

delivery of such traffic to the called party's premises.”⁶¹ While the Commission inexplicably ignored this definition in the Declaratory Ruling, the federal courts that have considered the question unanimously have agreed that calls to ISPs appear to terminate locally under this definition.

In particular, the D.C. Circuit in Bell Atlantic determined that the Commission's regulatory definition of termination supports the conclusion that local ISP-bound traffic is subject to reciprocal compensation. The D.C. Circuit stated that local calls to ISPs most readily meet the Commission's regulatory definition of “termination” for reciprocal compensation purposes: “Calls to ISPs appear to fit this definition [of termination]: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party'.”⁶² Naturally, the Commission must heed the D.C. Circuit's conclusion on remand.

The D.C. Circuit is not alone in its conclusion. The Fifth Circuit also found that calls to ISPs terminate at the ISP under the Commission's own regulations.⁶³ The Fifth Circuit explained that, under the Commission's 1996 definition, “‘termination’ occurs when [the ISP's carrier] switches the call at its facility and delivers the call to ‘the called party's premises,’ which is the ISP's local facility. Under this usage, the call indeed ‘terminates’ at the ISP's premises.”⁶⁴ Two federal district courts have likewise concluded that ISP-bound traffic terminates locally under this definition.⁶⁵

⁶¹ Id.; 47 C.F.R. § 51.701(d); see also Local Competition Order, 11 F.C.C.R. at 16015-16 (¶ 1040).

⁶² Bell Atlantic, 206 F.3d at 6 (emphasis added).

⁶³ Southwestern Bell Tel. Co. v. Pub. Utils. Comm'n, 208 F.3d 475, 483 (5th Cir. 2000).

⁶⁴ Id., (emphasis added), citing Local Competition Order, 11 F.C.C.R. at 16022 (¶ 1040).

⁶⁵ See BellSouth Telecommunications v. MCImetro Access Transmission Servs., 97 F. Supp. 2d 1363, 2000 WL 656527, at *14 (N.D. Ga. May 4, 2000) (affirming state commission decision that
(continued...)

In addition, the D.C. Circuit's decision and those of other federal courts further indicate that ISP-bound traffic must terminate at the ISP due to the statutory and regulatory distinction between telecommunications and information services. ISPs provide information services, not telecommunications services.⁶⁶ An "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications[.]"⁶⁷ As the Commission has recognized, telecommunications and information services are mutually exclusive categories of service under the 1996 Act.⁶⁸

In Bell Atlantic, the D.C. Circuit recognized the importance of this distinction and relied upon it to support its conclusion that calls to ISPs appear to terminate at the ISPs. The D.C. Circuit held:

ISPs . . . are "information service providers," . . . which upon receiving a call originate further communications to deliver and retrieve information to and from distant websites. . . . Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long-distance carriers).⁶⁹

Acknowledging WorldCom's comments, the D.C. Circuit further recognized that "[i]n this regard, an ISP appears . . . no different from many businesses, such as 'pizza delivery firms, travel

⁶⁵(...continued)

calls terminate at ISPs under industry usage); Illinois Bell Tel. Co. v. WorldCom Technologies, No. 98 C 1925, 1998 WL 419493, at *14 (N.D. Ill. July 21, 1998) (finding state commission conclusion that calls to ISPs terminate at the ISP not inconsistent with federal law), aff'd 179 F.3d 566 (7th Cir. 1999).

⁶⁶ See, e.g., Bell Atlantic, 206 F.3d at 6-7.

⁶⁷ 47 U.S.C. § 153(20).

⁶⁸ See, e.g., Universal Service Report, at 59, 81, 129 & nn.299, 304.

⁶⁹ Bell Atlantic, 206 F.3d at 6-7 (emphasis added).

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.'⁷⁰

In similar contexts, two other federal Circuit Courts have relied heavily on the distinction between telecommunications and information services in determining obligations under the 1996 Act. The Ninth Circuit recognized that the Act and the Commission's interpretations under it differentiate the telecommunications services used to connect to ISPs and the information services the ISPs provide.⁷¹ The Ninth Circuit stated:

Under the [Act], Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscribers access to the Internet at a 'point of presence' assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic 'telecommunications,' which the Communications Act defines as 'the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'⁷²

The Ninth Circuit then continued:

By contrast, the FCC considers the ISP itself as providing 'information services' under the Act As the definition [of information services] suggests, ISPs are themselves users of telecommunications when they lease lines to transport data on their own networks and beyond on the Internet backbone. However, in relation to their subscribers, who are the 'public' in terms of the statutory definition of telecommunications service, they provide 'information services,' and therefore are not subject to regulation as telecommunications carriers.⁷³

⁷⁰ Id. at 7, quoting Comments of MCI WorldCom, Inc., In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, April 12, 1999 (MCI WorldCom ISP Comments).

⁷¹ City of Portland, 2000 WL 796708 at *6.

⁷² City of Portland, 2000 WL 796708 at *6.

