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Before The Public Utilities Commission Of The State Of California

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)

ORDER MODIFYING AND DENYING APPLICATIONS FOR REHEARING OF DECISION 98-10-057

INTRODUCTION

In Decision (D.) 98-10-057 the Commission affirmed its jurisdiction over telephone traffic between end users and Internet Service Providers (ISPs), and determined that such calls are subject to the bill-and-keep or reciprocal compensation provisions of applicable interconnection agreements.[1] The Decision was issued as a result of a motion filed by the California Telecommunications Coalition (Coalition)[2] regarding the jurisdictional status and billing treatment of

[1] Under standard reciprocal compensation provisions of interconnection agreements, 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 §51.701(e), 51.703.) 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 Corporation, Sprint Communications Co., L.P., Time Warner AxS of California, L.P., Teligent, Inc.,

telephone calls utilizing a local exchange number to access ISPs. The Coalition sought a Commission order affirming that calls delivered to ISPs should be treated as local calls, under Commission jurisdiction, and subject to the reciprocal compensation provisions of applicable interconnection agreements.

GTE California Inc. (GTEC) and Pacific Bell (Applicants) have filed applications for rehearing of this Decision. Responses were filed by Pac-West Telecomm, Inc. (Pac-West) and the Coalition.[3] Both Applicants allege the Commission misapplied federal law in concluding that ISP-bound traffic is local and therefore subject to reciprocal compensation. Pacific raises the argument that several findings of the Decision are not supported by adequate evidence. Pacific also asserts that the Decision is "internally inconsistent" as well as inconsistent with a prior Commission decision. Finally, Pacific argues that the Commission violated the Federal Telecommunications Act of 1996 (Act) and acted in excess of its authority in purporting to change Pacific's local calling areas and in revising numerous interconnection agreements without evidence. Pacific also has requested oral argument on all of the issues presented in its application for rehearing. GTEC also argues that it would be error for the Commission to implement the Decision until a complete record on the unique one-way flow and costs of Internet traffic is established.

DISCUSSION

A. Request for Oral Argument

Pacific requests oral argument on *all* issues raised in its application for rehearing, on the basis that "the application raises issues of 'major significance for the Commission.'" While some of the issues raised in Pacific's application are

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California Cable Television Association, and Brooks Fiber Communications.

[3] For purposes of the Response to Pacific's Application for Rehearing, the Coalition consists of: ICG Telecom Group, Inc., MCI Worldcom, Inc., California Cable Television Association, Sprint

of significance, Pacific fails to demonstrate that oral argument will materially assist the Commission in resolving the application. As such, Pacific's request does not meet the requirements for oral argument as set forth in Rule 86.3 of the Commission's Rules of Practice and Procedure. We received extensive and thorough briefs from several parties addressing the issues raised in Pacific's application. We find the briefs are sufficient in assisting the Commission in resolving the applications for rehearing. We also find that oral argument would produce further delay in this proceeding, and we note that other proceedings before this Commission are awaiting our decision in this matter. For the above reasons, the Commission denies Pacific's request for oral argument. (Rule 86.5.)

B. The Commission Did Not Err in Treating ISP-bound Traffic as Local for Purposes of Inter-carrier Compensation Provisions of Interconnection Agreements

We will first address the issue of treating ISP-bound calls as local for the purpose of reciprocal compensation. In our Decision, we noted that reciprocal compensation provisions of interconnection agreements only apply to local communications. In order to determine whether ISP traffic was defined as local or interstate, we looked at whether the 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. In resolving this question, we analyzed a string of FCC cases and orders regarding the treatment of Internet traffic. We noted for example that the FCC defined telecommunications access to the Internet as being distinctly different from telecommunications access for interstate long-distance calls. (Decision, p. 9.) We cited to one FCC Report and Order in which the FCC concluded that "Internet access consists of more than one component." (Decision,

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Communications Co., L.P., and Time Warner Telecom of California, L.P.

p. 9, citing FCC's Report and Order In Re Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776 (Released May 8, 1997) ¶ 83.) We further noted that the FCC had found that "Internet access services are appropriately classified as information, rather than telecommunications, services,"[4] and that the FCC affirmed that the categories of "telecommunications service" and "information service" are mutually exclusive. (Decision, p. 9.) Based on our review of these FCC cases and other authorities, we concluded that service to an ISP which thereafter connects to the Internet constitutes two separate components, the first a telecommunications service which "terminates" at the ISP's modem, and a second component characterized as an information service which consists of the transmission of data beyond the ISP modem. (This is referred to as the "two-call" or "two-component" theory.) In the discussion portion of the Decision, we stated 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." (D.98-10-057, p. 12.)

