

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

In the Matter of

Developing a Unified Intercarrier  
Compensation Regime

CC Docket No. 01-92

**Comments of the  
Information Technology Association of America**

The Information Technology Association of America (“ITAA”) hereby files these comments in response to the Commission’s Notice of Proposed Rulemaking (“*Notice*”) in the above-captioned proceeding.<sup>1</sup> ITAA shares the Commission’s goal of developing an efficient intercarrier compensation regime. ITAA is concerned, however, by statements in the *Notice* that appear to call into question the Commission’s long-established determination that enhanced (information) service providers (“ESPs”), including Internet service providers (“ISPs”), are *users* of communications service – not common carriers – and, therefore, are not subject to any “intercarrier” compensation regime.

ITAA urges the Commission to make clear that it does not intend to re-visit the question of whether ESPs should continue to be allowed to obtain service from local exchange carriers (“LECs”) on the same terms as other business users, rather than being subject to carrier access charges. ITAA also urges the Commission not to adopt any intercarrier compensation regime that would treat ISP-bound traffic in a different manner than local voice traffic.

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<sup>1</sup> *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132 (rel. Apr. 27, 2001) (“*Notice*”).

## STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. Together with its forty-one affiliated regional technology councils, ITAA represents more than 26,000 companies located throughout the United States – ranging from small locally based enterprises to major multinational corporations. ITAA’s members provide the public with a wide variety of information products, software, and services. ITAA’s members include a significant number of enhanced (information) service providers.

During the last two decades, ITAA has actively participated in every Commission proceeding that has considered proposals to extend the carrier access charge regime – which governs the compensation that interexchange carriers must pay to local exchange carriers – to enhanced service providers. ITAA has consistently urged the Commission not to extend the carrier access charge regime to ESPs.

### **I. THE COMMISSION CAN PROMOTE EFFICIENCY BY REAFFIRMING ITS DECISION NOT TO EXTEND THE CARRIER ACCESS CHARGE REGIME TO ENHANCED SERVICE PROVIDERS**

The *Notice* appears to reflect a serious misunderstanding regarding the regulatory status of ESPs. The *Notice* states that, in establishing a regime applicable to intercarrier compensation, “the Commission has repeatedly emphasized the need to establish efficient rate structures and efficient rate levels.”<sup>2</sup> The *Notice* goes on to observe, however, that “efficiency has not been the only goal of intercarrier compensation rules.”<sup>3</sup> By way of example, the *Notice* states that “in order to encourage the development of enhanced services, this Commission in 1983 exempted

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<sup>2</sup> *Id.* ¶ 31.

<sup>3</sup> *Id.*

ESPs from having to pay carrier access charges.”<sup>4</sup> The *Notice* then asks whether “efficiency should be the sole or paramount goal of intercarrier compensation policy.”<sup>5</sup> This language suggests that the Commission believes that the elimination of the so-called “ESP exemption” would increase the efficiency of the Commission’s intercarrier compensation regime.

This conclusion is incorrect for two reasons. First, the Commission has never “exempted” ESPs from paying carrier access charges. Second, *extending* the carrier access charge regime to ESPs would not increase efficiency – it would simply impose a still-imperfect regime on a new category of market participants.

**A. Because ESPs are End-Users – Not Carriers – They are Not Subject to Any “Inter-carrier Compensation” Regime**

The term “ESP exemption,” while sometimes used as convenient shorthand, is a misnomer. The Commission has never “*exempted*” ESPs from paying carrier access charges. Rather, the Commission has repeatedly recognized that, because ESPs are end-users – rather than carriers – they *are not subject to* the carrier access charge regime.

The Commission’s 1983 *Access Charge Order* divided users of the local network into two categories: interexchange carriers and end-users.<sup>6</sup> End-users compensate local exchange carriers for their use of the local telephone network by paying a mix of flat-rate Federal end-user charges and State charges. Interexchange carriers, by contrast, are subject to the Commission’s carrier access charge regime.<sup>7</sup> The Commission’s carrier access charge rules, first adopted in the

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* ¶ 33.

