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April 26, 1999

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554VIA UNITED PARCEL SERVICE
AND ECFS

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APR 27 1999

FCC MAIL ROOM

Re: CC Docket Nos. 96-98 and 99-68

Dear Ms. Salas:

Please find enclosed for filing an original and five copies of the Reply Comments of the People of the State of California and the California Public Utilities Commission in the above-referenced dockets. Also enclosed is one additional copy of this document. Kindly file-stamp this copy and return it to me in the enclosed self-addressed envelope

California is also providing an electronic copy of these comments via your ECFS system.

Thank you for your attention to this matter. If you have any questions, I can be reached at (415) 703-2047.

Sincerely,

A handwritten signature in cursive script that reads "Ellen S. LeVine".

Ellen S. LeVine
Attorney for CaliforniaNo. of Copies rec'd
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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

Inter-Carrier Compensation for ISP-
Bound Traffic

CC Docket No. 96-98

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APR 27 1999

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CC Docket No. 99-68

**REPLY COMMENTS OF THE PEOPLE OF THE STATE OF
CALIFORNIA AND THE CALIFORNIA PUBLIC UTILITIES
COMMISSION**

The People of the State of California and the California Public Utilities Commission ("California" or "CPUC") hereby file these comments in response to opening comments in the Notice of Proposed Rulemaking ("NPRM") in the above-referenced dockets.¹

**I. There Is No Legal Impediment To The FCC's Adoption Of
Its Tentative Conclusion To Rely On Commercial
Negotiations And State Arbitrations In Determining Inter-
Carrier Compensation For ISP-Bound Traffic**

In our opening comments, California urged the Federal Communications Commission ("FCC") to adopt its tentative proposal to continue to rely on

¹ Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, FCC 96-38 (Feb. 26, 1999).

commercial negotiations, and if necessary, state arbitrations, to determine reasonable inter-carrier compensation rates for ISP-bound traffic. Many of the competitive local exchange carriers (“CLECs”) support this proposal. As they point out, established state arbitration proceedings are well-suited to resolve all interconnection issues, promote administrative efficiency, and reduce delay in competitive entry by allowing for the adjudication of all issues in one forum before a single decisionmaker.

Not surprisingly, the incumbent local exchange carriers (“ILECs”), fearing “serious misinterpretation by state commissions and ‘others,’” strongly oppose the FCC’s tentative proposal.² Their reasons for opposition, however, are not compelling.

Several parties, for example, claim that the FCC lacks authority under the Telecommunications Act of 1996 (“1996 Act”) to allow states to arbitrate disputes when negotiations fail to produce an agreement. This is so, according to these parties, because the FCC found ISP-bound traffic to be “largely interstate,” and not severable by jurisdiction. Declaratory Ruling, ¶ 1.

These parties are mistaken. The FCC did not conclude that all ISP-bound traffic is interstate, but acknowledged that some traffic might indeed be local.

² SBC Comments at 9.

Declaratory Ruling, ¶ 18³ To the extent that such traffic is local, Section 251(b)(5) requiring reciprocal compensation for terminating carriers would apply. The FCC does not exceed its authority by allowing states to apply Section 251(b)(5) to local traffic in arbitration proceedings under Sections 251 and 252.

To be sure, the recognition that ISP services are jurisdictionally mixed, and that at least some of the traffic is local, enabled the FCC, as a matter of law, to permit ISPs to buy transmission services out of intrastate tariffs approved by state commissions. Southwestern Bell Telephone Co. v. FCC, 153 F.3d 523 (8th Cir. 1998). This was so even though the FCC found it difficult to divide the services into interstate and intrastate components to permit dual regulation. By the same logic and law, if the FCC “appropriately exercised its discretion to require an ISP to pay intrastate charges [set by a state] for its line,” notwithstanding that some or most of the ISP’s services are interstate, then the FCC may appropriately require the payment of reciprocal compensation set by a state for ISP-bound traffic, even if some or most of this traffic may be interstate. Southwestern Bell, 153 F.3d at 542. The FCC no more exceeds its authority to permit the application of state-approved rates in tariffs for services offered to ISPs than it does here by permitting the

³ By these comments, California does not concede that ISP-bound traffic is “largely interstate.” The FCC has developed no record substantiating that conclusion. Indeed, the record in a related case indicates that most traffic to ISPs is intrastate or local. In the Matter of GTE Telephone Operating Companies, CC Docket No. 96-79, Reply Comments of Hyperion Telecommunications, Inc. on Petitions for Reconsideration.

application of state-approved rates in arbitration proceedings for traffic bound for ISPs.

