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October 26, 2006

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Erratum:* CC Docket No. 01-92

Dear Ms. Dortch:

Yesterday, October 25, 2006, Broadview Networks, Grande Communications, NuVox Communications, One Communications Corp., Talk America Inc., and XO Communications, Inc., (collectively, the "Joint Commenters"), filed with the Commission their Comments on the so-called Missoula Plan (the "Plan"), which was submitted on July 24, 2006 in the above-referenced docket. Unfortunately, Attachment 1 was inadvertently left out of the filing. To correct that, the Comments, including Attachment 1, are enclosed herewith for inclusion in the record.

If there are any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

Edward A. Yorkgitis, Jr.

Counsel to Broadview Networks, Grande Communications, NuVox Communications, One Communications Corp., Talk America Inc., and XO Communications, Inc.

EAY:cpa
Enclosure

DC01/YORKC/256660.1

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

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

COMMENTS OF BROADVIEW NETWORKS, GRANDE COMMUNICATIONS, NUVOX COMMUNICATIONS, ONE COMMUNICATIONS CORP., TALK AMERICA, INC., AND XO COMMUNICATIONS ON THE MISSOULA PLAN

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October 25, 2006

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SUMMARY

The Joint Commenters oppose the complex and overly broad Missoula Plan. Virtually every major provision of the Plan is suspect on *both* policy *and* legal grounds. While consistently offering benefits to incumbent local exchange carriers ("ILECs"), the Plan would discriminate against their competitors, and consumers will be asked to foot the gargantuan bill to the tune of almost $7 billion annually, by even the most conservative estimates. While submitted under the guise of reforming intercarrier compensation, the plan unjustifiably proposes drastic changes to existing regulatory frameworks that have evolved over the past 25-plus years in the case of access charges and over the past 10 years, in the case of interconnection architectures and related carrier obligations. The Plan, if adopted, would sweep away a plethora of Commission and State interpretations of policy determinations under the Telecommunications Act of 1996 (the "1996 Act"). It would inject the Commission into the middle of subjects heretofore reserved for Section 252 State commission arbitration disputes, would strip State commissions of jurisdiction reserved for them or expressly conferred on them under the Communications Act of 1934, as amended (the "Act"), and would flout a number of substantive provisions of the Act. In short, the Plan represents an attempt to roll back the clock and reverse key interconnection decisions with which ILECs are unhappy, all, purportedly, in the service of conferring regularity within the realm of intercarrier compensation – an objective the Plan would not achieve in any event.

The Commission should not consider the Plan. Instead, the Commission should expeditiously proceed to address two matters to relieve most of the intercarrier compensation ills and potential arbitrage opportunities afflicting the industry today. *One*, the Commission should adopt rules concerning "phantom traffic," creating an industry-wide method for determining the

jurisdiction and nature of any call, increasing clarity in all cases as to who should be billed and what charges apply. *Two*, the Commission should bring greater certainty to the industry and address on a *prospective* basis what is appropriate intercarrier compensation for voice over Internet Protocol ("VoIP") traffic. These issues are ripe for resolution in several proceedings pending before the Commission.

From a public policy perspective, the Plan fails to meet the goals set out by the Commission in the *Further Notice of Proposed Rulemaking*. In fact, the Missoula Plan is often directly contrary to the Commission's stated goals. The Missoula Plan discourages efficient competition and investment in efficient technologies, is not technologically or competitively neutral, and would burden the already-strained universal service mechanisms. Indeed, the Missoula Plan's myriad complexities provide for disparate rates for similar functions, depending upon under which Track the carrier providing the function falls. Additionally, competitive carriers that have invested in and deployed more advanced and efficient networks would be disadvantaged by having to engage in costly reorganizing and mirror legacy ILEC networks in their interconnection arrangements. Competitive carriers would also have to shoulder a disproportionate share of the burden for transport of traffic between their own and ILEC networks. And the federal universal service fund under the Missoula Plan would find itself facing a much heavier burden, not for the benefit of consumers or to advance the objectives of Section 254 of the Act, but to ensure revenue neutrality for ILECs.

Another public policy infirmity of the Plan is its attempt to shoehorn the disparate needs of so-called Track 1, Track 2, and Track 3 carriers into a one-size-fits-all solution. This deviates from the Commission's historical approach to addressing rural carrier-related issues separately from those of other carriers, as it has in the past by separately treating access charge reform for rural carriers. The Commission should bifurcate this proceeding to address the needs of so-called Track 1 and Track 2 carriers separately from those of the smaller rural carriers that make up Track 3.

The Missoula Plan also contravenes federal law in multiple ways. *First*, the Plan impermissibly intrudes on the States' exclusive authority to set rates for intrastate access services under Section 2(b) of the Act. Despite the Plan's supporters' claims, Section 251(b)(5) of the Act is inapplicable to access services and confers no power on the Commission in this area. Further, the "impossibility exception" does not provide the Commission with the authority in the current circumstances to preempt the States' traditional role in setting intrastate access charges.

Second, the Missoula Plan usurps the States' authority under Sections 252(c)(2) and 252(d)(2) of the Act to establish reciprocal compensation rates for the transport and termination of traffic under Section 251(b)(5). Although the FCC may lawfully establish a methodology for setting reciprocal compensation rates, the courts have held that the authority to establish the rates themselves is within the exclusive jurisdiction of the States. The Plan's proponents' attempt to invoke the "impossibility exception" in the context of reciprocal compensation is misguided since the States' jurisdiction over reciprocal compensation rate setting does not arise under Section 2(b) of the Act. Similarly, the States' authority over reciprocal compensation rates cannot be the subject of forbearance as, quite simply, the Commission may not forbear from applying what it does not have jurisdiction to apply in the first instance. Moreover, the Commission may not forbear with the intention of imposing a new regulatory framework in lieu of that established by Congress.

Third, the Plan contravenes the pricing standard for reciprocal compensation set forth in Section 252(d)(2) of the Act. The Plan proposes arbitrarily low rates for transport and termination functions network functions that will not allow carriers to recover their costs. The proposed rates are not based on any standard and are well below existing cost-based rates established by State commissions.

Fourth, the Missoula Plan unnecessarily and radically alters the interconnection framework provided for in the 1996 Act. Indeed, the Plan directly contravenes the rights of competitive carriers under Section 251(c)(2) of the Act by promoting the concept of the "Edge," which, among other things, strips non-ILECs of their entitlement to request interconnection on ILEC networks at "technically feasible points," including, if they choose, at a single point of interconnection within a LATA. Further, without any policy justification, the Missoula Plan's inequitable transport provisions would permit, in many situations, an ILEC to charge a CLEC or other interconnected carrier for traffic that originates on the ILEC's network and preclude the competitive carrier from recovering its costs when it provides an interconnection facility used by the ILEC, despite Commission and court decisions that solidly provide otherwise. These and other onerous interconnection-related provisions work to turn the Act on its head by impermissibly shifting an ILEC's costs to its competitors.

Fifth, the Missoula Plan improperly treats the provision of tandem transit service by an ILEC as voluntary. Rather, it is a requirement pursuant to Section 251(c)(2) of the Act, as well as sound public policy, that ILECs provide tandem transit service. Moreover, the Missoula Plan would set tandem transit service rates (a role reserved for the States, not the Commission) at levels well above cost that are also inherently inconsistent with other portions of the Missoula Plan and, as such, are anticompetitive as well as unlawful.

Sixth, the Missoula Plan's Restructure Mechanism and Early Adopter Fund are unlawful and cannot be implemented by the Commission. Specifically, the Restructure

Mechanism impermissibly discriminates against non-ILECs who are not eligible to recover from the Mechanism in violation of the U.S. Constitution because there is no rational basis to permit such discrimination. Similarly, the Early Adopter Fund unlawfully coerces State reduction of intrastate access charges and adoption of the Missoula Plan and therefore would constitute an unconstitutional exercise of Congress' spending power. The Early Adopter Fund, in addition, would impermissibly allow States to make universal service decisions that burden the interstate universal service fund in violation of Section 254(f). Further, both the Restructure Mechanism and Early Adopter Fund contravene Section 254 of the Act, targeting universal service fund monies to improper objectives.

Finally, the Plan seeks to reform interstate access charges unnecessarily. Apart from arbitrarily setting default interstate access rates, the Plan would allow local exchange carriers to increase the subscriber line charge ("SLC") dramatically over the life of the Plan in order to recover lost access revenues resulting from reduced access charges. The Plan's SLC provisions are contrary to the public interest because they would allow the ILECs the flexibility to raise the SLC for customers that have the least, or no, competitive choice while making no or minimal SLC increases where the ILEC faces competition from CLECs and others. Under the SLC provisions and the discriminatory Restructure Mechanism, CLECs and other competitors, as a practical matter, will not be able to recover any lost revenues.

Rather than adopt any portion of the Missoula Plan, the Commission should act expeditiously to minimize if not eliminate "phantom traffic" concerns and adopt a framework, applied on a prospective basis, for intercarrier compensation for VoIP-originated and -terminated traffic.

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

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
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COMMENTS OF BROADVIEW NETWORKS, GRANDE COMMUNICATIONS, NUVOX COMMUNICATIONS, ONE COMMUNICATIONS CORP., TALK AMERICA, INC., AND XO COMMUNICATIONS ON THE MISSOULA PLAN

Broadview Networks, Grande Communications, NuVox Communications, One Communications Corp., Talk America Inc., and XO Communications, Inc., (collectively, the "Joint Commenters"), pursuant to the *Public Notice* and subsequent order issued[1] by the Federal Communications Commission ("FCC" or "Commission"), through their undersigned attorneys, submit these comments on the so-called Missoula Plan (the "Plan") submitted on July 24, 2006, in the above-referenced docket.[2] As discussed herein, the Plan generally is unsound as a matter of policy and in many particulars would be unlawful. For the detailed reasons set forth herein, the Commission should not adopt the Missoula Plan and instead proceed to address the issues of "phantom traffic" and intercarrier compensation regarding voice over Internet Protocol ("VoIP") traffic raised in petitions for declaratory ruling pending before the Commission in WC Docket Nos. 05-276 and 05-283 and in its *IP-Enabled Services* proceeding, WC Docket No. 04-36.

1 *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, CC Docket No. 01-92, DA 06-1510, rel. July 25, 2006; Order, CC Docket No. 01-92, DA 06-1730, rel. Aug. 29, 2006.

2 *Ex parte* letter from the NARUC Task Force on Intercarrier Compensation to FCC Chairman Kevin J. Martin, CC Docket No. 01-92, dated July 24, 2006, including attachments containing the Missoula Plan, the Executive Summary of the Missoula Plan, and a Legal and Policy Overview of the Missoula Plan (collectively, the "Missoula Plan" or "Plan").

I. INTRODUCTION

The Missoula Plan is needlessly complex and gratuitously addresses myriad settled issues that are not appropriate for reconsideration or resolution in this proceeding. Generally speaking, the Missoula Plan would benefit the Plan's supporters at the expense of their competitors. In the most fundamental sense, the Plan represents an effort by some incumbent local exchange carriers ("ILECs") to drastically modify competitive telecommunications policy, overturning a decade of Commission and State agency arbitration decisions – an apparent attempt by the supporters of the Plan to "win back" what was never theirs to lose in the first place. While the Plan's supporters claim that the Plan reforms "yesterday's regulations," the stark reality is that the Plan seeks to advantage the older networks of the "ILECs," providing ILECs an unmerited buffer from the effects of increasing competition, rather than the more modern and efficient networks of competitive local exchange carriers ("CLECs") and many other competitors of the ILECs such as VoIP providers, cable operators, and wireless companies.[3] The Commission should not turn back the clock. It should reject the Plan.

The supporters of the Plan pronounce seemingly lofty goals – unified rates to eliminate arbitrage opportunities, encouragement of investment, and advancement of universal service. Notably, these objectives are, on their face, only partially congruent with the Commission's primary objectives for intercarrier compensation reform set out in the *Further Notice of Proposed Rulemaking* in this proceeding: encouraging efficient interconnection and network investment, reforming intercarrier compensation in a manner that is competitively and

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3 The Plan's supporters claim that it will promote broadband deployment (*e.g.*, Missoula Plan, Policy and Legal Overview, p. 1), but the Missoula Plan has no connection with broadband services. Instead, by undermining competition, especially in rural areas, the Plan may, inadvertently, have a negative impact on broadband deployment and the availability of broadband choices to the public.

technologically neutral, and promoting universal service.[4] If the Plan were adopted, even its supporters' revisionist list of goals would not be advanced.

First, the Plan does not, as advertised, result in unified rates. There are different rates when mid-size and smaller rural ILECs exchange traffic with carriers in other Tracks, such as the major ILECs, CLECs, wireless carriers, cable companies, and other competitive providers in Track 1. These disparities are amply demonstrated in the chart in Attachment 1 hereto.[5] An examination of the Plan also reveals that rates will not in any sense be unified for the same functions. There are distinct charges for the same network functions depending upon whether they are assessed on the originating or terminating end of a call. Tandem transit rates, as another example, would be several times higher than call termination rates even though tandem transit involves less functionality. None of the rates proposed by the Plan can be described as having any relation to costs or the applicable pricing standards in the Act. Moreover, the Plan would create a heightened asymmetry in intercarrier rates, contrary to the existing regulatory regime, which would be anti-competitive. And, among larger ILECs and other competitive carriers – all of which are put into Track 1, which is the most regulated Track under the Plan – any semblance of unification is undermined because of the disparate impact of the Plan's provisions on competitors, which are put in the position of subsidizing programs in which they cannot participate, such as the Restructure Mechanism.

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4 Missoula Plan, Executive Summary, at 1. *See, Developing a Unified Intercarrier Compensation Regime,* Further NPRM, 20 FCC Rcd 4685, 4700-02 ¶¶29-33 (2005) ("*Intercarrier Compensation FNPRM*").

5 *See ex parte* letter and attached presentation of Edward A. Yorkgitis, Jr., Kelley Drye & Warren LLP, to Marlene Dortch, FCC, on behalf of XO Communications, NuVox Communications, One Communications Corp., Broadview Networks, WC Docket No. 01-92, dated October 20, 2006, slide 12 of 62, which is appended hereto as ***Attachment 1*** ("XO *et al. ex parte*").

Second, investment in efficient technologies would not be rewarded but penalized under the Plan. Competitive carriers that have invested in and deployed more advanced and efficient networks would be disadvantaged by having to mirror legacy ILEC networks in their interconnection arrangements.

Third, the federal universal service fund would be increased substantially, principally to ensure revenue neutrality for ILECs. Payments into the fund can be expected to rise by at least a third under the Plan, even in the most conservative of scenarios, which reflects a $2.25 billion dollar increase.[6] And this modest estimate ignores the projected additional increases that consumers can be expected to face in the form of increased subscriber line charges, up to $10.00 per line in year 4 of the Plan, that ILECs and (theoretically, at least) other carriers can assess to make up for lost access charge revenues.[7] Indeed, by estimate of the National Association of State Utility Consumer Advocates ("NASUCA"), although intercarrier compensation will be reduced by around $6 billion under the Plan, mostly in the form of reduced interexchange switched access charges, end user assessments will grow by at least $7 billion, by conservative estimates, to pay for the Plan.[8] Notably there is no requirement or guarantee that end user consumers will see even a penny of the access charge reductions that interexchange

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6 The Plan's supporters themselves anticipate the $2.25 billion increase over today's $7.0 billion universal service fund annual requirement. See *ex parte* presentation of the Missoula Plan Supporters, dated August 17, 2006, at slide 11 of 23; *see also*, Universal Service Fund Facts – Administrative Financial Data, available on the Web at http://www.usac.org/about/universal-service/fund-facts/fund-facts-administrative-financial-data.aspx (estimating 2006 USF support at $7.3 billion). Expectations are that portions of their projected increase are understated, particularly the Restructure Mechanism and the early Adopter Fund. *See* NARUC conference call slides, including NASUCA slides 13-14 filed as part of XO *et al. ex parte.*

7 Under some scenarios, in fact, carriers can move to a $10.00 SLC faster by reducing their access charges more rapidly than the Plan calls for as a baseline. *See, e.g.,* Missoula Plan at 21, §2.C.1.b.

8 *See XO et al. ex parte*, slide 13.

carriers will enjoy under the Plan, making the $7 billion price tag, for end users, a potential case of "all pain and no gain."

Not only would the consumer bill be gargantuan with no promise of offsetting benefit, but the scope of the Plan is unrestrained. Rather than limit itself to issues that are appropriate to this proceeding, such as addressing the problems associated with "phantom traffic,"[9] the Plan is a patchwork – some might call it the creation of a mad scientist – that forays into diverse areas such as interconnection architecture reform, the rewriting of the heretofore symmetrical duties of each of two interconnected carriers to assume the costs for its own originating local traffic, the overhauling of tandem transit services, and rate deregulation. The Plan even includes some unnecessary further reform of interstate access charges. The bulk of these issues, *if they should even be addressed at all at this time*, should be considered as they have been, *i.e.*, by the States. Alternatively, they should be considered in other proceedings.

Not only does the Missoula Plan take on unconnected policy matters, its supporters encourage the Commission to insert jurisdiction over matters which have been left by Congress for the States to decide. In particular, the Plan's supporters seek to have the Commission improperly wrest from the States long-recognized authority over intrastate access rates. The Plan would also have the Commission cross the boundaries established by Congress in the Telecommunications Act of 1996 and prevent the States from continuing to set rates for Section 251(b)(5) telecommunications traffic. Moreover, the Plan will render meaningless in many contexts the States' role in resolving arbitration disputes leading to new interconnection

9 Phantom traffic comes in many guises, but principally it is traffic exchanged between carriers that contains no or inaccurate originating line information or that is misrouted. Phantom traffic frustrates the efforts of terminating carriers to assess proper charges against originating or intermediate carriers, as otherwise appropriate. The Joint Commenters agree phantom traffic is a problem that should be addressed by the Commission promptly.

agreements. Further, the Plan would deprive competitive telecommunications carriers of many of the rights established by the Commission and the States in interpreting the 1996 Act, such as the right to interconnect on an ILEC's network at any technically feasible point on just, reasonable, and non-discriminatory terms, the right to interconnect with an ILEC at a single point of interconnection within a LATA, and the right of a carrier to recover costs associated with transporting traffic originating on another carrier's network to facilitate delivery to its own network for termination (and the concomitant right not to be charged for handling such other carrier-originated traffic).

