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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 9, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, SW
Washington DC, 20554

Re: Reply Comments of WorldCom, Inc.
CC Docket Nos. 96-98 and 99-68

Dear Ms. Salas:

On August 4, 2000, WorldCom, Inc. ("WorldCom") filed its reply comments in the above-referenced dockets. However, that document was not the correct version. Accordingly, WorldCom submits the correct version of its reply comments for filing with the Commission. We regret any inconvenience this may have caused.

Please contact me if you have any questions.

Very truly yours,


Richard S. Whitt

CORRECTED VERSION

WORLDCOM, INC.

**Please substitute these reply comments
in their entirety for those filed by
WorldCom on August 4, 2000**

CORRECTED VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Comments Sought On Remand Of The)
Commission's Reciprocal Compensation) CC Docket Nos. 96-98, 99-68
Declaratory Ruling By the U.S. Court)
Of Appeals For The D.C. Circuit)

REPLY COMMENTS OF WORLDCOM, INC.

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Dated: August 4, 2000

EXECUTIVE SUMMARY

The heat of rhetoric and cross-arguments aside, the issue before the Commission is straightforward: how does a local carrier get paid for participating in the origination or termination of a telephone call? The relevant statutory, regulatory, and equity principles are equally straightforward: the telecommunications services provided by local carriers constitute either telephone exchange service or exchange access service. In both cases, local carriers incur actual economic costs for originating, transporting, and terminating telecommunications. Local carriers are paid access charges for providing exchange access to create an interexchange call, and they are paid reciprocal compensation for providing telephone exchange service to create an intra-exchange (local) call.

When applied to calls from one set of end users (an ILEC's own residential customers) to another set of end users (a CLEC's own ISP customers), these fundamental principles yield a consistent conclusion. The ILEC's customers originate the calls, and the CLEC's customers receive the calls. Thus, because the ILEC's customers are both the cost causers and the party responsible for paying for the calls, the ILEC must compensate the CLEC for the cost of transporting and terminating these calls. Where calls originate and terminate within the same local exchange, the compensation to be paid is dictated by § 251 of the Telecommunications Act of 1996.¹

WorldCom demonstrated in its opening comments that the Commission should conclude that reciprocal compensation under § 251(b)(5) the 1996 Act applies to local traffic bound for Internet service providers. Several commenters – most notably the incumbent local exchange carriers and

¹ 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.

their trade association, the United States Telecom Association – argue to the contrary that the Commission should rule that reciprocal compensation does not apply to ISP-bound traffic. In support of their arguments, however, the ILEC commenters for the most part offer the very same arguments that the D.C. Circuit rejected in its decision vacating and remanding the Commission's Declaratory Ruling. In particular, the ILEC commenters propose that the governing statutory definitions of the 1996 Act that the D.C. Circuit found dispositive somehow are irrelevant to this issue. The ILECs also set forth a series of meritless factual and policy arguments that amount to little more than special pleading for a new regulatory regime that will maximize their profits and frustrate competition.

For the reasons set forth below – in addition to the reasons set forth in WorldCom's opening comments and its briefs to the D.C. Circuit – the ILECs' arguments are without merit. The Commission should follow the D.C. Circuit's directive and apply the governing statutory terms as well as its own consistent history of classifying ISPs as end users and treating ISP-bound traffic as local. Under the statute and relevant precedent, the Commission should conclude that the 1996 Act requires payment of reciprocal compensation for the transport and termination of local ISP-bound traffic.

Of course, determining that local calls to ISPs constitute telephone exchange service does not dislodge the FCC's jurisdiction over such traffic. As the Supreme Court has affirmed, the Commission has ample authority under the 1996 Act to adopt regulations to promote local competition, and adopt methodologies that states must follow to establish intercarrier payments for the transport and termination of telecommunications within a local exchange. The existence of such authority obviates the need for the FCC to attempt to force-fit its traditional jurisdictional analysis of carrier services to non-carriers such as ISPs.

