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BY HAND DELIVERY

Dorothy Attwood, Esq.
Chief, Common Carrier Bureau
Federal Communications Commission
Room 5-C450
445 12th St., SW
Washington, DC 20554

Re: Inter-Carrier Compensation for Internet Service Provider Traffic; CC Docket No. 99-68

Dear Ms. Attwood:

As indicated on numerous occasions throughout this proceeding, the competitive telecommunications industry does not believe the Commission should disrupt the current state-administered system of inter-carrier compensation for local (including ISP-bound) traffic.[1] However, we understand that plans are under consideration by the Commission to intervene in some portion of the current compensation mechanism. Given this situation, we do appreciate the widespread recognition that a transition plan would have to accompany any such Federal intervention, and we would like to address here one technical aspect of such a plan, the so-called "growth ceiling."

Our observations regarding the growth ceiling are based on the overall plan under consideration. We understand that a transition plan would cover a three year period, and rely upon the ratios of inbound to outbound traffic exchanged statewide between each CLEC and ILEC to distinguish two kinds of traffic. Traffic received by a CLEC at or below the ratio would be deemed intrastate traffic subject to section 251(b)(5). Traffic above the ratio would be presumed to be interstate traffic not subject to section 251(b)(5), and limited by a Federal "cap"

[1] See, e.g., ex partes filed January 10, 2001, February 16, 2001, and March 16, 2001, by ALTS and CompTel.

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on the level of state-approved rates applied to these above-ratio minutes.[2] We anticipate such a plan would expressly state that no alternative compensation mechanism, such as bill-and-keep, would be applied to the above-ratio minutes during the transition period, although alternative plans may well be considered in other proceedings for ultimate implementation upon expiration of the transition period.

We also understand this transition plan might contain an annual limit of 10% on the growth of above-ratio minutes that CLECs could bill during the transition period.[3] Obviously, any decision by the Commission that it is necessary to cap above-ratio rates implies that the Commission understands the costs of this traffic. Consequently, the Commission's determination of and imposition of a rate cap would by itself assure that no above-ratio minutes would ever recover more than their costs.

Indeed, if the Commission ultimately does not require those states that have implemented bill-and-keep regimes to increase their rates to at least the level of the Federal rate cap, CLECs will collect no revenues for an appreciable portion of the overall above-ratio minutes. This means the rate cap alone will keep total above-ratio revenues below costs, and the imposition of any additional limitations, such as a growth ceiling, would be entirely unnecessary.

Beyond the fact it is unnecessary, a growth ceiling would also effectively impose a bill-and-keep system on certain incremental traffic, even though the Commission has not yet commenced its inquiry concerning such an approach to inter-carrier compensation.[4] Stated differently, refusing to allow CLECs to

[2] We continue to believe that section 251(b)(5) fully applies to above-ratio traffic, but we will not repeat the basis for our position here.

[3] To avoid confusion, we will refer to the 10% limit as the "growth ceiling," and to the Federal limit on the level of state rates applied to above-ratio minutes as the "rate cap."

[4] This is how we understand the mechanics of a growth ceiling would work. Assume the transition period starts on July 1, 2001 (the mechanics of billing requires that changes be implemented on the first day of a month). Each CLEC would calculate its total inbound and outbound minutes exchanged with each ILEC in every state for the 12 months prior to July 1, 2001, and then use the ratio adopted by the transition plan to calculate the amount of above-ratio minutes exchanged with each ILEC in each state during these prior 12 months. The CLEC would then multiply this amount by 110%, 121% (110% x 1.1) and 133% (121% x 1.1) to obtain the maximum number of above-ratio minutes that could be billed to each ILEC in each state during the first, second, and third years of the transition plan.

recover a portion of their terminating variable costs from originating carriers (and we repeat that the creation of a Federal rate cap necessarily assumes the Commission understands those costs) would amount to a de facto implementation of bill-and-keep prior to any Commission determination concerning the merits of that system for this traffic, or any traffic.

