

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Comments 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

COMMENTS OF WORLDCOM, INC.

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Dated: July 21, 2000

EXECUTIVE SUMMARY

In the Public Notice released on June 23, 2000,¹ the Commission sought comment on the vacation and remand of the FCC's reciprocal compensation declaratory ruling by the United States Court of Appeals for the D.C. Circuit.² The Commission invited comment on the jurisdictional nature of ISP-bound traffic, specifically regarding whether a call to an ISP is subject to the reciprocal compensation provisions of § 251(b)(5) of the Telecommunications Act of 1996 (1996 Act). The Commission also invited comment on the definitions of "exchange access service," "telephone exchange service," "termination," and "information access." Lastly, the Commission sought to update the record regarding any ex parte communications filed during the period in which the D.C. Circuit court considered the matter.

WorldCom submits that, on this remand, the Commission should take the following action:

- The Commission should declare that calls to ISPs that originate in the same local calling area are local traffic under the requisite provisions of the 1996 Act and the Commission's regulations, and therefore that reciprocal compensation under section 251(b)(5) is mandated for calls to ISPs.
- The Commission should also declare that calls to ISPs that originate in the same local calling area should be treated as local calls subject to reciprocal compensation – just as they are treated as local calls for every other regulatory purpose.
- The Commission should let stand its prior determination that state commissions have authority to interpret and enforce the terms of interconnection agreements to require reciprocal compensation for ISP-bound traffic.

¹ Public Notice, Comments 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, June 23, 2000.

² Bell Atlantic v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

In rendering its determinations, the Commission should recognize that the Supreme Court has unequivocally held that the Commission has authority, under the 1996 Act, to regulate the rates that local carriers charge each other for reciprocal compensation of ISP-bound traffic. Therefore, to the extent the Commission has concerns about the reciprocal compensation rates that carriers are charging for the exchange of ISP-bound traffic, it may regulate those rates as it regulates other interconnection pricing under the 1996 Act.

In these comments, WorldCom first sets forth the reasons why the D.C. Circuit's decision forecloses the Commission from continuing to use an "end-to-end" jurisdictional analysis to determine whether section 251(b)(5) applies to ISP-bound traffic. As we explain, the Commission's jurisdiction to regulate this traffic is indisputable and thus not at issue in this proceeding. Rather, at issue is the proper classification of this traffic. Second, we provide the reasons why ISP-bound traffic cannot be "exchange access" as defined in the 1996 Act, but must be "telephone exchange service." We further explain why "information access" is not a separate category of service under the Act. Third, we provide the reasons why calls to ISPs "terminate" locally as the Commission has defined that term in its regulations. Fourth, we explain why the Commission's historical treatment both of enhanced service providers as end users, and ISP-bound traffic as local necessitates subjecting such traffic to reciprocal compensation. Fifth, we explain that, if the Commission chooses to set a federal pricing rule, the rates for reciprocal compensation for ISP-bound traffic should be based on the ILECs' forward-looking costs.

As this proceeding is a remand from the D.C. Circuit's decision in Bell Atlantic v. FCC, at pertinent points throughout these comments we provide a summary of the key points of the D.C. Circuit's decision that bear on this proceeding. Further, because many of the arguments pertinent

to the Commission's determination in this proceeding were made to the D.C. Circuit in Bell Atlantic, these comments incorporate by reference the briefs filed by MCI WorldCom and supporting intervenors in that case.

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COMMENTS OF WORLDCOM, INC.

I. Whether ISP-Bound Traffic Is Subject to Reciprocal Compensation Under Section 251(b)(5) Does Not Depend on an Analysis of the Commission's Jurisdiction

The D.C. Circuit's decision to vacate and remand the Declaratory Ruling³ requires the Commission to analyze the question whether calls to ISPs are subject to reciprocal compensation under section 251(b)(5) by focusing on the text of the statute and the regulations the Commission adopted, not on largely outdated precedent concerning its jurisdiction over local and long-distance telephone service. As demonstrated below, the Commission's continued reliance on a jurisdictional analysis will result in the exact same fatal error that caused the D.C. Circuit to vacate the Declaratory Ruling for want of reasoned decision-making.

