Voice | Data | Internet | Wireless | Entertainment

Jeffrey S Lanning

Director—Federal Regulatory Affairs
701 Pennsylvania Ave, NW, Suite 820
Washington, DC 20004

(202) 393-7113

jeffrey.s.lanning@embarq.com

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Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *High-Cost Universal Service Support*, WC Docket No. 05-337; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Intercarrier Compensation*, CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *In the Matter of IP-Enabled Services*, WC Docket No. 04-36

Dear Chairman Martin and Commissioners:

Embarq has worked extensively with other parties and the Commission over the past several years to come up with intercarrier compensation and universal service reforms that would benefit consumers and solve the substantial problems with both systems that are universally recognized and thoroughly examined in the record. Embarq truly desires fundamental reform in these areas, and Embarq believes that it may make the most sense to accomplish such reform through a single comprehensive order. Despite this predisposition, Embarq must object to the process and apparent conclusions in the draft order regarding intercarrier compensation and universal service that is circulating among the Commissioners for consideration at the Commission's scheduled open meeting on November 4, 2008.

For the reasons set out in the letter, it appears that the draft order contains numerous legal infirmities in addition to the flawed policy outcomes that Embarq and others have explained in the relevant records. The first of these errors is an overarching process problem that is so great that it violates the Administrative Procedure Act. Simply put, nobody is adequately informed about what's in the order, and it appears that essential components of the order are new and utterly unexposed to public scrutiny. Moreover, taken as a whole, the order is materially different from anything that has been put out for public notice and comment or otherwise discussed in the record. Parties have had to spend the bulk of the two weeks since the order was circulated just figuring out what's at stake, rendering all parties virtually unable to comment meaningfully on the proposed order.

Even if this state of affairs were legally permissible—and it's not—it would still be fundamentally unfair and improper. Accordingly, Embarq joins many other parties urging the Commission to adopt a discrete order addressing the discrete issue of answering the court

remand of the Commission's rules for the appropriate intercarrier compensation on dial-up Internet access calls, and to put the rest of the proposed order out for notice and comment.

In addition, to the overarching process concern described above, Embarq has the concerns regarding legal issues that have arisen through the trade press and ex parte meetings. The rest of this letter identifies some of the most significant concerns. It is by no means exhaustive; nor could it be as Embarq has not even seen the proposed order. Nonetheless, Embarq believes that these potential legal issues provide a strong reason for the Commission to put the proposed order out for public comment.

I. THE COMMISSION HAS NOT COMPLIED WITH THE PROCESS REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT

A. It Appears that Essential Components of the Proposed Order have Never Been Subject to Adequate Notice and Comment

The Commission is under an obligation to provide interested and affected parties adequate notice of any actions the Commission may be contemplating. The Commission must also afford such actual or potential parties a full and fair opportunity to comment on the factual, legal, and policy assumptions, conclusions, and implications of any Commission action. Finally, the Commission must address any legitimate concerns properly raised on the record; it cannot avoid or ignore tough questions or inconvenient facts.

The Commission apparently is poised to violate these fundamental obligations under the Administrative Procedure Act. In particular, it appears that the proposed order contains numerous essential decisions and rules that are completely new and unmentioned in both Commission releases and ex parte submissions. For example, it appears that the Commission intends to make final conclusions on:

1. A new and novel theory regarding the its jurisdiction over ISP-bound traffic that parties have never seen nor been able to commit upon;
2. A new and novel cost interpretation of the "additional cost" standard section 252(d)(2) for reciprocal compensation;
3. A new and novel requirement for 100% broadband deployment in order to retain eligibility for high-cost support under the Universal Service Fund; and
4. A new and novel practice of regulating firms in competitive markets by requiring them to use revenues from competitive activities to subsidize below-cost regulated activities before being eligible for access replacement support.

This list is not meant to be comprehensive. Indeed, it could not possibly be comprehensive as Embarq has not had the opportunity to review the proposed order and it is apparent that the public filings in the relevant dockets do not offer sufficient guidance regarding the contents of the proposed order.

