BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Investigation Into the Treatment of Reciprocal Compensation for Internet Service Provider Traffic.	))))	**Case No. 99-941-TP-ARB**

CINCINNATI BELL TELEPHONE COMPANY'S INITIAL BRIEF ON THE EFFECT OF *BELL ATLANTIC TELEPHONE CO. v. FCC* AND MEMORANDUM IN OPPOSITION TO CLEC MOTION FOR SUMMARY JUDGMENT

On March 31, 2000, AT&T Communications Corporation of Ohio, Inc., TCG Ohio, Buckeye TeleSystem, Inc., CoreComm Newco, Inc., and MCI WorldCom, Inc. ("the CLEC Group") moved the Commission for an Order modifying the procedural schedule to provide parties with the opportunity to brief the impact of *Bell Atlantic Tel. Cos. v. FCC,* Case No. 99-1094, 2000 U.S. App. LEXIS 4685 (D.C. Cir. March 24, 2000). Alternatively, the CLEC Group moved for summary judgment on the grounds that, based on the D.C. Circuit decision, traffic to ISP providers is "local traffic" subject to reciprocal compensation. Time Warner Telecom of Ohio, L.P. and Intermedia Communications, Inc. subsequently joined in the CLEC motion.

As a result of an April 3, 2000 conference with the parties, the Attorney Examiner found it appropriate to grant the motion to suspend the procedural schedule in this matter. Further, the Attorney Examiner called for initial and reply briefs on the issues to be considered by the Commission in this proceeding as well as the impact of the D.C. Circuit Court of Appeals decision in *Bell Atlantic* on the issues previously established in the March 15, 2000 Attorney Examiner's entry. The hearing date in this matter has been vacated indefinitely. This constitutes Cincinnati Bell Telephone Company's ("CBT's") initial brief in response to the April 6, 2000 Entry.

I. The D. C. Circuit Decision

On March 24, 2000, the U.S. Court of Appeals for the D.C. Circuit issued its opinion in a consolidated appeal of the FCC's February 26, 1999 *Declaratory Ruling*.[1] *Bell Atlantic Tel. Cos. v. FCC*, No. 99-1094, D.C. Cir., (March 24, 2000) (hereinafter "the D.C. Circuit decision"). In its *Declaratory Ruling*, the FCC had determined that ISP traffic is largely interstate in nature. It had further determined that ISP traffic is not subject to the reciprocal compensation obligations in § 251(b)(5), which the FCC has reserved for local exchange traffic. However, the FCC allowed states to determine whether carriers should receive some form of compensation for ISP traffic and, if so, what amount. The FCC determined that parties may have voluntarily included reciprocal compensation provisions in their interconnection agreements and that state commissions could construe existing agreements to determine whether they require compensation. The FCC also stated that state commission could determine in arbitration cases whether reciprocal compensation should be paid for ISP traffic in future agreements. The FCC also has initiated its own proceeding to determine how ISP traffic should be handled, but has made no decision at this time.

In *Bell Atlantic*, there were two separate challenges to the *Declaratory Ruling*. Certain ILECs challenged the FCC's allowance of state commissions to impose reciprocal compensation on ISP traffic because the traffic was interstate. A group of CLECs challenged the FCC's analysis that had led to the conclusion ISP calls were not local exchange traffic. The D.C. Circuit decided that the FCC had not provided a satisfactory explanation why it concluded that

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 ("*Declaratory Ruling*"), released February 26, 1999.

ISP traffic was "exchange access" rather than "telephone exchange service." Accordingly, the Court vacated the FCC's Declaratory Ruling and remanded the case to the FCC for further consideration. Notably, the court also stated that its ruling leaves ILECs free to seek relief from state-authorized compensation that they believe has been wrongfully imposed.

