BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

CINCINNATI BELL TELEPHONE COMPANY'S REPLY BRIEF

In response to the various briefs filed with the Commission on April 14, 2000, Cincinnati Bell Telephone Company ("CBT") hereby submits the following Reply Brief.

I. The D.C. Circuit Decision Does Not Affect the Outcome of This Proceeding

CBT agrees with Ameritech Ohio, GTE and Sprint that the D.C. Circuit decision provides no reason to alter the course of this proceeding. This proceeding continues to provide the Commission an opportunity to examine and deal with the inequities and inadequacies of the present reciprocal compensation structure when applied to the unique characteristics of ISP traffic. CBT disagrees with Sprint and the CLECs, however, that the D.C. Circuit Opinion should lead the Commission to determine that calls to ISPs are eligible for reciprocal compensation.

The D.C. Circuit vacated and remanded the FCC's ISP Declaratory Ruling solely because the Court was not satisfied with the FCC's explanation of why ISP-bound traffic is not local. The D.C. Circuit only vacated the Declaratory Ruling because the FCC had not adequately explained its basis for using "end-to-end" analysis for determining whether ISP traffic was subject to reciprocal compensation. The Court did not challenge the FCC's use of "end-to-end" analysis in determining its jurisdiction over ISP traffic. The Court only stated that end-to-end

analysis is not obviously transferable to determine whether ISP traffic was subject to reciprocal compensation.

The only effect of the D.C. Circuit decision was to vacate the FCC Order, not to hold that ISP traffic is local. Nor did the D.C. Circuit decision change the FCC precedents dating back to 1983 that ISP calls are interstate in nature and are properly classified as "exchange access." Any CLEC contention that the D.C. Circuit actually decided that ISP traffic is local is wrong. The D. C. Circuit did not decide that calls to ISPs either are or are not eligible for reciprocal compensation under the Act. The Court only held that the FCC had failed to justify its ruling.

The D.C. Circuit decision did not resolve any of the issues identified by this Commission in this proceeding. It did not consider or determine the ability of any network to distinguish ISP traffic, the cost of ISP traffic, or the propriety of any particular compensation mechanism. The decision permits the FCC to reach the same conclusion on remand that it has consistently reached since 1983, that calls to ISPs are interstate access, not local calls. The FCC only needs to do a better job articulating its reasoning. The FCC has already indicated informally that it will provide the requested clarification and reach the same conclusion. State commissions are free to do the same in the interim.

The contentions of CLECs regarding the effects of the D.C. Circuit decision and this Commission's prior decisions are wildly exaggerated. Nothing in the D.C. Circuit decision determined the nature of ISP traffic for purposes of compensation. The D.C. Circuit did not disturb the FCC's conclusion that ISP traffic was interstate for purposes of the FCC's jurisdiction over the traffic. The FCC is free on remand, so long as it provides a rational explanation, to establish a different compensation mechanism for ISP traffic as opposed to local traffic, or even to abolish all compensation for ISP traffic.

II. The FCC Can Come To The Same Conclusion On Remand As It Did In The Declaratory Ruling.

The CLECs assume that the FCC has only one choice on remand, to determine that ISP calls are local and are subject to reciprocal compensation. To the contrary, the D.C. Circuit acknowledged that the FCC is given Chevron deference to interpret the Act, so there are several possible outcomes. Even if the FCC concludes on remand that ISP traffic is not "exchange access," that does not mean it is "exchange service." Furthermore, even if the Commission concludes that ISP traffic is "exchange service," that does not preclude the development of a different method of compensation for ISP traffic. In the interim, assuming that the lack of authoritative guidance from the FCC authorizes this Commission to act, then this Commission has the same freedom as the FCC to interpret the Act and to develop rules to govern ISP traffic.

