Before the
Federal Communications Commission
Washington, D.C. 20552

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

Reply Comments of the Texas Office of Public Utility Counsel, Consumer Federation of America And Consumers Union

Laurie Pappas
Deputy Public Counsel
Office of Public Utility Counsel
1701 North Congress Street
Austin, Texas 78701
512-936-7500

Gene Kimmelman
Vice President for Federal and International Policy
Consumers Union
1101 17th Street, NW Suite 500
Washington, DC 20036
202-462-6262

Mark Cooper
Director of Research
Consumer Federation of America
1424 16th Street, N.W. Suite 310
Washington, D.C. 20036
301-384-2204

January 10, 2007

CONTENTS

Introduction 2
Legal Issues 4
Economic Issues 7
Administrative Issues 9
Equity Issues 10
Conclusion 12

INTRODUCTION

Since the Missoula Plan (hereafter the Plan) is presented as the result of a NARUC task force, it is interesting to review what the members of NARUC think of it.[1] It is safe to say that they all applaud the effort but hate the result. Indeed, one commenter has gone through the principles for intercarrier compensation reform enunciated by NARUC and has found that the Missoula Plan violates virtually every one.[2] Several of the state public utility commissions (PUCs) note the broad opposition to the plan[3] and even point out that the vast majority of phone companies oppose it.[4]

The comments of the PUCs and other public interest groups (hereafter public interest commenters), such as the National Association of State Utility

---

[1] All references herein are to initial comments filed *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006.

[2] Comments of the Public Service Commission of the State of Missouri, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (MO) at 5-7.

[3] Comments of the Delaware Public Service Commission, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006. (DE), Comments of the Connecticut Departments of Public Utility Control, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (CT), Comments of the Massachusetts Department of Telecommunications and Energy, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (MA), Comments of the Pennsylvania Public Utility Commission, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (PA), at 1; Comments of the Virginia State Corporation Commission, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (VA), at 3.

[4] MO at 47 ((90% oppose);

Consumer Advocates (NASUCA)[5] and the New Jersey Division of Ratepayer Counsel (NJRC),[6] echo many of the concerns we raised in our initial comments and provide a good outline for replies. Their complaints, as did ours, fall into four broad categories – legal, economic, administrative and equity concerns.

Before we examine the specific concerns with the plan, it is important to note the broad failures of the plan identified by the public interest commenters. First, the public interest commenters do not believe that the Plan accomplishes the goals of access charge reform. It does not unify rates across companies,[7] between technologies,[8] or with respect to originating and terminating minutes.[9] As a result it does not eliminate the opportunity for arbitrage.[10]

---

[5] Comments of the National Association of State Utility Consumer Advocates on the Missoula Plan, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (NASUCA).

[6] Comments of the New Jersey Division of Rate Counsel, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (NJDRC).

[7] Comments of Mid-Atlantic Conference of Regulatory Utility Commissioners and State Commissioners of the MACRUC States, In *the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (MACRUC) at 4; MO-48; Comments of the New Jersey Board of Public Utilities, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (NJ) at 3.

[8] Comments of the Oklahoma Corporation Commission, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (OK) at 3.

[9] PA at 15.

[10] PA at 5; Comments of the South Carolina Office of Regulatory Staff, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (SC) at 5.

Second, it perpetuates the "gravy train"[11] of access charges and provides the Incumbent Local Exchange Carriers (ILECs) with an "Insurance Policy."[12]

Third, it is not technology neutral.[13]

Commenter-supporters of the Missoula Plan essentially added nothing new in legal or economic analysis to further support the Plan. The Public Interest Commentators, however point out the legal, economic and public policy problems of the Plan. These problems, also articulated by Texas Office of Public Utility Counsel, Consumers Federation of America & Consumers Union ("OPUC, et. al") in OPUC, et. al comments, cannot be adequately resolved within the context of the Missoula Plan.

The Plan should be rejected because it is without legal or economic justification and is inconsistent with the public policy goal of competition underlying the Act.

In the remaining pages OPUC, et. al. will highlight the problems innate to the Plan that the public interest Commentators discussed in their comments and with which OPUC, et. al agree.

