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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 |
| | ) | |
| Inter-Carrier Compensation for ISP-Bound Traffic | ) | CC Docket No. 99-68 |

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# COMMENTS OF SBC COMMUNICATIONS INC.

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GARY L. PHILLIPS
ROGER K. TOPPINS
ALFRED G. RICHTER JR.

SBC COMMUNICATIONS, INC
1401 Eye Street, NW
Suite 1100
Washington, D.C. 20005
(202) 326-8910

Its Attorneys

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**COMMENTS OF SBC COMMUNICATIONS INC.**

## I. INTRODUCTION AND SUMMARY

This proceeding raises two critical issues: (i) whether a connection to the Internet is local traffic that terminates at the ISP server; and (ii) the extent, if any, to which Internet traffic should be the subject of inter-carrier compensation arrangements. As discussed below, the Commission should reaffirm that Internet connections are not local traffic, do not terminate at the ISP server, and, therefore, are not subject to the reciprocal compensation provisions of section 251(b)(5). In addition, the Commission should establish a bill and keep regulatory regime for such traffic. That is the only regime that is consistent with the law, sound economics, the purposes of the 1996 Act, and the positions of the United States Government in the international arena.

The Commission has already concluded in three separate orders that a connection to the Internet is access traffic, not local traffic. The D.C. Circuit, however, found that the *Reciprocal Compensation Order* did not adequately explain this conclusion.[1] On remand, the Commission should reaffirm its earlier decisions based on the following key points.

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[1] *Bell Atlantic Telephone Companies v. FCC,* 206 F.3d 1 (D.C. Cir. 2000) (*Remand Order).*

*First,* the traditional end-to-end analysis of a communication is not limited to jurisdictional determinations. Rather, this analysis also is used to determine the boundaries of a communication for *regulatory* purposes. Indeed, if the end-to-end analysis were limited to jurisdictional determinations – as CLECs argue – there would be a disconnect between the Commission's jurisdiction and its authority under section 201: the Commission would have jurisdiction over Internet communications but would be powerless to regulate that traffic under section 201. That result would be squarely at odds with section 251(i), which states: "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."

*Second,* the end-to-end construct applies to *any* type of communication, whether it is a circuit-switched wireline voice communication, a wireless communication, a cable television signal, or a dial-up connection to the Internet. To the extent that the court suggested that this analysis applies only to circuit-switched voice communications, it was wrong.

*Third,* the status of ISPs as information service providers has no bearing on whether telecommunications terminates at the ISP server. ISPs are not, for reciprocal compensation purposes, like "businesses, such as 'pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies,' which use a variety of communication services to provide their goods or services to their customers." The critical difference between ISPs and these other entities is that ISPs do not merely use communications to conduct their businesses; they switch communications sent to them by their subscribers to the addresses specified by their subscribers. To be sure, the ISP may or may not *itself* provide the telecommunications component of its information service, but that is of no import. What is dispositive is that the ISP

receives the Internet transmission sent by the end user and carries it or engages a telecommunications service provider to carry it to its intended destination.[2]

*Fourth,* section 51.701(d) of the Commission's rules does not address which calls are local and hence subject to reciprocal compensation; it merely describes what constitutes the "termination" of traffic that is local. That is clear both from the text of section 51.701(d) (which defines 'termination' as "the switching of *local* telecommunications traffic ..."), and from the order adopting that rule (which defines 'termination as "the switching of traffic *that is subject to section 251(b)(5)...*"). In any event, Internet traffic does not terminate at the ISP server under this definition because the ISP is not the "called party" when an end user sends and receives messages to and from distant points on the Internet.

*Fifth,* the status of an Internet connection as telephone exchange service, exchange access, or some other form of access is a red herring. Neither section 251(b)(5) nor the Commission's reciprocal compensation regulations apply, by their terms, to "telephone exchange service." Rather, they apply to "the transport and termination of local telecommunications traffic[,]"[3] which the Commission defines as "telecommunications traffic ... that originates and terminates within a local service area established by the state commission[.]"[4] Thus, the only issue is whether a CLEC that delivers Internet traffic to an ISP is "terminating" "local telecommunications traffic." If it is not, it is not eligible for reciprocal compensation,

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[2] SBC believes that a description of how an Internet transmission is routed would be particularly useful in demonstrating that ISPs do not originate new communications but, rather, forward the communications they receive from their subscribers. SBC attaches such a description as **Attachment A.**

[3] 47 CFR § 51.701(a).

