BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040 JOINT CLEC BRIEF ON RECIPROCAL COMPENSATION FOR ISP-BOUND TRAFFIC

NEXTLINK Washington, Inc. ("NEXTLINK"), Electric Lightwave, Inc. ("ELI"), and Advanced TelCom Group, Inc. ("ATG") (collectively "Joint CLECs") provide the following brief addressing the legal issues arising from the provisions in the Statement of Generally Available Terms ("SGAT") filed by U S WEST Communications, Inc. ("U S WEST") denying interconnection cost sharing and reciprocal compensation for traffic bound to Internet Service Providers ("ISPs"). These provisions of U S WEST's SGAT fail to comply with well-established Commission requirements, and the Commission should refuse to approve or, for purposes of Section 271, permit U S WEST to rely on the SGAT until these provisions are revised to be in full compliance with those requirements.

DISCUSSION

The Commission cannot approve U S WEST's SGAT unless the Commission determines after reviewing the SGAT that it complies with federal law, and "nothing in this section shall

prohibit a State commission from establishing or enforcing other requirements of State law in its review." 47 U.S.C. § 252(f)(2). The Commission has repeatedly and consistently required interconnecting carriers to compensate each other for the exchange of local traffic, including ISP-bound traffic. U S WEST's SGAT, however, precludes reciprocal compensation for ISP-bound traffic, as well as the sharing of costs for interconnection facilities over which such traffic is exchanged, and thus violates Washington – and likely federal – law.

Attempting to deny reciprocal compensation for ISP-bound traffic is a prime example of U S WEST's refusal to accept Commission decisions with which U S WEST disagrees. This issue first arose in the initial arbitrations conducted under the federal Telecommunications Act of 1996 ("Act"), specifically in the arbitration between U S WEST and MFS. The Commission concluded that MFS was entitled to reciprocal compensation for ISP-bound traffic, and the Ninth Circuit affirmed that decision. *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1122-23 (9th Cir. 1999). U S WEST raised the issue again in the generic costing and pricing proceeding, and the Commission again determined that reciprocal compensation is due for ISP-bound traffic. Docket Nos UT-960369, *et al*., Seventeenth Supp. Order, para. 54. U S WEST contested this issue yet again in response to petitions for enforcement of interconnection agreements filed by NEXTLINK and ATG, and once again the Commission concluded that U S WEST must pay reciprocal compensation for ISP traffic. *See* Docket Nos. UT- 990340 (NEXTLINK) and UT- 993003 (ATG). The SGAT thus represents U S WEST's latest defiance of this established Commission mandate.

U S WEST identifies no change in circumstances or governing law that justifies, much less requires, Commission reconsideration of this requirement. To the contrary, recent decisions by the FCC and federal courts confirm the Commission's authority to require reciprocal compensation for ISP-bound traffic and, at a minimum, suggest that ISP-bound traffic is part of the local traffic for which the Act unequivocally requires compensation.

After the passage of the Act, every one of the 27 state commissions and federal courts that had addressed the issue concluded that ISP-bound traffic was local traffic subject to the Act's reciprocal compensation provisions. In February 1999, however, the FCC issued an order in which it concluded that ISP-bound traffic is jurisdictionally "interstate," but that state commissions could nevertheless require carriers to pay reciprocal compensation for delivering that traffic, at least until such time as the FCC determines how carriers are to be compensated:

> Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. . . . As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to [47 U.S.C.] section 252 "extends to both interstate and intrastate matters." Thus the mere fact that ISP-bound traffic is largely interstate does not remove it from the section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with federal law. While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.
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> . . . . Although reciprocal compensation is mandated under section

> 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain circumstances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any Commission rule regarding ISP-bound traffic.

In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-38, Declaratory Ruling ¶¶ 25-26 (Feb. 26, 1999) ("*ISP Order*") (quoting *id*., First Report and Order, 11 FCC Rcd at 15544) (footnotes omitted). The vast majority of state commissions and federal courts that have addressed this issue since the FCC issued its *ISP Order* continue to require reciprocal compensation for ISP-bound traffic.[1]

On March 24, 2000, the D.C. Circuit Court of Appeals vacated the *ISP Order*, rejecting the rationale and assumptions underlying the FCC's conclusion that ISP calls are non-local. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In concluding that ISP bound calls are predominantly non-local, the court found that the FCC "applied its so-called 'end-to-end' analysis, noting that the communication characteristically will ultimately (if indirectly) extend

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[1] *See, e.g., Southwestern Bell Telephone Co. v. Public Utilities Commission of Texas*, No. 98-50787, 2000 WL 332062 (5th Cir. Mar. 30, 2000); *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1122-23 (9th Cir. 1999); *Illinois Bell Tel. Co. v. Worldcom Technologies, Inc.*,179 F.3d 566 (7th Cir. 1999). Of the 30 state commissions that have addressed this issue since February 26, 1999, 23 have required reciprocal compensation for ISP-bound traffic. Citations to these decisions are not included but can be provided if they would be of assistance to the Commission.

beyond the ISP to websites out-of-state and around the world. Accordingly it found the calls non-local." *Id*. at 2. The court, however, did not understand why the FCC would apply such an analysis for purposes of determining whether ISP traffic is local:

> There is no dispute that the Commission has historically been justified in relying on this method [end-to-end analysis] when determining whether a particular communication is jurisdictionally interstate. But it has yet to provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.
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> In fact, the extension of "end-to-end" analysis from jurisdictional purposes to the present context yields intuitively backwards results. Calls that are jurisdictionally *intra*state will be subject to the federal reciprocal compensation requirement, while calls that are *inter*state are not subject to federal regulation but instead are left to potential state regulation. The inconsistency is not necessarily fatal, since under the 1996 Act the Commission has jurisdiction to implement such provisions as § 251, even if they are within the traditional domain of the states. But it reveals that arguments supporting use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this context.

