

File

12

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV
00 APR 14 PM 5:04

In the Matter of the Commission)
Investigation Into the Treatment of Reciprocal)
Compensation for Internet Service Provider)
Traffic.)

PUCO
Case No. 99-941-TP-ARB

JOINT BRIEF
OF
INTERMEDIA COMMUNICATIONS INC.,
TELECOMMUNICATIONS RESELLERS ASSOCIATION
AND
TIME WARNER TELECOM OF OHIO, L.P.
REGARDING
THE EFFECT OF THE D.C. CIRCUIT COURT'S DECISION ON THIS PROCEEDING
AND
REQUEST FOR SUMMARY JUDGMENT

In the Entry of April 6, 2000, the Attorney Examiner confirmed his ruling of April 3, 2000 to suspend the procedural schedule in the above entitled matter and ruled that is was appropriate to call for the filing of initial and reply briefs on (1) the impact of the D.C. Circuit Court of Appeals in *Bell Atlantic Telephone Companies v. Federal Communications Commission, et al.*, Case No. 99-1094, 2000 WL 273383 ("D.C. Circuit Court decision") on this proceeding and (2) the issues to be considered by the Commission in this matter in light of the D.C. Circuit Court decision. In response to the Entry, Intermedia Communications Inc. ("Intermedia"), Telecommunications Resellers Association ("TRA"), and Time Warner Telecom of Ohio, L.P. ("TWTC-Ohio") submit this brief and request for summary judgment.

SUMMARY STATEMENT OF POSITION

The status of the law in light of the D.C. circuit court decision is that dial up calls to internet service providers ("ISPs") are local traffic and are subject to §251 (b) (5) of the

662560 v1

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.
Technician SW Date Processed 4-17-00

Telecommunications Act of 1996. Therefore, as local traffic, ISP calls require intercarrier reciprocal compensation.

BACKGROUND

State commissions have the authority and obligation to establish prospectively intercarrier compensation rates for local traffic (47 C.F.R. §§51.705 through 51.711). Calls to internet service providers ("ISPs") are local traffic. The state commissions also have the authority to oversee the implementation of interconnection contracts *Southwestern Bell Tel. Co. v. Public Util. Comm. of Texas*, No. 98-50787, Case No. 99-1094, 2000 WL 33062 (5th Cir. [Tex]) referred to herein as ("Fifth Circuit Court decision") at *6. The Public Utilities Commission of Ohio ("Commission") has, as have other state commissions, exercised this authority in deciding the interconnection contract enforcement disputes that arose from the first group of interconnection contracts.

In addition to the rules that the Federal Communications Commission ("FCC") promulgated concerning the reciprocal compensation, the FCC ruled in its declaratory ruling in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP Bound Traffic*, 14 FCC Rcd 3689 (1999) (the "Reciprocal Compensation Ruling") that state commissions have the authority to set intercarrier rates prospectively. The D.C. Circuit Court decision left undisturbed the authority for state commissions to set intercarrier rates as set forth in the Reciprocal Compensation Ruling.

THE STATE OF THE LAW IN LIGHT OF THE D.C. CIRCUIT COURT DECISION IS THAT ISP TRAFFIC IS LOCAL TRAFFIC SUBJECT TO RECIPROCAL COMPENSATION

The impact of the D.C. Circuit Court decision is simple and clear. In vacating the Reciprocal Compensation Ruling regarding the inapplicability of §251 (b) (5) to ISP traffic, the

D.C. Circuit Court decision confirmed the state of the law prior to the Reciprocal Compensation Ruling. Calls to ISPs are local as has been determined by this Commission in numerous proceedings. See *In the Matter of the Complaint of ICG Telecom Group, Inc. v. Ameritech Ohio*, Case No. 97-1557-TP-CSS, (Opinion and Order August 27, 1998); *In the Matter of the Complaint of MCI Metro Access Transmission Services, Inc. v. Ameritech Ohio*, Case No. 97-1723-TP-CSS (Opinion & Order October 14, 1998); *In the Matter of the Complaint of Time Warner Communications of Ohio, L.P. v. Ameritech Ohio*, Case No. 98-308-TP-CSS (Opinion & Order October 14, 1998); on appeal in U.S. District Court, Southern District of Ohio, Eastern Division *The Ohio Bell Telephone Company d/b/a Ameritech Ohio v. ICG Telecom Group, Inc., et al.*, Civil Action No. C2-99-522. The vast majority of other state commissions have also held that ISP traffic is local and subject to reciprocal compensation. Two weeks ago the Fifth Circuit Court decision affirmed the Texas commission's ruling that ISP traffic is local.

