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

In the Matter of	)	
	)	
Intercarrier Compensation Reform	)	CC Docket No. 01-92
	)	
	)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

ON THE

PUBLIC NOTICE REGARDING THE MISSOULA PLAN

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SUMMARY OF COMMENTS

The United States Telecom Association endorses the Missoula Plan for intercarrier compensation reform.[1] Intercarrier compensation reform is urgently needed because the existing systems for intercarrier compensation currently are outdated as a result of technological innovation, market evolution, and legal/regulatory changes. The Plan is a significant and balanced step forward in reforming these systems in a way that will benefit consumers. Notably, the Plan meets the Commission's principal goals for intercarrier compensation reform.

The Plan minimizes regulatory arbitrage with a default intercarrier rate structure that treats traffic uniformly. Today, telecommunications markets are disrupted by diverse intercarrier compensation regimes that impose arbitrary cost differences for the handling of traffic depending on the jurisdictions, customers, or technologies involved in calls when the same function is performed in each case. There is near universal agreement that this state of affairs produces uneconomic arbitrage and intercarrier disputes. Accordingly, the Commission should move to minimize arbitrage by adopting a uniform rate structure for traffic regardless of the identity of the service provider, the jurisdiction of the call, or the underlying technology (e.g., wireless, wireline, cable, etc.) with which the call was made. The Missoula Plan does just that by establishing a uniform rate structure that treats each minute of traffic the same at any given point in the network without regard to the technology or identity of the providers on any given call.

The Plan significantly integrates universal service reform with intercarrier compensation reform. A critical component of intercarrier compensation reform is making sure that it is accomplished in a manner that supports universal service, and facilitates needed reform of high-cost support mechanisms. The Missoula Plan makes significant strides toward reforming

[1] Some USTelecom members do not support the Plan, and they may express their concerns in separate comments.

universal service in connection with intercarrier compensation reform by re-indexing the rural high-cost loop fund, which is essential to ensure that carriers are compensated for the carrier-of-last resort obligations that they, and generally only they, fulfill at below-cost rates in high-cost areas. The Missoula Plan also eliminates the study area size distinctions for the recovery of high cost loop support, which brings needed rationalization and equitable treatment to the system.

The Plan relies in the first instance on competition and commercial agreements where possible to determine market outcomes. The Commission concluded in the *FNPRM* that reform of intercarrier compensation should promote efficient networks and foster facilities-based competition. Whereas today's rules for intercarrier compensation stand in the way of the policies of the 1996 Act, the Missoula Plan strongly facilitates commercial arrangements. First, the rules are *default* arrangements for the most part. Companies are free to negotiate alternatives, which will benefit all parties involved. Second, the Missoula Plan brings much needed clarity and reduced risk to interconnection and intercarrier relationships, which reduces transaction costs and facilitates contracting. The Missoula Plan also takes significant account of the different circumstances faced by carriers, most notably through the three-track approach to reform, and it facilitates competition and contracting by introducing more pricing flexibility for regulated companies operating in increasingly competitive markets.

The Plan gives network owners a more consistent and predictable opportunity to be compensated for the use of their networks. The Missoula Plan is a particularly appropriate vehicle for intercarrier compensation reform because it addresses the fundamental need to encourage investment in networks. Regulation today is moving towards ultimately denying many network owners a reasonable opportunity to recover their investments by forcing them to seek recovery of substantial percentages of their investments through intercarrier compensation mechanisms that are eroding or evaporating altogether (whether through convergence or increased arbitrage and gaming). Physical networks are the heart of telecommunications, however, and they will remain so for the foreseeable future. Therefore, companies investing in physical networks must be reasonably confident that they will have a realistic opportunity to recover the cost of their investment and make a competitive return on investment.

The Missoula Plan recognizes the value of networks throughout its structure and individual elements. The three tracks for reform, the rules for interconnection, the default arrangements for the exchange of traffic, and the restructure mechanism (RM) all reflect the importance of providing network owners with reasonable opportunities to recover their investments while eliminating many of the sources of regulatory arbitrage that are threatening to prevent regulated network owners from recovering their investments over time. In addition, the Missoula Plan affords carriers substantial flexibility to determine their best recovery options.

The Plan facilitates direct and indirect interconnection. The Missoula Plan takes significant steps toward fostering direct and indirect interconnection. It maintains existing meet points for traffic exchanged between two ILECs; it establishes an interconnection framework that balances the financial burdens for transport arrangements; and it ensures the availability of transit service for voice traffic.

The Plan contains workable transitions that will minimize service provider and customer disruptions. The problems with intercarrier compensation are systemic and largely the result of outdated regulation. Accordingly, it is incumbent on the Commission to solve those problems without unduly burdening any one segment of the industry. The Missoula Plan does this through its three-track structure and other mechanisms that take account of different carriers' circumstances and staged rebalancing among end user rates, intercarrier rates, and the

Restructure Mechanism so as to minimize rate shock and ensure that markets and providers' operations are able to adjust smoothly to the new regime.

Finally, the Plan does not disturb rate of return regulation or NECA pooling. It is important that intercarrier compensation reform be implemented in as minimally disruptive a manner as possible. The process of intercarrier compensation reform will have a major impact on the operations of rate-of-return carriers in any event, and a successful transition will depend on making those impacts manageable over time. The Missoula Plan has reasonable transition periods and, critically, allows carriers to continue with rate-of-return regulation and pooling of revenues through the National Exchange Carrier Association (NECA).

USTelecom does not take a position on the Plan's track definitions. A number of USTelecom members have expressed concern about the classification of some or all of their study areas into a particular "Track" in the plan, which would affect the length of the transition as well as rate levels for their particular companies. A number of other member companies have stated that they believe the track definitions in the Plan are fair and appropriate. USTelecom does not take a position on the track definitions or appropriate track assignments for individual companies. USTelecom members will file separately on this issue and, of course, the Commission should consider their arguments.

The Commission should resolve the open issues consistent with sound policy and legal precedent. The Plan does leave several "open" issues unresolved, and USTelecom urges the Commission to resolve them consistent with sound policy and legal precedent. In particular:

(1) The Access Restructure Mechanism must not be portable as this would defeat the principle of competitive neutrality;

(2) The early adopter fund is a good idea in principle, so the Commission should work to implement such a mechanism consistent with sound policy and legal requirements;

(3) The Commission should reform its Universal Service contribution methodology by implementing a system based primarily on numbers; and

(4) The Commission should reform high-cost support as necessary to ensure that it is predictable, sustainable, and sufficient, and directed at the critical networks.

