



November 4, 2008

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, N.E., Suite 110
Washington, D.C. 20002

**Re: *Intercarrier Compensation for ISP-Bound Traffic,*
CC Docket No. 99-68**

Dear Ms. Dortch:

Attached please find the *ex parte* submission of Core Communications, Inc. ("Core") in support of its position in the 99-68 docket. The *ex parte* reflects Core's position regarding the Joint Statement of Commissioners Copps, Adelstein, Tate, and McDowell and the response statement of Chairman Martin with respect to the agenda items set for the November 4, 2008 Open Meeting.

If you have any questions regarding this filing, please contact me.

Respectfully submitted,

Danielle M. Benoit¹

cc: ***Via Electronic Mail***
Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate

¹ Licensed only in New York, DC Bar application pending, working under the supervision of a licensed DC attorney.

Commissioner Robert M. McDowell
Matthew Berry
Nicholas Alexander
Amy Bender
Scott Bergmann
Scott M. Deutchman
Greg Orlando

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Intercarrier Compensation for ISP-Bound)	CC Docket No. 99-68
Traffic)	
)	

EX PARTE OF CORE COMMUNICATIONS, INC.

Core Communications, Inc. ("Core"), by its undersigned counsel, hereby submits this *ex parte* filing to summarize important developments in this docket and related proceedings before the Federal Communications Commission ("Commission").

On November 3, 2008, the Commission issued a notice deleting from the agenda of its November 4, 2008 Public Meeting a comprehensive intercarrier compensation and universal service reform item, which reportedly included a response to the Court of Appeals for the District of Columbia Circuit's mandamus in *In re Core Communications, Inc.*, 531 F.3d. 849 (D.C. Cir. 2008). A copy of the notice is attached hereto as Exhibit 1. Subsequently, Commissioners Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate, and Robert M. McDowell issued a Joint Statement in response to the decision to remove the item, which highlighted, among other concerns, the lack of "notice and comment" for the proposals set forth by Chairman Kevin J. Martin in his proposed comprehensive reform item. The Joint Statement further noted the desire for an item to resolve narrowly the *In re Core* mandamus. A copy of the Joint Statement is attached hereto as Exhibit 2. Chairman Martin, in response, stated that the "narrow" order the other Commissioners appear to be seeking in response to *In re Core* is based on "artificial and unsupported distinctions." Chairman Martin further stated that such an approach is unlikely to "be seen any more favorably by the Court that the Commission's two

previous attempts,” which the Court rejected. A copy of Chairman Martin’s statement is attached hereto as Exhibit 3.

Adoption of such an order would be unfortunate for at least three reasons. First, an order premised on “artificial and unsupported distinctions” would force another round of litigation, and thereby unwisely consume the resources of the Court, the Commission, and the industry.

Second, no party has been given any notice or the ability to comment on the new order the Chairman appears to have directed the staff to prepare just last night in response to the other Commissioners’ request. The Commission must operate within the confines of the Administrative Procedure Act (“APA”) and must adhere to the “the degree of openness, explanation, and participatory democracy required by the APA.” *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (9th Cir. 1978). Section 553 of the APA provides that:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

5 U.S.C. § 553. Failure to provide sufficient notice is grounds for reversal or remand. *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (remanding rule regarding Access Broadband Over Power Line service). The Commission has wholly ignored its notice and comment obligations with regard to the *In re Core* mandamus. Indeed the Commission has never issued any notice suggesting what possible responses it is considering. And apparently, the Commission began considering something brand new in the last 24 hours.

Third, any order adopted regarding telecommunications to ISPs will bind the Commission in its on-going efforts to unify intercarrier compensation systems for all telecommunications. The Commission should not base the foundation of its reform efforts on “artificial and unsupported distinctions.” Rather, as Core has noted, the Commission would act

far more responsibly by acknowledging that no party has put forward a sustainable legal basis for excluding telecommunications to ISPs from § 251(b)(5)'s reciprocal compensation regime, and by permitting the vacatur of the *ISP Remand Order* by operation of the Court's mandamus.

At bottom, the Commission has not met the *In re Core* mandamus with the openness, fairness, and opportunity to comment required by the APA. The Commission further appears poised to take the very first step in a comprehensive reform effort through a hastily drafted order that relies on "artificial and unsupported distinctions." These last minute actions are fatally flawed, wholly arbitrary, and completely contradictory to the Court's mandate *In re Core* mandamus.

The *ISP Remand Order* is unsupportable. The Commission should recognize this by allowing it to be vacated by operation of the *In re Core* mandamus. The Commission could then proceed with its global intercarrier compensation and universal service reform efforts, relieved of the burden put on the Commission by the unlawful *ISP Remand Order*.

