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

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
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. 99-20
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36

COMMENTS OF THE
<u>NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION</u>

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COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its comments in response to the Commission's *Order and FNPRM* in the above-referenced dockets.[1]

[1] *High-Cost Universal Service Support, et al*., WC Docket Nos. 05-337, *et al*., Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008) (*Order and FNPRM*). Due to the expedited pleading cycle, NCTA is not addressing every issue raised by the various proposals attached to the *Order and FNPRM*. We have filed comments in many of these proceedings previously and may do so in the future as well.

INTRODUCTION AND SUMMARY

NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks and services. NCTA's members also include suppliers of equipment and services to the cable industry. The cable industry is also the nation's largest provider of high-speed Internet access after investing over $130 billion since 1996 to build out a two-way interactive network with fiber optic technology. NCTA's members also are the leading providers of Voice over Internet Protocol (VoIP) service and therefore NCTA has a significant interest in the regulatory regime applicable to such services.

The *Order and FNPRM* seeks comment on a number of proposals that would dramatically reform the rules governing intercarrier compensation and universal service. The draft item proposes a new regime in which states would establish a single rate for termination of telecommunications traffic based on a new pricing methodology established by the Commission.[2] The regime would apply to all telecommunications carriers and interconnected VoIP providers.[3] Rate-of-return ILECs would have access to additional federal USF funding to offset some of their lost access revenues; price cap LECs, competitive LECs and VoIP providers generally would not be entitled to such funding.[4]

With respect to universal service reform, the draft item would cap the size of the high-cost fund and generally would phase out the provision of high-cost support to competitive

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[2] *Order and FNPRM*, App. C at ¶ 266-69. For purposes of these comments, NCTA will address Appendix C of the *Order and FNPRM*, which contains the most recent proposal circulated by Chairman Martin.

[3] *Id.* at ¶ 185 ("At the end of the transition, all telecommunications traffic will be treated as falling within the reciprocal compensation provision of section 251(b)(5) . . . .").

[4] *Id.* at ¶ 309 ("For price cap carriers, we adopt the proposal of various commenters to consider all a company's cost and revenues – both regulated and non-regulated – before providing new universal service support.").

ETCs.[5] It also would condition receipt of any high-cost funding on a carrier's commitment to provide broadband service throughout the area that is eligible for support within five years.[6]

NCTA consistently has supported rational reform of both the intercarrier compensation regime and the federal USF regime.[7] As explained below, many of the reforms proposed in the draft item are consistent with approaches that NCTA has advocated for years. In particular, the transition to a low, unified termination rate for all providers of voice services is a substantial improvement over the current regime. Combined with the proposed cap on federal high-cost universal service support, the draft item would be tremendously beneficial for the telecom industry and for consumers.

Other aspects of the proposal, however, are cause for concern. Absent significant changes, the analysis of the classification of VoIP services and the default interconnection rules contained in the draft item could significantly undermine the future of facilities-based competition in this country. Fortunately, neither of these proposals is essential, or even necessary, to intercarrier compensation reform and both should be dropped from the item before it is adopted.

The Commission also should provide greater clarity regarding the transition to the new compensation regime to ensure that the benefits of a unified regime are not lost during the transition process. NCTA offers three specific suggestions – shortening the transition period,

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5 *Id.* at ¶¶ 16-17.

6 *Id.* at ¶ 20.

7 *See, e.g.*, Comments of the National Cable & Telecommunications Association, WC Docket No. 05-337 (filed Apr. 17, 2008); Comments of the National Cable & Telecommunications Association, WC Docket No. 05-337 (filed May 31, 2007); Comments of the National Cable & Telecommunications Association, CC Docket No. 01-92 (filed Oct. 25, 2006) (NCTA 2006 Comments); Comments of the National Cable & Telecommunications Association, CC Docket No. 01-92 (filed May 23, 2005).

establishing clear rules regarding the compensation applicable to VoIP traffic, and preserving the status quo with respect to transit arrangements.

I. WITH CERTAIN CHANGES, THE DRAFT ITEM COULD MAKE SIGNIFICANT PROGRESS ON INTERCARRIER COMPENSATION REFORM

The Commission started the *Intercarrier Compensation* proceeding seven years ago because it was clear even then that the existing regime was unsustainable in the face of advances in competition and technology.[8] After years of struggling with these issues, the Commission is poised to move forward with reforms that would address some of the biggest problems facing the telecom industry today.

The core of the draft item is the proposal to transition to a regime in which states would establish a single termination rate to be used by every provider in the state, following a new pricing methodology based on the incremental cost of terminating a call.[9] NCTA supports both the proposed methodology and the proposal to establish a single rate for all providers in a state. This basic approach is consistent with the legal principles established by Congress and with basic principles of economics, and it is both competitively and technologically neutral. For all these reasons, it is a vast improvement over the current intercarrier compensation regime.[10]

One of the critical challenges in moving to a uniform, low termination rate is deciding whether, if at all, the Commission is obligated to provide carriers alternative revenue opportunities to make up for any access revenues that are lost. The item appropriately

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8 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9624, ¶ 36 (2001) ("Finally, many of those advocating the need for reforming existing intercarrier compensation rules argue that, with the introduction of local competition and new technologies (including packet-switched networks that are used for both voice and data), it has become essential to adopt a single, unified approach to intercarrier compensation. We seek comment on this view.").

