ORIGINAL

COLE, RAYWID & BRAVERMAN, L.L.P.

ORIGINAL

ATTORNEYS AT LAW
1919 PENNSYLVANIA AVENUE, N.W., SUITE 200
WASHINGTON, D.C. 20006-3458
TELEPHONE (202) 659-9750
FAX (202) 452-0067
WWW.CRBLAW.COM

CHRISTOPHER W. SAVAGE
DIRECT DIAL
202-828-9811
CHRIS.SAVAGE@CRBLAW.COM

LOS ANGELES OFFICE
2381 ROSECRANS AVENUE, SUITE 110
EL SEGUNDO, CALIFORNIA 90245-4290
TELEPHONE (310) 643-7999
FAX (310) 643-7997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 23, 2001

BY HAND

Mr. Kyle Dixon
Office of the Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Intercarrier Compensation for ISP-Bound Calls, CC Dkt. Nos. 96-98 et al.

Dear Mr. Dixon:

This letter follows up on our meeting yesterday. A copy is being filed with the Secretary as well in order to disclose the permitted *ex parte* contact in this ongoing rulemaking matter. At our meeting (which was also attended by Mr. William Rooney, Jr., General Counsel of Global NAPs, Inc.) we discussed some of the practical and legal matters before the Commission in connection with sorting out what to do about intercarrier compensation for ISP-bound calls.

At the outset, we very much appreciate your taking the time from your extraordinarily busy schedule to meet with us. Our hope was to provide a practical and perhaps slightly different perspective on the issues than you might have heard from others. To that same end, we are further imposing on you with this letter summarizing and in some respects expanding on what we discussed.

We discussed two main points. First, whatever the Commission decides to do on a going-forward basis, if it represents a significant change from the current scheme, CLECs who have relied on the current rules will need a reasonable period of transition. Second — and perhaps more important — CLECs around the country have been doing millions of dollars of work delivering ISP-bound calls on the understanding and expectation that existing contracts (that is, contracts pre-dating the Commission' February 1999 order) will be enforced in a manner that allows payment for ISP-bound calls. They have been forced to do this work for free because the ILECs have relied upon the Commission's order as a basis for litigating the issue, rather than paying for these calls. The ILECs' determination to follow this strategy is only heightened by

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the few states that have been misled into accepting the ILECs' position. Unless the Commission plainly and forthrightly states that under current rules — that is, before the new prospective system takes effect — ISP-bound calls are local for compensation purposes, the only possible result will be additional and in some cases severe financial hardship for CLECs, as the ILECs renew the vigor of their "litigate, don't pay" stonewalling campaign.

These two points are discussed in more detail below.

On the practical front, as we discussed, in Global NAPs' view, the Commission has very broad authority to deal with this issue prospectively.[1] Global NAPs obviously has its own views as to what the Commission should do — which we believe to be generally in accord with the views of other CLECs, and with which we believe the Commission is quite familiar. For the record (and briefly), we believe that ISP-bound calls are economically and technically equivalent to traffic that is "local" under any rational definition (*e.g.,* a call to a pizza parlor) and so should be treated the same as other local traffic for compensation purposes.

But our first key point was slightly different. One of the virtues of small entrepreneurial companies is that they can adjust their business plans more rapidly than entrenched incumbents, who are typically committed to particular technologies and service architectures to the tune of billions of dollars, and so cannot adapt very well to new conditions. We can deal with change. But — and this is crucial as a practical matter — the same small size that allows for agility in the marketplace also means that small CLECs, such as Global NAPs, operate with much less of a financial and operational reserve than the large incumbents.

The unfortunate Chapter 11 filing by e.spire yesterday afternoon illustrates this problem.

As a result, if the Commission chooses to establish some new and different regime for intercarrier compensation for ISP-bound calls (that is, different from the regime under which they are subject to compensation just like "local" calls, which is the overwhelmingly predominant result in state regulatory proceedings regarding this issue), it is critical that the Commission allow a reasonable transition period so that CLECs can adjust their business plans in a sensible fashion to adjust to the new rules.

