

## FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 96-98; FCC 99-38]

### Inter-Carrier Compensation for ISP-bound Traffic.

**AGENCY:** Federal Communications Commission.

**ACTION:** Clarification.

**SUMMARY:** On February 26, 1999, the Commission released a document in CC Docket No. 96-98 concluding that dial-up traffic bound for Internet service providers is largely interstate and thus subject to federal jurisdiction. The document also makes clear that parties are bound by their existing interconnection agreements, as construed by state commissions. Parties may have agreed that ISP-bound traffic should be subject to reciprocal compensation, or a state commission, in the exercise of its statutory authority to arbitrate interconnection disputes, may have imposed reciprocal compensation obligations for this traffic. In either case, parties are bound by their contracts.

**FOR FURTHER INFORMATION CONTACT:** Tamara Preiss, Attorney, Common Carrier Bureau, Competitive Pricing Division, (202) 418-1520.

**SUPPLEMENTARY INFORMATION:** This summarizes the Commission's Declaratory Ruling in CC Docket No. 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 99-38, adopted February 25, 1999, and released February 26, 1999. The file in its entirety is available for inspection and copying during the weekday hours of 9:00 a.m. to 4:30 p.m. in the Commission's Reference Center, room 239, 1919 M St., N.W., Washington D.C., or copies may be purchased from the Commission's duplicating contractor, ITS, Inc. 1231 20th St., N.W., Washington, D.C. 20036, phone (202) 857-3800.

### Analysis of Proceeding

#### I. Introduction

1. The Commission and the Common Carrier Bureau (Bureau) have received a number of requests to clarify whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic that it delivers to an information service provider, particularly an Internet service provider (ISP). Generally, competitive LECs (CLECs) contend that this is local traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the Communications Act of 1934 (Act), as amended by the Telecommunications

Act of 1996. Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56, *codified at* 47 U.S.C. 151 *et seq.* (1996 Act). Incumbent LECs contend that this is interstate traffic beyond the scope of Section 251(b)(5). After reviewing the record developed in response to these requests, the Commission concludes that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. This conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance. As explained, parties may have agreed to reciprocal compensation for ISP-bound traffic, or a state commission, in the exercise of its authority to arbitrate interconnection disputes under Section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic. In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, the Commission therefore concludes that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.

#### II. Background

2. Identifying the jurisdictional nature and regulatory treatment of ISP-bound communications requires us to determine how Internet traffic fits within the Commission's existing regulatory framework.

##### A. The Internet and ISPs

3. The Internet is an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet functions by splitting up information into "small chunks or 'packets' that are individually routed . . . to their destination." Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Universal Service Report to Congress*). With packet-switching, "even two packets from the same message may travel over different physical paths through the network . . . which enables users to invoke multiple Internet services simultaneously, and to access information with no knowledge of the physical location of the service where the information resides." *Id.*

4. An ISP is an entity that provides its customers the ability to obtain on-line information through the Internet. ISPs purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers. Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area.

The ISP, in turn, combines "computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." *Id.* Under this arrangement, the end user generally pays the LEC a flat monthly fee for use of the local exchange network and generally pays the ISP a flat, monthly fee for Internet access. The ISP typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls.

5. Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs. Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. In addition, incumbent LEC expenses and revenue associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes. ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable to end users. In the *Access Charge Reform Order*, the Commission decided to maintain the existing pricing structure pursuant to which ESPs are treated as end users for the purpose of applying access charges. *Access Charge Reform Order*, CC Docket No. 96-262, First Report and Order, 62 FR 31868 (June 11, 1997) (*Access Charge Reform Order*). Thus, the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local.

6. The Internet provides citizens of the United States with the ability to communicate across state and national borders in ways undreamed of only a few years ago. The Internet also is developing into a powerful instrumentality of interstate commerce. In 1997, the Commission decided that retaining the ESP exemption would avoid disrupting the still-evolving information services industry and advance the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." *Access Charge Reform Order*.

This Congressional mandate underscores the obligation and commitment of this Commission to foster and preserve the dynamic market for Internet-related services. The Commission emphasizes the strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet—which has flourished to date under the Commission's "hands off" regulatory approach—or the development of competition. The Commission is mindful of the need to address the jurisdictional question at issue here, and the effect the jurisdictional determination may have on inter-carrier compensation for ISP-bound traffic, in a manner that promotes efficient entry by providers of both local telephone and Internet access services, and that, by the same token, does not encourage inefficient entry.

