Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF AT&T INC. ON THE MISSOULA PLAN FOR INTERCARRIER COMPENSATION REFORM

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INTRODUCTION AND SUMMARY

Soon after the Commission issued its first NPRM in this docket six years ago, it looked to the industry to take the lead in developing a consensus plan for reforming intercarrier compensation. AT&T has answered this call with utmost dedication. For several years, it has worked diligently with other industry participants to design a comprehensive and workable plan that will rationalize today's crazy-quilt of intercarrier compensation and interconnection rules, increase the industry's overall efficiency, and manage a smooth transition to an IP-centric marketplace, all while protecting consumer interests in reliable and affordable service. The result — the Missoula Plan — is now, and for the foreseeable future will remain, the *only* plan before the Commission that meets these disparate objectives. If the Commission still intends to rely on the industry to help it chart a path through today's regulatory thickets, it will not do better than this Plan. And because there are no genuine alternatives in sight, the Plan is the Commission's last clear chance to avoid an unprecedented regulatory collapse, as mounting arbitrage opportunities undermine traditional implicit subsidies for universal service.

Several years ago, AT&T's predecessor companies played key roles in developing the first major plan the Commission considered in this docket: the Intercarrier Compensation Forum ("ICF") Plan, submitted in 2004. The ICF Plan advocated a bill-and-keep approach to intercarrier compensation, under which carriers would have looked entirely to their own end users, rather than other carriers (and their end users), for recovery of the network costs they incur when terminating calls originated on other carriers' networks. Although the Commission had itself expressed serious interest in a workable bill-and-keep proposal,[1] the ICF Plan met stiff resistance from NARUC and America's rural carriers, among others, who viewed any quick shift to a bill-and-keep regime as too radical a solution to the problem of excessive intercarrier charges. Chairman Martin expressed doubt that such a proposal would be "politically viable — especially in the short run."[2] But he added that "moving quickly to a unitary rate" for all terminating traffic handled by a given carrier "would be a step in the right direction – eliminating many arbitrage opportunities."[3]

AT&T took this message to heart. Along with several other members of the ICF coalition, AT&T reached out to the opponents of bill and keep and spent a year and a half hammering out the details of a consensus reform plan under the exceptionally helpful auspices of NARUC. The result is the Missoula Plan. The signatories include an extraordinary cross-section of the industry, including two of the nation's four largest ILECs (AT&T and Embarq, the wireline successor to Sprint); Windstream (the wireline successor to Alltel and Valor) and several hundred rural carriers; the nation's largest wireless carrier (Cingular); and two of the industry's most prominent CLECs and independent interexchange carriers (Level 3 and Global

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1 *See, e.g.*, Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9611-13 ¶¶ 1, 4 (2001) ("*Intercarrier Compensation NPRM*"); Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9153-55 ¶¶ 2, 6 (2001) ("*ISP Remand Order*"), *remanded on other grounds*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); Patrick DeGraba, FCC, OPP Working Paper Series, No. 33, *Bill and Keep at the Central Office As the Efficient Interconnection Regime* (Dec. 2000) (advocating a bill-and-keep regime).

2 Chairman Kevin Martin, FCC, Remarks at the NARUC Summer Meeting, at 4 (July 26, 2005) ("Martin NARUC Speech") (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260312A1.pdf).

3 *Id.*

Crossing). The Plan has also drawn support from California and a number of other states at the forefront of telecommunications reform.[4]

The Plan has received this volume of support precisely because the existing system is broken, and the Plan's proposed solutions are comprehensive, even-handed, and pro-consumer. The Plan delivers what Chairman Martin asked the industry to develop: a precisely calibrated roadmap for moving each carrier (except the very smallest) "quickly to a unitary rate" for all of the traffic it terminates, thereby "eliminating many arbitrage opportunities."[5] The Plan not only resolves hundreds of arbitrary rate discrepancies, but also sharply reduces termination rates from today's often inflated levels. The Plan thereby forces each carrier to look primarily, though not entirely, to its own end users for the recovery of its own network costs, rather than to other carriers — and ultimately to the customers of those other carriers.

In that key respect, the Plan makes each carrier more *responsible* to its own end users for quality and efficiency of service, and thus empowers end users in general, rather than regulators, to pick winners and losers in the marketplace. At the same time, the Plan will not drive

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4 *See, e.g.*, California Comments at 2 ("California is generally supportive of the Missoula Plan's framework."); Kansas Comments at 3-4 (describing the Missoula Plan as having "significant benefits" that "provide the parties with a framework to address the many issues the Commission faces"); Oklahoma Comments at 12 ("The Missoula Plan presents a good 'first step' for accomplishing access reform."). Some other parties, even while criticizing aspects of the Plan, commend it overall. *See, e.g.*, Qwest Comments at 12 (describing the Plan as a "starting point for discussing reform"); CenturyTel Comments at i ("The 'Missoula Plan' presents a thoughtful framework for reform."); GVNW Consulting Comments at 5 ("[The Missoula Plan] represents what the Commission had requested to be delivered: an industry solution to a thorny problem."); TCA Comments at 3 (concluding that the Missoula Plan's unified rate structure "will significantly increase [the] economic efficiency of the current system"). Each of these comments was filed in CC Docket No. 01-92 on or around October 25, 2006, in response to the Commission's Public Notices seeking comment on the Missoula Plan. Unless otherwise stated, the same is true of the other comments we cite below.

5 Martin NARUC Speech, *supra* note 2, at 4.

intercarrier rates down to zero, as a bill-and-keep approach would, and thus will not impose the same degree of upward pressure on end-user rates. Instead, the Plan prescribes only modest, phased-in increases to the regulatory *caps* on monthly end-user charges, and competition will often preclude carriers from raising rates even that far. The Plan will likewise require only a quite manageable increase in federal universal service funding. From a consumer's perspective, any rate increases will be more than offset by passed-through reductions in intercarrier rates, by the convenience of more flexible service plans, and by increases in industry efficiency as a whole, as regulatory anomalies are eliminated and market pressures force carriers to be more responsive to consumer needs.

Of course, genuine reform of any government program inevitably meets fierce opposition from those who benefit from the status quo. Intercarrier compensation is no exception: many parties oppose genuine reform. Rather than participate in the development of this Plan, these opponents chose to sit on the sidelines and await an opportunity to complain about the result afterwards. But their complaints miss the mark. For example, some opponents implausibly claim that there is no problem to be fixed, even though the Commission, the states, most parties, and virtually all industry analysts have confirmed that the problem is both real and dire. In contending otherwise, the critics simply mean that today's hodgepodge of mutually inconsistent rules is not problematic *for them*, given the arbitrage opportunities the rules create. But this hodgepodge is the source of grave uncertainty and inefficiency for the industry and, of particular concern to rural consumers, a threat to the integrity of the nation's universal service system.

Moreover, many of the Plan's opponents, such as those in the cable industry, offer many criticisms but no meaningful alternatives of their own. Although they generally claim that they favor reform, they do not seem to mean it. For example, NCTA floats general "principles" for reform but offers no concrete suggestions for *implementing* them while protecting consumers, carriers, and universal service commitments in the transition. And CTIA offers a bill-and-keep proposal that contains no detail regarding the many issues — such as protection of rural and low-income consumers — that would need to be resolved before implementation of such a proposal.[6] Hoping to make a virtue of that vice, such commenters criticize the Plan for its "complexity," as though the problem to be solved here is simple and requires no hard, detailed steps to correct. Precisely because it recognized that the necessary steps are both hard and detailed, however, the Commission has invited the industry to reach consensus on what those steps should be. The roster of Missoula sponsors is defined by the industry participants who took that invitation seriously. With few exceptions, the roster of the Plan's opponents is defined by those who sat the process out and hope to prolong the short-term benefits they derive from a doomed status quo.

Of course, no comprehensive intercarrier compensation plan will perfectly satisfy every segment of the industry. Nor is this Plan designed to serve as the ultimate solution. It envisions a reevaluation and opportunity for further regulatory rationalization in year four for most issues, and in year six for universal service issues. But even without those refinements, the Missoula Plan is far superior to the status quo, and the Commission has allowed the status quo to persist for far too long. At this critical point in the evolution of the industry, the most likely alternative

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[6] *See* Comments of CTIA, filed in CC Docket 01-92, May 23, 2005 (discussing CTIA's Mutually Efficient Traffic Exchange ("METE") proposal). Other commenters too have advocated various intercarrier compensation solutions without explaining how those solutions would work in practice. *See, e.g.*, Qwest Comments at 11-12 (advocating a bill-and-keep solution); NASUCA Comments at 76-90 (discussing, in little detail, NASUCA's "plan" for reforming intercarrier compensation).

to implementation of this Plan is a regulatory breakdown of unprecedented proportions. The Commission can and should avert that legacy by adopting this Plan.

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The remainder of these comments is divided into four parts. Part I recaps why, as the Plan's proponents have explained in some detail, the Plan provides enormous consumer benefits — some obvious, some less so. First, the Plan requires carriers to recover most of their network costs from their own customers rather than from other providers and *those* providers' customers. That step will make carriers more responsible to, and thus more *responsive* to, consumers overall. In addition, by rationalizing network cost recovery, the Plan will lower consumers' retail charges and expand the availability of the flat-rated service bundles that consumers prefer. Finally, the Plan will benefit consumers over the long run by increasing regulatory stability. That stability will not only save hundreds of millions of dollars in regulatory transaction costs, but also enhance incentives for efficient capital investment in new networks and services designed to meet consumer needs. As explained in the attached reply declaration of economists Richard Clarke and Thomas Makarewicz, the sum total of these consumer benefits far exceeds the costs, including the costs of the new Restructure Mechanism.

Parts II and III answer, respectively, policy-based and legal objections to the Plan's core proposals to lower intercarrier rates and restructure how carriers recover the relevant network costs. As Part II explains, the Plan adopts clear, competitively neutral compensation rules, and the SLC cap adjustments and Restructure Mechanism reasonably protect consumer interests in the wake of the Plan's intercarrier rate reductions. As we discuss, these measures do not unduly protect ILEC interests; they simply relax some of the artificial regulatory restrictions that preclude ILECs from competing on equal terms with other carriers that today face no such restrictions.

Although we address legal objections to various Plan components throughout these reply comments, Part III focuses in particular on the Commission's legal authority to adopt the Plan's core rate-restructuring rules. As we show, the Commission has *already made* the key legal determinations needed to support its direct jurisdiction under 47 U.S.C. § 201(b) and § 251(b)(5) over all intercarrier rates, with the possible exception of originating intrastate access charges. The Commission's assertion of such jurisdiction would therefore suffice to support the Plan in its current formulation, given that the Plan does not now compel the States to take any action with respect to those charges. But the Commission need not stop there, because it has also already made the key legal determinations needed to assert jurisdiction over *all* intercarrier compensation under the so-called "impossibility" exception to 47 U.S.C. § 152(b) ("section 2(b)"). Moreover, we observe, the rates prescribed by the Plan fully comport with the substantive pricing standards of section 252(d)(2), which require only that termination rates reflect the "additional cost" of terminating each call. This "additional cost" standard, which appears nowhere else in the Act, does not remotely direct the Commission to apply the TELRIC standard favored by CLECs, and it is certainly flexible enough to permit the rates proposed in the Plan. We also show that the Commission's jurisdiction over interconnection gives it full authority to prescribe reasonable rates for transit. Here, too, no provision of the Act requires that such rates be set at TELRIC.

Finally, Part IV addresses the Plan's proposed resolution of today's hornet's nest of interconnection disputes. We first debunk the notion that the Commission can somehow ignore those disputes while reforming intercarrier compensation, for these two sets of controversies are inextricably interrelated. We then rebut claims that the Plan's proposed resolution of these disputes would artificially advantage ILECs. As we explain, CLECs would retain the right to interconnect with an ILEC's network at any technically feasible point, despite a widespread misconception to the contrary. And nothing in law or public policy precludes an ILEC from charging interstate transport rates — which this Commission has already deemed just and reasonable — for "backhauling"[7] traffic to its Edge from whatever different, inefficient location the CLEC has chosen for dumping off its ILEC-bound traffic. In this and other respects, when CLECs claim to be attacking the Plan's interconnection provisions for violating principles of competitive neutrality, they are actually just attacking the Plan for *restoring* neutrality after ten years of entrenched regulatory preferences for CLECs.

ARGUMENT

I. Consumers Will Be the Primary Beneficiaries of the Missoula Plan.

Because AT&T has not previously commented in its individual capacity on the Missoula Plan, we begin by briefly summarizing why, in AT&T's view, that Plan is the Commission's last best hope for reforming intercarrier compensation in the interest of consumers. In Parts II and IV, we address the grab-bag of policy objections lodged by the Plan's opponents.

The Plan promotes consumer interests in several related but distinct respects. *First*, by requiring each carrier to rely more (but not exclusively) on its own end users for recovery of its network costs, it makes each carrier more accountable to those end users and thereby permits ordinary market forces, rather than regulation, to pick winners and losers in the marketplace. That point rests on a basic economic fact: under *any* cost-recovery scheme, consumers in the

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[7] We use this term to refer to what the Plan defines as "transport." Missoula Plan at 31, § II.E.3.b.

aggregate ultimately pay the costs of maintaining and operating the nation's telecommunications infrastructure. The ultimate question is whether individual carriers will recover those costs directly and efficiently from their own customers, or indirectly and inefficiently from other carriers — and, ultimately, from those *other carriers' customers*, who end up paying higher rates to cover the costs of those intercarrier payments.

In this respect (as well as the others discussed below), today's intercarrier compensation regime is egregiously inefficient, in that it often permits a carrier to charge other carriers excessive rates to cover its own network costs. Because retail competition normally provides no check on excessive intercarrier rates,[8] the only market-oriented solution to this problem is to place greater responsibility on each carrier to recover most of its costs directly from *its own* end users (and competitively neutral sources of universal service funding where appropriate) rather than from other carriers and *their* end users. The Plan thereby increases the exposure of each carrier to market discipline if, because it is inefficient, it generates higher costs than other carriers for the same quality of service. This increase in the transparency of cost recovery will empower consumers and facilitate competition. With more accurate pricing information, consumers will make better-educated decisions about their service options and will choose carriers that can deliver the best service at the lowest rates.

Second, the Plan will greatly alleviate the inefficiencies inherent in the *rate structures* currently used for the recovery of network costs. Today's regime produces a mismatch between

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8 *See, e.g.*, *Intercarrier Compensation NPRM* at 9616-17, 9625 ¶¶ 13-14, 38; Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, 4698 ¶ 24 (2005) ("*FNPRM*"); Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age* 310-13 (2005) ("*Digital Crossroads*").

the ways network costs are incurred and the ways they are recovered. Although there is reasonable disagreement about the precise extent to which network costs are fixed or usage-sensitive, there can be no disagreement that current regulatory schemes err enormously on the side of excessive reliance on usage-sensitive cost-recovery mechanisms, most notably in the form of often-inflated intrastate access charges. For example, although some states permit rural carriers to charge several cents a minute (or more) for terminating intrastate access calls, no carrier incurs even a fraction of that amount in incremental costs to process such a call through an already-installed end-office switch. By reducing such charges and shifting more cost recovery to flat-rated end-user charges, the Missoula Plan will efficiently realign cost recovery with the costs to be recovered.