9 *Order and FNPRM*, App. C at ¶¶ 266-69.

10 The Commission must make clear, however, that the per-minute termination charges established under its new methodology are the only charges that are permitted in connection with terminating traffic. A terminating network should not be permitted to impose additional charges for functions like multiplexing or trunk ports that should be included within the termination charge.

recognizes that carriers generally have numerous retail revenue streams – both regulated and unregulated – from which to recover the costs of operating their networks and that dollar-for-dollar replacement of "lost" access revenues is unnecessary.[11] NCTA supports this approach and encourages the Commission to apply it to rate-of-return carriers just as it proposes to do with respect to all other providers.

The draft item also takes an appropriately narrow approach to addressing "phantom traffic" concerns. As NCTA has explained previously, the primary cause of phantom traffic is the fact that termination rates vary based on factors that are arbitrary and capable of manipulation.[12] The key to reducing phantom traffic is to unify termination rates as proposed in the draft item. Beyond that, the only additional requirements that are needed are signaling rules to facilitate the ability of a terminating carrier to determine who is responsible for paying any termination charges. The draft item reaches the right result by adopting the rules needed to address this concern and rejecting a variety of additional obligations that ILECs had proposed.[13]

Although the basic proposal for intercarrier compensation reform achieves many of the Commission's objectives, the draft item unfortunately includes a number of extraneous proposed rulings that could have the effect of undermining facilities-based competition. Below we address the two most significant concerns raised by the draft item: the proposal to classify interconnected VoIP services as information services without addressing the consequences of that decision and the proposed default interconnection rules that would take effect upon completion of the transition. The Commission need not deal with either of these issues in order

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[11] *Order and FNPRM*, App. C at ¶ 309.

[12] *See* Comments of the National Cable & Telecommunications Association, CC Docket No. 01-92 (filed Dec. 7, 2006) at 7 ("[T]he ultimate solution to this problem is equalizing termination rates so that there no longer is any economic advantage associated with characterizing traffic in a particular way.").

[13] *Order and FNPRM*, App. C at ¶¶ 326-31, 338.

to reform the intercarrier compensation regime. And absent major changes, the specifics of both proposals could create significant problems for facilities-based competitors by hampering their ability to obtain interconnection arrangements with incumbents on fair and reasonable terms.

Finally, greater clarity is needed with respect to the transition to the new compensation regime. Many of the benefits of moving to a unified compensation regime will not be realized if the transition period is too long or if transition rules lead to a new round of disputes over the appropriate compensation for particular types of traffic. Accordingly, NCTA encourages the Commission to adopt a five-year transition period and to provide greater clarity as to the compensation rules applicable to VoIP traffic and transit arrangements during that transition.

II. A DIFFERENT APPROACH IS NEEDED WITH RESPECT TO THE CLASSIFICATION OF INTERCONNECTED VOIP SERVICES

A. Resolving The Classification Of VoIP Services Is Not Necessary To Reform The Intercarrier Compensation Regime

In the *Order and FNPRM*, the Commission found that compensation for dial-up ISP traffic was covered by Section 251(b)(5) of the Act. In reaching that conclusion, the Commission noted that the scope of Section 251(b)(5) "is not limited geographically . . . or to particular services."[14] Rather, "Congress used the term 'telecommunications,' the broadest of the statute's defined terms."[15]

Given the broad scope of Section 251(b)(5) as interpreted in the *Order and FNPRM*, it follows that interconnected VoIP services may be covered by Section 251(b)(5) as well. As the draft item explains, "[h]ad Congress intended to preclude the Commission from bringing certain types of telecommunications traffic within the section 251(b)(5) framework, it could have easily done so by incorporating restrictive terms in section 251(b)(5). Because Congress used the term

[14] *Order and FNPRM* at ¶ 8.

[15] *Id.*

'telecommunications,' the broadest of the statute's defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic."[16]

Based on the Commission's analysis of the statute, the classification of VoIP services is irrelevant to whether traffic generated by those services can be brought within any unified compensation regime the Commission might adopt. To the extent a VoIP service is considered a telecommunications service, it falls within the scope of Section 251(b)(5) just like other telecommunications services. The same result occurs if those services are classified as information services. By definition, information services are provided "via telecommunications."[17] If a VoIP service is classified as an information service, it necessarily is provided "via telecommunications" and therefore the termination of the telecommunication falls within the scope of Section 251(b)(5). Thus, the Commission has sufficient authority to require that all voice traffic, whether it is circuit-switched or VoIP, be subject to the same reciprocal compensation regime and it should exercise that authority here to declare that interconnected VoIP services are subject to Section 251(b)(5).

