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August 9, 2000

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FEDERAL COMMUNICATIONS COMMISSION
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BY HAND-DELIVERY

Magalie Roman Salas
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

Re: Reply Comments of ICG Telecom Group, Inc. In the Matter of Inter-Carrier
Compensation for ISP-Bound Traffic CC Docket Nos. 99-68 and 96-98 -
Public Notice of June 23, 1999

Dear Ms. Salas:

On behalf of ICG Telecom Group, Inc. ("ICG"), enclosed for filing is a corrected original and five copies of ICG's reply comments that were filed electronically in the referenced proceeding on August 4, 2000. One of the attachments to ICG's reply comments, the Declaration of William Page Montgomery, was incorrectly titled in the electronically filed version. Please date-stamp and return the extra file copy to me.

A corrected copy of the attachment is being served on the parties to this proceeding. If you have any questions, please call me at (202) 955-6680.

Sincerely,



Allan C. Hubbard

ACH/mjo

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Implementation of the Local)
Telecommunications Act of 1996)
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Intercarrier Compensation for ISP-Bound)
Traffic)
)

CC Docket No. 96-98

CC Docket No. 99-68

REPLY COMMENTS OF ICG TELECOM GROUP, INC.

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August 4, 2000

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SUMMARY

Bell Atlantic compels a finding that ISP-bound traffic is “telephone exchange service” and therefore subject to the reciprocal compensation provisions of Section 251(b)(5) of Act. The ILECs attempt to wave aside the court’s directive and refocus the debate on already rejected legal arguments and overblown policy claims of market “distortion.” The ILECs’ attempts must fail.

The ILECs, with one significant exception, point to the Commission’s *Advanced Services Remand Order* as support for their argument that ISP-bound calls are “exchange access” and therefore not subject to reciprocal compensation. As that one excepted ILEC properly concedes, ISP-bound calls cannot be “exchange access” because such calls do not entail the requisite “telephone toll services.” If an ISP-bound call is not “exchange access,” it must – as *Bell Atlantic* explains – be “telephone exchange service.”

The ILECs attempt to give short shift to the crucial definition of “telephone exchange service” by arguing that the term is irrelevant because it is not specifically mentioned in the Commission’s rule governing reciprocal compensation. The *Bell Atlantic* court certainly did not share that view when it vacated the Commission’s Declaratory Ruling for failure to explain “the fit of the . . . rule within the governing statute,” most specifically the fit of the rule within the statutory framework of “exchange access” and “telephone exchange service.”

The ILECs try but fail to breath life into the Commission’s end-to-end analysis for determining whether ISP-bound calls are subject to reciprocal compensation. In addition, the ILECs tout the ESP exemption as support for their argument that ISP-bound

calls are interstate and not local. Actually, the exemption cuts the other way because it shows that the Commission consistently has mandated that ISP-bound calls be treated as local.

ISP-bound traffic is substantially identical to other local traffic in its use of the network and the costs incurred by the terminating carrier. Thus, even if the Commission found that ISP-bound traffic is not subject to 251(b)(5), the Commission should prescribe inter-carrier compensation arrangements that are the same as reciprocal compensation arrangements for other local traffic.

The ILECs also raise misplaced policy arguments. Reciprocal compensation for ISP-bound calls does not, as the ILECs allege, distort the market. To the contrary, CLEC service to ISPs has had a salutary effect on the growth of the Internet. A departure from reciprocal compensation for ISP-bound calls would have strong negative impact on that market.

Regardless of the resolution of the legal issues pending here, the Commission's polestar in this proceeding should be to ensure that inter-carrier compensation arrangements for ISP-bound calls are the same arrangements as those in place for other types of local calls.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Local Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Intercarrier Compensation for ISP-Bound Traffic)	CC Docket No. 99-68

REPLY COMMENTS OF ICG TELECOM GROUP, INC.

ICG Telecom Group Inc. (“ICG”) hereby replies to the comments submitted by various parties on July 21, 2000 in response to the June 23, 2000 *Public Notice, Comment Sought On Remand Of The Commission’s Reciprocal Compensation Declaratory Ruling By The U.S. Court of Appeals For the D.C. Circuit*, in the above-captioned proceeding (the “Public Notice”).

