Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

To: The Commission

PETITON OF CORE COMMUNICATIONS, INC.
FOR STAY PENDING JUDICIAL REVIEW

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SUMMARY

Core Communications ("CoreTel") is an 11-employee competitive local exchange carrier that serves approximately 50 Internet service providers from four data centers in Maryland. CoreTel requested interconnection with Verizon in Philadelphia, Pittsburgh, and New York City during the first half of 2000 and made investments of over half a million dollars to extend its service to these areas. However, due to Verizon's recalcitrance, CoreTel did not launch in Philadelphia until April of this year and has not yet been able to launch in Pittsburgh and New York. If it they take effect, the "new market" provisions of the Commission's recent *Order on Remand* concerning reciprocal compensation will prevent CoreTel from competing in those three markets, as explained in the attached affidavit of CoreTel President Bret Mingo. In addition, CoreTel will have to abandon at least one of its newly opened Maryland data centers unless the Commission stays the "growth cap" provision of the *Order on Remand* pending judicial review.

Serious legal issues will be raised in the court of appeals concerning both the procedure by which the new market and growth cap rules were issued and the merits of those rules. Procedurally, it appears that the Commission is playing an administrative law shell game. The new market and growth cap rules were not proposed in any Notice of Proposed Rule Making, but are first mentioned in the record in an *ex parte* letter filed on March 26, 2001, less than a month before the *Order on Remand* was issued. Although two trade associations and a number of companies promptly filed comments in opposition to the last-minute proposals, the Commission did not even acknowledge those arguments in the *Order on Remand*, and responded only with generalities that are not supported by the record.

On the merits, the rules violate the most fundamental principle of administrative law: similarly situated parties must be treated similarly. A CLEC that was in operation in

Philadelphia, Pittsburgh, or New York as of the first quarter of 2001 will be able to continue to collect reciprocal compensation, but CoreTel will not be able to do so in those markets on account of the new markets rule. As the attached affidavit states, CoreTel will not be able to compete in these markets where other CLECs may collect reciprocal compensation but it cannot. In Maryland, the growth cap rule discriminates against CoreTel as a result of its recent entry into the market. Absent a stay, CoreTel will almost certainly close one of its Maryland data centers, and may close another.

In treating CLECs in this discriminatory fashion, the Commission appeared to assume that substantial investments had not been made in markets where a CLEC had few or no minutes. But as CoreTel's experience shows, that is not so. In addition, the Commission erroneously relied on nationwide averaged data in selecting the 10% growth cap. Adopting that one-size-fits-all rule was arbitrary and capricious.

CoreTel will be irreparably harmed if the rules take effect. Before judicial review -- even expedited review -- could be completed, CoreTel will have to go out of business in three of the seven markets where it owns equipment, and it may have to go out of business in two other markets as well. Even if it ultimately prevails in court, CoreTel will never be able be able to re-enter those markets competitively. The other equitable factors also support the issuance of a stay. CoreTel and other CLECs will provide additional competition in various markets if the rules are stayed. Verizon and the other incumbent LECs, in contrast, will not be seriously harmed by a stay.

Accordingly, the Commission should stay the new market and growth cap rules pending judicial review.

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Implementation of the Local Competition	)	
Provisions in the Telecommunications	)	CC Docket No. 96-98
Act of 1996	)	
	)	
Intercarrier Compensation	)	CC Docket No. 99-68
for ISP-Bound Traffic	)	

REQUEST OF CORE COMMUNICATIONS, INC.
FOR STAY PENDING JUDICIAL REVIEW

Pursuant to Sections 1.41, 1.43, and 1.44(e) of the Commission's Rules, Core Communications, Inc. ("CoreTel") hereby requests that the Commission stay pending judicial review the implementation of the "growth cap" and "new market bar" on reciprocal compensation for ISP-bound minutes adopted in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131, CC Docket Nos. 99-98 and 99-68 (rel. April 27, 2001). The *Order on Remand* is published at 66 Fed. Reg. 26,800 (2001), and will become effective June 14, 2001. CoreTel will imminently file a petition for appellate review of the *Order,* and several other petitions for review have already been filed. In order that the Court may have sufficient time to receive and act on such a petition before CoreTel begins to suffer irreparable harm, CoreTel respectfully requests that the Commission expedite consideration of this petition and rule no later than June 7, 2001.

CoreTel seeks this emergency relief because the growth cap/new market bar will – before judicial review can be completed – likely force CoreTel out of business in at least in three of the seven markets in which it currently provides (or plans imminently to provide) service, and it may have to go out of business in at least one other, more established market as well. These market exits will be extremely difficult if not impossible to reverse in the event CoreTel or other petitioners prevail on judicial review. As set forth in detail below, CoreTel plainly satisfies all of the relevant criteria for a stay pending judicial review.

BACKGROUND

A. CoreTel's Current and Planned Service Offerings

CoreTel is a privately held competitive local exchange carrier based in Annapolis, Maryland. CoreTel was founded in August 1997, eighteen months after the passage of the Telecommunications Act of 1996, because CoreTel's founders believed that the incumbent local telephone companies were not adequately meeting the service needs of Internet service providers. Through its managed modem and digital subscriber line services, CoreTel helps small to medium-sized ISPs provide Internet connectivity without investing in expensive data and telecommunications network equipment.

CoreTel is a very small company. It has 11 employees, and in 2000 had only $2.82 million in gross revenues, with after-tax earnings of $199,430.[1] CoreTel provides services to over 50 Internet service providers, managing about 2,800 modems and 2000 DSL circuits from four data centers located in Easton, Damascus, Baltimore, and Mount Airy, Maryland, and another in Philadelphia, Pennsylvania.[2] CoreTel initially concentrated its service offerings in Maryland, but began offering service in Philadelphia in April 2001. CoreTel is scheduled to

[1] Declaration of Bret L. Mingo ("Decl.") ¶ 5. (Attachment 1)

begin serving customers in Pittsburgh, Pennsylvania and New York City in June 2001, although a precise date for these launches is unavailable because of uncertainty as to when Verizon will finish provisioning necessary services.

It has take a substantial investment of both time and financial resources to build CoreTel to the point where it can provide service for LATAs in Maryland, and expand into Philadelphia, Pittsburgh, and New York City. In July 1999, CoreTel obtained a license to operate as a CLEC in Maryland. CoreTel had to make investments totaling well over $1 million in three LATAs in Maryland (Baltimore, Easton and Mount Airy) to locate switches, obtain interconnection facilities, and begin to market to prospective customers.[3] CoreTel's launch in these markets was substantially slowed by Verizon's delays in supplying necessary interconnection facilities. Although CoreTel requested these facilities from Verizon in July 1999, Verizon did not make interconnection in Baltimore until January 2000, or until February 2000 in the case of Easton and Mount Airy. Verizon's delays in these markets are currently the subject of a complaint before the Maryland PSC.[4]

In December 2000, after hundreds of thousands of dollars in additional investment, CoreTel opened a fourth data center in Damascus, Maryland, which serves the Washington DC LATA. CoreTel also suffered delays from Verizon in providing the necessary interconnection facilities for this market. Those delays are the subject of a complaint against Verizon filed by CoreTel before the FCC.

During this period, CoreTel also made investments in order to expand its business by rolling out managed modem services in new (and larger) markets, including Philadelphia and

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[2] Decl. ¶ 5.

[3] Decl. ¶ 6.

[4] Decl. ¶ 6.