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Declaratory Ruling By the U.S. Court)
Of Appeals For The D.C. Circuit)

REPLY COMMENTS

WorldCom, Inc. ("WorldCom"), respectfully submits these Reply Comments in connection with the Public Notice released on June 23, 2000.²

I. INTRODUCTION

WorldCom demonstrated in its opening comments that the Commission should conclude that reciprocal compensation under § 251(b)(5) the 1996 Act applies to local traffic bound for Internet service providers (ISPs). Several commenters – most notably the incumbent local exchange carriers (ILECs) and their trade association, the United States Telecom Association (USTA), (collectively, the "ILEC commenters") – argue to the contrary that the Commission should rule that reciprocal compensation does not apply to ISP-bound traffic.

² 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.

DISCUSSION

II. **Despite The ILECs' Pleas, The Commission Cannot Ignore the Statutory Definitions of "Exchange Access" and "Telephone Exchange Service"**

In its decision vacating the Commission's Order,³ the D.C. Circuit held, as "an independent ground requiring remand,"⁴ that the Commission did not "fit the present rule within the governing statute,"⁵ because it failed to determine whether the ISP-bound traffic at issue is "exchange access" or "telephone exchange" service. In its opening Comments, WorldCom demonstrated that fidelity to the D.C. Circuit's decision, to those statutory definitions, and to the Commission's consistent regulatory practices - including its classification of ISPs as end users - mandates that calls originating and terminating within the same local exchange be characterized as "telephone exchange service."

Indeed, the ILECs' own legal arguments betray the compelling nature of the D.C. Circuit's conclusions. Well understanding that application of the statutory definitions would lead inexorably to the conclusion that the calls indeed are a form of "telephone exchange service," the ILECs uniformly insist that the Commission should not consider which statutory definition applies - notwithstanding the D.C. Circuit ruling that the Commission must do so. Instead, these ILEC commenters go so far as to assert that whether ISP-bound traffic falls into the statutory classification of "telephone exchange service" or "exchange access" as defined in the 1996 Act is "irrelevant" to whether reciprocal compensation applies to the exchange of ISP-bound traffic. The ILECs insist,

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

⁴ Id. at 8.

⁵ Id.

instead, that the relevant question is only whether the call is “local.”⁶ These commenters therefore would have the Commission ignore the application of those statutory categories to ISP-bound traffic.

But to ignore the 1996 Act, as these commenters suggest, would be to ignore the mandate of the D.C. Circuit, and would also lead to an incoherent rule. As indicated above, the D.C. Circuit reversed the Declaratory Ruling precisely because the Commission “brushed aside” and failed to apply the statutory definitions of telephone exchange service and exchange access.⁷ The Commission simply may not ignore this ruling on the perverse theory that, as Qwest would have it, the D.C. Circuit was “confound[ed]” by WorldCom’s arguments.⁸ Nor is it the case, as USTA asserts, that the Court merely faulted the Commission for failing to explain in adequate detail why it rejected WorldCom’s claim that these statutory categories were relevant.⁹ To the contrary, the Court expressly held that the Commission was required to “fit the present rule” within the statutory definitions,¹⁰ and that it was required to explain “why such traffic is ‘exchange access’ rather than ‘telephone exchange service.’”¹¹ The ILECs would have the Commission believe that the D.C.

⁶ See, e.g., Comments of Verizon Communications (Verizon Comments) at 9-10; Comments of Qwest Corporation (Qwest Comments) at 11-13; Comments of the United States Telecom Association (USTA Comments) at 3, 6-7; United States Telecom Association, “Analysis of Issues on Remand of ISP Reciprocal Compensation Proceeding” (July 21, 2000) (USTA White Paper), at 2, 14-16; Comments of SBC Communications, Inc. (SBC Comments) at 22-24; Comments, BellSouth Corp. (BellSouth Comments) at 8 ¶ 16.

⁷ Bell Atlantic, 206 F.3d at 4, 8-9.

⁸ Qwest Comments at 11-12.

⁹ USTA Comments at 6.

¹⁰ Bell Atlantic, 206 F.3d at 8.

¹¹ Id. at 9.

