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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE OR LATE FILED

March 28, 2001

The Honorable Susan P. Ness
Federal Communications Commission
The Portals
445 12th Street, S. W.
Washington, D. C. 20554

Re: **EX PARTE** filed in *In the Matter of 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.

Dear Commissioner Ness:

We respectfully submit this ex parte presentation on behalf of WorldCom, Inc. ("WorldCom").

Incumbent carriers are requesting in this proceeding that the Commission issue an order that inevitably will result in another remand, if not outright reversal, from the reviewing court. Specifically, they are arguing to the Commission that it may base its analysis of the scope of reciprocal compensation obligations on the same flawed "interstate jurisdictional" test that it used in the original ruling, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689 ("*Reciprocal Compensation Ruling*"), *vacated*, *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

We urge the Commission not to take that approach. It would violate the D.C. Circuit's mandate to the Commission, ignore the Court's specific directives, and stand the Court's detailed analysis on its head. Accepting the incumbents' invitation would present the reviewing court with nothing more than a rehash of the arguments that led the D.C. Circuit to reject the *Reciprocal Compensation Ruling* in the first place for "want of reasoned decisionmaking." Accordingly, for the reasons set forth below, and in WorldCom's previous submissions, the Commission should conclude that section 251(b)(5) of the Telecommunications Act of 1996 ("1996

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Act" or "Act"), 47 U.S.C. § 251(b)(5), requires reciprocal compensation for the exchange of calls to Internet service providers ("ISPs").[1/]

Background

The specific question before the Commission in this remand proceeding is: "whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an Internet service provider (ISP)." *Reciprocal Compensation Ruling*, 14 F.C.C.R. at 3689 (¶ 1). In the *Reciprocal Compensation Ruling*, the Commission attempted to answer this question by looking to its interstate jurisdiction under the Communications Act of 1934, 47 U.S.C. § 201, and concluded that calls to ISPs are not local because they purportedly fall within that interstate jurisdiction. The Commission also instituted notice and comment proceedings to establish a compensation scheme, again relying on its section 201 jurisdiction. The D.C. Circuit vacated the Commission's ruling and its reliance on its interstate jurisdiction under section 201 for "want of reasoned decisionmaking." *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In remanding, the D.C. Circuit charged the Commission with two tasks:

- Explain, if possible, how using a "jurisdictional" analysis to answer the reciprocal compensation question "makes sense in terms of the statute or the Commission's own regulations," 206 F.3d at 3; and

- Address and not ignore the terms Congress used in the 1996 Act and the Commission's regulations promulgated under the Act, *id.* at 3, 6-9.

As noted, incumbent carriers are once again urging the Commission to re-adopt and expand upon its jurisdictional analysis under the Communications Act, 47 U.S.C. § 201, and to conclude under that analysis that reciprocal compensation does not apply to calls to ISPs. That analysis is incorrect and misplaced, and an order based on the incumbents' theory cannot be sustained. As explained below, in addition to previous submissions: (A) whether the Commission has interstate jurisdiction over calls to ISPs under section 201 is irrelevant to whether section 251(b)(5) confers a statutory right to reciprocal compensation for calls to ISPs; (B) under the plain terms of the 1996 Act and the Commission's regulations, calls to ISPs are subject to reciprocal compensation; and (C) even if the Commission's interstate jurisdiction under section 201 somehow were relevant to determining whether reciprocal compensation applies, calls to ISPs are local and subject to reciprocal compensation even under that section.

1/ We also respectfully direct the Commission's attention to WorldCom's July 21, 2000 Comments and August 4, 2000 Reply Comments, where many of these points are set forth in greater detail.

Discussion

A. Whether the Commission Has Interstate Jurisdiction Is Irrelevant to Whether Section 251(b)(5) Confers a Statutory Right to Reciprocal Compensation for Calls to ISPs.

