

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. C-1960/
of the Nebraska Public Service) PI-25
Commission, on its own Motion,)
to conduct an investigation of) FINDINGS AND CONCLUSIONS
the interstate or local charac-)
teristics of Internet service)
provider traffic.) Entered: December 7, 1999

BY THE COMMISSION:

I. Background

On December 15, 1998, the Commission opened this docket for the purpose of conducting an investigation of the interstate or local characteristics of Internet Service Provider (ISP) traffic. Public notice of this docket was published in the Daily Record, Omaha, Nebraska, on December 17, 1998.

In the Commission's order instituting this investigation, it was noted that the Commission has approved a number of interconnection agreements between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs), and that such agreements generally contain one or more provisions concerning the payment of reciprocal compensation. An issue exists in Nebraska, as in other states, concerning the proper characterization and treatment of ISP traffic for the purpose of payment of reciprocal compensation.

Based upon information presented to this Commission in Application Nos. C-1415 and C-1830, and in the order instituting this investigation, the Commission announced an interim and preliminary finding that ISP traffic is within the classification of local exchange service as defined in Section 001.01W of the Commission's Telecommunications Service Rules. However, pending the completion of its investigation in this docket, the Commission refrained from requiring the payment of reciprocal compensation relating to ISP traffic. The Commission requested comments on three issues set forth in its order. Comments were submitted to the Commission by: AT&T Communications of the Midwest, Inc.; Aliant Communications Inc., d/b/a ALLTEL; Cable USA, Inc.; GTE Service Corporation; Nebraska Independent Telephone Association; Sprint Communications Company L.P./United Telephone Company; and US West Communications, Inc.

By order dated September 21, 1999, the Commission, for reasons of administrative efficiency, transferred the issues relating to the regulation of ISPs and ISP traffic from Application No. C-1628 to this docket. Further, in its order dismissing Formal Complaint No. 1266 filed by US West Communications, Inc. against ICG Communications, Inc., the

Commission ordered that the issues raised by US West Communications, Inc., in such complaint should also be consolidated into this docket. While these additional issues have been made a part of this docket and evidence has been received by the Commission relating thereto, this order will only address the reciprocal compensation issue that is the original subject matter of this investigation. Rulings on the other issues consolidated into this docket will be made at a later date.

A significant development concerning this reciprocal compensation issue occurred in February 1999 when the Federal Communications Commission (FCC) issued its Declaratory Ruling *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, and further issued a Notice of Proposed Rulemaking in CC Docket No. 99-68 (FCC, February 26, 1999), which will be referred to in this Order as the "FCC Internet Order". The contents of the FCC Internet Order, as well as the interpretation thereof, will be addressed in the Findings and Conclusions below.

Initial comments in this matter were received from the parties identified above as of March 15, 1999. Reply comments were received from the parties on April 1, 1999. Procedural Order No. 1 was entered in this matter on October 5, 1999, in which the Commission ordered that a public hearing in this docket would be held on October 22, 1999, and that such hearing would be conducted in a legislative format. In said Procedural Order No. 1, the Commission identified additional issues on which it sought comments, requested information from parties as to the number of witnesses and amount of time needed at the hearing, and all parties desiring to testify at the hearing were directed to submit pre-filed testimony to the Commission by October 18, 1999.

At the outset of the October 22 hearing, all comments and reply comments received by the Commission in this matter were made a part of the record. The pre-filed testimony offered by parties in this matter was also made a part of the record. Witnesses appeared on behalf of AT&T Communications of the Midwest, Inc.; Aliant Communications Inc., d/b/a ALLTEL; Cable USA, Inc.; ICG Communications, Inc.; Internet Nebraska; Sprint Communications Company L.P./United Telephone Company; and US West Communications, Inc. and were cross-examined by the Commissioners and the Commission staff.

