Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 04-36
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier	)	
Compensation Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
Establishing Just and Reasonable Rates	)	
for Local Exchange Carriers	)	WC Docket No. 07-135

COMMENTS OF
HYPERCUBE TELECOM, LLC

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November 26, 2008

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SUMMARY

Although reform of the current intercarrier compensation structure may be important, it is all the more important that any such reform be sustainable. For over a decade, intercarrier compensation has been the subject of immense confusion and dispute as the statutory bases for various pricing and reform efforts have been called into question or rejected altogether by courts upon appeal. Thus, the Commission should proceed with caution in undertaking any further reform, should avoid overreaching for statutory support for its policy objectives, and should take only those steps toward reform that are clearly permitted by law and which are best positioned to survive upon appeal.

As one significant example of how the Commission should proceed with caution, it should decline to eliminate originating access charges as proposed in the Further Notice of Proposed Rulemaking. The elimination of such charges by regulatory fiat would go well beyond the Commission's authority and would in fact run contrary to the principles that underlie the intercarrier compensation structure contemplated by statute and the Commission's rules.

Likewise, the Commission should proceed with caution in responding to concerns regarding "traffic stimulation." Sweeping conclusions and imprecise rules could have the unintended consequence of interfering with legitimate business practices. If any action is necessary, the industry would be better served by adoption of a more narrow rule that gives the Commission the ability to target and ferret out truly fraudulent or abusive conduct by bad actors.

Finally, caution is warranted because the expedited schedule that the Commission has set for achieving reform -- with very short comment deadlines and an incredibly short period for review of those comments -- may give rise to concerns with respect to compliance with the Regulatory Flexibility Act.

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COMMENTS OF
HYPERCUBE TELECOM, LLC

Hypercube Telecom, LLC ("Hypercube") hereby submits its comments in response to the Further Notice of Proposed Rulemaking (the "NPRM") released by the Federal Communications Commission (the "Commission") on November 5, 2008 in the above-captioned proceedings.

I. REFORM IS IMPORTANT -- BUT *SUSTAINABLE* REFORM IS CRITICAL.

There appears to be general consensus among the industry and regulators that the intercarrier compensation structure requires some level of reform. As might be expected, however, there is hardly consensus with respect to what kind of (or to what degree) reform is appropriate, and it is therefore certain that whatever steps the Commission might take will be challenged by one party or another (or many or all). Thus, it is essential that the Commission undertake only legally defensible reform that is built upon a strong statutory foundation. Overreaching in statutory interpretation to achieve certain policy objectives, even if undertaken with laudable intent, only will undermine the purpose of reform and perpetuate uncertainty -- a result that may be worse for the industry than maintaining the *status quo*.

The risks of results-oriented attempts to achieve intercarrier compensation policy objectives without solid statutory grounding should by now be quite clear. In 2001, one commissioner warned that the Commission's efforts to eliminate perceived arbitrage and exercise jurisdiction over calls destined for Internet Service Providers ("ISPs") were doomed because they were "at odds with the agency's own precedent as well as the plain language of the statute."[1] Unfortunately, these warnings proved prescient, as the U.S. Court of Appeals for the District of Columbia Circuit rejected the Commission's legal reasoning and remanded (but did not vacate) its decision[2] -- leading seven years later to the recent order setting forth a new statutory basis for the ISP-bound traffic compensation rules. By contrast, for the sake of an industry that has seen great turmoil since 2001, the Commission should take a more cautious approach to statutory interpretation in the context of the present NPRM,[3] take into account the

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1 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9215-16 (2001) (dissenting statement of Commissioner Furchtgott-Roth) ("*ISP Remand Order*").

2 *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den*. 538 U.S. 1012 (2003).

3 Indeed, as part of such a cautious approach, it would also be advisable for the Commission to consider how promotion of technological solutions (such as more advanced interconnection capabilities) might reduce or eliminate

past decade of judicial guidance with respect to interpreting and enforcing the Communications Act of 1934, as amended,[4] and ensure that the rules it adopts will withstand the inevitable further judicial scrutiny. Put another way, because the industry cannot withstand another seven-plus years of uncertainty with respect to intercarrier compensation, the Commission should pay respect to the real and meaningful limitations of the Act and plant its reform efforts on a solid statutory foundation as described further herein.

II. ELIMINATION OF ORIGINATING ACCESS CHARGES WOULD BE CONTRARY TO LAW AND THE ECONOMIC PRINCIPLES THAT UNDERPIN THE COMMISSION'S INTERCARRIER COMPENSATION FRAMEWORK.

