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BEFORE

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THE PUBLIC UTILIITES COMMISSION OF OHIO

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

AT&T's BRIEF CONCERNING THE EFFECT OF THE D.C. CIRCUIT'S DECISION IN *BELL ATLANTIC TELEPHONE COMPANIES v. FCC*

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AT&T Communications of Ohio, Inc. and TCG Ohio, both subsidiaries of AT&T Corp. (collectively "AT&T") submit this brief concerning the effect of the D.C. Circuit's decision in Bell Atlantic Telephone Companies v. FCC, Case No. 99-1094, 2000 U.S. App. LEXIS 4685 (D.C. Cir. March 24, 2000).

I. Introduction

On March 24, 2000, in Bell Atlantic Telephone Companies v. FCC, Case No. 99-1094, 2000 U.S. App. LEXIS 4685 (D.C. Cir. March 24, 2000), the United States Court of Appeals for the District of Columbia vacated the FCC's Declaratory Ruling in In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Notice of Proposed Rulemaking in Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-98, 14 FCC Rcd. 3689 ("Declaratory Ruling"). After hearing arguments concerning the motion brought by AT&T and other carriers to modify the procedural schedule to allow for briefing on the effects of that ruling on this proceeding, by entry dated April 6, 2000, the Attorney Examiner invited parties to file 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, supra, on the issues previously established in the March 15, 2000 attorney examiner's entry." April 6, 2000 Entry, pp. 1-2.

The *holding* in Bell Atlantic profoundly modifies the issues to be determined in this case and its *findings* should lead the Commission to determine (now) as a matter of law that Internet Service Provider ("ISP") bound calls are local telecommunications traffic for which reciprocal compensation is mandated pursuant to both the FCC's and this Commission's pricing rules. The Bell Atlantic holding necessarily shifts the focus of this case from the policy oriented question of *whether ISP-bound calls should be subject to reciprocal compensation* to the threshold legal question of *whether ISP-bound calls constitute a local telecommunications service for which reciprocal compensation is already mandated.*[1] This question must be answered as a threshold matter because if an ISP-bound call is local, the governing pricing rules mandate that symmetrical reciprocal compensation is due.[2]

In addition to its primary holding – that the FCC failed to provide an adequate basis to support its finding that ISP calls are interstate -- the Bell Atlantic Court made numerous findings regarding the nature of ISP-bound calls and ISPs. Those findings wholly undercut each and every basis raised by the FCC (and the ILECs here) to support a finding that calls to ISPs are interstate and not local. Put simply, the Bell Atlantic

[1] In the absence of a FCC ruling on this threshold issue, this Commission is compelled to make it. The Commission should not waste its valuable resources and time on a protracted hearing in this matter when the Bell Atlantic decision provides the legal basis for it to find that ISP-bound traffic is local, for which reciprocal compensation is mandated on a uniform basis with local voice traffic. However, it would also be appropriate for the Commission to find that ISP-bound traffic should be compensated on this basis on independent policy grounds, regardless of the jurisdictional nature of the ISP-bound traffic. The Bell Atlantic decision fully supports the numerous policy reasons for treating ISP-bound traffic as local for reciprocal compensation purposes. Indeed such a finding would permit the Commission to provide an additional measure of certainty and finality on this issue.

[2] See 47 U.S.C. § 251(b)(1); 47 C.F.R. §§ 51.701-711. See also Ohio Local Service Guidelines IV.D.1-2.

decision leaves the FCC and this Commission with no other cognizable choice but to find that calls to ISPs are local.[3] The Commission should therefore grant summary judgment as already requested by AT&T and the other new entrant carriers ("NECs").

II. The *Bell Atlantic* Decision Should Lead the Commission to Find As a Matter of Law That ISP-Bound Traffic is Local and Subject to Reciprocal Compensation.

A. The *Bell Atlantic* Decision Has Shifted This Case to the Legal Issue of Whether an ISP-Bound Call Constitutes a "Telephone Exchange Service" or "Exchange Access" As Those Terms Are Defined Legally.

