

Bell Atlantic
1300 I Street NW, Suite 400W
Washington, DC 20005

Susanne Guyer
Executive Director,
Federal Regulatory Affairs

EX PARTE OR LATE FILED



October 28, 1998

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

RECEIVED

OCT 28 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **Docket CCB/CPD 97-30 and CC Docket No. 96-98, Reciprocal Compensation**

Dear Ms. Salas:

Yesterday, Mr. M. Glover and I, representing Bell Atlantic, met with Ms. S. Tetreault and Ms. S. Diskin of the Office of the General Counsel, and Ms. T. Preiss of the Competitive Pricing Division of the Common Carrier Bureau. The purpose of the meeting was to discuss the significant public policy consequences of the continued application of reciprocal compensation payments to Internet bound calls. During the discussion, Mr. Glover reviewed the Commission's legal authority to resolve the problems created by the misinterpretation of the ESP exemption. During the discussion a question was raised as to whether the FCC can adopt an interpretation of its prior orders that applies prospectively only. The answer is yes. The legal authorities are attached.

Mr. Glover also responded to a question as to whether adopting such an order would comply with the Administrative Procedures Act. The answer is yes.

As an initial matter, the APA contains an express exemption from the notice and comment requirements for interpretive rules, 5 U.S.C. § 553(b)(3)(A). It also contains an exemption where the agency "for good cause finds" that notice and comments are "impracticable, unnecessary, or contrary to the public interest," *id.*, § 553(b)(3)(B). Examples include where the agency is under a short deadline, and either reviews what data is available to it, Petry v. Block, 737 F.2d 1193, 1203 (D.C. Cir. 1984), or adopts interim or temporary rules to be effective immediately pending notice and comment on permanent rules, American Federation of Gov't Employees v. Block, 655 F. 2d 1153, 1157 (D.C. Cir. 1981).

No. of Copies rec'd 0+3
List ABCDE

In any event, the parties here received notice and an opportunity to comment, both in the pending reconsideration of the local interconnection order and in the proceeding initiated in response to the ALTS request for a declaratory ruling. The record addresses such issues as whether Internet traffic is subject to reciprocal compensation, whether competing carriers should receive end office or tandem rates, and competing carriers' own views as to an appropriate cost based compensation rate level. As a result, the requirements of the APA are fully met.

In accordance with Section 1.1206(a)(1) of the Commission's rules, an original and one copy of this notice are being submitted to the Secretary.

Sincerely,

A handwritten signature in cursive script that reads "Susanne Guyer (TAS)". The signature is written in black ink and is positioned above the printed name.

Susanne Guyer

cc: S. Tetreault
S. Diskin
T. Preiss

attachment

Prospective Application Of
Agency Interpretations

A question has been raised as to whether the FCC can adopt an interpretation of its prior orders establishing the so-called "enhanced service provider exemption" that applies prospectively only. The answer is yes.

Whether the FCC issues an interpretive ruling in the context of an ongoing adjudication (such as the GTE tariff proceeding) or issues a declaratory ruling (such as in the proceeding initiated in response to the ALTS petition), it has discretion to make that ruling prospective only.

1. Interpretive rules. The courts have long recognized that federal agencies have discretion to limit interpretive rulings adopted in agency adjudications to prospective application:

a. "[A] retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a 'manifest injustice.' Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1081 (D.C. Cir. 1987), citing Retail, Wholesale & Department Store Union v. NLRB, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (factors to consider include the extent to which a party relied on the former rule, and the degree of burden that retroactive application would impose on a party).

b. "While at one time the determination that a rule was properly established through adjudication would have

compelled the conclusion that it should be applied with full retroactive effect, see Linkletter v. Walker, 381 U.S. 618, 622-24 (1965), 'the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective.' Id. at 628. The Department [of the Interior] itself has recognized this very principle in its own adjudications. . . . In Safarik [v. Udall], 304 F.2d 944 (D.C. Cir.), cert denied, 371 U.S. 901 (1962)], the Court of Appeals for the District of Columbia Circuit upheld the Department=s power to give its decision prospective effect only. Id. at 950." McDonald v. Watt, 653 F.2d 1035, 1042 & n.18 (5th Cir. 1981).

c. "[I]t is a basic tenet of administrative law that agencies have some discretion to choose between adjudication and rulemaking when interpreting statutes and regulations committed to their authority . . . The Administrative Procedure Act does expressly prohibit an agency from retroactively imposing an interpretive rule upon a regulated party. [citation omitted]. Nonetheless, nothing in the APA prohibits an agency from adopting or revising an interpretation of a regulation that has been properly promulgated in an adjudication and applying that interpretation retroactively.... However, courts will not allow

retroactive application of an agency adjudication where doing so would result in a 'manifest injustice.'"

Beazer East, Inc. v. EPA, 963 F.2d 603, 609 & n.4 (3rd Cir. 1992).

2. Declaratory ruling. Likewise, the same rule applies if the agency adopts its interpretation in the form of a declaratory ruling to resolve an ongoing controversy, rather than in an adjudication.

a. Under the Administrative Procedure Act, "[t]he Agency with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); see also 47 C.F.R. 1.2.

b. "[W]e wish to emphasize that our ruling today will have prospective application only. . . . If we were to make our ruling today retroactive, it would probably create considerable disruption to all concerned." Request by Reagan for President Committee for Declaratory Ruling, 80 FCC 2d 225, 228 (1980).

c. "A determination in a declaratory ruling that a particular carrier practice is unlawful may effectively require a carrier to adopt a different practice for the future." In re AT&T, 3 FCC Rcd 5071, & 7 (1988).