Title II of the Act provides the Commission with relatively broad authority to regulate and prescribe rates for interstate services, but this authority is not without limits.[5] Of particular import to the pending NPRM, the Commission would exceed its statutory authority if it were to eliminate originating ***interstate*** access charges by regulatory fiat as currently proposed.[6] Rather, to ensure that such interstate charges are "just and reasonable" consistent with its statutory mandate,[7] the Commission should acknowledge the network functions that are provided by

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concerns (such as with respect to so-called "phantom traffic") in lieu of potentially overreaching regulatory action. *See, e.g., Network Interconnection Interoperability Reference Document, Part III, Installation and Maintenance Responsibilities for SS7 Links and Trunks*, ATIS-0300011, Ver. 10.1 (Jan. 2008) (describing standards for achieving interconnection and the exchange of SS7 signaling data).

4 *See, e.g., Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *vacated and remanded sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part and rev'd in part sub nom., Verizon Comms., Inc. v. F.C.C.*, 535 U.S. 467 (2002); *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

5 *See Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1349-50 (D.C. Cir. 1999) (discussing the authority conferred by various sections of Title II).

6 *NPRM* at Appendix A, ¶ 346, and at Appendix C, ¶ 343.

7 *See* 47 U.S.C. §§ 201 and 205.

carriers and consistently apply the cost-causation principles that form the heart of its intercarrier compensation framework (even as reformed) as discussed further below.

With respect to originating *intrastate* charges, the Commission's authority is even more limited. First, it is clear that the Commission has no authority under Sections 201, 205, and other provisions of Title II to regulate or mandate reform with respect to *intrastate* services and charges. Second, while Sections 251 and 252 of the Act[8] may authorize adoption of a *methodology* for the pricing of *transport and termination*, these provisions do not expressly apply to *origination* of traffic, and they clearly do not permit the Commission to *set* intercarrier compensation rates -- such as an effective rate of zero -- for originating intrastate access services.[9] Third, eliminating originating access charges (intrastate or interstate) would be contrary to the cost-causation principles that will continue to serve as the bedrock of the Commission's intercarrier compensation structure. Thus, the Commission has neither the authority nor any economic basis to compel the elimination of *originating intrastate* access charges.

A. Elimination of Originating *Interstate* Access Charge By Regulatory Fiat Would be Contrary to the Statutory Framework and the Economic Principles Underpinning the Commission's Intercarrier Compensation Framework.

Section 251(b)(5) of the Act requires local exchange carriers ("LEC") to establish reciprocal compensation arrangements for the transport and termination.[10] Section 252(d)(2) of

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8 *Id.* at §§ 251 and 252.

9 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 384-85.

10 47 U.S.C. § 251(b)(5).

the Act,[11] in turn, authorizes the state commissions to set rates for transport and termination provided under Section 251(b)(5). The Commission only is permitted to set rates under Section 252(e)(5) where a state commission fails to act under Section 252, and in such cases, the Commission is required to apply the same pricing standards that the state commission would have under the Act.[12] Finally, in contrast to the "savings clause" in Section 251(i) that preserves Commission *regulatory* authority under Section 201,[13] there is no "savings clause" in Section 252 with respect to the Commission's *ratemaking* authority under Section 205 -- meaning that the Commission cannot simply substitute its ratemaking authority under Section 205 for the ratemaking requirements of Section 252. Accordingly, the U.S. Supreme Court has confirmed that while "the Commission has jurisdiction to design a pricing methodology" under Section 252(d), it cannot set rates pursuant to Sections 251 and 252.[14]

This limited grant of authority to establish a methodology for pricing of *transport and termination* under Sections 251 and 252 does not give the Commission any authority or basis upon which to regulate, reform, or eliminate charges for the provision of *originating* access services. Most significantly, mandating an effective rate of zero pursuant to Sections 251 and 252 -- which is what the elimination of originating access charges would be -- constitutes the very kind of rate-setting reserved for the state commissions. Moreover, such action would be inconsistent with the economic theory that has formed the heart of the intercarrier compensation framework since well before 1996, and which would continue to underpin the intercarrier

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11 *Id*. at § 252(d)(2).

12 *Id*. at § 252(e)(5).

13 *Id*. at § 251(i).

14 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S at 385.

compensation structure even if reformed as proposed in the NPRM. The Commission has consistently read Sections 251 and 252 as contemplating a "Calling-Party-Network-Pays" ("CPNP") structure for intercarrier compensation, and its access regimes under other provisions of Title II are likewise premised upon a CPNP framework.[15] Under a CPNP structure, the calling party's carrier pays to ensure delivery of the call placed by its end user.[16]

Although the Commission has barred *originating* charges on the exchange of local traffic in implementing the *transport and termination* obligations of Sections 251 and 252, this is consistent with the CPNP framework.[17] Specifically, in the context of a local call, the originating LEC draws compensation from its customer placing the call, and as the Calling Party Network, it should therefore not be entitled to receive compensation from the terminating carrier. Instead, consistent with the CPNP theory and Sections 251 and 252, that originating LEC must *pay* the terminating LEC for the "additional costs" incurred in terminating the call placed by the originating LEC's customer. But, as the Commission has long recognized, the CPNP theory applies differently in the context of a long distance call. In that case, there is a third carrier -- the

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[15] *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9614-15 (2001), at ¶ 9; *see also Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4694 (2005) ("*Second Intercarrier Compensation NPRM*"), at ¶ 17. ("[U]nder the existing regimes, the calling party's carrier, whether LEC, IXC, or CMRS provider, compensates the called party's carrier for terminating the call. Thus as a general matter, our existing regimes are based on a [CPNP] approach to compensation.")