The over-riding issue in this case has always been whether calls made to ISPs should be subject to the same compensation scheme as any other local call (i.e., reciprocal compensation). Before the Bell Atlantic decision, this Commission approached that determination as it was compelled to – in reference to the FCC's then governing Declaratory Ruling. There, based on its so-called "end-to-end" analysis, the FCC found that ISP calls were not local telecommunications traffic, for which reciprocal compensation is mandated. Declaratory Ruling, ¶ 18. Nevertheless, the FCC made is absolutely clear that it was not adopting a rule regarding inter-carrier compensation for traffic delivered to an ISP, but until adoption of a final rule it left the matter for the states to decide. Declaratory Ruling, ¶¶ 20, 28.[4] Based on the then-governing background, this

[3] Unlike other NECs who have consistently attacked the FCC's finding that ISP-bound calls are not local traffic, AT&T previously supported the FCC's finding that ISP calls are jurisdictionally interstate in nature. Nevertheless, AT&T always believed that ISP-bound calls should be treated as local for the purpose of reciprocal compensation, both for the compelling policy reasons and consistent with the FCC's holding, as part of the access charge exemption for ISPs, that ISPs should be treated as end-users. As described more fully below, the Bell Atlantic decision now makes clear the FCC has no legal basis to take any other action but to declare ISP-bound traffic as local.

[4] The FCC did indicate that its previous policies should lead a state to conclude that reciprocal compensation is due for this traffic: "We note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." Id.

Commission set forth a list of mainly policy-oriented issues it believed were relevant to this case and it looked to the parties to address them in their testimony and briefs.

An interesting thing happened on the way to the courthouse, however. In late March the D.C. Circuit vacated the FCC's Declaratory Ruling. The Commission has now sought legal briefing on the effect of that decision on this case.

The Bell Atlantic decision has fundamentally changed the background upon which the Commission must determine the proper compensation mechanism for ISP-bound traffic. It is beyond question that the Bell Atlantic Court vacated the FCC's decision that ISP-bound calls are interstate and not local. The Court explicitly held that the FCC's use of the "end-to-end" analysis – and thus its conclusion that the traffic is interstate -- was not supported:

> The Commission's ruling rests squarely on its decision to employ an end-to-end analysis for purposes of determining whether ISP-traffic is local. There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate. But it has yet to provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.

Bell Atlantic, 2000 U.S. App. LEXIS 4695, at *13-14.

The effect of this holding here is that this Commission must first make the threshold legal determination of whether or not ISP-bound traffic is local before taking on any other policy considerations. If the Commission finds as a matter of law that ISP-bound traffic is local, the governing FCC and Commission pricing rules mandate that those calls be subject to reciprocal compensation and treated no differently than any other local call. In other words, if ISP-bound calls are local then there are no other issues to resolve in this case and summary judgment is therefore appropriate.[5]

As explained below, that is exactly the decision the Bell Atlantic case compels. The holdings and findings in that case eliminate any possibility that calls to ISPs are anything but local. The Bell Atlantic Court rejected each and every one of the grounds that the FCC relied upon in initially determining that ISP-bound calls are interstate. No other arguments have been or could be made to save the FCC's Declaratory Ruling, and the Commission should acknowledge that fact now.

B. The *Bell Atlantic* Court Held that the Determinative Issue is Whether ISP-Bound Traffic Is "Telephone Exchange Service" or "Exchange Access."

Fortunately, the Bell Atlantic Court has given the Commission considerable guidance in deciding whether or not ISP-bound traffic is local. There, the Court indicated that the determination of whether or not ISP-bound traffic is local and subject to reciprocal compensation is answered by the more limited question of whether or not such traffic constitutes "telephone exchange service" traffic (i.e., local) for which reciprocal compensation is mandated or "exchange access" (i.e., interstate).

The Bell Atlantic Court's reasoning rests upon previous FCC precedent defining the universe of telecommunications traffic in this context as falling into one of two categories: telephone exchange service or exchange access. Section 251(b)(5) of the 1996 Act imposes on all local exchange carriers the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). As the Bell Atlantic Court noted, the FCC has held that Section

[5] On remand, the FCC will be forced to make the same decision now facing this Commission regarding the nature of ISP traffic. Based on the findings in the Bell Atlantic decision, the FCC cannot reasonably reach

251(b)(5) applies only to local traffic – "telephone exchange service" as defined by Section 153(47) of the Act.[6] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499, ¶¶ 1033-34. On the other hand, long distance calls – "exchange access" – continue to be compensated with access charges.[7] Citing to various FCC orders, and the FCC's own briefing in that case, the Bell Atlantic Court observed that the FCC has made it abundantly clear that all such telecommunications traffic (i.e., ISP-bound calls) must fall into one of these two categories: telephone exchange service or exchange access. Bell Atlantic, at *23-24 (telephone exchange service and exchange access "occupy the field").