This Commission has never been compelled to find that ISP calls are subject to reciprocal compensation and the D.C. Circuit decision does not change the legal landscape. Had the D.C. Circuit decision truly meant that there was only one possible answer, there would have been no reason for remand. To the contrary, the court found that the statute was sufficiently ambiguous that the FCC could interpret ISP traffic as falling within either "exchange service" or "exchange access" because it did not fall neatly into either the local call or long distance call models. The court held correctly that it had no authority to tell the FCC how to interpret the statute; it merely told the FCC that it had to give better reasoning for what it did. The court did not, and could not, make the choice for the FCC or this Commission. Thus, the issues identified by the Commission in this proceeding still need to be resolved and the Commission should go forward as originally planned.

The impact of the D.C. Circuit Court decision is simple and clear: none. If the D.C. Circuit decision returns us to the state of the law prior to the Declaratory Ruling, that would be

the unbroken string of FCC precedents cited in CBT's Initial Brief that consistently held that ISP traffic was interstate access traffic that happened to be exempted from access charges for policy reasons. The FCC consistently determined that this was interstate access, not local traffic, and that ISPs would receive their interstate access by paying end user charges. FCC precedent would compel the conclusion that no reciprocal compensation should apply to ISP traffic.

III. Neither The Ameritech Decisions Nor Decisions of Other Courts Are Controlling On This Proceeding.

Most CLECs also improperly cite this Commission's prior decisions in three Ameritech complaint cases and other similar cases as precedent in this proceeding. There is no prior decision of this Commission deciding that ISP traffic is inherently subject to reciprocal compensation. In each case the Commission very specifically stated that it was only interpreting the contractual language of those particular interconnection agreements, none of which explicitly dealt with ISP traffic. In each decision, the Commission was careful to state that it was not deciding the general policy question of whether ISP traffic should be subject to compensation. In its Arbitration Award of February 24, 2000, *In the Matter of ICG Telecom Group, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, No. 99-1153-TP-ARB, the Commission specifically deferred judgment on the proper treatment of ISP traffic to this proceeding. As late as last Thursday, the Commission deferred a decision on rehearing in that arbitration, pending the briefing in this proceeding. The CLECs are trying to bootstrap the complaint case decisions into policy determinations, when they were never intended to be so.

Had the Commission intended the Ameritech decisions to be general policy statements on ISP traffic, there would have been no reason to initiate this proceeding. Time Warner and ICG were complainants in the Ameritech cases, and are the ones who petitioned the Commission to

open this generic proceeding for use by parties involved in negotiating "next generation" interconnection agreements. Obviously, Time Warner and ICG must have realized that the Commission had not made generic policy decisions when they opened this proceeding requesting that the Commission make generic policy decisions on ISP traffic for cases where the parties could not reach agreement. That is why this proceeding was necessary and the Commission should proceed on all of the issues identified by the Commission in the March 15, 2000 Entry.

Likewise, the court decisions and decisions of other state commissions to date have dealt with the interpretation and enforcement of existing interconnection agreements that did not specifically state how to treat ISP traffic. The March 30, 2000 Fifth Circuit decision cited by some CLECs is no exception. That case involved the interpretation of an existing interconnection agreement to decide whether the parties were bound contractually to pay reciprocal compensation on ISP traffic. That case did not decide whether such a policy should apply in cases where the parties had not reached an agreement on contractual language. The Fifth Circuit merely affirmed the Texas commission's interpretation of an existing interconnection agreement because the decision did not violate federal law. It did not say that the outcome was mandated or that it was good public policy.

This proceeding is very different, because it involves the policy decision of what the Commission should do in cases where the parties cannot reach an agreement on the treatment of ISP traffic and the parties are clearly not in agreement to pay reciprocal compensation. In the instant proceeding, the Commission does not have a contract to interpret; it must decide what the terms of future contracts will be when the parties cannot reach agreement. No CLEC has presented a case where a state commission or reviewing court was faced with that decision.

IV. The Telecommunications Act Does Not Compel A Finding That ISP Traffic Is Subject To Reciprocal Compensation.

Even though it rejected the FCC's Declaratory Ruling as unexplained, the D.C. Circuit did not answer the question of whether ISP-bound traffic is subject to reciprocal compensation. The court's opinion does not determine, as asserted by some CLECs, that ISP traffic is telephone exchange service. ISP traffic *can* be exchange access traffic and the FCC has determined that ISP traffic *is* exchange access.

