Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION™

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SUMMARY

Commenters overwhelmingly agree that the Commission must reform the existing intercarrier compensation and universal service regimes in a meaningful and timely fashion to reflect the evolving telecommunications market. Despite this consensus, the majority of commenters do not support or recommend lasting reform proposals that would meet the Commission's stated goals of promoting economic efficiency and facilities-based competition, preserving universal service, ensuring competitive and technological neutrality, and decreasing regulatory intervention in favor of market forces. Rather, many parties urge the Commission to retain the arbitrary jurisdictional, regulatory, and technological distinctions and inconsistent and anticompetitive policies that characterize the existing intercarrier compensation and universal service regimes. Consequently, these parties would continue to burden consumers with legacy costs and monopoly abuses, which will only further limit consumers' choices of services and providers and raise end user rates overall.

The comments and reform proposals filed by CTIA – The Wireless Association™ ("CTIA") and other wireless carriers represent the only industry segment that embraces and satisfies fully the Commission's reform goals. CTIA's Mutually Efficient Traffic Exchange ("METE") Proposal replaces the antiquated wireline-centric intercarrier compensation and universal service regimes with a comprehensive approach that does not "play favorites" with regard to technologies or service providers. Under the METE Proposal, truly unified default interconnection and compensation rules encompassing all jurisdictional, service and technological categories of traffic would apply to any carriers that have not entered into mutually agreed-upon compensation and interconnection arrangements. CTIA's proposed interconnection and compensation rules are designed to encourage and reward efficiency, thereby delivering

consumers the highest quality services at the least cost. Service providers would have the flexibility to recover their internal network costs from their end user customers and, where warranted, from a unified high-cost universal service mechanism based upon the forward-looking costs of the most efficient technology for a given high-cost area. In the universal service context, the Commission should also consider other market-driven mechanisms that would reward efficiency, such as a system of competitive bidding (or reverse auctions) to determine high-cost support levels for both incumbents and competitors. A review of other comments confirms that the METE Proposal is by far the best means for reforming the intercarrier compensation and universal service regimes.

Multiple parties support some level of rate unification and aligning interstate and intrastate access rates and reciprocal compensation. Many of them, however, pay lip service to the idea of a more efficient, fairer system by supporting proposals that do not eliminate all arbitrary distinctions and disparate intercarrier compensation rates. Some even suggest creating additional distinctions. Various commenters also continue to confer preferential treatment on wireline and other industry segment interests – particularly rural local exchange carriers ("RLECs") – by providing carve outs from proposed interconnection and compensation rules and providing RLECs free reign to recover the cost of their inefficient operations from other service providers' customers through the universal service fund. In addition, some commenters would limit high-cost universal service support to incumbent local exchange carriers ("ILECs") rather than making it portable to all carriers that commit to provide the supported services to consumers located in high-cost areas.

These distinctions and preferences benefit a limited class of service providers, which creates opportunities for arbitrage, anticompetitive behavior, and inefficiencies, rather than protecting consumer interests. In contrast, the METE Proposal is the only intercarrier compensation reform approach that removes all distinctions that discriminate against certain types of carriers.

Most intercarrier compensation and universal service reform proposals also place greater importance on carriers than on consumers by assuming that they have a right to "revenue neutrality," thereby sacrificing the increased efficiency and innovations that would result from a bill-and-keep regime and a forward-looking, least-cost universal service regime. CTIA and other commenters have demonstrated the significant efficiencies that the METE Proposal and similar reform plans would create, ultimately increasing competition and lowering end user rates overall. Those opposing a system that encourages and rewards efficiency fail to rebut this showing. Certain groups argue that a bill-and-keep system will inhibit rural investment and increase end user rates. To the extent that certain carriers are incapable – even when operating efficiently – to provide high-quality services at affordable rates, high-cost universal service will continue to be available under CTIA's METE Proposal. At the same time, relieving wireless and other carriers of the burdens of the current inefficient intercarrier compensation system will provide them with the right signals for investment and competitive entry in currently underserved markets.

The Commission has ample statutory authority to implement CTIA's METE Proposal or a similar unified intercarrier compensation regime. Pursuant to Sections 201, 251 and 252 of the Communications Act, the Commission may affirmatively or through its preemption authority regulate interstate and all intrastate intercarrier traffic and adopt a bill-and-keep regime. The Commission also has authority to require ILECs to provide tandem transit service and should establish a default nationwide transit rate based upon efficient, forward-looking costs.

To further ensure sustainable, technologically neutral and efficient intercarrier compensation and interconnection regimes, the Commission also must reject ILEC demands to change its regulations to handicap wireless carriers with legacy inefficiencies. Accordingly, the Commission should: (1) reaffirm that wireline carriers are obligated to load wireless numbers with different rating and routing points; and (2) uphold wireless service providers' dialing parity rights. If the Commission does not adopt the METE Proposal or a similar bill-and-keep plan, it should maintain the rule that reciprocal compensation applies to intraMTA traffic. It also should ensure that wireless carriers have the same opportunity to recover access and other termination charges that wireline carriers are afforded.

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CTIA – The Wireless Association™ ("CTIA") submits these reply comments pursuant to the Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding.[1] Many commenters agree that changes to the intercarrier compensation and universal service systems are needed to accommodate an evolving telecommunications marketplace. Meaningful and timely reform of the intercarrier compensation and universal service systems is achievable if the Commission exercises strong leadership.

I. INTRODUCTION

Many commenters advocate some type of reform of the intercarrier compensation and universal service systems and support one or more elements of the reform proposals offered by CTIA and other wireless carriers. Some parties support sweeping changes to the intercarrier compensation and universal service regimes, including wireless carriers,[2] the ICF,[3] some of the Bell Operating Companies ("BOCs") and other local exchange carriers ("LECs"),[4] and consumer

[1] *Developing a Unified Intercarrier Compensation Regime,* Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005) ("FNPRM").

[2] *See, e.g.,* Western Wireless at 5-11. The initial comments in response to the FNPRM will be cited in this abbreviated manner throughout. Textual references to parties filing comments will be abbreviated in a similar manner.

representatives.[5] Other than CTIA and the wireless service providers, however, few commenters support lasting reforms that would meet all of the Commission's intercarrier compensation and universal service reform goals, which are consistent with CTIA's principles for reform.[6] A review of the initial comments confirms that CTIA's comprehensive Mutually Efficient Traffic Exchange ("METE") Proposal remains the best means of promoting the Commission's goals of realizing economic efficiency through intercarrier compensation and universal service regimes that maximize benefits for consumers and minimize administrative complexity.

The METE Proposal embodies a shift away from a circuit-switched monopoly legacy orientation to an approach that does not favor any sector or technology over any others. In place of the existing inconsistent patchwork of access and reciprocal compensation rates, service providers that have not entered into mutually agreed-upon compensation and interconnection arrangements would be subject to unified default interconnection and compensation rules encompassing all jurisdictional, service and technological categories of traffic. Service providers exchanging traffic would have the flexibility to recover their internal network costs from their

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[3] ICF at 2-30.

[4] *See, e.g.,* BellSouth at 4-8; Frontier at 2.

[5] *See, e.g.,* Ad Hoc Tel. Users at 3-7.

[6] The Commission's reform goals are: (a) promotion of economic efficiency and facilities-based competition; (b) preservation of universal service through expanded choices and reasonable rates for rural customers; (c) competitive and technological neutrality; (d) the elimination of artificial regulatory distinctions unrelated to cost; and (e) minimal regulatory intervention and enforcement and greater reliance on commercially negotiated agreements. FNPRM, 2- FCC Rcd at 4701-02. These goals parallel CTIA's reform principles. *See* Letter from Steve Largent, President and Chief Executive Officer, CTIA-The Wireless Association™, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (Nov. 29, 2004) ("CTIA Principles").

end user customers and, where warranted, the reformed high-cost universal service mechanism.[7] Under the METE Proposal, the interconnection framework would be simplified and would be reciprocal – meaning that no class of service provider or technology could *unilaterally* impose the costs of interconnection and/or intercarrier compensation on any other class of service provider or technology. Service providers would pay for internetwork transit and/or transport services at rates based on efficient forward-looking economic costs. Other wireless carriers submitted or support similar approaches.[8]

Many other parties, however, support proposals that would retain regulatory distinctions that favor some service providers while disfavoring others.[9] In particular, they are heavily weighted toward particular industry interests, ignoring the development and rapid customer acceptance of IP-based and wireless services that operate without regard to state boundaries or jurisdictional separations. The ICF catalogs the niche interests that would be advanced by various other proposals, although not acknowledging its own "tilt" in favor incumbent LEC ("ILEC") networks, generally, and rural ILECs ("RLECs"), in particular.[10] As ICF notes, most

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[7] CTIA at 5-6, 10-45.

[8] *See, e.g.,* Western Wireless at 6-11.

[9] The other significant proposals in the record include the Ex Parte Brief of the Intercarrier Compensation Forum in Support of the Intercarrier Compensation and Universal Service Reform Plan ("ICF Brief") and App. A, the Intercarrier Compensation and Universal Service Reform Plan ("ICF Plan"), attached to Letter from Gary M. Epstein and Richard R. Cameron, Counsel for the Intercarrier Compensation Forum, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (Oct. 5, 2004) and National Association of Regulatory Utility Commissioners Study Committee on Intercarrier Compensation Goals for a New Intercarrier Compensation System and Intercarrier Compensation Proposal, attached as Appendices B and C, respectively, to Letter from Robert B. Nelson, Elliott G. Smith, and Ray Baum, NARUC, to Kevin Martin, Chairman, Federal Communications Commission, CC Docket No. 01-92 (May 18, 2005) ("NARUC Proposal").

[10] *See* ICF at 48-81; CTIA at 46, 50, 52.

of the proposals in the record are neither comprehensive nor balanced and "would continue to subject identical uses of the network to radically different regulatory regimes."[11]

Most notable in this regard are demands for "revenue neutrality" to protect RLECs and other service providers from what CenturyTel asserts is "an increasingly competitive environment."[12] RLECs' adamant refusal to consider recovering more of their internal network costs from their end users and their view of unlimited cost recovery from other telecommunications providers – whether through intercarrier compensation or universal service – as an entitlement are the most significant obstacles to any meaningful reform.

In spite of the mounting evidence of the need for reform, some parties even advocate that no significant changes be made, opposing any requirements that would reduce or eliminate inefficient intercarrier compensation or that would not guarantee revenue neutrality. For example, the Rural Alliance, a combination of ARIC and EPG representing over 200 RLECs, advocates that access and reciprocal compensation charges be maintained and based on each carrier's embedded costs because "[s]ustaining revenue streams to rural carriers is necessary to support the existing and future infrastructure."[13] It criticizes other plans for proposing too much reform, arguing that "[n]o rational basis exists to depart from [the current] fundamental framework."[14] The Rural Alliance suggests that the Commission simply clarify existing interconnection rules and reject any interconnection requirements that would cause RLECs to incur any internetwork transport costs -- even for calls originated by an RLEC's own

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[11] ICF at 48.

[12] CenturyTel at i.

[13] Rural Alliance at 4.

[14] *Id.* at 9, 16-20.

customers.[15] If any intercarrier compensation reform should nevertheless occur, the Rural Alliance advocates revenue replacement funding to recover any "losses" from such reform.[16] This approach would perpetuate the inefficiencies and inflated costs of the current intercarrier compensation regime and ignore obvious consumer benefits resulting from lower-cost, higher-quality and innovative services provided over a variety of technology platforms. It is crucial that the Commission reject such views if it is to bring about meaningful reform.

