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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of)
The National Exchange)
Carrier Association, Inc.)
) CC Docket No. 80-286
Petition for Interim Waiver of)
Section 36.2(a)(3) of the) DA 98-909
Commission's Rules)

REPLY

The National Exchange Carrier Association, Inc. (NECA)¹ files herein its Reply to comments filed in response to NECA's Petition for Waiver of Section 36.2(a)(3) of the Commission's rules.²

The record overwhelmingly supports the need for interim relief. Nearly all commenting parties agree that growth in Internet traffic is having significant unintended effects on separations results with potentially serious adverse effects on small companies and their customers. As Century Telephone Enterprises, Inc. notes, "growth in Internet minutes experienced by some LECs [local exchange carriers] may undermine the proper application of the separations rules and the underlying Commission principles governing this process."³

¹ Under the Commission's rules, NECA is responsible for the preparation of interstate access charge tariffs on behalf of telephone companies that do not file separate tariffs; and for the distribution of interstate access charge revenues. See 47 C.F.R. §§ 69.603 and 64.604.

² See National Exchange Carrier Association, Inc., Petition for Interim Waiver, filed May 8, 1998 (Petition). See also National Exchange Carrier Association, Inc. Filed a Petition for Waiver of Section 36.2(a)(3) of the Commission's Rules, CC Docket No. 80-286, Public Notice, DA 98-909 (rel. May 14, 1998)(Public Notice).

³ Century Telephone Enterprises, Inc. Comments at 1 -2. See also Comments of ITCs, Inc. at 3 ("While the Internet has, and will continue to change everything from network

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MCI, the State Members of the 80-286 Federal-State Joint Board, and the Association for Local Telecommunications Services (ALTS) oppose grant of the requested relief, arguing that NECA's petition does not demonstrate a need for waiver.⁴ The record shows, however, that Internet traffic is having profound "real world" effects on interstate allocations of some small companies. ICORE explains, for example, that one company with only 552 access lines has experienced a drop of approximately \$50.00 per access line annually of this company's interstate revenue requirement from 1996 to 1997.⁵ Home Telephone Company, a provider of services to approximately 2,200 customers in five rural exchanges in Kansas, estimates that its incremental revenue from Internet usage in 1998 will be \$9,500, while its loss in interstate settlements in 1998 will be more than \$65,000.⁶ Information provided by these commenters clearly illustrates the dramatic effects of Internet traffic on separations studies.

NECA recognizes that, under the standard announced in *WAIT Radio v. FCC*, 418 F.2d

configurations to educational concepts to the economics of commerce, it has played havoc with a process that is supposed to maintain stability within the regulatory framework of the telecommunications industry. It has severely skewed separations results."); Park Region Telephone Company at 1; and Washington Independent Telephone Association at 2.

⁴ See Comments of MCI at 2, ALTS at ii, and State Members of the Joint Board at 2.

⁵ ICORE Comments at 3. ICORE additionally notes that, for a second company, Internet traffic will cause a loss of approximately \$40.00 per access line per year in interstate revenue requirements from 1996 to 1997.

⁶ Home Telephone Company Comments at 5-6. See also Comments of Mantanuska Telephone Association at 2 (an 8% increase in 1997 intrastate dial equipment minutes (DEM) attributable to Internet traffic); Comments of Mashell Telecom, Inc. at 1 (ISP traffic causing interstate DEM to be understated by 5%).

1153, 1159 (D.C. Cir. 1969), applications for waiver “face a high hurdle at the starting gate.”⁷ It is important to note, however, that NECA’s *Petition* seeks only interim relief, pending resolution of issues concerning the separations treatment of Internet traffic in the Commission’s ongoing separations reform proceeding. Grant of the requested waiver will stay further unintended changes to the interstate separations process, allowing the Commission and the Joint Board time to study the issues thoroughly. Waiver will also assure that separations studies continue to produce results that are reasonable and consistent with Commission intent, notwithstanding changes in technology and increases in Internet traffic levels.⁸

