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February 6, 2004

VIA ELECTRONIC MAIL

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: ***Notice of Ex Parte Presentation (CC Docket No. 01-92)***

Dear Ms. Dortch:

This is to advise you that, on Thursday, February 5, 2004, John Sumpter, Vice President, Regulatory, Pac-West Telecomm, Inc., and the undersigned met with Matthew Brill (Commissioner Abernathy's Senior Legal Advisor) to discuss issues relating to the Commission's efforts to develop a Unified Intercarrier Compensation Regime. The discussions addressed the issues in the attached materials.

Pursuant to the Commission's *ex parte* rules, this letter is being filed electronically in the above-referenced docket. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

By: _____
Richard M. Rindler

Attachment
cc: Matthew Brill (w/attach.)

9121502v1

Intercarrier Compensation

Agenda

FCC's ISP Order – "What to do"

- 251(b)(5) and 251(g)
- What the Order does now
- How the remand should be addressed
- Picking the 251(b)(5) rate
- End result

Access Charges

- Impact of current situation
- Impact of "bill & keep" proposals
- Pac-West's proposal

Intercarrier Compensation

- Pac-West uses the term “intercarrier compensation” to apply to traffic exchanged between carriers over “circuit-switched” interconnection trunks, specifically “local interconnection trunks” (LIT) or access trunks (typically called FG-D or “meet-point” trunks) where there is a dialed number and a calling number both governed by the North American Numbering Plan.
- Intercarrier compensation is governed by sections 251(b)(5) and 251(g) of the 96 Act
- Intercarrier compensation should be cost-based, reciprocal and symmetrical. Carriers should not earn excess profit on intercarrier compensation, but should recover traffic-related incremental costs.
- Traffic exchanged between networks over packet-switched interconnection (ATM, Frame Relay, IP) is covered by other forms of compensation which may predate the 96 Act and fall within 251(g)

FCC ISP ORDER –

WHAT THE ORDER DOES NOW

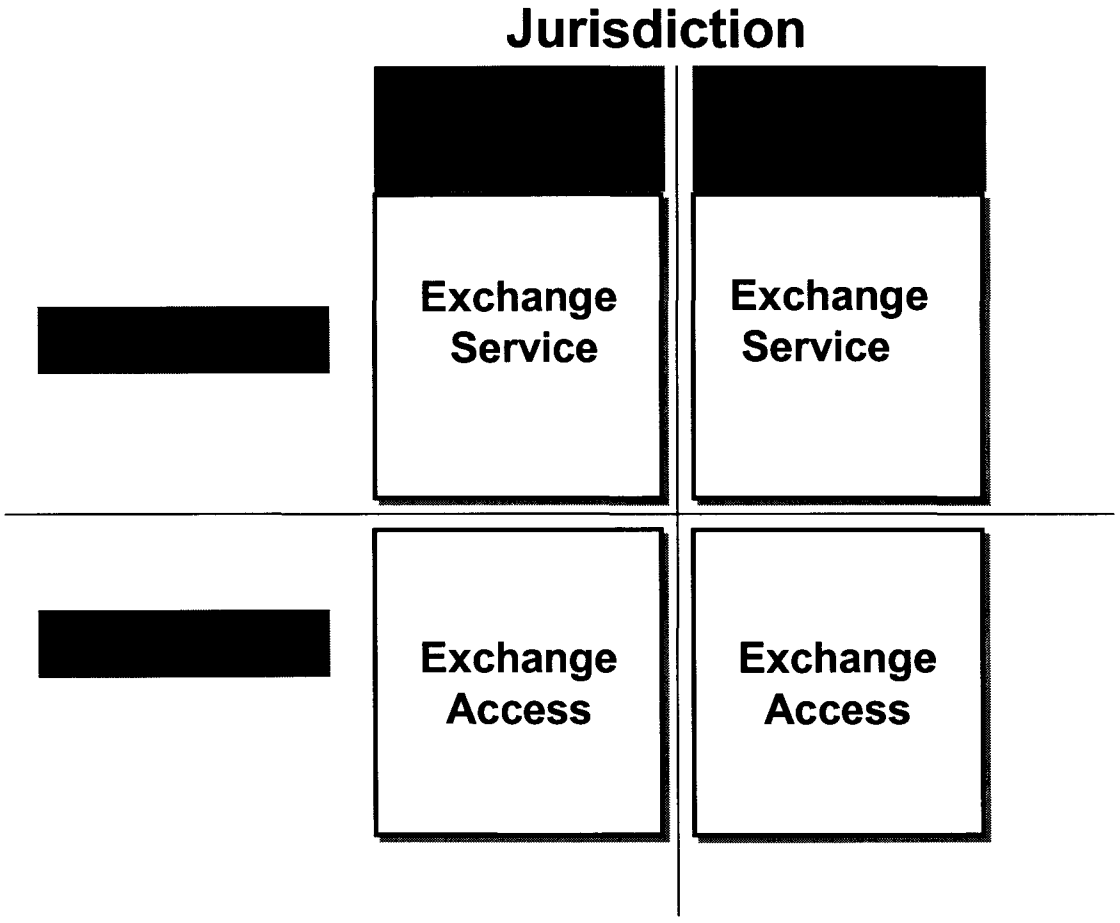
- The FCC asserts jurisdiction over "ISP-bound traffic" (§ 4, 98)
- All traffic not subject to 251(g) is 251(b)(5) (§ 46)
- Establishes Rate Cap w/ phase-down (§ 7, 8, 78)
- Sets Volume Cap (§ 7, 8, 78)
- Establishes New Market ban (§ 81)
- Establishes "mirroring offer" (§ 8, 89)
- Creates "3:1" rebuttable presumption to identify Interstate traffic (§ 8)
- Defines how presumption can be rebutted (§ 8, 79)
- Establishes result if an ILEC chooses to not make the mirroring offer (§ 89)
- Resolves CLECs cannot "opt-in" to recip comp terms in ICAs (§ 82)

