PRISM

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July 21, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
445 Twelfth Street, SW
TW-A325
Washington, DC 20554

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

Dear Ms. Salas:

Prism Communication Services, Inc. hereby submits an original and four (4) copies of its Comments in the above-referenced dockets.

Also enclosed is a Return Copy of this filing. Please date-stamp this copy and return it in the envelope included for that purpose.

Any questions regarding this filing should be directed to the undersigned counsel.

Very truly yours,

Renée R. Crittendon
Deputy Chief Counsel-Telecommunications

cc: Service List

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	

COMMENTS OF PRISM COMMUNICATION SERVICES, INC.

Prism Communication Services, Inc. ("Prism"), hereby submits its Comments in response to the Federal Communications Commission's ("FCC" or "Commission") June 23, 2000 Public Notice in the above-referenced proceeding concerning inter-carrier compensation for Internet Service Provider ("ISP") bound traffic.

INTRODUCTION

On February 26, 1999 the Commission issued a Declaratory Ruling and Notice of Proposed Rulemaking in which it determined that ISP-bound traffic was jurisdictionally mixed and not a local call subject to reciprocal compensation under Section 251(b)(5) of the Communications Act.[1] The Commission used an "end-to-end" analysis to conclude that ISP bound calls "do not terminate at the ISP's local server" but rather continue to their ultimate destinations, often at Internet websites located in other states.[2] Although it

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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 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*").

[2] *Id.* at 3697.

determined that the jurisdictional nature of such traffic is mixed and largely interstate, the Commission found no reason to interfere with any state commission findings as to the application of reciprocal compensation in interconnection agreements.[3] Rather, the FCC concluded that, in the absence of a federal rule governing inter-carrier compensation for ISP-bound calls, parties were bound by their interconnection agreements, as interpreted and enforced by state commissions.[4]

On March 24, 2000, the U.S. Court of Appeals for the D.C. Circuit vacated certain provisions of the FCC's *Reciprocal Compensation Ruling,* remanding the matter back to the Commission for reasoned decision-making.[5] The Court determined that the FCC had not adequately justified applying its end-to-end jurisdictional analysis to its determination of whether ISP-bound calls are subject to the reciprocal compensation requirements of Section 251(b)(5).[6] The Court found that the FCC (1) failed to apply its definition of "termination" to its analysis; and (2) relied upon cases in its end-to-end analysis which can be distinguished on the theory that they involve continuous communications switched by IXCs, as opposed to ISPs, which are not telecommunications providers.[7] The Court also determined that a remand was required because the Commission failed to provide a satisfactory explanation as to how its conclusions regarding ISP-bound calls accord with the statutory definitions of "telephone exchange service" and "exchange access service."[8]

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3 *Id.* at 3690, 3703.
4 *Id.* at 3703.
5 *See Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C.Cir. 2000).
6 *Id.* at 3-6.
7 *Id.* at 6-7.
8 *Id.* at 8-9.

In light of the Court's remand, the FCC issued its Public Notice seeking comments on the issues identified by the Court. In particular, the FCC asks parties to comment on the jurisdictional nature of ISP-bound traffic, the scope of Section 251(b)(5)'s reciprocal compensation requirement, and the relevance of the definitions of "termination," "telephone exchange service," "exchange access service," and information access." In these comments, Prism provides its insights into these issues and urges the Commission to provide carriers with a well-reasoned and clear decision on remand. A well-articulated ruling that leaves nothing open to interpretation will ensure that carriers with little or no leverage to negotiate such terms in their interconnection agreements with incumbents will not be further disrupted and delayed in their entry into local markets.

DISCUSSION

As noted above, the FCC now seeks comments regarding the issues outlined in the Court's ruling, including, as it states, comments "on the jurisdictional nature of ISP-bound traffic."[9] Prism submits that this is not an issue on remand for the FCC's review. In particular, the Court makes clear that "[t]here is no dispute that the Commission has historically been justified in relying on this method [the end-to-end analysis] when determining whether a particular communication is jurisdictionally interstate."[10] Although the one-call analysis was appropriately used to determine whether a call is within the FCC's interstate jurisdiction, it was the FCC's extension of this analysis to the characterization of ISP-bound calls as fitting the long distance call model that, according to the Court, lacked reasoned decision making.[11]

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9 June 23, 2000 *Public Notice* in CC Docket Nos. 96-98-99-68, FCC 00-227 at 2.

10 206 F.3d at 5.

11 *Id.* at 3.

Accordingly, Prism comments not on the jurisdictional nature of this traffic, but rather on the "heart of this case;" namely, "whether a call to an ISP is local or long distance."[12]

The Court's decision provides much guidance to the FCC in its evaluation of whether ISP-bound calls are long distance or local calls subject to reciprocal compensation. While noting that "neither category fits clearly," the Court stated that [c]alls to ISPs appear to fit the definition" of local telecommunications traffic.[13] The Court reached this determination by looking at the various relevant terms under the Commission's rules, Section 51.701 "Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic." 47 C.F.R. § 51.701.