⁷³ Id.

Similarly, 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.⁷⁴ The Eleventh Circuit held that the obligations of the Pole Attachments Act in 47 U.S.C. § 224(d)(3) does not grant the Commission authority to regulate Pole Attachments to be used for the provision of Internet services because those services are distinct from telecommunications and cable services the Commission can regulate.⁷⁵ As the Eleventh Circuit explained, the Pole Attachments Act applies only to "charges for pole attachments used by telecommunications carriers to provide telecommunications services."⁷⁶ After reviewing the relevant statutory definitions and this Commission's determinations in the Universal Service Report, the Eleventh Circuit held that "the information services provided by ISPs, which it referred to as 'Internet service' do not meet the definition of either a cable service or a telecommunications service."⁷⁷ The Eleventh Circuit therefore concluded that the Commission lacked jurisdiction under § 224(d)(3) to regulate Pole Attachments used for Internet services.⁷⁸

In light of the strong support for the conclusion that ISP-bound traffic terminates at the ISP, numerous state commissions have expressly recognized that, under firmly rooted industry custom, usage, and practice, ISP-bound traffic is local traffic that terminates at the ISP. That 32 state

⁷⁴ Gulf Power Co. v. FCC, 208 F.3d 1263, 1276-78 (11th Cir. 2000).

⁷⁵ Id.

⁷⁶ Id. at 1276 (emphasis added).

⁷⁷ Gulf Power Co. v. FCC, 208 F.3d at 1278.

⁷⁸ Id.

commissions have found that calls to ISPs are subject to reciprocal compensation ⁷⁹ is further compelling evidence that under the telecommunications industry's custom, usage, and practice, calls to ISPs terminate locally.⁸⁰

B. The Technical Nature of Calls To ISPs Supports Imposing Reciprocal Compensation

In addition to the abundance of legal precedent supporting the view that calls to ISPs

⁷⁹ See, e.g., Southwestern Bell, 208 F.3d at 487 (noting that five state commission decisions demonstrate that under industry practice, calls to ISPs terminate locally); see also In re Complaint of MFS Intelenet, Order No. 75280 at 13 ("recognizing the prevailing local treatment of ISP traffic at the time the agreement was executed, we conclude that the regulatory and industry custom at that time dictated that ISP traffic be treated as local, and therefore, subject to reciprocal compensation"); Petition for Declaratory Order of TCG Delaware Valley, P-00971256, Opinion & Order, at 23-24 (Pa. Pub. Util. Comm'n June 16, 1998) (construing "the industry understanding and practice involving reciprocal compensation for calls to ISPs as "compelling" evidence that "Local Traffic, eligible for reciprocal compensation, included traffic from [incumbent's] end-user customers to ISPs"); In re ICG's and ITC's Emergency Petitions, Docket 26619, Order at 24 (Ala. Pub. Serv. Comm'n, March 4, 1999) ("we note that at the time the interconnection agreements in question were entered, ISP traffic was treated as local in virtually every respect by all industry participants including the F.C.C."); In re Application of the NPSC, C-1960/PI-25, Findings & Conclusions at 6 (Neb. Pub. Serv. Comm'n Dec. 7, 1999) ("At the time the agreements were entered into, ISP traffic was treated as local in virtually every respect by the industry and the FCC"); In re Complaint against US West by Nextlink, Docket No. 99-049-44, Order at 3 (Utah Pub. Serv. Comm'n Oct. 28, 1999) ("At the time the Initial Interconnection Agreement was entered into by the parties, the treatment of ISP bound traffic as local traffic was well established"); In re Petition of Electric Lightwave, No. T-01051B-98-0689, Order at 5 (Ariz. Corp. Comm'n Nov. 2, 1999) ("it was typical in the industry at the time to consider ISP-bound traffic as terminating with the ESP"); In re Pacific Bell's Petition for Arbitration, No. 98-11-024, Order at 7 (Cal. Pub. Util. Comm'n June 29, 1999) ("Pacific [Bell] proposes a definition of local calls [to exclude calls to ISPs] that is inconsistent with Commission and industry practice").

⁸⁰ As Lawrence Strickling pointed out during his testimony before the House Telecommunications Subcommittee during a recent hearing on HR 4445 and Reciprocal Compensation, "state commission have continued to address this issue. Many states have required local exchange carriers to pay reciprocal compensation for these calls, and none of these decisions has been overturned in court." Written Testimony of Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, before the House Subcommittee on Telecommunications, Hearing on HR 4445 and Reciprocal Compensation, June 22, 2000, at 4 (Strickling Testimony).

terminate at the ISPs. a technical examination of the way an ILEC customer might make a dial-up call to connect to the Internet may also be illustrative. In a typical situation the customer would click on a dial-up icon on their computer. Through the computer's modem, the computer would dial the ISP's access number. The computer would then send information to the ILEC local switch serving the customer, indicating to the switch that the customer has gone "off-hook" or that the phone is in use.⁸¹ As a result of the "off-hook" signal, the ILEC local switch will provide a dial tone, signaling that the customer can now dial the telephone number of the ISP. Shortly after going off hook, the computer will send the multi-frequency tones corresponding to the ISP's telephone number, in the same fashion as a touch tone phone would.⁸²

