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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

OPPOSITION OF VOICESTREAM WIRELESS CORPORATION TO PETITIONS FOR RECONSIDERATION

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SUMMARY

Several rural LECs petition the Commission for reconsideration of the Mirroring Rule it adopted in the *ISP Order* on the grounds that the Commission, in disregard of the APA, failed to provide adequate notice of its consideration of a requirement that carriers that adopt the caps for ISP traffic will also have to apply them to Section 251(b)(5) traffic.

There was ample evidence in the record of the Commission's consideration of the possible adoption of a mirroring rule, and that the rural LECs had both actual and constructive notice of the Commission's intention. First, several leading rural LEC trade associations actively engaged in *ex parte* discussions with the Commission regarding the specific issue of the Mirroring Rule. One such association, the USTA, actually proposed that the Commission adopt a mirroring rule, going so far as to suggest a bill-and-keep approach for all Section 251(b)(5) traffic, including wireless traffic. Further, the record is replete with discussions concerning various network architectures, calling patterns, costs, and cost structures – with respect to both ISP traffic and Section 251(b)(5) traffic. The discussions of these matters in the record provides ample notice to all parties that the Commission could readily adopt a rule in the *ISP Order* that implicated Section 251(b)(5) traffic as well ISP traffic. Moreover, during the pendency of this proceeding, both ISP traffic and Section 251(b)(5) traffic have been commonly accorded the same treatment under state commission rules.

The rural LECs' Petitions represent a gluttonous attempt to have their cake and eat it too. They wish to continue to price-gouge CMRS carriers by forcing them to pay reciprocal compensation rates up to five-to-ten times the Commission-mandated rate

caps, while continuing to terminate much of their own traffic effectively under a bill-and-keep regime. The Commission should reject these self-serving challenges to the Mirroring Rule of the *ISP Order*.

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OPPOSITION OF VOICESTREAM WIRELESS CORPORATION TO PETITIONS FOR RECONSIDERATION

VoiceStream Wireless Corporation ("VoiceStream"), by its undersigned counsel, submits this opposition in response to several Petitions for Reconsideration ("Petitions") filed by rural local exchange carriers ("rural LECs")[1] of the Federal Communications Commission's ("Commission's") *Order on Remand and Report and Order*[2] in the above-captioned proceeding. Among other things, the *ISP Order*: (1) caps the reciprocal compensation rates that local exchange carriers ("LECs") may charge each other to transport traffic that terminates to Internet Service Providers ("ISP traffic"); (2) establishes a three-year phase-down period for these rates; and finally, (3) adopts a mirroring rule that establishes the same rates for ISP traffic and local telecommunications (*e.g.* "Section 251(b)(5)") traffic (the "Mirroring Rule") for an incumbent local exchange carrier ("ILEC") that chooses to adopt rate caps for ISP traffic. Under the

[1] The groups of rural LECs who filed Petitions include: (1) the Independent Alliance on Inter-Carrier Compensation ("Alliance"); (2) Choctaw Telephone Company, Electra Telephone Company, Haxtun Telephone Company, McKan Dial Telephone Company, Park Region Mutual Telephone Company, South Dakota Independent Telephone Coalition, Tatum Telephone Company, and Walnut Hill Telephone Company, Inc. (collectively "Choctaw"); and the National Telephone Cooperative Association ("NTCA").

[2] *Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP Traffic*, FCC 01-131, CC Docket Nos. 99-98 and 99-68 (rel. Apr. 27, 2001) (*"ISP Order"*).

Mirroring Rule, the rate caps apply to Section 251(b)(5) traffic only if an ILEC also adopts the rate caps for ISP traffic.

I. Introduction

Various rural LEC coalitions seek reconsideration of the *ISP Order*, contending that the Commission exceeded the scope of this proceeding by also applying the rate cap to Section 251(b)(5) traffic.[3] They argue that this aspect of the proceeding lacked appropriate notice as required by the Administrative Procedures Act ("APA") since there was an insufficient record for the Commission to address reciprocal compensation for non-ISP traffic.[4] The rural LECs are wrong. The record contains more than ample notice to the rural LECs that the Commission was considering adopting a reciprocal compensation plan that would also encompass Section 251(b)(5) traffic. In fact, the leading ILEC and rural LEC trade associations – the United States Telecom Association ("USTA") and the National Telephone Cooperative Association ("NTCA") – were largely responsible for creating a record on this topic because they actually discussed the Mirroring Rule with the Commission in the months before it issued the *ISP Order*.

Adoption of the Mirroring Rule is essential to any fair resolution of the ISP traffic issue. Indeed, THE USTA was responsible for proposing the Mirroring Rule as a *quid pro quo* enabling the Commission to adopt the rate caps for ISP traffic. Any other solution would have resulted in ILECs receiving a one-sided revenue windfall for non-ISP intercarrier traffic, while CLEC revenues for ISP traffic would be cut drastically. Moreover, even if the Commission had not given specific advance notice of consideration of a mirroring rule in the *Public Notice*,[5] the Commission was careful to adopt a rule that specifically protected the interests of the rural LECs.

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[3] Alliance Petition at 4-6 and NTCA Petition at 3-4.
[4] Alliance Petition at 3 and NTCA Petition at 3-5.