As the D.C. Circuit noted, in the Declaratory Ruling the Commission "brushed aside" the statutory language and its own regulations and instead employed an "end-to-end analysis that it has

³ Declaratory Ruling and Notice of Proposed Rulemaking, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, February 26, 1999 (Declaratory Ruling).

traditionally used for jurisdictional purposes. . ."⁴ The D.C. Circuit vacated this ruling for "want of reasoned decisionmaking."⁵ It held that the Commission failed to "provide an explanation why this [jurisdictional] inquiry is relevant to discerning whether a call to an ISP" is subject to reciprocal compensation under the Act.⁶ In fact, the D.C. Circuit concluded that using a jurisdictional analysis yields "intuitively backwards results."⁷ The D.C. Circuit recognized that the question presented to the Commission is one of statutory interpretation and application of its regulations, and that jurisdictional arguments "are not obviously transferable to this context."⁸ The D.C. Circuit further rejected the Commission's efforts to apply its "end-to-end" jurisdictional precedent to the reciprocal compensation context. Expressly addressing the pre-1996 Act precedents that the Commission relied upon for its end-to-end analysis in the Declaratory Ruling, the D.C. Circuit concluded that those decisions are "not on point."⁹

In light of the D.C. Circuit's decision, on remand the Commission cannot justify continued reliance on this jurisdictional end-to-end analysis. At the outset, Congress has addressed the issue of reciprocal compensation in the Act, and this Commission has addressed that issue in its regulations. The Commission must begin its analysis by examining the statute and its own regulations. The D.C. Circuit vacated the Declaratory Ruling precisely because the Commission

⁴ Bell Atlantic, 206 F.3d at 4 (internal quotation marks omitted).

⁵ Id. at 3.

⁶ Bell Atlantic, 206 F.3d at 5.

⁷ Id. at 6.

⁸ Id.

⁹ Id.

extended its end-to-end analysis to reciprocal compensation "without explaining why such an extension made sense in terms of the statute or the Commission's own regulations."¹⁰ The Commission in other contexts has also acknowledged that the 1996 Act requires it to "address the classification of Internet access service de novo, looking to the text of the 1996 Act."¹¹ As is demonstrated below, when the Commission does examine the statutory definitions of "exchange access" and "telephone exchange service" as well as its own prior regulatory definition of "local" and "termination," it is indisputable that reciprocal compensation is required for local calls to ISPs.

Moreover, the nature and extent of the Commission's jurisdiction over local and interexchange telecommunications traffic are irrelevant to the question of whether local calls to ISPs are subject to reciprocal compensation under the Act. The jurisdictional analysis that the Commission conducted in the Declaratory Ruling was grounded in the pre-Act regulatory regime under which local calls were subject to state regulation and interexchange calls to federal regulation. The 1996 Act completely revamped that scheme, rendering local and interexchange calls equally subject to federal authority. As the Commission stated in the Local Competition Order:

The Commission concludes that sections 251 and 252 address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled elements. The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues.¹²

¹⁰ Id. at 3.

¹¹ Report to Congress, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, April 10, 1998, (Universal Service Report), 13 F.C.C.R. at 11537 (¶ 75).

¹² In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (1996) (Local Competition Order), at 15513 (¶ 24).

The Supreme Court confirmed that the Commission has jurisdiction under §§ 251 and 252 to regulate local telecommunications that were historically regulated by the states.¹³ In Iowa Utilities Board, the states "insisted that primary authority to implement the local-competition provisions [of the Act] belonged to the States rather than to the FCC" and that therefore the FCC lacked jurisdiction to regulate local calls in many instances, most notably in setting rate methodologies for local services.¹⁴ The Supreme Court categorically rejected the argument:

We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the provisions of this Act, which include §§ 251 and 252, added by the Telecommunications Act of 1996.¹⁵

The Court emphasized that "§ 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."¹⁶ The Supreme Court expressly found that the "Commission has jurisdiction to design a pricing methodology" for matters addressed in § 251.¹⁷ The D.C. Circuit, in its review of the Declaratory Ruling, also agreed that the Commission "has jurisdiction to implement such provisions as § 251, even if they are within the traditional domain of the states."¹⁸

Because the Commission and Supreme Court have expressly held that the 1996 Act obliterated the previously rigid lines between interstate and intrastate jurisdiction, it is nonsensical for the Commission to conclude that whether the Act requires reciprocal compensation for calls to

¹³ AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

¹⁴ Iowa Utils. Bd., 525 U.S. at 374.