C. The *Bell Atlantic* Holding and Findings Lead to the Inescapable Conclusion that ISP-bound Traffic is Local.

The Bell Atlantic decision has not only shifted the focus of this case to the threshold legal issue, but it has also negated each and every basis upon which the FCC found that ISP-bound traffic was interstate. While the **holding** in the Bell Atlantic case makes it clear that the determinative issue is whether calls to ISPs are "telephone exchange service" or "exchange access," the **findings** lead to one inevitable conclusion:

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any other decision except that it is local.

[6] "Telephone exchange service" is defined as:

> (A) a service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange areas 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). Quite similarly, under 47 C.F.R. § 51.701(b)(1) "telecommunications traffic" is local if it "originates and terminates within a local service area."

[7] "Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

that calls to ISPs constitute telephone exchange service, for which reciprocal compensation is mandated.

For example, the Court first found that calls to ISPs do not fall under the definition of "exchange access." Citing to 47 U.S.C. § 153(16), the Court noted that "[a] call is 'exchange access' if offered 'for the purpose of the origination or termination of telephone toll services.'" Bell Atlantic, at *25. However, the Court agreed with MCI that "ISPs provide information service rather than telecommunications; as such 'ISPs connect to the local network 'for the purpose of' providing information services, not originating or terminating telephone toll service.''" Bell Atlantic, *25 (citations omitted). In fact, as the Court observed, the FCC has "clearly stated" that "ISPs do not use exchange access." Bell Atlantic, at *24 (citing In the Matter of the Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, 11 FCC Rcd 21905, 22023, ¶ 248 (1996)).

Beyond these basic definitional contradictions, the Court found significant practical differences between long distance calls and calls to ISPs. Noting that the FCC has described "long distance" calls "as those in which the LECs collaborate with a long-distance carrier, which itself charges the end-user and pays out compensation to the LECs," the Court held that the FCC "has yet to provide an explanation why [its end-to-end] inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs." Bell Atlantic, at *13-14. As the Court explained: "even if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation." Id., at * 17. And many such differences do exist. See, e.g., id., at *16-17("[a]lthough ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long distance carriers)"). Indeed, the Court construed the FCC's decision to exempt ISPs from access charges to be "rested . . . on an acknowledgment of the real differences between long-distance calls and calls to information service providers." Id., at * 22. The Court found it "obscure why those [differences] have now dropped out of the picture." Id.

The Court then went out of its way to shed considerable doubt on any conclusion that ISP-bound calls are anything but local. Indeed, the Court explicitly rejected and/or seriously questioned each and every argument that was raised (or that could be raised) by the FCC and the other parties to the case (including the ILECs) why ISP traffic is anything but local.

First and foremost, the Court found that the characteristics of calls to ISPs more closely resemble other local calls as opposed to long distance calls. And the Court found that ISPs appear to be no different than any other end-user:

> Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long distance carriers).
>
> In this regard an ISP appears, as MCI WorldCom argued, no different from many businesses, such as "pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies," which use a variety of communication service to provide their goods or services to their customers. Of course, the ISP's origination of telecommunications as a result of the user's call is instantaneous (although perhaps no more so than a credit card verification system or bank account information service). But this does not imply that the original communication does not "terminate" at the ISP. The [FCC] has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, "simply a communications-

intensive business end user selling a product to other consumer and business end-users."

Id., at *18 (citations omitted).

The D.C. Circuit also explicitly rejected the FCC's argument (supported by the ILECs here) that an ISP-bound call does not "terminate" at the ISP: "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." Id. The Court realized the legal significance of this finding – it places ISP-bound calls more appropriately into the FCC definition of "local" telecommunications traffic. The Court explained that by 47 C.F.R. § 51.701(b)(1) the FCC has defined "telecommunications traffic" as local if it "originates and terminates within a local service area" and that the FCC has defined "termination" 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." Based on these definitions, the Court found that "[c]alls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" Id., at *14-15. These holdings compel the conclusion that because ISP traffic "terminates" at the ISP, that traffic terminates within a local service area and therefore satisfies the statutory definition of "telephone exchange service" as well as the FCC's definition of "local" traffic.

