DOCKET FILE COPY ORIGINAL

RECEIVED

JUN 14 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

PETITION FOR RECONSIDERATION

Choctaw Telephone Company; Electra Telephone Company; Haxtun Telephone Company; MoKan Dial Telephone Company; Park Region Mutual Telephone Company; South Dakota Independent Telephone Coalition; Tatum Telephone Company; and Walnut Hill Telephone Company, Inc. ("the Petitioners"), by their attorneys and pursuant to Section 1.106 of the Commission's Rules, petition the Commission for reconsideration of the mirroring provision adopted at paragraphs 89 through 94 of its Order on Remand and Report and Order (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996), CC Docket Nos. 96-98 and 99-68, FCC 01-131, released April 27, 2001 ("Order"). This order appeared in the Federal Register on May 15, 2001 (66 Fed. Reg. 26800-06).

The Petitioners support the Commission's efforts to eliminate the gaming, profiteering, regulatory arbitrage and uneconomical results produced by the application of the Section 251(b)(5) reciprocal compensation provisions developed for traditional voice traffic to high-volume, one-directional traffic bound via Internet Service Providers ("ISP") to Internet destinations around the world. Petitioners agree with the Commission that ISP-bound traffic should not be subject to the reciprocal compensation obligations of Section 251(b)(5), but should be regulated and compensated instead under Section 201 of the Communications Act.

However, the Commission's interim compensation mechanism for ISP-bound traffic should not be expanded via a "mirroring" requirement to encompass the traditional two-way voice and data traffic exchanged among incumbent local exchange carriers ("ILECs"), competitive local exchange carriers ("CLECs") and Commercial Mobile Radio Service ("CMRS") carriers. The "mirroring" requirement adopted in paragraph 89 of the Order should be reconsidered and eliminated because it: (a) violates the notice requirements of Sections 553(b) and (c) of the Administrative Procedure Act, 5 U.S.C. Secs. 553(b) and (c); (b) unlawfully invades and preempts the statutory jurisdiction of state commissions to arbitrate and approve cost-based rates for the transport and termination of Section 251(b)(5) traffic; and (c) improperly and inequitably disrupts existing reciprocal compensation arrangements.

Violation Of Administrative Procedure Act Notice Requirements

Sections 553(b) and (c) of the Administrative Procedure Act, 5 U.S.C. § 553(b) and (c), require the Commission and other administrative agencies to give interested parties general notice of the terms or substance of proposed rules, and an opportunity to participate in the rule making proceedings regarding such rules through the submission of written data, views, or arguments.

The Commission 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), FCC 00-227 (June 23, 2000), that initiated the present phase of the captioned rule making was addressed expressly and exclusively to the regulation of ISP-bound traffic, and particularly to the compensation mechanisms applicable thereto. The Commission requested comment solely upon the issues identified by the U.S. Court of Appeals for the D.C. Circuit in its

March 24, 2000 order vacating the Commission's February 26, 1999 Declaratory Ruling regarding compensation for ISP-bound traffic. The Public Notice requested specific comment on: (a) the jurisdictional nature of ISP-bound traffic; (b) the scope of the reciprocal compensation requirement of Section 251(b)(5); (c) the relevance of the concepts of "termination," "telephone exchange service," "exchange access service," and "information access," and (d) new or innovative inter-carrier compensation arrangements for ISP-bound traffic that parties may be considering or may have entered into. The Public Notice offered no express or implied indication that the Commission would consider the direct or indirect limitation or reduction of reciprocal compensation rates approved or arbitrated by state commissions for traditional voice and data traffic. Petitioners would have participated in the captioned proceeding if they had known that the Commission was considering the imposition of caps that will disrupt their existing reciprocal compensation arrangements for traditional voice and data traffic. They were lulled into non-participation by the Public Notice's exclusive focus upon ISP-bound traffic.

In Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 533 (D.C. Cir. 1982), cert. denied, 459 U.S. 835 (1982), the court found that a second round of comments was required when the difference between proposed and final agency rules deprived parties of notice. Likewise, reviewing courts have ruled that data submitted after the close of the comment period should only be considered by an agency when the public was made aware of it and afforded a fair opportunity to respond to it. See Air Pollution Control Dist. v. EPA, 739 F.2d 1071 (6th Cir. 1984); Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Commission, 569 F.2d 831, 842 (5th Cir. 1978).

The Commission should not have adopted an eleventh hour "mirroring" requirement for non-ISP-bound traffic without giving interested parties notice and a fair opportunity to comment. It should vacate paragraphs 89 through 94 of the Order, and consider a "mirroring" requirement only after a further rule making in which carriers, state commissions and other interested parties are afforded a fair opportunity to participate.

