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FEDERAL COMMUNICATIONS COMMISSION
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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**

THE NATIONAL TELEPHONE COOPERATIVE ASSOCIATION'S PETITION FOR RECONSIDERATION

National Telephone Cooperative Association
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PETITION FOR RECONSIDERATION

The National Telephone Cooperative Association (NTCA),[1] hereby petitions the Federal Communications Commission (FCC or Commission) to reconsider its Order on Remand and Report and Order in the above-captioned proceeding.[2] The Commission improperly used the Internet service provider (ISP) traffic proceeding to establish mandatory compensation rules and rates for non-ISP traffic. This action is beyond the scope of the proceeding and in violation of the Administrative Procedure Act. Rural carriers, and other interested parties, were neither provided proper notice nor an opportunity to comment on the new rules and rates and their negative impact on rural carrier non-ISP traffic revenues.[3] The Commission should therefore

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1 NTCA is a national association of over 540 local exchange carriers that provide service primarily in rural areas. All NTCA members are small carriers that are defined as "rural telephone companies" in the Telecommunications Act of 1996 (Act). *47 U.S.C. § 151 (37).*

2 47 C.F.R. § 1.429.

3 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP Bound Traffic,* CC Docket Nos. 96-98 and 99-68, FCC 01-131,

reconsider its Order and specifically eliminate or amend the mirroring provision in its new mandatory compensation mechanism so that it does not require carriers in the process of renegotiating interconnection agreements, on or after May 15, 2001, to charge the same rates for ISP and non-ISP traffic.

I THE FCC IMPROPERLY EXTENDED ITS NEW INTERIM MANADORY ISP TRAFFIC COMPENSATION RULES AND RATES TO ALL NON-ISP TRAFFIC.

The history of this proceeding demonstrates clearly that the Commission never provided interested parties with notice and an opportunity to comment on the Commission's new rules and concerning non-ISP bound traffic. On February 26, 1999, the FCC released a Declaratory Ruling and Notice of Proposed Rulemaking addressing the issue of inter-carrier compensation for the delivery of telecommunications traffic to an ISP.[4] In the *ISP Reciprocal Compensation Ruling,* the Commission determined that ISP-bound calls are not local calls subject to reciprocal compensation under section 251(b)(5) of the Act.[5] The Administrative Procedure Act requires that governmental agencies, including the FCC, provide interested parties with notice and an opportunity to comment on rules before they are adopted.[6] In the Notice of Proposed Rulemaking (NPRM) portion of the ruling, however, the Commission sought comment only on

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Published in the Federal Register on May 15, 2001, (Order).

4 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, 14 FCC Rcd 3689 (1999) (*ISP Reciprocal Compensation Ruling*).

5 Section 251(b)(5) requires carriers to negotiate and establish reciprocal compensation arrangements for the transport and termination of telecommunications calls to and from each carrier's network to the other's network within a local calling area.

rules regarding "inter-carrier compensation for ISP-bound traffic."[7] There was no indication in the *ISP Reciprocal Compensation Ruling* or NPRM that the Commission was extending the proceeding to consider rules concerning inter-carrier compensation for non-ISP traffic.

On March 24, 2000, the United States Court of Appeals for the D.C. Circuit vacated and remanded certain provisions of the FCC's *ISP Reciprocal Compensation Ruling*.[8] The Court ruled that the Commission's jurisdictional analysis in determining whether an ISP-bound call is subject to the reciprocal compensation under section 251(b)(5) was inadequately justified and remanded the case back to the FCC for further explanation.

On June 23, 2000, the FCC released a Public Notice seeking comment on the remand of the Commission's *ISP Reciprocal Compensation Ruling*. In the Public Notice, the FCC asked parties to comment specifically on the "jurisdictional nature of ISP-bound traffic" and "any new or innovative inter-carrier compensation arrangements for ISP-bound traffic."[9] Nothing in this Public Notice indicated that the Commission was considering new rules and rates for recovering the costs associated with non-ISP bound traffic.

