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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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IN THE MATTER OF THE
COMMISSION INVESTIGATION INTO
THE TREATMENT OF RECIPROCAL
COMPENSATION FOR INTERNET
SERVICE PROVIDER TRAFFIC

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CASE NO. 99-941-TP-ARB

ICG TELECOM GROUP, INC.'S BRIEF ON THE EFFECT OF THE D.C. CIRCUIT'S
DECISION IN BELL ATLANTIC V. FCC

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April 14, 2000

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ICG Telecom Group, Inc. ("ICG"), pursuant to the Hearing Examiner's Entry of [date], hereby submits its brief on (i) the effect on this proceeding of the United States Court of Appeals for the District of Columbia Circuit's recent decision in *Bell Atlantic Telephone Companies v. FCC*, No. 99-1094, 2000 U.S. App. LEXIS 4685 (D.C. Cir. March 24, 2000) ("*Bell Atlantic*") and (ii) the appropriate scope of discovery.

INTRODUCTION

For the past year the debate over whether ISP-bound traffic should be subject to reciprocal compensation has turned in large measure on the effects of the Federal Communications Commission's ("FCC") February 26, 1999 order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689 ("*Declaratory Ruling*"). There, the FCC held that ISP-bound traffic is interstate traffic and not subject to Section 251(b)(5)'s reciprocal compensation obligation. The argument has thus been over whether ISP-bound traffic is nevertheless sufficiently similar to the local traffic subject to Section 251(b)(5) to warrant similar treatment. In general, state commissions have held that ISP-bound

traffic is similar to local traffic and should therefore be subject to reciprocal compensation, as has this Commission in the past. Every federal court to review the matter has upheld state commission determinations to that effect.

In *Bell Atlantic*, the D.C. Circuit vacated and remanded the *Declaratory Ruling* while at the same time vindicating all of the state commission decisions decided in its wake that held that ISP-bound traffic is subject to reciprocal compensation. While preserving, and providing additional support for, those state commission rulings, the court's decision has also changed the terms of the debate. The court made two things clear that, taken together, necessarily lead to the conclusion that under federal law the Commission is required to summarily order reciprocal compensation for ISP-bound traffic. First, the court held that whether ISP-bound traffic is subject to reciprocal compensation turns on the relevant statutory provisions, *not* the end-to-end jurisdictional analysis engaged in by the FCC. Under this statutory framework, all traffic exchanged by interconnected carriers falls into one of two categories: "telephone exchange service" or "exchange access." If traffic is telephone exchange service, it is subject to reciprocal compensation; if it is exchange access, it is not.

Second, the court's opinion makes clear that ISP-bound traffic is telephone exchange service, not exchange access. Under the logic of the court's opinion and the plain language of the statute no other interpretation is possible. ISP-bound traffic *cannot* be exchange access traffic and therefore must necessarily be telephone exchange service traffic subject to reciprocal compensation. This Commission should summarily so order. See Section I below.

If, however, notwithstanding the court's decision Commission believes that it is appropriate to continue with this proceeding, then the Commission must revisit all of the issues decided by the *Declaratory Ruling* relating to the regulatory classification of ISP-bound traffic. The court's vacatur of the ruling has the effect of undoing all of the determinations made by the

FCC. The Commission must therefore treat all of the questions that the *Declaratory Ruling* purported to answer as unsettled. See Section II below.

If the Commission proceeds with the hearing, there should be no discovery of competitive local exchange carrier ("CLEC") cost data. The requests for such data made by Ameritech Ohio ("Ohio") can serve no useful purpose given the scope of this hearing. In any event, they are woefully premature. See Section III below.

DISCUSSION

I. In Light of the D.C. Circuit's Decision, the Commission Should Summarily Order the Parties to Pay One Another Reciprocal Compensation for ISP-Bound Traffic

A. Whether or Not ISP-Bound Traffic Is Subject to Reciprocal Compensation Depends Solely on Whether It Is Telephone Exchange Service (Subject) or Exchange Access (Not Subject)

The D.C. Circuit held that the FCC applied the wrong analysis in the *Declaratory Ruling*. In determining that ISP-bound traffic was not subject to reciprocal compensation under Section 251(b)(5), the FCC engaged in the end-to-end analysis that it has traditionally used to determine the jurisdictional nature of traffic (i.e. whether traffic is subject to regulation at the federal or state level). The court rejected this approach, holding that the FCC had failed to explain why it was appropriate to apply an end-to-end jurisdictional analysis to the question of whether an ISP-bound call is subject to reciprocal compensation. The court observed that "the [FCC] has historically been justified in relying on [the end-to-end] method when determining whether a particular communication is jurisdictionally interstate." *Bell Atlantic*, 2000 U.S. App. LEXIS 4685, *13. But, the court found, "[h]owever sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing [ISP-bound calls] as continuous works for purposes of reciprocal compensation." *Id.*, *19. In other words, the fact that a call to an ISP may be jurisdictionally interstate under an "end-to-end" analysis does mean that reciprocal compensation is not paid on the call.