Because the classification of VoIP services is not essential to reforming the intercarrier compensation regime, the Commission should leave the resolution of this issue for another day, after careful consideration of all of the related issues, as it has done in a numerous prior orders.[18] The Commission has been considering issues related to the classification of VoIP services for

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[16] *Id*.

[17] 47 U.S.C. § 153(20).

[18] *See, e.g.*, *IP-Enabled Services; E-911 Requirements for IP-Enabled Service Providers,* WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) (*VoIP E911 Order*); *Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (*VoIP USF Order*).

almost five years and any attempt to bring that prolonged debate to a rapid end creates a risk that important considerations will be overlooked.

If the Commission nevertheless classifies interconnected VoIP as an information service, it also should explain, in no uncertain terms, that providers of that service (and any affiliated and unaffiliated wholesale carriers they work with) are entitled to maintain interconnection with other telecommunications providers pursuant to Sections 251 and 252, as well as continued access to telephone numbers and other functions essential to providing voice service to consumers. These are critically important issues for VoIP providers. The Commission should not address the classification question unless it simultaneously reaffirms the *Time Warner Cable Order* and other precedent upon which VoIP providers have come to depend.[19] Given the massive disruption that intercarrier compensation reform creates in its own right, deferring resolution of the VoIP classification question would be the more prudent course for the Commission at this time.

B. The VoIP Marketplace Is Characterized By A Variety of Services and Business Models

In response to the Commission's Notice of Proposed Rulemaking in the *IP-Enabled Services* proceeding,[20] NCTA proposed that the Commission establish a set of rights and obligations that would apply to all VoIP providers without regard to whether VoIP was classified

[19] *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act, As Amended, To Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007) (*Time Warner Cable Order*) ("[A] provider of wholesale telecommunications service is a telecommunications carrier and is entitled to interconnection under Section 251 of the Act. The regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under Section 251."); *Bright House Networks, et al. v. Verizon California, et al,* File No. EB-08-MD-002, Memorandum Opinion and Order, 23 FCC Rcd 10704, 10718, ¶ 39 (2008) (*Retention Marketing Order*) ("Based on the specific record in this specific case, we find that the Bright House and Comcast-affiliated Competitive Carriers are common carriers for purposes of section 222(b).").

[20] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

as an information service or a telecommunications service.[21] NCTA explained that this approach was needed in part because "individual cable operators have taken a variety of approaches in the deployment of VoIP offerings and services."[22]

In the four years since the Commission commenced the *IP-Enabled Services* rulemaking, VoIP services, and particularly cable-based VoIP services, have developed into the first meaningful facilities-based competition to the ILECs in the residential market. During that period of time, cable operators have added roughly 14 million customers. As NCTA predicted in its 2004 comments, different companies have taken different approaches to offering VoIP services.[23] Some companies, like Vonage, offer "over the top" services that use the public Internet and require customers separately to buy broadband Internet access.[24] In contrast, cable operators offer VoIP service in which calls travel over managed packet networks. But even among cable operators there are different business models. Some companies partner with an unaffiliated wholesale telecommunications carrier,[25] some partner with an affiliated wholesale telecommunications carrier,[26] and some operate more like traditional competitive carriers.[27]

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21 Comments of the National Cable & Telecommunications Association, WC Docket No. 04-36 (filed May 28, 2004) at 3-4 (NCTA 2004 Comments).

22 *Id*. at 12-13.

23 *Id.*

24 *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) (*Vonage Order*).

25 *Time Warner Cable Order*.

26 *Retention Marketing Order* at ¶ 3; Comments of Comcast Corp., WC Docket No. 08-56 (filed May 19, 2008) at 2.

27 *See* Letter from K.C. Halm, Counsel for Bresnan Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 08-56 (filed July 28, 2008) at 5 ("Bresnan has obtained a CPCN from the Utah PSC, and therefore is entitled to the rights of a telecommunications carrier in that jurisdiction."); *see also* Letter from John Nakahata, Counsel for General Communication Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Oct. 28, 2008) (GCI Letter) at 3 ("the Commission should make clear that a provider can elect to continue to be treated as, and will be deemed to be, a "telecommunications carrier" for these services.").

Although there are numerous differences among the business models used by cable operators and other VoIP providers, there are some constants. First, in *all* cases there is an entity involved in the provision of VoIP service that operates as a "telecommunications carrier." The Commission specifically defines "interconnected VoIP" as a service that enables users to make calls to, and receive calls from, customers of ILECs and other carriers,[28] something that would not be possible unless at least one entity involved in providing the service has the right to interconnect with those carriers and obtain telephone numbers.[29] Whether the carrier entity is the VoIP provider itself, an affiliated wholesale provider, or an unaffiliated wholesale provider, no company can be an "interconnected VoIP" provider unless some entity involved in the provision of service is deemed to possess the rights and obligations of a telecommunications carrier.[30]

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[28] *VoIP E-911 Order*, 20 FCC Rcd at 10257-58, ¶ 24 ("Thus, an interconnected VoIP service is one we define for purposes of the present Order as bearing the following characteristics: (1) the service enables real-time, two-way voice communications; (2) the service requires a broadband connection from the user's location; (3) the service requires IP-compatible CPE; and (4) the service offering permits users generally to receive calls that originate on the PSTN *and* to terminate calls to the PSTN.").