Pittsburgh, Pennsylvania, and New York City. In order to be in a position to launch service in these markets CoreTel invested over $500,000 to obtain switch locations and interconnection facilities and to begin to market to prospective customers.[5]

In these markets too, however, CoreTel encountered recalcitrance and delay on the part of Verizon in furnishing interconnection facilities. Although CoreTel had requested interconnection in the Philadelphia market by February 2000, delays related to obtaining interconnection prevented the service from launching until April of this year.[6] Similarly, although CoreTel requested interconnection in Pittsburgh and New York in June of 2000, CoreTel will not be able to launch services there until June 2001.[7]

CoreTel's decision to invest in these new markets were made in reliance on the FCC's rules, but also cognizant of the fact that the FCC was considering changes to reciprocal compensation for traffic delivered to ISPs. What CoreTel did not and could not have foreseen, however, was that Commission would adopt an order dramatically discriminated between CLECs already in a market serving a large, established base of ISPs, and CLECs that were just entering markets or had only a small share of the ISP market.[8] The idea of a growth cap or a new market bar did not surface at the FCC until March 2001 – less than a month before the FCC's adoption of the *Order on Remand* and far too late for CoreTel to adjust its already sunk investments. Implementation of the new rules adopted by the Commission in its *Order on Remand* will prevent CoreTel from competing effectively in these new markets, and thus from recovering those investments. Indeed, CoreTel anticipates that if the growth cap/new market bar

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[5] Decl. ¶ 7.

[6] Decl. ¶ 8.

[7] Decl. ¶ 8.

[8] Decl. ¶ 9

portions of the *Order on Remand* are not stayed, the company will go out of business in Philadelphia, Pittsburgh, and New York City, and will also have to go out of business in at least one of its established Maryland markets as well.[9]

B. Proceedings Before the Commission

In its *Declaratory Ruling*,[10] released on February 26, 1999, the Commission addressed the regulatory treatment of ISP-bound traffic. Applying an "end-to-end" analysis of such traffic, the Commission found that it is not local because it does not "originate[] and terminate[] within a local area."[11] Accordingly, the Commission ruled that the reciprocal compensation obligations of section 251(b)(5) do not apply to this traffic, but that – pending adoption of a federal rule – parties could voluntarily include ISP-bound traffic in their interconnection agreements under sections 251 and 252 of the Act.[12] At the same time, in the *Intercarrier Compensation NPRM* accompanying the *Declaratory Ruling*, the Commission requested comment on the most appropriate intercarrier compensation mechanism for ISP-bound traffic.

In March 2000, before the Commission could issue a decision on intercarrier compensation, the Court of Appeals vacated the *Declaratory Ruling*'s jurisdictional analysis and remanded the issue to the Commission.[13] In a public notice released June 23, 2000, the Commission sought comment on the issues raised by the court's remand, with initial comments

[9] Decl. ¶ 14.

[10] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999).

[11] *Id.* at 3697.

[12] *Id.* at 3703.

[13] *See Bell Atl. Tel Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

due by July 21, 2000 and reply comments by August 4, 2000.[14] Specifically, the *Public Notice* requested that parties address the jurisdictional nature of ISP-bound traffic, the scope of the reciprocal compensation requirement of section 251(b)(5), and the relevance of the concepts of “termination,” “telephone exchange service,” “exchange access service,” and “information access.”[15] The Commission also invited parties to update the record by responding to any *ex parte* presentations filed after the close of the reply period on April 27, 1999. The *Public Notice* did not, however, raise the possibility of a growth cap or new market bar on reciprocal compensation for ISP-bound traffic, or, indeed, of any sort of reciprocal compensation scheme that would result in differential compensation for CLECs.

Although the *Public Notice* elicited voluminous comments (and replies) from interested parties, none addressed the possibility of a growth cap on reciprocal compensation. In fact, the issue does not even appear on the public record of this proceeding until almost a year after the Commission’s *Public Notice*. At that time, an *ex parte* letter filed on behalf of ALTS and CompTel indicated that the organizations had come to “understand that plans [were] under consideration by the Commission” to adopt a “transition plan,” including a “so-called ‘growth ceiling,’” to “address inter-carrier compensation for local (including ISP-bound) traffic.”[16] In that letter, ALTS and CompTel presented detailed arguments explaining why “the defects of a growth ceiling are so fundamental that it should not be part of any transition plan.”[17]

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[14] *See* Comment Sought on Remand of the Commission’s Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit, CC Docket Nos. 96-98, 99-68, Public Notice, 15 FCC Rcd 11311 (2000) (“*Public Notice*”).

[15] *Id.* at 11311.

[16] *See* Letter from John D. Windhausen, Jr., ALTS, and H. Russel Frisby, Jr., CompTel, to Dorothy Attwood, Chief, Common Carrier Bureau, at 1 (March 26, 2001) (“3/26/01 ALTS/CompTel Letter”).

[17] *Id.* at 4.

ALTS and CompTel first set forth their understanding of the "growth ceiling" under the plan being considered by the Commission.[18] The transition plan would rely on ratios of inbound to outbound traffic exchanged statewide between each CLEC and ILEC; traffic received by a CLEC above the ratio would be presumed to be interstate traffic not subject to section 251(b)(5), and limited by a Federal "cap" on the level of state-approved rates to be applied to these 1above-ratio minutes. The growth ceiling would then impose an annual limit of 10% on the growth of above-ratio minutes that CLECs could bill during the transition period.

ALTS and CompTel presented two primary critiques of this sort of growth ceiling. First, the organizations argued that a growth cap would amount to a premature and improper imposition of a bill-and-keep system on certain incremental traffic. Specifically, by "refusing to allow CLECs to recover a portion of their terminating variable costs from originating carriers [for above-cap minutes, the growth cap] . . . would amount to a *de facto* implementation of bill-and-keep prior to any Commission determination concerning the merits of that system for this [ISP-bound] traffic, or any traffic."[19] Second, and still more importantly, ALTS and CompTel pointed out that implementation of "a growth ceiling would [likely] be discriminatory," particularly as between a "CLEC which has at least one year's experience in a state [and] a CLEC that just completed installation of identical equipment in the same markets in that state":[20]

> 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. 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

[18] As further set forth below, the growth cap ultimately adopted by the Commission was similar to that criticized by ALTS and CompTel. *See infra* at 12.

[19] *Id.* at 3.

[20] *Id.*

> costs of terminating traffic if existing CLECs in the same market do not require such a payment.[21]

Finally, the organizations urged that if the Commission were to adopt a growth ceiling, it should incorporate certain specific provisions to limit the cap's harmful effects on CLECs.[22]

Shortly after this ALTS/CompTel *ex parte* was filed, several individual companies made similar *ex parte* filings to oppose adoption of a growth ceiling.[23] Level 3 Communications argued in no uncertain terms that a growth cap "calculated based upon the historic number of minutes terminated by the CLEC to its ISP customers during the previous 12-month period . . . . [would be] patently arbitrary, capricious and discriminatory."[24] Level 3 explained that such a "cap would discourage growth by new entrants," and would "ignore[] long-standing economic principles by punishing those carriers who succeed in the marketplace by attracting new customers."[25] Level 3 included examples illustrating specifically how a growth cap would yield arbitrary and capricious results in a variety of circumstances.[26]

Ex partes filed by Sprint and Pac-West made similar points. Sprint explained that it "share[d] Level 3's view that a growth cap, because of its discriminatory effects as between particular CLECs, cannot be justified as a means of reducing the ILECs' total reciprocal

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[21] *Id.*

[22] *Id.* at 4-5.