Having rejected the FCC's end-to-end jurisdictional analysis, the court found the question of whether or not ISP-bound traffic is subject to reciprocal compensation is answered by a straight-forward analysis of the applicable statutory provisions. Section 251(b)(5) purports to impose on all local exchange carriers ("LECs") the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The FCC, however, interpreted Section 251(b)(5) to only apply to local traffic—"telephone exchange service"¹ traffic as defined by the Act. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, ¶¶ 1033-34 (1996) ("*Local Competition Order*"). Long distance calls—"exchange access" under the Act—continue to be compensated with access charges, as they were prior to the enactment of Section 251(b)(5). *Id.* Thus, the court found that the only relevant question is whether ISP-bound traffic is telephone exchange service (and thus subject to reciprocal compensation) or exchange access (and thus not subject to reciprocal compensation). *Bell Atlantic*, 2000 U.S. App. LEXIS 4685, *26 (the *Declaratory Ruling* vacated because the FCC failed to address whether ISP traffic is exchange access or telephone exchange service).

The court's opinion leaves no room for the argument that ISP-bound traffic can fall into some category other than telephone exchange service or exchange access. Under Section

¹ Section 153(47) of the Act defines "telephone exchange service" to mean

(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).

251(c)(2) of the Act, LECs interconnect with requesting carriers to provide one of two types of telecommunications traffic—"exchange access" or "telephone exchange service." 47 U.S.C. § 251(c)(2)(A). As the court observed, the FCC has held that all telecommunications traffic exchanged between LECs must fall into one of the two categories. *Bell Atlantic*, 2000 U.S. App. LEXIS 4685, *23-34 (telephone exchange service and exchange access "occupy the field").²

B. The Court's Decision Makes Clear that ISP-Bound Calls Are Telephone Exchange Service Calls and Are thus Subject to Reciprocal Compensation Under Section 251(b)(5)

1. ISP-Bound Calls Cannot Be Exchange Access and Must Therefore Be Telephone Exchange Service

The court's decision makes clear that calls to ISPs cannot be exchange access and must therefore be telephone exchange service. Exchange access is defined by the Act as "the offering of access to telephone exchange services or facilities for the origination or termination of *telephone toll services*." 47 U.S.C. § 153(16) (emphasis added). Telephone toll service is, in turn, defined as "telephone service between stations in different exchange areas for which there is a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. §

² In the only paragraph in the *Declaratory Ruling* in which the FCC addressed the classification of ISP-bound traffic as either telephone exchange service or exchange access, the FCC merely stated that enhanced service providers (of which ISPs are a sub-category) are "users of access service," but that it "has treated them as end users for pricing purposes." *Declaratory Ruling*, ¶17. The court dismissed this classification of ISP-bound calls as "access service." The court found that

[i]n a statutory world of 'telephone exchange service' and 'exchange access,' which the [FCC] here says constitute the only possibilities, the reference to 'access service,' combining the different key words from the two terms before us, sheds no light.

Bell Atlantic, 2000 U.S. App. LEXIS 4685, *23. Given the FCC's previous finding that all telecommunications traffic is *either* telephone exchange service or exchange access, there is no room in the statutory scheme for a third category, "access service."

153(48). Exchange access then is the offering of access for the origination or termination of telephone toll service.

Calls to ISPs thus can be exchange access calls only if ISPs are providers of telephone toll service. ISPs, however, *cannot* be providers of telephone toll service. Telephone toll service providers are providers of telecommunications. As the court observed, ISPs are “information service providers.” *Bell Atlantic*, 2000 U.S. App. LEXIS 4685, *16-17 (citing *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501, ¶ 66 (1998) (“*Universal Service Report*”)). It is well-settled that information services are “mutually exclusive” from telecommunications services even though they may rely on or incorporate telecommunications. *Universal Service Report*, ¶ 59; *see also Bell Atlantic*, 2000 U.S. App. LEXIS 4685, *17 (“Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers.”).³ Since ISPs are information service providers, calls to ISPs fall outside the definition of exchange access.