Circuit erred in so ruling. But the place to bring that claim is before the United States Supreme Court, not the FCC, and no such petition for review was forthcoming from the ILECs. This Commission has no constitutional or statutory authority to simply “reverse” the D.C. Circuit’s mandate, especially when based only on ILEC claims that the D.C. Circuit “got it wrong.”¹²

In any event, the D.C. Circuit plainly got it right. The statutory definitions not only are relevant, they are binding on the Commission. Under the Commission's rules, reciprocal compensation applies to the transport and termination of local traffic.¹³ The ILECs’ suggestion that a call can be “local” without regard to whether it fits into the Act’s definition of “telephone exchange” service is little more than a bald assertion that the Commission is free to disregard the Act’s definition of a local call. It is not. As the Commission has explained on multiple occasions, “telephone exchange service” is synonymous under the Act with the intrastate service used to make local calls.¹⁴ For example, among other occasions, the Commission has stated:

- “Because telephone exchange service is a *local, intrastate service*, section 251(c)(2) plainly addresses intrastate service. . . .”¹⁵

¹² Verizon Comments, at 3.

¹³ 47 C.F.R. § 51.701(a).

¹⁴ See, e.g., Local Competition Order, 11 F.C.C.R. at 15545 (¶ 87); In re Application of BellSouth Corp. for Provision of In-Region, InterLATA Services, 13 F.C.C.R. 20599, 20621 (¶ 28) (1998); Non-Accounting Safeguards Order, 11 F.C.C.R. at 21926 (¶ 38); In re Implementation of the Telecommunications Act of 1996, Telemessaging, Electronic Publishing & Alarm Monitoring Services, 12 F.C.C.R. 3824, 3828-29 (¶ 9) (1997); In re Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, 12 F.C.C.R. 5470, 5512 (¶ 84) (1997).

¹⁵ Local Competition Order, 11 F.C.C.R. at 15545 (¶ 87) (emphasis added).

- “Because telephone exchange service is a *local, intrastate service*, section 275(b) plainly addresses intrastate service.”¹⁶
- “Because section 271 is intended to allow the BOCs into the long distance market only after they open the local market to competition, we believe that Congress intended for the Commission to consider as ‘telephone exchange service,’ for section 271 purposes, *those services that permit customers to make local calls* that are functionally equivalent to the calls that customers make through their wireline service.”¹⁷

By the Commission’s own words, then, calls to ISPs necessarily are subject to reciprocal compensation if the telecommunications service used to make them is telephone exchange service.

Indeed, the Commission itself admitted to the D.C. Circuit in the challenge to the Declaratory Ruling that “telephone exchange” service is subject to reciprocal compensation. Responding to WorldCom's arguments in Bell Atlantic that ISP-bound traffic constitutes telephone exchange service, the Commission countered that it viewed this traffic as interstate. The FCC stated further that ISP-bound traffic:

“is not *telephone exchange service (which alone, the Commission has held, is subject to the reciprocal compensation requirement of section 251(b)(5))*.”¹⁸ (emphasis added).

¹⁶ In re Implementation of the Telecommunications Act of 1996, Telemessaging, Electronic Publishing & Alarm Monitoring Services, 12 F.C.C.R. 3824, 3828-29 (¶ 9) (1997) (emphasis added).

¹⁷ In re Application of BellSouth Corp. for Provision of In-Region, InterLATA Services, 13 F.C.C.R. 20599, 20622 (¶ 29) (1998) (emphasis added); see also id. At 20621 (¶ 28); Non-Accounting Safeguards Order, 11 F.C.C.R. at 21926 (¶ 38); In re Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, 12 F.C.C.R. 5470, 5512 (¶ 84) (1997).

¹⁸ Brief for Federal Communications Commission, Bell Atlantic v. FCC, No. 99-1094, at 23 n.10 (emphasis added).

While WorldCom disagrees with the FCC claim that local ISP-bound traffic is not telephone exchange service, it strongly agrees with the Commission's conclusion that telephone exchange service is subject to the reciprocal compensation requirement.

Conversely, "exchange access service" is defined under the Act as the service of providing access to a long-distance service, and the Commission has made clear that such calls are not subject to reciprocal compensation, but to a complementary regime of access charges. The Commission having so ruled repeatedly and consistently, it is no surprise that the D.C. Circuit concluded that the Commission was obliged to address the statutory terms that define a local call in considering whether ISP-bound traffic is subject to reciprocal compensation.

