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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matters of	)	
	)	
Inter-Carrier Compensation	)	CC Docket No. 99-68
For ISP-Bound Traffic	)	
	)	
Implementation of the Local Competition Provisions	)	CC Docket No. 96-98
In the Telecommunications Act of 1996	)	

COMMENTS OF FOCAL COMMUNICATIONS CORPORATION, ALLEGIANCE TELECOM, INC., AND ADELPHIA BUSINESS SOLUTIONS, INC.

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SUMMARY

In its decision vacating the *Reciprocal Compensation Ruling,* the D.C. Circuit has provided this Commission with the opportunity to resolve the issue of intercarrier compensation for local telecommunications traffic bound for Internet service providers ("ISPs") while maintaining its traditional end-to-end jurisdictional analysis. The Court concluded that the analysis the Commission had undertaken to determine the jurisdictional nature of ISP-bound traffic did not dictate the regulatory treatment of that traffic. As a result, the Commission may continue to conduct its traditional "end-to-end" analysis of a communication to determine whether it is jurisdictionally interstate, while at the same time subjecting portions of that communication to varying types of regulation -- even to regulation by state commissions -- as may be necessary to implement national policy concerns.

These Comments explain how the Commission may find that communications that travel over the global network of computers known as the Internet may be jurisdictionally interstate, while the portion between an end user and an ISP is subject to regulation as local exchange telephone service. These Comments explain how this approach is the logical extension of, and entirely consistent with, Commission precedent dating back to the ESP Exemption cases beginning in 1983 and continuing through decisions implementing the Telecommunications Act of 1996. They also explain why local dial-up traffic to ISPs is subject to Section 251(b)(5) reciprocal compensation requirements. These Comments also explain how local dial-up calls to ISPs "terminate" at the ISP for purposes of determining the eligibility of ISP traffic to carriers' reciprocal compensation obligations. Finally, these Comments explain how local dial-up traffic to

ISPs can only be characterized as telephone exchange service under the Act. To the extent that the Commission wishes to retain a service category that it rarely, if ever, has used, these Comments explain how "information access" may be considered a subcategory of telephone exchange service.

The Commission should rule that, from a regulatory perspective, dial-up traffic to local telephone numbers used by ISPs is local traffic subject to all regulatory requirements that attach to local telecommunications, including the obligation to pay reciprocal compensation under Section 251(b)(5) of the Act .

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Focal Communications Corporation ("Focal"), Allegiance Telecom, Inc. ("Allegiance"), and Adelphia Business Solutions, Inc. ("Adelphia"), by undersigned counsel, hereby submit their comments in response to the Public Notice issued on June 23, 2000.[1] In the Public Notice, the Commission sought comment on the issues identified by the United States Court of Appeals for the District of Columbia Circuit in its decision vacating and remanding the Commission's *Reciprocal Compensation Ruling*.[2]

In its decision vacating the *Reciprocal Compensation Ruling,* the D.C. Circuit has provided this Commission with the opportunity to resolve the issue of intercarrier compensation for local telecommunications traffic bound for Internet service providers ("ISPs") while maintaining its traditional end-to-end jurisdictional analysis. The Court concluded that the analysis the Commission had undertaken to determine the

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1 *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, Public Notice (rel. Jun. 23, 2000).

2 *Bell Atlantic Telephone Companies v. FCC,* 206 F.3d 1 (D.C. Cir. 2000), *vacating* Declaratory Ruling, *Intercarrier Compensation for ISP-Bound Traffic,* 14 FCC Rcd 3689 (1999) ("*Reciprocal Compensation Ruling*").

jurisdictional nature of ISP-bound traffic did not dictate the regulatory treatment of that traffic. As a result, the Commission may continue to conduct its traditional "end-to-end" analysis of a communication to determine whether it is jurisdictionally interstate, while at the same time subjecting portions of that communication to varying types of regulation -- even to regulation by state commissions -- as may be necessary to implement national policy concerns.

Armed with this authority, the Commission should rule that communications over the Internet can be jurisdictionally interstate, and that it shares regulatory authority with the various state commissions over all dial-up telecommunications between end users and ISPs. The Commission also should rule that, from a regulatory perspective, dial-up traffic to local telephone numbers used by ISPs is local traffic subject to all regulatory requirements that attach to local telecommunications, including the obligation to pay reciprocal compensation under Section 251(b)(5) of the Telecommunications Act of 1996 ("the Act").

These Comments explain how the Commission may find that communications that travel over the global network of computers known as the Internet may be jurisdictionally interstate, while the portion between an end user and an ISP is subject to regulation as local exchange telephone service. These Comments explain how this approach is the logical extension of, and entirely consistent with, Commission precedent dating back to the ESP Exemption cases beginning in 1983 and continuing through decisions implementing the Act. They also explain why local dial-up traffic to ISPs is subject to Section 251(b)(5) reciprocal compensation requirements. These Comments also explain how local dial-up calls to ISPs "terminate" at the ISP for purposes of

determining the eligibility of ISP traffic to carriers' reciprocal compensation obligations. Finally, these Comments explain how local dial-up traffic to ISPs can only be characterized as telephone exchange service under the Act. To the extent that the Commission wishes to retain a service category that it rarely, if ever, has used, these Comments explain how "information access" may be considered a subcategory of telephone exchange service.

