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

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

REPLY COMMENTS OF BELL ATLANTIC[1]

Despite the fact that the petition filed by NECA is narrowly limited and does not directly address the issue of the underlying jurisdictional nature of internet traffic, the comments filed by ALTS launch a broad-based attack on the Commission's often repeated conclusion that this traffic is jurisdictionally interstate. ALTS is simply wrong. As recognized by the Commission, this traffic, which goes to the internet service provider ("ISP") solely for the purpose of connection to other points throughout the world, clearly is predominantly *interstate*.

Not only is ALTS's argument wrong, but it is also essentially irrelevant to the separate question of how the costs should be treated for separations purposes. The simple fact today is that the Commission's ISP exemption prevents local exchange carriers from collecting interstate access charges on this traffic, and allows ISPs instead to purchase

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

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services out of intrastate tarrifs. Until the Commission modifies its policy exempting ISPs from any interstate charges, the only revenues associated with this traffic are intrastate. As a result, the separated costs associated with this traffic likewise have been, and continue to be, directed to the *intrastate* jurisdiction. Consequently, the interstate nature of this traffic does nothing to undermine the reasons that Bell Atlantic previously demonstrated to support freezing separations factors.

1. **ISP Traffic Is Predominantly Interstate.** In its comments ALTS does not limit its argument to the separations treatment of ISP traffic, but also argues that the Commission has found such usage to be "jurisdictionally intrastate" and that "modern caching techniques" mean that ISP traffic is terminated locally. ALTS Comments at 9-10. ALTS is wrong on both counts.

In fact, the Commission has repeatedly recognized that the calls to internet service providers (and other enhanced service providers) are not made with the intent to terminate at that location, but rather to reach a worldwide network through the provider's gateway. *See MTS and WATS Market Structure*, 97 FCC 2d 682 at 711-12 (1983) ("At its own location the [enhanced service provider] connects the local exchange call to another service or facility over which the call is carried out of state."); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, 4306 (1987) ("[e]nhanced service providers, like facilities-based interexchange carriers and

resellers, use the local network to provide interstate services."); *Access Charge Reform*, 11 FCC Rcd 21354 at ¶¶ 282-90 (1996).[2]

ALTS also is wrong that the advent of "caching" – or the practice of downloading information from a distant location to a local database – somehow changes this conclusion. This is a technological distinction without a legal or practical difference. As appellate courts and the Commission have recognized, the "key to jurisdiction is the nature of the communication itself rather than the physical location of the technology." *BellSouth Emergency Petition*, 7 FCC Rcd 1619, 1621 (1992), quoting *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1066 (2d. Cir. 1980). In the BellSouth case, the Commission found that BellSouth's voice mail service was jurisdictionally interstate, even though the storage technology for the voice message was within a single state. This was so because calls to the voice mail system could come from out of state. The local storage, and local delivery of the message were simply the transmission methods for what was an end-to-end interstate communication. *Id.* Likewise, for internet connections, even where the information may be "cached" or otherwise stored within a single state, the ultimate communication is with the source of that information, which is predominantly in another state.

2. <u>The Interstate Nature of the Traffic Does Not Change Current Separations Practices.</u> Making clear that communications running through ISPs are predominantly

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[2] The federal district court administering the Modification of Final Judgment ("MFJ") reached a similar conclusion, finding it an "inescapable" conclusion, that calls to an information service with a gateway architecture, similar to the ISP connections to the internet, are interexchange calls. *U.S. v. Western Electric Co., Inc.*, 1989-1 Trade Cas. (CCH) P68,400 (D.D.C. 1988). Once the ultimate internet destination is taken into account, it is also inescapable that these calls are predominantly interstate.

interstate does not answer the question of how to treat the cost for separations purposes. The Commission has made a policy choice to exempt ISPs from paying interstate access charges. *Access Charge Reform*, 12 FCC Rcd 15982 at ¶ 344 (1997). Because the only tariffed rate recovery associated with that traffic is intrastate[3] – the cost to the ISP of the business line – local telephone companies have categorized the costs associated with this traffic as intrastate for separations purposes. *See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements*, 4 FCC Rcd 3983, 3987 (1989). This is consistent with Commission precedent on how to categorize costs for separations where the Commission has sought to avoid "a mismatch in costs and revenues." *Determination of Interstate and Intrastate Usage of Feature Group A*, 4 FCC Rcd 1966, 1974 (1989). Thus, the intrastate categorization for separations purposes is a result of the Commission's flawed policy choice that, at least for the present, there should be no interstate tariff to recover the costs associated with internet traffic.[4]

Consequently, the interstate nature of ISP traffic does nothing to change the fact that the solution to the *separations* treatment is a complete freeze on all separations factors, as advocated by Bell Atlantic and other parties to this proceeding. *See*

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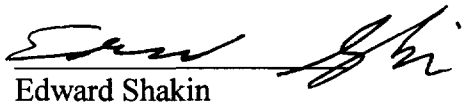
[3] The switching and transport costs all are assigned to intrastate. The interstate jurisdiction is assigned a portion of the fixed common line costs, which are recovered through the interstate subscriber line charge and the presubscribed interexchange carrier charge.

[4] For a discussion as to why the ISP exemption is a flawed policy, *see Access Charge Reform*, CC Dkt. 96-262, Joint Comments of Bell Atlantic and NYNEX on Notice of Inquiry (filed Mar. 24, 1997).

Jurisdictional Separations Reform, CC Dkt. No. 80-286, Comments of Bell Atlantic (filed Dec. 10, 1997). Such a freeze would recognize the fact that the only revenue associated with this traffic remains intrastate in nature, while also avoiding disruptions from isolated changes in calling patterns, such as those identified by NECA.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 1998 a copy of the foregoing "Reply Comments of Bell Atlantic" was sent by first class mail, postage prepaid, to the parties on the attached list.

Jennifer L. Hoh

* Via hand delivery.

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