

Decision 03-09-005 September 4, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Reciprocal
Compensation for Telephone Traffic Transmitted
to Internet Services Providers Modems.

Rulemaking 00-02-005
(Filed February 3, 2000)

DECISION CLOSING RULEMAKING

By this order, we close the above-captioned rulemaking since no remaining issues require resolution in this proceeding. The order instituting this rulemaking was issued on February 3, 2000, for the purposes of adopting rules concerning reciprocal compensation for Internet Service Provider (ISP)-bound traffic. As explained below, the issues previously identified for treatment in this rulemaking either have been resolved, or are subject to future resolution through other forums, and thus this proceeding may now be closed.

Evidentiary hearings were held in this proceeding during the summer of 2000. An Administrative Law Judge's (ALJ) proposed decision and the Assigned Commissioner's alternate proposed decision were issued in the fall of that year based on those hearings regarding reciprocal compensation for ISP-bound traffic. The Commission deferred consideration of the proposed decisions in anticipation of action on this issue at the federal level. On April 27, 2001, the Federal Communications Commission (FCC) released its "Order on Remand and Report and Order" in the matter of reciprocal compensation for ISP-bound

traffic.¹ The FCC Order asserted federal jurisdiction and adopted prospective rules governing reciprocal compensation due for the delivery of ISP-bound traffic. The FCC's stated intention was to transition from a reciprocal compensation to a bill-and-keep approach to compensation for delivery of all traffic over which the FCC has jurisdiction.

In recognition that the FCC Order addressed the controversy concerning reciprocal compensation on ISP traffic on a prospective basis, the pending proposed decisions concerning ISP reciprocal compensation were withdrawn from the Commission's agenda. The assigned ALJ issued a ruling on May 29, 2001, to provide parties the opportunity to comment as to whether any issues remained to be decided through this rulemaking in view of the FCC Order. Opening comments were filed on June 29, 2001, and reply comments were filed on July 13, 2001.

In a related action, on June 15, 2001, Pac-West Telecomm, Inc. (Pac-West) filed a motion for an order requiring compliance with existing interconnection agreements and related measures in response to the above-referenced Order of the FCC establishing a rate structure for intercarrier compensation in handling calls to ISPs. In its motion, Pac-West asked the Commission to address substantive questions as to whether the Incumbent Local Exchange Carriers (ILECs) were properly implementing the FCC Order.

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).

On November 29, 2001, the Commission issued Decision (D.) 01-11-067, denying Pac-West's motion, in part, to the extent that it requested a generic review and preapproval process be adopted as a condition of carriers' implementing the FCC Order. We granted the motion to the extent it sought confirmation that this Commission retained jurisdiction to adjudicate and enforce terms of existing interconnection contracts relating to the payment of reciprocal compensation.

Our findings in D.01-11-067 eliminated the need for further proceedings on the majority of issues that were in dispute in this rulemaking, but deferred action on a few items pending in the proceeding, as noted in comments filed in response to the May 29, 2001 ALJ ruling. We take note of remaining outstanding matters in the instant order.

Significance of Legal Appeals to the FCC Remand Order

In its comments on the Draft Decision, Pac-West argues that the FCC Order on Remand cannot be relied upon by this Commission as having resolved all outstanding issues concerning reciprocal compensation that are within the scope of this proceeding. Pac-West argues that U.S. Court of Appeals invalidated the legal reasoning of the FCC Order on Remand, and again remanded the matter back to the FCC for reanalysis and rejustification of its conclusions. To the extent that the FCC's basis for asserting jurisdiction has been invalidated by the Court of Appeals, Pac-West argues that this Commission can reconfirm its jurisdiction over the disputed traffic. Pac-West argues that the Commission must engage in its own analysis of the Court of Appeals decision and tailor its own decisions in this area to be consistent with the Telecommunications Act of 1996. On this basis, Pac-West opposes the closing of this proceeding

SBC Communications, Inc. (Pacific) disagrees with Pac-West's characterizations and implications relating to the FCC Order on Remand. Pacific notes that while the FCC Order was remanded, the reviewing Court expressly declined to vacate the order and specifically left in place the 3:1 rebuttable presumption concerning Internet-bound traffic, along with the related interim compensation scheme leading to bill-and-keep for Internet traffic. The Ninth Circuit Court expressly ruled that the ISP Remand Order remains in effect pending the FCC's proceedings on remand.

