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FEDERAL COMMUNICATIONS COMMISSION
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October 21, 1998

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

The Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
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The Honorable Michael K. Powell
Commissioner
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The Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
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The Honorable Gloria Tristani
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Federal Communications Commission
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Re: Reciprocal Compensation for Local Calls to ISPs; CC Docket No. 96-98; CCB/CPD No. 97-30; CC Docket Nos. 98-79; 98-103; 98-161; 98-168

Dear Chairman and Commissioners:

The undersigned parties are writing to you concerning the Commission's order anticipated by October 28th involving four tariff investigations of the jurisdiction of xDSL tariffs that have been filed by several incumbent local exchange carriers (CC Docket Nos. 98-79; 98-103, 98-161, and 98-168). Our concern is that this order might easily be misused by incumbent carriers in their efforts to disrupt current state-supervised reciprocal compensation contracts for dial-up calls to ISPs unless the Commission takes the specific actions described below. Accordingly, we respectfully request the Commission to take the following actions in the upcoming xDSL order:

First, all parties agree at least some xDSL services are part of interstate calls in certain situations (such as where an xDSL telecommuter is located across a state line from his or her corporate LAN). Because the ILECs' proposed xDSL services may have at least these interstate applications, there is no bar to tariffing these services at the Federal level and thus no immediate need for the Commission to articulate at this time any specific theory concerning its jurisdiction over all kinds of services involving xDSL loop transport. Instead, the Commission should only: (1) allow the current xDSL interstate services to remain in effect (though not tariffed as "exchange access" for the reasons explained below); (2) expressly defer the adoption of a specific jurisdictional theory (and any findings concerning the jurisdiction of particular services

under that theory) to a subsequent rulemaking; and, (3) expressly find that nothing the Commission does is intended, now or in the future, to change or affect carrier-to-carrier compensation for dial-up calls to ISPs under current interconnection contracts.

This approach permits the Commission to coordinate adoption of its ultimate jurisdictional approach with the states in a rulemaking context (such as the pending Internet NOI proceeding), while putting to rest the ILECs' efforts to obtain a Commission "bail-out" from their current contracts. If the ILECs believe there are any aspects of existing reciprocal compensation contracts that should be reconsidered in negotiations for subsequent agreements, they are free to pursue those issues in the next round of negotiations. Furthermore, if the Commission wishes to address any particular issues concerning reciprocal compensation, it would remain free to initiate a proceeding concerning such matters at a time and in a manner of its own choosing, rather than in the very limited confines of a tariff investigation.

Second, the Commission also needs to address the repeated claim that all interstate calls are somehow exempt from reciprocal compensation. In fact, only calls subject to access charges (whether interstate or intrastate) are exempt from reciprocal compensation under the Local Competition Order. The ILECs have filed their current xDSL tariffs as "exchange access" services. Thus, if the Commission were to take no action concerning this tariffing, the incumbents will portray this inaction in state proceedings and court cases as equivalent to a Commission finding that all calls to ISPs, including dial-up calls to ISPs, are "exchange access" services, and thus not subject to reciprocal compensation.[1] This claim is plainly unfounded in light of the ILECs' own concessions that their current tariffed interstate xDSL services (which combine xDSL loop transport from an end user location along with bundled ATM interoffice transport only to ISP locations) are not exchange access services.[2] The only occasion on which xDSL loop transport would be part of an "exchange access" service would be if it were used to carry interexchange toll calls, but that particular use of xDSL is not currently allowed by these tariffs.[3] Accordingly, the Commission should find that these particular xDSL loop transport services are not part of any "exchange

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[1] The record in the many state proceedings dealing with reciprocal compensation for calls to ISPs amply demonstrate that the ILECs will seize upon any ambiguity in the upcoming xDSL order that could be misportrayed as supporting the ILECs' position.

[2] Thus, while the IXCs may be fully entitled to order from these tariffs, they cannot currently make use of them to carry toll traffic.

[3] BellSouth itself admits: "ADSL service does not fall within the Communications Act's definition of exchange access" (BellSouth Direct Case in CC Docket No. 98-79 at 17), and U S WEST agrees: "ADSL is not exchange access" (U S WEST comments in CC Docket No. 161 at 2)).

access" services, and require that they be refiled as interstate communications (see § 152) but not as "exchange access" services.

Third, in the event the Commission adopts a bifurcated approach by issuing an xDSL order addressing jurisdiction and a separate notice or order dealing with reciprocal compensation issues, the Commission should expressly state in both of these actions that it is not now disrupting existing reciprocal compensation agreements and relevant precedent concerning calls to ISPs and has no intention of ever disrupting current agreements and precedent. The Commission needs to act here with far greater precision than simply by speaking of "prospective" versus "retroactive" effect. Instead, the Commission should expressly fence off existing agreements from the effects of any policy changes, and limit the effect of any future notice or order involving reciprocal compensation solely to the negotiations, arbitrations, and review of future interconnection agreements. In particular, it is important that the Commission's declaration that it will not alter existing agreements be contained in the earlier of its two actions to avoid any intervening confusion concerning the full validity of existing contracts. Inasmuch as some ILECs continue to refuse to comply with outstanding orders that reciprocal compensation be paid on this traffic, the Commission needs to act with precision and clarity in each of its orders and notices dealing with this issue.

These actions would vindicate Congress' requirement that interconnection arrangements be negotiated between incumbents and new entrants, with any disputes subject to resolution by the states. The incumbents' efforts to have this Commission overturn contractual arrangements they originally imposed on the CLECs, and invalidate state actions upholding those contracts is utterly inconsistent with Congress' reliance on state-supervised negotiations.

Furthermore, these actions would fully preserve the Commission's discretion to work with the states concerning any policy concerns involving reciprocal compensation the Commission believes needs addressing in the next round of negotiations. The only effect of these actions would be to halt the incumbents' attempts to use this Commission as a means of escape from contracts that are based upon their own voluntary negotiations with CLECs.

We believe you fully appreciate why it is unnecessary and undesirable for the Commission to issue an order in the narrow context of a xDSL tariff investigation that could be portrayed as overturning numerous state decisions, and reversing contractual arrangements the incumbents themselves demanded from CLECs. Such a result would plainly be unfair, and inconsistent with the Commission's commitment to competition.

Please let us know if we can answer any questions about this very important matter.

Sincerely,

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