DOCKET FILE COPY ORIGINAL

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

RECEIVED
JUN 6 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

RESPONSE IN SUPPORT OF PETITION OF CORE COMMUNICATIONS, INC. FOR STAY PENDING JUDICIAL REVIEW

On June 1, 2001 Core Communications, Inc. ("CoreTel") filed a Petition for Stay Pending Judicial Review of the Commission's *ISP-Bound Traffic Order*.[1] Focal Communications Corporation ("Focal"), Pac-West Telecomm, Inc. ("Pac-West"), and U S LEC Corp. ("US LEC"), by their undersigned attorneys, hereby file their response to that Petition.

I. INTRODUCTION

Focal, Pac-West and US LEC support CoreTel's request for a stay pending judicial review. The provisions of the *Order* that place limits on the amount of ISP-bound traffic for which a local exchange carrier ("LEC") terminating such traffic will be compensated will undoubtedly have severe adverse effects on many competitive local exchange carriers ("CLECs"). CLECs have already invested millions of dollars in order to initiate service in new markets, and will, as a result of the provisions in the *Order* imposing a "growth ceiling" and

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) ("*ISP-Bound Traffic Order*" or the "*Order*").

eliminating intercarrier compensation for ISP-bound traffic in "new markets," be unable to serve those markets economically. While Focal, Pac-West and US LEC were aware that reciprocal compensation rates were likely to be reduced by the Commission in line with the levels of compensation in recently negotiated and arbitrated agreements, they had no reason to believe that the Commission would establish a compensation regime that adversely impacted some carriers, thereby benefiting other similarly situated carriers.

The Commission should remedy this problem by granting CoreTel's stay.[2] An alternative to granting a stay would be to implement the proposals that Focal, Pac-West and US LEC describe in Section V. of this Response. These proposals would either reschedule by one year the initiation of the growth ceiling and the new market restrictions, or provide a baseline to calculate growth for new switches based on the national average of ISP-bound minutes terminated on *all* CLEC switches. These proposals do not depart significantly from the terms of the *Order*, but would certainly lessen the *Order's* disparate impact on competitors.

II. THE GROWTH CEILING WAS INAPPROPRIATELY IMPOSED

The growth limitation on ISP-bound traffic terminated by CLECs imposed by the *Order* was inappropriately imposed on the competitive industry.[3] The concept of a growth ceiling, as CoreTel indicates, surfaced in the record only a month prior to the Commission's adoption of its *Order*. It was never the subject of notice and comment. For that reason alone, the Commission should grant the stay requested by CoreTel.

Further, the rationale for imposing a growth ceiling is no longer sound. The professed reason for the growth ceiling was to "ensure that growth in dial-up Internet access does not

[2] For the reasons stated in CoreTel's petition, the growth ceiling and new market restrictions of the *Order* will cause irreparable injury. Because of the discriminatory nature of these provisions, among other reasons, CoreTel is likely to prevail on appeal. The parties effected by a grant of a stay, principally the ILECs, will not suffer significant harm as a result, and the public interest weighs heavily in favor of providing the limited relief requested by CoreTel.

[3] *See Order* at ¶ 78.

undermine our efforts to limit intercarrier compensation for this traffic and to begin . . .a smooth transition toward a bill and keep regime."[4] The Commission deemed the 10% growth ceiling reasonable in light of CLEC estimates of growth. Events, however, have overtaken those estimates. Most "free" Internet access providers have gone out of business, and the survivors are in the process of converting to paid subscription service.[5] The growth expectations that may have been anticipated from a free product have vanished. Further suppressing dial-up growth, the world's largest ISP -- America Online -- recently announced a 9% increase in its basic dial-up service rate.[6] This rate change alone means approximately 32 million dial-up Internet access subscribers in the United States will have their basic rates increased.[7] At the same time, the ILEC roll out of DSL service and cable companies' roll out of cable modem service are booming.[8] This combination of facts makes the Commission's concern with an absolute increase in compensation owed for ISP-bound calls divorced from reality. There is, therefore, no need for the growth ceiling on top of the rate cap, and the Commission should stay those portions of its *Order*.

III. THE GROWTH CEILING AND NEW MARKET RESTRICTIONS OF THE ORDER ARE NOT CONSISTENT WITH THE COMMISSION'S INTENT TO PROVIDE A REASONABLE TRANSITION

---

[4] *Order* at ¶ 86.