The Commission has ample legal authority to adopt the Missoula Plan. There should be no doubt that the Commission also has the legal authority to implement intercarrier compensation reform based on the Missoula Plan. At the outset, it is clear that the Commission has the authority to adopt intercarrier compensation reform using the Missoula Plan for all categories of traffic other than intrastate access pursuant to section 201 and section 251 of the Communications Act. The Commission also has broad authority to reform intrastate access in connection with broader intercarrier compensation reform. State regulation of intercarrier compensation is inconsistent with a unified federal intercarrier compensation policy and, thus, preemption is appropriate under the inseverability doctrine. Moreover, intercarrier traffic is increasingly mixed and impractical to separate jurisdictionally and, therefore, state regulation of such traffic may be preempted.

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The United States Telecom Association endorses the Missoula Plan for intercarrier compensation reform.[1] Intercarrier compensation reform is urgently needed because the existing systems for intercarrier compensation are outdated as a result of technological innovation, market evolution, and legal/regulatory changes. The Missoula Plan represents a watershed compromise for fair and balanced comprehensive reform of the intercarrier compensation systems. It is not perfect and, indeed, its signatories do not claim perfection. It is, however, a reasonable approach that harmonizes intercarrier compensation and accounts for the most significant adverse consequences to intercarrier compensation arrangements by technological innovation, market evolution, and legal/regulatory changes. The Commission, therefore, should act expeditiously to adopt the Missoula Plan and address several "open" issues, related to intercarrier compensation reform left unresolved by the Plan.[2]

Adoption of the Missoula Plan would greatly serve the public interest, and it would benefit consumers and the economy. In particular, the Commission should expect that overall

[1] Some USTelecom members do not support the Plan, and they may express their concerns in separate comments.

[2] USTelecom does not take a position on the Plan's track definitions or appropriate track assignments for individual companies. USTelecom members will file separately on this issue—either supporting the definitions or raising concerns. The Commission should of course consider their arguments.

rates will decline as was the case with prior instances where rate-regulated carriers (long distance and local) were permitted to move away from usage-based charges and toward fixed monthly charges. Moreover, the Missoula Plan will increase telecommunications carriers' operating efficiency and bring much-needed predictability to telecommunications revenue flows, which should reduce the cost of capital for the industry as a whole. Finally, by reducing uncertainty and risk, the Missoula Plan will foster the development of more efficient business arrangements throughout the telecommunications industry.

These Comments are organized in three sections. First, we explain USTelecom's reasons for endorsing the Missoula Plan and urging the Commission to implement it promptly to reform and rationalize the disparate intercarrier compensation arrangements that are impeding competition and investment. Second, we address the issues left open by the Missoula Plan signatories. Third, and last, we explain in detail why the Commission has the legal authority to implement comprehensive intercarrier compensation reform.

I. USTELECOM ENDORSES THE MISSOULA PLAN FOR INTERCARRIER COMPENSATION REFORM.

USTelecom endorses the Missoula Plan for intercarrier compensation reform because it offers a clear path to much-needed rationalization of the telecommunications industry's disparate and outdated intercarrier compensation mechanisms. Plan members have filed persuasive evidence of the need for intercarrier compensation reform.[3] In fact, the Commission itself presented a strong case in the *FNPRM* for reforming the system of rules and regulations that

[3] *E.g.*, Letter from NARUC Task Force on Intercarrier Compensation, Ray Baum – Chair, to The Honorable Kevin Martin, Chairman of the Federal Communications Commission, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, The Missoula Plan, Policy and Legal Overview, at 1-3 (July 24, 2006) (the *Missoula Plan Filing*).

currently governs intercarrier compensation.[4] Based on general agreement in the record before it, including comments filed by USTelecom,[5] the Commission concluded that it must "replace the existing patchwork of intercarrier compensation rules with a unified approach … [because the current scheme] is increasingly unworkable in the current environment and creates distortions in the market at the expense of healthy competition."[6]

The Plan represents a watershed compromise for fair and balanced comprehensive intercarrier compensation reform. Adoption of the plan is in the public interest, and will benefit consumers and the economy. In particular, the Plan:

(a) meets the Commission's principal goals for intercarrier compensation reform;

(b) minimizes regulatory arbitrage with a default intercarrier rate structure that treats traffic uniformly;

(c) significantly integrates universal service reform with intercarrier compensation reform;

(d) relies in the first instance on competition and commercial agreements where possible to determine market outcomes;

(e) provides network owners with a more consistent and predictable opportunity to be compensated for the use of their networks;

(f) facilitates direct and indirect interconnection;

(g) contains workable transitions that minimize service provider and customer disruptions; and

(h) does not disturb rate of return regulation or NECA pooling.

Each of these attributes of the Plan is discussed in the following sections.

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[4] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking ¶¶ 15-28, 20 FCC Rcd. 4615 (March 3, 2005) (*FNPRM*).

[5] Comments of the United States Telecom Association, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Aug. 21, 2001); Reply Comments of the United States Telecom Association, *Developing a Unified Intercarrier Compensation Regime*¸ CC Docket No. 01-92 (Nov. 5, 2001) (*USTelecom Intercarrier Compensation Reform Reply Comments*).

[6] *FNPRM* ¶ 3

A. The Missoula Plan Meets the Commission's Principal Goals for Intercarrier Compensation Reform.

The Commission established its own goals for intercarrier compensation reform: (1) encourage investment in telecommunications networks and the development of efficient competition;[7] (2) preserve universal service; (3) achieve competitive and technological neutrality; and (4) minimize regulatory intervention and enforcement.[8] In establishing these goals, the Commission noted general agreement on the goals among parties commenting on the record (while acknowledging differences among commenters on specific goals).

The Missoula Plan squarely fulfills all of the Commission's goals for intercarrier compensation reform. It encourages investment in telecommunications networks and the development of efficient competition by removing regulatory arbitrage. This will encourage innovation and investment to follow productive investments instead of arbitrage opportunities. In addition, the Plan reduces risk and uncertainty which, in turn, will reduce the cost of capital and make network investments more attractive. The Missoula Plan preserves and, indeed, advances universal service by reducing reliance on unsustainable implicit subsidies. It achieves competitive and technological neutrality by treating all carriers and all types of traffic the same at any given point of switching. Finally, it minimizes regulatory intervention and enforcement by serving solely as a set of default rules that encourage commercial negotiation, and by offering increased pricing flexibility and incentives to adopt alternative regulation.

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[7] USTelecom assumes that the Commission is interested in investment in all networks, including those owned by USTelecom member incumbent local exchange carriers (ILECs). Not only do these networks account for a substantial percentage of telecommunications infrastructure, efficient competition would not thrive if significant competitors were effectively prevented from investing in their networks.