[4] 47 CFR § 51.701(b)(1).

irrespective of whether the traffic is classified as exchange access, telephone exchange service, or otherwise.

*Sixth,* in exempting ISP traffic from certain interstate access charges, the Commission has *never* held that ISP traffic is not access traffic. While it did state in one sentence of its 1987 *Access Reform Order* that ISPs *may not* use the network in a way analogous to IXCs, that one, unadorned (and equivocal) sentence, hardly demonstrates the Commission's belief that ISP traffic is not access traffic at all. Rather, at most, it suggests the Commission's belief that it may be inappropriate to charge ISPs and IXCs the same access *rates* or to subject each to the same rate structure. Indeed, the extensive policy discussion in this and every other order in which the Commission addressed the access charge exemption belies any notion that the Commission viewed this traffic as something other than access traffic. That discussion would have been wholly superfluous if ISP traffic was not access traffic.

*Seventh,* notwithstanding that, for public policy reasons, the Commission has exempted ISPs from the access charge regime that applies to interexchange carriers, it would be bad public policy to treat this traffic like local traffic for reciprocal compensation purposes. Indeed, to do so would be fundamentally inconsistent with the access charge exemption and the purposes, not only of section 251(b)(5), but of the 1996 Act as a whole.

These seven points should put to rest any doubts that the court has about whether ISP traffic is subject to the reciprocal compensation provisions of the Act. Reaffirming its decision that section 251(b)(5) does not apply to ISP traffic, however, is only half the task. In addition to reasserting that an Internet connection is not a local call for reciprocal compensation purposes, the Commission should, at long last, establish a sensible policy with respect to Internet traffic.

It has now been three years since ALTS filed its petition with the FCC seeking clarification of the status of Internet traffic for reciprocal compensation purposes. Since that time, CLECs collectively have pocketed hundreds of millions, if not billions, of dollars in windfall profits. Many of these CLECs have devised business strategies based on the provision of dial-up access to ISPs, while scrupulously avoiding residential customers and shunning the advanced technology TA 96 was intended to promote. Some have even committed fraud to take maximum advantage of the enormous arbitrage opportunity that is available to them.

In the meantime, in the absence of clear guidance from the FCC, the states have issued a patchwork quilt of inconsistent regulatory decisions. Some have concluded that Internet traffic is interstate in nature; others maintain that it is local. Some require reciprocal compensation payments for ISP traffic; others have opted for bill and keep. One state found that it has no authority to address compensation issues for ISP traffic.

It is time – indeed, long past time - for the Commission to take decisive action in this area. Reciprocal compensation for ISP traffic is antithetical to the principal goals of the 1996 Act and every one of the public policies that the Commission articulated in its February 1999 NPRM:

- it discourages CLECs from competing in the residential market;
- it slows the deployment of advanced services;
- it skews investment decisions;
- it distorts pricing for telecommunications services and Internet services, thereby encouraging inefficient use of LEC networks – and hence inefficient and unnecessary investment in telecommunications infrastructure; and
- it co-opts competition in the market for ISP services.

In the words of the Massachusetts Commission:

> The unqualified payment of reciprocal compensation for ISP-bound traffic ... does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition.[5]

Moreover, the damaging effects of ISP reciprocal compensation may transcend the domestic telecommunications markets. In the international arena, the United States is fighting a proposal submitted to the International Telecommunications Union that would replace the current bill and keep arrangements for Internet backbone traffic with what is effectively an international reciprocal compensation arrangement among Internet backbone providers – a proposal that could cost American companies and consumers billions of dollars each year. The United States is correct to oppose this proposal, which represents an inappropriate and undesirable regulatory intrusion on the Internet that could have significant negative consequences. Its efforts, though, could well be undermined to the extent it pursues inconsistent Internet policies on the domestic front.

The Commission has worked hard to open markets to competition and its efforts are bringing tangible results, as is evidenced by the recent New York and Texas 271 orders. But consumers will not enjoy the full promise of the 1996 Act if, as is the case in Texas, 92% of the traffic that SBC sends to CLECs is Internet traffic. The only way for consumers to reap the full benefits of open markets is for the Commission to allow those markets to function properly, without regulatory distortions, such as reciprocal compensation for one-way Internet traffic. It

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[5] *Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996,* D.T.E. 97-116-C at 25-26.

should eliminate those distortions by asserting its jurisdiction over ISP traffic and establishing a "bill and keep" methodology for all Internet data traffic.

