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July 22, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 990874-TP (US LEC Complaint)

Dear Ms. Bayó:

Enclosed please find the original and fifteen copies of BellSouth Telecommunications, Inc.'s Answer and Response to Complaint of US LEC of Florida Inc., which we ask that you file in the above-referenced matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Michael P. Goggin

Michael P. Goggin

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket No. 990874-TP (US LEC Complaint)

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 22nd day of July, 1999 to the following:

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Michael P. Goggin

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of US LEC of Florida, Inc. against BellSouth Telecommunications, Inc. for Breach of Terms of Florida Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and Request For Relief	)	Docket No. 990874-TP
	)	Filed: July 22, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.'S ANSWER AND RESPONSE TO COMPLAINT OF US LEC OF FLORIDA, INC.

BellSouth Telecommunications, Inc., ("BellSouth"), hereby files its Answer and Response, pursuant to Rule 1.110, Florida Rules of Civil Procedure and Rules 25-22.037 and 25-22.0375, Florida Administrative Code, to the Complaint of US LEC of Florida, Inc. ("US LEC"). The Complaint seeks a ruling that dial-up access to the internet through an Internet Service Provider ("ISP") should qualify for reciprocal compensation under the terms of BellSouth's Interconnection Agreement with US LEC when such traffic originates with a BellSouth customer and passes through an ISP served by US LEC. There is no legal, factual or policy basis for such a ruling because, as the Federal Communications Commission ("FCC") has ruled, such traffic does not "terminate" on US LEC's network.[1] Indeed, the FCC found that such traffic is "largely interstate," not local.[2] As a result, it is clear that dial-up access to the internet through

[1] *See* Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 96-68, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic,* FCC Order No. 99-38 (Feb. 25, 1999) ("FCC Declaratory Ruling") attached as Exhibit A.

[2] *Id. See also, Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996,* Order, Massachusetts D.T.E. 97-116-C (May 19, 1999) (Reversing an earlier order requiring payment of reciprocal compensation on dial-up internet access through an ISP); *In the Matter of the Petition of Global NAPS, Inc. for Arbitration of*

an ISP is not subject to the reciprocal compensation requirements of the Interconnection Agreement between BellSouth and US LEC. Accordingly, US LEC is not entitled to the relief it seeks in this proceeding, and the Commission should dismiss its Complaint.

FIRST DEFENSE

The Complaint fails to state a cause of action for which relief can be granted.

SECOND DEFENSE

US LEC lacks standing to bring this Complaint.

THIRD DEFENSE

In response to the specific allegations of the Complaint, BellSouth states the following:

1. The Commission orders referenced in Paragraph 1 of the Complaint speak for themselves. The remainder of this Paragraph states conclusions to which no response is required.

2. BellSouth is without sufficient knowledge to admit or deny, and therefore denies the allegations of Paragraph 2 of the Complaint.

Interconnection Rates, Terms, Conditions and Related Arrangements With Bell Atlantic-New Jersey, Inc. Pursuant to Section 256(b) of the Telecommunications Act of 1996, Decision and Order, N.J.B.P.U. (July 12, 1999) (ISP-bound traffic is interstate and not subject to reciprocal compensation obligations); Order, *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services Inc.* (W.D.N.C. May 20, 1999)(remanding order of NCUC which had required payment of reciprocal compensation for dial-up internet traffic in wake of FCC's determination that such traffic is not local) attached as Exhibits B, C, and D, respectively.

3. BellSouth is without sufficient knowledge to admit or deny, and therefore denies the allegations of Paragraph 3 of the Complaint.

4. BellSouth admits the allegations of Paragraph 4 of the Complaint.

5. BellSouth admits that it is authorized to provide and provides local exchange services in the State of Florida. BellSouth is without sufficient knowledge to admit or deny, and therefore denies, the remaining allegations of Paragraph 5 of the Complaint.

6. 47 U.S.C. § 251(a), referred to in Paragraph 6 of the Complaint, speaks for itself.

7. BellSouth admits the allegations of Paragraph 7 of the Complaint.

8. 47 U.S.C § 251(b)(5), referred to in Paragraph 8 of the Complaint, speaks for itself. The remaining allegations in this Paragraph are conclusions to which no response is required.

9. 47 U.S.C. § 252, referred to in Paragraph 9 of the Complaint, and the Interconnection Agreement attached to the Complaint as Exhibit A, speak for themselves. BellSouth admits the remaining allegations of Paragraph 9.

10. The agreements attached to the Complaint as Exhibits B and C and the Commission Orders referred to in Paragraph 10 of the Complaint, speak for themselves. BellSouth admits the remaining allegations of Paragraph 10 of the Complaint.

11. The agreements referred to in Paragraph 11 of the Complaint speak for themselves.

12. Paragraph 12 of the Complaint states conclusions to which no response is required.

13. Paragraph 13 of the Complaint states conclusions to which no response is required.

14. The FCC orders referred to in Paragraph 14 of the Complaint speak for themselves. The remaining allegations in Paragraph 14 are conclusions to which no response is required.

15. The agreements referred to in Paragraph 15 of the Complaint speak for themselves.

16. The agreements referred to in Paragraph 16 of the Complaint speak for themselves.

17. The agreements referred to in Paragraph 17 of the Complaint speak for themselves.

18. Paragraph 18 of the Complaint states conclusions to which no response is required.

19. To the extent that Paragraph 19 of the Complaint alleges that dial-up access to the internet through an ISP constitutes local exchange service, BellSouth

denies the allegation. BellSouth is without sufficient knowledge to admit or deny, and therefore denies, the remaining allegations of Paragraph 19.

20. Paragraph 20 of the Complaint states a conclusion to which no response is required.

21. BellSouth admits that it provides tariffed local exchange services over its network to its customers, including ISPs. BellSouth is without sufficient knowledge to admit or deny, and therefore denies that allegation in Paragraph 21 of the Complaint that US LEC provides tariffed local exchange services to its customers, including ISPs. BellSouth denies the remaining allegations of Paragraph 21.

22. The agreements referred to in Paragraph 22 of the Complaint speak for themselves.

23. BellSouth admits that US LEC has delivered invoices to BellSouth which total at least $ 1,116,979.09 that purport to be for reciprocal compensation and late charges owed to US LEC. BellSouth denies the remaining allegations of Paragraph 23 of the Complaint.

24. BellSouth admits that it has paid US LEC at least $ 25,332.28 and that it has informed US LEC that dial-up access to the internet through an ISP is not local traffic and is not subject to the reciprocal compensation obligations of the agreements between US LEC and BellSouth. BellSouth denies the remaining allegations of Paragraph 24 of the Complaint.

25. BellSouth denies the allegations of Paragraph 25 of the Complaint.

26. Paragraph 26 of the Complaint states conclusions to which no response is required. To the extent any facts are alleged in Paragraph 26, they are denied.

WHEREFORE, having fully answered the allegations raised in the Complaint, BellSouth respectfully requests that the Complaint of US LEC of Florida, Inc. be dismissed as US LEC is not entitled to the relief sought.

Respectfully submitted this 22nd day of July, 1999.

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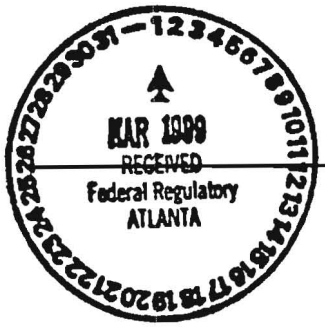

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68

Adopted: February 25, 1999 Released: February 26, 1999

NPRM Comment Date: April 12, 1999

NPRM Reply Date: April 27, 1999

By the Commission: Commissioner Ness issuing a statement; Commissioner Furchtgott-Roth not participating; and Commissioner Powell concurring and issuing a statement.

I. INTRODUCTION

1. The Commission and the Common Carrier Bureau (Bureau) have received a number of requests to clarify whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an Internet service provider (ISP).[1] Generally, competitive LECs (CLECs) contend that this is local traffic

[1] *See, e.g.*, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 61 Fed. Reg. 53,922 (1996); Petition for Partial Reconsideration and Clarification of MFS Communications Co., Inc. at 28; Letter from Richard J. Metzger, General Counsel for ALTS, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC (June 20, 1997) (ALTS Letter); Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic, CCB/CPD 97-30, DA 97-1399 (rel. July 2, 1997) (*ALTS Letter Notice*); Letter from Edward D. Young, Senior Vice President & Deputy General Counsel for Bell Atlantic, and Thomas J. Tauke, Senior Vice President Government Relations for Bell Atlantic, to Hon. William E. Kennard, Chairman, FCC (July 1, 1998). This question sometimes has been posed more narrowly, *i.e.*, whether an incumbent LEC must pay reciprocal

EXHIBIT A

subject to the reciprocal compensation provisions of section 251(b)(5) of the Communications Act of 1934 (Act), as amended by the Telecommunications Act of 1996.[2] Incumbent LECs contend that this is interstate traffic beyond the scope of section 251(b)(5). After reviewing the record developed in response to these requests, we conclude that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. This conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance. As explained below, parties may have agreed to reciprocal compensation for ISP-bound traffic, or a state commission, in the exercise of its authority to arbitrate interconnection disputes under section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic. In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.

II. BACKGROUND

2. Identifying the jurisdictional nature and regulatory treatment of ISP-bound communications requires us to determine how Internet traffic fits within our existing regulatory framework. We begin, therefore, with a brief description of relevant terminology and technology. We then turn to the specific matter of LEC delivery of ISP-bound communications.

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compensation to a competitive LEC (CLEC) that delivers incumbent LEC-originated traffic to ISPs. Because the pertinent provision of the 1996 Act pertains to all LECs, we examine this issue in the broader context. 47 U.S.C. § 251(b)(5).

For purposes of this Declaratory Ruling, we refer to providers of enhanced services and providers of information services as ESPs, a category which includes Internet service providers, which we refer to here as ISPs. As the Commission stated in the *Access Charge Reform Order*, the term "enhanced services," defined in the Commission's rules as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information," 47 C.F.R. § 64.702(a), is quite similar to "information services," defined in the Act as offering "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 16131-32 n.498 (1997) (*Access Charge Reform Order*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). *See also* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, at 11516 (1998) (*Universal Service Report to Congress*) (reiterating Commission's conclusion that the 1996 Act's definitions of telecommunications services and information services "essentially correspond to the pre-existing categories of basic and enhanced services").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.* (1996 Act).

A. The Internet and ISPs.

3. The Internet is an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world.[3] The Internet functions by splitting up information into "small chunks or 'packets' that are individually routed . . . to their destination."[4] With packet-switching, "even two packets from the same message may travel over different physical paths through the network . . . which enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the service where the information resides."[5]

4. An ISP is an entity that provides its customers the ability to obtain on-line information through the Internet. ISPs purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers.[6] Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area. The ISP, in turn, combines "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services."[7] Under this arrangement, the end user generally pays the LEC a flat monthly fee for use of the local exchange network and generally pays the ISP a flat, monthly fee for Internet access.[8] The ISP typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls.

5. Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services,[9] since 1983 it has exempted ESPs from the payment

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[3] 47 U.S.C. § 230; *see also Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2334 (1997).

[4] *Universal Service Report to Congress*, 13 FCC Rcd at 11531, 11532.

[5] *Id.*

[6] *Id.* at 11532.

[7] *Id.* at 11531.

[8] The Commission has acknowledged the significance of end users being able to place local, rather than toll, calls to ISPs, in analyzing, among other things, universal service issues. *See, e.g.*, Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 9142-43, 9159, 9160 (1997) (*Universal Service Order*); *Universal Service Report to Congress*, 13 FCC Rcd at 11541-42.

[9] *See, e.g.*, MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983) (*MTS/WATS Market Structure Order*) ("[a]mong the variety of users of access service are . . . enhanced service providers"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (*ESP Exemption Order*) (referring to "certain classes of exchange access users, including enhanced service providers"); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 2 FCC Rcd 4305, 4306 (1987) (ESPs, "like facilities-based interexchange carriers and resellers, use the local network to provide

of certain interstate access charges.[10] Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs.[11] Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices.[12] In addition, incumbent LEC expenses and revenue associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes.[13] ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable to end users.[14] In the *Access Charge Reform Order*, the Commission decided to maintain the existing pricing structure pursuant to which ESPs are treated as end users for the

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interstate services"); *Access Charge Reform Order*, 12 FCC Rcd at 16131-32 (information service providers "may use incumbent LEC facilities to originate and terminate interstate calls").

[10] The exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ESPs, that had been paying the generally much lower business service rates from the rate shock that would result from immediate imposition of carrier access charges. *See MTS/WATS Market Structure Order*, 97 FCC 2d at 715.

[11] Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2635 n.8, 2637 n.53 (1988) (*ESP Exemption Order*).

[12] *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. The subscriber line charge (SLC) is an access charge imposed on end users to recover at least a portion of the cost of the interstate portion of LEC facilities used to link each end user to the public switched telephone network (PSTN).

[13] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Notice of Proposed Rulemaking, 4 FCC Rcd. 3983, 3987-88 (1989).

[14] *See* 47 C.F.R. § 69.5(a) ("End user charges shall be computed and assessed upon public end users, and upon providers of public telephones. . . ."); *see also* 47 C.F.R. § 69.5(c) ("Special access surcharges shall be assessed upon users of exchange facilities that interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not assessed upon such interconnected usage."). *See also* 47 C.F.R. § 69.2(m) (End user means "any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an 'end user' when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an 'end user' if all resale transmissions offered by such reseller originate on the premises of such reseller.").

purpose of applying access charges.[15] Thus, the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local.

6. The Internet provides citizens of the United States with the ability to communicate across state and national borders in ways undreamed of only a few years ago. The Internet also is developing into a powerful instrumentality of interstate commerce. In 1997, we decided that retaining the ESP exemption would avoid disrupting the still-evolving information services industry and advance the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[16] This Congressional mandate underscores the obligation and commitment of this Commission to foster and preserve the dynamic market for Internet-related services. We emphasize the strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet -- which has flourished to date under our "hands off" regulatory approach -- or the development of competition. We are mindful of the need to address the jurisdictional question at issue here, and the effect the jurisdictional determination may have on inter-carrier compensation for ISP-bound traffic, in a manner that promotes efficient entry by providers of both local telephone and Internet access services, and that, by the same token, does not encourage inefficient entry.

B. Incumbent LEC and CLEC Delivery of ISP-Bound Traffic.

7. Section 251(b)(5) of the Act requires all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[17] In the *Local Competition Order*, this Commission construed this provision to apply only to the transport and termination of "local telecommunications traffic."[18] In order to determine what compensation is

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[15] *Access Charge Reform Order*, 12 FCC Rcd at 16133-34. On August 19, 1998, the U.S. Court of Appeals for the Eighth Circuit affirmed the Commission's *Access Charge Reform Order*. Specifically, the court found that the Commission's decision to exempt information services providers from the application of interstate access charges (other than SLCs) was consistent with past precedent, did not unreasonably discriminate in favor of ISPs, did not constitute an unlawful abdication of the Commission's regulatory authority in favor of the states, and did not deprive incumbents of the ability to recover their pertinent costs. *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

[16] *Access Charge Reform Order*, 12 FCC Rcd at 16134. *See also* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

[17] 47 U.S.C. § 251(b)(5).

[18] *See* 47 C.F.R. § 51.701; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16013 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd.*), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996); *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996); *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC

due when two carriers collaborate to deliver a call to an ISP, we must determine as a threshold matter whether this is interstate or intrastate traffic. In general, an originating LEC end user's call to an ISP served by another LEC is carried (1) by the originating LEC from the end user to the point of interconnection (POI) with the LEC serving the ISP; (2) by the LEC serving the ISP from the LEC-LEC POI to the ISP's local server; and (3) from the ISP's local server to a computer that the originating LEC end user desires to reach via the Internet. If these calls terminate at the ISP's local server (where another (packet-switched) "call" begins), as many CLECs contend, then they are intrastate calls, and LECs serving ISPs are entitled to reciprocal compensation for the "transport and termination" of this traffic. If, however, these calls do not terminate locally, incumbent LECs argue, then LECs serving ISPs are not entitled to reciprocal compensation under section 251(b)(5).

8. CLECs argue that, because section 251(b)(5) of the Act refers to the duty to establish reciprocal compensation arrangements for the "transport and termination of telecommunications,"[19] a transmission "terminates" for reciprocal compensation purposes when it ceases to be "telecommunications."[20] "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[21] CLECs contend that, under this definition, Internet service is not "telecommunications" and that the "telecommunications" component of Internet traffic terminates at the ISP's local server. In addition, CLECs and ISPs argue that, given that ESPs are exempt from paying certain interstate access charges[22] and that, as a result, the PSTN links serving ESPs are treated as intrastate under

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Rcd 12460 (1997); *further recon. pending*. State commissions that considered this issue reached the same conclusion. *See, e.g.*, Petition of the Southern New England Tel. Co. for a Declaratory Ruling Concerning Internet Servs. Provider Traffic, Docket No. 97-05-22, Decision, at 9 (Conn. Comm'n September 17, 1997); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R.95-04-04, Decision 98-10-057, at 7 (Cal. Comm'n October 28, 1998); Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas, MO-98-CA-43, slip op. at 7 (W.D. Tex. June 16, 1998). Section 251 of the Act makes clear that interstate traffic remains subject to the Commission's jurisdiction under section 201. *See* 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."). *See also CompTel*, 117 F.3d at 1075 (Commission acted within its jurisdiction in allowing incumbent LECs to collect, on an interim basis, access charges for interstate calls traversing the incumbent LECs' local switches for which the interconnecting carriers pay unbundled local switching element charges); 47 U.S.C. §152(a) (Commission has jurisdiction over "all interstate and foreign communications by wire").

[19] 47 U.S.C. § 251(b)(5) (emphasis added).

[20] *See, e.g.*, RCN Telecom Services (RCN) Comments at 6; Teleport Communications Group Inc. (TCG) Comments at 4-5; WorldCom, Inc. Comments at 8-9. Citations to parties' comments in this Declaratory Ruling and Notice of Proposed Rulemaking refer to comments filed in response to the *ALTS Letter Notice*.

[21] 47 U.S.C. § 153(43).

[22] We discuss the ESP exemption, *supra*.

the separations regime, the services that CLECs provide for ISPs must be deemed local.[23] Incumbent LECs contend, however, that the "telecommunications" terminate not at the ISP's local server, but at the Internet site accessed by the end user, in which case these are interstate calls for which, they argue, no reciprocal compensation is due.[24]

III. DISCUSSION

9. The Commission has no rule governing inter-carrier compensation for ISP-bound traffic. Generally speaking, when a call is completed by two (or more) interconnecting carriers, the carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (*e.g.*, by delivering a call to an interexchange carrier (IXC)), the carriers will share access revenues received from the interstate service provider. Conversely, when two carriers collaborate to complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to section 251(b)(5) of the Act. Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. As explained above, under the ESP exemption, LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover, the Commission has directed states to treat ISP traffic as if it were local, by permitting ISPs to purchase their PSTN links through local business tariffs. As a result, and because the Commission had not addressed inter-carrier compensation under these circumstances, parties negotiating interconnection agreements and the state commissions charged with interpreting them were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs, leading to the present dispute.

A. Jurisdictional Nature of Incumbent LEC and CLEC Delivery of ISP-Bound Traffic.

10. As many incumbent LECs properly note,[25] the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers. In *BellSouth MemoryCall*, for example, the

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[23] *See, e.g.*, American Communications Services, Inc. (ACSI) Comments at 5; Adelphia Communications Corporation (Adelphia), et al., Comments at 12-13; ALTS Letter at 6-7; ALTS Reply at 2, 13; Cox Communications, Inc. (Cox) Comments at 5; America Online, Inc. (AOL) Comments at 7-8; AT&T Corp. Comments at 4.

[24] *See, e.g.*, Ameritech Operating Cos. (Ameritech) Comments at 13; BellSouth Corporation (BellSouth) Reply at 4-6; Southwestern Bell Tel. Co., Pacific Bell, Nevada Bell (SBC) Reply at 5; United States Telephone Association (USTA) Comments at 5-6.

[25] *See, e.g.*, Ameritech Comments at 13; BellSouth Reply at 4-6; SBC Reply at 5; USTA Comments at 5-6.

Commission considered the jurisdictional nature of traffic that consisted of an incoming interstate transmission (call) to the switch serving a voice mail subscriber and an intrastate transmission of that message from that switch to the voice mail apparatus.[26] The Commission determined that the entire transmission constituted one interstate call, because "there is a continuous path of communications across state lines between the caller and the voice mail service."[27] The Commission's jurisdictional determination did not turn on the common carrier status of either the provider or the services at issue;[28] *BellSouth MemoryCall* is not, therefore, distinguishable on the grounds that ISPs are not common carriers.

11. Similarly, in *Teleconnect*, the Bureau examined whether a call using Teleconnect's "All-Call America" (ACA) service, a nationwide 800 travel service that uses AT&T's Megacom 800 service, is a single, end-to-end call.[29] Generally, an ACA call is initiated by an end user from a common line open end; the call is routed through a LEC to an AT&T Megacom line, and is then transferred from AT&T to Teleconnect by another LEC.[30] At that point, Teleconnect routes the call through the LEC to the end user being called.[31] The Bureau rejected the argument that the (ACA) 800 call used to connect to an interexchange carrier's (IXC) switch was a separate and distinct call from the call that was placed from that switch.[32] The Commission affirmed, noting that "both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, we regulate an interstate wire communications under the Communications Act from its inception to its completion."[33] The Commission concluded that "an

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[26] Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall*).

[27] *Id.* at 1620.

[28] *Id.* at 1621-22. Indeed, the Commission expressly noted that, although BellSouth's "voice mail service is an enhanced service, that fact does not limit our authority to preempt." *Id.* at 1622 n.44.

[29] *Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) (*Teleconnect*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997).

[30] *Id.* at 1627.

[31] *Id.* at 1627-28.

[32] *Id.* at 1626.

[33] *Id.* at 1629 (citing *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (concluding that a physically intrastate in-WATS line, used to terminate an end-to-end interstate communication, is an interstate facility subject to Commission regulation)). *See also United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944) (the Act contemplates the regulation of interstate wire communication from its inception to its completion), *aff'd sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945); *New York Telephone Co.*, 76 FCC 2d 349, 352-53 (1980) (physically intrastate foreign exchange facilities used to carry interconnected interstate traffic are subject to federal jurisdiction).

interstate communication does not end at an intermediate switch. . . . The interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities."[34] In addition, in *Southwestern Bell Telephone Company*, the Commission rejected the argument that "a credit card call should be treated for jurisdictional purposes as two calls: one from the card user to the interexchange carrier's switch, and another from the switch to the called party" and concluded that "switching at the credit card switch is an intermediate step in a single end-to-end communication."[35]

12. Consistent with these precedents,[36] we conclude, as explained further below, that the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend,[37] but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state.[38] The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our jurisdiction. As the Commission stated in *BellSouth MemoryCall*, "this Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls."[39] Indeed, in the vast majority of cases, the facilities that incumbent LECs use to provide interstate access are located entirely within one state.[40] Thus, we reject MCI WorldCom's assertion that the LEC facilities used to deliver traffic to ISPs must cross state boundaries for such traffic to be classified as interstate.[41]

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[34] *Teleconnect*, 10 FCC Rcd at 1629.

