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WRITER'S DIRECT DIAL NO.

VIA HAND DELIVERY
Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W. -- TW-A325
Washington, D.C.

Attention: Sheryl Todd, Common Carrier Bureau

Re: **CC Docket No. 96-45 and File No. AAD 95-30; Comments of Waitsfield-Fayston Telephone Company, Inc. and Northland Telephone Company of Vermont**

Dear Ms. Salas:

Pursuant to the Commission's March 28, 1999 Public Notice in the above-referenced proceedings, DA 99-573, enclosed for filing herewith please find an original and seven copies of the Comments of Waitsfield-Fayston Telephone Company, Inc. and Northland Telephone Company of Vermont.

As required by the Public Notice, these comments have also been submitted on diskette to Sheryl Todd of the Commission's Common Carrier Bureau, as well as on diskette to the Commission's copy contractor, International Transcription Service, Inc.

Please acknowledge receipt of this response by file-stamping and returning the extra copy enclosed for this purpose.

Please call us if you have any questions regarding this matter.

Sincerely,

Gerard J. Duffy (MBA)

Benjamin H. Dickens, Jr.
Gerard J. Duffy

Enclosures

No. of Copies rec'd 0+6
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
VERMONT TELEPHONE COMPANY, INC.	) CC Docket No. 96-45
	)
Request for Modification of Conditions Adopted by the Common Carrier Bureau in Approval of Petition for Study Area Waiver	) File No. AAD 95-30

RECEIVED
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OFFICE OF THE SECRETARY

TO: Chief, Common Carrier Bureau

COMMENTS OF
WAITSFIELD-FAYSTON TELEPHONE COMPANY, INC.
AND NORTHLAND TELEPHONE COMPANY OF VERMONT

WAITSFIELD-FAYSTON TELEPHONE COMPANY, INC.
NORTHLAND TELEPHONE COMPANY OF VERMONT

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Dated: April 15, 1999

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<u>Summary</u>

Waitsfield-Fayston Telephone Company, Inc. ("Waitsfield") and Northland Telephone Company of Vermont ("Northland") oppose the March 12, 1999 "Expedited Request For Modification Of Waiver Conditions" of Vermont Telephone Company, Inc. ("VTel").

VTel's filing is an untimely request for reconsideration of the caps imposed on the Universal Service Fund ("USF") draws of Waitsfield, Northland and VTel in the <u>Memorandum Opinion and Order</u> entered in *Champlain Valley Telecom, Inc.*, 11 FCC Rcd 7111 (Acc. & Aud. Div. 1996) ("<u>Waiver Order</u>"). As such, VTel's request has been barred by the 30-day statutory deadline established in Section 405(a) of the Communications Act since July 15, 1996.

VTel has provided no evidence or justification for reduction or limitation of the Waitsfield and Northland USF caps, so that its USF cap can be increased by over $500,000. The switch, Internet, ISDN and ADSL upgrades that VTel claims to have undertaken **after** the <u>Waiver Order</u> have no relation to loop costs or USF support, much less to the USF caps or support of Waitsfield or Northland.

Finally, VTel's request is a transparent and inequitable attempt to increase its own USF cap at the direct expense of two unrelated carriers. Whereas Waitsfield and Northland generally oppose the imposition of USF caps upon individual carriers, they believe that such caps would lose any possible justification whatsoever if carriers exceeding their USF caps could expropriate for themselves the unused portions of the USF caps imposed upon other carriers.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
VERMONT TELEPHONE COMPANY, INC.	)	CC Docket No. 96-45
	)	
Request for Modification of Conditions Adopted by the Common Carrier Bureau in Approval of Petition for Study Area Waiver	))))	File No. AAD 95-30

TO: Chief, Common Carrier Bureau

COMMENTS OF
WAITSFIELD-FAYSTON TELEPHONE COMPANY, INC.
AND NORTHLAND TELEPHONE COMPANY OF VERMONT

Waitsfield-Fayston Telephone Company, Inc. ("Waitsfield") and Northland Telephone Company of Vermont ("Northland"), by their attorneys, hereby oppose the "Expedited Request For Modification Of Waiver Conditions" filed by Vermont Telephone Company, Inc. ("VTel") on March 12, 1999. These comments are filed pursuant to the schedule established in the Commission's Public Notice titled *Pleading Cycle Established for Vermont Telephone Company, Inc.'s Request for Modification of Conditions Adopted by the Common Carrier Bureau in Approval of Petition For Study Area Waiver*, DA 99-573 (March 26, 1999).

