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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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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
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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OPPOSITION OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits its Opposition to Petitions for Reconsideration filed in the above captioned proceeding.[2]

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1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

2 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, *Declaratory Ruling and Notice of Proposed Rulemaking*, 14 FCC Rcd 3689 (1999) ("Declaratory Ruling"); *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 and 99-68, Public Notice, 15 FCC Rcd 11311 (1999) ("Public Notice"); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, *Order on Remand and Report and Order*, FCC 01-131 (rel. Apr. 27, 2001)("Report and Order").

I. INTRODUCTION AND SUMMARY

CTIA has long advocated a bill-and-keep compensation mechanism to govern the exchange of traffic between LECs and CMRS providers.[3] This advocacy derives from the firm belief that reduced reliance on intercarrier compensation will send the proper pricing signals to providers and will maximize efficiency incentives if properly implemented by the Commission.

The Report and Order adopts cautious but laudable steps toward this goal. Although focused primarily on terminating charges for ISP-bound traffic, the Report and Order properly seeks to account for the long-recognized inter-relationship between ISP-bound traffic and non-ISP-bound traffic. The importance of this inter-relationship derives partly from inter-carrier compensation flows. Often because of the skewed signals that would otherwise result, States typically have applied the same compensation mechanisms to both types of traffic. The Commission promotes a similar approach from a federal level -- albeit pursuant to the ILECs' voluntary adoption of such a regime -- while implementing a more economically rational cost recovery mechanism.

The objections of the Petitions for Reconsideration lack merit. The rules adopted in the Report and Order logically derive from the broad yet intricate subjects at issue in this proceeding and placed on public notice by the Commission. Moreover, while respecting the boundaries of State authority under Sections 251 and 252, the Report and Order appropriately constructs a federal approach to the issue of terminating charges for ISP-bound compensation similar to the

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3 See, e.g., CTIA Ex Parte Presentation Letter at 4 (Dec. 29, 2000) Michael F. Altschul, CTIA (explaining that the FCC is the "sole arbiter of the terms for LEC-CMRS interconnection," and should therefore "replace LEC-CMRS reciprocal, symmetrical compensation requirements with bill and keep as expeditiously as possible...").

Commission's unique jurisdiction over LEC-CMRS interconnection. Finally, the Report and Order considers and accounts for carrier costs while steadfastly and properly refusing to embed the inflated costs of network inefficiencies into an intercarrier compensation mechanism. So as not to further delay the competitive benefits and improved economic signaling that will grow from the Report and Order, CTIA respectfully urges the Commission to deny the Petitions for Reconsideration discussed herein.

II. THE COMMISSION'S ACTIONS WERE PROCEDURALLY SOUND.

Petitioners contend that the Commission violated the Administrative Procedure Act ("APA") by failing to provide adequate notice of the full scope of the final rules.[4] As demonstrated below, Petitioners set the procedural bar too high. The rules adopted in the Report and Order are a logical outgrowth of the subjects and issues raised by the Public Notice.

The APA requires that an agency publish notice of its proposed rulemaking that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[5] "An agency satisfies this notice requirement if the final rule is a 'logical outgrowth' of the proposed rule."[6] To be sure, there is "no precise definition of what counts as a 'logical

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4 See Petition for Reconsideration and/or Clarification of the Independent Alliance on Inter-Carrier Compensation ("IAICC Petition") at 6, n.15 ("Neither the *Declaratory Ruling and NPRM* nor the *Public Notice* provided notice to the public of the Commission's intent to adopt rules governing non-ISP-bound traffic in violation of the Administrative Procedures [sic] Act."); Petition for Reconsideration of Choctaw Telephone Company, *et al.*, at 2-3 ("Choctaw Petition"); National Telephone Cooperative Association's Petition for Reconsideration at 7-8 ("NTCA Petition").

5 5 U.S.C. § 553(b)(3).

6 Arizona Public Ser. Co. v. EPA, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (citing Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-46 (D.C. Cir. 1991)).

outgrowth.'"[7] However, from the extensive body of case law on the topic emerge some general themes that illuminate the standard.

A. The Final Rules Were A Logical Outgrowth Of The Public Notice.

"The focus of the 'logical outgrowth' test . . . 'is whether . . . [the party], *ex ante*, should have anticipated that such a requirement might be imposed.'"[8] The Public Notice itself provided more than a sufficient basis for parties to be aware of potential effects of the proceeding on reciprocal compensation. The Public Notice seeks comment on the "jurisdictional nature of ISP-bound traffic, as well as the scope of the reciprocal compensation requirement of section 251(b)(5)." This request for comment contemplates the possibility of ISP-bound traffic being considered "local" in nature, akin to voice-grade Section 251 traffic (the conclusion reached by the Declaratory Ruling to which the Public Notice refers). Although the Commission ultimately rejected this conclusion, it nevertheless remained a possible -- indeed, likely -- outcome when the Public Notice was released.

The Public Notice also made clear that the Commission was contemplating not only the jurisdictional nature of the ISP-bound traffic, but also the appropriate compensation structure for its carriage. It sought comment on "new or innovative inter-carrier compensation arrangements for ISP-bound traffic that parties may be considering or may have entered into." Hence, if the Commission had concluded that ISP-bound traffic was local in nature and subject to Section 251 reciprocal compensation arrangements, it remained a logical potential outgrowth that the Commission would establish compensation arrangements for that ISP-bound traffic. It is no

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7 National Min. Ass'n v. Mine Safety & Health Admin., 116 F.3d 520, 531 (D.C. Cir. 1997).

8 Aeronautical Radio, 928 F.2d at 446 (D.C. Cir. 1991)(quoting Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983)).

great leap of logic to reason that if ISP-bound traffic were to be treated identical to non-ISP bound traffic for jurisdictional purposes, the compensation arrangements governing both types of traffic would be similar. Consequently, a change in the compensation arrangement for ISP-bound traffic -- one explicitly contemplated by the Public Notice -- would be likely to involve a change in the compensation arrangement for non-ISP-bound traffic.[9] Petitioners should have anticipated that rules affecting compensation for non-ISP-bound traffic might be affected by the rulemaking.

B. The Public Notice Sufficiently Described The Subjects And Issues Being Considered By The Commission So As To Place Parties On Notice Of The Sorts Of Changes Ultimately Adopted.

Having taken an unreasonably narrow view of the issues intricately involved in this proceeding, Petitioners now complain that they could never have imagined such a result and "had no realistic opportunity to comment on the non-ISP traffic aspects"[10] addressed by the Report and Order. The APA "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule."[11] The notice "is sufficient if it provides a description of the subjects and issues involved."[12]

As noted above, and as is abundantly evident in the record of this proceeding, the nature of ISP-bound traffic is frequently (if not always) compared to or contrasted with non-ISP-bound

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9 In fact, prior to issuance of the Public Notice, ISP-bound traffic and non-ISP bound traffic actually were treated identically for purposes of reciprocal compensation.

10 IAICC Petition at 6, n.15.

11 California Citizens Band Ass'n v. U.S., 375 F.2d 43, 48 (D.C. Cir. 1967) (citations omitted).

12 Id. at 49.

traffic.[13] Far from being unimaginable, an analysis of ISP-bound traffic, its nature and the appropriate compensation arrangements therefore, unaccompanied by a discussion of its relationship to the nature of and compensation arrangements for non-ISP-bound traffic would be novel. Because the two types of traffic are inter-related, they are not properly considered in a vacuum. The rules adopted in the Report and Order account for this inter-relationship with a new approach, but the connection between the two types of traffic is not -- or should not have been -- foreign to Petitioners. Indeed, such a connection was not lost on several commenters who raised the issue of compensation arrangements for Section 251(b)(5) traffic in their submissions to the FCC.[14] The discussion by other interested parties of compensation arrangements for non-ISP-bound traffic strongly suggests that the Public Notice is reasonably deemed to have provided notice that such an issue would arise.[15] Although Petitioners may have

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13 See, e.g., Bell Atlantic Telephone Companies v. FCC, 206 F.3d 1, 6-7 (D.C. Cir. 2000) (articulating the differences and similarities between ISP-bound and non-ISP-bound traffic). The court iterated the differences of ISP-bound traffic to non-ISP-bound traffic by stating that, "[a]lthough ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long-distance carriers)." Id. at 7; see also Southwestern Bell v. FCC, 153 F.3d 523, 534 (8th Cir. 1998) (comparing ISP-bound traffic to non-ISP-bound traffic, and affirming the jurisdictionally mixed nature of ISP-bound traffic).

14 See, e.g., ALTS Notice of Ex Parte Presentation, filed in CC Docket Nos. 96-98, 99-68 at 2 (Dec. 21, 2000) Jonathan Askin, ALTS (stating that "[t]he phase-down plan and ultimate rate structure envisioned by the Commission would apply to ISP-bound traffic as well as all other local traffic, and not distinguish between the two in any way.").

15 Comments themselves may be insufficient to provide notice, Shell Oil Co. v. EPA, 950 F.2d 741, 751 (D.C. Cir. 1991). However, where multiple comments discuss issues for which another party contends there was inadequate notice, such comments offer evidence that the agency-provided notice was sufficient. See, e.g., United Steelworkers of America, AFL-CIO-CLC v. Schuykill Metals Corp., 828 F.2d 314, 318 (5th Cir. 1987) ("[O]ther parties provided extensive comments relating to the importance of promulgating MRP benefits of extreme breadth and unprecedented scope. . . . Thus, it was readily apparent to interested parties that the scope of MRP benefits was in dispute. The comments received reflected such an understanding and provided additional support

preferred the Public Notice to have spelled out the realm of considered topics in a more explicit fashion, the APA does not obligate the Commission to describe the matters under consideration with any greater detail than it provided.

If Petitioners will be adversely affected by the Report and Order, they inevitably received adequate notice. Only carriers of ISP-bound traffic are affected by the Report and Order and it is precisely those carriers who should have been informed by the Public Notice's explicit and adequate notice that their traffic compensation arrangements were under review. Petitioners complain that they "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."[16] However, the rules will "disrupt" their reciprocal compensation arrangements *only* if Petitioners carry ISP-bound traffic and opt into the new regime. If Petitioners carry ISP-bound traffic, the Public Notice explicitly informed them that the regulatory treatment of their traffic was at stake, removing any legitimate basis they may otherwise have had for being "lulled into non-participation." If Petitioners do not carry ISP-bound traffic, then the new rules do not affect them and their alleged non-participation is harmless. They cannot credibly allege harm simultaneous with inadequate notice.

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for the broad, final rule; the NPRM was 'sufficiently descriptive of the "subjects and issues involved" . . . that interested parties . . . offer[ed] informed criticism and comments.'") (citations omitted).

16 Choctaw Petition at 3.

III. THE COMMISSION'S ACTIONS ARE FULLY CONSISTENT WITH ITS STATUTORY AUTHORITY.

For the most part, Petitioners do not take issue with the Commission's pricing authority over ISP-bound traffic pursuant to Section 201.[17] Indeed, one could not credibly assert that the Commission lacks Section 201 pricing authority for jurisdictionally interstate services. The contentions rest with pricing arrangements that affect Section 251(b)(5) traffic. Petitioners claim that the opt-in mirroring requirement takes from the States a responsibility assigned to them by the 1996 Act.[18] Petitioners complaints lie with precisely the issue considered and, at long last, decided by the Supreme Court. The Court made clear that the States do not possess sole control over compensation levels for exchanging Section 251(b)(5) traffic. To the contrary, the FCC "has jurisdiction to design a pricing methodology" for this traffic that States are compelled to implement.[19] The Commission acted within its authority to construct a pricing methodology to cure the regulatory arbitrage and resulting payment imbalances for ISP-bound and non-ISP-bound traffic.

Moreover, the effect of the Report and Order on reciprocal compensation is neither mandatory nor universal. Rather, its effect on Section 251(b)(5) traffic is limited to those instances in which ILECs *voluntarily* choose the new regime that reduces termination costs for ISP-bound traffic. The effect on State jurisdiction over reciprocal compensation rates is no different than if ILECs already had unilaterally lowered the terminating charges assessed against

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17 See, e.g., id. at 1-2 ("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.").

18 Id. at 4-5; IAICC Petition at 10-12.

19 AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 385 (1999).

CLECs in interconnection negotiations under Section 252(a). Should an ILEC elect *not* to use the new ISP-bound interim caps and rates, it will experience no change in the State-approved reciprocal compensation rates for its Section 251 traffic. By proceeding through voluntary opt-in mechanisms, the Commission avoids intrusion on State PUC jurisdiction and, indeed, provides ILECs with the discretion to proceed in the manner that best suits their respective business plans.

IV. THE PROPRIETY OF THE COMMISSION'S ACTIONS IS FURTHER ENHANCED BY THE VOLUNTARY NATURE OF ITS RULES.

Petitioners object to the Report and Order largely because they presume an involuntary quality to the Commission's rules that simply does not exist. For example, Choctaw views the optional character of the rules as illusory, complaining dramatically that "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."[20] NTCA contends that "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."[21] IAICC mischaracterizes the Commission's order as "forc[ing] both non-Section 251(b)(5) traffic and all Section 251(b)(5) traffic to a bill-and-keep (or capped rate) inter-carrier compensation result in any instance where an adversary of an incumbent LEC demands such treatment regardless of the LEC's statutory right to terminating compensation."[22]

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20 Choctaw Petition at 5.

21 NTCA Petition at 7.

22 IAICC Petition at 5-6. It bears mention that the "statutory right" to which IAICC refers expressly includes the possibility of a bill-and-keep regime. 47 U.S.C. § 252(d)(2)(B)(i) ("This paragraph shall not be construed to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements).").

The interim compensation arrangements afford ILECs substantial benefits and immediate relief. However, the Commission is under no obligation to provide interim relief for ILECs, much less *unconditional* interim relief. ILECs who find the mirroring requirement unacceptable may forego the immediacy of the interim arrangement and pursue a more "acceptable" compensation arrangement through the permanent, albeit relatively delayed, rules that will arise out of the more comprehensive *Inter-Carrier Compensation* rulemaking. However, offering a choice does not amount to compulsion, particularly when the alternative is the maintenance of the status quo.

V. THE COMMISSION DID NOT ACT IN AN ARBITRARY AND CAPRICIOUS MANNER.

Petitioners allege that the Commission failed to adequately consider a carrier's termination costs when applying a reciprocal compensation standard.[23] To the contrary, the Commission considered the attempts of ILECs to justify reciprocal compensation rates that are higher than terminating charges for ISP-bound traffic[24] and after a lengthy discussion concluded that

> [t]he 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.[25]

With respect to ISP-bound traffic, these contentions miss the central point of the Commission's policy. Repeatedly, the Report and Order explains that carriers will no longer recover all of the

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23 See, e.g., id. at 9-10.

24 Report and Order ¶¶ 90-93.

25 Id. ¶ 93.

terminating costs of ISP-bound traffic through carrier-to-carrier charges, but instead must look to their end users for that portion of terminating costs unrecoverable from connecting carriers.[26] Where State PUC regulation prohibits an unauthorized increase in end user rates, "if ILECs feel that these [end user] rates are so low as to preclude cost recovery, they should seek relief from their state commissions."[27] This represents a bold and fundamental change in cost recovery mechanisms for ISP-bound traffic (and, where ILECs so choose, for Section 251(b)(5) traffic). However, far from being arbitrary and capricious, the Commission's well-reasoned analysis adequately describes the basis for its approach and explains how its new policy, including the mirroring condition, will lead to more economically rational behavior and will promote sustainable competition.[28]

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26 Id. ¶ 74 ("We believe that a bill and keep regime for ISP-bound traffic may eliminate these [uneconomic] incentives and concomitant opportunity for regulatory arbitrage by forcing carriers to look only to their ISP customers, rather than to other carriers, for cost recovery."); id. ¶ 80 ("We acknowledge that carriers incur costs in delivering traffic to ISPs, and it may be that in some instances those costs exceed the rate caps we adopt here. To the extent a LEC's costs of transporting and terminating this traffic exceed the applicable rate caps, however, it may recover those amounts from its own end-users."); id. ¶ 83 ("The interim compensation regime, as a whole, begins a transition toward what we have tentatively concluded, in the companion *NPRM*, to be a more rational cost recovery mechanism under which LECs recover more of their costs from their own customers.").

27 Id. ¶ 80, n.151.

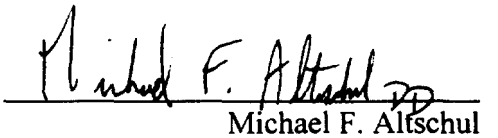
28 Id. ¶¶ 67-76.

VI. CONCLUSION.

For the foregoing reasons, CTIA respectfully requests that the Commission deny the Petitions for Reconsideration discussed herein.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION



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CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 23rd day of July, 2001 copies of the foregoing "Opposition of The Cellular Telecommunications & Internet Association" were delivered by postage pre-paid first class mail, or otherwise indicated to the following parties:

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