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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.)

Case No. 99-941-TP-ARB

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AMERITECH OHIO'S INITIAL BRIEF ON THE D.C. CIRCUIT COURT OF
APPEALS' BELL ATLANTIC DECISION AS IT RELATES TO THE COMMISSION'S
GENERIC ARBITRATION

I. Introduction.

Ameritech Ohio ("Ameritech"), by its attorneys, submits this Initial Brief pursuant to the April 6, 2000, Attorney Examiner Entry.

Several CLECs urge the Commission to significantly narrow the scope of this proceeding or abandon it altogether on the ground that the D.C. Circuit Court of Appeals' *Bell Atlantic* decision¹ "negated the only basis upon which the Commission could have concluded that ISP traffic (and similar types of traffic) should be subject to a compensation scheme other than reciprocal compensation." See, Motion to Modify Procedural Schedule Or Motion For Summary Judgment at p. 5. The CLECs are just plain wrong. As discussed below, the *Bell Atlantic* decision provides the Commission no reason to alter the course it charted for this proceeding. The reasons articulated in the Commission's Entry, dated January 13, 2000, for commencing a generic investigation of inter-carrier compensation for ISP-bound traffic remain applicable, as do the issues set forth in the Attorney Examiner's March 15, 2000, Entry. Unaffected by the *Bell Atlantic* remand, this proceeding continues to provide the Commission an opportunity to

¹ *Bell Atlantic Tel. Cos. v. FCC*, No. 99-1094, 2000 U.S. App. LEXIS 4685 (D.C. Cir. March 24, 2000) (hereinafter "*Bell Atlantic*").

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examine and deal with the inequities and inadequacies of the present reciprocal compensation structure when applied to the unique characteristics of ISP traffic.²

II. Bell Atlantic

On March 24, 2000, the Court in *Bell Atlantic, supra*, vacated and remanded the FCC's ISP Declaratory Ruling³ because the Court was not satisfied with the FCC's February 26, 1999 explanation of why ISP-bound traffic is not local. However, the Court reached no substantive conclusion either as to whether the end-to-end analysis is appropriate in this context or as to whether ISP-bound traffic terminates at an ISP's premises. Rather, the D.C. Circuit Court held only that the FCC had not adequately explained its conclusion and, therefore, remanded the matter so that the FCC can provide a "satisfactory explanation." Slip Op. at 15.

The *only* legal effect of the D.C. Circuit's decision was to vacate the FCC Order in which that holding appeared, not to reverse it or hold that ISP traffic is local. The Court's vacatur of this one Order obviously did not extinguish the FCC precedents dating back to 1983 holding ISP calls interstate in nature, up to and including the FCC's most recent December 23, 1999 decision also reiterating that ISP traffic is properly classified as "exchange access."⁴

² Ameritech Ohio's discussion of the limited issues identified for briefing here should not be misconstrued as any departure from Ameritech Ohio's previously stated position that state commissions lack the legal authority to impose inter-carrier compensation obligations on ISP-bound traffic through a generic investigation. See "Responsive Comments of Ameritech Ohio," filed September 15, 1999. Ameritech will not reiterate its jurisdictional position here since 1) the Commission intends to accept post-hearing briefs on the issue and 2) the *Bell Atlantic* decision does not compel a modification of either Ameritech's jurisdictional position or the Commission's initial disagreement with it in the Entry dated January 13, 2000.

³ *Inter-carrier compensation for ISP-bound traffic*, FCC 99-38, Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68 (February 26, 1999) ("ISP Declaratory Ruling").

⁴ See, e.g., *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶78 (1983) (holding that "enhanced service providers" – which include ISPs – "obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls."); *Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking*, 2 F.C.C. Rcd. 4305, ¶7 (1987) (ISPs, "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, 3 F.C.C. Rcd. 2631, ¶2 (1988) (describing enhanced service providers as "providers of interstate service" and "exchange access users"); *In re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, CC Dockets 96-262, et.al.,

Additionally, the last paragraph of the *Bell Atlantic* decision leaves no doubt that vacatur of the FCC's *Declaratory Ruling* is the only legal effect of the decision:

Because the [FCC] has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] . . . local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission. We do not reach the objections of the incumbent LECs -- that § 251(b)(5) preempts state Commission authority to compel payments to the competitor LECs; *at present we have no adequately explained classification of these communications, and in the interim our vacatur of the [FCC's] ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.*

(Emphasis added.) In the face of the Court's statement that "we have no adequately explained classification of these communications" — any CLEC contention that *Bell Atlantic* holds ISP traffic to be local is preposterous.