## II. THE RECIPROCAL COMPENSATION REQUIREMENTS OF THE 1996 ACT DO NOT APPLY TO ISP-BOUND TRAFFIC.

In the *Reciprocal Compensation Ruling*, the Commission held that ISP-bound calls do not terminate at the ISP server and hence are not local calls that are subject to the reciprocal compensation provisions of the Act. The Commission based its ruling on an end-to-end analysis of ISP-bound traffic, an analysis it claimed was traditionally used to determine the jurisdiction of a call.[6] In applying this analysis, it rejected arguments that "for jurisdictional purposes, ISP-bound traffic must be separated into two components: an intrastate telecommunications service, provided in this instance by one or more LECs, and an interstate information service, provided by the ISP."[7] It likewise rejected arguments that ISP-bound traffic is "local" traffic because of the ISP access charge exemption, or that it meets the statutory definition of telephone exchange service.[8]

On appeal, the D.C. Circuit found that the Commission had not adequately explained its conclusions. It found, in particular, that the Commission had not adequately explained why the end-to-end analysis was controlling, stating:

> The end-to-end analysis applied by the Commission here is one that it has traditionally used to determine whether a call is within its interstate jurisdiction. Here it used the analysis for quite a different purpose, without

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[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Declaratory Ruling, 14 FCC Rcd. 3689 (1999) (*Reciprocal Compensation Ruling*) at para. 10: "The Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." *See also id.* at paras. 11-15.

[7] *Id.* at para. 13.

[8] *Id.* at paras. 16-17.

> explaining why such an extension made sense in terms of the statute or the Commission's own regulations.[9]

In addition, the court found that the Commission had not adequately reconciled its ruling with the statutory definitions of "exchange access," and "telephone exchange service."[10]

On remand, the Commission should reiterate, but more fully explain, its conclusion in the *Reciprocal Compensation Ruling* that ISP-bound traffic is not subject to the reciprocal compensation provisions of the Act. It should affirm the application of an end-to-end analysis to ISP traffic, explaining that this analysis has been used for more than fifty years to determine the boundaries of all communications by wire or radio. It should explain, in particular, that: (1) the end-to-end analysis has been used both for jurisdictional *and regulatory* purposes and that the Commission's jurisdiction must, as a statutory matter, coincide with its authority under section 201; (2) the end-to-end analysis applies no less to ISP-bound traffic than to traditional circuit-switched voice traffic; (3) the status of ISPs as information service providers is irrelevant to whether telecommunications transmitted by an end user terminates at the ISP server; and (4) section 51.701(d) has no bearing on whether a particular call is "local telecommunications traffic" that is subject to reciprocal compensation, but Internet traffic does not terminate at the ISP server under this definition, in any event, because the ISP is not the "called party."

The Commission also should elaborate on its conclusion that ISP-bound traffic is not local traffic. Of course, by showing that ISP-bound traffic terminates on the Internet, not the ISP server, the Commission will necessarily demonstrate that such traffic is not local traffic. Nevertheless, to clear up any doubts the court may have, the Commission also should explain

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9 *Remand Order*, 206 F.2d at 3.

10 *Id.* at 8-9.

that: (1) the status of ISP-bound traffic as exchange access service, telephone exchange service, or otherwise has no bearing on whether that traffic is local terminating traffic that is subject to reciprocal compensation; and (2) it has never based the access charge exemption on a finding that ISP-bound traffic is not access traffic.

Finally, the Commission should rationalize its holding with its past decisions and the purposes of the Act. It should explain that, notwithstanding that ISPs are exempt from paying certain interstate access charges, it would be contrary to public policy, including the key goals of the 1996 Act, to treat ISP traffic as local traffic for reciprocal compensation purposes.

### A. The End-to-End Analysis is the Appropriate Construct for Determining Whether ISP-Bound Traffic Terminates at the ISP Server.

