ORDER NO. 00-722

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 238

In the Matter of the Petition of SPRINT COMMUNICATIONS COMPANY, L.P., for Arbitration of Interconnection Rates, Terms, and Conditions with QWEST CORPORATION, pursuant to the Telecommunications Act of 1996.	))))))	COMMISSION DECISION

DISPOSTION: ARBITRATOR'S DECISION ADOPTED

On June 21, 2000, Sprint Communications Company L.P. (Sprint) filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with U S WEST Communications, Inc. (now Qwest Corporation, hereafter "Qwest") pursuant to the Telecommunications Act of 1996. Qwest responded to the petition on July 17, 2000.

Conferences were held on July 20, August 29, and August 30, 2000. At the August 30 conference, the parties agreed to stipulate the prefiled testimony and exhibits into evidence (as supplemented by certain discovery responses), waive the scheduled hearing, and submit briefs on the outstanding issues.

Qwest filed a motion to compel discovery on September 1, 2000. Sprint responded to the motion on September 6, 2000. On September 8, 2000, the arbitrator issued a ruling granting the motion to compel in part.

Opening briefs were filed on September 18, 2000. Reply briefs were filed on September 25, 2000. On October 16, 2000, the Arbitrator issued his decision in this proceeding. Qwest filed exceptions to the decision on October 27, 2000.

Standards for Arbitration and Commission Review

This arbitration was conducted under 47 U.S.C. §252 of the Act. Subsection (c) of §252 provides:

> Standards for Arbitration--In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
>
> > (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission [Federal Communication Commission] pursuant to section 251;
> >
> > (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
> >
> > (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. Section 252(e)(2)(B) provides that the State commission may reject an agreement (or any portion thereof) adopted by arbitration only "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

> Notwithstanding paragraph (2), but subject to section 252, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Commission Conclusion

The Commission has reviewed the Arbitrator's decision and the exceptions filed by Qwest. The Arbitrator's decision complies with the requirements of the Act, applicable FCC regulations, and relevant state law and regulations, and should be approved.

ORDER

IT IS ORDERED that the Arbitrator's decision in this case, attached to and made part of this order as Appendix A, is adopted.

Made, entered, and effective _____.

_____
Ron Eachus
Chairman

_____
Roger Hamilton
Commissioner

_____
Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-14-095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-13-070(2)(a). A party may appeal this order to a court pursuant to applicable law.

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Opening briefs were filed on September 18, 2000. Reply briefs were filed on September 25, 2000. The exhibits admitted in this proceeding are listed in Appendix B.

Statutory Authority

The standards for arbitration are set forth in 47 USC §252(c):

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Issue in Dispute

Qwest and Sprint request that the Commission resolve the following issue:[1]

Issue No. 1 (Provision (C)2.3.4.1.3) — Should reciprocal compensation be paid for telecommunications traffic originated by an end-user customer and terminated to an Internet Service Provider (ISP) within the customer's local calling area?

The Internet is "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world. Unlike the conventional 'circuit-switched network' which uses a single end-to-end path for each transmission, the Internet is a 'distributed packet-switched network,' which means that information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination."[2]

ISPs are entities that provide their customers with access to the Internet. In the case of "dial-up" Internet access, a customer will use a computer and modem to place a call to the ISP server in the customer's local calling area. The customer will usually pay a flat monthly fee to the ISP for this service (over and above the flat fee already paid by the customer to the local telephone company for use of the local exchange network). Calls are transmitted to the ISP over business lines purchased by the ISP from the LEC, typically for a flat monthly fee that allows unlimited incoming calls.[3]

In 1983, the Federal Communications Commission (FCC) determined that Enhanced Service Providers (ESPs), including ISPs, should be exempted from paying interstate access charges. The FCC reaffirmed the exemption in 1991 and 1997, noting, among other things, the need to "preserve the vibrant and competitive free market that presently exists for Internet and other interactive computer services."[4]

Section 251(b)(5) of the Act requires local exchange carriers (LECs) to "establish reciprocal compensation arrangements for the transport and termination of

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[1] By letter dated October 13, 2000, the parties withdrew a second issue relating to the calculation of nonrecurring charges for unbundled element combinations.

[2] *Reno v. ACLU*, 521 U.S. 844 (1997); *In the Matter of Federal-State Joint Board On Universal Service*, 13 FCC Rcd 11501, 11532 (p 64) (1998)).

[3] *Bell Atlantic Telephone Companies, et al., v. FCC et al.*, 206 F3d 1, 4 (D.C. Cir. 2000).

[4] *In the Matter of Access Charge Reform*, 12 FCC Rcd 15982 (1997).

telecommunications." By regulation, the FCC has limited the scope of the reciprocal compensation requirement to local telecommunications traffic. 47 C.F.R. §51.701(a).[5]

On February 26, 1999, the FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking (ISP Order)[6] addressing inter-carrier compensation for the exchange of ISP-bound traffic. The FCC concluded that ISP-bound traffic is "jurisdictionally mixed" and "largely interstate," and initiated a rulemaking to adopt a federal rule governing inter-carrier compensation for that traffic. It also held that State commissions in arbitration proceedings may adopt reciprocal compensation as "an appropriate interim inter-carrier compensation mechanism" for ISP-bound traffic pending completion of the rulemaking.[7]

On March 24, 2000, the United States Court of Appeals for the District of Columbia Circuit, vacated the FCC's ISP order. The Court held:

> Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] . . . local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission. We do not reach the objections of the incumbent LECs that §251(b)(5) preempts state commission authority to compel payments to the competitor LECs; at present we have no adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.[8]

In previous arbitration proceedings, the Commission has concluded that ISP-bound traffic is local and subject to the reciprocal compensation requirements in §251(b)(5) of the Act. The most recent decision on this issue was entered in docket ARB 91, an arbitration proceeding involving GTE Northwest Incorporated (now Verizon) and Electric Lightwave, Inc. In Order No. 99-218, entered March 17,1999, the Commission adopted the arbitrator's decision that ISP-bound traffic was local and subject

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[5] *Bell Atlantic* at 2.

[6] *In the Matter of Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic,* CC Dockets 96-98 and 99-68, Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68, at ¶16, 14 FCC Rcd 3689, 3690 (released February 26, 1999) (hereafter the "FCC ISP Order"), vacated *by Bell Atlantic Tel Cos. v. FCC et al.*, supra.

[7] Id. at ¶ 27. The FCC also noted that "[u]ntil adoption of a final rule, state commissions will continue to determine whether reciprocal compensation is due for [ISP-bound] traffic." Id. at ¶28.

