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July 9, 2004

**EX PARTE**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> St. SW  
Washington, D.C. 20554

**Re: Implementation of the Local Competition Provisions of the  
Telecommunications Act of 1996, CC Docket No. 96-98;  
Inter-carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68**

Dear Ms. Dortch:

In response to questions from Commission staff, BellSouth hereby files into the record of this proceeding pertinent parts of the transcript of oral argument in two appeals of orders of this Commission.

Specifically, staff has asked whether the Commission is somehow constrained by prior determinations of the D.C. Court of Appeals to find that traffic bound for Internet Service Providers (ISPs) is necessarily subject to section 251(b)(5) of the Act. In response, BellSouth is providing the attached partial transcripts from two oral arguments before the D.C. Circuit: *Worldcom, Inc. v. FCC*, Nos. 01-1218, *et al.* (D.C. Cir. argued Feb. 12 2002) and *Worldcom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. argued Feb. 21, 2001). While these transcripts were cited in the white paper filed in this docket by BellSouth and Verizon, BellSouth submits the relevant pages into the docket for the staff's review. The comments of the court, which includes two of the three judges from the panel in *Bell Atlantic v. FCC* (Judges Sentelle and Williams), make clear that the decision in *Bell Atlantic* was "rigorously agnostic" on whether such traffic should be treated as local for purposes of reciprocal compensation.

Pursuant to Commission rules, please include a copy of this letter and attachments in the docket of the proceedings identified above.

Sincerely,

A handwritten signature in blue ink that reads "Glenn T. Reynolds". The signature is written in a cursive style with a long horizontal stroke at the end.

Glenn T. Reynolds

Cc: Christopher Libertelli  
John Rogovin  
Austin Schlick  
Linda Kinney  
John Stanley  
William Maher  
Jeffery Carlisle  
Tamara Priess  
Steve Morris  
Robert Tanner  
Victoria Schlesinger

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WORLDCOM, INC. et al.,

Petitioner,

No. 00-1002

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND THE UNITED STATES OF AMERICA,  
Respondents.

Wednesday,  
February 21, 2001

Washington, D.C.

The above-entitled matter came on for oral  
argument, pursuant to notice.

BEFORE:

THE HONORABLE STEPHEN F. WILLIAMS, Judge

THE HONORABLE DAVID B. SENTELLE, Judge

THE HONORABLE JUDITH W. ROGERS, Judge

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1 the origination or termination of telephone toll  
2 service. In other words, when you connect to your  
3 ISP, whether it be by dial up or whether it by DSL,  
4 you're doing that to get information services, not to  
5 make a long distance call.

6 The FCC cited the order of remand to this  
7 Court in Bell Atlantic. It made the same arguments in  
8 Bell Atlantic that it makes here. That is, at times  
9 noncarriers can be purchasers of exchange access, that  
10 the statement in nonaccounting safeguards order that  
11 ISPs do not use exchange access was wrongly decided,  
12 that historically, this has always been an interstate  
13 access service and the Court rejected them, rejected  
14 those arguments. First said in Bell --

15 THE COURT: Did we say they were wrong or  
16 simply that they were not adequately supported?

17 MR. BRADFORD: I think that the Court said  
18 that they were not adequately supported. I would go  
19 further and say they were wrong --

20 THE COURT: I understand you would go  
21 farther, but you're not saying we went farther?

22 MR. BRADFORD: No, I think -- the way I  
23 look at it, Your Honor, is that this Court sets some  
24 hurdles --

25 THE COURT: And it may be good enough.

1 You may not be giving up any essential ground when you  
2 say that.

3 MR. BRADFORD: Well, yes, Your Honor, but  
4 I think the way I look at this is you set some  
5 hurdles. You said you've got some questions you've  
6 got to answer here if you're going to go where you're  
7 going.

8 THE COURT: That's what I'm saying, it may  
9 be enough. You're not giving up your argument to  
10 admit that we didn't go as far as you're now trying to  
11 go.

12 MR. BRADFORD: Point 1 is the one I think  
13 that you're making, Judge Sentelle, which is if you're  
14 going to get there you at least got to try and jump  
15 the hurdles and this order doesn't do it. But  
16 moreover, I mean this is the second time around where  
17 they've given their best shot at jumping the hurdles.  
18 At some point you say if this is as good as you can  
19 do, if this is the best argument and it's not a  
20 reasonable argument, then it's foreclosed. It's not  
21 a permissible meaning of the --

22 THE COURT: Yes, except that this one  
23 didn't have the benefit, whatever that may be, of the  
24 Bell Atlantic decision, right?

