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Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; IP-Enabled Services, WC Docket No. 04-36; Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25

Dear Ms. Dortch:

The VON Coalition applauds the FCC's renewed commitment to comprehensive intercarrier compensation reform.[1] As leading communications innovators, VON Coalition members welcome the Commission's efforts to rationalize intercarrier compensation, and urge the Commission to adopt reforms that promote the implementation and use of VoIP and other IP services and encourage increasing use and deployment of broadband networks. The Commission should adopt intercarrier compensation reforms that eliminate inefficiency, empower consumers to structure their communications as they see fit, and enable innovators to deploy new services in response to consumer demand.

1. Introduction

The VON Coalition represents a wide range of companies focused on bringing high quality, competitively priced VoIP services to consumers and businesses. VON has previously voiced its support for the immediate comprehensive reform of the existing

[1] *Core Commc'ns., Inc., v. FCC*, 531 F.3d 849 at 859 (noting counsel statement) (D.C. Cir. 2008).

intercarrier compensation system and, in particular, for implementation of bill and keep.[2] As a wide segment of the industry, including VON, has explained, reform is necessary to "accommodate progress and innovation, and to ensure technological and competitive neutrality."[3] The most rational approach to reform would be for the Commission to adopt a bill and keep system that requires carriers to recover their costs from end-users, or in limited circumstances from an explicit subsidy, instead of through economically irrational intercarrier charges.

2. The Commission Can and Should Immediately Adopt Bill and Keep.

Bill and keep is neither new nor radical. The Commission has already issued a detailed NPRM inviting comment on bill and keep as an alternative to existing intercarrier compensation arrangements,[4] and a broad range of carriers and providers from all areas of the industry has already expressed support for bill and keep. There is, in short, a more than sufficient basis in the existing record for the Commission to immediately adopt a bill and keep regime for all traffic.

There is consensus that the current system of intercarrier compensation is broken. The rules in place today make artificial distinctions among functionally identical types of traffic, thereby distorting consumer choice, encouraging inefficiency, and permitting arbitrage. This broken system must be replaced immediately with uniform rules that are competitively neutral and market-oriented. The simple and logical solution to the difficult problems posed by intercarrier compensation is bill and keep.

The Commission's *Bill and Keep NPRM* highlights many of the benefits of a bill and keep system. From the regulator's perspective, bill and keep systems "avoid two difficult problems."[5] The first is allocating common costs among services. Because regulators lack perfect knowledge, a regulator's allocation of these costs will necessarily be both imperfect and arbitrary.[6] These imperfect cost allocations distort markets and thereby decrease consumer welfare. An efficient bill-and-keep regime "spares regulators the necessity of allocating common costs."[7] The second is the absence of direct end user control over access arrangements under current regimes. Because "the parties to a call are not empowered, under current arrangements, to choose the lowest-cost means of completing a call with the quality and other characteristics they prefer," intercarrier cost

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[2] Reply Comments of the VON Coalition, WC Docket No. 01-92 (filed July 20, 2005). The Voice on the Net Coalition's support is focused on comprehensive modernization of intercarrier voice compensation rates. Individual VON members may have distinct views on broader reform measures.

[3] Letter to Chmn. Martin and Commrs. Copps, McDowell, Adelstein, and Tate from AT&T, CompTIA, CTIA - The Wireless Association, Global Crossing, The Information Technology Industry Council, National Association of Manufacturers, New Global Telecom, PointOne, Sprint, The Telecommunications Industry Association, T-Mobile, Verizon, The VON Coalition, WC Docket No. 04-36 and CC Docket No. 01-92 at pg. 2 (filed Aug. 6, 2008).

[4] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001) ("*Bill and Keep NPRM*").

[5] *Bill and Keep NPRM* at ¶ 39.

[6] *Id*.

[7] *Id*.

assignments "cannot . . . ensure efficient outcomes."[8] Carriers and consumers must pay for these inefficiencies. Bill and keep would replace this disconnect with a system that is able to respond directly to market signals and maximize consumer welfare.