[8] *Bell Atlantic* at 9.

to the reciprocal compensation provisions in §251(b)(5) of the Act.[9] While acknowledging the FCC's jurisdictional determination in the ISP order, the Commission found that, in absence of a federal rule, reciprocal compensation was a "logical and reasonable method of compensating carriers for the costs incurred to terminate [ISP-bound traffic]." The Commission further concluded that reciprocal compensation should remain in effect for this traffic "pending the adoption of a federal rule establishing an appropriate interstate compensation mechanism."[10] In an opinion entered July 11, 2000, the federal district court upheld the Commission's decision regarding this issue.[11]

Qwest Position. In this arbitration proceeding, Qwest requests that the Commission revisit its decision to require reciprocal compensation for ISP-bound traffic on an interim basis. Qwest advances the following arguments in support of its position:

(a) Dial-up Internet calls from customers to ISPs within a local calling area are not local telecommunications subject to reciprocal compensation under 251(b)(5). The FCC has traditionally regarded ISP-bound traffic as "predominantly interstate" in nature. The ISP Order merely reaffirms the FCC's prior conclusions concerning this traffic.

According to Qwest witness Joseph Craig, the routing of an ISP call from a network perspective is very similar to the routing of a long distance call.[12] Calls made by an end user to an ISP do not terminate within the local calling area at the ISP's modem. Instead, the ISP modem acts as an interface between the end user's modem and the ISP server, which then delivers the call over the Internet backbone to a remote hub, or web site, specified by the end user in the form of a Universal Resource Locator (URL). The remote hubs to which ISP calls are delivered[13] are often located outside the state of the originating end user. For Oregon ISPs, the closest remote hubs are located in San Francisco or San Jose.

Another similarity between ISP calls and long distance calls is that the originating carrier does not know the ultimate destination of the call and does not deliver the call to that destination. For both types of calls, the originating carrier hands off the call to another local carrier for delivery to the final destination. In contrast, when a customer

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[9] The arbitrator found that the identical issue had been addressed by the Commission in Order No. 96-324 in PUC docket ARB 3. Order No. 96-324 concluded, among other things, that all traffic originated and terminated by Enhanced Service Providers, including ISP-bound traffic, is local traffic subject to reciprocal compensation. See Order No. 96-324, Appendix A at 12-13; Order No. 99-218, Appendix A at 6.

[10] Order No. 99-218 at 3-4, reaffirmed on reconsideration in Order No. 99-397, issued June 22, 1999.

[11] *GTE Northwest, Inc. v. Electric Lightwave, Inc. et al.,* Civil No. 99-1595-BR (D. OR. July 11, 2000).

[12] A local call is one that originates and terminates within a designated local calling area. A long distance call is one that originates in one local calling area and terminates in a different local calling area. Qwest Exhibit/7, Craig/5, 8.

[13] The remote hubs are also referred to as Network Access Points and Metropolitan Area Exchange locations. Qwest Exhibit/7, Craig/12.

makes a local call, the call travels over a dedicated path within the local calling area, allowing both the originating and terminating switches to know where the call came from and where it is going. Also, local calls tend to be much shorter in duration than long distance calls and ISP calls. Qwest states that ISP dial-up access is analogous to jointly-provided Feature Group A service, a type of access service that has been provided in Oregon and other states for several years.

(b) Reciprocal compensation is contrary to the public interest because it creates an implicit subsidy for customers generating Internet traffic and "will lead to a direct subsidy for Sprint," contrary to the intent of the Act. Qwest states that these subsidies are in addition to the implicit subsidy already created by the FCC's decision to exempt Internet traffic from interstate access charges. The access charge exemption requires LECs to forego substantial revenues because they cannot rely on access charges to recover network costs associated with originating ISP-bound traffic. Qwest contends that reciprocal compensation exacerbates the problem because it effectively requires the company to "make up for the lost access revenues of a competing local provider."[14]

(c) Reciprocal compensation creates issues of distributive justice. According to Qwest witness Larry Brotherson, reciprocal compensation does not provide carriers with an incentive to charge ISPs rates covering the full cost of the local exchange facilities used to terminate calls. As a result, ISPs do not have to pass the full costs along to Internet users. The net effect, according to Qwest, is that the carrier whose customer originates the call to the ISP ends up bearing the cost associated with two local exchange networks – its own network and the network of the carrier to whom it pays reciprocal compensation for terminating the calls to the ISP. Those costs must then be recovered from retail customers, some of whom are not Internet users.

(d) Reciprocal compensation conflicts with the economic principle of cost causation.[15] Since Internet users generate costs as customers of the ISP and not as customers of the LEC, the ISP should be considered the cost causer. Qwest asserts that same situation exists where a customer makes an interstate call using an IXC. In that situation, the IXC is the cost causer because the customer uses the IXC's long distance service, not the LEC's service. Qwest recommends that the compensation structure for

[14] Mr. Brotherson states that Internet voice calls illustrate why reciprocal compensation is inappropriate for ISP-bound traffic. By using special software, customers are now able to use their computers to make interstate voice calls over the Internet. For example, a Qwest customer in Eugene might call an Ameritech customer in Chicago via an IP call. If the customer's ISP is served by Sprint in Eugene, the Qwest customer's call to Chicago would first be sent to Sprint in Eugene and then handed off by Sprint to the ISP. In this instance, neither Qwest nor Sprint would be able to collect access charges from the ISP for use of the local network because of the FCC's access charge exemption. However, in addition to being unable to recover access charges from the ISP, Qwest would be required to pay local reciprocal compensation to Sprint for an interstate voice call. Qwest argues that this amounts to an unfair penalty because Qwest is effectively forced to pay Sprint for network expenses that Sprint was unable to collect from the ISP because of the access charge exemption. Qwest Exhibit/1 Brotherson 19-20.

[15] In general, the principle of cost causation holds that cost of an activity should be paid by those responsible for causing the activity to take place. Qwest states that "in a perfect world" the cost causation principle would require Internet users to pay the full cost of the local exchange facilities necessary to provide Internet service. Qwest Exhibit/1, Brotherson/7.

