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EX PARTE

Electronic Filing via ECFS

April 25, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
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

Dear Ms. Dortch:

On April 24, 2008, Andy Crain, Melissa Newman and Lynn Starr, all of Qwest, and Russ Hanser, representing Qwest, met with Matthew Berry, Christopher Killion and Joseph Palmore of the Office of General Counsel to discuss the above-captioned proceedings.

The attached document was used as a basis for the discussion.

Please contact me at 202.429.3120 if you have any questions.

Sincerely,

/s/ Melissa E. Newman

Attachment

Copy via email to:
Matthew Berry
Christopher Killion
Joseph Palmore

RECIPROCAL COMPENSATION FOR ISP-BOUND TRAFFIC

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

Qwest *ex parte* presentation
April 24, 2008

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WORLDCOM REMAND ORDER

- In the *WorldCom* remand order, the DC Circuit Court recognized that a legal basis for bill and keep for ISP-bound traffic can be established.

- The Court expressly declined to review other legal theories that could have supported the Commission's decision, other than whether Section 251(g) created a carve-out from reciprocal compensation for issues that arose after the adoption of the Act.

- Core requests that the Commission return retroactively to a regulatory structure that it has repeatedly declared to be contrary to the public interest.
  - There is no legal basis for the Commission to reverse its findings in this record.

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THIS PROCEEDING IS GOVERNED BY THE FCC'S FINDINGS AND CONCLUSIONS

- The FCC has already analyzed the record and reached a number of conclusions which are not challenged.
  - "[T]he application of a CPNP regime, such as reciprocal compensation, to ISP-bound traffic undermines the operation of competitive markets." Para 71.
  - Reciprocal compensation for ISP-bound traffic has "created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress intended to facilitate with the 1996 Act." Para 21.
  - Reciprocal compensation for ISP-bound traffic "has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access regime." Para 21.
  - "We are concerned, however, that intercarrier payments for ISP-bound traffic have created severe market distortions." Para 76.
  - "We are convinced that viable, long-term competition among efficient providers of local exchange and exchange access services cannot be sustained where the intercarrier compensation regime does not reward efficiency and may produce retail rates that do not reflect the costs of the services provided." Para 71.
  - "There is convincing evidence in the record that at least some carriers have targeted ISPs as customers merely to take advantage of these intercarrier payments." Para 2.

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THESE CONCLUSIONS WERE REAFFIRMED BY THE COMMISSION AND THE COURT

- In the Core forbearance proceeding, the Commission held: “Core does not challenge the Commission’s conclusion that rate caps help avoid arbitrage and market distortions that otherwise would result from the availability of reciprocal compensation for ISP-bound traffic.” 19 FCC Rcd 20179, para 18

- In affirming the Core decision, the DC Court of appeals found that: “Core offers no ground for concluding that the FCC’s [economic] analysis is unreasonable.” *(In re: Core Communications, Inc.)* 455 F. 3d 267, 279 (DC Cir. 2006).

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RECIPROCAL COMPENSATION FOR ISP-BOUND TRAFFIC CREATES ECONOMIC DISTORTIONS

- Assessing reciprocal compensation on ISP-bound traffic enables CLECs and ISPs to offer services that are paid for by someone other than the customer/cost causer.

- The Commission has recognized that the distortions are extreme:
  - CLECs terminating 18 times more traffic than originating.
  - One CLEC terminating 40 times more traffic than originating.
  - CLECs actively seeking ISPs as customers in order to collect ISP reciprocal compensation.
  - CLECs organized for sole purpose of serving ISPs.

- Assessing reciprocal compensation on ISP-bound traffic provides an artificial subsidy to dial-up and creates a disincentive for migration to broadband.

THE PROBLEM PERSISTS

- Qwest delivered the following ISP-bound minutes to CLECs
  - 2005: 61,050,635,531
  - 2006: 50,157,670,907
  - 2007: 37,014,863,156
- If reciprocal compensation at voice levels is reinstated, this trend will likely be reversed.

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THE COMMISSION HAS FOUR VIABLE OPTIONS

- Option 1: The Commission can rule that Section 251(b)(5) does not apply to ISP-bound calls because they are not local.
  - Verizon May 17, 2004 *ex parte* filing explains this option in detail.

- Option 2: The Commission can rule that the reciprocal compensation is not justified on ISP-bound calls because the costs are not caused by the "originating" carrier.

- Option 3: The Commission can adopt specific rules for ISP-bound calls under the reciprocal compensation sections of the Act.

- Option 4: The Commission can forbear from the reciprocal compensation provisions of the Act (specifically, Section 252(d)(2)(A)(i)) and preserve its rules governing ISP traffic.

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OPTION 2: FIND THAT RECIPROCAL COMPENSATION IS NOT JUSTIFIED ON ISP-BOUND CALLS

- Section 252(d)(2)(A)(i) applies to costs that are "associated with the transport and termination" of carrying calls "that originate on the network facilities of the other carrier."

- The costs associated with an ISP-bound call are not "associated with" the transport and termination of the call. They are caused by the ISP, which is actively soliciting traffic and is compensated for the traffic that it processes.

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OPTION 3: ADOPT SPECIFIC RULES FOR ISP-BOUND CALLS UNDER THE RECIPROCAL COMPENSATION SECTIONS OF THE ACT

- Given the findings on the record, the Commission can adopt specific rules for ISP-bound traffic that avoid the economic dislocations that would be caused by the Core approach.

- Bill and keep is expressly permitted by the Act and can be applied on an interim basis to only ISP traffic.

- Or the Commission can ratify what it has done, that is, specific reciprocal compensation prices for ISP traffic.

- Section 251(i) preserves jurisdiction pursuant to Section 201.

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OPTION 4: FORBEAR FROM SECTION 252(d)(2)(A)(i)

- The Commission can forbear from applying the reciprocal compensation rules to ISP-bound traffic.

- Forbearance would allow the Commission to adopt rules applicable to ISP-bound traffic under Sections 201 and 202.

- The forbearance criteria are clearly met:
  - Reciprocal compensation for ISP-bound traffic is not necessary to ensure reasonable and non-discriminatory rates—in fact, Core's proposal would ensure the opposite.
  - Reciprocal compensation for ISP-bound traffic is not necessary to protect consumers.
  - Eliminating reciprocal compensation for ISP-bound traffic is clearly in the public interest, as the Commission has already found.

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