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October 19, 1998

VIA HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M St. N.W., Room 222
Washington, D.C. 20554

Re: *Ex Parte* Presentation for Filing In the Matter of Request by ALTS for Clarification of the Commissions' Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, Docket Nos. CCB/CPD 97-30 and CC Docket 96-98; In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; and In the Matter of GTE Telephone Operators GTOC Tariff No. 1 GTOC Transmittal No. 1148, CC Docket No. 98-79

Dear Ms. Salas:

Pursuant to Section 1.206(b) of the Commission's rules,[1/] Cablevision Lightpath, Inc. ("Lightpath"), by its attorneys, hereby submits six copies of the attached Comments on Direct Case (originally filed in CC Docket No. 98-168) for inclusion in the record in the above-referenced proceedings. In these Comments, Lightpath explains that under current law, the states have jurisdiction over reciprocal compensation issues, and have acted correctly in applying reciprocal compensation obligations to local calls terminating with an ISP. Lightpath requests that the Commission not disturb these authoritative state decisions on reciprocal compensation.

[1/] 47 C.F.R. § 1.206(b).

Please contact the undersigned if you have any questions concerning this filing. Thank you for your assistance.

Respectfully submitted,

Gil M. Strobel

Enclosure

cc: Richard B. Cameron (w/enclosure)
Edward B. Krachmer (w/enclosure
James D. Schlichting (w/enclosure)
Chérie R. Kiser (without enclosure)
David Ellen (without enclosure)

DCDOCS: 135961.1 (2wwp01!.doc)

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

In the Matter of	)	
	)	
Bell Atlantic Telephone Companies	)	CC Docket No. 98-168
Tariff No. 1	)	
Transmittal No. 1076	)	

CABLEVISION LIGHTPATH, INC.'S COMMENTS ON DIRECT CASE

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October 15, 1998

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

In the Matter of	)	
	)	
Bell Atlantic Telephone Companies	)	CC Docket No. 98-168
Tariff No. 1	)	
Transmittal No. 1076	)	

CABLEVISION LIGHTPATH, INC.'S COMMENTS ON DIRECT CASE

Cablevision Lightpath, Inc. ("Lightpath"), by its attorneys, hereby submits these comments in the above-referenced proceeding.

INTRODUCTION

Lightpath is a competitive, facilities-based provider of local telephone services to residential and business customers, including business customers that are Internet service providers ("ISPs"). As such, Lightpath is seriously concerned about incumbent local exchange carriers' ("ILECs'") recent efforts to avoid paying reciprocal compensation for phone calls that are transported over competitive local exchange carriers' ("CLECs'") local networks and terminated to CLECs' local ISP customers.

There are legitimate network costs associated with the termination of local phone calls. In fact, the ILECs originally favored reciprocal compensation over a "bill and keep" regime because they believed that reciprocal compensation would best allow them to recover these network costs. Similarly, the ILECs, including Bell Atlantic, originally characterized ISP-bound traffic that originated and terminated within the same exchange service area as local[1/] and

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[1/] For example, in obtaining FCC approval to provide "Internet Access Services," Bell Atlantic

charged their own customers local rates for calls to ISPs. Now, however, the ILECs are dissatisfied with the results of the policies they originally advocated, because reciprocal compensation has boosted competition and cut into their monopolies. The ILECs now proffer a new legal argument in an effort to avoid paying reciprocal compensation for phone calls to CLECs' local ISP business customers. This is simply an attempt to get something for nothing -- i.e., to use a CLEC's network to terminate a call without paying for the network costs associated with the call.

These attempts should not be rewarded. The legitimate network costs associated with terminating a local call do not disappear simply because that call happens to terminate with an ISP. Furthermore, eliminating reciprocal compensation for local ISP-bound calls would undermine the continuing development of the Internet. CLECs would be reluctant to serve ISPs if the CLEC could not be compensated for the costs of terminating calls to their ISP customers. This would force ISPs to rely solely on the ILECs for service, thus reducing competition for a key segment of the local market. Such a result would be antithetical to the pro-competitive goals of the 1996 Act.

