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Decision 98-10-057 October 22,1998

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

ORIGINAL

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| Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service. | Rulemaking 95-04-043 (Filed April 26, 1995) |
| Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service. | Investigation 95-04-044 (Filed April 26, 1995) |

## OPINION

By this order, we affirm our jurisdiction over telephone traffic between end users and Internet Service Providers (ISPs), and determine that such calls are subject to the bill-and-keep or reciprocal compensation provisions of applicable interconnection agreements.[1]

### Background

On March 18, 1998, the California Telecommunications Coalition (Coalition)[2] filed a motion in the Local Competition Docket seeking a ruling

[1] Under standard reciprocal compensation provisions of interconnection contracts, the cost of providing access for a customer's local call that *originates* from one local exchange carrier's network and *terminates* on another local exchange carrier's network is attributed to the carrier from which the call originated. (47 CFR Sec. 51.701(e), 51.703 (1997).) Such "local" calls are distinct from "long distance" calls which merely pass through interexchange switches and involve access charges rather than reciprocal compensation fees.

[2] For purposes of the Motion, the Coalition consists of the following parties: ICG Telecom Group, Inc., Teleport Communications Group, Inc., MCI Telecommunications

*Footnote continued on next page*

regarding the jurisdictional status and billing treatment of telephone calls utilizing a local exchange number to access ISPs. Disputes have arisen in interconnection agreements over which carrier should pay for the cost of terminating calls originated by customers of the incumbent local exchange carrier (ILEC) to access ISPs which, in turn, are telephone customers of a competitive local carrier (CLC). Typically, an ISP purchases telephone lines located within the local calling area of its customers to provide Internet access by having the customer dial a local number over an ordinary telephone line. Such calls are rated as local, thus allowing the caller to utilize the ISP's service without incurring toll charges. The ISP then converts the analog messages from its customers into data "packets" that are sent through its modem to the Internet and its host computers and servers worldwide.

The Coalition seeks a Commission order affirming that such calls to ISPs should be treated as local calls, under Commission jurisdiction, and subject to the bill-and-keep or reciprocal compensation provisions of applicable interconnection agreements. The Coalition seeks generic resolution of this issue within R.95-04-043, the Local Competition Docket in light of the position advanced by Pacific Bell (Pacific) claiming that calls to an ISP constitute interstate calls. Pacific believes such calls are not subject to this Commission's jurisdiction, and do not qualify for the reciprocal compensation arrangements which are applicable only to local calls. The Coalition claims that, as a result of Pacific's position, CLCs are being unfairly deprived of compensation for terminating ISP traffic. Two complaint cases currently pending before the Commission raise this same issue in the context of specific interconnection agreements in dispute. The

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Corporation, Sprint Communications Co., L.P., Time Warner AxS of California, L.P., Teligent, Inc., California Cable Television Association.

Coalition expresses concern that the two complaint cases are likely only the first of many more disputes to come if the Commission does not resolve this issue generically in this proceeding.

Responses to the Coalition's motion were filed on April 2, 1998. Responses in support of the motion were filed by various parties representing CLCs. Responses in opposition to the motion were filed by the two large incumbent local exchange carriers (ILECs), Pacific and GTE California (GTEC), and by two separate groups of small ILECs.[3] Comments were also filed by Roseville Telephone Company. On April 16, 1998, the Coalition filed a reply to the responses of Pacific and GTEC. On May 8, 1998, Pacific and GTEC each filed a further response to the reply of the Coalition. We have taken parties' comments into account in resolving this dispute.

### Position of Parties

The Coalition argues that ISP traffic meets the definition of a local call, and is subject to this Commission's jurisdiction as intrastate traffic, subject to reciprocal compensation requirements. The Coalition measures call "termination" at the point where the call is delivered to the telephone exchange service bearing the called number. The Coalition claims that where an ISP uses a phone line located within the local calling area of its customers, the calls to the

[3] One group of the small ILECs filing comments was comprised of Evans Telephone Company, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Co., Pinnacles Telephone Company, The Siskiyou Telephone Company, The Volcano Telephone Company, and Winterhaven Telephone Company. A second group of small ILECs was composed of Calaveras Telephone Company, California-Oregon Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., The Ponderosa Telephone Company, and Sierra Telephone Company.

ISP terminate when the ISP's modem answers the customers' incoming calls over local phone lines.

The Coalition thus views ISP service as constituting two separate segments, the first of which is a basic local telecommunication service, with the end user's call terminating at the ISP modem. The Coalition views the second segment as a separate data transmission which does not involve telecommunications service, but which is an enhanced information service utilizing worldwide computer networks. If the call did not terminate at the ISP modem, reasons the Coalition, then the ISP would have to be a telecommunications carrier, providing long distance service. Yet, the ISP is treated as a customer by the underlying telecommunications carriers providing the ISP service. In further support of its view that ISP traffic is intrastate in nature, the Coalition cites the FCC's *Access Charge Order* which prescribes that Information Service Providers may purchase services from ILECs under the same intrastate tariffs available to end users.

Other parties representing CLCs support the Coalition's motion, arguing that they have developed business plans based in part on the current industry practice of reciprocal compensation for local calls to ISPs. The CLCs state that the dispute over this issue creates an unacceptable level of uncertainty, warranting expedited Commission action affirming that current industry practice is correct.

The ILECs oppose the Coalition's motion, arguing that ISP traffic is not local, but is interstate in nature, and thus, not subject to this Commission's jurisdiction. As such, the ILECs argue that the Commission has no authority to require reciprocal compensation for termination of ISP traffic, which they claim is subject exclusively to FCC jurisdiction.

Pacific acknowledges that the FCC has permitted ISPs to purchase ILEC services under intrastate tariffs and has exempted ISPs from access charges, but

characterizes such actions merely as indicators that the FCC has jurisdiction over these services, but has chosen for policy reasons to forbear from treating the calls as interstate with respect to access charges. The ILECs claim that the very fact that the FCC has exempted Information Service Providers from federal access charges demonstrates that it has jurisdiction over such calls, otherwise the FCC would have had no authority in the first place to grant an exemption for such calls.

The ILECs deny that calls to ISPs "terminate" at the ISP's modem, but argue that such calls remain in transit through the modem for further relay across state and national boundaries via the Internet. As such, the ILECs define ISP traffic as interstate based on the fact that the ISP sends and receives data transmitted to its local customers which may involve access to computer networks located outside of California or even outside of national boundaries. GTEC argues that a communication must be analyzed, for jurisdictional purposes, from its inception to its completion. GTEC seeks to draw an analogy between the intermediate switching of interstate calls of long distance carriers and the transmission performed by the ISP modem, connecting to worldwide web sites.

GTEC argues that ISP calls involve both intrastate and interstate elements, and as such, are inseverable for jurisdictional purposes. GTEC cites the *Memory Call* case, arguing that in it, the FCC applied an end-to-end analysis to BellSouth's voicemail service to conclude that it was jurisdictionally interstate, even though it utilized an intrastate call forwarding service to allow out-of-state callers to retrieve messages. GTEC argues that a similar analysis should apply to ISP traffic, thereby rendering it jurisdictionally interstate. (Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp, 7 FCC Rcd 1619 (1992).)

