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November 1, 2000

***EX PARTE* FILING**

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-bound Traffic, CC Docket No. 99-68 - Notice *of Ex Parte* Presentation

Dear Ms. Salas:

On October 31, 2000, Lee Schroeder, Vice President, Government and Regulatory Strategy for Cablevision Lightpath, Inc. ("Lightpath"), and the undersigned met with Kyle Dixon, Legal Advisor to Commissioner Powell. The meeting concerned the New York Public Service Commission's ("NY PSC") treatment of intercarrier compensation and other issues raised by the above-referenced proceeding. Lightpath also provided a summary of the NY PSC's approach to intercarrier compensation for Internet service providers and a written *ex parte* presentation previously filed in this proceeding. Copies of both these documents are attached.

Pursuant to sections 1.1206(b)(1) and (b)(2) of the Commission's rules, an original and one copy of this letter are being filed with the Office of the Secretary. Copies of the letter are also being served on the Commission personnel who participated in the meeting.

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Any questions concerning this submission should be addressed to the undersigned.

Respectfully submitted,

Chérie R. Kiser

cc: Kyle Dixon
Lee Schroeder

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October 17, 2000

VIA ELECTRONIC FILING AND HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 96-98 - Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 99-68 - Intercarrier Compensation for ISP-bound Traffic

Dear Ms. Salas:

Lightpath submits this response to certain arguments raised for the first time by SBC Communications, Inc. ("SBC") in reply comments and *ex parte* presentations submitted thereafter in the above-referenced proceeding. SBC argues that competing carriers should not receive reciprocal compensation for the transport and termination of traffic to ISPs because the competing carriers are fully compensated through the local business line rates, the subscriber line charge ("SLC"), and the special access surcharge.[1/] SBC's new argument distorts the facts and provides no compelling or logical rationale for changing a fundamental economic premise that is a key contributor to the development of an environment that supports competition - that carriers should be compensated for the use of their networks. SBC's argument draws on rules and rationale from Commission orders that were written before the advent of competition and were designed for a world in which the incumbent carrier was the only provider of local telecommunications service.

The foundation of a competitive telecommunications market is the seamless interconnection of networks to allow multiple carriers to complete calls to their respective customers.[2/] With the obvious exception of the incumbent telephone companies' networks, these

[1/] SBC Reply Comments at 13-17; SBC August 15, 2000 *Ex Parte* Presentation at 14-19; SBC September 15, 2000 *Ex Parte* Presentation at 5-6.

[2/] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 16025, ¶ 1058 ("Local Competition Order") ("The 1996 Act

telecommunications networks have been built based on economic rules established by regulatory agencies to facilitate the development of competition. The elimination of reciprocal compensation for the termination of traffic to a single customer type, as proposed by SBC, undermines a fundamental economic tenet of the regulatory regime to promote competitive telecommunications. Reciprocal compensation is intended to reimburse connecting carriers for the incremental "costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[3/]

In this latest effort to bolster a regime of bill and keep for ISP traffic -- the regime that the ILECs desperately sought to avoid when they thought they would be terminating the vast majority of the traffic[4/] -- SBC now contends that competing carriers receive sufficient compensation from their ISP customers to preclude the need for reciprocal compensation.[5/] SBC's filings ignore the fact that the ILECs previously argued that these same revenue sources were wholly inadequate to recover their costs when they serve ISPs.[6/]

SBC argues that the payment of reciprocal compensation on top of the state business line rate, the SLC, and the special access surcharge result in "double recovery."[7/] Despite SBC's contentions, there is no double recovery because the charges it identifies are not designed to recover the additional costs of transport and termination of local traffic that reciprocal compensation payments are designed to recover.

The SLC

The SLC,[8/] for example, is designed to recover from end users some of the costs of the local loop allocated to the interstate jurisdiction. *See* 47 C.F.R. § 69.152(a) ("Such charge shall be assessed for each line between the premises of an end user, or public telephone location, and a Class 5 office that is or may be used for local exchange service transmissions."). The transport and termination charges established by the Commission under its reciprocal compensation rules, however, do not recover any loop costs.[9/] The Commission recognized that loop costs are not

envisions a seamless interconnection of competing networks, rather than the development of redundant, ubiquitous networks throughout the nation.").