WorldCom demonstrated in its opening comments that the plain meaning of relevant statutory terms compels the conclusion that ISP-bound traffic constitutes telephone exchange service.¹⁹ First, ISP-bound traffic fits squarely within the statutory definitions of telephone exchange service in 47 U.S.C. § 153(47)(A) and (B).²⁰ Moreover, calls to ISPs cannot be exchange access because local ISP-bound traffic cannot meet the statutory definition of exchange access.²¹ No credible reading of the plain and unambiguous phrase "for the purpose of the origination or termination of telephone toll service" in the Act's definition of exchange access can support the conclusion that ISP-bound traffic constitutes exchange access.²² Notably, the ILEC commenters do not suggest that ISPs connect to the local network "for the purpose" of the origination or termination

¹⁹ See WorldCom Comments at 7-15.

²⁰ See id. at 7-12.

²¹ See id. at 7-8.

²² 47 U.S.C. § 153(16) (emphasis added).

of telephone toll service, as the statutory definition of exchange access requires.²³ Applicable Commission and federal court precedent further confirms that the nature of the statutorily-distinct information services that ISPs provide precludes local ISP-bound traffic from being considered anything other than telephone exchange service.²⁴

Several ILEC commenters note that in the Advanced Services Order on Remand the Commission concluded that dedicated DSL ISP-bound traffic constitutes "exchange access" as defined in the Act.²⁵ But the Advanced Services Order on Remand addressed issues pertaining uniquely to xDSL-services, not dial-up services. One can argue that, unlike the dial-up services at issue here, DSL traffic is dedicated and bypasses the local switch. The Commission previously concluded in the GTE Tariff Order²⁶ that its analysis of DSL traffic has no application to whether reciprocal compensation applies to dial-up ISP-bound traffic.²⁷

More to the point, as WorldCom explained in its opening comments, the conclusions in the Advanced Services Order on Remand are highly questionable as a matter of law and Commission

²³ Indeed, several ILEC commenters argue that end users connect to ISPs for the purpose of reaching and utilizing the Internet - which plainly is not telephone toll service. See Qwest Comments at 7, 9; USTA Comments 4.

²⁴ See WorldCom Comments at 8-12.

²⁵ See, e.g., Verizon Comments at 9; USTA Comments at 18; USTA White Paper at 15-16; SBC Comments at 22-24.

²⁶ In re GTE Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, 13 F.C.C.R. 22466 (1998).

²⁷ Id. at 22466-67, 22481-82; see Illinois Bell Tel. Co. v. WorldCom Technologies, Inc., 179 F.3d 566, 573 (7th Cir. 1999) (acknowledging Commission statement that DSL analysis inapplicable to reciprocal compensation issues in dial-up context).

precedent.²⁸ The Advanced Services Order on Remand relies extensively on the now-vacated Declaratory Ruling, and suffers from the same defect – both altogether ignore the statutory requirement that exchange access requires that the connection to the local network be provided “for the purpose of the origination or termination of telephone toll services.”²⁹ Moreover, the Advanced Services Order on Remand claims to overturn conclusions in the Commission's Non-Accounting Safeguards Order, but does so based in a summary fashion, without ever addressing the Commission's determination in the Non-Accounting Safeguards that ISPs do not provide telephone toll services.³⁰

Finally, at least one commenter asserts that local ISP-bound traffic constitutes a purported third category of "information access."³¹ This argument is without merit and utterly lacks support from the statute.³² As WorldCom already has demonstrated, information access is not a distinct category of services under the 1996 Act, and the Commission already has conceded that ISP-bound traffic must be either exchange access or telephone exchange service.³³

For the foregoing reasons, the Commission should undertake the statutory analysis the D.C. Circuit commanded and should find that local ISP-bound traffic constitutes telephone exchange service as defined in the 1996 Act.

²⁸ See WorldCom Comments at 11-12.

²⁹ Advanced Services Order on Remand, 15 F.C.C.R. at 404-05 (¶¶ 42-3).

³⁰ Id.

³¹ See Qwest Comments at 12-13; see also Ex Parte of ITAA, dated May 9, 2000, at 3-4.