I. INTRODUCTION

Faced with the *Bell Atlantic* decision¹ which requires the Commission to find that ISP-bound traffic is subject to reciprocal compensation, the ILECs² wave aside the court’s clear directive and attempt to re-focus the debate on a number of the ILECs’ specious claims concerning the “distortions” that the ILECs allege will result from reciprocal compensation for ISP-bound traffic. The ILECs attack the competitive industry’s successes in serving ISPs as if CLECs were somehow gaming the process,

¹ *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (2000) (“*Bell Atlantic*”).

² The “ILECs” as used herein include United States Telecom Association (“USTA”), BellSouth Corporation (“BellSouth”), Qwest Corporation (“Qwest”), SBC Communications, Inc. (“SBC”) and Verizon Communications (“Verizon”).

accusing CLECs of riding the reciprocal compensation “gravy train.” Notwithstanding the ILECs’ assertions to the contrary, the fact that CLECs are net recipients of reciprocal compensation is simply a by-product of two competitive failures on the part of the ILECs.

First, due to a combination of monopolistic hubris and the fact that each of the ILECs has an ISP affiliate of its own, the ILECs have not competed vigorously for the ISP market. Without competitive pressures, the ILECs offered only “one size fits all” service at high rates. ICG and other CLECs, however, are able to offer ISPs an attractive combination of price and service packages that are carefully tailored to the ISPs’ operations. For example, ICG offers ISPs the option of collocating ISP equipment alongside ICG equipment in ICG’s central offices. ISPs have also been attracted by ICG’s superior network, which consists entirely of digital switching and fiber optic transport as opposed to the ILEC’s hybrid legacy networks.

Second, the ILECs have consistently sought to prevent broad competitive entry in every way possible. As a result, CLECs have been unable to achieve significant market penetration in the residential market. This means that nearly all residential Internet users are ILEC customers, and thus the ILECs are the originating carrier for almost all residential ISP-bound traffic. This fact, coupled with the CLECs’ notable successes in attracting ISP customers explains why ISP-bound traffic is the one category of traffic for which the ILECs are net payors rather than net payees.

While the ILECs are slowly awakening from their competitive slumber and beginning to more actively pursue the ISP market, their primary response has been to ask the Commission and state public utility commissions for a quick regulatory fix to the

problem. The bail-out the ILECs seek comes at no cost to them, and at great cost to their competitors so it is easy to see why they prefer that course.

The ILECs would have the Commission believe that the Commission must treat what they claim are symptoms of a broken market by exempting from compensation the single class of traffic where they are net payors. The ILECs attempt to deny ICG and other CLECs recovery of the costs that they incur in delivering traffic from ILEC customers to ISPs. The ILECs unfairly target this important customer CLEC base and would, if successful, leave ICG and other CLECs in the position of delivering traffic originated by the ILECs' customers without any way of recovering the costs they incur.

As the Maryland Public Service Commission found in its decision upholding reciprocal compensation for ISP-bound traffic, there would be onerous, anti-competitive costs imposed on CLECs if ISP-bound traffic is not subject to reciprocal compensation:

We are very concerned that [denying reciprocal compensation for ISP-bound traffic] will result in CLECs receiving no compensation for terminating ISP-bound traffic. Such an effect will be detrimental to our efforts to encourage competition in Maryland. No one disputes that local exchange carriers incur costs to terminate the traffic of other carriers over their network. In the absence of finding that reciprocal compensation applies, a class of calls (ISP traffic) will exist for which there is no compensation.³

The success of ICG and other CLECs in attracting ISP customers has made the ISP segment one of the few key areas where competitors have managed to win any significant market share away from the incumbent LECs. If CLECs are unable to recover their costs, one of their most notable successes to date will be turned into a defeat. This in turn could have serious ramifications for competition generally. If ICG and other CLECs

³ *MFS Intelnet of Maryland, Inc. v. Bell Atlantic-Maryland, Inc.*, Case No. 8731 (MD PUC 1999).

lose their competitive toehold and are denied the revenue stream and growth potential that ISPs represent, it will be significantly more difficult for them to continue to expand into the residential and business markets. The continued availability of reciprocal compensation for ISP-bound calls is thus critical not only to ICG and its ISPs, but to consumers who are its indirect but very real beneficiaries.

The Commission should also keep in mind that the current traffic imbalance is self-correcting, as reflected in the 25 percent drop in reciprocal compensation as a percentage of total CLEC revenue this year projected by Verizon. *See Verizon Comments at 21* (reciprocal compensation currently accounts for 8 percent of CLEC revenue and is expected to decline to 6 percent by year's end). This is true for two reasons. First, as the ILECs begin to compete more actively for ISPs, the traffic flow is moving towards balance. Second, as more and more residential and business customers transition to DSL and cable modems – which are not subject to reciprocal compensation – there will be a corresponding reduction in payments. The Commission should not overreact to a temporary market condition. Instead, it should let the market correct itself.

