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ATTORNEYS AT LAW

September 10, 2004

EX PARTE – Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Implementation of the Local Competition Provisions of the
Telecommunications Act of 1996, CC Docket No. 96-98;
Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68;*

Dear Ms. Dortch:

On September 10, 2004, on behalf of Level 3 Communications LLC (“Level 3”), Ms. Cindy Schonhaut, of Level 3, and I met with Daniel Gonzalez, Senior Legal Advisor to Commissioner Martin. In the meeting, we discussed issues that Level 3 has summarized fully in its previous *ex parte* submissions, including those filed on June 23, 2004 (CC Docket Nos. 96-98, 99-68), June 25, 2004 (CC Docket Nos. 96-98, 99-68; WC Docket Nos. 03-266, 04-36), and September 10, 2004 (CC Docket Nos. 96-98, 99-68). We also discussed the *ex parte* submission filed jointly on behalf of Sprint, Level 3, MCI and AT&T on September 8, 2004 (CC Docket Nos. 01-92, 96-98, and 99-68). In addition, we provided Mr. Gonzalez with a copy of the attached document.

In accordance with the Commission’s rules, I am filing this letter electronically in the dockets identified above.

Sincerely,

/s/

John T. Nakahata

Enc.

cc w/encl: Tamara Preiss
Jane Jackson
Steve Morris

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PUBLIC UTILITY COMMISSION
OF TEXAS

CONSOLIDATED COMPLAINTS AND §
REQUESTS FOR POST- §
INTERCONNECTION DISPUTE §
RESOLUTION REGARDING §
INTERCARRIER COMPENSATION §
FOR "FX-TYPE" TRAFFIC AGAINST §
SOUTHWESTERN BELL TELEPHONE §
COMPANY §

PUBLIC UTILITY COMMISSION
OF TEXAS

**ORDER APPROVING IN PART, REVERSING IN PART AND MODIFYING
REVISED ARBITRATION AWARD**

This Order approves in part, reverses in part and modifies the revised arbitration award (Revised Award) issued in this proceeding. The Commission modifies the Revised Award to reflect as follows. First, the compensation method in the *ISP Remand Order*¹ only applies to local traffic bound for Internet Service Providers (ISPs) instead of both local and non-local traffic bound for ISPs. Second, access charges, not reciprocal compensation, apply to non-local traffic, regardless of whether ISP-bound. Accordingly, the Commission approves the Revised Award as modified and requires the parties to submit revised interconnection agreements as specified below.

I. Jurisdiction

The Federal Telecommunications Act of 1996 (FTA)² authorizes state commissions to arbitrate open issues between an incumbent local exchange carrier (ILEC) and a requesting telecommunications carrier.³ The FTA also grants state commissions authority to approve or reject interconnection agreements adopted by negotiation or arbitration.⁴ The FTA's

¹ *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) (*ISP Remand Order*).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 15 and 47 U.S.C.) (FTA).

³ 47 U.S.C. § 252(b).

⁴ 47 U.S.C. § 252(e).

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authorization to approve or reject these interconnection agreements carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.⁵ The Public Utility Commission of Texas is a state commission responsible for approving interconnection agreements pursuant to the FTA.

II. Procedural History

On April 25, 2001, Time Warner Telecom (Time Warner), KMC Telecom Holdings, Inc. (KMC), Focal Communications Corporation (Focal), and Allegiance Telecom, Inc. (Allegiance) (collectively the “CLEC Coalition”) filed petitions against Southwestern Bell Telephone, LP, d/b/a SBC Texas (SBCT) for post-interconnection dispute resolution regarding inter-carrier compensation for “FX-type” traffic. The petitioners moved for consolidation because of the common issues among the dockets; SBCT agreed with the request to consolidate. Accordingly, the Arbitrators consolidated Docket Nos. 24015, 24016, 24017 and 24018 into Docket No. 24015, dismissing Docket Nos. 24016, 24017 and 24018. Thereafter, AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications Houston, Inc. (collectively “AT&T”) intervened as well as Tex-Link Communications, Inc. f/k/a Taylor Communications Group (Tex-Link).

The parties filed direct testimony on June 6, 2001, rebuttal testimony on June 20, 2001 and supplemental testimony on June 29, 2001. The hearing on the merits was held on July 2 and 3, 2001. The Texas Telephone Association filed an amicus brief on July 27, 2001. The parties filed their initial briefs on August 3, 2001 and reply briefs on August 20, 2001. The Arbitrators issued an award on November 28, 2001. Shortly thereafter, Time Warner, Focal, Allegiance and KMC settled their disputes and jointly filed motions with SBCT to dismiss with prejudice.⁶ The Arbitrators granted the motions to dismiss on January 17, 2002. The Arbitrators subsequently issued the Revised Award on August 28, 2002. The Commission considered the Revised Award at the June 18, 2004 open meeting.