³² See WorldCom Comments at 14-15.

³³ See id.

III. The Comments Fail To Defend Continued Reliance on the Jurisdictional "End-to-End" Precedent That the D.C. Circuit Found Unpersuasive and Inapplicable

In addition to reversing the FCC for failing to come to terms with the provisions of the Act, the D.C. Circuit also concluded that the Commission failed to provide an explanation why its orders addressing the boundary between state and FCC jurisdiction prior to the 1996 Act are relevant to the issue currently before the Commission.³⁴ As WorldCom demonstrated in its opening submission,³⁵ after the 1996 Act the Commission's jurisdiction to regulate local ISP-bound traffic is beyond dispute. As a result, the pre-Act jurisdictional precedent - which, after all, is limited only to carriers - is entirely irrelevant to the question whether calls to ISPs should be subject to reciprocal compensation.³⁶ SBC's assertion that an end-to-end jurisdictional analysis is necessary because "it is the only way to protect the exclusive right of the federal government - and more specifically, this Commission - to regulate interstate communications,"³⁷ is simply false. The 1996 Act expressly gives the Commission the right to assert jurisdiction over communications without regard to whether it is deemed local or interstate. Indeed, the very provision at issue here - § 251(b)(5) - is an express grant of authority to the FCC to establish the compensation mechanism when multiple carriers collaborate to provide local traffic. The Commission should follow the Court's instruction and abandon its prior flawed, jurisdictional line of reasoning altogether.

³⁴ Bell Atlantic, 206 F.3d at 5.

³⁵ Id.

³⁶ Id. at 1-7.

³⁷ SBC Comments at 14.

Several commenters, however, argue that the Court's holding in this regard "reflects a misunderstanding,"³⁸ and that the Commission should continue to apply an end-to-end jurisdictional analysis to determine that ISP-bound traffic cannot be subject to reciprocal compensation obligations.³⁹ Their arguments are without merit.

First and foremost, application of an end-to-end analysis to ISPs once again would have the Commission ignore the words of the D.C. Circuit's opinion. As WorldCom explained in its opening comments, the Court found this analysis, when applied to ISPs, "intuitively backwards" and "not on point," and flatly inconsistent with relevant Commission precedent.⁴⁰ As the ILECs continue to contest and refuse to acknowledge, ISPs are not carriers, but instead are end users of telecommunications services.⁴¹ The Court credited WorldCom's explanation that calls to ISPs are no different than calls to pizza delivery firms and other businesses that make further use of telecommunications – calls that indisputably terminate at the called business – without regard to whatever additional services that business provides.⁴² If the ILECs truly believe that these conclusions reflect a "misunderstanding" by the Court, or poor briefing by the ILECs,⁴³ they should

³⁸ BellSouth Comments at 6.

³⁹ See, e.g., Verizon Comments at 6-7, 9; Qwest Comments at 3-11; SBC Comments at 9-22; USTA Comments at 2-5; USTA White Paper at 1, 8-10; BellSouth Comments at 2, 5-8.

⁴⁰ Bell Atlantic, 206 F.3d at 6-7.

⁴¹ 47 U.S.C. § 64.702(a).

⁴² Bell Atlantic, 206 F.3d at 6.

⁴³ See Qwest Comments at 3.

have sought either reconsideration by that court or review by the Supreme Court, rather than inappropriately asking this Commission to ignore the court's mandate.

Moreover, as WorldCom also explained, far from supporting the positions of the ILEC commenters, application of the Commission's prior decisions that do involve ISP or ESP-bound traffic leads inexorably to the conclusion that ISP-bound traffic *should* be subject to reciprocal compensation obligations.⁴⁴ Until the vacated Declaratory Ruling, the Commission had an unbroken string of precedent for two decades in which the Commission has treated dial-up ISP-bound traffic (or the pre-Act enhanced service provider (ESP)-bound traffic) as local. Even after the Declaratory Ruling, the Commission has chosen to continue to treat dial-up, ISP-bound traffic as local.⁴⁵ Not surprisingly, the federal courts that have examined the Commission's precedent have agreed with WorldCom's position and have concluded that the precedent supports imposing reciprocal compensation obligations on ISP-bound traffic. Moreover, the precedent cited by the ILECs involving the end-to-end jurisdictional analysis applied to IXCs plainly is not relevant to this case because ISPs, unlike IXCs, are end users and not themselves telecommunications carriers.⁴⁶ Contrary to Verizon's claims, the fact that calls are delivered to ISPs rather than to carriers is legally significant.⁴⁷ The Commission should reject the ILECs' invitation to ignore the uniform holdings of the federal courts that have considered these questions.

