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November 13, 1998

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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: **Notice of *Ex Parte* Presentation by 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 in the above-captioned docketed proceedings. This filing summarizes arguments regarding the Commission's ability to exercise jurisdiction over dial-up traffic to Internet service providers ("ISPs") that have been made in earlier *ex parte* presentations by ALTS, CLECs and a number of other parties. While some of the commenters cited in the attached summary emphasize different regulatory theories, and some reach different conclusions regarding the regulatory treatment of ISP-bound dial-up traffic on a going-forward basis, all of the parties cited herein fully agree that the Commission may exercise jurisdiction over such traffic in a way that does not disrupt existing interconnection agreements between CLECs and ILECs, and that leaves the decisions of 24 state regulatory commissions intact.

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 of the above-referenced proceedings. Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

Jonathan E. Canis

cc: Chairman William E. Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Kathryn Brown
Robert Pepper
Lawrence D. Strickling
James D. Schlichting
International Transcription Service

ALTS
Association for Local Telecommunications Services

SUMMARY OF LEGAL THEORIES SUPPORTING ENFORCEMENT OF EXISTING INTERCONNECTION CONTRACTS AND STATE DECISIONS ORDERING PAYMENT OF RECIPROCAL COMPENSATION FOR ISP-BOUND TRAFFIC

1. The FCC May Assert Ultimate Federal Authority Over Dial-up ISP-bound Traffic While Keeping State-prescribed Mutual Compensation Rates In Effect

A. Sections 152(a) and 201-205 of the Communications Act provide the FCC with jurisdiction over dial-up, ISP-bound calls

- Most on-line sessions involve subscriber interaction with both in-state and out-of-state computer servers. Because it is not possible to determine the location of the servers with which a subscriber interacts, there is no practical way to separate ISP-bound traffic into interstate and intrastate components.

- Because ISP traffic is both "jurisdictionally mixed" and "inseverable," the FCC has two choices. If the FCC finds that state regulation is "negating" valid federal policies, then – pursuant to §§ 152(a) and 210-205 of the Communications Act – the agency may assert exclusive federal authority over ISP traffic. If the FCC does not find that state regulation negates valid federal polices, the agency has broad discretion to share regulatory responsibility with the states.[1]

- The FCC has consistently allowed the states to play the leading role in the regulation of ILEC services used to carry ISP traffic. For example, the FCC has repeatedly and consistently held that the States may regulate the rates that ILECs charge ISPs for the local facilities that they use to receive traffic from their subscribers. At the same time, the FCC has required – as a matter of federal law – that the states treat ISPs in the same manner as other end-users.[2]

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1 ALTS Nov. 10 *ex parte*, attachment at 2.

2 ALTS Nov. 2 *ex parte* at 2; ALTS Nov. 10 *ex parte*, attachment at 1-2; Time Warner Oct. 30 *ex parte* at 1; KMC Nov. 5 *ex parte* at 4-5, ITAA Nov. 5 *ex parte* at 3.

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- The Eighth Circuit – relying on the jurisdictionally mixed/inseverable theory – recently reaffirmed the FCC's discretion to allow the states to play the leading role in regulating ISP traffic. *See Southwestern Bell v. FCC,* 153 F.3d 523, 542 n.9 (8th Cir. 1998) ("[T] he FCC has determined that the [local telecommunications] facilities used by ISPs are 'jurisdictionally mixed,' carrying both interstate and intrastate traffic. Because the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall traffic is interstate or intrastate, ... the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to pay [federal end-user charges] . . . .").[3]

- Precisely the same principles are applicable to reciprocal compensation arrangements governing ISP traffic. The FCC could assert exclusive authority, under Section 152(a) and 201-205, to establish reciprocal compensation agreements governing this traffic – if it found that state-mandated compensation arrangements were negating valid federal policies.

- Because the existing state-mandated compensation arrangements comport fully with the FCC's policies, the FCC cannot impose a federal compensation regime at the present time.

