

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

An Investigation into the Intrastate Switched  
Access Rates of All Kentucky Incumbent and  
Competitive Local Exchange Carriers

Adm. Case No. 2010-00398

**Response of tw telecom of Kentucky, llc  
to AT&T's 5/2/11 Data Requests**

tw telecom of kentucky, llc ("TWTC"), pursuant to the procedural schedule set forth in Appendix A to the Commission's Order dated March 10, 2011, hereby submits this response to the data requests propounded by 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 Services, and TCG Ohio ("collectively, "AT&T") on May 2, 2011.

The attorneys of record for TWTC, rather than the listed witness, are responsible for objections stated herein.

Respectfully submitted

/s/ Katherine K. Yunker

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**Publicly Filed**



**Request:**

1. Do you offer standalone basic local exchange service as defined in KRS 278.541? If so, for each year from 2001 through 2010, and for 2011 most recent data available, please provide the total number of revenue-producing *retail* access lines for the following:

- a. Residential standalone basic local exchange service (as defined in KRS 278.541) access lines, including “lines” being provided via anon-traditional means such as voice over Internet protocol (VoIP).
- b. Business standalone basic local exchange service (as defined in KRS 278.541) access lines, including “lines” being provided via a non-traditional means such as voice over Internet protocol (VoIP).
- c. Residential non-basic local exchange service access lines (as defined in KRS 278.541), including “lines” being provided via a non-traditional means such as voice over Internet protocol (VoIP), and voice grade equivalent lines for ISDN-BRI.
- d. Business non-basic local exchange service access lines (as defined in KRS 278.541), including “lines” being provided via a non-traditional means such as voice over Internet protocol (VoIP), and voice grade equivalent lines to which intrastate switched access applies (e.g., all activated B-channels in an ISDN-PRI or ISDN-BRI to the extent the ISDN-PRI or ISDN-BRI is providing connectivity to the PSTN).
- e. Other facilities to which intrastate switched access applies, if any, not included in (a) through (d) above.

**Response:** Note: TWTC’s records go back to 2007 in Kentucky.

a. Not applicable. TWTC does not offer residential services.

b.

2007	— redacted —
2008	
2009	
2010	
2011	

c. Not applicable. TWTC does not offer residential services.

d.

2007

2008

2009

2010

2011

— redacted —

e. Not applicable

**Request:**

2. For each year from 2001 through 2010, and for 2011 most recent data available, please provide the average monthly revenue per line identified in Data Request 1(a), 1(b), 1(c), 1(d) and 1(e). If the average monthly revenue figures are not available in the format requested for each of these types of lines, provide the total annual revenue for the years requested, for all lines identified in Data Request 1, presented at the greatest level of disaggregation the ILEC maintains in its historical revenue records.

**Response:** Note: TWTC's records go back to 2007 in Kentucky. In addition, AT&T does not specify and TWTC does not assume what "the greatest level of disaggregation the ILEC maintains in its historical revenue records" might be.

- as to #1(b):

2007	—
2008	—
2009	—
2010	—
2011	—

- as to #1(d):

2007	—
2008	—
2009	—
2010	—
2011	—

**Request:**

3. For each year from 2001 through 2010, and for 2011 most recent data available, please provide the total number of all revenue-producing wholesale access lines (i.e., resale, UNE loops, and facilities that have the capability to provide voice grade equivalent service) for the following:

- a. Residential standalone basic local exchange service (as defined in KRS 278.541).
- b. Business standalone basic local exchange service (as defined in KRS 278.541).
- c. Residential non-basic local exchange service access lines, including voice grade equivalent lines for ISDN BRI.
- d. Business non-basic local exchange service access lines, including voice grade equivalent lines (e.g., all activated B-channels in an ISDN-PRI or ISDN-BRI to the extent the ISDN-PRI or ISDN-BRI is providing connectivity to the PSTN).
- e. Other facilities to which intrastate switched access applies, if any, not included in (a) through (d) above.

**Response:**

- a. Not applicable. TWTC does not offer residential services.
- b. Not applicable.
- c. Not applicable. TWTC does not offer residential services.
- d.

2007	— redacted —
2008	
2009	
2010	
2011	

- e. Not applicable.

**Request:**

4. For each of the *retail* types of lines identified in Data Request 1 (a) through (e), for 2010, and for 2011 most recent data available, provide the calculated weighted average local rate per line per month, and all back-up information and worksheets that support these calculations.

**Response:** OBJECTION. This request is unduly burdensome, and would require that TWTC perform an analysis or generate a particular number, rather than provide data it has.

Without waiver of the objection, TWTC states that AT&T should be able to perform the required calculation on an annual basis, using the data provided in the Response to AT&T 5/2/11 Requests #1 and #2, plus the effective TWTC tariffs on file with the Kentucky PSC.

**Request:**

5. For each of the *wholesale* types of lines in Data Request 3(a) through (e), for 2010, and for 2011 most recent data available, provide the calculated weighted average local rate per line per month, and all back-up information and worksheets that support these calculations.

**Response:** OBJECTION. This request is unduly burdensome, and would require that TWTC perform an analysis or generate a particular number, rather than provide data it has.

Without waiver of the objection, TWTC states that AT&T should be able to perform the required calculation, using the data provided in the Response to AT&T 5/2/11 Request #3, plus the effective TWTC tariffs on file with the Kentucky PSC.



**Request:**

6. For 2010, and 2011 most current data available, provide the following:
- a. Volumes of intraMTA minutes terminated by you on behalf of all wireless carriers, and dollars billed for such terminating intraMTA minutes broken out by
    1. IntraLATA intrastate,
    2. InterLATA intrastate, and
    3. InterLATA interstate.
  - b. Volume of intrastate, interMTA minutes terminated by you on behalf of wireless carriers, and dollars billed for such intrastate, interMTA minutes.
  - c. Volume of local minutes terminated by you and dollars billed for wireless traffic as reciprocal compensation for such traffic.
  - d. Volume of local minutes terminated by you and dollars billed for non-wireless traffic as reciprocal compensation for such traffic

**Response:**

	Jan. 2010 – Dec. 2010		Jan. 2011 – May 2011	
	MOU	\$ Amount	MOU	\$ Amount
a. <u>intra-MTA</u> originating <u>wireless</u> MOU terminating and billed by TWTC	— redacted —			
b. <u>intra-MTA</u> originating <u>wireless</u> MOU terminating and billed by TWTC	— redacted —			
c. <u>local</u> originating <u>wireless</u> MOU terminating and billed by TWTC	<i>see responses for #6.a and #6.b</i>			
d. <u>local</u> originating <u>non-wireless</u> MOU terminating and billed by TWTC	— redacted —			

Witness: Carolyn Ridley

Note: TWTC bills Wireless Carriers' intra-MTA and inter-MTA MOUs based on lookups from databases provided by its Vendor which reflect the FCC's Wireless inter-MTA and intra-MTA jurisdictions. The responses to subparts 6.a.-c. are therefore divided by these classifications and not by the classifications in the data request. They also are based on the billing to the Wireless Carriers where TWTC has finalized Traffic Termination Contracts. In situations where TWTC does not have a contract with a Wireless Carrier, the traffic is terminated under a bill-and-keep compensation.

**Request:**

7. What rate(s) do you charge for termination of intraMTA wireless calls? Provide the source showing the basis for each such rate(s).

**Response:** TWTC's contractual rate for the termination of intra-MTA wireless traffic in Kentucky is — **redacted** —.

**Request:**

8. What rate(s) do you charge for termination of VoIP calls originated by VoIP providers?

**Response:** TWTC charges the same rates for VoIP calls originated by VoIP providers as for all other voice traffic originated by other carriers. Please refer to TWTC's effective tariffs on file with the Kentucky PSC.

Note: TWTC bills traffic based on the jurisdiction identified using the originating to terminating telephone numbers. Traffic identified as intrastate toll is billed applying rates from TWTC's Kentucky intrastate access tariff (Kentucky Tariff No. 14); traffic identified as interstate is billed at interstate access tariff rates; and traffic that is local is billed at contractual rates. If a contract has not been negotiated, then the local traffic is treated under a bill-and-keep compensation arrangement.

**Request:**

9. For each year from 2001 through 2010, and for 2011 most recent data available, provide, and in (a) thru (d) specifically identify and group the revenues in a matrix by (1) type of provider (CLEC/ILEC, mobile wireless services provider, cable VoIP services provider, and non-cable VoIP services provider), and by (2) each rate element billed. Please identify separately (if any) revenues from your non- ILEC affiliates.

- a. Total *intrastate, terminating* switched access revenues billed (including non-traffic sensitive revenues) and MOUs;
- b. Total *intrastate, originating* switched access revenues billed (including non-traffic sensitive revenues) and MOUs;
- c. Total *interstate, terminating* switched access revenues billed (including non-traffic sensitive revenues) and MOUs;
- d. Total *interstate, originating* switched access revenues billed (including non-traffic sensitive revenues) and MOUs;
- e. Please provide the work papers for the rate elements, volumes, revenues and associated calculations for (a) through (d) above in electronic/Excel format. Please specify the unit of measure for each rate element (e.g., MOU, circuit/month, line, message, etc.). If the billing basis is not MOU, please provide the relevant quantities associated with each rate element.

**Response:** Note: TWTC does not differentiate VoIP traffic from other switched access traffic and does not have billing detail prior to August 2007 for Kentucky.

- a. – d. From August 2007 through May 2011, total switched access MOUs and revenues billed are as shown on Attachment 1 hereto.
- e. See Attachment 2 (MOUs) and Attachment 3 (Billed Amounts).

Aug. 2007 — May 2011		CLEC/ILEC		IXC		Wireless*	
		MOUs	Revenues	MOUs	Revenues	MOUs	Revenues
a.	intrastate, terminating	<b>— Redacted —</b>					
b.	intrastate, originating						
c.	interstate, terminating						
d.	interstate, originating						

\* intra-MTA/reciprocal compensation attributed as intrastate; inter-MTA/reciprocal compensation attributed as interstate

MOU Data		Orig/Term	JUR	ELEM LEVEL											
		Orig													
		1-Interstate			1-Interstate Total	4-Intrastate									
Acct Type	Billing Year	800 DB QUERY- Per Query	END OFFICE SWITCHING- Per Mou	LOCAL TRANSPORT- Per MOU	TANDEM SWITCHING- Per MOU		800 DB QUERY- Per Query	CARRIER COMMON LINE- Per MOU							
CLEC/ILEC	2007	<b>— Redacted —</b>													
	2008														
	2009														
	2011														
CLEC/ILEC Total		<b>— Redacted —</b>													
	2009														
Wireless									<b>— Redacted —</b>						
	2008														
	2009														
	2010														
	2011	<b>— Redacted —</b>													
Wireless Total															
Grand Total															

MOU Data							4-Intrastate Total	Orig Total					
Acct Type	Billing Year	END OFFICE SWITCHING- Per Mou	LOCAL TRANSPORT- Per MOU	LOCAL TRANSPORT- Per MOU per Mile	LOCAL TRANSPORT-RIC	TANDEM SWITCHING-Per MOU							
CLEC/ILEC	2007	<b>— Redacted —</b>											
	2008												
	2009												
	2010												
	2011												
CLEC/ILEC Total													
IXC	2007	<b>— Redacted —</b>											
	2008												
	2009												
	2010												
	2011												
IXC Total													
Wireless	2008	<b>— Redacted —</b>											
	2009												
	2010												
	2011												
Wireless Total													
Grand Total													



MOU Data		Term					
Acct Type	Billing Year	1-Interstate		1-Interstate Total	4-Intrastate		
		END OFFICE SWITCHING- Per Mou	LOCAL TRANSPORT- Per MOU		CARRIER COMMON LINE-Per MOU	END OFFICE SWITCHING- Per Mou	LOCAL TRANSPORT- Per MOU
CLEC/ILEC	2007	<b>— Redacted —</b>					
	2008						
	2009						
	2010						
	2011						
CLEC/ILEC Total							
IXC	2007						
	2008						
	2009						
	2010						
	2011						
IXC Total							
Wireless	2008						
	2009						
	2010						
	2011						
Wireless Total							
Grand Total							

MOU Data			Term Total	Grand Total
Acct Type	Billing Year	MISCELLANEOUS - Rec Comp	4-Intrastate Total	
CLEC/ILEC	2007			
	2008			
	2009			
	2010			
	2011			
CLEC/ILEC Total				
IXC	2007			
	2008			
	2009			
	2010			
	2011			
IXC Total				
Wireless	2008			
	2009			
	2010			
	2011			
Wireless Total				
Grand Total				

**— Redacted —**

Revenue Data		Orig/Term	JUR	ELEM LEVEL				
		Orig						
		1-Interstate				1-Interstate Total	4-Intrastate	
Acct Type	Billing Year	800 DB QUERY-Per Query	END OFFICE SWITCHING-Per MOU	LOCAL TRANSPORT- Per MOU	TANDEM SWITCHING-Per MOU		800 DB QUERY-Per Query	CARRIER COMMON LINE
CLEC/ILEC	2007	<b>— Redacted —</b>						
	2009							
CLEC/ILEC Total								
Wireless	2008							
	2009							
	2010							
	2011							
Wireless Total								
Grand Total								

Revenue Data							4-Intrastate Total
Acct Type	Billing Year	END OFFICE SWITCHING-Per MOU	LOCAL TRANSPORT- Per MOU	LOCAL TRANSPORT- Per MOU per Mile	LOCAL TRANSPORT- RIC-Per MOU	TANDEM SWITCHING-Per MOU	
CLEC/ILEC	2007	<b>— Redacted —</b>					
	2008						
	2009						
	2010						
	2011						
CLEC/ILEC Total							
IXC	2007						
	2008						
	2009						
	2010						
	2011						
IXC Total							
Wireless	2008						
	2009						
	2010						
	2011						
Wireless Total							
Grand Total							

Revenue Data		Orig Total	Term				
			1-Interstate		1-Interstate Total	4-Intrastate	
Acct Type	Billing Year		END OFFICE SWITCHING-Per MOU	LOCAL TRANSPORT- Per MOU		CARRIER COMMON LINE	END OFFICE SWITCHING-Per MOU
CLEC/ILEC	2007	<b>— Redacted —</b>					
	2008						
	2009						
	2010						
	2011						
CLEC/ILEC Total							
IXC	2007						
	2008						
	2009						
	2010						
	2011						
IXC Total							
Wireless	2008						
	2009						
	2010						
	2011						
Wireless Total							
Grand Total							

Revenue Data						Term Total	Grand Total				
					4-Intrastate Total						
Acct Type	Billing Year	LOCAL TRANSPORT Per MOU	LOCAL TRANSPORT-Per MOU per Mile	MISCELLANEOUS - Rec Comp							
CLEC/ILEC	2007	<b>— Redacted —</b>									
	2008										
	2009										
	2010										
	2011										
CLEC/ILEC Total											
IXC	2007										
	2008										
	2009										
	2010										
	2011										
IXC Total											
Wireless	2008										
	2009										
	2010										
	2011										
Wireless Total											
Grand Total											

**Request:**

10. For 2010, and for 2011 most recent data available, for you and your affiliates (if any), please provide the following:
- a. Total Kentucky *intrastate* originating and terminating switched MOUs and access expenditures paid to other providers (i.e., ILECs and CLECs, excluding payments to any of your affiliates). Please provide payments to each carrier and group by ILECs and CLECs separately;
  - b. Total Kentucky *interstate* originating and terminating switched MOUs and access expenditures paid to other providers (i.e., ILECs, and CLECs, excluding any of your affiliates). Please provide payments to each carrier and group by ILECs and CLECs separately;
  - c. Please respond to (a) and (b) for the traffic (excluded above) between you and your Kentucky affiliates.

**Response:**

a. – b.

			Orig MOU	Term MOU	Term MOU	Orig Exp. \$	Term Exp \$
CLEC	2010	Interstate	— redacted —				
		Intrastate					
		Local					
	2010 Total						
	2011	Interstate					
		Intrastate					
	2011 Total						
CLEC Total							
ILEC	2010	Interstate	— redacted —				
		Intrastate					
		Local					
		UNE-P					
	2010 Total						
	2011	Interstate					
		Intrastate					
		Local					
		UNE-P					
	2011 Total						
ILEC Total							
wireless	2010	Intra-MTA	— redacted —				
		2010 Total					
	2011	Intra-MTA					
		2011 Total					
wireless Total							
Grand Total							

Witness: Carolyn Ridley

c. Not applicable.



**Request:**

11. Please provide separate estimates of the percentage of terminating intercarrier traffic you and your parent companies and affiliates receive both in Kentucky and nationwide that lacks sufficient call detail or signaling information to either (a) identify the carrier financially responsible for intercarrier charges or (b) apply the proper compensation regime for interstate access, intrastate access, and reciprocal compensation (such traffic is generally and collectively known as “phantom traffic”).

**Response:** OBJECTION. The request does not seek information relevant to this investigation, calls for speculation, and is overly broad in seeking data about traffic received nationwide other than in Kentucky.

Without waiver of the objection, TWTC states that it does not routinely estimate or maintain the data requested. However, a brief review of information as to one Transit Vendor interconnected to TWTC in Kentucky yields a preliminary estimate that 2.6% of the traffic is “phantom traffic.”

**Request:**

12. What is your practice for determining the intercarrier compensation applicable to traffic that lacks sufficient information to otherwise identify the traffic's proper intercarrier compensation regime? Cite all your intrastate and interstate tariffs, interconnection agreements, or other relevant sources that determine what intercarrier compensation scheme should apply to such traffic.

**Response:** OBJECTION. The request does not seek information relevant to this investigation, is unduly burdensome, and calls for a study and legal conclusion as to what "relevant sources ... determine what intercarrier compensation scheme should apply to such traffic."

Without waiver of the objection, TWTC states that such "phantom traffic" typically does not contain enough information to identify whom to bill. Traffic for which sufficient identifying information cannot be determined is directed to TWTC's "unbillable" file.

**Request:**

13. Please provide your estimate of the percentage of your terminating intercarrier traffic, both for traffic sent or received by you in Kentucky, for which the compensation regime (interstate access, intrastate access, or reciprocal compensation) is mischaracterized.

**Response:** OBJECTION. The request does not seek information relevant to this investigation, calls for speculation, and is ambiguous or insufficiently precise.

Without waiver of the objection, TWTC states that it does not routinely estimate or maintain the data requested.

**Request:**

14. Have you, your parent companies and/or affiliates filed any appeals of FCC Orders that established your interstate switched access rates?

**Response:** No.

**Request:**

15. Have you ever made a claim or appeal in any forum that your existing interstate switched access rates are not compensatory or are confiscatory? Please list every instance where such claim or appeal was made, provide all evidence supporting such claim, and indicate the result of the related challenge or appeal (if any)?

**Response:** No.

**Request:**

16. Regarding the origination and termination of landline toll traffic in Kentucky:
- a. Does the function provided by you for interstate originating and terminating switched access service materially differ from the functionality provided for your intrastate originating and terminating switched access service? If so, identify and describe each material difference in detail, and quantify the cost difference caused by each purported material difference.
  - b. Does the functionality you use to provide terminating switched access services, either for interstate or intrastate toll calls, materially differ from the functionality you use to provide local call termination for which either the FCC adopted reciprocal compensation charge or local interconnection charge applies? If so, identify and describe each material difference in detail, and quantify the cost difference caused by each purported material difference.
  - c. Does the function you perform to provide terminating switched access services, either for interstate or intrastate calls, materially differ from the function you use to terminate VoIP originated calls? If so, identify and describe each material difference, and quantify the cost difference caused by each purported material difference.
  - d. Does the function you perform to provide terminating switched access services, either for interstate or intrastate calls, materially differ from the function you use to terminate intraMTA wireless calls, either interstate or intrastate? If so, identify and describe each material difference, and quantify the cost difference caused by each purported material difference.

**Response:** The disparity in switched access rates is not based on network functionality, but is an artifact of a system of subsidies created to support universal service objections. It is TWTC's understanding that many LECs rely on switched access revenues to support their provision of service and business plans and — as such — intercarrier compensation reform needs to be considered in a holistic, comprehensive manner.

- a. No.
- b. No.
- c. No.
- d. No.

**Request:**

17. In accordance with the FCC's April 26, 2001 Seventh Report and Order in CC Docket 96-262, have you capped your interstate switched access rates to the level of the interstate switched access rates of the incumbent local exchange carrier with which you compete?

**Response:** OBJECTION. The request reductively characterizes the referenced Order and presumes applicability of the requirement.

Without waiver of the objection and without comment on the characterization of the referenced Order, TWTC states it has capped its interstate switched access rates to the level of the interstate switched access rates of the ILEC(s) with which it competes.

**Request:**

18. Do you or any of your parent companies or affiliates in any other state mirror your interstate and intrastate access rates or any individual rate elements? Also, are you subject to any future mirroring (e.g., by an order that requires phased-in mirroring)?

- a. Please list all states where you or an affiliate company mirror these rates or rate elements;
- b. Please describe and identify (by docket number, relevant statute section, or other similar type of identifier) the proceedings or legislation that led you or an affiliate entity to mirror these rates;
- c. Please state whether you or your affected affiliate entity appealed any order of any state commission or challenged any statute involved in (a) or (b) above. If yes, identify each appeal or challenge.
- d. If the answer to (c) indicates “Yes,” what was the result of the related appeal or challenge?

**Response:** OBJECTION. This request is unduly broad (and of dubious relevance) in seeking narrative information and lists relating to matters of public record in other states. Furthermore, the request calls for a legal conclusion about the nature, effect, and application of other states’ requirements.

Without waiver of the objection and without implying agreement as to whether a requirement in another jurisdiction constitutes “mirroring” or what is to be mirrored, TWTC states as follows:

- a. TWTC states that it has complied with all such orders or requirements of which it is aware. AT&T has access to information, in all of the states in which TWTC operates, from which to determine the applicable orders or requirements and whether TWTC’s switched access tariffs are in compliance therewith.
- b. *See* the response to #18(a).



- c. TWTC has not challenged any such state commission order or statute. It did recently participate in the legislative process in two states in the southeast which resulted in legislative mandates to mirror intrastate switched access rates to interstate rates over a phased-in period of time.
- d. In Georgia, CLECs are required to reduce intrastate switched access rates to interstate levels over a 10-year phase-in period, given a 10-year revenue replacement fund which was also ordered. In Tennessee, TWTC led the effort to reach an industry compromise (which included AT&T) and which resulted in a five-year phase-in to interstate levels, without the creation of a new state fund.

**Request:**

19. Do you or any of your parent companies or affiliates in any other state mirror the intrastate access rates or any individual rate elements of the competing ILEC, or have you or any of your parent companies or affiliates been ordered to do so in the future?

- a. Please list all states where you mirror these rates or rate elements;
- b. Please describe and identify (by docket number, relevant statute section, or other similar type of identifier) the proceedings or legislation that led you to mirror these rates;
- c. Please state whether you appealed any order of any state commission or challenged any statute involved in (a) or (b) above. If yes, identify each appeal or challenge.
- d. If the answer to (c) indicates “Yes,” what was the result of the related appeal or challenge?

**Response:** OBJECTION. This request is unduly broad (and of dubious relevance) in seeking narrative information and lists relating to matters of public record in other states.

Without waiver of the objection and without implying agreement as to whether a requirement or practice in another jurisdiction constitutes “mirroring,” TWTC states as follows:

- a.-b. *See* the response to #18(a).
- c. *See* the response to #18(c).
- d. *See* the response to #18(d).

**Request:**

20. If not otherwise identified in Data Requests 18 and 19, have you or any of your parent companies or affiliates in any other state been ordered to restrict its access rates in any way?

- a. Please list all states where your access rates are restricted and describe the restriction;
- b. Please describe and identify (by docket number, relevant statute section, or other similar type of identifier) the proceedings or legislation that led you to restrict your access rates;
- c. Please state whether you appealed any order of any state commission or challenged any statute involved in (a) or (b) above. If yes, identify each appeal or challenge.
- d. If the answer to (c) indicates “Yes,” what was the result of the related appeal or challenge?

**Response:** OBJECTION. This request is unduly broad (and of dubious relevance) in seeking narrative information and lists relating to matters of public record in other states.