Most importantly, the *status quo ante* of the rural LECs has not changed at all. Thus, the Petitions represent a transparent effort by the rural LECs to ensure that they retain the ability to charge CMRS carriers indefensibly high non-cost-based rates for reciprocal compensation while also adopting ISP traffic rate caps. VoiceStream urges the Commission to reject this "have our cake and eat it too" approach of certain rural LECs and deny the rural LECs' Petitions that challenge the Mirroring Rule of the *ISP Order*.

II. The Record Contains Ample Notice to All Parties of the Commission's Consideration of the Mirroring Rule.

A. The Rural LECs Had Actual Notice of the Commission's Final Rule.

The rural LECs uniformly contend that the Commission violated requirements of the APA[6] by failing to provide general notice to interested parties of the terms or substance of the proposed rules and by denying them an opportunity to participate adequately in the rulemaking process.[7] Their argument is disingenuous, to say the least. The rural LECs feign surprise that the Commission has proposed a mechanism that allows the ILECs voluntarily to apply the same reciprocal compensation rate to both ISP traffic and Section 251(b)(5) traffic.[8] Their astonishment is misplaced since the record discloses that LECs had *actual* notice of the Commission's consideration of the Mirroring Rule.

Like other Commission rulemakings, the *Public Notice* explicitly articulated the "permit but disclose" status of this proceeding, allowing interested parties to engage in *ex parte* discussions with the Commission on the subject matter of reciprocal compensation.[9] The

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[5] *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, 1999 ("*Public Notice*").

[6] 5 U.S.C. § 553(b) and (c).

[7] Alliance Petition at 2-7, Choctaw Petition at 2, and NTCA Petition at 3-5.

[8] Alliance Petition at 2, Choctaw Petition at 1, and NTCA Petition at 1.

[9] *Public Notice* at 1.

Mirroring Rule did not suddenly appear out of thin air. Between the end of the official comment period (August 4, 2000) and the release of the *ISP Order*, many parties – including rural LEC trade associations – were extremely active lobbying the Commission on the issue, supporting and recommending various iterations of the rule that the Commission ultimately adopted. Publicly available summaries of the *ex parte* discussions that rural LEC trade associations had with the Commission on this matter completely debunk the notion that the rural LECs were unwittingly ambushed by the Commission's adoption of the Mirroring Rule.

The *ex parte* activity regarding the Mirroring Rule began as early as December 21, 2000, when the Association for Local Telecommunications Services ("ALTS") filed a written *ex parte*. In an accompanying letter, the ALTS and the Competitive Telecommunications Association ("CompTel") indicated they were aware that the Commission was considering the adoption of a bill-and-keep mechanism for "reciprocal compensation" – but not merely for ISP traffic alone. They further indicated that they understood the "Chairman's current plan"[10] to include a phase-down mechanism and an ultimate rate structure that "would apply to ISP traffic as well as all other traffic, and *not distinguish between the two in any way*."[11]

Although the rules the Commission adopted in its April 2001 *ISP Order* are not exactly identical to those discussed in the ALTS *ex parte*, as early as December 2000, it was commonly known that the Commission was actively contemplating a reciprocal compensation mechanism that applied equally to ISP traffic *and* Section 251(b)(5) traffic. Moreover, the differences between the ultimate plan and the proposal that the ALTS and the CompTel understood to be on the table in December 2000 – combined with the continued *ex partes* by interested parties –

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[10] Letter from John D. Windhausen, Jr., President, ALTS and H. Russell Frisby, Jr., President, CompTel to Dorothy Atwood, Chief, Common Carrier Bureau, Federal Communications Commission (December 18, 2000) ("ALTS Letter") at 1. The ALTS Letter is attached hereto as Exhibit 1.

clearly indicate that the Commission considered a range of alternatives between August 2000 and April 2001.[12]

The trade associations representing the rural LECs likewise were very active in presenting their views on this matter to the Commission on an *ex parte* basis. On January 10, 2001, the USTA filed an *ex parte* letter to Chairman Kennard in which it supported a plan that explicitly included a mirroring rule:

> USTA supports a reciprocal compensation solution that would *condition the availability of bill and keep for dial-up ISP-bound traffic on the availability of bill and keep for all local traffic,* including wireless traffic. Under this approach, a local exchange carrier (LEC) could elect bill and keep for its interconnection arrangements for dialup ISP-bound traffic. Having made the election for bill and keep, the LEC would be required to offer bill and keep for all local traffic, including wireless traffic.[13]

This letter establishes that at least as of January 2001, the rural LECs were aware that one of their leading trade associations was advocating that the Commission adopt a mirroring provision that would apply equally to wireless traffic. The USTA also sought to protect rural LEC interests by making the adoption of rate caps at the option of each ILEC:

> Absent making the election for bill and keep for dial-up ISP-bound traffic, *reciprocal compensation would remain an option* (subject to negotiation, mediation or arbitration between an ILEC and a

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[11] ALTS Letter at 2 (emphasis added).

[12] Indeed, it appears that in response to the entreaties of various trade associations representing the rural LECs, that the Commission moved much closer to adopting a bill-and-keep regime for the exchange of both ISP traffic and Section 251(b)(5) traffic. It stopped short of that end result, however, and instead adopted *interim* rules in the *ISP Order*, leaving final resolution of the matter to a rulemaking it concurrently issued. (*See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (rel. April 27, 2001) ("*Unified Intercarrier Compensation NPRM*"). If the rural LECs are opposed to bill-and-keep reciprocal compensation, they have ample opportunity to state their position by filing comments on August 21, 2001, in response to the *Unified Intercarrier Compensation NPRM*. As with the adoption of the transition rules in the *ISP Order*, they also will have the opportunity to discuss matters with the Commission on an *ex parte* basis.

