

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of a Complaint Against U.S.
WEST COMMUNICATIONS, INC., by
NEXTLINK, INC., Requesting the Utah
Public Service Commission Enforce an
Interconnection Agreement Between
NextLink, Inc., and U.S. West
Communications, Inc.

DOCKET NO. 99-049-44

ORDER

ISSUED: October 28, 1999

By The Commission:

Petitioner NextLink, Inc. ("NextLink"), and U.S. West Communications, Inc. ("US West"), mutually negotiated various terms of an interconnection agreement and asked the Commission to arbitrate contested terms in Docket No. 98-2203-03. The final interconnection agreement was approved July 15, 1999 ("Current Interconnection Agreement"). The Current Interconnection Agreement sets forth the terms, conditions, and rates for network interconnection; access to unbundled network elements; ancillary network services; and retail services available for resale within the State of Utah. Prior to the Current Interconnection Agreement, the parties operated under an earlier interconnection agreement ("Initial Interconnection Agreement"), approved by the Commission in June 1997, in Docket No. 97-2208-01. Both the Initial and the Current Interconnection Agreements require the parties to compensate each other for various forms of traffic exchanged between their networks. The applicable terms are found in the Current Agreement in Section 5.4.1, and in the Initial Agreement in Article V, Section E.1.

PROCEDURAL HISTORY

On September 8, 1999, NextLink filed a Complaint pursuant to the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-3, and the Utah Public Telecommunications Law, Utah Code Ann. §§ 54-8b-2.2(1)(e), 54-8b-16 and -17, requesting an expedited proceeding and an Order from the Commission requiring US West to, among other things, comply with the terms of the Interconnection Agreement between NextLink and US West.

NextLink's Complaint primarily focuses on NextLink's claims that under the terms of the Interconnection Agreements, traffic terminating to an Internet service provider ("ISP") is to be treated as local traffic for purposes of reciprocal compensation. NextLink further alleges that US West has refused to treat ISP traffic as local traffic and, accordingly, has refused to pay NextLink reciprocal compensation for such traffic. NextLink further asserts that US West's refusal to compensate NextLink for ISP traffic constitutes an intentional, wilful, and bad faith violation of the Interconnection Agreements.

NextLink further asserts that despite the information set forth in NextLink's traffic studies and records showing that the local traffic exchange was out of balance and despite ongoing negotiations between US West and NextLink over reciprocal compensation, US West refuses to pay reciprocal compensation to NextLink for the period from January 1, 1999, through the present, a period for which NextLink has sent invoices to US West.

In accordance with Utah Code Ann. § 54-8b-17(1)(c), an Informal Prehearing Conference was held on September 20 at 9:30 a.m. NextLink was represented by

Gregory J. Kopta, Esq., and US West was represented by Lynn Anton Stang, Esq., and Gregory B. Monson, Esq. The Commission heard oral argument on US West's Motion to Dismiss Or, In the Alternative, For a Stay of the Proceedings. After hearing oral argument, the Commission denied US West's Motion to Dismiss and set a Hearing on the Complaint,

as required by Utah Code Ann. § 54-8b-17(1)(d), for September 30, 1999, at 10:00 a.m., at which time counsel for each party would present oral arguments on their respective legal positions as to interpretation of the Interconnection Agreement.

Pursuant to the Scheduling Order, the matter came on for Hearing on the Complaint before the Commission pursuant to Utah Code Ann. § 54-8b-17(d)(I), which requires that a hearing commence on the complaint not later than twenty-five (25) days after the complaint is filed (unless the Commission finds that extraordinary conditions exist). NextLink was represented by Gregory Kopta, Esq., and US West was represented by

Lynn Anton Stang, Esq., and Gregory B. Monson, Esq. The Commission heard oral argument on the parties' respective legal positions as to interpretation of the Interconnection Agreements and took the matter under advisement.

DISCUSSION

The Current Interconnection Agreement's provisions relating to reciprocal compensation, Section 5.4.1, were mutually agreed to by the parties. It was not an issue submitted to the Commission for arbitrated resolution; the Commission was precluded from reaching or addressing the issue in the arbitration in Docket No. 98-2208-03. See,

47 U.S.C. §252(b)(4). The Current Interconnection Agreement provides:

5.4.1 The Parties will comply with all relevant Commission rulings with respect to reciprocal compensation, including bill and keep requirements. If the Commission orders a retroactive true-up for reciprocal compensation, the procedure outlined in Section 4.1 of this Agreement shall be applied.

