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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Inter-Carrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68

COMMENTS OF VIRGIN ISLANDS TELEPHONE COMPANY

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April 12, 1999

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TABLE OF CONTENTS

Page

SUMMARY i

I. INTRODUCTION 2

II. THE FCC CANNOT CONFER UPON THE STATES JURISDICTION TO ESTABLISH COMPENSATION MECHANISMS FOR THE CARRIAGE OF INTERSTATE TRAFFIC 4

A. The Commission Cannot Delegate Its Jurisdiction To Set Compensation Under Section 201(a) Of The Communications Act 5

B. Inter-Carrier Compensation for ISP-bound Traffic Is Not a Proper Subject For State Arbitration 8

III. ANY FEDERAL MECHANISM FOR CALCULATING INTER-CARRIER COMPENSATION SHOULD BE COST-BASED 11

IV. THE COMMISSION SHOULD REJECT A CONSTRUCTION OF THE ACT'S "MOST FAVORED NATION" PROVISION THAT CONFLICTS WITH THE NEGOTIATION AND ARBITRATION REQUIREMENTS OF SECTION 252 15

V. CONCLUSION 17

SUMMARY

The Virgin Islands Telephone Company ("Vitelco"), the incumbent local exchange carrier for the United States Virgin Islands, covering the islands of St. Croix, St. Thomas, St. John and Water Island, hereby submits these Comments in response to the FCC's Declaratory Ruling and Notice of Proposed Rulemaking of February 26, 1999. Vitelco asks the Commission to take a balanced approach to establishing a mechanism for inter-carrier compensation for ISP-bound traffic by: (1) holding that state commission's have no jurisdiction to establish inter-carrier compensation and (2) establishing a federal, cost-based compensation mechanism.

The FCC's decision that Internet traffic is substantially interstate in character removes the issue of inter-carrier compensation from the jurisdiction of the state commissions. Section 251 of the Communications Act requires ILECs to negotiate reciprocal compensation arrangements only with respect to *local* traffic, and Section 252 gives States the authority to arbitrate only those issues enumerated in Section 251. Moreover, Section 201(a) of the Act, which confers upon the FCC authority to establish interstate rates, is non-delegable consistent with the distinct jurisdictions of the FCC and the States as established by the Congress and confirmed by the Supreme Court. Accordingly, any mechanism for determining inter-carrier compensation for the termination of ISP-bound traffic must be federal in character.

Vitelco submits that, consistent with the Act's goals of encouraging competition for the benefit of consumers, the FCC should not freeze in place the patchwork of compensation mechanisms established by state commissions by allowing CLECs to "opt-in" to favorable provisions of expired or soon-to-expire interconnection agreements. Instead, the Agency should adopt a federal, cost-based compensation mechanism and provide for the recovery of all costs incurred in carrying ISP-bound traffic. Thus, if ILEC to CLEC payments are required under a

federal compensation regime, the FCC must provide a mechanism, such as a revenue source, from which CLEC payments will be funded. A first step in this regard would be to adopt the meet-point billing system currently used to determine inter-carrier compensation for the carriage of long-distance traffic. While a meet-point regime will not, because of the ESP exemption, provide for full recovery of all costs incurred in carrying ISP-bound traffic, it will eliminate the subsidy ILECs presently pay to CLECs for the termination of such traffic and more closely tie compensation to the manner in which costs are actually incurred.

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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Inter-Carrier Compensation for ISP-Bound Traffic	CC Docket No. 99-68

COMMENTS OF VIRGIN ISLANDS TELEPHONE COMPANY

The Virgin Islands Telephone Company ("Vitelco") respectfully submits these comments in response to the Notice of Proposed Rulemaking issued in the above captioned docket. As demonstrated more fully below, the Federal Communications Commission ("FCC" or "Commission") is the only body with legal authority to establish inter-carrier compensation rates for ISP-bound traffic, which is jurisdictionally interstate. Moreover, because reciprocal compensation is applicable only to *local* telecommunications and further is premised on two-way traffic, it is not the appropriate compensation mechanism for ISP-bound traffic. Rather, a compensation mechanism applicable to interstate voice traffic, such as meet-point billing, is more appropriate for ISP-bound traffic. Accordingly, Vitelco urges the Commission to establish a federal, cost-based, efficient inter-carrier compensation mechanism.

