

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

IN THE MATTER OF THE INVESTIGATION  
INTO QWEST CORPORATION'S  
COMPLIANCE WITH SECTION 271 OF THE  
TELECOMMUNICATIONS ACT OF 1996

**Docket No. UT-003022**

IN THE MATTER OF QWEST  
CORPORATION'S STATEMENT OF  
GENERALLY AVAILABLE TERMS  
PURSUANT TO SECTION 252(f) OF THE  
TELECOMMUNICATIONS ACT OF 1996

**Docket No. UT-003040**

**QWEST CORPORATION'S PETITION FOR RECONSIDERATION  
OF ISSUES RELATING TO INTERCARRIER COMPENSATION  
FOR ISP-BOUND TRAFFIC**

Qwest Corporation ("Qwest") respectfully requests reconsideration of the Washington Utilities and Transportation Commission's ("Commission's") interim Commission Order Addressing Workshop One Issues: Checklist Items No. 3, 7, 8, 9, 10, 12, and 13 in the above-captioned proceedings. This petition is filed in accordance with the provisions of that Order, which allow reconsideration even though the post-order review provisions of the Administrative Procedure Act are not directly applicable. Qwest's petition is limited to a single issue: the Commission's interim Workshop 1 Order regarding Checklist Item 13 (Reciprocal Compensation) as it relates to intercarrier compensation for Internet-bound traffic delivered to Internet service providers ("ISP's").

**I. INTRODUCTION**

The issue of intercarrier compensation for ISP-bound traffic arose in the context of the Commission's consolidated proceeding to address the requirements of Section 271 of the Telecommunications Act of 1996 ("Act")<sup>1</sup> and the Commission's approval of Qwest's

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<sup>1</sup> Pub. L No. 104-404, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et. seq.*

proposed Statement of Generally Available Terms ("SGAT") under Section 252 (f)(2) of the Act. Since the release of both the Administrative Law Judge's Draft Initial Order on August 8, 2000, and her Revised Initial Order on August 30, 2001, the law regarding compensation for Internet-bound traffic has taken a somewhat dramatic turn. New FCC rulings clearly exclude Internet-bound traffic from the reciprocal compensation obligations of 47 U.S.C. §§ 251(b)(5) and 271(c)(2)(B)(xiii). The Commission did not consider these recent developments in its June 11, 2001 Order. Thus, Qwest seeks reconsideration of the Commission's interim Workshop 1 Order on this issue.

On April 27, 2001, the Federal Communications Commission ("FCC") released its Order on Remand and Report and Order *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, FCC 01-131 (rel. April 27, 2001) ("*ISP Order on Remand*").<sup>2</sup> The *ISP Order on Remand* directly addresses the issue of intercarrier compensation for traffic delivered to ISPs and in it the FCC reaffirms that Internet calls are expressly exempted from the reciprocal compensation requirements of the Act and are jurisdictionally interstate in nature.<sup>3</sup> According to the FCC, ISP-bound traffic is "information access" traffic under Section 251(g) of the Act that is, pursuant to Section 201 of the Communications Act of 1934, subject to the exclusive jurisdiction of the FCC.<sup>4</sup> Accordingly, having exercised its jurisdiction under Section 201, the FCC declared that state commissions are without authority to address the issue of intercarrier compensation for ISP-bound traffic.<sup>5</sup>

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<sup>2</sup> With the exception of the provisions relating to opt-in rights, the *ISP Order on Remand* became effective on June 14, 2001. See 66 Fed. Reg. 26800 (May 15, 2001). The United States Court of Appeals for the District of Columbia Circuit recently denied a request for a stay of *ISP Order on Remand*. The appellate court did, however, indicate its willingness expedite its consideration of the petitioners' petition for review of the order.

<sup>3</sup> See generally, *ISP Order on Remand* ¶¶ 42-47, 52-65.

<sup>4</sup> *Id.* ¶ 65.

<sup>5</sup> *Id.* ¶ 82.

