

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Investi-)
gation Into the Treatment of Reciprocal) Case No. 99-941-TP-ARB
Compensation for Internet Service Pro-)
vider Traffic.)

ENTRY

The Commission finds:

- (1) On February 26, 1999, the Federal Communications Commission (FCC) released a Declaratory Ruling *In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, and Notice of Proposed Rulemaking in *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68 (Declaratory Ruling). In the Declaratory Ruling, the FCC addressed, among other things, the issue of whether a local exchange carrier (LEC) is entitled to receive reciprocal compensation for traffic the LEC delivers to an internet service provider (ISP). Noting that it currently had no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic, the FCC found that, in the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under Section 252 of the Telecommunications Act of 1996 (1996 Act)¹ to resolve interconnection disputes between incumbent LECs (ILECs) and competitive LECs (CLECs) have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation.²

By the same token, the FCC found, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for ISP-bound traffic and to adopt another compensation mechanism.³ The FCC further found that state commission

¹ 47 U.S.C. 151 et seq.

² Declaratory Ruling at ¶26.

³ Id.

authority over interconnection agreements pursuant to Section 252 of the 1996 Act extends to both interstate and intra-state matters.⁴

- (2) On August 12, 1999, Time Warner Telecom of Ohio, L.P., ICG Telecom Group, Inc., CoreComm/Newco Inc., and Telecommunications Resellers Association (collectively Petitioners) filed an application requesting that the Commission open a proceeding, under its authority set forth in Chapter 4927, Revised Code and in Sections 4905.04 through 4905.06, Revised Code, to investigate the treatment of reciprocal compensation for ISP-bound traffic. Petitioners maintain that they have been, and continue to be, actively involved in negotiations with ILECs involving, among other issues, the treatment of reciprocal compensation for ISP traffic. Rather than having the issue decided on a case-by-case basis, the Petitioners seek resolution of this issue in a generic proceeding in which all interested parties would have an opportunity to comment and be heard, and the Commission could pronounce a uniform policy governing this issue for all telecommunications providers in the state of Ohio.
- (3) On August 26, 1999, GTE North Incorporated (GTE) filed a response and memorandum in opposition to the Petitioners August 12, 1999 application. Ameritech Ohio (Ameritech) also filed responsive comments on September 15, 1999. Both GTE and Ameritech claim that this Commission lacks the legal authority under either state or federal law to impose inter-carrier compensation obligations on ISP-bound traffic through a generic investigation. Noting that the FCC is already conducting a generic investigation on the issue of inter-carrier compensation for ISP-bound traffic and because the scope of state commission authority under the Declaratory Ruling is currently on appeal at the United States Court of Appeals, District of Columbia Circuit, GTE and Ameritech aver that, at a minimum, this Commission should defer any generic proceedings until the appeal from the Declaratory Ruling is resolved. In addition to its memorandum in opposition, GTE also filed a motion to intervene should the Commission initiate a proceeding as the Petitioners have requested.

⁴ Id at ¶25 and citing to *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*-(*Local Competition Order*), CC Docket 96-98, First Report and Order.

- (4) After a thorough review of the arguments submitted on this matter, the Commission determines that it is appropriate to initiate an investigation in order to determine, on a generic basis, a prospective position on inter-carrier compensation for dial-up⁵ ISP-bound traffic to be utilized by LECs should they be unable to negotiate a satisfactory resolution of this issue through their own commercial negotiations. This determination to develop a generic position on inter-carrier compensation for ISP-bound traffic, and perhaps other principally one-way traffic with characteristics similar to ISP-bound traffic, will advance all LECs interests in that this issue will not have to be arbitrated on a case-by-case basis once a generic determination is rendered. All parties entering into interconnection agreements will thus benefit by the Commission rendering a generic position on inter-carrier compensation for this traffic.
- (5) Contrary to the position expressed by GTE and Ameritech, the Commission finds ample authority in federal and state law to conduct this investigation. Although not dispositive of this Commission's decision, the FCC has held that Sections 251-253 of the 1996 Act afford state commissions substantial authority to regulate not only intrastate services but interstate services as well.⁶ The FCC's jurisdictional analysis set forth above was upheld by the United States Supreme Court in *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999). Further, Section 261(c) of the 1996 Act preserves for states the authority to prescribe requirements in addition to those prescribed pursuant to Sections 251-252 when necessary to further competition in the provision of exchange or exchange access service. The 1996 Act, in Section 252(g), also contemplated the consolidation of state proceedings under Section 252 so as to ease the administrative burdens on telecommunication carriers, other parties to the proceedings, and the state commissions in carrying out the responsibilities associated with 1996 Act.
- (6) Besides federal law, Ohio's state law confers jurisdiction on the Commission to conduct the generic investigation outlined herein. In language essentially repeated in Sections

⁵ Dial-up ISP traffic is characterized by a LEC end user customer dialing a local call that travels over the public switched telephone network to reach an ISP.

⁶ *Local Competition Order* at ¶83.

4905.05 and 4905.06, Revised Code, Section 4905.04(A), Revised Code, provides to the Commission the "power and jurisdiction to supervise and regulate public utilities...." This authority to supervise and regulate public utilities includes "such power and jurisdiction as is reasonably necessary for the commission to perform the acts of a state commission pursuant to the 'Telecommunications Act of 1996'".⁷ Moreover, the Commission has the authority pursuant to Section 4905.31, Revised Code, to consider reasonable arrangements or other financial devices in lieu of the per minute of use rates between two utilities for this type of traffic. In approving such alternative financial devices, the Commission must ensure that the rates are just and reasonable in accordance with Section 4905.22, Revised Code.

