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**

REPLY BRIEF OF MCI WORLDCOM, INC.

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The parties to this case have been asked to advise the Commission as to the impact of the D.C. Circuit Court of Appeals' March 24, 2000 decision in *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 Circuit Court decision] on this generic arbitration proceeding and the issues identified for resolution in the March 15, 2000, Entry. Initial briefs were filed by most of the parties, including MCI WorldCom, Inc.(MWCOM), on April 14, 2000, and MWCOM hereby submits its reply to those initial briefs.

I. THE CIRCUIT COURT DECISION IS MORE THAN A "BUMP IN THE ROAD" TO A COMMISSION FINDING THAT TRAFFIC TERMINATING TO ISP PROVIDERS IS NOT LOCAL TRAFFIC SUBJECT TO RECIPROCAL COMPENSATION.

Ameritech Ohio (Ameritech), Cincinnati Bell Telephone (CBT) and GTE North, Incorporated (GTE) have all taken the position that the Circuit Court decision did nothing more than ask the FCC for a better explanation of why traffic terminated to ISP providers is not local traffic, and that all other FCC pronouncements on the subject, whether preceding the Declaratory

Ruling[1] vacated by the Circuit Court or issued subsequent to that Ruling, remain intact and support their position. Indeed, Ameritech has gone so far as to state that the Circuit Court decision is nothing more than a "bump in the road"; the "road" apparently being the Commission's path to establishing a compensation mechanism other than reciprocal compensation based on the ILEC's TELRIC costs for traffic terminated to ISP providers. Continuing with that analogy, MWCOM would submit that the Circuit Court decision is more akin to a bridge that has been washed out, rendering the road impassable.

The ILECs first argue that the D.C. Circuit "reached no substantive conclusion" as to whether ISP-bound traffic should be subject to a particular compensation scheme but rather asked the FCC for a "satisfactory explanation" of its end-to-end analysis (Ameritech comments, 2; CBT, 2-3; GTE, 2). While it is true that the court never flatly told the FCC how ISP traffic should have been categorized, it is not hard to comprehend the direction in which the court was heading with such statements as: "Calls to ISPs appear to fit this definition [of "termination"]: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party'"; and "even if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation". (Circuit Court decision, 5, 6) With all due respect to Common Carrier Bureau Chief Lawrence Strickling, whose statements were attached to the Ameritech comments, the Circuit Court certainly implied that the FCC made a mistake in its reasoning. In light of the

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[1]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).

court's conclusion that "the extension of 'end-to-end' analysis from jurisdictional purposes to the present context yields intuitively backwards results" (*id.*, 5), the FCC has definitely been given direction for its decision on remand.

Furthermore, the Circuit Court has specifically cast doubt on the FCC's prior, and subsequent, conclusions that traffic bound to ISPs should be considered interstate in nature. Indeed, the FCC's illogical reasoning on this subject, both in the Declaratory Ruling and from one order to the next, was a factor in the Court's decision to vacate and remand the Declaratory Ruling. For example, the Court noted that the cases relied on by the FCC to support its analysis of the ISP communication on an end-to-end basis were not on point. The first case cited by the FCC, *Teleconnect Co. v. Bell Telephone Co.*, 10 FCC Rcd. 1626 (1995), *aff'd sub nom Southwestern Bell Telephone Co. v. FCC,* 116 F.3d. 593 (D.C. Cir. 1997), involved an 800 call to a long-distance recipient and other one, *In the Matter of the Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation,* 7 FCC Rcd 1619 (1992) concerned voicemail service, yet in the *Access Charge Reform Order*, 12 FCC Rcd. at 16133, the FCC had characterized ISPs as "information service providers" whose use of the public switched network may not be "analogous to IXCs" (*id.*). In the same order, the FCC also referred to calls to ISPs as "local" (*id.*, 6). Thus the Court undermined the FCC's analogies between traffic terminated to ISP providers and calls which are handed off to an IXC by the local exchange carrier.