FCC ISP ORDER –

Impact of Order – unnecessarily harmful to CLECs

- Pac-West forced to remove switches in CO & UT, withdraw CPCN
- New traffic above volume cap ceded to other carriers
- ILECs continue to receive benefit of regulatory arbitrage on access traffic [251(g)] priced higher than cost while CLECs' incremental costs not recovered
- As recip comp rate drops below cost, ILECs benefit from using CLEC networks for traffic ILEC originates w/o compensating CLEC
- Order is clear that an ILEC must make election in 2001 (SBC did not)
- The ISP Order states that ILECs must offer to exchange all 251(b)(5) traffic at the same FCC rate. The remand says ISP traffic is not 251(g) traffic. When the mirroring offer says "all 251(b)(5) traffic," does it mean all?

251(b)(5) and "interstate" are not mutually exclusive



FCC ISP ORDER –

HOW THE REMAND SHOULD BE ADDRESSED

- Continue to assert jurisdiction over "ISP bound" 251(b)(5) traffic
- All traffic that is not 251(g) is 251(b)(5)
- The compensation for 251(b)(5) must be reciprocal
- State rates apply to all 251(b)(5) traffic unless ILEC makes mirroring offer to all carriers in a state
- FCC interim rate applies to all 251(b)(5) traffic if ILEC makes offer *and* CLEC accepts offer ("all traffic" means all – no traffic excluded by caps)
- If CLEC rejects offer, then 3:1 is used to identify Interstate 251(b)(5) traffic. FCC rate applies to interstate and state rate applies to intrastate. No traffic excluded by caps.
- Carriers can opt-in to ICA provisions
- Only significant "retroactive" impact is to traffic exchanged since 2001 that exceeds the cap
- Interim rate replaced by unified compensation rate in 3 years
- Explicit "change of law"

FCC ISP ORDER –

251(b)(5) – What is the right rate?

- Principle should be incremental costs – but:
- There is no need for cost studies, just rules
- The rate must be symmetrical and reciprocal
- The rate must apply to all 251 (b)(5) traffic unless carriers agree to a different result
- 251(g) traffic should fall within 251(b)(5) by a date certain

"Picking the rate"

- If the FCC establishes and enforces the principles above, then
- Let the dominant ILEC pick the rate – with no offset to other rates
- If the principles above are enforced, Pac-West is confident that ILECs will get the rate "right"
- The ILECs "cut the cake," the CLECs "pick the piece"

FCC ISP ORDER –

Result of proposal

- 251(b)(5) and 251(g) traffic treated as required by remand and 96 Act
- Controlled retroactive impact (mostly to traffic above volume caps)
- If combined with an access rate plan that merges 251(g) with 251(b)(5) in a reasonable time (3 years), ILECs will have an intense incentive to get the rate "right"
- No volume or new market caps

ACCESS CHARGES – 251(g) TRAFFIC

What's wrong with access?

- Priced significantly above cost
- Provides excess profits to ILECs
- Drives carriers to shift traffic from 251(g) to 251(b)(5)
- ILECs force uneconomic network interconnection on CLECs (separate trunks to segregate traffic) to maintain ILECs uneconomic profits

What should be done

- 251(g) access rates should be reduced in steps to 251(b)(5) rates
- Allow the ILEC to pick the 251(b)(5) rate, but keep it reciprocal

What should not be done

- Mandatory Bill & Keep would drive uneconomic behavior
- Do not load traffic sensitive costs on NTS rates
- A minute is, in fact, a minute. Don't discriminate on the basis of who the customer is, or how far a call traveled on someone else's network, or how it originated

Summary

- The remand of the ISP order can be addressed most simply by eliminating the volume and new market caps
- The FCC can rely on the dominant ILEC in a state to set an appropriate compensation rate *if* the ILEC knows that:
  - The rate will be reciprocal
  - The rate will apply to all 251(b)(5) traffic
  - The rate will apply to 251(g) traffic by a date certain
  - The ILEC will not be allowed to subsidize a rate below cost by a subsidy from end-user line rates (or from any other source)
- The best access rate plan will merge 251(g) with 251(b)(5) in a reasonable time (3 years), creating a unified intercarrier compensation regime