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NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

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September 30, 2008

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, D.C. 20554

***Ex Parte* Notice: *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92; and *IP-Enabled Services,* WC Docket 04-36.**

Dear Ms. Dortch:

On Monday, September 29, 2008, Scott Reiter and Daniel Mitchell with the National Telecommunications Cooperative Association (NTCA), met with Deborah Commissioner Tate's Legal Advisor Greg Orlando and Cory Williams, Intern with Commissioner Tate's office to discuss issues raised in the above referenced dockets. Specifically, NTCA refuted the Verizon September 19, 2008, ex parte filing which erroneously claims the Commission has legal authority to adopt a $0.0007 terminating access rate for all traffic on the public switched communications network (PSTN), for all carriers, and in all jurisdictions. NTCA will discuss briefly in this filing the substance of the meeting and several reasons why the Commission should reject the $0.0007 proposal and Verizon's legal arguments. NTCA will file a more comprehensive legal brief in direct response to Verizon's September 19, 2008, filing in the next few days. In addition, enclosed please find a document which addresses several of Verizon's factual misrepresentations in its September 19, 2008 filing and NTCA's corrections to these misrepresentations.

In the midst of the worst financial crisis since the Great Depression, Verizon, AT&T and others are desperately attempting to pull the wool over the eyes of the Federal Communications Commission (Commission or FCC), Congress, and the American Public in order to gain an unlawful multi-billion dollar annual windfall at the expense of consumers and small rural independent communications carriers.[1] Under the guise of solving regulatory arbitrage and fraud issues, Verizon erroneously asserts that the Commission has legal authority to preempt State Commission jurisdiction and to set a one-size fits all unified $0.0007 per minute terminating access rate for all voice traffic that is transported and terminated on the PSTN, by all carriers, and in all jurisdictions (Federal, State, and Local).[2] The unraveling of Verizon's contorted legal arguments reveals that Congress granted State Commissions, not the FCC, the exclusive legal authority to regulate and set intrastate toll access rates and local reciprocal compensation rates. The Verizon/AT&T $0.0007 proposal and its resulting multi-billion dollar annual windfall must be denied. Consumers must be spared the additional financial burden of paying for Verizon's and AT&T's unjust enrichment scheme while at the same time having to pay for the Wall Street disaster under the Government's pending taxpayer bailout plan.

[1] See the AT&T, Verzion, et al Ex Parte filed on August 6, 2008, *In the Matter of a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *IP-Enabled Services,* WC Docket No. 04-36; *Universal Service Contribution Methodology,* WC Docket No. 06-122.

[2] See Verizon's Written Ex Parte Filed on September 19, 2008, *In the Matter of a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92; *IP-Enabled Services,* WC Docket No. 04-36; *Universal Service Contribution Methodology,* WC Docket No. 06-122. (Verizon Ex Parte, September 19, 2008).

STATE COMMISSIONS HAVE EXCLUSIVE JURISDICTION TO SET AND REGULATE INTRASTATE ACCESS RATES AND RECIPROCAL COMPENSATION RATES

Section 152(b) of the Act provides the State Commissions with exclusive jurisdiction over intrastate rates and services. In *Louisiana Public Service Commission v. FCC* the Supreme Court specifically found that Section 152(b) "denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes."[3] Indeed, the Supreme Court held:

> [Section 152(b)] asserts that "nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, facilities, or regulations for or in connection with intrastate communications service…." **By its terms this section fences off from the FCC reach or regulation intrastate matters-indeed, including matters "in connection with" intrastate service.** Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.[4] [Emphasis Added]

In 1999, the Supreme Court in *AT&T Corp. v. Iowa Utilities Board* affirmed this finding and stated that need for both limitations [federal and state] is exemplified by *Louisiana Public Service. Commission v. FCC*, where the FCC claimed authority to issue rules governing depreciation methods applied by local telephone companies.[5]

In *AT&T Corp. v. Iowa Utilities Board*, the Commission supported its claim of preemption of depreciation methods with two arguments. First, that it could regulate intrastate because Congress had intended the depreciation provisions of the Communications Act to bind state commissions--*i.e.*, that the depreciation provisions "applied" to intrastate ratemaking.[6] The Supreme Court observed that "[w]hile it is, no doubt, possible to find some support in the broad language of the section for respondents' position, we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b) ...."[7] The Commission also argued that, even if the statute's depreciation provisions did not apply intrastate, regulation of state depreciation methods would enable it to effectuate the federal policy of encouraging competition in interstate telecommunications.[8] The Supreme Court also rejected that argument because, even though the FCC's broad regulatory authority normally would have been enough to justify its regulation