25 MR. BRADFORD: That's right. I always

1 MR. INGLE: Well, yesterday you put a  
2 "yes" into one of our advocates.

3 THE COURT: Depends on what the question,  
4 how the question is phrased.

5 MR. INGLE: I guess it is. The Commission  
6 is on remand looking into the matters that were sent  
7 back in the Bell Atlantic case in the context of  
8 reciprocal compensation. This is a different context.

9 I have to say that I found the arguments  
10 this morning as to what this Court did and did not  
11 decide in Bell Atlantic to be a little different from  
12 my reading of Bell Atlantic.

13 I felt the Bell Atlantic decision said at  
14 least with respect to the analysis that the Commission  
15 had put in this remand order, I thought the Court was  
16 saying those arguments were not presented in the  
17 Commission order that's on review and therefore  
18 Chenery bars them. The Court made some other  
19 observations, but I'm not sure those were necessarily  
20 parts of its holding. It seemed to me that what the  
21 Court held in that case was that the Commission had  
22 not sufficiently justified what it had done.

23 I did not perceive the Court there as  
24 saying --

25 THE COURT: I think Mr. Bradford finally

1 admitted that during his tenure at the stand there.

2 MR. INGLE: Well, I suppose that's right.  
3 One quick point, my red light is on, if you don't mind  
4 my making it. Qwest has told us this morning that  
5 until the remand order that the Commission adopted,  
6 the whole world assumed that Section 251(c) applied  
7 only to -- well, this proceeding was started by an  
8 application, a petition filed by Qwest's predecessor,  
9 U.S. West in which they spent page after page after  
10 page in their entire summary asking for forbearance  
11 from the application of this statute to their advance  
12 services.

13 THE COURT: Not the whole world assumes,  
14 certainly.

15 MR. INGLE: Not the whole world, that's  
16 right. Thank you.

17 ORAL ARGUMENT OF DANIEL MERON, ESQ.

18 ON BEHALF OF INTERVENORS

19 May it please the Court, my name is Daniel  
20 Meron and I represent the Intervenors in support of  
21 the FCC and against the Qwest Petitioners.

22 Judge Sentelle, I'd just like to start  
23 addressing your question about the statute and the  
24 word "that is engaged in". The contrast, I think, the  
25 telecommunications carrier definition is pretty

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WORLDCOM INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,  
ET AL.,

Respondents.

No. 01-1218

Tuesday,  
February 12, 2002

Washington, D.C.

The above-entitled matter came on for  
oral argument, pursuant to notice

BEFORE:

THE HONORABLE DAVID B. SENTELLE, Judge

THE HONORABLE DAVID S. TATEL, Judge

THE HONORABLE STEPHEN F. WILLIAMS, Senior Judge

1                   P R O C E E D I N G S

2                   THE CLERK: Case No. 01-1218, et al.  
3                   WORLDCOM, INC., ET AL.

4                   v.

5                   FEDERAL COMMUNICATIONS COMMISSION, ET AL.

6                   Mr. Bradford for Petitioner WorldCom,  
7                   Inc., Mr. Ramsay for State Petitioners, Mr. Rogovin  
8                   for Respondents, and Mr. Evans for Intervenors.

9                   ORAL ARGUMENT OF DARRYL M. BRADFORD, ESQ.

10                  ON BEHALF OF PETITIONER WORLDCOM, INC.

11                  Good morning, Your Honors. If it please  
12                  the Court, I'd like to reserve three minutes of my  
13                  times for rebuttal.

14                  I'd like to start this morning with the  
15                  FCC's flawed statutory analysis in its Order of Remand  
16                  stemming from this Court's decision in Bell Atlantic,  
17                  and then at the end of my argument I'd like to turn to  
18                  the new intercarrier compensation regime, which I  
19                  think needs to be vacated as arbitrary, capricious,  
20                  and discriminatory.

21                  If I could just step back for a second,  
22                  Your Honors, the FCC originally held that Section  
23                  251(b)(5) of the Act was limited to local traffic. It  
24                  then held that calls to ISPs were not entitled to  
25                  reciprocal compensation because they were not local

1 calls. This Court vacated that determination, finding  
2 that the FCC had failed to explain why calls to ISPs  
3 were different from any other local call.

4 On remand, one would have thought that the  
5 FCC would have taken this Court's strong suggestion,  
6 found these calls to be local calls like any other  
7 local calls.

