

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of Core Communications, Inc. Petition for Forbearance

WC Docket No. 03-171

OPPOSITION OF VERIZON

Summary

Core's request that the Commission forbear from its rules concerning compensation for ISP-bound calls is a truly bad idea. Granting this request would return the industry to state it was in before the Commission's 2001 order,¹ which the Commission found was plagued by market dysfunction and legal uncertainty. The Commission's findings in that order rightly doom Core's petition, and Verizon² urges the Commission to deny it.

In order to grant forbearance, the Commission must find that forbearance would be "consistent with the public interest."³ However, the Commission found that the compensation system to which Core wants the Commission to return created "an opportunity for regulatory arbitrage and leading to uneconomical results"⁴ that are inconsistent with the public interest.

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("ISP Order").

² The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc., listed in Attachment A.

³ 47 U.S.C. § 160(a)(3).

⁴ *ISP Order* ¶ 21.

One way for the Commission to support a decision to forbear would be to find that “forbearance will promote competition among providers of telecommunications services.”⁵ Such a conclusion would be impossible here in light of the Commission’s findings two years ago that the old compensation system “distorts competition,”⁶ encourages carriers “not [to] offer[] viable local telephone competition,”⁷ “hinders the development of efficient competition in the local exchange and exchange access markets”⁸ and “undermines the operation of competitive markets.”⁹

Forbearance must also be based on a finding that the rule in question “is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable.”¹⁰ However, the Commission found that the compensation system Core advocates “encourages carriers to overuse competing carriers’ *origination* facilities,”¹¹ an unjust and unreasonable result.

Core’s petition does not even try to show that anything has changed since the Commission made these findings. While it makes a brief nod in the direction of section 10 and the criteria for forbearance, it does not even attempt to show how it meets all the criteria set out in the Act. The petition does suggest four reasons, unrelated to the statutory criteria, why the Commission should forbear from enforcing its intercarrier compensation regime. All are just

⁵ 47 U.S.C. § 160(b).

⁶ *ISP Order* ¶ 5.

⁷ *ISP Order* ¶ 21.

⁸ *ISP Order* ¶ 95.

⁹ *ISP Order* ¶ 71.

¹⁰ 47 U.S.C. § 160(a)(1).

¹¹ *ISP Order* ¶ 73 (emphasis in original).

assertions without any attempted proof, are irrelevant to a section 10 analysis or have already been rejected by the Commission. None is remotely sufficient under section 10 of the Act.

Prior Proceedings. It is not hard to understand why Core does not like the Commission's rules. Before the Commission adopted them, carriers like Core could receive "reciprocal compensation" payments from the originating carrier for delivering calls to ISPs under section 251(b)(5) of the Act.¹² In that order, however, the Commission found that calls delivered to the Internet via an ISP are not subject to reciprocal compensation under section 251(b)(5). Instead, the Commission established a new compensation system which was intended, first, to curtail the growth of reciprocal compensation payments for Internet-bound calls and, then, to reduce the level of those payments.

The Commission found that this system was not consistent with the Act and, worse, was creating market distortions that were undermining the goals of the Act. Under this regime, the Commission found "that CLECs target ISPs in large part because of the availability of reciprocal compensation payments."¹³ This was because ISPs do not themselves make outgoing calls, and the calls they receive and direct to the Internet typically are of long duration. Under a reciprocal compensation regime, a CLEC with a large ISP customer base will receive enormous per minute payments from an originating carrier that serves the ISPs' end-user customers, and will pay very little if anything in compensation for calls going the other way. Indeed, the Commission found that some ILECs send CLECs (and pay the CLECs for) 20 to 40 times more traffic than the

¹² "Reciprocal compensation" is the means by which, when LECs collaborate to complete the calls that are subject to section 251(b)(5), the originating LEC pays compensation to the second carrier for "transport and termination" of the calls.

¹³ *ISP Order* ¶ 70.