[35] In the Matter of Southwestern Bell Tel. Co., CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341 (1988) (*Southwestern Bell Tel. Co.*).

[36] Although the cited cases involve interexchange carriers rather than ISPs, and the Commission has observed that "it is not clear that ISPs use the public switched network in a manner analogous to IXCs," *Access Charge Reform Order*, 12 FCC Rcd at 16133, the Commission's observation does not affect the jurisdictional analysis.

[37] *See, e.g.*, ACSI Comments at 5; Adelphia, et al., Comments at 12-13; ALTS Letter at 6-7; Cox Comments at 5.

[38] This conclusion is fully consistent with *BellSouth MemoryCall*. Although MCI WorldCom relies on *BellSouth MemoryCall* to support its argument that the ISP is the relevant endpoint for purposes of the jurisdictional analysis (*see* Letter from Richard S. Whitt, Director – Federal Affairs/Counsel, MCI WorldCom, Inc., to Magalie R. Salas, Secretary, FCC (October 2, 1998)), there, as here, the Commission analyzed the communication from its inception to the "transmission's ultimate destination." *BellSouth Memory Call*, 7 FCC Rcd at 1621.

[39] *BellSouth MemoryCall*, 7 FCC Rcd at 1621.

[40] *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

[41] *See* Letter from Richard S. Whitt, Director -- Federal Affairs/Counsel, MCI WorldCom, Inc., to Magalie R. Salas, Secretary, FCC (October 19, 1998) (*MCI WorldCom Ex Parte*). For this reason, we also reject CLEC arguments that provision of such services by a Bell Operating Company (BOC) violates section 271 of the Act

13. We disagree with those commenters that argue that, for jurisdictional purposes, ISP-bound traffic must be separated into two components: an intrastate telecommunications service, provided in this instance by one or more LECs, and an interstate information service, provided by the ISP.[42] As discussed above, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication.[43] The Commission previously has distinguished between the "telecommunications services component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to universal service.[44] Although the Commission concluded that ISPs do not appear to offer "telecommunications service" and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund,[45] it has never found that "telecommunications" end where "enhanced" service begins. To the contrary, in the context of open network architecture (ONA) elements, for example, the Commission stated that "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II."[46] The 1996

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unless the BOC has received authorization to provide in-region InterLATA service. *See, e.g., MCI WorldCom Ex Parte* at 4. Section 271 does not bar BOC provision of interstate access services, such as interLATA information access. *See* Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, 11 FCC Rcd 21905, 21962-63 (*Non-Accounting Safeguards Order*) ("When a BOC is neither providing nor reselling the interLATA transmission component of an information service that may be accessed across LATA boundaries, the statute does not require that service to be provided through a section 272 separate affiliate.").

[42] *See, e.g.*, RCN Comments at 6; TCG Comments at 4-5; WorldCom Comments at 8-9.

[43] *See United States v. AT&T*, 57 F. Supp. 451, 453-55 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945).

[44] *Universal Service Order*, 12 FCC Rcd at 9179-81. We disagree with MCI WorldCom's claim that the Commission determined in the *Universal Service Order* that there are two distinct transmissions when an end user contacts the Internet. *MCI WorldCom Ex Parte* at 4. In that order, the Commission discussed various "connections" involved with Internet access but in no way implied that any "transmission" or "traffic" terminated or originated at any intermediate point. *See Universal Service Order*, 12 FCC Rcd at 9180. As discussed, *supra*, MCI WorldCom's similar assertions regarding the *Non-Accounting Safeguards Order* are equally unpersuasive. *MCI WorldCom Ex Parte* at 4.

[45] *Id.* at 9180. We confirmed this view in the *Universal Service Report to Congress*. *Universal Service Report to Congress* at 13 FCC Rcd 11522-23.

[46] *See* Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 141 (1988) ("when an enhanced service is interstate (that is, when it involves communications or transmissions between points in different states on an end-to-end basis), the underlying basic services are subject to Title II regulation"), *aff'd sub nom. People of State of Cal. v. FCC*, 3 F.3d 1505 (9th Cir. 1993). *See, e.g.*, Amendment of Section 64.702 of the Commission's Rules and Regulations, 2 FCC Rcd 3072, 3080 (1987) ("carriers must provide efficient nondiscriminatory access to the basic service facilities necessary to support their competitors' enhanced services"); *vacated on other grounds sub nom. People of State of Cal. v. FCC*, 905 F.2d 1217 (9th Cir. 1990). *See also BellSouth MemoryCall*, 7 FCC Rcd at 1621 (rejecting "two call" argument as applied to interstate call to voice mail apparatus, even though voice mail is an enhanced service).

Act is consistent with this approach. For example, as amended by the 1996 Act, Section 3(20) of the Communications Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[47] This definition recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications. Although it concluded in the *Universal Service Report to Congress* that ISPs do not provide "telecommunications" as defined in the 1996 Act,[48] the Commission reiterated the traditional analysis that ESPs enhance the underlying telecommunications service.[49] Thus, we analyze ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.

14. Some CLECs note that the language of section 252(d)(2) provides for the recovery of the costs of transporting and terminating a "call."[50] Although the 1996 Act does not define the term "call," these CLECs argue that it is used in the 1996 Act in a manner that implies a circuit-switched connection between two telephone numbers.[51] For example, Adelphia contends that a "call" takes place when two stations on the PSTN are connected to each other.[52] A call "terminates," according to Adelphia, when one station on the PSTN dials another station, and the second station answers.[53] Under this view, the "call" associated with Internet traffic ends at the ISP's local premises.[54]

15. We find that this argument is inconsistent with Commission precedent, discussed above, holding that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts. The examples cited by CLECs[55] to support the

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[47] 47 U.S.C. § 153(20) (emphasis added); *see also* 47 C.F.R. § 64.702(a) (enhanced services are provided "over common carrier transmission facilities used in interstate communications").

[48] *Universal Service Report to Congress*, 13 FCC Rcd at 11536-40. *See also Universal Service Order*, 12 FCC Rcd at 9180 n.2023.

[49] *See Universal Service Report to Congress*, 13 FCC Rcd at 11540. *See also Universal Service Order* 12 FCC Rcd at 9180 n.2023 (referencing *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 2 FCC Rcd 3072, 3080 (1987)).

[50] 47 U.S.C. § 252(d)(2). *See, e.g.*, Adelphia, et al., Comments at 15.

[51] *See, e.g.*, Adelphia, et al., Comments at 15-20; Adelphia, et al., Reply at 5, 9-10, TCG Comments at 3-4; WorldCom Comments at 6-7.

[52] *See, e.g.*, Adelphia, et al., Comments at 15-16.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 15-16, 19-20; Adelphia, et al., Reply at 18 n.32.

argument that calls end at the called number are not dispositive. The statutory sections upon which they rely were written to apply to specific situations, all of which, as far as we can tell, involve traditional telephony connections between two called numbers, as opposed to the novel circumstance of Internet traffic.[56]

16. Nor are we are persuaded by CLEC arguments that, because the Commission has treated ISPs as end users for purposes of the ESP exemption, an Internet call must terminate at the ISP's point of presence.[57] The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service.[58] In the *MTS/WATS Market Structure Order*, for instance, the Commission concluded that ESPs are "among a variety of users of access service" in that they "obtain local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area."[59] The fact that ESPs are exempt from access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs. That the Commission exempted ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary.[60] We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic.[61]

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[56] *See, e.g.*, 47 U.S.C. §§ 222(d)(3), 223(a)(1), 271(c)(2)(B)(x), and 271(j).

[57] *See, e.g.*, ACSI Comments at 5; Adelphia, et al., Comments at 12-13; ALTS Letter at 6-7; ALTS Reply at 2, 13; Cox Comments at 5; AOL Comments at 7-8; AT&T Comments at 4.

[58] *See, e.g., MTS/WATS Market Structure Order*, 97 FCC 2d at 715; Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987).

[59] *MTS/WATS Market Structure Order*, 97 FCC 2d at 860; *see also* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305.

[60] *See, e.g., MTS/WATS Market Structure Order*, 97 FCC 2d at 860. *See also* Access Charge Reform, CC Docket No. 96-262, Notice of Proposed Rulemaking, 11 FCC Rcd 21354 at 21478 ("although ESPs may use incumbent LEC facilities to originate and terminate interstate calls, ESPs should not be required to pay interstate access charges") (emphasis added).

[61] Indeed, the Eighth Circuit found that "the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to pay the SLC . . . , but not to pay the per-minute interstate access charge." *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d at 543 (emphasis added).

17. CLECs also argue that the traffic they deliver to ISPs must be deemed either "telephone exchange service"[62] or "exchange access."[63] They contend that ISP traffic cannot be "exchange access," because neither LECs nor CLECs assess toll charges for the service. CLEC delivery of ISP traffic is, therefore, according to CLECs, "telephone exchange service," a form of local telecommunications for which reciprocal compensation is due.[64] As discussed above, however, the Commission consistently has characterized ESPs as "users of access service" but has treated them as end users for pricing purposes.[65] Thus, we are unpersuaded by this argument.

18. Having concluded that the jurisdictional nature of ISP-bound traffic is determined by the nature of the end-to-end transmission between an end user and the Internet, we now must determine whether that transmission constitutes interstate telecommunications. Section 2(a) of the Act grants the Commission jurisdiction over "all interstate and foreign communication by wire."[66] Traffic is deemed interstate "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia."[67] In a conventional circuit-switched network, a call that originates and terminates in a single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate. The jurisdictional analysis is less straightforward for the packet-switched network environment of the Internet.[68] An Internet communication does not necessarily have a point of "termination" in the traditional sense. An Internet user typically communicates

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[62] "Telephone exchange service" means "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area 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).

[63] "Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. §153(16). "Telephone toll services" is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48).

[64] *See, e.g.*, Adelphia, et al., Reply at 5-9.

[65] *MTS/WATS Market Structure Order*, 97 FCC 2d at 860; *see also* Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215, Notice of Proposed Rulemaking, 2 FCC Rcd 4305 (1987). *See also* 47 C.F.R. § 69.2(b) (defining "access service" as "services and facilities provided for the origination or termination of any interstate or foreign telecommunications").

[66] 47 U.S.C. § 152(a).

[67] *Universal Service Report to Congress*, 13 FCC Rcd at 11555.

[68] *See, e.g.*, Kevin Werbach, Digital Tornado: The Internet and Telecommunications Policy, OPP Working Paper No. 29, at 45 (Mar. 1997) (*Digital Tornado*).

with more than one destination point during a single Internet call, or "session," and may do so either sequentially or simultaneously. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country.[69] Further complicating the matter of identifying the geographical destinations of Internet traffic is that the contents of popular websites increasingly are being stored in multiple servers throughout the Internet, based on "caching" or website "mirroring" techniques.[70] After reviewing the record, we conclude that, although some Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites.[71]

19. Although ISP-bound traffic is jurisdictionally mixed, incumbent LECs argue that it is not technically possible to separate the intrastate and interstate ISP-bound traffic.[72] In the current absence of a federal rule governing inter-carrier compensation, however, we do not find it necessary to reach the question of whether such traffic is separable into intrastate and interstate traffic.[73]

20. Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption. ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs.[74] Nor, as we discuss below, is it dispositive of interconnection disputes currently before state commissions.

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[69] *See, e.g., Digital Tornado* at 45. *See also* Adelphia, et al., Reply at 11 n.21.

[70] *See, e.g., MCI WorldCom Ex Parte* at 7.

[71] *See, e.g.*, Adelphia, et al., Comments at 22; Letter from Edward D. Young, Senior Vice President & Deputy General Counsel for Bell Atlantic, and Thomas J. Tauke, Senior Vice President -- Government Relations for Bell Atlantic, to Hon. William E. Kennard, Chairman, FCC (July 1, 1998) at Att. 2; Compuserve Comments at 4; Letter from B. Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications, Inc., to Magalie R. Salas, Secretary, FCC (May 13, 1998) Att. at 7; WorldCom Reply at 8-9.

[72] Even if it is technically impossible to separate the intrastate and interstate ISP traffic, it may be possible for LECs to determine whether dial-up traffic is in fact destined for an ISP.

[73] We note that in Section IV, *infra*, we seek comment on the separability of such traffic and whether the Commission should exercise exclusive jurisdiction over inter-carrier compensation for all ISP-bound traffic.

[74] ESPs also have certain flat-rated interstate offerings available to them. *See, e.g.*, GTE Telephone Operating Cos. GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC No. 98-292, Memorandum Opinion and Order (rel. October 30, 1998), *recon. pending*.

B. Inter-Carrier Compensation for Delivery of ISP-Bound Traffic.

21. We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism. We seek comment on such a rule in Section IV, below.

22. Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions.

23. Although we determine, above, that ISP-bound traffic is largely interstate, parties nonetheless may have agreed to treat the traffic as subject to reciprocal compensation. The Commission's treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs.[75] 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. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes.[76]

24. Against this backdrop, and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements. For example, it may be appropriate for state commissions to consider such factors as whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate

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[75] *MTS/WATS Market Structure Order*, 97 FCC 2d at 715.

[76] Not all incumbent LECs characterize Internet traffic as intrastate traffic for separations purposes. In January, 1998, SBC indicated that it planned to allocate 100 percent of the costs associated with Internet traffic, which it previously had classified as local, to the interstate jurisdiction. *See* Letter from B. Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications., Inc., to Ken Moran, Chief, Accounting and Audits Division, FCC (Jan. 20, 1998).

or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. These factors are illustrative only; state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions. Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.[77] Finally, we note that issues regarding whether an entity is properly certified as a LEC if it serves only or predominantly ISPs are matters of state jurisdiction.[78]

25. Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. The passage of the 1996 Act raised the novel issue of the applicability of its local competition provisions[79] to the issue of inter-carrier compensation for ISP-bound traffic. Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant

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[77] This analysis is not inconsistent with our conclusion in the *Local Competition Order* that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within state-defined local calling areas. *Local Competition Order*, 11 FCC Rcd. at 16013. In so construing the statutory obligation, we did not preclude parties from agreeing to include interstate traffic (or non-local intrastate traffic) within the scope of their interconnection agreements, so long as no Commission rules were otherwise violated. *See* 47 U.S.C. § 252(a)(1) (parties may negotiate and enter into a binding agreement without regard to the standards set forth in section 251(b) and (c)).

[78] *See, e.g.*, Complaint of WorldCom Technologies, Inc. against New England Tel. and Tel. Co. for alleged breach of interconnection terms entered into under Section 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116, at 13 (Mass. Comm'n October 26, 1998) (requesting information from parties regarding whether certain CLECs have been or are established solely (or predominantly) for the purpose of delivering traffic to ISPs, particularly ISPs affiliated with the CLECs in question, and stating that these facts might affect such CLECs' regulatory status); Letter from B. Jeannie Fry, Director of Federal Regulatory Affairs, SBC Communications, Inc., to Magalie R. Salas, Secretary, FCC (May 13, 1998) at Tab 5 (carrier's webpage advertisement invites parties to offer "free internet access while getting paid for it"). We believe the state commissions are capable of assessing whether and to what extent these and other anomalous practices are inconsistent with the statutory scheme (*e.g.*, definition of a carrier) and thereby outside the scope of any determination regarding inter-carrier compensation.

[79] *See* 47 U.S.C. §§ 251, 252.

to section 252 "extends to both interstate and intrastate matters."[80] Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process.[81] However, any such arbitration must be consistent with governing federal law.[82] While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

26. Some CLECs construe our rules treating ISPs as end users for purposes of interstate access charges as requiring the payment of reciprocal compensation for this traffic.[83] Incumbent LECs contend, however, that our rules preclude the imposition of reciprocal compensation obligations to interstate traffic and that, pursuant to the ESP exemption, LECs carrying ISP-bound traffic are compensated by their end user customers -- the originating end user or the ISP.[84] Either of these options might be a reasonable extension of our rules, but the Commission has never applied either the ESP exemption or its rules regarding the joint provision of access to the situation where two carriers collaborate to deliver traffic to an ISP. As we stated previously, the Commission currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic.[85] In the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic,[86] neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in

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[80] *Local Competition Order*, 11 FCC Rcd at 15544; *see also id. at* 15547 (sections 251 and 252 "address both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements").

[81] *Id.*

[82] *Cf.* 47 U.S.C. § 251(i) ("Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.").

[83] *See* note 26, *supra*, and accompanying text.

[84] *See, e.g.*, Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, to Magalie Salas, Secretary, FCC (November 20, 1998). Ameritech argues, *inter alia*, that the Commission held in the *Local Competition Order* that reciprocal compensation does not apply to the transport and termination of interstate traffic. *Id.*, Att. A, at 6. It further argues that Commission rules do in fact address inter-carrier compensation for ISP traffic. In the usual case, two LECs jointly providing interstate access service share access revenues; because the Commission exempts ISPs from the payment of access charges, however, LECs carrying ISP traffic are limited to revenues they collect from their end user customers. *Id.*, Att. A, at 7.

[85] We seek comment on an appropriate compensation mechanism in Section IV, below.

[86] *See* 47 C.F.R. 51.701(a); *Local Competition Order*, 11 FCC Rcd at 16013.

certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law.[87] A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic.[88] By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

27. State commissions considering what effect, if any, this Declaratory Ruling has on their decisions as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic might conclude, depending on the bases of those decisions, that it is not necessary to re-visit those determinations. We recognize that our conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server, but nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.

IV. Notice of Proposed Rulemaking (CC Docket No. 99-68)

A. Discussion.

28. We do not have an adequate record upon which to adopt a rule regarding inter-carrier compensation for ISP-bound traffic. We do believe, however, that adopting such a rule to govern prospective compensation would serve the public interest. As a general matter, we tentatively conclude that our rule should strongly reflect our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts. We seek comment on two alternative proposals for implementing such a regime. Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic. As discussed above, the Commission's holding that parties' agreements, as interpreted by state

[87] As noted, section 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected *local* telecommunications traffic. 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. As discussed, *supra*, in the absence a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic.

[88] As noted, in other contexts we have directed the states to treat such traffic as local. *See ESP Exemption Order*, 3 FCC Rcd 2631, 2635 n.8, 2637 n.53.

commissions, should be binding also applies to those state commissions that have not yet addressed the issue.

29. For the traffic at issue here, we tentatively conclude that a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation. In addition, setting a rate by regulation appears unwise because the actual amounts, need for, and direction of inter-carrier compensation might reasonably vary depending on the underlying commercial relationships with the end user, and who ultimately pays for transmission between its location and the ISP.[89] We acknowledge that, no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network. We believe that efficient rates for inter-carrier compensation for ISP-bound traffic are not likely to be based entirely on minute-of-use pricing structures. In particular, pure minute-of-use pricing structures are not likely to reflect accurately how costs are incurred for delivering ISP-bound traffic. For example, flat-rated pricing based on capacity may be more cost-based. Parties also might reasonably agree to rates that include a separate call set-up charge, coupled with very low per-minute rates. These economic characteristics of this traffic are likely to make voluntary agreements among the parties easier to reach. For these reasons, we propose that inter-carrier compensation rates for ISP-bound traffic be based on commercial negotiations undertaken as part of the broader interconnection negotiations between incumbent LECs and CLECs. We seek comment below on two alternative proposals to govern the negotiations with respect to ISP-bound traffic.

30. We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts. As with other issues on which parties petition state commissions for arbitration under section 252 of the Act, if a state commission fails to act, the Commission will assume the responsibility of the state commission within 90 days of being notified of such failure.[90] This proposal could help facilitate the policy goals set forth above by forcing the parties to hold a single set of negotiations regarding rates, terms, and conditions for interconnected traffic and to submit all disputes regarding interconnected traffic to a single arbitrator. We seek comment on this tentative conclusion.

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[89] When an end user effectively purchases a telecommunications-based service from more than one service provider, it can pay for the costs of the underlying telecommunications either directly to the telecommunications service provider, or indirectly through the other service provider, which in turn pays the telecommunications provider. Both sets of arrangements exist today.

[90] 47 U.S.C. § 252(e)(5).

31. We also seek comment on an alternative proposal that we adopt a set of federal rules governing inter-carrier compensation for ISP-bound traffic pursuant to which parties would engage in negotiations concerning rates, terms, and conditions applicable to delivery of interstate ISP-bound traffic. These negotiations would commence on the effective date of the adopted rule but could proceed in tandem with broader interconnection negotiations between the parties. We realize, however, that the success of any negotiation over rates is likely to depend on the availability of the swift and certain resolution of disputes, and the structure of the resolution process. For example, the Commission, through delegation to the Common Carrier Bureau, might resolve such disputes, at the request of either party, through an arbitration-like process, following a discrete period of voluntary negotiation. We seek comment on how such an approach would operate procedurally and what costing standards the Commission might use in arbitrating disputes. We also seek comment on how this proposal compares with a broad interconnection negotiation in which most disputes are resolved by a state arbitrator but disputes regarding ISP-bound traffic are resolved through a federal arbitration-like process. We also seek comment on whether it is possible, as a technical matter, to segregate intrastate and interstate ISP-bound traffic and whether any federal rules we adopt should apply to all intrastate and interstate ISP-bound traffic.

32. We also seek comment on whether the Commission has the authority to establish an arbitration process that is final and binding and not subject to judicial review. For instance, we note that parties might agree to binding arbitration pursuant to the Administrative Dispute Resolution Act.[91] We seek comment on whether and how such a system should be implemented. In particular, we seek comment on the desirability of arbitration before an arbitrator selected by the parties, as provided by the Administrative Dispute Resolution Act, as opposed to a federal or state decision-maker.[92]

33. We also invite parties to submit alternative proposals for inter-carrier compensation for interstate ISP-bound traffic that will advance our policy goals in this area. For example, Ameritech has proposed basing inter-carrier compensation for ISP-bound traffic on sharing the incumbent LEC's revenue associated with the interconnected ISP-bound traffic.[93] We also request parties to comment on how any alternatives they propose will advance the Commission's goals of ensuring the broadest possible entry of efficient new competitors, eliminating incentives for inefficient entry and irrational pricing schemes, and providing to consumers as rapidly as possible the benefits of competition and emerging technologies.

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[91] Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2738, *codified at* 5 U.S.C. § 571 *et seq.*

[92] *See* 5 U.S.C. § 577.

[93] *See* Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, Inc., to Magalie R. Salas, Secretary, FCC (July 17, 1998).

34. We are aware that disputes may arise regarding various terms and conditions for inter-carrier compensation for ISP-bound traffic. Although many such disputes could be resolved through a negotiation and arbitration process, we seek comment on whether there are any issues under our two proposals above that we can and should address in the first instance through rules rather than through arbitration. We request parties to comment on the need for rules pertaining to such matters and, to the extent that parties believe that rules are appropriate, the substance and degree of specificity of such rules. We emphasize, however, that we do not seek comment on whether interstate access charges should be imposed on ESPs as part of this proceeding. We recently reaffirmed that exemption in the *Access Charge Reform Order*, and we do not reconsider it here.[94]

35. Pursuant to section 252(i) of the Act,[95] interconnection agreements often have clauses (often referred to as "most-favored nation" or "MFN" provisions) that allow parties to select, to varying degrees of specificity, provisions from other parties' interconnection agreements with that particular LEC. We understand that an arbitrator recently permitted a CLEC to exercise MFN rights to opt into an interconnection agreement that an incumbent LEC previously had negotiated with another CLEC.[96] That interconnection agreement, executed in July 1996, has a three-year term. The arbitrator concluded that the new CLEC was entitled to opt into the agreement for a new three-year term, thus raising the possibility that the incumbent LEC might be subject to the obligations set forth in that agreement for an indeterminate length of time, without any opportunity for renegotiation, as successive CLECs opt into the agreement.[97] We seek comment, therefore, on whether and how section 252(i) and MFN rights affect parties' ability to negotiate or renegotiate terms of their interconnection agreements.