Waitsfield and Northland oppose VTel's request, which actually is an untimely request for reconsideration of the caps imposed upon the Universal Service Fund ("USF") draws of all three companies in the Accounting and Audits Division's ("Division's") June 14, 1996 Memorandum Opinion and Order in *Champlain Valley Telecom, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 7111 (1996) ("Waiver Order"). In particular, Waitsfield and Northland oppose VTel's requests for reduction of Waitsfield's aggregate USF cap, and for limitation of the modified USF cap that was proposed in Northland's timely July 15, 1996 reconsideration petition. There is absolutely no legal or equitable basis for VTel to single out for reduction the existing and future USF support of unrelated carriers -- such as Waitsfield and Northland -- in order to offset a substantial increase in VTel's own USF draw.

Background

Waitsfield, Northland and VTel are separately owned, managed and operated local exchange carriers that serve wholly separate and non-contiguous exchange areas within the State of Vermont.

The only "relationship" that ever has existed among Waitsfield, Northland and VTel was their participation in WFT Acquisition Company ("WFT"), a consortium-like entity formed in 1993 to facilitate the acquisition by the three companies of the Vermont exchanges of Contel of Vermont, Inc. ("Contel"). In 1994, WFT sought and obtained a waiver of the Section 6.41(c)(2) "all-or-nothing" rule so that Waitsfield, Northland and VTel could acquire the Contel exchanges without the companies or their affiliates becoming subject to price cap regulation. See *Maine Telecommunications Group, Inc.*, Order, 9 FCC Rcd 3082 (1994). The transaction was completed in July, 1994, and the acquired Contel exchanges were immediately formed into three separate, non-contiguous clusters and divided among Champlain Valley Telecom, Inc. ("CVT," an affiliate subsequently merged into Waitsfield), Northland and VTel.

From July, 1994 to June, 1996, CVT, Northland and VTel operated independently as wholly separate local exchange carriers within a single "WFT" Vermont study area (the boundaries of which were unchanged from those of Contel's former Vermont study area). Each company operated its own cluster of former Contel exchanges, had its own management and employees, maintained and upgraded its own facilities, served and billed its own customers, kept its own plant and accounting records, and prepared its own cost studies. The only continuing "relationship" among the three companies during this period was that they consolidated their separate annual cost studies for 1994, 1995, and the first half of 1996 into aggregate 1994, 1995 and half-year 1996 cost studies for the "WFT" study area before furnishing the data to the National Exchange Carrier Association ("NECA") for tariffing, pooling and USF purposes.

In February, 1995, CVT, Northland and VTel filed a "Joint Petition For Waiver" ("Joint Petition") of the Part 36 definition of "study area" in order to divide the WFT/Contel study area into separate CVT, North-land and VTel study areas. All three companies participated in the preparation of the Joint Petition, and all three approved it before it was filed. This participation and approval included calculation of the estimated USF impact of the study area change (as summarized in Exhibit 2 of the Joint Petition), as well as the estimated USF support to be received by each of the three separate companies. The loop costs underlying these per-company USF calculations were determined by directly assigning loop and associated plant investment to the specific

Contel exchanges acquired by CVT, Northland and VTel (which, at the time of the filing, had already been separately operated by each company for over six months) and by allocating non-exchange specific costs among the three companies on the basis of the relative access lines acquired by each from Contel. CVT, Northland and VTel estimated that their total USF draws would exceed Contel's 1994 USF draw by $19,631.74, but declared that they were willing to forego the increased amounts in order to expedite the study area waiver process. See Joint Petition at 12 and Exhibit 2.

The Commission's Waiver Order authorized the proposed disaggregation of the WFT/Contel study area subject to the conditions: 1) that the CVT exchanges be consolidated into the pre-existing Waitsfield study area; and 2) that annual USF draws be capped at $1,819,419 for the consolidated Waitsfield/CVT study area, at $547,800 for the Northland study area, and at $1,045,558 for the VTel study area. See Waiver Order, 11 FCC Rcd at 7119.

On July 15, 1996, CVT, Northland and VTel each filed a separate and timely petition for reconsideration of the Waiver Order.