ILECs receive from the same CLECs, and that 90 percent of CLEC billings for reciprocal compensation are for Internet-bound traffic.¹⁴

This payment system, the Commission said, “created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act.”¹⁵ And “the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.”¹⁶ Core is exactly that sort of CLEC.

By its own admission, Core has no interest in being a real local service competitor, but is merely in the game in order to take advantage of “regulatory arbitrage opportunities”¹⁷ in collecting reciprocal compensation. It is one of those companies whose activities “undermine[] the operation of competitive markets”¹⁸ and pervert a system that the Commission established to provide real competitors with fair compensation for the services they provide.

Core has never liked the Commission’s rules concerning compensation for ISP-bound calls. Immediately after the Commission adopted them, Core filed a mandamus petition with the D.C. Circuit asking the court to vacate the new rules summarily,¹⁹ a request which that court rejected.²⁰ At the same time, Core also asked the D.C. Circuit²¹ to stay the rules pending appeal.

¹⁴ *ISP Order* ¶¶ 69-70.

¹⁵ *ISP Order* ¶ 21.

¹⁶ *ISP Order* ¶ 21.

¹⁷ *ISP Order* ¶ 67.

¹⁸ *ISP Order* ¶ 71.

¹⁹ Emergency Petition of Core Communications, Inc. for Enforcement of Mandate, No. 01-1254, dated June 4, 2001 (D.C. Cir.).

²⁰ *In re Core Communications Inc.*, Order, No. 01-1254 (D.C. Cir. June 14, 2001).

The Commission vigorously opposed the stay request,²² and the court promptly denied it too.²³ Core appealed, but even before the appeal was argued, Core petitioned the Commission for a waiver of these rules.²⁴ Then, when the D.C. Circuit remanded this matter to the Commission,²⁵ Core asked that court to reconsider and to vacate the rules.²⁶ When the court denied that request,²⁷ Core sought a hearing from the Supreme Court,²⁸ which was also denied.²⁹

Now, here they go again with a new and different attack.

Core Offers No Facts To Support Forbearance. Core's first reason why the Commission should forbear is that the rules are "legally unsound."³⁰ This, of course, is not a ground for forbearance under section 10; it is a subject that will be before the Commission on remand of the order from the court.

Moreover, while the court of appeals found that section 251(g) could not be the basis for the Commission's action, it made no findings as to other statutory bases. In fact, the court

²¹ Emergency Petition of Core Communications, Inc. for Stay Pending Judicial Review, Nos. 01-1218, 01-1256 (D.C. Cir. June 7, 2001). Core had previously asked the Commission for a stay. Petition of Core Communications, Inc. for Stay Pending Judicial Review, CC Docket Nos. 96-98, 99-68, dated June 1, 2001.

²² Response of FCC to Emergency Motion for Stay and Motion for Expedited Consideration, *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. June 12, 2001).

²³ *WorldCom, Inc. v. FCC*, Order, No. 01-1218 et al. (D.C. Cir. June 14, 2001).

²⁴ Petition of Core Communications, Inc. for Waiver of the Growth Cap/New Market Bar in Delaware, New York and Pennsylvania, CCB/CPD File No. 01-20, dated Aug. 17, 2001.

²⁵ *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

²⁶ Petition of Core Communications, Inc. for Rehearing, *WorldCom, Inc. v. FCC*, No. 01-1218 et al. (DC Cir. June 17, 2002).

²⁷ *WorldCom, Inc. v. FCC*, Order, No. 01-1218 et al. (DC Cir. Sept. 24, 2002).

²⁸ Petition for Writ of Certiorari, *Core Communications, Inc. v. FCC*, No. 02-980 (Dec. 23, 2002).

²⁹ *Core Communications, Inc. v. FCC*, 123 S. Ct. 1927 (2003).