In light of the FCC's *ISP Order on Remand*, the Commission should reconsider its decision and defer to the FCC's jurisdiction relating to intercarrier compensation for ISP traffic.

## II. GROUNDS FOR RECONSIDERATION

The Administrative Law Judge issued her Draft Initial Order and Revised Initial Order during a time of regulatory uncertainty over the proper jurisdictional treatment of Internet traffic. In its initial *ISP Order*<sup>6</sup> the FCC determined that "ISP-bound traffic is largely interstate," yet the FCC declined to establish "a federal rule to govern intercarrier compensation for this traffic."<sup>7</sup> Thus, under the initial *ISP Order*, in the absence of conflicting federal law, state commissions were free to order (or not order) reciprocal compensation for ISP-bound traffic.<sup>8</sup> Indeed, the Administrative Law Judge, and this Commission in following her rulings, relied on these conclusions as well as the D.C. Circuit's remand of the *ISP Order*<sup>9</sup> in determining that issues relating to intercarrier compensation for ISP-bound traffic were properly within its jurisdiction.<sup>10</sup> As a result, the Commission required Qwest's SGAT to include reciprocal compensation for ISP-bound traffic.<sup>11</sup>

On remand, the FCC reaffirmed its initial conclusion regarding the jurisdictional nature of ISP-bound traffic and definitively ruled that calls to ISPs do not fall within the Act's reciprocal compensation requirements. Specifically, the FCC ruled that Congress excluded traffic identified in Section 251(g) of the Act, including traffic destined for ISPs, from telecommunications traffic subject to reciprocal compensation under Section 251(b)(5) of the

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<sup>6</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No.99-68, 14 FCC Rcd 3689 (1999)(*"ISP Order"*)

<sup>7</sup> *ISP Order on Remand* at ¶ 15.

<sup>8</sup> *Id.*

<sup>9</sup> *See Bell Atlantic. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

<sup>10</sup> *See, e.g.*, Revised Initial Order (Docket Nos. UT-00302, UT-00304) ¶ 200 (stating that, "given the state of the law," the Commission's prior decisions regarding ISP traffic remain binding on Qwest).

<sup>11</sup> *Id.*

Act.<sup>12</sup> Accordingly, the FCC determined that, under Section 201 of the Act, it has exclusive jurisdiction over traffic delivered to ISPs.<sup>13</sup> Indeed, the FCC emphasized that as of June 14, 2001, state commissions "no longer have authority to address" the issue of intercarrier compensation for ISP-bound traffic.<sup>14</sup>

Although the FCC did establish an interim compensation regime in its *ISP Order on Remand*, the FCC concluded preliminarily that bill-and-keep is the most appropriate form of intercarrier compensation for Internet traffic. On this point, the FCC declared:

[B]ased upon the current record . . . bill and keep appears the preferable cost recovery mechanism for ISP-bound traffic because it eliminates a substantial opportunity for regulatory arbitrage.<sup>15</sup>

In sum, pursuant to the FCC's decision in its *ISP Order on Remand*, the Commission no longer has authority to consider intercarrier compensation issues relating to ISP-bound traffic. Rather, the Commission must defer consideration of this issue to the FCC, under Section 201 of the Act.<sup>16</sup>

Section 271(c)(2)(B)(xiii) of the Act requires BOCs to "establish *reciprocal compen-*

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<sup>12</sup> *ISP Order on Remand* ¶ 1. The FCC agrees with the D.C. Circuit that resolution of this issue required more than a jurisdictional analysis. Thus, the FCC views the "carve out" provisions of Section 251(g) as a limitation on the scope of Section 251(b)(5). See *ISP Order on Remand* ¶¶ 35-36.

<sup>13</sup> *ISP Order on Remand* ¶¶ 65, 82.

<sup>14</sup> *Id.* ¶ 82.