Finally, in its *Advanced Service Remand Order* issued on December 23, 1999, *supra*, the FCC already has effectively responded to the D.C. Circuit Court's quoted concern over ISP traffic being classified as exchange access. The FCC explained in no uncertain terms that "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],

Third Report and Order, 11 F.C.C. Red. 21354, ¶284 (1996) (the "category of enhanced services . . . includes access to the Internet"); *In Re Access Charge Reform*, First Report and Order, F.C.C. 97-158, CC Docket Nos. 96-262, et. al., ¶341 (May 16, 1997) (ISPs "may use incumbent LEC facilities to originate and terminate interstate calls."); *In Re Federal-State Joint Board on Universal Service*, F.C.C. 98-67, Report to Congress, CC Docket No. 96-45, ¶146 (April 10, 1998) ("Universal Service Report") (explaining that enhanced service providers use "local exchange networks to originate and terminate interstate services . . ."); *In re GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, CC Docket No. 98-79, ¶21 (FCC, October 30, 1998) (again confirmed that it "traditionally has characterized the link from an end-user to an [ISP] as an interstate access service."); *In the Matter of Deployment of Wire Line Services Offering Advanced Telecommunications Capability*, CC Dockets Nos. 98-147, et. al., ¶16 (December 23, 1999) ("Advanced Service Remand Order")

such traffic is properly classified as 'exchange access.'" *Advanced Service Remand Order* at ¶16. This decision remains the law unless and until it is set aside by a federal court of appeals.⁵

Consequently, contrary to the CLECs' contention, *Bell Atlantic* offers no cause for narrowing the scope of this proceeding or abandoning it on the basis that ISP traffic must now be deemed local and, therefore, subject only to statutorily mandated reciprocal compensation. The *Bell Atlantic* decision permits the FCC, on remand, to reach the same conclusion it has reached throughout its long line of precedents, i.e., that calls to ISPs are not local. As the staff of another public utilities commission in the Ameritech region recently stated, "the D.C. Circuit's Decision does not call into question the FCC's *conclusion* regarding the [non-local] character of ISP traffic; rather, it finds that the FCC's *articulated basis* for its conclusion is insufficient to support that conclusion." (See Excerpt of Brief of Illinois Commerce Commission Staff, Exhibit 1, emphasis in original, a complete copy of which was docketed in Case No. 99-1153-TP-ARB attached to Ameritech Ohio's Memorandum Contra ICG's Application for Rehearing).

Thus, the FCC need only do a better job articulating its holdings to the Court. And, the FCC has already indicated informally that it believes it can provide the Court's requested clarification and still reach the same conclusion. (See Exhibit 2 hereto, reporting a statement by the Chief of the FCC's Common Carrier Bureau that "he remained convinced that calls to ISP should be considered interstate calls . . ." and that "we [the FCC] need to better articulate our position.")

⁵ While the FCC has held that ISP traffic is exchange access, from which it necessarily follows that it is not local, we stress that a determination (if such a determination should someday be made) that ISP traffic is not exchange access does not necessarily imply that it is local. Because reciprocal compensation applies only to local telecommunications, the dispositive question is whether ISP traffic is local or not local. Simply put, reciprocal compensation does not apply to ISP traffic if ISP traffic is not local, whether or not it is exchange access.

In summary, the court decision the CLECs try to depict as the end of the line for the FCC's holding of ISP traffic as non-local is, in reality, just a bump in the road. The truth is *Bell Atlantic* leaves the FCC free to rule again ISP traffic is not local, which it indicates it will again rule, and leaves state Commissions free to do the same in the meanwhile, consistent with a very long line of FCC precedent pre-dating and post-dating the vacated ISP Declaratory Ruling. And, as far as its impact on the Commission's analysis in this generic case, *Bell Atlantic* does not even amount to a bump in the road toward rationalizing inter-carrier compensation for ISP traffic. At this juncture, it is up to state commissions to decide what makes sense in terms of compensation on ISP traffic and that is precisely what this Commission has undertaken to do. Nothing in *Bell Atlantic* undermines this generic determination process.