Moreover, as the court observed, the FCC itself has said that “it is not clear that ISPs use the public switched network in a manner analogous to [telephone toll providers.]” *Id.* (quoting *Access Charge Reform, First Report and Order*, 12 FCC Rcd 15982, ¶ 345 (1997)). Rather, the court found that “an ISP appears . . . no different from any businesses, such as pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies which use a variety of communication services to provide their goods or services to their customers.” *Bell Atlantic*, 2000 U.S. App. LEXIS 4685, *17-18. The court therefore held that “ISPs provide information service rather than telecommunications; as such ISPs connect to the

³ “Information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*.” 47 C.F.R. § 153(20) (emphasis added). Thus, information services necessarily incorporate telecommunications. The fact that they do so in no way transforms them into a telecommunications offering.

local network for the purpose of providing information services, *not originating or terminating telephone toll service.*" *Bell Atlantic*, 2000 U.S. App. LEXIS 4685, *25 (emphasis added).

Accordingly, the dial-up service LECs provide callers to reach ISPs is not exchange access. Since all telecommunications call must be either telephone exchange service or exchange access, ISP-bound calls must therefore be telephone exchange service, and are therefore subject to reciprocal compensation obligations under Section 251(b)(5). As local traffic, ISP-bound calls are also subject to reciprocal compensation under the Commission's own regulations. Ohio PUC Local Service Guidelines, § IV.A.2.

2. The *Advanced Services Order* Lends No Support to the View that ISP-Bound Traffic Is Exchange Access

Ameritech may argue that that the FCC's December 23, 1999 order in its *Advanced Services* proceeding supports the contrary finding that calls to ISPs are in fact exchange access calls. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-413, released December 23, 1999 ("*Advanced Services Order*"). It does not.

In the *Advanced Services Order*, the FCC addressed whether digital subscriber line ("DSL") offerings are telecommunications services subject to the obligations imposed by Section 251(c) as either telephone exchange service or exchange access service. The FCC found that DSL calls to ISPs can be exchange access. *Id.*, ¶ 35. That holding, however, is not applicable to the dial-up calls to ISPs at issue in this proceeding. As the FCC found in an order predating the *Advanced Services Order* in which it addressed the jurisdictional nature of DSL, because DSL is a dedicated connection rather than a circuit-switched call, it is entirely distinct from dial-up Internet access. *GTE Telephone Operating Cos.*, GTOC Transmittal No. 1148, 13 FCC Rcd 22466, ¶ 2 (1998) ("*GTE DSL Tariff Order*"). The FCC therefore went out of its way to

emphasize that its regulatory approach to DSL has no relevance to whether dial-up calls to ISPs are subject to reciprocal compensation. The FCC was unequivocal that the order

does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs.

Id. So too the *Advanced Service Order*. The fact that DSL traffic in some applications can be exchange access simply has no bearing on whether dial-up calls to ISPs are exchange access.

3. The Commission Should Summarily Order Reciprocal Compensation for ISP-Bound Traffic

Given that (1) the only question in determining whether ISP-bound traffic is subject to reciprocal compensation is whether it is telephone exchange service (and thus subject to reciprocal compensation) or exchange access (and thus not subject to reciprocal compensation); and (2) ISP-bound traffic can only be telephone exchange service, there is nothing for the Commission to decide in this proceeding. Rather than continue with this proceeding, the Commission should summarily order reciprocal compensation for ISP-bound traffic at the same rate as all other local traffic.

II. If, Notwithstanding the Court's Decision, the Commission Believes a Hearing Is Appropriate, It Must Revisit all of the Issues Decided in the *Declaratory Ruling* Regarding the Regulatory Status of ISP-Bound Traffic

If, notwithstanding the court's decision, the Commission believes that it must proceed with the hearing, then the scope of the hearing must be expanded so that the Commission can revisit all of the *Declaratory Ruling's* determinations regarding the regulatory status of ISP-bound traffic.⁴ The D.C. Circuit's vacatur of the *Declaratory Ruling* has the effect of voiding all of the determinations regarding the regulatory treatment of ISP-bound traffic made therein, returning the state of the law regarding ISP-bound reciprocal compensation to as it existed on February 25,

⁴ The court did not challenge the FCC's jurisdictional findings.