[13] Letter from Gary Lytle, Interim President and CEO, USTA, to Hon. William Kennard, Chairman, Federal Communications Commission (January 10, 2001) ("USTA Letter") at 1 (emphasis added). The USTA Letter is attached hereto as Exhibit 2.

> CLEC) for ISP traffic, and the LEC would not be obligated to offer bill and keep for local traffic or wireless traffic.[14]

Of particular significance to the Petitioners' claims of inadequate notice, the USTA letter confirms that the mirroring policy it was proposing to the Commission was the result of internal deliberations to meet the needs of its rural LEC members:

> I believe that this optional bill and keep approach would address many of the spurious claims raised by those that have opposed fixing the reciprocal compensation problem while *avoiding unintended problems for many rural companies that have unique traffic flows.*[15]

Rural LEC members of the USTA were keenly aware of both the Commission's consideration of a mirroring provision for Section 251(b)(5) traffic, and the efforts that the USTA had made on behalf of rural ILECs to protect their reciprocal compensation revenues. To the extent that individual members disagreed with the USTA's analysis that the plan would benefit them, they had more than adequate opportunity to clarify their concerns directly with the Commission: Certain rural LECs and trade associations did so.

For example, two months later, in March 2001, representatives of the NTCA participated in a series of *ex parte* meetings with Commission Staff concerning reciprocal compensation issues. The NTCA advocated its position that "[i]f the Commission decides on a transition to 'bill and keep,' it should *limit its decision to Internet bound traffic.*"[16] This *ex parte* again confirms actual notice to the NTCA and its rural LEC members that the Commission was considering a mirroring rule, and it documents their active efforts to oppose adoption of such a rule. Yet, the NTCA and its member companies incredibly claim in their Petition that "[r]ural

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[14] USTA Letter at 1 (emphasis added).

[15] *Id.* (emphasis added).

[16] Letter from Daniel Mitchell, Senior Regulatory Counsel, NTCA, to Magalie R. Salas, Secretary, Federal Communications Commission, March 12, 2001 ("NTCA Letter") (emphasis added"), at 2. The NTCA Letter is attached hereto as Exhibit 3.

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."[17] the NTCA's prior ex parte meetings directly contradict this assertion with the Commission on this very issue.

Of the 100 *ad hoc* members of the so-called "Independent Alliance of Inter-Carrier Compensation" (the "Alliance"), 63 are members of THE USTA and 66 are members of the NTCA, according to the membership records of these trade associations.[18] Two of the eight parties (25%) joining with Choctaw Telephone Company's ("Choctaw's") Petition are also members of THE USTA.[19] Further, there is significant overlap between the memberships of the USTA and the NTCA. As the Petitioners obviously realize, the opportunity to "comment" in an administrative proceeding does not end with the filing of formal reply comments, and the individual companies – like their trade associations – were on notice that the Commission was considering a range of solutions. As Choctaw itself notes:

> 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 the proposed rules, and an opportunity to participate in the rule making proceedings regarding such rules through the submission *of written data, views, or arguments.*[20]

Clearly, as members of the USTA and the NTCA, the rural LECs were actively engaging in *ex parte* presentations with the Commission and were involved in the formulation of reciprocal compensation policy.[21] The rural LECs were well aware of the Mirroring Rule that the USTA

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[17] NTCA Petition at 1.

[18] *See* http://www.usta.org/memlst.html and http://www.ntca.org/about/membership/membersites.html.

[19] *E.g.*, Park Region Mutual Telephone Company and Tatum Telephone Company.

[20] Choctaw Petition at 2 (emphasis added).

[21] The Alliance's statement that neither it "nor its members have directly participated previously in this proceeding" (Alliance Petition at 2) is only half-true. Both in the USTA and the NTCA have had active roles, and the majority of Alliance members belong to both associations.

proposed to the Commission in January 2001 and had ample opportunity to submit "written data, views, or arguments" to the Commission. And, if certain rural LEC members of these associations did not agree with the policy advocated by their associations, such as the USTA's significant January 2001 proposal of bill-and-keep for non-ISP traffic, they were free to attempt to proffer their own positions directly to the Commission. Many chose to do so and voiced their position through the NTCA *ex parte* meetings in March 2001. If other rural LECs chose not to participate, they have no cause to complain now.

B. The Rural LECs Had Constructive Notice of the Commission's Final Rule.

Even absent the evidence of actual notice provided by the *ex partes*, the rural LECs had constructive notice of the final rule. The record in this docket is replete with discussions concerning various network architectures, calling patterns, costs, and cost structures – with respect to both ISP traffic and Section 251(b)(5) traffic. The breadth of the entire record in the docket provides notice that the Commission could readily adopt a rule for reasons of fundamental equity alone, in the *ISP Order* that implicated Section 251(b)(5) traffic as well ISP traffic. Moreover, during the pendency of this proceeding, both ISP traffic and Section 251(b)(5) traffic have been accorded the same treatment under the Telecommunications Act of 1996 ("1996 Act"), State commission orders,[22] and federal court decisions,[23] irrespective of the Commission's assessment of the jurisdictional nature of ISP traffic. Thus, even though the Commission had declined to adopt a rule that specifically recognized ISP traffic as subject to

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[22] *See, e.g., Joint Petition of Bell Atlantic Pennsylvania, Inc.; Conectiv Communications, Inc.; Network Access Solutions; and the Rural Telephone Company Coalition for Resolution of Global Telecommunications Proceedings;* Docket No. P-00991649, *Opinion and Order*, August 26, 1999, p. 211 ("Pennsylvania will treat internet calls as local calls for purpose of compensation to the extent permitted by Federal law.").