III. The Commission's Original Reasons for Convening this Proceeding Continue to Apply

The FCC's ISP rulemaking proceeding in CC Docket 99-68 had been in progress for nearly a year at the time the Commission decided to proceed with this generic arbitration. Rather than continue to wait for the FCC's determination, the Commission decided to develop a generic position on the subject of intercarrier compensation for ISP-bound traffic for application prospectively until the FCC ruled because many first generation interconnection agreements will expire this year. The Commission concluded that "[a]ll parties entering into interconnections agreements will thus benefit by the Commission rendering a generic position on inter-carrier compensation for this traffic." See, January 13, 2000 Entry at p. 3.

Now, in the wake of *Bell Atlantic*, the Commission again finds itself waiting for an FCC determination, this time on remand from the D.C. Circuit. Again, the Commission has the choice of awaiting the next FCC determination and not addressing ISP traffic or, as it chose before, proceed to develop a generic interim position that accounts for the unique characteristics of ISP-

bound traffic. The considerations which convinced the Commission to commence this proceeding in January continue to apply. While everyone awaits the FCC's further explanation of federal law, parties with expiring interconnection agreements would benefit from the Commission's interim generic policy on the subject.

Should the Commission proceed as it decided to in January, *Bell Atlantic* provides no reason to alter its Issues list set forth in the Attorney Examiner's Entry filed on March 15, 2000. Since *Bell Atlantic* clearly did not hold that ISP-bound traffic is local for reciprocal compensation purposes, the Commission remains free to examine the characteristics of ISP-bound traffic that distinguish it from local traffic and consider economically-rational compensation mechanisms that account for these characteristics, unlike reciprocal compensation applicable to traditional voice traffic. And, the only way to properly conduct this investigation is to receive evidence responsive to the Commission's questions concerning the identification of ISP-bound traffic, the costs and network configurations specific to routing ISP calls, and the policy implications and competitive incentives associated with each proposed compensation arrangement for routing dial-up ISP traffic. (See *March 15, 2000 Entry*, ¶¶4(b)-(e).) Since it is uncertain when the FCC will answer the questions raised by *Bell Atlantic*, the Commission may now have more reason than ever to develop a generic policy applicable to ISP-bound traffic while proceedings pend before the FCC on remand.

Finally, even in the unlikely event the FCC ultimately is not successful in establishing to the D.C. Circuit Court's satisfaction that ISP traffic is not local traffic, proceeding ahead now with a generic determination applicable until the FCC rules would not be a waste of resources. First, the Commission's generic determination would be useful to the parties in interconnection agreement negotiations and disputes until a final non-appealable result is achieved on the federal

level. This benefit is precisely that which motivated the Commission to initiate this generic proceeding in the first place while it awaited the FCC's ISP rulemaking determination.

Second, §251(d)(2) of the Act provides that reciprocal compensation for *local* traffic must be limited to the carrier's cost of terminating that traffic. Ameritech is confident that the Commission's pending investigation into the cost and network configurations associated with the delivery of ISP traffic would demonstrate the need for a cost-based compensation mechanism much different from how reciprocal compensation currently is paid on traditional local voice traffic. The FCC reached a similar conclusion with respect to paging traffic even though it held that paging traffic is local traffic eligible for reciprocal compensation. In so ruling, the FCC noted the differences between paging traffic and traditional local voice traffic result in different cost characteristics and, therefore, a different reciprocal compensation arrangement for such traffic. See, First Report and Order, CC Docket 96-98 (August 8, 1996), at ¶¶ 1036, 1043, 1092. Those distinctions apply to ISP traffic as well. Absent the Commission's investigation of ISP traffic in this proceeding and departure from the way reciprocal compensation is structured for traditional voice traffic, many CLECs during the foreseeable future will continue to grossly over-recover their costs of routing ISP traffic.

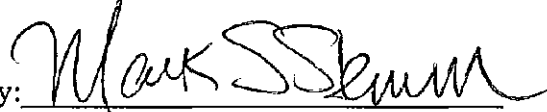
IV. Conclusion.

The Commission undertook this proceeding to conduct a comprehensive evaluation of the special characteristics of ISP traffic. Contrary to the CLECs' unfounded suggestions, *Bell Atlantic* holds nothing to preclude the Commission's intended scope of investigation into compensation mechanisms which rationally assure only cost recovery, not over-compensation. For all of the reasons set forth above, Ameritech Ohio requests the Commission continue with this proceeding and set forth a new hearing and discovery schedule forthwith.

