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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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1999

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

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

Intermedia Communications, Inc. ("Intermedia"), Telecommunications Resellers Association ("TRA") and Time Warner Telecom of Ohio, L.P. ("TWTC-Ohio") respectfully submit this reply brief regarding the effect of the D.C. Circuit Court's decision on this proceeding.

SUMMARY STATEMENT OF POSITION

The state of the law now, as it was before the Federal Communications Commission's ("FCC's") February 26, 1999, Reciprocal Compensation Ruling in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP Bound Traffic*, 14 FCC Rcd 3689 (1999) (the "Reciprocal Compensation Ruling"), is that dial up calls to internet service providers ("ISPs") are local traffic. As local traffic, ISP calls are subject to the reciprocal

compensation obligations of § 251(b)(5) of the Telecommunications Act of 1996 (the “Act”).

The ILECs¹ attempts to avoid this conclusion are unavailing. Their contention that *Bell Atlantic Tel. Companies v. Federal Communications Commission, et al.*, 2000 WL 273383 (D.C. Cir. Mar. 24, 2000) (hereinafter "D.C. Circuit Court decision") failed to render a substantive conclusion on the nature of ISP traffic ignores the *effect* of the D.C. Circuit Court decision. The D.C. Circuit vacated the Reciprocal Compensation Ruling. Absent the Reciprocal Compensation Ruling, and instructed by the comments of the D.C. Circuit, the state of the law is clear: ISP traffic is local traffic subject to reciprocal compensation under the Act.

The ILECs also contend that other FCC precedent, up to and including the FCC’s decision in *In the Matter of Deployment of Wire Line Services Offering Advanced Telecommunications Capability*, CC Dockets Nos. 98-147, et al., (Dec. 23, 1999) (the “DSL Ruling”), dictate treating ISP traffic as exchange access for purposes of reciprocal compensation. The ILECs had made this argument before the Reciprocal Compensation Ruling and it had been rejected by state commissions and federal courts. Moreover, the D.C. Circuit explicitly addressed the very precedent relied on by the ILECs and found that, as support for the contention that ISP traffic amounts to exchange access, an argument based on the FCC precedent and the ESP exemption “is not very compelling.” *D.C. Circuit Court decision*, * 13.

The ILECs also suggest that the D.C. Circuit somehow created a third category of traffic that is neither local nor exchange access for which this Commission might create a

¹ ILECs refer to Ameritech Ohio (“Ameritech”); Cincinnati Bell Telephone Company (“CBT”); and GTE North Incorporated (“GTE”).

new compensation mechanism. This contention directly contradicts not only the governing statute and the D.C. Circuit Court decision, but also the conclusion of the FCC that the two categories of exchange access and telephone exchange service “occupy the field.” *D.C. Circuit Court decision*, * 14. ISP traffic must either be exchange access or local traffic. Because it is local traffic, reciprocal compensation *must* apply. § 251(b)(5).

Finally, the ILECs wrongly contend that this Commission’s previous rulings finding ISP traffic to be local traffic subject to reciprocal compensation are of no value in the current proceeding. While this Commission’s role primarily involved the interpretation and enforcement of contractual relationships, the Commission went beyond the contractual language to determine the state of the law at the time the contracts were executed. The Commission correctly found that ISP traffic was local traffic subject to reciprocal compensation. The law found by this Commission in those cases has not changed, and, in fact, was affirmed by the D.C. Circuit Court decision vacating the Reciprocal Compensation Ruling. Accordingly, the findings of this Commission in its previous decisions requiring reciprocal compensation for ISP traffic apply with full force in this proceeding.

In light of the unavoidable conclusion that ISP traffic is local traffic under current law, this Commission has no reason to continue in its review of the issues identified in 4(b) through (e) in its Entry of March 15, 2000. Because ISP traffic is local, § 251(b)(5) *requires* reciprocal compensation for ISP traffic. The Commission may not consider other compensation mechanisms, and there is no reason to take evidence relevant only to such alternative compensation mechanisms. Moreover, because the two categories of local traffic and exchange access occupy the field, this Commission should not attempt to

separate out ISP traffic from other local traffic in order to treat ISP traffic differently. Finally, because neither an alternate compensation mechanism nor a separation of ISP traffic is possible, a discussion of the policy and competitive implications of either is irrelevant and outside the appropriate scope of this Commission's consideration.

Accordingly, the Commission should affirm its previous findings treating ISP traffic as local and prospectively adopt reciprocal compensation as the intercarrier compensation system for ISP traffic.

