

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into) Docket No. UT-003022
U S WEST Communications, Inc.'s)
Compliance with Section 271 of the)
Telecommunications Act of 1996)

..... In)
the Matter of U S WEST Communications,) Docket No. UT-003040
Inc.'s Statement of Generally Available)
Terms Pursuant to Section 252(f) of the)
Telecommunications Act of 1996.)

**U S WEST’S AMENDED LEGAL
BRIEF REGARDING EXCLUSION
OF INTERNET-BOUND TRAFFIC**

INTRODUCTION

U S WEST Communications, Inc., soon to be known as Qwest Corporation (hereinafter "Qwest") submits this brief to the Washington Utilities Transportation Commission ("WUTC") regarding the exclusion of Internet-bound traffic from Qwest's Statement of Generally Available Terms and Conditions ("SGAT") and from consideration of Qwest's compliance with checklist item 13, 47 U.S.C. § 271(c)(2)(B)(xiii), in Washington.

Qwest is keenly aware of the prior Commission's rulings on treatment of Internet-bound traffic in past proceedings. Although U S WEST does not agree with those rulings, it has paid reciprocal compensation for Internet-bound traffic under its interconnection agreements with competitive local exchange carriers ("CLECs") in Washington pursuant to the Commission's decisions. Indeed, as described in the workshop, Qwest has paid approximately \$18 million to Washington CLECs, which includes Internet-bound traffic, and received far less than \$1 million in return.

Qwest urges the Commission to follow the Federal Communications Commission's ("FCC") lead and recognize the entirely different context in which the issue arises in these proceedings. As set forth fully below, for a host of reasons, the Commission should abide by the FCC's consistent and valid rulings on this issue in the 271 context and therefore accept Qwest's exclusion of Internet-bound traffic from the SGAT and from these proceedings.

First, reciprocal compensation for ISP-bound traffic is not a 271 issue. The FCC recently affirmed its consistent position that 271 workshop proceedings are not the proper forum to address this issue. Under section 271, the Commission is asked only to determine whether Qwest complies with the checklist requirements of Section 271, not to develop its overall policy or legal determination on this issue. The Commission has and will continue to develop its policy on this issue in its ongoing cost docket or in Section 252 proceedings, where it is more

appropriately raised.

Also, the FCC has conclusively determined that compensation for Internet-bound traffic is an "inter-carrier compensation" issue, *not* a "reciprocal compensation" issue, and *not* a checklist item 13 issue. This FCC determination in the 271 context remains binding in this proceeding and on this Commission's consideration of Qwest's compliance with checklist item 13. Accordingly, compensation for Internet-bound traffic is irrelevant to determining Qwest's compliance with this checklist item.

Second, it is unnecessary for the Commission to address this issue in reviewing Qwest's SGAT. Under 47 U.S.C. § 252(f)(1)&(2), Qwest's SGAT must comply with Section 251. No provision of the Telecommunications Act of 1996 ("the Act") and no FCC order *requires* Qwest to pay CLECs reciprocal compensation for Internet-bound traffic as a matter of Section 251. Thus, Qwest is free to exclude such traffic from its SGAT.

In addition, no CLEC is required to accept the SGAT's terms, and no CLEC will be bound by the Commission's determinations in this proceeding. The SGAT is Qwest's standard offering. As the Act makes clear, Qwest's submission of an SGAT in no way precludes a CLEC from negotiating its own interconnection agreement with Qwest or seeking arbitration of this issue before the Commission. Therefore, those CLECs who believe reciprocal compensation should be paid for this traffic are free to decline this arrangement in the SGAT and negotiate or arbitrate this issue with Qwest. Consequently, whether the SGAT includes or excludes reciprocal compensation for Internet-bound traffic is simply not relevant.

Finally, these dockets are not the proper forum for this issue to be decided by this Commission. No CLEC submitted factual testimony or evidence in support of their positions on compensation for Internet-bound traffic. Thus, this Commission cannot develop an informed opinion on this issue in the context of these proceedings.

Accordingly, Qwest requests that the Commission accept Qwest's exclusion of Internet-bound traffic from its SGAT and strike consideration of this "inter-carrier compensation" issue from consideration of Qwest's compliance with checklist item 13.