- (7) The Commission intends to proceed expeditiously with this investigation. To that end, the Commission will conduct this investigation generally as an arbitration under the guidelines for mediation and arbitration set forth in Case No. 96-463-TP-UNC (463 guidelines), *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996* (Entry July 18, 1996). The Commission will modify the 463 guidelines where necessary to facilitate this arbitration. The Docketing Division is directed to modify the purpose code of this case to reflect that this matter will proceed as a ARB case rather than as a UNC case as originally filed.
- (8) The Commission clarifies that principles of efficiency and economy of resources dictate that a generic arbitration be undertaken in order to adopt a Commission policy applicable when LECs can not agree on inter-carrier compensation for dial-up ISP traffic. However, we note that, as a general matter, commercial negotiations are still the better method of establishing interconnection agreements between individual parties. Thus, the Commission tentatively concludes, whatever the outcome of this generic arbitration, that interconnecting parties should first attempt to negotiate an acceptable resolution of inter-carrier compensation among themselves before relying upon the results of this generic arbitration.

⁷ Section 4905.04(B), Revised Code.

- (9) On September 7, September 17, and October 26, 1999, United Telephone Company of Ohio dba Sprint and Sprint Communications Company L.P. (collectively Sprint), AT&T Communications of Ohio, Inc. and TCG Ohio, Inc. (collectively AT&T), and Level 3 Communications, filed motions to intervene in this matter. Each intervenor asserted that it has a real and substantial interest in this matter that would be impaired if not granted an opportunity to participate in this investigation. Further, the intervenors aver that, as the Commission has not yet acted on the request for a generic proceeding, granting the respective motions for intervention will not unduly delay these proceedings or otherwise prejudice other parties.
- (10) In light of the Commission's decision outlined above to proceed with a generic arbitration, the Commission determines that intervention should be granted to GTE, Sprint, AT&T, and Level 3 Communications. Any other stakeholder interested in the generic resolution of this matter is invited to intervene at this time.
- (11) In order to further educate the Commission and its staff on the economic and policy issues involving reciprocal compensation for ISP traffic, a forum shall be scheduled for January 27, 2000, following the Commission's 11:00 a.m. signing session. Persons interested in presenting prepared comments to the Commission must contact the Chief of the Telecommunications Section, Legal Department by no later than January 21, 2000.
- (12) A prehearing conference is scheduled for 1:30 p.m., on February 3, 2000, at the Commission's offices 180 East Broad Street, Columbus, Ohio. The purpose of this prehearing conference will be to discuss hearing dates, discovery deadlines, and other procedural matters. All persons who have submitted a motion to intervene in this matter are invited to attend this conference. Intervenors participating at this prehearing conference must be represented by counsel.
- (13) On November 9, 1999, Mr. David A. Truno, an attorney admitted to practice before the Supreme Court of Ohio, filed a motion on behalf of Level 3 Communications seeking to permit Mr. Richard M. Rindler and Ms. Robin L. Redfield to practice before this Commission for purposes of the above captioned proceeding. In support of this motion, Level 3

Communications avers that Mr. Rindler and Ms. Redfield are coordinating counsel for state regulatory matters and that both Mr. Rindler and Ms. Redfield are admitted to practice and are in good standing in a number of other jurisdictions.

- (14) Pursuant to Rule 4901-1-08(B), Ohio Administrative Code, the Commission finds that Mr. Rindler and Ms. Redfield shall be permitted to appear and represent Level 3 Communications before the Commission for the purposes of this proceeding.

It is, therefore,

ORDERED, That, as outlined above, a generic arbitration be conducted in this matter. It is, further,

ORDERED, That the purpose code of this case be changed to ARB in accordance with Finding (7). It is, further,

ORDERED, That, in accordance with Finding (10), the motions to intervene submitted in this matter are granted. It is, further,

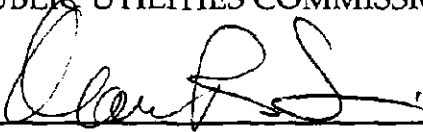
ORDERED, That a Commission forum be scheduled for January 27, 2000, in accordance with Finding (11). It is, further,

ORDERED, That a prehearing conference be scheduled in accordance with Finding (12). It is, further,

ORDERED, That Mr. Richard M. Rindler and Ms. Robin L. Redfield be permitted to represent Level 3 Communications in this proceeding in accordance with Finding (14). It is, further,

ORDERED, That copies of this Entry be served upon all incumbent local exchange carriers and new entrant carriers operating in Ohio, Ohio's Consumer Counsel, and any other interested persons of record.

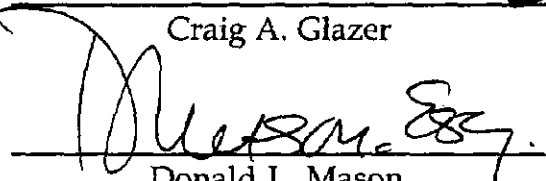
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Ronda Hartman Fergus

Craig A. Glazer

Judith A. Jones

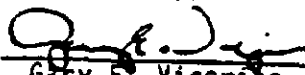
Donald L. Mason

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Gary E. Vigorito
Secretary