WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
Fax: 202 303 2000

October 6, 2008

VIA E-MAIL **EX PARTE**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: WC Dkt. Nos. 05-337, 99-68, & 04-36; CC Dkt. Nos. 01-92 & 96-45

Dear Ms. Dortch:

On October 3, 2008, the undersigned, representing tw telecom inc. and One Communications Corp., met with Scott Deutchman, Competition and Universal Service Legal Policy Advisor to Commissioner Copps.

The attached presentation formed the basis of the discussions.

Please let us know if you have any questions or concerns in connection with this filing.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), a copy of this notice is being filed electronically in the above-referenced dockets.

Respectfully submitted,

_______/s/__________
Thomas Jones
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006
202-303-1111

Enclosures

cc: Scott Deutchman

PRESENTATION REGARDING REFORM OF
INTERCARRIER COMPENSATION AND UNIVERSAL SERVICE
CC Docket No. 01-92, 96-45; WC Docket Nos. 05-337, 99-68, 04-36
(Oct. 3, 2008)

I. THE FCC SHOULD ESTABLISH TELRIC AS THE UNIFORM PRICING METHODOLOGY FOR ALL TRAFFIC EXCHANGE AS THE CENTERPIECE OF COMPREHENSIVE REFORM.

A. Adopt TELRIC as uniform rate methodology for all terminating rates.

1. This approach is sound policy:

    a. TELRIC is an established methodology for setting cost-based rates, as is required by Section 252(d)(2);

    b. setting rates based on TELRIC diminishes any purported need for increased universal service subsidies to compensate ILECs for foregone intercarrier revenue; and

    c. reliance on Section 251(b)(5) to set a uniform methodology for all terminating traffic is less subject to legal risk than the other possible approaches.

2. Section 251(b)(5) appears to grant the FCC with express authority to require that all LECs establish reciprocal compensation arrangements for intrastate access traffic.

3. If the FCC acts pursuant to Section 251(b)(5), states would apply the FCC’s TELRIC methodology to establish the terminating rate for each ILEC (and competitors exchanging traffic with the ILEC); such state-derived rates would be included in interconnection agreements and would apply to all local and intrastate terminating access traffic; interstate terminating access rates would be set forth in FCC tariffs and the FCC would deem the TELRIC-based rate as just and reasonable for these purposes.

4. Carriers would remain free to negotiate other arrangements, including bill and keep.

B. Establish an appropriate transition to uniform TELRIC methodology. The FCC should establish at least a five year transition for reducing interstate access rates to TELRIC-based levels and should allow states a longer transition for reducing intrastate access rates to TELRIC-based levels so that states can rebalance local rates as needed and perform TELRIC cost studies.

C. Do not modify regulations governing interconnection architecture. There is no logical connection between changes to interconnection architecture and intercarrier compensation reform; existing arrangements are the result of more than a decade of negotiations and interconnection arrangements and are stable.

D. **Prohibit ILECs from using SLC increases to engage in anticompetitive conduct.** ILECs must be prohibited from recovering any foregone intercarrier payments associated with multiline business customers from end user charges imposed upon residential or single line business customers. Otherwise, recovery of foregone intercarrier payments through higher SLCs is appropriate.

E. **Prohibit ILECs from freezing transit service rates at existing access charge levels.** Singling out transit service to allow ILECs to charge current access rates only for transit service (as Verizon suggests) represents an unjustified wealth transfer from competitors to ILECs.

F. **Strictly limit the size of any "Replacement Mechanism" fund.**

1. There is no basis for granting price cap carriers compensation from an RM in the event of intercarrier compensation reform. In particular, there is no basis for asserting that all revenues associated with access charges in excess of cost-based rates are subsidies (this assertion is also flatly inconsistent with ILEC arguments that LECs recover all costs of terminating traffic to ISPs from end user business charges paid by ISPs). Moreover, granting only ILECs, but not competitors, the right to benefit from the RM is arbitrary and capricious. **The RM fund amounts to a requirement that the ILECs' competitors fund the ILECs' foregone access charge revenue.** If the FCC does establish an RM for price cap ILECs, it should make that fund available to all LECs, including CLECs.