Such a hopelessly complex behemoth as the Missoula Plan might make sense if this were the Commission's first attempt to address intercarrier compensation and the States had declined to take on intercarrier compensation and interconnection issues.[10] But neither of these conditions holds. The Commission has been removing subsidies from interstate access charges for over twenty years and has squeezed out most of the excess. Many States have taken similar actions on the intrastate level, but their task is complicated by issues regarding local exchange

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10 The plethora of regulations, exceptions, categories, conditions, and nuances that the Plan contains, as submitted, guarantees that the adoption of the Plan would be followed by years of litigation to clarify its meaning and application. Apart from its bulk and complexity and, most importantly, its unlawfulness, the Plan is hopelessly vague on important issues as well as smaller details. For example, the Plan sets up a Restructure Mechanism and an Early Adopter Fund designed to reimburse ILECs that reduce their access and other intercarrier compensation charges under the Plan or pursuant to state proceedings pre-dating the Plan's adoption. Even the low end of the proponents' estimates project that these two funding mechanisms alone would cost more than 1.5 billion dollars, but there is no clear statement in the Plan's one hundred pages as to how these monies would be raised. Undoubtedly end users will be asked to foot the bill, but will different groups of end users be required to do so in a way that even roughly correlates with the "benefits" they receive from the Plan? This cannot be answered because the details of carrier and end user contribution obligations are left for another day. Similarly, the Plan suggests that CLECs and other non-ILEC carriers may have the opportunity to recover funds from the Restructure Mechanism, but no details at all are provided regarding when and how. The Plan is incomplete in many other respects: as one illustration, while it purports to address intercarrier compensation for VoIP traffic that terminates on the public switched telephone network ("PSTN"), the Plan does not address compensation obligations when PSTN traffic terminates on a VoIP network.

rates for highly disparate areas in terms of cost and the facts of historical variations, matters which Congress intended each State to work out for itself. Either way, much has already been accomplished on the federal and state level and it would be unseemly to overhaul all rates the way the Plan proposes to do regardless of what has preceded it. In a similar way, the Plan seeks to wipe away, with one stroke, a decade of State decisions regarding interconnection rates and interconnection architectures issues. Without a doubt, the Plan is a case of "too much too late," and is inappropriate for the tasks that remain to be addressed by regulators.

Not surprisingly, and contrary to the claims of its proponents, the Plan has only limited support. Yes, there is a lengthy list of supporters attached to the Plan, but only a cursory glance reveals that the numerically vast majority of supporters are small rural ILECs, known as "Track 3" carriers under the Plan. Track 3 carriers are asked to make only nominal reductions in their intercarrier rates relative to other, larger ILECs and their CLEC, wireless, and other competitors. In fact, some Track 3 intercarrier compensation rates will rise, and the greatest lack of rate uniformity is to be found under the Plan by those the Track 3 supporters would be allowed to charge. Significantly, two of the four major ILECs, Verizon and Qwest, do not support the plan. State workshops conducted over the past two months make clear that consumer groups and virtually all CLECs are opposed to the Plan, as are the majority of wireless carriers, cable companies, and alternative service providers.

Rather than endorse significant parts of the Plan, let alone the Plan in its entirety, the Commission should pronounce it "dead on arrival" – so that further time and resources are not expended on it – and instead focus its energy on immediately bringing greater certainty to intercarrier compensation by addressing two problems. ***One***, the Commission should adopt measures to reduce significantly the problems with "phantom traffic," by requiring carriers to transmit appropriate signaling information and articulating clear guidelines applicable to jurisdictionalizing traffic for purposes of intercarrier compensation. The record in this rulemaking proceeding is sufficient to move to a decision on this matter. ***Two***, the Commission should resolve the several petitions for declaratory ruling before it regarding intercarrier compensation for VoIP-originated traffic in Docket No. 05-276 and 05-283. The Commission should eliminate any remaining areas of uncertainty regarding the application of access charges or other forms of intercarrier compensation for the exchange and termination of VoIP-originated traffic in its *IP Enabled Services Proceeding*.[11] These pending matters provide the Commission with the opportunity to address many of the issues surrounding intercarrier compensation for VoIP traffic that terminates on the PSTN, such as who is liable for terminating charges for such traffic and pursuant to what principles. While the Commission might consider the Missoula Plan as comments of a sort on these two narrow sets of issues, the other aspects of the Plan should simply be rejected.

In Section II of these Comments, the Joint Commenters explain the Plan impermissibly would usurp State authority specifically reserved by Section 2(b) of the Communications Act of 1934, as amended (the "Act") by having the Commission set *intrastate* access charges. Section III of the Comments demonstrates why the Plan contravenes the policies and statutory framework established by Congress in the Telecommunications Act of 1996 (the "1996 Act") in its provisions regarding the jurisdiction to establish intercarrier compensation charges, reciprocal compensation rate levels, interconnection architectures, cost-recovery for inter-network transmission facilities, and tandem transit services. In Section IV, the Joint

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[11] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004). The application of any such intercarrier compensation that alters the current applicability of the enhanced service provider access charge exemption should be on a prospective basis only.

Commenters explain why two of the Act's make-whole provisions for ILECs – the Early Adopter Fund ("EAF") and Restructure Mechanism ("RM") – favor the incumbents and certain States at the expense of competitors and other States and why both are unlawful. The Plan's unwarranted changes to the interstate access charge regime, including precipitous increases in the subscriber line charge ("SLC"), are addressed in Section V. Recognizing that rural carriers face certain difficult issues, the Joint Commenters, in Section VI, urge the Commission to take these up separately as they have in the past. Finally, in Section VII, the Joint Commenters encourage the Commission to resolve the most important open issues in the context of intercarrier compensation today by issuing regulation in this docket to minimize phantom traffic and by issuing rulings regarding the propriety and application of intercarrier compensation for VoIP originated traffic (on a prospective basis) in the *IP-Enabled Services* proceeding and in several pending declaratory ruling proceedings.

II. THE PLAN INVITES THE COMMISSION TO IMPERMISSIBLY INTRUDE UPON STATE AUTHORITY BY SETTING INTRASTATE ACCESS CHARGE RATES

The Missoula Plan would have the Commission set intrastate switched access charge rates equal to the Plan's interstate switched access charges.[12] Congress intended that the States have general authority over intrastate communications, a domain that the Commission has stepped into in only the most limited of circumstances. The Commission has long recognized the States' exercise of their authority over intrastate access charges is off limits to it. The Plan's supporters offer no compelling reason for, or sufficient grounds for, the Commission to change course and preempt the States' authority to establish intrastate access charges. This portion of the Missoula Plan must be rejected.

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12 Missoula Plan at 18, §II.B.3.a.iii.

A. <u>Section 2(b) of the Act Reserves for States Exclusive Jurisdiction Over Intrastate Access Charges</u>

The current framework of the access charge regime was instituted over twenty-five years ago with the original break-up of AT&T. At that time, the Commission retained the role of reviewing local exchange carriers' *interstate* access charges assessed for the origination and termination of interexchange services, leaving to the States the same task with respect to *intrastate* access charges. In 1980, the Commission, in its *MTS and WATS Market Structure* proceeding, recognized that how it chose to regulate interstate access charges could, at best, serve as a model the States *might* choose to emulate, not one they could be forced to adopt:

> The present statute does not empower us to establish access service compensation arrangements for all interexchange services. Any arrangement we prescribe necessarily must be confined to interstate and foreign communications. That prescribed arrangement could be used as a model for intrastate interexchange access service compensation arrangements *if the states chose to follow it.*[13]

In its 1983 Third Report and Order in the *MTS and WATS Market Structure* proceeding, the Commission refused to preempt state regulation of intrastate access charges, again recognizing the limits placed on it over under the statute and referring to its reasoning just three years' earlier (described above):

> SBS has proposed that we preempt state regulation of intrastate access charges and others have suggested that we delegate responsibility for interstate access charges to the state commissions. We rejected somewhat similar suggestions when we adopted the Second Supplemental Notice. 77 FCC 2d at 232.[14]

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13 *In the Matter of MTS and WATS Market Structure,* Second Supplemental Notice of Inquiry and proposed Rulemaking, CC Docket No. 78-72, 77 F.C.C.2d 224, 232, ¶38 (1980) (subsequent history omitted).

14 *MTS and WATS Market-Structure,* Third Report and Order, 93 FCC 2d 241, 264 ¶69 (1983).

The stumbling block for the Commission, which it properly recognized in 1980 and 1983, is the same which exists unchanged in the statute today. Section 2(b) of the Act provides, in relevant part, that

> *nothing* in [the 1934 Act] shall be construed to apply to or to give the [Federal Communications] Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any caller . . ..[15]

Section 2(b) is well established as reserving to the States the exclusive jurisdiction over all interexchange services, except where the Congress has clearly carved out exceptions, such as Section 332(c)(3) of the Act, which gives the Commission exclusive jurisdiction over rates and entry of wireless carriers, "[n]otwithstanding sections 2(b) and 221(b)."[16] Despite the Section 332(c)(3) exception and conferral of exclusive jurisdiction over the rates for wireless services in the federal agency, the U.S. Court of Appeals for the Eleventh Circuit earlier this year concluded that the scope of the term "rates" in Section 332(c)(3) was not so broad as to prevent the States from regulating line items on wireless customers bills.[17] In short, this recent case underscores that the wiggle room of the Commission to ignore the limits placed on its jurisdiction relative to the States is very narrow indeed.

The Missoula Plan would step on the toes of the States in ways that Congress has not allowed. While for all three Tracks of carriers under the Plan, State implementation of the

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15 47 U.S.C. §152(b).

16 47 U.S.C. § 332(c)(3)(A). Section 221(b) of the Act deals with state jurisdiction over telephone exchange services, a matter not directly at issue in the Missoula Plan, although potentially an alternative source of its authority are reciprocal compensation and tandem transit service rates.

17 *National Association of State Utility Consumer Advocates v. FCC*, 457 F. 3d 1238 (11th Cir. 2006).

provisions relating to intrastate *originating* access charges will be (at least initially) voluntary,[18] the Commission-mandated rates for intrastate *terminating* access would be *mandatory in each State* for the carriers in Tracks 1 and 2, regardless of whether a given State chooses to adopt the Plan.[19] However, even with respect to intrastate *originating* charges, the Plan provides that carriers may petition the Commission to preempt State authority over Tracks 1 and 2 carriers at Step 2.[20]

The Plan's supporters recognize the extreme stretch the Plan asks the Commission to make to the concept of the dual jurisdiction system of regulation over this nation's telecommunications services. They advise that the Commission "will need to adopt *assertive new legal strategies* to implement those provisions and, in particular, to establish uniform rates for all traffic terminated by carriers in [Tracks 1 and 2], including traffic traditionally characterized as 'local' and 'intrastate access.'"[21] Read differently, the Plan's proponents are advising the Commission that they had better be ready to defend the Plan on appeal. Unfortunately for the Plan's supporters, the "assertive new legal strategies" they ask the Commission to adopt to achieve the Plan's aims – Commission control over all Track 1 and Track 2 intercarrier compensation – are not particularly new and they are not even facially legal.

B. <u>Section 251(b)(5) Does Not Give The Commission Jurisdiction Over Intrastate Access Charges</u>

The Congress's adoption of Section 251(b)(5) did not alter the long-standing jurisdictional division between the Commission and the States' over access charges. As an initial matter, the Plan's supporters argue that "the Commission has direct jurisdiction under

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18 Missoula Plan at 3, §I.B.2.

19 *Id.*, §I.B.3. *See also,* Missoula Plan: Policy and Legal Overview at 4.

20 Missoula Plan at 3, §I.B.2.a.

21 Missoula Plan: Policy and Legal Overview at 5 (emphasis supplied).

Sections 201 and 251(b)(5) to reach all classes of intercarrier compensation within Tracks 1 and 2 except arguably for originating interstate access."[22] Regarding intrastate access, the Plan's supporters reply principally on the fact that, in isolation, Section 251(b)(5) does not appear to make distinctions among telecommunications traffic on the basis of jurisdiction or service definition. But Section 251(b)(5) *cannot* be read in isolation and must be viewed in the context of the Act as a whole. In its *ISP Remand Order,* the Commission recognized that the term "telecommunications" as used in Section 251(b)(5) "must be must be construed in light of other provisions in the statute."[23] Considering Section 251(g) in particular, the Commission found Section 251(g) preserved the existing *interstate* access charge regime independent of the seemingly broad dictates of Section 251(b)(5). The Commission also concluded

> *that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations*, because 'it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms.' *Local Competition Order* , 11 FCC Rcd at 15869.[24]

To remove any doubt about the limitation of Section 251(b)(5) to non-access traffic, the Commission added "[access] services thus remain subject to Commission jurisdiction under section 201 (or, to the extent they are *intra*state services, they remain subject to the jurisdiction of state commissions) . . .."[25]

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22 *Id.,* Attachment A at 1. The Missoula Plan's supporters never explain why asserting jurisdiction over intrastate *originating* access charges is a problem. The reality is that the Commission cannot and should not assert jurisdiction over *any* intrastate access charges.

23 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 16 FCC Rcd 9151, 9168 n. 66 (2001) ("*ISP Remand Order*"), *remanded on other grounds sub nom. WorldCom, Inc. v. FCC,* 288 F. 3d 429 (D.C.Cir. 2002).

24 *Id.* (emphasis supplied).

25 *Id.* at 9169 (emphasis in original).

In addition, Section 251(b)(5) imposes obligations only on local exchange carriers, not on interexchange carriers. Thus, the context of Section 251(b)(5) is that it applies only between carriers *reciprocally exchanging telecommunications traffic* when at least one of the carriers is a local exchange carrier. Interexchange carriers and local exchange carriers do not exchange traffic in any way recognized by either the Commission or any State commission that would cause an IXC and a LEC to compensate the other reciprocally.[26] In contrast with the arrangements contemplated in Section 251(b)(5), the local exchange carrier has always charged the interexchange carrier for access regardless of the direction of the traffic. There is nothing reciprocal about the access charge regime, and nothing reciprocal about intercarrier compensation under the Missoula Plan when it comes to interexchange traffic and intrastate access charges (or interstate access charges, for that matter, albeit the Plan's supporters, notably, do not suggest the Commission has authority over *inter*state access charges as a result of Section 251(b)(5)), which would be the logical end of their argument that 251(b)(5) extends Commission jurisdiction to *intra*state access charges.

Underscoring the lack of nexus between access charges and Section 251(b)(5) is the statutory pricing standard applicable to Section 251(b)(5) traffic. Section 252(d)(2)(A)(i) of the Act, addressing compliance of incumbent local exchange carriers with Section 251(b)(5), states that the terms of reciprocal compensation are not to be considered just and reasonable unless they provide for the "mutual and reciprocal recovery *by each carrier* of costs associated with the transport and termination *on each carrier's network facilities* of calls that originate on

26 Indeed, as discussed in Section III.E., *infra,* the Plan itself would treat jointly provided access services as tandem transit traffic in many instances. While transmitting jointly-provided access services in this way is highly dubious, at best, the Plan notably never tries to equate access traffic with reciprocal compensation traffic, other than proposing identical rates for the two categories.

the network facilities of the other carrier."[27] This language expressly contemplates that compensation under Section 251(b)(5) will stem from a bilateral relationship in which the traffic will originate on one of the carrier's network's and terminate on the other carrier's facilities and that compensation will flow from the originating carrier to the terminating carrier. That type of relationship does *not* exist between an interexchange carrier and a local exchange carrier providing it exchange access services.

Consequently, it is quite clear, and not subject to Commission re-interpretation, that Section 251(b)(5) and any Commission jurisdiction that comes with it[28] does not extend to intrastate access charges.[29] In a desperate attempt to prove otherwise, the Missoula Plan supporters point to the Commission's statements in the *ISP Remand Order* that Section 251(b)(5) applies to all telecommunications traffic "not excluded by section 251(g)."[30] This proves too much, because the simple fact, which the Commission recognized in the *ISP Remand Order*, is that Section 251(b)(5) does not extend to access traffic. This is *not* something the Commission has the power to change. As the Supreme Court noted in *Louisiana Public Service Commission v. FCC*, "[a]n agency may not confer power on itself."[31] The Missoula Plan supporters go on to quote the Commission, again from the *ISP Remand Order*, as interpreting Section 251(g) to

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27 47 U.S.C. § 252(d)(2)(A)(i).

28 As discussed below in Section II.B, the Commission's authority to establish rates for reciprocal compensation traffic that is subject to Section 251(b)(5) is limited in a way that invalidates other portions of the Missoula Plan.

29 To the extent not otherwise conclusive, as described above, the simultaneous passage of Sections 251(b)(5) and 251(g) refute the suggestion that, absent Section 251(g), Section 251(b)(5) would extend to interstate and intrastate access charges as idle speculation. Where Congress meant to create a carve out from otherwise applicable sections, as in Section 332(c)(3)(A) where Congress recognized that state authority that existed in Sections 2(b) and 221(b) otherwise would apply, it did so.

30 Missoula Plan: Policy and Legal Overview, Attachment 1 at 3.

31 *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 1902, 90 L.Ed.2d 369 (1986) ("*Louisiana PSC*").

provide that "unless and until the Commission by regulation should determine otherwise, Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g)."[32] They use this quote to suggest that Commission concluded that 251(g) somehow shifted jurisdiction over intrastate access charges, at a time of the Commission's choosing, *to the Commission*. But this is flatly contradictory with the Commission's numerous statements in the *ISP Remand Order* that the Commission's jurisdiction over access charges extends to *interstate services only*, and that the states retain jurisdiction over intrastate access charges.[33] The Missoula Plan attempts to gut the heart and brains from the *ISP Remand Order's* jurisdictional discussion and tries to pass it off as the complete animal.[34]

Finally, although no further clarification is needed, the 1996 Act specifically provided that the Commission had no power to preclude State commission regulation that "establishes access and interconnection obligations of local exchange carriers" that is consistent with the requirements of Section 251 and does not prevent implementation of the purposes of Part II of Title II concerning the Development of Competitive Markets.[35] Given Congress's reservation of rights in Section 2(b) to the States over intrastate communications matters, the statute's express preservation of preexisting access regimes in Section 251(g) (which the

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32 Missoula Plan: Policy and Legal Overview, Attachment 1 at 3.

33 *ISP Remand Order, e.g.,* at ¶¶37, 39.

34 The Missoula Plan supporters misuse the Commission's 2005 *Further Notice of Proposed Rulemaking* in this docket to suggest that the Commission concluded section 251(g) gave it authority over intrastate access charges. *See* Missoula Plan: Policy and Legal Overview, Attachment 1 at 3-4, *quoting Intercarrier Compensation FNPRM,* 20 FCC Rcd at 4722 ¶79. Contrary to the dissimulation of the Plan's supporters, the Commission asked "parties to comment on whether the Commission has authority to replace intrastate access regulation with some alternative mechanism." *Id.* In short, and quite plainly, the Commission has never concluded that it has authority over intrastate access charges as a result of 251(g). The Commission should not reach that determination now.

35 47 U.S.C. § 251(d)(3). *See* 47 U.S.C. §§ 251-261, *inclusive* ("Part II of Title II).

Commission has recognized extended to State-administered intrastate access regimes), and the twenty-five year period (ten years of which occurred after passage of the 1996 Act) in which States have been regulating intrastate access without adversely affecting the Commission's ability to establish and reform interstate access, it is too late in the day for the Commission to conclude that continued state regulation of intrastate access charges somehow is inconsistent with Section 251 or the purposes of Part II of Title II.

C. The "Impossibility Exception" of *Louisiana PSC* Does Not Apply in These Circumstances to Justify Preemption over Intrastate Access Charges

In the alternative to arguments based on Section 251(b)(5), the Missoula Plan's supporters argue that the Commission has independent authority under its general rulemaking authority pursuant to Section 201 to preempt the States' jurisdiction to regulate intrastate access charges.[36] In particular, the Plan's supporters rely upon the so-called "impossibility exception" articulated in the *Louisiana PSC* case. *Louisiana PSC*, which strongly reinforces the general jurisdiction of the States over intrastate communications, holds that an agency may preempt state regulation of an intrastate matter *only* when the matter has interstate aspects as well and when it is "*not* possible to separate the interstate and the intrastate components of the asserted FCC regulation."[37] Subsequent case law has refined the so-called "impossibility exception" to allow Commission preemption of state regulation when: (1) the matter to be regulated has both interstate and intrastate aspects, (2) Commission preemption is necessary to protect a valid federal regulatory objective, and (3) state regulation would negate the exercise by the

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36 Missoula Plan: Policy and Legal Overview, Attachment 1 at 4-7.

