



ILLINOIS COMMERCE COMMISSION

Office of General Counsel

April 23, 1999

VIA AIRNET EXPRESS

Magalie Roman Salas
 Office of the Secretary
 Federal Communications Commission
 445 Twelfth Street, S.W., Room TW-A325
 Washington, D.C. 20554

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RE: The Illinois Commerce Commission's Reply Comments to In re Inter-carrier Compensation for ISP-Bound Traffic, CC Docket 99-68, Notice of Proposed Rulemaking, FCC 99-38.

Dear Office of the Secretary:

Enclosed please find the Illinois Commerce Commission's Reply Comments to In re Inter-carrier Compensation for ISP-Bound Traffic, CC Docket 99-68, Notice of Proposed Rulemaking, FCC 99-38. I have included an original and four copies. Additionally, I have mailed a floppy disk to the International Transcription Service and to the Common Carrier Bureau.

I would appreciate acknowledging receipt of the filing by returning a duplicate time stamped copy of this letter in the enclosed self addressed, stamped envelope.

Thank you for your attention to this matter.

Sincerely,


 Myra L. Karegianes
 General Counsel

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Implementation of the Local
Competition Provisions in
the Telecommunications
Act of 1996

CC Docket No. 96-98

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Inter-Carrier Compensation
for ISP-Bound Traffic

CC Docket No. 99-68

REPLY COMMENTS OF THE
ILLINOIS COMMERCE COMMISSION

The Illinois Commerce Commission ("ICC") hereby replies to the initial comments filed in the above-captioned proceeding in response to the FCC's February 26, 1999, *Notice of Proposed Rulemaking* ("NPRM").¹

As an initial matter, the Illinois Commerce Commission agrees with those commenters asserting that the FCC erred in determining that Internet Service Provider ("ISP")-bound traffic is interstate. The ICC, along with over twenty states, concluded that ISP-bound traffic is intrastate (local). For a detailed discussion of the reasons for this ruling, please see Attachment 1² to these reply comments. The ICC continues to stand by its decision and would urge the FCC to reconsider its ruling.

¹ *In re* Inter-carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking, FCC 99-38 (rel. Feb. 26, 1999) ("NPRM").

² ICC Dockets 97-0404/97-0519/97-0525 Consolidated.

However, assuming that the FCC does not reconsider its ruling in the instant case, the ICC recommends the following:

- Since the FCC ruled that ISP-bound traffic is interstate traffic, the costs and revenues associated with the inter-carrier transport and termination of such traffic should be assigned to the interstate jurisdiction.
- Compensation for inter-carrier transport and termination of ISP-bound traffic should be determined by the FCC in a generic proceeding. The ICC is not prepared at this time to recommend any specific billing arrangements.
- If the FCC determines that compensation for ISP-bound traffic should be addressed on the federal level, the ICC recommends that the FCC establish guidelines governing such compensation. These guidelines should allow parties to continue utilizing the negotiation process and bring unresolved issues surrounding ISP-bound traffic to the FCC. Further, local exchange carriers should be responsible for filing tariffs and/or interconnection agreements that address compensation for all ISP-bound traffic at the federal level.
- If the FCC determines that the 251/252 negotiation process should be used, the ICC recommends that the FCC establish guidelines regarding the mechanism states should use for purposes of compensating local exchange carriers for transporting and terminating ISP-bound traffic. The ICC also recommends that the FCC re-evaluate its limitations on the use of bill-and-keep arrangements.
- Regarding Section 252(i) and Most Favored Nation ("MFN") issues, the ICC recommends that carriers be bound by the terms and conditions set forth in their interconnection agreements for the full term of the contract. Any agreements opted into by other carriers (which contain inter-carrier compensation arrangements for ISP-bound traffic) via the MFN clause should expire concurrently on the expiration date of the original agreement. Other MFN issues should be addressed in a generic docket dealing with the FCC's Interconnection Rules.

Comments Regarding the NPRM

I. The FCC Should Oversee the Establishment of Rates and Tariffs as well as Recovery of Costs Associated with the Inter-Carrier Transport and Termination of ISP-Bound Traffic.