For over fifty years, the Commission and the courts have unfailingly adhered to the view that the boundaries of a communication are determined on an end-to-end basis, without regard to any intermediate switching.[11] In concluding that ISP-bound traffic does not terminate at the ISP server, the Commission relied on this principle. Although the Commission clearly was correct to do so, the D.C. Circuit held that the Commission did not adequately explain why this principle is relevant to whether ISP-bound traffic "terminates" at the ISP server for reciprocal compensation purposes. The court questioned the application of this principle on four grounds. These are addressed, in turn, below.

[11] *See Reciprocal Compensation Ruling* at paras. 10-17 and cases cited therein.

### 1. The End-to-End Analysis is Not Used Merely to Determine Jurisdiction

One of the principal bases for the court's skepticism was its apparent belief that the end-to-end analysis has been used only for jurisdictional purposes. Thus it repeatedly questioned "the extension of 'end-to-end' analysis from jurisdictional purposes to the present context[.]"[12]

The source of the court's confusion is easily understood. The *Reciprocal Compensation Ruling* itself repeatedly describes the end-to-end construct as a basis for determining *jurisdiction.*[13]

As the Commission is well aware, however, the end-to-end analysis traditionally has been used not only to address the jurisdictional status of a communication, but also its regulatory status, including its status for inter-carrier compensation purposes. In *Teleconnect v. Bell Telephone Company of Pa.*,[14] for example, the Commission applied this analysis to an access charge dispute involving Teleconnect's nationwide 800 travel service. Specifically, it rejected arguments that an 800 call used to connect to an interexchange carrier's switch was a separate and distinct communication for purposes of the access charge regime from the long-distance call placed from that switch.[15] Addressing the issue in the first instance, the Common Carrier Bureau

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[12] *Remand Order* at 6.

[13] *See Reciprocal Compensation Ruling* at para. 10 ("the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication ...). *See also id.* at para. 13 ("We disagree with those commenters that argue that, for jurisdictional purposes, ISP-bound traffic must be separated into two components ..."). *And id.* ("the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication.") The Commission also captioned the section of the *Reciprocal Compensation Ruling* which concluded that ISP traffic does not terminate at the ISP server in jurisdictional terms: "Jurisdictional Nature of Incumbent LEC and CLEC Delivery of ISP-Bound Traffic."

[14] *Teleconnect v. Bell Telephone Co. of Pa.,* 10 FCC Rcd 1626 (1995) at para. 12, *aff'd Southwestern Bell Telephone Co. v. FCC,* No. 95-1193 (D.C. Cir. June 27, 1997).

[15] Teleconnect's service worked as follows: an end user wishing to place an away-from-home call would dial an 800 number. The call, which originated on an open end, would then be routed via an

noted: "Just as Commission regulation does not end with an intermediate switch, neither does the character of [a] call change at [an] intermediate switch."[16]

The Commission affirmed, relying, like the Bureau, on an end-to-end analysis of the transmission:

> In general all of the defendants' arguments ignore the fact that ACA service conveys a single communication from the caller to the called party. Indeed, from the caller's point of view, any intermediate switching during the call is, as Teleconnect claims, "transparent." The record reflects that the user of ACA service intends to make a single call terminating not at the Teleconnect intermediate switch, where the Megacom link ends, but at the telephone line of the called party.[17]

Significantly, in applying end-to-end principles to what was, in essence, an inter-carrier compensation dispute, the Commission considered and rejected the argument that end-to-end principles are relevant only to jurisdictional analyses: "While Nevada Bell and Pacific Bell attempt to distinguish the so-called 'jurisdictional' nature of a call from its status for 'billing' purposes, they present no persuasive argument nor any authority to support their contention that this distinction has legal significance."[18]

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AT&T Megacom 800 line to an Ameritech switch in Chicago. Ameritech would then transmit the call to a Teleconnect switch, which would prompt the caller to enter the telephone number it desired to call. After receiving the number, Teleconnect would then send the call over a private line to the terminating LEC, which would terminate the call on an open end.

LECs claimed that the service involved two calls: the first 800 call, which originated on an open end and terminated at the Ameritech switch on a closed end, and a subsequent call, which originated on a closed end and terminated on an open end. Teleconnect, in contrast, argued that the entire communication was a single call and that LECs could not assess access charges as if the two legs of the call were separate calls, each with only one open end.

[16] *Teleconnect Co. v. Bell Telephone Company of Pa.*, 6 FCC Rcd 5202 (Com. Car. Bur. 1991) at para. 24.