Respectfully submitted,



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November 4, 2008

EXHIBIT 1



Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commission Meeting Agenda

A Public Notice of the Federal Communications
Commission
News Media Information (202) 418-0500
Fax-On-Demand (202) 418-2830
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

November 3, 2008

DELETION OF AGENDA ITEM FROM NOVEMBER 4, 2008, OPEN MEETING

The following item has been deleted from the list of Agenda items scheduled for consideration at the November 4, 2008, Open Meeting and previously listed in the Commissioner's Notice of October 28, 2008.

<u>ITEM NO.</u>	<u>BUREAU</u>	<u>SUBJECT</u>
1	WIRELINE COMPETITION	TITLE: High-cost Universal Service Support (WC Docket No. 05-337); Federal-State Joint Board on Universal Service (CC Docket No. 96-45); Lifeline and Link Up (WC Docket No. 03-109); Universal Service Contribution Methodology (WC Docket No. 06-122); Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities (CG Docket No. 03-123); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98); Developing a Unified Intercarrier Compensation Regime (CC Docket No. 01-92); Intercarrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68); and IP-Enabled Services (WC Docket No. 04-36) SUMMARY: The Commission will consider a Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking addressing the comprehensive reform of intercarrier compensation and universal service.

-FCC-

*The summaries listed in this notice are intended for the use of the public attending open Commission meetings. Information not summarized may also be considered at such meetings. Consequently these summaries should not be interpreted to limit the Commission's authority to consider any relevant information.

EXHIBIT 2



NEWS

News media Information 202 / 418-0500
Fax-On-Demand 202 / 418-2830
TTY 202/418-2555
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1974).

FOR IMMEDIATE RELEASE

November 3, 2008

JOINT STATEMENT OF COMMISSIONERS MICHAEL J. COPPS, JONATHAN S. ADELSTEIN, DEBORAH TAYLOR TATE AND ROBERT M. MCDOWELL

Below is a Joint Statement from the above-referenced commissioners in response to the decision to remove the intercarrier compensation and universal service proposals from tomorrow's agenda:

“Three weeks ago, Chairman Martin first shared with the Commission his proposals to fundamentally reform the intercarrier compensation and universal service systems. Four Commissioners provided the Chairman bi-partisan, constructive and substantive suggestions, and stated that notice and comment should be sought on the proposals, with an understanding that we would all be prepared to vote on December 18. We also have asked the Chairman to narrowly address the ISP-bound traffic remand and the Joint Board's Recommendation. We therefore are disappointed that the Chairman has withdrawn the fundamental reform item from tomorrow's agenda.

“We approached this proceeding with the common goal of modernizing our universal service and intercarrier compensation policies, and commend the desire to tackle some of the most important issues facing this Commission. It is equally important to ensure that any reform proposal receive the full benefit of public notice and comment - especially in light of the difficult economic circumstances currently facing our nation.

“We remain committed to fulfilling our obligation to tackle these difficult issues, and have set forth a reasonable path for completing comprehensive reform. We remain hopeful that the consensus process we have pursued regarding this issue will ultimately lead to a thoughtful, well-reasoned item that will inure to the benefit all Americans.”

EXHIBIT 3

*STATEMENT OF FCC CHAIRMAN KEVIN J. MARTIN ON INTERCARRIER
COMPENSATION AND UNIVERSAL SERVICE REFORM*

November 3, 2008

The issues of Intercarrier Compensation and Universal Service reform have been in front of the Commission for years. Last summer I publicly indicated my intention to put forward concrete and comprehensive proposals to reform the inefficient and outmoded Intercarrier compensation and Universal Service programs. Those proposals have been with my colleagues for several weeks now. I am disappointed that we will miss the opportunity for comprehensive reform. Instead my colleagues have requested that we once again seek public comment on several proposals. As a result such a notice would make little progress and ask for comment again on the most basic and broad questions about reforming the two programs. For example, the Commission would again ask should broadband be supported by the Universal Service Fund and should we move to one uniform rate for all traffic or should that rate vary by the type of company?

I would like to be encouraged by my colleagues' commitment that they will truly be ready to complete this much needed reform on December 18. The nature of the questions they would like to include makes me doubt they will have found their answers with an additional seven weeks. I believe the far more likely outcome is that, in December, the other Commissioners will merely want another Further Notice and another round of comment on the most difficult questions. I do not believe they will be prepared to address the most challenging issues and that the Commission will be negotiating over what further questions to ask in December.

Additionally, I have instructed the Bureau to draft a narrow order to address the Court's remand. However, I remain skeptical that such an order which retains artificial and unsupported distinctions between types of Internet traffic will be seen any more favorably by the Court than the Commission's two previous attempts.

I recognize that few other issues before the Commission are as technically complex and involved, with as many competing interests, as are reforming the Intercarrier Compensation and Universal Service programs. But neither of those two realities are an excuse for inaction. They will be true in one month, in one year or as we have now seen at the Commission, in ten years. I too remain committed to tackling the most difficult issues, providing answers to the toughest questions, fixing broken and outdated government programs and providing broadband to all Americans including those living in rural areas. I look forward to completing these long overdue and much needed reforms as soon as possible.