**THE STATE OF THE LAW IS THAT ISP
TRAFFIC IS LOCAL TRAFFIC SUBJECT TO
RECIPROCAL COMPENSATION
OBLIGATIONS UNDER § 251(b)(5)**

The D.C. Circuit Court decision vacated the Reciprocal Compensation Ruling. *See D.C. Circuit Court decision*, * 15. To vacate a decision means “to annul; to cancel or rescind; to declare, to make, or to render void; to defeat; to deprive of force; to make of no authority or validity; to set aside.” *Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 (D.C. Cir. 1983). When a decision or ruling is vacated, it is void “in its entirety.” *See Owner-Operator Independent Drivers Assoc., Inc. v. Bissell*, 2000 WL 390522, at *15 (6th Cir. 2000) (in dissent). Moreover, a vacated decision is void *ab initio*, having “the effect of reinstating the rules previously in force.” *Civil Aeronautics Board*, at 797. Accordingly, as a result of the D.C. Circuit's vacatur of the Reciprocal Compensation Ruling, the Reciprocal Compensation Ruling is set aside and void. Absent the Reciprocal Compensation Ruling, the overwhelming weight of authority and precedent, entirely ignored by the ILECs, demonstrates that ISP traffic is local traffic. This Commission reviewed the relevant law in its earlier reciprocal compensation decisions. *See In the Matter of the Complaint of ICG Telecom Group, Inc.*

v. Ameritech Ohio, Case No. 97-1557-TP-CSS, (Opinion and Order August 27, 1998); *In the matter of the Complaint of MCI Metro Access Transmission Services, Inc. v. Ameritech Ohio*, Case No. 97-1723-TP-CSS (Opinion & Order October 14, 1998); *In the Matter of the Complaint of Time Warner Communications of Ohio, L.P. v. Ameritech Ohio*, Case No. 98-308-TP-CSS (Opinion & Order October 14, 1998) (“TWTC Oct. 14, Order”). In those decisions, the Commission held that ISP traffic was local traffic subject to reciprocal compensation under the Act. *See In the Matter of the Complaints of ICG Telecom Group, Inc., MCI Metro Access Transmission Services, Inc., and Time Warner Telecom of Ohio, L.P. v. Ameritech Ohio*, at 5 (Entry on Rehearing May 5, 1999) (holding that the Commission’s decisions that ISP traffic was local traffic subject to reciprocal compensation “were in accord with existing FCC authority.”).

The vast majority of other state commissions also have held that ISP traffic is local traffic subject to reciprocal compensation under an analysis similar to that applied by this Commission.²

Moreover, each of the ten federal courts to consider the issue, including the United States Courts of Appeal for the Fifth, Seventh and Ninth Circuits, and District Courts in Washington, Texas, Illinois, Oregon, Michigan, Alabama and Oklahoma, has upheld the state commissions’ determination that ISP traffic is local traffic subject to reciprocal compensation.³ One of these decisions, that of the Fifth Circuit, came after the

² States that have found ISP traffic to be local traffic subject to reciprocal compensation include: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

³ *See Illinois Bell Tel. Co. d/b/a Ameritech Illinois v. WorldCom Technologies, Inc. et al.*, 179 F.3d 566 (7th Cir. 1999); *U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999); *Southwestern Bell Tel. Co. v. Public Utility Comm’n of Texas, et al.*, No. 98-50787, 2000 WL 332062 (5th

D.C. Circuit Court decision vacating the Reciprocal Compensation Ruling, and explicitly rejected many of the arguments relied on by the ILECs and the FCC. *See Southwestern Bell Tel. Co. v. Public Utility Commission of Texas, et al.*, 2000 WL 332062, *7 (5th Cir. Mar. 30, 2000). Specifically, the Fifth Circuit held that an end-to-end analysis was inappropriate and that ISP calls terminate locally. *See Id.* * 9.

Finally, the reasoning behind this overwhelming weight of authority finds support in the analysis of the D.C. Circuit Court decision. The D.C. Circuit considered the FCC's own definitions of local traffic and termination and found that dial up calls to ISPs fit these definitions. *See D.C. Circuit Court decision* * 8. The FCC defines traffic as local if it "originates and terminates within a local service area." 47 C.F.R. § 51.701(b)(1). The FCC considers a call terminated when switched traffic is delivered to the called party's premises. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16015 (1996); 47 C.F.R. § 51.701(d). The D.C. Circuit found that the ISP "is clearly the called party" for purposes of this definition. *See D.C. Circuit Court decision*, * 9. Accordingly, the D.C. Circuit indicated that a call to an ISP falls within the definition of local traffic. *See Id.*

