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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68

Adopted: February 25, 1999 Released: February 26, 1999

NPRM Comment Date: April 12, 1999

NPRM Reply Date: April 27, 1999

By the Commission: Commissioner Ness issuing a statement; Commissioner Furchtgott-Roth not participating; and Commissioner Powell concurring and issuing a statement.

I. INTRODUCTION

1. The Commission and the Common Carrier Bureau (Bureau) have received a number of requests to clarify whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an Internet service provider (ISP).[1] Generally, competitive LECs (CLECs)

[1] *See, e.g.*, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996); Petition for Partial Reconsideration and Clarification of MFS Communications Co., Inc. at 28; Letter from Richard J. Metzger, General Counsel for ALTS, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC (June 20, 1997) (ALTS Letter); Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30, DA 97-1399 (rel. July 2, 1997) (*ALTS Letter Notice*); Letter from Edward D. Young, Senior Vice President & Deputy General Counsel for Bell Atlantic, and Thomas J. Tauke, Senior Vice President -- Government Relations for Bell Atlantic, to Hon. William E. Kennard, Chairman, FCC (July 1, 1998). This question sometimes has been posed more narrowly, *i.e.*, whether an incumbent LEC must pay reciprocal

contend that this is local traffic subject to the reciprocal compensation provisions of section 251(b)(5) of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996.[2] Incumbent LECs contend that this is interstate traffic beyond the scope of section 251(b)(5). After reviewing the record developed in response to these requests, we conclude that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. This conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance. As explained below, parties may have agreed to reciprocal compensation for ISP-bound traffic, or a state commission, in the exercise of its authority to arbitrate interconnection disputes under section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic. In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.

II. BACKGROUND

2. Identifying the jurisdictional nature and regulatory treatment of ISP-bound communications requires us to determine how Internet traffic fits within our existing regulatory framework. We begin, therefore, with a brief description of relevant terminology and technology. We then turn to the specific matter of LEC delivery of ISP-bound communications.

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compensation to a competitive LEC (CLEC) that delivers incumbent LEC-originated traffic to ISPs. Because the pertinent provision of the 1996 Act pertains to all LECs, we examine this issue in the broader context. 47 U.S.C. § 251(b)(5).

For purposes of this Declaratory Ruling, we refer to providers of enhanced services and providers of information services as ESPs, a category which includes Internet service providers, which we refer to here as ISPs. As the Commission stated in the *Access Charge Reform Order*, the term "enhanced services," defined in the Commission's rules as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information," 47 C.F.R. § 64.702(a), is quite similar to "information services," defined in the Act as offering "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 16131-32 n.498 (1997) (*Access Charge Reform Order*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, at 11516 (1998) (*Universal Service Report to Congress*) (reiterating Commission's conclusion that the 1996 Act's definitions of telecommunications services and information services "essentially correspond to the pre-existing categories of basic and enhanced services").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.* (1996 Act).

A. The Internet and ISPs.

3. The Internet is an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world.[3] The Internet functions by splitting up information into "small chunks or 'packets' that are individually routed . . . to their destination."[4] With packet-switching, "even two packets from the same message may travel over different physical paths through the network . . . which enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the service where the information resides."[5]

4. An ISP is an entity that provides its customers the ability to obtain on-line information through the Internet. ISPs purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers.[6] Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area. The ISP, in turn, combines "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services."[7] Under this arrangement, the end user generally pays the LEC a flat monthly fee for use of the local exchange network and generally pays the ISP a flat, monthly fee for Internet access.[8] The ISP typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls.

5. Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services,[9] since 1983 it has exempted ESPs from the

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[3] 47 U.S.C. § 230; *see also Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2334 (1997).

[4] *Universal Service Report to Congress*, 13 FCC Rcd at 11531, 11532.

[5] *Id.*

[6] *Id.* at 11532.

[7] *Id.* at 11531.

[8] The Commission has acknowledged the significance of end users being able to place local, rather than toll, calls to ISPs, in analyzing, among other things, universal service issues. *See, e.g.*, Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 9142-43, 9159, 9160 (1997) (*Universal Service Order*); *Universal Service Report to Congress*, 13 FCC Rcd at 11541-42.

[9] *See, e.g.*, MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983) (*MTS/WATS Market Structure Order*) ("[a]mong the variety of users of access service are . . . enhanced service providers"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (*ESP Exemption Order*) (referring to "certain classes of exchange access users, including enhanced service providers"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 2 FCC Rcd 4305,

payment of certain interstate access charges.[10] Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs.[11] Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.[12] In addition, incumbent LEC expenses and revenue associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes.[13] ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable to end users.[14] In the *Access Charge Reform Order*, the Commission decided to maintain the existing pricing structure pursuant to which ESPs are treated as end users for the purpose of applying access charges.[15]

4306 (1987) (ESPs, "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services"); *Access Charge Reform Order*, 12 FCC Rcd at 16131-32 (information service providers "may use incumbent LEC facilities to originate and terminate interstate calls").

[10] The exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ESPs, that had been paying the generally much lower business service rates from the rate shock that would result from immediate imposition of carrier access charges. *See MTS/WATS Market Structure Order*, 97 FCC 2d at 715.

[11] Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2635 n.8, 2637 n.53 (1988) (*ESP Exemption Order*).

[12] *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. The subscriber line charge (SLC) is an access charge imposed on end users to recover at least a portion of the cost of the interstate portion of LEC facilities used to link each end user to the public switched telephone network (PSTN).

[13] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Notice of Proposed Rulemaking, 4 FCC Rcd. 3983, 3987-88 (1989).

[14] *See* 47 C.F.R. § 69.5(a) ("End user charges shall be computed and assessed upon public end users, and upon providers of public telephones. . . ."); *see also* 47 C.F.R. § 69.5(c) ("Special access surcharges shall be assessed upon users of exchange facilities that interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not assessed upon such interconnected usage."). *See also* 47 C.F.R. § 69.2(m) (End user means "any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller.").

[15] *Access Charge Reform Order*, 12 FCC Rcd at 16133-34. On August 19, 1998, the U.S. Court of Appeals for the Eighth Circuit affirmed the Commission's *Access Charge Reform Order*. Specifically, the court found that the Commission's decision to exempt information services providers from the application of interstate access charges (other than SLCs) was consistent with past precedent, did not unreasonably discriminate in favor of ISPs, did not constitute an unlawful abdication of the Commission's regulatory authority in favor of the states, and did not deprive incumbents of the ability to recover their pertinent costs. *Southwestern Bell Telephone Co. v. FCC*,

Thus, the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local.

6. The Internet provides citizens of the United States with the ability to communicate across state and national borders in ways undreamed of only a few years ago. The Internet also is developing into a powerful instrumentality of interstate commerce. In 1997, we decided that retaining the ESP exemption would avoid disrupting the still-evolving information services industry and advance the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[16] This Congressional mandate underscores the obligation and commitment of this Commission to foster and preserve the dynamic market for Internet-related services. We emphasize the strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet -- which has flourished to date under our "hands off" regulatory approach -- or the development of competition. We are mindful of the need to address the jurisdictional question at issue here, and the effect the jurisdictional determination may have on inter-carrier compensation for ISP-bound traffic, in a manner that promotes efficient entry by providers of both local telephone and Internet access services, and that, by the same token, does not encourage inefficient entry.