37 *Louisiana PSC*, *supra*, 476 U.S. at 375 n. 4, 106 S.Ct. at 1902 n. 4 (emphasis in original).

Commission of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects.[38]

Regarding the applicability of the impossibility exception to intrastate access services, the Plan's supporters generally ignore the three-prong test articulated by the courts. Instead, they baldly assert that "[g]enuine [intercarrier compensation] reform for *any* class of traffic, however, including traffic over which the Commission has undisputed jurisdiction, cannot succeed unless it encompasses *every* class of traffic, including intrastate access traffic."[39] The Plan's supporters argue, in effect, that unless the Commission preempts the States from regulating authority specifically reserved to them by Congress in Section 2(b), the Commission will be unable to achieve the federal goal of effective intercarrier compensation reform.[40] The extent of the Commission's legitimate objectives for intercarrier compensation reform, given the dual jurisdictional nature of communications regulation in this country, however, are limited to reform for *interstate* communications. The "impossibility exception" only applies to *valid* federal objectives, and thus the exception *cannot* be invoked to preempt the States from their otherwise valid jurisdiction over intrastate communications traffic to achieve Commission objectives with respect to intrastate traffic *per se*. But this is precise what the Missoula Plan seeks to do, making the Commission regulation of *intra*state rates the objective itself, rather than a necessary means to regulate *inter*state matters.

Ironically, the Missoula Plan summons the impossibility exception articulated in *Louisiana PSC* on grounds which are almost indistinguishable from the grounds offered by the

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38 *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990), *citing Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 (D.C.Cir.1989), *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 431 (D.C.Cir.1989).

39 Missoula Plan: Policy and Legal Overview, Attachment 1 at 5 (emphases in original).

40 The Missoula Plan proponents ignore that effective reform has been accomplished for the past two decades without causing the FCC to intrude upon State jurisdiction.

Commission in that case (and rejected by the Supreme Court) to preempt state regulation of carrier depreciation rates. In *Louisiana PSC*, the U.S. Supreme Court found the Commission had overstepped the jurisdictional bounds set by Congress under the Act by preempting state regulation of depreciation rates and methods for equipment, plant, and other property used by telephone companies to provide both intrastate and interstate service. The Court found that Congress did not intend that regulations adopted by the Commission under the authority granted the Commission under Section 201(b) of the Act to supersede state authority over intrastate communications, whether on the subject of depreciation rates, end user rates, or otherwise. Most relevant to the current debate, the Court explicitly rejected the Commission's argument that Congress's directive to the Commission in Section 1 of the Act to ensure efficient, *national* phone service inherently gave the Commission plenary authority over depreciation rates for equipment used for both interstate and intrastate communications because of the express jurisdictional limitations in Section 2(b). Regarding Section 2(b), the Court underscored that, "By its terms, this provision fences off from Commission reach or regulation intrastate matters--indeed, including matters 'in connection with' intrastate service."[41] Thus, in the wake of *Louisiana PSC*, a dual system for regulating depreciation rates for one set of equipment and plant was preserved.

Conversely, the *Louisiana PSC* Court noted that state regulation could only be displaced where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress *provided* the federal agency is acting *within the scope* of its congressionally delegated activity. Given the separations process provided within the statute and the Congress's clear vision that there would be a dual jurisdiction system of telecommunications

[41] *Louisiana PSC*, 476 U.S. at 370.

regulation, the Court did not consider depreciation rates to provide a situation justifying preemption. The subject matter here – interstate and intrastate access charges – no less than interstate and intrastate depreciation rates, is naturally subject to the dual jurisdiction framework of the Act, as the States and Commission have correctly understood it to be from the beginning.

The Supreme Court in *Louisiana PSC* went on to underscore that federal preemption would be allowed only "where it [is] *not possible to separate the interstate* and intrastate components" of the subject matter. In those narrow circumstances, the exercise of plenary federal jurisdiction and preemption of conflicting state regulatory is permissible.[42] Thus, for example, the Court of Appeals for the D.C. Circuit, three years after *Louisiana PSC*, upheld the Commission's preemption of the state tariffing of inside wiring, noting that such preemption is permissible "when the states' exercise of [its] authority negates the exercise by the FCC of its own lawful authority over interstate communications."[43] The Commission and courts have affirmed other areas where interstate and intrastate aspects of services or facilities are inextricably tied together, justifying federal preemption and the assertion of exclusive jurisdiction by the Commission where state regulation would jeopardize Commission regulation over interstate matters.[44]

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42 *Id.* at 375 n. 4.

43 *National Ass'n of Reg. Util. Commrs. v. FCC,* 880 F.2d 422, 429 (D.C. Cir. 1989).

44 *E.g., Federal-State Joint Board on Universal Service: Western Wireless Corporation (Petition for Preemption of an Order of the South Dakota Public Utilities Commission),* Declaratory Ruling, 15 FCC Rcd 15168 (2000) (preempting a state interpretation of section 214(e)(1) of the 1934 Act that requires a new entrant to provide service throughout the service area prior to designation as an ETC to be fundamentally inconsistent with Congress' universal service objectives as outlined in section 254, and the Commission's policies and rules in implementing section 254); *Illinois Bell Telephone Co. v. FCC,* 883 F. 2d 104 (D.C. Cir. 1989) (permissible for Commission to preempt state regulation of the joint marketing of customer premises equipment used inextricably for intrastate and interstate and telephone service (Centrex) inconsistent with the Commission's own joint marketing regulations); *Public Service Commission of Maryland v. FCC,* 606 F. 2d 1510 (D.C. Cir 1990) (upholding Commission preemption of state

In contrast, regarding interstate and intrastate access charges for switched services, the Commission has never recognized there is anything inextricable about interstate and intrastate access services. Each interexchange minute passed over local exchange facilities has been jurisdictionalized as one or the other for decades. The States have regulated the rates for intrastate access minutes during that entire period, and continue to do so today. The Commission has never suggested that the federal policies and objectives regarding the regulation of interstate switched access charges were somehow threatened by these State actions. As discussed above, when the modern access charge regime was constructed in the early 1980s, the Commission considered and expressly rejected, on the basis of the clear divisions created by Section 2(b), arguments that it preempt state regulation of intrastate access charges.[45]

The Missoula Plan's supporters suggest that for some traffic, namely VoIP and wireless traffic, it is often impossible to separate intrastate calls from interstate calls. According to them, this justifies preemption of intrastate rate-setting authority. Even if that were true, that would not justify preempting state regulation of intrastate access services for other types of calls, such as wireline-to-wireline carrier calls. But the Missoula Plan's supporters do not make a convincing case for inseparability even as it applies to VoIP and wireless calls. The Plan's supporters cite the Commission's *Vonage Order* for the proposition that "there is no practical way of identifying the actual geographic location of a VoIP call's end points."[46] But this conveniently overlooks the Commission's subsequent requirement that E911 services be made available to VoIP end users, which is predicated on knowing the physical location of the VoIP

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attempts to set rates charged by local carriers to interexchange carriers for disconnection of local telephone service for failure to pay interstate services).

45 *See, supra,* nn. 13, 14 and accompanying text.

46 Missoula Plan: Policy and Legal Overview, Attachment 1 at 6.

end user.[47] If that is known, the end point of the call can be known. Moreover, the Commission has since separately acknowledged that at least some VoIP providers may be able to determine the geographic end points of their subscriber's communications.[48] Specifically, in the Commission's June 27, 2006, order imposing universal service contribution obligations on VoIP providers, the Commission explained that

> a fundamental premise of our decision to preempt Minnesota's regulations in the *Vonage Order* was that it was impossible to determine whether calls by Vonage's customers stay within or cross state boundaries. . . . [T]o the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its actual percentage of interstate calls. Under this alternative, however, we note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider.[49]

In other words, rather than muddling the distinctions between intrastate and interstate jurisdictions, technological advancements affecting VoIP services may be rendering it easier to make such distinctions.

Similarly, the E911 requirements applicable to CMRS carriers provide the technology to determine the geographic location of a wireless carrier during any given call, a technology which could be used for the limited additional purpose of determining the

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47 *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005).

48 Inexplicably, although the Plan was filed one month after the VoIP universal service fund decision, the Plan's supporters rely exclusively on the at least partially revised *Vonage* decision. *See Universal Service Contribution Methodology*, WC Docket No. 06-122, FCC 06-94 (released June 27, 2006).

49 *Id.*, ¶ 56 (footnotes omitted).

jurisdictional nature of a wireless call.[50] At bottom, therefore, the suggestion that "it will become progressively more difficult to determine, on a call-by-call basis, which calls are actually intrastate and which calls are actually interstate"[51] ignores the realities of today's technologies.

Even if that were not the case, if the Commission were to move forward on the premise that all VoIP traffic were jurisdictionally interstate, then that would simply suggest that the Commission may address intercarrier compensation for VoIP traffic along with other categories of interstate traffic. It would not be cause for stripping the States of jurisdiction over non-VoIP traffic, as the Plan's proponents illogically argue.

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At bottom, the Commission should not needlessly preempt state authority when there are less restrictive methods to resolve most of the problems for which the proponents invoke state preemption as the solution. The only concern with any relevance to the question of extending Commission jurisdiction to intrastate access charges has to do with the issue of "phantom traffic." There is no doubt that this issue cannot be resolved without first establishing a binding method for determining the jurisdiction of any call that originates or terminates over the PSTN that allows originating and terminating carriers to bill based upon jurisdiction. If that is achieved, the opportunity for arbitrage is reduced dramatically if not eliminated, and there is little reason to consider federal regulation of *intra*state access charges. The Missoula Plan offers one possible method for resolving the "phantom traffic" problem. There are others that have

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50 *See* 47 C.F.R. §20.18(e) ("Licensees subject to this section must provide to the designated Public Safety Answering Point Phase II enhanced 911 service, *i.e.*, the location of all 911 calls by longitude and latitude in conformance with Phase II accuracy requirements").

51 Missoula Plan: Policy and Legal Overview, Attachment 1 at 6.

been submitted into the record of this proceeding.[52] Before overstepping its statutory authority by fundamentally reinterpreting Section 2(b) to exercise jurisdiction over intrastate access charges, the Commission should first resolve the "phantom traffic" issue (as discussed in Section VII below) which can be done by asserting its well-established authority to determine what is and what is not *interstate* traffic.[53] The Missoula Plan's attempts to set intrastate access charge rates, whether originating or terminating, cannot be lawfully adopted.[54]

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52 *E.g., ex parte* letter from Karen Brinkmann, on behalf of the Midsize Carrier Coalition, to Marlene H. Dortch, FCC, CC Docket No. 01-92, dated Dec. 5, 2005 ("*Midsize Carrier Coalition ex parte*").

53 *See Thrifty Call, Inc. Petition for Declaratory Ruling Concerning BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1,* 19 FCC Rcd 22240, ¶7 (Commission has jurisdiction to determine whether calls are subject to the interstate jurisdiction as a precursor to separate federal and state regulation under the dual regulatory regime prescribed by the Act); *see also, Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-49 (1930 ("The separation of the intrastate and interstate property, revenues, and expenses" of LECs "is essential to the appropriate recognition of the competent authority in each field of regulation"). Of course, the Commission *cannot* conclude that all telecommunications traffic is interstate for intercarrier compensation purposes, although that is, in essence, what the Plan's supporters propose.

54 Apart from the legal infirmities of the Missoula Plan's provisions with respect to access charges, any attempt to lower intrastate access charges by federal fiat is becoming less important as State commissions on an increasing basis are addressing the relatively high levels of intrastate access charges. For example, the Florida legislature and the Florida Public Service Commission have taken steps designed to address intrastate access reform, creating a process intended to minimize disparities regarding intercarrier compensation. F.S. § 364.164 (establishing a structure to move intrastate access charges to the interstate levels). Similarly, the Maine legislature required that as of June 1, 2005, intrastate access rates would not exceed interstate rates as of January 1, 2003. Further, after each reduction in interstate access rates, the statute requires the Maine PUC to consider corresponding reductions in the intrastate rate. 35-A Me. Rev. Stat. Ann. § 7101-B(2). *See also, e.g., Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Virginia*, D.T.E. 01-31, Phase I Order, May 8, 2002 and Phase II Order, April 11, 2003 (reducing intrastate switched access rates to interstate levels and allowing Verizon to increase rates for other intrastate services so decrease in switched access rates was revenue neutral); Petition of AT&T Communications of Virginia, LLC for reductions in the intrastate carrier access rates of Verizon Virginia Inc. and Verizon South Inc., Final Order, case No. PUC-2003-00091, Feb. 9, 2005 at 5 ("We find that Verizon's intrastate access rates should be decreased toward cost to reduce the amount of subsidies included in such charges"); *In the Matter of the Commission's Investigation into the Modification of Intrastate Access Charges*, Opinion and Order, Ohio Pub. Util. Comm'n Case No. 00-127-TP-COI, Jan. 11, 2001

III. THE MISSOULA PLAN IS IMPERMISSIBLY AT ODDS WITH THE STATUTORY FRAMEWORK ESTABLISHED BY THE 1996 ACT

Key aspects of the Plan contravene the statutory framework established by the Congress in the 1996 Act and implemented over the past decade by the Commission and State regulators. *One,* the Plan strips from the States their statutory role of setting reciprocal compensation rates where carriers cannot voluntarily agree to them. *Two,* the Plan purports to set reciprocal compensation rates without regard for the Act's applicable cost-based pricing standard – and at only a fraction of the rate levels State commissions have found correct in intercarrier arbitrations – a result which will have serious anti-competitive consequences. *Three,* the Plan's interconnection architecture provisions would undermine the policies underlying Commission and State arbitration decisions to the serious disadvantage of CLECs and other competitive carriers. Indeed, these provisions are at odds with Section 251(c)(2) of the Act which allows for interconnection at any technically feasible point (and subject to a statutory cost-based pricing standard). The Plan contradicts the Act's interconnection provisions in additional ways, for example, by eliminating the "single point of interconnection" obligation, and imposing on non-ILECs an unequal share of the costs for facilities between the interconnecting networks of two carriers installed to exchange the traffic originated by *both carriers*. *Four*, as a policy matter, and as a result of inheriting ubiquitous legacy networks installed through monopoly revenues, ILECs serve a natural and important role in the exchange of traffic between all carriers by providing tandem transit service. The Plan would undermine this policy by ignoring the ILECs' statutory obligations to provide tandem transit services and again usurp state authority to set tandem transit service charges. Adding insult to injury, the Plan would impose only a

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(ordering Ameritech, Cincinnati Bell, Sprint/United and Verizon to reduce intrastate access rates to mirror the CALLS Plan rate caps and rate reductions).

temporary cap on tandem transit rates at more than double the rate typically set by State commissions.

A. **The Plan Improperly Usurps the States' Role of Establishing Rates for Reciprocal Compensation**

1. Section 252 gives the States ratemaking authority over Section 251(b)(5) traffic

The provisions of the Missoula Plan which are intended to bring the scope of rates of reciprocal compensation under Section 251(b)(5) for the transport and termination of non-access telecommunications traffic contravene Sections 251 and 252 of the Act, as well as existing federal precedent. The Missoula Plan would improperly have the Commission wrest ratemaking authority from the States over such traffic in violation of Section 252 of the Act. Specifically, the Missoula Plan contemplates that the Commission will establish by fiat an ultimate reciprocal compensation rate of $0.0005 for Track 1 carriers for the transport and termination of "pure" telecommunications and ISP-bound traffic.[55]

Congress conferred on State commissions explicit Congressional authority to set, *inter alia*, rates for Section 251(b)(5) reciprocal compensation. Section 252(c)(2) provides, in relevant part, that State commissions "shall establish any rates for interconnection, services, or network elements, according to subsection (d)." In turn, "subsection (d)", *i.e.,* Section 252(d)(2), provides, in relevant part:

> For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) [concerning reciprocal compensation], a *State commission* shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of the costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier;

55 *See* Missoula Plan, Executive Summary, at 4.

> and such terms and conditions determine such costs on the basis of a reasonable and approximation of the additional costs of terminating such calls.[56]

Clearly, the plain language of the above-referenced provisions of the Act expressly provides that State commissions have jurisdiction over the rates, terms, and conditions for the exchange of telecommunications traffic covered by Section 251(b)(5), and that such rates should allow carriers to recover their costs associated with providing the functions necessary to transport and terminate such traffic. Both the Supreme Court and the Eighth Circuit have held as much.

In *AT&T v. Iowa Utilities Board*, the Supreme Court held that the Commission has jurisdiction under Section 201(b) of the Act to implement the local market opening provisions enumerated in Sections 251 and 252 of the 1996 Act by adopting regulations.[57] At the same time as it reached this holding, the Court also ruled that, although the Commission possesses authority under Sections 251 and 252 of the Act to *design a methodology* for use in establishing rates for interconnection and unbundled network elements, the rate making itself is within the sole province of State commissions pursuant to Section 252 of the Act:

> The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory "Pricing standards" set forth in § 252(d). It is the States that will apply those standards and implement that methodology, *determining the concrete result in particular circumstances*. That is enough to constitute the establishment of rates.[58]

Thus, the Court found that concrete rates are to be set by the States based upon the circumstances found there.

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56 47 U.S.C. §252(d)(2) (emphasis added).

57 *AT&T v. Iowa Utils. Bd.*, 366, 378, 199 S.Ct. 721, 730, 142 L.Ed.2d 835 (1999).

58 *Id.,* 525 U.S. at 384 (emphasis supplied).

The Eighth Circuit in *Iowa Utilities Board v. FCC* reiterated this point forcefully when it struck down the Commission's reciprocal compensation and UNE rate default proxy rules, Rule 51.707 and 51.513, respectively, which were established in the Commission's *Local Competition Order*.[59] Through Rule 51.707, the Commission, while recognizing the States' authority and role to set permanent rates, purported to set an interim default range for the rates for transport and termination of local exchange traffic.[60] Specifically, the Commission adopted "a default proxy range of 0.2 cents ($0.002) to 0.4 cents ($0.004) per minute of use for calls handed off at the end-office switch."[61] The Commission stated that "[i]n states that have not conducted or reviewed a forward-looking economic cost study, but have set rates for transport and termination of traffic consistent with the default price ranges and ceilings discussed above, an incumbent LEC shall use these state-determined rates as interim rates."[62] Concerning Rule 51.513's UNE proxy rates, the Commission similarly concluded that "[t]hese proxies are interim only. They will apply until a state sets rates in arbitrations on the basis of an economic cost study, or until we promulgate new proxies based on economic cost models."[63]

Reviewing Rules 51.513 and 51.707 on appeal, the Eighth Circuit held that the "First Report and Order very clearly commands the use of proxy prices by directing that 'a state commission *shall* use [default proxies] . . . in the period before it applies the pricing

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59 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶787-827 (1996) ("*Local Competition Order*").

60 *Id.*, Appendix B.

61 *Id.*, ¶1060.

62 *Id.*, ¶1066.

