



September 16, 2004

VIA ELECTRONIC FILING

Marlene M. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68

Dear Ms. Dortch:

The purpose of this letter is to reiterate that the Commission should resist any temptation to attempt to regulate ISP-bound traffic under section 201 of the Communications Act ("Act"), 47 U.S.C. § 201. Section 201 is inapplicable to calls to ISPs because: (a) ISPs are not common carriers, and (b) ISPs typically purchase telephone exchange service, which is not interstate. Rather, the telephone exchange services purchased by ISPs are intrastate, and the appropriate compensation mechanism for such traffic is reciprocal compensation under sections 251(b)(5) and 252(d)(2) of the Act, 47 U.S.C. § 251(b)(5), § 252(d)(2). This may not be the specific outcome that the Commission desires, but it is the outcome demanded by the Act.

Section 201 of the Act applies only to the actions of common carriers related to their provision of interstate telecommunications services. 47 U.S.C. § 201. When Congress enacted the 1996 Act, it amended the definition of "common carrier," and the new definition provides that "[a] telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services." 47 U.S.C. § 153(44) (emphasis added). Thus, for ISP-bound traffic to fit within the framework established by Congress in section 201, ISP-bound traffic would have to be interstate, and any such interstate transmission would have to meet the definition of a telecommunications service provided by a common carrier. ISP-bound traffic satisfies none of these prerequisites, and therefore ISP-bound traffic lawfully cannot be placed under section 201.

First off, a telephone call to an ISP is neither interstate nor exchange access under the Act. Rather, the telecommunications service that ISPs purchase from LECs falls squarely within the Act's definition of telephone exchange service:

TELEPHONE EXCHANGE SERVICE. – The term “telephone exchange service” means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47). ISPs subscribe to LEC services within a given exchange area, as defined by the state commissions and LEC local exchange tariffs. Accordingly, to the extent that ISPs purchase telephone exchange service, there can be no doubt that such a service is intrastate and therefore outside of the scope of 201.

Second, even if it could be said that the underlying “transmission” between one end user and an ISP end user is interstate (even though ISPs buy local telephone exchange service), ISP-bound calls still would not properly fall within section 201 because any ostensibly interstate portion of the transmission does not constitute a “telecommunication service” provided by a “common carrier.” “Telecommunications services” are defined as “the offering of telecommunications for a fee directly to the public or such classes of users as to be effectively available to the public.” *Id.* § 153(46). ISPs simply do not provide telecommunications services; rather, they provide information services, which are outside of the parameters of section 201.

Section 201 of the Act applies only to common carriers in activities related to their provision of interstate telecommunications services.¹ ISPs are neither common carriers nor do they provide interstate telecommunications services. As the *Verity* court noted:

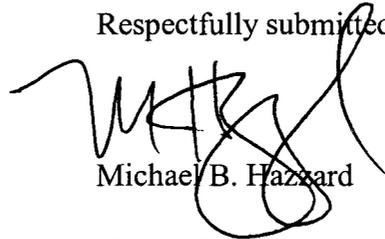
The FCC long has distinguished between basic telecommunications carriage – principally ordinary telephone and long distance service – and enhanced services....” Indeed, “the FCC declined to institute comprehensive regulation for enhanced services and found that vendors of enhanced services, defined as anything more than basic transmission service, were not engaged in common carrier activity.” Furthermore, the “Telecommunications Act of 1996 likewise distinguishes between telecommunications services and information services, stating that “a telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services.”

¹ See, e.g. *Federal Trade Commission v. Verity International, LTD*, 124 F.Supp. 193, 201-202 (2000) (S.D.N.Y.); *Global NAPS Bell Atlantic-New Jersey, Inc.*, 287 F.Supp.2d 532, 546 (2003).

Verity, 124 F.Supp. at 201-202 (citations omitted). The *GNAPS* court likewise noted that the “statute is unambiguous, ‘a telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent that it is engaged in providing telecommunications services.*” *GNAPS*, 287 F.Supp.2d at 547 (emphasis original). Because ISP are not common carriers and do not provide interstate telecommunications services, calls to ISPs simply cannot fall within the ambit of section 201.

For all of these reasons, the Commission should avoid any effort to shoehorn ISP-bound traffic into section 201.² It simply does not fit. Rather, the Commission should follow the plain language of the statute and find that ISP-bound calls fall within the confines of section 251(b)(5) and 252(d)(2). This may not be the outcome that the Commission otherwise might prefer, but it is the only outcome that is consistent with Congress’ intent as set forth in the Act.

Respectfully submitted,



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² In its September 14, 2004 letter to the Commission in these proceedings, Core identified a number of legal and policy problems that inevitably would result were the Commission to classify ISP-bound traffic under section 201, and Core will not repeat those arguments here.