[8] *FNPRM* ¶¶ 31-33

Consumers ultimately will be the biggest beneficiaries from the positive intercarrier compensation reform set out in the Missoula Plan. Competitive, consumer-driven markets will deliver products and services that respond first and foremost to consumer preferences. Reducing arbitrage and administrative costs will also lead to lower prices and simpler terms of service. Positive intercarrier compensation reform also will promote network investment, producing a more robust telecommunications infrastructure and greater availability of innovative services. Finally, but very importantly, positive intercarrier compensation reform accompanied by related universal service reform will ensure predictable and adequate support for universally available, affordable services for all Americans.

B. The Missoula Plan Minimizes Regulatory Arbitrage With A Default Intercarrier Rate Structure That Treats Traffic Uniformly.

Currently, the application of different rates depending on the type of traffic often creates arbitrage opportunities. For example, the termination of a call on a given loop can be charged as little as less than one-tenth of a penny per minute or as much as several cents per minute depending on the source of the call, even though the cost of providing the service does not vary much. This fact alone causes allocative inefficiency as providers and customers respond to regulator-imposed rather than market-driven price signals.

The artificial arbitrage that is caused by the current jumble of intercarrier compensation arrangements is harming competition and investment in many other ways. Network owners are seeing increasing threats to their opportunity to recoup their investments as some users mischaracterize traffic and take advantage of loopholes to avoid lawful charges. The unpredictability and risk associated with arbitrage and competitive distortion, therefore, are harming network investment and innovation. In addition, because rural networks are even more dependent on intercarrier compensation than are networks in more densely-populated areas, the current problems are threatening universal service. Finally, this government-managed competition is thwarting the development of truly competitive markets.

The current varying regimes for intercarrier compensation are also administratively costly and impose substantial overhead compliance burdens on providers. Substantial differences in the treatment of traffic create an expensive and uncertain process for resolving regulatory disputes over the proper treatment of traffic and the collection of monies owed. Indeed, the Commission and providers alike have just expended countless hours and dollars disputing the appropriate treatment for particular types of traffic in the *Level 3,*[9] *Sprint,*[10] *T-Mobile,*[11] and *AT&T Calling Card*[12] proceedings, among others. Moreover, the ability to dramatically reduce costs by reclassifying traffic presents some carriers using intercarrier termination services with an irresistible incentive to misclassify traffic, which further burdens the entire industry with costly monitoring and enforcement processes. This inefficiency and administrative uncertainty further inhibits investment and thwarts technological innovation.

The nation's telecommunications markets can no longer tolerate the disruption produced by arbitrary distinctions between jurisdictions, customers, or technologies when the same

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[9] *Petition of Level 3 Communications LLC for Forbearance Under 47 U.S.C. Section 160(c) from Application of Section 251(g) of the Communications Act of 1934*, WC Docket No. 03-266, *withdrawn*, Letter from John T. Nakahata, Counsel to Level 3 Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission (Mar. 21, 2005).

[10] *Sprint Petition For Declaratory Ruling Regarding The Routing And Rating Of Traffic By ILECs*, CC Docket No. 01-92, *pending.*

[11] *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Report & Order, 20 FCC Rcd 4855 (2005).

[12] *AT&T Corporation Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services/Regulation of Prepaid Calling Card Services*, WC Docket No. 03-133, Order, 20 FCC Rcd 4826 (2005).

function is performed. As is supported by near universal agreement in the record, the Commission should move to minimize arbitrage by adopting a uniform rate structure for traffic regardless of the identity of the service provider, the jurisdiction of the call, or the underlying technology (e.g., wireless, wireline, cable, etc.) with which the call was made. Accordingly, the Commission should follow through on its expressed interest by adopting the Missoula Plan, which establishes a uniform rate structure that treats each minute of traffic the same at any given point in the network without regard to the technology or identity of the provider originating or carrying the call.[13]

The Missoula Plan also addresses the problem of "phantom traffic" by establishing clear rules regarding signaling and billing records. These provisions will facilitate interconnection by reducing the transaction costs associated with collecting revenue due on services rendered. This will significantly benefit consumers by reducing the cost and disruption associated with the myriad, and seemingly endless stream, of intercarrier compensation disputes being brought before the Commission, state commissions, and the courts.

C. The Missoula Plan Significantly Integrates Universal Service Reform With Intercarrier Compensation Reform.

A critical component of intercarrier compensation reform is making sure that it is accomplished in a manner that supports universal service, and facilitates needed reform of high-cost support mechanisms. Telecommunications is essential to economic development; therefore, everyone benefits when the nation's telecommunications infrastructure is extended to remote areas. It is also a critical part of homeland security and emergency services. Moreover, the

[13] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation NPRM*).

public telephone network is a leading example of the power of network economics—it is so valuable in significant part because it reaches nearly everybody. The more people that are connected to the network, the greater its value. For these reasons, universal service has been a strong national policy for nearly 100 years, and fulfilling this policy through the deployment of affordable, high-quality service in all areas of our country has been a great achievement. Throughout most of the past century, intercarrier compensation has played an important role in universal service.

The Missoula Plan makes significant strides toward reforming and preserving universal service in connection with intercarrier compensation reform. Among other things, it re-indexes the rural high-cost loop fund, which is essential to ensure that carriers are compensated for the carrier-of-last resort obligations imposed on them. The Missoula Plan also eliminates the study area size distinctions for the recovery of high cost loop support, which brings needed rationalization and equitable treatment to the system. Finally, the Missoula Plan enhances the safety valve mechanism applicable to exchanges acquired by rural ILECs.

D. The Missoula Plan Relies In The First Instance On Competition And Commercial Agreements Where Possible To Determine Market Outcomes.

USTelecom agrees with the Commission's conclusion in the *FNPRM* that reform of intercarrier compensation should promote efficient networks and foster facilities-based competition.[14] Facilities-based competition between efficient networks is the surest prescription for competitive markets. Accordingly, the Commission should create an environment in which commercial transactions between private parties can thrive. The Telecommunications Act of 1996 (1996 Act) was signed into law with the express purpose to "promote competition and

[14] *FNPRM* ¶ 31.

reduce regulation in order to secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies."[15] Commercial arrangements made in competitive, consumer-driven markets generally will be more able than the Commission to produce innovation, efficiency, high quality services, and low prices. Whereas today's rules for intercarrier compensation stand in the way of the policies of the 1996 Act, the Commission can and should adopt default rules that are consistent with the 1996 Act's purposes by promoting competition and reducing government intervention, while ensuring that the high-cost and insular areas of our nation continue to receive affordable high-quality telecommunications service.