Both Applicants point to an FCC Order in GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148, FCC 98-292, Memorandum Opinion and Order, Oct. 30, 1998 (GTE Order), issued shortly after this Commission issued D.98-10-057. Pacific and GTEC argue that in the GTE Order, the FCC unequivocally rejects the "two-call" theory which grounds the Decision's reciprocal compensation rationale. In the GTE Order, the FCC ruled that GTE's proposed DSL Solutions-ADSL Service (ADSL service) is a mixed use special access which is mostly interstate and thus properly tariffed at the federal

[4] D.98-10-057, p. 9, citing Report to Congress in re Federal-State Joint Bd. On Universal Service, FCC 98-67 at ¶ 73 (Released April 10, 1998).

level.[5] (GTE Order ¶¶ 25-26.) The Applicants argue that many of the arguments relied on in the Decision concerning the jurisdictional nature of ISP traffic were rejected in the FCC's GTE Order. The FCC rejected the argument, for example, that ISP-bound traffic must be separated into an intrastate telecommunications service provided by the LEC and an interstate service provided by the ISP. (GTE Order ¶ 12.) The FCC relied on Petition for Emergency Relief and Declaratory Ruling Filed by Bellsouth Corp. (Memory Call), 7 FCC Rcd 1619 (1992), Teleconnect Co. v. Bell Tel. Co. of Penn. Et al., 10 FCC Rcd 1626 (1995), and other authorities to find that Internet communications "do not terminate at the ISP's local server, as some competitive LECs and ISPs contend, but continue to the ultimate destination or destinations." (GTE Order ¶ 19.) The applicants argue that since the FCC unequivocally rejected the "two-call theory" that is the foundation of our Decision, and found that calls to ISPs are jurisdictionally interstate, this Commission can no longer require these calls be subject to reciprocal compensation provisions of applicable interconnection agreements.

Although our jurisdictional analysis regarding ISP traffic is inconsistent with the FCC's order, we disagree that the GTE Order compels a reversal of our decision to treat ISP-bound calls as local for purposes of reciprocal compensation provisions of applicable interconnection agreements. In the GTE Order, the FCC recognized that reciprocal compensation, as applied to Internet calls, was not at issue. The FCC emphasized in its GTE Order that it decided only the issue of "GTE's federal tariff for ADSL service, which provides specifically for a dedicated connection, rather than a circuit-switched, dial-up connection, to ISPs and potentially other locations." (GTE Order ¶ 2) The FCC specifically

72.1.4.2

[5] ADSL service permits ISPs to provide end users with high-speed access to the Internet, using a combination of the local telephone plant and specialized equipment at the wire center. The end user connects to the ISP's point of presence (POP), and from there, the communication travels on to the Internet. ADSL involves a dedicated, rather than a dial-up, connection to the ISP's POP.

noted that the scope of its holding excluded the type of issue addressed in our Decision:

> This Order does 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. [Footnote omitted.] Unlike GTE's ADSL tariff, the reciprocal compensation controversy implicates: the applicability of the separate body of Commission rules and policies relating to inter-carrier compensation when more than one local exchange carrier transmits a call from an end user to an ISP, and the applicability of interconnection agreements under sections 251 and 252 of the Communications Act, as amended by the Telecommunications Act of 1996, entered into by incumbent LECs and competitive LECs that state commissions have found, in arbitration, to include such traffic. Because of these considerations, we find that this Order does not, and cannot, determine whether reciprocal compensation is owed, on either a retrospective or a prospective basis, pursuant to existing interconnection agreements, state arbitration decision, and federal court decisions. (GTE Order ¶ 2).

Since the GTE Order relates specifically to GTE's ADSL offering, which is distinguishable from dial-up Internet access addressed in our Decision, and since the FCC explicitly declared that its GTE Order does not determine whether reciprocal compensation is owed for traffic delivered to ISPs, we find that the FCC's GTE Order does not establish legal error in or compel a reversal of our Decision as the Applicants contend. However, the FCC stated in its GTE Order that it would issue a separate order specifically addressing reciprocal compensation issues. On February 25, 1999, the FCC adopted Implementation of the Local

12.1.4.1

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. 98-68, Feb. 25, 1999 (Declaratory Ruling).

In the Declaratory Ruling, the FCC similarly states that for jurisdictional purposes, ISP-bound traffic should be analyzed on an end-to-end basis, rather than by breaking the traffic into component parts. The FCC stated that the communications at issue do not terminate at the ISP's local server, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state. (Declaratory Ruling ¶ 12.) The FCC noted that while it has previously distinguished between the "telecommunications 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, and while the FCC concluded that ISPs do not appear to offer "telecommunications service" and thus are not "telecommunications carriers", it has never found that "telecommunications" end where "enhanced" service begins. (Id., ¶ 13.) The FCC's ISP Order finds that while ISP-bound traffic is "jurisdictionally mixed," it appears to be "largely interstate." The FCC rejects the two-component theory for calls to ISPs, applies a one-communication theory, and finds that the reciprocal compensation requirement of Section 251(b)(5) of the Act does not govern inter-carrier compensation for ISP-bound traffic.[6]

Since the FCC makes many of the same findings and arguments regarding the jurisdictional nature of dial-up ISP traffic as it did in its GTE Order, we can evaluate many of the Applicants' allegations of legal error in light of the Declaratory Ruling. Pacific and GTEC both contend that since D.98-10-057 is based on a two-call theory it can no longer be followed. Rather, as a result of the

[6] FCC Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, adopted February 25, 1999.