[3] *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 476 U.S. 355, 90 L.Ed.2d 369, 54 USWL 4505, p. 12, (May 27, 1986).
[4] Id., at 54 USWL 4505, p. 11.
[5] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721 (Jan 25, 1999), see, http://www.fcc.gov/ogc/documents/opinions/1999/iowa.html, p.7 of 36.
[6] See, http://www.fcc.gov/ogc/documents/opinions/1999/iowa.html, p.7 of 36.
[7] Id.
[8] Id.

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of intrastate depreciation methods that affected interstate commerce,[9] Section 152(b) prevented the Commission from taking intrastate action solely because it furthered an interstate goal.[10]

Although the precise issue of whether the Commission has authority to establish a single $0.0007 per minute terminating access default rate for all traffic, for all carriers, in all jurisdictions was not raised in *AT&T Corp. v. Iowa Utilities Board,* the Supreme Court stated the following:

> The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing Standards' set forth in Section 252(d). ***It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.***[11] [emphasis added]

Appropriately, the Supreme Court determined the FCC has the authority to establish the pricing methodology and the State Commissions have the explicit authority pursuant to Section 251 and 252 to actually determine the reciprocal compensation rates for each particular carrier based on their own unique costs and circumstances. Thus, the FCC cannot use its pricing methodology authority to establish a one-size fits all default $0.0007 terminating access rate that will apply to all traffic, to all carriers, in all jurisdictions. This would be a direct violation of Sections 152(b), 251(b)(5), 251(d)(3), and 252(d). The FCC's establishment of the all-encompassing $0.0007 rate would divest the State commissions of their authority to set rates and to determine "concrete result[s] in particular circumstances." Accordingly, the mandatory $0.0007 proposal must be dismissed.

PREEMPTION

Verizon ignores *Louisiana Public Service Commission v. FCC*, and fails to address the critical finding in *AT&T Corp. v. Iowa Utilities Board* that prohibits the FCC from setting a one-size fits all default terminating access rate. Instead, Verizon asserts that the Supremacy Clause of Article VI of the United States Constitution provides the FCC with the power to preempt state commission jurisdiction and ratemaking authority under Sections 152(b), 251(b)(5), 252(d)(2)(A)(ii), and 252(d)(2)(B)(ii) of the Act. Verizon is wrong and is attempting to mislead the Commission.

Congress, in enacting the Communications Act of 1934, as amended, did not "express a clear attempt to preempt state law."[12] To contrary, Congress expressly preserved State Commission jurisdiction over charges, classifications, practices, facilities, or regulations for or in connection with intrastate communications services pursuant to Section 152(b). Indeed, Congress enhanced State Commission jurisdiction in 1996, when it amended the Communications Act of 1934 with Section 251(d)(3) entitled in capital letters by Congress the "PRESERVATION OF STATE ACCESS REGULATIONS." Section

[9] See *Louisiana Public Service Commission v. FCC*, 476 U.S. at 377, 106 S.Ct. 1890; cf. *Houston & Shreveport R. Co. v. United States*, 234 U.S. 342, 358, 34 S.Ct. 833, 58 L.Ed. 1341 (1914).
[10] *Louisiana Public Service Commission v. FCC*, 476 U.S. at 377, 106 S.Ct. 1890.
[11] See, http://www.fcc.gov/ogc/documents/opinions/1999/iowa.html, p.8 of 36.
[12] *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 604 (1977).

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251(d)(3) states that in "prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State Commission that -

(A) Establishes access and interconnection obligations of local exchange carriers;
(B) Is consistent with the requirements of this section; and
(C) Does not substantially prevent the implementation of the requirements of this section and the purposes of this part."