I. INTRODUCTION

Vitelco is the incumbent local exchange carrier for the United States Virgin Islands covering the islands of St. Croix, St. Thomas, St. John and Water Island. Because a significant portion of Vitelco's service area is rural and insular, and the Virgin Islands incur frequent, significant damages from hurricanes and other natural events, Vitelco's costs in transmitting telecommunications services are higher than the national average. As such, Vitelco has a serious interest in ensuring that the Commission's regulations, or lack thereof, do not result in Vitelco being unable to recover its costs for transmitting calls. In the *Declaratory Ruling*, the FCC notes the "strong federal interest" in ensuring that regulation does not impede the growth of the Internet.[1] Vitelco submits that the Commission also has a strong interest in promoting universal local telephone service at reasonable rates. Thus, by these Comments, Vitelco asks the Agency to carefully consider the interests of both ILECs and ISPs and to take a balanced approach to establishing an inter-carrier compensation regime.

Vitelco fully supports the FCC's determination that ISP-bound traffic is largely interstate. Vitelco is perplexed, however, that despite the foregoing finding, the Agency has concluded that state commissions can set inter-carrier compensation requirements for such interstate traffic. The FCC's conclusion is untenable because it flies in the face of the Communications Act, as amended ("Act"), which clearly demarcates federal and state jurisdiction and expressly limits the issues that may be arbitrated by state commissions.

ISP-bound traffic is jurisdictionally interstate. Therefore, the Commission cannot delegate to the States its authority under Section 201(a) to establish compensation rates for such

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 99-68 (Feb. 26, 1999) ("*Declaratory Ruling*") at ¶ 6.

interstate traffic. Further, because of its interstate nature, ISP-bound traffic is not subject to reciprocal compensation obligations imposed under Section 251(b)(5). As such, inter-carrier compensation for ISP-bound traffic can never be subject to compulsory state arbitration under Section 252(b).

The absence of a federal compensation mechanism for LECs carrying ISP-bound traffic has left the window open for the States to haphazardly impose varying compensation mechanisms on ILECs, most of which have resulted in ILECs providing substantial subsidies to CLECs. Vitelco urges the Commission not to freeze this patchwork in place, in particular by avoiding a construction of the "Most Favored Nation" provision of Section 252 that allows CLECs to "opt-in" to favorable provisions of expired interconnection agreements or agreements nearing expiration. Instead, the Commission should adopt a cost-based inter-carrier compensation mechanism for ISP-bound traffic that is fair for all carriers involved.

Reciprocal compensation, however, can never be the appropriate compensation mechanism for ISP-bound traffic.[2] ISP-bound traffic is one-way. Thus, there is no reciprocity for this traffic as is contemplated in the context of interstate voice traffic. While CLECs receive a windfall from reciprocal compensation, ILECs such as Vitelco suffer irreparable harm because they cannot recover their costs for originating and transmitting ISP-bound traffic.

Vitelco believes that meet-point billing would be an appropriate interim compensation mechanism for ISP-bound traffic transmitted by multiple LECs. It has worked favorably for multiple providers of interstate voice traffic—an analogous context—and thus should work well

[2] These Comments are limited solely to the topic of inter-carrier compensation for carriage of Internet dial-up traffic. Vitelco expresses no view on the compensation mechanism that should govern, for example, phone-to-phone IP telephony.

here. Vitelco does recognize, however, that because of the ESP access charge exemption ILECs cannot recoup their costs from ISPs. Vitelco is not asking the Agency to revisit the ESP exemption at this time. Nevertheless, until a federal compensation mechanism is adopted, Vitelco requests that the Commission preclude state commissions from requiring ILECs to pay CLECs reciprocal compensation for this traffic. A meet-point billing mechanism would effectively accomplish this goal by placing the responsibility on CLECs to recover their own costs from sources other than ILECs.

Any federal, cost-based compensation mechanism eventually adopted should not reinstate the ILEC to CLEC subsidy. However, to the extent that the FCC establishes a compensation mechanism that requires ILEC to CLEC payments, the FCC must also establish a mechanism, such as a revenue source, from which the payments will be funded. Such a mechanism can either be end user payments or a charge that can be levied on ISPs. But the FCC cannot force payments to CLECs from revenues that are derived from the general body of ratepayers or access customers. Such a decision would be setting up a new subsidy system that is prohibited by Section 254 of the Communications Act.

