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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 ) Case No. 99-941-TP-ARB  
for Internet Service Provider Traffic. )

MOTION TO MODIFY PROCEDURAL SCHEDULE OR  
MOTION FOR SUMMARY JUDGMENT

Now come AT&T Communications Corporation of Ohio, Inc. and TCG Ohio, Buckeye TeleSystem, Inc., CoreComm Newco, Inc., and MCI WorldCom, Inc., (hereinafter "the CLEC Group") (CLEC Group), and move the Commission for an Order modifying the procedural schedule for the purpose of providing parties with the opportunity to submit briefs addressing the issues which are to be determined by the Commission in this proceeding and the impact of *Bell Atlantic Telephone Companies, et. al. v. Federal Communications Commission, et. al.* Case No. 99-1094, 2000 U.S. App. LEXIS 4685 (D.C.Cir. March 24, 2000) prior to the filing of testimony and the commencement of the hearing. Alternatively, the CLEC Group moves that the Commission grant summary judgment in favor of the CLECs on the grounds that, based on the District Court decision, that traffic terminated to ISP providers is local traffic subject to the reciprocal compensation requirements contained in Section 251(b) of the Telecommunications Act of 1996.

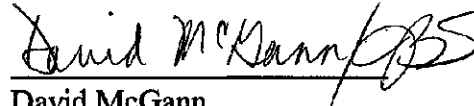
In addition, the CLEC Group requests that further discussion of this motion take place during the conference that the Attorney Examiner has scheduled for Monday, April 3, 2000, and that consideration be given to conducting that conference in person, as discussed below. A memorandum in support of this motion is attached hereto and incorporated by reference herein.

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Respectfully submitted,

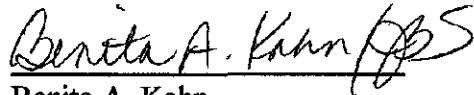


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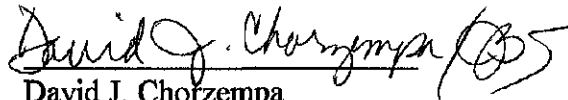


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**MEMORANDUM IN SUPPORT OF  
MOTION TO MODIFY  
PROCEDURAL SCHEDULE OR MOTION  
FOR SUMMARY JUDGMENT**

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**I.     THE DISTRICT COURT DECISION**

On March 24, 2000, the U.S. Court of Appeals for the D.C. Circuit issued its opinion in a consolidated appeal of the FCC's February 26, 1999 Declaratory Ruling<sup>1</sup> addressing the question whether NECs that serve Internet service providers ("ISPs") are entitled to reciprocal compensation for calls from ILEC customers to those ISPs (*Bell Atlantic Telephone Companies, et. al. v. Federal Communications Commission, et. al.* Case No. 99-1094, 2000 U.S. App. LEXIS 4685 [D.C.Cir. March 24, 2000]) (hereinafter "the District Court decision"). A copy of the decision has been attached hereto. The Court found that the FCC failed to adequately explain: (1) why it concluded that CLECs which terminate calls to ISPs are not terminating local telecommunications traffic (which would entitle them to reciprocal compensation), and (2) why under the Act such traffic should be classified as "exchange access" rather than "telephone

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<sup>1</sup> Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 96-98, *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68 (rel. Feb. 26, 1999)(hereinafter "Declaratory Ruling").

exchange service." Accordingly, the Court vacated the FCC's order in its entirety and remanded the case to the FCC.

The District Court decision has undermined the FCC's jurisdictional determination that calls terminated to ISPs are interstate in nature by holding that its use of the "end-to-end" analysis is not transferable to the reciprocal compensation context, yielding "intuitively backwards results" (Decision, p.6). Thus, to the extent that this Commission was under the impression, based on the FCC's jurisdictional analysis set forth in the Declaratory Ruling, that ISP-bound traffic should be subject to a compensation scheme other than reciprocal compensation, the basis for such a conclusion has been nullified by the District Court decision. Indeed, the District Court decision has validated the Commission's previous analysis and determinations that ISP-bound traffic is local for reciprocal compensation purposes.

