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

COMMENTS OF TIME WARNER TELECOM

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Time Warner Telecom ("TWTC"), by its attorneys, hereby files these comments in response to the Public Notice released on June 23, 2000 by the Commission in the above-captioned proceedings. In the Public Notice, the Commission sought comments on whether, in light of the D.C. Court of Appeals decision in Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1 (D.C. Cir. 1999) ("Bell Atlantic v. FCC"), reciprocal compensation under Section 251(b)(5) of the Communications Act should apply to the exchange of Internet Service Provider or "ISP"-bound traffic.

I. INTRODUCTION AND SUMMARY

In this remand proceeding, the Commission should hold that the exchange of ISP-bound traffic is subject to reciprocal compensation under Section 251(b)(5) of the Communications Act. In so doing, the Commission can retain jurisdiction over the exchange of ISP-bound traffic and establish a regulatory scheme that encourages efficient outcomes.

Under Section 251(b)(5), reciprocal compensation applies to traffic that originates and terminates within the same local calling area. As the D.C. Circuit's decision in Bell Atlantic v. FCC makes clear, the "termination" point for reciprocal compensation purposes need not be the same as the end point of telecommunications for jurisdictional purposes. The Commission should hold in this proceeding that the term "termination" under Section 251(b)(5) is a term of art meaning the delivery of a call to any non-carrier called party. Thus, calls between ISP customers and ISPs within the same local calling area would be subject to reciprocal compensation. This is so *even though* the traffic is jurisdictionally interstate. Moreover, in applying reciprocal compensation to ISP-bound traffic, the Commission should require that the exchange of ISP-bound traffic be subject to the same rates and rate structure that apply to all other reciprocal compensation traffic.

This approach is good policy because carriers use precisely the same facilities and perform the same functionalities when transporting and terminating ISP-bound traffic as when they transport and terminate all other circuit-switched traffic subject to transport and termination. That ISPs receive more traffic than they originate is no more reason to prohibit the application of reciprocal compensation for ISP-bound calls than it would be to prohibit reciprocal compensation for calls to pizza companies, radio programs, crisis hotlines or any other end users that receive more traffic than they originate.

The ILECs will almost certainly argue strenuously in this proceeding that applying reciprocal compensation to the exchange of ISP-bound traffic results in ILECs funding CLEC entry and causes all kinds of regulatory gamesmanship on the part of CLECs. But these assertions are dead wrong. Regulatory distortions are not caused by the application of reciprocal compensation to the exchange of ISP-bound traffic. Rather, inefficient behavior is encouraged where the exchange rate is not based on an accurate estimation of forward-looking costs. Of course, the ILECs themselves urged the Commission and the states to set reciprocal compensation rates well above cost because they thought this would stunt CLEC entry. Thus, the ILECs have only themselves to blame for inefficient incentives created in the past. In any event, those incentives are quickly disappearing as states across the country lower reciprocal compensation rates to cost-based levels. The Commission must allow that process to proceed and mandate that those efficient rates apply to ISP-bound traffic.

The Commission's goal in this proceeding should be to establish a regulatory framework that allows CLECs to compete on cost and service quality to provide local service to ISPs. As the Commission has recognized, CLECs unquestionably incur costs when transporting and terminating traffic to ISPs.[1] To deny CLECs any compensation for performing these functions would make

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[1] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, ¶ 29 (1999) ("Declaratory Ruling").

it impossible for CLECs to serve ISPs, leaving ISPs without competitive alternatives. The Commission must recognize that ISPs buy local service from carriers such as TWTC not because TWTC uses reciprocal compensation to subsidize ISDN PRI line prices for ISPs (in fact, TWTC's prices in this regard are not much below the ILEC prices), but because ISPs can obtain superior service from TWTC. It is becoming increasingly clear (especially as incentives for inefficient behavior diminish with the reduction in reciprocal compensation rates) that CLECs currently terminate large amounts of ISP traffic primarily because ISPs choose to purchase CLEC service based on the superior quality of that service. The Commission must recognize that the ILECs are fully capable of adjusting that imbalance by improving the quality of service they provide to ISPs and by competing to win more ISP customers. It is this kind of competition that the continued application of efficient reciprocal compensation rates to the exchange of ISP-bound traffic will permit to flourish.