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

7. Section 251(b)(5) of the Act requires all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. 251(b)(5). In the *Local Competition Order*, this Commission construed this provision to apply only to the transport and termination of "local telecommunications traffic." See 47 CFR 51.701; Implementation of the Local Telecommunications Act of 1996, First Report and Order, CC Docket Nos. 96-98, 95-185, 61 FR 45476 (August 29, 1996) (*Local Competition Order*). In order to determine what compensation is due when two carriers collaborate to deliver a call to an ISP, the Commission must determine as a threshold matter whether this is interstate or intrastate traffic. In general, an originating LEC end user's call to an ISP served by another LEC is carried (1) by the originating LEC from the end user to the point of interconnection (POI) with the LEC serving the ISP; (2) by the LEC serving the ISP from the LEC-LEC POI to the ISP's local server; and (3) from the ISP's local server to a computer that the originating LEC end user desires to reach via the Internet. If these calls terminate at the ISP's local server (where another (packet-switched) "call" begins), as many CLECs contend, then they are intrastate calls, and LECs serving ISPs are entitled to reciprocal compensation for the "transport and termination" of this traffic. If, however, these calls do not terminate locally, incumbent LECs argue, then LECs serving ISPs are not entitled to

reciprocal compensation under section 251(b)(5).

8. CLECs argue that, because Section 251(b)(5) of the Act refers to the duty to establish reciprocal compensation arrangements for the "transport and termination of telecommunications," a transmission "terminates" for reciprocal compensation purposes when it ceases to be "telecommunications." "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(43). CLECs contend that, under this definition, Internet service is not "telecommunications" and that the "telecommunications" component of Internet traffic terminates at the ISP's local server. In addition, CLECs and ISPs argue that, given that ESPs are exempt from paying certain interstate access charges and that, as a result, the PSTN links serving ESPs are treated as intrastate under the separations regime, the services that CLECs provide for ISPs must be deemed local. Incumbent LECs contend, however, that the "telecommunications" terminate not at the ISP's local server, but at the Internet site accessed by the end user, in which case these are interstate calls for which, they argue, no reciprocal compensation is due.

#### III. Discussion

9. The Commission has no rule governing inter-carrier compensation for ISP-bound traffic. Generally speaking, when a call is completed by two (or more) interconnecting carriers, the carriers are compensated for carrying that traffic through either reciprocal compensation or access charges. When two carriers jointly provide interstate access (e.g., by delivering a call to an interexchange carrier (IXC)), the carriers will share access revenues received from the interstate service provider. Conversely, when two carriers collaborate to complete a local call, the originating carrier is compensated by its end user and the terminating carrier is entitled to reciprocal compensation pursuant to Section 251(b)(5) of the Act. Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. As explained, under the ESP exemption, LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover, the Commission has directed states to treat ISP traffic as if it

were local, by permitting ISPs to purchase their PSTN links through local business tariffs. As a result, and because the Commission had not addressed inter-carrier compensation under these circumstances, parties negotiating interconnection agreements and the state commissions charged with interpreting them were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs, leading to the present dispute.

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

10. As many incumbent LECs properly note, the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers. In *BellSouth MemoryCall*, for example, the Commission considered the jurisdictional nature of traffic that consisted of an incoming interstate transmission (call) to the switch serving a voice mail subscriber and an intrastate transmission of that message from that switch to the voice mail apparatus. Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall*). The Commission determined that the entire transmission constituted one interstate call, because "there is a continuous path of communications across state lines between the caller and the voice mail service." *Id.* The Commission's jurisdictional determination did not turn on the common carrier status of either the provider or the services at issue; *BellSouth MemoryCall* is not, therefore, distinguishable on the grounds that ISPs are not common carriers.

11. Similarly, in *Teleconnect*, the Bureau examined whether a call using Teleconnect's "All-Call America" (ACA) service, a nationwide 800 travel service that uses AT&T's Megacom 800 service, is a single, end-to-end call. *Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) (*Teleconnect*). Generally, an ACA call is initiated by an end user from a common line open end; the call is routed through a LEC to an AT&T Megacom line, and is then transferred from AT&T to Teleconnect by another LEC. At that point, Teleconnect routes the call through the LEC to the end user being called. The Bureau rejected the argument that the (ACA) 800 call used

to connect to an interexchange carrier's (IXC) switch was a separate and distinct call from the call that was placed from that switch. The Commission affirmed, noting that "both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. According to these precedents, the Commission regulates an interstate wire communications under the Communications Act from its inception to its completion." *Id.* The Commission concluded that "an interstate communication does not end at an intermediate switch. . . . The interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities." *Id.* In addition, in *Southwestern Bell Telephone Company*, the Commission rejected the argument that "a credit card call should be treated for jurisdictional purposes as two calls: one from the card user to the interexchange carrier's switch, and another from the switch to the called party" and concluded that "switching at the credit card switch is an intermediate step in a single end-to-end communication." In the Matter of *Southwestern Bell Tel. Co.*, CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339 (1988) (*Southwestern Bell Tel. Co.*).

