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EX PARTE

October 5, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, DC 20554

Re: *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic* – CC Docket Nos. 96-98 and 99-68; *In the Matter of Core Communications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order* – WC Docket No. 03-171

Dear Ms. Dortch:

On September 23, 2004, Melissa Newman, Andrew Crain, in person, Linda Downey, Pamela Morton and Dan Hult, via telephone, of Qwest met (in separate meetings) with Chris Libertelli, Jessica Rosenworcel, Scott Bergmann, and Matt Brill, and on September 24, 2004, Melissa Newman, in person, and Andrew Crain, Linda Downey, Pamela Morton and Dan Hult, via telephone, met with Dan Gonzalez.

On April 27, 2001, the Commission released an *Order* setting forth rules for intercarrier compensation for ISP-bound traffic.[1] In that *Order*, the Commission adopted a compensation regime that provided for a transition to bill-and-keep. Unless a state commission adopted a bill-and-keep regime, ISP-bound traffic was subject to gradually decreasing rates for 36 months, or until further Commission action, whichever is later, with the last rate before bill-and-keep set at $.0007 per minute of use.[2] On appeal, the D.C. Circuit Court remanded the *ISP Remand Order* but did not vacate the rules.[3] The Court disagreed with the Commission's categorization of ISP-bound traffic as subject to Section 251(g) of the Telecommunications Act, but it made clear several times that it did not disagree with the Commission's conclusion that such traffic should be subject to a bill-and-keep regime.[4]

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, *Order on Remand and Report and Order*, 16 FCC Rcd 9151, 9162 ¶ 21 (2001) ("*ISP Remand Order*" or "*Order*").

[2] *Id.* at 9187 ¶ 78.

[3] *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (remanding, but declining to vacate the *ISP Remand Order*).

[4] *Id.* at 432-34.

The interim pricing regime adopted by the Commission in the *ISP Remand Order* has now been in effect for more than 36 months, and under the Commission's reasons for implementing the interim regime it is now appropriate for the Commission to adopt a bill-and-keep regime for ISP-bound traffic. Qwest has previously submitted several filings that provide the Commission with legal, economic and policy rationales for a bill-and-keep regime for ISP-bound traffic: (1) a November 22, 2000 white paper entitled *A Legal Roadmap for Implementing a Bill and Keep Rule for All Wireline Traffic*; (2) Qwest's November 5, 2001 Reply Comments in CC Docket No. 01-92; (3) Qwest's November 12, 2001 *ex parte* submission including an analysis by Dr. William E. Taylor, *et al.*, entitled, *An Economic and Policy Analysis of Efficient Intercarrier Compensation Mechanisms for ISP-Bound Traffic*; and (4) an October 26, 2000 letter from John W. Kure to Magalie Roman Salas containing further analyses by Dr. Taylor.

Those submissions set forth in detail why, consistent with the D.C. Circuit's decision in *WorldCom* and its prior ruling in *Bell Atlantic v. FCC*,[5] the Commission can adopt a bill-and-keep regime under either Section 201 or Section 251(b)(5) of the Telecommunications Act. Either way, the Commission should reiterate in its order that the new pricing regime is prospective only, consistent with the fact that the *WorldCom* court did not vacate the interim regime established by the *ISP Remand Order.* The Commission should make clear that by categorizing the traffic as Section 201 or Section 251(b)(5), rather than as Section 251(g) as in the *ISP Remand Order*, does not change the fact that the interim regime adopted in the *ISP Remand Order* governs the pricing of ISP-bound traffic until the effective date of the new decision.

Qwest understands that several parties have recently proposed that the Commission continue the interim rate of $.0007 for several more years before the ultimate migration to bill-and-keep. There is no reason to continue the interim price regime. As the Commission made clear in the *ISP Remand Order,* three years is adequate time for carriers to have re-ordered their business plans to anticipate a bill-and-keep regime.[6] There is no economic or policy reason not to convert to bill-and-keep immediately.