The small ILECs raise concern over the impact on their operations if the Commission ruled that ISP traffic be assigned to the intrastate jurisdiction. The rates and revenues of the small ILECs' depend in large measure on calculations based on intra-and-interstate calling traffic ratios. The small ILECs claim that the potential revenue shifts caused by the changes in jurisdictional assignments of the sort addressed in the Motion are so significant that Congress requires such matters to be referred to the Federal-State Joint Board. The small ILECs question the jurisdiction of the Commission to unilaterally decide the jurisdictional assignment of any traffic.

The Coalition also presents a summary of rulings which have been issued by other state commissions concerning whether reciprocal compensation should apply to local calls terminating with ISP end users. The Coalition claims that every state commission that has issued a final decision on this issue has ruled that reciprocal compensation should apply to such calls. While acknowledging that such actions are not binding on this Commission, the Coalition views such decisions as useful information, illustrating how other jurisdictions faced with this same issue have resolved it. In addition, the National Association of Regulatory Utility Commissioners (NARUC) passed a resolution at its November 1997 meeting concluding ISP traffic should remain subject to state jurisdiction.

GTEC discounts the significance of the orders from other jurisdictions cited by the Coalition, arguing that most of the cited orders merely involved interconnection complaints under specific contracts or arbitration proceedings which barely touched upon the ISP traffic issue. To the extent that the cited orders do rule that reciprocal compensation applies to ISP traffic, GTEC claims that the reasoning underlying the orders is faulty.

## Discussion

The first issue to be resolved is whether calls to an ISP constitute interstate or intrastate local traffic. The question of whether ISP traffic is defined as local or as interstate has a bearing on whether such calls come within the jurisdiction of this Commission and also whether such calls are subject to reciprocal compensation arrangements. Reciprocal compensation provisions of interconnection agreements only apply to local communications, that is, traffic originating and terminating within a local calling area.

There is no question that the Internet services offered by an ISP involves the transmission of information beyond the boundaries of a local calling area, and which may, in fact, span the globe. The Internet itself is an interstate network of computer systems. The question, however, is whether this network of computer systems comprising the Internet can properly be characterized as a telecommunications network for purposes of measuring the termination point of a telephone call to access the Internet through an ISP. Parties dispute whether such Internet communications can properly be disaggregated into separate components, one involving the telecommunications network, and one that does not. We must consider whether the transmission of data which occurs beyond the ISP's modem constitutes an indivisible part of a total telecommunications service. This question, in turn, depends on how we define a telecommunications service and how such service is terminated.

GTEC argues that the Coalition's attempt to sever the ISP communication into separate intrastate and interstate segments is contrary to legal precedent, but that a communication must be analyzed, for jurisdictional purposes, "from its inception to its completion." (See *Teleconnect Co. v. Bell Te. Co. of Penn. et al.*, 10 FCC Rcd 1626, 1629-30 (1995), aff'd *Southwestern Bell Tel. Co. v. FCC*, No. 95-119 (D.C. Dir. June 27, 1997). GTEC cites a case in which the FCC found that a

telephone service was interstate and thus subject to FCC jurisdiction even though the originating caller reached a local telephone number from out of state using foreign exchange and common control switching arrangement services. The service permitted an end user in New York to call an out-of-state customer by dialing a local number and paying local rates. GTEC claims this case is analogous to the dispute over ISP traffic, arguing that both instances involve the use of intrastate local services, in part, to complete an interstate call.

GTEC also cites the *Memory Call* case where the FCC concluded that voice mail service is subject to interstate jurisdiction even though out-of-state callers could retrieve messages using an intrastate call forwarding service. GTEC cites the FCC findings that:

> "The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology. Jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination...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." (Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp., 7 FCC Rcd 1620-21 (1992).)

We disagree with GTEC's claim that the FCC's assertion of jurisdiction over voicemail service as cited in the *Memory Call* case has applicability to the ISP issue before us here. Even in instances where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, the FCC ruled that "state regulation of the intrastate service that affects interstate service will not be preempted unless it thwarts or impedes a valid federal policy." (*Id., at 1620 (para. 6).*) Thus, even if ISP traffic did involve the jurisdictional mixing of interstate and intrastate services, state regulation of the intrastate portion of the service would not be preempted since no federal

policy is being thwarted or impeded by requiring that such ISP traffic be considered local. The FCC has not issued any regulation on this matter.

Moreover, contrary to its treatment of voice mail and telephone services, the FCC has not categorized Internet use via local phone connections as a single end-to end telecommunications service. The FCC has instead defined Internet connections as being distinctly different from interstate long-distance calls. For example, in its decision not to apply interstate access charges to ISPs, the FCC noted that, "given the evolution in ISP technologies and markets since access charges were first established in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs [long-distance interexchange carriers]." First Report and Order In Re Access Charge Reform. (12 FCC Rcd 15982 at ¶ 345 (Released May 16, 1997).)

Likewise, in the FCC's Report and Order In Re Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776 (Released May 8, 1997) ("Report and Order"), the FCC concluded that "Internet access consists of more than one component." (*Id.* at ¶ 83.) The FCC reasoned that "Internet access includes a network transmission component, which is the connection over a [local exchange] network from a subscriber to an Internet Service Provider, in addition to the underlying information service." (*Id.*)

The FCC has found that "Internet access services are appropriately classified as information, rather than telecommunications, services." Report to Congress in re Federal-State Joint Bd. On Universal Service, FCC 98-67 at ¶ 73 (Released April 10, 1998). The FCC has affirmed that the categories of "telecommunications service" and "information service" are mutually exclusive. The FCC further concluded that: "Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport." (*Id.*) In contrast to

a telecommunications service, the FCC found that: "[t]he Internet is a distributed packet-switched network. . . [where the] information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." (*Id.* at ¶ 64.12.)

The FCC further explained how the service offered by an ISP differs from a telecommunications service:

> "Internet access providers typically provide their subscribers with the ability to run a variety of applications ....When subscribers store files on Internet service provider computers to establish 'home pages' on the World Wide Web, they are, without question, utilizing the provider's capability for . . . storing . .. or making available information" to others. The service cannot accurately be characterized from this perspective as 'transmission, between or among points specified by the user'; the proprietor of a Web page does not specify the points to which its files will be transmitted, because it does not know who will seek to download its files. Nor is it 'without change in the form or content,' since the appearance of the files on a recipient's screen depends in part on the software that the recipient chooses to employ. When subscribers utilize their Internet service provider's facilities to retrieve files from the World Wide Web, they are similarly interacting with stored data, typically maintained on the facilities of either their own Internet service provider (via a Web page 'cache') or on those of another. Subscribers can retrieve files from the World Wide Web, and browse their contents, because their service provider offers the 'capability for. . . acquiring, .. . retrieving [and] utilizing. . . information.'" (*Id.* at ¶ 76 (citations omitted); Report and Order, 12 F.C.C.R. 8776 at ¶ 83.)

