

RICA REPORT

News and Views for the Rural CLEC Community

No. 21 — April 23, 2004

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RICA Report is published semi-monthly by RICA, exclusively for RICA's CLEC members. With 80+ carrier members, RICA is the premier trade association representing the independent rural competitive local exchange carrier industry. *RICA Report* concisely captures regulatory and legal news, commentary, and insight relevant to rural CLECs.

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1. Commission Finds AT&T Use of IP Networks to Provide Standard Long Distance Subject to Interstate Access Charges

In a unanimous decision released April 21, the Commission determined that AT&T must pay interstate access charges, at least on a going forward basis, for long distance phone-to-phone calls that the carrier routes over Internet Protocol (IP) networks. Though applicable to any interexchange carrier (IXC), the FCC limited its decision explicitly to any interexchange services that: "(1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." The FCC made clear that the decision applies whether one or more IXCs are involved in the transport of a call. At the same time, the Commission also limited the decision only to application of the current rules. It explicitly allowed that the Commission could adopt "a fundamentally different approach" to access charge rules upon conclusion of its broader and interrelated reviews of IP-enabled services and intercarrier compensation rules.

(continued next page)

The Commission determined that the service AT&T described in its petition to be exempt from access charges was telecommunications, and not an information or enhanced service. The FCC repeated various times that the service AT&T described, and to which the ruling applies, is a plain vanilla 1+ long distance offering that begins and ends on the public switched telephone network (PSTN). The Commission reasoned that to allow AT&T to be exempt from access charges simply because it routed all or part of a call over an IP network, when the end user experienced no enhanced functionality or savings, would be to allow the carrier to engage in arbitrage, and send false economic signals to carriers to invest in IP technology. Chairman Powell opined in a separate statement that it also would "collapse the universal system virtually overnight."

Of central concern to two commissioners —Martin and Copps— and the issue that apparently held up the decision, is retroactivity. AT&T reportedly has withheld payments to some carriers for two years. An order to repay could have a material effect on AT&T's finances. The FCC Order does not resolve the

question of past liability, but does include some rather strange and self-contradictory words. In a section labeled "Retroactivity of Access Charges," the Commission describes at length court opinions that

require a balancing of equitable issues in determining whether decisions are retroactive, and concludes it cannot make such a determination because they require extensive facts regarding the specific service.

[Please Complete RICA 2004 Annual Survey](#)

Those RICA CLEC members that have not completed RICA's annual survey are urged to do so. The online survey takes only a few minutes to complete, and permits RICA members a great opportunity to help shape RICA initiatives throughout the year. Please respond to the email you received now. A summary of the survey—a real snapshot of the rural CLEC industry—will be provided at RICA's 5th Annual Conference May 26-28 at the Luxor in Las Vegas. Thank you!

Yet the FCC has had the AT&T Petition before it for 18 months, during which time scores of *ex parte* meetings involving AT&T and the BOCs (including a debate with both present) addressed this precise point. Having reached the curious conclusion that it does not have a sufficient record to decide whether AT&T should be liable for past charges, the FCC drops a final footnote stating that it "does not have jurisdiction to resolve claims for collection of unpaid tariff charges." (It cites a long line of cases to that effect, except for the most recent case, *MGC Communications v. AT&T*, in which the FCC *did* decide that AT&T had to pay access charges to a CLEC.) If the FCC has no intention of adjudicating the claim for past access charges, there was no apparent reason for its extensive discussion of "retroactivity."

Retroactivity in any event is not even a legitimate issue in cases where the decision is what the current rules have always said, as opposed to whether a new rule should be applied in the past. The FCC decision was unanimous that under decisions going back many years, AT&T's service did not qualify for exemption. As Commissioner Abernathy stated, "[T]here is no doubt that AT&T's 'phone-to-phone IP telephone service' is a telecommunications service....We are not choosing to extend regulatory requirements in this Order, such requirements already apply...and can be eliminated only through a rulemaking proceeding or a waiver." Chairman Powell stated "[AT&T] has long been obligated to pay access charges for this service...."

AT&T, however, apparently supported by Commissioners Copps and Martin, points to various statements in previous Commission discussions which could be interpreted as exempting its service. Most prominently, AT&T points to a 1998 report to Congress known as the *Stevens Report*. As the Order makes clear, not one of these documents purported to be either a rulemaking or waiver, without which there is no basis for avoiding the rule. It is certainly possible, as Commissioner Copps points out, that some entities may have been misled by the FCC, including presumably Silicon Valley startups who pride themselves on their distance from the fine points of Washington regulation. AT&T, however, the oldest surviving communication carrier in the country, has had battalions of lawyers dealing with regulatory nuances for 115 years, and should be laughed out of court if it claimed to be misled.

