

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

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

**REPLY COMMENTS OF THE ASSOCIATION FOR  
LOCAL TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Services ("ALTS") hereby files its Reply Comments in the above-captioned proceeding. ALTS filed an Opposition to NECA's request on June 4, 1998, based on NECA's failure to show why Internet traffic is actually interstate, its failure to show the need for a freeze of the separations allocators, and the prejudging effect a grant of the waiver would have on the Commission's determination of the correct jurisdictional treatment of Internet traffic and the associated questions relating to ISP reciprocal compensation.

**I. LOCAL CALLS TO ISPS ARE INTRASTATE UNDER FEDERAL CASE LAW.**

On June 16, 1998, the United States District Court for the Western District of Texas issued an order and opinion in Southwestern Bell Telephone Company v. Public Utility Commission of Texas, MO-98-CA-43 ("SBC Order"), in which it denied SBC's request for a stay of the Public Utility Commission of Texas' order requiring SBC to pay reciprocal compensation on local calls to ISPs that are exchanged with CLECs. In that Order the Court

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held: "Contrary to the FCC's treatment of voice mail and other telephone services, the FCC has not explicitly categorized Internet use via local phone connections as a single end-to-end communication. Indeed, the FCC appears to define the very nature of Internet connections differently from interstate long-distance calls" (SBC Order at 18; emphasis in the original, citing to the Commission's Report to Congress on Universal Service).

The Court concluded that: "in the instant case, the 'call' from Southwestern Bell's customers to Time Warner's ISPs terminates where the telecommunications service ends at the ISPs' facilities. As a technologically different transmission, the ISPs' information service cannot be a continuation of the 'call' of a local customer. Southwestern Bell is bound by its interconnection agreements because 'reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call ... [where] the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call" (SBC Order at 23; emphasis in the original, citing to the Commission's Local Competition Order, CC Docket No. 96-98 at ¶ 1034).

Thus, the June 16th SBC Order conclusively demonstrates that NECA and the commenters in support of NECA, particularly SBC (Comments at 1) and BellSouth (Comments at 2), are utterly

mistaken in asserting that local calls to ISPS are interstate.<sup>1</sup>

**II. COMMENTS IN SUPPORT OF NECA DEMONSTRATE THAT NECA  
IS ACTUALLY SEEKING A RULEMAKING, NOT A WAIVER.**

A number of incumbent local exchange companies and their consultants have filed comments supporting the NECA petition. However, none of them articulate any sound reason to grant the waiver. These comments generally repeat NECA's claim that Internet traffic has increased, and that the treatment of Internet traffic as intrastate has somehow distorted the jurisdictional cost allocation process.<sup>2</sup>

These supporting comments only underscore the inappropriateness of the NECA waiver request. A waiver of the Commission's rules is granted only when a party can show why its peculiar circumstances warrant it not being treated as the general rule would require. The requesting party must show "good cause" why the rules should not apply to that party's

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<sup>1</sup> The Court also recognized the fundamental distinction between the current regulatory definition of an interstate telecommunications call, and Congress' constitutional power to regulate interstate commerce (at 20), a distinction that is less clear to Harris, Skrivan & Associates (Comments at 3: "If the FCC determines that the use of the Internet is not interstate in nature, then can the use of the Internet to send child pornography still be considered 'interstate commerce' and thus subject to the jurisdiction of the FBI and the U.S. Attorney's office?").

<sup>2</sup> See, e.g., Comments of Frederick & Warriner at 2.

particular circumstances.<sup>3</sup> A waiver request that does not show special circumstances relative to the requesting party can not be granted. Any "waiver" request that is really a generalized attack on a rule can only be acted upon through a petition for rulemaking.

NECA's ostensible "waiver petition" is actually a generalized attack on the rule that Internet traffic must be treated as intrastate traffic under current separations requirements (a rule also recognized in the comments of the State Members of the 80-286 Joint Board: "NECA does not dispute that, under current FCC interpretation, Internet traffic is treated as local traffic for jurisdictional purposes" (State Members of Joint Board Comments at 2)). The existence of the rule is also evident from the fact that aspects of this rule are currently under review in the Separations Reform NPRM (CC No. 80-286; released October 7, 1997; at ¶ 49). Clearly, granting the "waiver" request sought by NECA would impermissibly end-run the Commission's existing rulemaking proceeding.

**III. THE STATE MEMBERS OF THE 80-286 JOINT BOARD ARE CORRECT THAT NECA HAS FAILED TO SHOW ANY BASIS FOR ITS REQUESTED WAIVER.**

Finally, ALTS fully supports the comments of the State Members of the Docket 80-286 Federal State Joint Board ("State Members") filed in this proceeding. The State Members are

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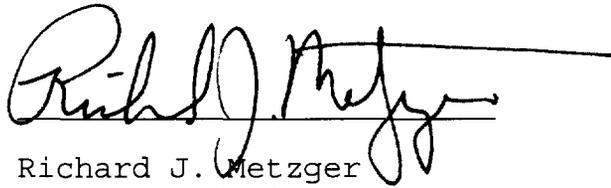
<sup>3</sup> See, e.g., WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

correct that allowing the ILECs to choose their submitted data from among the current study period, a prior period, or an average period, would "give companies an inappropriate opportunity to 'game' their separations factors." State Members of Joint Board Comments at 2. The whole point of having separations rules is to ensure some consistency and continuity in the separations process. The State Members are also correct that the NECA petition provides insufficient information to support any waiver of the rules.

**CONCLUSION**

For the foregoing reasons, the Commission should deny NECA's request.

Respectfully submitted,

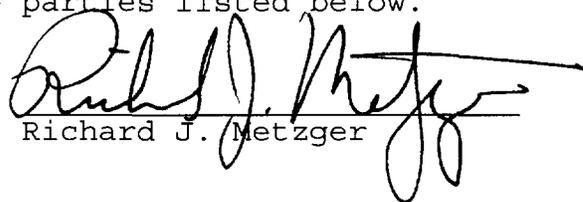
A handwritten signature in black ink, appearing to read "Richard J. Metzger", written over a horizontal line.

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June 18, 1998

Certificate of Service

I hereby certify that this 18th day of June, 1998, copies of the foregoing Reply of the Association for Local Telecommunications Services were served via first class mail, postage prepaid, or by hand to the parties listed below.

  
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