In its Declaratory Ruling, the FCC determined that a “substantial portion” of ISP-bound traffic is interstate.³ At the same time, it ruled that such interstate services are to be “treated” as “intrastate (local)” service. (Declaratory Ruling ¶ 23). The ICC agrees with the the Vermont Public Service Board (“PSB”), that the FCC makes a fundamental error in failing to align costs, control and jurisdiction analyzing the ISP-bound traffic issue. As stated by Vermont PSB, “[a]llocating jurisdiction in a way that leaves one regulator with the jurisdictional authority and another regulator with responsibility for reviewing tariffs is an unusual, possibly unprecedented step” (Vermont PSB Comments, at 6). Further, the Vermont PSB correctly observes that such a ruling could have the effect of “fundamentally transform[ing] the sources of state regulatory authority” and could likely result in “numerous and unnecessary conflicts between state and federal regulators” (Id. at 1, 6). If the FCC asserts jurisdiction over ISP-bound traffic, the ICC agrees with the Vermont PSC that the FCC should also oversee the establishment of rates and tariffs as well as the recovery of costs associated with inter-carrier transport and termination of such traffic. (Id. at 13). Further, it is imperative that the FCC address the potential problem of jurisdictional conflict that will arise from

³ In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling, FCC 99-38 (rel. Feb. 26, 1999) at ¶ 18 (“DR”).

asserting jurisdiction over ISP-bound traffic but delegating rate, cost and tariffing issues to state commissions.

In addition, the ICC agrees with those state commissions that urge that separations changes be made promptly to reflect the FCC's assertion of jurisdiction over ISP-bound traffic. (See, Vermont PSB Comments, at 14, Public Utility Commission of Texas Comments, at 9; Indiana PSB Comments at 5). Specifically, the ICC agrees with the Vermont PSB, which recommends that a separations change be made for transferring the costs of ISP-bound traffic to the interstate jurisdiction. The ICC also urges that the FCC work closely with the Separations Joint Board on these issues.

II. Compensation for ISP-Bound Traffic Should Be Handled at the Federal Level

The FCC seeks comment on two proposals for prospectively determining inter-carrier compensation for Internet traffic. Proposal One would allow carriers to determine compensation through private negotiation or, if these negotiations fail, through arbitrations conducted by state commissions under sections 251 and 252 of the Act. NPRM ¶ 30. In Proposal Two, the FCC would adopt a set of federal rules governing inter-carrier compensation for ISP-bound traffic pursuant to which parties engage in negotiation concerning the rates, terms, and conditions for such inter-carrier compensation, with any resulting disputes settled by a federal arbitration process. NPRM ¶ 31.

A. *Proposal One*

The ICC recommends that the FCC not adopt the first proposal for several reasons. First, as stated above, since the FCC considers ISP-bound traffic to be interstate traffic, the costs and revenues associated with such traffic should be assigned to the interstate jurisdiction. Second, there is possible uncertainty regarding the proper forum for disputes over state commission decisions. For example, the NPRM does not explain what forums are available to a party disappointed by a state decision or how it plans to exercise its jurisdiction over ISP-bound traffic (Vermont PSB Comments, at 11). The ICC concurs with the Vermont PSB that there are "procedural ambiguities [in] suggesting that the [FCC] might overrule state decisions about revenue requirements and rate designs...and there will be a chilling effect on state ratemaking and policymaking concerning intrastate services" if such a ruling is allowed. (Id.). Third, under the FCC's current rules and regulations, state commissions may not have the flexibility to mandate reciprocal compensation provisions such as bill-and-keep. Specifically, the ICC concurs with the Indiana Utility Regulatory Commission ("IURC") that the FCC's "roughly balanced" requirement for bill and keep may be difficult to achieve in many instances and could require CLECs to install expensive billing systems. Finally, the ICC is mindful that some portion of ISP-bound traffic is intrastate (local); however, as indicated by many commenters to this proceeding, at this time it appears that this traffic cannot be separated. Therefore, because the FCC ruled that the majority of ISP-bound traffic is interstate, to remain consistent, the rates, terms, and conditions for such traffic should be negotiated or arbitrated in the federal jurisdiction.

If, however, the FCC adopts its first proposal, the ICC agrees with the Public Utility Commission of Texas that the FCC should promptly implement a rulemaking to develop broad policy for treating ISP-bound traffic. Public Utility Commission of Texas Comments, at 6. The ICC also agrees that “FCC policy leadership on the issue is critical to ensure the broadest possible entry of efficient new competitors, eliminate inefficient entry and irrational pricing, and provide customers the benefits of competition and new technology” (Id.)