B. It Appears the Proposed Order Is Materially Different from Anything Discussed in the Record

The Commission apparently is headed for a failure to fulfill its obligations in this proceeding, most notably by adopting an order that is materially different than anything upon which parties have had an opportunity to comment. Even if all of the components of the order had been adequately noticed and subject to public comment (and they haven't as described below), the Commission has an obligation to provide additional notice and receive additional comment when it intends to proceed with a combination of decisions that clearly will impact parties in unanticipated ways. In the case of such a material change in the contours of a possible decision, the Commission must provide additional notice and seek additional comment. Based on what Embarq has been able to learn through press reports in and ex parte meetings in the past two weeks, it appears that the Commission has put together a materially different order from anything that upon which parties have had an opportunity to comment. The Commission should, therefore, seek additional comment and, if it fails to do so, it will violate the Administrative Procedure Act.

C. It Appears that the Commission Is Poised to Declare VoIP as an Information Service without Addressing the Comments in the Relevant Docket

Based on press stories and *ex parte* meetings, it appears that the Commission is poised to declare Voice over Internet Protocol-based services to be information service rather than telecommunications services. This is momentous decision on a question that has significant consequences for the entire industry. Yet, it appears that the Commission makes this decision in a *single* sentence and offers no analysis to support the conclusion. Moreover, based on this fact, it appears the Commission does not begin to address the many factual and legal issues raised in the Commission's docket regarding the proper classification of IP-enabled services. This lack of clarity and apparent disregard for the Commission's obligation to address the comments of interested parties would constitute additional violations of the Administrative Procedure Act.

II. THE COMMISSION CANNOT APPLY SECTION 251(B)(5) AND SECTION 252(D)(2) TO THE TERMINATION OF INTEREXCHANGE TRAFFIC

By its terms and context, reciprocal compensation applies only to local traffic. Section 251(b)(5) only applies to the transport *and* termination of traffic, as stated in the plain language of the provision. It does not cover stand-alone transport, nor would it be logical to extend section 251(b)(5) in such a way. Indeed, that would eviscerate section 201 and subject transit traffic and even long distance traffic to regulation under an "additional cost" standard, which is illogical. There is no suggestion on the record that 251(b)(5) applies to all telecommunications traffic, nor could such an argument be made seriously.

Both parties to a reciprocal compensation arrangement must be terminating traffic, or else the obligation would not be reciprocal. It appears, however, that the Commission is poised to rule that the termination of long distance traffic carried by interexchange carriers is

covered by the section 251(b)(5) reciprocal compensation obligation. This is simply inconsistent with the purpose and plain language of section 251(b)(5). A carrier does not terminate the interexchange traffic it receives from a local exchange carrier; instead, it transports the traffic to another local calling area. Therefore, such a carrier cannot enter into a reciprocal relationship with a LEC for the termination of the interexchange traffic it hand to the LEC. Since the relationship cannot be reciprocal, section 251(b)(5) cannot apply.

This exclusion of interexchange traffic from the scope of section 251(b)(5) is logical and consistent with the statutory framework. The purpose of section 251 is to facilitate *local* competition. As such, it applies to the exchange of local traffic between two carriers. It does not apply to interexchange traffic, and attempting to do so would produce illogical outcomes. Moreover, if the Commission were to adopt such a framework, it would represent a substantial departure from current precedent and practice. The Commission is obliged to provide a full and reasoned explanation for such a substantial departure, which it cannot feasibly do in this circumstance without the benefit of additional comment from interested parties.

III. THE COMMISSION APPARENTLY WOULD VIOLATE THE COMMUNICATIONS ACT, ADMINISTRATIVE PROCEDURE ACT, AND THE UNITED STATES CONSTITUTION BY DECLARING ALL VOICE OVER INTERNET PROTOCOL TRAFFIC TO BE INFORMATION SERVICES

When voice communications are provided via telecommunications over traditional networks (whether or not they use digital technology), they are classified as telecommunications services. This could be expressed as:

voice + transmission = telecommunications service.