For these and other reasons, Lightpath seeks to clarify what should be a straightforward jurisdictional point, albeit one which the ILECs have done an effective job of obscuring -- that the FCC has broad jurisdiction under the Communications Act of 1934 over what it regards as

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asserted that calls to ISPs over the public switched network are fundamentally local in nature. See In the Matter of Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, CCB Pol. 96-09, Bell Atlantic Reply Comments at 4-5 (filed Apr. 29, 1996); see also Amendment to Bell Atlantic CEI Plan to Expand Service Following Merger with NYNEX, CCB Pol. 96-09 at 4 (filed May 5, 1997) ("Bell Atlantic CEI Plan") ("[I]n providing this [Internet Access Service] Bell Atlantic and its vendor will subscribe only to generally-available local telecommunications services.").

interstate traffic, but that under existing Eighth Circuit precedent (currently on review in the Supreme Court), the Telecommunications Act of 1996 has *circumscribed* that jurisdiction in certain limited areas, including carrier-to-carrier reciprocal compensation.[2] Specifically, the FCC may not presently exercise its otherwise broad Communications Act jurisdiction in a way that conflicts with authoritative state determinations under the Telecommunications Act regarding carrier-to-carrier reciprocal compensation. Any assumption of Commission jurisdiction over xDSL *end user* services need not, and cannot, disturb authoritative state commission decisions that the carrier-to-carrier reciprocal compensation obligation set forth in the Telecommunications Act of 1996 applies to local phone calls terminated to ISPs.

ARGUMENT

In order to promote the development of local competition, section 251 of the Telecommunications Act of 1996 Act (which amended the 1934 Act) creates certain new carrier-to-carrier obligations. One such new obligation is the carrier-to-carrier reciprocal compensation obligation set forth in section 251(b)(5). In particular, section 251(b)(5) requires "local exchange carriers" to establish "reciprocal compensation" arrangements for the "transport and termination of telecommunications."[3] Section 252(d)(2) sets forth the pricing standards that govern these

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[2] Lightpath recognizes that the 1996 Act is not separate from the original 1934 Act, but merely embodies substantial amendments to the original Act. For ease of description, however, these comments will use the term "1934 Act" to refer to the original, or unamended portions of the Telecommunications Act, and the term "1996 Act" to refer to the 1996 amendments.

[3] 47 U.S.C. § 251(b)(5).

arrangements.[4] Neither Section 251(b)(5) nor 252(d)(2) contain an exception for ISP-bound calls.

One vexing and important jurisdictional question (but not one raised by these proceedings) is whether the FCC or the states are responsible for deciding issues of statutory interpretation arising under sections 251 and 252, and under sections 251(b)(5) and 252(d)(2) in particular, such as the issue of whether they apply to local ISP-bound calls. As noted, along with creating certain new carrier-to-carrier obligations, the 1996 Act also established a whole new jurisdictional scheme to decide these issues of statutory interpretation and thereby define the nature and scope of such obligations. Although the contours of this new jurisdictional scheme are currently being litigated before the Supreme Court and elsewhere, for now, under current Eighth Circuit precedent, the scheme squarely assigns jurisdiction over the interpretation of sections 251(b)(5) and 252(d)(2) to state commissions in the course of arbitrating and enforcing interconnection agreements. The Eighth Circuit could not have been clearer on this point, as it vacated *all* of the FCC's reciprocal compensation rules promulgated under section 251(b)(5) (except as they relate to CMRS providers), including the rules clarifying that the section 251(b)(5) reciprocal compensation requirement applies only to "local" traffic (47 CFR 51.701)(a) and 51.703(a)).[5]

After the Eighth Circuit's decision that state commissions, not the FCC, have jurisdiction to define the nature and scope of the section 251(b)(5) reciprocal compensation obligation, many state commissions took up the issue of whether this obligation applies to local ISP-bound calls.

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[4] See 47 U.S.C. § 252(d)(2).

[5] Iowa Utilities Bd. v. FCC, 120 F.2d 753, 800 (8th Cir. 1997) (vacating many FCC rules under Section 251 including, 47 C.F.R. §§ 51.701(a) and 51.703(a)).