II. Positions of the Parties

Dr. Robert Harris, appearing as an expert witness on behalf of US West, presented an economic and public policy analysis concerning this Commission's preliminary finding that ISP-bound traffic is local and the harmful effects of requiring US West to pay reciprocal compensation on such traffic. Dr. Harris reemphasized that the FCC conclusion that ISP-bound traffic is jurisdictionally interstate in nature and that such traffic is not local

in nature primarily because traditional local telephone traffic and ISP-bound traffic are not substitutes and are not competitive services.

With regard to the payment of reciprocal compensation concerning ISP-bound traffic, Dr. Harris argued that because the Regional Bell Operating Companies (RBOCs) did not recognize the potential volumes of ISP-bound traffic during negotiations of interconnection agreements and because the RBOCs had made a "mistake" on the issue as to the treatment of ISP-bound traffic, CLECs should be compensated for terminating calls to ISPs using the "two to one imbalance test" or that ISP-bound traffic should be exempted from compensation completely.

Mr. Brad Hedrick, appearing on behalf of ALLTEL's CLEC, testified in favor of regulatory treatment of ISP-bound traffic as local and explained the terms of the interconnection agreement between his company and US West (Hedrick Exhibit No. 1) that require the payment of reciprocal compensation for ISP-bound traffic. Mr. Hedrick provided the Commission with a copy of a "Fact Sheet" issued by the FCC in connection with the FCC Internet Order (Hedrick Exhibit No. 3) in which the FCC stated that all 26 state commissions that had, as of that date, considered the reciprocal compensation issue had concluded that compensation is payable for ISP-bound traffic. Mr. Hedrick also provided a compilation of decisions by Federal courts and state commissions that have addressed this issue subsequent to the announcement of the FCC Internet Order (Hedrick Exhibit No. 4).

Ms. Arleen M. Starr testified on behalf of AT&T. Ms. Starr described to the Commission the FCC's long-standing policy of treating ISP traffic as local. Ms. Starr further testified that the industry practice at the time that most Nebraska interconnection agreements were negotiated and approved was that ISP-bound traffic is subject to reciprocal compensation, due, at least in part, to the exemption from access charges that the FCC granted to enhanced service providers (ESPs). Because carriers cannot collect access charges for ISP-bound traffic due to the ESP exemption (under which such traffic is treated as local), the only source of compensation for such traffic is through reciprocal compensation provisions approved by state commissions. In light of this practice, absent an interconnection agreement provision expressly excluding ISP-bound traffic from reciprocal compensation, such traffic must be regarded as local and receive compensation. Ms. Starr testified that the AT&T/US West interconnection agreement provides for reciprocal compensation for local traffic. There is no exclusion for ISP-bound traffic.

Mr. David Rearden, an economist employed by Sprint/ United, recommended that the Commission affirm its preliminary finding that the termination of ISP-bound traffic be treated as local traffic,

and proceed to identify a more permanent resolution for compensating carriers for terminating ISP-bound traffic. Reciprocal compensation at the same rates used with regard to traditional local service calls was recommended to avoid unfair advantage by one group of carriers over another.

While pre-filed testimony of Mr. Gregory P. Babbitt was submitted by Cable USA, Inc., Mr. Andrew S. Pollock, legal counsel for Cable USA, testified. Mr. Pollock stated that the FCC Internet Order does not preclude a finding that ISP-bound traffic is subject to reciprocal compensation, and that this Commission has jurisdiction to enforce compensation arrangements in interconnection agreements. Mr. Pollock supported Ms. Starr's testimony concerning the custom and usage within the industry at the time the current interconnection agreements were negotiated which treated ISP-bound traffic as local in nature and subject to reciprocal compensation when traffic is not in balance. With regard to existing approved interconnection agreements, Mr. Pollock urged the Commission to apply rules of contractual interpretation and construction and to enforce such agreements thereby requiring payment of reciprocal compensation for ISP-bound traffic. He also asserted that the Commission should adopt a pro-competition policy of treating Internet traffic as local for purposes of reciprocal compensation on a going-forward basis.