The Missoula Plan strongly facilitates commercial arrangements in two ways. First, the rules are *default* arrangements for the most part. Companies are free to negotiate alternatives, and we should expect that this will occur often and to the benefit of all parties involved. Second, the Missoula Plan brings much needed clarity and reduced risk to interconnection and intercarrier relationships, which reduces transaction costs and facilitates contracting.[16] The Missoula Plan also takes significant account of the different circumstances faced by carriers, particularly those serving high-cost areas, most notably through the three-track approach to reform. On balance, therefore, the Missoula Plan should mark a substantial step forward in the move away from regulation and toward commercial dealing.

The Commission should also strive to eliminate obstacles to flexible pricing and service innovation. The Missoula Plan does this by introducing more pricing flexibility for regulated companies, which are facing increasingly competitive markets. Most notably, providers are

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[15] Preamble to the 1996 Act, which can be found at Committee on Energy and Commerce, U.S. House of Representatives, *Compilation of Selected Acts within the Jurisdiction of the Committee on Energy and Commerce*, Communications Law at 413 (April 2003).

[16] Ronald H. Coase, *The Problem of Social Cost*. 3 J. Law & Econ. 1 (1960).

given some pricing flexibility with respect to regulated end-user rates, such as the Subscriber Line Charge (SLC). These are significant steps as the industry moves forward with increasing competition and deployment of new technologies. During this progression, regulation of intercarrier compensation should diminish and, after a transition, voice services and the networks on which they are provided should be regulated no more than to the same minimal extent as are other competitive markets, with the caveat that default rules for intercarrier compensation remain in place to facilitate negotiation.

E. The Missoula Plan Provides Network Owners With A More Consistent And Predictable Opportunity To Be Compensated For The Use Of Their Networks.

The Missoula Plan is a particularly appropriate vehicle for intercarrier compensation reform because it addresses the fundamental need to encourage investment in networks. Regulation today is moving towards ultimately denying many network owners a reasonable opportunity to recover their investments because they are required to recover substantial percentages of their investments through intercarrier compensation mechanisms that are eroding or evaporating altogether (whether through convergence or increased arbitrage and gaming).

Physical networks are the heart of telecommunications, and they will remain so for the foreseeable future. Even the rapidly growing wireless and Internet Protocol (IP)-enabled networks require substantial physical infrastructure just as is the case with traditional telecommunications networks. This critical physical infrastructure requires substantial capital investment and, once made, that investment is *sunk*—it cannot be readily moved or converted to another use. Therefore, companies investing in physical networks must be reasonably confident that they will have a realistic opportunity to earn a competitive return or they will not take the risk of making these critical investments.

The Missoula Plan recognizes the value of networks throughout its structure and individual elements. The three tracks for reform, the rules for interconnection, the default arrangements for the exchange of traffic, and the restructure mechanism (RM) all reflect the importance of providing network owners with reasonable opportunities to recover their investments. The Missoula Plan offers network owners a reasonable opportunity to earn a competitive return on their network investments. Most importantly, the Missoula Plan moves to uniform rate structures at each point in the network, which will remove most arbitrage opportunities. It also reduces intercarrier compensation rates substantially.

Moving to a uniform default rate structure will cause many LECs to experience reductions in access revenues. In connection with these prescribed reductions, there should be an opportunity for modest, equitable increases in end-user rates as well as the use of other recovery vehicles in order to compensate carriers for the use of their networks. The Commission must be particularly mindful of the need to ensure that increases in the amounts LECs will recover from end users do not cause rate shock, produce unaffordable rates or deny LECs a meaningful opportunity to recover their investment. Accordingly, some LECs may have to recover access revenue reductions through an ARM, and the Missoula Plan creates just such a mechanism. In addition, the Missoula Plan affords carriers substantial flexibility to determine the best recovery options to fit their individual needs.

F. The Missoula Plan Facilitates Direct and Indirect Interconnection.

The Missoula Plan takes significant steps toward fostering direct and indirect interconnection. It maintains existing meet points for traffic exchanged between two ILECs; it establishes an interconnection framework that balances the financial burden for transport; and it ensures that transit service is available for voice traffic. Transit service is generally understood as the use of the facilities of a LEC (or sometimes a third-party provider) to transport traffic from one telecommunications carrier to another.[17] It is not economically feasible for every provider to interconnect directly with every other provider, particularly in more sparsely-populated areas where there is less traffic. Therefore, telecommunications service providers undertake to deliver traffic indirectly by delivering it to another carrier that does have direct interconnection with the originating provider. This switching and transport functionality is called transit service, and it is essential to the operation of efficient telecommunications markets.

G. The Missoula Plan Contains Workable Transitions that Will Minimize Service Provider and Customer Disruptions.

Whichever route the Commission chooses, it must implement reasonable transitions tailored to the diverse needs of providers throughout the industry. The problems with intercarrier compensation are systemic and largely the result of outdated regulation. Accordingly, it is incumbent on the Commission to solve those problems without unduly burdening any one segment of the industry. In particular, an appropriate transition would include staged rebalancing among end user rates, intercarrier rates, and an Access Restructure Mechanism so as to minimize rate shock and ensure that markets and providers' operations are able to adjust smoothly to the new regime. All of these transitions are provided under the Missoula Plan.

H. The Missoula Plan Does Not Disturb Rate Of Return Regulation or NECA Pooling.

It is important that intercarrier compensation reform be implemented in as minimally disruptive a manner as possible. The process of intercarrier compensation reform will

[17] *See Qwest Corp. v. FCC*, 346 U.S. App. D.C. 271, 252 F.3d 462, 468 (D.C. Cir. 2001) (citing *TSR Wireless, LLC v. U S WEST Communications, Inc.*, 15 F.C.C.R. 11,177 n.70, 2000 WL 796763 (2000)) (the FCC defines "transiting traffic" as "traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to the [terminating] carrier's network").

substantially impact the operations of rate-of-return carriers; successful reform will depend on making those impacts manageable over time. The Missoula Plan has reasonable transition periods and, critically, allows carriers to continue with rate-of-return regulation and pooling of revenues through the National Exchange Carrier Association (NECA). Rate-of-return carriers are given incentives to move from rate-of-return regulation to incentive regulation (which will help the overall industry transition away from regulation), and these decisions are optional under the Plan in order to minimize adverse impacts and allow carriers to determine their own transition paths

I. USTelecom Does Not Take A Position On The Plan's Track Definitions

A number of USTelecom members have expressed concern about the classification of some or all of their study areas into a particular "Track" in the plan, which would affect the length of the transition as well as rate levels for their particular companies. A number of other member companies have stated that they believe the track definitions in the Plan are fair and appropriate. USTelecom does not take a position on the track definitions or appropriate track assignments for individual companies. USTelecom members will file separately on this issue and, of course, the Commission should consider their arguments.