Without waiver of the objection and without implying agreement as to whether a requirement in another jurisdiction constitutes “mirroring” or a restriction, TWTC refers AT&T to the corresponding subpart of the response to #18.

**Request:**

21. Have you ever filed a pleading with the FCC indicating your support for a unified interstate and intrastate rate? If yes, provide such filing or a cite to obtain the document if publicly available.

**Response:** Yes. Attached are three such filings on behalf of TWTC, an affiliate, or a predecessor in interest. There are other FCC filings indicating such support which — like the three attached — are indexed by and available through the FCC.

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

In the Matter of )  
 )  
Developing a Unified Intercarrier ) CC Docket No. 01-92  
Compensation Regime )  
 )  
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**COMMENTS OF TIME WARNER TELECOM, CONVERSENT COMMUNICATIONS  
INC, CBeyond COMMUNICATIONS LLC, AND LIGHTSHIP TELECOM**

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May 23, 2005

Comments of Time Warner Telecom,  
Conversent Communications Inc.,  
Cbeyond Communications LLC and  
Lightship Telecom  
CC Docket No. 01-92  
May 23, 2005

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BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

In the Matter of )  
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Developing a Unified Intercarrier ) CC Docket No. 01-92  
Compensation Regime )  
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**COMMENTS OF TIME WARNER TELECOM, CONVERSENT COMMUNICATIONS  
LLC, CBeyond COMMUNICATIONS LLC, AND LIGHTSHIP TELECOM**

Time Warner Telecom, Inc. (“TWTC”), Conversent Communications LLC  
 (“Conversent”), Cbeyond Communications LLC (“Cbeyond”) and Lightship Telecom  
 (“Lightship”) (collectively, the “Joint Commenters”), by their attorneys, hereby submit these  
 comments in response to the Further Notice of Proposed Rulemaking regarding Developing a  
 Unified Intercarrier Compensation Regime<sup>1</sup>.

**I. INTRODUCTION AND SUMMARY**

In assessing the optimal approach to intercarrier compensation reform, the Commission  
 must weigh the costs and benefits of the possible approaches. If undertaken pragmatically and  
 honestly, such an assessment yields the conclusion that a central component of reform must be  
 the requirement that, to the extent possible, each carrier charge a single, cost-based rate for the  
 exchange of all types of traffic.

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<sup>1</sup> See *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, FCC 05-33 (rel. Mar. 3, 2005) (“FNPRM”).

The Commission has at least a reasonable chance of ensuring that carriers charge cost-based unified rates. As the Supreme Court held in *AT&T v. Iowa Utils Bd.*, the Commission has the authority to adopt regulations to implement the express terms of the Act, even where those terms address intrastate communications. The language of Section 251(b)(5) would appear to govern the termination of all traffic, interstate and intrastate (the case for Commission preemption on traffic origination is significantly weaker). Accordingly, the Commission arguably has the authority to mandate that states use a cost-based methodology, in particular TELRIC, as the basis for setting all intercarrier termination rates. The states have of course already set reciprocal compensation rates based on TELRIC, and these rates should become the Target Rates for all terminating charges. Rate reductions should be phased in over a multiple year transition. As all of the reform proposals recognize, decreases in intercarrier payments should be accompanied by increases in end user charges.

Ensuring the adoption of unified, cost-based rates for the exchange of traffic can, if properly structured, offer at least as many public policy benefits as bill and keep. Both approaches set a uniform price for the exchange of traffic and therefore eliminate the most obvious and immediate flaw in the current system: different prices for different types of traffic. Proponents of bill and keep argue that the shared benefits (between called and calling parties) of a call make a price of zero the most efficient exchange rate, but this is not so. In fact, the economic literature indicates that a cost-based price is often the efficient price where both parties benefit from a call. Similarly, proponents of bill and keep argue that carriers do not incur significant traffic-sensitive costs, but this is not the case. In fact, next-generation wireline



networks that deploy shared fiber loop feeder facilities incur even more traffic sensitive costs than has been the case in the past, and CMRS carriers, whose network costs are almost entirely shared and therefore traffic sensitive, carry increasingly large volumes of traffic.

Proponents of bill and keep argue further that per minute intercarrier charges prevent the development of flat-monthly end user rate structures and that a price of zero would not have this effect. This is incorrect, however, because flat monthly end user rate plans were developed while carriers paid (often above-cost) per minute exchange rates. Proponents of bill and keep argue that retaining any intercarrier payments perpetuates the terminating monopoly problem and leads to endless disputes regarding the “correct” intercarrier rate. But as the internet backbone providers have proven, intercarrier payments (e.g., transit rates) among interconnected networks that have a monopoly over termination to their customers does not necessarily perpetuate the need for regulation of terminating access. Once the obstacles to competitive pressure on intercarrier payments among telecommunications carriers (such as Section 254(g) geographic averaging) are eliminated, it is not at all clear that the retention of a cost-based exchange rate would cause regulation to be needed any longer than would be the case under bill and keep with its huge increases in end user rates and in universal service subsidies. In sum, when closely examined, the benefits of affirmative cost-based rates are just as powerful as the benefits of bill and keep.

At the same time, unified, cost-based rates carry far fewer costs than bill and keep. Most obviously, the legal basis for preemption is far stronger under a cost-based unified rate regime than under bill and keep. Indeed, the weaknesses in the preemption claims of the advocates of

bill and keep are obvious enough that the Commission should halt further discussion of bill and keep under the current statute. Moreover, bill and keep would require that the Commission undertake a complex and contentious set of proceedings to implement huge increases in end user rates and universal service funding. While a cost-based, unified rate system would require such proceedings, the increases in end user rates and in universal service would be far smaller and thus the difficulty of the undertaking diminished accordingly.

While a national methodology for intercarrier payments is clearly the best approach to reform, any reform plan, regardless of the intercarrier rate, must follow certain basic principles. *First*, the Commission should ensure that intercarrier compensation reform does not undermine the development of efficient competition. For example, it must ensure that incumbent LECs are not able to recover switching and transport costs from end users in a manner that harms consumers or competition. This means that incumbent LECs must be prohibited from recovering any of the intercarrier payments associated with multiline business customers from end user charges imposed upon residential or single line business customers. Moreover, the incumbents should not be granted any further flexibility to discriminate in the manner which they apply end user charges to multiline business customers.

*Second*, the Commission must ensure that incumbent LECs are not able to use any changes in the rules governing network interconnection as a means of artificially raising competitors' costs. The ICF has proposed the most extensive changes to the current interconnection regime, apparently based on the understanding that bill and keep requires such changes. Cost-based intercarrier rates would eliminate any such concern. Moreover, the existing

network interconnection rules are functioning adequately in the current environment. There is no need to complicate an already complex proceeding with this issue. In all events, there is no basis for allowing incumbent LECs to define multiple “edge” points at tandem offices for CLEC interconnection, as the ICF essentially does. This proposal unjustifiably increases CLEC costs and is flatly inconsistent with Section 251(c)(2). Equally unjustified are the ICF proposals that incumbents should never pay for facilities used to establish interconnection between CLEC and ILEC networks and that the often unreasonably high tandem transit rates should remain in place for two years.

*Third*, in assessing the optimal approach to intercarrier compensation reform, the Commission must be realistic in assessing the participation of rural incumbent LECs. Any cost-based methodology should allow rural incumbents with high costs to charge intercarrier rates that reflect such costs. But the rural exemption provisions of Section 251(f) may prevent the Commission from even ensuring that rural incumbent termination rates follow a uniform methodology. This is an area in which federal-state collaboration may be more promising than preemption.

*Finally*, the Commission must ensure that intercarrier compensation reform does not include the creation of additional subsidy funds that threaten either the sustainability of universal service or competition. The current universal service fund is already dangerously large. Any further increases in the size of the fund must be kept as small as possible and be accompanied by an expansion in the base of contributors. Any subsidy fund designed to compensate carriers for the loss of intercarrier compensation revenue must be strictly interim in nature and must

distribute subsidies that are portable to competitors if applicable outside of areas subject to the rural exemption from local competitive under Section 251(f).

**II. The Establishment Of Unified, Cost-Based Terminating Rates Would Substantially Increase The Efficiency Of The Current Inter-carrier Compensation System**

While bill and keep has received a great deal of attention from both the Commission staff and the industry, even its most ardent proponents would likely concede that it represents an enormously complex undertaking. Yet the most obvious (and probably the most harmful) flaws in the current inter-carrier compensation system could be remedied without the need for a grand scheme to completely transform the manner in which carriers exchange traffic. By simply ensuring, to the extent possible under the current statute, that each carrier charges a single, cost-based price for the exchange of all traffic, the Commission could advance consumer welfare substantially without introducing all of the uncertainties and costs of bill and keep.

Every commentator agrees that the application of different rates for different traffic is inefficient where the switching and transport functions performed are the same. It is clear therefore that the Commission could enhance the efficiency of the current system substantially by ensuring that, to the extent possible, each carrier charges the same cost-based rate for the exchange of all traffic (as explained below, the single rate may vary from one carrier to another). This outcome would be beneficial even if, as discussed below, it can only be adopted for traffic termination (and not traffic origination).

As NARUC suggests, it is both legally permissible and sound policy to establish a unified rate (at least on the terminating end) for inter-carrier compensation based on forward-looking

costs.<sup>2</sup> Given the existing statutory framework, the appropriate means of achieving this goal is for the Commission to reaffirm TELRIC as the required methodology for all traffic subject to Section 251(b)(5) (and, by extension, the pricing requirements of Section 252(d)(2)). The Commission would then rule (as the ICF has suggested) that Section 251(b)(5) governs the termination of all traffic by local exchange carriers, including intrastate terminating access, interstate terminating access and ISP-bound traffic. Each state's existing reciprocal compensation rates would become the unified terminating rates ("Target Rates") for intrastate access, reciprocal compensation, and ISP-bound traffic (subsequent state adjustments to the rate could obviously be made and accommodated by the plan). The FCC would set the interstate terminating access Target Rate for a particular carrier operating in the state to match the state-set rate.

The Commission should then establish an appropriate transition to the applicable unified Target Rates. For example, the Commission could require reductions in access charges in equal increments over 5 years until each carrier has reached its Target Rate in the fifth year of the plan. If necessary, the transition could be longer, for example 7 years, for rural carriers. At some point in the plan, the rate applicable to the exchange of ISP-bound traffic would need to be increased to the TELRIC level. It may be appropriate for this increase to occur in the last year of the

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<sup>2</sup> See *Ex Parte* presentation of NARUC, App C. at 5 ("*NARUC Plan*"), attached to Letter of Robert B Nelson, Commissioner, Michigan Public Service Commission *et al.*, to Kevin Martin, Chairman, FCC, CC Dkt. No. 01-92 (filed May 18, 2005).

transition. As demand for broadband access to the internet grows during the transition period, the impact of the increase for the exchange of dial-up ISP-bound traffic should be minimal. In addition, as many of the reform proposals contemplate, the reduction in intercarrier payments should be accompanied by corresponding increases in the caps applicable to federal subscriber line charges so that carriers have the opportunity to recover directly from end users the revenues that are eliminated from the intercarrier compensation system.

It is important to emphasize, as NARUC does, that all carriers should remain free to agree voluntarily to exchange traffic on a bill and keep basis (*see NARUC Plan* at 5) and that nothing in any FCC intercarrier compensation reform plan should in any way limit the availability of this option. Indeed, as is discussed more fully below, Section 252(d)(2)(B) expressly preserves the right of carriers to enter into bill and keep arrangements if certain criteria are met.

Carriers should continue to be free to mutually agree to convert per minute intercarrier compensation rates to capacity charges at any time. *See NARUC Plan* at 6. Going forward, the FCC should, as NARUC suggests, initiate a proceeding to address capacity-based charges. *See id.* Any capacity-based rules must ensure that ILECs are prevented from using their market power to raise rivals costs. For example, it would be completely inappropriate for the Commission to import into the local market the intercarrier compensation system used by internet backbones in which smaller networks pay but larger networks do not pay for the exchange of traffic. Moreover, the FCC must determine how carriers would apply capacity

charges to shared trunk facilities. As discussed in detail below, it is generally inappropriate to impose flat-rated charges on shared facilities in an economically efficient manner.

**A. TELRIC Is An Appropriate Methodology For Setting Inter-carrier Compensation Rates**

It is sound policy to rely on TELRIC as the basis for setting inter-carrier compensation rates. TELRIC is of course not perfect, but perfection in ratemaking, whether it be a positive rate or a rate of zero, is impossible. It is clear, however, that TELRIC rates do not significantly under-compensate carriers for the cost of providing switching service. As the Supreme Court held, TELRIC is “just and reasonable”<sup>3</sup> and does not inhibit investment. *See id.* at 523. Nor, if the years of RBOC opposition to UNE pricing as unreasonably low are to be believed, do TELRIC rates significantly over-compensate carriers for the cost of performing switching and transport. Thus, because TELRIC produces rates more or less in line with the cost of providing service, it is unlikely that carriers in a TELRIC-based inter-carrier compensation system would attempt to disguise traffic, bypass the network, or engage in gaming or arbitrage tactics to any significant degree.

In the *Local Competition Order*, the Commission held that the traffic-sensitive portion of the TELRIC switching rate constitutes the “additional cost” of transport and termination upon

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<sup>3</sup> *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 516 (2002) (“At the end of the day, theory aside, the claim that TELRIC is unreasonable as a matter of law because it simulates but does not produce facilities-based competition founders on fact.”).

which Section 252(d)(2) transport and termination rates must be based.<sup>4</sup> In the *FNPRM*, the Commission asks if it should reconsider this holding.<sup>5</sup> The Commission articulates this question in numerous different ways. But regardless of whether the question is posed as a concern that carriers do not incur usage-sensitive costs when providing switching or as an inquiry into whether the Commission should utilize short run incremental costs rather than long run increment or average costs (for these purposes long run incremental and average costs amount to essentially the same thing), the answer is that TELRIC should not be abandoned. In an industry characterized by a large proportion of fixed costs, the only practical way to set prices is by using long run or “average” costs. This was the premise upon which the Commission established TELRIC. Indeed, even competitors that pay TELRIC-based prices have consistently conceded that a forward-looking pricing methodology must use long run, or average, costs.<sup>6</sup>

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<sup>4</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1057 (1996) (“*Local Competition Order*”) (“We conclude that such non-traffic sensitive costs should not be considered ‘additional costs’ when a LEC terminates a call that originated on the network of a competing carrier. For the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an ‘additional cost’ to be recovered through termination charges.”).

<sup>5</sup> See *FNPRM* ¶ 67 (“In the Commission’s pending TELRIC rulemaking, a number of parties have argued that the substantial majority of switching costs do not vary with minutes of use (MOU) and that switching should be offered on a flat-rated basis rather than a per-minute basis. These arguments are consistent with the decisions of a number of state commissions finding that end-office switching costs are not traffic-sensitive and therefore should be recovered on a flat, per-line basis, and not on a per-MOU basis.”).

<sup>6</sup> See Affidavit of William J. Baumol, Janusz A. Ordover, and Robert D. Willig, attached as Appendix B to AT&T Comments, CC Dkt. No. 96-98 ¶ 3 (filed May 20, 1996). This has been confirmed in similar capacity-based, regulated industries, such as the airline industry. See *Economic Regulation and Incremental Costs*, Consultation Paper for the Civil Aviation Authority, London, UK (rel. February 2001) available at <http://www.caa.co.uk/docs/5/ergdocs/economicregincrcostsfeb01.pdf>. To be sure, pricing based on short-run



The Commission has held that the use of a network component causes a carrier to incur usage-sensitive costs if (1) the component of the network is shared<sup>7</sup> or (2) there is an additional cost incurred by each increment of use, since capacity must eventually be expanded to accommodate peak load demand.<sup>8</sup> If either of these criteria is satisfied, the Commission has held and economic theory indicates that it is more economically efficient to recoup costs through

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marginal costs (SRMC) can provide an efficient method of capacity allocation. This methodology ultimately results in a “saw tooth” pattern, i.e. the price curve spikes as capacity becomes scarce and then drops precipitously as capacity is added. This is the only way that SRMC-based pricing permits carriers to recover their high proportion of fixed costs. But such SRMC-based prices serve as poor indications of investment opportunities, because market participants, as well as new entrants, must be convinced that such price spikes are forthcoming to offset any new investment in capacity or any loss incurred during the “trench” intervals in the price curve. Volatility is also difficult to accommodate in a regulatory system based on price caps, requiring heavier administrative scrutiny with less information on which to establish norms. Finally, volatile prices generally have highly undesirable consequences for end users because they yield wildly different prices for the same service at different moments in time. While long run pricing might not allocate capacity as efficiently as SRMC, it provides a clearer picture of the investment opportunities and is easier to implement.

<sup>7</sup> See, e.g., *Access Charge Reform et al.*, First Report and Order, 12 FCC Rcd 15982, ¶ 62 (1997) (“*Access Charge First Report and Order*”) (“Costs of local switching attributable to trunk ports are moved to a separate category with in the traffic-sensitive basket. These costs will be recovered through *flat-rated* monthly charges collected from users of *dedicated* trunk ports and *per-minute*, traffic-sensitive charges assessed on users of *shared* trunk ports.”) (emphasis added).

<sup>8</sup> See *id.* ¶ 54 (“Because the cost of using the incumbent LEC’s common line does not increase with usage, the costs should be recovered through flat non-traffic-sensitive fees.”). As Sprint explains, “A subscriber can make greater use of a dedicated resource . . . without causing the network supplier to incur additional costs for that dedicated resource. In contrast, shared resources that are placed in a common pool and drawn upon for the duration of a call or during call set-up and call tear-down have very different cost characteristics. For example, in the long run, added minutes of calling handled by a network switch or trunk require that the capacity of that resource be increased in order to maintain service quality for other users. Thus, the costs incurred by the network supplier for a shared resource increase when the volume of calling increases.” See Bridger M. Mitchell and Padmanabhan Srinagesh, *Transport and Termination Costs in PCS Networks: An Economic Analysis* at 11 (Apr. 4, 2000) (“*CRA Paper*”) attached to Letter of Jonathan M. Chambers, Sprint, to Larry Strickland and Thomas J Shugrue, FCC, CC Dkt. Nos. 95-185 *et al.*, (filed Apr. 7, 2000).

usage-sensitive rates.<sup>9</sup> Indeed, recovering usage-sensitive switching costs through flat-rated prices would create new subsidies because customers with below-average usage levels would necessarily subsidize customers with above-average usage levels.<sup>10</sup>

Applying this two-part standard, it is clear that switching still contains substantial usage-sensitive costs. First, notwithstanding the Commission's suggestion to the contrary, it is simply untrue that the capacity of new digital switches is so great that they can essentially absorb any foreseeable increase in traffic volumes over the years to come and therefore do not cause carriers to incur usage-sensitive costs.<sup>11</sup> Only three years ago, the Commission in the *Virginia Arbitration Order* rejected this very notion.<sup>12</sup> Moreover, although it acknowledged in its *ISP Remand Order* that "next-generation switching technology" is more efficient, the Commission found no reason to conclude there that the usage-sensitive costs of switching had disappeared. The Commission found that ISP-bound traffic must continue to be compensated on a minutes-of-

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<sup>9</sup> See *Access Charge First Report and Order* ¶ 24 ("Thus, the cost of traffic-sensitive access services should be recovered through corresponding per-minute access rates. Similarly, NTS cost should be recovered through fixed, flat rated fees.").

<sup>10</sup> See Verizon Comments, CC Dkt. No. 03-173 at 55 (filed Dec. 16, 2003) ("Verizon Comments").

<sup>11</sup> See *FNPRM* ¶ 68 ("We invite comment on the proposition that digital switching costs no longer vary with minutes of use due to increased processor capacity.").

<sup>12</sup> See *Application by Verizon Va. Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Va.*, Memorandum Opinion and Order, 17 FCC Rcd 21880, ¶ 121 (2002) ("The switch processor is a shared facility and our rules explicitly grant states the discretion to recover the costs of shared facilities on a usage-sensitive basis.").

use (“MOU”) basis.<sup>13</sup> Nor does the argument that the manner in which carriers purchase switches support the conclusion that switching costs are no longer usage-sensitive. For example, incumbent LECs have noted in the TELRIC reform proceeding that switch purchases are “sized” based on future demand and therefore are usage-sensitive.<sup>14</sup> Second, and more importantly, switches, no matter what their capacity, continue to be a shared component of the network, and therefore their costs should continue to be recovered on a usage-sensitive basis.

In fact, there is ample evidence that the usage-sensitive costs of origination, transport and termination of traffic are actually *increasing*. For example, the Commission has in the past treated loop costs as non-usage sensitive because loop facilities were dedicated to a particular customer.<sup>15</sup> However, as SBC (the only remaining BOC member of the ICF) notes, ILEC

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<sup>13</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151, ¶ 84, n.157 (2001) (“ISP Remand Order”)

<sup>14</sup> See, e.g., SBC Reply Comments, CC Dkt. No. 03-173, at 77 (filed Jan. 30, 2004) (“The CLECs claim that switching costs are almost exclusively non-traffic sensitive . . . That is false . . . . [T]he amount of capacity the incumbent purchases at the outset is of course dependent on its best estimate of future usage, and all usage the incumbent then serves contributes to the potential exhaust of the switch’s capacity. It is thus entirely sensible, as regulators have concluded for decades, to expect users of the switch to bear some substantial percentage of these total costs in direct proportion to their usage.”); Verizon Comments at 54, n.92 (filed Dec. 16, 2003) (“[S]witch processor and memory costs vary with usage. Switch processing resources are engineered and sized prior to deployment based on the amount of expected future use. When an incumbent purchases a switch processor, the size of the switch processor depends on how much traffic the incumbent expects the switch to carry.”).

<sup>15</sup> Local Competition Order ¶ 1057 (“The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. We conclude that such non-traffic sensitive costs should not be considered ‘additional costs’ when a LEC terminates a call that originated on the network of a competing carrier.”).

deployment of fiber feeder loop plant is causing loop facilities to be shared by multiple end user customers (and carriers). Thus, the more traffic there is, the more feeder plant is necessary.<sup>16</sup>

The use of shared feeder loops is likely to grow as fiber is deployed closer to the customer premises. For example, in an FTTC architecture, each individual home has its own dedicated copper loop running from the customer premises to a remote terminal while the shared fiber feeder runs from the remote terminal back to the central office.<sup>17</sup> Most FTTP networks are deployed using a dedicated fiber running from the customer premises to splitters in the field which in turn are connected to shared feeder plant that runs to the central office.<sup>18</sup>

In addition, a very large portion of the costs CMRS carriers (which carry more and more traffic) incur to transport and terminate traffic are usage-sensitive. As Sprint has demonstrated, wireless carriers have a high proportion of usage-sensitive costs because neither their loop facilities (spectrum) nor much of their other network infrastructure is dedicated to one customer; rather it is largely shared among multiple subscribers.<sup>19</sup> In addition, in the long run, spectrum

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<sup>16</sup> Application for Review of SBC Communications, CC Dkt. Nos. 95-185, *et al.*, at 4 (filed June 8, 2001).

<sup>17</sup> See Nosa Omuogi *et al.*, *Comparing Integrated Broadband Architectures From an Economic and Public Policy Perspective*, in TELECOMMUNICATIONS AND INTERNET POLICY (Brock, G., ed. 1996), available at <http://www.ini.cmu.edu/~sirbu/pubs/FITL/tpc6.html> (noting the similarities between DLC and FTTC architectures).

<sup>18</sup> See [http://www.iec.org/online/tutorials/fiber\\_home/topic04.html](http://www.iec.org/online/tutorials/fiber_home/topic04.html) (“The splitter is typically placed approximately 30,000 feet from the central office (CO). The split ratio may range from 2 to 32 users and is done without using any active components in the network. The signal is then delivered another 3,000 feet to the home over a single fiber.”).

