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Public Utility Commission of Texas

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Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: CC Docket No. 96-98, ~~99-68~~ (FCC 00-227)
Inter-Carrier Compensation for ISP-Bound Traffic

To the Secretary:

Enclosed herewith for filing with the Commission are an original plus four copies of the Comments of the Public Utility Commission of Texas in the above captioned matter. We are providing copies to ITS and the Competitive Pricing Division. We are also providing an electronic copy of these comments via your ECFS interface.

Sincerely,

A handwritten signature in cursive script that reads "Stephen J. Davis".

Stephen J. Davis
Director, Office of Policy Development

cc: ITS, Inc.
Chief, Competitive Pricing Division

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List A B C D E

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

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In the Matter of)	
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
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)	
Inter-Carrier Compensation for ISP-Bound Traffic)	CC Docket No. 99-68 (FCC 00-227)

COMMENTS OF THE
PUBLIC UTILITY COMMISSION OF TEXAS

In a Public Notice released June 23, 2000,¹ the Federal Communications Commission (“FCC” or “Commission”) seeks comment on a number of issues related to the remand of its *Reciprocal Compensation Ruling*² by the United States Court of Appeals for the D.C. Circuit.³ The Public Utility Commission of Texas (PUCT), having jurisdiction over telecommunications services in Texas, herein provides its comments in response to the Public Notice. The PUCT provided Comments in April 1999 on the FCC’s initial NPRM in this proceeding.⁴

The Court of Appeals vacated the FCC’s *Reciprocal Compensation Ruling* and remanded the proceeding for want of reasoned decision-making. The appellate court concluded that the FCC did not justify its end-to-end analysis in terms of the statute or the FCC’s own regulations in determining whether a call to an ISP is subject to the reciprocal compensation

¹ *Public Notice: Comment Sought on Remand of the Commission’s Reciprocal Compensation Declaratory Ruling* by the U.S. Court of Appeals for the D.C. Circuit, CC Docket Nos. 96-98, 99-68, FCC 00-227 (June 23, 1999).

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, FCC 99-38, 14 FCC Rcd 3689 (1999) (*Reciprocal Compensation Ruling*).

³ *Bell Atl. Tel. Companies v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000).

⁴ *Comments of the Public Utility Commission of Texas*, CC Docket Nos. 96-98 and 99-68 (Apr 8, 1999).

requirement of section 251(b)(5). The FCC now seeks further comment on the issues identified by the court in its decision: the jurisdictional nature of ISP-bound traffic, the scope of the reciprocal compensation requirement of section 251(b)(5), and the relevance of the concepts of “termination,” “telephone exchange service,” “exchange access service,” and “information access.” The Commission also seeks comment regarding any new or innovative inter-carrier compensation arrangements for ISP-bound traffic that parties may be considering or may have entered into, either voluntarily or at the direction of a state commission.

In these Comments, the PUCT will support its position that ISP-bound traffic should be considered local for the purpose of applying reciprocal compensation rates, and we will argue that section 251(b)(5) does not preempt state authority. We are providing a copy of a new decision by the PUCT in a proceeding involving reciprocal compensation, and we offer one recommendation for a reexamination of FCC rules.

The Jurisdictional Nature of ISP-Bound Traffic

The PUCT considers ISP-bound traffic to be local for the purpose of applying reciprocal compensation rates. We disagree with the Commission’s conclusion in the *Reciprocal Compensation Ruling*, based an end-to-end analysis, that ISP-bound calls are not local calls. The history of our evidentiary proceedings, and the appeals of those rulings, supports our view.