Specifically, the Court noted that pursuant to Section 51.701(b)(1), telecommunications traffic is local if it "originates and terminates within a local service area."[14] According to the Commission's rules, 'termination' is "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of that traffic to the called party's premises." 47 C.F.R. § 51.701(d). The Court logically concluded that ISP-bound calls --that is, traffic that is switched by the ISP's local exchange carrier and then delivered to the ISP (the called party), would appear to meet the definition of local traffic.[15]

Moreover, the Court brings to the forefront a number of Commission rulings that bolster the concept that ISP-bound calls are local calls. In particular, the Court reviewed the FCC's classification of enhanced service providers of which ISPs are a subset. As the Court pointed out, the Commission has already acknowledged that ISPs do not

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12 *Id.* at 5.
13 *Id.* at 5-6.
14 *Id.* at 6.
15 *Id.*

necessarily use the public switched network in a manner similar to interexchange carriers (IXCs) and has referred to calls to ISPs as local.[16] The Court demonstrated that the FCC has even analogized that a call to an ISP is much like "a call to a local business that then uses the telephone to order wares to meet the need."[17] Notably, the Court remarked that such differences between ISPs (which use telecommunications to provide information services) and IXCs (which are themselves telecommunications providers) are relevant for purposes of reciprocal compensation.[18] In this regard, the Court again suggests that ISP-bound traffic fits within the local call model, noting: "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP."[19]

With regard to the use of "telephone exchange" and "exchange access" services in this context, terms which by the Commission's own admission on appeal constitute the only possibilities, the Court again looked to the Commission's own statements. Specifically, the Court found that "the Commission clearly stated that 'ISPs do not use exchange access.'"[20] While the Commission overruled this determination after oral argument in this case, the Court points out that the FCC did not make this argument in the instant case, and that, in any event, the statute appears ambiguous.[21] Nevertheless, the Court offers MCI WorldCom's argument that ISPs connect to the local network for the purpose of providing information services as opposed to originating and terminating

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16 *Id.* at 6,8 (citing *In the Matter of Access Charge Reform*, 12 FCC Rcd 15982, 16132-33 (1997)).

17 *Id.* at 8 (citing Brief of FCC at 76, *Southwester Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998)(No. 97-2618)).

18 *Id.* at 6-7.

19 *Id.* at 7.

20 *Id.* at 8 (citing *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 22023 (1996)).

21 *Id.* at 9.

telephone toll services (i.e., exchange access services).[22] The obvious and logical inference is that it is clearly within the FCC's purview to determine that the delivery of ISP traffic is telephone exchange service, a form of local telecommunications for which compensation is due.

It is clear from four years of experience that incumbents can and will exploit regulatory ambiguities to protect their local monopolies and to impede the development of local competition. Accordingly, it is critically important that the Commission rely on the Court's foregoing guidelines and act quickly to fill the existing federal standards vacuum in a manner that avoids further appeals. Prism strongly urges the Commission to do so by determining that dial-up ISP bound calls are local in nature and subject to compensation. This result is a natural one that flows not only from the Court's decision, but from the recognition that the Commission's classification of ISP-bound traffic as largely interstate, does not change the reality that companies that carry telecommunications traffic deserve to be compensated for the costs of carrying that traffic. In particular, the costs of terminating a dial-up ISP bound call include the traffic sensitive costs of local switching.

CONCLUSION

Any incentive an ILEC might otherwise have to negotiate reasonable compensation provisions for traffic delivered to ISPs are certainly outweighed by incumbents' powerful incentives to take whatever steps are necessary to deny potential competitors interconnection on commercially reasonable terms. In fact, recent history teaches us that compensation for ISP-bound traffic has been among the issues most

[22] *Id.* at 9 (citing Petitioner MCI WorldCom's Reply Br. at 6).

strenuously contested and least likely to be resolved via voluntary negotiation. Stability and clarity are vital to the deployment of local competitive services and the viability of new and emerging telecommunications companies. For this reason, Prism urges the Commission to heed the logical assessments and characterizations offered by the Court. In short, the FCC should conclude that, while ISP-bound calls may be jurisdictionally interstate, dial-up calls to ISPs fit more rationally into the local calling model and thus should be compensated. Such an approach is not only within the Commission's jurisdiction, but also advances the public interest.

Respectfully submitted,

PRISM COMMUNICATION SERVICES, INC.

By: Renée Roland Crittendon
Deputy Chief Counsel, Telecommunications

July 21, 2000

CERTIFICATE OF SERVICE LIST

I, Evelyn A. Opany, hereby certify that a correct copy of the Comments of Prism Communication Services, Inc. was served via Courier to the following individuals, this 21st day of July 2000.

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