As noted, the principal question before the Commission is one of statutory construction: whether the mandatory reciprocal compensation requirements of section 251(b)(5) apply to calls to ISPs. As the D.C. Circuit held in *Bell Atlantic*, the Commission must answer that question by analyzing the 1996 Act's text, structure, and purposes. The Commission did not do that in the *Reciprocal Compensation Ruling*. Instead, it conducted a lengthy inquiry into whether calls to ISPs should be considered "interstate" and thus subject to the Commission's traditional regulatory authority under section 201 of the Communications Act. The Commission believed that calls to ISPs fall within its Title II authority over interstate communications and therefore cannot be subject to the reciprocal compensation requirements of section 251(b)(5). But that is a *non sequitur*. Even if calls to ISPs were jurisdictionally interstate – and they are not – it is simply not the case that calls subject to the Commission's traditional interstate jurisdiction under section 201 automatically fall outside the Act's reciprocal compensation provisions.

The 1996 Act expressly requires reciprocal compensation for *all* "telecommunications," not merely local telecommunications. 47 U.S.C. § 251(b)(5). The limitation of section 251(b)(5) to "local" traffic comes solely from the Commission's interpretation of that section in the *Local Competition Order* and the resulting regulations. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 16012-14 (1996) (¶¶ 1033-1034) ("*Local Competition Order*"); 47 C.F.R. § 51.701. In turn, the Commission's limitation of section 251(b)(5) to local traffic in the *Local Competition Order* and regulations had nothing to do with the jurisdictional nature of traffic. That is not surprising, because any such jurisdictional analysis would contradict the Act's plain language, which does not mention jurisdiction.

By its plain terms, section 251(b)(5) is a *compensation* provision, not a jurisdictional provision. It provides that carriers are entitled to be compensated when they perform certain services – transport and termination – for other carriers with whom they are interconnected. Transport and termination are actual services (or components of services), not theoretical concepts of jurisdiction. The Commission's decision in the *Local Competition Order* to limit section 251(b)(5)'s applicability to local traffic arose only because a separate compensation scheme – the access charge regime – already existed for long-distance calls. The Commission understandably limited section 251(b)(5) to local traffic, because otherwise local carriers could receive a double-recovery when connecting to long-distance carriers. This was a pragmatic policy decision, not a conclusion premised in any way on jurisdiction. As the Commission stated:

> Access charges were developed to address a situation in which three carriers – typically, the originating LEC, the IXC [long-distance carrier], and the terminating LEC – collaborate to complete a long-distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service. By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call.

Local Competition Order, 11 F.C.C.R. at 16013 (¶ 1034) (footnotes omitted).

Any conclusion that the applicability of section 251(b)(5) to calls to ISPs rests on the Commission's interstate jurisdiction under section 201 would stand the Commission's reasoning in *Local Competition Order* on its head. As the Commission stated, the 1996 Act eliminated the previous importance of jurisdictional boundaries:

> The Commission concludes that sections 251 and 252 address both interstate and intrastate aspects of interconnection, resale services, and access to unbundled elements. The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues.

Id. at 15513 (¶ 24).

Indeed, it would have made no sense for the Commission to base its interpretation of section 251(b)(5) on the scope of its interstate jurisdiction. The central tenet of the *Local Competition Order* and the Supreme Court's decision in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), is that 1996 Act extends the Commission's jurisdiction to intrastate services. In a related context, the Commission itself has recognized that the 1996 Act requires it to "address the classification of Internet access service do novo, looking to the text of the 1996 Act." Report to Congress, *In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, 11537 (¶ 75) ("*Universal Service Report*"). Moreover, as WorldCom has explained in previous

comments, the Commission has ample jurisdiction under section 251 of the 1996 Act to regulate the reciprocal compensation pricing methodology. *See, e.g., AT&T Corp.*, 525 U.S. at 384.[2/]

We understand that some incumbents are claiming to the Commission that sections 251(g) and 251(i) of the 1996 Act, 47 U.S.C. §§ 251(g), (i), somehow support the use of a jurisdictional test to determine whether section 251(b)(5) applies to particular traffic. That claim is equally misplaced. These sections neither address whether a certain type of call is in fact interstate under the Act's definitions, nor whether reciprocal compensation is owed for any particular call. Rather, section 251(g) merely preserves the equal access requirements imposed at the breakup of the Bell System and formerly monitored by the MFJ court, and section 251(i) simply preserves the Commission's jurisdiction over interstate calls. 47 U.S.C. § 251(g); *see Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, No. 98-C-1925, 1998 WL 419493, at *14-15 (N.D. Ill. July 23, 1998).