Furthermore, Section 251(b)(5) explicitly provides the State Commissions with the legal "duty to establish reciprocal compensation arrangements for the transport and termination of Telecommunications" for voice calls that originate and terminate in a local calling area shared by two competing carriers.[13] Thus, Congress has expressly directed that the State Commissions, and not the FCC, shall exercise jurisdiction over charges, classifications, practices, facilities, or regulations for or in connection with intrastate communications services, including local reciprocal compensation.[14]

In addition, there is no outright or actual conflict between federal and state law.[15] Congress has clearly established that the FCC has jurisdiction over interstate (Federal) communications pursuant to Section 151, and State Commissions have jurisdiction over intrastate (State) and reciprocal compensation (local) communications pursuant to Sections 152, 251, and 252 of the Act. These jurisdictional and authoritative boundaries have worked together since 1934 and have flourished throughout the 1990s and 2000s in establishing vibrant competitive communications markets that have lead to new and innovative services, new jobs, and opportunities for new entrants and consumers. Indeed, compliance with both federal and state intercarrier compensation laws and regulations has never been nor is it now physically impossible to implement and enforce.[16]

Moreover, there is nothing in Federal law, implicit or explicit, which provides a barrier to State Commissions to set intrastate (state) toll access rates or reciprocal compensation (local) access rates[17] nor has Congress legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law.[18] Indeed, as demonstrated above and below the Act itself pursuant to sections 152(b), 251(b)(5), 251(d)(3), 252(d)(2)(A)(ii), and 252(d)(2)(B)(ii)

[13] Section 252(d)(2)(B) states that this paragraph shall not be construed - to precluded under Section 252(d)(2)(B)(i) arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or to authorize under 252(d)(2)(B)(ii) the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to additional costs of such calls.
[14] Section 252(b)(2)(A) states for the purpose of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable – (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of another carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the traditional costs of terminating such calls.
[15] *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed. 180 (1962).
[16] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 312, 83 S.Ct. 1210, 10 L.Ed. 284 (1963).
[17] *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed. 4909 (1983)
[18] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

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explicitly provides multiple barriers which prevent the FCC, not State Commissions, from setting intrastate (state) toll access rates and reciprocal compensation (local) access rates.

Verizon further argues that sections 152(b), 251(b)(5), 251(d)(3), 252(d)(2)(A)(ii), and 252(d)(2)(B)(ii) stand as an obstacle to the accomplishment and execution of the full objectives of Congress, and thus the FCC should preempt State Commission jurisdiction to set and regulate intrastate access charges and reciprocal compensation rates.[19] As shown below Verizon's arguments are self-serving, misleading and without merit.[20]

Verizon asserts that prevention of arbitrage and fraud provides the basis for the FCC to assert preemption and the need for a uniform rate of $0.0007 per minute.[21] Verizon claims that different rates are an obstacle to competition, investment, and deployment of new services.[22] These arguments are wrong. Competition particularly from wireless has flourished under the current regulatory regime. New services and investment have blossomed under this regulatory regime. The record does not contain evidence, much less substantial evidence that going to a uniform rate wound increase competition, investment, or new services in the communications industry.

Indeed, the Commission's most recent report on the state of competition in the wireless industry using a new data source that allows for a significantly more granular and accurate analysis of mobile telephone service deployment and competition found that:

- Approximately 280 million people, or 99.8 percent of the U.S. population, have one or more different operators offering mobile telephone service in the census blocks in which they live.

- More than 95 percent of the U.S. population lives in areas with at least three mobile telephone operators competing to offer service.

- More than half of the U.S. population lives in areas with at least five competing mobile telephone operators.

- Approximately 99.3 percent of the U.S. population living in rural counties, or 60.6 million people, have one or more different operators offering mobile telephone service in the census blocks within the rural counties in which they live.

[19] Verizon Ex Parte, September 19, 2008, pp. 19-26, 29-35.
[20] *Hines v. Davidowitz,* 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation. *Fidelity Savings & Loan Assn. v. De la Cuesta, 485* U.S. 141, 102 S.Ct. 3014, 73 L.Ed. 664 (1982); *Capital Cities Inc.,* 467 U.S. 691, 104 S.Ct. 2964, 81 L.Ed. 580 (1984).
[21] Verizon Ex Parte, September 19, 2008, p. 28.
[22] Id., pp. 26-28.

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- Approximately 82 percent of the U.S. population lives in census blocks with at least one mobile broadband provider offering service.[23]

In addition, during 2006, the number of mobile telephone subscribers in the United States rose from 213 million to 241.8 million, increasing the nationwide penetration rate to approximately 80 percent. The average amount of minutes that subscribers spend using their mobile devices increased from 708 minutes per month during the second half of 2005 to 714 minutes per month during the second half of 2006. In addition, the volume of text messaging traffic rose from 9.8 billion messages sent during December 2005 to 18.7 billon messages sent during December 2006. Revenue per minute, which can be used to measure the per-minute price of mobile telephone service, remained unchanged during 2006 at $0.07.[24] As the foregoing data illustrates, new services and investment are flourishing under today's federal/state access charge regime.