The FCC's description of Internet service makes it clear that the transmission beyond the ISP modem is an information service, not a telecommunications service. The ISP does not operate switches as does a telecommunications carrier, and does not switch calls to other end users. Rather, the ISP answers the call, signifying that the telecommunications service is terminated at the ISP modem. Once the ISP connection with the local caller is established, the ISP uses its computer network capabilities to send and receive

data transmissions over the Internet. These information transmissions are performed utilizing technologies which are independent of the public switched telecommunications network. Moreover, the ISP is not certificated as a telecommunications carrier, and its own manipulations of data transmissions through the Internet computer network cannot properly be defined as a telecommunications service for purposes of measuring where ISP traffic is terminated. Likewise, the transmission of data through the Internet cannot reasonably be construed as an interstate telecommunications service simply because the Internet can route information from worldwide sources.

GTEC argues that the FCC's granting of an exemption from federal access charges to Information Service Providers constitutes a valid inference that the FCC exclusively regulates traffic. We disagree. The FCC's Access Charge Order was limited to interstate ISP traffic. The FCC did not assert exclusive jurisdiction over intrastate ISP issues. The FCC has historically exercised its jurisdiction over telephone carriers providing interstate enhanced services pursuant to its ancillary jurisdiction under Title I, 47 USC, Sec. 151-155. In 1990, however, the Ninth Circuit Court considered the jurisdictional issue of whether the FCC could preempt the state from the regulation of the intrastate enhanced services offered by carriers. The Ninth Circuit ruled that the state's jurisdiction over carrier-provided intrastate service does not intrude upon the FCC's jurisdiction over interstate enhanced services. The Ninth Circuit explained:

> "[T]he broad language of Sec. 2(b)(1) [of the Communications Act] makes clear that the sphere of state authority which statute 'fences off from FCC reach or regulation, *Louisiana PSC, 476 US at 370,* includes, at a minimum, services that are delivered by a telephone carrier 'in connection with' its intrastate common carrier telephone services. When telecommunications services are delivered on an intrastate basis by telephone carriers over telephone lines, they at the very least qualify as services 'in connection with intrastate communication service by wire ....of any carrier.' (47 USC Sec.

> 152(b)(1).) That these enhanced services are not themselves provided on a common carrier basis is beside the point. As long as enhanced services are provided by communications carriers over the intrastate telephone network, the broad 'in connection with' language of Sec. 2(b)(1) places them squarely within the regulatory domain of the states." (Emphasis added.)

Based on the analysis above, we find that ISP service does constitute two separate components, one of which is a telecommunications service, and the other which is not. Under the 1996 Telecommunications Act, Congress separately defined "telecommunications" 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." (47 USC 153(43).) On the other hand, Congress defined "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service." (47 USC 153(20).) As an information service provider, the ISP is an end user with respect to the termination point of a telecommunications service.

Consistent with the FCC's characterization of Internet service , we conclude that the relevant determinant as to whether ISP traffic is intrastate is the distance from the end user originating the call to the ISP modem. If this distance is within a single local calling area, then we conclude that such call is a local call, and subject to this Commission's jurisdiction. In contrast, long distance voice calls terminate at a remote location outside of the local calling area.

Pacific argues that the telephone numbers for the ISP modem may be located in a different LATA from the CLC switch through which the call passes. In such instances, Pacific argues, the call would not be local, but would be a toll

call. While we agree that such calls would be toll calls, we find such an argument to be a red herring. Our finding remains unchanged that the rating of calls should be treated in a consistent manner whether they happen to involve an ISP or any other end user. If the call originates and terminates within the same local calling area, it should be treated as local.

Our finding that calls to the modem of an ISP constitute local telephone traffic does not contradict case law finding that Internet transactions may involve interstate commerce or that the "nature" of a communication, not the physical location of telecommunications facilities, is the proper determinant of FCC jurisdiction. The exercise of jurisdiction by the FCC and Congress includes authority over the Internet's information service component which involves transmissions across computer networks beyond the ISP modem and the transactions which occur over those networks. The jurisdiction of this Commission covers the intrastate telephone line connection between the ILEC's end user and the ISP modem.

The treatment of an ILEC customer call to an ISP modem as a local call is consistent with our Consumer Protection rules adopted in this proceeding where we defined a "completed call or telephonic communication to be a "call or other telephonic communication, originated by a person or mechanical device from a number to another number which is answered by a person or mechanical/electrical device." (D.95-07-054, App.B, Sec. 2.5.) Based on this definition, the ISP call is properly viewed as terminating at the ISP modem, at which point the originating call is answered, and the ISP connection established. Accordingly, the determination of whether the call is local is based upon whether the rate centers associated with the telephone numbers of the end user and the ISP provider are both within the same local calling area.

Thus, we conclude that we have jurisdiction over the intrastate telecommunications service component of ISP traffic, and thus have authority to deem these calls local.

## Payment of Reciprocal Compensation Fees

### *Parties' Positions*

The Coalition claims that CLCs are being unfairly deprived of reciprocal compensation fees for terminating the ISP traffic originated by ILEC customers. The Coalition claims Pacific has violated PU Code Sec. 453 by refusing to treat calls to ISPs as local calls eligible for reciprocal compensation. Sec. 453 prohibits public utilities from granting "any preference or advantage to any corporation or person" or subjecting "any corporation or person to any prejudice or disadvantage" as to "rates, charges, service, facilities or in any other respect ...as between classes of service." The Coalition claims that while Pacific collects local measured usage or Zone Usage Measurement (ZUM) Zone 3 charges on the party originating calls to Pacific's own Internet access service, Pacific discriminates against CLCs by refusing to share this revenue for calls from ILEC customers to ISPs served by CLCs. Pacific also receives revenues on flat rate service ($11.25 per month) over the rate for measured rate service ($6.00 per month). The Coalition cites this $5.25 per month differential as compensation for Pacific's costs for usage associated with flat rate service for which there is no extra charge. Likewise, GTEC receives usage revenue on ISP calls, ZUM Zone 3 revenues, and a $7.25 increment over measured rate service in its flat rate charge.

Because Pacific does not share any compensation received from such callers with the CLC that incurs the cost to terminate the call to the ISP, the Coalition claims such differential treatment produces an unfair competitive edge for Pacific and violates Sec. 453(a) and (c). The Coalition argues that CLCs are entitled to receive compensation for terminating inbound calls in the same

manner as Pacific and its own Internet operations do. As the volume of ISP traffic continues to grow at explosive rates, the Coalition argues, the CLCs' burden of terminating ISP calls correspondingly grows greater.