63 *Id.*, ¶787.

methodology.'"[64] The Court explained that, while the U.S. Supreme Court in *AT&T v. Iowa Utilities Board* determined that the Commission has jurisdiction to design a pricing methodology,

> *the FCC does not have the jurisdiction to set the actual prices for the state Commissions to use.* Setting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to §252(c)(2) . . .We conclude that the proxy prices cannot stand and . . .vacate rules 51.513 . . . and 51.707."[65]

As both *AT&T v. Iowa Utilities Board* and *Iowa Utilities Board v. FCC* render pellucid, the Commission is not permitted to set actual reciprocal compensation rates under 251(b)(5). The Plan's supporters' assertions that the Commission has direct authority to set intrastate rates pursuant to Section 251(b)(5) of the Act ignore other provisions of the Act and the court precedent described above.[66]

That Congress would give State commissions this authority is sound public policy, given that the non-access traffic governed by Section 251(b)(5), for the most part, is intrastate telephone exchange traffic from the perspective of end users – separate and apart from its wholesale nature under Section 251(b)(5). Under Section 2(b), the State commissions have the exclusive authority to regulate intrastate telephone exchange traffic, although that Section is not the direct source of the States' authority over reciprocal compensation rates. Just as the

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64 *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 756 (8th Cir. 2000) (emphasis in original), *aff'd in part, rev'd in part sub nom. Verizon v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701(2002)("*Verizon v. FCC*").

65 *Id.*, 219 F.3d at 757 (emphasis added), citing *AT&T v. Iowa Utils. Bd., supra,* 525 U.S. at 385. It is worth noting that, although Rules 51.513 and 51.707 may still be found in the Code of Federal Regulations, those rules were not before the U.S. Supreme Court in *Verizon v. FCC supra,* and therefore were not among those rules that were reinstated by the Supreme Court. As such, the rules are erroneously contained in the existing Code. *See US WEST Communications, Inc. v. Jennings*, 304 F.3d 950, 955-56 (9th Cir. 2002) (explaining that the vacated proxy rules were not before the Supreme Court on appeal in *Verizon v. FCC*).

66 *See* Missoula Plan, Policy and Legal Overview, Attachment A, at 3-4.

Supreme Court in *AT&T v. Iowa Utility Bd.* Ruled that States had authority under Sections 251(c)(3) and 252(d)(1) to set rates for unbundled network elements, Congress recognized that States could best determine the appropriate rates for reciprocal compensation based on the particular circumstances existing within a given State, as guided by the methodology that the Commission might properly adopt.

The Plan's supporters also point to the Commission's *ISP Remand Order* to support their position that the Commission has authority to set reciprocal compensation rates. Apart from the fact that the Commission's decision was remanded by the U.S. Court of Appeals for the District of Columbia Circuit, the Commission's actions regarding interim compensation for ISP-bound traffic provide no general guide to the relationship between state and federal authority over compensation for the exchange of intrastate traffic subject to Section 251(b)(5). In fact, quite the opposite is true. The Commission in its *ISP Remand Order* specifically concluded "that ISP-bound traffic is not subject to reciprocal the compensation provisions of section 251(b)(5)," determining instead that ISP-bound traffic falls within the categories of traffic enumerated in Section 251(g) of the Act.[67] The Commission, therefore, addressed ISP-bound traffic under Section 201 of the Act, *not* 251(b)(5).[68]

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67 *ISP Remand Order*, 16 FCC Rcd 9151, ¶35.

68 *Id.*, ¶52. On appeal in *WorldCom v. FCC*, however, the D.C. Circuit held that §251(g) did not provide a basis for the Commission's action regarding ISP-bound traffic in the *ISP Remand Order*, and remanded the decision to the Commission for better explanation of the justification for the Commission's action. The Commission has yet to issue a decision on remand, rendering the Commission's treatment of ISP-bound traffic in the *ISP Remand Order* even more suspect as a guide to the treatment of the separate category of Section 251(b)(5) traffic generally. *See WorldCom, Inc. v. FCC,* 288 F. 3d at 433.

2. The "impossibility exception" is unavailable to the Commission to usurp State jurisdiction over Section 251(b)(5) reciprocal compensation rates

The Missoula Plan supporters, apparently mindful that any Commission jurisdiction pursuant to Section 251(b)(5) is not sufficient to allow the Commission, rather than the States, to set reciprocal compensation rates, rather than the States – indeed, as discussed below, the supporters ultimately ask for the Commission to forbear from Sections 252(c)(2) and 252(d)(2) – turn to the "impossibility exception" articulated in *Louisiana PSC* as "independent" justification for the Commission setting such rates.[69] Admittedly, the Commission's assertion of jurisdiction in the *ISP Remand Order* under Section 201 over ISP-bound traffic, for example, was rooted in the argument that ISP traffic cannot be reliably separated into interstate and intrastate components and the impossibility exception of *Louisiana PSC*.[70] The impossibility exception is inapposite to the question of setting rates for reciprocal compensation traffic, however. Notably, the exception was first articulated in the context of applying Section 2(b) of the Act which reserves the States' general jurisdiction over intrastate communications. The dual federalism framework written into Section 2(b) of the Communications Act of 1934 provides that the Commission has jurisdiction over interstate ratemaking, while State commissions possess authority over purely intrastate matters, including intrastate ratemaking. The *ISP Remand Order*, indeed, although it was issued in the post-1996 Act era, relied upon principles predating the 1996 Act, because the Commission, as a threshold matter, deemed ISP-bound traffic outside the scope of traffic directly regulated under the 1996 Act.

When Congress enacted the 1996 Act, it modified the jurisdictional lines between the States and the Commission for certain types of traffic, including traffic subject to so-called

69 *See* Missoula Plan, Policy and Legal Overview, Attachment A at 5.

70 *ISP Remand Order* at ¶52. *See also, Louisiana PSC*, 476 U.S. at 375 n. 4 (setting out the "impossibility exception").

reciprocal compensation. As explained above, Congress, as of February 1996, gave State commissions the jurisdiction to set reciprocal compensation rates, not through the pre-existing general intrastate reservation of Section 2(b), but through the explicit grants of Sections 252(c)(2) and 252(d)(2). The impossibility exception had been articulated to operate along the general dividing line between interstate versus intrastate matters where particular jurisdictional questions are not resolved by the statute, not the narrow field of 251(b)(5) reciprocal compensation rates, for which jurisdiction is specifically addressed in the 1996 Act. Stated differently, the issue of the Commission's Section 251(b)(5) authority *vis-à-vis* reciprocal compensation is a distinction between designing a rate making methodology (over which the Commission has jurisdiction) and actually establishing rates (authority explicitly given to the States), whereas the limit of its authority pursuant to Section 2(b) is a generally stated interstate-intrastate distinction. Thus, the impossibility exception cannot even be invoked in the context of ratesetting for Section 251(b)(5) traffic because Congress has already drawn the lines of jurisdiction clearly.

Furthermore, even assuming *arguendo* that the impossibility exception somehow applied in the context of 251(b)(5), preemption is not warranted here as the Commission cannot satisfy all three prongs of the impossibility test. As explained above, *Louisiana PSC's* "impossibility exception" applies when: (1) the matter to be regulated has both interstate and intrastate aspects, (2) Commission preemption is necessary to protect a valid federal regulatory objective, and (3) state regulation would negate the exercise by the Commission of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects.[71]

Here, preempting State commissions' authority to set reciprocal compensation rates would not protect a *valid* federal regulatory objective. The Plan's supporters assume that identical rates among intrastate access, interstate access, and reciprocal compensation, regardless of whether the States have jurisdiction over intrastate access and reciprocal compensation in the first instance, is a federal objective that allows preemption. However, as explained in the Introduction, a very large number of rate disparities persist in the Plan.[72] Consequently, even if the Commission were able to preempt the States, the Plan is so fraught with rate disparities and other inequities that the preemption would not result in the Commission achieving its expressly stated regulatory goals.[73] Moreover, the "impossibility exception" is a narrow one, and the Commission must show that all aspects of state regulation that are preempted thwart federal policy.[74] This test is nigh impossible to meet when the Congress expressly grants authority to the States in the area under review, as it has here.

Moreover, the final prong of the impossibility exception – regulation of the interstate aspects of the matter cannot be separated from regulation of the intrastate aspects – cannot be satisfied for reciprocal compensation traffic. It is quite possible to determine the

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71 *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990), *citing Illinois Bell Tel. Co. v. FCC,* 883 F.2d 104, 113 (D.C.Cir.1989), *National Ass'n of Regulatory Util. Comm'rs v. FCC,* 880 F.2d 422, 431 (D.C.Cir.1989).

72 *See also*, Attachment 1.

73 This is not to say that if rates were unified, the Joint Commenters would concur that mere unification would represent a valid regulatory objective warranting preemption. Rather, the Commission can achieve most, if not all, that unified rates purportedly address – reducing remaining arbitrage opportunities – by addressing "phantom traffic" issues and clarifying intercarrier compensation obligations regarding VoIP traffic. *See* Section VII, *infra.*

74 *People of the State of California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990).

jurisdiction of Section 251(b)(5) traffic – assuming such jurisdictional distinctions make sense for reciprocal compensation traffic[75] – certainly to the same extent as other switched traffic can be jurisdictionalized and pursuant to the same principles. Such traffic does not, for instance, have the characteristics of ISP-bound traffic, in which any dial-up connection to the Internet may involve both intrastate and interstate aspects that are not readily quantified. Industry standard practice provides that reciprocal compensation calls are jurisdictionalized and rated by comparing the originating and terminating NPA-NXXs of the calling and called parties (which are proxies for the geographic end-points of a call), and the Missoula Plan even advocates formal adoption of that long-standing approach as a solution to the issue of "phantom traffic."[76] As such, there is simply no valid justification for preempting Congressionally granted state ratemaking authority here under the "impossibility exception," assuming it even theoretically applied in these circumstances.

3. The States' authority over reciprocal compensation rates cannot be the subject of forbearance

In a last ditch attempt to provide a basis for the Commission to implement the Plan's reciprocal compensation provisions, the Plan foregoes the jurisdictional debate altogether and advocates that the Commission forbear from enforcing Sections 252(c)(2) and 252(d)(2) of the Act, which gives the States authority over reciprocal compensation rates, as discussed above.[77] This the Commission cannot do. Section 10 of the Act provides

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75 Indeed, the Congress treated all Section 251(b)(5) reciprocal compensation in one category regardless of its traditional jurisdiction. Contrary to the result the "impossibility exception" otherwise might lead to in such circumstances, Congress gave the States, not the Commission, over such traffic. As such, Sections 251(b)(5), 252(c)(2), and 252(d)(2) almost amount to a *reverse* Congressionally-mandated impossibility exception for reciprocal compensation traffic.

76 *See* Missoula Plan at 25, §II.D.

77 Missoula Plan, Policy and Legal Overview, Attachment A at 7.

> the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that -- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[78]

Subsection (b) of the statute provides that the Commission may use a finding that granting forbearance "will enhance competition among providers of telecommunications services" as the basis for satisfying the public interest prong of the statute.[79]

The Plan's supporters argue that Section 10 gives the Commission authority to forbear from "any provision of th[e] Act."[80] However, the Plan fails to acknowledge that the opening words of Section 10 quoted above limit the Commission to forbearance only from those provisions over which it has authority to apply or enforce in the first instance: "[T]he Commission shall forbear from applying any regulation or any provision of this Act . . .." The threshold question is whether the provision in question is one that, without forbearance, the Commission, rather than another regulatory body, is charged with applying. Where the Congress charged the States, as opposed to the Commission, to apply a section of the Act to carriers or services, the Commission is simply unable to *forbear from applying* that provision due to its *inability to apply* that provision in the first place.[81] For example, the Commission could no more

78 47 U.S.C. §160(a).

79 47 U.S.C. §160(b).

80 Missoula Plan, Policy and Legal Overview, Attachment A at 7.

81 Of course, if the provision which charges the States to act is dependent upon another provision with respect to which Congress confers jurisdiction on the Commission, then

forbear from the requirement that State commissions shall set reciprocal compensation rates as required by Sections 252(c)(2) and 252(d)(2) than it could forbear from State commissions' authority to approve interconnection agreements pursuant to 252(e) of the Act.

Additionally, forbearance is only appropriate when market forces are such that the Commission is able to conclude *that regulation is no longer necessary.* Indeed, the Commission has previously found that the first prong of the forbearance test can be satisfied where recent marketplace developments events undermine the Commission's prior decisions.[82] Here, there are no pro-competitive market forces or changed circumstances that would warrant forbearance from setting reciprocal compensation rates altogether. To the contrary, in fact, the Plan is highly regulatory in nature and firmly recognizes the need for reciprocal compensation charges. The Commission, were it to follow the forbearance course the Plan advocates, would simply be replacing Congressional requirements with a different set of Commission-adopted regulations. This would violate Section 10 at its heart. Moreover, when the Commission forbears from applying a statutory provision, it does not repeal that part of the Act. Rather the application of that provision is simply suspended. That provision is still part of the Act, and the Commission must both respect it and act consistently with it when adopting regulations. Yet the Plan's supporters advocate in this instance that the Commission not simply forbear but *replace* portions of the Act with a framework of its own design, which the Commission is unable to do. The

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the Commission can, in a sense, indirectly forbear. Thus, for example, to the extent the Commission forbears from requiring an ILEC to provide particular unbundled network elements under Section 251(c)(3) or 251(d)(2), the States can no longer apply the Section 252(d)(1) pricing standard to set rates for those unbundled network elements. But this type of indirect forbearance is not what the Plan's supporters have in mind.

82 *See Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. §160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171 (rel. Oct. 18, 2004) ("*Core Forbearance Order*") at ¶¶20-24 (finding that recent industry statistics indicate that expansion of the arbitrage opportunity presented by ISP-bound traffic is unlikely to occur given declining usage of dial-up ISP services).

Commission cannot lawfully forbear from application of Sections 252(c)(2) and 252(d)(2) of the Act in order to pave the way for the Commission to assume the role granted to the States by Congress.[83] At bottom, forbearance authority is just that, the authority to forbear. It is not authority to repeal and legislate anew.

In light of the foregoing, the Commission must reject the Missoula Plan's provisions that would have the Commission set reciprocal compensation rates.

B. The Plan Would Set Reciprocal Compensation Rates Without Regard for the Applicable Statutory Pricing Standard and Long-Standing Commission Policies

Reciprocal compensation for traffic exchanged under Section 251(b)(5) is not only to be established by the States, it is subject to the specific pricing standard set forth in Section 252(d)(2). The Missoula Plan completely ignores this standard, proposing arbitrarily low rates that clearly violate the statutory standard.[84] The Plan, in fact, does not claim to use any standard at all when proposing the ultimate rate for Track 1 carriers of $0.0005 per minute for access and reciprocal compensation traffic.[85] No ILEC, to the Joint Commenters' knowledge, has ever submitted a cost study supporting such a low rate for the transport and termination of reciprocal compensation traffic. As discussed below, States have set the rates four to six times higher than this. Apart from the proposed rates' statutory infirmities, amplified in this subsection, the Plan's rates are anti-competitive because they do not allow terminating carriers to

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83 Arguably, the only way the Commission could attempt to eliminate State commissions' authority to set reciprocal compensation rates would be to eliminate the entire framework for reciprocal compensation it implemented pursuant to its authority under Section 251(b)(5), the consideration of which, by an stretch of the imagination, is not before the Commission in this docket.

84 The Plan utilized no standard at all when proposing the ultimate rate for Track 1 carriers of $0.0005 per minute for access and reciprocal compensation traffic.

85 Missoula Plan, Executive Summary, at 4.

recover their costs,[86] a situation which harms the carrier, in any given interconnection arrangement, that terminates the greater amount of traffic originated by the other.[87]

If an ILEC and another carrier cannot agree to rates for the transport and termination of Section 251(b)(5) traffic, Section 252(d)(2) provides the pricing standard under which such rates must be established. In order for such rates to be just and reasonable, the terms and conditions of reciprocal compensation must provide for the recovery by each carrier of its "costs associated with the transport and termination on [that] carrier's network facilities of calls that originate on the network facilities of the other carrier."[88] A "reasonable approximation of the additional costs of terminating such calls" suffices, according to the statute.[89] As an alternative to compensation based on "additional costs," the statute allows for bill and keep arrangements, as has long been recognized, and which many carriers have agreed to in some of their interconnection agreements.[90]

While the Missoula Plan would not foreclose bill-and-keep arrangements voluntarily agreed to between an ILEC and a non-ILEC, it does establish the reciprocal compensation rates of the Plan as the "default" where other rates or bill and keep arrangements are not mutually agreed to by the carriers.[91] Thus for example, if two carriers cannot agree on a

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86 Because the Plan does not allow terminating carriers to recover their costs, the Plan may constitute an unconstitutional taking of property under the Fifth Amendment.

87 Under the Plan, some carriers, principally ILECs, can offset the below-cost reciprocal compensation rate, in part if not completely, depending upon the balance of traffic, by assessing a markedly above-cost tandem transit rate. *See* Section III.E.2, *infra*. While it is not clear that the ILECs had this in mind when it set the two sets of reciprocal compensation and tandem transit rates, there is no doubt that the juxtaposition of the two rates strongly discriminates against CLECs and other non-ILEC competitors.

88 47 U.S.C. § 252(d)(2)(A)(i).

89 *Id.* § 252(d)(2)(A)(ii).

90 *Id.* § 252(d)(2)(B)(i).

91 Missoula Plan at 36-41, §II.E.5.

reciprocal compensation rate between them, presumably the States, in "arbitrating" the dispute would have no choice but to adopt the "default rate," since a State commission's arbitration decision must be consistent with the regulations of the Commission.[92] The Plan makes no pretext that these "default" rates, *e.g.*, \$0.0005 for Track 1 carriers by Step 3, for example, are in any way related to the additional costs of such carriers as they perform the functions of transport and termination.

Indeed, the clear evidence, based upon ten years of experience implementing the Act, is that the Plan's "default" rates are arbitrary. Numerous State commissions have conducted in-depth proceedings to establish the TELRIC costs associated with the functions performed in the transport and termination of traffic. The resulting State-approved rates are typically much higher than the \$0.0005 per minute rate the Plan would force upon Track 1 carriers. In California, for example, the Public Utilities Commission recently examined the TELRIC costs of Verizon and AT&T for end office switching – only one component of transport and termination – and found them to be *double* the Plan-proposed reciprocal compensation rates for Track 1 carriers.[93] In Missouri, a combined rate incorporating TELRIC costs for end office switching,

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92 *See* 47 U.S.C. § 252(c)(1) (in arbitrating interconnection agreement provisions, "a State commission shall ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251"); *see also* 47 U.S.C. § 252(e)(2)(B) (an arbitrated provision may be rejected by a State commission only, *inter alia*, if it is inconsistent with Sections 251 and 252 and the Commission's regulations implementing those sections).