3/ Local Competition Order, 11 FCC Rcd at 16013, ¶ 1034.

4/ Local Competition Order, 11 FCC Rcd at 16047, ¶ 1100. All seven regional Bell Operating Companies and GTE submitted comments opposing "bill and keep" during the original Local Competition proceeding. See id. at 16047 nn.2649-50. This is in direct contrast to SBC's current support for bill and keep. SBC October 15, 2000 *Ex Parte* Presentation at 8-10.

5/ SBC August 15, 2000 *Ex Parte* Presentation at 15.

6/ Southwestern Bell Telephone Co. v. FCC, 153 F.3d 523, 541 (8th Cir. 1998).

7/ SBC Reply Comments at 17.

8/ The SLC is also called the End User Common Line Charge. SBC August 15, 2000 *Ex Parte* Presentation at 17.

9/ See Local Competition Order, 11 FCC Rcd at 16024-25, ¶ 1057. The Commission there concluded the costs of the local loop and line ports associated with local switches do not vary in proportion to the number of calls terminated over those facilities. "We conclude that such non-traffic sensitive costs should not be considered 'additional costs' when a LEC terminates a call that originated on the network of a competing carrier. For purposes of setting rates under 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that

traffic sensitive and therefore no additional costs are incurred for terminating traffic over the local loop. Reciprocal compensation is designed to recover such additional *costs that arise due to the use of the terminating carrier's network.*[10/] Transport and termination costs recoverable under the Commission's reciprocal compensation regime include the additional costs of transport (including tandem switching, if any) from the point of interconnection between the two carriers to the terminating carrier's end office switch (or equivalent facility) serving the called party, and the variable costs of end office switching - not the costs of the local loop.[11/] The SLC and reciprocal compensation, therefore, are designed to recover completely different costs.

Special Access Surcharge

Nor is the special access surcharge a source of revenue that is available to defray the additional costs of transport and termination designed to be recovered through reciprocal compensation payments. As SBC's own diagrams show, the special access surcharge applies, if at all, to a dedicated private line connecting the ISP to the Internet, which is separate and distinct from the facilities used for transport and termination.[12/] In many instances, the carrier providing the private line link, and ostensibly charging the surcharge, may not even be the same carrier incurring the costs of terminating traffic to the ISP from the point of interconnection with the originating LEC -- the costs recovered by reciprocal compensation. In addition, like the SLC, the special access surcharge is designed to recover costs allocated to the interstate jurisdiction, not the costs of transport and termination that are allocated to the local jurisdiction and recovered through reciprocal compensation.

Local Business Rates

SBC also contends that the ISP's payment of local business rates compensate competing carriers for terminating traffic to ISPs. SBC argues that, because ISPs only receive traffic, "it is impossible to view the revenues paid by the ISP as anything but payment for the receipt of traffic."[13/] This argument lacks substance and fails to prove anything. ISPs are not the only end users that receive more traffic than they originate. Any number of end users exhibit traffic patterns that are predominantly one-way. This could include an ISP providing access to the Internet, an electric utility providing telemetering services, a call center for a cable company or government agency, or the local pizza delivery shop. If there are different cost characteristics associated with such one-way traffic, they should be addressed as a whole, not isolated to ISPs. Moreover, taken to its logical conclusion, SBC's argument suggests that whether a carrier should

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is recovered on a usage-sensitive basis constitutes an 'additional cost' to be recovered through termination charges." Id.

10/ Local Competition Order, 11 FCC Rcd at 16013, ¶ 1034.

11/ 47 C.F.R. § 51.701(c),(d).

12/ See e.g., SBC August 15, 2000 *Ex Parte* Presentation, Figure 2. Figure 2 is attached to this letter as Exhibit A. SBC's diagram misrepresents what an ISP is paying for through its payment to a CLEC. A more accurate representation is presented in Exhibit B.

13/ See SBC September 15, 2000 *Ex Parte* Presentation at 6.

receive reciprocal compensation and at what level requires an analysis of the usage pattern for each individual customer. If that customer predominantly receives traffic, then the carrier serving that customer should receive little, if any, reciprocal compensation.