[29] Under current rules, "[i]nterconnected VoIP providers that have not obtained a license or certificate of public convenience and necessity from the relevant states and otherwise are not eligible to receive numbers directly from the administrators may make numbers available to their customers through commercial agreements with carriers (i.e., numbering partners)." *Local Number Portability Porting Interval and Validation Requirements, et al.*, WC Docket Nos. 07-244, et al., Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, 19542, ¶ 20 (2007) (*VoIP LNP Order*). Conversely, "[t]o the extent that an interconnected VoIP provider is licensed or certificated as a carrier, that carrier is eligible to obtain numbering resources directly from the North American Numbering Plan Administrator." *Id*. at ¶ 20 n.62. The only exception the Commission has made to the rule that numbers may be provided only to carriers is for an affiliate of AT&T. *Administration of the North American Numbering Plan*, CC Docket No. 99-200, 20 FCC Rcd 2957 (2005).

[30] By way of comparison, the service described in the *Pulver Order* only offered the ability to communicate with other customers of the service, not with customers of other providers, and therefore it did not require the participation of a telecommunications carrier. *See Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (*Pulver Order*).

Second, regardless of business model, the entity providing service to the retail customer is subject to critical requirements of the Communications Act – E911,[31] CALEA,[32] LNP,[33] USF,[34] CPNI,[35] TRS,[36] disabilities access,[37] Form 477 reporting,[38] and FCC regulatory fees.[39] As a result of Commission decisions over the last four years, the choice between classifying VoIP as a telecommunications service or an information service is *not* a choice between regulation and deregulation at the federal level; *all* VoIP services are now subject to extensive federal regulation regardless of how those services ultimately are classified.

Third, the Commission has been fully aware of the different models used by VoIP providers and at no point has it ever suggested, let alone required, that any VoIP provider alter the method it uses to provide service. Given this history, there is no reason for the Commission not to respect the decisions companies have made or penalize them by requiring significant changes in business models or creating uncertainty that leads to litigation as a result of any decision it now makes with respect to the classification of interconnected VoIP services.

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31 *VoIP E911 Order*.

32 *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005).

33 *VoIP LNP Order*.

34 *VoIP USF Order*.

35 *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007).

36 *IP-Enabled Services; Telecommunications Rely Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, WC Docket Nos. 04-36, 03-123, Report and Order, 22 FCC Rcd 11275 (2007).

37 *Id*.

38 *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691 (2008).

39 *Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, MD Docket No. 07-81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712 (2007).

C. The Commission Must Preserve Interconnection And Other Critical Rights Of VoIP Providers

Given all that has occurred in the marketplace in the last four years, the Commission is not writing on a blank slate with respect to the classification of VoIP services. Any decision definitively resolving the classification of VoIP services will have significant implications for VoIP providers that must be addressed in order to avoid disruption to services now used by tens of millions of customers.

The discussion of the classification of interconnected VoIP services in the draft item does not adequately acknowledge the need to preserve critical interconnection rights. Nor is there any recognition of the degree to which customers have come to rely on these services and the effect that the classification decision could have on VoIP providers' continued ability to serve these customers. As the Bureau found in the *Time Warner Cable Order*, "ensuring the protections of Section 251 interconnection is a critical component for the growth of facilities-based local competition."[40]

Moreover, while prior Commission orders have addressed the obligations applicable to "interconnected VoIP" service providers, the draft item focuses on "IP-PSTN" traffic without explaining what relationship that category of traffic has to the retail VoIP services that companies offer in the marketplace.[41] Taken literally, the draft order would result in circuit-switched basic local exchange service being classified as an information service because it "allows a customer to originate a communication on an IP network and terminate it on a circuit-switched network, or vice versa."[42] In short, adoption of the order as drafted would create

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40 *Time Warner Cable Order*, 22 FCC Rcd at 3519, ¶ 13.

41 *Order and FNPRM*, App. C at ¶¶ 204-206.

42 *Id.* at ¶ 204, n.520.

massive uncertainty that could threaten the ability of VoIP providers to continue serving customers.

If the Commission is going to address the classification of VoIP services, it must do so in a manner that puts to rest the lingering disputes that VoIP providers continue to face regarding interconnection rights.[43] For VoIP to be offered as an information service, the Commission must make clear that one entity involved in the provision of that service will be deemed a telecommunications carrier subject to applicable requirements of Title II and state law for purposes of interconnection and other wholesale services, e.g., exchange access services.[44]

For example, if a cable operator provides VoIP service in conjunction with an unaffiliated telecommunications carrier, as described in the *Time Warner Cable Order*, that wholesale carrier has all of the rights and all the obligations of a carrier. The Commission should explicitly affirm the holding in the Bureau's *Time Warner Cable Order* that "providers of wholesale telecommunications services enjoy the same rights as any 'telecommunications carrier'" and that "the statutory classification of the end-user service, and the classification of VoIP specifically, is

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[43] *Compare* Petition for Declaratory Ruling of Vermont Telephone Co., WC Docket No. 08-56 (filed Apr. 11, 2008) (seeking "clarification" of VTel's obligation to interconnect with a wholesale carrier in Vermont), *with* Comments of the National Cable & Telecommunications Association, WC Docket No. 08-56 (filed May 16, 2008) ("VTel's misstatement of the facts and its alleged confusion about the law is nothing more than a desperate attempt to preserve its monopoly and block Comcast from offering a competing service.").

