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

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

REPLY COMMENTS OF CAVALIER TELEPHONE, LLC MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. PAC-WEST TELECOMM, INC. RCN CORPORATION

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SUMMARY

The comments filed in response to the Missoula Plan show that there is no "broad ...base of support" for the Plan. Support comes only from AT&T and its subsidiaries and rural ILECs.

Supporters' comments highlight the serious deficiencies of the Plan that would prevent achievement of the Commission's goals for intercarrier compensation reform. Although a subsidy revenue replacement mechanism should not be adopted at all, ILEC requests that the proposed Restructure Mechanism should be non-portable is blatantly anticompetitive and characteristic of other key aspects of the Plan that would harm competition. "Revenue predictability" is not an appropriate goal for intercarrier compensation reform and is no more than a euphemism for features of the plan designed to protect ILECs from competition.

The Edge interconnection approach of the Plan disadvantages CLECs because they could be required to haul traffic to multiple Edges. The proposed Rural Transport Rule would be even more competitively harmful because it would impose obligations on connecting companies to haul traffic in both directions. In fact, none of the interconnection proposals or issues raised by the Plan are necessary for intercarrier compensation reform. The Commission should establish intercarrier compensation reform without new, complicated, competitively harmful interconnection rules.

The proposal of some ILECs to block traffic that does not comport with their phantom traffic proposals as well as the proposal to withhold equal access interconnection as a remedy to VNXX would both threaten the reliability and integrity of the telephone network and harm consumers, as well as constituting unlawful self-help.

The Commission should reject ILEC requests to backtrack on reciprocal compensation for dial-up ISP traffic. All the reasons for which the Commission established the "mirroring

rule" and forbore from application of the "new markets rule" remain valid. Nor would application of "bill-and-keep" to dial-up ISP traffic or other traffic be lawful because, when traffic is out-of-balance, "bill-and-keep" does not provide for the mutual recovery of costs as required by Section 252(d)(2) of the Act. A lawful identification of traffic subject to reciprocal compensation must provide that any traffic not subject to Section 251(g) is subject to reciprocal compensation under Section 251(b)(5).

The Commission should provide that any default unified rates are floors that may not be reduced by state commissions. The Commission should not require pass-throughs to customers of any intercarrier compensation reductions for a number of reasons, including that competitive carriers would be burdened with additional offsetting fees and costs. It would also be impractical for the Commission and carriers to administer pass-throughs.

The Plan is so vague that it would increase uncertainty and litigation. The Plan appears to be intentionally vague on whether it would resolve interconnection issues raised by Time Warner Cable in a pending petition for declaratory ruling, and whether the comparable function component of the reciprocal compensation proposal would override the geographic comparability rule of Section 51.711(a)(3) of the Commission's rules. Nor does the plan provide its economic models or underlying data.

The Commission should reject the Plan.

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Cavalier Telephone, LLC, McLeodUSA Telecommunications Services, Inc., Pac-West Telecomm, Inc., and RCN Corporation submit these reply comments in opposition to the "Missoula Plan" filed on July 24, 2006 by the National Association of Regulatory Utility Commissioners' Task Force on Intercarrier Compensation.[1]

The voluminous comments filed in response to the Missoula Plan confirm that there is no industry consensus in support of the Plan. Comments in support of the Plan, highlight its numerous anticompetitive aspects including that it seeks to protect ILEC revenues from competition and would impose burdensome and unnecessary interconnection proposals on CLECs . For all the reasons stated in initial comments, the Commission should promptly reject the Plan. At a minimum, prior to any further deliberations in this proceeding, the Commission

[1] Comment Sought on Missoula Intercarrier Compensation Reform Plan, *Public Notice*, CC Docket No. 01-92, DA 06-150 (rel. July 25, 2006).

should require that the Plan supporters clarify, and provide further information concerning, a number of important issues.

I. THERE IS NO INDUSTRY CONSENSUS

Although the Missoula Plan supporters claim a "broad … base of support" for their proposal,[2] the record reveals that the supporters represent only a relatively narrow segment of the industry, and that opposition to their self-serving "solution" to inter-carrier compensation reform is widespread.[3] Opponents include two of the three BOC holding companies, several mid-sized incumbent LECs, most wireless carriers, cable providers, state regulators, consumer organizations, both residential and commercial users, and the great majority of competitive wireline carriers (both local and all-distance). The Plan's support comes almost exclusively from AT&T and its subsidiaries, and from smaller rural ILECs who would benefit from the special-interest provisions of the Plan. Nothing could be more inaccurate than the claim that the Plan reflects a good compromise that most industry "entities" will accept.[4] Although rural telephone companies do have special circumstances that need to be considered in reforming inter-carrier compensation, addressing the needs of rural companies *alone* is not sufficient reason to adopt all of the other anti-competitive, inefficient, and unlawful components of the Plan. While industry

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2 Supporters at 1.