[23] *See, e.g., Southwestern Bell Telephone Co. v. Brooks Fiber*, 235 F.3d 493 (10th Cir. 2000).

Section 251(b)(5) reciprocal compensation, it has recognized similar cost recovery for both types of traffic. As the Commission recently observed:

> The overall record in this proceeding does not lead us to conclude that any system architectures or technologies widely used by LECs result in material differences between the cost of delivering ISP-bound traffic and the cost of delivering local voice traffic, and we see no reason, therefore, to distinguish between voice and ISP traffic with respect to intercarrier compensation.[24]

Finally, the inherent unfairness to competitive carriers that would have resulted if the Commission had changed the *status quo ante* and allowed ILECs to apply the rate cap solely to ISP traffic demonstrates that rural LECs had every expectation that the Commission would adopt a mirroring rule. This sensitivity is very apparent in the USTA January 2001 *ex parte.*

In the *Public Notice*, the Commission sought broad comment on "the scope of the reciprocal compensation requirement of section 251(b)(5)" and on any "new or innovative inter-carrier compensation arrangements for ISP traffic."[25] No artificial limits were placed on the scope of the rules governing reciprocal compensation under Section 251(b)(5): Nor was there any indication that the rules adopted would be for only one segment of traffic between carriers.

Against this background, Choctaw now claims:

> 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.[26]

The specificity that Choctaw demands in a rulemaking is absurd. If any agency were required to articulate every detail or permutation of every rule it ever intended to adopt in a notice of rulemaking, the resulting administrative burden and administrative delay would be

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[24] *ISP Order* at ¶ 93.
[25] *Public Notice* at 1.
[26] Choctaw Petition at 3.

overwhelming. The consequent lag in promulgating rules would be anathema to the public interest in timely rulemaking.[27] Choctaw's reference to a case in which adoption of a final rule was flawed because the affected parties lacked an additional opportunity to comment on the significant differences between the language of the proposed and final rule is not on point.[28] In the instant proceeding, the Commission proposed no specific language. Instead, the Commission made it abundantly clear that it was casting a large net. The Commission sought comment on "scope" and "on the relevance of concepts."

The Commission did not propose any specific language from which the final order differs. Instead, it adopted a rule clearly supported by the record evidence and one, which the principles of logic and fairness demand. There can be no good faith claim that the Commission veered from its anticipated path, and that additional opportunity for comment was necessary – given that the Commission's original notice was broad and inclusive of the rules adopted in the *ISP Order.*

III. Notwithstanding Their Actual Notice of the Commission's Consideration of the Mirroring Rule, the *Status Quo Ante* of the Rural LECs Has not Changed.

Even if the facts support the ostrich-like argument of the rural LECs that they had no idea that the Commission was considering a mirroring rule, they have suffered no injury from this result. Because the ISP rate caps are entirely voluntary – consistent with the USTA's proposal – rural LECs do not have to subject themselves to the rate caps for Section 251(b)(5) traffic. The rural LECs are affected by the Mirroring Rule only to the extent they wish to benefit from the ISP rate caps while continuing to price-gouge CMRS carriers by charging excessively high non-

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[27] Indeed, perhaps the loudest hue and cry would have come from the RBOC members of the USTA, who demanded immediate relief from the Commission to reduce their cost of terminating ISP traffic.

[28] Choctaw Petition at 3, citing *Connecticut Light & Power v. NRC*, 673 F.2d 525, 533 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 835 (1982).

TELRIC-based rates for Section 251(b)(5) traffic. It is beyond reason for the rural LECs to expect that the Commission would adopt such one-sided and anti-competitive rules. Certainly THE USTA had no such expectation.

The new rules explicitly give ILECs the option to choose between: (1) exchanging both ISP traffic and Section 251(b)(5) traffic at the identical capped rates, *or* (2) continuing to exchange ISP traffic and Section 251(b)(5) traffic pursuant to state approved or arbitrated reciprocal compensation rates reflected in interconnection agreements.[29] Therefore, any ILEC that determines that it is not in its economic interest to cap its rates for Section 251(b)(5) traffic simply need not select that option. For those carriers, the *status quo ante* is maintained. It is instructive that in the five (5) weeks since the *ISP Order* became effective, virtually none of the rural LECs has adopted the *ISP Order* rate caps. Thus, it is difficult to ascertain in what manner the *ISP Order* harms them. Certainly, none of the rural LEC Petitioners has indicated any intention of adopting the rate caps. Moreover, none of the Petitioners has provided hard data that it originates anything more than a negligible amount of ISP traffic.

