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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Re: Notice of Permitted Ex Parte Contact; Submission of Additional Materials For The Record (CC Dkt. Nos. 96-98 and 98-79; CCB/CPD 97-30)

Dear Ms. Salas:

The purpose of this letter is to advise the Commission of permitted *ex parte* contacts between undersigned counsel on behalf of Global NAPS, Inc. and various Commission staff members with regard to the issue of terminating compensation for calls to ISPs. On Wednesday, November 4, 1998, undersigned counsel discussed the issue by telephone with Mr. Tom Power of the Chairman's office, Mr. Jim Casserly of Commissioner Ness's office, and Mr. Paul Gallant of Commissioner Tristani's office. On Thursday, November 5, 1998, undersigned counsel met with Mr. Kevin Martin of Commissioner Furtchgott-Roth's office and with Ms. Tamara Preiss of the Common Carrier Bureau to discuss these matters.

In addition, each of the above-mentioned individuals, as well as Mr. Kyle Dixon of Commissioner Powell's office, was provided with a copy of the attached materials summarizing matters already in the record of these proceedings.

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Please contact the undersigned if you have any questions about this matter.

Very truly yours,

Christopher W. Savage

cc: Ms. Kathryn C. Brown

Reciprocal Compensation And Calls To ISPs — Current Law

Is reciprocal compensation for calls to ISPs consistent with *current* Commission precedent? Yes.

Under current law, dial-in calls to ISPs are local calls as long as the number dialed is within the calling party's local calling plan. This is a different question from whether the call is jurisdictionally interstate or intrastate.

Treating calls to ISPs as local is consistent with 15 years of precedent under Section 201 (access charges), recent precedent under Section 202 (ONA obligations), Section 251(c) (interconnection rights of ISPs) and Section 254 (universal service). (*See* Attachment B.) The claim that the calls to ISPs are only local for purposes of access charges ignores the precedent under Sections 202, 251(c), and 254.

That calls to ISPs are local does not contradict the fact that the traffic carried on such calls is jurisdictionally interstate. This is confirmed by the 8th Circuit's decision in *Southwestern Bell*. The court simultaneously upheld (a) Commission jurisdiction over dial-in calls to ISPs; (b) the decision to *exercise* that jurisdiction by permitting ISPs to subscribe to intrastate-tariffed local exchange services, like any other business user; while specifically noting (c) that the reason ISPs subscribe to such services is to be able to receive "local calls" from their customers.

This seemingly odd result — calls that can be *both* local *and* interstate — is not odd at all given a review of the relevant language of the Communications Act. The character of a *call* as local is a totally different statutory question from the jurisdiction of the *communication* carried on a call.

In statutory terms, a "communication" under Section 3(33) and/or Section 3(52) (defining "radio communication" and "wire communication") is interstate if it meets the definition of "interstate communication" in Section 3(22). That definition looks at the end points of the total communication; if they are in different states, the communication is "interstate." If not, it is intrastate. (*See* Attachment A.)

By contrast, a call is "local" if it meets the definition of "telephone exchange service" in Section 3(47). A call is local under Section 3(47) if the called number is within the local calling plan of the party making the call.

These statutory provisions establish two different standards. The test for "interstate" vs. "intrastate" is unrelated to the test for "local" vs. "toll." For example, a call from Los Angeles to San Francisco isn't interstate (under Section 3(22)) just because it isn't a local call (under Section 3(47)). Similarly, a call to an ISP isn't *intra*state just because it's local.

Two other situations illustrate that a call can be both interstate and local. CMRS calls that stay within a single MTA are "local" calls for purposes of Section 251(b)(5) even

though most MTAs cross state lines. (*Local Competition Order*, ¶ 1035.) Also, Section 221(b) recognizes calls within interstate local calling areas as "interstate communications," although in that case Congress assigned regulatory authority over such calls to the states, not the Commission.