<sup>19</sup> See *CRA Paper* at 4 (“Spectrum and capacity in a BTS, a BSC, backhaul links, and MTX(s) are dedicated to a call for its duration. When the call is terminated, those resources are released and can be used to support another call.”); *id.* at 10-11 (“To apply the Commission’s rate standard in a wireless network, we inquire whether each component of a PCS network is shared by several users or whether it is dedicated to a single user. Next, we consider whether

and additional cell sites must be considered to be usage-sensitive substitutes for one another because, as traffic congestion increases, carriers must either acquire more spectrum, split cells or do a combination of both (*CRA Paper* at 13).<sup>20</sup>

In light of these realities, it is clear that the transport and termination functions performed by wireline and wireless networks include substantial usage-sensitive costs that are only increasing as wireless substitution increases and DLC and fiber-loop architectures become the norm. Even the ICF seems to agree that tandem switching should continue to be paid for on an MOU basis.<sup>21</sup> In sum, the logic of the *Local Competition Order* still applies. Since there remain substantial usage-sensitive costs, it is appropriate and economically efficient for carriers to recover those charges through per minute rates. *See Local Competition Order* ¶¶ 743-745.

Furthermore, it makes sense to apply a single cost methodology, to the extent the applicable law permits, to the origination and termination of all traffic. This is because carriers

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each component's costs are traffic-sensitive. Our analysis find that handsets are resources dedicated to individual users and their costs are not traffic-sensitive, while all of the other components are shared among users of the wireless network and the costs of those elements are traffic-sensitive.”).

<sup>20</sup> *See id.* at 15 (“In the long run, when all inputs are variable, wireless providers will use a combination of more spectrum (if suitable spectrum is available) and cell splitting to meet increased demand. In this long-run context, all costs associated with cell sites are appropriately treated as traffic-sensitive costs to be included in computing the additional costs of terminating interconnected calls.”).

<sup>21</sup> *See* Intercarrier Compensation and Universal Service Reform Plan, CC Dkt. No. 01-92, at 25 (filed Oct. 5, 2004) (“*ICF Plan*”) (“During the first two years of the Plan, rates for Tandem Transit Service shall be no higher than the rates for such service on June 30, 2005, or the day before the first day of the Plan. During the three-year period beginning at the start of Step 3 of the rate transition, rates for this service shall be computed to produce no more than the *Average Revenue Per Minute Limit* calculated using the methodology in Section III.C.3.a, below.”) (emphasis added).

perform the same functions and incur the same costs when originating and terminating traffic.<sup>22</sup>

Indeed, the Commission has only set one rate for UNE switching regardless of the nature of the traffic that passes through that switch. The Commission also noted that there is no distinction between the cost of terminating reciprocal compensation or ISP-bound traffic.<sup>23</sup> In other words, switching is switching and like services should be subject to the same rates.

**B. Local Exchange Carriers Should Continue To Apply Traffic Origination Charges Where Another Carrier Has A Customer Relationship With An End User**

There continues to be a sound basis in public policy for originating access charges. Most importantly, the origination function causes local carriers to incur the same usage-sensitive costs as termination. Long haul providers that use this functionality benefit from the origination service provided and in a very real sense “cause” the local exchange carrier to incur the costs of origination. Local exchange carriers cannot continue to provide this service and incur the costs of providing it without just compensation. Accordingly, where two carriers provide service to a customer over the same facilities (e.g., the customer purchases local and long distance service

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<sup>22</sup> See Ex Parte Brief of the Intercarrier Compensation Forum in Support of the Intercarrier Compensation and Universal Service Reform Plan, CC Dkt. No. 01-92, at 10 (filed Oct. 4, 2005) (“*ICF Brief*”) (“[T]he compensation a carrier receives for termination -- routing a call through the end office switch (or functional equivalent) en route to the called party -- may differ radically depending on whether the call crosses state boundaries . . . . Yet in each of these cases, the terminating carrier performs the same transport and termination functions.”).

<sup>23</sup> See *ISP Remand Order* ¶ 92 (“Nor does the record demonstrate that CLECs and ILECs incur different costs in delivering traffic that would justify disparate treatment of ISP-bound traffic and local voice traffic under section 251(b)(5).”).

from different carriers), the two carriers should share the cost of the facilities in the form of originating access.

It is also significant that local exchange carriers, including CLECs, continue to be bound by the equal access requirements to provide originating access service to unaffiliated long distance carriers to which their local customers presubscribe.<sup>24</sup> It is unreasonable to impose this duty upon local exchange carriers and then prohibit them from recovering the costs incurred in providing such service.

**C. The FCC Likely Has The Authority At Least To Establish TELRIC As The Methodology For Setting All Terminating Rates**

TELRIC, unlike bill and keep, can likely withstand legal scrutiny as applied to all types of traffic, at least on the terminating end. In *AT&T v. Iowa Utilities Board*, the Supreme Court held that the Commission has the authority under Section 201(b) to adopt regulations implementing the terms of Act.<sup>25</sup> Where a particular statutory provision addresses intrastate as well as interstate communications, the Commission's authority to adopt implementing regulations extends to both the subject intrastate and interstate communications. As the ICF explains, this holding can be logically interpreted to mean that the Commission has the authority to adopt regulations implementing Section 251(b)(5) (which applies to all "telecommunications")

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<sup>24</sup> See, e.g., 46 C.F.R. § 64.604(b)(3).

<sup>25</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377 (1999) ("*Iowa Utilities Board*").

to the “transport and termination” of both intrastate and interstate traffic. As the Supreme Court held, this does not mean that the FCC may set specific rates. As explained in greater detail below, that is the responsibility of the states. *Id.* at 385 n. 10. But it does likely mean that the Commission has the authority to require that states set terminating rates for all intrastate traffic (including intrastate terminating access) based on TELRIC. It is also well within the Commission’s authority to use the TELRIC-based rate adopted by a state as the interstate terminating access rate.

As noted above, it would also be desirable to apply the Target Rate to originating access charges. Unfortunately, there is a significantly greater legal risk associated with attempting to establish a unified traffic origination rate than is the case with attempting to establish a unified termination rate. Since Section 251(b)(5) only addresses “the transport and termination of telecommunications,” there is a significant risk that the Commission’s power to preempt under Section 201(b) will not extend to intrastate originating access. In light of this uncertainty, it makes sense for the FCC to focus its attention on ensuring uniform terminating rates and to seek a collaborative dialogue with the states through a Joint Board to transition intrastate originating access (and interstate originating access) to the Target Rate.

In any event, the Commission can rely to a significant degree on market pressures to reduce originating access charges. This is a likely outcome, because long distance calling is increasingly moving towards arrangements in which the local and long distance connections are provided by the same carrier (e.g., in wireline circuit-switched LEC/IXC, CMRS, and VoIP arrangements). Moreover, the largest providers of stand-alone long distance service, in other



words the largest payers of originating access charges, will likely dramatically reduce the volume of originating access they purchase in the near future. AT&T and MCI have announced that they are exiting the mass market long distance market as stand-alone providers of long distance service.<sup>26</sup> Moreover, if acquired by SBC and Verizon respectively, AT&T and MCI likely accelerate their exit from the market as providers of stand-alone long distance service. Thus, even if originating access charges were not subject to unified cost-based Target Rates, there are unlikely to be significant harmful consequences in terms of consumer welfare.

**III. The Commission Probably May Not And, In All Events, Should Not Impose A Unified Intercarrier Compensation Rate Of Zero On The Origination And Termination Of Telecommunications Traffic**

Although the FCC staff and members of the industry have dedicated enormous resources trying to justify the adoption of bill and keep as legal and policy matter, that effort has been unsuccessful. It is far from clear that a single price of zero for the exchange of traffic is either lawful or sound public policy.

**A. There Are Substantial Legal Risks Associated With Mandating Bill And Keep For All Traffic**

Bill and keep is beset by legal problems that likely preclude its implementation for most, if not all, classes of traffic. Most fundamentally, there are substantial risks associated with

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<sup>26</sup> See AT&T Corp. and SBC Communications Inc., Application under the Cable Landing License Act, Description of the Transaction, WC Dkt. No. 05-65, Public Interest Showing and Related Demonstrations, at 7 (filed Feb. 21, 2005); Verizon Communications Inc. and MCI Inc., Application for Transfer of Control, WC Dkt. No. 05-75. Exh. 1 at 47 (filed Mar. 11, 2005).

mandating bill and keep for traffic subject to Section 251(b)(5) when that traffic is out-of-balance or where carriers incur significantly different termination costs.

Since, as demonstrated above, there continues to be an “additional cost” for terminating traffic subject to Section 251(b)(5), bill and keep is impermissible in the absence of payments between carriers to account for those costs.<sup>27</sup> Indeed, the Commission has made clear that bill and keep arrangements do not provide for a mutual and reciprocal recovery of costs and are therefore not permitted when traffic is out-of-balance. In such a scenario, the in-kind payments between carriers are not equivalent, and therefore one of the carriers is not fully compensated for the additional costs that the other carrier has placed upon its network.<sup>28</sup> Accordingly, the FCC determined that bill and keep arrangements can only be required “if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so.” *Local Competition Order* ¶ 1111. A similar conclusion may even be justified where there is a balance of traffic between carriers that incur different costs of terminating traffic.

The ICF acknowledges the need for a “mutual recovery of costs” for traffic exchanged pursuant to 251(b)(5). *See ICF Brief* at 39. Yet, the ICF blithely asserts that these costs can be

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<sup>27</sup> As stated above, Section 252(d)(2)(B)(i) does allow carriers to mutually agree to bill and keep arrangements.

<sup>28</sup> *See Local Competition Order* ¶ 1112 (“In general, we find that carriers incur costs that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating access is positive, bill-and-keep arrangements are not economically efficient because they distort carriers’ incentives, encouraging them to overuse carriers’ termination facilities by seeking customers that primarily originate traffic.”).

recovered through “end user charges, and, where necessary, universal service.” *Id.* This is most likely a mistaken reading of the Act. Section 252(d)(2)(A) states that an interconnection agreement between LECs cannot be considered just and reasonable unless the agreement “provide[s] for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.” 47 U.S.C. § 252(d)(2)(A)(i). If a carrier is recovering these costs from its end users or universal service, the carrier’s recovery is not “reciprocal” or “mutual.”

Any reasonable understanding of these terms precludes the ICF’s reading of the statute. Merriam-Webster defines “mutual” as “done, felt, etc. by each of two or more or toward the other or others; reciprocal.” WEBSTER’S NEW WORLD DICTIONARY 896 (3d ed. 1988). Similarly, reciprocal means “present or existing on both sides; each to the other; mutual.” *Id.* at 1120. These synonymous terms clearly mean that one carrier must compensate the other for the costs imposed on its network and *vice versa*, not that one carrier may be compensated for its costs from a third party. Simply because costs are in fact recovered though bill and keep does not mean that this recovery is mutual or reciprocal. The Commission has said as much in its previous Intercarrier Compensation NPRM.<sup>29</sup> Finally, the ICF’s reference (*see ICF Brief* at 40)

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<sup>29</sup> *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, ¶ 75 (2001) (“We note that the statute explicitly identifies bill and keep as one arrangement that affords ‘the mutual recovery of costs through the offsetting of reciprocal obligations’: *one party terminates the other’s calls and vice-versa, thus providing for ‘in-kind’ reciprocal compensation.*”) (emphasis added).

to *dicta* by the D.C. Circuit that the Commission *might* have the authority to impose bill and keep on Section 251(b)(5) traffic should carry no weight.<sup>30</sup>

It is also fairly certain that this same bar against establishing bill and keep for out-of-balance reciprocal compensation traffic would apply equally to ISP-bound traffic. The FCC has now attempted twice to place ISP traffic outside of the ambit of Section 251(b)(5) and has twice been rebuffed by the courts as exceeding its authority.<sup>31</sup> It is therefore likely that the Commission will eventually be forced to establish compensation for ISP-bound traffic under Section 251(b)(5). If Section 251(b)(5) applies to ISP-bound traffic, so too does the ban on bill and keep for out-of-balance traffic.

Nor is it likely that the Commission has the authority to forbear from this statutory bar on bill and keep for out-of-balance Section 251(b)(5) traffic. Section 10(d) of the Communications Act prohibits the Commission from exercising its forbearance authority with respect to Section 251(c) until it is fully implemented. *See* 47 U.S.C. § 160(d). The question for purposes of reciprocal compensation is whether Section 251(c) incorporates Section 251(b) obligations to the extent that those obligations apply to ILECs. The answer is clearly yes. Section 251(c) begins by stating that, “[i]n addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties . . . .” 47 U.S.C. § 251(c). The canons of statutory

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<sup>30</sup> *See WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (“*WorldCom*”).

<sup>31</sup> *See Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); *WorldCom*.

construction require that this language be given independent meaning and not be construed as mere surplusage.<sup>32</sup> The most natural reading of the introductory phrase, “[i]n addition to the duties contained in subsection (b),” is that Congress intended that all Section 251(b) obligations, including reciprocal compensation, be incorporated into Section 251(c) (and therefore made subject to the exclusion from the Commission’s forbearance authority) to the extent the Section 251(b) obligations apply to ILECs. Indeed, it would seem that number portability, reciprocal compensation, and other similar requirements in Section 251(b) are just as worthy of the prohibition against forbearance when applied to ILECs as Section 251(c) requirements. This is precisely the conclusion reached by the Common Carrier Bureau in a letter ruling.<sup>33</sup>

It is highly likely therefore that the prohibition on forbearance from the requirements of Section 251(c) includes a similar prohibition on forbearance on Section 251(b)(5) (and by extension Section 252(d)(2)) until the Commission has determined that Section 251(c) is “fully implemented.” But the Commission has made no such determination, and it is not even clear upon what basis it would make such a determination.

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<sup>32</sup> See *Regions Hosp. v. Shalala*, 522 U.S. 448, 467 (1998) (“We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon’s Abridgement, sect. 2, it was said that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.’ This rule has been repeated innumerable times.”) (quoting *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879)); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute, we are obliged to give effect, if possible, to every word Congress used.”).

<sup>33</sup> See Letter from Carol E. Matthey, Deputy Chief of the Common Carrier Bureau, to Michael L. Shor, Bell Atlantic/GTE Merger Order, 16 FCC Rcd 22 (2000).

It is also entirely possible that a court would conclude that the Commission does not under any circumstances have the authority to forbear from applying the requirements of Section 252(d)(2) that are designed to ensure that carriers receive adequate compensation for the exchange of traffic. Unlike the provisions of Section 251 and elsewhere in the Act that define the *duties* of some or all carriers, which are provisions for which forbearance may be exercised, the provisions of Section 252(d)(2) at issue here are designed to *protect* carriers from unreasonable interconnection arrangements. In other words, the terms of Section 252(d)(2) are designed to place limits on the FCC's and states' authority to establish interconnection duties without just compensation. A federal agency only has such power as is granted by Congress. It cannot be that an agency has the authority to affirmatively expand its authority by exercising its forbearance power. Yet this would be precisely the result if the Commission were to forbear from enforcing Section 252(d)(2).

Even if the Commission had the right to *consider* whether it is appropriate to forbear from the requirements of Section 252(d)(2), there is no evidence that the statutory standard for forbearance could be met. While this is not the place for a full treatment of this subject, it should be clear, given the numerous policy and legal problems associated with bill and keep, that its adoption is not in the public interest, as is required under the forbearance standard.

Even if bill and keep were somehow permitted for out-of-balance Section 251(b)(5) traffic, it is unlikely that the FCC has the authority to set intrastate access or reciprocal compensation rates (specifically, set the rates at zero). In arguing otherwise, the ICF substantially misstates the precedent set by *Iowa Utilities Board*. As was noted *supra*, the

holding of *Iowa Utilities Board* permits the FCC to direct states to employ TELRIC to set intrastate rates since the FCC may prescribe intrastate access rate *methodologies*. The ICF agrees, noting that, “[u]nder *Iowa Utilities Board*, the Commission has plenary jurisdiction to make very specific methodological decisions about the implementation of section 251.” *ICF Brief* at 41. However, it is simply incorrect to assert, as the ICF does, that “the choice of bill and keep is precisely such a decision, even though it has the effect of producing *specific outcome* . . . .” *Id.* (emphasis added). As the FCC has repeatedly found, moving to bill and keep is equivalent to setting the rate for intercarrier payments at zero.<sup>34</sup> A rate of zero, or any rate set by the FCC is a “specific outcome” or, in the words of the court in *Iowa Utilities Board*, a “concrete result” (see *Iowa Utilities Board*, 525 U.S. at 384) that the FCC is not permitted to mandate under the Act.<sup>35</sup> As the D.C. Circuit notes, the 1996 Act establishes “a scheme in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a

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<sup>34</sup> See, e.g., *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, ¶ 3 (1996) (“We further tentatively conclude that, at least for an interim period, interconnection rates for local switching facilities and connections to end users should be priced on a ‘bill and keep’ basis (i.e., both the LEC and the CMRS provider charge a rate of zero for the termination of traffic) . . . .”).

<sup>35</sup> The Commission recently noted the limits of federal rate setting power for network elements in its DSL Tying Order: (“[T]he Act, for example, expressly assigns to the states the authority to arbitrate interconnection disputes among carriers, and, subject to the general framework set forth by the Commission, to establish appropriate rates for competitive carrier’s use of unbundled network elements. See generally 47 U.S.C. § 252.”). See *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830, n.69 (2005). The Commission’s authority to set reciprocal compensation rates is similarly limited.

few specified areas (*ratemaking*, interconnection agreements, etc) has left the policy implications of that extension to be determined by state commissions, [and those decisions] *are beyond federal control.*” *Id.* at 385 n.10 (emphasis added). Rather, the FCC may only “issue[] rules to guide the state commission judgments.” *Id.* at 385. The FCC is permitted to command the states to use TELRIC, but it is the states that have the ultimate ratemaking authority to achieve “concrete result[s].”<sup>36</sup>

The logic of *Iowa Utilities Board* would apply with equal, if not greater, force to prevent the Commission from setting specific rates for originating intrastate access. As discussed, the Commission’s authority under 251(b)(5) only covers the “transport and termination of telecommunications.” Therefore, absent the voluntary agreement by 50 state commissions to abandon calling party pays in favor of bill and keep (and a rate of zero) for their intrastate access and reciprocal compensation traffic (a highly unlikely outcome), this traffic will remain under a calling party pays system.

Moreover, the ICF argument that it is able to eliminate intrastate access charges because such charges are “at odds with federal universal service” principles, again overstates the extent of the Commission’s preemptive power. If the Commission has no express delegated authority in the Act to preempt the state rule in question (as it arguably has with regard to intrastate

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<sup>36</sup> See *Iowa Utilities Board*, 525 U.S. at 384 (“It is the States that will apply those [TELRIC] standards and implement that methodology, determining the *concrete result* in particular circumstances. That is enough to constitute the establishment of rates.”) (emphasis added).



terminating access), it may not do so for the purpose of simply furthering a federal goal. For example, in *Louisiana PSC*, the Supreme Court held that Section 152(b)'s limitation of the FCC's jurisdiction over rates "denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes," even if such denial undermines a unified federal scheme for depreciation. 476 U.S. at 373. Because of this limitation, the FCC may not preempt state rates, even if preemption would further some federal goal.<sup>37</sup>

In the absence of an express of jurisdiction in the federal statute, the FCC can only preempt state common carrier regulation where it is impossible to separate the interstate and intrastate components<sup>38</sup> of the regulated subject matter and the state regulation would "negate" the federal regulatory goal.<sup>39</sup> To this end, the ICF alleges that, because state universal service funding must be explicit and since it is impossible to determine to what extent access charges contain implicit subsidies, it is necessary to preempt the intrastate rates and move to bill and keep. In other words, the ICF argues that above-cost intrastate rates "negate" the federal policy

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<sup>37</sup> *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1996) ("Section 152(b) constitutes, as we have explained above, a congressional denial of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. Thus we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.").

<sup>38</sup> *Id.* at 375 n.4.

<sup>39</sup> For example, the courts have held that the FCC acted within its authority to permit subscribers to use their own telephones and preempted state regulation preventing subscribers from providing their own phones that would be used exclusively for intrastate service since state regulation would negate the federal tariff. *See North Carolina Utils. Comm'n v. FCC*, 537 F.2d 78 (4<sup>th</sup> Cir. 1976).

of tolerating no implicit universal service subsidies. The problem with this argument is that Section 254 states that federal universal service subsidies should be explicit, but it does not say that state universal service subsidies should be explicit.<sup>40</sup> Thus, as the Fifth Circuit recently determined, it is simply not true that retention of intrastate implicit subsidies somehow negates an inseverable federal policy: “Qwest and SBC deduce a statutory mandate requiring the states to transition from implicit to explicit support mechanisms. We reject this argument. In drafting the statute, Congress unambiguously imposed an explicit subsidy requirement on federal support mechanisms; no such requirement is expressly imposed upon the states.”<sup>41</sup> Therefore, the Act precludes the very goal which the ICF claims as the basis for preemption.

The ICF also alleges that the implicit subsidies in intrastate access charges violate the Act’s admonition that rates be “sufficient,” “predictable,” and “equitable and non-discriminatory” and therefore the FCC can preempt intrastate rates. Again, the Fifth Circuit explicitly rejected these arguments, holding that the states have substantial discretion over how to establish universal service subsidies.<sup>42</sup>

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<sup>40</sup> Compare 47 U.S.C. § 254(e) (stating that “Federal universal service support . . . should be explicit and sufficient”), with *id.* § 254(f) (stating that states “may” adopt universal service “mechanisms” and that, if a state does establish such mechanisms, they must be “specific, predictable, and sufficient” (not explicit)).

<sup>41</sup> *Qwest Communications Int’l, Inc. v. FCC*, 398 F.3d 1222, 1232 (10<sup>th</sup> Cir. 2005).

<sup>42</sup> See *id.* at 1233 (“We do not find, as urged by the Petitioners, that Congress’s requirement that state and federal funding be ‘specific, predictable and sufficient,’ 47 U.S.C. § 254(b)(5), provides a backdoor to federal manipulation of state support mechanisms. The Petitioners’ argument that implicit subsidies are inherently non-specific, unpredictable, and insufficient is unavailing . . . . We agree with the FCC that the plain text of the statute merely imposes an obligation on the carriers to contribute to universal service funds; it does not impose a requirement of parity with respect to the internal functioning and the distribution of funds between and among carriers . . . .”)

Finally, the ICF claims that Section 251(g) permits the FCC to regulate “all telecommunications under Section 251(b)(5), including access traffic.” *ICF Brief* at 32.

However, 251(g) is not an independent grant of authority. As the Supreme Court flatly stated in *AT&T v. Iowa Utilities Board*, Section 251(g) “is not [a] grant[] of authority at all.” Similarly, in striking down the Commission’s attempt to rely on Section 251(g) as an affirmative source of authority to regulate ISP-bound traffic, the D.C. Circuit explained that “[251(g)] is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act.” *WorldCom*, 288 F.3d at 430. It is worth noting that, even in adopting its aggressive (and unlawful) interpretation of Section 251(g) as a grant of jurisdiction over ISP-bound traffic, the Commission did not attempt to rely on Section 251(g) as a basis for expanding Commission’s authority over intrastate communications.<sup>43</sup>

All of this demonstrates that, if the Commission were to implement a comprehensive bill and keep regime for all traffic, there is a substantial risk that the courts would reverse and remand with respect to intrastate access, reciprocal compensation and ISP-bound traffic. Only interstate access would (possibly) remain subject to bill and keep while other traffic would continue to be billed on a CPNP basis. This dual system would invite substantial arbitrage

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Congress intended that the states to retain significant oversight and authority and did not dictate an arbitrary time line for transition from one system of support to another.”).

<sup>43</sup> See *ISP Remand Order* ¶ 52 (“Thus, ISP traffic is properly classified as interstate, and it falls under the Commission’s section 201 jurisdiction.”).

activities. Bill and keep therefore presents unacceptable legal risks and should not be implemented.

**B. Bill And Keep Is Probably Not More Efficient Than Cost-Based Unified Rates And Will Create Its Own Market Distortions**

Proponents of bill and keep offer several arguments in support of their position that a price of zero for the exchange of traffic is more efficient. None of these arguments is persuasive.

*First*, bill and keep proponents have argued that a price of zero is appropriate since both parties benefit equally from a call and place costs on the network.<sup>44</sup> Many commenters in the previous Inter-carrier NPRM spilled much ink debating the veracity of this premise. It is undoubtedly true that, in some cases, call recipients benefit from a call and can be understood to “cause” the cost of the call. But the proponents of bill and keep are simply mistaken that this fact justifies the adoption of bill and keep.