ILECs that do not wish to exchange Section 251(b)(5) traffic according to the rate caps must exchange ISP traffic at state-approved or arbitrated reciprocal compensation rates.[30] This regime has existed since ILECs and CMRS carriers entered into initial interconnection agreements following the passage of the 1996 Act. Moreover, the Commission retained that regime when it initiated this docket.[31] The only thing that has changed is that the Mirroring Rule

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[29] *ISP Order* at ¶ 90.

[30] *Id.* at ¶ 89.

[31] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic,* 14 FCC Rcd 3689 (1999) ("*Declaratory Ruling*") ("nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule. . . .") at ¶ 27.

prevents rural LECs from reducing their revenue outflows for ISP traffic without taking the reciprocal step of limiting the rates they charge for their Section 251(b)(5) traffic.

IV. The Petitions Represent an Unfair Effort by Rural LECs To Retain Excessively High Reciprocal Compensation Rates for Wireless Traffic.

The Commission wisely recognizes the inequity that would result if it allowed carriers to "pick and choose" among intercarrier compensation rate regimes depending upon the class of traffic for which they enjoy a traffic imbalance. The Mirroring Rule equitably avoids the "Heads, I Win – Tails, You Lose" result that would have ensued had the Commission permitted ILECs to pay reduced ISP traffic rates while continuing to receive non-cost-based excessively high reciprocal compensation rates.

For example, the rates of the Missouri Independent Telephone Companies (including, among others, Choctaw Telephone Company) illustrate the significant cost burden that rural LECs impose upon competitive connecting carriers. These rural LECs impose recently tariffed currently charges for the termination of local wireless calls ranging from $0.0506 to $0.0744 per minute-of-use, with an average of $0.0605.[32] These rates are 500% – 1000% higher than the $0.0007 - $0.0015 per minute-of-use rate caps that the Commission has established for the three-year transitional term. Because the rate caps are not mandatory for them, the rural LECs can continue to fill their silos by price-gouging CMRS carriers and CLECs with non-cost based, inflated rates for termination of Section 251(b)(5) traffic.

Significantly, the four largest ILECs did not petition for reconsideration of the *ISP Order*. To date, three of the four (BellSouth, Qwest, and Verizon) have informed interconnecting

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[32] *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service*, Case No. TT-2001-139, Missouri Public Service Commission, *Report and Order*, February 8, 2001.

carriers that they intend to adopt the Commission's rate caps.[33] One of the reasons why the rural LECs and smaller ILECs have not followed this course is because their rates are embarrassingly high.[34] The rates at which the former Bell Companies ("RBOCs" and other, larger ILECs) exchange traffic pursuant to Section 251(b)(5) are TELRIC-based rates that have been subject to State commission arbitration or price cap cost proceedings in which their cost studies have been carefully reviewed. The rates at which the rural LECs exchange such traffic have not received such scrutiny to date. Instead, their rates continue to reflect embedded costs, and they are based on anachronistic rate-of-return methodologies that permit gold-plated networks and generous incomes for rural telephone companies.

To VoiceStream's knowledge, very few, if any, of the rural LECs have adopted the rate caps. Nor has any of the rural LECs challenged the principle of rate caps for ISP traffic. To the contrary, one Petitioner specifically "limits its Petition to the impact of the *Order* on non-ISP traffic."[35] The rural LECs' resounding silence on this matter strongly suggests either that the ISP traffic that rural LECs' customers originate terminate to CLEC networks is negligible or non-existent, and they will not benefit from reduced termination costs for ISP traffic. It also suggests that the ISP traffic that neighboring ILECs terminate to rural LECs is governed by existing (and generally, unpublished) bill-and-keep arrangements.[36] Their lack of objection to the capped rates for ISP traffic is not surprising, however, given that the capped rates are so low they essentially

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[33]The fourth, SBC, is still evaluating its options and has scrupulously attempted to reserve the right to adopt the rate caps in the future if economic analysis warrants such action.

[34] It should be noted that the NTCA is concerned that the Mirroring Rule will require rural LECs renegotiating interconnection agreements "to reduce significantly their rates for non-ISP traffic." (NTCA Petition at 7).

[35] Alliance Petition at page. 2.

[36] Displaying a double standard, rural LECs do not complain about bill-and-keep arrangements with neighboring ILECs, even though traffic imbalances may exist between smaller and larger ILECs. The Commission should carefully examine the LEC-LEC bill-and-keep arrangements in the *Unified Inter-Carrier Compensation Regime NPRM,* so that rural LECs do not impose less favorable and discriminatory reciprocal compensation

approach bill-and-keep. Since the rates will ultimately be capped at less than one-tenth of one penny per minute, and will be subject to growth caps and other protections, ISP traffic is unlikely to have a significant negative impact on ILEC revenue outflows if the *ISP Order* remains law.

V. Conclusion

The rural LECs have failed to demonstrate that the Commission's adoption of a voluntary option for applying capped rates to Section 251(b)(5) traffic violates any notice requirements of the APA. They had both actual and constructive notice of the Commission's intention to adopt the rules it did in the *ISP Order*. Moreover, they had ample opportunity to discuss their concerns with the Commission on an *ex parte* basis. Although they had actual notice, even if they claim did not, the rural LECs are not harmed by the rate caps, as the *ISP Order* continues to permit them to elect to charge excessively high rates upon CMRS carriers under the existing regime.

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arrangements upon competitive carriers than they do on their neighboring ILECs.

