BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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

REPLY COMMENTS OF THE NEW MEXICO PUBLIC REGULATION COMMISSION

Pursuant to the Federal Communications Commission's ("FCC's") Order of December 22, 2006 in the above docket, extending the deadline for the filing of reply comments to February 1, 2007, and in reference to comments previously filed with the FCC by other states' regulatory commissions, the New Mexico Public Regulation Commission (NMPRC) hereby submits its Reply Comments regarding the intercarrier compensation reform proposal submitted in August, 2006 known as the "Missoula Plan."

I. INTRODUCTION

The Missoula plan addresses a number of key issues identified by the FCC in the intercarrier compensation proceeding, specifically the creation of a more uniform compensation regime for the exchange of telecommunications traffic among carriers; implementation of such a regime in a technologically and competitively neutral manner; minimal regulatory oversight; and furtherance of universal service principles[1]. While the NMPRC is in general

[1] FCC 2005 FNPRM – FCC 05-42.

agreement with these goals, we are concerned that, in various ways, the Missoula Plan fails to meet them and risks introducing new inequities into the intercarrier compensation regime. The NMPRC is particularly concerned about (1) the impact of new or increased subscriber line charges ("SLCs") and surcharges on ratepayers, especially residential ratepayers who make relatively few toll calls; (2) effectively requiring ratepayers in states like New Mexico that already have reduced intrastate access rates to subsidize such reductions in other states; (3) unequal treatment of different classes of carriers, with potentially anti-competitive effects; (4) provisions for addressing phantom traffic and arbitrage issues; and (5) preemption of state authority over intrastate rates. We address these issues below.

II. IMPACT ON RATEPAYERS

While the proponents of the Missoula Plan assert that it will reduce telephone bills[2], various features of the Plan call this assertion into question, particularly with regard to relatively low income residential consumers. The NMPRC, like many other state commissions, is particularly concerned about further increases to residential and business phone basic service through federal SLC and federal USF surcharge increases. The NMPRC has recently rebalanced residential and business rates by an average of $1.78 per access line; and has instituted a 3% surcharge on all intrastate access revenues in the state. On top of the 3% surcharge and the $1.78 state rate rebalancing, New Mexico consumers will be asked to pay yet higher rates through

[2] See Exhibit 1, Missoula Plan, Executive Summary, July 18, 2006.

increases to the federal SLC ($2.25 to $3.50 per customer depending on the "Track" designation of the carrier – bringing the federal SLC up to as much as $10 per month for most customers), as well as an increase in the federal universal service fund surcharge from its current level of 10.9% to something in the range of 13.5% to 15%.[3] Even without taking into consideration the recently implemented New Mexico USF-related increases on customer bills, the new charges and rate increases under the Missoula Plan would impose a new and heavy burden on ratepayers in New Mexico, a state with a relatively low average family income.

Moreover, for many customers, particularly those who make relatively few toll calls (low income customers, for the most part), the increases in phone bills resulting from the Missoula Plan's higher federal SLC will not be offset by reductions in long distance charges, even assuming savings from access charge reductions are passed on to consumers (which is not assured; see below). Based on national figures it has been estimated that a customer would have to use in excess of 244 minutes (more than four hours) of wireline long distance per month in order to "break even" under the Missoula Plan – that is, before the increases in his or her bill resulting from the Plan's higher SLC will be fully offset by savings in the form of reduced long distance rates -

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[3] The cumulative impact of the New Mexico USF surcharge and rate increases and the additional federal USF surcharges and subscriber line charges under the Missoula Plan may be partly mitigated by the "Early Adopter" provisions of the Plan; however, those provisions have not been made specific and their prospective effects on New Mexico and New Mexico consumers are uncertain at this time. See Part III below.

- assuming the savings are passed on to the consumer.[4] In New Mexico, where long distance rates have already been greatly reduced, this "break even" point would be an even higher number of long distance minutes. In effect, consumers, particularly relatively low income consumers who can least afford it, would be subsidizing the Missoula Plan's mandatory reductions in intercarrier compensation rates for the benefit of certain carriers.

In addition, the Missoula Plan does not require carriers to pass savings that they realize from paying lower intercarrier exchange rates on to end-users. The Plan simply does not address the issue of the pass-through of savings to consumers in the form of reduced rates as the result of access charge reductions to carriers. This silence highlights the NMPRC's concern that the Plan essentially guarantees revenues to carriers for access charge reductions while assuming that competitive market forces will drive long distance charges close to carriers' access costs, resulting in savings to consumers who use significant amounts of long distance services. The Plan both assures exchange carriers that they will be compensated for lost access revenues and sets up a mechanism whereby long distance carriers realize savings from great reductions in access payments to Track 1 and Track 2

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[4] *See,* National Regulatory Research Institute (NRRI), "Intercarrier Compensation and the Missoula Plan," October 2006, p. 63. In making this calculation, the NRRI ignored the increase in federal universal service charges resulting from the Missoula Plan; assumed that the SLC would increase by $3.50 per line per month; and assumed that long-distance rates would decrease by 1.433 cents per minute. If the increase in federal universal service payments were taken into account, then the number of minutes of long distance to "break even" would be more than 244. The NRRI also noted that Lifeline subscribers would protected from the SLC increase and, therefore, that group of low income consumers generally would benefit from lower toll rates.

carriers in an estimated total amount of approximately $6 billion dollars.[5] If carriers fail to decrease long distance prices promptly to match their cost savings, interexchange carriers stand not only to shift access cost reductions to residential customers in the form of increased local exchange rates, but also realize substantially increased net income in the differential between long distance rates and the low access charges they will now pay to other carriers. The NMPRC believes that any form of access charge reductions should be accompanied by safeguards assuring the access cost reductions to carriers are passed on to end-user customers.

For the above reasons, the NMPRC is concerned that while rates paid by customers for interstate and intrastate toll calls may decrease substantially as a result of implementing the Missoula Plan, the charges and fees added to their bills in order to fund these reductions in many cases may result in higher overall bills, particularly for residential customers who make relatively few toll calls, placing an extraordinary burden on relatively low income consumers. In addition, we are concerned that not all of the cost savings that carriers will realize as a result of the Plan will, in fact, be passed on to consumers in the absence of a requirement to that effect.

III. SUBSIDIES FROM NEW MEXICO CONSUMERS TO CARRIERS AND TO OTHER STATES

[5] AT&T, as a result of the Missoula Plan, stands to save an estimated $2 billion of this amount in expenses.

Because New Mexico has already adopted a mechanism, through its universal service fund, to lower intrastate switched access charges to interstate levels, New Mexico would be regarded as an "early adopter state" under the Missoula Plan. The Plan contemplates an "Early Adopter Fund" to be created to compensate early adopter states for the access charge reductions they have already put into effect, but the Plan fails to spell out how the Early Adopter Fund would operate; what formula would be used to determine its size; or what criteria would be used to determine how much money early adopter states could expect to receive from the Early Adopter Fund. Despite the undefined nature of the Early Adopter Fund, the supporters of the Missoula Plan in their initial filing urged the FCC to adopt the Missoula Plan as is, whether a contemplated Early Adopter Plan amendment to the plan was filed or not: "The Missoula Plan supporters are committing resources to work with State Commissioners to help size the Early Adopter Fund and to determine how that Fund should work when States have rebalanced access rates through State funds, local rate increases, and/or new line items. *In no event should these ongoing efforts delay the FCC from reaching a decision on the Plan."*[6]

In addition to approximately $39.4 million that New Mexico consumers already pay through rate rebalancing and state universal service surcharges, they will pay up to $29.7 million in the form of increases in the federal SLC and federal USF surcharges for the new Federal Restructure Mechanism and

[6] Missoula Plan, Executive Summary, fn. 9, p. 12, July 18, 2006.

Early Adopter Fund under the Missoula Plan. The implication is that unless the Missoula Plan's Early Adopter Fund fully compensates New Mexico consumers for the money they will have already spent on reducing access charges through the state USF, the additional monies New Mexico consumers would pay as a result of the Plan would go to subsidize states that have not rebalanced access rates and to local exchange carriers that receive increased levels of federal USF support (through the Missoula Plan's Restructure Mechanism and Early Adopter Fund). This burden would fall most heavily on basic local exchange customers in the form of the increased federal SLC. Of the additional estimated $29.7 million that New Mexico ratepayers would have to pay as a result of the Missoula Plan, we estimate $10.9 million would accrue to New Mexico carriers from the additional decreases in switched access rates, and $18.8 million (approximately 63%) would go to carriers as a subsidy to their reductions of intercarrier compensation in other states. In order for New Mexico to be made whole under an Early Adopter Plan, approximately $23 million would need to be transferred from an Early Adopter Fund to replace the monies New Mexico carriers receive directly from the NMSUSF through the state surcharge of 3%, and New Mexico customers should be credited the difference between the Federal SLC and the New Mexico rebalancing SLC.

IV. DIFFERENT RATES FOR DIFFERENT "TRACKS" OF CARRIERS

The Missoula Plan would establish three classes or "Tracks" of telecommunications carriers. Track 1 consists of Regional Bell Operating Companies (RBOCs, Qwest in New Mexico), CLECs, wireless providers and other non-rural carriers. Track 2 consists of mid-size rural carriers (Windstream in New Mexico). Track 3 consists of rural carriers not under Track 2. The Plan would reduce rates charged by Track 1 carriers for terminating calls to $.0005, creating a single, unified rate for Track 1 carriers. It would cap rates charged by Track 2 carriers for terminating calls at $.0110 (22 times higher than the uniform termination rate for Track 1 carriers). For Track 3 carriers, the Plan would unify interstate and intrastate originating and terminating access rates, arriving at a new level that has not yet been determined.

The NMPRC, through the state Universal Service Fund, has reduced intrastate access rates to current interstate access rate levels uniformly for carriers operating in New Mexico that are described as Track 1, Track 2 and Track 3 carriers in the Missoula Plan. The Missoula Plan would further reduce Track 1 and Track 2 carrier access rates, but would make them very different from each other and different from Track 3 rates. The NMPRC is in favor of harmonizing intercarrier compensation rates among all types of carriers, especially if those rates more closely reflect carriers' costs of building, upgrading, and maintaining the network. However, the NMPRC is concerned that the Missoula Plan, by dividing the universe of telecommunications carriers into three classes and setting widely differing access rates for the different classes, both fails to unify intercarrier rates and creates a new situation that could have anti-competitive consequences. In particular, as the Ohio and Texas commissions have pointed out in their comments to the FCC,[7] because all CLECs and wireless carriers are designated Track 1 without regard to the nature of the territory they serve, rural CLECs, for example, would pay Track 2 and Track 3 ILECs a higher rate for access traffic than they would be paid by those same ILECs for such traffic, and would be required to pay higher rates for both access and local transport than would the ILECs.

V. PHANTOM TRAFFIC AND ARBITRAGE

If, as the Missoula Plan envisions, its efforts to unify intercarrier compensation charges result in reducing incentives for carriers to disguise traffic ("phantom traffic") and to arbitrage the traffic they originate or carry, the NMPRC is in favor of those results. However, if other effective mechanisms can be used to greatly reduce the ability of carriers to disguise traffic and remove arbitrage incentives, the argument for harmonizing rates as a way to reduce phantom traffic and arbitrage becomes largely moot. It appears that the matter is more an issue of proper description of traffic and calculation of and compensation for costs than an issue of recouping carriers'

[7] National Regulatory Research Institute "A Summary of State Commissions' Comments on the Missoula Plan: Issues of Concern" Jing Liu et al., November 10, 2006, p. iv.

lost revenues. The NMPRC is concerned that because of the differential between access rates for the different Tracks of carriers identified in the Missoula Plan, there probably will still be incentives for carriers to disguise traffic and to engage in arbitrage, unless proper safeguards are put in place to identify and quell instances of these undesirable practices. As it is, the situation is unfair to carriers who play by the rules and gives an unfair competitive advantage to those who do not. The NMPRC hopes that the FCC will take action to address this situation. The NMPRC believes, however, that the issues of phantom traffic and arbitrage can best be dealt with, and should be dealt with separately rather than as part of a massive intercarrier compensation overhaul.

VI. FEDERAL PREEMPTION

The NMPRC is concerned that the Missoula Plan purports to establish federal pre-emption of state authority over what appears to clearly be a matter of state jurisdiction: the rates telecommunications carriers charge each other for the movement of intrastate telecommunications traffic. It is the opinion of the NMPRC that the Missoula Plan is illegal in preempting states in the setting of intrastate access rates and reciprocal compensation rates for carrying intrastate traffic. The states' authority to set rates for intrastate services is clearly set forth in the federal Communications Act.[8] Indeed, Section 152(b) of the Communications Act expressly prohibits the FCC from regulating in that area. As the United States Supreme Court underscored that prohibition in *Louisiana Public Service Commission v. FCC*,[9]: "The [Federal Communications] Act establishes . . . a system of dual state and federal regulation over telephone service . . . . In broad terms, the Act grants to the FCC the authority to regulate "interstate and foreign commerce in wire and radio communication," 47 U.S. C. § 151, while expressly denying that agency "jurisdiction with respect to . . . intrastate communication service . . . ." 47 U.S.C. § 152(b). This, in the NMPRC's view, renders invalid those portions of the Missoula plan that propose to set intrastate rates through a federal mechanism.

VII. CONCLUSION

The New Mexico Public Regulation Commission respectfully asks the Federal Communications Commission take into consideration the foregoing concerns regarding the Missoula Plan before making any decision on implementing relevant portions of the Plan.

[8] 47 U.S.C. § 152(b) passed as part of the original Act in 1934. The relevant language of this provision was not changed by the 1996 Federal Communications Act or any other amendment to the original act.
[9] 476 U.S. 355 (1986).

ADOPTED at Santa Fe, New Mexico, this 25th day of January, 2007.

NEW MEXICO PUBLIC REGULATION

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