One obvious consumer benefit of such reform will be sharp reductions in usage-sensitive retail rates. For example, intense competition in the long-distance market will force carriers to pass through the Plan's access charge savings by lowering retail long distance rates.[9] A number of commenters argue this consumer benefit will occur only if regulators act to compel it,[10] but history refutes the concern that such heavy-handed market intervention is necessary. Prior decreases in access charges have produced substantial savings in end-user rates, sometimes even exceeding the reduction in the access charges themselves.[11] Indeed, that market dynamic worked

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[9] Such rate reductions are illustrated in detail in the consumer impact charts attached as Exhibit 1 to the Missoula Supporters' July 24, 2006 filing.

[10] *See, e.g.*, NASUCA Comments at 25, 28; Texas Office of Public Utility Counsel et al. ("TOPUC") Comments at 3.

[11] For example, long distance rates dropped steadily in the years following the reduction of access charges in the CALLS proceeding. *See* Industry Analysis & Technology Division, Wireline Competition Bureau, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service*, Tables 1.15, 2.6, and 3.1 (2006), *available at*

properly even before today's robust competition in the long-distance market, when the pre-merger AT&T Corp. controlled over 50% of the long distance market.[12] In today's market, long-distance prices are held firmly in check not just by wireline long distance competition, but also (and increasingly) by CMRS and VoIP providers. Thus, unless they hope to lose customers to other providers, both IXCs and LECs will be forced to pass their intercarrier compensation savings on to consumers.[13]

Nor will the Plan's increases in SLC caps eclipse these consumer savings. As an initial matter, the formal increases in those regulatory caps will be both gradual and modest.[14] And the Plan protects low-income consumers by ensuring that Lifeline funding will offset any increases in their end-user rates on a dollar-for-dollar basis.[15] Competition, moreover, will inhibit many ILECs from raising their rates even to the full extent of the caps. That is a key reason why SureWest, an ILEC, opposes the Plan: it recognizes that competition will make it difficult if not impossible for carriers *ever* to take advantage of the full SLC cap increases.[16] This, again, is one of the chief benefits of the Plan. By shifting a portion of each carrier's cost recovery from

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http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266857A1.pdf; *see also* Missoula Supporters Comments at 11 (documenting continued decline in consumers' telephone rates in response to intercarrier compensation reform).

12 *See* Clarke & Makarewicz, Economic Benefits from Missoula Plan Reform of Intercarrier Compensation at 18 (attached as Exhibit 1).

13 *See id.*

14 *See* Missoula Plan at 20-22, §§ II.C.1 through II.C.3.

15 *See* Missoula Plan at 64, § VI.A.1.a.ii; *id.* at 79, § VI.C.6.

16 *See, e.g.*, SureWest Comments at iv, 15, 18, 31-32; *see also* Qwest Comments at 18-19 ("the Plan is clearly not 'revenue neutral' since Track 1 carriers (that are more likely to face competitive entry) are not able to recover from the Restructure Mechanism based upon lines lost due to increasing their SLCs").

intercarrier compensation (which retail competition *cannot* constrain) to end-user rates (which retail competition *can* constrain), the Plan increases each carrier's exposure to marketplace pressures and places consumers squarely in the driver's seat.

The attached Reply Declaration of economists Richard Clarke and Thomas Makarewicz (Exhibit 1) quantifies the extent to which competition can be expected to inhibit actual SLC increases and discusses, more generally, why the consumer benefits of the Plan easily outweigh the consumer costs, including the costs of the new Restructure Mechanism. In brief, their analysis reaffirms that the Plan will increase net consumer welfare by nearly $27 billion over the Plan's eight-year term.[17] Clarke and Makarewicz also answer various criticisms of their initial study. In a new analysis, they make clear that: (1) as has historically been the case, the planned reductions in access charges will flow through to consumers without any regulatory mandate, and; (2) the methodological assumptions underlying their analysis accurately reflect the structures of the wireline and wireless markets. None of the criticism lodged in this proceeding casts doubt on Clarke and Makarewicz's central conclusion: that despite the SLC increases contemplated by the Plan, most consumers will receive lower, not higher, telephone bills overall.

Third, by harmonizing rates for functionally identical network operations, the Plan will increase the availability of the flat-rated bundled service offerings that consumers prefer. The existing hodge-podge of intercarrier compensation schemes prescribes radically different rates depending on arbitrary regulatory classifications in the types of calls at issue (*e.g.,* wireline vs. wireless vs. VoIP) and the geographic endpoints of those calls (intrastate vs. interstate, local vs. interexchange, intraLATA vs. interLATA, and intra-MTA vs. inter-MTA). Those arbitrary

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[17] *See* Exhibit 1 at 12.

discrepancies greatly complicate the ability of carriers to treat each minute as a minute. As a result, consumers face a dizzying array of price differences for services that may be functionally similar. For example, the rates for a VoIP call may be vastly different from the rates for a wireline call between the same endpoints, and wireline customers may pay less to call someone across the country than they do to call someone in a neighboring town.

The Missoula Plan largely eliminates these regulatory distortions, bringing intercarrier charges for all types of traffic closer together and facilitating more rational and equitable pricing of communications services. A minute will be a minute, discouraging disparate pricing among different types of services. As prices are rationalized, wireline carriers will be freer to offer consumers flat-rated "all you can eat" calling plans. And customers in rural areas will enjoy larger local calling areas because rural carriers will have less incentive to carve out artificially small local calling areas designed to generate toll revenues.

Finally, consumers will benefit from the Plan's adoption over the long term because, by creating greater regulatory certainty, the Plan will eliminate millions of dollars annually in wasteful transaction costs, which would otherwise be passed through to consumers, and will encourage greater capital investment in new networks and services. For example, the Plan will promptly resolve ongoing phantom-traffic disputes; will provide easily administered and competitively neutral rules addressing a host of topics, including both intercarrier compensation and interconnection; and will facilitate streamlined negotiation of interconnection agreements, thereby reducing the number and complexity of arbitration proceedings. These reforms will allow carriers to refocus their energies on creating consumer value rather than exploiting (or closing) regulatory loopholes. It will also free regulators to refocus *their* energies on activities that will benefit consumers directly, such as policing consumer fraud, facilitating deployment of advanced communications networks, and administering state universal service programs.

II. The Plan's Intercarrier Rate Reforms and Cost-Recovery Mechanisms Are Reasonable and Competitively Neutral.

The Plan's opponents criticize its intercarrier compensation reforms from opposite perspectives. Some argue that the Plan's rate reductions do not go far enough, while others contend that they go too far; some argue that the proposed rules are too complex, while others complain that they are not comprehensive enough; some argue that some of the proposed rules are too rigorous, while others contend that they are too lax; and some argue that the Plan unduly benefits ILECs, while others complain that it unduly benefits CLECs. None of these arguments bears scrutiny.

A. The Plan's Intercarrier Compensation Rules Are Reasonable.

1. Origination and Termination Rates.

As noted, AT&T was initially part of the ICF coalition that proposed a comprehensive bill-and-keep plan to the Commission in 2004. Like the other former ICF members that support the Missoula Plan, AT&T now recognizes that, in the Chairman Martin's words, an abrupt shift to bill and keep — which would essentially prescribe a rate of zero for all terminating traffic — would not be "politically viable — especially in the short run."[18] After exhaustive negotiations, AT&T and the other Missoula adherents have produced the reasonable alternative that Chairman Martin requested: a non-bill-and-keep plan that "mov[es] quickly to a unitary [positive] rate" for

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18 Martin NARUC Speech, *supra* note 2, at 4.

traffic terminated over the vast majority of access lines and thereby takes "a step in the right direction" by "eliminating many arbitrage opportunities."[19]

The opponents of the Missoula Plan's rate reforms fall roughly into two camps: those that, like CTIA and Qwest,[20] still cling to the hope for an immediate shift to bill and keep, and those that endorse positive rates but appear to prefer today's higher and inconsistent rates to the only pragmatic rate-unification plan on the table.[21] Neither of these camps has faced up to reality. First, as discussed above, and as the Chairman has observed, any abrupt transition to a zero rate under a bill-and-keep plan is neither politically sustainable nor sound public policy.[22] Even the Missoula Plan, which does *not* reduce termination rates to zero, has engendered stiff (though misplaced) opposition from some commenters because it proposes much more moderate increases to end-user rates and universal-service support mechanisms.[23] A bill-and-keep plan would trigger even stiffer opposition and would likely face exactly the same fate as the ICF Plan.

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19 *Id.*

20 *See* Qwest Comments at 4, 11-12; CTIA Comments at v, 17; *see also* Alltel and Suncom Comments at 13-14 & n.18.

21 Some of the Plan's critics also claim that the Plan's proposed reforms are too "complex." *E.g.*, Cavalier et al. Comments at 41; Cincinnati Bell Comments at 3-4. But this is nonsense. Any reform plan necessarily requires a carefully orchestrated phase-in of intercarrier rate reductions, as well as rules to address the inherently related issues regarding end-user rates, universal service, interconnection, and transit. The alternatives — sparsely detailed "plans" such as CTIA's METE proposal or vague principles for reform such as those advanced by NASUCA or NCTA — provide no guidance and leave to the Commission all the work of ironing out all these details. Thus, contrary to its critics, the Missoula Plan's so-called "complexity" is in fact a hallmark of its thoroughness.

22 *See* Martin NARUC Speech, *supra* note 2, at 4.

23 *See, e.g.*, NASUCA Comments at 19, 25 (arguing that SLC increases and the Restructure Mechanism shift the burden of paying network costs from carriers to consumers); Comptel Comments at 7-8 (same); Cavalier et al. Comments at 4-7 (attacking the Restructure Mechanism).

Nor is there any merit to arguments on the other end of the spectrum from Plan opponents who insist that the Plan goes *too far* in reducing intercarrier rates. These Plan opponents — many of whom wish to go on exploiting termination arbitrage opportunities — complain that the Plan's intercarrier charges are too low to allow them to recoup their costs.[24] But a termination rate cannot be "too low" so long as the terminating carrier can recover its network costs from its own end users, as each carrier will remain free to do under the Plan. As discussed in Part III below, moreover, the Communications Act itself provides that bill and keep (*i.e.*, a universal termination rate of zero) is an acceptable methodology, and the Commission has already endorsed that methodology for the class of ISP-bound traffic, despite the strong resistance of carriers that specialized in terminating that traffic.[25] A fortiori, the Plan's positive rate prescriptions can hardly be attacked as unfair to terminating carriers.

In particular, nothing in law or public policy requires regulators to set termination rates at TELRIC, as some propose.[26] First, continued reliance on 51 state commissions to prescribe 51 different sets of TELRIC-based rates would preclude the main goal of this proceeding — national unification of intercarrier compensation — and would waste millions of dollars per year in administrative litigation. Second, the Commission all but conceded in 2003 that TELRIC is flawed because it rests on incompatible economic premises and is subject to pervasive result-

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[24] *See, e.g.*, Broadview et al. Comments at 37-42; Cavalier et al. Comments at 49, 58-61.

[25] *See ISP Remand Order* at 9154-56 ¶¶ 4-7.

[26] *See* California Comments at 12-13; Time Warner Telecom et al. Comments at 5; Cavalier et al. Comments at 49, 58-61; Wisconsin Comments at 4.

oriented manipulation.[27] Indeed, given those well-founded concerns, it would be arbitrary and capricious for the Commission to *retain* TELRIC as a cost methodology for intercarrier compensation.

There is also no merit to the objection that the Plan should have imposed the same unitary rate on *all* carriers, including the nation's rural ILECs.[28] As an initial matter, this criticism misses the forest for the trees. For the overwhelming majority of the nation's access lines, the Plan unifies all rates. By Step 3 of the Plan, all Track 1 carriers, including CMRS carriers and CLECs, will charge symmetrical rates when they exchange traffic, and they will charge those rates without regard to legacy classifications of the traffic at issue. Moreover, even as to the small minority of lines in Track 2 and 3 areas, the Plan substantially lowers rates and eliminates distinctions based on different technologies — e.g., CMRS vs. VoIP vs. wireline traffic. This is plainly a vast improvement over the status quo.

In all events, this Commission has long treated rural ILECs, with their high-cost network characteristics and greater vulnerability to regulatory change, differently from larger, non-rural

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[27] *See* Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18945, 18964-65 ¶¶ 49-51 (2003) (questioning the contradictory economic concepts on which the TELRIC methodology is based); *see id.* at 18949 ¶ 7 (noting that a TELRIC proceeding may "become a 'black box' from which a variety of possible rates may emerge.").

[28] *See, e.g.*, Qwest Comments at 13-14 (stating that "the use of 'tracks' to differentiate carriers mars the entire Plan."); Eschelon Comments at 5-6 (arguing that "[t]he entire 'Track' concept is deeply flawed and contrary to the Commission's stated goals of creating an intercarrier compensation regime that is competitively neutral."); Verizon Comments at 20 (arguing that the distinctions between tracks create arbitrage opportunities); CTIA Comments at 6-8, 15-17 (arguing that the Plan does not achieve the Commission's stated goals for intercarrier compensation because it does not completely unify rates); Core Comments at 6-8 (same). For purposes of this discussion, the term "rural ILEC" refers to Track 2 and 3 ILECs.

ILECs.[29] It would be no more practicable to eliminate that regulatory distinction in the blink of an eye than to order a flash-cut to bill and keep. The Plan thus moderates, but does not eliminate, that rural/non-rural distinction over the Plan's term by permitting rural carriers to charge higher rates than their non-rural counterparts while nonetheless subjecting them to much greater intercarrier rate *reductions* than non-rural carriers. This middle-ground approach appropriately reflects the unique conditions in high-cost areas, the special burdens that rural ILECs bear in providing carrier-of-last-resort services in such markets, and the unusual vulnerability of these smaller businesses to shifts in the regulatory environment. While some CLECs complain that, in rural areas, they too should be treated as Track 3 carriers,[30] these competitive providers have never faced equivalent carrier-of-last-resort obligations and instead are free to market their services to a targeted group of customers at optimal prices. Their circumstances differ markedly from those of rural ILECs, as the Plan appropriately recognizes. In short, the Plan goes as far toward complete rate unification as can be accomplished in the short term while preserving universal service and avoiding radical industry dislocations.

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[29] The Commission has explained that rural carriers "generally have higher operating and equipment costs, which are attributable to lower subscriber density, small exchanges, and a lack of economies of scale." Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 16 FCC Rcd 11244, 11247 ¶ 5 (2001) ("*MAG Order*"). Consequently, the Commission has "historically not adopted one-size-fits-all policies that might impede rather than support the provision of affordable service by rural carriers." Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863, 4913-14 ¶ 75 (2004) ("*IP NPRM*").

[30] *See, e.g.*, Comptel Comments at 4-5; Alltel and Suncom Comments at 8; Eschelon Comments at 5-6. CLECs are in fact treated as Track 3 carriers for reciprocal compensation purposes when exchanging traffic with Track 3 ILECs. *See* Missoula Plan at 36, § II.E.5.a.iii.