Note that local calling (that is, "telephone exchange service") is just one type of "telecommunications service," and that all telecommunications as a group is just one type of "communications." As a result, there are situations where it is useful to distinguish between the telecommunications component of an overall communication and other the components. (The Commission did this, for example, in the May 1997 *Universal Service Order* and again in the April 1998 *Report to Congress*.) In those cases, however, *jurisdiction* depends on the end-to-end nature of the *communication*, not merely the "telecommunications" portion of the overall service.

This is illustrated by the BellSouth voice mail case. There the Commission held that voice mail service is interstate when a subscriber dials a voice mail server to retrieve a message previously left by someone calling in from out of state. The jurisdiction of the overall service (here, interstate) is determined by the end-to-end communication, even though the caller's information was stored as opposed to immediately delivered. But the fact that the service is jurisdictionally interstate does not convert the voice mail subscriber's call to the local voice mail server into a toll call, nor does it suggest that the call should properly be rated as interstate access, as opposed to local exchange service.

This same logic applies to dial-in calls to ISPs. The "communication" is interstate when the ISP retrieves files from a distant web server for the end user (or even, under the BellSouth voice mail precedent, when it retrieves a locally cached web page that it previously retrieved from a distant state). The storage and retrieval (among other functions) means that the ISP is performing an information service, not a telecommunications service; the interstate transmission of the distant web pages (whether or not they are locally stored in the process) makes the overall communication interstate.

But the *telecommunications* service used to reach the ISP is local — despite its interstate character — because the ISP's modem can be reached as part of the end user's telephone exchange service. In statutory terms, the *jurisdiction* of the total *communication* under Section 3(22) is determined by its end points, so when the end user accesses the distant web site, that is an interstate "communication." But character of the dial-in *call* as *local* depends on a totally different test (Section 3(47)), which is whether the calling party has a local calling plan (the "exchange service charge," in statutory terms) that treats calls to the ISP's number as a local call.

The Commission, therefore, can and should declare that under current law (again, as illustrated by the *Southwestern Bell* case), calls to ISPs are *local* under Section 3(47) (to the extent that the ISP's dial-in number is within the caller's local calling plan), even though they are jurisdictionally *interstate* under Section 3(22) (because the total communication, viewed on an end-to-end basis, involves transmission of information between states).

Attachment A: Statutory Provisions

Statutory Definitions Regarding Interstate vs. Interstate Jurisdiction:

(52) WIRE COMMUNICATION.—The term "wire communications" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(33) RADIO COMMUNICATION.—The term "radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(22) INTERSTATE COMMUNICATION.—The term "interstate communication" or "interstate transmission" means communication or transmission (A) from any State, Territory, or possession of the United States (other than the [Philippine Islands and] the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than [the Philippine Islands, and] the Canal Zone), or the District of Columbia, (B) from or to the United States to or from [the Philippine Islands] or the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of Title II of this Act (other than Section 223 thereof), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

Statutory Definitions Regarding Local vs. Toll:

(47) TELEPHONE EXCHANGE SERVICE.—The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

(48) TELEPHONE TOLL SERVICE.—The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

Attachment B: Precedent Showing That Under Current Law ISPs Are End Users That Can Receive Local Calls

1. *Local Competition Order.* In the August 1996 *Local Competition Order,* the Commission declined to grant ISPs interconnection rights against LECs under Section 251 (*i.e.,* the type of interconnection rights that Section 251 gives to CLECs) because ISPs are not "telecommunications carriers." In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499 (1996) at ¶ 995. If ISPs are not carriers, they are end users/customers, who may receive calls just like other business users.

2. *Access Charge Reform Order.* In May 1997, the Commission confirmed the rule that ISPs are to be treated as end users, not carriers, for purposes of access charges. In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, *First Report and Order,* 12 FCC Rcd 15982 (1997) at ¶¶ 341-48. In the *Access Charge Reform Order,* the Commission also summarized the effect of its longstanding, existing policies regarding ISPs. It stated:

> As a result of the decisions the Commission made in the *Access Charge Reconsideration Order* [in 1983], *ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users.* ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.[502]
>
> [502] *ESP Exemption Order,* 3 FCC Rcd at 2631 nn. 8, 53. To maximize the number of subscribers that can reach them *through a local call,* most ISPs have deployed points of presence.

