

CC Docket 96-98

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November 6, 1998

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OFFICE OF THE SECRETARY

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VIA HAND DELIVERY

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

Dear Ms. Salas:

Please file a copy of the attached letter into each of the following dockets (as referenced in footnote 1 of the letter):

1. CC Docket No. 96-98
2. CC File DA 97-1399
3. CCB/CPD Docket No. 97-30
4. CC Docket No. 98-79

I am attaching extra copies of this document for your convenience. Thank you for your attention to this matter.

Sincerely,


Christopher W. Savage

Enclosures

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By Hand

The Honorable William E. Kennard, Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Reciprocal Compensation for Internet Traffic

Dear Chairman Kennard:

This letter is being filed on behalf of Global NAPs, Inc. ("GNAPs"), a competitive local exchange carrier ("CLEC") that provides local exchange services to Internet Service Providers ("ISPs").¹ GNAPs has been in commercial operation for less than a year, and currently operates in two states. GNAPs plans to expand its operations to include new customer groups, new services, and new geographic areas, based on the degree to which its success in the marketplace warrants such expansion.

The press today reports that the Commission will shortly be issuing a decision in the GTE tariff case (relating to whether xDSL service connecting end users to the Internet is jurisdictionally interstate). The press also reports that the Commission will take some steps regarding the eligibility of dial-in calls to ISPs for terminating compensation under Section 251(b)(5) of the Communications Act.

¹ A copy of this letter is being filed in Common Carrier Docket No. 96-98 (Local Interconnection), Common Carrier Bureau file DA 97-1399, CCB/CPD 97-30 (ALTS Declaratory Ruling) and Common Carrier Docket No. 98-79 (GTE ADSL Tariff case).

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Press reports of as-yet-untaken Commission actions can hardly be viewed as authoritative. Even so, on the cautious assumption that there is some basis for those reports, GNAPs offers a few thoughts for the Commission's consideration.

As the Commission is aware, incumbent LECs ("ILECs") argue that dial-up calls to ISPs are jurisdictionally interstate, even though they are normally established by an end user dialing a 7-digit or 10-digit local number. The ILECs then argue that jurisdictionally interstate calls cannot be "local" (despite the "local" nature of the dialing involved). From this they conclude that calls to ISPs cannot properly be subject to terminating compensation under Section 251(b)(5).

GNAPs will not elaborate on the many flaws in the ILECs' approach to this issue. Suffice it to say that the generally accepted view is that, even if calls to ISPs are "interstate" in some sense, the Commission has held that ISPs are not providers of telecommunications services; they are users of such services.² Consequently, unless the Commission establishes a different regime, when an ISP's subscriber calls the ISP, that is as much a local call as when the ISP's subscriber calls a take-out pizza parlor. In the absence of some other disqualifying factor, both are local calls and both are subject to terminating compensation obligations.

All state regulators to have considered the issue reach this conclusion in one form or another. Some ILECs, however, have continued to thwart their state-

² The Commission has made these statements in contexts as diverse as access charges under Section 201, universal service under Section 254, local interconnection under Section 251, and open network architecture/Computer III obligations under Section 202. See 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 (ISPs are end users for purposes of access charges under Section 201); 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 (referring to ISPs as "end users" in the context of "*Computer III*" unbundling obligations based on Section 202); 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 (ISPs are users, not carriers, for purposes of interconnection rights under Section 251(c)); In the Matter of Federal-State Joint Board on Universal Service, *Report To Congress*, 13 FCC Rcd 11501 (1998) at ¶¶ 13, 21, 105 (ISPs are end users, not carriers, for purposes of universal service under Section 254).

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imposed duty to pay terminating compensation for calls to ISPs on the basis of alleged uncertainty in this Commission's precedents. In these circumstances, whatever the Commission may ultimately choose to do about this issue, it would be a great help to the development of local exchange competition, as well as to ongoing efforts by CLECs to better integrate the Internet with the public switched network, to clarify what the current state of Commission precedent really is.³

Clearly, current law is that ISPs are to be treated as users of local exchange telecommunications services. As noted above, the Commission has indicated that this is true for purposes of Section 201 (access charges); Section 202 (non-discrimination); Section 251(c) (interconnection rights) and Section 254 (universal service). In light of these precedents, the only logical conclusion is that the same result applies under Section 251(b)(5). From this perspective, the ILECs' counter-arguments are addressed not to what current Commission precedents plainly dictate, but instead to the question of whether the Commission should follow those precedents in the future.

GNAPs believes that the analysis contained in the Commission's existing precedents is basically sound and that the Commission's future policy decisions regarding dial-up access to ISPs should be guided by it. Future regulatory regimes aside, however, the Commission should clearly state that under *existing* precedent, ISPs are end users, not carriers, and as a matter of federal regulatory policy should be treated as end users. Such a Commission statement would provide much-needed certainty in this rapidly-evolving segment of the industry.

Such a statement would not impinge on states' rights regarding determination of interconnection disputes under Section 252. First, if calls to ISPs are indeed jurisdictionally interstate, then the Commission has the authority to direct that they be treated like other local calls for purposes of Section 251(b)(5), just as it has the authority to direct in the access charge context that ISPs may purchase local exchange service out of intrastate local business service tariffs. The Commission's authority to compel this result was recently upheld by the 8th Circuit in the *Southwestern Bell v. FCC* case. It seems unlikely that the 8th Circuit (or any other court) would object to the Commission stating in the related context of LEC-to-LEC interconnection that arguably

³ As the Commission is aware, a holding that calls to ISPs are not subject to terminating compensation would have the effect of eliminating competition for the business of serving ISPs, who would be left to the tender mercies of the ILECs — most of whom are aggressively pursuing their own ISP operations as well. Such a result simply cannot be squared with the pro-competitive purposes of the 1996 Act.

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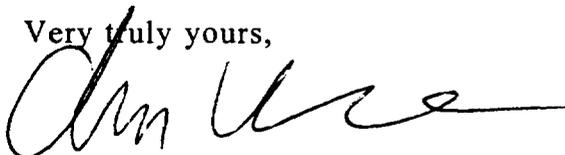
interstate traffic is to be placed under the authority of state regulatory bodies until the Commission itself directs otherwise.

Second (and putting aside the scope of the Commission's authority to literally direct how Section 251(b)(5) applies to calls to ISPs), ILECs have been using claims that this Commission's precedent is unclear to avoid terminating compensation obligations that state regulators have uniformly imposed. A confirmation that under the current regime, ISPs are end users — that is, a clear and simple statement that state regulators have correctly understood existing precedent — would not be impinge upon or usurp any state authority. To the contrary, it would support state efforts to exercise the authority that, under the current regime, rests in their hands.

For these reasons, GNAPS urges the Commission to expressly state (a) that under its current (and long-standing) precedents, ISPs are end users of local exchange services for purposes of federal regulatory policy; (b) that as far as the Commission is concerned, this policy applies fully to reciprocal compensation under Section 251(b)(5); and (c) that any contrary arguments (such as those being advanced by the ILECs) are based on an erroneous view of those precedents. Such a statement would not constrain the Commission's discretion to fashion whatever policy it chooses in the future regarding ISPs and dial-up access to the Internet. It would, however, permit the full operation of the competitive forces now being brought to bear on the ILECs while the longer-term policy questions are sorted out.

Please contact me if you have any questions regarding this matter.

Very truly yours,



Christopher W. Savage
Counsel for
GLOBAL NAPS, INC.

cc: Commissioner Ness
Commissioner Furtchgott-Roth
Commissioner Powell
Commissioner Tristani
Common Carrier Assistants