B. Incumbent LEC and CLEC Delivery of ISP-Bound Traffic.

7. Section 251(b)(5) of the Act requires all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[17] In the *Local Competition Order*, this Commission construed this provision to apply only to the transport and termination of "local telecommunications traffic."[18] In order to determine what

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153 F.3d 523, 542 (8th Cir. 1998).

[16] *Access Charge Reform Order*, 12 FCC Rcd at 16134. *See also* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

[17] 47 U.S.C. § 251(b)(5).

[18] *See* 47 C.F.R. § 51.701; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16013 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996); *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996); *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12460 (1997); *further recon. pending*. State commissions that considered this issue reached the same conclusion. *See, e.g.*, Petition of the Southern New England Tel. Co. for a Declaratory Ruling Concerning Internet Servs. Provider Traffic, Docket No. 97-05-22, Decision, at 9 (Conn. Comm'n September 17, 1997); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R.95-04-04, Decision 98-10-057, at 7 (Cal. Comm'n October 28, 1998); Southwestern Bell Tel. Co. v.

compensation is due when two carriers collaborate to deliver a call to an ISP, we must determine as a threshold matter whether this is interstate or intrastate traffic. In general, an originating LEC end user's call to an ISP served by another LEC is carried (1) by the originating LEC from the end user to the point of interconnection (POI) with the LEC serving the ISP; (2) by the LEC serving the ISP from the LEC-LEC POI to the ISP's local server; and (3) from the ISP's local server to a computer that the originating LEC end user desires to reach via the Internet. If these calls terminate at the ISP's local server (where another (packet-switched) "call" begins), as many CLECs contend, then they are intrastate calls, and LECs serving ISPs are entitled to reciprocal compensation for the "transport and termination" of this traffic. If, however, these calls do not terminate locally, incumbent LECs argue, then LECs serving ISPs are not entitled to reciprocal compensation under section 251(b)(5).

8. CLECs argue that, because section 251(b)(5) of the Act refers to the duty to establish reciprocal compensation arrangements for the "transport and termination of telecommunications,"[19] a transmission "terminates" for reciprocal compensation purposes when it ceases to be "telecommunications."[20] "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[21] CLECs contend that, under this definition, Internet service is not "telecommunications" and that the "telecommunications" component of Internet traffic terminates at the ISP's local server. In addition, CLECs and ISPs argue that, given that ESPs are exempt from paying certain interstate access charges[22] and that, as a result, the PSTN links serving ESPs are treated as intrastate under the separations regime, the services that CLECs provide for ISPs

Public Util. Comm'n of Texas, MO-98-CA-43, slip op. at 7 (W.D. Tex. June 16, 1998). Section 251 of the Act makes clear that interstate traffic remains subject to the Commission's jurisdiction under section 201. *See* 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."). *See also CompTel*, 117 F.3d at 1075 (Commission acted within its jurisdiction in allowing incumbent LECs to collect, on an interim basis, access charges for interstate calls traversing the incumbent LECs' local switches for which the interconnecting carriers pay unbundled local switching element charges); 47 U.S.C. §152(a) (Commission has jurisdiction over "all interstate and foreign communications by wire").

[19] 47 U.S.C. § 251(b)(5) (emphasis added).

[20] *See, e.g.*, RCN Telecom Services (RCN) Comments at 6; Teleport Communications Group Inc. (TCG) Comments at 4-5; WorldCom, Inc. Comments at 8-9. Citations to parties' comments in this Declaratory Ruling and Notice of Proposed Rulemaking refer to comments filed in response to the *ALTS Letter Notice*.

[21] 47 U.S.C. § 153(43).

[22] We discuss the ESP exemption, *supra*.

must be deemed local.[23] Incumbent LECs contend, however, that the "telecommunications" terminate not at the ISP's local server, but at the Internet site accessed by the end user, in which case these are interstate calls for which, they argue, no reciprocal compensation is due.[24]

III. DISCUSSION

9. The Commission has no rule governing inter-carrier compensation for ISP-bound traffic. Generally speaking, when a call is completed by two (or more) interconnecting carriers, the carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (*e.g.*, by delivering a call to an interexchange carrier (IXC)), the carriers will share access revenues received from the interstate service provider. Conversely, when two carriers collaborate to complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act. Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. As explained above, under the ESP exemption, LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover, the Commission has directed states to treat ISP traffic as if it were local, by permitting ISPs to purchase their PSTN links through local business tariffs. As a result, and because the Commission had not addressed inter-carrier compensation under these circumstances, parties negotiating interconnection agreements and the state commissions charged with interpreting them were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs, leading to the present dispute.

A. Jurisdictional Nature of Incumbent LEC and CLEC Delivery of ISP-Bound Traffic.

10. As many incumbent LECs properly note,[25] the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers. In *BellSouth MemoryCall*, for

[23] *See, e.g.*, American Communications Services, Inc. (ACSI) Comments at 5; Adelphia Communications Corporation (Adelphia), et al., Comments at 12-13; ALTS Letter at 6-7; ALTS Reply at 2, 13; Cox Communications, Inc. (Cox) Comments at 5; America Online, Inc. (AOL) Comments at 7-8; AT&T Corp. Comments at 4.

[24] *See, e.g.*, Ameritech Operating Cos. (Ameritech) Comments at 13; BellSouth Corporation (BellSouth) Reply at 4-6; Southwestern Bell Tel. Co., Pacific Bell, Nevada Bell (SBC) Reply at 5; United States Telephone Association (USTA) Comments at 5-6.

[25] *See, e.g.*, Ameritech Comments at 13; BellSouth Reply at 4-6; SBC Reply at 5; USTA Comments at 5-6.

example, the Commission considered the jurisdictional nature of traffic that consisted of an incoming interstate transmission (call) to the switch serving a voice mail subscriber and an intrastate transmission of that message from that switch to the voice mail apparatus.[26] The Commission determined that the entire transmission constituted one interstate call, because "there is a continuous path of communications across state lines between the caller and the voice mail service."[27] The Commission's jurisdictional determination did not turn on the common carrier status of either the provider or the services at issue;[28] *BellSouth MemoryCall* is not, therefore, distinguishable on the grounds that ISPs are not common carriers.

11. Similarly, in *Teleconnect*, the Bureau examined whether a call using Teleconnect's "All-Call America" (ACA) service, a nationwide 800 travel service that uses AT&T's Megacom 800 service, is a single, end-to-end call.[29] Generally, an ACA call is initiated by an end user from a common line open end; the call is routed through a LEC to an AT&T Megacom line, and is then transferred from AT&T to Teleconnect by another LEC.[30] At that point, Teleconnect routes the call through the LEC to the end user being called.[31] The Bureau rejected the argument that the (ACA) 800 call used to connect to an interexchange carrier's (IXC) switch was a separate and distinct call from the call that was placed from that switch.[32] The Commission affirmed, noting that "both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, we regulate an interstate wire communications under the Communications Act from its inception to its completion."[33] The

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[26] Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall*).

[27] *Id.* at 1620.

[28] *Id.* at 1621-22. Indeed, the Commission expressly noted that, although BellSouth's "voice mail service is an enhanced service, that fact does not limit our authority to preempt." *Id.* at 1622 n.44.

