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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 )  
 )  
Inter-Carrier Compensation )  
for ISP-Bound Traffic )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 96-98

CC Docket No. 99-68

**COMMENTS OF THE  
RURAL INDEPENDENT COMPETITIVE ALLIANCE**

The Rural Independent Competitive Alliance ("RICA"), by its attorneys, files these comments in response to the Commission's Public Notice, FCC 00-227, June 23, 2000, seeking comment in response to the issues raised by the Court of Appeals in its decision vacating the Commission's *Reciprocal Compensation Ruling*.<sup>1</sup> RICA, an alliance of Competitive Local Exchange Carriers ("CLECs"), is a newly-formed organization, the members of which generally operate in rural areas, bringing the first, if not only, competitive local exchange and access service to vast geographic areas of the United States that otherwise would remain captive to the incumbent local exchange carrier ("ILEC").

**I. THE COMMISSION MUST PROCEED FROM BASIC PRINCIPLES THAT ARE CONSISTENT WITH THE FACTS**

**A. The Commission on remand must adopt consistent principles.**

RICA member CLECs provide service in rural areas, using their own facilities for the most part. Many RICA members terminate ISP-bound traffic and in some instances receive

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<sup>1</sup> *Bell Atlantic Telephone Co. v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic*"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP- Bound Traffic, Declaratory Ruling*, 14 FCC Rcd 3689 (1999) ("*Reciprocal Compensation Ruling*").

reciprocal compensation for such termination in accordance with their interconnection agreements with the ILECs.<sup>2</sup> Nevertheless, RICA recognizes that, in the long run, regulation of the inter-carrier relationships in the industry must be based on sound principles, consistently applied.

It is apparent from the Court's opinion that the lack of consistency in the Commission's policies regarding the status of Enhanced Service Providers ("ESPs") and now Internet Service Providers ("ISPs") convinced the Court that it need not defer to the Commission's judgement on the question of whether an ISP-bound "call" terminates at the ISP or continues uninterrupted into the cloud of the Internet.<sup>3</sup> Unless these inconsistencies are cured, on remand, the Court will not be satisfied with merely a better articulation of the rationale of the *Reciprocal Compensation Ruling*. RICA offers the following suggestions of principles for the Commission's consideration in restructuring its policies.

**B. Inter-carrier compensation must be fair to all carriers involved.**

The principle of competitive neutrality should be followed in establishing rules for compensation for ISP-bound traffic.<sup>4</sup> The current situation in which CLECs disproportionately

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<sup>2</sup> As explained at II(A), below, where such agreements so provide, the Commission should not undertake to supercede existing contractual relationships, whatever its determinations with regard to the other issues.

<sup>3</sup> The Court noted that the *Reciprocal Compensation Ruling* declared that communications did not stop at the ISP but continued to consider ESPs (of which ISPs are a subset) as end-users. *See Bell Atlantic*, 206 F.3d at 7 (court noting that in 1983, Commission exempted ESPs from the access charge system, "thus in effect treating them like end users rather than long distance carriers" and continued to reaffirm this decision in 1991 and 1997).

<sup>4</sup> This discussion assumes that the carriers involved are legitimate LECs, serving non-ISP customers as well as ISPs. The equality and competitive neutrality considerations applicable to competing LECs should not apply where an ISP simply creates an alter-ego of a CLEC with a business plan founded upon reciprocal compensation payments rather than serving the public.

are the terminating carrier for ISP-bound traffic is not an inherently permanent status. It is therefore in the interests of all LECs to have a situation in which each carrier recovers its costs of origination or termination in a manner that is acceptable to the public and consistent with public policy goals. Given the rapidly growing and substantial volume of ISP-bound traffic,<sup>5</sup> RICA recognizes that a long term policy cannot be built on a situation where the originating carrier charges its customers a fixed amount per month, but pays a per minute charge to the terminating carrier for a substantial fraction of its traffic.<sup>6</sup>

As the Court noted, under the current arrangement, originating LECs are expected to recover their costs from their end users. LECs with substantial reciprocal compensation costs could increase their flat rate monthly charges to all their customers in an amount designed to recover the increased cost of operation. This solution has the effect of causing non-ISP using customers to subsidize the web-surfing of their neighbors, and may not be feasible where there is competition or potential competition in the local market. Alternatively, as interconnection agreements are renewed they can be revised to adopt compensation plans that are equitable and result in more predictable costs and revenues for both parties.