If the Commission does decide to continue the interim measures, it should continue all aspects of the earlier interim regime, including: (1) the new market entrant rule that carriers that did not exchange ISP-bound traffic at the time of the order are subject to bill-and-keep;[7] and (2) the growth cap rule that traffic in excess of the then current level of traffic plus a 10% annual growth factor is subject to bill-and-keep. The Commission included those rules because the interim pricing regime, while continuing some of the market distorting aspects of the previous regime, would mitigate some of the impact on companies that entered the market in reliance upon the then-existing reciprocal compensation regime. There is no logical or policy basis for

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[5] *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

[6] *ISP Remand Order*, 16 FCC Rcd at 9189-90 ¶ 83.

[7] *Id.* at 9187 ¶ 78, 9188-89 ¶ 81.

applying the interim regime to companies that did not rely on the former regime or on traffic that carriers added after that regime was vacated. Therefore, the existing growth caps and new entrant restrictions should remain in place.[8]

Some carriers contend that the new entrant restrictions and the growth caps are no longer necessary because dial-up subscribership is decreasing. Sprint made this argument in an *ex parte* letter filed in this matter on September 22, 2004, citing a Telecommunications Reports *Online Census* (attached to its *ex parte* letter). While that report does show a decline in dial-up subscribers, the decline is not of the magnitude that would justify removal of growth caps and new entrant restrictions – the report shows that "dial-up share" declined 1.6% in the final quarter of 2003 and 3.3% for the entire year.[9] The report cautions that: "Nonetheless, dial-up connections remain the dominant access format – still accounting for nearly 69 percent of the customer base at the end of 2003."[10]

In its region, Qwest is experiencing continued growth in ISP-bound traffic. Qwest does not know whether the growth is due to increased dial-up subscribers in its region, to an increase in minutes of use of dial-up subscribers, or to changes in traffic patterns by CLECs. Nevertheless, the increase in ISP-bound traffic is real, and the removal of growth caps and new market restrictions would create serious and unnecessary risk by resuming economic incentives for CLECs to increase traffic for the sole purpose of collecting reciprocal compensation payments. In Qwest's region, 17 CLECs carry almost exclusively ISP-bound traffic.

Since the Commission's ISP Reciprocal Compensation Order took effect in 2001, Qwest has experienced a 39% cumulative increase in known ISP-bound minutes of use – the increase was more than 50% in states that have not adopted bill-and-keep for ISP-bound traffic. One CLEC has increased its minutes of use by 363%, another by 1034%, and a third by 958%. As a result of these increases, Qwest could suffer losses of more than $40 million per year if growth caps and new market restrictions are lifted.

The growth rates in ISP-bound traffic vary significantly by state:

- In Arizona, ISP-bound traffic has grown by 49% since 2001.
- In Minnesota, ISP-bound traffic has grown by 35% since 2001.
- In Oregon, ISP-bound traffic has grown by 140% since 2001.
- In Washington, ISP-bound traffic has grown by 76% since 2001.
- In Colorado and Iowa, both of which have adopted bill-and-keep for ISP-bound traffic, ISP-bound traffic has grown by just 3% since 2001.

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[8] *Id.*

[9] TR Census, attached to Sprint's Sept. 22, 2004 ex parte letter, CC Docket No. 99-68 at 3.

[10] *Id.* at 1.

The chart attached to this letter as Exhibit A shows the reciprocal compensation rates set by the state commissions in Qwest's region. These rates apply to non-ISP-bound traffic.

CLECs in Qwest region are actively marketing services to ISPs for dial-up traffic. The Level 3 Communications website states at http://www.level3.com/559.html:

> Our rapidly expanding (3)Connect Modem service covers more than 15,500 local calling area rate centers and 2,458 total unique rate centers. Service is sold on a per-port basis for a flat monthly fee or on a metered basis based on the total number of hours used. The monthly charge includes local dial-in numbers, complete network coverage for a specific region, modems to collect the incoming traffic, and managed routers.