Indeed, as economists Hermalin and Katz have shown,<sup>45</sup> zero is often not the efficient price for the exchange of traffic between networks even where the called and calling party benefit from a call. For example, Hermalin and Katz show that, when the benefits between

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<sup>44</sup> See Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime*, at 17-19 (Dec. 2000) (“COBAK”); *FNPRM*, Appendix C, *A Bill and Keep Approach to Inter-carrier Compensation Reform*, at 99-103 (“Staff Paper”).

<sup>45</sup> See Benjamin E. Hermalin & Michael L. Katz, Walter A. Haas School of Business, University of California, Berkeley, *Network Interconnection with Two-Sided User Benefits* (July 2001).

calling and calling parties are shared, carriers do not compete with one another<sup>46</sup> and the carriers have different termination costs,<sup>47</sup> an affirmative exchange rate is efficient. Even in circumstances where carriers do compete, Hermalin and Katz demonstrate that there are certain situations where bill and keep is not appropriate.

*Second*, advocates of bill and keep argue that recovering switching and transport costs directly from end users is good policy because it eliminates the so-called terminating access monopoly problem. *See COBAK* at 25. The terminating access monopoly refers to a local exchange carrier's "monopoly" over the delivery to its customers of calls that originate on other carriers' networks. The concern is that this monopoly problem exists even for small CLECs and would seem therefore to be a problem that will not disappear even when a market is fully competitive. It is asserted that retaining intercarrier payments perpetuates the terminating monopoly and therefore the need for regulation even after the market is competitive and regulation of end user rates is no longer necessary. *See id.* at 28.

This argument has a certain facile appeal, but it does not hold up under close scrutiny. In fact, it is not the case that intercarrier payments combined with terminating "monopolies" require the regulation of intercarrier payments among multiple interconnected networks in perpetuity. For example, an internet backbone provider has a "monopoly" over access to customers (e.g.,

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<sup>46</sup> Meaning that they are not competing for the same end-user customer. For example, BellSouth generally does not compete for end users in SBC's territory and *vice-versa*.

<sup>47</sup> In contrast, DeGraba's COBAK model assumes that carriers would have the same costs. *See COBAK* at 17.

servers) served by the backbone network, and (except where peering applies) internet backbones pay each other for the exchange of traffic. Yet there is currently no apparent need to regulate intercarrier payments among internet backbone providers. Thus, it is not the existence of a terminating monopoly or intercarrier payments *per se* that perpetuates the terminating monopoly problem. On the contrary, it appears that the development of competition can eliminate the need not just for regulation of end user charges, but also for terminating access rates.<sup>48</sup>

It is clear therefore that undertaking the complex and uncertain task of adopting bill and keep is not the only means of reducing or eliminating the terminating monopoly problem. Rather than assume that bill and keep is the best way to address this problem, the Commission must weigh the costs and benefits of other means of addressing this problem. For example, one of the main reasons why CLECs were able, absent rate regulation, to charge unreasonable terminating access charges was that the geographic averaging requirements of Section 251(g) prevented long distance carriers from passing through to their customers the high terminating charges imposed by called parties' LECs. Absent the constraints of Section 254(g), long distance carriers might have passed through high terminating costs to calling parties (as they do the high termination rates charged by some foreign carriers). Calling parties would in turn have complained to the called parties or simply refused to call them. The result may well have been greater discipline on

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<sup>48</sup> This does not mean that it would be appropriate to import the characteristics of internet backbone traffic exchange into the local market. The point is simply that the existence of intercarrier rates does not necessarily perpetuate the need for regulation of traffic termination charges.

CLEC terminating access rates. As this example illustrates, there are likely numerous ways for the Commission to eliminate regulatory impediments (e.g., by forbearing from applying Section 254(g)) to the erosion of the terminating monopolies. Bill and keep is not the only way, and probably not the least costly way, of achieving this goal.

*Third*, proponents of bill and keep argue that eliminating intercarrier payments is sound policy because it eliminates costly disputes over what the “correct” intercarrier rate is. See *Staff Paper* at 107. But as has been observed in the past, this is essentially an argument for trading one type of regulation for another.<sup>49</sup> Recovering switching and transport costs from end users requires the regulation of end user rates charged by the incumbents and likely also an increase in the size of the universal service fund. It is hard to see why it is any easier to solve these regulatory problems than to set a reasonable, cost-based intercarrier compensation rate. This is especially true since TELRIC-based intercarrier compensation rates have already been established. Moreover, since, as explained, competition can in fact eliminate the need for regulation of intercarrier payments under the correct circumstances, it is not clear that regulation will become unnecessary for end user charges sooner than for intercarrier charges.

All of this demonstrates that the arguments offered in support of bill and keep are weak even on their own terms. But it is also important to consider the true possible benefits to consumer welfare of the most efficient intercarrier compensation regime possible. The truth is

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<sup>49</sup> See e.g., AT&T Comments, CC Dkt. No. 01-92 at ii (filed Aug. 11, 2001).

that intercarrier payments constitute a smaller and smaller portion of carriers' overall costs. The adoption of TELRIC-based rates for all intercarrier charges (or at least all termination charges) would reduce this level even further. Additional changes to the intercarrier compensation rules, even if they made the system more efficient (and of course that is far from certain), would probably not result in significant increases in consumer welfare.

For example, proponents of bill and keep have claimed that per minute intercarrier compensation rates retard the development of purportedly more efficient flat monthly end user charges. *See COBAK* at 28. But the CMRS industry developed these pricing plans while paying per minute reciprocal compensation and terminating access charges. Further significant reductions in per minute charges will make it even easier for carriers to transition to such pricing plans.

Like most administrative policy decisions, the question of how to proceed with intercarrier compensation reform requires a cost benefit analysis. As demonstrated herein, the costs of bill and keep are very substantial. It would require that the Commission rely on dubious legal arguments that would tie up reform in lengthy, costly and probably unsuccessful litigation. Bill and keep would also require that the Commission establish a new set of regulations addressing the complex and contentious questions of end user recovery and probably result in very large increases in universal service obligations. The adoption of cost-based unified intercarrier compensation rates would be far less costly. It would not implicate most of the legal risks associated with bill and keep, and it would not introduce any new legal risks. It would require increases in end user rates, but those increases would be much more modest and the



transition less difficult than would be the case with bill and keep. Cost-based rates might also require an expansion in the universal service fund, but such expansion would be modest, again making the change must less difficult to administer than would be the case with bill and keep.

On the other hand, the benefits of bill and keep are no greater than cost-based unified rates. Both cost-based, unified rates and bill and keep eliminate the arbitrage problem caused by the application of different rates to different types of traffic. Cost-based unified rates yield intercarrier pricing that is at least as efficient as bill and keep. Bill and keep would eliminate the terminating monopoly, but this could be accomplished under a cost-based unified rate regime. Finally, bill and keep would allow for the elimination of regulation upon the development of competition, but this too is achievable using less costly means while retaining cost-based pricing. It is clear therefore that the cost-benefit analysis weighs heavily against the adoption of bill and keep and in favor of cost-based unified rates.

**IV. The Commission Should Prohibit ILECs From Recovering Intercarrier Compensation Revenue Currently Associated With Multi-Line Business Customers In A Manner That Results In Unreasonable End User Charges And That Harms Competition**

A critical aspect of any intercarrier compensation reform plan is the manner in which the plan addresses the recovery of revenues removed from the intercarrier compensation regime. The most efficient means of addressing this issue is to offer carriers the opportunity to recover the costs directly from end users to the extent possible (thereby limiting increases in universal

service funding).<sup>50</sup> It should do so by allowing incumbent LECs to recover foregone intercarrier compensation through increased interstate subscriber line charges. Specifically, the Commission should allow gradual increases in the caps applicable to subscriber line charges, with the eventual elimination of the cap on multi-line business subscriber line charges. In managing the transition to higher end user charges, the FCC must ensure that it places appropriate constraints on the manner in which ILECs can recover these costs. In the absence of regulation or competition, ILECs have the incentive and ability to charge unreasonably high rates to some customers and to engage in strategic pricing to exclude entrants seeking to serve other customers.

It is well-established that incumbent LECs have the incentive to misallocate the costs of competitive services to regulatory cost categories associated with services over which the ILECs have market power. Congress recognized this incentive by enacting Section 254(k), which prohibits a carrier from using “services that are not competitive to subsidize services that are subject to competition.” 47 U.S.C. § 254(k). The Commission has (incorrectly) applied Section 254(k) by focusing entirely on the cross-subsidy of unregulated services by regulated services. But the Commission has elsewhere recognized that the incumbents have powerful incentives to shift the costs of regulated services subject to competition to cost categories associated with

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<sup>50</sup> *Cf. Access Charge Reform, et al.*, Sixth Report and Order in CC Docket Nos 96-262 and 94-1, *et al.*, 15 FCC Rcd 12962 ¶ 12 (2000) (“*CALLS Order*”).

other regulated services that are not subject to competition.<sup>51</sup> The inelastic nature of the demand for telecommunications services makes this type of cost misallocation highly profitable for the regulated firm since increases in prices do not result in significant reductions in the quantity of service demanded.

The recovery of switching and transport costs directly from end users as part of intercarrier compensation reform poses precisely this threat. It potentially opens the door to allow ILECs to recover costs associated with business services subject to competition from mass market and business services over which the incumbents have market power.

For example, the ILECs hold a position of commanding market power in the provision of mass market telephone service. They face little competition from traditional wireline competitors or from recently emerging technologies. UNE-P-based providers are likely to provide very little competition in the mass market in the future since unbundled switching will soon become unavailable.<sup>52</sup> The proposed acquisition of AT&T by SBC and of MCI by Verizon will accelerate this trend. Nor can it be said that CMRS or VoIP offers substantial competition. The Commission has made clear that these services are, at most, complements to circuit switched

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<sup>51</sup> See *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539, ¶ 74 (1996).

<sup>52</sup> See *Unbundled Access to Network Elements et al.*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 219-221 (2005) (“TRRO”).

voice service.<sup>53</sup> Significant decreases in wireless prices have not induced large numbers of wireline consumers to “cut the cord,” indicating a clear lack of cross-elasticity that further demonstrates that wireless and wireline services are in different product markets. Furthermore, as the Commission stated, VoIP is primarily a complement to, not a substitute for, traditional wireline services.<sup>54</sup> All of this indicates that the ILECs have the incentive and ability to unilaterally increase prices on mass market telephone service customers, unless regulation prevents this outcome.

The ILECs also appear to retain the ability to raise the price of certain services offered to small and medium-sized business customers. They can do this primarily by raising their rivals’ costs.<sup>55</sup> For example, in the recent *Triennial Review Remand Order*, the Commission eliminated

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<sup>53</sup> The Commission has “previously found that consumers tend to use wireless and wireline services in a complementary manner and view the services as distinct because of differences in functionality.” *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 239 (2004) (“*Cingular-AWS Merger Order*”) (citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 ¶ 230 (2003) *vacated and remanded in part, affirmed in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004)). Accordingly, the Commission concluded that, “while there is some evidence of a small, but growing number of consumers that have chosen to cut the cord and use wireless services in lieu of wireline service, this trend is a relatively recent phenomenon.” *Cingular-AWS Merger Order* ¶ 242.

<sup>54</sup> *TRRO* n.118.

<sup>55</sup> The Commission has acknowledged that ILECs have powerful incentives to raise rivals’ costs. See *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 107 (1999) (“In addition, incumbent LECs, which are both competitors and suppliers to new entrants, have strong economic incentive, to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act. More specifically, an incumbent LEC has an incentive to: (1) delay interconnection negotiations and resolution of interconnection disputes; (2) limit both the methods and points of interconnection and the facilities and services to which entrants are provided access; (3) raise

unbundled DS1 loops in Tier One wire centers (those with 60,000 or more business access lines) and unbundled DS3 loops in Tier One and Tier Two wire centers (those with 38,000 or more business access lines). *TRRO* §§ 174-175, 178-179. Given the scarcity of competitive providers of wholesale loops and the inadequacy of current special access regulation, the incumbents have both the incentive and opportunity to increase their rivals' loop costs (and therefore increase the downstream retail price) in the provision of business services in Tier One and Two wire centers. The proposed acquisitions of AT&T by SBC and of MCI by Verizon will, if allowed to take effect, increase further the ILECs' stranglehold ability to raise rivals' costs. Furthermore, in areas outside of the dense urban areas, the incumbents generally face no competition for business customers at all. In those areas, the incumbents likely have the incentive and ability to simply unilaterally increase the price for business services.

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entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides. An incumbent LEC has similar, and probably greater, incentive to deny special accommodations required by competitive LECs seeking to offer innovative advanced services that the incumbent may not even offer. As noted at the outset, this view of the incumbent LECs' incentives and abilities is the fundamental postulate of the basic cornerstones of modern telecommunications law -- the MFJ and the 1996 Act."); *Application of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 14032, § 188 (2000) ("[G]iven their monopoly control over exchange access services, each Applicant currently has the ability to discriminate against rivals providing interexchange services, in favor of its own interexchange operations, by denying, degrading, or delaying access on the originating and terminating ends."); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 12 FCC Rcd 15756, § 111 (1997) ("[t]here are various ways in which a BOC could attempt to discriminate against unaffiliated interLATA carriers, such as through poorer quality interconnection arrangements or unnecessary delays in satisfying its competitors' requests to connect to the BOC's network.") (footnote omitted).

The combination of inelastic demand and market power affords ILECs the incentive and ability to raise prices selectively on captive ratepayers while keeping prices low on customers for whom they face competition. The result is unreasonably high prices charged to consumers purchasing the subsidizing services and harm to competition in the provision of the subsidized services. The Joint Commenters are, not surprisingly, especially concerned about the latter.

The Commission has, in the past, specifically expressed the concern that, given the opportunity, ILECs have the incentive to “engage in exclusionary pricing behavior and thereby thwart the development of competition.”<sup>56</sup> The Commission has also stated that the rules in Part 64 are insufficient to “protect against improper cost allocations from one regulated activity to another regulated activity,”<sup>57</sup> requiring the adoption of further regulatory constraints on ILEC pricing flexibility. For example, in granting the incumbents special access pricing flexibility, the Commission adopted several different constraints designed to limit the incumbents’ ability to use pricing flexibility to engage in exclusionary conduct.<sup>58</sup> While these restrictions have proven insufficient, they nevertheless reflect the appropriate policy concern at issue here. Similarly, in the CALLS order, the Commission sought to limit the consequences of pricing flexibility for

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<sup>56</sup> See *Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd 14221, ¶ 79 (1999) (“*Price Flex Order*”).

<sup>57</sup> *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report & Order, 11 FCC Rcd 17539, ¶ 74 (1996).

<sup>58</sup> See *Price Flex Order* ¶ 21 (discussing density zone pricing constraints); ¶ 134 (limiting the use of growth discount plans); ¶ 169 (noting that certain services removed from price caps will be removed from baskets to prevent pricing distortions).

competition by precluding ILECs from deaveraging their increased end user charges unless a state had geographically deaveraged UNE rates for loops. *CALLS Order ¶ 127.*

Regulations designed to limit the incumbents' ability to act on their incentive to misallocate costs are necessary in the instant case as well. Most fundamentally, the Commission must not allow incumbents to recover intercarrier compensation revenue currently associated with multiline business customers (for whom there are competitive alternatives) from mass market customers (for whom competitive alternatives have disappeared or will soon disappear).

But there is also no basis for granting the incumbents further pricing flexibility to recover end user charges among different multiline business customers. While the ICF has proposed that incumbent LECs would have significant pricing flexibility in charging newly increased end user rates, (*see ICF plan* at 63-68) it has offered no basis for concluding that this is reasonable or even what the consequences of such flexibility would be for consumers. Nor has the ICF demonstrated why the pricing flexibility that was requested by the CALLS participants and granted by the Commission is insufficient. This is likely because no valid basis exists for such flexibility. The incumbents' incentives to engage in exclusionary conduct by shifting costs among differently-situated business customers are even more of a threat today, in light of the reduction in the availability of unbundled loops and the looming threat of the Bell-IXC mergers, than they have been in the recent past. Indeed, if anything, the Commission should focus on whether the incumbents already possess too much pricing flexibility in light of current levels of competition. In any event, under no circumstances should the creation of increased caps for end

user charges as a result of intercarrier compensation reform result in increased pricing flexibility for incumbents.

**V. The Commission Should Ensure That Network Interconnection Rules Restrict The ILECs' Ability To Raise Rivals' Costs**

It is well-established that incumbent LECs have the incentive to deny competitors efficient interconnection for the exchange of traffic. The basic rule of network effects is that the more users that connect to a network, the greater the value the network has to those that use it. This essentially means that CLECs value interconnection much more than ILECs because ILEC networks serve many more customers than CLEC networks. Indeed, ILECs have powerful incentives to increase the price and decrease the quality of the interconnection they grant to CLECs.<sup>59</sup> The Commission must therefore ensure that the ILECs do not exploit intercarrier compensation reform as a means of raising CLECs' costs of interconnection.

As a threshold matter, there is no apparent reason for the Commission even to address network interconnection in this proceeding so long as carriers charge each other cost-based rates for the exchange of traffic. The existing interconnection rules function adequately in an environment in which carriers pay each other for the transport and termination functionalities performed. They should function even more effectively if intercarrier compensation rates are brought closer to cost. This proceeding is complex enough without the Commission assuming

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<sup>59</sup> See *Local Competition Order* ¶ 224 (noting that ILECs have the incentive to engage in degradation of quality “in a manner imperceptible to end users.”); *Applications of NYNEX Corporation, Transferor and Bell Atlantic Corporation, Transferee*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 6 (1997).



the added and unnecessary burden of rewriting a set of rules that are only now, nine years after passage of the 1996 Act, becoming relatively stable and predictable.

In all events, however, the Commission should not adopt the network interconnection changes proposed by the ICF (the only plan to proposed extensive changes in this regard). The ICF interconnection proposal suffers from three basic problems. *First*, the “edge” proposal in the ICF essentially requires CLECs (so-called “non-hierarchical networks”) to bear the financial responsibility for carrying traffic that originates with CLEC customers to a number of ILEC interconnection points in a LATA that is equal to the number of ILEC access tandems in the LATA. *See ICF Plan* at 4, 10. This rule would require CLECs to pay to transport traffic to interconnection points in the ILEC network without any consideration of whether it is efficient or sound engineering practice to do so. The result would be an artificial increase in CLEC costs. The edge proposal has of course been proposed as part of a bill and keep proposal. But it is worth noting that the current single point of interconnection in a LATA rule does not result in significant CLEC “free riding” on ILEC networks (the concern that apparently prompted the ICF proposal). Each of the Joint Commenters (either because of requirements in interconnection agreements or simply because it is sound engineering and business practice) regularly establishes dedicated interconnection points at tandem offices and even in some cases end offices when traffic volumes justify such arrangements. Such arrangements limit free riding on incumbent LEC networks. Any situations where free riding becomes a problem could surely be addressed as they arise and need not be addressed in this proceeding.

Not only is the edge proposal unsound public policy, it is also unlawful. Section 251(c)(2) imposes upon incumbent LECs the duty to interconnect with requesting carriers at any technically feasible point. By granting the ILEC (the “hierarchical network”) the right to designate the location and number of points of interconnection on its network, the ICF proposal is clearly inconsistent with the language of the statute. Section 251(c)(2) “permits the CLEC to choose the points in the network at which to interconnect” subject only the qualification of technical feasibility. *MCI Telecomms. Corp. v. Bell Atl. Pa.*, 271 F.3d 491, 517 (3d Cir. 2001). Moreover, the statute expressly grants CLECs the right to interconnect at a single interconnection “point.” *See US West Comms., Inc. v. Jennings*, 304 F.3d 950, 961 (9<sup>th</sup> Cir. 2002). The only way that the ICF proposal to allow ILECs to designate the *location and number* of interconnection points could be consistent with Section 251(c)(2) is if such an approach were “technically necessary,” which of course it is not. *See MCI Telecomms. Corp. v. Bell Atl. Pa.*, 271 F.3d at 517. (concluding that Verizon proposal that WorldCom interconnect in all access tandem serving areas within a LATA was inconsistent with Section 251(c)(2)).

*Second*, where a CLEC interconnects with an ILEC, the *ICF Plan* unreasonably requires that the CLEC bear the financial responsibility for carrying traffic in both directions between carriers, rather than requiring that each carrier bear the burden of carrying traffic originating on its network to the other carrier’s edge. As part of this rule, an ILEC never pays for any portion of the interconnection facility, even if a CLEC has constructed such facility. If the CLEC purchases the facility from the ILEC, it pays 50 percent of the above-cost interstate switched dedicated transport rate for up to 40 miles. *See ICF Plan* at 11.

This is yet another means for ILECs to artificially raise CLECs' interconnection costs without any regard to efficiency. Efficient interconnection would require that carriers split the cost of the least expensive facility for exchanging traffic. Yet the ICF proposal requires that CLECs absorb the entire cost of interconnection facilities they construct, thereby essentially precluding use of CLEC-constructed facilities even if they are the most efficient alternative. This leaves CLECs no choice but to purchase interconnection facilities from the ILECs. Just to add insult to injury, the CLEC must pay 50 percent of the above-cost dedicated access rate, rather than 50 percent of a true cost-based rate (such as one based on TELRIC). It is clear therefore that this aspect of the *ICF Plan* must also be rejected.

*Third*, there is a significant flaw in the tandem transit regime proposed by the ICF. The ICF plan would not even begin to regulate tandem transit rates until 2007 (*see ICF Plan* at 25), and even then, the rates would continue to be well above-cost. The retention of above-cost tandem transit rates gives CLECs the incentive to bypass the incumbent tandem with direct interconnection facilities to other carriers even where such arrangements are inefficient. By contrast, unifying tandem transit rates at the more reasonable TELRIC-based rate would yield efficient outcomes.

Currently, tandem transit rates vary substantially based on the extent to which the states have actively intervened to prevent the ILECs from abusing their market power over tandem

transit services. For example, Conversent pays tandem transit rates<sup>60</sup> that range from .095 cents per minute in Massachusetts to 2.3 cents per minute in Connecticut.<sup>61</sup> Where CLECs must pay high tandem transit rates, they often have no choice but to establish direct connections to other carriers where such interconnection is in fact inefficient. For example, because the tandem transit rates in Connecticut are so high, Conversent has bypassed SNET's tandems and trunked directly to several other carriers' networks even though such arrangements are inefficient (and would not be established if SNET charged a cost-based tandem transit rate). While this is an extremely costly and unwieldy network architecture, it still permits Conversent to save money over having to pay substantially above-cost tandem transit rates. To establish these arrangements, Conversent must expend resources paying for the additional trunks and negotiating interconnection agreements to cover what is often very small amounts of traffic. In fact, in many cases, other carriers will refuse to negotiate these agreements because of the high transaction costs and their inability to recover these costs at low traffic volumes. In those situations, Conversent is forced to pay the above-cost tandem transit rates. It is clear therefore

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<sup>60</sup> The rates described herein are blended because the actual rates are tiered for day-evening-night or peak-off-peak.

<sup>61</sup> This rate actually comprises both the tandem transit rate and the applicable intercarrier termination rate. This is because SNET collects the reciprocal compensation and intrastate terminating access charges and passes them along to the ultimate terminating carrier when it provides transit service. Because those rates vary, but SNET charges 2.3 cents for all tandem transit traffic, the effective transit rate in Connecticut varies arbitrarily by the type of traffic transited. Moreover, even if the reciprocal compensation and intrastate terminating access charges are subtracted out of the 2.3 cents per minute charge, SBC's tandem transit rate in Connecticut is the highest of all of states that Conversent serves. For example, intrastate terminating access rates (which are considerably higher than reciprocal compensation rates) are capped at 1.5 cents per minute in Connecticut, yielding an effective rate of .8 cents per minute for tandem transit service for such traffic. That rate is higher than any other tandem transit rate Conversent pays. The effective rate for reciprocal tandem transit is much higher.

that the Commission should, to the extent possible, begin the transition to cost-based transit prices immediately.

