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1020 Nineteenth Street NW
Suite 700
Washington, DC 20036
303 896-1446
fax: 202 296-5157

John W. Kure
Executive Director - Federal Regulatory

Qwest

Ex Parte

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 4, 2001

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 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 December 21, 2000, the Iowa Utilities Board released an order in the arbitration case between Sprint and Qwest regarding the payment of reciprocal compensation for ISP-bound traffic. The Board found that:

> Reciprocal compensation for ISP-bound traffic would introduce a series of unwanted distortions into the market: cross-subsidization of CLECs, ISPs and Internet users by the ILECs customers who do not use the Internet, excessive use of the Internet, excessive entry into the market by CLECs specializing in ISP traffic mainly for the purpose of receiving compensation from the ILECs, and disincentives for CLECs to offer either residential service or advanced services.

From a policy perspective the Iowa Board decision is clearly correct and merits serious consideration by this Commission in resolving the ISP reciprocal compensation issues currently before it.

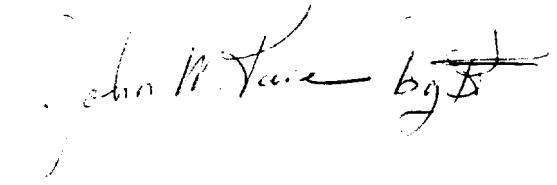
The Iowa Board decision also illustrates a key element in the analysis of the ISP reciprocal compensation issue. The Board determined that "the determination in this arbitration proceeding [does not] turn[] on the distinction between whether ISP-bound traffic is 'local' or 'interstate.'" This determination permitted the Board to exercise its traditional and historical functions of determining regulatory decisions in a manner consistent with the best interests of the people of the State of Iowa without regard to analysis of how Sections 251(b)(5) and 252(d)(2) of the Act should be interpreted. Qwest believes that the issue of whether traffic delivered to the Internet is interstate in nature has been answered in the affirmative in the original ISP reciprocal

compensation order and was left undisturbed in Court ruling in Bell Atlantic v. FCC.[1] One of the critical questions which remains for this Commission to answer in this proceeding is whether Internet access services which this Commission has held to be jurisdictionally interstate are nevertheless properly definable as "transport and termination" under Sections 251(b)(5) and 252(d)(2) of the Act. The Iowa Board's ability to make its public interest determination about the propriety of reciprocal compensation for traffic delivered to ISPs necessarily implicates the question of whether this traffic is subject to Sections 251(b)(5) and 252(d)(2) of the Act at all. As we have pointed out in the past, the most legally reasonable approach for the Commission to take in this proceeding is to determine, correctly, that ISP traffic is not subject to the reciprocal compensation provisions of the Act. The attached Order of the Iowa Board confirms the correctness of this recommendation.

In accordance with Section 1.1206(b)(2) of the FCC's Rules, an original and two copies of this letter are being filed with your office for inclusion in the public record.

Acknowledgement and date of receipt of this submission are requested. A duplicate of this letter is provided for this purpose. Please call if you have any questions.

Sincerely,



Attachment

cc: Kyle Dixon, Rebecca Beynon, Deena Shetler, Jordan Goldstein, Anna Gomez, Tamara Preiss, Dorothy Attwood

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[1] See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, 14 FCC Rcd. 3689 (Rel. Feb. 26, 1999), vacated on other grounds, Bell Atlantic Tel. Cos. v. FCC, 206 F. 3d 1 (DC Cir. 2000).

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE ARBITRATION OF: SPRINT COMMUNICATIONS COMPANY L.P., Petitioning party, And U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION, Responding party.	DOCKET NO. ARB-00-1

ARBITRATION ORDER

(Issued December 21, 2000)

On June 21, 2000, Sprint Communications Company L.P. (Sprint) filed a petition requesting arbitration of the unresolved issues in the interconnection negotiations between itself and U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest). The issues set forth in the petition included reciprocal compensation for traffic delivered to enhanced service providers (ESPs); availability and charges for unbundled network elements; vertical features; and access charges for local services. Of these issues, only the issue of reciprocal compensation remains unresolved by the parties for determination by the Utilities Board (Board).

Qwest filed its response to the petition on July 17, 2000, pursuant to 47 U.S.C. § 252(b)(3). Following the filing of testimony, a hearing was held on October 18, 2000.

The initial petition defined the issue as follows:

> Reciprocal compensation should be paid for ISP-bound traffic because such traffic is local or should be treated as local for purposes of inter-carrier compensation.

In its petition, Sprint described its request related to the reciprocal compensation issue stating,

> Sprint requests that the Board find that traffic terminated to an ISP is local and even if it is not "local" in the strictest sense of the word, it should be subject to termination rates that are equal to those paid for other types of local traffic.