Moreover, the D.C. Circuit indicated that ISP traffic could not fit within the definition of exchange access, the only statutory alternative to classification as local traffic. *See Id.* * 12-13. Exchange access, the court noted, is a call offered "for the purpose of the origination or termination of telephone toll services." 47 U.S.C. §

Cir. Mar. 30, 2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications*, NO. 98-CV-468-K(J), Order (N.D. Okla. Oct. 1, 1999); *Michigan Bell Tel. Co. v. MFS Intelenet, Inc.*, No. 5:98 CV 18, 1999 U.S. Dist. LEXIS 12093 (W.D. Mich. Aug. 2, 1999); *BellSouth Telecommunications, Inc. v. ITC DeltaCom Communications, Inc.*, 62 F.Supp.2d 1302 (M.D. Ala. Aug. 18, 1999) *aff'd on recon.* (M.D. Ala. Nov. 15, 1999); *U.S. West Communications, Inc. v. WorldCom Technologies, Inc., et al.*, 31 F.Supp.2d 819 (D. Or. Dec. 10, 1998).

153(16). The calls for which reciprocal compensation are due are calls where an ISP connects to the local switched network for the purpose of offering information services. Accordingly, ISP traffic cannot be anything other than local traffic subject to reciprocal compensation.

These authorities, combined with the precedent of this Commission, demonstrate that under the current state of the law, ISP traffic is local traffic for which reciprocal compensation is required under § 251(b)(5).

**THE ILECS' ARGUMENTS AGAINST
TREATING ISP TRAFFIC AS LOCAL ARE
UNAVAILING**

The ILECs offer a variety of arguments in an attempt to obfuscate or avoid the state of the law. The ILECs' arguments, however, are legally insupportable and fail to demonstrate any justification or authority on which this Commission could do other than affirm its previous decisions finding ISP traffic to be local and conclusively establish reciprocal compensation as the intercarrier compensation mechanism for ISP traffic.

A. ISP Traffic Is Local Traffic.

The ILECs make much of the fact that the D.C. Circuit, while vacating the Reciprocal Compensation Ruling, made no independent holding on the substantive issue of whether reciprocal compensation was required for ISP traffic. (Ameritech Ohio's Initial Brief ("Ameritech Br.") at 2; Initial Brief Of GTE North Incorporated ("GTE Br.") at 3.) The D.C. Circuit's role in reviewing the Reciprocal Compensation Ruling was not to make its own determination with regard to reciprocal compensation. Rather, it was focused on whether the Reciprocal Compensation Ruling could be affirmed under the applicable standards of review. In fulfilling its duty, the D.C. Circuit vacated the

Reciprocal Compensation Ruling “for want of reasoned decision-making.” *D.C. Circuit Court decision*, * 5. Once vacated by the D.C. Circuit, the Reciprocal Compensation Ruling is void. The result is not that there is *no law* with regard to the treatment of ISP traffic, as the ILECs would have it, but rather that the law on the treatment of ISP traffic is as it was prior to and without the Reciprocal Compensation Ruling. The state of the law absent the Reciprocal Compensation Ruling is that ISP traffic is local traffic subject to the reciprocal compensation obligations under § 251(b)(5). This is so even though the D.C. Circuit’s role did not include a review and statement of the law in the absence of the Reciprocal Compensation Ruling. The D.C. Circuit dressed down the only, and presumably the most able, effort by an agency in support of the claim that § 251(b)(5) does not apply to ISP traffic. The analysis of the D.C. Circuit clearly points in the direction that ISP traffic is local traffic subject to reciprocal compensation and supports other courts’ and state commissions’ decisions to that effect. Thus, § 251(b)(5), which always appeared to apply to ISP traffic, now manifestly does so.

**B. FCC Precedent Does Not Dictate That
ISP Traffic Is Exchange Access.**

In support of their contention that the law does not currently treat ISP traffic as local traffic, the ILECs offer a rehash of FCC precedent that they claim demonstrates the FCC’s long history of treating ISP traffic as exchange access. (Ameritech Br. at 2, n.4; Cincinnati Bell Telephone Company’s Initial Brief (“CBT Br.”) at 5-10.) The ILECs’ claims, however, fail for three independent reasons: (1) the FCC, as this Commission found and the FCC itself admits, historically treated ISP traffic as *local* traffic, not exchange access; (2) the D.C. Circuit explicitly rejected the FCC precedent cited by the

ILECs as authority supporting an argument that ISP traffic should be considered exchange access; and (3) the post-Reciprocal Compensation Ruling precedent cited by the ILECs is irrelevant to the issues in this proceeding.