ISPs mirror IXC exchange access by requiring ISPs to pay usage charges to the ILEC or CLEC serving the ISP. Where the carrier serving the Internet user does not also serve the ISP, carriers could make arrangements to exchange information that would allow the carrier who does not serve the ISP to bill the ISP for the cost of using the carrier's local exchange facilities. Qwest states that "precisely such arrangements are made when two LECs jointly provide switched access to an IXC."[16]

(e) Reciprocal compensation for terminating ISP-bound traffic gives rise to "perverse" economic incentives. According to Mr. Brotherson:

> an incentive would be created for a CLEC to resort to means that artificially stimulate Internet calls onto its network. For example, Sprint could offer financial or other promotional incentives to encourage Internet service providers to locate on its network. The compensation so received by Sprint would be used to subsidize the services it provides to Internet service providers, not to build and maintain the local network for Oregon end users that was the intent of reciprocal compensation. Thus, reciprocal compensation for ISP-bound traffic could have the unintended consequence of creating a vicious circle: greater compensation leading to a larger subsidy for Internet service providers, increased demand for Internet use, greater calling by Internet users and more compensation to a CLEC.[17]

Mr. Brotherson claims that "a secondary, but no less detrimental, incentive could be a signal to other CLECs to market exclusively or primarily to Internet service providers in quest of the promised [reciprocal] compensation." Indeed, Qwest argues that the distinction between CLECs and ISPs is rapidly disappearing as CLECs enter into strategic alliances and partnerships with dial-up ISPs.

Although Qwest is also able to market to ISPs, Mr. Brotherson contends that the company "cannot create the one-way flow [of ISP-bound traffic] that a CLEC such as Sprint can generate," because of Qwest's large and diverse customer base. Qwest states that there is a significant imbalance in the ISP-bound traffic terminated by CLECs in Oregon. [Discussion of proprietary information – See Confidential Appendix A, Item No.1]. Qwest asserts that the traffic imbalance will continue because of the characteristics of Qwest's customer base. It further maintains that the amount of reciprocal compensation paid to CLECs will continue to increase because of the rapid growth in Internet usage. Qwest reiterates that CLEC-owned ISPs already receive subsidies by virtue of the access charge exemption and urges that those subsidies not be expanded by also requiring LECs to pay reciprocal compensation.

(f) Reciprocal compensation imposes a tremendous economic burden on Qwest that will translate into higher retail rates for its customers. In addition to substantial capital expenses the company has incurred because of the rapid growth of Internet traffic, there is also the potential for reciprocal compensation payments to completely consume

[16] *Id*.

[17] *Id*. at 8.

the revenue Qwest receives from its customers through the flat monthly residential rate. Qwest contends that reciprocal compensation produces a financial windfall for Sprint and other CLECs without furthering any legitimate public policy goals. These adverse consequences can be avoided by excluding ISP-bound traffic from reciprocal compensation altogether, thereby requiring each local provider to bear the expense of Internet-bound traffic generated by its own customers.

Based on these arguments, Qwest recommends that the Commission defer reciprocal compensation for ISP-bound traffic by approving a rate of $0.00 for a three-year period pending further investigation by the FCC and state commissions into the impact of Internet-traffic on network infrastructure and other issues. In the alternative, Qwest proposes that the Commission authorize bill and keep arrangements[18] for ISP-bound traffic.

In addition to the foregoing, Qwest contends that the network costs incurred by Sprint to terminate ISP-bound traffic are significantly less than the costs Qwest incurs to terminate an average voice call. Thus, if reciprocal compensation is authorized for ISP-bound traffic, the rate paid to Sprint should be adjusted downward from the $0.001330/minute reciprocal compensation rate currently received by Qwest for transporting and terminating local telecommunications traffic.

According to Mr. Craig, carriers that specialize in handling large amounts of Internet traffic can design data, or packet-switched, networks to maximize the cost efficiencies associated with that type of traffic. Packet-switched networks are more efficient from an engineering standpoint because the service provider can anticipate load requirements more readily than in the case of circuit-switched networks built to accommodate variable requirements associated with a diverse customer base. Mr. Craig contends that it costs Sprint less to terminate ISP calls on its packet-switched network because of lower call set-up costs, higher trunk utilization levels, and ability to "statistically multiplex" data traffic.

An accurate method of identifying ISP-bound traffic is necessary if it is to be compensated at a lower rate than voice traffic or excluded from reciprocal compensation altogether. Qwest has developed a three-step process that is designed to identify ISP-bound traffic. Step one of the process uses the Hewlett Packard CroSS 7 system to capture data regarding the number and duration of all calls originated by Qwest customers and delivered to CLECs (and *vice versa*). Step two applies an algorithm to the call detail records stored by the CroSS 7 system to identify modem traffic based on call characteristics common to Internet calls. Step three utilizes a "modem identifier" to determine if the modem calls identified by the algorithm are Internet calls.

Sprint Position. Sprint states that reciprocal compensation is the proper method of compensating LECs for costs incurred to terminate ISP-bound traffic. It concurs with the

[18] 47 C.F.R. §51. 713(a) defines bill and keep arrangements as "those in which neither of the two interconnecting carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's network."

Commission's decision in docket ARB 91 concerning this issue. Sprint further argues that the *Bell Atlantic* decision undercuts the "end-to-end" jurisdictional analysis used by the FCC to conclude that ISP-bound traffic is predominantly interstate in nature.

According to Sprint witness David Stahly, the costs associated with terminating a call to an ISP on the local network are very similar, if not identical, to the costs of terminating a call to a local customer. In the typical case where a Qwest end user originates Internet traffic that is terminated to an ISP on Sprint's network, Sprint's termination costs include transporting the traffic from the meet point with Qwest to Sprint's end office switch serving the ISP and switching the call to the ISP.[19] These transport and switching costs are recovered from Qwest via the reciprocal compensation rate.

Sprint disagrees with Qwest's position that ISPs provide a carrier-type function for which they should be charged access similar to IXCs. Mr. Stahly emphasizes that terminating traffic to an ISP is no different than terminating traffic to a local area network (LAN). Qwest is compensated for LAN traffic using local rates and reciprocal compensation.[20] LAN traffic is treated as local even where a company links its local LAN to corporate headquarters in another state.

According to Mr. Stahly, the cost of terminating a call depends on several factors, including scale of operations, volume of traffic, network architecture and equipment type. Many CLECs, including Sprint, have designed their networks using technology similar to existing ILEC networks, so costs can be expected to be similar. On the other hand, differences in scale, network architecture and other factors may result in different cost structures. For example, ILEC networks generally have a much greater scale than CLEC networks, allowing them to carry greater volumes of traffic at a significantly lower cost per minute. CLECs, on the other hand, possess cost advantages due to efficient network architectures and state of the art technology. These are not considered significant enough, however, to outweigh the advantages of the ILEC's economies of scale. Also, Qwest and other ILECs are making significant investments in new technology that will rapidly eliminate any cost advantage CLECs may have gained.