In their motion, the CLECs dramatically overstate both the holding and the effect of this decision. The D.C. Circuit decision did not undermine the FCC's determination that it had jurisdiction over calls to ISPs and affirmed its use of an "end-to-end" analysis for determining whether communications are jurisdictionally interstate. What the court criticized was the FCC's lack of explanation why "end-to-end" analysis was also relevant to determining whether ISP calls fit the local call model or the long-distance call model. However, the court readily agreed that neither the local nor long-distance models clearly fit ISP traffic. The D.C. Circuit did not determine whether or not ISP-bound traffic should be subject to a compensation scheme or whether any such compensation scheme must be reciprocal compensation. Indeed, the court simply remanded the matter to the FCC for further explanation. By no stretch of the imagination did the court decide whether or not ISP-bound traffic was local for reciprocal compensation purposes, which decision was left to the FCC on remand. The court did not rule out the conclusion that ISP traffic could be considered Exchange Access.[2]

II. The D.C. Decision Has Not Altered The Legal Status of ISP Traffic.

The FCC's *Declaratory Ruling* had admitted that the ILECs' position that FCC rules

[2] The CLECs' argument that ISP traffic cannot be "exchange access" because it does not involve "toll telephone service" is not determinative. No one could realistically argue that toll-free 1-800 traffic is not "exchange access" because there is not a toll charge for the call. As the D.C. Circuit stated, there is a gray area between local service and toll service, within which the FCC and/or this Commission has room to interpret. ISP traffic is likewise not local traffic according to the literal definition of that term, because it does not terminate at the ISPs' premises, if, in fact, the ISPs actually have premises within the local calling area.

preclude the imposition of reciprocal compensation obligations on ISP-bound traffic "might be a reasonable extension of our rules." ¶ 26. "[I]n the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism." Id. (emphasis added). At worst, the D.C. Circuit decision vacating the *Declaratory Ruling* created such an "absence of governing federal law" until the FCC acts on remand, enabling state commissions to choose not to impose reciprocal compensation or to adopt another compensation mechanism.

The D.C. Decision does not prevent the Commission from concluding that ISP traffic should be subject to a compensation scheme other than reciprocal compensation. The purpose and scope of this generic proceeding has not been altered. ISP traffic had been declared by the FCC to be interstate access in numerous orders predating the Declaratory Ruling. This history is recited in the next section. None of those prior decisions was affected by the D.C. Circuit decision.

Subsequent to the Declaratory Ruling, the FCC issued another decision confirming that ISP traffic is not local, which order has not been challenged on appeal. The FCC ruled subsequent to its *Declaratory Ruling* that ISP traffic was not local traffic:

> [W]e conclude that typically ISP-bound traffic does not originate and terminate within an exchange and, therefore, does not constitute telephone exchange service within the meaning of the [1996] Act. . . . [Rather], such traffic is properly classified as "exchange access."

In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147 *et al.*, ¶ 16 (Dec. 23, 1999). That ruling was unaffected by the D.C. Circuit's decision and remains the federal law today.

In addition, even after the D.C. Circuit decision, the FCC's Common Carrier Bureau

Chief publicly stated that the ruling does not alter his view that ISP traffic is interstate but, instead, requires the FCC to provide further explanation of that conclusion. *TR Daily*, March 24, 2000. At the present time, there is no reason to believe that the FCC will come to a conclusion on the nature of ISP traffic that is any different from the Declaratory Ruling. The FCC is likely on remand to maintain its view that ISP traffic is interstate access traffic and will provide an explanation as required by the D.C. Circuit.

III. The Historical ISP Access Charge Exemption Dictates Treatment of ISP Traffic As Exchange Access Until and Unless the FCC Decides Otherwise.

In order to determine how to characterize ISP traffic in the wake of the vacation of the *Declaratory Ruling*, it is important to understand the historical treatment of ISP traffic by the FCC prior to the *Declaratory Ruling*. This preexisting body of law would control after vacation of the *Declaratory Ruling*. Contrary to the CLECs' misconception, ISP traffic has never been considered "local traffic" but has always been considered interstate traffic exempt from access charges. Despite the D.C. Decision, federal law remains that ISP traffic is interstate in nature.