2. Transit Rate Caps.

"Tandem Transit Service" (or "transit") encompasses the switched, "non-access" transport service that a carrier, without a relationship with the calling or called parties to a call, provides to the carriers on either end of the call to effect their indirect interconnection. Because there may be scores of carriers operating within a given geographic area, and because it generally would be uneconomical for each such carrier to interconnect directly with every other such carrier, transit performs a critical function in today's telecommunications industry. Nonetheless, the Commission's rules barely address transit at all, as discussed in Parts III.B.1 and IV.B. Despite the myriad rules the Commission has issued concerning the exchange of traffic under the 1996 Act, the Commission has never imposed any obligation on any carrier to provide transit services in the first place. The Missoula Plan adopts a moderate regulatory approach to this subject. Although the Plan does not require any carrier to provide transit if it does not already do so, it does require carriers that currently provide transit to continuing doing so over the life of the Plan, subject to reasonable rate caps.[31]

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[31] *See, e.g.*, Missoula Plan at 50, § III.D.2.a (providing that "[a]ll ILECs that are providing Tandem Transit Service at Step 0 must continue providing that service during the term of the Plan."); *id.* at 51-52, § III.D.4 (discussing rate caps for Tandem Transit Service). We discuss the Commission's legal authority to impose this requirement in Part IV below. Some commenters in fact contend that the Plan should have gone further and *mandated* that all ILECs provide transit services. *See, e.g.*, Cavalier et al. Comments at 15-19; NCTA Comments at 23-24; Broadview et al. Comments at 59-63. But that service is already widely available today without a regulatory mandate, and the Plan's provisions ensuring that transit providers have interconnection rights should increase the availability of transit — at even more competitive rates. In any event, as noted, the Plan does ensure that any carrier that provides transit on the day before the Plan is adopted must continue to provide that service for the life of the Plan. *See* Missoula Plan at 50, § III.D.2.a.

As with other aspects of the Plan, opponents criticize the transit provisions from both sides. Some claim that the Plan's proposals for transit regulation go too far, and others claim that they do not go far enough. In fact, these middle-ground transit proposals are entirely reasonable. First, a handful of commenters argue that the Commission should impose no transit rules at all,[32] but that position ignores the benefits of ending years of litigation and regulatory uncertainty on this subject. Disputes persist in state commission proceedings concerning whether carriers should be required to provide transit services in the first place and, if so, at what rates.[33] Transit providers need certainty that, where they provide these services, regulators will permit them to charge rates that cover their full costs.[34] Similarly, carriers *served* by transit

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[32] *See* Qwest Comments at 29-31; Verizon Comments at 34. *Compare* Comments of SBC Communications, filed in CC Docket 01-92, May 23, 2005, at 4 n.2 (conceding that the Commission has "jurisdiction under section 201 of the Act to prevent carriers from *disrupting* indirect interconnection once carriers are relying on it," but noting that "it is a separate question whether section 251(a) could be read to require a carrier to act as an intermediary and provide transit in the first instance").

[33] *See, e.g.*, *Petition of AT&T Communications of Michigan, Inc, for arbitration to establish an interconnection agreement with Ameritech Michigan*, MPSC Case Nos. U-11151, U-11152, Order Approving Agreement Adopted by Arbitration (Nov 26, 1996), *available at* http://www.cis.state.mi.us/mpsc/orders/archive/pdfs/U-11151_11-26-1996.pdf; *Petition of Verizon South, Inc., for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic between Third Party Carriers and Request for Order Requiring Carolina Telephone and Telegraph Company to Adopt Alternative Transport Method*, Docket No. P-19, Sub 454, Order Denying Petition (NCUC Sep. 22, 2003), *available at* http://ncuc.commerce.state.nc.us/cgi-bin/fldrdocs.ndm/INPUT?compdesc=VERIZON%20SOUTH%20INC%2E&numret=001&comptype=P&docknumb=19&suffix1=&subNumb=454&suffix2=&parm1=000119668.

[34] Significantly, transit rates, unlike termination rates, *must* be at least cost-based to be rational. Whereas originating and terminating carriers have *end-user customers* they can bill for any costs they do not recover from other carriers, transit providers by definition have no such relevant customers from whom they can collect the costs of transit and therefore must recover those costs from the carriers on either end of the call.

providers need certainty about the regulatory limits that will apply to the rates they will be charged for purchasing this service.

On the other end of the spectrum, some commenters argue that the Plan should have imposed lower rate caps for transit services — preferably at TELRIC.[35] But the discredited TELRIC cost methodology would be no more appropriate to apply in this context than in the call-termination context, and it would make no sense for the Commission to apply that methodology for transit traffic for the first time now that it has finally acknowledged serious doubts about TELRIC's methodological integrity.[36]

Some commenters claim that, by not imposing lower caps on transit rates, the Plan will allow transit rates to rise in a handful of States that have adopted an unusually interventionist approach to the issue.[37] This claim is flawed in several independent respects. First, simply as an empirical matter, it compares apples to oranges. The rate caps specified by the Plan for "Tandem Transit Service" cover not only transit services themselves (the subject of existing state-level rate caps) but also, as part of the Plan's comprehensive phantom traffic solution, the provision of call-detail records by the transit provider to terminating (and intermediate transit) providers.[38]

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35 *See* NCTA Comments at 12-13; Cavalier et al. Comments at 15, 20, 63-64; CTIA Comments at 14; Broadview et al. Comments at 59, 63-65.

36 *See* Part II.A.1, *supra*; Part III.B.1, *infra*. In any event, even where states have, incorrectly, applied TELRIC to transit, the rates have varied dramatically. For example, in 2005, Verizon's tariffed transit rate in Maryland was $0.000248, while in Maine its average tariffed rate was $0.004765 — a difference of more than an order of magnitude.

37 *See, e.g.*, Broadview et al. Comments at 25-26, 63-65; NCTA Comments at 11-13; CTIA Comments at 14.

38 *See* Missoula Plan § V.D.4.c; Letter from Supporters of the Missoula Plan to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 6 (filed November 6, 2006) ("Missoula Plan Nov. 6 *Ex Parte*"). Qwest argues that, given this new

Second, competition from independent providers such as Neutral Tandem may well keep transit rates from increasing beyond their existing levels in the first place. Indeed, the Plan will invigorate such competition precisely because, as discussed in Part IV below, it creates an absolute right of interconnection for all transit providers[39] and puts the choice whether to interconnect directly or indirectly squarely on the carrier with financial responsibility for transport. Finally, rate caps lower than those prescribed by the Plan would perversely nip such competition in the bud by artificially inhibiting the entry of competitive transit providers.[40]

3. Rates for VoIP and IP-Based Traffic.

While some commenters argue that the Missoula Plan is too complex, others fault the Plan for not enlarging the sphere of regulatory intervention by addressing VoIP issues unrelated to cost recovery for originating or terminating calls on the PSTN. NCTA argues, for example, that the Commission should establish a regulatory entitlement for VoIP providers "to collect compensation when they terminate calls" *over the Internet*.[41] NCTA also seems to believe that the Plan should have addressed pure IP-to-IP traffic that *never even touches the PSTN*.[42] This is nonsense.

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requirement, the Plan's proposed rate for Tandem Transit Service is "wholly inadequate to cover the costs involved." Qwest Comments at 39 n.73.

[39] *See* Missoula Plan at 41-42, § III.A.1; *see generally* Part IV.B, *infra*.

[40] *See, e.g.*, *USTA v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*") (noting that "[c]ompetitors will presumably not be drawn to markets where customers are already charged below cost"). *See also* Letter from Neutral Tandem, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 06-74 (filed Dec. 29, 2006) (urging the Commission to avoid imposing transit rate conditions in the AT&T/BellSouth merger proceeding that would discourage entry by competitive transit service providers).

[41] NCTA Comments at 21-22.

[42] *See id.*; *see also* Comptel Comments at 5; Ohio Comments at 22.

There is no doubt that VoIP — and IP traffic in general — is the future of communications. This, however, is a proceeding about how to manage recovery of the costs of operating *the PSTN*, not about ways to subject the Internet to price regulation for the first time. And given the robust competition among providers of Internet-based services, the Commission and Congress have wisely adopted a hands-off policy towards those services.[43] The Plan respects that policy. It appropriately clarifies how VoIP providers should compensate PSTN-based providers for calls that terminate on, originate on, or traverse the PSTN by ensuring that PSTN carriers are compensated for VoIP calls just as they are for all other traffic. No other discussion of VoIP traffic would be necessary or helpful. As Verizon notes, IP-to-IP traffic "is left to the VoIP providers' private negotiations, which is consistent with the deregulatory framework that applies today to the Internet."[44]

B. The Plan's Use of Telephone Numbers as an Interim Geographic Proxy Is Reasonable.

For the vast majority of lines (those covered by Tracks 1 and 2), the Plan will eliminate the distinction between "local" and "access" traffic over the course of several years and will thus succeed in eliminating the relevance of those categories to intercarrier compensation. Nonetheless, those categories will remain relevant during that several-year transition period for Track 1 and 2 carriers and will remain relevant afterwards for Track 3 carriers, which may continue to assess different rate levels for terminating local and access traffic. As the worsening phantom traffic problem reveals, however, it often is not feasible as a practical matter to identify

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[43] *See, e.g.,* Memorandum Opinion and Order, *Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3307 ¶ 1 (2004) ("*Pulver Order*").

[44] Verizon Comments at 25.

the geographic endpoints of a particular call, the traditional means carriers have used to categorize traffic.[45] The Plan thus adopts a workable proxy, based on telephone numbers, for identifying the geographic locations of those endpoints to the (ever-decreasing) extent to which geography remains relevant to compensation.[46]

Qwest and others criticize the Plan's numbers-based framework on the ground that telephone numbers are an imperfect proxy for a call's actual geographic endpoints.[47] But telephone numbers are certainly a *reasonable* proxy for the Commission to adopt, given the absence of any feasible alternative means of resolving today's intractable disputes about the proper regulatory classification of individual CMRS, VoIP, and VFX calls.[48] As the Missoula Supporters explained in their initial filing, the Commission has wide discretion to adopt any reasonable approach to the jurisdictionalization of call traffic, and a numbers-based approach readily qualifies as such.[49] Moreover, contrary to the suggestion of some parties,[50] this interim

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45 AT&T, together with the other supporters of the Missoula Plan, has filed separate comments explaining why the Plan's phantom traffic provisions are appropriate and should be promptly adopted. *See* Reply Comments of the Supporters of the Missoula Plan, on Their Phantom Traffic Proposal, filed in CC Docket 01-92, Jan. 5, 2007.

46 *See* Missoula Plan at 25-30, § II.D.

47 Qwest Comments at 24-25; *see also* Verizon Comments at 23-24.

48 *See, e.g.*, *Sprint Corp. Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs*, CC Docket No. 01-92; *Global NAPS, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2d Cir. 2006) (intercarrier payments for VNXX traffic); *Atlas Tel. Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005) (intercarrier payments for intra-MTA wireline-CMRS traffic).

49 *See, e.g.*, Declaratory Ruling, *Thrifty Call, Inc.*, *Petition for Declaratory Ruling Concerning BellSouth Telecommunications, Inc.*, 19 FCC Rcd 22240, 22242-44 ¶¶ 5-11 (2004) (basing the application of access charges on Commission-defined percentage of interstate use (PIU) factors). While the Commission has relied on geography as the basis for jurisdictionalizing traffic, it also has relied on proxies for geography where appropriate. *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions in the*

proxy approach will not create new arbitrage opportunities or intensify existing ones; it will simply bring greater certainty to a means of reconciling jurisdictional disputes that most carriers already use in most circumstances.

Similarly, there is no merit to claims that the Plan's use of this proxy will drain numbering resources.[51] Today, certain providers (especially VoIP providers) obtain large blocks of numbers in different geographic areas so that they can offer their customers seemingly "local" numbers that will help them (or parties calling them) to avoid access charges. Despite the contrary suggestion of some critics, the Plan will make that problem better, not worse. It will *reduce* the threat of number exhaust by substantially reducing the relevance of geography to intercarrier compensation and thereby removing the incentive for VoIP providers to market multiple numbers to customers. In any event, the Commission would of course remain free, as part of its review at Step 4 of the Plan, to adopt a variety of measures (including further rationalization of Track 3 rates) to remedy any number exhaust concerns that might remain.[52]

Telecommunications Act of 1996, 11 FCC Rcd 15499, 16017-18 ¶ 1044 (1996) ("*Local Competition Order*") (using proxies for the geographic location of a caller with respect to wireless traffic).

[50] *See* Qwest Comments at 25; *see also* Verizon Comments at 23.

[51] *See* Ohio Comments at 48 (Claiming that use of a pure numbering-based system "would likely drain available numbering resources"); Connecticut Comments at 9-10 (fearing that the Missoula Plan will "potentially cause[] an increased need for area code relief and accelerat[e] NANP exhaust").

[52] Qwest separately complains that the approach will require a revamping of the treatment of 8YY traffic. *See* Qwest Comments at 39. But any move toward a more unified approach will likely disturb some existing arrangements that reflect legacy distinctions. That cost will be far outweighed by the administrative and litigation savings that will result from adoption of the Plan's clear and comprehensive rules.

Finally, although CMRS carriers claim that the Plan's categorization of intra-MTA toll traffic creates unfair asymmetries, that criticism ignores the substantial improvements the Plan will make with respect to compensation for CMRS-terminated traffic. CMRS carriers argue that under the rules, they must *pay* reciprocal compensation for their intra-MTA CMRS-to-wireline toll traffic unless it is carried by an IXC, whereas they may *collect* reciprocal compensation on intra-MTA wireline-to-CMRS traffic in somewhat more limited circumstances, and may instead be limited to collecting capped access charges. Since such access charges may be lower than the reciprocal compensation rates in Track 2 and Track 3 serving areas, the contention is that a CMRS carrier might have to pay more to originate than it collects to terminate the exact same call.[53] In fact, however, this alleged asymmetry is greatly exaggerated. In most cases, CMRS carriers will both pay *and* collect reciprocal compensation except where an IXC carries a toll call — and as an added protection, the Plan prevents improper handoff of wireline-to-CMRS traffic to an IXC.[54] In any event, the rule is a major improvement compared to the confusion that reigns today, given that it is not now clear how either the wireline *or* the CMRS carrier is compensated — and by whom — with respect to intra-MTA toll traffic, especially when carried by an IXC.[55] The Plan for the first time establishes a definitive right for CMRS carriers to *impose* terminating charges of *any* kind on IXCs from whom they accept traffic.[56]

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53 *See* CTIA Comments at 23; Verizon Wireless Comments at 15.

54 Missoula Plan at 29, § II.D.3.b.ii.3.

55 *See FNPRM* at 4745-46 ¶¶ 136-137 (2005) ("Many rural LECs argue that intra-MTA traffic between a rural LEC and a CMRS provider must be routed through an IXC and therefore is subject to access charges, rather than reciprocal compensation.").

56 Missoula Plan at 29-30, § II.D.3.c. Moreover, this is only one of the many benefits CMRS carriers will derive from the Plan. For example, CMRS carriers will benefit from the

C. The Plan's SLC Rules and Restructure Mechanism Are Appropriate and Competitively Neutral.

As discussed, the Plan pairs reductions in intercarrier compensation with rules ensuring a fair opportunity for carriers to recover their costs through (i) modestly increased SLCs and (ii) in some cases, disbursements from a new Restructure Mechanism.[57] In each respect, the Plan's provisions are perfectly reasonable.

1. The SLC Rules Impose Reasonable Costs on End Users and Do Not Provide Anti-Competitive Opportunities to ILECs.

As with so many other aspects of the Plan, critics attack the Plan's SLC provisions from both sides: some commenters argue that the SLC cap increases are excessive,[58] whereas others claim that SLC caps should be eliminated altogether.[59] Commenters in the first category contend

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Edge rules (which recognize that MSCs qualify as edges just like tandem switches do), from the phantom traffic rules (which assure their ability to bill for terminating traffic), and from the various intercarrier compensation rules (which ensure their ability to charge symmetrical rates for terminating traffic with ILECs and other carriers).