We also understand that incumbents are arguing that the D.C. Circuit went so far as to hold that calls to ISPs are jurisdictionally interstate. That argument is incorrect and irrelevant. The D.C. Circuit simply noted that no parties had disputed that the Commission may use its interstate jurisdictional test to determine "whether a particular communication is interstate." *Bell Atlantic*, 206 F.3d at 5. But as the Court further stated, the Commission has to explain how that method is relevant to determining how interconnected local carriers should be compensated for the exchange of traffic to ISPs. Echoing the Commission's analysis of reciprocal compensation in paragraph 1034 of the *Local Competition Order*, the Court found that the Commission "has yet to provide an explanation why this [end-to-end jurisdictional] inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs." *Id.*

As WorldCom and others have demonstrated, the Commission's jurisdictional analysis is irrelevant and makes no sense in this context. Instead, the Commission must focus on the Act and its regulations to determine whether section 251(b)(5) mandates reciprocal compensation for calls to ISPs.

B. Under the Plain Terms of the 1996 Act and the Commission's Regulations, Calls to ISPs Are Subject to Reciprocal Compensation.

The Commission must answer the question presented by looking at the terms of the 1996 Act and its own regulations. Under section 251(b)(5) and 47 C.F.R. § 51.701(d), the 1996 Act affirmatively requires reciprocal compensation for calls to ISPs if calls to ISPs "terminate" locally.

2/ We also direct the Commission's attention to the ex parte materials WorldCom submitted on November 10, 2000, indicating the dramatic reduction in reciprocal compensation rates.

In the *Local Competition Order*, the Commission interpreted "termination" as the service one carrier provides when completing a call to one of its customers that another carrier's customer originated. The Commission defined termination, "for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and *delivery of that traffic from that switch to the called party's premises*." *Local Competition Order*, 11 F.C.C.R. at 16015-16 (¶ 1040) (emphasis added); *accord* 47 C.F.R. § 51.701(d); *see Pacific Bell v. Cook Telecom*, 197 F.3d 1236, 1241-44 (9th Cir. 1999). Section 251(b)(5) thus requires reciprocal compensation to be paid to local carriers when they switch a local call originated by another carrier's customer and deliver it to their own customer's premises.[3/]

Calls to ISPs terminate locally under the Commission's definition. To date, two federal Circuit Courts of Appeal have concluded that calls to ISPs do "terminate" at ISPs under the Commission's definition, and none has ruled otherwise. The Fifth Circuit applied the Commission's definition and held that a call to an ISP "indeed terminates at the ISP's premises." *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475, 486 (5th Cir. 2000). Likewise, the D.C. Circuit stated: "[c]alls to ISPs appear to fit [the FCC's] definition [of termination for reciprocal compensation purposes]: the traffic is switched by the [carrier] whose customer is the ISP and then delivered to the ISP, which is *clearly* the 'called party.'" *Bell Atlantic*, 206 F.3d at 6 (emphasis added); *accord BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Servs.*, 97 F. Supp. 2d 1363, 1379 (N.D. Ga. 2000); *see also Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, No. 98 C 1925, 1998 WL 419493, at *14 n.13 (N.D. Ill. July 23, 1998), *aff'd*, 179 F.3d 566 (7th Cir. 1999). In very similar circumstances, the Tenth Circuit also concluded that calls to ISPs terminate locally. *Southwestern Bell Tel. Co. v. Brooks Fiber Communications*, 235 F.3d 493, 499 (10th Cir. 2000). Accordingly, the Commission must apply its own definition of termination, not ignore it. As the foregoing United States Circuit Court decisions confirm, applying the definition leads inexorably to the conclusion that reciprocal compensation applies to calls to ISPs.