FCC's GTE Order, Pacific argues that calls to ISPs must now be understood as non-local interstate calls, and that reciprocal compensation requirements cannot be mandated. Pacific concludes that ISP traffic cannot be subject to reciprocal compensation and, as interstate traffic, meet point billing as a minimum is appropriate. GTEC likewise argues that since the Commission's application of FCC precedent is inconsistent with the FCC's jurisdictional analysis, the Decision must be reversed.

Although our jurisdictional analysis is inconsistent with the FCC's Declaratory Ruling, the FCC's ruling does not require a different result with respect to our decision to treat ISP-bound calls as local for purposes of reciprocal compensation. As the FCC explicitly stated, the conclusion that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate "does not in itself determine whether reciprocal compensation is due in any particular instance." (Declaratory Ruling ¶1.) Moreover, the FCC stated that its determination that a portion of dial-up ISP-bound traffic is interstate is not dispositive of interconnection disputes currently before state commissions. (Id., ¶ 20.) 72.1.4.2

The FCC makes it abundantly clear that it does not intend to preempt or interfere with any state commission decision regarding compensation for ISP-bound traffic. Contrary to the assertions of Pacific and GTEC, the FCC has not asserted exclusive jurisdiction over inter-carrier compensation for all ISP-bound traffic. (Declaratory Ruling, Footnote 73.) The FCC declared that: "Until adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic." (Id., ¶ 28.) 72.1.4.2

Neither the FCC's GTE Order or Declaratory Ruling contain any statement that the FCC has decided to terminate the "shared jurisdiction" approach that it has taken to date with respect to state jurisdiction over certain aspects of Internet-related services. The FCC did not reach the conclusion that Internet traffic is wholly interstate and that state regulatory commissions had no authority

to determine whether reciprocal compensation applied to ISP-bound calls in their respective states. To the contrary, the FCC acknowledged that some of this traffic may be intrastate. (Declaratory Ruling ¶ 18.) The FCC might have declared all state commission decisions, either issued generically or in arbitrations, as invalid and directed this traffic to be treated as strictly interstate and excluded from reciprocal compensation. The FCC did not take this approach. Instead, the FCC stated that it would not interfere with state commission decisions on this issue. (Id., ¶¶ 21, 27.)

Until the FCC establishes a new regime for inter-carrier compensation for these calls, state commissions remain free to determine what, if any, intercarrier compensation should be paid for the delivery of such ISP traffic. 12.1.4.2 (Id., ¶ 7.) The only limitation is that such a state determination must not conflict with federal law. As the FCC noted in its Declaratory Ruling, there currently is no federal rule addressing this issue, and accordingly found "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." (Id., ¶ 21.) Thus, the FCC's Declaratory Ruling expressly preserves the authority of state commissions to determine an appropriate compensation mechanism for ISP-bound traffic.

In our Decision, we recognized that "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." (D.98-10-057, at 20.) As we noted in our Decision, and as the FCC noted in its Declaratory Ruling, there is no federal rule or regulation on this matter which would be affected by our Decision. Quite the contrary, the FCC explicitly stated "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." (Declaratory Ruling ¶ 26.) In fact, in a footnote to that statement, the FCC states: "As noted, in other contexts we have directed states to treat such traffic as local." (Id., Footnote 88.) Furthermore, the FCC emphasizes that it has treated, and continues to treat, ISP-bound traffic as local for the purpose of exempting ISPs from access charges. (Id., ¶ 23.)

Pacific and GTEC argue that, under current governing federal law, they cannot be required to pay reciprocal compensation for termination. To the contrary, the FCC explicitly recognized that it has had a longstanding policy of treating this traffic as local and that reciprocal compensation may be an appropriate compensation mechanism for ISP-bound traffic:

> 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. (Id., ¶ 25.)

At this point, reciprocal compensation has not been eliminated as a compensation option by the FCC. State commissions may continue to treat this traffic as local and find that this traffic is subject to reciprocal compensation provisions of interconnection agreements, pending further action by the FCC.

The FCC's Declaratory Ruling acknowledges that state commissions may have reached different positions as to the nature and jurisdiction of ISP-bound traffic:

> 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 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. (Id., ¶ 27.)

Although we did reach a different position on the jurisdictional nature of ISP-bound traffic, we nonetheless have reached a legally sustainable result. Our determination that reciprocal compensation provisions of applicable interconnection agreements should apply to the termination of this traffic does not rest on the "two-call" theory which has been rejected by the FCC. Our Decision addressed two separate issues: the jurisdictional nature of Internet communications, and the proper treatment of ISP-bound calls for purposes of reciprocal compensation provisions of interconnection agreements. In an analysis independent of our jurisdictional determination, we found that reciprocal compensation provisions of applicable interconnection agreements applied to ISP-bound traffic in California.

As discussed in the Decision, the parties to the interconnection agreements which are subject to reciprocal compensation for local calls voluntarily agreed to such a provision. We found no legal reason for treating calls to ISPs differently than other local calls. The FCC's Declaratory Ruling does not change this result: "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." (Declaratory Ruling ¶ 29.) "[W]e 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." (Id., ¶ 25.) Our determination that this

traffic should be treated as local for reciprocal compensation purposes is consonant with the FCC's Declaratory Ruling:

> 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. (D.98-10-057, at 17.)