⁵ *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1274-1276 (11th Cir. 2003); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex.*, 208 F.3d 475, 479-480 (5th Cir. 2000); see also *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 356 (6th Cir. 2003).

⁶ Allegiance and SWBT filed their motion to dismiss on December 6, 2001. Time Warner, Focal and KMC with SWBT filed motions to dismiss on January 15, 2002.

III. Discussion

In deciding DPL Issue No. 1, the Arbitrators applied the *ISP Remand Order's* compensation policies too broadly to all ISP traffic. The *ISP Remand Order's* compensation method only applies to traffic bound for ISPs within the caller's local calling area. However, the Arbitrators found that the *ISP Remand Order's* compensation scheme applied to both local and non-local ISP traffic. The D.C. Circuit, in addressing the *ISP Remand Order* stated:

In the order before us the Federal Communications Commission held that under § 251(g) of the Act it was authorized to "carve out" from § 251(b)(5) calls made to internet service providers ("ISPs") located within the caller's local calling area.⁷

The *ISP Remand Order's* compensation scheme does not apply to non-local ISP traffic. Rather, the FCC left existing compensation arrangements undisturbed with respect to non-local ISP traffic. Consequently, non-local ISP traffic receives the same treatment as other non-local traffic.

The Commission reverses the decision on DPL Issue No. 2, which applied bill and keep to all non-ISP-bound FX-type traffic. Instead, the Commission determines that access charges apply to FX-type traffic. This is consistent with prior Commission decisions. In Docket No. 21982, the Commission previously determined that FX-type calls that originate and terminate outside of a mandatory calling scope are not eligible for reciprocal compensation:

[R]eciprocal compensation arrangements apply to calls that originate from and terminate to an end-user within a mandatory single or multi-exchange local calling area, including the mandatory EAS/ELCS areas comprised of SWBT exchanges and the mandatory EAS/ELCS areas comprised of SWBT exchanges and exchanges of independent ILECs. Consistent with this precedent, optional EAS traffic is not subject to reciprocal compensation. The Commission also finds that to the extent that FX-type and 8YY traffic do not terminate within a mandatory local calling scope, they are not eligible for reciprocal compensation.⁸

⁷ *WorldCom, Inc. v. Federal Communications Comm'n*, 288 F.3d 429, 430 (D.C. Cir. 2000).

⁸ *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Docket No. 21982, Revised Arbitration Award at 18 (Aug. 31, 2000); Final Order (Mar. 5, 2001).

In Docket No. 25673, the Commission held that: “the geographic location of the calling customer and the called customer is the appropriate factor for differentiating toll calls from ELCS calls in this case.”⁹ The Commission further concluded that when the ILEC’s customer calls the ISP, which is physically located outside of customer’s ELCS calling area, the call may not be rated as ELCS and the ILEC must charge those calls as intraLATA toll calls.¹⁰ Given that access charges apply to toll calls, the Commission’s decisions in Docket Nos. 25673 and 21982 indicate that access charges, not reciprocal compensation, apply to traffic between locations in different mandatory local calling areas. Consequently, access charges apply to FX-type traffic.

To implement the Commission’s decisions on the Revised Award, the Commission modifies the proposed agreement language as specified below.

Tex-Link Attachment 12 modifications:

1.3.1 Pursuant to the Texas Commission Arbitration Award in Docket 24015, the transport and termination compensation for Virtual FX, Dedicated FX, and FX-type Traffic will be ~~“Bill and Keep.”~~ access charges.

~~1.3.5 To the extent that ISP-bound traffic is provisioned via a Virtual FX Traffic, Dedicated FX Traffic, or other FX-type arrangement, it is subject to the compensation mechanism of Bill & Keep.~~ Intentionally Left Blank.

8.1.1 In order to ensure that Virtual FX, Dedicated FX, and FX-type Traffic is being properly segregated from other types of intercarrier traffic, the terminating carrier will be responsible for keeping a written record of all FX Telephone Numbers (whether Dedicated, Virtual, and FX-type) for which ~~Bill and Keep applies~~ access charges apply, and providing an NXX level *summary* of the minutes of use to FX Telephone Numbers on its network to the originating carrier each month (or in each applicable billing period, if not billed monthly).

AT&T Attachment 12 modifications:

16.2 ~~Bill and Keep~~ Access Charge Inter-Carrier Compensation

16.2.1 Pursuant to the TexPUC Arbitration Award in Docket 24015, the transport and termination compensation for Virtual FX Traffic,

⁹ *Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency Action of ASAP Paging, Inc. Against CenturyTel of San Marcos, Inc.*, Docket No. 21982, Order at 7 (March 5, 2001).