Prior to the Reciprocal Compensation Ruling, the FCC consistently treated ISP traffic as local. *See Reciprocal Compensation Ruling*, ¶ 24. Analyzing its own precedent in the Reciprocal Compensation Ruling, the FCC noted that it had a “longstanding policy of treating [ISP] traffic as local.” *Id.* The FCC summarized its historical treatment of ISP traffic stating:

The Commission’s treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs. Since then, the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. . . . *the Commission has treated ISP-bound traffic as though it were local.*

Id. at ¶ 23 (emphasis added).

In rendering its initial decisions on reciprocal compensation, this Commission examined the FCC authority available at the time the interconnection agreements were negotiated and found that a determination that ISP traffic should be treated as local for purposes of reciprocal compensation “is in accord with existing FCC authority.” *TWTC Oct. 14, Order*, pp. 18-19. The Commission noted that “[a]t this time, the overwhelming weight of FCC precedent reflects that ISPs are end users of telecommunications services provided by ILECs and competitive LECs and that calls to ISPs’ local numbers are not subject to interexchange access charges.” *Id.*, p. 21. After determining that reciprocal compensation should apply to ISP traffic, the Commission reiterated that its finding was

based, in part, on “FCC precedent at the time [the] agreement was negotiated.” *Id.* at p. 23.

In relying on FCC precedent, the ILECs appear to have missed the boat entirely on the D.C. Circuit’s rejection of the FCC’s reasoning. The ILECs suggest that all the FCC need do is offer the same conclusion supported by an improved articulation of its reasoning to satisfy the D.C. Circuit. (Ameritech Br. at 2, 4; CBT Br. at 3; GTE Br. at 3.) This contention implies that the D.C. Circuit failed to understand the FCC’s reasoning and has requested that it be made more clear. That is not the case. The D.C. Circuit clearly understood the FCC but found that its reasoning failed to support the conclusion it offered. *See D.C. Circuit Court decision*, * 15. One of the primary elements of the FCC’s reasoning that was considered and rejected by the D.C. Circuit was the very set of FCC precedents now relied on once again by the ILECs. *See D.C. Circuit Court decision*, * 10, 12-13.

The D.C. Circuit explicitly considered the cases in which the FCC had previously applied an end-to-end analysis to long distance traffic, as well as cases in which the FCC had discussed the ESP exemption. *See D.C. Circuit Court decision*, * 10, 12-13. The D.C. Circuit found that these cases were not on point and distinguishable. *See D.C. Circuit Court decision*, * 10. Moreover, the D.C. Circuit explicitly held that an argument that the ESP exemption demonstrates that the FCC always has treated ISP traffic as exchange access is “not very compelling.” *See D.C. Circuit Court decision*, * 13. Any claim by the ILECs now that this FCC precedent supports their position is directly precluded by the D.C. Circuit Court decision.

The ILECs also seek support from the DSL Ruling, another FCC ruling found by the D.C. Circuit Court not to support the FCC's decision in the Reciprocal Compensation Ruling. (Ameritech Br. at 3; CBT Br. at 4); *see D.C. Circuit Court decision*, * 14. The DSL Ruling, however, is irrelevant to the issue of the appropriate classification of ISP traffic. Instead, the DSL Ruling held only that "always-on" dedicated DSL connections to an ISP can be exchange access. *See DSL Ruling*, at ¶ 35. Because a dedicated DSL connection is not a circuit-switched call, as is the case with a dial up connection to an ISP, the FCC's regulatory treatment of such DSL connections does not influence the classification of ISP dial up traffic. *See GTE Tel. Operating Cos.* 13 FCC Rcd 22466, ¶ 2 (1998).

Accordingly, the ILEC's reliance on FCC precedent is misplaced. In light of the D.C. Circuit Court decision, the FCC precedent cited by the ILECs does not support their contention that ISP traffic should be treated as anything other than local traffic, subject to § 251(b)(5) reciprocal compensation.

C. There Are Only Two Types Of Traffic Under The Act.

The ILECs argue that even if ISP traffic is not exchange access, it still may be treated differently than other local traffic and exempted from the reciprocal compensation requirements of § 251(b)(5). (Ameritech Br. at 6-7; CBT Br. at 17-18.) The ILECs' position, however, contradicts the governing statute, the D.C. Circuit Court decision, and even the conclusion of the FCC.

The Act contemplates two types of telecommunications: exchange access (long-distance) and telephone exchange service (local). 47 U.S.C. §§ 153(16), (47). Reciprocal compensation is required for the latter. 47 CFR § 51.701(a). The D.C.