**VI. It May Be Appropriate To Apply Different Intercarrier Compensation Rates To Rural ILECs**

Several of the intercarrier compensation reform proposals treat carriers serving rural areas (or some proxy for identifying rural areas) more favorably than other carriers. For example, several of the plans allow carriers serving rural areas to charge higher intercarrier compensation rates than other carriers may charge. Unfortunately, none of the plans addresses the fact that there are significant limitations on the Commission's authority to adopt regulations governing intercarrier compensation for rural ILECs. Nevertheless, to the extent that the Commission does retain such authority, differential treatment of rural ILECs is probably lawful and acceptable public policy.

To begin with, the Commission seems to have the authority to set intercarrier rates charged by rural carriers at a higher level than those charged by other carriers. As mentioned, the "additional cost" standard in Section 252(d)(2) seems to require that carriers with higher costs be allowed to charge rates to reflect those costs. This is also of course consistent with the TELRIC methodology, under which higher forward-looking costs of a particular carrier would be reflected in higher rates.

The application of rates set under Section 252(d)(2) to rural carriers is not without its legal complications, however. Section 252(d)(2) applies to traffic exchanged pursuant to Section 251(b)(5). But Section 251(f)(2) creates the risk that the Commission lacks the authority to

ensure that Section 251(b)(5), and by extension Section 252(d)(2), applies to rural carriers.

Section 251(f)(2) grants incumbent LECs with fewer than 2 percent of the nation's total subscriber lines the right to petition a state commission to suspend application of Section 251(b) to the rural incumbent. 47 U.S.C. § 251(f)(2). A state "shall" grant such a petition if it determines that it is (1) necessary to avoid "a significant adverse economic impact on users of telecommunications services generally," *or* to avoid an "unduly economically burdensome" *or* "technically infeasible" requirement; and (2) is in the public interest. *See id.*

The provisions of Section 251(f)(2) have potentially broad implications for any attempt to establish a unified, national intercarrier compensation system. As the Commission has observed, every incumbent LEC in the country other than the BOCs and Sprint has fewer than 2 percent of the nation's total subscriber lines and therefore is eligible to file a petition under Section 251(f)(2). Moreover, the Eighth Circuit has held that a state may grant a Section 251(f)(2) petition based merely on the fact that an ILEC experiences the normal economic harm caused by competitive entry and the reasoned conclusion that granting the petition is in the public interest. *See Iowa Utils Bd. v. FCC*, 219 F.3d 744, 759-62 (8<sup>th</sup> Cir. 2000). The Commission has also ruled that it will leave it to the states to "interpret the provisions of section 251(f) through rulemaking and adjudicative proceedings" and that states "will be responsible for determining whether a LEC in a particular instance" has met the Section 251(f)(2) standard. *Local Competition Order* ¶ 38. All of this indicates that the states have substantial discretion to determine whether Section 251(b)(5) and the "additional cost" standard in Section 252(d)(2) will apply in the future to all ILECs except for the BOCs and Sprint.

To the extent that the Commission does retain authority over intercarrier compensation rates charged by rural incumbent LECs, it should seek to ensure that there is a reasonable basis in cost for any differential between rural ILEC rates and rates charged by other carriers. As is the case with rates charged by other carriers, the Commission should ensure that rural ILECs at the very least charge a unified rate for the termination of all traffic. The most appropriate means of achieving this goal would be for the Commission to require the states to utilize TELRIC methodology (or possibly a similar methodology that includes a greater portion of embedded costs than TELRIC)<sup>62</sup> to set reciprocal compensation and terminating intrastate access rates applicable to rural carriers. The Commission would then adopt the state-set rate as the interstate terminating access rate. It would be optimal to apply this same rate to originating access. Nevertheless, as explained above, the heightened legal risks associated with the exercise of Commission jurisdiction over the methodology states use to set originating access rates counsels in favor of focusing on ensuring unified rates for termination.

It appears to be sound policy to allow rural ILECs to charge higher intercarrier compensation rates. As mentioned, the efficiency analysis indicates that traffic exchanged between carriers that do not compete (which is normally the case with rural carriers) should reflect the cost differentials among the carriers even where calling and called parties “cause” the

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<sup>62</sup> The Commission is currently considering the extent to which it should adopt a modified forward-looking cost model for determining the level of universal service funding for rural ILECs. *See Federal-State Joint Board on Universal Service*, Fourteenth Report and Order, 16 FCC Rcd 11244, ¶ 8 (2001) (continuing the use of embedded cost to determine rural ILEC universal service subsidies for five years while the Commission studies the manner in which a modified forward-looking model can be developed for rural ILECs).

costs of the call to be incurred. If the rural ILEC charges the same rate for all traffic and that single rate is brought closer to a reasonable estimation of cost, increased consumer welfare should result.

Moreover, arguments raised by proponents of bill and keep are the least persuasive with regard to rural carriers. Rural carriers are the least likely to face significant competition anytime in the foreseeable future, so it is hard to argue that placing all of the costs of intercarrier compensation on end users will expose those end-user rates to competition and gradually eliminate the need for regulation. Rural ILEC end user rates will likely require regulatory oversight even longer than ILEC rates elsewhere in the country. Eliminating rural ILEC intercarrier payments would unquestionably trade one form of regulation for another for the foreseeable future. Thus, retaining lower (but still relatively high) rates for rural ILECs would probably have minimal impact on end user pricing efficiency.

**VII. The FCC Must Ensure That Intercarrier Compensation Reform Does Not Threaten To Undermine The Sustainability Of The Universal Service Fund Or Result In The Establishment Of Subsidy Funds That Skew Competitive Outcomes**

In assessing the various subsidy funds included in intercarrier compensation reform proposals, the Commission should be guided by three basic principles. The Commission must (1) limit further increases in the universal service fund to the extent possible, (2) ensure that any increase in the size of the universal service subsidy pool is accompanied by an expansion in the pool of contributors, and (3) limit the scope and duration of any interim fund designed to compensate carriers for the loss of intercarrier payments during the transition to higher end user rates.



*First*, it is clear that the federal universal fund is already dangerously large. The most recent federal universal service contribution factor (applicable to interstate and international end user telecommunications service and, with some exceptions, end user telecommunications revenues) is 11.1 percent.<sup>63</sup> This level may already be close to the point at which the pass-through to end users threatens (ironically) the statutory goals of universal service. As the Fifth Circuit has explained, “excessive funding may itself violate the sufficiency requirements of the Act.” This is because “universal service is funded by a general pool subsidized by all telecommunications providers -- and thus indirectly by the customers -- excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out the market.” *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 620 (5<sup>th</sup> Cir. 2001).

As explained above, retaining cost-based intercarrier compensation rates is the correct legal and policy outcome regardless of the implications for universal service. But a collateral benefit of retaining cost-based intercarrier compensation rates is that, by limiting the extent to which switching and transport costs are recovered directly from end users, a unified rate limits the extent to which intercarrier compensation reform will result in a larger universal service fund. This is extremely important in terms of advancing the goals of universal service themselves (as the Fifth Circuit explained), but also to advance the basic policy objective of

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<sup>63</sup> See *Proposed Second Quarter 2005 Universal Service Contribution Factor*, Public Notice, 20 FCC Rcd 5239 (2005).

efficient pricing. The efficiency concerns are of course that artificially increasing the price of service through universal service pass-throughs to end users can cause customers that are demand elastic to purchase less of the service than would be the case in the absence of the price increase. The resulting dead weight loss is the very essence of harm to consumer welfare.

*Second*, in all events, the Commission must accompany any increase in the size of the universal service fund with the adoption of a new system for carrier contributions to the fund that broadens the base of contributors. The need for broadening the contribution base has been addressed exhaustively in other contexts, and there is no reason to reiterate the arguments in favor of reform at this time. It is sufficient to emphasize, as do NARUC and the ICF, that any further increase in the size of the universal service fund cannot be sustained without including new categories of service providers in the class of contributors to federal universal service contributors.

*Third*, several of the plans propose interim subsidy schemes designed to make carriers whole during the transition to higher end user charges. The Commission should approach these subsidy schemes with a high degree of caution. It seems likely that any significant revenue shortfall during the transition to higher end user revenues could be eliminated (or at least reduced enough to obviate the need for an interim subsidy) by reducing the annual reductions in intercarrier compensation rates or increasing the annual increases in end user rates. If for some reason neither of these alternatives is deemed viable, however, it may be appropriate to adopt a strictly interim subsidy mechanism designed to prevent dramatic reductions in revenue. It is important to emphasize that, outside of areas where competitive entry is precluded by the

protections of Section 251(f), any compensatory subsidy must be portable to competitors.

Competitors such as the Joint Commenters will experience revenue loss as a result of intercarrier compensation reform that is likely to be at least as significant (in relative terms) as the shortfalls experienced by incumbent LECs. If competitors are required to contribute to a subsidy fund that benefits their incumbent LEC competitors but competitors are not able to receive compensation from the fund, competitors will be placed in an untenable regulatory price squeeze.

In addition, under no circumstances should any such compensatory subsidy be adopted as a long-term solution to reductions in intercarrier compensation for particular classes of carriers. As the Fifth Circuit has explained, the “Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition in the market.” *Alenco*, 201 F.3d at 620 (emphasis in original). Accordingly, “[s]o long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.” *Id.*

### **VIII. CONCLUSION**

The Commission should approach the reform of intercarrier compensation in a manner that is consistent with these comments.

Respectfully submitted,

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May 23, 2005

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

In the Matter of	)	
	)	
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 an 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

**COMMENTS OF  
CBEYOND, INC., INTEGRA TELECOM, INC., AND TW TELECOM INC.**

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April 18, 2011

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**COMMENTS OF  
CBEYOND, INC., INTEGRA TELECOM, INC., AND TW TELECOM INC.**

Cbeyond, Inc. (“Cbeyond”), Integra Telecom, Inc. (“Integra”), and tw telecom inc. (“tw telecom”) (collectively, the “Joint Commenters”), through their undersigned counsel, hereby submit these comments on the *USF/ICC Transformation NPRM*<sup>1</sup> in the above-captioned proceedings.

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<sup>1</sup> See *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 an 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, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) (“*USF/ICC Transformation NPRM*” or “*NPRM*”).

## I. INTRODUCTION AND SUMMARY.

The Joint Commenters commend the Commission for its commitment to “eliminate waste and inefficiency and modernize USF and ICC to bring the benefits of broadband to all Americans.”<sup>2</sup> In order to achieve this goal and resolve the fundamental problems that have been plaguing the current ICC system, the Joint Commenters recommend that the Commission take the following actions. *First*, the FCC should gradually reduce, through a series of lock-step annual reductions, intrastate terminating access rates to interstate levels and ultimately unify all terminating rates under Section 251(b)(5)<sup>3</sup> and Section 201(b) of the Act<sup>4</sup> to a single TELRIC-based level. As discussed in Part II, the Commission should adopt this proposal because it would (1) eliminate the inefficient incentives created by the existing intercarrier compensation regime; (2) obviate the need for explicit universal service support to replace reduced ICC revenues; (3) allow carriers sufficient time to make adjustments to their businesses as a result of reduced ICC revenues; and (4) enable carriers to make investment decisions with more certainty.

Moreover, reliance on preemption of intrastate access rates under Section 251(b)(5) to achieve reform would avoid the difficulties posed by relying on the states to reform intrastate access rates. These include (1) a disorderly, unpredictable, and costly reform process; and (2) an increased likelihood of variation among states’ intrastate access rates. Furthermore, the Commission has the authority under the terms of Section 251(b)(5) and under Section 201(b) to establish a uniform rate methodology for the termination of all telecommunications traffic. The FCC also has the authority to adopt TELRIC as the pricing methodology for all terminating rates

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<sup>2</sup> FCC Commissioners, “Making Universal Service and Intercarrier Compensation Reform Happen,” <http://reboot.fcc.gov/blog?entryId=1335527> (last visited Apr. 12, 2011).

<sup>3</sup> 47 U.S.C. § 251(b)(5).

<sup>4</sup> *Id.* § 201(b).



because the Commission has already found that TELRIC is consistent with the “additional costs” standard of Section 252(d)(2) of the Act.<sup>5</sup>

*Second*, the Commission should not provide universal service subsidies for the replacement of foregone ICC revenues. Rather, the FCC should (1) address recovery of intrastate access revenues by giving the states sufficient time to rebalance intrastate access rates; and (2) address recovery of interstate access revenues by allowing incumbent LECs to increase their subscriber line charges (in which case the Commission must limit the extent to which incumbent LECs are able to shift recovery from competitive markets to less competitive markets). As discussed in Part III, if the Commission nonetheless establishes an ICC revenue replacement fund as part of the Connect America Fund (“CAF”), it must impose specific limits on recovery from the fund.

*Third*, the FCC should control the size of the USF by, among other things, (1) setting an overall budget for the CAF that does not exceed the size of the high-cost universal service program in 2010, adjusted for inflation; and (2) ensuring that distribution of CAF funding is consistent with the principles outlined in the National Broadband Plan. The Commission should also promptly initiate a proceeding to reform its universal service *contribution* rules (discussion of which was noticeably absent from the *USF/ICC Transformation NPRM*). In particular, the FCC should broaden the universal service contribution base to include all broadband Internet access service revenues. As discussed in Part IV, requiring all providers of broadband services to contribute to the USF would not only minimize the burden of increasing universal service contributions on consumers and businesses, it would also eliminate the distortions in the broadband Internet access services market created by the current contribution system.

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<sup>5</sup> *Id.* § 252(d)(2).

*Fourth*, the FCC should regulate tandem transit service and require that such service be provided at TELRIC-based rates. As discussed in Part V, such regulation is necessary because the tandem transit service market is not effectively competitive.

**II. THE FCC SHOULD GRADUALLY REDUCE INTRASTATE TERMINATING ACCESS RATES TO INTERSTATE LEVELS AND ULTIMATELY UNIFY ALL TERMINATING RATES TO A SINGLE TELRIC-BASED LEVEL.**

In the *NPRM*, the Commission seeks comment on how it should pursue its proposed reduction of ICC rates<sup>6</sup> and the ICC methodology that it should adopt as the end-point for comprehensive reform.<sup>7</sup> The Joint Commenters urge the FCC to undertake a two-stage process in which (1) in stage one, it gradually (i.e., over a period of five years) reduces, through a series of lock-step annual reductions, intrastate terminating access rates to interstate levels;<sup>8</sup> and (2) in stage two, it unifies (over a period of one to two years) all terminating rates (including intrastate access, interstate access, reciprocal compensation, and the ISP-bound terminating rate) to a single TELRIC-based level.<sup>9</sup> In all events, carriers should remain free to voluntarily negotiate their own agreements regarding ICC, including bill-and-keep agreements.

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<sup>6</sup> See *NPRM* ¶¶ 533-558.

<sup>7</sup> See *id.* ¶¶ 529-532.

<sup>8</sup> This aspect of the Joint Commenters' proposal is consistent with the National Broadband Plan's recommendation that ICC reform begin "by reducing intrastate rates to interstate rate levels in equal increments over a period of time." See *Connecting America: National Broadband Plan*, at 149 (Mar. 16, 2010) ("National Broadband Plan").

<sup>9</sup> To the extent that the FCC were to act pursuant to the Section 251(b)(5) framework, states would apply the FCC's TELRIC methodology to establish the terminating rate for each incumbent LEC (and competitors exchanging traffic with the incumbent LEC). Such rates would be included in interconnection agreements and apply to all local and intrastate terminating access traffic. Interstate terminating access rates would be set forth in FCC tariffs and the FCC would deem the TELRIC-based rates to be just and reasonable for purposes of Section 201(b) of the Act. See 47 U.S.C. § 201(b).

As discussed herein, the Commission should adopt the Joint Commenters' two-stage proposal because it would result in a number of significant public policy benefits. Additionally, this proposal, which relies on the reciprocal compensation framework of Section 251(b)(5), avoids the problems associated with reform based on "the existing jurisdictional framework."<sup>10</sup> Moreover, the FCC has the authority to unify all terminating rates under Sections 251(b)(5) and 201(b) (although it is not apparent that the FCC has such authority with respect to intrastate originating access rates). The Commission also has the authority to adopt TELRIC as the methodology for all terminating rates unified under Sections 251(b)(5) and 201(b) of the Act. Importantly, however, it does not have the authority to adopt a unified terminating rate of \$0.0007 or to mandate bill-and-keep for the exchange of all traffic.

**A. A Gradual, Multi-Year Transition That Results In Uniform, Cost-Based Rates For Termination Would Yield Substantial Public Policy Benefits.**

The Joint Commenters' proposal would yield several substantial public policy benefits. *First*, unifying intrastate and interstate terminating access rates and ultimately adopting TELRIC as the uniform pricing methodology for all terminating rates would eliminate the inefficient incentives created by the current ICC system. As the Commission has recognized, one of the fundamental problems with the existing regime is that "terminating rates are not uniform despite the uniformity of the function of terminating a call."<sup>11</sup> Such disparities lead to arbitrage opportunities such as phantom traffic.<sup>12</sup> Requiring all LECs to charge the same rates for termination of all traffic would eliminate carriers' incentives to misidentify traffic to pay the lowest intercarrier rate or receive the highest intercarrier rate.

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<sup>10</sup> *NPRM* ¶ 537.

<sup>11</sup> National Broadband Plan at 142.

<sup>12</sup> *See id.*

As the Commission has further recognized, “[m]ost ICC rates are above incremental cost, which creates opportunities for access stimulation, in which carriers artificially inflate the amount of minutes subject to ICC payments.”<sup>13</sup> If required to charge cost-based rates, however, LECs would no longer have an incentive to invest in such schemes.<sup>14</sup>

*Second*, the gradual reduction of intrastate terminating access rates to interstate levels in combination with the unification of all terminating rates at TELRIC would obviate any need for explicit universal service support for recovery of foregone ICC revenues.<sup>15</sup> To begin with, a multi-year transition for the reduction of intrastate terminating access rates to interstate levels would allow states to undertake rate rebalancing (i.e., to increase local rates as intrastate access rates decrease) gradually and thereby diffuse the impact of higher local rates on consumers. In addition, cost-based rates for termination would fully compensate incumbent LECs for that function.

*Third*, a gradual, multi-year transition would also allow incumbent and competitive LECs to undertake the necessary adjustments in their businesses resulting from the dramatic reductions in their intrastate terminating access revenues in many states.<sup>16</sup> For example, competitive LECs enter into long-term contracts with many of their business customers, and the terms of such contracts generally prevent competitive LECs from adjusting end-user customer rates to account

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<sup>13</sup> *Id.*

<sup>14</sup> While the Commission has already proposed short-term reforms to address phantom traffic and access stimulation, it correctly recognizes that “wasteful attempts to game the system will likely persist as long as ICC rates remain disparate and well above carriers’ incremental costs of terminating a call.” *NPRM* ¶ 40.

<sup>15</sup> *See id.* ¶¶ 559, 585-590.

<sup>16</sup> As the Commission recognizes in the *NPRM*, “any transition [must] be gradual enough to enable the private sector to react and plan appropriately.” *Id.* ¶ 533.

for reduced ICC revenues. It would therefore take several years for competitive LECs to make these adjustments.

*Fourth*, the predictability of annual lock-step reductions in intrastate terminating access rates would enable LECs to account for access revenue reductions in their investment decisions and thereby make such decisions with a greater level of certainty. As the Commission has recognized, “decline[s] in revenues and free cash flows at unpredictable levels could hamper carriers’ ability to implement network upgrade investments or other capital improvements”<sup>17</sup> and “reform must be staged over time” in order to “minimize regulatory uncertainty for investment.”<sup>18</sup>

**B. Reform Based On Section 251(b)(5) Of The Act Would Avoid The Problems Posed By Reform Under The Existing Jurisdictional Framework.**

In the *NPRM*, the Commission seeks comment on the advantages and disadvantages of two alternative approaches to working with the states to achieve ICC rate reduction.<sup>19</sup> Under what the Commission calls “reform based on the existing jurisdictional framework,” the FCC and the states would pursue reduction of interstate and intrastate access rates, respectively, on parallel tracks.<sup>20</sup> Under this approach, the Commission could create incentives for the states to reduce intrastate access rates by, for example, limiting initial distribution of funding under the CAF to states that have taken measures to reduce such rates.<sup>21</sup> By contrast, under reform based

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<sup>17</sup> National Broadband Plan at 142.

<sup>18</sup> *Id.* at 141; *see also id.* (“Success will come from a clear road map for reform, including guidance about the timing and pace of changes to existing regulations, so that the private sector can react and plan appropriately.”).

<sup>19</sup> *See NPRM* ¶¶ 534-535.

<sup>20</sup> *See id.* ¶¶ 534, 537-539.

<sup>21</sup> *See id.* ¶ 544.

on Section 251(b)(5) of the Act, the Commission would “unify all intercarrier rates, including those for intrastate calls” under the reciprocal compensation framework of Section 251(b)(5) and determine a pricing methodology for such rates, which would ultimately be implemented by the states.<sup>22</sup>

Reform based on the existing jurisdictional framework poses at least two major problems that would be avoided if reform were to proceed pursuant to FCC preemption of intrastate access rates under Section 251(b)(5). *First*, proposals based on the existing jurisdictional framework would result in a less orderly and predictable reform process because 50 different states—rather than the FCC—would be responsible for reducing intrastate access rates. As discussed above, a predictable reform process is critical for LECs to “react and plan appropriately”<sup>23</sup> for substantial reductions in their ICC revenues. It would also be extremely costly for competitive LECs—which have fewer resources than large incumbent LECs—to participate in the multitude of state commission proceedings that would govern intrastate access rate reductions if reform proceeded based on the existing jurisdictional framework.

*Second*, there is a greater likelihood of variation among individual states’ intrastate access rates if ICC reform proceeds based on the existing jurisdictional framework. As the Commission acknowledges in the *NPRM*, “intrastate rates w[ould] continue to be different as states grapple with different ways to reform intrastate access, which could result in different transitions and varying rates, potentially allowing continued arbitrage based on the disparity in rates for different jurisdictions.”<sup>24</sup> This problem would not exist if the FCC were to preempt

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<sup>22</sup> *See id.* ¶¶ 534, 550.

<sup>23</sup> *Id.* ¶ 533.

<sup>24</sup> *Id.* ¶ 537.

intrastate access rates under Section 251(b)(5). What is more, reform based on the existing jurisdictional framework could result temporarily in a wider gap between interstate access rates and intrastate access rates, depending on the timing of the FCC's and the states' transitions. Pursuing ICC reform in a manner that could lead to such increased disparities makes little sense when the Commission's goal is to eliminate arbitrage by unifying rates.<sup>25</sup>

**C. The FCC Has The Authority To Unify All Terminating Rates Under Sections 251(b)(5) And 201(b) Of The Act.**

In the *NPRM*, the Commission seeks comment on whether it has the authority to unify all intercarrier rates under the reciprocal compensation framework of Section 251(b)(5).<sup>26</sup> The FCC clearly has the authority to unify all terminating rates under Section 251(b)(5). *First*, the Joint Commenters concur with the FCC that it can bring all telecommunications traffic within the Section 251(b)(5) framework because the reference to "telecommunications" in that provision is not limited in geographic scope (e.g., local, intrastate, or interstate) or confined to particular services (e.g., telephone exchange service, telephone toll service, or exchange access).<sup>27</sup> In addition, under Commission precedent, Section 251(b)(5) is not limited to traffic exchanged between LECs and instead applies to all traffic exchanged between a LEC and another carrier (e.g., a CMRS provider).<sup>28</sup> Accordingly, the Commission could extend the duty to provide

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<sup>25</sup> See National Broadband Plan at 149 (recognizing that "transition[ing] all ICC terminating rates to a uniform rate per carrier" "is an important step to eliminate inefficient economic behavior").

<sup>26</sup> See *NPRM* ¶¶ 512-515.

<sup>27</sup> See *id.* ¶ 513.

