



The Commonwealth of Massachusetts
DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY

July 11, 2000

D.T.E. 97-116-E

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

ORDER DENYING GLOBAL NAPS, INC.'S MOTION TO VACATE THE DEPARTMENT
OF TELECOMMUNICATIONS AND ENERGY'S ORDERS, D.T.E. 97-116-C AND
D.T.E. 97-116-D/99-39, AND TO REINSTATE D.T.E. 97-116

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I. INTRODUCTION

On May 19, 1999, the Department of Telecommunications and Energy ("Department") issued MCI WorldCom Technologies, Inc., D.T.E. 97-116-C (1999). D.T.E. 97-116-C authorized New England Telephone and Telegraph Company, d/b/a Bell Atlantic - Massachusetts ("Bell Atlantic" or "BA-MA") to cease making reciprocal compensation payments for traffic terminated by Competitive Local Exchange Carriers ("CLECs") to Internet Service Providers ("ISPs"). The Department determined that traffic to ISPs constitutes "non-local interstate" traffic, rather than "local" traffic subject to reciprocal compensation pursuant to approved interconnection agreements. D.T.E. 97-116-C at 19-31.

In deciding D.T.E. 97-116-C, the Department relied on the holding of the Federal Communications Commission ("FCC") in Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling, 14 FCC Rcd 3689 (1999) ("Internet Traffic Order"). In the Internet Traffic Order, the FCC employed an "end-to-end" or "one-call" analysis and concluded that ISP-bound traffic does "not terminate at the ISP's local server . . . but continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that often is located in another state." Id. at ¶ 12. As such, the FCC determined that ISP-bound traffic was not subject to reciprocal compensation under the terms of the Telecommunications Act of 1996 ("1996 Act").¹ Id. at ¶ 26 n.87.

¹ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, et seq.).

D.T.E. 97-116-C vacated a prior Department Order, D.T.E. 97-116 (1998), decided before the FCC's Internet Traffic Order, in which the Department had ruled that ISP-bound traffic was "local" and therefore eligible for reciprocal compensation. D.T.E. 97-116, at 11. On February 25, 2000, the Department issued a joint order, D.T.E. 97-116-D/99-39 (2000), denying parties' motions for reconsideration of D.T.E. 97-116-C and dismissing as moot a related complaint by Global NAPs, Inc. ("GNAPs").

On March 24, 2000, the United States Court of Appeals for the District of Columbia Circuit vacated the FCC's Internet Traffic Order and remanded the case to the FCC, stating that the FCC failed to explain adequately the basis for its use of an "end-to-end" analysis within the context of reciprocal compensation. Bell Atlantic Telephone Companies v. Federal Communications Commission, 206 F.3d 1, 3 (D.C. Cir. 2000) ("D.C. Circuit Court decision"). On April 5, 2000, GNAPs filed a Motion to Vacate the Department's Orders in D.T.E. 97-116-C and D.T.E. 97-116-D/99-39, and to reinstate D.T.E. 97-116 ("Motion"). GNAPs asserts that the D.C. Circuit Court's decision to vacate and remand the FCC's Internet Traffic Order nullified the Department's Orders which relied upon that FCC ruling (Motion at 2). Comments on GNAPs' Motion were filed by the following: RNK, Inc. d/b/a RNK Telecom ("RNK"); Conversent Communications of Massachusetts, LLC ("Conversent"); MCI WorldCom, Inc., now WorldCom, Inc. ("WorldCom"); jointly by RCN-BecoCom, LLC, Allegiance Telecom of Massachusetts, Inc., and Focal Communications Corporation (collectively, "RCN"); Norfolk County Internet ("Norfolk"); AT&T Communications of New England, Inc. ("AT&T"); GNAPs; and Bell Atlantic. Reply comments were filed by WorldCom, AT&T, RCN and Bell Atlantic.