I. THE COURT DID NOT QUESTION THE COMMISSION'S END-TO-END JURISDICTIONAL ANALYSIS

The Commission's *Reciprocal Compensation Ruling* was remanded because the Court determined that the Commission had failed to explain why its end-to-end analysis traditionally used to determine jurisdiction was applicable to determine whether reciprocal compensation was owed for calls to ISPs. To the Court, "[t]he Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, 'simply a communications-intensive business end-user selling a product to other consumer and business end-users.'"[3]

To the Court, there is a clear difference between the Commission's jurisdictional analysis and the analysis the Commission conducts to determine regulatory treatment under the Act:

> The Commission's ruling rests solely on its decision to employ an end-to-end analysis for purposes of determining whether ISP-traffic is local. There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate. But it has yet to provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two

[3] *Bell Atlantic*, 206 F.3d at 7.

> collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.[4]

Thus, it is clear that the Court does not dispute the Commission's end-to-end jurisdictional analysis as applied to Internet services. On an end-to-end basis, it is understandable that many Internet communications would appear to be interstate under Section 151 of the Communications Act. The Court concluded, though, that this did not resolve the question of whether dial-up calls to ISPs are eligible for reciprocal compensation. Instead, the Court has demonstrated to the Commission that it has an opportunity to rule that dial-up traffic to ISPs is eligible for reciprocal compensation under Section 251(b)(5), while maintaining Commission jurisdiction over interstate Internet communications.

The key to such a ruling, of course, is that the local dial-up telecommunications of an Internet communication is severable -- from a regulatory perspective – from the information service provided by the ISP.[5] Indeed, from a regulatory perspective the severance point is the nexus of telecommunications and information services. The local telecommunications service provided by local exchange carriers establishes a circuit-switched connection between an ISP subscriber and an ISP. The information service provided by the ISP permits the ISP subscriber to obtain information from the global network of interconnected computers known as the Internet.

This approach is certainly not novel. In fact, it is firmly grounded in Commission precedent. For example, when the Commission was considering whether ISPs should be

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[4] *Id.* at 5.

[5] See also the discussion below regarding the fact that the term "termination" may have different meanings in different contexts.

required to contribute to Universal Service funding, the Commission agreed with the Federal-State Joint Board on Universal Service that Internet communications were comprised of separate components for regulatory purposes -- local telecommunications and information services:

> We agree with the Joint Board's determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network transmission component, which is the connection over a LEC network from a subscriber to an Internet service provider, in addition to the underlying information service.[6]

Furthermore, the Commission stated, "When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's service offering."[7] In the *Access Charge Reform Order* issued at about the same time, the Commission stated that ISP subscribers reach their ISPs "through a local call" "even for calls that appear to traverse state boundaries."[8] Indeed, according to the Commission, "it is not clear that ISPs use the public switched network in a manner analogous to IXCs. . . [M]any of the characteristics of ISP traffic . . . may be shared by other classes of business customers."[9]

In addition, the technology used in Internet communications provides further proof that the ISP is the appropriate place to separate the two services for regulatory

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6 *In re Federal-State Joint Board on Universal Service*, Report and Order, FCC 97-157, 12 FCC Rcd 8776 at ¶ 83.

7 *Id.* at ¶ 789.

8 *In re Access Charge Reform*, First Report & Order, 12 FCC Rcd 15982, ¶ 342 n.502, *aff'd, Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (*"Access Charge Reform Order"*).

9 *Id.* at ¶ 345.

purposes. Local exchange carriers use traditional circuit-switched telecommunications to connect the ISP subscriber to the ISP. A circuit between the ISP and its subscriber is established for the duration of the Internet communication. Beyond the ISP's modem pool, the ISP (or the ISP's underlying telecommunications provider) uses packet switching to send and receive information across the Internet. There is no open circuit established between the ISP and the location of the information requested. The information is sent in packets that may take many separate transmission paths before reaching the same destination at the ISP. Therefore, *as a technical as well as a regulatory matter,* the local telecommunications between a subscriber and an ISP are distinct from the service provided by the ISP.

