BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Developing a Unified Intercarrier Compensation Regime	)))))	CC Docket No. 01-92

**EX PARTE BRIEF OF THE INTERCARRIER COMPENSATION FORUM
IN SUPPORT OF THE
INTERCARRIER COMPENSATION AND UNIVERSAL SERVICE REFORM PLAN**

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INTRODUCTION

These comments are submitted by the Intercarrier Compensation Forum ("ICF") in support of the Intercarrier Compensation and Universal Service Reform Plan ("ICF Plan" or "Plan") in the above-captioned proceeding. The Plan promises enormous public interest benefits and presents the best means of resolving the interrelated intercarrier compensation and universal service funding issues pending before the Commission.

On August 13, 2004, the ICF submitted an ex parte filing with the Commission in this docket. That filing contained an Executive Summary of the ICF Plan, an extensive slide presentation providing an overview of the Plan, and two sets of Network Diagrams comparing the present broken intercarrier compensation system to the result that would occur under the Plan. In this filing we submit the actual ICF Plan, which is the product of tens of thousands of hours of work over more than 15 months by a broad cross-section of the industry (Appendix A), the policy and legal support for the Plan, a Plan Summary highlighting the Plan's major components (Appendix B) and other supporting material.

As we show here, the Plan is superior to other reform proposals in several important respects. First, it relies upon easily administered and competitively neutral rules that minimize the need for regulatory intervention. Second, it creates a uniform, predictable and efficient intercarrier compensation regime that is legally sound and will provide timely relief from the inefficiencies of today's radically divergent intercarrier compensation schemes. Third, it creates stable and explicit universal service support in place of unsustainable reliance on implicit support mechanisms. Finally, in contrast to other reform proposals, the Plan is sensitive to the unique needs of low-income consumers and rural customers and carriers—and also provides reasonable interim steps to ensure that no industry group is disproportionately burdened—without sacrificing the efficiency, sustainability, or administrability that are the keys to successful reform.

While the Plan offers significant public benefits, among its most far-reaching advantages will be the promotion of broadband investment and deployment. Today's arbitrary and increasingly unpredictable intercarrier compensation distinctions retard broadband growth and threaten to undermine the Commission's broadband policies. Uncertainty and the serious risk of an adverse regulatory classification deter investment in new services and networks. The enormous transaction costs expended to comply with, enforce, and avoid the effect of today's legacy rules also take their toll, diverting funds better spent on the development and deployment of new infrastructure and services. By establishing predictable and efficient rules that apply uniformly without regard to technology or regulatory classification, the Plan eliminates each of these impediments to efficient broadband deployment. It dramatically reduces regulatory and administrative costs and provides the uniformity and certainty needed to foster investment. And the Plan removes disincentives to rural broadband deployment by moving to rational and explicit universal service support and eliminating reliance on high intrastate access rates.

SUMMARY

There is no longer any serious dispute that the current system of intercarrier compensation is hopelessly outmoded and that consumers are the victims. The telecommunications industry today is characterized by a patchwork of disparate intercarrier compensation schemes that were adopted piecemeal over the decades to address discrete regulatory problems. As a result, legacy regulatory classifications ("local," "toll," EAS, CMRS, "enhanced," interstate, intrastate, interLATA, intraLATA, intraMTA, etc.) prescribe radically divergent compensation rules for indistinguishable telecommunications functions. By treating like functions differently, these disparate schemes create artificial and uneconomic distinctions among carriers and types of traffic. These legacy distinctions are no longer sustainable or meaningful in an age of competition, rapid technological evolution, and industry-wide convergence on IP-enabled platforms. They distort investment, create regulatory uncertainty, and impose enormous transaction costs—all of which translate into higher consumer rates.

The hodge-podge of intercarrier compensation regimes in effect today thwarts the public interest in a related respect as well: it threatens continued universal service support for high cost and rural customers. Despite the contrary mandate of the Telecommunications Act of 1996, universal service (in the form of low residential rates) is still funded, in part, by implicit support contained in both retail and intercarrier rates. Technological and marketplace developments—such as wireless "one rate" plans and, more recently, VoIP—inevitably erode such implicit support by shifting long distance minutes away from the traditional wireline long distance services that generate access charges. The shift has been dramatic: over the last four years, the interstate access minutes of the largest ILECs, for example, have fallen by more than 25 percent.

Even the federal Universal Service Fund, although explicit, relies on an unstable funding base. Carriers' contribution obligations rest on regulatory distinctions—between, for example, "interstate" and "intrastate" services and between "telecommunications services" and "information services"—that have become increasingly blurred with the emergence of new Internet applications and the proliferation of various service "bundles." And the rules allow some providers to make reduced contributions or none at all. More and more providers are thus able to serve customers without contributing to federal universal service support. This leaves the carriers that do contribute with an escalating share of the burden—a burden that gets passed along to their dwindling customer base in the form of ever-higher rates. The predictable result is a regulatory death spiral for the existing universal service regime.

Without serious reform now, that death spiral could lead to dramatic long-term rate hikes for customers in rural and other high cost areas. Because reform requires hard choices, however, policymakers have long clung to legacy intercarrier compensation and universal service funding schemes in the hope that competition and technology would advance slowly enough to defer the day of reckoning. As the Commission itself has recognized, however, muddling through is no longer an option.[1/] It is time for policymakers on all levels to face up to the need for a comprehensive overhaul of the intricately interrelated rules governing intercarrier compensation and universal service.

Comprehensive reform can succeed in mending today's fractured system only if it achieves each of the following critical objectives:

1/ *See, e.g.*, Report and Order and Second Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 24952, 24955 ¶ 3 (2002) ("*Interim Universal Service Order*"); *see also id.* at 25045-46 (separate statement of Commissioner Kathleen Q. Abernathy) ("any methodology that assesses contributions based solely on revenues from end-user interstate telecommunications services is fundamentally incompatible with the direction of the communications industry," and reliance on such a system will result in "a continued decline in the reported base of interstate telecommunications service revenues—and a corresponding increase in the contribution factor"); Federal Communications Commission Commissioner Michael J. Copps, Remarks at the Quello Center Symposium, Washington, D.C. (Feb. 25, 2004), *available at* http://hraunfoss.fcc.gov/edocs_ public/attachmatch/DOC-244356A1.pdf ("Our intercarrier compensation system is Byzantine and broken. We have in place today a system under which the amounts and direction of payments vary depending on whether carriers route traffic to an incumbent local provider, a competitive local provider, a long-distance provider, an Internet provider, a CMRS carrier or a paging provider. In an era of convergence of markets and technologies, this patchwork of rates should have been consigned by now to the realm of historical curiosity.").

- Eliminating today's multiple *rate structures* for intercarrier compensation—including the access charge and reciprocal compensation regimes—and replacing them with a single unified rate structure governing all traffic exchanged between carriers.

- Replacing today's myriad of different intercarrier compensation *rates*—including interstate access, intrastate access, voice reciprocal compensation, intercarrier compensation for ISP-bound traffic, and interILEC settlements—with uniform rates for all traffic.

- Replacing today's disparate rules for allocation of financial responsibility among interconnected carriers with a single set of rules expressly delineating each carrier's *financial* responsibility with respect to traffic exchange, while preserving existing flexibility with respect to physical points of interconnection.

- Effecting these reforms while still protecting *universal service* generally and, in particular, rural America's access to affordable telecommunications and information services that are reasonably comparable to those available in urban areas.

An intercarrier compensation reform plan that fails to achieve each of these goals will exacerbate—rather than solve—the problems facing the industry. Because the underlying problems are inextricably linked, relief on only one front could simply produce new distortions. The only possible solution is a comprehensive one.

To that end, the ICF—composed of long distance carriers, incumbent LECs, rural carriers, competitive local exchange companies, next-generation network providers, and wireless carriers—has designed the detailed roadmap set forth in Appendix A to meet each of the four key goals outlined above and to move intercarrier compensation regulation and universal service from upheaval to stability. The ICF Plan is a balanced approach that does not favor any particular industry segment. The ICF met for a year and a half to develop the Plan. Over the course of the discussions, some members dropped out while others joined or rejoined;[2/] the final Plan represents the input of all the participants along the way. And because it was forged by disparate companies from all corners of the industry, the Plan embodies a pragmatic and commercially reasonable solution to problems that have long vexed policymakers while, at the same time, advancing the public interest most of all.

The overarching goal of the ICF is to redirect the industry's energies from pitched regulatory battles—about interconnection details, amounts of compensation due, and the appropriate characterization of particular services—to true competition on the merits as well as stable universal service mechanisms designed to prosper, not wilt, in the face of that competition. The Plan meets that goal in several ways. *First*, it establishes clear financial and technical rights and obligations with respect to the interconnection of carrier networks. *Second*, it reforms today's fractured intercarrier compensation rules by restructuring many rates immediately, reducing and unifying terminating compensation, and moving, by 2008, to a uniform intercarrier compensation system that eliminates originating charges and, except in rural areas, intra-network terminating transport charges. By 2011, the Plan will complete the transition to a comprehensive bill-and-keep system, under which rational end user charges and explicit universal service mechanisms will replace the inefficient intercarrier compensation mechanisms that consumers ultimately absorb today in the form of higher rates. To protect rural America, however, the Plan ensures that rural carriers will have the option of maintaining a distinct revenue stream when

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[2/] Current ICF members include AT&T Corp., General Communication, Inc., Global Crossing North America Inc., Iowa Telecom, Level 3 Communications, LLC, MCI, Inc., SBC Telecommunications Inc., Sprint Corporation, and Valor Telecommunications, Inc.

they provide terminating transport services. This transition generally will require each carrier to rely on its own subscribers (and supplemental universal service funding as necessary), rather than on the subscribers of other carriers, for the payment of its network costs. By making each carrier responsible to its own end users in this manner, the Plan will permit market forces, rather than regulation, to govern the future of this industry as competition develops. *Third*, the Plan eliminates the implicit universal service support contained in some intercarrier compensation charges today and instead creates new explicit support mechanisms. The Plan will also broaden and stabilize the funding base for universal service support.

These measures—a careful compilation of checks and balances—are designed to work together as a unified and inseverable whole. As noted above, reform must be comprehensive and unified. Reform of intercarrier compensation without reform of universal service support, for example, would harm consumers by accelerating the erosion of universal service funding. Likewise, reform of only some aspects of intercarrier compensation without the unified approach defined here would leave in place the same types of arbitrary distinctions that plague the current system.

Finally, as discussed in Part III below, the Plan as a whole, as well as each of its component parts, is consistent with existing law and fully achievable by the Commission today. *First*, under the Supreme Court's holding in *AT&T Corp. v. Iowa Utilities Board*,[3/] the Commission has plenary authority under sections 201 and 251(b)(5) to address the compensation rules applicable for the exchange of all telecommunications traffic, whether "local" or "long

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3/ 525 U.S. 366 (1999).

distance," "interstate" or "intrastate." *Second*, the Commission has broad independent authority under section 254 to prohibit mechanisms—such as traditional intrastate access charges—that represent unsustainable sources of universal service funding, so long as the Commission ensures that those mechanisms are replaced with more durable support mechanisms, as the Plan provides. *Third*, as the D.C. Circuit recently indicated, the Commission has authority to prescribe, for all traffic, a uniform "bill and keep" compensation rule, under which each carrier recovers from its own subscribers the costs of transmitting calls to and from them, whether or not the intercarrier exchange of traffic happens to be "balanced."