II. GNAPs' MOTION

GNAPs argues that the FCC's Internet Traffic Order was the sole basis of the Department's Orders D.T.E. 97-116-C and D.T.E. 97-116-D/99-39 (Motion at 2). GNAPs asserts that because the Internet Traffic Order was vacated, so too must the Department vacate its Orders that were based on the Internet Traffic Order (id.). Furthermore, GNAPs argues that with the Internet Traffic Order vacated, the Department and the parties are in the same positions as before the issuance of the Internet Traffic Order, and therefore the Department's Order D.T.E. 97-116 must be reinstated (id. at 3-4).

III. POSITIONS OF THE PARTIES AND COMMENTERS²

A. CLECs³

The CLECs assert that the D.C. Circuit Court's decision vacating the FCC's Internet Traffic Order as well as a recent decision by the Fifth Circuit⁴ clearly establish an obligation to pay reciprocal compensation for termination of ISP-bound traffic (RNK Comments at 1; Conversent Comments at 3; WorldCom Comments at 6; RCN Comments at 5). The CLECs assert that the holdings in these cases require the Department to vacate its decisions in

² In addition to the parties to D.T.E. 97-116, the Department allowed comments from all service list members. As distinct from parties, commenters have no right to appeal as to matters of law from final orders issued by the Department. See G.L. c. 25, § 5; G.L. c. 30A, § 1(3); 220 C.M.R. § 1.03.

³ For ease of reference and because their arguments are similar, we refer to GNAPs, RNK, Conversent, WorldCom, RCN, Norfolk and AT&T collectively as "the CLECs."

⁴ Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, 208 F.3d 475 (5th Cir. 2000) (upholding Texas PUC decision that carriers' interconnection agreements require calls to ISPs be treated as local traffic subject to reciprocal compensation) ("Fifth Circuit decision").

D.T.E. 97-116-C and D.T.E. 97-116-D (RNK Comments at 1; Conversent Comments at 3; WorldCom Comments at 6, 10; AT&T Comments at 4⁵; AT&T Reply Comments at 3). The CLECs argue that the D.C. Circuit Court's decision vacating the FCC's Internet Traffic Order removes the entire basis for the Department's setting aside of D.T.E. 97-116 (RNK Comments at 1; Conversent Comments at 3; WorldCom Comments at 7; AT&T Comments at 4). AT&T argues that the Department's prior decision in D.T.E. 97-116-C to vacate D.T.E. 97-116, on the basis that the precedent on which it relied was superseded or vacated by the Internet Traffic Order, now requires the Department to vacate its Orders which relied on the Internet Traffic Order (AT&T Comments at 4). RCN argues that the D.C. Court's decision is a material change in the law that requires the Department to vacate D.T.E. 97-116-C (RCN Reply Comments at 1). In addition, the CLECs assert that the Department should join the majority of state commissions and Federal courts in finding that, absent language in applicable interconnection agreements specifically treating ISP-bound traffic as something other than local, such traffic must be considered local for reciprocal compensation purposes (RNK Comments at 2; WorldCom Comments at 7, 14).

RNK argues that the D.C. Circuit Court raised very serious substantive concerns about the FCC's characterization of ISP-bound traffic (RNK Comments at 2). WorldCom submits that the D.C. Circuit Court determined that calls to ISPs are entitled to reciprocal compensation under FCC regulations (WorldCom Comments at 8). RCN asserts that the D.C. Circuit Court expressly rejected the portion of the Internet Traffic Order relied upon by the

⁵ On May 5, 2000, Norfolk submitted a one-page letter concurring with AT&T's Initial Comments supporting GNAPs' Motion.

Department in vacating D.T.E. 97-116 (RCN Comments at 6). Furthermore, RCN argues that the Court agreed with the CLECs in that neither the FCC's "one-call" analysis nor its jurisdictional definition of when or where a call terminates controls the contracting parties' understanding of that term as set forth in specific interconnection agreements (RCN Comments at 6). RCN further asserts that the D.C. Circuit Court made clear that the FCC's jurisdictional analysis was separate and apart from any determination as to whether calls to ISPs are eligible for reciprocal compensation (RCN Reply Comments at 3). AT&T asserts that the D.C. Circuit Court explicitly held the FCC's use of an "end-to-end" analysis was not supported and that the Court eliminated any possibility that calls to ISPs are anything but local (AT&T Comments at 5-6). AT&T contends that the Court found that ISP-bound calls are not "exchange access"⁶ and therefore constitute "telephone exchange service" subject to reciprocal compensation (AT&T Comments at 7-9).