II. THE FCC CANNOT CONFER UPON THE STATES JURISDICTION TO ESTABLISH COMPENSATION MECHANISMS FOR THE CARRIAGE OF INTERSTATE TRAFFIC

Vitelco fully supports the Commission's determination in the *Declaratory Ruling* that a "substantial portion" of ISP-bound traffic is interstate.[3] Citing established precedent, the Agency concluded that ISP-traffic must be examined on an end-to-end basis, rather than separating the

[3] *Declaratory Ruling* at ¶¶ 18, 20.

traffic into two transmission segments—one local and one interstate.[4] Because ISP-traffic is "largely interstate"—as determined by the Agency and supported by case law[5]— this traffic must be treated as interstate communications for jurisdictional purposes. Accordingly, as demonstrated below, the FCC is the only body with the authority to establish a compensation mechanism for ISP-bound traffic and this power cannot be delegated to the States.

A. The Commission Cannot Delegate Its Jurisdiction To Set Compensation Under Section 201(a) Of The Communications Act.

The Congress, in passing the Communications Act of 1934, established a "dual system of state and federal regulation of telephone service."[6] Congress granted the FCC exclusive jurisdiction under Section 151 to regulate "interstate and foreign communication by wire or radio," and the States explicit jurisdiction under Section 152(b) to govern "intrastate communication service by wire or radio."

Further, pursuant to Title II of the Act, Congress granted the Commission exclusive jurisdiction to regulate interstate common carrier rates. Specifically, Section 201(a) authorizes the FCC to establish and administer regulations requiring common carriers to "establish physical connections with other carriers," "through routes," and "charges applicable thereto and the divisions of such charges."[7] What Section 201(a) does not do, however, is grant the States any jurisdiction to regulate interstate rates, as evidenced by the express language of the Section and its legislative history.

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[4] *Id.* at ¶¶ 10-13.

[5] *See, e.g. ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), aff'd, 117 S.Ct. 2329 (1997).

[6] *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555, 561 (D.C. Cir. 1997).

[7] 47 U.S.C. § 201(a).

In concluding that state commissions, in the absence of a federal rule, are free to require or not require the payment of reciprocal compensation for ISP-bound traffic,[8] the FCC, in effect, unlawfully delegated its authority to establish interstate rates. The Agency, however, is not free to delegate its statutory responsibilities to the States. Congress, in adopting Sections 151 and 152(b), established two distinct spheres of jurisdiction for wire and radio communications—one federal and one state. The FCC cannot elude this jurisdictional divide by taking a passive approach to its obligation to regulate interstate rates and allowing the States to tackle this statutory obligation in its "regulatory absence." Such a "hand-off" of statutory responsibility to the States would completely muddle the dual system of governance established by Congress.

Further, this *de facto* delegation of authority clearly runs afoul of established precedent. The courts repeatedly have recognized the demarcation between FCC and state jurisdiction, with the former restricted to regulating interstate matters and the latter intrastate matters. The Supreme Court, in *Louisiana Public Service Commission v. FCC*,[9] discussed at length the jurisdiction of the FCC and States, stating that the FCC's broad jurisdiction under Section 151 is limited to interstate communications because Section 152(b), "[b]y its terms. . . fences off from FCC reach or regulation intrastate matters," which are reserved for the States.[10] Likewise, the Second Circuit has held that "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications services are to be governed

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[8] *Declaratory Ruling* at ¶ 26.

[9] 476 U.S. 355 (1986).

[10] *Id.* at 369; *see AT&T v. Iowa Utilities Board*, 119 S.Ct. 721 (1999) (recognizing that states have jurisdiction over intrastate matters while the FCC's jurisdiction is limited to interstate matters).

solely by federal law."[11] Accordingly, the States are completely barred from regulating interstate matters, unless expressly directed to do so by Congress.