The Commission should address this inequity in the *Unified Intercarrier Compensation NPRM* concerning bill-and-keep. For these reasons, VoiceStream respectfully requests that the Commission deny the Petitions for Reconsideration of the Alliance, Choctaw, and the NTCA.

Respectfully submitted,

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July 23, 2001

EXHIBIT 1

ALTS LETTER

ALTS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Jonathan Askin
General Counsel

December 18, 2000

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th St. SW
Washington DC 20554

Re: CC Docket No. 99-68

Dear Ms. Attwood:

The purpose of this letter is to respond to claims from the ILECs that the basic phase-down transition proposed by Chairman Kennard is not adequate to reduce the amount of reciprocal compensation currently paid by the incumbents.

The ILECs' most recent calculation of the effect of the proposed three-year transition plan is attached to Verizon's ex parte filed in this docket on December 13, 2000 (attached to this letter for your convenience). However, these numbers are completely unfounded for several basic reasons.

First, the ILECs' numbers are based upon preposterous and unsubstantiated growth assumptions for dial-up traffic usage per on-line household. As AT&T noted in its November 28th ex parte in this docket, the ILEC study assumes without citation a 30% compounded annual growth rate for dial-up traffic. But Merrill Lynch predicts only a 7% per year compounded growth rate for dial-up traffic per household from 1998 through 2003. Id.

Second, the ILECs' claim that individual households will somehow increase their usage annually by 30% is also contradicted by the fact that

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usage-intensive households are rapidly moving to broadband.[1] Indeed, Morgan Stanley Dean Witter initiated coverage of Genuity, a tier-one ISP, by predicting that dial-up penetration of American households will decline between 2000 and 2003 (August, 2000, page 25). And the recent demise of numerous free ISP services will further depress dial-up minutes over the next three years. Correcting for just some of these errors cuts the ILECs' reciprocal compensation estimates in half (AT&T ex parte filed November 28th filing at 4-5).

Applying the Chairman's proposed ratio approach to hard data for an individual CLEC reveals the truth. Time Warner Telecom (TWTC) has submitted data to the Bureau showing that the original proposal would impose a flash-cut reduction of its reciprocal compensation payments by 68%, 75%, and 86% in each of the three years.[2] Furthermore, the modified transition plan of the competitive industry being proposed today, which applies a reduced rate to above-ratio traffic, would still reduce Time Warner Telecom's reciprocal compensation revenues by 17%, 37%, and 64%.

Given that the New York Public Service Commission has already ruled that Time Warner Telecom should be exempted from application of the ratio plan adopted in that state in light of its robust local network, it is manifest that the modified transition proposed by the competitive industry will decrease the absolute amount of reciprocal compensation paid by the incumbents.

[1] Statistical Research, Inc.'s Fall 2000 Ownership Report shows that the percentage of online households using a cable modem or DSL connection has risen from 5 percent to 11 percent in the last six months. The proportion of online households accessing the Web via a shared phone line dropped 9 percent to 68 percent in the past six months, after staying at a consistent 75 percent from Spring 1998 through Spring 2000.

[2] TWTC serves a diverse customer base. For example, in October 2000, ISPs accounted for less than 4% of TWTC's nationwide customer base, 45% of which is terminating minutes that are ISP-related. Even with this small percentage of ISP customers, most TWTC service areas have traffic imbalances that legitimately exceed a 12:1 ratio.

ALTS

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Please let us know if we can answer any other questions concerning this important matter.

Sincerely,

Jonathan Askin

cc: Glenn Reynolds
Jane Jackson
Tamara Preiss
Rodney McDonald
Kathy Brown
Anna Gomez
Jordan Goldstein
Rebecca Beynon
Deena Shetler
Kyle Dixon

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W. Scott Randolph
Director - Regulatory Matters

verizon

Verizon Communications
1850 M Street, NW
Suite 1200
Washington, DC 20036

Phone: 202 463-5293
Fax: 202 463-5239
srandolph@verizon.com

December 13, 2000

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Ex Parte: Intercarrier Compensation for ISP-Bound Traffic – CC Docket No. 99-68

Dear Ms. Salas,

On Tuesday, December 12, 2000, Susanne Guyer, Ed Shakin, Frank Gumper and myself, representing Verizon, met with Kyle Dixon of Commissioner Powell's office to discuss intercarrier compensation for ISP-bound traffic. We discussed the Commission's authority to impose a bill and keep regime for reciprocal compensation, as well as its authority to impose interim caps on traffic imbalances. The attached chart was used in the discussions to demonstrate how an interim cap should be set to produce real reductions in reciprocal compensation payments in the first year of the transition.

Pursuant to Section 1.1206(a)(1) of the Commission's rules, and original and one copy of this letter are being submitted to the Office of the Secretary. Please associate this notification with the record in the proceeding indicated above.

If you have any questions regarding this matter, please call me at (202) 463-5293.