In order to properly route the call, the ILEC switch analyzes the dialed number to determine whether the call is local, intraLATA toll, or interLATA.⁸³ In the event that the dialed number is a CLEC number within the local calling area of the ILEC customer, the call is routed to a local interconnection trunk between the ILEC and the CLEC. The CLEC's local switch attempts to complete the call and signals the customer by providing ringer current or its equivalent.⁸⁴ When the CLEC end user customer goes "off hook," the CLEC local switch senses that the call has been

⁸¹ MCI WorldCom Communications, Inc., et al., v. Southwestern Bell Telephone Company, Surrebuttal Testimony of Don Price on behalf of MCI WorldCom, Inc. and Brooks Fiber Communications of Missouri, Inc., Missouri Public Service Commission Case No. TC-2000-225, et al., June 28, 2000, at 8 (Price Surrebuttal) to be filed in August, 2000.

⁸² Price Surrebuttal, at 8.

⁸³ Id.

⁸⁴ Id. at 9.

answered and completes the call.⁸⁵ The functions performed by the CLEC, as described above, are referred to as call termination.

Interconnection can be accomplished using Common Channel Control Signaling System 7 (SS7 signaling). SS7 signaling allows carriers' networks to communicate with each other so that calls can be set up and taken down across the networks.⁸⁶ SS7 signaling is the means by which the carriers' networks "interoperate," based on industry-standards. These standards establish requirements for signaling messages between networks to ensure the smooth flow of telecommunications between the networks as within a given carrier's network.

Referring back to the earlier example of an ILEC customer call to an ISP, when the ILEC's local switch serving the customer recognizes that the called number is associated with a specific CLEC, the ILEC switch sends that CLEC a SS7 message requesting an open local interconnection trunk for transmission and alerting the CLEC of the called party's number.⁸⁷ The CLEC would then respond with SS7 messages that there is an available local interconnection trunk path between the carriers' local switches and that the called party's line is not busy. In response, the ILECs local switch routes the call to the available interconnection trunk path for completion by the CLEC.⁸⁸ The CLEC, in turn completes the call to its end user customer and provides the ILEC an SS7 message notifying the ILEC that the call was answered.

The steps described above occur almost instantaneously and are utilized in setting-up and

⁸⁵ Id.

⁸⁶ Id. at 10.

⁸⁷ Price Surrebuttal, at 10.

⁸⁸ Id.

completing a call.⁸⁹ As illustrated by the example, when the ILEC's end user "attempts to establish communications" with the CLEC end user customer - the ISP - the CLEC switch delivers the call to an end user and sends the ILEC an SS7 message advising that the call has been completed. By the Commission's own definition, "We define termination for the purposes of section 251(b)(5) as the switching of traffic that is subject to section 251(b)(5) [i.e., local calls] at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises."⁹⁰ The functions the CLEC performs falls within the meaning of termination.

At least one ILEC has argued that calls from its end users to ISP end users served by CLECs actually terminate "somewhere on the Internet."⁹¹ However, an examination of this argument reveals its flaws. If in fact calls from ILEC's end users to ISP end users served by CLECs terminated somewhere on the Internet, then the ILEC's switches would receive notice of call completion from some entity other than the CLEC – presumably from an ISP.⁹² However, it is the CLEC that provides the ILEC with the information that the call has been completed.

In addition, if calls to ISPs do not terminate within the local calling area, it would follow that each time the ILEC's customer visits a different website to browse, the unknown entity providing the ILEC the "mythical terminating function" would have to notify the ILEC that the call was

⁸⁹ Moreover, the steps described above to complete a local call are the same whether the call is made to an ISP or any other type of end-user customer of the CLEC.

⁹⁰ Brief of Petitioner MCI WorldCom, Inc. and Supporting Intervenors, Bell Atlantic, 206 F.3d at 36-37, citing, Local Competition Order, 11 F.C.C.R. at 16015 (para. 1040) (emphasis added); 47 C.F.R. section 51.701(d).

⁹¹ Price Surrebuttal, at 11.

⁹² Id. at 11-12.

delivered to another end user.⁹³ Thus, it would follow that the terminating point in the call would be every content provider that the customer visits while surfing the Internet. In reality, it is the CLEC that provides the ILEC notice of call completion when the call is delivered to its end user, which is the ISP.

Statutory and regulatory requirements aside, it is technologically unsupportable for the Commission to assert that a call to an ISP terminates at some point beyond the ISP. Moreover, only a short proportion of the duration of a call to an ISP actually involves a connection to the Internet. For the majority of the duration of the call, the caller is accessing data only at the point of the local ISP.⁹⁴ In any event, the practical application of the definition of telephone exchange service applies far more logically to the call outlined above than the definition of exchange access service. Thus, for this reason as well, the Commission must conclude that local calls to ISPs that terminate within the local calling area constitute telephone exchange service.