¹⁵ Id. at 378 (internal quotation marks omitted).

¹⁶ Id. at 380 (emphasis added).

¹⁷ Id. at 384.

¹⁸ Bell Atlantic, 206 F.3d at 6.

ISPs should turn on a now largely obsolete jurisdictional analysis. The Supreme Court has conclusively determined that, with the passage of the 1996 Act, the Commission's jurisdiction to regulate traffic under § 251(b)(5) was established by Congress and does not depend on whether traffic is local or interexchange. The Commission can classify intraexchange ISP-bound traffic¹⁹ as local and regulate it under § 251(b)(5).

In fact, the Commission has already determined that it may regulate local traffic under § 251(b)(5). In paragraphs 1033-34 of the Local Competition Order, the Commission addressed arguments that the use of the unmodified term "telecommunications" in § 251(b)(5) – rather than "local telecommunications" – meant that reciprocal compensation ought to apply to interexchange calls as well as local calls. The Commission rejected those arguments and concluded that reciprocal compensation should apply only to local calls because access charges exist to compensate carriers in the long-distance arena.²⁰ The Commission's conclusion in the Local Competition Order that reciprocal compensation applies only to local calls did not, however, lead the Commission to forego regulation of those calls. To the contrary, the Commission devoted significant portions of the same Local Competition Order to determining issues related to the scope of § 251(b)(5) and the mechanisms by which reciprocal compensation for the exchange of local traffic ought to be set.²¹ If the Commission lacked jurisdiction over local traffic, then those same provisions of the Local

¹⁹ By "ISP-bound traffic" and "calls to ISPs" we refer to traffic to an ISP where the originating and terminating local telephone number (NXX) are associated with the same local service area. The Commission has correctly left to state commissions the responsibility for defining local service areas, Local Competition Order, 11 F.C.C.R. at 16013-15 (¶¶ 1033-1038), and approving local interconnection terms between ILECs and CLECs.

²⁰ Bell Atlantic, 206 F.3d at 6.

²¹ See Local Competition Order, 11 F.C.C.R. at 16011, (¶ 1027).

Competition Order would be void.

The text of the 1996 Act and the Commission's interpretation of it in the Local Competition Order further establish that whether reciprocal compensation applies to any given call cannot turn on the largely metaphysical question of jurisdiction. Rather, it is a question of compensation for services that one carrier performs for another. Section 251(b)(5) requires reciprocal compensation for the "transport and termination" of telecommunications. "Transport and termination" are not jurisdictional concepts. Rather, they are services – or components of services – for which compensation is due. After all, § 251(b)(5) is a compensation provision. The Commission recognized this fact in the Local Competition Order, where it acknowledged "that transport and termination of local traffic are . . . services" ²² Indeed, the concept of "termination" is linked to the termination of telecommunications services elsewhere in the 1996 Act. ²³ Moreover, as both the D.C. Circuit and Fifth Circuit have recognized, in the Local Competition Order the Commission promulgated a definition of termination under which calls to ISPs terminate at the ISP. ²⁴ The Commission must apply that definition, not ignore it.

In sum, the Commission must determine whether reciprocal compensation is due under § 251(b)(5) by examining the text of the Act and the Commission's regulations, not by application of an obsolete jurisdictional analysis. The Commission plainly has jurisdiction to regulate local calls

²² Local Competition Order, 11 F.C.C.R. at 16012-13 (¶ 1033) (emphasis added).

²³ See, e.g., 47 U.S.C. § 153(16) (defining "exchange access" in the context of "the origination or termination of telephone toll services") (emphasis added); *id.* § 153(47)(B) (defining comparable "telephone exchange service" in the context of allowing a subscriber to "originate and terminate a telecommunications service") (emphasis added).

²⁴ Bell Atlantic, 206 F.3d at 6; Southwestern Bell Tel. Co. v. Public Utils. Comm'n, 208 F.3d 475, 486 (5th Cir. 2000); see 47 C.F.R. § 51.701(d).

to ISPs – including setting a pricing methodology – regardless of whether it labels the call local or interstate.