<sup>28</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1041 (1996) ("Although [S]ection 252(b)(5) [sic] does not explicitly state to whom the LEC's obligations runs, we find that LECs

reciprocal compensation under Section 251(b)(5) to all telecommunications traffic exchanged with LECs.<sup>29</sup>

*Second*, the Joint Commenters agree with the Commission that Section 201(b) of the Act “authorizes the Commission to adopt reciprocal compensation rules governing all telecommunications traffic (whether interstate or intrastate).”<sup>30</sup> In particular, the Supreme Court has held that Section 201(b) gives the FCC rulemaking authority to carry out the provisions of the Act and in those instances where such a provision encompasses both intrastate and interstate communications, the FCC may regulate both.<sup>31</sup> Accordingly, given that Section 251(b)(5) encompasses all “telecommunications” regardless of jurisdiction, the FCC has the authority under Section 201(b) to establish reciprocal compensation rules governing all telecommunications traffic, including intrastate access traffic.

It is not entirely clear, however, that the FCC has the authority to regulate *intrastate originating* access rates under Section 251(b)(5).<sup>32</sup> That provision refers only to the “transport

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have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers.”) (“*Local Competition Order*”).

<sup>29</sup> See *NPRM* ¶ 513.

<sup>30</sup> See *id.* ¶ 515.

<sup>31</sup> See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-85 (1999).

<sup>32</sup> The Commission has the authority to regulate *interstate originating* access rates under Sections 2(a), 201(b), and 202(a) of the Act. See 47 U.S.C. § 152(a) (giving the Commission jurisdiction over “interstate” “communication”); see also *id.* §§ 201(b) & 202(a) (requiring rates for interstate communication services to be just and reasonable and not unjustly or unreasonably discriminatory). Moreover, as discussed above, the FCC has the authority to establish a pricing methodology for the transport and termination of all telecommunications traffic—both intrastate and interstate—subject to Section 251(b)(5). But it is not clear that the Act grants the FCC jurisdiction over intrastate originating access rates.



and termination”—not origination—of telecommunications.<sup>33</sup> Nor does any other provision of the Act grant the FCC authority over intrastate originating access rates. While the Commission suggests that Section 251(g) of the Act<sup>34</sup> broadly permits “regulations prescribed by the Commission” to replace the current access charge system and those “regulations” can cover originating access charges,<sup>35</sup> the Commission provides no support for this proposition.

**D. The FCC Has The Authority To Adopt TELRIC As The Uniform Pricing Methodology For All Terminating Rates.**

In the *NPRM*, the Commission seeks comment on its “authority to adopt a methodology for traffic that is within the scope of [S]ection 251(b)(5)” and on what that methodology should be.<sup>36</sup> As the Commission recognizes, Section 252(d)(2) of the Act prescribes the standards for setting rates for the termination of telecommunications traffic subject to Section 251(b)(5).<sup>37</sup> Section 252(d)(2) provides that such rates are not just and reasonable unless they allow for the recovery of the “additional costs” of termination.<sup>38</sup> The Commission should adopt TELRIC as the pricing methodology for all terminating rates unified under Section 251(b)(5) other than those already governed by Section 201(b)<sup>39</sup> because the FCC has already found that TELRIC

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<sup>33</sup> 47 U.S.C. § 251(b)(5).

<sup>34</sup> *Id.* § 251(g).

<sup>35</sup> *See NPRM* ¶ 517.

<sup>36</sup> *See id.* ¶ 516.

<sup>37</sup> *See id.*

<sup>38</sup> 47 U.S.C. § 252(d)(2)(A)(ii). Although the terms of Section 252(d)(2) apply to incumbent LECs, competitive LECs should also be able to recover the additional costs of termination. Absent a right to collect the same level of access charges, competitive LECs would be disadvantaged in the downstream retail telecommunications services market.

<sup>39</sup> *See supra* note 9.

satisfies the “additional costs” standard of Section 252(d)(2).<sup>40</sup> In addition, as some of the Joint Commenters have explained in the past, there is no question that carriers incur additional costs, such as switching costs, when terminating traffic.<sup>41</sup> This is true regardless of the technology used in a particular network, whether TDM or IP technology used in softswitches.<sup>42</sup>

Importantly, the FCC does not have the authority to adopt a unified terminating rate of \$0.0007<sup>43</sup> or to impose bill-and-keep on all telecommunications traffic subject to Section 251(b)(5).<sup>44</sup> To begin with, while the FCC has the authority to establish a rate *methodology* for traffic subject to Sections 251(b)(5) and 252(d)(2), it does not have the authority to set *specific rates* for such traffic.<sup>45</sup> Thus, the Commission cannot set a unified rate of \$0.0007 or a rate of

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<sup>40</sup> See *Local Competition Order* ¶ 1054 (finding that “the ‘additional cost’ standard permits the use of the forward-looking, economic cost-based pricing standard that we are establishing for interconnection and unbundled elements”). Specifically, the FCC has held that the traffic-sensitive portion of the TELRIC methodology constitutes the “‘additional cost’” of transport and termination for purposes of Section 252(d)(2). See *id.* ¶ 1057 (“For the purposes of setting rates under [S]ection 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an ‘additional cost’ to be recovered through termination charges.”).

<sup>41</sup> See Comments of tw telecom inc., One Communications Corp., and Cbeyond, Inc., WC Dkt. No. 05-337 et al., at 5 & nn.3-4 (filed Nov. 26, 2008) (“tw telecom et al. 2008 ICC Comments”); Reply Comments of tw telecom inc., One Communications Corp., and Cbeyond, Inc., WC Dkt. No. 05-337 et al., at 5-6 (filed Dec. 22, 2008) (“tw telecom et al. 2008 ICC Reply Comments”); see also Letter from Thomas Jones, Counsel for tw telecom inc. and One Communications Corp., to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92 et al., at 5-6 (filed Oct. 14, 2008) (“tw telecom et al. Oct. 14, 2008 Ex Parte Letter”) (explaining that the TELRIC-based method of calculating the “additional costs” of switching continues to be fundamentally sound).

<sup>42</sup> See tw telecom et al. 2008 ICC Comments at 5 & nn.3-4; tw telecom et al. 2008 ICC Reply Comments at 5-6.

<sup>43</sup> See Comments of Verizon and Verizon Wireless, WC Dkt. No. 05-337 et al., at 49-52 (filed Nov. 26, 2008) (advocating adoption of a uniform terminating rate at or below \$0.0007).

<sup>44</sup> See *NPRM* ¶ 530 (seeking comment on this issue).

<sup>45</sup> See *Iowa Utils. Bd.*, 525 U.S. at 385 (holding that “the Commission has jurisdiction to design a pricing methodology” under its rulemaking authority in Section 201(b) of the Act); see *id.* at 384

zero (which would be the consequence of mandating bill-and-keep) for termination of traffic subject to Section 251(b)(5). While the FCC set a specific rate of \$0.0007 for ISP-bound traffic, it did so pursuant to Section 201(b) because all ISP-bound traffic is interstate.<sup>46</sup> The Commission could not have adopted a specific rate for ISP-bound traffic if it had been purely intrastate traffic or intrastate traffic that was severable from interstate traffic. The FCC would have instead needed to rely on Sections 251(b)(5) and 252(d)(2), which only permit the Commission to establish a pricing methodology implemented by the states.

In addition, a unified terminating rate of \$0.0007 would not satisfy the “additional costs” standard of Section 252(d)(2). Indeed, as commenters in this proceeding have explained, there is substantial evidence in the record demonstrating that a rate of \$0.0007 would not cover carriers’ costs of terminating traffic.<sup>47</sup> Moreover, as tw telecom has explained in the past, the fact that

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(“It is the States that will apply th[e] [pricing] standards [of Section 252(d)] and implement that methodology, determining the concrete result in particular circumstances.”); *see also Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) (“The Supreme Court held that the FCC ‘has jurisdiction to design a pricing methodology.’ However, the FCC does not have jurisdiction to set the actual prices for the state commissions to use. Setting specific prices goes beyond the FCC’s authority to design a pricing methodology and intrudes on the states’ right to set the actual rates pursuant to § 252(c)(2).”) (internal citation omitted), *rev’d on other grounds*, 535 U.S. 467 (2002).

<sup>46</sup> *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475, ¶¶ 17-21 (2008).

<sup>47</sup> *See Comments of PAETEC Holding Corp., Mpower Communications Corp., and U.S. TelePacific Corp., and RCN Telecom Services, LLC*, WC Dkt. No. 10-90 et al., at 38-42 (Apr. 1, 2011) (discussing studies and comments submitted by NECA, NTCA, ITTA, CenturyTel, Windstream, Embarq, XO Communications, NuVox, PAETEC, and others).

some carriers have agreed to this rate in some interconnection agreements does not lead to the conclusion that it is cost-based.<sup>48</sup>

Furthermore, the FCC lacks authority to mandate bill-and-keep where there is a traffic imbalance.<sup>49</sup> *First*, requiring bill-and-keep in such a situation would prevent the LEC that terminates more traffic than it originates from recovering the “additional costs” of termination. *Second*, Section 252(d)(2)(A)(i) of the Act requires that interconnection agreements “provide for the *mutual and reciprocal recovery* by each carrier of costs associated with the transport and termination on each carrier’s network facilities,”<sup>50</sup> and Section 252(d)(2)(B)(i) only permits bill-and-keep where it “afford[s] the *mutual recovery* of costs through the *offsetting of reciprocal obligations*.”<sup>51</sup> If a terminating carrier must recover costs incurred as a result of a traffic imbalance from end users or the USF, as would be the case under bill-and-keep, such recovery

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<sup>48</sup> See Letter from Thomas Jones, Counsel for tw telecom inc. and One Communications Corp., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-337 et al., Attachment, at 3 (filed Oct. 6, 2008) (explaining that (1) the fact that an incumbent LEC agrees to a rate of \$0.0007 in interconnection agreements in situations where the incumbent LEC is a net terminator of traffic has no bearing on whether the incumbent LEC’s own terminating costs are equal to or less than \$0.0007; (2) interconnection agreement negotiations include give-and-take on dozens of issues and a carrier might well agree to below-cost termination rates in return for more valuable concessions on other issues; (3) many, if not most, carriers have not agreed to the \$0.0007 rate, supporting the conclusion that such carriers do not view it as cost-based).

<sup>49</sup> The Joint Commenters have proposed the use of bill-and-keep between competitive LECs as a means of addressing traffic pumping schemes perpetuated by one competitive LEC against another. See Comments of Cbeyond, Inc., Integra Telecom, Inc., and tw telecom inc., WC Dkt. No. 10-90 et al., at 16-18 (filed Apr. 1, 2011). That proposal does not implicate the concerns described herein with regard to bill-and-keep because the concerns discussed herein pertain to statutory provisions—most importantly, Section 252(d)(2)—that only apply where an incumbent LEC is involved in the traffic exchange. In all events, the Joint Commenters’ proposal for addressing traffic pumping between competitive LECs would only require that bill-and-keep apply until the parties reach an agreement for the exchange of local traffic.

<sup>50</sup> 47 U.S.C. § 252(d)(2)(A)(i) (emphasis added).

<sup>51</sup> *Id.* § 252(d)(2)(B)(i) (emphasis added).

would not be “mutual and reciprocal.” Nor would it constitute recovery “through the offsetting of reciprocal obligations.” Rather, under these statutory provisions, carriers must recover the net costs of transport and termination from each other.<sup>52</sup>

**III. THE FCC SHOULD NOT PROVIDE UNIVERSAL SERVICE SUBSIDIES FOR THE REPLACEMENT OF FOREGONE ICC REVENUES.**

In the *NPRM*, the Commission proposes to provide explicit universal service support for recovery of reduced ICC revenues and seeks comment on how to design this funding mechanism.<sup>53</sup> As discussed above, however, if the FCC were to adopt the Joint Commenters’ proposal to set ICC rates at cost (i.e., using the TELRIC methodology), there would be no need for funding to replace foregone ICC revenues. That is, any cost-based rates for transport and termination (and, as explained, TELRIC-based rates qualify as cost-based) fully compensate incumbent LECs for those functions. Accordingly, the Commission should not establish an ICC revenue replacement fund as part of the CAF.

The Commission should instead address recovery of reduced intrastate access revenues by allowing sufficient time for states to rebalance intrastate rates (i.e., to increase local rates as intrastate access rates decrease). In addition, the FCC should address recovery of reduced interstate access revenues (as well as intrastate access revenues)<sup>54</sup> by permitting incumbent LECs to increase their residential and business interstate subscriber line charges (“SLCs”) to their respective caps. The FCC could also increase interstate SLC caps.<sup>55</sup>

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<sup>52</sup> See *tw telecom et al.* Oct. 14, 2008 Ex Parte Letter at 22 & n.55; Letter from Thomas Jones, Counsel for *tw telecom inc.* and *One Communications Corp.*, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92 et al., Attachment, at 4-5 (filed Oct. 6, 2008).

<sup>53</sup> See *NPRM* ¶¶ 585-590.

<sup>54</sup> See *id.* ¶ 583.

<sup>55</sup> See *id.* ¶ 582.

In all events, the Commission must limit the extent to which incumbent LECs can shift recovery from competitive markets to less competitive markets. Specifically, the Commission should (1) not permit incumbent LECs to recover lost ICC revenues by selectively raising SLCs in geographic areas with little or no competition, while lowering them in areas subject to greater competition; and (2) only permit incumbent LECs to recover foregone ICC revenues associated with business lines through higher SLCs imposed on business customers, not residential customers.

If the FCC nevertheless establishes a fund for the replacement of ICC revenues, it should impose certain limits on recovery from the fund. *First*, the Commission should require incumbent LECs to recover from end users the maximum amount permitted under existing or increased interstate SLC caps before allowing recovery from the replacement fund.

*Second*, the Commission must take into account the high per-line revenues incumbent LECs earn when selling voice bundled with broadband and/or video services before allowing recovery from the replacement fund. Accordingly, if the FCC adopts its proposed residential benchmark approach to ICC revenue recovery,<sup>56</sup> all revenues that an incumbent LEC earns from an access line—including revenues from broadband and video service—should be compared to the residential benchmark. If the total revenues associated with the line exceed the benchmark, then the incumbent LEC would not receive any payments from the replacement fund.

*Third*, the replacement fund should not support lines in those areas where local telephone service rates have already been deregulated. That is, there is no need for subsidy payments to the incumbent LEC where the relevant state commission has effectively determined that, if the incumbent LEC were to increase prices (such as by increasing SLCs to recover lost ICC

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<sup>56</sup> *See id.* ¶¶ 573-578.

revenues), there is sufficient competition to ensure that local telephone service remains affordable.

*Fourth*, the replacement fund should not subsidize an incumbent LEC for costs associated with an access line that the incumbent LEC no longer uses to provide service to a customer (i.e., recovery should be calculated on a per-line basis).

#### **IV. THE FCC SHOULD CONTROL THE SIZE OF THE USF AND REVISE ITS UNIVERSAL SERVICE CONTRIBUTION RULES AS PART OF COMPREHENSIVE USF/ICC REFORM.**

In the *NPRM*, the Commission seeks comment on numerous aspects of its proposal to transform the existing high-cost universal service program into a broadband-focused CAF (e.g., the size of the CAF).<sup>57</sup> The Joint Commenters strongly support the Commission’s goal of “[c]ontrol[ing] the size of USF as it transitions to support broadband, including by reducing waste and inefficiency.”<sup>58</sup> In order to achieve this goal, the FCC should take the following actions. *First*, the Commission should adopt the proposal in the *NPRM* to “set an overall budget for the CAF such that the sum of the CAF and any existing high-cost programs (however modified in the future) in a given year are equal to the size of the current high-cost program in 2010,” adjusted for inflation.<sup>59</sup>

*Second*, the FCC should ensure that distribution of CAF funding adheres to the following principles outlined in the National Broadband Plan: (1) the “CAF should only provide funding in geographic areas where there is no private sector business case to provide broadband and high-

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<sup>57</sup> *See id.* ¶¶ 412-416.

<sup>58</sup> *Id.* ¶ 10.

<sup>59</sup> *Id.* ¶ 414.

quality voice-grade service”;<sup>60</sup> (2) “[t]here should be at most one subsidized provider of broadband per geographic area”;<sup>61</sup> (3) the “FCC should identify ways to drive funding to efficient levels, including market-based mechanisms where appropriate, to determine the firms that will receive CAF support and the amount of support they will receive”;<sup>62</sup> and (4) “[r]ecipients of CAF support must be accountable for [their] use and subject to enforceable timelines for achieving universal access.”<sup>63</sup>

*Third*, the FCC should immediately transfer high-cost support currently provided to incumbent LECs in areas where local telephone service rates have been deregulated to the CAF for use in areas unserved by broadband providers. It is wasteful and inefficient for the Commission to continue to subsidize local telephone service in areas where the relevant state commission has effectively determined that numerous service providers can efficiently serve the relevant market.

Importantly, as it undertakes universal service *distribution* reform, the FCC should also undertake universal service *contribution* reform. The current universal service contribution

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<sup>60</sup> National Broadband Plan at 145. In contravention of this principle, the Commission suggests in the *NPRM* that CAF funding could be provided in areas already served by unsubsidized providers of high-quality voice service and broadband Internet access services. *See NPRM* ¶ 409. This would be a wasteful and inefficient use of federal support because the presence of such a competitor demonstrates that subsidies are unnecessary.

<sup>61</sup> National Broadband Plan at 145; *see also NPRM* ¶ 402.

<sup>62</sup> National Broadband Plan at 145; *see also NPRM* ¶ 25 (explaining that using “a market-driven process [in Phase I CAF] to award support will spur high-impact broadband deployment and give the Commission and the private sector experience with a mechanism for providing consumers access to high-quality network infrastructure in an efficient manner” in the long term).

<sup>63</sup> National Broadband Plan at 145; *see also NPRM* ¶ 457-478 (proposing a variety of measures to increase accountability of fund recipients).



factor is at a near historic high of 14.9%.<sup>64</sup> As the National Broadband Plan recognizes, the FCC must adopt revised contribution methodology rules to “minimize the burden of increasing universal service contributions on consumers” and to “ensure that USF remains sustainable over time.”<sup>65</sup> Indeed, the legacy contribution base—which “has remained flat over the last decade”<sup>66</sup>—cannot support the construction and operation of new and expanding broadband networks. Accordingly, the FCC should broaden the universal service contribution base<sup>67</sup> to include all broadband Internet access service revenues.

Requiring all providers of broadband services to contribute to the USF would not only decrease the contribution burden on consumers and businesses, but it would also eliminate the distortions in the broadband Internet access services market created by the current contribution system. As tw telecom has explained elsewhere, under existing contribution rules, competitive LECs that purchase special access as inputs to broadband Internet access services are indirectly subject to universal service contribution obligations,<sup>68</sup> but incumbent LECs that rely on their own special access loops to provide broadband Internet access services are not subject to any universal service contribution obligations.<sup>69</sup> Without contribution reform, this systematic

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<sup>64</sup> *Proposed Second Quarter 2011 Universal Service Contribution Factor*, Public Notice, DA 11-473, CC Docket No. 96-45, at 1 (rel. Mar. 10, 2011).

<sup>65</sup> *See* National Broadband Plan at 149 (Recommendation 8.10).

<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

<sup>68</sup> While wholesale providers of special access must contribute to the USF, they generally pass this contribution obligation through to their customers, such as tw telecom.

<sup>69</sup> *See* Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-122, at 1-6 (filed Apr. 27, 2010).

discrimination in favor of incumbents and against competitors in the provision of broadband Internet access services will only continue.

**V. THE FCC SHOULD REGULATE TANDEM TRANSIT SERVICE AND REQUIRE THAT SUCH SERVICE BE PROVIDED AT TELRIC-BASED RATES.**

In the *NPRM*, the Commission states that “the record in this proceeding indicates that a competitive market for transit services exists” and seeks comment “on the need for the Commission to regulate transiting service.”<sup>70</sup> In fact, the market for tandem transit service is *not* effectively competitive. To begin with, in most areas, the incumbent LEC has a monopoly over transit service and is able to charge above-cost rates. For example, in legacy BellSouth territory, AT&T offers competitive LECs such as Cbeyond a tandem transit rate of \$0.0025—almost two-and-a-half times legacy BellSouth’s average TELRIC rate for tandem transit service.<sup>71</sup> Similarly, legacy Qwest’s average TELRIC rate for tandem transit service is \$0.0014, but legacy Qwest has taken the position that tandem transit service need not be priced at cost-based rates and it offers a rate of \$0.0045—more than three times the TELRIC rate—in its current Negotiations Interconnection Agreement Template.<sup>72</sup>

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<sup>70</sup> See *NPRM* ¶ 683.

<sup>71</sup> See Declaration of Greg Darnell on behalf of Cbeyond, Inc. ¶¶ 4-5 (attached hereto as “Attachment A”). While the TELRIC rates for the services comprising tandem transit service were established in the legacy BellSouth territory in 2001 and 2002, there is no reason to expect that AT&T’s costs of providing these services have increased since that time. See *id.* ¶ 4. In fact, AT&T has suggested that average switching costs have decreased by 3% per year between 2000 and 2008. See Letter from Henry Hultquist, Vice President-Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92 et al., at 2 (filed Oct. 13, 2008).

<sup>72</sup> See Declaration of Douglas K. Denney on behalf of Integra Telecom, Inc., ¶¶ 4-5 (attached hereto as “Attachment B”). Interestingly, while Qwest has argued that a terminating rate of \$0.0007 is “a reasonable approximation of the additional cost to terminate traffic” (see Reply Comments of Qwest Communications International Inc., WC Dkt. No. 05-337 et al., at 17 (filed Dec. 22, 2008)), the same functionality is included in tandem transit service, for which Qwest seeks to charge a market-based rate of \$0.0045. Qwest cannot have it both ways (i.e., seek

In addition, Integra and Cbeyond have found that there are few viable alternative tandem transit service providers to the incumbent LEC in the geographic markets they serve.<sup>73</sup> For example, Integra has found that Qwest faces only one significant competitor, Neutral Tandem, in the provision of tandem transit service in the majority of the markets in which Integra provides service.<sup>74</sup> But Neutral Tandem does not offer service in all of Integra's markets, and Neutral Tandem's network does not reach all of the networks (such as rural incumbent LEC networks) to which Integra needs to route traffic.<sup>75</sup> Similarly, because Neutral Tandem's service does not reach all of the networks that subtend the RBOC's local tandem switch to which Cbeyond needs to route traffic, Cbeyond must still use the RBOC's local tandem switch in every market that Cbeyond serves.<sup>76</sup> Furthermore, in order to make use of Neutral Tandem's limited tandem transit service, Cbeyond must incur the additional expense of disaggregating traffic and building additional facilities to reach Neutral Tandem's network.<sup>77</sup> These burdens have the effect of significantly increasing the real cost of purchasing tandem transit service from Neutral Tandem.

In light of these facts, the FCC should compel incumbent LECs to offer tandem transit service at TELRIC-based prices. There are at least two bases for the FCC's authority to compel incumbent LECs to offer tandem transit service. *First*, Section 251(c)(2) of the Act requires

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regulation of a functionality where Qwest is obligated to pay for the functionality and seek deregulation of the same functionality where Qwest has the ability to charge for the functionality).

<sup>73</sup> See Denney Declaration ¶ 6; see also Darnell Declaration ¶ 6 (explaining that Cbeyond has one alternative tandem transit provider, Neutral Tandem, in certain Cbeyond markets).

<sup>74</sup> See Denney Declaration ¶ 6.

<sup>75</sup> See *id.*

<sup>76</sup> See Darnell Declaration ¶ 6.

<sup>77</sup> See *id.*

incumbent LECs to interconnect with competitors at any technically feasible point for the “transmission and routing of telephone exchange service.”<sup>78</sup> This duty unquestionably requires incumbent LECs to establish interconnection for the “transmission and routing of telephone exchange service” between carriers that lack direct interconnection (i.e., tandem transit). Moreover, this interconnection duty would be meaningless unless it included the obligation to carry out the “transmission and routing” functions. *Second*, the language of Section 251(b)(5) confirms this conclusion. Under Section 251(b)(5), all LECs have the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”<sup>79</sup> The duty to establish reciprocal compensation for the “transport” of traffic implicitly includes the duty to transport the traffic to which the compensation applies. Finally, the duty of telecommunications carriers to provide “indirect[]” interconnection under Section 251(a) of the Act<sup>80</sup> would be meaningless if incumbent LECs did not have the duty to provide tandem transit service under Section 251(b)(5).<sup>81</sup> That is because it is generally not possible for two carriers to interconnect indirectly for the exchange of local traffic unless they can utilize the incumbent LEC’s ubiquitous network.