The Commission has declared stand-alone Internet Protocol-based transmission services to be information services, however, because of the use of Internet Protocol. This could be expressed as:

transmission + IP = information service.

It appears that the Commission is poised to declare all uses of Voice over Internet Protocol to information services. This could be expressed as:

IP + voice = information service.

If the Commission were also to declare all uses of VoIP to be information services, it would engage in an arbitrary and capricious classification that is inconsistent with the Communications Act, the Administrative Procedures Act, and the United State Constitution. This is so because the decision could be expressed as:

transmission + IP + voice = information service.

This outcome is inconsistent with the traditional, and still applicable, rule that:

transmission + voice = telecommunications service.

In fact, telecommunications carriers would be able to deregulate themselves and self-designate their services as information services simply by introducing Internet Protocol

between the telecommunications and voice layers of their networks. This outcome is inconsistent with the long-standing Commission practice of technological neutrality—regulatory treatment should not vary based solely on the use of one particular technology. Nor is there any reasonable justification for such a distinction; as the Commission has explained on several occasions, voice communications should be regulated the same irrespective of technology. Moreover, if the Commission were to adopt such a framework, it would represent a substantial departure from current precedent and practice. The Commission is obliged to provide a full and reasoned explanation for such a substantial departure, which it cannot feasibly do in this circumstance without the benefit of additional comment from interested parties.

Further, cable telephony, a sub-set of Voice over Internet Protocol traffic, is indistinguishable from the voice services traditional telecommunications carriers provide. Both provide subscribers the ability to use a devise, dial a number assigned from the North America Numbering Plan, and engage in real-time voice conversations. The cable companies extensively advertise the cable telephony services are a direct substitute for telecommunications carriers' voice services. Allowing cable telephony to be exempt from the intercarrier compensation regime, the direct result if the Commission treats all Voice over Internet Protocol traffic as Information Services, will result in extremely disparate financial treatment of the two voice services that have not been and cannot be justified and therefore that violate the Equal Protection, Due Process, Takings, and Commerce clauses of the United State Constitution as well as being an arbitrary and capricious classification under the Administrative Procedures Act and the Communications Act.

IV. THE COMMISSION APPARENTLY WOULD ABDICATE ITS RESPONSIBILITIES UNDER SECTION 254

As the Commission has long acknowledged, interstate and intrastate access charges provide important revenue and implicit support for networks in high-cost areas. Without this revenue and support, carriers of last resort in high-cost areas clearly will be unable to maintain affordable service at rates that are comparable to those found in low-cost areas, such as urban population centers.

The Commission's implementation of high-cost support has yet to pass judicial scrutiny. The high-cost support mechanism for non-rural areas has been remanded twice. Therefore, the Commission cannot lawfully "freeze" current the current Universal Service Fund. Instead, it must first fix the flaws in the system. Apparently, however, the proposed order will only compound the errors, and leave the Commission even further from compliance with the section 254 mandate. When a court reviews the proposed order, it will have to inquire as to what the Commission is doing to ensure that all customers have access to, at a minimum, the statutorily-specified telecommunications services at affordable and comparable rates. Based on the information about what is in the proposed order, the Commission no longer has any basis for concluding that is meeting this mandate.

V. THE COMMISSION APPARENTLY IS IMPOSING ARBITRARY, CAPRICIOUS, AND WHOLLY UNWORKABLE BROADBAND REQUIREMENTS FOR RECEIPT OF UNIVERSAL SERVICE SUPPORT

It appears that the Commission may require USF recipients to provide defined broadband services ubiquitously throughout the study areas in which they receive support. Apparently, the Commission would not determine that broadband is to be classified as a supported service under section 254. This conclusion seems sensible at this time given the state of network deployment and the high cost of making broadband available ubiquitously. Instead, the Commission apparently is contemplating making USF support conditional on a carrier commitment to provide defined broadband services ubiquitously throughout the study area in which it receives high-cost USF support in order to retain that support, which was established to maintain traditional voice services. This would represent a substantial break with past precedent. The Commission is obliged to provide a full and reasoned explanation for such a substantial departure, which it cannot feasibly do in this circumstance without the benefit of additional comment from interested parties.