- Rather, the FCC should declare that, consistent with its well-established policies governing ISP traffic, it will continue to allow the states to regulate reciprocal compensation agreements governing ISP traffic. The FCC should further clarify that, as a matter of federal law, the states must treat ISP in the same manner as other end-users. In addition, a state's failure to do so would constitute a violation of the non-discrimination provisions contained in Section 202 of the Communications Act.[4] Thus, as a matter of federal law, a state must construe any provision in an existing or future interconnection agreement that requires reciprocal compensation for "local" traffic to include ISP traffic.

- If, after compiling a complete record, the FCC concludes that state-mandated reciprocal compensation arrangements applicable to ISP traffic are negating any valid federal policy, the agency the FCC may establish a comprehensive federal regime to govern inter-carrier compensation for this traffic.[5]

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3 ALTS Nov, 2 *ex parte* at 2; ITAA Nov. 5 *ex parte* at 3.

4 Time Warner Oct. 30 *ex parte* at 3-4; ALTS Nov. 2 *ex parte* at 2-3.

5 ALTS Nov. 2 *ex parte* at 2; ITAA Nov. 5 *ex parte* at 3.

B. Alternatively, the FCC could find that the terms of Section 251(b)(5) apply to ISP traffic

- Consistent with its decision in the *GTE ADSL Tariff Order*, the FCC may find that dial-up calls to ISPs may be deemed an interstate communications by wire, comprised of a "telecommunications" segment (as defined by § (3)(43) of the Act) between the end user and the ISP, and an "information" segment (as defined by § (3)(20)) from the ISP over the Internet.[6]

- For purposes of establishing jurisdiction, the FCC may find that ISP traffic terminates at databases in interstate locations; however, for purposes of establishing compensation, the FCC should reaffirm that: i) the telecommunications segment of the call terminates at the ISP; ii) that the CLEC provides transport and termination to the ISP location; and iii) that the telecommunications segment of the transmission constitutes "local traffic."[7]

C. It is imperative that the Commission not disrupt existing contracts calling for the payment of mutual compensation; to protect these agreements, the FCC must continue to treat dial-up calls to ISPs as "local" for ratemaking purposes

- To date, 24 state commissions have ordered ILECs to pay reciprocal compensation for dial-up, ISP-bound traffic; these state decisions cover 70% of the U.S. population and 70% of existing phone lines.[8]

- Disrupting these state decisions, and the underlying interconnection contracts, would be enormously disruptive to the industry, making it difficult for CLECs to establish business plans, to attract capital, and to enter new markets.[9]

- Most interconnection agreements call for the payment of mutual compensation for "local traffic."

- To avoid disrupting existing agreements, the FCC must reaffirm that ISP-bound traffic is "local" for purposes of ratemaking under existing law.[10]

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6 KMC Nov. 6 *ex parte* at 2-3.

7 KMC Nov. 6 *ex parte* at 4-5.

8 ALTS *ex parte* of Oct. 29 (handout).

9 Lawler Group Oct. 21 *ex parte* at 1-2.

10 ALTS Nov. 2 *ex parte* at 2; KMC Nov. 6 *ex parte* at 4-5; Time Warner Oct. 30 *ex parte* at 2-3.

- Treating such traffic as local for ratemaking purposes is fully consistent with industry norms and reflects the intentions of both the ILECs and CLECs when they entered their interconnection agreements.[11]

- The fact that some states have relied on jurisdictional theories that have not been adopted by the FCC (such as the "Two Call" theory), does not invalidate their findings in favor of mutual compensation, and does not prevent the FCC from using its independent authority under §§ 152(a) and 201-205 to ratify those decisions.[12]

- "Existing arrangements" should be defined to include all interconnection agreements negotiated or implemented by carriers prior to the establishment of a new compensation scheme adopted and implemented by the FCC.[13]

2. The FCC should not change the existing state-established reciprocal compensation scheme on a going-forward basis

- Because any change to the existing, state-prescribed compensation system for dial-up ISP-bound traffic would be highly disruptive to the industry, the FCC should maintain the existing system on a going-forward basis.[14]

- State regulators may effect prospective changes as they deem appropriate.

- The FCC can reserve the right to implement changes in the existing system on a going-forward basis, to ensure that the reciprocal compensation rates are just and reasonable, provided that such action is consistent *with Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).[15]

- Because the FCC will leave the enforcement of mutual compensation obligations to the states, such action is fully compliant *with Iowa Utils. Bd.*[16]

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11 Time Warner Oct. 30 *ex parte* at 3 & nn.7-8.

