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

REPLY OF THE
INDEPENDENT ALLIANCE ON INTER-CARRIER COMPENSATION

The Independent Alliance on Inter-Carrier Compensation ("Alliance") respectfully submits its Reply to Oppositions filed in response to the Petition for Reconsideration and/or Clarification ("Petition") filed by the Alliance in the above-captioned proceeding. The Petition asks for reconsideration and/or clarification of the *Order on Remand and Report and Order* ("*Order*") released in this proceeding on April 27, 2001. In its Petition, the Alliance seeks Commission action to modify or clarify the *Order* to confine its application to traffic bound to Internet service providers (hereafter, "ISPs"). Grant of the relief sought by the Alliance is essential in order to conform the Commission's action to applicable statute, established administrative procedure and requirements, and existing Commission rules and public policy. Moreover, the reconsideration and/or clarification is required to avoid otherwise unnecessary preemption of State authority over inter-carrier arrangements between telecommunications carriers.[1]

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[1] The National Association of Regulatory Utility Commissioners ("NARUC") recently adopted a resolution that sets forth many of the same concerns about the *Order* as those of the Alliance. The resolution expresses concerns with respect to jurisdictional authority, treatment of intrastate traffic, affordability of basic service, and other universal service goals. *See* "Resolution on Jurisdictional Issues for Internet-Bound Traffic," sponsored by the Committees on Consumer Affairs and Telecommunications adopted July 18, 2001.

I. Regardless of any participation in "negotiations" by other parties in an attempt to reach a "regulatory consensus," the application of the inter-carrier compensation mechanism for ISP-bound traffic to other forms of traffic is premature.

The procedural background of the proceeding that resulted in the Petition by the Alliance is fully reviewed in the Petition. The *Order* is the culmination of the Commission's consideration, on remand by the U.S. Court of Appeals for the District of Columbia Circuit of an earlier decision in this proceeding. In the *Order*, the Commission determines that ISP-bound traffic falls under the scope of §251(g) of the Telecommunications Act of 1996 (the "Act") and, accordingly, is excluded from §251(b)(5) of the Act. The Commission's *Order* also establishes inter-carrier compensation arrangements with respect to the ISP-bound traffic. As noted in the Petition, the Alliance does not seek reconsideration or clarification of any aspect of the *Order* that addresses ISP-bound traffic.

The concerns of the Alliance arise with respect to those aspects of the *Order* that would require rural telephone companies to apply the Commission's ISP-bound traffic inter-carrier compensation mechanism to other forms of traffic. Concurrent with the issuance of the *Order*, the Commission issued the Unified Inter-Carrier Compensation *NPRM*[2] to consider whether the Commission should replace existing inter-carrier compensation arrangements with a "bill and keep" arrangement. The Commission indicated that the issuance of the *NPRM* was, in part, a result of its concern that market distortions result from inter-carrier payment arrangements with all forms of traffic. The Commission noted that this concern is "particularly apparent with respect to ISP-bound traffic . . . . Accordingly, in this Order we also take interim steps to limit the regulatory arbitrage opportunity presented by ISP-bound traffic while we consider the broader

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[2] Developing a Unified Inter-Carrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (released April 27, 2001) ("*NPRM*").

issues of inter-carrier compensation in the *NPRM* proceeding."[3] The Alliance respectfully submits that, contrary to the very *NPRM* process that the Commission has established, the subsequent application of the Commission's conclusions regarding ISP-bound traffic to other forms of traffic is premature, unnecessarily preempts state commission authority over inter-carrier compensation arrangements, and is in conflict with the Act.

