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Ex Parte

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 5, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 96-98 and 99-68
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic

Dear Ms. Salas:

On September 29, 2000, Robert B. McKenna and the undersigned representing Qwest Corporation[1] met with Federal Communications Commission ("FCC") members Tamara Preiss of the Competitive Pricing Division, Jonathan Nuechterlein, Laurence Bourne, Paula Silberthau and Debra Weiner of the Office of General Counsel. The purpose of the meeting was to discuss ISP Reciprocal Compensation issues in light of the Court's decision in Bell Atlantic v. FCC.[2] The attached document provides information concerning the specific issues discussed.

Sincerely,

Melissa E. Newman

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Attachment

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[1] On June 30, 2000, U S WEST, Inc., the parent and sole shareholder of U S WEST Communications, Inc., merged with and into Qwest Communications International Inc. Further, on July 6, 2000, U S WEST Communications, Inc. was renamed Qwest Corporation.

[2] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, 14 FCC Rcd. 3689; vacated and remanded sub nom. Bell Atlantic Telephone Companies v. FCC, 206 F. 3d. 1 (D.C. Cir.) (2000) mandate issued May 17, 2000.

ISP RECIPROCAL COMPENSATION

1. In light of the Bell Atlantic decision, it remains reasonable and lawful for the Commission to rely on the fact that an Internet call does not terminate for jurisdictional purposes in determining that reciprocal compensation is not warranted.

- The analysis is supported by dozens of cases recited in the comments of Qwest and others in the docket on remand.

- The bottom line is that a call from an end user customer to an Internet Web site does not "terminate" with the ISP which establishes the Internet connection. As the FCC recognized in its Declaratory Ruling, the fact that termination does not occur removes the connection between the two LECs from the reciprocal compensation provisions of Section 251(b)(5).

- The error in the Declaratory Ruling was simply that the Commission, having properly determined that a call between an end user and an Internet Web site was jurisdictionally interstate, assumed that this proper analysis automatically answered the question of whether reciprocal compensation was warranted.

  - Just because a call is jurisdictionally interstate does not automatically mean that it is not terminated for purposes of Section 251(b)(5). The Court found that more analysis was necessary.
  - The additional research, which has been submitted on the record, documents that the Commission's conclusion was correct in the Declaratory Ruling—not that the reasoning was correct.

- While the legal arguments here can become complex and convoluted, the basic analysis is simple: when an end user customer calls an ISP, it is not because he or she wants to talk to the ISP. It is because the end user desires connectivity to the Internet and to the Web sites and other computers, which can be reached through the Internet.

2. The Commission has properly found that the "termination" language in the Act means that reciprocal compensation under Section 251(b)(5) applies only to local traffic.

- Interstate carrier traffic is not terminated.

- Interstate telecommunications traffic, which is not carrier traffic, is also not terminated.

3. Since Section 251(b)(5) does not apply to traffic delivered through a CLEC into the Internet for termination, another model must be applied.

- Most logical is the access charge model. Two LECs collaborating to provide access to an IXC work under a structure, which permits both to recover their respective costs.

- A "bill and keep" model serves the same purpose—each LEC recovers its costs from its own customer.

4. Any model, at least so long as the Commission and state regulators continue to regulate LEC-to-LEC connection prices, must be predicated on economic reality and sound economic principles.

- CLECs supporting the reciprocal compensation scheme predicate their argument on an economic position, which is fundamentally flawed.

- They contend that reciprocal compensation in an ISP context is simply a matter of a LEC terminating a call on behalf of another LEC, thereby performing a service on behalf of the "originating LEC" which merits compensation.

- As a matter of straightforward economics, this argument misstates the nature of relationship between the ISP and the end user customer.