93 *See Joint Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050,* Order Correcting Errors, D.05-03-026, issued March 29, 2005; *see also*, CPUC Memorandum dated Sep. 29, 2006, comparing the CPUC's TELRIC rates for SBC and Verizon with the rates proposed by the Missoula Plan and recommending that the CPUC file comments on the Missoula Plan, available on the Web at www.cpuc.ca.gov/Published/Report/60558.htm. The Joint Commenters acknowledge that the section 252(d)(2) pricing standard does not apply to Track 2 and Track 3 carriers that are not subject to Section 251(b) obligations under Section 251(f) of the Act.

tandem switching, and tandem switched transport was recently set at roughly $0.003 per minute.[94] In Michigan, the composite rate for end office switching, tandem switching and tandem transport termination is $0.001835 per MOU.[95] In Wisconsin, the rate for those functions has been set at $0.011473.[96] Similarly, the Kansas Commission set rates for the same transport and termination functions at approximately $0.00225 per minute.[97] Qwest's Third Amended Statement of Generally Available Terms ("SGAT") reveals the reciprocal compensation rate in Arizona is $0.002220, which covers end office switching, tandem switching, and tandem transmission.[98] Verizon's tariffed rates, typically reflecting State Commission orders establishing TELRIC costs, are also in the range or two or three tenths of a cent per minute. In New York, for example, Verizon offers reciprocal compensation rates of $0.001069 per minute, when the delivery is at the end office, and $0.002893 per minute, when the hand off is at the tandem.[99] Comparable Massachusetts rates are $0.001127 and $0.002075,

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94 *See, e.g., Interconnection Agreement-Missouri between Southwestern Bell Telephone, L.P., d/b/a SBC Missouri and NuVox Communications of Missouri, Inc., Appendix 6c, Pricing Schedule; and Attachment 12, Intercarrier Compensation,* Order Approving Arbitrated Interconnection Agreement issued in Case No. TK-2006-0049, August 8, 2005 (End Office Switching at $0.00162; Tandem Switching at $0.001231; and Transport/Termination at $0.000156).

95 *See Interconnection Agreement between AT&T-Michigan and XO Communications*, Exhibit A, Case No. U-13531.

96 *See Interconnection Agreement between MCI and Wisconsin Bell, Inc.*, Attachment A.

97 *See, e.g., Interconnection Agreement-Kansas between Southwestern Bell Telephone, L.P. d/b/a SBC Kansas and NuVox Communications of Kansas, Inc., Appendix 6b, Pricing Schedule; and Attachment 12, Intercarrier Compensation,* Final Order Approving Contracts issued in Docket 05-BTKT-365-ARB, September 14, 2005 (End Office Switching at $0.00131; Tandem Switching at $0.000789; and Transport/Termination at $0.000157).

98 Qwest Arizona SGAT at Exhibit A, 3rd Amended, Feb. 2, 2005.

99 *See* Verizon' NYPSC No. 8 Tariff, §35.6.2.

respectively.[100] All of these cost-based charges are well above the unjustified rate the Plan proposes for reciprocal compensation.[101]

Reciprocal compensation rates that are significantly below TELRIC costs for the functions performed, as the Plan's rates are, would violate Section 252(d)(2) on its face.[102] Unlike the Commission's current rules, the Plan does not recognize that a non-ILEC Track 1 carrier may have higher costs than an ILEC. Under existing Commission regulations, an ILEC and non-ILEC charge each other the same rates, typically based on the ILEC's costs (or at least the rate it proposes to charge). However, a non-ILEC may charge an asymmetrical rate if it provides adequate demonstration that it has higher per unit costs, *e.g.*, as a result of its up front costs in establishing its facilities-based network.[103] Thus, facilities-based carriers with higher per unit costs will not, under the Plan, have the chance to recover those costs. The only carrier-

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100 *See* Verizon's DTE MA No. 17 Tariff, Part M, §§3.1.1, 3.1.2.

101 The Plan also proposes that, as of Step 4, for Track 1 and 2 carriers, interconnection trunks will be available at interstate special access tariffed rates. Missoula Plan at 31, §II.E.3.c.iii.(1). In the *Triennial Review Remand Order*, the Commission confirmed that ILECs have an obligation to provide interconnection facilities under Section 251(c)(2). *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003). ¶ 366 ("*Triennial Review Order*") ("TRO"). Thus, these facilities must be available at TELRIC under the Section 252(d)(1) pricing standard, under which the State commissions have the jurisdiction to set the rates. Accordingly, this is yet another way that the Plan would violate Sections 251(c)(2) and 252(d), as well as impermissibly intrude on State jurisdiction.

102 The solution is not to forbear from the enforcement of Section 252(d)(2) as the Missoula Plan supporters glibly suggest. The Commission cannot, under Section 10 of the Act, forbear from a statutory provision in order to replace it with a Commission-initiated regulation that would not be permitted under the statute. That would simply turn the Commission into an extra-legislative body that could rewrite Title II of the Act at will, which was not what the Congress envisioned when it gave the Commission forbearance authority. Moreover, as explained above, Section 252(d)(2) does not apply to the Commission, but to the State commissions, and it is thus not a provision that the Commission applies or enforces (except when it stands in the shoes of the State commissions as arbitrator pursuant to the extraordinary circumstances that trigger Section 252(e)(5) of the Act.)

103 47 C.F.R. § 51.711(b).

carrier asymmetries that the Plan recognizes (indeed, creates) are in the case of traffic exchanged between carriers of different Tracks, a situation that is fundamentally at odds with the Commission's current interpretation of the Act and policy determination that rates between any two carriers should, in general, be symmetrical.[104] In this regard, among others, the Plan would represent a clear policy step backwards to the pre-1996 Act era when ILECs gouged competitive carriers and sometimes required them to pay for the privilege of terminating ILEC-originated traffic.

The Plan is also unclear whether terminating carriers with only one switch will be entitled to charge only the end office rate for reciprocal compensation or, if they provide coverage with that switch that is comparable in geographic scope to a tandem switch, which many switches in fiber-ring architectures do, they are entitled to received the "tandem rate" (consisting of the rates for tandem switching, tandem switched transport, and end office switching).[105] The current Commission rules provide for compensation at the "tandem rate" when a competitor's switch serves an area comparable in geographic scope to a tandem switch, a matter frequently arbitrated by the State commissions.[106] The rule reflects the Commission's understanding that the different architecture of a CLEC network does not preclude its (typically) single switch from providing functionality equivalent to an ILEC tandem switch. The failure of the Plan to preserve this requirement would discriminate against non-ILECs that have deployed

104 *See, e.g., Local Competition Order* at ¶¶1085-93. To the extent an ILEC is not bound by Section 251(b)(5), the Commission's rules calling for symmetrical reciprocal compensation, subject to certain exceptions, do not apply.

105 *See* Missoula Plan at 35-36, §§II.E.4, II.E.5. ("Termination charges shall cover the components of any dedicated transport, common transport or tandem switching used to terminate traffic within a carrier's network and end office switching or equivalent functionality;" "Traffic exchanged between an ILEC and a non-ILEC: The non-ILEC will charge the same reciprocal compensation rate charged by the ILEC for performance of comparable functions").

106 *See* 47 C.F.R. 51.711(a)(3).

more efficient architectures requiring fewer switches and would represent an anti-competitive step back in policy.

C. The Plan Strips Non-ILEC Carriers of Their Ability to Request Interconnection at Any Feasible Point

The 1996 Act set up a two-tiered interconnection scheme. All carriers are obligated under Section 251(a)(1) of the Act to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. ILECs, in light of their dominant market shares and legacy networks built up with monopoly profits, are subject to a higher and more specific standard. One of the fundamental rights that telecommunications carriers received from Congress was the right to interconnect with an ILEC's network "at any technically feasible point within the carrier's network" "for the transmission and routing of telephone exchange service and exchange access" "on rates, terms, and conditions that are just reasonable, and nondiscriminatory, in accordance with the terms and conditions of the [interconnection] agreement [with the requesting carrier] and the requirements of [section 251] and section 252."[107] The statute reflects a policy determination that, until the competitive playing field is leveled, neither the ILEC's rights nor its obligations regarding interconnection are reciprocal with those of the requesting carrier (unless that carrier is also an ILEC).[108]

The Missoula Plan would all but eliminate this two-tiered Congressional interconnection framework in several ways. In most important respects, under the Plan, a Track 1 non-ILEC's rights and obligations in the future would be no different than those of a Track 1 ILEC. Both sets of carriers would be subject to the same requirements regarding the designation

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107 47 U.S.C. §§ 251(c)(2)(B), (C), & (D).

108 The playing field would be leveled only when the Commission determines, if ever, that it should forbear from enforcing an ILEC's Section 251(c)(2) interconnection obligations, a matter which has never been presented to the Commission, let alone ruled upon.

of so-called "Edges" and the options for interconnection that they must accommodate, the one material distinction being that the Plan recognizes that ILECs *must* permit physical and virtual collocation. However, both sets of carriers must allow two of the four types of interconnection arrangements set forth in Section III.C.1.c. of the Plan.[109] Therefore, a CLEC, like any Track 1 ILEC, would have to allow for *direct* interconnection upon request from another Track 1 carrier, which has not previously been required. There is not any justification for such a requirement given the plain language of Section 251(a)(1), which imposes no more than an *indirect* interconnection requirement on any carrier that is not an ILEC. Whereas the ILEC under Section 251(c)(2) expressly must allow interconnection at technically feasible points on *its* network, the Plan would force CLECs and other non-ILECs to designate points on their own networks where other carriers can interconnect.

The Plan's supporters offer no public policy reason why the current set of regulations and decisions, including numerous State arbitration decisions, entitling non-ILEC carriers to interconnect on an ILEC's network at any technically feasible point should be altered. The Commission got it right ten years ago when it rejected a proposal of the Rural Telephone Coalition to set points of interconnection: "the Act does not permit incumbent LECs to deny interconnection . . . for any reason other than a showing that it is not technically feasible."[110] The Plan would allow the ILECs to do what the Commission concluded it did not have the power to do. The Commission's conclusions regarding the soundness of letting the requesting carriers to select the points of interconnection, provided they are technically feasible, ring just as true today: granting the CLECs that right "lowers barriers to competitive entry for carriers that have

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109 *See* Missoula Plan at 47. The Plan is unclear regarding whether ILECs must provide, in addition to collocation, two of the remaining three types of interconnection or must only provide two of the four types, one of the two being collocation.

110 *Local Competition Order, supra,* 11 F.C.C. Rcd at 15606, ¶ 206.

not deployed ubiquitous networks by permitting them to select the points in an incumbent LEC's network at which they wish to deliver traffic."[111]

While the Plan suggests that a requesting carrier would retain the ability under Section 251(c)(2) to seek interconnection at points other than an ILEC's designated Edge, it is hard to understand how that right could be enforced without gutting the Plan, which surely its supporters did not intend. If a carrier can request interconnection at points other than the Edges on the same terms as it may interconnect at the Edges, the ILECs' designation of Edges becomes meaningless unless there is a penalty associated with seeking interconnection at a technically feasible point other than an Edge. The likely penalty, of course, is that the ILEC will be able to assess higher or additional charges at a point other than a designated Edge. If this were the case, because interconnection at non-Edge points objectively imposed more costs on the ILECs, that might be justified (consistent with other statutory requirements, such as a competitor's entitlement to a single point of interconnection).[112] But the charges cannot be increased simply on the basis of the interconnection point not being an ILEC's designated Edge. Such additional charges for interconnection at a non-Edge would have to comply with the interconnection pricing standard of Section 252(d)(1). Likewise, charges for interconnection at an Edge must comply with that pricing standard – or the Plan is in conflict with Sections 251(c)(2) and 252(d)(1). In short, the Edge concept, as proposed, cannot be reconciled with the Act.

D. <u>The Plan Improperly Forces Certain Inefficient Interconnection Architectures on Non-ILEC Carriers in Contravention of the Act</u>

Not only does the Missoula Plan compromise requesting carrier's entitlement to connect at any technically feasible point on an ILEC's network, the Plan, without justification,

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111 *Id.* ¶ 209.

112 *See, e.g., id.*

turns the existing and well-established framework for interconnection under the 1996 Act on its head in other ways. The Plan would totally eviscerate a decade of State and federal implementation of the local market-opening provisions of the Act by skewing the interconnecting parties' physical interconnection and financial responsibilities in favor of the ILECs, and affirmatively to the detriment of CLECs. The Plan's interconnection provisions favor ILECs to the extent they still operate old hub-and-spoke networks. At the same time, the proposals harm CLECs that have implemented newer, more efficient network architectures. As such, the Plan is contrary to one of the Commission's principal policy goals in this proceeding that Commission action on intercarrier companion promote efficient competition and efficient investments in network facilities.[113]

The interconnection provisions of the Plan would undermine three basic principles that have been well-settled in cases interpreting the 1996 Act: (1) that CLECs are entitled to interconnect with an incumbent's network at a single point of interconnection ("SPOI"), located at the discretion of the CLEC, subject to certain constraints; (2) that carriers may not assess terminating carriers charges for traffic originating on their own networks; and (3) that carriers are entitled to recover an appropriate amount of their costs when they provide the facilities enabling another carrier to deliver its originating traffic to the providing carrier's network.

By abandoning these existing, fundamental precepts, the Missoula Plan unjustifiably assumes an environment where ILEC obligations, rather than being governed by Section 251(c)(2) as they are today, will move more toward simplified and generally applicable 251(a) duties. As shown below, however, the Missoula Plan's not-so-subtle-shift toward a

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113 *See Intercarrier Compensation FNPRM, supra,* ¶¶31, 33.

251(a)-only world ignores and undermines the obligations imposed on ILECs pursuant to Section 251(c)(2) and the policies of the Commission and the States that recognize the vital role that incumbent networks play, because of their historical ubiquity, in the development of competition. Accordingly, those parts of the Plan regarding interconnection architectures must be rejected as unlawful and contrary to the public interest.

1. The Plan's "Edge" Requirements Are at Odds With a CLEC's Right to Select a Single Point of Interconnection

The Commission has interpreted Section 251(c)(2) of the Act to permit non-ILEC carriers to establish a single POI on an ILEC's network in a LATA for the delivery of its originating traffic. The Commission addressed this question and ruled definitively that CLECs have the legal right under Section 252 to select a single POI on the ILEC's network. In the *Local Competition Order*, the Commission stated, "[t]he interconnection obligation of section 251(c)(2), discussed in this section, *allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs*, thereby lowering the competing carriers' costs of, among other things, transport and termination of traffic."[114]

The Commission has consistently applied the Act to prevent an ILEC from increasing the CLEC's costs by requiring multiple points of interconnection, or by ILEC efforts to shift costs to CLECs in exchange for obtaining the right to establish a single POI. For example, in its order approving Southwestern Bell Telephone's ("SWBT") application for Section 271 authority in Texas, the Commission reiterated that CLECs have the option to interconnect at as few as one technically feasible point within each LATA: "New entrants may select the most efficient points at which to exchange traffic with incumbent LECs, thereby

114 *Local Competition Order*, ¶172 (emphasis added).

lowering the competing carriers' cost of, among other things, transport and termination."[115] Further, the Commission stated in that Order, "section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. *This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA*."[116] And in April 2001, the Commission interpreting Section 251(c)(2) succinctly concluded that "an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA."[117] State commission arbitration decisions have consistently applied the Commission's guidelines in particular cases to ensure that non-ILEC carriers may choose to interconnect with an ILEC at only one point within each LATA.

Federal courts have also held that, under the Act, CLECs may interconnect at a single POI. In one case, the Third Circuit reversed and remanded a Pennsylvania Public Service Commission decision requiring WorldCom to interconnect in each access tandem serving area in Bell Atlantic-Pennsylvania's network.[118] The Court explained that, under the Act, a CLEC's decision on where or where not to interconnect is subject only to concerns of technical feasibility.[119] The Third Circuit held that requiring multiple interconnection points could be costly and would be inconsistent with the goals of the Act.[120] Specifically, the Court held,

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115 *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, ¶78 (2000).

116 *Id., citing Local Competition Order*, ¶¶172, 209 (emphasis added).

117 *In the Matter of Developing a Unified Intercarrier Compensation Mechanism, Notice of Proposed Rulemaking*, CC Docket No. 01-92 (rel. April 27, 2001), ¶112.

118 *MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 517 (3rd Cir. 2001).

119 *Id.*, 271 F.3d. at 518.

120 *Id.* at 517.

> To the degree that a state commission may have discretion in determining whether there will be one or more interconnection points within a LATA, the commission, in exercising that discretion, must keep in mind whether the cost of interconnection at multiple points will be prohibitive, creating a bar to competition in the local service area. If only one interconnection is necessary, the requirement by the commission that there be additional connections at an unnecessary cost to the CLEC, would be inconsistent with the policy behind the Act.[121]

In another case, US WEST appealed an Arizona Corporation Commission arbitration decision allowing AT&T to interconnect at a single POI on US WEST's network.[122] The Ninth Circuit held that AT&T could choose to interconnect at a single POI. The Court stated "[a]n incumbent carrier denying a request for interconnection at a particular point must prove interconnection at that point is not technically feasible" and held that, because US West had not provided evidence that interconnection at a single POI was technically infeasible, AT&T was permitted to interconnect at a single POI.[123]

The Plan's "Edge" concept urges the Commission to reformulate its own interpretations of the Act contrary to its past determinations and the decisions of the courts. Under the Edge provisions of the Plan, each carrier, *inter alia,* would be required to establish one or more locations on its network – in its discretion – where it will receive traffic from other carriers for routing within its network.[124] Subject to certain exceptions under the Plan, a carrier would have to designate its Edge at an end office, an access tandem, a Point of Presence ('POP"), a trunking media gateway, or a mobile switching center.[125] A carrier would be required

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121 *MCI Telecommunication Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d. at 517 (internal citations omitted).

122 *US West Communications, Inc. v. Jennings*, 304 F.3d 950, 960-961 (9th Cir. 2002).

123 *Id.*

124 Missoula Plan at 42, §III.B.

125 *Id.* at 43-45, §§III.B.1.e.i-v.

to designate at least one Edge in each LATA in which it receives traffic from other carriers,[126] and may agree with another carrier to designate that other carrier's facilities within the LATA as its own Edge. A carrier would in no way be limited to a single Edge, and may designate numerous Edges in a single LATA, coming close to (if not achieving) what the ILECs have long unsuccessfully sought before the Commission and State regulators, an interconnection point in every rate center.

Because the Plan's Edge concept allows for ILECs to designate multiple locations on its own network where interconnecting carriers must send their originating traffic, the Edge framework contradicts a telecommunications carrier's right under federal law to request interconnection at a single technically feasible point on the ILEC's network. The Edge framework also represents a policy promoting inefficient interconnection architectures because it favors historic networks over more modern, technologically advanced networks, something which, to date, state and federal regulators have taken care to avoid. The current policies and regulations of the Commission permit a CLEC, for example, to interconnect its fiber-ring network in a market to a single location on the ILEC's network without incurring the unnecessary expense and delay associated with replicating or shadowing the ILEC's century-old, hierarchical network architecture; a SPOI is simply the most efficient way for a competitive carrier to interconnect to an ILECs network. By contrast, the Edge concept, if adopted, would undermine the efficiencies of the CLECs' fiber-ring architecture in which one switch and the fiber ring provides the functionality of, and displaces the need for, a tandem switch, multiple end offices, and various interoffice trunks. The Edge concept would force CLECs to needlessly undergo massive and costly re-grooming of their networks, by deploying many more circuits to

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126 *Id.* at 45,§III.B.2.

deliver their traffic for termination to ILEC networks than are needed today. In many situations, by contrast, the ILEC may have to do little more to establish an Edge than to erect a frame and some cross-connects. This result would frustrate the Commission's stated goal in this proceeding to promote efficient networks and competition.

The legal or public policy justification required for such a radical departure from existing precedent does not exist. Indeed, the Plan offers no policy justifications for having the Commission fundamentally reverse direction at this point. The motivation of the Plan's supporters must be seen for what it is, an effort to brush aside a decade of federal and State cases to obtain the result they fought for, and lost, following the passage of the 1996 Act. Deployment of competitive networks has not proliferated – if it ever will – so as to warrant all non-ILECs to regroom their networks to interconnect at multiple points designated by the ILECs within each LATA. Accordingly, the Commission cannot lawfully implement the Edge concept and should not do so as a policy matter.