II. THE FCC SHOULD RULE THAT SECTION 251(b)(5) APPLIES TO THE EXCHANGE OF ISP-BOUND TRAFFIC.

In the Declaratory Ruling that was the subject of the Bell Atlantic v. FCC decision, the Commission for the first time addressed the question of whether reciprocal compensation under Section 251(b)(5) applies to the exchange of ISP-bound traffic. As the Commission recognized, the answer to that question turns on whether the ISP-bound traffic is "local telecommunications traffic" under 47 C.F.R. § 51.70. Whether traffic fits within this category depends in turn on whether its point of

"termination" is within the same local calling area as the point of origination. There was no dispute that ISP subscribers and ISPs are both generally located within the same local calling area. Rather, the question was whether the "termination" point of ISP-bound dial-up traffic was the ISP or the traffic's ultimate destination on the Internet.

In its analysis, the Commission assumed that the question of whether a call from an ISP subscriber to an ISP "terminates" for purposes of reciprocal compensation is the same as whether the ISP is the end point of the underlying communication for purposes of the jurisdictional analysis. The Commission apparently felt constrained to conclude that ISP-bound traffic did not terminate at the called ISP because otherwise it would run afoul of years of precedent in which it had applied the "end-to-end" analysis for determining the jurisdictional nature of a communication.

It is now clear that the Commission's assumption that the same methodology must apply for determining the Section 251(b)(5) "termination" point and the jurisdictional end point was incorrect. In Bell Atlantic v. FCC, The D.C. Circuit held that "arguments supporting use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to [the reciprocal compensation] context." Bell Atlantic v. FCC, 206 F.3d at 6. The D.C. Circuit identified the following basic problems with the application of the end-to-end analysis: (1) the function performed by CLECs in delivering ISP-bound calls seems to fit the definition of reciprocal compensation "termination" in Section 51.701(d) of the Commission's rules;

id.; (2) the FCC's reliance on cases concerning the handing off of traffic to long distance carriers did not account for the differences between long distance carriers and ISPs; id. at 6-7; and (3) the FCC's decision seemed at odds with its long-standing treatment of ISPs as end users, id. at 7-8. Furthermore, the Court found the Commission's failure to explain how ISP-bound traffic can be understood as "exchange access" rather than "telephone exchange service" to be an independent basis for remand. Id. at 8-9. Because the FCC had not provided a "satisfactory explanation" as to why it was reasonable, in light of these inconsistencies, to treat the end-to-end analysis as controlling, the D.C. Circuit remanded the matter to the FCC. Id. at 9.

In this proceeding, the Commission can now finally settle this contentious issue in a manner that will remain faithful to the end-to-end method of determining jurisdiction but that also fully addresses the inconsistencies that arise when this method is applied for determining the point of "termination" under Section 251(b)(5). Specifically, the Commission should hold that, as used in the context of Section 251(b)(5) and as defined in the Commission's own rules, "termination" is a term of art which means the switching and delivery of a call to a non-carrier called party. The point of termination is "local" under the Commission's rules where the call originates and terminates within the same local calling area (or extended calling area).[2]

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[2] As the Commission has held, the states have the authority to determine "what geographic areas should be considered 'local

Under this approach, the end point for jurisdictional purposes is not necessarily the same as the point of "termination" for purposes of reciprocal compensation. While it may be that the underlying telecommunications for an Internet-bound call begins at the ISP subscriber and continues through to the ISP and onto the Internet, making the end point for the jurisdictional analysis the Internet server(s), the point of "termination" for reciprocal compensation purposes is simply the point at which the call is switched and delivered to the non-carrier called party (e.g., the ISP). As a result, the call could be local for Section 251(b)(5) purposes but interstate for jurisdictional purposes.