Interference With State Jurisdiction
Over Section 251(b)(5) Reciprocal Compensation Rates

Sections 252(b), (c) and (e) of the Communications Act give state commissions jurisdiction over the arbitration and approval of interconnection agreements, including reciprocal compensation agreements. Section 252(e)(5) of the Act allows the Commission to assume these state commission responsibilities only if and when a state commission fails to carry them out.

Section 252(d)(2) gives state commissions jurisdiction to determine whether the charges for transport and termination of Section 251(5)(b) traffic in arbitrated and approved interconnection agreements are just and reasonable. Section 252(d)(2)(A)(ii) requires state commissions to determine transport and termination costs on the basis of a reasonable approximation of the additional costs of terminating Section 251(b)(5) traffic. Section 252(d)(2)(B)(i) gives state commissions the discretion to employ bill-and-keep arrangements for Section 251(b)(5) traffic.

Pursuant to these statutory provisions and the Commission's implementing regulations, (47 C.F.R. Secs. 51.701 to 51.717), state commissions have arbitrated and/or approved numerous agreements between ILECs and CMRS carriers, and between ILECs and CLECs, specifying reciprocal compensation for the transport and termination of traditional voice and data traffic. The Commission's "mirroring" requirement preempts and vacates these state commission determinations by requiring an ILEC that elects to use the new interim caps for ISP-bound traffic to reduce its termination rates for Section 251(b)(5) traffic to the same levels (first 0.15 cent, then 0.10 cent, and then 0.07 cent per minute of use). Even if the "mirroring" requirement is deemed to affect only Section 251(b)(5) reciprocal compensation charges in agreements to be renewed or extended at a future date, it still operates to deprive state commissions of their right to determine Section 251(b)(2) reciprocal compensation rates for ILECs that "elect" to use the capped rates for ISP-bound traffic.

Petitioners recognize that the "mirroring" requirement gives ILECs the "option" to retain their state commission-approved rates for Section 251(b)(5) reciprocal compensation if they agree to pay the same rates to the CLECs or other carriers terminating their ISP-bound traffic. However, in light of the regulatory arbitrage and economic distortions caused by ILEC payment of per-minute termination charges for Internet connections that may last for hours, days or weeks on lines for which they receive only flat-fee monthly service charges, ILECs have no more "freedom" to choose the non-capped option than store clerks have "freedom" to refuse to open cash registers when armed robbers point guns at them. In any event, whether the Commission imposes its capped ISP-bound traffic rates on all Section 251(b)(5) traffic terminated by ILECs, or whether ILECs can "choose" whether or not the Commission's capped rates are imposed upon their Section 251(b)(5) terminating traffic, state commissions will be deprived of their express statutory jurisdiction under Section 252(b), (c), (d) and (e) to determine and approve these rates.

Likewise, state commissions have express statutory jurisdiction and discretion in Section 252(d)(2)(B)(i) to adopt bill-and-keep arrangements where them deem them appropriate. If a state commission has determined to require bill-and-keep arrangements for ISP-bound traffic, but not for reciprocal compensation arrangements involving traditional voice and data traffic, the Commission has no statutory authority to employ "mirroring" requirements or other devices to override the state commission's discretion.

Therefore, the Commission should reconsider and eliminate the Order's "mirroring" requirement on the ground that it impairs the express statutory jurisdiction of state commissions to determine and approve just and reasonable charges for the transport and termination of Section 251(b)(5) traffic.

Disruption of Existing Reciprocal Compensation Arrangements

Even if it had been adopted pursuant to appropriate administrative notice and even if it did not override the statutory jurisdiction of state commissions over Section 251(b)(5) traffic, the eleventh hour "mirroring" requirement should still be reconsidered and eliminated because it arbitrarily and capriciously disrupts and distorts negotiated, arbitrated and approved reciprocal compensation rates.

As indicated above, Section 252(d)(2)(A)(ii) of the Communications Act requires state commissions to determine reciprocal compensation charges for Section 251(b)(5) traffic on the basis of a reasonable approximation of the additional costs of terminating such traffic. Section 51.705 of the Commission's Rules requires these charges to be established, at the election of the state commission, on the basis of: (a) forward-looking economic costs determined by a cost study reviewed and approved by the state commission; (b) default proxies set by the Commission (but only until the state commission establishes its own rates); or (c) bill-and-keep arrangements.