3 Surewest Communications, at 11-13 ("Surewest"); *see also* Cincinnati Bell Inc., at 2 ("Cincinnati Bell").

4 Eastern Rural Telecom Association at 5, 6 ("ERDA") .

consensus would be desirable, the Missoula Plan does not reflect, and the Commission may not adopt the Plan on the basis that it enjoys, significant industry support.[5]

II. ILEC COMMENTS HIGHLIGHT NUMEROUS DEFECIENCIES OF THE PLAN

A. Any Restructure Mechanism Must Be Portable

Rural ILECs uniformly take the position that the proposed Restructure Mechanism is necessarily, and/or ought to be, established as part of rules governing interstate access charges under Section 201 of the Act, rather than as a universal service program under Section 254.[6] They apparently believe that Section 201 Restructure Mechanism participation would not, and should not, be portable to competitive carriers.[7]

However, the Commission could not lawfully adopt the proposed Restructure Mechanism under Section 201 because it envisions replacement of intrastate access revenues.[8] Under Section 2(b)(2) of the Act, regulation of intrastate communications is reserved to the states.[9] While the Commission may preempt state regulation of matters that are inseparable from interstate communications, rates and cost accounting matters are severable and, therefore, may

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5 Nor may the Commission adopt the proposed compensation rates merely because some industry participants negotiated and proposed them. Cavalier Telephone, LLC *et al*. at 1.

6 Rural Group of Independents at 4 (“RGI”); ICORE Companies at 7 (“ICORE”); Nebraska Rural Independent Companies at 13 (“NRIC”); Rural Iowa Independent Telephone Association at 4(“RIITA”); GVNW Consulting, Inc. at 3 (“GVNW”).

7 *Id*.

8 RGI at 4.

9 47 U.S.C. § 152(b)(2).

not be preempted.[10] Therefore, the Commission has no authority under Section 201 to adopt a Restructure Mechanism for intrastate communications revenues and services.[11]

Moreover, even if the Commission could adopt some aspects of the Restructure Mechanism under Section 201, the Commission could not make any such funds non-portable under Section 201. The ILECs' apparent reasoning —because universal service is portable under Section 254, portability is not required under Section 201[12]—is a *non sequitor*.[13]

The Commission does not have authority under Section 201 to establish the proposed Restructure Mechanism.[14] Although ILECs have been careful not to argue explicitly that the Restructure Mechanism is a universal service program, this is specious as rural ILECs in particular contend that this massive new subsidy program is essential to permit them to provide affordable broadband service. Moreover, its costs would be imposed on the same subscriber base as universal service programs. Therefore, the Restructure Mechanism is in substance a universal service program, albeit one that does not meet the standards of section 254.[15] After the 1996 Act, the Commission has no authority to enact universal service programs under Section 201. Using access charges to fund universal goals creates an implicit subsidy that violates the "plain

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

11 Verizon Communications, Inc., at 28 ("Verizon"); see also, Surewest, at 29-30.

12 ICORE at 7.

13 General Communications, Inc., at 48-51 ("GCI").

14 National Association of State Utility Consumer Advocates at 60-62 ("NASUCA").

15 The Wireless Association, at 36 ("CTIA").

language" of section 254(e).[16] Congress intended Section 254 exclusively to govern universal service programs. The Plan proponents may not avoid the statutory requirements of Section 254 by trying to disguise an explicit subsidy as a "rate" under Section 201.

Apart from lack of statutory authority, the Commission should reject the rural ILECs' proposal that only they should be entitled to subsidies under an intercarrier compensation reform plan for all the reasons provided in initial comments.[17] This proposal is blatantly anticompetitive and therefore, directly contrary to the Commission's goal of competitively neutral intercarrier compensation reform. In the absence of a universal service justification, there is no basis for adopting a revenue replacement mechanism as part of intercarrier compensation reform, let alone one available only to ILECs.

B. The Commission Should Reject ILEC Requests for Steps Backward on Reciprocal Compensation for Dial-Up ISP Traffic

Rural ILECs urge the Commission to rescind the mirroring rule and reinstate the new markets rule because they claim that the FCC-ordered rate was based on BOC costs and does not reflect rural ILECs' higher costs of termination and there is still considerable dial-up usage in rural areas.[18] The Commission should reject this request for numerous reasons. First, the proponents of this argument did not submit evidence in the record that rural areas, like the rest of the nation, are not experiencing a significant shift from dial-up to broadband Internet access. As the Commission knows, this decline in dial-up subscribership was one of the principle

[16] *Texas Office of Public Utility Counsel*, 183 F. 3d 393 (5th Cir. 1999), 425.

[17] Cavalier Telephone, LLC *et al*. at 10-11.

[18] NRIC at 22; see also Minnesota Independent Coalition ("MIC"), at 10.

justifications for forbearing from the new markets rule.[19] In fact, the record shows that dial-up subscribers are expected to continue to fall from 50 million in 2002 to 20 million in 2007,[20] further justifying the Commission's decision to forbear from the new markets rule. This loss of dial-up customers includes forecasts concerning providers such as AOL[21] that serve all areas of the country, both rural and urban. In short, ILECs in initial comments fail to provide any support for their assertions that rural areas are not experiencing the same decline in dial-up subscribership as the rest of the country.[22]

Second, the ILECs that request that the new markets rule be reinstated fail to cite any changed circumstances or explain why the Commission's decision to forbear from application of that rule was not entirely correct.[23] The Commission found that the new market rule required different rates for the same calls and that the policy rationale for that rule "no longer outweighs policies favoring a unified compensation regime..." As such, the Commission forbore from application of that rule.[24] Because the rural ILECs cite no new evidence or changed

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19 *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, FCC 04-241, released October 18, 2004, paras. 24, 20, aff'd. *aff'd In re: Core Communications, Inc*, 455 F. 3d 267 (D.C. Cir. 2006).

