



**NOTICE OF WRITTEN EX PARTE
PRESENTATION (47 C.F.R. § 1.1204(10))**

August 26, 2008

The Honorable Kevin Martin
Chairman
Federal Communications Commission
445 12th Street, SW - Room TW B204
Washington, DC 20554

Re: *In the Matter of Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the ESP Exemption, CC Docket Nos. 08-152*

In the Matter of IP-Enabled Services, WC Docket No. 04-36 & Verizon's August 6, 2007 Ex Parte Requesting Application of Vonage Holding to Facilities-based VoIP Services.

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

Dear Chairman Martin:

Last year, several State commissions and the National Association of Regulatory Utility Commissioners (NARUC) filed letters¹ highlighting significant flaws in an August 6, 2007 Verizon *ex parte*² asking the FCC to preempt State oversight of *non-nomadic* Voice-over-Internet-Protocol (VoIP) service. That Verizon *ex parte*, citing a March 2007 8th Circuit opinion upholding FCC preemption of State oversight of *nomadic* VoIP service,³ urges the FCC to “. . . confirm . . . that the same rules apply to all VoIP providers.”⁴ {emphasis added}

¹ See, e.g., August 15, 2007 Letter from Joel Shifman, for the Maine PUC, to FCC Chairman Martin WC Docket 04-36 (Available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519716391); August 9, 2007 Letter from Peter McGowan, for the New York DPS, to FCC Chairman Martin WC Docket No. 04-36 (Available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519707881); September 9, 2007 Letter from Brad Ramsay, for NARUC, to FCC Chairman Martin, WC Docket No. 04-36. (Available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519723182).

² Verizon filed the request in WC Docket No. 04-36.

³ *In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, (2004) (*Vonage Order*), petitions for review denied, *Minnesota Public Utilities Commission v. FCC*, 483 F3d 570 (8th Cir. 2007).

⁴ See, August 6, 2007 Letter from Susanne Guyer and Michael Glover, for Verizon, to FCC Chairman Martin at p. 12. (Available at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519609986).

Last month, AT&T asked the FCC to adopt interim measures addressing access fees for VoIP traffic – a request that requires specific preemption of State intrastate compensation regimes.⁵ AT&T also asked the FCC to eliminate "remaining uncertainty" and declare that "fixed-location VoIP services," such as its U-verse offering, are not subject to State regulation.

Finally, a little over a week ago, Verizon, AT&T, and other industry advocates joined in a letter urging the FCC to "*reaffirm* that all IP voice services, if regulated at all are subject to federal jurisdiction". {Emphasis Added}⁶

All three of these pleadings mischaracterize the current state of both the law and the facts with respect to *non-nomadic* VoIP traffic.

The FCC has *never* found that *non-nomadic* VOIP is subject to federal preemption. In fact, the Eighth Circuit, after listening to FCC counsel strongly press this precise point, agreed and specified that the issue of whether "State regulation of fixed VOIP should not be preempted remains an open issue." Significantly, that same court also noted that "the FCC has indicated (that) VOIP providers who can track the geographic endpoints of their calls do not qualify for the preemptive effects of the Vonage order."⁷ As New York pointed out in its 2007 response to Verizon, non-nomadic/facilities-based VoIP providers carry intrastate calls⁸ and the FCC has jurisdiction only when (a) it is impossible to separate the interstate and intrastate components of the FCC regulation, and (b) the State regulation negates the FCC's lawful authority over interstate communications.⁹

⁵ AT&T's proposal explicitly suggests increases in the subscriber line charges and preemption of intrastate access charges that are not at parity with interstate levels for any IP terminating traffic. *In the Matter of Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the ESP Exemption*, CC Docket Nos. 08-152 (DA 08-17125 Rel. 07/24/2008). In April 2003, recognizing the problems with the existing access regime, NARUC's Committee on Telecommunications created the NARUC Task Force on Intercarrier Compensation (NTFIC). At its February 2005 meetings, NARUC passed a resolution that lists NTFIC-generated principles *that should govern any revision of the federal intercarrier compensation regime*. Both are attached to this letter. The principles address the design and functioning of, and prerequisites for, a new intercarrier compensation plan.