It is unlikely that many rural ILECs or CLECs have much traffic terminating on PRI trunks, which AT&T has used to terminate much IP-networked traffic. Nevertheless, RICA members who have not been paid interstate access charges by IXCs claiming exemption due to their use of IP networks are encouraged to contact RICA counsel at +1 202.296.8890 or rica@klctele.com. (WC Docket No. 02-361)

2. Access Charge Reminder: CLEC Access Charge Rate Change

Rural CLECs are reminded that, effective June 20, 2004, and consistent with the Commission's 2001 CLEC Access Charge Reform Order ("Order"), with the exception of those carriers subject to the "rural exemption" established in the Order, the benchmark rate for a CLEC's interstate switched exchange access services will be the rate charged for similar services by the competing ILEC. RICA members should determine whether their interstate tariffs need to be changed in plenty of time to make any necessary filings. (FCC 01-146)

3. Commission Proposes Additional Small LEC Reporting Requirements

The Commission on April 16 proposed changes to FCC Form 477, aimed at capturing data related to local phone competition and broadband services deployment, that would require additional reporting requirements of carriers with relatively few access lines and/or subscribers. The proposal would also extend reporting obligations another five years, through March 2010. Under the Commission proposal, facilities-based broadband providers with fewer than 250 high-speed lines (or in the case of facilities-based voice grade equivalent lines, 10,000) would be required to report such lines. Currently, such Form 477 reporting is voluntary. Also, carriers would be required under the proposal to report the number of high-speed subscribers per zip code, rather than report simply the zip codes in which they have active high-speed connections.

Comments on the proposal will be due within 30 days of publication of the notice in Federal Register; reply comments, within 60 days of such publication (WC Docket No. 04-141, CC Docket No. 99-301)

4. In the States and In Brief

- The D.C. Circuit Court of Appeal extended until June 15 the stay of its decision overturning the Commission's TRO. The extension gives the Commission and its supporters additional time to request that the U.S. Solicitor General appeal the decision to the Supreme Court. It also provides carriers additional time to negotiate new or revised agreements, as urged by FCC commissioners. Qwest and MCI have agreed to participate in open, mediated negotiations. SBC rejected CompTel/ASCENT's offer to negotiate on an industry-wide basis, and instead urged CLECs individually to contact their account managers. SBC indicted that because smaller CLECs may need more negotiating time, it is

offering them the opportunity to execute an amendment to their agreements by which availability of the UNE-P will be extended through year-end at a cost of \$22 throughout SBC's region of operation. CLECs interested in the offer must respond to SBC by June 15.

- The Ninth Circuit federal appeals court stayed its decision in the *Brand X* case, in which it had determined that cable modem service entails a telecommunications service component—transmission, potentially opening up the service (over contrary FCC policy) to the panoply of Title II telecommunications regulation. The stay will remain in effect pending the filing of a petition for Supreme Court review.
- Qwest and Covad announced a three-year line-sharing agreement by which Covad will be able to access Qwest's loops to provide DSL services. The FCC announced the three-year phase-out of required line sharing in its August 2003 TRO, a decision upheld on appeal. Covad expressed hope to reach similar agreements in other Bell territories. FCC Chairman Powell and Commissioner Abernathy, who had opposed that portion of the TRO, lauded the deal.
- According to *Rocky Mountain News*, a survey prepared by Gallup for UBS investment banking found that 34% of respondents would switch to VoIP services if they could realize a 20% savings on their phone bill. Also, 74% of respondents expressed no preference whether the local telephone or cable company provided a bundle of communications services.
- *TelecomWeb* reports that per a new study by the Telecommunications Industry Association (TIA), spending on enterprise voice and data communications equipment totaled \$94 billion in 2003, up almost 4% from 2002, and is expected to rise to \$122 billion —28%— through 2007. The big reason? IP applications, according to TIA's president. (www.tiaonline.org)

UPCOMING RICA EVENTS 📞 MARK YOUR CALENDARS!

- **Annual Conference 2004**, featuring half-day seminar (May 26) dedicated to Voice over IP challenges and opportunities. May 26-28, Luxor Hotel Las Vegas, Nev.
- **Fall Conference 2004** to be held November 1-3, Westin Riverwalk Hotel, San Antonio, Tex.
- Details/registration:
<http://ricalliance.org/events/index.php>