[23] *See* Letter from John T. Nakahata, Harris, Wiltshire, & Grannis, to Magalie Roman Salas, Secretary, FCC (April 6, 2001) ("4/6/01 Level 3 Letter"); *See* Letter from John T. Nakahata, Harris, Wiltshire, & Grannis, to Magalie Roman Salas, Secretary, FCC (April 10, 2001); Letter from Richard Juhnke, Sprint, to Magalie Roman Salas, Secretary, FCC (April 16, 2001) ("4/16/01 Sprint Letter"); Letter from Richard Juhnke, Sprint, to Magalie Roman Salas, Secretary, FCC (April 17, 2001); Letter from Wally Griffin, Pac-West, to Michael Powell, Chairman, FCC (April 18, 2001) ("4/18/01 Pac-West Letter").

[24] 4/6/01 Level 3 Letter, attachment at 1.

[25] *Id.*

[26] *Id.* at 1,2.

obligations on ISP-bound traffic."[27] Sprint also argued that if rate reductions alone were deemed by the Commission to result in insufficient reductions in ILECs' total payments, then "some sort of pooling mechanism should be adopted to ensure that every CLEC is paid the same rate on every minute of use."[28] Pac-West, for its part, urged the Commission to avoid the "perverse economic impacts of the growth cap" by "adopting the modifications proposed in the CompTel/ALTS *ex parte* of March 30, 2001."[29]

The Commission's *Order on Remand*, issued shortly after the filing of these *ex partes*, simply glossed over these substantive objections and adopted a growth cap even more stringent than the potential cap addressed in the *ex parte* filings. The *Order* provided:

> For the year 2001, a LEC may receive compensation, pursuant to a particular compensation agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation under that agreement in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the 2002 ceiling applicable to that agreement.[30]

In addition, the Commission added a flat bar on a carrier receiving any intercarrier compensation when it enters a new market – *i.e.*, one in which it had not exchanged traffic prior to April, 2001, the date on which the *Order on Remand* was adopted.[31] In such circumstances, the Commission

[27] 4/16/01 Sprint Letter at 1.

[28] *Id.*

[29] 4/18/01 Pac-West Letter at 1.

[30] *Order on Remand* ¶ 78.

[31] *Id.* at ¶ 81.

wrote, a carrier may not collect any reciprocal compensation, but must "exchange ISP-bound traffic on a bill-and-keep basis."[32]

Apparently in response to *ex partes* such as those discussed above, the Commission made a limited effort to justify imposing this growth cap/new markets regime. As to the growth cap, the Commission first opined that a "ten percent growth cap . . . [is] reasonable in light of CLEC projections that the growth of dial-up Internet minutes will fall in the range of seven to ten percent per year."[33] Second, the Commission stated that "this mechanism is fully consistent with the manner in which the Commission has directed ILECs to recover the costs of serving ISPs." Third, the Commission claimed that "next-generation switching an other technological developments appear to be contributing to a decline in the costs of serving ISPs."[34] Fourth, the Commission suggested that "there may be a considerable margin between current reciprocal compensation rates and the actual costs of transport and termination."[35] Finally, in connection with new markets, the Commission argued that eliminating reciprocal compensation altogether makes sense because "carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues and thus have no need of a transition during which to make adjustments to their prior business plans."[36]

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[32] *Id.* Notably, however, the Commission's "new markets" rule is not conceptually distinct from its "growth cap" rule. It also limits carriers to collecting reciprocal compensation for the previous years billed minutes plus 10% -- zero plus 10% of zero is still zero, or a bill-and-keep regime. In seeking a stay of the Commission's "growth cap rule," CoreTel thus also seeks a stay of the correlative "new market" rule.

[33] *Id.* at ¶ 86.

[34] *Id.*

[35] *Id.*

[36] *Id.* at ¶ 81.

The Commission's efforts to justify the growth cap/new market bar thus consisted only of a number of bald assertions, utterly devoid of analysis. Still more important, however, the Commission essayed no response whatsoever to the central argument repeatedly set forth in the *ex partes* discussed above: that the growth cap/new market bar will confer an arbitrary and discriminatory competitive advantage on CLECS with large amounts of existing ISP traffic over CLECs with no or limited current market share.

C. Devastating Effect of the Growth Cap/New Markets Rules on CoreTel

The Commission's growth cap/new market bar will likely prevent CoreTel from completing its drive to expand into the Philadelphia, Pittsburgh, and New York City markets, and will force the company to forfeit the substantial capital investments that it has already made in those markets. In addition, the rules may oblige CoreTel to abandon a significant portion of its established service territory. Verizon has already indicated its intent to avail itself of the FCC's *Order on Remand*.[37]

As set forth above, the *Order on Remand* imposes a maximum cap, or growth cap, on ISP-bound minutes of use for which carriers like CoreTel may obtain reciprocal compensation.[38] For 2001, the cap is calculated according to a formula based on the CLEC's usage in each state for the first quarter of 2001, with an additional ten percent provided to permit growth in use and subscribership. In any market in which CoreTel was not exchanging traffic prior to April 18, 2001, both the growth cap formula and the new market ban require CoreTel to offer service solely on a "bill-and-keep" basis, without any intercarrier compensation.[39] In contrast, CLECs

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[37] *See* Attachment 2

[38] *Order on Remand* ¶ 78.

[39] Where an ISP had not accrued any minutes of use prior to that date, it is precluded from obtaining any compensation whatsoever because ten percent of zero remains zero.

already providing service to a particular area as of the first quarter of 2001 will continue to receive reciprocal compensation revenues up to the limit set by the growth cap. As a result, as CoreTel enters Philadelphia, Pittsburgh, and New York City, it would be forced to recover all costs of serving an ISP customer from the ISP, while its competitors can recover costs both from the rates charged to ISPs *and* from reciprocal compensation payments. Because CoreTel must match or beat the prices charged by more established CLECs to attract customers, the growth cap and new market ban place CoreTel at an extreme competitive disadvantage. The business that CoreTel will lose as a result of these new rules and the competitive advantage they confer on established CLECs is incalculable and irremediable at some later date.

Accordingly, if the growth cap/new market rules are not stayed, CoreTel anticipates terminating its efforts to serve the New York City, Philadelphia, and Pittsburgh markets, and sacrificing the hundreds of thousands of dollars that it has already invested in those markets.[40] Exiting those markets now will also effectively foreclose CoreTel from competing effectively for business there in the future, even if it ultimately prevails in court on its claim that the growth cap and new market bar are arbitrary and capricious and therefore unlawful. In addition to the time lost between now and the resolution of the anticipated court appeal of the Commission action, CoreTel will also lose the period of well over one year necessary to again request and obtain interconnection, re-deploy equipment, and make the related preparations necessary to launch its services. CoreTel's competitors in those markets will thus have an enormous head-start in these markets, which would almost certainly be impossible to overcome.

In addition to the irreparable harm that CoreTel will suffer in new or barely launched markets, the growth cap will also cause CoreTel substantially to cut back its existing operations

[40] Decl. ¶¶ 7,14.

in Maryland. Because CoreTel was delayed in launching service in each of its service areas on Maryland, CoreTel's total traffic volume in the first quarter of 2001 is much lower than it would have been had CoreTel been able to launch earlier. With a small initial base of minutes, in the absence of the FCC's Order, CoreTel expected to grow far in excess of the FCC's projected average nationwide growth rate of 10%.[41] CoreTel expects that much of this growth would come from taking ISP customers from other CLECs who would receive reciprocal compensation for this traffic.[42] CoreTel projects that it would hit its Maryland growth cap at the start of the fourth quarter of 2001, requiring CoreTel to provide service on a bill-and-keep basis in Maryland for the entire fourth quarter, when many of its competitors would still be receiving reciprocal compensation payments for traffic they terminate to ISPs.[43] As such, CoreTel expects that the growth cap will have a much more dramatic effect on CoreTel than on its more established competitors.

