Decision 01-06-060 June 28, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

O P I N I O N

1. Introduction

On July 24, 2000, Citizens Telecommunications Company of California (Citizens), filed a motion in this proceeding. On September 29, 2000, Roseville Telephone Company (Roseville) filed a similar motion. Each movant seeks an order that requires competitive local exchange carriers (CLECs) to establish and maintain memorandum accounts to track the amount of Internet service provider (ISP) traffic terminated on their networks by Citizens and Roseville, respectively, and related reciprocal compensation received from Roseville and Citizens, respectively.

By this decision, we deny the motions. The issue of whether any prospective changes in compensation for ISP traffic are warranted, and any related accounting requirements resulting therefrom shall be separately addressed in Rulemaking (R.) 00-02-005.

In Decision (D.) 00-05-024 (May 24, 2000), the Commission ordered the establishment of accounts by Pacific Bell (Pacific), GTE California (now GTEC Verizon California) and the CLECs which interconnect with them to record ISP-bound traffic and reciprocal compensation payments in order to track data that could be needed in a future proceeding. Movants argue that the authorization of a memorandum account, in no way prejudges the reasonableness of the amounts recorded or whether the amounts recorded may be recovered at a later time. The purpose of a memorandum account is only to ensure that the specified amounts are tracked for potential regulatory purposes in future proceedings.

Movants argue that CLECs which interconnect with Citizens or Roseville should establish memorandum accounts in connection with reciprocal compensation payments made for the termination of ISP-traffic, because the issue of the propriety of reciprocal compensation payments for ISP-bound traffic is not finally resolved in California or elsewhere. Movants note that the Commission has opened an investigation into the payment of reciprocal compensation for the ISP-bound traffic. (R.00-02-005.) At the time that movants filed their motions, the Federal Communications Commission (FCC) was reviewing the question of reciprocal compensation payments for ISP-bound traffic. The FCC has now released its order, on April 27, 2001, addressing intercarrier compensation for ISP-bound traffic.[1] The impact of the FCC Order on the pending motions before us is addressed in the Discussion Section of this

[1] *In the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic.* CC Docket 96-98; 99-68; Order on Remand and Report and Order, (FCC 01-131) (released April 27, 2001) (FCC Order).

decision. Movants also note federal legislation that has been introduced which would amend the Telecommunications Act to prohibit the payment of reciprocal compensation for ISP-bound traffic. (H.R. 4445.)

Despite the movants dispute as to the authority of the Commission to require them to pay reciprocal compensation for ISP-bound traffic, they are each making reciprocal compensation payments for ISP-bound traffic to Pac-West Telecomm, Inc. pursuant to the arbitrated interconnection agreement adopted by the Commission (in D.99-12-021 for Citizens and D.00-09-032 for Roseville). Movants argue that because other CLECs may opt-in to the reciprocal compensation provisions of either of these agreements, pursuant to the terms of Telecommunications Act as implemented by the FCC, (47 U.S.C. § 251(1)) the order adopted pursuant to this motion address all CLECs who may in the future claim reciprocal compensations from Roseville.

Movants claim that while they can only estimate what portion of the traffic they deliver to Pac-West or other CLECs is ISP-bound, only the CLEC itself can truly account for its ISP-bound traffic. Thus, movants request that each CLEC identify at its switches the volume of traffic being delivered to its ISP customers, and maintain an account of the reciprocal compensation payments associated with this ISP-bound traffic.

In a ruling in the arbitration proceeding initiated by Pac-West against Pacific Bell (Pacific) (Application (A.) 98-11-024), the arbitrator agreed that the ultimate resolution of the dispute over the payment of reciprocal compensation for termination of ISP-bound traffic would become more complex and litigious absent the identification and maintenance of records by the CLEC of all ISP-bound traffic and reciprocal compensation revenues received. Accordingly, movants argue that the Commission has already determined that there is good

cause to order the establishment of memorandum accounts in connection with the on-going disputes over the payment of reciprocal compensation for ISP-bound traffic.