Based upon the totality of the evidence provided to the Commission in this matter, the Commission issues the following Findings and Conclusions.

F I N D I N G S A N D C O N C L U S I O N S

Section 251(b)(5) requires all local exchange carriers (LECs) to establish reciprocal compensation arrangements for the transport and termination of telecommunications and such arrangements are generally set forth in the parties' interconnection agreement. The FCC's regulations define "reciprocal compensation" as an "arrangement between two carriers. . . in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. sec. 51.701(e) (1998).

In the FCC Internet Order, the FCC focused on the question of the proper classification of an ISP-bound call and concluded that ". . . ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." (paragraph 1). The FCC noted however that this conclusion "does not in itself determine whether reciprocal

compensation is due in any particular instance." Rather the FCC recognized that parties may have agreed to reciprocal compensation for ISP-bound traffic. And even where no agreement exists, "a state commission, in the exercise of its authority to arbitrate interconnection disputes under section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic."

While the FCC has opened a rulemaking proceeding for the purpose of adopting a rule controlling inter-carrier compensation for ISP-bound traffic (FCC Internet Order at paragraph 28), no such rule has yet been announced. Absent such a rule, the FCC has held: "We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic . . ." (FCC Internet Order at paragraph 21). In so doing, the FCC clearly did not preclude, absent a federal rule, state commissions from determining that interconnection agreements require reciprocal compensation for ISP-bound traffic.

Based upon the evidence presented to the Commission in this matter, the Commission finds that it has jurisdiction to determine the regulatory treatment of ISP-bound traffic for purposes of payment of reciprocal compensation.

Having reviewed the Nebraska-approved interconnection agreements and based upon the record presented, we conclude that, at the time the interconnection agreements were developed, the parties did not intend to exclude ISP-bound traffic from being subject to reciprocal compensation provisions. At the time the agreements were entered into, ISP traffic was treated as local in virtually every respect by the industry and the FCC. Since 1983, the FCC has treated enhanced service providers, including ISPs, as end-users and exempted them from payment of access charges. In light of the overwhelming industry practice, it was incumbent upon the negotiating parties to exclude ISP traffic from the definition of local traffic in interconnection agreements.

As such, the Commission concludes that ISP-bound traffic is properly subject to regulatory treatment as local traffic, and therefore, as a general matter, is subject to reciprocal compensation unless a particular interconnection agreement expressly and specifically excludes ISP-bound traffic from the parties' reciprocal compensation obligations. Therefore, each party to such an interconnection agreement shall pay to the other party reciprocal compensation for ISP-bound traffic originated by its customers and terminated on facilities of the other party. The rates provided in the parties' interconnection agreement for the termination of local traffic shall govern ISP-bound traffic. In the event that parties to a particular interconnection agreement have negotiated, and this Commission has approved or approves some other means for compensation for ISP-bound

traffic, such provisions shall govern.

All outstanding balances relating to reciprocal compensation, specifically including reciprocal compensation for ISP-bound traffic, shall be paid by the party owed such compensation to the party to whom such compensation is owed consistent with the requirements of the preceding findings and within thirty (30) days following the date of this order. The foregoing basis for compensation for ISP-bound traffic shall remain in effect until such time that the FCC adopts a rule governing compensation for such traffic, or the parties negotiate new reciprocal compensation obligations.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a copy of this order shall be served upon each carrier that is a party to an interconnection agreement that has been approved by this Commission.

IT IS FURTHER ORDERED that all telecommunications carriers shall be subject to and comply with the foregoing Findings and Conclusions.

IT IS FURTHER ORDERED that should any court of competent jurisdiction determine any part of this order to be legally invalid, the remaining portions of this order shall remain in effect to the full extent possible.

MADE AND ENTERED at Lincoln, Nebraska, this 7th day of December, 1999.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

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