B. Proposal Two

Given the ICC’s recommendation that the costs and revenues associated with ISP-bound traffic should be assigned to the interstate jurisdiction, the FCC should adopt a form of proposal two. The FCC should establish a set of guidelines governing inter-carrier compensation for ISP-bound traffic pursuant to which parties engage in negotiation concerning the rates, terms, and conditions for such inter-carrier compensation. These guidelines should provide direction as to the types of compensation options available. Further, the guidelines should allow for the parties to continue utilizing the negotiation process and bring unresolved issues surrounding ISP-bound traffic to the FCC.

Consistent with the recommendations above, carriers should be responsible for filing inter-carrier compensation for ISP-bound traffic provisions in tariffs and/or interconnection agreements at the federal level.

III. The FCC Should Initiate a Rulemaking to Determine Compensation Options for ISP-Bound Traffic

If the FCC chooses not to mandate the use of reciprocal compensation for ISP-bound traffic, the ICC is not prepared to recommend a specific billing arrangement at this time. However, the ICC recommends that the FCC initiate an expedited rulemaking seeking comment from all interested parties on the various billing arrangement options available.

Further, should the FCC consider bill-and-keep as a viable compensation mechanism, the ICC recommends that the FCC modify its rules regarding the bill-and-keep reciprocal compensation option. Specifically, the ICC concurs with the IURC's recommendation that the FCC consider eliminating the "roughly balanced" requirement for use of bill and keep.

IV. Carriers Should Be Held to the Terms of an Agreement for the Full Length of the Contract.

The FCC also seeks comment on "whether and how section 252(i) and MFN rights affect parties' ability to negotiate or renegotiate terms of their interconnection agreements." NPRM ¶ 35. The ICC recommends that carriers be held to the terms of its agreements for the full length of these agreements. For those carriers opting into an existing agreement (which addresses compensation for ISP-bound traffic) via MFN clauses, the term of the MFN agreement should expire concurrently with the expiration date of the existing agreement.

In addition, the ICC agrees with the Florida Public Service Commission that the impact of Section 252(i) and MFN clauses on carriers' ability to negotiate involves

“interconnection issues far more encompassing than inter-carrier compensation for ISP-bound traffic” (Florida Public Service Commission Comments, at 7-8). Therefore, the ICC recommends that the FCC explore the more generic Section 252(i) and MFN issues in a generic investigation into the FCC's interconnection rules. (Id. at 8)

CONCLUSION

For the reasons set forth herein, the ICC recommends that the FCC:

- Assign costs and revenues associated with inter-carrier transport and termination of ISP-bound traffic to the interstate jurisdiction.
- Determine compensation arrangements for inter-carrier transport and termination of ISP-bound traffic in a generic proceeding and modify limitations on the use of bill-and-keep arrangements to render it a viable option.
- Establish guidelines regarding the mechanism carriers should use for purposes of addressing compensation for inter-carrier transport and termination of ISP-traffic, if the FCC concludes that compensation issues should be addressed on the federal level. The ICC recommends that these guidelines allow parties to continue utilizing the negotiation process and bring unresolved issues surrounding ISP-bound traffic to the FCC. Further, local exchange carriers should be responsible for filing tariffs and/or interconnection agreements that address compensation for all ISP-bound traffic at the federal level.
- Establish guidelines regarding the mechanism states should use for purposes of ruling on compensation issues for inter-carrier transport and termination of ISP-traffic, if the FCC concludes that the 251/252 negotiation process should be used.
- Regarding Section 252(i) and Most Favored Nation (“MFN”) issues, the ICC recommends that carriers be bound by the terms and conditions set forth in their interconnection agreements for the full term of the contract. Any agreements opted into by other carriers (which contain inter-carrier compensation arrangements for ISP-bound traffic) via the MFN clause should expire concurrently on the expiration date of the original agreement. Other MFN issues should be addressed in a generic docket dealing with the FCC’s Interconnection Rules.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Myra Karegianes", written over a horizontal line.

Myra Karegianes
General Counsel
Thomas R. Stanton
Special Assistant Attorneys General
Illinois Commerce Commission