Sprint disagrees with Qwest's claim that Sprint's data backbone network reduces Sprint's cost of terminating ISP-bound traffic. Although Sprint acknowledges that its data network is very efficient, Mr. Stahly emphasizes that it is an entirely different business and has nothing to do with the "Dial IP product" that allows end-user customers to dial up their ISP on a local basis.

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[19] The cost of carrying the call from the Sprint end office switch to the ISP's premise over the local loop is recovered from the ISP via a flat-rated local loop charge such as the Primary Rate Interface (PRI) ISDN loop charge. Thus, when Qwest terminates ISP-bound traffic on Sprint's network, Qwest is not charged for traversing the loop. Sprint Exhibit/1, Stahly/10-11.

[20] Sprint states "instead of dialing an ISP, an employee places a local call by dialing into her company's LAN. Qwest considers the call to have been terminated within the local exchange and thus, rates it as a local call. The only revenue Qwest receives from the company is for the local PRI ISDN trunks it sells to the company. Qwest recovers the usage cost of the employee dialing into her company's LAN via the local 1R [residential] rates Qwest charges the employee." Sprint Exhibit/2, Stahly/14-15.

Sprint concurs with Qwest that network costs associated with Internet usage are caused by customers using the Internet. It disagrees, however, with Qwest's "attempts to cast ISPs as the cost causer" as well as its proposal to bill ISPs for Internet-related costs. Sprint argues that Qwest should be compensated for ISP-bound traffic in the same manner that it is currently compensated for local traffic; that is, by factoring both the originating and terminating cost of such calls into its local rate structure. Sprint acknowledges that local network usage has increased dramatically with the growth of the Internet, information lines and LANs. To the extent that Qwest has not factored such usage into its local rates, it may need to rebalance those rates to recover costs caused by customers originating such traffic.

Sprint also disputes Qwest's claim that reciprocal compensation will produce a "one way flow" of ISP-bound traffic in favor of CLECs. It emphasizes that Qwest actively markets its own ISP service[21] and that CLECs are required to pay reciprocal compensation when Qwest terminates Internet traffic originated by CLEC customers. Sprint also emphasizes that it will pay Qwest the same reciprocal compensation rate that Qwest pays to Sprint.

Sprint disagrees with Qwest's proposal to establish a different compensation rate for ISP-bound traffic. Although Sprint acknowledges that Internet calls may have different cost characteristics than voice calls due to factors such as longer holding times, higher trunk utilization and other characteristics, it maintains that there is no evidence in this record to establish a different rate. Also, while Sprint agrees that the reciprocal compensation rate should reflect the overall costs and mix of traffic, it emphasizes that identifying costs is problematic because of rapid changes Internet usage and telecommunications generally. Sprint proposes that Qwest file revised cost studies if it seeks to modify the reciprocal compensation rate currently in effect.

Sprint maintains that the HP CroSS 7 system [Discussion of proprietary information—See Confidential Appendix A, Item No. 2]

As noted above, Sprint recommends that the Commission use Qwest's reciprocal compensation rate as a reasonable proxy for Sprint's transport and termination cost. It argues that symmetrical compensation will maintain consistency among CLECs until such time as reciprocal compensation issues can be examined in a generic proceeding. On the other hand, Sprint contends that Qwest's proposal to eliminate reciprocal compensation for a three-year period or, alternatively, to implement bill and keep arrangements, prevents Sprint from recovering its cost of terminating ISP-bound traffic

[21]Sprint argues that Qwest's ISP's offering is inconsistent with its argument that ISP-bound traffic is an interstate service because Qwest has not been granted authority to carry interstate traffic under §271 of the Act. The FCC dismissed this argument in its ISP Order, reasoning that Regional Bell Operating Companies such as Qwest are not barred from providing "interstate access services." *ISP Order* at ¶12, footnote 41. The Court in *Bell Atlantic*, however, questioned the FCC's reliance on the term "access services," noting it was a "pre-Act term" seemingly inconsistent with "the statutory world of 'telephone services' and 'exchange access.'" *Bell Atlantic* at 8. The Court's observation raises questions about the rationale used by the FCC to dismiss the §271 issue.

originated by Qwest customers. Further, such proposals will discriminate against Sprint *vis a vis* other CLECs that have entered into reciprocal compensation arrangements with Qwest.

Discussion and Decision. For the reasons set forth below, I agree with Sprint that reciprocal compensation should be paid for ISP-bound traffic consistent with the policy articulated by the Commission in docket ARB 91. Reciprocal compensation should be paid at the rate currently assessed by Qwest for transporting and terminating local telecommunications traffic.

(a) Qwest relies upon the FCC's now-vacated ISP Order and the testimony of its witnesses regarding the technical attributes of ISP-bound traffic to contend that such traffic is interstate and therefore exempt from reciprocal compensation. This argument is not persuasive.

As discussed above, the Commission has already concluded in prior arbitration decisions that ISP-bound traffic is local. The Commission's findings on this issue have been sustained in federal district court, the most recent decision having been rendered only two months ago.[22] In fact, the vast majority of states continue to hold that ISP-bound traffic is local and subject to reciprocal compensation, notwithstanding the FCC's ISP order.[23]

States that have examined issues relating to ISP-bound traffic have articulated at least three separate bases for concluding that such traffic is subject to reciprocal compensation. The first line of reasoning -- acknowledged by the Commission in dockets ARB 1 and ARB 91 -- is that all traffic carried on the transmission path established between two subscribers in the same local calling area is local traffic. Thus, when an end user customer calls an ISP location within the local calling area, the telecommunications service component of that call terminates at the ISP's location.[24] The second rationale is that telecommunications traffic carried by two carriers that is not otherwise subject to access charges should be subject to reciprocal compensation.[25] A third basis for concluding that ISP-bound traffic is subject to reciprocal compensation is that ISPs purchase service and use the network in a manner similar to other business local

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[22] *GTE Northwest, Inc. v. Electric Lightwave, Inc. et al., supra; see also, U S WEST Communications, Inc. v. Worldcom Technologies, Inc., et al., 31 F. Supp.2d 819,825 (D. OR 1998).*

[23] To date, 33 states have concluded that ISP-bound traffic is local in nature while six have found that it is interstate. Only eleven states and the District of Columbia have not addressed reciprocal compensation for ISP-bound traffic. *Competition, Reciprocal Compensation and ISP-bound Traffic: Issues and Policy Responses*, Donna N. Lampert Associates, P.C. (September, 2000) at 10, footnote 48; see also, *Illinois Bell Tel. Co. v. Worldcom Techs.*, 179 F.3d 566, 574 (7th Cir. 1999).