As revealed by the Opposition Comments, the premature application of the ISP-bound traffic inter-carrier mechanism established by the *Order* to other forms of traffic appears to be the result of an attempt at a "regulatory consensus" or "deal" -- the large local exchange carriers ("LECs") escape payment of compensation for ISP-bound traffic in exchange for reducing their own terminating charges to other carriers.[4] The only basis in the *Order* for extending the conclusions to the non-ISP traffic is the unsupported conclusion that it otherwise would be "patently unfair to allow incumbent LECs to benefit from reduced inter-carrier compensation rates for ISP-bound traffic . . .while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the caps we adopt here, when the traffic imbalance is reversed."[5]

This basis for the premature action and pre-judging of the *NPRM* is no basis at all. The *Order* does not even gloss over the fact that the would-be "patently unfair" compensation rates referred to in the quote above were rates established in accordance with applicable Commission rules and applicable statutory requirements. The *Order* simply ignores this fact.

Review of the Oppositions to the Petition are revealing in this regard. The opposing

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[3] *Order* at para. 2.

[4] *See, e.g.*, Voicestream Wireless Corporation at pp. 5-6.

[5] *Order* at para. 89 (footnote omitted).

parties apparently are under the impression that they are due a new entitlement, notwithstanding the process established by the *NPRM*, and only because the Commission has acted now to address ISP-bound traffic. In particular, representatives of wireless carriers seek an immediate bill and keep for the termination of Major Trading Area CMRS traffic.[6] Ironically, some members of the Alliance are both rural LECs and rural wireless carriers. These carriers, however, have the very same concerns that the Commission has expressed in that the inter-carrier framework should not promote inappropriate arbitrage opportunities, and therefore, these carriers seek a reasoned and fair treatment for all arrangements. Accordingly, the Alliance members welcome the opportunity for full consideration of any new and rational inter-carrier compensation mechanisms and cost recovery systems that will be examined and considered in the context of the *NPRM*. The Alliance respectfully submits, however, that whatever additional changes they or any party may advocate to serve their own interests, no such policy should be adopted in the absence of a basis formed on an appropriate record and established in accordance with proper procedures as those initiated by the *NPRM*. Moreover, no change in policy should be imposed in areas served by rural telephone companies in the absence of full consideration of the ramifications on the provision of Universal Service.

II. Notwithstanding the wishes and hopes of the opposing parties, the *Order* does not comply with required procedure and applicable statutes to the extent that it attempts to address non-ISP traffic.

The opposition comments have much in common. The most obvious thread that binds is the desire of these parties to obtain immediate reductions in the compensation charges they each pay to LECs. In order to support their objective, these parties essentially insist that the

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[6] *See, generally,* Oppositions filed by the Cellular Telecommunications & Internet Association (CTIA"), Voicestream Wireless Corporation, and AT&T Wireless Services, Inc.

Commission may prejudge its own *NPRM*, ignore matters of procedure and basic fairness in process, and arbitrarily require changes in rates established in accordance with the procedures and pricing requirements set forth in the Act.

A. The members of the Alliance did not have actual or constructive notice that the *Order* could affect non-ISP inter-carrier compensation mechanisms.

In its Petition, the Alliance points out that this proceeding which resulted in the *Order* focused solely on ISP-bound traffic. The Commission, in order to justify its decision on remand that ISP-bound traffic is interstate, emphasizes and relies upon the statutory distinction between §251(b)(5) traffic and §251(g) traffic.

Parties filing Oppositions insist that rural LECs, including the Alliance members, had both actual and constructive notice of the Commission's intent to consider issuing an order in this proceeding that would affect and change existing inter-carrier compensation arrangements established pursuant to existing rules, regulations, and statutory authority.[7] These parties claim that national associations, through the *ex parte* process, not only had notice, but addressed related issues. Moreover, some parties purport that one association representing rural LECs supported the very position that the Alliance opposes.[8] Irrespective of any activity by any association, the fact remains that the Alliance members did not have actual or constructive notice of Commission consideration of changes in non-ISP traffic arrangements in this phase of this proceeding. As is obvious by the participation of the Alliance members in their request for reconsideration, they would have participated and acted if they had the notice that the parties in Opposition claim.

Contrary to the claims of the opposing parties, the mere proffering of a party's self-serving position and proposal through an *ex parte* filing hardly constitutes notice that the Commission

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[7] *See, e.g.*, CTIA at 3-9, Voicestream Wireless Corporation at 3-10.