[44] The Commission also should reaffirm that an entity need only declare its willingness to offer telecommunications service on a common carrier basis, by obtaining a state certificate or through other means, to qualify as a "telecommunications carrier" under the Act. *See, e.g., Consolidated Comm. of Fort Bend Co. v. Pub. Util. Comm. of Texas*, 497 F.Supp.2d 836, 845 (W.D. Tex. 2007) ("Moreover, the record reflects that Sprint has a tariff on file, and although not required for a carrier to be considered a common carrier, the tariff provides additional evidence that Sprint holds itself out to serve all potential users indifferently."); *Retention Marketing Order*, 10 FCC Rcd at 10718, ¶¶ 39 (giving "significant weight" to attestations that companies will "serve all similarly situated customers equally."); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14902, ¶ 91 (2005); *Salsgiver Telecom, Inc. v. North Pittsburgh Telephone Co.*, File No. EB-06-MD-002, Memorandum Opinion and Order, 22 FCC Rcd 9285, 9290-91, ¶ 12 (EB 2007) ("[W]e conclude that Salsgiver Telecom's possession of a valid state authorization to provide telecommunications services as a CAP, together with its associated state tariff filing, constitutes presumptive evidence of its status as a 'telecommunications carrier' within the meaning of the Act.").

not dispositive of the wholesale carrier's rights."[45] It also should make clear that this analysis is true for all purposes, not just the two statutory provisions addressed in that order.

The same exact approach is warranted when a cable operator provides VoIP service in conjunction with an affiliated wholesale carrier, even if that carrier has only a single customer for its wholesale services, as the Commission held in the *Retention Marketing Order*.[46] The Commission should make clear that the wholesale carrier in that scenario is a telecommunications carrier for all parts of the Act, including Sections 251 and 252, not just the one provision addressed in that order.

As noted above, some companies have obtained state certification and operated as telecommunications carriers on a wholesale basis, a retail basis, or both, utilizing IP transmission among a host of other technologies to provide the same basic telecommunications services. If the Commission finds that retail VoIP is classified as an information service subject to exclusive federal jurisdiction, as suggested in the draft item, it should unambiguously preserve the rights of companies that have chosen to operate as wholesale or retail telecommunications carriers, to the extent they choose to continue to do so. Millions of customers are served by telecommunications carriers that use IP technology and the Commission must ensure that those companies are able to continue providing service pursuant to any order that the Commission adopts without needless litigation over their rights to interconnect, obtain telephone numbers or collect federal high-cost support, and without being required to restructure their entire business.[47]

By assuring that interconnection rights and associated statutory entitlements will be preserved in all cases, the Commission will preserve the framework that has finally led to the

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[45] *Time Warner Cable Order*, 22 FCC Rcd at 3517, ¶ 19.

[46] *Retention Marketing Order*, 23 FCC Rcd at 10718, ¶ 39.

[47] *See, e.g.*, GCI Letter at 2-3.

emergence of facilities-based competition in the mass marketplace. This approach essentially would preserve the status quo for all providers, rather than requiring major changes in business models. Cable operators have invested billions of dollars so that they can provide facilities-based service in competition with ILECs. Given the reasonableness of these choices and the substantial benefits to the public from this facilities-based competition, it would be entirely inappropriate for the Commission to now require any set of providers to make significant changes in how they provide service or to create a lack of certainty as to their interconnection rights.

Finally, just as a competitor's use of IP technology would not impair existing interconnection arrangements, the Commission should confirm that an ILEC's use of IP technology would have no effect on its interconnection obligations under Section 251(c). Even if an ILEC provides interconnected VoIP services that are classified as information services, the Commission must make clear that at least one entity involved in the provision of that service will be subject to the interconnection obligations of Section 251(c), i.e., an ILEC cannot avoid those obligations simply by using IP-based equipment to provide voice service or partnering with an affiliated or unaffiliated wholesale carrier. Any Commission order that does not explicitly affirm the continued applicability of these rights and obligations would threaten the future of facilities-based competition.

III. THE COMMISSION SHOULD NOT ADOPT DEFAULT INTERCONNECTION RULES

The draft item includes a set of default interconnection rules that are largely based on a proposal submitted by AT&T and Verizon.[48] As explained below, the proposed default rules are

[48] *See Order and FNPRM*, App. C at ¶ 270, *citing* Letter from Donna Epps, Verizon, and Hank Hultquist, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Oct. 14, 2008) (AT&T/Verizon Proposal).

deeply flawed. Not only are they unnecessary to achieve intercarrier compensation reform, but they would violate the Act and undermine facilities-based competition. The Commission should not adopt these rules as part of any order reforming the intercarrier compensation regime.

