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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 23, 1998

ORAL EX PARTE PRESENTATION

Ms. Magalie Roman Salas
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: **CC Docket No. 98-79; CCB/CPD 97-30**

Dear Ms. Salas:

On October 23, 1998, Cindy Schonhaut, Senior Vice President of Government and External Affairs, ICG Communications, Inc. ("ICG"), Michael Carowitz and the undersigned, both counsel to ICG, met with Jim Casserly of Commissioner Ness's Office to discuss developments in the above-referenced docket.

Specifically, ICG discussed possible options for the Commission to take to ensure that the Commission's forthcoming order in the tariff investigation does not have any unintended impact on reciprocal compensation for dial-up calls to Internet service providers ("ISPs"). ICG's arguments are outlined more fully in the attachments to this letter, which were distributed at the meeting.

Very truly yours,

Albert H. Kramer/mc

Albert H. Kramer

AHK/mjo
cc: Jim Casserly

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ICG'S POINTS FOR ORDER APPROVING FEDERAL TARIFFING OF DSL SERVICES

I. The Commission must make clear in the DSL tariff order what it is NOT doing:

A. The FCC is NOT ruling that dial-up calls to ISPs are interstate calls, nor that they are not properly treated as local traffic under existing interconnection agreements.

B. The FCC is NOT overturning any state commission decision concerning reciprocal compensation for calls to ISPs. The Commission does not intend to revisit reciprocal compensation decisions made by the states under Section 252. Indeed, the states continue to retain their authority to oversee negotiations of interconnection agreements.

C. The FCC is NOT classifying DSL service as "exchange access," even if DSL services may be tariffed at the interstate level.

II. The actions that can resolve the DSL tariff investigation consistent with maintaining a competitive balance and respecting state authority are:

A. Allowing the tariffs for DSL service to stay in effect because DSL service can have interstate applications. The Commission should not make a determination about the jurisdictional nature of calls to ISPs.

B. Consider long-term solutions in a separate proceeding.

III. This approach, which is entirely consistent with the integrity of the Telecommunications Act of 1996, accomplishes the following:

A. The Commission retains the flexibility to weigh in with policy guidance on ISP issues in the interconnection context, whether in the companion proceeding to the tariff order or elsewhere in a pending or broader proceeding.

B. Does not create a regulatory lapse or foster uncertainty in the interim.

C. Provides the FCC with full flexibility to address prospectively reciprocal compensation issues.

D. Preserves the role of the states.

ICG'S POINTS FOR ORDER APPROVING FEDERAL TARIFFING OF DSL SERVICES

I. **The Commission must make clear in the DSL tariff order what it is NOT doing:**

A. **The FCC is NOT ruling that dial-up calls to ISPs are interstate calls, nor that they are not properly treated as local traffic under existing interconnection agreements.**

1. The Commission need not make any determination in the context of the tariff investigation about the jurisdictional nature of calls to ISPs or any other Internet-related calls.

a. The Commission should avoid making a "one call" or a "point-to-point" finding that would classify a call to an ISP as interstate.

i. With a call to an ISP, there are two services at issue: (1) the local, intrastate call to the ISP (which is an end user of the serving LECs' telecommunications service); and (2) the information service the ISP provides to its customer (which is not a regulated telecommunications service at all, whether intrastate or interstate in nature).

b. Whatever the jurisdictional nature of an Internet communication, the telecommunications service connecting a caller to an ISP is intrastate.

2. Finding that calls to ISPs are interstate would amount to a reversal of the Commission's course, which would be inconsistent and inequitable, and would likely undermine the progress of local competition and send the wrong signal to the financial markets.

B. **The FCC is NOT overturning any state commission decision concerning reciprocal compensation for calls to ISPs. Nor will the Commission examine such decisions by the states. Indeed, the states continue to retain their authority to oversee negotiations of interconnection agreements.**

1. The Commission should also make clear that as a matter of policy it does not intend to reexamine decisions made by the states in exercising their authority under Section 252.

a. The decisions by the state commissions interpreted provisions of interconnection agreements or resolved disputes in arbitration proceedings, consistent with state authority under Section 252 of the Act.

b. Unless the Commission forecloses application of its ruling to dial-up calls to ISPs, there will be confusion and uncertainty in state proceedings about the extent of the Commission's findings.

c. The Commission should not be in the position of modifying agreements entered into by the parties.

