COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION INTO THE INTRASTATE SWITCHED ACCESS RATS OF ALL KENTUCKY INCUMBENT AND COMPETITIVE LOCAL EXCHANGE CARRIERS	)	ADMINISTRATIVE CASE NO. 2010-00398

COMMENTS OF VERIZON[1]

Pursuant to the Commission's March 10, 2011 Procedural Schedule,[2] Verizon hereby provides its comments regarding the Commission's investigation into the intrastate switched access rates of Kentucky's local exchange carriers ("LECs") and AT&T's proposed access reform plan.[3]

Access reform is long overdue. Indeed, certain Kentucky LECs have escaped scrutiny of their intrastate switched access rates for years, resulting in intrastate access charges that exceed

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1 As used herein, "Verizon" refers collectively to MCImetro Transmission Access Transmission Services LLC d/b/a Verizon Access Transmission Services, MCI Communications Services, Inc. d/b/a Verizon Business Services, Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance, NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions, TTI National, Inc., Teleconnect Long Distance Service & Systems d/b/a Telecom*USA and Verizon Select Services, Inc.

2 Appendix A to the Commission's November 5, 2010 Order initiating this proceeding ("*Nov. 5 Order*") set forth an initial procedural schedule that, *inter alia*, established a date by which "Public Comments" – *i.e.*, comments from non-party members of the public – had to be filed. However, that initial schedule did not identify a date by which parties to the proceeding would have to submit comments. (Verizon was made a party to the proceeding by virtue of the Commission's December 27, 2010 Order granting its motion to intervene.) Certain parties, including BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky, AT&T Communications of the South Central States, LLC, BellSouth Long Distance, Inc. d/b/a AT&T Long Distance Service, and TCG Ohio (collectively, "AT&T"), nevertheless proceeded to file their comments at the time public comments were due (or thereafter). In these Comments, Verizon addresses not only the AT&T access reform proposal, but also certain issues identified in the Commission's initial *Nov. 5 Order* and raised in comments filed to date by other carriers.

3 *See* Comments of AT&T (Dec. 17, 2010).

any fair, just and reasonable level.[4] Comprehensive access reform and a more rational access regime will lead to increased efficiency, innovation, and consumer benefits.

Both the Commission and the Federal Communications Commission ("FCC") have recognized that market-based mechanisms can produce efficient prices and promote the public interest.[5] Negotiated intercarrier compensation agreements are the best long-term solution to ensuring the efficiency of telecommunications markets in the face of substantial technological change. Among other advantages, this approach adapts more easily to changing technologies, encouraging their introduction without the need to modify the regulatory regime. However, in the absence of commercially negotiated agreements, as is the case here, regulatory intervention may be necessary to assure just and reasonable switched access rates for certain carriers. Until the industry can transition fully to a regime of commercially negotiated agreements and pending further action from the FCC,[6] the Commission needs to assure that all carriers' intrastate switched access rates – not just those of the largest carrier – are set and maintained at a level that will promote competition and economic efficiency.

As a first step toward that goal, the Commission should do what it has long promised: reduce the excessive subsidies contained in the intrastate switched access rates of certain Kentucky incumbent local exchange carriers ("ILECs") by eliminating the Non-Traffic Sensitive Revenue Requirement ("NTSRR") those ILECs recover through the Carrier Common Line

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[4] *See* KRS § 278.030(1).

[5] *See Exemptions for Interexchange Carriers*, Adm. Case No. 359 (June 21, 1996) (retail toll market); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long Distance Users; Federal-State Joint Board On Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (May 31, 2000) ("*CALLS Order*") at ¶ 178.

[6] As discussed below, the FCC has issued a Notice of Proposed Rulemaking addressing, among other things, intercarrier compensation and universal service fund issues. *See In the Matter of Connect America Fund*, WC Docket No. 1-90, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) ("*ICC/USF NPRM*").

Charge ("CCLC") rate element. The Commission long ago made the policy decision to eliminate the NTSRR as competition developed, and two large Kentucky ILECs have now competed for years without any NTSRR in their rates. But the Commission has not yet required all Kentucky ILECs to do so, and the continuing inclusion of these (and other) charges makes their intrastate switched access charges even more unfair, unjust and unreasonable. Because these charges hinder competition, the Commission at a minimum should immediately eliminate any remaining NTSRR recovery (which in most cases can be accomplished just by eliminating the CCLC element) for all Kentucky carriers.

In addition, until the FCC acts on comprehensive intercarrier compensation reform, the Commission should take another step toward addressing access rates more broadly by joining other states in adopting a benchmarking approach, whereby the Commission selects a benchmark access rate that approximates what a fair, just and reasonable intrastate switched access rate would be in a fully competitive access market and caps all Kentucky intrastate switched access charges at that level. In particular, Verizon recommends using the intrastate switched access rate of Kentucky's largest incumbent local exchange carrier (AT&T) as the benchmark for all other Kentucky LECs. AT&T long ago eliminated the NTSRR and CCLC elements from its intrastate switched access charges. And, as the Regional Bell Operating Company ("RBOC") and largest provider of switched access service in Kentucky, AT&T's rates have been subject to the greatest regulatory scrutiny.

Indeed, adopting the AT&T intrastate rates as the benchmark in many cases will produce rates about the same as those that Kentucky LECs already charge for the same services on an interstate basis. For that reason, AT&T has proposed that Kentucky ILECs benchmark their intrastate switched access rates to their respective FCC-approved interstate access rates, with

Kentucky competitive local exchange carriers ("CLECs") capping their intrastate rates at the same level of the ILECs with which they compete.[7] While Verizon's benchmarking proposal is preferable to AT&T's, both substantively and administratively, adopting either of these benchmarking approaches will reduce the historical, excessive subsidies baked into current intrastate access rates in Kentucky and would represent another step toward promoting competition and market discipline and, ultimately, benefitting consumers.

Verizon agrees with AT&T that Kentucky CLECs have the regulatory flexibility to recover any "lost" revenues resulting from intrastate access switched access reductions in a variety of ways, including through retail rate rebalancing.[8] However, in contrast to AT&T, Verizon proposes that Kentucky ILECs also recover any "lost" access revenues through retail rate rebalancing, rather than through any new government subsidies. While AT&T proposes the creation of a new Kentucky Universal Service Fund to ensure certain revenue levels for Kentucky ILECs, paid for by other carriers and, ultimately, their customers,[9] such a fund is neither necessary nor prudent. To the contrary, as discussed below, merely shifting access costs to other carriers through a new state funding mechanism is inconsistent with what the FCC has proposed as part of its pending ICC/USF reform proceeding, and the Commission should await the results of that proceeding before deciding to implement any new state fund here.[10]

The Commission did not establish any such fund when it previously required other Kentucky LECs to reduce their intrastate rates, and there is no requirement in Kentucky law that would dictate a different result now. Nor is there any public policy justification for guaranteeing

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[7] *See* Comments of AT&T at 8.

[8] *See id*. at 8-9.

[9] *Id*. at 9 and Exhibit A.

[10] *See ICC/USF NPRM*, *supra*.

ILECs revenue recovery through a state universal service fund mechanism to replace lost access revenues. Shifting the revenue burden from one carrier-funded source (access rates) to another (a state USF) does nothing to solve the fundamental economic inefficiencies and competitive harms caused when local exchange carriers rely on their competitors for a substantial portion of their operating revenues, instead of looking to their own end-user customers.

Accordingly, the Commission should move forward with the intrastate switched access rate cap, as Verizon has proposed, but only allow the affected Kentucky LECs to replace any lost access revenues through rebalancing of their retail rates, rather than through any new state universal service fund.

I. BACKGROUND.

Unlike the highly competitive market for the retail services that telecommunications carriers provide to end-user customers, the market for the wholesale switched access services that Kentucky LECs provide to other carriers is not competitive. Long distance carriers (sometimes called interexchange carriers or "IXCs") and other providers subject to access charges cannot choose whom their customers call and, under existing legal and regulatory requirements, generally must carry and complete any call a customer places.[11] Accordingly, as the Commission recognized in its *Nov. 5 Order* initiating this proceeding, "an IXC has no control over which incumbent LEC ('ILEC') or competitive LEC ('CLEC') serves that IXC's customer, and IXCs are obligated to pay whatever switched access rates ILECs and CLECs choose to assess for those calls."[12] Both the Commission and the FCC long have recognized that this arrangement creates the risk that, absent regulatory intervention, some LECs will charge unjust

[11] The situation is similar in the originating access market, particularly given that toll deaveraging is prohibited at the interstate level and thus would not be feasible on the intrastate level.

[12] *Nov. 5 Order* at 2-3.

and unreasonable switched access rates,[13] which, in turn, creates a windfall for those LECs while harming access charge payors, their customers, and competition, in general.

Excessive implicit subsidies in intrastate switched access rates are vestiges of an outdated regulatory approach, designed solely to promote wireline universal service objectives in monopoly local telephone markets.[14] The Commission noted that, with respect to Kentucky access rates, in particular, "[t]he existing cost-recovery mechanism was developed for a communications world where single narrowband wireline connections were the dominant form of telecommunications and competition was very limited."[15] But, as the Commission acknowledged, "[t]hat is no longer the case."[16]

The federal Telecommunications Act of 1996 opened local exchange markets to competition, and the myriad technological advances in recent years have led to consumers today being able to obtain service from a wide variety of providers, including not just traditional wireline ILECs, but wireline CLECs, wireless carriers, cable companies, and Voice over Internet Protocol ("VoIP") providers.[17] All of these different kinds of providers offer services in Kentucky today, such that Kentucky consumers can choose from a host of different retail providers. Given these choices, Kentucky consumers no longer are forced to rely on wireline

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[13] *See, e.g., In re Access Charge Reform,* Seventh Report and Order and Further Notice of Proposed Rulemaking ("*CLEC Rate Cap Order*"), 16 FCC Rcd. 9923, 9936 (2001) ("We … acknowledge that the market for access services does not appear to be structured in a manner that allows competition to discipline rates."); *Inquiry into IntraLATA Toll Competition*, Order, Adm. Case No. 323, Phase 1 at 45 (May 6, 1991) (acknowledging the need to continue regulating LECs because switched access services are "a monopoly service").

[14] *See CALLS Order* at ¶ 23.

[15] *Nov. 5 Order* at 3.

[16] *Id*.

[17] *See CLEC Rate Cap Order* at ¶ 21 ("Although competition for access services existed to some extent prior to 1996, the 1996 Act created new opportunities for competing access providers by opening the local exchange market to competition.").

ILEC service to be assured affordable basic universal service. As this Commission has recognized, "[t]he legacy narrowband [wireline] world is quickly being superseded by a very intermodal, competitive, and increasingly Internet-oriented telecommunications environment."[18]

For example, the non-ILEC share of Kentucky access lines has nearly doubled in the last five years, with consumers increasingly choosing wireless services for their voice communications.[19] Indeed, as of June 2010, there were nearly three times as many mobile wireless subscribers in Kentucky (3.65 million) as there were ILEC access lines (1.3 million).[20]

This is consistent with data from across the country. The FCC estimated that, by the end of 2008, 90 percent of Americans already had a mobile wireless device.[21] Since then, the percentage has increased, with many Americans choosing to forego any wireline telephone communication and utilize only wireless devices for voice services. The Centers for Disease Control estimated that, by June 2010, "[m]ore than one out of every four American homes (26.6%) had only wireless telephones" and "[i]n addition, nearly one of every six American homes (15.9%) received all or almost all calls on wireless telephones despite having a landline."[22]

Similar trends are visible in broadband and VoIP services, both in Kentucky and nationwide. According to data compiled by the National Telecommunications and Information

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[18] *Nov. 5 Order* at 3.

[19] *See* Local Telephone Competition: Status as of June 30, 2010, Industry Analysis and Technology Division, Wireline Competition Bureau (March 2011).

[20] *Id*.

[21] *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, FCC 10-81, W.T. Docket No. 09-66 (2010).

[22] Blumberg S.J., Luke J.V., "Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2010" (National Center for Health Statistics, December 21, 2010). Available from: http://www.cdc.gov/nchs/nhis.htm.

Administration ("NTIA") in collaboration with the FCC, by June 30, 2010, nearly 86 percent of Kentuckians had access to one or more wireline broadband providers[23] – many of which also provide voice services. Similarly, 86.4% of Kentucky consumers in that time frame had access to wireless broadband services.[24]

In view of this profound shift from wireline to other communications options, the Commission should be increasingly concerned with Kentucky wireline LECs continuing to receive excessive historical subsidies through access charges (or replacement USF distributions) paid by other providers that, in many cases, are competitors of the LECs. There cannot be a level playing field when one group of competitors receives excessive subsidies that others do not, and receives them from the very companies with which it competes. Such subsidies act as a fence to competitors. The result is a skewed market where certain LECs have kept retail rates low by keeping access rates high. The Commission recognized the potential for this problem nearly twenty years ago when Brandenburg Telephone Company sought permission to expand into competitive services by investing in a wireless partnership:

> As the telecommunications industry moves from monopoly to competition, the danger of diversion of financial assets of the monopoly to the more competitive operations, to the detriment of the captive ratepayers, becomes increasingly likely. *The Commission will not allow this to happen.*[25]

Today, Verizon and other access payors are those ratepayers. And the FCC repeatedly has observed that economically efficient competition and the consumer benefits it yields cannot be fully achieved as long as local exchange carriers seek to recover a disproportionate share of

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[23] *See* http://www.broadbandmap.gov/summarize/state/kentucky.

[24] *Id.*

[25] *Petition of Brandenburg Telephone Company and Brandenburg Communications Corporation for Approval of Holding Company*, Case No. 91-260 (January 22, 1992) (emphasis added).

their costs from other carriers (*i.e.*, access payors), rather than from their own end users.[26] Such irrational access rate structures lead to what the FCC has termed "inefficient and undesirable economic behavior"[27] and, ultimately, to higher prices for consumers.

II. BOTH THE FCC AND THIS COMMISSION HAVE RECOGNIZED THE NEED TO REDUCE ACCESS RATES.

"With the passage of the 1996 Act" and the opening of retail markets to competition, "the [FCC] determined that it was necessary to make substantial revisions to access charges,"[28] because continuing to allow LECs to shift their costs onto other providers through unduly high access rates would be "inconsistent with the competitive market that we seek to encourage for access service."[29] Thus, the FCC ordered various access charge reductions, including restructuring and reducing the interstate access rates of federal price-cap carriers through the *CALLS Order*, *supra*, and substantially reducing the interstate access rates of rate-of-return carriers through the *MAG Order*, *supra*. The FCC also adopted a benchmarking approach for interstate access charges, among other things capping CLECs' per minute interstate access charges at the level of the interstate access rates charged by the competing ILEC[30] and noting that "a benchmark provides a bright line rule that permits a simple determination of whether a [carrier's] access rates are just and reasonable."[31]

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[26] *See generally CLEC Rate Cap Order*, *supra; CALLS Order*, *supra*; *Multi-Association (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report & Order and Further Notice of Proposed Rulemaking, CC Docket No. 00-256, Fifteenth Report & Order in CC Docket No. 96-45, and Report & Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001) ("*MAG Order*").

[27] *CALLS Order* at ¶ 129.

[28] *Id*. at ¶ 18.

[29] *CLEC Rate Cap Order* at ¶ 33.

[30] *Id*. at ¶¶ 40, 45; 47 C.F.R. § 61.26 (b).

[31] *CLEC Rate Cap Order* at ¶ 41.

Through these and other orders, the FCC has "instituted reforms that changed the manner in which … LECs recover access costs by aligning the rate structure more closely with the manner in which costs are incurred."[32] The bottom line is that "[t]he result of the [FCC]'s efforts has been a steady reduction in access charges …."[33]

For its part, this Commission has long recognized the importance of setting intrastate switched access charges at appropriate levels and historically has echoed the corresponding access policy decisions announced by the FCC. For example, this Commission has identified a need for access reform and found that removing excessive subsidies from switched access rates and pricing access services more closely to their costs is in the public interest.[34] In approving access reductions for other carriers over the past decade, the Commission specifically has cited such public interest benefits.[35] But mere recognition of these benefits is not enough. The Commission should resume the work it has stopped, and do so without shifting the recovery to other carriers and consumers.

Some Kentucky carriers – including more than a dozen Kentucky ILECs – have continued to charge the same intrastate switched access rates for many years, maintaining charges at levels that far exceed any just and reasonable rate. For example, as the Commission knows from the record in the complaint proceeding Verizon brought challenging Windstream's

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[32] *CALLS Order* at ¶ 18.

[33] *CLEC Rate Cap Order* at ¶ 8.

[34] *Inquiry into Universal Service and Funding Issues*, Adm. Case No. 360, Order (June 18, 1997); *see also Certification of the Carriers Receiving Federal Universal Service High-Cost Support*, Adm. Case No. 381 (March 24, 2000) ("*2000 Certification Order*").

[35] *Review of BellSouth Telecomm., Inc.'s Price Regulation Plan*, Order, Case No. 99-434 ("*BellSouth Price Plan Review*"), at 9-10 (Aug. 3, 2000); *see also Tariff Filing of BellSouth Telecommunications, Inc. to Mirror Interstate Rates*, Order, Case No. 98-065 ("*BellSouth Mirroring Order*"), at 4-5 (March 31, 1999); *Cincinnati Bell Telephone*, Case No. 98-292, Order at 13-14 (Jan. 25, 1999).

intrastate switched access rates that has been incorporated into this proceeding,[36] even some of the larger Kentucky ILECs today charge several hundred percent more than AT&T for the same intrastate switched access services.[37] But when Verizon intervened in a general rate case to protest the extremely high terminating access rates of North Central Telephone Cooperative ("NCTC"), the Commission refused to take action solely because Verizon was the only intervenor, despite a clear showing that NCTC was charging Verizon more than twelve cents per minute, an intrastate access rate many multiples higher than other carriers, including AT&T.[38] Meanwhile, as Windstream persists in its deadweight resistance to Kentucky access reform, it continues – through acquisitions – to beef up its own interexchange network to compete against the access payors it is overcharging.[39] This was exactly the Commission's concern in its 1992 *Brandenburg Telephone* decision. The Commission should not allow this to happen any longer.

Given the clear policy positions of this Commission and the FCC, the need for further intrastate switched access charge reductions without shifting the burden onto other carriers' customers could not be more obvious. In these circumstances, AT&T is correct in noting that "[t]he major issue in this case is not whether to reform switched access rates, but rather what the reform will be."[40]

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[36] *See In the Matter of: MCI Communications Services, Inc., et al. v. Windstream Kentucky West, Inc., et al.*, Case No. 2007-00503, Order (Nov. 5, 2010) at 3.

[37] *See*, *e.g.*, *In the Matter of: MCI Communications Services, Inc., et al. v. Windstream Kentucky West, Inc., et al.*, Case No. 2007-00503, Direct Prefiled Testimony of Don Price (July 14, 2010) ("Price DT") at 6.

[38] *North Central Telephone*, Case No. 2007-0162 (April 24, 2008). NCTC disclosed its terminating access rate in response to Verizon's Post-Hearing Data Request No. 7, filed January 23, 2008.

[39] http://news.windstream.com/article_display.cfm?article_id=1232 (Windstream announces acquisition of Kentucky Data Link and Norlight to double its existing fiber footprint).

[40] *See* Comments of AT&T at 10.

III. THE COMMISSION SHOULD ELIMINATE NTSRR RECOVERY AND REQUIRE ALL KENTUCKY LOCAL EXCHANGE CARRIERS TO BENCHMARK THEIR INTRASTATE SWITCHED ACCESS RATES TO AT&T'S INTRASTATE RATE.

The Commission can go a long way towards appropriate intrastate switched access reform in Kentucky by taking two, relatively straightforward steps: (1) eliminate any continuing NTSRR recovery for Kentucky local exchange carriers; and (2) benchmark all Kentucky intrastate switched access charges to AT&T's intrastate switched access rate.

A. In Accordance with Its Stated Policy, the Commission Should Finalize the Elimination of Anachronistic and Counterproductive NTSRR Charges.

The Commission should finish what it started several years ago and finally eliminate any continuing NTSRR recovery for Kentucky ILECs. The Commission long ago made the policy decision to eliminate the NTSRR as competition developed, recognizing that – whatever good the NTSRR originally may have done – the public policy harms of continuing to subsidize certain wireline carriers through this switched access rate element had come to outweigh the benefits. As the Commission stated more than ten years ago: "The NTSRR is a non-cost based access charge that is used to support local access rates. The Commission has, through other proceedings, used excess revenues . . . to reduce NTSRR and ***has an established policy of working to eliminate the NTSRR.***"[41] That Commission policy is entirely consistent with action taken by the FCC, which has phased out the non-traffic-sensitive CCLC as part of its "long range goal… to have incumbent LECs recover a large share of the NTS common line costs from end users instead of carriers."[42] For its part, the Commission has emphasized that the "[e]limination

[41] *2000 Certification Order* at 2 (emphasis added).

[42] *See generally Access Charge Reform*, First Report & Order at ¶ 68, 12 FCC Rcd 15982 (1997), *add'l sub. nom.*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) ("*Access Reform Order*").

of NTS is a priority and will be considered along with the elimination of other implicit subsidies."[43]

Consistent with the Commission's policy, certain Kentucky LECs – including AT&T – already have eliminated any NTSRR (and/or the CCLC element through which Kentucky carriers have collected the NTSRR) from their intrastate switched access rates. But in the decade since the Commission established its policy, the Commission has not required all Kentucky LECs to do so. As the Commission knows from the various individual complaint proceedings brought before it, including the Verizon complaint proceeding against Windstream, as well as Verizon's proof in the 2007 North Central Telephone rate case, the continuing inclusion of NTSRR and CCLC charges has been a significant factor in many ILECs' intrastate switched access rates remaining above any fair, just and reasonable threshold.[44]

These extraordinary subsidies are buried in a single tariff page in which thirteen of the rural local exchange carriers ("RLECs") concur.[45] Several RLECs receive more than ten dollars per access line per month. Brandenburg Telephone Company receives $9.67 per line per month, *an amount nearly double* the $5.60 per month Brandenburg Telephone charges for local residential service.

To level the playing field and promote competition, the Commission should eliminate any prospective NTSRR recovery for all Kentucky LECs, which virtually can be accomplished

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[43] *Inquiry into Universal Service and Funding Issues*, Adm. Case No. 360, Order, at 35 (May 22, 1998).

[44] *See*, *e.g.*, Price DT at 23-25.

[45] Duo County Telephone Cooperative Corp., Inc. PSC KY NO. 2A, Original Page 17-2. Three other Kentucky ILECs, all owned by TDS, include their NTSRR in the tariff for Lewisport Telephone Company. Lewisport Telephone Company PSC KY No. 3, First Revised Sheet 17-2.

just by eliminating the legacy NTSRR, thereby reducing if not eliminating the terminating Carrier Common Line Charge.[46]

B. The Commission Should Join the Myriad of Other Jurisdictions to Reform Access Charges by Capping Rates at an Appropriate Benchmark Level.

To quickly and effectively address access charge reform on a broader basis, the Commission should require all Kentucky LECs to benchmark their intrastate switched access rates to AT&T's intrastate rate. Benchmarking is a well-established and effective means of reducing switched access rates toward more appropriate levels. Indeed, the FCC and numerous other states have moved away from anachronistic cost-based approaches and toward the use of benchmarking as a means to set access rates.

1. Benchmarking Has Been Widely Accepted as an Appropriate Mechanism to Reduce Switched Access Rates.

As the FCC explained when reducing CLEC switched access charges:

> [A] benchmark provides a bright line rule that permits a simple determination of whether a [carrier's] access rates are just and reasonable. Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing … rates to any objective standard of "reasonableness."
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> [T]he benchmark we adopt will address persistent concern over the reasonableness of [carrier] access charges and will provide critical stability for both the long distance and exchange access markets.[47]

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[46] Indeed, the FCC already has eliminated (or significantly reduced) CCLCs in their entirety on an interstate basis and, for the same policy reasons, they no longer have a place in Kentucky either. *See generally Access Charge Reform*, *supra*; *MAG Order* at ¶ 63 (noting that eliminating the CCLC from interstate switched access tariffs for federal rate-of-return carriers would reduce switched access rates, reduce the cost of long distance service, and encourage a more efficient level of consumption).

[47] *CLEC Rate Cap Order* at ¶¶ 41, 44.

Numerous states already have relied on benchmarking to the dominant carrier as a simple and effective means of reducing LECs' intrastate access prices.[48] And this Commission has utilized benchmarking in the past – including for access rates. In fact, the original Kentucky access tariffs were permitted to mirror the then-current traffic sensitive elements of interstate

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[48] *See*, *e.g.*, *Order Instituting Rulemaking to Review Policies Concerning Intrastate Carrier Access Charges*, **California** D. 07-12-020 in Rulemaking 03-08-018, Final Opinion Modifying Intrastate Access Charges (Dec. 6, 2007) (capping CLEC rates at no higher than Verizon's or SBC's rate, plus 10%); *DPUC Investigation of Intrastate Carrier Access Charges***,** Decision, **Connecticut** D.P.U. Docket No. 02-05-17, 2004 Conn. PUC Lexis 15, at *45 (2004) (capping CLEC rates at SBC's then-current rate); **Delaware** Code, Title 26, § 707(e) (capping all service providers' switched access rates at the level of the largest ILEC in the state); 199 **Iowa** Admin. Code 22.14(2)(d)(1)(2) (prohibiting CLECs from charging a carrier common line charge if it would render the CLEC's rate higher than the competing ILEC's rate); *Iowa Telecommunications Assoc.*, Final Order, Iowa Utilities Board Docket Nos. TF-07-125 and TF-07-139 (May 30, 2008) (requiring rural ILECs concurring in association tariff for intrastate switched access rates to mirror NECA interstate switching rates); **Louisiana** PSC General Order No. U-17949-TT, App.B, Section 301 (k)(4) (May 3, 1996) (CLECs must charge switched access rates that do not exceed the competing ILEC's rates); Code of **Maryland** Regulations § 20.45.09.03(b) (capping all LECs' switched access rates at the level of the largest LEC in Maryland); *Petition of Verizon New England Inc. et al. for Investigation Under Chapter 159, Section 14, of the Intrastate Access Rates of Competitive Local Exchange Carriers*, Final Order, **Massachusetts** D.T.C. 07-9 (June 22, 2009) (capping CLEC switched access rates at level of Verizon ILEC); *In the Matter of the Commission, on Its Own Motion, Seeking to Conduct an Investigation into Intrastate Access Charge Reform and Intrastate Universal Service Fund*, **Nebraska** Pub. Serv. Comm'n Application No. C-1628/NUSF, Progression Order #15, at ¶ 9 (Feb. 21, 2001) ("absent a demonstration of costs, a CLEC's access charges, in aggregate, must be reasonably comparable to the ILEC with whom they compete"); **New Hampshire** PUC § 431.07 (CLECs cannot charge higher rates for access than the ILEC does); **New York** P.U.C. Case 94-C-0095, Order, at 16-17 (Sept. 27, 1995), N.Y. P.U.C. Opinion 96-13, at 26-27 (May 22, 1996), and N.Y. P.S.C. Opinion 98-10, 1998 N.Y. PUC Lexis 325, at 26-27 (June 2, 1998) (benchmarking CLEC access charges to the level of the largest carrier in the LATA); *Establishment of Carrier-to-Carrier Rules*, Entry on Rehearing, **Ohio** P.U.C. Case No. 06-1344-TP-ORD, at 16-18 (Oct. 17, 2007) (capping CLECs' switched access rates at the level of the competing ILEC); 66 **Pennsylvania** Consolidated Statutes § 3017 (c) (prohibiting CLEC access rates higher than those charged by the incumbent in the same service territory, absent cost justification); **Texas** P.U.C. Subst. Rule § 26.223 (CLEC may not charge a higher rate for intrastate switched access than the ILEC in the area served or the statewide average composite rates published by the Texas P.U.C. and updated at least every two years); *Amendment of Rules Governing the Certification and Regulation of CLECs*, Final Order, **Virginia** State Corp. Comm. Case No. PUC-2007-00033 (Sept. 28, 2007) (a CLEC's switched access rate cannot exceed the higher of its interstate rate or the rate of the competing ILEC); **Washington** Admin. Code § 480-120-540 (requires CLECs' and ILECs' terminating access rates to be no higher than their local interconnection rate, or depending on their regulatory status, incremental cost); *Petition by Verizon West Virginia Inc. Requesting that Commission Initiate a General Investigation of the Intrastate Switched Access Charges of Competitive Local Exchange Carriers Operating in WV*, **West Virginia** Public Serv. Comm'n Order, Case No. 08-0656-T-PC (Nov. 23, 2009) (capping CLEC switched access rates at the competing ILEC's level).

access tariffs.[49] The Commission also relied on benchmarking when, in March 2006, it decided to allow Kentucky ILECs to revise their intrastate primary interexchange carrier ("PIC") change charges to mirror federally tariffed rates that fall within the "safe harbor" rates adopted by the FCC in CC Docket No. 02-53. The Commission said that, "in light of the FCC actions and adoption of new safe harbor rates, it is appropriate for the Commission to adjust its cap to mirror the FCC's interstate rates."[50]

Accordingly, Verizon's recommendation that the Commission take another step toward rationalizing access charges through benchmarking to the RBOC rate does not ask the Commission to set new policy. Rather, it simply asks the Commission to apply its existing policy to additional Kentucky LECs – including large carriers like Windstream and other Kentucky ILECs that have avoided scrutiny of their intrastate switched access rates for years and now charge rates that are, in some cases, several hundred percent higher than those charged by AT&T. Some of these carriers, like Brandenburg Telephone Company, North Central Telephone Coop., West Kentucky Rural Telephone Coop., Thacker-Grigsby Telephone, Highland Telephone and Duo County, are competing in the retail long distance business and have rolled out a vast array of other retail services to complement their local offerings. Some have built advanced fiber-to-the-home networks, and some have made significant inroads as wireless competitors and/or CLECs outside of their incumbent footprints. As competitors, and against the backdrop of the 2006 Kentucky statutory changes intended to accelerate retail competition in Kentucky, these carriers should not have their unreasonably high access rates protected any longer.

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[49] *Investigation of Toll and Access Charge Pricing and Toll Settlement Agreements*, Order, Case No. 8838, at 40-41 (November 20, 1984).

[50] *Petition of Duo County Telephone Coop. Corp.*, Order, Case No. 2006-00076 (March 20, 2006).

2. Benchmarking Is Preferable to Any Cost-Based Approach.

Despite the wide acceptance of benchmarking methodology, in its *Nov. 5 Order* initiating this proceeding, the Commission nevertheless raised the question of whether Kentucky should transition to a cost-based system for access rates.[51] As the Commission is aware from the various individual complaint proceedings brought before it, certain Kentucky LECs currently charge excessive intrastate switched access rates, far higher than AT&T's rates. For example, the record in the complaint proceeding Verizon brought against Windstream reveals that Windstream's intrastate switched access rates in Kentucky are not – and never have been – based on its costs.[52] For Windstream and other Kentucky LECs, their intrastate switched access charges contain excessive subsidies (including for NTSRR recovery), paid for by other carriers that, in many cases, are their competitors.

This arrangement inhibits economically efficient competition[53] and, ultimately, leads to higher prices for consumers – which is precisely why this Commission has found that removing excessive subsidies from switched access rates and pricing access services more closely to their costs is in the public interest.[54] Among other things, regulators – including this Commission – have indicated that switched access rates should move toward the cost of providing switched access services[55] because that generally is what would happen in a competitive switched access market.

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[51] *Nov. 5 Order* at 6.

[52] *See*, *e.g.*, Price DT at 29, 32-33.

[53] *See generally CLEC Rate Cap Order*, *supra; CALLS Order*, *supra*; *MAG Order*, *supra*.

[54] *See Inquiry into Universal Service and Funding Issues*, Adm. Case No. 360, Order (June 18, 1997); *2000 Certification Order*, *supra*.

[55] *See BellSouth Price Plan Review*, at 9-10; *BellSouth Mirroring Order*, at 4-5; *Cincinnati Bell Telephone*, Case No. 98-292, Order at 13-14 (Jan. 25, 1999).

By eliminating any NTSRR recovery and adopting AT&T's intrastate switched access rates as a benchmark for all Kentucky LECs, the Commission can quickly, effectively and lawfully move intrastate access rates toward cost. Accordingly, moving to a completely cost-based system for access rates is not necessary, nor advisable.

Benchmark rates are not necessarily set at cost. Indeed, the benchmark rates proposed here by both Verizon and AT&T are likely set above cost. Even so, the proposed benchmark rates are set at levels much closer to cost than the rates currently charged by many Kentucky LECs, such that there can be no question that moving Kentucky LECs' intrastate rates toward AT&T's rates would drive other carriers' intrastate rates down closer to cost.

Moreover, using a benchmark rate is much more straightforward and easy to administer than conducting a full-blown rate case or adopting some other cost-based alternative. If each carrier were required to support its intrastate switched access rates by demonstrating its own, individual costs either through the use of cost studies or some other method, that demonstration would impose potentially significant costs on each carrier, lead to a flood of time-consuming proceedings before the Commission, and serve no real purpose beyond what already can be served by using a benchmark. For these reasons, consistent with the FCC's directives and its own policy, the Commission should adopt the benchmarking approach Verizon has proposed.

3. In these Circumstances, AT&T's Intrastate Switched Access Rates Provide the Most Appropriate Benchmark.

The Commission should select AT&T's intrastate switched access rate as the benchmark for all Kentucky LECs, such that no Kentucky intrastate rates can exceed that level. The AT&T rate reflects an appropriate benchmark for several reasons.

AT&T already has eliminated the NTSRR and the corresponding CCLC rate element from its intrastate switched access rates,[56] consistent with the Commission's determination that the NTSRR should be phased out for all carriers.[57]

Moreover, AT&T operates as the RBOC – and, therefore, the dominant provider – in Kentucky. As the dominant provider, AT&T's rates for intrastate switched access service better approximate the rates that would prevail if the market for that service were competitive. Similarly, as the RBOC, AT&T has received the most regulatory scrutiny, both in general and with respect to its intrastate switched access rates, in particular. Accordingly, the AT&T intrastate switched access rates not only act as a proxy for what the prevailing market rate would be, but already have been approved by the Commission as just and reasonable.

Finally, the AT&T intrastate rate represents a reasonable rate for other Kentucky LECs because, in some cases, those LECs already charge interstate switched access rate that are comparable to – or even lower than – the AT&T interstate switched access rate.

For these reasons, benchmarking to AT&T's intrastate switched access rates is preferable to AT&T's own two-fold proposal, which is to benchmark Kentucky ILEC intrastate rates to interstate levels and to benchmark Kentucky CLEC intrastate rates to the intrastate rates of the ILECs with which they compete.[58] There is no reason to treat ILECs and CLECs differently, and having different rates for different carriers creates the potential for arbitrage and inefficiency. However, if the Commission is inclined to reject Verizon's proposal, AT&T's benchmarking proposal is still preferable to a purely cost-based approach. For, regardless of which benchmark

[56] *See* BellSouth PSC Tariff E2, § E3.9, Sixth Revised page 10, effective 2/16/1997 (eliminating CCLC). AT&T eliminated its own NTSRR through tariff revisions made on September 5, 2000.

[57] *See, e.g., Inquiry into Universal Service and Funding Issues*, Adm. Case No. 360, Order, at 35 (May 22, 1998) ("Elimination of NTS is a priority and will be considered along with the elimination of other implicit subsidies.")

[58] Comments of AT&T at 8.

is used, capping rates at benchmark levels is a simple, easily-implemented and effective means of rationalizing intrastate switched access rates in Kentucky, at least until market-based mechanisms (like negotiated agreements) are able to produce more efficient pricing.

4. Access Charge Reductions Are Long Overdue and Should Be Implemented Immediately.

The Commission previously asked whether there should be a transition period to allow Kentucky local exchange carriers to implement access charge reductions,[59] and AT&T proposes that CLECs and ILECs cap their rates at benchmark levels within one month and six months, respectively.[60] But, if current intrastate switched access rates are unjust and unreasonable (and for any carrier relying on NTSRR, in particular, they are), then they should be reduced immediately. Kentucky local exchange carriers should not be permitted to continue reaping amounts to which they are not entitled for a moment longer – especially in the case of any NTSRR recovery that the Commission long ago decided should be eliminated. Once the Commission has decided the rates should be reduced, there is no reason to delay those reductions.

The 30-day proposal for CLEC access rate reductions is acceptable as being more or less immediate, and Verizon commits to reducing the rates of its own Kentucky CLEC in accordance with such an order from the Commission. But there is no reason to wait six months for ILEC rate reductions. If anything, ILEC rates based on legacy NTSRR represent a much larger problem in Kentucky, and should not be pushed off until later. AT&T's proffered reason for delaying implementation of ILEC access rate reductions is solely to allow for implementation of a Kentucky state universal service fund. But, as discussed below, there is no reason to create

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[59] *Nov. 5 Order* at 6.

[60] Comments of AT&T, Appendix A at 1.

such a fund at all. And there certainly is no reason to delay necessary access rate reductions in the interim unless the Commission intends merely to shift the costs to other carriers by creating a new state fund, in which case the access reductions will not accomplish the desired reform at all. In short, the sooner the Commission implements access charge reform, the sooner the Commonwealth will reap the associated benefits to competition and consumers.

IV. THE COMMISSION SHOULD REJECT ANY PROPOSAL TO ESTABLISH A STATE UNIVERSAL SERVICE FUND.

AT&T proposes that, if the Commission reduces the implicit subsidies contained in current Kentucky intrastate switched access rates by capping those rates at a benchmark level, it should allow at least certain Kentucky local exchange carriers (namely, ILECs) to make up the difference through explicit subsidies paid from a state universal service fund.[61] But, in today's marketplace, there is no need or public policy justification for guaranteeing that any Kentucky LECs continue to receive a level of revenue that reflects historic, excessive subsidies. To the contrary, simply shifting the subsidy and revenue burden from one carrier-funded source (access rates) to another (a state USF) solves nothing. To achieve meaningful access reform, the Commission should look to other methods, rather than establish any form of fund that requires competitive providers (and their customers) to subsidize the ILECs with which those providers must compete. The obvious alternative is for the Commission to allow affected LECs to rebalance their retail rates, which even AT&T acknowledges should be the first – and, in some cases, only – revenue recovery mechanism.[62]

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[61] *Id*. at 8-9.

[62] *See id*.

A. There Is No Need for a State Universal Service Fund.

The purpose of any appropriate universal service fund is to ensure that consumers in every area have access to basic telecommunications services at affordable rates. A proper fund achieves this goal by subsidizing providers that offer services in higher cost areas, thereby defraying that cost and incentivizing providers to serve areas they otherwise would not. But a fund can only be justified in those locations or instances where the alternative is that, without such a fund, basic affordable service will not be available.

Verizon agrees that ensuring the universal availability of some form of basic telephone service at an affordable price is important. However, there is no need to create a government fund to meet these objectives in Kentucky when the market already has met them. AT&T's proposed fund is intended solely to preserve historic profits and revenues and is not intended to fulfill any universal service objectives.

AT&T's plan would provide funding to ILECs without any demonstration that it is necessary to achieve or even used to support any universal service objective. In other words, to accept AT&T's plan, the Commission simply would have to ***assume***, among other things, that: (1) wireline ILECs will only provide universal service if they are guaranteed to continue to receive today's revenue levels through a state universal service fund; (2) only wireline ILECs can ensure universal service; and (3) affordable equivalent service is unavailable from alternate providers.

But there has been no showing here that the first assumption is true. That is hardly surprising because, to the extent that requiring Kentucky ILECs to benchmark their intrastate switched access rates to AT&T's rate (or another alternative rate) would result in lost revenues, that does not necessarily mean that those carriers cannot recover their costs or would not continue to provide service without those revenues. Due to excessive implicit subsidies baked

into those access rates, other revenue streams available to the ILECs, cost-cutting measures and other actions these carriers can undertake, it cannot be assumed that those carriers will not cover their costs even after the rates are reduced or continue providing the same level of service they do today.

Moreover, the second two assumptions are demonstrably false. As discussed above, in addition to ILECs, there are a host of other providers that already stand ready to provide service throughout the Commonwealth at rates consumers already have demonstrated are affordable and that they are willing to pay. Given the presence of alternate providers in the market, there is no need, as AT&T proposes, to subsidize Kentucky ILECs. Indeed, customers already can – and increasingly do – obtain affordable service from other providers throughout the Commonwealth, including predominantly wireless carriers, notwithstanding that those providers operate without the benefit of state-sanctioned subsidies. Since the goals of universal service already have been achieved through competition, any government subsidies at this point are unnecessary.

Viewed from this perspective, the proposed state USF actually would be counterproductive. The proposed fund only would serve to maintain ILECs' current revenue levels. But consumers would not benefit. To the contrary, by requiring other providers to contribute to the fund – including wireless providers that, as discussed below, currently pay minimal intrastate access charges and, unlike LECs, do not collect any access charges – the proposed AT&T mechanism would impose an additional cost on those providers and, thus, their customers. In fact, the costs associated with mandatory fund contributions can deter the entry of new providers and hobble existing competitors. This would hinder, not promote, universal service objectives and competition, in general. The purpose of universal service programs is to ensure access to quality service at affordable rates – not to skew the market artificially by

subsidizing legacy services that consumers increasingly do not want.[63] There is no better evidence that a government subsidy, whether state or federal, is unnecessary than the presence of a competitor willing to serve the same customers without such support.

B. Even if Kentucky LECs Needed to Make Up Revenue Losses Associated with Access Charge Reform, a State USF Is Not the Appropriate Vehicle for Doing So.

As noted above, due to excessive implicit subsidies contained in current intrastate access rates, Kentucky local exchange carriers may still be able to cover their costs even after those rates are reduced. But, if a given LEC wishes to attempt to recoup the revenue reduction associated with access rate reductions, as a matter of public policy and sound economic principles, it should look to its own retail customers, cost-cutting or other measures, rather than to other carriers and their customers. The FCC specifically has recognized that recovery from a carrier's own end users is a proper, economically efficient way to proceed.[64] Even Kentucky carriers that would be affected by access charge reductions – including specifically Windstream – have acknowledged that recovery from its customers is the best approach.[65] In fact, even AT&T acknowledges that CLECs do not need any "help" from the Commission and that even ILECs first should look to recover lost access revenues by rebalancing their basic local exchange rates before seeking any recovery from a state fund.[66]

As detailed above, one of the fundamental problems associated with excessive switched access rates and revenue replacement funds is that they allow LECs to rely on recovering their

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[63] *See* 47 U.S.C. § 254(b)(3).

[64] *See*, *e.g.*, *Access Charge Reform Order* at ¶ 68.

[65] *See* Windstream's Comments in WC Docket No. 08-152 (Aug. 21, 2008) ("Windstream supports the premise that carriers should first recover a reasonable amount of the costs to provide service from their customers before seeking universal service funding.").

[66] Comments of AT&T at 8-9.

costs from other carriers, rather than competing in the open market for revenues from their end-user customers. As the FCC has held:

> Such cost shifting is inconsistent with the competitive market that we seek to encourage for access service. Rather, it may promote economically inefficient entry into the local markets and may distort the long distance market. While we seek to promote competition among local-service providers, we also seek to eliminate from our rules opportunities for arbitrage and incentives for inefficient market entry.[67]

Indeed, the FCC repeatedly has observed that economically efficient competition and the consumer benefits it yields cannot be fully achieved as long as local exchange carriers seek to recover a disproportionate share of their costs from other carriers (*i.e.*, access payors), rather than from their own end users.[68] However, that is precisely what AT&T's proposed fund would allow. By replacing lost access revenue, a state USF merely would take the implicit subsidy reflected in excessive access charges and make it explicit through state USF payments. In other words, competing carriers and their customers *still* would be subsidizing the ILECs, but the subsidy vehicle would be shifted from access charges to direct contributions to a fund. In either case, the same fundamental problem remains. As such, the proposed fund would leave the competitive playing field just as uneven as it is now.

The more economically efficient approach – and the approach that will best serve the access reform goals articulated by both the FCC and this Commission – is to allow Kentucky LECs to rebalance their retail rates when excessive artificial subsidies are removed. If necessary, Verizon also supports further relaxing or eliminating legacy regulatory requirements that might slow the LECs' ability to rebalance rates quickly, reduce their costs, or otherwise make up for reduced access revenues.

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[67] *CLEC Rate Cap Order* at ¶ 33

[68] *See generally id.*; *CALLS Order*, *supra*; *MAG Order*, *supra*.

The FCC specifically has recognized that retail rate rebalancing is an appropriate way to proceed:

> When a [local exchange carrier] attempts to recover additional amounts from its own end user, that customer receives correct price signals and can decide whether he should find an alternative provider for access (and likely local exchange) service. This approach brings market discipline and accurate price signals to bear on the end user's choice of access providers.[69]

This is precisely how the National Broadband Plan proposes that state commissions handle access charge reductions on a going-forward basis. As noted above, the NBP proposes certain intercarrier compensation reforms, including reducing carriers' intrastate switched access rates through benchmarking. But, with respect to providing carriers the opportunity to recoup any unrecovered legitimate costs, the NBP explicitly provides that "[t]he FCC should also encourage states to complete rate rebalancing of local rates to offset the impact of lost access revenues."[70]

While AT&T suggests this is feasible for CLECs, but not ILECs, Kentucky law actually allows both classes of local exchange carriers the flexibility they need to rebalance the retail rates they charge their own end users for local exchange services. Virtually all CLEC services are nonbasic under the 2006 statutory revisions, giving competitive carriers the ability to price their services to meet market demands.[71] And ILECs have the same flexibility for their own nonbasic services provided to residential and business customers. For basic local exchange services, every Kentucky ILEC has the option to seek rate adjustments using the methods

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[69] *CLEC Rate Cap Order* at ¶ 39; *see also Access Charge Reform Order* at ¶ 68.

[70] *See*, *e.g.*, Federal Communications Commission, "Connecting America: The National Broadband Plan," http://www.broadband.gov/download-plan (Mar. 16, 2010) ("NBP") at 148 (Recommendation 8.7).

[71] KRS 278.544(4).

provided by statute.[72] Only four Kentucky ILECs adopted the price regulation plans provided by KRS 278.543, such that their basic local exchange rates currently are limited by statute. But those five-year statutory caps expire in July of this year. In other words, today's regulatory paradigm for competitive services isn't remotely comparable to what existed when the NTSRR scheme was put in place. Thanks to significant statutory changes, flexibility abounds, and carriers can price their competitive services as they wish.

Despite this flexibility, many Kentucky local exchange carriers have taken advantage of the excessive implicit subsidies in their access rates and artificially suppressed their rates for basic local exchange services. But, because those local exchange service rates currently are so low, they afford those LECs significant room to recoup any unrecovered costs following the necessary rate reductions.[73]

Accordingly, Kentucky local exchange carriers can and should look to recoup any revenue losses resulting from the necessary access charge reductions from their own end-user customers, rather than through any carrier-funded source that would undermine fair and efficient competition. The Commission, therefore, should reject AT&T's proposal to create a state

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[72] KRS 278.180.

[73] In addition to the fact that Kentucky local exchange carriers can and should recover a larger portion of their costs from their own end users, many of those carriers already have other significant sources of funding available to them. In particular, many Kentucky LECs derive substantial amounts of money each year from federal "high cost funding" programs. While the FCC's high cost program is intended to reduce interstate access rates, certain elements of the federal program are also intended to provide a contribution to costs that are jurisdictionally *intrastate*. *See* "Universal Service Monitoring Report," CC Docket No. 98-202 (2009), prepared by Federal and State Staff for the Federal-State Joint Board on Universal Service, in CC Docket No. 96-45 ("Joint Board Monitoring Report") at 3-8 ("Like ICLS [Interstate Common Line Support], the purpose of this mechanism [Interstate Access Support, or 'IAS'] is to provide explicit support to ensure reasonably affordable interstate rates. This is in contrast to the Commission's other high-cost support mechanisms, which provide support *to enable states to ensure reasonably affordable and comparable intrastate rates*.") (emphasis added).

universal service fund.[74] Indeed, because adopting AT&T's state USF proposal would run counter to the recommendations contained in the National Broadband Plan, there is a significant risk that the Commission would have to make significant changes to – or entirely scrap – any state USF mechanism once the FCC completes the pending rulemaking.

C. The Proposed State USF Would Place an Unfair Burden on Mobile Services Preferred by Consumers.

If the Commission nevertheless is inclined to consider establishing a state USF, it should not be on the terms proposed by AT&T. Under AT&T's proposal, wireless carriers would be treated the same as regulated ILECs, CLECs and toll providers, and would be required to subsidize ILECs directly through payments to the state USF. However, wireless carriers utilize little to no intrastate access service and, unlike LECs, they do not collect tariffed access charges. The intrastate traffic that they exchange with ILECs is predominantly intra-Metropolitan Trading Area ("MTA") traffic and, thus, is not subject to access rates. Clearly, it would be improper and unfair to impose a state USF contribution requirement on wireless carriers when wireless carriers do not participate in the access charge system the way ILECs do. This is particularly true because, while the Commission expressly sought intervention in this case from IXCs and CLECs, it did not seek participation from wireless CMRS carriers, whose rates it does not regulate. And in light of KRS 278.54611, the 2005 statute that deregulated wireless services, any proposal to tax wireless carriers to "make whole" the ILECs faces immediate legal problems.

Even if there were no jurisdictional or other legal barriers to the Commission exercising authority to assess wireless providers in this manner, which there are, the Commission would have to reject such action as a matter of public policy.

[74] In addition, to the extent ILECs face financial problems as a result of legacy regulatory obligations, those obligations can be eliminated as responsibility for serving customers passes to the competitive market.

Public policy dictates that the Commission should not require providers of new, innovative services — including wireless services — to finance the business models of other telephone companies. That is particularly the case where there has been no demonstration that basic service would otherwise be unaffordable, that alternatives to traditional wireline service do not exist, or that wireline carriers could not provide the service without the support of such a fund. The Commission should not burden new services and technologies (and the customers that use them) based on legacy regulatory concepts and obligations that have outlived their usefulness. Indeed, these service and technology innovations are spurring competition in the telecommunications marketplace, thereby providing an impetus for reduced rates in the traditional wireline sector. Burdening such services and customers with unnecessary new state USF fees will tend to drive investment dollars away from Kentucky at a time when Kentucky's economy can least afford such a loss. If the Commission forces wireless carriers to contribute to any fund that might be established, the result will simply be higher rates, a chilling effect on innovation, reduced investment, and fewer competitive options and benefits for Kentucky consumers.

If the Commission establishes a fund (and, again, it should not), the Commission must recognize that carriers required to contribute to the fund will be forced to recover those costs from their own customers. Those providers will and should be permitted to recover their contributions through surcharges that are, in effect, new taxes.[75] Obviously, these new Commission-imposed charges could adversely affect a contributing carrier's competitive position by making its own

[75] The Commission has consistently ordered that the existing state universal service fund that supports low income customers be funded through *mandatory* surcharges set by the Commission and enforced through carrier tariffs. See generally *Inquiry into Universal Service and Funding Issues*, Adm. Case No. 360, Order, at 15 (August 7, 1998).

services more expensive. However, contributing providers should at least have the discretion to decide for themselves whether such a mechanism could mitigate the contribution burden.

V. THERE IS NO JURISDICTIONAL IMPEDIMENT TO THE COMMISSION'S INVESTIGATION.

In its initial comments, Windstream argued that certain 2006 statutory amendments stripped the Commission of its jurisdiction over the intrastate switched access rates of certain alternatively regulated carriers.[76] Hoping to escape scrutiny of its own rates, as well, Cincinnati Bell now parrots that weary argument.[77] However, the Commission and every court to examine the issue already have concluded that the Commission continues to have the authority to review and reform intrastate switched access rates of all Kentucky local exchange carriers.

Windstream raised this very jurisdictional argument in the context of the individual complaint proceeding Verizon brought challenging Windstream's intrastate switched access rates. And, at every step of the way, that argument was rejected. On March 11, 2009, the Commission issued an order recognizing its jurisdiction over Verizon's petition and denying Windstream's motion to dismiss. Windstream appealed, raising the jurisdictional issue it asserts here with the Franklin Circuit Court.

On October 19, 2009, the Franklin Circuit Court issued an *Opinion and Order* rejecting the jurisdictional argument and finding that the statutory provision cited by Windstream did not immunize Windstream's wholesale switched access rates from Commission review: "[T]he legislature intended to allow electing carriers to avoid rate regulation in the competitive retail market, … but to retain PSC jurisdiction over the rates charged by all utilities in the non-competitive markets," such as the intrastate switched access market. *Opinion and Order* at 7.

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[76] *See* Comments of Windstream Kentucky West, LLC and Windstream Kentucky East, LLC at 2-4.

[77] *See* Comments of Cincinnati Bell Telephone Company LLC at 2-5.

Windstream appealed and filed motions with both the Franklin Circuit Court and the Kentucky Court of Appeals seeking injunctive relief pursuant to CR 65.08 pending resolution of the appeal. Both motions were denied. In its *Order Denying Motion for CR 65.08 Relief*, the Court of Appeals specifically noted that "there is most likely not a substantial chance of success in the pending appeal [on the jurisdictional argument]." *Id.* at 10.

Windstream then filed a motion for interlocutory injunctive relief pursuant to CR 65.09 with the Kentucky Supreme Court. That motion was denied, as well.

While the issue presently remains pending on appeal at the Court of Appeals, that Court already has expressed its view that Windstream is not likely to prevail on the merits of its jurisdictional claim. At this point, there is no need to wait for any more rulings. The Commission and multiple state courts already have confirmed that the Commission retains jurisdiction over the intrastate switched access rates of Windstream and all other alternatively regulated Kentucky local exchange carriers. Three and a half years after Verizon brought its complaint, Windstream's foot dragging continues, and the Commission's long overdue task to treat Windstream as it already treats AT&T remains at the starting line.

Nevertheless, three Kentucky CLECs recently filed a joint motion seeking to suspend this proceeding, in part based on the pending appeal of the ILEC jurisdictional issue.[78] Because they are CLECs, that appeal will not affect the Commission's jurisdiction over the moving carriers in any respect. But, even setting that aside, the pending appeal should not present any impediment to Commission action here, for several reasons.

First, the appeal should have been dismissed already. The appeal stems from the Verizon complaint proceeding against Windstream. But the Commission closed the Verizon complaint

[78] *See* Joint Motion of TWTC, Level 3, and PAETEC To Suspend Procedural Schedule at 2-3.

proceeding against Windstream several months ago,[79] determining that it would investigate the intrastate switched access rates of all Kentucky carriers in this industry-wide proceeding.[80] Since the complaint proceeding from which the appeal arises has been closed, Windstream's jurisdictional appeal is now moot and should be dismissed.

Second, even if the appeal were to live on, the courts have made quite clear that Commission proceedings should go forward during pendency of appeal. "The Court sees no valid reason to further delay the PSC's scrutiny of these rates for the entire period of time that the case will be on appeal …."[81] Nothing has happened in the interim that would change that mandate from the courts.

Third, even if the appeal proceeds, the outcome of that appeal will not change anything here. The Court of Appeals already indicated that Windstream is not likely to prevail on the merits of its jurisdictional argument. Indeed, the Commission and every court to consider the issue agree: the Commission has jurisdiction over the intrastate switched access rates of all Kentucky LECs, including specifically alternatively regulated ILECs.

In short, there is no impediment to the Commission's jurisdiction to proceed with much-needed access reform in this docket.

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[79] *See In the Matter of: MCI Communications Services, Inc., et al. v. Windstream Kentucky West, Inc., et al.*, Case No. 2007-00503, Order (Nov. 5, 2010)

[80] *See In the Matter of: An Investigation into the Intrastate Switched Access Rates of All Kentucky Incumbent and Competitive Local Exchange Carriers*, Admin. Case No. 2010-00398, Order (Nov. 5, 2010).

[81] *Windstream Kentucky West, LLC v. Kentucky Public Serv. Comm'n*, Civil Action No. 09-CI-00552, Order Denying Injunctive Relief at 3 (Franklin Cir. Ct., Dec. 1, 2009).

VI. THE COMMISSION SHOULD PROCEED WITH INTRASTATE ACCESS REFORM PENDING THE RESULTS OF THE FCC'S RULEMAKING.

The joint motion to suspend also seeks to halt this proceeding on the basis of pending FCC rulemaking proceedings regarding intercarrier compensation reform.[82] However, the Commission should not wait for those federal proceedings before conducting long overdue intrastate switched access reform, so long as it does so without creating a new state universal service fund or shifting access charges to other carriers and their customers through state USF contributions.

The Commission already rejected this same argument in the course of the Verizon complaint proceeding against Windstream, noting that "the mere existence of th[e] possibility" that the FCC could issue an order addressing access charge reform should not deter "the Commission from the need to address intercarrier compensation."[83] The Commission likewise was well aware of the pending FCC proceedings when it established the current schedule in this investigation, and elected to move forward anyway. There is no reason to change course now. To the contrary, the National Broadband Plan actually advocates for continuing intrastate switched access reform and "encourage[s] states to complete rebalancing of local rates to offset the impact of lost access revenues …."[84]

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[82] *See* Joint Motion of TWTC, Level 3, and PAETEC To Suspend Procedural Schedule at 1-3.

[83] *In the matter of: MCI Communications Services, Inc., et al., vs. Windstream Kentucky West, Inc., et al.*, Case No. 2007-00503, Order (Mar. 11, 2009) at 6.

[84] NBP at 142.

Because intrastate switched access reform is consistent with the proposed FCC reform, the Commission should proceed to establish new intrastate rate benchmarks in this proceeding, rather than waiting for federal action at an indeterminate point in the future.[85]

VII. CONCLUSION.

As set forth above, the Commission should act to address the economic inefficiencies contained in the current Kentucky intrastate switched access system, eliminate NTSRR recovery through the CCLC element of intrastate access rates, and adopt a benchmarking approach to ensure that those access rates are set at fair, just and reasonable levels. Kentucky local exchange carriers can and should look to recover any resulting revenue reductions through retail rate rebalancing, rather than via a new state universal service mechanism that only would perpetuate the problems resulting from carriers obtaining too much of their revenues from other carriers, rather than their own end-user customers.

[85] However, to the extent the Commission is considering establishing a state universal service fund (and it should not be), that would be entirely inconsistent with proposed FCC action. Accordingly, as discussed above, the Commission should wait for further guidance from the FCC before establishing any new state USF.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the electronic version of this filing made with the Commission on April 15, 2011, is a true and accurate copy of the document filed herewith in paper form, and the electronic version of the filing has been transmitted to the Commission.

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Douglas F. Brent