[29] *Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) (*Teleconnect*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997).

[30] *Id.* at 1627.

[31] *Id.* at 1627-28.

[32] *Id.* at 1626.

[33] *Id.* at 1629 (citing *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (concluding that a physically intrastate in-WATS line, used to terminate an end-to-end interstate communication, is an interstate facility subject to Commission regulation)). *See also United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944) (the Act contemplates the regulation of interstate wire communication from its inception to its completion), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945); *New York Telephone Co.*, 76 FCC 2d 349, 352-53 (1980) (physically intrastate foreign exchange facilities used to carry interconnected interstate traffic are subject to federal jurisdiction).

Commission concluded that "an interstate communication does not end at an intermediate switch. . . . The interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities."[34] In addition, in *Southwestern Bell Telephone Company*, the Commission rejected the argument that "a credit card call should be treated for jurisdictional purposes as two calls: one from the card user to the interexchange carrier's switch, and another from the switch to the called party" and concluded that "switching at the credit card switch is an intermediate step in a single end-to-end communication."[35]

12. Consistent with these precedents,[36] we conclude, as explained further below, that the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend,[37] but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state.[38] The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our jurisdiction. As the Commission stated in *BellSouth MemoryCall,* "this Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls."[39] Indeed, in the vast majority of cases, the facilities that incumbent LECs use to provide interstate access are located entirely within one state.[40] Thus, we reject MCI WorldCom's assertion that the LEC

[34] *Teleconnect*, 10 FCC Rcd at 1629.

[35] In the Matter of Southwestern Bell Tel. Co., CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341 (1988) (*Southwestern Bell Tel. Co.*).

[36] Although the cited cases involve interexchange carriers rather than ISPs, and the Commission has observed that "it is not clear that ISPs use the public switched network in a manner analogous to IXCs," *Access Charge Reform Order*, 12 FCC Rcd at 16133, the Commission's observation does not affect the jurisdictional analysis.

[37] *See, e.g.*, ACSI Comments at 5; Adelphia, et al., Comments at 12-13; ALTS Letter at 6-7; Cox Comments at 5.

[38] This conclusion is fully consistent with *BellSouth MemoryCall*. Although MCI WorldCom relies on *BellSouth MemoryCall* to support its argument that the ISP is the relevant endpoint for purposes of the jurisdictional analysis (*see* Letter from Richard S. Whitt, Director -- Federal Affairs/Counsel, MCI WorldCom, Inc., to Magalie R. Salas, Secretary, FCC (October 2, 1998)), there, as here, the Commission analyzed the communication from its inception to the "transmission's ultimate destination." *BellSouth Memory Call*, 7 FCC Rcd at 1621.

[39] *BellSouth MemoryCall*, 7 FCC Rcd at 1621.

[40] *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

facilities used to deliver traffic to ISPs must cross state boundaries for such traffic to be classified as interstate.[41]

13. We disagree with those commenters that argue that, for jurisdictional purposes, ISP-bound traffic must be separated into two components: an intrastate telecommunications service, provided in this instance by one or more LECs, and an interstate information service, provided by the ISP.[42] As discussed above, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication.[43] The Commission previously has distinguished between the "telecommunications services component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to universal service.[44] Although the Commission concluded that ISPs do not appear to offer "telecommunications service" and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund,[45] it has never found that "telecommunications" end where "enhanced" service begins. To the contrary, in the context of open network architecture (ONA) elements, for example, the Commission stated that "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of a[n

[41] *See* Letter from Richard S. Whitt, Director -- Federal Affairs/Counsel, MCI WorldCom, Inc., to Magalie R. Salas, Secretary, FCC (October 19, 1998) (*MCI WorldCom Ex Parte*). For this reason, we also reject CLEC arguments that provision of such services by a Bell Operating Company (BOC) violates section 271 of the Act unless the BOC has received authorization to provide in-region InterLATA service. *See, e.g., MCI WorldCom Ex Parte* at 4. Section 271 does not bar BOC provision of interstate access services, such as interLATA information access. *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, 11 FCC Rcd 21905, 21962-63 (*Non-Accounting Safeguards Order*) ("When a BOC is neither providing nor reselling the interLATA transmission component of an information service that may be accessed across LATA boundaries, the statute does not require that service to be provided through a section 272 separate affiliate.").

[42] *See, e.g.*, RCN Comments at 6; TCG Comments at 4-5; WorldCom Comments at 8-9.

[43] *See United States v. AT&T*, 57 F. Supp. 451, 453-55 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945).

[44] *Universal Service Order*, 12 FCC Rcd at 9179-81. We disagree with MCI WorldCom's claim that the Commission determined in the *Universal Service Order* that there are two distinct transmissions when an end user contacts the Internet. *MCI WorldCom Ex Parte* at 4. In that order, the Commission discussed various "connections" involved with Internet access but in no way implied that any "transmission" or "traffic" terminated or originated at any intermediate point. *See Universal Service Order*, 12 FCC Rcd at 9180. As discussed, *supra*, MCI WorldCom's similar assertions regarding the *Non-Accounting Safeguards Order* are equally unpersuasive. *MCI WorldCom Ex Parte* at 4.

[45] *Id.* at 9180. We confirmed this view in the *Universal Service Report to Congress. Universal Service Report to Congress* at 13 FCC Rcd 11522-23.

enhanced] service that is not subject to Title II."[46] The 1996 Act is consistent with this approach. For example, as amended by the 1996 Act, Section 3(20) of the Communications Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[47] This definition recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications. Although it concluded in the *Universal Service Report to Congress* that ISPs do not provide "telecommunications" as defined in the 1996 Act,[48] the Commission reiterated the traditional analysis that ESPs enhance the underlying telecommunications service.[49] Thus, we analyze ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.

14. Some CLECs note that the language of section 252(d)(2) provides for the recovery of the costs of transporting and terminating a "call."[50] Although the 1996 Act does not define the term "call," these CLECs argue that it is used in the 1996 Act in a manner that implies a circuit-switched connection between two telephone numbers.[51] For example, Adelphia contends that a "call" takes place when two stations on the PSTN are connected to each other.[52] A call "terminates," according to Adelphia, when one station on the PSTN dials

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[46] *See* Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 141 (1988) ("when an enhanced service is interstate (that is, when it involves communications or transmissions between points in different states on an end-to-end basis), the underlying basic services are subject to Title II regulation"), *aff'd sub nom. People of State of Cal. v. FCC*, 3 F.3d 1505 (9th Cir. 1993). *See, e.g.*, Amendment of Section 64.702 of the Commission's Rules and Regulations, 2 FCC Rcd 3072, 3080 (1987) ("carriers must provide efficient nondiscriminatory access to the basic service facilities necessary to support their competitors' enhanced services"); *vacated on other grounds sub nom. People of State of Cal. v. FCC*, 905 F.2d 1217 (9th Cir. 1990). *See also BellSouth MemoryCall*, 7 FCC Rcd at 1621 (rejecting "two call" argument as applied to interstate call to voice mail apparatus, even though voice mail is an enhanced service).

[47] 47 U.S.C. § 153(20) (emphasis added); *see also* 47 C.F.R. § 64.702(a) (enhanced services are provided "over common carrier transmission facilities used in interstate communications").