However, even if the ILECs are correct (which they are not) that Section 251(b)(5) does not permit reciprocal compensation for ISP-bound traffic, nothing prevents the FCC from using its authority under Section 201 to adopt rules allowing states to determine reasonable compensation for the carriage of such traffic. See Section 251(i) (“Nothing in this section shall be construed to limit or otherwise affect the Commission’s authority under Section 201.”) SBC, for one, effectively concedes this fact, but urges the FCC not “to allow the Section 251/252 processes to trump the access structure put in place by the [FCC].…”⁴ Far from “trumping” the access structure, the FCC’s proposal to continue relying “on Section 251/252 processes” is fully consistent with that structure. Just as the access charge structure permits the states to approve the local business rates ISPs pay for transmission service provided by a LEC, so it may permit the states to approve rates for the recovery of costs that the LEC incurs in delivering such traffic to the ISP.⁵

In addition, continued reliance on commercial negotiations and, if necessary, state arbitrations, is consistent with the 1996 Act’s purpose to “open[]

⁴ SBC Comments at 6-7.

⁵ It would not be consistent with the access charge exemption for CLECs to charge the ISP for the CLEC’s costs in delivering traffic to the ISP.

all telecommunications markets to competition.” S. 652 Conference Report. Cf. Section 261 (state may establish regulations not inconsistent with requirements of this part [Part II of Title I of the 1996 Act]). Indeed, the FCC expressly construed Section 252 as extending state authority over both interstate and intrastate interconnection services, a construction that is belatedly challenged now.⁶ Accord: Conference Report (“new section 251(a) imposes a general duty to interconnect directly or indirectly between *all* telecommunications carriers”) (emphasis added). The FCC has also confirmed that states are free to adopt additional requirements in proceedings conducted under Sections 251 and 252.⁷

In sum, there is no legal barrier that precludes the FCC from adopting its tentative proposal to permit states to continue to arbitrate the rates for inter-carrier compensation for ISP-bound traffic. Not only is the FCC’s proposal lawful, but it makes sense as a matter of efficiency and administrative simplicity to place in one

⁶ In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers, CC Docket Nos. 96-98 and 95-185, First Report and Order (“Local Competition Order”), released August 8, 1996), ¶ 84 (the “states’ authority pursuant to section 252 also extends to both interstate and intrastate matters” and “it would make little sense in terms of economics or technology to distinguish between interstate and intrastate components for purposes of sections 251 and 252.”) See also ¶ 86 (“we conclude that sections 251 and 252 address both interstate and intrastate aspects of interconnection services...”). And contrary to GTE’s argument that Section 252 precludes a state from rejecting an agreement only if it fails to meet the requirements of Section 251, Section 252(e)(2)(A)(ii) expressly provides that states may also reject an agreement if it finds “the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.”

⁷ Local Competition Order, ¶ 66

forum before one decisionmaker the arbitration of *all* interconnection rate issues. Other than their unhappiness with the particular outcomes of individual arbitrations, opponents of the FCC's proposal point to nothing that demonstrates the unlawfulness of these proceedings or the inability of states to conduct them fairly and reasonably.⁸ The proposal should be adopted.⁹

II. Jurisdictional Cost Separations Procedures Require That The Interstate Costs Of Interstate Services Be Assigned To The Interstate Jurisdiction

Several commenters urge the FCC not to adopt rules that would require incumbent LECs or CLECs to segregate traffic based on whether it is bound for Internet service providers on the one hand, or bound to another carrier or an information service provider, on the other. As pointed out by commenters, carriers do not routinely segregate traffic either by type (i.e., voice, data) or by provider (i.e., carrier, ISP). California agrees that such segregation is neither warranted nor practical as a technical or economic matter.¹⁰

⁸ Parties, of course, can seek review of state arbitration orders in federal district court.

⁹ In addition, the FCC should reject any suggestions to revisit its conclusion that states may interpret existing interconnection agreements to require the payment of reciprocal compensation, based in part on the factors set forth in the FCC's Declaratory Ruling and NPRM, ¶ 24. Indeed, a petition for reconsideration, and not comments herein, is the proper procedural vehicle for questioning the FCC's conclusion regarding state authority with respect to existing interconnection agreements, or agreements negotiated prior to the adoption of any federal rules.

¹⁰ Only SBC claims, without discussing technical and economic issues, that it segregates Internet-bound traffic to avoid paying reciprocal compensation, based on its belief that such traffic is interstate. SBC Comments at 12.

A number of commenters also question the FCC's intent to directly assign all of the costs of ISP-bound traffic to the intrastate jurisdiction when the FCC has classified such traffic as interstate. Such assignment made sense prior to the issuance of the FCC's Declaratory Ruling when "the [FCC] ... treated ISP-bound traffic as though it were local." Declaratory Ruling, ¶ 23. See also id. at ¶ 9 ("the [FCC] has directed states to treat ISP traffic as if it were local."). Because of such treatment, incumbent LECS assigned the costs and revenues associated with ISP-bound traffic to the intrastate jurisdiction for separations purposes. Id.

Upon the issuance of its Declaratory Ruling, the FCC now classifies ISP-bound traffic as largely interstate. With this change, existing separation rules require that incumbent LECs either apportion the costs associated with ISP-bound traffic between state and federal jurisdictions, or, if the traffic is deemed jurisdictionally inseverable, allocate all of the costs associated with such traffic to the interstate jurisdiction. What is not proper is to assign all ISP-bound traffic costs, now deemed largely interstate, to the intrastate jurisdiction for recovery in intrastate rates. Smith v. Illinois Bell Tel Co., 282 U.S. 133 (1930); Section 254(k) (joint and common facilities costs must be reasonably allocated between the state and federal jurisdictions). California agrees with the state members of the Federal-State Joint Board on Separations and others that the investment and expenses associated with interstate services must be allocated to the interstate jurisdiction.