[16] *See* Charles B. Goldfarb, *Intercarrier Compensation: One Component of Telecom Reform*, Congressional Research Service Report for Congress, dated April 28, 2005 ("*CRS Report*"), at 12-18; Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime*, OPP Working Paper No. 33, Federal Communications Commission, Office of Plans and Policy (2000) ("*COBAK Working Paper*"), at ¶ 14.

[17] 47 C.F.R. § 51.703(b). It is worth recalling that when the Commission first adopted this rule, it believed that Section 251(b)(5) should be read as applying *only* to the transport and termination of local traffic. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16013 (1996) ("*Local Competition Order*"), at ¶ 1034. Thus, there was no reason for the Commission to consider at the time the interplay of this rule and CPNP principles in the context of a long distance call.

interexchange carrier ("IXC") -- that serves as the Calling Party Network. The third-party IXC is receiving compensation directly from the caller for placement of that long distance call, and thus consistent with the CPNP framework, *it is that IXC who should pay the other carriers who help to complete that call*.[18] The Commission would preserve part of this framework in terms of requiring the IXC to compensate *the terminating LEC* (albeit at lower rates), but would unjustifiably jettison another part of this framework by compelling the originating LEC to go without any compensation even as it performs the same or similar functions.[19] The CPNP theory does not *prohibit* originating access charges in the context of a long distance call; to the contrary, it *requires* that such charges apply (just as terminating access charges would) as a matter of cost causation. Thus, even as it makes sense under CPNP principles for the Commission to have adopted a rule prohibiting assessment of originating charges in the context of a local call (since the originating LEC is the Calling Party Network), such a prohibition would be flatly contrary to those same economic principles for a long distance call (where the third party IXC, and not the originating LEC, is the Calling Party Network).

In the current NPRM, with one glaring exception, the Commission has *not* proposed to eliminate or modify the CPNP underpinnings of intercarrier compensation -- rather, but for this one exceptional departure from CPNP principles, the Commission has merely proposed to alter the methodology by which the rates payable by the Calling Party Network are set. The singular exception, of course, is the proposed elimination of originating access charges. Although the

[18] *See Second Intercarrier Compensation NPRM*, 20 FCC Rcd at 4694, ¶ 17; *COBAK Working Paper* at ¶ 14; *CRS Report* at 16-17.

[19] Indeed, originating LECs often perform *additional* functions, such as SMS database look-ups for toll-free traffic, that are not required of terminating LECs. To deny an originating LEC compensation for its efforts in this regard while requiring compensation to a terminating LEC in the context of that same long distance call would be arbitrary and capricious.

NPRM asserts that the "retention of originating access charges would be inconsistent with our new regulatory approach to intercarrier compensation,"[20] this conclusion misses the mark. The imposition of originating access charges on long distance calls might *appear* inconsistent with the prohibition on originating compensation for local calls. But looks are deceiving, and the aesthetic desire to apply only terminating charges going forward does not justify selective departure from the consistent application of CPNP principles or the unilateral mandatory shifting to LECs of the additional costs of providing equal access to, and origination services for, IXCs.[21] Instead, as discussed above, more careful consideration confirms that the imposition of originating access charges on long distance calls is entirely consistent with and even required by CPNP principles. Elimination of originating access charges altogether on interexchange calls would therefore be an arbitrary and baseless partial deviation from the CPNP principles that the Commission otherwise continues to employ under Sections 251 and 252 and other parts of Title II.[22]

Of course, the Commission also has separate authority under Sections 201 and 205 and other parts of Title II to regulate and reform interstate services and charges.[23] But it would be contrary to the Act and sound policy -- and rather ironic -- if the Commission's effort to *unify*

[20] *NPRM* at Appendix A, ¶ 346, and at Appendix C, ¶ 343.

[21] Each LEC is required to provide equal access to IXCs, and a combination of subscriber line charges and/or originating access charges have traditionally been used to compensate LECs for the costs they incur in originating calls for those IXCs.