This distinction between jurisdictional definition and regulatory treatment is not new either. The Court has only made clear what the Commission has been doing since 1983 when it established the so-called "ESP Exemption": the Commission has long recognized that it may assert jurisdiction over interstate information (or enhanced) services, while ordering local regulatory treatment of component parts. By directing LECs to make local exchange services available to ISPs in order for them to provide interstate information services, the Commission recognized the dichotomy between jurisdiction and regulation. It is for this reason that the Commission stated in the *Reciprocal Compensation Ruling* that "our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic."[10] The Commission should apply that policy in the context of reciprocal compensation and rule

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[10] *Reciprocal Compensation Ruling* at ¶ 25.

that local dial-up traffic to ISPs is eligible for reciprocal compensation under Section 251(b)(5). Such a ruling is consistent with and the logical consequence of designating ISPs as end users that purchase local exchange services from local exchange service tariffs.

II. FOR REGULATORY PURPOSES, LOCAL DIAL-UP TRAFFIC TO ISPS TERMINATES AT THE ISP

The Court did not challenge the Commission's application of its "end-to-end" analysis of dial-up traffic to ISPs for the purposes of determining jurisdiction. The Court, however, distinguished that jurisdictional analysis from a regulatory one, specifically for determining whether ISP-bound traffic terminates at the ISP and is eligible for reciprocal compensation. To the Court, application of the end-to-end analysis for this purpose "yields intuitively backward results."[11] Further, "arguments supporting use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this context."[12]

In fact, the term "termination" has different meanings depending on the context. "Termination" in the context of providing a telecommunications service under the Act has been defined by the Commission "for the purposes of this subpart," as "the act of 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."[13] The fact that the Commission limited "termination" to only "local" traffic clearly indicates that there are other meanings of the word depending upon the context.

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[11] *Bell Atlantic,* 206 F.3d at 6.

[12] *Id.*

[13] 47 C.F.R. § 51.701(d).

Otherwise, non-local long distance traffic could never "terminate." Further, the Commission took care to limit its definition of the statutory term "termination" to apply only to the statutory term and the Commission's rules interpreting that term. Termination in this context refers to a function provided by a local exchange carrier for which it is to be compensated.

In addition, traffic "terminates" at ISPs because they are end users of telecommunications services.[14] The Court agreed that the services provided by LECs when completing calls to ISPs constitute termination: "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.'"[15]

Further, at least one RBOC has used the word "termination" to describe the very act of delivering ISP-bound traffic to an ISP. In one of the earliest letters sent by BellSouth to CLECs serving ISPs regarding reciprocal compensation, BellSouth refused to pay reciprocal compensation for "traffic terminated to an ESP."[16] According to BellSouth, "Traffic originated by and terminated to information service providers and internet access providers enjoys a unique status, especially call termination." BellSouth's use of the word termination was entirely consistent with the Commission's definition of the word in the local competition regulations, notwithstanding its position elsewhere that

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[14] 47 C.F.R. § 64.702(a); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Docket No. 20828, Final Decision, 77 F.C.C.2d 384, 431-2 (1980).

[15] *Bell Atlantic,* 206 F.3d at 6.

[16] Letter dated August 12, 1997 from Ernest L. Bush, Assistant Vice President – Regulatory Policy & Planning, BellSouth Telecommunications, Inc., to All Competitive Local Exchange Carriers. The letter is attached as Exhibit A.

ISP-bound traffic only "terminates" at the server hosting the information sought by an ISP subscriber.[17]

As BellSouth recognized, in the context of delivery of traffic by a CLEC to ISPs, telecommunications terminate at the ISP. The CLEC provides the final switching and delivery to the called party, the ISP. The call to the ISP is answered by modems and answer supervision is returned. Answer supervision is "the term telephone companies use to describe the signal which the called station (or other customer premises equipment (CPE)) emits to tell telephone companies' billing equipment that a call has been answered and billing should commence."[18] It is provided by the local exchange carrier terminating a telephone call, whether the call is local or long distance. The term "answered" encompasses analog telephones, modems, facsimile devices and any other Part 68 registered terminal equipment.[19] Answer supervision is widely recognized as clear indicia that a call has been terminated. The Commission has stated in another proceeding that "Bell Atlantic contends that the most important quality characteristic for call termination is answer supervision[.]"[20] In fact, answer supervision is so essential in determining when a call is terminated for billing purposes that providing it was one of the requirements for "equal access" under the Modified Final Judgment in the AT&T

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17 *See* Reply Comments of BellSouth Corporation, *In re Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic,* File No. CCB/CPD 97-30 (July 31, 1997) at 2-3.

18 *Petition for Adoption of a New Section 68.314(h) of the Commission's Rules,* Report and Order, FCC 90-337, 5 FCC Rcd 6202 (Oct. 24, 1990) at n. 2.

19 *Id.* at ¶ 18.

20 *Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, to Conform it with Part 36, Jurisdictional Separations Procedures,* FCC 87-271, 2 FCC Rcd 6447 (Aug. 18, 1987) at ¶82.

breakup.[21] Prior to the MFJ, interexchange carriers were unable to bill accurately because they could not determine when a call was terminated. Thus, the local call to the ISP terminates for regulatory purposes of reciprocal compensation when the call is answered and answer supervision is returned.