We recognized that the CLCs perform a necessary function in terminating ISP traffic, thus enabling the communication to be completed. We further stated, "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." (D.98-10-057, at 18.) Finally, we noted in the Decision that treating ISP traffic as local 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. (Id., at 19.)

As noted above, the FCC Ruling states that while reciprocal compensation is not compelled by the Act, other equitable or legal considerations may suggest that compensation is due for this traffic. (Declaratory Ruling ¶ 27.) In our Decision, considerations other than the mere fact that these calls are local governed our decision that this traffic be subject to reciprocal compensation provisions of applicable interconnection agreements. As explained above, other legal and equitable considerations provide a foundation for our Decision. The Decision will be modified to add additional findings to reflect this rationale. As such, there is no need to revisit our Decision on this issue. We conclude that,

although our jurisdictional analysis is inconsistent with the FCC's analysis, the Applicants have not demonstrated legal error in our construction of interconnection agreements as requiring the payment of compensation to CLCs for terminating ISP-bound traffic.

C. The Decision's Findings Are Adequate and Supported by the Record

We now turn to Pacific's arguments that the Decision and its findings are not supported by any record. Pacific claims that the Decision contains findings which have no basis in any record evidence. Pacific further argues that the Commission relied on materials outside the record in reaching its decision. Specifically, Pacific points to Findings of Fact Nos. 4, 10, 11, 13, and 14, claiming that there were no evidentiary hearings to create a factual record for these findings, and there is no evidentiary record that otherwise provides any basis for these findings.

We disagree with Pacific's presumption that evidentiary hearings were necessary prior to the issuance of this Decision. Pacific's assertion is based on a misunderstanding of the record in a rulemaking proceeding like this one, where the Commission exercises its legislative authority. Under the Commission's quasi-legislative authority, it has discretion to grant a hearing or issue regulations without full evidentiary hearings. In a rulemaking proceeding under the Commission's Rules of Practice and Procedure, "written proposals, comments, or exceptions are used instead of evidentiary hearings." (Rule 14.1.) Where, as in this case, proceedings are appropriately characterized as legislative in nature, the California Supreme Court has held that evidentiary hearings are not required. (See, Wood v. Public Utilities Commission (1971) 4 Cal.3d 288, 292.) In such instances, the requirements are purely statutory and the agency is not circumscribed by the concept of due process or other restrictions applicable to judicial or quasi-judicial adversary proceedings.

The Commission received extensive comments from the parties on the issues addressed in the Decision. We arrived at many of the conclusions in this Decision based on a combination of information provided in written submissions, our individual and institutional experience, general information, and common sense. (See, Re Tariff Filing Rules for Telecommunications Utilities, Other than Local Exchange Carriers and AT&T-C [D.93-05-010] 49 C.P.U.C.2d 197, 201 (1993).) To say that there is no record evidence in this case ignores the fact that this is a rulemaking proceeding where the record is developed through written submissions. The Commission has a more than ample and sufficient record for its decision in the comments that it received from the parties.

As the Commission acted under its legislative authority when it adopted D.98-10-057, it is appropriate to judge its findings in that context. When an agency acts under its quasi-legislative authority, the California Supreme Court has stated, "[n]ot only does the 'finding' of such 'facts' belong to the quasi-legislative function, the 'facts' 'found' must themselves be viewed as quasi-legislative in nature. All are informed with legal, policy, and technical considerations.... Consequently, none is similar to the sort of 'historical or physical facts' ...typically found in the course of administrative adjudication." (20th Century Ins. Co. v. Garamendi (1994) 8 Cal.4th 216, 278 n12.) Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion. (Western Oil & Gas Assn. V. State Lands Comm. (1980) 105 Cal.App.3d 554, 564, quoting Davis, Administrative Law Treatise (1958) § 7.02, p. 423.)

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11.2.1.1

The findings of fact Pacific complains of are the types of general facts that help the Commission decide questions of law and policy. The reasoning that led the Commission to each fact is clearly set forth in the decision. Finding of

Fact No. 4,[7] for example, was culled from a discussions in the comments of the parties and the Decision concerning prior FCC cases which classified various elements of access to the Internet via ISPs as information or telecommunications services. (See, Decision, pp. 8-12.) The fact that "no party presented any factual or technical evidence concerning either telecommunications or computer networks" is irrelevant and unnecessary to this finding. Likewise, Pacific argues that Finding No. 13 was made without record evidence concerning what telecommunications network functions are required to terminate ISP traffic, whether any such functions are performed by Pacific Bell or CLECs, or whether those functions are the same or different than required to terminate other calls. Finding of Fact No. 13 states: "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." Again, we find that our general expertise and knowledge of the telecommunications industry, as well as the written submissions of the parties provides a sufficient basis for this finding. Moreover, Pacific makes no showing that this finding is in any way incorrect.