A. Background

The draft item would prescribe a new pricing methodology for transport and termination of telecommunications traffic. The states would exercise their authority under Sections 251 and 252 to establish a single uniform rate for all carriers in the state pursuant to this methodology. While all traffic ultimately would be subject to Section 251(b)(5), there will be a lengthy transition period during which access traffic will continue to be terminated pursuant to access tariffs, not Section 251(b)(5) agreements.

In addressing how this new pricing regime for transport and termination will be implemented, the item proposes a set of "default rules regarding the network 'edge'" that would take effect at the end of the transition.[49] The rules essentially require all terminating providers to establish a network edge at which they will accept traffic for termination to their customers, with the termination rate established pursuant to the new pricing methodology the order would adopt. The draft item states that these rules "would not require changes to *physical* points of interconnection."[50] Implicit in this statement is that the rules may require changes in *financial* responsibility for the cost of interconnection and traffic exchange arrangements, although the draft item does not explain what pricing methodology would apply to arrangements that are not covered by the default rules. It does make clear, however, that the default rule "does not alter

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[49] *Order and FNPRM*, App. C at ¶ 270.

[50] *Id.* (emphasis added).

any obligations of incumbent LECs to interconnect at any technically feasible point, nor does the rule alter carriers' ability to request interconnection."[51]

B. The Proposed Interconnection Rules Are Not Necessary To Achieve Intercarrier Compensation Reform

The stated purpose of these rules is to "define functions governed by a uniform terminating rate" when traffic is exchanged pursuant to Section 251(b)(5).[52] But the draft item ignores the fact that existing Commission rules *already* define the "transport" and "termination" functions for which rates must be established under Section 251(b)(5).[53] The Commission also has rules that specify the rate structure that states should establish when they set rates for these functions.[54] The draft item does not even acknowledge the existence of these rules, let alone explain why changes are needed.[55] Nor is there any explanation as to why it makes sense to adopt rules in 2008 that won't take effect until 2019. As a matter of basic administrative law, the Commission cannot change its rules in this way without providing a reasoned explanation for why such a change is warranted.[56]

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[51] *Id.* at ¶ 270 n.717.

[52] *Order and FNPRM*, App. C at ¶ 270.

[53] 47 C.F.R. § 51.701.

[54] 47 C.F.R. § 51.709.

[55] As NCTA explained previously, the AT&T/Verizon proposal on which these proposed rules are based was similarly lacking. *See* Letter from Kyle McSlarrow, President, National Cable & Telecommunications Association, to Kevin J. Martin, Chairman, Federal Communications Commission, CC Docket No. 01-92 et al. (filed Oct. 27, 2008).

[56] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.").

C. The Proposed Interconnection Rules Are Inconsistent With The Act

Section 251 establishes an interconnection regime in which CLECs may choose: (1) the point at which interconnection will take place;[57] (2) the technology used for interconnection;[58] and (3) whether interconnection will be direct or indirect.[59] The default rules proposed in the draft item would thwart the long-established right of a requesting carrier to choose where interconnection takes place. In particular, the proposed rules will create uncertainty with respect to the continued applicability of the Commission's "single POI per LATA" policy, pursuant to which a CLEC is entitled to interconnect and exchange traffic at a single point of interconnection in each LATA and not be forced to interconnect at additional locations.[60]

The default rules would seem to permit an ILEC to designate a network edge at multiple tandems in a LATA and impose additional charges (which might be calculated under a different, more expensive, pricing methodology than the one proposed in the order) to CLECs that choose not to establish a point of interconnection at each tandem. The courts long ago found that such an approach violates the Act because "the decision where to interconnect and where not to

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57 *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, 15608, ¶ 209 (1996) (*Local Competition Order*); *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 518 (3d Cir. 2001) ("the CLEC cannot be required to interconnect at points where it has not requested to do so.").

58 *Local Competition Order*, 11 FCC Rcd at 15606, ¶ 206 ("[T]he Act does not permit incumbent LECs to deny interconnection or access to unbundled elements for any reason other than a showing that it is not technically feasible.").

59 *Id.* at 15991, ¶ 997 ("Section 251(c) specifically imposes obligations upon incumbent LECs to interconnect, upon request, at all technically feasible points. This direct interconnection, however, is not required under section 251(a) of all telecommunications carriers.")

60 *See In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. D/B/A Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd. 18354, 18390 (2000).

interconnect must be left to [the CLEC]" and requiring "additional connections at an unnecessary cost to the CLEC[] would be inconsistent with the policy behind the Act."[61]

The default rules also seem to require CLECs to identify a network edge on their networks where they would accept traffic from other carriers. Such an approach essentially would impose a direct interconnection obligation on CLECs. But the Commission has long recognized that the CLECs have no such obligation under Section 251, nor do they have any obligation to provide collocation; only ILECs have those obligations.[62] Any interconnection rules the Commission adopts must conform to the statutory regime created by Congress.