Access Charge Reform Order, supra, 12 FCC Rcd 15982 at ¶ 342 & n.502 (emphasis added).

3. *Universal Service Order.* In May 1997, the Commission released the *Universal Service Order,* holding that there is a distinction between the telecommunications functions that carriers provide to link end users to ISPs (which ***are*** "telecommunications" subject to universal service assessments) and the information services that ISPs provide (which are ***not*** "telecommunications" and not subject to universal service assessments). In the Matter of Federal-State Joint Board on Universal Service, *Report and Order,* CC Docket No. 96-45 (released May 8, 1997) ("*Universal Service Order*") at ¶¶ 788-90.

4. *Report to Congress.* In April 1998, the Commission reaffirmed its earlier universal service decision, holding that the categories of "information service" provider and "telecommunications carrier" are mutually exclusive. In the Matter of Federal-State Joint Board on Universal Service, *Report To Congress,* 13 FCC Rcd 11501 (1998) at ¶¶ 13, 21, 105 (ISPs "use telecommunications networks to reach their subscribers, *but they are in a very different business from carriers.* [ISPs] provide their customers with value-added functionality by means

of computer processing and interaction with stored data. They leverage telecommunications connectivity to provide these services, but this makes them *customers* of telecommunications carriers rather than their competitors.") (emphasis added).

On the specific question of "current" law, in the *Report to Congress,* the Commission described the pre-existing regime as follows:

> Under *Computer II*, and under our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. The service it provides to its subscribers is not subject to Title II and is categorized as an information service. *The information service provider, indeed, is itself a user of telecommunications;* that is, telecommunications is an input in the provision of an information service.

Report to Congress, supra , 13 FCC Rcd 11501 at ¶ 69 n.138 (emphasis added).

5. *ESP Exemption Order.* In 1988, the Commission confirmed that ISPs do not pay switched access charges when they connect to the public switched network, and described the "current situation" (*i.e.,* the situation as of 1988) as follows:

> Thus, the *current situation* of enhanced service providers [of which ISPs are examples] for access charge purposes will continue. *At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges.*

In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, *Order,* 3 FCC Rcd 2631 (1988) at ¶ 20 n.53 (emphasis added).

6. *Computer III Remand Further NPRM.* In early 1998, the Commission was considering the question of whether ISPs — already found not to be "carriers" with interconnection rights under Section 251 of the Act — should nevertheless be granted certain other rights against ILECs under what is known as the "Computer III" regime. In discussing this question, the FCC stated:

> We believe, however, that section 251 is intended to bring about competition in the local exchange market that, ultimately, will result in increased variety in service offerings and lower service prices, to the benefit of all *end users, including ISPs.*

In the Matter of *Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, *Further Notice of Proposed Rulemaking,* 13 FCC Rcd 6040 at ¶ 33 (emphasis added).

7. *Southwestern Bell v. FCC (appeal of Access Charge Reform Order).* In August 1998, the *Access Charge Reform Order* was upheld by the 8th Circuit. Some ILECs had challenged the Commission' treatment of ISPs. The court rejected that challenge. In the course of upholding the Commission's policy, the court described it as follows:

> Initially we note that the FCC has maintained *the same position for the past fourteen years,* refusing to permit the assessment of interstate access charges on ISPs. ... Furthermore, the Commission's actions do not discriminate in favor of ISPs, *which do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges.*[9]
>
> [9] ISPs subscribe to LEC facilities in order to *receive local calls* from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.

Southwestern Bell v. FCC, Nos. 97-2618 *et al.*, 1998 U.S. App. LEXIS 20479 at [*26] & n.9 (8th Cir. August 19, 1998) (emphasis added).