Dated: April 14, 2000

Respectfully submitted,

AMERITECH OHIO

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Ameritech Ohio's Initial Brief On The D.C. Circuit Court Of Appeals' Bell Atlantic Decision As It Relates To The Commission's Generic Arbitration was served via hand-delivery at the brief exchange or mailed by regular U.S. mail this 14th day of April, 2000, on the following counsel of record:

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STATE OF ILLINOIS



ILLINOIS COMMERCE COMMISSION

Office of General Counsel

March 27, 2000

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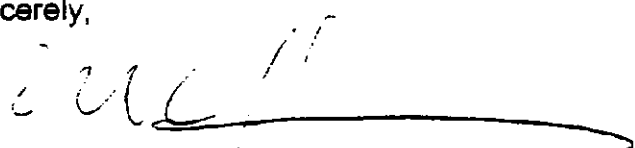
Re: Ill. C.C. Docket No. 00-0027

Dear Ms. Caton:

Enclosed for filing in the above-referenced docket please find an original and eleven (11) copies of the Initial Brief of the Staff of the Illinois Commerce Commission. Also enclosed are a Notice of Filing and Certificate of Service.

Please acknowledge receipt by date stamping a duplicate copy of this letter and returning it to me in the envelope provided.

Sincerely,


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Counsel for the Staff of the
Illinois Commerce Commission

MLH/bjm
cc: Service list (w/encls.)

EXHIBIT

1

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Focal Communications Corporation)
of Illinois)

00-0027

Petition for Arbitration Pursuant to Section)
252(b) of the Telecommunications Act of)
1996 to Establish an interconnection)
Agreement with Illinois Bell Telephone)
Company d/b/a Ameritech Illinois.)

**INITIAL BRIEF OF THE
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

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March 27, 2000

undertake to segregate and identify for rating ISP traffic, and further, his recommendation that Focal receive a reciprocal compensation rate that has been adjusted to reflect a longer holding times, specifically \$0.001333. Staff Exhibit No. 2 at 17, 21.

As an initial matter, the Staff must bring to the Commission's attention the decision recently rendered by the Circuit Court of Appeals for the District of Columbia in Bell Atlantic Telephone Cos. v. FCC, No. 99-1094 (D.C. Cir., March 24, 2000) (slip opinion), a copy of which is attached hereto. In that decision, the court vacated the FCC rule characterizing traffic terminating at an ISP as jurisdictionally interstate. Bell Atlantic Telephone Cos. v. FCC, No. 99-1094, slip op. at 5, 15.

Regrettably, the D.C. Circuit's analysis does not afford the Commission any particular aid in rendering a decision in this proceeding. In vacating the FCC's determination, the D.C. Circuit found that the FCC failed to provide an acceptable explanation why its traditional "end-to-end" analysis, which it used to determine that ISP traffic is jurisdictionally interstate, should properly apply to reciprocal compensation. Id., at 9. The court noted that "[h]owever sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing [traffic routed to an ISP and thereafter to the Internet] as continuous works for purposes of reciprocal compensation." Id., at 11.

Although it vacated the FCC's Reciprocal Compensation Order, the D.C. Circuit specifically declined to characterize ISP traffic for reciprocal compensation purposes. It observed that:

The issue at the heart of this case is whether a call to an ISP is local or long-distance. Neither category fits clearly. The Commission has described local calls, on the one hand, as those in which LECs collaborate to complete a call and are compensated for their respective roles in completing the call, and long-distance calls, on the other, 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. (citation omitted)

Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP.

Bell Atlantic v. FCC, No. 99-0194 (D.C. Cir., March 24, 2000) slip op. at 8.

Finally, the court noted that:

We do not reach the objections of the incumbent LECs—that [Section] 251(b)(5) preempts state commission authority to compel payments to the competitor LECs; at present we have no adequately explained classification of these communications, and in the interim our *vacatur* of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.

Bell Atlantic v. FCC, No. 99-0194 (D.C. Cir., March 24, 2000) slip op. at 15.

The D.C. Circuit decision sheds considerably more heat than light upon this matter. It appears to stand for the propositions that (1) ISP traffic is difficult to characterize, inasmuch as it does not fit squarely into any existing category of telecommunications traffic; (2) there is little agreement regarding how such traffic *should* be characterized; and (3) state Commissions have the authority to set reciprocal compensation rates in the absence of any definitive statement by the FCC. The former two propositions are readily apparent from the evidence adduced in this matter, and the latter reflects no change in the existing order.