In order to continue to provide service in the areas in which it has the lowest operating costs and to be able to compete in those low cost areas against competitors with much larger pools of minutes not subject to the growth cap, in the absence of a stay, CoreTel will likely be forced to close some of its operations in Maryland, particularly in Mount Airy, and possibly in Damascus. Once CoreTel is forced to abandon these service areas and customers, it will be extremely difficult and time consuming for CoreTel to reenter those markets.

STANDARD OF REVIEW

In determining whether to stay the effectiveness of an FCC order, the Commission applies the four-factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d

[41] Decl. ¶ 16.

[42] Decl. ¶ 16.

[43] Decl. ¶ 16.

921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). That test examines whether: (1) petitioners are likely to succeed on the merits; (2) petitioners will suffer irreparable injury absent a stay; (3) a stay would substantially harm other interested parties; and (4) a stay would serve the public interest. The D.C. Circuit has emphasized that these factors relate on a "sliding scale," such that when "the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas" are less compelling. *See Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998). This is particularly true where, as here, a stay request simply seeks to preserve the *status quo* pending judicial review. Indeed, the Commission itself has indicated that a stay maintaining the *status quo* should be granted "when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm." *Florida Publ Serv. Comm'n*, 11 FCC Rcd 14324, 14325-26 & n.11 (1996); *see also Washington Metropolitan*, 559 F.2d at 844 ("An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. . . . [Such relief is available] whether or not movant has shown a mathematical probability of success.").

ARGUMENT

CoreTel satisfies all of the relevant criteria for a stay pending review. First, there is no question that CoreTel can demonstrate that "a serious legal question" exists as to the validity of the growth cap/new market bar. Indeed, CoreTel can – although it need not – easily clear the higher hurdle of "likelihood of success on the merits" for two reasons. First, as a substantive matter, the growth cap and new market bar are both patently discriminatory and irrationally constructed. Second, the rules were the product of a fatally flawed Commission process.

CoreTel is also certain to experience irreparable injury. At a minimum, if the growth cap/new market rules are not stayed, CoreTel must abandon its efforts to expand its service offerings to the Philadelphia, Pittsburgh, and New York City markets, and it will lose both the over half a million dollars that it has already invested in those markets and the opportunity to effectively compete for business there in the future. In addition, CoreTel will be obliged to retrench in its established markets, and to close its data center serving western Maryland. In contrast, a stay of the growth cap/new market bar would not harm any third parties or the public interest, but rather would simply preserve the *status quo* pending appeal.

I. CoreTel is Likely to Prevail on the Merits.

A. The Growth Cap and New Market Bar are Arbitrary and Capricious Because They are Both Patently Discriminatory and Irrationally Constructed.

The "new market bar" and "growth cap" provisions of the FCC's "transition plan" for intercarrier compensation are so arbitrarily constructed and patently discriminatory that they cannot be justified, even as transitional measures. In creating these provisions out of whole cloth, the Commission appears to have ignored basic principles of economics and nondiscrimination. As a result, the growth cap/new market rules do not satisfy the baseline administrative law requirement of "reasoned decision making."

1. The Growth Cap and New Market Bar Irrationally Discriminate Against CLECs New to a Particular Market, and in Favor of "Incumbent" CLECs.

It is a basic precept of administrative law – and indeed, of our legal system more generally – that similarly situated entities must be treated similarly. *See, e.g.*, *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987). The growth cap/new market bar adopted by the Commission in the *Order on Remand* depart from that fundamental principle *without reasoned explanation*. The *Order* therefore constitutes a paradigm of arbitrary and capricious agency action. *See, e.g.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (emphasizing that an agency must always "articulate with reasonable clarity its reasons for decision").

As set forth above, *see supra* at 13, the *Order on Remand* imposes a maximum cap that can have dramatically different effects on individual CLECs based solely on the volume of traffic received in the first quarter of 2001. Two CLECs that have both relied on the Commission's previous rules in formulating business plans, that have both made substantially similar investments, and that both target the same pool of potential customers will face very different transition periods under the Commission's *Order on Remand*. The larger, slower-growing CLEC will receive reciprocal compensation payments for all ISP-bound traffic it terminates, while the small, fast-growing CLEC will receive reciprocal compensation for only a fraction of its ISP-bound traffic – or, in the case of a new market entrant, will receive no reciprocal compensation payments at all. As a result, the Commission's new rules place CLECs entering new markets at an impossible competitive disadvantage compared to "incumbent"

CLECs, because new entrants must charge potential customers far more for the same service than would "incumbent" CLECs entitled to reciprocal compensation.[44]

Although the Commission never publicly announced that it was considering adopting such a patently discriminatory rule, the CLEC community learned of the possibility shortly before the Commission issued its *Order on Remand*, and advised the agency of the discrimination problems presented by such a rule in the starkest terms. For example, ALTS and CompTel filed an *ex parte* letter explaining in detail that a growth cap/new market regime would be discriminatory because "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."[45]

The Commission's *Order on Remand*, however, simply brushed aside the CLECs competitive concerns, stating – without further explanation, analysis or evidence – that "nothing in this Order prevents any carrier from serving or indeed expanding service to ISPs so long as they recover the costs of additional minutes from their ISP customers."[46] But that casual assertion misses the whole point: the Commission appears to have confused the pricing and cost recovery options of a monopolist with those of a firm in a competitive market. *CoreTel and all other CLECs compete in a competitive market to serve ISP customers.* In such a market, the price that a specific firm can charge is limited by the price charged by competitors, as well as by

[44] Decl. ¶ 13.

[45] 3/26/01 ALTS/CompTel Letter at 3. *See also* 4/6/01 Level 3 Letter, attachment at 1 (characterizing the growth cap approach as "patently arbitrary, capricious and discriminatory," and presenting detailed examples illustrating specifically how a cap would yield discriminatory results in a variety of circumstances); 4/16/01 Sprint Letter at 1 (describing the growth cap rule's "discriminatory effects").

[46] *Order on Remand* ¶ 86.

the purchaser's demand.[47] Under the Commission's new rules, however, only *some* of the CLECs are required to recover all costs from end users, while other CLECs can continue to recover a portion of their costs (in the form of reciprocal compensation) from carriers. The price that CoreTel or any other new or rapidly growing CLEC can charge will therefore be severely constrained by the prices charged by established CLECs unaffected by either the growth cap or the new market bar.

The FCC's evident desire to avoid opportunities for regulatory arbitrage and to limit distortions in the operation of a competitive market also does not provide a reasoned basis for discriminating against carriers with little or no existing ISP-bound traffic. In fact, by allowing established CLECs serving ISPs to continue to receive compensation for ISP-bound traffic, the FCC simply compounds the marketplace distortions created by regulation.[48] To the extent the FCC sought to *reduce* competitive distortions, it could only have done so by treating all terminating CLECs the same, not by discriminating between them.

In sum, Commission failed to address, except in general terms, the discriminatory character of its growth cap and of the new market bar in its *Order on Remand*. Accordingly, the Commission's rule is inconsistent with the long-standing requirements of even-handed treatment and reasoned decision making.

[47] In contrast, in a monopolistic marketplace, the price the monopolist can charge is limited only by the purchaser's demand, and the monopolist in the absence of regulation can recover costs according to whatever rate structure it chooses.