According to MCI, waiver is unnecessary because “traffic studies that treat Internet traffic as intrastate achieve precisely the result required by the separations rules”⁹ It is beyond serious argument, however, that Internet traffic is predominately interstate and

⁷ In numerous instances, the Commission has granted waivers of its rules on an *interim* basis while it is considering rule revisions to address problems identified in a waiver petition. *See, e.g.,* Investigation of Bell Atlantic’s New Expanded interconnection Offerings, *Order*, 11 FCC Rcd 19790 (1996); Cellular Telecommunications Industry Association, Petition for Waiver of Part 61 of the Commission’s Rules, *Order*, 8 FCC Rcd 2555 (1993); Southwestern Bell Telephone Company, Petitions for Waiver of Part 69 of the Commission’s Rules, 6 FCC Rcd 6095 (Com.Car.Bur. 1991); Bell Operating Companies’ Joint Petition for Waiver of Computer II Rules, 5 FCC Rcd 4714 (1990).

⁸ Grant of the requested waiver will not prejudice the outcome of the separations reform proceeding, as the State Members of the Federal-State Joint Board suggest. To the contrary, allowing companies to continue using historical data from a specified period merely preserves the *status quo* pending further study. In the unlikely event the Commission determines that increases in Internet traffic should be allowed to skew cost allocations to intrastate, even though the traffic is jurisdictionally interstate, it can simply order companies to resume updating their separations studies based on current traffic data.

⁹ MCI Comments at 3.

international in nature.¹⁰ As commenters explain, however, Internet traffic is typically defaulted to the intrastate jurisdiction in separations studies.¹¹ Such treatment of Internet traffic artificially reduces LECs' interstate DEM, as well as other interstate separations factors.¹² This results in an over-allocation of costs to the intrastate jurisdiction, unfairly burdening local ratepayers.¹³

This result cannot be what the Commission intended when it established the current separations rules. Those rules were intended to allocate costs according to the "actual use" of the telephone network. Contrary to MCI's claims, treating interstate Internet traffic as local accomplishes the *opposite* of what the rules intend.¹⁴

It is important to bear in mind that the separations rules were developed in an era when

¹⁰ See, e.g., Comments of Western Alliance at 4, Park Region Telephone Company at 1, BellSouth Telecommunications, Inc. at 1, and Home Telephone Company at 1-2.

¹¹ See, e.g., Comments of Northeast Florida Telephone Company, Inc. at 2, Home Telephone Company 1-2, and Small Western LECs at 2-3.

¹² ICORE Comments at 2.

¹³ See Comments of SBC Communications at 2-3, quoting Ex Parte Presentation of TDS Telecommunications Corporation before Joint Board Staff, letter dated March 26, 1998, attachment entitled "TDS Telecom Separations Positions" ("[T]he explosion in Internet traffic and its subsequent classification as local is driving down relative interstate minutes of use[,] shifting more traffic sensitive costs to the intrastate jurisdiction."); and BellSouth Telecommunications, Inc. at 1.

¹⁴ Similarly, ALTS asserts that grant of NECA's petition would violate the ratemaking principles established by the Supreme Court in *Smith v. Illinois Bell* because, (contrary to the views expressed by many commenters in this proceeding), Internet traffic should be considered jurisdictionally intrastate. See generally ALTS at 3-6. The jurisdictional nature of Internet traffic is a matter of some controversy, to say the least. Certainly, the current rate treatment of Internet traffic does not determine its jurisdiction, as ALTS seems to suggest. In any event, NECA's petition does not seek to prejudge this issue, or any of the other controversial matters identified by ALTS. NECA's request is intended only to allow its pool participants, and other similarly-situated rate of return telephone companies, to maintain the jurisdictional *status quo* pending resolution of complex issues associated with separations treatment of Internet traffic.

the telephone network was predominantly used for voice telephony. The rules assume, for example, that customers use their telephones to make intrastate and interstate telephone “calls”, which can easily be distinguished based on origination and termination points. By applying traffic factors based on percentages of interstate and intrastate “minutes of use”, the rules assume that costs can fairly be allocated between the jurisdictions.