Pacific denies the charge that it has violated Sec. 453, arguing that most of its customers pay no additional charge for each individual local call, but are subject generally to local flat rate service. Likewise, Pacific's customers do not pay ZUM Zone 3 charges for ISP calls since CLCs specifically assign telephone numbers to ISPs from NXX codes that permit customers to avoid such charges. Pacific claims that its prices of $11.25 for flat rate service and $6 for measured rate service do not even cover its costs of providing local service to its own customers, much less the costs associated with calls from its customers to ISPs serviced by a CLC. Pacific argues that these prices were not designed to cover the costs associated with ISP usage where customers maintain their connection to the ISP for extended periods of time. Thus, Pacific denies that it collects any surplus revenues for ISP calls which can be shared with CLCs.

Pacific claims that it would be confiscatory to ILECs to require them to pay CLCs for the termination of ISP traffic. Since virtually all of the ISP traffic is one-way, Pacific argues, the compensating per-minute termination charges would likewise flow asymmetrically to the CLCs that have the customer relationship with the ISPs. The ILEC would thus pay both the costs of originating and terminating ISP traffic.

The ILECs argue that, even if the Commission concludes that it has jurisdiction over such calls, reciprocal compensation for ISP traffic should not be authorized as a matter of policy. Because ISPs receive calls, but almost never originate calls, the CLC would receive payment for terminating ISP traffic, but would seldom, if ever, pay for termination of outgoing calls originating from the ISP. At the same time, the ILEC would have to bear the call origination costs plus

the per-minute charges paid to the CLC for terminating the call. The ILECs claim such an arrangement would place an unfair and extraordinary burden on the carrier which originates the call. On the other hand, the CLCs argue that it is they who are disadvantaged by the obligation to terminate calls originated by the ILECs' customers to ISPs.

The ILECs warn that, if ISP traffic is deemed local, and the Commission requires that reciprocal compensation fees apply to ISP traffic, CLCs stand to gain millions of dollars in one-way reciprocal compensation payments under interconnection agreements with the ILECs, thereby subsidizing CLCs' businesses and undermining local competition. GTEC argues that no local carrier would voluntarily serve a subscriber if it stands to pay more in reciprocal compensation fees than it receives for providing local telephone service to the subscriber. Pacific argues that the payment of termination fees to the CLCs for ISP traffic will create an incentive for CLCs to "game" the system in a competitively abusive manner. Pacific claims that instead of charging ISPs to connect to the CLC network, the CLC can remit some of their reciprocal compensation fees to pay the ISPs for connecting the CLCs in the first place. Pacific believes the payment of reciprocal compensation fees for ISP traffic creates the wrong incentives encouraging such marketing practices.

### Discussion

We conclude that provisions applicable to interconnection agreements should apply to the termination of ISP calls as they do to any other local calls. We are unpersuaded by the argument that the payment of termination fees to CLCs for ISP calls is inherently unfair. Parties to the interconnection agreements which are subject to reciprocal compensation for local calls voluntarily agreed to such a provision. In the initial phase of the Local Competition proceeding, both Pacific and GTEC advocated the adoption of reciprocal compensation for call

termination. The contractual obligation to pay such charges does not disappear merely because the balance between incoming and outgoing calls is asymmetrical or not to the liking of one party or the other.

The telecommunications network functions that are required to terminate ISP traffic are no different from the functions required to terminate local calls of any other end user. The CLCs incur costs to terminate calls to ISPs just as they do for other calls. Likewise, the ILEC is relieved of the burden of terminating such traffic. We find no legal basis for treating ISP traffic differently from the traffic of any other similarly situated end users.

The fact that such calls flow predominantly in one direction does not negate the costs involved in terminating traffic, nor justify denying carriers compensation for the termination of local calls to which they are otherwise entitled. The U.S. District Court for the Northern District of California has recently upheld the principle that reciprocal compensation obligations are not invalidated merely because the directional flow of terminating traffic is not symmetrical. In upholding the reciprocal compensation provisions of an interconnection agreement involving a one-way paging carrier, the Court stated:

> "The Court agrees with Cook and the CPUC that nothing in the Act precludes one-way carriers such as Cook from entering into reciprocal compensation agreements with LECs. The Act requires only that the agreements be 'reciprocal' in that each carrier agrees to pay the other for the benefits it receives from the other carrier when the other carrier terminates a call that originates with the first carrier. The compensation agreement between Cook and Pacific Bell does so. Nothing in the statute's language indicates that such compensation agreements are not required if a disproportionate number of calls will originate with the facilities of one carrier or if no calls will originate with those of the other carrier." (Pacific Bell v. Telecom, Inc., U.S. D. C.; Judgment No. C97-03990 Civ.; September 3, 1998)

The imbalance in ISP traffic flow merely reflects the fact that vast majority of telephone customers still are served by an ILEC and thus, most calls will

originate with ILEC customers. The ILECs benefit from the huge share of the market they still possess, and generate at least some revenue from the calls to ISPs which are originated by ILEC customers and which terminate on the network of the CLC. For example, the differential rate for flat rate service in excess of measured rate service represents such a source of revenues. Also, the presence of the ISPs enhances the incentive for ILEC customers to purchase second phone lines from which further revenue is generated. It is not confiscatory merely to require the ILEC to compensate the CLC for terminating such calls in conformance with the freely negotiated reciprocal compensation provisions of applicable interconnection agreements. The CLC performs a necessary function in terminating ISP traffic, thus enabling the communication to be completed. Moreover, as the volume of such traffic increases, the burden on CLCs to provide for the termination of such traffic correspondingly increases. Absent a compensation agreement, the CLC terminating the ILEC customer's call receives no compensation for its termination. It is therefore equitable that the CLC be compensated through termination fees applicable to local calls.

There is nothing discriminatory in requiring that reciprocal compensation apply to ISP traffic since the obligation for reciprocal compensation applies to all carriers, not just to the ILECs. Thus, where calls are originated by CLC customers and terminated by an ILEC to its own ISP customer, the CLC must pay termination fees to the ILEC on whose network the call was terminated. In a competitive local exchange market, ILECs are free to compete for the business of an ISP. If the termination charge is not set at a level which corresponds to the costs incurred in terminating a call, the proper remedy is not to void the requirements of the interconnection agreement prescribing recovery of a termination charge. Rather, the proper remedy would be for the termination charge to be negotiated between the parties to recognize the appropriate costs of

call termination and in view of the corresponding revenues received by the carrier on whose network the call is originated. ILEC can renegotiate the interconnection agreements when they terminate to achieve this outcome.

### Impacts on Interstate/Intrastate Calling Ratios

We are unpersuaded by the arguments of the small ILECs that we should refrain from deciding the jurisdictional status of ISP traffic because it could adversely affect the revenues of the small ILECs which is based on intrastate-interstate calling traffic ratios. Our ruling that ISP traffic is intrastate is consistent with the manner in which such traffic has been treated in interconnection agreements historically prior to the recent change initiated by Pacific in questioning the validity of such treatment. In any event, to the extent that a small ILEC believes it will experience a material revenue impact as a result of a change in jurisdictional calling traffic ratios, it may seek recourse through its general rate case process.[4] Therefore, the issues resolved in this order concerning our jurisdiction over ISP traffic should not have any adverse impact on the traditional manner in which the small ILECs have determined traffic ratios for rate and revenue purposes.