II. THE COMMISSION MUST SEIZE THIS OPPORTUNITY TO REFORM THE INTERCARRIER COMPENSATION AND UNIVERSAL SERVICE SYSTEMS.

The current intercarrier compensation and universal service regimes are increasingly irrational – and unsustainable – in today's multi-dimensional telecommunications market, characterized by both emerging intermodal competition and convergence. The current rules promote and reward economically irrational behavior that leads to less value, innovation, and choices for consumers – especially those located in rural, high-cost areas. They are not designed to accommodate technological innovations such as wireless and Voice over Internet Protocol (VoIP) services that provide valuable consumer benefits. Importantly, today's rules do not reflect how the truly competitive wireless and Internet markets increasingly resolve interconnection matters – *i.e.*, through commercially negotiated agreements that promote efficient forms of interconnection and eliminate intercarrier compensation between service providers. The need for reform therefore is long overdue.

Failure to act now will slow the nationwide proliferation of the very types of advanced services that the Commission's competition and universal service policies are meant to promote.

[15] *Id.* at 12, 98-107.

[16] *Id.* at 14, 73-74.

Doing nothing, or leaving in place systems that are little changed, also will encourage regulatory arbitrage and accelerate strains on the already broken intercarrier compensation and universal service systems. For example, continuing today's inefficiencies and regulatory distinctions will increase opportunities and incentives to bypass or avoid inefficient circuit-switched legacy networks, partly in favor of IP-based networks outside the intercarrier compensation and universal service systems.[17] This in turn reduces sources for intercarrier revenues and forces those wireline service providers that rely primarily on intercarrier compensation and universal service revenues to increase their intercarrier compensation rates and demand for universal service support, increasing costs that are imposed upon a shrinking pool of telecommunications carrier payers. Thus, if the Commission fails to respond to the inexorable technological and market forces reshaping telecommunications with effective reform now, the intercarrier compensation and universal service structures will be rendered increasingly irrelevant and unsustainable by VoIP and other developments.

To accomplish the task before it, the Commission must eliminate irrelevant and irrational regulatory distinctions, encourage and reward efficiency, and significantly reduce administrative complexities. The "Commission cannot simply stand at the sidelines and wait for" "today's regulatory framework" to "collapse under its own weight or be rendered irrelevant by new technologies."[18] Consumers in high-cost rural areas bear the brunt of the inefficiencies and lack of innovation bred by the current intercarrier compensation system. Wireless and other competitive carriers simply will not enter markets where intercarrier compensation and interconnection rules provide certain classes of carriers or technologies with such extreme cost

[17] Verizon, at 19-20, would worsen this problem by removing ILEC networks from the intercarrier compensation regime to the extent they transition to packet switching technology.

[18] ICF at 4.

advantages. In the absence of meaningful reform, consumers in high-cost areas will continue to be denied the full benefits of the emerging multi-dimensional telecommunications marketplace.

III. MOST COMMENTERS SUPPORT THE ELIMINATION OF AT LEAST SOME OUTDATED REGULATORY DISTINCTIONS.

The initial comments confirm that only an intercarrier compensation, interconnection and universal service system such as that outlined in the METE Proposal can truly benefit consumers by delivering them the fullest array of technologies and services at the least cost. Piecemeal reform that retains one or more distinctions will increase costs and reduce competitive alternatives for consumers. Similarly, proposed new universal service or universal service type funds reserved exclusively for ILECs or even narrower categories of eligible carriers would stifle competition, particularly in rural areas. All universal service funds should be fully portable to all competitive carriers providing the supported services.

A. The Initial Comments Demonstrate The Benefits Of Eliminating Distinctions In The Intercarrier Compensation System.

There is widespread agreement on the overall need for at least partial unification of disparate intercarrier rates.[19] Most of the commenting parties support some degree of rate unification, ranging from a "more uniform rate structure for various types of traffic than exists currently"[20] to a unified bill-and-keep system.[21] A majority of parties advocating some type of rate unification, including ICF, CCAP, JSI and BellSouth, supports alignment of interstate and

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[19] *See, e.g.,* USTA at 12-13; BellSouth at 17; CompTel/ALTS at 4; NCTA at 3; Nextel at 1; Pac-West at 5; ICF at 6, 10-13.

[20] Verizon at 4.

[21] *See, e.g.,* ICF at 25-26; Western Wireless at 6-7; WilTel at 14; USTA at 12-13; BellSouth at 17; CompTel/ALTS at 4; NCTA at 3; Nextel at 1; Pac-West at 5.

intrastate access rates, whether as part of a larger restructuring or otherwise.[22] Parties advocating interstate/intrastate alignment typically support reducing intrastate access rates to interstate access rate levels in order to remove a significant disparity in rates and reduce arbitrage.[23] Many parties also support aligning reciprocal compensation and access rates, or at least bringing access rates toward reciprocal compensation rates.[24]

Proposals to maintain intercarrier compensation rates and fashion interconnection rules based on the current intercarrier service category distinctions, service provider characteristics or other regulatory distinctions cannot be sustained because they will create additional incentives for customers to migrate traffic to IP and other networks that are not burdened by the legacy intercarrier compensation and universal service systems. If migration cannot be achieved, these proposals would discourage competitive entry in rural and other high-cost markets altogether, to the detriment of consumers. Irrational regulatory distinctions create incentives for carriers to become part of the benefited class (*e.g.,* RLECs) and to mischaracterize traffic (*e.g.,* as intrastate long-distance). The result is endless disputes about compensation and universal service levels and harm to consumers.[25]

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[22] *See, e.g.,* ICF at 25-26 (all intercarrier charges unified and then eliminated); Minn. Ind. Coalition at 23-25; CCAP at 15, 25 ("[a]ssuming that the Commission ultimately obtains jurisdiction over intrastate access charges"); JSI at 12-14 (suggesting "a cooperative effort with the states"); BellSouth at 39-50; Pac-West at 12 (move interstate rates to new baseline rate immediately and reduce intrastate rates more gradually under joint board supervision); Rural Alliance at 12; Sprint at 14; Verizon at 6.

[23] *See, e.g.,* Minn. Ind. Coalition at 23-25; ICF at 25-26; JSI at 13-14; CCAP at 25.

[24] *See, e.g.,* ICF at 25-26; CCAP at 15-16; BellSouth at 28-30; Time Warner Telecom *et al.* at 7; CompTel/ALTS at 5; Qwest at 10-11; Rural Alliance at 12; Verizon Wireless at 4-5.

[25] *See* Western Wireless at 3, 12-13; ICF at 2-4, 8-9, 55-67; BellSouth at 3-8.

Verizon Wireless points out that wireless carriers are especially disadvantaged under the current regime because of RLEC and competitive LEC ("CLEC") attempts to exploit arbitrary distinctions by misclassifying the jurisdiction of calls, disregarding the intraMTA rule and initiating recurring disputes regarding reciprocal compensation regulations.[26] It is vital that any reform eliminate the distinctions that give rise to these abuses. As US Cellular points out, intercarrier compensation reform must achieve competitive neutrality in order to be effective. The focus accordingly must be on consumer interests, rather than service provider interests.[27]

Some commenters, however, support the continuation of arbitrary and irrelevant distinctions that will undermine the goal of a unified intercarrier compensation system and generate arbitrage. Remarkably, a few commenters, including NTCA and SureWest, oppose any intercarrier rate unification at all,[28] and at least one additional commenter, JSI, opposes aligning reciprocal compensation and access rates.[29] A number of carriers support intercarrier compensation plans and interconnection rules expressly favoring rural or rate-of-return carriers.[30]

Wireless carriers, BellSouth and other commenters point out that the ICF Plan and other proposals ostensibly support the elimination of regulatory distinctions but fail to meet that goal because they perpetuate inequalities based on the type of service provider, jurisdiction, service category and other factors.[31] The ICF proposes wireline-centric interconnection rules that

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[26] Verizon Wireless at 2, 5, 10.

[27] US Cellular at 4. *See also* Western Wireless at 4, 12-13.

[28] *See, e.g.,* NTCA at iv, 7, 19-20; SureWest at iv, 24.

[29] *See, e.g.,* JSI at 11-12 (access rates and reciprocal compensation rates should remain under separate pricing regimes)

[30] *See, e.g.,* Minn. Ind. Coalition at 10-12; NTCA at 15.

[31] *See, e.g.,* Verizon Wireless at 8; US Cellular at 10-14.

distinguish between "hierarchical" and "non-hierarchical" and between wireline and wireless networks.[32] Such rules would impose disproportionate interconnection costs on wireless carriers. Various service providers, for example, criticize the ICF Plan's favoritism toward RLECs by allowing RLECs to impose upon CMRS providers terminating transport charges.[33] The ICF Plan also would require CMRS providers to transport traffic originating from a hierarchical LEC's network "edge" to the CMRS provider edge. These obligations are not reciprocal. As various wireless carriers explain, by distorting the competitive marketplace in favor of wireline networks, the ICF Plan would inhibit competition in the very high-cost, rural areas most in need of additional choices for consumers.[34]

NTCA goes further in demanding a "different set of interconnection rules that would apply to rural ILECs" even more discriminatory than ICF's rules.[35] NTCA would impose on any non-RLEC interconnecting with an RLEC responsibility for not only all internetwork transport costs, but also the RLEC's own intranetwork costs outside the local calling area of its end user.[36] Other proposals also are heavily weighted toward wireline interests, such as NARUC's proposal to award additional terminating transport revenues to RLECs.[37]

Some of the proposals in the record create new types of distinctions that preclude a fully unified intercarrier compensation system. The NARUC Proposal envisions different default

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[32] Western Wireless at 12.

[33] *See, e.g.,* Verizon Wireless at 8; US Cellular at 12-13; Time Warner Telecom *et al.* at 43-45 (ICF interconnection rules violate Section 251(c)(2) of the Act).

[34] *See, e.g.,* Nextel Partners at 18-22.

[35] NTCA at 45.

[36] *Id.* at 45-49.

[37] *See* Western Wireless at 13.

termination rates depending on the size of the wire center terminating the call (discouraging economies of scale) and would authorize state commissions to establish different rates if the parties cannot reach agreement.[38] Intercarrier compensation rates that vary by wire center, however, cannot be "unified." The new capacity-based intercarrier charges in the EPG Plan also cannot achieve uniformity because those charges would apply only to directly interconnected carriers and would not apply to local calls.[39]

BellSouth criticizes all of the proposals in the record for maintaining regulatory distinctions and then offers a proposal under which a "local network provider," but no other type of carrier, is compensated at either of two rates, depending on whether a call is switched through a tandem office or exchanged at an end office.[40] Thus, wireless carriers and other service providers not falling within the category of local network provider with tandems and end offices do not qualify for intercarrier compensation under BellSouth's approach.[41]

In contrast, CTIA's METE Proposal and other wireless carrier proposals not only meet the Commission's goal of maximizing efficiency, as discussed below, but also truly eliminate all arbitrary distinctions in intercarrier compensation and interconnection. Other parties fall short of this goal.

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[38] *See* BellSouth at 15 (citing NARUC Proposal, App. C at 4-5).

[39] *See* BellSouth at 13, describing Comprehensive Plan for Intercarrier Compensation, attached to Letter from Glenn H. Brown, Facilitator of the Expanded Portland Group, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (Nov. 2, 2004) ("EPG Plan").