[48] *Universal Service Report to Congress*, 13 FCC Rcd at 11536-40. *See also Universal Service Order*, 12 FCC Rcd at 9180 n.2023.

[49] *See Universal Service Report to Congress,* 13 FCC Rcd at 11540. *See also Universal Service Order* 12 FCC Rcd at 9180 n.2023 (referencing *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 2 FCC Rcd 3072, 3080 (1987)).

[50] 47 U.S.C. § 252(d)(2). *See, e.g.*, Adelphia, et al., Comments at 15.

[51] *See, e.g.*, Adelphia, et al., Comments at 15-20; Adelphia, et al., Reply at 5, 9-10, TCG Comments at 3-4; WorldCom Comments at 6-7.

[52] *See, e.g.*, Adelphia, et al., Comments at 15-16.

another station, and the second station answers.[53] Under this view, the "call" associated with Internet traffic ends at the ISP's local premises.[54]

15. We find that this argument is inconsistent with Commission precedent, discussed above, holding that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts. The examples cited by CLECs[55] to support the argument that calls end at the called number are not dispositive. The statutory sections upon which they rely were written to apply to specific situations, all of which, as far as we can tell, involve traditional telephony connections between two called numbers, as opposed to the novel circumstance of Internet traffic.[56]

16. Nor are we are persuaded by CLEC arguments that, because the Commission has treated ISPs as end users for purposes of the ESP exemption, an Internet call must terminate at the ISP's point of presence.[57] The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service.[58] In the *MTS/WATS Market Structure Order*, for instance, the Commission concluded that ESPs are "among a variety of users of access service" in that they "obtain local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area."[59] The fact that ESPs are exempt from access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs. That the Commission exempted ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary.[60] We emphasize that the Commission's decision to treat

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[53] *Id.*

[54] *Id.*

[55] *Id.* at 15-16, 19-20; Adelphia, et al., Reply at 18 n.32.

[56] *See, e.g.*, 47 U.S.C. §§ 222(d)(3), 223(a)(1), 271(c)(2)(B)(x), and 271(j).

[57] *See, e.g.*, ACSI Comments at 5; Adelphia, et al., Comments at 12-13; ALTS Letter at 6-7; ALTS Reply at 2, 13; Cox Comments at 5; AOL Comments at 7-8; AT&T Comments at 4.

[58] *See, e.g., MTS/WATS Market Structure Order*, 97 FCC 2d at 715; Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987).

[59] *MTS/WATS Market Structure Order*, 97 FCC 2d at 860; *see also* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305.

[60] *See, e.g., MTS/WATS Market Structure Order*, 97 FCC 2d at 860. *See also* Access Charge Reform, CC Docket No. 96-262, Notice of Proposed Rulemaking, 11 FCC Rcd 21354 at 21478 ("although ESPs may use incumbent LEC facilities to originate and terminate interstate calls, ESPs should not be required to pay interstate

ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic.[61]

17. CLECs also argue that the traffic they deliver to ISPs must be deemed either "telephone exchange service"[62] or "exchange access."[63] They contend that ISP traffic cannot be "exchange access," because neither LECs nor CLECs assess toll charges for the service. CLEC delivery of ISP traffic is, therefore, according to CLECs, "telephone exchange service," a form of local telecommunications for which reciprocal compensation is due.[64] As discussed above, however, the Commission consistently has characterized ESPs as "users of access service" but has treated them as end users for pricing purposes.[65] Thus, we are unpersuaded by this argument.

18. Having concluded that the jurisdictional nature of ISP-bound traffic is determined by the nature of the end-to-end transmission between an end user and the Internet, we now must determine whether that transmission constitutes interstate telecommunications. Section 2(a) of the Act grants the Commission jurisdiction over "all interstate and foreign communication by wire."[66] Traffic is deemed interstate "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of

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access charges") (emphasis added).

[61] Indeed, the Eighth Circuit found that "the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to pay the SLC . . . , but not to pay the per-minute interstate access charge." *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d at 543 (emphasis added).

[62] "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." 47 U.S.C. § 153(47).

[63] "Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. §153(16). "Telephone toll services" is defined as "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." 47 U.S.C. § 153(48).

[64] *See, e.g.*, Adelphia, et al., Reply at 5-9.

[65] *MTS/WATS Market Structure Order*, 97 FCC 2d at 860; *see also* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987). *See also* 47 C.F.R. § 69.2(b) (defining "access service" as "services and facilities provided for the origination or termination of any interstate or foreign telecommunications").

[66] 47 U.S.C. § 152(a).

Columbia."[67] In a conventional circuit-switched network, a call that originates and terminates in a single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate. The jurisdictional analysis is less straightforward for the packet-switched network environment of the Internet.[68] An Internet communication does not necessarily have a point of "termination" in the traditional sense. An Internet user typically communicates with more than one destination point during a single Internet call, or "session," and may do so either sequentially or simultaneously. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country.[69] Further complicating the matter of identifying the geographical destinations of Internet traffic is that the contents of popular websites increasingly are being stored in multiple servers throughout the Internet, based on "caching" or website "mirroring" techniques.[70] After reviewing the record, we conclude that, although some Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites.[71]

19. Although ISP-bound traffic is jurisdictionally mixed, incumbent LECs argue that it is not technically possible to separate the intrastate and interstate ISP-bound traffic.[72] In the current absence of a federal rule governing inter-carrier compensation, however, we do not find it necessary to reach the question of whether such traffic is separable into intrastate and interstate traffic.[73]

20. Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption.. ESPs, including ISPs, continue

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[67] *Universal Service Report to Congress*, 13 FCC Rcd at 11555.

[68] *See, e.g.*, Kevin Werbach, Digital Tornado: The Internet and Telecommunications Policy, OPP Working Paper No. 29, at 45 (Mar. 1997) (*Digital Tornado*).

[69] *See, e.g., Digital Tornado* at 45. *See also* Adelphia, et al., Reply at 11 n.21.

[70] *See, e.g., MCI WorldCom Ex Parte* at 7.

[71] *See, e.g.*, Adelphia, et al., Comments at 22; Letter from Edward D. Young, Senior Vice President & Deputy General Counsel for Bell Atlantic, and Thomas J. Tauke, Senior Vice President -- Government Relations for Bell Atlantic, to Hon. William E. Kennard, Chairman, FCC (July 1, 1998) at Att. 2; Compuserve Comments at 4; Letter from B. Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications, Inc., to Magalie R. Salas, Secretary, FCC (May 13, 1998) Att. at 7; WorldCom Reply at 8-9.

[72] Even if it is technically impossible to separate the intrastate and interstate ISP traffic, it may be possible for LECs to determine whether dial-up traffic is in fact destined for an ISP.

[73] We note that in Section IV, *infra*, we seek comment on the separability of such traffic and whether the Commission should exercise exclusive jurisdiction over inter-carrier compensation for all ISP-bound traffic.

to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs.[74] Nor, as we discuss below, is it dispositive of interconnection disputes currently before state commissions.

B. Inter-Carrier Compensation for Delivery of ISP-Bound Traffic.

21. We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism. We seek comment on such a rule in Section IV, below.

22. Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions.