[22] Indeed, even as the Commission desires to eliminate the carve-outs of Section 251(g) to bring all traffic under Section 251(b)(5) as part of its intercarrier compensation reform, there is good reason to be cautious in doing so. *See* 47 U.S.C. § 251(g). Not only would the Commission sweep too broadly in eliminating all originating access charges contrary to fundamental CPNP principles, but the provisions of Section 251(g) as they apply to interexchange traffic could remain important for purposes of preserving other LEC obligations, such as the requirement that LECs provide equal access to IXCs.

[23] *See* 47 U.S.C. §§ 201 and 205.

intercarrier compensation regime were premised upon a *conflicted* application of CPNP principles. Again, the case of the long distance call described above is instructive. If such a call were placed from New York to California, under the NPRM, the IXC would receive compensation from its customer who places the call and would pay the terminating LEC in California for the use of its network in delivering the call -- but the IXC would pay the originating LEC in New York nothing for the use of its network in routing that call to the IXC. In other words, the Calling Party Network -- the network receiving compensation directly from the calling party for placement of that call -- would receive a free ride on the originating LEC's network, even as it compensates the terminating LEC for performing the very same or similar functions on the other end of the call. Indeed, the originating LEC may very well perform *additional* functions not provided by the terminating LEC, such as querying databases to ensure proper routing of 8YY traffic; presumably even as it proposes to eliminate originating compensation from the IXCs, the Commission does not intend for originating LECs to cease performing these functions for the IXCs' benefit. To avoid such an arbitrary, capricious, and unjustifiably selective application of CPNP principles, the Commission should not eliminate originating access charges via regulatory fiat, but should instead adopt a *truly unified* (*i.e.*, internally and logically consistent) intercarrier compensation regime.[24]

All of this is not to say, however, that the Commission is without any authority to reform originating interstate access charges. Indeed, the Commission has taken several steps in the past

[24] Even under a deferential *Chevron* analysis, it would seem difficult to defend the inconsistent application of a single economic theory (*i.e.*, CPNP) under a single statutory framework (*i.e.*, Sections 251 and 252) to all kinds of carriers and traffic patterns except for one (*i.e.*, LEC origination of interexchange traffic for IXCs). *See, e.g.*, *National Cable & Telecomms. Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 980-81 (2005) (stating that "[u]nexplained inconsistency is . . . a reason for holding an interpretation to be an arbitrary and capricious change from agency practice . . .").

pursuant to Sections 201 and 205 to regulate and prescribe originating interstate access charges. For example, in 2001, the Commission took action "to ensure, by the least intrusive means possible, that [competitive local exchange carrier ("CLEC")] access charges are just and reasonable."[25] In the *Seventh Report and Order*, the Commission adopted a benchmark for CLEC access charges that, in existing markets, declined over time from a specified rate per minute to "the switched access rate of the competing [incumbent local exchange carrier ("ILEC")],"[26] and required CLECs to begin charging the competing ILEC rate immediately upon entry into new markets.[27] The Commission therefore could certainly take reasoned and well-grounded steps with respect to reform of originating interstate access charges. But to do away altogether with originating access charges by regulatory fiat would represent an unreasonable and unjustifiable exercise of Title II authority, would deny an originating LEC reasonable compensation for the functions it performs for an IXC in the context of a long-distance call (including, for example, the cost of performing a SMS database dip to route toll-free calls to the proper IXC network, as well as the cost of switching and transport),[28] and would contradict the very CPNP principles that remain at the heart of the Commission's intercarrier compensation structure, even if reformed as proposed in the NPRM.

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25 *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9924 (2001), at ¶ 2 ("*Seventh Report and Order*").

26 *Seventh Report and Order*, at 9944-45, ¶ 52.

27 *Seventh Report and Order*, at 9947-48, ¶ 58.

28 *See Access Charge Reform*, CC Docket No. 96-262, Eight Report and Order, 19 FCC Rcd 9108, 9142-44 (2004) ("*Eighth Report and Order*"), at ¶¶ 69-72 and n. 251 (upholding CLEC recovery of access charges, including database query charges, for origination of 8YY traffic).

B. The Commission Has Neither Basis Nor Authority Upon Which to Eliminate, Reform, or Regulate Originating *Intrastate* Access Charges.