The ICG Communications website states at http://www.icgcomm.com/products/isp/isp.asp:

> Our ISP services give you everything you need to seamlessly expand your coverage and serve your customers. We've spent the last two decades developing a robust network with a nationwide and extensive metro footprint specifically for businesses. Our state-of-the-art equipment, national coverage, and technical expertise makes us the choice for ISPs that need a cost-effective way to manage their markets and expand into new ones.

If growth caps and new market restrictions are lifted, CLECs will have an economic incentive to make long-distance calls to appear as local traffic, like is being currently done with virtual NXXs. A virtual NXX allows a customer to obtain a telephone number in a local calling area in which the customer is not physically located. Thus, when calls are made to that number from the same calling area as the NXX, the call appears to be local, even though the called party and calling party are in different calling areas. Several CLECs are marketing virtual NXXs to ISP customers. If an ISP is located within a LATA the CLEC provides the ISP with virtual NXXs in all other calling areas within the LATA. The ISP provides its customers in remote cities with numbers that appear to be local, but the customer calls are actually routed to the ISP in a completely different calling area that could be more than a hundred miles away. The call from the customer to the ISP is carried completely on the public switched network, and the call is unquestionably a long distance call, to which reciprocal compensation would not apply. Under all Commission precedent, the call from the end user to the ISP is a long distance call.

The *ISP Remand Order* was intended to apply to situations where end-user customers access the Internet through an ISP server located in the same calling area.[11] The Commission should clarify in any future order on ISP-bound traffic that the order applies to situations where the end user is calling an ISP server in the same local calling area. If the server is located outside of the local calling area, then the call to the ISP is a long distance call, which is not subject to reciprocal compensation, despite the fact that the virtual NXX is located in the same local calling

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[11] *ISP Remand Order,* 16 FCC Rcd at 9157-59 ¶ 10.

area as the end user. The physical end points, not the originating and terminating NXX codes, of the communications determine the jurisdictional nature of a particular call for intercarrier compensation purposes.[12] The Commission's decisions establishing the ESP exemption establish that an ISP, for access charges purposes, is an end user, and a call over the public switched network that crosses local calling areas to reach the ISP is a long distance call.[13] Despite this clear Commission precedent, CLECs have attempted to charge reciprocal compensation for such calls, even though the calls are not local. This type of activity will increase dramatically if growth caps are removed.

Sprint argues that the growth caps and new market restrictions disadvantage new competitors. The most efficient, sound and reasonable way to remedy this problem is to move immediately to a bill-and-keep regime for ISP-bound traffic. If the Commission decides to continue the interim regime, it should maintain the restrictions of the *ISP Remand Order*, and it should clarify that in jurisdictions that have already migrated to bill-and-keep, the $.0007 rate does not apply.

Sincerely,

/s/ Andrew D. Crain

cc: Matthew Brill (via e-mail at matthew.brill@fcc.gov)
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[12] *Id.* at 9177-79 ¶¶ 56-59.

[13] *See In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order*, 3 FCC Rcd 2631 (1988).

EXHIBIT A

Qwest State 251(b)(5) Rates

	End Office	Tandem*	
Arizona	$0.0009695	$0.0023095	
Colorado	$0.0020000	$0.0044300	
Idaho	$0.0029000	$0.0083280	AT&T ICA Rates
Iowa	Bill and Keep		
Minnesota	na	$0.0016400	State allows all CLECs to bill Tandem rates
Montana	$0.0026550	$0.0064770	
Nebraska	$0.0020340	$0.0045440	
New Mexico	$0.0011083	$0.0030660	
North Dakota	$0.0024350	$0.0038150	
Oregon	$0.0013300	$0.0033380	
South Dakota	$0.0034690	$0.0057250	
Utah	$0.0014270	$0.0032380	
Washington	$0.0031410	$0.0054160	State allows all CLECs to bill Tandem rates
Wyoming	$0.0024470	$0.0045630	

*Tandem includes End Office, Tandem Switching and Tandem Transmission @ 8 miles