## Findings of Fact

1. Disputes have arisen in interconnection agreements over which carrier should pay for the cost of terminating calls originated by customers of one local carrier to access Internet Service Providers (ISPs) which, in turn, are telephone customers of another local carrier.

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[4] The dominant large ILECs may seek any remedy they deem necessary to recover from their own end users whatever additional costs are allegedly caused by their end user's calls to ISPs. For example, the ILECs could request modification of the Commission's definition of basic service adopted in D.96-10-066 to possibly add a usage element above a certain threshold of minutes to flat rate service.

2. The question of whether ISP traffic is subject to call termination charges depends, in part, on whether such traffic is defined as local or as interstate, and consequently, on whether such calls come within the jurisdiction of this Commission.

3. Provision for reciprocal compensation for call termination in interconnection agreements only applies to local traffic originating and terminating within a local calling area.

4. ISP service is composed of two discrete elements, one being a telecommunications service by which the end user connects to the ISP modem through a local call, the second being an information service by which the ISP converts the customer's analog messages into data packets which are individually routed through its modem to host computer networks located throughout the world.

5. Under the 1996 Telecommunications Act (Act), "telecommunications" is defined 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." (47 USC 153(43).)

6. The Act separately defines "information" services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service." (47 USC 153(20).)

7. Even where interstate services are jurisdictionally mixed with intrastate services and facilities otherwise regulated by the states, the FCC has ruled that state regulation of the intrastate service will not be preempted unless it thwarts or impedes a valid federal policy.

8. No valid federal policy is thwarted or impeded by a state regulation ruling that reciprocal compensation provisions of interconnection agreements apply to the termination of ISP traffic on another carrier's network.

9. The U.S. Court of Appeals for the Ninth Circuit has ruled that state jurisdiction over carrier-provided intrastate enhanced services such as ISP calls does not intrude upon FCC's jurisdiction over interstate enhanced services offered by carriers.

10. The relevant determinant of whether ISP traffic is intrastate is the whether between the rate centers associated with the telephone number of an end user originating the call and the telephone number at the ISP modem where the call is terminated are both intrastate.

11. If the rate centers associated with the telephone number of the end user originating the call and the telephone number used to access the ISP modem lies within a single local calling area, then such call is a local call.

12. The issues resolved in this order concerning our jurisdiction over intrastate calls to ISPs should not have any adverse impact on the traditional manner in which the small ILECs have determined traffic ratios for rate and revenue purposes.

13. The telecommunications network functions that are required to terminate ISP traffic are no different from the functions required to terminate local calls of any other end user.

14. The fact that ISP traffic flows predominantly in one direction does not negate the costs involved in terminating traffic.

## Conclusions of Law

1. This Commission has jurisdiction over transmissions originating from an end user and terminating at an ISP modem where both the end user and modem are intrastate.

2. This Commission has jurisdiction to issue an order ruling on whether a transmission terminating at an ISP is to be subject to the reciprocal compensation provisions of interconnection agreements.

3. The reciprocal compensation provisions applicable to interconnection agreements should apply to the termination of calls to ISPs as they do to any other local calls.

4. There is nothing discriminatory in requiring that reciprocal compensation apply to the ISP termination of calls to by CLCs since the obligation for reciprocal compensation applies to all carriers, not just to the ILECs.

5. It is not confiscatory merely to require the ILEC to compensate the CLC for terminating such calls in conformance with the reciprocal compensation provisions of applicable interconnection agreements.

## O R D E R

IT IS ORDERED that:

1. The compensation provisions of interconnection agreements shall apply to the terminating traffic sent by competitive local carriers (CLCs) to Internet Service Providers (ISPs).

2. All carriers subject to interconnection agreements containing reciprocal compensation provisions are directed to make the appropriate reciprocal payment called for in such agreements for the termination of ISP traffic which would otherwise qualify as a local call based on the rating of the call measured

by the distance between the rate centers of the telephone number of the calling party and the telephone number used to access the ISP modem until such agreements are ended. At that time, both the CLCs and incumbent local exchange carriers (ILECs) are free to negotiate whatever new revisions they can agree to for termination.

This order is effective today.

Dated October 22, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
Commissioners

I will file a dissent.

/s/ HENRY M. DUQUE
Commissioner

I will file a dissent.

/s/ JOSIAH L. NEEPER
Commissioner

I will file a concurrence.

/s/ JESSIE J. KNIGHT, JR.
Commissioner

Henry M. Duque, Commissioner, dissenting:

I respectfully dissent from the decision of the majority.

My reasoning, like that of the majority voting for Decision 98-10-057, leads to the conclusion that this Commission has jurisdiction to resolve issues concerning internet traffic and to interpret interconnection agreements. Nonetheless, failures of reasoning, law, due process, and policy preclude me from supporting Decision 98-10-057.

Decision 98-10-057, after resolving the issue of jurisdiction, reaches a novel definition of "local call." Finding of Fact 11 states that "If the rate centers associated with the telephone number used to access the ISP modem lies [sic] within a single local calling area, then such call is a local call." Unfortunately, this finding neither comports with long-standing policies and practices embedded in tariffs filed to comply with prior Commission decisions nor with the reasoning contained in Decision 98-10-057 itself. Instead, it subtly shifts from a definition of a "local" call determined by locations, to a definition of "local" that derives from numbering conventions. There is no basis for this change, no analysis of its policy consequences, and no argument in the decision itself that supports this change.

For the longest time, the local service area has been defined in tariffs as:

> "An area within which are located the stations which customers may call at exchange rates, in accordance with the provisions of exchange tariffs. The local service area may include the whole or a part of an exchange area, or all of two or more exchange areas." (Pacific Bell Tariff, Schedule Cal. P.U.C No. A2 5th Revised Sheet 17, Filed January 29, 1996).[1]

Thus, the prime determination of whether a call is local is the physical location of the caller and the physical location of the party called – not the rate centers associated with the caller's number and the number of the party called.

Decision 98-10-057 itself follows the reasoning that it is location – not numbering

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convention – that counts:

> "Consistent with the FCC's characterization of Internet service, we conclude that the relevant determinant as to whether ISP traffic is intrastate is the distance from the end user originating the call to the ISP modem. If this distance is within a single local calling area, then we conclude that such call is a local call, and subject to this Commission's jurisdiction." (Mimeo, p. 12, emphasis added).

This reasoning calls for a very different finding of fact than Finding of Fact 11. It would support a finding of fact which states that a call is "local" when the distance from the rate center that contains the exchange where the caller is located to the rate center that contains the exchange in which the modem is located measures less than twelve miles. It does not support Finding of Fact 11 as contained here.