[57] The Plan also suggests an Early Adopter Mechanism ("EAM") to provide support for *states* that have taken steps to reform their intrastate rate structures. *See* Missoula Plan at 76-77, § VI.B. Details of this mechanism are spelled out in a separate "Federal Benchmark Mechanism" filing, submitted with the endorsement of many of the states that have been at the forefront of intercarrier compensation reform. *See* Letter from Five State Commissions and the Supporters of the Missoula Plan to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 6 (filed Jan. 30, 2007). This mechanism will help ensure that consumers in those states will not be disproportionately burdened when the Plan's intercarrier compensation reforms and the new Restructure Mechanism are implemented nationwide. The recent filing moots the premature objections of several commenters to the mechanics of the EAM. *See, e.g.*, Time Warner Telecom et al. Comments at 12-13; California Comments at 13-16.

[58] *See, e.g.*, NASUCA Comments at 19, 25; Comptel Comments at 7-8; Illinois Comments at 2; Texas Comments at 3.

[59] *See, e.g.*, Alltel and Suncom Comments at 23 ("Alltel and SunCom generally agree with the Missoula plan proposals to permit increases in the SLC caps, but would go farther and would move toward eliminating SLC caps altogether over a reasonable transition period.").

that the Plan unfairly shifts the burden of paying network costs from carriers to consumers. But this is economic naiveté. As discussed in Part I, consumers in the aggregate will pay the costs of maintaining and operating the nation's telecommunications networks one way or another under any regulatory regime. The only question is whether consumers should pay a disproportionate share of those costs *inefficiently and indirectly* through intercarrier charges, as they do now, or whether they should pay a greater share of those costs efficiently through charges imposed on them directly by their own carriers of choice.[60] The result of following the second approach will not be higher consumer bills; the result will be lower bills and a more efficient and responsive industry.[61]

There is likewise no merit to the claim that the Plan's SLC rules unfairly favor ILECs by granting them undue flexibility in setting different SLC rates for different groups of customers.[62] First, the Plan in fact greatly constrains such flexibility in a number of respects.[63] Second,

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[60] Some commenters oppose the notion of using the flat-rated SLC to recover network costs at all, arguing that this will amount to a burden for low-usage customers and a subsidy for high-usage customers. *See, e.g.*, NASUCA Comments at 57-58; Ohio Comments at 38; Cavalier et al. Comments at 38. But today, high-usage customers subsidize *low-usage* customers through per-minute intercarrier rates that typically dwarf marginal cost. And most of the costs in an ILEC network are the non-usage-sensitive costs involved in the last-mile loop facilities investment. Low-usage customers therefore impose nearly the same costs on the system as high-usage customers, and it therefore makes perfect sense to recover those costs through higher flat-rated charges.

[61] *See generally* Exhibit 1 (discussing economic benefits of Plan).

[62] *See, e.g.*, Ohio Comments at 31-33; Cavalier et al. Comments at 12-13; Oklahoma Comments at 3. The Plan grants some additional flexibility only to price-cap ILECs, because of the level of competition they face within their service territories. *See* Missoula Plan at 24-25, § II.C.7.

[63] For example, the Plan mandates that no SLC may exceed any of the caps established in the Plan (including nationwide, average, and individual SLC rate caps), it places limits on ILECs' ability to engage in geographic deaveraging of rates, and it forbids ILECs from offsetting

granting ILECs *some* additional flexibility does not "favor" them over their unregulated competitors, because those competitors face no restrictions of any kind on the types of charges they may impose on their end users. If anything, therefore, the Plan's approach will slightly level a playing field that is currently skewed against ILECs. Finally, pricing flexibility is the hallmark of any competitive market; it not only ensures the most efficient allocation of resources, but encourages efficient competitive entry when a provider charges excessive rates. In opposing such flexibility, commenters quarrel not so much with the Missoula Plan, as with the Commission's recognition that competition will never flourish so long as regulators cling to excessive command-and-control price regulation.[64]

2. The Restructure Mechanism Is a Reasonable and Lawful Means of Ensuring Appropriate Opportunities for Cost Recovery.

The Restructure Mechanism is an essential component of the Plan's intercarrier compensation reform. Like any other competitively neutral source of universal service funding, it protects the legitimate interests of consumers and carriers alike during the transition from today's regulatory regime, which remains pervaded by cross-subsidies, to a more rational system

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price increases in one service category with price decreases in another service category. *See* Missoula Plan at 19-25, § II.C.

[64] *See, e.g.*, *Intercarrier Compensation NPRM* at 9612 ¶ 1 ("Consistent with the deregulatory goals of the 1996 Act, we seek an approach to intercarrier compensation that minimizes the need for regulatory intervention, both now and as competition continues to develop."); *FNPRM* at 4702 ¶ 33 ("An approach requiring minimal regulatory intervention and enforcement is consistent with the pro-competitive de-regulatory environment envisioned by the 1996 Act."); Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, 15806 ¶ 88 (1997) ("The Commission has long recognized that the regulations associated with dominant carrier classification can dampen competition.").

that eliminates those cross-subsidies.[65] In the absence of this mechanism, carriers of last resort could recover the costs traditionally recovered through implicit cross-subsidies only by imposing higher end-user charges than the Plan contemplates. That result would be particularly burdensome for customers in rural and high cost areas, where reliance on implicit cross-subsidies has always been greatest.[66] Indeed, accompanying intercarrier compensation reform with enhanced universal service programs like the Restructure Mechanism is not just a good idea, but a legal necessity: Section 254 requires the Commission to ensure that the rates paid by consumers in high cost, rural areas are "just, reasonable, and affordable" and "reasonably comparable to rates charged . . . in urban areas."[67]

Contrary to the contention of some commenters, the Restructure Mechanism, combined with the increased SLC caps, will not remotely guarantee that a given ILEC will maintain its existing revenue levels. In competitive areas, particularly those where Track 1 ILECs like

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65 *See generally* Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, *Access Charge Reform*, 15 FCC Rcd 12962 (2000); *FNPRM* at 4702 ¶ 32.

66 *See, e.g.*, *FNPRM* at ¶ 8 n.20 (noting that "rates for local telephone service in rural and high cost areas had been implicitly subsidized by charging high-volume long-distance callers and urban residents artificially higher rates").

67 47 U.S.C. § 254(b)(1), (3). In addition, neither the Commission nor the States could reduce rates that cover carriers' costs without providing an adequate alternative source of cost recovery without violating the Takings Clause. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-10 (1989); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944) (government must permit utilities "to operate successfully, to maintain . . . financial integrity, to attract capital, and to compensate . . . investors for the risk assumed"); *see also Brooks-Scanlon Co. v. Railroad Comm'n*, 251 U.S. 396, 399 (1920) ("[a] carrier cannot be compelled to carry on even a branch of business at a loss"); *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n*, 485 F.2d 786, 808 (D.C. Cir. 1973) ("It is well settled that utility investors are entitled to recoup from consumers the full amount of their investment in depreciable assets devoted to public service.").

AT&T operate, the ILEC will often be unable to raise the SLC to the new levels permitted under the Plan because of alternative offerings from CMRS carriers, VoIP providers, CLECs, and cable companies. The ILEC thus will lose one source of potential cost recovery under the Plan, even as its intercarrier rates continue to drop. At the same time, the ILEC's access to Restructure Mechanism funding is calculated as if the carrier *were* recovering the maximum permissible amount from end users based on the SLC caps authorized by the Plan, even if it is not in fact doing so.[68] Thus, ILECs facing competition may well see their revenues *decrease* under the Plan even if they lose no lines at all.

Moreover, contrary to the misconception of some commenters,[69] ILECs serving the overwhelming majority of the nation's access lines will lose Restructure Mechanism funding when they do lose lines. From day one, funding for Track 1 price-cap carriers will be calculated on a per-line basis. If the carrier loses a line, it will also lose the full amount of Restructure Mechanism funding for that line; no adjustment will be made to the remaining funding to account for whatever increased per-line costs the carrier incurs because of its loss of that customer and any associated economies of scale or density.[70] The same will be true for Track 2

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68 *See* Missoula Plan at 64, § VI.A.1.a.i.

69 *See, e.g.*, US Cellular Comments at 14; Cavalier et al. Comments at 10-11.

70 *See* Missoula Plan at 66-68, § VI.A.1.b.vi. This is in marked contrast to the high cost loop fund, where the loss of a line results in an increase in per-line funding for the carrier's remaining lines, precisely to account for these residual network costs. *See, e.g.*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, 16 FCC Rcd 11244, 11293-97 ¶¶ 120-130 (2001).

price-cap carriers beginning at Step 4 of the Plan.[71]

There is likewise no merit to claims that the Restructure Mechanism is competitively biased on the theory that it will be unavailable to non-ILECs.[72] In fact, nothing in the Plan limits the availability of Restructure Mechanism dollars to ILECs, and the Plan leaves the full scope of portability for the Commission to decide.[73] AT&T in particular has made clear that it advocates making the Restructure Mechanism available to all ETCs competing in its service areas, as is currently the case with universal service mechanisms in operation today.[74] In any event, complaints about access to this fund ring hollow when made by carriers that have never had carrier-of-last-resort obligations and have generally confined their network build-out to more attractive neighborhoods and business districts where they have the best chance of earning a profit. These carriers have not historically depended on implicit cross-subsidies embedded in intercarrier charges, and it is entirely appropriate to limit Restructure Mechanism funding to

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[71] *See* Missoula Plan at 73, § VI.A.1.c.vi. Commenters are also mistaken when they argue that the Restructure Mechanism removes the incentive for ILECs to cut costs. *See, e.g.*, Alltel and Suncom Comments at 16-17. Under the Plan, price-cap carriers will be entitled to retain any additional income that they earn through efficiency gains, and such gains will not reduce the amount of those carriers' Restructure Mechanism distributions. *See* Missoula Plan at 64-73, § VI.A.1.b-c. This, together with the prospect of reduced Restructure Mechanism dollars in the face of line loss, creates substantial efficiency incentives. While the rule for rate-of-return carriers is that decreased costs will result in a decreased right to Restructure Mechanism revenues, that is no different from existing rate regulation for rate-of-return carriers, and creates no new incentives or disincentives.

[72] *See, e.g.*, TOPUC Comments at 7; CTIA Comments at 35-37; Comptel Comments at 5-9.

[73] *See* Missoula Plan at 74, § VI.A.2.

[74] Even in Track 2 and Track 3 areas, AT&T advocates making the Restructure Mechanism available to all competing *wireline* ETCs. Missoula Supporters' Comments at Attach. C, p. 3. While this excludes CMRS carriers, such carriers do not lose — and in fact *gain* — access to access charge revenues under the Plan.

those carriers that *have* depended on such cross-subsidies and whose cost recovery *is* therefore threatened by the Plan's proposals for draining those cross-subsidies from intercarrier charges.

Finally, it makes no sense to argue, as some commenters do, that conditioning Restructure Mechanism funds on a state's participation in the Plan violates principles of state sovereignty.[75] The Commission has clear authority to raise the *federal* SLC caps and to provide additional *federal* universal service support through the Restructure Mechanism. As the courts have repeatedly held, moreover, the federal government may condition federal funding, like that from the Restructure Mechanism, on a State's adherence to the terms of a federal program.[76] As the Fifth and Tenth Circuits have explained, this principle applies to the Commission's relationship with the states under section 254 of the Act.[77] Indeed, the inducement the FCC would provide the states here to participate in the Plan would be mild by comparison to inducements that other federal agencies have successfully imposed on the states in other contexts.[78] In fact, many courts have questioned whether *any* conditions on federal funding can

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[75] *See* Missouri Comments at 22-23; Ohio Comments at 43-45.

[76] *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding a statute withholding federal highway funds from states that failed to establish a minimum legal drinking age of 21).

[77] *See Qwest Corp. v. FCC*, 258 F.3d 1191, 1203-04 (10th Cir. 2001) (holding that the FCC has not just the authority but the *obligation* to give the States "carrot and stick" inducements to ensure their compliance with federal universal service goals); *Texas Office of Public Util. Counsel v. FCC*, 183 F.3d 393, 444 (5th Cir. 1999) (holding that the Commission may place conditions on the states' receipt of federal universal service funding).

[78] *See, e.g.*, *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (holding that the government could condition all of Arkansas' federal education funds — amounting to $250 million, which was 12% of the state's annual education budget — on the state's waiver of sovereign immunity); *Kansas v. United States*, 214 F.3d 1196, 1198 (10th Cir. 2000) (holding that the government could condition $130 million in TANF and child-support enforcement dollars on Kansas' implementation of a state child support enforcement program that complied with federal standards).

be unduly coercive if (i) the spending power is used in pursuit of the general welfare, (ii) the government's funding conditions are unambiguous, and (iii) those conditions are related to the federal interest in a particular national program (and do not violate an independent constitutional bar).[79] Conditioning Restructure Mechanism dollars on a state's participation in the Plan meets each of the prongs of that test.

III. The Commission Has Ample Legal Authority to Adopt the Plan's Intercarrier Rate Reforms.

A. Section 2(b) Poses No Barrier to Implementation of the Plan.

A number of the Plan's opponents argue that section 2(b) of the Communications Act deprives the Commission of regulatory jurisdiction to implement comprehensive reform of intercarrier compensation — and, in particular, jurisdiction to address intrastate access charges.[80] As discussed below, that argument is meritless for two independent reasons. First, section 251(b)(5) encompasses — and section 201(b) thus authorizes the Commission to regulate — all classes of intercarrier compensation. The only class of such charges for which there might be any possible question as to the Commission's authority is intrastate access charges. However, because, as currently framed, the Plan does not compel the States to adopt any measures governing originating access charges, the Commission need not address the scope of its

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79 *See, e.g.*, *Kansas*, 214 F.3d at 1202 (explaining that, under the Spending Clause precedents, the "coercion theory is unclear, suspect, and has little precedent to support its application."); *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) (expressing skepticism regarding use of a "coercion test" to analyze potential violations of the Spending Clause, noting that "[t]he difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.").

80 *See, e.g.*, Broadview et al. Comments at 10-24; NASUCA Comments at 37-42; Missouri Comments at 12-22; Ohio Comments at 1-19.

jurisdiction over such charges unless and until some party petitions to make those voluntary provisions mandatory, and thus need not resolve that jurisdictional issue before adopting the Plan as a whole. Second, in any event, the "impossibility" exception of *Louisiana Public Service Commission v. FCC* independently authorizes the Commission to regulate intercarrier compensation for *all* classes of traffic to effectuate its responsibilities under sections 201 and 251.[81]

1. The 1996 Act Grants the Commission Full Jurisdiction over All Termination Rates.

a. Section 251(b)(5) Applies to All Telecommunications Traffic.

Section 201(b) of the Communications Act authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." As the Supreme Court confirmed in *AT&T Corp. v. Iowa Utilities Board,* the Commission's section 201(b) rulemaking jurisdiction is not limited to jurisdictionally interstate matters covered in section 201(a). Instead, it extends to all provisions of the Communications Act, including the provisions added by the Telecommunications Act of 1996 that encompass matters that, before 1996, fell within the exclusive jurisdiction of the states.[82] It is thus undisputed that the Commission may adopt intercarrier compensation rules with respect to all traffic — interstate and intrastate — falling within the scope of section 251(b)(5). That provision applies to, and thus authorizes the Commission to regulate, intercarrier compensation for any exchange of telecommunications traffic.