II. Under The Terms Of The 1996 Act, Reciprocal Compensation Obligations Apply To Local ISP-Bound Traffic Because That Traffic Constitutes “Telephone Exchange Service” That Terminates Locally

As the Commission has recognized, under the 1996 Act, ISP-bound traffic must be either telephone exchange service or exchange access. Section 251(c)(2)²⁵ compels this result, because any other conclusion would impermissibly and completely frustrate the 1996 Act's central market-opening pricing requirements. The Commission agreed in the Advanced Services Order²⁶ that ISP-bound traffic must be either exchange access or telephone exchange service. The Commission similarly argued to this effect in its brief and at oral argument in Bell Atlantic.²⁷ The Commission also reiterated this conclusion in the Advanced Services Order on Remand.²⁸ As demonstrated below, ISP-bound traffic cannot be exchange access under the Act. Rather, as it must, ISP-bound traffic squarely falls within the statutory definitions of telephone exchange service.

A. Exchange Access: ISP-Bound Traffic Is Not Exchange Access As Defined In The 1996 Act Because ISPs Do Not Connect To The Local Network For The Purpose Of The Origination Or Termination Of Telephone Toll Service

Dial-up calls to ISPs are not exchange access under the terms of the 1996 Act. As defined in the 1996 Act, "exchange access" requires that the access be "for the purpose of the origination and

²⁵ 47 U.S.C. § 251(c)(2).

²⁶ In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24011, 24032 (¶ 40) (1998) (Advanced Services Order).

²⁷ Bell Atlantic, 206 F.3d at 8.

²⁸ In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services, 15 F.C.C.R. 385, CC Docket Nos. 98-147 et al., FCC 99-413 (Dec. 23, 1999) (Advanced Services Order on Remand).

termination of telephone toll services."²⁹ The meaning of the words "for the purpose" are plain and indisputable. Webster's Dictionary defines purpose as "something that one sets before himself as an object to be attained: an end or aim to be kept in view in any plan, measure, exertion, or operation."³⁰ Similarly, Black's Law Dictionary defines "purpose" as "[a]n objective, goal or end."³¹

ISP-bound traffic cannot fall within the 1996 Act's definition of exchange access because local calls to ISPs do not connect to the local network "for the purpose" of the origination or termination of telephone toll services. Rather, ISPs provide "information services," which this Commission has held are "mutually exclusive," under the 1996 Act's definitions, from telecommunications service. The mutual exclusivity of these services forecloses any determination that ISP-bound traffic is exchange access as defined in the Act.

In Bell Atlantic, the D.C. Circuit recognized that the statutory classification and the nature of the services ISPs provide precludes a conclusion that they connect to the local network "for the purpose" of the origination or termination of telephone toll services. Acknowledging WorldCom's arguments, the D.C. Circuit stated:

As MCI WorldCom argued, ISPs provide information service rather than telecommunications; as such, "ISPs connect to the local network 'for the purpose of providing information services, not originating or terminating telephone toll services.'" Petitioner MCI WorldCom Reply Br. at 6.³²

²⁹ 47 U.S.C. § 153(16).

³⁰ Webster's Third New International Dictionary of the English Language, Unabridged, at 1847 (Mirriam-Webster 1993).

³¹ Black's Law Dictionary, at 1250 (7th ed. 1999); accord United States Dep't of Treasury v. Fabe, 508 U.S. 491, 505 (1993) ("The broad category of laws enacted 'for the purpose' of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance") (quoting Black's Law Dictionary 1236, 1286 (6th ed. 1990)).

³² Bell Atlantic, 206 F.3d at 9.

On remand, the Commission must come to terms with the D.C. Circuit's conclusions, which are strongly supported by the 1996 Act's distinction between telecommunications and information services, by Commission precedent, and by recent decisions of other federal Circuit Courts.

For example, as the Commission found in the Universal Service Report, ISPs "generally do not provide telecommunications," instead, they are end users and providers of information services.³³ The only telecommunications service provided to the caller terminates at the ISP. The Commission's determination in the Universal Service Report that ISPs do not provide telecommunications was mandated by the Act's express distinction between telecommunications and information services. The Commission applied these definitions to Internet services in the Universal Service Report and concluded that the services that ISPs provide are information services, not telecommunications services.³⁴

Similarly, as the D.C. Circuit noted in Bell Atlantic, the Commission based its decision to continue to exempt ISPs from access charges in the Access Charge Reform Order, and defended that decision in the Eighth Circuit, by emphasizing the "real differences" between long-distance calls and calls to ISPs.³⁵ The Commission cannot contradict these well-established decisions at this juncture and claim suddenly on remand that ISPs connect to the network for the purpose of providing long-distance telephone toll services.