Finding of Fact 11's new definition in which "local" is determined by the telephone numbers, not locations, has significant policy consequences for all Californians. In particular, Finding of Fact 11 deems "local" any call placed between two numbers associated with a single "rate center," even if the phone or modem answering that call is hundreds of miles away. Consequently, if there is no link between the location of an ISP modem and the number assigned, all calls within a state to a modem could become "local" through the strategic purchase and assignment of telephone numbers by a Competitive Local Carrier (CLC). If, on the other hand, CLCs strictly follow a practice of assigning numbers to ISP modems based on the physical location of the modem answering the call, then Finding of Fact 11, although not justified, produces no change in the rating of calls.

Determining the facts of the situation – whether or not numbers are linked to the location of specific modems – is thus particularly important. Indeed, facts determine whether Finding of Fact 11 constitutes a wholesale revision of telephone pricing policies or is merely an infelicitous effort to restate traditional policy. This proceeding, however, developed no record concerning the numbering policies of CLCs or other carriers. Thus, it established no facts concerning number assignment practices in California.

This threat to current pricing policies is more than an abstract musing about a failure to develop a record. There is a current investigation in the State of Maine, in particular, to determine whether a carrier used multiple NXX codes "allowing customers

to avoid toll charges, rather than for the purpose of providing local exchange service."[2] Maine appears to view this practice, if documented, as one that undermines the traditional rating of calls. In particular, this practice would end all distinctions between local and toll calling.

If any California company assigns telephone numbers independent of location, Finding of Fact 11 creates mischief. Without any consideration of past pricing policy, it facilitates the practice of bypassing toll charges through the purchase of phone numbers. Indeed, unless some previous Commission ruling has set numbering policy, a fact not in evidence, Finding of Fact 11 would appear to establish a new rating practice that can readily eliminate all toll charges for many customers. This is reckless and unsound policy. It has no basis in fact or in law. Moreover, the adoption of Finding of Fact 11 without facts or hearing constitutes legal error. At a minimum, this reversal of Commission pricing policy requires a hearing.

Next, Decision 98-10-057, relying on this unsupported change in policy that permits numbers, rather than locations, to determine the rating of a call, orders the immediate payment of reciprocal compensation for calls placed to ISPs (Ordering Paragraph 2). In this sweeping step, the decision resolves actual and potential disputes concerning hundreds of interconnection contracts negotiated under the supervision of the Commission. Clearly, this order, based on an unsupported change in policy taken without a hearing, lacks a legal foundation. Issuing this order thus constitutes legal error.

In addition to its faulty reasoning, D.98-10-057 denies basic rights of due process. The decision orders the payment of compensation by incumbent carriers without examining the wording of a single contract and the contract terms that govern compensation. In adopting D.98-10-057, the Commission rejected a legally defensible alternative that would have the Commission examine the terms in a particular contract before ordering payment. This reasonable approach would determine how a specific contract addresses the pricing of calls to internet service providers or whether a contract either uses or defines the term "local" call. After a review of a disputed contract, the

[2] State of Maine, Public Utilities Commission, Docket No. 98-758, Notice of Investigation, October 6, 1998.

Commission could issue a decision interpreting it, including compensation terms. This approach, rejected in the rush to adopt Decision 98-10-057, should be ordered. Failure to do so would constitute another legal error.

Finally, in addition to committing legal error, Decision 98-10-057 constitutes poor regulation. Decision 98-10-057 neither asks nor answers any questions concerning the effects of its new call-rating policy on California's information infrastructure. Thus, its approach to decision making denies the very premise of good regulation, which is that rational decisions based on facts and reason serve the public interest. Moreover, this rational process is enshrined in the statutory guidance contained in Section 709 of the Public Utilities Code, which recommends that telecommunications regulators consider the consequences for the state's telecommunications and information infrastructure of regulatory decisions. Thus, Decision 98-10-057 fails to comport with Section 709 of the Public Utilities Code.

In summary, failures of reasoning, legal errors, failures to provide due process, and faulty regulatory actions endemic to Decision 98-10-057 compel my dissent.

/s/ HENRY M. DUQUE

Henry M. Duque

**Commissioner Josiah L. Neeper, Dissenting:**

I dissent from the majority's decision. The majority's decision errs in its analysis of Internet traffic by segmenting one leg of Internet call and considering it a local call while deeming the remaining segment of the call information service. Internet call does not terminate at the local switch of the Internet Service Provider; nor does it terminate at the competitive local exchange carrier's (CLECs) switch. Rather, it terminates at the ultimate destination the caller targets, similar to long distance service, and can be local, intrastate, interstate or international.

There is one overriding question in this case. That is: where does Internet traffic terminate? Does it terminate at the competitive local exchange carrier's switch or the modem of an Internet Service Provider? Or does it terminate at its ultimate destination the caller wishes to access?

The Coalition's Motion raises two intertwined and inseparable issues. We are to determine, first, whether Internet traffic is interstate or intrastate. That starts with the federal-state jurisdictional question, but the answer to this question inescapably leads to deciding the subsequent question: whether Internet traffic starts with a separate, severable, telephone segment that is subject to reciprocal compensation. If we say the Internet call is intrastate because we want to exercise a State's right rationale to decide the reciprocal compensation issue now or later, we will have essentially determined right now that Internet traffic is local.

Advocacy for States' rights is not the only issue. The issue is whether when someone in California sends an E-mail to Montana there is a separate severable local segment that is subject to the CPUC regulation under the federal telecommunications law and scheme. Is there another segment in Montana subject to its jurisdiction? And is the middle regulated by the FCC? In my view, there is

no need for duplicity of regulation when a single, integrated regulation of the interstate call can be done by a single regulator.

The Internet is an interstate network of computer systems interconnected with the telecommunications network, which enables the Internet to allow communication to occur across State, federal and international boundaries. No one disputes that the Internet allows people to communicate with one another. It is a medium of communication with limitless potential for international commerce, voice communication, and video communication. No one disputes that the Internet is also a source of boundless information that resides in different locations scattered around the entire globe. This is a medium far more important in its capacity and potential to bring together all humans on the globe connected with one another than any other communication medium we have experienced in this civilization. It is also undergoing dynamic evolution and transformation. Given this, I think it will defy logic to reduce and relegate the Internet or any part of it as just information service that is physically and inherently distinguishable from telephony.

The question presented to us by the Coalition's motion is whether this medium of communication that is made up of the Internet network and in part the telephone network can be broken into separate and distinct pieces, so that we can carve out a State jurisdiction. The entire exercise of determining whether Internet traffic is intrastate or intrastate rests on where we believe the Internet traffic terminates at the ISP's modem or somewhere else where the caller desires. I believe it terminates at the ultimate destination of the caller. Here is why.

First, the transformation of the Internet call as it traverses from an end user to its final destination has no decisional influence as to where the call terminates. The physical transportation of the call from the end user to the ISP is accomplished

by the CLEC which receives the call from the end user and sends it to the ISP on its trunks, just as it does any call to another customer. However, when the call reaches the ISP's modem, unless the desired destination resides at the ISP, the ISP generally routes the call to its ultimate destination which may be within the state, in another state, or at an international site, using what is called "packet switched data" protocol. The ISP then keeps the connection active for transmission and reception of communication to occur. On its way, the message or data may be "packeted" before it gets to its destination; but whatever happens in between you get your message across or receive it the way it is intended.