2. The "Edge" Concept Essentially Requires CLECs to Pay for Transporting ILEC-Originated Traffic and Does Not Allow CLECs to Recover Their Interconnection Costs

Under the Missoula Plan, contrary to existing policies and regulations, a non-ILEC currently interconnected at an ILEC's local tandem switch (or end office switch) would be required to take on the burden of transport trunks and facilities spanning an interconnection with an ILEC network *in both directions*.[127] Specifically, the Plan states that "[t]he non-ILEC will provide, at its own expense, the transport to interconnect its network with a Track 1 ILEC's Virtual Edge for traffic exchanged *in both directions* over this interconnection arrangement with

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127 Missoula Plan at 32, §II.E.3.d.ii.2.(b).

the ILEC."[128] The Virtual Edge is defined as a "Track 1 ILEC's end office or local tandem."[129] Under the Commission's current regulations and interpretations of Section 251(c)(2), as explained more fully below, the interconnection facility between two interconnected LECs' networks carrying traffic between the carrier's respective switches is a facility for which *each* is financially responsible in proportion to its originating traffic.[130] These reciprocal requirements are typically embodied in carriers' interconnection agreements. ILECs frequently have challenged claims by non-ILECs to charge for the use of these interconnection facilities, and by this proposal, the Plan's supporters improperly seek to modify their current interconnection agreements to relieve them of continuing to be financially responsible for their use of facilities provided by the non-ILEC to deliver their originating traffic to the non-ILEC. The Commission should not condone such blatant disregard for Commission policies promoting competition, the Act, its own regulations, and existing interconnection agreements by even considering to adopt this aspect of the Plan.

The Plan would impose one-sided transport-related obligations on non-ILECs in other situations as well. The Plan states that "[i]f a carrier elects to physically interconnect with an ILEC's network at a location other than the ILEC's Edge or another location specified in the Plan by asserting its rights under Section 251(c)(2), the Plan's default rules concerning the financial obligation for the transport of traffic will apply."[131] That is, the Plan provides that CLECs and other Track 1 carriers *when asserting their statutory rights of interconnection at any*

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128 *Id.* (emphasis added).

129 *Id.* at 32, §II.E.3.d.ii.

130 As noted in note 101, *supra*, the Plan also proposes to allow ILECs to charge special access rates for interconnection trunks, in violation of Section 251(c)(2).

131 *Id.* at 42, §II.A.2.

technically feasible point will pay for both carriers' interconnection transport costs.[132] Any proposal that penalizes a carrier for asserting its statutory rights must be rejected summarily as contrary to the Act and public policy. Moreover, these transport provisions of the Plan, if adopted, would allow ILECs to shift their post-1996-Act transport financial obligations to competitors, further hamstringing the continued development of facilities-based competition.

The Plan provides further that where traffic between a Track 1 non-ILEC and Track 1 ILEC is out-of-balance (by more than 3:1), with the non-ILEC terminating more of the ILEC's originating traffic, the non-ILEC assumes the burden of inter-network transport *in both directions*.[133] Like the other provisions just described, this clause of the Plan requiring one carrier to pay for transporting the originating carrier's traffic flies in the face of sound pro-competitive policy, the statute, the Commission's rules and orders, and parties' interconnection agreements. Even the Commission's *ISP Remand Order* did not impose on CLECs that terminated more than three times the amount of traffic as they sent to an ILEC the burden of picking up the transport costs for inter-network facilities associated with the originating carrier's costs.

At the dawn of the post-1996 Act era, the Commission clearly set forth the mutual financial obligations for inter-network transport that have guided ILEC and non-ILEC relations since. In the *Local Competition Order,* the Commission interpreted Section 251(c)(2) as requiring certain conditions placed on the facilities used to interconnect two networks provided by one of the two interconnecting carriers where one is an ILEC. The Commission, reacting to

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132 *See* Section III.D.1 of these Comments, *supra*. This provision of the Plan is particularly "interesting" as it clearly contemplates that it will exist *in addition to* Section 251(c)(2) rather than *in lieu of* Section 251(c)(2). However, as these comments demonstrate, the transport provision, like the Edge provision, is patently inconsistent with Section 251(c)(2) of the Act, as that section of the statute has been interpreted by both the Commission and federal courts.

133 Missoula Plan at 31, §II.E.3.d.i.

pre-Act conditions when the ILECs often charged competitors for transporting the *ILEC's* originating traffic between the two networks, as well requiring competitors to assume the costs of their own originating delivering traffic to the ILEC, required arrangements that were reciprocal, rather than one-sided.

Section 51.703(b) of the Commission's interconnection rules provides that "a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."[134] This rule prohibits carriers from shifting to other carriers the costs of transporting traffic to the point of interconnection, instead requiring each carrier to bear the responsibility for the costs of delivering its traffic to the network of other carriers for termination. The Commission amplified the basis for Section 51.703(b) of its rules in the *Local Competition Order,* stating:

> Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself.[135]

Section 51.703(b) of the Commission's rules was at issue in the Commission's *Virginia Arbitration Order.*[136] In that order, the Commission addressed, *inter alia,* the principles relating to the obligation of the originating carrier to pay for its transport costs to deliver its traffic to the other carrier's network. The ILEC in that matter, Verizon, proposed language that would have required AT&T to deliver its traffic all the way to the ILEC end office. The ILEC further proposed that if AT&T did not establish a POI at every ILEC end office, it would require

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134 47 C.F.R. § 51.703(b).

135 *See Local Competition Order,* ¶ 218.

136 *In re Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection*, 17 FCC Rcd 27039 (2002) ("*Virginia Arbitration Order*").

AT&T to pay for the transport costs that the ILEC incurred to deliver its own originating traffic from its originating switch to AT&T's switch or POI. The Commission rejected Verizon's proposed terms and found that its rules implementing the Act obligate ILECs to bear the cost of delivering traffic originating on their networks to interconnecting LECs' networks for termination.[137] The Commission explained that "this precept stems from rules 51.703(b) and 51.709(b), which on the one hand preclude all LECs from charging other carriers for local traffic that the LEC originates, and on the other hand permit carriers providing transmission facilities between two networks to recover from the other carrier the costs of the proportion of that trunk capacity used by [the] interconnecting carrier to send traffic that will terminate on the providing carrier's network."[138]

In a dispute between BellSouth and MCI, the Fourth Circuit underscored this point:

> In sum, we are left with an unambiguous rule, the legality of which is unchallenged, that prohibits the charge that SBC seeks to impose. *Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions.* Although we find some surface appeal in BellSouth's suggestion that the charge here is not reciprocal compensation, but rather the permissible shifting of costs attending interconnection, the FCC, as noted above, has endorsed cost-shifting related to interconnection only as it relates to the one-time costs of physical linkage, and in doing so, expressly declined the invitation to extend the definition of "interconnection" to include the transport and termination of traffic.[139]

As the above-cited precedent clearly demonstrates, it is well established under regulations implementing Section 251(c)(2) that ILECs must bear their fair share of

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137 *Id.*, ¶¶66-70.

138 *Id.*, n. 187 (emphasis added).

139 *MCImetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 881 (4th Cir. 2003).

interconnection transport costs for their own originating traffic. In an environment where two carriers must place facilities between their networks in order to facilitate the exchange of traffic between their customers, the only sound policy is for each carrier to bear a fair share of the costs for the interconnection facilities. It is impossible to imagine a different result which does not skew the playing field in favor of one of the carriers. The Missoula Plan, however, would shunt this policy and gut existing federal law by shifting the ILEC's financial responsibility to CLECs and other interconnected non-ILEC carriers, requiring the ILEC's competitors to bear a disproportionate share of (and in some cases, involving Track 3 carriers, all of) the costs of interconnection facilities between the parties' networks.[140]

Not only would competitive carriers have to pay for transport of ILEC-originated traffic in certain situations under the Plan, the CLECs and other non-ILECs operating under the Missoula Plan would lose the ability to fully recover for interconnection transmission facilities they have deployed under existing interconnection agreements (and Commission and State decisions) but the costs of which they have not fully recovered.[141] In effect, the transport provisions of the Missoula Plan in the scenarios described above would also eviscerate Rule 51.709(b), which provides that the cost of interconnection facilities should be shared by the parties based the proportion of trunk capacity used by the interconnecting carrier.[142] This rule has the same policy basis as Section 51.703(b), namely that the costs of inter-network facilities should be shared by both parties where they use them. Specifically, that rules states, in relevant part, that "the rate of a carrier providing transmission facilities dedicated to the transmission of

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140 Missoula Plan at 33-34, §II.E.3.e.

141 Under the Plan's proposed change of law provisions, ILECs could be expected to cease paying for interconnection facilities promptly after the passage of the Act for existing interconnection arrangements.

142 47 C.F.R. §51.709(b).

traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network."[143] The Commission explained in the *Local Competition Order,* in which it adopted this rule, that

> [t]he amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, *if the providing carrier provides one-way trunks that the interconnecting carrier uses exclusively for sending terminating traffic to the providing carrier, then the interconnecting carrier is to pay the providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier. Under an alternative scenario, if the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks*...Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier.[144]

So, under 51.709(b), if a CLEC established two-way trunks between itself and the ILEC, and the ILEC originates 40% of the traffic that flows over those trunks, then the ILEC is required to pay the CLEC for 40% of the cost of those trunks. Rule 51.709(b), like Rule 51.703(b), reflects the recognition that the utility and the value of the PSTN is increased as more carriers' users are interconnected, which may be better achieved through interconnection arrangements that are equitable for both parties. That premise underlying the Commission's interconnection rules is equally as valid today as it was in 1996, and there is insufficient justification for such a drastic change in regulatory course as the Plan proposes. As demonstrated above, the Missoula Plan's

143 47 C.F.R. § 51.709(b).

144 *Local Competition Order*, ¶1062 (emphasis added).

transport provisions are inconsistent with the Act, the Commission's rules, valid federal precedent, and sound pro-competitive public policy. Therefore, these provisions must be rejected.

E. The Plan's Tandem Transit Traffic Provisions Are Anti-Competitive and Unlawful

The Plan proposes very specific and detailed regulations regarding tandem transit services, by which one local exchange carrier provides indirect interconnection between two other local carriers for the routing and transmission of telephone exchange services.[145] Historically, these services have been provided by ILECs to their competitors and to neighboring ILECs, taking the form of making tandem switching and tandem transport functionalities available between two third-party local networks where two networks are not directly interconnected but are each directly connected to the ILEC. Compensation and other terms and conditions for tandem transit typically have been addressed in carrier interconnection agreements. The Commission itself has never adopted rules regarding tandem transit traffic.[146] Nonetheless, the matter has on many occasions been the subject of Section 252 arbitrations. CLECs have viewed an ILEC's provision of tandem transit service as required under Section 251(c)(2) of the Act, whereas ILECs have tended to view that obligation as voluntary (and not subject to arbitration under Section 252). CLECs have typically won the right to ILEC tandem transit service, and State commissions have frequently been required to arbitrate the rates for such services, often setting them at TELRIC levels associated with tandem switching and tandem transport.

145 Missoula Plan at 49, §III.D.

146 *Virginia Arbitration Order,* 17 FCC Rcd 27039, ¶115.

As discussed below, tandem transit service is an obligation of ILECs under the Act, but the Missoula Plan improperly treats the service as voluntary. Moreover, the Missoula Plan sets tandem transit service rates at unlawfully high levels that are also inherently inconsistent with other portions of the Missoula Plan. As with intrastate access charges and reciprocal compensation rates, the Plan improperly seeks to have the Commission preempt State commission authority to set tandem transit service rates. For each of these reasons, the Plan's provisions regarding tandem transit services should be rejected and the current regime allowed to stay in place.

1. An ILEC obligation to provide tandem transit service exists under Section 251(c)(2) of the Act and constitutes sound public policy

The provision of tandem transit service is essential to competition in communications markets. Without it, indirect interconnection would be a virtual impossibility, and competitive carriers would have to take the costly steps of establishing direct interconnection arrangements with all other carriers regardless of whether the traffic volumes exchanged with particular carriers economically justified such interconnection. Direct interconnection among themselves is not an obligation the Act imposed on non-ILECs.[147] ILECs, in contrast, have direct interconnection obligations with all requesting carriers and are legally obligated to provide transiting functions for telephone exchange traffic as part of these overarching interconnection obligations (and are entitled to recover their costs in doing so), unless they are exempt from Section 251(c) obligations pursuant to Section 251(f) of the Act. Under Section 251(c)(2) of the Act, ILECs are required to interconnect directly with requesting telecommunications carriers for the routing and transmission of telephone exchange service.[148] The Act does not require that

[147] 47 C.F.R. § 251(a)(1) (obligation of all telecommunications carriers to connect with other carriers directly or indirectly).

[148] 47 U.S.C. § 251(c)(2).

traffic exchanged through a Section 251(c)(2) arrangement be originated or terminated on the ILEC network. Accordingly, interconnection for purposes of carrying transit traffic between two competitive local exchange carriers that are directly interconnected with a given ILEC falls within the scope of that ILEC's Section 251(c)(2) obligation under the Act.

As noted above, various State commissions have looked at the question of whether an ILEC's provision of tandem transit traffic is obligatory. Some commissions have gone right to the heart of the matter and found that ILECs have a Section 251(c)(2) obligation to provide tandem transit service. According to the Missouri Public Service Commission, for example, the ILEC's obligation to provide tandem transit service is plain. The PSC explained:

> This intermediary carrier, for the purposes of the present discussion, is a dominant ILEC like SBC [now AT&T]. SBC is not indirectly interconnected to the two carriers in question, it is directly interconnected. Its duties are set out in § 251(c)(2). That section requires SBC to interconnect with any requesting carrier for the purpose of exchanging traffic. The statute does not specify that the traffic must be intended for termination, or that it must have originated, on the two [directly] interconnected networks.[149]

Other commissions have resolved the matter on the basis of policy, namely that the ILEC has traditionally provided the service since the passage of the 1996 Act, and have compelled the ILEC to continue to do so in order to preserve competitiveness in communications markets. Thus, for example, the Texas Public Utilities Commission, in February 2006, while not

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149 *Southwestern Bell Telephone Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement,* Final Arbitrator's Report, case No. TO-2005-0336, Section 1(C) (June 21, 2005). *See also, e.g., In the Matter of Joint Petition of NewSouth Communications Corp. et al. for Arbitration with BellSouth Telecommunications, Inc.*, Docket No. P-772, Sub 8, Docket No. P-913, Sub 5; Docket No. P-989, Sub 3; Docket No. P-824, sub 6; Docket No. P-1202, Sub 4, North Carolina Util. Comm'n, July 26, 2005 ("[t]he tandem transit function is a § 251 obligation and BellSouth must charge TELRIC rates for it"); *In re: Petition for Arbitration of CELLCO Partnership d/b/a Verizon Wireless*, Docket No. 03-00585, Tennessee Regulatory Authority, Order of Arbitration Award at 18 ("...the reciprocal compensation requirements of 47 U.S.C. § 251(b)(5) and the related negotiation and arbitration process in § 252(a) and (b) apply to traffic exchanged indirectly between a CMRS provide and ICO member").

taking on the issue of whether the statute required SBC to provide tandem transit service, ruled that

> requiring SBC Texas to provide transit services at cost-based rates will promote interconnection of all telecommunications networks. In the absence of alternative transit providers in Texas, the Commission finds that SBC Texas's proposal to negotiate transit services separately outside the scope of an FTA § 251/252 negotiation may result in cost-prohibitive rates for transit service.[150]

In other words, apart from the statutory obligation, given the general lack of alternative tandem transit service providers and the need for indirect interconnection, if non-ILECs are not to overburdened with physical demands on their smaller networks, requiring ILECs to provide tandem transit service has been and remains sound policy.[151]

If ILECs were to cease providing transit service, it would stand the Congressionally-mandated framework on its head. Under Section 251(a) of the Act, a non-ILEC carrier is permitted to interconnect *indirectly* with ILECs, CLECs, and other carriers if it chooses. There is no requirement that non-ILECs directly interconnect with one another. *However, ILECs are required to directly interconnect with requesting carriers.* Should an ILEC refuse to provide tandem transit service to directly interconnected carriers, then any interconnected carrier would be *required* to interconnect *directly* with all other carriers (absent

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150 Arbitration of Non-Costing Issues For Successor Interconnection Agreements to the Texas 271 Agreement, Arbitration Award, Docket No. 28821, p. 23 (Feb. 22, 2006). *See also, e.g., In re: Petition and complaint for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc., by AT&T Communications of the Southern States, LLC,* Order No. PSC-06-0776-FOF-TP, Docket No. 050125, Florida Pub. Serv. Comm'n, Sep. 18, 2006 at 44 ("We agree that § 251 contains no explicit obligation to provide transit service, but . . . the question is whether there is an implied obligation . . . This Commission need only acknowledge in this proceeding that § 251(a) requires all telecommunications carriers to interconnect directly or indirectly, and that transit service has been expressly recognized by the FCC as a means to establish indirect interconnection").

151 *See Petition of Neutral Tandem, Inc. for Interconnection with Verizon Wireless, Inc. Pursuant to Sections 201(a) and 332(c)(1)(B) of the Communications Act of 1934, as amended,* WC Docket No. 06-159, filed Aug. 2, 2006.

the availability of economically efficient alternative transit providers) to ensure its originating traffic is terminated. This is not a result contemplated in the Act, in which Congress imposed a different interconnection obligation on non-ILECs. Moreover, an ILEC refusal to provide tandem transit service should be recognized as a refusal to interconnect directly for the full purposes described in the Act.

Requiring CLECs to interconnect directly with one another not only would be contrary to the Act, but also would introduce network inefficiencies and would create a stumbling block to robust competition. As noted above, numerous carriers would need to interconnect directly with one another, resulting in multitudinous costly trunking arrangements that would not be carrying significant volumes of traffic. For example, in the case of two non-ILEC carriers, in addition to both having to interconnect directly with the ILEC (two trunks), the two would have to connect with each other (a third trunk). A third competitor added to the mix would add a minimum of three additional trunks to that required where ILEC provides a tandem transit connection for the other three carriers. A fourth competitor would add six additional trunks, and the progression of necessary interconnections would increase geometrically. The result would be a series of networks interconnected inefficiently when compared to the efficiencies that exist when the ILEC acts as the tandem transit provider and far fewer trunking arrangements are required due to the tandem's ability to sort the traffic coming from one carrier destined for the networks of myriad other customers. Provided that ILECs recover their costs of providing tandem transit service, the ILECs have not been, and would not be, injured by providing this service, and competition, competitors, and ultimately consumers would benefit.