⁴⁴ WorldCom Comments at 25-33.

⁴⁵ See id. at 32.

⁴⁶ See Bell Atlantic, 206 F.3d at 8-9; Southwestern Bell, 208 F.3d at 483-85; Illinois Bell Tel. Co. v. WorldCom Technologies, 179 F.3d 566, 573-74 (7th Cir. 1999).

⁴⁷ Verizon Comments at 7-9.

A number of commenters also continue to argue that the so-called "exemption" of ISPs from access charges compels the conclusion that ISP-bound traffic is interstate traffic not subject to reciprocal compensation.⁴⁸ These commenters claim that the "exemption" indicates that ISP-bound traffic is inherently interstate, and therefore cannot be subject to reciprocal compensation.⁴⁹ This argument similarly fails for a number of reasons.

Initially, it must be pointed out that the FCC's access charge rules contains no such "exemption." ISPs are end users, not carriers, and as such are not subject to FCC regulation as common carriers.⁵⁰ ISPs are also classified as end users under the FCC's Part 69 rules.⁵¹ A review of the FCC's access charge proceedings reveals that the Commission never actually concluded, as a matter of law and policy, that carrier access charges should apply to ESPs. The "exemption" terminology first made its appearance in 1987, some seven years after the FCC first classified ESPs as end users. As a result, it is inaccurate to state that the Commission "exempted" ISPs from access charges. Instead, as WorldCom explained and the D.C. Circuit recognized in Bell Atlantic, the Commission has affirmatively *classified* ISPs as end users under its regulations.⁵² Calls to ISPs thus should be subject to reciprocal compensation just like calls to any other local end users.

⁴⁸ See Qwest Comments at 10-11; USTA Comments at 3, 5-6; USTA White Paper at 2, 10-14; SBC Comments at 4, 26-28.

⁴⁹ See, generally, id.

⁵⁰ 47 C.F.R. § 64.702(a).

⁵¹ 47 C.F.R. § 69.2(m).

⁵² See WorldCom Comments at 25-33; Bell Atlantic, 206 F.3d at 8; see also 47 C.F.R. § 64.702(a).

Indeed, as the D.C. Circuit recognized, the Commission recently justified its continuing access charge treatment of ISPs by providing the Eighth Circuit "with a sharp differentiation between such calls and ordinary long-distance calls covered by the 'end-to-end' analysis."⁵³ The D.C. Circuit explained that the Commission rested the continued exemption "on an acknowledgment of the *real differences between long-distance calls and calls to information service providers*" and concluded that "[i]t is obscure why those [differences] have now dropped out of the picture."⁵⁴ As WorldCom summarized in its comments to the Commission in the proceedings leading to the Declaratory Ruling, for purposes of reciprocal compensation, an ISP is "'simply a communications-intensive business end user selling a product to other consumer and business end-users."⁵⁵

Moreover, the D.C. Circuit in Bell Atlantic has already rejected the argument based on the Commission's ruling that ISPs should be exempt from access charges. Responding to the identical arguments that the ILEC commenters repeat now, the D.C. Circuit found "not very compelling" the Commission's assertion that the use of the word "exemption" leads to the conclusion that ISP-bound traffic is not subject to reciprocal compensation.⁵⁶ Indeed, the D.C. Circuit found the Commission's long-standing classification of ISPs as end users a powerful indication - in fact, an "embarrassment"

⁵³ Bell Atlantic, 206 F.3d at 8.

⁵⁴ Id.

⁵⁵ Id. at 7, quoting Comments of WorldCom, Inc. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68 at 7 (July 17, 1997).