[17] *Teleconnect v. Bell Telephone Co. of Pa.*, 10 FCC Rcd 1626 (1995) at para. 12.

[18] *Id.*

*Teleconnect* is by no means the only case in which the Commission has applied an end-to-end analysis in resolving access charge disputes. In *International Telecharge, Inc. v. Southwestern Bell et al.,*[19] the Commission held that an 800 call used to access an operator service center was, for access charge purposes, part of a single end-to-end communication that terminated at the telephone number of the called party. In *Bill Correctors, Inc. v. Pacific Bell,*[20] the Commission again applied an end-to-end analysis in prohibiting Pacific Bell from collecting end user common line (EUCL) charges for intermediate central offices through which the link between an FX customer and its foreign serving office passed. And in *AT&T Corp. v. Bell Atlantic- Pennsylvania.,*[21] the Commission applied an end-to-end analysis in holding that "a call redirected by call forwarding does not terminate at the location dialed by the caller" and thus does not warrant the application of "intermediate" carrier common line charges.

The Commission also has applied end-to-end principles in considering whether a particular communication is an interLATA communication for purposes of section 271. In that case, the Commission held that Bell Atlantic may transport and terminate traffic CLEC-originated traffic across LATA boundaries if the ultimate origination and termination points of the call are within the same LATA.[22]

In short, the end-to-end analytical construct is not just a jurisdictional tool, as the Court assumed. To the contrary, it is an analytical framework that is used to gauge the boundaries of a

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19 11 FCC Rcd 10061 (1996).

20 10 FCC Rcd. 2305 (1995).

21 14 FCC Rcd 556 (1998) at para. 44.

22 *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,* 14 FCC Rcd 13861 (1999).

communication for both jurisdictional and regulatory purposes. It was entirely appropriate for the Commission to apply that age-old principle here.

Indeed, the Commission had no choice but to apply that principle. Since – as the court seems to concede – an end-to-end analysis is appropriately used to determine jurisdiction, it *must* also be used to determine the reach of the reciprocal compensation provisions of the Act. Otherwise, the Commission's jurisdiction over a communication would not be coincident with its authority to establish a rate regime for that communication under section 201.[23] Such a result would be flatly inconsistent with section 251(i), which states "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."

### 2. The End-to-End Analysis Applies as Much to ISP-Bound Traffic as to Traditional Long-Distance Voice Traffic.

In addition to questioning whether the traditional end-to-end analysis applies to non-jurisdictional determinations, the court seemed to question whether that analysis is relevant to Internet communications in any context, jurisdictional or otherwise:

> 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 collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.[24]

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[23] With respect to ISP-bound traffic, for example, the disconnect between jurisdiction and section 201 authority would mean that the Commission would be unable lift the ISP access charge exemption, if it so chose, or even to establish some other type of access charge, such as a flat-rated charge. In fact, absent a change in its interpretation of section 252(d)(2) of the Act, the Commission would be precluded from proceeding with the bill and keep proposal that is to be subject of its forthcoming Notice of Inquiry.

[24] *Remand Order* at 5. See *also id.* at 6 (the end-to-end cases cited by the Commission are not on point because "[b]oth involved a single continuous communication, originated by the end-user, switched by a long-distance carrier, and eventually delivered to is destination." *And see id.* at 5 (Calls to ISPs "are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP.")

The court's doubts may simply relate to the status of ISPs as information service providers – an issue that is addressed below. To the extent, however, its decision could be taken to suggest that end-to-end principles are suited only to traditional, circuit-switched voice traffic, it was wrong. The end-to-end analysis is used to gauge the boundaries, not merely of traditional long-distance voice calls, but of *all* types of communications by wire and radio. It has been applied, for example, to microwave facilities located wholly within the state of Idaho that were used to deliver television signals that cross state boundaries.[25] It has also been applied to CATV distribution facilities. In both cases, the D.C. Circuit's analysis was identical to the analysis used for circuit-switched voice traffic. As stated in *General Telephone*:

> The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of the television signals is performing an interstate communications service.[26]

The reason it is well settled that the boundaries of a communication are determined on an end-to-end basis is simple: it is the only way to protect the exclusive right of the federal government - and more specifically, this Commission - to regulate interstate communications. If an end-to-end communication were subject to bifurcated jurisdiction, states would effectively have veto power over federal communications policies. In this respect, the principle that the

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[25] *Idaho Microwave, Inc. v. FCC,* 352 F.2d 729, 732 (D.C. Cir. 1965) (noting that the facility is "used as a link in the continuous transmission of television signals from [Utah] to [Idaho]" and concluding "though Idaho Microwave's physical facilities are located within Idaho, it performs an interstate communication service when it takes part in the transmission of signals from Utah to Idaho.")