III. SECTION 251(B)(5) IS NOT LIMITED TO LOCAL TRAFFIC

It is clear that the Court is troubled by the Commission's limitation of reciprocal compensation to local traffic. On a number of occasions, the Court states that this limitation has been imposed by the Commission, not by the statute. The Court said, "By regulation the Commission has limited the scope of the reciprocal compensation requirement to 'local telecommunications traffic.'"[22] "[The Commission has] taken the calls to ISPs out of §251(b)(5)'s provision for 'reciprocal compensation' (as it interpreted it)[.]"[23] "Although §251(b)(5) purports to extend reciprocal compensation to all 'telecommunications,' the Commission has construed the reciprocal compensation requirement as limited to local traffic."[24] "[The Commission was] [f]aced with the question whether such traffic is 'local,' for purposes of its regulation limiting §251(b)(5) reciprocal compensation to local traffic..."[25] In every case, the Court made clear that the limitation of Section 251(b)(5) was the Commission's own creation.

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21 *See United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131, 228 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

22 *Bell Atlantic*, 206 F.3d at 2.

23 *Id.*

24 *Id.* at 4.

25 *Id.*

In fact, § 251(b)(5) does not limit the payment of reciprocal compensation to "local" traffic. Section 251(b)(5) applies to all telecommunications. The Commission limited reciprocal compensation to local traffic because local exchange carriers were compensated for non-local traffic through access charges paid by interexchange carriers under a regime that was created prior to the Act.[26] One participant in the Commission's proceeding implementing the local competition provisions of the Act even proposed extending §251(b)(5) obligations to interexchange traffic.[27] The Commission rejected this proposal not because the statute limits reciprocal compensation to local traffic, but because of the existence of access charges to compensate carriers.[28] Thus, it was not the "local" nature of certain telecommunications that made them subject to Section 251(b)(5), it was the fact that long distance traffic was already subject to an access charge regime in which three carriers collaborated to complete a call, and the carrier in the middle compensated the carriers on the ends of the communication.

The Commission did not consider the implications of ISP-bound traffic when it issued its *Local Competition Order* that defined the boundaries for § 251(b)(5) reciprocal compensation obligations because it fit the model of two carriers collaborating to complete a local call. Had the Commission included a description of ISP-bound traffic in its discussion of reciprocal compensation obligations, it is likely that it would have been explained along the lines of the application of Section 251(b)(5) to traffic terminated by

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[26] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), *vacated in part, Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("*Local Competition Order*") at ¶¶ 1033-1035.

[27] *Id.* at ¶ 1032.

[28] *Id.* at ¶ 1034.

commercial mobile radio service ("CMRS") providers. That is, it is subject to reciprocal compensation based upon the initial set-up of the connection between end users.

In the *Local Competition Order*, the Commission characterized CMRS traffic by saying, "CMRS customers may travel from location to location during the course of a single call, which could it make it difficult to determine the applicable transport and termination rate or access charge. . . This could complicate the computation of traffic flows and the applicability of transport and termination rates, given that in certain cases, the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate and intrastate access charges."[29] Moreover, "a significant amount of LEC-CMRS traffic crosses state lines, because CMRS service areas often cross state lines and CMRS customers are mobile."[30] For this reason, in order to determine whether reciprocal compensation or access charges are owed for CMRS traffic, the cell site engaged by the mobile customer when the call was initially established would serve as the geographic location to determine the end points of the communication for compensation purposes. Thus, the Commission utilized Section 251(b)(5) for communications that may have mixed jurisdiction.

With respect to Internet communications, the Commission has described them this way:

> An Internet communication does not necessarily have a point of 'termination' in the traditional sense. An Internet user typically communicates with more than one destination point during a single Internet call, or 'session,' and may do so either sequentially or

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29 *Id.* at ¶ 1044.

30 *Id.* at n.2487 (citations omitted).

> simultaneously. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange area or in another country. Further complicating the matter of identifying the geographical destinations of Internet traffic is that the contents of popular websites increasingly are being stored in multiple servers throughout the Internet, based on 'caching' or website 'mirroring' techniques.[31]

This analysis is similar to the analysis used to describe CMRS traffic: the geographic end points of the communication are difficult to ascertain because they change constantly. Nevertheless, prior to any of this global Internet activity, "an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area."[32] Just as the Commission adopted an approach for CMRS providers that, for purposes of intercarrier compensation, took a snapshot of the communication at the moment that the call was set up and the two communicating end users established a connection, it is perfectly reasonable for the Commission to have done the same for ISP-bound communications.[33] Just as CMRS traffic may be eligible for reciprocal compensation even though the "termination" points of the call may vary throughout the communication, thereby removing its initial "local" character, so too should ISP-bound traffic qualify for reciprocal compensation as "local" traffic.

In addition, to the extent ISP-bound traffic is considered to have an interstate character, any interconnected LEC that serves a community that straddles a state line

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31 *Reciprocal Compensation Ruling* at ¶ 18.