20 Letter from John. T. Nakahata, Counsel for Level 3 Communications, LLC to Marlene H. Dortch, CC Docket No. 01-92, September 8, 2006, at 2, citing Bernstein Research, "Broadband Update: DSL Share Reaches 40% of Net Adds in 4 Q ....Overall Growth Remains Robust," March 10, 2004 at 3.

21 *Id*.

22 *See* Verizon, at 27.

23 NRIC at 22.

24 *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, FCC 04-241, released October 18, 2004, ¶ 24, ¶ *aff'd In re; Core Communications, Inc.*, 455 F. 3d 267 (D.C. Cir. 2006).

circumstances, there is no basis for the Commission to reverse its determination to forbear from applying the new markets rule.

Finally, even if these parties had submitted evidence that dial-up traffic in rural areas is stable or growing, that would be no basis for rescinding the mirroring rule. In the *ISP Remand Order*, the Commission provided that rate caps on ISP-bound traffic would apply only if the ILEC offers to exchange all traffic subject to section 251(b)(5) at the same capped rate.[25] The Commission did so because "the record fails to demonstrate that there are inherent differences between the costs of delivering a voice call to a local end-user and a data call to an ISP, thus the 'mirroring' rule we adopt here requires that incumbent LECs pay the same rates for ISP-bound calls that they receive for Section 251(b)(5) traffic." [26] In short, the Commission has already rejected the rural ILECs' claim that the mirroring rule requires that they subsidize dial-up ISP customers.[27] Although rural ILECs claim that rate caps were based on BOC costs, and that rural ILEC costs are higher, they have failed to allege or show that the rate cap does not cover their costs plus a reasonable profit.[28] As such, they have provided no justification for elimination of the mirroring rule.

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[25] *Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ¶ 89 ("*ISP Remand Order*").

[26] *Id.* ¶ 8.

[27] NRIC at 22.

[28] NRIC at 18-20.

C. *Bill-And-Keep Is Not A Lawful or Efficient Default Intercarrier Compensation Mechanism*

Some initial comments continue to urge bill-and-keep either for ISP-bound traffic,[29] or for all forms of traffic.[30] But, mandatory bill-and-keep for any traffic when traffic is out of balance can never satisfy the standard of Section 252(d)(2) of the Act. Section 252 of the Act requires the "mutual recovery of costs" between carriers terminating each other's traffic. When traffic is out of balance, bill-and-keep does not provide for the mutual recovery of costs. Bill-and-keep also fails the standard of section 252 because it would not provide recovery of the "additional costs of terminating such calls." The Commission cannot reconcile a mandatory bill-and-keep arrangement with the plain language of the Act, a conclusion the Commission came to in 1996 in the *Local Competition Order*.[31]

In addition, a terminating compensation rate of zero under bill-and-keep arrangements, without the consent of the terminating carrier, is not "just and reasonable," and therefore would violate Section 201. As long as the Commission requires compensation by any carrier to any other carrier for the provision of any service, it is difficult to imagine how the Commission could justify no compensation for the provision of the fairly simple service of transport and terminating switching for the completion of a telephone call. If a zero rate of compensation can satisfy a "just and reasonable" standard, then the Commission can expect any number of petitions seeking to set rates for unbundled network elements at the same zero compensation rate. If an ILEC is

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29 MIC at 11.

30 Alltel & Suncom at 13; Sprint-Nextel at 8.

31 *Local Competition Order* ¶¶ 1033-1034.

not entitled to compensation from another carrier for providing transport and termination, it is probably not entitled to compensation when it is providing other services or functions of its network.

In addition, Section (B), the "Rules of Construction" for the reciprocal compensation pricing standard, permits the Commission to allow "arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations." The heart of this requirement is that a carrier must be permitted to recover its costs only through the offsetting of reciprocal obligations. It does not permit the Commission to order that a carrier recover its costs from its own end users. A carrier can only recover its terminating switching costs without receiving compensation from the originating carrier if the terminating carrier owes the originating carrier enough compensation to offset the amount that the terminating carrier would be owed. As long as the terminating carrier incurs costs to terminate traffic for another carrier, and the terminating carrier does not incur a reciprocal obligation to the originating carrier, bill-and-keep can never satisfy the 252(d)(2) pricing standard. Parties may mutually agree not to seek compensation, of course, and subsection (B) of section 252(d)(2) permits the Commission to accept such arrangements, but under the law, the Commission simply cannot order a party not to collect compensation from a carrier sending traffic to it for termination under section 251(b)(5).

Further, the Act anticipated that carriers may wish to adopt bill-and-keep arrangements by identifying "arrangements that waive mutual recovery" of costs as acceptable alternatives to reciprocal compensation.[32] The word "waive," however, requires some affirmative, voluntary,

[32] 47 U.S.C. §252(d)(2)(B)(i).

and intentional action on the part of a carrier;[33] the Commission cannot order a carrier to "waive" its rights under the Act. Thus, the Commission may not adopt bill-and-keep even if it were good policy.