36. As discussed above, not all ISP-bound traffic is interstate. We seek comment on whether we should adopt rules for the interstate traffic that would coexist with state rules governing the intrastate traffic, or whether it is too difficult or inefficient to separate intrastate ISP-bound traffic from interstate ISP-bound traffic. We further seek comment on the technical and practical implications of requiring the separation of intrastate and interstate ISP-bound traffic. In addition, we seek comment on the implications of various proposals regarding inter-carrier compensation for ISP-bound traffic on the separations regime, such as the appropriate treatment of incumbent LEC revenues and payments associated with the delivery of such traffic. This Commission is mindful of concerns that our jurisdictional analysis may result in allocation to

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[94] *Access Charge Reform Order*, 12 FCC Rcd at 16133.

[95] 47 U.S.C. § 252(i).

[96] *See* Letter from Michael E. Glover, Associate General Counsel, Bell Atlantic, to Magalie R. Salas, Secretary, FCC (October 28, 1998), at 2, Att. 3 at 6-8.

[97] *Id.*

different jurisdictions of the costs and revenues associated with ISP-bound traffic,[98] and we wish to make clear that we have no intention of permitting such a mismatch to occur. With respect to current arrangements, we note that this order does not alter the long-standing determination that ESPs (including ISPs) can procure their connections to LEC end offices under intrastate end-user tariffs, and thus for those LECs subject to jurisdictional separations both the costs and the revenues associated with such connections will continue to be accounted for as intrastate.

B. Procedural Matters.

1. Ex Parte Presentations.

37. This Notice of Proposed Rulemaking is a permit-but-disclose notice-and-comment rulemaking proceeding. *Ex Parte* presentations are permitted, in accordance with the Commission's rules, provided that they are disclosed as required.[99]

2. Initial Regulatory Flexibility Analysis.

38. As required by the Regulatory Flexibility Act (RFA),[100] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the *Notice of Proposed Rulemaking* (*Notice*). Written public comments are requested on the IRFA. These comments must be filed by the deadlines for comment on the remainder of the *Notice*, and should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA), in accordance with the RFA, 5 U.S.C. § 603(a).

39. *Need for and Objectives of the Proposed Rules.* We tentatively conclude that we should adopt a rule regarding inter-carrier compensation for ISP-bound traffic that strongly reflects our judgment that commercial negotiations are the ideal means of establishing the terms of interconnection contracts. We seek comment on two alternative proposals for implementing such a regime. Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic. In light of comments received in response to the *Notice*, we might issue new rules or alter existing rules.

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[98] *See* Letter from James Bradford Ramsay, Assistant General Counsel, National Association of Regulatory Utility Commissioners, to Magalie R. Salas, Secretary, FCC (December 14, 1998).

[99] *See generally* 47 C.F.R. §§ 1.1200, 1.1202, 1.1204, 1.1206.

[100] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 et seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

40. *Legal Basis.* The legal basis for any action that may be taken pursuant to the *Notice* is contained in Sections 1, 2, 4, 201, 202, 274, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 251, 252, and 303(r).

41. *Description and Estimate of the Number of Small Entities That May Be Affected by the Notice of Proposed Rulemaking.* The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by proposed rules. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.[101] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by SBA.[102] The SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be an entity with no more than 1,500 employees.[103] Consistent with prior practice, we here exclude small incumbent local exchange carriers (LECs) from the definition of "small entity" and "small business concern."[104] Although such a company may have 1,500 or fewer employees and thus fall within the SBA's definition of a small telecommunications entity, such companies are either dominant in their field of operations or are not independently owned and operated. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this present analysis and use the term "small incumbent LECs" to refer to any incumbent LEC that arguably might be defined by SBA as a small business concern.

42. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census (the Census Bureau) reports that at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[105] This number includes a variety of different categories of carriers, including local exchange carriers (both incumbent and competitive), interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities because they are not "independently owned or operated."[106] For

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[101] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). The Commission may also develop additional definitions that are appropriate to its activities.

[102] 15 U.S.C. § 632.

[103] *See* 13 C.F.R. § 121.201.

[104] *See, e.g., Local Competition Order*, 11 FCC Rcd at 16150.

[105] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[106] 15 U.S.C. § 632(a)(1).

example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are either small entities or small incumbent LECs that may be affected by this *Notice*.

43. *Local Exchange Carriers*. Neither the Commission nor the SBA has developed a definition of small providers of local exchange services. The closest applicable definition under the SBA's rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[107] According to our most recent data, 1,371 companies reported that they were engaged in the provision of local exchange services.[108] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, or are dominant, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,371 small providers of local exchange service are small entities or small incumbent LECs that may be affected by the *Notice*.

44. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements*. As a result of rules that we may adopt, incumbent LECs and CLECs may be required to discern the amount of traffic carried on their networks that is bound for ISPs. In addition, such incumbent LECs and entrants may be required to produce information regrading the costs of carrying ISP-bound traffic on their networks.

45. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Alternatives Considered*. As noted above, we propose to adopt rules that may require incumbent LECs and CLECs to discern the amount of traffic carried on their networks that is bound for ISPs.[109] We anticipate that if we adopt such rules, incumbent LECs and CLECs, including small entity incumbent LEC and CLECs, will be able to receive compensation for the delivery of ISP-bound traffic that they might not otherwise receive. The *Notice* also requests comment on alternative proposals.

46. *Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules*. None.

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[107] FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Figure 2 (*Number of Carriers Paying into the TRS Fund by Type of Carrier*) (Nov. 1997).

[108] *Id.*

[109] *See* ¶¶ 28-36, *supra*.

3. Comment Filing Procedures.

47. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before April 12, 1999, and reply comments on or before April 27, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[110]

48. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail message to ecfs@fcc.gov and include "get form <your e-mail address>" in the body of the message. A sample form and directions will be sent in reply.

49. Parties that choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 Twelfth St., S.W., Room TW-A325, Washington, DC 20554.

50. Parties that choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Wanda Harris, Federal Communications Commission, Common Carrier Bureau, Competitive Pricing Division, 445 Twelfth St., S.W., Fifth Floor, Washington, DC 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the docket number in this case, CC Docket No. 99-68); type of pleading (comment or reply comment); date of submission; and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, DC 20036.

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[110] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

V. Ordering Clauses

51. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i) and (j), 201-209, 251, 252, and 403 of the Communications Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-209, 251, 252 and 403, that this Notice of Proposed Rulemaking IS HEREBY ADOPTED and comments ARE REQUESTED as described above.

52. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Separate Statement
of
Commissioner Susan Ness

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket 96-98); and Inter-carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68)

This proceeding is one of unusual importance and unusual complexity.

The debate over reciprocal compensation for ISP-bound traffic is *important* for three main reasons. First, the issues we review here involve access to the Internet, a unique, extraordinary, and ever-evolving national and international network of networks that is rapidly transforming communication, commerce, and communities. Second, reciprocal compensation may substantially affect the nature and the extent of local telephone competition, which was a principal objective of the Telecommunications Act of 1996. Third, any decision in this area may affect relationships between state and federal regulatory authorities, who must work in harmony to achieve successful implementation of the Telecommunications Act.

The debate is *complex* because it involves the application of legal precedents from the early 1980s to services and carrier arrangements that were unimaginable only a few short years ago, as well as provisions of the 1996 Act that have already led to considerable controversy and litigation. We must grapple with equities that may be quite different when viewed prospectively than when viewed retrospectively. A further complication is that reciprocal compensation involves certain issues that can better be assessed by state public utility commissions than by the FCC, and yet it also implicates important national interests affecting access to an interstate (and international) service.

At the end of the day, however, I believe the case boils down to elementary and straightforward propositions. Switched network telephone calls to Internet service providers are inherently interstate, which is the decision most consistent with our prior creation of an ESP exemption from interstate access charges -- and with the interstate and international nature of the Internet. But to say this is *not* to overrule, undermine, or prevent state commission decisions that construe interconnection agreements to require reciprocal compensation for ISP-bound traffic. It was, and remains, reasonable for the states (and federal district courts) to so rule, given our prior decisions -- and the practices of the ILECs themselves -- to treat this traffic as local.[1]

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1 Since 1983, the Commission has consistently and consciously permitted enhanced service providers, a category that now includes Internet service providers (ISPs) to connect to their customers using local business lines. *See, e.g., MTS and WATS Market Structure*, 97 FCC 2d 682, 715, para. 83 (1983) (subsequent history omitted). Enhanced service providers use "*interstate* access" but pay "*local* business exchange service rates." *Id.* (emphasis added); *see also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631, 2635 n.8 (1988) ("enhanced service providers generally pay *local* business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices") (emphasis added); *accord id.* at 2637 n.53.

This decision was not altered by passage of the Telecommunications Act of 1996. After that law was passed, we expressly reiterated that ISPs "purchase services from incumbent LECs under the same *intrastate* tariffs available to and users" and determined that, if "*intrastate* rate structures fail to compensate incumbent LECs adequately for providing service to customers

And, although we are declaring that there are national interests that must be respected on a going-forward basis, it may well be that these interests can be protected without changing the long-standing decision to treat this traffic as local. One could readily imagine, for example, that states will not seek to assess per-minute fees on Internet-bound calls, just as the FCC has repeatedly resisted entreaties to do so. One can also reasonably foresee that, even if ISP-bound traffic continues to be handled by the state commissions under the usual 251/252 process, the parties themselves (in voluntarily negotiated agreements) or the state commissions (if called upon to arbitrate agreements between incumbents and new entrants) will in future agreements address the issues associated with ISP-bound traffic in ways that avoid some of the obvious anomalies and competitive distortions that may result from some of the current ILEC-CLEC arrangements.

In short, I believe the decision we have adopted is one that (1) comports with the law, (2) is fair both to incumbent local exchange carriers and to competitive local exchange carriers, (3) does not unravel the core determinations of the more than two dozen state commissions that have addressed this issue, (4) sets the stage for future determinations that will eliminate or at least attenuate any anomalies inherent in current compensation arrangements, and (5) preserves this Commission's ability to safeguard the innovative, competitive, and unregulated character of the Internet. I hope that parties responding to the Notice of Proposed Rulemaking will focus on ways in which all of these objectives may continue to be advanced.

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with high volumes of incoming calls, incumbent LECs may address their concerns to *state* regulators." *Access Charge Reform*, 12 FCC Rcd. 15982, 16132, para. 342 & 16135, para. 346 (1997), *aff'd Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (emphasis added). The Eighth Circuit explicitly recognized that the manner in which Internet-bound traffic is treated is a product of FCC "discretion." *Southwestern Bell Telephone*, 153 F.3d at 543. It is significant that, in the aforementioned *Access Charge Reform* proceeding, we implicitly affirmed both the FCC's ultimate authority over this traffic and the state commissions' competence to handle it unless and until directed otherwise. It is especially telling that the *Southwestern Bell Telephone* decision, acknowledging the Commission's ultimate authority over such inherently interstate traffic, came from a court that was otherwise quite resistant to FCC encroachment on matters that it deemed to be on the states' side of a "horse-high, hog-tight, and bull-strong fence." *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *rev'd in pertinent part, AT&T Corp. v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING

Re: Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98) and Inter-Carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68).

I write separately to explain the bases upon which I concur in this action. Specifically, based on the long inquiry that has led to our action today, I agree with the majority that LEC-to-LEC Internet-bound traffic is properly classified as jurisdictionally interstate. Because of this agreement, and in light of the serious governmental interests implicated, I believe it is appropriate for the Commission to consider whether the current method of determining intercarrier compensation for this traffic at the state level continues to be appropriate. I believe, however, that in a well-meaning effort to preserve existing state decisions regarding reciprocal compensation for this traffic, we have strayed into areas best left to state authorities and may have unwittingly muddled our jurisdictional analysis.

As the attached decision correctly points out, a number of the Commission's precedents indicate that the jurisdictional nature of communications should be determined by the end points of the communication (*i.e.*, by looking at the entire communication as "one call"). I believe this method of evaluating jurisdiction remains valid and important, especially considering the growing number of creative and complex methods for transmitting and transporting communications. Indeed, the challenge of packet networks is that they make it nearly impossible (at present) to trace accurately the route of a single communication to its destination, especially given that each packet of which the communication is comprised may take a different route before reassembling at the intended destination. These and other technological developments will continue to frustrate traditional geographic boundaries.

Our decision that LEC-to-LEC Internet-bound traffic is interstate in nature fundamentally calls into question a number of state decisions that applied reciprocal compensation to LEC-to-LEC Internet-bound traffic based primarily or exclusively on the view, which we herein reject, that this traffic is local. I agree with the majority that this conclusion does not, in itself, dictate how or whether carriers of this traffic should be compensated, nor does this conclusion determine whether this Commission or state commissions should establish compensation arrangements. I likewise agree that not all state decisions to apply reciprocal compensation to this traffic share this basis, and that, as a general matter, there may be other bases upon which state commissions could continue these compensation schemes even after the action we take here.

But even given the fact that our decision today does not necessarily undermine each of the state decisions, I think the most prudent course would have been for us to decline to speculate on what bases there may be for upholding those decisions. The decisions themselves are not before us and it is properly for state authorities to explore the ramifications of our action today on those

decisions. Furthermore, having reviewed a number of the state decisions in this area, I am persuaded that the underlying facts, analytical underpinnings and applicable law vary enormously from state to state. We cannot, even in the most carefully worded or sweeping dicta, address all of these variations meaningfully.

That said, I might support some of the majority's suggested rationales for preserving existing state decisions, but cannot embrace others because I am unpersuaded either that they are sensitive to the wide variations in the facts, analysis and legal contexts or that the benefits of such rationales substantially exceed their potential risks. I put in the first category the view that state decisions applying reciprocal compensation to LEC-to-LEC Internet-bound traffic should be preserved where the state or reviewing court finds that the parties *agreed* to compensate each other for this traffic in this way. Sections 251 and 252 of the Act express a clear preference for negotiations as the primary method for carriers to determine the terms of interconnection, and the Act allows parties to agree even to terms that do not satisfy the requirements of these sections. Thus, I firmly believe that if a state commission or court interpreting state law determines that carriers agreed to apply reciprocal compensation to this traffic, those carriers should be held to the terms of their agreement. Furthermore, I have no strong objection to our dicta to the extent it suggests that state commissions or reviewing courts may identify other justifications for preserving state decisions to apply reciprocal compensation to this traffic under state law. If we had included only this rationale as a basis upon which states could uphold their existing decisions, my concerns with our decision today would have been significantly reduced.

But rather than merely acknowledging generally the possibility of state law bases on which we believe such agreements can be sustained, we have chosen to proffer other specific bases. I am concerned, however, that the other theories proffered here are legally and analytically unsound, may prospectively hinder our ability to address the public policy concerns that led us to assert jurisdiction here in the first place, and yet do very little retroactively to preserve state-sanctioned agreements. As such, I decline to subscribe to certain of the dicta in our decision.

First, I decline to subscribe to any suggestion that the state decisions could be preserved based on the theory that we had essentially delegated responsibility to state commissions to approve or determine compensation arrangements for LEC-to-LEC Internet-bound traffic. Unquestionably, we have in the past declined to apply certain types of existing federal compensation or charges to traffic flowing to enhanced service providers (ESPs) from individual LECs. As the decision appears to acknowledge, however, we have never made a conscious, affirmative choice to defer in similar fashion to local compensation measures for the situation we face here (*i.e.*, intercarrier compensation for LEC-to-LEC Internet-bound traffic). I do not question that a state may have understandably analogized the ESP precedent to this case. But no matter how apt the analogy to the facts before us now, one cannot assume delegated authority by analogy. Thus, I cannot support any suggestion that the Commission has heretofore delegated authority to state commissions to impose reciprocal compensation on this traffic.

Second, I decline to subscribe to the dicta in this decision to the extent it suggests that the state decisions can be preserved because state commissions and this Commission share jurisdiction for implementing the sections 251 and 252 of the Act.

I fully agree that the states, to the extent they acted pursuant to their statutory obligation to arbitrate and approve interconnection agreements, acted reasonably in the absence of a clear federal rule. Nonetheless, I fail to see how such reasonableness will be a defense to claims that our jurisdictional analysis conflicts with that of a state. Such reasonableness does little to preserve those state decisions most likely to be disturbed by our "one call" jurisdictional analysis, namely, decisions based primarily or exclusively on a "two call" theory. In short, I think touching on the issue of shared jurisdiction muddles our conclusion that there is federal jurisdiction with respect to these questions.[1] I remain open to considering any reasonable compensation scheme (including delegating authority to states) but would have preferred to do so on the basis of our interstate authority, rather than on shared jurisdiction.

In closing, I wish to note that I would have preferred to avoid making tentative conclusions in the Notice section of today's decision. Indeed, in light of the complexity of the analysis, the importance of the issues and the long inquiry leading up to this decision, some may find it strange that our tentative conclusion in favor of state-level arbitrations would leave the method of establishing intercarrier compensation for this traffic virtually unchanged. I encourage commenters to provide information on both sides of this important issue so that we can assess more fully which compensation scheme is best.

For these reasons, I cannot fully support our decision today, and thus I concur in it. I wish to commend, however, my colleagues and our dedicated staff for their diligence and patience in wrestling with these knotty legal and policy issues.

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1 Any shared jurisdiction theory raises certain questions, such as: what are the limits of federal authority in crafting a compensation regime? Although the recent Supreme Court decision in *AT&T Corp. v. Iowa Utilities Board* begins to answer this question, the Court's answer may not be entirely complete. For example, in affirming the Commission's pricing jurisdiction, the Court states: "While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements . . . and granting exemptions to rural LECs, . . . these assignments . . . do not logically preclude the Commission's issuance of rules *to guide the state commission judgments*." *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) (opinion of the court, section II) (emphasis added). Other than affirming the approach taken in the Commission's underlying order, however, the Court provided little guidance regarding the level of specificity with which the Commission can "guide the state commission judgments."

D.T.E. 97-116-C

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

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SUMMARY

In February 1999, the Federal Communications Commission ("FCC") declared that telephone traffic bound for Internet service providers ("ISP-bound traffic") and thence onward to Internet websites is a single interstate call ("one call") and is therefore subject to FCC jurisdiction under the 1996 Telecommunications Act ("1996 Act"). The FCC's "one call" ruling effectively undercut the jurisdictional claim of any state utility regulatory agency over ISP-bound traffic, insofar as an agency asserted that calls to Internet websites were severable into two components: (1) one call terminating at the ISP and (2) a subsequent call connecting the ISP and the target Internet website. The FCC did not judge state regulators' decision that rested on other bases, apart from noting that decisions resting on state contract law or other legal or equitable considerations "might" still be valid until the FCC issued a final rule on the matter.

In MCI WorldCom Technologies, Inc., D.T.E. 97-116 (1998) ("Order"), relying on prior FCC's decisions that seemed to give greater scope for state jurisdiction over ISP-bound traffic, the Department of Telecommunications and Energy ("Department") had earlier ruled in favor of MCI WorldCom (a competitive local exchange carrier or "CLEC") upon its complaint that the interconnection agreement with Bell Atlantic-Massachusetts, under Section 251 of the 1996 Act, required the payment of reciprocal compensation for handling one another's ISP-bound traffic. The Order held that this interconnection agreement required reciprocal compensation for terminating ISP-bound traffic. The express and exclusive basis for the holding was (a) that the link between caller and ISP in ISP-bound traffic was jurisdictionally severable from the continuing link onward from the ISP to the target Internet site, (b) that ISP-bound traffic was thus "local" under the 1996 Act and the interconnection agreement, and (c) that ISP-bound traffic was, therefore, subject to Department jurisdiction as an intrastate rather than an interstate call. The Department noted that other CLECs' interconnection agreements with Bell Atlantic contained identical provisions and directed Bell Atlantic to treat them accordingly. The Department's Order claimed no other basis for its assertion of state jurisdiction over ISP-bound traffic (i.e., it asserted no jurisdictional claim based on state contract law or other legal or equitable considerations, such as the FCC had noted might underpin some state decisions).

In March, Bell Atlantic moved the Department to modify its Order in light of the FCC's ruling. After considering the motion and responsive comments, the Department today concludes that the FCC ruling has superseded its own 1998 Order and has struck down the sole and express basis for its assertion of state jurisdiction over ISP-bound traffic. The net effect of the FCC's ruling is to nullify MCI WorldCom Technologies, Inc., D.T.E. 97-116. Relying, then, on Section 252 of the 1996 Act, the Department has directed Bell Atlantic and the CLECs to negotiate their renewed dispute over payment for handling each other's ISP-bound traffic. The Department has offered to mediate the dispute, if necessary, and to arbitrate the matter, if required to.

To guide the parties in their negotiations, the Department has set forth certain views on competition in telecommunications and on its need to avoid regulatory distortions that falsely mimic competition but, in fact, simply lead to inefficient, market-entry advantage for certain CLEC/ISP entities through regulator-imposed income transfers.

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I. INTRODUCTION: THE DEPARTMENT'S ORDER OF OCTOBER 21, 1998

On October 21, 1998, the Department of Telecommunications and Energy ("Department") issued an Order granting the petition of MCI WorldCom, Inc.(1) ("MCI WorldCom") and directing New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") to continue reciprocal compensation payments(2) for the termination of local exchange traffic to Internet Service Providers ("ISPs") in accordance with its interconnection agreements. MCI WorldCom Technologies, Inc., D.T.E. 97-116, at 12 (1998) ("MCI WorldCom" or "October Order" or "Order"). The Department stated that it expected Bell Atlantic to apply its definition of local exchange traffic to all interconnection agreements between the ILEC Bell Atlantic and other Competitive Local Exchange Carriers ("CLECs"). Id. at 14.

In MCI WorldCom, the Department determined that a call to an ISP ("ISP-bound traffic"(3)) is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet. Id. at 11. Because the Department decided that a call from a Bell Atlantic customer to an ISP that is terminated by MCI WorldCom-and by extension, other CLECs--is a "local call," for purposes of the subject interconnection agreements, CLECs transporting and terminating calls to ISPs were deemed eligible for reciprocal compensation. Id. at 12-13. However, in its Order, the Department explicitly recognized that proceedings pending before the Federal Communications Commission ("FCC") could require it to modify its holding. Id. at 5 n.11. Finally, concerns that ISPs in Massachusetts may be establishing themselves as CLECs solely (or predominantly) to receive reciprocal compensation from Bell Atlantic prompted the Department to request information that would enable it to determine whether to open an investigation into the regulatory status of particular CLECs. Id. at 13.