[24] *Southwestern Bell Tel. v. PUC*, 208 F3d. 475, 486 (5th Cir. 2000).

[25] See *Worldcom, Inc., f/k/a MFS Intelenet of Washington, Inc. v. GTE Northwest Incorporated*, Docket No. UT-980338 (Washington Utilities and Transportation Commission May 1999); *Competition, Reciprocal Compensation and ISP-bound Traffic: Issues and Policy Responses*, *supra* at 11.

exchange customers and should not be treated differently.[26] The *Bell Atlantic* decision, discussed below, affirms that these methods of analyzing ISP-bound traffic are reasonable from a legal standpoint.

The *Bell Atlantic* decision casts serious doubt upon the jurisdictional analysis used by the FCC -- and relied upon by Qwest in this case -- to conclude that ISP-bound traffic is "largely interstate," and therefore exempt from reciprocal compensation. According to the Court, Internet traffic has attributes of both local and interstate traffic and does not fit neatly into either category:

> The issue at the heart of this case is whether a call to an ISP is local or long distance. Neither category fits clearly. The [FCC] has described local calls, on the one hand, as those in which LECs collaborate to complete a call and are compensated for their respective roles in completing the call, and long-distance calls, on the other hand, as those in which the LECs collaborate with a long-distance carrier, which itself charges the end-user and pays out compensation to the LECs.
>
> Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP.[27]

More importantly, the Court concluded that the FCC's ISP Order was defective because it (a) does not adequately explain the relevance of using the "end to end" jurisdictional analysis to conclude that ISP-bound traffic is interstate in nature[28]; (b) fails to discuss why traffic switched by an LEC and delivered to an ISP does not qualify as the "termination" of traffic subject to the reciprocal compensation obligations of §251(b)(5);[29] (c) fails to distinguish prior FCC rulings which have treated calls to information service providers as local; and (d) does not adequately explain why ISP-bound traffic is "exchange access" rather than "telephone exchange service." The

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[26] See *Petition of the Southern New England Telephone Company For a Declaratory Ruling Concerning Internet Service Provider Traffic*, Docket No. 97-05-22 at 10 (Connecticut DPUC Sept. 10, 1997).

[27] *Bell Atlantic* at 5.

[28] Among other things, the Court stated that "the extension of the FCC's "end to end" jurisdictional analysis yields intuitively backward results, that the cases relied upon by the FCC to support its analysis "are not on point," and that the FCC failed to adequately distinguish the operations of ISPs, which use telecommunications to provide information services, from interexchange carriers, which provide telecommunications services. *Id* .at 6.

[29] In this context, the Court stated: "But, observes MCI/Worldcom, the [FCC] "failed to apply, or even mention its [own] definition of 'termination,' namely the switching of traffic that is subject to section 251(b)(5), at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises. Calls to ISPs appear to fit this definition; the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP which is clearly the called party." *Id*. at 6. (Citations omitted.)

Court's findings undermine the FCC's conclusions regarding the jurisdictional nature of ISP-bound traffic.[30]

Even if the FCC's finding that ISP-bound traffic is "largely interstate" is correct, it does not compel the conclusion that it is improper to require reciprocal compensation for such traffic pending the outcome of the FCC's rulemaking process. As the Commission emphasized in Order No. 99-218, the FCC has acknowledged that state commissions retain authority in arbitration proceedings to require reciprocal compensation for ISP-bound traffic in the absence of a federal regulation to the contrary.[31] This conclusion was affirmed in *Bell Atlantic at 3,* in *Illinois Bell Tel. Co. v. Worldcom Techs*., 179 F.3d 566, 572 (7th Cir. 1999), and in *Southwestern Bell Tel. v. PUC*, 208 F3d. 475, 480 (5th Cir. 2000).

(b) Qwest's claim that reciprocal compensation is inconsistent with the principle of cost causation is unconvincing. Qwest's witnesses testified at length regarding the alleged similarities between ISP and IXC traffic in an effort to characterize ISPs as the cost causers. However, the Court in *Bell Atlantic* was not persuaded by attempts to analogize ISP-bound traffic to long distance calls for purposes of the reciprocal compensation requirements of §251(b)(5). The Court emphasized that ISPs, unlike IXCs, do not provide "telecommunications services" and are not "telecommunications carriers." It further held:

> Even if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation. Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long distance providers).

> In this regard an ISP appears, as MCI Worldcom argued, "no different from many businesses, such as pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies," which use a variety of communications services to provide their goods or services to their customers. Of course, the ISP's origination of telecommunications as a result of the user's call is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service). But this does not imply that the original communication does not "terminate" at the ISP. The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal

[30] The Court also emphasized that, "[a]lthough §251(b)(5) [of the Act] purports to extend reciprocal compensation to all 'telecommunications', the [FCC] has construed the reciprocal compensation requirement as limited to local traffic. See 47 C.F.R. §51.701(a)." *Id*. at 4. The Court's observation also raises questions about the FCC's authority to limit the scope of §251(b)(5) by excluding a particular subset of telecommunications traffic -- in this case, ISP-bound traffic -- from the reciprocal compensation requirement.

[31] ISP Order at ¶25-26.

compensation, "simply a communications-intensive business end user selling a product to other consumer and business end-users."[32]

In addition to these comments, the Court noted that prior FCC statements appear inconsistent with the conclusion that Internet calls are comparable to long distance calls.[33] These observations cast further doubt on the FCC's end-to-end analysis and, by extension, upon Qwest's assertions that ISP-bound traffic (a) is analogous to the three-carrier (LEC to IXC to LEC) long distance calling model, as opposed to the two-carrier (LEC to LEC) local calling model, and (b) should have a compensation structure mirroring that of IXC exchange access.

In addition to improperly comparing ISP traffic with IXC traffic, Qwest's assertion that reciprocal compensation violates the principle of cost causation is incorrect. Qwest concedes that "in a perfect world," the cost causers -- that is, Internet users -- should pay all of the costs associated with Internet usage. Yet, as Sprint points out, this is precisely the outcome if (a) Qwest pays reciprocal compensation to other LECs for terminating traffic originated by Qwest customers and (b) Qwest is ultimately obliged to raise local rates to offset its termination-related expenses. Under this scenario, the cost causers – Qwest customers using the Internet – absorb the cost associated with their usage through increases in their local telephone rates.

