

File

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Commission)
Investigation Into the Treatment of)
Reciprocal Compensation for Internet) Case No. 99-941-TP-ARB
Service Provider Traffic)

REPLY BRIEF OF BUCKEYE TELESYSTEM, INC.

William S. Newcomb, Jr. (0000918)
Stephen M. Howard (0022421)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Phone: (614) 464-5681
Fax: (614) 719-4885

Attorneys for Buckeye TeleSystem, Inc.

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INTRODUCTION

The issues before the Commission are far less complicated than the initial briefs of the ILECs pretend. The parties originally paid reciprocal compensation to each other for ISP-bound traffic under their interconnection agreements, without regard to the comparative duration of the calls or the fact that they involve the Internet. At that time, the ILECs received far more reciprocal compensation than they paid to the CLECs because almost all local telephone customers (including ISPs) were ILEC subscribers.

As the CLECs obtained more local customers (including ISPs), the balance of reciprocal compensation payments began to tilt away from the ILECs. They responded by refusing to pay any compensation to the CLECs for ISP-bound traffic. Citing the comparative duration of the calls and the fact that they involve the Internet, the ILECs claimed that ISP calls are not local traffic and require no compensation whatsoever, even though they use the CLECs' facilities in the same way that other local calls do. This proceeding was initiated to resolve the dispute.

Buckeye TeleSystem, Inc., identified three dispositive issues in its initial brief. First, the PUCO's jurisdictional authority to decide whether reciprocal compensation should be paid for ISP-bound traffic could not be clearer; it has been recognized by the courts, by the FCC, by this Commission, and by more than two dozen regulatory commissions in other states. Second, it is indisputably anti-competitive and unfair for ILECs to use a CLEC's facilities to complete their customers' ISP calls without paying compensation to the CLEC. Third, the proper measure for this compensation is the reciprocal compensation standard used for all other local calls, because ISP calls are legally and functionally local traffic.

The initial briefs of the three incumbent LECs do not challenge the Commission's previous ruling that it has jurisdictional authority to resolve this issue. In addition, they do not dispute that CLECs are entitled to receive at least some compensation for completing ISP calls. But they argue that there is no binding legal precedent requiring the Commission to find that ISP-bound traffic is local traffic subject to reciprocal compensation charges, and they ask the Commission to develop a special standard of compensation for ISP calls that would reduce their payments to the CLECs.

The Commission should summarily reject the ILECs' argument as a matter of law and logic. First, ISP calls cannot be exempted from reciprocal compensation obligations because they are local traffic; the recent Bell Atlantic decision rejected every conceivable legal justification for the ILECs' present claim that ISP calls are not local traffic. Second, ISP calls should not be exempted

from reciprocal compensation obligations even if they were not local traffic because they are functionally identical to local calls; ISP calls have no unique characteristics that would warrant discriminatory compensation charges.

ARGUMENT

1. The Commission must require reciprocal compensation for ISP calls because they are local traffic.

When the Court vacated the FCC's Declaratory Ruling in Bell Atlantic Telephone Companies v. FCC, No. 99-1094, 2000 U.S. App. LEXIS 4685 (D.C. Cir., Mar. 24, 2000), it flatly rejected every single justification that the FCC relied upon in finding that ISP calls are not local traffic. The ILECs correctly observe that the Court did not preclusively hold that ISP calls are local, but the limited nature of the Court's ruling merely reflects the procedural reality that its scope of review was limited to the four corners of the Declaratory Ruling itself and did not include hypothetical future rulings by the FCC. In addition, there is no reason to believe that the FCC can offer any better justifications for its position than it did in that case. The three ILECs in this proceeding do not offer any reasons for finding that ISP calls are non-local other than the arguments that were expressly rejected in Bell Atlantic.

When the Bell Atlantic Court reviewed earlier FCC rulings, it found that they also support the conclusion that ISP-bound traffic is local. The ILECs now argue that there are some FCC rulings that suggest the opposite, but those rulings are based upon precisely the same justifications that the Bell Atlantic Court rejected. The ILECs' contention that ISP calls are non-local traffic is

ultimately based solely upon their unfounded hope that the FCC will somehow come up with some new legal justification that will be approved by the courts. The holding in Bell Atlantic is directly applicable here: in the continued absence of any such legal justification, ISP calls must be considered local traffic subject to statutory reciprocal compensation obligations.

2. The Commission should require reciprocal compensation for ISP calls even if they are not local traffic.

If the CLECs are correct that ISP calls are local traffic, then the Commission must summarily require reciprocal compensation, as set forth above. On the other hand, even if the ILECs were correct that ISP calls are not local traffic, then the Commission should also summarily require reciprocal compensation because dial-up ISP-bound traffic uses local facilities in exactly the same way as any other local calls. Fairness and regulatory consistency dictate that functionally identical calls should be compensated in the same way.

The ILECs argue that the Commission should develop a separate and different compensation system for ISP calls because they are "unique". The only "unique" characteristic identified by the ILECs is the comparatively longer average duration of ISP calls, resulting in higher minute-of-use reciprocal compensation charges. But reciprocal compensation charges depend upon the total volume of calls, i.e., the number of calls and the length of those calls, and they do not balance for any subscribers who receive a different volume of inter-carrier local calls than they make. Thus, a pizza delivery service that subscribes to a CLEC may receive thousands of calls lasting a few minutes each from ILEC subscribers, and make very few outgoing calls, so that the total

reciprocal compensation charges owed to the CLEC are far higher than the reciprocal compensation charges owed to the ILEC. There is nothing "unique" about ISP calls in this respect, and it would be unfair to single them out for lower compensation when many other local calls share this same characteristic.