IV. Commission Precedent Also Powerfully Supports Subjecting ISP-Bound Traffic To Reciprocal Compensation

For all the reasons set forth above, the Commission must first and foremost analyze ISP-bound calls within the framework of the statutory provisions of the 1996 Act. As the D.C. Circuit held, analysis based solely on Commission precedent addressing its jurisdiction over related

⁹³ Id. at 12.

⁹⁴ The Hyperion Study submitted in the GTE DSL Tariff proceeding is responsive to this point. The Study concluded that “the 10 percent threshold for Commission jurisdiction over mixed-use special access lines is not satisfied. The results of the study indicate that the ratio of interstate holding time to total holding time for electronic mail is 4.5 percent. . . . for Web browsing is 9.69 percent. . . .[and the] weighted total ratio of interstate holding time to total holding time for both electronic mail and Web browsing is 6.57 percent.” Reply Comments of Hyperion Telecommunications, Inc. on Petitions for Reconsideration, In the Matter of GTE Telephone Operating Companies, GTOC Tariff FCC No. 1, GTOC Trans. No. 1148, CC Docket No. 98-79, January 19, 1999, at 6-7.

communications services is no substitute for the required statutory analysis. At the same time, recourse to the FCC's precedents powerfully supports the conclusions mandated by the statute itself: ISPs are end users of telecommunications services, and are not subject to the access charge regime that applies to long-distance carriers. Further, a dial-up call to that end user (when it is located within the same telephone exchange as the caller) is a telephone exchange call, as that term is defined in the Act and as it has been understood in long-standing Commission precedent.⁹⁵

A brief history of the regulatory treatment of calls to ISPs from the early 1980s to date reveals the consistent and coherent regulatory regime that existed prior to the Ruling. That regulatory framework ensured that every party involved in making, receiving, and carrying an ISP-bound call handled, accounted for, and paid for the call as if it were a local call made to an end user who is not itself a telecommunications carrier.

The first relevant occasion on which the Commission had to address this traffic occurred in the "Computer II" proceedings in 1980.⁹⁶ In that proceeding, the Commission addressed the appropriate regulatory classification of "enhanced service providers," a term that did not appear in the Communications Act but which the Commission developed under its regulatory regime.⁹⁷ In

⁹⁵ In its brief to the D.C. Circuit, Commission's counsel provided an idiosyncratic interpretation of these Commission precedents which the Court found to be "confus[ed]," "not very compelling," and "an embarrassment." Bell Atlantic, 206 F.3d at 7.

⁹⁶ In re Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384, 430 (¶ 119) (1980), aff'd, sub nom. Computer & Communications Indus. Ass'n v. FCC, 693 F.2d 198, 205, 220 (D.C. Cir. 1982).

⁹⁷ ISPs would have been classified as "enhanced service providers" under the Commission's pre-Act regulatory definitions. The Act codified the similar concept of "information service providers." The Commission has determined that all enhanced service providers are information service providers. Non-Accounting Safeguards, 11 F.C.C.R. at 21955-56 (¶ 102); Advanced Services Order, 13 F.C.C.R. at 24029-30 (¶ 35 & n.56).

Computer II, the Commission determined that enhanced service providers are not subject to the Commission's regulatory jurisdiction under Title II.⁹⁸ Instead, the Commission classified enhanced services providers as end users, which "means any customer[s] of any interstate or foreign telecommunications service that [are] not . . . carrier[s]."⁹⁹ The Commission's regulatory classification of enhanced services providers as end users not subject to Title II regulation remains in effect today. Thus ISPs, as "end users" or customers of telecommunications services, receive local calls like any other end user.¹⁰⁰

Next, in the 1983 MTS & WATS Order, the Commission addressed how local carriers would be compensated for originating and terminating long-distance calls. It adopted the access charge regime under which long-distance carriers have paid local carriers access charges for originating or

⁹⁸ See 47 C.F.R. § 64.702(a).

⁹⁹ 47 C.F.R. § 69.2(m).

¹⁰⁰ In invoking the "end to end" jurisdictional analysis, the Commission renders ISPs as de facto common carriers. See Declaratory Ruling, at ¶ 12, n.36. However, this directly contradicts both precedent and existing regulations of the FCC, and requires that the Commission state affirmatively that ISPs are not regulated common carriers. ISPs have never been treated in this manner, and the FCC should not contradict regulatory precedent in order to create an exception to an exception. ISPs provide enhanced services, which the Commission has defined as those "which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." While enhanced services may be "offered over common carrier transmission facilities used in interstate commerce," it is without question that "enhanced services are not regulated under Title II of the Act" and thus, any attempt to sweep them outside the ambit of the reciprocal compensation framework must fail. Accordingly, the Commission should refrain from contradicting past precedent that places ISPs outside the scope of common carrier regulation, and recognize that CLECs are entitled to reciprocal compensation for calls to ISPs.