Verizon claims further that the FCC should preempt state jurisdiction over state and local access charges because carriers cannot or will not be able to determine the federal/state/local jurisdiction of the majority voice traffic in the future.[25] In other words, landline, wireless and Internet voice traffic today and in the future will be "inseverable."[26] This is also untrue. Today, the overwhelming majority of voice traffic is separated, categorized and jurisdictionalized. In 2007, there were 15 billion identified and jurisdictionalized interstate (federal) access minutes according to the National Exchange Carrier Association (NECA) Access Service Tariff F.C.C. No. 5, Transmittal No. 1214, Volume 3, page 4, submitted to the Commission on June 16, 2008. Billing between carriers for originating and terminating voice calls in all jurisdictions – federal, state, and local - is estimated at approximately $8 billion dollars per year. If these voice calls were inseverable, unbillable, and unrecoverable as alleged by Verizon, the industry would have come to a screeching halt a long- time ago.

Instead the opposite is happening in the communications market under the existing federal/state access charge regime. Markets for access today are extremely competitive and opportunities to raise federal and state access rates are prohibited and constrained by competition. The correct conclusion, as the then BellSouth, now AT&T, noted with respect to special access, is for the federal government not to regulate and certainly not for the federal government to insist on uniform rates.[27] In 2005, competition for special access flourished driving rates down. The same arguments apply with respect to the switched access market today. Wireless and VoIP traffic have flourish under the current federal/state regulatory regime. Current federal/state regulation is not an impediment to competition, to new investment, or to new broadband services. There is no need for the government to change the regulatory structure to achieve the FCC's and

[23] FCC Release Annual Report on State of Competition in the Wireless Industry (FCC 08-28), New Release, February 4, 2008. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279986A1.doc.
[24] Id.
[25] Verizon Ex Parte, September 19, 2008, pp. 3-4.
[26] Id.
[27] Comments of BellSouth, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, pp. 13-19, filed on June 13, 2005. See, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517632863.

Congress' stated policy goals. Those goals are being achieved under the current federal/state access structure.[28]

Verizon also claims that IP-based service offerings "up-end traditional conceptions of location-based and device-based phone numbers" and "eliminate the historical understanding that a 'call' has only two end points."[29] Verizon states that wireless services break the "historical connection between telephone numbers and geographic location."[30] Verizon further states that a telephone number is no longer a reliable indicator of the geographic location of a user of IP-based or wireless services *implies that* such services are "location-independent."[31] All of these assertions are false.

The Internet protocol is, above all else, an *end-to-end* addressing scheme designed expressly for the purpose of exchanging data between two parties,[32] where each party's customer premise equipment CPE knows the IP address of the other, and where ***both addresses are present in every data packet sent*** between them. Public Internet addresses are well-defined within the address space specified by the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit organization, under the terms of its contract with the U.S. Department of Commerce. Every assigned IP address – whether public or private – is unambiguously associated with a single, specific electronic device, which necessarily resides in a particular geographical location. Further, the facts that (a) every IP data packet contains both a source address and a destination address and (b) the primary task of an IP network is to deliver these packets from their source CPE to their destination CPE together refute the assertion that IP-based communications do not have two end points.

The only ambiguities in associating an IP address with the exact physical location of a device occur either when the device is using wireless Internet access or the device utilizes Dynamic Host Configuration Protocol ("DHCP") to obtain an Internet address from a pool of addresses kept by a DHCP server. Yet even in those cases, the uncertainty in a device's exact location might only very rarely rise to a level that would preclude the association of an Internet address with the State in which the equipment is located.

The assertion that IP-based services or wireless services somehow operate independently of the physical transmission of information-bearing signals between electronic devices – including end users' devices, which obviously exist in real, physical space and are located at some real, geographical location – is simply false.

