

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Inter-Carrier Compensation) CC Docket No. 99-68
for ISP-Bound Traffic)

Reply Comments of the
National Telephone Cooperative Association

The National Telephone Cooperative Association (NTCA) files its Reply Comments in response to comments filed April 12, 1999 in this proceeding.

I. INTERSTATE TRAFFIC CREATES INTERSTATE COST WHICH MUST BE RECOVERED THROUGH INTERSTATE RATES

A major point of departure among the commenting parties is the validity of the Commission's statement in the Notice of Proposed Rulemaking that costs and revenues associated with providing an interstate service to Information Service Providers (ISPs) must be accounted for as intrastate and the service offered under intrastate tariffs.¹ Several comments agreed with NTCA's position that assignment of cost and revenues must follow the jurisdictional nature of the traffic.² As well stated by the State Members of the Separations Joint

¹ Notice of Proposed Rulemaking, CC Docket No. 99-68, Inter-Carrier Compensation for ISP-Bound Traffic, FCC 99-38, released February 26, 1999 (NPRM) at para. 36.

² NTCA has joined with other ILEC associations to comment in the Separations proceeding, CC Docket 80-286, that the Commission should either freeze the separations factors on an interim basis because of the distortion caused by the Internet traffic, or remove the traffic

Board: A [B]y breaking the link between jurisdictional authority and responsibility . . . the FCC exerts its jurisdictional authority but accepts no jurisdictional responsibility.³

from the separations calculations. Telephone Associations comments, March 30, 1999.

³ State Members of the CC Docket 80-286 Federal-State Joint Board on Separations, 4. See also, GVNW at 6; Indiana Utility Regulatory Commission at 5: A. . . the IURC must emphasize its belief that if the FCC wants jurisdiction of Internet traffic, it should assume responsibility for setting rates, recovering costs, and establishing a tariff for the services that enable such traffic.³

AT&T on the other hand, asserts that it would be inconsistent with the exemption from interstate access charges to assign ISP-bound traffic to the interstate jurisdiction, citing the Commission's Access Reform Order.⁴ Whatever the merits of that order at the time, it was based upon a record now more than two years old, a period which has seen enormous changes in the number of users and the volume of Internet traffic. Assuming, *arguendo*, that the ESP exemption from the Part 69 access charges remains appropriate policy, it does not follow that the costs associated with providing interstate service must be assigned to the intrastate jurisdiction. The Access Reform Order's decision not to apply the Part 69 rules *as presently constituted* was justified by the Commission as a result of its conclusion that the access charges system includes non-cost based rates and inefficient rate structures,⁵ and because ISPs should not be subjected to a regulatory system designed for circuit switched interexchange voice telephone.⁵ The Commission also stated that ISPs may not use the network in a manner analogous to IXC and that it was not convinced that LEC allegations of network congestion warrant imposition of access charges.⁶

None of these reasons for not applying the rate structure developed for IXCs support the

⁴ AT&T at 19, 20.

⁵ First Report and Order, In the Matter of Access Reform, CC Docket No. 96-262, para. 343, 12 FCC Rcd 15982, 16132, 16133 (1997). (Access Reform Order) The 8th Circuit's decision affirming the Commission's continuation of the ISP exemption was based upon the same now obsolete record before the Commission, relied on the Commission's then conclusion that facilities used by ISPs are jurisdictionally mixed, and the fact that the Commission had not then issued a final determination with regard to treatment of ISPs. Southwestern Bell Telephone Company v. FCC, 153 F.3d 523 (8th Cir. 1998).

⁶ Access Reform Order, 12 FCC Rcd 16133, 16134.

conclusion that interstate traffic should be assigned to the intrastate jurisdiction. If in fact the Part 69 rules are inappropriate for ISPs, that is no basis upon which to conclude that some other set of rules cannot be found which will be appropriate and are designed to address each of the concerns expressed.⁷ The only alternative is for other interstate rate payers to continue to subsidize ISPs and their users. It may soon be the case that the largest implicit subsidy in the access rates is the ESP exemption. A perfect *Catch 22* can thus be constructed by pointing out that access charges cannot be applied to ESPs because they include too much of an implicit subsidy caused by the ESP exemption.

AT&T has confused cost *allocation* with cost *recovery*. The Commission's conclusion that the traffic is interstate does not determine what interstate cost recovery plan must be used, it only determines that it must be an interstate plan. Having asserted, correctly, its authority, the Commission cannot dodge its responsibility.⁸ GTE correctly noted that these responsibilities

⁷ As pointed out by Bell South at p.2, of its Comments, the connection provided to an ISP is within the Commission's definition of Access Service in Part 69.