II. USTELECOM URGES THE COMMISSION TO RESOLVE THE OPEN ISSUES CONSISTENT WITH SOUND POLICY AND LEGAL PRECEDENT.

A. The Restructure Mechanism Must Not Be Portable.

Reform of intercarrier compensation will require some combination of modest and equitable increases in end user rates, support from a Restructure Mechanism (RM), intercarrier compensation payments, and continued support from a stable USF. This is the structure of the Missoula Plan.

USTelecom supports the adoption of the RM in the Missoula Plan. The Commission should recognize that some carriers may not reasonably be expected to recover revenue reductions attributable to reform exclusively from increased end user rates, particularly given the effects of a century of regulation. Many USTelecom member companies could not reasonably recover lost access revenue solely by increasing end user rates because such rates simply would not be perceived as affordable. Similarly, SLC increases must be reasonable as many USTelecom members face substantial competition, which limits the extent to which they can implement SLC increases. Even USTelecom members facing less competition may be limited in their ability to implement SLC increases, as rates could rise above affordable levels. The SLC increases in the Missoula Plan are reasonable, yet some USTelecom members may need to look to alternative recovery mechanisms given the state of competition in their markets and a relative lack of pricing flexibility and the residual effects of a century of price regulation.

Support from the RM should be made available only to the carriers that currently provide access service and must reduce their rates under the Plan, particularly those that have long been prevented by regulation from charging end-user rates commensurate with access charge reductions. This is the competitively neutral outcome as those companies face regulation of intercarrier and end user rates while other companies do not face such regulation. Similarly, support from the RM should not be portable—it reflects a calculation of otherwise un-recoverable costs that are unique to the affected carrier. An RM fails to meet its purpose if made portable.

It is equally important that the Commission make clear that recovery of lost access revenue cannot diminish or jeopardize existing universal service mechanisms. The existing system of universal service support, which is already strained, serves the vital purpose of ensuring that consumers in rural and high cost areas have access to telecommunications and information services "that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."[18] The existing universal service system must remain focused on these efforts.

The RM should be funded broadly by all users of the public telecommunications infrastructure. Access revenues helped, and continue to assist, incumbent carriers to build, maintain, and expand the nationwide public network over which consumers and other end users have relied, and continue to rely, for consistent, reliable telecommunications services. The existence of this public network benefits all users of telecommunications services, particularly users in rural/high cost areas of the country. Moreover, the separate RM should be funded broadly by all users of the public telecommunications infrastructure because it facilitates regulatory reform—a change in the price regulation of a class of carriers—that benefits all users and moves the industry toward market-based competition. Therefore, USTelecom urges the Commission to implement a broad base of contributions to fund an RM. USTelecom proposes that funding for the RM adopted as part of an intercarrier compensation reform plan should be based primarily on numbers.

There should not be any required showing to receive support from the RM, which should be established based on the reduction in regulated revenue from action taken in this proceeding. Carriers that should recover from an RM—those that have previously provided access services—already have demonstrated that their rates are just and reasonable. Therefore, the RM is presumptively just and reasonable as well. Equally important, it would be administratively burdensome to require a showing of financial need to receive support from the RMTo require

[18] 47 U.S.C. §254(b)(3).

carriers to make a showing that they need support from an RM, a fund that essentially replaces revenue that has already been deemed necessary and appropriate by virtue of the rate setting process, is repetitive, unnecessary, burdensome, and costly. By incorporating current access revenue needs into an RM, the Commission can clearly ascertain the necessary size of the RM and administer contributions efficiently, without needlessly increasing administrative costs.

Finally, yet importantly, the Joint Board is looking into new distribution mechanisms, including auctions, that are inconsistent with portability and the Commission may adopt broader universal service reform that is not portable. The Commission should not, therefore, prejudge the Joint Board process by requiring portability for the RM. Intercarrier compensation reform must recognize the role regulation has played in forcing LECs to rely on access compensation. Incumbent LEC networks were built in reliance on compensation for fulfilling carrier-of-last-resort obligations, and only incumbent LECs are subject to the full extent of carrier-of-last resort obligations. Only incumbent LECs historically have been sharply restricted from recovering network costs from end users and, they still have limited pricing flexibility today. Moreover, along with CLECs, their access charges are regulated today. Accordingly, it is competitively neutral to pair this history of regulation with the ability to receive funds from the RM.

B. The Application of the Early Adopter Fund

Some states have taken significant steps toward intercarrier compensation reform by requiring reductions in intrastate access charges and establishing some form of explicit state fund to compensate carriers for those access rate reductions. Consumers in those states could be disproportionately burdened compared with those in other states by the operation of the access reductions in the Plan. Accordingly, the Plan:

> [C]reates an "Early Adopter Fund" to provide support for states that have reduced access rates through an explicit state fund by the time the Plan is adopted. This mechanism will enable states to recover some of the funding that they have distributed to carriers that have reduced their intrastate access rates. The Early Adopter Fund will be used solely to decrease the size of state recovery mechanisms. Implementation of the Early Adopter Fund will help ensure that consumers in these states are not disproportionately burdened when the intercarrier compensation reforms and the new Restructure Mechanism are implemented nationwide under the plan.[19]

This approach is sound in principle and, accordingly, USTelecom supports the efforts of the Missoula Plan members to size the fund and determine how it will work. Similarly, USTelecom urges the Commission to support such efforts and to take the lead if necessary. In any event, the Commission should move forward expeditiously with implementation of the other elements of the Plan without waiting for resolution of open issues related to the Early Adopter Fund.

C. Universal Service Contribution Issues

The current universal service system is under considerable strain and the contribution methodology is unfair. The federal Universal Service Fund (USF or Fund) contribution factor is growing over time at an unsustainable rate because, in part, the base of contributions is being eroded by changing markets and technologies even after the Commissions *VoIP Contributions Order*. Yet, the demand for universal service support continues to grow, particularly as more competitive eligible telecommunications carriers are designated and seek support from the Fund. Currently, we face an urgent need to stabilize and broaden the base upon which contributions are calculated because stand-alone long distance service is the core source of funds and it is ceasing to be relevant. All of this strain is clearly exhibited in the high contribution factor, which has averaged over ten percent of interstate and international end-user revenues in 2006. Without

[19] Missoula Plan, Executive Summary, at 12-13.

reform of the universal service contribution methodology, this strain on the system will continue to grow. Chairman Martin has acknowledged the urgent need for reform, and he has clearly stated that he prefers moving to a system based on telephone numbers (and their equivalents).