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<sup>5</sup> See e.g., Telephone Association of New England (citing studies that found that the average holding time per call for Internet traffic had increased by 106%); Richmond Telephone Company Comments at 1; America Online Comments at 1 (noting that America Online and “thousands of other ISPs” offer dial-up Internet access services).

<sup>6</sup> This situation is materially different from the case of calls placed through long distance carriers, where the end user expects to pay a per-minute charge. Even in this situation, the Commission has been actively reducing the usage based charges and increasing the flat rate charges. See *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, CC Dockets 96-262, 94-1, 99-249, 96-45, para. 59 (rel. May 31, 2000).

**C. The classification of ISP-Bound Calls as terminating on the ISP or continuing to the Internet is a Policy choice.**

The Court noted that there is no clear answer to the question of whether ISP-Bound traffic is designated local or long distance, stating “neither category fits clearly.”<sup>7</sup> One difficulty with categorization is that from one “call” to another, as well as sometimes within the same “call,” the communication may sometimes look much like a completed call to the ISP’s local point of presence and other times does not.<sup>8</sup>

Another variable is that whether one call or two, not all ISP-bound traffic is, strictly speaking, for the purpose of using an information service. For some subscribers, the predominant, or sole use may be the exchange of e-mail, or to communicate by voice-over-IP technology. In either case, the communications fit the classic common carrier model of communications of the subscriber’s choosing, which is transmitted unaltered by the carrier.<sup>9</sup> In these cases, at least, the ISP is performing the functions of a common carrier, although the precise point of termination maybe unknown or unknowable.

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<sup>7</sup> *Bell Atlantic*, 206 F.3d at 5.

<sup>8</sup> When the subscriber’s first screen is a menu from its ISP, from which the subscriber chooses subsequent communications destinations, the situation is analogous to a two call situation. In other cases, the subscriber programs his computer so that a particular web site, located on a non-local server, always comes up first on his screen.

<sup>9</sup> *NARUC v. FCC*, 533 F.2d 601,609 (D.C. Cir. 1976) (*NARUC II*) (expanding upon test set forth in *NARUC I* (*NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976)) for determining common carrier status to include provision of service over which customers “transmit intelligence of their own design and choosing”). The court distinguished between circuit switched long distance calls and packet switched information service calls, *Bell Atlantic*, 206 F.3d at 4, but this distinction is only between the technology which happens to be used. Information services can be delivered by circuit switched facilities, and telecommunications services can, and are, delivered by packet switched facilities.

Although the Court's opinion appears to favor the conclusion that ISP-bound traffic terminates at the ISP by its references to the ISP as the "called party," it also recognized the substantial ambiguities involved which set the stage for *Chevron* deference to the Commission's reasonable choice.<sup>10</sup> The Court appears to have vacated the *Reciprocal Compensation Order* not so much because it rejected the Commission's conclusion that calls do not terminate at the ISP, but because all other related Commission rulings and policies are logically inconsistent with that conclusion.<sup>11</sup> RICA expects the Court will ultimately accept either conclusion if the Commission adopts consistent policies.

In addition to the inconsistencies noted by the Court, the comments in the NPRM following the *Reciprocal Compensation Ruling* identified several others, principally the Commission's insistence that it could designate the ISP-bound traffic as interstate, but continue to require carriers to conduct separations studies and rate-making as if it were intrastate traffic.<sup>12</sup> Several state commissions pointed out that if the Commission wants to call the traffic interstate, it must assume regulatory responsibility for it.<sup>13</sup>

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<sup>10</sup> *Bell Atlantic*, 206 F.3d at 9, citing *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 842-43, 104 S.Ct 2778, 81 L.Ed 2d 694 (1984).

<sup>11</sup> *Bell Atlantic*, 206 F.3d at 9.