1999. Therefore, in deciding the issues in this proceeding, this Commission must revisit each of those determinations. Among the issues the Commission must address in light of the vacatur of the *Declaratory Ruling* are whether ISP-bound calls terminate at the ISP or continue to some other destination and whether such calls are telephone exchange service (i.e. local) traffic subject to Section 251(b)(5).

III. No Discovery Regarding CLEC Cost/Market Data Is Appropriate

Regardless of whether the Commission decides to rule summarily in light of the court's decision or to proceed with this hearing, the Commission should not permit any discovery regarding CLEC cost and market data. Ameritech has served extensive discovery requests on each CLEC in this proceeding requesting information concerning the CLEC's cost of terminating ISP-bound traffic, revenues, network architectures and marketing plans. The CLECs have uniformly objected to these requests on the ground that they are completely irrelevant.

The information requested by Ameritech can serve no useful purpose. Individual CLEC costs are not relevant unless the Commission intends to conduct an inquiry into each company's individual cost structures with an eye towards setting separate reciprocal compensation rates for every CLEC. To do so would work on an onerous burden on not only the parties but on the Commission. The Commission's resources will be severely taxed if it is required to examine every CLEC's individual data. The Commission simply cannot conduct an individual rate case for every CLEC participating in this proceeding, much less every CLEC in the state without paralyzing all of its other operations.

Not only would conducting potentially dozens of individual rate cases be impossibly burdensome but such an exercise would be pointless. The fundamental question at issue in this proceeding is whether ISP-bound traffic is local, telephone exchange traffic. As discussed above, the court's decision makes clear that it is. The FCC's regulations and this Commission's own

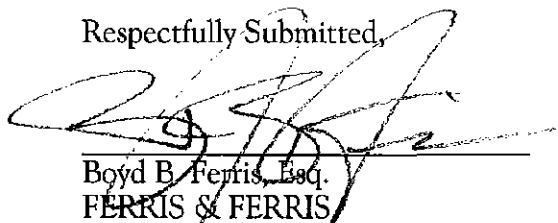
guidelines specify that reciprocal compensation will apply, and that the rate is a symmetrical rate based on Ameritech's rates. 47 C.F.R. § 51.711(a); Ohio PUC Local Service Guidelines, § IV.D.2. Individual CLEC costs are irrelevant.

Finally, even if the Commission ultimately determines that it is for some reason appropriate to examine individual CLEC cost data, it would be woefully premature to require the discovery sought by Ameritech at this juncture. Given the enormous burden that Ameritech's discovery requests impose on both the CLEC parties and on the Commission, there is no reason to allow such discovery at this time. The whole point of this proceeding is to decide how, as a policy matter, ISP-bound calls will be compensated. ICG believes that in light of the court's decision there is only one possible answer to that question—ISP-bound traffic is local, i.e. telephone exchange service, traffic subject to Section 251(b)(5) and therefore is subject to reciprocal compensation at the same rate as all other local traffic. If, notwithstanding the court's decision, the Commission comes to a different conclusion at the end of this proceeding that it believes makes CLEC cost data relevant then it is only then that there is any conceivable relevance to the data sought by Ameritech.

CONCLUSION

In light of the D.C. Circuit's decision, this Commission must summarily order that ISP-bound traffic is subject to reciprocal compensation at the same rate as all other local traffic. If, however, the Commission nevertheless believes it is appropriate to continue with this proceeding, it must address all of the issues relating to the regulatory classification of ISP-bound traffic resolved by the *Declaratory Ruling*. Finally, the Commission must prohibit Ameritech from seeking discovery of CLEC cost/market data.

Respectfully Submitted,



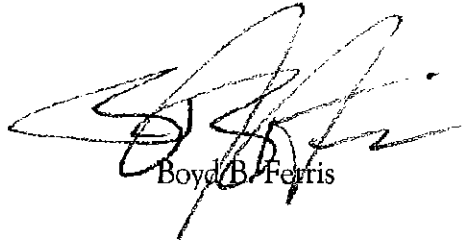
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document, ICG Telecom Group, Inc.'s Brief on the Effect of the D.C. Circuit's Decision in *Bell Atlantic v. FCC*, was served upon the following parties via hand-delivery, this 14th day of April, 2000.


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