The Missoula Plan includes substantial access charge reductions that some carriers are unlikely to be able to recover entirely through end-user rate increases. It is important to be mindful that intercarrier compensation reform must not harm nationwide availability of affordable high-quality telecommunications services at reasonably comparable rates in urban and rural areas. Accordingly, it is imperative that the Commission take steps to reform and secure universal service at the same time as it undertakes intercarrier compensation reform. Such reform must follow several key principles to be successful: (1) network owners must be compensated; (2) the base must be broad and stable; and (3) universal support contributions must be fair and competitively and technologically neutral, and they must not drive customer purchasing decisions. USTelecom has presented a plan to the Commission that would reform universal service contributions to accomplish the three principles mentioned above. Specifically, USTelecom urges the Commission to:

(a) assess contributions for residential services based on working telephone numbers and connections for broadband services;

(b) ensure there is parity in contributions for residential broadband services; and

(c) assess contributions for business network services based on telephone numbers and either bandwidth tier connections or interstate revenues.

D. Universal Service Distribution Issues

Implementation of the Missoula Plan may increase pressure on universal service support mechanisms. Therefore, it is imperative that the Commission ensure the continued predictability, sufficiency, and stability of the high-cost support mechanisms while making modifications as needed to address new needs created by intercarrier compensation reform.

Universal service is vital to our country and its economy. The principle of universal service has been a cornerstone of telecommunications law and policy for nearly a century, and our nation's telecommunications network has helped define the fabric of American life. High-cost support is necessary to ensure universal service as defined in the Communications Act—high-quality service at comparable rates. The cost of providing telecommunications service varies significantly depending on population density, the distance over which infrastructure must be deployed, topography, and socioeconomic conditions. Therefore, section 254 of the Communications Act requires the creation and operation of high-cost support mechanisms. To be successful these mechanisms must follow several core principles, namely preserving the economic viability of critical networks, facilitating the provision of affordable service to all consumers at comparable rates throughout the country, and providing predictable, sufficient, and sustainable support.

The current high-cost support mechanism is strained by flawed distribution policies. Regulatory asymmetries are interfering with competition; the implicit subsidies used to support service in high-cost areas are at risk; and the current system supports multiple networks in areas where market-based competition cannot even support a single network and allows for the possibility of sending high-cost support payments to competitors that do not even serve the high-cost lines for which support is intended, which accentuates the harm to competition.

III. THE COMMISSION HAS THE LEGAL AUTHORITY TO IMPLEMENT THE MISSOULA PLAN FOR INTERCARRIER COMPENSATION REFORM.

At the outset, the Commission has unquestionable authority to adopt intercarrier compensation reform using the Missoula Plan for all categories of traffic other than intrastate access pursuant to section 201 and section 251 of the Communications Act. Traditionally, there have been three categories of wireline calls for purposes of intercarrier compensation: (1) interstate toll calls subject to interstate access charges, (2) calls where the transport and termination of telecommunications has been subject to section 251(b)(5) reciprocal compensation, and (3) intrastate toll calls subject to intrastate access charges.[20] Nobody has seriously contested the Commission's authority to adopt rules governing the terms of interconnection for the first two categories of calls. The Commission also has authority over the third category as well, as we explain in Sections IV.1-IV.3 below. First, for the sake of thoroughness, we summarize the Commission's authority over interstate calls and those subject to section 251(b)(5).

Interstate calls. Section 201(a) gives the FCC plenary authority over all interstate and international calls and separately empowers the Commission to require all common carriers "to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating through such routes."[21] The FCC has used this section 201(a) authority

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[20] The growth of VoIP-originated traffic, as to which the FCC has asserted exclusive jurisdiction, only enlarges the proportion of PSTN-terminated traffic over which the Commission has regulatory authority. *See* Mem. Op. and Order, *Vonage Holdings Corp.'s Pet. for Decl. Ruling*, 19 FCC Rcd 22404 (2004).

[21] Although section 201 conditions the Commission's exercise of its "through route" authority on giving interested parties an "opportunity for hearing," the Commission has long found that a notice-and-comment rulemaking proceeding fulfills that procedural requirement. *See* Decision, *Offshore Tel. Co. Petition Pursuant to Section 201(a) of the Communications Act*

to develop rules regarding the compensation that carriers may charge for terminating other carriers' interstate access traffic.[22] And it "has on many occasions ordered . . . interconnection among carriers [pursuant to section 201(a)]," and in so doing has "specif[ied] the types of facilities which the interconnecting carrier or carriers must provide."[23] Thus, the FCC would merely follow past practice by relying on section 201(a) to require carriers to follow signaling and routing rules and negotiate with terminating ILECs about identifying, and making arrangements for paying, appropriate compensation for interstate calls.

Calls subject to section 251(b)(5) reciprocal compensation. Although the commenters in this proceeding dispute the exact scope of section 251(b)(5), there is no dispute that this provision gives the Commission the authority to adopt rules requiring all LECs to identify non-access traffic and negotiate compensation-related arrangements for that traffic. Indeed, that authority follows directly from the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*.[24] As the Court held there, "[t]he FCC has rulemaking authority to carry out the

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of 1934, As Amended, for Establishment of Charges for Through Interstate Communications Services, etc., 97 F.C.C.2d 377 ¶¶ 2-3 & n.6 (1983), *vacated on other grounds, Offshore Tel. Co. v. FCC*, No. 83-2055 (D.C. Cir. Sept. 21, 1984); Memorandum Opinion and Order, *Petition of Offshore Tel. Co. Pursuant to Section 201(a) of the Communications Act of 1934, As Amended, for Establishment of Charges for Through Interstate Communications Services etc.*, 68 F.C.C.2d 63 ¶ 4 (1978); Memorandum Opinion and Order on Reconsideration, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 16 FCC Rcd 10009 ¶ 8 n.25 (2001) (citing cases); *see also Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1264-65 (3d Cir. 1974).

[22] *E.g.*, *MTS and WATS Market Structure*, CC Docket 80-286, Third Report and Order, 93 F.C.C.2d 241 ¶ 41 (1983) (establishing access charges in lieu of access compensation arrangements "in order to eliminate existing access compensation disparities").

[23] *American Telephone & Telegraph Co.*, Notice of Inquiry and Proposed Rulemaking, 84 F.C.C.2d 1 ¶ 9 (1981); *see id.* n.10 (providing examples).

[24] 525 U.S. 366 (1999).