Fourth, as confirmed by the Commission's long tradition of employing interstate mechanisms to help carriers recover costs booked as "intrastate," the Commission has full authority to implement the ICF's proposals without making formal alterations to the existing separations regime. *Fifth*, the Commission is likewise authorized to adopt the numbers/connections-based contribution methodology proposed in the Plan. *Finally*, the Commission has authority under sections 201 and 251(a) to establish just and reasonable rates for the "transiting" function performed as part of indirect interconnections.

DISCUSSION

I. THE PROBLEM: THE PRESENT SYSTEM OF INTERCARRIER COMPENSATION HARMS CONSUMERS AND CARRIERS, AND CURRENT UNIVERSAL SERVICE FUNDING MECHANISMS ARE UNSUSTAINABLE

The current amalgam of intercarrier compensation schemes disserves the interests of consumers and carriers alike. As discussed below, the only workable solution is to overhaul the existing system and, in particular, to replace today's artificial distinctions with a uniform approach to all exchanges of telecommunications traffic.

A. The Existing Rules Distort Competition and Hurt Consumers

The disparate intercarrier compensation schemes in effect today were originally designed to address discrete services under different statutory requirements and policy goals. For example, access charges for "long distance" calls evolved as a means, in part, of supporting universal service.[4/] To promote the then-fledgling enhanced services industry, however, regulators treated enhanced service providers differently for these purposes than providers of conventional long distance services.[5/] And responsibility for setting access charges has long been bifurcated between state and federal jurisdictions. In 1996, the FCC adopted reciprocal compensation rules, thereby creating a third compensation scheme.[6/] Commercial mobile radio service (CMRS) providers face still different intercarrier compensation rules, in which access charge obligations turn on whether traffic is "intraMTA" rather than, as in the case of wireline traffic, on whether it stays within an ILEC-defined local calling area.[7/] Other FCC decisions effectively preclude CMRS providers from collecting access charges.[8/]

4/ *See* Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9623 ¶ 31 (2001) ("*Intercarrier Compensation NPRM*") (noting that, "in order to encourage universal service, this Commission and state regulators historically set access charges above cost").

5/ *See* Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, 715 ¶ 83 (1983); First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16131-36 ¶¶ 341-48 (1997); *see also Intercarrier Compensation NPRM*, 16 FCC Rcd at 9623 ¶ 31.

6/ *See* First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16008-58 ¶¶ 1027-1118 (1996) ("*Local Competition Order*").

7/ *See, e.g.*, 47 C.F.R. § 51.701(b); *Local Competition Order* at 16016-17 ¶ 1043 (explaining that "traffic between an incumbent LEC and a CMRS network that originates and

As a result of these disparate regimes, the compensation a carrier owes (or collects) with respect to a given call—as well as the agency that sets that compensation—turn on increasingly meaningless distinctions such as the technology used, the fleeting location of a mobile caller, the precise geographic span between originating and terminating carriers, and the regulatory characterization of the party that originates or terminates the call. In particular, the 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, stays within the state but crosses rate center boundaries, or remains purely "local" in that it stays within the same calling area at all times. Similarly, if the originating carrier is a CMRS provider, it might find itself subject to different compensation demands if the terminating carrier is an exempt rural carrier or a competitive local exchange carrier (CLEC) with which it has no direct, physical interconnection.[9/] Yet in each of these cases, the terminating carrier performs the same transport and termination functions.

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terminates within the same MTA . . . is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges").

[8/] *See* Declaratory Ruling, *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, 13196-98 ¶¶ 8-12 (2002) (providing that CMRS carriers may not impose access charges through tariffs and that IXCs need not pay access charges to CMRS carriers absent a contractual obligation to do so); *see also* Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1480 ¶ 179 (1994) ("*CMRS Forbearance Order*") (forbearing from requiring or permitting CMRS providers to file tariffs for interstate access services).

[9/] *See, e.g.*, *Sprint Spectrum LLP v. Missouri Pub. Serv. Comm.*, 112 S.W.3d 20, 25-26 (Mo. Ct. App. 2003) (allowing rural carriers, when terminating local traffic from CMRS carriers, to charge tariffed rates rather than complying with the reciprocal compensation regime); *see generally* Public Notice, *Comment Sought on Petitions for Declaratory Ruling Regarding*

This crazy-quilt of compensation schemes harms consumers both directly and indirectly by thwarting the development of rationally competitive telecommunications markets. First, it confronts consumers with a bewildering array of charges for different calls, and only the savviest of them can navigate the system to obtain the best rates for particular calls. For example, because of higher intrastate access charges, wireline consumers in many areas often find themselves paying higher rates to call a neighboring town than to call across the country. A wireless customer, by contrast, might pay the same rate for both calls, because wireless calls within an MTA (which can encompass multiple local calling areas and even states) are not subject to intrastate access rates.[10/] The current regime also creates incentives for interexchange carriers to seek ways to avoid access charges, particularly intrastate access charges, and for LECs or regulators to limit the scope of local calling areas to increase the number of calls for which such toll or intrastate access charges must be paid. For example, rural customers generally have smaller calling scopes than non-rural customers. As a result, customers in rural areas generally pay more in toll charges than their non-rural counterparts.[11/] At the same time, rural access charges that are significantly higher than those in urban areas may deter long distance entry and

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Intercarrier Compensation for Wireless Traffic, 17 FCC Rcd 19046 (2002) (responding to CMRS carrier's complaint that some rural LECs have filed state tariffs as a mechanism to collect reciprocal compensation for the termination of intra-MTA traffic).

10/ *See, e.g.*, 47 C.F.R. § 51.701(b).

11/ *See, e.g.*, Rural Task Force, *White Paper 2: The Rural Difference*, Jan. 2000, at 39-40, *available at* http://www.wutc.wa.gov/rtf (noting that "[f]or rural study areas overall, nearly 60 percent of the customers have calling scopes of less than 5,000 lines[,] but[] less than 20 percent have calling scopes greater than 25,000. For non-rural study areas, less than 10 percent of the customers have calling scopes less than 5,000 lines, but over 70 percent have calling scopes greater than 25,000 lines"); *id.* at 42-43 (explaining that, on average, rural customers pay $37.18 per month for toll calls, while non-rural customers pay only $29.82).

thereby deprive consumers in rural areas of the full range of long distance carriers and calling plans available to urban customers.[12]

These are some of the *direct* harms that the current chaos in intercarrier rules inflicts on consumers; the *indirect* harms can hurt consumers just as much. Because the rules are enormously confusing, and are jury-rigged to address each new technology and service as it arises, they are typically at least one step behind the industry. The resulting uncertainty about how regulators will apply these rules destabilizes telecommunications markets, frustrates business planning, and deters efficient investment.[13] The regulatory artificiality of the current system likewise undermines the efficient selection of winners and losers in the market. Carriers have incentives to choose one technology—or service configuration—over another to avoid higher intercarrier charges and thus obtain artificial advantages over their competitors.[14] Less efficient carriers can thereby prevail over more efficient ones not by serving the needs of

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[12] Part of the problem is that 47 U.S.C. § 254(g) requires IXCs to average their rates across the country, as discussed further in Part III below. High access charges in a particular rural area can therefore artificially increase an IXC's rates everywhere it provides service.

[13] *See* Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4802 ¶ 5 (2002) ("*Cable Modem Order*"), *vacated on other grounds by Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) ("[W]e seek to remove regulatory uncertainty that in itself may discourage investment and innovation."); *CMRS Forbearance Order* at 1421 ¶ 25 (noting that "a stable and predictable federal regulatory environment . . . is conducive to continued investment . . . minimizing regulatory uncertainty and any consequent chilling of investment activity").

[14] *See Intercarrier Compensation NPRM* at 9616 ¶ 12 (explaining that "any discrepancy in regulatory treatment between similar types of traffic or similar categories of parties is likely to create opportunities for . . . parties [to] revise or rearrange their transactions to exploit a more advantageous regulatory treatment").

consumers more effectively, but simply by gaming the regulatory system more adroitly.[15] At the same time, under the current system, carriers that receive high intercarrier compensation payments may have incentives to protect those revenue streams in the face of competition and technological change even when doing so may not be efficient. In each case, the result is a wasteful misallocation of social resources.

The existing system also inflicts enormous transaction costs on the industry and, ultimately, on the consumers who must absorb them. First, it requires providers to devote tremendous resources to identifying calls as "local," "toll," intraLATA, interLATA, intraMTA, interstate, intrastate, CMRS, or "ISP-bound," or as "information services" or "telecommunications services," simply to divine which compensation rules should apply. Providers must likewise incur significant costs simply to measure, bill, reconcile, and dispute intercarrier compensation payments. Litigation about the application of the current rules—and about which rules to apply to which traffic—consumes many millions of dollars per year on both the federal and state levels.[16] Those costs, too, are passed on to consumers. All of these activities are inefficient and serve no productive purpose.

B. The Existing Rules Endanger Universal Service

The inequities and gaps in today's intercarrier compensation rules also contribute to the instability of the current support system for universal service. Although some explicit universal

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15/ *Id.* (noting that the existing system produces opportunities for parties to benefit from actions that, "in the absence of regulation, would be viewed as costly or inefficient").

16/ *See, e.g.*, Michael Finneran, *A New Era in Telecom Regulation*, Bus. Comm. Rev., July 2004, at 20 (reporting that "the telecom industry now spends more on litigation and regulation than it spends on research and development").

service support is available at the state and federal levels, there is still some universal service support that is implicit and thus unquantified.[17/] Competition, however, is irreversibly eroding this implicit funding.[18/] And even the explicit funds in place today are unstable because they rely on contribution mechanisms that rest on increasingly untenable distinctions among legacy categories of services and carriers.

First, on the retail side, competition is undermining traditional implicit support mechanisms such as geographic rate averaging and above-cost business line rates.[19/] Historically, before the development of local competition, ILECs could charge above-cost rates for certain services (such as value-added services) and customers (such as businesses and urban

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[17/] *See, e.g.*, Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 22559, 22571 ¶ 22 (2003) ("*Universal Service Remand Order*"); *see also Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 327-28 (5th Cir. 2001) ("*TOPUC II*") (noting FCC's difficulties in quantifying support implicit in interstate access charges).

[18/] *See, e.g.*, *Universal Service Remand Order* at 22568 ¶ 16 (explaining that Congress recognized that "it would be difficult to sustain implicit subsidies in a competitive market: competition would erode the implicit subsidies that state and, to a lesser extent, federal policies had relied on to keep rates comparable because competitive pressures would drive down above-cost rates"); *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9623 ¶ 32 (noting that "the implicit subsidies historically contained in access charges are not sustainable in competitive local telecommunications markets").

[19/] *See, e.g.*, Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of December 31, 2003*, at Table 2 (June 2004), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0604.pdf (showing that, as of December 2003, competitors had captured 25% of the market for institutional, government, and medium and large business customers).

residential customers) in order to subsidize services and customers in higher cost areas.[20] In the wake of the 1996 Act, ILECs are losing the customers that traditionally provided this implicit support and also are having to lower their rates as they try to retain them.[21] Competition thereby eventually destroys implicit universal service support.[22] The Commission has thus long recognized that a system of implicit retail support is simply "not sustainable . . . in a competitive environment."[23] Congress itself, however, directed that universal service support at the federal and state levels be reformed to be "specific, predictable and sufficient."[24] The current reliance on implicit support violates this statutory directive.[25]

20/ *See* Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8784 ¶ 11 (1997) ("*Universal Service Order*"), *aff'd in part, rev'd in part sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC I*").

21/ *See id.* at 8787-88 ¶ 17 (explaining that, "[i]n a competitive market, a carrier that attempts to charge rates significantly above cost to a class of customers will lose many of those customers to a competitor").

22/ The erosion of implicit support also makes it less likely under the current system that customers in high cost areas can obtain the full benefits of technological innovation promised by the 1996 Act as section 254 of the Act envisions and in fact requires. *See* 47 U.S.C. § 254(b)(2) (requiring that "[a]ccess to advanced telecommunications and information services . . . be provided in all regions of the Nation"); *id.* § 254(b)(3) (mandating that customers in high cost areas "have access to telecommunications and information services, including . . . advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas"); *id.* § 254(c)(1) (requiring the Commission, when defining universal service, to "tak[e] into account advances in telecommunications and information technologies and services").

23/ *Universal Service Order* at 8786-87 ¶ 17.

24/ 47 U.S.C. § 254(b)(5) (requiring the Commission to ensure that there are "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service").

25/ *See Comsat Corp. v. FCC*, 250 F.3d 931, 939 (5th Cir. 2001) ("the 'FCC cannot maintain any implicit subsidies' whether on a permissive or mandatory basis").

The same is true not just of end user rates, but of access charges—the fees that long distance carriers pay for access to the local network. To the extent that above-cost intrastate access charges, in particular, support lower local retail rates, arbitrary distinctions in intercarrier compensation mean that only some providers and services—those that are subject to access charges—pay this support, while others do not. Such regulatory disparities place increasing strains on traditional support mechanisms. The amount that the largest wireline LECs collect in access charges has been shrinking as more traffic leaves the wireline network and is carried by CMRS and VoIP providers.[26/] This migration of traffic is occurring in part *because* regulatory disparities provide these service providers with significant cost advantages over carriers that must pay access charges.

At the same time, even explicit universal service funding has become increasingly unstable because the contribution obligation at the federal level—the primary source of explicit support—is itself tied to economically arbitrary classifications of services and providers. For the

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[26/] *Compare* National Exchange Carrier Association access minutes of use data for second quarter 2000, *available at* http://www.fcc.gov/wcb/iatd/neca.html, Carrier Common Line Access Minutes of Use, mou00-01.zip, *with* National Exchange Carrier Association access minutes of use data for second quarter 2004, *available at* http://www.neca.org/wawatch/wwpdf/091704_4.pdf, Washington Watch for Sept. 17, 2004 (showing decline in interstate access minutes of more than 25 percent over the last four years); *see also* Jeffrey Halpern, *US Telecom: A Slow Growth Industry with Few Positive Longer-Term Catalysts; Marketweight with a Negative Bias*, Bernstein Research Call, May 21, 2004, at 15-16 & Exhibit 25 (estimating that Tier 1 wireline long distance providers have lost 24 percent of their expected retail market volume and predicting that wireless, VoIP, and other technologies will capture 60% of the market by 2008); Yankee Group News Release, *U.S. Consumer Long Distance Calling Is Increasingly Wireless, Says Yankee Group*, Mar. 23, 2004, *available at* http://www.yankeegroup.com/public/news_releases/news_release_detail.jsp?ID=PressReleases/news_03232004_cts_2.htm (discussing survey results showing that wireless users now make over 40 percent of their long distance calls on wireless phones).

most part, federal USF contributions today are assessed only on the basis of a provider's retail revenues for the provision of interstate (and international) telecommunications.[27] But identifying such revenues is no longer the straightforward exercise it once was. "All you can eat" buckets of undifferentiated minutes, including those offered by wireless carriers, make it difficult to earmark revenues reliably and non-arbitrarily as "interstate" or "intrastate."[28] New, inherently mobile and packet-based services such as VoIP, as well as bundles including multichannel video or other non-telecommunications services, also present jurisdictionalization and revenue allocation challenges.[29] In addition, only certain providers currently contribute to explicit universal service. For example, providers of cable modem service do not, even though DSL providers must.[30] And carriers that provide only international services do not contribute,

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27/ *See, e.g.*, 47 C.F.R. § 54.709(a).

28/ *See* Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 21252, 21257-58 ¶ 11 (1998) (establishing "safe harbor percentages" as proxies for the percentage of interstate wireless telecommunications revenues generated by each category of wireless telecommunications provider); *see also Interim Universal Service Order* at 24954-61 ¶¶ 1-15 (refining contribution methodology).

29/ *See, e.g.*, Memorandum Opinion and Order, *Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3307 ¶ 1 (2004) ("*Pulver Order*") (declaring Pulver.com's VoIP service to be an interstate information service).

30/ *Compare Cable Modem Order* at 4853 ¶ 110 (noting that the Commission was merely "considering" whether providers of cable modem service should contribute to universal service), *with* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, 17 FCC Rcd 3019, 3051 ¶ 72 (2002) ("*Wireline Broadband NPRM*") (explaining that a wireline telecommunications carrier must contribute to universal service if it offers wireline broadband Internet access to end users for a single price).

while their full-service competitors contribute on the basis of their interstate *and* international revenues.[31]

These competitively biased distinctions in contribution obligations, of course, give providers of non-contributing services (or services subject to reduced contribution obligations) an arbitrary competitive advantage over contributing providers. That advantage skews the market and thus further reduces the contribution base as traffic migrates to service arrangements that minimize the amount of revenue associated with "interstate telecommunications" or to platforms or offerings exempt from contribution obligations entirely. As the Commission recently observed, this self-reinforcing problem has escalated to a point of genuine crisis:

> [I]nterstate telecommunications revenues are becoming increasingly difficult to identify as customers migrate to bundled packages of interstate and intrastate telecommunications and non-telecommunications products and services. This has increased opportunities to mischaracterize revenues that should be counted for contribution purposes. Such mischaracterization may result in decreases in the assessable revenue base. Increased competition also is placing downward pressure on interstate rates and revenues, which also contributes to the decline in the contribution base. For example, traditional long-distance providers increasingly are entering local markets at the same time that competitive and incumbent local exchange carriers are increasingly providing long-distance services. Customers also are migrating to mobile wireless and Internet-based services. As we recently noted, these changes have led to fluctuations in the contribution base and rising contribution obligations.[32]

Of course, as those contribution obligations increase, the carriers bearing them incur ever higher costs they must pass along to their customers, and those customers will thus be even more likely to defect to other carriers exempt from such contribution obligations. The result is a classic

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[31] *See* 47 C.F.R. § 54.706(c).

[32] *See Interim Universal Service Order* at 24955 ¶ 3 (footnotes omitted).

regulatory death spiral for the future of universal service funding, which could hardly have come at a worse time: by the Wireline Competition Bureau's estimate, the *demands* for such funding are poised to increase dramatically.[33/] For all of these reasons, the need for genuine reform of the universal service system is exceptionally urgent.

II. THE SOLUTION: THE ICF PLAN COMPREHENSIVELY RESOLVES THE CURRENT MORASS

The Commission and the industry have struggled with these issues for years. These problems are so intractable in part because any solution must be comprehensive. Reform of intercarrier compensation without simultaneous reform of the existing universal service system, which continues to rely on implicit support inherent in today's intercarrier charges, would have serious consequences for many American consumers, particularly those in rural areas. Similarly, reform of some intercarrier compensation regimes and not others could potentially exacerbate competitive imbalances as traffic shifts to the advantaged services. Reform has also been difficult because self-interest has led different industry factions to favor radically divergent solutions to particular intercarrier compensation issues.

The ICF Plan embodies a comprehensive, inseverable proposal to reform both intercarrier compensation and universal service. The Plan was painstakingly developed by a broad cross-section of the industry. Over the course of many months of discussion, the group devised a

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33/ *See, e.g.*, *id.*; *Commission Seeks Comment on Staff Study re Alternative Contribution Methodologies*, Public Notice, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, FCC No. 03-31 (rel. Feb. 26, 2003) ("*Staff Study*") (projecting a 16 percent increase in USF funding obligations from 2003 to 2007, even assuming no growth in high-cost loop, local switching and interstate common line support mechanisms and no increase in competitive eligible telecommunications carrier ("CETC") market entry).

global solution that comprehensively and rationally resolves the industry-wide challenges discussed above.[34/] The specific proposals are spelled out in the formal Plan document attached as Appendix A and summarized in Appendix B. Our goal in this section is not to delineate the Plan in all of its detail, but rather to show how, in contrast to other reform proposals, the Plan will relieve the serious problems described above.

Intercarrier Compensation and Network Interconnection. The Plan tackles intercarrier compensation problems in two ways. First, it establishes clear rules for *direct* interconnection arrangements between two carriers as well as *indirect* interconnection arrangements involving the transport facilities of intermediate ("transiting") carriers. Second, it provides both immediate and stable, long-term relief from the irrationality of the current system, reforming and unifying the existing hodge-podge of intercarrier compensation arrangements, with a gradual phase-in of bill and keep for all traffic.[35/]

Attached as Appendix C to this Brief is a series of diagrams illustrating today's amalgam of disparate network interconnection arrangements and their utterly irrational financial

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[34/] No party would have been prepared to sign on to each of the Plan components taken individually. But all the components of the Plan have the full support of the ICF members as part of a broad, seamless reform program.

[35/] "Bill and keep" under the ICF Plan means that if a calling party's carrier hands off a call to a called party's carrier at a prescribed point in the latter's network, the called party's carrier must look to its customers, not the calling party's carrier, for compensation. Under the Plan, carriers would nonetheless pay for their use of other carriers' networks for transit or backhaul and for the use of special access and other dedicated facilities leased from those other carriers. Both the network interconnection and the intercarrier compensation provisions include special modifications for rural carriers to ensure that such carriers, and thus rural ratepayers, are adequately protected. For example, certain rural carriers (defined in the Plan as "Covered Rural Telephone Companies"), unlike the major LECs, are given ongoing opportunities to continue to recover transport revenues for carrying terminating traffic within their service territories.

consequences. These diagrams, submitted to the Commission in connection with ICF's August 19, 2004 ex parte presentation, represent a major effort by present and former ICF member companies to provide the Commission with a systematic organized overview of what is wrong with today's intercarrier compensation system. Appendix D contains a second series of network diagrams which present the network configurations and financial arrangements for these same or similar network configurations under the Plan. This second set of diagrams illustrates how the Plan meets the rate structure, uniformity and universal service goals described in this Brief.

When complete, this transition to bill and keep will mean that when an originating carrier drops off a call at a designated point of interconnection (known in the Plan as a network "Edge") with a terminating carrier, the latter carrier cannot seek to recover its associated network costs from the originating carrier. Instead, the terminating carrier must recover all of its costs from its own end users (and, to the extent necessary, from one of the universal service mechanisms described below). The terminating carrier will thus no longer recover its own transport and termination costs from the originating carrier—and ultimately from *that* carrier's end users—in the form of access charges or reciprocal compensation. This will have the benefit of giving every carrier control over its cost structure. And by making each carrier responsible to *its own* customers for the recovery of its network costs, the Plan will force carriers to compete for customers on the basis of the efficiency and value of the services provided, not on the basis of comparative ability to exploit arbitrary regulatory distinctions. Put differently, the Plan will permit competition, rather than regulation, to drive consumer choice in telecommunications markets, a change that will become increasingly important with the accelerating pace of technological change.[36/] It thus furthers Congress' goal of establishing a "pro-competitive, de-regulatory national policy framework" for the telecommunications industry.[37/]

To ensure that all rate-regulated carriers can cover their costs and serve their customers effectively, the Plan makes up for reductions in intercarrier revenues by permitting a phased-in increase in end user charges—the federal subscriber line charge (SLC)—and by establishing the new universal service funding programs discussed below.[38/] For several reasons, this shifting of cost-recovery mechanisms will significantly benefit consumers. First, under the Plan, end users will pay directly (and efficiently) costs that they now already pay indirectly (and inefficiently). For example, the SLC increases merely make up to some degree for revenues that LECs currently charge other carriers. Without the Plan, the other carriers that now pay those charges—such as IXCs, LECs, or CMRS carriers—would continue passing them on to consumers in the form of higher end user rates. Under the Plan, however, competition will induce those carriers to reduce these end user rates substantially once their compensation obligations are eliminated. And competition, as well as the pricing flexibility the Plan affords, is likely to pressure LECs

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36/ *See, e.g.*, Patrick DeGraba, Federal Communications Commission, OPP Working Paper Series, No. 33, *Bill and Keep at the Central Office As the Efficient Interconnection Regime* at 25 ¶ 87 (Dec. 2000) ("*DeGraba Working Paper*") (noting that a technologically neutral bill-and-keep regime "reduces the likelihood that a carrier will choose a less efficient technology solely because it receives more favorable regulatory treatment . . . [and] gives carriers the incentive to use the technology that provides services at the least cost").

37/ H.R. CONF. REP. NO. 104-458, at 1 (1996).

38/ The SLC increases will occur only gradually, and even those gradual increases are modified for rural and low-income customers. For example, the ICF Plan protects low-income consumers by exempting Lifeline customers from SLC increases.

themselves to avoid adopting all of the SLC increases the Plan allows, thus producing decreases in the total charges that end users pay.

Just as important, the Plan will benefit consumers by freeing the telecommunications marketplace of the waste and investment-deterring uncertainty attributable to intercarrier compensation disputes under today's fractured system. The Plan's clear rules will eliminate such disputes, free up resources now dedicated to litigation and to unproductive tracking and auditing efforts, and allow carriers to make more rational decisions about how to design their networks and services to produce the greatest consumer value. Moreover, the Plan will enable market forces—in the form of consumer choice among competing carriers—to keep charges in efficient alignment with the underlying costs. The present regime, in contrast, holds an originating carrier captive to the rates charged by terminating carriers. And, because a terminating carrier has the incentive to overcharge originating carriers for its termination costs, any form of the present "calling party's network pays" ("CPNP") regime would require regulatory ratemaking proceedings in perpetuity. As the Commission has indicated, it is nearly impossible for even the most proficient regulator to get termination rates "right," and command-and-control regulation is in any event inherently less capable than market forces of matching individual rates to costs.[39/] For that reason alone, the Plan is clearly superior to any alternative proposal to "reform"

[39/] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9185-86 ¶ 76 (2001) (*"ISP Remand Order"*), *remanded on other grounds, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 1012 (2003).

intercarrier compensation by maintaining a CPNP system but adjusting some or all of the rate levels.

In addition, the Plan's bill-and-keep approach allocates costs to "cost causers" at least as accurately as, and likely more accurately than, the existing CPNP regime. The fundamental premises of the present system are that the sole cost-causer and sole beneficiary of a typical telephone communication is the caller; thus, all costs of transporting the communication are imposed on the caller's network (and indirectly on the caller).[40/] Those premises, which underlie both the reciprocal compensation and access charge regimes, are incorrect. A substantial share of the costs of telecommunications traffic is caused by the decisions of called parties to make their numbers available to callers, to answer incoming calls, and to remain on the line. Indeed, the called party's responsibility for a share of those costs has never been clearer, now that widespread use of caller ID permits end users to screen all calls and the national do-not-call registry has enabled them to declare their phone numbers off-limits to unwanted telemarketers.[41/] Likewise, since a completed call involves parties at both ends, it is incorrect to view the caller as the sole beneficiary of a call. While no regime can always capture the precise proportion of costs and benefits attributable to each call participant, the generalization underlying bill and keep—

[40/] *See, e.g.*, *Intercarrier Compensation NPRM* at 9619 ¶ 19 & n.36 (noting widespread assumption that the calling party is the sole cost causer of the call); *id.* at 9624-25 ¶ 37 (explaining that "CPNP regimes may be viewed as implicitly embracing the premise that the originating caller receives all the benefits of a call and should, therefore, bear the costs of both origination and termination").

[41/] *See* Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14017 ¶ 1 (2003); *DeGraba Working Paper* at 33-34 ¶ 118 (noting that "parties, using caller-ID or similar devices, could screen their calls"). Similarly, consumers may choose to have an unlisted number to avoid unwanted calls.

that costs and benefits are shared—is far more accurate than the generalization of the current CPNP system that the calling party is solely responsible for causing 100% of the costs of all calls and deriving 100% of the benefits.

The Plan achieves all of the objectives described above while leaving intact the most important spheres of state regulatory authority. The Plan fully preserves state authority to cap local *end user* rates, and to establish state universal service funds that are consistent with, and do not rely on or burden, the federal USF mechanisms. The Plan likewise permits the states to fulfill their traditional roles as the guardians of consumer welfare. States will further retain the authority to require investment in facilities and services, to approve voluntary interconnection and intercarrier compensation agreements, to arbitrate open issues when carriers cannot reach agreement, and to enforce agreements when disputes arise. Importantly, though, arbitrations and disputes should be far less common under the Plan.

In addition to the consumer benefits discussed above, the Plan will further advantage consumers in a number of other key respects. First, it will create the regulatory certainty needed to generate additional investment in telecommunications markets—in new technology, infrastructure upgrades, and new services. Second, by eliminating regulatory anomalies that affect and distort investment decisions, the Plan will result in a more efficient allocation of societal resources. Moreover, by removing artificial and inefficient constraints on pricing and service options, the Plan will allow providers to rationalize their pricing plans. In particular, it will provide carriers with more flexibility to respond efficiently to the widespread preference of many consumers for bundled packages of indistinguishable service minutes. Similarly, under the Plan, competition will significantly reduce the prices for intrastate calling and eliminate current disparities between interstate and intrastate long distance rates. The same competitive pressures will tend to eliminate the distinction between "local" and "toll" calls. Rural customers will enjoy the benefits of more long distance competition once long distance carriers no longer face the disincentive of high access charges.

All consumers nationwide, moreover, will enjoy the benefits of the increased broadband investment and innovation that the Plan will stimulate. Under the Plan, every network owner and service provider contemplating broadband investment or other innovation will know with certainty the uniform financial impacts associated with interconnection and exchange of traffic. Every network owner and service provider can expect a radical reduction in regulatory costs. And every network owner and service provider will be able to invest with confidence that universal service needs will be met with stable universal service mechanisms. In this regard, too, the ICF Plan stands apart from other reform proposals, each of which would preserve (and, in some cases, exacerbate) inefficiencies and uncertainties that plague existing intercarrier compensation and universal service regimes.

Universal Service. The Plan seeks to eliminate unsustainable implicit universal service support by creating two new explicit support mechanisms. To the extent other revenues permitted by the Plan do not otherwise do so, these mechanisms are designed to provide adequate funding to preserve universal service as intercarrier compensation is eliminated. The two new funds created by the Plan are the "Intercarrier Compensation Recovery Mechanism" ("ICRM") for non-rural local telephone companies and the "Transitional Network Recovery Mechanism" ("TRNM") for rural carriers.[42/]

42/ ICRM support is portable. TNRM support is portable only to ETCs that would have

The Plan also broadens and stabilizes the funding source for universal service support by creating a new, unified contribution methodology. This methodology eliminates arbitrary regulatory exemptions from contribution obligations and thus ensures that more providers share the cost of universal service. Specifically, the Plan relies on a numbers/connection-based assessment methodology under which every provider is assessed one "unit" of contribution for each unique working telephone number it provides, and for each residential DSL, cable modem, and other high-speed, non-circuit-switched connection. Other connections, such as non-switched, dedicated business connections, are assessed different units on the basis of their capacity.

The Plan thus preserves and advances universal service in a competitively neutral and sustainable manner. It eliminates reliance on eroding implicit support and helps address the artificial competitive advantages associated with imposing the cost of supporting universal service on only a subset of providers offering similar, competing services. And the Plan ensures a more stable funding base by spreading the obligation to support universal service among a broader range of providers and eliminating loopholes based on service type, geography, or technology. Finally, the Plan helps the states by recovering intrastate costs that are recovered now, if at all, through rapidly eroding implicit support, and it does so without causing any of the

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reduced access revenues as a result of the Plan (e.g., not CMRS carriers), because TNRM support is calculated specifically to replace critical support, on a revenue neutral basis to the CRTC, that the CRTCs and non-CMRS CETCs would lose as a result of the Plan's elimination of such revenues. Because CRTCs and non-CMRS CETCs are disproportionately dependent on the support such revenues provide, TNRM support is not available to CMRS carriers, which do not receive such support from access revenues, during the fund's initial transitional period. Under the Plan, the Commission would revisit the criteria for ETC eligibility for TNRM support in 2013.

rate shock that might accompany immediate rate rebalancing in the absence of such support mechanisms.

In sum, the ICF Plan greatly promotes the public interest because, to the benefit of consumers and the industry alike—and unlike any other reform proposal that has been submitted to the Commission—it comprehensively meets each of the key regulatory objectives noted at the outset of this brief. The Plan eliminates artificial distinctions in both rates and rate structures; it unifies today's disparate rules for allocation of financial responsibility among interconnected carriers; and it accomplishes these reforms while still protecting universal service and, in particular, rural America's access to affordable telecommunications and information services. Moreover, the Plan will provide a stable, predictable platform for 21st century innovation, thereby promoting broadband and IP-enabled investment, creating a level competitive playing field, and enabling a dramatic reduction in regulatory intervention and the associated costs. Finally, as we now show, the Commission has ample authority to adopt the Plan under existing law.

III. THE PLAN IS CONSISTENT WITH EXISTING LAW

A. The Commission Has Full Jurisdiction Under the Communications Act, as Amended by the 1996 Act, to Establish Uniform Intercarrier Compensation Rules for All Classes of Traffic

Section 201(b) of the Communications Act authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." As the Supreme Court confirmed in *Iowa Utilities Board,* the Commission's section 201(b) rulemaking jurisdiction is not limited to jurisdictionally interstate matters covered elsewhere in section 201. Instead, it extends to *all* provisions of the Communications Act, including the provisions added by the Telecommunications Act of 1996 that encompass matters that, before 1996, fell within the exclusive jurisdiction of the states.[43/] It is thus undisputed that the Commission may adopt rules implementing section 251(b)(5) and the other statutory provisions governing carrier interconnection with respect to all traffic—interstate and intrastate—within the scope of those provisions. This authority permits the Commission to implement the ICF Plan's comprehensive approach to intercarrier compensation for any exchange of telecommunications traffic.

Congress drafted section 251(b)(5) expansively to bring national consistency to questions of intercarrier compensation. By its terms, this provision extends to all compensation issues relating to the transport and termination of "telecommunications" involving any local exchange carrier. The breadth of that language is significant in three principal respects. *First*, and perhaps most important, section 251(b)(5) makes no distinctions among traffic on the basis of jurisdiction ("local," "toll," "intrastate," "interstate") or service definition (*e.g.*, "exchange access," "information access," or "exchange service"). All such traffic is plainly "telecommunications." In its *ISP Remand Order* in 2001, the Commission was thus entirely correct in concluding that "[w]e were mistaken [in the *Local Competition Order*] to have characterized" section 251(b)(5) as limited to local traffic, given that "'local' . . . is not a term used in section 251(b)(5) or section 251(g)."[44/] The D.C. Circuit left this conclusion intact on review, although it took issue with other aspects of the *ISP Remand Order*.[45/]

43/ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999).

44/ *See ISP Remand Order* at 9167, 9172 ¶¶ 34, 45.

45/ *See WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

If it had wished, of course, Congress could have limited the scope of this provision to "local telecommunications," to "telecommunications that originate and terminate within the same local calling area," or to "telecommunications handed off from one LEC directly to another LEC." But Congress included no such limitations on the scope of section 251(b)(5). Instead, it drafted section 251(b)(5) broadly to address all "telecommunications," the most expansive of the statute's defined terms.[46/] Despite the clarity of this statutory language, some continue to argue that the Commission's jurisdiction to implement section 251(b)(5) extends only to "local" traffic and that the Commission thus lacks authority under that provision to address intercarrier compensation issues relating to any category of traffic that is deemed to be neither "local" nor "interstate." This misguided effort to carve up the Commission's rulemaking authority on the basis of such legacy jurisdictional categories is not just irreconcilable with the plain language of section 251(b)(5), but strikingly similar to the unavailing attacks in the 1990s on the Commission's jurisdiction to implement sections 251 and 252 more generally. Here, as in that context, the attempt to "produce[] a most chopped-up statute" along jurisdictional lines is flawed both because it violates the statutory text and because it is "most unlikely that Congress created such a strange hodgepodge."[47/]

Second, as the Commission has further found, section 251(b)(5) applies not just to the exchange of traffic between two LECs, but more broadly to the exchange of any traffic involving

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46/ *See* 47 U.S.C. § 153(43).

47/ *Iowa Utils. Bd.*, 525 U.S. at 381 n.8.

a LEC at one end.[48/] In other words, although the obligation to establish reciprocal compensation arrangements for the transport and termination of telecommunications falls on LECs, Congress did not limit to other LECs the class of potential *beneficiaries* of that obligation.

Third, as the Commission has further indicated, section 251(b)(5) covers intercarrier compensation issues on the originating end of a call as well as the terminating end, even though it explicitly addresses only the "transport and termination of telecommunications." As the Commission recognized in the *Local Competition Order*, because section 251(b)(5) provides for intercarrier compensation only for termination of traffic and does not authorize charges for originating traffic, LECs could no longer charge CMRS providers or other carriers for LEC-originated traffic.[49/] Thus, with the exception of pre-1996 Act compensation rules temporarily grandfathered by section 251(g), section 251(b)(5) is properly read to bar carriers from imposing any charges, including access charges, for the costs of originating traffic.

Because the statutory language itself compels the conclusion that the Commission's section 251(b)(5) authority extends to *all* telecommunications involving a LEC, the Commission would face formidable litigation risks were it now to reverse course yet again on the scope of section 251(b)(5). Indeed, as the D.C. Circuit recently admonished, "[e]ven under the deferential

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48/ *See Local Competition Order* at 16016 ¶ 1041 ("Although section 251(b)(5) does not explicitly state to whom the LEC's obligation runs, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to *any* telecommunications carriers," including non-LEC CMRS providers) (emphasis added). Where Congress intended LECs' 1996 Act obligations to run only to a limited class of carriers, it did so explicitly. *See, e.g.*, 47 U.S.C. § 251(b)(3) ("The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service. . . .").

49/ *Local Competition Order* at 16016 ¶ 1042.

Chevron standard of review, an agency cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term."[50] The statutory context in which the D.C. Circuit enforced that principle is closely analogous to the statutory context here. Just as the court applied that principle to reject the Commission's "argument that long distance services are not 'telecommunications services'" for purposes of section 251(d)(2), so too is the Commission barred from finding that particular categories of "telecommunications" do not *count* as "telecommunications" for purposes of section 251(b)(5).

Were there any remaining question about the Commission's jurisdiction to address all telecommunications under section 251(b)(5), including access traffic, it would be resolved by section 251(g). That provision singles out access traffic for special treatment and temporarily grandfathers the pre-1996 rules applicable to such traffic, including rules governing "receipt of compensation."[51] There would have been no need for Congress to have preserved those compensation rules against the effects of section 251 if section 251(b)(5) did not in fact address the "receipt of compensation" for the traffic covered by section 251(g)—*i.e.,* access traffic. Because Congress is presumed not to have wasted its breath, the only sensible interpretation of section 251(g) confirms what section 251(b)(5) already makes clear on its face: that intercarrier compensation for all access traffic falls within the broad scope of the Commission's jurisdiction to implement section 251.

50/ *USTA v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004).

51/ 47 U.S.C. § 251(g).

In a footnote of the *ISP Remand Order,* the Commission obliquely suggested that "ambiguity" in the scope of "telecommunications" might support a construction that *intrastate* access traffic falls outside of section 251(b)(5).[52/] As noted, however, there is no such ambiguity: the statutory definition of "telecommunications" straightforwardly encompasses all access traffic. Moreover, there is no basis for the apparent policy concern that motivated the Commission to look for ambiguity in this unambiguous language—*i.e.,* a concern that (i) section 251(g) preserves only the *interstate* access charge regime (until the adoption of superseding Commission regulations) but not the parallel intrastate access regime and (ii) Congress should be presumed not to have intended to have undercut the latter regime immediately upon enacting the 1996 Act.[53/] No less than its interstate counterpart, the intrastate access charge regime derives from the 1982 AT&T consent decree and the subsequent GTE decree.[54/] Contrary to the

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52/ *See ISP Remand Order* at 9168 ¶ 37 n.66.

53/ *See id.*

54/ Before 1982, compensation for interexchange access was generally derived through an AT&T-administered system of settlements and division of revenues. Second Supplemental Notice of Inquiry and Proposed Rulemaking, *MTS and WATS Market Structure*, 77 F.C.C.2d 224, 227-28, 234 ¶¶ 15-19, 47 (1980). The AT&T consent decree replaced that system with a regime of federal *and* intrastate access charges. *See United States v. AT&T Co.*, 552 F. Supp. 131, 227, 233 (D.D.C. 1982); Third Report and Order, *MTS and WATS Market Structure*, 93 F.C.C.2d 241, 246 ¶ 11 (1983). The court order accompanying the consent decree made clear that the decree required access charges to be used in both the interstate and intrastate jurisdictions: "Under the proposed decree, state regulators will set access charges for intrastate interexchange service and the FCC will set access charges for interstate interexchange service." *AT&T*, 552 F. Supp. at 169 n.161. Thus, both interstate and intrastate access charges were borne of the same "consent decree," and both are preserved under section 251(g). There is also no evidence in the legislative history that Congress intended to treat intrastate access charges any differently, for grandfathering purposes, from interstate access charges. To the contrary, the House Conference Report broadly states that "the substance of this new statutory duty" under section 251(g) "shall be the equal access and nondiscrimination restrictions and obligations, Commission's apparent belief, therefore, the intrastate access regime falls squarely within the ambit of section 251(g), which grandfathers "equal access and nondiscriminatory interconnection . . . obligations (including receipt of compensation) . . . under any court order, consent decree," or FCC order. Indeed, it would have been perverse for Congress to have authorized the Commission to reform intercarrier compensation rules relating to "local" and "interstate" traffic but *not* the rules applicable to the one class of traffic—intrastate access—that is subject to the *highest* above-cost charges and that is generally thought to be most laden with unsustainable implicit support.

In any event, even if section 251(g) were read *not* to grandfather intrastate access charges, that reading would raise no pragmatic concerns about the broad scope of section 251(b)(5), for the Commission could still exercise its well-established authority to impose interim rules ensuring a smooth transition to a new regulatory regime. Indeed, in a variety of contexts, and particularly in matters of intercarrier compensation, the courts have long upheld the Commission's expansive authority to take reasonable transitional measures needed to protect the industry from sudden disruptions.[55/] The Commission's authority to adopt similar measures to manage the transition from access charges to a unified section 251(b)(5) regime forecloses any claim that Congress must have meant to exclude intrastate access charges permanently from the scope of section 251(b)(5). And this same authority permits the Commission to adopt the ICF

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including receipt of compensation, that applied to the local exchange carrier immediately prior to the date of enactment, *regardless of the source*." H.R. CONF. REP. NO. 104-458, at 123 (1996) (emphasis added).

55/ *See, e.g., CompTel v. FCC*, 309 F.3d 8, 15 (D.C. Cir. 2002); *CompTel v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997).

Plan's proposed transition from the present schemes of intercarrier compensation to a unified system based on bill-and-keep principles.

B. The Commission May Additionally Assert Preemptive Authority Over "Intrastate" Traffic Under Section 254

For the reasons discussed, the Commission has full authority under sections 201 and 251(b)(5) alone to adopt rules governing any exchange of telecommunications traffic, regardless of legacy jurisdictional considerations. As a belt-and-suspenders safeguard, however, the Commission can and should exercise its independent authority under section 254 as an additional basis for mandating a transition to a uniform rule of bill and keep for all traffic. In particular, the Commission can and should preempt intrastate access charges on the ground that they are inconsistent with the Commission's duty under section 254 to rationalize universal service support. In so doing, the Commission need not (and should not) stop with a simple prohibition on the use of cross-subsidies within access charges. More broadly, it should find that intrastate access charges generally have been universally and substantially above cost and that it would be impractical to determine the precise degree to which they are so. The Commission thus may order the complete abolition of access charges on the ground that those charges are inconsistent with the principles of the Act generally and should be replaced by a more rational and sustainable source of universal service support.

Along with section 254(d), section 254(b)(5) requires the Commission to create "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." As the Tenth Circuit held in its 2001 *Qwest* decision, "the Act requires the FCC to base its policies on the principle that there should be sufficient [and explicit] *state* mechanisms to promote universal service. Thus, the FCC must ensure that these mechanisms exist."[56] Sections 254(b)(4), 254(d), and 254(f) further require the Commission to ensure that the contribution mechanisms for universal service funding are "equitable and nondiscriminatory."[57]

In each of these respects, the Commission has ample authority to preempt state regulation at odds with these federal universal service principles, both to discharge its obligation to ensure that state mechanisms are "sufficient" and to ensure that no state adopts regulations that violate section 254(f) in that they are "inconsistent with the Commission's rules to preserve and advance universal service."

Here, above-cost access charges—used as a source of universal service support, whether state or federal—violate all of these requirements of section 254. In particular, it would be impossible for the states to determine which portions of access charges represent the genuine "costs" of particular access services and which represent implicit support. As discussed in Part I of this brief, moreover, support embedded in intrastate access charges is highly vulnerable to competition and avoidance. Because this implicit support is therefore neither "predictable" nor "sufficient" as a support mechanism, the Commission is plainly authorized, under the Tenth Circuit's analysis, to replace it with more robust funding mechanisms.[58]

56/ *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001) (emphasis added).

57/ *See also Universal Service Order* at 8801-02 ¶¶ 46-49 (noting that "competitive neutrality" is required and that "the principle of competitive neutrality in this context should include technological neutrality").

58/ *See* Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863, 4865-66 ¶ 3 n.11 (2004) (discussing the past erosion of access charges and the future threat posed by

Reliance on above-cost intrastate access charges is likewise inconsistent with the requirement that contributions to universal service must be "equitable and nondiscriminatory." First, even though IXCs, ISPs, and CMRS providers all use local exchange networks, access charge obligations vary and often turn on regulatory classifications rather than the nature of the use of local exchange facilities. Second, ILECs alone bear the risk of, and the burden of covering, any shortfall in such funding due to the erosion of access charges. Third, some carriers—CMRS providers—are not even entitled to collect access charges, and such charges are thus not fully "portable."

Access charges also greatly exacerbate the extent to which the geographic rate-averaging requirement of section 254(g) produces economically inefficient implicit cross-subsidies. That provision requires IXCs to charge the same retail rates to subscribers in high-cost areas as to subscribers in urban areas. Because the current access charge regime requires IXCs to cover a portion of each LEC's own network costs and then pass those costs along to their end users, it subjects the recovery of those costs to cross-subsidies. When a LEC charges an IXC high access charges to originate a call, for example, the IXC cannot pass those charges back directly to the subscriber that initiated the call; it must instead spread those charges over its entire national subscribership base. Long distance subscribers in urban areas and in states that have low access charges therefore must artificially subsidize low rates for subscribers in rural areas and states

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increased competition); *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9616 ¶ 12 (recognizing the many arbitrage opportunities created by access charges); Order, *Access Charge Reform*, 12 FCC Rcd 10175, 10182-83 ¶¶ 17, 16 (1997) (noting that the support implicit in access charges is "sustainable only in a monopoly environment" and has "never been precisely quantified").

with high access charges. Because of the geographic averaging requirement, high access fees erect a barrier to entry into the long distance market, for IXCs have a disincentive to expand into markets with such fees if they have to average those unusually high costs into their retail rates nationwide. If access charges were eliminated, by contrast, those costs would never be the responsibility of the IXCs to begin with and would therefore fall outside the scope of the section 254(g) national rate-averaging requirement.

For all of these reasons, the Commission has broad authority to preempt continued reliance on access charges to subsidize universal service.[59/] The Commission is thus fully empowered to replace intrastate access charge schemes with more neutral and durable funding systems.

C. The Commission Has Substantive Authority to Impose Bill and Keep for All Telecommunications Traffic and to Impose the ICF Plan's Proposed Transition from Current Rates to Bill and Keep

The Commission not only has *jurisdiction* to impose a unified intercarrier compensation system for all traffic, but also the authority to prescribe a transition to bill and keep in particular as the substantive compensation rule, even for "unbalanced" traffic subject to the pricing rules of sections 251(b)(5) and 252(d)(2).

In the *Local Competition Order*, at the same time that the Commission erroneously limited the scope of section 251(b)(5) to local traffic, it also found—more as a matter of policy than of statutory interpretation—that bill and keep was inappropriate for unbalanced traffic.[60/] In

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59/ 47 U.S.C. § 254(b)(5), (d); *see Qwest v. FCC*, 258 F.3d 1191, 1203-04 (10th Cir. 2001).

60/ *See Local Competition Order* at 16054-55 ¶¶ 1111-12.

the present context of comprehensive intercarrier compensation reform of *all* traffic, including access traffic, the Commission now should focus more carefully on the breadth of its statutory authority and reach the contrary conclusion—namely, that the text of section 252(d)(2) permits the Commission to order bill and keep for all traffic, including unbalanced traffic.[61/]

As an initial matter, section 252(d)(2)(A) directs the Commission and the states (i) to "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (ii) to "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." This language is perfectly consistent with a regime, such as bill and keep, in which each carrier is afforded an opportunity for "recovery" of those costs from its own end users.[62/]

If there were any question on this point, it would be answered by the "bill-and-keep savings clause." Section 252(d)(2)(B)(i) expressly authorizes all regulatory "arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements)." Bill and keep, as structured in the ICF Plan, entitles carriers to the "mutual recovery of costs" by permitting them to recover those costs through end user charges and, where necessary, universal service. As the legislative history confirms, this clause thus permits "a range of compensation schemes, such as an in-kind exchange of traffic without cash payment (known as bill-and-keep

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61/ *See WorldCom,* 288 F.3d at 434.

62/ *See Local Competition Order* at 16055 ¶ 1112 ("bill-and-keep arrangements that lack *any* provisions for compensation do not provide for recovery of costs") (emphasis added).

arrangements)."[63/] Importantly, the D.C. Circuit has already indicated its support for the same conclusion, noting the "non-trivial likelihood that the Commission has authority to elect" a bill-and-keep regime for section 251(b)(5) traffic under the terms of section 252(d)(2)(B)(i), which the court specifically cited.[64/] Although section 252(d)(2), like the 1996 Act as a whole, "is in many important respects a model of ambiguity or indeed even self-contradiction," Congress "is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency."[65/] Here, the Commission can and should resolve any ambiguity in this statutory language in favor of an appropriately robust construction of the bill-and-keep savings clause.

Reading section 252(d)(2) to preserve the Commission's discretion in this respect does *not* reduce the pricing standards of section 252(d)(2) to surplusage. That provision is properly understood to require the Commission to choose, for all traffic within the scope of section 251(b)(5), *either* bill and keep, so long as carriers may recover their costs from end users directly (or, where appropriate, from universal service support), *or* a genuinely cost-based CPNP regime. Section 252(d)(2) still precludes *non*-cost-based compensation rules as well as arrangements (common before 1996) under which an *originating* carrier charges a *terminating* (or intermediate) carrier for handing off calls to it. And the Commission's choice of bill and keep rather than a CPNP rule is particularly reasonable now, since eight years of experience have shown that CPNP creates the potential for serious market distortions and that it is too costly (if

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63/ S. REP. NO. 104-230, at 120 (1996).

64/ *See WorldCom*, 288 F.3d at 434.

65/ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 397.

possible at all) to ensure "perfect" cost-based rates. The Commission is thus more than free to revisit and reject its unelaborated assumption in the *Local Competition Order* that Congress meant to lock in those distortions forever through the relevant statutory language.[66/]

In addition, as the D.C. Circuit further suggested in citing the bill-and-keep savings clause as a basis for remanding but not vacating the *ISP Remand Order,* the Commission would not overstep any *jurisdictional* boundaries established in *Iowa Utilities Board* by prescribing bill and keep for all traffic. Under *Iowa Utilities Board,* the Commission has plenary jurisdiction to make very specific methodological decisions about the implementation of section 251, and a choice of bill and keep is precisely such a decision, even though it has the effect of producing specific outcomes in matters of intercarrier compensation. Indeed, the Commission cannot *avoid* prescribing the circumstances in which bill and keep is appropriate if it is to play its statutorily assigned role in interpreting the scope of the bill-and-keep savings clause of section 252(d)(2).

For all of these reasons, sections 252(d)(2) and 251(b)(5) pose no obstacle to an FCC-mandated transition to bill and keep for all traffic. Finally, this transition to bill and keep need not—and, under the ICF Plan, would not—occur in one step. As noted, the Commission has ample authority to avoid sudden industry disruptions by adopting the Plan's proposal for a

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66/ *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863-64 (1984) (agency is free to change mind on matters of statutory interpretation); *Smiley v. Citibank*, 517 U.S. 735, 742 (1996) ("[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by ambiguities of a statute with the implementing agency."); *see also Independent Bankers Ass'n v. Farm Credit Administration*, 164 F.3d 661, 668 (D.C. Cir. 1999).

transitional glide-path from existing intercarrier compensation rates to a comprehensive bill-and-keep regime.[67]

D. The Commission Has Authority Under Section 251(b)(5) and Section 254 to Raise the SLC and Establish the ICRM and TNRM, Even Though Those Mechanisms Will Cover Some Costs Currently Booked as "Intrastate"

The analysis above establishes that the Commission has authority to prescribe compensation rules ensuring the mutual recovery of carriers' costs. And it confirms that the Commission may adopt a bill-and-keep regime for that purpose. This authority necessarily includes a corollary authority to take the steps needed to ensure that, despite the transition to bill and keep, carriers actually have reasonable opportunities to recover the relevant costs, as section 252(d)(2) requires. The SLC increase and the establishment of the ICRM and TNRM constitute a clearly permissible exercise of that authority. Indeed, the Commission not only has the *authority* to establish mechanisms that provide adequate cost recovery opportunities and universal service funding through SLC increases and new explicit universal service mechanisms, but an *obligation* to do so if it eliminates the existing intercarrier compensation regimes. Precisely because section 252(d)(2) entitles carriers to the opportunity to recover their costs, the Commission could not adopt a transition to bill and keep unless it establishes alternative support mechanisms that, like these, afford carriers that opportunity.

The legacy jurisdictional separations regime, which divides costs and their recovery into distinct interstate and intrastate "jurisdictions," poses no obstacle to the Commission's adoption

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[67] *See CompTel*, 117 F.3d at 1074-75; *see also CompTel*, 309 F.3d at 15 ("the Commission can justify a policy by reference to the purposes of avoiding disruption pending a broader reform").

of these aspects of the ICF Plan. First, the ICRM and TNRM are just new support mechanisms that, like existing funding programs for rural and non-rural carriers, the Commission may adopt pursuant to its general universal service powers, including its authority to "defin[e] . . . the services that are supported by Federal universal service support mechanisms."[68/] In a range of contexts, the Commission has long provided *federal* funds to cover at least a portion of costs allocated to the *intrastate* side of the cost ledger.[69/] That, for example, is the central and explicit function of the high cost fund for non-rural carriers.[70/] If there were any legal problem with this practice from a jurisdictional separations perspective, which there is not, that same problem would afflict the very foundations of this Commission's existing universal service programs.[71/]

68/ 47 U.S.C. § 254(a)(2).

69/ *See* Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8807 ¶ 56 (1997) (including intrastate services among those services supported by federal universal service mechanisms); *TOPUC I*, 183 F.3d at 444 (recognizing that the Commission provides federal universal service funds to support intrastate rate discounts to schools and libraries).

70/ *See generally* Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 22559 (2003); Ninth Report and Order and Eighteenth Order on Reconsideration, *Federal-State Joint Board on Universal Service*, 14 FCC Rcd 20432 (1999) (subsequent history omitted).

71/ The Commission has never adhered strictly to the most "accurate" apportionment between the two jurisdictions. In the past, the Commission has used the separations process to shift some intrastate costs to the interstate jurisdiction in an effort to provide implicit universal service support from interstate to intrastate services. Even before Congress enacted section 254, the D.C. Circuit upheld these Commission policies on universal service grounds. *See National Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095, 1105 n.6 (D.C. Cir. 1984) ("*NARUC*") (relying on 47 U.S.C. § 151); *MCI Telecomm. Corp.* v. *FCC*, 750 F.2d 135, 140-41 (D.C. Cir. 1984). All of this underscores that, as the Supreme Court has noted, "extreme nicety is not required" when allocating costs. *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 150 (1930).

For the same reasons, the Commission may lawfully raise the SLC to cover a portion of the costs formerly covered by intrastate access charges as an exercise of its plenary authority to ensure a sustainable and explicit universal service system. It is not possible to replace all of the implicit support embodied in intercarrier compensation with explicit federal support, because doing so would necessitate unsustainable increases to the size of the fund and would impose a tremendous burden on all providers. Nor would that approach be appropriate even if it were possible, because at least some portion of access charges is designed to recover the costs that each LEC actually bears in providing access. Since the Commission cannot unravel, in each instance, which portion is implicit support and which is compensation for the costs of serving a given end user, the only reasonable and sustainable approach is to permit carriers both to increase end user charges via the SLC—up to the caps contemplated by the Plan to the extent competition permits—and, where appropriate, to obtain additional universal service funding through the ICRM/TNRM mechanisms. The SLC increases contemplated by the Plan are thus a key factor in eliminating implicit support and transitioning to a uniform and rational bill-and-keep environment for intercarrier compensation. As discussed in Part II of this brief, moreover, this bill-and-keep approach to cost recovery—unlike existing carrier-to-carrier cost-recovery mechanisms—will permit competition to keep overall end user rates at lower, efficient levels.[72]

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[72] As the courts have consistently held, the Commission may restructure end user charges, including the SLC, to produce more efficient mechanisms for the recovery of network costs that would otherwise be recovered inefficiently through intercarrier compensation charges. Nothing in section 254(k) is to the contrary. *See, e.g.*, *TOPUC II,* 265 F.3d at 323-24; *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 558-59 (8th Cir. 1998); *see also NARUC*, 737 F.2d at 1111-15 (holding that the Commission has power to impose flat-rate end user charges).

Finally, the Commission would fully respect the states' own policy interests by adopting federal support programs to ensure adequate recovery of costs on the intrastate side of the cost ledger.[73/] The federal revenue measures contemplated by the ICF Plan are, indeed, the very opposite of an unfunded mandate. Rather than forcing the states to assume a new burden, the Commission would achieve the goals of section 254 by lifting the states' existing obligation to arrange for recovery of certain network costs and by shifting to itself the burden of covering those costs through the combination of the new federal mechanisms and the other sources of revenue provided by the Plan. Finally, nothing in this scheme involves federal intrusion into the states' central prerogative to set their own retail rates.

The federal support programs the Plan creates are fully consistent with the requirements of section 254 of the Act. The ICRM and TNRM are explicit and predictable support

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[73/] To establish a uniform bill-and-keep regime, the Commission need not refer to the Joint Board its decisions to increase the SLC or replace interstate and intrastate switched access revenues. First, adoption of the Plan does not require a referral to a *separations* Joint Board. While changes in the separations rules must be referred to the Joint Board pursuant to 47 U.S.C. § 410(c), the Plan leaves intact the existing separations rules concerning allocation of costs and merely changes the universal service support mechanism to provide for the *recovery* of necessary access revenues through an increased SLC. *See TOPUC II*, 265 F.3d at 324 (distinguishing between cost recovery and cost allocation). Moving cost recovery to the federal SLC does not change the allocation of affected costs, and there is no other reason why federal universal service payments cannot be made to cover costs allocated to the intrastate jurisdiction. For example, section 36.631 of the Commission's rules provides federal universal service support to rural LECs on a sliding scale, based on their average loop costs, to cover a percentage of loop costs that are allocated to the intrastate jurisdiction. *See* Fourteenth Report and Order, *Federal-State Joint Board on Universal Service,* 16 FCC Rcd 11244, 11251-52 ¶ 13 n.19 (2001); *see also Crocket Tel. Co. v. FCC,* 963 F.2d 1564, 1570 (D.C. Cir. 1992). Similarly, section 254(a) does not require the Commission to refer the Plan to a *universal service* Joint Board. Indeed, even if the Plan were interpreted to require a change in the definition of universal service, "[t]he statute requires consultation with the Joint Board for only the initial implementation of § 254's universal service requirement. *See* 47 U.S.C. § 254(a)(1). Any consultation afterwards is permissive." *TOPUC II*, 265 F.3d at 328 n.7.

mechanisms that will promote affordable quality services, including advanced and information services, across the nation. The funds are also equitable and fully portable for all non-CMRS ETCs. While in rural areas, eligibility is restricted to wireline LECs, that limitation is necessary as a transitional safeguard for rural universal service. Non-CMRS ETCs (who generally are all wireline LECs) in high cost rural areas are uniquely dependent on the support access charges now provide, and the shift to bill and keep therefore will be more disruptive to these carriers as compared to others. In order to preserve low-cost, high quality service in rural areas as rural carriers adjust to the new support mechanism, the Plan reserves the new rural fund for non-CMRS ETCs. The Plan thus would exclude CMRS carriers, who are now generally precluded from tariffing and therefore from relying on access charges—and thus will be less affected by their elimination. This limitation is discrete: it applies only to the TNRM; the ICRM is available to all carriers that qualify as ETCs; and the Plan does not affect eligibility for any pre-existing universal support funding. And the Plan further provides that the Commission will re-examine the TNRM eligibility restriction in 2013, when the same transitional concerns may no longer apply. The Commission has ample authority to implement such a discrete, interim eligibility restriction as an appropriate transitional measure.[74/]

E. The Commission Has Full Authority To Adopt the Plan's Contribution Methodology for Universal Service

The Commission's universal service authority derives from two principal sources: (i) its general mandate under section 1 of the Communications Act to "regulat[e] interstate . . . commerce in communication by wire and radio so as to make available, so far as possible, to all

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74/ *See, e.g., CompTel,* 309 F.3d at 14-15;*CompTel*, 117 F.3d at 1073-75.

the people of the United States . . . a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,"[75] and (ii) its mandate under section 254 to ensure that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms . . . to preserve and advance universal service."[76] The Plan will replace the unsustainable revenue-based contribution mechanisms in effect today with a more durable methodology that assesses contributions on the basis of telephone numbers and connections to a public network. The Commission has full authority under sections 1 and 254 to make this long-overdue change.

First, the Plan's numbers/connections-based contribution methodology fully comports with the Commission's obligation under section 254(d) to require telecommunications carriers to contribute to universal service on "an equitable and nondiscriminatory basis." As discussed in Part I, the current revenue-based contribution methodology is both inequitable and unsustainable because it permits carriers to avoid or minimize their contribution obligations simply by choosing certain technologies, service configurations, or network architectures. The Plan meets the need for a new methodology by distributing the contribution burden broadly among the vast majority of telecommunications providers in a technology-neutral, non-discriminatory, and

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75/ 47 U.S.C. § 151; *see NARUC*, 737 F.2d at 1108 (recognizing that section 1 contains a "prominen[t] . . . universal service objective"); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (declaring that "universal service is an important FCC objective" and establishment of a Universal Service Fund is "within the Commission's statutory authority" under section 1).

76/ 47 U.S.C. § 254(d).

transparent manner.[77] LECs, traditional long-distance providers, wireless carriers, broadband providers, and VoIP providers that use telephone numbers will all be subject to the contribution obligation because each utilizes telephone numbers or provides connections to a public network (or both). And the Plan abolishes the artificial regulatory distinctions that today cause traditional IXCs to bear a disproportionately large share of the contribution obligation, even as their revenues fall and long distance traffic shifts to other networks.

The Plan's contribution methodology is also "equitable and nondiscriminatory." It is true that, like any reform to the contribution methodology, the Plan's approach would necessarily change the relative contribution burdens among different industry segments. For example, because assessments would no longer rest on revenues, a criterion not found in the Act, traditional IXCs would bear proportionally less of a burden than they do today. But to argue that this change makes the Plan's approach less "equitable" than the current regime incorrectly assumes that the particular burdens imposed by the present interstate-revenue-based scheme are the proper frame of reference. Because contribution obligations are ultimately passed through to consumers, the relevant question is not whether all industry segments share (in some indeterminate sense) exactly the same obligations, but whether competing providers of like

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[77] The Commission plainly has authority to impose a contribution obligation on all providers that use numbers or connections, even if some of those are not traditional telecommunications carriers. Section 254(d) permissively authorizes the Commission to assess contributions on "[a]ny . . . provider of interstate *telecommunications* . . . if the public interest so requires." 47 U.S.C. § 254(d) (emphasis added). The Commission has already tentatively determined that an information service provider that owns the underlying transmission facilities on which packets are transmitted is providing telecommunications and therefore falls within the scope of the Commission's permissive contribution authority. *Wireline Broadband NPRM* at 3032-33 ¶¶ 24-25 & n.58; Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11830, 11532-35 ¶ 66-70 & n.138 (1998).

services face comparable contribution burdens. Under the Plan, they do; under the current system, they do not.

Likewise, the Plan's exclusion of the handful of carriers that do not use numbers or connections is no less consistent with section 254(d)'s "every telecommunications carrier" contribution requirement than the contribution mechanism in place today. Under the Plan, every carrier that serves end users will contribute, since, with commercially insignificant exceptions, such providers will generally require some type of number or connection to reach customers. For example, independent long distance carriers will bear significant (albeit reduced) contribution obligations because, in today's all-distance environment, very few such carriers provide only transport service. Most of them also provide direct connections (such as private or special access lines) and telephone numbers (such as toll-free numbers) to various classes of customers. Further, the ICF contribution methodology itself applies to "every carrier" and does not carve out any technology and service type. *Every* carrier that provides a number or relevant connection is required to contribute a specific amount.[78/] Under the Plan, for example, a cable

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[78/] Section 251(e) answers any questions that might arise about the Commission's authority to impose contribution obligations on providers that use telephone numbers even if they are not found to provide "telecommunications." Section 251(e) empowers the Commission to "administer telecommunications numbering" and grants it "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States." 47 U.S.C. § 251(e)(1). As the Second Circuit has observed, section 251(e) grants the Commission broad license to use its plenary authority over numbering resources to achieve the basic goals of the Act, such as promoting competition and eliminating unreasonable discrimination. *See New York PSC v. FCC*, 267 F.3d 91, 102-06 (2d Cir. 2001) (Commission may require, over state public utility commission's objection, that all customers dial a ten-digit number to make local calls to ease the introduction of an area code overlay in New York City). Here, the assessment of a small USF fee associated with the provision of one or several NANP numbers would, as noted, advance the fundamental goals of universal service articulated under sections 1 and 254 of the modem service provider and a DSL provider will be assessed the same number of units for every connection, thus eradicating a disparity that exists under the current funding rules.[79]

This Plan is also fully consistent with any jurisdictional limits that section 2(b) of the Communications Act places on the Commission's authority.[80] The Plan provides for a flat-rate assessment on connections that either are wholly interstate or, like special access lines, are used indivisibly for both inter- and intrastate purposes. The Commission has indisputable regulatory jurisdiction over such dual-use facilities.[81] And because the assessment would not vary with a carrier's intrastate revenues, it would not violate the Fifth Circuit's prohibition on assessments that are based on such revenues.[82]

F. The Commission Has Full Authority To Implement The Plan's Interconnection Rules

The Plan establishes uniform intercarrier compensation rules with a transition to bill and keep for the termination of *all* traffic delivered to another carrier's "Network Edge" in a LATA.

Act, while at the same time promoting number conservation and efficient number utilization. *See generally* Report and Order and Further Notice of Proposed Rulemaking, *Numbering Resource Optimization*, 15 FCC Rcd 7574, 7578 ¶ 3 (2000) (noting the Commission's concern over "[t]he rapid depletion of numbering resources nationwide and the potential it creates for NANP exhaust").

79/ *See generally* S. REP. NO. 104-23, at 27-28 (1995) (explaining that "every carrier" language is intended to "require[] . . . carriers that concentrate their marketing of services or network capacity to particular market segments, such as high volume business users," to "contribute on an equitable and nondiscriminatory basis to the preservation and advancement of universal service" so as to "prevent distortion of competitive forces").

80/ 47 U.S.C. § 152(b).

81/ *NARUC*, 737 F.2d at 1111-16 (affirming the Commission's authority, even in light of section 2(b), to impose a per-line subscriber line charge, to support universal service, on dual-use equipment).

82/ *TOPUC I*, 183 F.3d at 448.

Under the Plan, CLECs will remain free, pursuant to section 251(c)(2), to interconnect at various physical points on an ILEC's network in addition to these Network Edges (which, in the case of ILECs, will generally be tandem switches). In recognition of the financial implications of each carrier's choice of physical interconnection points, however, CLECs that choose to deliver traffic to an ILEC at physical interconnection points *other* than the ILEC's designated Network Edge will be required to compensate the ILEC for "backhauling" that traffic from the chosen physical interconnection points to the relevant "edge" of the ILEC's network. (By definition under the Plan, upon conversion to bill and keep, the compensation that one carrier owes another when depositing traffic at the latter's Network Edge is zero.)

Of course, if a carrier lacks facilities of its own to deliver traffic to the Network Edge of the terminating carrier, it may lease dedicated capacity for this purpose on the transport facilities of other entities. Moreover, if the carrier is otherwise entitled to lease dedicated transport as an unbundled network element at TELRIC-based rates, nothing in the ICF Plan precludes it from doing so. The Plan simply provides that in the absence of such arrangements, a carrier that chooses to deliver traffic at a point other than the Network Edge of the terminating ILEC has the right to lease dedicated transport circuits from the ILEC as a "special access" service, currently subject to section 201 just and reasonable standards.

Thus, in the absence of independently available rights to lease transport as an unbundled network element from the ILEC pursuant to section 251(c)(3), the Plan provides that ILECs must be compensated when they use their own facilities to "backhaul" traffic to the relevant Network

Edge from a separate point of handoff.[83/] In the context of the comprehensive reform and competitively neutral compensation rules for *all* traffic contemplated by the Plan, the Commission can reasonably construe the category of "transport," for purposes of section 251(b)(5), as limited to the function of moving traffic from the designated Network Edge to the switch serving the called party. Under this construction, this limited backhaul function would fall outside the scope of section 251(b)(5)—and thus the pricing rules of section 252(d)(2)—and under current rules would be subject to the "just and reasonable" standard of section 201. The Commission likewise has authority to rule that an obligation to backhaul traffic under the Network Edge concept embodied in the Plan is not a function of section 251(c)(2) physical "interconnection" to which the pricing standards of section 252(d)(1) apply. The traffic does clearly fall, however, within the Commission's more traditional jurisdiction under section 201 to regulate "mixed use" facilities (since these interconnection arrangements are designed for the exchange of all traffic, whether interstate or intrastate).[84/]

83/ This backhaul function should be distinguished from the "interconnection transport" function set forth in the Plan. The latter function, and its associated pricing rules, apply only to interconnection arrangements between designated Network Edges.

84/ Decision and Order, *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 5660, 5660-61 ¶¶ 2, 6-7 (1989) (adopting separations procedures under which mixed use special access lines are assigned to the interstate jurisdiction when interstate traffic accounts for at least ten percent of the traffic carried on those lines); Memorandum Opinion and Order, *GTE Tel. Operating Cos.*, 13 FCC Rcd 22466, 22479-80 ¶¶ 23-25 (1998) (reaffirming that, under the Commission's mixed-use facilities rule, special access facilities are subject to federal regulation when more than ten percent of the traffic is interstate). *See generally Qwest Corp. v. Scott*, 380 F.3d 367 (8th Cir. 2004) (applying the mixed-use facilities rule).

G. The Commission May Require the Provision of Transit and Regulate Rates for Such Transit

The Commission's authority to prescribe transit rates is rooted in sections 201 and 251(a) of the Act. *First*, to the extent transit traffic is interstate, section 201 plainly authorizes the Commission to regulate it and to ensure that the charges are just and reasonable.[85] Indeed, the Commission has for years relied on its section 201 authority to require that LECs provide transit for traffic between an IXC and independent LECs, CMRS carriers, and others.[86] *Second*, section 251(a), which requires all telecommunications carriers to "interconnect directly or indirectly" with all other telecommunications carrier networks, authorizes the Commission to regulate *all* transit traffic, including intrastate traffic.[87] Section 251(a) requires interconnection of all carriers, but expressly gives carriers the option of relying on *indirect* interconnection to accomplish that end. Direct interconnection between each carrier and every other would be neither efficient nor feasible. *Indirect* interconnection—*i.e.*, transiting—therefore is essential to ensure the nationwide interconnectedness Congress envisioned.

As the Commission has observed, the "fundamental purpose" of section 251(a) is to "promot[e] the interconnection of all telecommunications networks by ensuring that incumbent

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85/ 47 U.S.C. § 201(a) (authorizing the Commission to require "through routes" between and among carriers for the transmission of traffic); 47 U.S.C. § 201(b) (requiring rates and practices to be just and reasonable).

86/ *E.g.*, Memorandum Opinion and Order, *Elkhart Tel. Co. v. SWBT*, 11 FCC Rcd 1051, 1056-57 ¶¶ 34, 37 (1995); *see, e.g.*, Report and Order, *MTS and WATS Market Structure Phase III*, 100 F.C.C.2d 860 (1985).

87/ 47 U.S.C. § 251(a)(1).

LECs are not the only carriers that are able to interconnect efficiently with other carriers."[88/] *Indirect* interconnection thus plainly encompasses the provision by the "middle" carrier(s) of transit between the two indirectly interconnected carriers. Put another way, there must be an open pipe between two indirectly interconnected carriers in order for there to be indirect interconnection *at all*. And, in fact, the Commission has repeatedly recognized that transit *is* that open pipe and thus is a fundamental component of indirect interconnection.[89/]

Regulation of transiting pursuant to section 251(a) is perfectly consistent with the Commission's previous rulings that section 251(a) authorizes the Commission only to regulate the "physical linking of two networks."[90/] In one case, for example, the Commission determined

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88/ Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435, 15478 ¶ 84 (2001) ("*Collocation Remand Order"), aff'd sub nom. Verizon Telephone Cos. V. FCC,* 292 F.3d 903 (D.C. Cir. 2002); *see also Local Competition Order* at 15991 ¶ 997 (noting that "the [section 251] duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives.").

89/ Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration et al.*, 17 FCC Rcd 27039, 27101-02 ¶ 118 (2002) (finding that transit was key to WorldCom's "ability to interconnect indirectly with other carriers" and serve the "interests of all end users in connectivity to the public switched network."); Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978, 17319-20 ¶ 534 n.1640 (2003) (subsequent history omitted) (noting that "transiting" is "a means of indirectly interconnecting with other . . . carriers for the purpose of terminating local and intraLATA traffic."); *Collocation Remand Order* at 15477-78 ¶¶ 83-84 (finding that the Commission has authority to require LECs to provision a cross connection between a CLEC and a competitive transport provider because that connection is essential to the indirect interconnection required under section 251(a)).

90/ Memorandum Opinion and Order, *Total Telecomm. Servs. v. AT&T Corp.*, 16 FCC Rcd 5726, 5736-37 ¶ 23 (*Total Telecom Order*), *aff'd in relevant part, rev'd in part, AT&T v, FCC,* 317 F.3d 227 (D.C. Cir. 2003) (*Atlas Appeal)*. In the *Total Telecom Order*, the Commission that 251(a) did not authorize it to require AT&T to order a CLEC's terminating access service. But, as the D.C. Circuit found in affirming the Commission's decision, the distinction the Commission drew between section 251(a) and the Act's "transport and termination" requirement does not spare any carrier from its section 251(a) obligation "to establish a physical connection with" other carriers.[91] As the court pointed out, despite AT&T's refusal in that case to send traffic to the plaintiff carrier—which was demanding extremely high terminating access charges—the two carriers were in fact interconnected, via indirect transit-based links provided by Southwestern Bell.[92]

Total Telecom thus supports the Commission's section 251(a) authority over transiting. The independent connections of AT&T and the plaintiffs to Southwestern Bell could satisfy section 251(a)'s indirect interconnection requirement only if Southwestern Bell in fact provided a link between the two carriers. The mere fact that two carriers connect with a third carrier may establish the *possibility* of interconnection, but section 251(a) requires actual interconnection, and that is accomplished only where the middle link—transit—is at least offered by that third carrier. Thus, the D.C. Circuit's decision should be read to stand for the proposition that the two indirectly connected carriers cannot be forced, under section 251(a), to *utilize* their interconnection by actually sending traffic to one another. But it cannot sensibly be read to foreclose the Commission's authority to regulate—on just, reasonable, and non-discriminatory

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relied on its earlier determination in the *Local Competition Order* at 15590 ¶ 176 ("We conclude that the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic.").

[91] *Atlas Appeal*, 317 F.3d at 235.

[92] *Id.*

terms under section 201—the provision of the essential middle link for indirect interconnection, for that interpretation would gut section 251(a)'s indirect interconnection provision of all meaning.

CONCLUSION

The Commission can and should adopt the ICF Plan as an inseverable whole.

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