because the ISP's *information services* are legally and technically distinct from the *telecommunications service* that customers use to connect to their ISPs.

In light of the technical and legal distinction between the local call to an ISP (a "telephone exchange service") and the ISP's interactions with the Internet (an "information service"), and in light of the fact that increasing amounts of "Internet traffic" between ISPs and end users is actually local end-to-end, it is clear that Bell Atlantic's bold assertion — "Internet traffic is interstate and interexchange" — is at most half right. Some — maybe even all — communications between end users and the Internet may be jurisdictionally interstate. But for such a communication to be "interexchange," it would have to be a form of "telecommunications," and, in particular, a form of "telephone toll service" involving the establishment of a connection between two PSN exchange lines in different local calling areas. This is not what happens when an end user (for example) retrieves files from a distant World Wide Web site. To the contrary, the only exchange lines connected to each other when an end user calls a local ISP are the end user's and the ISP's — in the same local calling area. These calls, therefore, are subject to terminating compensation under Section 251(b)(5).

\* \* \* \* \*

For all of the reasons stated above, if the Commission issues any order in this matter, that order should expressly state that the question of whether communications between end users and ISPs over dial-in lines are jurisdictionally interstate is separate and distinct

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from the question of whether the calls end users make to ISPs are subject to terminating compensation. The Commission should also expressly state that, to the extent such calls *are* jurisdictionally interstate, the terminating compensation obligation of Section 251(b)(5) fully applies to them.

For convenience, ALEC has attached proposed language to be included in an ordering clause.

Very truly yours,

A handwritten signature in black ink, appearing to read "Chris Savage", written over a horizontal line.

Christopher W. Savage  
Counsel for:  
ALEC, Inc.

cc: Commissioner Ness  
Commissioner Powell  
Commissioner Tristani  
Commissioner Furtchgott-Roth  
Kathryn C. Brown

## Proposed Ordering Clauses

- I. Pursuant to sections 4(i), 4(j), 201, 251(b)(5), 251(i), and 303(r) of the Communications Act of 1934, as amended, it is hereby ORDERED that this declaratory ruling is adopted, to be effective immediately upon release.
- II. By adoption of this Order, we confirm, as we have held in previous orders, that calls that telephone exchange service subscribers make to exchange services of Internet Service Providers (ISPs) are a form of telecommunications that is separate and distinct from the information services that the ISPs themselves provide. We confirm, therefore, that there is no sound legal or policy basis for evaluating the status of local calls by end users to ISPs any differently than any other local calls. This ruling specifically applies to the reciprocal compensation obligations imposed by section 251(b)(5) of the Act. Therefore, when a call from an end user is handed off by a carrier serving the customer originating the call to another carrier that terminates the call to an ISP, such a call is fully subject to reciprocal compensation obligations, as long as the end user and the ISP are in the same local calling area.
- III. By adoption of this Order, we also clarify that, while our previous orders exempting ISPs and other information service providers from the payment of interstate exchange access charges allowed those providers to purchase services from a local exchange carrier's intrastate tariffs, our orders did not affect the nature of the end-to-end communication that is carried, in part, on the local exchange calls by which some end users connect to their ISPs. The fact that the communication itself may be jurisdictionally interstate, however, does not resolve the question of whether the portion of the communication that constitutes a local call is or is not subject to terminating compensation under Section 251(b)(5). To the extent that we have jurisdiction over such local calls by virtue of the interstate nature of the underlying communication, we now expressly hold that such calls *are* subject to terminating compensation under Section 251(b)(5).
- IV. By adoption of this Order, we do not prejudge whether any individual carriers may have expressly and unambiguously agreed to forgo their rights under the Act and voluntarily exempted from the reciprocal compensation obligation calls that end users of one carrier make to ISPs served by another carrier. Under Section 252(a)(1), a carrier may waive its right to receive such compensation, despite the fact that the carrier would otherwise be entitled to it under the Act. Such individual determinations are best made by state commissions based on their review of specific interconnection agreements.