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ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Re: Written *Ex Parte* Presentation of the Association for Local
Telecommunications Services
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 Ms. Salas:

Pursuant to § 1.1206(b)(1) of the Commission's Rules, the Association for Local Telecommunication Services ("ALTS") submits this written *ex parte* presentation related to the above-captioned docketed proceedings. This filing is submitted in response to the Commission's Order of October 30, 1998, in the above-captioned docketed proceeding. It is of critical importance to ALTS' members that, if the Commission should assert jurisdiction over dial-up calls to Internet service providers ("ISPs"), such action must not disrupt existing compensation arrangements that are currently governed by interconnection agreements, and that have been the subject of final decisions by 23 State regulatory commissions.

In order to eliminate any ambiguity that could have such a disruptive effect, this presentation provides proposed language regarding the Commission's jurisdiction over dial-up calls to ISPs in a way that ensures the integrity of the decisions by the 23 State regulatory bodies that mandate payment of reciprocal compensation when such traffic is passed between incumbent and competitive local exchange carriers.

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THE COMMISSION WILL CONTINUE TO RELY ON STATE-DETERMINED RATES FOR THE RECIPROCAL COMPENSATION OF ISP-BOUND TRAFFIC

“Our finding today that dial-up, circuit-switched calls to ISPs include some interstate services does not require us to assert exclusive jurisdiction over such traffic and displace current and past state supervision over the interstate portion of these services. We have noted our authority over this traffic on several occasions during the past fifteen years, and each time we have concluded that continued state authority best furthered our policy goals. Indeed, the Eighth Circuit recently reaffirmed our discretion to allow the states to continue treating this traffic as ‘local’ until such time as we choose to alter this regulatory environment.”¹

“Pursuant to this discretion, we hereby reaffirm our long-standing decision to allow the states to regulate all aspects of circuit-switched calls to ISPs, including but not limited to, the treatment of interstate services as ‘local’ for all ratemaking and compensation purposes, and state determinations that, for purposes of reciprocal compensation, such traffic terminates at the ISP. As noted elsewhere in this order, we seek comment as to whether we should exercise active jurisdiction in the future over the carrier-to-carrier aspects of circuit-switched calls to ISPs upon the expiration of existing interconnection arrangements. Accordingly, our reaffirmation of state authority over carrier-to-carrier compensation for this traffic applies to existing interconnection arrangements.² After receiving these comments, we will issue an order explaining how this aspect of circuit-switched calls to ISPs will be regulated in the future.”

“Our decision is fully consistent with §§152(a) and 201-205 of the Communications Act. The fact that some forums may have reached a different jurisdictional conclusion than ours does not preclude us from agreeing with their disposition of the merits. Accordingly, we hereby affirm that, pursuant to §§152(a) and 201-205, the reciprocal compensation rates in existing and past interconnection agreements apply to the interstate ISP traffic already exchanged among carriers, as well as to such traffic that will be exchanged in the future until such time as we order changes in this regulatory treatment. We also affirm State interpretations of such agreements, including the State commission findings that dial-up traffic to ISPs terminates at the ISP for purposes of reciprocal compensation.”

“This finding is also compelled by the nondiscrimination provisions of the

¹ *Southwestern Bell v. FCC*, 153 F.3d 523, 543 (1998).

² We intend “existing arrangements” to include interconnection arrangements negotiated or implemented by any carriers that may require interconnection prior to the effective date of a federal scheme for carrier-to-carrier compensation, such as a carrier starting service for the first time in a state.