The ILECs' real complaint -- that reciprocal compensation should not be based on MOU -- is not unique to ISP-bound traffic. The Commission should not extend the present proceeding so that the ILECs can pursue a compensation scheme that discriminates specifically and exclusively against ISP traffic.

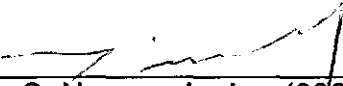
CONCLUSION

Ohio's local exchange carriers originally treated ISP calls as local traffic for all purposes and paid the reciprocal compensation charges that their interconnection agreements required for local calls. Courts and state regulatory commissions around the country consistently reached the same conclusion. The ILECs' present claim that ISP calls are not local traffic is solely the result of their shifting economic self-interests, and it is supported only by their hope that the FCC will think of some legal justification for their position that has not already been rejected by the courts. Virtually every state regulatory commission that has considered the question has found that ISP calls are local calls requiring reciprocal compensation, and this Commission should reach the same conclusion.

Even if ISP calls were not considered local traffic in some technical sense, they are nevertheless functionally identical to local calls in every respect that is relevant to inter-carrier compensation. ISP calls use exactly the same local

facilities as any other local calls and have no unique characteristics that warrant discriminatory treatment. The appropriate compensation has already been determined for identical local calls, and the Commission should summarily require reciprocal compensation for ISP-bound traffic in this proceeding.

Respectfully submitted,



William S. Newcomb, Jr. (0000918)
Stephen M. Howard (0022421)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Phone: (614) 464-5681
Fax: (614) 719-4885

Attorneys for Buckeye TeleSystem, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of Buckeye TeleSystem, Inc. was served on April 24, 2000, via ordinary first-class U.S. Mail upon the following parties of record listed below:

Dave Bergmann
Dirken D. Winkler,
Assistants Consumer Counsel
Office of Ohio Consumers' Counsel
77 S. High Street, 15th Floor
Columbus, Ohio 43266-0550

Duane W. Luckey
Chief Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215-3793

Roger P. Sugarman
Kegler, Brown, Hill & Ritter
Capitol Square
65 E. State Street, Suite 1800
Columbus, Ohio 43215-4294

Marsha R. Schermer
Vice President, Regulatory
Time Warner Telecom of Ohio L.P.
65 East State Street, Suite 1800
Columbus, Ohio 43215

Boyd B. Ferris
Ferris & Ferris
2733 W. Dublin-Granville Road
Columbus, Ohio 43235-4268

Sally W. Bloomfield, Esq.
Bricker & Eckler, LLP
100 South Third Street
Columbus, Ohio 43215-4291

Thomas J. O'Brien
CoreComm Newco, Inc.
450 West Wilson Bridge Rd.
Worthington, Ohio 43085

Joseph R. Stewart
Sprint
50 W. Broad Street, Suite 3600
Columbus, Ohio 43215

Daniel R. Conway
Porter, Wright, Morris & Arthur
41 S. High Street
Columbus, Ohio 43215-3406

David J. Chorzempa, Attorney
AT&T Corp.
222 West Adams
Chicago, Illinois 60606

Robin L. Redfield
Swidler Berlin
3000 K Street N.W., Suite 300
Washington, D.C. 20007

David L. Turano
Harris Turano Mazza
941 Chatham Lane, Suite 201
Columbus, Ohio 43221

Michael Mulcahy
Ohio Bell Telephone Company
45 Erieview Plaza, Suite 1400
Cleveland, Ohio 44114

Mark S. Stemm
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, Ohio 43215

Jack B. Harrison
Doug Hart
Frost & Jacobs
2500 PNC Center
201 E. Fifth Street
Cincinnati, Ohio 45202

Prince I. Jenkins
Intermedia Communications Ohio, Inc.
3625 Queen Palm Drive
Tampa, Florida 33619-1309

Judith B. Sanders
Bell, Royer & Sanders Co., L.P.A.
33 South Grant Avenue
Columbus, Ohio 43215-3927

John W. Bentine, Esq.
Chester, Willcox & Saxbe
17 S. High Street, Suite 900
Columbus, Ohio 43215

Lee Lauridsen
Senior Attorney
Sprint Communications Company L.P.
8140 Ward Parkway
Kansas City, MO 64114

Thomas E. Lodge
Thompson, Hine and Flory
One Columbus
10 West Broad Street, Suite 700
Columbus, Ohio 43215-3435

Richard M. Rindler
Swidler & Berlin
3000 K Street N.W.
Suite 300
Washington, DC 20007-5116

David W. McGann
MCI WorldCom
Suite 3700
205 N. Michigan Avenue
Chicago, IL 60601

Joseph R. Stewart
Sprint
50 W. Broad Street, Suite 3600
Columbus, Ohio 43215

Benita A. Kahn
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P. O. Box 1008
Columbus, Ohio 43216-1008



Stephen M. Howard