Attachment 3: Initial Comments of ITAA
CC Docket No. 02-33
Broadband Wireline ISP Proceeding
Pages 39-54
(May 3, 2002)

order – but may, instead "preemptively preempt" States from adopting certain types of regulations.[108]

At the present time, there does not appear to be a need for the Commission to "preemptively preempt" the States from adopting any category of regulation applicable to carrier-provided broadband Internet access services. Nor does there appear to be any need for the Commission to preempt any existing State regulation. The Commission, however, should carefully monitor State activity in this area – and that it will not hesitate to preempt any State regulation applicable to carrier-provided information services that, as a practical matter, would thwart or impede achievement of pro-competitive Federal policies. At the same time, however, the Commission should allow States to continue to play a constructive, complimentary role in the regulation of broadband services.[109]

II. THE COMMISSION CANNOT REQUIRE BROADBAND INTERNET SERVICE PROVIDERS TO MAKE DIRECT PAYMENTS TO THE UNIVERSAL SERVICE FUND

Remarkably, at the same time the Commission is considering freeing the ILECs from their fundamental duties as common carriers, the Commission is also considering *imposing* one of the most basic common carrier obligations – the duty to make direct payments to the Universal Service Fund ("USF") – on non-regulated broadband Internet Service Providers. The Commission should decline to do so. As demonstrated below, because ISPs do not provide

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[108] *See generally,* J. Nadler, *Give Peace a Chance: FCC-State Relations After California III,* 47 Fed. Comm. L. J 457, 493-99 (1995) (describing the application of the "thwart or impede" standard).

[109] The recent decision of the California Public Utility Commission in *California ISP Association v. Pacific Bell Telephone Company,* Case 01-07-027 (Cal. PUC, Mar. 28, 2002), provides a good example of the kind of "co-operative federalism" that the Commission should promote. In this proceeding, the CPUC recognized that the FCC has jurisdiction over the rates, terms, and conditions on which Pac Bell provides DSL service pursuant to tariff, but that the State could enforce its requirements regarding service quality and unfair business practices, which were outside the scope of the federal tariff.

telecommunications or telecommunications services to anyone, the Commission does not have statutory authority to require broadband ISPs to make direct USF payments. Even if the Commission had the authority, moreover, its professed concerns about the sufficiency of the USF funding base and the need for "competitive neutrality" do not provide an adequate justification for abandoning its long-standing policy of treating ISPs as end-users, rather than carriers. To the contrary, imposing USF payment obligations on broadband ISPs would have significant adverse consequences.

A. Requiring ISPs to Make Direct Payments to the USF Would be Unlawful

Contrary to the suggestion in the *Notice,*[110] the Commission cannot use its "permissive authority" under Section 254(d) of the Communications Act as a basis to require broadband ISPs to make direct payments to the USF. Section 254(d) allows the Commission to require "*provider[s]* [of] interstate telecommunications . . . [to] contribute" to universal service.[111] ISPs, however, do not "provide" telecommunications to any party.

1. Wireline ISPs do not provide telecommunications

The Commission clearly lacks authority to require ISPs that use broadband telecommunications or telecommunications provided by facilities-based carriers to make direct payments to the USF. The drafters of the Telecommunications Act made clear that an entity that provides an information service is "offering . . . a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."[112] While that

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[110] *Notice* ¶ 71.

[111] *See* 47 U.S.C. § 254(d) (emphasis added).

[112] 47 U.S.C. § 153(20).

capability is made available "via telecommunications,"[113] this does not make an ISP a telecommunications provider. As the Senate Committee Report that accompanied in Telecommunications Act explained, "Information Service Providers do not 'provide' telecommunications services; they are users of telecommunications services."[114] Because ISPs do not *provide* telecommunications or telecommunications services to any party, the Commission cannot require them to make direct payments to the USF.

The possibility that an ISP may deploy its own "last mile" wireline transmission facilities does not change the analysis. As the Commission correctly observed in the *Notice*, an ISP "offering . . . service over its own facilities does not offer 'telecommunications' to anyone, it merely uses telecommunications to provide end-users with wireline broadband Internet access services."[115] Therefore, the Commission cannot require so-called "facilities-based ISPs" to make contributions to universal service.[116]

2. Cable-based ISPs do not provide telecommunications

The Commission has no basis to require cable system operators or ISPs that deliver service over a cable network to make direct payments to the USF.