Further, as the D.C. Circuit recognized, the Commission is required to address additional important statutory terms in the 1996 Act. In vacating the *Reciprocal Compensation Ruling*, the D.C. Circuit held as "an *independent ground* requiring remand" that the Commission did not "fit the present rule within the governing statute" because it failed to determine whether calls to ISPs constitute "telephone exchange service" or "exchange access." *Bell Atlantic*, 206 F.3d at 8 (emphasis added).

3/ Some incumbents have mistakenly suggested reciprocal compensation cannot apply if traffic flow is largely one way, such as the inbound nature of calls to ISPs. As the Ninth Circuit has explained, however, the volume and direction of the traffic flow does not affect the obligation to pay compensation. *Cook Telecom*, 197 F.3d at 1241-44. The *obligation* to pay compensation is mutual and reciprocal, not necessarily the flow of traffic. *See id.* Just as incumbents must pay new entrants compensation for the transport and termination of calls to ISPs, so also must new entrants pay incumbents compensation for the transport and termination of calls to ISPs. *See id.*

The Commission has held on multiple occasions that ISP-bound traffic must be either "exchange access" or "telephone exchange service." *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services*, 15 F.C.C.R. 385, 386 (¶ 3) (1999); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services*, 13 F.C.C.R. 24011, 24032 (¶ 40) (1998). "Telephone exchange service" is the Act's term for the service used in connection with local traffic. *E.g.*, *In re Implementation of the Telecommunications Act of 1996, Telemessaging, Electronic Publishing & Alarm Monitoring Servs.*, 12 F.C.C.R. 3824, 3838-29 (¶ 9) (1997); *In re Application of BellSouth Corp. for Provision of In-Region, InterLATA Servs.*, 13 F.C.C.R. 20599, 20622 (¶ 29) (1998). As the Commission itself told the D.C. Circuit in *Bell Atlantic*, reciprocal compensation applies when two carriers jointly provide telephone exchange service. *See* Brief for Federal Communications Commission, *Bell Atlantic v. FCC*, No. 99-1094, at 23 n.10. The D.C. Circuit expressly held that the Commission must explain "why such traffic is 'exchange access' rather than telephone exchange service." *Id.* at 9.

As WorldCom and others have demonstrated in previous submissions, calls to ISPs constitute telephone exchange service under the Act and cannot constitute exchange access. ISPs do not connect to the local exchange network "for the purpose of the origination or termination of telephone toll service," as the statutory definition of exchange access requires. *See* 47 U.S.C. § 153(48). Rather, as the D.C. Circuit recognized, ISPs connect to provide statutorily-distinct "information services," which the Commission itself has recognized are mutually exclusive from telecommunications services. *Bell Atlantic*, 206 F.3d at 8-9. While calls to ISPs thus cannot be exchange access, they fit squarely within the statutory definition of telephone exchange service, as it existed both before and after the 1996 Act's additions. *See* 47 U.S.C. § 153(47). By the terms of the statute and the Commission's own regulations, reciprocal compensation therefore applies to calls to ISPs.

C. Even if the Commission's End-to-End Interstate Jurisdiction Were Relevant – and It Is Not – Calls to ISPs Are Local Traffic Subject to Reciprocal Compensation.

As demonstrated, the Commission's end-to-end interstate jurisdictional analysis is inapplicable here, and it is a foregone conclusion that applying that analysis will result in another vacatur and remand. But even if were appropriate to use the end-to-end jurisdictional analysis to determine whether reciprocal compensation applies – and it is not – calls to ISPs would still be subject to reciprocal compensation because they are local calls.

First, the 1996 Act, the Commission's precedent, and federal court decisions all establish that calls to ISPs involve two separate services: a local telecommunications service (telephone exchange service) for which reciprocal compensation is due, and a separate "information" service. Under the 1996 Act, "information service" and "telecommunications" are separately defined

and distinct categories. *See* 47 U.S.C. § 153(20) (information service); *id.* § 153(43) (telecommunications). The Commission correctly has held that these services are mutually exclusive, and that ISPs "generally do not provide telecommunications services." *Universal Service Report*, 13 F.C.C.R. at 11508, 11528-40 (¶¶ 15, 55-80). As the Ninth Circuit has explained, "[u]nder the [1996 Act], Internet access for most users consists of two separate services." *AT&T Corp. v. City of Portland* 216 F.3d 871, 877 (9th Cir. 2000); *see also id.* at 877-78. The first service is a local telecommunications service used to connect a caller to an ISP. The second is the information service that the ISP provides.