5.4.1.1 The Parties agree that call termination rates as described in Appendix A will apply reciprocally for the termination of EAS/Local traffic per minute of use.

We find Nextlink's argument regarding the obligation for compensating ISP-bound traffic, under the Current Interconnection Agreement, persuasive. US West's argument ignores the first sentence of Section 5.4.1. By its plain terms, the first sentence requires the parties to "comply with all relevant Commission rulings with respect to reciprocal compensation." It is difficult to articulate wording having any more clarity and plain meaning. The most pertinent ruling giving the first sentence effect is the Commission's ruling on reciprocal compensation obligations for ISP-bound traffic made in our consolidated arbitration proceedings involving the interconnection agreements between US West, AT&T of the Mountain States, and MCIMetro Access Transmission Services. By Order issued April 28, 1998, in consolidated Docket Nos. 96-087-03 and 96-095-01, the Commission ruled as follows:

We decline to adopt USWC's [US West's] proposed ¶ 5.1.1.1.5 requiring that Internet traffic originating with or terminating to an ISP be exempt from reciprocal compensation. AT&T/MCI shall be entitled to reciprocal compensation for calls terminated to ISPs they serve. We conclude that such calls are at this time local to the degree they are exempt under federal rules from interstate access charges. We may revisit this decision if and when the FCC modifies the enhanced service provider exemption for ISPs.

-Id., page 38.

US West has argued that this ruling is not "relevant." US West does so by misconstruing the April 28, 1998, ruling. The Commission did not base the ruling by determining that such calls are local as a matter of law. If such calls were local, the FCC's enhanced service provider exemption for ISPs from access charges would not make sense. Local calls, by their very nature, do not implicate the rationale underlying the imposition of access charges. The FCC substantiated this approach in its February 26, 1999, Declaratory Ruling in CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 14 F.C.C.R. 3689 ("ISP Decision"). There, the FCC definitively determined that ISP bound traffic is not local in nature, but is largely interstate traffic.

In the ISP Decision, however, the FCC determined that even though ISP bound traffic is largely interstate traffic, such does not preclude local traffic reciprocal compensation obligations for the exchange of ISP traffic. *Id.*, ¶¶s 21-27. US West is wrong to suggest that reciprocal compensation can not be paid for ISP bound traffic under the law. *See, e.g.*,

Illinois Bell Telephone v Worldcom Technologies, 179 F.3d 566 (7th Cir. 1999). The FCC identifies various considerations upon which the parties or a state commission may determine whether ISP bound traffic is subject to a reciprocal compensation obligation. In

Paragraph 25, the FCC even states that the FCC's past, continued treatment of ISP bound traffic as local, "if applied in the separate context of reciprocal compensation, suggest[s] that such compensation is due for that traffic." ISP Decision, *supra*. If we were to apply those considerations, we would determine that the Current Interconnection Agreement does require the payment of reciprocal compensation.

We need not rely upon the FCC's litany of considerations to resolve the reciprocal compensation issue for the Current Interconnection Agreement. We do not accept US West's effort to distinguish the April 28, 1998, ruling as not being "relevant." The Commission's April 28, 1998, ruling requires reciprocal compensation for ISP bound traffic based upon the FCC's treatment of such calls as local calls. Our ruling was not rooted in a determination of where these calls "terminate" (in the technical sense of call termination, exemplified in the FCC's basis for the ISP Decision), but on the FCC's "longstanding policy of treating the traffic as local." ISP Decision, *supra*, ¶ 24. The only "relevant" Commission ruling that could alter our April 28, 1999, ruling on a reciprocal compensation obligation for ISP bound traffic is one that we have not made; the condition stated has yet to occur. The FCC has not modified the ISPs' exemption from access charges. Until such time, the relevant Commission ruling on reciprocal compensation, to which Current Interconnection Agreement Section 5.4.1 refers, is our April 28, 1998, ruling.