LEGAL ISSUES

[11] MA at 14.
[12] OK at 9.
[13] MO at 6.

There should be no doubt that the plan raises numerous legal issues and is certain to be challenged as violating the Telecommunications Act of 1996 (hereafter the 1996 Act).

It should not be surprising to find that the preemption of state authority catches the attention of the state PUCs and public interest groups.[14] Simply put, they do not find the convoluted legal arguments offered by the supporters of the plan to preempt state authority legally persuasive.

The concerns about pre-emption are not limited to the proposed intrusion of the FCC into setting of intrastate access charges. Some public interest commenters believe that the Plan preempts the authority granted to the states to deal with reciprocal compensation and generally violates the statute's language on reciprocal compensations.[15]

---

[14] CT at 2,7, 10; Comments of the Florida Public Service Commission in Response to the Federal Communications Commission's Public Notice Seeking Comment on the Missoula Intercarrier Compensation Reform Plan, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (FL) at 3-4; MACRUC-3; MO 4, 9, 12-11; NJ-9; Comments of the New York State Department of Public Service, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (NY) at 9; Comments of the Public Utilities Commission of Ohio, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (OH) at 7; PA at 3; SC at 5; Comments of the Public Utility Commission of Texas, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (TX) at 2,7-8: VA at 11,13;

[15] MO at 13; OH at 15-19.

In the opinion of some of the public interest commenters, the unauthorized preemptive thrust of the Plan is not limited to these clear instances in which authorities explicitly reserved to the states in the 1996 Act. These public interest commenters see a broader preemption of state authority that will not withstand judicial scrutiny. They see the plan as overturning state law,[16] preempting extended areas service compromises that were hard fought and worked out over long periods of time[17] and undercutting local competition policies adopted by the states, pursuant to the 1996 Act.[18]

The legal challenges to the plan foreseen by the public interest commenters are not limited to the pre-emption issue. Public interest commenters see other flaws in the plan that will result in legal challenges. The Plan undercuts successful negotiations and arbitrations, which were the preferred approach to settling disputes under the 1996 Act.[19] The Plan requires the FCC to reverse course after ten years in spite of the fact that arbitration/negotiation has settled many disputes. The plan reaches far afield from the issue at the core of the intercarrier compensation proceeding in an effort to buy support and overturns the results of negotiations/arbitration that are encouraged by the Act.

---

[16] MO at 26.
[17] MO at 42, 43.
[18] MO at 23.
[19] MA at 10; MACRUC at 4.

The plan denies competitive local exchange carriers the right to interconnect at any technically feasible point as articulated in the Act.[20] The plan replaces this approach with an Edge solution that requires the competitors to use a meet point dictated by the incumbents, or bear huge costs of carrying traffic to that point. The court will not only easily see that the Plan deprives CLECs of an important right granted them by the Act, but they will be struck by the anticompetitive impact of the Edge solution, an impact that clearly contradicts the primary thrust of the Act.

In several areas the public interest commenters believe the Plan results in rates that are not just and reasonable, as required by the Act, or rates that lack adequate justification which leaves them vulnerable to reversal by the courts as arbitrary and capricious. While many of these issues are economic and will be discussed below, the flawed analysis underlying the Plan lifts the challenge out of the realm of mere economics and elevates it to the legal arena.

- For example, the increase in prices and ultimate deregulation of tandem transit is not justified and results in charges that are not just and reasonable.[21]
- The restructuring mechanism lacks a clearly articulated legal basis (in fact different entities claim different justifications).[22] Moreover, the restructuring mechanism does not conform to the legal

[20] MO at 50.
[21] MO at 52.
[22] NASUCA, at 4-5, 60-63.

requirements of the sections of the Act in which the supporters would like to fit it. They are trying to pound a round policy peg into a square legal hole and it just won't go.