[5] *See* Lisa DiCarlo, "No Free Lunch," Forbes.com, March 12, 2001 ("By now it's clear that the concept of free unlimited Internet access was flawed beyond belief."; "If NetZero isn't able to snag a few million paying subscribers within about 18 months, net zero will be about what this company is worth.")

[6] *See* Elliot Zaret, "AOL rate hike may spur others," MSNBC.com, http://www.msnbc.com/news/576763.asp.

[7] America Online serves 32 million subscribers. The next closest competitors in terms of market share, MSN and Earthlink, Inc., serve 5 million and 4.8 million subscribers, respectively. *See* Alec Klein, "Microsoft Seeks to Profit from AOL Hike," The Washington Post, May 30, 2001, E1.

[8] Christopher Stern and Peter S. Goodman, "High Speed, Higher Fees," The Washington Post, June 3, 2001. H1.

The Commission recognized in the *Order* that it was inappropriate to adopt a "flash cut" to a new compensation regime that would upset the legitimate business expectations of carriers and their customers: "We believe it appropriate in tailoring an interim compensation mechanism to take these expectations into account while simultaneously establishing rates that will produce more accurate price signals and substantially reduce market distinctions."[9] The Commission then went on and imposed the flash cut it sought to avoid by denying intercarrier compensation for carriers entering new markets. The Commission justified this contrary stance in part on the grounds that "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."[10] As indicated by the declarations filed by Focal, Pac-West and US LEC, as well as the declaration previously filed by Core-Tel, that premise is simply wrong. It fails to recognize the substantial investments that must be made prior to entering a new market.

New market entry is not done on a "flash cut" basis. Negotiation of interconnection agreements, obtaining and preparing collocation space, acquisition of switches and provisioning of interconnection trunks are among the long list of things that must be accomplished after a decision to enter a new market has been made and prior to the exchange of any traffic.[11] These steps require a minimum of eight months, can easily consume a year, and sometimes may take more time.[12] For example, if a CLEC must arbitrate disputed issues with the ILEC under Section 252 of the Telecom Act, the delay could be significantly more than a year. In addition, this extensive planning and deployment process is expensive. Pac-West invested over $60 million in

---

[9] *Order* at ¶ 77.

[10] *Order* at ¶ 81.

[11] *See* Declaration of Wally Griffin (CEO, Pac-West Telecomm, Inc.) at ¶ 7 ("Griffin Declaration"); Declaration of John Barnicle (COO, Focal Communications Corporation) at ¶ 6 ("Barnicle Declaration"); Declaration of Aaron D. Cowell, Jr. (President, U S LEC Corp.) at ¶ 7 ("Cowell Declaration").

[12] Griffin Declaration at ¶ 7; Barnicle Declaration at ¶ 6; Cowell Declaration at ¶ 7.

2000 in expanding its service footprint in nine western states.[13] Focal invested more than $300 million in 2000 in capital expenditures, a portion of which was spent on turning up new markets to add to its footprint.[14] US LEC invested more than $100 million to expand its network in 2000.[15] While the *Order* recognizes the inappropriateness of thwarting expectations for some, the *Order* unfortunately draws this line in the wrong place. Given the investments that have been made in reliance on the existing Commission rules and the expectation that compensation for terminating ISP-bound traffic would continue, albeit at a lower rate, it is inappropriate for the Commission to arbitrarily eliminate compensation to those carriers who have made such investments.

IV. THE *ORDER* WILL HAVE SUBSTANTIAL ANTICOMPETITIVE RESULTS

As CoreTel notes, the adverse impact of the growth ceiling and new market provisions of the *Order* have a disparate impact on competing carriers and a substantial anticompetitive effect.[16] When any CLEC plans to enter new markets, it anticipates competing against both the ILEC and other CLECs for the business of serving ISPs. The *Order* undermines a CLEC's ability to compete for this business. While the carriers that had already established a presence in the markets and had been exchanging ISP-bound traffic will continue to be compensated, new entrants will be forced either to recoup their terminating switching costs from their end users, or absorb the costs without recouping them from end users.[17] No carrier will be able to compete

[13]Griffin Declaration at ¶ 6.

[14] Barnicle Declaration at ¶ 5.