2. The proposed tandem transit service rates are well in excess of costs and are inexplicably divergent from existing decisions and the Plan's proposed reciprocal compensation rates

The Missoula Plan does not recognize the statutory obligation for an ILEC or any other carrier to provide tandem transit service, but merely would impose an obligation on a provider that is offering tandem transit services to continue to do so for the life of the Plan. In this sense, the Plan does not go far enough for the reasons described above. But an even more significant flaw in the Plan is the rate set for tandem transit service. As described above, a tandem transit carrier provides the same tandem transport and switching functionalities that are covered by the Plan's transport and termination charge for reciprocal compensation traffic, which also include recovery for end office switching. The reciprocal compensation rates would be capped first at \$0.0007 and, ultimately, \$0.0005 per minute.[152] The Plan, inexplicably, does not apply a tandem transit service rate cap lower than the reciprocal compensation rate, even though the functions performed in providing tandem transit service are a subset of those covered by the Plan's reciprocal compensation charge – end office termination is not included. Instead, the Plan applies a rate to Track 1 carriers of \$0.0025 per minute (at Step 2), up to five times as much as the Track 1 reciprocal compensation rate which can increase even further if traffic is out of balance.[153] At Step 4, the cap is lifted altogether for intra-MSA traffic, which represents the bulk of tandem transit service traffic today.[154]

The inflated proposed rate cannot pass muster under a legal or a policy standard. Because ILEC tandem transit service stems from the ILEC's interconnection obligations under Section 251(c)(2), the pricing standard of Section 252(d)(1) applies, which the Commission has

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152 Missoula Plan at 37, §II.E.5.

153 Missoula Plan at 51, §III.D.4.b.i.

154 Missoula Plan at 52, §III.D.4.e.

interpreted as requiring TELRIC pricing. The rate of $0.0025 per minute is considerably above all recent State determinations of tandem switching and tandem transport TELRIC-based rates, or more specifically tandem transit service rates. For example, in Missouri and Kansas, State commissions recently set tandem transit rates at $0.00096 and $0.000953, respectively, *less than 40%* of the rate that AT&T would be free to charge under the Plan even before the Plan's deregulation of tandem transit rates is triggered.[155] In Arizona, Qwest's current transit rate is $0.001340.[156] Moreover, Verizon in its current template agreements, proposes to charge only $0.001621 (for usage sensitive ports) and $0.000951 per minute in New York and Massachusetts, respectively, both well below the Plan's proposed rate.[157]

Alternatively, assuming *arguendo* that Section 251(c)(2) does not apply, tandem transit traffic is a form of Section 251(b)(5) telecommunications traffic, which is mutually exchanged between the originating, the transiting carrier, and the terminating carrier. Even in this scenario, the transiting carrier can charge no more than a reasonable approximation of its additional costs for performing the tandem switching and related transport functions. In light of the intensive cost examination work performed by the States, it is inescapable that under any reasonable long run incremental cost standard, a rate of $0.0025 is excessive by a factor of at least two or three for tandem and transport functions. Exacerbating the excessiveness of the rate

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155 *See, e.g., Interconnection Agreement between Southwestern Bell Telephone, L.P. d/b/a SBC Kansas and NuVox Communications of Kansas, Inc., Appendix 6b, Pricing Schedule; and Attachment 12, Intercarrier Compensation,* Final Order Approving Contracts issued in Docket 05-BTKT-365-ARB, September 14, 2005; *see also, e.g., Interconnection Agreement* between *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri and NuVox Communications of Missouri, Inc., Appendix 6c, Pricing Schedule; and Attachment 12, Intercarrier Compensation,* Order Approving Arbitrated Interconnection Agreement issued in Case No. TK-2006-0049, August 8, 2005.

156 Qwest Arizona SGAT at Exhibit A, 3rd Amended, Feb. 2, 2005.

157 *See* Verizon' NYPSC No. 8 Tariff, §35.6; *See also,* Verizon's DTE MA No. 17 Tariff, Part M, §3.1.2. For dedicated ports, the New York rate falls to $0.000481, *less than 20%* of the Plan's rate.

is that the tandem transit service carrier and the customer almost invariably will be competing with each other for end users. Accordingly, the Plan's proposed above-cost tandem transit rates would create a windfall for the one competitor and an unreasonable cost burden for another, doubling the competitively adverse impact of the proposed rates.

Finally, the Plan's tandem transit provisions are flawed because they would have the Commission set the rates for ILEC-provided tandem transit service. Because tandem transit service is a Section 251(c)(2) obligation, State commissions, *not* this Commission, possess the jurisdiction to set tandem transit rates under Sections 252(c)(2) and 252(d). For reasons similar to those set forth in Section III.A., *supra*, regarding Section 251(b)(5) reciprocal compensation traffic, there is no basis for the Commission preempting this State authority.

Should it proceed in its consideration of the Missoula Plan, the Commission has no choice but to conclude that tandem transit service is a Section 251(c)(2) obligation of the ILECs and that the duty to set those rates, where parties cannot agree to them, falls upon the States pursuant to Section 252(c)(2) and Section 252(d) of the Act. The Missoula Plan's proposed terms regarding tandem transit service should be rejected.

IV. THE RESTRUCTURE MECHANISM AND EARLY ADOPTER FUND REPRESENT UNSOUND POLICY AND ARE UNLAWFUL

The Missoula Plan's Restructure Mechanism and Early Adopter Fund provisions are also unlawful and cannot be implemented by the Commission.[158] As demonstrated below, the Missoula Plan's Restructure Mechanism unreasonably discriminates against CLECs in violation of the concept of equal protection found in the Fifth Amendment's due process guarantee. The Early Adopter Fund is unlawful because it is sufficiently coercive so as to compel

158 Any comment on the Early Adopter Fund must, by definition, be preliminary, as the Plan's supporters explain it is still a work in progress. Missoula Plan, Executive Summary, at 12-13, nn. 9, 10.

States that have not done so already to reduce their intrastate access charge rates and adopt the Missoula Plan, and because it violates Section 254(f) of the Act. Both mechanisms would also impermissibly use federal universal service fund revenues for purposes insufficiently related to the proposed beneficiaries of Section 254.

A. The Restructure Mechanism Impermissibly Discriminates Against Non-ILECs

The Missoula Plan's so-called Restructure Mechanism is merely a euphemism for "ILEC Make-Whole Mechanism." In fact, it is more than a make-whole provision. Because interstate access charges have been steadily declining, to say nothing of intrastate access charges in many states, and the potential payout from the Restructure Mechanism is based on a carrier's *prior year* revenues,[159] the Restructure Mechanism actually represents a windfall to ILECs.

According to the Plan, "the Restructure Mechanism is designed to replace the revenues that are eliminated in connection with the Track 1, Track 2, and Track 3 transitions, to the extent such revenues are not recovered through restructured intercarrier charges or increased SLCs."[160] In short, the Mechanism is designed to shield ILECs from reductions in intercarrier compensation, and prevents end users from reaping the benefits from reduced access charges. While the Restructure Mechanism ensures revenue neutrality for ILECs, the Mechanism does not provide for the recovery of any lost CLEC revenues or revenues of other non-ILECs. The Plan contains several pages which describe in painstaking detail how ILECs go about recovering money to make up for access charges reductions but, as for CLECs and other competitors, the

159 Missoula Plan at 65, §VI.A.1.b.ii(1)(a).

160 Missoula Plan, Executive Summary, at 12. The Joint Commenters' concerns with the SLC increases are discussed in Section V of these Comments. Because access charge revenues are declining, the permanent SLC increases contemplated by the Plan also have the potential of becoming a windfall.

Plan only states nebulously that "restructure mechanism dollars will be available to other carriers in circumstances to be determined in the future."[161]

This discrimination violates the U.S. Constitution's equal protection clause. In *Bolling v. Sharpe*, the U.S. Supreme Court held that it was absurd that the U.S. Constitution could deny the states the power to abridge equal protection of the laws, yet permit that power to the Congress.[162] Accordingly, the Court held that the Fifth Amendment contains an equal protection guarantee applicable to Congress similar to that found in the Fourteenth Amendment and applicable to the States.[163] Under the test articulated by the Supreme Court, "[i]n areas of social and economic policy, a [] classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[164] Even upon a cursory examination of the Plan's Restructure Mechanism, it is clear those provisions do not apply to CLECs and other non-ILEC competitors. Moreover, there is no rational basis for the exclusion.

The most pointed demonstration that there is no rational basis for the exclusion of non-ILECs is that such discrimination would contravene the Commission's own stated objectives in this proceeding. In its *Intercarrier Compensation FNPRM* in this proceeding, the

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161 Missoula Plan at 74, §IV.A.2.

162 The Court reasoned that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." 347 U.S. 497, 499 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954).

163 *Id.,* 347 U.S. at 498.

164 *See FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 2101 (1993), *citing Sullivan v. Stroop,* 496 U.S. 478, 485, 110 S.Ct. 2499, 2504, 110 L.Ed.2d 438 (1990); *Bowen v. Gilliard,* 483 U.S. 587, 600-603, 107 S.Ct. 3008, 3016-3018, 97 L.Ed.2d 485 (1987); *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 174-179, 101 S.Ct. 453, 459-462, 66 L.Ed.2d 368 (1980); *Dandridge v. Williams,* 397 U.S. 471, 484-485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970).

Commission explained that any new intercarrier compensation regime must be "competitively and technologically neutral."[165] In stark contrast to this goal, the Restructure Mechanism provisions undermine competition by providing a revenue-neutral scheme for ILECs while providing non-neutral treatment for CLECs.[166] Moreover, favoring ILECs at the expense of CLECs does not encourage the efficient use of telecommunications networks or the development of efficient competition, another of the Commission's objectives in this proceeding. As described in further detail above, the ILEC's legacy hierarchical networks possess certain inefficiencies as compared with CLEC networks and therefore should not be unduly rewarded.[167] But, unfortunately and undeniably, the Restructure Mechanism would do exactly that – it turns the Commission's goals on their head by rewarding the ILECs' inefficient networks and punishing the CLECs' more efficient networks. The disparity is made even more egregious by the certainty – the details of funding the Restructure Mechanism are left vague in the Plan – that the non-ILECs (and their customers) will be forced to help fund the Mechanism without the ability to recover or otherwise benefit from this new fund. There is simply no rational basis for the discrimination inherent in the Restructure Mechanism and it must be rejected.

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165 *Intercarrier Compensation FNPRM*, 20 FCC Rcd 4685, ¶33.

166 It is not clear under the Plan whether non-ILECs will be required to contribute to the Restructure Mechanism, in light of the vagueness of this part of the Plan. To the extent that non-ILECs and their customers are required to contribute to the Restructure Mechanism, in addition to non-ILECs being unable to recover from the Mechanism, the discrimination is exacerbated.

167 In contrast, requiring ILECs to provide tandem transit service is not only required under Section 251(c)(2) of the Act, but this obligation is rationally imposed in light of the ubiquity of the ILEC networks and the fact that these networks were constructed and developed through state-imposed monopolies.

B. The Early Adopter Fund Is Unconstitutional, Violates Section 254(f) of the Act By Inviting the States to Burden the Universal Service Fund, and Discriminates Among the States

The Missoula Plan's Early Adopter provisions are similarly unlawful and may not be adopted by the Commission. The Early Adopter Fund provisions contemplate that the federal government will offer monetary incentives to a limited number of States that choose to promptly opt into the Plan and will have taken actions to reduce intrastate access rates by the time of the Plan's adoptions.[168] The Missoula Plan explains that it "creates an Early Adopter Fund for States that have reduced intrastate access charges through explicit State funds by the time the Plan is adopted."[169] Other States will not be eligible to benefit from the Fund. In a play to obtain support from States for the Plan, while promising to strip them of their authority over intrastate access charges and reciprocal compensation rates and otherwise limiting their arbitration duties under Section 252 as discussed above, the Plan creates a powerful incentive for States to reduce their intrastate access charges on their own before the FCC forces them to do so outright.

The legal and policy analysis contained in the Plan attempts to provide support for the Early Adopter Fund (and the Restructure Mechanism) by citing cases which, according to the Plan's proponents, stand for the proposition that the federal government may place conditions on the States' receipt of federal funds.[170] Although it is accurate that federal precedent provides that Congress, in certain cases, may condition (or may delegate its authority to condition) States' receipt of federal funds pursuant to the Spending Clause of the U.S. Constitution, Congress'

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168 *See* Missoula Plan, Policy and Legal Overview at 7-8.

169 Missoula Plan at 63, §IV.

170 Missoula Plan, Policy and Legal Overview at. 8, *citing South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987); *Qwest v. FCC*, 258 F.3d 1191, 1203-04 (10th Cir. 2001); and *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 444 (5th Cir. 1999).

spending power is not unlimited.[171] Indeed, federal case law holds, for example, that other constitutional provisions may provide an independent bar to the conditional grant of federal funds[172] or that such financial inducements "might be so coercive as to pass the point in which 'pressure turns into compulsion.'"[173] When conditions are proposed in such a way that, by definition, the only States that can benefit are those that seize the opportunity to act before the conditions are fully articulated and made effective, there can be no doubt that Congress, or its delegate, is attempting to coerce the States to act. This would be especially true if a federal agency generated the coercion in an area where Congress did not give the federal agency authority to regulate.

Here, the Plan's inducements are indistinguishable from the sort of coercion described above. These Early Adopter Fund eligibility requirements amount to the establishment of penalties for States that choose not to adopt the Plan or not to reduce, anticipatorily, intrastate access rates prior to the Plan's adoption. The provisions surrounding the Early Adopter Fund go beyond simply dangling the prospect of a financial reimbursement to States that choose to reduce intrastate rates before the Commission determines whether to adopt the Plan. If adopted, the Fund provisions would punish those States that choose not to reduce intrastate rates in advance on the mere promise of potential Early Adopt Fund monies or that choose to reserve their rights to regulate intrastate access charges (and preserve their challenges against the Plan's other incursions on State jurisdiction) by not adopting the Plan. Unlike the cases which the Missoula Plan supporters cite to support the Early Adopter Fund, some States will be unable to perfect their eligibility for the federal funds once the Commission adopts the Plan. This disparity

171 *See, e.g., Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

172 *Id., Dole*, 483 U.S. at 208.

173 *Id.*, 483 U.S. at 211, *citing Stewart Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937).

highlights the coercion that the proposed Early Adopter Fund provisions seek to create, which is made all the more insidious because the coercion would occur solely before the Plan becomes effective, albeit the coercion relies, ultimately, upon the Plan becoming effective. The Commission should nip this problem in the bud and make clear as soon as possible that it does not intend to adopt the Early Adopter Fund.

The Early Adopter Fund provisions, by being premised on the fact that States have created funding mechanisms to assist ILECs that have been required to reduce intrastate access charges, highlight another infirmity of the Plan. According to the text of the Plan, the Early Adopter Fund "will enable States to recover some of the funding that they distributed to carriers [read, "ILECs"] that have reduced their intrastate access rates. Early Adopter funding *must* be used to decrease the size of explicit State funding mechanisms."[174] That is, to the extent that States adopting the Missoula Plan have also acted to reduce intrastate access charges and taken measures to allow ILECs to recover some of their lost revenues, the explicit subsidies that these States provide to ILECs whose intrastate access revenues have fallen may be offset by federal monies received from the Early Adopter Fund. (States that have reduced intrastate access rates but have not adopted a mechanism to allow carriers to recover some of their lost intrastate access revenues apparently would not be eligible for the Early Adopter Fund distributions, even if they do adopt the Plan.)

Importantly, however, the Missoula Plan contemplates that, for Tracks 1 and 2, implementation of the Plan is voluntary for States only as it relates to reducing *originating* intrastate access; intrastate terminating access charges are reduced under the Plan regardless of

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[174] Missoula Plan at 76, §IV.B. (emphasis added).

State participation.[175] Consequently, Track 1 and Track 2 ILECs will seek to offset the loss of revenue associated with the Plan's mandatory reduction in *terminating* intrastate access rates by seeking additional state subsidies or the establishment of recovery mechanisms. So States that choose not to adopt the Plan will be burdened by the need to allocate additional support to ILECs (not to mention the absurdity that end users in these States will have to fund the Early Adopter Fund that only benefits carriers operating in *other States*). By contrast, States that voluntarily agree to adopt the Plan and will have already reduced their intrastate originating access rates (and set up a State recovery mechanism) will be eligible for federal support to offset the State support provided to ILECs forced to make intrastate access reductions. Such a scheme punishes States that do not implement the Plan by acting as an unfunded mandate and further coerces States into reducing access charges now in anticipation of adopting the Plan.

C. The Restructure Mechanism and Early Adopter Fund Each Targets Universal Service Fund Monies to Statutorily Inappropriate Purposes

By any names, the so-called Restructure Mechanism and the Early Adopter Fund are simply universal service mechanisms subject to Section 254 of the Act. Beyond the clear import of the Restructure Mechanism's provisions, the Plan even states that it "makes changes to a number of *existing* universal service mechanisms,"[176] clearly implying that the Restructure Mechanism is a proposed form of universal service support. Concerning the Early Adopter Fund, the Plan's supporters themselves expressly anticipate that the Early Adopter Fund will be paid for through the universal service contribution mechanism or a similar charge assessed on

175 *See* Missoula Plan at 3, §§I.B.2, I.B.3. It is noteworthy that the Plan makes no attempt to justify its differing treatment of intrastate originating and terminating access. Another unexplained disparity is that the Plan provides that any reduction of both originating and terminating intrastate access is voluntary for Track 3 carriers.

176 Missoula Plan at 63, §IV.

end users that is indistinguishable from today's universal service fund charges assessed by most contributors to the fund.[177] Both the Mechanism and the Fund violate Section 254.

As an initial matter, the Early Adopter Fund allows states to burden the federal universal service fund in violation of Section 254(f). That section provides that States may adopt universal service regulations only to the extent that they do not rely on or burden federal universal service support mechanisms.[178] As explained above, the Early Adopter Fund provisions establishes a rubric under which State-adopted universal service programs will essentially be reimbursed by the federal government for providing support to ILECs to make up for their originating and terminating intrastate access rate reductions. Thus, payouts under the Early Adopter Fund provisions of the Plan – triggered directly by actions taken by States with regard to their own explicit subsidy programs in the face of reduced *intrastate* access charges – fly directly in the face of Section 254(f).

In addition, both the Mechanism and the Fund improperly target, as a direct matter, indiscriminate compensation to ILECs to offset lower access charge revenues without regard to the specific objectives articulated in Section 254. Section 254 of the Act provides the framework for the advancement of universal service.[179] As such, Section 254 expressly provides that universal service support should go toward certain specific "targets," including schools, libraries, low income users, and end users in high cost areas. Although carriers that serve such target areas are the direct recipients of some support payments (rather than the affected end users

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177 *Ex parte* letter of Missoula Plan Supporters to Marlene H. Dortch, FCC, CC Docket No. 01-92, dated August 17, 2006.

178 47 U.S.C. §254(f) ("a state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations . . . do not rely on or burden federal universal service support mechanisms").

179 47 U.S.C. §254

themselves), the distribution of such funds in these cases is closely tied to the services provided to the ultimate intended beneficiaries identified in Section 254.

Importantly, Section 254 does not contemplate that support payments will be limited to a single class of carriers, *i.e.,* ILECs, nor does it permit support to be funneled solely to ILECs to reimburse them generically for lost access revenues. But this is exactly what the Restructure Mechanism and Early Adopter Fund would do. That is, these mechanisms would serve to make ILECs whole by improperly making ILECs the ultimate beneficiary of universal service funds, rather than the customers that the ILECs serve (whether directly or indirectly). The Plan makes no attempt to justify such payments or explain any purported nexus between such payments to ILECs and the advancement of universal service in the ways contemplated by Section 254. Neither the Restructure Mechanism nor the Early Adopter Fund is sufficiently related to any of the purposes of federal universal service under Section 254, and both are unlawful on this basis.