<sup>12</sup> *See, e.g.*, NTCA's Comments at 8; Indiana Utility Regulatory Commission's Comments at 5; Cincinnati Bell Telephone's Comments at 6; State of Florida Public Service Comments at 9; NECA's Reply Comments at 1-2.

<sup>13</sup> *See, e.g.*, Missouri Public Service Commission's Comments at 1.

#### **D. Several Alternatives Are Available**

A simple solution, but not necessarily the best, is to reverse the *Reciprocal Compensation Ruling* and return the issue of reciprocal compensation to state arbitration proceedings. An alternative would be to create an ISP separations formula, allocating the traffic jurisdictionally based upon sampling of the destinations of ISP-bound traffic. This could be difficult to conduct and would require frequent updating due to the dynamic nature of the industry. Nevertheless, if the Commission determines to maintain the result in the *Reciprocal Compensation Ruling* then it must bring its other policies into harmony with the ruling.

Analogous issues have been worked out in the past. The current access charge regime developed in the early days of long distance competition, when new carriers, such as MCI, provided service by subscribing to business lines to which their customers called for connection to the carrier's network. In the *ENFIA* decision it was determined that this use of the local carrier's facilities was indeed an interstate use subject to FCC control.<sup>14</sup> Subsequently the issue was revisited and ultimately led to the creation of Feature Group A in the interstate access tariffs.<sup>15</sup> Using these precedents, the Commission could revise its policies and establish equitable compensation among LECs involved in delivering ISP-bound traffic.

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<sup>14</sup> *Exchange Network Facilities for Interstate Access (ENFIA): Memorandum Opinion and Order*, 71 FCC 2d 440 (1979)

<sup>15</sup> *See In the Matter of MTS and Wats Market Structure: Memorandum Opinion and Order*, 101 FCC 2d 1222, 1228-29 (1985); *see, e.g., In the Matter of MTS and Wats Market Structure: Third Report and Order*, 93 FCC 2d 241 (1983), *modified on reconsideration*, 97 FCC 2d 682 (1983), *modified on further reconsideration*, 97 FCC 2d 834 (1984), *aff'd and remanded in part*, *Nat'l Ass'n of Regulatory Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3583, 3595 (U.S. Feb. 19, 1985)(No. 84-95).

## II. RICA RECOMMENDATIONS

RICA concluded above that on remand the Commission can justify either the “single call” or the “end-on-end” approach to describing ISP bound traffic, provided it harmonizes and rationalizes its related policies. RICA also recognizes that the controlling factor in the Commission’s decision will probably not be the impact on small rural CLECs, given the hundreds of millions of dollars at stake in urban markets. At the same time, however, the Commission can frame its decision in a manner that is fair and reasonable to all LECs – ILECs and CLECs, rural and urban alike -- and will benefit rather than impede the growing competition in rural areas for which RICA members and other rural CLECs are uniquely responsible. The following principles should, therefore, be adopted:

- A. Interconnecting carriers should remain free voluntarily to establish compensation arrangements between themselves, and existing agreements should be enforced.**

There is no need for governmental action to reform agreements where the parties have determined between themselves how and from whom each will recover its costs of delivering traffic to ISPs. Whether this is denominated reciprocal compensation, bill and keep, meet point billing or some other alternative, if the parties have voluntarily entered into such agreements, there is no reason to disturb existing agreements or prescribe all future agreements.

- B. The Commission must recognize the fundamental changes in the industry since 1996 and determine the need for legislative changes.**

When faced with issues of determining jurisdiction in the world of POTS and Private Line Service, the Commission generally has been able to reach sensible and supportable conclusions,

based on the origin and termination of the communication<sup>16</sup> This understandable concept was stretched, but generally upheld by the courts, when the Commission decided that physically intrastate transmission of broadcast signals rendered the service interstate and the carrier obligated to obtain Section 214 certification.<sup>17</sup> Since the Internet, like Broadcast transmission, is inherently interstate communication, there is an arguable consistency in holding that all Internet bound communication is also interstate and the carriers and the service are subject to regulation by the Commission.<sup>18</sup>

