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Ex Parte

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

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Ms. Dortch:

As Verizon explained in its Supplemental Comments,¹ the Commission should not limit itself to a single rationale in issuing its third decision on 47 U.S.C. § 251(b)(5) and ISP-bound traffic. Providing a comprehensive view of the Commission's authority to retain its ISP payment regime will ensure that the Commission will not have to revisit this issue on remand a fourth time. As we have explained at length elsewhere, ISP-bound traffic is unquestionably jurisdictionally interstate in nature, and therefore falls squarely within the Commission's authority over interstate traffic under section 201. The Commission's authority over that traffic was expressly preserved by the 1996 Act (see section 251(i)). Regardless of any other grounds that the Commission provides to "explain[] the legal authority" it had to adopt the ISP payment rules in its *ISP Remand Order*,² however, we respectfully urge the Commission to also provide the following, additional grounds.

¹ See Supplemental Comments of Verizon and Verizon Wireless on Intercarrier Payments for ISP-Bound Traffic and the *WorldCom* Remand, CC Docket Nos. 01-92 *et al.* (FCC filed Oct. 2, 2008) ("Supplemental Comments").

² *In re Core Communications, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008).

First, the Commission should note that, even aside from its authority over interstate traffic, its authority to adopt rules to implement the pricing standards in the 1996 Act is beyond question. *See Iowa Utils. Bd.*, 525 U.S. at 377-78. Because the rules that the Commission adopted pursuant in the *ISP Remand Order* are pricing standards — setting maximums on the payments due for ISP-bound traffic — those rules could have been adopted pursuant to the Commission’s authority to adopt rules interpreting and implementing sections 251(b)(5) and 252(d)(2). Indeed, the D.C. Circuit has already pointed to § 252(d)(2) as a possible alternative ground on which the Commission could have promulgated the pricing rules adopted in the *ISP Remand Order* under section 201. *See WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).

In light of the unique technical nature of ISP-bound traffic and the arbitrage opportunities that traffic creates, the ISP payment rules the Commission adopted in the *ISP Remand Order* could have been adopted consistent with the terms of section 252(d)(2). First, those rules are consistent with the “additional costs” language in § 252(d)(2)(A)(ii) in the context of this unique category of traffic given the ability of “CLECs . . . to recover more of their costs from their ISP customers.” *ISP Remand Order* ¶¶ 76, 87. Second, in the context of the technologically unique category of traffic at issue here, which “generate[s] extremely high traffic volumes that are entirely one-directional,” *id.* ¶ 5, those rules are consistent with the notion reflected both in section 251(b)(5) and the pricing standard in section 252(d)(2) that compensation should be “mutual and reciprocal,” 47 U.S.C. § 252(d)(2)(A)(i). Indeed, from a technical standpoint, this traffic is particularly unique given that, once the ISP and its customer lock up what is, in essence, a temporary dedicated connection, virtually all of the communication transmitted over that connection flows from the ISP to the customer. Third, because those rules set only a “rate cap” — both directly on ISP-bound traffic and indirectly on non-ISP traffic subject to section 251(b)(5) through the mirroring rule — and those caps were set based on an “approximat[ion]” of carriers’ costs drawn from “negotiated interconnection agreements,” *ISP Remand Order* ¶ 85, those rules (including the mirroring rule) are consistent with the requirement that rates set under § 252(d)(2) reflect a “reasonable approximation” of the additional costs incurred, without “establish[ing] with particularity th[ose] additional costs,” 47 U.S.C. § 252(d)(2)(A)(ii), (d)(2)(B)(ii).³

Second, even apart from its authority over interstate traffic and its authority to adopt rules interpreting and implementing section 251(b)(5) and 252(d)(2), the Commission should find that it could (and under the unique circumstances here would) have exercised its forbearance authority under section 10. Forbearing from section 251(b)(5) insofar as it applied to ISP-bound traffic would have left compensation arrangements for such jurisdictionally interstate traffic subject to the Commission’s section 201 authority, which is the authority the Commission relied on in the *ISP Remand Order* for all four rules it adopted. Findings in that order demonstrate that all of the forbearance criteria were satisfied in 2001. First, enforcement of section 251(b)(5) would not have been “necessary to ensure” that rates “are just and reasonable,” 47 U.S.C. § 160(a)(1)); on the contrary, the record evidence strongly suggested that rates that states had

³ *See generally* Supplemental Comments at 46-49.

applied to this traffic up to that point (often under color of section 251(b)(5)) were unjust and unreasonable and had resulted in uneconomic arbitrage. *ISP Remand Order* ¶¶ 5, 70, 87. Second, because requiring payment of reciprocal compensation for ISP-bound traffic results in “a subsidy running from all users of basic telephone service to those end-users who employ dial-up Internet access,” *id.* ¶ 87, that deterred companies from offering consumers “viable local telephone competition,” *id.* ¶ 21, enforcement of section 251(b)(5) would not have been “necessary for the protection of consumers,” 47 U.S.C. § 160(a)(2). Finally, the Commission’s findings about the anti-competitive effects and regulatory arbitrage from subjecting ISP-bound traffic to reciprocal compensation, *see, e.g., ISP Remand Order* ¶ 21, demonstrates that forbearance would have been “consistent with the public interest” and would have “promote[d] competitive market conditions,” 47 U.S.C. § 160(a)(3), (b).⁴

Finally, as noted above, there is no dispute that the Commission adopted the ISP payment rules in the *ISP Remand Order* pursuant to its section 201 authority over interstate traffic. *See ISP Remand Order* ¶ 52. It remains the case, therefore, that if ISP-bound traffic is *not* for any reason encompassed within the section 251(b)(5) duty to enter into reciprocal compensation arrangements, such traffic was (and still is) subject to the Commission’s authority under section 201 because it is jurisdictionally interstate. Therefore, the Commission had the authority to adopt the rules contained in the *ISP Remand Order* under this scenario as well.

Sincerely,

/S/

Donna Epps

cc: Dan Gonzalez
Amy Bender
Nick Alexander
Scott Bergmann
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Greg Orlando

⁴ *See generally* Supplemental Comments at 41-46.