The ESP[3] access charge exemption was created in 1983, when public Internet usage was virtually non-existent. In the Matter of MTS and WATS Market Structure, 97 F.C.C.2d 682 (released August 22, 1983). At that time, access charges themselves were relatively new and the Internet was in its infancy. In the MTS/WATS Order, the FCC stated that its original intent had been to apply access charges to enhanced service providers. ¶ 76. ESPs were characterized as "users of access service" and the FCC stated that they obtain local exchange services or facilities which are, in part or in whole, for the purpose of completing interstate calls which transit its

[3] The term "enhanced service provider" or "ESP" encompasses ISPs, but is a broader category of users. For purposes of simplicity, CBT will use the terms ESP and ISP interchangeably in this brief.

location. ¶ 78. "A facilities-based carrier, reseller or enhanced service provider might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities to access its customers." Id. However, rather than impose per minute of use interstate access charges on ESPs, the FCC decided to protect them from "rate shock." "Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability." ¶ 83. There is no doubt that the FCC understood that ESPs made interstate use of the local network. It defined the term "access service" as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." 47 C.F.R. § 69.2(a). ESPs avoided paying normal access charges by virtue of being classified as "end users." The only revenue source ILECs were allowed to recover from ESPs was the end user charge for the services and facilities to which the ESP subscribed.

In 1987, the FCC issued a Notice of Proposed Rulemaking to reconsider whether ESPs should be assessed access charges. The FCC stated that ESPs "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services." Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 2 FCC Rcd 4305, 4306 (1987). However, the FCC decided not to eliminate the exemption from interstate access charges afforded to enhanced service providers at that time. Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631 (released Apr. 27, 1988). Referring to the MTS/WATS Order, discussed above, the FCC stated: "In 1983 we adopted a comprehensive 'access charge' plan for the recovery by

local exchange carriers (LECs) of the costs associated with the origination and termination of interstate calls." ¶ 2. The FCC described the exemption, not as a determination that ESP traffic was local traffic, but that ESPs would be treated as end users for purposes of paying for their interstate access usage: "Under our present rules, enhanced service providers are treated as end users for purposes of applying access charges. Therefore, enhanced service providers generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices." Id., n. 8. The FCC stated that the ESP industry was in a period of substantial change and, once again, decided not to burden the industry with access charges. It, therefore, continued the access charge exemption: "Thus, the current treatment of enhanced service providers for access charge purposes will continue. At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges." Id., n. 53.

The FCC returned to the ESP access charge exemption in 1989 in Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 4 FCC Rcd 3983 (released May 9, 1989). In reciting the history of the exemption, the FCC confirmed that ESPs continued to make interstate use of the local network: "At the time we formulated our access charge rules, some interstate service providers, including certain basic service resellers and ESPs, were using local business lines to obtain access to the local exchange for their interstate traffic." ¶ 29. "As a result, many ESPs currently pay state-tariffed business line rates and subscriber line charges for their switched interstate access connections." ¶ 30. The FCC determined that it would not disturb the ESP exemption, but examined whether an alternative means of implementing it should be adopted. n. 74. The FCC acknowledged that the exemption was causing interstate costs to be recovered from intrastate

rates and considered whether some other means of access charge recovery should be employed. The FCC concluded that because usage sensitive costs were allocated to the intrastate jurisdiction, other interstate access customers were not unduly burdened by the ESP exemption. Imposing interstate traffic-sensitive charges would cause instability for the ESP industry, while continuing the exemption would not appreciably burden interstate ratepayers because the amount of ESP traffic was rather small compared to other traffic.

The FCC revisited the ESP access charge exemption again in its 1997 Access Charge Reform Order. Access Charge Reform, CC Docket No. 96-262, FCC No. 97-158, First Report and Order, 12 FCC Rcd 15982 (1997). Again, the FCC began its discussion of the exemption by confirming that ISPs are interstate users of the local network: "In the 1983 *Access Charge Reconsideration Order*, the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities to originate and terminate interstate calls, ISPs should not be required to pay interstate access charges." ¶ 341. The effect of the exemption was not to make ISP usage of the network local, but to allow ISPs to obtain interstate access by paying local rates: "ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries." ¶ 342. The FCC continued to justify the exemption by stating that the imposition of interstate per-minute access charges on ISPs would chill development of the Internet. It concluded that "Information service providers may use incumbent LEC facilities to originate and terminate interstate calls." 12 FCC Rcd at 16131-32.