Moreover, the D.C. Circuit's decision does not call into question the FCC's *conclusion* regarding the character of ISP traffic; rather, it finds that the FCC's *articulated basis* for its conclusion is insufficient, as a matter of law, to support that conclusion. Accordingly, the Commission is left even more to its own devices in resolving this matter than was previously the case.

Prior Commission decisions regarding reciprocal compensation for ISP traffic are not particularly useful in resolving the specific issue now before the Commission. In Teleport Communications Group, et al. v. Illinois Bell, ICC Dockets No. 97-0404 / 97-0519 / 97-0525 (Consol.), the Commission ruled upon complaints by CLECs serving ISPs that Ameritech had unilaterally discontinued reciprocal compensation payments to them for ISP traffic, which compensation was due under *existing* interconnection agreements between Ameritech and complainants. Teleport Communications Group, et al. v. Illinois Bell, ICC Dockets No. 97-0404 / 97-0519 / 97-0525 (Consol.), Final Order at 2 (March 11, 1998) (hereafter "TCG Order"). The interconnection agreements in question called for reciprocal compensation to be paid by the parties to the agreements on local traffic as defined in the agreements. *Id.*, at 4, 10. The definition of local traffic in the agreements in question appears not to have specifically excluded ISP traffic. *Id.*, at 9.

The Commission found that the agreements clearly required Ameritech to pay reciprocal compensation when its customers called ISPs served by a CLEC. *Id.*, at 13. The Commission stated three bases for its ruling. First, the Commission found that the language of the agreements in question provided for reciprocal compensation where "transport and termination of Local Traffic [is] billable by Ameritech which a ...



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FCC Stands by Conclusion That Calls to ISPs Are Interstate, Despite Court's Nixing 1999 Order



The U.S. Court of Appeals in Washington has vacated and remanded for further consideration the FCC's 1999 order regarding intercarrier compensation for traffic bound for Internet service providers (ISPs).



Despite some harsh language for the FCC in the court decision, the FCC's Common Carrier Bureau chief says he still thinks that calls to ISPs are interstate and that some fine tuning and further explanation should satisfy the court that the agency's view was correct.

In the 1999 order, the FCC tried to perform a delicate jurisdictional balancing act (TR, March 1, 1999). It found that calls to ISPs were jurisdictionally interstate. But it allowed numerous state commission rulings that treated such traffic as local to remain in effect. The FCC said it was reasonable for the states to have reached such conclusions because no federal rules on ISP-bound traffic had been in place.

At the same time, the FCC launched a proceeding to consider whether to set up a federal compensation regime for ISP-bound traffic. A proposed order has been circulating at the FCC and had been expected to go to the Commissioners for consideration soon, sources told TR. Now those plans likely will be put on hold as the agency addresses the court remand.

Court Sees No 'Reasoned Decision Making'

In *Bell Atlantic Corp. et al. v. FCC* (consolidated cases beginning at 99-1094), the court remanded the order for "want of reasoned decision making." The opinion released March 24 was written by Circuit Judge Stephen F. Williams, joined by Judges David B. Sentelle and A. Raymond Randolph.

The court was unhappy with the FCC's application of an "end-to-end" analysis in determining that calls to ISPs were jurisdictionally interstate. Focusing on the end points of the communications, the FCC had determined that calls to ISPs could "terminate" at a Web site anywhere, making them jurisdictionally interstate.

EXHIBIT

2

Such an "end-to-end" analysis is straightforward in a circuit-switched world, the court said, but the FCC's reasons for using such an analysis are "not obviously transferable in this context." The court pointed to MCI WorldCom, Inc.'s argument that telecommunications traffic is considered local if it "originates and terminates within a local service area."

MCI WorldCom had said the FCC had failed to apply, or even mention, its definition of termination-"the switching of traffic that is subject to section 251 (b)(5) [of the Telecommunications Act of 1996] 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."

The court said, "Calls to ISPs appear to fit this definition: The traffic is switched by the [carrier] whose customer is the ISP and then delivered to the ISP, which is clearly the called party." The FCC avoided that result by analyzing the communication on an end-to-end basis, the court said. "But the cases it relied on for using this analysis are not on point."