The FCC's *Advanced Service Remand Order*, issued on December 23, 1999, has effectively answered the D.C. Circuit's concern over the FCC's use of the term "access service" with respect to ISP traffic. There, the FCC clearly classified ISP traffic as exchange access: "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], such traffic is properly classified as 'exchange access.'" *Advanced Service Remand Order* at ¶16.

While the D.C. Circuit criticized the FCC's use of the term "access service" as not found in the Act, the court ignored the FCC's own rules where that term is defined as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." 47 C.F.R. § 69.2(a). The D.C. Circuit acknowledged that ISP calls were interstate telecommunication, or else it could not have agreed with the FCC's jurisdictional analysis. Thus, ISP calls really are "access service" under the FCC's access regulations. While the definition of "access service" and "exchange service" may not be exactly the same, it is for the FCC to determine whether "access service," as it defined it, comes within the scope of the statutory term "exchange access."

The D.C. Circuit decision did not foreclose the FCC from finding that calls to ISPs are "exchange access." The FCC has considerable interpretative power to apply the statutory

language. Under Chevron, the FCC receives deference in interpreting the Act, as it is the agency charged with implementing the statute. The FCC must be given interpretative leeway to determine which of the two categories applies to ISP traffic if it is not clearly within either definition. The D.C. Circuit said as much when it stated that ISP traffic does not clearly fall within either the local or long distance calling models. The Court deferred to the FCC's right to interpret the meaning of the Act.

Even if the FCC's ultimate determination is that ISP traffic does not fit the statutory definition of "exchange access" because it is not "toll" traffic, it does not follow that it is "exchange service." It could be neither. There may be more categories of traffic than simply "exchange service" and "exchange access." Even though the FCC had previously taken the position that telecommunications traffic is either "exchange service" or "exchange access," the FCC can change that policy by providing a reason for making the change. There is nothing mutually exclusive about those definitions, nor do they cover the universe of telecommunications. There are clearly categories of traffic that do not fit either definition. For example, toll-free calls are handed off to a long distance carrier and do not terminate in the local service area, but they are not "toll calls." This traffic literally does not fall within either definition. ISP traffic shares a similar status. ISP traffic does not really terminate in the local service area, because in many cases the "premises" (if there are any) to which that traffic is delivered are not located in the local service area, even though the calls may be routed using only seven digit dialing. Conversely, one could also argue that an ISP call is a "toll call" because ISP customers pay their ISPs for the privilege of using their dial-up services, and many ISP end users pay per minute of use charges to their ISPs.

V. The FCC Could Find ISP Traffic Is Not Subject to Reciprocal Compensation.

The CLECs argue that the FCC's regulations and decisions applying reciprocal compensation to "local traffic" require it to apply that treatment to ISP calls. The CLECs forget that, as the author of those rules, the FCC has the prerogative to interpret them as it deems appropriate or to amend them to provide for a specific treatment of ISP traffic. Section 251(b)(5) of the Telecom Act says that reciprocal compensation arrangements apply to "transport and termination of telecommunications." The FCC has interpreted § 251(b)(5) of the Act to apply reciprocal compensation only to local traffic, even though the Act uses the broader term "telecommunications." *Local Competition Order*, ¶¶ 1033-34; 47 CFR §51.701. The FCC is not compelled to continue to apply reciprocal compensation on all "exchange service." Nothing prevents the FCC from further refining its implementation of § 251(b)(5) to state specifically that ISP traffic is not "local" or that it is not subject to reciprocal compensation and to develop a separate compensation mechanism for it. The FCC is also free to alter its definition of "terminate" in order to exclude ISP calls from the definition of "exchange service." The FCC does not necessarily have to categorize this traffic as "exchange service," "exchange access" or anything else; it only has to decide whether ISP traffic should be subject to reciprocal compensation or some other form of compensation.