terminating a long-distance call. But when a customer made a local call, a single local carrier delivered the call to the called party, and the caller paid the local carrier for those services.¹⁰¹

Later in 1983, in the MTS & WATS Reconsideration Order, the Commission considered whether local carriers are entitled to access charges for delivering calls to information service providers (or "enhanced service providers" under the lexicon of that day). The Commission found that these calls should be treated as local calls made to end users within a local calling area and that the newly-created access charge regime would not apply. Local carriers would be compensated for these calls just as they were for any local call – the calling party would pay for them as part of its local phone bills.¹⁰² Although the Commission for the first time labeled this treatment as an "exemption" from the access charge regime, it concluded that local treatment was justified for various policy reasons.¹⁰³

The Commission extended this consistent treatment of calls to ISPs as local traffic to the regulatory accounting arena. Under the Commission's "separations" regime, costs incurred in carrying calls to ISPs are also treated as local and are recouped under charges set by state commissions. Local carriers must separately account for revenues and expenses associated with

¹⁰¹ In re MTS & WATS Market Structure, 93 F.C.C.2d 241 (1983).

¹⁰² MTS & WATS Reconsideration Order, 97 F.C.C.2d 683, 711-15 (¶¶ 78-83).

¹⁰³ In 1991, the Commission reaffirmed its 1983 decision. In re Part 69 of the Commissions Rules Relating to the Creation of Access Charges Subelements, 6 F.C.C.R. 4524, 4535 (¶ 60) (1991); MTS & WATS Reconsideration Order, 97 F.C.C.2d 683, 711-15 (¶¶ 78-83). It is worth noting that the Commission's so-called "exemption" is based on a false and heretofore untested premise: that but for this treatment of ESPs, interstate carrier access charges should and would apply to these end users. Nowhere in the FCC's Access Charge Order, however, did the FCC ever reach that conclusion. Because ESPs were satisfied with the outcome, if not the path taken there, the FCC's analysis (or lack thereof) was never challenged in court. If and when the Commission ever attempts to eliminate or modify its "exemption," this gaping hole in the reasoning behind the exemption will likely be exposed.

intrastate and interstate traffic.¹⁰⁴ Expenses that are intrastate are included in a carrier's "rate base" – the expenses it seeks to recoup through local charges.¹⁰⁵ In 1989, the Commission confirmed that its regulatory treatment of traffic destined for information service providers extended to how carriers account for and recover expenses associated with those calls.¹⁰⁶ Thus, state commissions are charged with setting local rates at levels that cover these and other expenses associated with local traffic. In 1991, the Commission reaffirmed its 1983 decision to exempt calls to ISPs from access charges.¹⁰⁷

The Commission's treatment of calls to ISPs as local continued after the adoption of the 1996 Act. In the Access Charge Order, the Commission held yet again that calls to ISPs should continue to be treated as local traffic for regulatory purposes. The Commission went to great lengths to distinguish the service provided in delivering calls to ISPs from the exchange access service provided to long-distance carriers: "[G]iven the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to [long-distance carriers]."¹⁰⁸ The Commission noted that ISPs had deployed numerous points of presence to "maximize the number of subscribers that can reach them through a local call."¹⁰⁹ The Commission found that, if "some intrastate rate structures fail to

¹⁰⁴ Access Charge Order, 12 F.C.C.R. at 15990 (¶ 17).

¹⁰⁵ See id.

¹⁰⁶ In re Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements, 4 F.C.C.R. 3983, 3989 (¶ 47) (1989).

¹⁰⁷ In re Part 69 of the Commissions Rules Relating to the Creation of Access Charges Subelements, 6 F.C.C.R. at 4535 (¶ 60).

¹⁰⁸ Access Charge Order, 12 F.C.C.R. at 16133 (¶ 345).

¹⁰⁹ Id. at 16132 (¶ 342 n.502) (emphasis added).

compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls [such as ISPs], incumbent LECs may address their concerns to state regulators.”¹¹⁰

The Access Charge Order also supports the conclusion that ISPs should be treated as end users, and not common carriers, despite the Commission’s present slant. “ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use incumbent LEC networks to receive calls from their customers.”¹¹¹

The Commission subsequently defended the Access Charge Order on appeal in the United States Court of Appeals for the Eighth Circuit by distinguishing the services used to connect callers to ISPs from long-distance calls. Various incumbent carriers had attacked the Access Charge Order in the Eighth Circuit, arguing that calls to ISPs form part of an interstate communication and that federal law therefore precludes treating ISPs as local customers. The Commission successfully argued that the service provided by local carriers to ISPs is analogous to that furnished to any other local business users that receive local calls from their customers. It even contrasted the end-to-end nature of long-distance calls with the nature of calls to an ISP:

The ISP subscribes to [local carrier] facilities in order to receive local calls from customers who want to buy the ISP's information services, which may (or may not) be stored in computers in a different state. In this sense, the ISP's use of the [local carrier's] facilities is analogous to the way another business subscriber uses a similarly-priced local business line to receive calls from customers who want to buy that subscriber’s wares that are stored in another state and require shipment back to the customer's location. In contrast, an IXC, which pays the per-minute access charge, uses the [local carrier's]

¹¹⁰ Id. at 16134 (¶ 346).