The precedents the FCC used involved telecommunications services like "800" calls and voice-mail services, the court recalled. ISPs, however, are information service providers, "which upon receiving a call originate further communications to deliver and retrieve information to and from distant Web sites," the court said.

"Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers," the court said.

"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 services to provide their goods or services to their customers," the court wrote.

The FCC has not 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," the court said.

Court Cites Conflicting Arguments

The court noted that the FCC had exempted enhanced service providers (ESPs), which include ISPs, from paying interstate access charges. The ESP exemption is "something of an embarrassment to the Commission's present ruling," the court said.

In defending its ESP exemption before the U.S. Court of Appeals for the Eighth Circuit (St. Louis) in a separate case, the FCC had distinguished between ESP traffic and long distance traffic, "even using the analogy that calls to ESPs are really like a call to a local business that uses the telephone to order wares that meet the need," the court said.

At that time, the FCC acknowledged "real differences" between long distance calls and calls to ESPs, the court recalled. "It is obscure why those have now dropped out of the picture."

The court cited another reason for remanding the order: the FCC's failure to

explain whether ISP-bound traffic should be considered "telephone exchange service" or "exchange access service" or should be included in a third category.

MCI WorldCom contended the traffic is telephone exchange service, while incumbent local exchange carriers (ILECs) want it to be considered exchange access service.

The court recalled that the FCC's order addressed this point only briefly by stating that it had characterized enhanced service providers as users of access service but treated them as end users for pricing.

"If the Commission meant to place ISP traffic within a third category, . . . [doing so] would conflict with its concession . . . that 'exchange access' and 'telephone exchange service' occupy the field," the court said. The 1996 Act is ambiguous as to whether calls to ISPs fit within the definition of exchange access or telephone exchange service, the court said, so the FCC's interpretation would be subject to judicial deference.

The courts review an "agency's interpretation only for reasonableness where Congress has not resolved the issue," the court noted. But "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,'" the court wrote.

"Because the Commission has not provided a satisfactory explanation of why [local exchange carriers] that terminate calls to ISPs are not properly seen as 'terminating. . . local telecommunications traffic,' and why such traffic is 'exchange access' rather than 'telephone exchange service,' we vacate the ruling and remand the case to the Commission," the court wrote.

The court didn't reach the ILECs' contention-that section 251(b)(5) preempts state commission authority to compel payments to CLECs.

Strickling: Calls Are Still Interstate

Common Carrier Bureau Chief Lawrence E. Strickling told TR shortly after the court released its opinion that he remained convinced that calls to ISPs should be considered interstate calls. "It seems to me that what the court is really telling us is that we need to better articulate our position," Mr. Strickling said.

"I don't read this decision as telling us that we made a mistake" in finding ISP-bound calls to be interstate in nature, he said. "We need to take the confusing precedents and make clear to the court why this is interstate traffic."

Mr. Strickling said he also didn't expect the decision to have much of an effect on the marketplace. Without a federal reciprocal compensation regime in place, the states have moved forward to resolve the disputes, and that should continue, he said.

Edward D. Young III, senior vice president-regulatory at Bell Atlantic, agreed with Mr. Strickling's assessment. The court vacated the FCC's order "not because the FCC was wrong, but because in its view the FCC did not adequately explain the basis for its conclusion that Internet calls are interstate calls." Bell Atlantic still supports the FCC's decision, saying it applied the correct analysis. "The FCC needs to simply explain why [calls to ISPs] are

exchange access and not telephone exchange service," Mr. Young told TR.

Competitive local exchange carriers (CLECs), however, disagreed. The decision is "very favorable to the CLEC industry," providing more clarity and certainty regarding the compensation CLECs can expect for terminating calls to ISPs, said Jonathan Askin, general counsel at the Association for Local Telecommunications Services.

"This is a very strong ruling," he said. The FCC will be "hard pressed" to see this as anything other than requiring ISP-bound calls to be local calls, he added.

Section 252(d)(2) of the Act gives the FCC authority to set reciprocal compensation rates for local traffic, Mr. Askin noted. If, in the wake of the court ruling, the FCC decides ISP-bound traffic is jurisdictionally local, it can issue federal reciprocal compensation rules, he said. Now it can set federal reciprocal compensation rules without "stepping on anyone's toes" at the state commission level, Mr. Askin said.

An MCI WorldCom spokesman said his company "welcomed" the court's decision. "This validates our long-held observation that ISPs should be treated like any other end user," he said.

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