Finding of Fact 14 states: "The fact that ISP traffic flows predominantly in one direction does not negate the costs involved in terminating traffic." Pacific argues that this finding was made without evidence regarding CLCs' costs involved in terminating ISP traffic. GTEC similarly argues that it would be an error for this Commission to implement D.98-10-057 until a complete record on the unique one-way flow and costs of Internet traffic were established. GTEC provides no analysis of its own as to why it thinks such a record is necessary. Instead it cites the following passage from a draft alternate decision:

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[7] Finding of Fact No. 4 states: "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 the modem to host computer networks located throughout the world."

> In setting our policy regarding paging companies, the Commission carefully considered the imbalance of traffic flow and the unique costs associated with paging traffic. In sharp contrast to this considered step, we know of no record in the arbitrated interconnection agreements between ILECs and CLCs that either directly addressed the imbalance in ISP traffic flow or any special pricing/costing characteristics associated with this type of communication.

GTEC apparently draws a parallel between ISP-bound traffic and paging traffic in making its assertion that a record is required on the flow and costs of ISP-bound traffic. In determining that paging companies were entitled to reciprocal compensation for the termination of paging traffic, the Commission did consider the imbalance of traffic flow and unique costs associated with paging traffic. However, this imbalance was a result of the fact that LECs and paging providers employ different technologies. One-way paging customers could not originate telecommunications on the paging company's network which would terminate on a LEC's network. That is not the same situation as in the case of ISP-bound traffic. As we noted in our Decision:

> The imbalance of ISP traffic flow merely reflects the fact that the vast majority of telephone customers still are served by an ILEC and thus, most calls will originate with ILEC customers....[T]he 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. (D.98-10-057, at 17-18.)

Finding of Fact No. 14 states that 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 actual costs incurred is irrelevant to this determination. The U.S. District Court for the Northern District of California agrees: "Nothing in the statute's [referring to the Telecommunications Act of 1996] 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. Cook Telecom, Inc., et al., No. C97-03990, 1998 U.S. Dist. LEXIS 14430, at *18 (U.S.D.C. Sept. 3, 1998).)

We find that the record is sufficient to support our Decision in this case. Applicants' arguments are merely a distraction from one of the real underlying issues in this case: that ILECs should be bound by their agreement to pay reciprocal compensation for local calls, which historically included ISP-bound calls prior to the recent change initiated by Pacific in questioning the validity of such treatment. The recent FCC Declaratory Ruling certainly affirms the validity of treating ISP-bound traffic as local for purposes of inter-carrier compensation arrangements. We accordingly find the Applicants' arguments without merit.

Pacific also raises several arguments concerning Findings of Fact 10 and 11, including the claim that these findings were made without any evidence concerning any CLC or ISP network in California as to the location of ISP modems, and the potential abuse or misuse of the assignment of numbers. Finding of Fact No. 10 states: "The relevant determinant of whether ISP traffic is intrastate is the whether between (sic) 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." We find that in light of the FCC's Declaratory Ruling, which found ISP-bound traffic to be largely interstate, this Finding of Fact could and should be deleted. Therefore, Pacific's argument

concerning this finding is moot. We address Pacific's other arguments concerning Finding of Fact No. 11 below.

Finally we address Pacific's argument that the Commission relied on matters that were not part of the record in issuing the Decision. First, Pacific points to a statement made in Commissioner Knight's concurring opinion: "[n]umerous technical arguments had been made on both sides to define why use of the Internet is or is not like any phone call." Pacific argues that there are no such technical arguments anywhere in the record. Pacific further contends that Commissioner Knight based part of his discussion on an ex parte communication by Bank of America. Pacific specifically notes Commissioner Knight's assertion that the Decision provides "certainty for the CLECs "who have invested millions of dollars in networks to terminate calls" and for the investment community backing the CLECs that relied upon the contractual arrangements that the Commission approved. Pacific argues that these assertions were not based on any evidence in the record, but instead rely on an ex parte communication from Bank of America. We find Pacific's arguments devoid of merit. To suggest that no technical arguments have been offered in this proceeding is simply disingenuous and ignores the record in this case. Commissioner Knight's statements regarding certainty for CLECs and the investment community could easily have been culled or inferred from the several rounds of briefs filed by the parties. For example, in one response filed in support of the Coalition's Motion, FirstWorld Anaheim, FirstWorld SoCal, FirstWorld Orange Coast, and FirstWorld SGV, stated that:

> FirstWorld has developed and acted on business plans based in part on the current industry practice of reciprocal compensation for local calls to ISPs. These business plans involve ISPs as underlying recipients of FirstWorld services. FirstWorld has invested time, money and facilities into the local marketplace for the development of these business plans. However, Pacific's and GTEC's unilateral decision on this issue

> of reciprocal compensation creates an unacceptable level of uncertainty, which may have a direct effect on these business plans. The Commission must act quickly to reduce uncertainty and to affirm current industry practice. (FirstWorld Response to the Coalition's Motion, filed April 2, 1998, p. 2.)

Pacific's claim that the concurring opinion was based on extra-record material is, therefore, speculative.[8] Furthermore, the statements contained in Commissioner Knight's concurrence are not findings of the Decision itself. Pacific has failed to demonstrate that the Decision rests on materials or evidence not in the record. As such, Pacific's allegations of legal error are without merit.