¹¹¹ In the Matter of Access Charge Reform, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, dated May 16, 1997, at ¶ 343 (Access Charge Order).

facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.¹¹²

The Eighth Circuit upheld the Commission's decision not to subject ISPs to access charges because the Commission reasonably had decided to treat this traffic as local.¹¹³ It concluded that ISPs should "pay intrastate charges" for their telephone lines like any other local customers and that "[t]he states are free to assess intrastate tariffs as they see fit."¹¹⁴ The Court of Appeals endorsed the Commission's position that ISPs "utilize the local networks differently than do IXCs,"¹¹⁵ and noted that "ISPs subscribe to [local exchange carrier] facilities in order to receive local calls from customers who want to access the ISP's data."¹¹⁶

In April 1998, the Commission yet again extended its local treatment of ISP-bound traffic. This time, the Commission concluded in the universal service arena that ISPs are not subject to universal service requirements because they are end users of telecommunications services like any other local business customers.¹¹⁷ In the Report to Congress, the Commission clarified that "Internet service providers do not provide telecommunications."¹¹⁸ This is the case because "the Internet

¹¹² Brief of FCC at 76, Southwestern Bell v FCC, No. 97-2618 (8th Cir. 1997) (emphasis added).

¹¹³ Southwestern Bell, 153 F.3d at 542.

¹¹⁴ Id. at 543.

¹¹⁵ Id. at 544.

¹¹⁶ Id. at 542 n.9 (emphasis added).

¹¹⁷ See Universal Service Report, 13 F.C.C.R. at 11527-52 (¶¶ 53-105); Declaratory Ruling ¶ 4 n.8 ("[t]he Commission has acknowledged the significance of end users being able to place local, rather than toll, calls to ISPs, in analyzing, among other things, universal service issues" (emphasis added)).

¹¹⁸ Universal Services Report, at ¶ 15.

service provider often will not know which applications a user has installed or is using. Subscribers are able to run those applications, nonetheless, precisely because of the enhanced functionality of that Internet access gives them."¹¹⁹

Finally, in the Declaratory Ruling itself, the Commission recognized that its "policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic."¹²⁰ The Commission therefore confirmed in the Declaratory Ruling that it will "continue[] to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local."¹²¹ Indeed, after the Declaratory Ruling the Commission confirmed yet again that calls to ISPs are to be treated as local traffic.¹²² Similarly, ISPs pay a subscriber line charge, which is imposed only on local customers.¹²³ All of the foregoing reasons have led federal circuit courts reviewing the Commission's regulatory treatment of calls to ISPs to conclude that the Commission's policy is treat calls to ISPs as local.¹²⁴

Thus, for almost two decades, calls to ISPs have been treated no differently than any other local calls to any other end user. Subscribers dialing a seven-digit number to reach the ISP are

¹¹⁹ Universal Services Report, at ¶ 79.

¹²⁰ Id. at 3705 (¶ 25).

¹²¹ Id. at 3692 (¶ 5).

¹²² See, e.g., Public Notice, Common Carrier Bureau Issues Letter to Bell Atlantic Regarding Jurisdictional Separations Treatment of Reciprocal Compensation for Internet Traffic, 1999 WL 556957 (July 30, 1999).

¹²³ See Declaratory Ruling, 14 F.C.C.R. at 3691 (¶ 4).

¹²⁴ See Southwestern Bell, 208 F.3d at 483-87; Illinois Bell, 179 F.3d at 573-74.

charged for a local call under the local tariff. Because ISPs are end users, not carriers, ISPs purchase their links to the public telephone network through intrastate business tariffs, just as other local customers do.¹²⁵ Similarly, ISPs pay a subscriber line charge, a charge which is imposed only on local customers.¹²⁶ There is no rational basis to find that, for reciprocal compensation purposes, ISP-bound traffic cannot be treated as local.

V. There Is No Compelling Need For The Commission To Take New, Independent Action Regarding Reciprocal Compensation At This Time

Though it is clear that the FCC has jurisdiction to regulate ISP-bound traffic, the Commission should nonetheless refrain from adopting rules to govern this traffic beyond the federal regulations on reciprocal compensation already in place. To the extent any action is needed, the Commission should reiterate that states are required to continue to treat ISPs as end users, pursuant to past FCC rules, for reciprocal compensation purposes, and establish forward looking cost rates as the baseline for reciprocal compensation payments upon which states can rely.