Internet traffic, however, is challenging these assumptions. As commenters point out, Internet traffic exhibits dramatically different calling patterns and usage characteristics than voice traffic. Internet calls typically involve, for example, much longer holding times than traditional voice calls.¹⁵ Internet traffic also differs from traditional voice telephony in that it is inherently difficult to jurisdictionalize. As BellSouth notes, “a single call through an ISP to the Internet can simultaneously access destinations in other states and other nations, as well as local ones.”¹⁶

Further advances in Internet technology can only be expected to exacerbate these problems. Continued deployment of frame relay services, SONET rings, ADSL and other advanced networking technologies, for example, will increasingly lead carriers to transmit traditional voice services over data networks and *vice versa*, making it ever more difficult to determine “actual use” by the different jurisdictions. For example, some network technologies may provide users with continuous, round-the-clock access to the Internet without the need to make a modem-based call to an ISP. Such circuits could conceivably permit users to make local

¹⁵ See Comments of TDS at 4, Rural Telephone Coalition at 2, Matanuska Telephone Association, Inc. at 2, and Northeast Florida Telephone Co., Inc. at 3. While it is true, as the State Members of the Federal-State Joint Board assert, that the voice telephone network has been used for some time to transmit data traffic, the effects of such use on separations studies has not been significant until recent years. See Comments of the State Members of the Joint Board at 3.

¹⁶ Comments of BellSouth Telecommunications, Inc. at 2.

and long distance voice calls, and access local and interstate data networks, in a single day-long “call.” To the extent that Commission rules require carriers to allocate costs based on “minutes of use” for such circuits, it is conceivable that 100 percent of the related costs could be allocated to the intrastate jurisdiction even though the actual usage is jurisdictionally mixed.

The Commission has recognized that the separations rules are becoming outdated.¹⁷ NECA’s petition does not, however, attempt to resolve or prejudice the complex issues associated with separations treatment of these new network technologies and services. Rather, grant of the requested waiver will simply allow companies that are significantly affected by Internet traffic to maintain reasonable allocation levels pending further study.

Finally, NECA recognizes the concern, expressed by the State Members of the 80-286 Federal-State Joint Board, about the optional nature of the requested waiver.¹⁸ Since the *Petition* would only allow companies to use data from a prior period, to be specified by the Commission, there should be no concerns regarding self-selection of data. Also, NECA’s *Petition* recommended that, as a condition of the waiver, any company that utilizes the waiver must continue to maintain allocations at historical levels until the Commission and Joint Board resolve issues regarding separations treatment of Internet traffic. These limitations should resolve any concerns about “gaming the system.”¹⁹

¹⁷ See Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22120 (1997).

¹⁸ See Comments of State Members of the Federal-State Joint Board Comments at 2.

¹⁹ See Comments of GVNW at 2 and Century Telephone Enterprises, Inc. at 2.

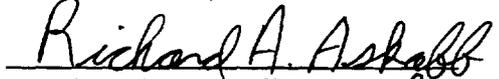
CONCLUSION

Internet traffic raises a number of difficult separations issues that are currently being considered by the Commission and Joint Board in this proceeding. Current treatment of jurisdictionally interstate Internet traffic as local is causing serious cost misallocations that are certain to grow worse as Internet traffic increases. NECA's *Petition* offers an interim solution that will ensure the completion of accurate 1997 cost studies on a timely basis. Grant of the requested waiver will provide stability, while the Commission and Joint Board thoroughly analyze the complex issues that surround Internet traffic. If companies that take advantage of the waiver are required to continue using historical data from a specified prior period on a going-forward basis, pending resolution of separations reform through the Joint Board process, there should be no concern that the waiver will permit carriers to "game the system."

Good cause having been shown, the Commission should grant NECA's *Petition* for waiver of the requirements of Section 36.2(a)(3). Further, the Commission should grant NECA's *Petition* on an expedited basis, so as to permit companies to complete 1997 separations studies on a timely basis.

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