## **II THE DISTRICT COURT DECISION HAS ALTERED THE SCOPE OF THIS PROCEEDING.**

Because the District Court decision has negated the only basis upon which the Commission could have concluded that ISP-bound traffic (and similar types of traffic) should be subject to a compensation scheme other than reciprocal compensation, the purpose and scope of this generic proceeding has been substantially altered, if not eliminated altogether. For this reason, the CLEC Group is seeking a modification of the procedural schedule so that the impact of the District Court decision may be fully briefed and the Commission will have an opportunity to issue a preliminary ruling prior to the time that the parties must engage in continued discovery, testimony preparation and hearing participation. It would be an unconscionable waste of

resources for this case to go forward as currently scheduled and for the Commission to defer consideration of the District Court decision until after the hearing. Alternatively, the CLEC Group urges the Commission to treat this motion as one for summary judgment and issue a finding that, on a prospective basis, ISP-bound traffic shall be considered to be local traffic subject to reciprocal compensation pursuant to Section 251(b) and the Commission's Local Service Guidelines.

**III. THE COMMISSION MUST IMMEDIATELY ADDRESS THE IMPACT OF THE DISTRICT COURT DECISION BEFORE THIS CASE MOVES FORWARD.**

Through a series of entries and prehearing conferences, the Commission has established a procedural schedule which is advancing very rapidly. April 3, 2000 is the date for discovery cut-off and identification of witnesses; testimony and arbitration packages are due April 10, 2000; and the hearing is scheduled to begin on April 17, 2000. In a March 15, 2000, Entry the Commission also identified issues to be addressed at the hearing, and the parties were advised at the prehearing conference on March 17, 2000 that the legal issues identified in paragraph 4.a. of that Entry should not be the subject of testimony but should be included in briefs to be submitted after the close of the hearing. One of the items identified in that paragraph is the "extent of the Commission's jurisdiction to establish the terms and conditions of service regarding compensation for dial-up internet service provider (ISP) traffic".

It is the position of the CLEC Group that the extent of the Commission's ability to establish a compensation mechanism other than reciprocal compensation for ISP-bound traffic has been severely limited by the District Court Opinion. Indeed, the role of the Commission with

respect to the development of a compensation mechanism has now become perfunctory and should be limited to a ruling in this case affirming the Commission's prior rulings that NECs and ILECs must compensate each other for ISP-bound traffic at the ILEC's TELRIC-based reciprocal compensation rates [See *ICG Telecom Group v. Ameritech Ohio*, Case No. 97-1557-TP-CSS; *Time Warner Communications of Ohio v. Ameritech*, Case No. 98-308-TP-CSS and *MCImetro Access Transmission Services v. Ameritech Ohio*, Case No. 97-1723-TP-CSS and Panel Report in *In the Matter of ICG Telecom Group's Petition for Arbitration*, Case No. 99-1153-TP-ARB (January 11, 2000)].<sup>2</sup> In any event, the extent of the Commission's jurisdiction is a threshold issue which must be addressed and resolved immediately before this case moves forward, rather than being examined at the end of the process.

The need for an immediate preliminary determination of the scope of this proceeding is particularly critical for discovery purposes. The ILECs have already served voluminous information requests upon the NEC participants seeking information about each carrier's network configuration and the costs associated with terminating ISP traffic, as well as the segregation of ISP traffic and other items. The information being elicited by these requests is totally irrelevant to a compensation scheme for ISP traffic which is symmetrical and based on the ILECs' reciprocal compensation rates. Indeed, it is unlikely that discovery is even necessary in light of the District Court decision. A Commission ruling at this point will spare the parties and the Attorney Examiner further squabbles over the issues which are to be addressed in this proceeding.

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<sup>2</sup> In the Arbitration Award the Commission did not reach a different conclusion with regard to the nature of traffic terminating to an ISP but rather deferred a final decision to the outcome of this generic arbitration docket (Case No. 99-1153-TP-ARB, Award, February 24, 2000, p. 9). ICG has sought rehearing of this issue.