Furthermore, the Commission has jurisdiction to set prices for tandem transit service under Section 251(b)(5) because such service involves the “transport” of telecommunications.<sup>82</sup>

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<sup>78</sup> 47 U.S.C. § 251(c)(2)(A).

<sup>79</sup> *Id.* § 251(b)(5).

<sup>80</sup> *Id.* § 251(a)(1).

<sup>81</sup> *See* Petition of the Competitive Carriers of the South for Rate Setting, *In re BellSouth Telecommunications, Inc. Petition for Declaratory Ruling Regarding Transit Traffic*, Georgia PSC Dkt. No. 16772-U, at 4-7 (filed Apr. 7, 2008).

<sup>82</sup> *See* 47 C.F.R. § 51.701(c) (defining “transport” as “the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the

And, the Commission has the authority under Section 251(b)(5) to establish a cost-based pricing methodology applicable to the “compensation” paid to incumbent LECs. Accordingly, the FCC should require that such rates be set at TELRIC. Indeed, it would be absurd for the Commission to pursue reduction of access charges on the basis that they are above cost but permit providers of tandem transit service to charge above-cost rates when that service includes the exact same functionalities (with the exception of local switching).

## **VI. CONCLUSION**

For the foregoing reasons, the Commission should take the actions recommended herein by the Joint Commenters.

Respectfully submitted,

*/s/ Thomas Jones*

Thomas Jones

Nirali Patel

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*Attorneys for Cbeyond, Inc., Integra Telecom, Inc.,  
and tw telecom inc.*

April 18, 2011

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interconnection point between two carriers to the terminating carrier’s end office switch that directly serves the called party”). Tandem transit service consists of the transmission and tandem switching functions.

## **ATTACHMENT A**

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

In the Matter of	)	
	)	
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 an 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

**DECLARATION OF GREG DARNELL  
 ON BEHALF OF CBeyond, INC.**

1. I am Director of Local Exchange Carrier (“LEC”) Relations for Cbeyond Communications, LLC, the operating company of Cbeyond, Inc. (“Cbeyond”). In this position, I am responsible for negotiating and resolving all operational, financial, and contractual escalations between Cbeyond and other LECs. Prior to joining Cbeyond in March 2007, I was President of Public Servant Consulting, Inc., a consulting company providing unbundled network element cost analysis services and interconnection agreement negotiation services. Between January 1984 and January 2006, I was employed by MCI and Verizon, where I held numerous positions including Financial Analyst Telecommunications Cost, Supervisor Telecommunications Cost Analysis, Senior Financial Analyst Federal Regulatory, Manager Economic Analysis, Chief of Staff Southeast Region Carrier Management, Manager Vendor Relations, Senior Manager Regulatory Economics, and Executive Staff Member State

Regulatory. I am a graduate of the University of Maryland, where I received a B.A. in Behavioral and Social Sciences in Economics and an M.S. in Telecommunications Management. I have testified in more than 40 state regulatory proceedings on telecommunications cost, universal service, interconnection, intercarrier compensation, and other issues.

2. Cbeyond is a leading IP-based managed services provider that delivers integrated packages of high-speed Internet, local and long distance phone, and mobile services, as well as productivity-enhancing applications such as web hosting and virtual private networking, to approximately 57,000 small businesses in 14 markets throughout the United States (i.e., Atlanta, Boston, Chicago, Dallas-Fort Worth, Denver, Detroit, Houston, Los Angeles, Miami, Minneapolis/St. Paul, San Diego, the San Francisco Bay area, Seattle, and the greater Washington, D.C. area).

3. Where Cbeyond exchanges an insufficient level of traffic with another carrier to justify direct interconnection, Cbeyond purchases tandem transit service from an intermediary carrier and routes its traffic through the intermediary carrier's network. The purpose of this declaration is to describe (1) the methodology I used to determine legacy BellSouth's average TELRIC rate for tandem transit service; and (2) Cbeyond's experience with non-incumbent LEC providers of tandem transit service.

4. The table below shows BellSouth's TELRIC rates for tandem switching, common transport, common transport per mile, and shared tandem trunk port in each of the 9 states in legacy BellSouth's territory. I obtained these rates from state public utility commission orders and proceedings establishing rates for unbundled network elements and interconnection services consistent with the TELRIC methodology in 2001 and 2002. While these rates are from 2001 and 2002, there is no reason to expect that AT&T's costs of providing these services have



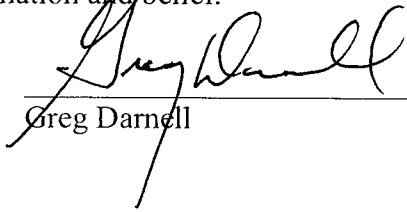
increased since that time. The TELRIC rate for tandem transit service listed for each state is the sum of the rates for tandem switching, common transport, common transport per mile at 10 miles, and shared tandem trunk port. The table shows that legacy BellSouth's average TELRIC rate for tandem transit service across its 9-state territory is \$0.0010432.

State	Tandem Switching TELRIC Rate	Common Transport TELRIC Rate	Common Transport Per Mile Rate	Shared Tandem Trunk Port Rate	Transit TELRIC @ 10 Miles Of Common Transport	Source
AL	0.0000950	0.0003224	0.0000023	0.0002015	0.0006419	AL PSC Dkt 27821, Order 5/31/02
FL	0.0001319	0.0004372	0.0000035	0.0002252	0.0008293	FL PSC Dkt 990649-TP, Order 10/18/01
GA	0.0006757	0.0004152	0.0000080	0.0002126	0.0013835	GA Dkt 10692-U, Order 2/1/00
KY	0.0001940	0.0007466	0.0000030	0.0002416	0.0012122	KY Admin Case 382, Order 12/18/01
LA	0.0001067	0.0003748	0.0000032	0.0003000	0.0008135	LA PSC Dkt U-24714 (sub A), Order 10/17/01
MS	0.0001723	0.0004541	0.0000026	0.0001828	0.0008352	MS PSC Dkt 2000-UA-999, Order 10/12/01
NC	0.0006000	0.0003400	0.0000100	0.0003000	0.0013400	NCUC Dkt P-100, Sub 133d, Order 12/11/01
SC	0.0001634	0.0004095	0.0000045	0.0002863	0.0009042	SC PSC Order 2001-1089, 11/30/01
TN	0.0009778	0.0003871	0.0000064	0.0000000	0.0014289	TRA Dkt 97-01262, Order 2/27/01
Legacy BellSouth Average	0.0003463	0.0004319	0.0000048	0.0002167	<b>0.0010432</b>	

5. AT&T currently offers competitive LECs, such as Cbeyond, a tandem transit rate of \$0.0025.

6. In certain markets, Cbeyond does have an alternative to the RBOC's tandem transit service for some tandem transit traffic. This alternative tandem transit provider is called Neutral Tandem. However, Neutral Tandem's service does not reach all of the networks (e.g., rural incumbent LEC networks) that subtend the RBOC's local tandem switch to which Cbeyond needs to route traffic. As such, Cbeyond must still use the RBOC's local tandem switch in every market. In addition, in order to make use of Neutral Tandem's limited tandem transit service, Cbeyond must incur the additional expense of disaggregating traffic and building additional facilities to reach Neutral Tandem's network.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

  
\_\_\_\_\_  
Greg Darnell

Dated: 4/13/11

## **ATTACHMENT B**

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

In the Matter of	)	
	)	
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 an 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

**DECLARATION OF DOUGLAS K. DENNEY  
ON BEHALF OF INTEGRA TELECOM, INC.**

1. I am Director of Costs and Policy for Integra Telecom, Inc. (“Integra”). In this role, my responsibilities include negotiating interconnection agreements, monitoring, and reviewing and analyzing the wholesale costs that Integra and its affiliates pay to carriers such as Qwest. I received a B.S. degree in Business Management from Phillips University in 1988. I spent three years doing graduate work at the University of Arizona in Economics, and then I transferred to Oregon State University, where I completed all of the requirements for a Ph.D. except my dissertation. My field of study was Industrial Organization, and I focused on cost models and the measurement of market power. I taught a variety of economics courses at the University of Arizona and Oregon State University. I was hired by AT&T in December 1996 and spent most of my time with AT&T analyzing cost models. In December 2004, I was hired by Eschelon Telecom, Inc., which was subsequently purchased by Integra, where I am presently

employed. I have participated in more than 50 proceedings in the 14-state Qwest region and have also testified about issues relating to the wholesale cost of local service (including universal service funding, unbundled network element pricing, geographic rate deaveraging, and competitive local exchange carrier (“LEC”) access rates) and interconnection agreement arbitrations.

2. Integra is the fourth largest competitive LEC in the United States. Integra owns and operates a 3,000-route mile metropolitan area network and a 5,000-mile long haul network. It provides voice, data, and Internet communications to thousands of business and carrier customers predominately in 11 Western states (Arizona, California, Colorado, Idaho, Minnesota, Montana, Nevada, North Dakota, Oregon, Utah, and Washington).

3. Where Integra is unable to justify direct interconnection (e.g., due to an insufficient level of traffic with another carrier), Integra purchases tandem transit service from an intermediary carrier and routes its traffic through the intermediary carrier’s network. The purpose of this declaration is to describe (1) the methodology I used to determine legacy Qwest’s average TELRIC rate for tandem transit service; and (2) Integra’s experience with non-incumbent LEC providers of tandem transit service.

4. The table below lists Qwest’s TELRIC rates for tandem switching and tandem transport in each of the 14 states in Qwest’s territory. I obtained these rates for each state (except Wyoming)<sup>1</sup> from the Exhibit As to Qwest’s Statements of Generally Available Terms (“SGATs”) on file with state public utility commissions.<sup>2</sup> These Exhibit As generally include

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<sup>1</sup> I obtained Qwest’s TELRIC rates for tandem switching and tandem transport in Wyoming from “Wyoming Exhibit A 12-17-10” to Qwest’s Negotiations Interconnection Agreement Template, *available at* <http://www.qwest.com/wholesale/clecs/nta.html#> (last visited Apr. 7, 2011).

<sup>2</sup> *See* <http://www.qwest.com/about/policy/sgats/> (last visited Apr. 7, 2011).

the latest state public utility commission Order TELRIC rates for the elements used to provide transit traffic. The TELRIC rate for tandem transit service listed for each state is the sum of the TELRIC rate for tandem switching and the TELRIC rate for tandem transport. The tandem transport component sometimes contains both a fixed and per-mile component. Qwest charges a state-specific mileage for the per-mile component, which I used in these calculations. The state-specific mileage for transit traffic is contained in the SGAT Exhibit A for each state. The table shows that Qwest’s average TELRIC rate for tandem transit service across its 14-state territory is \$0.001416. This average is weighted by the number of Qwest lines in each state, which I obtained from FCC Form 477 data.<sup>3</sup>

State	Recip Comp (LS + TS + TT)	Tandem Transit (TS + TT)	Tandem Switching (TS)	Tandem Transport (TT)	Local Switching (LS)	Lines (477)
Arizona	\$ 0.00231	\$ 0.001340	\$ 0.000550	\$ 0.000790	\$ 0.000970	1,494,281
Colorado	\$ 0.00272	\$ 0.001112	\$ 0.000690	\$ 0.000422	\$ 0.001610	1,576,581
Idaho	\$ 0.00275	\$ 0.001403	\$ 0.000690	\$ 0.000713	\$ 0.001343	357,914
Iowa	\$ 0.00359	\$ 0.002030	\$ 0.000690	\$ 0.001340	\$ 0.001558	659,527
Minnesota	\$ 0.00164	\$ 0.001640	\$ 0.001120	\$ 0.000520	\$ -	1,232,521
Montana	\$ 0.00351	\$ 0.001934	\$ 0.000690	\$ 0.001244	\$ 0.001574	208,388
Nebraska	\$ 0.00271	\$ 0.001455	\$ 0.000690	\$ 0.000765	\$ 0.001260	226,104
New Mexico	\$ 0.00372	\$ 0.001674	\$ 0.000853	\$ 0.000821	\$ 0.002046	563,084
North Dakota	\$ 0.00421	\$ 0.002728	\$ 0.002100	\$ 0.000628	\$ 0.001482	102,825
Oregon	\$ 0.00246	\$ 0.001125	\$ 0.000690	\$ 0.000435	\$ 0.001330	765,446
South Dakota	\$ 0.00189	\$ 0.001186	\$ 0.000690	\$ 0.000496	\$ 0.000702	116,871
Utah	\$ 0.00299	\$ 0.001366	\$ 0.000686	\$ 0.000680	\$ 0.001626	646,739
Washington	\$ 0.00222	\$ 0.001040	\$ 0.000690	\$ 0.000350	\$ 0.001178	1,378,685
Wyoming	\$ 0.00616	\$ 0.003537	\$ 0.002856	\$ 0.000681	\$ 0.002622	152,350
<b>Weighted Average</b>	<b>\$ 0.002639</b>	<b>\$ 0.001416</b>				

<sup>3</sup> See “Selected RBOC Local Telephone Data As of 6/30/10,” available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/RBOC\\_Local\\_Telephone\\_June\\_2010.xls](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/RBOC_Local_Telephone_June_2010.xls) (last visited Apr. 7, 2011).

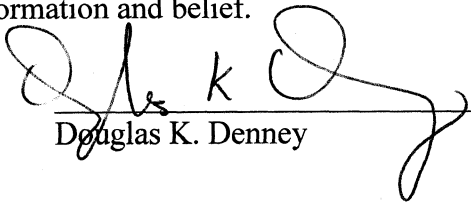
5. Qwest has taken the position that tandem transit service need not be priced at cost-based rates. Qwest offers a tandem transit service rate of \$0.0045 in its current Negotiations Interconnection Agreement Template, which Qwest offers as the baseline for negotiating new interconnection agreements.<sup>4</sup>

6. I have found that there are few alternative tandem transit service providers to Qwest in the geographic markets that Integra serves. In fact, in my experience, Qwest faces only one large competitor in the provision of tandem transit service in the majority of the markets in which Integra provides service. In Integra's larger markets, such as Minnesota, Oregon, and Washington, that competitor is Neutral Tandem. Neutral Tandem does not offer service in Integra's small markets, such as Idaho, North Dakota, Nevada, and Montana. In addition, Neutral Tandem's network does not reach all of the networks (such as rural incumbent LEC networks) to which Integra needs to route traffic.

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<sup>4</sup> See Exhibit A to Qwest's Negotiations Interconnection Agreement Template, *available at* <http://www.qwest.com/wholesale/clecs/nta.html#> (last visited Apr. 7, 2011).

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

  
\_\_\_\_\_  
Douglas K. Denney

Dated: 4/14/2011



BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

In the Matter of	)	
	)	
	)	
In the Matter of	)	
High-Cost Universal Service Support	)	WC Dkt. 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
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act of 1996	)	
	)	
Developing a Unified Intercarrier Compensation	)	CC Docket No. 01-92
Regime	)	
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36

**COMMENTS OF TW TELECOM INC., ONE COMMUNICATIONS CORP. AND  
CBeyond INC.**

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ATTORNEYS FOR TW TELECOM INC., ONE  
COMMUNICATIONS CORP. AND CBeyond  
INC.

November 26, 2008

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BEFORE THE  
 Federal Communications Commission  
 WASHINGTON, D.C.

In the Matter of	)	
	)	
	)	
In the Matter of	)	
High-Cost Universal Service Support	)	WC Dkt. No. 05-337
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Numbering Resource Optimization	)	CC Docket No. 99-200
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Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act of	)	
1996	)	
	)	
Developing a Unified Intercarrier Compensation	)	CC Docket No. 01-92
Regime	)	
	)	
Intercarrier Compensation for ISP-Bound	)	CC Docket No. 99-68
Traffic	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

**COMMENTS OF TW TELECOM INC., ONE COMMUNICATIONS CORP. AND  
 CBeyond INC.**

tw telecom inc. (“TWTC”), One Communications Corp. (“One”), and Cbeyond Inc. (“Cbeyond”) (collectively, the “Joint Commenters”), by their attorneys, hereby file these comments in response to the FNPRM released in the above referenced dockets on November 5.<sup>1</sup>

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<sup>1</sup> *High-Cost Universal Service Support et al.*, Order on Remand and Report & Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008) (“*FNPRM*”). References to

## **I. INTRODUCTION AND SUMMARY**

As Commissioners Adelstein, Copps, McDowell and Tate explained in their concurring joint statement (“Joint Statement”) released along with the FNPRM, the FCC has the opportunity in this proceeding to go a long way toward eliminating arbitrage opportunities in the intercarrier compensation regime. *First*, the FCC has taken an important first step in the comprehensive draft orders by recognizing that Sections 251(b)(5) and 252(d)(2) provide the strongest legal basis for FCC preemption of intrastate terminating access rates. Although the comprehensive draft orders implicate unnecessary legal and policy risks by proposing to set all terminating rates based on a new long run incremental cost (“LRIC”) methodology, the four commissioners propose the more prudent course of reducing intrastate terminating access rates to the level of interstate terminating access rates. If the FCC adopts this approach, it should do so by reducing intrastate rates in equal amounts each year over a five year transition period. During this time period, the FCC can determine the appropriate next steps for unifying terminating access rates, which can be most appropriately accomplished by applying the existing TELRIC methodology.

*Second*, the comprehensive draft orders sensibly limit the extent to which ILECs would be eligible for supplemental subsidy payments to compensate for reductions in terminating access revenues. No carrier, ILEC or CLEC, should be guaranteed a predetermined revenue stream. Furthermore, the FCC must recognize that it does not have the statutory authority to provide universal service funding for broadband internet access service. The FCC has classified that service as an information service and Section 254(c) of the Communications Act defines supported services as an evolving level of “telecommunications services.” The information

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the “draft order” refer to the “Chairman’s Draft Proposal,” attached as Appendix A to the FNPRM, unless otherwise noted. References to the “comprehensive draft orders” mean the draft orders attached as Appendix A and Appendix C collectively.

service and telecommunications service classifications are mutually exclusive. Accordingly, the FCC may not condition access to universal service funds on carriers' deployment of broadband, nor may it establish a broadband fund for lifeline customers.

There are a number of other reforms proposed in the draft orders that should be either modified or rejected, as follows.

- The FCC should modify its SLC rules to ensure that ILECs cannot recover reductions in terminating access rates in an inappropriate manner. The FCC should ensure that reductions in access revenues associated with multiline business customers are recovered solely from SLC increases for such customers.
- In reforming the universal service contribution methodology regime, the FCC must ensure that the relative burden on business and residential customers remains the same over time. Contributions needed to pay for future increases in the fund should not be solely or disproportionately recovered from business services.
- The proposed classification of IP/PSTN service as an information service in the comprehensive draft orders has no basis in law, is unnecessary for the advancement of the FCC's objective of unifying rates for traffic termination, and would place important carrier rights (such as UNE access) at risk.
- There is no basis for preempting state regulation of IP/PSTN service (other than of course intrastate terminating access rates pursuant to Section 251(b)(5)), and broad preemption of state regulation is not necessary to unify intercarrier rates.
- The FCC should apply access charges to IP/PSTN service and should do so in this rulemaking proceeding; waiting to do so in an adjudicatory or quasi-adjudicatory proceeding such as a forbearance proceeding risks retroactive application of access charges, which is clearly not in the public interest.
- The FCC should not adopt new interconnection architecture rules in this proceeding; changes to such rules are unnecessary and, as proposed, are not relevant to newly deployed IP-based networks.
- The FCC does not have the authority to regulate intrastate originating access rates.

## **II. DISCUSSION**

Given the complexity of this proceeding, the four Commissioners are correct that the FCC should focus on adopting pragmatic solutions to the most pressing problems associated with

intercarrier compensation and universal service.<sup>2</sup> Moreover, in doing so, the FCC should ensure that the adopted reforms do not undermine competition or unnecessarily burden certain types of customers.

**A. If The FCC Seeks To Unify Terminating Rates, It Should Unify Terminating Access Rates Pursuant To A Five-Year Transition.**

As recognized by the comprehensive draft orders, Sections 251(b)(5) and 252(d)(2) offer the soundest legal basis for preempting intrastate terminating access rates and unifying all terminating rates. However, if the FCC were to take any action on rate unification, it should focus on unifying interstate and intrastate access rates as the first step to unifying all terminating intercarrier rates subject to Section 251(b)(5) in a later order. Reducing intrastate terminating access rates to interstate terminating access rate levels would be a major step toward unifying all terminating rates, and it implicates a very large portion of LECs' terminating revenues. It therefore makes sense to establish an extended transition. Accordingly, interstate and intrastate access rates should be unified in equal steps over a period of five years. The FCC need not take any other steps right now. Reducing intrastate terminating access rates to the level of interstate access rates is a necessary component of any intercarrier compensation regime, as is a substantial transition. If the FCC commences access charge unification now while simultaneously assessing subsequent steps in the rate unification process, it will not in any way delay implementation of the final steps in the reform process.

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<sup>2</sup> See Joint Statement of Commissioners Copps, Adelstein, Tate and McDowell, attached to the FNPRM.

**B. There Is No Basis For The Proposal To Adopt LRIC As The Basis For Setting Traffic Termination Rates.**

There is no basis for the proposal in the comprehensive draft orders to adopt a new LRIC-based cost methodology for all terminating access rates. As the Joint Commenters have previously explained, the manner in which TELRIC calculates the costs of termination satisfies the “additional cost” standard of Section 252(d)(2). Furthermore, the TELRIC methodology appears to track closely the actual costs incurred by carriers when terminating traffic.<sup>3</sup> Recent evidence submitted into the record by CLECs demonstrates that TELRIC remains a reasonable approximation of the additional costs of termination.<sup>4</sup> If anything, the current TELRIC methodology appears to underestimate the costs of termination because it excludes the cost of shared loop facilities. This is an increasingly large portion of LECs’ costs because LECs are steadily replacing dedicated loop connections between a central office and an end user with shared fiber feeder loops and neighborhood passive optical networks. *See Willkie Oct. 14 Letter* at 5-6.

Moreover, the FCC failed to support its proposed LRIC-based pricing methodology with substantial evidence.<sup>5</sup> No party advocated adopting the LRIC-based proposal adopted in the

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<sup>3</sup> *See Ex Parte* Letter of Thomas Jones, Counsel, tw telecom *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, WC Dkt. Nos. 05-337 *et al.*, at 5-6 (filed Oct. 14, 2008) (“*Willkie Oct. 14 Letter*”).

<sup>4</sup> *See, e.g., Ex Parte* Letter of John J. Heitmann, Counsel, NuVox, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92 (filed Oct. 24, 2008) (attaching a declaration showing that TELRIC captures the “additional costs” of softswitches as well); *Ex Parte* Letter of Brad Mutchelknaus, Counsel, NuVox, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-92, WC Dkt. No. 04-36 (filed Oct 2, 2008) (attaching a study by QSI Consulting showing that NuVox’s actual cost of termination is well above \$0.0007).

<sup>5</sup> *See NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (“Substantial evidence is more than a scintilla.... It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” (internal quotation marks omitted)).

comprehensive draft orders. Nor did any party even attempt to show that such a methodology would produce reasonable rates and/or rates that would meet the “additional costs” standard of Section 252(d)(2). As Dr. Lee Selwyn explains in a paper filed today in the above-referenced dockets, the FCC’s proposed LRIC methodology is inconsistent with economic theory and would yield discriminatory outcomes that arbitrarily favor the large BOCs as compared to smaller, more specialized CLECs.<sup>6</sup> In fact, the FCC has not even attempted to supply a factual predicate for its proposed methodology. The FCC candidly admits that “there appear to be no cost studies or analysis in the record that attempt to estimate the terminations costs using Faulhaber’s definition of incremental cost.” *Draft Order* ¶ 253. Accordingly, it is unlikely that the FCC’s standard would withstand review on appeal, particularly if evidence supporting the suitability of the LRIC-based cost standard is not placed on the record.