23. Although we determine, above, that ISP-bound traffic is largely interstate, parties nonetheless may have agreed to treat the traffic as subject to reciprocal compensation. The Commission's treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs.[75] Since then, the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes.[76]

24. Against this backdrop, and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes

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[74] ESPs also have certain flat-rated interstate offerings available to them. *See, e.g.*, GTE Telephone Operating Cos. GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC No. 98-292, Memorandum Opinion and Order (rel. October 30, 1998), *recon. pending*.

[75] *MTS/WATS Market Structure Order*, 97 FCC 2d at 715.

[76] Not all incumbent LECs characterize Internet traffic as intrastate traffic for separations purposes. In January, 1998, SBC indicated that it planned to allocate 100 percent of the costs associated with Internet traffic, which it previously had classified as local, to the interstate jurisdiction. *See* Letter from B. Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications., Inc., to Ken Moran, Chief, Accounting and Audits Division, FCC (Jan. 20, 1998).

of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements. For example, it may be appropriate for state commissions to consider such factors as whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. These factors are illustrative only; state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions. Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.[77] Finally, we note that issues regarding whether an entity is properly certified as a LEC if it serves only or predominantly ISPs are matters of state jurisdiction.[78]

25. Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation

[77] This analysis is not inconsistent with our conclusion in the *Local Competition Order* that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within state-defined local calling areas. *Local Competition Order*, 11 FCC Rcd. at 16013. In so construing the statutory obligation, we did not preclude parties from agreeing to include interstate traffic (or non-local intrastate traffic) within the scope of their interconnection agreements, so long as no Commission rules were otherwise violated. *See* 47 U.S.C. § 252(a)(1) (parties may negotiate and enter into a binding agreement without regard to the standards set forth in section 251(b) and (c)).

[78] *See, e.g.*, Complaint of WorldCom Technologies, Inc. against New England Tel. and Tel. Co. for alleged breach of interconnection terms entered into under Section 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116, at 13 (Mass. Comm'n October 26, 1998) (requesting information from parties regarding whether certain CLECs have been or are established solely (or predominantly) for the purpose of delivering traffic to ISPs, particularly ISPs affiliated with the CLECs in question, and stating that these facts might affect such CLECs' regulatory status); Letter from B. Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications, Inc., to Magalie R. Salas, Secretary, FCC (May 13, 1998) at Tab 5 (carrier's webpage advertisement invites parties to offer "free internet access while getting paid for it"). We believe the state commissions are capable of assessing whether and to what extent these and other anomalous practices are inconsistent with the statutory scheme (*e.g.*, definition of a carrier) and thereby outside the scope of any determination regarding inter-carrier compensation.

should be paid for this traffic. The passage of the 1996 Act raised the novel issue of the applicability of its local competition provisions[79] to the issue of inter-carrier compensation for ISP-bound traffic. Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to section 252 "extends to both interstate and intrastate matters."[80] Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process.[81] However, any such arbitration must be consistent with governing federal law.[82] While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

26. Some CLECs construe our rules treating ISPs as end users for purposes of interstate access charges as requiring the payment of reciprocal compensation for this traffic.[83] Incumbent LECs contend, however, that our rules preclude the imposition of reciprocal compensation obligations to interstate traffic and that, pursuant to the ESP exemption, LECs carrying ISP-bound traffic are compensated by their end user customers -- the originating end user or the ISP.[84] Either of these options might be a reasonable extension of our rules, but the Commission has never applied either the ESP exemption or its rules regarding the joint provision of access to the situation where two carriers collaborate to deliver traffic to an ISP. As we stated previously, the Commission currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic.[85] In the absence of a federal rule, state

[79] *See* 47 U.S.C. §§ 251, 252.

[80] *Local Competition Order*, 11 FCC Rcd at 15544; *see also id. at* 15547 (sections 251 and 252 "address both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements").

[81] *Id.*

[82] *Cf.* 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.").

[83] *See* note 26, *supra*, and accompanying text.

[84] *See, e.g.,* Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, to Magalie Salas, Secretary, FCC (November 20, 1998). Ameritech argues, *inter alia*, that the Commission held in the *Local Competition Order* that reciprocal compensation does not apply to the transport and termination of interstate traffic. *Id.,* Att. A, at 6. It further argues that Commission rules do in fact address inter-carrier compensation for ISP traffic. In the usual case, two LECs jointly providing interstate access service share access revenues; because the Commission exempts ISPs from the payment of access charges, however, LECs carrying ISP traffic are limited to revenues they collect from their end user customers. *Id.*, Att. A, at 7.

[85] We seek comment on an appropriate compensation mechanism in Section IV, below.

commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic,[86] neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law.[87] A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic.[88] By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

27. State commissions considering what effect, if any, this Declaratory Ruling has on their decisions as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic might conclude, depending on the bases of those decisions, that it is not necessary to re-visit those determinations. We recognize that our conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server, but nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.

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[86] *See* 47 C.F.R. 51.701(a); *Local Competition Order*, 11 FCC Rcd at 16013.

[87] As noted, section 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected *local* telecommunications traffic. We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic. As discussed, *supra*, in the absence a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic.

[88] As noted, in other contexts we have directed the states to treat such traffic as local. *See ESP Exemption Order*, 3 FCC Rcd 2631, 2635 n.8, 2637 n.53.

IV. Notice of Proposed Rulemaking (CC Docket No. 99-68)

A. Discussion.

28. We do not have an adequate record upon which to adopt a rule regarding inter-carrier compensation for ISP-bound traffic. We do believe, however, that adopting such a rule to govern prospective compensation would serve the public interest. As a general matter, we tentatively conclude that our rule should strongly reflect our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts. We seek comment on two alternative proposals for implementing such a regime. Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic. As discussed above, the Commission's holding that parties' agreements, as interpreted by state commissions, should be binding also applies to those state commissions that have not yet addressed the issue.

29. For the traffic at issue here, we tentatively conclude that a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation. In addition, setting a rate by regulation appears unwise because the actual amounts, need for, and direction of inter-carrier compensation might reasonably vary depending on the underlying commercial relationships with the end user, and who ultimately pays for transmission between its location and the ISP.[89] We acknowledge that, no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network. We believe that efficient rates for inter-carrier compensation for ISP-bound traffic are not likely to be based entirely on minute-of-use pricing structures. In particular, pure minute-of-use pricing structures are not likely to reflect accurately how costs are incurred for delivering ISP-bound traffic. For example, flat-rated pricing based on capacity may be more cost-based. Parties also might reasonably agree to rates that include a separate call set-up charge, coupled with very low per-minute rates. These economic characteristics of this traffic are likely to make voluntary agreements among the parties easier to reach. For these reasons, we propose that inter-carrier compensation rates for ISP-bound traffic be based on commercial negotiations undertaken as part of the broader interconnection negotiations between incumbent LECs and CLECs. We seek comment below on two alternative proposals to govern the negotiations with respect to ISP-bound traffic.

30. We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate

[89] When an end user effectively purchases a telecommunications-based service from more than one service provider, it can pay for the costs of the underlying telecommunications either directly to the telecommunications service provider, or indirectly through the other service provider, which in turn pays the telecommunications provider. Both sets of arrangements exist today.

ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts. As with other issues on which parties petition state commissions for arbitration under section 252 of the Act, if a state commission fails to act, the Commission will assume the responsibility of the state commission within 90 days of being notified of such failure.[90] This proposal could help facilitate the policy goals set forth above by forcing the parties to hold a single set of negotiations regarding rates, terms, and conditions for interconnected traffic and to submit all disputes regarding interconnected traffic to a single arbitrator. We seek comment on this tentative conclusion.

31. We also seek comment on an alternative proposal that we adopt a set of federal rules governing inter-carrier compensation for ISP-bound traffic pursuant to which parties would engage in negotiations concerning rates, terms, and conditions applicable to delivery of interstate ISP-bound traffic. These negotiations would commence on the effective date of the adopted rule but could proceed in tandem with broader interconnection negotiations between the parties. We realize, however, that the success of any negotiation over rates is likely to depend on the availability of the swift and certain resolution of disputes, and the structure of the resolution process. For example, the Commission, through delegation to the Common Carrier Bureau, might resolve such disputes, at the request of either party, through an arbitration-like process, following a discrete period of voluntary negotiation. We seek comment on how such an approach would operate procedurally and what costing standards the Commission might use in arbitrating disputes. We also seek comment on how this proposal compares with a broad interconnection negotiation in which most disputes are resolved by a state arbitrator but disputes regarding ISP-bound traffic are resolved through a federal arbitration-like process. We also seek comment on whether it is possible, as a technical matter, to segregate intrastate and interstate ISP-bound traffic and whether any federal rules we adopt should apply to all intrastate and interstate ISP-bound traffic.

32. We also seek comment on whether the Commission has the authority to establish an arbitration process that is final and binding and not subject to judicial review. For instance, we note that parties might agree to binding arbitration pursuant to the Administrative Dispute Resolution Act.[91] We seek comment on whether and how such a system should be implemented. In particular, we seek comment on the desirability of arbitration before an arbitrator selected by the parties, as provided by the Administrative Dispute Resolution Act, as opposed to a federal or state decision-maker.[92]

33. We also invite parties to submit alternative proposals for inter-carrier compensation for interstate ISP-bound traffic that will advance our policy goals in this area.

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[90] 47 U.S.C. § 252(e)(5).

[91] Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2738, *codified at* 5 U.S.C. § 571 *et seq.*

[92] *See* 5 U.S.C. § 577.

For example, Ameritech has proposed basing inter-carrier compensation for ISP-bound traffic on sharing the incumbent LEC's revenue associated with the interconnected ISP-bound traffic.[93] We also request parties to comment on how any alternatives they propose will advance the Commission's goals of ensuring the broadest possible entry of efficient new competitors, eliminating incentives for inefficient entry and irrational pricing schemes, and providing to consumers as rapidly as possible the benefits of competition and emerging technologies.

34. We are aware that disputes may arise regarding various terms and conditions for inter-carrier compensation for ISP-bound traffic. Although many such disputes could be resolved through a negotiation and arbitration process, we seek comment on whether there are any issues under our two proposals above that we can and should address in the first instance through rules rather than through arbitration. We request parties to comment on the need for rules pertaining to such matters and, to the extent that parties believe that rules are appropriate, the substance and degree of specificity of such rules. We emphasize, however, that we do not seek comment on whether interstate access charges should be imposed on ESPs as part of this proceeding. We recently reaffirmed that exemption in the *Access Charge Reform Order*, and we do not reconsider it here.[94]

35. Pursuant to section 252(i) of the Act,[95] interconnection agreements often have clauses (often referred to as "most-favored nation" or "MFN" provisions) that allow parties to select, to varying degrees of specificity, provisions from other parties' interconnection agreements with that particular LEC. We understand that an arbitrator recently permitted a CLEC to exercise MFN rights to opt into an interconnection agreement that an incumbent LEC previously had negotiated with another CLEC.[96] That interconnection agreement, executed in July 1996, has a three-year term. The arbitrator concluded that the new CLEC was entitled to opt into the agreement for a new three-year term, thus raising the possibility that the incumbent LEC might be subject to the obligations set forth in that agreement for an indeterminate length of time, without any opportunity for renegotiation, as successive CLECs opt into the agreement.[97] We seek comment, therefore, on whether and how section 252(i) and MFN rights affect parties' ability to negotiate or renegotiate terms of their interconnection agreements.

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[93] *See* Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, Inc., to Magalie R. Salas, Secretary, FCC (July 17, 1998).

[94] *Access Charge Reform Order*, 12 FCC Rcd at 16133.

[95] 47 U.S.C. § 252(i).

[96] *See* Letter from Michael E. Glover, Associate General Counsel, Bell Atlantic, to Magalie R. Salas, Secretary, FCC (October 28, 1998), at 2, Att. 3 at 6-8.

[97] *Id.*

36. As discussed above, not all ISP-bound traffic is interstate. We seek comment on whether we should adopt rules for the interstate traffic that would coexist with state rules governing the intrastate traffic, or whether it is too difficult or inefficient to separate intrastate ISP-bound traffic from interstate ISP-bound traffic. We further seek comment on the technical and practical implications of requiring the separation of intrastate and interstate ISP-bound traffic. In addition, we seek comment on the implications of various proposals regarding inter-carrier compensation for ISP-bound traffic on the separations regime, such as the appropriate treatment of incumbent LEC revenues and payments associated with the delivery of such traffic. This Commission is mindful of concerns that our jurisdictional analysis may result in allocation to different jurisdictions of the costs and revenues associated with ISP-bound traffic,[98] and we wish to make clear that we have no intention of permitting such a mismatch to occur. With respect to current arrangements, we note that this order does not alter the long-standing determination that ESPs (including ISPs) can procure their connections to LEC end offices under intrastate end-user tariffs, and thus for those LECs subject to jurisdictional separations both the costs and the revenues associated with such connections will continue to be accounted for as intrastate.

B. Procedural Matters.

1. Ex Parte Presentations.

37. This Notice of Proposed Rulemaking is a permit-but-disclose notice-and-comment rulemaking proceeding. *Ex Parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.[99]

2. Initial Regulatory Flexibility Analysis.

38. As required by the Regulatory Flexibility Act (RFA),[100] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking* (*Notice*). Written public comments are requested on the IRFA. These comments must be filed by the deadlines for comment on the remainder of the *Notice*, and should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *Notice*, including the IRFA, to the Chief Counsel for

[98] *See* Letter from James Bradford Ramsay, Assistant General Counsel, National Association of Regulatory Utility Commissioners, to Magalie R. Salas, Secretary, FCC (December 14, 1998).

[99] *See generally* 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

[100] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

Advocacy of the Small Business Administration (SBA), in accordance with the RFA, 5 U.S.C. § 603(a).

39. *Need for and Objectives of the Proposed Rules.* We tentatively conclude that we should adopt a rule regarding inter-carrier compensation for ISP-bound traffic that strongly reflects our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts. We seek comment on two alternative proposals for implementing such a regime. Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic. In light of comments received in response to the *Notice*, we might issue new rules or alter existing rules.

40. *Legal Basis.* The legal basis for any action that may be taken pursuant to the *Notice* is contained in Sections 1, 2, 4, 201, 202, 274, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 251, 252, and 303(r).