In this manner the ISP plays an intermediary role between the end user and the destination of the call, linking the communication path between caller in one area and the ultimate termination point. The destination of the Internet user are "mixed." They may terminate at the ISP's server or end up in a "web site" located in Moldavia or South Africa; or in Peoria, Illinois. And there is no way of telling what portion of the destination is where. But if it were possible to do that, then we could have had ease in determining which Internet call is interstate and which ones are intrastate, just as we do for long distance telephone calls. Here we have a medium where distance between caller and called is nearly irrelevant, a condition that is not hard to imagine for ordinary telephony in the near future.

When you consider the mixed nature of calls in the Internet and long distance service, the fundamental jurisdictional similarity between the two is inescapable. The only differences between them, I see it, are technology and the type of communication used. Internet traffic is largely data and "packet switched"; whereas interexchange is voice transmission and circuit switched. But I note that this distinction may in fact be more limited than my description because today with the right gadgets you can make a voice call using the Internet.

After a serious consideration of the issues, I have taken the view that our analysis of this case must consider the whole integrated, inseparable picture just as the FCC did in a number of cases before it concerning jurisdictional issues. The FCC's rulings in the past provide ample support to an end-to-end analysis in determining the jurisdictional nature of Internet traffic. Let me cite a few them.

First, the FCC's analysis in the Memory Call case is instructive in our consideration here. In the Memory case, the FCC relied and explicitly stated its rationale in its determination of jurisdiction that what mattered most was the ultimate termination of the call regardless of the location of the call forwarding service. It said that its jurisdiction does not end at the local switch but continues to the ultimate termination of the call.

Second, the FCC asserted jurisdiction over certain type of local calls used to provide interstate service in New York saying that the service as a whole was interstate and thus subject to its jurisdiction consistent with its analysis of call origination and its ultimate termination.

Finally, the FCC has also applied its end-to-end analysis to Bellsouth's voicemail to conclude that voicemail is jurisdictionally interstate despite the fact that the voicemail allowed out-of-state callers to retrieve their messages by using an intrastate call forwarding service. The focus of the FCC in this case was on the existence of "a continuous two-way transmission path from the caller, who is out of state, to the voicemail service" to determine that the call is an interstate communication.

Let me turn now to another extensively argued issue which the majority's decision misconstrues in reaching its conclusion. The FCC's exemption of access charges for Internet access traffic is an extension of a preferential treatment based on public policy goals to protect budding technologies from access charges just as

it did for other enhanced services. If the FCC put aside its protectionist policy objectives towards the Internet and fully considered the issue further, access charge would apply to Internet traffic.

This is perhaps made clear in its Access Charge Reform Order last year, in which the FCC re-affirmed its preferential treatment of ISPs. In that order it specifically said ISPs may use incumbent LEC facilities to originate and terminate interstate calls, but that they should not be required to pay interstate access charges. ISPs would pay business line rates, and other appropriate line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.

This exemption was granted not because of an FCC's determination that ISPs were end users or had a different use of the local exchange network but because of a policy preference that Internet traffic should be free of access charges.

Consistent with this characterization of Internet service, my alternate order resolves that the relevant determinant as to whether ISP traffic is intrastate or interstate is the nature of communication. Jurisdictional determination must consider the ultimate termination of the call. ISP calls terminate at the ultimate destination the caller intends to reach just as long distance telephone calls terminate at a remote location outside of the local calling area.

A call to the modem of an ISP is not an end by itself. It is merely a necessary stop as it continues to travel to its final destination. The ISP is a means for the completion of Internet communication that has a beginning and a termination.

The resolution of the call termination automatically leads to treating Internet calls as interstate calls and thus not subject to reciprocal compensation.

The alternate decision proposes to treat Internet traffic in the manner I described to you. It will protect the integrity of the telecommunications network, prevents gaming of the reciprocal compensation system that, in my view, was not established for the purposes of one way traffic, and protects local competition by encouraging CLEC's to compete in the local market by providing local telephone service instead of seeking an additional revenue source.

The majority's decision takes the contrary view that Internet traffic is severable for state jurisdictional purposes and in so doing perverts the definition of local calling. I disagree.

For all the above reasons I dissent from the majority decision.

Josiah L. Neeper
Commissioner

San Francisco, California
October 22, 1998

## Commissioner Jessie J. Knight, Jr., Concurring:

This is a very critical case that has enormous implication for the future development of the business paradigms that will ensue around the Internet and a case that I have carefully reviewed. I support this order because I agree with its technical and legal analyses and the certainty that rendering this decision today provides to the competitive local carriers and internet service providers offering services in today's marketplace.

With regard to the technical and legal analyses, I endorse this order because it does not erode the line drawn in detail almost a decade ago in the federal government's computer inquiry cases that dealt specifically with computers and the inquiry to separate telecommunications services from enhanced information and computer-related services, such as those offered by internet service providers. As defined in the Telecommunications Act, information services, are distinguished from telecommunications services because among other things, they "generate, acquire, store, transform, process and retrieve information via telecommunications." As the order describes, internet service providers allow their subscribers to access files on the World Wide Web to acquire, retrieve, and utilize stored information. By upholding the distinctions between telecommunications and information services, this order does not blur these currently separately defined services into one generic category. If this line were somehow erased, the effort could lead to intrusion of regulation into today's internet marketplace, which the last decade of regulatory and judicial history has been careful to avoid.

Given the distinction between telecommunications and information services, I agree with the order's finding that terminating calls to an internet service provider is no different than terminating a call to any other end user. Where the distinction does exist is between the call to reach the internet provider and the enhanced or information service provided by the internet provider.

Numerous technical arguments have been made on both sides to define why use of the internet is or is not like any other phone call. But the heart of the matter, in my mind, is that internet service providers are not certificated as telecommunications carriers. Based on this fact, I see no reason to potentially expand jurisdiction over them by now distinguishing them from other end users. No matter how sophisticated the technical arguments, the Commission should not accidentally equate the internet network with the phone network at this time, and otherwise erase the model that parties relied on when they negotiated current interconnection contracts.

Also, I support this order for the certainty it provides nascent facilities-based carriers, who have invested millions of dollars in networks to terminate calls to their customers, including internet service providers. These facilities-based carriers have long counted on receiving payment for the terminations they have performed. By adopting this order, the Commission will assure the marketplace, including the investment community backing the competitive carriers, that the contractual arrangements that the Commission approved in negotiated interconnection agreements can be relied upon. It is important to note that the order does allow future renegotiation of these arrangements to suit the new realities of this market as it evolves over time.

Some have characterized compensation to competitive local carriers for terminating internet service provider traffic as a "lop-sided payment." I wholeheartedly disagree. The competitive carriers are entitled to compensation for the terminations they perform, especially since they relieve the incumbent of performing these terminations, such that the incumbent does not incur the operating costs attendant to this function. Furthermore, carriers are free to renegotiate the terms of these interconnection agreements as they expire, if the current terms are no longer acceptable to either party.