2. For rural carriers, such a fund should only apply to customers that subscribe to stand-alone basic telephone service (lines over which the ILEC provides bundles of voice with data and/or video should not be eligible), and it should not apply in any case in which end user services have been deregulated.

G. **A change to the USF contribution methodology should not unfairly burden or benefit any particular class of service provider.** A pure numbers-based approach would result in a dramatic shift in contribution obligations. tw telecom estimates that such an approach would increase its contribution obligations by 48 percent over the amount it contributes under the existing rules. These dramatic and arbitrary changes can be addressed by combining numbers-based contributions with contribution obligations applicable to broadband connections, based on capacity tiers.

II. THERE IS NO BASIS FOR ESTABLISHING A SINGLE TERMINATING RATE, SUCH AS 0.0007, FOR ALL TRAFFIC.

A. The FCC lacks the authority to establish a specific rate for the termination of all traffic under Section 251(b)(5)/252(d)(2).

1. The Supreme Court and Eighth Circuit held that the FCC's role in setting rates under Section 251(b)(5) and 251(d)(2) is limited to defining the methodology; states apply the FCC-established methodology to establish specific rates:

a. The 1996 Act establishes "a scheme in which Congress broadly extended its law into the field of intrastate telecommunications, but in a few specific areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, [and those decisions] are beyond federal control." *AT&T v. Iowa Utils Bd.*, 525 U.S. at 385 n.10.

b. The FCC may only "issue[] rules to guide the state commission judgments" regarding the establishment of rates. *Id.* at 385.

c. "It is the states that will apply those [TELRIC] standards and implement that methodology, determining the concrete result in particular circumstances." *Id.* at 384.

d. "[T]he FCC does not have jurisdiction to set the actual prices for the state commissions to use. Setting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to § 252(c)(2)" *Iowa Utils. Bd. v. FCC*, 219 F.3d at 757.

2. There is no evidence that $0.0007 is a cost based rate. The fact that some carriers have agreed to this rate level in some interconnection agreements does not support the conclusion that it is cost based.

   a. An ILEC that agrees to the $0.0007 rate in interconnection agreements in situations where the ILEC is a net terminator of traffic has no bearing on whether the ILEC's own terminating costs are equal to or less than $0.0007.

   b. Interconnection agreement negotiations include give and take on dozens of issues; a carrier might well agree to below-cost transport and termination rates in return for more valuable concessions on other items.

   c. Many, probably most, carriers have not agreed to the $0.0007 rate, supporting the conclusion that such carriers do not view it as cost-based.

B. The FCC may not impose $0.0007 on all terminating access pursuant to conflict preemption, as Verizon claims. In *La. PSC v. FCC*, the Supreme Court held that Section 2(b)'s limitation of the FCC's jurisdiction over rates "denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes" even if such denial undermines a unified federal scheme for depreciation. *La. PSC v. FCC*, 476 U.S. at 373. This was because the FCC found that it was "possible" to separate intrastate costs from interstate costs for purposes of depreciation, even though the FCC could not achieve absolute precision in this regard (as the Court explained, "the realities of technology and economics belie such a clean parceling of responsibility" between the FCC and the states *see id.*, 476 U.S. at 360). The same is true for intercarrier compensation rates.

1. Although absolute precision may not be possible, existing mechanisms such as PIUs afford reasonable mechanisms for separating interstate from intrastate traffic

for purposes of intercarrier compensation. These mechanisms are analogous to the separations mechanisms relied upon by the Court in *La. PSC v. FCC*.

2. At the very least, these mechanisms can be used to identify the jurisdiction of traffic in all cases in which carriers exchange non-IP traffic.

3. Conflict preemption must be narrowly tailored to preempt only in those cases where there is impossibility. *People of the State of California v FCC*, 905 F.2d at 1243. Where reasonable mechanisms are available to differentiate interstate from intrastate traffic, no impossibility exists and no preemption is allowed.