32 *Id.* at ¶ 4.

33 Internet-based information services delivered directly to CMRS end users makes the comparison even more apt. In essence, CMRS providers are also acting as ISPs when they deliver Internet content to wireless handset users. Verizon Wireless touts this service as marking "a new era in the convergence of wireless and the Internet." "Wireless Internet Access Gets Personal," Jul 17, 2000, http://newscenter.verizon.com/proactive/newsroom/ release.vtml?id=40528.

already pays and receives reciprocal compensation for interstate traffic. For example, a telephone call from the Commission's headquarters in Washington, D.C. to Reagan National Airport in Virginia would be eligible for reciprocal compensation as a local call, yet the call is interstate. For this reason, the Commission already recognizes a category of "local interstate" traffic. For example, in Table 2.12 of the Commission's report "Preliminary Statistics of Communications Common Carriers," ILECs reported revenues in the category of Interstate Basic Local Service.[34] Thus, there is no doubt that traffic may be jurisdictionally interstate yet still qualify as local exchange service. The same is true of dial-up traffic to ISPs.

The Court has made clear that any limitation of Section 251(b)(5) to only local traffic is imposed by the Commission, not the statute. The Commission may address the Court's concerns by ruling that Section 251(b)(5) applies to local traffic, including traffic that has been treated as local traffic for regulatory purposes while being treated as interstate for jurisdictional purposes. Consistent with its ruling in the *Local Competition Order*, the Commission should make clear that reciprocal compensation applies to traffic carried by two carriers, as opposed to access charges that apply to traffic carried by three carriers.

IV. THE ACT DOES NOT RECOGNIZE A SEPARATE CATEGORY OF INFORMATION ACCESS SERVICES

The Court remanded the *Reciprocal Compensation Ruling* to the Commission because the Commission failed to explain why the end-to-end analysis used to address jurisdiction was applicable to determine whether ISP-bound traffic is eligible for

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[34] *Preliminary Statistics of Communications Common Carriers,* 1998 Edition, May 28, 1999, Table 2.12, page 154.

reciprocal compensation. The Court cited a second independent ground requiring remand: how the *Reciprocal Compensation Ruling* fit within the language of the Telecom Act.[35] Under this approach, the Commission did not adequately explain whether dial-up traffic to ISPs was either telephone exchange service under the Act, or exchange access. The Court found that the Commission's explanation that it "consistently has characterized ESPs as 'users of access service' but has treated them as end users for pricing purposes" "sheds no light."[36] Accordingly, the Commission asked for comment "on the relevance of the concepts of 'termination,' 'telephone exchange service,' 'exchange access service,' and 'information access.'"[37]

Focal, Allegiance, and Adelphia contend that the distinction between "telephone exchange service" and "exchange access" is not relevant to this matter. The Commission's limitation on Section 251(b)(5) applies where three carriers collaborate to complete a call and toll charges are imposed on end users, and does not incorporate or rely upon the statutory categories of telephone exchange service or exchange access. Thus, it is not necessary to decide whether ISP-bound traffic is telephone exchange service or exchange access in order to decide whether it is eligible for reciprocal compensation under Section 251(b)(5).

Nevertheless, if the Commission believes that it is necessary to classify ISP-bound traffic, it should be classified as telephone exchange service. ISP-bound traffic is telephone exchange service because it is not exchange access under the Act. ISP-bound

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35 *Bell Atlantic,* 206 F.3d at 8.

36 *Id.*

37 *Public Notice* at 2.

traffic is not "information access" because information access is not a separate category of traffic under the Act.

As Focal, Allegiance, and Adelphia have previously argued before the Court and before this Commission, ISP-bound traffic cannot be exchange access because ISPs do not obtain telecommunications "for the purposes of providing telephone toll services."[38] Telephone toll services are telecommunications, and ISPs do not provide telecommunications services. [39] Information services and telecommunications services are mutually exclusive.[40]

Similarly, the service provided to ISPs cannot be "information access." The Commission has already ruled "information access" is not a separate category apart from telephone exchange service or exchange access.[41] Indeed, the Commission has suggested that information access is only a subcategory of telephone exchange service or exchange access.[42] As discussed above, local telecommunications provided to ISPs cannot be exchange access under the Telecom Act. Thus, information access must be a subcategory of telephone exchange service.

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38 *See* Brief of Petitioner MCI WorldCom, Inc. and Supporting Intervenors, *Bell Atlantic Telephone Companies v. FCC*, Case No. 99-1094, D.C. Cir. (Jun. 7, 1999); Comments of Focal Communications Corporation, Hyperion Telecommunications, Inc., d/b/a Adelphia Business Solutions and KMC Telecom, Inc., *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147 (Sep. 24, 1999).

39 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) at ¶ 55.

40 *Id.* at ¶ 13.

41 *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, Order on Remand (re. Dec. 23, 1999) ("*Advanced Services Remand Order*") at ¶¶ 46-48.