In late 1998, the FCC considered an ADSL offering proposed by GTE and revisited its analysis of ISP traffic. GTE Telephone Operating Cos. GTOC Tariff No. 1 GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292, released

October 30, 1998. GTE had sought a declaration that its new service was an interstate service that should be tariffed at the federal level. A variety of CLECs took the position that the connection between GTE's end user customer and the ISPs' POP should be treated as a local call, with a second information service call beginning at the ISPs POP and continuing onto the Internet. The FCC, however, agreed with GTE that this service was an interstate service. ¶ 16.

While clearly stating that its decision was limited to dedicated connections, rather than circuit-switched dial-up traffic, the FCC stated several conclusions that inevitably apply to dial-up traffic as well.[4] In a precursor to its *Declaratory Ruling*, the FCC concluded that the communications at issue did not terminate at the ISP's local server but continued to the ultimate destination or destinations on the Internet. ¶ 19. The FCC also rejected the argument that the historical treatment of ISPs as end users for purposes of the access charge exemption meant that Internet calls terminated locally. ¶ 21. "The fact that ESPs are exempt from certain access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs. That the Commission exempted ESPs from access charges indicates its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary." Id. The FCC summarized its past treatment of ISP traffic with respect to access charges, recognizing that ISPs do use interstate access services, but since 1983 have been exempted from the payment of certain access charges. "Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges." ¶ 7 (emphasis added). The FCC did not say that ESPs were treated as end users for purposes of characterizing their traffic, which

[4] The GTE order indicated that another order, dealing with dial-up traffic, would be released the following week, however, that order was not released as planned. Finally, on February 26, 1999, the FCC released its *Declaratory Ruling*.

has always been described as interstate traffic. Further, the FCC cited its own definition of "end user" which is "any customer of an interstate or foreign telecommunications service that is not a carrier . . ." 47 C.F.R. § 69.2(m) (emphasis added). Thus, even where the FCC has treated ISPs as "end users" that term carries with it the qualification that the ISP is an end user of interstate services.

The fact that the FCC has exempted ISPs from access charges in the current rules and they pay local rates for network connections does not change the nature of the traffic. The CLECs mistakenly assume that because ISP traffic is exempt from access charges that it is "local." However, as the foregoing review of the history of the ESP exemption indicates, in creating the ESP exemption, the FCC did not determine that ESP traffic is local, it simply allowed ESPs to purchase an interstate service from local tariffs. The FCC has always clearly stated that the traffic is interstate and would be subject to access charges but for the exemption. It was only quite recently that revisionist history has begun calling ISP traffic "local traffic." The FCC has consistently said that ISP traffic was access traffic and that, rather than pay per minute of use access charges, ISPs would receive their interstate access in exchange for paying end user charges. This prior body of law remains undisturbed by the D.C. Circuit decision.

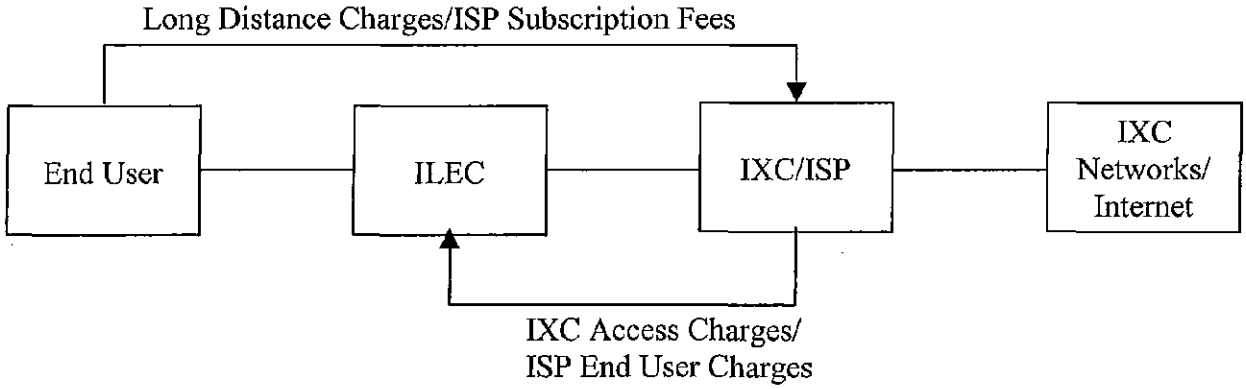
IV. The FCC's Treatment of ISP Traffic As Interstate Access Precludes An Award of Reciprocal Compensation.

