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Public Service Commission

April 9, 1999

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BY AIRBORNE EXPRESS

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th, SW - TW-A325
Washington, DC 20554

Re: CC Docket No. 96-98 - Implementation of the Local Competition Provisions in the Telecommunications Act of 1996.

CC Docket No. 99-68, Inter-Carrier Compensation for ISP-Bound Traffic.

Dear Ms. Salas:

Enclosed please find the original and 11 copies of the Florida Public Service Commission's Comments in the above-referenced docket. Please date stamp and return one copy in the enclosed self-addressed envelope. A diskette is also being furnished to the Common Carrier Bureau.

Sincerely,

Cynthia B. Miller
Senior Attorney

CBM:jmb
cc: Brad Ramsay, NARUC
International Transcription Service
Wanda Harris, Common Carrier Bureau

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

FLORIDA PUBLIC SERVICE COMMISSION COMMENTS ON NOTICE OF PROPOSED RULEMAKING

The Florida Public Service Commission ("FPSC") hereby respectfully submits its comments in the above docket. Specifically, these comments are in response to the Commission's Notice of Proposed Rulemaking released on February 26, 1999 regarding inter-carrier compensation for ISP-bound traffic. We comment specifically on the Commission's alternatives for handling inter-carrier compensation.

FCC's Incorrect Jurisdictional Analysis

In the FCC's declaratory ruling on reciprocal compensation for traffic delivered to an information service provider, the FCC concludes that the communications do not terminate at the Internet Service Provider's (ISPs) local server, but continue to the ultimate destination(s), specifically at an Internet website that is often located in another state. The FCC noted, "the fact that the facilities and apparatus used to deliver traffic to the ISP's local server may be located within a single state does not affect our jurisdiction." (Order at ¶ 12).

The order specifically disagreed with those commenters who asserted, for jurisdictional purposes, that ISP-bound traffic must be separated into two components: an intrastate telecommunications service, provided by one or more LECs, and an interstate information service, provided by the ISP. The order analyzes "ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site." (Order at ¶ 13).

The FPSC believes that the Commission is in error in assuming that "telecommunications continues through the ISP POP *simply because the ISP uses telecommunications.*" The FCC's position is inconsistent with its conclusion in the Universal Service Report to Congress, where the Commission found that "information service providers are not transformed into providers of telecommunications simply because they use telecommunications." In that Report, the Commission concluded that an ISP offering is properly categorized as an information service, not subject to Title II, and that the ISP "is itself a user of telecommunications; that is, telecommunications is an *input in the provision of an information service."*

Internet services are purchased by end users as two components, as described in the FCC's NPRM. First, an access line, provided by a local exchange carrier, allows the end user to call an ISP using a seven-digit number. The second step involves protocol conversion, transmission, routing, etc., provided by the ISP which enables the customer to access Internet content and services.[1] The access lines purchased by end users are local access lines that are provided through an <u>intra</u>state tariff. Because ISP's are recognized as Enhanced Service Providers (ESPs) and thus are exempt from paying certain interstate access charges, they are able to purchase their access lines through <u>intra</u>state business tariffs rather than interstate access tariffs. Once a transmission reaches an ISP server, it leaves the public switched network and is routed to its ultimate destination through the Internet backbone, which is a private, packet-switched network over which the FCC has no jurisdiction. In order to assert its jurisdiction, the FCC has combined a service that is regulated on an intrastate basis and provided over the public switched network with an unregulated service that

[1] NPRM, paragraph 4.

is provided across a private network to create a new, interstate service.

We believe that the FCC is clinging to a weathered end-to-end jurisdictional approach that is particularly ill-suited for the years ahead. The end-to-end analysis will not fit well with an environment in which Internet telephony has become commonplace, nor is it appropriate if significant elements of the current facilities-based local exchange network monopoly persist indefinitely. Taken to a logical extreme, the Commission's approach could have the particularly unwanted effect of extending federal jurisdiction beyond telephony, while simultaneously emasculating the type of (state) regulation that is best suited to handle a residual local "pipeline" monopoly. We believe that state commissions are in a better position to address these issues because of our proximity to consumers, our understanding of unique market conditions within our respective jurisdictions, and our longstanding regulatory authority over with local telecommunications providers.

Taken to its logical conclusion, the FCC's decision on the jurisdictional nature of ISP-bound traffic dictates that cable modems must now also be regulated as a form of telecommunications. ISP-bound traffic carried over cable modems is currently not regulated as telecommunications. Although cable modems provide a means to connect to ISPs that is different from dial up access, we believe that once the traffic reaches the ISP, access to the Internet is identical to that provided via dial-up access (usually with greater speed). However, if this traffic is now considered "end-to-end telecommunications," Internet service provided via cable modems should be regulated as a common carrier service.

We believe that such a policy is a bad idea and is contrary to the underlying principals of the Telecommunications Act. The logical extension of the policies adopted by the FCC creates more regulation, not less, and could have the unintended consequences of deterring further advanced telecommunications development over the Internet.

FPSC Responses to NPRM

Notwithstanding the FCC's incorrect premise that local ISP-bound traffic is interstate in nature, the FPSC believes there is only one correct method for dealing with inter-carrier compensation for this traffic given these circumstances. The FCC's first option, to give states full discretion in continuing to deal with compensation as an issue in their Section 251/252 arbitration proceedings, will somewhat mitigate the problems that the Commission's determination has created. Allowing states to determine correct compensation policies, unencumbered by federal mandates, will ensure that states will be able to arbitrate these issues in the manner that best fits each state's circumstances.