II . EVENTS SINCE OCTOBER 21, 1998

On November 6, 1998, Bell Atlantic filed a Motion for Extension of the Judicial Appeal Period for all parties until 20 days after the FCC issues a ruling on reciprocal compensation for ISP-bound traffic. On November 10, 1998, the Department granted Bell Atlantic's motion.

Also on November 10, 1998, MCI WorldCom filed a Motion for Reconsideration arguing that a department decision to open an investigation into the regulatory status of certain CLECs would be inconsistent with the Act.(4) On February 25, 1999, the Department issued an Order denying MCI's Motion for Reconsideration, finding that the Department's general supervisory and regulatory jurisdiction permits it to request information from telecommunications carriers and to use that information in determining whether to open an investigation.(5) MCI WorldCom, D.T.E. 97-116-A at 4.

On February 26, 1999, the FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking in which it decided that jurisdiction over ISP-bound traffic is interstate. In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling (rel. Feb. 26, 1999) ("Internet Traffic Order"); Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking (rel. Feb. 26, 1999) ("NPRM"). The FCC concluded that ISP-bound traffic does "not terminate at the ISP's local server . . . but continue[s] to the ultimate

destination or destinations, specifically at a[n] Internet website that is often located in another state." Internet Traffic Order at ¶ 12. Having decided that jurisdiction over ISP-bound traffic is determined by the nature of the end-to-end transmission between a caller and an Internet site, id. at ¶¶ 12 and 18, the FCC determined that because ISP-bound traffic is interstate, that jurisdiction over the question of reciprocal compensation for such traffic, on the claim that it is local, lies with the FCC. Id. at ¶ 12. However, the FCC reserved for future rulemaking the question of payment for ISP-bound traffic among LECs. Id. at ¶ 21. Until that rulemaking is final, state commissions retain some, undefined measure of authority over ISP-bound traffic-consistent, of course, with the FCC's declaratory ruling on jurisdiction. Id. at ¶ 22. In the interim, state commissions either may continue, where appropriate, to enforce existing reciprocal compensation obligations between carriers under interconnection agreements or may, as needed, modify those obligations based on its findings in the Internet Traffic Order.
Id. at ¶¶ 25-27. And, citing this Department's concern over "gaming" of reciprocal compensation in its October Order, the FCC "note[d] that issues regarding whether an entity is properly certified as a LEC if it serves only or predominantly ISPs are matters of state jurisdiction." Id., at ¶ 24 and n. 78.

On March 2, 1999, Bell Atlantic filed a Motion for Modification of the Department's MCI WorldCom Order ("Motion for Modification") asking the Department to determine that its interconnection agreements do not require reciprocal compensation payments for ISP-bound traffic. Bell Atlantic argues that because the FCC determined that ISP-bound traffic is interstate and not local traffic, the reciprocal compensation requirements of the 1996 Act and the FCC's rules do not govern inter-carrier compensation for this traffic (Motion for Modification at 2). Therefore, Bell Atlantic contends that it is no longer required to make such payments. Bell Atlantic further states that it will escrow reciprocal compensation payments for ISP-bound traffic until the Department determines whether to modify MCI WorldCom (id.).(6) The Department originally established deadlines of March 19, 1999 for opponents' responses to the Motion for Modification and March 26, 1999 for Bell Atlantic's reply to those responses.

On March 10, 1999, Bell Atlantic responded to objections to its unilateral decision to escrow payments. Bell Atlantic filed a Motion for Stay Pending Decision on Motion for Modification ("Motion for Stay"). The Motion for Stay sought permission to escrow reciprocal compensation, pending a Department ruling on its Motion for Modification.(7).

The following entities(8) filed comments in response to the Motion for Modification: Teleport Communications-Boston, Inc., and Teleport Communications Group, as AT&T companies, and AT&T Communications of New England, Inc. (collectively "AT&T"); Cablevision Lightpath-MA, Inc. ("Cablevision"); Choice One Communications, Inc. ("Choice One"); a coalition of Massachusetts CLECs and ISPs (the "Coalition"); CoreComm Limited and CoreComm Massachusetts, Inc. (jointly "CoreComm"); Focal Communications Corporation ("Focal"); Global NAPs, Inc. ("GNAPS");(9) Intermedia Communications, Inc. ("Intermedia"); Level 3 Communications, Inc. ("Level 3");(10) MCI WorldCom; NEVD of Massachusetts, LLC ("NEVD"); PaeTec Communications, Inc.; Prism Operations, LLC ("Prism");(11) RCN-BecoCom, LLC ("RCN"); and RNK, Inc. ("RNK").(12) Bell Atlantic filed reply comments on March 15, 1999.(13)

On March 23, 1999, the Department issued MCI WorldCom, D.T.E. 97-116-B (1999) ("Escrow Order") granting Bell Atlantic interim relief from our prior Order and authorizing Bell Atlantic to place disputed reciprocal compensation payments in escrow, pending a final decision on its Motion for Modification. That Order scheduled oral argument on the contending claims, but argument was later postponed.(14)

On March 31, 1999, RNK filed a Motion for Clarification, Suspension of Escrow Order, and Reconsideration of Escrow Order ("RNK Motion for Clarification"). RNK seeks clarification on five points: (1) the relationship of the Escrow Order and specific terms contained in RNK's interconnection agreement with Bell Atlantic concerning the identity of the escrow agent, the rate of interest on the escrow account, and the responsibility for escrow costs; (2) whether escrow authority applies to reciprocal compensation accrued only after March 23, 1999, the date of the Escrow Order; (3) whether escrow applies to reciprocal compensation due and payable for traffic only in excess of the 2:1 ratio; (4) whether the Escrow Order uses differing meanings for the terms "Internet-bound traffic" and "ISP-bound" traffic; and (5) whether the authority to escrow granted to Bell Atlantic should even apply to CLECs, like RNK, which

provide multiple telecommunications services besides simply serving ISPs (RNK Motion for Clarification at 4-8). Until the Department rules on these issues, RNK argues, the Escrow Order should be suspended (id. at 8-10). RNK also argues that "extraordinary circumstances," particularly the escrow's adverse financial effect on small start-up CLECs, dictate that the Department reconsider the Escrow Order (id. at 10-11). Responses to RNK's Motion for Clarification were filed on April 5, 1999 by Bell Atlantic, GNAPS, and the Coalition.

Finally, on April 16, 1999, GNAPS filed a complaint against Bell Atlantic. The complaint seeks adjudication of GNAPS's claimed right to receive reciprocal compensation payments for calls that Bell Atlantic customers make to ISPs, where such customers receive their dial-in connections to the public switched network from GNAPS.

Comments have been extensive. After reviewing them, the Department sees no need for the oral argument originally scheduled in its Escrow Order of March 23. Therefore, Bell Atlantic's Appeal of the Hearing Officer's Ground Rules is dismissed as moot. RNK's Motion for Clarification is addressed in the context of our ruling on Bell Atlantic's Motion for Modification.(15)

III. POSITIONS OF THE PARTIES AND COMMENTERS

A. Bell Atlantic

Bell Atlantic claims that the Department's Order in MCI WorldCom must be modified because its conclusion that ISP-bound traffic was local was based on mistakes of both fact and law regarding jurisdiction over ISP-bound traffic (Motion for Modification at 8). According to Bell Atlantic, the FCC in its Internet Traffic Order determined, contrary to the Department's finding in MCI WorldCom, that an ISP-bound call cannot be separated into two components but is a single, uninterrupted transmission from a caller to a remote website (id.). Bell Atlantic contends that because ISP-bound traffic is not local, such traffic is not subject to reciprocal compensation under the Act, the FCC's rules, or any of Bell Atlantic's interconnection agreements(16) (id. at 9). Moreover, Bell Atlantic argues, the FCC, contrary to the Department's October Order and the CLECs' present claim, rejected the argument that because ISPs have local telephone numbers, calls placed to those numbers are local calls (id.). Bell Atlantic indicates the fact that the FCC exempted enhanced service providers ("ESPs") from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary (id.). Furthermore, Bell Atlantic argues, the FCC's recent GTE and Internet Traffic Orders have made it clear that Internet-bound traffic is interstate and therefore has no severable local component (id. at 10).

Concerning its contracting intent, Bell Atlantic states that it has not agreed to pay reciprocal compensation for ISP-bound traffic (Bell Atlantic Reply Comments at 8). Bell Atlantic argues that as a threshold legal matter and as a matter of contract law, the factual issues raised in the pleadings filed in opposition to the Motion for Modification may not constitute grounds for a determination that reciprocal compensation should be imposed for ISP-bound traffic under the interconnection agreements (id.). Bell Atlantic contends that when the wording of a contract is unambiguous, the contract must be enforced according to its terms (id. at 8-9). Because the Department has previously determined the agreements at issue to be unambiguous, Bell Atlantic argues that the Department should not now admit parole or extrinsic evidence relating to the parties' intent regarding the agreements (id.). Bell Atlantic argues that public policy and the impact on CLECs and ISPs have nothing to do with what the contracts actually say (id.). Accordingly, Bell Atlantic contends that ISP-bound traffic is not eligible for reciprocal compensation under Bell Atlantic's interconnection agreements and, further, that the CLECs have already received substantial compensation to which they are not entitled under those agreements (Bell Atlantic Motion at 10).

With respect to continued reciprocal compensation for ISP-bound traffic, Bell Atlantic states that it does not dispute that the FCC has not precluded the payment of reciprocal compensation for ISP-bound traffic in all circumstances, but that the Department's conclusion in MCI WorldCom was not based on any of the grounds permitted by the FCC (Bell Atlantic Reply Comments at 5). According to Bell Atlantic, the FCC stated that state commissions that have ordered the payment of reciprocal compensation for Internet-bound

traffic might conclude, depending on the basis of those decisions, that it is not necessary to revisit those determinations (id. at 6). Bell Atlantic notes, however, that MCI WorldCom did not rely on any of the other bases that the FCC recognized (id.). Bell Atlantic contends, in the alternative, that if the Department wishes to consider whether reciprocal compensation should continue to be imposed for Internet-bound traffic, the Department must resolve the disputed factual assertions raised by the parties in an adjudicatory proceeding that permits the parties to present evidence (id.).

B. CLECS

First, the CLECs point out that the FCC explicitly stated that "nothing in this [Internet Traffic Order] precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the [FCC's] rulemaking" (see e.g., Intermedia Comments at 5; Prism Comments at 3; Focal Comments at 11; NEVD Comments at 8, citing Internet Traffic Order at ¶ 27).

Next, the CLECs argue that the FCC's ruling on the jurisdictional analysis of calls to ISPs in its Internet Traffic Order in no way requires the Department to revisit MCI WorldCom; rather, in their view, it reaffirms the Department's Order (see e.g., AT&T Comments at 3; Coalition Comments at 3; MCI WorldCom Comments at 7-8; CoreComm Comments at 1; RNK Comments at 2). Level 3, for instance, argues that "the Department was quite clear that the determination it was making was for the purpose of classifying the traffic in the Agreement. It was not making a jurisdictional decision." Level 3 also argues that the FCC made it clear that its jurisdictional decision on ISP-bound traffic should not interfere with the decision made by a state commission (Level 3 Comments at 5; see also Choice One Comments at 3-5). According to the CLECs, the Department did not declare that ISP-bound traffic is "local" in the sense of "jurisdictionally intrastate," but only that those calls are more appropriately viewed as local traffic instead of long distance calls. The CLECs contend, therefore, that there is no conflict between MCI WorldCom and the FCC's Internet Traffic Order (see e.g., GNAPS Comments at 6; RCN Comments at 2, citing MCI WorldCom, D.T.E. 97-116, at 11-13; PaeTec Comments at 3). The CLECs maintain that Bell Atlantic chooses to focus only on the FCC's decision concerning jurisdiction, whereas the FCC specifically recognized the limit of that analysis (MCI WorldCom Comments at 10; CoreComm Comments at 3, citing Internet Traffic Order at ¶ 20) by stating that "the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local" (MCI WorldCom Comments at 11; RCN Comments at 4, citing Internet Traffic Order at ¶ 5).

CoreComm asserts that the FCC divided the analysis in its Internet Traffic Order into two parts, "one focusing on the nature of ISP-bound traffic for the purpose of resolving jurisdictional issues and the other focusing on the separate issue of what sort of regulatory treatment should be accorded such calls" (CoreComm Comments at 3). CoreComm supports this argument by quoting the first sentence of the FCC's Internet Traffic Order: "Identifying the jurisdictional and regulatory treatment of ISP-bound communications requires us to determine how Internet traffic fits within our existing regulatory framework" (CoreComm Comments at 4, citing Internet Traffic Order at ¶ 1 (emphasis added by CoreComm)). CoreComm argues that the FCC recognizes the difference between "jurisdictional analysis" and "regulatory treatment" (CoreComm Comments at 4; see also Focal Comments at 10-11).

The CLECs also contend that § 252(e)(1) of the Act gives the states the authority to interpret the interconnection agreements that they approved (see, e.g., RNK Comments at 3; NEVD Comments at 3). The CLECs base their arguments on the FCC's statement that "[n]othing in this [Internet Traffic Order], therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements" (see e.g., Coalition Comments at 4; PaeTec Comments at 6 n.16; Level 3 Comments at 5; RCN Comments at 3-4; NEVD Comments at 4, each citing Internet Traffic Order at ¶ 24). MCI WorldCom contends that "under well-established principles of contract construction, parties' intent is determined with respect to the time of contracting, not at some subsequent date" and at the time when it entered into its interconnection agreement with Bell Atlantic, both it and Bell Atlantic intended to treat calls to ISPs as local traffic subject to reciprocal compensation (MCI WorldCom Comments at 14; see also AT&T Comments at 4). In addition, the CLECs argue that the FCC identified "illustrative" factors(17)

a state commission could consider when determining whether the parties to an interconnection agreement intended to subject ISP-bound traffic to reciprocal compensation. Furthermore, the CLECs argue, the Department previously considered these factors and correctly concluded that ISP-bound traffic is subject to reciprocal compensation under existing interconnection agreements (see e.g., MCI WorldCom Comments at 12-14; RCN Comments at 5-7; Intermedia Comments at 4-5; Focal Comments at 5; PaeTec Comment at 5). MCI WorldCom, for instance, contends that the Department, in MCI WorldCom, considered the factors the FCC identified in the Internet Traffic Order at ¶ 24, and reached a conclusion that Bell Atlantic and MCI WorldCom agreed to compensate each other for termination of all local calls by finding that (1) the characteristics of ISP-bound traffic are identical to any other local calls, (2) Bell Atlantic and all other carriers charge their customers local rates for ISP-bound traffic, (3) the ISPs' premises are located within the LATA, thus meeting the definition of local traffic in its Agreement,(18) and (4) that ISP-bound traffic is subject to reciprocal compensation obligation for the same reasons that other kind of calls -- such as calls to private networks -- are subject to reciprocal compensation (MCI Comments at 3-4, 12-13, citing MCI WorldCom at 10). Accordingly, while the FCC and the Department may consider other compensation mechanisms in the future, reciprocal compensation under the existing interconnection agreement should not be modified (Level 3 Comments at 7; Prism Comments at 6-7).

AT&T argues that existing interconnection agreements should remain in full force, pending renegotiation by the parties and the FCC's completion of its rulemaking on inter-carrier compensation for ISP-bound traffic (AT&T comments at 6, citing the AT&T-Bell Atlantic Interconnection Agreement § 7.3 (providing "Parties shall negotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action")).

The CLECs bolster their argument concerning intent by noting that the telecommunication industry's custom and usage regarding ISP-bound traffic at the time the interconnection agreements were executed support their assertion that calls to ISPs are considered local and, therefore, subject to reciprocal compensation.(19) Even Bell Atlantic, the CLECs contend, recognized that calls to ISPs were local as it aptly demonstrated in its formal "Reply Comments" submitted in the FCC's proceeding to develop rules to implement §§ 251 and 252 of the Act (see e.g., Level 3 Comments at 5-6; GNAPS Comments at 3-4, citing In Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC docket no. 96-98, Reply Comments of Bell Atlantic at 21 (submitted May 30, 1996)). Arguing in favor of an actual compensation mechanism as opposed to a bill and keep arrangement supported by the CLECs, Bell Atlantic declared that (1) calls to ISPs are local, (2) subject to reciprocal compensation, and (3) the rates Bell Atlantic proposed for such reciprocal compensation were reasonable (see e.g., GNAPS Comments at 3-4; Focal Comments at 8; NEVD Comments at 12, citing In Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC docket no. 96-98, Reply Comments of Bell Atlantic at 21 (submitted May 30, 1996)). The CLECs argue that the fact that Bell Atlantic did not accurately predict the impact of its proposal (which eventually prevailed) should not provide a valid basis for Bell Atlantic to repudiate its agreements (Level 3 Comments at 6). While Bell Atlantic may not have foreseen the traffic imbalance caused by many ISPs opting to take service from a CLEC, Bell Atlantic should, as the party with the much more substantial sales, marketing, and technical experience, be assigned any risks associated with its poor foresight (NEVD Comments at 13).

GNAPS further supports the CLECs argument that Bell Atlantic considered dial-up ISP calls as local by citing to Bell Atlantic's "comparably efficient interconnection" ("CEI") plans for its own Internet access service (see e.g., GNAPS Comments at 9; Focal Comments at 8-9). In its CEI plans, Bell Atlantic stated that "[f]or dial-up access, the end-user will place a local call to the Bell Atlantic Internet hub site from either a local residence or business line or from an Integrated Services Digital Network ("ISDN") service" (see e.g., GNAPS Comments at 9, citing Amendment to Bell Atlantic CEI Plan to Expand Service Following Merger with NYNEX at 2, CCB Pol 96-09 (filed May 5, 1997); Focal Comments 8-9). Accordingly, GNAPS asserts that it is obvious that Bell Atlantic understood fully the general industry practice on treating ISP-bound calls as local (GNAPS Comments at 9-10)

PaeTec argues that Bell Atlantic, in its interconnection agreements, could have specifically carved out ISP-bound traffic as non-local in the same manner as other traffic with all the characteristics of local calls was

excluded from reciprocal compensation obligations (PaeTec Comments at 6 (claiming that the Bell Atlantic-MCI WorldCom interconnection agreement specifically identifies Feature Group A traffic as not subject to reciprocal compensation)). Because ISP-bound traffic was not excluded, PaeTec argues, Bell Atlantic's attempt to exclude such traffic now from its reciprocal compensation obligations is entirely a post hoc rationale now that the balance of this traffic goes against it (id. at 6-7). Moreover, PaeTec states, Bell Atlantic has a serious credibility problem with respect to this issue: if Bell Atlantic now is to be believed that it never intended to include ISP-bound traffic within the reciprocal compensation provisions of its interconnection agreement with MCI WorldCom, then one must also believe that Bell Atlantic intended to transport and terminate all traffic originated by a MCI WorldCom customer to a Bell Atlantic customer that happened to be an ISP, without any compensation at all from MCI WorldCom (id. at 8). RNK argues that another indication that Bell Atlantic intended ISP-bound traffic to be "local" for reciprocal compensation purposes is the fact that Bell Atlantic has paid for and accepted credit for local traffic that included ISP-bound calls (RNK Comments at 2). RNK thus makes a "course of conduct under the contract" argument to supplement the "usage of the trade" argument raised by GNAPS (GNAPS Comments at 9-10).

With respect to state law grounds, the CLECs argue the Department has authority to require reciprocal compensation for Internet-bound traffic as acknowledged in MCI WorldCom (Prism Comments at 3-4; RNK Comments at 3; NEVD Comments at 4). Prism argues that there is no federal law that prohibits applying reciprocal compensation to non-local calls, and points to the FCC's statement that "[i]n so construing the statutory obligation, we did not preclude parties from agreeing to include interstate traffic (or non-local intrastate traffic) within the scope of their interconnection agreements, so long as no Commission rules were otherwise violated" for support (Prism Comments at 7, citing Internet Traffic Order at ¶ 24); see also, NEVD Comments at 7). In addition, the CLECs also argue that applying the fact that ISP-bound traffic has been exempt from interstate access charges establishes that such traffic is subject to reciprocal compensation (see e.g., Prism Comments at 6; PaeTec Comments at 5; NEVD Comments at 6). The CLECs argue that, pursuant to the FCC's Internet Traffic Order, "state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' [contracting] intentions" (PaeTec Comments at 9, citing Internet Traffic Order at ¶ 24). Referring to G.L. c. 106, § 1-205(5), PaeTec asserts that because there are no express or implied terms in the interconnection agreement excluding the usage of trade that a telephone call to the telephone number of an ISP terminates when the call is answered, that usage of trade must be considered part of the definition of reciprocal compensation in the interconnection agreement" (PaeTec Comments at 10-11).

The Coalition asserts that if calls to ISPs are interstate as explained in FCC's ruling, then one may need to question how Bell Atlantic can carry such traffic because it currently lacks the authority to do so until it meets the requirements § 271 (Coalition Comment at 6). In addition, the Coalition contends that if the Department were now to adopt the single transmission analysis used in the FCC's ruling, then serious questions would arise concerning the consistency of this new analysis with the segmented transmission analysis used in Voice Mail, D.P.U. 97-101 (1998) (id. at 7). Lastly, the Coalition points out that there is "a significant question of estoppel and reliance on such practice by the CLECs that have expended very significant financial and human resources based upon the established practice that traffic to ISPs requires ILEC payment of reciprocal compensation" (id. at 7).

Regarding public policy concerns, RNK asserts that growth of the Internet is in the public interest and that the absence of reciprocal compensation will result in irreparable harm to CLECs and Massachusetts' consumers (RNK Comments at 5-6). The CLECs also contend that sound economic policy and regulatory fairness require full compensation for their significant network costs related to delivering calls to ISPs (Cablevision Letter at 2; GNAPS Comment at 4; Focal Comments at 7; RNK Comments at 6; NEVD Comment at 14).

Concerning the due process issues, MCI WorldCom contends that if the Department were to reconsider any issue, the proper procedure would be for the Department to hold an evidentiary hearing in order to investigate the parties' intent regarding calls to ISPs at the time they entered into the interconnection agreements (MCI WorldCom Comments at 17-18). RCN argues that the Department should leave MCI WorldCom in full force pending the completion of evidentiary hearings on whether the Order continues to be valid (RCN Comments at 7). GNAPS asserts that if the Department wishes to make a re-determination

on the intentions of the parties in the affected agreement, the Department should conduct an evidentiary hearing to explore how the factors identified in the FCC's Internet Traffic Order apply (GNAPS Comments at 8).

IV. ANALYSIS AND FINDINGS

Effect of the Federal Communications Commission's Internet Traffic Order on the Continued Validity of the Department's Order in MCI WorldCom

On February 26, 1999, the FCC declared that the 1996 Act, 47 U.S.C. sec. 251(b)(5), mandated reciprocal compensation for the transport and termination of local traffic only. The FCC further held that this mandate does not extend to ISP-bound traffic, because ISP-bound traffic is not local but is interstate for purposes of the 1996 Act's reciprocal compensation provisions. ISP-bound traffic is thus not subject to state enforcement under the 1996 on the grounds that it is local traffic. Internet Traffic Order at ¶¶ 12 and 26 n. 87.

