



reciprocal compensation for ISP traffic. The FCC ruled that such compensation was not required under section 251:

As noted, section 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected *local* telecommunications traffic. We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic. As discussed, *supra*, in the absence a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic.

*ISP Reciprocal Compensation Ruling* at n.87.

Subsequently, in the *BANY Order*,<sup>5</sup> the FCC dealt with the issue of whether ISP reciprocal compensation was required under checklist item 13 of section 271. The FCC ruled that ISP reciprocal compensation was not a requirement under 271:

In light of our prior ruling that “ISP-bound traffic is non-local interstate traffic” and that “the reciprocal compensation requirements of section 251(b)(5) of the Act . . . do[es] not govern inter-carrier compensation for this traffic,” we conclude that Global NAPs’ arguments are irrelevant to checklist item 13. . . . Inter-carrier compensation for ISP bound traffic . . . is not governed by section 251(b)(5), and, therefore, is not a checklist item.

*Id.* ¶377 (emphasis added). As will be shown, this FCC holding was not affected by either of the appellate rulings at issue except insofar as the Fifth Circuit opinion confirms the correctness of its reasoning. Thus, it remains the governing law on the topic of ISP reciprocal compensation under 271.

Thereafter, the parties in this docket agreed during the workshops that ISP reciprocal compensation was not a 271 issue. They did so based on the *BANY Order*.

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<sup>5</sup> *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Decision No. FCC 99-404, adopted: December 21, 1999, released: December 22, 1999.

Afterward, on March 24, 2000, the D.C. Circuit ruled on its review of the *ISP Reciprocal Compensation Ruling* in *Bell Atlantic Tel. Cos. v. FCC*. For purposes of this docket, the D.C. Circuit opinion is more important for what it did not do than for what it did do. For, although the Court vacated and remanded the *ISP Reciprocal Compensation Ruling*, it did not reverse that ruling. In other words, it did not find the *ISP Reciprocal Compensation Ruling* to be incorrect. Rather, it found the *Ruling* to be lacking in explanation and ordered the FCC to supplement its explanation on remand. On the very same day the D.C. Circuit opinion was released, the FCC announced its intent to further justify its position in the *ISP Reciprocal Compensation Ruling*.

Six days later, the Fifth Circuit released an opinion in its review of the Texas PUC's ruling on a complaint brought under an interconnection agreement under section 252 for ISP reciprocal compensation. In *Southwestern Bell Telephone Co. v. Public Utility Commission Of Texas*, the Court held that, as a matter of state law, the Texas PUC was free to interpret the interconnection agreement at issue as requiring ISP reciprocal compensation.

Not long after the appellate decisions, the parties in this docket were asked to brief the effect, if any, of these decisions on this docket.

MCI WorldCom, AT&T and Sprint submitted a Joint Statement of Position (IXC Joint Statement). Not surprisingly, they asserted that the appellate opinions mandated that this Commission order U S WEST to amend its SGAT to provide for ISP reciprocal compensation. They are incorrect as a matter of law.

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**I. THE DC CIRCUIT MERELY VACATED THE ISP RECIPROCAL  
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On March 24, 2000, the D.C. Circuit vacated the *ISP Declaratory Ruling* and remanded the case to the FCC to clarify its reasoning. *Bell Atlantic Tel. Cos. v. FCC*, 2000 U.S. App. LEXIS 4685 (D.C. Cir. Mar. 24, 2000). The D.C. Circuit did *not* hold that the FCC erred in determining that ISP traffic is interstate or that it does not terminate within a local calling area. Rather, it simply remanded the matter to the FCC for further analysis and clarification:

Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] ... local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission.

*Id.*<sup>6</sup>

Indeed, in the wake of this ruling, the FCC has specifically declared its intent to *reaffirm* its prior determination that ISP traffic is interstate, and therefore, excluded from reciprocal compensation arrangements under Section 251(b)(5). Telecommunications Reports Daily, *Strickling Believes FCC Can Justify Recip Comp Ruling in Face of Remand* (Mar. 24, 2000); Kathy Chen, *Court Orders FCC to Reconsider Ruling that Internet Calls are Long Distance*, WALL STREET JOURNAL, March 27, 2000 at B8.

Thus, on remand, the FCC is free to reiterate its initial ruling with additional explanation, and that is exactly what it intends to do.

The *BANY Order* obviously was not directly affected by the DC Circuit ruling because the Court was not reviewing the *BANY Order*; it was reviewing the *ISP Reciprocal Compensation Ruling*. Nor was the *BANY Order* indirectly affected by the

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<sup>6</sup> Consequently, the following key premise from the IXC Joint Statement is both false and misleading: "The D.C. Circuit found that such calls most likely terminate at the ISP and are, therefore, local calls." IXC Joint Statement at 3 (emphasis added). In fact, the D.C. Circuit clearly refrained from ruling on whether ISP calls are local and remanded the matter back to the FCC merely for a better explanation of why they are not local.