The CLECs also argue that the Fifth Circuit decision clarifies Bell Atlantic's responsibility to pay reciprocal compensation for calls made to ISPs (RNK Comments at 4; WorldCom Comments at 13-14; RCN Comments at 8). According to the CLECs, the Fifth

⁶ "Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services." 47 U.S.C. § 153(16). "Telephone exchange service" is defined as:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47).

Circuit properly found that ISP-bound traffic is local for reciprocal compensation purposes (RNK Comments at 4; WorldCom Comments at 14; RCN Comments at 5). RCN asserts that the Fifth Circuit Court decision likewise rejected the arguments that the Department had relied on in vacating D.T.E. 97-116 (RCN Comments at 8). RCN states that the Fifth Circuit concluded that a state commission's determination that reciprocal compensation obligations encompass ISP-bound traffic does not conflict with the 1996 Act or with any FCC rule regarding such traffic (*id.* at 8).

The CLECs agree with GNAPs that D.T.E. 97-116 should be reinstated (RNK Comments at 4; Conversent Comments at 3; WorldCom Comments at 10). The CLECs urge the Department to reject Bell Atlantic's recommendation to take no action until the FCC issues a decision on remand, arguing that there is no justification for such a delay (WorldCom Reply Comments at 3-4; AT&T Reply Comments at 2-3). RNK contends that it is proper for the Department to return to its pre-Internet Traffic Order status while the FCC revises its decision in compliance with the D.C. Circuit Court's decision (RNK Comments at 3). RCN contends that in D.T.E. 97-116, the Department correctly applied prevailing Federal law in determining that parties to the interconnection agreement were obligated to compensate each other for all local traffic, including ISP-bound traffic (RCN Comments at 5). RCN also contends that if the FCC issues a new decision, then the parties can address the impact, if any, of that decision. but in the meantime, the Department should reinstate D.T.E. 97-116 (RCN Reply Comments at 4-5). RNK claims that the Department, in the D.T.E. 97-116-C and D.T.E. 97-116-D Orders, interfered with the parties' express contractual intent that all local traffic, including ISP-bound traffic, generates reciprocal compensation, while D.T.E. 97-116 properly treated

ISP-bound traffic consistent with the parties' intent (RNK Comments at 2-3). WorldCom argues that D.T.E. 97-116 was a proper exercise of the Department's jurisdiction to interpret and enforce interconnection agreements and it is within the Department's jurisdiction to reinstate that Order (WorldCom Comments at 14). RNK argues there are two pragmatic reasons for reinstatement of D.T.E. 97-116 and the payment of reciprocal compensation for ISP-bound traffic: first, CLECs are currently incurring costs for terminating ISP-bound traffic but are receiving no compensation for it; and second, the catch-up payment by Bell Atlantic will not have to be as large and CLECs will have the needed revenues for network infrastructure and advancements (RNK Comments at 5). RCN also recommends that, in addition to reinstating D.T.E. 97-116, the Department should direct Bell Atlantic to pay all past-due reciprocal compensation with interest (RCN Comments at 10).

WorldCom argues that Bell Atlantic's claim that FCC decisions other than the Internet Traffic Order support Bell Atlantic's position against reciprocal compensation for ISP-bound traffic has been rejected by every court to have considered it (WorldCom Reply Comments at 4-6). Likewise, the CLECs reject Bell Atlantic's reliance on the FCC's Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, CC Docket Nos. 98-147, et al., FCC 99-413 (released Dec. 23, 1999) ("Advanced Services

Remand Order")⁷, as being unrelated to the issues of reciprocal compensation or to state commission authority concerning interconnection agreements (WorldCom Reply Comments at 6; RCN Reply Comments at 3-4). AT&T states that the nature of Bell Atlantic's obligation to pay reciprocal compensation for ISP-bound calls is established by its interconnection agreements (AT&T Reply Comments at 4). AT&T further argues that Bell Atlantic has breached its contractual obligations under its interconnection agreements by asking the Department to rule on reciprocal compensation for ISP-bound calls without first raising the issue through contractual dispute resolution procedures (AT&T Reply Comments at 5).