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[113] *Id.*

[114] S. Rpt. 104-23, 104th Cong, 1st Sess., at 28 (1995). Further evidence that Congress did not intend for ISPs to be treated as telecommunications carriers comes from the fact that, in several places, the legislation clearly distinguishes telecommunications and information services. *See, e.g.*, 47 U.S.C. § 254(h)(2) (Commission to promote access to both "advanced telecommunications and information services.").

[115] *Notice* ¶ 25.

[116] This situation is entirely different from the situation in which a facilities-based *carrier* provides an information service. As discussed above, pursuant to Section 202 of the Communications Act, and the Commission's *Computer II* rules, the carrier is obligated to unbundle the telecommunications functionality and to provide it – to both affiliated and non-affiliated ISPs – as a telecommunications service. *See, supra*, §§ I.A & I.B.1. In that case, the carrier must make a payment to the USF based on the provision of telecommunications service "to itself" and to the non-affiliated ISP, just as it would if it provided the telecommunications service to any other customer.

The Commission has not determined whether the transmission functionality that a cable system operator provides to a non-affiliated ISP constitutes "telecommunications"[117] and whether to impose an obligation on cable system operators to offer that transmission functionality on an unbundled basis, as a telecommunications service.[118] Until the Commission resolves this issue, it would be premature to determine whether cable system operators should be required to make USF payments based on the provision of telecommunications or telecommunications services.

Regardless of how the Commission resolves that question, however, the Commission clearly cannot require ISPs that provide service over a cable system to make direct payments to the USF. As the Commission just recently concluded, "cable modem service" (*i.e.*, broadband Internet access service provided over a cable network) does not include the "offering of a telecommunications service to subscribers."[119] Therefore, just as with broadband wireline ISPs, because cable ISPs do not "provide" telecommunications or telecommunications service to anyone, the Commission lacks the statutory authority to require cable ISPs to make direct payments to the USF.

3. The Commission has not identified any "Internet telephony" offering that constitutes the provision of telecommunications services

At the present time, the Commission classifies all providers of so-called "Internet telephony" as either software vendors or ISPs, rather than as providers of telecommunications

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[117] *Notice* ¶ 54.

[118] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4844-49 (2002).

[119] *Id.* ¶ 39

service. Therefore, the Commission currently lacks the authority to require any Internet telephony providers to make direct payments to the USF.

The Commission has recognized that there are a number of ways in which voice traffic can be sent over the Internet.[120] Many of these configurations – such as those that involve use of software to send voice traffic between two Personal Computers ("PCs") – bear little resemblance to conventional voice telephony. The only common element is the use of the Internet protocol ("IP") to transport voice traffic. In the *Report to Congress on Universal Service*, however, the Commission determined that certain variants of Internet telephony services *may* meet the statutory definition of the term telecommunications service.[121] As a result, the Commission concluded that it may be appropriate to require these providers to make USF payments.[122] The Commission further recognized, however, that such determinations are best made on a case-by-case basis, in response to a formal complaint.[123] Until such time, the Commission will continue to treat all providers of Internet telephony services as ISPs.

To date, no party has presented the Commission with a complaint alleging that a specific provider of Internet telephony services is providing a service that constitutes "telecommunications." As a result, at the present time, the Commission has no basis to require any Internet telephony provider to make direct USF payments.

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[120] *Report to Congress on Universal Service,* 13 FCC Rcd at 11541-42.

[121] *Id.* at 11541.

[122] *Id.* at 11545.

[123] *Id.* at 11544-45.

B. The Commission has Failed to Provide an Adequate Justification for Imposing USF Payment Obligations on ISPs

Requiring ISPs to make direct payments to the USF would be a radical departure from well-established practice. Therefore, even if it had the legal authority, the Commission should not do so absent the most compelling policy justification. The *Notice* suggests that the Commission has two policy concerns. First, that the growth of broadband Internet access services could undermine the "funding base" of the USF.[124] And, second, that requiring some or all ISPs to make direct payments to the USF is necessary to ensure "competitive neutrality."[125] Neither of these concerns provides an adequate justification.

1. Concerns about sufficiency of the funding base do not justify imposition of USF payment obligations on ISPs

Under the current assessment system, a telecommunications carrier's obligation to make payments to the USF is assessed by multiplying each carrier's billed interstate and international end-user telecommunications revenues by a "contribution factor."[126] Some observers have expressed concern that the growth of broadband Internet access services could reduce carriers' end-user telecommunications revenues, thereby "eroding the base" from which USF revenue is derived. Concerns about the sufficiency of the funding base plainly do not provide a basis for the Commission to require ISPs to make direct payments to the USF.