The PUCT initially addressed the issue of reciprocal compensation in late 1996 in the First Mega-Arbitration Award,⁵ establishing a “bill and keep” mechanism for such

⁵ *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops*

compensation. In 1997, the PUCT issued the Second Mega-Arbitration Award⁶ in which permanent inter-carrier compensation rates were established. The scope of the reciprocal compensation provisions approved in the Mega-Arbitration proceedings was disputed in a subsequent proceeding⁷ that specifically involved ISP-bound traffic. Despite Southwestern Bell Telephone Company (“SWBT”) arguments that ISP-bound traffic should be considered jurisdictionally interstate, the PUCT determined that such traffic is local, and should be subject to reciprocal compensation for the transport and termination of local traffic. The PUCT concluded that calls over the Internet consist of two components: the information component, which is the content of the call, and the network component, which is the carrier-to-carrier and carrier-to-end-user telecommunications transmission of the call. SWBT appealed the PUCT decision to federal district court, where the court upheld the PUCT decision,⁸ agreeing that, under the interconnection agreements, “local traffic” includes calls to ISPs. Specifically, the district court agreed with the notion that a “call” from a SWBT customer to a Time Warner ISP customer terminates locally at the ISP’s facility. SWBT then appealed the PUCT and district court decisions to the U.S. Court of Appeals for the Fifth Circuit.⁹ The Court of Appeals held that the PUC and the district court had jurisdiction to adjudicate the merits of this case and

Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company, Docket No. 16189, *et al*, Award (Nov. 8, 1996) (First Mega-Arbitration Award).

⁶ *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al*, Award (Dec. 19, 1997) (Second Mega-Arbitration Award).

⁷ *Complaint and Request for Expedited Ruling of Time Warner Communications*, Docket No. 18082, (Mar. 2, 1998).

⁸ *Southwestern Bell Telephone Company v. Public Utility Commission of Texas*, No. MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938 (W.D. Tex, Jun. 16, 1998).

⁹ *SWBT v. Public Utility Commission, et. al.*, No. 98-50787, 208 F.3d 475; 2000 U.S. App. LEXIS 5642 (5th Cir., 2000).

agreed with their dispositions of it, stating that “[t]he conclusion that modem calls terminate locally for purposes of compensation is both well-reasoned and supported by substantial evidence.”¹⁰

The Reciprocal Compensation Requirement Of Section 251(b)(5)

Under section 251(b)(5), each local exchange carrier has the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. The FCC has construed this provision to apply only to the provision of “local telecommunications traffic”. Before the Court of Appeals, incumbent LECs argued that section 251(b)(5) preempts state commission authority to compel payments to CLECs; however, the Court of Appeals did not rule on that portion of the case.

We do not agree that section 251(b)(5) preempts state authority in establishing reciprocal compensation policy and rates. While section 251(d) gives the Commission authority to establish regulations to implement the requirements of section 251, it also states that the Commission shall not preclude any regulation, order, or policy of a State commission that: establishes access and interconnection obligations of local exchange carriers; is consistent with the requirements of the section; and does not substantially prevent implementation of the requirements of the section. There is no need for preemption of the state regulatory role in this regard. Many state regulatory agencies, including the PUCT, have expended thousands of hours

¹⁰ *Id.*, Section II.

of scarce staff resources in order to pursue the implementation of the competitive provisions of the Telecommunications Act.

Even in the event that the Commission affirms its earlier determination that ISP-bound traffic is not jurisdictionally local, then the PUCT urges the Commission to continue allowing state regulators to oversee the successful process of negotiation and arbitration under sections 251 and 252 of the Act.

In order to provide a more consistent framework for the application of reciprocal compensation for ISP-bound traffic, the PUCT welcomes the opportunity to provide added input into the development of additional FCC rules that would establish nationwide guidelines for this interconnection issue.

New Inter-Carrier Compensation Arrangements For ISP-Bound Traffic

The PUCT has just completed an evidentiary proceeding to re-examine and establish rates and conditions for ISP-bound traffic.¹¹ This proceeding consolidated the issue of reciprocal compensation from several pending arbitration cases. After extensive hearings and conferences, with participation by many industry parties,¹² the PUCT determined that symmetric rates, based on SWBT's costs, should apply. The PUCT adopted a bifurcated rate structure (consisting of a

¹¹ *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Docket No. 21982.

¹² Parties in this proceeding include: Adelphia Business Solutions of Texas, LLP, Allegiance Telecom of Texas, Inc., AT&T Communications of the Southwest, Inc., CCTX, Inc. D/B/A Connect!, e.spire Communications, Inc., Focal Communications Corp., Level 3 Communications, MCI Worldcom Communications, Inc., Southwestern Bell Telephone Company, Taylor Communications Group, Inc., and a coalition of CLECs that include Time Warner Telecom, L.P., KMC Telecom, Inc., GST Telecom, Inc., NEXTLINK Texas, Inc., Intermedia Communications, Inc.,

per call and per minute element) for end-office switching. The PUCT determined that two rate formulas for tandem switching and end-office transport may be applied, depending on the CLEC's tandem functionality. The PUCT's Order in this proceeding is attached.