VI. THE COMMISSION APPARENTLY IS DRAWING ARBITRARY AND CAPRICIOUS DISTINCTIONS

It appears that the Commission may decide to subject price-cap regulated incumbent local exchange carriers to a requirement that they subsidize their below-cost regulated activities with revenue from their competitive businesses. This would be inherently arbitrary and capricious, and utterly inconsistent with the Commission's practice for decades. The Commission has long recognized competition as superior to regulation at ensuring just and reasonable rates and preventing over-earning. In such case, it would make no sense to require firms to use revenues from competitive markets to subsidize regulated activities. Indeed, the thrust of Commission regulation has been to ensure the opposite—to make sure that profits from regulated activities are not used to subsidize competitive activities. There is no precedent, and surely no justification, for requiring the opposite. Indeed, the Commission has specifically found that it is not possible for firms to subsidize regulated services with revenue from competitive services. The Commission should not depart from this conclusion.

Another related yet different, arbitrary and capricious policy choice is the treatment of local exchange carriers with respect to the access replacement mechanisms. Forcing price-cap carriers but not rate-of-return carriers to subject themselves to losses on unregulated lines of business is arbitrary and capricious. There is no policy justification for treating the two classes of carrier separately with regard to their respective *unregulated* activities. Different regulation of their local telecommunications offerings does not offer the requisite nexus to the unregulated activities. Moreover, if the Commission were to require price-cap carriers to lose money on regulated activities and subsidize those regulated activities with revenue from unregulated activities, it would run a risk of violating the takings clause of the Constitution. The Commission must afford a regulated firm—including one regulated through price-caps—a reasonable opportunity to make a normal profit. It cannot shirk this responsibility by requiring the regulated firm to cross-subsidize the regulated activity with revenue from unregulated activities. In any event, if the Commission were to adopt the intercarrier

compensation framework as we understand it, it would represent a substantial departure from current precedent and practice. The Commission is obliged to provide a full and reasoned explanation for such a substantial departure, which it cannot feasibly do in this circumstance without the benefit of additional comment from interested parties.

VII. THE COMMISSION APPARENTLY WOULD VIOLATE JURISDICTIONAL SEPARATIONS AND THE ALLOCATION OF RESPONSIBILITY SET FORTH IN THE TELECOMMUNICATIONS ACT OF 1996

Even if the Commission were correct that section 251(b)(5) applies to intrastate exchange access traffic, the Commission would not be permitted to determine whether carriers are to be afforded alternative recovery mechanisms for the displace revenue. Under section 2(b), the Commission does not have jurisdiction over intrastate traffic, so state commissions would have the responsibility for alternative recovery mechanisms. Moreover, any preemption to protect a federal policy must be narrowly tailored, which would not be true here.

Second, to the extent the Commission is altering the allocations of telecommunications service provider costs between the state and federal jurisdictions (which would seem to be the case when the recovery mechanism is altered), the Commission arguably must refer the matter to the Federal-State Joint Board on Separations, does not appear to have occurred with respect to the matters in the proposed order. In any event, if the Commission were to adopt the intercarrier compensation framework as we understand it, it would represent a substantial departure from current precedent and practice. The Commission is obliged to provide a full and reasoned explanation for such a substantial departure, which it cannot feasibly do in this circumstance without the benefit of additional comment from interested parties.

VIII. THE COMMISSION APPEARS TO BE FUNDAMENTALLY CHANGING THE CURRENT REGULATORY STRUCTURE WITHOUT ADEQUATELY EXPLANING ITS DEPARTURE FROM PAST PRECEDENT AND AFFORDING A REASONABLE OPPORTUNITY TO RECOVER EXISTING REVENUE STREAMS

Based on press accounts and ex parte meetings with Commission staff, it appears that the Commission's proposed order, taken as a whole, marks a fundamental change in the existing regulatory structure for local exchange carriers. The Commission must explain such a departure from past precedent, and it must afford the affected LECs a reasonable opportunity to recover the revenues on which they had come to rely during the past decades of Commission regulation. It appears that the Commission may be falling short on both counts.