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[81] 476 U.S. 355 (1986) ("*Louisiana PSC*").

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

Congress drafted section 251(b)(5) expansively to bring national consistency to questions of intercarrier compensation. By its terms, this provision extends to all compensation issues relating to the transport and termination of "telecommunications" involving at least one local exchange carrier. Section 251(b)(5) makes no distinctions among traffic on the basis of jurisdiction ("local," "toll," "intrastate," "interstate") or service definition (*e.g.*, "exchange access," "information access," or "exchange service"). All such traffic is plainly "telecommunications." In its *ISP Remand Order* in 2001, the Commission was thus entirely correct in concluding that "[w]e were mistaken [in the *Local Competition Order*] to have characterized" section 251(b)(5) as limited to local traffic, given that "'local' . . . is not a term used in section 251(b)(5) or section 251(g)."[83]

Some parties continue to imply that the Commission was wrong to draw that conclusion.[84] But the statutory language gave the Commission little choice. If it had wished, Congress could have limited the scope of this provision to "local telecommunications," to "telecommunications that originate and terminate within the same local calling area," or to "telecommunications handed off from one LEC directly to another LEC." But Congress included no such limitations on the scope of section 251(b)(5). Instead, it drafted section 251(b)(5) broadly to address all "telecommunications," the most expansive of the statute's

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[83] *See ISP Remand Order* at 9166-9167, 9172-73 ¶¶ 34, 45. The D.C. Circuit left this conclusion intact on review, although it took issue with other aspects of the *ISP Remand Order*. *See WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). Below we address Broadview's suggestion that the *ISP Remand Order* does not mean what it says and somehow cuts in favor of limiting section 251(b)(5) to local traffic.

[84] *E.g.*, NASUCA Comments at 39-40; Missouri Comments at 14-15.

defined terms.[85] Because the statutory language itself compels the conclusion that the Commission's section 251(b)(5) authority extends to *all* telecommunications involving a LEC, the Commission would face formidable litigation risks were it now to reverse course yet again on the scope of section 251(b)(5). "Even under the deferential *Chevron* standard of review, an agency cannot, absent strong structural or contextual evidence, exclude from coverage certain items that clearly fall within the plain meaning of a statutory term."[86]

There is also no merit to the argument of some Plan opponents that section 251(b)(5) applies just to the exchange of traffic between two LECs, and not to the terms on which LECs receive terminating traffic from non-LECs (such as IXCs).[87] The Commission has already rejected that argument on the ground that the language of section 251(b)(5) extends more broadly to the exchange of any traffic involving a LEC at one end.[88] Although the *obligation* to establish reciprocal compensation arrangements for the transport and termination of telecommunications

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85 *See* 47 U.S.C. § 153(43).

86 *USTA v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004) ("*USTA II*"). As the supporters of the Missoula Plan have observed, "the statutory context in which the D.C. Circuit enforced that principle [in *USTA II*] is closely analogous to the statutory context here. Just as the court rejected the Commission's argument that long distance services are not 'telecommunications services' for purposes of section 251(d)(2), so too should the Commission reject the argument that long distance services are not 'telecommunications' for purposes of section 251(b)(5)." Missoula Plan, Policy and Legal Overview, Attachment A, at 2 (some internal quotation marks omitted).

87 *E.g.*, Broadview et al. Comments at 14.

88 *See Local Competition Order* at 16016 ¶ 1041 ("Although section 251(b)(5) does not explicitly state to whom the LEC's obligation runs, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to *any* telecommunications carriers," including non-LEC CMRS providers) (emphasis added). Where Congress intended LECs' 1996 Act obligations to run only to a limited class of carriers, it did so explicitly. *See, e.g.*, 47 U.S.C. § 251(b)(3) ("The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service. . . .").

falls on LECs, Congress did not limit the class of potential *beneficiaries* of that obligation to other LECs.[89]

Finally, the statutory structure as a whole belies the argument of Plan opponents that Congress somehow meant to deprive the Commission of authority to address intercarrier compensation issues relating to any category of traffic that is deemed to be neither "local" (and covered by section 251(b)(5)) nor "interstate" (and covered by section 201(a)).[90] The opponents' effort to carve up the Commission's rulemaking authority on the basis of such legacy jurisdictional categories is strikingly similar to the unavailing attacks in the 1990s on the Commission's jurisdiction to implement sections 251 and 252 more generally. Here, as in that context, the attempt to "produce[] a most chopped-up statute" along jurisdictional lines is flawed both because it violates the statutory text and because it is "most unlikely that Congress created such a strange hodgepodge."[91] Indeed, it would have been perverse for Congress to have authorized the Commission to reform intercarrier compensation rules relating to "local" and "interstate" traffic but not the rules applicable to the one class of traffic — intrastate access —

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89 The Commission has undisputed authority to treat wireless carriers as "LECs" for these purposes in order to effectuate the Plan provisions concerning their intercarrier compensation obligations. *See* 47 U.S.C. § 153(26). The Commission also has full authority to require all local carriers — CLECs in addition to ILECs and wireless carriers — to enter into formal interconnection agreements for the reasons set forth in the Plan's Policy and Legal Overview, at 7. Although Verizon briefly asserts otherwise, Comments at 33, it does not address that analysis or make any effort to distinguish this Commission's decision in Declaratory Ruling and Report and Order, *Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, 20 FCC Rcd 4855, 4864-65 ¶ 16 (2005) (subjecting wireless carriers to section 252 procedures upon receipt of an ILEC interconnection request).

90 *See, e.g.*, Broadview et al. Comments at 9-37; NASUCA Comments at 38-41; Connecticut Comments at 7-9.

91 *Iowa Utils. Bd.*, 525 U.S. at 381 n.8.

that is subject to the *highest* above-cost charges and that is generally thought to be most laden with unsustainable implicit support.

b. Section 251(g) Confirms the Breadth of the Commission's Jurisdiction Under Section 251(b)(5).

In advocating a "most chopped-up" regulatory scheme for intercarrier compensation, some Plan opponents claim that section 251(g) operates as an implicit limitation on the Commission's otherwise broad grant of authority under section 251(b)(5).[92] In fact, section 251(g) simply confirms the Commission's plenary jurisdiction to address intercarrier compensation issues for all telecommunications under section 251(b)(5), including access traffic.

Section 251(g) singles out access traffic for special treatment and *temporarily* grandfathers the pre-1996 rules applicable to such traffic, including rules governing "receipt of compensation," until the Commission exercises its discretion to "supersede[]" these legacy rules with generally applicable rules promulgated under section 251(b)(5).[93] There would have been no need for Congress to have preserved those legacy rules against the effects of section 251 if section 251(b)(5) did not in fact address the "receipt of compensation" for the traffic covered by section 251(g) — *i.e.*, access traffic. Because Congress is presumed not to have filled this statute with pointless surplusage, the only sensible interpretation of section 251(g) confirms what section 251(b)(5) already makes clear on its face: that intercarrier compensation for all access traffic falls within the broad scope of the Commission's jurisdiction to implement section 251 — subject only to the temporary grandfathering provisions of section 251(g).

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[92] *E.g.*, Broadview et al. Comments at 13-16; *see also* Missouri Comments at 15-16; Ohio Comments at 12-15.

[93] 47 U.S.C. § 251(g).

Plan opponents rely on a passage in the *ISP Remand Order* in which the Commission noted that services falling within the scope of section 251(g) "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)."[94] But their reliance on this passage is inexplicable because it does not begin to support their position.

There is no question that section 251(g) temporarily preserves the regulatory status quo for all traffic within that provision's scope. There is also no question that intrastate access traffic falls within that scope. As the Commission confirmed in its 2005 *FNPRM* in this docket, the "section 251(g) carve-out includes intrastate access services."[95] The only dispute is whether, as the Commission has proposed, it can and should "supersede that carve-out" by "replac[ing]

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94 Broadview et al. Comments at 13 (quoting *ISP Remand Order* at 9169 ¶ 39); Missouri Comments at 16-17 (same). Plan opponents also rely on a nebulous sentence within a footnote of the *ISP Remand Order*, in which the Commission obliquely suggested that "ambiguity" in the scope of "telecommunications" might support a construction that intrastate access traffic falls outside of section 251(b)(5). *E.g.*, *id.* at 13 (quoting *ISP Remand Order* at 9168 ¶ 37 n.66). But as discussed above and in the text of the *ISP Remand Order* (*e.g.*, at 9166-67, 9172-73 ¶¶ 34, 45), there is no such "ambiguity" in section 251(b)(5) in the first place.

95 *FNPRM* at 4722 ¶ 79. This conclusion is correct: no less than its interstate counterpart, the intrastate access charge regime falls within the temporary grandfathering mechanism set forth in 47 U.S.C. § 251(g) for "equal access and nondiscriminatory interconnection . . . obligations (including receipt of compensation) . . . under any court order, consent decree," or FCC order. Before 1982, compensation for interexchange access was generally derived through an AT&T-administered system of settlements and division of revenues. *See* Second Supplemental Notice of Inquiry and Proposed Rulemaking, *MTS and WATS Market Structure*, 77 F.C.C.2d 224, 227-28, 234 ¶¶ 15-19, 47 (1980). The AT&T consent decree replaced that system with a regime of federal *and* intrastate access charges. *See United States v. AT&T Co.*, 552 F. Supp. 131, 227, 233 (D.D.C. 1982); Third Report and Order, *MTS and WATS Market Structure*, 93 F.C.C.2d 241, 246 ¶ 11 (1983). The court order accompanying the consent decree made clear that the decree required access charges to be used in both the interstate and intrastate jurisdictions: "Under the proposed decree, state regulators will set access charges for intrastate interexchange service and the FCC will set access charges for interstate interexchange service." *AT&T*, 552 F. Supp. at 169 n.161. Thus, both interstate and intrastate access charges were borne of the same "consent decree," and both are preserved under section 251(g).

intrastate access regulation with some alternative mechanism" of the Commission's design as part of a comprehensive approach to intercarrier compensation.[96]

There is only one logical resolution of this dispute. The sole reason the "section 251(g) carve-out includes intrastate access services"[97] in the first place is that, if it did *not* include them, section 251(b)(5) would have operated to eliminate the corresponding access charges immediately. Once the Commission removes this or any class of traffic from the scope of section 251(g), that traffic becomes subject to section 251(b)(5) as it would have been from the beginning if Congress had not temporarily grandfathered such traffic from the effects of section 251 to begin with. And because the Commission has plenary authority under *Iowa Utilities Board* to implement section 251(b)(5), it has plenary authority to address compensation issues involving intrastate access traffic.

2. The *Louisiana PSC* "Impossibility" Exception Independently Authorizes the Commission to Regulate All Intercarrier Compensation.

As discussed, the Commission's *Iowa Utilities Board* authority under sections 201(b) and 251(b)(5) extends broadly to all termination rates, and the Commission need invoke no further authority to adopt the Plan in its current form. Nonetheless, in addition to its *Iowa Utilities Board* authority, the Commission has — and should assert — independent pre-1996 Act jurisdiction under section 201 to take the steps needed to ensure a nationally consistent intercarrier compensation regime as to both terminating and originating traffic.

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96 *FNPRM* at 4722 ¶ 79.

97 *Id.*

Traditionally, section 2(b) of the Communications Act[98] operated to preclude the Commission from regulating all jurisdictionally intrastate intercarrier compensation. Since 1996, two basic developments have eroded that traditional jurisdictional restriction. First, in the 1996 Act, Congress authorized the FCC to regulate intercarrier compensation for traffic that, even under the *narrowest* interpretation of section 251(b)(5), indisputably includes most intrastate calls (*i.e.*, all local calls). Second, the industry has seen rapid growth in services, such as wireless and VoIP, for which jurisdictional distinctions are meaningless.[99] As a result, the Commission now has clear jurisdiction to prescribe intercarrier compensation rules for almost all major categories of traffic: interstate (sections 201 and 251(g)), intrastate transport and termination (section 251(b)(5)), wireless (section 332), and VoIP (section 201).[100]

Given these developments, no one now disputes that recent developments have superseded the traditional limits on FCC jurisdiction and that, despite section 2(b), the Commission may now regulate intercarrier compensation for most calls that never cross state lines. Under Commission precedent, the only class of traffic as to which there is any serious debate about the Commission's jurisdiction is wireline, circuit-switched, interexchange, intrastate access traffic. Such traffic constitutes a still-significant but declining percentage of

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98 47 U.S.C. § 152(b); *see Louisiana PSC*, 476 U.S. 355 (1986).

99 Report and Order and Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7528-29 ¶ 19 & nn.76-78 (2006) ("*Universal Service Contribution Order*") (explaining that "wireless and interconnected VoIP services have experienced dramatic growth," with wireless carriers growing from 101 million to 206 million subscribers from 2000 to the middle of 2005, and VoIP providers growing from 150,000 subscribers to 4.2 million subscribers from 2003 to the end of 2005).

100 *See* Memorandum Opinion and Order, *Vonage Holdings Corporation, Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*").

services overall. The only question is whether section 2(b) fences off this arbitrarily defined class of calls from the FCC's otherwise comprehensive regulatory authority — even though these are the calls for which intercarrier compensation reform is most needed, and even though it is "most unlikely that Congress" meant to produce such "chopped-up statute"[101] by permitting the FCC to regulate intercarrier compensation for all calls except these.

Section 2(b) would not require that bizarre result even if the opponents' cramped view of section 251(b)(5) were sound. The "impossibility" exception set forth in footnote 4 of *Louisiana PSC* authorizes the Commission to regulate matters traditionally left to the States when such regulation is necessary to protect a valid federal regulatory objective.[102] Here, genuine reform for *any* class of traffic, including traffic over which the Commission has undisputed jurisdiction, cannot succeed unless it encompasses *every* substantial class of traffic, including intrastate access traffic; otherwise, artificial rate disparities for functionally substitutable services will continue to destabilize the industry as a whole.[103] Federal involvement is therefore necessary to prevent methodological inconsistencies from "thwart[ing] the lawful exercise of federal authority over interstate communications."[104]

Some Plan opponents claim that this jurisdictional argument is "almost indistinguishable" from the preemption rationale the Supreme Court rejected in *Louisiana PSC* itself.[105] Of course,

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101 *Iowa Utils. Bd.*, 525 U.S. at 381 n.8.

102 *See Louisiana PSC*, 476 U.S. at 376 n.4; *see generally Vonage Order* at 22418-24 ¶¶ 23-32 (discussing case law and applying it to VoIP jurisdictional disputes).

103 *See* Part I, *supra*; *see also* Missoula Supporters' Comments at 4-5.

104 *Vonage Order* at 22412 ¶ 15; *see also NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989).

105 Broadview et al. Comments at 18-20.

those who advocate an artificially narrow view of the Commission's jurisdiction routinely claim that a given exercise of that jurisdiction is "almost indistinguishable" from the regulatory program at issue in *Louisiana PSC*, but courts are not so easily fooled.[106] In reality, the issue in that case bears no resemblance to the issue here.