In addition to the D.C. Circuit in Bell Atlantic, other federal courts to consider the question have agreed unanimously that the information services ISPs provide are distinct from the services

³³ See, e.g., Universal Service Report, 13 F.C.C.R. at 11508, 11528-29 (¶¶ 15, 55).

³⁴ See, e.g., id. at 11536-40 (¶¶ 73-80).

³⁵ See Bell Atlantic, 206 F.3d at 8; In re Access Charge Reform, 12 F.C.C.R. 15982, 16132, 16133 (¶342 n.502, 345) (1997) (Access Charge Reform Order).

used to connect to the ISP. The Ninth Circuit recognized that the 1996 Act and the Commission's interpretations under it differentiate between the services used to connect to ISPs and the information services the ISPs provide.³⁶ Likewise, the Eleventh Circuit relied upon the distinctions between the services used to connect to an ISP and the information services ISPs provide to conclude that "Internet services" provided by ISPs are not telecommunications services.³⁷

To be sure, ISPs may use telephone toll services in connection with their provision of information services, but that is not the only telecommunications input that they may use. Rather, as the Commission has held, ISPs "typically utilize a wide range of telecommunications inputs" to provide information services.³⁸ As the D.C. Circuit explained in Bell Atlantic, ISPs are like many other businesses that "use a variety of communication services to provide their goods or services to their customers."³⁹ It would be contrary to longstanding FCC precedent to, for the first time, cease treating ISPs as end users,⁴⁰ and begin treating them as interexchange carriers.⁴¹

³⁶ AT&T Corp. v. City of Portland, ___ F.3d ___, 2000 WL 796708, *6 (9th Cir. June 22, 2000).

³⁷ Gulf Power Co. v. FCC, 208 F.3d 1263, 1276-78 (11th Cir. 2000); see also Southwestern Bell Tel. Co. v. Pub. Utils. Comm'n, No. MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938, at *30-46 (W.D. Tex. June 16, 1998) (discussing separate nature of information services provided by ISPs and requiring reciprocal compensation for ISP-bound traffic under interconnection agreements), aff'd, 208 F.3d 475 (5th Cir. 2000).

³⁸ Universal Service Report, 13 F.C.C.R. at 11523 (¶ 66).

³⁹ Bell Atlantic, 206 F.3d at 7 (quoting WorldCom comments).

⁴⁰ 47 U.S.C. § 64.702(a).

⁴¹ See id.; see also In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, May 9, 1989, at ¶¶ 29 -41 (exempting ESPs from access charges and including ESPs in the definition of "end user" of telecommunications service).

Additionally, calls to ISPs cannot be exchange access as defined in the statute because calls to ISPs do not involve the "separate charge" that is required in the definition of telephone toll service.⁴² When a long-distance company obtains exchange access "for the purpose of the origination or termination of telephone toll services," the subscriber receives a separate charge from that company for the telephone toll services.⁴³ A subscriber does not receive a separate charge for telephone toll services when an ISP connects to provide information services.

Thus, in effect, the "two-services" theory that the Commission utilized in the Universal Service Report is correct. The "two *call*" theory, as it has commonly been labeled, is a misnomer. The point is that there are two separate and distinct services - a telecommunications service provided to the calling party and an information service provided by the called party - that are provided by different entities with different business and subject to different regulatory treatment. This clear distinction removes calls to ISPs from within the parameters of exchange access service. Past rulings of the Commission to the contrary have not withstood judicial scrutiny, and those that remain will likely fail as well.

In particular, the Commission should not look to the Advanced Services Order on Remand as support for the conclusion that ISP-bound traffic constitutes exchange access. That Order is under appeal in the D.C. Circuit and is heavily suspect in its conclusion that ISP-bound traffic does not constitute telephone exchange service. The Advanced Services Order on Remand relies extensively on the now-vacated Declaratory Ruling and ignores the statutory requirement that exchange access requires that the connection to the local network be provided "*for the purpose* of the origination or

⁴² See 47 U.S.C. § 153(48).