On May 4, 2000, D.00-05-024 granted that portion of Pacific's motion for a Commission order for CLECs to establish and maintain memorandum accounts for all disputed payments made by Pacific pursuant to the arbitrated interconnection agreements. The order was also applied to the CLECs' interconnection agreements with Verizon. Accordingly, movants argue that the order should now also be applied to the CLECs' interconnection agreements with each of them.

As a condition of establishing this memorandum account, Pacific and GTEC were ordered to track traffic they terminate to ISPs and establish and maintain a memorandum account for the associated reciprocal compensation payments they receive from CLECs. (D.00-05-024, O.P. 3.) Citizens and Roseville each agree to comply with this condition.

No party filed a response to Citizen's motion. Pac-West, the only party to file a response to Roseville's motion, objected to the requested relief on October 16, 2000.

Pac-West opposes Roseville's motion, arguing that it fails to prove any of the facts necessary to support the requested relief and that it ignores the record developed in R.00-02-005 regarding the impossibility of accurately identifying ISP-bound minutes. Furthermore, Roseville fails to propose any methodology by which such ISP-bound traffic is to be identified. Roseville's statement that it would also establish such a memorandum account is completely undermined by its testimony under oath in R.00-02-005 that it does not have the capability to do so. Pac-West argues that a grant of Roseville's Motion without granting

Pac-West and other potentially affected parties a hearing on the factual matters set forth in this Response would constitute prejudgment, without any evidentiary record, of one of the central factual issues currently before the Commission in R.00-02-005; i.e., whether ISP-bound traffic can be specifically identified and, if it can, the proper methodology for doing so.

Since Roseville is proposing to impose on Pac-West and other interconnecting carriers a new requirement to track ISP-bound traffic, Pac-West argues that Roseville must demonstrate, at a minimum, the feasibility of complying with such requirement. Yet, Roseville offers no evidence that any ILEC or CLEC currently has any mechanism in place to track ISP-bound traffic, and, Roseville fails to make any specific proposal as to how to identify ISP-bound calls or account for reciprocal compensation payments for such calls.

Pac-West argues that to support Roseville's requested relief, the motion should have proposed a methodology for identifying ISP-bound traffic, which, at a minimum, set forth:

- a criteria for determining which entities qualify as ISPs;
- a criteria for determining what types of local calls should be considered ISP-bound calls;[2]
- a methodology for identifying ISP telephone numbers;
- a methodology for segregating ISP-bound calls from other local calls; and
- a description of any call detail billing or other recordkeeping mechanism that could feasibly be implemented to identify ISP-bound traffic.

[2] For example, should ISP-bound calls include only Internet-bound calls, or should they also include non-Internet-bound calls? Many ISP-bound minutes do not ever connect to the Internet.

Roseville made no attempt to provide these details as a basis for a Commission finding that imposition of the memorandum accounting requirement sought by Roseville is feasible, as well as fair, necessary, and appropriate.

On October 26, 2000, Roseville filed a third-round pleading arguing that the Commission should disregard Pac-West's contentions regarding the impossibility of separately measuring Internet traffic. Roseville claims that the real issue is not one of impossibility but rather simply objections to the cost involved in setting up necessary tracking mechanisms. Roseville states that the burden should be on the CLECs--not on Roseville -- to develop tracking mechanisms for ISP traffic since they are most familiar with their own networks.

2. Discussion

Since the motions of both Roseville and Citizens ask for essentially the same form of relief, we shall address them on a combined basis. Citizens and Roseville essentially seek to be treated in the same manner as Pacific and Verizon with respect to memorandum accounting requirements that have previously been established for ISP traffic.