The local exchange network is used for two purposes: as a means for local customers to call each other; and as a means for local customers to access interstate networks. Generally speaking, local usage of the network is paid for by local subscribers, and interstate usage of the network is paid for by interstate carriers. For example, when a long distance call is placed, the local carrier bills the interstate carrier access charges for its usage of the local network. The long

distance carrier combines these charges with its charges for the use of its long distance network (and any local network at the distant end of the call) and bills the end user for the total call. The local carrier receives nothing directly from its customer for the long distance call.

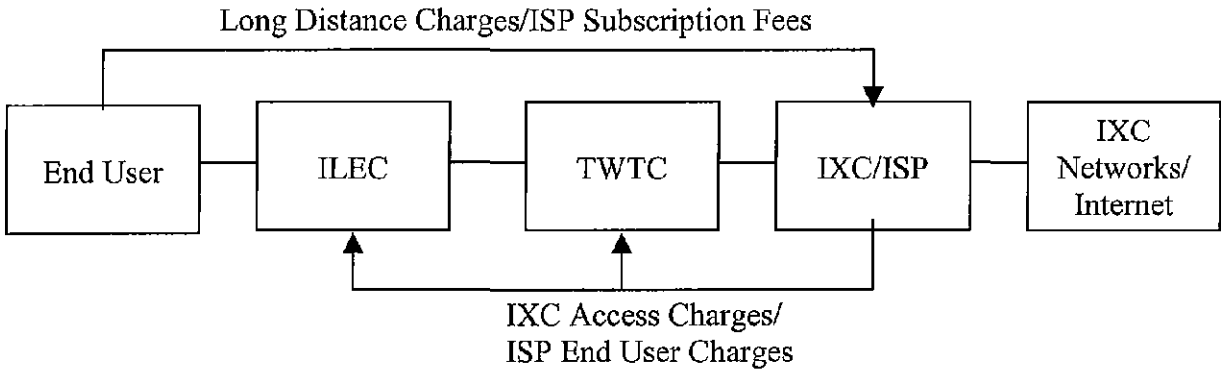
As between the originating customer and its local carrier, ISP traffic is exactly like long distance traffic. The local customer does not pay the local carrier anything extra for the call. However, due to the ISP access charge exemption, the local carrier cannot charge the ISP any usage sensitive access charges for that call either. The local carrier can look only to the end user charges paid by the ISP as its interstate access contribution. When an end user places an interstate call to an ISP, the local carrier gets no additional revenue from anyone for that call.

The revenue flows attributable to interstate traffic when an ILEC customer places a call to an IXC or ISP served by the ILEC's network can be understood through the following diagram:



Interstate calls are originated by a local end user to the ILEC, who passes the call on to the interstate carrier, who transports the call to the distant location, where the process is reversed. The originating end user does not pay the ILEC for interstate calls, but, rather, pays the IXC or ISP. In turn, the IXC or ISP pays the ILEC for usage of its local network, either in the form of interstate access fees or, in the case of ISPs, end user charges as a surrogate. Introduction of a

CLEC as the local carrier serving the ISP should not change the basic relationships between originating customer, the local exchange companies and IXC/ISPs:



The local exchange companies should still be looking to the IXC/ISP for any revenue attributable to this traffic and would logically share this revenue, as occurs with meet-point access billing arrangements. CLECs, however, want to keep all of the ISP revenue and obtain additional revenue from the ILECs.

The FCC has said that carriers serving ISPs must look to end user revenues from the ISPs to compensate them for the costs of handling this traffic. CLECs should not be in any better position than ILECs in this regard. To allow a CLEC who handles the traffic to recover both end user charges from the ISP and reciprocal compensation charges from an originating LEC would allow the CLEC to recover far more for serving an ISP than an ILEC would have received for handling this traffic entirely on its own network. Plus, this compensation would come at the direct expense of the ILEC. The exchange of ISP traffic is not any different in concept than the exchange of interexchange traffic under a meet point billing arrangement. In the case of ISP traffic, it just happens that there is no access revenue to split, due to the ISP access charge exemption.