Verizon also argues that subjecting VoIP and other IP-based services to state regulations designed for different services in a different era would thus conflict with Congress's and the Commission's policies to encourage the development and deployment of broadband services, as set forth in Section 706 of the 1996

[28] See, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Report (rel. June 12, 2008) (Fifth 706 Report); Also see, *12th Annual CMRS Competition 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,* Report FCC 08-28, (Released February 4, 2008).
[29] Verizon Ex Parte, September 19, 2008, p. 5.
[30] Verizon Ex Parte, September 19, 2008, p. 6.
[31] Verizon Ex Parte, September 19, 2008, p. 9-10.
[32] *See* Robert Cannon, "Will the Real Internet Please Stand Up: An Attorney's Quest to Define the Internet" (March 2004) at pages 8-9. Telecommunications Policy Research Conference 2002. Html version available at http://intel.si.umich.edu/tprc/papers/2002/165/RealInternet.htm.

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Act.[33] Verizon is wrong once again. In FCC's August 5, 2008 amicus brief in *Vonage v. Nebraska Public Service Commission*, the FCC recognized that a portion of VoIP service revenue is properly classified as intrastate in nature and thus can be separated and assessed for state universal service funding (USF) purposes.[34] If interconnected VoIP traffic can be separated and accessed for USF purposes, it can properly be separated, jurisdictionalized and billed for access charges in the federal and state jurisdictions.

Verizon further claims that under today's federal/state access rate regime stands as an obstacle to the FCC's policies to encourage the deployment of broadband as set forth in Section 706 of Act.[35] This claim is false. In June 2008, the Commission submitted its Fifth Section 706 Report to Congress on the status of broadband deployment throughout the United States. In this Report, the FCC concluded that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion and therefore the FCC is not required to take "immediate action" to rectify any failure.[36] Verizon's argument that the current federal/state access regime stands as an obstacle to the accomplishment and execution of the objectives of Congress in Section 706 of the Act, falls on its face in light of the FCC's most recent Section 706 findings and Report to Congress.

FORBEARANCE:

Verizon argues that if the Commission is prohibited from establishing a single $0.0007 per minute terminating access rates for all traffic, for all carriers, and in all jurisdictions, then in the alternative the FCC should "forbear from Section 251(b)(5) traffic (local reciprocal compensation traffic) and regulate such traffic directly" because it is inseverable, and then set the rate for this traffic at $0.0007 per minute.[37] Verizon's alternative legal argument is flawed in many respects, the most glaring is the fact the Commission can not forbear from enforcing a section of the Act for which the FCC does not possess Congressionally-delegated jurisdiction or enforcement authority.

As demonstrated above, the FCC does not have legal authority to set rates under Section 251(b)(5). Section 251(b)(5), when read in conjunction with Section 252, explicitly provides the State Commissions with the legal "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" for voice calls that originate and terminate in a local calling area shared by two competing carriers. Congress has expressly delegated to the State Commissions, to the exclusion of the FCC (unless the State Commission fails to act, in which case, *and only in which case*, Congress authorized action by the FCC pursuant to Section 252(e)(5)) jurisdiction over charges, classifications, practices, facilities, or regulations for or in connection with intrastate communications services, including reciprocal compensation.

[33] Verizon Ex Parte, September 19, 2008, p. 14.
[34] *Brief of Amicus Curiae Untied States and Federal Communications Commission Supporting Appellant's request for Reversal, In the United States Court of Appeals For the Eight Circuit, No. 08-1764, Vonage Holdings Corp. and Vonage Network Inc., v, Nebraska Public Service Commission et al,* on Appeal form the United States District Court for the District of Nebraska, filed on August 5, 2008 at pp. 16-17.
[35] Verizon Ex Parte, September 19, 2008, pp. 26-28.
[36] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Report (rel. June 12, 2008) (Fifth 706 Report).
[37] Verizon Ex Parte, September 19, 2008, pp. 26-29.

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Thus, the FCC cannot forbear from enforcing a section of the Act for which the FCC does not possess Congressionally-delegated jurisdiction or enforcement authority.

Further, Section 251(b)(5) only applies to traffic for calls that originate and terminate in a local calling area shared by two competing carriers. For a wireline to wireline carrier call this is a local area within a State's borders. For an intrastate toll call – a call that originates in the local calling of one carrier and terminates in a different local calling area of another carrier, but both local calling areas located within the same State's borders – the FCC has no jurisdiction to set the rates for such intrastate toll calls. Section 152(b) provides the State Commissions with exclusive jurisdiction over these calls as demonstrated above and confirmed by the Supreme Court.[38] Again, the FCC cannot forbear from enforcing a section of the Act which it does not have jurisdiction and authority to enforce.