In *Louisiana PSC*, the only question was whether it was feasible, as an accounting matter, for the federal government and the states to prescribe different depreciation rates for the same equipment; the Court held that it was, and no harm came to the industry as a whole.[107] In this case, the question is whether the FCC must stand idly by while radical regulatory disparities create worsening fraud and arbitrage opportunities that, if left unchecked, will undermine the industry's stability in general and universal service in particular.[108] The damage threatened by further federal inaction cannot be compartmentalized into "interstate" and "intrastate" spheres; it would affect every corner of this industry, every type of telecommunications service, and the most basic federal policy objectives ranging from universal service to deregulation to competition. Only by replacing the ineffective patchwork of intercarrier compensation rules with a comprehensive and unified approach can the Commission remedy these urgent problems.

No more need be shown to trigger the Commission's jurisdiction under the "impossibility" exception. Nothing in footnote 4 of *Louisiana PSC* confines the "impossibility" exception to cases in which it is *technically* impossible to compartmentalize the interstate and

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[106] *See, e.g., Iowa Utils. Bd.*, 525 U.S. at 381 n.7 ("We of course do not agree with [the dissent's] contention . . . that [*Louisiana PSC*] 'raised a question almost identical to the one before us.'") (citation omitted).

[107] *See* 476 U.S. at 358-59, 375-76.

[108] *See* Part I, *supra*.

intrastate subjects of regulation. To the contrary, the *Louisiana PSC* Court indicated that section 2(b) is inapplicable where jurisdictional compartmentalization is technically possible but separate state regulation would "negate" federal policy goals by forcing providers to divide their services arbitrarily and inefficiently into interstate and intrastate components.[109] Here, the Commission may assert plenary jurisdiction over intercarrier compensation to protect federal policy objectives whether or not it will be feasible for carriers even on a technical level to distinguish between "interstate" and "intrastate" traffic for compensation purposes.

In any event, the Commission could readily conclude that, in today's emerging telecommunications landscape, separation of individual calls into distinct "interstate" and "intrastate" jurisdictions *is* technically infeasible. In the *Vonage Order*, the Commission recognized that carriers cannot easily keep track of the geographic endpoints of VoIP calls for compensation purposes, and that it would be senseless to make them invest in costly systems solely to support that regulatory inquiry.[110] On that basis, the Commission preempted State

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109 Specifically, the Court noted, with approval, the FCC's decision to preempt state laws "prohibiting subscribers from connecting their own phones unless used exclusively in interstate service." *See* 476 U.S. at 376 n.4 (citing *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), and *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977)). The Missouri PSC mistakenly reads this same passage to state only that the Commission may "preempt state regulation *prohibiting customers from owning their own phones*, where federal law permitted customers to provide their own telephone for service." Missouri Comments at 18 (emphasis added). In fact, as the Court noted, these preempted state laws did not go that far: they permitted customers to own their own telephone equipment so long as they did not use that equipment for intrastate calls. 476 U.S. at 376 n.4. But even though it was thereby *possible* to divide the subject of regulation (telephone equipment) into "intrastate" and "interstate" spheres, it was not commercially *sensible* to do so (because customers should not have to purchase two sets of telephone equipment just to satisfy legal rules), and preemption was therefore appropriate.

110 *See Vonage Order* at 22420-21 ¶ 25 ("Vonage has no service-driven reason to know users' locations, and . . . to require Vonage to attempt to incorporate geographic 'end-point' identification capabilities into its service solely to facilitate the use of an end-to-end approach

regulation of VoIP services.[111] And because wireless services are inherently mobile, it is often "difficult for CMRS providers to determine, in real time . . . the customer's specific geographic location" for rate-making purposes.[112]

Wireless and VoIP traffic make up a large percentage of all traffic today, and a disproportionately large percentage of intercarrier compensation disputes already arise from the exchange of such traffic, given the difficulty of pinpointing a wireless or VoIP call's geographic endpoints.[113] At some point in the not-too-distant future, wireless and VoIP services will eclipse

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would serve no legitimate policy purpose. Rather than encouraging and promoting the development of innovative, competitive advanced service offerings, we would be taking the opposite course, molding this new service into the same old familiar shape."); *see also Pulver Order* at 3320-23 ¶¶ 21-24 ("Attempting to require [a VoIP provider] to locate its members for the purpose of adhering to a regulatory analysis that served [the legacy circuit-switched network] would be forcing changes on this service for the sake of regulation itself, rather than for any particular policy purpose. . . . [I]mposing this substantial burden would make little sense and would almost certainly be significant and negative for the development of new and innovative IP services and applications.").

111 Broadview and its co-commenters claim that the Commission somehow disavowed its central holding in the *Vonage Order* when, in subsequent orders, it suggested that *some* VoIP providers might be able to trace the endpoints of some calls for purposes *other than* carrier-to-carrier compensation. *See* Broadview et al. Comments at 21-22 (citing First Report and Order, *E911 Req'ts for IP-Enabled Serv. Providers*, 20 FCC Rcd 10245 (2005), and *Universal Service Contribution Methodology*, WC Dkt No. 06-122, FCC 06-94 (2006)). The states challenging the *Vonage Order* in their Eighth Circuit appeal made this same argument, and the Commission properly rejected it in its appellate briefs. *See* Brief of Respondent FCC, *Minnesota Public Utils. Comm'n v. Federal Commc'ns Comm'n*, Nos. 05-1069, 05-1122, 05-3114 & 05-3118, at 53-56 (8th Cir. Dec. 1, 2005); *see also* 28(j) Letter from Nandan M. Joshi, Counsel, Federal Communications Commission, to Michael E. Gans, Clerk, United States Court of Appeals for the Eighth Circuit, Docket Nos. 05-1069 et al. (filed July 11, 2006).

112 *Local Competition Order* at 16017-18 ¶ 1044.

113 *See, e.g.*, Eleventh Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 21 FCC Rcd 10947, 10950-51 ¶ 5 (2006) (noting that, by December 2005, CMRS carriers had 213 million subscribers in the U.S., accounting for approximately 71 percent of the population); *Universal Service Contribution Order* at 7528-29

traditional wireline telephony in commercial significance. As that process unfolds, it will become ever more difficult to determine, on a call-by-call basis, which calls are actually "intrastate" and which calls are actually "interstate." Section 2(b) does not require the Commission to withhold comprehensive intercarrier compensation reform, and distort the progress of the telecommunications industry, simply to accommodate that fool's errand.[114]

B. The 1996 Act Poses No Barrier to Implementation of the Missoula Plan.

1. The Commission's Implementation of the Plan Would Not Violate Section 252.

In addition to their section 2(b) challenges, a few opponents separately contend that the Plan would violate the 1996 Act on the theory that it would require the Commission to cross a line, supposedly drawn by the Supreme Court in *Iowa Utilities Board*, separating the FCC's role in setting a cost *methodology* from the states' role in setting actual *rates*.[115] This claim is without merit.

First, this argument wrongly assumes that *Iowa Utilities Board* subjects the FCC to this rigid division of labor in the first place. It does not. The relevant passage in that decision holds

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¶ 19 & n.78 (noting that VoIP providers had 4.2 million subscribers at the end of 2005, and they are predicted to have 19 million subscribers by the end of 2009); *Digital Crossroads*, *supra* note 8, at 303-08 (discussing intercarrier compensation issues posed by wireless services and VoIP).

114 We agree with Qwest that "numbers are increasingly less related to geography," Qwest Comments at 24, but that observation does not support Qwest's attack on the Plan's use of numbers as proxies for geography, particularly during the transition to a regime in which, for the vast majority of lines, geography will no longer matter because a given carrier's termination rates will be the same no matter where a call originated. *See* Missoula Plan, Policy and Legal Overview, at 6-7 (citing Commission orders upholding use of numbers as proxies). Indeed, there is no obvious or efficient alternative to the use of numbers as geographical proxies if there is to be a transition, rather than an abrupt flash-cut, to that geography-neutral regime.

115 *See* Broadview et al. Comments at 27-30; Missouri Comments at 24-26; Ohio Comments at 15-19.

only that section 252, which anticipates that state commissions will set rates in the course of arbitrating disputes, does not implicitly repeal the FCC's general rulemaking jurisdiction under section 201(b).[116] And that provision, the Court observed, authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Communications Act,[117] "which include §§ 251 and 252, added by the Telecommunications Act of 1996."[118] Administrative agencies like the FCC issue rules that run the gamut from very general to very specific. Here, the grant of rulemaking authority in section 201(b) does not remotely confine the FCC to the promulgation of abstract methodological rules instead of rules prescribing specific rate caps, as the FCC confirms each time it issues rules prescribing particular rates for particular services.[119]

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116 *See* 525 U.S. at 384-85.

117 47 U.S.C. § 201(b).

118 525 U.S. at 378. Notably, in *dissenting* from the majority's decision to uphold the FCC's pricing jurisdiction, Justice Breyer appeared to endorse what he called "[t]he FCC's strongest argument" — that "its rate rules do not actually supplant local ratesetting authority" but "simply set forth limits[.]" *Id.* at 423 (Breyer, J., dissenting in relevant part). Justice Breyer nonetheless dissented on the ground that "[t]he FCC's rules . . . are not general" but rather are "highly specific and highly detailed" (*id.*) — a fact that did not trouble the Court's majority, which upheld the rules anyway. Finally, the Ohio PUC's reliance (*see* Comments at 18) on footnote 10 of *Iowa Utilities Board* — for the proposition that many of the "policy implications" of the 1996 Act are "beyond federal control" — is frivolous: in this passage, the Court was merely characterizing the jurisdictional challenge that it *rejected*. *See* 525 U.S. at 385 n.10.

119 *See, e.g.*, Memorandum Opinion and Order, *Tariffs Implementing Access Charge Reform*, 13 FCC Rcd 14683, 14707 ¶ 53 (1998) (explaining that, "[u]nder Section 201(b), we are charged with ensuring the price cap LEC rates are just and reasonable, and in exercising that authority, we have the ability to set just and reasonable rates when we find rates to be unreasonable. The Communications Act empowers us 'to determine and prescribe what will be the just and reasonable charge, or the maximum or minimum, or maximum and minimum, charge or charges' these LECs are permitted to impose") (footnotes omitted).

Of particular relevance here, the FCC exercised that authority to set specific rates for terminating ISP-bound traffic, including the $0.0007 rate that applies today.[120] Although the D.C. Circuit invalidated the precise doctrinal basis of the Commission's ISP-bound traffic rules, the court declined to vacate the Commission's rate prescriptions because it found that the FCC might well succeed in imposing the same outcome "under §§ 251(b)(5) and 252(d)(B)(i)."[121] At no point did the D.C. Circuit suggest that the FCC might need to defer such rate-setting authority to the states, even though the rates at issue fall (as the Court found) within the purview of sections 251(b)(5) and 252(d)(2). Indeed, just two years later, the D.C. Circuit admonished the FCC to *avoid* undue delegations of federal rulemaking authority to the states.[122]

As Broadview notes (Comments at 28-29), the Eighth Circuit invalidated the Commission's "proxy" rates in 2000 in the course of its unsuccessful campaign to invalidate all of the Commission's pricing rules.[123] Although the FCC did not specifically ask the Supreme Court to reinstate the proxy rates, presumably because it had never sought to enforce them (and they had become obsolete in any event by the time the issue reached the Supreme Court), nothing in the Missoula Plan depends on the continued validity of the proxy rates in the first place. Moreover, given that the Supreme Court twice intervened to reverse the Eighth Circuit's sustained assault on the Commission's pricing rules (first in *Iowa Utilities Board* in 1996 and

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[120] *ISP Remand Order* at 9186-92 ¶¶ 77-85.

[121] *WorldCom*, 288 F.3d at 434.

[122] *See USTA II*, 359 F.3d at 565-66.

[123] *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part*, *Verizon Communications Corp. v. FCC*, 535 U.S. 467 (2002).

then in *Verizon* in 2002), any pre-2002 Eighth Circuit holding on the validity of those pricing rules is a surpassingly untenable basis upon which to rest any legal argument.

Moving from jurisdictional to substantive challenges, several opponents next argue that, by reducing ultimate termination rates "significantly below TELRIC costs for the functions performed," the Plan "would violate Section 252(d)(2) on its face."[124] This is nonsense. Section 252(d)(2) requires regulators to set rates for terminating calls at zero (where bill and keep is the chosen methodology) or "on the basis of a reasonable approximation of the *additional costs* of terminating such calls."[125] Nothing in section 252(d)(2) requires the FCC to interpret the "additional cost" standard — which appears nowhere else in the Communications Act — to incorporate the same TELRIC methodology the Commission uses for pricing unbundled network elements. Although the Commission adopted that approach in 1996, it retains full discretion to determine that TELRIC is no longer an appropriate methodology for setting termination rates, particularly in light of its own outspoken concerns about TELRIC's methodological integrity.[126]

Moreover, the parties that criticize the Plan's termination rates as "too low" never explain why they believe those rates fall below the levels produced by any reasonable construction of the term "additional costs." Once a network is up and running, the marginal cost of terminating an individual call is negligible.[127] And the term "additional cost" could reasonably be interpreted to

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124 Broadview et al. Comments at 41; *see also* Cavalier et al. Comments at 58-61.

125 47 U.S.C. § 252(d)(2)(A)(ii) (emphasis added).

126 *See* Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements, and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18945, 18948-51 ¶¶ 4-8 (2003).

127 *See, e.g.*, Report and Order and Second Further Notice of Proposed Rulemaking, *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, 3220 ¶ 717 (1989)

mean marginal cost, in which event the prescribed rate would be zero — essentially, a bill-and-keep regime.[128] But the Plan opts for a reasonable middle ground, in which some portion of common costs are attributed to each call minute to produce a positive rate. That per-minute attribution of common costs cannot be "too small" as a matter of statutory compulsion because the statute could alternatively be construed to permit a marginal cost approach and thus a rate of zero. And, as we discuss in Part II.A.1 above, the Plan's rates are not "too small" from a policy perspective either, since all carriers are equally free to recover from their own end users any fixed network costs they do not recover from other carriers (and *their* end users).[129]

Finally, a few opponents complain that the Plan violates section 251(a) or section 251(c)(2) because it prescribes rates above TELRIC for tandem transit service (*i.e.*, the service of connecting two local networks that are not themselves physically interconnected).[130] But the Commission has never required any carrier to provide such service in the first place,[131] and "any duty [an ILEC] may have under section 251(a)(1) of the Act to provide transit service would not

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(explaining that "a LEC's marginal cost of providing an additional minute of service over common line facilities approaches zero").

[128] For the reasons expressed in the comments of the Intercarrier Compensation Forum in response to the Commission's 2005 *Further Notice* in this docket, AT&T submits that the FCC would have statutory authority to set a termination rate of zero not just through interpretation of the "additional cost" standard to mean "marginal cost," but independently through an appropriately robust construction of the bill-and-keep savings clause of section 252(d)(2)(B)(i). *See* Comments of the Intercarrier Compensation Forum, filed in CC Docket 01-92, May 23, 2005, at Appendix A, pages A-8 to A-11.

[129] *See, e.g.*, *ISP Remand Order* at 9185-86, 9190-93 ¶¶ 76, 85-88.

[130] *See* Broadview et al. Comments at 58-65; Cavalier et al. Comments at 62-64.

[131] *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17319-20 ¶ 534 n.1640 (2003), *vacated on other grounds*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

require that service to be priced at TELRIC."[132] Certainly section 251(c)(2) imposes no duty to provide transiting services: it requires only direct physical interconnection between an ILEC and a requesting carrier for purposes of exchanging traffic *between their respective subscribers*, and provides no basis for requiring ILECs to provide indirect interconnection between two third-party networks through transiting arrangements.