41. *Description and Estimate of the Number of Small Entities That May Be Affected by the Notice of Proposed Rulemaking.* The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[101] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by SBA.[102] The SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[103] Consistent with prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."[104] Although such a company may have 1,500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

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[101] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[102] 15 U.S.C. § 632.

[103] *See* 13 C.F.R. § 121.201.

[104] *See, e.g.*, *Local Competition Order*, 11 FCC Rcd at 16150.

42. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census (the Census Bureau) reports that at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[105] This number includes a variety of different categories of carriers, including local exchange carriers (both incumbent and competitive), interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not "independently owned or operated."[106] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are either small entities or small incumbent LECs that may be affected by this *Notice*.

43. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[107] According to our most recent data, 1,371 companies reported that they were engaged in the provision of local exchange services.[108] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, or are dominant, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 small providers of local exchange service are small entities or small incumbent LECs that may be affected by the *Notice*.

44. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.* As a result of rules that we may adopt, incumbent LECs and CLECs may be required to discern the amount of traffic carried on their networks that is bound for ISPs. In addition, such incumbent LECs and entrants may be required to produce information regrading the costs of carrying ISP-bound traffic on their networks.

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[105] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[106] 15 U.S.C. § 632(a)(1).

[107] FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Figure 2 (*Number of Carriers Paying into the TRS Fund by Type of Carrier*) (Nov. 1997).

[108] *Id.*

45. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered.* As noted above, we propose to adopt rules that may require incumbent LECs and CLECs to discern the amount of traffic carried on their networks that is bound for ISPs.[109] We anticipate that if we adopt such rules, incumbent LECs and CLECs, including small entity incumbent LEC and CLECs, will be able to receive compensation for the delivery of ISP-bound traffic that they might not otherwise receive. The *Notice* also requests comment on alternative proposals.

46. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules.* None.

3. Comment Filing Procedures.

47. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before April 12, 1999, and reply comments on or before April 27, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[110]

48. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail message to ecfs@fcc.gov and include "get form <your e-mail address>" in the body of the message. A sample form and directions will be sent in reply.

49. Parties that choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth St., S.W., Room TW-A325, Washington, DC 20554.

50. Parties that choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Harris, Federal Communications Commission, Common Carrier Bureau, Competitive Pricing Division, 445 Twelfth St., S.W., Fifth Floor, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The

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[109] *See* ¶¶ 28-36, *supra.*

[110] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the docket number in this case, CC Docket No. 99-68); type of pleading (comment or reply comment); date of submission; and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, DC 20036.

V. Ordering Clauses

51. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i) and (j), 201-209, 251, 252, and 403 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-209, 251, 252 and 403, that this Notice of Proposed Rulemaking IS HEREBY ADOPTED and comments ARE REQUESTED as described above.

52. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

February 25, 1999

Separate Statement
of
Commissioner Susan Ness

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket 96-98); and Inter-carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68)

This proceeding is one of unusual importance and unusual complexity.

The debate over reciprocal compensation for ISP-bound traffic is *important* for three main reasons. First, the issues we review here involve access to the Internet, a unique, extraordinary, and ever-evolving national and international network of networks that is rapidly transforming communication, commerce, and communities. Second, reciprocal compensation may substantially affect the nature and the extent of local telephone competition, which was a principal objective of the Telecommunications Act of 1996. Third, any decision in this area may affect relationships between state and federal regulatory authorities, who must work in harmony to achieve successful implementation of the Telecommunications Act.

The debate is *complex* because it involves the application of legal precedents from the early 1980s to services and carrier arrangements that were unimaginable only a few short years ago, as well as provisions of the 1996 Act that have already led to considerable controversy and litigation. We must grapple with equities that may be quite different when viewed prospectively than when viewed retrospectively. A further complication is that reciprocal compensation involves certain issues that can better be assessed by state public utility commissions than by the FCC, and yet it also implicates important national interests affecting access to an interstate (and international) service.

At the end of the day, however, I believe the case boils down to elementary and straightforward propositions. Switched network telephone calls to Internet service providers are inherently interstate, which is the decision most consistent with our prior creation of an ESP exemption from interstate access charges -- and with the interstate and international nature of the Internet. But to say this is *not* to overrule, undermine, or prevent state commission decisions that construe interconnection agreements to require reciprocal compensation for ISP-bound traffic. It was, and remains, reasonable for the states (and federal district courts) to so rule, given our prior decisions -- and the practices of the ILECs themselves -- to treat this traffic as local.[1]

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[1] Since 1983, the Commission has consistently and consciously permitted enhanced service providers, a category that now includes Internet service providers (ISPs) to connect to their customers using local business lines. *See, e.g., MTS and WATS Market Structure*, 97 FCC 2d 682, 715, para. 83 (1983) (subsequent history omitted). Enhanced service providers use "*interstate* access" but pay "*local* business exchange service rates." *Id.* (emphasis added); *see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service*

And, although we are declaring that there are national interests that must be respected on a going-forward basis, it may well be that these interests can be protected without changing the long-standing decision to treat this traffic as local. One could readily imagine, for example, that states will not seek to assess per-minute fees on Internet-bound calls, just as the FCC has repeatedly resisted entreaties to do so. One can also reasonably foresee that, even if ISP-bound traffic continues to be handled by the state commissions under the usual 251/252 process, the parties themselves (in voluntarily negotiated agreements) or the state commissions (if called upon to arbitrate agreements between incumbents and new entrants) will in future agreements address the issues associated with ISP-bound traffic in ways that avoid some of the obvious anomalies and competitive distortions that may result from some of the current ILEC-CLEC arrangements.

In short, I believe the decision we have adopted is one that (1) comports with the law, (2) is fair both to incumbent local exchange carriers and to competitive local exchange carriers, (3) does not unravel the core determinations of the more than two dozen state commissions that have addressed this issue, (4) sets the stage for future determinations that will eliminate or at least attenuate any anomalies inherent in current compensation arrangements, and (5) preserves this Commission's ability to safeguard the innovative, competitive, and unregulated character of the Internet. I hope that parties responding to the Notice of Proposed Rulemaking will focus on ways in which all of these objectives may continue to be advanced.

Providers, 3 FCC Rcd. 2631, 2635 n.8 (1988) ("enhanced service providers generally pay *local* business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices") (emphasis added); *accord id.* at 2637 n.53.

This decision was not altered by passage of the Telecommunications Act of 1996. After that law was passed, we expressly reiterated that ISPs "purchase services from incumbent LECs under the same *intrastate* tariffs available to end users" and determined that, if "*intrastate* rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to *state* regulators." *Access Charge Reform*, 12 FCC Rcd. 15982, 16132, para. 342 & 16135, para. 346 (1997), *aff'd Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (emphasis added). The Eighth Circuit explicitly recognized that the manner in which Internet-bound traffic is treated is a product of FCC "discretion." *Southwestern Bell Telephone*, 153 F.3d at 543. It is significant that, in the aforementioned *Access Charge Reform* proceeding, we implicitly affirmed both the FCC's ultimate authority over this traffic and the state commissions' competence to handle it unless and until directed otherwise. It is especially telling that the *Southwestern Bell Telephone* decision, acknowledging the Commission's ultimate authority over such inherently interstate traffic, came from a court that was otherwise quite resistant to FCC encroachment on matters that it deemed to be on the states' side of a "horse-high, hog-tight, and bull-strong fence." *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *rev'd in pertinent part*, *AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).