B. Bell Atlantic

Bell Atlantic urges the Department to wait until the FCC addresses the D.C. Circuit Court's concerns on remand (BA-MA Reply Comments at 3). According to Bell Atlantic, because it has been the Department's intent to follow the FCC's classification of ISP-bound traffic, the Department should take no action until the FCC provides the further explanation required by the Court (BA-MA Reply Comments at 3). Bell Atlantic further argues that the D.C. Circuit Court's decision to vacate and remand the Internet Traffic Order does not require the Department to vacate its related Orders (BA-MA Comments at 2; BA-MA Reply Comments at 2-3). Bell Atlantic contends that the D.C. Circuit Court did not find that the FCC's "one-call" or "end-to-end" analysis was wrong as a matter of law, or that it was an

⁷ In the Advanced Services Remand Order at ¶ 16, in a discussion about xDSL-based services, the FCC stated, "typically ISP-bound traffic does not originate and terminate within an exchange and, therefore, does not constitute telephone exchange service within the meaning of the 1996 Act." However, the FCC did not make this argument in its Internet Traffic Order and the FCC issued the Advanced Services Remand Order after oral argument in the D.C. Circuit case. Bell Atlantic v. FCC, 206 F.3d at 8-9.

impermissible interpretation of the 1996 Act's reciprocal compensation provisions (BA-MA Comments at 4; BA-MA Reply Comments at 2). Bell Atlantic argues that the D.C. Circuit Court likewise did not find that the "two-call" analysis endorsed by the CLECs was the appropriate method of determining the jurisdiction of ISP-bound traffic and that the Court did not determine that ISP-bound traffic is either "telephone exchange service" or "exchange access service" (BA-MA Comments at 4; BA-MA Reply Comments at 2). Bell Atlantic asserts that the Court took issue with the Internet Traffic Order because the FCC failed to explain adequately how its end-to-end analysis was controlling for the purposes of reciprocal compensation (BA-MA Comments at 4-5; BA-MA Reply Comments at 2). Bell Atlantic argues that the Court left the FCC free on remand to reach the same result as in its Internet Traffic Order (BA-MA Reply Comments at 3).

Bell Atlantic further asserts that the FCC will not change its position on the non-local character of ISP-bound traffic (BA-MA Reply Comments at 3-4). Bell Atlantic contends that in view of the FCC's ruling in its Advanced Services Remand Order, in which the FCC held that ISPs provide exchange access service to their subscribers, it is unlikely that the FCC could conclude on remand that ISP-bound traffic is jurisdictionally local and subject to reciprocal compensation rules (BA-MA Reply Comments at 6-7). According to Bell Atlantic, the Department has no basis for taking any action to vacate its rulings premised on the Internet Traffic Order or reinstate previous rulings until the FCC provides the further explanation mandated by the D.C. Circuit Court (BA-MA Comments at 5; BA-MA Reply Comments at 3). Bell Atlantic further argues that the Department's Orders sought to be vacated by GNAPs are not unfair or anti-competitive (BA-MA Comments at 6). Bell Atlantic asserts that the

Department has declared that the payment of reciprocal compensation for ISP-bound traffic was predicated on a "loophole" and constituted a "regulatory anomaly," and therefore, should not be a source of benefit for the CLECs while the matter is before the FCC (BA-MA Comments at 6-7).

Bell Atlantic further argues that the Fifth Circuit Court decision relied upon by the CLECs does not support GNAPs' Motion (BA-MA Reply Comments at 8). Bell Atlantic contends that the Fifth Circuit Court's decision to uphold the Texas Public Utilities Commission's determination that parties to an interconnection agreement had agreed to pay each other reciprocal compensation for Internet traffic was not surprising since under 47 U.S.C. § 252(e)(2)(A), the terms of a negotiated agreement do not have to conform to the requirements of the 1996 Act (BA-MA Reply Comments at 9). In Massachusetts, Bell Atlantic argues, it only agreed to pay reciprocal compensation for local traffic as required by the 1996 Act (BA-MA Reply Comments at 9). Bell Atlantic further disputes that it intended to pay reciprocal compensation for ISP-bound traffic at all (BA-MA Reply Comments at 10).