As the Commission has noted, bill and keep follows the logic of its prescient *Computer II* decision to deregulate CPE.[9] *Computer II* "was equivalent to mandating interconnection with customer-owned CPE, and setting a zero interconnection rate for CPE."[10] This simple change unleashed consumer choice in the CPE market, with tremendous results. The CPE market is now characterized by "full and fair competition," with "CPE . . . available from a diversity of vendors" and "prices . . . declining."[11] This flourishing CPE market has in turn "allow[ed] information service providers . . . to deliver increasingly sophisticated multimedia content to their customers."[12] It is time for the Commission to take a similar step by replacing the inefficient patchwork of legacy intercarrier compensation rules with a forward-looking bill and keep regime for all traffic.

Adoption of bill and keep, furthermore, would bring intercarrier compensation more in line with the system of interprovider compensation that characterizes IP networks – the networks of the future. As carriers and other providers continue to move their products and services from traditional circuit-switched to IP-based packet technologies, it is critical that the Commission likewise replace the outdated patchwork of legacy intercarrier compensation rules that are dependent on where a call originates, and thus require carriers to jurisdictionalize traffic, with rules that more closely approximate the rules governing IP networks in the global marketplace. In addition to the many other benefits cited herein, bill and keep avoids additional costs imposed on carriers offering services in the U.S. that are not incurred by global carriers. The increased administrative cost, as well as the cost of dispute resolution, has a significant impact on the global competitiveness of U.S. carriers. Like the rules governing the exchange of IP traffic, bill and keep eliminates the need to jurisdictionalize traffic and significantly reduces the legal and regulatory burden associated with the complicated U.S. compensation structure, thereby improving the economic status of the U.S. telecommunications industry in the global marketplace.

The adoption of a bill and keep regime for carrier to carrier compensation will serve the Commission's goal that "new rules accommodate continuing change in the marketplace and do not distort the opportunity for carriers using different and novel

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[8] *Id*. at ¶ 40.
[9] *Id*. at ¶ 41.
[10] *Id*.
[11] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets*, Report and Order, CC Docket Nos. 96-61 & 98-183, 16 FCC Rcd 7418 at ¶ 21 (2001).
[12] *Id*.

technologies to compete for customers."[13] The Internet compensation model, which is rooted in bill and keep, has driven enormous consumer choice and benefit, and it is time for the Commission to extend those benefits by applying bill and keep principles to the PSTN.

3. The Commission has the Jurisdiction and Authority to Adopt Bill and Keep for All Traffic.

The Commission has both the jurisdiction and the authority to adopt a bill and keep regime that governs all traffic.[14] The Intercarrier Compensation Forum[15] has already laid out the legal basis for the Commission's authority to both implement a uniform regime that applies to interstate and intrastate traffic and to mandate reform based on bill-and-keep.[16]

The Communications Act grants the Commission authority to implement a compensation regime that governs both interstate and intrastate traffic. Section 201(b) of the Act provides the Commission with the authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Act.[17] The Supreme Court has explained that this grant of authority: "means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include Sections 251 and 252, added by the Telecommunications Act of 1996."[18] The Commission therefore undoubtedly has the authority to adopt rules implementing Section 251(b)(5) and other statutory provisions governing carrier interconnection with respect to all traffic – interstate and intrastate – within the scope of those provisions.

The plain language of Section 251(b)(5) extends Commission authority to all compensation issues relating to the transport and termination of "telecommunications" involving any local exchange carrier. Congress could have, of course, limited the scope of this provision by drafting Section 251(b)(5) to cover "local telecommunications" or some other subset of telecommunications, but it did not. The Commission's discussion of the scope of Section 251(b)(5) in its *ISP Remand Order* confirms the plain text of the statute, as the Commission there explained that "[w]e were mistaken [in the *Local*

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[13] *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, 20 FCC Rcd 4685 at ¶ 33 (2005). *See also* VON Sept. 25 Letter in Docket 08-152 (explaining that any reform "must recognize what we have learned from the Internet compensation model: users do not pay a different price whether an e-mail is local or long distance or to connect to a web site located across a LATA boundary in rural Iowa. Instead, video phones are free to communicate around the globe. It is an 'all you can eat' flat-rate world that spans geography and does not charge by the minute, distance or time").