This approach fully addresses the concerns raised by the D.C. Circuit. First, construing ISP-bound traffic as terminating at the ISP for purposes of Section 251(b)(5) is consistent with the Commission's definition of "termination" in the reciprocal compensation context. Section 51.701(d) of the Commission's rules defines "termination" as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." 47 C.F.R. § 51.701(d).

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areas' for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs." See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 15499, ¶ 1035 (1996).

As the D.C. Circuit recognized, calls to ISPs "appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" Bell Atlantic v. FCC, 206 F.3d at 6. The approach recommended by TWTC here reflects this fact. It also results in a construction of the term "termination" that comports with the industry's usage of the term.[3]

Second, the Commission's decisions applying the end-to-end jurisdictional analysis do not undermine the approach recommended here. Commission precedent, cited in the Declaratory Ruling, establishes that calls that are handed from one carrier to another for switching and delivery to end users are interstate if any part of the communication crosses a state boundary. See Declaratory Ruling, ¶¶ 10-11 (discussing Teleconnect Co. v. Bell Telephone Co. of Penn., 10 FCC Rcd 1626 (1995) and Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp.,

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[3] See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 372 (1986) ("technical terms of art should be interpreted by reference to the trade or industry to which they apply"). Several courts have found that the definition of "termination" supported by TWTC is consistent with industry usage. See Illinois Bell Tel. Co. v. WorldCom Technologies, Inc., 1998 U.S. Dist. LEXIS 11344, *46 (N. Dist. Ill. 1998) (accepting as reasonable the ICC's conclusion, based on expert testimony, that the term "termination" means the point at which "'a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned'"); BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., 2000 U.S. Dist LEXIS 6743 (N. Dist. Ga. 2000) (recognizing the "'peculiar meaning' given to the term 'terminate' in the telecommunications industry" as a reasonable basis for construing Section 251(b)(5) to apply to the exchange of ISP-bound traffic).

7 FCC Rcd 1619 (1992)). But as the D.C. Circuit pointed out, ISPs are not carriers, and that difference (while perhaps irrelevant of purposes of the jurisdictional analysis) "appears relevant for purposes of reciprocal compensation." Bell Atlantic v. FCC, 206 F.3d at 7-8. TWTC's proposed approach, one which TWTC has supported throughout the Commission's review of the ISP-reciprocal compensation issue,[4] is consistent with this view because it treats calls from end users to ISPs within the same local calling area just like all other calls between non-carriers within the same local calling area and not like situations where the telecommunications traffic is bound for a carrier. The latter traffic would be classified as "exchange access" traffic.

Third, it follows that treating "termination" as a term of art meaning delivery of a call to a non-carrier customer is fully consistent with the end user status of ISPs. The fact that the Commission has stated in previous orders that "it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs" and referred to calls to information service providers as "local" obviously contradicts the approach adopted in the Declaratory Ruling.[5] But these statements are fully consistent with the approach proposed here by TWTC.

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[4] See TWTC Reply Comments in CCB/CPD 97-30 (July 31, 1997).

[5] See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, 12 FCC Rcd 15982, ¶¶ 345, 342 n.502 (1997).

Fourth, the Commission has conceded that the only two possible types of traffic relevant here are "telephone exchange service" and "exchange access." See Bell Atlantic v. FCC, 206 F.3d at 23. While it is easy to square ISP-bound traffic with the statutory definition of "telephone exchange service," it is very difficult to fit this traffic within the statutory definition of "exchange access." The definition of "telephone exchange service" is as follows:

> (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). The telephone service provided to ISP customers and covered by "the exchange service charge" includes the ability to reach other end users within the same exchange area, such as ISPs, by dialing local numbers. The telephone service provided to ISPs under state tariff includes the ability to receive calls from other end users within the same exchange area. ISP-bound traffic therefore appears to fit easily within the statutory definition of telephone exchange service.