In the NPRM, the Commission proposes that *all* originating access charges -- both interstate *and* intrastate -- "must be eliminated at the conclusion of the transition to the new [intercarrier compensation] regime."[29] The preceding section addresses the statutory and economic policy concerns with respect to eliminating originating *interstate* access charges by regulatory fiat, and these concerns apply with equal, if not greater, force to originating *intrastate* access charges. But there are also significant additional jurisdictional hurdles that prevent the Commission from regulating or setting rates for originating intrastate access services. Although Sections 201 and 205 of the Act may empower the Commission to regulate and prescribe rates with respect to *interstate* services, the Commission cannot rely upon these statutory grants of authority to reform or regulate *intrastate* services or rates, including originating intrastate access charges. To the contrary, Section 2(b) of the Act,[30] which has been characterized as a "hog tight, horse high, and bull strong" jurisdictional fence,[31] prevents the Commission from preempting state law or engaging in the regulation of purely intrastate telecommunications matters in the absence of a clear Congressional mandate.[32] Sections 201 and 205 contain no such grant of authority, and the Commission has made no claim (nor could it) that intrastate access charges are somehow inseparable from interstate regulatory matters such that federal regulation pursuant to

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29 *NPRM* at Appendix A, ¶ 229, and at Appendix C, ¶ 224.

30 47 U.S.C. § 152(b).

31 *Iowa Utils Bd.*, 120 F.3d at 800.

32 *See, e.g., Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374-76 (1986).

these statutes is necessary or appropriate.[33] Thus, the Commission cannot rely upon Sections 201 or 205 to engage in any regulation or rate-setting activity with respect to originating *intrastate* access charges.

Although the Commission has recently cited to Section 332 of the Act as "an instructive example" of the purportedly broad scope of its authority pursuant to Section 201,[34] this example is instructive in demonstrating the limitations of Section 201 as well. In fact, Section 332 contains a *much broader* grant of authority than Section 201, in terms of both scope and jurisdictional reach. Section 332, for example, has been read to give the Commission authority both to regulate *and* prescribe rates for LEC-CMRS interconnection,[35] whereas Section 201 merely confers *regulatory* authority. (By contrast, Section 205 grants the Commission *rate-setting* authority with respect to interstate common carrier services.[36]) Moreover, unlike Section 201, Section 332 is expressly exempt from the Section 2(b) *Louisiana* fence,[37] evidencing a clear Congressional preference for a preemptive federal regulatory framework with respect to wireless services.[38] Yet, notwithstanding the broader authority conferred by Section 332, the

[33] *Compare id*. at 375, n. 4 (distinguishing cases where Commission regulation of arguably intrastate matters was upheld because it was not possible to separate the interstate and intrastate components of the asserted regulation).

[34] *NPRM* at ¶ 19.

[35] *Iowa Utils. Bd.*, 120 F.3d at 800; *see also Qwest Corp. v. FCC*, 252 F.3d 462, 466-467 (8th Cir. 2001) (discussing the preclusive effect of the court's upholding of Commission-issued intercarrier compensation and interconnection pricing rules pursuant to Section 332).

[36] *See, e.g.*, *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d at 1349; *AT&T Co. v. FCC*, 487 F.2d 865, 871-72 (2nd Cir. 1973) (discussing the distinctions between the authority granted by various provisions of Title II of the Act).

[37] 47 U.S.C. § 152(b).

[38] *See, e.g.*, H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993) (identifying the purpose of Section 332 as "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure . . .").

Commission has consistently proceeded with caution in setting *intrastate* interconnection rates thereunder; both before and after the Telecommunications Act of 1996, the Commission has declined to use Section 332 to override state regulation and has largely left both regulation of and rate-setting for LEC-CMRS interconnection to the states.[39] Thus, Section 332 is instructive in: (1) showing the Commission's prior restraint with respect to imposing a federal intercarrier compensation framework even where it has broad statutory authority to do so, and (2) highlighting the significant jurisdictional limits of the Commission's authority under Title II of the Act.

The Commission should take a similarly cautious approach now and avoid overreaching for a legal basis to eliminate intrastate originating access charges. The Commission appears to taken some account of the jurisdictional limitations of Sections 201 and 205 in the NPRM, relying at least in part now upon Sections 251 and 252 for its reform proposals.[40] Even Sections 251 and 252, however, impose limits of which the Commission must be mindful. For example, as discussed in the preceding subsection, Sections 251(b)(5) and 252(d)(2) apply only to the *transport and termination* of traffic, and they do not expressly (or even implicitly) apply to the *origination* of traffic.[41] Thus, although it may have been reasonable and consistent with CPNP

[39] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1498 (1994), at ¶ 231 (declining to preempt state regulation with respect to "LEC intrastate interconnection rates applicable to cellular carriers"); *Local Competition Order*, 11 FCC Rcd at 16005-07, ¶¶ 1023-1026 (declining to establish special rules or rates for LEC-CMRS interconnection pursuant to Section 332, and instead leaving regulation of such interconnection requirements to state commission determination through the Section 251 and 252 negotiation and arbitration process).

[40] *See, e.g., NPRM* at Appendix A, ¶¶ 216-217.