ILEC claims that the Commission must interpose itself into the reciprocal compensation issue should be rejected summarily. For example, some ILECs have complained that reciprocal compensation for ISP calls is inherently “out of balance,” since, due to the nature of the calls, there is much more traffic traveling from the customer to the ISP than from the ISP to the customer. They also assert that CLECs have taken advantage of this imbalance by aggressively seeking ISP customers, allegedly to benefit from this imbalance. Thus, they assert, the FCC needs to regulate to correct this imbalance.

¹²⁵ See 47 C.F.R. §§ 69.2(m), 69.5; In re Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, 3 F.C.C.R. at 2633, at ¶¶ 2 n.8, 20 n.53, (1988); Declaratory Ruling, ¶ 5 n.11.

¹²⁶ Declaratory Ruling, at ¶ 4.

This is an entirely specious argument. The Act requires that all LECs be compensated CLECs for the costs associated with another LEC's traffic carried over their transport and switching facilities. The originating caller's carrier needs no such compensation because it is compensated directly by the caller. To the extent that reciprocal compensation rates are cost-based, reciprocal compensation by definition does no more than compensate the terminating end customer's carrier for the expense of transporting and terminating the calls it receives. Such cost-based compensation creates no artificial incentives on anyone's part, and does not, the ILECs' assertions to the contrary notwithstanding, encourage inefficient providers.¹²⁷

WorldCom, along with other CLECs, have consistently urged state commissions to set transport and switching rates at a true, forward-looking, cost based rate. In the past, ILECs drove those same rates higher, hoping to capture monopoly rents for the switching and transport facilities that CLECs need to lease in order to provide competing local service. To the extent that some reciprocal compensation rates are above cost, it is only because the ILECs deemed it in their interest to make inflated claims about the TELRIC cost of the switching and transport functions. These same ILECs cannot now be heard to complain that they are the victims of high rates they themselves have vigorously promoted throughout the country.¹²⁸

¹²⁷ To be sure, if reciprocal compensation rates are set substantially above cost, then the imbalance of traffic could, at least as a theoretical matter, make it commercially advantageous to have end-user customers who receive more local calls than they make. But, by its very nature, this is a problem that (to the extent it exists at all) can be corrected by the negotiation and arbitration process established in the 1996 Act.

¹²⁸ *The ILECs also fail to mention the very real, financial benefit they receive as a result of providing Internet access services to their residential customers. As the Commission pointed out in the Access Charge Reform Order, "Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services."* Access Charge Reform Order,
(continued...)

More to the point, the supposed “problem” of high rates will plainly be resolved as intended by the 1996 Act - through the negotiation and arbitration process. To the extent that the ILECs believe that the transport and switching termination rates they earlier claimed as cost-based are now above cost, they finally have some incentive to seek true cost-based rates for these elements. Indeed, the only obvious effect of allowing reciprocal compensation to apply in situations in which traffic is out of balance will be to drive transport and termination rates to cost – a market-based solution that will have important beneficial consequences on the related rates for unbundled network elements. If the ILECs are truly concerned about regulatory distortions caused by imbalance reciprocal compensation traffic, they need only agree to cost-based compensation for switching termination and transport. These rates will promote local competition just as they will assure that no party is benefitting unduly from reciprocal compensation arrangements. This is a “win-win” situation for the public. The Commission’s response to this dynamic should be to stay its hand and let the market drive rates down to cost to the benefit of all consumers.

Happily, that appears to be precisely what is happening. As Common Carrier Bureau Chief Lawrence Strickling noted in his testimony before the House Telecommunications Subcommittee in its hearing on reciprocal compensation:

Most significant, perhaps, are the agreements that parties have reached through private negotiation. Many incumbent local exchange carriers insisted on reciprocal compensation rates as high as \$.01 per minute in agreements they entered into with competitive entrants in 1996, based on the apparent expectation that they would be the net beneficiaries of these payments. These agreements are expiring, however, and some of these same carriers are now negotiating dramatically lower reciprocal compensation rates for all traffic, including ISP-bound traffic – as low as \$.00175 per minute. Consumers will be better off and local competition will be fostered as

¹²⁸(...continued)
at ¶ 346.

parties continue to negotiate rates that more accurately reflect the actual costs of transport and termination.¹²⁹

VI. Should The FCC Choose To Exercise Its Jurisdiction, It Should Be Done Within The Context Of A Federal Rule That Requires Reciprocal Compensation Based Upon The ILECs' Forward-Looking, Cost-Based Rates

A. If The Commission Determines That New Rules Are Necessary, They Should Be Limited In Scope

In the event that the Commission chooses to create a new federal rule governing ISP-bound traffic, the Commission should seek to ensure that reciprocal compensation rates are based on the forward-looking, cost-based rates of the ILECs, and are symmetrical in nature. As is set forth more fully below, the rule should consider the costs of termination assumed by the LECs. The Commission should also refrain from applying “bill and keep” as the basis for reciprocal compensation for local calls to ISPs because it fails to compensate LECs for the costs that CLECs incur in the termination of traffic.