Even though the PUCT has been called upon to arbitrate numerous inter-carrier interconnection disputes, including the issues related to reciprocal compensation, we support the FCC's position that commercial negotiations, driven by market forces, are the optimal means for establishing interconnection agreements.

The Transport Rule

The PUCT raises one additional issue that was discussed in our recent proceeding, regarding the application of symmetrical tandem rates. The Commission's discussion in the First Report and Order¹³ includes the possibility that "additional costs" incurred when transporting and terminating a call from another LEC may vary depending on whether tandem switching is involved. The Order anticipates that states may establish rates based on a number of factors, including the application of new technologies that may perform functions similar to that of a tandem switch in the provision of service. However, the FCC's rule 47 CFR 51.711 is not clear that states may consider new technologies in the establishment of relevant rates, and under one reading, compels a state commission to include the tandem rate once a showing of geographic coverage has been made. This lack of clarity resulted in a great deal of debate during the hearing

IGC Choicecom, L.P., Telegent, Inc., Winstar Wireless of Texas, Inc., and Reliant Energy.

¹³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, First Report and Order, FCC 96-235, ¶ 1090 (Aug. 8, 1996).

on the merits in our recent proceeding, and we respectfully request that the Commission reconsider and possibly repeal this rule in the near future.

Conclusion

The reciprocal compensation issue is one of many devilish details that has been identified and successfully addressed by state regulators. We encourage the Commission to continue its reliance upon and cooperation with state regulators in the implementation of the competitive aspects of the Telecommunications Act.

Respectfully submitted,

Public Utility Commission of Texas
1701 N. Congress Ave.
P.O. Box 13326
Austin, Texas 78711-3326

July 12, 2000



Pat Wood, III
Chairman



Judy Walsh
Commissioner



Brett A. Perlman
Commissioner

DR

DOCKET NO. 21982

PROCEEDING TO EXAMINE § PUBLIC UTILITY COMMISSION
RECIPROCAL COMPENSATION §
PURSUANT TO SECTION 252 OF THE § OF TEXAS
FEDERAL TELECOMMUNICATIONS §
ACT OF 1996 §

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ARBITRATION AWARD
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DOCKET NO. 21982

PROCEEDING TO EXAMINE § PUBLIC UTILITY COMMISSION
RECIPROCAL COMPENSATION §
PURSUANT TO SECTION 252 OF THE § OF TEXAS
FEDERAL TELECOMMUNICATIONS §
ACT OF 1996 §

ARBITRATION AWARD

This Arbitration Award (Award) approves permanent rates for inter-carrier compensation relating to the transport and termination of local traffic between Southwestern Bell Telephone Company (SWBT) and certain competitive local exchange carriers (CLECs). Specifically, these rates provide reciprocal compensation for the inter-office transport, end-office switching, and tandem switching of local traffic. For purposes of this Award, a call to an Internet service provider (ISP) is subject to these reciprocal compensation rates to the extent that such a call originates and terminates within the same local calling area.

SWBT and any CLEC that has requested arbitration of the issue of inter-carrier compensation in this proceeding¹ pursuant to § 252 of the federal Telecommunications Act of 1996² shall incorporate the rates approved in this Award in any interconnection agreement which is subject to the outcome of this proceeding. If the CLEC has formally notified the Commission of its election of either the first or third option regarding reciprocal compensation for local traffic in Attachment 12 of the Texas 271 Agreement (T2A)³, then a true-up of the applicable bill-and-keep period shall be performed using the inter-carrier rates approved in this Award.⁴

¹ Order No. 3 required CLECs to file petitions seeking arbitration of the issue of inter-carrier compensation in this proceeding by February 3, 2000. Order No. 3 at 1 (Jan. 25, 2000).

² Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (FTA).

