Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the *ISP Remand Order*	)))	WC Docket No. 03-171

COMMENTS OF QWEST CORPORATION
IN SUPPORT OF PETITION FOR RECONSIDERATION

Qwest Corporation ("Qwest") hereby files these comments in support of a Petition for Reconsideration, filed November 17, 2004, by SBC Communications, Inc. ("SBC") in the above-captioned docket.

The SBC Petition seeks reconsideration of the Federal Communications Commission's ("Commission") October 8, 2004 *Order* which denied a Forbearance Petition filed by Core Communications, Inc. ("Core"), but which modified, *sua sponte*, the Commission's rules governing "reciprocal compensation" for Internet service provider- ("ISP") bound traffic.[1] These comments are preliminary in nature, because the Commission has not yet placed the SBC Petition on public notice. Nevertheless, given the importance of the points raised by SBC, Qwest makes these brief comments in support of the SBC Petition.

The Commission's *Order* denied Core's request that the Commission use its authority under Section 10 of the Communications Act to "forbear" from all of the Commission's rules regarding intercarrier compensation for ISP-bound traffic. While the *Order* denied Core's Petition, it nevertheless modified the Commission's rules to eliminate two important aspects of the transitional rules that governed compensation for ISP traffic – specifically, the "new

[1] *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, *Order*, 19 FCC Rcd 20179 (2004) ("*Core Order*" or "*Order*").

markets" rule and the "growth cap" rule. One of the chief rationales for eliminating these two rules was the Commission's finding that dial-up ISP-bound traffic was decreasing. Based on this, the Commission concluded that the problems addressed by these two rules – specifically out-of-control uneconomic arbitrage as competitive local exchange carriers ("CLECs") construct networks solely to take advantage of "reciprocal compensation" for ISP traffic – had dissipated. Accordingly, the Commission ruled that the "new markets" rule and the "growth cap" rule were no longer necessary.[2] There is an obvious logical fallacy in this reasoning, since the only valid conclusion that could be drawn from the fact that arbitrage had not dramatically increased under these rules was that these rules had actually worked. But leaving this problem aside, the Commission's conclusion is also factually invalid.

As Qwest demonstrated in an *ex parte* presentation made on October 5, 2004, dial-up ISP-bound traffic has actually increased dramatically in Qwest's territory (although not nearly as much as would have occurred had the new market and growth cap rules not been in place). Rather than decreasing, this overall growth amounted to a 39% increase in known ISP-bound traffic for Qwest. In other words, the factual premise of the *Order* was not accurate, and the *Order* did not address the evidence that it was inaccurate.[3] A copy of this *ex parte* presentation is attached hereto.

Perhaps most significant, however, is the contrast presented in the *ex parte* presentation between the states of Iowa and Colorado on the one hand, and the other twelve states in Qwest's region on the other. Iowa and Colorado have adopted a bill-and-keep regulatory structure for

---

[2] *Id.* ¶¶ 20-21.

[3] We recognize that the *ex parte* presentation was filed on October 5, 2004, shortly before the adoption of the *Order*. However, the written presentation was filed following an extensive meeting with key Commission personnel, and Qwest had every expectation that the evidence submitted would be considered.

ISP-bound traffic. Dial-up ISP-bound traffic in these two states has increased only 3% since the Commission issued its rules in 2001.[4] Without the incentive of regulatory arbitrage dampened by the "new markets" and "growth cap" rules, the normal ISP growth shifted naturally to broadband connections when economic considerations so dictated. In sharp contrast, Qwest has seen the very high levels of growth in ISP-bound traffic in other states that did not have bill-and-keep rules. For example, as measured in minutes of use ("MoU"), Qwest measured the following increases over the last three years:

- Arizona – 49% increase in ISP-bound traffic.
- Minnesota – 35% increase in ISP-bound traffic.
- Oregon – 140% increase in ISP-bound traffic.
- Washington – 76% increase in ISP-bound traffic.

Qwest also pointed out in its *ex parte* presentation that certain CLECs – such as Level 3 and ICG Communications – are aggressively promoting dial-up ISP service on their public websites.[5]

Taken together, these facts strongly indicate two things. The first is that the level of ISP-bound traffic is increasing, not decreasing, and that CLECs are continuing to target particular states for growth in ISP-related traffic. The second is that a bill-and-keep regime, such as Qwest has advocated, is the only rational approach to managing ISP-bound traffic and for stabilizing reciprocal compensation.