On April 27, 2001, the FCC released its Order on Remand and Report and Order on the jurisdictional nature of ISP-bound traffic and inter-carrier compensation for telecommunications

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6 5 U.S.C. § 553.

7 *ISP Reciprocal Compensation Ruling*, ¶¶ 28-36.

8 *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

9 Public Notice, 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, FCC 00-227 (rel. June 23, 2000).

traffic delivered to ISPs. In the Order, the Commission reclassified ISP-bound traffic as "information access" as defined by section 251(g) of the Act, and removed it from the scope of telecommunications traffic subject to reciprocal compensation under section 251(b)(5). The FCC also indicated that it is still considering the most efficient cost recovery mechanism for ISP-bound traffic and may adopt "bill and keep"[10] as that mechanism in the future. Pending the FCC's final decision on the most efficient recovery mechanism, the Commission adopted a 36-month interim cost recovery mechanism for ISP-bound traffic. The 36-month transition plan includes the following provisions:

1. **Transitional Rates.** For the first six months beginning on May 15, 2001, inter-carrier compensation for ISP-bound traffic will be capped at a rate of $00.0015 per-minute. For the next 18 months the rate will be capped at $00.0010 per-minute, and $00.007 per-minute thereafter.[11]

2. **Revenue Cap.** A cap on total ISP-bound traffic minutes for which a local exchange carrier (LEC) may receive in compensation equal to the number of ISP-bound traffic minutes that the LEC was previously entitled to compensation, plus a 10 percent growth factor.[12]

3. **3:1 Ratio.** A rebuttable presumption that traffic by one carrier to another carrier that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic and subject to the 36-month interim compensation mechanism and rates.[13]

4. **Bill and Keep for New Carriers.** On or after May 15, 2001, when a new carrier enters a market or an existing carrier expands its market, carriers are required to exchange ISP-bound traffic on a bill and keep basis (i.e., free of charge) during the 36-month interim

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10 Bill and keep refers to an arrangement in which neither of the two interconnecting networks charges the other for terminating traffic that originates over the other's network.

11 Order, ¶ 78.

12 Order, ¶ 78.

13 Order, ¶ 79.

period.[14]

5. **CMRS/MTA Provision.** A requirement that telecommunications traffic between a LEC and a commercial mobile radio service (CMRS) provider that originates and terminates calls within the same Major Trading Area (MTA) is subject to section 251(b)(5), and consequently the Commission's new rules and rates apply to this telecommunications traffic.[15]

6. **Renegotiated Contract Provision.** The 36-month interim compensation rate regime applies as carriers negotiate expired or expiring interconnection agreements subject to section 251(b)(5).[16]

7. **Mirroring Provision.** Requires that the 36-month rate caps for ISP-bound traffic apply only if the incumbent LEC offers to exchange all of its local exchange traffic, including non-ISP traffic, subject to section 251(b)(5) at the same rate.[17]

It is the combined effect of the renegotiated contract provision and the mirroring provision in this order that goes beyond the scope of this proceeding. The implementation of these two rules within the 36-month ISP compensation plan improperly extends the FCC's new ISP transitional rates to non-ISP traffic. For example, if a rural LEC enters into a renegotiated interconnection agreement with an existing carrier on or after May 15, 2001, the new capped, transitional ISP traffic rates apply to the rural LEC's ISP-traffic, as required under the renegotiated contract provision.[18] Because the rural LEC is now required to apply the new

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14 Order, ¶ 81.

15 Order, ¶ 89, footnote 177, and Appendix B – Final Rules.

16 Order, ¶ 82. This provision does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. Interconnection agreements that permit or require renegotiation on the basis of changes in the law may be altered to reflect this interim recovery mechanism according to the terms of the existing interconnection agreement. The effect of the order on existing agreements therefore depends on the particular terms of the agreement.