The FPSC believes that the Commission's second option involving federal rules for inter-carrier compensation is not warranted. This proposal would be contrary to the Commission's previous indications that it did not wish to interfere with state commission arbitrations involving ISP traffic.

If the Commission determines that federal rules are necessary, then the Commission should also be responsible for enforcement of those rules. This would include arbitrating, or arranging for independent arbitration of, any disputes regarding this traffic. The states should not be obligated to enforce FCC rules on this matter.

The Commission also sought comment on whether under either option there may be a need for some federal rules to aid in the resolution of disputes on these matters. The FPSC believes that the development of such rules is both unnecessary and overly prescriptive. Section 252 of the Telecommunications Act of 1996 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. Indeed, the Commission observed in its Local Competition Order that state commission authority pursuant to section 252 includes both interstate and intrastate matters.

The Commission also sought comment on the impact of Section 252(I) and Most Favored Nations ("MFN") clauses on parties' ability to negotiate or renegotiate terms of their interconnection agreements. The FPSC believes that this topic involves interconnection issues far more encompassing than inter-carrier compensation for ISP-bound traffic. The Commission's interpretation of Section 252(I) and its effect on interconnection agreements is best explored in a generic investigation into its interconnection rules. The FPSC presumes that the Commission will issue an NPRM on the validity, need, and implementation schedule of its interconnection pricing rules within the next few months. Given the broad nature of this question, we believe it is best suited for that proceeding.

While the FPSC believes that this issue should be addressed in a generic interconnection inquiry, we believe that the Commission's interpretation of 252(I)significantly reduces competitors' incentives to negotiate an agreement. A competitive carrier can minimize its expenses by selecting portions of other

CLEC agreements without having to concede on any other issues. ILECs will have little incentive to negotiate agreements since other CLECs would likely cannibalize any new agreement.

Over time, this process would create a "best-of-breed" contract based entirely on previously negotiated agreements. This creation, which may bear a striking resemblance to a tariff, would effectively defeat both the need and purpose of negotiation.

With regard to the Commission's specific example involving the time frame a carrier should be afforded to opt into a pre-existing contract, the FPSC believes that the ability of a CLEC to use conditions or rates from a pre-existing contract should expire at the same time the original contract terminates.

The FPSC believes that MFN clauses in negotiated agreements are different from the Commission's interpretation of Section 252(I). Although MFN clauses may, in some instances, result in the same ability for a CLEC to "pick and choose" terms from other contracts, an MFN clause is a voluntary agreement between parties and therefore is not equivalent to the mandatory terms of Section 252(I). If parties believe that MFN clauses in contracts are too strict or too broad, or are interpreted incorrectly through arbitration, then they have the option to renegotiate those terms with more specificity the next time they enter into a negotiated agreement. In contrast, the Commission's interpretation of Section 252(I), which the FPSC believes grants *global* MFN rights to all carriers for any term in any contract, may eventually eliminate the need or reason for negotiated contracts altogether.

FPSC Endorsement of Certain Comments of the Indiana Commission

Mismatch of Revenues and Costs

The FPSC also endorses the following points raised by the Indiana Utility Regulatory Commission (IURC). Specifically, assigning the revenues and the costs for an interstate service such as the Internet to the intrastate jurisdiction creates specific cost allocation problems. Both end users and ISPs may purchase residential or business access lines, whichever are applicable, out of an intrastate tariff. These access lines, in turn, provide end users access to the ISP and the ISP access to end users. The FPSC believes that the intrastate jurisdiction should not be responsible for recovering the costs associated with an interstate service. The FPSC reiterates that if Internet traffic is an interstate service which uses the local loop, then an additional portion of the loop cost should be recovered through an interstate rate, not basic local service (BLS) rates. Assigning the costs and revenues associated with Internet traffic solely to the intrastate jurisdiction could force the states and, by extension, basic local service customers to recover more than their fair share of common plant costs. Bluntly stated, *if Internet traffic is interstate traffic, then intrastate basic local service rates, which currently recover the cost of Internet access, might be too high.*

Bill & Keep Arrangements

In addition, if the FCC believes that a uniform cost recovery mechanism for ISP-bound traffic is necessary, then the FCC should look at the possibility of encouraging the states to require carriers to recover their costs for the transport and termination of <u>all</u> traffic through bill and keep arrangements.[2] The FCC previously presented states three options for setting rates for the transport and termination of local traffic in its first local competition order.[3] States could: 1) develop rates based on a TELRIC cost study; 2) use the default cost proxies

[2] Bill and keep arrangements are arrangements in which "neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network." *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-96, August 8, 1996, paragraph 1096.

[3] *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-96, released August 8, 1996.

developed by the FCC; or 3) order carriers to adopt bill and keep arrangements, so long as the traffic between carriers is "roughly balanced".[4] However, the balanced traffic standard could be difficult to achieve in many instances and could require CLECs to install expensive billing systems. The FPSC notes the IURC's recommendation that the "roughly balanced" requirement be eliminated in order for bill and keep to be a practical alternative to reciprocal compensation. This should also be reviewed by the FCC.

Respectfully submitted,

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DATED: April 9, 1999

[4] Id, paragraph 1112.