Sincerely,

W. Scott Randolph
Director - Regulatory Matters

cc: Kyle Dixon

Potential Cost of Reciprocal Compensation for Terminating Internet Traffic

Residential Internet Usage Forecasts	1999	2000	2001	2002	2003	Avg. Ann. Growth
Total US Households (000s)	103,900	105,000	106,400	107,700	109,000	1.25%
U.S Online Households (000s)	43,600	47,300	51,400	56,900	62,500	9.73%
% Penetration	42%	45%	48%	53%	57%	
Avg Minutes of Access Per On-Line HH Per Day	63	82	106	138	179	30.00%
Avg Minutes of Access Per On-Line HH Per Year	22,888	29,754	38,681	50,285	65,370	
Total Internet Access Minutes -- Residential	997,918,800,000	1,407,383,120,000	1,988,189,008,000	2,861,212,858,400	4,085,651,050,000	42.65%
% Broadband (xDSL, Cable modems, wireless)	4%	12%	20%	29%	36%	
% Dial Up	96%	88%	80%	71%	64%	
Dial Up Access Minutes	958,000,128,000	1,238,497,145,600	1,590,551,206,400	2,031,461,129,464	2,614,816,672,000	28.29%
% of Dial Up Internet Access Minutes That CLECs Terminate	40.0%	50.0%	57.0%	66.7%	66.7%	
Dial Up Internet Access Minutes Terminated by CLECs	383,200,051,200	619,248,572,800	906,614,187,648	1,354,306,065,336	1,744,082,720,224	41.22%
ILEC Reciprocal Compensation Liability Scenarios -- With a Constant Recip Comp Rate of $.004/Min.						
Scenario 1: Cap That Produces Constant Recip Comp Payments						
Cap on Terminating to Originating Minutes			12:1	8:1	4:1	
Dial-Minutes that Qualify for Recip Comp Payments		619,248,572,800	604,408,458,432	601,913,806,816	387,573,937,828	
Total Recip Comp Payments		$2,476,994,291	$2,417,637,834	$2,407,655,227	$1,550,295,751	
Scenario 2						
Cap on Terminating to Originating Minutes			8:1	4:1	2:1	
Dial-Minutes that Qualify for Recip Comp Payments		619,248,572,800	302,204,729,216	300,956,903,408	193,786,968,914	
Total Recip Comp Payments		$2,476,994,291	$1,208,818,917	$1,203,827,614	$775,147,876	
Scenario 3						
Cap on Terminating to Originating Minutes			5:1	3:1	2:1	
Dial-Minutes that Qualify for Recip Comp Payments		619,248,572,800	251,837,274,347	225,717,677,556	193,786,968,914	
Total Recip Comp Payments		$2,476,994,291	$1,007,348,097	$902,870,710	$775,147,876	
Scenario 4						
Cap on Terminating to Originating Minutes			4:1	2:1	*Bill & Keep*	
Dial-Minutes that Qualify for Recip Comp Payments		619,248,572,800	201,469,818,477	150,478,451,704	0	
Total Recip Comp Payments		$2,476,994,291	$806,879,278	$601,913,807	$0	
Scenario 5						
Cap on Terminating to Originating Minutes			3:1	*Bill & Keep*	*Bill & Keep*	
Dial-Minutes that Qualify for Recip Comp Payments		619,248,572,800	151,102,364,608	0	0	
Total Recip Comp Payments		$2,476,994,291	$604,409,458	$0	$0	

Sources:

Total US Households (000s)	Sanford Bernstein & Co and McKinsey & Co., *Broadband*, Jan. 2000
U.S Online Households (000s)	Sanford Bernstein & Co and McKinsey & Co., *Broadband*, Jan. 2000
Avg Minutes of Access Per On-Line HH Per Year	Nielsen 9/14/99 Press Release; Cahners 3/28/00 Press Release; Thomas Weisel Partners, *Media Metrix's July Internet Usage Trends*, 8/23/00
% Broadband (xDSL, Cable modems, wireless)	Dean Witter Morgan Stanley, The Broadband Report Reaping What You Sow: ROI in the Broadband Market, May 2000
% of Dial Up Internet Access Minutes That CLECs Terminate	ALTS Press Release

For Comparable Forecasts See Also:

U.S Online Households (000s)	Dean Witter Morgan Stanley, The Broadband Report Reaping What You Sow: ROI in the Broadband Market, May 2000
% Broadband (xDSL, Cable modems, wireless)	Hoak Breedlove Wesneski & Co., *The Last Race for the First Mile*, 6/2/00

EXHIBIT 2

USTA LETTER

ORIGINAL

USTA
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Fax (202) 326-7333
www.usta.org

EX PARTE OR LATE FILED

EX PARTE

January 10, 2001

RECEIVED

JAN 1 0 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445-12th Street, SW
Room TW-A325
Washington, DC 20554

Re: CC DOCKET NO. 99-68

Dear Ms. Roman Salas:

Enclosed is a copy of a letter that was delivered to Chairman William Kennard today in the above-referenced docket.

In accordance with Section 1.1206(b)(1) of the Commission's rules, two copies of the presentation are being submitted herewith. Please include the presentation in the public record of these proceedings. If there are any questions regarding this submission, please contact the undersigned.