The CLEC Group requests that the Commission immediately and temporarily suspend the current procedural schedule and convene a prehearing conference on April 3, 2000, at which an expedited briefing and/or oral argument schedule can be established. Although the Attorney Examiner has previously scheduled a telephone conference for that date, the CLECs note that many of their representatives will be at the Commission for the Ameritech OSS/testing collaborative in addition to other meetings, making attendance by phone more difficult than attendance in person. A face-to-face prehearing would be preferable.

#### **IV. THE COMMISSION SHOULD RESOLVE THIS CASE SUMMARILY.**

In the January 13, 2000, Entry that initiated this proceeding, the Commission relied on the language of the Declaratory Ruling in stating "... the FCC found, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for ISP-bound traffic and to adopt another compensation mechanism [footnote citing ¶26 of the Declaratory Ruling]." (Entry, p.1) The FCC's statements in that paragraph as to the ability of state commissions to adopt reciprocal compensation or some "other mechanism" were based on its determination that ISP-bound traffic was interstate for jurisdictional purposes, as set forth in footnote 87, contained in the same paragraph:

...We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic.

That holding has been reversed by the District Court and remanded to the FCC. The District Court rejected the FCC's end-to-end analysis of a call placed to an ISP provider, stating:



However sound the end-to-end analysis may be for jurisdictional purposes, the [FCC] has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation.

(Decision, p. 11).

The District Court went on to find that the FCC brushed aside its own definition of call "termination", namely "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." Local Competition Order, 11 FCC Rcd. At 16015 (p. 1040); 47 CFR §51.701(d). In this regard, the District Court noted:

Calls 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'.

(Decision, p. 9)

The D.C. Circuit concluded that calls to ISPs may terminate at the ISP because the information services that an ISP provides are distinct from the separate telecommunications service used to connect the caller to the ISP. As the D.C. Circuit stated:

ISPs . . . are "information service providers," . . . which upon receiving a call originate further communications to deliver and retrieve information to and from distant websites. . . . Although ISPs use telecommunications services to provide information services, they are not telecommunications providers (as are long-distance carriers).

(Decision, pp. 10-11.) Adopting MCI WorldCom's argument, the D.C. Circuit recognized that "[i]n this regard, an ISP appears no different from many businesses, such as 'pizza delivery firms, travel reservations agencies, credit card verification firms, or taxicab companies,' which use a variety of communication services to provide their goods or services to their customers."


(Decision at 11, quoting WorldCom comments).

Because the District Court has cast significant doubt on whether ISP-bound traffic could be anything but local traffic, ISP-bound traffic must be compensated pursuant to the reciprocal compensation requirements. The CLEC Group urges the Commission to make a summary determination that, on a prospective basis, ISP-bound traffic will be subject to reciprocal compensation pursuant to the Commission's Local Service Guidelines.

## V. CONCLUSION.

This proceeding has been placed on a very fast procedural track, so it is imperative that the Commission rule on this motion as quickly as possible. The importance of addressing the District Court decision has clearly been recognized by the Attorney Examiner, who has scheduled a conference call to discuss these matters on April 3, 2000. As noted above, the CLEC Group would like to have a face-to-face prehearing conference on that date and urges the Commission to suspend the current procedural schedule until the preliminary ruling requested in this motion has been issued.

Respectfully submitted,



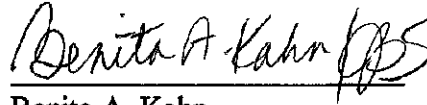
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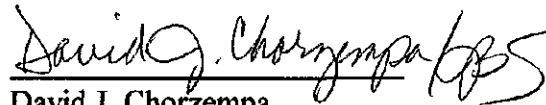
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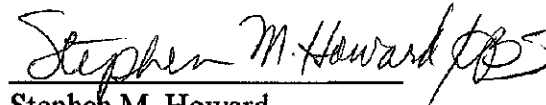


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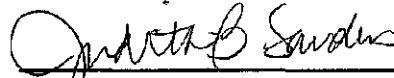
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion was served by Internet email upon all the parties included on the Commission's electronic distribution list used for Entries in this proceeding and/or upon all counsel listed on the attached Service List by U.S. Mail, this 31st day of March, 2000.



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