<sup>6</sup> See *MTS and WATS Market Structure*, First Report and Order, 93 F.C.C.2d 241 (1983), *aff’d sub nom. NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

<sup>7</sup> See generally *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, 12965-66 (2000) (“*CALLS Order*”) (The access charge regime was adopted “in lieu of” earlier agreements between the pre-Divestiture AT&T

1983 Order, make *no mention* of ESPs – much less purport to “exempt” ESPs from paying carrier access charges.<sup>8</sup> Rather, from the beginning, the Commission has repeatedly and consistently concluded that ESP are *users* of the telecommunications services, which – like a number of other end-users – connect jurisdictionally mixed private line networks to the local public switched telephone network.<sup>9</sup>

Because ESPs are end-users, they have always been allowed to pay the ILECs the same combination of Federal and State charges as other end-users with comparable network configurations.<sup>10</sup> The Commission’s treatment of ESPs as end-users has been affirmed twice – first by the D.C. Circuit in 1984 and again by the Eighth Circuit in 1997.<sup>11</sup> The Commission reiterated its position in its 1998 *Universal Service Report to Congress*, observing that

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and “MCI and the other long-distance competitors” regarding payment for the use of the local network “for originating and terminating interstate calls.”).

<sup>8</sup> See 47 C.F.R. § 69.5(b) (“Carrier’s carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services”); *id.* § 69.2(m) (defining an “end-user” as any customer of an interstate or foreign telecommunication service that is not a carrier).

<sup>9</sup> See *MTS and WATS Market Structure*, Order on Reconsideration, 97 F.C.C.2d 682, 711-22 (1983). The Commission’s treatment of ESPs stands in stark contrast to its treatment of resellers – which the agency has consistently classified as carriers. At the time it adopted the *Access Charge Order*, the Commission created an *express* exemption for resale carries. See *id.* at 769 (reprinting former Section 69.5 of the Commission’s Rules). The Commission subsequently eliminated this exemption based on its conclusion that “resellers of private lines . . . [should] pay the same charges as those assessed on *other interexchange carriers* for their use of these local switched access facilities.” *WATS-Related and Other Amendments of Part 69 of the Commission’s Rules*, Second Report and Order, CC Docket 86-1, ¶¶ 11-14, reprinted in 60 Rad. Reg.2d (P&F) 1542, 1548-49 (rel. Aug. 26, 1986) (emphasis added).

<sup>10</sup> The Commission has repeatedly rejected proposals to extend the carrier access charge regime to ESPs. See, e.g., *Amendment of Part 69 of the Commission’s Rules Related to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd 4524, 4534-35 (1991) (rejecting claims that imposition of carrier access charges on ESPs would result in significantly lower charges to end-users); *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 167-69 (1991) (ESP “will continue to be able to take local business lines, or other state-tariffed access arrangements, instead of federal access, in the same manner as other end-users.”); *Amendment of Part 69 of the Commission’s Rules Related to Enhanced Service Providers*, 3 FCC Rcd 2631, 1632-33 (1988) (terminating docket opened to consider whether to extend carrier access charge regime to ESPs).

<sup>11</sup> See *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 541-44 (8<sup>th</sup> Cir. 1998); *NARUC v. FCC*, 737 F.2d at 1136-37.

“information service providers are not subject to regulation as common carriers”<sup>12</sup> and therefore, are not required to pay carrier access charges.<sup>13</sup>

**B. Extending Carrier Access Charges to ESPs Would Not Increase Efficiency**

The Commission has previously considered, and directly rejected, the argument that *extending* the carrier access charge regime to ESPs would promote efficiency. In the 1987 *Access Reform Order*, the Commission stated that:

[T]he existing access charge system includes non-cost-based rates and inefficient rate structures. . . . [T]here is no reason to *extend* such a system to an additional class of customers. . . . [ESPs] should not be subject to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because [they] use incumbent LEC networks to receive calls from their customers.<sup>14</sup>

To be sure, the Commission’s *CALLS Order* has eliminated some of the subsidies and inefficient rate structures that have long been a part of the Commission’s carrier access charge regime. However, as the Commission has recognized, the *CALLS Order* created “a transition to a more economically rational approach to access charges” – not the “perfect, ultimate solution.”<sup>15</sup> In the *Notice*, the Commission has indicated that it does not propose to make further “major changes in our access charge rules in the initial phase of this proceeding.”<sup>16</sup> Rather, the current carrier access charge regime is likely to remain in effect for at least the middle of 2005. The conclusion that the Commission reached in the *Access Reform Order* remains correct today:

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<sup>12</sup> *Federal State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11511 (1998)

<sup>13</sup> *Id.* at 11552.

<sup>14</sup> *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16132-16133 (1997) (emphasis added).

<sup>15</sup> *CALLS Order*, 15 FCC Rcd at 12973-74.