The issues clearly are not readily amenable to resolution under the current statute because the environment has changed so radically in the short time since 1995 when the Act was drafted. The entire concept of determining the respective jurisdiction of state and federal regulators based upon origination and termination of communications is not sustainable in an environment where

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<sup>16</sup> See *Teleconnect Co. v. Bell Telephone of Penn.*, E-88-83, 10 FCC Rcd 1626, 1629 (1995) *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997) (concluding that “an interstate communication does not end at an intermediate switch . . . . The interstate communication itself extends from the inception of the call to its completion, regardless of any intermediate facilities”); see also *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945); *New York Telephone Co.*, 76 FCC 2d 349, 352-53 (1980).

<sup>17</sup> See *Idaho Microwave, Inc. v. FCC* 372 F2d. 729 (1965); *Ward v. Northern Ohio Telephone Co.*, 300 F2d. 816 (1962), *cert. denied* 371 US 820 (1962); *Pacific Teletronics, Inc.* 4 RR2d 145 (1964); *Capital City Telephone Co.*, 3 FCC 189, 193-4 (1936); ; See also *Southwestern Bell Telephone Company, et al., Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Services*, 8 FCC Rcd 2589 (1993), *reversed on other grounds*, 19 F3d 1475 (D.C. Cir. 1994).

<sup>18</sup> The Commission required even carriers otherwise subject to limited regulation under Section 2(b)(2) to obtain Section 214 Certification and file interstate tariffs to transport video programming for CATV companies. See *In the Matter of Commission Order, dated April 6, 1966, Requiring Common Carriers to File Tariffs With Commission For Local Distribution of Channels Furnished For Use in CATV Systems*, 4 FCC 2d 257 (1966).

the meaning of the word “terminate” is no longer clear, and in any case cannot be readily determined.<sup>19</sup> Ultimately, amendments to the Act may be required.

**C. In the interim, regulators must recognize that originating LECs, whether CLECs or ILECS, must be able to recover from their customers any charges they pay to terminating LECs.**

Any consideration of competitive neutrality must necessarily occur in the context of the actual marketplace for both LEC and ISP services, as well as the political environment that flows from them. The Court noted that reciprocal compensation contemplates that the originating carrier recovers its costs through charges to its end users, and that the payments to the terminating carrier cover that carrier’s cost of terminating.<sup>20</sup> Originating carriers could simply assess per-minute charges on their end users for calls to ISPs in the exact amount of the incremental cost imposed on them by the reciprocal compensation charges.<sup>21</sup>

RICA recognizes, however, that the cost in consumer ill-will and political capital is such that this alternative probably cannot be pursued. The Commission should therefore consider alternative methodologies to ensure that carriers are afforded reasonable cost-recovery methodologies.

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<sup>19</sup> The jurisdictional boundaries issues raised by the growth of the Internet were recently addressed in the July 2000, Draft Report , Transnational Issues in Cyberspace, A Project on the Law Relating to Jurisdiction, released by the American Bar Association Section of Business Law.

<sup>20</sup> *Bell Atlantic*, 206 F.3d at 4.

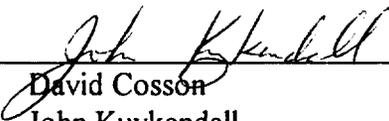
<sup>21</sup> Such a charge could be either an intrastate or interstate charge, depending on the ultimate determination of the jurisdiction of the traffic.

### III. CONCLUSION

The Court has given the industry and the Commission a “wake up” call. A long term solution for inter-carrier compensation is only a piece of a bigger puzzle, but it must be determined in a manner that is consistent with the universe of related issues, and in a manner which does not impede the dynamism of the industry, nor allow industry participants to build business plans based on regulatory arbitrage. A key ingredient will be the provision of maximum flexibility for voluntary agreements between carriers.

Respectfully submitted,

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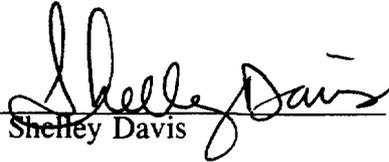
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**CERTIFICATE OF SERVICE**

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