There is no question that ISP-bound traffic should be treated as interstate communications for jurisdictional purposes. In other contexts where the traffic carried by a particular service is jurisdictionally mixed, the Commission has classified the entire service as jurisdictionally interstate provided that more than ten percent of the traffic is interstate and that the traffic cannot be separated into its intrastate and interstate elements.[12] The FCC has already concluded that a significant portion of ISP-bound traffic is interstate, surmounting the ten percent threshold.[13] Likewise, the inseparability requirement is satisfied. Due to fact that the overwhelming majority of Internet calls access numerous websites that reside on multiple servers in locations in various States or foreign countries, it is virtually impossible for any carrier to determine the ultimate destination point for any Internet call. Accordingly, because ISP-bound traffic is interstate in nature, it falls within the jurisdiction of the FCC—and only the FCC.

The reality is the that FCC has no legal basis for concluding that the States can arbitrate compensation issues for ISP-bound traffic—a fact buttressed by the absence of legal support in the *Declaratory Ruling*.[14] In fact, such a conclusion flies in the face of Supreme Court precedent stating that the "[f]ederal government may neither issue directives requiring the States to address

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[11] *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486, 491 (D.C. Cir. 1968).

[12] *See MTS and WATS Market Structure*, 4 FCC Rcd 5660, 5660 (1989); *GTE Telephone Operating Cos.*, 14 CR 279, ¶ 27 (October 30, 1998).

[13] *Declaratory Ruling* at ¶ 18.

[14] *See id.* at ¶¶ 21-27.

particular problems, nor command the State's officers . . . to administer or enforce a federal regulatory program."[15] Accordingly, the FCC cannot look to Section 151 and federal case law for the green light to permit state commissions to assume the FCC's statutory obligation to regulate interstate matters, which includes inter-carrier compensation for ISP-bound traffic. Moreover, as demonstrated below, neither Section 251 nor Section 252 of the Act provides the States the requisite authority to arbitrate the issue of inter-carrier compensation for ISP-bound traffic.

B. Inter-Carrier Compensation for ISP-bound Traffic Is Not a Proper Subject For State Arbitration

In the *Declaratory Ruling*, the FCC concluded that "the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the Section 251/252 negotiation and arbitration process."[16] Thus, according to the FCC, state commissions can arbitrate compensation issues for Internet traffic under Section 252 so long as the arbitration "is consistent with governing federal law."[17] As set forth below, neither Section 251 nor 252 provides the States any jurisdiction to address inter-carrier compensation for ISP-bound traffic.

Section 251(b)(5) is the sole provision in the Act that even arguably addresses inter-carrier compensation for CLECs. Specifically, this subsection mandates that local exchange carriers must "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[18] There appears to be no dispute that reciprocal compensation

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[15] *Printz v. United States*, 117 S.Ct. 2365, 2384 (1997).

[16] *Declaratory Ruling* at ¶ 25.

[17] *Id.*

[18] 47 U.S.C. § 251(b)(5).

obligations govern only *local* traffic. Indeed, the FCC clearly acknowledged this fact in the *Declaratory Ruling*.[19] Nonetheless, the Agency concluded that the States, in the absence of a federal requirement, could impose the reciprocal compensation obligations of Section 251(b)(5) on ILECs transmitting interstate traffic. Section 251(b)(5) provides no support for the Agency's conclusion, as evidenced by the provision's language and legislative history. Accordingly, the FCC must look elsewhere to support its conclusion that States have authority to determine whether reciprocal compensation is appropriate for ISP-bound traffic.

Section 251(c), however, does not provide the FCC the necessary support. This subsection expressly limits the subject matter that ILECs have a duty to negotiate with requesting carriers pursuant to Section 252. Specifically, Section 251(c)(1) requires ILECs to "negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b)" and subsection (c).[20] As stated previously, the only even arguable provision in Section 251(b) or (c) that could encompass inter-carrier compensation for ISP-bound traffic would be the provision addressing reciprocal compensation. However, as demonstrated above, reciprocal compensation obligations, by definition, apply only to *local* traffic. As such, ISP-bound traffic, which is jurisdictionally interstate, can never be subject to reciprocal compensation obligations. Therefore, ILECs have no duty to negotiate compensation for ISP-bound traffic pursuant to Section 251(c)(1) and can never be required to arbitrate the issue under Section 252.

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[19] *Declaratory Ruling* at ¶ 26.

[20] 47 U.S.C. § 251(c)(1).