**THE D.C. CIRCUIT COURT DECISION
REJECTS THE FCC'S "END-TO-END"
ANALYSIS APPLIED TO DETERMINING
THE NATURE OF ISP CALLS**

The D.C. Circuit Court decision noted that while the FCC has traditionally applied an "end-to-end analysis" to determine whether a call was within its interstate jurisdiction, the Court found that the FCC's use of its interstate jurisdictional analysis was not appropriately applied to support its conclusion that the nature of calls to the ISP is long distance. D.C. Circuit decision at *1. Though the Court did not discuss the merits of the FCC use of the "end-to-end" analysis in determining jurisdiction in a "conventional 'circuit switched network,'" the Court did not find the analysis so simple, straightforward, or applicable, in a "packet-switched network" wherein the internet communication does not necessarily have a point of "termination" in the traditional sense. Rather, the Court noted that the "arguments supporting use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this context [i.e., to decide the nature

of the call].” D.C. Circuit Court decision at *5. The Court thus held that the issue it had to consider was not federal or state jurisdiction, but the nature of ISP-bound calls:

The issue at the heart of this case is whether a call to an ISP is local or long distance.

Id. The Court concluded that the FCC Reciprocal Compensation Ruling had not explained why the FCC extended a jurisdictional concept to a factual analysis of the nature of the call, and due to the FCC's “want of reasoned decision-making,” vacated the FCC’s conclusion that ISP-bound calls were long distance in nature. D.C. Circuit Court decision at *2.

The D.C. Circuit Court, in ruling that ISP bound calls terminate at the ISP’s premises, adopted MCI's argument that “termination” is defined as “the switching of traffic that is subject to section 251(b)(5) at the terminating carrier’s end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party’s premises,” D.C. Circuit Court decision at *5 (cites omitted). The Court asserted that calls to ISPs fit this definition; the ISP is the “called party.” Thus, the Court rejected the FCC's conclusion that ISP-bound calls do not terminate at the ISP, and by implication then, if the call to the ISP is within a local calling area, the traffic is local for purposes of reciprocal compensation under §251(b)(5). The fact that ISPs may use communications services and originate further telecommunications, even instantaneous with the termination of the call to the ISP, “does not imply that the original communication does not ‘terminate’ at the ISP.” D.C. Circuit Court decision at *6. Just as calls to pizza delivery firms or any number of other businesses that have a preponderance of local inbound calls are local, so are ISP bound calls.

**BECAUSE THE FCC HAS HELD THAT
THERE CAN ONLY BE TWO CATEGORIES
OF CALLS (LOCAL AND LONG DISTANCE),
THE D.C. COURT DECISION SUPPORTS
THE CONCLUSION THAT ISP CALLS ARE
LOCAL**

The D.C. Circuit Court decision also found an "independent ground" requiring remand of the FCC's exclusion of ISP traffic from §251(b)(5) compensation as local traffic. The FCC has maintained that there are essentially only two types of telecommunications: local and long distance, or, more precisely, "telephone exchange service" [set forth in 47 U.S.C. §153(16)] and "exchange access" [set forth in 47 U.S.C. §153(47)].

Indeed, the Court pointed out in its decision that the FCC had ignored its own definitions for classifying calls. The FCC maintains that only two types of calls occupy the field of call categories --- "exchange access" (long distance) and "telephone exchange service" (local calls). D.C. Circuit Court decision at *8. The Court noted that the FCC has specifically held that ISPs "do not use exchange access" (they are not long distance calls). In describing calls to ISPs as "access services," the FCC seemed to be creating a third category of traffic in contradiction to its own limitation of only two types of traffic.