CVT's reconsideration petition requested: a) that the study area changes be made effective as of January 1, 1996, rather than June 14, 1996; b) that CVT be granted a study area separate from that of Waitsfield; and c) that the cap on the aggregate USF draw of Waitsfield and CVT be rescinded. On January 14, 1999, Waitsfield withdrew the separate study area request because Waitsfield and CVT had merged on January 1, 1999. The other portions of the

Waitsfield/CVT petition remain pending.

Northland's July 15, 1996 reconsideration petition requested: a) that the cap on its USF draw be rescinded, or increased to $896,409 in order to support the costs of planned upgrades which had not been included in Northland's earlier USF estimates; and b) that the study area changes be made effective as of January 1, 1996. Northland's petition remains pending.

In turn, VTel's July 15, 1996 reconsideration petition requested only that the study area changes be made effective as of January 1, 1996. VTel's petition was granted by the Bureau in *Petition of Vermont Telephone Company, Inc.*, Order On Reconsideration, 1998 FCC LEXIS 6655 (December 28, 1998).

VTel filed the instant "Expedited Request" on March 12, 1999, almost two and a half years after the statutory reconsideration period for the Waiver Order expired. VTel now requests: a) increase of its own USF cap from $1,045,558 to $1,583,457; b) reduction of Waitsfield/CVT's aggregate USF cap from $1,819,419 to $1,176,704; and c) limitation of Northland's modified USF cap at $652,616 (rather than $896,409, as has been timely requested by Northland). VTel claims that its USF cap should be increased at the expense of Waitsfield and Northland because, subsequent to the Waiver Order, VTel upgraded all of its exchanges to DMS-100 switching technology, experienced an increase in the number of its working loops, was one of the first U.S. telephone companies to offer Internet service, and became the first Vermont telephone company to offer ADSL. See VTel Request at 2 and 6.

VTEL's Request Should Be Dismissed
As An Untimely Petition For Reconsideration

Section 405(a) of the Communications Act of 1934, as amended, requires an interested or aggrieved party to file a petition for reconsideration within thirty days from the date upon which public notice is given of the order, decision, report or action complained of. See 47 U.S.C. § 405(a). This statutory filing period may not be waived or extended by the Commission absent extraordinary circumstances. See Yes to Stop Callaway Committee against Television Station KTVI, St. Louis, Missouri, 98 FCC 2d 1317 (1984); The Ridgewood Group, 79 FCC 2d 588 (1980); Gardner v. FCC, 530 F. 2d 1086, 1091 (D.C. Cir. 1976).

The Waiver Order was released on June 14, 1996. Although VTel filed a timely petition for reconsideration on July 15, 1996, its petition did not request: a) any increase in the USF cap imposed upon VTel; b) any decrease in the USF cap imposed upon Waitsfield/CVT; c) any limitation or modification of the USF cap imposed upon Northland; or d) any revision of the loop cost allocations and separate USF support estimates proffered jointly by CVT, Northland and VTel, and adopted by the Division.

VTel has had no cognizable interest in the USF draws of Waitsfield/CVT or Northland since the release of the Waiver Order on June 14, 1996. If VTel believed that the joint allocations and calculations of loop costs among CVT, Northland and VTel were inaccurate, or that the relative amounts of the estimated USF draws or initially imposed USF caps for the three companies should have been modified, Section 405(a) of the Act required VTel to seek reconsideration of the Waiver Order on or before July 15, 1996. Since that date, VTel has been barred from challenging the Waiver Order's determinations concerning to Waitsfield/CVT and Northland, and may seek removal or modification **only** of its own USF cap if subsequent changed circumstances establish good cause for a waiver.

Put another way, VTel has advanced no significant reason (much less the requisite "extraordinary circumstances") why the Bureau should waive the statutory 30-day reconsideration period, and reduce or limit the Waitsfield/CVT and Northland USF caps because VTel has filed a request for it to do so almost two and a half years after release of the Waiver Order. For its untimeliness alone, VTel's misnamed "Expedited" Request should be dismissed or denied.

VTel Has Advanced No Relevant Basis
For Modifying The Division's Prior Order

VTel's proffered arguments for modification of the Waitsfield/CVT, Northland and VTel caps have no relationship whatsoever to the loop cost allocations and the estimated USF draws adopted in the Waiver Order. In fact, VTel's claims and assertions bear little or no relationship to the USF support system in general.