In ruling in favor of Federal versus state regulatory jurisdiction over ISP-bound traffic and in construing 47 U.S.C. sec. 251(b)(5), the FCC focused on the"end-to-end" nature of the Internet communication. The initiating caller or customer is one "end" of the communication, and the terminating "end" is the web or other Internet site called by the customer. The FCC rejected arguments that would segment such traffic into intra- and inter-state portions and thereby also rejected a consequent, artificial segmentation of jurisdiction. Id. at ¶ 11. The FCC noted that it "analyzes the totality of the communication when determining the jurisdictional nature of a communication . . . [and] recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications." Id. at ¶ 13. The FCC considers each such commercial transaction as "one call" "from its inception to its completion" and accordingly rejects the jurisdictional limitation implied by arbitrarily isolating the initial part of the call from the rest of the stream of interstate commerce. Id. at ¶ 11.(20)

This line of analysis is certainly not surprising or even novel. For decades, decisional law has expansively analyzed questions of Federal versus state jurisdiction under the Commerce Clause, U.S. Const. Art. I, sec. 8, cl. 3, in this way. See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964) (practically unlimited view of the reach of Congress to local activity under the Commerce Clause if effect on interstate commerce can be posited). Unless and until modified by the FCC itself or overturned by a court of competent jurisdiction,(21) the FCC's view of the 1996 Act must govern this Department's exercise of its authority over reciprocal compensation; and the FCC so advises us. Internet Traffic Order at ¶ 27.

In October 1998, the Department had ruled on this very same, jurisdictional question in MCI WorldCom, D.T.E. 97-116.(22).

On March 2, 1999, Bell Atlantic moved the Department to modify its Order in MCI WorldCom in light of the FCC's Internet Traffic Order. Bell Atlantic's Motion for Modification, at 10, states that ISP-bound traffic "is now, and always has been, interstate traffic . . . , and CLECs have received substantial compensation to which they are not entitled under those [i.e., their respective interconnection] agreements."

In MCI WorldCom, the Department construed the 1996 Act as conferring jurisdiction upon it to hear MCI WorldCom's complaint about interpretation of its interconnection agreement with Bell Atlantic. MCI WorldCom, D.T.E. 97-116, at 5. In exercising this jurisdiction, the Department found "that a call from a Bell Atlantic[-Massachusetts] customer that is terminated by MCI WorldCom to an ISP is a 'local call,' for purposes of the definition of local traffic in the Agreement [between Bell Atlantic and MCI WorldCom], and, as such, is eligible for reciprocal compensation." Id., at 5, 12-13. The Department noted that although the parties to the matter had "raised numerous issues," the Department's Order "need only address the question of whether a call terminated by MCI WorldCom to an ISP is local, thus qualifying it for reciprocal compensation under MCI WorldCom's interconnection agreement with Bell Atlantic." Id., at 6 (emphasis added). The Department's October Order thus confined its enquiry in this matter solely and exclusively to whether the ISP-bound traffic in question was "local" (i.e., intrastate) or interstate calling. This limitation of the basis for the Department's holding was express; and no other basis may be reasonably inferred from the

Order. The October Order's effectiveness was thus ransom to the validity of its legal or jurisdictional conclusion.

To repeat, lest it be misunderstood: there was no other basis for the Department's holding in MCI WorldCom, D.T.E. 97-116. If that express legal basis were to prove untenable (as, in the event, it has), the effectiveness of the Order could not hold. And the Department recognized and acknowledged as much. Id., at 5 n. 11 and 6 n. 12.

As it happens, the Department's "two-call" theory cannot be squared with the FCC's "one-call" analysis. In rendering its "two-call" decision on reciprocal compensation for ISP-bound traffic, the Department twice acknowledged that FCC authority over the question may trump or supersede the Department's. Noting that the FCC might exercise its superior jurisdiction in a manner inconsistent with the Department's view of the law, the Department twice observed that, in that event, its own Order might require modification or change. Id. That twice-repeated caution(23) of the risk attendant on proceeding with reciprocal compensation for ISP-bound traffic before the FCC spoke appears to have been discounted or to have gone unheeded, if one is to judge from the numerous filings in response to Bell Atlantic's Motion for Modification. The substance of these filings is rehearsed above and need not be repeated here.

MCI WorldCom also expressed reservation that an enterprise "established solely (or predominately) for the purpose of funneling traffic to an ISP (particularly if that ISP is an affiliate) . . . may jeopardize its regulatory status and entitlements as a local exchange carrier." Id., at 13. The reservation was over the potential for "gaming" the regulatory scheme--with the consequence of siphoning off revenues but achieving no advance in true, efficient competitive entry.(24) This reservation was the subject of a motion for reconsideration by MCI Telecommunications Corporation, addressed by the Department in MCI WorldCom Technologies, Inc., D.T.E. 97-116-A (1999). The significance of the reservation was recognized in Internet TrafficOrder, at ¶ 24 n.78.

In its October Order, the Department exercised its authority to resolve the MCI WorldCom complaint. The Department based its Order on the express and exclusive premise that "[a] call to an ISP is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet." MCI WorldCom, D.T.E. 97-116, at 11, 12-13. To be sure, the FCC evidenced discomfort in trumping states' authority under Section 251(b)(5) and spoke equivocally about the effects of its declaratory order on decisions already taken by state commissions such as the Department. Internet Traffic Order at ¶¶ 27 and 28.(25) Even so, the message for the Department's MCI WorldCom Order cannot be mistaken.

The Department based its October Order on a mistake of law, i.e., on an erroneous characterization of ISP-bound traffic and on a consequently false predicate for concluding that jurisdiction was intrastate. By basing its jurisdictional analysis and finding on a mischaracterization of the nature of ISP-bound traffic, the Department exceeded its grant of state regulatory authority under the 1996 Act. Although the vague and equivocal terms of Paragraph 27 of the FCC's Internet Traffic Order may suggest that some state commissions "might conclude" that their reciprocal compensation orders remain viable, the FCC has, to put the matter baldly, rendered the DTE's October Order in MCI WorldCom-as a practical matter-a nullity. Pace the FCC's consoling notion that some states' orders might stand on state "contractual principles or other legal or equitable(26) considerations," Internet Traffic Order at ¶ 27, our Order stood squarely, expressly, and exclusively on a "two call" premise. That foundation has crumbled.(27) There is no alternative or supplemental finding in our October 1998 Order to rely on in mandating continued reciprocal compensation for ISP-bound traffic. In view of the FCC's practical negation of the legal and analytic basis of our October Order, we see no logical alternative to vacating that Order in response to the Motion for Modification. We hereby vacate MCI WorldCom, D.T.E. 97-116.

Unless and until some future investigation of a complaint, if one is filed, concerning the instant interconnection agreement determines a different basis for such payments, there presently is no Department order of continuing effect or validity in support
of the proposition that such an obligation arises between MCI WorldCom and Bell Atlantic. Although MCI WorldCom and Bell Atlantic may still disagree about reciprocal compensation obligations under their

interconnection agreement, there is-post February 26, 1999-no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute.

The consequences may be adverse for enterprises that acted aggressively in reliance on the nullified and now-vacated Department decision in MCI WorldCom's favor (ignoring the Department's express warnings that its decision could be changed by FCC findings). But no amount of wishful thinking can our justify clinging to a vitiated decision; nor can it empower the Department to countermand what the FCC has determined. The attempt of some parties and commenters to base their arguments on the vague terms of Paragraph 27 of Internet Traffic Order is futile. If that paragraph has any effective meaning (a matter open to doubt, given the FCC's reference to its pending rulemaking), then surely it is that only those pre-26 February decisions by state commissions founded, not on a "two call" jurisdictional theory, but rather on state contract law or some "other legal or equitable considerations" might yet remain viable-at any rate, "depending on the bases of those decisions" and, of course, "pending the completion of the rulemaking" the FCC initiated. Internet Traffic Order at ¶ 27. It seems patent that the FCC had in mind state decisions already, or yet to be, taken(28)--and that only to the extent such decisions might fit this vague criterion. The Department's October Order was not so based-with the result that, were that Order not vacated, it would float, untethered, in a jurisdictional void. MCI WorldCom may choose to renew its complaint upon some claim that Massachusetts contract law "or other legal or equitable considerations" give rise to mutual obligation on its and Bell Atlantic's parts to pay reciprocal compensation for ISP-bound traffic, even despite the FCC's jurisdictional pronouncement.(29)

How useful such a renewal might be is not predictable. We suggest a perhaps more promising course below.

Pending, however, such a renewal of the complaint and ultimate resolution of the matter, Bell Atlantic's Motion for Modification of March 2, 1999 is granted, in that the Department's Order in MCI WorldCom, D.T.E. 97-116, is vacated. Although that Order adjudicated only the Bell Atlantic-MCI WorldCom dispute, it professed to have broader implication (see Section IV of the October Order); and so, the suggested, broader applicability of that Order must, since the issuance of Internet Traffic Order, be doubted. MCI WorldCom, D.T.E. 97-116 at 14. However, Bell Atlantic has acted, since the October Order, on the understanding that our findings in MCI WorldCom applied to all interconnection agreements; and now a corresponding but converse understanding based on the instant Order appears warranted. In fact, as far as reciprocal compensation payments not made to MCI WorldCom or other CLECs as of February 26, 1999 are concerned,(30) no currently effective Department order categorically requires Bell Atlantic to pay, in some way, for handling CLECs' ISP-bound traffic. Bell Atlantic has proposed making payments under its interconnection agreements at a ratio not in excess of 2:1(terminating-to-originating traffic).(31) This arrangement is reasonable for the nonce, i.e., until the dispute is settled.

Reciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic), beginning with (and including payments that were not disbursed as of) February 26, 1999. Yet it still appears there were and may still be costs incurred by local exchange carriers in terminating such traffic. These transactions are not, however, "local" within the meaning of Section 5.8 of the Bell Atlantic-MCI WorldCom interconnection agreement. During negotiations, the parties to this agreement may determine that adequate pricing and other terms for these transactions are already governed by other contract provisions (and, certainly, arguments along these lines have been advanced in the CLECs' comments; see Section III.B. supra). Or else, accepting or at least acquiescing in our view of Section 5.8 of the interconnection agreement, they may jointly conclude that the present agreement is silent on the point and needs to be supplemented to provide new terms for these mutual services.

They are free to arrive at either judgment in coming to terms over the present dispute.(32) The best outcome is for Bell Atlantic and MCI WorldCom (or other CLECs where other interconnection agreements are concerned) to arrive at a resolution themselves. A far less satisfactory outcome is for the Department to have to interpret, or even to supply, terms, because the parties cannot agree. If the parties act wisely, it need not come to that, however. "Section 252 sets up a preference for negotiated interconnection agreements." AT&T Corp. v. Iowa Utilities Board, __ U.S. at __, 119 S.Ct. at 742 (Thomas, J., dissenting). Accordingly, we strongly advise potential complainants to follow this more promising and, in fact, statutorily preferred

route before initiating any complaint based on "contractual principles or other legal or equitable considerations" with the Department. Moreover, it would be inefficient to have parallel complaint adjudications going on while mediation or arbitration is under way.

The FCC has tentatively concluded that "the inter-carrier compensation for this telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the 1996 Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts." Internet Traffic Order at ¶ 30. Although the FCC has not formally adopted this tentative conclusion, in the currently unresolved of inter-carrier compensation for ISP-bound traffic in Massachusetts (i.e., apart from 2:1 payments for the nonce), we expect carriers to begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish, insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for all ISP-bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic. If need be, we would be willing to provide a Department mediator to facilitate agreement, pursuant to the mediation provision of section 252(a)(2). If these negotiations do not resolve the present interconnection agreement dispute, the Department can arbitrate the matter under section 252(b). At that time, consistent with the discretion we have been given by the FCC (at least until the NPRM is settled), the Department would resolve whatever issues are put before it. But such formal process implies time, and time's value in business suggests that the parties would be better off themselves resolving the matters that divide them.

We note also that termination of the obligation for reciprocal compensation payments for ISP-bound traffic (because that traffic is no longer deemed local) removes the incentive for CLECs to use their regulatory status "solely (or predominately)" to funnel traffic to ISPs. This development also removes the need for any further Department inquiry into the regulatory status of certain CLECs, the question raised by the October Order. B. Competition and Efficient Entry.

Having, then, assessed the effect of the FCC's declaratory ruling on our October Order, we turn to larger policy questions about the role of the Department in promoting efficient entry by new providers. The many comments filed in this case, asserting the importance of requiring reciprocal compensation for ISP-bound traffic to advance toward the policy goal of promoting competition in the local exchange, make clear that it is necessary for this Department to express to the negotiators its views on what competition really means.

Much futile debate in public utility regulation, especially in the current environment of developing markets, revolves around unexamined or sometimes distorted use of the terms 'competition' and its derivative 'competitive'. Loose, misleading, or self-serving meaning often underlies disputes and sows confusion.(33)

It underlies this dispute as well.

In so saying, we do not prejudge any formal renewal or prosecution of the dispute before us last October, where such a renewal might rest "on contractual principles or other legal or equitable considerations," as distinct from general policy arguments. But, as the parties and commenters in this docket will be negotiating, we believe it would be useful to highlight, in general terms, how the Department views underlying policy and economic issues. Otherwise, the parties must negotiate in a vacuum. In addition, certain of the interconnection agreements are coming due for renewal, e.g., MediaOne's agreement.

The unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition.(34) A loophole, in a word. There is, however-and we emphasize this point-nothing sinister or even improper about taking advantage of an opportunity such as the one presented by our October Order. One would not expect profit-maximizing enterprises like CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited. Create an opportunity and inventive enterprise will seize upon it. It was ever

thus. But regulatory policy, while it may applaud such displays of commercial energy, ought not create such loopholes or, once having recognized their effects, ought not leave them open.

Real competition is more than just shifting dollars from one person's pocket to another's. And it is even more than the mere act of some customers' choosing between contending carriers. Real competition is not an outcome in itself--it is a means to an end.(35) The "end" in this case is economic efficiency, which Baumol and Sidak have defined as "that state of affairs in which, as the specialized literature of welfare economics recognizes, no opportunity to promote the general welfare has been neglected. Such an opportunity is defined as the availability of a course of action that will benefit at least some individuals, in their own estimation, in a way not achieved at the expense of others." Toward Competition in Local Telephony, at 24 (emphasis added).(36)'(37) Failure by an economic regulatory agency to insist on true competition and economic efficiency in the use of society's resources is tantamount to countenancing and, to some degree, encouraging waste of those resources. Clearly, continuing to require payment of reciprocal compensation along the lines of our October Order is not an opportunity to promote the general welfare. It is an opportunity only to promote the welfare of certain CLECs, ISPs, and their customers, at the expense of Bell Atlantic's telephone customers and shareholders.

The Department has consistently rejected attempts over the years to make some customers and competitors better off at the expense of others, all in the name of promoting competition. For example, when the propriety of stranded cost recovery was being debated for the electric industry, the Department (with the sanction of the Supreme Judicial Court and of the General Court(38)) found that electric companies should have an opportunity to recover all of their prudently-incurred, non-mitigable stranded costs. This decision was (and still is) opposed by some on the claim that it purportedly reduces the benefits of competition; but the Department has rejected the notion that the mere shifting of costs to other customers or shareholders can be considered a "benefit" of competition. Similarly, in its recent decision in the natural gas unbundling docket, the Department stated:

Our role is not to guarantee the success of entrants. Rather, our role is to put in place the structural conditions necessary for an efficient competitive process -- one where marketplace decisions of both producers and consumers are made on the basis of incremental costs. An efficient, unbundled gas industry framework would allow customers to compare the LDCs'[local distribution companies] incremental costs to marketers' incremental costs. However, this comparison cannot be made if historic cost commitments are imposed asymmetrically on the LDCs. In other words, if LDCs must include the inefficient costs of past commitments in their prices, while marketers are not required to include those costs for customers who choose to migrate, then marketplace decisions, at least in the near term, are being made on the basis of an asymmetric allocation of historic cost responsibility, not on the basis of incremental costs. This does not lead to efficient competition.

Gas Unbundling, D.T.E. 98-32-B, at 30 (1999) (footnote omitted).

As the FCC has noted, reciprocal compensation payments for ISP-bound traffic are probably not cost-based. Internet Traffic Order at ¶ 29. The revenues generated by reciprocal compensation for that incoming traffic are most likely in excess of the cost of sending such traffic to ISPs.(39) ISP-bound traffic is almost entirely incoming, so it generates significant reciprocal compensation payments from Bell Atlantic to CLECs, an imbalance which enables CLECs to increase their profits or to offer attractive rates and services to Internet service providers-or to do both. Not surprisingly, ISPs view themselves as beneficiaries of this "competition" and argue fervently in favor of maintaining reciprocal compensation for ISP-bound traffic. However, the benefits gained, through this regulatory distortion, by CLECs, ISPs, and their customers do not make society as a whole better off, because they come artificially at the expense of others.

Where an increase in income results from regulatory anomaly, rather than from greater competitive efficiency in the marketplace, a regulator is well advise to take his thumb off the scale. We do so today. Arguing that we should not correct the distortions created by reciprocal compensation payments because they benefit ISPs and their customers is much like saying that one should not encourage people to quit

smoking, and so avoid adverse personal and public health consequences, merely because some members of society make a living growing tobacco. Decisions like this should be driven by concerns for overall societal welfare-and not by concern for preserving the hothouse environment of an artificial market niche.(40)

C. A Further Word about the Department's October Order

The foregoing analysis makes clear how the FCC's Internet Traffic Order affected MCI WorldCom, D.T.E. 97-116, but may raise the question of why, in the first place, we required Bell Atlantic last October to pay reciprocal compensation for ISP-bound traffic. We did so not because we felt that it was a good policy or that it promoted competition, but because we felt bound by the then-current state of decisional law, relying to a large degree on the FCC's own previous pronouncements to the effect that Internet calls represented two distinct services (particularly, the FCC's prior treatment of ESPs as discussed in Internet Traffic Order, at ¶ 5(41)). However, unease with the result did prompt the question of whether certain enterprises had nominally established themselves as CLECs "solely (or predominately)" to benefit from reciprocal compensation. That unease underlay the caution that the October Order would have to be reconsidered, were the FCC later to undercut its legal footing. In October, it appeared that the FCC's previous "two call" analysis was determinative of the issue. Then Internet Traffic Order clarified the FCC's earlier two-service analysis and fatally undercut our conclusion that ISP-bound traffic had to be deemed local under the interconnection agreement.

Some commenters have argued that Internet Traffic Order does not require us to modify our October decision. We disagree for the reasons already stated, but that it not the point. The real question for us is not whether the FCC's February decision requires us merely to modify our October decision, but whether we should cast about for some reason, any reason, to sustain that questionable result.(42) On the contrary, we view the FCC's decision as "liberating," in that it gives us the discretion to do what we would have liked to have been able to do back in October-namely, to get the parties to the interconnection agreement to set rationally based, economic bounds on reciprocal compensation payments for ISP-bound traffic. The negotiations we have directed should be able to accomplish just that.

In conclusion, we observe that there have been calls for regulators to apply a battery of telecommunications regulatory requirements, including access charges, universal service levies, and service-territory obligations, to the Internet and ISPs. We do not agree with this approach. As noted by the FCC, the Internet has been successful beyond the wildest imagining--in large part because it has generally operated outside of a confining regulatory framework. Internet Traffic Order at ¶ 6.

However, the Internet should not benefit from CLECs' and ISPs' "gaming" regulation, either. Certain CLECs and ISPs have figured out a way to use reciprocal compensation--a regulatory requirement originally designed to promote local telephone exchange competition for all customers--as a revenue source for increased profits, lower Internet access costs, and maybe even improved Internet access. But someone else is "picking up the tab." In the near-term, that "someone else" appears to be Bell Atlantic. But perhaps(43), over the longer term, it could be Bell Atlantic's telephone customers under the price-cap regime, NYNEX Price-Cap Order, D.P.U. 94-50, at 181-83 (1995), if the Department were on its own to insist on imposing some other basis ISP-bound reciprocal compensation on the agreement and if that insistence amounted to an exogenous regulatory variable, imposed despite the FCC's jurisdictional declaration in Internet Traffic Order.

Perpetuating this regulatory distortion would not be rational: the Internet is powerful enough to stand on its own, without such effective subsidies. Ending this regulatory distortion would encourage efficient investment in Internet and other telecommunications technology. Efficient investment promotes real competition that benefits all customers. Few, if any, may have foreseen this potential for distortion when the 1996 Act became law. But the FCC's negation of the legal basis for MCI WorldCom, D.T.E. 98-116, requires that we review and correct, not willfully cling to, demonstrated error. It would be regrettable to forego an opportunity to bring about a rational economic result. As the parties to the instant and other interconnection agreements attempt to sort out their disputes, they need to consider the Department's policy disposition if it is ultimately called upon to supply the solution.

V. ORDER

After due consideration, it is hereby

ORDERED: That the Motion for Modification, filed by New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts on March 2, 1999, is ALLOWED in that the Order of October 21, 1998 in MCI WorldCom Technologies, Inc., D.T.E. 97-116, is hereby VACATED; and it is

FURTHER ORDERED: That the Motion for Clarification, Reconsideration and Suspension of Escrow Order, filed by RNK, Inc. on March 31, 1999 (which incorporates by reference the Letter for Specific and Expeditious Relief, filed by RNK, Inc. on March 31, 1999) is DENIED; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts shall not be required, until further notice from the Department or until negotiations result in different payment terms, to escrow any reciprocal compensation payments for Internet-bound traffic or be required to maintain the present escrow arrangement; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts shall not be required to make reciprocal compensation payments, in excess of a 2:1 terminating-to-originating traffic ratio, beginning with any payments made or to be made after (and including payments undisbursed as of) February 26, 1999.

By Order of the Department,

_____

James Connelly, Commissioner

_____

W. Robert Keating, Commissioner

_____

Paul B. Vasington, Commissioner

Pursuant to § 252(e)(6) of the Telecommunications Act of 1996, appeal of this final Order may be taken to the federal District Court or the Federal Communications Commission. Timing of the filing of such appeal is governed by the applicable rules of the appellate body to which the appeal is made, or in the absence of such, within 20 days of the date of this Order.

CONCURRING AND DISSENTING OPINION OF JANET GAIL BESSER, CHAIR AND EUGENE J. SULLIVAN, JR., COMMISSIONER

I. INTRODUCTION

Although we agree that the FCC's Internet Traffic Order invalidated the factual two-call premise of the Department's October Order, we disagree with the majority's conclusion that this invalidation automatically serves to relieve Bell Atlantic from any and all obligations to pay compensation for ISP-bound traffic

terminated by CLECs. D.T.E. 97-116-C at 25, 40. For the reasons stated below, we believe that the Department should determine whether existing interconnection agreements require the parties to pay reciprocal compensation for this traffic. In addition, we would have required Bell Atlantic to continue to escrow the disputed payments while this matter is determined. Finally, we would strongly encourage the disputants to negotiate new commercial arrangements regarding this traffic. Accordingly, we concur in part, and dissent in part from the majority's decision.