The FCC has only directly addressed the treatment of ISP traffic in the context of reciprocal compensation in the Declaratory Ruling. It has the opportunity on remand to decide where this traffic falls within its regulatory treatment, or to change its regulatory treatment.The FCC could determine that ISP traffic is *neither* exchange access *nor* exchange service, or even if ISP traffic is technically "exchange service," that it still should not be subject to reciprocal compensation. The D.C. Circuit decision does not eliminate any of these scenarios and the Commission should

not rule them out. The court's opinion leaves plenty of room for the FCC to determine whether ISP traffic falls into one of the categories of "exchange service" or "exchange access" or whether there is a third category. The court agreed that ISP traffic did not neatly fit either the local or the long distance models and it remanded to the FCC for further consideration. While the FCC has in the past taken the position that all telecommunications traffic must fall into one of the two categories, that position was formed when the FCC believed that ISP traffic was "exchange access." The FCC may change its policy if it determines that the two-category theory inappropriately implements the Act with respect to ISP traffic.

VI. Classification As Local Traffic Does Not Require Payment of Reciprocal Compensation.

Even if the Commission finds that ISP traffic is local, it is free to develop different rules to rationalize inter-carrier compensation for ISP traffic. It is for the Commission to decide what makes the most sense in terms of compensation for ISP traffic, which is what this proceeding was intended to do. 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 affect these costs) are all important to the question of whether and how ISP traffic should be compensated. The Commission must answer all of these questions in order to arrive at a just result.

CLECs wish to ignore economic and policy consideration and blindly adhere to Local Service Guideline IV. D.1.a. Reciprocal compensation, based upon ILECs' costs, is not required for ISP calls just because that is how the Commission's Local Service Guidelines treated local voice traffic. This proceeding presents the Commission with the opportunity to design new rules that treat ISP traffic in a manner rationally based on its own characteristics, not because it falls

into a "local" category. The CLECs rely on legal fictions to justify receipt of the same rates ILECs charge for short duration voice calls, not any proven economic cost of this traffic. The purpose of this case is to analyze this problem area and try to reach the best solution. Applying current reciprocal compensation rates to ISP traffic is not economically efficient or the correct result.

VII. The Commission Should Devise A Rational Mechanism Designed For the Costs of ISP Traffic.

The Commission undertook this proceeding to conduct a comprehensive evaluation of the special characteristics of ISP traffic. Section 251(d)(2) of the Act provides that reciprocal compensation is limited to the carrier's cost of terminating that traffic. If the Commission decides to allow some form of compensation for handling ISP traffic, it should continue to investigate the cost and network configurations associated with the delivery of ISP traffic to devise a cost-based compensation mechanism more appropriate to ISP traffic than the current reciprocal compensation system applicable to local traffic. The FCC reached a similar conclusion with respect to paging traffic, even though it is local traffic eligible for reciprocal compensation. The differences between paging traffic and traditional local voice traffic, *e.g.*, paging traffic is one-way traffic, result in different cost characteristics and, therefore, a different compensation arrangement for such traffic. Those distinctions apply to ISP traffic as well.

For CLECs to be entitled to compensation, they must prove that they incur costs to handle ISP traffic and establish what those costs are. CLECs wish to bypass these steps. They wish to simply assume that their costs of handling ISP traffic are exactly the same as the ILECs' costs of receiving local telephone traffic from CLECs. These matters should not be assumed and must be proven by the CLECs.

Even if the Commission concludes that public policy requires that CLECs receive compensation for their costs to handle ISP traffic, there is nothing in the record of this proceeding what those costs are. CBT and the other ILECs served discovery intended to determine how CLECs handle ISP traffic and to identify those costs, but CLECs have stonewalled those efforts. The Commission should require all CLECs to respond to the discovery with meaningful information that the Commission can use to determine what the appropriate compensation rules should be.