Furthermore, the Court noted that the FCC did not consider how ISPs activities, as non-carrier providers (rather, ISPs are information providers) could fit within the statutory definition of exchange access¹. *Id.* As an information provider, ISPs do not offer their facilities for the purposes of originating or terminating toll calls; ISPs therefore are not telecommunication carriers.

Because the ISP-bound traffic by definition cannot be long distance, and because the FCC has only two classifications for traffic, the Court reasoned that the FCC had not shown the

¹ 47 U.S.C. Section 153 (47) defines exchange access as:

ISP traffic was other than local. Hence, it vacated the "end-to-end" analysis as a basis for classifying ISP-bound traffic as long distance.

While one might argue that the D.C. Circuit Court decision did not explicitly conclude that dial up ISP-bound traffic is local traffic, the Fifth Circuit has so concluded. In its March 30, 2000, the U.S. Court of Appeals for the Fifth Circuit affirmed a decision of the Texas commission that modem calls within a local calling area to ISPs are "local" calls and therefore subject to reciprocal compensation obligations under agreements between incumbent local exchange carriers and competitive local exchange carriers approved by the Texas commission. In its opinion at *6, the Court stated:

. . . we hold that the PUC's determination that reciprocal compensation obligations encompass ISP-bound traffic does not conflict with the Act or with any FCC rule regarding such traffic.

Underlying the Fifth Circuit Court decision as well as the decisions of the Texas commission and a lower federal court is the notion that ISPs are like other business users of local telephone service, *i.e.*, they are end users for telephone pricing purposes. They are subject to local telephone charges but not subject to access charges. Thus, the present state of the law is that ISP-bound calls are local.

**ISP TRAFFIC, AS LOCAL TRAFFIC, IS
SUBJECT TO RECIPROCAL
COMPENSATION TREATMENT IN
ACCORDANCE WITH THE PROVISIONS OF
47 U.S.C. SECTIONS 251 (b) (5), 252 (d) (2),
THE FCC'S IMPLEMENTING RULES AND
THE COMMISSION'S LOCAL SERVICE
GUIDELINES**

The D.C. Circuit Court decision vacating the FCC's conclusion that ISP-bound traffic is not local traffic means that dial-up ISP-bound traffic cannot be exempted from the reciprocal

the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. Emphasis added.

compensation provisions of 47 U.S.C. §§251(b)(5) and 252(d)(2) and is subject to all the rules and principles, including the TELRIC pricing methodology, which govern reciprocal compensation. Sections 251 (b) (5) and 252 (d) (2) state respectively that all LECs have the duty to establish reciprocal compensation arrangements for transport and termination of telecommunications and that in determining just and reasonable rates for compensation, state commissions shall not consider terms and conditions for reciprocal compensation reasonable unless the terms and conditions provide for mutual and reciprocal recovery of its costs by each carrier.

In turn, the FCC has promulgated rules to effect these provisions of the Telecommunications Act of 1996, 47 C.F.R. 51.701 through 51.711. These rules state that reciprocal compensation shall be paid for the transport and termination of local traffic between LECs and other telecommunications carriers and that the rate of compensation shall be the ILEC rate unless the CLEC requests and proves that its costs are higher. ISP-bound traffic, as well as all other local traffic, is subject to the FCC's rules relating to local traffic exchanged among LECs. The CLECs have not made applications to have reciprocal compensation rates that are other than the ILEC rates for transport and termination set by the Commission in the various TELRIC proceedings. Thus, the current TELRIC rates apply to intercarrier compensation for ISP and other local traffic. Indeed, the ILECs were compensating CLECs at the TELRIC rates or their predecessor interim rates until midway through the term of their interconnection agreements, they unilaterally adopted the position that the character of ISP-bound traffic was long distance. The D.C. Circuit Court decision, having vacated the FCC's classification of ISP-bound traffic as exchange access or long distance, requires the ILECs, pursuant to federal law and the FCC's regulations, to pay symmetrical reciprocal compensation at the Commission-established TELRIC rates.