D. The Decision Should Be Clarified As To How ISP-bound Calls Are Classified As Local For Purposes Of Inter-carrier Compensation

Pacific makes several arguments stemming from our attempt to define which ISP-bound calls would qualify as a local call for purposes of reciprocal compensation provisions. In our Decision, we stated 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...." (D.98-10-057, at 12.) Finding of Fact No. 11 states: "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." Pacific argues that "these determinations were made without any evidence concerning any CLEC or ISP network in California as to the location of

[8] Pacific's argument that the Commission relied on material not in the record is somewhat ironic in that Pacific itself tries to introduce evidence in its application for rehearing which is not part of the record in this proceeding. The exhibits attached to Pacific's application are not part of the record in this case and accordingly will not be considered by this Commission in reviewing the application for rehearing.

ISP modems, the potential abuse or misuse of the assignment of numbers, etc." (Pacific Application for Rehearing, p. 9.)

Pacific further claims that the Decision is "internally inconsistent." Pacific notes that the body of the Decision states that with regard to the telecommunications component of the call to the ISP which formed the basis for intrastate jurisdiction, the Decision found that this component consisted of the leg of the call from the end user to the ISP modem. Pacific argues that this is inconsistent with Finding of Fact 11 which states that a local call depends exclusively on "the telephone number used to access the ISP modem." Pacific argues that this notion that local calls are defined based on the telephone numbers used to access the ISP modem, as opposed to the physical location of the ISP modem or even the physical location of the switch that connects to the modem, is inconsistent with the theory that the calls "terminate" at the ISP modem and with the Commission rules on Pacific Bell local calling areas.

Finally, Pacific argues that the Commission acted in excess of its authority and in violation of federal law insofar as the Decision's definition of a local call violates Pacific's tariffs, changes Pacific's interconnection agreements, and redefines Pacific's local calling areas. Pacific argues that under its current tariffs, whether a call is local depends on whether the calling party and called party are within the same local calling area. According to Pacific, calls within the 12-mile radius of the local exchange calling area are billed as local calls. Pacific further notes that almost all of the interconnection agreements it has entered into with CLCs have pricing provisions that are based on the Commission distinction between local and toll calls. Pacific argues that the Decision radically changes its interconnection agreements by redefining Pacific's local calling areas and virtually eliminating the category of toll traffic. According to Pacific, toll calls will become a thing of the past if the nature of the call is made to depend on the designation of the telephone number, rather than on the geographic location of the parties.

Pacific predicts that CLCs will designate all numbers as "local" and require Pacific to route those calls to their switches.

In response, the Coalition argues that Pacific confuses matters by attempting to focus on the ISP modem for determining, not whether the call is inter- or intrastate, but whether the call is "local" or "interexchange." The Coalition claims that Pacific is attempting to introduce into this reciprocal compensation phase of the rulemaking some of the issues and arguments currently being considered by the Commission in the "rating and routing" phase of this proceeding. The Coalition points out that the relevant determinant as to whether a call is local is not the distance between the callers themselves, but rather the distance in airline miles between the rate center point associated with the telephone number of the calling party and the rate center point associated with the telephone number of the called party. According to the Coalition, as a practical matter, no carrier could possibly rate telephone calls based on the actual location of the parties because neither ILEC nor CLC billing systems contain such information. The Coalition claims that the Decision could be clarified by removing references to the location of the ISP's modem for purposes of determining whether a call is "local" while retaining references to the ISP's modem for the purpose of determining whether the call is an intrastate call or not.

Pac-West similarly responds that the Commission's decision to classify calls for purposes of reciprocal compensation as local or toll based on the rate centers of the calling and called parties' telephone numbers is not inconsistent with its determination that jurisdiction over such calls should be established based on the actual physical locations of the originating party's station and the ISP modem. Pac-West also asserts that, contrary to the claims of Pacific and GTEC, calls are not rated based on the physical locations of the calling and called parties, but rather are based on the rate centers associated with the calling and called parties' telephone numbers.

We agree that Pacific confuses the issue by focusing on the ISP modem for determining whether a call is "local" or "toll" rather than inter- or intrastate. However, we find several of Pacific's arguments rendered moot to the extent the FCC has now declared ISP-bound traffic largely interstate. The issue remains, however, in determining how a call to an ISP should be rated as local for inter-carrier compensation purposes. The parties apparently dispute whether the relevant determinant is the geographic location of the parties, or the distance between the rate centers associated with the called and calling parties' telephone numbers.

In this Decision, we asserted jurisdiction over dial-up calls to ISPs for the purpose of determining whether reciprocal compensation or bill-and-keep provisions of interconnection agreements were applicable to these calls. The jurisdictional analysis aside, it was our intent that calls to ISPs be treated as any other local call for the purpose of reciprocal compensation. In the Decision we specifically stated that "the rating of calls should be treated in a consistent manner whether they happen to involve an ISP or any other end user." (D.98-10-057, at 13.) Ordering Paragraph No. 2 similarly reflects our intention:

> 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. (D.98-10-057, Ordering Paragraph 2.)