(c) Qwest argues that reciprocal compensation creates problems of distributive justice because the company will be forced to also increase rates for customers who do not use the Internet. To begin with, Qwest has not established that reciprocal compensation will necessarily require the company to raise local rates. (See discussion below.) Even if local rates do have to be increased to accommodate increased Internet usage, it is not inequitable to require all customers to absorb the increase. Inherent in the concept of a flat rate structure is the assumption that customers will have varying amounts of usage. Thus, under the flat local telephone rates currently in effect, customers who make very few calls or calls of short duration pay the same rates as customers who use the phone frequently or for a greater length of time. The same is true in the case of flat-rate Extended Area Service (EAS); some flat-rate customers take advantage of EAS calling much more often than other customers paying the same rate. Moreover, the popularity of the Internet and the rapid integration of computers into everyday life suggests that it will not be long before Internet access is regarded as an essential service for all customers. Thus, to the extent a problem exists, it is likely to be short-lived.

(d) Qwest also contends that requiring reciprocal compensation for ISP-bound traffic is contrary to public policy because it exacerbates the revenue consequences associated with the access charge exemption for ISP-bound traffic. Qwest acknowledges

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[32] *Bell Atlantic* at 6-7.

[33] *Id.* at 6 (citing prior the FCC's statements that "it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs" and referring to calls to information service providers as "local"), and 8 (noting that the FCC's brief in *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998) analogized a call to an ISP as being like a call to a local business.)

that the exemption impacts all LECs, but contends that a policy of allowing LECs to recover call termination costs through reciprocal compensation disadvantages Qwest more than CLECs such as Sprint. The source of the problem, according to Qwest, is the fact that it has a larger, more diverse customer base than do the CLECs.

I agree with Sprint that the revenue impact associated with the FCC's access charge exemption is not an issue in this case and should not control the Commission's decision to require reciprocal compensation for costs incurred by LECs to terminate ISP-bound traffic.[34] The access charge exemption for ISP-bound traffic has been mandated by the FCC and is not within the control of state commissions. Furthermore, the FCC has stated that it will not consider eliminating the exemption in its pending rulemaking proceeding.[35] In other words, the exemption is a fact of life that all LECs must contend with. As Sprint points out, the practical consequence is that all LECs will have to recoup the cost of originating ISP-bound traffic through their local rates.

Further, Qwest's allegation that Sprint seeks reciprocal compensation "to make up for [the] loss in access revenue" is unfounded. As emphasized below, reciprocal compensation is required to recompense all local exchange carriers for costs incurred to terminate local exchange traffic. Qwest's attempt to combine reciprocal compensation with the access charge exemption unnecessarily detracts from the issue at hand.

(e) Qwest also claims that reciprocal compensation creates "one-way traffic flows" and "perverse economic incentives." To illustrate this point, Qwest presented evidence comparing the minutes of ISP-bound traffic originated by its customers and terminated by CLECs with the minutes of ISP-bound traffic originated by CLEC customers and terminated by Qwest. The evidence shows that Qwest customers originate substantially more Internet traffic terminated by CLECs than *vice versa*.[36] Qwest asserts that reciprocal compensation has precipitated this traffic imbalance by encouraging CLECs to artificially stimulate Internet traffic onto their networks by entering into strategic relationships with ISPs and by providing ISPs with financial and economic incentives.

These arguments are not compelling. Although the evidence shows that Qwest customers originate substantially more minutes of ISP-bound traffic than do CLEC customers, that does not necessarily mean that CLECs are deliberately attempting to

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[34] If anything, the access charge exemption undermines Qwest's argument that ISP-bound traffic is interstate and therefore not subject to reciprocal compensation. In its ISP Order, the FCC stated: "[w]e 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." ISP Order at ¶25. The Court in *Bell Atlantic* made a similar observation, noting that "the FCC in 1983 exempted ESPs from the access charge system, *thus in effect treating them like end users rather than long-distance carriers*." *Bell Atlantic* at 7. (Emphasis added).

[35] ISP Order at ¶34.

[36] The actual figures are designated confidential. See Qwest Exhibit/2,Brotherson/15; Confidential Appendix A, Item No. 1.

create "one-way" revenue streams[37] by soliciting only ISP customers.[38] Indeed, Qwest concedes that the traffic imbalance is a function of the size of its customer base. In other words, Qwest is the dominant local exchange provider and has far more customers originating ISP-bound traffic than do the CLECs. That is not surprising, given the fact that local exchange telecommunications competition has not yet taken hold in Oregon.[39]

Even if CLECs do offer economic incentives to attract ISP customers, there is nothing inherently wrong with such efforts. Contrary to Qwest's claim, reciprocal compensation paid to local exchange carriers for terminating ISP-bound traffic is not a subsidy, but is rather payment for network costs incurred to terminate traffic originated by Qwest customers. The fact that some CLECs may offer financial or promotional incentives to attract ISP customers should not obscure the fact that §251(b)(5) entitles all local exchange carriers to recover their costs of transporting and terminating telecommunications traffic.

(f) The evidence does not support Qwest's claim that reciprocal compensation will impose a tremendous financial burden on the company. Mr. Brotherson projects that the total amount of reciprocal compensation Qwest will have to pay to all Oregon CLECs in calendar year 2000 will be approximately **. While that amount is not *de minimus*, it is significantly less than ** percent of Qwest's annual Oregon operating revenues,[40] making it very unlikely that the company will experience the dire financial consequences it has predicted. [See Confidential Appendix A, Item No. 4].

Qwest emphasizes that the amount of reciprocal compensation paid to other LECs will increase substantially as Internet traffic continues to grow. But Qwest should also receive more reciprocal compensation revenue as CLECs gain a foothold in the local exchange market and their customers originate more calls to ISPs served by Qwest. Moreover, the record in this case does not address the extent to which new high-speed "broadband" alternatives to dial-up Internet access (*e.g.*, xDSL lines and cable modems)

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[37] It is unclear from the record whether Qwest contends that ISP-bound traffic is ineligible for reciprocal compensation because it is "one-way" traffic. A similar argument was rejected by the Ninth Circuit Court of Appeals in *Pacific Bell v. Cook Telecom.*, 197 F3d 1236, 1244-1245 (9th Cir. 1999). In that case, the Court held that paging carriers were entitled to reciprocal compensation notwithstanding the fact that paging traffic is one-way in nature.

[38] Sprint asserts that it intends to serve all types of customers, not merely ISPs. Sprint Exhibit/2, Stahly/19.