12. Consistent with these precedents, the Commission concludes, as explained, that the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state. The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect the Commission's jurisdiction. As the Commission stated in *BellSouth MemoryCall*, "this Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with the origination and termination of interstate calls."

*BellSouth MemoryCall*. Indeed, in the vast majority of cases, the facilities that incumbent LECs use to provide interstate access are located entirely within one state. Thus, the Commission rejects MCI WorldCom's assertion that the LEC facilities used to deliver traffic to ISPs must cross state boundaries for such traffic to be classified as interstate.

13. The Commission disagrees with those commenters that argue that, for jurisdictional purposes, ISP-bound traffic must be separated into two components: an intrastate

telecommunications service, provided in this instance by one or more LECs, and an interstate information service, provided by the ISP. As discussed, the Commission analyzes the totality of the communication when determining the jurisdictional nature of a communication. The Commission previously has distinguished between the "telecommunications services component" and the "information services component" of end-to-end Internet access for purposes of determining which entities are required to contribute to universal service. Federal-State Joint Board on Universal Service, Report and Order, 62 FR 32862 (June 17, 1997) (*Universal Service Order*). Although the Commission concluded that ISPs do not appear to offer "telecommunications service" and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund, it has never found that "telecommunications" end where "enhanced" service begins. To the contrary, in the context of open network architecture (ONA) elements, for example, the Commission stated that "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II." Filing and Review of Open Network Architecture Plans, 54 FR 3453 (January 24, 1989). The 1996 Act is consistent with this approach. For example, as amended by the 1996 Act, Section 3(20) of the Communications Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(20) (emphasis added). This definition recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications. Although it concluded in the *Universal Service Report to Congress* that ISPs do not provide "telecommunications" as defined in the 1996 Act, the Commission reiterated the traditional analysis that ESPs enhance the underlying telecommunications service. *Universal Service Report to Congress*. Thus, the Commission analyzes ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.

14. Some CLECs note that the language of section 252(d)(2) provides for the recovery of the costs of transporting and terminating a "call."

Although the 1996 Act does not define the term "call," these CLECs argue that it is used in the 1996 Act in a manner that implies a circuit-switched connection between two telephone numbers. For example, Adelphia contends that a "call" takes place when two stations on the PSTN are connected to each other. A call "terminates," according to Adelphia, when one station on the PSTN dials another station, and the second station answers. Under this view, the "call" associated with Internet traffic ends at the ISP's local premises.

15. The Commission finds that this argument is inconsistent with Commission precedent holding that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts. The examples cited by CLECs to support the argument that calls end at the called number are not dispositive. The statutory sections upon which they rely were written to apply to specific situations, all of which, as far as the Commission can tell, involve traditional telephony connections between two called numbers, as opposed to the novel circumstance of Internet traffic.

16. Nor is the Commission persuaded by CLEC arguments that, because the Commission has treated ISPs as end users for purposes of the ESP exemption, an Internet call must terminate at the ISP's point of presence. The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service. In the *MTS/WATS Market Structure Order*, for instance, the Commission concluded that ESPs are "among a variety of users of access service" in that they "obtain local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area." *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 48 FR 10319 (March 11, 1983) (*MTS/WATS Market Structure Order*). The fact that ESPs are exempt from access charges and purchase their PSTN links through local tariffs does not transform the nature of traffic routed to ESPs. That the Commission exempted ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary. The Commission emphasizes that its decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic.