Id. at 5-6 (citations omitted).

The court also gave compelling reasons for the FCC to determine, on remand, that ISP-bound calls are local for purposes of the Act:

> In attacking the Commission's classification of ISP-bound calls as non-local for purposes of reciprocal compensation, MCI WorldCom notes that under 47 CFR § 51.701(b)(1) "telecommunications traffic" is local if it "originates and terminates within a local service area." But, observes MCI WorldCom, the Commission failed to apply, or even to mention, its definition of "termination," namely "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic

> from that switch to the called party's premises." Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the "called party."

Id. at 6 (citations omitted).

The court even explained why, in its view, ISP-bound calls are not "long distance" calls:

> Even if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation. Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long-distance carriers).
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> In this regard an ISP appears, as MCI WorldCom argued, no different from many businesses, such as "pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies," which use a variety of communication services to provide their goods or services to their customers. Of course, the ISP's origination of telecommunications as a result of the user's call is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service). But this does not imply that the original communication does not "terminate" at the ISP. The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, "simply a communications-intensive business end user selling a product to other consumer and business end-users."

Id. at 6 (citation omitted). In vacating the *ISP Order*, therefore, the court effectively eviscerated the FCC's rationale for determining that ISP-bound traffic is non-local. The court found that, based on the record before it, that such traffic is more "local" than long distance, and required the FCC to explain why the FCC's own definitions and practice do not require that ISP-bound traffic be considered local, rather than interstate, traffic.

The Commission's decisions to treat ISP-bound traffic as local traffic subject to reciprocal compensation are fully consistent with both the FCC's *ISP Order* and the D.C. Circuit's decision. In determining whether reciprocal compensation should be paid for such traffic, the Commission found that while that traffic may not technically "terminate" at the ISP in the FCC's view, the carrier that delivers the traffic to the ISP incurs the cost of delivering that traffic as if the traffic terminated at that point:

> Although the [*ISP Order*] concludes that ISP-bound local-interstate traffic does not terminate at the ISP's local server, it does not necessarily terminate at a local carrier's end-office switch in some other state either. However, a *cost* of "terminating the call" occurs at the end-user ISP's local server (where the traffic is routed onto a packet-switched network), and the applicable rate should be determined by the state where the terminating carrier's end office switch is located. ISPs are end-users, not telecommunications carriers.
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> In the case of ISP-bound traffic, the terminating carrier incurring costs is the carrier that delivers traffic to the ISP.

In re ELI/GTE Arbitration, Docket No. UT-980370, Commission Decision at 8-9 (emphasis in original and footnote omitted). The Commission rejected the ILEC position that no compensation should be paid to the carrier that incurs the cost of delivering the traffic to the ISP because the ILEC "receives compensation when end-users on its network call an ISP that is also [an ILEC] customer. Nondiscrimination principles dictate that compensation should be paid when [the ILEC's] customers originate ISP-bound traffic that terminates on another LEC's

network." *Id*. at 9.[2]

Whether ISP-bound traffic is local traffic under the Act, as the D.C. Circuit Court was inclined to find, or jurisdictionally interstate but subject to individual state commission

[2] The Commission's requirement thus is fully consistent with state and federal law. The legislature, for example, has required that all rates or charges "for messages, conversations, services rendered and equipment and facilities supplied . . . shall be fair, just, reasonable and sufficient," RCW 80.36.080, and has expressly authorized the Commission to determine appropriate rates or charges if those being charged or proposed to be charged are "unjust, unreasonable, unjustly discriminatory or unduly preferential, . . . or . . . are insufficient to yield reasonable compensation for the service rendered." RCW 80.36.140; *accord* 47 U.S.C. §§ 201-05. U S WEST's proposal to compel CLECs to transport and terminate traffic originated by U S WEST customers without charge – particularly when U S WEST recovers its costs from its own customers for providing the same service – is "unjust, unreasonable, unjustly discriminatory" and "insufficient to yield reasonable compensation" under well-established principles of both state and federal regulatory law.

compensation determinations, as the FCC originally concluded, the Commission has properly and correctly concluded that carriers transporting and terminating such traffic are entitled to reciprocal compensation. U S WEST has not made, and cannot make, a case to the contrary. Rather, U S WEST's SGAT provisions on interconnection and reciprocal compensation are nothing more than the company's latest attempts to defy a well-established Commission requirement, to impose unwarranted costs on competitors and the Commission by continually relitigating resolved issues, and to undermine the development of effective local exchange competition by denying compensation to competing carriers.

CONCLUSION

The SGAT violates the Commission's requirement that reciprocal compensation must be paid for the transport and termination of ISP-bound traffic. Accordingly, the Commission should refuse to approve the SGAT, or permit U S WEST to rely on that document to satisfy U S WEST's obligations under Section 271, until U S WEST revises the SGAT to provide for reciprocal compensation for ISP-bound traffic and to provide for cost sharing for interconnection facilities used to exchange such traffic.

DATED this 6th day of July, 2000.

DAVIS WRIGHT TREMAINE LLP
Attorneys for NEXTLINK Washington, Inc., Electric Lightwave, Inc., and Advanced TelCom Group, Inc.

By _____

Gregory J. Kopta
WSBA No. 20519