[40] BellSouth at 8-18.

[41] The competitive need to allow wireless carriers to impose access charges for interMTA calls in the event that the Commission does not implement a bill-and-keep system is discussed in Part VIII(D), *infra*.

B. A Unified High-Cost Support Mechanism Is Essential To Achieving The Universal Services Goals Of The Act.

A number of commenters agree with the METE Proposal that universal service reform should result in a unified high-cost fund to replace the hodge-podge of high-cost programs that have grown up over the years to support particular access rate elements or carrier categories. A single high-cost fund, properly targeted to high-cost areas, would be far more efficient than the current mix of funds allocated under inconsistent criteria.[42] A reformed high-cost fund also should be fully portable to ensure that rural customers enjoy the benefits of intermodal competition – a wider variety of higher quality, less costly services.[43]

The most egregious assaults against the benefits of a unified mechanism in the initial comments are the arguments for the proposed new non-portable universal service or universal service-type support mechanisms reserved for ILECs. These proposals are nothing more than gimmicks to maintain inefficient and costly ILEC intercarrier revenue flows from a wider pool of payers under the universal service fund umbrella. For example, the ICF's Transitional Network Recovery Mechanism ("TNRM"), NARUC's Access Charge Transition Fund, USTA's proposed Access Restructure Mechanism ("ARM"), CCAP's proposed High-Cost Connection Fund ("HCCF"), JSI's proposed funding approach, the Minnesota Independent Coalition's proposed restructuring mechanism, the Rural Alliance's recovery mechanism, and NTCA's Residual Access Cost Recovery Mechanism ("RACRM") are discriminatory because they would be non-portable to competitive carriers such as wireless carriers offering the supported services.[44]

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[42] US Cellular at 11; Western Wireless at 27, 41-43; CTIA at 38-39.

[43] Western Wireless at 39, 46.

[44] *See* USTA at 40-41; CCAP at 20-22; Minn. Ind. Coalition at 29; NTCA at 56-59; Rural Alliance at 21, 73; Comporium at 11-12; ERTA at 2; ICF at 34-36; JSI at 4-5.

CCAP would go even further by rolling some of the current high-cost universal service programs into its proposed HCCF, thereby making them non-portable as well.[45]

Under JSI's approach, intrastate access revenues transitioned to interstate cost recovery mechanisms would not be portable because such amounts "represent the recovery of a rate-of-return carrier's embedded costs."[46] Similarly, NTCA argues that universal support should not be portable when it is based on ILEC costs.[47] In other words, they suggest that competitors are presumably too efficient to need support, which should be available only to inefficient incumbents.[48] Rewarding inefficiency and giving incumbent LECs exclusive access to high-cost universal service support is not the right answer. As discussed below, the better solution is to give both incumbents and competitors *less* support based on the costs of the most efficient technology.

The examples listed above highlight the inefficiencies that are bred by discriminatory support mechanisms. Universal service support must "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another."[49] Therefore, it must remain fully portable and available to all carriers, irrespective of technology, that provide supported services within their designated service

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[45] CCAP at 21-22.

[46] JSI at 14.

[47] NTCA at 56-59.

[48] *See also* CenturyTel at 37-39.

[49] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8801 (1997) ("*USF Order*") (subsequent history omitted).

areas.[50] As the U.S. Court of Appeals for the Fifth Circuit affirmed, the universal service program "must treat all market participants equally – for example, subsidies must be portable – so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers."[51] Discriminating against particular types of technologies or carriers maintains legacy, inefficient networks, hampers other service providers' ability to effectively compete against legacy incumbent carriers, and denies consumers the benefits of more innovative networks and affordable services.[52] The Commission should not consider any universal service proposal that does not provide for fully portable support.

IV. THE COMMISSION SHOULD NOT IGNORE THE CONSUMER BENEFITS OF INCREASED EFFICIENCY.

A. Some Commenters Advocate Retention Of Current Inefficiencies.

Several parties, including the Rural Alliance, advocate continued intercarrier compensation and universal service support based on ILEC embedded costs.[53] The members of this anti-reform block argue that only compensation based on legacy embedded costs will cover all ILEC costs and enable RLECs to continue providing service in high-cost areas without

[50] CTIA at 37-38; U.S. Cellular at 4, 10; Western Wireless at 39-40, 45-46; Dobson Cellular at 10; Allied Paging at 10; Rural Cellular Association at 4; Cox at 5, 11; NCTA at 8-9; Time Warner Telecom *et al.* at 52-53; XO at 16-20; CCG at 9-10.

[51] *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2001) ("*Alenco*"); *see also Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund*, 15 FCC Rcd 16227, 16231-32 (2000) ("it is difficult to see how a [non-portable funding mechanism] could be considered competitively neutral" because "a mechanism that offers non-portable support may give ILECs a substantial unfair price advantage in competing for customers.").

[52] CTIA at 34-38; Nextel at 19-20; Western Wireless at 39-40.

[53] *See* Rural Alliance at 34-47; NTCA at 27-34; CCAP at 18-19; Colorado Telecom. Ass'n. at 25-27; JSI at 5-11.

burdening the high-cost universal service program.[54] BellSouth points out that the ARIC FACTS Plan also would base intercarrier compensation rates on each individual LEC's embedded costs.[55] JSI goes so far as to argue that NARUC's proposed originating access rate of $0.002 per minute is inadequate for RLECs that now charge $0.012 per minute for local switching.[56] By maintaining intercarrier compensation for the origination and/or termination of traffic, particularly based on embedded costs, and insisting on "all you can eat" embedded cost universal service mechanisms, many commenters would sacrifice the cost savings and innovation that would result from more efficient intercarrier compensation and universal service systems, as outlined in the METE Proposal.

B. Wireless Carriers And Others Demonstrate The Pro-Consumer Benefits Of Efficient Intercarrier Compensation And Universal Service Systems.

1. Opponents Have Failed To Rebut The Benefits Of A System That Incorporates Bill-And-Keep Principles.

Wireless carriers, Qwest, ICF and other commenters demonstrate the pro-consumer benefits of a system that incorporates a unified bill-and-keep regime and technology neutral interconnection rules.[57] A unified bill-and-keep mechanism is the most rational intercarrier

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[54] *See, e.g.,* Rural Alliance at 34-50.

[55] BellSouth at 14 (citing FNPRM, 20 FCC Rcd at 4708-09). Because rates under the FACTS Plan would vary from carrier to carrier, rates would continue to reflect each carrier's inefficiencies and would not be "unified." BellSouth at 15. *See* FNPRM, 20 FCC Rcd at 4687; The Intercarrier Compensation Reform Plan of the Alliance for Rational Intercarrier Compensation, attached to Letter from Ken Pfister, Counsel to the Alliance for Rational Intercarrier Compensation, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (Nov. 4, 2004) ("FACTS Plan").

[56] JSI at 15.

[57] *See, e.g.,* Nextel at 1; Nextel Partners at 4-6; Western Wireless at 7-8, 18; ICF at 26-27, 29-30; Qwest at 8-9, 11, 19-22; SBC at 10-13.

compensation system, as Qwest explains,[58] and would encourage efficiency and foster competition by promoting carrier self-reliance and reducing inefficient investment.[59] Service providers no longer would be able to gain unfair advantages in the competitive market by recovering a significant percentage – in many cases a majority – of their costs from their competitors. By allowing less efficient carriers to impose their costs on their more efficient competitors, such a form of cost recovery distorts the competitive market and discourages efficient competitive entry, denying consumers – especially those located in high-cost, rural areas – the full benefits of competition.

The arguments against a bill-and-keep system all rest, at least implicitly, on the notion that it permits "free use" of the called party's network, which must bear incremental costs that cannot be recovered from other revenue sources.[60] The opponents' studies and expert statements, however, hardly demonstrate that costs are incurred in a manner that militates against bill-and-keep. They tend to show, rather, that switching and other network costs are "lumpy," *i.e.*, are incurred in an "increasing step" fashion to add more capacity.[61] Until traffic volume reaches the level of the added capacity, opponents' submissions do not demonstrate that each call adds any discernible cost. Each addition to capacity, moreover, enables the service provider to

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[58] Qwest at 19-22.

[59] *See, e.g.,* US Cellular at 5-6; ICF at 29.

[60] NTCA at 19. *See also, e.g.*, Rural Alliance, app. B, Dale Lehman, *The Economic Cost of Mandatory Bill and Keep*; letter from Michael W. Fleming, counsel to Pac-West Telecomm, Inc., to Marlene R. Dortch, Secretary, FCC (May 23, 2005), attachment, Lee L. Selwyn and Helen E. Golding, *Intercarrier Compensation in a Diverse Competitive Environment* at 18-21, 37-44 (May 2005) ("Pac-West Study").

[61] NTCA, attachment, Larry Thompson and John De Witte, Vantage Point, *Traffic Sensitivity of Telephone Switching Equipment* at 14 (May 2005). *See also id.* at 17; BellSouth at 22-26.

achieve greater efficiency by providing each minute of service at a lower average cost and earn more revenue by serving more customers.

More importantly, arguments about the nature of telecommunications costs or traffic imbalances are irrelevant to the issue of who should pay those costs. Opponents have not shown why service providers cannot or should not recover more of their internal network costs from their end users, called parties as well as callers.[62] There are some suggestions that certain service providers carry traffic unrelated to their own end users,[63] but, under the METE Proposal, transit (and in some cases transport) providers would be reimbursed for carrying calls to terminating carriers.[64] As CTIA and other commenters explained, called parties derive benefits from calls and, under cost-causation principles, accordingly should bear part of the costs.[65] Use of a carrier's network to deliver a call to its subscriber thus is not "free" if the carrier can recover its costs from one of its benefited subscribers.[66]

Traffic balances between carriers also are irrelevant because traffic flows have nothing to do with the benefits to the parties. Bill-and-keep is just as appropriate for a carrier that receives more calls than it sends as it is for carriers with balanced traffic flows. The net recipient carrier's

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[62] Service providers would still be reimbursed for internetwork transport and transit services provided to other carriers under the METE Proposal and similar plans.

[63] BellSouth at 9-12; Pac-West at 42-45.

[64] CTIA at 12, 24, 27.

[65] *See, e.g.,* CTIA at 14-17; Qwest at 19; US Cellular at 7.

[66] Pac-West introduces a study challenging the assumption that both parties benefit from a call, but without any evidence supporting that challenge. Pac-West Study at 32-37.

end users are deriving benefits from the calls they receive, and the carrier should recover any costs it incurs in terminating those calls from those users.[67]

CenturyTel and other RLECs claim that bill-and-keep would inhibit rural telecommunications investment because RLECs would not be able to recover all of their costs.[68] Under CTIA's METE Proposal, however, carriers would have opportunities to recover all of their costs from their own end user customers, transport and transit charges and universal service support to the extent that they deliver value and competitive priced services to end user customers and operate efficiently. What CenturyTel and others would prefer is intercarrier compensation and universal service systems that insulate them from the efficiency demands of the competitive market and from the demands of their own end user customers.

NTCA argues that bill-and-keep would have a disparate impact on rural carriers and consumers, citing data showing RLECs' disproportionate dependence on universal service support and access revenues and the impact that bill-and-keep would have on RLEC revenues and end user rates.[69] That is precisely the type of data, however, that CTIA cited to demonstrate the need for a system that squeezes out inefficiencies and eliminates distortions in the competitive market.[70] RLECs will never become more efficient unless the intercarrier compensation system is restructured to encourage and reward efficiency. Continuation of the same RLEC dependency will only postpone the necessary changes.