    - Unlike most telephony transactions, the ISP sells a distinct service to the end user customer which itself incorporates the path between the Internet (and the accessed Web sites) and the end user customer as part of the service.
    - The normal LEC-to-LEC transaction involves joint interconnection of two parties within a single exchange—the end user initiating the call desiring to connect to a customer served by another LEC.
    - This is not the case when an end user desires to conduct business with another party using the facilities of the two LECs as an input to the business transaction—as is the case in connections to both IXCs and ISPs.
    - The actual cost causer in the ISP transaction is the business relationship between the ISP and the end user customer—who is really the customer of the ISP in the transaction.
    - To view the "originating" LEC as causing costs to be imposed on the "terminating" LEC is to fundamentally misunderstand the economics of the transaction.
    - It is this reality which caused the Arizona and Colorado Commissions to deny reciprocal compensation in ISP transaction involving multiple LECs.

- Dr. William Taylor's analysis sets out the economics of the transaction with precision. This analysis was filed with the Commission by way of ex parte presentation on December 2, 1999.

5. The Commission does not need to address the issue of whether it can lawfully terminate or modify existing interconnection agreements to account for the new reciprocal compensation rules.

- In the case of Qwest in its position as an ILEC, each interconnection agreement contains a change of law provision, which would enable Qwest, and the contracting CLEC to deal with the new legal interpretation which is necessary in this proceeding.

- We agree that it would be very unwise, and quite possibly ultra vires, for the Commission to actually attempt to modify existing agreements by force majeure. Contracts, which are illegal, can clearly be voided, and contracts which were imposed by regulators with provisions which were beyond the power of the regulator to impose can be dealt with through the regulatory process, as can contracts which obtained a particular provision through the "pick and choose" rules. But contracts which have been freely negotiated to include reciprocal compensation provisions, which could not be imposed, should be allowed to continue unless very strong reasons to the contrary appear.

- The Commission should make clear, however, that additional reciprocal compensation agreements cannot be obtained through the "pick and choose" rules.

6. It has been suggested (e.g., AT&T) that the limitation of reciprocal compensation to local traffic be removed, and that reciprocal compensation be paid on all originating traffic. At least in the interim, AT&T posits that this approach could differentiate between access (carrier) non-local traffic and non-access (ISP) non-local traffic in a manner which permitted the continuation of the existing access charge regime.

- As a legal matter, ILECs and others have been trying for years to eliminate the unwarranted differentiation between the charges for interstate ISP access and the charges for carrier access. While thus far these differences have been upheld by courts, it would be extremely unwise to expand them. It should be assumed that elimination of the "local" requirement to qualify for reciprocal compensation under Section 251(b)(5) would by necessity implicate switched access as well.

- Moreover, as the technologies which drive information services and those which drive telecommunications services continue to converge (e.g., IP voice), the danger of creating a legally untenable discrimination will continue to grow.

7. If a "two call" approach to Internet-bound traffic were to be used, the analysis would lead to a conclusion that more than two calls were involved because of the nature of Internet transmissions. A proper "two call" analysis would lead directly to a "bill and keep" structure.

- Currently an Internet call is treated as a call which follows the originating nature of the initial circuit connection to the Internet. That is, there is a single call between the

end user and the ultimate Internet destination (e.g., a Web site), which includes the return path.

- However, if the technological breaks in the transmission which are relied on by proponents of ISP reciprocal compensation are considered relevant, it must be remembered that the break between the circuit protocol and the IP protocol is not the only transformation of the communication during the end-to-end communication.

- For example, the IP protocol does not establish a circuit as that term is understood in the circuit world. The virtual circuit which is established relies on the addressing information in the packets themselves.

- This means that, if a separate call is deemed to have been originated at the ISP into the Internet towards the Web site which is the customer's designated termination point, by the same analysis a separate call is intimated by the Web site back in the direction of the ISP and the customer. The "return path" of the call is totally unrelated to the entry path. It is really a second call, or at least would be if the fiction on which the "two call" theory rests is accepted.

- This would, of course, result in yet a fourth call, from the ISP to the end user. In this call the CLEC which was the "terminating" LEC for the origination of the call would now be the "originating" LEC for the return call. Reciprocal compensation under this structure would balance itself out into an automatic bill and keep scenario.

- This fiction is, of course, unnecessary, because the call itself is a single communication, which does not terminate except between the two end points of the call—the end user on the one side and the Web site on the other.