[26] *General Telephone Co. of California v. FCC,* 413 F.2d 390, 397 (D.C. Cir.), *cert. denied,* 396 U.S. 888 (1969) (upholding a Commission determination that common carrier lines used to distribute cable television programming within a state are subject to FCC jurisdiction because the signals transmitted via those lines had originated as over the air broadcasts).

boundaries of a communication are determined on an end-to-end basis is rooted, not only in the very fabric of the Communications Act, but in the Commerce Clause of the United States Constitution. *See Western Union Telegraph Co. v. Foster,* 247 U.S. 105 (1918) (holding that an interstate communication continues until it reaches "'the point where the parties originally intended that the movement should finally end'" and that states may not regulate any portion of that communication.) *See also Filing and Review of Open Network Architecture Plans,* 4 FCC Rcd 1 (1988) at para. 273 ("the courts have construed our jurisdiction as applying to all 'services' and 'facilities' used at any point in completing an interstate telephone call. Indeed, we would be incapable of carrying out our statutory objectives if we have no authority over any facility that carries interstate calls but is physically intrastate.")

### 3. The Status of ISPs as Information Service Providers Does Not Alter the Analysis

A third source of the court's skepticism about the relevance of an end-to-end analysis to ISP traffic is the status of ISPs as information service providers, as opposed to telecommunications service providers. Noting that, "[a]lthough ISPs use telecommunications to provide information service, they are not themselves telecommunications providers," the court questioned whether ISPs should be viewed differently from IXCs for reciprocal compensation purposes.[27]

The court's skepticism is misplaced. The relevance of end-to-end principles to ISP traffic is in no way altered by the fact that ISPs are information service providers. To the contrary, in concluding that ISPs are information service providers, the Commission specifically noted that

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[27] *Remand Order* at 6-7.

this classification is irrelevant to whether CLECs that serve ISPs are entitled to reciprocal compensation.[28]

The reason the Commission recognized that the status of an ISP as information service provider is irrelevant to reciprocal compensation issues is that, by definition, information services are provided "via telecommunications" – that is, they are built on an underlying telecommunications component.[29] Indeed, an information service is actually nothing more than a telecommunications service with added functionality. While a telecommunications service provider offers pure transmission service, an information service provider offers something more than pure transmission. It combines telecommunications with enhancements, such as data processing and other functions. The Commission recognized this in the *Universal Service Report,* when it stated that ISPs:

> lease lines, and otherwise acquire telecommunications, from telecommunications providers – interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers and others. In offering service to end users, however, they do more than resell those data transport services. They conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service.[30]

To be sure, ISPs are, for the most part,[31] considered users, not providers of telecommunications services. But that does not mean, as the court suggested, that ISPs are no different from businesses, such as pizza delivery firms, travel reservation agencies, etc. "which

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28 *Federal-State Joint Board on Universal Service,* 13 FCC Rcd 11501 (1998) (*Universal Service Report)* at n. 220.

29 *See* U.S.C. § 3(20).

30 *Universal Service Report* at para. 10.

31 To the extent an ISP provides its own backbone services, that ISP may be treated as a provider of telecommunications services for purposes of universal service requirements. *Id.* at para. 69.

use a variety of communications services to provide their goods or services to their customers." Unlike these businesses, ISPs do not merely use communications to conduct their businesses; they forward *subscriber-initiated* communications to destinations on the Internet.