Broadband has increased revenues. As an initial matter, the growth of broadband Internet access services has not decreased carriers' end-user revenues. To the contrary, by spurring demand for second lines, DSL, and other new services, the growth of the Internet has

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[124] *See, e.g., Notice* ¶ 82.

[125] *See, e.g., id.* ¶ 80.

[126] *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9205-12 (1997).

significantly increased carriers' telecommunications revenues. Therefore, if anything, the growth of the Internet had expanded – rather than eroded – the USF funding base.

Internet telephony. In the *Notice,* the Commission has specifically expressed concern that the growth of Internet telephony services could erode the USF funding base.[127] There is no evidence that Internet telephony is having any discernible impact on carriers' end-user telecommunications service revenue. Despite growth in recent years, Internet telephony remains a niche service. In calendar year 2000, carriers reported approximately $81.7 billion in end-user interstate and international telecommunications revenue.[128] By contrast, one analyst estimates that IP telephony end-user revenues during that period totaled $310 million.[129] Thus, even if ISPs were required to make direct payments to the USF, the size of the funding base would increase by less than 0.4 percent.[130]

Connection-based regime. In a separate, but related, proceeding, the Commission has proposed to replace the current end-user telecommunications revenue assessment methodology with a methodology that bases USF contributions on the number and capacity of the "network

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[127] *See Notice* ¶ 82.

[128] *See Telecommunications Industry Revenues,* Report, Table 6 (rel. Jan. 2002) (total interstate revenue reported by universal service worksheet filers was $68,671,000,000; total reported international revenue was $13,014,000,000) *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/ telrev00pdf.

[129] *See* "Frost Predicts VOIP Revenue Growth" *XCHANGE, available at* http://www.x-changemag.com/hotnews/18h655944.html (posted Aug. 6, 2001) (citing estimate of analysts Frost and Sullivan that year 2000 revenues from retail voice over the Internet services of $273 million); *see also* "Voice-over-DSL maker Jetstream closes," CNET. News.com, *available at* http://news.com.com/2100-1033-883382.html (posted Apr. 15, 2002) (noting closing of largest provider of equipment used for voice-over-DSL applications).

[130] This figure likely over-states the carriers' revenue loss from Internet telephony. A significant portion of the voice traffic sent over the Internet represents traffic that would never have been sent over the public switched network and, therefore, would not have generated any end-user telecommunications revenue. Such traffic is typically originated by those subscribers for whom low price is more important than quality, reliability, or ease-of-use, such as students.

connections" that a carrier provides. [131] Adoption of the connection-based assessment methodology would obviate any concern about the long-term sufficiency of the USF. In its recent comments in support of the adoption of a connection-based approach, ITAA explained that:

> [B]ecause the number of network connections continues to rise, a connection-based assessment system will ensure a sufficient – and, indeed, growing – funding base. As a result, the per-connection assessment rate imposed on telecommunications carriers should remain reasonably constant over time. This, in turn, will make it possible to provide greater stability and predictability for telecommunications users – while removing the purported justification for imposing USF payment obligations on ISPs. [132]

In light of the above, concerns about the sufficiency of the USF funding base plainly do not provide an adequate justification for imposition of USF payment obligations on ISPs.

2. Concerns about competitive neutrality do not justify imposition of USF payment obligations on ISPs

The Commission, quite properly, has expressed concern that any USF assessment system must satisfy the statutory "competitive neutrality" requirement. [133] However, requiring telecommunications carriers to pay into the USF, while not requiring ISPs to do so, does not raise any question of competitive neutrality. Under the existing Commission rules, *all* providers – whether telecommunications carrier or non-carrier-affiliated ISPs – must make direct payments

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[131] *See Federal-State Joint Board on Universal* Service, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752 (2002).

[132] Comments of the Information Technology Association of America, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed Apr. 22, 2002) at 5. If the Commission adopts a connection-based methodology, the connection charge should be imposed only on carriers that provide a connection to end-users in order to provide telecommunication or a telecommunication service to the user. Consistent with long-established Commission rules, ISPs should be treated as end-users, not providers of telecommunication services. Thus, an ISP that deploys facilities solely for the purpose of providing an information service would not be obligated to pay a connection charge.