We recognize that there are pending issues regarding remanded portions of the FCC Order, but these issues are being addressed at the federal level. These unresolved issues are not pending before this Commission. Any legal uncertainty regarding such matters that have been remanded that are pending at the federal level does not constitute justification to conduct further litigation on ISP reciprocal compensation in the instant rulemaking. Moreover, it is not productive to continue to leave this rulemaking open indefinitely with no activity nor indication as to when or how the FCC will resolve the remanded issues. It would be speculative to presume how the FCC may ultimately address the issues subject to remand, and consequently, whether or to what extent there would be any rulemaking required by this Commission as a result. Thus, Pac-West's arguments do not persuade us to leave this rulemaking open.

FCC Presumption Concerning Imbalance Traffic

One of the controversies dealt with in the FCC Order had to do with the manner of identification of traffic as being either ISP-bound versus other traffic. The FCC, in its Order, adopted a rebuttable presumption "that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to the compensation

mechanism.” The FCC further ruled that an individual carrier may rebut the presumption “by demonstrating to the appropriate state commission that traffic above the 3:1 ratio is in fact local traffic delivered to non-ISP customers.” For traffic below the 3:1 ratio, the originating carrier likewise can rebut the presumption that the traffic is not ISP-bound “by demonstrat[ing] to the state commission that traffic it delivers to another carrier is ISP-bound traffic, even though it does not exceed the 3:1 ratio.” The FCC left it to the states to hear and resolve disputes regarding whether this presumption could be rebutted.

In its motion filed June 15, 2001, Pac-West asked the Commission to adopt an expedited dispute resolution process for addressing challenges to the rebuttable presumption regarding the nature of any out-of-balance traffic. Pacific Bell Telephone Company (Pacific) argued that any such process should apply equally if an ILEC wants to challenge the FCC’s rebuttable presumption that traffic below a 3:1 ratio is not Internet-bound traffic.

In D.01-11-067, we deferred for further study the issue of whether or how to devise an expedited process to resolve disputes over the 3:1 traffic imbalance presumption under the FCC Order. We note, however, that no party provided any detailed proposal as to how such an expedited dispute resolution process regarding the 3:1 ratio should be devised. We find that no case has been made to justify expending resources to develop a separate generic dispute resolution process just to deal with this limited issue. At this time, we conclude that to the extent a party seeks to rebut the FCC’s 3:1 presumption regarding out-of-balance traffic, such dispute process is best addressed on a case-by-case basis within individual arbitration proceedings. We shall not consider the matter further in this rulemaking.

Compensation for Calls Using Disparate Rating and Routing Points

Another pending question is whether further proceedings are warranted in this rulemaking concerning the issue of compensation relating to calls utilizing disparate rating and routing points. This issue was first raised in the Local Competition Proceeding (Rulemaking (R.) 95-04-043) through a motion filed by several joint parties, resulting in the issuance of D.99-09-029. We concluded in D.99-09-029 that a carrier may not avoid responsibility for reasonable intercarrier compensation for the routing of calls from a foreign exchange merely by redefining the rating designation from toll to local. We directed that carriers were responsible for negotiating reasonable arrangements among carriers for compensation for calls routed from a foreign exchange, but rated as a local call.

We further stated in D.99-09-029 that because parties in various arbitration proceedings had been unable to agree on the treatment of disparate rating and routing of calls, we would establish generic principles in R.95-04-043. Further resolution of these issues was then transferred from R.95-04-043 to the instant proceeding by the Order Instituting Rulemaking 00-02-005 dated February 3, 2000.