However, in reviewing the text of the Decision, as well as in Finding of Fact 11, and Ordering Paragraph No. 2, we agree that the language used, while not legally erroneous, is technically incorrect. As is explained in D.98-07-095,

each telephone number is assigned a "rate center," a physical location designated by vertical and horizontal (V&H) coordinates. These coordinates are used to calculate airline mileage between rate centers for rating and billing purposes. Whether a call is rated as local is determined by the distance from the rate center associated with the originating caller's telephone number. If the distance from the rate center associated with the originating caller's telephone number to the rate center associated with the called party's number (i.e. the ISP, or another end user) is within the originating caller's local calling area, the call is local.

72.1.3

The Commission has established a local calling area of up to 12 miles between rate centers. (Re Alternative Regulatory Frameworks for Local Exchange Carriers [D.90-11-058] 38 Cal.P.U.C.2d 269 (1990).) Calls within applicable Extended Area Service (EAS) are also considered local. If the distance between rate centers exceeds 12 miles, or EAS, then the call is rated as a toll call. (See, e.g., D.98-07-095, at 3.)[9]

72.1.3

Therefore, the correct relevant determinant as to whether ISP traffic is treated as local is the distance between the rate centers of the calling and called parties, not the physical location of the modem or the parties terminal equipment. The text of the Decision at page 12, as well as Finding of Fact 11 and Ordering Paragraph 2 should accordingly be modified to reflect the correct technical definition of a local call. For interconnection purposes, a dial-up call to an ISP would be treated as local if the rate center associated with the ISP's telephone number is within the 12 mile radius, or applicable EAS, of the rate center associated with the originating caller's telephone number. This is consistent with

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[9] We note that there are certain minor variations and exceptions to these rules, which we do not intend to disturb by this decision. For example, in certain rural areas the local calling area may be greater than 12 miles. Also, intrastate, inter LATA calls are not local, with the exception of six routes. Interstate, intra LATA calls are also not local with the exception of Verde to Reno and Winterhaven to Arizona. Certain intrastate, interLATA calls (i.e., operator assisted local calls) are not local.

Pacific's tariffs, and does nothing to change Pacific's local calling areas or its interconnection agreements with CLCs.[10]

As modified, the Decision is consistent with other decisions issued by this Commission regarding the determination of whether a call is rated as local. (See, e.g., D.90-11-058; D.98-07-095.) Insofar as it was our intent to treat calls to ISPs as any other local call, we find no merit to Pacific's claims that the Decision constitutes wholesale revision of its local calling areas, interconnection agreements, or tariffs. The Coalition is correct that several of the arguments and issues raised by Pacific are being addressed by this Commission in a separate phase of this proceeding. Pacific's concerns regarding the physical location of the ISP modems and the potential misuse of abuse in the assignment of numbers relate to issues associated with the disparate routing and rating of calls, where a CLC seeks to obtain telephone numbers linked with a rate center with V&H coordinates that do not coincide with the geographic location of the end user. The Commission has taken comments in R.95-04-043/I.95-04-044 on the proper treatment of routing and rating, plus appropriate inter-carrier compensation for those calls. (See, D.97-12-094 and D.99-02-096.) This Decision does not address whether CLC may assign a telephone number outside the geographic location of a rate center, and this issue need not be addressed on rehearing. The legality and

[10] Pacific's tariff defines a "local call" as "a completed call or telephonic communication between a calling station and any other station within the local service area of the calling station." A "local service area" is defined as an "area within which are located the stations which customers may call at exchange rates, in accordance with the provisions of the exchange tariffs." (Pacific's Schedule Cal.P.U.C. A2.1.1) However, in determining the distance of the call for rating purposes, the relevant measurement is not the distance between the callers, or stations, but rather the distance in airline miles between the rate centers associated with the telephone numbers of the called and calling parties. Schedule Cal.P.U.C. No. A6, 3rd Revised Sheet 2, Section 6.2.1.A.4, Rates and Charges, a. Method of Applying Rates: "(1) Toll rates between points (cities, towns or localities) are based on the airline distance between rate centers. In general, each point is designated as a rate center.... (2) Determine the airline distance between the rate centers involved...." Therefore, based on this provision, toll tariffs do in fact prescribe call rating based on the distance between the applicable rate centers of the called and calling parties, not the physical location of the parties' terminal equipment. (See also, D.99-02-096.)

validity of this practice instead will be determined in a separate order. Likewise, this Decision does not address the question of how call rating and inter-carrier compensation is implicated or affected by the use of disparate rating and routing points. The consideration of these issues for calls involving the use of disparate rating and routing points is before the Commission in the previously mentioned proceedings in R.95-04-043/I.95-04-044. The findings and conclusions concerning reciprocal compensation obligations in D.98-10-057 should not be construed as prejudging the outcome of the Commission's deliberations regarding inter-carrier compensation in the aforementioned proceedings regarding disparate rating and routing practices. In light of the above discussion, we find that Pacific's concerns on this issue do not implicate legal error in this Decision.