[41] By contrast, in other sections of the Act, Congress has clearly distinguished between origination and termination (or receipt) as separate functions or has otherwise specified when it meant to focus only on originating functions or services. *See, e.g.,* 47 U.S.C. § 152(a) (stating that the Act applies to any communication "which originates and/or is received within the United States"), § 153(16) (defining "exchange access" as involving origination *or* termination), §§ 271 and 272 (defining the limits of Bell Operating Company authority to offer

principles for the Commission to ban originating compensation for local calls (because the originating LEC is also the Calling Party Network), it would be a stretch -- and contrary to the CPNP principles that remain the foundation of the NPRM's terminating compensation structure -- for the Commission to rely upon statutes addressing *transport and termination* to prohibit *originating* access charges on long distance traffic.

Furthermore, the Commission's authority under Sections 251 and 252 is limited to establishment of a pricing methodology, and these statutory provisions clearly do not permit the Commission to set intercarrier compensation rates.[42] Yet the NPRM proposes to go far beyond methodology and mandates an effective rate of zero for all originating access charges. While the Commission has previously relied upon Sections 201 and 205 as described in the preceding subsection to support some regulation (although not complete elimination) with respect to originating *interstate* access charges, there is no similar statutory fallback with respect to Commission regulation of or rate-setting for originating *intrastate* access services. In short, there is neither legal authority nor any basis in the economic policy underlying the Commission's intercarrier compensation framework to support the elimination, regulation, or reform of originating intrastate access charges.[43]

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interLATA services by reference to origination of communications), and § 1302(d)(1) (defining "advanced telecommunications capability" as allowing users to "originate and receive" certain kinds of features and services).

[42] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 385.

[43] Some have contended that Section 251(g) of the Act *might* confer authority upon the Commission to regulate intrastate access charges. *See, e.g., Ex Parte* Presentation of T-Mobile USA, Inc., CC Docket No. 01-92 (dated Oct. 3, 2008), at 10. Such arguments, however, go too far and would overly extend the logical interpretation of the statute. Section 251(g) merely *preserved* the Commission's pre-existing regulatory schemes notwithstanding certain provisions of the 1996 Act. *WorldCom v. FCC*, 288 F.3d at 432. ("On its face, § 251(g) appears to provide simply for the 'continued enforcement' of certain pre-Act regulatory 'interconnection restrictions and obligations'" . . . .) Nothing in Section 251(g) constitutes an affirmative grant of additional authority over matters that were not previously subject to Commission jurisdiction. The Commission had no jurisdiction under Title II with respect to

III. THE COMMISSION SHOULD AVOID OVERREACHING IN ADDRESSING "TRAFFIC STIMULATION" ISSUES.

The NPRM does not contain any proposals with respect to "traffic stimulation," but the joint statement of Commissioners Copps, Adelstein, Tate, and McDowell indicates an intent to consider and adopt rules regarding this issue.[44] If the Commission chooses to do so, however, it should proceed with caution to avoid unintended consequences. In particular, it is critical that the Commission not sweep up legitimate, common, and necessary business practices in its effort to prohibit more narrow kinds of conduct that it views as problematic.

For example, some have asserted that the Commission should address "revenue sharing" as part of any effort to address traffic stimulation concerns.[45] But revenue sharing is neither unlawful nor a reliable indicator of traffic stimulation. Offering incentives to customers (which often could be construed as "revenue sharing") is a necessary and common business practice. Indeed, rather than making sweeping pronouncements on this question in the past, the Commission has concluded on several occasions that revenue sharing or commission payments are not "per se" unlawful arrangements.[46] Yet the term "revenue sharing" has been broadly bandied about more recently by some in a way that could encapsulate arrangements that have

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purely intrastate matters prior to 1996 (*see* footnotes 29 to 33 and accompanying text), and it certainly cannot gain any such authority now simply by removing the regulatory constructs that Section 251(g) allowed it to maintain.

[44] *NPRM* at Joint Statement of Commissioners Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate and Robert M. McDowell. Hypercube has previously addressed this issue in several pleadings. *See Ex Parte* Presentation of Hypercube Telecom, LLC, CC Dockets No. 99-68 and 01-92, dated Oct. 28, 2008; *Ex Parte* Communication of Hypercube Telecom, LLC, WC Docket No. 07-135, dated May 16, 2008.

[45] *See, e.g.*, *Ex Parte* Letter from Melissa E. Newman, Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Dockets No. 96-45, 99-68, and 01-92; WC Dockets No. 04-36, 05-337, and 07-135, dated Oct. 23, 2008, at 5.

[46] *See, e.g.*, *AT&T Corp. v. Jefferson Tel. Co.*, File No. E-97-07, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001); *see also Eighth Report and Order*, 19 FCC Rcd at 9142-44, ¶¶ 70-71.

little or nothing to do with traffic stimulation concerns. Consistent with its prior review of such questions, the Commission should decline to declare a broad category of "revenue sharing" as prohibited or questionable in nature, and should continue to focus instead on identifying and addressing on a case-by-case basis illegitimate arrangements that involve fraud or abuse.