42 *Id.* at n.99.

Given that local telecommunications to ISPs is neither exchange access nor information access, it must be telephone exchange service under the Act. As discussed above, for regulatory purposes, the local call to the ISP terminates at the called number of the ISP and answer supervision is returned. The local call to the ISP is billed to the end user as any other local call. Local service is purchased from LECs out of local exchange service tariffs. Expenses and revenues associated with service to ISPs are treated as intrastate for separations purposes.[43] In short, local traffic to ISPs is no different from any other local call to any other business end user. Thus, the local call to the ISP easily satisfies the definition of telephone exchange service.

V. THE COMMISSION SHOULD REJECT EFFORTS TO ELIMINATE RECIPROCAL COMPENSATION FOR ISP TRAFFIC ENTIRELY OR TO SHIFT THE BURDEN OF COMPENSATION TO THE ISP's THEMSELVES

Among the myriad of *ex parte* filings with the Commission submitted after the April 27, 1999, closing date for the submission of reply comments in the NPRM, several parties urged the Commission either to eliminate reciprocal compensation for ISP traffic entirely in favor of a "bill and keep" arrangement[44] or, alternatively suggested that the

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[43] *See Reciprocal Compensation Ruling* at ¶¶ 4-5.

[44] See, e.g., Ex Parte Statement dated January 3, 2000, from Mr. G. Phillips on behalf of SBC Communications, Inc. ("the Commission should adopt a 'bill and keep' methodology for Internet traffic"); Ex Parte filing dated November 23, 1999, from Mr. W.W. Jordan on behalf of BellSouth ("Each co-carrier funds its own Internet costs"); Summary of Ex Parte Presentation dated May 3, 2000 from L. E. Sarjeant on behalf of the United States Telecom Association ("[t]he FCC was also encouraged to adopt bill and keep as the appropriate compensation structure for one way, Internet bound traffic").

burden of compensation rested on the ISP, not the originating carrier.[45] The Commission should reject these arguments entirely.

First, those who now argue strenuously in favor of a bill and keep mechanism are some of the same commenters who first opposed (with equal vigor) that arrangement and demanded that they be compensated for the use of their networks. In comments filed with the Commission in connection with formulating the rules governing the development of local competition, BellSouth, for example, expressly stated that the use of *its* facilities by another LEC to deliver traffic, without any compensation at all, would be unconstitutional. That comment is reported as follows:

> Numerous incumbent LECs argue that mandating bill-and-keep arrangements requires a LEC to transport and terminate traffic of another LEC, constituting a physical intrusion into the LEC's property. *BellSouth further asserts that bill and keep would lead to no compensation for use of incumbent LEC property and will therefore constitute an uncompensated taking in violation of the Constitution.*[46]

What was true in 1996 is true with equal force today: a CLEC incurs costs when it transports and terminates traffic bound for ISPs and it is entitled to be compensated for the costs it incurs in providing a valuable service to the customer of the originating carrier. To be sure, if the traffic exchanged by ILECs and CLECs is in relative equipose, then no compensation need be exchanged because the amount each party owes to the other nets out to zero. Yet the ILECs anticipated traffic exchange imbalances when they

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[45] See, e.g., Ex Parte filed November 15, 1999 from M. Newman on behalf of US WEST, at p. 6 of the attachment ("under an economically efficient system of compensation . . . the ISP—as the agent of the cost-causer—would pay the ILEC (and the CLEC that also serves it) usage charges analogous to carrier access charges paid by IXCs, i.e., the ILEC-IXC interconnection regime would apply.")

[46] *Local Competition* Order at ¶ 1105.

opposed bill-and-keep before and sought usage-based compensation rates. The New York Public Service Commission has described the situation aptly:

> In assessing the significance of the traffic imbalances that are so much at issue here, one must begin with the very basic point that reciprocal compensation was chosen over bill-and-keep in part because some imbalances were seen as likely. The ILECs' earlier advocacy of reciprocal compensation over bill-and-keep does not legally estop them from now urging changes in reciprocal compensation, or even its total abandonment; but it does suggest at least that the existence of imbalances should not be seen by them as a complete surprise.[47]

Nor is it proper to shift the costs onto the ISP, whether as the cost-causer itself, or as the alleged "agent" for the cost-causer customer. Under that view, access-like charges are imposed upon the ISP by the ILEC and the CLEC, and the ISP, in turn, passes those charges along to its customers. This suggestion totally ignores the long-standing exemption from access charges that the Commission first imposed in the early 1980's. Regardless of the reason behind the exemption, the Commission has refused, on numerous occasions, to retreat from that policy. Yet, that is precisely the argument offered by US WEST without any real evidence to support its claim.

Further, reciprocal compensation represents the cost of transporting and terminating telecommunications. If an ILEC did not pay reciprocal compensation to another LEC that terminated the call to an ISP, it would incur those costs itself. Thus, reciprocal compensation represents costs otherwise avoided by the ILEC when a CLEC assumes the obligation of transporting and terminating traffic to an ISP.