³ *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Project No. 16251, Order No. 55 (Oct. 13, 1999). The T2A is a standardized interconnection agreement available from SWBT through October 13, 2003. See Project No. 16251, Order No. 55, Attachment 12 at ¶ 4.1; Docket No. 16251, SWBT Letter Agreeing to Extend T2A (July 7, 2000). Attachment 12 to the T2A addresses the issue of reciprocal compensation, providing an electing CLEC with three options from which to choose. Under the first option, after January 22, 2000, SWBT and the electing CLEC shall operate under a bill-and-keep arrangement for all wireline traffic, including ISP-bound traffic, during periods of negotiation and/or

I. JURISDICTION

If an incumbent local exchange carrier (ILEC) and CLEC cannot successfully negotiate rates, terms and conditions in an interconnection agreement, FTA § 252(b)(1) provides that either of the negotiating parties "may petition a State commission to arbitrate any open issues." The Commission is a state regulatory body responsible for arbitrating interconnection agreements approved pursuant to the FTA.

II. PROCEDURAL HISTORY

On January 13, 2000, the Commission initiated this proceeding for the purpose of consolidating requests to arbitrate the issue of reciprocal compensation for the transport and termination of local traffic. This proceeding addresses only this single issue; other issues for which arbitration is requested by the carriers participating in this docket are addressed in separate arbitration proceedings relating to specific interconnection agreements. The Commission limited participation in this docket to only those parties arbitrating the issue of reciprocal compensation in this proceeding, *i.e.*, SWBT and interconnecting CLECs,⁵ consistent with P.U.C. SUBST. R. 22.305(e).⁶

arbitration. The second option permits the parties to operate under a bill-and-keep arrangement for the duration of their agreement. Under the third option, commencing on the date that the CLEC opts into the T2A, SWBT and the electing CLEC seeking to negotiate and/or arbitrate the issue of compensation shall operate under a bill-and-keep arrangement for all wireline traffic, including ISP-bound traffic, during periods of negotiation and/or arbitration. The bill-and-keep arrangements under both the first and third options are subject to true-up. The Commission concludes that the true-up period under the first and third options ends upon the Commission's approval of an interconnection agreement incorporating the inter-carrier compensation rates approved in this Award.

⁴ After a CLEC files notification of its intent to opt into the T2A, in whole or in part, the Commission issues a letter of acknowledgement.

⁵ See generally Order No. 3 (Jan. 25, 2000). GTE Southwest, Inc. and other ILECs did not seek to expand the scope of this proceeding to arbitrate reciprocal compensation issues for purposes of their interconnection agreements.

⁶ This rule allows only the parties to the interconnection agreement to participate as parties in the arbitration proceeding.

The parties in this proceeding are: Adelpia Business Solutions of Texas, LLP (Adelpia), Allegiance Telecom of Texas, Inc. (Allegiance), AT&T Communications of the Southwest, Inc. (AT&T), CCTX, Inc. D/B/A Connect! (Connect), the CLEC Coalition⁷ (the Coalition), e.spire Communications, Inc. (e.spire), Focal Communications Corp. (Focal), Level 3 Communications (Level 3), MCI Worldcom Communications, Inc. (WCOM), Southwestern Bell Telephone Company (SWBT), and Taylor Communications Group, Inc. (Taylor Comm.).⁸

The parties engaged in discovery through April 4, 2000. Direct testimony was filed on March 15, 17, and 20, 2000; rebuttal testimony was filed on March 31, 2000. The hearing on the merits was held on April 4 and 5, and May 18, 2000.

III. RELEVANT STATE AND FEDERAL PROCEEDINGS

A. RELEVANT COMMISSION DECISIONS

Mega-Arbitrations

The FTA became effective in February 1996. Soon thereafter, several proceedings—collectively referred to as the Mega-Arbitrations—were initiated and consolidated for the purpose of arbitrating the first interconnection agreements in Texas under the new federal statute. A focal issue in these proceedings revolved around establishing “reciprocal compensation” rates. “Reciprocal compensation” refers to the statutorily mandated arrangement between two carriers

⁷ The CLEC Coalition includes: Time Warner Telecom, L.P. (TW), KMC Telecom, Inc. (KMC), GST Telecom, Inc. (GST), NEXTLINK Texas, Inc. (NEXTLINK), Intermedia Communications, Inc. (Intermedia), ICG Choicecom, L.P. (ICG), Teligent, Inc. (Teligent), Winstar Wireless of Texas, Inc. (Winstar), and Reliant Energy (Reliant).