[8] *E.g.*, Voicestream Wireless Corporation at 3-8.

would consider a rule or policy change with respect to which it had not previously issued public notice. Logic, common sense, and law come together in the Administrative Procedures Act in this respect. Once the Commission issues public notice with respect to its deliberations and proposals, the public is not expected to vigilantly review *ex parte* filings to determine if the Commission might, at the whim of a party, alter the scope of the proceeding set forth in the public notice. The Alliance members and other rural LECs had no basis for concern that the Commission would change the scope of the Public Notice issued in this proceeding that would require them to avidly review *ex parte* filings in search of potential "deal-making" or "consensus-building" that would result in action beyond the scope of the Public Notice. Section 553(b) of the Administrative Procedure Act is clear. The Commission must provide formal notice of a rule before it adopts a new rule. The public will have an opportunity to consider the proposed rule changes sought by the opposing parties in the context of the *NPRM*. This opportunity did not exist in the context of the proceeding that resulted in the *Order*, and, accordingly, there is no basis to adopt any rule or policy that affects non-ISP traffic.

B. The impact of the *Order* on non-ISP traffic compensation arrangements is, contrary to the opposing parties, a fact.

Several of the parties filing oppositions to the Petition suggest that the members of the Alliance need not be concerned about the *Order*. With a written pat on the back, these parties conclude that the Alliance concerns only become a reality if and when an Alliance member chooses to utilize the ISP-bound traffic inter-carrier arrangements set forth in the *Order*.[9] These parties are either incorrect, or the *Order* requires the clarification sought by the Alliance.

There is nothing "voluntary" about the objectionable, forced mirroring aspects of the

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[9] *See, e.g.*, CTIA at 8-10; Voicestream Wireless Corporation at 10-12.

Order. When carriers have not exchanged traffic pursuant to an interconnection agreement entered prior to the *Order*, the carriers must exchange ISP-bound traffic on a bill-and-keep basis.[10] Once a LEC exchanges ISP-bound traffic with any carrier on a bill-and-keep basis, it must exchange all traffic subject to §251(b)(5) on the same basis.[11]

If the Commission did intend that the mirroring requirements of the *Order* are to be "voluntary," as suggested by other parties, the *Order* would, as a consequence, require revision to protect the public interests that the Commission seeks to address. In the *Order*, the Commission, as discussed above, addresses the policy needs to address the arbitrage problems and market distortions that have been associated with inter-carrier compensation for ISP-bound traffic. With respect to the Alliance members and other rural LECs, the Commission has not considered or set forth any basis for imposing different treatment on a rural LEC with respect to ISP-bound traffic simply because the rural LEC does not choose to forego its statutory right to recover the costs associated with the transport and termination of §251(b)(5) traffic on its network. No basis exists, on or off the record, to tie the treatment of traffic with respect to entirely separate and distinct §251(g) traffic to how a LEC prices the transport and termination of §251(b)(5) traffic.[12]

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[10] *Order* at para. 81.

[11] *Id.* at para. 89. If the Commission did not intend this result, the Alliance respectfully reiterates its request for clarification.

[12] CTIA notes that the §252(d)(2) "statutory right" regarding the pricing of transport and termination "expressly includes the possibility of a bill-and-keep regime." CTIA at n. 22. However, this statutory provision supports the positions of the Alliance and is contrary to the opposing parties' positions. The statute clearly specifies that bill-and-keep is a possible outcome of an interconnection between two parties. Mandatory bill-and-keep for §251(b)(5) transport and termination would unlawfully abrogate the meaning of the relevant §252 provisions.

C. The Comments of Opposing Parties reflect either a misunderstanding or misstatement regarding the relationship between the pricing of transport and termination pursuant to §251(b)(5) of the Act versus services within the scope of §251(g).

1. The Comments of Opposing Parties express their dislike of rural LEC §251(b)(5) transport and termination rates, but ignore the legal process and pricing standards pursuant to which the rates were established.