That is a critical distinction that the court did not fully grasp. In addition to comparing ISPs to ordinary users of telecommunications services, the court repeatedly stated that ISPs *originate* communications on behalf of their subscribers.[32] But ISPs do not *originate* communications; as noted, they forward communications that their subscribers have originated to the addresses specified by their subscribers. When an end user sends an e-mail, for example, that e-mail originates at the end user's computer terminal, not the ISP server. As stated in the *Advanced Services Remand Order*:

> the service provided by the local exchange carrier to the ISP is ordinarily exchange access service because it enables the ISP to transport the communication *initiated by the end-user subscriber* located in one exchange to its ultimate destination in another exchange[.][33]

Just as Internet traffic does not originate at the ISP server, neither does it terminate at that server. Rather, the server is a conduit through which Internet subscribers send and receive information to and from points on the Internet. In fact, the Commission has repeatedly so held. It did so, of course, in the *Reciprocal Compensation Ruling* and the *Advanced Services Remand Order*, quoted above, but these orders do not break new ground; they simply reflect what the Commission has consistently recognized.

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[32] *See, e.g. Remand Order* at 6, 7.

[33] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 15 FCC Rcd 385 (1999) at para. 35 (emphasis added).

In the *BellSouth MemoryCall Order,*[34] for example, the Commission squarely rejected the argument that telecommunications terminates at the point an information service begins. Specifically, the Commission held that when an out-of-state caller accesses a voice mail service, there occurs a single interstate communication, which begins with the caller and terminates at the ultimate destination of the information service – the voice mail equipment. Indeed, the Commission held that, for purposes of determining the boundaries of a communication, a telecommunications service that connects to an information service is no different from an ordinary phone call:

> [W]hen a caller is connected to BellSouth's voice mail service, receives instructions and/or a message, and records a message, there is a continuous two-way transmission path from the caller location to the voice mail service. When the caller is out-of-state, there is a continuous path of communications across state lines between the caller and the voice mail service, *just as there is when a traditional out-of-state long distance voice telephone call is forwarded by the local switch to another location in the state and answered by a person, a message service bureau or customer premises answering device.*[35]

The *BellSouth MemoryCall Order* bears special emphasis because it is dispositive of this case and because its significance somehow escaped the court. Here, again, though, this was not the first instance in which the Commission held that telecommunications does not terminate where an information service begins. It did so four years earlier in the *ONA Order*:

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[34] *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation,* 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall Order).*

[35] *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation,* 7 FCC Rcd 1619 (1992) at para. 9 (emphasis added). *See also Universal Service Report* at para. 80: "[A]n Internet access provider must enable the movement of information between customer's own computers and the distant computers with which those customers seek to interact." *And see Non-Accounting Safeguards Order* at n. 291, wherein the Commission stated:

> An end-user may obtain access to the Internet from an Internet service provider by using dial-up or dedicated access to connect to the Internet service provider's processor. The Internet service provider, in turn, *connects the end-user,* to an Internet

> Enhanced services by definition are services "offered over common carrier transmission facilities." Since the *Computer II* regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service. *Computer III* does not change this principle. Indeed, we have explicitly held that "the basic services involved in such (CEI/ONA) offerings are to be tariffed in the appropriate federal or state jurisdiction." Thus, when an enhanced service is interstate (that is, when it involves communications or transmissions between points in different states on an end-to-end basis), the underlying basic services are subject to Title II regulation.[36]

Of course, an ISP itself may or may not itself provide the telecommunications services that are used to carry the end user-originated communications to their ultimate destination on the Internet, but that is of no import. If the traffic, in fact, leaves the ISP's server, as does Internet traffic, that traffic does not terminate at the ISP's local server. Rather, that server simply represents an intermediate switching point through which telecommunications transmitted between subscribers and the Internet pass.

In short, the regulatory status of the ISP as information service provider or telecommunications service provider is a red herring. Telecommunications sent to an ISP does not terminate at the ISP server for the simple reason that it is transmitted from the ISP server to subscriber-designated destinations on the Internet. Because it does not terminate at the ISP server, the LEC that delivers the traffic to the ISP is not entitled to reciprocal compensation.

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backbone provider that carries traffic to and from other Internet host sites (emphasis added).

[36] *Filing and Review of Open Network Architecture Plans,* 4 FCC Rcd 1 (1988) at para. 274 (citations omitted). *Cf. Universal Service Report* at para. 69 (holding that ISPs that provide their own backbone services may be required to contribute to universal service funding).