'provisions of [the Communications] Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996."[25]

Intrastate access traffic is addressable. The Commission also has the clear authority to reach intrastate access traffic in connection with comprehensive intercarrier compensation reform under the Missoula Plan. Section 2(a)[26] of the Communications Act of 1934, as amended (Act), gives the Commission exclusive jurisdiction over interstate communications, while Section 2(b)[27] of the Act reserves to states jurisdiction over intrastate services. Because access charges for intrastate traffic historically have been within the exclusive jurisdiction of state commissions, the Commission is concerned about its legal authority to implement intrastate access reform. The Commission should be assured, however, that there is clear legal authority to implement reform of intrastate access mechanisms pursuant to a clear national policy to reduce arbitrage, promote competition, preserve universal service, and reduce regulation.

A. Section 201 of the Act Clearly Grants the Commission the Authority To Preempt State Law

The Commission may preempt state jurisdiction of access traffic under section 201 of the Act. Section 201[28] gives the Commission authority to implement the requirements of the 1996 Act establishing competitive markets. Establishing competitive markets arguably could require uniform intercarrier compensation without regard to the pre-1996 Act effect of section 2(b).[29]

[25] *Id.* at 378 (quoting 47 U.S.C. § 201(b)).

[26] 47 U.S.C. § 152(a).

[27] 47 U.S.C. § 152(b).

[28] 47 U.S.C. § 201.

[29] Should it be found to cover intrastate access, section 201 authority is explicitly preserved by 47 U.S.C. § 251(i), a savings provision that states, "Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201."

More specifically, section 201(b)[30] 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." In *AT&T v. Iowa Utils. Bd.*,[31] the United States Supreme Court confirmed that section 201(b) rulemaking jurisdiction is not limited to jurisdictionally interstate matters covered in section 201 but extends to all provisions of the Act including provisions added by the 1996 Act encompassing matters that fell within the exclusive jurisdiction of the states before 1996. Therefore, the Commission may adopt rules implementing statutory provisions governing intercarrier compensation and interconnection of traffic—whether intrastate or interstate—within the scope of those statutory provisions.

B. State Regulation of Intercarrier Compensation Is Inconsistent with a Unified Federal Intercarrier Compensation Policy and, thus, Preemption Is Appropriate Under the Inseverability Doctrine

The Commission should preempt state regulation of intercarrier compensation because it is inconsistent with a unified federal intercarrier compensation policy, just as state regulation of the use of terminal equipment is inconsistent with federal regulation and can, therefore, be preempted. In *North Carolina Utils. Comm'n v. FCC*,[32] when the Commission acted within its authority to permit subscribers to provide their own telephones, the Fourth Circuit upheld the Commission's preemption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used exclusively in interstate service because the state regulation would negate the federal tariff: "Because separation of terminal equipment used exclusively for local communication is a practical and economic impossibility, the proposed state

[30] 47 U.S.C. § 201(b).

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

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

rules would have scuttled the federal interconnection policy."[33] This argument for the basis of preemption is often referred to as "the impossibility exception" to section 2(b)(1) or "the inseverability doctrine."

The inseverability doctrine has been approved and used by the U.S. Supreme Court. In *Louisiana Pub. Serv. Comm'n v. FCC*,[34] the Supreme Court confirmed that preemption is possible under the inseverability doctrine, writing that federal preemption is appropriate "where it was not possible to separate the interstate and intrastate components of the asserted FCC regulation"[35] or where a state regulation "would negate" a federal regulation.[36] The Commission recently applied the inseverability doctrine when it concluded that Vonage's DigitalVoice service could not be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules.[37]

The Commission has established a clear national policy of reducing intercarrier arbitrage, which is thwarting achievement of the 1996 Act goals of competition, deregulation, and universal service. A major source of this arbitrage lies in the different treatment of functionally equivalent access traffic between the state and federal jurisdictions. Accordingly, state regulation *would negate* federal regulation as it would preserve arbitrage opportunities in direct opposition to valid Commission regulations implementing important federal objectives. Just as it

[33] *Id*. at 1043.

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

[35] *Id*. at 375-76 n.4.

[36] *Id*.

[37] *Vonage Holdings Corp. Petition for Decl. Ruling Concerning an Order of the Minnesota Pub. Utils. Comm'n*, WC Docket No. 03-211, Memorandum Opinion and Order, ¶ 15, n.86 (rel. Nov. 12, 2004) (*Vonage Order*). Citing *Louisiana Pub. Serv. Comm'n*, the Commission stated that it could find no plausible approach to separating DigitalVoice into interstate and intrastate components for purposes of enabling dual federal and state regulations to coexist without negating federal policy and rules.

was impossible to maintain separate state and federal regulation of terminal equipment once the Commission sought to deregulate the market, it simply is no longer possible to separate the interstate and intrastate components of intercarrier compensation when competition, deregulation, and universal service require that both interstate and intrastate traffic be treated the same.

Another example of the exercise of preemption under the inseverability doctrine is *PUC of Maryland v. FCC*.[38] In that case, the D.C. Circuit found that the Commission properly preempted states from setting rates charged by LECs to IXCs for disconnection of local customers' telephones for failure to pay a bill. The disconnection service called DNP involved total disconnection, preventing a customer from using his or her telephone for both interstate and local calls. In reaching its decision, the Court stated that Commission preemption of state regulation is permissible when (1) the matter to be regulated has both interstate and intrastate components, (2) Commission preemption is necessary to protect a valid federal regulatory objective, and (3) state regulation would "negate[] exercise by the FCC of its own lawful authority" because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects.[39] The DNP service had both intrastate and interstate aspects because the disconnection prevented a customer from making both types of calls. In addition, the Court found that preemption promoted valid federal goals of preventing states from subsidizing local service with interstate revenues and of promoting competition in a service to interstate carriers. Finally, the Court noted that the Commission found it technically impossible to disconnect service for in-state calls without also disconnecting service for out-of-state calls.

[38] *Pub. Utils. Comm'n of Maryland v. FCC*, 909 F. 2d 1510 (1990).

[39] *Id*. at 1515.

Just as it was necessary to preempt state regulation regarding disconnection because there was no way to maintain different rules for disconnection, it is becoming necessary to preempt intrastate treatment of intercarrier compensation because it is becoming impossible to maintain separate rules for intrastate and interstate traffic. With voice traffic increasingly moving to wireless service and IP-enabled services (both of which are interstate in nature), existing mechanisms for ascertaining the geographical end points of calls are becoming obsolete. Wireless handsets and many IP-enabled handsets are mobile in nature—they are routinely used to connect to their respective networks in many different geographic locations, even during the course of the same day. These mobile handsets are identified by the same numbers without regard to where they are used to originate or terminate calls and it would at best be impractical and very expensive to develop new mechanisms for separating traffic. Moreover, even if it were practical to separate wireless and IP-enabled traffic, disparate treatment would continue to send the wrong signals to market participants, thereby frustrating valid federal objectives by distorting competition, thwarting deregulation, and undermining universal service.

