

**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
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	WC Docket 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
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	

COMMENTS OF
D&E COMMUNICATIONS, INC.

D&E Communications, Inc. (“D&E”) hereby submits these Comments in response to the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceedings, released November 5, 2008 (“*FNPRM*”). In these Comments, D&E recommends that to prevent destructive and pernicious arbitrage, the Commission should explicitly rule that providers of IP/PSTN traffic (including VOIP) must, during any “transition” period and beyond, pay the same intercarrier compensation (“ICC”)

charges as providers using other technologies. In addition, because there are current ongoing disputes between carriers and VOIP providers over past obligations to pay access charges, the Commission should rule that for the period prior to the enactment of new ICC rules, providers of VOIP were required to pay access charges to terminate calls onto the PSTN.

I. Introduction

D&E is an integrated communications provider offering local and interexchange voice, high-speed data, Internet access, and multichannel video services through its incumbent affiliates Denver and Ephrata Telephone and Telegraph Company, Conestoga Telephone and Telegraph Company, Buffalo Valley Telephone Company, and its CETC, D&E Systems, Inc. D&E has been serving customers in central Pennsylvania for more than 100 years. D&E's core business has always been its operations as a rural incumbent local exchange carrier ("RLEC"), though in 1998, it began competitive local exchange carrier operations as well.¹ D&E has built its strong reputation by providing high-quality, dependable and affordable services to its customers. In its RLEC territories, it is the carrier of last resort ("COLR"), and it takes its COLR responsibilities seriously. Part of taking such responsibilities seriously is a commitment to maintaining a high quality network. But maintaining a high quality network requires resources, and carriers that use the D&E network to terminate traffic must contribute to the cost of maintaining that network. Unfortunately, in the last few years, VOIP providers have often diligently avoided paying access charges to the LECs that terminate VOIP calls on the PSTN, even though the Commission's current rules and policies require such payments. As discussed below, the financial impact of such improper cost avoidance is significant for a carrier of

¹ As of December 31, 2007, D&E served over 170,000 RLEC and CLEC access lines.

the size of D&E, and harmful to all carriers' abilities to maintain the PSTN in the high quality manner expected by all users.

II. The Commission Must Not Perpetuate Arbitrage By VOIP Providers.

D&E is greatly concerned that the Commission proposes that during the transition to the completion of ICC reform, the "status quo" will be maintained in regards to the ICC payment obligation for IP/PSTN (and thus presumably VOIP) traffic.² Although the legal status quo is that VOIP providers must pay access charges for the termination of their traffic on the PSTN, the status quo as a matter of fact is that VOIP providers often refuse to make such payments. This behavior is a pernicious form of regulatory arbitrage that cannot be facilitated and perpetuated by the Commission.

D&E believes that the Commission may classify the VOIP service to end user customers as a federally regulated non-common carrier service, but still require IP/ PSTN traffic to be subject to the same intercarrier compensation rules as all other competing technologies that terminate calls to the PSTN. Conversely however, ruling that IP/PSTN traffic is not subject to the same ICC rules as all other competing technologies that terminate calls to the PSTN 1) will create an improperly discriminatory regulatory structure, providing an unbalanced playing field in favor of VOIP service providers over traditional carriers, 2) will create havoc during a transition period for intrastate to interstate access calls terminating to the public switched network, and 3) will lead to improper non-payment of millions of dollars that rural LECs are entitled to receive through state access tariffs deemed just and reasonable by their state commission, thus

² *FNPRM* at footnote 564 of Appendix A, footnote 555 of Appendix C.

significantly harming their ability to provide the high quality services that all users expect.

If VOIP service providers are exempted from intercarrier compensation obligations and not required to pay reciprocal compensation charges for terminating local usage, and access charges for terminating interexchange long distance calls from carriers, then IXCs that currently pay intercarrier compensation charges will immediately reclassify their traffic as VOIP, reducing their costs to remain competitive while depriving the terminating local exchange carriers of their ability to recover their network costs. This situation will damage both competition and the financial viability of local exchange carriers.

Thus, while the elimination of arbitrage is a core goal of the Commission's ICC reform, failure to assess existing intercarrier compensation rates on IP/PSTN traffic will simply create further arbitrage. The LEC networks will continue to be utilized free of charge until most or all of the terminating traffic is no longer paying for the use of those facilities. Even if the Commission were to rule that IP/PSTN traffic is jurisdictionally interstate and subject to interstate access charges, a similar arbitrage scenario will be created during the transition from state access to interstate access. Once again, the non-VOIP carriers will claim that their traffic is VOIP traffic and subject to interstate access charges because interstate access rates are cheaper than intrastate access rates.