In their comments in response to the May 29, 2001 ALJ ruling, parties were directed to address whether the FCC Order affected the Commission's authority to adopt rules relating to intercarrier compensation involving the use of disparate rating and routing points and, if so, whether this additional review of this issue should be taken up in this proceeding or any other forum.

In their comments, certain parties — particularly those representing ILECs — argued that the Commission should pursue the issue of compensation for such calls, either in this proceeding or by returning the matter to the Local Competition proceeding (R.95-04-043). Some parties argued that the impact of

these arrangements on some of the smaller Local Exchange Carriers (LECs) had been aggravated due to the elimination of the revenue and expense pooling process with Pacific that previously had served to ameliorate some of these impacts on the smaller LECs. Certain parties (e.g., Focal) argued that further dispute over compensation with respect to disparate rating and routing points is no longer relevant because the FCC Order abandoned its previous distinction between “local” and “nonlocal” calls for compensation purposes. Other parties (e.g., Verizon California, Inc. (Verizon)), however, pointed out that the rating and routing issue is not specific to Internet-bound traffic, the issue which was addressed by the FCC Order. Verizon thus argued that any further consideration of the rating and routing issue should be taken up, but in a separate proceeding which is not limited to ISP matters.

In comments on the Draft Decision, Citizens Telecommunications and Calveras Telephone Company et. al. (representing the “Small LECs”) point out that while individual arbitration proceedings have addressed intercarrier compensation for disparate rating and routing points, those arbitrations involve interconnection agreements between specific carriers to which Small LECs are not a party. As a result, the Small LECs argue that disparately rated and routed calls are being completed by Small LECs at no charge to Competitive Local Exchange Carriers (CLECs). Because small LEC compensation issues relevant to disparately rated and routed calls have not been addressed in arbitration proceedings, the Small LECs recommend that the proceeding remain open to consider this issue, or alternatively that the issue be returned to the Local Competition Docket (R.95-04-043).

The Commission has independently addressed issues as to compensation for this type of calling arrangement in various interconnection agreement

arbitrations brought before us since R.00-02-005 was opened. Most recently, the Commission addressed the issue of intercarrier compensation for this type of service arrangement in D.03-05-031 in the arbitration of an interconnection agreement between Pacific and Pac-West. In D.03-05-031, the Commission found that for foreign exchange type of service where the traffic does not return to the originating rate center, such traffic would be subject to transport charges payable to the originating carrier.²

We recognize that the issue of compensation for disparate rating and routing points is not limited to ISP traffic and, thus, is not disposed of by the FCC Order on the treatment of Internet traffic.

We also acknowledge the concerns raised by the Small LECs regarding the lack of a forum through arbitration proceedings to address Small LECs' interests in connection with disparate rating and routing calls. Unlike parties to interconnection agreements, Small LECs do not have a forum through arbitration proceedings to have their interests addressed. We agree that a generic forum should be provided for the Small LECs to be heard on the issue of compensation for calls subject to disparate rating and routing points, but find it preferable to return this issue to the Local Competition proceeding rather than to address it in this rulemaking. The original purpose of this proceeding was to address reciprocal compensation for Internet-bound traffic. Since we are not leaving this rulemaking open for further proceedings on ISP reciprocal compensation, the remaining issue of compensation for disparate rating and routing points becomes stranded. Because the concerns raised by the Small LECs regarding disparate

² For further elaboration of this policy, see also the Global NAPs, Inc. Arbitration in D.02-06-076, pp. 25-30.

rating and routing of calls are not limited to Internet-bound traffic, but have wider applicability, a more appropriate forum for addressing the concerns of the Small LECs is in the Local Competition proceeding. We shall transfer the issue to that proceeding accordingly.

We direct to the ALJ in the Local Competition proceeding to take appropriate actions to have this issue addressed in that proceeding. Any party to this proceeding interested in continuing involvement in this issue that is not already a party in R.95-04-043 should request to become a party in that proceeding.

