

ISSUE DATE: August 17, 1999

DOCKET NO. P-3167, 421/CP-99-529

ORDER DENYING PETITION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayner	Commissioner
Gregory Scott	Commissioner

In the Matter of the Petition of U S WEST Communications, Inc. for a Determination That ISP Traffic Is Not Subject to Reciprocal Compensation Payments Under the MFS/U S WEST Interconnection Agreement

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PROCEDURAL HISTORY

On April 20, 1999 U S WEST Communications, Inc. filed a request for a ruling that traffic to Internet service providers was not subject to the reciprocal compensation requirements of its interconnection agreements with MFS Intelenet, Inc., KMC Telecom, Inc., Ovation Communications of Minnesota, Inc., and Harmony International. The Company argued that a recent Federal Communications Commission (FCC) decision finding such traffic to be largely interstate eliminated any justification for requiring reciprocal compensation for these calls.

On May 12, 1999 the Commission issued a notice soliciting comments on the request. Contel of Minnesota, Inc. d/b/a GTE Minnesota filed comments supporting U S WEST's request.

The following parties filed comments opposing the request: Sprint Communications Company L. P. and Sprint Minnesota, Inc., filing jointly; MCI WORLDCOM, Inc., MFS Intelenet, Inc. and MCI Telecommunications Corporation, filing jointly; KMC Telecom Inc. and Ovation Communications of Minnesota, Inc., filing jointly; and AT&T Communications of the Midwest, Inc.

The Department of Public Service filed comments stating that the Commission had the authority to continue requiring reciprocal compensation for traffic to Internet service providers under the four interconnection agreements at issue. The agency did not take a position on whether the Commission should do so.

On August 3, 1999 the case came before the Commission.

FINDINGS AND CONCLUSIONS

I. Legal and Factual Background

Reciprocal compensation is a creature of the federal Telecommunications Act of 1996, which opened the nation's local telephone markets to competition. The Act requires all local exchange carriers to interconnect with one another and to establish reciprocal compensation arrangements to compensate one another for the costs of transporting and terminating calls originating on other carriers' networks.¹

Reciprocal compensation is designed only to recover the costs of transporting and terminating *local* calls; the costs of transporting and terminating interexchange calls have long been recovered through state and federal access charges. Also, the FCC rules implementing the 1996 Act explicitly limit reciprocal compensation to "local telecommunications traffic."²

At the same time, however, until February 26 of this year, it was unclear whether traffic from end users to Internet service providers (ISPs) was local or interstate. What was clear was that the FCC had decided, in a series of decisions going back 15 years, to treat this traffic as local traffic, unless and until changed circumstances dictated different treatment.

In 1983, when the FCC established interstate access charges, it exempted ISPs, permitting them to buy service under local business tariffs, instead of federal access tariffs, and to pay subscriber line charges, instead of access charges.³ In 1997, when the agency fine-tuned access charges to promote local competition, it reaffirmed the ISP exemption, citing the Congressional mandate "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."⁴ Throughout this time, the FCC also consistently permitted local exchange carriers to record their revenues and expenses from serving ISPs as local revenues and expenses for separations purposes.⁵

Of course, it was clear all along that ISP-bound traffic was unique. Although ISPs are typically

¹ 47 U.S.C. § 251(a) and (b)(5).

² See 47 C.F.R. 51.701.

³ MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983).

⁴ Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd at 16133-34.

⁵ Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Settlements for Open Network Architecture, CC Docket No. 89-79, Notice of Proposed Rulemaking, 4 FCC Rcd. 3983, 3987-88 (1989).

located in the same local calling area as their customers, the information their customers retrieve from the Internet is stored in and transmitted through computers all over the world. Similarly, when ISP customers send electronic mail or other on-line communications, these communications often cross interexchange, interstate, and international borders.

The issue of whether ISP-bound traffic was interstate or intrastate came to a head when local competition materialized. Then, local exchange carriers had to decide, when negotiating interconnection agreements, whether to pay reciprocal compensation for ISP-bound calls. When negotiations failed, state commissions had to decide the issue. (Under the Act, carriers unable to reach negotiated interconnection agreements must take disputed issues to their state commissions.⁶)

In Minnesota, some carriers negotiated interconnection agreements requiring reciprocal compensation for ISP-bound traffic; others did not. When this Commission faced the issue in arbitrating an interconnection dispute between U S WEST and MFS Communications Company, the Commission decided to require reciprocal compensation over U S WEST's objections.