LECs currently have no means to combat the arbitrage that the Commission's proposal will engender. It is critical for the Commission to recognize that LECs have no method to determine which terminating traffic is IP originated and which traffic is not. All traffic terminating to the PSTN looks the same, contains the same information, and is

used for the same purpose, *i.e.*, to complete a voice communication. This inability to verify the nature of the traffic leads to a multitude of disputes. Call detail records (CDRs) generated by central office switches which carriers use to bill access charges do not contain a data field that indicates the call is an IP originated call. In fact, the only means available for a terminating carrier to determine whether traffic is IP/PSTN would be to call the “from number” and question the customer. This approach is not feasible because carriers terminate many thousands of calls from all over the country. In addition, even if a carrier wanted to do so, many service providers are stripping information such as the “from number” from the CDRs, and they refuse to provide the information when requested to do so. In one case, a carrier terminated usage to D&E that had no from number detail in the record. The carrier claimed the usage to be VOIP originated. When D&E requested detailed records with from number information to validate the claim, the carrier argued it was D&E’s responsibility to identify the from number since it was D&E who was attempting to bill the information. D&E however received these records from its tandem provider who stated the from number was never delivered in signaling to the tandem for termination to D&E. The carrier claiming the usage to be VOIP later stated there was no requirement to populate the from number on any VOIP originated call.

D&E has already experienced reductions in lawful ICC revenue of more than \$100,000, with the amounts growing monthly as more carriers begin to claim that their traffic is VOIP and thus exempt from ICC obligations. D&E began this year with one VOIP provider refusing to pay its access bills. Now, D&E has three VOIP providers refusing to pay their bills. These providers respond to D&E’s billing inquiries by claiming their traffic is VOIP, and thus exempt from access payment obligations. They

challenge D&E to prove that their traffic is not VOIP. Incredibly, in one situation where D&E was able to examine the disputed traffic claimed to be IP originated, D&E found that approximately 14% of the traffic was non-VOIP traffic originated by customers of one D&E company calling customers of another D&E company. In this case, the traffic was sent by D&E's long distance company to an IXC reseller who utilizes other IXCs to terminate long distance traffic. Even though D&E proved that some of the terminating traffic was non-VOIP traffic, the service provider still refused to pay any of its bills.

In light of the above, D&E has had to file a civil suit in Pennsylvania against one VOIP provider due to non-payment of access charges. D&E understands that there are numerous other such pending disputes between VOIP providers and LECs in civil courts throughout the country. These proceedings will likely remain unresolved until the Commission rules on the underlying issue as to whether, prior to any new ICC reform enacted in this proceeding, VOIP providers were required to pay access charges for the termination of their traffic on the PSTN. Thus, regardless of any changes that the Commission may enact going forward, it should also rule as to the status of VOIP traffic in the present and past.

It is clear under current Commission policies and rules, VOIP providers are required to pay access charges to carriers that terminate the VOIP traffic on the PSTN. Some VOIP providers claim that because their traffic originated in IP format, and is converted to and terminated in TDM format, this constitutes a "net protocol conversion" that transforms the provider into an "enhanced service provider" (or under the 1996 Act, an "information service provider" or ISP), and thus the traffic is exempt from access charges. This is not correct. The Commission created an exemption from access charges

in 1983 for enhanced service providers, due to their role in an emerging industry that promised to offer considerable public interest benefits.³ Under this “ESP Exemption,” the FCC permitted ESPs (now ISPs) to obtain originating access services needed to receive traffic from their end-user customers by ordering “end user” lines from local exchange carriers’ local business tariffs. Thus, the ESP Exemption is properly limited to circumstances where the access service is used to connect an ISP with its own subscribers so that the ISP may provide an information service to that subscriber. The Commission recognized this limited nature of the ESP exemption in the *Access Charge Reform Order*, noting that ISPs are exempted from the access charge obligation only when they “use incumbent LEC networks to receive calls from their customers.”⁴ The ESP exemption thus does not allow ISPs to then carry the call to an unrelated third party via the PSTN without paying the applicable access charges to terminate that call on the PSTN.⁵ The Commission should explicitly confirm this holding regarding the current state of the law.

³ *In re MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682 at ¶¶ 77-83 (1983).

⁴ *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 (1997), at ¶ 343.

⁵ *Id.* at ¶ 345 (finding persuasive that ISPs do not appear to “use the public switched network in a manner analogous to IXCs.” In contrast, however, interconnected VOIP providers use the PSTN to terminate traffic in the exact same manner as IXCs.)

III. Conclusion

In order to prevent pernicious regulatory arbitrage that harms the ability to maintain the PSTN, the Commission should explicitly rule that going forward, providers of IP/PSTN traffic (including VOIP) must pay the same ICC charges as providers using other technologies. In addition, because there are current on-going disputes between carriers and service providers over past obligations to pay access charges on VOIP traffic, the Commission should rule that for the period prior to the enactment of new ICC rules, providers of VOIP were required to pay access charges to terminate calls onto the PSTN.

Respectfully submitted,
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