Qwest's *ex parte* presentation also demonstrated that the study upon which the *Core Order* ultimately relied upon in reaching this conclusion[6] did not really stand for the proposition

---

[4] These Iowa and Colorado statistics, which were not discussed in the *Order*, are simply incompatible with the possibility of concluding that elimination of the "new markets" and "growth cap" rules will not by itself serve to increase the amount of dial-up Internet traffic, thus acting directly contrary to the Commission's efforts to control uneconomic arbitrage.

[5] *See* http://www.level3.com/559.html; *see also* http://www.icgcomm/products/isp/isp.asp.

for which it was cited, and that the Commission had concluded that "dial-up connections remain the dominant access format – still accounting for nearly 69 percent of the customer base at the end of 2003."[7] Qwest further pointed out the critical function that the "growth cap" and "new market" rules continued to play in limiting the uneconomic arbitrage opportunities that are caused by the compensation structure for ISP-bound traffic.

The *Core Order* does not address the facts raised in Qwest's *ex parte* presentation. Instead, it simply concludes that dial-up ISP traffic had declined under the old rules, and assumes that dial-up traffic would continue to decline once those rules had been eliminated. The *Core Order* does not acknowledge the information Qwest provided in the record plainly contrary to these conclusions, and this mistake requires reconsideration by the Commission.

However, what is more significant than these factual and logical errors is the fact that the *Core Order's* elimination of the "new market" and "growth cap" rules will now stimulate the very arbitrage that these rules were intended to prevent. Thus, even assuming that there is some logic in eliminating these rules, there is no basis at all upon which they can be eliminated while keeping the ISP compensation rate at the existing level of $.0007 per MoU.

If the Commission is determined to modify the rules to eliminate these important aspects of the ISP-bound traffic transitional scheme, it must immediately modify the compensation rate as well. SBC points out this option in its Petition,[8] and Qwest supports this effort to find some basis on which the Commission can avoid turning the *Core Order* into a windfall for CLECs who have constructed (or will construct) businesses based largely (or entirely) on the ISP-reciprocal compensation arbitrage. In fact, as pointed out in the attached *ex parte* presentation,

---

[6] *Core Order* ¶ 8 and n.56.

[7] *See* Attachment at 3.

[8] *See* Petition at 10-11.

Qwest itself stands to lose an additional $40 million per year in arbitrage losses should the growth cap and new market rules be eliminated – losses that would need to be offset in order to avoid a massive windfall to CLECs.

The Commission should grant the SBC Petition as quickly as possible. Otherwise the *Core Order* will undermine the ability of carriers to arrange their business dealings on a rational and economic basis and will thereby pose a significant danger to the public interest.

Respectfully submitted,

QWEST CORPORATION

By: Michael B. Adams, Jr.
Andrew D. Crain
Robert B. McKenna
Michael B. Adams, Jr.
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6652

Its Attorneys

December 1, 2004

Qwest
1801 California Street, 9th Floor
Denver, Colorado 80202
Phone 303 383 6648
Facsimile 303 896 1107
Andrew.Crain@qwest.com

Andrew D. Crain
Associate General Counsel

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]

---

[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

---

[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.

---

[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

[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)
Scott Bergmann (via e-mail at scott.bergmann@fcc.gov)
Jessica Rosenworcel (via e-mail at jessica.rosenworcel@fcc.gov)
Christopher Libertelli (via e-mail at christopher.libertelli@fcc.gov)
Daniel Gonzalez (via e-mail at daniel.gonzalez@fcc.gov)
Jeffrey Carlisle (via e-mail at jeffrey.carlisle@fcc.gov)
Tamara Preiss (via e-mail at tamara.preiss@fcc.gov)

---

[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

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION IN SUPPORT OF PETITION FOR RECONSIDERATION** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served, via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com and 3) served, via First Class United States mail, postage prepaid, on the parties listed on the attached service list.

Richard Grozier
Richard Grozier

December 1, 2004

Deborah J. Israel.....Core
Michael B. Hazzard
Louis J. Rouleau
Womble Carlyle Sandridge & Rice PLLC
Seventh Floor
1401 Eye Street, N.W.
Washington, DC 20005

Chris Van De Verg
Core Communications, Inc.
Suite 302
209 West Street
Annapolis, MD 21401

Jim Lamoureux
Gary L. Phillips
Paul K. Mancini
SBC Communications Inc.
4th Floor
1401 I Street, N.W.
Washington, DC 20005