Some commenters have also proposed a "net payor" test as a means of establishing impermissible revenue sharing.[47] But a "net payor" test is imprecise and would favor those larger operations who are able to spread revenues among diverse affiliates -- bundled offerings from larger integrated carriers typically have net payor components between jointly owned companies. The Commission should therefore avoid an overly heavy hand in addressing traffic stimulation, and should steer clear of sweeping pronouncements and imprecise conclusions about "revenue sharing" that would create unintended consequences by harming smaller carriers and their legitimate business arrangements with customers and other carriers.

IV. THE COMMISSION MUST ENSURE COMPLIANCE WITH THE REGULATORY FLEXIBILITY ACT.

Hypercube urges the Commission to comply with the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 *et. seq.*, as it evaluates changes to intercarrier compensation and universal service rules in the above-referenced dockets. The RFA requires administrative agencies to assess the negative impact of their proposed rules on small businesses, and to ensure that small businesses are not adversely affected by government rules and regulations.[48]

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47 *See, e.g.,* Comments of AT&T Inc., WC Docket No. 07-135, dated Dec. 17, 2007, at 32.

48 *See National Association of Psychiatric Health Systems v. Shalala*, 120 F.Supp.2d 33, 42 (D. D.C. 2000). *See also* Pub. L. No. 96-354, § 2(b), 94 Stat. 1164, 1165 (1980) ("It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and

Specifically, the RFA directs the Commission to prepare an Initial Regulatory Flexibility Analysis ("IRFA") that describes the impact of a proposed rule on small entities.[49] This analysis addresses several areas, including, for example, a description of the reasons why agency action is being considered; a statement of the objectives of, and legal basis for, the proposed rule; a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; and a description of any significant alternatives to the proposed rule which accomplish the stated objectives and which minimize significant economic impact to small entities. The IRFA must be made available for comment, which has been done in this case.[50]

In addition to the IRFA, the RFA requires the Commission to perform a Final Regulatory Flexibility Analysis ("FRFA") in its final rule.[51] The FRFA has numerous specific components, some of which are similar to the IRFA requirements.[52] Significantly, the FRFA also must contain "a summary of the significant issues raised by the public comments in response to the

consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration").

49 *See* 5 U.S.C. § 603. An IRFA is not required where the head of the agency certifies that the rule will not have significant economic impact on a substantial number of small entities, which does not apply in this case since an IRFA was attached to the NPRM at Appendix E. Hypercube is among the "small entities" protected by the RFA. *See NPRM*, Appendix E (Initial Regulatory Flexibility Act Analysis), ¶ 12, *citing* 5 U.S.C. § 601 (The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." Also, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.) Although neither the Commission nor the Small Business Administration ("SBA") have developed a small business size standard specifically for competitive LECs, the appropriate size standard under SBA rules is for the category "Wired Telecommunications Carriers." Under that standard, a business is small if it has 1,500 or fewer employees. *Id.*, ¶ 17, *citing* 13 C.F.R. § 121.201, NAICS code 517110.

50 *See NPRM* at Appendix E.

51 5 U.S.C. § 604.

52 *Id*. at § 604(a).

initial regulatory flexibility analysis, a summary of the assessment by the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments."[53] In addition, the Commission must include the following evaluation:

> A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[54]

The adequacy of the Commission's FRFA is subject to judicial review, which an affected small entity may seek if it is adversely affected or aggrieved by the Commission's decision.[55]

The current posture of these dockets strongly suggests that, if the Commission rules in mid-December, it will not have sufficient time to conduct an adequate review of the record, consistent with the RFA, before making its decision. The proposed overhaul of the intercarrier compensation and universal service regimes is highly complex, and includes issues not previously addressed in other notices of proposed rulemaking (such as the proposed cost methodology, which departs from the existing TELRIC standard). The Commission is likely to receive thousands of pages of comments by November 26 in response to these complicated matters. The December 3 reply comment deadline (which includes only three full business days due to the intervening Thanksgiving holiday) means that only two weeks and one day will elapse between the reply comment date and the Commission's December 18 meeting, during which a

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53 *Id*. at § 604(a)(2).

54 *Id*. at § 604(a)(5).

55 *Id*. at § 611 (allowing a small entity that is adversely affected or aggrieved by final agency action to seek judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b) and 610).

vote in these dockets may take place.[56] Even though the Commission ordinarily circulates agenda items three weeks before a meeting, the time period in this case could be less than two weeks, providing even less time for the Commission to meaningfully conduct the required analysis under the FRFA. Hypercube joins other parties who have expressed serious reservations about whether the Commission can conduct a thorough review of the matters at issue in such an extremely attenuated time period.[57] Any ruling within such a tight time frame could violate the RFA if the Commission acts before conducting the detailed analysis required by the statute, which is a real possibility given the complexity of the issues.[58] The Commission

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[56] *See* Joint Statement of Commissioners Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate, and Robert M. McDowell (Nov. 3, 2008) (noting that "we would all be prepared to vote on December 18").