Nor would bill-and-keep be good policy. The Commission should not adopt bill-and-keep because it would require major new federal regulatory programs governing ILEC end user charges that would be even more burdensome and likely even more anticompetitive than those proposed in the Missoula Plan. Shifting recovery to end user charges inherently favors ILECs because they continue to possess non-competitive customer segments to whom they may disproportionately shift recovery. And, end user charges for terminating traffic are not economically efficient because the receiving end user is not the cost causer.[34] An efficient intercarrier compensation program would rely on a unified rate cost recovery approach for all types of traffic with charges based on forward-looking costs as has been proposed to the Commission.[35] This approach would lawfully achieve the Commission's goals for intercarrier compensation reform without favoring ILECs.

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33 Webster's New College Dictionary defines "waive" as "to give up or relinquish (a right or claim) voluntarily." Similarly, a "waiver" is "Intentional relinquishment of a right, claim, or privilege." (emphasis added).

34 *Efficient Intercarrier Compensation Mechanisms for the Emerging Competitive Environment*, ETI, Lee L. Selwyn and Scott C. Lundquist, August 2001, pp. 44, 57, and 61, attached to Comments of Focal Communications Corporation, *et al*., CC Docket No. 01-92, filed August 21, 2001.

35 *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 05-33, released March 3, 2005, ¶ 51; Comments of Pac-West Telecomm, Inc. *et al*., CC Docket No. 01-922, filed May 23, 2005, at 28; Letter from Richard M. Rindler, Counsel for Cost-Based Intercarrier Compensation Coalition to Marlene H. Dortch, CC Docket No. 01-92, filed September 2, 2004.

Accordingly, the Commission should in this proceeding definitively reject mandated bill-and-keep as a significant feature of intercarrier compensation reform.

D. The Rural Transport Rule Is Anticompetitive

In their initial comments, some rural ILECs request that the Rural Transport Rule be strengthened in their favor.[36]

Initial Comments have explained why the Edge concept of the Plan disadvantages CLECs.[37] In particular, competitors typically deploy one switch to serve an entire LATA or, in some cases, multiple LATAs. By requiring interconnecting carriers to establish at least one POI in each LATA, existing rules ensure that ILECs will not be able to raise their rivals' costs by forcing them to mimic the ILECs' historical architecture, while, at the same time, preventing interconnecting carriers from forcing ILECs to transport traffic to a single POI serving several LATAs. But, the Plan -- to the sole benefit of ILECs -- would require competitors to haul traffic to multiple Edges whereas ILECs may only have an obligation to haul their originating traffic to a single Edge of a competitor's network.[38] This aspect of the Plan unfairly advantages the historical ILEC network architecture and imposes significant interconnection costs on competitors, violating the FCC's principles of competitive and technological neutrality.

As competitively harmful as the Edge concept is in general, it is even more so in connection with the so-called Rural Transport Rule. Under this feature of the Plan, CLECs and

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[36] MIC at 14.

[37] Cavalier, *et al*. at 25-28.

[38] As explained in Section IV.E., ILECs may not even bear the cost of delivering their originating traffic to a CLEC's Edge if the traffic is out of balance.

other Track 1 carriers would bear the financial burden for interconnection transport in both directions between their Edges and the meet point of the Track 3 ILEC.[39] Further, if the Track 1 ILEC provides dedicated transport through a direct interconnection arrangement, the Track 3 ILEC will compensate the Track 1 ILEC to transport its traffic to the Track 3 ILEC's edge only for the first ten miles.[40] In other words, under the Rural Transport Rule, CLECs must bear nearly all of the potentially very large expenses of transporting traffic to and from rural carriers

As explained elsewhere in these comments, the Commission does not need to address or impose a set of complex, disruptive new interconnection obligations on LECs in order to achieve intercarrier compensation reform, let alone ones that egregiously favor incumbents.[41] But even if it were to address interconnection obligations, it should not impose the competitively harmful multiple Edge concept and/or the Rural Transport Rule.[42] If a CLEC chooses to establish a presence as a local competitor, all interconnection obligations to haul non-access traffic should be mutual and reciprocal. Interconnection obligations should not impose lopsided requirements on CLECs to carry traffic in both directions, or to interconnect at multiple edges that are designed to favor ILECs and make it cost prohibitive for competitors to interconnect.[43]

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39 Plan § II., E, 1, e, i, 2).

40 Plan § II., E, 1, e, i, 4).

41 *See* p. 19, *infra*.

42 CTIA, at 11.

43 CTIA, at 19-21.

E. ILEC Self-Help Proposals Should Be Rejected

The Commission should reject ILECs' self-help proposals concerning blocking of traffic and withholding of equal access to competitive carriers that provide VNNX service.

ILECs ask that they be permitted to block traffic that does not comport with their phantom traffic proposals. They ask that the Commission should either permit carriers to block traffic when ILEC requested information is not present or permit ILECs to intercept such calls and require the caller to either terminate the call or complete it as an operator services call.[44] This proposal reflects ILECs' exaggerated views of the scope of the phantom traffic "problem," as well as their disregard for the strong public interest in a seamless interconnected nationwide network in which customers, including first-responders, have assurance that calls will be completed. The possibility that ILECs could intercept calls from CLEC customers would additionally provide them an unwarranted opportunity to engage in anticompetitive messaging to customers. The Commission should reject this proposal, and assuming that rules governing phantom traffic are adopted, should establish enforcement mechanisms that do not threaten the integrity of the telephone network.