IV. ANALYSIS AND FINDINGS

In ruling on GNAPs' Motion, the Department assesses whether (1) the vacatur and remand of the FCC's Internet Traffic Order requires the Department to vacate D.T.E. 97-116-C and D.T.E. 97-116-D/99-39; and (2) whether vacating our previous Orders is the appropriate course of action. The parties correctly state that the Department concluded in D.T.E. 97-116-C that the FCC's Internet Traffic Order removed the sole and express basis for the Department's holding in D.T.E. 97-116 and that the net effect of the Internet Traffic Order was to nullify D.T.E. 97-116. D.T.E. 97-116-C at 24. For this reason, the Department

vacated D.T.E. 97-116. Id. at 25. However, for the reasons discussed below, the Department concludes that a vacatur of D.T.E. 97-116-C and D.T.E. 97-116-D/99-39, is neither necessary nor appropriate following the D.C. Circuit Court's vacatur and remand of the FCC's Internet Traffic Order.

As an initial matter, GNAPs' and the CLECs' argument that the Department's action (in this case, vacatur) in one proceeding necessarily requires similar action in a subsequent proceeding lacks merit. The Department rules on each motion in each proceeding based on the form and contents of the motion before it and on the specific facts before the Department at that time. See Boston Edison Company, D.P.U. 97-63, at 10, Interlocutory Order on Motions to Vacate and Reconsider (October 10, 1997) ("[n]o argument can be made that intervention in one proceeding serves as a basis for intervention in another, even similar proceeding").

The present situation differs greatly from what the Department faced in considering vacatur of D.T.E. 97-116. At that time, the Internet Traffic Order characterizing ISP-bound traffic as "non-local" was an FCC final ruling and the only pending proceeding was the FCC's rulemaking on pricing of such traffic. The FCC's Internet Traffic Order invalidated the Department's "two-call" premise in D.T.E. 97-116. Now, this same FCC decision is on remand for further explanation, a process which may lead either to the FCC's articulating a clearer basis for its earlier decision or to its modifying that earlier decision (see further discussion, below). The FCC recently released a Public Notice seeking comment on the issues identified by the D.C. Circuit Court and establishing a pleading cycle.⁸ In the Public Notice

⁸ Comment Sought On Remand of the Commission's Reciprocal Compensation

(continued...)

at 2, the FCC asks for comments on the jurisdictional nature of ISP-bound traffic, as well as the scope of the reciprocal compensation requirements of 47 U.S.C. § 251(b)(5). The FCC also requests comment on inter-carrier compensation arrangements for ISP-bound traffic that parties have considered or entered into during the pendency of the FCC's proceeding. Id. Therefore, the set of conditions (a definitive FCC Order) that compelled the Department's vacatur of D.T.E. 97-116 do not exist in the current situation (a remand for further explanation), and the Department is not under the same obligation to vacate D.T.E. 97-116-C and D.T.E. 97-116-D/99-39. The prudent course is to await FCC action on its Public Notice.

Notwithstanding the Department's earlier vacatur of D.T.E. 97-116, the CLECs' argument that the D.C. Circuit Court's decision to vacate and remand the Internet Traffic Order constitutes such a substantial change that D.T.E. 97-116-C, and by extension D.T.E. 97-116-D/99-39, must be vacated, is incorrect. D.T.E. 97-116-C is a final Order issued by the Department following extensive deliberation and decided in accordance with the law. The Department affirmed D.T.E. 97-116-C in response to parties' motions for reconsideration. D.T.E. 97-116-D/99-39, at 16. D.T.E. 97-116-C remains in effect unless a court of competent jurisdiction rules otherwise or the Department in the exercise of its jurisdiction changes the Order. See Joyce v. George W. Prescott Pub. Co., 355 Mass. 795 (1969) (petition to vacate was properly denied where it sought review and reversal but did not show or