B. In Recognizing That LECs Incur Costs For Termination of Traffic, The Commission Must Determine The Format For Reciprocal Compensation

Despite ILECs' attempts to cloud reality, CLECs incur real costs for the termination of traffic to their ISP customers. WorldCom proposed previously a four-part federal rule to govern reciprocal compensation for ISP-bound traffic, which the Commission should consider if it chooses to create a federal rule in this proceeding:

- (1) When a local exchange carrier delivers traffic to end users that are ISPs, the local exchange carrier incurs the same transport and termination costs that it incurs when delivering local exchange traffic to other end users.
- (2) Local exchange carriers are to be compensated for delivering traffic to ISPs by the local exchange carrier on whose network the calls originated, or the interexchange carrier over whose network the calls were transmitted. The

¹²⁹ Strickling Testimony, at 5.

originating carrier is prohibited from adopting carrier access-like arrangements that would require compensation to be paid by the terminating carrier, or an ISP to the other end.

- (3) Compensation shall be set at the same reciprocal compensation rate applied to local exchange traffic. This rate is to be based upon the ILEC's forward-looking, cost-based rates for terminating local exchange traffic. Where the local exchange carrier's switch serves a geographic area comparable to that served by the ILEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional cost is the ILEC tandem rate. CLECs shall not be required to provide their own cost studies.
- (4) Such compensation rates shall be established under interconnection agreements negotiated and arbitrated pursuant to Sections 251 and 252 of the 1996 Act, and applicable Commission regulations.¹³⁰

1. Require States To Adopt Forward Looking Cost-Based Rates For Interconnection And UNEs, Which Should Be Symmetrical

Any action by the Commission should require states to use forward-looking costs¹³¹ as the basis for rates set within a particular jurisdiction, derived from cost models submitted by LECs.¹³² The Commission should also require that those rates must be symmetrical. Requiring symmetrical rates "reduce[s] an incumbent LEC's ability to use its bargaining strength to negotiate excessively high termination charges that competitors would pay the incumbent LEC and excessively low

¹³⁰ Reply Comments of MCI WorldCom, In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68 (April 27, 1999), at 2-3.

¹³¹ The Eighth Circuit recently rejected the inclusion of "hypothetical" costs within TELRIC but left in place the rest of the Commission's pricing standard, and in particular endorsed the Commission's adoption of a forward-looking cost methodology. This decision does not call into question the FCC's authority to determine an appropriate pricing methodology, and the FCC can set that level to be at forward-looking, cost-based rates. Moreover, the court's decision rested entirely on its reading of the particular language of the network element pricing provisions, § 252(d)(1), whereas the pricing rules for reciprocal compensation are set out in a different provision of the Act, § 252(d)(2).

¹³² MCI WorldCom ISP Comments, at 11-12.

termination rates that the incumbent LEC would pay interconnecting carriers.”¹³³ The costs that would be incurred in dividing out the voice traffic from the data traffic in order to determine which packets were for voice or data would be unduly burdensome on CLECs, and serve no purpose.

2. The ILECs’ Own Costs Should Serve As The Proxy For Termination Rates

The Commission has recognized that the most reasonable baseline for the establishment of rates for additional costs of CLEC termination are the ILECs’ costs for transport and termination. The Commission noted that amongst ILECs, “the forward-looking economic costs should be similar in most cases,” and that the ILECs are far better suited to conduct cost studies than CLECs, which vary in size, scope, and geographic presence.¹³⁴

3. The Proxy Rate Range For Telecommunications Traffic To ISPs Must Equal the Proxy Rate Range For Traffic Terminating To All Other End Users

ISPs are end users of telecommunications services, just like any other active business customer. As noted above, there are no additional costs inherent to the termination of ISP traffic that do not apply to the termination of traffic for other business customers. Accordingly, compensation rates generally should be no lower than the proxy rates for local voice termination. The Commission should affirm that because “the same local network infrastructure is being used to terminate calls, so the same costs should be incurred.”¹³⁵ Any rule that is established by the Commission will benefit the states only if reciprocal compensation rates are symmetrical for both voice and data.

¹³³ Local Competition Order, at ¶ 1087.

¹³⁴ Local Competition Order, at ¶ 1085; Comments of MCI WorldCom, at 14-16.

¹³⁵ MCI WorldCom ISP Comments, at 16.

VII. CONCLUSION

In light of the foregoing, WorldCom, Inc. respectfully requests that the Commission declare that calls to ISPs are local traffic under the requisite provisions of the 1996 Act, and the Commission's prior and existing rules, and therefore that reciprocal compensation under section 251(b)(5) is mandated for calls to ISPs. Moreover, the Commission should order that local calls to ISPs be treated as local calls subject to reciprocal compensation, and 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.

Respectfully submitted,

July 21, 2000

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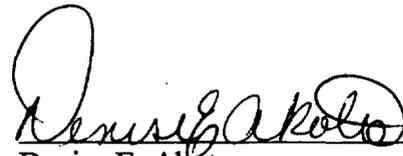
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