⁴³ See id.

termination of telephone toll services.”⁴⁴ Moreover, the Advanced Services Order on Remand purports to overturn pertinent provisions of the Commission's Non-Accounting Safeguards Order, but cites a quote that does not exist in that document, and does not address the Commission's determination in the Non-Accounting Safeguards that ISPs do not provide telephone toll services.⁴⁵

Accordingly, the Commission should separately consider asking a voluntary remand of the Advanced Services Order on Remand decision as well.

In sum, no credible reading of the statute can support the conclusion that ISPs connect to the local network "for the purpose" of the origination or termination of telephone toll services. Accordingly, ISP-bound traffic cannot constitute exchange access under the Act.

B. Telephone Exchange Service: Calls To ISP Constitute Telephone Exchange Service Under The 1996 Act

Because ISP-bound traffic is not exchange access, it must be telephone exchange service, as the Commission has previously acknowledged. And in fact, dial-up calls to ISPs readily satisfy the definition of telephone exchange service under the 1996 Act.⁴⁶

First, these calls meet the traditional definition set forth in § 153(47)(A), which requires that the service occurs within a local exchange or a system of exchanges and the service is covered by the exchange service charge.⁴⁷ Calls to ISPs satisfy both of these requirements. Originating carriers charge their own customers for initiating calls to ISPs. The carrier that delivers the call to an ISP is performing a service for the initiating carrier's customer, and therefore should be compensated.

⁴⁴ Advanced Services Order on Remand, 15 F.C.C.R. at 404-05 (¶¶ 42-3).

⁴⁵ Advanced Services Order on Remand, 15 F.C.C.R. at 404-05 (¶¶ 42-3).

⁴⁶ 47 U.S.C. § 153(47).

⁴⁷ Id.

These costs are not recovered from the ISP itself – just as they are not recovered by the terminating carrier from the receiving party any time two LECs exchange local traffic. So long as the originating customer pays for the call, reciprocal compensation will be due. If a customer did not pay for local phone calls on his local phone bill, he could not call his ISP.

Further, even if calls to ISPs somehow are not traditional telephone exchange services under 47 U.S.C. § 153(47)(A), they certainly qualify as a "comparable" service under the new definition in § 153(47)(B).⁴⁸ Given that the Commission has recognized ISPs as end-users of telecommunications services,⁴⁹ and that § 251(b)(5) requires that all LECs pay reciprocal compensation for "the transport and termination of telecommunications"⁵⁰ it is consistent with § 153(47)(B) that calls to ISPs fall within the statutory definition of telephone exchange service.

State public utility commissions have also been quite clear in supporting the conclusion that calls to ISPs are telephone exchange service.⁵¹ As the Texas PUC noted:

The [PUC] has previously concluded that ISP-bound traffic is local in nature and reaffirms that such traffic is eligible for reciprocal compensation in this proceeding. Its prior rulings remain viable from technological, policy, and legal standpoints, and they are now

⁴⁸ 47 U.S.C. § 153(47)(B) states that telephone exchange services are also "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."

⁴⁹ 47 C.F.R. 64.702(a).

⁵⁰ 47 U.S.C. § 251(b)(5).

⁵¹ As the Commission noted in the Declaratory Ruling, in the absence of a definitive statement from the Commission, "state commissions will continue to determine whether reciprocal compensation is due for this traffic." Declaratory Ruling, at ¶ 28. States have acted during the Commission's silence, and have decided generally that reciprocal compensation is appropriate for calls to ISPs. Contradictory action by the Commission at this point would undermine the established practice in the majority of states that recognize reciprocal compensation for these calls.

supported by the federal appellate court decisions in Southwestern Bell Telephone Co. v. Public Utility Commission of Texas and Bell Atlantic v. FCC. Moreover, designating ISP-bound traffic as local traffic is not inconsistent with any action taken by the FCC on the matter. Even if the designation of ISP-bound traffic as local is subject to future challenge at the FCC and/or in the courts, the Commission finds independently that it is reasonable to compensate such traffic as local traffic. Finally, the Commission concludes that there are no compelling policy reasons for establishing a reciprocal compensation mechanisms that would require the separation and/or measurement of ISP-bound traffic.⁵²

Given the breadth of support for this conclusion in the states, the Commission should also should recognize that calls to ISPs are telephone exchange service, and preserve the ability of states and private parties to oversee the details regarding payment for termination of calls made to ISPs.⁵³

C. Information Access Is Not A Separate Category Of Service Under The Act

The Commission has also requested comment on whether calls to ISPs should be deemed "information access." WorldCom asserts that there is no basis for labeling calls to ISPs as "information access." The term appears to be a holdover from the Modification of Final Judgment

⁵² Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996, Arbitration Award issued July 13, 2000, Docket No. 21982, at 16-17.