As a basis for their respective motions, the movants make reference to the memorandum accounts for ISP-related reciprocal compensation that were authorized in D.00-05-024 for Pacific and Verizon. In that decision, we concluded that because the legal issues relating to reciprocal compensation for ISP traffic had not been finally resolved, the use of memorandum accounts would provide for quantification of the disputed amounts involved as transactions were being made. In this way, parties would presumably not have to reconstruct the disputed amounts after the fact. Movants claim they are in a similar situation with respect to reciprocal compensation payments they must

make for ISP-bound traffic under their interconnection agreements. Accordingly, they seek a similar remedy for themselves. The movants here similarly argue that the issue of the propriety of ISP payments still has not been finally resolved in California. Yet since movants filed their original motions, a significant development has occurred. On April 27, 2001, the FCC issued an Order that adopts new rules governing intercarrier compensation for telecommunications traffic delivered to ISPs. Therefore, the premise underlying the motions that the treatment of ISP traffic had not been decided in California is no longer entirely accurate in view of the subsequently issued FCC Order. The disposition of the motions for memorandum accounts must be made in light of the findings and directives set forth in the FCC Order.

An underlying premise for setting up memorandum accounts is that current transactions booked into the accounts will be subject to a retroactive adjustment at some point in the future. Yet, the FCC Order makes no provision for any retroactive adjustments to reciprocal compensation billings that were made prior to the effective date of the FCC Order.[3] Instead, the FCC Order expressly states that it does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. Likewise, the FCC Order does not preempt any state commission decision regarding compensation for ISP-traffic for the period prior to the effective date of the regime adopted therein.[4] Therefore, there would be no need for memorandum account tracking or true up of past payments of reciprocal compensation to the extent that the FCC Order has no retroactive applicability.

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[3] FCC Order, Paragraph 82.

Instead, the FCC expressly preserves states' rights to determine the treatment of such traffic for periods preceding the effective date of the FCC Order.

The establishment of a memorandum account also presumes some methodology or criteria by which ISP-bound traffic could be properly segregated from other forms of traffic. In its order, however, the FCC makes no provision for segregating ISP-bound traffic from other forms of traffic for billing purposes on a forward-looking basis, nor provides any guidelines or criteria as to how such traffic could be accurately segregated and tracked.[5] In fact, the FCC Order requires that carriers must apply the same rate to all traffic, including the traffic of ISPs, in order to qualify for the rate caps adopted in the Order. The FCC expressly refused to take any action that would result in the establishment of separate intercarrier compensation rates, terms, and conditions for local voice and ISP traffic. The FCC found no evidence in its own record to establish any inherent differences between the costs on any one network of delivering a voice call to a local end user and a data call to an ISP.

The one pending legal challenge whereby current ISP reciprocal compensation payments could conceivably be subject to retroactive treatment relates to the court cases that have been filed by Pacific and Verizon.[6] As we

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[4] *Id.*

[5] The FCC Order acknowledges that some carriers are unable to identify ISP-bound traffic. The Order states that in order to limit disputes and avoid costly efforts to separately identify ISP-bound traffic, it merely adopts a rebuttal presumption that traffic delivered to a carrier exceeding a 3:1 ratio of terminating to originating traffic is ISP traffic subject to the FCC-adopted compensation mechanism.

[6] On August 25, 1999, GTE California Incorporated (now known as Verizon California) filed a Complaint for Declaratory and Injunctive Relief (Civil Action No. C.99-3973) in the United States District Court for the Northern District of California challenging

Footnote continued on next page

noted in D.00-05-024, due to Pacific's and Verizon's pending legal appeals of Commission decisions authorizing reciprocal compensation for ISP-bound traffic, the legal issues relating to such obligations have not been finally decided. The reviewing courts may or may not order changes in reciprocal compensation policy, and, if ordered, those changes may or may not be retroactive in whole or part. If the case was remanded and retroactive adjustments were required pursuant to such a court order, the court order could conceivably impact Roseville's and Citizen's reciprocal compensation payments under current interconnection agreements as well.

Thus, to that extent only, the parties' request for memorandum accounting arguably may have some plausible relevance to the reciprocal compensation payments they are currently making. Yet, in view of the subsequent FCC Order addressing ISP-related intercarrier compensation, as referenced above, we find that our previous premises have been significantly modified regarding the uncertainty of whether prior reciprocal compensation payments may be subject to retroactive adjustment. Given subsequent developments since our issuance of D.00-05-024, we no longer find a sufficient basis to justify imposing memorandum accounting requirements on carriers to track reciprocal compensation for ISP-bound traffic.