Alternatively, if the FCC determines that it is not possible to distinguish ISP-bound traffic from other types of voice and data traffic, then the allocation of costs for ISP-bound traffic should be no different than the allocation of such costs for other types of traffic. This approach is consistent with the position of many commenters who argue against attempting to treat ISP-bound traffic differently from voice and data traffic for inter-carrier compensation purposes. The same should hold true for jurisdictional cost allocation purposes. Under current allocation procedures, the costs of non-traffic sensitive facilities used to provide voice and other types of data traffic are allocated 75 percent to the state jurisdiction and 25 percent to the federal jurisdiction.¹¹ Traffic-sensitive costs of services that are largely interstate and not jurisdictionally severable are assigned in full to the interstate jurisdiction. The FCC may not lawfully determine unilaterally that the costs of a particular interstate service – i.e., dial-up access to the Internet – may be assigned differently than the costs of all other interstate services. Such

¹¹ Whether this allocation continues to be appropriate is being examined in the Federal-State Joint Board Cost Separations docket. See Comments of Indiana Utility Regulatory Commission at 6; Comments of Vermont Public Service Board at 13.

determination must be made by the Federal-State Joint Board on Separations after considerations of law and policy.¹²

III. CLECs Are Entitled To Compensation For Delivering Traffic To ISPs

The FCC has unequivocally stated that LECs “incur a cost when delivering traffic to an ISP that originates on another LEC’s network.” NPRM, ¶ 29.

California will defer to the CLECs to rebut the “public policy arguments” mustered by some incumbent LECs in an attempt to defeat the payment of any compensation to CLECs serving ISPs. California, however, observes that these incumbent LECs do not challenge the FCC’s finding that CLECs incur costs for delivering traffic to ISPs, or that such costs are compensable.¹³ Rather, the incumbent LECs are challenging the reasonableness of compensation rates paid to CLECs.¹⁴ Such challenge, like any other interconnection rate challenge, is properly made to the state commission, with review by a federal district court.

The same holds true for incumbent LEC complaints that they do not recoup their full costs in originating ISP-bound traffic. Once again, these complaints

¹² AT&T’s resistance to an interstate assignment of interstate costs of interstate ISP-bound traffic is based on its complaint that such an assignment will unduly increase interstate access charges. That complaint, however, should be addressed to the FCC in its access charge proceeding, just as (as AT&T points out) incumbent LEC complaints about the allegedly inadequate compensation levels of intrastate charges should be directed to other proceedings. AT&T Comments at 21 quoting FCC: (“[t]o the extent that some 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.”)

¹³ See, e.g., Comments of SBC at 19-21.

¹⁴ See, e.g., Comments of GTE at 7-8.

challenge the adequacy of the rate paid by the end user seeking to access the ISP. If the incumbent LECs believe that existing rates are inadequate, they can raise this issue in state arbitrations, subject to federal district court review.¹⁵ Such complaints are not a basis to reduce the rate paid to the CLEC for the costs it incurs in delivering traffic to the ISP. In any event, as AT&T correctly points out, the incumbent LECs fail to cite the dramatic growth in Internet traffic that has spurred the demand for more lines from end users, and hence, produced more revenues for the incumbent LEC.¹⁶

Should the FCC decide to apply federal rules to inter-carrier compensation, California agrees with those commenters who advocate that the FCC apply the same forward-looking compensation methodology to ISP-bound traffic as that applied to other traffic exchanged between LECs. California also agrees that the cost of delivering traffic to an ISP will be the same whether the traffic ultimately is interstate or intrastate. Consistent with the FCC's interpretation of Sections 251 and 252 permitting states to arbitrate both interstate and intrastate interconnection issues, states should continue to arbitrate inter-carrier compensation rates for all ISP-bound traffic.

¹⁵ Similarly, as the FCC stated, complaints by incumbent LECs that certain CLECs allegedly are realizing undue windfalls from serving ISPs exclusively are matters for the states to assess, and are outside the scope of this proceeding. Declaratory Ruling, ¶ 24 n.78.

¹⁶ AT&T Comments at 13.

IV. CONCLUSION

Based on our opening comments and these reply comments, California respectfully urges the FCC (1) to adopt its tentative conclusion to continue to rely on commercial negotiations, subject to state arbitration, to resolve all interconnection issues, including inter-carrier compensation for ISP-bound traffic; and (2) to assign the interstate costs of "largely interstate" ISP-bound services to the interstate jurisdiction for cost separations purposes.

Respectfully submitted,

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April 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon parties on the attached list by mailing by first-class a copy properly addressed to each party.

Dated at San Francisco, California this 27th day of April, 1999.

A handwritten signature in cursive script, reading "Ellen S. Levine", written in black ink. The signature is positioned above a horizontal line.

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