II. DISCUSSION

A. The Department's October Order

The Department's October Order explicitly and clearly limited the basis for its conclusion that calls terminated by CLECs to ISPs qualified for reciprocal compensation by determining only that such calls were "local." MCI WorldCom at 6. Although the parties in that proceeding raised numerous issues, including various substantive policy and economic reasons for paying reciprocal compensation, the Department never explored these issues through hearings and discovery. Id. The October Order made no findings with respect to any other bases for reciprocal compensation nor did that Order specifically claim that other bases did not exist. Id. Rather, the October Order clearly determined, relying solely on a two-call analysis,(44) that ISP-bound traffic constitutes "local" traffic thus "qualifying it for reciprocal compensation." Id. at 12-13.

B. The Effect of the Internet Traffic Order on the Department's October Order

On February 26, 1999, the FCC determined that ISP-bound traffic was considered interstate based on a one-call analysis. Internet Traffic Order at ¶¶ 1,3. We agree with the majority that this decision removes the basis we used to support our conclusions in the October Order. However, we disagree with the majority's view of the immediate consequences of the Internet Traffic Order for our October Order. Without the local call basis, and without deciding the validity of any other potential bases, the majority concludes that Bell Atlantic is no longer obligated to pay reciprocal compensation for ISP-bound traffic. D.T.E. 97-116-C at 25, 40.

The conclusion that Bell Atlantic is no longer obligated to pay reciprocal compensation ignores the fact that Bell Atlantic had been paying reciprocal compensation well before issuance of the October Order. MCI WorldCom at 1-2, n.6. Thus, if our October Order is in fact a "nullity"(45) as the majority states, D.T.E. 97-116-C at 24, then the logical conclusion would be that Bell Atlantic should revert back to paying full reciprocal compensation pursuant to its interconnection agreement until such time as the Department determines whether other legitimate sources of support for this obligation exist.(46) Internet Traffic Order at ¶ 24.

Moreover, we do not find anything in the Internet Traffic Order that supports the conclusion that MCI WorldCom should be vacated. D.T.E. 97-116-C at 40. We do not agree that the MCI WorldCom Order no longer gives rise to any rights or obligations; rather, we believe that the MCI WorldCom Order was valid at the very least until issuance of the Internet Traffic Order.(47) We therefore disagree with the majority's decision that Bell Atlantic is not required to pay funds due before issuance of the Internet Traffic Order. D.T.E. 97-116-C at 28 n. 30.

Finally, we also strongly disagree with the majority's suggestion that the Internet Traffic Order may have eliminated any and all obligations for Bell Atlantic ever to have paid any reciprocal compensation for ISP-bound traffic. While we may agree that Bell Atlantic's obligation to pay reciprocal compensation for this traffic was called into question on February 26, 1999, that ruling merely changed the state of the law from that date forward. Reciprocal compensation paid from Bell Atlantic to the CLECs before that date was made pursuant to valid, legal obligations, consistent with state policy, and we disagree with any intimations to the contrary by the majority.

The Internet Traffic Order requires the Department to resume the investigation we thought we had concluded in October 1998. The FCC recognized that this might be the case for a number of state

commissions, stating that it recognize[s] that our conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server, but nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking . . . . (emphasis added).

Internet Traffic Order at ¶ 27.

The majority views the authority granted to state commissions in ¶ 27 as "vague" and "equivocal." D.T.E. 97-116-C at 24. However, we believe that this interpretation is not warranted. First, we have statutory obligations to fully investigate and adjudicate disputes subject to our jurisdiction. G.L. c. 30A; see also G.L. c. 159, §§ 12(d), 16, 19, 20. We should not prejudge whether arguments yet to be put forth by litigants have or lack merit without the benefit of a complete record developed with the fundamental due process rights of cross-examination and rebuttal. Second, the majority chooses to read ¶ 27 in light of Commissioner Michael K. Powell's concurrence. However, a concurring opinion (or, we acknowledge, a dissenting one for that matter) does not make the law. Consequently, we would accept the FCC's majority view and the authority it grants to state commissions as controlling until lawfully set aside, either by a reviewing court or a subsequent FCC decision. We note the difference between a suggestion that we "might" want to or need to "re-examine" our earlier conclusion, and an order from the FCC or other appellate body vacating, nullifying, remanding, or overruling our MCI WorldCom decision. Furthermore, we are buttressed in our view that ¶ 27 contains more than "a consoling notion," D.T.E. 97-116-C at 24, by the fact that, of the eleven state commissions that have considered the reciprocal compensation issue since the Internet Traffic Order, none have found that it is dispositive of this issue nor have any determined that LECs' existing obligations to pay reciprocal compensation should be changed.(48)

C. The Effect of the Internet Traffic Order on the Escrow Order

Our reasoning with respect to Bell Atlantic's reciprocal compensation obligations in the wake of the Internet Traffic Order does not lead us to conclude that we ought to require Bell Atlantic to pay reciprocal compensation for ISP-bound traffic to the CLECs during the completion of this proceeding or for the pendency of a new one. Although we agree that the FCC now has final jurisdiction to regulate and establish a compensation mechanism for this traffic, the FCC recognized that it has no regulations currently in place concerning these issues and issued an NPRM to rectify the situation. Internet Traffic Order at ¶¶ 1, 9, 21; NPRM at ¶¶ 28-36. However, for the interim period, the FCC made it clear that states could continue to determine how compensation for this traffic should be structured. While the Internet Traffic Order grants broad discretion over this compensation issue to the states for this interim period, this discretion is not unlimited. Thus, while it may be appropriate for a state to continue reciprocal compensation for contractual, policy or equitable considerations, or to develop and implement some other inter-carrier compensation mechanism, we have difficulty interpreting the FCC's order as authorizing a rate of "zero"(49) for this traffic, for the following two reasons. First, the Act requires local exchange carriers to compensate each other for the transport and termination of traffic that originates on one carrier's network and terminates on another carrier's network. 47 U.S.C. § 251(b)(5). Second, a carrier's transport and termination of this traffic has some non-zero associated costs, as the majority acknowledges.(50) D.T.E. 97-116-C at 28-29. Thus, we believe that inter-carrier compensation is due but recognize that the ultimate level of this compensation remains to be determined. Accordingly, we would have continued escrow in recognition of the legitimate dispute regarding these funds and to preserve them for immediate payment upon final decision or settlement. Accord D.T.E. 97-116-B (authorizing Bell Atlantic to escrow certain reciprocal compensation payments because escrow constitutes an accepted method to preserve disputed payments during a commercial dispute, and because various interconnection agreements require escrow of funds in the event of a dispute).

D. Discussion Concerning Negotiation and Settlement of this Dispute

While we agree with the majority that a negotiated settlement is the ideal outcome, we have concerns about the process that it would use to reach such a resolution. The process the majority articulates lacks any

meaningful incentives for the parties to reach a settlement for two reasons. First, the elimination of Bell Atlantic's obligation to pay reciprocal compensation into escrow for ISP-bound traffic provides a sure recipe for delay and non-settlement because Bell Atlantic now has little incentive to negotiate(51) and the CLECs have reduced leverage. Second, without an active adjudication proceeding concurrent with the negotiation/mediation/arbitration process established by § 252 of the 1996 Act, no route exists for the Department to end the dispute by issuing a final order.

E. Competition and Efficient Entry

Finally, we respond to the majority's colloquy on competition and efficient entry. In our view, this discussion is not directly related to the dispute before the Department in the instant proceeding. The substance of the discussion was not addressed directly by the parties or by the Commission as a whole in our deliberations. Therefore, we do not consider it to be a useful or appropriate addition to the Order.(52)

The majority does attempt to make a connection between the discussion in Section IV.B. and the issue of payment of reciprocal compensation for ISP-bound traffic, for example on page 32 where it states, "we do not prejudge any potential renewal of the dispute before us last October, where such a renewal might rest 'on contractual principles or other legal or equitable considerations' and not on substantive policy or economic issues." The majority appears to make this statement because it has reached a conclusion on the substantive policy and economic issues, to borrow its words, "in a vacuum."(53) In fact, one can infer from this conclusion that the majority has determined that there is no other basis for paying reciprocal compensation without consideration of evidence or argument.

Not only did the Department's October Order not reach the question whether there were bases for payment of reciprocal compensation other than the "local call" basis on which we relied then, but we also did not address any of the substantive policy or economic issues that, as a public utilities commission charged with protecting the public interest, it is our job to address. Doing our job - that is, taking evidence and hearing argument before reaching a reasoned decision - is not "cast[ing] about for . . . any reason to sustain [a] questionable result." Id. at 38. Rather, it is doing the work necessary to determine whether a result is, in fact, questionable or not questionable. As we have already indicated, continuing the current proceeding or opening a new one to address whether there are other bases - including consideration of substantive policy or economic issues - for payment of reciprocal compensation for ISP-bound traffic should be the Department's next step in resolving the current dispute.

Janet Gail Besser, Chair
Eugene J. Sullivan, Jr., Commissioner

SEPARATE STATEMENT OF JANET GAIL BESSER, CHAIR

In addition, while I question the value of including general pronouncements in an order such as this, I cannot let what I see as the majority's incomplete or inaccurate characterization of the Department's policy on competition go unaddressed. When the majority quotes from a previous Department order on the subject, I obviously take no issue with its restatement of Department policy. The Department's deliberations in Gas Unbundling, D.T.E. 98-32-B (1999), centered on the prerequisites and regulatory framework for promoting competition in the gas industry. The passage quoted by the majority on the role of entrants was part of a larger discussion of what constitutes full and fair competition -- an oft-stated goal of the Department in the context of both electric industry restructuring, Electric Restructuring, D.P.U. 95-30 (1995) and Electric Industry Restructuring, D.P.U. 96-100 (1997) and gas unbundling, D.T.E. 98-32-B at 4. There are also other individual statements in this section with which I agree.

However, I am concerned that the overall tone of the discussion does not capture the Department's policy on competition and efficient entry. In the current context, the passage from Gas Unbundling appears to be used to bolster criticism of new entrants for pursuing their own self-interest, despite the majority's assertions to the contrary.(54) The majority's narrow focus on the actions of new entrants here does not do

justice to the Department's policy on competition, a broad and comprehensive policy that we have spent much of our time developing over the last several years to enable the utility industries to make the transition from traditional regulation to competitive markets and to open these markets to new entrants who will bring with them innovation and pressures for efficient operation. In my view, the Department's policy on competition is best and most succinctly captured in the principles we articulated in 1995 to guide the restructuring of the electric industry, D.P.U. 95-30, and used again in 1997 to lead off the Department's gas unbundling initiative. Department Letter to Gas Local Distribution Companies, D.T.E. 98-32 (July 18, 1997). In this Order, I fear that the majority has fallen into the trap it identified of the "[l]oose, misleading, or self-serving usage [that] often underlies disputes and sows confusion." D.T.E. 97-116-C at 31. Therefore, I must respectfully disagree with its overall characterization of Department policy on competition and efficient entry.

Janet Gail Besser, Chair

1. MCI WorldCom, Inc. is the successor-in-interest to WorldCom Technologies, Inc. which is the successor-in-interest to MFS Intelenet Service of Massachusetts, Inc. ("MFS"). MFS is the entity that filed the original complaint in this docket.

2. The Telecommunications Act of 1996 ("1996 Act") requires each incumbent local exchange carrier ("ILEC") (Bell Atlantic is the ILEC in Massachusetts) to open its monopoly networks to effective competition before that ILEC will be authorized to provide long-distance telecommunications services. Section 251(b)(5) of the Act requires all local exchange carriers to compensate each other for the transport and termination of local traffic that originates on one carrier's network and terminates on another carrier's network. 47 U.S.C. § 251(b)(5). The Federal Communications Commission has interpreted this provision as limiting reciprocal compensation payments to the transport and termination of local traffic. See 47 C.F.R. § 51.701.

3. There are several ways to describe dial-up, Internet calling. For consistency, we adopt the FCC's term 'ISP-bound traffic'.

4. MCI also requested an extension of the judicial appeal period. The Department determined that this request was moot because the Department had previously granted Bell Atlantic's motion to extend the judicial appeal period for all parties. MCI WorldCom, D.T.E. 97-116-A at 5 (February 25, 1999).

5. Before the issuance of D.T.E. 97-116-A, the Department's Telecommunications Division issued data requests to ten CLECs to determine whether their customer bases were predominantly or solely ISPs, and whether any affiliate relationship exists between the CLECs and their ISP customers. Responses were received on or before January 20, 1999.

6. Bell Atlantic does not indicate how it will differentiate ISP-bound traffic from local traffic carried on its network. Instead, Bell Atlantic sets up a 2:1 proxy by stating (1) that it will escrow amounts in excess of the 2:1 ratio, billed to any CLEC that terminates at least twice as much traffic as it sends to Bell Atlantic, but (2) that if a CLEC demonstrates that the imbalance is associated with "local" traffic, Bell Atlantic will pay reciprocal compensation charges for those calls (Motion for Modification at 2 n.3).

7. Bell Atlantic notes that it filed the Motion for Stay to ensure that there would be "no ambiguity regarding [Bell Atlantic's] ability to withhold payments while the Department considers the Motion for Modification" (Motion for Stay at 3 n.2).

8. In addition to parties to D.T.E. 97-116, the Department allowed comments from all facilities-based CLECs with interconnection agreements with Bell Atlantic.

9. On March 4, 1999, GNAPS filed a petition for intervention. The Department has yet to rule on that petition.

10. Level 3 is the successor-by-merger of XCOM Technologies, Inc., which is an intervenor.

11. Prism formerly was known as Transwire Operations, LLC.

12. RCN, Choice One, the Coalition, Focal, GNAPS, NEVD, Norfolk, Prism, and RNK are not parties in D.T.E. 97-116.

13. With the Department's permission, MCI WorldCom filed its response on March 15, 1999, and Bell Atlantic filed its reply to MCI WorldCom's response on March 18, 1999.

14. Bell Atlantic's appeal of the hearing officer ruling on oral argument need not be ruled upon, for today's Order renders it moot.

15. ''

16. Bell Atlantic indicates that its interconnection agreements only require reciprocal compensation for local traffic and that, to be "local," the call must originate and terminate within a given local access transport area ("LATA") in the Commonwealth of Massachusetts (id. at 9).

17. These "illustrative" factors are:

whether incumbent LECs serving ESPs [Enhanced Service Providers] (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.

Internet Traffic Order at ¶ 24.

18. But see Internet Traffic Order, at ¶ 12 ("The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our [FCC's] jurisdiction").

19. 19 The CLECs cite the Alabama Public Service Commission's recent conclusion "that the industry custom and usage at that time [the interconnection agreements under review herein were entered] dictated that ISP traffic be treated as local and, therefore, subject to reciprocal compensation." (AT&T Comments at 5; MCI Comments at 14-16, citing In Re: Emergency Petitions of ICG Telecom Group Inc. and ITC Deltacom Communications Inc., Alabama PSC docket 26619 at 25 (Mar. 4, 1999)).

20. The FCC characterizes the Internet as "a powerful instrumentality of interstate commerce." Internet Traffic Order at ¶ 6. Although the FCC admits its treatment of enhanced service providers ("ESPs") has something of an intrastate flavor, id. at ¶ 5, describing the Internet in this way virtually dictated the FCC's "one call" analysis. See also Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd at 15983, 1631-33 (1997). The FCC has evidently determined to close this avenue of caselaw by distinguishing it, somewhat artificially, from its holding in Internet Traffic Order.

21. The recent "transferring [of] the States' regulatory authority wholesale to the Federal Communications Commission" for which Justice Thomas recently faulted the Court's majority in AT&T Corp. v. Iowa Utilities Board suggests that judicial reversal is unlikely. AT&T Corp. v. Iowa Utilities Board, __ U.S. __, at __, 119 S.Ct. 721, 741 (1999) (Thomas, J., dissenting).

22. Although numerous CLECs intervened in the proceeding, the Department had before it only the complaint of MCI WorldCom for alleged breach of contract by Bell Atlantic. The Department did, however, note the implications of its Order for other interconnection agreements. MCI WorldCom, D.T.E.

97-116, at 14. The contract in question was the "Interconnection Agreement between New England Telephone and Telegraph Company and MFS Intelenet of Massachusetts, Inc." dated 26 June 1996, and filed with the Department on 10 July 1996. Of particular note, are §1.38, the definition of 'Local Traffic', and §5.8, Reciprocal Compensation Arrangements - Section 251(b)(5).

23. The point was noted for a third time in MCI WorldCom Technologies, Inc., D.T.E. 97-116-A, at 2 (1999)

24. The matter of efficient entry by providers versus inefficient entry evidently weighs heavily upon the FCC as well. Internet Traffic Order at ¶ 6.

25. The equivocation is subtle but evident in the word "necessarily" as used in the penultimate sentence of ¶ 27. It did not escape the notice of one FCC commissioner. As he so often politely but cogently does, FCC Commissioner Michael K. Powell points out the essential incoherence of the majority's dicta about state decisions affected by the Internet Traffic Order: "Such reasonableness does little to preserve those state decisions most likely to be disturbed by our 'one call' jurisdictional analysis, namely, decisions based primarily or exclusively on a 'two-call' theory. In short, I think touching on the issue of shared jurisdiction muddles our conclusion that there is federal jurisdiction with respect to these questions." Internet Traffic Order, Concurrence of Commissioner Powell, text at n. 1. There is evident division among the FCC commissioners over the implications of this "shared jurisdiction theory" (to use Commissioner Powell's term). See Separate Statement of Commissioner Susan Ness, fourth paragraph (it "remains reasonable for the states . . . to treat this [ISP-bound] traffic as local"). It may be that the FCC's temporized ("muddled" in Commissioner Powell's terms) jurisdictional analysis is a reaction to the sizeable minority of the Supreme Court, who joined Justice Thomas in expressing dismay at the FCC's earlier incursion into a traditional state province in AT&T Corp. v. Iowa Utilities Board (see note 21 supra).

26. The FCC's use of the word "equitable" is ambiguous. It is not clear what equitable powers a regulatory agency could, in any event, claim to exercise, as it acts under a statutory grant. The FCC's observation was evidently intended to cushion the jurisdictional blow, but all it does is muddle the message, as Commissioner Powell has observed. Internet Traffic Order, Concurrence of Commissioner Powell, text at n. 1.

27. The parties to this docket have diligently provided the Department with other states' decisions on reciprocal compensation rendered since Internet Traffic Order was issued. We have reviewed those filings. Other state commissions considered the effects of the FCC's ruling on their situations, on the interconnection agreements before them, and on prior decisions rendered. We have before us only our own October Order and the interconnection agreement construed by that Order. Useful as it has been to know what other states have made of the FCC's ruling, it is equally useful to recall Commissioner Powell's observation about the effects of that ruling: "Furthermore, having reviewed a number of the state decisions in this area, I am persuaded that the underlying facts, analytical underpinnings and applicable law vary enormously from state to state." Internet Traffic Order, Concurrence of Commissioner Powell, page 2.

28. The FCC's wording ("any determination a state commission has made, or may make in the future"), Internet Traffic Order at ¶ 24, must be read in light of the only plausible, saving grounds for such state determinations set out by the FCC in ¶ 27 (state decisions taken, before or after February 26, that rest on "contractual principles or other legal or equitable considerations"). State decisions whose conclusions "are based on a finding that this [ISP-bound] traffic terminates at an ISP server," id., are in another category, however. And our October Order falls into this latter group.

29. We do not, at this point, hazard a judgment whether such an alternative basis exists in the Bell Atlantic-MCI WorldCom interconnection agreement before us. If such a basis can be convincingly shown, then it would not be the Department's role to save contracting parties from later-regretted commercial judgments. See Complaint of A-R Cable Services, Inc., D.T.E. 98-52, at 5 n. 7 (1998).

30. This finding partly addresses RNK's Motion for Clarification. Bell Atlantic's Motion for Modification of our October Order intimates that reciprocal compensation payments made for ISP-bound traffic before

February 26, 1999 were never truly due and owing under the interconnection agreement. Bell Atlantic notes that "there is no severable 'local' component of an Internet call but such traffic is now, and always has been, interstate traffic. . . . Internet-bound calls are not eligible for 'local' reciprocal compensation under BA-MA's interconnection agreements, and CLECs have received substantial compensation to which they are not entitled under those agreements." Bell Atlantic's Motion for Modification, at 10. Despite Bell Atlantic's intimation, the question of refund is not before us, and so we take no position on the status of payments made by Bell Atlantic for reciprocal compensation for ISP-bound traffic prior to February 26, 1999. To do so now would be premature-assuming that D.T.E. even has jurisdiction over the question of refunds and considering the instructions below as to negotiations, mediation, and, if it must come to that, arbitration. But we shall not require Bell Atlantic to make (i.e., to disburse) any payments that were not made as of that date. See text immediately infra.

31. In the current absence of a precise means to separate ISP-bound traffic from other traffic, we believe that Bell Atlantic's 2:1 ratio as a proxy is generous to the point of likely including some ISP-bound traffic. However, this 2:1 proxy is rather like a rebuttable presumption, allowing any carrier to demonstrate adduce evidence in negotiations, or ultimately arbitration, that its terminating traffic is not ISP-bound, even if it is in excess of the 2:1 proxy. Where disputes arise, however, the disputants are well advised to work the matters out between themselves, rather than bringing them to this forum after less-than-thorough negotiations.

32. See Internet Traffic Order, at ¶ 24 n. 77.

33. The frequent misuse and abuse of 'competition' and allied terms calls to mind the colloquy between Humpty Dumpty and Alice, when she objects to his arbitrary and idiosyncratic meanings for words:

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master--that's all."

Lewis Carroll, Through the Looking-Glass, and What Alice Found There (Boston: Lee and Shepard, 1st U.S. edition, 1872) chapter VI , p. 124.

34. See, e.g., the career accomplishment cited in Bell Atlantic Reply Comments on Motion for Modification, March 15, 1999, Attachment A, Resume of David F. Callan: "Identified niche opportunity related to asymmetrical traffic patterns under Federally mandated interconnection architecture." The premise of a mandate, of course, no longer holds post Internet Traffic Order.

35. As noted by Justice Breyer in AT&T Corp. v. Iowa Utilities Board, "[t]he competition that the [1996] Act seeks is a process, not an end result." AT&T Corp. v. Iowa Utilities Board, Opinion of Breyer, J., __ U.S. at __, 119 S.Ct. at 751. When the exercise of regulatory authority artificially brings into play additional providers but some one else in the market is "picking up the tab" for those new players' entry, that is not competition. It is, rather, handicapping one horse so the others in the field may as likely cross the finish first, despite their otherwise slower speed. There is no real gain in the efficient deployment of society's resources and thus no net social gain. While some may make the case for incubating infant industries, the purportedly temporary "life-support" measures entailed in doing so often become necessities (even entitlements) that cannot, practically speaking, later be withdrawn.

In the case of reciprocal compensation for ISP-bound traffic, "shifting dollars from one person's pocket to another's" occurs when Bell Atlantic's reciprocal compensation payments are in excess of a CLEC's costs to terminate ISP-bound traffic. (The discussion in the text infra makes clear that we believe this result likely obtains. See also note 34 supra and note 39 infra.) In addition, Bell Atlantic contends that the reciprocal

compensation payments it has made are in excess of the costs that Bell Atlantic avoids by no longer terminating this traffic. Therefore, Bell Atlantic is making payments to CLECs for recovery of costs that are not being incurred and is paying more than its own avoided-cost savings. As a result, Bell Atlantic's shareholders or telephone customers are losing money, and CLECs are either earning additional profits or passing through these "savings" to their own customers as putative benefits of competition. Such benefits are not related to any efficiencies achieved or value added by CLECs. They are simply the result of regulatory distortion.