12 Time Warner Oct. 30 *ex parte* at 2 n.4. Note also that some parties have questioned whether the FCC, acting under §§ 151 and 201, may disrupt state rulings on reciprocal compensation.

13 ALTS Nov. 2 *ex parte* at 2 n.2.

14 Time Warner Oct. 30 *ex parte* at 4-5; Lawler Group Oct. 21 *ex parte* at 1-2.

15 Time Warner Oct. 30 *ex parte* at 4-5.

16 Time Warner Oct. 30 *ex parte* at 5 n.12; KMC Nov. 6 *ex parte* at 5.

3. **Absent Mutual Compensation, CLECs Might Be Forced to Provide Transport and Termination Functions to ILECs Without Compensation**[17]

- CLECs transport and terminate ISP-bound traffic that originates on ILEC networks, and incur costs in doing so.

- Mutual compensation is the only vehicle presently used by CLECs to obtain compensation for the functions they perform for the ILECs.

  - The FCC's policy of exempting ISPs from ILEC access charges effectively prohibits CLECs from imposing such charges on ISPs.

    - If CLECs were to impose access charge-like fees on ISPs while ILECs were prohibited from doing so, CLECs would immediately lose their ISP customers to the ILECs.

- Such an outcome could effect an uncompensated taking of CLEC property, in violation of the Fifth Amendment to the Constitution.[18]

4. **Complete Federalization of Compensation Scheme, with FCC-Prescribed Rates**

- The FCC could find that all ISP-bound traffic is inherently interstate and could prescribe rates for such traffic pursuant to its authority to establish rates for inter-carrier traffic.

- The FCC has never adopted the "ten percent rule" or a comparable rule for dial-up traffic, and as a result, the Commission is free to determine, as a matter of policy, the most appropriate division of federal and state authority over this traffic.[19]

- The FCC's prescription could approve state-prescribed mutual compensation rates under existing interconnection agreements under a variety of theories.

  - Finding that such power is implicit in its authority to set rates: *Western Union Telegraph Co.*, 10 FCC Rcd 1741 (1995) (FCC may establish rates retroactively to fill "regulatory hiatus");[20] *New York Tel. v. FCC,* 631 F.2d 1059 (2d Cir. 1980) (FCC may order retroactive tariff changes to cure discrimination).[21]

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17 ALTS Nov. 2 *ex parte* at 3; Time Warner Oct. 30 *ex parte* at 2.

18 ALTS Nov. 2 *ex parte* at 3.

19 ITAA Nov. 5 *ex parte* at 4.

20 ALTS Nov. 2 *ex parte* at 4 n.5.

21 ALTS Nov. 10 *ex parte* at 4.

- FCC has broad authority to do equity under principles of Quantum Meruit: *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) (FCC may provide remedy under quantum meruit if necessary to do equity).[22]

5. FCC has authority to enforce payment of mutual compensation amounts owed under existing contracts[23]

A. FCC may use its enforcement authority pursuant to §§ 206-208 of the Act

- These provisions of the Act grant the FCC broad regulatory authority to hear complaints of non-payment, and to award payment of interest, injunctive relief and other relief as deemed appropriate.

- Because the FCC is adopting the state-prescribed rates under its authority to set intercarrier compensation rates pursuant to §§ 152(a) and 201-205 of the Act, it would not be enforcing interconnection agreements established under §§ 251 – 252, which the Eighth Circuit has found to be the exclusive province of the states. *Iowa Utils Bd. v. FCC,* 120 F.3d 753, 804 (8th Cir. 1997).

B. FCC may require payment as a precondition to a grant of regulatory approvals

- Authorizations of mergers and transfers of control, and grants of interLATA relief under § 271 of the Act, and the grant of additional pricing flexibility or other regulatory relief under the FCC's forbearance authority all require public interest analysis.

- The FCC should require ILECs seeking such authority to be current in all mutual compensation payments as a necessary precondition to a grant of such authority.

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22 ALTS Nov. 2 *ex parte* at 4 & n.5.

23 ALTS Nov. 2 *ex parte* at 4.