The practice advocated by CLECs, that ILECs pay them for ISP calls based on rates that were developed for short duration local voice traffic, is economically irrational and anticompetitive. Such a system creates perverse incentives to attract ISPs as customers in order to generate as much reciprocal compensation as possible, to design alternative network arrangements that reduce costs of handling this traffic (such as the so-called SS7 Internet gateway), and to avoid attracting customers who originate dial-up ISP traffic that would cause that carrier to incur reciprocal compensation charges. These incentives stifle residential competition and increase the cost to ILECs to service residential customers.

When the access charge exemption for ISP calls was created, there was very little ISP traffic and it had virtually no impact on the ILECs' rates. The FCC ostensibly created this policy to foster development of the Internet, however, given the current explosion in use of the Internet, ISP traffic has become a significant part of overall network traffic. To impose all of the costs of ISP traffic on the ILECs, because residential customers are the main source of ISP dial-up traffic, places all of the cost burden of ISP traffic on the ILECs who serve residential customers, while the economic reward (without corresponding risk) goes to the CLECs. This is not an economically fair result.

CLECs want ILECs to compensate them to handle ISP calls without proving what their economic costs to handle those calls are, and without taking into account the substantial revenue the CLECs receive from their ISP customers (which revenues have been won away at the expense of the ILECs). The assertion that the cost of handling ISP traffic is the same as regular voice traffic assumes away what this proceeding was supposed to determine.

The CLECs contend that, because they do not intend to try to prove their costs are higher than the ILECs, they are automatically entitled to charge the same rates on ISP traffic as ILECs charge for local traffic. CLECs should not be entitled to mirror ILEC rates if they cannot demonstrate that those rates reflect their own economic costs. It is irrelevant that the CLECs have not made applications for rates higher than the ILECs' rates for transport and termination. As an economic proposition, they should only recover their costs, not the windfall profits that would be generated by applying reciprocal compensation rates to ISP traffic.

Even if ISP calls involve the same types of costs as local calls, ISP calls do not have the same duration as local calls. The FCC has consistently stated that costs should be recovered in the same manner in which they are incurred. That assumption formed much of the basis for access charge reform where the FCC converted usage sensitive charges to flat rates on the theory that non-usage sensitive costs should not be recovered in usage sensitive rates. The CLECs wish to completely ignore this cost recovery principal when it comes to ISP traffic that generates enormous windfall profits to them. It is clear that certain switching costs are sensitive to the number of calls and other costs are sensitive to call duration. ISP traffic is of much longer duration than local traffic and would skew any blended rate that tried to capture per call and per minute variable costs in a single rate element applicable to all traffic. Regardless of how the Commission treats ISP traffic, it should make sure that CLECs do not overrecover costs by being

allowed to recover repeatedly those setup costs that occur only once per call. CBT proposed such a solution involving a charge per message, to recover call-sensitive costs, and a charge per minute of use, to reflect duration-sensitive sensitive costs.

VIII. The Commission Should Not Modify the Issues in this Case.

CBT agrees with Ameritech that the considerations which convinced the Commission to commence this proceeding continue to apply. Until the FCC takes further action, parties negotiating interconnection agreements need resolution of the ISP issue. This is what motivated the Commission to initiate this generic proceeding in the first place. The D.C. Circuit decision provides no reason to alter the issues set forth in the Attorney Examiner's March 15, 2000 Entry. The Commission remains free to examine the characteristics of ISP traffic that distinguish it from local traffic and consider economically-rational compensation mechanisms that account for these characteristics. The Commission should receive evidence responsive to its 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.

A thorough analysis of the issues is necessary for the Commission to obtain a sound basis for determining the appropriate compensation arrangements for ISP traffic. The Commission should not draw any conclusions until it has heard all of the evidence. In that regard, the Commission should require all CLECs to cooperate in providing responsive information so that the Commission can act on the facts, not simply the rhetorical positions the CLECs have advocated.