In contrast, "exchange access" is defined in the statute 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 service, in turn, 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) (emphasis added). While the term "telephone service" is not defined, the conventional industry usage of the term is that it is a voice service. ISPs provide data service. It is therefore extremely difficult to see how ISP-bound traffic could reasonably fit within the statutory definition of exchange access.

It is also important to point out that there is clear precedent for the fact that local service can in some circumstances be interstate in nature. As an initial matter, in the Local Competition Order, the Commission explicitly recognized that there would be "cases in which territory in multiple states is included in a single local service area, and a local call from one carrier to another crosses state lines." See Local Competition Order, ¶ 1038. In such cases, the Commission held that "the applicable rate for any particular call should be that established by the state in which the call terminates." Id. Furthermore, the Commission has permitted carriers to provide local service (in expanded local calling service or "ELCS" areas) that is jurisdictionally interstate.[6] Indeed, in a recent case,

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[6] See Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, CC Docket No. 96-159, File Nos. NSD-LM-97-2 through NSD-LM-97-25, Memorandum Opinion and Order, ¶¶ 18-19, Appendix A (rel. July 15, 1997) (granting LATA modifications to allow BOCs to provide "traditional local service" in the form of ELCS between exchanges, some of which are located in adjacent states, such as Ohio-West Virginia and West-Virginia-Virginia).

the Commission recognized that reciprocal compensation applies where competing carriers exchange local traffic in ELCS areas that cross state lines.[7]

III. THE COMMISSION SHOULD REQUIRE THAT THE SAME RATE LEVELS AND RATE STRUCTURES APPLY TO THE EXCHANGE OF ISP-BOUND TRAFFIC AS APPLY TO THE EXCHANGE OF OTHER LOCAL TRAFFIC.

In addition to finding that the exchange of ISP-bound traffic is local for purposes of Section 251(b)(5), the Commission should require that states apply the same rate and rate structure to the exchange of ISP-bound traffic that applies to the exchange of all other traffic subject to reciprocal compensation. A uniform approach for all traffic subject to reciprocal compensation is more likely to result in efficient outcomes than one in which different rates and rate structures are set for ISP-bound traffic on the one hand and all other reciprocal compensation traffic on the other.

To begin with, it is appropriate from an engineering and cost perspective to apply the same prices to all dial-up, circuit switched local traffic. Carriers perform exactly the same technical functions when transporting and terminating dial-up ISP-bound traffic that they perform when transporting and

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[7] See Request by RCN Telecom Services and Bell Atlantic for Clarification of Bell Atlantic's Authority to Carry Local Traffic between Exchanges on behalf of Competitive Local Exchange Carriers, File No. NSD-L-99-05, Memorandum Opinion and Order (rel. Aug. 31, 1999) (permitting Bell Atlantic and RCN to exchange, under reciprocal compensation arrangements, local traffic in an expanded local calling service area that crossed the Pennsylvania-New Jersey border as well as a LATA border).

terminating other dial-up traffic. It is therefore logical to conclude that carriers' costs would be the same in all cases.

The Commission has been justifiably concerned that applying reciprocal compensation rates and rate structures to ISP-bound traffic would create inefficient incentives and would allow firms to enter solely to "game" the reciprocal compensation system. But inefficient incentives are not created by the application of reciprocal compensation to the exchange of ISP-bound traffic. Rather, inefficient incentives are created only when the rates and rate structure for the exchange of dial-up traffic are set incorrectly (significantly above or below cost). It should be no surprise that inefficiently high reciprocal compensation prices (and possibly inefficient rate structures) have caused some fringe firms to enter solely to serve local customers that receive disproportionate amounts of local traffic. But one would expect that if the reciprocal compensation rate were set too low, carriers would be induced to serve only customers that originate large amounts of local dial-up traffic. Inefficient behavior will be eliminated only if regulators get the price right. It is this endeavor that should be the focus of regulators going-forward.