This is all the more true because the bill-and-keep approach urged by the ILECs would itself create a distortion in the market by creating a disincentive for carriers to serve ISPs and other types of customers with predominately incoming calls. Bill and keep makes no economic sense where significant traffic imbalances exist and would result in terminating carriers incurring costs they cannot recover. Regulatory structures always have a market effect. The solution is not to react to every swing of the market with a new regulation that sends the market back in the opposite direction but to allow the market to regulate itself.

II. ISP-BOUND TRAFFIC IS “TELEPHONE EXCHANGE SERVICE” AND THEREFORE IS SUBJECT TO THE RECIPROCAL COMPENSATION OBLIGATIONS OF SECTION 251(B)(5)

As ICG explained in its initial comments, *Bell Atlantic* makes clear that whether ISP-bound calls are subject to reciprocal compensation turns not on the end-to-end analysis engaged in by the Commission but on whether such traffic falls into the statutory category of “telephone exchange service” or “exchange access.” Because those two statutory categories “occupy the field,”⁴ ISP-bound calls must be either “telephone exchange service” or “exchange access.” Because ISPs do not provide “telephone toll services” as defined by the Communications Act of 1934, as amended (“Act”), ISP-bound calls cannot qualify as “exchange access.” Accordingly, ISP-bound calls must be “telephone exchange service” and thus must be eligible for reciprocal compensation under Section 251(b)(5) of the Communications Act of 1934, as amended (“Act”) and Section 51.701(b) of the Commission’s rules.

The ILECs (except for Qwest) argue weakly that ISP-bound calls are “exchange access” and thus are not subject to reciprocal compensation (Qwest acknowledges this argument is a loser and does not even attempt to assert it). Alternatively, the ILECs argue that it is “irrelevant” whether ISP-bound calls are telephone exchange service because the Commission’s rule defining “local telecommunication traffic” does not specifically invoke the statutory definition of telephone exchange service. The ILECs also try to salvage the Commission’s end-to-end analysis as a basis for denying reciprocal compensation for ISP-bound calls, and continue to point to the ESP exemption as support for their position that such calls are not subject to reciprocal compensation.

⁴ See *Bell Atlantic* at 8.

A. The ILECs Give Short Shrift to the Crucial Statutory Definition of “Telephone Exchange Service”

The ILECs, except Qwest, all point to the Commission’s *Advanced Services Remand Order*⁵ as support for their view that ISP-bound calls are exchange access, and thus not entitled to reciprocal compensation. USTA “Analysis of Issues on Remand in Reciprocal Compensation Proceeding” (“USTA Analysis”) at 14-16; BellSouth Comments at 8; SBC Comments at 22-23; and Verizon Comments at 9-10.

As ICG showed in its comments, the *Advanced Services Remand Order* provides the ILECs flimsy material with which to shore up their position that ISP-bound calls are exchange access. The *Advanced Services Remand Order*, which has been appealed to the D.C. Circuit, relates solely to DSL calls to ISPs, not the dial-up calls at issue in this proceeding. ICG Comments at 11-12. This distinction is significant. With a DSL connection, two LECs do not need to exchange traffic to facilitate the Internet users’ connection with the ISP. Thus reciprocal compensation does not even come into play as it would with two LECs who cooperate to provide a dial-up connection to the ISP. *Id.* at 12.

Moreover, as WorldCom points out, the *Advanced Services Remand Order*’s conclusion that ISP-bound DSL calls constitute exchange access service is heavily suspect:

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 of termination of telephone toll services.”

WorldCom Comments at 11.

⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147, FCC 99-413, released December 23, 1999 (“*Advanced Services Remand Order*”).

Even Qwest has the intellectual honesty to concede that ISP-bound calls are not “exchange access.” “Because ISPs do not provide ‘telephone toll services’ to their subscribers,” Qwest acknowledges that “the LEC portion of these calls do not qualify as ‘exchange access.’” Qwest Comments at 12. In short, the *Advanced Services Remand Order* provides no viable support for the ILECs’ argument that ISP-bound calls are exchange access rather than telephone exchange service for purposes of reciprocal compensation.