That decision was based on four facts: (1) U S WEST charged ISPs standard local business rates, not special ISP rates; (2) U S WEST did not handle ISP-bound traffic differently from other local traffic; (3) the law did not require U S WEST to handle ISP-bound traffic differently from other local traffic; and (4) U S WEST had not demonstrated that separating ISP-bound traffic from other traffic was even technically feasible.⁷

After the U S WEST/MFS arbitration, three other companies exercised their right under the 1996 Act to adopt the U S WEST/MFS contract, including its terms requiring reciprocal compensation for ISP-bound traffic.⁸ Those companies were KMC Telecom, Inc., Ovation Communications of Minnesota, Inc., and Harmony International.

⁶ 47 U.S.C. § 252(b).

⁷ *In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with U S WEST Communications, Inc. Pursuant to Section 252 (b) of the Federal Telecommunications Act of 1996*, Docket No. P-442,421/M-96-855; P-5321, 421/M-96-909; P-3167, 421/M-96-729, ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A U S WEST COST PROCEEDING (December 2, 1996), hereinafter *U S WEST/MFS Arbitration Order*.

⁸ 47 U.S.C. § 252(i).

Meanwhile, local exchange carriers throughout the country filed petitions asking the FCC to clarify whether ISP-bound traffic was subject to reciprocal compensation. On February 26, 1999 the FCC released a Declaratory Ruling finding that ISP-bound traffic was jurisdictionally mixed, but largely interstate, and subject to FCC jurisdiction.⁹ The agency opened a rulemaking proceeding to determine how carriers should be compensated for carrying this traffic. In the mean time, the agency stated, state commissions should continue deciding that issue when it arose, and negotiated and arbitrated interconnection agreements addressing the issue could remain in effect.

II. U S WEST's Petition

U S WEST's petition asks the Commission to find that U S WEST, MFS, and the three companies that have adopted the U S WEST/MFS arbitrated interconnection agreement are no longer required to pay reciprocal compensation for ISP-bound traffic for the following reasons:

- (1) The FCC has held that ISP-bound traffic is interstate traffic, and the Telecommunications Act of 1996 "does not permit state commissions to require a carrier to pay reciprocal compensation for such traffic."
- (2) The Commission's reasons for requiring reciprocal compensation in the U S WEST/MFS arbitration case are improper under the FCC's *Declaratory Ruling*.
- (3) The language of the arbitrated interconnection agreement limits reciprocal compensation to local traffic; since it is now clear that ISP-bound traffic is not local traffic, no reciprocal compensation for that traffic is required under the terms of the agreement itself.

III. Commission Action

The Commission will deny the petition for the reasons set forth below.

A. The FCC Ruling Does Not Invalidate the U S WEST/MFS Arbitrated Interconnection Agreement.

U S WEST argued that the FCC finding that ISP-bound traffic is interstate traffic either deprives this Commission of the authority to require reciprocal compensation or exposes that decision as incorrect and compels its reversal. The Commission disagrees.

The FCC's Declaratory Ruling makes it clear that, until it completes its rulemaking on compensation for ISP-bound traffic, states retain the authority to require reciprocal compensation,

⁹ Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68 (rel. Feb. 16, 1999), hereinafter *Declaratory Ruling*.

to devise other compensation mechanisms, and to enforce negotiated and arbitrated interconnection agreements requiring reciprocal compensation:

We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.

Declaratory Ruling, at ¶ 21.

The Ruling makes it equally clear that requiring reciprocal compensation is a reasonable interim means of compensating local exchange carriers for transporting and terminating ISP-bound traffic:

While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

Declaratory Ruling, at ¶ 25.

Finally, the Ruling makes it clear that in the absence of a federal rule, states had — and have — an obligation to devise some form of compensation for transporting and terminating ISP-bound traffic:

In the absence of federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. . . .

By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

Declaratory Ruling, at ¶ 26.

The Commission concludes that the FCC's Declaratory Ruling does not invalidate the reciprocal compensation requirements of the U S WEST/MFS arbitrated interconnection agreement or those of the adopted agreements of KMC Telecom, Inc., Ovation Communications of Minnesota, Inc., and Harmony International.