¹⁰ *Id.*

Dedicated FX Traffic, and FX-type Traffic will be "~~Bill and Keep.~~" access charges.

- 16.2.1.1 ~~Bill and Keep shall be defined as the intercarrier traffic termination arrangement whereby each Party recovers its costs by billing its own end users and keeping the revenue for itself, without intercarrier compensation for completing the calls. Intentionally Omitted.~~
- 16.2.1.2 ~~Under a Bill and Keep arrangement, each Party will continue to abide by the applicable provisions of the underlying Interconnection Agreement for physical interconnection, trunking, signaling, transporting, and recording switch usage, but they will not compensate the terminating carrier for the transport or termination of Dedicated FX Traffic, Virtual FX Traffic, and FX-type Traffic subject to Bill and Keep. Intentionally Omitted.~~
- 16.2.2 ~~The local exchange carrier whose customer receives a call originated by the other Party's end user (Terminating Carrier) shall be responsible for not billing any minutes of use on its network that are "Virtual FX Traffic," "FX-type Traffic," or "Dedicated FX Traffic" as defined herein. To the extent minutes of use are nevertheless billed and paid by the originating carrier whose customer originated the call (Originating Carrier), but later found to be Virtual FX Traffic, Dedicated FX Traffic, or FX-type Traffic that should have been subject to Bill and Keep, the Terminating Carrier will be responsible for reimbursing the originating carrier the amount of compensation paid, plus interest, in accordance with terms for past due amounts established under Section 8 of the General Terms and Conditions of the Interconnection Agreement. Intentionally Omitted.~~
- 16.2.3 ~~To the extent that ISP-bound traffic is provisioned via a Virtual FX Traffic, Dedicated FX Traffic, or other FX-type arrangement, it is subject to the compensation mechanism of Bill and Keep. Intentionally Omitted.~~
- 16.3.1 In order to ensure that Virtual FX, Dedicated FX, and FX-type Traffic is being properly segregated from other types of intercarrier traffic, the terminating carrier will be responsible for keeping a written record of all FX Telephone Numbers (whether Dedicated, Virtual, and FX-type) for which ~~Bill and Keep applies~~ access charges apply, and providing an NXX level summary of the minutes of use to FX Telephone Numbers on its network to the originating carrier each month (or in each applicable billing period, if not billed monthly).

IV. Commission Findings

1. The Commission's review of the Revised Award and the proposed interconnection agreement language is required by FTA section 252(e). Subsection (e) provides that any interconnection agreement "adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies."
2. The Commission is the state regulatory body responsible for arbitrating interconnection agreements approved pursuant to the FTA.
3. The Commission has reviewed the Revised Award, the proposed interconnection agreement language, and the pleadings and comments filed by Time Warner, KMC, Focal, Allegiance, AT&T, Tex-Link, SBCT, and the Arbitrators.
4. The Commission finds that provisions of the proposed interconnection agreement that comply with the Revised Award shall be approved as modified by this Order. The Commission finds these provisions comply with FTA sections 251 and 252. Provisions that do not comply with the Revised Award and this Order are not approved.
5. The Commission finds the Revised Award and its modifications are consistent with Chapter 21 of the Commission's procedural rules.

V. Ordering Paragraphs

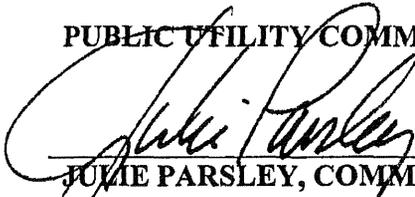
1. The Revised Award and specific language in the parties' interconnection agreement implementing the Revised Award are approved, as modified by this Order. In the event there are inconsistencies between this Order and the Revised Award, the Commission's decisions set forth in this Order shall govern and be implemented in the interconnection agreement.
2. Pursuant to P.U.C. PROC. R. 21.125(l), the parties shall file a revised, signed interconnection agreement modified in accordance with the rulings in this Order within

five (5) working days of the date of this Order. Additionally, the parties shall file affidavits attesting that the interconnection agreement conforms to this Order and the Revised Award as modified by the Commission.

3. All other issues disposed of by the Revised Award but not discussed here are approved without change.

SIGNED AT AUSTIN, TEXAS the 16th day of August, 2004.

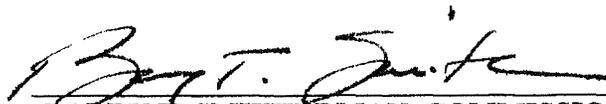
PUBLIC UTILITY COMMISSION OF TEXAS



JULIE PARSLEY, COMMISSIONER



PAUL HUDSON, CHAIRMAN



BARRY T. SMITHERMAN, COMMISSIONER