The FCC has barred ILECs from imposing access charges on ISPs and requires them to

allow ISPs to purchase end user services. This artificial treatment of ISP traffic was not because of its true jurisdictional or physical nature, but simply to exclude it from the interstate access charge regime to shield the Internet from the burden of paying access charges. The access charge exemption should not be used to determine whether the traffic is "local" for purposes of reciprocal compensation. Because they have been prohibited from charging ISPs access charges and must recover ISPs' access usage only through end user charges, for ILECs to have to pay other carriers to handle ISP traffic would be inequitable. In that event, not only would the ILECs not receive access charges, they also no longer receive the end user revenues from the ISPs served by CLECs, but would be expected to pay CLECs who are receiving the end user charges. Such a result would expand the existing implicit subsidy from incumbent local telephone companies to ISPs by adding an express subsidy from ILECs to CLECs, who themselves would not contribute to the implicit Internet subsidy.[5]

As discussed supra with respect to the historical ESP access exemption, the FCC has consistently maintained that ISP traffic is interstate traffic that uses interstate access services. The D.C. Circuit's vacation of the *Declaratory Ruling* has not impacted any of the FCC's other decisions on this issue. The purpose of its historical regulatory treatment of ISP traffic was to encourage the growth of the Internet without burdening it with paying per minute of use access charges. In essence, the FCC created an implicit subsidy to the Internet by allowing it to obtain access services over the local telephone network for merely the price of local service

[5] In a portion of its *Declaratory Ruling* not challenged on appeal, the FCC was mindful to address the jurisdictional question "in a manner that promotes efficient entry by providers of both local telephone and Internet access services, and that, by the same token, does not encourage inefficient entry." ¶ 6. The Commission should keep this in mind when determining whether it makes economic sense for CLECs to be compensated for ISP traffic from ILECs which creates incentives for CLECs to enter the market to serve ISPs simply to transfer wealth from ILECs to CLECs, with no corresponding consumer welfare benefit.

connections.[6] There is nothing that mandates payment of reciprocal compensation on this traffic simply because it is exempt from access charges.

V. Summary Judgment Is Not Appropriate.

Alternatively, the CLEC Group urged the Commission to treat its motion as one for summary judgment and determine that ISP-bound traffic should be considered local traffic subject to reciprocal compensation pursuant to § 251(b) and the Commission's Local Service Guidelines. The CLEC Group contends that the Commission's ability to establish a compensation mechanism other than reciprocal compensation for ISP-bound traffic was severely limited by the D.C. Circuit. Nothing could be further from the truth. The CLECs' motion relies on a complete misrepresentation of the D.C. Circuit's decision. In fact, the D.C. Circuit decision opens the door for ILECs to contest past decisions by state commissions that have awarded reciprocal compensation for ISP traffic based upon the *Declaratory Ruling*. The D.C. Circuit ruling puts into question the very rulings of this and other state commissions that the CLECs rely upon to support their claims to reciprocal compensation for ISP-bound traffic at the ILEC's TELRIC-based rates. [See *ICG Telecom Group v. Ameritech Ohio,* Case No. 97-1557-TP-CSS; *Time Warner Communications of Ohio v. Ameritech*, Case No. 98-308-TP-CSS and *MCImetro Access Transmission Services v. Ameritech Ohio,* Case No. 97-1723-TP-CSS].

The CLECs contend that this proceeding should be limited to affirming the

[6] If CLECs were to receive reciprocal compensation on ISP traffic, they would not be contributing to the Internet subsidy, but would increase the burden of the subsidy on ILECs and increase the ILECs' total cost of supporting the Internet well beyond what it was before CLECs entered the local exchange business. Apparently, the CLECs' only suggestion is for ILECs' to increase their local residential service rates or to impose per minute of use charges on access to the Internet, neither of which is an available solution. The FCC has publicly stated that it has no intention of imposing per minute of use charges on end users who access the Internet. See *Fact Sheet*, "No Consumer Per-Minute Charges to Access ISPs," February 1999, http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/nominute.html.