³⁰ Petition at 2.

explicitly recognized that other statutory provisions could provide the substantive basis for the rules Core says are “legally unsound.”³¹ The court did not resolve, for example, “whether the Commission may adopt bill-and-keep for ISP-bound calls pursuant to section 251(b)(5)” and whether the “interim pricing limits imposed by the Commission are adequately reasoned.”³² The court also made it clear that it was not holding that the Commission was without statutory authority to adopt the rules Core challenges. On the contrary, the court explained that “[m]any of the petitioners themselves favor bill-and-keep, and there is plainly a non-trivial likelihood that the Commission has authority to elect such a system (perhaps under section 251(b)(5) and 252(d)(2)[(B)](i)).”³³

Core’s second claim is that the rules “blatantly discriminate among telecommunications carriers.”³⁴ In particular, Core says that the rules discriminate between the Bell companies and CLECs like Core and “place CLECs at a competitive disadvantage compared to the BOCs that offer telecommunications services to ISPs.”³⁵ This is nonsense. Under the Commission’s rules, similarly situated carriers are treated alike, and the same rules apply to similar services offered by different carriers. Verizon receives reciprocal compensation and compensation for calls delivered to ISPs on exactly the same terms as Core does. Therefore, there is no discrimination.

Core’s claim of discrimination is that, while Core has chosen only to pursue only ISPs as customers, other carriers like the Bells have other types of customers. The Commission

³¹ The court of appeals, of course, could not have relied upon any of these provisions to affirm the Commission’s decision because the Commission had not relied on them. *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

³² *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).

³³ *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).

³⁴ Petition at 4.

³⁵ Petition at 6.

recognized this in its order where it found, “[T]he record strongly suggests that CLECs target ISPs in large part because of the availability of reciprocal compensation payments.”³⁶ Any difference that results from this, of course, is not a “discrimination,” because the two classes of carriers are, in fact, different. Moreover, any supposed “discrimination” is of Core’s own making, and Core can readily end it simply by serving other customers in the same way that Verizon and others do.

Third, Core says that the Commission’s rules “have deterred investment in the telecommunications business, and have thereby substantially harmed the competitive telecommunications industry and the broader national economy.”³⁷ While it is not at all clear that could be a basis for forbearance under section 10, Core has not offered a single fact to support this bald assertion, either about its own investment or investment by competitive LECs generally.

Moreover, it is hard to see how the compensation regime Core attacks could possibly have the effect of reducing the amount of investment in the telecommunications business. The Commission found that the old compensation regime “distorts competition by subsidizing one type of service at the expense of others”³⁸ and uneconomically causes CLECs to serve ISPs rather than other classes of customers. Even a facilities-based CLEC needs to invest little to serve ISPs, however. Although Core filed the details under seal, it publicly told the Commission that serving ISPs required minimal investment — referring to “the very low costs associated with the few facilities (primarily modem facilities) that actually would be required to service [ISP]

³⁶ *ISP Order* ¶ 70.

³⁷ Petition at 6.

³⁸ *ISP Order* ¶ 5.

traffic.”³⁹ Because the old compensation regime generated investment only in “few facilities” of “very low cost,” returning to that regime by granting Core’s forbearance petition would not stimulate investment in the telecommunications business.

Finally, the facts disprove Core’s unsupported rhetoric that the existing system has “substantially harmed the competitive telecommunications industry.” The Commission’s latest findings on “the competitive telecommunications industry” show it to be thriving — for example, that total CLEC end-user access lines increased by 14 percent during the second half of 2002, and that CLECs reported 10.2 percent of total residential and small business access lines, compared to 6.6 percent a year earlier.⁴⁰ “The competitive telecommunications industry” is, therefore, doing well, in spite of Core’s assertion to the contrary.