These commissions have held that the reciprocal compensation obligation set forth in these provisions does indeed apply to phone calls to local ISP customers.[6]

New York is a good example of how the new section 251/252 jurisdictional scheme, as interpreted by the Eighth Circuit, plays out with respect to the section 251(b)(5) reciprocal compensation obligation. The New York Public Service Commission ("NYPSC") stated that the 1996 Act reserves to the states the authority to determine appropriate reciprocal compensation.[7] Pursuant to that authority, the NYPSC ruled that reciprocal compensation applies to local calls to an ISP. This ruling was based on sound public policy. As the NYPSC noted, "a call to an ISP is no different from a call to any other large volume customer, such as a local bank or a radio call-

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[6] These state decisions applying reciprocal compensation to local ISP-bound traffic are consistent with FCC decisions regarding ISPs. Although, in other contexts, the FCC has determined that ISP traffic is interstate in nature, it has also ruled that ISPs use network facilities differently than do interexchange carriers ("IXCs"). See In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, First Report and Order (CC Dockets Nos. 96-262, 94-1, 31-213, 95-72), FCC 97-158, 12 FCC Rcd 15982 (rel. May 16, 1997) ("Order") at ¶ 345; Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 542, 544 (8th Cir. Aug. 19, 1998) ("SBC"). In light of these differences, the FCC has treated ISPs as end users – exempting them from access charges, and stating that ISPs should obtain service pursuant to state tariffs. See Order at ¶¶ 342, 346; In the Matter of Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45 (rel. April 10, 1998) at ¶¶ 69, 100, 138; SBC, 153 F.3d at 541. ISPs have and do purchase local services. The states' decisions to apply reciprocal compensation to local calls to ISPs therefore are consistent with the FCC's determination that ISPs should be treated as end users -- like any other local business customer.

[7] New York Case 97-C-1275, Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, Order Closing Proceeding (Issued and Effective March 19, 1998) at p. 3 ("Order Closing Proceeding").

in program. These are all local calls."[8] The NYPSC also recognized that calls to ISPs are no more costly than other local calls.[9] Bell Atlantic and other incumbents chose not to appeal the NYPSC's ruling (to a New York federal district court, to the Second Circuit, and ultimately to the Supreme Court). The NYPSC's decision, and the numerous other state decisions like it, are based on well-reasoned, pro-competitive analyses and are consistent with FCC policies.

In any event, while the FCC continues to have broad jurisdiction over traffic that it regards as interstate in nature, the Eighth Circuit's ruling means that authoritative state commission interpretations of section 251(b)(5) prevail. Thus, for example, where a state commission (such as the NYPSC) authoritatively interprets section 251(b)(5) to apply the reciprocal compensation obligation to phone calls to local ISPs, the FCC may not -- and should not want to -- exercise its jurisdiction over interstate traffic in way that conflicts with this interpretation. This conclusion follows from the fundamental axiom of statutory construction that a later-enacted statutory provision (section 251) governs over earlier enacted provisions (the original Communications Act of 1934) where the two conflict.[10] The ILECs attempt to obscure the fundamental jurisdictional implications of the 1996 Act for reciprocal compensation and other carrier-to-carrier matters by more or less *ignoring* section 251(b)(5) and the 1996 Act.

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[8] New York Case 97-C-1275, Order Closing Proceeding at p. 3. See also Id. at p. 6 ("Calls to local telephone numbers of internet service providers are intrastate in nature and will be treated as intrastate for the purpose of reciprocal compensation. Further, there is nothing unique about internet traffic...that would warrant a different compensation structure for this type of call.")

[9] Id. at 5.

[10] The U.S. Supreme Court is currently reviewing the Eighth Circuit's decision, and may issue a ruling that would expand the FCC's role in this area.

Finally, in deciding whether section 251(b)(5)'s reciprocal compensation obligation applies to phone calls to local ISP customers, state commissions may consider some of the same factors that traditionally distinguish interstate from intrastate phone calls. This does not, however, change the fact that the law that is ultimately being interpreted is section 251(b)(5) of the 1996 Act. Nor does it change the fact that, under the Eighth Circuit's reading of the 1996 Act, state commissions are the entities responsible for interpreting section 251(b)(5) and defining its scope (subject to federal court review).

CONCLUSION

With the passage of the 1996 Act, the interstate or intrastate nature of traffic no longer determines which entity has jurisdiction over such traffic for all purposes, e.g., with respect to carrier-to-carrier obligations. To spur competition, the 1996 Act created certain new carrier-to-carrier obligations, and devised a new jurisdictional scheme for the interpretation and enforcement of these obligations. The ILECs cannot simply ignore this new jurisdictional scheme when it is in their interest to do so. Moreover, at least 22 states have reviewed the issue on the record and have found, in the face of persistent ILEC advocacy, that reciprocal

compensation should apply to ISP-bound traffic. There is no policy reason or legal basis for the FCC to disturb these state decisions in acting on xDSL end user service tariffs.

Respectfully submitted,

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October 15, 1998

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