Notwithstanding the Commission's acknowledgement that "there is no exact science to setting rate caps" (Order, para. 84), the "mirroring" requirement imposes the Commission's nationwide caps on charges for terminating ISP-bound traffic on a variety of reciprocal compensation arrangements for traditional voice and data traffic. Some of these arrangements were freely negotiated between ILECs and CMRS carriers or CLECs, with the reciprocal compensation charges comprising part of the give-and-take involving rates, facilities, points of interconnection, collocation, and other matters. Other arrangements were reached and approved after lengthy and expensive preparation and litigation with respect to forward-looking cost studies presented by the ILEC. In many of these instances, the CMRS carriers and CLECs were allowed to adopt the ILEC's termination charges for "symmetry" purposes without being required to demonstrate the nature and size of their own termination costs; in others, the CMRS carriers and CLECs presented their own cost studies and sought state commission approval of their own termination rates. The "mirroring" requirement unilaterally revises these negotiated agreements and/or disregards the ILEC cost studies and state commission determinations. It imposes the Commission's capped charged for terminating ISP-bound traffic (0.15 cent/0.10 cent/0.07 cent per minute) upon all traffic terminated by the affected ILECs without regard to actual costs or circumstances. In most cases, the capped rate constitutes a substantial reduction from the rates previously determined as a result of negotiations, cost studies and state commission proceedings.

Moreover, the "mirroring" requirement appears to tilt the playing field against the affected ILECs by requiring them to reduce their termination charges for traditional voice and data traffic to the caps for ISP-bound traffic, while allowing the CMRS and CLEC parties to such arrangements to retain their prior termination rates. For example, assume that ILEC XYZ has a state commission-approved interconnection agreement with CMRS Carrier ABC providing for them to exchange traffic at a symmetrical terminating rate of 3.0 cents per minute (based upon ILEC XYZ's forward-looking termination costs). The "mirroring" requirement will require XYZ to reduce its charge for terminating ABC's traffic from 3.0 cents per minute to 0.15 cent per minute if XYZ elects to use the 0.15 cent rate for (ISP-bound traffic. However, unless the interconnection agreement or state commission order expressly requires that terminating charges between the parties remain symmetrical at all times, the "mirroring" requirement does not appear to require ABC to reduce its termination charge. Hence, the "mirroring" requirement may arbitrarily and inequitably alter the negotiated and/or state-approved relationship between XYZ and ABC by requiring XYZ to continue to pay ABC 3.0 cents per minute for terminating its traffic while receiving only 0.15 cent per minute for terminating ABC's traffic. Needless to say, this would bestow a wholly unfair and unwarranted competitive advantage upon ABC.

Hence, even if it were lawful from a procedural and jurisdictional standpoint, the "mirroring" requirement would remain an unwise and disruptive policy choice. It should be reconsidered and eliminated.

Conclusion

Petitioners support the Commission's attempts to limit the regulatory arbitrage and economic distortions caused by the unwarranted application of reciprocal compensation principles to ISP-bound traffic for which they were not intended. The Commission has reasonably and properly determined that ISP-bound traffic constitutes "information access" that differs from the traditional voice and data traffic covered by Section 251(b)(5), and that is not subject to reciprocal compensation requirements. However, it has erred by introducing an eleventh hour "mirroring" requirement that disregards the distinctions between ISP-bound traffic and traditional voice and data traffic, and forces ILECs to apply the caps developed for "information access" traffic to the wholly separate class of Section 251(b)(5) traffic. This "mirroring" requirement should be reconsidered and eliminated because it: (a) violates the notice requirements of Sections 553(b) and (c) of the Administrative Procedure Act; (b) improperly invades and preempts the statutory jurisdiction of state commissions to arbitrate and approve cost-based rates for the transport and termination of Section 251(b)(5) traffic; and (c) improperly and inequitably disrupts existing reciprocal compensation arrangements.

Respectfully submitted.
Choctaw Telephone Company
Electra Telephone Company
Haxtun Telephone Company
MoKan Dial Telephone Company
Park Region Mutual Telephone Company
South Dakota Independent Telephone Coalition
Tatum Telephone Company
Walnut Hill Telephone Company, Inc.

By____________________
Benjamin H. Dickens, Jr.
Gerard J. Duffy
Mary J. Sisak

Blooston, Mordkofsky, Dickens
Duffy & Prendergast
2120 L Street, N.W. (Suite 300)
Washington, DC 20037
(202) 659-0830

Dated: June 14, 2001

CERTIFICATE OF SERVICE

I, Douglas W. Everette, hereby certify that I am an attorney with the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, and that a copy of the foregoing **Petition for Reconsideration** has been served by first class mail or hand delivery this 14th day of June, 2001, to the persons listed below.

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W. – Suite TW-B204
Washington, D.C. 20554

Tamara Preiss
Common Carrier Bureau
Competitive Pricing Division
Federal Communications Commission
445 Twelfth Street, S.W.--Suite 5-A232
Washington, D.C. 20554

International Transcription Service
Federal Communications Commission
445 Twelfth Street, S.W.--Suite CY-B402
Washington, D.C. 20554

Douglas W. Everette
Douglas W. Everette