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[1] Under Section 201(b), the Commission may adopt whatever rules are needed to implement "the Act," including Sections 251 and 252. *See AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366 (1999). If ISP-bound calls are subject to Section 251(b)(5), then the Commission may act under Section 201(b) to set binding rules regarding how that traffic will be handled (including how states must handle it in arbitrations). If it is not, but is instead "generic" interstate traffic subject to Section 201 of the Act, then the Commission may act under Section 201(b) to set intercarrier compensation rules for it. So whether ISP-bound calls fit within Section 251(b)(5) or not, the Commission clearly has jurisdiction to determine what the inter-carrier compensation rules for them will be.

We also discussed another critical practical issue, which is the litigation and uncertainty surrounding ISP-bound calls that have been delivered under existing contracts. As we noted, the Commission should rule that under its presently existing rules (that is, those promulgated in August 1996 and still in effect today), ISP-bound calls fall within the meaning of "local" traffic for purposes of reciprocal compensation.[2]

In the practical, real world (and with some exceptions), the typical interconnection contract from before February 1999 provides for compensation for "local" traffic but says nothing about ISP-bound traffic. Prior to this Commission's ill-fated decision from February 1999, every state to consider the question concluded that ISP-bound calls fell within the purview of the term "local." This unanimity arose because that was the only answer that made sense, given that every time the Commission had considered any analogous question, it had concluded that ISP-bound calls would be treated as local. This happened with regard to access charges (they don't apply to ISPs); universal service (ISPs don't pay USF assessments, because they are customers, not carriers); separations (the costs of handling ISP-bound calls are separated to the intrastate jurisdiction like any other local calls); interconnection rights (ISPs don't have them, because they are customers, not carriers); and the type of tariff from which ISPs should buy service (intrastate local business tariffs).[3] So when the compensation issue arose, states concluded that ISP-bound calls should be treated as local as well.

This uniform state-level result was completely in accord with what the D.C. Circuit eventually held, which is that the distinction that matters here isn't whether the traffic is interstate or intrastate — that doesn't really matter at all — but rather whether these calls should be viewed as "local" or long distance. *See Bell Atlantic v. FCC,* 206 F.3d 1, 3 (D.C. Cir. 2000). Since ISPs do not pay access charges, and do not assess toll charges on their customers, the only logical result is that these calls should be treated as "local" for compensation purposes.[4]

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[2] Legally, the rules that are in effect today on this topic are the rules from August 1996. The legal effect of the D.C. Circuit's vacating of the February 1999 order is that the analysis and discussion in that order (that is, the portion of the order other than the rulemaking proposal) is null and void. Despite the enormous effort that obviously went into the February 1999 order, as a legal matter it simply does not exist any more.

[3] The citations for all of these matters are in the record of this proceeding. In fact, the Commission itself identified most of them in the now-vacated February 1999 order.

[4] As we discussed, nothing in Section 251(b)(5) itself limits the reciprocal compensation obligation to "local" traffic. The "local" restriction was added by the Commission, for the purpose of preventing "double dipping," *i.e.,* a carrier receiving ***both*** reciprocal compensation from the originating carrier ***and*** access charges from the entity receiving the call. Since ISPs do not pay access charges, no "double dipping" can occur, so ISP-bound calls should be deemed "local" for purposes of the Commission's rules for this reason alone.

In this regard, we discussed the idea that the D.C. Circuit merely asked the Commission for a better "explanation" of why the end-to-end jurisdictional analysis made sense in the context of deciding whether the "local" or "toll" model should apply to ISP-bound calls. On some literal level that is true; the February 1999 order was vacated and remanded, not flatly reversed. But the Commission should not take what amounts to the court's politeness as a license to repeat on remand what the court plainly viewed to be logical errors in the original decision.

Putting the matter bluntly, the problem with the notion that the court just wanted "a better explanation" arises in trying to actually ***fashion*** one. This is a problem because it is impossible to simultaneously (a) meet the objections posed by the court's decision and (b) reach the same conclusion reached in February 1999, *viz.,* that the (supposed) interstate nature of the traffic means that reciprocal compensation cannot or should not be due. Like squaring the circle or untangling the Gordian Knot, before you start it seems like there should be some way to do it, but as you get into the problem, you come to realize that there isn't.[5]

Two final points on this issue. First, if it is merely ***possible*** for traffic to simultaneously be jurisdictionally interstate and "local" for compensation purposes, then the ILECs' standard position simply collapses. "It's interstate so it can't be local" is a fine litigation mantra for the ILECs. But the court directed the Commission to explain why, assuming the traffic is interstate, it should not ***also*** be treated as local for compensation purposes. ***That*** question unavoidably ***presumes*** that the ILECs' mantra must be false, because the court clearly believes that traffic ***can*** be both interstate for jurisdictional purposes (by applying the end-to-end test) and still be treated as local for compensation purposes. In this regard, the court asked the Commission to explain whether the "long distance/access charge" model or the "local/recip comp" model "works" for ISP-bound calls. That question puts the focus on economics, not jurisdictional metaphysics. And in that realm the answer is simple: since ISPs do not pay access charges, and since as far as the end user is concerned calls to ISPs are economically local, reciprocal compensation applies.

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[5] To give a few examples, the court was willing to accept that ISP-bound traffic could be interstate for jurisdictional purposes and local for compensation purposes, so the mere invocation of "it's interstate traffic" does not solve (or even contribute much to the solution of) the problem; it held that precedents such as *MemoryCall* are not controlling; it found precedents like the May 1997 *Access Charge Reform Order* and the April 1998 *Report to Congress on Universal Service* to be persuasive; it held that when an end user calls an ISP, the ISP was "clearly" the "called party;" and it rejected the Commission's reliance on its broad, pre-1996-Act definition of "access service" to classify these calls as non-local, in the face of the much narrower statutory definition of "exchange access" actually included in the 1996 Act. And just last month, the Commission's litigation counsel conceded to the court of appeals that the Commission's December 1999 *Advanced Services Remand Order,* holding that connections to ISPs are a form of "exchange access," should have been voluntarily remanded to the Commission for more work following the issuance of the *Bell Atlantic v. AT&T* decision vacating the February 1999 reciprocal compensation order. It would take quite an "explanation" to overcome these hurdles and reach the same result reached in February 1999.

Second, as we discussed, since the original August 1996 order, the Commission has decreed that a large amount of traffic that is undeniably interstate must also be treated as local for compensation purposes. This is the situation with intra-MTA traffic exchanged between a LEC and a CMRS provider. We noted that Global NAPs is located in Massachusetts, which is in MTA 8. Under the Commission's rules, a call that originates on a wireless phone in Bangor, Maine and is handed off for termination to the ILEC in Providence, Rhode Island is a "local" call for compensation purposes, despite its manifestly interstate nature. How could the Commission hope to persuade the court that it had faithfully sorted the issues out on remand if it came up with the same answer as it did before — that is, "it's interstate so it isn't local" — when the Commission's own rules plainly and expressly command that parties treat a large and growing segment of interstate traffic as local for compensation purposes?

So — essentially whatever the Commission decides to do on a prospective basis — the Commission would do a real service to the industry to forthrightly declare that under today's rules — that is, the rules that have existed since August 1996 — ISP-bound calls fit within the "local" category for compensation purposes. Such a ruling would not in any way constrain the Commission with regard to its choices for the future. But it would bring a swift end to the obstructionist campaign of stonewalling litigation on this topic to which CLECs have been subject in the wake of the February 1999 order and subsequent court activity.

Again, we are grateful that you were able to take the time to meet with us and discuss this issue.

Sincerely,

Christopher W. Savage

cc: Commission Secretary
Tamra Preiss