The FCC's theory fares no better under Section 252. Under Section 252(a)(1), ILECs are required to negotiate "interconnection," "services," or "network elements" pursuant to Section 251(b) and (c) and *may* negotiate and enter agreements with other carriers addressing subjects not encompassed by Section 251(b) and (c).[21] Where ILECs and requesting carriers are unable to resolve issues via negotiation, either party can petition a state commission to arbitrate "open" or "unresolved" issues pursuant to Section 252(b).[22] Neither 252(a) nor (b), however, confers unfettered jurisdiction upon the States to consider unresolved interstate matters.

While Congress authorized the States to arbitrate "open" issues set forth in a petition, Congress surely did not intend to give the States carte blanche authority to address all interstate issues that might be raised in a petition by one of the parties to the negotiation. Otherwise, state commissions could be granted jurisdiction by one of the parties on any matter whatsoever, even non-communications matters, which, in effect, would nullify the dual system of governance established by Congress pursuant to Sections 151 and 152(b) of the Act. Vitelco does agree with the FCC that Section 252 "extends to both interstate and intrastate matters,"[23] however, the interstate matters subject to state arbitration are appropriately restricted to those set forth in Section 251(b) and (c).

Accordingly, because Sections 251(b)(5) and (c)(1) do not obligate ILECs to negotiate compensation for ISP-bound traffic, and Section 252 does not confer jurisdiction on the States to

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[21] 47 U.S.C. § 252(a)(1).

[22] 47 U.S.C. § 252(b).

[23] *Declaratory Ruling* at ¶ 25.

arbitrate interstate issues outside the scope of Section 251, the FCC cannot permit state commissions to continue arbitrating compensation issues concerning ISP-bound traffic.

III. ANY FEDERAL MECHANISM FOR CALCULATING INTER-CARRIER COMPENSATION SHOULD BE COST-BASED

In adopting the Telecommunications Act of 1996, Congress sought to promote competition, reduce regulation to lower prices and improve the quality of services, and "encourage the rapid deployment of new telecommunications technologies."[24] Following Congress' lead, the FCC typically has taken a "hands-off," deregulatory approach to promoting development of the Internet.[25] However, in endorsing a regulatory scheme whereby States can require ILECs to pay usage-based reciprocal compensation to CLECs for ISP-bound traffic, the FCC is neither promoting competition nor encouraging the development of new telecommunications technologies like Internet communication. Instead, the FCC has created significant arbitrage opportunities for CLECs, resulting in substantial profits for these carriers, while leaving ILECs in a financial lurch, with no way to recover costs legitimately incurred. Vitelco submits that the FCC should correct this situation by adopting a cost-based, federal scheme for inter-carrier compensation, using the meet-point billing regime applicable to interstate voice traffic as a model.

As an initial matter, usage-based reciprocal compensation for ISP-bound traffic does not "promote competition" because it is inefficient. The Commission's interconnection policies promote competition where they encourage market entrance by CLECs capable of providing

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[24] Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56. *codified at* 47 U.S.C. § 151 *et seq.*

[25] *Declaratory Ruling* at ¶ 6.

comparable telecommunications services at or below the cost of such services as provided by ILECs. Under a usage-based reciprocal compensation regime, however, CLEC entrance results not from any competitive advantage in the cost of providing comparable service but because of a regulatory arbitrage opportunity.

Specifically, most interconnection agreements provide equivalent compensation for the termination of Internet and voice traffic. However, as CLECs have learned, Internet traffic is fundamentally different in character than voice traffic. First, unlike voice traffic which is usually two-way—voice customers receive calls *and* originate calls—ISP-bound traffic is almost entirely one-way. Internet users dial-in to the ISP, but the ISP does not dial-out. Second, voice traffic typically is directed to a wide variety of destinations—the homes and businesses of users located all over a LEC's service area. Internet traffic, by contrast, is usually distributed to the same place—an ISP. Not surprisingly, the cost of constructing and operating a network exclusively to terminate ISP-bound traffic can be significantly below the cost of constructing and operating a network to provide voice service. Notwithstanding, under most interconnection agreements, a CLEC exclusively terminating ISP-bound traffic is *paid* as if it is in the much more expensive business of originating, transporting and terminating voice traffic.