If the Commission does adopt default interconnection rules, it must retain the language in the draft item that makes clear that such rules are intended to preserve all the existing rights and obligations of interconnecting carriers, including the obligation of ILECs to provide cost-based interconnection at any technically feasible point.[63] The Commission also must make clear that any interconnection-related obligations contained in existing interconnection agreements will remain in effect, even in connection with "evergreen" agreements. The Commission should not create a mechanism for ILECs to escape their contractual obligations where parties have not agreed to a change of law provision, but that is exactly what the draft item would seem to allow.[64]

D. The Proposed Interconnection Rules Are Not Based On Modern Networks

The proposed default rules provide that a provider's network edge is "the location of its end office, MSC, point of presence, or trunking media gateway, which PSTN routing

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61 *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F. 3d 491, 517-18 (3d Cir. 2001).

62 *Local Competition Order*, 11 FCC Rcd at 15991, ¶ 997.

63 *Order and FNPRM*, App. C at ¶ 270 n.717.

64 *Id*. at ¶ 287.

conventions (e.g., NPAC or LERG) associate with the called party telephone number."[65] Where that location subtends a tandem switch controlled by the terminating provider, the tandem will be considered the network edge.[66]

There is a striking disconnect between the old hierarchical, circuit-switched networks on which these default interconnection rules are based and the modern IP-based networks on which the draft item bases the new pricing methodology. In explaining the need for a new pricing methodology, there is extensive discussion in the draft item regarding the migration of the industry to IP-based networks in general, and to softswitches in particular. In particular, the item finds that "[t]elecommunications carriers are currently deploying such networks at a rapid pace . . . most experts believe that IP technologies will be used to deliver the predominant share of voice and data traffic *within a few years*."[67]

Yet the interconnection rules proposed in the very next section of the item, which aren't scheduled to take effect until *2019*, completely ignore the "rapid pace" of technological change and approaching prevalence of IP networks.[68] The default rules don't even mention softswitches as a possible "edge" location. Nor is there any recognition that efficient interconnection of IP-based networks can occur with far fewer points of physical interconnection than would be needed in a circuit-switched environment, i.e., that interconnection at every tandem may be incredibly inefficient. In that sense, a set of default rules that provides favorable rates only if

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65 *Id.* at ¶ 270.

66 *Id.*

67 *Order and FNPRM*, App. C at ¶ 255 (emphasis added); *see also* Letter from Henry Hultquist, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Oct. 13, 2008) at 2 ("certificated LECs are instead deploying special purpose packet switches, known as 'softswitches' – a type of packet router designed specifically to support voice telephony services.").

68 By no means are we suggesting that a shorter transition period, as proposed below, would address this concern. Because of the various legal and technical deficiencies, the default interconnection rules would be inadequate even if they took effect immediately.

traffic is delivered to a circuit-switched tandem will penalize CLECs that attempt to take advantage of interconnection arrangements that otherwise would be more efficient.[69]

The failure to identify softswitches as a potential network edge location is symptomatic of a larger concern: the proposal seems not to contemplate the interconnection of IP networks or the exchange of traffic in IP format. That is a significant omission in an item that is premised on the entire industry eventually transitioning to IP-based networks.[70] As NCTA and COMPTEL have explained previously, an ILEC's use of IP-based equipment in no way relieves it of its obligation to allow interconnection at any technically feasible point on its network.[71] If for some reason the Commission finds that it is necessary to establish a set of default interconnection rules that won't take effect for another decade, those rules absolutely should be premised on the interconnection of IP networks and the exchange of traffic in IP format; any other approach would be nonsensical.

E. The Proposed Interconnection Rules Unreasonably Favor Rural ILECs

The proposed interconnection rules include a proposal from OPASTCO and WTA that would relieve RLECs of the obligation to transport their originating traffic to a terminating carrier when the parties exchange local or Extended Area Service (EAS) traffic through an

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[69] Equally problematic is the failure of the default rules to acknowledge the benefits of fiber meet points. The Commission long ago recognized that fiber meet points are an efficient way for two networks to interconnect. *See Local Competition Order*, 11 FCC Rcd at 15781, ¶ 553. Accordingly, to the extent the Commission adopts default interconnection rules, fiber terminals must be identified as a potential default "edge" location.

[70] *Order and FNPRM*, App. C at ¶ 255; *see also* Verizon White Paper, attached to Letter from Donna Epps, Vice President, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-92, *et al.* (filed Sept. 19, 2008) at 8 ("All available evidence suggests that the trends in favor of wireless and IP-based services – and away from traditional wireline services – will continue and that these changes will continue to have significant and ever-increasing effects on the communications marketplace."); Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers, WC Docket No. 08-152 (filed July 17, 2008) at 11 ("AT&T is among the nation's leading IP-enabled service providers, with increasing amounts of traffic originating in IP, a firm expectation that this trend will continue, and a resulting need for certainty in the compensation structure that will apply to such traffic.").