[48] In the absence of a stay, for example, CoreTel will have the incentive to cease serving higher costs areas of Maryland so that it can focus its compensable traffic into a few, lower cost LATAs. This distortion would be less pronounced if all CLECs were subject to the same rate caps when in the same markets.

2. The FCC Irrationally Assumed that CLECs with Little or No Traffic Did Not Act in Reliance on Reciprocal Compensation Revenues or Need a Transition to Make Adjustments to Prior Business Plans.

Although with respect to established CLECs, the Commission recognized that it was "prudent to avoid a 'flash cut' to a new compensation regime that would upset the legitimate business expectations of carriers and their customers," the Commission apparently had no such concerns where a new carrier enters the market or an existing carrier expands into a market it previously had not served. Instead, for new carriers or carriers operating in new (for that carrier) markets, the Commission's rules effectively imposed a "flash cut" to bill-and-keep. The Commission asserted that "carriers entering new markets to service ISPs have not acted in reliance on reciprocal compensation revenues and thus have no need of a transition during which to make adjustments to their prior business plans."

The Commission's assertion that that new carriers had not relied on the Commission's existing rules in formulating business plans and in marketing to customers is simply untrue. CoreTel's own experience demonstrates that a company must make substantial investments of time and money before it can turn up service. In addition to locating switches and providing interconnection facilities, a CLEC entering a market must market its services to potential clients so that it will be in a position to sign up customers upon turning on service. CoreTel executed its business plan, making these investments and engaging in marketing efforts, in reliance on the FCC's then-existing rules. Reliance on the FCC's rules in formulating business plans and marketing to customers provides no basis for distinguishing between CoreTel and more established CLECs in terms of the amount of intercarrier compensation that may be charged or the length of the necessary transition.

The FCC therefore provides no reasoned basis for its decision to impose an immediate "flash cut" to bill-and-keep for carriers with little or no ISP-bound traffic in a market on the effective date of the Order, but to provide a 3-year transition that does not end in bill-and-keep for more established CLECs serving ISPs. Such an unjustified distinction between similarly situated parties is impermissible. *Southern Bell Tel. & Tel. Co. v. FCC*, 781 F.2d 209, 216 (D.C. Cir. 1986) ("[A]n agency must treat like cases similarly or explain its disparate treatment.").

3. The FCC Irrationally and Without Justification Imposed a Growth Cap and New Market Bar Based on Projections of Nationwide, Industrywide ISP-Bound Traffic, with No Logical Nexus to Growth in Individual Markets or for Specific Firms.

The FCC's cap on traffic minutes subject to intercarrier compensation payments is not only discriminatory, but also was adopted without any logical foundation in the record. In the record, the Commission had projections by CLEC trade associations that dial-up internet access traffic would grow at only seven to ten percent per year in aggregate nationwide.[49] The Commission rejected ILEC projections that dial-up internet access traffic would grow by 40% per year nationwide.[50] The Commission then asserted – again without explanation or record support – that "[I]f CLECs have projected growth in the range of ten percent, the limiting intercarrier compensation at that level should not disrupt their customer relationships or their business planning."[51]

But the Commission failed to provide the required evidence of a connection between industry aggregate estimates of the growth of dial-up internet access traffic and firm-specific, market-specific projections of the growth of dial-up internet access traffic for a specific firm in a

[49] *Order on Remand* ¶ 86.

[50] *Id*.

[51] *Id*.

specific market. *See, e.g., Burlington Truck Lines Inc. v. United States,* 371 U.S. 156, 168 (1962) (agencies must state a rational connection between the facts found that the choices made); *City of Brookings Mun. Telephone Co. v. FCC,* 822 F.2d 1153, 1171 (D.C. Cir. 1987) (holding that the FCC cannot average data for companies to which the data is inapplicable). No such evidence exists. Indeed, as Level 3 and CompTel/ALTS pointed out in ex parte filings, a carrier that solely took or acquired ISP business from another CLEC could have a large growth in its own minutes – far exceeding the compensable limits of the growth cap – but have no impact on the total industry aggregate volume of dial-up internet access traffic.[52]

The Commission did not, and could not, justify this result. The clear impact of the growth cap in the situation in which a CLEC seeks to win ISP business from another CLEC is to distort competition by allocating market share through regulation. As was explained in ex parte filings to the Commission, the FCC's new rules limit competition among CLECs without necessarily achieving any impact on total carrier-to-carrier compensation paid nationwide.[53] To be rational, any cap on compensable minutes of termination of ISP-bound traffic would have to be set based upon market-specific, firm-specific traffic projections.

4. The FCC's Entire Transition Plan, Including the Growth Cap and New Market Bar Provisions, is Premised Upon an Erroneous Interpretation of 251(g).

The entire transitional intercarrier compensation plan for ISP-bound traffic, including the growth cap/new market bar provisions, is built on a jurisdictional foundation of sand. The Commission itself recognizes that serious legal issues are presented by its conclusion that Section 251(g) excludes ISP-bound traffic from the scope of the reciprocal compensation provision. That is obviously so since, as the Commission acknowledged, its new interpretation

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[52] *See, e.g.*, 4/6/01 Level 3 Letter at 2-3; 3/26/01 ALTS/CompTel Letter at 3.

of Section 251 is contrary to its prior interpretation (on which the D.C. Circuit had ruled) and was not contemplated by the court of appeals in remanding for a further explanation of the Commission's position. Moreover, the Commission's argument that § 251(g) is a jurisdictional basis for regulating ISP-bound traffic under § 201 is outside of the scope of the D.C. Circuit's mandate in *Bell Atl. Tel Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). We would remind the Commission that it need not conclude that it was wrong, but only that a serious legal issue is presented, under the standard for staying its own order. We will not belabor the merits of jurisdictional issue, which the Commission plainly considered at some length. But the seriousness of the legal issues presented with respect to the Commission's interpretation of 251(g) amplify the need for a stay of the growth cap and new market restrictions, which apparently were raised very late in the proceeding and plainly were not considered at length by the Commission, pending judicial review.

B. The Growth Cap and New Market Bar are Unlawful Because They are the Product of a Fundamentally Flawed Process.

In addition to the substantive defects identified above, the Commission's growth cap and new market bar were adopted pursuant to a fatally flawed process. CoreTel can therefore demonstrate a likelihood of success on the merits on procedural as well as substantive grounds.

The Commission never – either in any Notice of Proposed Rulemaking or in its *Public Notice* seeking comment after the D.C. Circuit remanded the agency's initial *Declaratory Ruling* on reciprocal compensation issues – publicly proposed to adopt a growth cap or new market bar. Indeed, the *Public Notice* was expressly limited to soliciting comments on the jurisdictional nature of ISP-bound traffic; the scope of the reciprocal compensation requirement of section 251(b)(5); the relevance of the concepts of "termination," "telephone exchange service,"

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[53] *Id.*; 3/30/01 ALTS/CompTel Letter at 2.

"exchange access service," and "information access"; and updating the record with responses to *ex partes* filed after the close of the initial reply period.[54] The Commission never gave adequate notice that it would consider a discriminatory transition scheme, such as the growth cap and new market bar. Nothing in the Commission's notices would have alerted CoreTel that a discriminatory transition scheme could result. *See MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1141-43 (D.C. Cir. 1995) (granting petition for review because the Commission failed to provide adequate notice of its intention to make a rule change).

The growth cap and new market bar were first mentioned in the record of this proceeding in an *ex parte* letter filed on March 26, 2001, nearly a year after the *Public Notice*, and less than a month before the Order was issued. At that point, as discussed in detail *supra* at 10-13, two trade associations and a number of companies promptly filed *ex parte* letters in opposition to the last-minute proposals. Those letters detailed the fundamental problems of discrimination inherent in this new approach, and provided the Commission a full opportunity to address these concerns.