ARGUMENT

A. Compensation for Internet-Bound Traffic Is Not A Section 271 Issue.

In its Bell Atlantic New York Order,¹ the FCC dispositively held that inter-carrier compensation for Internet-bound traffic is not a "reciprocal compensation" issue under 47 U.S.C. § 251(b)(5) and "is *not* a checklist item."² Specifically, the FCC determined that because Internet-bound traffic is not "local" traffic, it is outside the bounds of 47 U.S.C. § 251(b)(5). Paragraph 377 of the Bell Atlantic New York Order states:

We recognize that Bell Atlantic has an obligation to comply with New York Commission orders concerning inter-carrier compensation for ISP-bound traffic Inter-carrier compensation for ISP bound traffic, however, is not governed by section 251(b)(5), and, therefore, is not a

¹ Memorandum Opinion and Order, 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, FCC 99-404 (Dec. 22, 1999).

² Id. ¶ 377 (emphasis added).

checklist item.

Because Internet-bound traffic is not governed by Section 251(b)(5), it is irrelevant to consideration of whether Qwest satisfies the requirements of checklist item 13.³ The FCC reached a similar conclusion in the Second BellSouth Louisiana Order, in which it declined to consider compensation for Internet-bound traffic in determining whether BellSouth satisfied the requirements of checklist item 13.⁴

It is immaterial to this proceeding that the D.C. Circuit in Bell Atlantic Tel. Cos. v. FCC⁵ vacated the FCC's declaratory ruling on Internet-bound traffic.⁶ The D.C. Circuit did not address or review the Bell Atlantic New York Order in its decision, and, therefore, the Bell Atlantic New York Order remains valid.⁷

Indeed, since the D.C. Circuit ruling, the FCC has reaffirmed that reciprocal compensation is not a section 271 issue. In its SBC Texas Order,⁸ the FCC responded to the contention that reciprocal compensation apply to ISP-bound traffic in the following manner:

As noted above, the D.C. Court of Appeals remanded the Commission's ruling that ISP-bound traffic is not subject to section 251(b)(5)'s reciprocal compensation requirements. Because Allegiance does not allege that SWBT fails this checklist item, and also because this issue is [sic] before us again due to the court's remand, we do not address it in the context of a 271 application.⁹

Further, the FCC clarified the limited role of section 271 proceedings.¹⁰ Such workshops are to be streamlined examinations of whether the BOC has complied with the existing rules regarding the checklist items and other 271 requirements. They are not to be used for making new policy changes or interpretations. This clearly was not intended by Congress when it

³ Id.

⁴ Memorandum Opinion and Order, Application of BellSouth Corporation et al for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599 ¶ 303 (1998) ("Second BellSouth Louisiana Order").

⁵ 206 F.3d 1 (D.C. Cir. 2000).

⁶ Declaratory Ruling and Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689 (Feb. 26, 1999) (the "ISP Declaratory Ruling").

⁷ Moreover, the D.C. Circuit did *not* hold that the FCC erred in determining that Internet-bound traffic is interstate or that it does not terminate within a local calling area. Rather, the court simply remanded the matter to the FCC for further analysis and clarification. Indeed, in the wake of this ruling, the FCC has specifically declared its intent to *reaffirm* its prior determination that Internet-bound traffic is interstate, and therefore, excluded from reciprocal compensation arrangements under Section 251(b)(5). See 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.

⁸ Memorandum Opinion and Order, Application by SBC Communications Inc et al for Provision of In-Region, InterLATA Services in Texas, FCC 00-238 (June 30, 2000) ("SBC Texas Order").

⁹ SBC Texas Order, ¶386.

¹⁰ Id. ¶¶23-27.

established the expeditious statutory procedure for interLATA relief in section 271. As the FCC put it,

[T]he section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application. ...Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications -- generally dominated by extremely fact-intensive disputes about an individual BOC's empirical performance -- are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability. If Congress had intended to compel us to use section 271 proceedings for that purpose, it would not have confined our already intensive review to an extraordinarily compressed 90-day timetable.¹¹

Also, if such policy disputes were handled in this docket, the public's interest in local and interLATA competition would be irretrievably harmed. Section 271 was intended to provide an incentive to Qwest to comply with the checklist items in order to be able to enter the interLATA toll market. The FCC found "[t]hat hope would largely vanish if a BOC's opponents could effectively doom any section 271 application by freightening their comments with novel interpretive disputes and demand that authorization be denied unless each one of those disputes is resolved in the BOC's favor."¹²