E. Pacific's Allegation That The Decision Is "Inconsistent" With A Prior Commission Decision Is Without Merit

Pacific claims that the Decision's theory that calls terminate at the ISP's modem is inconsistent with the decision issued in the Cook Telecom Inc. arbitration. (D.97-09-122.) Pacific argues that in Cook Telecom, we found that calls to paging customers "did not terminate with Cook but went all the way to the paging customer." (Pacific Application, p. 19.) Pacific claims that this statement is somehow inconsistent with this Decision's determination that calls "terminate" at the ISP modem. Aside from the fact that Pacific's argument is based on a distortion of the use of the word "terminate," as well as a distorted comparison of the issues presented in the Cook case and in the present case, we find that Pacific's arguments are rendered mute by the modifications made to the Decision as described herein and the fact that the FCC declared that ISP-bound calls do not "terminate" at the ISP's modem, but constitute a continuance transmission to a distant website. As such, we find Pacific's argument does not establish legal error in the Decision.

CONCLUSION

We have reviewed each and every allegation of legal error raised in the rehearing applications, and find that good cause for rehearing has not been shown. However, the Decision shall be modified to clarify how a call to an ISP is rated as a local call, for purposes of inter-carrier compensation provisions of interconnection agreements.

Therefore, **IT IS ORDERED** that:

1. Decision 98-10-057 is modified as follows:

   a) The last two paragraphs at page 12 of the Decision are modified to read:

> "We conclude that the relevant determinant as to whether ISP traffic should be rated as local is the distance from the rate center associated with the telephone number of the end user originating the call to the rate center associated with the ISP's telephone number. If the distance from the originating caller's rate center to the ISP's rate center is within the originating caller's local calling area (the 12 miles radius and applicable EAS), then the call should be treated as local. In contrast, calls which terminate at a remote location outside of the originating caller's local calling area should not be rated as local (i.e., they should be treated as toll calls or long distance).
>
> 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 treated as 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. The Commission is currently reviewing in R.95-04-043/I.95-04-044 the issue of how calls should be rated in situations where disparate rating and routing points are used. Disparate rating and routing is where the designated rate center of the called part's NXX prefix is different from the rate center from which the called party's terminal equipment is served. Depending on the outcome of that proceeding, the requirements for the rating of calls in such instances may be subject to modification accordingly."

b) Finding of Fact No. 10 shall be deleted.

c) Finding of Fact No. 11 is modified to read:

"If the rate center associated with the telephone number of the end user originating the call is within 12 miles or EAS of the rate center associated with the telephone number used to access the ISP, then such call should be rated as a local call."

d) The following is added as Finding of Fact No. 15:

"LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network, just as they do for other calls."

e) The following is added as Finding of Fact No. 16:

"Absent a compensation agreement, a LEC terminating another LEC customer's call receives no compensation for its termination."

f) Conclusion of Law No. 1 shall be deleted.

g) Conclusion of Law No. 2 is modified to read:

"This Commission has the authority to determine whether ISP-bound calls are subject to the reciprocal compensation provisions of interconnection agreements."

h) The following is added as Conclusion of Law No. 6:

"It is equitable that a LEC be compensated through termination fees applicable to local calls, including ISP-bound calls."

i) Ordering Paragraph No. 2 is modified to read:

"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 until such agreements are ended, or until or unless the Commission reaches a different determination in its deliberations concerning the use of disparate rating and routing points being conducted in R.95-04-043/I.95-04-044. Whether an

ISP-bound call should be treated as local is based on the rating of the call measured by the distance from the rate center associated with the originating caller's telephone number to the rate center associated with the telephone number used to access the ISP modem.

2. Pacific Bell's request for oral argument on its application for rehearing is denied.

3. The application for rehearing filed by Pacific Bell is denied.

4. The application for rehearing filed by GTE California, Inc. is denied.

This decision is effective today.

Dated July 22, 1999, at San Francisco, California.

RICHARD A. BILAS
President
JOEL Z. HYATT
CARL W. WOOD
Commissioners

I will file a written concurrence.

/s/ RICHARD A. BILAS
President

I dissent.

/s/ HENRY M. DUQUE
Commissioner

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner

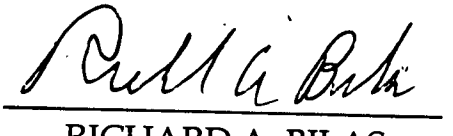
Concurring Opinion of President Bilas

I continue to support this Commission's decision on the applicability of reciprocal compensation for Internet Service Providers (ISP) traffic.

Although I have had several opportunities to decide certain aspects of reciprocal compensation, I am still left with the impression that this Commission would benefit from a generic proceeding. Today's order correctly denies rehearing. However, I would like a record that reflects what effect, if any, the recent FCC orders have on this issue. Similarly, I would like to see ISPs, CLCs, and ILECs discuss the financial ramifications of various compensation methodologies in a generic proceeding.

I have previously noted that one possible vehicle is the Local Competition docket. While this is still an option, I am open to a new proceeding which may have the ability to move more quickly.

As I stated in my concurring opinion on the PacWest/Pacific Bell arbitration decision, it is my intention for a generic proceeding to begin in the very near future and to have a decision ready for the Commission in a few months after beginning. I reiterate that such a timely proceeding is necessary in the quickly changing telecommunications environment.



RICHARD A. BILAS
Commissioner

San Francisco, California
July 22, 1999