⁸(...continued)

Declaratory Ruling By the U.S. Court of Appeals for the D.C. Circuit, Public Notice, CC Docket Nos. 96-98, 99-68, FCC 00-227 (rel. June 23, 2000) ("Public Notice"). In the Public Notice, the FCC seeks comments by July 21, 2000, and reply comments by August 4, 2000. Id. A copy of the Public Notice is appended to this Order.

suggest that judgment was entered otherwise than in accordance with law); see also Galvin v. Welsh Manufacturing Co., 382 Mass. 340 (1981); Bouchard v. DeGagne, 368 Mass. 45 (1975) (holding that if a judgment is final, changes in the law alone would not justify re-opening that judgment). In addition, the Department has broad discretion to decide whether or not to vacate a judgment. See Tai v. City of Boston, 45 Mass. App. Ct. 220, 224 (1998) ("[d]ecisive in the instant case is that, ultimately, resolution of motions for relief from judgment repose in the broad discretion of the motion judge."); see also Mass. R. Civ. P. 60(b)(6)⁹ ("[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for any other reason justifying relief from operation of the judgment").

Also, the Department notes the FCC's past practice of preserving the status quo in certain proceedings during the interim between vacatur by a court and FCC action on remand. See e.g., February 8, 1999, Letter from Edward D. Young, III, Bell Atlantic Senior Vice-President and Deputy General Counsel to Lawrence Strickling, FCC Common Carrier Bureau Chief, confirming Bell Atlantic's continued commitment following vacatur to provide all of the individual network elements listed in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997) and Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th

⁹ Although the Department is not required to follow the rules of evidence, or rules of civil procedure followed by the courts, the Department often uses these rules for guidance. See 220 C.M.R. §§ 1.06(6)(c)(2); 1.06(6)(c)(4); 1.10(1).

Cir. 1997), aff'd in part and remanded, AT&T Corp. et al. v. Iowa Utils. Bd, et al., 525 U.S. 366 (1999). This letter is part of the public docket in Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-J (1999). In that case, the Department based a significant policy determination (namely -- ordering the availability of the unbundled network element platform) on the preservation of the status quo pending a final FCC decision on remand. See id. at 9. Therefore, for the above reasons, the Department concludes that it is not *required to vacate* D.T.E. 97-116-C and D.T.E. 97-116-D/99-39, as suggested by GNAPs and the CLECs, as a result of the changes in the current state of federal law regarding reciprocal compensation for ISP-bound traffic brought about by the D.C. Circuit Court's decision.

Moreover, the Department does not agree with GNAPs and the CLECs that the D.C. Circuit Court's decision requires the FCC to find on remand that ISP-bound traffic is "local" for the purposes of the 1996 Act. Certainly, the D.C. Circuit Court raised concerns with the Internet Traffic Order, and questioned the FCC's analysis. However, the CLECs have incorrectly expanded the D.C. Circuit Court's holding by claiming the Court definitively determined that ISP-bound traffic is "local" traffic subject to reciprocal compensation.¹⁰ The CLECs distort its message. In fact, following the remand by the D.C. Circuit Court, the FCC

¹⁰ In the D.C. Circuit Court decision, the Court stated, "[b]ecause the Commission has not supplied a real explanation for its decision to treat end-to-end analysis as controlling . . . we must vacate the ruling and remand the case." 206 F.3d at 8. Further, the Court's recurrent use of the word "appears," as in "[the difference between ISPs and traditional long distance carriers] appears relevant for the purposes of reciprocal compensation," (Id. at 6-7) indicates that the Court is not making definitive findings but rather indicating the areas in which it requires the FCC to provide satisfactory or "real" explanation. Id. at 6, 7.

could, with adequate explanation and analysis, confirm its determination in Internet Traffic Order that ISP-bound traffic is not subject to reciprocal compensation under the 1996 Act. Therefore, although the Department cannot predict the FCC's conclusions on remand, the change in federal law asserted by GNAPs and the CLECs may well be temporary at best -- especially considering the Advanced Services Remand Order.