The Court next referred to the series of FCC decisions exempting Enhanced Service Providers (ESPs) from the access charge system as "something of an embarrassment to the Commission's present ruling", especially in light of the both FCC's language in the *Access Charge Reform Order* cited above and the statement in the FCC's brief in the 8th Circuit appeal of the

Order that "a call to an information service provider is really like a call to a local business that then uses the telephone to order wares to meet the need".(*id.*, 7). The Court was particularly unimpressed with the FCC's attempt to "flip the argument on its head" by arguing that ESPs "in fact use interstate access service; otherwise, the exemption would not be necessary" (*id.*).

Ameritech's and CBT's attempts to the contrary, the Circuit Court has now laid to rest any argument that the same series of FCC decisions exempting ESPs from the access charge regime can be used to support a state commission decision that calls to ISPs are non-local and not subject to reciprocal compensation (Ameritech brief, 2; CBT brief, 5-14). Furthermore, the FCC's language in *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 98-147 *et. al.* (Dec. 23, 1999), cited by both Ameritech and CBT, is nothing more than a restatement of the FCC's erroneous conclusion in the Declaratory Ruling ("we conclude that typically ISP-bound traffic does not originate or terminate within an exchange and, therefore, does not constitute telephone exchange service within the meaning of the Act" *Advances Services,* ¶16). Obviously this statement does not address either the Circuit Court's observations, or the FCC's conclusions in the *Access Charge Reform* order, that calls to ISPs terminate with the ISP, the "called party". Ameritech's comment that the FCC "effectively responded" to the Circuit Court's concerns is simply erroneous (Ameritech brief, 3). The *Advanced Services* decision has no more validity for the purposes of this investigation than the Declaratory Ruling.

As MWCOM explained in its initial brief, the Circuit Court decision validates this Commission's prior findings that FCC precedent supports the classification of ISP bound traffic as local for reciprocal compensation purposes (MWCOM brief, 3). The Commission should

continue upon that course and refuse to pursue the direction which is now a dead end.

II IT IS UNNECESSARY FOR THE COMMISSION TO CONSIDER THE ISSUES CONTAINED IN THE MARCH 15, 2000, ENTRY.

Undaunted by the obvious implications of the Circuit Court decision, the ILECs have argued that the Commission should march ahead with this generic investigation without modification of the March 15, 2000 list of issues. These recommendations, of course, are based on based on the ILECs' conclusions that the Circuit Court decision should have no impact on this Commission's determination to establish a compensation mechanism other than reciprocal compensation for ISP bound traffic. Without repeating the arguments contained in its initial brief, MWCOM would submit that this "business-as-usual" approach advocated simply flies in the face of the Circuit Court's clear directive to the FCC to re-evaluate the nature of ISP calls as being "largely interstate", since to the Court such traffic appeared to be no different than other forms of local traffic.

As noted by Ameritech at footnote 5 of its initial brief, "the dispositive question is whether IPS traffic is local or not local". The FCC's conclusion in the Declaratory Ruling that the answer is "not local" has been cast in doubt, and there is no reason for the Commission to extend its inquiry beyond a finding that ISP traffic is "local". Although CBT has argued otherwise, the Commission at this point is bound by its Local Service Guidelines and the Telecom Act to order the ILECs and the NECs to pay TELRIC-based reciprocal compensation for such traffic. The ILECs have presented no compelling reason that the Commission should not follow its own precedent and summarily decide resolve this case on the grounds that ISP bound traffic is local for

reciprocal compensation purposes. All of the other issues in the March 15, 2000, Entry are now irrelevant.

Respectfully submitted,

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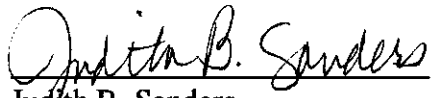
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply Brief was served on all counsel listed on the attached Service List by hand delivery or U.S. Mail, postage prepaid, this 24th day of April, 2000.



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