Moreover, under the Act's forbearance provision, 47 U.S.C. Section 160(a), the FCC may forbear from applying a regulation or provision of the Act, if the Commission determines that the enforcement of such regulation is: (a) "not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and not unjustly or unreasonably discriminatory", (b) "enforcement of such regulation or provision is not necessary for the protection of consumers", and (c) "forbearance from applying such provision or regulation is consistent with the public interest" Notwithstanding the fact that FCC cannot set local reciprocal compensation rates under Section 251(b)(5) or set intrastate toll rates under section 152(b), if State Commissions were prohibited from setting and enforcing access rates established under Sections 251(b)(5) and 152(b), consumers living rural areas of the United States served by rate-of-return (RoR) carriers would see their voice and broadband rates increase to unjust and unreasonable levels, their financial ability to purchase broadband become limited or prohibited, and the Congress's goals of competition, investment, and broadband deployment would grind to halt in rural America.

Today, for billions of landline, wireless, and VoIP minutes, the end points are determinative and can be accurately billed. Verizon obfuscates the true question of severability; that is "can the end points of a call be determined and on that basis does traffic have a jurisdictional nature" and the clear answer is yes; traffic is severable. Verizon clearly admits that the true location of the end points of a transmission can be determined with the proper equipment and real time systems.[39] The Commission itself supported this position concerning interconnected VoIP in its amicus brief filed in support of the *Nebraska Public Service Commission in Vonage v. NPSC,* No. 08-1764 (8th Cir.), pages 16-17, August 5, 2008. Not only is Verizon's premise that the FCC can forbear from regulation of an area for which it does not possess congressionally delegated regulatory authority flawed, but also Verizon's premise of inseverability is contrary to the recognition of intrastate as well as interstate elements if interconnected VoIP service indicated in the FCC's amicus brief and in the Commission interconnected VoIP universal service contribution order.[40]

[38] *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 476 U.S. 355, 90 L.Ed.2d 369, 54 USWL 4505, p. 12, (May 27, 1986).
[39] Verizon Ex Parte, September 19, 2008, p. 17.
[40] Universal Service Fund Contribution Methodology, 21 FCC Rcd 7518 (2006), , *aff'd in part and rev'd in part, Vonage Holdings Corp v. FCC*, 489 F.3[rd] 1232 (D.C. Cir. 2007).

In summary, the Commission does not have the statutory authority to set intrastate rates, reciprocal compensation rates, or preempt State Commission jurisdiction to regulate these rates. As state above, NTCA will file a more comprehensive legal brief in response to Verizon's September 19, 2008 filing, in the next few days. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is and the document which addresses several of Verizon's factual misrepresentations in its September 19, 2008 filing and NTCA's corrections to these misrepresentations is being filed via ECFS with your office. If you have any questions, please do not hesitate to contact me at (703) 351-2016.

Sincerely,

/s/ Daniel Mitchell
Daniel Mitchell
Vice President
Legal and Industry

DM:rhb
Enclosure

cc: Greg Orlando
Scott Bergmann
Scott Deutchman
Nicholas Alexander
Dan Gonzalez
Amy Bender
Dana Shaffer
Jeremy Marcus
Donald Stockdale
Marcus Maher
Randy Clarke
Victoria Goldberg
Albert Lewis
Jay Atkinson
Chris Barnekov
Lynn Engledow
Matthew berry
Ajit Pai
Paula Silberthau
Christopher Killion
Lisa Gelb
Albert Lewis
Rebekah Goodheart

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Ex Parte Handout

VERIZON'S FACTUAL MISREPRESENTATIONS
In Its September 19, 2008, Ex Parte Filing
CC Docket No. 01-92
WC Docket No. 04-36
WC Docket No. 06-122

Inseverability

Verizon

- For CMRS and VoIP based services there is no practical means to identify the "end points" of a call. (Verizon Ex parte Filing (VZ) p. 5-6)
- With "find-me" and "follow-me" services, telephone numbers are an increasingly poor proxy for location (VZ p. 9)
- Intermodal porting of a telephone number breaks the association between numbers and location (VZ p. 10)
- Carriers can't distinguish between technologies relative to intermodal traffic terminating on the PSTN (VZ p. 11)
- There is no service market driven reason to develop capabilities to identify the end points of traffic (VZ p. 12)
- Arbitrage is the outcome associated with disparate rates for all carriers (VZ p. 13)