[39] *See, e.g., Local Competition Survey*, David Booth, Oregon Public Utility Commission Staff (August 12, 1999). Qwest's calculations also show that ISP-bound traffic comprises approximately ** of the total traffic originated by Qwest customers and terminated by CLECs. [See Confidential Appendix A; Item No. 3] However, Qwest did not specify what portion of the total traffic originated by CLEC customers and terminated by Qwest consists of ISP-bound traffic. Without this information, there is no way to know if Qwest customers originate a disproportionately greater percentage of ISP-bound traffic than do CLEC customers. Likewise, there is no way to know if the overall traffic imbalance identified by Qwest is due to anything more than the fact that it has more customers than do the CLECs.

[40] See *1998 Oregon Utility Statistics*, Public Utility Commission of Oregon at 64. In addition, it is not clear whether Qwest's estimate takes into account the revenues it will receive for terminating ISP-bound traffic generated by CLEC customers.

may impact the amount of reciprocal compensation paid by carriers. To the extent that reciprocal compensation is not required for broadband alternatives, and large numbers of customers or heavy Internet users gravitate toward these alternatives, the amount of reciprocal compensation payments may be far less than Qwest projects.

Ironically, the position now advocated by Qwest (and by GTE in ARB 91) is directly contrary to that taken by those companies a few years ago when the Commission first considered allowing competing carriers to provide local exchange service in Oregon. At that time, Qwest and Verizon's predecessors (U S WEST Communications and GTE Northwest, respectively) argued strenuously in favor of reciprocal compensation, claiming that they would terminate the vast majority of local exchange traffic and that bill and keep arrangements would deny them the opportunity to recover their costs.[41] *See*, Order No. 96-021 at 27-61, dockets CP 1, 14 and 15. Now that the CLECs are terminating more local traffic than the ILECs, Qwest and Verizon have forecasted that there will be continuing traffic imbalances and substantial revenue losses unless reciprocal compensation is eliminated. As in the prior docket, the evidence simply does not support the ILECs' prediction of undue harm.

(g) The public policy arguments raised by Qwest regarding reciprocal compensation are similar to those raised by GTE in docket ARB 91. At hearing, GTE argued, *inter alia*, that reciprocal compensation encourages competitors to make inappropriate economic decisions, and imposes a substantial financial burden on GTE as the incumbent provider.[42] On appeal, GTE argued that "Internet traffic is different from regular local calls, and that requiring a carrier to pay reciprocal compensation on ISP calls . . . leads to unjust results and violates the 1996 Telecommunications Act."[43] These arguments were summarily dismissed by the Court, which observed that the claim had been "resoundingly and almost uniformly rejected by every court that has addressed it."[44]

In this context, it is important to keep in mind that the Commission decided in ARB 91 to retain reciprocal compensation for ISP-bound traffic on an interim basis pending the adoption of federal rules governing the subject. There remains the possibility that the FCC may decide to implement a compensation mechanism for ISP-bound traffic that makes carriers indifferent to the number of ISP customers located on their networks. Before the FCC makes a final decision on that issue however, it is certain to examine the technical, economic and policy concerns raised in comments presented by the ILECs, CLECs, regulatory agencies, consumer advocacy groups and other interested parties. In Order No. 99-218, the Commission emphasized the importance of conducting a comprehensive review of issues relating to Internet traffic. Nothing has changed since

[41] Indeed, that was the position taken by ILECs generally when the FCC sought public comment on how it should implement §251(b)(5) of the Act. See, *Competition, Reciprocal Compensation and ISP-bound Traffic: Issues and Policy Responses, supra* at 3.

[42] See *e.g.*, Order No. 99-218 at 8-9.

[43] *GTE Northwest, Inc. v. Electric Lightwave, Inc., et al.*, slip. op. at 10.

[44] *Id.*

that time to warrant adoption of a different compensation mechanism for ISP-bound traffic while the FCC rulemaking is pending.

(h) There is no basis in the record for adopting the bill and keep alternative recommended by Qwest. Section 51.713(b) of the FCC rules authorizes state commissions to impose bill and keep arrangements where there is evidence that traffic between interconnecting carriers is roughly balanced and is expected to remain so. Subsection (c) of that rule provides that state commissions may presume that traffic between carriers will be balanced unless the presumption is rebutted.

Qwest's own evidence shows that ISP-bound traffic exchanged between the Qwest and other Oregon CLECs in Oregon is *not in balance*. Indeed, Qwest objects to reciprocal compensation in large part because of the concern that its customers originate a greater volume of Internet traffic to CLEC ISPs than *vice versa*. Qwest cannot ask the Commission to presume that a traffic balance exists for purposes of implementing bill and keep when the principal reason for requesting that compensation method stems from its claim that traffic will be imbalanced.[45]

(i) As noted above, it is necessary to have an accurate method of identifying ISP-bound traffic if that traffic is to be excluded from reciprocal compensation or compensated at a different rate than voice traffic. Since I agree with Sprint that reciprocal compensation should apply to ISP-bound traffic in accordance with the Commission's decision in docket ARB 91, the remaining question is whether Qwest has produced sufficient evidence to support a finding that ISP-bound traffic should be compensated at a lower rate than local voice traffic. I conclude that Qwest has not made such a showing in this case.

The witnesses in this proceeding identified a number of factors that influence the network costs. These include the scale of operations, network architecture, equipment type, volume of traffic, call hold times, trunk utilization levels, and line concentration. Although Qwest's witnesses discussed generally how these factors might influence Sprint's cost of terminating traffic, they did not present any cost studies or specific evidence to substantiate their assertion that Sprint's costs are in fact less than Qwest's. Nor did Qwest develop an alternative reciprocal compensation rate for review by the Commission. Absent a more comprehensive showing, there is simply no basis for implementing a lower reciprocal compensation rate.

In a recent arbitration proceeding before the Washington Utilities and Transportation Commission (WUTC), Sprint and Qwest stipulated that "the costs carriers incur to terminate voice calls typically exceed the costs they incur to deliver Internet calls to Internet service providers."[46] Qwest argues that the stipulation in that docket is

[45] *Id.* at 4-5; see also, Order No. 99-218, Appendix A at 13.