2. The need to respect existing state law determinations is particularly apparent in the area of reciprocal compensation for calls to ISPs.

a. It is not possible to reliably identify calls to ISPs from other local calls.

b. Many calls to ISPs never leave the ISP's intrastate platform.

c. Twenty-one (21) states have already examined the issue of reciprocal compensation for calls to ISPs. In addition, NARUC has recently adopted a second resolution in less than a year asking the FCC to coordinate with the states before taking any action on this issue.

C. **The FCC is <u>NOT</u> classifying DSL service as "exchange access," even if DSL services may be tariffed at the interstate level.**

1. Classifying DSL service as "exchange access" would be inconsistent with state supervision of carrier-to-carrier compensation for calls to ISPs.

2. There are significant policy considerations that would be implicated by an "exchange access" classification:

a. Because most reciprocal compensation agreements expressly exclude "access" traffic, the ILECs would likely argue to the states that *all* calls to ISPs, including "dial-up" calls, are interstate in nature and therefore "access."

b. DSL traffic would be exempted from the Act's interconnection requirements.

3. DSL service does not bear the indicia of exchange access.

a. It does not involve "the origination or termination of telephone *toll* services."

b. It fails to qualify as a Part 69 exchange access tariff both because: (1) it is a point-to-point communication within the same state; and (2) it fails to provide access to an IXC's POP.

c. It would be inconsistent with Commission policy exempting ISPs (as end users) from access charges to classify as "exchange access" a service that GTE admits is for end users.

d. Under the Commission's rules, "access service" involves "interstate or foreign telecommunication." No such "interstate *telecommunication*" is associated with DSL calls, no matter how one classifies the information service provided by the ISP.

II. **The actions that can resolve the DSL tariff investigation consistent with maintaining a competitive balance and respecting state authority are:**

A. **Allowing the tariffs for DSL service to stay in effect because DSL service can have interstate applications. The Commision should not make a determination about the jurisdictional nature of calls to ISPs.**

1. Because the ILECs' proposed DSL services may sometimes have interstate applications, there is no bar to tariffing such services at the federal level.

a. It is theoretically possible for a "point-to-point" Internet "communication" to be interstate, but the two underlying services remain distinct.

i. The ISP platform initiates a completely new service that is an information service.

ii. The ISP platform is not an "intermediate switching point" within an "unbroken" communication.

2. DSL services may also be tariffed at the intrastate level.

3. A decision to allow DSL services to be tariffed at either the federal or state levels would not change the continued availability of DSL services.

B. **Consider long-term solutions in a separate proceeding.**

1. ISP "exemption" from access charges.

2. Appropriate compensation arrangements.

a. To the extent that the Commission chooses to make any ruling on reciprocal compensation for calls to ISPs, such action should be made with a continuing role for the states in regulating the details, such as end user rates and carrier-to-carrier compensation.

i. The Commission has the option of allowing the states to address these compensation issues pursuant to their Section 252 authority over interconnection agreements.

ii. If the Commission chooses to resolve reciprocal compensation issues itself, it should signal its intention to explore all compensation issues in a full rulemaking proceeding – whether a pending proceeding where the issue has been raised, or in a new proceeding initiated to explore reciprocal compensation issues.

ALTS

Association for Local Telecommunications Services

ILECs will tell you that dial-up traffic to the Internet is not included in Reciprocal Compensation Agreements

Fact of the matter is that the State Commissions say otherwise

- 23 of 23 State Commissions have ruled in favor of the CLECs. These 23 states cover over 70% of the total U.S. population and over 70% of the total phone lines. States are:

- AZ, CA, CO, CT, FL, IL, MA, MD, MI, MN, MO, NC, NY, OH, OK, OR, PA, TN, TX, VA, WA, WV, WI

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