[15] Cowell Declaration at ¶ 6.

[16]Petition at 20-21.

[17]Griffin Declaration at ¶ 11; Barnicle Declaration at ¶ 9; Cowell Declaration at ¶ 13.

with the existing carriers with that sort of price disadvantage. The *Order* is really nothing more than an order for new entrants to pack up their equipment and go home.[18]

The Commission should also stay the implementation of its growth ceiling because it imposes vastly disparate results on similarly situated companies. An example in the record makes this disparate result readily apparent.[19] Compare the treatment of a CLEC that 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 the same state. While one CLEC would have a significant volume of traffic to calculate a growth ceiling, the other CLEC may have exchanged very little traffic in the first quarter of 2001 to allow it to reasonably grow within the 10% limit imposed by the *Order*. One CLEC could grow at a reasonable rate and never exceed the growth ceiling, while the newer entrant would reach its growth ceiling almost immediately.[20] The newer entrant would be at a significant disadvantage compared to the more established CLEC.

A growth ceiling and new market bar also penalizes a CLEC that chooses to enter or expand in a state by acquiring the equipment of a CLEC exiting the market or downsizing. If the growth ceiling applies to a switch acquired in this manner, it is possible that no compensation would be paid to terminate ISP-bound traffic. Both the CLEC attempting to dispose of the equipment and the CLEC interested in expanding in the market would be adversely affected. Substantial idle facilities and stranded investment would be the result. More importantly, all customers, not only ISPs, would have fewer choices in carriers in those markets as a result of the deleterious consequences of serving ISPs.

---

[18]One cannot even say that the *Order* is an order for carriers to consolidate their operations into their existing service markets. The growth ceiling prevents CLECs from growing their ISP services in existing markets. The *Order* is, in simple truth, a mandate for CLECs to get out of the business of serving ISPs.

[19]*Ex parte* letter from John D. Windhausen, President, ALTS, and H. Russell Frisby, Jr., President, CompTel, to Dorothy Attwood, March 26, 2001.

[20]Griffin Declaration at ¶ 10; Barnicle Declaration at ¶ 7; Cowell Declaration at ¶ 12.

V. THERE ARE A NUMBER OF SOLUTIONS THAT THE COMMISSION MAY ADOPT

There are several ways in which the Commission could eliminate or at least lessen the severity of the "flash cut" of denying compensation for ISP-bound traffic in new markets and the unfairness of the growth ceiling for relatively new entrants. The simplest way to eliminate the barrier to competitors and competition is to stay those portions of the order imposing a growth ceiling and the new market ban.

In the event CoreTel's stay is not granted, Focal, Pac-West and US LEC urge the Commission to adopt one of the following alternatives. These proposals do not depart significantly from the terms of the *Order*, and will certainly lessen the *Order's* disparate impact on competitors. The first alternative would be to simply reschedule the effective date of the growth ceiling and new market provisions of the *Order*. Rather than making the new market restriction effective immediately, it should be made effective one year following the effective date of the *Order*. Given the long lead-times necessary to begin service in new markets, this new effective date would protect those CLECs that have already incurred substantial expenses to expand into new markets in reliance on the Commission's existing rules and the market place signals they were receiving. The Commission should also delay the implementation of the growth ceiling so that the base period will be the first quarter of 2002, rather than the first quarter of 2001 as currently written. Again, this would allow new switches to reach a level of maturity from which a baseline more reasonably could be drawn. These two revisions to the *Order* would accomplish the result the Commission indicated it sought in adopting an interim plan, namely, not frustrating the legitimate expectations of CLECs, their customers and vendors.

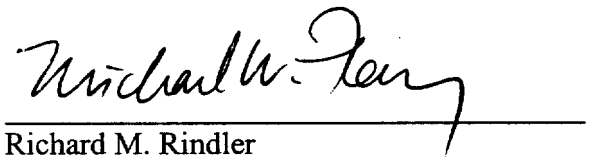
Finally, in the event the Commission neither stays the *Order* nor reschedules implementation of the growth ceiling and new market provisions, Focal, Pac-West and US LEC urge the Commission to adopt other steps to lessen the disparate impact of the current interim plan on similarly situated carriers. Again, this alternative proposal is a small change from the existing terms of the *Order*. For a CLEC that is turning up new switches, the baseline for

calculating the growth ceiling should be the national average minutes of use per switch recorded by *all* CLECs (that have exchanged traffic for at least six months prior to 2001) during the first quarter of 2001. A "new" switch subject to this rule would be any switch deployed within one year prior to and one year after the effective date of the *Order*. Given the long lead-time necessary to enter a new market, such an approach would not encourage uneconomic investment, would not encourage boosting dial-up minutes, and would lessen some of the unanticipated negative consequences of the growth ceiling.