Unquestionably, the D.C. Circuit Court vacated and remanded the FCC's Internet Traffic Order, and the Department will be bound by the determinations made by the FCC on remand, whatever those determinations may be. Because the Department and the parties will be bound when the FCC acts on remand, it is impractical for the Department to follow GNAPs and the CLECs' recommendation to career back and forth with alternating decisions on the very issue even now under review by the FCC. The Department determines that stability during the interim by upholding the finality of D.T.E. 97-116-C and D.T.E. 97-116-D/99-39 is the better course. See Chiu-Kun Woo v. Moy, 17 Mass. App. Ct. 949 (1983) (concern about finality of litigation is an appropriate consideration when acting on a motion for relief from judgment). Therefore, the Department declines to grant GNAPs' Motion to Vacate D.T.E. 97-116-C and D.T.E. 97-116-D/99-39. As the Department has concluded that it will not vacate these Orders, we do not reach GNAPs' request and the CLECs' recommendation to reinstate the Department's Order D.T.E. 97-116.

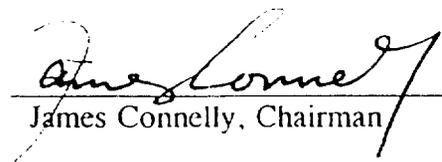
V. ORDER

Accordingly, after due notice and consideration, it is hereby

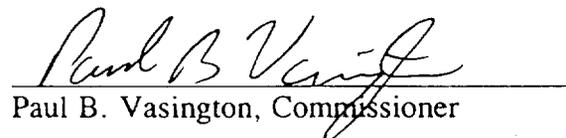
ORDERED: That GNAPs' Motion to Vacate D.T.E. 97-116-C and D.T.E.

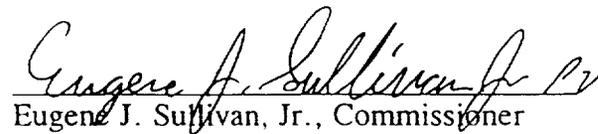
97-116-D/99-39, and reinstate D.T.E. 97-116, is hereby DENIED.

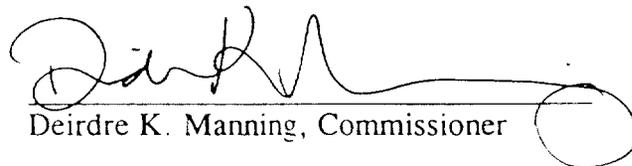
By Order of the Department,


James Connelly, Chairman


W. Robert Keating, Commissioner


Paul B. Vasington, Commissioner


Eugene J. Sullivan, Jr., Commissioner


Deirdre K. Manning, Commissioner

A true copy
Attest.


Mary B. Cottrell
Secretary

Appeal of this final Order shall be taken in accordance with applicable law. Timing of the filing of such appeal is governed by the applicable rules of the appellate body to which the appeal is made.



PUBLIC NOTICE

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Released: June 23, 2000

Comment Sought On Remand Of The Commission's Reciprocal Compensation Declaratory Ruling By The U.S. Court Of Appeals For The D.C. Circuit

Pleading Cycle Established

CC Docket Nos. 96-98, 99-68

COMMENTS: July 21, 2000

REPLY COMMENTS: August 4, 2000

On February 26, 1999, the Commission released a Declaratory Ruling and Notice of Proposed Rulemaking to address the issue of inter-carrier compensation for the delivery of telecommunications traffic to an Internet service provider (ISP).¹ In the *Reciprocal Compensation Ruling*, the Commission determined that ISP-bound calls are not local calls subject to reciprocal compensation under our rules implementing section 251(b)(5) of the Act.² Using an "end-to-end" analysis of these calls, the Commission concluded that ISP-bound calls do not terminate at the ISP's local server, but instead continue to one or more Internet websites that are often located in another state.³ It therefore found that ISP-bound calls are jurisdictionally mixed, largely interstate, and thus not subject to reciprocal compensation.⁴ The Commission also acknowledged that there was no federal rule establishing an inter-carrier compensation mechanism for such traffic or governing what amounts, if any, should be paid.⁵ In the absence of a federal rule regarding the appropriate inter-carrier compensation for ISP-bound traffic, the Commission held that parties were bound by their interconnection agreements as interpreted and enforced by state commissions.⁶ The Commission sought comment, therefore, in the *Reciprocal Compensation Ruling*, on a federal inter-carrier compensation mechanism for ISP-bound traffic.⁷