⁸ If the consequence of recognizing that interstate traffic is interstate traffic for separations purposes is to recognize that LECs have lower interstate earnings, the Commission cannot ignore that result merely because it is inconvenient.

include establishing rules which allow all LECs to be compensated for their costs of delivering traffic and which treat similar uses of an ILEC=s network in a consistent way.⁹

II. WHERE MULTIPLE CARRIERS PARTICIPATE IN PROVIDING END USERS ACCESS TO ISPS, THEIR INDIVIDUAL COSTS ARE BEST RECOVERED THROUGH NEGOTIATED AGREEMENTS ON THE MEET-POINT BILLING MODEL

There is substantial support in the comments for the proposition that the so-called inter-carrier compensation issue should be resolved by analogy to the similar issues presented in development of access charges and resolved by development of meet-point billing arrangements.¹⁰

Now that it is recognized that when two or more LECs are involved in connecting an end-user to

⁹ GTE at 21.

¹⁰ See, e.g. Virgin Islands Tel. Co. at 13-15; Cincinnati Bell at 4, U S West at 3-8 . Some comments continue to seek ways to continue the inappropriate reciprocal compensation boondoggle which greatly enriched some of them, but has been given its death sentence by the Commission=s conclusion that the traffic is interstate, not local. See, Global NAPs at 6: A. . . mandatory reciprocal compensation is essential. . . ≡; Cablevision Lightpath, Inc. at 3. Verio Inc. at 4, MCI at 10.

an ISP, both have costs which must be recovered somewhere.¹¹ Some CLECs appear to conclude that they must recover their costs from ILECs or they won't be able to compete.¹² There is no basis, however, to conclude that one of these LECs owes anything to

¹¹ Ameritech at 8-14 points out that the Commission cannot assume LECs are recovering their costs through intrastate rates. The comments of Richmond Telephone Company and the Telephone Association of New England each demonstrate that these costs are substantial.

¹² See, Prism at 7: AThe Commission must...not allow competitive carriers seeking to enter the marketplace to founder at the feet of the ILECs.≡

the other, in the absence of an agreement by which one carriers undertakes to recover all of the costs attributable to both and divide the revenues with the other.¹³

LECs should in the first instance attempt to negotiate between them the most practical solution for each situation. Where agreement cannot be reached, however, the remedy is to invoke the Commission's authority under Section 201(a). Several LECs build a strong case for the position that there is no state commission jurisdiction to resolve such disputes, although some states appear willing to take on the task.¹⁴ Whichever regulatory authority is ultimately established, the Commission should establish only general guidelines, and not attempt to fix precise rates.

III. ALL INTERNET TRAFFIC SHOULD BE CONSIDERED INTERSTATE

The comments provide substantial support for the conclusion that it is not practical to attempt to separate interstate and intrastate Internet-bound traffic. As Cincinnati Bell points out, ISP-bound traffic does not terminate at the called number and the terminating location can

¹³ Such an agreement would be roughly analogous to the pre-access interstate settlement contracts between Independent LECs and the Bell Companies, in which the former billed the end user for calls at the AT&T tariff rate, and then Asettled with the Bell Company on the difference between the revenue and the Independent's cost.

¹⁴ See, e.g. Bell South at 4, Frontier at 6-8.

change during a single Internet session.¹⁵ ITAA states plainly ANeither the subscriber, nor the

¹⁵ Cincinnati Bell at 2. See also, Bell Atlantic at 7 and Eppert Declaration; John Staurulakis, Inc. at 4.

ISP, nor the serving LEC typically has any way of knowing the geographic location of computer servers accessed during an on-line session.¹⁶

IV. CONCLUSION

The essence of this segment of the evolving regulatory process in an attempt to keep up with rapid and dynamic market change is how multiple carriers providing access to the Internet each recover their resulting costs. The issue is first of all not whether one of these carriers should compensate the others, but what costs are properly recoverable. Because the Commission has properly concluded that this Internet-bound traffic is mostly interstate or foreign, it follows that the costs, revenues and any tariffs are also interstate, and that there are no reciprocal compensation obligations. Once these rather obvious conclusions are reached, it should be a relatively straightforward matter to adapt the meet-point billing process used for jointly provided access to interexchange carriers to the business of providing access to the Internet.

Respectfully submitted

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¹⁶ Information Technology Association of America at 3.

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Reply Comments of the National Telephone Cooperative Association in CC Docket No. 99-68, FCC 99-38 was served on this 27th day of April 1999 by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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