Some parties have utilized their opportunity to respond to the Alliance Petition as a misplaced means to promote their self-serving view regarding rates for inter-carrier compensation associated with non-ISP traffic.[13] The very fact that these comments focus the parties' efforts on their objectives with respect to non-ISP traffic further underscores the rational requirement for the reconsideration sought by the Alliance.

While these opposing parties complain about the level of rural LEC rates, no party recognizes or demonstrates any understanding of the statutory process and pricing standards pursuant to which these rates were established..[14] These parties attempt to vent their dissatisfaction with LEC termination rates, in general, but fail to demonstrate any basis for altering the established pricing processes and standards, much less implementing changes to existing non-ISP inter-carrier traffic agreements within the scope of this proceeding. As noted previously, individual members of the Alliance may not disagree with the concern expressed by the Commission regarding the need to consider all aspects of inter-carrier compensation in order to address arbitrage opportunities and market distortions that may result from the existing mechanisms. The proper forum, however, within which to pursue this matter and to implement change is the *NPRM*, and not this proceeding.

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[13] *See, e.g.*, Voicestream Wireless Corporation at 12-14.

[14] *See* §252(a)-(d) of the Act.

2. Both the Opposing Parties and the Commission have ignored the fact that, for inter-carrier compensation purposes, the treatment of information service traffic and other forms of traffic have long been distinguished on the basis of Commission regulation.

In many respects, the sections of the *Order* that set forth the "mirroring" relationship between §251(b)(5) interconnection and the Commission's new requirements for ISP-bound traffic[15] appear to have been issued by a different Commission than that which earlier in the *Order* addresses the jurisdictional nature of ISP-bound traffic and the appropriate treatment of inter-carrier compensation. When addressing the jurisdictional issue on remand, the Commission clearly sets forth its historic treatment of enhanced service providers ("ESPs") including ISPs. The Commission's analysis incorporates its institutional recollection that it determined to exempt ESPs from interstate access charges on the basis of public policy considerations, notwithstanding the fact that ESPs receive services that are equivalent to interstate access.[16] The Commission, in fact, bases its conclusion regarding ISP traffic on its determination that ESP traffic, together with other forms of traffic, were included by Congress under the scope of §251(g) (*i.e.*, "information access") and not within §251(b), thereby enabling the Commission not only to assert jurisdiction, but also to regulate pricing (including the continuation of the ESP access charge exemption).[17]

The Commission, however, apparently did not apply the same analysis later in the *Order* when it attempts to fashion a "mirroring" relationship between §251(b)(5) agreements and the treatment of ISP-bound traffic. In fact, as previously discussed, the Commission states that it sees "no reason to impose different rates for ISP-bound and voice traffic. . . ," disregarding its own policies cited earlier in the *Order* to support both the distinct statutory treatment afforded by the

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[15] *Order* at paras. 89-94.

[16] *Order* at para. 11.

[17] *Id.* at paras.36-37.

Act and the Commission's ESP access charge exemption policy.

Opposing parties merely latch on to the unsupported argument that the costs of ISP-bound traffic termination is the same as the costs associated with the termination of other forms of traffic.[18] The promotion of this position ignores the distinct and fundamentally different treatment the Commission has afforded the compensation framework for different forms of traffic, irrespective of "costs." Moreover, if the argument convincingly supported the proposition that the pricing of §251(g) ISP interconnection must be the same as §251(b)(5), the statutory result would require the imposition of the statute driven §252(d) pricing standards on §251(g) ISP traffic, a conclusion that the *Order* specifically avoids. The statute cannot be ignored to achieve the opposite result.

III. CONCLUSION

For the foregoing reasons, the Alliance respectfully requests that the Commission reject the Oppositions to the Petition and grant the relief requested by the Alliance in its Petition.

Respectfully submitted,

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[18] *See, e.g.*, CTIA at 10-11; Voicestream Wireless Corporation at 9.

CERTIFICATE OF SERVICE

I, Stephen G. Kraskin, hereby certify that copies of the foregoing **"Reply of the Independent Alliance of Inter-Carrier Compensation "** were served by first-class mail or by hand on this 2nd day of August, 2001 to those on the following list:

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