Respectfully submitted,

Lawrence E. Sarjeant

Lawrence E. Sarjeant
Vice President & General Counsel
Legal and Regulatory Affairs

cc: Chairman W. Kennard
Commissioner S. Ness
Commissioner H. Furtchgott-Roth
Commissioner G. Tristani
K. Brown
D. Attwood
T. Sugrue

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January 10, 2001

***EX PARTE* PRESENTATION**

RECEIVED
JAN 10 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Hon. William Kennard
Chairman
Federal Communications Commission
445 12th Street, SW, Rm. 8-B201H
Washington, D.C. 20554

Re: **Inter-Carrier Compensation for ISP-Bound Traffic**
CC Docket No. 99-68

Dear Chairman Kennard:

I write to follow-up my letter to you of December 15, 2000, concerning Commission action in the above-referenced reciprocal compensation remand proceeding. USTA members anxiously await Commission action that will bring an end to the unjustified subsidy resulting from reciprocal compensation payments for dial-up ISP-bound traffic. USTA remains convinced that the Commission must implement a fix for this inequitable situation that is mandatory for states and reaffirms the interstate nature of ISP-bound traffic.

I want to advise you that USTA supports a reciprocal compensation solution that would condition the availability of bill and keep for dial-up ISP-bound traffic on the availability of bill and keep for all local traffic, including wireless traffic. Under this approach, a local exchange carrier (LEC) could elect bill and keep for its interconnection arrangements for dial-up ISP-bound traffic. Having made the election for bill and keep, the LEC would be required to offer bill and keep for all local traffic, including wireless traffic. Absent making the election for bill and keep for dial-up ISP-bound traffic, reciprocal compensation would remain an option (subject to negotiation, mediation or arbitration between an ILEC and a CLEC) for ISP-bound traffic, and the LEC would not be obligated to offer bill and keep for local traffic or wireless traffic. I believe that this optional bill and keep approach would address many of the spurious claims raised by those that have opposed fixing the reciprocal compensation problem while avoiding unintended problems for many rural companies that have unique traffic flows.

I cannot overstate the importance of expeditious Commission action to arrive at a fair solution in this matter that reaffirms the Commission's jurisdiction over ISP-bound traffic and applies to all states. Thank you for your consideration.

Sincerely,

Gary R. Lytle

Interim President and CEO

cc: Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Harold Furchtgott-Roth
Commissioner Gloria Tristani
Kathryn Brown
Dorothy Attwood
Thomas Sugrue

EXHIBIT 3

NTCA LETTER

The Voice of Rural Telecommunications

NTCA

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

March 12, 2001

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street S.W., TW-A325
Washington, D.C. 20554

Re: Ex Parte Notice
CC Docket No. 96-98, CC Docket No. 99-68

Dear Ms. Salas:

On Monday, March 12, 2001, Deena Shetler and Sarah Whitesell, Legal Advisors for Commissioner Tristani met with Daniel Mitchell and Scott Reiter of the National Telephone Cooperative Association. We discussed issues in the above-referenced proceedings related to reciprocal compensation and Internet service provider (ISP) bound traffic. A document summarizing NTCA's positions on issues concerning reciprocal compensation was provided at the meeting and the focus of discussion. Enclosed is a copy of the summary provided at the meeting.

In accordance with the FCC=s rules, an original and two copies of this letter are being filed with the Secretary=s office. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

/s/ Daniel Mitchell
Daniel Mitchell

cc: Deena Shetler
Sarah Whitesell

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION
4121 Wilson Boulevard $Tenth Floor $Arlington, Virginia 22203-1801
Phone /703.351.2000 $ Fax /703.351.2001 $ www.ntca.org

The Voice of Rural Telecommunications

National Telephone Cooperative Association

March 12, 2001, Ex Parte Presentation on Reciprocal Compensation with Deena Shetler and Sarah Whitesell, Legal Advisors to Commissioner Tristani.

Summary of NTCA's positions concerning reciprocal compensation issues:

- Immediate actions by the Commission should be limited to issues raised in the NPRM in Docket No. CC 99-68 and by DC Circuit in its remand of the Commission's Reciprocal Compensation Declaratory Ruling.
- The initial decision classifying Internet bound traffic as interstate is proper.
- The Commission has jurisdiction and should establish a mechanism for recovery of the costs associated with this traffic.
- Internet bound traffic should also be treated as interstate for separations purposes.
- If the Commission decides on a transition to "bill and keep," it should limit its decision to Internet bound traffic.
- Decisions involving other inter-carrier compensation issues should be reserved until the forthcoming NOI is complete:

    1) CMRS – LEC interconnection arrangements should be left undisturbed.

    2) LEC – LEC agreements covered by § 251(b)(5) should continue to be governed by interconnection agreements negotiated between parties with no mandatory "bill and keep" for this traffic.

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION
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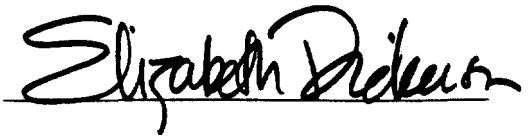
Phone /703.351.2000 $ Fax /703.351.2001 $ www.ntca.org

CERTIFICATE OF SERVICE

I, Elizabeth Dickerson, do hereby certify that a copy of the foregoing Opposition of VoiceStream Wireless Corporation was served on this 23rd day of July 2001 by first-class, U.S. Mail, postage prepaid, or hand-delivered, to the following persons:



Magalie Roman Salas
Secretary
Federal Communications Commission
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Washington, DC 20554

International Transcription Service
Federal Communications Commission
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Lewis Stern
Vice President and Chief Financial Officer
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Jordan Goldstein, Senior Legal Advisor
Office of Commissioner Michael J. Copps
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Michelle Carey, Chief Policy & Program Planning
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Office of Commissioner Keven J. Martin
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