[14] The Voice on the Net Coalition's support is focused on comprehensive modernization of intercarrier voice compensation rates. Individual VON members may have distinct views on broader reform measures.

[15] The VON Coalition supports bill and keep, but expresses no position on the ICF proposal as a whole.

[16] Intercarrier Compensation Forum Comments at 38-48, CC Docket No. 01-92 (filed on Mar. 23, 2005) ("ICF Comments"); Intercarrier Compensation Forum Reply Comments at 45-55, CC Docket No. 01-92 (filed on July 20, 2005).

[17] 47 U.S.C. Sec. 201(b).

[18] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 at 378 (1999).

Competition Order] to have characterized" section 251(b)(5) as limited to local traffic, and noted that "'local' . . .is not a term used in section 251(b)(5) or section 251(g)."[19] The D.C. Circuit left this conclusion intact on review, although it took issue with other aspects of the *ISP Remand Order*.[20]

Section 251(g) again confirms that the reference to "telecommunications" in Section 251(b)(5) applies to all telecommunications, including access traffic. Section 251(g) temporarily grandfathers the pre-1996 rules applicable to access traffic, including rules governing the "receipt of compensation."[21] This carve out of existing rules from the effects of Section 251 would not be necessary if Section 251(b)(5) did not address the "receipt of compensation" for traffic covered by 251(g). There can therefore be no doubt that Section 251(b)(5) applies to all "telecommunications" involving a local exchange carrier.[22]

In addition to having the jurisdiction necessary to impose a unified compensation scheme that applies to all traffic, the Commission has the authority to adopt a bill and keep regime. As an initial matter, Section 252(d)(2)(B)(i) specifically contemplates "arrangements that waive mutual recovery (such as bill-and-keep)."[23]

Even without this specific provision, however, Section 252 permits the Commission to adopt a bill and keep regime. Section 252(d)(2)(A) directs the Commission and the states (i) to "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 the other carrier," and (ii) to "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[24] Bill and keep satisfies these statutory requirements by permitting each carrier to "recover . . . costs" from its own end users. The Commission has confirmed that this reading of the statute applies even where traffic flows may be unbalanced, explaining that "bill-and-keep arrangements also provide for the 'mutual and reciprocal recovery of costs associated with the transport and termination of traffic' when traffic is not in balance."[25]

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[19] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket Nos. 96-98 and 99-68, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

[20] *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[21] 47 U.S.C. Sec. 251(g).

[22] The ICF has, however, provided additional bases for this conclusion. *See* ICF Comments at 40-42.

[23] 47 U.S.C. Sec. 252(d)(2)(B)(i); *see also WorldCom, Inc. v. FCC*, 288 F.3d at 434 (noting the "non-trivial likelihood that the Commission has authority to elect" a bill-and-keep regime for section 251(b)(5) traffic under the terms of section 252(d)(2)(B)(i)).

[24] 47 U.S.C. Sec. 252(d)(2)(A).

[25] *Bill and Keep NPRM* at ¶ 75. As the ICF explains, "reading section 252(d)(2) to preserve the Commission's discretion in this respect does *not* reduce the pricing standards of section 252(d)(2) to surplusage." ICF Comments at 46 (emphasis original).

4. The Commission Should Maintain the Distinction between Carriers and Non-Carriers.

In its order adopting a reformed compensation regime, the Commission will avoid significant industry confusion if it also addresses which entities are subject to the Title II regime that governs carrier-to-carrier compensation. The Commission should take this opportunity to clarify that Title II carriers are entitled to terminate all forms of IP-originated traffic – without restriction – and that the applicable rate for termination during a transition to bill and keep should be assessed on the interconnecting carrier, not on a non-carrier VoIP provider or other end user. As more and more communications innovation moves to the applications layer of the network, the Commission should clearly distinguish applications and IP-enabled providers from telecommunications carriers that provide the underlying physical layer of the network. So long as Internet products remain free from Title II regulation, the Commission will continue to accomplish Congress's Title II goals of expanding consumer choice for voice communications and encouraging the deployment of broadband services to all consumers, including those in rural areas of the country.[26]