[46] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Sprint Communications Company, L.P., and U S WEST Communications, Inc.*, Docket No. UT-003006 Washington Utilities and Transportation Commission (July 2000).

supported by substantial evidence demonstrating that it costs less to terminate Internet calls, and that Sprint acknowledges such differences.[47] While that may be true, there is insufficient evidence *in this record* to establish a lower rate for ISP-bound traffic. Moreover, the agreement between Qwest and Sprint in the WUTC case provides that the "costs, recovery mechanism and permanent rate associated with the delivery of Internet traffic to ISPs" should be determined in a generic docket pending before that commission. In the interim, the WUTC arbitrators determined that "the parties should be required to pay each other reciprocal compensation for ISP-bound traffic on a minute-of-use basis at the same rate that they compensate each other for terminating local traffic."[48]

Sprint continues to support the idea of modifying the reciprocal compensation rate structure in a generic proceeding and has submitted comments in the FCC's remand proceeding (convened in response to the *Bell Atlantic decision)* recommending changes to the current rate structure.[49] As the Commission recognized in docket ARB 91, it makes more sense to consider modifications to the intercarrier compensation rate structure in a generic context than in arbitration proceedings. The time constraints imposed upon the arbitration process limit the ability to conduct a detailed analysis of the cost studies underlying the development of new rates. Ideally, the FCC will consider rate structure issues in its remand proceeding or its pending rulemaking docket. I agree with Sprint that the public interest will be best served if there is a uniform national standard for intercarrier compensation that the states can apply in future arbitration dockets.

Assuming the FCC reaffirms state authority to require reciprocal compensation for ISP-bound traffic, it may nevertheless prove problematical to establish separate rates for that traffic. The testimony discloses that network costs are a function of several factors which are likely to vary from carrier to carrier, making it difficult to develop a single rate for ISP-bound traffic applicable to all carriers. An additional complication is that competing carriers would likely be required to disclose a considerable amount of competitively sensitive information regarding their networks and operations.

Another unresolved issue is whether state commissions possess the authority to establish lower reciprocal compensation rates for non-incumbent carriers. FCC rule 51.711(a) states that reciprocal compensation shall be symmetrical based upon the transport and termination rates charged by the incumbent LEC except as provided in subsections (b) and (c). Subsection (c) deals with rates for specific types of carriers and is inapplicable here. Subsection (b), on the other hand, permits a state commission to establish asymmetrical transport and termination rates "*only if the carrier other than the incumbent LEC*" carrier proves to the state commission that its transport and termination

[47] Qwest Opening Brief at 15.

[48] WUTC Docket No. UT-003006, supra at 13-14

[49] *Comments of Sprint Corporation*, CC Docket Nos. 96-98 and 99-68, at 3 (July 21, 2000). These comments are not part of the record and cannot be used to develop an alternative reciprocal compensation rate in this proceeding.

costs *"exceed the costs* incurred by the incumbent LEC * * * such that a higher rate is justified." The rule says nothing about establishing lower transport and termination rates for a non-incumbent LEC based on a finding that its transport and termination costs are *less than* those of the incumbent carrier. Although the parties do not address the requirements of 47 C.F.R. §51.711, the rule on its face appears to preclude establishing a lower reciprocal compensation rate for Sprint in this instance.

(j) Because I find that reciprocal compensation should apply to ISP-bound traffic at the rates assessed by Qwest for transporting and terminating local telecommunications traffic, it is unnecessary to resolve the dispute over Qwest's ability to accurately identify ISP-bound traffic. [Discussion of proprietary information – See Confidential Appendix A, Item No. 5]

Arbitrator's Decision

1. The interconnection agreement between Sprint and Qwest shall specify that the transport and termination of ISP-bound traffic is subject to reciprocal compensation on an interim basis consistent with Commission policy as set forth in Order Nos. 99-218 and 99-397 entered in docket ARB 91. The language proposed by Sprint for Provision (C) 2.3.4.1.3 is consistent with this decision and should be incorporated in the interconnection agreement

2. The interconnection agreement between Sprint and Qwest shall specify that reciprocal compensation for ISP-bound traffic shall be at the rates assessed by Qwest for the transport and termination of local telecommunications traffic.

3. Within 30 days of the date of the Commission's final order in this proceeding, Qwest and Sprint shall submit an interconnection agreement consistent with the terms of this decision.

4. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the date this decision is served.

Dated at Salem, Oregon, this 16th day of October, 2000.

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Samuel J. Petrillo
Arbitrator

Confidential Appendix A –Docket ARB 238

Item No. 1 –

Item No. 2 –

Item No. 3 –

Item No. 4 –

Item No. 5 –

CONFIDENTIAL APPENDIX A, PAGE 1 OF 1, IS AVAILABLE PURSUANT TO THE
TERMS OF THE PROTECTIVE ORDER (ORDER NO. 00-428)
ISSUED IN THIS PROCEEDING.

Appendix A
Page 1 of 1

Appendix B -- Exhibit List -- Docket ARB 238

Qwest Exhibit 1	Redacted Direct Testimony of Larry B. Brotherson
Qwest Exhibit 2	Confidential Direct Testimony of Larry B. Brotherson
Qwest Exhibit 3	Diagram comparing ISP and IXC traffic
Qwest Exhibit 4	Memorandum from Jim Koehler to Karen Chandler-Ferguson; Final Report on ISP Identification Project, dated June 16, 1999
Qwest Exhibit 5	Modem Identifier Design Documentation Ying-li Wu, Author, dated October 18, 1999
Qwest Exhibit 6	Diagram illustrating Imbalance of Traffic
Qwest Exhibit 7	Redacted Direct Testimony of Joseph Craig
Qwest Exhibit 8	Diagram illustrating a Local Call
Qwest Exhibit 9	Diagram illustrating a Long Distance Call
Qwest Exhibit 10	Excerpt from Internet Website illustrating deployment of Hewlett Packard Agilent AcceSS7 system
Qwest Exhibit 11	Direct Testimony of Perry W. Hooks Jr.
Qwest Exhibit 12	Rebuttal Testimony of Larry B. Brotherson
Qwest Exhibit 13	Colorado Public Utility Commission Initial Decision, No. C00-479, Adopted May 3, 2000
Qwest Exhibit 14	Arizona Corporation Commission Opinion and Order, Docket T-02432B-00-0026 *et al*., dated June 13, 2000
Qwest Exhibit 15	Rebuttal Testimony of Joseph Craig
Qwest Exhibit 16	Rebuttal Testimony of Perry W. Hooks, Jr.
Sprint Exhibit 1	Direct Testimony of David E. Stahly
Sprint Exhibit 2	Reply Testimony of David E. Stahly [Confidential in Part]
Sprint Exhibit 3	Excerpt from Qwest Website regarding Qwest's ISP service