⁶ August 6, 2008 Letter to FCC Commissioners Martin, Copps, McDowell, Adelstein, and Tate from AT&T, CompTIA, CTIA, Global Crossing The Information Technology Industry Council, National Association of Manufacturers, New Global Telecom, PointOne Sprint Nextel Corp., The Telecommunications Industry Association, T-Mobile, Verizon, The VON Coalition, WC Docket 04-36; *Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92 at 2. (See: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520036915)

⁷ *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007) slip op. at 22 (Available at: <http://www.ca8.uscourts.gov/opns/opFrame.html>) The court cites to a 2006 FCC decision which specifies a VoIP provider "with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an interconnected VoIP provider." See, *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94, 21 FCC Rcd 7518, 7546, ¶ 56 (rel. June 27, 2006), aff'd in part, vacated in part, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1244 (D.C. Cir. 2007). {emphasis added} (Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-94A1.pdf).

⁸ See *Vonage Order* at ¶32 n. 113 (rel. Nov. 12, 2004) ("digital voice clearly enables intrastate communications.") ("this [cable VoIP] network design also permits providers to offer a single, integrated service that includes both local and long distance calling.") (quoting *Letter from J.G. Harrington, Counsel for Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC*, WC Docket Nos. 03-21 1,04-36 at 1-2). "In addition, while we acknowledge that there are generally intrastate components to interconnected VoIP service and E911 service, . . ." *In the Matter of IP-Enabled Services*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶29 n. 95 (rel. June 3, 2005). See also note 7, *supra*.

⁹ See *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Iowa Utilities Board v. FCC*, 120 F3d 753, 796 (8th Cir. 1997) rev'd sub nom. on other grounds, *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

Because there is no question it is possible to separate intrastate non-nomadic facilities-based VoIP calls from interstate calls, the FCC has no jurisdiction over such calls.

In addition to the flaws in the legal analysis presented, all these submissions also raise issues of fact (such as the cost of separating services that are ancillary to telephone service) and critically important policy questions about the role of State efforts in overseeing the development of the telecommunications market and maintaining core consumer protections for a vital service.

For example, the August 6th joint industry letter urges the adoption of a uniform intercarrier compensation régime applicable to all traffic. However, it is apparent the FCC lacks authority to implement such a régime through preemption or without instigating a substantial increase in either State or federal universal service funds. Moreover, the FCC *cannot* use federal funds to reduce intrastate intercarrier compensation charges without making certain separations rule changes. Section 410(c)¹⁰ requires that any such proposed changes must be referred to the Federal-State Joint Board on Separations before any final FCC rules can be adopted.

The Commission should not act on any of these requests without creating a detailed factual record on both severability and related cost allocation issues which can justify the anticipated action. This would include receiving a recommendation from the Separations Joint Board on any revisions to the current frozen allocators.

If you have questions about this, or any other NARUC position, please do not hesitate to contact me at 202.898.2207 or jramsay@naruc.org.

Sincerely,

James Bradford Ramsay
NARUC General Counsel

¹⁰ 47 U.S.C. § 410(c) (1978).

Appendix A

February 16, 2005 Resolution on the NARUC Intercarrier Compensation Task Force

WHEREAS, The Federal Communications Commission has issued a Further Notice of Proposed Rulemaking on numerous broad questions relating to intercarrier compensation; *and*

WHEREAS, A NARUC Task Force has been at work for more than a year evaluating the proposals of several industry groups and seeking consensus among those groups; *and*

WHEREAS, Pursuant to the recommendations of the Task Force, NARUC adopted a statement of policy principles for intercarrier compensation on May 5, 2004; *and*

WHEREAS, At the summer NARUC meeting in Salt Lake City, the Task Force sponsored a NARUC Meeting panel discussion of intercarrier compensation issues; *and*

WHEREAS, In the following months, the NARUC Task Force has conducted four additional multi-day meetings, in Missoula, Nashville, and Washington D.C. (twice), in each case meeting with from 20 to 40 plus stakeholders from the full range of telecommunications industries; *and*

WHEREAS, The NARUC Task Force has carefully reviewed and discussed a range of intercarrier compensation plans, including those proposed by interexchange carriers, rural local exchange companies and public advocates, as well as less formal input from the cable and wireless industries as well as individual companies; *and*

WHEREAS, The NARUC Task Force has published for comment “The Task Force” proposal for intercarrier compensation; *and*

WHEREAS, The Task Force proposal draws elements from several plans proposed by industry groups, but also proposes some new ideas; *and*

