

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Commission Investigation)
Into the Treatment of Reciprocal)
Compensation for Internet Service Provider)
Traffic)

Case No. 99-941-TP-ARB

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AT&T'S REPLY BRIEF ON EFFECT OF THE D.C. CIRCUIT ISP DECISION

AT&T Communications of Ohio, Inc. and TCG Ohio hereby file this reply to the briefs of Ameritech Ohio, Cincinnati Bell Telephone, and GTE North (collectively referred to as "the ILECs").

I. Introduction

The initial briefs filed in this case make one thing absolutely clear: the ILECs can posit no legally-sustainable rationale for this Commission to find that calling to internet service providers ("ISP") is anything but local except the same rationales that the FCC relied upon in its now vacated Declaratory Ruling.¹ The essential point the ILECs ignore, however, is that each and every one of those rationales was rejected by the D.C. Circuit when it vacated that ruling in Bell Atlantic Telephone Companies v. FCC, Case No. 99-1094, 2000 U.S. App. LEXIS 4685 (D.C. Cir. March 24, 2000). Indeed, the ILEC arguments have been rejected by each and every judicial body that has heard them.

Although it is true that the D.C. Circuit did not specifically hold that ISP traffic is local, its **findings** undercut every argument raised by both the FCC and the ILECs to support a holding that ISP traffic is anything but local. In their briefs here, the ILECs raise nothing new, but simply rehash the very arguments the D.C. Circuit found wholly

¹ In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Notice of Proposed Rulemaking in Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-98, 14 FCC Rcd. 3689.

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unpersuasive. In short, the findings in the Bell Atlantic case compel this Commission, as well as the FCC, to hold as a matter of law that ISP-bound traffic is local, for which the FCC and this Commission's pricing rules mandate reciprocal compensation.²

II. The D.C. Circuit Decision Rejected Each and Every Rationale That Could Support a Finding that ISP-Bound Traffic is Anything But Local.

As noted at length in AT&T's initial brief, by its holding and findings, the Bell Atlantic Court rejected each and every possible rationale for finding that ISP-bound traffic is anything but local:

- The Court found that under the law as it currently stands, which this Commission is bound to enforce, the legal determination of whether or not ISP-bound traffic is local and subject to reciprocal compensation is answered by the more limited question of whether or not such traffic constitutes "telephone exchange service" traffic (i.e., local) for which reciprocal compensation is mandated or "exchange access" (i.e., interstate). Interpreting the FCC's own rules and orders, the Bell Atlantic Court found that these two categories "occupy the field."
- The Court found that calls to ISPs do not fall under the definition of "exchange access." Citing to 47 U.S.C. § 153(16), the Court noted that "[a] call is 'exchange access' if offered 'for the purpose of the origination or termination of telephone toll services.'" Bell Atlantic, at *25. The Court, therefore, agreed with MCI that "ISPs provide information service rather than telecommunications; as such 'ISPs connect to the local network 'for the purpose of' providing information services, not originating or terminating telephone toll service.'" Id., at *25 (citations omitted).
- The Court found that the characteristics of calls to ISPs more closely resemble other local calls as opposed to long distance calls. As the Court explained: "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 service to provide their goods or services to their customers." Id., at *18 (citations omitted).
- Most importantly, the D.C. Circuit explicitly rejected the FCC's argument (supported by the ILECs here) that an ISP-bound call does not "terminate" at the ISP: "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." Id. The legal effect of this ruling is that because ISP-bound traffic "terminates" at the ISP, that traffic falls

² See 47 U.S.C. § 251(b)(1); 47 C.F.R. §§ 51.701-711. See also Ohio Local Service Guidelines IV.D.1-2.

squarely under the FCC's definition of telephone exchange services³ and local traffic. The Court of Appeals explained that by 47 C.F.R. § 51.701(b)(1) the FCC has defined "telecommunications traffic" as local if it "originates and terminates within a local service area" and that the FCC has defined "termination" as "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." Based on these definitions, the Court found that "[c]alls 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.'" *Id.*, at *14-15.