D.C. Circuit opinion: The *BANY Order*'s ruling that ISP reciprocal compensation is irrelevant to 271 is still the law of the land on the topic. The premise of that ruling was not reversed as incorrect by the D.C. Circuit; it was merely vacated and remanded for further explanation by the FCC.

## **II. THE FIFTH CIRCUIT RULING HAS ABSOLUTELY NOTHING TO DO WITH CHECKLIST ITEM 13.**

The Fifth Circuit in *Southwestern Bell Tel. Co. v. Public Utils. Comm'n*, \_\_\_ F.3d \_\_\_, 2000 WL 332062, (5th Cir. Mar. 30, 2000) actually confirmed the premise of the *BANY Order* – that there is no federal duty to pay ISP reciprocal compensation. In fact, the whole point of the decision was that, notwithstanding the lack of a federal ISP reciprocal compensation duty, the Texas PUC was free to find a state law contract obligation to pay ISP reciprocal compensation when interpreting an interconnection agreement.

The Fifth Circuit agreed with the Seventh Circuit and the FCC that there is no federal ISP reciprocal compensation duty and that the lack of a federal ISP reciprocal compensation duty does not preclude a state commission from finding a state law duty to pay ISP reciprocal compensation: “That the Act does not require reciprocal compensation for calls to ISPs is not to say that it prohibits it.” *Id.* (emphasis added; citation omitted). The Court later reiterated that the case before it was a matter of state law contract interpretation, rather than federal telecommunications law:

In light of the foregoing, we hold that the agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions. We therefore decline Southwestern Bell's invitation to determine the contractual issues as a facet of federal law.

*Id.*

It could not be any clearer that the Fifth Circuit decision accepted the fact that section 251 (and therefore section 271) do not require payment of ISP reciprocal compensation. Thus, the Fifth Circuit opinion has no effect on the *BANY Order* except to confirm its reasoning. That puts the matter to rest – the *BANY Order* still governs the issue of ISP reciprocal compensation in the 271 context.

### **III. THIS COMMISSION MAY NOT IMPOSE A STATE LAW ISP RECIPROCAL COMPENSATION DUTY IN THIS 271 DOCKET.**

The IXCs make one last ditch effort to wrongfully impose a reciprocal compensation duty on U S WEST. They claim that the Fifth Circuit gave this Commission the power to order ISP reciprocal compensation under state communications law and policy in this 271 proceeding. This claim, like the IXCs' other claims, is wrong.<sup>7</sup> Indeed, it turns the Fifth Circuit opinion on its head.

As noted above, the Fifth Circuit took pains to point out that there is no federal ISP reciprocal compensation duty. Section 271 proceedings, like this one, are held solely for the purpose of determining compliance with federal law under section 271. State law does not enter into this process. Therefore, under the reasoning of the Fifth Circuit, the Commission cannot in this proceeding impose an ISP reciprocal compensation duty because there is no such federal duty.

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<sup>7</sup> Furthermore, even if such power existed, the IXCs' policy argument is unconvincing at best. The IXCs claim that reciprocal compensation is the "only way" to recover their costs of terminating ISP traffic. This is clearly false. They could charge such costs to the ISPs who are the cost causers and who are making all of their revenues based on such traffic. Instead, CLECs are routinely and voluntarily choosing not to recover such costs from the cost causers. Indeed, there are reports that CLECs are actually paying ISPs to use their network so that they can boost revenues by abusing the concept of reciprocal compensation.

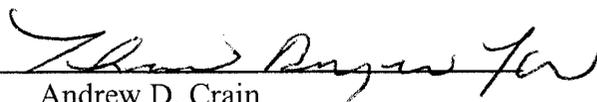
## CONCLUSION

The recent appellate decisions, while interesting developments, do not have any effect on this 271 docket except that the Fifth Circuit confirmed that there is no federal ISP reciprocal compensation duty. They do not disturb (indeed the Fifth Circuit opinion supports) the holding in the *BANY Order* that neither section 251 nor section 271 contains an obligation to pay ISP reciprocal compensation. Therefore, the Commission should not disturb the parties' preexisting workshop agreement that ISP reciprocal compensation is irrelevant to this docket.

DATED this 21<sup>st</sup> day of April, 2000.

Respectfully submitted,

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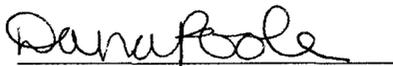
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