Any compensation structure adopted by the Commission should firmly locate Title II interconnection and the attendant compensation rights and obligations with telecommunications carriers who, with regard to VoIP traffic, often sell wholesale services to VoIP providers. A corollary of this declaration is that, if regulated at all, application and software providers are Title I providers and the services made available by these providers are not subject to the rights or responsibilities of their Title II carrier partners, including the compensation structure at issue in this reform proceeding. In confirming this regulatory structure, the Commission would act to clearly establish the limits of Title II and provide the Internet communications market and all customers a degree of regulatory certainty. It is not in the interest of either new entrants or established incumbents seeking to offer VoIP products and services for continued regulatory uncertainty regarding 251 compensation rights and obligations to exist. As the VoIP industry has experienced over the past few years, the impact of regulation affects whether consumers will have access to innovative features and functionalities offered by VoIP providers at the edge, or if they will have access only to VoIP products that mimic the circuit switched offerings of the past.

Many VoIP providers are not network operators and do not aspire to offer a replacement for traditional telephone service. It is therefore critical that the Commission continue to act with restraint as it seeks to achieve the economic goals of the Communications Act through regulation. Confirming that VoIP providers that partner with carriers to enable VoIP customers to communicate with PSTN customers are not

[26] 47 U.S.C. Sec. 157 nt.; *see also, e.g.*, 47 U.S.C. Sec. 154(o) (requiring the Commission, "[f]or the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property," to investigate and study "methods of obtaining the cooperation and coordination of these systems"); 47 U.S.C. Sec. 271(c)(2)(B)(vii) (requiring the Commission, in order to grant a Bell operating company (BOC) interLATA authority, to find that the BOC is providing nondiscriminatory access to 911 and E911 services).

carriers, and therefore are not subject to the compensation regime being established by the Commission, would increase investment in innovative edge applications and facilitate the rapid evolution of IP products and services for the benefit of U.S. consumers and ultimately, the economy as a whole.

5. Additional Steps are Necessary to Ensure Rational Reform.

As it considers comprehensive reform of the intercarrier compensation system, the Commission should take care to implement reforms in a manner that continues to encourage the development and deployment of new and innovative services, and ensures that the communications industry can continue to build on existing broadband networks and IP services. In particular, the Commission should:

- Ensure that during any transition there is no unnecessary rate churn, and that no existing rate is permitted to increase if it will be at or below current levels after the transition.

- Preserve existing Rule 69.5(b), which limits the class of providers subject to switched access charges to "interexchange carriers."[27] Specifically, the Commission should not take any action to change the existing treatment of end-users, including ESPs and ISPs, under Rule 69.5(b), and should avoid any suggestion that the adoption of new rules calls into question the applicability of current law that ESPs and ISPs are end-users not subject to switched access charges.[28]

- Avoid call signaling rules that create new obligations to generate call identifying information where such information does not generate organically due to technical parameters.[29]

- Complete the "broad examination of the regulatory framework to apply to price cap local exchange carriers' (LECs) interstate special access services" by bringing down special access prices to cost-based levels. Excessive special access rents significantly impair wireless and wireline broadband deployment and pricing levels.

Each of these steps is necessary to enable the continued development and deployment of new and innovative IP services.

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[27] 47 C.F.R. Sec. 69.5(b).
[28] *See, e.g.*, Reply Comments of the Voice on the Net Coalition at 7-15, WC Docket Nos. 07-256 & 08-8 (filed Mar. 14, 2008).
[29] *See also* Comments of the Voice on the Net Coalition, CC Docket No. 01-92 (filed Dec. 7, 2006).

6. Conclusion

The VON Coalition commends the Commission's effort to comprehensively reform the broken intercarrier compensation system. As explained above, the Commission should adopt a bill and keep regime as the simplest and most rational approach to this difficult challenge.

Sincerely,

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