By voting on this order today, the Commission is able to weigh in with its view on the debate over treatment of calls to internet providers as it unfolds at the national level before the Federal Communications Commission.

Dated October 22, 1998 at San Francisco, California.

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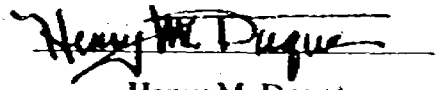
In summary, failures of reasoning, legal errors, failures to provide due process, and faulty regulatory actions endemic to Decision 98-10-057 compel my dissent.



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**Commissioner Josiah L. Neeper, Dissenting:**

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no need for duplicity of regulation when a single, integrated regulation of the interstate call can be done by a single regulator.

The Internet is an interstate network of computer systems interconnected with the telecommunications network, which enables the Internet to allow communication to occur across State, federal and international boundaries. No one disputes that the Internet allows people to communicate with one another. It is a medium of communication with limitless potential for international commerce, voice communication, and video communication. No one disputes that the Internet is also a source of boundless information that resides in different locations scattered around the entire globe. This is a medium far more important in its capacity and potential to bring together all humans on the globe connected with one another than any other communication medium we have experienced in this civilization. It is also undergoing dynamic evolution and transformation. Given this, I think it will defy logic to reduce and relegate the Internet or any part of it as just information service that is physically and inherently distinguishable from telephony.

The question presented to us by the Coalition's motion is whether this medium of communication that is made up of the Internet network and in part the telephone network can be broken into separate and distinct pieces, so that we can carve out a State jurisdiction. The entire exercise of determining whether Internet traffic is intrastate or intrastate rests on where we believe the Internet traffic terminates at the ISP's modem or somewhere else where the caller desires. I believe it terminates at the ultimate destination of the caller. Here is why.

First, the transformation of the Internet call as it traverses from an end user to its final destination has no decisional influence as to where the call terminates. The physical transportation of the call from the end user to the ISP is accomplished

by the CLEC which receives the call from the end user and sends it to the ISP on its trunks, just as it does any call to another customer. However, when the call reaches the ISP's modem, unless the desired destination resides at the ISP, the ISP generally routes the call to its ultimate destination which may be within the state, in another state, or at an international site, using what is called "packet switched data" protocol. The ISP then keeps the connection active for transmission and reception of communication to occur. On its way, the message or data may be "packeted" before it gets to its destination; but whatever happens in between you get your message across or receive it the way it is intended.

In this manner the ISP plays an intermediary role between the end user and the destination of the call, linking the communication path between caller in one area and the ultimate termination point. The destination of the Internet user are "mixed." They may terminate at the ISP's server or end up in a "web site" located in Moldavia or South Africa; or in Peoria, Illinois. And there is no way of telling what portion of the destination is where. But if it were possible to do that, then we could have had ease in determining which Internet call is interstate and which ones are intrastate, just as we do for long distance telephone calls. Here we have a medium where distance between caller and called is nearly irrelevant, a condition that is not hard to imagine for ordinary telephony in the near future.

When you consider the mixed nature of calls in the Internet and long distance service, the fundamental jurisdictional similarity between the two is inescapable. The only differences between them, I see it, are technology and the type of communication used. Internet traffic is largely data and "packet switched"; whereas interexchange is voice transmission and circuit switched. But I note that this distinction may in fact be more limited than my description because today with the right gadgets you can make a voice call using the Internet.

After a serious consideration of the issues, I have taken the view that our analysis of this case must consider the whole integrated, inseparable picture just as the FCC did in a number of cases before it concerning jurisdictional issues. The FCC's rulings in the past provide ample support to an end-to-end analysis in determining the jurisdictional nature of Internet traffic. Let me cite a few them.

First, the FCC's analysis in the Memory Call case is instructive in our consideration here. In the Memory case, the FCC relied and explicitly stated its rationale in its determination of jurisdiction that what mattered most was the ultimate termination of the call regardless of the location of the call forwarding service. It said that its jurisdiction does not end at the local switch but continues to the ultimate termination of the call.

Second, the FCC asserted jurisdiction over certain type of local calls used to provide interstate service in New York saying that the service as a whole was interstate and thus subject to its jurisdiction consistent with its analysis of call origination and its ultimate termination.

Finally, the FCC has also applied its end-to-end analysis to Bellsouth's voicemail to conclude that voicemail is jurisdictionally interstate despite the fact that the voicemail allowed out-of-state callers to retrieve their messages by using an intrastate call forwarding service. The focus of the FCC in this case was on the existence of "a continuous two-way transmission path from the caller, who is out of state, to the voicemail service" to determine that the call is an interstate communication.

Let me turn now to another extensively argued issue which the majority's decision misconstrues in reaching its conclusion. The FCC's exemption of access charges for Internet access traffic is an extension of a preferential treatment based on public policy goals to protect budding technologies from access charges just as

it did for other enhanced services. If the FCC put aside its protectionist policy objectives towards the Internet and fully considered the issue further, access charge would apply to Internet traffic.

This is perhaps made clear in its Access Charge Reform Order last year, in which the FCC re-affirmed its preferential treatment of ISPs. In that order it specifically said ISPs may use incumbent LEC facilities to originate and terminate interstate calls, but that they should not be required to pay interstate access charges. ISPs would pay business line rates, and other appropriate line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.

This exemption was granted not because of an FCC's determination that ISPs were end users or had a different use of the local exchange network but because of a policy preference that Internet traffic should be free of access charges.

Consistent with this characterization of Internet service, my alternate order resolves that the relevant determinant as to whether ISP traffic is intrastate or interstate is the nature of communication. Jurisdictional determination must consider the ultimate termination of the call. ISP calls terminate at the ultimate destination the caller intends to reach just as long distance telephone calls terminate at a remote location outside of the local calling area.

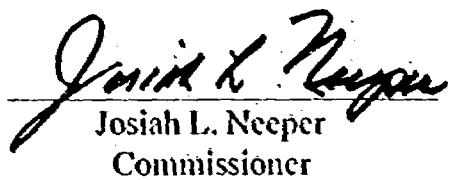
A call to the modem of an ISP is not an end by itself. It is merely a necessary stop as it continues to travel to its final destination. The ISP is a means for the completion of Internet communication that has a beginning and a termination.

The resolution of the call termination automatically leads to treating Internet calls as interstate calls and thus not subject to reciprocal compensation.

The alternate decision proposes to treat Internet traffic in the manner I described to you. It will protect the integrity of the telecommunications network, prevents gaming of the reciprocal compensation system that, in my view, was not established for the purposes of one way traffic, and protects local competition by encouraging CLEC's to compete in the local market by providing local telephone service instead of seeking an additional revenue source.

The majority's decision takes the contrary view that Internet traffic is severable for state jurisdictional purposes and in so doing perverts the definition of local calling. I disagree.

For all the above reasons I dissent from the majority decision.



Josiah L. Neeper
Commissioner

San Francisco, California
October 22, 1998