VTel requests "correction" of the capped amounts of USF funding authorized for CVT, Northland and VTel in the Waiver Order on the basis of "more accurate and updated financial and demand data than the 1992 data available at the time the cap was established." See VTel Request at 1. In doing so, VTel disregards the fact that it had operated the exchanges that it acquired from

Contel for over seven months at the time that the Joint Petition was filed, as well as the fact that it had fully participated in the preparation of the loop cost and USF calculations presented therein. VTel offers no evidence at all that the loop cost allocations and USF estimates in the Joint Petition were inaccurate. Rather, the sole reason that VTel advances for reducing or limiting the Waitsfield/CVT and Northland USF caps is that VTel now believes that it needs an additional $537,889 in annual USF support for itself.

VTel asserts that **subsequent** to adoption of the Waiver Order, its own cost per loop "has increased due to upgrades made in its telecommunications infrastructure and an increase in the number of VTel's working loops." See VTel Request at 2. VTel describes these upgrades as follows:

> . . . VTel has upgraded all of its exchanges to DMS-100 technology, enabling CLASS services and ISDN to be available to some 20,000 access lines. VTel was one of the first telephone companies in the United States to offer Internet service, and today is the first telephone company in Vermont to offer ADSL. All of the upgrades made by VTel have come without any increase in basic local exchange service rates.

Id. at 6.

The striking feature of VTel's asserted upgrades is that they bear no significant relationship to its loop costs or to the traditional, loop-related USF support mechanisms.

VTel's post-Waiver Order installation of DMS-100 switches in its exchanges should have had little or no impact upon its loop costs or loop-related USF support. In many instances, additional switching investment and loops actually *reduce* a carrier's cost per loop, and thereby reduce its related draw of USF support under the current algorithm. Rather, any increased VTel switching investment should be recovered through mechanisms like weighted Dial Equipment Minutes ("DEM"). Although weighted DEM support has been included in the modified USF program since January 1, 1998, it has not been subject to the caps imposed by the Commission on USF support for loop-related costs. See *Federal-State Joint Board on Universal Service*, Fourth Order On Reconsideration In CC Docket No. 96-45, Report And Order In CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5340-41 (1997).

Likewise, the investments and expenses attributable to VTel's provision of ISDN, Internet and ADSL services should have no impact on any loop costs subject to USF support. The Commission has not included any of these advanced services within its current list of the core services designated for USF support in high cost areas. See 47 C.F.R. § 54.101(a); see also *Federal-State Joint Board on Universal Service*, Report And Order, 12 FCC Rcd 8776, 8809-8825 (1997)("First Universal Service Order"). In fact, the Commission expressly has excluded Internet access, as well as higher (than voice grade) quality access links (such as ISDN and ADSL) from the services presently designated for USF support. See First Universal Service Order at 8822-23.

Put simply, the switching and advanced service upgrades listed and relied upon in VTel's Expedited Request have no relevance to, nor any significant impact upon, the size or accuracy of the loop costs or USF estimates relied upon and accepted by the Division in the Waiver Order. This was true at the time of the filing and prosecution of the Joint Petition, as well as at all times thereafter. Hence, VTel's post-Waiver Order switching and advanced service upgrades do not offer any basis or justification for VTel's proposed reduction or limitation of the Waitsfield/CVT and Northland USF caps.

Reduction or Modification of the Waitsfield and Northland USF Caps Would Be Inequitable

The Commission has never required any individual carrier's USF support to be reduced, on a dollar-for-dollar basis, to offset or pay for an increase in the USF support for an unrelated carrier. Rather, the Commission has employed industry-wide, indexed caps on the size of the entire USF program for high cost areas as its primary means for regulating overall increases in USF support. See First Universal Service Order, 12 FCC Rcd at 8940; see also *Amendment of Part 36 of The Commission's Rules and Establishment of a Joint Board*, Report And Order, 9 FCC Rcd 303 (1993).

Waitsfield and Northland believe that the USF caps imposed by the Division on individual carriers in connection with pre-May 7, 1997 study area waivers were superseded by the Commission's First Universal Service Order, supra, and that retention of such individual carrier caps will impair needed infrastructure upgrades and service offerings in Rural America. Rural telephone companies in Vermont and elsewhere should be encouraged by the Commission to acquire and upgrade high-cost exchanges long neglected by larger carriers. Carriers willing to make the investments and sacrifices necessary to improve service in rural areas should not be penalized by reduction or limitation of the USF support which they would otherwise receive for their acquired or pre-existing exchanges.