The Commission's Local Service Guidelines are parallel with the FCC's rules. They also mandate that reciprocal compensation for local traffic and further require that the rates for transport and termination for local traffic shall be symmetrical. Guideline IV.A.2 and IV.D.2.

If the ILECs believe that the current TELRIC rates are no longer appropriate, their recourse is to initiate a proceeding to revise the TELRIC rates.

**THE EFFECT OF THE D.C. CIRCUIT COURT
DECISION IS TO LIMIT SUBSTANTIALLY
THE COMMISSION'S SCOPE OF INQUIRY
IN THIS PROCEEDING**

The Attorney Examiner's Entry of March 15, 2000 sets forth five groupings of inquiries for this proceeding. The first group of questions most affected by the D.C. Circuit Court decision appears in Finding No. 4(a). Finding No. 4(a) pertains to the extent of the Commission's jurisdiction to establish terms and conditions for ISP traffic and its authority to investigate compensation for ISP traffic in light of the FCC proceedings. It also asked about whether the results of the proceedings should terminate at the time the FCC issues an order or at the time there is a final appealable decision. In light of the D.C. Circuit Court decision, as well as the Fifth Circuit Court decision, there is no question that the Commission does have jurisdiction to treat ISP-bound traffic as local. The clearest impact of the D.C. Circuit Court decision is that state commissions treat ISP traffic as local traffic for purposes of reciprocal compensation under 47 U.S.C. §251 (b) (5).

Since the Commission has already decided the TELRIC cases, these rates should continue to apply to ISP traffic. It would not be consistent with the D.C. Circuit Court decision (or for that matter the Fifth Circuit Court decision) for this Commission to attempt to establish a third category of rates for ISP traffic. It would be both a fruitless and an ill-advised venture to attempt to set a third category of intercarrier compensation given the status of the law.

The second group of questions [Finding No. 4(b)] in the March 15, 2000 Entry pertains to the whether carriers can segregate ISP traffic from other types of local traffic; whether there is a reasonable method of separating ISP traffic from other types of local traffic; whether the Commission can consider different classes or service categories of local traffic; and would such distinctions between types of local traffic be legally permitted. In a ruling not altered by the D.C. Circuit Court decision, the FCC had previously established that there are only two classifications of traffic--local and long distance. Thus, the prevailing law is that the Commission should apply local reciprocal compensation rates to ISP traffic. Therefore, this group of questions is now moot by the D.C. Circuit Court decision.

A third group of questions [Finding No. 4(c)] pertains to identifying the cost elements of an ISP call; whether those cost elements vary from other local traffic; and whether the costs vary, depending upon the network configuration. These inquiries, like the inquiries of Finding No. 4(b) are no longer relevant or legally permissible in accordance with the D.C. Circuit Court decision.

The fourth group of questions [Finding 4(d)] pertains to compensation methodologies and mechanisms, and whether they should be the same or different for ISP and non-ISP traffic. The question is answered by the fact that ISP traffic is local and thus compensable as local traffic. Therefore, there is no need to develop any other mechanism or methodology, because the FCC has determined that there are only two classifications of calls--local and long distance.

The fifth group of questions in Finding No. 4(e) deals with the policy implications which exist for each proposed compensation arrangement. Given the legal parameters establishing the symmetrical reciprocal compensation under §251(b)(5) for all local traffic, including ISP traffic, no further policy debate is required.


CONCLUSION

The obvious conclusion from the D.C. Circuit Court's analysis is that the ISP traffic is local. As such, ISP traffic is subject to symmetrical reciprocal compensation. The Fifth Circuit Court decision underscores the appropriateness of state commission's requiring reciprocal compensation for ISP traffic.

Therefore, the Commission should conclude that no further inquiry is warranted in this proceeding by affirming that ISP traffic is local and subject to the symmetrical reciprocal compensation as is all other local traffic.

Respectfully submitted,

**INTERMEDIA COMMUNICATIONS INC.
TELECOMMUNICATIONS RESELLERS ASSOCIATION
TIME WARNER TELECOM OF OHIO, L.P.**


Sally W. Bloomfield
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2368

TIME WARNER TELECOM OF OHIO, L.P.


Marsha Rockey Schermer
Vice President Regulatory Midwest Region
TIME WARNER TELECOM OF OHIO, L.P.
250 W. Old Wilson Bridge Road, Suite 130
Worthington, OH 43085
(614) 255-2124

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing JOINT BRIEF OF INTERMEDIA COMMUNICATIONS INC., TELECOMMUNICATIONS RESELLERS ASSOCIATION AND TIME WARNER TELECOM OF OHIO, L.P. REGARDING THE EFFECT OF THE D.C. CIRCUIT COURT'S DECISION ON THIS PROCEEDING AND REQUEST FOR SUMMARY JUDGMENT was served by Internet email upon all the parties included on the Commission's electronic distribution list used for Entries in this proceeding and upon all counsel listed on the attached Service List by U.S. Mail, this 14th day of April, 2000.


Sally W. Bloomfield

ROGER P. SUGARMAN
KEGLER BROWN HILL & RITTER
65 E STATE ST STE 1800
COLUMBUS OH 43215

BOYD B. FERRIS
FERRIS & FERRIS
2733 W DUBLIN-GRANVILLE RD
COLUMBUS OH 43235-2798

BENITA KAHN
VORYS SATER SEYMOUR & PEASE
52 E GAY ST
COLUMBUS OH 43216-1008

THOMAS J. O'BRIEN
ASSISTANT GENERAL COUNSEL
CORECOMM NEWCO, INC.
450 WEST WILSON BRIDGE ROAD
SUITE 100
WORTHINGTON, OHIO 43085

DAVID CHORZEMPA
AT&T CORP
227 W MONROE ST #1300
CHICAGO IL 60606

WILLIAM H. KEATING
5994 WHITECRAIGS COURT
DUBLIN, OHIO 43017

LEE LAURIDSEN
SPRINT COMMUNICATIONS CO
8140 WARD PARKWAY SE
KANSAS CITY MO 64114

JOSEPH R. STEWART
SENIOR ATTORNEY
SPRINT COMMUNICATIONS COMPANY
50 WEST BROAD STREET, SUITE 3600
COLUMBUS, OHIO 43215

STEPHEN M. HOWARD
VORYS SATER SEYMOUR & PEASE
52 E GAY ST
COLUMBUS OH 43216-1008

DAVID C. BERGMANN
OHIO CONSUMERS' COUNSEL
77 S HIGH STREET - 15th FLOOR
COLUMBUS OH 43266-0550

JUDITH B. SANDERS
BELL ROYER & SANDERS CO LPA
33 S GRANT AV
COLUMBUS OH 43215

DAVID TURANO
941 CHATHAM LANE
SUITE 201
COLUMBUS, OHIO 43221

RICH RINDLER
ROBIN L. REDFIELD
3000 K STREET, NW
SUITE 300
WASHINGTON, DC 20007-5116

MARK R. STEMM
CRAIG R. CARLSON
PORTER, WRIGHT, MORRIS & ARTHUR
41 SOUTH HIGH STREET
COLUMBUS, OH 43215

MICHAEL MULCHAY
AMERITECH
45 ERIEVIEW PLAZA, SUITE 1400
CLEVELAND, OH 44114

DOUGLAS E. HART
JACK B. HARRISON
FROST & JACOBS
2500 PNC CENTER
CINCINNATI, OH 45202

THOMAS E. LODGE
SCOTT A. CAMPBELL
THOMPSON, HINE & FLORY
10 WEST BROAD STREET
COLUMBUS, OH 43215-3435

JOHN W. BENTINE
CHESTER WILOX & SAXBE LLP
17 SOUTH HIGH STREET, STE 900
COLUMBUS, OHIO 43215

JEFF JONES
ATTORNEY EXAMINER
PUBLIC UTILITIES COMMISSION OF OHIO
180 EAST BROAD STREET
COLUMBUS, OH 43215