To the extent the Commission finds merit in the contention that "convergent" traffic, (*i.e.*, predominantly incoming traffic), warrants special treatment, Lightpath has suggested a mechanism to address any such concerns. Throughout these proceedings, Lightpath has described the New York Public Service Commission's ("NYPSC") framework for compensating carriers for terminating traffic, including ISP-bound traffic.[14/] Under that framework, carriers would receive the lesser end office termination rate for incoming traffic above a specific ratio unless the carrier could show that it has invested in a full-service, facilities-based "network with tandem-like functionality, designed both to send and receive customer traffic."[15/] The New York framework is a very reasonable approach to addressing concerns about traffic imbalances that may be caused by ISP-bound traffic.

Finally, it is interesting to note that SBC's argument that the charges paid by ISPs compensate CLECs for their costs is completely contrary to previous ILEC claims. In 1997, the ILECs argued that the ESP exemption from access charges must be lifted because ILECs were not being fully compensated for their costs.[16/] The ILECs made this argument even though they were receiving the business line rate from the ISP, the SLC and special access surcharge -- the very charges that SBC now claims are fully compensatory with respect to CLECs' termination of traffic to ISPs.[17/] In fact, when the ILECs were making this argument, they were not only receiving these revenues from the ISP, which the ILECs were serving, but the calling party as well because there was no competition. The revenue sources the ILECs previously argued were insufficient to compensate them are now deemed fully compensatory when they are received by CLECs.

In summary, adoption of SBC's proposal would undermine a fundamental economic principle that is key to a regulatory environment supportive of competition. SBC would have the FCC begin to erode this environment in a piecemeal fashion by singling out traffic based on user classification. Furthermore, SBC seeks to superimpose on the CLECs a pricing structure created

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14/ Lightpath Comments at 12-16; Lightpath Reply Comments at 4-7.

15/ Case 99-C-0529, Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation, New York Public Service Commission Opinion 99-10, Opinion and Order Concerning Reciprocal Compensation (Aug. 26, 1999) at 57. The NYPSC based its tandem functionality analysis on the FCC's Local Competition Order. Id. at 5-6.

16/ See Southwestern Bell Telephone Co. v. FCC, 153 F.3d 523, 541-42 (8th Cir. 1998). The Eighth Circuit was citing the FCC's Access Charge Reform Order that even if the costs are "undeniably interstate," the classification makes the ISPs subject to treatment as intrastate end users." Access Charge Reform, First Report and Order, CC Docket No. 96-262, 12 FCC Rcd 15982, 16133-34, ¶ 346 (1997).

17/ It should be noted that the SLC is not a federally mandated charge to be applied by CLECs and in many instances may not be part of the CLECs' rate structure. Moreover, as noted above, if the CLEC does not also provide the private line portion of the ISP's service between the ISP End User and the Internet, the only revenue received by the CLEC would be the business line rate similar to the revenues CLECs receive from all other end user business customers.

and designed for a time when incumbent, price regulated carriers provided ubiquitous local service. The Commission should reject SBC's contorted arguments and reaffirm that carriers that terminate traffic are entitled to recover their additional costs from the originating carrier.

Respectfully submitted,

CABLEVISION LIGHTPATH, INC.

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Enhanced Service Provider Exemption