Finally, the central, narrow issue in a 271 docket is compliance with the rules existing at the time of the applications. Those rules arising thereafter are irrelevant:

Just as our long-standing approach to the procedural framework for section 271 applications focuses our factual inquiry on a BOC's performance at the time of its application, so too may we fix at that same point the local competition obligations against which the BOC's performance is generally measured for purposes of deciding whether to grant the application. Nothing in section 271 or any other provision of the Act compels us to require a BOC applicant to demonstrate compliance with new local competition obligations that were unrecognized at the time the application was filed.¹³

Although the issue of treatment of Internet-bound traffic may be relevant in other Commission dockets, the SBC Texas Order and the Bell Atlantic New York Order conclusively establishes that the intervenors arguments regarding compensation for Internet-bound traffic do not belong in this proceeding. Moreover, to the extent the Commission believes that Qwest has a "legally binding" obligation to pay reciprocal compensation for Internet-bound traffic, Qwest has met it. Qwest has and continues to pay CLECs for this traffic under its current interconnection agreements.

B. Compensation for Internet-Bound Traffic Is Not An SGAT Issue.

Compensation for Internet-bound traffic also is not an SGAT issue. Under Section

¹¹ Id. ¶¶24-5 (emphasis added).

¹² Id. ¶26.

¹³ Id. ¶27.

252(f)(1), Qwest's SGAT must comply with Section 251. No provision of the Act and no FCC order requires Qwest to include Internet-bound traffic in the reciprocal compensation provisions of its SGAT under that section. Accordingly, Qwest properly excluded such traffic from the reciprocal compensation provisions.

The CLECs appear to argue that since the D.C. Circuit vacated the FCC's ISP Declaratory Ruling, Qwest is *required* to include Internet-bound traffic in its SGAT. As set forth above, however, the court did not vacate that order on the merits; rather, it remanded it to the FCC to further explain its analysis. Thus, nothing in the D.C. Circuit's decision mandates that Qwest pay reciprocal compensation for Internet-bound traffic. Likewise, the Fifth Circuit's decision in Southwestern Bell Tel. Co. v. Public Utils. Comm'n¹⁴ is inapplicable: that court simply held that the Texas commission did not err in *interpreting* an *existing* interconnection agreement to require reciprocal compensation for Internet-bound traffic based upon evidence from the past. The court did not, nor could it, hold that all incumbent LECs *must* include such traffic in reciprocal compensation arrangements on a going-forward basis.

The intervenors' attempts to inject this issue into this proceeding suggest two mistaken beliefs: (1) that the SGAT will somehow violate the law because the FCC will revise its determination on Internet-bound traffic or its prior determination will not withstand judicial scrutiny, and (2) the SGAT must include reciprocal compensation for this traffic because the intervenors believe reciprocal compensation should be paid for it. Neither of these concerns should persuade the Commission to require Qwest to include reciprocal compensation for Internet-bound traffic in its SGAT.

Section 2.2 of the SGAT in conjunction with Section 7 eliminates the intervenors' first concern. Section 2.2 states in part:

To the extent that the Existing Rules are changed, vacated, dismissed, stayed, or modified, then this Agreement and all contracts adopting all or part of this Agreement shall be amended to reflect such modification or change of the Existing Rules.

If the FCC were to backtrack on its public statements that it intends to reaffirm its prior determination that Internet-bound traffic is interstate and excluded from Section 251(b)(5) arrangements, or if its determination is overturned on the merits, Section 2.2 will incorporate any valid and binding change in the law. Thus, if there is some subsequent binding federal order that requires Qwest to include Internet-bound traffic in the reciprocal compensation provisions of the SGAT, the SGAT will be amended to comply with the law.

To the extent any intervenor opposes the exclusion of Internet-bound traffic from the reciprocal compensation provisions of the SGAT for competitive or others reasons, their remedy is simple: do not accept the reciprocal compensation arrangements in the SGAT. Under Section 1.8 of the SGAT, CLECs are free to accept some arrangements from the SGAT, while declining to accept the reciprocal compensation arrangement. Furthermore, unlike an arbitrated interconnection agreement in which the parties are bound by the Commission's determinations, no carrier is bound to execute the SGAT or the provisions contained in it. The Act is unmistakably clear that Qwest's submission of an SGAT, or this Commission's approval of it, does not relieve Qwest of its duty to negotiate individual interconnection agreements with any

¹⁴ 208 F.3d 475 (5th Cir. 2000).