4. Thus, Verizon's argument could only in theory support preemption of state intercarrier compensation regulation where carriers exchange IP-based voice traffic. But there is no basis for conflict preemption with regard to fixed VoIP traffic since telephone numbers used for fixed VoIP service have geographic significance. Even for nomadic VoIP traffic, AT&T has correctly asserted that the FCC could simply use telephone numbers as a reasonable proxy for customer location. But again, even if conflict preemption were permissible for nomadic VoIP traffic, the FCC could only preempt state regulation of interconnection arrangements **for that traffic**. It could not rely on conflict preemption to establish a national $0.0007 termination rate for all traffic.

III. THERE IS NO BASIS FOR APPLYING BILL AND KEEP TO ALL TRAFFIC.

A. The FCC lacks the authority to impose bill and keep on LECs. Carriers incur costs when terminating traffic. *Local Competition Order* ¶ 1112. Where there is a traffic imbalance between carriers, it is likely that the net terminator incurs net costs.

1. Section 252(d)(2)(A): an interconnection agreement cannot be considered just and reasonable unless the agreement "provide[s] for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination on each carrier's network facilities." If a terminating carrier must recover these costs directly from end users or a universal service fund, recovery is not "reciprocal" or "mutual"

   a. Black's Law Dictionary, 7th Ed. at 707 "Mutual: Common to both parties. Interchangeable; reciprocal; each acting in return or correspondence to the other; given and received . . ."

   b. Black's Law Dictionary, 7th Ed. at 1276 "Reciprocal: Directed by each other toward the others; Mutual;"

   c. This means carriers must recover net costs of transport and termination **from each other**.

2. Section 252(d)(2)(B)(i): bill and keep is permissible where it affords mutual recovery of costs "through the offsetting of reciprocal obligations." Recovery from end users or universal service of costs incurred as a result of traffic imbalances

cannot be understood to qualify as recovery "through the offsetting of reciprocal obligations."

3. Section 252(d)(2)(B)(i): bill and keep permissible where parties "waive" their right to mutual recovery. A waiver is a voluntary relinquishment of rights; it is not the mandated relinquishment of such rights. Black's Law Dictionary, 7th Ed. at 1574 "Waive: To abandon, renounce, or surrender (a claim, priviledge or right, etc.); to give up (a right or claim) voluntarily."

4. The FCC cannot rely on forbearance from the provisions of Section 252(d)(2) as a means of ensuring that carriers charge $0.0007 to exchange all traffic. Forbearance from Section 252(d)(2) would eliminate the only federal standard for setting prices for traffic subject to Section 251(b)(5) (or at the very least segregatable intrastate traffic subject to Section 251(b)(5)). **The FCC would therefore have no pricing power at all for this traffic.** Moreover, the FCC could not use forbearance to **require** that CLECs charge $0.0007 because **the FCC may not use forbearance as a means of imposing new regulatory obligations (*see Fones4All Corp.*, 21 FCC Rcd 11125, ¶ 7)**

5. Mandating bill and keep is no different from mandating a specific rate for all terminating traffic (i.e., the rate is zero). As explained, the FCC lacks the authority to mandate specific rates for traffic subject to Sections 251(b)(5) and 252(d)(2). The FCC may only mandate rate-setting methodologies for such traffic.

B. There are many circumstances in which bill and keep is not more efficient than cost-based unified rates for terminating access.

1. Hermalin and Katz have shown that zero is often not the most efficient price for traffic exchange. This is true, for example, where interconnecting carriers incur different costs for terminating traffic.

2. Bill and keep replaces one form of regulation (terminating access regulation) with another (regulations of end user charges and USF); it is difficult to know which is less costly, especially if the FCC eliminates the vast majority of intercarrier compensation issues by establishing TELRIC as the unified terminating rate methodology.

3. Intercarrier compensation payments comprise an ever-smaller portion of carrier costs; additional changes beyond the common sense approach of establishing a unified terminating access methodology are unlikely to yield significant gains in consumer welfare.