The Reality

- Today, for hundreds of billions of minutes, the end points are determinative and can be accurately billed.
- Verizon obfuscates the true question of severability; that is "can the end points of a call be determined and on that basis does traffic have a jurisdictional nature" and the clear answer is yes; traffic is severable.
    - Verizon clearly admits that the true location of the end points of a transmission can be determined with the proper equipment and real time systems (VZ p. 17)
    - The FCC itself supported this position in its amicus brief filed in support of the Nebraska Public Service Commission in Vonage v. NPSC, No. 08-1764 (8th Cir.).
- It is unnecessary to discriminate between technologies to determine the end points of a call.
- End point identification is critical to the operation of public safety services (E-911) and law enforcement activities (CALEA)

Decline in Traditional Long Distance Services

Verizon

- Substitution on a massive scale is occurring for traditional wireline subscriptions and traditional long distance service (VZ p. 6-7)
  - Analysts report that VoIP providers have reached 31% of households
  - Government Health agency reports that 15.8% of households have fully cut cord
  - Traditional wireline access minutes have dropped from 792 billion minutes in 2000 to 544 billion in 2006 because of wireless and VoIP substitution
- Substitution trends will continue at an ever increasing rate (VZ p. 8)

The Reality

- The fact that there are fully 84.2% of households and 544 billion access minutes still associated with wireline service is reason enough for the Commission to not prematurely make draconian changes to the intercarrier compensation regime.
- In rural areas, the percentage of customers that have retained their wireline phone is higher than in urban areas because rural customers often do not have wireless service at their homes or even uninterrupted service along highways.
- Enterprise customers will always require services that meet carrier grade requirements including high levels of transmission quality and availability and will continue to be connected to the transport network via wireline QoS managed networks.
- Nearly all transport networks are landline.
- Most wireless carriers use the wireline network to transport their traffic, especially in rural areas.

Negotiated/Arbitrated Rates in Reciprocal Compensation Agreements

Verizon

- The $0.0007 per minute is the same rate currently applicable to a portion of § 251(b)(5) traffic as a result of the Commission's mirroring rule. (VZ p. 29)
- The $0.0007 per minute is consistent with Verizon's more recent experience in negotiating agreements with CLECs; Verizon has entered into negotiated and publicly filed interconnection agreements with a number of carriers, including AT&T and Level 3 that set a rate at or below $0.0007 per minute for terminating local traffic and for ISP-bound traffic. These agreements provide substantial evidence that $.0007 rates are just and reasonable because carriers have agreed to **them** through voluntary, arms-length negotiations (VZ p. 31).

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The Reality

- Virtually no rural ILECs have adopted the $0.0007 rate and the mirroring rule.
- Per minute rates that range between $0.02 and $0.025 are consistent with rural **carriers'** experience in Nebraska, Iowa, and South Dakota in negotiating agreements with CMRS carriers. These negotiated or arbitrated rates constitute evidence that these rates for rural ILECs are just and reasonable.
  - Iowa-Over 270 interconnection agreements on file between rural ILECs and various CMRS carriers at $0.02
  - South Dakota-50 interconnection agreements on file between rural ILECs and CMRS carriers at rates that range between $0.02 and $0.03
  - Nebraska-38 interconnection agreements on file between rural ILECs and CMRS carriers at rates that range between $0.02 and $0.024.
- What Verizon cites as its additional terminating cost does not represent the reality of rural LECs and cannot be considered a just and reasonable terminating rate for rural LECs

Concerns from the Economic Perspective

Verizon

- Market outcomes provide strong evidence that $0.0007 per minute is a just and reasonable rate (VZ p. 5)
- ….prevent market forces from distributing limited investment resources to their most efficient uses (VZ p. 21)

The Reality

- If market forces were left alone to distribute investment resources to their most efficient uses, rural areas in the United States today would not have access to telecommunication or advanced services, such as broadband
- Since rural customers are an integral part of the telecommunication market, the costs of providing service to this market segment are part of the total economic costs of having an efficient telecommunication system.
- According to economic theory, the costs of correcting for a market failure should be internalized in the total cost of providing a particular good or service, in this case, telephone service.
- Differentiated rates from carrier to carrier for intercarrier compensation are efficient because they allocate resources according to various costs associated with conducting business in different geographies.
- It would not be responsible for the FCC to adopt an intercarrier compensation reform plan without conducting a complete cost-benefit analysis of switching from the current practice to Verizon's proposed plan.