⁵³ See, e.g., Proceeding on Motion of the Commission to Examine Reciprocal Compensation, New York Public Service Commission Opinion and Order 99-10, Case No. 99-C-0529, issued August 26, 1999, at 58 (NY PSC Order). As to the question of the compensation for ISP traffic, the New York P.S.C. rejected the ILECs' requests to distinguish ISP traffic from other "convergent traffic." NY PSC Order, at 61. The decision goes on to conclude that "Bell Atlantic-New York has shown no reason to treat ISP traffic differently from other convergent traffic.... To deny all compensation for ISP termination would be to unfairly ignore the indisputable fact that CLECs completing these calls incur costs in doing so. . . ." Id. The PSC also refused "to abandon TELRIC costing in this context. . .," and rejected BA's proposal to establish "special reciprocal compensation rates ... for Internet-bound traffic. . . ." Id., at 62.

(the MFJ) that broke up the Bell System.⁵⁴ The Commission already has held that information access is not a separate category of service at all, but rather a “specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services.”⁵⁵

WorldCom previously has explained that the "information access" classification in the MFJ clearly identifies "information access" as an "exchange telecommunications service."⁵⁶ This means that information access is (1) a type of telecommunications service, and (2) a "specialized" type of exchange service.⁵⁷ The term covers "specialized exchange services," such as "the provision of network control signaling, answer supervision, automatic calling number identification, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers."⁵⁸ In other words, "information access" is a local telecommunications service, and likely a sub-category of “telephone exchange service.” Any conclusion that information access is a form of exchange access, or a whole new category of service, is entirely without support. Accordingly, based upon statutory limitations and lack of contrary support, calls to ISPs cannot be deemed “information access.”

⁵⁴ See United States v. AT&T Co., 552 F. Supp. 131, 229 (D.D.C. 1982).

⁵⁵ Advanced Services Order on Remand, 15 F.C.C.R. at 385 (¶¶ 46-49) citing MFJ, Section IV(I).

⁵⁶ See Reply Comments of MCI WorldCom at 15, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147, dated Oct. 1, 1999.

⁵⁷ Advanced Services Order on Remand, 15 F.C.C.R. at 385 (¶ 47 n.99).

⁵⁸ Id.

III. ISP-Bound Traffic Is Subject To Reciprocal Compensation Under The 1996 Act For The Additional Reason That It “Terminates” Locally Under The Act's Terms And The Commission's Definition Of Termination

Reciprocal compensation applies to ISP-bound traffic for the additional reason that ISP-bound traffic "terminates" at the ISP under the Commission's own regulations interpreting § 251(b)(5), as federal courts reviewing that definition have agreed. Further, federal courts have recognized the statutory and regulatory distinction between the telecommunications used to connect subscribers to ISPs and the information services the ISPs provide. This important distinction leads inexorably to the conclusion that ISP-bound traffic is subject to reciprocal compensation. Not surprisingly, an overwhelming number of state public utility commissions considering the meaning of the word "termination" have concluded that ISP-bound traffic terminates locally under these authorities and well-established industry usage and custom. Consideration of the technical nature of a dial-up connection to an ISP further illustrates why this traffic terminates at the ISP.

A. ISP-Bound Traffic Terminates Locally Under the Act's Terms And The Commission's Regulations

The Commission's regulations promulgated with the Local Competition Order include a definition of "termination" for reciprocal compensation purposes. Under the Commission's regulations, reciprocal compensation is to be paid for "local telecommunications traffic."⁵⁹ Local telecommunications traffic is traffic "that originates and terminates within a local service area."⁶⁰ The regulations define "termination" for reciprocal compensation purposes as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and

⁵⁹ 47 C.F.R. § 51.701(a).

⁶⁰ Id.; see also 47 C.F.R. § 51.701(b)(1).