Commission's prior rulings awarding reciprocal compensation in complaint cases against Ameritech. These decisions have no bearing on this case. In the Ameritech cases, this Commission did not rule that ISP traffic is inherently subject to reciprocal compensation payments; it ruled that Ameritech most likely "agreed" to pay reciprocal compensation on ISP traffic based on the contract language and circumstances in place when those particular agreements were signed. The Commission clearly stated that it was not deciding that ISP traffic is local traffic as a matter of law for purposes of reciprocal compensation. See *Entry on Rehearing*, Case No. 97-1557-TP-CSS, May 5, 1999 ("The Commission emphasized, however, that its decision 'should not be viewed by anyone as an opinion on the broader policy implications involved . . .'") The Commission has the legal authority to determine that reciprocal compensation is not due for ISP traffic. The purpose of the hearing in this matter is to determine whether reciprocal compensation is appropriate when the parties cannot agree.

The FCC has not established any policy for whether ISP traffic is subject to reciprocal compensation; nor has this Commission done so in its prior decisions. Likewise, in the recent arbitration between ICG and Ameritech, the Commission deferred a ruling on this issue to the outcome of this proceeding. The issue of whether ISP traffic is subject to reciprocal compensation has not been decided by this Commission other than in the context of specific agreements between Ameritech and certain CLECs on the specific facts applicable to those agreements. The Commission's task in the Ameritech complaint cases was not to determine as a matter of policy whether ISP traffic should trigger reciprocal compensation, but to determine how the parties to those agreements had agreed to treat that traffic. The Commission stated that its mission was to determine "what the parties understood at the time the agreement was negotiated." Opinion and Order, In the Matter of the Complaint of Time Warner

Communications of Ohio, L.P. v. Ameritech Ohio, Case No. 98-308-TP-CSS, at 7. Those decisions are of no value in this proceeding, in which an interim policy on ISP traffic is to be developed for situations when the parties cannot agree.

Contrary to the CLECs' contention, this proceeding is not dependent upon the January 13, 2000 Entry's reliance on the language of the Declaratory Ruling ("the FCC found, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for ISP-bound traffic and to adopt another compensation mechanism."). The D.C. Circuit merely vacated the FCC's lack of justification for its decision; it did not condemn the result itself. Thus, the FCC is free on remand to come to exactly the same conclusion as it did before; it just needs to provide adequate reasoning for its decision. In fact, the D.C. Circuit confirmed the possibility that ISP traffic would be treated differently than local traffic:

> The statute appears ambiguous as to whether calls to ISPs fit within "exchange access" or "telephone exchange service," and on that view any agency interpretation would be subject to judicial deference. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Despite its criticism of the FCC's logic in determining that ISP calls do not "terminate," the D.C. Circuit did not, and could not, reach the opposite conclusion. Recognizing the limits of its review authority, the court clearly stopped short of this result:

> But, even though we review the agency's interpretation only for reasonableness where Congress has not resolved the issue, where a decision "is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). See also *Acme Die Casting v. NLRB*, 26 F.3d 162, 166 (D.C. Cir. 1994); *Leeco, Inc. v. Hays*, 965 F.2d 1081, 1085 (D.C. Cir. 1992); *City of Kansas City v. Department of Housing and Urban Development*, 923 F.2d 188, 191-92 (D.C. Cir. 1991).

Having stated that ISP traffic does not neatly fit into either a local or a long-distance category,

the D.C. Circuit has left the FCC free on remand to determine that ISP traffic falls into the long-distance option or even a third category of traffic. Under *Chevron*, all the FCC need do is provide a rational basis for its decision.

In response to the last issue identified in paragraph 4(b) of the March 15, 2000 Entry, until the FCC reaches a contrary conclusion, this Commission is able to impose its own interim solution, which could also define ISP traffic as exchange access or even a third category of traffic. Ultimately, if the FCC develops rules interpreting § 252(d) as it applies to ISP traffic, any such lawful rules would have to be honored. *AT&T v. Iowa Utilities Board*, 119 S.Ct. 721 (1999). Whether or not any rules developed by this Commission should terminate when the FCC issues an order in its pending proceeding or should await the issuance of a final appealable decision on the issue depends largely on how the FCC treats its decision. CBT believes it is premature to take a position on when the Commission's rules should cease to operate until it is clear exactly what the FCC does.