<sup>16</sup> *Notice* ¶ 97.

extending an “imperfect” regulatory regime, designed to govern the relationship between IXC and LECs, to a new category of customers would increase – rather than reduce – inefficiency.

**C. The Commission Should Reaffirm That It Does Not Intend to Apply Any Intercarrier Compensation Regime to ESPs**

The purpose of this proceeding is to consider the feasibility of adopting a “unified regime for the flows of payments among telecommunications carriers that result from the interconnection of telecommunications networks under current systems of regulation.”<sup>17</sup> Because ESPs are not carriers, the Commission should make clear that this docket does not provide an appropriate opportunity to consider any change in the rules governing the payments that ESPs make to LECs for use of local network facilities. To the extent the Commission chooses to address the obligations of ESPs to compensate LECs, it should confirm that it will not seek to impose carrier access charges on ESPs.

**II. THE COMMISSION SHOULD NOT SINGLE OUT ISP-BOUND TRAFFIC FOR DISCRIMINATORY TREATMENT**

In the *Notice*, the Commission asks whether it should replace the current reciprocal compensation regime applicable to traffic subject to Section 251(b)(5) – essentially voice traffic between one end-user and another end-user located in the same local calling area – with a “bill-and-keep” regime.<sup>18</sup> The Commission also asks whether it should impose a bill-and-keep regime on ISP-bound dial-up traffic within a local calling area.<sup>19</sup> ITAA urges that the Commission treat these two categories of physically local traffic in a consistent manner.

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<sup>17</sup> *Id.* ¶ 1.

<sup>18</sup> *Id.* ¶¶ 69-77.

<sup>19</sup> *Id.* ¶¶ 66-68. As the Commission has correctly recognized, while this traffic is physically local, it is jurisdictionally mixed – with a significant interstate component.

In its recent *ISP Intercarrier Compensation Order*, the Commission took strong action to eliminate what it concluded were certain economic distortions resulting from the application of reciprocal compensation to ISP-bound traffic.<sup>20</sup> At the same time, however, the Commission recognized that:

It would be unwise as a policy matter, and patently unfair, . . . to impose different [compensation] rates for ISP-bound traffic and voice traffic. The record . . . fails to establish any inherent differences between the costs on any one network of delivering a voice call to a local end-user to a data call to an ISP. . . . We therefore are unwilling to take any action that results in the establishment of separate intercarrier compensation rates, terms and conditions for local voice and ISP-bound traffic.<sup>21</sup>

The Commission therefore determined that, if an incumbent LEC wants to exchange ISP-bound traffic at the rates specified in that Order, it would have to exchange local voice traffic at that rate, as well.<sup>22</sup>

The Commission should not depart from that approach. Specifically, the Commission should reject any suggestion that it adopt a bill-and-keep regime for ISP-bound traffic, while preserving reciprocal compensation for local voice traffic. Given the Commission's finding that the cost of delivering local voice and ISP-bound traffic is comparable, adopting different compensation regimes would constitute unreasonable discrimination against ISP-bound traffic and in favor of local voice traffic. Indeed, this approach would discriminate unreasonably between ISPs and other data-oriented businesses that have similar traffic patterns and network configurations. The end-result would be to reduce artificially the incentives of CLECs to

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<sup>20</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, CC Docket 96-98, FCC 01-131 (rel. Apr. 27, 2001).

<sup>21</sup> *Id.* ¶¶ 89-90.

<sup>22</sup> *Id.* ¶ 89.

provide service to ISPs, thereby depriving ISPs – and, ultimately, their subscribers – of the full benefits of local competition.

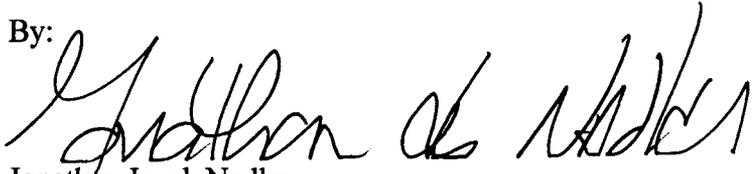
### CONCLUSION

For the foregoing reasons, the Commission should: (1) not alter the rules allowing ESPs to pay the ILECs the same combination of Federal and State charges as other end-users that connect jurisdictionally mixed private line networks to the local telephone network; and (2) adopt a consistent compensation regime governing local voice and ISP-bound traffic.

Respectfully submitted,

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