Indeed, US WEST fails entirely to address the sound policy reasons for maintaining the access charge exemption awarded to ISPs and also fails to articulate a

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[47] *Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation,* Case 99-C-0529, Opinion and Order Concerning Reciprocal Compensation, (N.Y.P.S.C. Aug. 26, 1999) at 56 ("*NYPSC Decision*").

reasonable basis for deviating from the long held view that the calling party is responsible for compensating all carriers involved in handling the call that they originate. This has been true regardless of the reason why the caller initiates the communication. Adopting US WEST's argument starts the Commission down the slope of differentiating between callers, or classes of callers, based upon either the identity of the party they are calling or the reason for the call. Here, too, the Commission has rejected such a differentiation based on the type of call or the identity of the called party and it should resist any argument to impose such a dichotomy in this proceeding.

VI. NEW RECIPROCAL COMPENSATION ARRANGEMENTS

The Commission sought comments on new approaches taken to compensate carriers of calls to ISPs. Both the New York Public Service Commission ("NYPSC") and the Public Utility Commission of Texas ("Texas PUC"), recently issued rulings adopting new rate structures for reciprocal compensation. The NYPSC rejected the attempts of the ILECs to exclude ISP-bound traffic from reciprocal compensation stating that, "we see no sound reason to treat ISP traffic differently from other convergent traffic."[48] The NYPSC recognized that some compensation is due because CLECs incur costs in completing these calls.[49] Further, the NYPSC correctly noted that reciprocal compensation must be based on forward-looking economic costs.

Similarly, the Texas PUC, on July 13, 2000, released an Arbitration Award affecting multiple parties in which it concluded that ISP-bound traffic is subject to

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48 *NYPSC Decision* at 61.

49 *Id.*

reciprocal compensation.[50] The Texas PUC rejected Southwestern Bell Telephone Company's ("SWBT's) request that ISP-bound traffic be treated differently than other local traffic. The Texas PUC also correctly acknowledged that rates are to be based on forward looking economic costs and are required to be symmetrical.[51]

In its examination of the treatment of reciprocal compensation, the NYPSC sought to determine whether the existing reciprocal compensation rates were cost-based.[52] It concluded that the record before it suggested that the cost of serving a small number of large, convergent customers is lower than that of a mass market.[53] Although it acknowledged that every CLEC with a traffic imbalance does not necessarily have lower costs, it concluded that as a general rule "large convergent customers can be served via more efficient, higher capacity facilities, and those facilities will likely have less idle time."[54] The NYPSC noted, however, that for good reasons, it is the ILEC's costs that are relevant to determine rates, unless a CLEC attempts to prove its costs are higher than the ILEC.[55] In its attempt to correct the perceived rate inequity caused by convergent traffic, the NYPSC reduced the CLEC's opportunity to recover the tandem rate.[56]

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50 *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996,* Docket No. 21982, Arbitration Award (Tex. P.U.C. July 13, 2000).

51 *See Arbitration Award* at *19 and *38. Although the Eighth Circuit recently vacated certain aspects of the Commission's TELRIC rules, the Court did not disturb the requirement that reciprocal compensation rates be based on forward-looking economic costs of the ILEC. *See Iowa Utilities Bd., et al. v. FCC,* 2000 WL 979117 at *5 (8th Cir. Jul. 18, 2000).

52 *See NYPSC Decision* at 58.

53 Convergent traffic includes one-way, high volume calls to end users such as chatlines and ISPs. *NYPSC Decision* at 8.

54 *See id.*

55 *See id*

56 There was no evidence of a direct correlation between reduced cost associated with convergent traffic and the cost associated with tandem switching.

Specifically, the NYPSC decided that a LEC would be entitled to receive the tandem termination rate, except when the traffic imbalance reaches a 3:1 ratio (three time more inbound than outbound traffic). For traffic exchanged in excess of the 3:1 ratio, a LEC will not be entitled to receive the tandem rate unless it makes an additional showing. In order to receive the tandem rate for traffic above the 3:1 ratio, a LEC must demonstrate "tandem-like functionality." According to the NYPSC, if a CLEC meets all or some of the factors it outlined, it "would demonstrate that the carrier in question was investing in a network with tandem-like functionality, designed to both send and receive customer traffic." The NYPSC explained that:

> Multiple interconnection points, collocation cages, SONET rings and other types of transport facilities in various combinations are all evidence of a network being built out to reach a dispersed customer base. Collocation cages along with the use of unbundled loops are a clear indication the carrier intends to serve residential and small business customers. The presence of the network design features would be more important than actual numbers of residential and business customers served given the newness of the competitive local exchange market.[57]

Under the Texas PUC's rate structure, CLECs receive a blended end-office and tandem rate. The Texas PUC takes rates based on previously determined ILEC costs and establishes a call set up charge plus a minute of use charge. The blended minute of use charge represents a compromise between the tandem and end office rates and is based on an estimate from SWBT of the CLECs use of SWBT tandem switches.[58] The Texas PUC concluded that CLECs are only presumptively entitled to the blended rate until the traffic reaches a ratio of 3:1. After the traffic reaches the 3:1 ratio, the CLEC continues to

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[57] *NYPSC Decision* at 61.

recover the lower end-office rate, but no longer receives the blended rate unless the CLEC proves that it has "tandem functionality" or a network that looks like an ILEC's network.