VI. Even If ISP Traffic Is "Local" The Commission Is Free To Establish A Different Compensation Scheme For ISP Traffic.

Even if the D.C. Circuit decision casts doubt on whether ISP-bound traffic could be anything but local traffic, such a conclusion still would not mean that ISP-bound traffic is subject to reciprocal compensation. The Commission has flexibility to investigate the matter and determine for itself whether and how carriers handling ISP traffic should be compensated. Section 252(d) of the Act empowers the Commission to establish rates for transport and termination of traffic.

Current FCC rules require that rates for transport and termination must be "structured consistently with the manner that carriers incur those costs." 47 C.F.R. § 51.709(a). All parties

to this proceeding are well aware that ILECs' current reciprocal compensation rates were developed based on their average costs of handling traffic on their networks of relatively short duration (3-4 minutes) as contrasted with ISP traffic that has much longer holding times (25-30 minutes). Existing rates spread non-duration sensitive costs over the length of an average call on the ILECs' networks. These costs have been added to the duration sensitive, per-minute costs to arrive at a single per minute rate that is applied to all local traffic. Using this same rate structure for ISP traffic, which has much longer holding times, would result in unjustified windfalls.[7] The Commission certainly has the authority to correct this injustice, regardless of whether ISP traffic is treated as "local" traffic. Rates must be structured in accordance with how costs are incurred.

VII. The Commission Should Require CLECs to Provide the Information Requested by ILECs in Discovery.

The Commission is empowered by § 252 of the Act to determine what compensation scheme, if any, is appropriate for ISP traffic. There is nothing in the D.C. Circuit opinion that limits the Commission's choice to reciprocal compensation at the ILECs' TELRIC rates. One of the key purposes of this proceeding was to investigate whether some other approach to compensation was more rational. CLECs with lower costs of handling ISP traffic should not enjoy windfalls from reciprocal compensation. Accordingly, it is entirely fit and proper that the Commission investigate the network architectures used by CLECs to handle ISP traffic and the costs they incur in operating those networks. Despite the high relevance of this sort of information, the CLECs have nearly uniformly refused to provide such information in discovery,

[7] For example, if the setup cost of a call is $.004 and the additional cost per minute is $.001, a rate of $.002 would recover the correct total cost of a 4 minute call of $.008 ($.001 x 4 mins. + $.004 for setup). However, if the call is 24 minutes long, the same rate would recover $.048 ($.002 x 24 mins.), when the cost was only $.028 ($.001 x 24 mins. + $.004 for setup). This would create a windfall in excess of 70% over cost.

hiding behind general objections that they are entitled to mirror ILECs' TELRIC rates and that CLECs' costs are not relevant. There is a pressing need for the Commission to require CLECs to respond to the ILECs' information requests with complete information about each carrier's network configuration and the costs associated with handling ISP traffic, as well as their ability to segregate ISP traffic. These issues are all outlined in the Commission's March 15, 2000 order to be considered at the hearing. The CLECs' near uniform refusal to provide any information in response to these requests is totally contrary to the stated purpose of this proceeding. Discovery was not rendered unnecessary by the D. C. Circuit decision. A Commission ruling that this discovery is relevant to the issues is necessary in order to compel the CLECs to respond to discovery in a proper manner.

CONCLUSION

For all of the foregoing reasons, CBT urges the Commission to find that it has jurisdiction to establish an interim solution to ISP traffic, to deny the CLECs' alternative motion for summary judgment, to declare that the scope of discovery includes information with respect to the CLECs' network configurations, costs to accommodate ISP customers and ability to segregate ISP traffic, and to set this matter for hearing at the earliest convenient date.

Respectfully submitted,

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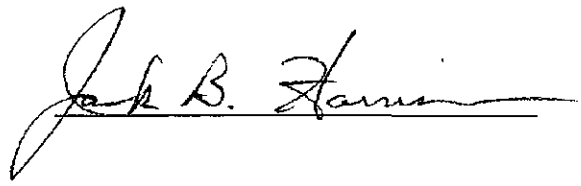
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion was served by Internet email upon all the parties included on the Commission's electronic distribution list used for Entries in this proceeding and/or upon all counsel listed on the attached Service List by hand delivery at the brief exchange or by U.S. Mail, this 14th day of April, 2000.



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