February 25, 1999

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING

Re: Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98) and Inter-Carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68).

I write separately to explain the bases upon which I concur in this action. Specifically, based on the long inquiry that has led to our action today, I agree with the majority that LEC-to-LEC Internet-bound traffic is properly classified as jurisdictionally interstate. Because of this agreement, and in light of the serious governmental interests implicated, I believe it is appropriate for the Commission to consider whether the current method of determining intercarrier compensation for this traffic at the state level continues to be appropriate. I believe, however, that in a well-meaning effort to preserve existing state decisions regarding reciprocal compensation for this traffic, we have strayed into areas best left to state authorities and may have unwittingly muddled our jurisdictional analysis.

As the attached decision correctly points out, a number of the Commission's precedents indicate that the jurisdictional nature of communications should be determined by the end points of the communication (*i.e.*, by looking at the entire communication as "one call"). I believe this method of evaluating jurisdiction remains valid and important, especially considering the growing number of creative and complex methods for transmitting and transporting communications. Indeed, the challenge of packet networks is that they make it nearly impossible (at present) to trace accurately the route of a single communication to its destination, especially given that each packet of which the communication is comprised may take a different route before reassembling at the intended destination. These and other technological developments will continue to frustrate traditional geographic boundaries.

Our decision that LEC-to-LEC Internet-bound traffic is interstate in nature fundamentally calls into question a number of state decisions that applied reciprocal compensation to LEC-to-LEC Internet-bound traffic based primarily or exclusively on the view, which we herein reject, that this traffic is local. I agree with the majority that this conclusion does not, in itself, dictate how or whether carriers of this traffic should be compensated, nor does this conclusion determine whether this Commission or state commissions should establish compensation arrangements. I likewise agree that not all state decisions to apply reciprocal compensation to this traffic share this basis, and that, as a general matter, there may be other bases upon which state commissions could continue these compensation schemes even after the action we take here.

But even given the fact that our decision today does not necessarily undermine each of the state decisions, I think the most prudent course would have been for us to decline to speculate on what bases there may be for upholding those decisions. The decisions themselves are not before us and it is properly for state authorities to explore the

ramifications of our action today on those decisions. Furthermore, having reviewed a number of the state decisions in this area, I am persuaded that the underlying facts, analytical underpinnings and applicable law vary enormously from state to state. We cannot, even in the most carefully worded or sweeping dicta, address all of these variations meaningfully.

That said, I might support some of the majority's suggested rationales for preserving existing state decisions, but cannot embrace others because I am unpersuaded either that they are sensitive to the wide variations in the facts, analysis and legal contexts or that the benefits of such rationales substantially exceed their potential risks. I put in the first category the view that state decisions applying reciprocal compensation to LEC-to-LEC Internet-bound traffic should be preserved where the state or reviewing court finds that the parties *agreed* to compensate each other for this traffic in this way. Sections 251 and 252 of the Act express a clear preference for negotiations as the primary method for carriers to determine the terms of interconnection, and the Act allows parties to agree even to terms that do not satisfy the requirements of these sections. Thus, I firmly believe that if a state commission or court interpreting state law determines that carriers agreed to apply reciprocal compensation to this traffic, those carriers should be held to the terms of their agreement. Furthermore, I have no strong objection to our dicta to the extent it suggests that state commissions or reviewing courts may identify other justifications for preserving state decisions to apply reciprocal compensation to this traffic under state law. If we had included only this rationale as a basis upon which states could uphold their existing decisions, my concerns with our decision today would have been significantly reduced.

But rather than merely acknowledging generally the possibility of state law bases on which we believe such agreements can be sustained, we have chosen to proffer other specific bases. I am concerned, however, that the other theories proffered here are legally and analytically unsound, may prospectively hinder our ability to address the public policy concerns that led us to assert jurisdiction here in the first place, and yet do very little retroactively to preserve state-sanctioned agreements. As such, I decline to subscribe to certain of the dicta in our decision.

First, I decline to subscribe to any suggestion that the state decisions could be preserved based on the theory that we had essentially delegated responsibility to state commissions to approve or determine compensation arrangements for LEC-to-LEC Internet-bound traffic. Unquestionably, we have in the past declined to apply certain types of existing federal compensation or charges to traffic flowing to enhanced service providers (ESPs) from individual LECs. As the decision appears to acknowledge, however, we have never made a conscious, affirmative choice to defer in similar fashion to local compensation measures for the situation we face here (*i.e.*, intercarrier compensation for LEC-to-LEC Internet-bound traffic). I do not question that a state may have understandably analogized the ESP precedent to this case. But no matter how apt the analogy to the facts before us now, one cannot assume delegated authority by analogy. Thus, I cannot support any suggestion that the Commission has heretofore delegated authority to state commissions to impose reciprocal compensation on this traffic.

Second, I decline to subscribe to the dicta in this decision to the extent it suggests that the state decisions can be preserved because state commissions and this Commission share jurisdiction for implementing the sections 251 and 252 of the Act.

I fully agree that the states, to the extent they acted pursuant to their statutory obligation to arbitrate and approve interconnection agreements, acted reasonably in the absence of a clear federal rule. Nonetheless, I fail to see how such reasonableness will be a defense to claims that our jurisdictional analysis conflicts with that of a state. Such reasonableness does little to preserve those state decisions most likely to be disturbed by our "one call" jurisdictional analysis, namely, decisions based primarily or exclusively on a "two call" theory. In short, I think touching on the issue of shared jurisdiction muddles our conclusion that there is federal jurisdiction with respect to these questions.[1] I remain open to considering any reasonable compensation scheme (including delegating authority to states) but would have preferred to do so on the basis of our interstate authority, rather than on shared jurisdiction.

In closing, I wish to note that I would have preferred to avoid making tentative conclusions in the Notice section of today's decision. Indeed, in light of the complexity of the analysis, the importance of the issues and the long inquiry leading up to this decision, some may find it strange that our tentative conclusion in favor of state-level arbitrations would leave the method of establishing intercarrier compensation for this traffic virtually unchanged. I encourage commenters to provide information on both sides of this important issue so that we can assess more fully which compensation scheme is best.

For these reasons, I cannot fully support our decision today, and thus I concur in it. I wish to commend, however, my colleagues and our dedicated staff for their diligence and patience in wrestling with these knotty legal and policy issues.

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[1] Any shared jurisdiction theory raises certain questions, such as: what are the limits of federal authority in crafting a compensation regime? Although the recent Supreme Court decision in *AT&T Corp. v. Iowa Utilities Board* begins to answer this question, the Court's answer may not be entirely complete. For example, in affirming the Commission's pricing jurisdiction, the Court states: "While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements . . . and granting exemptions to rural LECs, . . . these assignments . . . do not logically preclude the Commission's issuance of rules *to guide the state commission judgments*.", *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) (opinion of the court, section II) (emphasis added). Other than affirming the approach taken in the Commission's underlying order, however, the Court provided little guidance regarding the level of specificity with which the Commission can "guide the state commission judgments."