IX. THE COMMISSION APPARENTLY IS RELYING ON MUTUALLY EXCLUSIVE LEGAL CONCLUSIONS REGARDING DIAL-UP INFORMATION SERVICE PROVIDER TRAFFIC

We also have concerns about the legal rationale the Commission may be adopting for setting rates for dial-up ISP traffic. It appears that the Commission may decide that dial-up calls to Internet Service Providers (ISPs) are still covered by the rules adopted in the ISP Remand Order, including the rate of $0.0007 for out-of-balance traffic. Embarq supports this outcome. Based on trade press accounts and ex parte meetings with Commission staff, it also appears that the Commission may be justifying its rules for ISP-bound traffic with two legal conclusions: (1) ISP-bound traffic is interstate, information service traffic (which must be terminated outside the state in significant measure); (2) it is, nonetheless, covered by section 251(b)(5) (which means that it must be terminated locally); and (3) the Commission sets the appropriate rate instead of the applicable state commission doing so pursuant to section 252(d)(2) (and the Supreme Court's *Iowa Utilities Board* decision).

Embarq has proposed a different legal rationale in the record, namely that section 251(b)(5) does not apply to ISP-bound traffic because: (a) that provision only applies where traffic is terminated locally (by both parties to the arrangement); (b) ISP-bound traffic is not terminated locally for jurisdictional purposes; and (c) the concept of call termination must be the same for analyzing jurisdiction and compensation.

When the Commission declared ISP-bound traffic to be an information service in the 1990s, it automatically pulled such traffic out from the scope of the reciprocal compensation obligations of section 251(b)(5). Although the Commission did not explain this adequately in its first order dealing with ISP-bound traffic, it was correct in its conclusion that section 251(b)(5) cannot apply because the "one-call" theory applies and ISP-bound traffic is jurisdictionally interstate. The court did not disagree, per se, but rather remanded for a better explanation.

The explanation is clear, and the Commission could readily support the rules adopted in the *ISP Remand Order*. As explained above, Section 251(b)(5) only applies to the transport *and* termination of local traffic. Traffic cannot be interstate and be terminated locally at the same time. The Commission has long held that ISP-bound traffic is interstate in nature which, by definition, means that it cannot be terminated locally. Therefore, a carrier delivering traffic to an ISP is not providing termination services. Rather, it is merely transporting the traffic and, accordingly, cannot avail itself of section 251(b)(5).

It is important to note that Commission decisions declaring ISP-bound traffic to be information services support, indeed compel, this conclusion. The Commission has no greater jurisdiction over intrastate information services than it does over intrastate telecommunications services. Accordingly, the Commission has determined that the ISP-bound traffic does not terminate locally, and the Commission has the authority to set the appropriate rate pursuant to section 201. This can best be done within the framework for originating access traffic (or possibly, treat it as information access traffic as was the case under the Modified Final Judgment). This framework would require the ISP to pay the local exchange carrier serving the ISP and, to the extent any additional compensation would be

appropriate, the ISP would also pay the local exchange carrier serving the end user initiating the dial-up ISP connection for access to the network. Under no circumstances would it be logical or consistent with the originating access paradigm to require on LEC to pay reciprocal compensation to the other LEC on originating access traffic.

X. CONCLUSION

In conclusion, Embarq submits that it appears that the proposed order, as explained in press stories and ex parte meetings, may suffer from a number of legal issues. Accordingly, Embarq respectfully requests that the Commission issue an order addressing the discrete issue of answering the court remand of the Commission's rules for the appropriate intercarrier compensation on dial-up Internet access calls, and put the rest of the proposed order out for notice and comment.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this submission is being filed in each of the above-referenced dockets.

Sincerely,

Jeffrey S Lanning

cc: Daniel Gonzalez
Amy Bender
Scott Deutchman
Scott Bergmann
Greg Orlando
Nicholas Alexander
Dana Shaffer
Matthew Berry