Moreover, the inefficiency of the usage-based reciprocal compensation regime is compounded by the ESP access charge exemption which deprives ILECs of the revenue source from which reciprocal compensation payments are typically made. With respect to ISP-bound traffic, no access charges are collected and, hence, reciprocal compensation payments must be made out of a LEC's own revenue. When coupled with the fact that the compensation payments for ISP-bound traffic flow only one way, the net effect is that LECs are forced to make significant payments to CLECs without any corresponding revenue to cover the expense.

Consequently, Vitelco views usage-based reciprocal compensation as potentially devastating, both to the ratepaying public and to Vitelco's financial viability. Vitelco estimates that it has approximately 60,000 lines interconnected to the public switched telephone network. If each one of those lines was used to log on to the Internet for only 30 minutes each day (a modest estimate, given the prevalence of ISP flat rate plans which create no incentive to disconnect) Vitelco envisions a potential usage-based expense of $3,285,000 per year.[26] Pro-rated across Vitelco's access lines, the unrecovered expense amounts to a local revenue deficiency of $4.56 per line each month.[27] Such a substantial, unchecked outflow of local service revenues would have a tremendously negative effect on universal service in the U.S. Virgin Islands. Alternatively, the costs might be passed through to consumers in the form of a substantial rate increase. Either result is completely contrary to the goals of 1996 Act and the public interest.

Vitelco submits that, consistent with Congress' intent to promote competition in order to secure lower prices and the deployment of new services for consumers, any federal mechanism for calculating inter-carrier compensation for the termination of ISP-bound traffic must be cost-based and provide a revenue source from which ILECs can reimburse CLECs for their incurred costs should ILEC to CLEC payments continue to be required. The meet-point billing regime currently used to calculate inter-carrier compensation for carriage of interstate voice traffic

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[26] The figure is derived from the following calculation: 60,000 lines x 30 minutes of Internet use per day x $.005 per minute reciprocal compensation payment x 365 days per year = $3,285,000.00 in unrecovered costs due to carriage of ISP-bound traffic annually.

[27] $3,285,000.00 in unrecovered costs ÷ 60,000 access lines ÷ 12 months per year = $4.56 in unrecovered costs per line each month.

provides a model.[28] Under the meet-point system, an ILEC levies its own charge to an interexchange carrier for access to the portion of the ILEC's facilities used by the IXC up to the "meet point"[29] between the ILEC and a CLEC who jointly carries the call.[30] In this way, compensation more closely tracks the manner in which costs are incurred because both the ILEC and CLEC are compensated only for the portion of their facilities the IXC actually uses.

The meet-point billing regime is a logical, cost-based mechanism for calculating inter-carrier compensation in the context of ISP-bound traffic as well. Meet-point billing takes into account that both ILEC and CLEC facilities are used in the transmission of ISP-bound traffic and, accordingly, both carriers incur costs. Adopting such a regime would eliminate much of the inefficiency of the current usage-based reciprocal compensation system, which ignores costs incurred for the use of ILEC facilities while simultaneously compensating CLECs at rates substantially above cost.

A meet-point billing regime need not affect the ESP access charge exemption. While Vitelco believes the FCC should not artificially constrain its options in fashioning a cost-based federal mechanism for inter-carrier compensation by taking the ESP exemption off the table, it does not ask the Commission to reconsider the exemption at this time. In the interim, the Commission should not continue to require ILECs to subsidize CLECs for carrying ISP-bound

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[28] The Commission has required meet-point billing in the interexchange context since 1988. *See Access Billing Requirements for Joint Service Provision*, 65 RR 2d 650, ¶ 3 (1988) (citing *Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1176-77 (1984)).

[29] "A 'meet point' is a point of interconnection between two networks, designated by two telecommunications carriers, at which one carrier's responsibility for service begins and the other carrier's responsibility ends." 47 C.F.R. § 51.5.

[30] *See Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1176-77 (1984).

traffic. A meet-point billing regime would effectively accomplish this result by placing the burden on the CLEC to recover its own costs for transmitting such traffic.

If the Commission does adopt a federal compensation mechanism for ISP-bound traffic that requires ILEC to CLEC payments for the carriage of such traffic, the FCC must also provide a revenue source from which ILECs can make such payments. The funding mechanism can be derived either from end user payment or new charges levied on ISPs. But the FCC clearly cannot refuse to establish such a funding source. Without one, the compensation mechanism would simply be a subsidy from the ILECs general ratepayers, access customers or shareholders to CLECs, something that is fundamentally inconsistent with the Act.[31] Therefore, only a direct funding mechanism is consistent with the Act's provisions.