[71] Letter from 360 Networks, et al. to Kevin Martin, Chairman, Federal Communications Commission, CC Docket No. 01-92 (filed Sept. 29, 2008) at 3-4 (NCTA/COMPTEL Letter).

intermediate tandem provided by a third carrier.[72] NCTA has significant concerns regarding this aspect of the default rules. First, at the end of a 10-year transition to a compensation regime that is intended to eliminate arbitrary distinctions between different types of traffic, this special rule would apply only to certain calls (local and EAS) made by customers of certain carriers (rural rate-of-return incumbent LECs) to customers of certain other carriers (non-rural carriers). A rule that perpetuates so many arbitrary distinctions is exactly what the Commission should be moving away from in this order. To enshrine these distinctions in a rule that doesn't even begin to take effect for a decade seems absurdly inconsistent with the Commission's goals.

Second, there is no basis for imposing interconnection rules that so blatantly violate the principles of competitive neutrality upon which intercarrier compensation reform should be based. A rule that assigns most of the costs of indirect interconnection to CLECs would provide an overwhelming incentive for RLECs to delay or deny providing direct interconnection. As noted elsewhere in these comments, interconnection is the key to facilities-based competition and allowing RLECs to escape their interconnection obligations harms consumers by denying them a choice of providers. At a minimum, the Commission should make clear that any RLEC that refuses to provide direct interconnection upon request is not entitled to favorable treatment with respect to the costs of exchanging traffic through an indirect interconnection arrangement.

IV. GREATER CLARITY IS NEEDED WITH RESPECT TO THE TRANSITION PERIOD

The draft item proposes a lengthy period – as much as 10 years – to transition from the existing compensation regime to the new unified regime.[73] NCTA is concerned that many of the

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[72] *Order and FNPRM*, App. C at ¶ 270, *citing* Letter from John Rose, OPASTCO, and Kelly Worthington, WTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-92, et al. (filed Oct. 29, 2008).

[73] *Order and FNPRM*, App. C at ¶ 187.

benefits of moving to a unified regime will not materialize if the transition takes longer than necessary or if the rules that apply during the transition are not sufficiently clear. We offer three suggestions for addressing these concerns.

First, the Commission should adopt a shorter transition period. If the Commission believes the regime it is adopting serves the public interest better than the current regime, and NCTA agrees that it does, then waiting 10 years for that result to be achieved is contrary to the public interest. The draft item seems to assume that a long transition is needed because states will not begin the process of establishing rates under the new pricing methodology until the first two phases of the transition are complete. But there is no reason for states to wait four years to get started. A transition of five years, as many parties have proposed,[74] should give states more than adequate time to conduct a new round of cost studies using the new methodology.

Second, greater clarity is needed with respect to the compensation rules applicable to VoIP traffic during the transition. The draft item addresses this issue in a footnote, stating that "IP/PSTN traffic ultimately will be subject to the final uniform reciprocal compensation rates established pursuant to the methodology adopted in this order. We maintain the status quo for this traffic during the transition, however."[75]

NCTA is concerned that the interplay between this footnote and the discussion earlier in the item about the mechanics of the transition may create ambiguity. To avoid unnecessary disputes, the Commission should make clear that: (1) the classification of VoIP service as an information service does not change the compensation obligations applicable to VoIP traffic

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[74] *See, e.g.*, Letter from Kyle McSlarrow, President, National Cable & Telecommunications Association, to Kevin Martin, Chairman, Federal Communications Commission, CC Docket No. 01-92 (filed Oct. 28, 2008) ("Given the widespread recognition that disparate terminating rates lead to regulatory arbitrage, all providers will benefit from unifying termination rates sooner rather than later."); Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed Oct. 23, 2008) at 3-4.

[75] *Id*. at ¶ 213 n. 555.

during the transition period; (2) VoIP traffic that today is exchanged pursuant to reciprocal compensation or bill-and-keep agreements should continue to be exchanged pursuant to those agreements; and (3) rates for VoIP traffic that today is exchanged pursuant to access tariffs should be ratcheted down over time as provided for in the draft item. A more explicit explanation of the regime applicable to VoIP traffic during the transition will provide needed certainty for all parties. For example, incumbent carriers should not be able to assert that the classification of interconnected VoIP services as interstate services somehow justifies the imposition of access charges.

Finally, the Commission should state explicitly that there will be no changes to transit arrangements during the transition. The Commission asked about transit issues in its 2005 Further Notice in the *Intercarrier Compensation* proceeding and proposes to do so again in the draft item.[76] As NCTA has explained previously, transit is an essential service that should be provided by ILECs provide to facilities-based competitors pursuant to Sections 251 and 252.[77] If the Commission is not going to reaffirm that such services must be provided pursuant to Sections 251 and 252, it should at a minimum retain the status quo for existing transit arrangements while it once again considers the issue in a Further Notice.

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[76] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740-44 ¶¶ 127-32; *Order and FNPRM*, App. C at ¶ 344.

[77] NCTA 2006 Comments at 23-24.

CONCLUSION

For all the reasons explained above, the Commission should adopt the draft item with the changes recommended in these comments.

Respectfully submitted,

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