2. The Commission Can and Should Forbear from Section 252 to the Extent It Would Otherwise Frustrate Implementation of the Missoula Plan.

Although the Plan's rate prescriptions are lawful for the reasons discussed, the Plan's proponents have asked the Commission to exercise its section 10 authority to "forbear from applying"[133] section 252 to the extent that any provision of that section might later be found to pose any jurisdictional or substantive barrier to implementation of the Plan.[134] AT&T endorses that approach and, for the reasons outlined in the Plan's legal analysis, agrees that the three statutory preconditions to forbearance are satisfied.[135]

Broadview contends that the opening clause of section 10 — "the Commission shall forbear from *applying* . . . any provision of this Act" — precludes the Commission from exercising its forbearance authority with respect to any provision that "Congress charged the

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132 Memorandum Opinion and Order, *Petition of WorldCom, Inc. et al., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration*, 17 FCC Rcd 27039, 27101 ¶ 117 (2002) ("*WorldCom Order*").

133 47 U.S.C. § 160(a).

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

135 *Id.*

States . . . to apply" in the first instance, such as the provisions of section 252.[136] This argument is without merit. To begin with, Broadview's analysis overlooks the comprehensive role Congress gave the Commission in superintending state implementation of section 252. As the Supreme Court has explained, "Commission jurisdiction always follows where the Act applies," including in the provisions of section 252.[137] To underscore the Commission's dominant role, Congress further provided in section 10 that a "State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying."[138] That provision would be meaningless if, as Broadview suggests, the Commission's forbearance authority were inapplicable to any provision that "Congress charged the States, as opposed to the Commission, to apply" in the first instance.[139]

Contrary to Broadview's suggestion, the use of the word "apply" in the opening clause of section 10 also does not limit the Commission's forbearance authority to purely substantive provisions. To "apply" a provision means "to put [it] into operation or effect."[140] In this case, Broadview asks the Commission to put what it (mistakenly) considers a jurisdictional

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136 Broadview et al. Comments at 35.

137 *Iowa Utils. Bd.*, 525 U.S. at 380 (internal quotation marks omitted). The Commission has routinely promulgated rules implementing the specific terms of section 252 even though the states are responsible for putting those rules into effect. *See, e.g.*, *Local Competition Order* at 15515 ¶ 29 (ordering states to use TELRIC when setting rates for unbundled network elements under section 252 and establishing default rate ranges for the states to apply); *id.* at 15519 ¶ 40 (interpreting section 252(i)); Notice of Apparent Liability for Forfeiture, *Qwest Corporation*, 19 FCC Rcd 5169, 5169-70 ¶¶ 1-2 (2004) (penalizing Qwest $9 million for failing to file dozens of interconnection agreements with state commissions, as required by 47 U.S.C. § 252(a)).

138 47 U.S.C. § 160(e).

139 Broadview et al. Comments at 35.

140 Merriam-Webster's Collegiate Dictionary 56 (10th ed. 1993).

impediment "into operation or effect" by declining to prescribe specific rates. Our response is that the Commission should conditionally forbear from giving effect to — *i.e.*, applying — that supposed jurisdictional impediment. The only question is whether forbearance from such impediments would satisfy the three statutory criteria set forth in sections 10(a)(1)-(3). As explained in the Missoula Plan's legal analysis, the answer is yes. Nothing in the opening clause of section 10 suggests a contrary conclusion.

Broadview also contends, without citation of authority, that "forbearance is only appropriate when market forces are such that the Commission is able to conclude *that regulation is no longer necessary*."[141] But if Congress had meant to limit the Commission's forbearance authority to circumstances where complete and immediate deregulation is appropriate, it would have included language to that effect in section 10. It did not. Instead, it directed the FCC to forbear from the application of "any" legal requirement that is not itself necessary for the protection of carriers or consumers whenever "forbearance . . . is consistent with the public interest."[142] In this case, to the extent that any aspect of section 252 would preclude national intercarrier compensation reform, forbearance from that provision is essential to the public interest even though — indeed, precisely because — the FCC will replace the existing hodge-podge of conflicting termination rates with a simplified, nationally coherent regime instead. Section 10 was designed precisely to permit such regulatory simplification when the Commission deems it necessary to promote the public interest.

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[141] Broadview et al. Comments at 36.

[142] 47 U.S.C. § 160(a).

IV. The Plan's Interconnection Rules Are Reasonable, Competitively Neutral, and Lawful.

A. The Plan's "Edge" Rules Create an Efficient, Market-Driven Framework that Treats All Carriers Fairly.

The Missoula Plan creates a definitive and straightforward default interconnection framework for all telecommunications carriers. Carriers are free to enter into any other arrangements pursuant to voluntary negotiations, but the framework is designed to provide all carriers with default options that put them on an equal footing in terms of their rights and costs of interconnection.

Central to that framework is the concept of a network "Edge." If a carrier drops traffic off at another carrier's Edge, it pays the low termination rates prescribed by the Plan. For example, if a carrier originates a call bound for a tandem-based Track 1 ILEC subscriber, and if it drops the call off at the Edge serving that subscriber's end office, it will pay the ILEC (at Step 4) a termination rate of only $0.0005 per minute. If, however, the carrier drops the call off at another location within the ILEC's network, it must (with certain exceptions) compensate the ILEC for inefficiently transporting the call between the point of interconnection and the access tandem Edge location — unless the two carriers agree otherwise. Because the rates for that "backhaul" function are capped at a higher level than termination rates, they give the originating carrier appropriate price signals to explore alternative, more efficient means of routing the call to the Edge, whether by building out its own transport facilities to that point or contracting with an independent transit provider (whose entry the Plan will separately facilitate, as discussed below). At the same time, those backhaul rates fall within the broad spectrum of cost-based rates; indeed, they are based on the ILEC's interstate transport rates, which this Commission has already deemed "just and reasonable" under section 201 — and they are in many cases lower than the transport rates most connecting carriers pay today.[143]

The simplicity and evenhandedness of the Plan's Edge rules should eliminate decades of dispute and restore order to this battleground of arbitrage and gamesmanship. The Edge rules were designed so that all carriers have default Edges designed to cover comparable geographic areas and, with certain exceptions to protect the interests of rural consumers, similar rights and obligations with respect to interconnection: thus, all carriers have equal footing in interconnection negotiations. As we show here, the rules are necessary, fair, efficient, and consistent with Commission authority.

1. The Missoula Plan's Edge Rules Are a Critical Component of Intercarrier Compensation Reform.

A handful of commenters contend that the Plan's interconnection rules are unnecessary because the regime as it exists today is "settled"[144] or "safe and predictable."[145] This is nonsense: interconnection disputes and a crazy-quilt of disparate state regulatory decisions have plagued the industry for years.[146] The Commission itself has acknowledged that its existing rules have "encourage[d] traffic imbalances" and have generated "a substantial number of disputes

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143 *See* Missoula Plan at 8-19, 49-54, §§ II.B, III.D (setting rates and rate caps for transport and transit).

144 Cavalier et al. Comments at 28.

145 Time Warner Telecom et al. Comments at 16. *See also* Ohio Comments at 22-26 (claiming that existing rules "have encouraged efficient network use as they have been fine-tuned through actual network implementation and numerous State arbitration proceedings"); Florida Comments at 7 (referring to current interconnection rules as "settled").

146 *See* Missoula Supporters Comments at 9-10 n.9 (listing several post-96 Act cases involving major interconnection disputes); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411 (1994) (addressing CMRS-LEC interconnection issues prior to 1996 Act).

related to how carriers should allocate interconnection costs."[147] Even NCTA concedes that "some of the most contentious issues among telecommunication providers involve the physical interconnection of networks," and "the consequence of this disjointed regime is that traffic is not exchanged as efficiently as it could be."[148]

Despite contrary suggestions,[149] moreover, intercarrier compensation reform cannot be resolved in isolation from the reform of the interconnection regime. Any intercarrier compensation regime requires identification of the points in carriers' networks where the various compensation rules are triggered. Only once those points have been defined in the same, predictable manner for *all* carriers and *all* traffic in *all* service areas will carriers have the certainty they need to make appropriate investment decisions. The Commission itself has recognized this indelible link. It specifically sought comment on how to design appropriate interconnection rules, in both its 2005 *FNPRM*[150] and its original 2001 *NPRM*.[151] Even CTIA, in its METE proposal, notes that that "default interconnection rules" are "[c]entral to any

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147 *See FNPRM* at 4727-28 ¶ 91.

148 NCTA Comments at 14.

149 *See* GCI Comments at 44 ("The proposed dismantling of the current interconnection regime is wholly unnecessary and unrelated to steps necessary to implement intercarrier compensation reform."); RNK Telecom Comments at 37-38 (urging separate proceeding for resolution of interconnection disputes).

150 *See FNPRM* at 4702-03, 4728-29 ¶¶ 34, 92 (noting that "any proposal for reform of compensation mechanisms should address the impact of such changes on network interconnection rules" and seeking "additional comment on changes to our network interconnection rules to accompany proposed changes to the intercarrier compensation regimes").

151 *See Intercarrier Compensation NPRM* at 9650-52, ¶¶ 112-14.

intercarrier compensation reform,"[152] though CTIA then offers no detail regarding any proposed default rules.

In that respect, CTIA is hardly alone: *none* of the commenters that object to the Plan's interconnection rules propose any meaningful alternatives. In this respect, too, the choice is between a broken status quo and the only workable reform plan on the table.

2. The Missoula Plan's Edge Rules Are Efficient and Competitively Neutral.

The Plan's Edge designations are based on input from a broad cross-section of the industry and reflect, as a general matter, the most efficient points for receiving traffic on a network and routing the calls received to their destinations. For example, wireless carriers may designate their MSCs, CLECs their end-office locations, and IP-based carriers their Trunking Media Gateways. And *any* carrier may designate a point of presence where they lack a physical switch in a LATA.[153] By recognizing that, for example, CLEC and CMRS switches frequently cover a comparable geographic area to ILEC access tandems, the Plan is sensitive to the differences in network architectures between ILECs, CLECs, wireless carriers, and IP-based carriers. The Plan further ensures that there will be at least one Edge per carrier in every LATA, so that no carrier is forced to bear the costs of hauling traffic across several states.[154] And,

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[152] Comments of CTIA, filed in CC Docket 01-92, May 23, 2005, at 21 (discussing CTIA's Mutually Efficient Traffic Exchange ("METE") proposal).

[153] *See* Missoula Plan at 45-46, § III.B.2. Verizon complains that these rules prefer CLECs because, while Track 1 ILEC Edge options will often be limited to the Access Tandem, CLECs will be able to choose among far more types of facilities based on their architecture. *See* Verizon Comments at 22. But the Plan's rules are neutral: Any carrier with qualifying network facilities can make use of them as an Edge.

[154] *See* Missoula Plan at 45, § III.B.2.a.

except in the case of smaller rural carriers with higher costs,[155] the Plan selects the ILEC Access Tandem as the appropriate Edge for the end users served by that ILEC's end offices subtending that Access Tandem. Moreover, a one-Edge-per-LATA approach is a reasonable compromise between allowing all carriers (including Track 1 ILECs) to choose each called party's end office as an Edge, on the one hand, and the current situation, on the other hand, in which an ILEC must bear the costs of accepting traffic for *all* end users in a LATA at a single point of interconnection.[156] The Plan's interconnection rules will also eliminate disputes regarding whether carriers must obtain collocation in order to physically interconnect, substantially lowering the cost of interconnecting at other carriers' Edge locations (such as ILEC access tandems).[157]

Some commenters insist that the Plan's interconnection rules favor ILECs and will impose unfair costs on CLECs. This complaint rests largely on the assumption that the Plan's Edge rules will require CLECs and CMRS carriers to reconfigure their networks by moving from existing points of interconnection to the "Edges" established by the Plan,[158] and by establishing

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155 *See* Missoula Plan at 46, § II.B.2.e (permitting Track 2 and 3 carriers greater flexibility in the designation of Edges).

156 Indeed, the Commission itself has suggested that the use by a CLEC of a single point of physical interconnection many not be well aligned with issues of interconnection *costs*. *See FNPRM* at 4727-28 ¶ 91 ("[Interconnection] disputes arise in part because of a lack of clarity among the various rules governing the costs of interconnection facilities and the relationship of those rules to the single POI rule.").

157 Specifically, the Plan ensures that every carrier will allow termination of another carrier's fiber optic or electrical transmission cable without collocation or additional recurring fees. Missoula Plan at 46-47, §§ III.C.1.a-b.

158 *See, e.g.*, Cavalier et al. Comments at 21 ("[T]he Plan would increase competitors' costs by requiring them to establish more facilities to more locations, at a greater cost per unit of transport, with no net benefit — except to ILECs."); Comptel Comments at 9 ("[T]he Plan would

their own Edges in every LATA.[159] That assumption is wrong. The Plan does not require reconfiguration of any carrier's interconnection facilities. It *permits* that result if the carriers involved determine that would be the most efficient outcome, but it provides that any rights carriers have to interconnect on the ILEC's network remain undisturbed by the Edge rules.[160] The Plan further establishes that an originating carrier may use the terminating carrier's own facilities for interconnection transport,[161] a provision that belies claims that the Plan permits ILECs to demand that CLECs relocate their physical interconnection arrangements directly to designated ILEC Edges. In addition, the Plan includes "Virtual Edge" rules that protect the investment that non-ILECs have already made in facilities built out to physical points of interconnection that may not qualify as Edges under the Plan.[162] Indeed, the Plan *expands* on

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allow a carrier to force a competing LEC to move current connections from the existing [POIs] to unilaterally designated "Edges."); CTIA Comments at 10 ("Competitive carriers would bear the tremendous cost of duplicating otherwise suitable interconnections with terminating ILECs by installing trunks to multiple new Edge locations designated by the ILECs in each LATA."); Verizon Wireless Comments at 9.

[159] *See, e.g.*, Cavalier et al. Comments at 25-26.

[160] Missoula Plan at 42, § III.A.2 (preserving physical interconnection rights of carriers under section 251(c)(2)).

[161] *See, e.g.*, Missoula Plan at 48, § III.C.5.

[162] *See* Missoula Plan at 32-33, § II.E.3.d.ii. Broadview oddly argues that these rules are unfair to the CLEC, *see* Broadview et al. Comments at 51-52, but the rules were in fact crafted to address CLEC concerns and were negotiated with CLEC participation. The rules for use of these pre-existing arrangements are designed to ensure the CLEC gets the financial benefit of its investment without unfairly burdening the ILEC. And if a CLEC determines that use of the default Access Tandem Edge rules are preferable and more cost effective, it may simply abandon the Virtual Edge.

existing physical interconnection rights by creating clearly articulated rights with respect to the types of physical interconnection all carriers — including transit providers — may demand.[163]

In short, the Edge rules do not limit the points at which carriers may physically interconnect, although a terminating carrier must of course be capable of meeting all physical interconnection obligations under the Plan at its designated Edges.[164] Instead, as noted, the Edge rules define the point at which the pricing rules change for the routing of traffic through the terminating carrier's network.[165] Carriers can always choose to interconnect at other points based either on commercial negotiations or on any applicable statutory interconnection rights they may have. Thus, CTIA and others are simply wrong in claiming that the Plan requires carriers to physically interconnect at any and every tandem office within a LATA that an ILEC

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163 *See* Missoula Plan at 46-48, § III.C; *id.* at 41, § III.A.1.