In its FNPRM, the FCC asks whether “the terminating rate for all § 251(b)(5) traffic be set as: (i) a single, statewide rate; or (ii) a single rate per operating company.” *FNPRM* ¶ 41. Under the most reasonable reading of the statute, states should, as the FCC determined in the *Local Competition Order*, set rates for Sections 251(b)(5) traffic on an ILEC-by-ILEC basis.<sup>7</sup> Moreover, there is no reason to reverse the FCC’s finding in the *Local Competition Order* that CLEC rates should mirror the ILEC rate in that area because their costs (at least as measured pursuant to TELRIC) are likely to be similar. *See Local Competition Order*. Of course, this is not always the case. The FCC should therefore retain the rule that, if “a competing local service

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<sup>6</sup> See Declaration of Dr. Lee L. Selwyn, attached to *Ex Parte* Letter of Brad Mutchelknaus *et al.*, to Marlene Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, WC Dkt. Nos. 05-337 *et al.* (filed Nov. 26, 2008).

<sup>7</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1085-1086 (“*Local Competition Order*”).



provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study” to establish its own rates. *See id.* ¶ 1089. To be sure, as the FCC has recognized, only the largest carriers can practically undertake such a study. *See id.* ¶ 1085. Thus, granting carriers the right to demonstrate their own costs (something the draft orders do not even do), is no substitute for the adoption of a sound methodology for determining “additional costs” under Section 252(d)(2). It is simply one aspect of any cost-based methodology.

**C. Any Alternative Cost Recovery Mechanism Should Be Limited And Available to CLECs.**

If the FCC adopts any “make whole” mechanism to compensate ILECs for reduced terminating access revenues, it should adopt the approach set forth in the comprehensive draft orders under which ILECs’ access to such make-whole subsidies would be limited. In particular, the FCC should adopt the “normal profit” test for determining whether a price-cap ILEC would be eligible to draw from the fund. *See Draft Order* ¶ 317. Moreover, if an ILEC is eligible for make-whole payments pursuant to this test, CLECs should be equally eligible pursuant to the same test.

**D. The FCC May Not Subsidize Broadband Information Services With Universal Service Funding**

The comprehensive draft orders propose (1) conditioning universal service support on carriers’ deployment of broadband (*see Draft Order* ¶¶ 19-25), and (2) establishing a \$300 million “pilot” broadband fund for lifeline customers. *See id.* ¶¶ 65-91. However, the FCC does not have the authority to adopt either proposal.

In the *Wireline Broadband Order*, the FCC determined that broadband is an information service.<sup>8</sup> The Act is crystal clear that universal service funding is only permitted for an “evolving level of telecommunications services.” 47 U.S.C. § 254(c)(1). The FCC has concluded that a service cannot simultaneously qualify as an information service and a telecommunications service.<sup>9</sup> Accordingly, the FCC may not subsidize broadband deployment through universal service mechanisms.

The FCC asserts that conditioning universal service support on broadband deployment is consistent with the “objectives” of Section 706. *See Draft Order* ¶ 21. But Section 706 is not an affirmative grant of authority; it merely “directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services.”<sup>10</sup> Section 706 cannot therefore support the FCC’s legal theory.

Similarly, the FCC seeks to justify its broadband pilot program by asserting that it has the authority to commence that program under Sections 1, 4(i), 201, 205, and 254 of the Act. *See Draft Order* ¶ 71. But the FCC must do more than summarily invoke section 1 and the suggestion of ancillary jurisdiction as a talisman to justify what it could not otherwise do under

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<sup>8</sup> *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 12 (2005).

<sup>9</sup> *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, Order on Remand, 16 FCC Rcd 9751, ¶ 36 (2001) (affirming its prior findings that “‘telecommunications service’ and ‘information service’ are mutually exclusive”).

<sup>10</sup> *See Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Memorandum Opinion & Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶ 69 (1998) (“After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress’ policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods.”).

the Act. While it is unlikely that the FCC could justify its broadband pilot program under its ancillary jurisdiction, it does not even attempt to undertake the ancillary legal analysis.

The FCC also cites to statutory principles underlying the universal service program as an additional legal basis for its pilot program. *See id.* ¶ 72. But the FCC cannot rely on congressional intent when the language of a statutory provision is clear on its face.<sup>11</sup> The reference to “telecommunications service” in Section 254(c) could not be clearer, and there is therefore no basis for even considering congressional intent that would run contrary to the terms of the Act.

**E. The FCC Should Appropriately Limit ILECs’ Ability To Recover Foregone Multiline Business Access Revenues From Residential SLCs**

As the comprehensive draft orders propose, ILECs should be allowed to recover foregone terminating access revenues from SLC cap increases. *See Draft Order* ¶¶ 296-310. As the Joint Commenters have explained, however, the FCC should establish rules to ensure that ILECs cannot subsidize end-user rates or SLCs in product markets and geographic markets subject to more competition (e.g., enterprise market and urban markets) with SLC increases in areas subject to less competition (e.g., mass market and rural markets). *See Willkie Oct. 14 Letter* at 13-14. As explained, absent such protections, competition in downstream retail markets will be distorted. *See id.* Thus, although the comprehensive draft orders do not address this issue, the FCC should do so in any order adopted in this proceeding. *See id.*

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<sup>11</sup> *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) (“[I]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

**F. The FCC Should Not Adopt A New USF Contribution Methodology For Business Services At This Time.**

The draft orders include proposals for two different approaches to universal service contribution methodology reform. In the first (found in the comprehensive draft orders), the FCC would assess a \$1 contribution on residential telephone numbers. USF requirements not covered by residential telephone number contributions would be funded by business customers on a per-connection basis with the per-connection contribution level set pursuant to an FNPRM. *See Draft Order ¶¶ 105-134.* In the second (found in Appendix B), the FCC would impose an \$.85 per number assessment on all telephone numbers (both business and residential), and the FCC would also impose a connection-based charge on business customers that would vary depending on the capacity of the business connection. *See Appendix B ¶¶ 52-82.*

As the Joint Commenters have explained, adoption of either of these methodologies would result in enormous and arbitrary increases in the contributions of certain types of business customers (e.g., universities, hospitals, charitable organizations and government agencies). *Willkie Oct. 14 Letter* at 16-17. Many or most of these customers would likely pay these increases since carriers generally pass USF contributions through to end users. It is not obvious how the FCC could design a new USF contribution methodology for business services that does not cause large increases in certain businesses' contributions. Nor is reforming USF contributions a necessary component of or precondition for intercarrier compensation reform. The FCC should and can proceed with caution by studying the real-world consequences of reform proposals before rashly adopting an approach. Accordingly, the FCC should follow the approach taken in the Chairman's draft orders in Appendices A and C, and seek comprehensive industry input on the most appropriate means of reforming USF contributions for business service prior to adopting new rules.

Regardless of the proposal ultimately adopted, the FCC must ensure that businesses are not required to bear a disproportionate universal service contribution burden. In other words, the relative business/residential contribution percentage must remain constant. For example, if a \$1 per residential number assessment means that 45 percent of the fund would be paid for by businesses, the FCC must ensure that this percentage remains the same over time. Therefore, if the size of the fund were to increase in a particular year by 10 percent, and the amount of assessable numbers remained the same, the per number contribution for residential customers should increase by 10 percent as well.

**G. The FCC Should Not Classify VoIP As An Information Service.**

The comprehensive draft orders classify voice service that originates in IP and terminates on the PSTN (“IP/PSTN voice service”) as an information service. *See Draft Order* ¶ 209. This classification has no basis in law, and it does not advance the FCC’s goal of unifying intercarrier compensation rates.

The proposed information service classification is based on the fact that a net protocol conversion takes place during an IP/PSTN communication. But the mere presence of protocol conversion in IP/PSTN traffic is not a sound basis for classifying IP/PSTN traffic as an information service. As the Joint Commenters have explained previously, there are many instances, for example in traffic exchanged between CMRS networks, where a net protocol conversion takes place (e.g., between GSM and CDMA). Yet services that undergo such conversions remain classified as telecommunications services.<sup>12</sup>

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<sup>12</sup> *See* Comments of Time Warner Telecom, WC Dkt. No. 04-36, at 25 (May 28, 2004), attached to *Ex Parte* Letter of Jonathan Lechter, Counsel, tw telecom inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, CC Dkt. Nos. 05-337 *et al.* (filed Oct. 24, 2008).

The FCC observes that a service is not classified as an information service where there is “no change in an existing service, but merely a change in electrical interface characteristics to facilitate transitional introduction of new technology.” *Draft Order* ¶ 210 (internal citation omitted). The FCC argues that IP/PSTN services do not fall within this rule because IP/PSTN services are not “mere changes to the underlying technology used for ‘existing’ basic services, but are entirely new services with characteristics in many ways distinct from pre-existing telephone services.” *Id.* But this is simply not the case. As tw telecom has explained in detail, there are no fundamental differences between circuit-switched and VoIP services.<sup>13</sup> Any differences are differences of degree, not of kind.<sup>14</sup>

Under the FCC’s logic, there are any number of services that could be classified as information services, including many transmission services currently demanded by businesses. For example, carrier Ethernet service could be transformed into an information service because (1) carriers offer Ethernet users protocol conversion as part of the Ethernet service and (2) Ethernet service provides better, more robust features than legacy ATM and TDM services. Yet the FCC has clearly stated that Ethernet service is a telecommunications service. *See Wireline Broadband Order* ¶ 9.

In addition, many medium and larger sized companies are served by networks that involve multiple net protocol conversions. A multi-location customer might be served at some locations with a TDM-based service, at another location with an ATM-based service and at

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<sup>13</sup> *See Ex Parte* Letter of Thomas Jones, Counsel, tw telecom inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, CC Dkt. Nos. 05-337 *et al.* (filed Oct. 23, 2008) (“*Willkie Oct. 23 Letter*”).

<sup>14</sup> For example, while providers of both circuit-switched and VoIP services can tell the user when members of a work group are currently talking on the phone through an on-screen display, the same functionality can be provided by lights on a circuit-switched office handset. *See id.* at 5.

another location with Ethernet-based service. Carriers provide the protocol conversion functionality so that all of these locations can exchange data. Like IP/PSTN service, Ethernet service has substantial advantages over older transmission technologies with similar, but less robust features. As a result of these advantages, Ethernet, like IP/PSTN service, is slowly replacing older transmission technologies. Classifying Ethernet service as an information service would therefore foreclose FCC jurisdiction to regulate what will become the PSTN in the future for business customers. This change would be the result of the adoption of a new technology, one similar to the replacement of analog switches with digital switches. Such a change does not eliminate the ILECs' market power (derived from their control over fiber and copper bottleneck end user connections) or any other basis for continued regulation, and it therefore should not be the basis for reclassification as an information service.

The classification of IP/PSTN service as an information service would also place important carrier rights at risk. As carriers continue to migrate their networks to IP, they would no longer be providing "telecommunications service" under the proposed definition in the comprehensive draft orders. A competitor is eligible for certain of the bedrock Section 251(c) rights, including arguably UNE access and collocation, only to the extent that the competitor is providing a telecommunications service. *See* 47 U.S.C. §§ 251(c)(3), (6). If basic voice service, provided via IP, were classified as an information service, there is a substantial risk that competitors would be deemed to not qualify for these critical inputs.

Moreover, there is no need for the FCC to classify IP/PSTN traffic as an information service in order to unify intercarrier terminating rates. Indeed, under the legal theory set forth in the comprehensive draft orders, the FCC could unify all terminating rates, including rates for IP/PSTN traffic, because IP/PSTN service is provided via telecommunications and therefore

could be regulated pursuant to Section 251(b)(5). *See Draft Order* n.564. Therefore, obtaining jurisdiction over IP/PSTN traffic under Section 251(b)(5) is possible regardless of whether IP/PSTN service itself is classified as a telecommunications or as an information service.

**H. There Is No Basis For Sweeping FCC Preemption Of State Regulation Of IP/PSTN Service.**

The comprehensive draft orders propose preempting state economic and entry regulation of all IP/PSTN services. The draft orders do not include an explicit legal rationale for such preemption, but the drafts imply that preemption is permissible simply because the FCC is classifying IP/PSTN service as an information service.<sup>15</sup> This is incorrect. As the Ninth Circuit has held, states have the jurisdiction to regulate intrastate information services.<sup>16</sup>

As TWTC has explained, absent an express grant of statutory authority (which does not exist in this context), the FCC may preempt state regulation of a service (either telecommunications service or information service) with an intrastate aspect only if the requirements of the “impossibility doctrine” are met. As the FCC acknowledged in the *Vonage Order*, under that doctrine, the FCC may preempt state regulation of services that have an intrastate component if (1) it is impossible or impractical to separate the interstate and intrastate components of the service (the “inseverability” prong) and (2) the state regulation at issue would thwart or negate the implementation of a defined federal policy (the “purpose” prong). In the *Vonage Order*,<sup>17</sup> the FCC found that the test was met with respect to state entry and economic

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<sup>15</sup> *See Draft Order* ¶ 211 (“We preempt any state efforts to impose ‘traditional ‘telephone company’ regulations’ as they relate to IP/PSTN information services as inconsistent with our generally unregulated treatment of information services.”).

<sup>16</sup> *California v FCC*, 905 F.2d 1217, 1243 (9<sup>th</sup> Cir. 1990) (“*California I*”).

<sup>17</sup> *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd



regulation of nomadic VoIP service. *See Vonage Order* ¶¶ 23-37. As TWTC explained at length, neither prong is met with respect to geographically fixed VoIP service. *See generally Willkie Oct. 23 Letter*. But the discussion in the comprehensive draft orders does not even *consider* whether the impossibility doctrine is satisfied. The draft orders simply assert, with no analysis, that the preemptive effect of the *Vonage Order* applies to all IP/PSTN services. *See Draft Order* ¶ 211.

Furthermore, preemption of state regulation of IP/PSTN service is not relevant to the FCC's goal of unifying all intercarrier rates (except to the extent that the FCC must preempt intrastate terminating access rates, which is not relevant here). For example, whether a state has the authority to regulate ILEC end user rates for intrastate IP voice service simply has no relevance to intercarrier compensation reform. In addition, as the Joint Commenters have argued, preventing states from regulating intrastate voice service would be affirmatively harmful to competition. *See Willkie Oct. 23 Letter* at 8-11.

**I. The FCC Should Apply Access Charges On A Prospective Basis To IP/PSTN Traffic.**

While the comprehensive draft orders are not entirely clear on the subject, they appear to say that the FCC should not decide whether access charges apply to VoIP (it will “maintain the status quo”) until the issue becomes moot when reciprocal compensation rates and access rates equalize during its planned 10 year transition. *See Draft Order* n.564. Under the “*status quo*,” private parties have litigated the application of access charges to VoIP at state Commissions and in the courts. Clarifying whether access charges apply would benefit all carriers. Thus, as the

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22404 (2004) (“*Vonage Order*”), *aff'd sub nom. Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

Joint Commenters have argued, it would be the best policy for the FCC to apply access charges to VoIP in the future, and the easiest way to do so would be to simply classify VoIP service as a telecommunications service.<sup>18</sup>

If the FCC applies access charges to VoIP, it must ensure that access charges do not apply retroactively.<sup>19</sup> Retroactive application would upset settled business expectations and would invite a litigation nightmare as parties fight over the nature and jurisdiction of years-old traffic. Carriers currently track the jurisdiction of and apply intercarrier rates to VoIP traffic based on (1) the trunk group over which the VoIP traffic is delivered (switched access rates apply to traffic delivered over Feature Group D trunks and reciprocal compensation rates apply to traffic delivered over local trunks), and (2) traffic studies (e.g., percentage of interstate usage studies). If these methods prove to be unreliable, it is extremely hard, if not impossible, for a terminating carrier to go back later and determine the jurisdiction of the traffic sent. Retroactive review of VoIP traffic termination would be extraordinarily burdensome.

The FCC can all but eliminate the need for such a review if it classifies VoIP as a telecommunications service in this proceeding. The Supreme Court has held that retroactive application of a rule established in a rulemaking proceeding is not permitted unless Congress has expressly authorized such application.<sup>20</sup> In his oft-cited concurrence in *Bowen*, Justice Scalia

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<sup>18</sup> See TWTC Comments, WC Dkt. No. 04-36, at 42 (filed May 28, 2004).

<sup>19</sup> See *Ex Parte* Letter of Thomas Jones, Counsel, TWTC, One Communications Corp., and Cbeyond Inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, CC Dkt. Nos. 05-337 *et al.*, at 1 (filed Oct. 28, 2008).

<sup>20</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("*Bowen*"), *affirming*, *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987). See also *MPAA v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992) ("The holding of *Bowen* is that agencies do not have the authority to promulgate retroactive rules unless Congress has expressly said they do.")

explained that the Administrative Procedure Act requires that legislative rules (rules established in a rulemaking) be given prospective effect only.<sup>21</sup> The Supreme Court has held that a rule is “retroactive” where it (1) impairs rights a party possessed when he acted; (2) increases a party’s liability for past conduct; or (3) imposes new duties with respect to transactions already completed.<sup>22</sup> Here, application of access charges to VoIP traffic that has already been terminated would clearly come within the definition of “retroactive” because such action would increase a LEC’s liability for past conduct or impose a new duty with respect to a transaction that has already been completed. Retroactive application of access charges to VoIP traffic would also alter the legal consequences of past actions by making termination of VoIP traffic without paying access charges unlawful.

A determination in this proceeding that access charges apply to VoIP traffic could be made based on the record established in response to the IP-Enabled Services or Intercarrier Compensation FNPRMs, and would therefore be a decision in a rulemaking.<sup>23</sup> As a result, if the FCC were to modify the comprehensive draft orders to make clear that access charges apply, retroactive application of such a rule would be impermissible because the Communications Act does not expressly permit such an application.

However, if the FCC were to determine in an adjudicatory or quasi-adjudicatory proceeding that access charges apply to VoIP, it may be more difficult to avoid retroactive

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<sup>21</sup> See *Bowen*, 488 U.S. at 216-20 (Scalia, J., concurring).

<sup>22</sup> See *DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

<sup>23</sup> See, e.g., *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 80 (2005) (seeking comment on the application of intrastate access charges to VoIP); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 32 (2004) (seeking comment on whether access charges should apply to VoIP).

application. There are currently two forbearance petitions pending before the FCC, one filed by Feature Group IP (“FGIP”) and one filed by Embarq.<sup>24</sup> The FCC must rule on the FGIP petition by January 21, 2009 or it will be granted by default. Both of these petitions ask that the FCC make a determination of whether access charges apply to VoIP. As the Joint Commenters and others have argued, because of substantial procedural defects in these petitions, the FCC may dispose of them without making a determination on the merits of whether access charges apply to VoIP.<sup>25</sup> However, if, in ruling on these petitions, the FCC were to determine that access charges apply to VoIP, the FCC would likely be required to conduct a retroactivity analysis.<sup>26</sup> Even if the FCC were to determine that access charges should not apply retroactively, there is no guarantee it would be upheld on appeal. All of this just shows that the far better course is for the FCC to rule in this rulemaking proceeding that access charges apply to VoIP service and that they apply prospectively only.

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<sup>24</sup> See Petition of Embarq Local Operating Companies for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b) and Commission Orders on the ESP Exemption, WC Dkt. No. 08-8 (filed Jan. 11, 2008); Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1) and Rule 69.5(b), WC Dkt. No. 07-256 (filed Oct. 23, 2007).

<sup>25</sup> See Comments of Time Warner Telecom Inc., Cbeyond Inc. and One Communications Corp., WC Dkt. No. 08-8, at 7-8 (filed Feb. 19, 2008) (arguing that Embarq can only apply access charges to VoIP through an affirmative rule change, not forbearance, and that Section 10 does not permit Embarq to obtain relief from rules that apply to other carriers). See also Comments of Time Warner Telecom Inc., Cbeyond Inc. and One Communications Corp., WC Dkt. No. 07-256, at 3-4, 7-8 (filed Feb. 19, 2008) (arguing that FGIP may not “clarify” that the ESP exemption applies to FGIP through a forbearance petition and Section 10 does not permit FGIP to obtain relief from rules that apply to other carriers).

<sup>26</sup> See *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (holding that “equity and fairness” determine whether a decision applies retroactively).

**J. The FCC Should Not Alter The Rules Governing Interconnection Architecture.**

The comprehensive draft orders incorporate *in toto* AT&T's proposal for mandated interconnection architecture. *See Draft Order* ¶ 275. The FCC should not include these rules in any final order adopted. As the Joint Commenters have explained, (1) there is no reason to alter current interconnection arrangements that have been in place for decades in some cases; (2) there is no logical connection between changes to interconnection architecture and intercarrier compensation reform; and (3) the rule changes included in the comprehensive draft orders would violate CLECs' statutory right to interconnect at any "technically feasible point." *See Willkie Oct. 14 Letter* at 15. Furthermore, it makes no sense to formulate interconnection architecture rules for circuit switched networks that will take effect in 10 years when most carriers' networks will likely be purely or largely IP-based (and therefore configured very differently) by that time. The FCC's proposal is akin to setting standards for whale oil lamps just as the incandescent bulb begins to dominate the lighting market. The FCC should therefore forego further consideration of interconnection architecture rules.

**K. There Is No Basis For Reforming The Rules Governing Originating Access Charges.**

The comprehensive draft orders propose capping originating interstate and intrastate access rates and the associated NPRM seeks comment on how to reduce originating access rates to zero. *See Draft Order* ¶ 229. But there is little point in this inquiry because the FCC likely does not have the authority to set originating intrastate access rates. For example, Section 251(b)(5), the most logical basis for FCC authority over originating access, refers solely to "termination" of traffic. Nor does any other provision of the Communications Act grant the FCC authority over intrastate "originating" services.

In any event, with fewer stand-alone long distance providers, the volume of originating access minutes has no doubt declined substantially in the last few years, and this trend will almost certainly continue. As a result, any arbitrage opportunities associated with what might be above-cost originating intrastate access rates are likely minimal and will continue to decline. Rather than attempting to address an issue over which the FCC lacks authority and which is gradually disappearing, the FCC should focus instead on reforming terminating rates in this proceeding.

### **III. CONCLUSION**

The FCC should adopt the foregoing proposals for the reasons discussed above.

/s/

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ATTORNEYS FOR TW TELECOM INC., ONE  
COMMUNICATIONS CORP. AND CBeyond  
INC.

November 26, 2008

**Request:**

22. Do you provide intrastate toll and interstate toll services in Kentucky? If not, do you have an affiliate that provides those services? If so, provide the names of the affiliates and the type of service they provide.

**Response:** Yes. *See* TWTC's Interexchange Services Tariff (Kentucky Tariff No. 16) on file with the Kentucky PSC.

**Request:**

23. For each year from 2001 through 2010, and for 2011 most recent data available, for you and your affiliates (if any), please provide the following:

- a. Total Kentucky *intrastate* toll MOUs and revenues;
- b. Total Kentucky *interstate* toll MOUs and revenues.

**Response:** OBJECTION. This request is overly broad and unduly burdensome, particularly because it seeks information that is of dubious relevance to this investigation.

Without waiver of the objection, TWTC provides the following responsive information:

- a. Total Kentucky intrastate toll MOUs and revenues:

Time Period	MOU	Revenue
Jan. – May 2011		
2010	— redacted —	
2009		

- b. Total Kentucky interstate toll MOUs and revenues:

Time Period	MOU	Revenue
Jan. – May 2011		
2010	— redacted —	
2009		



**Request:**

24. Do you have any elasticity studies for local or toll services? If so, please produce copies of them.

**Response:** No.

**Request:**

25. Provide the total amount of revenues and volumes for retail vertical services for each year from 2001 through 2010, and for 2011 most recent data available.

**Response:** OBJECTION. This request is overly broad and unduly burdensome, particularly because it seeks information that is of dubious relevance to this investigation. It is also insufficiently precise as to either the revenues or volumes requested.

Without waiver of the objection, TWTC states that it does not routinely maintain data of the sort and in the format requested and did not complete a special study to provide responsive information as to any period of time. Note: TWTC's records go back to 2007 in Kentucky.

**Request:**

26. Provide a schedule reflecting your local rates for residential and business customers by rate group for the last 10 years.

**Response:** OBJECTION. This request is unduly burdensome to the extent that the requested “schedule” is other than tariffs that are publicly available.

Without waiver of the objection, TWTC refers AT&T to its current and past (superseded) tariffs on file with the Kentucky PSC.