The Commission's *Order on Remand*, while it did make a limited effort to justify the new rules in general terms, failed to respond to or even acknowledge the discrimination problem addressed by the *ex partes*. That oversight itself violated the established rule that an agency must respond to all significant comments. *See e.g.*, *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987); *U.S. Satellite Broadcasting Co., Inc. v. FCC*, 740 F.2d 1177 (D.C. Cir. 1984); *see also Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566, 1568 (D.C. Cir. 1992) (emphasizing that the "FCC cannot simply ignore a well-grounded argument that the Commission is proceeding irrationally). These *ex parte* filings were clearly significant in that

[54] *Public Notice*, 15 FCC Rcd at 11311.

they raised points that were relevant and that, if adopted, would have required changes in the proposed rule. *See Home Box Office v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977).

In addition to sidestepping the discrimination problem highlighted by the *ex partes*, the Commission also failed to respond to – or even acknowledge – any alternative proposals made by CLECs for accomplishing the agency's goal of reforming the reciprocal compensation regime while limiting the changes' impact on CLECs. Level 3 and Sprint, in particular, suggested that rather than employ a growth cap, a "pooling mechanism that sets total overall reciprocal compensation to be paid for traffic not otherwise subject to binding and valid interconnection agreements, and then allocates the pooled compensation revenue among CLECs according to the minutes actually delivered" would be a fairer and more effective approach.[55] ALTS and CompTel also made a number of detailed suggestions for limiting the detrimental effect of a growth cap, were one to be adopted.[56]

Like the concerns about discrimination raised in the *ex parte* filings, these suggestions for less burdensome changes to the reciprocal compensation regime constituted "significant" comments to the which the Commission was required to respond. *See, e.g., U..S. Satellite Broadcasting Co., Inc. v. FCC*, 740 F.2d 1177 (D.C. Cir. 1984). The Commission was also obligated by the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,[57] to consider significant alternatives to lessen the regulatory impact of its new rules on small businesses. In adopting the growth cap and new

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[55] *See* 4/10/01 Level 3 Letter at 2; 1/16/01 Sprint Letter at 1.

[56] 3/26/01 ALTS/CompTel Letter at 4.

[57] Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 *et seq.*), amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 1040121, 110 Stat. 857 (1996) (5 U.S.C. § 612(a)).

market bar – the burdens of which clearly fall in a disproportionate and discriminatory manner on small CLECs like CoreTel – the Commission simply ignored its obligations under the RFA.

In sum, the growth cap and new market bar were the product of flawed Commission procedures, and CoreTel can demonstrate a likelihood of success on this ground as well.

II. CoreTel Will Suffer Irreparable Harm if the Growth Cap and New Market Bar are not Stayed Pending Judicial Review.

As discussed *supra* at 15-17, the effects of the growth cap and new market bar on CoreTel will be dramatic and immediate. Before judicial review could be completed, CoreTel will likely have to abandon its plans to serve three new markets – Philadelphia, Pittsburgh, and New York – in which it has already made over a half a million dollars of investments.[58] That retreat will be necessary because CoreTel will not receive *any* reciprocal compensation revenues in those markets, while competitor CLECs who entered those markets earlier will continue collect such revenues. CoreTel cannot possibly compete against CLECs who have a massive, discriminatory competitive advantage in the form of continued reciprocal compensation revenues.

Significantly, exiting these three new markets now will also effectively foreclose CoreTel from competing for business there in the future, even if it ultimately prevails in court on its claim that the growth cap and new market bar are arbitrary and capricious. If no stay is issued, CoreTel will lose not only the time between now and the resolution of the anticipated court appeal of the Commission action, but also the period of well over one year that would be necessary to again request and obtain interconnection, re-deploy equipment, and make the related preparations necessary to launch its services. CoreTel's competitors in those markets will have an enormous head-start, which would be impossible to overcome. This harm thus cannot be remedied in the future.

In addition to the irreparable harm that CoreTel will suffer in new markets under the *Order on Remand*, the growth cap will severely limit its ability to compete in its established Maryland service areas. Even in Maryland, where CoreTel will be able to continue to receive some reciprocal compensation revenues, CoreTel's total number of billable minutes will be small compared to that of some competitors due to its recent entry into the market. As a result of this competitive disadvantage imposed by the Commission's new rules, CoreTel will likely be obliged to close its Mount Airy data center in the near future if the growth cap is not stayed, and will have to seriously consider closing its Damascus, Maryland data center as well.

These detrimental effects constitute "irreparable harm" for the purpose of a stay request. While CoreTel certainly recognizes that temporary economic losses for which "adequate compensatory or other corrective relief will be available at a later date do not qualify as irreparable harm," *Virginia Petroleum Jobbers*, 259 F.2d at 925, this is decidedly not such a case. There is no way that CoreTel could – were it ultimately to prevail on the merits – obtain "adequate compensatory or other corrective relief" for having been forced out of three new markets and one established market. Accordingly, this is clearly a situation in which the "threat of unrecoverable economic loss 'does qualify as irreparable harm.'" *See, e.g., Access Charge Reform (Request for Stay)*, 12 FCC Rcd 101175, 10188 (1997) (quoting *Iowa Utilities Board v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996)).

III. Issuance of a Stay Will not Cause Harm to Other Parties.

Although implementation of the growth cap and new market bar would cause imminent, severe, and irreparable harm to CoreTel, staying the order pending appeal would not cause any

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[58] Decl. ¶ 16.

significant harm to other parties. Certainly the issuance of a stay would not hurt other CLECs – implementation of the new rules can only decrease their revenues. Nor would a stay harm CoreTel's ISP customers, or individual consumers. As further set forth in the public interest discussion below, both ISPs and consumers can only benefit from a stay, because it would permit CoreTel to continue to serve markets from which it will otherwise withdraw. Clearly, having additional service providers in a given market increases competition, and helps to keep access prices lower for ISPs and consumers.

A stay also will not significantly harm ILECs. They will, of course, have to continue to make reciprocal compensation payments during the pendency of the appeal, but if the Commission's rules are ultimately upheld, those payments can be returned or offset against future obligations. Moreover, although those payments constitute a large portion of the revenues of a small company like CoreTel, they are only a miniscule percentage of the expenses of the massive ILECs. Accordingly, continuing to make those payments for a matter of months – particularly subject to repayment if the new rules are upheld – will have absolutely no long-term effects on the ILECs' businesses.

Finally, issuing a stay will not harm the Commission itself. To the contrary, the agency would be needlessly burdened were it required, upon reversal, to attempt to undo the damage caused by implementation of the growth cap and new market bar. As a number of courts have recognized, where an order that remains subject to reversal would dramatically alter the *status quo*, administrative efficiency goals are often best served by staying the order pending appeal. *See, e.g., Ruiz v. Estelle*, 650 F.2d 555, 573 (5th Cir. 1981).

IV. Issuance of a Stay is in the Public Interest.

A stay pending judicial review would benefit the public because it would enable CoreTel to continue to serve its customers in Philadelphia and Western Maryland, as well as to pursue its efforts to bring additional competition to the Pittsburgh and New York City markets. As set forth in detail above, if a stay does not issue, CoreTel will likely exit those markets.