⁵⁶ Bell Atlantic, 206 F.3d at 8.

to the Commission – that the FCC’s contrary ruling in the reciprocal compensation order was erroneous.⁵⁷

Finally, the Commission's decision not to subject ISPs to access charges confirms that ISP-bound traffic should be subject to the only other conceivably relevant system of carrier-to-carrier compensation in the Act and implementing regulations – reciprocal compensation. Although the Act itself does not limit reciprocal compensation to local traffic, the Commission in the Local Competition Order concluded that reciprocal compensation ought to apply only to local traffic precisely because access charges are available to compensate carriers for their services in the long-distance arena.⁵⁸ Because the Commission interpreted section 251(b)(5) as applicable only to local traffic on the ground that access charges cover long-distance calls, it follows that reciprocal compensation should apply as the form of inter-carrier compensation where access charges do not.

IV. Calls to ISPs Terminate Locally Under the Commission's Regulatory Definition of Termination

WorldCom demonstrated in its opening comments that ISP-bound traffic is subject to reciprocal compensation because it satisfies the definition of termination in the regulations the Commission promulgated pursuant to its Local Competition Order.⁵⁹ Several ILEC commenters assert that the Commission's definition of termination does not apply, purportedly because the

⁵⁷ Bell Atlantic, 206 F.3d at 8.

⁵⁸ 11 F.C.C.R. at 16012-13 (¶¶ 1033-34).

⁵⁹ See WorldCom Comments at 16-21.

definition only applies after a determination has been made that the calls in question are local.⁶⁰

This claim is without merit.

As a threshold matter, and contrary to the ILECs' claim, the definition of termination does not apply after one determines that traffic is local.⁶¹ Rather, the definition of "termination" under the Commission's regulations determines whether traffic is local in the first place. The regulations define "local telecommunications traffic" as "[t]elecommunications traffic . . . that originates and *terminates* within a local service area established by the state commission."⁶² In turn, the regulations define "termination" as "the switching of local telecommunications traffic at terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."⁶³ Thus, the definition of termination is relevant under the Commission's regulations to determine whether ISP-bound traffic is local.

Moreover, the federal courts already have spoken to this issue and have uniformly rejected the ILECs' argument. The D.C. Circuit in Bell Atlantic vacated and remanded the Declaratory Ruling because, among other reasons, the Commission had failed to apply its termination definition, and instead had applied the end-to-end jurisdictional analysis.⁶⁴ When considering the termination definition, the D.C. Circuit recognized that "Calls to ISPs appear to fit this definition: the traffic is

⁶⁰ See, e.g., Verizon Comments at 4-5; Qwest Comments at 7-10; USTA Comments at 4-5; USTA White Paper at 1, 3, 7-8; SBC Comments at 20-22; BellSouth Comments at 5, 7-8.

⁶¹ See id.

⁶² 47 C.F.R. § 51.701(b)(1)(emphasis added).

⁶³ Id.

⁶⁴ Bell Atlantic, 206 F.3d at 5-8.

switched by the LEC whose customer is the ISP and then delivered to an ISP, *which is clearly the 'called party.'*"⁶⁵ While USTA asserts that the D.C. Circuit was merely paraphrasing WorldCom's argument,⁶⁶ the language of the opinion and the holding itself plainly indicate otherwise. Additionally, the Fifth Circuit also reviewed the Commission's regulations and likewise concluded that calls to ISPs terminate under those regulations.⁶⁷ Thus, the Commission may not disregard the holdings of two federal Circuit Courts of Appeal.

Several ILEC commenters further assert that, even if the Commission were to apply its regulatory definition of termination, ISP-bound traffic does not meet the definition because the ISP is not the "called party" under the definition.⁶⁸ This claim begs the question – it is just another way of arguing that a call to an ISP “really” terminates not at the ISP, but at one or at a thousand web site locations or cache locations to which the ISPs culls information for the customer. As WorldCom demonstrated in its opening comments, under any reasonable understanding of the term, the end user ISP is the called party.⁶⁹ The D.C. Circuit, the Fifth Circuit, and every other federal court that have addressed the question all have reached this same conclusion.⁷⁰ The conclusion is equally

⁶⁵ Bell Atlantic, 206 F.3d at 6 (emphasis added).