VI. CONCLUSION

For the foregoing reasons, Focal, Pac-West, and US LEC support the Petition of CoreTel for a stay of certain provisions of the *ISP Traffic Order* pending judicial review, and request the Commission to grant the relief requested by CoreTel. If the Commission denies CoreTel's request, Focal, Pac-West, and US LEC request the Commission to grant the alternative relief as described in Section V. of this Response.

Respectfully submitted,



Richard M. Rindler
Michael W. Fleming
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

Dated: June 6, 2001

Counsel for Focal Communications Corporation, Pac-West Telecomm, Inc., and U S LEC Corp.

378557.2

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

DECLARATION OF WALLY GRIFFIN

I, Wally Griffin, pursuant to 28 U.S.C. § 1746, do hereby declare, under penalty of perjury, that the following are true and correct:

1. This declaration is made on behalf of Pac-West Telecomm, Inc. ("Pac-West") in support of its *Response to Petition of Core Communications, Inc. for Stay Pending Judicial Review.*

2. I am President and Chief Executive Officer of Pac-West, a company founded in 1980.

3. As President and Chief Executive Officer, I have knowledge of the Company's current services as well as its plans for market entry. I also have knowledge concerning Pac-West's financial information, including its past and planned investments and its actual and projected revenues.

4. Pac-West is publicly traded company listed on the NASDAQ with its corporate headquarters located in Stockton, California. Pac-West was one of the first CLECs in California and it is the only competitive provider offering local calling capability throughout the State. Additionally, the Company is an integrated communications provider providing usage-intensive customers, including Internet service providers (ISPs), medium and small businesses, and enhanced communications service providers a single source for all their telecommunications needs. Pac-West entered in the competitive telecommunications market in order to provide quality service to users that were typically ignored by historic monopoly providers.

5. At the end of first quarter of 2001, Pac-West had approximately $40 million dollars in revenue, 229,200 lines in service and 6.6 billion total minutes of usage. Pac-West provides network services to more than 90 ISPs in California, and 13,000 small and medium-sized businesses. Pac-West's primary markets have been California and Nevada.

6. In the year 2000 alone, the Company invested over $60 million in expanding its service footprint in nine western states to serve small- and medium-sized businesses, as well as ISPs.

7. The time frame for planning a roll-out of service to a new market is extensive. Pac-West's normal planning process to obtain real estate, facilities, interconnection agreements and personnel to serve new markets is typically 8-12 months.

8. Pac-West's decision to enter new markets was made knowing that the regulatory structure for reciprocal compensation payments was subject to change for traffic delivered to ISPs. What Pac-West could not anticipate is that the rules would be designed so that they severely disadvantage companies attempting to enter new markets and greatly benefit ILECs, and that for a substantial amount of traffic the rules would provide for no intercarrier compensation.

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

10. Under the new market provision adopted in the *Order*, Pac-West probably will be unable to collect intercarrier compensation for any traffic it may carry in excess of a 3:1 ratio because it terminated no minutes in its new markets during the first quarter of 2001. Despite the fact that it had yet to terminate traffic in those markets, Pac-West made significant investments to provide service there. Under its business plan, Pac-West expected to initiate service in those markets in 2001.

11. For markets where Pac-West has just begun to provide service, Pac-West will be subject to the 10% state growth ceiling. Pac-West would only need to sign one or two ISPs before its traffic was unbalanced. High volume users such as ISPs are, of course, the normal market opening targets. As a new market entrant in many markets, Pac-West would expect to rapidly grow and substantially increase the amount of minutes terminated on its network. Based on its past experience, the 10% growth ceiling will severely restrict its growth in new markets as the 10% growth ceiling does not reflect the reality of new market entry.