There is, moreover, a near certainty that other CLECs – including some without the resources to seek relief – face similar predicaments. Clearly, the ability of *any* CLEC to expand into new markets, or to continue to serve markets where it has "banked" only limited compensable minutes, will be severely constrained by the new rules. Particularly given that the numbers of CLECs have already begun to dwindle, this additional loss of competitive service providers would be significant. It would, moreover, clearly be a result directly contrary to the goals of the 1996 Act as well as the Commission's rationale for adopting the *Order on Remand*.[59]

[59] *See Order on Remand* ¶¶ 4-6 (discussing adverse competitive effect of CPNP system).

CONCLUSION

The Commission should stay the effect of the growth cap and new market bar pending judicial review. If the Commission does not act on this Petition by June 7, 2001, CoreTel intends to seek a stay of the *Order on Remand* from the U.S. Court of Appeals in order to provide the court with an opportunity to act before the rules would otherwise take effect on June 14, 2001.

Respectfully submitted,

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Dated: June 1, 2001

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications	)	CC Docket No. 96-98
Act of 1996	)	
	)	
Intercarrier Compensation	)	CC Docket No. 99-68
for ISP-Bound Traffic	)	

DECLARATION OF BRET L. MINGO

I, Bret L. Mingo, pursuant to 28 U.S.C.1746, do hereby declare, under penalty of perjury, that the following is true and correct:

1. This declaration is made on behalf of Core Communications, Inc. ("CoreTel"), in support of its *Request for Stay Pending Judicial Review.*

2. I am President of CoreTel, and have been since I founded the company in August of 1997.

3. As part of my responsibilities at CoreTel, I have knowledge of the services currently provided by the company, as well as its plans for expansion. I also have knowledge of the company's financial information, including its past and planned investments and its actual and projected revenues.

4. CoreTel is a privately held competitive local exchange carrier based in Annapolis, Maryland. Through its managed modem and digital subscriber line services, CoreTel helps small to medium-sized ISPs provide Internet connectivity without investing in expensive data and telecommunications network equipment. CoreTel was founded in August 1997, eighteen months after the passage of the Telecommunications Act of 1996. CoreTel's founders believed that the historical monopoly local telephone companies were not adequately meeting the service needs of Internet service providers.

5. CoreTel is a very small company. It has only 11 employees, and in 2000 had only $2.82 million in gross revenues, with after-tax earnings of approximately $200,000. CoreTel today provides modem and DSL services to over 50 Internet service providers, managing some 2800 modems and 2000 DSL circuits from data centers located in Easton, Damascus, Baltimore, and Mount Airy, Maryland, and in Philadelphia, Pennsylvania. CoreTel is scheduled to begin serving customers in Pittsburgh, Pennsylvania and New York City, New

York in June 2001. We do not have a precise date for these launches because of uncertainty as to when Verizon will finish provisioning necessary services.

6. It has taken a substantial amount of investment, both in terms of dollars and in terms of time, to build CoreTel to the point where it can provide service statewide in Maryland, and in Philadelphia, Pittsburgh and New York City. In July 1999, CoreTel obtained a license to operate as a CLEC in Maryland. CoreTel had to make substantial investments, totaling well over $1 million, in three LATAs in Maryland (Baltimore, Easton and Mount Airy) to locate switches, obtain interconnection facilities, and begin to market to prospective customers. In addition, CoreTel's launch was slowed by Verizon's delays in supplying necessary interconnection facilities, delays which are currently the subject of a complaint filed with the Maryland PSC against Verizon. CoreTel requested these facilities from Verizon in July 1999, but Verizon did not make interconnection until January 2000 in the case of Baltimore and February 2000 in the case of Easton and Mount Airy. In April 2000, CoreTel opened its data centers in Easton and Mount Airy, Maryland. In December 2000, after hundreds of thousands of dollars in additional investment, CoreTel opened a fourth data center in Damascus, Maryland, which is in the Washington DC LATA. CoreTel also suffered delays from Verizon in providing necessary interconnection facilities for this market, delays which are the subject of a complaint CoreTel filed against Verizon at the FCC.

7. During this period, CoreTel also made investments in order to expand its business by rolling out managed modem services in new (and larger) markets, including Philadelphia and Pittsburgh, Pennsylvania, and New York City. In order to be in a position to launch service in these markets, CoreTel invested over $500,000 to obtain switch locations and interconnection facilities and to begin to market to prospective customers.

8. In these markets too, however, CoreTel encountered recalcitrance and delay on the part of Verizon in furnishing interconnection facilities. Although CoreTel had requested interconnection in the Philadelphia market by February 2000, delays related to obtaining interconnection prevented the service from launching until April of this year. Similarly, although CoreTel requested interconnection in Pittsburgh and New York in June of 2000, CoreTel will not be able to launch services there until June 2001.

9. CoreTel's decision to invest in these new markets were made in reliance on the FCC's rules, but also cognizant of the fact that the FCC was considering changes to reciprocal compensation for traffic delivered to ISPs. CoreTel did not and could not have foreseen, however, that the Commission would adopt an order that blatantly and dramatically discriminated between CLECs already in a market serving a large, established base of ISPs, and CLECs that were just entering markets or had only a small share of the ISP market.

10. I have reviewed the Commission's *Order on Remand and Report and Order* ("*Order on Remand*") in the above-referenced proceeding and am familiar with the "growth cap" and "new markets" provisions adopted by the Commission therein.

11. Under the new market bar adopted in the *Order on Remand*, CoreTel will not be entitled to reciprocal compensation during 2001 for any traffic it may carry in the New York City, Philadelphia, or Pittsburgh markets, because – due in substantial part to Verizon's

unreasonable delays – it terminated no minutes in those markets during the first quarter of 2001.

12. If CoreTel continues to attempt to expand its services to New York City, Philadelphia and Pittsburgh markets – markets in which CoreTel has already sunk hundreds of thousands of dollars in investment – the company's projections indicate that, under the growth caps/new market rules adopted in the *Order on Remand*, CoreTel will not be able to recoup its investment unless it dramatically increases its per modem charge to its ISP customers.

13. Dramatically increasing per modem charges to recoup lost reciprocal compensation revenues in these three markets is not a realistic option because CoreTel faces competition from more established CLECs (CLECs that will continue to receive reciprocal compensation revenues under the growth cap/new market rules because they terminated traffic during the first quarter of 2001) in all three markets. Because these CLECs have higher growth caps under the FCC's *Order on Remand*, they will not, unlike CoreTel, be forced to recoup all costs from ISP customers alone but can continue to charge prices to ISPs that are reduced because of the reciprocal compensation payments they receive. Because CoreTel's prices must be set solely or largely based on ISP payments, it will be unable to compete effectively with CLECs who can set prices based on both ISP payments and reciprocal compensation payments.

14. If the new market rule is not stayed, CoreTel will, therefore, likely terminate its efforts to serve the New York City, Philadelphia, and Pittsburgh markets, rather than chart a course for negative earnings.

15. If CoreTel exits the New York City, Philadelphia, and Pittsburgh markets at this time, it will be effectively foreclosed from re-entering those markets even if it ultimately prevails in court on its claim that the growth cap/new market rules are arbitrary and capricious and, therefore, unlawful. In addition to the time lost between now and the resolution of the anticipated court appeal of the Commission action, CoreTel will also lose the period of well over one year necessary to again request and obtain interconnection, re-deploy equipment, and make the related preparations necessary to launch its services.