8 THE COURT: Given that we said in the  
9 opinion that the calls did not clearly fit in one  
10 category or the other so far as local or interstate,  
11 why would one have thought that the Commission would  
12 take that as a strong suggestion, counsel?

13 MR. BRADFORD: Because, Your Honor, it  
14 would be embracing the Telecommunications Act instead  
15 of running from it. What they would have done is they  
16 would have said, "Look, these are local calls. We've  
17 always treated them as local calls."

18 And we've got some policy concerns here,  
19 but there's another section of the Act -- 252(d) --  
20 that says rates for reciprocal compensation have to be  
21 cost-based. So we can use the tools Congress gave us  
22 to cure the policy concerns and the regulatory  
23 arbitrage concerns that we have and continue to treat  
24 calls to ISPs as local as we have.

25 THE COURT: What you're saying takes me

1           That would be a welcome relief. If the  
2 Court would say, "Look, you're entitled to reciprocal  
3 compensation for calls to ISPs." That doesn't mandate  
4 any particular form or rate. You, FCC, are bound by  
5 (d)(2) in cost-based rates. This case should be  
6 remanded for the FCC to determine what scheme complies  
7 with the constraints that Congress imposed in (d)(2).

8           And if that turns out to be bill and keep,  
9 and there's a record developed that shows that bill  
10 and keep meets the cost-based requirements, then, you  
11 know, I would be stuck with that. But I have to have  
12 a statutory measure to test it.

13           THE COURT: Let's go back a little  
14 further, though. You keep talking about 251(b)(5).  
15 But it's completely consistent that 251(g) can't be  
16 applied the way the Commission purported to apply it.  
17 And at the same time, that these transactions are not  
18 governed by 251(b)(5). Isn't that true?

19           MR. BRADFORD: Your Honor, I'm not sure if  
20 I follow the question.

21           THE COURT: In other words, there are  
22 other escape hatches from 251(b)(5), other than  
23 251(g). For example, I mean, simply the fact that in  
24 a regular interexchange carrier phone call 251(b)(5)  
25 doesn't apply, although you might think by reading its

1 words that it does. But everyone agrees that it  
2 doesn't apply to that.

3 MR. BRADFORD: I think that with regard to  
4 -- I hope I'm addressing the Court's question. I  
5 think that 251(b) (5), there is no escape hatch with  
6 regard to calls to ISPs.

7 THE COURT: I'm sorry. There is no --

8 MR. BRADFORD: There is no escape hatch  
9 with regard to calls to ISPs.

10 THE COURT: Why is that? Why is that?

11 MR. BRADFORD: Because --

12 THE COURT: Do you really think the  
13 analogy between a call to an ISP is so similar to a  
14 call to a pizza delivery place that it's got to be  
15 treated as local?

16 MR. BRADFORD: I do think that calls to  
17 ISPs do have to be treated as local. I think they are  
18 local calls because ISPs provided --

19 THE COURT: I thought we were rigorously  
20 agnostic about that in Bell Atlantic.

21 THE COURT: Yes. That strong signal I yet  
22 have not found, and I read the opinion back when Judge  
23 Williams and I were on the case. And I read your  
24 brief, and I went back and read our opinion, because  
25 I didn't recognize it from your description.

1 MR. BRADFORD: If I overstated the --

2 THE COURT: When we flatly said that they  
3 don't -- doesn't clearly fit in either category, I'm  
4 at a loss as to how you can pass the straight face  
5 test with the notion that we've given some strong  
6 signal that this is a local call.

7 MR. BRADFORD: Well, let me -- if I stated  
8 it, Your Honors, I apologize. It was not my intent to  
9 do so.

10 THE COURT: Oh, sure it was.

11 (Laughter.)

12 MR. BRADFORD: But I think what the Court  
13 was getting at is that there's a lot of similarities  
14 between these calls and other local calls that are  
15 derived from the statutory language and are derived  
16 from the fact that ISPs are end users. And even if  
17 you're going to use this end-to-end analysis, it's  
18 hard to figure out how you start at one end and the  
19 ISP, being an end user, isn't at the other end.

20 And you've always treated this traffic as  
21 local, and FCC -- you have to deal with these problems  
22 if you're going to say this isn't a local call. And  
23 what they did is they didn't do they. They  
24 sidestepped it.

25 THE COURT: How does the Commission treat

1 limiting principle to what you just said. We can act  
2 under 251(g) because we've always had a plan.  
3 Therefore, the Petitioners can't attack our plan  
4 successfully, whatever the plan is?