While both the NYPSC and Texas PUC correctly determined that ISP bound traffic is entitled to reciprocal compensation treatment, each creates rate structures that have not been determined to be cost based. Before considering adoption of either approach, the Commission must determine whether the use of bifurcated rates, traffic ratios, and tandem functionality are consistent with the requirement for symmetrical cost based reciprocal compensation.

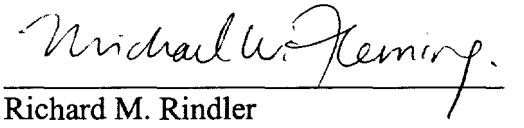
VII. CONCLUSION

For the foregoing reasons, the Commission should rule that the reciprocal compensation obligations of Section 251(b)(5) applies to local traffic and traffic treated as local traffic for regulatory purposes, including ISP-bound traffic. Further, local telecommunications to ISPs terminate at the ISP because LECs provide the final switching before delivery to the ISP, a business end user, and answer supervision is returned, the industry's accepted indicia of call termination. It is not necessary to decide whether ISP-bound traffic is either telephone exchange service or exchange access because Section 251(b)(5) is not limited to telephone exchange service. Even if it were necessary to classify dial-up traffic to ISPs as telephone exchange service or exchange access, the traffic would still be subject to reciprocal compensation requirements because

[58] There was no proof of a direct correlation between the percentage of trunks directed to an end office and how often a CLEC uses the tandem function.

it satisfies the definition of telephone exchange service and not the definition of exchange access.

Respectfully submitted,



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Dated: July 21, 2000

Counsel for Focal Communications Corporation, Allegiance Telecom, Inc., and Adelphia Business Solutions, Inc.

EXHIBIT A

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Ernest L. Bush
Assistant Vice President -
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SN91081223

August 12, 1997

To: All Competitive Local Exchange Carriers

Subject: Enhanced Service Providers (ESPs) Traffic

The purpose of this letter is to call to your attention that our interconnection agreement applies only to local traffic. Although enhanced service providers (ESPs) have been exempted from paying interstate access charges, the traffic to and from ESPs remains jurisdictionally interstate. As a result, BellSouth will neither pay, nor bill, local interconnection charges for traffic terminated to an ESP. Every reasonable effort will be made to insure that ESP traffic does not appear on our bills and such traffic should not appear on your bills to us. We will work with you on a going forward basis to improve the accuracy of our reciprocal billing processes. The ESP category includes a variety of service providers such as information service providers (ISPs) and internet service providers, among others.

On December 24, 1996, the Federal Communications Commission (FCC) released a Notice of Proposed Rule Making (NPRM) on interstate access charge reform and a Notice of Inquiry (NOI) on the treatment of interstate information service providers and the Internet, Docket Nos. 96-262 and 96-263. Among other matters, the NPRM and NOI addressed the information service provider's exemption from paying access charges and the usage of the public switched network by information service providers and internet access providers.

Traffic originated by and terminated to information service providers and internet access providers enjoys a unique status, especially call termination. Information service providers and internet access providers have historically been subject to an access charge exemption by the FCC which permits the use of basic local exchange telecommunications services as a substitute for switched access service. The FCC will address this exemption in the above-captioned proceedings. Until any such reform affecting information service providers and internet access providers is accomplished, traffic originated to and terminated by information service providers and internet access providers is exempt from access charges. This fact, however, does not make this interstate traffic "local", or subject it to reciprocal compensation agreements.

Please contact your Account Manager or Marc Cathey (205-977-3311) should you wish to discuss this issue further. For a name or address change to the distribution of this letter, contact Ethylyn Pugh at 205-977-1124.

Sincerely,

E. L. Bush

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July 2000, the foregoing Comments of Focal Communications Corporation, Allegiance Telecom, Inc., and Adelphia Business Solutions, Inc. was served by hand delivery to the following:

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Office of the Secretary
Federal Communications Commission
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TW - A325

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Washington, D.C. 20036

Jane Jackson, Chief
Competitive Pricing Division
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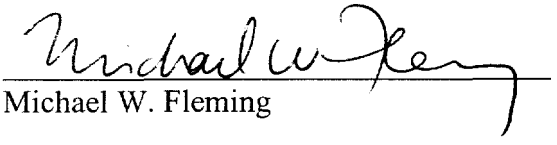

Michael W. Fleming