- There are multiple economic concerns with Verizon's proposed plan
  - Verizon does not quantify the supposed benefits of its plan.
    - Verizon refers to the benefits of its plan as being simpler and easier to administer. Only anecdotal evidence is provided for how the proposed rate of $0.0007 per minute was determined.
  - According to Verizon, the Commission should adopt $.0007 for all traffic because Verizon negotiated some interconnection agreements at this rate.
    - The laws of supply and demand for the entire market should be used to determine the equilibrium price of any service.
    - When determined by the rules of the market, the prices of many goods and services (for example, gas food, electricity, and many others) vary regionally to reflect variations in cost. The price of interconnection (access and reciprocal compensation) should not be any different.
  - The Verizon proposal does not provide any information on the economic costs of the proposed plan.

Other False Jurisdictional Issues raised by Verizon

Verizon

- IP-based service offerings "up-end traditional conceptions of location-based and device-based phone numbers" and "eliminate the historical understanding that a 'call' has only two end points." (VZ p. 5)

- Wireless services break the "historical connection between telephone numbers and geographic location." (VZ p. 6)

- The fact that a telephone number is no longer a reliable indicator of the geographic location of a user of IP-based or wireless services ***implies that*** such services are "location-independent." (VZ p. 9-10, ***emphasis added*****)**

The Reality

- The Internet protocol is, above all else, an *end-to-end* addressing scheme designed expressly for the purpose of exchanging data between two parties,[1] where each party's CPE knows the IP address of the other, and where ***both addresses are present in every data packet sent*** between them. Public Internet addresses are well-defined within the address space specified by the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit organization, under the terms of its contract with the U.S.

[1] *See* Robert Cannon, "Will the Real Internet Please Stand Up: An Attorney's Quest to Define the Internet" (March 2004) at pages 8-9. Telecommunications Policy Research Conference 2002. Html version available at http://intel.si.umich.edu/tprc/papers/2002/165/RealInternet.htm.

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Department of Commerce. Every assigned IP address – whether public or private – is unambiguously associated with a single, specific electronic device, which necessarily resides in a particular geographical location. Further, the facts that (a) every IP data packet contains both a source address and a destination address and (b) the primary task of an IP network is to deliver these packets from their source CPE to their destination CPE together refute the assertion that IP-based communications do not have two end points.

- The only ambiguities in associating an IP address with the exact physical location of a device occur either when the device is using wireless Internet access or the device utilizes Dynamic Host Configuration Protocol ("DHCP") to obtain an Internet address from a pool of addresses kept by a DHCP server. Yet even in those cases, the uncertainty in a device's exact location only rarely rises to a level that would preclude the association of an Internet address with the state in which the equipment is located.

- The assertion that IP-based services or wireless services somehow operate independently of the physical transmission of information-bearing signals between electronic devices – including end users' devices, which obviously exist in real, physical space and are located at some real, geographical location – is simply false.

Verizon

Terminating LECs cannot reliably distinguish IP-based from circuit-switched incoming traffic, nor can they reliably identify the geographical location of the calling party by examining the Calling Number associated with an individual incoming call.

Reality

- While LECs cannot do such identification, this is *irrelevant* to the question of whether calls are originated from an identifiable geographic location and can therefore, in principle, be classed as interstate or intrastate calls.

Verizon

- The Commission found in the *Vonage Order* that all Voice over Internet Protocol ("VoIP") *traffic* is inseverable and, therefore, interstate for jurisdictional purposes. (VZ, p. 3; *emphasis added)*

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Reality

- The Commission found no such thing. In the *Vonage Order*, the Commission found there was no possibility of separating Vonage's *service* – not its traffic – into interstate and intrastate components so as to allow the Minnesota PUC to exert control over only the intrastate service while leaving the interstate service under federal control. The Commission made no such determination with respect to VoIP *traffic*.

Verizon

- IP traffic provides a particularly clear example of traffic that is jurisdictionally mixed, but inseverable for jurisdictional purposes and for which the Commission must establish a uniform federal regime. (VZ p. 18)

Reality

- IP traffic is not jurisdictionally mixed. Just like circuit-switched voice traffic, some is interstate and some is intrastate. VoIP *services*, however, are jurisdictionally mixed, and the FCC preempted state commissions from exercising authority over such *services*.

- The FCC recently supported the Nebraska Public Service Commission's requirement that Vonage and other VoIP providers contribute to **Nebraska's** universal service fund on the basis of Vonage's intrastate revenues (See Vonage v. NPSC, No. 08-1764 (8th Cir.))