Figure 2

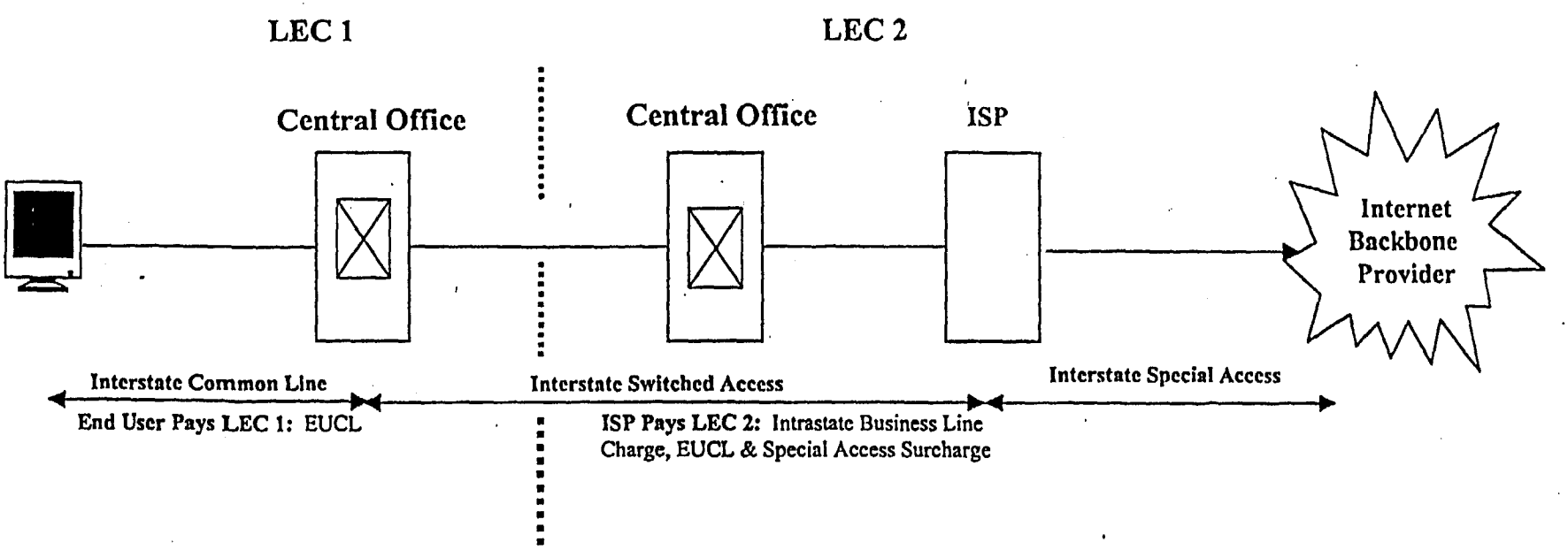
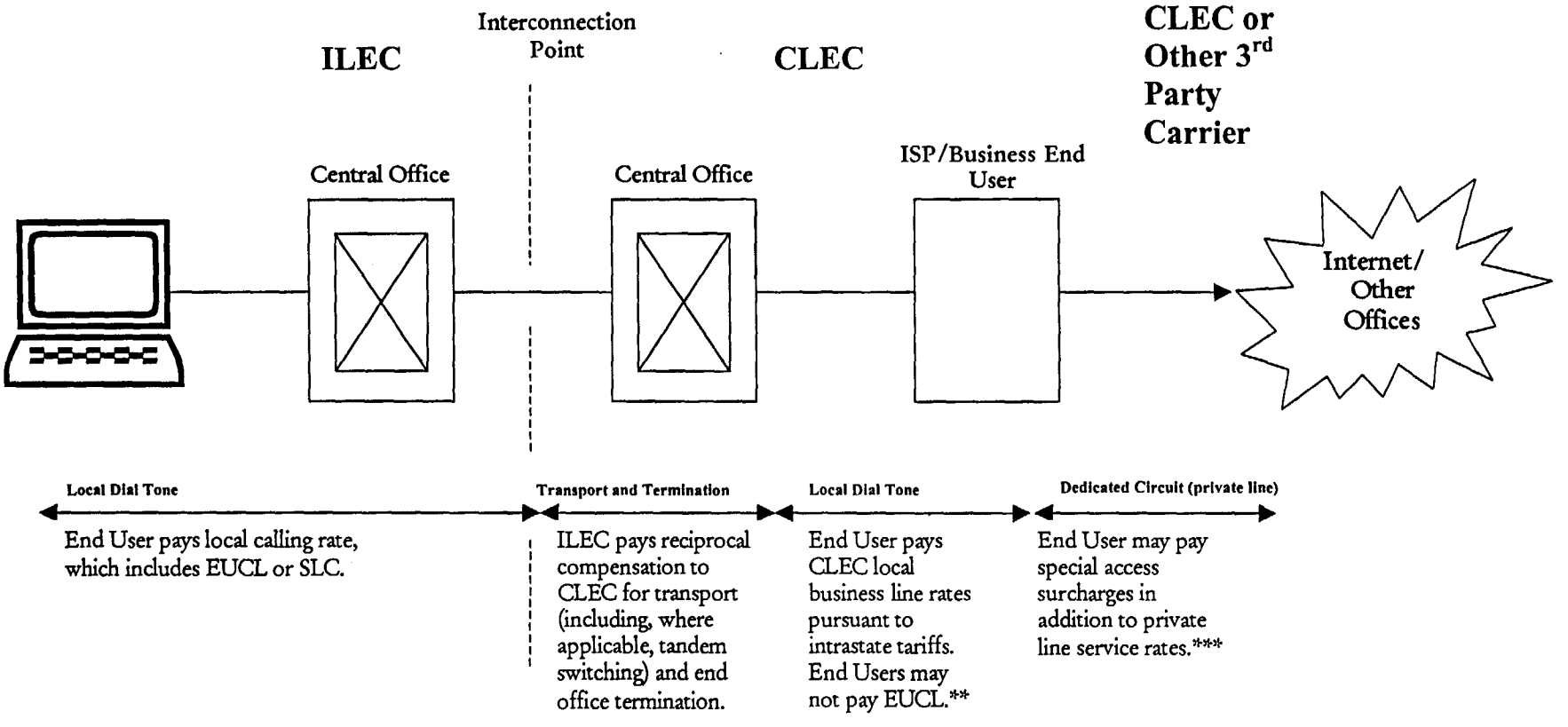