While we provide a forum within the Local Competition proceeding for addressing intercarrier compensation issues relating to Small LECs concerns, we are not persuaded that a generic forum is still needed to continue litigating intercarrier compensation for disparate rating and routing arrangements between CLECs and ILECs subject to interconnection agreements. In comments on the Draft Decision, no party identified any new arguments or evidence that would be submitted in any further generic proceedings related to compensation between parties to interconnection agreements that could not have been submitted in prior arbitrations. Moreover, no carrier is necessarily bound by the terms of a prior arbitration in prospective negotiations for interconnection, and carriers remain free to argue in negotiations or a subsequent arbitration that their circumstances warrant a different outcome from what was adopted in a prior arbitration.

In view of the fact that the Commission has independently developed a record on this issue in previous arbitration proceedings, it would be duplicative to expend scarce resources continuing to litigate the issue in this rulemaking.

There are no additional matters that must be addressed in this proceeding, and accordingly the proceeding shall be closed.

Comments on the ALJ Draft Decision

The draft decision of the ALJ 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 August 20, 2003 and Reply Comments on August 25, 2003.

Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. This rulemaking was opened for the purposes of adopting rules concerning reciprocal compensation for ISP-bound traffic.
2. On April 27, 2001, the FCC issued its “Order on Remand and Report and Order” in the matter of reciprocal compensation for ISP-bound traffic (FCC Order).
3. Based on review of the FCC Order, the Commission issued D.01-11-067, concluding that the FCC Order eliminated the need for further proceedings on prospective policy for ISP reciprocal compensation at issue in this rulemaking, but deferred for further consideration a few items.
4. D.01-11-067 deferred for further study the issue of whether or how to devise an expedited process to resolve disputes over the 3:1 traffic imbalance presumption of under the FCC Order.
5. No party has provided any detailed proposal as to how a generic expedited dispute resolution process regarding the 3:1 ratio should be devised.

6. In view of the fact that the Commission has independently developed a record in previous arbitration proceedings on compensation between parties to interconnection agreements for calls using disparate rating and routing points (e.g., D.02-06-076 and D.03-05-031), there is no useful purpose in expending scarce resources continuing to litigate this issue in this rulemaking.

7. Because arbitrations involve interconnection agreements between specific carriers to which small LECs are not a party, disparately rated and routed calls are being completed by Small LECs at no charge to CLECs.

8. Arbitration proceedings do not provide a forum for small LECs interests to be addressed with respect to compensation for disparately rated and routed calls.

9. The Local Competition Proceeding provides a more suitable forum for resolving the small LECs' issues concerning compensation for disparately rated and routed calls since it is not limited issues concerning only ISP-related traffic.

Conclusions of Law

1. Through comments filed in response to the ALJ ruling dated May 29, 2001, parties have been provided an opportunity to be heard concerning the need to keep this proceeding open to resolve any remaining issues.

2. The remaining issues previously designated for consideration in this rulemaking that were not disposed of by D.01-11-067 do not require further review in this rulemaking, as they either have been or can be addressed in other procedural forums.

3. To the extent a party seeks to rebut the FCC's presumption regarding out-of-balance traffic, such process is best addressed on a case-by-case basis within individual arbitration proceedings.

4. Issues regarding small LECs' compensation for disparately rated and routed calls should be transferred to the Local Competition proceeding and resolved in there.

5. No additional issues require resolution in this rulemaking.

6. This proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. Issues regarding small Local Exchange Carriers' compensation for disparately rated and routed calls are hereby transferred to the Local Competition proceeding (Rulemaking 95-04-043/Investigation 95-04-044).
2. The assigned Administrative Law Judge in the Local Competition proceeding shall take appropriate steps to provide notice and opportunity for parties to comment on further action to resolve outstanding issues relating to small LECs' compensation for disparately rated and routed calls.
3. This proceeding is closed.

This order is effective today.

Dated September 4, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners