Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

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

REPLY TO OPPOSITIOINS
TO PETITION FOR RECONSIDERATION
OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION'S

The National Telephone Cooperative Association ("NTCA") hereby submits its Reply to Oppositions to its Petition for Reconsideration in this proceeding.

I. THE DECISION TO PRESCRIBE RATES FOR SECTION 251(b)(5) TRAFFIC IS NOT A LOGICAL OUTGROWTH OF THE PROPOSED RULE

Various petitioners claim that the mirroring rule is not a major decision requiring more specific notice.[1] They claim that the rule follows "logically" from the rules proposed. However, the Commission's conclusions make it plain that it believes the rule makes a major change from the proposed rule and Notices because it implements <u>now</u> the tentative conclusions announced in the accompanying NPRM for the long term treatment

[1] Oppositions of Sprint Corporation at 2-3; AT&T Wireless (AT&T) at 3-6; VoiceStream Wireless Corporation (VoiceStream) at 3-10; Cellular Telecommunications & Internet Association (CTIA) at 3-7, Association of Communications Enterprises at 2-5.

of both ISP-bound and Section 251(b)(5) traffic.[2] The Commission made its objective clear. It said: In sum, our goal in this Order is decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end-users, consistent with the tentative conclusion in the NPRM that bill and keep is the appropriate intercarrier compensation mechanism for ISP-bound traffic.[3] The fact that the rule accomplishes what the companion NPRM proposes is strong evidence that parties did not receive adequate notice.

Contrary to petitioner's arguments, the Commission decision to begin the transition contemplated in the companion NPRM could not have been predicted from the various Notices issued in this proceeding. The dissenting opinion of Commissioner Furchgoth-Roth details the procedural history of this proceeding and each of the four questions that the Court required it to answer on remand.[4] Parties could expect the Commission to respond to the Court's remand and rule on these questions in an Order on Remand. The questions all relate to ISP-bound calls and the Commission's jurisdiction over that traffic. The Commission, of course, ruled on the jurisdictional nature of ISP-bound traffic and came up with an interim rule for compensation but went far beyond that in the mirroring rule. It exercised its authority under Section 201 to establish interim rates that will apply to ISP-bound and Section 251(b)(5) local traffic for 36 months. In

---

[2] 47 U.S.C. § 251(b), Communications Act of 1934 as amended by the Telecommunications Act in 1996 Pub.L. No. 104-104, 110 Stat. 56 (1996) (The Act). Hereafter, citations to the Act is by Section number.

[3] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic Providers,* CC Docket No. 96-98, CC Docket No.99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) ("Remand Order"), Para. 7. The <u>NPRM</u> referred to is the Notice of Proposed Rulemaking in CC Docket No. 01-92, *In the Matter of the Unified Compensation Regime.*

[4] *Remand Order*, see dissent of Commission Harold Furchgott-Roth. Four questions the court remanded are [rephrased for simplicity]: 1. Why are ISPs not like other local businesses? 2. Why do calls not terminate at ISPs? 3.How is the FCC's treatment of ISP-bound traffic consistent with its treatment of enhanced service providers? 4. Is ISP-bound traffic "exchange access" or "telephone exchange service".

doing so it concludes that ISP-bound traffic is interstate and governed by Section 254(g). While the Commission gave no clue that it would rely on 254(g), NTCA is not complaining that it received no notice of this possible outcome. Parties expected a determination of the nature of that traffic and a consistent and jurisdictionally appropriate resolution of the controversy over intercarrier compensation rates for that traffic but not the prescription of rates for local traffic.

Neither the Commission's Notices nor the Court's Remand support the "logical outgrowth" claim for the mirroring rule.[5] The effect of the mirroring rule is to prescribe a rate for traffic subject to Section 251(b)(2). The Commission has no authority to do so and its Notices gave no indication that it might usurp State authority in this area. State Commissions approve agreements for this traffic. Section 252(d)(2) prescribes pricing standards that govern State approval of terms and conditions for reciprocal compensation arrangements of transport and termination of this admittedly local traffic. Parties could not anticipate that the Commission would also ignore the pricing standards that States must apply to reciprocal compensation agreements for transport and termination, *i.e.,* terms and conditions must provide for the recovery by each carrier of its associated costs and cost must be based on a "reasonable approximation of the additional costs of terminating such calls." Section 252((d)(2)(A). The Commission ignored 252 entirely. It followed none of the procedural steps that guarantee notice and the opportunity for hearing in cases where the States approve reciprocal compensation charges under Section 252. It made no findings or determinations that traffic covered by the mirroring

[5] Footnote 1, *supra*.

provision would recover appropriate costs. In fact, it admitted that it made no findings based on actual costs for any of the traffic covered by the interim regime.[6]

II. PARTIES HAVE FAILED TO SHOW THAT THE FCC HAS AUTHORITY TO PRESCRIBE RATES FOR SECTION 251(b)(5) TRAFFIC

CTIA contends that the Commission has jurisdiction to impose the interim regime on 252(b)(5) traffic because *AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) (AT&T*) permits it to impose a "pricing methodology' that States are required to implement. [7] As shown above, the mirroring rule is not a "general pricing methodology." It leaves no choice to the States. In *AT&T*, the Supreme Court emphasized that Commission pricing standards were consistent with its 201(b) jurisdiction so long as the States were left with the authority to implement the methodology and determine the concrete result in particular circumstances.[8] The mirroring rule is obviously more than a "pricing methodology" of general applicability. The rule establishes charges. States have no choice and no authority to establish different rates for transport or termination of Section 251(b)(5) traffic in instances where carriers opt for the interim rates for ISP-bound traffic.

CTIA also argues that the mandatory limit on per minute charges is not arbitrary and capricious because it will force carriers to seek end user increases from State PUCs. [9] CTIA's underlying assumption is that the interim rates are rationally based. However, as noted above, the test the Act imposes for transport and termination charges under 251(b)(5) is whether they are "just and reasonable." Section 252(d)(2)(A). Moreover,

[6] *Order on Remand*, Para. 84
[7] See, CTIA Opposition at 8.
[8] *AT&T* at 384.
[9] CTIA Opposition at 10-11.

Section 252(d)(2)(A)(i) and (ii) provide that charges are not to be considered "just and reasonable" unless they provide for recovery (1) by each carrier of costs associated with the transport and termination and (2) these costs are determined on the basis of the additional costs of termination.

The Commission does not even attempt to justify its mirroring rule under this standard. Instead, it merely concludes that LECs generally will incur the same costs when delivering a call to a local end-user as it does delivering a call to an ISP.[10] Core Communication's Inc. (Core) endorses the Commission's conclusion.[11] It falls back, however, on the crux of the Commission's basis for imposing mirroring, its policy decision that it would be unfair to allow a different State compensation scheme to exist along side its own. Others embrace that theme.[12] They all miss the point that the mirroring rule prejudges the proposal in the companion NPRM and applies its tentative conclusions to 251(b)(5) traffic before comments have even been filed in that proceeding. It also does not consider the jurisdictional conflicts it creates, the impact on local rates, or the pricing standards that govern the traffic. The cry that the costs are the same is not supported since the Commission admits that the interim caps are not based on cost findings. The complaint that a dual system is unfair because ILECs get to "pick and choose" ignores the fact that ILECs are not in the business of choosing what type of traffic terminates on their networks. The rural ILECs did not manufacture the arbitrage opportunities that CLECs have exploited and that the Commission credits to failed rules for the compensation of ISP-bound traffic.[13] The Commission's palliative is misdirected.

---

[10] Order on Remand at Para. 90, n.180.
[11] Core Opposition at 3.
[12] Focal at n.19; AT&T at 6.
[13] Remand Order at Para 2.

Further, it should not be assumed that the States cannot manage to prevent any regulatory arbitrage that might result in the absence of a mirroring rule.

III. CONCLUSION

For the foregoing reasons, NTCA requests that the Commission grant its Petition for Reconsideration.

Respectfully submitted,

NATIONAL TELEPHONE
COOPERATIVE ASSOCIATION

By: /s/ L. Marie Guillory
L. Marie Guillory

By: /s/ Daniel Mitchell
Daniel Mitchell

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

August 2, 2001

<u>CERTIFICATE OF SERVICE</u>

I, Gail C. Malloy, certify that a copy of the foregoing Reply to Oppositions to Petitions for Reconsideration of the National Telephone Cooperative Association in CC Docket No. 96-98, FCC 01-131 was served on this 2nd day of August 2001 by first-class, U.S. Mail, postage prepaid, to the following persons:

Chairman Michael Powell
Federal Communications Commission
445 12th Street, SW, Room 8B201
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W., Room 8-B115
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W., Room 8-C302
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W., Room 8-A302
Washington, D.C. 20554

International Transcription Service
Federal Communications Commission
445 12th Street, S.W., Room CYB400
Washington, D.C. 20554

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

Al McCloud
Common Carrier Bureau
Network Services Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michael F. Altschul, Esq.
Cellular Telecommunications & Internet Association
1250 Connecticut Ave., N.W., Suite 200
Washington, DC 20036

Philip L Verveer, Esq.
Gunnar D. Halley, Esq.
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Michael B. Hazzard, Esq.
Tamara E. Connor, Esq.
Kelley Drye & Warren LLP
8000 Towers Crescent Drive, 12th Floor
Vienna, Virginia 22182

Brad E. Mutschellnaus, Esq.
Genevieve Morelli, Esq.
Kelley Drye & Warren LLP
1200 19th Street, N.W., 5th Floor
Washington, D.C. 20036

Howard J. Symons, Esq.
Sara F. Liebman, Esq.
Susan McDonald, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Ave., N.W., Suite 900
Washington, D.C. 20004-2608

Douglas I. Brandon, Esq.
AT&T Wireless Services
1150 Connecticut Avenue
Fourth Floor
Washington, D.C. 20036

John Goodman, Esq.
Michael E. Glover
Edward Shakin
Of Counsel
Verizon Wireless
1300 I Street, N.W., Suite 400 West
Washington, D.C. 20005

Susan E. McNeil, Esq.
H. Richard Juhnke, Esq.
Sprint Corporation
401 9th Street, N.W., Suite 400
Washington, D.C. 20004

Teresa K. Gaugler, Esq.
Association for Local
Telecommunications
Services
888 17th Street, N.W.
Washington, D.C. 20006

Stephen G. Kraskin, Esq.
Kraskin, Lesse & Cosson, LLP
2120 L Street N.W., Suite 300
Washington, D.C. 20037

Benjamin H. Dickens, Jr.
Blooston, Mordkofsky, Dickens, Duffy
& Prendergast
2120 L Street, N.W., Suite 300
Washington, D.C. 20037

Cynthia B. Miller
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Charles Hunter, Esq.
Hunter Communications Law Group
1424 16th Street, N.W.
Washington, D.C. 20006

Richard Rindler, Esq.
Swidler Berlin Shereff and Friedman
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Douglas Bonner, Esq.
LeBouf, Lamb, Green & MacRae
1875 Connecticut Avenue, N.W.
Washington, D.C. 20008

Brian T. O'Connor, VP
Legislative & Reg. Affairs LLP
VoiceStream Wireless Corporation
401 9th Street, N.W., Suite 550
Washington, D.C. 20004

/s/ Gail C. Malloy
Gail C. Malloy