As noted, the FCC's treatment of ISP bound traffic as local calls has bearing upon the application of parties' contractual terms regarding reciprocal compensation. The FCC's ISP Decision's list of factors to consider has relevance in determining whether the Initial Interconnection Agreement requires reciprocal compensation for ISP bound traffic. The FCC suggests that state commissions are to consider "whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges . . ." US West made no argument, nor presented evidence, that supports distinguishing ISP bound traffic from other local calls on any of the FCC's suggested bases. US West's presentation actually established that US West has not "made any effort to meter this traffic or otherwise segregate it from local traffic," that US West accounts for such services in their intrastate operations and bills its end users calls to ISPs as local calls. US West's approach is riveted on local calls' termination point contrasted to the ISP Decision's determination that ISP bound traffic largely terminates at interstate locations. However, the FCC has stated that its treatment of exempting ISP traffic from access charges (where an interstate termination determination has direct bearing on access charge compensation obligations), as applied to reciprocal compensation determinations, supports the imposition of reciprocal compensation for ISP traffic; rather than exempting the traffic from reciprocal compensation because of its technical point of termination. ISP Decision, *supra*, ¶ 25. We construe the Initial Interconnection Agreement's terms in this light. At the time the Initial Interconnection Agreement was entered into by the parties, the treatment of ISP bound traffic as local traffic was well established. No effort was made to distinguish, in the agreement, that, although ISP traffic was treated as local traffic everywhere else, there were to be circumstances where such treatment was not applicable under the agreement. We conclude that the Initial Interconnection Agreement requires the payment of reciprocal compensation for ISP bound traffic as local traffic.

While we resolve the questions on whether the agreements require reciprocal compensation for ISP bound traffic exchanged between NextLink and US West, we will not resolve, on this record, questions on the measurement of traffic exchanged and the actual amount of compensation that may be due. The presentations made before the Commission exclusively addressed the interpretation of the contracts' terms. Whether the measurements of ISP traffic submitted by NextLink are the definitive basis for calculating the amount of reciprocal compensation was given short shift at the hearing.

After hearing from the parties and being fully advised in the matter, the Commission enters the following findings of fact and conclusions of law and order.

FINDINGS OF FACT

1. On July 15, 1999, the Current Interconnection Agreement between NextLink and US WEST became effective after approval by the Commission.
2. The Initial Interconnection Negotiated Agreement was effective after approval by the Commission and applicable, for the issues raised in NextLink's Complaint, from January 1, 1999, until the effective date of the Current Interconnection Agreement.
3. US WEST and NextLink commenced the exchange of traffic during the period of the Initial Agreement and continue to exchange traffic.
4. At the time both Interconnection Agreements were negotiated, ISP bound traffic was treated as local traffic.
5. Section 5.4.1 of the Current Agreement requires both parties to be bound by relevant Commission decisions on the issue of reciprocal compensation.

6. The Commission has previously decided that as long as the FCC maintains the current access charge exemption for internet service providers that seven digit calls to these businesses will be subject to reciprocal compensation claims (i.e., they will be treated for accounting purposes as local calls regardless of their designation by the FCC). *In re Interconnection Contract Negotiations Between AT&T Communications of the Mountain States, Inc. and U S West, Docket No. 96-087-03, et al.*, Arbitration Order at 41

(April 28, 1999).

CONCLUSIONS OF LAW

The Commission concludes, as a matter of law, that:

1. Section 5.4.1 of the Current Interconnection Agreement requires the parties to be bound by the earlier AT&T decision. Therefore under the terms of the Current Interconnection Agreement between NextLink and US West, traffic placed to an ISP within a single local/EAS calling area is local traffic for purposes of reciprocal compensation.
2. Under the terms of the Current Interconnection Agreement, reciprocal compensation is to commence when either party provides a six-month traffic measurement study demonstrating that traffic was out of balance by more than +/- ten percent (10%).
3. The Initial Interconnection Agreement between NextLink and US West requires the treatment of ISP traffic of local calling and subject to reciprocal compensation.
4. The Initial Interconnection. Agreement requires reciprocal compensation where quarterly traffic is out of balance by more than +/- five percent (5%).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. Both parties shall comply with the terms of the Initial and Current Interconnection Agreements and pay to the other reciprocal compensation for traffic designated as local, which by this Order is to include ISP traffic, exchanged between their networks pursuant to the terms of the Initial and Current Interconnection Agreements.

DATED at Salt Lake City, Utah, this 28th day of October, 1999.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard

Commission Secretary