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

18. Having concluded that the jurisdictional nature of ISP-bound traffic is determined by the nature of the end-to-end transmission between an end user and the Internet, the Commission must determine whether that transmission constitutes interstate telecommunications. Section 2(a) of the Act grants the Commission jurisdiction over "all interstate and foreign communication by wire." 47 U.S.C. 152(a). Traffic is deemed interstate "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia." *Universal Service Report to Congress*. In a conventional circuit-switched network, a call that originates and terminates in a single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate. The jurisdictional analysis is less straightforward for the packet-switched network environment of the Internet. An Internet communication does not necessarily have a point of "termination" in the traditional sense. An Internet user typically communicates with more than one destination point during a single Internet call, or "session," and may do so either sequentially or simultaneously. In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various states or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country. Further complicating the matter of identifying the geographical destinations of Internet traffic is that the contents of popular websites increasingly are being stored in multiple

servers throughout the Internet, based on "caching" or website "mirroring" techniques. After reviewing the record, the Commission concludes that, although some Internet traffic is intrastate, a substantial portion of Internet traffic involves accessing interstate or foreign websites.

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

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

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

21. The Commission finds 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. The Commission seeks comment on such a rule in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, FCC 99-38, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (rel. February 26, 1999).

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

23. Although the Commission determines that ISP-bound traffic is largely interstate, parties nonetheless may have agreed to treat the traffic as subject to reciprocal compensation. The Commission's treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs. Since then, the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes.

24. Against this backdrop, and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic. When construing the parties' agreements to determine whether the parties so agreed, state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements. For example, it may be appropriate for state commissions to consider such factors as whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic. These factors are

illustrative only; state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' intentions. Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements. Finally, the Commission notes that issues regarding whether an entity is properly certified as a LEC if it serves only or predominantly ISPs are matters of state jurisdiction.

25. Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. The passage of the 1996 Act raised the novel issue of the applicability of its local competition provisions to the issue of inter-carrier compensation for ISP-bound traffic. Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As the Commission observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to section 252 "extends to both interstate and intrastate matters." *Local Competition Order*. Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the Commission has not adopted a specific rule governing the matter, the Commission notes that its policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

26. Some CLECs construe the Commission's rules treating ISPs as end users for purposes of interstate access charges as requiring the payment of reciprocal compensation for this traffic. Incumbent LECs contend, however, that the Commission's rules preclude the imposition of reciprocal compensation obligations to interstate traffic and that, pursuant to the ESP exemption, LECs carrying ISP-bound traffic are compensated by their end user customers—the originating end user or

the ISP. Either of these options might be a reasonable extension of the Commission's rules, but the Commission has never applied either the ESP exemption or its rules regarding the joint provision of access to the situation where two carriers collaborate to deliver traffic to an ISP. As the Commission stated, it currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic. In the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor the Commission's rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. 47 CFR 51.701(a); *Local Competition Order*. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding—or a subsequent state commission decision that those obligations encompass ISP-bound traffic—does not conflict with any Commission rule regarding ISP bound traffic. By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

27. State commissions considering what effect, if any, this Declaratory Ruling has on their decisions as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic might conclude, depending on the bases of those decisions, that it is not necessary to re-visit those determinations. The Commission recognizes that the Commission's conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server, but nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or

equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking initiated in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, FCC 99-38, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (rel. February 26, 1999).

Federal Communications Commission.

**Magalie Roman Salas,**  
Secretary.

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## FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 95-155]

### Toll Free Service Access Codes

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice; letter.

**SUMMARY:** The Common Carrier Bureau has issued a letter ending the 888 right-of-first-refusal process and referring non-compliant RespOrgs to the Bureau's Enforcement Division. All unclaimed set-aside 888 numbers (except 888-555-XXXX numbers) will be released into "spare" status and become available to all subscribers on a first come, first served basis on April 5, 1999.

**FOR FURTHER INFORMATION CONTACT:** Marty Schwimmer 202-418-2334.

**SUPPLEMENTARY INFORMATION:** The Bureau's letter follows:

Release Date: March 19, 1999.

Mr. Michael Wade,  
President, Database Service Management,  
Inc., 6 Corporate Place, Room PYA—  
1F286, Piscataway, NJ 08854-4157

Re: End of 888 Right-of-First-Refusal Process on April 5, 1999, Referral of Non-Compliant RespOrgs to Enforcement Division

Dear Mr. Wade: In January 1996, the Bureau directed Database Service Management, Inc. (DSMI) to set aside, in "unavailable" status, toll free 888 numbers that subscribers with corresponding 800 numbers might wish to request, except that 888-555-XXXX numbers were to remain unavailable because they are associated with directory assistance.<sup>1</sup> In March 1998, the Commission voted to permit holders of

<sup>1</sup> In the Matter of Toll Free Service Access Codes, Report and Order, CC Docket No. 95-155, 11 F.C.C.Rcd. 2496, 2509 (1996).