Because Qwest concedes – as it must – that it cannot rely on the *Advanced Services Remand Order* to establish that ISP-bound calls are exchange access (and therefore not telephone exchange service), Qwest attempts to argue that ISP calls fall into a third category: “information access.” Qwest Comments at 13. The obvious flaw in Qwest’s argument is that even if ISP-bound calls were “information access,” such calls still must fall in one of two mutually exclusive statutory categories of telecommunications: “telephone exchange service” or “exchange access.”⁶ As the court in *Bell Atlantic* pointed out, and as ICG and other CLEC parties have emphasized in their comments, the Commission itself has acknowledged that the statutory definition of telephone exchange service and exchange access “occupy the field” and “constitute the only possibilities.”⁷

As an alternative to their arguments that ISP-bound calls are not “telephone exchange service,” the ILECs blithely assert that the definition of telephone exchange service is “irrelevant” to the issue of whether Section 251(b)(5) reciprocal compensation obligations apply to ISP-bound calls. USTA Analysis at 14; BellSouth Comments at 8;

⁶ As WorldCom explains in its comments, “information access” most likely is a sub-category of “telephone exchange service.” WorldCom Comments at 14-15.

⁷ *Bell Atlantic* at 8.

Qwest Comments at 11-12; SBC Comments at 23; Verizon Comments at 10. The ILECs argue that the Commission did not explicitly reference the statutory definition of “telephone exchange service” in its rule defining “local telecommunication traffic,”⁸ and that the statutory definition therefore is not relevant. *Id.* The D.C. Circuit in *Bell Atlantic* – a court that routinely reviews Commission rules and regulations for consistency with the statutory provisions of the Act – certainly thought the statutory definition was relevant. As the court stated in its discussion of the “telephone exchange service” issue:

There is an independent ground requiring remand – the fit of the present rule within the governing statute.

Bell Atlantic at 8. For an agency fashioning rules, maintaining consistency with the enabling legislation is not only relevant but mandatory.

In short, the ILECs have maintained the weakest of attacks on the statutory analysis that is the linchpin to the determination that ISP-bound calls are subject to reciprocal compensation.

B. The ILECs Fail to Breath Life Into the Commission’s End-to-End Analysis for Determining Whether ISP-Bound Calls Are Subject to Reciprocal Compensation

Bell Atlantic inflicts irreparable damage on any application of the Commission’s end-to-end analysis to the issue of whether ISP-bound calls are subject to reciprocal compensation. As ICG explained, the court’s view in *Bell Atlantic* is that a finding that ISP-bound traffic is jurisdictionally interstate has no bearing on whether such traffic is local

⁸ The term “telephone exchange service” is co-extensive with “local service.” Had the Commission intended that “local telecommunications traffic” not fall within the statutory definition of “telephone exchange service,” surely the Commission would have explicitly stated as much.

telephone exchange service and therefore subject to Section 251(b)(5). *See* ICG Comments at 12-13.

The ILECs nonetheless make a futile argument that the Commission’s end-to-end analysis is somehow relevant. The USTA Analysis, which is echoed by most of the ILECs, urges the Commission to strengthen its end-to-end analysis in two respects. First, USTA urges the Commission to make clear that the “end-to-end jurisdictional analysis *has* been consistently applied to circumstances involving multiple service providers, including information-service providers.”⁹ Second, USTA urges the Commission to demonstrate that the “end-to-end analysis has not been confined to purely jurisdictional analysis, but has been applied as well to substantive questions concerning application of the Commission’s rules.”¹⁰ The individual ILECs advance the same arguments. *See* Verizon Comments at 5-6; Qwest Comments at 3-4; SBC Comments at 9-10 and BellSouth Comments at 6-7.

1. The Commission Has Not Applied the End-to-End Analysis to Circumstances Similar to an ISP-Bound Call

USTA cites *General Tel. Co. v. FCC*, 413 F.2d 390 (D.C. Cir.) cert. denied, 396 U.S. 888 (1969) (“*General Tel.*”) as an illustration of the point that the Commission has applied the end-to-end analysis to circumstances involving multiple service providers, including information service providers. USTA Analysis at 8-9. In *General Tel.*, the court upheld the Commission’s jurisdiction over “channel service,” a common carrier service using wholly intrastate facilities for the purpose of transmitting broadcast programming that originated in another state. USTA’s point in citing *General Tel.* is that “neither the Commission nor the court accepted the attempt to split the service [television broadcast] in

⁹ USTA Analysis at 8 (emphasis in original; footnote omitted).

¹⁰ *Id.* at 9.

two: the communication was treated on an end-to-end basis.” USTA Analysis at 9. USTA’s point is misplaced.

As a preliminary matter, it is not at all clear that the broadcast programming in question is an information service, as alleged by USTA. Broadcast programming does not offer “a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . .” 47 U.S.C. 153(41). Indeed, as the court explained in describing the TV signals being transmitted: “no claim is made that the program material transmitted by the TV station is materially different from the program material by the home viewer from such station.” *General Tel*, 413 F.2d at n.3.

Moreover, even if broadcast programming is an information service, *General Tel* does not apply. The fact that the Commission used an end-to-end analysis in its assertion of jurisdiction over channel service is irrelevant. In the cable service described in *General Tel*, the provider of the information service – the broadcaster – is located at the *end* of the transmission. Thus, while the service may involve multiple service providers, including an information-service provider, the service’s transmissions nonetheless constitute a continuous communication from the broadcaster to the end user.

ISP-bound calls are vastly different from the cable television transmissions described in *General Tel*. As the *Bell Atlantic* court explained, ISP-bound calls the transmission from the end user to the website involves two separate services. *Bell Atlantic* at 6-7. The first, from the end user to the ISP, is telecommunications service; the second, from the ISP to the website, is an information service. ISP-bound calls, therefore, do not constitute single continuous communications from the end user to the website.

Moreover, the Commission was motivated to apply its end-to-end analysis to the cable television service in *General Tel* because of its concern that, “[t]o categorize [the local telephone company’s] activities as intrastate would . . . serve merely to prevent the national regulation. That is not only appropriate, but essential to the use of radio facilities . . .” *General Tel* at 401. This concern does not exist for ISP-bound traffic since there is no question that the Commission has jurisdiction over ISP-bound traffic, regardless of whether the traffic is interstate or local for reciprocal compensation purposes.¹¹

2. End-to-End Analysis Can Only Be Applied When Consistent With Applicable Statutes and Rules

The ILECs also attempt to breath new life into another case on which the Commission relied as the basis for its *Ruling*: the *Teleconnect* case.¹² The ILECs now assert that *Teleconnect* demonstrates that the end-to-end analysis has been applied to “substantive” as well as “jurisdictional” questions. USTA Analysis at 9-10; Qwest Comments at 4-5; SBC Comments at 10-13; Verizon Comments at 6. USTA asserts that the end-to-end analysis the Commission conducted in *Teleconnect* had nothing to do with jurisdiction, but with the “substantive application of the FCC rules.” USTA Analysis at 9-10. Moreover, USTA asserts that the Court [in *Bell Atlantic*] overlooked” the fact that *Teleconnect*’s end-to-end analysis was “substantive.” *Id.* at 9.

USTA and the other ILEC parties miss the court’s point. The court’s concern with the Commission’s use of an end-to-end analysis was not based on its belief that the Commission’s end-to-end analysis had not been applied to “substantive questions

¹¹ See Section II.D. *infra*.

¹² *Teleconnect Co. v. Bell Telephone Co.*, 10 FCC Rcd 1626 (1995), *aff’d sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997) (“*Teleconnect*”)

concerning application of the Commission’s rules.” USTA Analysis at 9-10. Rather it was based on the fact that the Commission failed to explain why it applied the end-to-end analysis to determine whether ISP-bound calls are local, rather than applying Commission rules¹³ and statutory provisions to determine whether such calls are local. *Bell Atlantic* at 6-9.

Thus, while it may be true that in *Teleconnect* the Commission applied its end-to-end analysis to resolve a dispute regarding access charges, the Commission was not faced – as is the case with reciprocal compensation – with applicable Commission rules that require the Commission to use a specific framework to determine whether a call is local. The fact that the Commission applied the end-to-end analysis in *Teleconnect* has no bearing on whether the Commission can apply the end-to-end analysis in the reciprocal compensation context.

C. *Bell Atlantic* Makes Clear that an ISP-Bound Call Is Not a Single Continuous Communication

The court in *Bell Atlantic* emphasized that “ISPs are information service providers,”¹⁴ and that “[e]ven if the difference between ISPs and traditional long distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation.”¹⁵

The ILECs attack *Bell Atlantic*’s information service provider distinction. They do so by seeking to characterize an ISP-bound call as a “single continuous communication” – the term used by the Court in *Bell Atlantic* to characterize the type of traditional long

¹³ 47 C.F.R. §§ 51.701(b)(1) and 51.701(d).

¹⁴ *Bell Atlantic* at 6.

¹⁵ *Id.* at 6-7.

distance voice telecommunication at issue in *Teleconnect*. See USTA Analysis at 1 (“an Internet-bound call involves a single continuous communication”) and at 5 (“there is no doubt that a call to an Internet website *is* a single, continuous communication”). Verizon emphasizes this argument, and has gone so far as to submit a technical report that purports to substantiate its views. See Verizon Comments at 6-9, and attached Declaration of Dr. Charles L. Jackson.

As shown in the attached Declaration of Dr. Robert Mercer, there are fundamental differences between ISP-bound calls, on the one hand, and the long distance voice calls that are the subject of the “single continuous communication” referred to in *Bell Atlantic*, on the other hand. These differences include different data link protocols, the fact that there is no notion of a connection over the Internet and thus no connection to be created or terminated, and, perhaps most importantly, no voice network equivalent of the Internet process in which multiple application-to-application sessions involving multiple sites take place sequentially over a single dial-up connection. See Mercer Declaration at 3-4. Based on these differences, Dr. Mercer concludes that “in all key respects, a dial-up call to an ISP is a local exchange call that terminates at the ISP.” *Id.* at 2.

SBC comes at the issue from a different angle, and challenges the *Bell Atlantic* information services distinction by arguing that information service, by definition, is “built on an underlying telecommunications component.” SBC Comments at 16. As SBC explains it:

[A]n information service is actually nothing more than a telecommunications service with added functionality. While a telecommunications service provider offers pure transmission service, an information service provider offers something more than pure transmission. It combines telecommunications with enhancements, such as data processing and other functions.

SBC Comments at 16.

SBC then revisits the *MemoryCall*¹⁶ case, arguing that the case “bears special emphasis because it is dispositive of this case and because its significance somehow escaped the Court.” SBC Comments at 18. In *MemoryCall*, the Commission asserted jurisdiction over BellSouth’s voice mail service, finding that although that part of the service in which the call is forwarded from the called party’s number to the voice mail equipment may have been performed intrastate, when an out-of-state caller is connected to BellSouth’s voice mail “there is a continuous path of communications across state lines between the caller and the voicemail service.” *MemoryCall* at 1620. SBC makes much of the point that voice mail is an information service, and states that “the Commission held, for purposes of determining the boundaries of a communication, a telecommunication service that connects to an information service is no different from an ordinary phone call.” SBC Comments at 18.

SBC may be correct in suggesting that the court in *Bell Atlantic*, in distinguishing *MemoryCall*, did not appreciate that voice mail is an information service. See *Bell Atlantic* at 6-7, where the court makes no mention of the fact that BellSouth, as the provider of the voicemail service in *MemoryCall*, is functioning as an information service provider. Nevertheless, the question is “so what?” As the court explained:

However sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications [ISP-bound calls] as continuous *works for purposes of reciprocal compensation*.

Bell Atlantic at 7 (emphasis added).

¹⁶ *In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the Bell-South Corporation*, 7 FCC Rcd 1619 (1992) (“*MemoryCall*”)

D. SBC's Section 201 Argument Has Been Displaced by *AT&T v. Iowa Utilities Board*; the Commission Will Retain Jurisdiction Over ISP-Bound Calls Regardless of Whether Such Calls Are Interstate

SBC argues that if the Commission uses an end-to-end analysis for jurisdictional purposes, it must employ that same analysis in determining whether traffic is subject to Section 251(b)(5). As SBC stated:

Since – as the court seems to concede – an end-to-end analysis is appropriately used to determine jurisdiction, it *must* also be used to determine the reach of the reciprocal compensation provisions of the Act. Otherwise, the commission's jurisdiction over a communication would not be coincident with its authority to establish a rate regime for that communication under section 201. [footnote]

[footnote] With respect to ISP-bound traffic, for example, the disconnect between jurisdiction and section 201 authority would mean that the Commission would be unable to lift the ISP access charge, such as a flat-rated charge. In fact, absent a change in its interpretation of section 252(d)(2) of the Act, the Commission would be precluded from proceeding with the bill and keep proposal that is to be subject of its forthcoming Notice of Inquiry.

SBC Comments at 18.

This argument may have held water before the Supreme Court's decision in *AT&T v. Iowa Utilities Board*,¹⁷ but that is no longer the case. As Global NAPS and RCN aptly point out in their comments, the Supreme Court, by overturning the Eighth Circuit's earlier ruling questioning the Commission's authority over intrastate calls, has fundamentally changed the status of the issues. Global NAPS Comments at 8-9; RCN Comments at 3-5. As Global NAPS explains (Comments at 9) that:

. . . .to the extent that ISP-bound calls are jurisdictionally interstate, the Commission can direct that they be compensated under Section 251(b)(5) because it has plenary authority *both* over interstate traffic

¹⁷ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

and over how Section 251(b)(5) works. And if and to the extent that ISP-bound calls are jurisdictionally intrastate, the Commission can direct that they can be compensated under Section 251(b)(5) because the Commission has plenary authority over how Section 251(b)(5) works, even with regard to intrastate traffic.

To the extent the Commission’s objective in this proceeding is to assert jurisdiction over ISP-bound calls because of a perceived need for centralized regulation, the Commission need not be concerned.

E. The Commission’s Prior Treatment of ESPs Supports, Not Undermines, the Appropriateness of Reciprocal Compensation for ISP-Bound Calls

USTA argues that the Commission’s prior treatment of ESPs need not be the “embarrassment” that the court suggests that it is. USTA Analysis at 10. Accordingly, USTA urges the Commission “to explain that the ESP exemption firmly supports the FCC’s prior decision as a matter of policy.” *Id.* The court, however, made it clear that policy arguments were irrelevant to its concerns. It explained that, “[a]lthough to be sure, the Commission used policy arguments to justify the ‘exemption,’ it also rested it on an acknowledgment of the real differences between long-distance calls and calls to information service providers.” *Bell Atlantic* at 8.

The Commission has not only acknowledged that there are real differences between long distance calls and calls to ISPs, it has also treated calls to ISPs differently. Specifically, the Commission has treated the calls as local in nature. For example, under the Commission’s “separations” regime, costs incurred from carrying calls to ISPs are treated as local, and ISPs obtain service out of the same intrastate tariffs as other business end users. In response, USTA retorts that “this argument misconstrues the nature of the ESP exemption: just because calls to ESPs are treated as though they were local for one purpose – that is, for regulating the rate that ESPs and their end users pay for those calls – it does

not follow that such calls should be treated as local for all purposes.” USTA Analysis at 11. It is USTA, however, that misconstrues the nature of the ESP exemption. USTA simply fails to address the court’s clearly articulated concern that the Commission’s application of an end-to-end analysis for the purpose of reciprocal compensation conflicts with the Commission’s acknowledgment in the context of the ESP exemption, that calls to ISPs are different from calls to IXC’s. As the court and the Commission pointed out, the exemption is based in significant part on the fact that it is not clear that [information service providers] use the public switched network in a manner analogous to IXC’s.” *Bell Atlantic* at 8 (quoting *In the Matter of Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, 16133 (1997)). USTA, however, argues that the exemption is based on just the opposite; namely, that the “ESP exemption is based on recognition that ESPs use the local exchange in a manner analogous to the way IXC’s use the local exchange” USTA Analysis at 11.

USTA argues that the Commission should not treat ISP-bound calls as local for reciprocal compensation purposes despite its treatment of such traffic as local in other contexts because “treating Internet-bound calls as if they were local for reciprocal compensation purposes leads to market distortions and suppresses competition.” *Id.* Once again, however, this argument fails to respond to the court’s main point which is that the manner in which the Commission treats calls to ESPs is relevant because the ESP exemption was based in part on the Commission’s belief that calls to ESPs are local.

III. EVEN IF ISP-BOUND TRAFFIC IS NOT SUBJECT TO SECTION 251(B)(5), THE COMMISSION SHOULD TREAT THE TRAFFIC AS IF IT WERE AND REQUIRE RECIPROCAL COMPENSATION

A. ISP-Bound Traffic Is Substantially Identical to Local Traffic in Its Use of the Local Exchange Network and the Costs Incurred by the Terminating Carrier

Calls to ISPs are fundamentally indistinguishable from local voice calls in either their use of the local exchange network or the costs the terminating carrier incurs in terminating the traffic. There is thus no basis for treating ISP-bound calls differently than local voice calls, even if the Commission does not find that ISP-bound calls are subject to Section 251(b)(5).¹⁸

1. ISP-Bound Calls Use the Local Exchange Network in a Manner Substantially Identical to Local Voice Calls

Calls delivered by a LEC to an ISP are no different from calls delivered to a residential or business customer in terms of how the call uses the network. Indeed, this finding was one of the principle bases under which the great majority of state commissions that considered the issue after the *Declaratory Ruling* but prior to *Bell Atlantic* held that ISP-bound calls should be subject to reciprocal compensation.