This statement of its request caused some confusion as to whether the Board was being asked to determine the "termination rate" referred to in the petition. This was clarified through questioning at the hearing, enabling the Board to frame the ultimate issue for its determination as follows:

> For purposes of this interconnection agreement, will internet service provider (ISP) bound traffic be included in the quantification of "local traffic" under 199 IAC 38.6, which permits the Board to approve monetary compensation in circumstances where the total terminating to originating traffic for the exchange of mutual traffic between facilities-based local exchange companies is unbalanced?

Although Iowa is known as a "bill and keep" state, it isn't a pure bill and keep state. Compensation is handled on a bill and keep basis until circumstances exist where the total terminating to originating traffic for the exchange of mutual traffic between facilities-based local exchange companies is unbalanced. At that time, under the Board's rules, the Board has an opportunity to order reciprocal compensation, if appropriate.

The Federal Communications Commission (FCC) has ruled that ISP-bound traffic is interstate in nature.[1] This order was vacated and remanded to the FCC by the D.C. Circuit Court of Appeals, ruling that the FCC had not yet provided an adequate explanation of why such traffic is exchange access rather than telephone exchange service.

The Board does not agree that the determination in this arbitration proceeding turns on the distinction between whether ISP-bound traffic is "local" or "interstate." Other state commissions have struggled with this issue and there is no consensus among the states as to what is the most appropriate and beneficial way to address the issue of reciprocal compensation for ISP-bound traffic. The Board desires that its determination be one that will encourage and foster increased competition in the local market.

The Board agrees with much of the analysis of the Massachusetts Department of Telecommunications and Energy. Quoting from the Massachusetts order:

> The unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition. A loophole, in a word. There is, however—and we emphasize this point—nothing sinister or even improper about taking advantage of an opportunity such as the one presented by our October Order. One

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[1] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, 14 FCC Rcd 3689 (rel. Feb. 26, 1999) (ISP Order), vacated on other grounds in, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

> would not expect profit-maximizing enterprises like CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited. Create an opportunity and inventive enterprise will seize upon it. It was ever thus. But regulatory policy, while it may applaud such displays of commercial energy, ought not create such loopholes or, once having recognized their effects, ought not leave them open.
>
> Real competition is more than just shifting dollars from one person's pocket to another's. And it is even more than the mere act of some customers' choosing between contending carriers. Real competition is not an outcome in itself—it is a means to an end. The "end" in this case is economic efficiency, which Baumol and Sidak have defined as "that state of affairs in which, as the specialized literature of welfare economics recognizes, no opportunity to promote the general welfare has been neglected. Such an opportunity is defined as the availability of a course of action that will benefit at least some individuals, in their own estimation, in a way not achieved at the expense of others." Toward Competition in Local Telephony, at 24 (emphasis added). Failure by an economic regulatory agency to insist on true competition and economic efficiency in the use of society's resources is tantamount to countenancing and, to some degree, encouraging waste of those resources. Clearly, continuing to require payment of reciprocal compensation along the lines of our October Order is not an opportunity to promote the general welfare. It is an opportunity only to promote the welfare of certain CLECs, ISPs, and their customers, at the expense of Bell Atlantic's telephone customers and shareholders.

MCI WorldCom Technologies, Inc., D.T.E. 97-116 (issued 5-19-99) pp. 9-10.

Reciprocal compensation for ISP-bound traffic would introduce a series of unwanted distortions into the market: cross-subsidization of CLECs, ISPs, and Internet users by the ILECs customers who do not use the Internet, excessive use of the Internet, excessive entry into the market by CLECs specializing in ISP traffic mainly for the purpose of receiving compensation from the ILECs, and disincentives for CLECs to offer either residential service or advanced services.

Without reaching any decision as to whether ISP-bound traffic is "local" or "interstate" in nature, the Board will not order the payment of reciprocal compensation on ISP-bound traffic. The proposed language of Sprint for inclusion in the interconnection agreement as provision (C)2.3.4.1.3 specifies that the traffic is local, while Qwest's proposed language identifies the traffic as primarily interstate in nature. Because it has not reached a determination on the nature of the ISP-bound traffic, the Board must reject the proposed language for inclusion in the interconnection agreement of both Sprint and Qwest.

IT IS THEREFORE ORDERED:

The proposed language for provision (C)2.3.4.1.3 of the interconnection agreement between Sprint Communications Company L.P. and U S WEST Communications, Inc., n/k/a Qwest Corporation, shall incorporate the Board's decision that no reciprocal compensation will be paid for ISP-bound traffic.

UTILITIES BOARD

/s/ Susan J. Frye

ATTEST:

/s/ Raymond K. Vawter, Jr.
Executive Secretary

/s/ Diane Munns

Dated at Des Moines, Iowa, this 21st day of December, 2000.