IV. THE COMMISSION SHOULD REJECT A CONSTRUCTION OF THE ACT'S "MOST FAVORED NATION" PROVISION THAT CONFLICTS WITH THE NEGOTIATION AND ARBITRATION REQUIREMENTS OF SECTION 252

The FCC should not side-step its obligation to create a federal, cost-based mechanism for inter-carrier compensation by freezing existing state regimes in place. Section 252(i) of the Communication's Act, the MFN provision, requires ILECs to provide requesting carriers with "any interconnection service or network element" provided under any agreement to which it is a party and which is approved by a state commission "upon the same terms and conditions as those provided in the agreement."[32] The *Declaratory Ruling* asks whether, under the MFN provision,

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[31] Section 254 of the Act prohibits such new indirect subsidies. Furthermore, subsidizing CLECs for ISP-bound traffic is not a "universal service" that is eligible for a direct subsidy under Section 254, and no other provision of the Act, as implemented by the FCC, contemplates creating a new subsidy for ISPs or the CLECs they serve.

[32] 47 U.S.C. § 252(i).

CLECs might "opt-in" to the provisions of an expired interconnection agreement or an agreement near expiration, subjecting an ILEC to the obligations in the agreement "for an indeterminate length of time, without any opportunity for renegotiation, as successive CLECs opt into the agreement."[33] The simple answer to the Commission's question is "no."

It is a basic cannon of statutory construction that statutory language will be construed in a manner to avoid absurd results.[34] An interpretation of the MFN provision that potentially obligates an ILEC to comply with a particular provision of an interconnection agreement *forever* once that provision is included in a State approved interconnection agreement would wreak havoc with the negotiation regime established under Section 252. Section 252 compels ILECs to negotiate terms of interconnection with requesting carriers and, in the event of an impasse, to submit to state commission arbitration. The interpretation of Section 252(i) suggested in the *Declaratory Ruling*, however, would dispense with negotiation and arbitration altogether. CLECs would have absolutely no reason to negotiate when they could pluck favorable terms, without the accompanying expiration date, from existing agreements, or even resurrect entire agreements once they have expired.

A more logical construction of Section 252(i) focuses on the provision's requirement that interconnection service or network elements be offered "upon the same terms and conditions" as in a State approved agreement. Any interconnection service or network element provided pursuant to an interconnection agreement is made available only for a limited time and that term is an essential condition of the agreement, as demonstrated by Section 51.809 of the FCC's

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[33] *Declaratory Ruling* at ¶ 35.

[34] *See Sturges v. Crowninshield*, 17 U.S. 122, 202-3 (1819).

rules.[35] That section requires the provisions of State approved interconnection agreements to be made available for adoption by CLECs for "a reasonable period of time" after approval.[36] Clearly forever is not a reasonable period of time. Accordingly, where a CLEC adopts a provision from a State approved interconnection agreement to which an ILEC is already a party, the provision should continue in effect only for the term of the original agreement from which it was adopted.

V. CONCLUSION

For the foregoing reasons, Vitelco submits that only the FCC has jurisdiction to establish inter-carrier compensation rates for ISP-bound traffic. Accordingly, Vitelco urges the Commission to adopt a federal, cost-based compensation mechanism for ISP-bound traffic. Such a mechanism should provide for full recovery of the costs incurred in carrying such traffic. Thus, to the extent that the FCC establishes a mechanism that requires ILEC to CLEC payments, the FCC must also establish a mechanism, such as a revenue source, from which the payments will be funded. A first step in this regard would be to adopt the meet-point billing system currently used to determine inter-carrier compensation for the carriage of long-distance traffic. While a meet-point regime will not, because of the ESP exemption, fully compensate ILECs for the costs incurred in carrying ISP-bound traffic, it will eliminate the subsidy ILECs presently pay to

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[35] 47 C.F.R. § 51.809.

[36] *See* 47 C.F.R. § 51.809(c).

CLECs for the termination of such traffic, and more closely tie compensation to the manner in which costs are actually incurred.

Respectfully submitted,

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April 12, 1999