WHEREAS, The NARUC Task Force met in Washington, D.C., in January of this year with the stakeholder group of forty plus members to discuss the proposal and has reviewed and considered numerous oral and written comments from the stakeholders prior to and subsequent to the meeting in modifying the Task Force proposal; *and*

WHEREAS, The Task Force proposal would unify compensation by jurisdiction, by paying carrier, and by technology, would allow States to opt into a new national system of uniform rates, and would propose substantial reform of universal service mechanisms; *and*

WHEREAS, There are still key issues under active discussion and evaluation by the States and by NARUC, as well as by stakeholders that have participated in this process; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its February 2005 Winter Meetings in Washington, D.C., asks the FCC to carefully consider the Task Force proposal as discussions continue on the Task Force proposal in an attempt to reach a still broader consensus on key issues; *and be it further*

RESOLVED, That the intercarrier compensation reform proposal that NARUC might ultimately endorse should adhere to the policy principles adopted on May 5, 2004, to the extent possible, and should seek support among all industry, consumer, and governmental stakeholders; *and be it further*

RESOLVED, That NARUC's General Counsel shall file comments at the FCC to that effect.

Sponsored by the Telecommunications Committee

Adopted by the NARUC Board of Directors February 16, 2005

Appendix B

THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS STUDY COMMITTEE ON INTERCARRIER COMPENSATION GOALS FOR A NEW INTERCARRIER COMPENSATION SYSTEM

May 5, 2004

I. INTRODUCTION:

Portions of the current intercarrier compensation system are rapidly becoming unsustainable. There is disagreement among stakeholders over the appropriate solutions. Various industry groups have been working separately to develop intercarrier compensation proposals. The proposals are reportedly designed to replace some or all of the existing intercarrier compensation mechanisms, and are expected to be submitted to the FCC. "Inter-carrier compensation" controls how various carriers compensate one another for handling calls or for leasing dedicated circuits. "Reciprocal compensation," the fee for handling local traffic, has increasingly flowed from the Incumbent Local Exchange Carriers ("ILECs")¹¹ to the CLECs by virtue of such developments as CLECs terminating an increasing share of ISP traffic. "Access charges" are intercarrier fees for handling toll traffic. "Long distance" or toll compensation between carriers existed for decades under the old AT&T Bell System monopoly, and it supported a portion of the cost of common wires and facilities. Following divestiture, "access charges" were created for toll traffic. The emergence of new communications technologies has placed stress on the current compensation system. Because it was assembled piecemeal over time, the current intercarrier compensation system has inconsistencies that can result in discriminatory practices, arbitrage or "gaming" of the current system, and other unintended outcomes. In hopes of leading to a balanced solution, a group of the NARUC's commissioners and staff has drafted this set of guiding principles against which the various proposals can be measured and evaluated. These principles address the design and functioning of, and the prerequisites to, a new intercarrier compensation plan. They do not address the amount or appropriateness of costs recovered by particular carriers through intercarrier compensation.

¹¹ A "local exchange carrier" is defined generally by the Telecommunications Act of 1996 as any entity engaged in the provision of telephone exchange service or exchange access. In this document, it refers to both the traditional local providers of wire-line telephone service, referenced as the Incumbent Local Exchange Carriers or ILECs, and their competitors/any competing service, referenced in this document as Competing Local Exchange Carriers or CLECs.

II. APPLICABILITY:

- A. An integrated intercarrier compensation plan should encompass rates for interconnecting CLEC and ILEC local traffic as well as access charges paid by interexchange carriers.
- B. CLECs, IXCs, ISPs, VoIP, wireless, and any other companies exchanging traffic over the Public Switched Telecommunications Network should be covered ("Covered Entities").
- C. No Covered Entity should be entitled to purchase a service or function at local rates as a substitute for paying intercarrier compensation.