B. The Commission's Reasons for Requiring Reciprocal Compensation Under the U S WEST/MFS Interconnection Agreement Pass Muster Under the FCC's *Declaratory Ruling*.

U S WEST also claimed that the Commission's reasons for requiring reciprocal compensation in the U S WEST/MFS arbitration case were impermissible under the FCC's *Declaratory Ruling*.

The FCC cited only one instance in which state commissions should re-examine decisions requiring reciprocal compensation — when those decisions were based on findings that ISP-bound traffic terminates at the ISP server — and emphasized that there were many other strong and acceptable rationales for such decisions.¹⁰

The Commission explained its decision to require reciprocal compensation in the U S WEST/MFS case as follows:

The Commission finds that US WEST has failed to meet its burden of demonstrating a need to discriminate regarding the handling of ESP traffic. US WEST does not presently have different local rates for ESPs—it has shown no basis for imposing such discrimination on rates in this proceeding. US WEST has not shown that separating this traffic is required under the law or that it is technically feasible.

U S WEST/MFS Arbitration Order at 75.

This rationale does not rest on the incorrect (and prohibited) assumption that ISP-bound traffic terminates at the ISP server. Instead, it turns on the kinds of factors that the FCC has specifically identified as proper — U S WEST's treatment of ISP traffic as local traffic, its failure to segregate ISP-bound traffic from other local traffic, its charging of standard local rates to ISP customers. *Declaratory Ruling*, at ¶ 24.

The Commission concludes that its 1996 arbitration decision to require reciprocal compensation for ISP-bound traffic passes muster under the FCC's *Declaratory Ruling* and need not be re-examined.

¹⁰ *Declaratory Ruling*, at ¶ 27.

C. The Language of the Interconnection Agreement Does Not Preclude Reciprocal Compensation for ISP-Bound Traffic.

U S WEST also claimed that since the arbitrated interconnection agreement requires reciprocal compensation only “[i]f such traffic is local,”¹¹ and since we now know that ISP-bound traffic is not local, the agreement itself no longer permits the payment of reciprocal compensation for ISP-bound traffic. This is incorrect on at least two fronts.

First, the Order establishing the reciprocal compensation requirements between these two companies unequivocally required reciprocal compensation for ISP-bound traffic. The issue presented itself in the form of U S WEST-sponsored language exempting ISP-bound traffic from reciprocal compensation; the Commission struck the U S WEST language for the explicitly stated purpose of requiring reciprocal compensation for this traffic. Even if the language of the agreement failed to conform with the Commission’s Order, then, justice would require the Commission to reform or interpret the language of the agreement to conform with the Order.

Second, the language of the agreement can be read to require reciprocal compensation for ISP-bound traffic. While U S WEST is correct that the agreement requires reciprocal compensation for traffic “if such traffic is local,” ISP-bound traffic was treated as local when the agreement was signed, and it continues to be treated as local for regulatory purposes, pending the conclusion of the FCC’s ISP rulemaking. The *Declaratory Ruling* makes this clear:

Thus, the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local. . . .

Moreover, the Commission has directed states to treat ISP traffic as if it were local, . . .

Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. . . .

. . . state commissions have the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission’s longstanding policy of treating this traffic as local . . .

Declaratory Ruling, ¶¶ 5, 9, 16, 23, 24.

The use of the term “local,” then, to identify traffic subject to reciprocal compensation, does not automatically disqualify ISP-bound traffic. In fact, it militates toward including it.

¹¹ *Interconnection Agreement*, V. A.

In any case, however, the Commission reads the agreement in concert with the arbitration Order and hereby holds that the agreement requires the payment of reciprocal compensation for ISP-bound traffic.

IV. Conclusion

The FCC's *Declaratory Ruling* finding ISP-bound traffic to be largely interstate explicitly authorized state commissions to continue requiring reciprocal compensation for this traffic until the FCC finishes its rulemaking on the issue. This Commission's decision requiring reciprocal compensation for ISP-bound traffic in the U S WEST/MFS arbitration case remains legally sound and in full force and effect.

The Commission will deny U S WEST's petition.

ORDER

1. U S WEST's Petition for a Determination that ISP Traffic Is Not Subject to Reciprocal Compensation Payments Under the MFS/U S WEST Interconnection Agreement is hereby denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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