EXHIBIT B

END USER AND INTER-CARRIER COMPENSATION PAYMENTS FOR LOCAL BUSINESS TRAFFIC *



* This diagram only reflects traffic originated by an ILEC End User and terminated to a CLEC End User.

** The FCC's access charge rules applicable to Price Cap LECs are not applicable to competitive LECs and pricing for End User local business lines may not include an EUCL.

*** To the extent this surcharge is applied, it may be paid to carriers other than the CLEC furnishing the traffic to the End User.

Summary of the New York Public Service Commission's Approach to Inter-Carrier Compensation for Calls to Internet Service Providers. [1/]

In April, 1999 the New York Public Service Commission ("NYPSC") instituted a proceeding to re-examine reciprocal compensation -- particularly compensation for large-volume call termination to single customers, such as Internet service providers ("ISPs") and chatlines, that receive far more calls than they make (i.e., "convergent" traffic).[2/] After exhaustive discovery, a thorough administrative hearing (including an opportunity for cross examination of witnesses and experts), and a full round of briefing, the NYPSC concluded that:

- ISP-bound traffic should be treated as local, finding that there was "no sound reason to treat ISP traffic differently from other convergent traffic;"[3/]
- Convergent traffic can be terminated more efficiently and at lower costs than other traffic, and should therefore be compensated at a lower rate than non-convergent traffic;
- Carriers with a ratio of incoming to outgoing traffic greater than 3:1 for a three month period shall be presumed to carry a substantial amount of convergent traffic and should be compensated at the ILEC's end office rate for all traffic over the 3:1 ratio, unless a particular carrier can rebut this presumption. (Traffic below the 3:1 ratio continues to be compensated at Bell Atlantic's tandem rates in accordance with FCC rules);
- A carrier with a traffic imbalance greater than 3:1 can "rebut the presumption" by demonstrating that it is a full service, facilities-based carrier "investing in a network with tandem-like functionality, designed to both send and receive customer traffic."[4/] A carrier that successfully rebuts the presumption is entitled to receive the tandem rate, or the existing contract rate,[5/] for all traffic (including ISP-bound traffic) it terminates for another LEC.

The NYPSC's Order encourages true facilities-based competition by ensuring that full service, facilities-based carriers -- whose networks are designed to serve a wide range of

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1/ See Proceeding to Reexamine Reciprocal Compensation, Case 99-C-0529, Opinion and Order Concerning Reciprocal Compensation, Opinion No. 99-10 (issued August 26, 1999).

2/ Id. at 1-2.

3/ Id. at 58.

4/ Id. at 57.

5/ The NYPSC made clear that its decision did not modify the terms of existing contracts, except to the extent those contracts explicitly incorporate the tariffed rates affected by the NYPSC's Order. Id. at 60. In addition, ISP

residential and business customers dispersed over a broad geographic area -- are adequately compensated for the traffic they terminate. At the same time, the Order ensures that those carriers with more limited networks designed to specialize in terminating predominantly one-way traffic to relatively few customers are not overcompensated for the traffic they terminate.

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traffic is to be included in the reciprocal compensation provisions in existing interconnection agreements, unless an agreement explicitly excludes such traffic. Id. at 60-61.