5 MR. ROGOVIN: Well, Your Honor, the plan  
6 is, indeed -- is a valid exercise of Section 201,  
7 which is what the --

8 THE COURT: But if it's a valid exercise  
9 of 201, let's say enough to overcome other provisions  
10 of the statute, why isn't that enough?

11 THE COURT: Then you don't need 251(g).

12 THE COURT: You don't need 251(g).

13 MR. ROGOVIN: Your Honor, I don't think  
14 that we're saying that 251(i) is a sufficient grant of  
15 authority to allow us to go forward and resolve this  
16 case in the face of 251(b)(5). I think what we're  
17 saying is that the interplay between 251(b)(5) and  
18 251(g) -- first of all, it is ambiguous on its face.  
19 I don't think it's absolutely clear --

20 THE COURT: Again, I mean, I think  
21 251(b)(5) is bristling with ambiguity. But I'm not  
22 sure that 251(g) helps you in your quest.

23 MR. ROGOVIN: Well --

24 THE COURT: Did you mean to say that  
25 251(b)(5) is ambiguous on its face?

1 MR. ROGOVIN: Your Honor, I meant to say  
2 that I think reconciling the two of them together and  
3 applying them here to the situation where you have the  
4 joint provision of access to an information --

5 THE COURT: Well, I ask the question  
6 because at one point in your brief -- and I think it's  
7 on page 28 -- you seem to be arguing that -- you seem  
8 to be relying on Bell Atlantic for the proposition  
9 that 251(b) (5) -- the word "telecommunications" is, in  
10 and of itself, ambiguous, without any need to refer to  
11 251(g). Were you intending to make that argument?

12 MR. ROGOVIN: I think what we were  
13 intending to argue is that the word  
14 "telecommunications" in 251(b) (5) appears to apply to  
15 all telecommunications, and it may well be that this  
16 very traffic is covered by 251(b) (5), which requires  
17 us to look to 251(g) if we're to --

18 THE COURT: Well, another thing would just  
19 be to resolve the ambiguity of 251(b) (5).

20 MR. ROGOVIN: Well, that certainly was not  
21 decided and was not the focus of the Commission's  
22 decision.

23 THE COURT: That may be one of your  
24 problems. Judge Williams was pointing out to opposing  
25 counsel the cases we have on the standing question

1 THE COURT: But if it hadn't come up  
2 before the '96 Act, then how can it be covered by (g),  
3 which applies by its terms to those regulating sources  
4 that are in effect before February 8th of '96?

5 MR. EVANS: I think the answer, Judge  
6 Sentelle, is that to make sense of 251(g), to make  
7 sense of what Congress was trying to do, it has to be  
8 preserving the regime. The regime is not just the  
9 specific things that had been answered, but the regime  
10 is the set of principles that govern how those  
11 questions would be answered.

12 And that is why, without complaint from  
13 anybody, the FCC has continued to make changes in its  
14 exchange access rules and charges, pulling in  
15 interstices at great length, repeatedly, since 1996.  
16 No one has challenged that, and yet it falls clearly  
17 within the combination of 251(g) and 251(i). That's  
18 how the Commission has continuing authority to deal  
19 with it, because telecommunications --

20 THE COURT: Are these cases where there is  
21 some other provision of the Act which the Commission  
22 has not found is inapplicable, and other people are  
23 claiming is applicable?

24 MR. EVANS: Well, I think there --

25 THE COURT: Because, I mean, it seems to

1 me that's what creates the problem. The Commission  
2 assumes that 251(b)(5) is applicable, but then nudges  
3 around it.

4 MR. EVANS: Well, Judge Williams, the  
5 Commission also in its current thinking about the  
6 statute, which was a rethinking of the entire  
7 structure, said as well that 251(b)(5) applies to  
8 exchange access, but for 251(g). 251(g) is the  
9 provision that the Commission looked to to explain why  
10 it is that after 1996 --

11 THE COURT: Is this sort of rewriting  
12 paragraph 1034?

13 MR. EVANS: Yes. I mean, basically  
14 rethinking it a little bit. I mean, look, as Mr.  
15 Rogovin said, this is an agency that did something  
16 very rare in this Court's experience. A case is  
17 vacated, remanded, and the agency says, "Hey, wait a  
18 second. Let's step back and start over." I know. I  
19 sat in some of the meetings with the Commission staff.

20 They were throwing out all of the  
21 assumptions and starting from scratch. And what they  
22 realized is that the only sensible way to read the  
23 statute is to see in 251(g) a preservation of the  
24 regime for exchange access and information access, not  
25 one but not the other -- both.