ILECs also propose that where an EAS area includes rate centers that are associated with different tandems, the VNXX provider should be required to order a direct trunk group to the RLEC end office before the RLEC is required to provide equal access to seven-digit dialing.[45] This proposal should be rejected. It would seriously harm consumers if ILECs were permitted unilaterally to determine the circumstances under which they could withhold equal access

[44] RIITA at 4-5.

[45] National Telecommunications Cooperative Association ("NTCA") at 19-20.

interconnection, relegating some consumers to second- class status in terms of their ability to obtain quality access to their chosen service provider. In addition, for all the reasons provided to the Commission in other filings, VNXX should be continued in its current permitted arrangements in light of the differences in ILEC and CLEC network architectures and because it provides beneficial options and service choices to customers without disadvantaging ILECs.[46]

Under Commission precedent, such self-help is an unjust and unlawful practice in violation of Section 201(b) of the Act. This Commission has declared that if an IXC disputes a CLEC's presumptively reasonable charges, the IXC must pay the charges first and protest them later.[47] In *MGC v. AT&T*, the Commission determined that AT&T had improperly engaged in self-help measures by refusing to pay.[48] The FCC stated that AT&T's self-help was a violation of Section 201(b) of the Act.[49] Similarly, any ILEC attempt to withhold equal access when it suspects that a competing provider is providing VNXX service would be self-help in violation of Section 201(b).

Additionally, the proposed self-help measures come uncomfortably close to the type of unlawful self-help engaged in recently by a rural ILEC in connection with provision of Internet

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[46] Comments of Pac-West Telecomm, Inc. *et al.*, CC Docket No. 01-92, filed May 23, 2005, at 52; Letter From Richard M. Rindler, Counsel for Pac-West Telecomm, Inc. and US LEC Corp. to Marlene H. Dortch, CC Docket No. 01-92, January 19, 2004.

[47] *Broton v. AT&T*, Memorandum Opinion and Order, 13343, 12 FCC Rcd 1335, n.53.

[48] *In the Matter of MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11647, 11659 ¶ 27 (1999), recon. Denied, 15 FCC Rcd. 308 (2000).

[49] *Id.*

access.[50] The Commission should reject the instant self-help proposals as decisively as it acted in that instance.

F. The Plan Is Not Necessary to Assure Investment in Rural Exchanges

In initial comments, ILECs repeat claims that the Plan will enable investment by rural carriers in broadband facilities.[51] These claims are unconvincing because, among other reasons, they are completely unsupported.[52] ILEC commenters offer nothing other than bald, self-serving assertions that creation of new subsidy mechanisms will promote broadband investment.[53]

In fact, rural ILECs under the Plan would have less incentive to invest in new networks because multiple elements of the Plan, including the subsidy Restructure Mechanism and the Rural Transport Rule, protects them from competition by discouraging investment by competitors.[54] The Restructure Mechanism also discourages ILECs from investing in new networks to provide advanced services by providing support for legacy networks, and legacy networks only (not competitive networks).[55] As pointed out in initial comments, declining

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[50] *Madison River Communications, LLC and Affiliated Companies*, Order, DA 05-543, released March 3, 2005.

[51] NTCA at 5; Oregon Rural Companies at 4; *see also* National Cable & Telecommunications Association, at 33 ("NCTA").

[52] CTIA, at 34, 35. ("Consumers can benefit from carrier subsidies only if conditions are imposed on the distribution of the subsidies that spur efficient investment and operations.")

[53] See, e.g., NCTA at 5; Oregon Rural Companies at 4; ERDA at 5; MSTC at 6.

[54] Time Warner Cable, at 12-13 ("Time Warner "). ("The Missoula Plan would make it extremely difficult for new entrants to compete successfully in rural areas.")

[55] *See e.g.*, GCI, at 60-65.

revenues for legacy services caused by competition provide the strongest incentive for ILECs to invest in broadband because it encourages them to invest to obtain new revenue sources.[56]

The Commission has already determined that marketplace forces provide sufficient incentives for ILECs to invest in broadband networks. In the *Triennial Review Order*,[57] the Commission determined that CLECs face comparable risks and opportunities for new broadband revenues as do ILECs in considering whether to build fiber networks.[58] But, if CLECs and ILECs face comparable opportunities, it cannot be the case that rural or other ILECs need massive new subsidy programs in order to invest in broadband, especially given the ILEC's inherent advantages over competitive carriers in terms of access to rights of way.

Similarly, the Commission recently changed the regulatory scheme for the ILECs' provision of broadband service from Title II of the Act to Title I, in part on the proposition that "all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions."[59] Such a claim has been a keystone in recent ILEC advocacy. The Plan

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[56] Cavalier Telephone, LLC *et al*. at 8.

[57] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), corrected by Errata, 18 FCC Rcd 19020 (2003).

[58] *Triennial Review Order* at ¶ 275.

[59] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33 et al., Report and Order and Notice of Proposed Rulemaking, FCC 05-150, ¶ 45 (rel. Sept. 23, 2005) ("*Wireline Broadband Order*").

turns such logic on its head by now claiming that ILECs need regulatory subsidies to make such investments, while other carriers do not.

Accordingly, the Commission should reject the Plan because it would disserve the goal of increased broadband investment by rural carriers.

G. Interconnection Issues Are Unrelated To, and Unnecessary for, Intercarrier Compensation Reform

The interconnection regime is well established under Sections 251 and 252 of the Act and the Commission's implementing rules. The Commission need not even address issues related to interconnection in order to achieve intercarrier compensation reform, and it is plainly unnecessary and in violation of existing law to impose new, complex, and disruptive interconnection obligations on CLECs as reform is implemented.[60] However, that is precisely what the Plan purports to do, and its provisions modify existing interconnection obligations in a manner that patently favors incumbents to the significant detriment of CLECs. For example, as discussed in initial comments, the Plan would eviscerate CLECs' entitlement to a single point of interconnection ("POI") per local access and transport area ("LATA"); violate Section 252(d) by requiring competitors to pay tariffed rates for interconnection facilities if they lack available facilities to reach the incumbent's Edges; and remove Tandem Transit Service ("TTS") from Section 251/252 regulation. The Commission should reject the Plan on the ground that it unlawfully and unnecessarily seeks to alter the interconnection regime.

Apart from the substantive deficiencies of the Plan's interconnection-related provisions, such provisions simply have no place in an intercarrier compensation reform plan. The Plan's

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[60] GCI, at 44.

objective of shifting the ILECs' interconnection-related costs and foisting them on other interconnecting carriers is simply another means by which ILECs seek to minimize revenues lost to declining intercarrier compensation rates. Such a transparent attempt has nothing to do with any legitimate goal related to interconnection, and the Commission should decisively reject the supporters' invitation to disrupt the multitude of existing interconnection arrangements to the sole benefit of ILECs.[61]

H. Revenue Predictability Is Not An Appropriate Goal of Intercarrier Compensation Reform

The Plan supporters' fundamental premise—that it is appropriate to preserve ILEC revenues in the guise of intercarrier compensation reform—is fatally defective. The goal of "bringing predictability to telecom revenue flows"[62] espoused by Plan supporters, which would be effectuated in the Plan only for ILECs, to the extreme detriment of competitors , is neither legitimate nor legally sustainable, and the Commission should reject their attempt to create additional ILEC subsidies via opportunities that are not likewise available to CLECs.[63] Indeed, the premise subverts the goal of 1996 Act by creating a protected class of LECs rather than promoting competition. Moreover, as the ETI Study shows, taken as a whole, the Missoula Plan would in fact increase ILEC revenues—by an estimated $28.7 billion over eight years—making them better off under the Missoula Plan than under the current rules.[64]

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[61] GCI at 45-6.

[62] USTA at 4.

[63] Frontier Communications, at 12.

[64] *The True Economic Impact of the "Missoula Plan" for Intercarrier Compensation: An Assessment Based on Reality*, ETI, Lee Selwyn, November 2006, at 11 (filed Nov. 8, 2006).

The proposed Restructure Mechanism, which is the primary means by which the Plan's supporters seek to preserve ILEC revenues, is incompatible with the Commission's announced goals for intercarrier compensation reform, which include competitive neutrality, a unified regulatory regime, economic efficiency, minimizing the need for regulatory intervention, encouraging investment, and technological neutrality.[65] Nowhere did the Commission state that ensuring ILEC revenues and safeguarding their predictability is in any way related to its intercarrier compensation reform efforts.[66] In fact, there exists no sound justification for implementing a revenue replacement mechanism in connection with intercarrier compensation reform, and the one-sided nature of the Restructure Mechanism further undermines its propriety.

By permitting ILECs to recover revenues lost by reduced intercarrier compensation payments to the extent they are not recovered in increased SLCs, the proposed Restructure Mechanism would insulate ILECs from competitive pressures imposed by CLECs and other market entrants. The two theories the Plan supporters posit in defense of their proposal, that of promoting broadband investment by protecting ILECs from reduced revenue due to lines lost to competition and the alleged benefit to consumers, do not justify the subsidies that Plan supporters seek to apply to ILECs. Nor does the Plan attempt to substantiate, or even address, why consumers should subsidize ILECs based on current volumes that show marketplace forces are causing declining access lines, MOUs, and access revenues. Implementation of the

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[65] NPRM at ¶¶ 4, 36, 90, 97.

[66] *See* Alltel and Suncom, p. 2 (the Plan grants privileged status to rural and other ILECs, and its focus on protecting ILEC revenues and competitive position fail to advance the objectives of economically efficient facilities-based competition, consumer-focused universal service protection and competitive neutrality).

Restructure Mechanism would serve only to distort and destabilize the industry, as subsidized ILECs would be protected from the effects of competition while CLECs would have an extreme disincentive to continue to expand their businesses due in part to the competitive disadvantages resulting from ILEC subsidization.

In marked contrast to the position of ILECs under the Plan, however, CLECs would not have access to the Restructure Mechanism to make up lost access revenue. Therefore, the "predictability" touted by Plan supporters, even it were otherwise a legitimate goal, would only benefit ILECs, which is anticompetitive. The ILEC revenue predictability measure represented by the Restructure Mechanism should therefore be rejected as incompatible with the Commission's intercarrier compensation reform objectives.

I. Identification of Traffic Subject to Reciprocal Compensation Must Comport with the Act

The initial comments supporting the Plan make the same fundamental error that the Plan itself does, namely, they advocate classifying certain categories of traffic for intercarrier compensation purposes regardless of the applicable statutory requirements and without performing any statutory analysis. In order to withstand judicial scrutiny, any intercarrier compensation reform this Commission adopts must apply the statute to determine whether a particular class of traffic qualifies as "access" traffic under Section 251(g)[67] or non-access traffic under 251(b)(5). This reflects the fact that the FCC and U.S. Court of Appeals for the District of Columbia reconciled Sections 251(b)(5) and 251(g) in a straightforward manner: Traffic that does *not* fall within Section 251(g) is governed by Section 251(b)(5).[68] The Missoula Plan fails to apply the statute as interpreted by the Commission and the D.C. Circuit.

Before 2001, the FCC used the term "local traffic" to identify calls that were subject to reciprocal compensation obligations under Section 251(b)(5). However, the FCC removed the word "local" from its reciprocal compensation rules in 2001. Instead, the FCC redrafted its rules to make clear that Section 251(b)(5) applies to *all* telecommunications traffic that is not subject

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[67] Section 251(g) preserves pre-1996 Act rules governing interstate and intrastate "exchange access," "information access," and "exchange services for such access." The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. §2(16). "Telephone toll service" is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. §2(48). The other two terms are not defined in the statute or FCC rules.

[68] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9165-66 (¶¶ 30-39) (2001) ("*ISP Remand Order*"), *remanded, WorldCom v. FCC*, 288 F.3d 429, 431-34 (D.C. Cir. 2002), *cert. den*. 538 U.S. 1012 (2003).

to Section 251(g). The FCC found that, "[o]n its face," Section 251(b)(5) requires "local exchange carriers . . . to establish reciprocal compensation arrangements for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."[69] The D.C. Circuit did not cast any doubt on the FCC's express finding that Section 251(b)(5) applies, "on its face," to *all* telecommunications traffic, whether local or otherwise.

The FCC also found that Section 251(b)(5) is "subject to further limitation" – specifically, that certain types of traffic enumerated in Section 251(g) are "carve[d]-out" of Section 251(b)(5). Importantly, the D.C. Circuit found that Section 251(g) permits only "continued enforcement" of pre-1996 Act requirements, rather than conferring independent authority on the FCC to adopt new intercarrier compensation rules inconsistent with Section 251(b)(5).[70] In other words, the exchange access traffic described in Section 251(g) is limited to traffic exchange obligations that existed as of February 8, 1996.

Instead of applying the statute, the Missoula Plan attempts to apply the FCC's end-to-end jurisdictional test to define intercarrier compensation obligations. In general, where possible, FCC decisions require that the *jurisdiction* of traffic, *i.e.*, whether it is "interstate" or "intrastate," be determined by the origination and termination points of the call.[71] However, "interstate" or "intrastate" jurisdiction is *not relevant* to determining whether traffic is "exchange access," "information access" or "exchange services for such access." For example, when the FCC relied

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[69] *ISP Remand Order, 16 FCC Rcd 9165-66 (¶31)* (emphasis in original).

[70] *WorldCom, Inc.*, 288 F.3d at 432-434.

[71] *See, e.g., NARUC v. FCC,* 746 F.2d 1492, 1499 (D.C. Cir. 1984).

on the traditional end-to-end jurisdictional analysis to conclude that ISP-bound traffic is not "local," the D.C. Circuit reversed and remanded that decision on the ground that the FCC had failed to explain why the end-to-end jurisdictional analysis was relevant to determining which intercarrier compensation mechanism (access or non-access) would apply.[72] After *WorldCom*, not even ISP-bound calls can be classified as information access when a CLEC is providing service to the ISP. Because "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic,"[73] "§ 251(g) is not susceptible to the [FCC's] reading."[74]

The FCC should not repeat its mistakes by adopting the Missoula Plan's end-to-end classification of traffic as access or non-access. Rather, the Commission should apply the statute to determine whether each class of traffic is subject to 251(g) or 251(b)(5).

J. Unified Rates Should Be the Default Floor

The Plan provides a scheme of unified default rates at the end of the transition period. Apart from being incomplete, unduly complicated and failing to achieve a single genuine unitary rate for all traffic,[75] the proposed scheme is unclear as to whether states could set a rate that is lower than a unified rate established in the Plan. If the Commission were to adopt any such unified rate, it should determine that the rate established in the intercarrier compensation reform plan is the floor and that states may not set lower rates. This is necessary to promote regulatory

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[72] *Bell Atlantic v. FCC*, 206 F.3d 1, 5 (D.C Cir. 2000).

[73] *WorldCom, Inc.*, 288 F.3d at 433.

[74] *Id.* at 432.

[75] Time Warner, at 14-16; GCI at 83-85.

certainty. However, carriers should be permitted voluntarily to agree to lower rates or bill and keep.

K. The Commission Should Not Require Pass-Through to Customers of Any Intercarrier Compensation Reductions

Assuming that the Commission chooses to require that intercarrier compensation rates be substantially reduced, perhaps to a single unitary rate, it should not require that any reductions in fees experienced by LECs be passed through to customers for several reasons.

First, most LECs both pay and receive intercarrier compensation. Therefore, although they might experience reductions in some fees they pay, carriers will also likely experience reductions in amounts they receive. Although there would not be perfect offsets in every case, as the ETI Study explains, LECs will not necessarily be experiencing significant savings on a net basis.[76] In fact, the Plan would have virtually no net effect on intercarrier compensation revenues/costs of competitive carriers that provide bundled local/LD service in competition with ILECs; reduced access costs and access revenues will likely net to zero, resulting in no savings to flow through. Therefore, there is no need for pass-throughs and requiring them would substantially harm all LECs.

Moreover, it would be nearly impossible for the FCC to administer and enforce any pass-through requirements. Given that there are few stand-alone long distance carriers at this point, the FCC would be required to trace intracompany transfers, which will be all the more difficult if

[76] ETI Study at 9.

the FCC forbears from imposition of long distance separate affiliate and other dominant carrier requirements to BOCs.[77]

Further, it will be very complicated if not impossible for the Commission to identify pass-throughs given the disparate rate structures of intercarrier compensation and retail rates. How would reductions in per minute rates translate to equal reductions in flat-rated, bundled service plans typically offered by today's all-distance telecommunications carriers? As the ETI Study explains, "to the extent that any flow-through of lower access charges occurs at all, it would most likely take the form of an increase in the monthly calling allowance at prevailing price points rather than as a decrease in monthly charges."[78]

In addition, some carrier costs might substantially increase under the Plan. For example, the multiple Edge requirements, transit traffic provisions, and proposed phantom traffic rules would all impose additional network and interconnection costs on carriers that could offset, or far surpass, any net intercarrier compensation reductions.[79] Therefore, considering the Plan as a whole, there simply may not be any net savings to pass-through to customers. For these reasons, the Commission should not require any pass-through of purported savings caused by reductions in intercarrier compensation payments.

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77 *Petition of Qwest Communications International, Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunset Pursuant to 47 U.S.C. § 160*, WC Docket No. 05-333, filed November 22, 2005.

78 ETI Study at 13.

79 Verizon, at 33-34.

III. IN NUMEROUS AREAS, THE PLAN IS SO VAGUE THAT IT WILL INCREASE UNCERTAINTY AND LITIGATION

For all of the reasons specified herein and in initial comments, the Commission should reject the Plan. In addition to being overly complex, upsetting settled law, and attempting to incorporate numerous areas that are wholly unrelated to intercarrier compensation, the Plan lacks sufficient detail and in some respects appears to be intentionally vague. This vagueness and lack of detail will only lead to further disputes and prolonged litigation.[80] Following are just a few examples of areas that the Plan appears to leave intentionally vague.

Relationship to Pending Time Warner Cable Petitions. In petitions now pending before the Commission, Time Warner Cable has requested that the Commission determine that rural ILECs may not withhold interconnection to cable companies, CLECs, and others that would be providing access services to other providers including VoIP providers.[81] Rural ILECs want to preclude the competition by VoIP that could be made possible by these interconnection arrangements with so-called "wholesale" CLECs that do not provide service directly to end user customers in the traditional sense (e.g., residential users or small businesses). Rural ILECs claim that the Plan does not resolve interconnection issues raised by the Time Warner Cable petitions,[82] Section III A of the Plan requires that a carrier must permit other "carriers" to physically interconnect at its Edge for the purpose of direct Interconnection. The Plan defines

[80] Cincinnati Bell, at 3; *see also* CTIA, at 15-18 (Missoula Plan would create an "administrative nightmare").

[81] Petition of Time Warner Cable for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, filed March 1, 2006.

[82] RGI at 6.

"carrier" as any telecommunications carrier that offers telecommunications services on a retail basis, wholesale basis, or both. While this definition arguably resolves the issue of to whom ILECs are required to provide interconnection, the fact that rural ILECs interpret it as not resolving the Time Warner issue demonstrates the need for clarity.

Tandem Reciprocal Compensation Rate During the Transition to the Unitary Rate. The Plan provides that "[t]he non-ILEC will charge the same reciprocal compensation rate charged by the ILEC for performance of comparable functions."[83] This could be interpreted to override the existing geographic comparability requirement. Section 51.711 (a)(3) of the Commission's Rules requires geographic, not functional, comparability, which has been judicially approved.[84] Under that rule a CLEC is entitled to assess the same tandem interconnection rate for local call termination as an ILEC so long as the CLEC's switch serves the same geographical area as does the ILEC access tandem. It is unclear whether the Plan supporters intend to override Section 51.711. If so, as with eviscerating the single POI rule, there is no rational basis for including such changes in reform of intercarrier compensation rates.

Access to Models and Underlying Data. The Commission should require that the Plan Supporters make available the models and data underlying the Plan in a format that would permit an assessment of the adequacy of methodologies and information supporting the estimates of costs and benefits of the plan, including in particular the costs of the proposed Restructure Mechanism. Absent this disclosure, it is impossible for the Commission or others to evaluate the

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83 Plan, III, E, 5, a, iii.

84 47 C.F.R. § 51.711.

Plan's claimed benefits and measure the costs it would impose on the industry and consumers as a whole.[85]

IV. CONCLUSION

For these reasons, the Commission should reject the Plan.

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[85] Surewest, at 27. ("The Plan lacks documentation sufficient to fairly evaluate the likely impact on individual carriers, the overall telecommunications industry and consumers.")