Communications Act. Any agreement that results in the exclusion of ISP traffic from reciprocal compensation would violate the requirements of § 202(a). That provision states as follows:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device.³

Carriers perform the same functions when exchanging local voice traffic as when they exchange ISP traffic over circuit-switched, dial-up connections. Under § 202(a), carriers may not perform these ‘like’ services on terms and conditions that are either ‘directly or indirectly’ discriminatory. Refusing to pay compensation on traffic delivered to ISPs, while paying compensation on all other local calls, would unquestionably result in indirect discrimination against ISPs providing interstate services.⁴ This practice would essentially deny ISPs and ISPs alone among end users the opportunity to be served by competitive LECs. This is because, if competitive LECs cannot be compensated for the cost of delivering traffic to ISPs, they will not serve them. Section 202(a) therefore compels the maintenance of State-determined reciprocal compensation rates for dial-up ISP-bound traffic until such time as the Commission establishes a different compensation mechanism.”

“The maintenance of State-determined compensation rates is further compelled by equitable and public policy considerations. If the payment of reciprocal compensation amounts for ISP-bound traffic originating on ILEC networks and terminating on CLEC networks is not paid, CLECs will be deprived of compensation for the transport and other functions that they have provided to ILECs under existing interconnection contracts. Leaving CLECs without recourse to obtain compensation for such services would effect an uncompensated taking of CLEC property, in violation of the Fifth Amendment of the Constitution, and would be inconsistent with the procompetitive policies of the Communications Act. We are fully empowered to prevent such an outcome – beyond our discretion to defer to State supervision over interstate traffic, or to actively adopt all State-supervised arrangements as our own pursuant to §§ 152(a) and 201-205 – we also have authority to preserve the fair contractual expectations of

³ 47 U.S.C. § 202(a).

⁴ *See National Assoc. of Reg. Util. Comm'rs v. F.C.C.*, 746 F.2d 1492 (D.C. Cir. 1984) (FCC may, in order to prevent unlawful discrimination, prohibit resale and sharing restrictions in state WATS tariffs where those tariffed services are used by an interstate carrier to provide interstate services).

the parties under well-known contractual and equitable principles, such as *quantum meruit*.⁵ This established precedent provides us with further authority to prescribe the reciprocal compensation rates established by State regulators as the appropriate level of compensation for the CLEC services rendered to ILECs until such time as we may establish a different system of compensation.”

“By affirming our authority to exercise jurisdiction over ISP-bound calls, we also clarify that we may exercise our authority to enforce compliance with orders concerning the compensation for ISP-bound traffic. Specifically, we may use our authority to hear complaints regarding failure of payment, and may award monetary damages and interest, grant injunctive relief, and grant other forms of relief as deemed necessary pursuant to our authority under §§ 206-209 of the Communications Act. Such action would not involve the enforcement of interconnection agreements established pursuant to §§ 251-252 of the Act, which the U.S. Court of Appeals for the Eighth Circuit has determined to be the exclusive province of State regulatory bodies.”⁶”

“Finally, we are empowered to consider refusal by ILECs to pay amounts owed in compensation for the services provided by CLECs in handling ILEC ISP-bound traffic as part of our public interest determination in our review of ILEC applications for regulatory approvals for mergers and acquisitions, transfers of control, the grant of interLATA relief under § 271 of the Communications Act, and the grant of additional pricing flexibility pursuant to any future revision of our access charge rules.”

⁵ See *Local Exchange Carriers’ Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 12 FCC Rcd 18730, 18743 (1997)(Stating in dicta that “[w]e might well undertake such [remedial] action under a theory of quantum meruit if considerations of equity demanded a remedy in the nature of refunds to do equity”). See also, *Western Union Telegraph Co.*, 10 FCC Rcd 1741 (1995)(Under former § 222 of the Act, Commission has authority to establish rates during a 19-month “regulatory hiatus” period between time effective contracts expired and the time new rates could be prescribed following an investigation.)

⁶ *Iowa Utilities Board v. F.C.C.*, 120 F.3d 753, 803-04 (8th Cir. 1997).

Pursuant to 1.1206(b)(1), ALTS submits an original and one (1) copy of this written *ex parte* notification for inclusion in the public record of each above-referenced proceedings. Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES

By:  (78)
Cronan O'Connell
Acting President

cc: Chairman William E. Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
International Transcription Service