In sum, intercarrier compensation is no longer readily severable into interstate and intrastate components and should, therefore, be classified as interstate, subject to the Commission's jurisdiction. The Commission cannot achieve its goal of implementing a rational compensation scheme that limits arbitrage and encourages competition with a separate intrastate access regime in place. Moreover, as it becomes more and more difficult to distinguish intrastate from interstate traffic, the opportunities for arbitrage increase.[40] This increased arbitrage distorts

[40] *See, e.g.*, *Level 3 Communications LLC Petition for Forbearance*, WC Docket No. 03-266, IP-Enabled Services, WC Docket No. 04-36, USTelecom Notice of Ex Parte Presentation (Feb. 17, 2005) (opposing Level 3 petition for forbearance from rules regarding interstate access charges paid by long distance companies using VoIP to deliver traffic to the public switched telephone network). *See also*, Letter from James W. Olson, Vice President Law and General

competition and interferes with the pro-competitive deregulatory goals of the 1996 Act. Consequently, state jurisdiction over intercarrier compensation must be preempted under the inseverability doctrine.

C. Intercarrier Traffic Is Increasingly Mixed and Impractical To Separate Jurisdictionally and, therefore, State Regulation of Such Traffic Must Be Preempted

A related but different basis for preemption of state jurisdiction is that when it becomes impossible to separate traffic jurisdictionally, intrastate jurisdiction should be preempted, just as intrastate regulation of mixed-use private lines has been preempted.[41] The Commission has held that "mixed-use" special access lines carrying more than a *de minimis* amount of interstate traffic to private line systems are subject to FCC jurisdiction because traffic on such lines cannot be measured without significant administrative efforts.[42] Interstate traffic is deemed *de minimis* when it amounts to ten percent or less of the total traffic on a special access line.[43] More

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Counsel, United States Telecom Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, *Regulation of Prepaid Calling Card Services*, WC Docket No. 03-133 (Nov. 22, 2004) (disputing AT&T's claim that calls made using its prepaid calling card service were interstate in nature and, therefore, not subject to intrastate access charge payments).

[41] Although some of the case law seems to merge the inseverability and mixed-use doctrines, they are distinct. The inseverability doctrine is applicable when it may well be possible to separate traffic but there is a conflict between state and federal regulation, as in the terminal equipment case, *North Carolina v. FCC*, 552 F.2d 1036, and the mixed-use doctrine is applicable when it is not practical to separate intrastate and interstate traffic, as in the private lines case, *MTS and Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, n.7 (1989) (*Interstate Private Lines*).

[42] *Interstate Private Lines*, 4 FCC Rcd at 5660.

[43] *MTS and Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Recommended Decision and Order, 4 FCC Rcd. No. 3 1352. *See also GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd. 22466, FCC 98-292, at 14-15 (1998) (*MTS and WATS Market Structure Order*). (While some transmissions passing over an Internet access line might have been intrastate in nature, the

recently, the Commission held that the global portability feature of Pulver.com's Free World Dialup service, which enables a user to initiate and receive online communications from anywhere in the world without reference to the actual physical location of an underlying IP address, is an interstate information service in accordance with the mixed-use doctrine because it is impossible or impractical to attempt to separate the service into intrastate and interstate components.[44] Similarly, the Commission found that when a company such as Vonage had no service-driven reason to separate intrastate components of its services, such services would be treated as jurisdictionally interstate and state regulation would be preempted.[45]

As mentioned above, intercarrier traffic is increasingly mixed and impractical to separate jurisdictionally. Moreover, the Commission directly addressed the issue in *pulver.com* and clearly determined that certain characteristics of IP-enabled services are mixed. The inseparability of multiple features that can be accessed simultaneously, the irrelevance of geography to the use of the service, and the lack of service-related reasons to incorporate geographic or jurisdictional tracking systems into the IP network, all provide a basis for interstate treatment of IP traffic for intercarrier compensation purposes because the service provider has no means of determining which transmissions are interstate and which are intrastate. It is, therefore, becoming impossible to record and bill separately for interstate and intrastate usage, to measure revenues based upon jurisdiction, or to comply with other regulatory

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interstate component was not *de minimis*, and, therefore, GTE's Internet transport service was subject to interstate jurisdiction under the mixed-use doctrine).

[44] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor A Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, at 16.

[45] *Vonage Order*, at 20 and n.106 (citing *MTS and WATS Market Structure Order* finding that "mixed use" special access lines carrying more than a de minimis amount of interstate traffic to private line systems are subject to the Commission's jurisdiction).

requirements applied based on the jurisdiction of the traffic. In such cases, it is within the Commission's authority and consistent with its precedent to preempt state regulation.

IV. CONCLUSION

USTelecom endorses the Missoula plan for intercarrier compensation reform, and urges the Commission to implement it promptly because such reform is needed urgently. USTelecom endorses the Missoula Plan because it (a) the meets the Commission's principal goals for intercarrier compensation reform; (b) minimizes regulatory arbitrage with a default intercarrier rate structure that treats traffic uniformly; (c) significantly integrates universal service reform with intercarrier compensation reform; (d) relies in the first instance on competition and commercial agreements where possible to determine market outcomes; (e) provides network owners with a more consistent and predictable opportunity to be compensated for the use of their networks; (f) facilitates direct and indirect interconnection; (g) contains workable transitions that will minimize service provider and customer disruptions; and (h) does not disturb rate of return regulation or NECA pooling. USTelecom does not take a position on the plan's track definitions.

USTelecom also urges the Commission to resolve the open issues consistent with sound policy and legal precedent. In particular, the restructure mechanism must not be portable. In addition, USTelecom supports the principle of the early adopter fund, and urges the Commission and interested parties to develop a workable framework for such a fund. USTelecom also urges the Commission to adopted universal service contributions reform promptly. Finally, the Commission should ensure that high-cost support is predictable, sufficient, and sustainable in all areas of the country during and after the changes wrought by intercarrier compensation reform.

The Commission has the legal authority to implement the Missoula Plan for intercarrier compensation reform. Section 201 of the act clearly grants the Commission the authority to preempt state law. State regulation of intercarrier compensation is inconsistent with a unified federal intercarrier compensation policy and, thus, preemption is appropriate under the inseverability doctrine. Moreover, intercarrier traffic is increasingly mixed and impractical to separate jurisdictionally and, therefore, state regulation of such traffic may be preempted.

Respectfully submitted,

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