Despite these watershed findings, the ILECs continue to posit arguments based on the very assumptions rejected by the D.C. Circuit. CBT and Ameritech go on at length arguing that the FCC's previous decisions regarding ISP traffic and the FCC's grant of an ESP exemption to ISPs somehow prove that ISP-bound traffic is interstate. The D.C. Circuit could not have disagreed more. That court conducted an exhaustive review of the FCC's past precedents, including its grant of the ESP exemption to ISPs, and found that the reasoning in those decisions does not, as the ILECs allege, support a finding that ISP-bound traffic is interstate:

This classification of ESPs is something of an embarrassment to the [FCC's] present ruling. As MCI World-Com notes, the Commission acknowledged in the *Access Charge Reform Order* that "given the evolution in [information service provider] technologies and markets since we first established access charges in the early 1980s, it is not clear that [information service providers] use the public switched network in a manner analogous to IXC's [inter-exchange carriers]." It also referred to calls to information service providers as "local." And when this aspect of the *Access Charge Reform Order* was challenged in the 8th Circuit, the

³ A "telephone exchange service" is "a service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange areas operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47). Quite similarly, as noted, under 47 C.F.R. § 51.701(b)(1) "telecommunications traffic" is local if it "originates and terminates within a local service area."

Commission's briefwriters responded with a sharp differentiation between such calls and ordinary long-distance calls covered by the "end-to-end" analysis, and even used the analogy employed by MCI WorldCom here--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. When accused of inconsistency in the present matter, the Commission flipped the argument on its head, arguing that its exemption of ESPs from access charges actually confirms "its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary." FCC Ruling, 14 FCC Rcd at 3700 (P 16). This is not very compelling. Although, to be sure, the Commission used policy arguments to justify the "exemption," it also rested it on an acknowledgment of the real differences between long-distance calls and calls to information service providers. It is obscure why those have now dropped out of the picture.

Id., at *21-22 (emphasis added).

Then, in an attempted legal slight-of-hand, CBT and Ameritech cite to an FCC order post-dating the Declaratory Ruling (but issued prior to the D.C. Circuit's decision) in which the FCC found 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." Deployment of Wire Line Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147, et al., ¶ 16 (December 23, 1999) ("Advanced Services Order"). The ILECs claim that this precedent "remains the law" and overcomes the D.C. Circuit's vacatur of the Declaratory Ruling.

This argument strains credibility and is wrong as a matter of law. When the entirety of that subsequent order is read (and the footnotes and language extracted by the ILECs is replaced), it is abundantly clear that the FCC relied upon the holding and reasoning of its Declaratory Ruling in making its determination in the Advanced Services Order. In paragraph 16, for example, in language carefully omitted by the ILECs, the FCC first summarized its previous holdings at length and cited directly to the Declaratory

Ruling. Then, it clearly described its conclusions to be based on this past determination: “Consistent with this determination, we conclude that typically 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.” Id., at ¶ 16 (emphasis added). It certainly does not take a Blackstone or Learned Hand to know that if the Declaratory Ruling is no longer good law, then conclusions in later FCC orders that rely on that ruling and its flawed reasoning can no longer be valid.

Indeed, all of the FCC’s past and subsequent rulings on the issue of ISP-bound traffic are based on the reasoning that the D.C. Circuit found fatally flawed. All of these decisions rely upon the use of the FCC’s so called “end-to-end analysis,” which was specifically rejected by the D.C. Circuit as lacking a rationale basis. That analysis is based on the assumption that an ISP-bound call does not “terminate” at the ISP. As noted, the D.C. Circuit rejected the FCC’s argument that ISP-bound calls do not terminate at the ISP. Bell Atlantic, at *14-15. Since an ISP-bound call terminates at the ISP, the end-to-end analysis is no longer sustainable. The D.C. Circuit heard each and every possible argument that could possibly sustain the end-to-end analysis and found none compelling.

True, the D.C. Circuit stopped short of making the ultimate holding: that ISP traffic is local. It stopped short not because its findings do not lead to that inevitable conclusion, however. It did so because its standard of review so compelled it. As the D.C. Circuit explained, it is only authorized to review FCC decisions for their reasonableness. The Court is not authorized to displace the FCC in areas where Congress has given the FCC decision-making authority. Id., at *25-26. The fact the D.C. Circuit

was obligated to stop short of making a holding on the ultimate issue should not lead this Commission to treat the Bell Atlantic decision as merely perfunctory, as the ILECs argue. The Bell Atlantic Court went far beyond finding that the FCC needed merely to explain itself a little better, as the ILECs claim. To the contrary, the Court conducted a detailed legal and factual analysis of each of the arguments raised by the FCC and the ILECs. It conducted an exhaustive review of the past FCC precedents to which the ILECs cite here. And although the ILECs and the FCC surely blessed the Court of Appeals with lengthy briefs chocked-full with the same arguments the ILECs raise here, the Court of Appeals found no reasonable basis for the FCC's decision that ISP-bound traffic is interstate.