In D.00-05-024, we concluded that in view of uncertainty regarding the outcome of pending legal challenges to prior Commission decisions regarding reciprocal compensation, the identification of disputed amounts would be less

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D.98-10-057. In its complaint, Verizon asserts that the Commission lacked the authority to mandate reciprocal compensation under the Act. Pacific likewise filed a complaint in the United States District Court, Northern District of California, challenging the legality of D.98-10-057, as modified by D.99-07-047.

contentious if carriers kept track of disputed payments in memorandum accounts as transactions occurred. In D.00-05-024, we presumed benefits could be gained by keeping track of disputed payments as they are being made as opposed to attempting to reconstruct the amounts at issue after the fact. An order mandating memorandum accounting, however, presupposes that the appropriate accounting entries to be made are readily quantifiable and can be properly segregated from other costs. Yet, at the time we issued D.00-05-024, it was not yet clear to what extent measuring such payments was complex and litigious. Only after the evidentiary hearings in R.00-02-005, did the full extent of the complexity and litigiousness come fully to light.

In adopting D.00-05-024, however, we did not conduct a detailed evidentiary probe into the feasibility of a tracking mechanism for ISP traffic. At the time we adopted D.00-05-024, we did not have the evidentiary record subsequently developed in R.00-02-005 concerning the extent of claimed difficulties in accurately identifying and tracking qualifying minutes of traffic terminated to an ISP to the access Internet. In its pleading, Pac-West cites various references from the record in R.00-02-005 regarding the ISP cost tracking issue. Roseville's and Citizen's motions fail to refute the evidence that has been presented in R.00-02-005 concerning carriers' difficulty in separately identifying tracking ISP traffic that would not be subject to reciprocal compensation. Yet, Roseville and Citizens expect carriers to identify at their switches the volume of traffic specifically being delivered to ISPs without explaining what methodology they want carriers to use.

Accordingly, the fact that we required memorandum accounting in D.00-05-024 is not dispositive of the motions of Roseville and Citizens presently before us. We issued D.00-05-024 based upon the limited information that was

before us at the time. A more complete body of factual evidence has now been developed in R.00-02-005 and further guidance has been provided by the recently issued FCC Order. We must rule upon the Roseville and Citizens motions in view of the more updated information concerning the feasibility of separately measuring ISP traffic.

We find that in view of the problematic nature of measuring ISP traffic under currently developed accounting and billing systems as presented in R.00-02-005, our original presumption in D.00-05-024 regarding the ease of setting up memorandum accounts segregating ISP traffic has been called into question. It is not necessary to find that tracking such ISP traffic is "impossible." We merely recognize the complexity of the measurement issues involved.

In view of the additional evidence presented in R.00-02-005 and the findings of the FCC Order, we now conclude that there is insufficient basis to grant the motions before us to order memorandum accounting and to segregate Citizen's and Roseville's ISP transactions that have already occurred. To the extent different compensation policies are adopted with respect to ISP traffic on a going forward basis, any necessary memorandum accounting or tracking requirements for past transactions becomes moot.

In any event, irrespective of whatever records the CLECs may or may not keep of reciprocal compensation receipts, Roseville and Citizens on their own initiative can keep track of the total reciprocal compensation payments that they make to each of the CLECs. To the extent that some retroactive adjustment to reciprocal compensation paid by Roseville or Citizens conceivably might be granted by a subsequent court order, the payment records kept by Roseville and Citizens would still be available to develop some pro forma proration of disallowable ISP payments if necessary.

In conclusion, the premises that we relied upon in adopting the memorandum accounting requirements in D.00-05-024 have been materially modified by the subsequent development of the record in our own ISP proceeding, R.00-02-005, and by the issuance of the FCC Order regarding Intercarrier Compensation for ISP-bound Traffic. These additional developments provide additional information regarding (1) the problematic nature of separately tracking ISP-bound traffic, and (2) the unlikelihood that retroactive adjustments of reciprocal compensation payments will happen for either Roseville or Citizens. In the light of this additional information, we find no basis to impose memorandum accounting requirements as proposed in the motions of Roseville and Citizens. Accordingly, each of the motions is hereby denied.

3. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 (g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on the draft decision on June 18, 2001 by Verizon California, Inc. We have taken the comments into account, as appropriate, in finalizing this order.

Findings of Fact

1. D.98-10-57 as modified by D.99-07-047, requires reciprocal compensation payments made pursuant to interconnection agreements apply to ISP-bound traffic in the same manner as they apply to other local traffic.

2. The obligation of ILECs to pay reciprocal compensation to CLCs for ISP-bound traffic remains a disputed issue since Pacific and Verizon have filed complaints in U.S. District Court regarding the relevant Commission decisions.

3. Theoretically, the pending U.S. federal court cases filed by Pacific and Verizon challenging past reciprocal compensation payments could have some impact on Citizens and Roseville. Nonetheless, the issuance of the FCC's recent order regarding intercarrier compensation for ISP-bound traffic provides decisive policy guidance regarding the treatment of both past and prospective reciprocal compensation payments.

4. The FCC Order makes no provision for any retroactive adjustments to reciprocal compensation billings that were made prior to the effective date of the Order, but it does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions.

5. The FCC makes no provision for segregating ISP-bound traffic from other forms of traffic for billing purposes on a forward-looking basis, nor provides any guidelines or criteria as to how such traffic could be accurately segregated and tracked.

6. The FCC found no evidence in its own record to establish any inherent differences between the costs on any one network of delivering a voice call to a local end user and a data call to an ISP.

7. In D.00-05-024, the Commission concluded that in view of uncertainty regarding the outcome of pending legal challenges to prior Commission decisions regarding reciprocal compensation, the identification of disputed amounts would be less contentious if carriers kept track of disputed payments in memorandum accounts as transactions occurred.

8. In D.00-05-024, the Commission presumed benefits could be gained by keeping track of disputed payments as they are being made as opposed to attempting to reconstruct the amounts at issue after the fact, even though such

memorandum accounting, presupposes that the appropriate accounting entries are readily quantifiable and can be properly segregated from other costs.

Conclusions of Law

1. The fact that the Commission required memorandum accounting in D.00-05-024 is not dispositive of the motions of Roseville and Citizens.

2. In view of the unanswered questions regarding measuring ISP traffic under currently developed accounting and billing systems as presented in R.00-02-005, the Commission's original presumption in D.00-05-024 regarding the ease of setting up memorandum accounts segregating ISP traffic has been called into question.

3. The premises that the Commission relied upon in adopting the memorandum accounting requirements in D. 00-05-024 have been materially modified by the subsequent development of the record in the Commission's ISP proceeding, R. 00-02-005, and by the issuance of the FCC Order regarding Intercarrier Compensation for ISP-bound Traffic.

4. In view of the policy established by the FCC Order adopting changes in intercarrier compensation on a forward-looking basis only, there is significantly reduced likelihood that reciprocal compensation payments made prior to the effective date of the FCC Order will be subject to any retroactive adjustment.

5. Roseville and Citizens have failed to justify the burden involved in requiring memoradum accounting for all past reciprocal compensation payments separately attributable to ISP-bound traffic.

6. At the time the Commission adopted D.00-05-024, it did not have the evidentiary record subsequently developed in R.00-02-005 concerning the extent of claimed difficulties in accurately identifying and tracking qualifying minutes of traffic terminated to an ISP to access Internet web sites.

7. The motion of Citizens and Roseville to require CLECs that enter into interconnection agreements with either of those ILECs to establish a memorandum account for reciprocal compensation received for ISP traffic on the same basis as was previously required in D.00-05-024 should be denied.

O R D E R

IT IS ORDERED that the motions of Citizens Telecommunications Company of California, Inc. and Roseville Telephone Company for an order requiring competitive local carriers to establish and maintain memorandum accounts for disputed payments pursuant to the arbitrated interconnection agreements consistent with Decision 00-05-024 are denied.

This order is effective today.

Dated June 28, 2001 at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners