COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION INTO THE INTRASTATE SWITCHED ACCESS RATES OF ALL KENTUCKY INCUMBENT AND COMPETITIVE LOCAL EXCHANGE CARRIERS	)))))	Case No. 2010-00398

COMMENTS OF TW TELECOM AND LEVEL 3
ON THE EFFECTS OF THE FCC'S 11/18/11 ORDER ON THIS PROCEEDING

As directed by the Commission's Order entered March 22, 2012, tw telecom of kentucky llc ("TWTC") and Level 3 Communications, LLC ("Level 3") hereby submit their joint comments on the impact of the Federal Communications Commission's November 18, 2011 Order comprehensively reforming intercarrier compensation.

Summary

As noted in the Commission's 3/22/12 Order (p.1), the FCC has released an order that comprehensively reforms intercarrier compensation and universal service. Indeed, with its *Connect America Fund* Order ("CAF Order"),[1] the FCC has:

- brought intrastate and interstate access charges under a single federal regime;
- adopted comprehensive measures to reform such charges, either directly through measures adopted in the CAF Order or indirectly through measures proposed for further consideration in ongoing proceedings;

[1] Connect America Fund, WC Docket No. 10-90; A National Broadband Plan for Our Future, GN Docket No. 09-51; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; High-Cost Universal Service Support, WC Docket No. 05-337; Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Lifeline and Link-Up, WC Docket No. 03-109; Universal Service Reform – Mobility Fund, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) .

- adopted mechanisms for replacement of intrastate and interstate revenues lost through the reforms adopted; and,
- comprehensively reformed the federal system of universal service by repurposing the existing universal service support systems for the support of broadband deployment in unserved areas.

Given the FCC's comprehensive reform of, and assumption of jurisdiction over, intrastate access charges, the Commission may not conduct further proceedings in this docket without disturbing the uniform scheme put in place by the FCC. Although it has a role "in the filing of tariffs containing the new rates," 3/22/12 Order (p.4),[2] the Commission should enter an order dismissing this generic, investigative proceeding as moot under the CAF Order. Alternatively, given the potential for material modifications to the CAF Order, the Commission could enter an order staying this proceeding until the conclusion of the ongoing CAF proceedings before the FCC (*i.e.*, disposition of the pending petitions for reconsideration, as well as the pending Further Notice of Proposed Rulemaking) and the pending appeals from the CAF Order.

The CAF Order so limits Commission jurisdiction over terminating access charges and otherwise so alters the regulatory environment that this investigations should be closed.

The CAF Order unifies interstate and intrastate terminating access charges under Section 251(b)(5) of the Communications Act of 1934, as amended (the "Act"), and adopts a glide path to reduce gradually access charges and reciprocal compensation charges to bill-and-keep by 2020. *See generally* CAF Order, Fig. 9 at pp. 270-271. Among other things, the CAF Order: (i) adopts uniform national bill-and-keep as the ultimate end state for all telecommunications traffic exchanged with a LEC; (ii) immediately caps all intercarrier switched access rate elements

[2] The Commission should review the tariff filings made by individual carriers to ensure they comport with the FCC's Order — including the appropriate reductions to the non-traffic sensitive rate element. "The Commission is also to review negotiated interconnection agreements to ensure that they comply with the compensation framework," 3/22/12 Order p.4; however, like the tariff filings, these are carrier-specific inquiries.

(both intrastate and interstate) for price cap carriers and all interstate elements and intrastate terminating rates for rate-of-return carriers; (iii) adopts a six-year transition for price cap carriers and CLECs that benchmark to price cap carrier rates and a nine-year transition for rate-of-return carriers and CLECs that benchmark to rate-of-return carrier rates to transition rates to bill-and-keep; and (iv) adopts new revenue recovery mechanisms to mitigate the effect of intercarrier revenue reductions using a combination of end user recovery and a new Access Recovery Charge[3]. In addition, the Further Notice of Proposed Rulemaking (FNPRM) issued by the FCC as part of the CAF Order[4] seeks comment on the manner in which originating switched access, dedicated transport, tandem switching and tandem transport (in some circumstances), and other charges (including dedicated transport signaling and signaling for tandem switching) should be transitioned to bill-and-keep. CAF FNPRM at ¶ 1297.

Although the FCC strains to avoid use of the word "preemption" with respect to its impact on state rate making authority, by implementing a uniform national approach to intrastate and interstate access charges, it has preempted state rate-making authority with respect to access charges.[5] Here, the FCC has brought all access traffic under Section 251(b)(5) of the Act. *See* CAF Order at:

- ¶ 762 ("After reviewing the record, we adopt our proposal and conclude that section 251(b)(5) applies to traffic that traditionally has been classified as access traffic.");

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[3] Neither TWTC nor Level 3 is eligible to include an Access Recovery Charge on their end user bills and, therefore, has no plans to implement it.

[4] *See* footnote 1 above for a full citation. Comments on the FNPRM were filed on February 24, 2012, and Reply Comments on March 30, 2012.

[5] Indeed, the CAF Order has been widely understood to have a preemptive effect on intrastate authority. *See, e.g.*, Comments of the Massachusetts Department of Telecommunications and Cable (MDTC), FCC Docket No. 10-90 *et seq.*, at 2 (Feb. 24, 2012) ("The Commission's Order preempts state authority over intrastate ICC rates ...."); Comments of the Indiana Utility Regulatory Commission, FCC Docket No. 10-90 *et seq.*, at 5 (Feb. 24, 2012) (challenging the FCC's attempt "to abrogate state commissions' ratemaking authority....").

- ¶ 764 (“Consistent with our approach to comprehensive reform generally and the desire for a more unified approach, we find it appropriate to bring all traffic within the section 251(b)(5) regime at this time, and commenters generally agree.”)
- ¶ 765 (“We reject arguments that section 251(b)(5) does not apply to intrastate access traffic.”);
- ¶ 767 (“As discussed in this Order, we are bringing all telecommunications traffic terminated on LECs, including intrastate switched access traffic, into the section 251(b)(5) framework to fulfill the objectives of section 251(b)(5) and other provisions of the Act.”).

The CAF Order could not be clearer that the impact of this action is to “federalize” traffic that had been subject to disparate interstate and intrastate access regimes. *Id.* at ¶ 769.

In doing so, the FCC has intentionally supplanted state rate-making functions with respect to intrastate access charges. CAF Order, at ¶ 766, n.1374 (“[A]ll traffic terminated on a LEC will, going forward, be governed by section 251(b)(5) regardless of whether section 251(g) previously covered the state intrastate access regime.”); *see also id.* at ¶ 790 (“states will not set the transition for intrastate rates under this approach”). The FCC specifically rejected a piecemeal approach that would permit states to continue to exercise “tailored intrastate access reforms.” CAF Order at ¶ 796.

> We appreciate and respect the expertise and on-the-ground knowledge of our state partners concerning intrastate telecommunications.... With respect to the ultimate ICC framework and the intervening transition, however, we find that a uniform national approach will best create predictability for carriers and promote efficient pricing and new investment to the benefit of consumers.

Id. The FCC adopted this uniform approach based on a concern that permitting a state-by-state approach would lead to “significant variability and unpredictability of outcomes.” *Id.* at ¶ 794.

> The lack of certainty and predictability for the industry without a uniform framework is a significant concern. Carriers and investors need predictability to make

> investment and deployment decisions and lack of certainty regarding intrastate access rates or recovery hampers these efforts. In addition some parties warned that it would be "extremely costly" to participate in "the multitude" of state commission proceedings that would follow from an approach relying on dozens of different state transitions and recovery frameworks.

Id. at ¶ 794 (footnotes omitted). And, while the FCC has not yet established the specific steps pursuant to which intrastate originating access will be reduced to bill-and-keep, the adoption of such measures is currently before the FCC in its FNPRM.[6]

A federal agency such as the FCC, acting within the scope of its congressionally delegated authority, may preempt state regulation. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *see also City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("[I]n proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area."). The U.S. Supreme Court has previously confirmed the intention of Congress to confer broad authority to the FCC, and supplant state authority, in the Telecommunications Act of 1996, including Section 251.

> [T]he question ... is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regards to matters addressed by the 1996 Act, it unquestionably has.... If there is any 'presumption' applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.6 (1999). Here, the FCC has acted pursuant to this broad authority to preempt state authority over intrastate access charges expressly and unmistakably. *See, e.g.,* CAF Order, at ¶ 790 ("[S]tates will not set the transition for intrastate rates under this approach...."). In sum, the FCC's decision to bring intrastate access charges under the federal regime of Section 251(b)(5) is owed deference by the Commission.

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[6] *See* CAF FNPRM, ¶¶ 1298-1305. "Although the [FCC] can exercise its authority to implement a transition, as it does in the [CAF] Order today, the [FCC] could also defer to the states to create a transition to bill-and-keep for originating access." *Id.* at ¶ 1302.

As the FCC continues to examine the reduction of intrastate originating access rates, any action taken by an individual state in the meantime risks running afoul of the plan ultimately adopted by the FCC. State actions which are inconsistent with federal regulations or that frustrate or stand as an obstacle to the accomplishment of federal objectives are subject to preemption. *See, e.g.*, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983); *State Corp. Comm'n v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986); *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 259-61 (1964). Given the FCC's clear statements with regard to its intention to adopt uniform national standards for intercarrier compensation, as well as its ongoing proceedings with respect to originating access rates, further state action about intrastate access rates risks interfering with these valid federal objectives and, therefore, is subject to preemption.

Conclusion

Given that wholesale changes have been made at the federal level to the intercarrier compensation system, the current record developed in this proceeding is now outdated and inaccurate. The parties' positions are reflective of a regulatory environment that no longer exists, and the parties have not been permitted to elicit information from one another — through a hearing or otherwise — concerning the impact of the federal reforms. As a result, the Commission could not take action on the basis of the record presently before it, regardless of its underlying authority to act. Therefore, this proceeding should be closed or held in abeyance.

Respectfully submitted on behalf of TWTC and Level 3:

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