CLEC that wishes to do so.¹⁵ Indeed, the SGAT itself reiterates Qwest's commitment to negotiate and arbitrate interconnection agreements with CLECs who choose to forego its terms.¹⁶ Thus, it is immaterial to review of the SGAT that some carriers may oppose or disapprove its terms. Any carrier remains free to negotiate or arbitrate this issue before the Commission, regardless of the submission or approval of the SGAT.¹⁷

Furthermore, it is simply inappropriate to force Qwest to include reciprocal compensation for Internet-bound traffic in an SGAT. The SGAT is Qwest's *standard* contract offering. Because no carrier is bound to accept its terms and they have the added option of negotiating or arbitrating their own agreements, there is no basis to require Qwest – in the context of a standard contract offering – to include a provision that is not required by federal law. Although some of the CLECs claim that this exclusion is so offensive no carrier would ever accept it or desire its terms, McLeod, a sophisticated competitor, has executed the Washington SGAT, including the reciprocal compensation provisions, without exception. Thus, the exclusion of Internet-bound traffic is perfectly acceptable to CLECs who do not focus their business on serving only Internet service providers.

Exclusion of Internet-bound traffic does not eliminate the many benefits the SGAT offers to CLECs. As set forth above, CLECs are free to accept any arrangement in the SGAT while declining the reciprocal compensation provisions. Qwest should not be required in this standard offering to include provisions that the law does not require.

C. This Is Not The Proper Forum To Address Compensation for Internet-Bound Traffic.

As set forth above, inter-carrier compensation for Internet-bound traffic is not a relevant consideration in reviewing Qwest's compliance with checklist item 13 or the lawfulness of its SGAT. Moreover, the Commission should not, in this docket, establish its public policy position or legal determination on treatment of Internet-bound traffic. Indeed, the intervenors have submitted no factual testimony and no documentary support for their claims on this issue: their testimony recites primarily legal arguments, not facts. Thus, the intervenors, who themselves seek to inject this issue into this proceeding, have not provided the Commission with any information that would permit this Commission to make an informed decision. Instead, the issue of compensation for Internet-bound traffic should be addressed in the context of the next phase of the Commission's ongoing cost docket. Consideration in the cost docket will permit the Commission to address in detail the evidence all parties wish to present on this issue, allow the Commission's experts to consider more up-to-date evidence on the topic, possibly provide the opportunity to consider the FCC's future ruling on remand of the ISP Declaratory Ruling, and permit the Commission to establish a well-informed, and more current, public policy determination on this issue.

CONCLUSION

This docket is intended to address a limited issue: whether Qwest's application to provide in-region interLATA service complies with Section 271 of the Act. The FCC has determined

¹⁵ 47 U.S.C. § 252(f)(5).

¹⁶ SGAT § 1.5.

¹⁷ Indeed, Qwest is currently arbitrating this issue with Sprint and will be bound by the Commission's determination in that interconnection proceeding.

that treatment of Internet-bound traffic is an "inter-carrier compensation" issue, but not a checklist item 13 concern. Although intervenors may not agree with this determination, it remains controlling in this proceeding. Furthermore, no requirement of federal rules requires Qwest to include Internet-bound traffic in the reciprocal compensation provisions of its SGAT. Thus, the intervenors' comments and arguments on treatment of Internet-bound traffic are inappropriate in this docket.

The Commission should permit Qwest to exclude Internet-bound traffic from its standard contract offering and exclude consideration of its issue from its deliberations on Qwest's compliance with checklist item 13. To the extent any carrier believes it should receive compensation for Internet-bound traffic, the proper forum for that dispute is the Commission's cost docket or a Section 252 arbitration.

DATED this ____ day of July, 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE
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I hereby certify that I have this 7th day of July 2000, caused the foregoing **U S WEST's Amended Legal Brief Regarding Exclusion of Internet-Bound Traffic** to be served upon all parties of record in this proceeding, via first class mail.

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