However, assuming arguendo that the Commission, for any reason, determines to continue imposing and enforcing caps upon the USF support of certain individual carriers receiving study area waivers, such caps do not "earmark" USF support for any of these carriers or groups of carriers. VTel's assertion that the Waiver Order "earmarked" $3,412,777 in aggregate USF support for Waitsfield/CVT, Northland and VTel (VTel Request at 7) has no basis in the order or any other Commission ruling. The Commission's Waiver Order simply placed separate and independent caps on the USF draws of the three unrelated companies, and gave no indication that a specified amount of USF dollars was being set aside for any "group" of carriers.

As designed by the Commission, USF caps serve to limit the maximum USF support received by an affected carrier during a specified period. This limit is generally set at the future USF support estimated by the carrier in its study area waiver petition or related filing. A cap does not entitle the carrier to the capped amount of USF support if its actual loop costs during a particular year warrant a lesser amount. Likewise, caps have never been subjected by the Commission to a "use it or lose it" policy, and are not reduced for future years if actual costs result in USF support which falls below the capped amount during a particular year. Finally, individual carrier caps have been applied exclusively to the named carriers, and have not been subjected to upward or downward revisions due to decreases or increases in the USF support requested by unrelated carriers.

The only possible justification for the Commission to impose a USF cap upon a particular carrier is to limit that carrier's future USF draw, and perhaps to encourage or force that carrier to limit its future loop plant investments and related expenses. That purpose would be eviscerated if the carrier's USF cap were subject to unpredictable and uncontrollable fluctuations whenever some other carrier or carriers requested substantial changes in their USF draws or USF caps, or experienced substantial changes in their relevant loop-related costs.

In the present instance, almost $650,000 of Waitsfield/CVT's $1,819,419 USF cap is attributable to pre-existing Waitsfield exchanges that were not part of the Contel transaction. Notwithstanding the fact that Waitsfield was penalized additionally for acquiring the CVT exchanges by having the USF support of its pre-existing exchanges (as well as the acquired exchanges) limited, the Waitsfield/CVT organization has kept its USF draws below its cap. Waitsfield/CVT should not be penalized further by being forced to cede $642,715 of its potential future $1,819,419 USF support to VTel. This is true whether VTel's alleged upgrades and loop cost increases, if any, were justified or unjustified.

In particular, if VTel has taken actions which have resulted in loop costs greater than those supported by the cap on its USF draw, it should not be able to evade the consequences of its decisions by appropriating for itself a substantial portion of Waitsfield/CVT's cap. The message of such cap modifications would be that aggressive or imprudent spenders will be rewarded, while carriers attempting to comply with Commission caps will be penalized by having their caps reduced or limited.

Conclusion

VTel should not be allowed to seek or obtain modification of the USF caps imposed by the <u>Waiver Order</u> upon Waitsfield/CVT and Northland almost two and a half years after expiration of the statutory reconsideration deadline. VTel has presented no relevant or material evidence indicating why Waitsfield/CVT's or Northland's USF caps should be reduced or limited, or why its own USF cap should be increased at their expense. Rather, VTel's alleged switching, Internet, ISDN and ADSL upgrades have no apparent relation to USF support, while its self-serving "earmarking" theory would nullify any possible rationale for individual carrier USF caps by allowing carriers exceeding their USF caps to expropriate for themselves the unused portions of the USF caps imposed upon other carriers. The VTel request should, therefore, be dismissed or denied.

Respectfully submitted,
WAITSFIELD-FAYSTON TELEPHONE COMPANY, INC.
NORTHLAND TELEPHONE COMPANY OF VERMONT

By Gerard J. Duffy (MBA)
Benjamin H. Dickens, Jr.
Gerard J. Duffy

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Dated: April 15, 1999

Certificate of Service

I, Michael B. Adams, Jr., an attorney with the law firm of Blooston, Mordkofsky, Jackson & Dickens, hereby certify that I caused a copy of the foregoing Comments of Waitsfield-Fayston Telecom, Inc. and Northland Telephone Company of Vermont to be served to the following persons, via first class U.S. mail or hand delivery as indicated, this 15th day of April, 1999:

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