Ohio was one of the many states to require reciprocal compensation for ISP-bound traffic during that period. Attached hereto as a portion of the testimony of ICG's

¹⁸ ICG endorses the argument made by ALTS and AT&T that the Commission should require payment of reciprocal compensation even if it determines that ISP-bound traffic is interstate. Section 251(b)(5), by its terms, applies to interstate as well as local traffic. ALTS Comments at 11-12; AT&T Comments at 12-13. In its 1996 *Local Competition Order*, the Commission excluded long distance traffic from the reciprocal compensation obligation in order to protect the access charge regime and universal service. *Local Competition Order* at 16013. The exclusion, however, serves no purpose in the case of ISP-bound calls since such calls never supported universal service. This is another reason why the Commission should find that ISP-bound calls and subject to reciprocal compensation obligations.

economist witness in that proceeding, Michael Starkey. Mr. Starkey describes how the use of the local exchange network by an ISP-bound call and a local voice call are fundamentally identical:

[R]egardless of whether the originating customer dials either [an] ICG residential or [an] ISP customer, the call travels from the originating customer's premises to the Ameritech central office switch, which then routes the call to the Ameritech/ICG interconnection point and ultimately to the ICG switch. From the ICG switch the call is then transported to either the residential customer or the ISP customer depending upon the number dialed by the Ameritech customer.

Starkey Testimony at 27-28; *see* Starkey Testimony, Diagram 1 (showing that calls from a Ameritech customer to an ICG residential customer and to an ICG ISP customer are identical in their use of ICG's network). Thus, a "ten minute call originated on the Ameritech network and directed to the ICG network travels exactly the same path, requires the use of exactly the same facilities and generates exactly the same level of cost regardless of whether that call is dialed to an ICG local residential customer or to an ISP provider." Starkey Testimony at 27.

2. The Costs Carriers Incur in Terminating ISP-Bound Calls Are Substantially the Same as the Costs Carriers Incur in Terminating Local Voice Calls

As AT&T emphasized in its initial comments, "absent demonstrated and categorical delivery cost differences between ISP-bound and local traffic, that carriers should apply the same pro-competitive compensation arrangements to both types of traffic. . . ." AT&T Comments at 17. Yet the ILECs would have functionally identical calls to ISPs go completely uncompensated. This runs counter to one of the most basic economic principles: Given that the costs to terminate calls made to residential customers and to ISP customers are identical, the rates associated with recovering those costs should

be identical. As the Alabama Commission held in finding in ICG's favor on the issue of reciprocal compensation for ISP-bound traffic,

calls over [LEC] facilities to ISPs appear functionally equivalent to local voice calls which are subject to reciprocal compensation. *Since the same network facilities and functions are utilized to complete both types of calls, it is axiomatic that the costs to deliver them are identical. We find that those identical costs dictate that the rates associated with recovering those costs should also be identical.*

Alabama Order at 18 (emphasis added).¹⁹ Thus, as with ILEC-originated calls delivered to business or residential customers, ICG is entitled to recover the costs it incurs on ILEC's behalf when it delivers a call to an ISP.

SBC and Verizon have made passing attempts to demonstrate that there are cost differences between handling an ISP-bound call and other local calls. SBC Comments at 33-36, Smith Testimony and Verizon Comments at 13-19; Taylor Declaration. For the reasons explained in the Montgomery Declaration, the Smith Testimony should be given no credibility. Montgomery Declaration at 4. Indeed, SBC itself noted that it "anticipates that CLECs will criticize these studies" SBC Comments at 36.

Turning to the Verizon Comments, the purported cost differences fall into four categories: (1) call duration; (2) dedicated capacity; (3) call direction and (4) load distribution. As shown in the attached Declaration of William Page Montgomery ("Montgomery Declaration"), these cost differences are illusory.

As to call duration, the differences shown in the Taylor Declaration relate to spreading call set up costs over calls of greater than average duration, thereby lowering the

¹⁹ In re *Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket 27069, Final Order on Arbitration, (AL P.S.C. Nov. 10, 1999) ("*Alabama Order*").