¹ See implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, 14 FCC Rcd 3689 (1999) (*Reciprocal Compensation Ruling*).

² *Reciprocal Compensation Ruling*, 14 FCC Rcd at 3706; see also 47 U.S.C. § 251(b)(5).

³ *Id.* at 3695-3703.

⁴ *Id.* at 3690, 3695-3703.

⁵ *Id.* at 3689-90, 3695.

⁶ *Id.* at 3690, 3703.

⁷ *Id.* at 3707-3710.

On March 24, 2000, the United States Court of Appeals for the D.C. Circuit vacated certain provisions of the *Reciprocal Compensation Ruling*, and remanded the matter to the Commission.⁸ The court ruled that the Commission had not adequately justified the application of its jurisdictional analysis in determining whether a call to an ISP is subject to the reciprocal compensation requirement of section 251(b)(5).⁹ The court noted that (1) the Commission failed to apply its definition of "termination" to its analysis;¹⁰ and (2) cases upon which the Commission relied in its end-to-end analysis can be distinguished on the theory that they involve continuous communications switched by IXCs, as opposed to ISPs, which are not telecommunications providers.¹¹ The court also found that a remand was required because the Commission did not provide a satisfactory explanation as to how its conclusions regarding ISP-bound traffic accord with the statutory definitions of "telephone exchange service" and "exchange access service."¹²

We seek comment on the issues identified by the court in its decision. In particular, we ask parties to comment on the jurisdictional nature of ISP-bound traffic, as well as the scope of the reciprocal compensation requirement of section 251(b)(5), and on the relevance of the concepts of "termination," "telephone exchange service,"¹³ "exchange access service,"¹⁴ and "information access."¹⁵ In addition, we seek to update the record in the pending rulemaking proceeding by inviting parties to comment on any *ex parte* presentations filed after the close of the reply period on April 27, 1999. Finally, we seek comment regarding any new or innovative inter-carrier compensation arrangements for ISP-bound traffic that parties may be considering or may have entered into, either voluntarily or at the direction of a state commission, during the pendency of this proceeding.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. See 47 C.F.R. §§ 1.1200, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. See 47 C.F.R. § 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-

⁸ See *Bell Atl. Tel. Companies v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000).

⁹ See *id.* at 3-6.

¹⁰ See *id.* at 6.

¹¹ See *id.* at 6-7.

¹² See *id.* at 8-9.

¹³ See 47 U.S.C. § 153(47).

¹⁴ See 47 U.S.C. § 153(16).

¹⁵ See 47 U.S.C. § 251(g); see also 47 U.S.C. § 153(20).

disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

Interested parties may file comments no later than July 21, 2000. Reply comments may be filed no later than August 4, 2000. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.¹⁶ When filing comments, please reference CC Docket Nos. 96-98, 99-68.

Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties also may submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail message to ecfs@fcc.gov and include "get form <your e-mail address>" in the body of the message. A sample form and directions will be sent in reply.

An original and four copies of all comments and reply comments filed by paper must be filed with the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 - 12th Street, S.W., TW-A325, Washington, D.C. 20554. In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 1231 - 20th Street, N.W., Washington, D.C. 20036, and one copy with the Chief, Competitive Pricing Division, 445 - 12th Street, S.W., T.W - A225, Washington, D.C. 20554.

Action by the Commission on June 22, 2000.

For further information, contact Rodney McDonald, Competitive Pricing Division, Common Carrier Bureau, (202) 418-1520.

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¹⁶ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).