12. The *Order* adopted by the Commission puts Pac-West at a substantial disadvantage relative to established companies in the new markets the Company seeks to enter because its competitors can continue to collect reciprocal compensation payments for all of the traffic they terminate. In order for Pac-West to recoup its investment in the new markets that the Company intended to enter, the Company will have to increase the prices it charges for service. Established companies in new markets will be able to offer the same service at a lower price as they will continue to collect reciprocal compensation under the regulatory scheme established by the *Order*. Thus, companies like Pac-West face the stark choice of providing service at a loss in order to participate in the market and gain market share in new markets, or abandon plans for market entry. Ultimately, enforcement of this growth prohibition by the Commission will benefit only ILECs and ensure that they recapture the entire market share lost to the CLEC industry.

Executed on June 5, 2001 by:

Wally Griffin

WALLY GRIFFIN

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 JOHN BARNICLE

I, John Barnicle, pursuant to 28 U.S.C. § 1746, do hereby declare, under penalty of perjury, that the following are true and correct:

1. This declaration is made on behalf of Focal Communications Corporation ("Focal") in support of its *Response to Petition of Core Communications, Inc. for Stay Pending Judicial Review.*

2. I am the Chief Operating Officer for Focal. My business address is 200 North LaSalle Street, Chicago, IL, 60601. The facts set forth in this declaration are based on personal knowledge and I am competent to testify about them if called upon to do so.

3. I am generally familiar with the FCC's new transition mechanism for intercarrier compensation, including compensation for Internet-bound traffic. It is my understanding that one component of the new transition mechanism is a cap that limits the growth of traffic in excess of a 3:1 terminating to originating ratio that will be subject to compensation. Specifically, the amount of traffic that will be subject to compensation over the next three years will be based on the traffic subject to compensation during the first quarter of 2001, annualized and subjected to a 10% growth cap in 2001 and 2002.

4. The decision to invest in a new switch or a new market is based on a number of factors, including the expected revenue from that market. Certainly Focal was aware of and factored the downward trend of reciprocal compensation rates into its planning and investment decisions. However, when the decisions to invest in new switches were made, Focal was not aware that the FCC was considering any cap on the level of traffic that would be subject to compensation.

5. It is expensive to plan the deployment of a new switch and the roll-out of service to a new market. Focal spent more than $300 million in 2000 in capital expenditures, a portion of which was spent on expanding existing markets, and a portion of which was spent on turning up new markets to add to our footprint. On

average, Focal spends more than $15 million to bring up a brand new market, including the switch, network investment, power investment, leasehold improvements and ILEC collocation build-out.

6. The growth cap on compensable minutes, based on first quarter 2001 levels, is a dramatic departure from the assumptions underlying the investment decision to launch service in a new market. Significantly, these investment decisions must be made many months in advance of actually launching service. Launching in a new market, even by an experienced CLEC, requires a minimum of 9 to 12 months lead time as switches must be ordered, real estate secured, personnel recruited and an interconnection network built, even before the first minute of traffic traverses the switch. The lead-time may be even longer if service is to be launched in a new state, which requires certification by state and local authorities. This time frame does not even consider the delays imposed by ILECs with which Focal must have approved interconnection agreements.

7. For new switches and switches now under development, it is largely too late to reverse the investment decision that was made long before the FCC announced the cap on compensable traffic.

8. The 10% growth cap, based on first quarter 2001 traffic, will result in a significant disadvantage to Focal in any new markets and for new switches because the traffic on a new switch is necessarily below the optimum utilization level of a mature switch. As a consequence of the growth cap, Focal will be forced to terminate a significant proportion of other carriers' traffic without any compensation during the next three years in all of its newer markets. At the same time, Focal will have to pay the other carriers the full compensation rate on all traffic originated by Focal customers. The alternative would be to withdraw from providing service in certain areas or to certain customers.

9. This growth cap imposes an artificial prize squeeze on Focal in new markets and leaves it disadvantaged as compared to carriers with more mature utilization levels on their switches in these markets.

10. Based on the above, Focal does not expect that where it is adding new switching capacity, it will be able to pass on its cost of traffic termination to end users and still successfully compete with carriers in those markets who are expanding less rapidly. While Focal understood and accurately incorporated the extent of the Commission's caps on inter-carrier compensation for ISP-bound traffic into its switch purchase decisions, Focal certainly did not anticipate that the Commission would impose a disparate and negative regime on those carriers that are expanding their competitive facilities most rapidly inasmuch as encouraging competitive investment was a core goal of the 1996 Act.