16. In addition to the irreparable harm that CoreTel will suffer in new markets under the *Order on Remand*, because CoreTel was not fully interconnected in Maryland until December 2000, the growth cap will severely limit its ability to compete in its established Maryland service areas. Specifically, CoreTel will be at a severe competitive disadvantage in Maryland as compared to CLECs that had a longer period in which to develop their base of traffic for essentially the same reason that it is at a disadvantage in new markets: In the new markets, CoreTel by rule cannot obtain reciprocal compensation at all; in Maryland, the total amount of existing traffic to which the growth cap is applied is low relative to some competitors due to our recent entry into the market. In the absence of the FCC's order, CoreTel expected to grow far in excess of the FCC's projected average nationwide growth of 10%. Much of that growth would have come from taking ISP customers from more established CLECs. Those more established, slower-growing CLECs will continue to receive reciprocal compensation for ISP-bound traffic under the FCC's new rules. CoreTel projects that it will hit its

Maryland growth cap at the start of the fourth quarter of 2001. As such, CoreTel expects that the growth cap will have a much greater effect on it than on its more established competitors.

17. As a result of this competitive disadvantage imposed on CoreTel by the growth cap, we will almost certainly close our Mount Airy data center in the near future if the cap is not stayed. We will also need to give serious consideration to closing our Damascus center, also as a direct result of the operation of the growth cap. Because the growth cap sets a limit on the total number of minutes of traffic for which CoreTel can receive reciprocal compensation, the growth cap encourages CoreTel to consolidate its operations in its lowest cost data centers, rather than operating in both higher cost and lower cost areas. Thus, in order to compete with companies that can continue to receive reciprocal compensation for much more traffic, CoreTel would first close its higher cost data center in Mount Airy, MD. Again, once we have exited these markets it will be difficult to reenter these markets and in any event the lost time and market opportunity cannot be recovered or repaired at a later date.

18. CoreTel has received a letter from Verizon stating Verizon's intent to participate in the reciprocal compensation plan under the FCC's *Order on Remand*. A copy of that letter is attached as Exhibit A.

Executed on June 1, 2001 by:

BRET L. MINGO

Jeffrey A. Masoner
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verizon

May 14, 2001

Core Communications Inc.
Christopher Van de Verg
Secretary & General Counsel
209 West Street, Ste. 302
Annapolis, MD 21401

Dear Customer:

On April 18, 2001, the Federal Communications Commission ("FCC") adopted an order addressing the charges that carriers may bill to and collect from each other in connection with their exchange of dial-up Internet traffic. See, *Order on Remand and Report and Order*, CC Docket Nos. 96-98, 99-68 (adopted April 18, 2001) (the "Order"). This letter is intended to advise you of the key provisions of the Order, and to notify you of steps that Verizon is taking to implement the Order. Because the Order may have a material effect on your operations, please read this letter carefully.

In the Order, the FCC determines that Internet traffic is interstate exchange access traffic – specifically, information access traffic – and that such traffic is not subject to payment of reciprocal compensation under Section 251(b)(5) of the Communications Act. In addition, the FCC reconfirms its prior analysis that led to its earlier ruling that Internet traffic is not "local" traffic because a call to the Internet is one, continuous call and not two separate calls. In order to limit the regulatory arbitrage opportunity that has existed in those states where reciprocal compensation has been paid on Internet traffic prior to adoption of the Order, the FCC exercises its authority under Section 201 of the Communications Act to prescribe an alternative, transitional intercarrier compensation regime for Internet traffic.

In order to give effect to the Order, and to ensure its continued compliance with applicable law, Verizon will implement the following practices on the effective date of the rate-affecting provisions of the Order (*i.e.*, thirty days after publication in the Federal Register):

- To the extent Verizon is exchanging dial-up Internet traffic and traffic properly compensable under Section 251(b)(5) with you in a given state over facilities obtained under a particular interconnection agreement or local interconnection tariff, Verizon will presume, as an initial matter, that any such traffic that exceeds a 3:1 ratio of terminating to originating traffic is Internet traffic (and therefore interstate exchange access traffic). Either party may seek to rebut this presumption by demonstrating to the appropriate state regulatory commission that traffic below this ratio is in fact Internet traffic, or that traffic above this ratio is non-Internet traffic that is subject to reciprocal compensation pursuant to Section 251(b)(5) of the Act. During the pendency of any such proceedings, traffic above the 3:1 ratio will continue to be governed by the intercarrier compensation regime set forth in the Order, and upon conclusion of such proceedings, compensation paid between the parties will be subject to true-up, if appropriate.

- Initially, and continuing for six months after the effective date of the Order, the intercarrier compensation rate for Internet traffic will be capped at $.0015 per minute of use. Starting in the seventh month, and continuing for eighteen months, the rate will be capped at $.001 per minute of use. Starting in the twenty-fifth month, and continuing through the thirty-sixth month or until further FCC action (whichever is later), the rate will be capped at $.0007 per minute of use. If state law has previously required payment on Internet traffic at a rate lower than the applicable rate caps established in the Order, or has previously required a lower rate structure for Internet traffic, such as "bill and keep," then that lower rate or rate structure may apply under the terms of the Order.

- The amount of Internet traffic on which Verizon will pay intercarrier compensation to you in 2001 in a given state may not exceed 110% of the total number of Internet-bound minutes for which you were entitled to compensation under your interconnection agreement or local interconnection tariff in that state in the first quarter of 2001, annualized. (The volume of compensable Internet traffic in 2002 may not exceed 110% of the 2001 compensable Internet traffic volume originated on Verizon's network in a given state, and in 2003 may not exceed the 2002 compensable volume originated on Verizon's network in that state.) Accordingly, if you were not exchanging Internet traffic with Verizon in the first quarter of this year, or if for any reason you were not entitled under your interconnection agreement or local interconnection tariff to compensation on Internet traffic during that period, then you will not be entitled to compensation for Internet traffic under the Order.

- Verizon will pay properly invoiced intercarrier compensation charges on dial-up Internet traffic that originates on Verizon's network on or after the effective date of the Order up to the rate caps and payment limits authorized by the Order, as described above. **You are hereby put on notice, to the extent such notice is required, that Verizon will not pay any amounts invoiced by you that exceed the applicable rate caps or payment limits, as described above.**

- With respect to those states in which the state regulatory commission or any court of competent jurisdiction has previously determined that you are entitled to receive compensation for Internet traffic under the terms of your interconnection agreement, the Order recognizes Verizon's right to invoke the change of law provisions set forth in that agreement. Without waiving its position that neither Section 251(b)(5) nor your current interconnection agreement or any relevant tariff obligates Verizon to pay or continue paying reciprocal compensation on Internet traffic, **Verizon hereby gives written notice, to the extent such notice is required, that the Order constitutes a material change of law in the aforementioned states. Verizon hereby invokes any and all rights it may have under your interconnection agreement or**

otherwise with respect to government orders affecting its obligations to you or other changes in law, including, where applicable, the right to terminate any provision of your Interconnection agreement that imposes obligations on Verizon that are no longer required under applicable law.

The Order requires Verizon to offer all CLECs and CMRS providers an optional reciprocal compensation rate plan for termination of non-Internet traffic subject to Section 251(b)(5). Under this optional plan, such traffic exchanged between Verizon and a Local Exchange Carrier or CMRS provider in a given state will be subject to compensation at the same rate applicable to Internet traffic in that state under the terms of the Order. The terms and conditions applicable to this optional rate plan are available from your account manager or your designated Verizon Contract Negotiator, and will take effect no earlier than the date that is thirty days after publication of the Order in the Federal Register.

Because we anticipate that all parties will experience temporary billing difficulties in implementing the Order, you are encouraged to work with your assigned Verizon Account Manager to understand how the terms of the Order will be applied to you in each of the Verizon states in which you do business.

Very truly yours,

Jeffrey A. Masoner

Jeffrey A. Masoner
Vice President Interconnection Services