36. See, also, Thomas J. Duesterberg and Kenneth Gordon, Competition and Deregulation in Telecommunications, p. 26 (1997), "Pricing policies and investment incentives for all parties, including the incumbents, must simultaneously be developed so as to create an efficient telecommunications system. Ideally, this means that prices of final goods and services, as well as of intermediate goods purchased by competitors, should reflect real economic costs."

37. It is perhaps not fashionable to quote him in a regulated industry, but Adam Smith put the matter justly in 1776:

No regulation of commerce can increase the quantity of industry in any society beyond what its capital can maintain. It can only divert a part of it into a direction into which it might not otherwise have gone; and it is by no means certain that this artificial direction is likely to be more advantageous to the society than that into which it would have gone of its own accord.

Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage, indeed, and not that of the society, which he has in view. But the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society.

Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (Oxford: University of Oxford, 1869), vol. I, bk. 4, ch. 2 (the chapter concerns restraints on imports, but the point is broadly suggestive in assessing proposed government
actions).

38. The Supreme Judicial Court in Massachusetts Institute of Technology v. Department of Public Utilities, 425 Mass. 856, 866-67 (1997); and the General Court in St. 1997, c. 164.

39. Similarly, ISG-Telecom Consultants, Int'l., a Florida industry consultant that specializes in helping ISPs turn into CLECs, has characterized the income derived from reciprocal compensation as "gravy" income. See Bell Atlantic Reply Comments, March 15, 1999, Attachment F (Affidavit of Paula L. Brown), Subattachment C to Attachment F (tenth unnumbered page), copy of Internet communication of ISG-Telecom, entitled "Taking the Plunge from ISP to ISP/CLEC. Is it Right for You???", copyright 1996, 1997, 1998, 1999:

Although reciprocal compensation could be a new revenue source for the ISP/CLEC, we at ISG-Telecom NEVER recommend creating a business plan or business case model around reciprocal compensation. ISP/CLECs that choose to become CLECs to participate in reciprocal compensation should be aware of the current regulatory climate. Reciprocal compensation, in light of recent FCC considerations, should be considered "gravy" income ONLY [emphasis in original].

See also Internet Traffic Order, at ¶ 24 n. 78, wherein the FCC recognizes the question of consistency with the statutory scheme ("e.g., definition of a carrier") of such "anomalous practices" as "free [I]nternet access while getting paid for it." In a word, "gravy."

40. See notes 34 and 39 supra.

41. See note 20 supra.

42. The situation is not without earlier parallel. The Department faced a similar choice and like counsel in 1994-95. The Department's policy regarding "environmental externalities" in electric regulation was overturned on purely legal grounds by the Supreme Judicial Court in Massachusetts Electric Company v. Department of Public Utilities, 419 Mass. 239, 243-50, 252 (1994) (imposing such externalities was "beyond the range of its statutory authority to do so"), the Department-barely a month after the Court had corrected it-flatly rejected counsel that it somehow cling to judicially discredited precedent. Boston Edison Company, D.P.U. 95-1-CC, at 12-14 (1995). We can be no less forthright here. A clean break with error is salutary.

43. We employ emphasis advisedly. Only where "regulatory, judicial, or legislative changes uniquely affecting the telecommunications industry" (and other stated cost changes) impose resultant additional cost can Bell Atlantic qualify for recovery under the exogenous cost adjustment provisions of its price cap mechanism. NYNEX Price-Cap Order, D.P.U. 94-50, at 181-83. Extra-statutory, voluntary contractual undertakings are another matter-and Bell Atlantic was and is free to choose such undertakings for its own business reasons, Internet Traffic Order at ¶ 24 n. 77. See, also, Complaint of A-R Cable Services, Inc., D.T.E. 98-52, at 5 n. 7; and see note 28 supra. Yet, negotiation or mediation may settle the question, and so it may not be presented for Department decision for arbitration.

44. We note this was not, contrary to the majority's assertion, a "mistake of law." D.T.E. 97-116-C at 24. In fact, the FCC had, on May 7, 1997, noted that "[w]hen a subscriber obtains a connection to an [ISP] via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the [ISP's] service offering." In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, at ¶ 789, Report and Order (rel. May 7, 1997); see also Internet Traffic Order at ¶¶ 13-16. Accordingly, our October Order was consistent with existing law, subsequently changed, and was not a mistake of law.

45. Black's Law Dictionary (6th ed. 1991) defines the phrase "null and void" as meaning "that which binds no one or is incapable of giving rise to any rights or obligations under any circumstances . . . ."

46. We view this dispute as remaining active; in our view, MCI WorldCom need not re-file its complaint in order to re-invigorate this suit. Cf. D.T.E. 97-116-C at 25. However, we believe it would be a more efficient use of resources for the Department to re-notice these issues for resolution in the context of a generic adjudication applicable to all relevant interconnection agreements.

47. This has implications, for example, for RNK, which sought funds owing before issuance of the Internet Traffic Order (RNK Letter for Specific and Expeditious Relief dated March 31, 1999).

48. WorldCom, Inc. v. GTE Northwest Inc., "Third Supplemental Order Granting WorldCom's Complaint, Granting Staff's Penalty Proposal; and Denying GTE's Counterclaim," Washington Utilities and Transportation Commission, Docket No. UT-980338 (May 12, 1999) (Commission found no reason to alter prior decision in MFS/US West Arbitration, and that prior finding that calls to ISPs are local calls subject to reciprocal compensation should apply to MFS/GTE agreement as well); In the Matter of the Application of Global NAPs South, Inc. for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware, Inc., Delaware Public Service Commission, Docket No. 98-540, Order No. 5092 (May 11, 1999) (Commission affirmed arbitrator's award that found interconnection agreement adopted by Global NAPS did anticipate treating ISP-bound traffic as local for purposes of reciprocal compensation, because agreement did not contain provisions for segregation of ISP-bound traffic or other special procedures for such traffic; arbitrator also found that FCC Order not dispositive of issue and that GNAPS entitled to receive reciprocal compensation for ISP-bound calls unless and until FCC issues ruling to contrary); In the Matter of the Petition of GTE Hawaiian Telephone Company, Inc. for a Declaratory Order that Traffic to Internet Service Providers is Interstate and Not Subject to Transport and Termination Compensation, Hawaii Public Utilities Commission, Docket No. 99-0067, Decision and Order No. 16975 (May 6, 1999) (Commission found that previous finding that reciprocal compensation should be paid for Internet traffic not in conflict with FCC Order); In the Matter of the Complaints of ICG Telecom Group, Inc., MCImetro Access Transmission Services, Inc., and Time Warner Telecom v. Ameritech Ohio, Ohio

Public Utilities Commission, Case No. 97-1557-TP-CSS et al (May 5, 1999) (Commission found that FCC Order does not affect earlier decision and that pending new FCC rule, state commissions have authority to establish inter-carrier mechanism and to decide whether and under what circumstances reciprocal compensation is due); Electric Lightwave, Inc. v. U S WEST Communications, Inc., Oregon Public Utility Commission, Order No. 99-285 (April 26, 1999) (Commission ruled that ISP traffic is local under terms of existing interconnection agreements, agreeing with the Alabama PSC that parties were required to specifically exclude ISP traffic from the definition of local traffic or applicability of reciprocal compensation, if that was parties' intent); Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation, "Order Instituting Proceeding to Reexamine Reciprocal Compensation," New York Public Service Commission, Case No. 99-C-0529 (April 15, 1999) (Commission opened new docket to reexamine reciprocal compensation policy, particularly costs and rate structures applicable to large-volume call termination to single customers, and to set permanent rates for such by August, 1999; Commission noted that FCC order allows states to continue requiring payment of reciprocal compensation for Internet-bound traffic); In Re Petition of Pac-West Telecomm, Inc. for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Nevada Bell, "Order Adopting Revised Arbitration Decision," Nevada Public Utilities Commission, Docket Nos. 98-10015 and 99-1007 (April 12, 1999) (Commission found FCC Order does not alter fact that ISP-bound traffic is treated as local for rate-making purposes and that ISPs are no different than other local business customers; Commission noted there is no practical way of distinguishing ISP-bound traffic and fact that there is substantial imbalance between calls terminating to CLEC does not support conclusion that subsidy flow exists); In Re: Request for Arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. v. BellSouth Telecommunications, Inc. regarding Traffic Terminated to Internet Service Providers, Florida Public Service Commission, Docket No. 981008-TP, Order No. PSC-99-0658-FOF-TP (April 6, 1999) (Commission required continued payment of reciprocal compensation for Internet-bound traffic; Commission found it did not need to address jurisdictional nature of calls but only needed to examine parties' intent, which clearly showed intention that Internet-bound traffic be rated and billed as local calls); In the Matter of the Petition of Pacific Bell for Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc. pursuant to Section 256(b) of the Telecommunications Act of 1996, "Order on Draft Arbitrator's Report," California Public Utilities Commission, Application 98-11-024 (March 30, 1999) (in context of arbitration of new interconnection agreement, Arbitrator found that Pacific Bell is required to pay reciprocal compensation for ISP-bound traffic, concluding that such compensation was not eliminated by FCC Order); In Re: Emergency Petitions of ICG Telecom Group, Inc. and ITC Deltacom Communications, Inc. for a Declaratory Ruling, Alabama Public Service Commission, Docket No. 26619 (March 4, 1999) ("Commission found ILECs should pay reciprocal compensation for ISP traffic under terms of interconnection agreements; Commission also found that parties intended those calls to be local because they did not exclude ISP traffic from local traffic at time agreements entered into); In the Matter of Enforcement of Interconnection Agreement between Intermedia Communications, Inc. and BellSouth Telecommunications, Inc., "Order Denying Motion for Stay," North Carolina Utilities Commission, Docket No. P-55, SUB 1096 (March 1, 1999) (Commission denies further stay for BellSouth of its November 4, 1999 order requiring payment of reciprocal compensation for ISP traffic; Commission found that any further stay must be obtained from court on appeal; in comments to district court, Commission argues that FCC Order does not disturb Commission's earlier order).

49. We note that Bell Atlantic has voluntarily offered, and the majority has accepted, to continue paying reciprocal compensation for traffic up to an imbalance of 2:1. The majority notes that because there is no technological means to segregate legitimate local traffic from illegitimate ISP-bound traffic, this ratio "is generous to the point of likely including some ISP-bound traffic." D.T.E. 97-116-C at 28 n.31. However, according to the majority, there is no legal requirement that Bell Atlantic pay any reciprocal compensation to one another for this traffic; accordingly, the effective legal "rate" is zero. Id. at 25.

50. The majority's reference to a possible impact on Bell Atlantic's ratepayers (via a price cap exogenous cost) if Bell Atlantic was ordered to continue paying reciprocal compensation is premature and speculative at best. Whether Bell Atlantic would be eligible for such exogenous cost recovery is dependent on a number of complex factors which we would not presume to prejudge.

51. Given its conclusion that Bell Atlantic has no obligation to pay reciprocal compensation for ISP-bound traffic, it is not clear to us why the majority thinks Bell Atlantic would engage in negotiation, as it encourages Bell Atlantic to do, because if such discussions were to lead to an agreement for compensation, then Bell Atlantic would begin to pay its local competitors for traffic that, according to the majority, it has no obligation to pay.

52. We note that the Department occasionally provides general guidance at the close of an order on a specific adjudication, but the guidance is directly related to the substance of the order. For example, in Essex County Gas Company, D.T.E. 98-27 (1998), the Department included direction on the showing proponents of a merger should make to ensure expeditious consideration of their petitions. This type of guidance, directly related to the specific case at hand and flowing from the evidence presented, is, of course, appropriate.

53. The majority concludes, "Clearly, continuing to require payment of reciprocal compensation along the lines of our October Order is not an opportunity to promote the general welfare" without the Department having examined this question. D.T.E. 97-116-C at 34.

54. See, e.g., D.T.E. 97-116-C at 32-33 ("There is, however - and we emphasize this point - nothing illegal or improper in taking advantage of an opportunity such as the one presented by our October Order. One would not expect profit-maximizing enterprise[s] like CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited.").

AGENDA DATE: 7/7/99

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

IN THE MATTER OF THE PETITION OF GLOBAL NAPS INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS AND RELATED ARRANGEMENTS WITH BELL ATLANTIC-NEW JERSEY, INC. PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	)	TELECOMMUNICATIONS DECISION AND ORDER DOCKET NO. TO98070426

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes final action taken by the New Jersey Board of Public Utilities (Board) in the arbitration requested by Global NAPs, Inc. (GNI) by letter dated June 30, 1998, and will resolve all outstanding and unresolved issues in GNI's interconnection dispute with Bell Atlantic-New Jersey, Inc. (BA-NJ).

PROCEDURAL HISTORY

On January 26, 1998, GNI requested interconnection and network elements from BA-NJ pursuant to section 251 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56, codified in scattered sections of 47 U.S.C. §151 et seq. (hereinafter, the Act). During the period from the 135th to the 160th day after receipt of an interconnection request, the carrier or any other party to the negotiation may petition the State commission to arbitrate any outstanding issues. The State commission is required to resolve each issue set forth in any such proceeding "not later than 9 months after the date on which the local exchange carrier received the [interconnection] request under this section." 47 U.S.C. §252(b)(4)(C).

By letter dated June 30, 1998 and pursuant to section 252(b)(1) of the Act, GNI filed with the Board of Public Utilities (Board) a Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief. GNI essentially sought affirmation through the arbitration process that it was entitled to opt into an interconnection agreement previously

EXHIBIT C

approved by the Board between BA-NJ and MFS Intelenet of New Jersey, Inc. (MFS)[1], and to do so without any limitations or restrictions which it believed BA-NJ improperly sought to impose. By letter dated July 16, 1998, GNI advised the Board that it believed that the parties had reached an agreement for interconnection, had apparently resolved the issues raised in the petition, and requested that the Board suspend further action on the petition for arbitration pending successful execution of an interconnection agreement.

The parties having failed to reach an interconnection agreement, and pursuant to the Board's arbitration procedures,[2] on September 15, 1998, Ashley C. Brown from the Kennedy School of Government at Harvard University was chosen as the Arbitrator. On September 28, 1998, both parties submitted a joint statement of the unresolved issues to the Arbitrator and each party separately submitted a statement of their response to these issues. By letter dated October 2, 1998, the parties jointly submitted a letter to the Board stating that they had agreed not to file any motions with the Federal Communications Commission (FCC) for preemption of state jurisdiction for twenty days after the expiration of the nine-month time limit imposed by the Act. Notwithstanding the efforts of Board Staff and the Arbitrator to facilitate a mutually acceptable agreement, on October 20, 1998, each party separately submitted updated statements to the Arbitrator of the unresolved issues to be decided. By Order dated October 21, 1998 in this Docket, William J. Rooney, Esq., General Counsel for GNI, and Christopher W. Savage, Esq., were granted leave to appear pro hac vice on behalf of GNI, and Robert A. Lewis, Esq., was granted leave to appear pro hac vice on behalf of BA-NJ.

On October 21, 1998, an arbitration hearing was held in Boston, Massachusetts. Post-hearing briefs were submitted on October 23, 1998. The Arbitrator issued a decision which he termed a "Recommended Interim Final Decision" on October 26, 1998 (hereinafter, the Arbitrator's Decision).

The Arbitrator recast the submitted issues into six issues and resolved them in the following manner:

(1) Is GNI an entity eligible for an interconnection agreement?

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[1] See Order Approving Interconnection Agreement, I/M/O the Joint Petition of Bell Atlantic-New Jersey, Inc. and MFS Intelenet of New Jersey, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 and I/M/O the Bell Atlantic-New Jersey, Inc. Interconnection Agreement with MFS Intelenet of New Jersey, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, Docket Nos. TO96070527 and TO96070526 (March 10, 1997).

[2] See Order, I/M/O The Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996, Docket No. TX96070540 (August 15, 1996) (hereinafter, Arbitration Order).

Decision: GNI is eligible for an interconnection agreement with BA-NJ. Arbitrator's Decision at 5.

(2) Is GNI entitled to most favored nation (MFN) status in regard to other interconnection agreements?

Decision: GNI is entitled to MFN status in regard to opting into other interconnection agreements between BA-NJ and other competitive local exchange carriers (CLECs), including the interconnection agreement between BA-NJ and MFS Intelenet of New Jersey, Inc. (MFS). Ibid.

(3) When opting into a preexisting interconnection agreement under MFN status, is a party bound to the agreement in its entirety, or is it free to opt in on a provision by provision basis?

Decision: If GNI opts into the MFS agreement, it may only do so on an all or nothing basis. It is not free to "pick and choose" among the provisions of that agreement and is bound to the terms and conditions as of the date they are permitted to "opt in" to the MFS agreement. Id. at 6.

(4) If GNI is entitled to opt in to the MFS agreement, what should the duration of the contract be?

Decision: The duration of the interconnection agreement between BA-NJ and GNI should be nineteen days less than three years from the date of execution. Id. at 8.

(5) Are calls to Internet Service Providers (ISPs) eligible for reciprocal compensation under the MFS interconnection agreement?

Decision: Calls to ISPs are eligible for reciprocal compensation under the MFS interconnection agreement. Id. at 9.

(6) Are the applicable reciprocal compensation rates those set forth in the MFS interconnection agreement, or the generic rates established by the Board in Docket No. TX95120631?

Decision: The reciprocal compensation rates applicable to GNI and BA-NJ if GNI opts into the MFS interconnection agreement, are, for the duration of the time that the terms therein are applicable between GNI and BA-NJ, those set forth in that agreement. Id. at 10.

Meanwhile, on the federal level, the FCC was already engaged in its consideration of the issue of whether reciprocal compensation was the appropriate form of compensation for ISP-bound traffic. On October 30, 1998, the FCC issued a Memorandum Opinion and Order in GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292 (October 30, 1998) (hereinafter, GTE Telephone). In GTE the FCC concluded an investigation of an access offering by the GTE Telephone Operating Companies, and found that GTE's offering, which would permit Internet Service Providers to provide their end-user customers with high-speed access to the Internet, was an interstate service properly tariffed at the federal level. GTE Telephone at ¶1. In GTE Telephone, the FCC expressly stated that its Order did "not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit switched dial-up traffic originated by interconnecting LECs." Id. at ¶2. The FCC stated instead that it intended "in the next week to issue a separate order specifically addressing reciprocal compensation issues." Ibid. Thereafter, the Board, along with much of the telecommunications community, waited with great anticipation for further word from the FCC on the issue of compensation for ISP-bound traffic.

With regard to the Arbitrator's Decision, and as required in the Board's Arbitration Order, the parties were required to submit for Board consideration a fully executed interconnection agreement encompassing the arbitration decision within five (5) days of the Arbitrator's decision. On November 2, 1998, GNI filed a motion requesting that the Board issue an order to the effect that:

> (a) [GNI] is for all purposes deemed to have entered into an interconnection agreement with BA that reflects the [Arbitrator's Decision], with an effective date of today, November 2, 1998; and (b) to the extent that BA's actions in any way delay the date on which [GNI] can begin exercising its rights under the agreement, the termination date of the agreement is deemed extended, day for day, during the period that BA continues to engage in such delaying efforts.
>
> [November 2, 1998 Motion of GNI at 2, 10].

GNI attached a form of interconnection agreement, executed by GNI, which purports to incorporate the Arbitrator's Decision.

At its public meeting of November 4, 1998, the Board authorized its Secretary to send a letter to the parties advising them of their duties to submit a mutually executed agreement for Board consideration. The Secretary's letter was sent the same day. By letter dated November 5, 1998, GNI responded to the Board referencing its November 2, 1998 Motion and asking that the Board, in addition to the other relief requested, direct that BA-NJ pay to GNI

reasonable incurred attorney's fees in connection with GNI's efforts to reach an agreement with BA-NJ during the period November 2-5, 1998. On November 5, 1998, BA-NJ submitted two versions of interconnection agreements. The first modified the GNI agreement previously submitted to the Board by GNI on November 2, 1998. The second contains modifications to the original MFS agreement based on BA-NJ's interpretation of the Federal Communications Commission (FCC) Memorandum Opinion and Order in GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292 (October 30, 1998) (hereinafter, GTE Telephone). At the same time, BA-NJ submitted its Opposition to GNI's Motion. By letter dated November 6, 1998, GNI filed an answer BA-NJ's Opposition to its Motion. By letters dated November 10, 1998 and November 12, 1998 BA-NJ and GNI, respectively, submitted additional responsive papers. BA-NJ submitted additional comments by letter dated November 19, 1998, to which GNI responded by letter dated November 20, 1998.

By letter dated November 18, 1998, the Division of the Ratepayer Advocate (Advocate) submitted comments on the Arbitrator's Decision and noted the fact that the Board had before it three forms of interconnection agreements submitted by the parties. In its letter, the Advocate disagreed with the Eighth Circuit Court of Appeals rejection of the FCC's "pick and choose" rule[3] and the Board's adoption of the Eighth Circuit's interpretation. Nevertheless, the Advocate supported an interconnection agreement as recommended by the Arbitrator, and urged the Board to approve the interconnection agreement which in effect would reflect the MFS agreement. By letter dated November 25, 1998, BA-NJ responded to the Advocate's comments and stated that the Board should not approve an interconnection agreement based on the Arbitrator's Decision, but should find that the MFS agreement which GNI seeks to adopt must contain rates which conform to the Board's December 2, 1997 Generic Order in Docket No. TX95120631 and should extend for a term which expires on July 1, 1999, the termination date of the MFS Interconnection Agreement. In addition, BA-NJ stated that the Board should clarify that, pursuant to the FCC's determination in GTE Telephone, Internet traffic is jurisdictionally interstate. By letter dated December 1, 1998, GNI disagreed with BA-NJ and stated that the FCC's analysis in GTE Telephone did not affect the proper treatment of reciprocal compensation for ISP-bound traffic. As of the date of this Order, the Parties have failed to mutually execute a comprehensive interconnection agreement based on their continuing differences in interpreting the Arbitrator's Decision and FCC Orders.

Finally, on February 26, 1999, the FCC released its Declaratory Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, In/M/O Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (February 26, 1998) (hereinafter, Declaratory Ruling). In the Declaratory Ruling, the FCC advised that it considered ISP-bound traffic to be interstate traffic not subject to the reciprocal

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[3] See Iowa Utilities Board v. FCC, 120 F.3d 753, 800 (8th Cir. 1997); aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

compensation obligations imposed by section 251(b)(5) of the Act, Declaratory Ruling at ¶¶1, 18, 27 and fn 87, and advised further that, in the absence of a federal rule governing inter-carrier compensation for such traffic, states are free either to impose or not impose reciprocal compensation for ISP-bound traffic, depending upon the circumstances before the state commission, including the existence of interconnection agreements, Declaratory Ruling at ¶¶1, 21, 25-27.