- None of the rates have any cost justification.[23]

Several public interest commenters also point out there are several issues addressed in the Plan that are not intercarrier compensation issues. Since they do not belong in this proceeding, decision about them will be subject to legal challenge. This includes changes in the High Cost Fund[24] and intercarrier connection rules.[25]

Given the numerous and profound legal challenges that the Plan would face and the massive harm that it would impose on consumers and the public, implementation of the Plan is certain to be enjoined and tied up in the courts for years. Reform of intercarrier interconnection charges will be side-tracked and derailed. Commenters have proposed alternatives that will not trigger the legal challenges and will move the ball forward.[26] These alternatives, not the Missoula Plan, should be the starting point of the Commission's Intercarrier compensation reform, not the Missoula Plan.

---

[23] MO at 14; NY at 4; OH at 26; OK at 8; NASUCA at 18-20, 43.

[24] Comments of the People of the State of California and the California Public Utility Commission, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (CA) at 17; FL at 6.

[25] OH-22; PA-4.

[26] See for example, NASUCA at 76-92, PAPUC, at 21-27, for several aspects of reform; MO at 54-56 on phaontom traffic; .

ECONOMIC ISSUES

A host of economic concerns were expressed by the public interest commenters. There are essentially two economic themes in the public interest comments.

The central theme is that the entire structure of the proposal lacks cost justification. Thus, the target rate for switching is far above the cost of switching calculated by the states in fully adjudicated proceedings. There are several estimates that put the cost of switching at four or more times the target rate.[27] This creates an economic distortion by recovering the costs from the wrong customers.[28] The Plan's proposal to recover costs not covered in its proposed lowered access rate is also in the wrong form because the Plan seeks to recover traffic sensitive costs to be recovered by non-traffic sensitive charges.[29] The economic distortion also creates a subsidy flow from states that have engaged in reform of access charges to those who have not. In other words, there is a subsidy from reformed to unreformed states.[30]

---

[27] CA at 8; MA at 9; PA at 12; VA at 3.
[28] NASUCA at 57-58.
[29] VA at 8.
[30] Comments of the Illinois Commerce Commission, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (IL) at 2; Comments of the Corporation Commission of the State of Kansas, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (KS) at 10; VA at 9.

The make-whole nature of the proposal also creates another economic distortion.[31] The Plan replaces revenues that may not be lost and does not take into account other sources of revenue that may increase as a result of the Plan.[32] The bottom line is an over-recovery of costs,[33] especially when one takes into account that the Plan will lock in and then inflate revenue streams that have been declining over the past five years.[34]

The failure to conduct sound cost analysis magnifies the economic flaws in the plan. As a consequence, the Restructuring Mechanism is too big.[35] The make-whole mechanism over compensates ILECs when use declines[36] and/or lines are lost.[37]

A second economic theme among the public interest commenters is the anti-competitive impact of the Plan. The make-whole mechanism shields ILECs from the effects of competition, giving them a cushion to draw on when competitors take lines or new services with reducing revenue generating usage.[38]

---

[31] CA at 22; CT at 2, 5; VA at 7.
[32] NJ at 9.
[33] NASUCA at 18-25; CAPUC at 21-22.
[34] OK at 8; NASUCA at 1, 21-23.
[35] CA at 9, 19; SC at 4; VA at 13.
[36] CA at 19; NASUCA at 4.
[37] CA at 20.
[38] FL at 6; MA at 14; MACRUC at 4; NJ at 7; NY at 4; Initial Comments of the Public Service Commission of Wisconsin on the Missoula Intercarrier Compensation Reform Plan, *In the Matter of Intercarrier Compensation*, Federal Communications Commission, CC Docket No. 01-92, October 25, 2006, (W1) at 41.

Since the CLECS are not allowed to draw from this fund, they are placed at a disadvantage.

However, the Plan does even more damage to competition. It not only gives ILECs a shield to defend against competition, but a sword to attack competitors. The public interest commenters believe that the ILECs have the ability to deaverage the SLC in an anticompetitive fashion.[39] Public interest commenters also believe that the Edge proposal for interconnection will have an anticompetitive effect by forcing competitors to bear heavy costs, either to reconfigure their networks to get to the edge or pay for transport.[40]

ADMINISTRATIVE ISSUES

The public interest commenters find the plan extremely complex and fraught with inconsistencies and uncertainties.[41] There are both monetary and nonmonetary issues in implementation.

There are two serious administrative cost issues raised by the plan. On the one hand, there is an unsustainable increase in the Universal Service Fund.[42] On the other hand, the Early Adopter Fund is dramatically under funded. Many states complain that they have reformed their access charges with rate rebalancing, but would be ineligible for early adopter support because they did

---

[39] MA at 14; OK at 3, 10; TX at 3; VA at 18.
[40] PA at 18, 19; TX at 5.
[41] MO at 3-7.
[42] CA at 8; CT at 2, 5; DE at 3; MA at 13; MACRUC at 3; MO at 10.

not use a state universal service fund approach.[43] The magnitude of an adequate EAF would be to 25 times the size of the one included in the Plan.[44] The fund required could be as large as $5 billion.

Other public interest commenters believe that the proposal will stress administrative resources and ultimately fail for a variety of reasons.[45] Some point out that the Plan will put great stress on numbering resources.[46] The information requirements are severe and have not been properly built into the Plan.[47] Some believe that the split cost recovery is unmanageable.[48]

EQUITY

The claim of consumer benefits made by the supporters of the Plan is roundly rejected by the public interest commenters for a host of reasons.[49] Rather than consumer gains, they see a broad pattern of burdens placed on consumers and discriminatory wealth transfers from consumers to ILECs,[50] from CLECs to ILECs[51] and between the states.[52]

---

[43] FL at 6; IL at 4; KS at 8; NJ at 1, 4, 9; VA at 16.
[44] CA at 13; IL at 2; KS at 8, Attachment 1 suggest costs between $500 million and $2 billion; NY suggests costs as high as $5 billion; PA at 4 claims $1 billion which is 25 times the estimate in KS.
[45] MO at 3.
[46] CT at 9-10; OH at 47-48.
[47] IL at 12-13.
[48] IL at 15, 16; VA at 15.
[49] MO at 46 -47; NJRC at 12; NARUC at 28-36; NY at 5; OK at 10-11;
[50] NASUCA at 57-58.
[51] NASUCA at 22; OH at 3.
[52] MA at 7-8, NASUCA at 4, 37. NJ at 3; NY at 8, DC At 5-7; CT at 5-6; DE at 3; PA, at 5; TX at 2-4..

The below cost pricing of switching discussed in the economic section creates a cross subsidy from low-volume users to high-volume users.

Broadly, the public interest commenters believe that the failure of the plan to require the passthrough of access charge reductions means that consumers will bear a heavy burden.[53] This results from the lack of competition in long distance and the growth of bundling of services.[54] The magnitude of the impact on consumers is large enough to warrant the term "rate shock."[55]

The claim that low-income consumers will be shielded from the impact of the Plan is rejected on two grounds – the take-rate of lifeline programs is extremely low[56] and many low- income households are not eligible for the program.[57] Moreover, the new funding mechanisms created by the plan violate universal service principles by restricting access to restructuring mechanism[58] and failing to set a benchmark rate in the calculation of the restructuring mechanism, which would ensure reasonable comparability between rural and urban rates.[59] Allowing the differentiation of the subscriber line charge has the similar effect of failing to ensure comparability of rates.[60]

---

[53] FL at3; MA at 11; NASUCA at 3, 25-27.
[54] MO at 38; NJ at 5, 12; NJRC at 13-14 NY at 6; WI at 11.
[55] KS at7; MO at 9; OH at 35-38; TX at 2, 8.
[56] NJRC at 10 notes a take rate of 25%; PA at 13 notes 17% take rate on Lifeline.
[57] TX-3
[58] IL at 11.
[59] KS at 14; OK at 7.
[60] MACRUC at 3.

The heavy handed federalization of intrastate rates ignores unique situation/inequities such as the absence of intraLATA long distance in some jurisdictions[61] and small rural populations in others.[62]

CONCLUSION

The public interest commenters have identified a set of legal problems and economic flaws in the plan that parallels the concerns raised by OPUC, et. al, in our initial comments. For these myriad of reasons, the Missoula Plan should be rejected in its entirely by the Commission.

---

[61] DC at 3-5; MA at 11-14.
[62] MA at 8.