### 4. Section 51.701(d) of the Commission's Rules Does not Alter the Analysis.

A fourth basis upon which the court questioned the Commission's conclusion that ISP-bound traffic does not terminate at the ISP server was the Commission's failure, in the court's view, to reconcile that conclusion with section 51.701(d) of the Commission's rules, which provides: "For purposes of this subpart, termination is 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." Noting that the Commission "failed to apply, or even to mention" this rule, the court posits that "[c]alls 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.'"[37]

The court's suggestion that ISP-bound traffic qualifies for reciprocal compensation under section 51.701(d) of the Commission's rules is wrong. Section 51.701(d) of the Commission's rules does not purport to define which calls are subject to reciprocal compensation under the Commission's rules. It merely gives a definition of "termination" that pertains to whatever traffic is local and hence subject to reciprocal compensation. This is evident from the text of section 51.701(d), which defines termination as the "switching of *local* telecommunications traffic at the terminating carrier's end office switch, and delivery of such traffic to the *called party's* premises" (emphasis added).

It is also clear from the context in which this rule was established. Section 51.701(d) derives from paragraph 1040 of the *Local Competition Order* wherein the Commission stated: "We define termination for purposes of section 251(b)(5) as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility)

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[37] *Remand Order* at 6.

and delivery of that traffic to the called party's premises." Obviously, the Commission could not have intended thereby to define when reciprocal compensation is due: if that was its intent, it would not have limited this definition to traffic that is subject to section 251(b)(5).

What the Commission intended, rather, was to define "termination" so as to clearly distinguish "termination" from "transport" for traffic that is subject to section 251(b)(5). That is clear from the heading under which paragraph 1040 appears: **(2) Distinction between "Transport" and "Termination."** The Commission also stated that this was its intent:[38]

> In contrast to transport, for which some alternatives exist, alternatives for termination are not likely to exist in the near term. ... In addition, forward-looking costs are calculated differently for the transport of traffic and the termination of traffic[.] ...As such, we conclude that we need to treat transport and termination as separate functions, each with its own costs.[39]

In short, in defining "termination" the Commission had a limited purpose in mind – a purpose that is evident from the definition itself and from the context in which it was established. To read this definition – as does WorldCom – as discarding fifty-plus years of precedent regarding the boundaries of a communication – is to extend that rule beyond its intended purpose.

In any event, even if section 51.701 is deemed to define termination for purposes of determining which calls are subject to reciprocal compensation, ISP traffic would not fit the definition. Although the court suggests – without any support – that the ISP "is clearly the 'called party," that is simply wrong. While consumers use an ISP as a conduit through which to send and receive transmissions over the Internet, their intention is not to communicate with the

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[38] Unlike paragraphs 1039 and 1040, the preceding six paragraphs do address what traffic is subject to section 251(b)(5). These paragraphs appear under the boldface heading: **(1) Distinction between "Transport and Termination" and Access"** and conclude that § 251(b)(5) reciprocal compensation does not extend to interstate access traffic.

[39] *Local Competition Order* at para. 1040.

ISP, but to send and receive information to and from the Internet. For example, an end user that sends an e-mail does not intend to communicate with its ISP; it seeks to communicate with the person to whom the e-mail is addressed. Likewise, an end user that places a telephone call over the Internet or participates in on-line chat is communicating with the person who has been called or with those in the "chat room," not an ISP. And an end user that sends or retrieves information to or from a web site is communicating with the proprietor of that web site, not his/her ISP. In these cases, the ISP is no more the "called party" than is Teleconnect when an end user dials an 800 number to reach Teleconnect's switch.

### B. Whether or not ISP Traffic is Exchange Access, Telephone Exchange Service, or Information Access is Irrelevant.

A second, independent basis upon which the court remanded the *Reciprocal Compensation Ruling* was the Commission's failure, in the court's view, to reconcile its ruling with the statutory definitions of exchange access and telephone exchange service. Noting: (i) the Commission's statement in the *Non-Accounting Safeguards Order* that "ISPs do not use exchange access;"[40] (ii) the Commission's concession in its brief that all LEC traffic must be either telephone exchange or exchange access traffic; and (iii) WorldCom's argument that the term telephone exchange service "is synonymous under the Act with the service used to make local phone calls,"[41] the court found that the Commission had not adequately explained why ISP traffic is not telephone exchange and, hence local, service.

This issue is readily addressed. On December 23, 1999 – after oral argument on the appeal of the *Reciprocal Compensation Ruling* – the Commission overruled the determination in

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40 *Non-Accounting Safeguards Order,* 11 FCC Rcd 21905 at 22023.

41 *Remand Order* at 8.