It is also apparent that possible implementations of a growth ceiling would be discriminatory. For example, compare the treatment of a CLEC which has at least one year's experience in a state with a CLEC that just completed installation of identical equipment in the same markets in that state. If a growth ceiling were interpreted to prevent the new CLEC from billing any above-ratio minutes (i.e., 110% of zero is zero), the new CLEC and its customers would receive blatantly discriminatory treatment in violation of section 202.[5] Furthermore, no economically-rational ISP end user would take service from a new CLEC that is forced to require its ISP customers to pay all or a portion of the costs of terminating traffic if existing CLECs in the same market do not require such a payment. Such an implementation might well be viewed as an allocation of the ISP markets to existing local exchange carriers, and the effective exclusion of any new entrants. If a growth ceiling were adopted, it clearly should not be applied during the first year to any new switches which lack a full twelve month history.

Such a growth ceiling could also penalize a CLEC that chooses to enter or expand in a state by acquiring the equipment of other carriers that are downsizing or exiting the state. If the growth ceiling were interpreted to apply to minutes generated by a switch acquired in this manner, no compensation would be paid. Both the CLEC attempting to dispose of the facilities and the CLEC interested in expanding the market would be adversely affected. Substantial idle facilities and stranded investment and, more importantly, a decrease in customers' choice of carriers in those markets could result.

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[5] While it might be argued this implementation would be non-discriminatory for those potential entrants that have not yet made economic commitments to new markets, such a defense would not apply to those CLECs that have already made irreversible economic investments. This would almost always include switches that are to be installed in the near future, since even if newly ordered switches could be cancelled or returned to their manufacturer (highly unlikely, particularly under current market conditions), the immense investment involved in the preparation of central office space could never be recovered.

The competitive industry believes the defects of a growth ceiling are so fundamental that it should not be a part of any transition plan. However, if the Commission does decide to use a growth ceiling in addition to a rate cap, and that growth ceiling fails to exempt new switches during their first year as described above, we urge that it incorporate the following provisions at a minimum:

- For any CLEC switch that is planned for a new state and which was publicly announced prior to the effective date of the Commission's order (or which is already installed but which lacks a full twelve month history upon the effective date of the Commission's order), the average twelve month history of all the CLEC's existing switches nationwide will be attributed to the new switch in calculating the effect of the growth ceiling in that state.[6]
- In states where a CLEC already operates switches and where plans for a new switch were publicly announced prior to the effective date of the Commission's order (or which is already installed but which lacks a full twelve month history upon the effective date of the Commission's order), the average 12 month history of the CLEC's existing switches in that state will be attributed to the new switch in calculating the effect of the growth ceiling in that state.
- Adoption of a growth ceiling must not permit any ILEC to refuse to pay bills for above-ratio minutes prior to some "true up" date. As we noted above,[7] the growth ceiling would impose a predetermined limit on the annual amount of above-ratio minutes that could be billed by a CLEC to an ILEC in a single state. Since that ceiling on above-ratio minutes could not change based on any subsequent events, no ILEC is entitled to point to the existence of the ceiling to justify delayed payment of an otherwise correctly calculated bill for above-ratio minutes that, when added to the year-to-date total, do not exceed the applicable growth ceiling.
- Similarly, the mere existence of a ratio calculation cannot be used by ILECs to evade timely payment of proper monthly bills. The ratio methodology has been used in New York for well over a year, and CLECs and ILECs there have successfully used various approaches, such as using the results for the most recent available month, to calculate the applicable ratio. Because the ratio calculation has not required deferred payments or "true-ups" in New York, this

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6 Switches acquired by a CLEC in a merger, purchase, or any other fashion would be treated as new for the purpose of the transition plan.

7 Supra n. 4.

Commission should make it clear these will not be required – or permitted – in a Federal plan making use of ratios.

- The transition plan should expressly include a waiver process to accommodate special circumstances.

The competitive telecommunications industry supports the Commission's efforts to complete its examination of inter-carrier compensation for ISP-bound traffic as promptly as possible. Please let us know if we can assist you with this inquiry in any way.

Sincerely,

John D. Windhausen /muf

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