This distinction between the telecommunications service used to connect to an ISP and the information services that the ISP provides is significant. The Commission has classified – and continues to classify – ISPs as end users like other businesses. 47 C.F.R. § 64.702(a); *see, e.g., Bell Atlantic*, 206 F.3d at 8; *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 15 F.C.C.R. 19287 (¶ 23) (2000). As end users, ISPs are called parties that use telecommunications service like other businesses. As the Commission explained to the Eighth Circuit, calls to ISPs are very different from end-to-end long-distance calls:

> The ISP subscribes to [local carrier] facilities in order to receive *local calls* from customers who want to buy the ISP's information services, which may (or may not) be stored in computers in a different state. In this sense, the ISP's use of the [local carrier's] facilities is analogous to the way another business subscriber uses a similarly-priced *local business line* to receive calls from customers who want to buy that subscriber's wares that are stored in another state and require shipment back to the customer's location. In contrast, an IXC, which pays the per-minute access charge, uses the [local carrier's] facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.

Brief of FCC, *Southwestern Bell v FCC*, No. 97-2618 (8th Cir. 1997), at 76 (emphasis added). Citing these very statements, the D.C. Circuit recognized that the Commission's decision to treat calls to ISPs as local calls "rested . . . on an acknowledgment of the *real differences* between long-distance calls and calls to information services." *Bell Atlantic*, 206 F.3d at 8 (emphasis added).

Nonetheless, we understand that incumbents are persisting in their attempts to differentiate calls to ISPs from local calls to other business end users. For example, even though the D.C. Circuit agreed with WorldCom's argument that calls to ISPs are similar to "pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab services," *Bell Atlantic*, 206 F.3d at 7, claims are being made that calls to ISPs are different from those calls because the ISPs' servers are electronic machines and thus fundamentally different from a live human being.

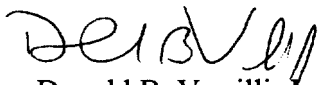
That distinction, however, flies in the face of the D.C. Circuit's recognition that a call to an ISP is equally comparable to a call to a "credit card verification system or a bank account information service." *Id.* Just as those local calls are subject to reciprocal compensation, so are calls to ISPs.[4/]

In any event, whatever the incumbents may claim today about the relevance of the purportedly interstate "jurisdictional" nature of calls to ISPs, the D.C. Circuit correctly recognized that the Commission for two decades has treated ISP-bound traffic as local traffic. *Bell Atlantic*, 206 F.3d at 6-8. The D.C. Circuit emphasized that the Commission's treatment of calls to ISPs as local traffic and its continued classification of ISPs as end users strongly supports the conclusion that calls to ISPs are subject to reciprocal compensation. *Id.* The Commission itself acknowledged in the *Reciprocal Compensation Ruling* that this treatment supports the conclusion that reciprocal compensation applies to calls to ISPs. *See, e.g., Reciprocal Compensation Ruling*, 14 F.C.C.R. at 3705 (¶ 25). In fact, the Commission's classification of ISPs as end users and its treatment of calls to ISPs as local more than supports that conclusion – it compels it. After all, the Commission cannot reasonably claim that the question at issue in these proceedings must be governed by an end-to-end analysis, and then assert that an "end user" is not at one of the ends.

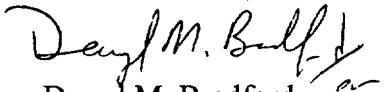
* * *

We appreciate the Commission's consideration of the foregoing points, and would be happy to provide any further assistance the Commission requires.

Very truly yours,



Donald B. Verrilli, Jr.



Darryl M. Bradford

cc: Dorothy Attwood
Jane Mago, Office of General Counsel
Linda Kinney, Office of General Counsel

4/ WorldCom again respectfully directs the Commission's attention to its previously-filed comments for further explanations of the technical nature of calls to ISPs. *See supra* note 1.