In all, Bell Atlantic should lead the Commission to the following conclusions:

(1) ISP-bound traffic must be either exchange access or telephone exchange services, for which reciprocal compensation is mandated.

(2) Calls to ISPs do not fit under the definition of exchange access, and the FCC has already held that ISPs do not use exchange access.

(3) Calls to ISPs are telephone exchange services because:

a. They are "terminated" at the ISP within the local exchange and therefore meet the definition of "telephone exchange service" and "local telecommunications traffic"; and

b. ISPs are no different from many businesses, such as "pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies," which use a variety of communication service to provide their goods or services to their customers.

Based on the law as it stands, and absent an FCC ruling to the contrary, these findings require the Commission to find that calls to ISPs fall under the definition of telephone exchange service, for which reciprocal compensation is mandated.

III. The Commission Should Modify and/or Clarify the Issues in this Case

The numerous questions posed by the Commission for testimony in this case (e.g., whether it is possible to separate dial-up ISP traffic from other types of traffic, the cost elements that contribute to the overall costs of a dial-up ISP call, whether network configurations effect these costs) are all irrelevant to the fundamental question of whether ISP-bound traffic is local. Once the Commission answers this question in the affirmative, there are no other issues left to be discussed.

AT&T anticipates that the ILECs will argue that these issues are still in play and will continue to claim that each and every NEC is obligated to provide "cost studies" to the Commission detailing their network configurations and their costs. Indeed, the ILECs have served harassing discovery on each of the NECs requesting detailed and highly specific cost information regarding each of the NEC's Ohio networks. AT&T has answered every question that could be potentially relevant to the Commission's "issues list." However, the ILECs questions go far beyond this issues list and appear intent upon turning this case into a mega-cost case.

But the Commission never intended this generic policy case to be focused on the minutiae of each NECs' costs. For example, the Commission posed the generic policy question of whether network configurations could vary the costs of a dial-up internet call. Obviously, this generic policy question can be easily answered based on the basic sets of knowledge and expertise already available to the ILECs and the NECs. However, the ILECs have used this generic request to seek highly specific and proprietary information from the NECs. These ILEC discovery requests are not only irrelevant, but their intent is clear: to harass the NECs into exiting this case. For example:

- They have asked the NECs to provide the number, location, capacity, and CLI code of each and every switch owned in Ohio (including long distance switches);
- They have asked the NECs to provide all capital costs and operating expenses for their switches in Ohio;
- They have asked for the total number of customers served by each of the NECs' switches;
- They have asked for copies of all documents evidencing each NEC's traffic usage, which would include every customer bill circulated in the state of Ohio;
- They have asked for the total amount of reciprocal compensation paid by each NEC to any other entity;

- They have asked for locations of each customer served by NECs in Ohio;
- They have asked for each NEC's annual revenues from ISPs, and beyond that all revenues received in the local exchange market, broken down between business and residential service;
- They have asked for each NEC's annual revenues from intraLATA toll, vertical features, and all other sources of revenue;
- And they have asked each NEC to determine "all costs incurred in serving ISP customers."

In other words, the ILECs seem intent on transforming this case from a generic policy case to a super-detailed cost case in which the Commission will be forced to dig through the costs of each and every Ohio NEC and determine a separate ISP-specific rate for each NEC. The Commission never intended this result and it should make that fact clear in any subsequent order.

CONCLUSION

For the reasons set forth above, the Commission should enter a summary order declaring ISP-bound traffic as local, for which reciprocal compensation is mandated.

Dated: April 14, 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **AT&T's Brief Concerning the Effect of the D.C. Circuit's Decision in *Bell Atlantic Telephone Companies v. FCC*** was hand delivered in a brief exchange at the offices of the Public Utilities Commission of Ohio and served by U.S. mail, postage prepaid, on all parties on the attached service list, this 14th day of April, 2000.

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