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[67] *See, e.g.,* T-Mobile at 16.

[68] *See, e.g.,* CenturyTel at 17-24; NTCA at 17-23.

[69] NTCA at 18-27.

[70] CTIA at 32-36.

Thus, none of the opponents' arguments undermines the obvious consumer benefits of a bill-and-keep system that incorporates technology neutral ground rules for interconnection. Bill-and-keep, coupled with technology neutral interconnection rules, is the only intercarrier compensation system that both maximizes incentives for efficiency and does not favor one technology over another.

2. The Addition Of New "Make-Whole" Universal Support Funds Would Exacerbate The Inefficiencies Of The Current System.

Multiple commenters advocate so-called "revenue neutrality," in which carrier revenue "lost" due to intercarrier compensation reform would be automatically recovered from the universal service fund or a similar funding mechanism.[71] By assuring carriers revenue neutrality, however, the Commission would forgo the consumer benefits of a more efficient system. Wireless carriers and others explain the harm to consumers and the violations of universal service principles that would result from new "make whole" universal support mechanisms designed to recover "lost" intercarrier compensation revenue.[72] "Revenue neutrality" is simply a demand for guaranteed profits without regard to consumer welfare.

The proposed new universal service-type support funds supported by some parties are not only discriminatory and anti-competitive, as discussed above, but also undermine the Commission's goal of encouraging efficiency and competition. Wireless carriers and other commenters urge the Commission to ensure that universal service support is used to benefit consumers by promoting the availability of quality telecommunications services at just,

[71] *See, e.g.,* ICF at 34-37; USTA at 35-37; CenturyTel at 16-32; CCAP at 13, 20-22; JSI at 4-5; Minn. Ind. Coalition at 14, 27-29; NTCA at 11, 26-27, 55-59; Rural Alliance at 21, 73; TDS at 9-10; Ad Hoc Tel. Users at 2-3.

[72] *See, e.g.,* Nextel at 19-29; Western Wireless at 43-46.

reasonable and affordable rates to all Americans.[73] This is best accomplished by allocating universal service support through a single, unified forward-looking support mechanism based upon the most efficient technology available.[74] A forward-looking, least-cost mechanism will target the right amount of universal service support and, as Western Wireless points out, also will not favor certain classes of carriers or technologies.[75] In the universal service context, the Commission should also consider other market-driven mechanisms that would reward efficiency, such as a system of competitive bidding (or reverse auctions) to determine high-cost support levels for both incumbents and competitors.

In contrast, other parties in effect argue that the purpose of the universal service fund is not to ensure consumer access to quality and affordable telecommunications services, but rather to ensure a permanent guaranteed revenue stream to carriers. Specifically, they argue that lost intercarrier compensation revenue must be recoverable through some form of support mechanism, typically through the universal service program or a new mechanism that works in a similar manner.[76]

Multiple commenters accurately note, however, that no party has demonstrated that any individual carrier has a legal right to unlimited embedded cost recovery from the universal

[73] T-Mobile at 4, 15-16, 28-29, 33; Nextel at 25-28; Western Wireless at 38; Cox at 11-12; Pac West at 7-8; Ad Hoc Tel. Users at 14.

[74] T-Mobile at 27-36; CTIA at 31-39; Western Wireless at 41-43; KMC at 32-33.

[75] Western Wireless at 41.

[76] ICF at 34-36; USTA at 35-37; Cincinnati Bell at 10-12; Frontier at 14-15; CenturyTel at 16-32; CCAP at 13, 20-22; JSI at 4-5; Minn. Ind. Coalition at 14, 27-29; NTCA at 11, 26-27, 55-59; Rural Alliance at 21, 73; TDS at 9-10; GCI at 5-6, 10-11; Ad Hoc Tel. Users at 2-3.

service mechanism.[77] NASUCA correctly points out that it is not the purpose of regulation to guarantee revenue recovery.[78] Those arguing for revenue neutrality point to no provision of the Act or Commission rules that guarantee those earnings. Rather, the universal service principles set forth in Section 254(b) of the Act support the opposite by specifically focusing on benefits to *consumers*, not on the *carriers* that may be serving those consumers.[79] The U.S. Court of Appeals for the Fifth Circuit has confirmed that:

> The Act does not guarantee all local telephone service providers a sufficient return on investment…. So long as there is sufficient and competitively-neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.[80]

As explained above, the Commission must reject arguments that any "lost" intercarrier compensation must be made up through the universal service system. The Act demands that the focus of universal service policies must be on *consumers,* not carriers. Nextel Communications correctly notes that there is no evidence that revenue neutrality is necessary to ensure that consumers can obtain affordable telecommunications services.[81] In fact, there are numerous examples that full recovery of carrier "embedded costs" through universal service is not necessary to ensure that affordable, high-quality services are maintained in high-cost areas. For example, since 2000, non-rural ILECs have received universal service support based not on their

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[77] Ad Hoc Tel. Users at 14-16; Nextel at 19, 21; Western Wireless at 45; NCTA at 8-9; Time Warner Telecom *et al.* at 53.

[78] NASUCA at 28-29, 31-34.

[79] 47 U.S.C. § 254(b).

[80] *Alenco*, 201 F.3d at 620, 621.

[81] Nextel at 20.

own embedded costs, but rather, on forward-looking economic costs.[82] Interstate Access Support is capped at $650 million annually, resulting in limited support for price-cap ILECs.[83] Likewise, RLECs do not currently receive full recovery of their embedded costs due to a cap on the overall size of the high-cost loop support mechanism.[84] Moreover, Section 54.305 of the Commission's rules generally limits acquired exchanges to the amount of support available to the selling carrier – often meaning that the transferee does not qualify for high-cost universal service support for acquired exchanges in spite of high embedded costs.[85]

By guaranteeing revenue neutrality, the Commission would eliminate any incentives for carriers to operate efficiently and would ensure that the legacy monopolistic inefficiencies that mark the current regime are continued in perpetuity.[86] For example, USTA's ARM, CCAP's proposed HCCF, JSI's proposed funding approach, and NTCA's RACRM breed inefficiency by automatically replacing all revenue "lost" as a result of intercarrier compensation reform. Such a result is wholly inconsistent with the Commission's universal service goal of providing incentives to carriers operating in rural high-cost areas to provide high-quality, affordable

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[82] *See* 47 C.F.R. §§ 54.309, 54.311.

[83] *See* 47 C.F.R. §§ 54.801.

[84] *See* 47 C.F.R. §§ 36.601-36.604.

[85] *See* 47 C.F.R. § 54.305 (safety value support provides opportunities, but no guarantees, to receive support for additional investment).

[86] Nextel at 19-21; Western Wireless at 44; Cox at 5, 11-12; Pac-West at 45-46, 49-50; NCTA at 8-9; XO at 16-20.

services to consumers without unnecessarily burdening the intercarrier compensation and universal service systems.[87]

Creating a new support fund or increasing universal service support for revenue neutrality purposes also would overburden the already strained universal service program. The record includes ample evidence that without universal service reform, the fund will continue to balloon and the universal service fees consumers pay will only increase. For example, CTIA estimates that under the ICF Plan, the universal service contribution factor based on contributor interstate telecommunications revenues will swell to 15.6 percent and above within five years.[88] Moving to another contribution system, such as one based on numbers or connections, will not change the high price tag of "revenue neutrality" for consumers – just express it differently. Cincinnati Bell also notes that "replacing lost access revenue with universal service subsidies may be a worse cure than the disease."[89] As the court acknowledged in *Alenco*, imposing excessive universal service fees on customers "can itself violate the Act" because they cause end user rates "unnecessarily to rise, thereby pricing some consumers out of the market."[90] Although some proposed revenue replacement funds are not technically characterized as a part of the universal service program – such as USTA's proposed ARM, CCAP's proposed HCCF and NTCA's proposed RACRM – the net financial effect of implementing one of these funds would be the

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[87] *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 16 FCC Rcd 19613, 19617, 19619 (2001).

[88] CTIA at 54; *see also* T-Mobile at 29-33; Nextel at 28; Western Wireless at 45; Cox at 11-12; KMC at 38-39; Ad Hoc Tel. Users at 15-16.

[89] Cincinnati Bell at 12-13.

[90] *Alenco*, 201 F.3d at 620; *see also USF Order*, 12 FCC Rcd at 8900.

same as in the case of any new universal service fund -- consumers ultimately would pay high universal service-type pass-through charges.

Accordingly, as Qwest argues, the Commission should reject ILECs' lobbying efforts for still more universal service support.[91] As noted above, to the extent that the Commission's reform efforts result in a loss of intercarrier compensation revenue, carriers still have the ability to recover that revenue directly from their own end user customers and from the reformed high-cost universal service support mechanism.[92] ILECs like CenturyTel will break the universal service program by insisting that the Commission "re-size and uncap" the universal service high-cost funds.[93] Under some of these proposals to uncap the fund, carriers that do not have high average costs would qualify for high-cost support. Accordingly, the Commission also should reject arguments that these recovery mechanisms for "lost" access revenue could be adopted without any negative impact on the universal service program.[94]

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[91] Qwest at 8.

[92] T-Mobile at 12-13, 15; CTIA at 10, 12-13; Nextel at 24-25; Western Wireless at 22; Qwest at 6-7; Pac-West at 49-50; NCTA at 9-11; XO at 16-20.

[93] CenturyTel at 8, 38-40; *see also* ICF at 34-35.

[94] USTA at 35. The Commission should similarly reject the argument that *state* universal service funds should be used as intercarrier compensation recovery mechanisms. *See* Letter from Tom Karalis, Fred Williamson & Associates, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (July 12, 2005). All of the reasons why carriers should not be allowed to recover lost intercarrier compensation revenues through the federal universal service program equally apply to state support mechanisms. Further, not all states have universal service funds and the process for contributing to and receiving monies from those funds will differ by jurisdiction. Aligning state and federal support mechanisms to ensure proper compensation would be unnecessary and administratively complex and burdensome, particularly in comparison to CTIA's METE Proposal.

Moreover, the Commission should reject RLEC arguments that high-cost universal service support should be based upon the embedded costs of wireline carriers.[95] Under that approach, the universal service mechanism will never reflect the efficient costs of serving consumers in high-cost areas, and growth of the fund will go unchecked. The Commission has long acknowledged that using embedded costs to allocate universal service support would "discourage prudent investment planning because carriers could receive support for inefficient as well as efficient investments…. [T]he use of embedded cost to calculate universal service support would lead to subsidization of inefficient carriers at the expense of efficient carriers and could create disincentives for carriers to operate efficiently."[96] As multiple commenters note, in contrast to the existing universal service regime, a universal service mechanism that allocates support based upon the forward-looking costs of the most efficient technology would spur competition and curb the growth of and ultimately stabilize the high-cost universal service program.[97] Accordingly, a fully portable, forward-looking, least-cost technology support mechanism or some other mechanism that replicates the efficiencies of a competitive market, such as competitive bidding, is required to achieve true intermodal competition.

Finally, the Commission also should reject arguments claiming that revenue neutrality – *i.e.,* more embedded cost support mechanisms – is necessary to sustain "carrier of last resort" obligations.[98] A carrier designated as a carrier of last resort (which could include a wireless

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[95] *See* CCAP at 18-19, JSI at 5-11; NTCA at 32-33.

[96] *See, e.g., USF Order*, 12 FCC Rcd at 8901 (citation omitted).

[97] *See, e.g.,* CTIA at 6, 38-39, 48-49; US Cellular at 10; Western Wireless at 41-43; Leap Wireless at 14-15.

[98] Frontier at 14-15; Cincinnati Bell at 8; CenturyTel at 16-17, 35-39; CCAP at 9-11; NTCA at 57.

eligible telecommunications carrier ("ETC")), should not be exempted from operating efficiently and in a cost-effective manner.

C. Requiring ILECs To Provide Transit Services Fosters Efficiency.

Requiring ILECs to provide transit services fosters efficiency by curbing ILECs' bottleneck power and facilitating interconnection.[99] If ILECs are not required to provide transit for indirectly interconnected carriers, the latter will either have to interconnect directly or pay significantly higher rates to induce ILECs to provide bottleneck transit services voluntarily. Either solution will be much costlier for originating carriers and their customers and will force many to withdraw from rural and other areas where there is insufficient traffic to justify direct interconnections. ILECs must not be permitted to generate such inefficiencies by hindering efficient indirect interconnections.

V. MOST COMMENTERS SUPPORTING INTERCARRIER COMPENSATION REFORM ENDORSE GREATER FLEXIBILITY IN RECOVERING COSTS FROM END USERS.

A. Carriers Should Be Allowed To Recover More Of Their Costs From End Users.

If service providers recover less, or none, of their internal network costs from other service providers as a result of intercarrier compensation reform, they should be allowed to recover more of their costs from their end users, together with properly targeted universal service support to ensure that high-quality services in high-cost areas remain affordable. As explained above, end users in the aggregate should not pay more for all of their telecommunications services than they do now, and will probably pay less in the long run, under CTIA's METE

[99] Pac-West at 22.

Proposal. In order to implement any system of reduced intercarrier charges, carriers must have more flexibility in assigning a higher percent of their total costs to end users.

Several commenters from different industry segments, including wireless carriers, NCTA, ICF and RBOCs, recognize that carriers must recover more of their costs from end users in the form of higher subscriber line charges ("SLCs") and other charges, if otherwise justified.[100] Some parties that insist on maintaining "revenue neutrality," however, such as CenturyTel, would deny carriers flexibility in recovering costs from end users by strictly limiting SLC increases.[101] Limiting SLC increases may be appropriate in certain scenarios, such as when an ILEC with market power already has high end user rates overall. However, RLEC opposition to SLC increases in every instance is wholly unjustified – and can only be explained by anti-competitive motives.

Rates in high-cost areas that rise above affordable levels can be addressed through properly targeted universal service support. RLECs' ostensible concerns about "rate impact" resulting from any increases in the SLC[102] are unjustified, especially in those markets with unusually low end-user rates. To allow carriers, typically RLECs, to continue recovering the majority of their costs from intercarrier compensation and universal services, while maintaining unusually low end user rates, is not only contrary to the "comparable rates" policy underlying Section 254(b)(3) of the Act but also distorts and inhibits the growth of competition.[103] CTIA and other commenters accordingly advocate LEC retail rate benchmarks to ensure that universal

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[100] *See, e.g.,* Nextel at 24-25; US Cellular at 7; Verizon Wireless at 26-27; BellSouth at 27-32; Pac-West at 49; Cox at 12-14; NCTA at 10; ICF at 27-28.

[101] CenturyTel at 10-16.

[102] NTCA at 26.

[103] *See* CTIA at 39. *See also* Colorado Telecom. Ass'n. at 35; Pac-West at 50.

service support does not subsidize carriers choosing to provide retail services at unusually low rates.[104]

B. End User Rates Should Be Deregulated Where Sufficient Competition Exists To Protect Consumers.

In areas where sufficient competition exists to protect consumers, service providers that reduce or eliminate intercarrier charges should have full pricing flexibility. As BellSouth suggests, the Commission's rules should be relaxed to allow carriers to set the SLC at different levels to reflect market conditions in different geographic areas and for different categories of customers.[105] The only constraint on such pricing flexibility should be the extent of local exchange competition. The Commission and the states could apply criteria similar to the impairment criteria applied in the *Triennial Review Remand Order* to determine whether sufficient enterprise market local exchange service competition exists in the area served by a given ILEC wire center to deregulate the SLC and other ILEC end user rates in that area.[106] In those areas without sufficient competition, the sum of the SLC and other local end user charges should be no less than an "affordable" level for ETCs – thereby decreasing strains on universal service.

VI. LESS COMPLEX INTERCARRIER COMPENSATION AND UNIVERSAL SERVICE SYSTEMS WOULD BENEFIT CONSUMERS.

Another benefit of the METE Proposal and similar plans is their administrative simplicity. Most parties, however, support the retention of some intercarrier charges or the

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[104] CTIA at 39-40; Cox at 13; Pac-West at 50.

[105] BellSouth at 30-32.

[106] *See Unbundled Access to Network Elements,* 20 FCC Rcd 2533, 2625-33 (2005) ("*Triennial Review Remand Order*").

implementation of new types of intercarrier compensation systems or new universal service mechanisms, thereby continuing or adding unnecessary complexity with regard to the intercarrier compensation and universal service systems.

A. Most Intercarrier Compensation Proposals Would Require Unnecessary Regulatory Oversight.

Plans that would transition to a capacity-based rate structure or other new compensation mechanism would introduce new and unnecessary complexities to intercarrier compensation, particularly in the billing systems that must be developed.[107] The Home/PBT and EPG Plans in particular would be extremely time consuming, costly and difficult to implement.[108] The EPG Plan also involves a "collaborative process" between state and Commission regulators, which guarantees years of proceedings.[109] Other proposals also promise massive, time-consuming regulatory proceedings in multiple fora. For example, the NARUC Proposal expressly contemplates extensive state commission proceedings and two rounds of formal referrals to various Federal-State Joint Boards – one concerning adoption of a new compensation system and a second round on implementation issues. Voluntary state participation in the new regime also adds a layer of complexity.[110] The ARIC FACTS Plan would exacerbate the complexity of the current system by calling for increased regulatory intervention and new layers of rate-setting proceedings involving this Commission, all 50 state commissions and the Joint Board.[111]

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[107] US Cellular at 13-14.

[108] *See* BellSouth at 14, discussing Updated Ex Parte of Home Telephone Company and PBT Telecom, CC Docket No. 01-92 (Nov. 2, 2004) ("Home/PBT Plan").

[109] ICF at 69-70; US Cellular at 14.

[110] *See* ICF at 68.

[111] *See* US Cellular at 14; ICF at 69.

Similarly, the CBICC Proposal contemplates two sets of TELRIC rate proceedings in every state commission – one to establish interstate rates and another to establish a transition to move intrastate rates toward the TELRIC baseline.[112]

On the other hand, the bill-and-keep type system advocated by CTIA and other commenters would end most intercarrier rate regulation and the need for carriers to track, bill and collect intercarrier charges. CTIA's METE Proposal thus would provide regulatory certainty with minimal regulatory intervention and administrative oversight.[113]

The ICF Plan also presents another type of unmanageable complexity in its overly detailed interconnection rules. As NTCA points out, those rules are too detailed to be feasibly administered or interpreted by the Commission or applied by the industry.[114] Simpler, more neutral interconnection rules as submitted in the METE Proposal would be more suitable. Because they are far less detailed than ICF's rules, the interconnection rules in the METE Proposal would be less prone to manipulation and abuse.

B. Proposals For New Universal Service Funds Also Add Unnecessary Complexity.

The creation of new universal service or universal service type funds as proposed by some commenters would add unnecessarily to the administrative complexity of an already overly complicated universal service system. There are currently five different high-cost universal service funds that support rural, non-rural, rate-of-return and price cap carriers with regard to

[112] ICF at 71, discussing Cost-Based Intercarrier Compensation Coalition Proposal, attached to Letter from Richard M. Rindler, Counsel to the Cost-Based Intercarrier Compensation Coalition, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (Sept. 2, 2004) ("CBICC Proposal").

[113] *See, e.g.,* US Cellular at 6.

[114] NTCA at 45. *See also* Western Wireless at 12.

interstate or intrastate local loop or switching costs, each with its own allocation methodology.[115] Adding funds to this mix, with separate allocation formulas, would increase the administrative burdens and costs of the high-cost universal service system. Each additional support mechanism, especially those based on embedded costs, would expand opportunities for waste, fraud and abuse by carriers maneuvering to meet the overlapping and inconsistent criteria for the expanded cornucopia of funds. Ultimately, the result of this additional administrative complexity would be a high-cost universal service support system that may be "explicit" in a technical (economic) sense, but certainly is not "explicit" within the plain meaning of the word in Section 254(e) of the Act.[116]

Instead, the Commission should combine the current mélange of high-cost programs into a single, unified forward-looking, least cost mechanism that will result in efficiency, competitive neutrality and administrative simplicity. Unification of the high-cost funds will reduce the administrative and enforcement costs of overseeing and complying with the universal service system. For example, under a single high-cost support mechanism that calculates support based on efficient forward-looking costs, carriers would report less information (*i.e.*, line or handset counts, wire center or mobile switching center locations, and customer locations or place of primary use)[117] than required under the current high-cost universal service mechanisms based on ILEC embedded costs. Instead of five (or possibly more) allocation formulas, a unified high-cost mechanism would distribute all high-cost funds under a consistent methodology. Unification

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[115] *See* 47 C.F.R. §§ 36.601 *et seq.* (High Cost Loop Support), 54.301 (Local Switching Support), 54.309 (High Cost Model Support), 54.800 (Interstate Access Support), 54.901 (Interstate Common Line Support).

[116] *See* 47 U.S.C. § 254(e) (requiring that universal service mechanisms be "explicit").

[117] Third party vendors could be used to provide some of that information.

thus would facilitate compliance with the universal service goal of focusing on customers in high-cost areas, rather than on a particular category of carrier or rate element.[118]

VII. THE COMMISSION HAS THE AUTHORITY TO IMPLEMENT THE METE PROPOSAL.

A. The Commission Has The Authority To Implement A Unified Bill-And-Keep Regime.

CTIA agrees with and supports the ICF's legal analysis of the Commission's authority to implement a unified bill-and-keep regime similar to that set forth in the METE Proposal.[119] Sections 201, 251 and 252 of the Act provide ample authority for the Commission to regulate both interstate and intrastate intercarrier traffic – either affirmatively or through exercise of its preemption authority – and to impose a bill-and-keep system.

Parties that argue that the Commission has no direct authority over intrastate access charges take an unrealistically narrow view of the Commission's authority over intrastate access services set forth in the 1996 Act.[120] One of these parties, the New York Public Service Commission, asserts that Section 251(b)(5) cannot be read to provide the Commission with jurisdiction over intrastate access charges simply "because Congress neglected to include language limiting the term 'telecommunications' in that provision," arguing that Sections 251 and 252 were intended to address only local exchange traffic.[121]

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[118] *See* US Cellular at 11.

[119] ICF at 38-48. CTIA does not support the "make whole" and certain other provisions in the ICF Plan, ICF at 34-36, but those aspects of the ICF Plan are not necessary to support the Commission's jurisdiction and authority to implement a unified bill-and-keep system.

[120] *See, e.g.*, Rural Alliance at 139-156; Pac-West at 7, 24; Time Warner Telecom *et al.* at 24-29; NARUC at 4-14; NASUCA at 37-43; NYPSC at 9-10; KMC at 62-70.

[121] NYPSC at 9.

The D.C. Circuit, however, has already ruled that the Commission "cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term."[122] In that case, which involved an interpretation of a closely analogous portion of Section 251, the court held that the Commission could not determine that long distance services are not "telecommunications services" for purposes of Section 251(d)(2).[123] In light of this ruling, the Commission cannot find that one subcategory of "telecommunications" services – namely, intrastate interexchange telecommunications services – are not covered by Section 251(b)(5). Accordingly, the Commission should not be distracted by attempts to second-guess Congressional intent given the clear language of the statute and the D.C. Circuit's existing interpretation of the defined terms used in Section 251.

Similarly, some parties argue that the Commission has no authority under Section 252(d)(2) to impose a bill-and-keep system, asserting that this regime does not provide for the "mutual" recovery of costs.[124] As ICF and CTIA have demonstrated, however, a bill-and-keep system *is* a mutual system in that both parties to a traffic exchange have the same rights to recover their costs from their end users (or from the universal service system).[125] Nothing in Section 252 requires that this cost recovery be obtained only from the other carrier involved in an interconnected call, only that the parties have equal rights to recover their costs. In fact, the statute expressly confirms this interpretation, noting that it should not be construed to "preclude… arrangements that waive mutual recovery (such as bill-and-keep

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[122] *USTA v. FCC,* 359 F.3d 554, 592 (D.C. Cir. 2004) ("*USTA*").

[123] *Id*.

[124] Pac-West at 13-14, 42, 47; Time Warner Telecom *et al.* at 20-26.

[125] CTIA at 20-21; ICF at 44-48.

arrangements)…."[126] Further, the Commission has held that the "waive" language in Section 252(d)(2) is not limited to voluntary agreements and that bill-and-keep can be imposed under Section 252(d)(2).[127] CTIA's METE Proposal therefore falls within the range of solutions that the Commission is authorized to implement.

Furthermore, Section 201(b) 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."[128] The Supreme Court has clarified that Section 201(b) authority is not limited to jurisdictionally interstate matters, but also extends to the provisions of the Telecommunications Act of 1996 that apply to matters that had been within the exclusive jurisdiction of the states prior to 1996.[129] Accordingly, Section 201 and the Supreme Court's interpretation of the scope of Section 201's authority further support the Commission's exercise of direct jurisdiction over intrastate access charges. The Commission therefore has clear and direct authority to establish a unified bill-and-keep regime that applies to both interstate and intrastate services.

The Commission also can exercise its authority to preempt state regulation of intrastate access charges if state regulation would frustrate attempts to develop a unified intercarrier compensation reform regime. The "inseverability" exception to state regulation of intrastate service[130] has been applied by the Supreme Court when it is impossible or impracticable to

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[126] 47 U.S.C. § 252(d)(2)(B)(i).

[127] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report & Order, 11 FCC Rcd 15499, 16054 (1996) ("*Local Competition Order*") (subsequent history omitted).

[128] 47 U.S.C. §201(b).

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

[130] *See Ilinois. Bell Tel. Co. v. FCC*, 883 F.2d 104, 115 (D.C. Cir. 1989) ("*Ill. Bell*") (referring to "the jurisdictional inseverability rationale").

separate interstate and intrastate regulated components and permits federal preemption when state regulation is inconsistent with a unified federal policy.[131] Furthermore, preemption can be supported if separation of the interstate and intrastate regulated components is "'impractical'" or "'inefficient.'"[132]

The D.C. Circuit acknowledged in *Ilinois Bell* that "[m]arketing realities" might make a jurisdictional separation impractical to uphold where intrastate and interstate services are sold in a combined package, thus justifying preemption.[133] Similarly, in *PSC of Maryland v. FCC*, the petitioners argued that it might be "possible technologically to cut off interstate access independent of local service" for customers delinquent on their bill payments.[134] The D.C. Circuit, however, gave deference to the FCC's position that such a separation, while technically feasible, was "not practical," and upheld the Commission's preemption of state authority over disconnecting local connections of delinquent customers.[135]

The Fourth Circuit upheld preemption of state regulation of terminal equipment used partly or entirely for intrastate communications after finding that separation of interstate and intrastate terminal equipment is "a practical and economic impossibility" and that the proposed state rules "would have scuttled the federal interconnection policy."[136] Thus, preemption was

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[131] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) ("*Louisiana*").

[132] *Pub. Util. Comm'n of Tex. v. FCC*, 886 F.2d 1325, 1333 (D.C. Cir. 1989) (quoting *Atlantic Richfield Co.*, 3 FCC Rcd 3089, 3091 (1988)).

[133] *Illinois Bell*, 883 F.2d at 113 n. 7.

[134] *Pub. Serv. Comm'n of Md. v. FCC*, 909 F. 2d 1510, 1516 (D.C. Cir. 1990).

[135] *Id.* Specifically, the court noted that the Maryland PSC failed to offer any evidence to challenge the FCC's finding that such a separation is not practical.

[136] *See North Carolina Utils. Comm'n v. FCC,* 552 F.2d 1036, 1043 (4th Cir. 1977), *cert. denied,* 434 U.S. 874 (1977) ("*NCUC*").

upheld "not because exclusively intrastate facilities cannot be built or imagined (indeed, some are already in existence), but because state commissions prefer to avoid the economic and political costs for forcing the general consumer to buy two sets of terminal equipment."[137]

Here, preemption is justified because it will be impossible to realize the full efficiencies to be derived from intercarrier compensation reform unless intrastate access charges are included in a unified system, and it is becoming increasingly impractical and inefficient to separate traffic subject to intrastate access charges from other traffic. The existing intercarrier compensation system treats interstate and intrastate traffic differently, thereby creating arbitrage opportunities that can be eliminated only with a unified regime. Furthermore, with the widespread acceptance and growth of mobile wireless service and mobile IP-enabled services (for which the Commission has preempted most intrastate regulation), it is becoming increasingly difficult, if not impossible, to determine the end points of many calls in order to categorize them as interstate or intrastate. As Verizon points out, the Commission has asserted preemptive authority over intrastate traffic in the context of VoIP and wireless services because of the difficulty in separating interstate and intrastate traffic.[138] As consumers increasingly switch to wireless and VoIP services, it will become increasingly difficult to separate traffic by jurisdiction.

Moreover, the preemption issue presented in this proceeding is unique in that the Communications Act affirmatively provides this Commission not only authority over all interstate telecommunications, but also authority, under Section 251(b)(5), to establish pricing rules governing a segment of intrastate telecommunications – namely, interconnected local calls.

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[137] *Id.* at 1049.

[138] Verizon at 36-37.

None of the commenters opposing Commission authority to implement a unified system argues to the contrary.[139]

The dispute over Commission jurisdiction in this proceeding thus concerns only one segment of intrastate telecommunications, namely, intrastate toll calls subject to intrastate access charges. All other telecommunications traffic – intrastate as well as interstate – is already under the Commission's direct jurisdiction. Various parties complain about the difficulty of separating intrastate toll calls subject to access charges from interconnected local calls.[140] Because the inseverability exception turns on the impracticality of separating traffic subject to Commission authority from traffic subject to state regulation, the increasing difficulty of separating intrastate toll calls from interconnected local calls also should support preemption of state regulation of intrastate access charges. Without such preemption, the Commission's implementation of a reformed intercarrier compensation system covering the categories of interstate and intrastate traffic affirmatively under its authority will be thwarted.[141]

Accordingly, the Commission should exercise its authority to preempt state regulation of intrastate access charges to the extent that it lacks direct authority to regulate intrastate access charges under the 1996 Act.[142] In addition, with respect to CMRS service, CTIA notes that

[139] *See, e.g., id.* at 40-41.

[140] Some of these claims are discussed in Part VIII, *infra.*

[141] *See NCUC*, 552 F.2d at 1043.

[142] Other parties also agree that the Commission has the authority to preempt regulation of intrastate access charges. *See, e.g.,* USTA at 24-31; BellSouth at 36-38; Verizon at 35-38.

Section 332(c)(3) already preempts state authority over intrastate access charges to the extent that such charges affect the entry of CMRS providers.[143]

B. The Commission Has The Authority To Require ILECs To Provide Tandem Transit Service.

CTIA agrees with other parties that the Commission has the authority to require ILECs to provide tandem transit service.[144] Sections 201(a), 251 and 332 of the Act all provide ample authority for the Commission to require ILEC provision of tandem transit service and to regulate the rates for such service. Transit service is a critical service for many carriers, particularly CMRS providers seeking to provide nationwide, efficient and cost-effective service, including service in rural areas where it is not feasible to directly interconnect with every RLEC.[145] ILECs, however, have bottleneck control over the transit service that is necessary for indirect interconnection.[146] Accordingly, required ILEC provision of tandem transit service is clearly "necessary or desirable in the public interest" under the standard set forth in Section 201(a).

In the case of interstate traffic, Section 201(a) provides the Commission with broad authority to require the establishment of "physical connections" between carriers, to require the establishment of "through routes" and applicable charges, and to establish regulations governing

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143 *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) ("*Iowa*"), *vacated and remanded in part on other grounds sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*Iowa*").

144 Nextel at 4-18; Leap Wireless at 11-13; Cox at 14-22; PacWest at 20-24.

145 As Nextel points out, Section 20.11(a) of the Commission's rules also provides that a LEC must provide mobile carriers with the type of interconnection that they reasonably request, and the Commission has explained that the purpose of this rule is to regulate the conduct of LECs with market power to ensure reasonable interconnection for CMRS providers. Nextel at 6-7 (citing *Biennial Review 2000 Staff Report,* 15 FCC Rcd 21084, 21203 (2000)).

146 Even the rural ILECs agree that the RBOCs have a near-monopoly on such services. NTCA at 54.

such "through routes." This language explicitly provides the Commission not only with authority over transit connections themselves, but also the charges and other terms and conditions related to the transit connection. Furthermore, "through routes" typically involve at least three carriers, so Section 201(a) implicitly encompasses the Commission's authority over the intermediate carrier in such arrangements. Although some parties argue that a Section 201(a) obligation can be imposed only "after notice and a hearing,"[147] it is well established that a rulemaking proceeding that establishes the criteria under which a carrier must interconnect to provide through service satisfies the hearing requirement.[148]

More broadly, Section 251(a) of the Act requires *all* telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers…."[149] Contrary to some commenters' suggestions,[150] regulation of the physical interconnection between two networks necessarily encompasses the connecting or "transiting" pipe to achieve indirect interconnections.[151] Any other interpretation would nullify a carrier's right under Section 251(a) to indirect interconnection. Indirect interconnections – *i.e.,* transiting arrangements – are therefore implicitly within the Commission's regulatory authority under this provision. Furthermore, there is nothing in this provision that limits the scope of the interconnected traffic subject to its requirements.[152]

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[147] Qwest at 37.

[148] *See, e.g., Lincoln Tel. & Tel. Co. v. FCC,* 659 F.2d 1092, 1101 n.43, 1103-04 & n.61 (D.C. Cir. 1981); *Access Charge Reform,* 19 FCC Rcd 9108, 9138 & n.216 (2004), *recon. pending*.

[149] 47 U.S.C. § 251(a)(1).

[150] BellSouth at 33-34; Qwest at 37.

[151] *See* Nextel at 15-16; Leap Wireless at 11-12; PacWest at 22.

[152] *Cf. USTA*, 359 F.3d at 592 (nothing in the Act limits the term "telecommunications").

Section 251(c)(2) also establishes that ILECs have a duty to provide interconnection for the "transmission and routing" of local exchange traffic.[153] This provision on its face is not limited solely to traffic originated by either the requesting carrier or the ILEC, but is broad enough to encompass traffic that is originated or terminated by a third party. Accordingly, this subsection also supports the Commission's authority to require ILECs to provide tandem transit service. As with Section 251(a), this provision is sufficiently broad to cover both interstate and intrastate traffic. Contrary to the assertions of some parties, although the Wireline Competition Bureau declined in the *MCI Virginia Arbitration* to "get out in front of" the full Commission and determine whether or not there is a Section 251(c) obligation to provide tandem transit service, it did not hold against such an obligation.[154] Furthermore, the Bureau also implied that Verizon might have a duty to provide transit service under Section 251(a) of the Act.[155]

Moreover, Section 332(c)(1)(B) of the Act expressly provides the Commission with the authority to order any common carrier to establish physical connections with CMRS providers.[156] The Commission itself tentatively concluded in 1996 that this provision alone provides sufficient authority to implement an interim bill-and-keep system for ILEC-CMRS

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[153] *See* Leap Wireless at 12-13; Cox at 14-22; PacWest at 20-24.

[154] *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Comm'n Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 FCC Rcd 27039, 27101-02 (WCB, 2002) ("*MCI Virginia Arbitration*") (noting that transit is vital to the "ability to interconnect indirectly with other carriers").

[155] *Id.*

[156] 47 U.S.C. § 332(c)(1)(B); *see also* 47 U.S.C. § 152(b).

interconnection.[157] Although the Commission did not invoke this authority at that time, it explicitly warned that "[s]hould the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates."[158] In light of the CMRS industry's difficulties in obtaining reasonable access to transit service at fair and nondiscriminatory rates, the Commission should revisit this issue and invoke its authority under Section 332.

The Commission thus has ample authority under multiple provisions of the Act, and should exercise that authority, to require that ILECs provide tandem transit services. Further, based upon the Commission's Section 201(b) obligation to ensure just and reasonable rates for regulated services, the Commission necessarily may regulate transit rates. As Sprint correctly noted, the RBOCs are attempting to impose non-cost-based "market" rates for transit services in many states.[159] Unless transit rates are based upon forward-looking costs, these inflated charges

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[157] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers* Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5072-73 (1996) ("*CMRS Access Charge NPRM*").

[158] *Local Competition Order*, 11 FCC Rcd at 16006.

[159] Sprint at 19. Accordingly, contrary to BellSouth's assertions, BellSouth at 32-33, there is more than sufficient reason for the Commission to intervene and establish affirmative ILEC requirements with respect to transit services. Similarly, the Commission should reject Qwest's urging of "market" transit pricing, Qwest at 38, in light of the fact that there is no real competition in the provision of transit services. Rather, even the rural ILECs agree that the RBOCs have a near-monopoly on such services, NTCA at 54, which precludes reliance upon market pricing. Contrary to the implications of some ILECs, *e.g.,* Qwest at 36, CTIA is not seeking avoidance of any payment for transit services, only that they be provided on a reasonable, forward-looking cost basis.

will eliminate some of the benefits of intercarrier compensation reform. To support the imposition of forward-looking costs, Section 251(c)(2) – which requires ILECs to interconnect for the "transmission and routing" of local calls – and Section 251(d)(1) – which requires these same Section 251(c)(2) interconnection rates to be cost-based – together provide sufficient legal basis for the Commission to impose such a requirement. Accordingly, the Commission should set a nationwide default transit rate based upon efficient, forward-looking costs. In any event, however, Section 332 permits the Commission to require forward-looking costs for CMRS transit.[160]

C. Implementation of the METE Proposal Will Not Constitute Unlawful Confiscation.

Contrary to the suggestions of some commenters,[161] neither implementation of a bill-and-keep system nor imposition of TELRIC-based tandem transit rates would constitute unlawful confiscation under the Fifth Amendment. Rather, as Nextel notes, any elimination of access revenues that permits carriers to recover their costs through other means and/or from other parties would not be confiscatory.[162] Regulators are not required to guarantee historic or expected revenues, or to guarantee recovery of embedded costs plus an 11.25% rate-of-return.

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[160] *See Iowa*, 120 F.3d at 800 n.21.

[161] *See, e.g.,* NTCA at 19-20; ICORE at 5-6; Prairiewave at 4; Qwest at 39. Some commenters raising confiscation claims, however, acknowledge that the elimination of access charges would be permissible so long as an alternative recovery mechanism is adopted. *See, e.g.,* Verizon at 26-27 (arguing that reduction of intercarrier compensation payments would raise serious constitutional questions *if* the Commission did not permit some alternative method of cost recovery, such as SLC increases); SBC at 16-17 (same).

[162] Nextel at 21-25. *See also* Leap Wireless at 9.

Instead, the regulator must only ensure that a carrier's overall rate structure provides a reasonable *opportunity* to recover a return on its investment.[163]

Here, adoption of a bill-and-keep system, coupled with the express ability to recover current access costs from a carrier's own customers (and universal service when necessary), cannot be confiscatory. Accordingly, implementation of the METE Proposal would not run afoul of constitutional prohibitions on confiscation.

VIII. THE COMMISSION SHOULD REJECT ATTEMPTS TO HANDICAP COMPETITIVE WIRELESS PROVIDERS WITH LEGACY NETWORK INEFFICIENCIES.

To ensure sustainable, technologically neutral and efficient intercarrier compensation and interconnection regimes, the Commission should grant Sprint Corporation's ("Sprint's") routing and rating petition ("Sprint Petition"),[164] and uphold wireless service providers' dialing parity rights. Moreover, if the Commission does not adopt the METE Proposal or a similar unified bill-and-keep proposal, it should maintain the intraMTA rule and ensure that wireless carriers have

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[163] *See Local Competition Order*, 11 FCC Rcd at 15871 (noting that case law "requires only that the end result of our overall regulatory framework provides LECs a reasonable opportunity to recover a return on their investment. In other words, incumbent LECs' overall rates must be considered, including the revenues from other services under our jurisdiction"). *See also Duquesne Light Co. v. Barasch,* 488 U.S. 299, 307, 312 (1989) (confiscation can only occur when an agency's rate change threatens a carrier's financial integrity); *Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944) (rate methodologies can be changed so long as the total impact of the change is not unjust and unreasonable); *Local Competition Order,* 11 FCC Rcd at 15870-71 (rejecting claim that TELRIC-based rates did not permit recovery of embedded costs and was thus confiscatory; noting that even when a rate change excludes recovery of prudently incurred historical costs, the change does not necessarily lead to a finding of confiscation). The Supreme Court upheld this specific finding in the *Local Competition Order*, noting that "regulation does not and should not guarantee full recovery of [carriers'] embedded costs." *Verizon Communs., Inc. v. FCC,* 535 U.S. 467, 528 (2002).

[164] Sprint Petition for Declaratory Ruling, Obligation of Incumbent LECs to Load Numbering Resources Lawfully Acquired and to Honor Routing and Rating Points Designated by Interconnecting Carriers, CC Docket No. 01-92 (May 9, 2002) ("Sprint Petition").

the same opportunity to recover access and other termination charges that wireline carriers are afforded.

A. ILECs Are Obligated To Load Wireless Carrier Numbers With Different Routing And Rating Points.

Numerous commenters explain that the ability of wireless service providers to compete effectively is thwarted by ILECs' refusals to load wireless carrier numbers with different routing and rating points into their switches and route calls to those numbers.[165] For example, Sprint notes that its ability to provide facilities-based wireless services and compete directly with incumbent carriers in rural areas "is greatly inhibited because, absent the establishment of direct connections, many incumbents refuse to recognize the local telephone numbers Sprint has acquired…. [F]ew residents of rural areas will consider Sprint's service if [they] must incur toll charges in calling a Sprint wireless customer who is located across the street."[166] Similarly, Dobson Cellular and American Cellular explain that "[t]o compete with the ILECs, CMRS providers and CLECs must be able to provide local numbers in any ILEC rate center where their customers demand them; otherwise calls to their customers from the ILEC network will not be rated as local."[167] Although Sprint raised this issue more than three years ago in the Sprint Petition, the Commission has yet to take any action that would curb incumbent carriers' anti-competitive behavior.

In effect, wireline carriers refuse to acknowledge that a wireless carrier's licensed service area typically does not correspond with a wireline carrier's local calling area, but rather may

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[165] *See* Sprint at 17-19; Western Wireless at 31-37; Dobson Cellular at 5-7; Allied Paging at 3-5.

[166] Sprint at 17.

[167] Dobson Cellular at 5-6.

overlap portions of the local calling areas of multiple wireline carriers. Thus, in order to provide customers with a local calling area comparable to that of an ILEC, wireless carriers often route calls through a single ILEC tandem rather than directly interconnecting with each ILEC.

Nonetheless, USTA and the Rural Alliance urge the Commission to apply an inefficient and discriminatory framework to the routing and rating of wireless calls. Specifically, USTA would require wireless and other carriers obtaining a number within an ILEC rate center to designate a point-of-presence in the ILEC's local serving area, thus effectively requiring wireless carriers to mirror the networks of all ILECs.[168] Similarly, the Rural Alliance incorrectly argues that the routing and rating dispute between wireline and wireless carriers stems from wireless carriers' misuse of the Local Exchange Routing Guide ("LERG") to dictate point-of-interconnection ("POI") locations, redefine distant toll tandems as local tandems, and shift costs to RLECs.[169] In effect, the Rural Alliance claims that any entry of routing and rating codes into the LERG by wireless carriers that is not the result of direct interconnection is improper, which is simply wrong as a matter of law and precedent.

CTIA and other parties have explained repeatedly over the last three years, most recently in comments in response to the FNPRM, that carriers have a legal right to obtain local numbers with different routing and rating points in each local calling area where they provide facilities-based service, without interconnecting directly with the ILEC serving each local area.[170] It is well established that it is often more efficient for wireless carriers to have telephone numbers with separate routing and rating points than it is to either replicate the ILEC legacy network in

[168] USTA at 33-34.

[169] Rural Alliance at 132-35.

[170] *See, e.g.,* CTIA at 29-31; T-Mobile at 40-43; Dobson Cellular at 3-7; Western Wireless at 31-37; Sprint Reply Comments, CC Docket No. 01-92, DA No. 02-1740 (Aug. 19, 2002).

order to interconnect directly everywhere or treat local calls as toll calls and pay access charges.[171] Thus, it is entirely appropriate for wireless carriers to enter data into the LERG that is a result of indirect interconnections, pursuant to their Section 251(a) right to interconnect indirectly with any other carrier.[172] Further, the Commission's technology-neutral policies do not require wireless carriers to implement technologically and economically inefficient interconnection practices simply to make them operate like wireline carriers.

B. The Commission Must Ensure That Wireless Carriers' Dialing Parity Rights Are Recognized By Wireline Carriers.

Although the Commission's discussion in the FNPRM regarding the rating of LEC-CMRS traffic does not specifically address LECs' local dialing obligations,[173] Nextel Partners identifies a serious problem that is hampering its and other wireless carriers' ability to effectively compete against their wireline counterparts. Specifically, many LECs are refusing to provide wireless carriers with local dialing parity, even though parity is mandated by statute and Commission regulation.[174]

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[171] CTIA at 29-30; T-Mobile at 40-41; Dobson Cellular at 3-7; Western Wireless at 31-37.

[172] Only the Rural Alliance, alone among commenters, specifically asserts that wireless carriers are improperly entering rating and routing data into the LERG. The Rural Alliance noticeably fails to cite to any support that the LERG is to be used only for rating and routing of directly interconnected calls. The Rural Alliance also does not even attempt to counter the fact that industry guidelines specifically recognize that the rating and routing points for a number may be different. *See, e.g.,* Central Office Code (NXX) Assignment Guidelines, INC 95-0407-008, § 6.2.2 (Feb. 4, 2005) ("Each switching center, each rate center and each POI may have unique V&H coordinates.").

[173] FNPRM, 20 FCC Rcd at 4747-48.

[174] Nextel Partners at 14-17.

Section 251(b)(3) of the Act explicitly mandates that LECs provide local dialing parity to competitive providers of telephone exchange services.[175] Although the Commission long ago concluded that wireless carriers, as providers of exchange service, are entitled to dialing parity,[176] some RLECs claim that wireless carriers may obtain dialing parity only if an interconnection agreement is executed between the wireline and wireless carriers. Consequently, wireless carriers often are compelled to enter into interconnection agreements with unfavorable terms and conditions if they want to effectively compete in these markets. Neither the Act nor the Commission, however, conditions dialing parity for wireless carriers on the existence of an interconnection agreement.[177] Accordingly, the Commission must reiterate that LECs are required to provide local dialing parity to wireless carriers within the wireless carriers' local calling areas and that an interconnection agreement is not a prerequisite for dialing parity.

C. The Commission Must Retain The IntraMTA Rule.

The Commission must maintain the intraMTA rule, codified in Section 51.701(b)(2) of the rules,[178] if it does not adopt CTIA's METE Proposal or another reform mechanism that unifies intercarrier compensation payments or otherwise adopts a regime that requires carriers to distinguish between local and non-local traffic. The Commission also should confirm that the rule applies to intraMTA traffic that may pass through a transiting carrier.

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[175] 47 U.S.C. § 251(b)(3); 47 C.F.R. § 51.207.

[176] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Second Report and Order, 11 FCC Rcd 19392, 19427-29 (1996) (subsequent history omitted).

[177] *See TSR Wireless, LLC v. US WEST Communs., Inc.*, 15 FCC Rcd 11166 (2000) (concluding that the Commission's interconnection pricing rules can be applied to wireless traffic under Section 332 of the Act and thus do not require a interconnection agreement pursuant to Section 252 of the Act), *aff'd Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[178] 47 C.F.R. § 51.701(b)(2).

When the Commission adopted the intraMTA rule, it correctly concluded that specific wireless local service areas for intercarrier compensation purposes must be established because wireless service areas are federally-mandated, vary in size and do not match wireline service areas that state regulators typically base upon the location of wireline rate centers.[179] Wireless carrier commenters emphasize that the intraMTA rule is necessary to protect the integrity of the wireless market.[180]

Opponents of the intraMTA rule acknowledge that the difference in local calling areas for wireline and wireless services is at the heart of the dispute regarding how carriers should be compensated for transporting and terminating LEC-CMRS calls.[181] Rather than "singl[ing] out wireless carriers for different treatment,"[182] the intraMTA rule simply ensures that wireless customers are not subject to toll charges for calls made within their wireless carrier's local service area (*i.e.*, the same benefits afforded to wireline-to-wireline calls). The solution offered by opponents of the intraMTA rule, however, would impose legacy inefficiencies on wireless service providers.

For example, by advocating the elimination of the intraMTA rule, USTA and Qwest in effect argue that wireless carriers should modify all of their local calling areas to match those of wireline carriers. An undertaking to completely reconfigure their networks would be prohibitively expensive, if it were technically possible at all.[183] Further, the local calling areas of

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[179] *Local Competition Order*, 11 FCC Rcd at 16014.

[180] *See, e.g.,* Nextel at 30-31; Dobson Cellular at 7-9; MetroPCS at 22-24; Western Wireless at 30-31; U.S. Cellular at 15.

[181] *See, e.g.,* Qwest at 50-51; Rural Alliance at 126-27.

[182] USTA at 48.

[183] MetroPCS at 23.

wireline carriers are based upon landline technology, service areas and pricing practices, none of which resembles wireless networks.[184] Similarly, the Rural Alliance suggests that only a LEC originated call that originates and is routed to a wireless carrier through a POI within a wireline local calling area would be subject to reciprocal compensation.[185] Thus, this approach requires the local calling area of a wireless carrier to match that of wireline carriers and to assume the legacy inefficiencies that characterize wireline networks.

Retaining the intraMTA rule also is necessary because, unlike wireline carriers, wireless carriers do not collect access charges for the termination of any calls.[186] In contrast, wireline carriers collect both reciprocal compensation and access charges. By eliminating the intraMTA rule, wireless local calling areas – and thus wireless carriers' reciprocal compensation revenues – would dramatically shrink while wireline carriers could still recover both access charges and reciprocal compensation. Therefore, eliminating the intraMTA rule would place wireless carriers at a competitive disadvantage to their wireline counterparts. Accordingly, if the Commission does not adopt the METE or similar proposal, the intraMTA rule must be retained. If the Commission neither adopts a bill-and-keep intercarrier compensation regime nor retains the intraMTA rule, as further discussed below, wireless carriers must be allowed to recover access charges so that they are on an equal competitive footing with wireline carriers.

Further, contrary to JSI's assertions, the intraMTA rule applies to LEC-CMRS calls originating and terminating within an MTA even if a LEC hands a call off to an IXC for delivery

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[184] Nextel at 30; Dobson Cellular at 9; U.S. Cellular at 15.

[185] Rural Alliance at 127; *see also* California LECs at 6.

[186] Western Wireless at 31.

to a wireless network.[187] The intraMTA rule is clear on its face and has been upheld by the U.S. Court of Appeals for the Tenth Circuit – traffic to or from a wireless network that originates and terminates within the same MTA is subject to reciprocal compensation obligations.[188] The Commission must affirm that this obligation is not affected if a LEC transits an intraMTA call through an IXC. To hold otherwise would validate LECs' attempts unilaterally to rewrite the intraMTA rule in order to receive access charges from IXCs rather than to pay reciprocal compensation for the termination of intraMTA wireless traffic and would undercut wireless carriers' right to indirectly interconnect under Section 251(a) of the Act.

The on-going disputes regarding application of the intraMTA rule reinforce the pressing need for CTIA's METE Proposal. Under CTIA's suggested regime, anachronistic and arbitrary jurisdictional distinctions would be replaced by a unified intercarrier compensation regime that encourages and rewards efficiency. Service providers' inability to measure whether traffic originates and terminates within the same MTA on a real-time basis, as noted by Verizon Wireless,[189] provides further support for the METE Proposal.

Yet other rating and routing disputes also are increasingly created by so-called "phantom traffic," which typically refers to calls that lack sufficient information to determine the identity of the originating carrier or the jurisdictional nature of the traffic. Phantom traffic can be caused in a number of ways, both intentional and inadvertent.[190] Moreover, phantom traffic appears to

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[187] JSI at 24-25.

[188] 47 C.F.R. § 51.701(b)(2); *Atlas Tel. Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256, 1264 (10th Cir. 2005). RLECs are not precluded from transiting traffic through IXCs and recovering access charges as a result. RLECs, however, must also satisfy their obligations to compensate wireless terminating carriers for intraMTA calls.

[189] Verizon Wireless at 6.

[190] TDS at 10.

be an outgrowth of the rapid evolution of new technologies and systems that is outpacing the industry's legacy wireline networks.[191] For example, certain LEC switches may not have the capability to transmit call data, and calls are thus routinely passed without critical billing information. Although RLECs generally characterize phantom traffic as a dispute caused only by wireless carriers, they conveniently ignore that phantom traffic also exists in the opposite direction when wireline originated calls are terminated on wireless networks and in the case of wireline/wireline interconnected calls.

Adoption of CTIA's METE proposal would effectively moot any dispute involving missing call information because the jurisdiction of a call would be irrelevant for billing purposes.[192] If the Commission does not adopt the METE proposal, it also should not adopt RLECs' proposals to: (1) adopt special truth-in-billing rules for phantom traffic; (2) apply particular penalties to such traffic; or (3) allow terminating carriers to block calls without call-identifying information.[193] The industry has been working together closely to develop new standards and practices to ensure carriers obtain the necessary call-information for billing purposes.[194] Multiple companies also have developed database and software solutions to better

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[191] CCAP at 7-8; *see also* Jonathan Smith, Verizon, *Phantom Traffic 2004: Scope of the Problem* at 4 (Apr. 7, 2004) (presented at NECA Phantom Traffic Conference), *available at* www.neca.org/media/Jonathan_Smith.pdf.

[192] NTCA at 51; TDS at 10-12.

[193] TDS at 10-11; SureWest at 23; NECA at 16-17; Colorado Telecom. Ass'n. at 17-18; CCAP at 9-10; CenturyTel at 7.

[194] *See* NTCA at 51-53 (describing the efforts of the Network Interoperability Forum to develop procedures for call identification). Various telecommunications industry members also have been participating in forums, working groups and discussions addressing phantom traffic.

track phantom traffic and determine its jurisdictional origins.[195] Thus, the Commission should provide the industry adequate time to address the phantom traffic issue before adopting onerous regulations. Further, to the extent any carrier acts fraudulently or illegally, it would be subject to the Commission's enforcement authority under the Act. Thus, additional actions are unnecessary.

D. Wireless Carriers Should Be Provided The Same Opportunity To Recover Access And Termination Charges As Wireline Carriers.

As CTIA and Sprint note in their comments,[196] if the Commission does not adopt a bill-and-keep type intercarrier compensation solution, it must resolve whether CMRS carriers should be allowed to impose access charges on IXCs for originating or terminating long distance traffic on their wireless networks.[197] Adoption of the METE proposal or other measure that is based upon a bill-and-keep regime, however, would eliminate call origination and termination charges and would moot this issue.

IX. CONCLUSION

The initial comments confirm the urgency of a thorough overhaul of the intercarrier compensation and high-cost universal service systems to accommodate technological and

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[195] For example, to track phantom traffic and ensure carriers receive appropriate intercarrier compensation for terminating such traffic, EDI Enterprises has developed Teletraffic Cop SS7 (*see* www.edienterprises.com/teletrafficcopss7.php), Tekelec has created a Traffic Management solution (*see* www.tekelec.com/products/prod_detail.asp?id=36), and Carrier Management Systems has developed Phantom Tracker software (*see* www.nams.net/phantom-traffic.html). Mid America Computer Corporation also has developed a special Jurisdictional Indicator Validation Edit process. Mid America at 2.

[196] CTIA at 18; Sprint at 21-22.

[197] *See CMRS Access Charge NPRM*). The Commission tentatively concluded that CMRS carriers could recover access charges, but it never adopted a final decision in that proceeding.

marketplace developments. A unified bill-and-keep intercarrier compensation system, supported by neutral interconnection rules, and a unified forward-looking, least-cost universal service support mechanism, as outlined in the METE Proposal, are vital elements of any meaningful reform. The Commission should exercise its authority under the Communications Act to carry out these reforms to ensure that consumers are afforded the benefits of innovation and competition that will flow from more efficient and competitively neutral intercarrier compensation and universal service regimes.

Respectfully submitted,

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