DISCUSSION

With regard to the first issue recited above, we FIND that the Arbitrator correctly determined that GNI is eligible to enter into an interconnection agreement. We note that at its public agenda meeting of June 9, 1999, the Board found that GNI had demonstrated that it possessed the requisite financial, technical and managerial expertise and resources which are necessary to provide local exchange and exchange access telecommunications services in New Jersey, and accordingly, the Board authorized GNI to provide local exchange and exchange access telecommunications service in New Jersey subject to the approval of its interconnection agreement and tariffs. See Order of Approval, I/M/O the Petition of Global NAPs, Inc. For a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services, Docket No. TE98060386 (June 21, 1999). Accordingly, we agree with the Arbitrator that GNI is an entity eligible for an interconnection agreement.

We also FIND that the Arbitrator is correct that as an approved local exchange carrier, GNI is entitled to opt into a pre-existing interconnection agreement through the so-called "most favored nation," or "MFN," process pursuant to section 252(i) of the Act. With regard to the third issue, subsequent to the Arbitrator's Decision, the Supreme Court reinstated 47 C.F.R. §51.809, allowing carriers to "pick and choose" parts of interconnection agreements, as well as opt into an entire agreement through the MFN process. See AT&T Corp. v. Iowa Utils. Bd., ___ U.S. ___, 119 S.Ct. 721, 738, 142 L.Ed.2d 835 (1999). Thus, we MODIFY the Arbitrator's Decision to comport with the Supreme Court decision with regard to the FCC's reinstated "pick and choose" rule.

We next turn to the fourth issue which confronted the arbitrator, the duration of the interconnection agreement created as a result of GNI opting into the terms and conditions of the MFS agreement. At the outset, we note that the FCC is currently seeking comment on just the situation that faced the Arbitrator in the matter now before the Board. In its February 26, 1999 Declaratory Ruling in CC Docket No. 96-98, the FCC noted that an arbitrator recently allowed a CLEC to opt into an interconnection agreement with a three year term for a new three year term, raising the possibility that an ILEC "might be subject to the obligations set forth in [the original] agreement for an indeterminate length of time, without any opportunity for renegotiation, as successive CLEC's opt into the agreement." Declaratory Ruling at ¶35. The FCC, therefore, is seeking comment on "whether and how section 252 (i) and MFN rights affect parties' ability to negotiate or renegotiate terms of their interconnection agreements." Ibid.

Because the Board is also concerned about the procedural and substantive rights of both ILECs and CLECs involved with the MFN and "pick and choose" processes, the Board HEREBY DIRECTS its Staff to prepare a rulemaking pre-proposal which will elicit ideas, views and comments from the industry regarding these issues. Of more immediate import, we note our preliminary belief that interconnection agreements should not exist into perpetuity without a right to have such agreements reviewed and renegotiated. Thus, on an interim basis, and subject to possible reexamination based upon the pending FCC and Staff actions noted above, we indicate herein our view that any existing agreement MFN'd by a CLEC should extend for a period of time equal to the remaining term of the original MFN'd agreement or one (1) year, whichever is greater. We further note our preliminary view that an original interconnection agreement may only be MFN'd during the original term of the agreement, and that once MFN'd for the additional term just noted, neither the original interconnection agreement nor the subsequent interconnection agreement may be subject to further adoption by any CLEC through the MFN process. This preliminary general view notwithstanding, however, we note that parties may, through negotiation, agree to adopt rates, terms and conditions which are identical to those contained in any other interconnection agreement and for a term of any length which they mutually desire. We stress that these are preliminary views which we fully expect to be commented upon by the industry in the context of both the FCC's and our own rulemaking processes.

We note also that the FCC has already expressed its view regarding how a carrier seeking interconnection, network elements or services pursuant to section 252(i) should proceed. The FCC has advised that such a carrier "need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis." First Report and Order, I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (August 8, 1996) at ¶1321. The FCC has also stated that it "leave[s] to state commissions in the first instance the details of the procedures for making agreements available to requesting carriers on an expedited basis." Ibid. In this regard, we remind carriers that the Board has already adopted a dispute resolution process which is made available expressly to resolve on an expedited basis petitions by carriers related to service-affecting issues and assertions of anti-competitive conduct, and is an appropriate means to resolve section 252(i) disputes. See Order on Reconsideration, I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (June 19, 1998).

With specific regard to the interconnection agreement between GNI and BA-NJ, however, we do not believe that the general view we have just announced regarding the duration of interconnection agreements adopted through the MFN process is necessarily appropriate. The GNI/BA-NJ Arbitrator rendered his decision on October 26, 1998. According to our arbitration guidelines, the parties should have submitted an interconnection agreement to the Board for its review within five (5) days thereafter. On November 2, 1998, GNI filed a motion requesting that the Board issue an order providing that the interconnection agreement between GNI and BA-NJ attached to its motion and based upon the MFS interconnection agreement shall be deemed

effective on November 2, 1998, and extended day to day thereafter for every day that BA-NJ delays in signing the attached agreement. Not including any such extensions, GNI's proposed interconnection agreement incorporated a termination date of October 14, 2001, 19 days less than three years, as approved by the Arbitrator's Decision.

We have already indicated above our preliminary view that an interconnection agreement which is adopted through the MFN process should extend for a term no less than 12 months. However, as noted above in the within matter, the parties, including the Advocate, continued to file comments on the Arbitrator's Decision through the month of November, 1998, the last submission being by GNI on December 1, 1998, and the Board delayed the decision on this arbitration further while it awaited the FCC's expected determination of the issue of the nature of ISP-bound traffic. In order not to penalize GNI for delay not caused by it, we HEREBY ADOPT a term which reflects the minimum one year term of an MFN'd agreement, and in addition reflects the delay which occurred from December 1, 1998 until July 7, 1999, a period of 219 days. Accordingly, we FIND that a term of one year and 219 days, or slightly more than 19 months, is appropriate in this case. Assuming that a signed interconnection agreement which conforms to our Decision is submitted within five (5) days of the date of this Order and is approved at the Board's July 26, 1999 public meeting, this interconnection agreement will therefore terminate one year and 219 days from July 26, 1999, or March 2, 2001. Because the Decision we make herein rests upon the unique nature of the circumstances surrounding the parties and this interconnection agreement, the Board believes that it is not in the public interest to permit this agreement to be adopted through the MFN process.

With regard to the fifth issue, whether calls to ISPs are eligible for reciprocal compensation under the MFS interconnection agreement, we must begin our analysis by noting again the FCC's most recent declarations regarding ISP-bound traffic. In its October 30, 1998 GTE Telephone Memorandum Opinion and Order, the FCC presaged its later declaration that ISP-bound traffic is interstate in character by concluding that a high speed Internet access offering by the GTE Telephone Operating Companies, was an interstate service properly tariffed at the federal level. GTE Telephone at ¶1. While the FCC expressly stated that its Order did "not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit switched dial-up traffic originated by interconnecting LECs," it did state that it intended "in the next week to issue a separate order specifically addressing reciprocal compensation issues." Id. at 2.

On February 26, 1999, the FCC finally released its Declaratory Ruling, concluding that ISP-bound traffic is largely interstate, but "[i]n the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions." Declaratory Ruling at ¶1. The FCC stated that the reciprocal compensation obligations imposed by section 251(b)(5) of the Act apply only to the transport and termination of local telecommunications traffic. Id. at ¶7. Continuing its tradition of determining the

jurisdictional nature of communications by reference to the end points of the communication, the FCC stated that a substantial portion of ISP-bound traffic is interstate because "the communications at issue do not terminate at the ISP's local server, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state." Id. at ¶¶10-18. The FCC advised that "pending adoption of a rule establishing an appropriate interstate compensation mechanism," it found "no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic." Id. at ¶21. The FCC further advised the following:

> [i]n the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed in section 252(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions are also free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.
>
> [Id. at ¶26 (footnotes omitted].

The FCC asserted that the adoption of rules governing inter-carrier compensation for ISP-bound traffic would serve the public interest, and proposed rules which, in the first instance, would rely on commercial negotiations as the ideal means to establish the terms of interconnection arrangements, id. at ¶28, but might also rely on arbitration on the state or even federal level, id. at ¶¶30-32.

The FCC recognized that its conclusion that ISP-bound traffic is largely interstate might cause some state commissions to reexamine conclusions that reciprocal compensation is due from ILECs to CLECs which carry this traffic to the extent that those conclusions are based

on a finding that ISP-bound traffic terminates at an ISP server. Id. at ¶27. In fact, that has already occurred. In Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered into under Sections 251 and 252 of the Telecommunications Act of 1996, D.T.E. 97-116-C (May 19, 1999) (hereinafter, Complaint of MCI WorldCom), the Massachusetts Department of Technology and Energy (Mass. DTE) reversed an earlier decision in which it determined that ISP-bound traffic was local based upon its understanding that such traffic was severable into two components, one call terminating at the ISP, and another call connecting the ISP to the target Internet website. Complaint of MCI WorldCom, Summary. The Mass. DTE stated that, in light of the Declaratory Ruling, the basis for its earlier decision had crumbled and that decision was now a "nullity," and "[u]nless and until modified by the FCC itself or overturned by a court of competent jurisdiction, the FCC's view of the 1996 Act must govern this Department's exercise of its authority over reciprocal compensation." Complaint of MCI WorldCom at 19-31. The Mass. DTE ruled that "[r]eciprocal compensation need not be paid for terminating ISP-bound traffic (on the grounds that it is local traffic), beginning with (and including payments that were not disbursed as of) February 26, 1999." Ibid.

In determining whether reciprocal compensation obligations apply to ISP-bound traffic which GNI will carry, the Board does not have the benefit of earlier arbitrations which have addressed this issue, nor was the issue addressed in the Board's Generic Proceeding. See Decision and Order, I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX95120631 (December 2, 1997). Although the MFS interconnection agreement was the result of both negotiations and arbitration, the reciprocal compensation issue was decided wholly through negotiations between MFS and BA-NJ. Section 5.7 of the MFS/BA-NJ agreement provided for reciprocal compensation for the transport and termination of local traffic, defined in section 1.44 of the agreement as "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ('EAS') area, as defined in BA's effective Customer tariffs." The negotiations which led to the adoption of these provisions occurred well before the FCC's declaration that ISP-bound traffic was interstate, a significant change in the law not known to either party to the negotiations and not reflected in the interconnection agreement which GNI desires to MFN.[4] The Board notes well the FCC's statements that in the absence of a federal rule regarding inter-carrier compensation for ISP-bound traffic, "parties should be bound by their existing interconnection agreements, as interpreted by state commissions." Declaratory Ruling at ¶1. In this case, however, the Board does not have an existing interconnection agreement between GNI and BA-

[4] We note, however, that pursuant to section 28 of the MFS agreement, FCC action or other legal developments which require modification of material terms contained in the agreement allows either Party to require a renegotiation of the terms that are reasonably affected by the change in the law. Thus, even were we not to exclude ISP-bound traffic from reciprocal compensation provisions of the agreement at this time, we conclude that section 28 of the MFN'd agreement could soon lead to the same result which the Board herein reaches.

NJ to interpret. Because of GNI's right to MFN an existing interconnection agreement, we FIND that it is appropriate to apply to GNI and BA-NJ the rates and terms in the existing MFS agreement which GNI desires to MFN with respect to reciprocal compensation obligations for traffic which is truly local. ISP-bound traffic, as determined by the FCC, is interstate in character, and, therefore, in the Board's view, is not entitled to reciprocal compensation. All other local traffic carried by GNI shall be subject to reciprocal compensation at the negotiated rates in the MFS interconnection agreement, that is $0.009 for local traffic delivered to a tandem switch and $0.007 for local calls delivered to an end office.

We expect that GNI will be compensated by its end user customers and/or by ISPs themselves for the ISP-bound traffic which it carries. Nevertheless, the Board is mindful of the FCC's ongoing rulemaking with regard to the appropriate form of inter-carrier compensation mechanism for ISP-bound traffic. We assure carriers that the Board shall review the FCC's ultimate ruling regarding such compensation and take appropriate action, as needed. Of course, the parties themselves are not foreclosed from further negotiations to develop more appropriate forms of compensation.

Accordingly, to clarify the last issue decided by the Arbitrator, the Board herein FINDS that the MFS interconnection agreement rates for reciprocal compensation, and not the Board's generic rates, shall apply to the interconnection agreement between the parties. The Arbitrator found that negotiated rates took precedence over rates determined by either regulation or by arbitration. Accordingly, he determined that the rates for reciprocal compensation negotiated by and between MFS and BA-NJ are applicable to the local traffic exchanged between GNI and BA-NJ. The Board agrees with the Arbitrator in this regard, but clarifies that the MFS interconnection agreement rates do not apply to the ISP-bound traffic carried by GNI since that traffic is interstate traffic pursuant to the FCC's Declaratory Ruling.

In conclusion, the Board FINDS that the resolution of all open arbitration issues set forth above and the conditions imposed herein upon the parties is consistent with the public interest and in accordance with law. The Board HEREBY APPROVES an interconnection agreement between the parties which is the same as the MFS agreement referenced above, as modified herein, as meeting the requirements of the Act for agreements which are in part

negotiated and in part arbitrated. The Board DIRECTS the Parties to submit to the Board for its approval a fully executed interconnection agreement reflecting the decisions set forth herein within five (5) business days of the date of this Order.

DATED: 9/13/99

BOARD OF PUBLIC UTILITIES
BY:

HERBERT H. TATE
PRESIDENT

CARMEN J. ARMENTI
COMMISSIONER

FREDERICK F. BUTLER
COMMISSIONER

ATTEST:

MARK W. MUSSER
SECRETARY

In the Matter of the Petition of Global NAPs, Inc.
For Arbitration of Interconnection Rates, Terms, Conditions
and Related Arrangements with Bell Atlantic-New Jersey, Inc.
Pursuant to Section 252(b) of the Telecommunications Act of 1996
BPU Docket No. TO98070426

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United States District Court
Western District Of North Carolina
Charlotte Division

BELLSOUTH TELECOMMUNICATIONS, INC.,

Plaintiff(s),

vs.

MCIMETRO ACCESS TRANSMISSION SVCS, INC.

Defendant(s).

JUDGMENT IN A CIVIL CASE

3:99CV97-MU

DECISION BY COURT. This action having come before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in accordance with the Court's May 20, 1999 Order.

May 20, 1999

FRANK G. JOHNS, CLERK

By: _____
Deputy Clerk

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:99CV97-MU

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
MCIMETRO ACCESS TRANSMISSION SERVICES, INC. and THE NORTH CAROLINA UTILITIES COMMISSION,	)	
	)	
Defendants.	)	

This matter is before the court upon Defendant The North Carolina Utilities Commission's (the "NCUC") Motion to Dismiss the Complaint as against the NCUC on the grounds of Eleventh Amendment immunity, and pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for want of subject matter jurisdiction. This action was filed by BellSouth Telecommunications, Inc. ("BellSouth") seeking judicial review of the NCUC's February 10, 1999 Order Ruling on Complaint Proceedings Involving Interconnection Agreement. In its Petition, BellSouth also seeks a declaratory judgment concerning the controversy between the parties and a permanent injunction barring the NCUC from enforcing the February 10, 1999 Order.

In accordance with the terms of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"), BellSouth and Defendant MCImetro Access Transmission Services, Inc. ("MCI") executed an Interconnection Agreement in April of 1997, which provided,

in part, for the payment of reciprocal compensation for the termination of local traffic on each other's telephone networks. The Agreement was approved by the NCUC on May 12, 1997. A dispute subsequently arose between MCI and BellSouth concerning the interpretation of the nature of telephone calls made to an Internet Service Provider ("ISP") and how such calls are treated under the reciprocal compensation provisions of the Interconnection Agreement between BellSouth and MCI. BellSouth claims that the calls are interstate in nature, and thus, are not subject to the reciprocal compensation provisions of the Interconnection Agreement. MCI contends that the calls constitute local traffic that is subject to the reciprocal compensation provisions of the Agreement. On April 23, 1998, Intermedia filed a petition with the NCUC claiming that, *inter alia*, BellSouth had breached the Interconnection Agreement by withholding payment of reciprocal compensation and announcing its intention not to make further reciprocal compensation payments to MCI for traffic originated by BellSouth end-users and then carried by MCI to its ISP customers. On February 10, 1999, the NCUC ruled that the ISP traffic in question is local, and that MCI is entitled to reciprocal compensation in accordance with the terms of the Interconnection Agreement. The NCUC further ordered that BellSouth pay MCI all amounts past due, plus interest, as well as all sums coming due in the future for terminating the ISP traffic. It is this part of the Order that BellSouth seeks to overturn.

The court must first address the NCUC's argument that this court lacks subject matter jurisdiction to hear this case. This case was brought pursuant to § 252(e)(6) of the 1996 Act, which provides in pertinent part:

> In a case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the

requirements of section 251 of this title and this section.
47 U.S.C. § 252(e)(6).

Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." The NCUC argues that the grant of federal jurisdiction pursuant to 47 U.S.C. § 252(e)(6) is coterminous with the exclusive federal jurisdiction set forth in §252(e)(4), such that federal jurisdiction is limited to those commission orders "approving or rejecting" interconnection agreements, and does not extend to orders seeking to interpret or enforce such agreements. In other words, an order of a state commission such as the one at issue here is not a decision made "under" section 252.

The NCUC cites three district court cases in support of its argument, GTE Florida, Inc. v. Johnson, 964 F. Supp. 333 (N.D.Fla. 1997); GTE South, Inc. v. Morrison, 957 F. Supp. 800 (E.D.Va. 1997); and GTE South, Inc. v. Breathett, 963 F. Supp. 610 (E.D.Ky. 1997). In each of those cases, a party sought federal court review of an interconnection agreement dispute before the relevant state commission had approved a final interconnection agreement between the parties. For that reason, each court found that the Act did not support jurisdiction. Unlike the cited cases, the instant case involves a NCUC Order regarding an agreement that has already received an approval determination. Accordingly, these cases involve a different legal question and are inapposite to this case. See Michigan Bell v. MFS Intelenet, 16 F. Supp.2d 817, 823 (W.D.Mich. 1998).

All federal court challenges to FCC rules implementing the Telecommunications Act of 1996 were consolidated in the Eighth Circuit case of Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1998), aff'd in part, rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721

(1999). In that case, a three-judge panel specifically found that enforcement decisions of state commissions are subject to federal district court review pursuant to Section 252(e)(6), stating: "We believe that the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)." 120 F.3d at 804, n.24. Moreover, the court found that § 252(e)(6) is "the exclusive means to attain review of state commission determinations under the Act." Id. at 803. This finding was not reversed by the Supreme Court on appeal.

Indeed, every court that has addressed this issue has held that federal district courts have jurisdiction under § 252(c)(6) to review state utility commission decisions enforcing and interpreting interconnection agreements approved by the commission pursuant to the Act. In Michigan Bell v. Intelenet, the commissioners, like the NCUC herein, argued that because the order at issue involved the interpretation and enforcement of an interconnection agreement, rather than its approval or rejection, the federal court lacked jurisdiction to review the order. The court rejected this argument, stating:

> [C]onsideration of the statutory scheme demonstrates that permitting state court review of this type of Order will directly contravene the intent of Congress. . . . Reviewing this subpart of the Act as a whole, the Court notes that Congress has created a unique framework which, while inviting state commissions to arbitrate and approve interconnection agreements, retains exclusive jurisdiction within the federal courts to ensure that those agreements meet federal requirements. In Sections 252(c)(4) and (6), Congress stated in no uncertain terms its intention to have the federal courts, and not the state courts, review [state commission] decisions approving or rejecting interconnection agreements born of this subpart. . . . Thus, the statutory structure demonstrates Congress' intent to enlist the assistance of the state commissions while creating a uniform body of federal law in this area.
>
> . . .
>
> . . . Thus, the language of subsection (e)(4) prohibiting state courts from reviewing

> approval and rejection decisions implicitly encompasses interpretation and enforcement decisions. Given the statutory structure and language of section 252, the Court finds that the [state commission] decisions interpreting or enforcing interconnection agreements born of this subpart are also within the exclusive jurisdiction of the federal courts.

Michigan Bell, 16 F. Supp.2d at 823-24 (citations omitted).

Following the uniform holdings of every court that has considered the issue, this court likewise finds that it has jurisdiction pursuant to § 252 to review the NCUC Order herein. Accordingly, the court need not address whether 28 U.S.C. §§1331 and 1332 also support federal jurisdiction.

Having determined that the court has subject matter jurisdiction to entertain this matter, the court turns to the merits of the case. Shortly after Plaintiff's Petition was filed, the Federal Communications Commission ("FCC") issued a Declaratory Ruling concerning the jurisdictional status of calls to ISPs and whether a local exchange carrier is entitled to reciprocal compensation for traffic it delivers to ISPs. See Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (February 26, 1999). In its Ruling, the FCC determined that ISP-bound traffic is largely interstate, in that it does not terminate at the ISP server, but constitutes a continuous transmission from the end-user to the Internet site. Id. at ¶ 12-13.

While the FCC Declaratory Ruling did determine that calls to ISPs are largely interstate, the FCC emphasized that this decision did not "interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic. . . ." Id. at ¶ 21. The FCC noted that parties may have agreed to treat ISP-bound traffic as subject to reciprocal compensation and that "[w]here parties have agreed to include this traffic

within their . . . interconnection agreements, they are bound by those agreements, as interpreted and enforced by state commissions." Id. at ¶ 22-23. The FCC listed several factors that state commissions may, but are not required, to consider when construing the parties' agreements to determine whether the parties agreed to treat ISP-bound traffic as local. Id. at ¶ 24.

Because the NCUC issued its Order in this case prior to the FCC's Declaratory Ruling, the court will remand this matter to the NCUC for reconsideration in light of that Ruling. The court recognizes that the NCUC may well reach the same decision, but nevertheless, the court wishes to give the NCUC an opportunity to reexamine its conclusions with the benefit of the recent FCC Ruling. As the court has found that it has subject matter jurisdiction and has determined that it will remand this matter to the NCUC for further consideration, the court finds it unnecessary to decide whether the Eleventh Amendment would bar suit against the NCUC, and therefore declines to decide that issue at this time. Likewise, the court declines to make any determinations at this time with regard to the appropriate standard of review. Accordingly,

IT IS THEREFORE ORDERED that the NCUC's Motion to Dismiss on the grounds of lack of subject matter jurisdiction is hereby DENIED;

IT IS FURTHER ORDERED that the court hereby REMANDS this matter to the NCUC for reconsideration in light of the FCC's Declaratory Ruling issued on February 26, 1999;

IT IS FURTHER ORDERED that Plaintiff's claims for declaratory judgment and injunctive relief are hereby DISMISSED without prejudice; and

IT IS FURTHER ORDERED that the Plaintiff's Motion to Stay, filed March 12, 1999, is

hereby DENIED as moot.

This 6th day of May, 1999.

Graham C. Mullen
Chief Judge
United States District Court

pab

United States District Court
for the
Western District of North Carolina
May 20, 1999

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:99-cv-00097

True and correct copies of the attached were mailed by the clerk to the following:

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U.S. Marshal	( )
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Defendant	( )
Warden	( )
Bureau of Prisons	( )
Court Reporter	( )
Courtroom Deputy	( )
Orig-Security	( )
Bankruptcy Clerk's Ofc.	( )
Other TTL	(✓)

Date: 5/21/99

Frank G. Johns, Clerk

By: _____
Deputy Clerk