Core also claims that it reasonably relied on the old compensation scheme in deciding to make investments and that it has been unable to recoup those investment under the new rules.⁴¹ Once again, Core offers no facts to support these claims. Moreover, the current compensation scheme only prevents Core from recouping its investment from Verizon and other LECs — nothing prevents Core from recouping its investments from its own customers.⁴² More important, as the Commission noted, “CLECs have been on notice since the 1999 *Declaratory Ruling* that it might be unwise to rely on the continued receipt of reciprocal compensation for ISP-bound traffic.”⁴³ If Core ignored the Commission’s warnings, it has only itself to blame.

³⁹ Core’s First Amended Supplemental Complaint for Damages, Declaration of Stephen E. Siwek ¶ 41, File No. EB-01-MD-007, dated August 11, 2003.

⁴⁰ Federal Communications Commission Releases Data on Local Telephone Competition, News Release at 1, dated June 12, 2003.

⁴¹ Petition at 7-9.

⁴² See *ISP Order* ¶ 83.

⁴³ *ISP Order* ¶ 84.

The fact that Core “sought to game the existing rules, and lost” is not grounds for a forbearance.⁴⁴

Core Is Wrong on the Law. Much of Core’s legal argument is beside the point under the criteria for forbearance in the Act. Section 10 provides that:

“[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that —

“(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

“(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

“(3) forbearance from applying such provision or regulation is consistent with the public interest.”⁴⁵

With regard to the public interest determination required by section 10(a)(3), section 10(b) states that, “[I]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”⁴⁶

Core, however, argues that the Commission’s rules are “not necessary to prevent anticompetitive harm to telecommunications carriers.”⁴⁷ That a rule may be “not necessary to prevent anticompetitive harm to telecommunications carriers” is, of course, not relevant to any analysis under section 10.

⁴⁴ See *Global NAPs, Inc. v. FCC*, 247 F.3d 252 at 260 (D.C. Cir. 2001).

⁴⁵ 47 U.S.C. § 160(a).

⁴⁶ *Id.* § 160(b).

⁴⁷ Petition at 9.

To prevail, Core must show enforcement of these rules is “not necessary for the protection of consumers,” under section 10(a)(2). Core’s argument on this point borders on the bizarre. It says that consumers are harmed because they cannot enjoy the lower rates and increased competitive choice that Core could offer them if Core received reciprocal compensation payments.⁴⁸ Core, of course, admits elsewhere that it does not serve consumers generally, only ISPs, so it is hard to see how consumers would benefit by Core’s increasing its reciprocal compensation revenues.⁴⁹ In fact, the LECs which had to make those additional payments to Core would presumably have to recover them from their customers. Granting forbearance would thus result in harm to consumers.

Finally, Core says in one short paragraph that grant of its petition is in the public interest.⁵⁰ Not only does Core not explain how or why this is true, it does not explain why the public interest rationale provided by the Commission in 2001⁵¹ is no longer valid.

In particular, under section 10, a public interest finding can be based on a showing that “forbearance will promote competition among providers of telecommunications services.” Forbearance here will do just the opposite. The Commission concluded that the old compensation that Core wants the Commission to return to “distort[ed] competition,”⁵² resulted in carriers’ “not offering viable local telephone competition, as Congress had intended to

⁴⁸ Petition at 10-11.

⁴⁹ As the Commission found, “To the extent that carriers offer [ISPs] below cost retail rates subsidized by intercarrier compensation, these customers do not receive accurate price signals.” *ISP Order* ¶ 68.

⁵⁰ Petition at 11.

⁵¹ *ISP Order* ¶¶ 5, 7, 21, 67-71, 73, 77.

⁵² *ISP Order* ¶ 5.

facilitate with the 1996 Act”⁵³ and “hindered the development of efficient competition in the local exchange and exchange access markets.”⁵⁴ Core has not offered any evidence that could cause the Commission to reach a different conclusion now as to the public interest.

Conclusion

The Commission should deny Core’s petition.

Respectfully submitted,



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⁵³ *ISP Order* ¶ 21.

⁵⁴ *ISP Order* ¶ 95.

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.