[133] *See* 47 U.S.C. § 254(d).

to the USF based on "end-user telecommunications revenue."[134] At the same time, *no* provider must pay into the fund based on revenue from the provision of Internet access service.[135]

While ISPs generally are not required to make direct payments to the USF, they make significant contributions to the advancement of universal service. Indeed, for many ISPs, payments to telecommunications carriers is the single largest cost of doing business.[136] The rates that ISPs pay to their carriers reflect the payments that the carriers must make to the USF. Requiring them to make direct payments to the USF would subject ISPs, alone among all users, to "double payment" obligations – the very opposite of competitive neutrality.

In light of the above, the proper approach is for the Commission to preserve the current regime, under which ISPs are not required to make direct payments to the USF. This conclusion is fully applicable to all ISPs – including so-called "facilities-based ISPs" and ISPs that provide their service over cable networks.

Wireline ISPs. In the *Report to Congress on Universal Service,* the Commission expressed concern that an ISP might "uneconomically self-provide telecommunications" in order to avoid the cost of contributing to universal service, thereby placing them at an unfair competitive advantage compared to ISPs that acquired telecommunications services from

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[134] The Commission has specifically found that an ISP that provides an end-user an information service and a "separate and distinct" interstate telecommunications service is obligated to make direct payments to the USF based on the revenue that it generates from the provision of the telecommunications service. *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5474 n.827 (1997).

[135] *See Federal-State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd 8776, 9205-9212 (1997) ("*Universal Service First Report and Order*").

[136] *See Notice* ¶ 74 ("ISPs that own no telecommunications facilities . . . do not contribute directly to universal service, but they make indirect contributions through charges paid to the underlying telecommunications carrier providing the leased telecommunications service.").

others.[137] The Commission recognized, however, that "there are significant operational difficulties associated with determining the amount of such an Internet service provider's revenues to be assessed for universal service purposes and with enforcing such requirements."[138] The Commission, therefore, did not seek to use its permissive authority to require "provider[s] of telecommunications" to support universal service as a basis to impose USF payment obligations "facilities-based ISPs."[139] The Commission should not alter that decision.

As an initial matter, there is no evidence that ISPs are deploying their own last mile facilities in order to avoid contributing to universal service. Indeed, given the substantial cost of doing so, and the level of risk that must be incurred, there is little reason to believe that many ISPs are likely to deploy their own last mile facilities in order evade these costs. Even if an ISP were to do so, however, it would still meet a significant portion of its need for telecommunications by obtaining services from other carriers, such as high-capacity links into the Internet. In that case, the ISP would continue to contribute to universal service, thereby reducing any competitive advantage it might obtain.[140]

Using the Commission's "permissive authority" to require providers of telecommunications to contribute to universal service as a basis to require "facilities-based ISPs" to make direct payments to the USF based on the value of the telecommunications that they

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[137] *Report to Congress on Universal Service,* 13 FCC Rcd at 11534.

[138] *Id.* This disadvantage results from the fact that, when an ISP acquires telecommunications services from a common carrier, the carrier typically "passes-through" its USF payments through the charges that it assesses the ISP. By contrast, if an ISP were to deploy its own telecommunications facilities – and use those facilities solely to provide information services – the ISP would not incur any USF payment obligation.

[139] *Id.* at 11534-35.

[140] Here, again, the payment that the ISP makes to its carrier will include a "pass-through" of the carrier's USF payments.

"provide to themselves" would represent an unprecedented expansion of the Commission's exercise of its authority. Until now, the Commission has carefully limited the obligation to make direct payments to the USF to common carriers and to those entities that *compete directly* against common carriers in the provision of *telecommunications* to third parties on a commercial basis. Thus, in the *Universal Service First Report and Order,* the Commission required entities that provide telecommunications for a fee on a private contractual basis to make direct payments to the USF based on end-user revenues. As the Commission explained, if a private network operator "provides telecommunications in competition with a common carrier . . . the principle of competitive neutrality requires that we should secure contributions from it as well as its competitors."[141]

Facilities-based ISPs, of course, do not compete against common carriers in the provision of *telecommunications*. Rather, they use telecommunications in order to provide an *information service*. Requiring an entity that derives no revenue from the provision of telecommunications to third parties to make direct payments to the USF plainly is not necessary in order to preserve the principle of competitive neutrality.