[57] *See* COMPTEL Letter to Members of Congress (November 17, 2008) (asking recipients to urge Commission to "practice extreme caution" in moving forward and to consider "allowing ample time for consideration and examination on both sides" before taking action on "issues that could dramatically affect the entire telecommunications industry"). *See also Ex Parte* Presentation of EarthLink, Inc., *et al.*, CC Dockets Nos. 99-68 and 01-92, dated Oct. 20, 2008, at 19-20; Motion/Request of the National Association of Regulatory Utility Commissioners for Public Comment on Recently Circulated *Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking on Universal Service and Intercarrier Compensation Reform*, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 21, 2008; *Motion to Defer and Set for Public Comment,* Independent Telephone & Telecommunications Alliance, CC Dockets Nos. 96-45 and 01-92, WC Dockets Nos. 04-36, 05-337, and 06-122, dated Oct. 24, 2008. These requests for transparency and consistency with sound administrative procedure have attracted far-flung support from individual state regulators and nearly every corner of the industry other than the Bell companies themselves. For example, numerous organizations (ranging from NARUC and NASUCA to CompTel and ITAA) and approximately 30 companies (ranging from competitive local carriers to rural telephone cooperatives) previously issued a press release calling for publication of rules for comment. *See Ex Parte Presentation* of Broadview, Cavalier and XO, CC Docket 01-092, date October 27, 2008. *See also Ex Parte* Presentation of the Tennessee Regulatory Authority, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 24, 2008; *Ex Parte* Presentation of the South Carolina Public Service Commission, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 24, 2008; *Ex Parte* Presentation of the North Carolina Utilities Commission, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 24, 2008; *Ex Parte* Presentation of the New Mexico Regulation Commission, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 24, 2008; *Ex Parte* Presentation of the Massachusetts Department of Telecommunications and Cable, CC Dockets Nos. 96-45 and 01-92, WC Docket No. 06-122, dated Oct. 24, 2008; *Ex Parte* Presentation of the Georgia Public Service Commission, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 23, 2008.

easily can avoid this situation by providing adequate time for review and determination of the numerous multifaceted issues set forth in the NPRM.

Concerns about RFA compliance are not merely academic. A substantial number of small entities, including Hypercube, will be affected by the Commission's actions in these dockets. Indeed, the Commission's own data show that of the 1,005 carriers reported to be engaged in the provision of either competitive access provider services or competitive LEC services, an estimated 918 have 1,500 or fewer employees.[59] Any changes that the Commission implements to intercarrier compensation plainly will affect the interests of these companies in a fundamental manner.

The staggering monetary impact of the proposed order presents further reason for the Commission to ensure that its actions are consistent with the RFA. Literally billions of dollars of revenue and expenses for CLECs and other carriers will be implicated by the Commission's actions. In addition to the direct costs resulting from the new rules, carriers will be faced with implementation costs and the expenses necessitated by changes to billing systems and other internal processes, such as information technology modifications. The Commission should not adopt a new regime without giving small entities a full opportunity to comment on its proposals, as required by the RFA, and by taking sufficient time to review and consider the comments before it releases a decision. Meaningful analysis by the Commission and parties of the many

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[58] *See National Association of Psychiatric Health Systems*, 20 F.Supp.2d 33 at 43-44 (Secretary of Health and Human Services failed to comply with RFA by preparing adequate analysis to support impact of final rule on small entities).

[59] *NPRM* at Appendix E, ¶ 17, *citing* FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 5.3, page 5-5 (Aug. 2008) ("the Commission estimates that most providers of competitive local exchange service, competitive access providers, 'Shared-Tenant Service Providers,' and 'Other Local Service Providers' are small entities").

issues before the Commission is severely threatened if it proceeds on the current course and rules in mid-December.

V. CONCLUSION

It is paramount that any reforms adopted by the Commission with respect to intercarrier compensation be built upon a solid legal foundation, sustainable upon appeal, and consistent without sound agency practice and procedure. To care for these concerns and for the foregoing reasons, the Commission should ensure that it has allowed adequate time for interested stakeholders to provide meaningful comments on its proposals and for thorough review and consideration of those comments. Moreover, if and when the Commission should decide to proceed forward with any reforms, it should decline to eliminate originating access charges as proposed in the NPRM and should proceed with caution to avoid unintended consequences in the adoption of any new rules with respect to so-called "traffic stimulation."

Respectfully submitted,

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Dated: November 26, 2008