⁶⁶ See, e.g., USTA White Paper at 7.

⁶⁷ Southwestern Bell, 208 F.3d at 486 (emphasis added); see also BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, 97 F. Supp. 2d 1363, 1470 (N.D. Ga. 2000).

⁶⁸ Verizon Comments at 4-7; Qwest Comments at 7-8; USTA Comments at 4-5; USTA White Paper at 7-8; SBC Comments at 21-22; BellSouth Comments at 5, 7-8.

⁶⁹ WorldCom Comments at 16-18.

⁷⁰ Bell Atlantic, 206 F.3d at 6; Southwestern Bell, 208 F.3d at 486; see also BellSouth, 97 F. Supp. 2d at 1379.

compelled by the Commission's classification of ISPs as end users. In this regard as well, the ILECs are inviting the Commission to reject the view of every court to have considered this issue, including the D.C. Circuit in this very case. The Commission should decline the invitation.

V. The ILECs' Policy Claims Regarding Reciprocal Compensation Are Contrary To The Statute And Demonstrate That Considerations of Policy Support Subjecting ISP Traffic to Reciprocal Compensation

The ILECs make a series of specious policy arguments that they claim support their view that there should be no reciprocal compensation for ISP-bound traffic. Generally, the ILECs assert that reciprocal compensation encourages CLECs to attract ISP customers to take advantage of the traffic imbalance they generate, and that this regulatory incentive leads to a series of deleterious consequences.⁷¹ They then describe a parade of horrors that allegedly will follow if this practice is allowed to continue. The initial - and indeed, dispositive - response to these varied arguments is the fact that they are completely beside the point. The ILECs would have the FCC ignore the statute and instead embrace dubious claims about the impact of reciprocal compensation. In fact, the D.C. Circuit has established the lawful path in this remand proceeding: the FCC must embrace the statute above all else. Substitution of ad hoc claims for congressional and judicial directives is a sure way to another court remand.

Another answer to the ILECs' claim about reciprocal compensation for ISP traffic is that, if switching and transport rates are set at cost, then by definition reciprocal compensation does no more

⁷¹ See, e.g., USTA White Paper at 13-14; BellSouth Comments at 13-14.

than cover the costs of transporting and terminating a call. Cost-based rates create no incentives on anyone's part to sign up customers that either make or receive a particular type of phone call.⁷²

Indeed, the only incentive created by applying reciprocal compensation to ISP traffic is an incentive on the part of the ILECs not to inflate the costs involved in transport and termination of traffic. This is an incentive that will have only pro-competitive effects. Apart from reciprocal compensation, ILECs have every incentive to overstate the true cost of network elements used by CLECs. Non-cost based element prices, as much as anything else, have slowed the growth of local competition. The incentives to fairly price network elements which are created by reciprocal compensation obligations are an increasingly important benefit to local competition, especially in light of the legal uncertainty created by ILEC challenges to the FCC's pricing methodology. In sum, the only incentives created by reciprocal compensation for local ISP traffic is a healthy incentive on the part of the ILECs to price network elements fairly.

Several commenters have suggested that, because of the purported imbalance in ISP-bound traffic, the Commission ought to impose a bill-and-keep regime of inter-carrier compensation for the exchange of ISP-bound traffic.⁷³ But as the Commission determined in the Local Competition Order,

⁷² By the same token, the ILEC arguments that ISP reciprocal compensation will deter CLECs from competing for local end-user customers, see SBC Comments at 36; Verizon Comments at 12-15, all depend on the fallacious argument that the cost-based recovery of charges for transport and termination of calls somehow results in a windfall to CLECs. Of course, the rates for transport and termination have been established based largely on the ILECs' own claimed TELRIC costs; if those rates now are too high, the ILECs' own cost studies are to blame. The argument is also news to WorldCom, a CLEC that provides service to many ISPs while at the same time aggressively and successfully seeking local customers whenever the ILECs' network element pricing makes that possible. The truth of the matter is that local competition will develop rapidly only when network element prices become truly cost-based, and reciprocal compensation for ISPs will make that more likely to happen, not less likely.

⁷³ See, e.g., SBC Comments at 51-53; BellSouth Comments at 5, 19-20.