164 *See* Missoula Plan at 42-46, § III.B.

165 *See, e.g.,* Missoula Plan Summary at 11; Missoula Plan at 41-46, § III.A-B. There are two exceptions to the general rule that the Edge marks a shift in cost methodology: the Rural Transport Rules and the Out-of-Balance Traffic rule. *See* Missoula Plan at 33-35, § II.E.3.e (rural transport rules); *id.* at 40-41, § II.E.9 (out-of-balance traffic). In both cases, the terminating carrier may bear some or all of the originating carrier's costs of interconnection transport between the two carriers' networks. But these limited exceptions comport with the Plan's overall reform goals. As explained more fully in the comments of the Plan's rural ILEC supporters, the Rural Transport Rules are a compromise position designed to minimize the size of the Restructure Mechanism and the increase in rural SLCs. The Out-of-Balance Traffic Rule is an arbitrage-prevention provision, much like the FCC's ISP-bound traffic rule on which it was modeled. Under that rule, if a carrier engages in a cottage industry of serving terminating-only customers, it will have to absorb the full costs of interconnection transport between the carriers' networks. *See id.* at 40-41, § II.E.9.b. Contrary to Cavalier's concerns, *see* Cavalier et al. Comments at 29, genuine, full service competitors should be unaffected. And contrary to Verizon's concerns, *see* Verizon Comments at 21, the rule discourages net *origination* schemes by preserving the originating carrier's obligation to pay terminating rates. In any event, if the Commission finds that the rule does not fully address or creates new arbitrage opportunities, it can address that concern in its Step 4 review.

designates as an Edge.[166] To the contrary: a CLEC may continue to deliver all of its traffic to a single physical point of interconnection within a LATA even if that physical point of interconnection does not qualify as an Edge.[167]

Of course, because Edge designations do have financial consequences, they will make some parties better off, and others worse off, than they are under today's less efficient rules. Today, some terminating carriers force others to use their transport as the only means of interconnecting or otherwise raise the cost of direct interconnection; at the same time, some originating carriers manipulate the interconnection and reciprocal compensation rules to force inefficiencies and costs on the terminating carrier. The Edge rules, including both the one-Edge-per-LATA rule and the originating carrier's right to determine the mode of interconnection and means of transport, will allow originating carriers to manage their costs and make efficient choices, while creating market-based incentives for terminating carriers to offer competitively-priced transport.[168] As Alltel recognizes, the Edge concept "creates incentives for each carrier to

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166 *See, e.g.,* CTIA Comments at 10.

167 Comptel and CGI contend that in Alaska, the rules will require competitors to abandon their end-office interconnections and build out to new, yet-unbuilt ILEC access tandems. *See* Comptel Comments at 11; GCI Comments at 6, 32-40. But the rules do not dictate *physical* interconnection arrangements in Alaska any more than they do anywhere else. Nor is it clear why a Track 3 ILEC in Alaska would benefit from designating its Edges further away from its end users, given that the Plan separately caps rates for transporting and terminating traffic from that Edge to its end users. Indeed, it is precisely for such reasons that the Plan permits Track 3 ILECs to designate end offices as an Edge.

168 The absence of such a rule would be particularly unfair to ILECs, given the very low terminating rates the Plan imposes. If the originating carrier could arbitrarily increase the terminating carrier's costs by inefficiently interconnecting, the terminating carrier might have to increase SLCs even more, or obtain more Restructure Mechanism support, in order to cover its costs. That result would undermine many of the efficiency-enhancing incentives of the Plan.

deploy its own network facilities up to the [E]dge as efficiently as possible."[169] If an originating carrier does not wish to pay the higher rates it would incur by relying on the terminating carrier's transport facilities, it may respond to that price signal by building out its own transport to the Edge or relying on a third party's transport (either leased facilities or tandem transit services).[170] Like any other reform measure, this new regulatory approach may upset those that have benefited from today's less efficient arrangements, but that is hardly a reason to oppose reform. By definition, reform can be achieved only with *change*. Under the Plan, all carriers bear some risk from change, but all will also share in its benefits.

Finally, because these Edge designations are default rules only,[171] there is no merit to claims that the Plan's interconnection rules will somehow disrupt the industry by requiring renegotiation of existing interconnection arrangements even when they are perfectly efficient.[172] If current arrangements are more efficient than the Plan defaults, the parties are perfectly free to retain them. Carriers will seek to renegotiate their existing arrangements only where it believes

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[169] Alltel and Suncom Comments at 21. Alltel nevertheless maintains that allowing ILECs to identify multiple Edges undermines this efficiency, but its argument is based on the assumptions that CLECs will have to actually build facilities to each Edge and will no longer be permitted to share transport to a central ILEC tandem. *See id.* But as noted, the Plan does not require CLECs to build *any* new facilities, nor does it prohibit use of shared transport for the aggregated traffic of several originating carriers — to one ILEC tandem, or several.

[170] *See, e.g.*, Missoula Plan at 9, § II.B.a.vi. And as noted above and discussed below, by creating a right of interconnection for transit carriers, the Plan makes indirect interconnection via a transit carrier a far more competitive alternative.

[171] Missoula Plan at 41, § III (summary).

[172] *See, e.g.*, NCTA Comments at 17 ("By giving carriers the ability to demand different interconnection arrangements than they have agreed to in the past, the plan creates the potential for a new round of disputes between providers."); Comptel Comments at 10 ("Allowing a carrier to unilaterally change the current interconnection arrangement to which the carriers had agreed would serve primarily to upset settled expectations . . . .").

it is possible to create a *more* efficient arrangement. And in any case where carriers are exchanging bi-directional traffic, they will have an incentive to achieve a negotiated two-way-trunk solution that is mutually cost-effective.

3. The Edge Rules Are Consistent with the 1996 Act and the Commission's Rules.

Contrary to the claims of some commenters,[173] the Plan's Edge rules fully comport with the 1996 Act. As noted, the Plan explicitly provides that interconnecting carriers may exercise their rights under section 251(c)(2)(B) to physically interconnect at any technically feasible point of interconnection. As explained, the Edge rules specify only a *financial* obligation for a carrier to transport traffic. The Plan's Edge framework similarly accommodates the Commission's current *regulatory* prohibition against requiring a CLEC to physically interconnect at more than one point in a LATA.[174] Under the Plan, a CLEC remains free to physically interconnect at only one point in a LATA for all its traffic in that LATA. The Plan simply provides that, lacking a mutual agreement, one carrier will pay another an appropriate rate for hauling that traffic from that interconnection point to the Edge serving the relevant end users.

Just as there is no basis for setting the Plan's termination rates at TELRIC (*see* Part III, *supra*), there is also no basis for insisting that the rates for backhauling traffic from a physical

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173 *See, e.g.*, Broadview et al. Comments at 43-45; Cavalier et al. Comments at 22-25; CTIA Comments at 12-13; Missouri Comments at 50-51; NCTA Comments at 15-16.

174 *See* Memorandum Opinion and Order, *Petition of WorldCom, Inc. et al., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration*, 17 FCC Rcd 27039, 27064 ¶ 52 (2002) ("*WorldCom Order*"). ("Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. This includes the right to request a single point of interconnection in a LATA.") (footnotes omitted). Of course, the Commission is in any event free to change, waive, or forbear from its own rules, if the public interest so requires.

point of interconnection to the relevant Edge must be set at TELRIC, as some commenters propose.[175] Indeed, the Commission should construe this backhaul function as falling outside the statutory "transport" covered by the Section 251(d)(2) pricing standards altogether. Section 251(d)(2) "transport" is reasonably interpreted as covering the carriage of traffic *from* the Edge, to the terminating carrier's serving end office — not the transport required in connection with efficient interconnection.[176] As discussed above, the Commission is also free to forbear from the pricing rules applicable to such backhaul if needed to create legal certainty.[177]

In any event, the Plan's rate caps for this backhaul function are fair and fall well within the range of cost-based rates. Because they are based on the carriers' interstate transport rates, the Commission has already deemed them "just and reasonable" under section 201. Further, for the reasons described above, it is perfectly reasonable to set these backhaul, interconnection rates

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175 *See* Broadview et al. Comments at 45; Cavalier et al. Comments at 27; NCTA Comments at 15-16. *See also* NCTA Comments at 14, 23-24 (complaining that transit service rates must be set at TELRIC); Cavalier et al. Comments at 15, 20, 62-64 (same).

176 Under the Plan, with respect to Track 1 tandem-based carriers, carriage of traffic from the Edge to the end office (*i.e.*, statutory "transport" as opposed to the "backhaul" transport function as defined under the Plan) is covered by the Plan's very low termination rates. As explained above, those rates are fully consistent with section 251(d)(2).

177 Some parties contend that the Rural Transport and Out-of-Balance Traffic rules conflict with the Commission rules (47 C.F.R. §§ 51.703, 51.709) prohibiting carriers from charging another for the transport of traffic that originates on its network. But the former addresses reciprocal compensation, not interconnection; and the latter prevents a carrier from charging an interconnecting carrier for the full cost of an interconnection facility that carriers traffic in both directions. The Plan ensures that the carrier with responsibility for the cost of transport will select the mode (and provider) of interconnection transport, *see* Missoula Plan at 42, § III.A.1.e, so that it can both minimize its costs and avoid using (and thus paying for) the other carrier's interconnection transport facilities at all. The rules therefore do not even implicate the situation contemplated by section 51.709. But in any event, the Commission is free to reconsider, waive, or forbear from such rules if the public interest so requires.

higher than the Plan's termination rates.[178] The rates the Plan sets for termination are very low, and will in many cases require the terminating carrier to turn to its end users or the Restructure Mechanism to recover its full (fixed and incremental) network costs. It would make no sense to allow originating CLECs to add to terminating ILECs' (and their customers') costs by requiring them to provide inefficient interconnection transport — chosen by the CLEC — at the same low rates. Finally, even the Plan's backhaul rates will serve only as a cap. If such transport can be provided more efficiently, other carriers or the ILEC itself will have incentives to offer it at lower rates.[179]

B. The Plan's Interconnection Rules for Transit Are Likewise Reasonable.

Under the Missoula Plan, carriers are required to interconnect directly not only with requesting carriers that seek to terminate their own traffic, but with Tandem Transit providers seeking to terminate *other* carriers' traffic.[180] As discussed above, transit is a critical component of an interconnection regime, given the inefficiency of expecting each carrier in a geographic region to interconnect directly with every other carrier. And transit should become an even more important option under the Plan, as originating carriers face new incentives to find the most efficient means of delivering their traffic to terminating carriers. It thus is vital to create explicit rules delineating the interconnection rights and obligations of Tandem Transit providers.

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[178] Moreover, the unified interstate rate carriers will pay for this backhaul function will often be lower than the rates they currently pay.

[179] As discussed above, the fact that carriers will not be permitted to require inefficient collocation facilities will itself help to drive down interconnection costs.

[180] *See* Missoula Plan at 41, § III.A.1 (A "carrier is . . . obligated to provide physical interconnection to transit carriers for their provision of indirect interconnection.").

Were there any doubt that definitive transit interconnection rules are necessary, the Commission's *Neutral Tandem* proceeding[181] should dispel them quickly. The comments in that proceeding make clear that the rights of competitive transit providers are a matter of debate today. And as might be expected in light of that proceeding, some commenters in this one question the Commission's authority to require carriers to accept interconnection from competitive transit providers.[182]

As AT&T has explained at length in that proceeding, however, the Commission derives such authority directly from Sections 251(a) and 201 of the Act.[183] Section 251(a) imposes a duty on all carriers to interconnect directly or indirectly with other carriers.[184] Since the very concept of "indirect" interconnection presumes that some carriers will rely on transit providers, the Commission may reasonably find that each carrier owes a duty of physical interconnection to transit providers under Section 251(a). Indeed, the FCC's Wireline Bureau already has found that transit is an essential component of the universal connectedness that is section 251(a)'s "fundamental purpose."[185] Moreover, Section 201 of the Act gives the Commission full

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181 *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 August 2, 2006).

182 *See, e.g.*, Verizon Comments at 33; Verizon Wireless Comments at 3-5. As AT&T's comments in the *Neutral Tandem* proceeding fully explain, Verizon argument is wrong in that proceeding just as it is wrong here.

183 *See generally* AT&T Inc. Reply Comments, filed in WC Docket No. 06-159, Sep. 25, 2006.

184 47 U.S.C. § 251(a).

185 *WorldCom Order* at 27101-02 ¶ 118.

authority to establish rules necessary to achieve section 251(a)'s fundamental purpose.[186] Section 201(a) further provides an independent basis for the imposition of a duty to interconnect with transit providers: the Commission may, after a hearing determining that it is in the public interest, require carriers "to establish physical connections with other carriers."[187] Since, under the Plan, jurisdictional distinctions between "access" and "local" traffic will become largely irrelevant, at least for the majority of traffic, Tandem Transit service will be used for both interstate and intrastate services, and the Commission may accordingly establish the rules governing the interconnection rights governing that service.

The Plan not only creates rights for Tandem Transit providers; it also ensures cost-effective interconnection for all carriers by requiring carriers that already provide transit to continue doing so. Contrary to Verizon's and Qwest's objections,[188] this requirement is both reasonable and lawful. The *right* of indirect interconnection contemplated by section 251(a)'s *duty* to accept indirect interconnection presumes that transit service will exist as a viable option. The Commission may reasonably find that implementation of section 251(a), and the public interest in a fully interconnected network, would best be served by imposing the minimal obligation on carriers that have indicated that they are willing and able to provide transit services

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[186] 47 U.S.C. § 201; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-81 (1999).

[187] 47 U.S.C. § 201(a). A full notice-and-comment proceeding qualifies as a hearing under section 201. *See Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3d Cir. 1974).

[188] Verizon Comments at 34; Qwest Comments at 29. (Qwest incorrectly asserts that the Plan creates a general obligation for LECs to provide transit, but the obligation is limited to those that already provide the service today).

to continue doing so.[189] Further, section 201 permits the Commission to require carriers to establish "through routes" where it finds this would serve the public interest.[190] The Commission has relied on its section 201 authority to regulate transit-type service in other contexts,[191] and that same authority should apply here: Tandem Transit service is already used for jurisdictionally mixed traffic since some CMRS and VoIP traffic transmitted over "local" interconnection facilities is in fact interstate. This will become more prevalent as the Plan eliminates any distinction between the treatment of (and interconnection) for "access" and "reciprocal compensation" traffic.

CONCLUSION

The Commission should promptly adopt the Missoula Plan.

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189 Indeed, the Wireline Bureau used precisely this rationale to preclude Verizon from discontinuing a transit service it already was providing, relying on the fact that section 251 is designed to "promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect efficiently with other carriers." *See WorldCom Order* at 27101-02 ¶ 118. Notably, as discussed above, neither the Bureau nor the Commission has ever deemed transit an obligation under section 251(c) or one that is subject to TELRIC.

190 47 U.S.C. § 201(a).

191 *See e.g.*, Memorandum Opinion and Order, *Local Exchange Carrier Blocking of Feature Group B Traffic Transiting Access Tandems*, 61 R.R.2d 437 ¶ 8 (1986) (finding that the uninterrupted transiting of traffic across the ILEC tandem is necessary to promote efficient telecommunications networks); *see also* First Report and Order, *Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules*, 29 F.C.C.2d 870 (1971), *aff'd sub nom. Washington Utilities and Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975).

Respectfully Submitted,

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