⁸ With the exception of WCOM and Taylor Comm., the CLECs participating in this docket filed requests to arbitrate the reciprocal compensation issue in this proceeding. WCOM and Taylor became parties to this proceeding by virtue of the severance of the issue of reciprocal compensation from other arbitration proceedings and the consolidation of such severed issue into this proceeding. *Petition of Southwestern Bell Telephone Company for Arbitration with MCI Worldcom Communications, Inc., Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, Docket No. 21791, Order No. 6 (Jan. 26, 2000); *Petition of Taylor Communications Group, Inc. for Arbitration with Southwestern Bell Telephone Company Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, Docket No. 21754, Order No. 7 (Jan. 24, 2000).

by which each carrier receives compensation for the transport and termination on its network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.⁹

In November 1996, the Commission issued the First Mega-Arbitration Award in Docket No. 16189,¹⁰ which established inter-carrier compensation rates, on an interim basis, for end-office switching, tandem switching, and inter-office transport. The reciprocal compensation rates adopted in the First Mega-Arbitration Award applied to calls that originated and terminated within SWBT's mandatory single- or multi-exchange local calling areas, including areas encompassed by mandatory Extended Area Service (EAS) arrangements. During the first nine months after the date upon which the first commercial call terminated between SWBT and a CLEC, however, the Commission designated "bill-and-keep"¹¹ as the arrangement by which reciprocal compensation would be accomplished.

The Second Mega-Arbitration Award in Docket No. 16189,¹² issued December 1997, approved cost studies for SWBT and established permanent inter-carrier compensation rates. These permanent rates appear in Attachment A to this Award.

Pursuant to FTA § 252(i), many CLECs subsequently opted into the reciprocal compensation provisions in the interconnection agreements approved in the Mega-Arbitration proceedings. Neither the First nor Second Mega-Arbitration Award, or the interconnection

⁹ See FTA §§ 251(b)(5), 252(d)(2). The FCC has construed the reciprocal compensation requirement in the FTA to apply to *local* telecommunications traffic only. 47 C.F.R. § 51.701(e) (1998).

¹⁰ *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al*, Award (Nov. 8, 1996) (First Mega-Arbitration Award).

¹¹ FTA §252(d)(2)(B)(i) permits "arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)."

¹² *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al*, Award (Dec. 19, 1997) (Second Mega-Arbitration Award).

agreements resulting from those proceedings, specifically addressed the issue of whether an ISP-bound call is subject to reciprocal compensation.

Docket No. 18082

The reciprocal compensation provisions in the interconnection agreements approved in the Mega-Arbitration proceedings were initially disputed in Docket No. 18082.¹³ In October 1997, Time Warner Communications of Austin L.P., Time Warner Communications of Houston, L.P., and FIBRcom (collectively, TW Comm) filed a complaint pursuant to Subchapter Q of the Commission's procedural rules, alleging that SWBT had breached its interconnection agreement with TW Comm. Specifically, the controversy centered on compensation for calls connecting SWBT customers to TW Comm customers that are ISPs. SWBT had refused to compensate TW Comm for such calls according to the reciprocal compensation rates in the interconnection agreement, based on its contention that those calls were not "local" in nature.

The Commission rejected SWBT's position and concluded that the calls in controversy were subject to the interconnection agreement's provisions relating to reciprocal compensation for the transport and termination of local traffic. In reaching this conclusion, the Commission first examined the nature of an ISP-bound call. It found that a call over the Internet consists of two components: (1) the information service component, which is the content of the call, and (2) the telecommunications service component, which is the carrier-to-carrier and carrier-to-end-user transmission of the call. With respect to the latter, the Commission concluded that when a person calls an ISP within a local calling area, the traffic carried on the call's transmission path is local in nature, with the telecommunications service component of the call terminating at the ISP.¹⁴

¹³ *Complaint and Request for Expedited Ruling of Time Warner Communications*, Docket No. 18082, Order (Feb. 27, 1998).