The ILECs will no doubt strenuously object that applying reciprocal compensation rates to ISP-bound traffic causes them serious financial harm. But this is highly misleading. If reciprocal compensation rates are set at levels that accurately reflect the incremental cost of terminating traffic, an ILEC will not lose money by paying another carrier to perform transport and

termination on its behalf. By not itself performing transport and termination, an ILEC will avoid the cost of these functions. If an ILEC pays a CLEC an amount up to the ILEC's avoided cost, the ILEC will be no worse off than if it had performed the transport and termination itself. Thus, ILEC arguments that applying reciprocal compensation to ISP-bound traffic causes them some sort of financial harm simply do not hold up, so long as the reciprocal compensation rate has been accurately set.

Nor is there reason for regulators to be concerned that some CLECs have deployed network architecture that allows them to transport and terminate traffic to ISPs at a cost below the forward-looking reciprocal compensation rate. CLECs in such cases are simply responding to the wholesome incentive created by a fixed, forward-looking rate for the exchange of traffic by lowering their costs. In a competitive environment, those lowered costs will be ultimately passed on to end users.

Furthermore, a requirement that all dial-up traffic be priced at the same level will diminish carriers' incentive to urge states to adopt inefficient rates. For example, if ISP-bound traffic were removed from the calculation, the ILECs might have the incentive to try to set the price for all other reciprocal compensation high, on the theory that CLECs need to terminate traffic to ILEC customers more than ILECs need to terminate traffic to CLEC customers. This was precisely what caused ILECs to seek inefficiently high reciprocal compensation rates immediately following the passage of the 1996 Act (the ILECs of course failed to account fully for the effect of ISP-

bound traffic). Thus, if all local traffic is included in reciprocal compensation rate calculations, the chances are greater that the parties will seek efficient prices.[8]

There is every reason to believe that states are fully capable of adjusting the price to more efficient levels. A recent analyst report, for example, estimates that per minute reciprocal compensation rates set by the states declined from $0.008-$0.009 in 1999 to $0.002-$0.003 today.[9] Indeed, as one would expect, as these prices have gone down, reciprocal compensation has become a smaller and smaller percentage of CLEC revenues.[10]

Finally, to the extent that a state may be concerned that it still has not set the price at an accurate level, the Commission should explicitly allow a state to adopt a tiered system for reciprocal compensation that will diminish the inefficient

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8 This point is even more critical in light of the Eighth Circuit's recent decision overturning the FCC's TELRIC rules. See Iowa Utils. Bd. v. FCC, No. 96-3321, 6-8 (8th Cir. July 18, 2000). In the absence of TELRIC rules, ILECs will have the incentive to try to seek higher prices for unbundled elements. The Commission's rules tie reciprocal compensation rates UNE prices. See 47 C.F.R. § 51.705(a)(1). If reciprocal compensation rates apply to the exchange of ISP-bound traffic, the ILECs' incentive to increase both UNE prices and reciprocal compensation prices will be reduced.

9 See Credit Suisse First Boston, "Telecommunications Services: CLECs," June 14, 2000.

10 See id. (estimating that reciprocal compensation now comprises only about 6% of average CLEC revenue and predicting that this source of revenue will continue to shrink as a percentage of CLEC revenues as it is "increasingly displaced by new products and services and the organic growth of existing revenues streams").

incentives created by inaccuracies in the price levels. For example, states should be permitted to lower the reciprocal compensation price as imbalances in traffic exchange increase. Again, reciprocal compensation prices may be set both too high or too low, and inefficient incentives will be created by a mistake in either direction. Thus, any mechanism adopted to prevent gaming of the system should apply where either an ILEC or a CLEC originates or terminates disproportionate amounts of traffic.

IV. CONCLUSION

For the reasons described herein, the Commission should rule that Section 251(b)(5) applies to the exchange of ISP-bound traffic and that the same price level and price structure should be adopted by states for all traffic subject to Section 251(b)(5).

Respectfully submitted,

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