III. ECONOMICALLY SOUND:

- A. The compensation plan should minimize arbitrage opportunities and be resistant to gaming.
- B. Intercarrier compensation should be designed to recover an appropriate portion of the requested carrier's ¹² applicable network costs. At a minimum, this will require compliance with the jurisdictional separations and cost allocation rules, applicable case law in effect at any point in time, and 47 U.S.C. §254(k).
- C. A carrier that provides a particular service or function should charge the same amount to all Covered Entities to whom the service or function is being provided. Charges should not discriminate among carriers based on:
 - 1. the classification of the requesting carrier;¹³
 - 2. the classification of the requesting carrier's customers;
 - 3. the location of the requesting carrier's customer;
 - 4. the geographic location of any of the end-users who are parties to the communication; or,
 - 5. the architecture or protocols of the requested carrier's network or equipment.
- D. Intercarrier compensation charges should be competitively and technologically neutral and reflect underlying economic cost.
- E. The intercarrier compensation system should encourage competition by ensuring that requested carriers have an economic incentive to interconnect, to carry the traffic, and to provide high-quality service to requesting carriers. In limited circumstances, carriers may voluntarily enter into a bill and keep arrangement.
- F. Volume of use should be considered when setting intercarrier compensation rates. Available capacity may be used as a surrogate for volume of use.
- G. Any intercarrier compensation system should be simple and inexpensive to administer.

¹² "Requested carrier" means a carrier that receives a request for telecommunications service. An example would be a LEC that receives traffic for termination on the loop of one of the LEC's customers.

¹³ "Requesting carrier" means a carrier that requests another carrier to transport, switch, or process its traffic.

IV. COMPETITIVE INTERCARRIER MARKETS NOT PRICE-REGULATED:

Market-based rates should be used where the market is determined to be competitive. A rigorous definition of "competitive market" is needed in order to prevent abuses.¹⁴

V. NON-COMPETITIVE INTERCARRIER MARKETS PRICE-REGULATED:

- A. An intercarrier compensation system should ensure that telecommunications providers have an opportunity to earn a reasonable return and that they maintain high-quality service. It should also encourage innovation and promote development of competitive markets.
- B. Government should limit the ability of carriers with market power to impose excessive charges.
- C. Where charges are restricted by government action, carriers have the protections of due process, and confiscation is not permitted.
- D. If any ILEC property or operations in the future could give rise to a confiscation claim, in a rate case or otherwise, then a practical way should be defined to exclude property and operations that are in competitive markets.

VI. APPROPRIATE FEDERALISM:

- A. The reciprocal compensation system should ensure that revenues, cost assignment, and the risk of confiscation are jurisdictionally consistent for all classes of traffic.
- B. State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers.
- C. To avoid creating harmful economic incentives to de-average toll rates by some interexchange carriers, the FCC should have the authority to pool costs within its defined jurisdiction whenever intercarrier compensation rates are high in some areas.
- D. State commissions should retain a role in this process reflecting their unique insights, as well as substantial discretion in developing retail rates for services provided by providers of last resort, whether a dual or unified compensation solution is adopted.
- E. A proposal preserving a significant State role that fits within the confines of existing law is preferable.

VII. UNIVERSAL SERVICE AND CONSUMER PROTECTION:

- A. The transition to a new intercarrier compensation system should ensure continuity of existing services and prevent significant rate shock to end-users. Penetration rates for basic service should not be jeopardized.

B. A new intercarrier compensation system should recognize that areas served by some rural local exchange carriers are significantly more difficult to serve and have much higher costs than other areas.

C. Rural customers should continue to have rates comparable to those paid by urban customers. End-user basic local exchange rates should not be increased above just, reasonable, and affordable levels.

D. Any intercarrier compensation plan should be designed to minimize the cost impact on both federal and State universal service support programs.

VIII. ACHIEVABILITY AND DURABILITY:

A new intercarrier compensation system should not only recognize existing circumstances but should also anticipate changes at least over the intermediate term, and should provide solutions that are appropriately resilient in the face of change.

IX. PREREQUISITES FOR PLAN IMPLEMENTATION:

A. The estimated cost impact on a carrier-by-carrier basis, by State, must be computed before a decision is made whether to adopt a new intercarrier compensation plan.

B. The FCC should identify, quantify, and evaluate the total of all federal high cost universal service fund payments received by each company today. The federal universal service support mechanisms should be revisited as an intercarrier compensation plan is implemented to ensure that telecommunications services remain accessible and affordable to all Americans.

C. The FCC should be required to regularly revisit its cost allocation rules for regulated/nonregulated services. Costs that should not be recovered through regulated rates ought to be excluded from the computation of intercarrier compensation rates.

D. Before any new intercarrier compensation plan is implemented, the effect of the plan on local exchange rates, including both interstate and intrastate SLCs, should be computed.

E. Even when a referral to a Joint Board is not mandated by law, in order to ensure State input the FCC should make a referral, and the Joint Board should act on that referral, in an expedited manner. Similarly, referrals to Joint Conferences should be handled on an expedited basis.