

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of US West Communi-) Application No. C-1830
cations, Inc., Denver, Colorado,)
filing its notice of intention to)
file its Section 271(c) application) CHECKLIST ITEM NO. 13
with the FCC and request for the) SATISFIED
the Commission to verify US West)
compliance with Section 271(c).) Entered: September 5, 2001

BY THE COMMISSION:

O P I N I O N A N D F I N D I N G S

This matter came before the Nebraska Public Service Commission (Commission) on May 17, 2001, on a motion and brief filed by Qwest Corporation, seeking approval in the above application of 47 U.S.C. § 271(c)(2)(b), otherwise known as Checklist Item No. 13. On June 23, 1998, US West, now known as Qwest Corporation (Qwest), filed an application requesting the Commission to verify Qwest's compliance with Section 271(c) of the Telecommunications Act of 1996. After holding a hearing on November 16 through November 20, 1998, the Commission issued an order on April 9, 1999, finding Qwest to be in compliance with eight of section 271's fourteen checklist items.

With respect to Checklist Item No. 13, the Commission found that Qwest had just and reasonable agreements in place with respect to reciprocal compensation in accordance with Section 252(d)(2).¹ The Commission did not give final approval of Checklist Item No. 13, however, because of the unclear state of the law with regards to payment of reciprocal compensation of Internet service providers (ISP) traffic (See April 9, 1999, order ¶ 144). At that time, the issue of how carriers should be reimbursed for traffic to ISPs was still pending before the Federal Communications Commission and the Commission, and the FCC was continuing to examine how carriers should be compensated for ISP traffic (Order ¶147).²

¹ "¶ 141 To comply with Checklist Item No. 13, US West must demonstrate that it provides reciprocal compensation arrangements in accordance with Section 252(d)(2). When considering whether the terms of reciprocal compensation are just and reasonable in accordance with Section (d)(2), a state commission shall consider whether (i) terms and conditions provide for the mutual and reciprocal recovery by each carrier of cost associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier, and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."

² ¶ 147. In examining BellSouth's Compliance with Checklist Item No. 13 in Louisiana the FCC stated that it would not consider BellSouth's unwillingness to pay reciprocal compensation for ISP traffic. In Application No. C-1960, this Commission issued a preliminary ruling that traffic to ISPs was local in nature. We did not, however make a specific ruling with respect to whether such traffic was subject to reciprocal compensation. Since the date of the hearing, the FCC has determined traffic to ISPs to be jurisdictionally mixed and primarily interstate in nature. The FCC is continuing to examine how carriers should be compensated for such traffic.

At the hearing, Aliant Midwest asserted that Qwest had not paid them reciprocal compensation for ISP-bound traffic. Qwest responded, however, that such traffic is "non-local" and, therefore, outside the reciprocal compensation requirement.

This Commission determined that it could not make a final affirmative statement on Qwest's compliance with Checklist Item No. 13 in light of the continued review of the issues of reciprocal compensation for ISP-bound traffic by the FCC and Commission.

O P I N I O N S A N D F I N D I N G S

Since the date of the April 9, 1999, order, the FCC has issued its decision clarifying and reaffirming that ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2), and therefore that "whether a carrier pays such compensation is 'irrelevant to checklist item 13.'" See *Bell Atlantic Communications, Inc., Memorandum Opinion and Order*, FCC 01-130, CC Docket No. 01-9, paras. 213-216 (April 16, 2001).

The issue of whether reciprocal compensation for ISP-bound traffic must be paid in order to satisfy Checklist Item No. 13 has been before the FCC on numerous occasions. In its *Bell Atlantic New York Order*, the FCC dispositively held that inter-carrier compensation for Internet-Bound traffic is not a "reciprocal compensation" issue under 47 U.S.C. § 251(b)(5) and "is not a checklist item."³ Specifically, the FCC determined that because Internet-bound traffic is not "local" traffic, it is outside the ambit of 47 U.S.C. § 251(b)(5).

The FCC reached a similar conclusion in the *Second BellSouth Louisiana Order*⁴, in which it declined to consider compensation for Internet-bound traffic in determining whether BellSouth satisfied the requirements of Checklist Item No. 13.

In February 1999, the FCC issued an order in which it concluded that ISP-bound traffic is jurisdictionally "interstate."⁵ Although the D.C. Circuit in *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir 2000), vacated the FCC's ISP Declaratory Ruling on Internet-bound-traffic, it did not address or review the *Bell Atlantic New York Order* in its decision, and therefore, the *Bell Atlantic New York Order* remains valid.

³ *Memorandum Opinion and Order, Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404 (Dec. 22, 1999) ("ISP Declaratory Ruling").

⁴ *Memorandum Opinion and Order, Application of BellSouth Corporation, et al. for Provision of In-Region, InterLata Services in Louisiana*, 13 FCC Red 20599 ¶ 303 (1998) ("Second BellSouth Louisiana Order").

⁵ *Declaratory Ruling and Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Red 3689 (Feb. 26, 1999).

Following the *Bell Atlantic New York Order*, the FCC has consistently determined both that ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2) and that "whether a carrier pays such compensation is 'irrelevant to Checklist Item No. 13.'" See *In the Matter of Application of Verizon New England Inc.*, ("Verizon Massachusetts Order")⁶

On April 27, 2001, less than two weeks after issuing the Verizon Massachusetts Order, the FCC, addressing the remand order from the Court of Appeals for the D.C. Circuit in the *Bell Atlantic* case, issued its rule on ISP-bound traffic and declared once again that ISP traffic is not subject to reciprocal compensation. 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*, FCC 01-131, CC Docket No. 96-98, CC Docket No. 99-68, ¶ 1 (rel. April 27, 2001). The FCC concluded that telecommunications traffic delivered to an ISP is interstate access traffic, specifically "information access," and therefore not subject to reciprocal compensation requirements.

In its April 27, 2001, order, the FCC reaffirmed, although for different reasons than before, that (i) the provisions of section 251(b)(5) do not extend to ISP-bound traffic; (ii) ISP traffic falls outside the scope of section 251(b)(5); and (iii) Congress excluded from the "telecommunications" traffic subject to reciprocal compensation the traffic identified in section 251(g), including traffic destined for ISPs.

It is clear that since the Commission's April 9, 1999, order, the Federal Communications Commission has determined that treatment of Internet-bound traffic is not relevant to Checklist Item No. 13. As such, the Commission finds that Qwest at this time satisfies 47 U.S.C. § 271(c)(2)(b), otherwise known as Checklist Item No. 13.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest at this time is in compliance with its reciprocal compensation requirements as required by §§ 47 U.S.C. § 271(c)(2)(b) of the Telecommunications Act of 1996.

⁶ Bell Atlantic Communications, Inc., Memorandum Opinion and Order, FCC 01-130, CC Docket No. 01-9, ¶ 213-216 (April 16, 2001).

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MADE AND ENTERED at Lincoln, Nebraska, this 5th day of September, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

George J. Johnson
Frank E. Landis

Alan C. Boyle

Frank E. Landis

//s//Frank E. Landis

Alan C. Boyle
Chairman

ATTEST:

And S. Pollack
Executive Director