June 6, 2001

John Barnicle

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

DECLARATION OF AARON D. COWELL, JR.

I, Aaron D. Cowell, Jr., pursuant to 28 U.S.C. § 1746, do hereby declare, under penalty of perjury, that the following are true and correct:

1. This declaration is made on behalf of US LEC Corp. ("US LEC") in support of its *Response to Petition of Core Communications, Inc. for Stay Pending Judicial Review.*

2. I am President of US LEC, a company founded in 1996.

3. As President, I have knowledge of the Company's current services as well as its plans for market entry. I also have knowledge concerning US LEC financial information, including its past and planned investments and its actual and projected revenues.

4. US LEC is a publicly traded company listed on the NASDAQ with its corporate headquarters located in Charlotte, North Carolina. US LEC is a switch-based competitive local exchange carrier that competes with historic monopoly providers by delivering high quality local, long distance and data services to large and mid-sized business customers in twelve states in the mid-Atlantic region, southeastern United States, and the District of Columbia.

5. As of January 1, 2001, US LEC provides service to more than 4000 medium and large-sized business customers. In the first quarter of 2001, the Company added 11,300 business trunks and 5,700 business lines.

6. US LEC invested over $100 million in 2000 in expanding its network, including adding service territories.

7. US LEC needs a minimum of nine months to enter a new market. Nine months covers the time it takes from sales forecast to switch turn-up. The timeframe can be delayed by various factors including obtaining an interconnection agreement with the ILEC, leasing transport facilities, and finding the necessary real estate and people to provide service.

8. Expanding into new markets requires a significant capital expenditure. US LEC has spent approximately $5 million for facilities for each of its most recent new markets. The expenses to activate a switch in a new market begin as soon as US LEC decides to enter the new market. This estimate does not include personnel, facility transport charges, real estate expenses, and other sales and administrative costs necessary to begin service in a new market.

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

10. When US LEC was evaluating its market expansion plans, it knew that the Commission was considering a change to the intercarrier compensation regime for ISP-bound traffic. There was, however, an expectation from the February 1999 Declaratory Ruling that some compensation would be paid to terminating carriers, even if it were at a level significantly lower than the state reciprocal compensation rate. US LEC did not realize that the Commission would impose the growth ceiling and new market restrictions of the *Order,* which will require US LEC to terminate a significant amount of new traffic without compensation.

11. US LEC expects to turn up switches in Ft. Myers, Florida and Mobile, Alabama later this month. Under the new market provision adopted in the *Order*, US LEC likely will not be paid terminating compensation for any ISP-bound traffic for those switches. Even though US LEC invested considerable sums in order to provide service in those markets, the revenue stream that US LEC calculated to sustain those investments has been dramatically impaired as a result of the *Order.*

12. The growth ceiling will also significantly, and unfairly, impair US LEC's ability to expand its service offerings in markets it recently began serving. In the seven new markets it entered in 2000, US LEC made a concerted effort to solicit non-ISP customers. As a result of the *Order*, US LEC will have a relatively small baseline, in some cases a zero baseline, from which to calculate a growth ceiling. By comparison, US LEC's competitors that solicited ISP customers in those markets in 2000, and generated significant ISP-bound minutes in the first quarter of 2001, will be able to continue to be compensated for their ISP-bound minutes, as well as grow within the *Order's* growth ceiling. They will, thus, be protected from competition from US LEC for ISP customers solely because they actively solicited ISP customers when US LEC did not.

13. The *Order* will also impair US LEC's ability to compete with other carriers in other ways. If US LEC is forced to recover its terminating switching expenses from its end users, while its competitors are compensated for terminating switching, US LEC will be at a significant pricing disadvantage. Carriers that have established businesses, but have no plans to expand service, are oddly at a competitive advantage over a company like US LEC that is still seeking customers aggressively. As a result of the *Order*, the Commission will force US LEC to either provide service at a loss, or revise its plans to enter new markets and lose most, if not all, of the investments in that market made to date. Keeping CLECs out of new markets, even if they do serve ISPs, cannot possibly promote competition.

Executed on June 6, 2001 by:

AARON D. COWELL, JR.