¹⁴ In finding that such traffic is local in nature, the Commission rejected SWBT's end-to-end analysis of an ISP-bound call, which viewed the call as terminating at the website or websites ultimately accessed by the calling party, rather than at the ISP.

Having reached this conclusion, the Commission then found that the scope of the definition of "local traffic" in the interconnection agreement included ISP traffic. The interconnection agreement's definition stated that, for reciprocal compensation purposes, "local traffic" includes (1) a call that originates and terminates in the same SWBT exchange area, or (2) originates and terminates within different SWBT exchanges that share a common mandatory calling area, *e.g.*, mandatory EAS, mandatory extended local calling service (ELCS), or any other service with a mandatory expanded local calling scope. The definition did not distinguish types of calls (*i.e.*, Internet versus voice), but rather focused upon the area in which the call originated and terminated. Therefore, if a call to an ISP originated and terminated within the same exchange or mandatory calling area, the traffic terminating at the ISP constituted "local traffic" and, consequently, was subject to the reciprocal compensation rates for such traffic, as specified in the interconnection agreement.

Other Post-Interconnection Agreement Disputes—Other post-interconnection agreement disputes between ILECs, including SWBT, and CLECs involving the same issue arose after the Commission's ruling in Docket No. 18082. In those subsequent proceedings interpreting specific interconnection agreements, the Commission applied the precedent established in Docket No. 18082 in finding that the transport and termination of calls to ISPs is subject to reciprocal compensation.¹⁵

¹⁵ See *Petition of Waller Creek Communications, Inc. for Arbitration with Southwestern Bell Telephone Company*, Docket No. 17922, Order Approving Interconnection Agreement (April 28, 1998); *Complaint of Taylor Communications Group, Inc. Against Southwestern Bell Telephone Company*, Docket No. 18975, Order No. 3 (May 4, 1998); *Complaint and Request for Expedited Ruling of Golden Harbor of Texas, Inc.*, Docket No. 19160, Arbitrator's Decision (June 30, 1998); *Petition for Arbitration Pursuant to FTA § 252(b) to Establish Interconnection Agreement with GTE Southwest Incorporated*, Docket No. 20028, Arbitration Award (Feb. 22, 1999); *Complaint of MFS Against GTE Southwest, Inc. Regarding GTE's Nonpayment of Reciprocal Compensation*, Docket No. 21706, Preliminary Order (April 13, 2000).

B. RELEVANT FEDERAL COMMUNICATIONS COMMISSION DECISIONS*Declaratory Order and Notice of Proposed Rulemaking*

The issue of whether ISP traffic is subject to reciprocal compensation also arose in other states. In response to formal and informal requests to clarify whether a carrier is entitled to receive reciprocal compensation for traffic delivered to an ISP, the Federal Communications Commission (FCC) issued a declaratory ruling and notice of proposed rulemaking in early 1999.¹⁶

The FCC's declaratory ruling concluded that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate in nature. In reaching this conclusion, the FCC rejected the notion that a call to an ISP is divisible into two separate parts, the information service component and the telecommunications service component. Rather, it focused upon the end-to-end nature of the communication, the approach traditionally used by the agency in determining whether a communication is intra- or interstate in nature. Finding that "[a]n Internet connection does not have a point of 'termination' in the traditional sense," the FCC found that a call to an ISP does not terminate at the ISP, but instead continues to its ultimate destination of an Internet website that is often located in another state or country. As a result of these conclusions, the FCC determined that FTA § 251(b)(5) does not *impose* any reciprocal compensation requirement for ISP-bound traffic.

Despite this statutory interpretation, however, the FCC stated that its conclusion did not, in and of itself, preclude the application of reciprocal compensation to the transport and termination of ISP-bound traffic. The FCC observed that parties to interconnection agreements may have agreed to the payment of reciprocal compensation for ISP-bound traffic, or that state commissions may have concluded that such compensation is due for such traffic in arbitration

¹⁶ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Declaratory Ruling; *Inter-Carrier Compensation of ISP-Bound Traffic*, CC Docket No. 99-68, Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (Feb. 26, 1999).