IX. Discovery Regarding CLEC Cost/Market Data Is Appropriate.

The ILECs have served discovery requests on each CLEC in this proceeding requesting information concerning that CLEC's cost of handling ISP traffic and its network architecture. Even though these issues are squarely relevant to the Commission's determinations to be made in this case, the CLECs have nearly uniformly objected to these requests. The Commission cannot conduct a proper proceeding to determine the appropriate treatment of ISP traffic, the methods by which it is handled, and its comparative costs, unless the CLECs participating in this proceeding are willing to share this information.

CLECs contend that calls to ISP customers are functionally indistinguishable from local calls on their networks. Yet, they refuse to respond to discovery asking them about their network structures and how they really handle ISP calls. CLECs assert that costs for calls to ISPs are the same as any local call. At the same time, however, they vigorously oppose any effort by the ILECs to try to determine whether that statement is true. The CLECs should not be permitted to make such bald assertions of "fact" if they refuse to provide discovery designed to test the truth of those assertions. CLECs should be required to produce this information so the Commission can determine how ISP traffic is handled on their networks and to determine how their costs of handling ISP traffic compare to their costs of other traffic and to the ILECs' costs.

Some CLECs also argue that ILECs are not harmed by paying reciprocal compensation on ISP traffic because they have other sources of revenue, such as second lines and subscriptions to captive ISPs. ICG has even served discovery on the ILECs on these issues. At the same time, however, the CLECs refuse to provide discovery on their other sources of revenue to cover their cost of ISP traffic. For CLECs to say ILECs should rely upon their revenues from independent

sources, but to ignore the sizeable revenues CLECs receive from their ISP customers is disingenuous.

The CLECs also skirt whether carriers can segregate ISP traffic from other types of local traffic. The Commission needs this information to know what creative options are available to it to solve this complex problem. The CLECs hide behind the D.C. Circuit decision, which did not decide these issues, instead of acknowledging that they know who their ISP customers are, where their ISP traffic goes, and could track this traffic with their switches if they wanted to.

Finally, while the CLECs have strongly resisted discovery, Sprint served nearly identical discovery on the ILEC participants in this case as the ILECs served on the CLECs. Given that Sprint's brief advocates the use of full reciprocal compensation at ILEC rates, regardless of the CLECs' costs, one can only wonder why Sprint served this discovery if it does not believe that such data was relevant to the proceeding.

X. The Commission Should Not Decide This Case Summarily.

The CLEC motion filed on March 31, 2000 requested the Commission to grant summary judgment in favor of the CLECs that ISP traffic will be subject to reciprocal compensation at TELRIC-based rates. There is no basis for such a summary finding as the Commission has no facts before it and the D.C. Circuit decision did not conclusively determine how ISP traffic should be handled as a policy matter. The Commission opened this case to establish future policy and should continue down that path. Summary judgment is inappropriate for all the reasons stated herein.

CONCLUSION

This proceeding is not limited to whether ISP-bound traffic is local, telephone exchange traffic. As discussed above, regardless of how the traffic is categorized, the Commission needs to determine how it should be handled for compensation purposes. While an ILEC's rates for transport and termination of local traffic are to be assessed on the basis of forward-looking economic costs, there are no explicit rules for ISP traffic. ISP traffic, like paging traffic, has very different characteristics than local voice traffic. The Commission should continue its investigation and determine what compensation, if any, is appropriate for ISP traffic. The Commission should develop a record to determine the costs of handling ISP calls, and what rates would properly compensate carriers for those costs, without creating windfalls for any party. The application of full reciprocal compensation to ISP traffic would be inconsistent with rational economic thinking.

Respectfully submitted,

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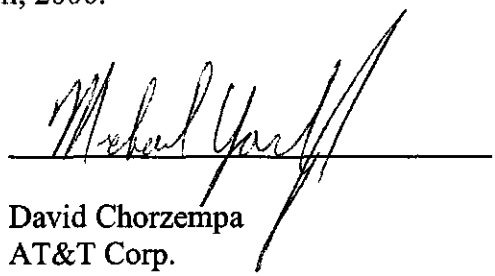
CERTIFICATE OF SERVICE

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 hand delivery at the brief exchange or by U.S. Mail, this 24th day of April, 2000.



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