<sup>15</sup> *Id.* ¶ 6. In reaching this conclusion, the FCC specifically endorsed most of the public policy and economic arguments that Qwest has presented in this docket and other Commission dockets in support of bill-and-keep. *Id.* ¶¶ 67-76. In particular, it found that: (1) bill-and-keep is likely to be more economically efficient than recovering the costs of Internet calls from originating carriers; (2) bill-and-keep will send proper economic signals and eliminate regulatory arbitrage; (3) without bill-and-keep, carriers have "enormous incentive" to target ISPs as customers for the purpose of generating large amounts of reciprocal compensation; (4) reciprocal compensation for Internet traffic undermines the operation of competitive markets; and (5) application of reciprocal compensation to Internet traffic fails to account for competitive carriers' ability to recover costs from their ISP customers. *Id.*

<sup>16</sup> In addition, the FCC's assertion of jurisdiction precludes state commissions from granting the CLECs' request that Internet traffic be included in calculating the relative use of interconnection facilities for the purpose of allocating the costs of those facilities between CLECs and ILECs. These issues are being dealt with in a separate proceeding. See *In the Matter of the Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT- 003013.

sation arrangements for transport and termination of *telecommunications*."<sup>17</sup> Because the FCC has determined that Internet-bound traffic is neither subject to "reciprocal compensation" under the Act nor is "telecommunications traffic," there is no basis for the Commission's determination that Qwest does not comply with Checklist Item 13 without paying this compensation. Furthermore, the FCC's *ISP Order on Remand* negates any claim that Qwest must pay reciprocal compensation in order for its SGAT to comply with the Act. Section 252(f) provides that a BOC's SGAT must comply with Section 251 of the Act and the FCC's regulations issued thereunder.<sup>18</sup> Because reciprocal compensation is not a Section 251 requirement under both the Act and the FCC's regulations, there is no basis for rejecting Qwest's SGAT because it excludes this traffic from the reciprocal compensation provisions. Finally, the Commission cannot order Qwest to pay reciprocal compensation on this traffic or find that Qwest is non-compliant with its Checklist Item 13 obligations as a result of past Commission decisions. The FCC's *ISP Order on Remand* divests this Commission of authority over this matter.

In light of the FCC's *ISP Order on Remand*, Qwest requests that, in addition to reconsidering its interim Workshop 1 Order, the Commission permit Qwest to modify the SGAT to conform to the FCC's *ISP Order on Remand*. Qwest will propose SGAT language that tracks the FCC's *ISP Order on Remand*. This language is still being finalized and will be submitted in one of Qwest's upcoming SGAT filings.

Accordingly, Qwest respectfully requests that the Commission reconsider its interim Workshop 1 Order and find that Qwest is not required to pay reciprocal compensation for Internet-bound traffic and its exclusion of such traffic from the reciprocal compensation provisions of its SGAT has no bearing on its compliance with Checklist Item 13 or Section 252(f).

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<sup>17</sup> 47 U.S.C. § 271(c)(2)(B)(xiii).

<sup>18</sup> 47 U.S.C. § 252(f)(1).

### III. CONCLUSION

Qwest's petition is based on a recent and conclusive clarification of the law on treatment of Internet-bound traffic. The FCC's *ISP Order on Remand* leaves no doubt that it is irrelevant for Checklist Item 13 and Section 252(f) purposes whether Qwest pays reciprocal compensation for ISP-bound traffic. Qwest requests the Commission to reconsider its interim Workshop 1 Order to conform to the FCC's *ISP Order on Remand* and find Qwest in compliance with Checklist Item 13 with respect to reciprocal compensation.

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Respectfully submitted,

Qwest Corporation

By: \_\_\_\_\_

Lisa Anderl  
QWEST CORPORATION  
1600 Seventh Avenue, Suite 3206  
Seattle, Washington 98191  
Phone: (206) 682-6108  
Fax: (206) 343-4040

Charles W. Steese  
QWEST CORPORATION  
1801 California Street, Suite 4900  
Denver, Colorado 80202  
Phone: (303) 672-2709

Kara M. Sacilotto  
PERKINS COIE LLP  
607 Fourteenth Street, N.W., Suite 800  
Washington, D.C. 20005-2011  
Phone: (202) 628-6600  
Fax: (202) 434-1690

*Attorneys for Qwest Corporation*