In all, the ILECs have failed to identify one legally-sustainable rationale that has not been rejected by the D.C. Circuit upon which the Commission could conclude that ISP-Bound traffic is interstate. The reason is obvious: none exists. On the other hand, the D.C. Circuit went out of its way to support the conclusion that ISP calls are local, as ISPs are "no different" from many businesses, such as pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies, which, similar to ISPs, primarily receive calls and use a variety of communication service to provide their goods or services to their customers.⁴

In conclusion, the Bell Atlantic decision leaves this Commission with no other allowable legal determination but to find that calls to ISPs are local. No possible rationale exists for finding ISP-bound traffic interstate that has not been wholly undercut

⁴ Indeed, the only new information the ILECs can cite to in support of their position is the hearsay statement of FCC staffer, Larry Strickling, who certainly does not have a vote on the issue and whose off-the-cuff statements are not binding upon this Commission or the FCC. (Ameritech Brief, Exhibit 2). The Commission should give this information the weight it deserves: none.

by the Bell Atlantic decision. The ILECs' briefs only serve to affirm this fact. The Commission should therefore grant summary judgment.

III. If ISP-Bound Calls Are Local Reciprocal Compensation is Mandated.

CBT is the only ILEC to argue here that "even if ISP traffic is 'local' the Commission is free to establish a different compensation scheme for ISP traffic." (CBT Brief, p. 17). This cannot be true. As the United States Supreme Court firmly established in AT&T v. Iowa Utilities Bd., 119 S. Ct. 721 (1999), the FCC has the authority to establish national pricing rules for the pricing of reciprocal compensation. Those rules are binding on this Commission and, like this Commission's own rules, mandate reciprocal compensation for traffic designated as local.⁵ As the D.C. Circuit itself held, if ISP-bound traffic is local, reciprocal compensation is "mandated." Citing directly to AT&T Corp. v. Iowa Utilities Bd., CBT correctly explained the binding effect of FCC rules: "if the FCC develops rules interpreting § 252(d) as it applies to ISP traffic, any such lawful rules would have to be honored." (CBT Brief, p. 17.) If the Commission properly finds that ISP-bound traffic is local, the FCC's pricing rules already mandate reciprocal compensation.⁶

IV. The Commission Should Limit Discovery in This Matter.

In its initial brief, AT&T described the onerous and overly burdensome discovery served by the ILECs in this case. That discovery goes far beyond the general policy-oriented questions posed by the Commission and seeks to discover each and every NECs "costs" in providing local service to ISPs.

⁵ See 47 U.S.C. § 251(b)(1); 47 C.F.R. §§ 51.701-711. See also Ohio Local Service Guidelines IV.D.1-2.

⁶ AT&T notes that if the Commission were to find that the D.C. Circuit decision does not compel a summary holding that ISP-bound traffic is local, the Commission should continue its investigation in this matter as it began.

The ILECs have failed to explain why this highly-detailed cost information is relevant to this policy case. AT&T notes that it answered every ILEC question that related to whether AT&T tracks ISP traffic separately or treats ISPs any differently than any other end-user customer. The answers to both these questions is "No" and should end the ILECs' inquiries. Instead, the ILECs continue to request detailed cost information.

The Commission never intended this generic policy case to be focused on the minutia of each NECs' costs. For example, the Commission posed the generic policy question of whether network configurations could vary the costs of a dial-up internet call. Obviously, this generic policy question can be easily answered based on the basic sets of knowledge and expertise already available to the ILECs and the NECs. The Commission should make this intent clear in any subsequent order extending this case.

CONCLUSION

For the reasons set forth above, and in AT&T's initial brief, the Commission should enter a summary order declaring ISP-bound traffic as local, for which reciprocal compensation is mandated.

Dated: April 24, 2000

Respectfully submitted,

AT&T COMMUNICATIONS OF OHIO, INC.

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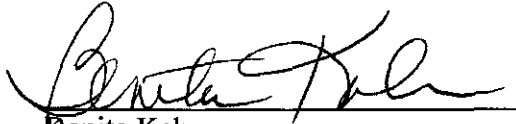
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CERTIFICATE OF SERVICE

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