17 Order, ¶ 89.

transitional rates to its ISP traffic, it is also required under the mirroring provision to apply these same rates to its non-ISP traffic. The new transitional ISP rates are, in many instances, lower than rural LEC reciprocal compensation rates for non-ISP traffic. The mirroring provision therefore requires rural LECs renegotiating the reciprocal compensation provision in their existing interconnection agreements to reduce significantly their rates for non-ISP traffic. These LECs are also therefore prevented from renegotiating separate non-ISP rates for LEC-LEC, LEC-CMRS, and LEC-CLEC[19] based on their costs associated with non-ISP bound traffic. Consequently, the new rules and rates will have a confiscatory effect on many rural LECs renegotiating contracts over the next 36 months because the required transitional rates will prevent them from recovering their costs associated with non-ISP traffic.

The FCC's ruling has a binding and negative effect on many small, rural telephone companies by reducing their rates on non-ISP bound traffic and impeding their ability to recover their cost associated with this traffic. The Order clearly constitutes a substantive rulemaking and prescribes new rates for non-ISP traffic.

The Administrative Procedure Act requires that the FCC provide interested parties with notice and an opportunity to comment on the rules before they are adopted.[20] The adequate notice requirement dictates that the Commission must "make its views known to the public in a

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18 Order, ¶ 82 and footnote 154.

19 Competitive Local Exchange Carrier (CLEC).

20 5 U.S.C. § 553

concrete and focused form so as to make criticism or formulation of alternative possible."[21] The FCC never made it known in this proceeding, namely, that it would establish new rules and rates that would apply to a carrier's non-ISP bound traffic. The FCC's failure to provide notice and an opportunity to comment violates the notice requirement provisions in 5 U.S.C. § 553 and constitutes an abuse of discretion under section 5 U.S.C. § 706.[22]

III CONCLUSION

The Commission should eliminate or amend the mirroring provision so that it does not require carriers in the process of renegotiating interconnection agreements, on or after May 15, 2001, to charge the same rates for ISP and non-ISP traffic. Decisions involving non-ISP inter-carrier compensation issues should be reserved for the Commission's pending Notice of Proposed Rulemaking which considers and requests comment on the development of a unified inter-carrier compensation regime, initial comments are to be submitted by August 17, 2001.[23]

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21 *Home Box Office v. FCC,* 567 F.2d 9, 36 (D.C. Cir. 1977): *USTA v. FCC*, 28 F.3d 1232 (1994).

22 *Clever Idea Co. v. Consumer Product Safety Com.,* 385 F. Supp. 688 (1974); *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749 (2001).

23 *In the Matter of Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132 (rel. April 27, 2001).

This is the proceeding in which the Commission has properly provided notice and an opportunity for carriers to comment on the issue of inter-carrier compensation for the delivery of non-ISP traffic.[24]

Respectfully submitted,

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

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24 The changes in the FCC's rules, specifically the CMRS/MTA provision, also negate the "local service area" geographic criterion that currently defines the scope of Section 251(b)(5) traffic. This provision revokes a state commission's authority to determine local service areas. This change also means that Extended Area Service (EAS) traffic will come under Section 251(b)(5) regardless of a state commissions previous treatment. While CMRS providers currently pay a relatively low compensation rate for termination of MTA traffic, the new FCC rules require the same compensation rate treatment for all "reciprocal compensation." This means that CMRS providers may now be afforded the opportunity to terminate MTA traffic without any termination compensation under a bill and keep regime. The disparate treatment for CMRS carriers is currently unfair and transitioning from an already low compensation rate to no compensation rate will further aggravate this inequity. The FCC should therefore also reconsider and amend this rule so that the disparate treatment afforded CMRS MTA traffic does not encourage regulatory arbitrage and undermine a LEC's ability to recover its costs through access charges.

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Petition for Reconsideration of the National Telephone Cooperative Association in CC Docket No. 96-98, CC Docket No. 99-68, FCC 01-131 was served on this 14th day of June 2001 by first-class, U.S. Mail, postage prepaid, to the following persons

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