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October 5, 2000

Ex Parte Filing

Magalie Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: *Comment 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

Dear Ms. Salas:

On October 4, 2000, Gary Phillips of SBC Communications Inc., Edward Shakin of Verizon Communications Inc., Keith Townsend of USTA, Aaron Panner, and I met with Christopher Wright, Jon Nuechterlein, Paula Silberthau, Debra Weiner, and Erez Kalir of the Office of General Counsel and Tamara Preiss of the Common Carrier Bureau to discuss matters in the above-captioned dockets. I have attached a summary of the points that we discussed.

One original and one copy of this letter are being submitted to you in compliance with 47 C.F.R. § 1.1206(a)(2) to be included in the record of this proceeding. If you have any questions concerning this matter, please contact me at (202) 326-7900.

Sincerely,

Mark L. Evans

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Enclosure

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PRESENTATION ON ISP RECIPROCAL COMPENSATION

The Commission should reaffirm that Internet-bound traffic is non-local traffic not subject to reciprocal compensation for four reasons:

- It's the only result consistent with the Commission's regulations
- It's the result that best comports with the statutory language and structure
  - Under the statute's terms, section 251(b)(5) obligations apply only when local carriers jointly complete calls — a matter that arises only with the introduction of competition among LECs for local end-user customers
  - Sections 251(g) and 251(i) make clear that section 251(b) is not intended to displace the Commission's preexisting authority over access traffic
  - The Commission got this right in the *First Report and Order*
- It's the right result as a matter of policy
- It gives the Commission maximum authority over this traffic

This result is eminently defensible in the Court of Appeals:

- The Commission's four-year-old conclusion that section 251(b)(5) applies only to local traffic was not the subject of the D.C. Circuit appeal, and there is no basis for challenging that conclusion here
- The D.C. Circuit remanded for three reasons:
  - The Commission had failed to explain the result in terms of its own regulations
  - The Commission had failed to explain how the reciprocal compensation ruling fits with the ESP exemption
  - The Commission had failed to square its ruling with the statutory terms "telephone exchange service" and "exchange access" — terms that the D.C. Circuit said are ambiguous

- Commission has already answered the third question and can effectively answer both of the others:

  - The Commission should explain that Internet-bound traffic does not "terminate" at the ISP within the meaning of the regulation (which codified the Commission's plainly correct interpretation of the statute); the agency is entitled to maximum deference when it construes its own regulations

  - The ESP exemption is a policy concerning the rate at which ESPs obtain exchange access service; it says nothing about the appropriate mechanism for inter-carrier compensation

  - The Commission thoroughly explained the telephone exchange service/exchange access dichotomy in its *Advanced Services Remand Order* — an order of which the D.C. Circuit was aware but which it refused to consider only because the analysis did not appear in the reciprocal compensation ruling itself

- Nothing in the D.C. Circuit's decision forecloses this result:

  - The whole point of the remand was to give the Commission the opportunity to explain the result it reached in light of the statute, its regulations, and its prior policy

  - The Court's language about "called party" is not a holding, but a characterization of MCI's arguments; another D.C. Circuit opinion states that "[a]ccess to a website reflects nothing more than a telephone call by a District resident to the defendants' computer servers, all of which apparently are operated outside of the District." *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349-50 (D.C. Cir. 2000).

  - The Court said that the terms "telephone exchange service" and "exchange access" are ambiguous and that "any agency interpretation would be subject to judicial deference"

A contrary result is unwise as a matter of policy:

- Requiring section 251(b)(5) reciprocal compensation on Internet-bound traffic means that Internet haves are subsidized by Internet have-nots

- It would force incumbents to pay CLECs when there is no source of revenue — as the Commission has recognized

- There is no indication that CLECs cannot recover their costs from ISPs — which is what the Commission required ILECs to do in the *Access Charge Reform Order*

A contrary result will give rise to significant new problems for the Commission here and elsewhere:

- It is impossible to square with the current regulation
- It is inconsistent with the *Advanced Services Remand Order*, the *GTE Tariff Order*, and many years of consistent precedent concerning the ESP exemption
- It would jeopardize Commission authority over this traffic and information services
- The Commission would lose the ability directly to regulate inter-carrier compensation for this traffic — subjecting it to state commission regulation, and federal district court review, under sections 251(b)(5) and 252(d)(2)

A contrary result reduces the Commission's flexibility:

- The Commission's prior analysis of section 252(d)(2)(B)(i) may affect its options with respect to mandatory bill-and-keep when traffic is not in balance
- It would be easy to establish bill-and-keep as a federal rule for Internet-bound traffic under section 201
- The Commission could condition bill-and-keep for Internet-bound traffic on the carriers' offering of bill-and-keep for local traffic as well