Circuit recognized that only two possible classifications existed when it determined that the FCC's failure to explain which of the two classifications applied to ISP traffic was an independent ground requiring vacatur of the Reciprocal Compensation Ruling. *See D.C. Circuit Court decision*, * 13-14. Moreover, the FCC itself conceded that the two classifications of exchange access and telephone exchange service occupied the field and constituted the only two possibilities. *See D.C. Circuit Court decision*, * 14.

Accordingly, if traffic is not exchange access, it must, by definition, be local traffic, and local traffic must, by statute, be subject to reciprocal compensation under § 251(b)(5). Because ISP traffic is not exchange access, but rather is local traffic, the Commission need not investigate alternatives to reciprocal compensation or attempt to separate ISP traffic from other local traffic.

**D. This Commission's Previous Decisions
Apply In This Proceeding.**

Finally, the ILECs contend that this Commission must consider the issue of reciprocal compensation for ISP traffic in a relative vacuum, arguing that the Commission's previous decisions addressed only the specific contractual language in each case. (CBT Br. at 14; GTE Br. at 4.) Although in each of its previous decisions determining ISP traffic to be local traffic, the Commission was interpreting and enforcing a specific interconnection agreement, the Commission went far beyond a contract-interpretation role and analyzed the nature and proper classification of ISP traffic as well as the status of federal law at the time the agreements were executed. In fact, the Commission specifically held that "[a]t this time, the overwhelming weight of FCC precedent reflects that ISPs are end users of telecommunications services provided by ILECs and competitive LECs and that calls to ISPs' local numbers are not subject to

interexchange access charges.” *TWTC Oct. 14, Order*, p. 21. The findings of the Commission in its previous cases that ISP traffic is local traffic subject to reciprocal compensation is appropriate precedent for this Commission to affirm. This is particularly true given the overwhelming and consistent weight of authority supporting the Commission’s earlier findings.

**IN LIGHT OF THE D.C. CIRCUIT’S
DECISION, THE COMMISSION HAS NO
REASON TO CONSIDER THE ISSUES
DESCRIBED AS 4 (b) THROUGH (e) IN THE
ENTRY OF MARCH 15, 2000**

As discussed more extensively in the initial Joint Brief of Intermedia Communications, Inc., Telecommunications Resellers Association and Time Warner Telecom of Ohio, L.P. Regarding The Effect Of The D.C. Circuit Court’s Decision On This Proceeding And Request For Summary Judgment (“Initial Joint Brief”), in light of the *D.C. Circuit Court decision* and the current status of the law, this Commission has no reason to consider the issues described as 4(b) through (e) in the Entry of March 15, 2000. ISP traffic is local. There is no possibility for a third category of traffic and, thus, no reason to attempt to segregate ISP traffic from other local traffic. Moreover, reciprocal compensation is the required method of intercarrier compensation for local, and thus ISP, traffic. Accordingly, the only legally permissible action by the Commission in this proceeding is to summarily determine that ISP traffic is local and that reciprocal compensation applies. The Commission’s consideration of (1) a segregation of ISP traffic from other local traffic; (2) cost elements distinguishing ISP traffic from other local traffic; (3) alternative compensation mechanisms for ISP traffic; and (4) the policy and competitive implications of all approaches, are now precluded in light of the *D.C.*


Circuit Court decision. It follows as well that the unduly burdensome, if not intentionally harassing, discovery served by the ILECs on the CLECs is irrelevant. CLECs should not be required to respond to the discovery in light of the D.C. Circuit's decision.

CONCLUSION


The state of the law is that ISP traffic is local traffic. ISP traffic, as local traffic, is subject to reciprocal compensation under the Act. In light of these facts, no further inquiry as outlined by the Commission is warranted or justified. Accordingly, the Commission should affirm its previous findings treating ISP traffic as local traffic subject to reciprocal compensation and prospectively adopt reciprocal compensation as the intercarrier compensation system for ISP traffic.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing JOINT REPLY BRIEF OF INTERMEDIA COMMUNICATIONS INC., TELECOMMUNICATIONS RESELLERS ASSOCIATION AND TIME WARNER TELECOM OF OHIO, L.P. REGARDING THE EFFECT OF THE D.C. CIRCUIT COURT'S DECISION was served by Internet email upon all the parties included on the Commission's electronic distribution list used for Entries in this proceeding and upon all counsel listed on the attached Service List by U.S. Mail, this 24th day of April, 2000.


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