Whatever the merits of the Commission's concerns about competitive neutrality may be, requiring a facilities-based ISP to make direct payments to the USF based on the value of the telecommunications that it "provides itself" would presents significant – and, perhaps, insurmountable – administrative difficulties. When a carrier provides telecommunications to third parties on a contractual basis, there is no question as to how much end-user

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[141] *Universal Service First Report and Order*, 12 FCC Rcd at 9184.

telecommunications revenue the carrier receives.[142] By contrast, when a facilities-based ISP uses telecommunications solely to meet its internal needs, there is no reliable basis for assessing the "revenue" that it should include in the USF assessment base.

Cable ISPs. Concerns about competitive neutrality also do not provide a basis for requiring cable system operators that provide Internet access service to make direct payments to the USF. Competitive neutrality does not require *identical* treatment of all market participants. The Communication Act maintains significant distinctions among platform providers. Rather, the competitive neutrality requirement obligates the Commission to consider these differences and to develop a universal service funding regime that, on balance, neither significantly advantages nor disadvantages any particular class of competitors.

To be sure, the obligation to make direct payments to the USF imposes a significant burden on wireline carriers – and, ultimately, on ISPs that use these carriers' networks to provide information services. However, in the case of the ILECs, this burden is partly offset by the fact that the LECs continue to receive subsidies through the carrier access charge regime.[143] By contrast, cable system operators have their own set of benefits and burdens. While they may not have to make direct payments to the USF, they must often pay substantial franchise fees – which often have an assessment rate nearly as high as the current USF "contribution rate."[144] In

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[142] Similarly, when an ILEC unbundles the telecommunications functionality that it uses to provide information services, and offers it as a tariffed service, the transmission-at-tariff requirement requires that the carrier use the tariffed rate to determine the revenue that it should include in the USF assessment base when it provides telecommunications service "to itself." In the case of a non-dominant common carrier, which provides service to third parties pursuant to contract, the contractual rate provides a reliable means to determine the revenue that it should include in the USF assessment base when it provides telecommunications service "to itself."

[143] *See Access Charge Reform,* Eleventh Report, 15 FCC Rcd 12962, 12977-78 (2000) ("*CALLS Order*").

[144] *See* 47 U.S.C. § 542(b) (setting cap on local franchise fees of five percent of gross revenues).

addition, cable system operators must forgo significant revenues in order to comply with requirements to devote capacity to so-called PEG (public interest, educational and government) and to public access programs.[145] Thus, the fact that cable system operators that provide Internet access services do not make direct payments to the USF does not necessarily violate the principle of competitive neutrality.

C. Requiring ISPs to Make Direct Payments to the USF Would Have Significant Adverse Consequences

Requiring ISPs to make direct payments to the USF would have a number of adverse policy consequences. In particular, it would: (1) constitute regulation of the Internet, which would be inconsistent with express congressional policy; (2) undermine the basis of the so-called "ESP exemption;" and (3) impede the U.S. Government's efforts to prevent the imposition of the an international settlements regime on the Internet.

1. Imposing carrier regulation on the Internet would contravene express congressional policy

In the Telecommunications Act, Congress clearly established, as a national policy, "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[146] The obligation to make direct payments to the USF is a fundamental part of the regulatory duties imposed on common carriers. Extending this obligation to broadband ISPs would be directly at odds with congressional policy and, doubtless, would lead to proposals for further regulatory intervention – at both the Federal and State levels.

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[145] *See id.* §§ 531, 535.

[146] *See id.* § 230(b)(2).

2. Treating ISPs as providers, rather than users, of telecommunications would undermine the foundation of the "ESP exemption"

Requiring broadband ISPs to make direct payments to the USF would have another adverse impact: it would undermine the basis of the so-called "ESP exemption" under which information service providers are allowed to obtain physically local telecommunications connections on the same terms as other business users, rather than having to pay the same above-cost carrier access charges as interstate interexchange carriers.[147]

From the beginning, the Commission has repeatedly and consistently concluded that ISPs 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.[148] Because ISPs are end-users, rather than carriers, they have always been allowed to pay the

