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July 20, 2000

Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
Portals II, TW-A325
445 12th Street
Washington, D.C. 20554

RE: 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 and 99-68

Dear Secretary Salas:

The New York State Department of Public Service (NYDPS) submits these letter comments in response to the Federal Communications Commission's (the Commission) Public Notice seeking comments on the issues raised by the United States Court of Appeals for the D.C. Circuit in Bell Atlantic Telephone Companies v. F.C.C., 206 F.3d (D.C. Cir. 2000). As the Notice states, the Court ruled that the Commission had not adequately justified its jurisdictional analysis in determining whether a call to an Internet service provider (ISP) is subject to the reciprocal compensation requirement of Section 251(b)(5).

The payment of reciprocal compensation for termination of traffic to the Internet has been an issue for New York as well as the Commission. Although we appreciate the Commission's determination to allow the states to set these rates in the context of interconnection agreements, we agree with the Court's jurisdictional analysis. Traffic to an ISP terminates at the ISP's location and not at the final Internet destination. [1]

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[1] Case 97-C-1275 – Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic, (March 19, 1998, pp 2-3).

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More specifically, a call to an ISP is no different than a local call to any other larger volume customer, such as a local bank or a radio call-in program; many intrastate communications ultimately connect to other networks.[2]

The fact that the call may be handed off and routed within an ISP's computer network(s) or through the Internet backbone does not, therefore, alter the jurisdictional nature of the call from an end user to an ISP. As the Court stated,

> "[a]n ISP appears, as MCI WorldCom argued, no different from many 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. Comments of WorldCom, Inc. at 7 (July 17, 1997)."

Thus, the Commission should declare access to an ISP to be a local call when the ISP has a local presence.

With regard to the Notice 's request for information on new or innovative approaches to intercarrier compensation for ISP-bound traffic, the New York Public Service Commission conducted a proceeding to reexamine reciprocal compensation applicable to large-volume call termination to a small number of customers.[3] The record as a whole suggested that the costs of serving a small number of large customers, such as ISPs, are likely to be lower than serving the mass market.[4] Consequently, the Commission established a rebuttal presumption that if a carrier's incoming to outgoing traffic ratio exceeds 3:1 for the most recent three-month period, it is fair to presume that the portion of its traffic that terminates at one or a small number of locations (convergent traffic) costs less to terminate at geographically dispersed locations. Carriers with greater than a 3:1 ratio, therefore, are compensated at a lower rate (the end-office rate) than the rate the connecting local exchange carrier receives (the tandem rate).

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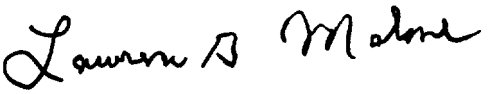
[2] See McDonnell Douglas Corp. v. General Tel. Co. of Cal., 594 F2d 720, 724, n.3 (9th Cir. 1979), cert. denied 444 U.S. 839 (1979).

[3] Case 99-C-0529, Order Instituting Proceeding to Reexamine Reciprocal Compensation, (April 15, 1999).

[4] Case 99-C-0529, Opinion and Order Concerning Reciprocal Compensation, (August 26, 1999, pp 54-55).

A carrier can rebut the presumption with a showing that its network and service warrant higher tandem rate compensation for all traffic.[5] To date, two carriers have been compensated at a higher rate: Time Warner Telecom, Inc. and Cablevision Lightpath, Inc. Of course, to the extent that interconnection agreements established specific rates, they were undisturbed.

Respectfully submitted,



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cc: Chief, Competitive Pricing Division
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[5] The network design factors bearing on the costs of the network include, but are not limited to, the number and capacity of central office switches; the number of points of interconnection offered to other local exchange carriers; the number of collocation cages; the presence of SONET rings and other types of transport facilities; and the presence of local distribution facilities such as coaxial cable and/or unbundled loops.