Finally, the Plan is a type of anti-universal service plan because even the reductions in access charges are not mandatorily passed through to end users in the form of lower rates. In any event, because the Restructure Mechanism (and increased SLCs) will be funded by the end users to the estimated tune of over $6 billion, the Plan ensures the end users, as a whole at least, will enjoy no net benefits from reduced intercarrier charges, also estimated at $6 billion.[180] The rationale for this is particularly flawed in light of the fact that the ILECs' networks now generate revenues from several new sources – DSL, video, and interexchange service, to name a few examples – that did not exist when a revenue neutral regulatory policy might have made more sense. Moreover, because the nation's largest interexchange carriers are

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[180] *See* note 8 *supra,* and accompanying text.

now ILECs, AT&T and Verizon in particular, the ILECs will be allowed to both enjoy the lower access charges when acting as interexchange carriers and the increased universal service support when acting as local exchange customers.

V. THERE IS NO CURRENT NEED TO REFORM *INTERSTATE* ACCESS CHARGES FURTHER AND THE MISSOULA PLAN'S PROPOSED CHANGES REGARDING INTERSTATE ACCESS, TAKEN AS A WHOLE, ARE HIGHLY DISCRIMINATORY

Since the passage of the 1996 Act, the Commission has given considerable attention to interstate access charges, in an effort to bring them closer to cost and to remove implicit subsidies that kept interstate rates inflated since the early 1980s. Indeed, access charge reform, along with implementation of Section 254's universal service provisions and of Sections 251 and 252, was part of the Commission's three-pronged approach to introduce competition to telecommunications markets. The Commission's regulatory decisions in its *Access Charge Reform* dockets and market forces generated by the introduction of more effective interexchange carrier bypass alternatives have driven interstate rates down dramatically over the past ten years, on the order of 5% annually, and are expected, in combination, to continue to push interstate access charges down further.

The Missoula Plan does not identify any problems with the current rates for interstate access charges, which are frequently as much as an order of magnitude lower than their intrastate counterparts. The Plan responds to concerns by its supporters about lost access charge revenues through provisions that would enable ILECs, but not CLECs, both as a practical and actual matter, to offset some or all of the reductions from *current* access charge revenue levels over the next five years.[181] These provisions take the form of (1) the Plan's Restructure

[181] As discussed in Section IV.A, *supra*, these provisions are likely to constitute a windfall for ILECs, given declining access charge rates and revenues.

Mechanism, and (2) significant increases in the end-user subscriber line charge ("SLC").[182] The problems with the Restructure Mechanism – its expressly discriminatory availability only to ILECs, its contravention of Section 254's universal service fund provisions, and the uncertain nature of its size – have been discussed in Sections IV.B and C above. This Section will focus the remainder of its attention on the provisions that would allow unwarranted SLC increases.[183]

The Missoula Plan provides that, as intercarrier compensation rates are reduced, carriers will have the opportunity to recover some of their lost revenues through increased SLCs. On its face, the Plan allows the SLC to be increased in stages over the first four Steps of the Plan for all Tracks of carriers. Track 1 carriers, for example, can increase their nationwide caps for the SLC from the current cap of $6.50 per line to $10.00 per line by the fourth year of the Plan.[184] Such increases are subject to constraints related to individual customer rate increases relative to pre-Plan levels and limits on average rate increases over pre-Plan averages.[185]

The Plan also provides considerable flexibility in the setting of SLC rate levels, and this is where ILECs benefit in terms of cost recovery while the CLECs and other carriers by contract are left unable, as a practical matter, to recover any lost access charge revenues through

182 Missoula Plan at 19-25, §§II.C, II.D.

183 The Plan would reform interstate access charges in at least one other way that should be rejected. Although the Plan, as a general matter, would reduce interstate access rates to $0.0005 for terminating traffic and a higher amount for originating traffic, when access service is jointly provided by a Track 1 or 2 ILEC and another carrier, that access service may be converted, in part, to tandem transit service, subject to much higher rates. When the ILEC is directly connected to the interexchange carrier, the ILEC, beginning at Step 3, may charge a much higher tandem transit rate of $0.0025 or more for providing what has heretofore been considered switched access services. *See* Missoula Plan at 54, §§ III.D.7.b (originating access in Step 4, where the ILEC has eliminated originating switched access charges) & c (terminating access in Step 3). These provisions, which balloon the interexchange carriers' access rates under the Plan, should not be permitted, and clearly benefit interexchange carriers affiliated with major ILECs.

184 Missoula Plan at 20, §II.C.1.

185 *Id.* at 21-22, §§II.C.1, II.C.2, II.C.3. However, these constraints on SLC increases can be lessened if the carrier makes larger access charge reductions than the Plan requires. *See id.* at 22-23, §II.C.4.

increased SLCs. If a carrier decides to implement SLC price increases, it is not constrained to do so across the board for all of its customers. Rather, the Plan would allow a carrier to deaverage SLC rates in multiple ways: (i) for different customer segments, (ii) in ways that can vary within each segment based upon the way in which customers purchase service (*i.e., volume* purchases, term commitments, or growth commitments), and (iii) in up to four pricing zones in *each* State for each segment and purchase option category.[186] At Step 4, as potential SLC rates approach their maximum levels, however, carriers get even more SLC-related pricing flexibility.[187]

For carriers, such as the large ILECs, that serve customers over an extensive area within the States of their operation, the Commission's rules create the potential for large SLC increases in select areas and for those customer segments for which there is little or no competition. As for those areas or customer segments that are the subject of competition, the ILECs can leave the SLCs untouched or increased only slightly. In response, as a competitive matter, CLECs and other providers will be left unable to raise the SLC, despite their own lost revenues. Should CLECs try to raise their SLCs, they will create the potential that they will lose customers and endanger their almost always inferior market position.

Consumers will suffer from this aspect of the Missoula Plan. One of the fallouts of the Plan's SLC-increase proposal, and the flexibility that is conferred on ILECs in how they implement the SLC price increases, is that residential and business customers that have no or very few competitive choices are most likely to bear the brunt of SLC rate increases. Carriers are far less likely to increase the SLC significantly in those areas where their customers have competitive service options – which by definition includes any areas where CLECs are operating. Adding insult to injury for the consumer, there is no specific correlation between

186 *Id.* at 23-25, §§II.C.5. II.C.6, II.C.7.

187 *Id.* at 25, § II.C.7.

customers that will face increased SLCs and the customers taking toll services generating the reduced access charge revenues that would supposedly justify the SLC increases in the first place. Thus, assuming that access charge reductions are passed through to end users, the Plan would not result in customers that enjoy the largest reduction in interexchange service charges paying higher SLCs. To the contrary, the Plan likely would confer a net benefit on many who use interexchange services the most (because they are more likely to have competitive choices) and would be paid for by others who use interexchange services the least.[188]

Further, because the SLC is an interstate charge, the SLC-related "make-whole" provisions can be expected to result in a shift of revenues away from State universal service mechanisms while increasing the contribution base for the federal universal service mechanism. The Plan does not acknowledge or address the consequences of this impact.

VI. THE CONCERNS OF RURAL CARRIERS SHOULD BE ADDRESSED IN A SEPARATE PROCEEDING CONSISTENT WITH PAST COMMISSION ACTION REGARDING ACCESS CHARGE REFORM

A pervasive infirmity of the Missoula Plan (and perhaps the cause of several of the others) on policy grounds is its attempt to shoehorn the disparate needs of Track 1, Track 2, and Track 3 into an integrated solution. Arguably, Track 1 carriers, which include the RBOCs, CLECs, IXCs and CMRS providers, and Track 2 carriers, which include most of the mid-sized rural carriers, have more in common with each other than they do with Track 3 carriers, which represent the smallest rate-of-return regulated rural carriers under the Plan. It is understandable

188 Even the Plan's own figures demonstrate the different impact on different categories of customers. *See* Missoula Plan, Exhibit 1, Summary matrix. High volume, urban users of wireline services will benefit the most, whereas rural and urban low volume users will pay more. Moreover, for Track 1 customers, the estimates provided in the Plan's Summary Matrix of the impact on consumers assume a less than full SLC increase of $8.75, rather than the $10.00 permitted by the Plan's provisions. Accordingly, the projected impact results understate consumer bills under the Missoula Plan by as much as $1.25 per line, a large portion of the average potential benefit at the maturation of the Plan.

why the Track 1 supporters of the Plan wanted to include the Track 3 carriers because the very lengthy list of supporters provided with the plan would be diminished considerably were these rural carriers excluded.[189] But these rate-of-return regulated carriers have unique needs that cannot adequately be addressed in a putative one-size-fits all approach to intercarrier compensation. Conversely, if the Commission were to approach intercarrier compensation solely from the perspective of Track 3 carriers, Track 1 and Track 2 carriers would likely suffer under such a regime.

Not surprisingly, the Commission historically has treated rural carrier issues separately. For example, the Commission adopted a comprehensive access charge and universal service reform for price cap carriers based, in part, on a proposal submitted by the Coalition for Affordable Local and Long Distance Service (the "CALLS" Plan),[190] but separately addressed the unique universal service and interstate access needs of rate-of-return carriers through the adoption of the Multi-Association Group ("MAG") Plan.[191] In so doing, the Commission stated that "we have tailored our approach to the specific challenges faced by small local telephone companies serving rural and high-cost areas."[192]

Significantly, the CALLS Plan and MAG Plan raised concerns and issues that are very similar to those that the Commission faces in the instant proceeding. Indeed, those past proceedings are very much prologue to the instant matter. As such, the Commission should not

189 Notably, the supporters were unable to obtain the concurrence of a representative number of mid-size carriers.

190 *See Price Cap Performance Review for Local Exchange Carriers*, 15 FCC Rcd 12962 (2000), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Util. Counsel et al. v. FCC,* No. 00-60434 (5th Cir. 2001).

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

192 *Id.*, ¶ 12.

deviate from its historical approach to these issues. Instead, if inclined to seriously consider the Plan – which the Joint Commenters submit it should not do – the Commission should bifurcate this proceeding and address the disparate and unique concerns of the various categories of carriers separately, consistent with its historic approach to these issues. However, as advocated in the next section, the Commission resources would be better spent and the industry better served were the Commission to limit its focus to "phantom traffic" issues and, on a prospective basis, the question of access charges or other intercarrier compensation for VoIP originated traffic.[193]

VII. THE COMMISSION SHOULD PROCEED TO TACKLE THE PROBLEMS OF PHANTOM TRAFFIC AND THE APPLICABILITY OF ACCESS CHARGES TO IP-PSTN TRAFFIC

Despite the numerous shortcomings of the Missoula Plan, it does highlight the need for the Commission to bring certainty into several areas of intercarrier compensation expeditiously. On the one hand, "phantom traffic" issues have plagued relations between carriers for a number of years, creating perceived and real arbitrage opportunities. Phantom traffic, because it either lacks or contains incorrect or misleading signaling information, makes it difficult or even impossible to determine what rates are applicable when such traffic is exchanged between carriers and to identify which carriers should be assessed intercarrier compensation. These are the problems creating most of the current opportunities for arbitrage. Resolving phantom traffic issues therefore will do far more to remove remaining arbitrage opportunities than the Plan's woefully unsuccessful effort to charge a single rate for all types and jurisdictions of traffic.

[193] *See* Section VII, *infra*.

Significant proposals to address phantom traffic issues have been made in this Docket in the past.[194] The Missoula Plan advances that debate by setting forth a detailed series of requirements and conditions that would apply to signaling information to act as a proxy for determining the endpoints of a call for jurisdictional and rating purposes.[195] The Joint Commenters would have no objection to the Commission considering this portion of the Plan as part of the record before it on the matter of phantom traffic. The Commission should factor in the other comments it has received on the issue, including those filed by several of the Joint Commenters, and promptly reach a decision that encompasses not only traditional wireline traffic, but wireless, VoIP, and ISP-bound traffic. Adopting a resolution to the phantom traffic issue will go a long way in eliminating the arbitrage opportunities that prompted much of the Missoula Plan in the first place. A solution to phantom traffic has the added benefits of not treading on State jurisdiction, not distorting the regulatory framework established by the Congress in the 1996 Act, nor constituting a sharp break with the evolving set of State and federal rules and decisions issued over the past decade, as so many of the other portions of the Plan do.

The Commission should also act promptly to bring clarity to the issue of intercarrier compensation for VoIP traffic that terminates on the PSTN. This highly contentious matter has spawned a series of petitions for declaratory ruling pending before the Commission that, when taken together, highlight many of the open regulatory matters concerning such

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194 *See, e.g., Midsize Carrier Coalition ex parte.*

195 The Plan notes that its proposal regarding phantom traffic is incomplete in several respects. *See, e.g.*, Missoula Plan at 60, § V.D.3.d, The Joint Commenters look forward to evaluating the complete proposal once it is submitted and intend to comment more specifically on the proposal at that time, as appropriate.

traffic.[196] These issues are also teed up in the Commission's *IP-Enabled Services* Rulemaking.[197] The Commission would serve the industry well by resolving these petitions expeditiously and, if necessary, issuing an order addressing intercarrier compensation for VoIP traffic in Docket No. 04-36. The Joint Commenters endorse the positions taken by the Joint CLEC Commenters in their comments and reply comments in Dockets 05-276 and 05-283.[198] The form of compensation, if any, if the Commission modifies the current treatment of IP-originated traffic as access-charge-exempt enhanced services traffic should be applied on a *prospective* basis only, a position endorsed by the largest supporter of the Missoula Plan, AT&T.[199]

VIII. CONCLUSION

For the foregoing reasons, the Commission should reject the needlessly complex and over-reaching Missoula Plan as contrary to law and the public interest. The Commission should proceed expeditiously to address the "phantom traffic" issues raised in this Docket,

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196 Petition *for Declaratory Ruling that VarTec Telecom, Inc. is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination*, WC Docket No. 05-276 (filed Aug. 20, 2004); *Petition of the SBC ILECs for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276 (filed Sep. 21, 2005); *Petition for Declaratory Ruling of Grande Communications, Inc.*, WC Docket 05-283 (filed Oct. 3, 2005) ("*Grande Petition*"); *Frontier Telephone of Rochester, Inc. Petition for Declaratory Ruling that that USA Datanet Corp. Is Liable for Originating Interstate Access Charges When it Uses Feature Group A Dialing to Originate Long Distance Calls*, WC Docket No. 05-276 (filed Nov. 22, 2005).

197 *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004).

198 *See* Comments of Joint CLEC Commenters, WC Docket No. 05-276, filed Nov. 10, 2005; Reply Comments of Joint CLEC Commenters, WC Docket No. 05-276, filed Dec. 12, 2005; *see also*, Comments of Joint CLEC Commenters, WC Docket No. 05-283, filed Dec. 12, 2005; Reply Comments of Joint CLEC Commenters, WC Docket No. 05-283, filed Jan. 11, 2006; Reply Comments of Grande Communications Networks, Inc., WC Docket No. 05-283, filed Jan. 11, 2006.

199 Comments of AT&T, WC Docket No. 05-283, at 2 (filed Dec. 12, 2005).

treating the Missoula Plan proposal in this regard as comments. In addition, the Commission should move to resolve the uncertainties regarding intercarrier compensation for VoIP originated traffic that terminates on the PSTN, as raised in several pending petitions for declaratory ruling in WC Docket Nos. 05-275 and 05-283, as well as in the *IP Enabled Services* rulemaking, WC Docket No. 04-36.

Respectfully submitted,

BROADVIEW NETWORKS
GRANDE COMMUNICATIONS
NUVOX COMMUNICATIONS
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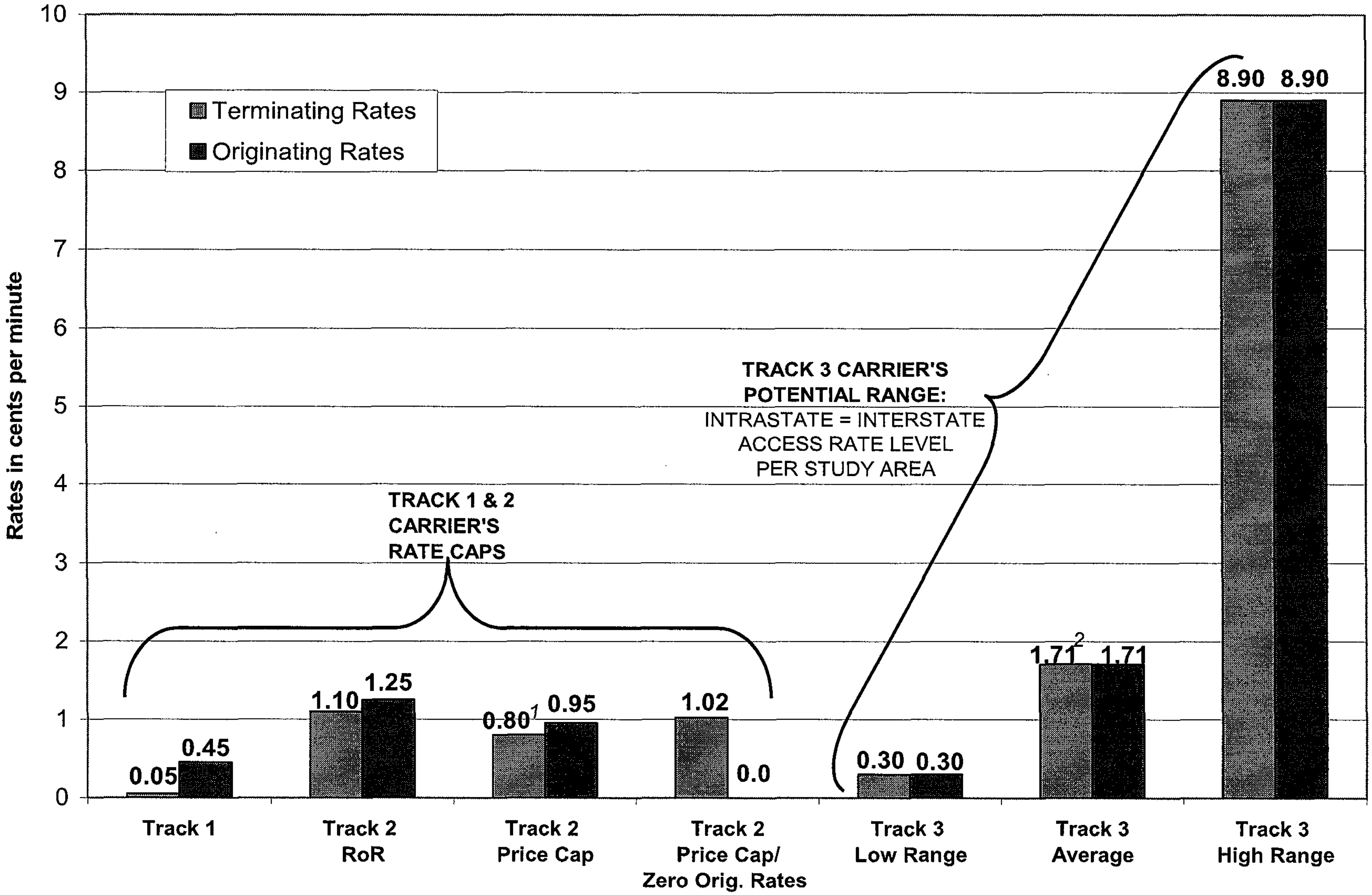
ATTACHMENT 1

The Missoula Plan Does Not Eliminate Disparity in Rates



1. Assumes end office switching rate of 0.05¢ and 0.75¢ for common transport and tandem switching.
2. Compensation for EAS traffic remains under existing arrangements. Reciprocal compensation rates for 251(b)(5) traffic capped at interstate access rate levels.