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[147] As ITAA has repeatedly pointed out, the term "ESP exemption" – while convenient shorthand – mischaracterizes the access charge treatment of ISPs (as ESPs are now referred to). The Commission's 1983 *Access Charge Order* divided users of the local network into two categories: interexchange carriers and end-users. *See MTS and WATS Market Structure,* First Report and Order, 93 F.C.C.2d 241 (1983) (*"Access Charge Order"*), *aff'd sub nom. NARUC v. FCC,* 737 F.2d 1095 (D.C. Cir. 1984). 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. *See CALLS Order,* 15 FCC Rcd at 12965-66 (The access charge regime was adopted "in lieu of" earlier agreements between the pre-divestiture AT&T and "MCI and the other long-distance competitors" regarding payment for the use of the local network "for originating and terminating interstate calls.") The Commission's carrier access charge rules, adopted in the 1983 Order, make *no mention* of ESPs – much less purport to "exempt" ESPs from paying carrier access charges. *See* 47 C.F.R. § 69.5(b) (2001) ("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."). Rather, the Commission has consistently recognized that ISPs are users of the telecommunications network and, therefore, are entitled to access it on the same terms and conditions as other users. The Commission's treatment of ISPs 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 carriers. *See Access Charge Order* at 344 (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).

[148] *See MTS and WATS Market Structure,* Memorandum Opinion and Order, 97 F.C.C.2d 682, 711-22 (1983).

ILECs the same combination of Federal and State charges as other end-users with comparable network configurations.[149] The Commission's treatment of ISPs as end-users has been affirmed twice – first by the D.C. Circuit in 1984 and again by the Eighth Circuit in 1998.[150] The Commission re-iterated its position in its 1998 *Universal Service Report to Congress*, observing that, because they are users of telecommunications, rather than providers, "information service providers are not subject to regulation as common carriers"[151] and therefore, are not required to pay carrier access charges.[152]

If the Commission were to reverse course and treat ISPs as telecommunication providers, rather than end-users, for *universal service* assessment purposes, the ILECs will no doubt argue that ISPs should be treated as telecommunications providers for *access charges* purposes. Requiring ISPs to pay above-cost, per-minute carrier access charges would make it difficult for ISPs to continue to offer subscribers offer low-cost, flat rate access to the Internet, thereby jeopardizing the continued growth and vitality of the Internet.[153]

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[149] The Commission has repeatedly rejected proposals to extend the carrier access charge regime to ISPs. *See, e.g., Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers,* Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 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,* Memorandum Opinion and Order, 4 FCC Rcd 1, 167-69 (1991) (ISPs "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*, Order, 3 FCC Rcd 2631, 2632-33 (1988) (terminating docket opened to consider whether to extend carrier access charge regime to ISPs).

[150] *See Southwestern Bell Telephone Co. v. FCC,* 153 F.3d 523, 541-44 (8th Cir. 1998); *NARUC v. FCC,* 737 F.2d at 1136-37.

[151] *Report to Congress on Universal Service*, 13 FCC Rcd at 11511.

[152] *Id.* at 11552.

[153] *See generally* FCC Office of Plans and Policy, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 (July 1999) (describing the benefits that have resulted from the Commission's decision not to impose common carrier regulation of information service providers) *available at* http://www.fcc.gov/opp/workingp.html.

3. Requiring ISPs to make direct payments to the USF would undermine U.S. Government efforts to prevent imposition of regulatory "charging arrangements" on international Internet traffic

Finally, the Commission must consider the adverse international consequences of imposing carrier regulation on ISPs. In recent years, a number of international organizations and foreign operators have advanced proposals, generally referred to as International Charging Arrangements for Internet Services ("ICAIS"), that would extend the "international settlements regime" to the Internet.[154] The United States has opposed ICAIS on the grounds that the application of legacy telecommunications regulation – designed to govern the relationship between carriers in different countries exchange circuit-switched voice traffic – would impede the development of the Internet.[155] If the Commission were to reverse course and determine that ISPs should be treated in the same manner as telecommunications carriers for universal service purposes, it would be more difficult for the U.S. Government to counter the arguments made by ICAIS advocates that existing telephony regulation should be imposed on the Internet.

The far better course is for the Commission to reaffirm its long-standing position that information service providers do not provide telecommunications and, therefore, that it would be inappropriate to impose common carrier regulation on them. This position was correct when the Commission adopted it in *Computer II*. It remains correct today.

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[154] *See generally* FCC Office of Plans and Policy, *The Digital Handshake: Connecting Internet Backbones*, Working Paper No. 32, at 35-38 (Sept. 2000) (describing the ICAIS debate) *available at* http://www.fcc.gov/opp/workingp.html.

[155] *See id.* at 35.